SUPREME COURT OF NOVA SCOTIA

Citation: Check Group Canada Inc. v. Icer Canada Corporation, 2010 NSSC 463

Date: 20101214
Docket: Hfx No. 330888
Registry: Halifax

Between:

Check Group Canada Inc.

Plaintiff

v.

Icer Canada Corporation, 9145-5089 Québec Inc, Robert Choueke, 109652 Canada Ltd.

Defendants

DECISION

Judge: The Honourable Justice John D. Murphy

Heard: December 14, 2010, in Halifax, Nova Scotia
{Oral decision rendered December 14, 2010}

Written Decision (Reasons): February 7, 2011

Counsel: John Keith, for Plaintiff (as Respondent)

William L. Mahody with Tammy Manning, for Defendants 9145-5089 Quebec Inc., Robert Choueke, 109652 Canada

Icer Canada Corporation, Defendant, not represented

By the Court:

INTRODUCTION

[1] This is a motion, pursuant to *Rule 4.07* of the *Nova Scotia Civil Procedure Rules* and s.12 of the *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c.2 ("*CJPTA*"), for an order dismissing or staying an action, on the grounds that this Court lacks territorial competence over the subject matter of the action or that the Court should decline to exercise its jurisdiction because the matter is *forum non conveniens*.

[2] The motion was heard on December 14, 2010. At the end of the hearing, I gave oral reasons dismissing the motion. As I explained in my oral reasons, I reserved the right, if necessary, to edit and expand on those reasons in a written decision.

[3] For the reasons that follow, I find that this Court has territorial competence over the subject matter of the action, and exclusive jurisdiction over the aspects of the action involving the *Nova Scotia Companies Act*, RSNS 1989, c.81. I also find that this Court is the most appropriate forum to bring this action. Accordingly, this motion is dismissed.

BACKGROUND

[4] The plaintiff, Check Group Canada Inc., is incorporated pursuant to the laws of the State of New York, with head office located in New York. The plaintiff is not registered to do business in Nova Scotia and does not have a place of business in this Province.

[5] The defendants, 9145-5089 Québec Inc. ("9145") and109652 Canada Ltd/Ltee ("109652") are incorporated pursuant to the laws of the Province of Québec and Canada respectively, with registered offices in Montréal. The defendant, Robert Choueke, controls and is the directing mind of both 9145 and 109652. Mr. Choueke resides in Québec. Throughout these reasons, I refer to these defendants collectively as the "Choueke defendants."

[6] The defendant, Icer Canada Corporation ("Icer Canada"), is a Nova Scotia unlimited liability company, with a registered head office in Halifax. Icer Canada was incorporated as a vehicle for a 50/50 joint venture, between the plaintiff and 9145, to distribute certain lines of "urban clothing" in Canada. The Province of Nova Scotia was chosen for the apparent tax benefits that would flow to the plaintiff, and not because Nova Scotia would be the epicentre of the joint venture's operations.

[7] The terms of the joint venture are the subject of disagreement between the parties. The core of the joint venture appears to be that the plaintiff would license certain clothing trademarks to Icer Canada in return for royalties, 9145 would provide day-to-day operational assistance to Icer Canada, and together, the plaintiff and 9145 would split dividends, from time to time, resulting from Icer Canada's operations.

[8] The plaintiff and 9145 conducted their joint venture pursuant to an unsigned memorandum of agreement. That agreement included a choice of law clause as follows: "This agreement shall be governed by and construed in accordance with the laws prevailing in the Province of Quebec." While there was never disagreement over the choice of law clause, the agreement was not executed, because there was disagreement over other terms. Nonetheless, the joint venture vehicle, Icer Canada, was incorporated. From about 2004 onward, Icer Canada began distributing urban clothing bearing the trademarks licensed from the plaintiff.

[9] On June 17, 2010, the plaintiff filed a Notice of Action naming Icer Canada, 9145, and Mr. Choueke as defendants. On August 9, 2010, the plaintiff filed an amended Notice of Action adding 109652 as a defendant.

[10] The amended Notice of Action alleges that 9145 and Mr. Choueke were under:

(a) a duty to act in good faith and in the best interests of the joint venture and Icer;

(b) a duty not to act for a purpose collateral to the purposes and objectives of the joint venture;

(c) a duty not to act so as to place themselves in a position where their personal or exclusive interests conflicted with those of the joint venture or Check Group; and

(d) a fiduciary obligation to preserve and defend the licensing opportunity for the benefit of Icer and the joint venture.

[11] The amended Notice of Action claims that the Choueke defendants "preferred their own interests, misappropriated the corporate opportunities and otherwise unjustly enriched themselves at the expense of the joint venture." In the alternative, the amended Notice of Action claims an oppression remedy under s.5 of the Third Schedule of the *Companies Act*.

[12] None of the defendants filed a Notice of Defence in response to the amended Notice of Action. Instead, on August 27, 2010, the Choueke defendants brought this motion to dismiss or stay the action pursuant to *Rule 4.07* and s.12 of the *CJPTA*.

[13] The motion was heard on December 14, 2010. The Choueke defendants and the plaintiff were represented by counsel. Icer Canada was not represented, and did not participate.

Issues

[14] The parties agree that this motion is governed by the *CJPTA*. In **Penny v. Bouch**, 2008 NSSC 378 at para.20 [**Bouch**], aff'd. 2009 NSCA 80, Wright J. interpreted the *CJPTA* and held that there is a two-step analysis to determine whether this Court should assume jurisdiction over an originating court process brought against a non-resident defendant in Nova Scotia:

> [T]he court must first determine whether it can assume jurisdiction, given the relationship among the subject matter of the case, the parties and the forum. If that legal test is met, the court must then consider the discretionary doctrine of *forum non conveniens*, which recognizes that there may be more than one forum capable of assuming jurisdiction.

[15] Therefore, this motion raises the following issues:

1) Does this Court have territorial competence (jurisdiction *simpliciter*) over the parties and/or the subject matter of the claims raised in the amended Notice of Action?

2) Should this Court decline to exercise its jurisdiction because there is a more appropriate forum in which to bring the action?

Analysis

Does this court have territorial competence (jurisdiction *simpliciter*) over the parties and/or the subject matter of the claims raised in the amended Notice of Action?

[16] Section 4 of the *CJPTA* provides that this Court can only assume territorial competence, over a proceeding brought against a person, if at least one of the following enumerated factors is satisfied:

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim;

(b) during the course of the proceeding that person submits to the court's jurisdiction;

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;

(d) that person is ordinarily resident in the Province at the time of the commencement of the proceeding; or

(e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.

[17] The parties agree that none of factors (a) to (d) are satisfied in the circumstances of this case. The parties disagree on whether there is a real and substantial connection between Nova Scotia and the facts on which the amended Notice of Action is brought against the Choueke defendants and Icer Canada.

[18] Section 11 of the *CJPTA* provides that a real and substantial connection will be presumed if any of a list of factors is established. That section reads:

> Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding
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> (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in the Province;
>
> (b) concerns the administration of the estate of a deceased person in relation to
>
> (i) immovable property of the deceased person in the Province, or
>
> (ii) movable property anywhere of the deceased person if, at the time of death, the person was ordinarily resident in the Province;
>
> (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
>
> (i) immovable or movable property in the Province, or
>
> (ii) movable property anywhere of a deceased person who, at the time of death, was ordinarily resident in the Province;
>
> (d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
>
> (i) the trust assets include immovable or movable property in the Province and the relief claimed is only as to that property,
>
> (ii) that trustee is ordinarily resident in the Province,
>
> (iii) the administration of the trust is principally carried on in the Province,
>
> (iv) by the express terms of a trust document, the trust is governed by the law of the Province;

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in the Province,

(ii) by its express terms, the contract is governed by the law of the Province, or

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in the Province by or on behalf of the seller;

(f) concerns restitutionary obligations that, to a substantial extent, arose in the Province;

(g) concerns a tort committed in the Province;

(h) concerns a business carried on in the Province;

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in the Province, or

(ii) in relation to immovable or movable property in the Province;

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in the Province;

(k) is for enforcement of a judgment of a court made in or outside the Province or an arbitral award made in or outside the Province; or

> (l) is for the recovery of taxes or other indebtedness and is brought by Her Majesty in right of the Province or of Canada or by a municipality or other local authority of the Province.

[19] The Choueke defendants argue that none of these factors apply. The plaintiff makes no argument on this point. In my view, the position of the Choueke defendants is correct. None of the enumerated factors in s.11 of the *CJPTA* apply to this case; therefore, there can be no presumption of a real and substantial connection between Nova Scotia and the facts on which the amended Notice of Action is brought.

[20] However, the absence of a presumed real and substantial connection does not mean that such a connection cannot be established. In **Bouch**, *supra* at para.26, this court held that the list of enumerated factors in s.11 of the *CJPT*A is non-exhaustive, and that it is necessary to consider the common law approach to analyzing the existence of a real and substantial connection.

[21] Under the common law, Canadian Courts take jurisdiction on three bases: 1) consent of the parties, either by attornment or agreement; 2) presence of the defendant in the territorial jurisdiction of the court when the proceeding is commenced; or 3) a real and substantial connection between the matter and the forum. The Choueke defendants did not attorn to this Court's jurisdiction nor was there an agreement between the parties that disputes would be adjudicated in Nova Scotia. None of the Choueke defendants was present in Nova Scotia at the time the proceeding was commenced. This leaves only the possibility that a real and substantial connection can establish a basis for jurisdiction.

[22] In **Moran v. Pyle National (Canada) Ltd**., [1975] 1 SCR 393 at 408, the Supreme Court of Canada adopted a "real and substantial connection" test for determining the location of a tort, and through that determination, the appropriate forum for hearing the matter. Dickson, J. (as he then was) noted the need for a "more flexible, qualitative and quantitative test" (**Moran** at 407).

[23] In **Morguard Investments Ltd. v. De Savoye**, [1990] 3 SCR 1077, LaForest J. held that the real and substantial connection test applied to jurisdictional issues arising out of enforcement of judgments given in other provinces. However, the Court did not pronounce on the exact content or scope of the test. In Hunt v T&N plc, [1993] 4 SCR 289 at 326, LaForest J. held that:

> [w]hatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.

[24] In **Muscutt v. Courcelles** (2002), 213 DLR (4th) 577 (Ont CA) [**Muscutt**], Sharpe J.A. reviewed the developments in the law relating to the assumption of jurisdiction, where a real and substantial connection exists between the subject matter and the forum. He noted the distinction between the assumption of jurisdiction and the discretion to decline to exercise jurisdiction under the doctrine of *forum non conveniens*, Sharpe J.A. held that a flexible approach was necessary to the assumption of jurisdiction under the real and substantial connection test, but that it was also important to have clarity and certainty in the law:

> As such, it is useful to identify the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant…. No factor is determinative. Rather, all relevant factors should be considered and weighed together (**Muscutt** at 604)

[25] Sharpe J.A. identified eight factors to be considered:

1) The connection between the forum and the plaintiff's claim;

2) The connection between the forum and the defendant;

3) Unfairness to the defendant in assuming jurisdiction;

4) Unfairness to the plaintiff in not assuming jurisdiction;

5) The involvement of other parties to the suit;

6) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;

7) Whether the case is interprovincial or international in nature; and

8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[26] The "**Muscutt** factors" have been adopted and applied in Nova Scotia in many decisions, and in respect of s.4 of the *CJPTA*, in **McDermott Gulf Operating Co. v Oceanographia Sociedad Anonima de Capital Variable**, 2010 NSSC 118 [**McDermott Gulf Operating**]. Further, these factors, as well as Sharpe J.A.'s analysis, were explicitly endorsed by the Court of Appeal in **Bouch v. Penny**, 2009 NSCA 80 [**Bouch II**].

[27] The Choueke defendants submit that an analysis of the **Muscutt** factors strongly militates against the assumption of jurisdiction. The plaintiff argues that the **Muscutt** factors support a finding of territorial competence.

[28] In my view, at the first-stage of the *CJPTA* analysis, if the only basis for territorial competence is a real and substantial connection, a detailed analysis of each **Muscutt** factor is not always necessary. "The real and substantial connection test requires only **a** real and substantial connection, not the **most** real and substantial connection" [*emphasis in original*] (**Muscutt** at 594; See also **Bouch II** at para.49). This is to be distinguished from the doctrine of *forum non conveniens*, which acknowledges that more than one forum can have jurisdiction, and instead asks which forum is the most appropriate for adjudicating the subject matter. Where the **Muscutt** factors support a finding of real and substantial connection, it is not necessary, at the first-stage, to also ask whether the forum has **the most** real and substantial connection.

[29] In this case, two **Muscutt** factors support a finding of a real and substantial connection to Nova Scotia: 1) the connection between the forum and the plaintiff's claim; and 2) unfairness to the plaintiff in not assuming jurisdiction (without unfairness to the defendant in assuming jurisdiction).

[30] I acknowledge that neither the plaintiff nor the Choueke defendants have any geographic or economic connection to Nova Scotia. However, the first Muscutt factor asks whether there is a connection between the plaintiff's **claim** and the forum, not necessarily the plaintiff and the forum. In that respect, I also acknowledge that the plaintiff's primary claims, relating to the Choueke defendants' fiduciary obligations and duties to act in good faith, have limited connection to Nova Scotia, other than that they relate to a joint venture vehicle that is a Nova Scotia ULC. However, the plaintiff also claims, in the alternative, an oppression remedy under the *Companies Act*. This claim is closely connected to Nova Scotia.

[31] The Supreme Court of Nova Scotia has exclusive jurisdiction to adjudicate claims for remedies under the *Companies Act*. Section 5(1) of the Third Schedule of the *Companies Act* states that "[a] complainant may apply to the court for an order under this Section." Section 2(1) of the *Companies Act* defines "Court" as "the Supreme Court of Nova Scotia, or a judge thereof." Courts considering parallel companies act legislation have held that this jurisdiction cannot be challenged (**Nord Resources Corp v Nor Pacific Ltd**., 2003 NBQB 201; **Voyage Co Industries Inc. v. Craster**, [1998] BCJ No 1884 (QL) (BC SC); **Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.** (2001), 20 BLR (3d) 289, [2001] OJ No 4882 (QL) (Ont Sup Ct J), aff'd. on other grounds (2003), 63 OR (3d) 431, 223 DLR (4th) 627 (CA)).

[32] The Choueke defendants do not dispute this exclusive jurisdiction, but instead ask, impliedly, that the plaintiff's claim be split in two, with the *Companies Act* remedies adjudicated in Nova Scotia, and the other claims adjudicated in Québec. In my view, the facts connected with the oppression claim and request for winding up of Icer Canada cannot be separated from the other aspects of the case.

[33] In **Harbert Distressed Investment Master Fund Ltd. v. Calpine Canada Energy Finance II ULC**, 2005 NSSC 211, this court held that a real and substantial connection existed between the subject matter and Nova Scotia in circumstances similar to this case. There, the plaintiffs were incorporated and located outside Canada, the parent defendant corporation was incorporated and located outside, and two affiliated defendants were Nova Scotia ULCs. In addition, the terms of agreement between the parties included binding choice of law provisions for New York and Alberta.

[34] The plaintiffs in **Harbert** alleged that the sale by the defendants of a natural gas-fired power plant in England was oppressive to their interests as bondholders in one of the Nova Scotia ULCs. The plaintiffs sought an oppression remedy under the *Companies Act*, and the parent defendant brought a motion to stay the matter, as against them, for lack of jurisdiction. The two defendant Nova Scotia ULCs admitted jurisdiction. The doctrine of *forum non conveniens* was not argued.

[35] This court found that the business of the defendants was so intertwined that a real and substantial connection existed between the parent defendant corporation and Nova Scotia. Smith A.C.J. stated, at para.87:

> As indicated previously, [the two defendant Nova Scotia ULCs] have acknowledged the jurisdiction of this Court to deal with the applications against them. As a result, this case is proceeding in Nova Scotia in relation to those two Respondents regardless of my conclusion in relation to jurisdiction over [the parent defendant corporation]. I see little reason to require the Applicants to bring a separate proceeding elsewhere recognizing that the facts that would be advanced in such an application would likely be the same as those advanced in this proceeding. This would result in increased costs to all of the parties and would introduce the possibility of inconsistent results in different jurisdictions.

[36] In my view, a similar conclusion is warranted in this case. This court has exclusive jurisdiction over the alternative remedies sought under the *Companies Act*. Those remedies are closely intertwined with the plaintiff's primary claims. It would be unfair to force the plaintiff to bring two separate actions, since this would result in duplication of production and discovery examinations. At the same time, in my view, the defendants will experience no significant unfairness in defending this action in Nova Scotia. None of the other **Muscutt** factors militates against a finding of a real and substantial connection. Therefore, I find that there is a real and substantial connection between the subject matter and Nova Scotia, and that this Court does have territorial competence, under s.4(e) of the *CJPTA*, to hear this matter.

Should this court decline to exercise its jurisdiction because there is a more appropriate forum in which to bring the action?

[37] Even where a court does have territorial competence, the doctrine of *forum non conveniens* recognizes that there may be instances where another forum is the more appropriate venue to hear the matter. Further, there may be other instances where the binding agreements between the parties override, or at least nullify, the need to conduct a *forum non conveniens* analysis.

[38] In **ZI Pompey Industrie v ECU-Line NV**, 2003 SCC 27 at para.21 [**ZI Pompey**], the Supreme Court of Canada clearly stated that where a binding choice of jurisdiction or forum selection clause exists between the parties, it is not appropriate to conduct the regular *forum non conveniens* analysis, and instead, the

burden shifts to the plaintiff to show why they should not be held to their agreement. There, the contract evidenced by or contained in the Bill of Lading included both a choice of law clause and a choice of jurisdiction clause. The Court held that the "strong cause test" (rather than the regular tripartite injunction test) should be applied where a party seeks a stay to enforce a choice of jurisdiction clause:

> Once the court is satisfied that a validly concluded bill of lading otherwise binds the parties, the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause [emphasis added] (**ZI Pompey** at para.39).

[39] The key precondition to an application of the principle in **ZI Pompey** is that there is a validly-concluded binding contract between the parties, which includes a choice of jurisdiction clause. In this case, there is neither a choice of jurisdiction clause nor a binding contract.

[40] The Choueke defendants argued that there was an agreement between the parties to adjudicate all disputes in the Province of Québec, and that the parties operated as though this agreement was binding. Those defendants based this argument on a letter of intent and an unsigned memorandum of agreement. The plaintiff contends that the memorandum of agreement lacked a choice of jurisdiction clause, and in any event, was unexecuted, and therefore not binding.

[41] In my view, the Choueke defendants have not established that there is a binding choice of jurisdiction clause between the parties. The letter of intent, which did contain a choice of jurisdiction clause, also expressly stated that it was not binding on the parties. The memorandum of agreement did not contain a choice of jurisdiction clause; it only contained a choice of law clause. Further, the memorandum of agreement was never executed. The evidence suggests that there was not consensus *ad idem* on all the terms of the agreement and that there was ongoing negotiation between the parties.

[42] It is true that some of the terms of the agreement were followed, and that the trademarks were licensed to Icer Canada. However, this is not sufficient to find a binding contract. The parties in this case are sophisticated. Mr. Choueke himself has 20 years of experience in the clothing distribution industry. The contractual negotiations involved experienced counsel. In my view, the Choueke defendants

were well aware, or should have been aware, of the significance of an unexecuted memorandum of agreement, and that they were taking a risk by operating in the absence of a validly-concluded binding contract.

[43] For the foregoing reasons, this case is distinguishable from **ZI Pompey**. The Choueke defendants have not established that the burden should shift to the plaintiff to explain why a choice of jurisdiction clause (which does not in fact exist) should not be followed.

[44] However, since I have concluded that this Court has territorial competence over the subject matter, it is necessary to proceed to the second-step of the *CJPTA* test, and undertake a *forum non conveniens* analysis by inquiring whether there is a more appropriate forum. If so, then this Court may exercise its residual discretion to decline to hear the case on the ground that the matter should be brought in the other forum.

[45] Section 12(2) of the *CJPTA* provides a list of factors that must be considered in determining whether Nova Scotia is the most appropriate forum. That section reads:

> A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
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> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[46] Under the *forum non conveniens* doctrine, the burden is on the defendant to establish, on a balance of probabilities, that another forum is clearly more appropriate than the forum selected by the plaintiff (**Amchem Products Inc. v. British Columbia (Workers' Compensation Board)**, [1993] 1 SCR 897). Prior to the entry into force of the *CJPTA*, and similar legislation in other provinces, the *forum non conveniens* doctrine was analyzed on the basis of the **Muscutt** factors.

[47] In **Lloyd's Underwriters v. Cominco Ltd.**, 2009 SCC 11, the Supreme Court of Canada considered s.11 of British Columbia's *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c.28, which is identical to s.12 of the *CJPTA*. McLachlin C.J.C. held, at para.22, that these provisions, which were a product of the Uniform Law Conference of Canada, were "intended to codify the *forum non conveniens* test, not to supplement it."

[48] In **McDermott Gulf Operating**, *supra* at para.119, this court noted "that there is significant overlap between the factors to be considered under the declining jurisdiction test [in s.12(2) of the *CJPTA*] and the [**Muscutt**] factors earlier considered under the real and substantial connection test." Duncan J. then proceeded to analyze the issue of *forum non conveniens* only on the basis of the statutorily-delineated factors. I intend to proceed on the same basis.

[49] The comparative convenience factor does not favour hearing the matter in Nova Scotia. The plaintiff states that if the matter is not heard in Nova Scotia, it would bring an action in New York and contest any action brought in Québec. The Choueke defendants argued that Québec was the more appropriate venue. I place no weight on the procedural tactics the plaintiff may or may not take. What is relevant is that the plaintiff is located in New York, the Choueke defendants are located in Montréal, and neither has offices in Halifax. It is obvious that New York would be more convenient for the plaintiff, and Montréal more convenient for the Choueke defendants. Geographic proximity suggests that either New York or Montréal would inconvenience the opposing side to a lesser degree, but convenience is only one factor under s.12(2) of the *CJPTA*.

[50] Aspects of the law to be applied to the issues both support and oppose hearing the matter in Nova Scotia. As previously discussed, the Supreme Court of Nova Scotia has exclusive jurisdiction over the *Companies Act* remedies claimed. This supports hearing the matter in Nova Scotia. However, the breach of fiduciary and good faith duties, claimed by the plaintiff, are intentional torts. In general, the

substantive law to be applied to torts is the law of the place where the activity occurred (**Tolofson v Jensen**, [1994] 3 SCR 1022).

[51] Assuming, without deciding, that the plaintiff's primary claims are well founded, this would suggest that the law to be applied is the *Civil Code of the Province of Québec*. *Articles 3126-3129* of the *Civil Code of Québec* govern choice of law determinations. Of relevance to this matter is *Article 3126*, which reads:

> The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur.
>
> In any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies.

Depending on how *Article 3126* is interpreted and applied, the governing law could be the law of Québec or the law of New York. This supports hearing the matter outside Nova Scotia, though I acknowledge that it is possible to apply foreign law to matters adjudicated in Nova Scotia.

[52] With respect to the enforcement of an eventual judgment, it is necessary to consider whether this Court would recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis, and also whether the case is interprovincial or international in nature. The case is interprovincial, since the Choueke defendants are advocating Québec as an alternative forum to Nova Scotia; this is a factor that favours Nova Scotia. Further, I am satisfied that this Court would recognize and enforce an extra-provincial judgment if these circumstances were reversed; this also militates in favour of Nova Scotia.

[53] Avoidance of multiple proceedings and conflicting decisions are closely-related factors that I will address together. As noted previously, the plaintiff's alternative claims must be heard in Nova Scotia because they fall under the exclusive jurisdiction of this Court. This means that if the plaintiff's primary claims are heard in Québec there will be multiple proceedings. Further, the facts underlying both sets of claims are so closely intertwined that the multiple proceedings would be adjudicating almost identical facts and issues. This has the

potential to lead to conflicting decisions in different courts. Both these factors strongly support hearing the matter in Nova Scotia.

[54] The fair and efficient working of the Canadian legal system also supports hearing the matter in Nova Scotia. I have found that it would be unfair to the plaintiff to split this case between two Canadian provinces, and it would not be unfair for the Choueke defendants to defend the action in Nova Scotia. Judicial resources are scarce across Canada. In the absence of a binding choice of jurisdiction clause, fairness and efficiency demand hearing a matter that has claims connected to multiple forums in the forum that has exclusive jurisdiction over at least some of the claims. This also strongly supports hearing the matter in Nova Scotia.

[55] I am not satisfied that Choueke defendants have clearly established that Québec is the more appropriate forum. Rather, when the factors enumerated in s.12(2) of the *CJPTA* are considered as a whole, Nova Scotia emerges as the more appropriate forum to hear this matter. Therefore, I decline to use my discretion not to exercise this Court's territorial competence over the matter.

Conclusion

[56] There is a real and substantial connection between the plaintiff's claim and Nova Scotia. As such, this Court has territorial competence to adjudicate the claim. The Choueke defendants have not clearly established that there is a more appropriate forum to hear this matter. Accordingly, I decline to exercise my discretion to not hear this matter on the basis of the *forum non conveniens* doctrine codified in s.12 of the *CJPTA*. The Choueke defendants' motion is dismissed.

[57] By consent, the parties agreed to exchange particulars following the oral hearing to enable the Choueke defendants to file a Notice of Defence by January 19, 2011. As those events have now occurred, it is not necessary to give further direction.

[58] Costs of the motion are assessed in the amount of $1,500 plus disbursements (including economy airfare for Mr. Jemal). The costs are payable by the Choueke defendants at the end of the litigation, but only if the plaintiff succeeds in the cause.

J.