SUPREME COURT OF NOVA SCOTIA

Citation: *Charlotte County Hospitality Partnership v. Coles Associates Ltd.*, 2018 NSSC 254

Date: 2018 10 16
Docket: Hfx No. 437613
Registry: Halifax

Between:

Charlotte County Hospitality Partnership

Plaintiff

v.

Coles Associates Ltd. and Avant Garde Construction and Management Inc.

Defendants

Judge:	The Honourable Justice Joshua Arnold
Heard:	September 22, October 26, and November 30, 2016; January 4, 2017; and July 12, 2018, in Halifax, Nova Scotia
Counsel:	William Ryan, Q.C., for the Plaintiff David Cameron and Jennie Pick, for the Defendant Coles

By the Court:

Overview

[1] Coles Associates Ltd. has moved for a stay of a Nova Scotia action, *Charlotte County Hospitality Partnership v. Coles Associates Ltd.*, in light of an action in New Brunswick which involves the same parties. Coles relies on the doctrine of *forum non conveniens*, or, alternatively, abuse of process. Charlotte County Hospitality Partnership opposes the motion.

Facts/History of the Proceedings

[2] CCHP is a Nova Scotia partnership which carries on business throughout the Atlantic provinces. It operates primarily in Nova Scotia. Coles is an extra-provincial corporation which engages in professional architecture and engineering. Though it operates mainly in Prince Edward Island, Coles carries on business throughout the Atlantic provinces. It is registered in Nova Scotia and has an appointed and recognized Nova Scotia agent.

[3] The dispute between CCHP and Coles relates to renovations to the Algonquin Marriott Autograph Resort in St. Andrews, New Brunswick. On April 23, 2012, CCHP retained Coles to perform various civil, mechanical, and electrical design services as part of these renovations. On March 26, 2015, CCHP initiated an action in negligence and breach of contract against Coles in Nova Scotia. CCHP alleges that Coles's designs were deficient and delivered past their required delivery date, necessitating various change orders and affecting the schedule and overall cost for the project.

[4] On November 6, 2015, Avant Garde Construction and Management Inc. initiated an action against CCHP in New Brunswick. Avant Garde provided construction and management services to CCHP in respect of the same renovations to the Algonquin. Avant Garde's position is that CCHP owes money to it on account of an alleged breach of the construction management contract between the two.

[5] On December 2, 2015, CCHP filed a defence, a counterclaim, and a third party claim against Coles seeking contribution and/or indemnity in the New Brunswick proceeding. Avant Garde defended CCHP's counterclaim on December 16, 2015. On July 5, 2016, Coles filed a defence to the third party claim

and a counterclaim for the alleged outstanding balance under its contract with CCHP.

[6] On December 3, 2015, CCHP amended its statement of claim in the Nova Scotia action to join Avant Garde as a defendant. In both its counterclaim in the New Brunswick action and its statement of claim in the Nova Scotia action, CCHP alleges that Avant Garde failed to exercise reasonable care and skill in managing the construction project and that it negligently failed to ensure that work on the project proceeded in a timely manner. CCHP says Avant Garde's mismanagement resulted in significant delay and increased costs. It claims special and general damages against Coles and Avant Garde jointly and severally in the amount of $6,200,000.

[7] Neither Coles nor Avant Garde have defended the Nova Scotia action. Avant Garde made it known to CCHP that it objected to the jurisdiction of the Nova Scotia Supreme Court and moved for a stay of the action on January 15, 2016.

[8] On April 25, 2016, Coles filed a brief indicating that it did not take a position on Avant Garde's motion for a stay, but would file a defence in whichever jurisdiction the court determined to be the appropriate forum. Before the motion could be heard, however, CCHP filed a notice of discontinuance with Avant Garde's consent on May 11, 2016. The discontinuance was to have no impact on CCHP's claim against Coles. Shortly thereafter, Coles contacted CCHP to inquire as to whether CCHP would discontinue the Nova Scotia action. On June 21, 2016, CCHP indicated that it had discontinued the action against Avant Garde due to a forum selection clause in the contract between it and Avant Garde, which stipulated that disputes between those two parties were to be determined in New Brunswick. No forum selection clause appears in the contract between CCHP and Coles.

[9] On September 7, 2016, Coles moved for a stay of the Nova Scotia action. The motion was heard in part on September 22 and October 26, 2016. Coles then sought to file further affidavit evidence in support of the motion. CCHP objected. On November 30, 2016, the court requested further written submissions, which were received from both parties in December. Additional submissions were filed in February 2017.

[10] On September 12, 2017, I rendered a decision allowing Coles to file further affidavit evidence. The parties filed additional materials on January 5, June 27,

June 28, and July 4, 2018. Counsel appeared in court on July 12, 2018, to make further submissions.

Issues

1. Should the Nova Scotia action brought by CCHP against Coles be stayed because New Brunswick is the most convenient forum?

Forum Non Conveniens

[11] In *Penny v. Bouch*, 2008 NSSC 378, aff'd 2009 NSCA 80, Wright J. held that the *Court Jurisdiction and Proceedings Transfer Act* adopts the two-step common law analysis for determining whether the court should assume jurisdiction over an originating court process brought against a non-resident defendant:

> 20 The Act clearly recognizes and affirms the two step analysis required to be engaged in whenever there is an issue over assumed jurisdiction, which arises where a non-resident defendant is served with an originating court process out of the territorial jurisdiction of the court pursuant to its Civil Procedure Rules. That is to say, in order to assume jurisdiction, the 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. The court may then decline to exercise its jurisdiction on the ground that there is another more appropriate forum to entertain the action.

[12] Whether the Nova Scotia Supreme Court has territorial competence (jurisdiction *simpliciter*) is determined in accordance with s. 4 of the *CJPTA*:

> **Proceedings against persons**
>
> 4 A court has territorial competence in a proceeding that is brought against a person only if
>
> (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.

[13] Section 8 outlines when a corporation will be considered "ordinarily resident" in Nova Scotia:

> **Ordinary residence of corporation**
>
> 8 A corporation is ordinarily resident in the Province, for the purposes of this Part, only if
>
> (a) the corporation has, or is required by law to have, a registered office in the Province;
>
> (b) pursuant to law, it
>
> (i) has registered an address in the Province at which process may be served generally, or
>
> (ii) has nominated an agent in the Province upon whom process may be served generally;
>
> (c) it has a place of business in the Province; or
>
> (d) its central management is exercised in the Province.

[14] As an extra-provincial corporation registered in Nova Scotia with a recognized agent in Nova Scotia, Coles concedes that it falls within the meaning of a corporation that is "ordinarily resident", and that this court has territorial jurisdiction over it. The question, then, is whether the court should decline to assume jurisdiction on the ground of *forum non conveniens*.

[15] Section 12 of the *CJPTA* codifies the common law *forum non conveniens* test: *Teck Cominco Metals Limited v. Lloyds Underwriters*, 2009 SCC 11, at para. 22. See also: *3289444 Nova Scotia Ltd. v. R.W. Armstrong & Associates Inc.*, 2018 NSCA 26. Section 12(2) of the *CJPTA* sets out a non-exhaustive list of factors that a court must consider when deciding whether a court outside Nova Scotia is a more appropriate forum to resolve a dispute:

> 12 (2) 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;
>
> (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.

[16] In *Teck*, McLachlin C.J. endorsed a "holistic approach" to the *forum non conveniens* analysis, requiring a consideration of all of the relevant factors, arguments, and the totality of the evidence: paras. 30, 34. See also: *Penny v. Bouch*, 2009 NSCA 80, at paras. 59-60.

[17] The burden of proof on a *forum non conveniens* motion was discussed in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, where Justice Lebel stated:

> 108 Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. … On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. …
>
> 109 The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

Accordingly, the court will only decline jurisdiction if Coles shows that New Brunswick is a clearly more appropriate forum for the hearing of CCHP's claims against it.

[18] Coles bases its position that New Brunswick is the more appropriate forum on ss. 12(c), (d), and (f) of the *CJPTA*. CCHP says s. 12(a) and (b) favour keeping the proceeding in Nova Scotia. Section 12(e) is neutral. There would be no difficulty enforcing a judgment rendered in New Brunswick in Nova Scotia, and *vice versa*. I will consider each of the relevant factors.

(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

[19] Coles has filed affidavits of Darcy Grant and Gardiner MacNeill, former Coles employees who worked on the Algonquin renovation project. Coles also relies on the previously filed affidavit of Patrick Sohy, president and director of Avant Garde. Coles says the affidavit evidence supports a finding that almost all of the work on the renovation project was done in New Brunswick, and that, aside from a few CCHP employees and some of Coles's own employees, all the material witnesses reside in New Brunswick.

[20] In Patrick Sohy's affidavit, he states that the services provided by Avant Garde pursuant to the contract between it and CCHP were provided in New Brunswick by Avant Garde employees located in New Brunswick. In addition, Mr. Sohy says, the sub-contractors who provided services and material in respect of the Algonquin were "nearly all located in New Brunswick". Exhibit "Q" to the affidavit is a list of contractors who provided services, work, and material in respect of the Algonquin.

[21] In Darcy Grant's affidavit, he explains that he was employed by Coles as a mechanical engineer during the Algonquin renovations. His role was to design mechanical components for the project and to provide direction regarding those designs through drawings, specifications, and change orders. He says he provided this direction to subcontractors working on the renovations as well as to "the Project owner or Avant Garde Construction and Management Inc., the Project construction manager".

[22] Mr. Grant confirms that he was on-site on between twenty and thirty occasions during the design and construction phases. He says that during his time at the site, and through phone conversations and correspondence, he came to know the companies and persons involved in installing and working on the mechanical aspects of the project. He specifically identifies Beaulieu Plumbing & Mechanical Inc., Seldon Smith & Sons, B&G Sprinklers Ltd., Controls & Equipment Ltd.,

Emmerson Pools, MC Ventilation Ltd., and Design Electric Inc., all of whom, he says, are based in New Brunswick. Mr. Grant also swore that:

> 16. To the best of my knowledge from my involvement on the Project, Coles was one of very few companies hired to provide construction or design services for the Project that was not based in New Brunswick. Companies that provided design or consulting services and were based outside of New Brunswick included Moncur Design Associates Inc. (Toronto, Ontario), Building Sciences Corporation (Ontario), and Campbell Comeau Engineering Limited (Halifax, Nova Scotia).

[23] Gardiner MacNeill states in his affidavit that he was employed by Coles as an electrical engineer during the Algonquin renovations. He says he left Coles in October 2013, but remained involved in the renovation project as an electrical subconsultant for Coles until July 2014. Mr. MacNeill says he was on the site approximately once per month until July 2014. His role was to provide inspection services with respect to his electrical design, and to assist with any necessary on-site electrical redesign arising from as-found conditions. Mr. MacNeill says there were four companies with whom he primarily interacted during his time at the site: Avant Garde, Design Electric Inc., Dramis Communications Solutions Ltd., and Ultra Alarm Services Ltd. Each of these companies, he says, are located in New Brunswick. Mr. MacNeill says the following about Avant Garde:

> 9. Avant Garde was the construction manager on the Project. I worked with Avant Garde, which is based out of New Brunswick, to provide direction and clarity on my electrical design. There were five individuals at Avant Garde with whom I primarily interacted: Patrick Sohy, Rob Clinch, Peter Milar, Tony Savoie and Greg McConnachie. Through conversations with these individuals about evening plans and my own observations as a person attending the Project site from away (I resided in Charlottetown, Prince Edward Island, at the time), I learned and believe that Patrick Sohy (at the time) and Peter Milar resided in or near Saint John, New Brunswick. I also learned and believe that Rob Clinch resided in or near Moncton, New Brunswick.

[24] Although Coles relies on these affidavits to establish that most of the material witnesses live in New Brunswick, there is nothing in the evidence or submissions to indicate that any of the individuals associated with the companies identified in the Sohy, Grant, and MacNeill affidavits will in fact be called by Coles as witnesses at trial.

[25] CCHP relies on the affidavit of Gordon Laing, the President and Chief Executive Officer of 3261154 Nova Scotia Limited, a wholly-owned subsidiary of

Southwest Properties Limited. 3261154 is one of the partners of CCHP, along with Charlotte Hotel Company, a Nova Scotia unlimited liability company. Mr. Laing swore that:

> 7. The directors and officers of 3261154 Nova Scotia Limited are myself, Paul Murphy, and Josef Spatz.
>
> …
>
> 20. In advancing its action against Coles, CCHP will be required to rely on evidence of its partners, including the directors and officers of 3261154 Nova Scotia Limited and of Southwest, all of whom work and reside in Halifax, Nova Scotia.
>
> 21. Employees of Southwest and of 3261154 Nova Scotia Limited performed crucial roles in the planning and execution of the Algonquin Hotel renovation project.
>
> 22. The following individuals who were employed by Southwest performed key services required for the renovation project for the Algonquin Hotel:

Individual	Employed by	Position
Robert White	Southwest Properties Ltd.	Vice President (retired)
Melanie Reid	Southwest Properties Ltd.	Project Coordinator (resigned)
Greg Faulkenham	Southwest Properties Ltd.	Assistant Controller
Paul Murphy	Southwest Properties Ltd.	CFO
Gordon Laing	Southwest Properties Ltd.	President & CEO
Leslie MacIntyre	Southwest Properties Ltd.	Controller
Carol Blackie	Southwest Properties Ltd.	Executive Assistant
Ben Young	Southwest Properties Ltd.	Vice President

> 23. All of these individuals are employed in and reside in Halifax, Nova Scotia.
>
> 24. All of the individuals referenced in the chart above are anticipated to be required to provide evidence in support of the claim of CCHP against Coles, or in response to a counterclaim initiated by Coles against CCHP.

[26] Mr. Laing states that requiring these individuals to attend a trial in New Brunswick would put a substantial burden on 3261154 and Southwest:

> 25. The requirement for these individuals to travel to New Brunswick to provide evidence in a hearing against Coles would create a substantial burden on CCHP, its partner 3261154 Nova Scotia Limited and its parent company Southwest both in respect to the costs of transporting to and housing these individuals in New Brunswick and also in relation to the dislocation to the business activities of these companies.
>
> 26. The individuals that would be required to attend for a trial in New Brunswick represent the majority of senior management for Southwest and for 3261154 Nova Scotia Limited which are multi-million dollar companies.
>
> 27. Removing the management team for these companies from the Province for extended periods of time will be highly prejudicial to the operations of these companies which are engaged in multiple projects worth hundreds of millions of dollars at all times.
>
> 28. Given the complexity of this action and the amount of damages suffered by CCHP it will be required that this action be scheduled for a lengthy trial.
>
> 29. Conducting this action in Halifax would allow these executives and other employees to be engaged in the regular work during the proceeding including evenings spent at their offices, which could not be accomplished if they were simultaneously all required to attend in New Brunswick.
>
> 30. Each of these companies has substantial risk involved with removing its senior leadership from their offices for extended periods of time as there are not other individuals who would remain in Halifax able to cover off all of the functions of these executives.
>
> 31. The nature of the business activities of Southwest and the other related companies (which is property development and management) requires the executives of this company and its project managers to be available at a moments notice to deal with emergencies as they arise; having all of these individuals out of the Province would not allow Southwest and the other companies to respond to the myriad issues which arise during property construction and which must be attended to immediately.

[27] Mr. Laing also identifies other individuals who CCHP will need to call as witnesses and who he says would be significantly more inconvenienced if the case is tried in New Brunswick:

> 34. In addition to its own employees and those of related companies CCHP will be required to call as witnesses representatives of other firms which were engaged in the renovation project. These include professionals hired by CCHP.

> 35. The engineering firm engaged by CCHP was Campbell Comeau Engineering Ltd. of Halifax, Nova Scotia and the principal individual employed by Campbell Comeau and engaged in the Algonquin Hotel renovation project was Wes Campbell, who resides and is employed in Halifax, Nova Scotia.
>
> 36. It is expected that Mr. Campbell will be required to provide evidence in the trial of this matter.
>
> 37. In addition to the individuals listed above, CCHP also engaged the services of Hoyts Moving and Storage which has its offices in Halifax, Nova Scotia. CCHP dealt directly with Randy Hoyt of this company who is a resident of Halifax, Nova Scotia.
>
> 38. Both Mr. Campbell and Mr. Hoyt are expected to be witnesses in this proceeding as CCHP establishes liability and quantifies its claim of damages against Coles.
>
> 39. CCHP will also be required to engage experts to advance it [*sic*] case on the issues of liability and of damages. The experts to be engaged by CCHP will not be located in New Brunswick and will either be retained from Halifax or from outside of the Atlantic Provinces.
>
> 40. In addition it is anticipated we will also call to give evidence Leslie Cleveland of Cleveland Shaw Ltd of Toronto (Forensic Accountant) and Robynne Moncur of Moncur Design Associates of Toronto. It would be much more practical for them to prepare and attend court in Nova Scotia as opposed to New Brunswick.

[28] The affidavits relied on by Coles establish that most of the on-site work at the Algonquin was performed by companies located in New Brunswick. From that, however, I am unable to infer that most of the material witnesses live in New Brunswick. As a result, there is no evidence from which the court can conclude that Coles or its witnesses will suffer greater inconvenience and expense if the trial is held in Nova Scotia as opposed to in New Brunswick.

[29] Unlike Coles, CCHP has identified people it intends to call as witnesses at trial, including the directors and officers of 3261154 and Southwest. I accept that it would be more convenient and less expensive for CCHP and its witnesses if the proceeding is heard in Nova Scotia. That said, if the proceeding is heard in New Brunswick, I am not satisfied that these individuals, or the companies they work for, will be inconvenienced to the degree suggested by Mr. Laing. A trial in New Brunswick would not require the simultaneous and continuous attendance of all of the executives identified by Mr. Laing. I am confident that operations at 3261154 and Southwest would continue without significant disruption. As for the witnesses

from Toronto, CCHP has not convinced me that there is a significant difference in the inconvenience and expense involved in their attendance at a trial in either jurisdiction.

[30] The other consideration when assessing the expense and inconvenience to CCHP is that its witnesses will already need to travel to New Brunswick to testify in the Avant Garde proceeding. Counsel for CCHP argued that Coles failed to prove that CCHP plans to call the same witnesses in both proceedings, and that the court had no evidence from which it could make that inference. I disagree. In Mr. Laing's affidavit, he states:

> 7. The directors and officers of 3261154 Nova Scotia Limited are myself, Paul Murphy, and Josef Spatz.
>
> …
>
> 21. Employees of Southwest and of 3261154 Nova Scotia Limited performed crucial roles in the planning and execution of the Algonquin Hotel renovation project.
>
> 22. The following individuals who were employed by Southwest performed key services required for the renovation project for the Algonquin Hotel …

Mr. Laing then identifies eight Southwest employees, including himself and Paul Murphy. According to Mr. Laing, the employees he listed performed "crucial roles" and provided "key services" for "the Algonquin Hotel renovation project". The affidavit does not say that the roles and services performed by these individuals were limited to aspects of the renovation in which Coles would have been involved. Mr. Laing states that the anticipated witnesses represent the majority of senior management for Southwest and 3261154. It is reasonable to infer from Mr. Laing's evidence that the witnesses CCHP intends to call to support its claim against Coles would also have relevant evidence to give in the proceeding against Avant Garde, the construction manager for the same project. Indeed, both Mr. Grant and Mr. MacNeill, former Coles employees, gave evidence that they provided advice and direction to Avant Garde in relation to their electrical and mechanical designs. These companies were not working entirely independently from one another on unrelated aspects of the renovation.

[31] While CCHP is correct that Coles has the burden on this motion, Coles does not need to succeed on every *CJPTA* factor to establish that New Brunswick is clearly the more appropriate forum. It is CCHP, not Coles, that relies primarily on the comparative convenience factor to support its position on *forum conveniens*,

and it is CCHP, not Coles, that can identify the witnesses it will call against Avant Garde. If CCHP did not want the court to draw the reasonable inference – from CCHP's own evidence – that there will be significant witness overlap between the two proceedings, and to consider that factor when assessing the inconvenience and expense to CCHP, it could have led further evidence on that point.

[32] I conclude that there will be some additional inconvenience and expense to CCHP if the proceeding is heard in New Brunswick. That inconvenience and expense, however, has been significantly overstated by CCHP. In any event, without any evidence from Coles as to who it intends to call as witnesses, the comparative convenience factor favours keeping the proceeding in Nova Scotia.

(b) the law to be applied to issues in the proceeding;

[33] CCHP's action against Coles is in negligence and breach of contract. Generally speaking, the law as it applies to breach of contract and negligence is likely to be the same in New Brunswick as in Nova Scotia. CCHP submits, however, that a limitation period issue will exist if it is forced to litigate its claims against Coles in New Brunswick. As a result, it says, this factor strongly favours Nova Scotia.

[34] CCHP submits that case law has consistently held that the doctrine of *forum non conveniens* should not be used when the end result is that the plaintiff will be prejudiced by the expiration of a limitation period in the other jurisdiction. CCHP relies on *Lilydale Co-operative Ltd. v. Meyn Canada*, [2007] O.J. No. 494, aff'd 2008 ONCA 126, [2008] O.J. No. 589, and *Monahan (Guardian ad litem of) v. Trahan*, (1992), 117 N.S.R. (2d) 393, [1992] N.S.J. No. 456, for this proposition. In *Lilydale*, the plaintiff suffered a massive fire at its poultry processing plant in Alberta. The fire resulted in more than $16 million in damages. Lilydale alleged that the fire was caused or contributed to by defects in the heater, improper installation of the thermal oil circulation pump, and the installation of an incorrectly sized burner or process unit or both. Lilydale commenced an action against the defendant, Meyn Canada, in Alberta, and later commenced a second, almost identical proceeding in Ontario. Meyn brought a motion to stay the Ontario proceedings on the basis that they were abusive, and that the evidence and other related factors in the litigation were much more closely connected to Alberta.

[35] The parties did not dispute that Lilydale's claim was statute-barred in Alberta. In fact, Meyn's primary defence in the Alberta action was that Lilydale had missed the limitation period. Lilydale argued that it would therefore suffer a

loss of juridical advantage if it were barred from proceeding in Ontario. After quoting from the decision of Justice Nordheimer in *Gotch v. Ramirez*, [2000] O.J. No. 1553 (Ont. Sup. Ct. J.), Justice Day stated:

> 31 Clearly, Justice Nordheimer focused very heavily on the consequences to the plaintiff who would most certainly lose the opportunity to have his case heard on its merits in the alternative jurisdiction. It is clear that Justice Nordheimer, recognizing that most of the connecting circumstances in *Gotch v. Ramirez*, supra, would have occurred outside of Ontario, still found in favour of the Ontario jurisdiction in the interest of securing the ends of justice. In the circumstances of this case, I am drawn to the same conclusion.
>
> 32 Specifically, Justice Nordheimer said that in the end result, the loss of juridical advantage to the plaintiff arising from the limitation period was sufficient to outweigh all of the other considerations, the majority of which favoured Pennsylvania as the appropriate forum for that litigation. Therefore, even if I find that all the other factors point to Alberta as the appropriate forum, following Justice Nordheimer, the loss of juridical advantage occasioned by the Alberta limitation period may well be enough to justify a refusal of the stay.

[36] Justice Day dismissed the motion, holding as follows:

> 37 Given that I cannot find anything even approaching strong reasons to the contrary, I find it appropriate to follow the reasoning of Justice Nordheimer in *Gotch v. Ramirez* in virtually parallel circumstances. …

[37] In *Monahan*, Mrs. Monahan claimed that her husband was very seriously injured as result of a collision that occurred during a hydroplane race in the province of Quebec. She alleged gross negligence on the part of the operator of the hydroplane that struck her husband's hydroplane, and negligence on the part of the Canadian Boating Federation and its directors. It was accepted that Mr. Monahan's injuries left him permanently physically and mentally disabled and in need of round-the-clock care. The defendants applied to have the action stayed on the basis that Quebec was a more appropriate forum than Nova Scotia. The applicable test was set out by Saunders J. (as he then was):

> 9 Nova Scotia cases have accepted and applied the two-part test for determining *forum conveniens* as outlined by the House of Lords in *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795 (H.L.). The test laid down by Lord Diplock in *MacShannon* is as follows at p. 812:
>
> > ... to justify a stay two conditions must be satisfied, one positive and the other negative: (a) The defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be

> done between the parties at substantially less inconvenience or expense, and (b) The stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.

[38] Justice Saunders held that the balance of convenience strongly favoured the plaintiff having her case heard in Nova Scotia for numerous reasons, including the following: all of the expert and lay evidence relevant to pecuniary and non-pecuniary damages would originate in Nova Scotia; obliging Mrs. Monahan's witnesses to fly to a foreign jurisdiction would impose a tremendous cost on her; Mr. Monahan should not be deprived of the opportunity to be physically present in the courtroom while the doctors and actuaries testified; the defendant corporation had a presence throughout the country and its activities were not connected to any particular Canadian jurisdiction; and five of the individual defendants resided in Ontario and had no connection to Quebec. Justice Saunders also considered it to be "of great significance" that Ms. Monahan swore that she would not be able to proceed with the action if it was not heard in Nova Scotia. On the issue of limitation periods, Saunders J. stated:

> 20 Given the significant differences in the legislation in Nova Scotia as compared to Quebec on the point of limitation periods I accept Mr. Barry's submission that if limitation became an issue, then to compel Mrs. Monahan to proceed in Quebec would in all likelihood deprive her of her right of action because she is out of time.

[39] Justice Saunders concluded that Nova Scotia was the more appropriate forum and dismissed the defendants' stay application.

[40] Coles says CCHP's concern that it will be statute-barred from advancing additional claims in its third party claim against Coles in New Brunswick is unfounded for two reasons. First, Coles says that if the Nova Scotia proceeding is stayed, it will not raise a limitations defence in New Brunswick. Second, Coles says that even if it were to raise a limitation period defence to the additional claims, it could not do so successfully due to a saving provision in the New Brunswick legislation. Section 21 of the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5. states:

> 21 Despite the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or an amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or

> events described in the original pleadings and the conditions set out in one of the following paragraphs are satisfied:
>
> > (a) the added claim is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;
> >
> > (b) the added claim adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within 6 months after the expiry of the limitation period, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits;
> >
> > (c) the added claim adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within 6 months after the expiry of the limitation period, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings.

[41] CCHP appears to assume that if New Brunswick is the more appropriate forum, New Brunswick law -- including its limitations legislation -- will govern the proceeding. Coles certainly takes the position that New Brunswick law applies, regardless of where the proceeding is heard. Although the issue of the applicable law has not been fully argued before me, I am satisfied that, even if New Brunswick law applies, CCHP will not be prevented from pursuing its claims against Coles.

[42] In my view, the case law considering the impact of limitation period issues on *forum non conveniens* motions is not as uniform as CCHP suggests. In *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39, the British Columbia Court of Appeal stated:

> 90 The next question is how the possible expiration of the limitation period factors into the analysis.
>
> 91 In a *forum non conveniens* analysis, facts regarding limitation periods are considered under the "juridical advantage" factor: see *Tolofson v. Jensen*, [1992] 3 W.W.R. 743 (B.C.C.A.); *Gotch v. Ramirez*, [2000] O.J. No. 1553 at para. 16 (S.C.). Many courts have found that the expiration of a limitation period in the other jurisdiction is a juridical disadvantage to the plaintiff that weighs against granting a stay of proceedings based on *forum non conveniens*: see *Tolofson*; *Gotch*; *Butkovsky v. Donahue* (1984), 52 B.C.L.R. 278 (S.C.); *Ang et al. v. Trach et al.*, [1986] O.J. No. 1117 (S.C.); *Jordan v. Schatz*, 2000 BCCA 409 at para. 28.

> However, some courts have found that a plaintiff's failure to bring an action within time in the other jurisdiction militates against attaching any weight to the juridical advantage factor because, in some circumstances, a plaintiff could successfully oppose a defendant's *forum non conveniens* application in one jurisdiction by simply allowing the limitation period to expire in the other jurisdiction: see *Kennedy v. Hughes*, [2006] O.J. No. 3870 at para. 12(v)-(vi) (S.C.); *Hurst v. Société Nationale de L'Amiante*, 2008 ONCA 573 at paras. 51-52.
>
> 92 It appears that the weight attached to the juridical advantage factor when considering the expiration of a limitation period in another jurisdiction is a case-specific inquiry that turns on the facts.

[43] In *Hurst v. Société Nationale de L'Amiante*, 2008 ONCA 573, the Ontario Court of Appeal wrote:

> [51] Addressing the issue of the claimed juridical disadvantage, which was the tolling of the limitation period in Quebec, the motion judge found that there was no reason for the appellants not to have commenced this action in Quebec at the time it was brought in Ontario. They had Quebec counsel representing them in the CVMQ proceeding and they also commenced the Mazarin action in Quebec. She concluded that given these facts, it was not open to the appellants to rely on the tolling of the limitation period in Quebec as a legitimate juridical disadvantage. On the contrary, she noted that it could be said that the respondents would suffer a juridical disadvantage by being deprived of a limitation defence if the action was allowed to proceed in Ontario when it was otherwise not the appropriate forum.
>
> [52] Of equal importance, in my view, is the fact that a number of the respondents clearly advised the appellants back in 1988 that they intended to challenge the choice of forum. Consistent with their overall delay in proceeding with this action, the appellants allowed the jurisdiction issue to lay dormant until 2005, knowing that they were losing their opportunity to litigate the oppression case in Quebec. It is only because of the appellants' choice not to begin an oppression action in Quebec within the limitation period that loss of juridical advantage became a factor in the *forum conveniens* analysis. As a result, it is not a factor that should carry much weight.

[44] In this case, CCHP has known since December 2015, when it added Avant Garde as a defendant to the Nova Scotia action and filed a third party indemnity claim against Coles in the New Brunswick action, that jurisdiction was a live issue. Having chosen not to amend its pleadings against Coles in New Brunswick, CCHP cannot now reasonably suggest that the expiry of the New Brunswick limitation period should be the decisive factor in this court's *forum non conveniens* analysis.

[45] I note as well that the *Monahan* decision does not support CCHP's contention that the expiration of a limitation period in another jurisdiction is the

single most important factor in the *forum non conveniens* analysis. Justice Saunders considered a multitude of factors, including the potential limitation issue, in determining that Nova Scotia was the more appropriate forum.

[46] In any event, in cases like *Gotch* and *Lilydale* where the limitation issue was treated as the most important factor, there was no debate that a decision by the Ontario court to decline jurisdiction would deprive the plaintiffs of their right of action. That is not the case here. I am satisfied that s. 21 of the New Brunswick *Limitation of Actions Act* is, as Coles suggests, a complete answer to CCHP's concerns. In *Commentary on Bill 28: Limitation of Actions Act*, (Fredericton: Office of the Attorney General of New Brunswick, January 2009), at page 15, the Office of the Attorney General explained the purpose of s. 21 of the New Brunswick *Act*:

> This section is drawn from the Alberta and ULCC Acts, and is explained on p.81-89 of the Alberta Law Reform Institute's report on *Limitations* (1989) and in subsequent Alberta case-law. It creates a framework within which, once a claim has been brought in time, some new claims can be added to the proceedings even though the limitation periods applicable to those claims have expired.
>
> In all cases the added claim must relate to the subject-matter of the original proceedings; thus the claims that have been brought in time define the range of the claims that can be added later under this section. In addition, if the claim adds a new defendant, the defendant must have had sufficient knowledge of the claim within the time frame that the combination of the limitation period and six months for service would allow. If the claim is by a new claimant, not only must the defendant have that knowledge, but the involvement of the new claimant must also be necessary or desirable from the point of the view of the original proceedings.

[47] CCHP is correct that the language of the provision is permissive, not mandatory. I am satisfied, however, that CCHP's claims against Coles clearly meet the section's requirements, and I have no reason to believe that a New Brunswick court would arbitrarily deprive CCHP of its right to pursue them. That said, CCHP's concerns can also be addressed by making a stay conditional on the waiver by Coles of any limitations defence available to it, and the acceptance of that waiver by the New Brunswick court. In *Quadrangle Holdings Ltd. v. Coady*, 2015 NSCA 13, [2015] N.S.J. No. 47, the Nova Scotia Court of Appeal said the following in relation to conditional stays:

> 31 As previously described, Justice Coady decided that Alberta was the preferable forum and granted a stay of the 2008 action. Justice Coady's stay was

> unconditional. That is common in Canadian courts, in contrast to America and the United Kingdom (Vaughan Black, *Conditional Forum Non Conveniens in Canadian Courts*, 39 Queens L.J., (2013), p. 41.) One common stay condition is that a defendant waive the limitation period of the forum in which it seeks adjudication. This approach was implicitly approved by the House of Lords in *Spiliada Maritime Corporation v. Cansulex Ltd.*, [1986] 3 All E.R. 843 where the House commented that expiry of a limitation period in a more convenient forum may be grounds to refuse a stay of an English action that was not time barred (pp. 860-63). The Supreme Court of Canada generally approved *Spiliada* in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board),* [1993] 1 S.C.R. 897.

[48] There are numerous examples of courts in other provinces ordering conditional stays to deal with potential limitations problems in other jurisdictions, or otherwise endorsing this approach: *United Oilseed Products Ltd. v. Royal Bank*, 1988 ABCA 207, 1988 CarswellAlta 98, at para. 35; *Rivas v. Damacio*, 1998 ABQB 313, [1998] A.J. No. 1612, at para. 14; *Pre Print Inc. v. Maritime Telegraph & Telephone Co.*, 1999 ABQB 890, [1999] A.J. No. 1379, at para. 33; *Jordan v. Schatz*, 2000 BCCA 409, [2000] B.C.J. No. 1303, at para. 25; *Nissho Iwai Co. v. Shanghai Ocean Shipping Co.*, (2000), 185 F.T.R. 314, [2000] F.C.J. No. 1100, at para. 22; *Pan-Afric Holdings Ltd. v. Ernst & Young LLP*, 2007 BCSC 65, [2007] B.C.J. No. 1033, at paras. 60-63; and *Candoo Excavating Services Ltd. v. Ipex Inc.*, 2015 ONSC 809, [2015] O.J. No. 535, at para. 30.

[49] For all of these reasons, I conclude that the law to be applied to issues in the proceeding is a neutral factor in this case.

(c) the desirability of avoiding multiplicity of legal proceedings;
(d) the desirability of avoiding conflicting decisions in different courts; and,
(f) the fair and efficient working of the Canadian legal system as a whole

[50] These three factors have overlapping considerations and I will address them together. Coles says that, as a result of the forum selection clause in the contract between CCHP and Avant Garde, those parties will be determining the issues between them in New Brunswick. CCHP discontinued its claim against Avant Garde in the Nova Scotia action for this reason. Coles says CCHP's claims against Coles and its claims against Avant Garde are intertwined, in that they relate to the same project, involve substantially the same facts, and are based on the same period of delay causing damages to CCHP. It makes no sense, Coles submits, for CCHP to continue with the Nova Scotia action against Coles alone when both Coles and Avant Garde are parties to the New Brunswick action. Coles further

submits that because CCHP alleges that Coles and Avant Garde are each responsible for the same delay, and has claimed the same damages against each of them, there is a serious potential for double recovery if they are each found liable to CCHP by courts in different provinces.

[51] Coles likens the current situation to *Check Group Canada Inc. v. Icer Canada Corp*., 2010 NSSC 463. In *Icer*, although some of the claims had very limited connections to Nova Scotia, others were for relief under the *Companies Act*, RSNS 1989, c. 81, and were therefore within the exclusive jurisdiction of the Nova Scotia Supreme Court. The moving party sought to hive off the latter claims from the others, allowing proceedings to go forward in both Quebec and Nova Scotia. Justice Murphy dismissed the motion on the basis of s. 12(c) and (d) of the *CJPTA*, stating:

> 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.

[52] Coles also relies on *McDermott Gulf Operating Co. v. Oceanographia Sociedad Anonima de Capital Variable*, 2010 NSSC 118. In that case, one of the defendants sought to have the Nova Scotia Supreme Court decline to exercise its jurisdiction on the basis of *forum non conveniens*, arguing that Mexico was the more appropriate forum. In considering ss. 12(c) and (d) of the *CJPTA*, Duncan J. discussed the impact of a forum selection clause between the plaintiff and some of the other defendants that required them to resolve any disputes in Nova Scotia:

> 124 If one accepts that it is preferable to avoid a multiplicity of proceedings, then Nova Scotia is the better forum to accomplish this. Clause 31 of the Charter Party is mandatory, that is, the dispute between the plaintiffs and Con-Dive "... shall be governed and construed in accordance with the Laws of Nova Scotia and the Federal Laws of Canada applicable thereto with any disputes resolved in the Supreme Court of Nova Scotia. ...". The clause does not allow for a discretion to those parties to litigate in Mexico. Therefore, the plaintiffs would be bound to pursue two actions arising largely out of the same fact situation, one in Mexico as against OSA, and the second in Nova Scotia against Con-Dive and Yanez.
>
> 125 The potential for conflicting decisions is increased by the resulting multiplicity of legal proceedings. Common issues to the two actions include the interpretation of the Charter Party, and the respective responsibilities of Con-Dive, OSA and Yanez in fulfilling the Charterer's obligations for payment of hire.

[53] Concluding that the other factors were neutral to the analysis, Duncan J. held that Nova Scotia was the more appropriate forum and dismissed the motion. Coles says the decisions in *Icer* and *McDermott* support its position that s. 12(c) and (d) heavily favour New Brunswick as the more appropriate forum.

[54] CCHP acknowledges that there are some similarities in the factual matrix underpinning both the Nova Scotia and New Brunswick actions. It says, however, that the two proceedings are based on two different contracts for two different kinds of services, and that they involve different legal issues. The key issues in the Nova Scotia proceeding, according to CCHP: (1) whether Coles breached its contract with CCHP; (2) whether Coles negligently carried out its contract with CCHP. CCHP emphasizes that in the New Brunswick action, it is a defendant and counterclaimant, as opposed to a plaintiff. The key issues in that proceeding, CCHP says: (1) whether CCHP breached its contract with Avant Garde or *vice versa*; (2) whether CCHP negligently carried out its contract with Avant Garde or *vice versa*. CCHP says any multiplicity of proceedings can be easily avoided if Coles accepts its offer to discontinue the claim against Coles in the New Brunswick proceeding.

[55] While CCHP submits that its claims against Coles are entirely unrelated to its claims against Avant Garde, CCHP's pleadings and the procedural history of both matters prove otherwise. In its statement of claim against Coles, CCHP states:

> 5. CCHP states that the designs prepared and work performed by Coles under the Agreement were deficient and, further, were delivered past their required delivery date.

> 6. Throughout the Project, various change orders were required as a result of defects in the designs prepared and work performed by Coles under the Agreement which affected the schedule of the Project, as well as the overall cost for the Project.
>
> 7. CCHP says that as a result of defects in the designs prepared and work performed by Coles under the Agreement, the scheduled completion date for the Project became unattainable. CCHP states that the Project was ultimately completed in June 2014, approximately one year past the date set for completion at the outset of the Project.
>
> 8. CCHP says that the delay in the completion of the Project was caused by defects in the designs prepared and work performed by Coles under the Agreement, and change orders required as a result of those defects. CCHP further says that any delay was beyond the control of CCHP.
>
> [*Emphasis added*]

[56] In its counterclaim against Avant Garde, CCHP states:

> 17. CCHP states that in breach of its obligations under the [Construction Management] Agreement and the [Subcontract Administration Services] Agreement, Avant Garde neglected to perform the Services required under the CM Agreement and the SAS Agreement. CCHP states that Avant Garde failed to comply with the requirements of the CM Agreement and the SAS Agreement to a material degree.
>
> 18. CCHP further states, and the fact is, that Avant Garde failed to exercise reasonable care and skill in managing the construction of the Project, and negligently failed to ensure that the work necessary to complete the Project proceeded in a timely manner and in accordance with the Project schedule and through their actions the project was over budget and they failed to properly manage the project. They failed to update the owner on issues, schedule slippage and budget overruns. They consistently told the owner that the schedule would be met and that the delays as of April could be caught up when indeed they knew or should have known that was not the case and not accurate.
>
> 19. As a result of Avant Garde's breach of contract and/or negligence in the performance of its duties under the CM Agreement and the SAS Agreement, the Project was significantly delayed beyond the completion date contemplated by the Project schedule.
>
> …
>
> 21. CCHP states that Avant Garde's breach of contract and/or negligence in the performance of its duties under the CM Agreement and the SAS Agreement has caused material delay and cost growth, resulting in substantial damages to CCHP, currently estimated to exceed $6.2 million …

> 22. Based on the foregoing, CCHP claims legal and/or equitable set-off and counterclaims against the Plaintiff for the following:
>
> (a) special damages in excess of $6.2 million, the particulars of which will be provided prior to trial; …
>
> [*Emphasis added*]

[57] After filing its defence and counterclaim against Avant Garde, CCHP filed a third party claim against Coles for contribution and/or indemnity for any damages that it might be found liable to pay to Avant Garde. Then CCHP amended its statement of claim in the Nova Scotia action to add Avant Garde as a defendant based on the same allegations it advanced in the counterclaim. CCHP's amendments included the following:

> 25. CCHP repeats the foregoing and claims against Coles and Avant Garde, jointly and severally, for the following…
>
> [*Underlining in original*]

[58] Despite CCHP's suggestion to the contrary, the only reasonable conclusion, based on CCHP's own conduct, it is clear that the claims against Coles and Avant Garde are inextricably linked. Although the particulars of the negligence or breach of contract CCHP alleges against each party are different, CCHP attributes a similar period of delay to both parties, and claims the same damages against each of them. If the Nova Scotia action is not stayed, courts in two jurisdictions will decide whether the actions of the defendant (or the defendant-by-counterclaim) in each proceeding delayed the completion of the Algonquin renovations, and, if so, what damages, if any, flowed from that delay. This multiplicity of proceedings creates the potential for conflicting decisions and, importantly, for the distinctly unfair possibility of double recovery on the part of CCHP. CCHP has not satisfied me that the court can safeguard against these risks, and it would therefore be contrary to the principles of order and fairness to allow both actions to proceed.

[59] The fair and efficient working of the Canadian legal system requires that the claims made by and against each of the three parties in relation to the Algonquin renovations be heard in the same proceeding by the same court. Since CCHP and Avant Garde are bound by the forum selection clause to deal with their dispute in New Brunswick, I conclude that New Brunswick is clearly the more appropriate forum for the hearing of CCHP's claims against Coles, despite the inconvenience or expense to CCHP.

Conclusion

[60] I am satisfied that New Brunswick is clearly the more appropriate forum to hear CCHP's claims against Coles. I therefore decline to exercise this court's territorial competence and enter a stay of CCHP's Nova Scotia action against Coles, conditional on the waiver by Coles of any limitation defence available to it, and the acceptance of that waiver by the New Brunswick court. Having reached this conclusion, I need not consider Coles's alternative argument that the proceeding should be stayed as an abuse of process.

[61] If the parties are unable to agree on costs, they may file submissions within 30 days of the release of this decision.

Arnold, J.