SUPREME COURT OF NOVA SCOTIA
Citation: ***Bishop v. Wagar***, 2020 NSSC 154

Date: 20200512
Docket: Hfx No.: 490716
Registry: Halifax

Between:

David Reginald Bishop

Plaintiff

v.

Heidi Wagar and Estate of Jasmin Campeau

Defendants

D E C I S I O N

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	January 20, 2020, in Halifax, Nova Scotia
Final Written Submissions:	February 4, 2020 (Plaintiff) February 13, 2020 (Defendants)
C**ounsel:**	Derrick J. Kimball and Sharon L. Cochrane, for the Plaintiff Scott R. Campbell and Dylan A.F. MacDonald, for the Defendants

By the Court:

[1] David Reginald Bishop was involved in a motor vehicle collision on September 8, 2017 on Highway 401 near Dickinson, Ontario. Mr. Bishop who resides in Bridgetown, Nova Scotia was driving a 2012 Volvo tractor trailer motor vehicle owned by his employer Eassons Transport Ltd. which is incorporated under the Nova Scotia *Companies Act,* R.S., 1989 c. 81, with its head office at Kentville, Nova Scotia.

[2] Mr. Bishop commenced action against Heidi Wagar, the owner of the other vehicle involved in the collision and the Estate of Jasim Campeau. Mr. Campeau was the driver of the vehicle owned by his wife Heidi Wagar. He died as a result of injuries sustained in the collision.

[3] Ms. Wagar is a resident of Ontario and was at the time of collision. Her motor vehicle which was involved in the collision was registered in Ontario.

[4] Mr. Campeau was a resident of Ontario. The Estate of Jasim Campeau has been administered solely in the Province of Ontario

[5] Ms. Wagar and the Estate of Jasim Campeau move for an order dismissing the action for lack of jurisdiction, saying Nova Scotia does not have territorial competence to deal with the claim.

[6] Territorial competence is governed by the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c. 2 ("*CJPTA*"). The burden to establish territorial competence is on the party seeking to establish it – in this case, Mr. Bishop.

[7] Section 4 of the *CJPTA* provides:

> 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;
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> (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.

[8] Mr. Bishop acknowledges only s. 4(e) would apply in this case.

[9] Section 11 of the *CJPTA* sets out circumstances which give rise to a presumption of a real and substantial connection. Before setting out certain circumstances which give rise to the presumption, the section provides:

> 11 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

[10] The Supreme Court of Canada dealt with the issue of factors which allow a court to assume jurisdiction of a dispute in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, a case on appeal from Ontario, a province which does not have a *CJPTA*. In giving the court's judgment, LeBel, J. set out presumptive factors at para. 90:

> 90 To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:
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> (a) the defendant is domiciled or resident in the province;
>
> (b) the defendant carries on business in the province;
>
> (c) the tort was committed in the province; and
>
> (d) a contract connected with the dispute was made in the province.

and at para. 93:

> 93 If, however, no recognized presumptive connecting factor - whether listed or new - applies, the effect of the common law real and substantial connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system.

[11] Mr. Bishop is a Nova Scotia resident. At the time of the collision he was in the course of his employment delivering freight to Cornwall, Ontario. Except for being assessed at the scene of the collision by EHW, all medical treatment he received was in Nova Scotia. His family physician, physiotherapist and the pain specialist who treated him are all located in Nova Scotia.

[12] Mr. Bishop submits there is a significant distinction between the jurisdictional relationships, when one is dealing with tort claims based on motor vehicle accidents, between Nova Scotia and a foreign country, on one hand, and Nova Scotia and another province of Canada, in this case Ontario, on the other. The legal and jurisdictional relationship between two Canadian common law provinces in the context of motor vehicle tort law is hardly within the ambit of private international law. There is a real and substantial difference. The facts and the jurisdictional dispute in this case were not before the Supreme Court of Canada in *Club Resorts,* which judgment cannot be taken to determine the consideration of fairness, order and comity would be the same when considering the relationship between common law provinces of Canada versus a provincial jurisdiction and a foreign country such as Cuba.

[13] However, the principles set out in the *Club Resorts* judgment apply to cases with either international or interprovincial aspects. As LeBel, J. stated at paras. 73 and 74:

> 73 Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up "on the fly" on a case-by-case basis - however laudable the objective of individual fairness may be. As La Forest J. wrote in *Morguard*, there must be order in the system, and it must permit the development of a just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. **Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect.** The need for certainty and predictability may conflict with the objective of fairness. An unfair set of rules could hardly be considered an efficient and just legal regime. The challenge is to reconcile fairness with the need for security, stability and efficiency in the design and implementation of a conflict of laws system.
>
> 74 The goal of the modern conflicts system is to facilitate exchanges and communications between people in different jurisdictions that have different legal

> systems. In this sense, it rests on the principle of comity. But comity itself is a very flexible concept. It cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other states and, in the Canadian context, respect for and deference to other provinces and their courts (*Morguard*, at p. 1095; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 47). **Comity cannot subsist in private international law without order, which requires a degree of stability and predictability in the development and application of the rules governing international or interprovincial relationships.** Fairness and justice are necessary characteristics of a legal system, but they cannot be divorced from the requirements of predictability and stability which assure order in the conflicts system. In the words of La Forest J. in *Morguard*, "what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice" (p. 1097; see also H. E. Yntema, "The Objectives of Private International Law" (1957), 35 *Can. Bar Rev.* 721, at p. 741). [emphasis added]

[14] None of the presumptive connecting factors set out in either s. 11 of the *CJPTA* or in the *Club Resorts* judgment have been established.

[15] Mr. Bishop submits there is a real and substantial connection between Nova Scotia and the facts on which this proceeding is based.

[16] The list of presumptive connecting factors set out in s. 11 of the *CJPTA* are not exhaustive. In the *Club Resorts* judgment the court addressed how new presumptive connecting factors are to be identified. LeBel, J. stated at paras. 91 and 92:

> 91 As I mentioned above, the list of presumptive connecting factors is not closed. Over time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:
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> (a) Similarity of the connecting factor with the recognized presumptive connecting factors;
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> (b) Treatment of the connecting factor in the case law;
>
> (c) Treatment of the connecting factor in statute law; and
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> (d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.
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> 92 When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful

> analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

and at para. 100 he summarized the new approach:

> 100 To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts may, over time, identify additional presumptive factors. The presumption of jurisdiction that arises where a recognized presumptive connecting factor - whether listed or new - exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine, which I need not address in these reasons. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. I will now turn to that issue.

[17] Mr. Bishop says in the common law provinces there is a common insurance scheme tailored to motor vehicle accidents. Standard automobile policies in both Ontario and Nova Scotia provide similar coverage. Insurance companies are required by law to represent and defend tortfeasors and have complete conduct of defence of claims including the right to retain counsel, settle and provide litigation instructions to counsel. Most insurance companies providing coverage in any given province are registered to provide coverage in other provinces. There is an interplay of insurance coverages common to both Nova Scotia and Ontario. By virtue of the insurance scheme common to both Nova Scotia and Ontario there is indeed “a contract connected with the dispute made in the province”.

[18] Mr. Bishop states in modern personal injury motor vehicle litigation, the normal and overwhelming circumstance involves a plaintiff who retains private counsel commencing action against a defendant represented by an insurance company.

[19] The issue whether an insurance contract is a sufficient presumptive connecting factor to give the court jurisdiction over non-resident defendants was addressed by the Ontario Court of Appeal in *Tamminga v. Tamminga*, 2014 ONCA 478 in which Strathy, J.A. in giving the Court's judgment stated at paras. 25 and 26:

> [25] In comparison with *Export Packers Co.*, the contract in the present case is even further removed from the events giving rise to the dispute. An automobile insurance contract "anticipates" accidents generally, but the tortfeasor will not be identifiable in advance. Unlike the contract in *Van Breda*, there is nothing that connects the appellant's insurance contract to the respondents. They are not parties to or beneficiaries of the contract. The appellant was not visiting the farm in Alberta for any reason related to the contract. The connection between the insurance policy and the dispute only arises in the aftermath of the tort and its application is conditional on the outcome of the appellant's claim against the tortfeasors.
>
> [26] In a word, there is no nexus between the insurance contract and the respondents.

[20] The plaintiff's insurance contract is not a contract connected to the dispute so as to raise a presumption of a real and substantial connection to Nova Scotia.

[21] Mr. Bishop submits the fact he was at the scene of the motor vehicle collision in the course of his employment is a presumptive connecting factor. In the *Club Resorts* judgment a presumptive connecting factor is "a contract connected with the dispute was made in the province".

[22] Mr. Bishop's employment contract with Eassons Transport Ltd. was made in Nova Scotia and the only reason Mr. Bishop was involved in the motor vehicle collision was his carrying out of his employment contract.

[23] It was submitted on Mr. Bishop's behalf that in *Club Resorts* the court held that the contract between Mr. Berg and Club Resorts was sufficient to give Ontario territorial competence to deal with the claim. In discussing the contract which was made in Ontario was sufficient to give Ontario territorial competence to deal with the claim, LeBel, J. commented at para. 116 of the judgment:

> 116 …A contract was entered into in Ontario and a relationship was thus created in Ontario between Mr. Berg, Club Resorts and Ms. Van Breda, who was brought within the scope of this relationship by the terms of the contract.

[24] The employment contract between Mr. Bishop and Eassons Transport Ltd. was not a contract connected with the dispute made in Nova Scotia capable of being a presumptive connecting factor as it had no connection with the defendants. There was no nexus between the employment contract and the defendants (*Tamminga v. Tamminga*, *supra*, para. 26).

[25] Mr. Bishop also says liability is not an issue and it would be illogical that all the witnesses be required to travel to Ontario for the trial. These are not connecting factors to give Nova Scotia territorial competence.

[26] None of the presumptive connecting factors set out in either s. 11 of the *CJPTA* or in the *Club Resorts* judgment have been established and no new presumptive connecting factors have been shown to exist.

[27] Considering all of the evidence, I find Mr. Bishop's claim does not have a real and substantial connection with Nova Scotia pursuant to s. 4 (e) of the *CJPTA* and therefore Nova Scotia lacks territorial competence to deal with the claim.

[28] At the hearing, Mr. Bishop's counsel raised for the first time that Nova Scotia, even if it lacks territorial competence, should hear the proceeding for the reasons set out in s. 7 of the *CJPTA*, namely:

> 7 A court that under Section 4 lacks territorial competence in a proceeding may hear the proceeding notwithstanding that Section if it considers that
>
> (a) there is no court outside the Province in which the plaintiff can commence the proceeding; or
>
> (b) the commencement of the proceeding in a court outside the Province cannot reasonably be required.

[29] The plaintiff submitted the Ontario limitation period to commence action had expired. No evidence of the Ontario limitation period was before the Court.

[30] I requested further submissions from the parties as to whether I should deal with the issue given the lateness of it being raised and, if so, whether s. 7 would apply in the circumstances of this case.

[31] Subsequently, the plaintiff advised he was withdrawing the s. 7 application stating "Upon review of the jurisprudence, it appears that Section 7 has no application to the circumstances of this matter".

[32] The plaintiff then made additional submissions for an order requesting the transfer of the proceeding to Ontario pursuant to Part II of the *CJPTA* stating:

> In the alternative, as previously argued, if this Court decides otherwise, the Plaintiff seeks an Order from this Court requesting the transfer of the proceeding to Ontario pursuant to Part II of the *CJPTA*.
>
> *Hurley v. Zutz* 2017 NSSC 46, involved a Nova Scotia resident Plaintiff who was involved in a motor vehicle accident in Edmonton with an Alberta resident Defendant. Both parties agreed that Nova Scotia lacked territorial jurisdiction. Justice Scaravelli held that a request for a transfer would be a more appropriate remedy than a dismissal of the claim and granted an order requesting the Province of Alberta accept the transfer of that proceeding.
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> In the circumstances of the instant case, it is clear that if Nova Scotia lacks territorial jurisdiction, it is because Ontario does have territorial jurisdiction. If this Court allows the Defendant's [sic, Defendants'] motion, then it is submitted following *Hurley, supra*, that the appropriate remedy is a request for a transfer.

[33] Sections 14 and 15 of the *CJPTA* provide:

> 14 (1) The Supreme Court, in accordance with this Part, may
>
> (a) transfer a proceeding to a court outside the Province; or
>
> …
>
> (5) Where anything relating to a transfer of a proceeding is or ought to be done in a court outside the Province, the Supreme Court, notwithstanding any differences between this Part and the rules applicable in the court outside the Province, may transfer or accept a transfer of the proceeding if the Supreme Court considers that the differences do not
>
> (a) impair the effectiveness of the transfer; or
>
> (b) inhibit the fair and proper conduct of the proceeding.
>
> **Grounds for transfer**
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> 15 (1) The Supreme Court, by order, may request a court outside the Province to accept a transfer of a proceeding in which the Supreme Court has both territorial and subject-matter competence if the Supreme Court is satisfied that
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> (a) the receiving court has subject-matter competence in the proceeding; and

> (b) under Section 12, the receiving court is a more appropriate forum for the proceeding than the Supreme Court.
>
> (2) The Supreme Court, by order, may request a court outside the Province to accept a transfer of a proceeding in which the Supreme Court lacks territorial or subject-matter competence if the Supreme Court is satisfied that the receiving court has both territorial and subject-matter competence in the proceeding.
>
> (3) In deciding whether a court outside the Province has territorial or subject-matter competence in a proceeding, the Supreme Court must apply the laws of the state in which the court outside the Province is established.

[34] The power to make an order requesting a court outside of Nova Scotia accept a transfer of a proceeding is discretionary. (see *Liu v. Composites Atlantic Ltd.*, 2013 NSCA 142 para. 19)

[35] As I have determined Nova Scotia lacks territorial competence, the ground for transfer which applies in this case is s. 15(2) of the *CJPTA*.

[36] Ontario does not have a *CJPTA*. In *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Thomas Reuters, 2012) the authors state at page 237:

> Yet, as noted above, the *CJPTA* does not rely on legislative reciprocity. Nothing in Part 3's transfer provisions requires that both the sending and receiving courts have a *CJPTA*.

[37] Courts in Nova Scotia and Saskatchewan, provinces which have a *CJPTA*, have held they could transfer proceedings to provinces which did not have a *CJPTA* provided the requirements of the *Act* were met. *Bartz v. Canadian Baptist Bible College Inc.*, 2009 NSSC 115; *Hurley v. Zutz*, 2017 NSSC 46; *Mundt v. Mundt*, 2006 SKQB 34.

[38] In appropriate cases, a court may make an order requesting a court in a jurisdiction without a *CJPTA* accept a transfer of a proceeding.

[39] To request a court in another jurisdiction to accept a transfer of a proceeding pursuant to s. 15(2) of the *CJPTA*, the transferring court must be satisfied the receiving court has both territorial and subject-matter competence in the proceeding. In making that determination, the laws of the state in which the receiving court is established must be applied. In this case the collision took place in Ontario. In the *Club Resorts* judgement, a case on appeal from Ontario, the

Court listed as a presumptive connecting factor the fact the tort was committed in the province. Any tort in this case would have been committed in Ontario. I am satisfied the Ontario Superior Court has both territorial and subject-matter competence in this proceeding.

[40] Section 16 of the *CJPTA* sets out provisions relating to orders requesting a court outside Nova Scotia accept a transfer of a proceeding including a requirement the Court state the reasons for the request.

[41] The plaintiff in submissions made an application for an order requesting Ontario accept a transfer of the proceeding.

[42] The only reason given in support of the application for the transfer order is the bare statement from Mr. Bishop's counsel during oral submissions the Ontario limitation period has expired. Nothing concerning the Ontario limitation period has been entered into evidence.

[43] In this case Nova Scotia does not have territorial competence. Ontario has both territorial and subject-matter competence. The limitation which applies to this action is the Ontario limitation period.

[44] Section 24 of the *CJPTA* provides with regard to a proceeding transferred to Nova Scotia, the Supreme Court must not hold a claim barred because of a limitation period if the claim was not barred under the limitation rule that would be applied by the transferring court **and** at the time the transfer took effect the transferring court had both territorial and subject-matter competence in the proceeding. Therefore, in the case of a proceeding transferred to Nova Scotia the limitation period in the action from the transferring court would have no effect unless the transferring court had territorial and subject-matter competence.

[45] Lacking territorial competence Nova Scotia has nothing to say as to the conduct of the proceeding. However, to save the cost of commencing a new proceeding in Ontario, I will request Ontario accept a transfer of this proceeding. Then the Ontario Superior Court of Justice will, applying Ontario law including limitation periods, determine if this is an appropriate case to accept the request for a transfer.

[46] Given the facts of the case, there is no basis to provide for the return of the proceeding to the Supreme Court of Nova Scotia as part of the order.

[47] I will hear from counsel concerning the form of the order requesting the Ontario Superior Court accept the transfer and costs.

Coughlan, J.