

SUPREME COURT OF NOVA SCOTIA

Citation: *Johnson v. Cumberland Sound Fisheries Ltd.*, 2023 NSSC 97

Date: 20230317

Docket: Halifax, No. 517753

Registry: Halifax

Between:

A. Todd Johnson and Keaton Guy

Plaintiffs

v.

Cumberland Sound Fisheries Ltd. (CSFL) and Pagnirtung Fisheries Ltd. (PFL)

Defendants

JURISDICTION DECISION

Judge: The Honourable Justice Kevin Coady

Heard: March 8, 2023, in Halifax, Nova Scotia

Decision: March 17, 2023

Counsel: David G. Coles, K.C., Counsel for the Plaintiffs
Nancy F. Barteaux, K.C., Counsel for Defendants

For the Court:

Background

[1] The Plaintiffs were employees of the Defendants from 2018/2019 until they were terminated in June 2022. The Defendants were engaged in the North Atlantic fishing industry and their plants and vessels operated out of Pangnirtung, Nunavut. The Plaintiffs were ordinarily residents of Nova Scotia. Some of their duties could be carried out from home but I find that the majority of their duties required them to travel to Nunavut.

[2] On September 8, 2022 Messrs. Johnson and Guy started a legal action against CSFL and PFL in Nova Scotia. They allege they were wrongfully terminated. Additionally, they allege the Defendants blacklisted them in their industry and as a result they were unable to mitigate their damages by finding new employment opportunities. They seek damages and re-imbusement of their expenses.

[3] The Defendants objected to the Plaintiffs chosen venue, and as such did not file a Notice of Defence. On December 8, 2022 the Defendants filed a Notice of Motion seeking the following relief:

“Moves for an Order to dismiss the Notice of Motion for Want of Jurisdiction pursuant to Civil Procedure Rule 4.07(1)”

The Defendants argue that this litigation is more appropriately conducted in Nunavut.

[4] The Defendants bring this motion pursuant to Civil Procedure Rule 4.07 which states:

- “(1) A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss for want of jurisdiction.
- (2) A defendant does not submit to the jurisdiction of the court only by moving to dismiss the action for want of jurisdiction.
- (3) A judge who dismisses a motion for an order dismissing an action for want of jurisdiction must set a deadline by which the

defendant may file a notice of defence, and the court may only grant judgment against the defendant at that time.”

This rule permits a Defendant to make a Motion dismissing an action for want of jurisdiction. In assessing such a motion, the Courts apply a two-step approach. The first step determines whether the filing court has jurisdiction. The second step determines whether there is a more convenient forum to decide the matter.

[5] The Plaintiffs rely on section 4 of the *Court Jurisdiction and Proceedings Transfer Act (CJPTA)* which states:

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) the 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.

The most relevant factor in this proceeding is “d”.

[6] In *LED Roadway Lighting Ltd. V. Alltrade Industrial Contractors Inc.*, 2019 NSSC 62 the Court stated at paragraph 46:

...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.

[7] Section 11 of the *CJPTA* creates a presumption of a real and substantial connection. It states:

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:

...

- 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 in the course of the purchasers' trade or profession, and
 - B. Resulted from a solicitation of business in the Province by or on behalf of the seller;
- f) concerns of 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;

[8] The first step is to determine whether the Supreme Court of Nova Scotia has jurisdiction over this matter, I conclude that it does as the Plaintiffs now reside in Nova Scotia (*Van Breda*, para 90). I do not find any other presumptive factors.

[9] Given my decision on step 1, the Defendants then bears the onus of showing that there is another jurisdiction that is clearly more appropriate in which to have the matter heard. I *New World Merchant Bank Inc. v. Radiant 360 Solutions Inc.*, 2018 NSSC 227 this Court stated at paragraphs 31-32:

[31] The party seeking to have the Nova Scotia courts, despite having territorial competence to hear the matter, exercise the discretion to not hear the matter, has to show that there is another jurisdiction that is clearly more appropriate in which to have the matter heard. The selected forum, here Nova Scotia, "wins by default" unless the other jurisdiction is clearly the more appropriate one. The question is not whether Nova Scotia is the

more appropriate forum but whether Newfoundland and Labrador is clearly the more appropriate one.

[32] Section 12(2) of the *CJPTA* sets out the factors that must be considered in deciding whether another jurisdiction is clearly in a better position to dispose fairly and efficiently of the litigation. The circumstances relevant to the proceeding must be considered and the parties agree that the issue in this case is the comparative convenience and expense for the parties and their witnesses.

[10] Section 12 of the *CJPTA* lists the circumstances the Court should consider when determining whether to decline territorial competence:

12(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(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 decision in different Courts;
- (e) the enforcement of an eventual judgement; and
- (f) the fair and efficient working of the Canadian legal system as a whole.

Although no other territory has been plead, the only other jurisdiction to consider in this case is Nunavut.

[11] The process prescribed by section 12 was canvassed in *Van Breda* at paragraphs 101-102:

[101] As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to

jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.

[102] Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.

The Applicants must prove on a balance of probabilities that Nunavut is clearly the more appropriate jurisdiction to have the matter heard.

[12] For the following reasons I find that Nunavut is the proper venue for this trial:

- Both Defendants were hired in Nunavut and the vast majority of their duties were performed there. They were provided with a vehicle and accommodations in Pangnirtung. This suggests that their connection with Nunavut is greater than their evidence indicate.
- The Applicants head office is located in Nunavut and their plants and facilities were similarly located. Many of their licensees and business partners will be witnesses at trial. They reside in Nunavut.
- Many of the Applicants co-workers and managers will be witnesses and they presently live and work in Nunavut. They have a great number of staff located there.
- The majority of the Applicants documentary evidence is located in Nunavut.
- The first language of many of the Applicant's trial witnesses is Inuktitut. Nunavut courts will be able to respond to witnesses in their first language.
- Both CSFL and PRL are companies incorporated in Nunavut.
- Section 12 of the agreement between the parties states that the contract is governed by the laws of the Territory of Nunavut.

[13] Mr. Johnson and Mr. Guy offer the following factors in support of the motion:

- There are several Nova Scotia companies that supply CSFL and PFL.
- Some of the companies' employees reside outside of Nunavut.
- Most of the witnesses to the alleged defamatory statements live in Nova Scotia.
- The Plaintiffs have not the financial resources to litigate in Nunavut.

There have been no identified Nova Scotia companies that do business with CFSL and PFL. The evidence does not identify employees who fully reside outside Nunavut. There is no evidence as to where the alleged defamatory statements were made. The Applicants' financial circumstances is not a factor to be considered. (*Khalifa v. MacDonald*, 2022 NSSC 157)

[14] As stated earlier, section 12 of the *CJPTA* lists the circumstances the Court should consider when determining whether to decline territorial competence. On section 12(2)(a), I find that Nunavut is the jurisdiction which will cause the parties the least inconvenience and expense. I accept that the Plaintiffs will have costs and inconveniences litigating in Nunavut but it will pale in comparison to the Defendants costs and inconveniences if required to litigate in Nova Scotia.

[15] Section 12(2)(b) of the *CJPTA* states "the law to be applied to issues in the proceeding" while there may be discreet differences between Nunavut and Nova Scotia jurisprudence, there is no evidence to suggest those changes would effect the trial outcome. Certainly, the convenience and expense considerations would trump any differences between any legislative variances.

[16] Section 12(2)(c) of the *CJPTA* addresses "the desirability of avoiding multiplicity of legal proceedings". I have no concerns that the issue of jurisdiction will result in such an outcome. Section 12(2)(d) addresses the "desirability of avoiding conflicting decisions in different courts". That is an essential reason to apply *forum non convenience* principles.

[17] Section 12(2)(e) addresses "the enforcement of an eventual judgment". I have no concerns that the Plaintiffs will have difficulties realizing on a judgment as

there are instruments in both jurisdictions to ensure enforcement. However, this factor favours Nunavut as all assets and resources of CSFL and PFL are located in that territory.

[18] Section 12(2)(f) of the *CJPTA* addresses “the fair and efficient working of the Canadian legal system as a whole”. Nunavut has a well-established justice system. I cannot imagine how this factor comes into play in this motion.

[19] I am satisfied that Nunavut is a more appropriate jurisdiction to litigate this case. I decline to accept jurisdiction and suggest the Plaintiffs pleadings be re-filed in Nunavut. The Nova Scotia action is stayed.

Coady, J.