

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** *Lamothe v. Lamothe*, 2014 NSSC 137

**Date:** 2014-04-14

**Docket:** SFHMCA-089959

**Registry:** Halifax

**Between:**

Maria Christine Lamothe

Applicant

v.

Corey Murdock Lamothe

Respondent

**Judge:** The Honourable Justice Elizabeth Jollimore

**Heard:** April 10, 2014, in Halifax, Nova Scotia

**Counsel:** Maria Lamothe, self-represented  
Amber Penney, for Corey Lamothe

## **By the Court:**

### **Introduction**

[1] These are written reasons following an oral decision rendered on April 10, 2014. I have edited them for grammar and to provide citations to the statutes and scholarship I mentioned in my decision.

[2] In February 2014, Maria Lamothe applied for spousal maintenance and a division of property. Her spousal maintenance application is pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 and her application for a property division is pursuant to the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. Today, she seeks interim spousal maintenance and an interim division of pension benefits.

[3] Ms. Lamothe filed an affidavit and Statements of Income, Expenses and Property when she started her application. On April 4, 2014, she filed a supplemental affidavit.

[4] In response, Corey Lamothe filed financial documents (Statements of Income, Expenses and Property) and an affidavit. He has also raised a preliminary matter, that of my jurisdiction to hear Ms. Lamothe's applications.

### **Family history**

[5] The Lamothes cohabited for some months prior to their marriage in September 1992. They separated in May 2011. According to Mr. Lamothe, his wife has lived in Nova Scotia since the spring of 2011, while he and the children continue to live in Ontario. Ontario is the last place where the parties lived together. They aren't divorced, and no legal proceedings have been started in Ontario.

[6] Mr. Lamothe is employed by the Department of National Defence where he's worked since 1988. His career has required the couple to relocate various times during their marriage. From their original home, they moved to Trenton, Ontario in 1994. They came to Halifax in 1997. They moved to Washington, D.C. in 2000. In 2004, they moved to Borden, Ontario and, in 2009, they moved to

Kingston, Ontario. They lived as a family in Ontario from 2004 until the separation in 2011. Mr. Lamothe and the children still live in Ontario.

[7] Over the nineteen years of their cohabitation, they spent thirteen years in Ontario, including the last seven.

### **Jurisdiction**

[8] Jurisdictional disputes are governed by the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d Sess.), c. 2. The Court of Appeal has discussed Part I of the *Act* most recently in *Bouch v. Penny*, 2009 NSCA 80. (Leave to appeal this decision to the Supreme Court of Canada was dismissed on March 25, 2010 at 2010 CanLII 14708.)

[9] In *Bouch v. Penny*, 2009 NSCA 80, Justice Saunders, with whom Justices Roscoe and Oland concurred, approved of Justice Wright's analysis in deciding the application at first instance. Justice Wright said, at paragraph 20 of his decision in *Penny v. Bouch*, 2008 NSSC 378, that where there's a dispute over assuming jurisdiction, the *Court Jurisdiction and Proceedings Transfer Act* requires I must first determine whether I can assume jurisdiction, given the relationship between the subject matter of the case, the parties and the forum. Whether I can do this is addressed in the analysis required by section 4 of the *Court Jurisdiction and Proceedings Transfer Act*.

[10] If that legal test is satisfied and I can assume jurisdiction, I must then consider whether I ought to assume jurisdiction. The analysis this requires is found in section 12 of the *Court Jurisdiction and Proceedings Transfer Act*. Conversely, if that legal test is not satisfied and I cannot assume jurisdiction, I turn to section 7 and ask if there are circumstances that mean I should exercise my general discretion and assume jurisdiction to hear Ms. Lamothe's applications.

### **Can I assume jurisdiction?**

[11] The *Court Jurisdiction and Proceedings Transfer Act* addresses the court's territorial competence in Part I. Section 4 of the *Act* says that only in certain circumstances does a court have territorial competence in a proceeding brought against a person and it identifies those circumstances. Subsections 4(a) to (d) are not relevant to Ms. Lamothe's applications. The only circumstance that *might* apply is found in subsection 4(e) which refers to circumstances where there is a

real and substantial connection between Nova Scotia and the facts on which the proceeding against Mr. Lamothe is based.

[12] A “real and substantial connection” is presumed to exist in the twelve different categories listed in section 11. Ms. Lamothe’s claims do not fall within legislated presumption of real and substantial connection.

[13] The opening clause of section 11 explicitly says that the section doesn’t limit Ms. Lamothe’s right to prove other circumstances that constitute a real and substantial connection between Nova Scotia and the facts on which her applications are based.

[14] Since there is no legislated presumption that Ms. Lamothe’s claims have a real and substantial connection to Nova Scotia, I must actually assess whether they do. In *Muscutt v. Courcelles*, 2002 CanLII 44957 (ON CA), Justice Sharpe (with whom Justices Rosenberg and Feldman concurred) said, at paragraph 75, that there is no “fixed formula” for this assessment. At paragraphs 76 to 110 of the Court’s reasons, Justice Sharpe discussed eight factors identified in the jurisprudence which are relevant to assessing whether there is a real and substantial connection.

[15] While *Muscutt v. Courcelles*, 2002 CanLII 44957 (ON CA) was decided before the *Court Jurisdiction and Proceedings Transfer Act* was enacted, Nova Scotia’s Court of Appeal affirmed continued reliance on *Muscutt v. Courcelles*, 2002 CanLII 44957 (ON CA) at paragraphs 44 and 45 in *Bouch v. Penny*, 2009 NSCA 80, as noted by Vaughan Black, Stephen G.A. Pitel and Michael Sobkin in *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012) at 137. So I turn to the factors in *Muscutt v. Courcelles*, 2002 CanLII 44957 (ON CA).

### **The connection between Nova Scotia and Ms. Lamothe’s applications**

[16] Ms. Lamothe resides in Nova Scotia. She says her parents and cousins live in Nova Scotia as well and they would be witnesses. Her parents would testify about a family loan and her cousins would testify about events which she says occurred between 1997 and 2000 when the family lived in Halifax. It isn’t apparent that the events about which her cousins would testify are immediately relevant to her applications.

### **The connection between Nova Scotia and Mr. Lamothe**

[17] Mr. Lamothe has lived in Nova Scotia in the past, for an uncertain period of time, but at least from 1997 until 2000.

### **Unfairness to Mr. Lamothe in taking jurisdiction**

[18] The unfairness to Mr. Lamothe in taking jurisdiction arises because most of the parties' married life was spent in Ontario. The witnesses he would call are there.

[19] Ms. Lamothe's spousal maintenance proceeding is governed by the *Maintenance and Custody Act*. Subsection 3A(1) of the *Act* says that when I'm faced with applications for both child maintenance and spousal maintenance I'm to give priority to child maintenance.

[20] In his affidavit, Mr. Lamothe says that the couple's older child is in university. She's received student loans to finance her studies. Their younger child has completed high school and has recently applied to join the military. Both children live with at home with their father, and he hasn't received financial assistance from Ms. Lamothe for the children at any point since the separation in the spring of 2011.

[21] I don't have a child maintenance application before me; however, I don't believe I could ignore the interplay between these financial obligations if I was deciding the spousal maintenance claim. The best evidence regarding the children's financial circumstances is currently available in Ontario.

[22] Section 4 of the *Maintenance and Custody Act* lists one dozen factors I'm to consider in awarding spousal maintenance. Some of these, as reflected in the evidence contained in Mr. Lamothe's affidavit and Ms. Lamothe's supplemental affidavit, require witnesses in Ontario. Given the evidence provided to date, it appears that there more witnesses in Ontario than in Nova Scotia, which would put Mr. Lamothe to greater expense. In my limited experience (*Brandon*, 2011 NSSC 128 at paragraph 13), even if witnesses from another province are able to testify by video link, there's expense associated with the video service.

[23] Mr. Lamothe says that he would seek an unequal division of property, in light of Ms. Lamothe's conduct during the latter years of their marriage and the

early years of their separation. Again, all the relevant witnesses are located in Ontario, where events occurred.

[24] In Nova Scotia, the *Matrimonial Property Act* governs the division of property, including pensions and any order for division of an Armed Forces pension is given effect under the *Pension Benefits Division Act*, S.C. 1992, c. 46, Sch. II: *Croitor*, 2001 NSCA 37.

[25] Section 22 of the *Matrimonial Property Act* is a choice of law provision. With regard to movable property, it requires that the law of the parties' last common habitual residence be applied in addressing their property rights. So, even if the application to divide property was heard in Nova Scotia, the decision would be made pursuant to Ontario law, the *Family Law Act*, R.S.O. 1990, c. F.3.

[26] There are means for proving foreign law in Nova Scotia. Civil Procedure Rule 54.03 explains how the law of another province is proven. An expert witness may be required in Nova Scotia to prove Ontario law. This would not be necessary in Ontario.

### **Unfairness to Ms. Lamothe in not taking jurisdiction**

[27] The unfairness to Ms. Lamothe would be that arising from being compelled to litigate her pension division claim in Ontario.

[28] In Ontario, Ms. Lamothe's spousal maintenance claim could proceed under section 33 of the *Family Law Act*. Like the *Maintenance and Custody Act*, it contains a lengthy list of factors to be considered. Many are better addressed by witnesses or evidence in Ontario. None, on my review, requires any witness from Nova Scotia except Ms. Lamothe. So she would not be required to produce witnesses from Nova Scotia at an Ontario proceeding.

[29] The unfairness of proceeding in Ontario is mitigated by the availability of interjurisdictional support legislation. Ms. Lamothe can claim maintenance without ever leaving Nova Scotia. She may apply under the *Interjurisdictional Support Orders Act*, S.N.S. 2002, c. 9 in Nova Scotia. Her application will be transmitted to Ontario and Mr. Lamothe can respond to it there.

### **Other parties' involvement**

[30] There are no other parties, so this is not weigh in my considerations.

### **The court's willingness to enforce a foreign judgment rendered on the same jurisdictional basis**

[31] At paragraph 93 in *Muscutt v. Courcelles*, 2002 CanLII 44957 (ON CA), Justice Sharpe said that I should consider whether the judgment of a foreign court, acting on the same jurisdictional basis as I am acting, would be recognized and enforced here. If I would not recognize and enforce such a judgment, I should not assume jurisdiction.

[32] This court would recognize and enforce a foreign judgment obtained on the same jurisdictional basis. This factor favours assuming jurisdiction.

### **The nature of the dispute: international or interprovincial**

[33] This is an interprovincial dispute which means it is easier for me to assume jurisdiction because there is much greater consistency and uniformity and much less risk of unfairness to the parties than there might be in an international dispute where the laws and legal systems may be much different.

### **Comity and the standards of jurisdiction used by other courts**

[34] According to Justice Sharpe at paragraph 102 in *Muscutt v. Courcelles*, 2002 CanLII 44957 (ON CA), I need not consider this.

### **Is there a real and substantial connection?**

[35] Overall, there is a greater connection between the claims, Mr. Lamothe and Ontario than between the claims, Mr. Lamothe and Nova Scotia. There is greater unfairness to Mr. Lamothe in proceeding in Nova Scotia, having regard to the availability of witnesses and the proof of Ontario property division law, than there is to Ms. Lamothe, who can pursue her maintenance claim under the *Interjurisdictional Support Orders Act* and who will be dealing with Ontario law on her property division application in any event.

[36] Considering all these factors, I conclude that there is no real and substantial connection to Nova Scotia and I cannot assume jurisdiction.

**Should I exercise my general discretion?**

[37] Where I cannot assume jurisdiction, I don't enter into the second step of the analysis, considering whether I ought to assume jurisdiction, having regard to subsection 12(2). However, my analysis isn't complete. I must have regard to section 7 of the *Court Jurisdiction and Proceedings Transfer Act* which provides that I have a general discretion to hear Ms. Lamothe's applications, notwithstanding section 4, if I consider that there's no court outside Nova Scotia where Ms. Lamothe can bring her applications or Ms. Lamothe cannot reasonably be required to bring her applications outside Nova Scotia.

**Can Ms. Lamothe bring her claims in a court outside Nova Scotia?**

[38] Before I consider whether Ms. Lamothe can bring her spousal maintenance claim in a court outside Nova Scotia, I do remind her that she can bring this application in the Family Division, under the *Interjurisdictional Support Orders Act*. Once filed in Nova Scotia, her application is then sent to a court in Ontario (the reciprocating jurisdiction – Mr. Lamothe's ordinary residence) where Mr. Lamothe can respond and an Ontario judge will make an order. In his article, "Conflict of Laws: Court Jurisdiction and Choice of Law in Family Matters", (2013) 32 C.F.L.Q. 53 at 68, Vaughan Black observed that most geographically complex support cases are covered by this legislation which has a simple jurisdictional test: where is the applicant's ordinary residence? The *Interjurisdictional Support Orders Act* has a tremendous advantage in simplifying geographically complex support cases.

[39] Otherwise, Ms. Lamothe's spousal maintenance claim can be brought in Ontario under Part III (section 33) of the *Family Law Act*. Alternately, since Mr. Lamothe has lived in Ontario for the last year, Ms. Lamothe could petition for divorce in Ontario pursuant to subsection 3(1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2<sup>nd</sup> Supp.) and claim spousal support.

[40] Ms. Lamothe's property division application can also be brought in another court. It is possible for her to advance this claim in Ontario on its own or joined in a petition for divorce.

[41] There are courts outside Nova Scotia where Ms. Lamothe can start these claims. This means there's no basis for me to exercise my discretion and assume jurisdiction under subsection 7(a).

[42] Subsection 7(b) allows me to assume jurisdiction where I consider that it cannot be reasonably required that Ms. Lamothe start a proceeding outside Nova Scotia. The requirement that Ms. Lamothe start a maintenance and property proceeding outside Nova Scotia can reasonably be required; indeed, it may be preferable, given the application of Ontario law.

### **Conclusion**

[43] I do not have jurisdiction to hear Ms. Lamothe's applications under section 4 of the *Court Jurisdiction and Proceedings Transfer Act*, and I have no discretion to assume such jurisdiction under section 7 of the *Act*. Mr. Lamothe's motion is granted. The order is being provided to the parties with these reasons.

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Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia