Claim No. SCCH-449291

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Custom Clean Atlantic Ltd. v. GSH Canada Inc., 2016 NSSM 17

BETWEEN:

CUSTOM CLEAN ATLANTIC LTD.

Claimant

- and -

GSF CANADA INC.

Defendant

PRELIMINARY RULING ON JURISDICTION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on May 3, 2016

Decision rendered on May 13, 2016

APPEARANCES

For the Claimant	Daniel Wallace Counsel
For the Defendant	Laura Rhodes, Counsel

BY THE COURT:

[1] This is a preliminary decision concerning the jurisdiction of the court.

[2] The facts, for purposes of this decision, are these. The Claimant is suing for $25,000.00 said to be owing on a subcontract, or subcontracts, for cleaning several T-D branches in Nova Scotia. The Defendant GSF Canada Inc. is a federal company (registered to do business in Nova Scotia) that has what might be called a master contract with a real estate management company (BGIS) which, in turn, supplies office cleaning services to T-D. The Defendant is based in Montreal, Quebec. BGIS is not a party to this litigation, and appears to be an Ontario company also registered to do business in Nova Scotia.

[3] Attached to the subcontract is a set of conditions. They could be said to be fine print, in the sense not only that they are in an extremely small font, but they also appear to be pre-printed standard conditions that are intended to apply to all subcontracts. They are in the French language only.

[4] In a section entitled “DROIT APPLICABLE” (applicable law) it is written that “les lois de la province de Quebec regissent le present bon de commande, son interpretation ainsi son execution. En cas de litige, celui-ci se faire devant les tribunaux competents de la province de Quebec, dans le district de Montreal.” Loosely translated, this states that the applicable law of the contract is Quebec law and all disputes shall be decided in the competent courts, in Montreal.” For ease of reference, I will refer to this as the “Quebec jurisdiction clause.”

[5] The Defendant insists that this clause ousts the jurisdiction of the courts in Nova Scotia and, in particular, the Small Claims Court.

[6] It is of some importance to sketch out the factual issues that would appear to be in issue in this case.

a. The Claimant simply says that it performed a service and there is money owing under the contracts.

b. The Defendant questions the accounting (without much particularity) but more substantively says that the work was not done up to the required standard. In its contemplated counterclaim, it pleads that it lost profits as a result of cancellation of some of its contracts with BGIS. It blames the Claimant's poor work for the cancellation of its contract with BGIS. It seeks damages for loss of profits in the amount of $25,000.00. While framed as a counterclaim, this could also be seen as a set-off claim.

[7] The Defendant pleads in its defence that the Nova Scotia courts are bound to respect the Quebec jurisdiction clause and asks for an order staying this case, sending the Claimant (if so advised) to the courts in Montreal. In practical terms, this would likely force the Claimant into the Quebec Court, Civil Division. The procedure in the Quebec Court, Civil Division, is likely to be more complex and expensive than that in the Nova Scotia Small Claims Court.

[8] The Small Claims Court of Quebec has jurisdictional limits of only up to $15,000.00, and does not allow for lawyers to represent parties. Also, it

precludes larger companies from using the court altogether, and the Claimant might well not be eligible to sue in that court, at all. For the Claimant, the advantages of suing in the Nova Scotia Small Claims Court are considerable, and obvious. But can it get past the Quebec jurisdiction clause?

[9] The Quebec jurisdiction clause, though apparently definite on its face, may be overridden if the Nova Scotia court is of the view that it derives jurisdiction some other way. Such clauses are not always the last word on the subject.

[10] The *Court Jurisdiction and Proceedings Transfer Act* is a Nova Scotia Statute that provides certain guidelines for when Nova Scotia courts have jurisdiction in a given case. The applicable sections are 3 and 4:

> TERRITORIAL COMPETENCE OF COURTS OF NOVA SCOTIA
>
> **Territorial competence of court**
>
> 3 (1) In this Part, "court" means a court of the Province unless the context otherwise requires.
>
> (2) The territorial competence of a court is to be determined solely by reference to this Part.
>
> **Proceedings against persons**
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> 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.

[11] I believe it is fair to say that none of 4 (a) through (c) would apply. There is no proceeding brought by this Defendant. The Defendant has not submitted to the court's jurisdiction; indeed, it has questioned it. And there is no agreement giving the Nova Scotia court jurisdiction; indeed, there is a provision giving jurisdiction to the Quebec courts.

[12] As for 4 (d), the Defendant could arguably be said to be ordinarily resident, in the sense that it is an extra-provincial corporation registered to do business in Nova Scotia. This brings into play s.8:

> **Ordinary residence of corporation**
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> 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.

[13] There is no question that the Defendant has a registered office in the province, even if only that of its lawyer, and has designated an agent upon whom documents may be served, also a lawyer. However, even if there is doubt as to whether the corporation is resident in Nova Scotia, there is the matter of s.4 (e) to consider.

[14] It is hard to argue against the proposition that there is a substantial connection between the facts and Nova Scotia. The case concerns the quality of work done by a Nova Scotia company on buildings in Nova Scotia. That there might be a connection also to Quebec does not negate the connection to Nova Scotia.

[15] The *Court Jurisdiction and Proceedings Transfer Act* accordingly supplies ample authority to give the Nova Scotia courts jurisdiction. However, that Act does not speak to the possibility of the parties providing in their contracts that disputes should be resolved in some other way, such as in the courts of another province or by an alternative process, such as arbitration.

[16] This brings us to s.14 of the *Small Claims Court Act*:

Void provision in agreement

14 (1) Except as otherwise provided in an enactment, any provision or acknowledgement in an agreement is void if it

(a) in any way purports to exclude, limit or vary the jurisdiction of the Court;

> (b) provides for the place of hearing of a claim, matter or proceeding under this Act to be at a place other than as permitted by this Act; or
>
> (c) states that the provisions of this Act or the regulations do not apply.
>
> (2) Where a provision or acknowledgement contrary to this Act is a term of an agreement, it shall be severable therefrom.

[17] On the face of it, this provision would appear to invalidate the Quebec jurisdiction clause, insofar as the Small Claims Court is concerned. However, before so finding I will consider in what circumstances other adjudicators have applied this clause.

[18] In *Jones v. Bob Blumenthal Auto Wholesalers Inc.*, 2014 NSSM 33, Adjudicator Knudsen found that a provision in a contract limiting the court's discretion to award costs was void, by virtue of s.14(2). That clause, if enforced, would have required a successful party in the litigation to pay the other party's costs, despite the result of the case.

[19] In *Tulloch v. Amerispec Home Inspection Services*, 2006 NSSM 48, Adjudicator Casey refused to enforce an arbitration clause, because it purported to limit the jurisdiction of the court. His reasoning is found in the following paragraphs:

> (12) The arbitration clause in question is designed at the very least to limit the jurisdiction of the Small Claims Court and the Defendant urges the Court to accept its position that it in fact excludes the jurisdiction of this Court. As such, Section 14 of the Small Claim Court Act applies. Accordingly, I find such provision to be void and according to Section 14(2) of the Act, must sever it from the agreement.

> (13) In the *Jaffasweet* case, reference is made to *Heyman v. Darwins Limited* (1942) A.C. 356 (H.L.) where Lord Macmillan set out the procedure to be followed in cases where arbitration clauses are put forward to oust the jurisdiction of the Court:
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> > "Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration." (Emphasis added)
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> (14) In this case, even if all of the other questions can be answered in the affirmative, there is a sufficient reason why the matter should not be referred to arbitration, namely, the provision is void insofar as it purports to limit or exclude the jurisdiction of this Court. In the cases referred to by the Defendant, there was no legislative provision which applied which declared such a provision void. This Court must, in every case, act within its legislative ambit.

[20] In *Richardson v. RxHousing Inc.*, 2010 NSSM 67, a case cited by the Defendant, Adjudicator O'Hara had before him a case where a Nova Scotia resident had placed a deposit on a rental apartment in California, that he had only seen on the internet. After receiving a negative report from an agent in California who viewed the unit, he decided that it was not up to par and sued in Nova Scotia to get his money back. The Defendant sought to enforce an exclusive jurisdiction clause that would have required him to sue in (of all places) Texas. Adjudicator O'Hara did not consider s.14 of the *Small Claims Court Act*, perhaps because it was not drawn to his attention. Even so, he refused to stay the action on the theory that the *Court Jurisdiction and Transfer Act* provided

jurisdiction in the Small Claims Court by virtue of a substantial connection to Nova Scotia, namely that the Claimant was in Nova Scotia and had transacted the agreement (by email) from Nova Scotia. He went on to consider whether Nova Scotia or Texas was the more convenient forum ("*forum conveniens*").

[21] The trend in the higher courts appears to favour the convenient forum analysis when there is a question of which of two courts should take jurisdiction: see *Club Resorts Ltd. v. Van Breda* [2012] S.C.J. 17. No case was cited to me where a clause directing disputes to a less convenient forum has been upheld.

[22] As I read this case, and others cited in *Richardson* (above), the presence of an exclusive jurisdiction clause may create a presumption in favour of the court stipulated in the contract, but leaves open the door to a party to establish that its forum of choice is more convenient.

[23] There is also a live question as to whether the Quebec jurisdiction clause is truly an "exclusive jurisdiction" clause that would place the onus on the Claimant to rebut the presumption that the foreign court has exclusive jurisdiction. As noted by adjudicator O'Hara in *Richardson* (above) there are cases where clauses with equally strong language have been treated otherwise. In *Hayes v. Peer 1 Network Inc.*, 2007 CanLII 245 (ON S.C.) (reversed on another ground at 2007 CanLII 65614 (ON S.C.D.C.)), a clause that read *"this Agreement is governed by the laws of the state of Washington and each party irrevocably attorns to the jurisdiction of the court system of the state of Washington*" was found not to be an exclusive jurisdiction clause. It was found to be an attornment clause. On that theory, the Claimant in this case may have attorned to the Quebec court, but has chosen its preferred forum by suing in

Nova Scotia, and is entitled to have its case heard unless some valid reason is shown why Nova Scotia is an inappropriate forum.

[24] However, I do not rest my finding on this theory.

Conclusions

[25] The Nova Scotia Small Claims Court is the forum which the Claimant has chosen. It has two potent routes to fend off the objection to jurisdiction.

[26] Firstly, the Quebec jurisdiction clause appears to be a clause captured by s.14 of the *Small Claims Court Act*. A party, namely the Defendant here, has sought to contract itself out of the Nova Scotia Small Claims Court's jurisdiction, despite doing business in Nova Scotia with a Nova Scotia company. It is interesting to note that the Supreme Court of Nova Scotia would not have a provision like s.14 to protect its jurisdiction, which highlights the importance of the Small Claims Court, where cases are smaller and the cost of a Claimant having to sue in another jurisdiction might be prohibitive. Section 14 is just another way that the Nova Scotia Legislature has attempted to provide, for Nova Scotians, a cost-effective, simple way of resolving smaller disputes. The advantage to the Claimant of having a simpler forum than the Quebec civil courts is obvious. Whether it admits so or not, the Defendant also shares that advantage. Cases involving $25,000.00 generally do not merit the full-blown procedure of a higher civil court.

[27] I find this case to be on all fours with the other Small Claims Court cases cited above. There is no important distinction between a contractual clause that purports to limit the remedies that the court may provide, or that diverts a case to

another forum (arbitration), and a clause that attempts to force a small claimant to travel to another city and another province.

[28] Secondly, I arrive at the same result using a *forum conveniens* analysis. The facts of this case allow for no other conclusion. The cleaning work in question was done in Nova Scotia by a Nova Scotia company (the Claimant) employing people living and working in Nova Scotia. The occupants of the buildings being cleaned - who might have something to say about the cleanliness of their work spaces - would be T-D employees living and working in Nova Scotia. All of the witnesses for the Claimant would be people living and working in Nova Scotia. Logically, if the Defendant persists in its defence that the work was not done properly, it will have to call as witnesses people who are in Nova Scotia, or at least were in Nova Scotia at relevant times.

[29] I understand that it might have to call a witness or two from Quebec, assuming that there are accounting or other issues concerning the contract. The possibility is also there that a witness may have to come from Ontario, but that inconvenience exists whether the case is heard in Nova Scotia or Quebec.

[30] The balance of convenience heavily, indeed overwhelmingly, favours Nova Scotia as the more convenient jurisdiction.

The law governing the case

[31] I appreciate that there is also a question of the applicable law, namely Quebec civil law. The contractual provision applying Quebec law is not ousted by either s.14 or the finding on *forum conveniens.*

[32] It is fairly common for a Nova Scotia court to apply “foreign” law in a case before it. This is not an obstacle. Most cases are highly factual in nature, and civil and commercial law principles are often in harmony across jurisdictions. It would be up to the party intending to rely on foreign law, namely the Defendant, to determine if there is any significant difference between Quebec law and Nova Scotia law on the facts of this case. I would be surprised if there was, but - if so - the point can be raised between counsel and hopefully an agreement can be arrived at as to the applicable legal principles. If necessary, written expert opinions on Quebec law may be provided to the court.

[33] I accordingly find that the Nova Scotia Small Claims Court has jurisdiction to hear this case.

[34] The Claimant has not yet filed a defence to the counterclaim, and should do so forthwith. Thereafter, either party may apply to the court administrator to set a special hearing date for the hearing on the merits, at a time and place convenient to both counsel.

Eric K. Slone, Adjudicator