

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Hurley v. Zutz*, 2017 NSSC 46

**Date:** 20170222

**Docket:** Antigonish No. 443629

**Registry:** Antigonish

**Between:**

John Bernard Hurley

Plaintiff

and

Dylan Zutz, Patricia Zutz and Randy Zutz

Defendants

**Decision**

**Judge:** The Honourable Justice N. M. (Nick) Scaravelli

**Heard:** December 14, 2016, in Antigonish, Nova Scotia

**Written Decision:** February 22, 2017

**Counsel:** William Mahody, Q.C. for the Plaintiff  
Linda R. Hupman for the Defendants

[1] On October 4<sup>th</sup>, 2013, the plaintiff John Bernard Hurley and the defendant Dylan Zutz were involved in a motor vehicle accident in Edmonton, Alberta. On September 24<sup>th</sup>, 2015 the plaintiff commenced an action against the defendants in the Nova Scotia Supreme Court. The defendants, lifelong residents of Alberta, advised the plaintiff they would be bringing a motion to strike the Nova Scotia claim for want of jurisdiction. As a cautionary measure, the plaintiff filed an action in Alberta on February 17<sup>th</sup>, 2016. This action appears to have been filed beyond the expiry of the Alberta limitation period and may be statute barred in that province.

[2] The defendant's motion before this court claimed an order dismissing the proceeding for lack of territorial jurisdiction or in the alternative, an order staying the action on the basis of forum non-convenience. The plaintiff concedes that Nova Scotia has no territorial or subject-matter competence over the action. As a result, forum non-convenience is no longer an issue.

**Position of the Parties:**

[3] The plaintiff, having conceded the jurisdictional issue, submits that dismissal is not the appropriate remedy. Instead, the court should issue an order requesting the action be transferred to Alberta pursuant to section 15(2) of the *Court*

*Jurisdiction and Proceedings Transfer Act*, R.S.N.S. 2003 c.2 (*CJPTA*) with a condition ordering the return of the action to the Nova Scotia Supreme Court for determination whether it should exercise its residual discretion to assume jurisdiction over the action pursuant to section 7 of the *CJPTA*, should Alberta refuse the transfer.

[4] The defendants submit the action in Nova Scotia be dismissed for lack of jurisdiction. Alternatively, the defendants submit the action be transferred to Alberta but that the request order should not contain any condition directing return to Nova Scotia Supreme Court for determination of the court's residual discretion.

**Issues –**

**Should the Nova Scotia court dismiss these proceedings for lack of jurisdiction or request a transfer of the proceeding to the Province of Alberta?**

**If transfer, should Nova Scotia retain jurisdiction to hear arguments on whether the court should invoke its general discretion to accept jurisdiction of this matter?**

[5] In Nova Scotia, the *CJPTA* governs questions of territorial jurisdiction.

**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.

[6] The plaintiff acknowledges that none of the criteria for territorial competence of this court as set out in section 4 of the *CJPTA*, apply in this case. However, the plaintiff submits that a request for transfer of the proceedings to Alberta is the appropriate remedy. Sections 14 and 15 of the *CJPTA* provide in part:

**14 (1)** The Supreme Court, in accordance with this Part, may

- (a) transfer a proceeding to a court outside the Province; . . . .

**(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.

**15 (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.

[7] Both parties agree that Alberta has both territorial and subject-matter competence in the proceeding.

[8] In addition to having both territorial and subject-matter competence, this court must also be satisfied that the *Rules* applicable in Alberta do not impair the effectiveness of the transfer or inhibit the fair and proper conduct of the proceedings.

[9] The Province of Alberta has not enacted legislation similar to the *CJPTA* nor has it established procedural rules dealing with transfer. However, this would not appear to be a bar to transfer.

[10] In *England v. Research Capital Corp*, 2008 BCSC 580, the court transferred a claim from British Columbia (with a similar *CJPTA*) to Alberta, a non *CJPTA* province. See also *Bartz(Guardian ad litem) v. Canadian Baptist Bible College Inc.*, 2009 NSSC 115 (*Bartz*). In *Bartz*, Justice Warner stated: “the absence of

procedural rule should not be an impediment to transfer between superior courts”.

The basis of this conclusion rests on the principal of comity and the core jurisdiction of section 96 courts to make procedural rules:

104 . . .

(a) The principle of comity inherent in the Canadian Constitution demands that superior courts respect the orders and judgments of sister superior courts.

(b) Superior courts in Canada are part of the same unitary court system, which have the Supreme Court of Canada at the apex; as LaForest, J.J. held in **Morguard**:

Rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.

(c) The constitutional imperative of comity is the basis upon which this Court can expect that Manitoba will "honour, recognize and follow" a transfer order. Severance of liability issues and damages issues is not a unique occurrence. Severance occurs in Manitoba as in other Canadian jurisdictions. It is not foreign to Manitoba's legal system that it hear only the liability issues.

(d) The Constitution demands no less than that, once it is accepted that Manitoba has full jurisdiction, its superior court will exercise its inherent jurisdiction over its procedure to accommodate a transfer order from this court.

[11] In this case, the requirements set out in section 14 and 15(2)(3) of the *CJPTA* all appear to have been met. There do not appear to be any procedural barriers or issues arising from section 14(5) which might impair the effectiveness of the transfer to Alberta. As stated in *AECOM Canada Ltd. V. Fisher*, 2011 BCSC 860:

57 This procedure is now statutory. As I read the *Act*, it contemplates transfer, not dismissal. I can think of no basis for dismissing the plaintiffs' claim. . . .

[12] Under the present circumstances I find that a request for transfer would be a more appropriate remedy than dismissal of the claim.

**Should Nova Scotia retain jurisdiction to hear arguments on whether the court should invoke its general discretion to accept jurisdiction of this matter?**

[13] The plaintiff did not make any substantive argument in support of retaining jurisdiction.

[14] Section 7 of *CJPTA* deals with general discretion of the court:

**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.

[15] Section 7 is the codification of the common law form of necessity (see *West Van Inc. v. Daisley*, 2014 ONCA 232 (*West Van*)).

[16] Section 16(2) provides in part:

**16 (2)** The order may . . .

(d) provide for the return of the proceeding to the Supreme Court on the occurrence of specified events.

[17] While the term “specified event” may be broad enough to allow the return of a claim to Nova Scotia to hear submissions on section 7 if another jurisdiction were to reject a transfer, there appears to be no case law where such an order was made. The defendant’s submit a plain reading of section 7 precludes this court from exercising its general discretion as the proceeding has already been “commenced” in Alberta.

[18] Section 6 of British Columbia’s *CJPTA* is identical to section 7 of the Nova Scotia Act. In *Josephson (Litigation guardian of) v. Balfour Recreation Commission* 2010 BCSC 603, the court set out the following test:

**86** . . . A court may take jurisdiction as a forum of necessity when jurisdiction does not otherwise exist, and when proceedings outside the jurisdiction cannot possibly be commenced or the commencement of the proceedings cannot reasonably be required.

[19] In *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84, the court stated:

**100** . . . Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. [under the Forum of Necessity Doctrine]

[20] It is apparent from the case law that the court’s discretionary remedy should only be used in exceptional circumstances which do not exist in this case.

Regardless of whether the plaintiff’s claim in Alberta fails due to the limitation

period, the fact there was another forum which he reasonably sought relief bars the application of section 7 (see: *West Van*).

[21] As a result, I find no basis for ordering return of the proceeding to the Province of Nova Scotia as part of the order.

[22] Accordingly, the court will grant an order requesting the Province of Alberta accept the transfer of this proceeding.

Scaravelli, J.