SUPREME COURT OF NOVA SCOTIA

Citation: *DORA Construction Limited v. Hospitality Homes Limited*, 2018 NSSC 50

Date: 20180308
Docket: Hfx, No. 466975
Registry: Halifax

Between:

DORA Construction Limited

Applicant

v.

Hospitality Homes Limited

Respondent

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	December 13, 2017, in Halifax, Nova Scotia
Counsel:	Harry Thurlow and Anna Garson (Articled Clerk) for Applicant Mark Knox, QC and Michael Potter, for Respondent

By the Court:

Introduction

[1] Dora Construction entered into a prime contract with Churchill Falls (Labrador) Corporation Ltd., to act as the general contractor for the provision of a residential complex at the Churchill Falls, NL power plant construction site. In 2012 and 2013 Dora subcontracted the construction of modular homes for the site to Hospitality Homes ("Hospitality"), a New Brunswick Company.

[2] The homes were manufactured at Hospitality's factory in New Brunswick and transported by truck through Quebec to Churchill Falls where they were set up for use. Once on site, damages were identified and rectified at Dora's expense. Some unsuccessful attempts were made by Dora to have Hospitality pay the costs of repair work, but litigation only commenced when, in August 2017, Dora filed an Application in Court alleging:

1. that the modular homes were deficient and that Dora was required to incur costs in excess of $200,000 to remedy the deficiencies; and
2. that Hospitality Homes overbilled Dora $200,000 which Dora inadvertently paid.

[3] In consequence of these claims, Dora seeks an order for damages, restitution, prejudgment interest, and costs.

[4] A date was set for a Motion for Directions. Hospitality Homes filed a Notice of Contest which stated, as its first substantive response that:

> The respondent says that your application should be dismissed because the contract (the stipulated Price contract) between the parties:
>
> 1. …
> 2. Was made in the province of New Brunswick and, therefore, this action has no standing

[5] When the matter went before the Chambers Judge for directions, Hospitality made it clear that it was not agreeing to the territorial jurisdiction of a Nova Scotia Court over this dispute. Notwithstanding this position, a hearing date was set for April 2018. The parties have exchanged affidavits disclosing documents. After the

Motion for Directions, Hospitality filed the present motions which seek alternative remedies:

1. An Order requiring enforcement of arbitration as provided for in the subcontract between the parties;
2. In the alternative, an order to dismiss the Application on the basis that a Nova Scotia Court does not have jurisdiction over the subject matter of the claim;
3. In the further alternative, an order that New Brunswick is the more appropriate forum in which to hear the proceeding; and
4. In the further alternative, an Order that the Application in Court be converted to an Action.

Issues

1. Does the contract between the parties require the dispute to be submitted to arbitration before the claim could be considered by the courts?
2. Does a Nova Scotia Court have territorial competence over the subject matter of the claim?
3. If yes, then is New Brunswick the more appropriate forum in which to hear the proceeding?
4. If the claim is to be adjudicated in Nova Scotia, then should the Application in Court be converted to an Action?

Analysis

Issue 1: *Does the contract between the parties require the dispute to be submitted to arbitration before the claim could be considered by the courts?*

[6] During argument, Hospitality conceded that the Arbitration Clause in the subcontract does not oust the jurisdiction of the courts to adjudicate this dispute. That motion is dismissed.

Issue 2: *Does a Nova Scotia court have territorial competence over the subject matter of the claim?*

[7] **Nova Scotia Civil Procedure Rule 5.14** states:

Lack of jurisdiction

5.14 (1) A respondent who maintains that the court does not have jurisdiction over the subject of an application, or over the respondent, may make a motion to dismiss the application for want of jurisdiction.

(2) A respondent does not submit to the jurisdiction of the court only by moving to dismiss the application for want of jurisdiction.

(3) A judge who dismisses a motion for an order dismissing an application for want of jurisdiction must set a deadline by which the respondent may file a notice of contest.

[8] The substance of this motion is governed by the provisions of the **Court Jurisdiction and Proceedings Transfer Act** 2003 (2nd Sess.), c. 2, s. 1 (CJPTA). The provisions of that **Act** which are relevant to this application are:

2 In this Act,

(h) "territorial competence" means the aspects of a court's jurisdiction that depend on a connection between

(i) the territory or legal system of the state in which the court is established, and

(ii) a party to a proceeding in the court or the facts on which the proceeding is based. 2003 (2nd Sess.), c. 2, s. 2.

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

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.
>
> Presumption of real and substantial connection
>
> 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:
>
> …
>
> (h) concerns a business carried on in the Province;
>
> Court may 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 decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole. 2003 (2nd Sess.), c. 2, s. 12.
>
> (emphasis added)

Section 4(b): During the course of the proceeding has Hospitality submitted to the court's jurisdiction?

[9] Dora argues that by filing a Notice of Contest and Affidavit of Documents, Hospitality has attorned to the jurisdiction and is barred from challenging the jurisdiction of the court to hear this Application. In making the argument, counsel for Dora acknowledged that counsel for Hospitality advised him in person at an early stage of the proceeding that his client did not agree to the jurisdiction of a Nova Scotia Court to hear the matter, favoring New Brunswick instead.

[10] Hospitality responds that it made its position clear verbally, then again in the Notice of Contest and that it was confirmed again with the court in the Motion for Directions, a transcript of which has been filed on these motions. This was followed by the current motions.

[11] Dora's position raises an interesting question. Hospitality should have filed the motion under **Rule 5.14(1)** immediately. By filing its Notice of Contest and exchanging documents it left itself open to the argument that it had submitted to the jurisdiction, and that their objection to jurisdiction could not be saved by **Rule 5.14(2)**.

[12] It is also true that Hospitality's intentions were clear to both of Dora and the Court from the outset. It is arguable that the Court, at the time of the Motion for Directions should have identified this issue for resolution before setting a schedule for filings and hearing.

[13] For the reasons that follow, I do not need to resolve this question as I have concluded that a Nova Scotia Court has territorial competence over the subject matter of the dispute.

Section 4(e): Is there is a real and substantial connection between Nova Scotia and the facts on which the proceeding against Hospitality is based?

[14] The Nova Scotia Court of Appeal, in *Bouch v. Penny* 2009 NSCA 80, at paragraph 29, cited with approval the analytical framework adopted by Justice Wright in disposing of this type of application. The relevant provision of his decision is reported at 2008 NSSC 378:

> 20 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.
>
> (Emphasis added)

[15] Section 11 of the **CJPTA** establishes a non-exhaustive list of circumstances in which a "real and substantial connection" is presumed to exist. Dora submits that section 11(h) applies, that is, this proceeding "concerns a business carried on in the Province". The interpretation of this section has been judicially considered in *Armco Capital Inc. v. Armoyan* 2010 NSSC 102, where Moir J. stated, at paras. 32-35:

> 32 Paragraph 11(h) has nothing to do with residency or with service on a corporation. It is about a business, no matter whether it is carried on by a resident or a non-resident, or a corporation or an individual.
>
> 33 The words of a statute are to be read in their entire context according to their grammatical and ordinary meaning. I see no conflict between s. 11(h) and any other part of the **Court Jurisdiction and Proceedings Act**. The words are plain, and we cannot add restrictions.
>
> 34 I find support from my conclusion that s. 11(h) applies to a business carried on in the province by any party in *TimberWest Forest Corp. v. United Steel, Paper and Forestry Union*, [2008] B.C.J. No. 552 (S.C.), to which Mr. Piercey and Mr. Campbell referred.
>
> 35 The cause prosecuted by Armco concerns a business carried on in Nova Scotia. Therefore, this court is presumptively competent.

[16] Justice Moir's decision was mentioned in the appeal of the ultimate trial result, reported as *Armoyan v. Armoyan* 2013 NSCA 99, but without comment:

> 95 On December 11, 2009, Armco Capital Inc., owned by Mr. Armoyan and his brother, applied in the Supreme Court of Nova Scotia for an order that Ms. Armoyan had unlawfully cloned information from Armco's computer (see above, para 27), and for an order enjoining her from using or communicating that information. On January 12, 2010, Ms. Armoyan applied in the Supreme Court of Nova Scotia for dismissal or stay of Armco's application, on the basis that the Florida Courts were the convenient forum to determine these issues. On March 17, 2010, Justice Moir ruled that Nova Scotia's court had jurisdiction simpliciter, but that Florida was the convenient forum. He stayed Armco's application (2010 NSSC 102). Armco appealed to this Court. Three days before the due date for its factum, Armco discontinued its appeal of the forum non conveniens ruling. The Court of Appeal continued to hear other issues, related to costs, and issued a decision on February 16, 2011 (2011 NSCA 22).

[17] Subsequently, Justice Moir's interpretation of section 11(h) was adopted in *3289444 Nova Scotia Ltd. v. RW Armstrong & Associates Inc.* 2016 NSSC 330, at para. 87.

[18] The evidentiary burden that must be met to satisfy the requirements of section 11(h) was discussed by Steeves J., writing in *CIC Capital Fund Ltd. v. Rawlinson* 2016 BCSC 516. He noted that the Armco interpretation of s. 11(h) runs contrary to some academic commentary on the application of the section:

> 36 I note that in *Club Resorts* the Supreme Court of Canada referenced only the defendant carrying on a business as a presumptive factor (at para. 90). So, for example, a defendant maintaining an actual presence such as an office in the jurisdiction (but more than a virtual presence) may establish territorial competence (at para. 87). Here it is the plaintiff that asserts carrying on business in British Columbia.
>
> 37 Similarly, in a commentary on the **CJPTA**, there is the conclusion that "it is quite likely that the drafters of the **CJPTA** intended s. 10(h) to apply only to businesses carried on by defendants." (Vaughan Black, Stephen Pitel, Michael Sobkin, *Statutory Jurisdiction: An Analysis of the CJPTA* (Carswell: 2012), at p. 123; contrary authority is noted at p. 122, including *Armco Capital Inc. v. Armoyan*, 2010 NSSC 102).
>
> 38 In any event, owning shares in a British Columbia company, having directors or employees that hold positions in a British Columbia company, retaining lawyers in this province and attending meetings in British Columbia related to the purchase of British Columbia assets does not satisfy the test for establishing a business carried on in British Columbia. These are a "passing presence" rather than carrying on business (*Lockwood Financial Ltd. v. China Blue Chemical Ltd.*, 2015 BCSC 839, at paras. 56-57).
>
> 39 It follows that the fact that the plaintiff has a registered office in British Columbia does not satisfy the test for carrying on business in this jurisdiction. Something more is required (*Lockwood Financial Ltd*., at para. 54, citing *Genco Resources Ltd. v. MacInnis*, 2010 BCSC 1342, at para. 42). If it were otherwise, jurisdiction would be established solely by virtue of the plaintiff's corporate residency, and it is well established that the plaintiff's residence alone is not a connecting factor (see for example *Dembrowski v. Rhainds*, 2011 BCCA 185, at para. 11).

[19] The Court accepted that the presumption in the section can refer to the business of the plaintiff. After a review of the evidence offered in support of the plaintiff's claim to "carrying on business in British Columbia" within the meaning of the **CJPTA**, he concluded:

> 53 It is clear enough that this information confirms the minimal presence of the plaintiff carrying on business in British Columbia and there is little connection between the plaintiff's dealings with the BCSC and its relationship with AIM.

> 54 As a final matter here, the plaintiff submits that it is carrying on business in British Columbia because it raises capital from Canadian institutional investors and a private syndicate whose principal residence is in Vancouver, British Columbia. However, as can be seen by the above letter from Mr. Bromley to the BCSC the plaintiff has approximately 14 shareholders in British Columbia representing approximately 4.83% of its issued share capital as of March 2013. As well, except for the specific exemption described above, there has been a cease trade order against the plaintiff since 2011. This was before it retained Cairn about a year later in 2012. Finally, there is no evidence of any other specific transactions that are in play or even contemplated. I am unable to agree with the plaintiff that potential investment from British Columbia is significant or otherwise indicative of a strong business in this jurisdiction.
>
> 55 Again, to establish the presumption under s. 10(h) of the CJPTA what is required is an actual rather than a virtual presence in this jurisdiction (Club Resorts, at para. 87). Similarly, something more than a "passing presence" is required (Lockwood Financial Ltd., at paras. 56-57).
>
> 56 Overall, I conclude that the plaintiff has not adduced evidence that there is a good and arguable case that it carries on business in British Columbia.

[20] The British Columbia Court of Appeal overturned a Chambers Judges' determination that the evidence met the requirement of this provision. In doing so, they distinguished *Armco* on its facts. The Court, writing, in *North America Steamships Ltd. v. HBC Hamburg Bulk Carriers GmbH & Co.* 2010 BCCA 501 held:

> 13 In the alternative, the chambers judge also ruled that the factor in s. 10(h) of the **CJPTA** had been met, i.e., that this action "concerns" a business carried on in the province. Again, she distinguished two British Columbia cases, *Marren et al. v. Echo Bay Mines Ltd.* 2003 BCCA 298 and *Cameron v. Equineox Technologies Ltd.* 2009 BCSC 221, which had held (as in England) that the residence of the plaintiff in British Columbia was not enough to constitute a real and substantial connection for purposes of the Act. She reasoned:
>
> > But in those cases the Courts made the finding that bare residency does not suffice; it was held that the tortious act or breach of contract must be connected to British Columbia in some way as well. I have already found that to be so. The substance of this dispute concerns HBC's alleged failure to make payments in British Columbia when required to do so under the **FFA**. <u>The breach, if it occurred, therefore occurred in British Columbia</u>. The plaintiff also operated its business and had all of its staff employed entirely within British Columbia. [At para. 27; emphasis added.]

[21] The appellate court concluded:

> 18 Nor am I convinced this action "concerns a business" carried on in British Columbia. Of course this is a commercial case that arises out of the parties' business dealings, but in my view, the phrase "concerns a business" has a narrower meaning than the phrase "arises out of business dealings", for example. Again, the cases to which Mr. Palleson referred us were very different from this one: see *Pope & Talbot Ltd. (Re)* 2009 BCSC 1014, 57 C.B.R. (5th) 94 at para. 100 and *Armco Capital Inc. v. Armoyan* 2010 NSSC 102 at paras. 30-5.

[22] I accept that section 11(h) of the **CJPTA** is available to the applicant, but that there must be an evidentiary basis upon which to conclude that:

(i) there is more than the minimal presence of the applicant carrying on business in Nova Scotia; and
(ii) there is a connection between the applicant's dealings with the respondent in relation to the cause of action in dispute.

[23] I am satisfied on the evidence that the applicant has met both requirements, and that a "real and substantial connection" is presumed. Therefore, the court has territorial competence to hear the matter.

[24] The evidence in support of this conclusion is:

- DORA Construction Ltd., is incorporated pursuant to the laws of Nova Scotia with its head office located in Dartmouth, Nova Scotia;
- DORA carries on business as a contractor in the construction industry in Nova Scotia and in other provinces;
- Negotiations for the contract in dispute were held in Nova Scotia on at least two occasions;
- The principals of the respondent company travelled from New Brunswick to the DORA head office in Dartmouth to execute the contract that is the subject of this dispute;
- Financial management of the project was run out of the Dartmouth office of DORA; and
- There were demand letters and other correspondence and communications with the respondent that originated out of the Dartmouth head office of DORA.

[25] The applicant has also noted that the respondent has a business presence in Nova Scotia. In addition to its participation in this contract through its dealing with DORA's head office, the respondent owns land in Nova Scotia, held for business related purposes, and has an authorized dealer for it products at two locations in Nova Scotia, one of which is in Dartmouth. While neither of the land ownership or the dealer network are connected to the contract in question, it puts the respondent's role in dealing with a Nova Scotia based company in context.

[26] Dora has also relied upon the common-law factors, arguing that they also favor a conclusion that there is a "real and substantial connection".

[27] Section 11 of the **CJPTA** expressly provides that the enumerated circumstances set out therein do not limit the right of the plaintiff to prove other circumstances that establish the requisite connection. The law contemplates that the factors or circumstances which the courts at common-law have taken into account in deciding cases involving assumed jurisdiction are still relevant and must be considered.

[28] Justice Sharpe writing on behalf of the court in *Muscutt v. Courcelles* (2002) 60 O.R. (3d) 20, at paras. 36-37, set out the common-law description of the real and substantial connection test as developed by the Supreme Court of Canada:

> [36] The language that the Supreme Court has used to describe the real and substantial connection test is deliberately general to allow for flexibility in the application of the test. In *Morguard*, at pp. 1104-09 S.C.R., the court variously described a real and substantial connection as a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the forum province", "with the transaction or the parties", and "with the action" (emphasis added). In *Tolofson*, at p. 1049 S.C.R., the court described a real and substantial connection as "a term not yet fully defined".
>
> [37] In *Hunt*, at p. 325 S.C.R., the court held:
>
> > The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined [in *Morguard*], and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these.

[29] The Court also held that the real and substantial connection test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction" and that "the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements

of order and fairness, not a mechanical counting of contacts or connections". *See* also, *Oakley v. Barry* (1998), 166 N.S.R. (2d) 282 (NSCA) and *O'Brien v. Canada (Attorney General)* (2002), 201 N.S.R. (2d)338 (NSCA).

[30] Justice Sharpe in *Muscutt* outlined a number of factors that emerge from the case law and that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant. It is clear that no one factor is determinative; rather, all relevant factors should be considered and weighed together. His subtitles, which were adopted by the Court of Appeal in *Bouch v. Penny, supra.*, encapsulate the factors. They are:

(1) The connection between the forum and the plaintiff's claim;

(2) The connection between the forum and the defendant;

(3) Unfairness to the defendant in assuming jurisdiction;

(4) Unfairness to the plaintiff in not assuming jurisdiction;

(5) The involvement of other parties to the suit,

(6) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;

(7) Whether the case is interprovincial or international in nature;

(8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[31] I will speak to these factors briefly, as the issue arose in the alternative.

(1) The connection between the forum and the applicant's claim

[32] The contract was negotiated out of Nova Scotia through the management staff located at the applicant's head office. It was executed in Nova Scotia. Damages were suffered in Nova Scotia. S*ee, Oakley v. Barry* 1998 NSCA 68. Witnesses for the applicant are most easily available to the court in Nova Scotia.

(2) The connection between the forum and the respondent

[33] The Respondent has a business presence in Nova Scotia and its principals attended in Nova Scotia for negotiation and execution of the contract.

(3) Unfairness to the respondent in assuming jurisdiction

[34] The contract does not provide a choice of forum. It does provide that the law of Newfoundland and Labrador governs disputes. Both parties have agreed that they would prefer that the case be heard in either of New Brunswick or Nova Scotia rather than Newfoundland and Labrador.

[35] While construction took place in New Brunswick, the units travelled through Quebec into Labrador. The claimed damage to the units and the deficiencies were identified in Labrador and were rectified on site. Material witnesses are located in various places now, including Nova Scotia and New Brunswick. The relatively short distances that any witness will travel between Nova Scotia and New Brunswick does not create unfairness. Witnesses who are now located outside of these provinces will be able to travel to Halifax readily. There is no advantage to require them to travel to New Brunswick and so no unfairness to the respondent.

[36] The respondent already has counsel in Nova Scotia who is familiar with the claim. Substantial work has been completed. The respondent has and continues to do business in Nova Scotia. Prosecution of the claim in Nova Scotia is not unfair to the respondent.

(4) Unfairness to the applicant in not assuming jurisdiction

[37] Other than the costs already incurred by the initiation of the application in Nova Scotia there is no greater or lesser unfairness to the applicant than the respondent. This is a neutral factor.

(5) The involvement of other parties to the suit

[38] There are no other parties to the application.

(6) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;

[39] The **Enforcement of Canadian Judgments and Decrees Act** 2001, c. 30, s. 1, provides for the enforcement in Nova Scotia of a New Brunswick judgment on

the same jurisdictional basis. Similarly, the **Canadian Judgments Act** R.S.N.B. 2011, c. 123, provides for the enforcement of Nova Scotia judgment in the province of New Brunswick. This is a neutral factor.

(7) Whether the case is interprovincial or international in nature

[40] This case is interprovincial. The assumption of jurisdiction is more easily justified in interprovincial cases than in international ones.

(8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

[41] I am satisfied that the standards of jurisdiction, recognition and enforcement prevailing in Nova Scotia and in New Brunswick are comparable. This is a neutral factor.

[42] Having regard to the common-law factors, I am satisfied that there is a real and substantial connection of the facts of this matter with the province of Nova Scotia and no factors which would serve to undermine that conclusion.

Issue 3: *Is New Brunswick the more appropriate forum in which to hear this application?*

[43] Section 12 of the **CJPTA** requires that the court, having concluded that Nova Scotia has territorial competence to hear the matter, determine whether New Brunswick is a more convenient forum for the hearing of the application. In deciding this question, the court is required to 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 decisions in different courts;

(e) The enforcement of an eventual judgment; and

(f) The fair and efficient working of the Canadian legal system as a whole.

(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

[44] One might argue that Newfoundland and Labrador would be the obvious place to litigate the dispute given that the units in question were transported there, that is where the problems were identified and that is where repair took place. Of course, that is not practical as the documentary evidence and the witnesses that will be material to the litigation of this dispute are in other provinces. Costs and convenience to the parties of having the matter heard in Nova Scotia or New Brunswick are comparable.

[45] It is expected that some witnesses will be coming from other provinces. This will be a comparable cost in either jurisdiction. Cost of recommencing the proceeding, possibly with new counsel from New Brunswick will generate unnecessary additional costs, possibly delay and inconvenience. The factor favors Nova Scotia as the more convenient forum.

(b) The law to be applied to issues in the proceeding

[46] As previously noted, the law of Newfoundland and Labrador is to be applied under the terms of the contract. This factor is neutral to the question of forum as between New Brunswick and Nova Scotia.

(c) The desirability of avoiding multiplicity of legal proceedings; and

(d) The desirability of avoiding conflicting decisions in different courts

[47] There is no risk of a multiplicity of proceedings based on the evidence and submissions in this hearing. Nor is there a potential for conflicting decisions arising from different courts. These too are neutral factors.

(e) The enforcement of an eventual judgment

[48] As outlined above, both of Nova Scotia and New Brunswick have legislation that provides for the enforcement of each other's judgements. This is a neutral factor.

(f) The fair and efficient working of the Canadian legal system as a whole

[49] The fairness of the Canadian legal system is not put in issue by this motion. It will be more efficient to complete this matter in Nova Scotia as this court's resources have already been engaged in administering the claim. Further, a hearing

time has been scheduled in this province which permits the matter to be heard and resolved expeditiously.

[50] Having regard to the factors set out in section 12(2) and my findings, I conclude that New Brunswick is not the more appropriate forum in which to hear this proceeding.

Issue 4*: If the claim is to be adjudicated in Nova Scotia, then should the Application in Court be converted to an Action?*

[51] Hospitality Homes expressed concerns that to defend its claim would require the cooperation of witnesses over whom it has no control and cannot require affidavits from. Some of the witnesses are current or former employees of Dora. Counsel was of the view that an action would be the preferred course as these witnesses could be subpoenaed and subject to direct examination by Hospitality's counsel.

[52] The argument fails on two bases, both of which Hospitality agreed with during submissions.

[53] First, the motion is premature. There is no evidence that the proposed witnesses will not cooperate in preparation of affidavits. They have not been approached to cooperate and to suggest they will not is speculative.

[54] Second, there is a judicial discretion in **Rule 5.13(2)(i)** that gives a judge the authority to:

> …permit a witness to testify instead of swearing or affirming an affidavit and order disclosure of the witness' anticipated evidence, such as by ordering delivery of a will say statement, or order discovery of the witness

[55] This motion is dismissed while reserving the right for the parties to seek the court's intervention if there are difficulties in obtaining affidavits from material witnesses.

Conclusion

[56] For the reasons set out above, I have concluded:

(i) that there is a real and substantial connection giving Nova Scotia territorial competence over the claim;

(ii) New Brunswick is not the more convenient forum for adjudication of this claim; and
(iii) the motion to convert the application to an action is dismissed.

[57] I will hear the parties on costs if they are unable to agree.

Duncan J.