IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Penny v. Bouch*, 2008 NSSC 378

Date: 20081217
Docket: S.H. No. 291463
Registry: Halifax

Between:

Caiden Christopher Penny, an infant, by his Litigation Guardian Vicki Penny and **Vicki Penny**

-and-

Peter J. Bouch, **William R. Young**, **Jared Yeung**, **Richard Moffatt** and the **David Thompson Health Region**, a body corporate, carrying on business as the **Red Deer Regional Hospital Centre**

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: October 30, 2008 in Chambers at Halifax, Nova Scotia

Written Decision: December 17, 2008

Counsel: Counsel for the plaintiffs - Raymond Wagner
Counsel for the individual defendants - Daniel Campbell, Q.C.
Counsel for the corporate defendant - J. Mark Raven-Jackson

Wright, J.

INTRODUCTION

[1] This is an application by the defendant Hospital, supported by all four defendant physicians, for an order dismissing this action on the ground that the

Supreme Court of Nova Scotia lacks jurisdiction to hear it in the absence of a real and substantial connection with the subject matter of the case and the parties. Alternatively, the defendants seek an order staying this proceeding on the ground that Nova Scotia is not the most appropriate forum in which it ought to be tried.

[2] The action was commenced in the Supreme Court of Nova Scotia on January 31, 2008 by Vicki Penny, both in her capacity as litigation guardian for her infant son Caiden and in her own personal capacity as well. It is an action for damages for medical malpractice against the four physicians in Alberta who treated her during her pregnancy in 2004 and against the Alberta hospital in which Caiden was born on July 17, 2004. None of the defendants have attorned to the jurisdiction of this court by filing a Defence or otherwise. They maintain that Alberta is the proper forum for this litigation.

FACTS

[3] The facts underlying this application are not contentious. The plaintiff Vicki Penny was born and raised in the Province of Nova Scotia. She gave birth to her first child, Connor, here in Nova Scotia in March of 2001.

[4] After completing college, Ms. Penny moved to Alberta in July of 2003 to increase her chances of finding work. A few months later, she became pregnant with her second child, Caiden. This second pregnancy was obviously a difficult one requiring prenatal care which was provided at various times by the four defendant physicians. Ultimately, Ms. Penny underwent an emergency caesarean section in the defendant Hospital on July 17, 2004 upon being admitted earlier that day.

[5] It is common ground that at the time all of these medical services were provided, Ms. Penny was a resident of the Province of Alberta and as such, had the benefit of Alberta Health Care coverage. Similarly, her son Caiden was covered by Alberta Health Care benefits.

[6] During cross-examination on her affidavit filed in response to this application, Ms. Penny acknowledged that she knew shortly after Caiden's birth that he had significant medical issues. After a six day stay at the defendant Hospital, the infant Caiden was transferred to the Neonatal Intensive Care Unit at the Stollery Children's Hospital in Edmonton for further tests and treatment. Those tests disclosed a number of neurological deficits although the physicians at that point were not able to give a definitive prognosis of what might develop.

[7] At all events, after a three week stay at the Children's Hospital in Edmonton, Ms. Penny and her infant son moved directly back to Nova Scotia where the majority of her family still live and where she could have the benefit of their support as a single mother. They remained in Nova Scotia for almost a year during which Caiden underwent further testing and treatments through the IWK Hospital in Halifax. In July of 2005, just before his first birthday, Caiden was diagnosed by his pediatric neurologist, Dr. Ellen Wood, with Spastic Dysplasia Cerebral Palsy.

[8] Very shortly after that (on July 29, 2005), Ms. Penny moved to Saskatchewan with her fiancé and her two children. They took up residence there which lasted until October of 2007. By that time, Ms. Penny had parted

ways with her fiancé and moved with her two sons to Ontario to provide support for her sick sister. Ms. Penny and her two sons lived there temporarily from October of 2007 until June of 2008.

[9] It was during that period of Ontario residence that this action was commenced in the Supreme Court of Nova Scotia on January 31, 2008 and served on the defendants *ex juris*. On June 12, 2008, the defendant Hospital filed the present application seeking a dismissal of the action on jurisdictional grounds or alternatively, a stay on the ground that the Nova Scotia Supreme Court is not the most appropriate forum.

[10] Later in the month of June of this year, Ms. Penny and her two sons moved back to Nova Scotia on a permanent basis. Her reason for doing so was to have the assistance and support of her family in raising two small sons, one with a severe disability, as a single mother.

[11] Since returning to live in Nova Scotia, Ms. Penny has had her son assessed by the Cerebral Palsy Clinic at the IWK Hospital in Halifax and he was scheduled to undergo surgery on December 1st, followed by physiotherapy treatment. In all, Caiden has been seen by seven medical specialists in Halifax for testing and treatment of his condition thus far.

[12] As for Ms. Penny, she supplemented her affidavit evidence with testimony that she began work locally as a pizza cook on September 1st of this year on a full- time basis. The family is presently living in a former matrimonial home with the permission of Ms. Penny's former husband with the proviso that Ms. Penny pay all household operating expenses. Her stated intention is to stay in

Halifax for the indefinite future because she believes this to be in the best interests of her children.

ISSUES

[13] The issues to be determined on this application can be framed as follows:

(1) Is there a real and substantial connection between the subject matter of this lawsuit and the chosen forum such that this court has jurisdiction to hear the matter;
(2) If so, should this court exercise its discretion to decline jurisdiction in favour of Alberta, be it the more appropriate forum; and
(3) Does the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c.2 (the "Act"), which came into force on June 1, 2008, apply in the determination of these issues?

APPLICABILITY OF THE ACT

[14] Needless to say, the issue that must first be decided is whether the Act applies in this matter where it only came into force after the commencement of this proceeding.

[15] Briefly by way of background, the Act is modeled after the *Uniform Court Jurisdiction and Proceedings Transfer Act* published in 1994 by the Uniform Law Conference of Canada. One of the stated purposes of the *Uniform Act* is to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in **Morguard Investments Ltd. v. De Savoye** [1990] 3 S.C.R. 1077 and **Amchem Products Inc. v. British Columbia (Workers' Compensation Board)** [1993] 1 S.C.R. 897.

[16] Thus far, the Nova Scotia Act is one of three such statutes to have been enacted in Canada, the others being in Saskatchewan and British Columbia. The Saskatchewan Act expressly applies only to proceedings commenced after the coming into force of the statute. No such provision appears in either the Nova Scotia or British Columbia Acts. Whether our Act applies to actions commenced before it came into force therefore becomes a matter of statutory interpretation.

[17] While there are no decided cases in Nova Scotia as yet on this point, there are several to be found in British Columbia, both at the trial and appellate levels. One of the earlier cases is **Courcelles v. Rogers et al.**, 2006 BCSC 882 in which the court held that the Act is of immediate application and applies to the disposition of the matter notwithstanding the fact that it was enacted after the action was commenced. This conclusion has been repeatedly followed in other decisions by the British Columbia Supreme Court (see, for example **Tecnet Canada Inc. v. Unisys Canada Inc.**, 2006 BCSC 1321) and was cited with implicit approval by the British Columbia Court of Appeal in **MTU Maintenance Canada Ltd. v. Kuehne & Nagel International Ltd.**, 2007 BCCA 552.

[18] The British Columbia decisions appear to have been decided on the footing that their *Court Jurisdiction and Proceedings Transfer Act* is in the nature of a procedural statute, resulting in the application of the common-law presumption that procedural legislation is intended to have immediate application (citing *Sullivan on the Construction of Statutes* (5th ed. at p. 696).

[19] I adopt the reasoning of the British Columbia courts in similarly concluding that the Nova Scotia Act is substantially in the nature of a procedural statute having immediate application upon coming into force. I therefore find that the Act does apply in the determination of the present application although its outcome would be the same otherwise where the Act is largely a codification of common-law principles developed by the Supreme Court of Canada.

TERRITORIAL COMPETENCE (Jurisdiction Simpliciter)

[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.

[21] This two step analysis owes its origin and development to four seminal decisions by the Supreme Court of Canada between 1990 and 1994, namely, the **Morguard** and **Amchem** decisions above mentioned, along with **Hunt v. T&N plc**, [1993] 4 S.C.R. 289 and **Tolofson v. Jensen**, [1994] 3 S.C.R. 1022. A summary of this historical development is concisely set out in **Muscutt v. Courcelles** (2002), 60 O.R. (3rd) 20 (C.A.) at paras. 12-17 which, for sake of brevity, I will simply incorporate by reference in this decision.

[22] In the adoption of this two step analysis, the Act incorporates two changes in terminology from its common-law language. The Act now uses the term "territorial competence" in place of jurisdiction *simpliciter* and speaks in terms of declining to exercise its territorial competence in place of the latin term *forum non conveniens*.

[23] "Territorial competence" is a defined term in the Act. It 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".

[24] Section 4 of the Act then goes on to enumerate five bases upon which territorial competence can be established. It reads as follows:

> **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;
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> (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.

[25] Since none of the defendants have any residence or presence in Nova Scotia and have neither submitted nor agreed to any assumed jurisdiction in the Province of Nova Scotia, this court has jurisdiction to try this action only if the real and substantial connection test is met. If this test can be met, the court must go on to consider the discretionary doctrine of *forum non conveniens* under its new nomenclature of declining territorial competence.

[26] Section 11 of the Act then enumerates 12 different circumstances in which a real and substantial connection between this province and the facts on which a proceeding is based is presumed to exist. The case at bar does not fall within the description of any of these presumptive circumstances. However, Section 11 expressly provides that the enumerated circumstances are set out without limiting the right of the plaintiff to prove other circumstances that establish the requisite connection. That leads me back to a consideration of the factors or circumstances which the courts at common-law have taken into account in deciding cases involving assumed jurisdiction.

[27] I should interject here that counsel for the defendant physicians has argued that the Act ought to be interpreted as narrowing the real and substantial connection analysis to one between this province and the facts on which the proceeding is based (given the language of Section 4(e) and 11, and the statutory definition of "territorial competence"). By comparison, the common-law description of the real and substantial connection test as developed by the Supreme Court of Canada is nicely summarized by Justice Sharpe of the Ontario Court of Appeal in **Muscutt** (at paras. 36-37):

> [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:
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> 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.
>
> 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".

[28] Given the undefined nature of the real and substantial connection test, and the need for flexibility in its application, I conclude that it was not the intent of the Nova Scotia Legislature to narrow the parameters of the real and substantial connection test as developed by the Supreme Court of Canada. In my view, the common-law treatment of this test was not intended to be changed by the language of the Act. I am reinforced in this conclusion by the fact that our Act is modeled after the *Uniform Act*, one of whose stated purposes is to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in **Morguard** and **Amchem**.

[29] One further principle enunciated in **Morguard** which should be noted is that the real and substantial connection test requires only *a* real and substantial connection, and not *the most* real and substantial connection. In the result, it is often the case that there is more than one forum capable of assuming jurisdiction and it becomes necessary to determine where the action should be litigated. Indeed, the residual discretion to decline jurisdiction where the real and substantial connection test is met assumes that the forum in question is not the only one that has jurisdiction over the case.

[30] The Nova Scotia Court of Appeal has had occasion to consider the application of the real and substantial connection test in two relatively recent cases, namely, **Oakley v. Barry** [1998] N.S.J. No. 122 and **O'Brien v. Canada (Attorney General)** [2002] N.S.J. No. 57. In the former case, Justice Pugsley held that the principles set out in **Morguard** should be applied flexibly, with the question of fairness in assuming jurisdiction to be considered from the point of view of all parties to the proceeding. This point was elaborated upon in **O'Brien** where Justice Hallett stated (at para. 20):

> The concept of order and fairness is integral to the question of determining whether there is a real and substantial connection between the cause of action and the forum province. This court has held in **Oakley** that it is not inappropriate for a court to consider as a component of the test, the fairness to the parties in determining if there is a real and substantial connection between the cause of action and the forum province that warrants a finding that the court has jurisdiction *simpliciter*.

[31] When speaking of order and fairness to the parties, it should be added

here that those considerations are not exhausted at the stage of assumed jurisdiction. Rather, they arise again in the application of the court's residual discretion to decline jurisdiction. As noted by Justice Sharpe in **Muscutt** (at para. 44), "The residual discretion therefore provides both a significant control on assumed jurisdiction and a rationale for lowering the threshold required for the real and substantial connection test".

[32] Against this backdrop of general principles, Justice Sharpe in **Muscutt** went on to outline a number of factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in the home forum as a result of a tort committed elsewhere. He made it clear, however, that no one factor is determinative; rather, all relevant factors should be considered and weighed together. He also noted (at para. 75) that, "A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important".

[33] Before examining the eight factors identified in **Muscutt** to be considered, I interject that had this application been heard as matters stood when it was filed, the plaintiff would have been unable to meet the real and substantial connection test. However, a number of factual developments have occurred since that time, as recited earlier in this decision, and they must now be taken into account in the consideration and weighing of the various factors identified in **Muscutt**. My consideration of each of these factors in this case follows.

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

[34] It should first be acknowledged that there is a strong connection between the subject matter of this proceeding and the Province of Alberta, where all the parties were resident in Alberta when the impugned medical services were provided and where the alleged tort was completed in that jurisdiction. It follows that most of the key witnesses on liability are located in Alberta, as are some other witnesses who can speak to damages since the initial follow-up diagnosis and treatment also took place in Alberta.

[35] On the other hand, the plaintiff with her two young sons has now returned to her native Nova Scotia to take up residence here for the indefinite future. I accept her evidence that the reason for her doing so was for the benefit of the significant support and assistance which are provided to her and her sons by family members, and not simply for purposes of defeating this application. At the same time, I recognize that mere residence in the home forum does not constitute a sufficient basis in and of itself for assuming jurisdiction.

[36] More importantly, however, since the return of the plaintiffs last June to reside in Nova Scotia, the damage suffered by them has become sited in this province and will continue to be indefinitely, especially in the case of the infant plaintiff who has a severe and permanent disability. Caiden also received extensive medical treatment in Nova Scotia during the first year of his life (save for the first month in Alberta) which has been resumed over the past few months as recited earlier. The suffering of damage in Nova Scotia, and the extensive medical attention that he has received and will continue to receive in Nova Scotia indefinitely, represents a significant connection with this province, as was the finding of the courts in similar situations in both **Oakley** and **Muscutt**.

[37] It should also be reiterated that it was here in Nova Scotia in July of 2005 when the infant plaintiff was first specifically diagnosed with Spastic Dysplasia Cerebral Palsy at the IWK Hospital, notwithstanding that certain neurological deficits were known to exist from the time of his birth.

[38] It is also to be noted that practically all of the plaintiffs' witnesses, be they health providers or family members, also reside in Nova Scotia. Although there will be some witnesses from Alberta who will speak to the issue of damages from the plaintiffs' initial care, it is fair to say that most of the witnesses who will be essential to prove the damages claim reside here in Nova Scotia. As noted earlier, Caiden has now been treated by seven medical specialists in his ongoing care here in Nova Scotia. Their testimony will be instrumental in respect of Caiden's medical condition, his care requirements and future prospects.

[39] It is fair to say that these factual developments over the past few months have created a significant connection between this action and Nova Scotia.

(2) The connection between the forum and the defendants.

[40] There is no connection between Nova Scotia and any of the defendants. As noted in **Muscutt** (at para. 74), however, while the defendants' contact with the jurisdiction is an important factor, it is not a necessary factor.

(3) Unfairness to the defendants in assuming jurisdiction.

[41] As frequently noted in the leading cases, the assumption of jurisdiction is ultimately guided by the requirements of order and fairness.

[42] Here, there is no connection between Nova Scotia and any of the defendants, nor can it be said that it was reasonably foreseeable that their conduct would result in harm suffered in Nova Scotia. Moreover, the litigation of this case in Nova Scotia will undoubtedly involve a significant disruption to the professional practices of various physicians, nurses and other hospital employees who may be called to testify. By extension, the provision of medical services to their array of patients will be disrupted as well. All of this is attested to in the various affidavits filed on behalf of each of the defendants.

[43] Counsel for the plaintiffs insists that this disruption can be minimized, considering his anticipation that pre-trial discovery examinations of all Alberta witnesses will be held in their place of residence, and no one from Alberta would be likely to attend the trial in Nova Scotia for lengthy periods of time. Even so, considerable disruption is inevitable and this factor obviously weighs in favour of the defendants.

(4) Unfairness to the plaintiffs in not assuming jurisdiction.

[44] The principles of order and fairness must, of course, be considered in relation to the plaintiffs as well as the defendants.

[45] The plaintiff Vicki Penny is now in a situation where she has returned to her native Nova Scotia with her two sons and intends to reside here for the indefinite future. She has now obtained full-time employment, albeit at a very modest income level. The damage suffered as a result of the alleged tort, especially in respect of the infant plaintiff Caiden, is sited in this province for

which he has received over the past few months, and will continue to receive indefinitely, extensive medical attention under Nova Scotia Health Care.

[46] Ms. Penny's predicament, to which she has attested in her affidavit and in cross-examination, is that she is financially incapable of proceeding with this action in any place other than Nova Scotia. She has no assets and only limited resources at her disposal.

[47] Moreover, her son's medical disability is such that he requires constant care and attention and she feels that she would be unable to leave him to travel to Alberta for extended periods of time. At the same time, Caiden's condition makes his own mobility difficult and it is unlikely that he could accompany his mother if this litigation were moved to Alberta.

[48] As to the costs of litigation, Ms. Penny has retained the services of the Wagner firm on a contingency fee basis and she is worried that she would not be able to find an equally competent lawyer in Alberta who would agree to represent her on such a contingency basis. Also, she cannot afford to pay the travel costs of the several Nova Scotia witnesses who would have to travel to Alberta to testify.

[49] As a single mother, Ms. Penny has no spousal assistance to lean on but rather relies on the support and assistance of her family members.

[50] Given the marginal financial resources at her disposal, and the personal care requirements and immobility of her son Caiden, this becomes an access to justice issue for the plaintiffs. The submission of their counsel was that if this

case were to be moved to Alberta, the personal hardships of the plaintiffs may well be such that they are not able to proceed with the litigation at all.

[51] This factor obviously weighs significantly in favour of the plaintiffs.

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

[52] In this case, there is no involvement of any other parties that could create the risk of multiplicity of proceedings or the risk of inconsistent results therefrom. Counsel for the plaintiffs has also informed the court that no other legal proceedings have been commenced in Alberta, nor are they otherwise being contemplated as matters presently stand.

[53] This factor is therefore neutral on the question of jurisdiction.

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

[54] This factor is also neutral where it appears that Alberta and Nova Scotia would both recognize an extra-provincial judgment from the other on the same jurisdictional basis.

(7) Whether the case is inter-Provincial or international in nature.

[55] The assumption of jurisdiction is more easily justified in inter-provincial cases than in international ones. This factor thus favours assumed jurisdiction by Nova Scotia, although it is of relatively minor weight.

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

[56] As this is an inter-provincial issue, this factor is not applicable.

Conclusion on Territorial Competence

[57] As observed earlier, it is often the result that there is more than one forum capable of assuming jurisdiction. I conclude that this is one of those cases. After all of the foregoing factors are fairly weighed, guided as they are by the principles of order and fairness, I am satisfied that there is a real and substantial connection between this forum and the subject matter of the action and the parties. Of significant weight in this analysis is the connection between the forum and the plaintiffs' claim and the unfairness to the plaintiffs in not assuming jurisdiction.

DECLINING JURISDICTION (*forum non conveniens*)

[58] The second step of this legal analysis is now embodied in section 12(1) of the Act which reads as follows:

> (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.

[59] The Act then goes on in subparagraph (2) to set out a non-exhaustive list of circumstances then to be considered. It reads as follows:

(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.

[60] Section 12 of the Act is essentially a codification of common-law principles developed by the Supreme Court of Canada, notably in **Amchem**, and in subsequent appellate decisions across the country. It is readily apparent that the list of factors in subparagraph (2) closely resembles the list of common-law factors enumerated in the frequently quoted decision in **Muscutt** (at para. 41). In addition, the use of the phrase "the ends of justice" along with the wording of subparagraph (2)(f) reflect that the application of the declining jurisdiction test is also to be guided by the principles of order and fairness.

[61] In **Amchem**, the Supreme Court of Canada held that the test for ousting a claim on the basis of the *forum non conveniens* doctrine is whether there is another forum that is clearly more appropriate than the forum selected by the plaintiff for the adjudication of the dispute. Accordingly, in a situation where there is no one forum that is clearly the most appropriate, the domestic forum wins out by default and a stay is refused.

[62] The burden of proof is not on the plaintiffs to show that Nova Scotia is the most appropriate forum. Rather, the burden is on the defendants, not just to show that Nova Scotia is not the natural or appropriate forum for the trial, but to establish that Alberta is a clearly or distinctly more appropriate forum than

Nova Scotia.

[63] In my view, the foregoing common-law principles remain unaltered by the passage of the Act. Again, this conclusion is supported by the fact that the Act is modeled after the *Uniform Act*, one of whose stated purposes is to bring Canadian jurisdictional rules into line with the principles laid down in **Morguard** and **Amchem**.

[64] I turn now to the factors to be considered in the exercise of the court's discretion whether to decline to exercise its territorial competence. It is readily apparent that there is significant overlap between the factors to be considered under the declining jurisdiction test and the factors earlier considered under the real and substantial connection test. A notable difference, however, is that under the latter test, it is only necessary to show *a* real and substantial connection, and not *the most* real and substantial connection. In this second step of the analysis, the task is to determine which jurisdiction has the closest connection with the action and the parties.

[65] Of the six factors enumerated in section 12(2) of the Act, it can be readily affirmed that subparagraphs (c),(d) and (e) do not come into play in this case for the reasons mentioned in the first step of the analysis. Neither is subparagraph (b) ("the law to be applied to issues in the proceeding") a factor of any significance in this case. Clearly, the law of Alberta applies regardless of which forum is chosen. However, it is safe to say that there is not likely to be any material difference in the law as between Alberta and Nova Scotia, whether in relation to the standard of care to be met by physicians in treating their patients or the assessment of damages. If any such differences should exist, they can be

addressed by expert evidence in the usual way.

[66] The analysis therefore centres upon a consideration of (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses between the competing fora and (f) the fair and efficient working of the Canadian legal system as a whole. These factors are to be applied, of course, with the guidance of the principles of order and fairness.

[67] The following, in summary form, are the circumstances relied on by the defendants that favour an adjudication of this case in Alberta:

1) The alleged tort was completed in Alberta and any resulting liability arises there.

2) The majority of the parties and witnesses in this case reside in Alberta. This extends to all witnesses on the issue of liability (with the possible exception of experts) and includes all four defendant physicians and the nurses and other hospital staff of the corporate defendant. In addition, there will be some witnesses from Alberta who will speak to damages from the initial treatment and care of the infant plaintiff between the defendant hospital and the Stollery Children's Hospital over the first month of his life.

3) The defendant physicians, nurses and other hospital staff will be heavily inconvenienced if they have to travel to Nova Scotia for the trial of this action. By extension, the medical services they provide to their array of patients will be disrupted as well.

4) All the medical records are located in Alberta.

5) There is no juridical advantage in Nova Scotia to be lost by the choice of Alberta as the more appropriate forum.

6) It would be unfair to the defendants, having no connection with the Province of Nova Scotia whatsoever, to be forced to defend this proceeding in this

province over the provision of medical services that took place entirely in Alberta and without any reasonable foreseeability that their conduct would result in harm being suffered in this jurisdiction.

[68] The following, in summary form, are the circumstances relied on by the plaintiffs that favour an adjudication of this case in Nova Scotia:

1) The plaintiff Vicki Penny is a native Nova Scotian who has returned with her two young sons to live in this province for the indefinite future. The infant plaintiff Caiden spent only the first month of his life in the Province of Alberta while in hospital.

2) Although the key witnesses on liability reside in Alberta (save experts who may come from elsewhere), the key witnesses on damages reside in Nova Scotia. These include the extensive array of medical specialists who have been treating Caiden since his return to Nova Scotia and who will continue to do so indefinitely, given the severity of his disability. It also includes family members and friends who reside in Nova Scotia who will speak to damages as well.

3) The defendants have retained experienced Nova Scotia counsel under a contingency fee agreement, without being burdened by financial concerns as to how to pay for their legal representation. Given their situation of personal hardship, including impecuniosity and the immobility of the infant son Caiden because of his severe disability, having this case tried in Alberta would create an undue burden on them to the point that they may be unable to continue with the litigation were it to be removed to Alberta where they have no support.

4) Although the defendants would undoubtedly be inconvenienced by having to come to Nova Scotia, they are not burdened by the personal hardships and financial constraints weighing upon the plaintiffs.

5) In light of these circumstances, and the extent to which they bear upon her access to justice, the plaintiff should not be deprived of her selection of the home forum for the adjudication of this case.

[69] These competing factors as summarized stack up quite closely against

each other, in my view, and leave the court with a close call to make. However, I am persuaded by the decision of the Nova Scotia Court of Appeal in **Dennis v. Salvation Army Grace General Hospital Board** [1997] N.S.J. No. 19, which indeed I am bound by, that this court ought to exercise its discretion in favour of Nova Scotia as at least an equally appropriate forum as Alberta.

[70] The facts in **Dennis**, briefly summarized, are that the plaintiffs moved from Nova Scotia to Labrador in 1990. About three years later, they had a son, born in St. John's, who suffered irreversible and profound damage to his brain and central nervous system as a consequence of the birth. About a month later, the family returned to live in Nova Scotia where they continued to reside until the commencement of their action for medical malpractice in 1995.

[71] At paragraphs 32-40 of that decision, the Court of Appeal set out the various factors put forth by both parties in support of their respective positions. Those competing factors, upon examination, are strikingly similar to the list of factors advanced by the plaintiffs and the defendants respectively in this case as summarized above.

[72] Counsel for the defendant physicians has attempted to distinguish **Dennis** from the present case on the factual distinctions that the Dennis family was in the process of moving to Nova Scotia at the time of their child's birth, and in fact were residing here at the time the action was commenced. In my view, those factual distinctions are not material enough to permit a different outcome from being reached in this case, based on the current circumstances of the plaintiffs.

[73] In going on to read the Court of Appeal's analysis in weighing the competing factors in **Dennis** (at paras. 42-44), I am guided to the conclusion that likewise here, it cannot be said that the defendants have established that Alberta is clearly a more appropriate jurisdiction to try this action, so as to deprive the plaintiffs of the benefit of an appropriate jurisdiction which they have selected. The best that can be said, as in **Dennis**, is that the factors which favour trial in Alberta, when weighed against the factors which favour trial in Nova Scotia, show that there is no one jurisdiction which is clearly more appropriate than the other for the trial of this action.

[74] Since the selected forum wins out by default in that situation, according to **Amchem**, the defendants' application must fail, thereby enabling the plaintiffs to proceed with their action in this Court.

COSTS

[75] The plaintiffs shall be entitled to their costs of this application to be determined in accordance with Tariff C under section 63 of the Civil Procedure Rules. If the parties are unable to agree on the amount of costs, written submissions can be directed to my attention within the next 30 days for a decision.

J.