SUPREME COURT OF NOVA SCOTIA

Citation: *Ucore Rare Metals Inc. v. IBC Advanced Technologies, Inc.*, 2019 NSSC 132

Date: 20190423
Docket: Hfx No. 483216
Registry: Halifax

Between:

Ucore Rare Metals Inc., a body corporate

Plaintiff/Respondent

v.

IBC Advanced Technologies, Inc., a body corporate, and Steven R. Izatt

Defendants/Applicants

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	April 23, 2019, in Halifax, Nova Scotia
Oral Decision:	April 23, 2019
Written Decision:	April 26, 2019
Counsel:	Michelle C. Awad, Q.C. and Jeff Aucoin, for the Applicants/ Defendants Caitlin Regan-Cottreau and Stewart Hayne, for the Respondent/ Plaintiff

By the Court (Orally):

INTRODUCTION

[1] By Notice of Motion filed April 8, 2019 the Defendants, IBC Advanced Technologies, Inc. and Steven R. Izatt (IBC and Izatt) bring the within Motion:

> seeking an Order dismissing or permanently staying the Amended Claims in the Applicant's Amended Notice of Application in Court filed on April 2, 2019, on the following bases:
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> i. The Supreme Court of Nova Scotia does not have the jurisdiction to hear this Application; or
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> ii. In the alternative, the Supreme Court of Nova Scotia is *forum non conveniens*.

[2] The moving parties rely on *Civil Procedure Rules* 5.14 and 4.07, depending on whether the conversion of the proceedings granted orally on April 1, 2019 has occurred. As was confirmed today by virtue of an April 18, 2019 Order, the matter has been converted from an Application in Court to an Action; accordingly, this Motion is pursuant to Rule 4.07. As well, the *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c. 2 and the common law dealing with jurisdiction and *forum non conveniens* govern this Motion.

[3] In terms of evidence, IBC and Izatt rely on the affidavit of Mr. Izatt filed April 8 and his reply affidavit filed April 18, 2019.

[4] The responding party is the Plaintiff in the Action, Ucore Rare Metals Inc. (Ucore). Ucore asks that the Motion be dismissed with costs and that a deadline be set for the filing of the IBC and Izatt Defence.

[5] In terms of evidence, Ucore relies on the affidavits of Lindsey Odell, Derek Kostal and Peter Manuel filed April 16, 2019.

[6] The parties rely on their filed affidavits, briefs, books of authorities and, in the case of IBC and Izatt, a proposed form of Order. There is no objection to any of the paragraphs or exhibits to the affidavits; thus they are in by consent. On April 18, the parties confirmed there would be no cross-examination of the affiants. In the result, today the Court heard oral argument, only.

POSITION OF THE PARTIES

IBC and Izatt

[7] IBC and Izatt submit that Ucore cannot demonstrate that the Supreme Court of Nova Scotia has jurisdiction over the claims in its amended pleading filed April 2, 2019. They say there has been no attornment. They argue there is a lack of territorial competence and a lack of a real and substantial connection between Nova Scotia and the facts giving rise to the claims.

[8] Alternatively, IBC and Izatt say that even if it is found that this Court has jurisdiction over the proceedings, it should decline to exercise its jurisdiction as Utah is clearly a more appropriate forum in which to litigate Ucore's claims regarding an Option Agreement between Ucore and IBC with an effective date of March 16, 2019 (Option Agreement).

[9] In the result, IBC and Izatt's proposed Order involves dismissing the claims advanced in the amended pleadings. They are also open to having the claims permanently stayed. Alternatively, IBC and Izatt request that the Court decline to exercise its jurisdiction, given their position that Nova Scotia is *forum non conveniens* and issue an Order dismissing or permanently staying the claims. Finally, they ask for costs pursuant to the scale on this Motion.

Ucore

[10] By way of response, Ucore points out that the amended pleading seeks both damages arising from a libel and a declaration that the Option Agreement is valid and enforceable and therefore asks for specific enforcement on the Option Agreement.

[11] Ucore asserts that the Supreme Court of Nova Scotia has jurisdiction because its claims have a real and substantial connection to Nova Scotia. They add that Nova Scotia was selected by Ucore, that it is the most convenient forum and the first forum in which legal proceedings were commenced to deal with the parties' issues.

[12] In any event, Ucore says that IBC and Izatt have given up their right to challenge the jurisdiction of the Supreme Court of Nova Scotia and have lost their ability to invoke the doctrine of *forum non conveniens*, as IBC and Izatt have attorned. In the result, Ucore asks for a dismissal with costs and for a deadline to be set for IBC and Izatt to file their Defence.

DISCUSSION, ANALYSIS AND DISPOSITION

[13] With respect to the procedural history of this matter, I am satisfied that paras. 5 through 37 of Ms. Odell's affidavit are accurate. I say this having compared it with the actual Court file which discloses these additional steps:

1. IBC and Izatt were served with the Nova Scotia Notice of Application on December 13, 2018;
2. Matthew Moir was removed as counsel for IBC and Izatt by Order of March 20, 2019; and
3. On March 25, 2019 IBC and Izatt filed a Notice of New Counsel.

[14] March 25, 2019 also marks the first time that IBC and Izatt raised the jurisdictional issue as Ms. Awad stated in her letter addressed to Justice Arnold as follows:

> 1. … Further, the Respondents intend to challenge the Court's jurisdiction to deal with new claims raised by the Applicant in the amended pleading.
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> …
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> 3. The Respondents have reviewed the Applicant's proposed amended Notice of Application in Court and say that the Supreme Court of Nova Scotia does not have jurisdiction over the new claims raised. Alternatively and if the Court has jurisdiction, the Respondents say that Nova Scotia is a *forum non conveniens* for the Applicant's new claims in the Amended Notice of Application in Court. That issue needs to be determined and if the Respondents' position is accepted, that will likely impact the next steps in the proceeding. Moreover, if the Applicant agrees with the Respondents' view that the Applicant's defamation claims must proceed by way of action, the next step will be for the Applicant to review and likely re-file its claims. The jurisdiction and *forum non conveniens* issues will need to be considered in the context of the Applicant's elected next steps.

[15] In the result, the issue was raised for the first time over three months after the lawsuit was initially commenced in Nova Scotia. The critical question that must be addressed is whether IBC and Izatt took actions over the course of the period slightly in excess of three months which amount to attornment?

[16] Prior to the Notice of New Counsel being filed on March 25, 2019, Mr. Moir represented IBC and Izatt up until the Order of March 20th. I have carefully reviewed the affidavits and Court file so as to determine what he did on behalf of his clients and note as follows:

> (a) Appeared at the January 15, 2019 Motion for Directions and consented to deadlines for filing its Notice of Contest and Respondents' Claim;

(b) Secured the Consent Order from Uncore extending those filing deadlines, on the basis that its anticipated Respondents' Claim was complex and required lengthy and careful review in order to appropriately draft the pleadings;

(c) Advised Ucore that "the claims in the Notice of Respondents' Claim are significantly expanded from the Utah Pleading", with counsel agreeing to provide an advanced outline of those claims as soon as he was able;

(d) Consented to an interim injunction, enjoining it from advancing its purported termination of the Option Agreement;

(e) Twice indicated that it did not oppose Ucore's amended claims – the first time, notably, after having reviewed those claims but weeks before raising any jurisdictional challenge;

(f) Sought to convert the format of the proceedings from an Application to an Action – both publicly, and in communication with Ucore and the Court.

[17] All the while, at no time did Mr. Moir advise that he was raising the jurisdiction issue. When I consider the totality of these steps, it is clear to me that IBC and Izatt were doing much more than setting the stage for this Motion today. Accordingly, I am of the view that *Fraser v. 4358376 Canada Inc.*, 2014 ONCA 553, and *SRU Biosystems, Inc. v. Hobbs*, 2006 CanLII 7525 (ON SC), are distinguishable as they dealt with "procedural steps brought within in the confines of a jurisdiction motion" under the Ontario *Civil Procedure Rules*. Indeed, I find *Kinch v. Pyle*, (2004) 8 CPC (6^{tth}) (Ont Sup Ct. J), and *Wolfe v. Wyeth*, 2011 ONCA 347, to be more analogous to this case and refer to *Wolfe* and the Ontario Court of Appeal's words at para. 44:

> **[W]hen a party to an action appears in court and goes beyond challenging the jurisdiction of the court** based on jurisdiction simpliciter and *forum non conveniens*, **the party will be regarded as appearing voluntarily, thus giving the court consent-based jurisdiction**. That is what happened here.
>
> [emphasis added]

[18] In this regard I agree with Ucore that IBC and Izatt have taken numerous steps and appeared before the Court on several occasions seeking to avail themselves of the Supreme Court of Nova Scotia's processes.

[19] From the Motion materials filed by the moving parties, it is clear they do not contest Nova Scotia's jurisdiction over the original claims filed late last year. For this reason, were I to grant their requested Order, the result would be a lawsuit here and two others in Utah. A multiplicity of proceedings would hardly be an economical and/or efficient use of the Courts' time, to say nothing of the parties. I am mindful of *Banro Corp. v. Éditions Écosociété Inc*, 2012 SCC 18, *Check Group*

Canada Inc. v. Icer Canada Corporation, 2010 NSSC 463, and *Han v. Cho*, 2006 BCSC 1623, and adopt their reasoning on this point.

[20] In any case, I am of the view that the facts underlying the original and amended claims are essentially the same or an extension of one to the other and it makes sense to have them heard in one proceeding.

[21] Having considered this matter in its entirety, I am of the view that IBC and Izatt lost their ability to challenge this Court as the most convenient forum once they attorned to this jurisdiction. They did this through the actions of their former lawyer, Mr. Moir, inclusive of his March 13, 2019 letter, his other correspondence and attendances in this Court which bind his then clients, the Defendants. In this respect I am mindful of the reasoning in *O'Brien v. Simard*, 2006 BCCA 410, as recently endorsed in *Nordmark v. Frykman*, 2018 BCSC 2219.

[22] I would add that even if I am wrong in the above determination, based on all of the evidence I am of the view that Nova Scotia is the most convenient forum. In this regard, I accept the factors for consideration are as set out in s. 12 of the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*).

[23] I also refer to *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, and the Supreme Court of Canada's decision, especially at paras. 101 – 104 and 109:

> (9) Doctrine of *Forum Non Conveniens* and the Exercise of Jurisdiction
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> 101 As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.
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> 102 Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.
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> 103 If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative

> forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.
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> 104 This Court reviewed and structured the method of application of the doctrine of *forum non conveniens* in *Amchem*. It built on the existing jurisprudence, and in particular on the judgment of the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd*., [1987] 1 A.C. 460. The doctrine tempers the consequences of a strict application of the rules governing the assumption of jurisdiction. As those rules are, at their core, based on establishing the existence of objective factual connections, their use by the courts might give rise to concerns about their potential rigidity and lack of consideration for the actual circumstances of the parties. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court can stay proceedings brought before it on the basis of the doctrine.
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> …
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> 109 The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

[24] When I examine the comparative convenience I must start by observing that IBC is operated out of Utah and that Ucore has a real and substantial connection to Nova Scotia. In this latter regard the evidence discloses, among other things as follows:

> (1) Ucore's contractual obligations under the Option Agreement have occurred and will occur substantially in Nova Scotia, pursuant to s. 11(e) of the *CJPTA*;

(2) A tort (defamation) actually occurred in Nova Scotia, pursuant to s. 11(g) of the *CJPTA*; and

(3) Ucore carries on business in Nova Scotia, pursuant to s. 11(h) of the *CJPTA*.

[25] Further, I accept the Peter Manuel affidavit evidence which establishes:

(a) All of the day-to-day business of Ucore is either conducted at, or directed from, the Bedford head office.

(b) In addition to directing its business out of Bedford, all of the key individuals involved in Ucore's business, except two, reside in the Halifax, Nova Scotia area.

(c) All of Ucore's corporate records are located in Nova Scotia.

(d) Ucore's primary bank accounts are in Nova Scotia.

(e) Ucore's primary securities regulator is the Nova Scotia Securities Commission.

[26] I would add that Mr. Izatt's reply affidavit attaches press releases from Ucore which confirm the Nova Scotia connection, as it is Halifax where the press releases are issued from and Mr. Jim MacKenzie is named as the contact with a '902' phone number.

[27] It is an indisputable fact that Ucore struck first by commencing this lawsuit in Nova Scotia approximately three weeks before IBC and Izatt did so in Utah. While I have no doubt that Utah is the preferred jurisdiction for the Defendants, I am confident that accommodations can be made within the Nova Scotia *Civil Procedure Rules* to ameliorate the inconveniences.

[28] In all of the circumstances, I am of the view that the Supreme Court of Nova Scotia has jurisdiction and that IBC and Izatt, by their actions within the Nova Scotia Court process up until now, have attorned. I would ask that the successful party prepare an Order to this effect, and set a deadline for the filing of a Defence on or before May 17, 2019. As for costs, they shall be payable forthwith in any event of the cause by the Defendants to the successful party, the Plaintiff, in the amount of $2,000.00.

Chipman, J.