SUPREME COURT OF NOVA SCOTIA

Citation: *Devlin v. Haddad*, 2022 NSSC 355

Date: 20221220
Docket: Hfx No. 499138
Registry: Halifax

Between:

Michael Devlin and The John Howard Society of Canada

Plaintiffs

v.

Dr. Camille Haddad, Attorney General of Canada for Correctional Services Canada, The College of Physicians and Surgeons of New Brunswick

Defendants

DECISION

Judge: The Honourable Justice Peter P. Rosinski

Heard: October 24, 2022 in Halifax, Nova Scotia

Counsel: Lisa Teryl and Daniel Wilband, for the Plaintiffs
Rémy M. Boudreau, for the Defendant Dr. Camille Haddad
Kelly Peck and Gwendoline MacIsaac, for the Defendant Attorney General of Canada
John P. Barry, K.C. and Robynn MacDonald, for the Defendant The College of Physicians and Surgeons

By the Court:

I - Introduction

[1] At all material times relevant hereto Mr. Devlin has been incarcerated in a federal penitentiary in Canada.

[2] In conjunction with his co-plaintiff, the John Howard Society of Canada, Mr. Devlin has filed an amended statement of claim against the defendants.[1]

[3] I have the following motions before me:

1. the Attorney General of Canada ["ACG"] for the Correctional Service of Canada ["CSC"] seeks an order striking the amended statement of claim on the basis that the court does not have jurisdiction over the tort claim made against Canada as a result of subsection 21(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50 ["*CLPA*"][2]; or in the alternative, that the proceeding be stayed only until such time as the plaintiffs apply to lift the stay for the sole purpose of transferring the proceeding to the New Brunswick Court of King's Bench; and seeks costs;
2. Dr. Haddad seeks an order staying the proceeding on the basis that this court does not have territorial competence, pursuant to Part I of the *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 c. 2 ["*CJPTA*"]; in the alternative that the court refuse to exercise its territorial jurisdiction pursuant to section 12 of the *CJPTA* on the basis that the province of New Brunswick is the more appropriate forum; requesting that the New Brunswick Court of King's Bench accept the transfer of the proceeding pursuant to Part II of the *CJPTA*;

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[1] He also provided his Answer to the Demand for particulars from the College on January 14, 2022. The College filed a Notice of Defence on February 22, 2022. The College did not dispute the jurisdiction of this court in its Notice of defence, therefore the College has attorned to this court's jurisdiction and accepted that its territorial competence has been proven - See *Civil Procedure Rule* 4.07 ["*CPR*"] and *Wamboldt Estate v. Wamboldt*, 2017 NSSC 288, per Lynch, J. at paras. 8-18. Nevertheless, the College is still entitled to argue that Nova Scotia is not the *forum conveniens*.

[2] As in the AGC's brief at para. 36: "The Applicant requests an order striking Mr. Devlin's claim as against Canada, without leave to amend, and dismissing the action, with costs."

and costs – in the alternative, allowing a reasonable time to file a defence;

3. the College of Physicians and Surgeons of New Brunswick, [“the College”] seeks an order identical to that of Dr. Haddad.

[4] In relation to these three motions, I conclude as follows:

1. I decline CSC’s motion to strike the amended statement of claim, insofar as Mr. Devlin and John Howard’s claim are concerned, but will conditionally stay the proceeding against CSC until the Court of King’s Bench of New Brunswick accepts a request from this Court to transfer the proceedings;
2. I grant Dr. Haddad’s motion to conditionally stay the proceedings as against Dr. Haddad pursuant to Part I of the CJPTA until the Court of King’s Bench of New Brunswick accepts a request from this Court to transfer the proceedings; and
3. (because it has submitted to the territorial jurisdiction of Nova Scotia) I grant the College’s motion to have this Court decline jurisdiction pursuant to s. 12 CJPTA, and conditionally stay the proceeding against the College until the Court of King’s Bench of New Brunswick accepts a request from this Court to transfer the proceedings.

II - Background

i) The pleadings

[5] Let me briefly state the nature of Mr. Devlin’s claims.

[6] They are very specific on the one hand:

1. in relation to the alleged negligent treatment he personally received from Dr. Camille Haddad at the Atlantic Institution in Renous, New Brunswick, (also as a result of CSC’s institutional nonmedical negligence and Charter violations – see paragraphs 6, 63, 66 and 78 of the amended statement of claim) and alleged bad faith by the College in their oversight of Dr. Haddad;

yet much more expansive on the other hand in relation to his and John Howard’s claims that:

2. s. 2 of *Canada Health Act*, RSC 1985, c. C-6 ["*CHA*"] is *ultra vires* the federal government's authority as it is contrary to the constitutional division of powers between the federal government and provincial/territorial governments (in that it purports to exclude federally incarcerated inmates from being treated the same as other individuals in each of the provincial/territorial areas in Canada); as are ss. 85-86 of the *Corrections and Conditional Release Act*, SC 1992, c. 20, ["*CCRA* "] which purport to give the responsibility for healthcare of all those inmates exclusively to CSC; and
3. consequently, his (and other federal inmates') rights under section 7, 12 and 15 of the *Charter of Rights and Freedoms* have thereby also been violated without justification.

ii) Mr. Devlin's circumstances and his allegations in greater detail

[7] While incarcerated in a federal penitentiary, Mr. Devlin is administratively under the auspices of the CSC. This location within the federal penitentiary system is exclusively determined by CSC.

[8] He specifically claims only against one individual: Dr. Haddad.

[9] Dr. Haddad was licensed to practice medicine in the province of New Brunswick at all material times.

[10] Dr. Haddad is subject to regulation by the College.

[11] Dr. Haddad was contracted by CSC to provide medical care to inmates incarcerated at its Renous, NB "Atlantic Institution".

[12] Mr. Devlin claims that in treating him at Atlantic Institution, Dr. Haddad did so negligently.

[13] In the only explicit references to them being liable in his amended statement of claim, Mr. Devlin states his factual allegations about the "College", and goes on to state what remedies he seeks against all the defendants:[3]

[3] From those statements, Mr. Devlin pleads that the CSC and the College breached their duties of supervision/regulation of Dr. Haddad, and after having been alerted to Mr. Devlin's complaints failed to refer him to

75 Mr. Devlin called and wrote to the defendant College to complain about the medical services of defendant Hadadd in the winter of 2019, and states that they further failed to respond. In May 2020, and since then, Mr. Devlin has followed up again with the defendant College about defendant Haddad. He has yet to receive a response of any sort from the defendant College. By failing to consider Mr. Devlin's complaint because he was a federal prisoner, the defendant College in bad faith failed to assess:

a) the negligence claims documented in this statement of claim;

b) whether the defendant Haddad unethically threatened to remove Mr. Devlin's neurologic pain medicine;

c) whether, contrary to their code of ethics, defendant Haddad continued to treat Mr. Devlin in August 2019 after Mr. Devlin made complaints to the defendant College and to the defendant CSC about defendant Haddad's conduct;

d) such other negligence of defendant Haddad as may appear from the evidence.

76 As a result of such actions Mr. Devlin suffered various and sundry losses including continued unwanted and negligent medical services by the defendant Haddad which negatively impacted his health and safety.[4]

77 In particular, but not limited to, the defendant College acted in bad faith by failing to oversee defendant Haddad's professional services as required under the Medical Act (NB) chapter 74 of 7 Elizabeth II 1958, sections 54, 55, 57 and 58.

Remedies

78 <u>Mr. Devlin as an individual plaintiff</u>, therefore requests the following relief from the defendants and each of them jointly and severally:

a) general damages for pain and suffering;

b) special damages, the particulars of which will be forwarded prior to trial;

c) punitive damages;

d) remedies under sections 24(1) or/and 52 of the [Canadian] Charter [of Rights and Freedoms], including but not limited to allowing Mr. Devlin treatment from a private practice general practitioner medical doctor and specialist not contracted with

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another primary care physician and were otherwise responsible for his general non-medical negligent treatment, causing him further harm.

[4] These are elaborated upon in his January 14, 2022, Answer to Demand for Particulars.

defendant CSC, pending government rectification of the [*Canada Health Act*, RSC 1985, c. C-6 (definition of insured persons) and the *Corrections and Conditional Release Act*, SC 1992, c. 20];

e) costs

79 John Howard, as an individual plaintiff, requests from the defendant CSC: a. special public interest costs;

80 Both, John Howard and Mr. Devlin request: [s. 52 of the *Constitution Act*, 1982, declarations that ss. 2 of the CHA, and 85-86 of the CCRA are *ultra vires* federal jurisdiction and contrary to ss. 7, 12 and 15 of the Charter of Rights].

[14] As claimed at para. 14 of the Amended Notice of Action:

e) John Howard is comprised of dozens of member societies and communities across Canada providing direct services to incarcerated persons who have a direct and personal stake in these issues, as they have been incarcerated in federal penitentiaries.

f) the resources of John Howard confirm their capacity to bring forward the claim to ensure that the issues will be presented in a sufficiently concrete and well-developed factual setting;

g) the claim raises issues that are in the public interest that transcend the interests of any single incarcerated person who may be directly affected by the conduct of defendant CSC in providing medical services;

h) the claim raises a comprehensive challenge to the *CCRA* and *CHA* based on sections 7, 12 and 15 of the Charter as well as with respect to federal/provincial division of powers under the *Constitution Act*; it is a systemic challenge that differs in scope from an individual challenge to a discrete issue;

i) claims of this nature present the possibility of being lengthy and arduous. Accordingly, it is unreasonable to expect incarcerated individuals, many of whom will be released from incarceration prior to the conclusion of a claim of this nature, to bring it forward by themselves; and

j) the claim is, in all of the circumstances, a reasonable and effective means of bringing this matter before the Court."

[15] Mr. Devlin also makes claims under the title: "Unconstitutionality of the *Canada Health Act*: Division of Powers".

[16] Therein, he notes that section 2 of the *CHA* excludes federal prisoners as insured persons. He further states:

> 19 In excluding federal prisoners as insured persons, the federal government has created a gap in the funding and delivery of healthcare services to federal prisoners, in so far as other Canadians who are not so excluded can receive healthcare services provided and paid for by the provinces.
>
> 20 This gap in the funding and delivery of healthcare services requires the federal government through defendant CSC, to both fund and have control over the delivery of healthcare services to federal prisoners.
>
> 22 … by legislating and effectively making CSC responsible for the administration and delivery of healthcare services to federal prisoners… The federal government has, and does, impair a core area of provincial jurisdiction and responsibility for healthcare, this being the overall administration and delivery of healthcare services.
>
> 23 Accordingly, with respect to excluding federal prisoners as insured persons, section 2 of the CHA should be declared *ultra vires*… and/or inapplicable insofar as such legislation and operation impairs the core area of provincial responsibility for the delivery of healthcare services… sections 85 – 86 of the CCRA make defendant CSC responsible for healthcare as it relates to federal prisoners, accordingly these section should also be declared *ultra vires* the legislative and operational authority of the federal government and/or inapplicable insofar as such legislation and operation impairs the core area of provincial responsibility for the delivery of healthcare services.

[17] Further under the title: "The CHA and CCRA as being in violation of section 7, 12 and 15 of the Charter":

> 24… As such, section 2 of the *CHA* and sections 85 – 86 of the *CCRA* have resulted, and will continue to result, in the violation of Mr. Devlin's and other federal prisoners' rights under section 7, 12 and 15 of the Charter.
>
> …
>
> 27 Mr. Devlin and John Howard state that sections 85 – 86 of the *CCRA* failed to define what constitutes the proper delivery of healthcare services to federal prisoners, while further failing to make the provision of such proper services mandatory for defendant CSC… fails to require defendant CSC to provide the same standard of healthcare to federal prisoners as that which would be provided by provincial health delivery systems to other Canadians and individuals living in the community.
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> …

29 … defendant CSC has not and will not be able to provide healthcare services to federal prisoners in a manner that is patient centred and independent…

30 … The structure of healthcare is delivered and administered by the provinces is and will primarily be able to provide healthcare in a manner that is patient centric and otherwise respects the principle of the independence of healthcare professionals.

31 … as uninsured persons under the *CHA*, federal prisoners do not and will not receive the same level of healthcare services as that which is provided by provincial healthcare delivery systems.

…

34 This non-patient centred and non-independent operationalization manifests in other numerous ways, including, though not limited to, the following:

a. defendant CSC fails to ensure that healthcare professionals report to medical staff acting independently of CSC general operations.

b. Defendant CSC fails to ensure that healthcare professional compensation structures are independent of defendant CSC's control and influence.

c. Defendant CSC fails to ensure that resource allocation is delivered without control or influence from defendant CSC.

…

e. The CCRA regulations and policies provide fewer pharmaceutical options for federally incarcerated persons then non-incarcerated persons;

f. Federal medical funding ratios in the federal prisons are unequal in comparison to that provided for the general community;

g. Care for various health conditions in federal penitentiaries including, though not necessarily limited to, chronic pain, substance abuse disorder, and mental health ailments, dental and geriatric needs, chronic and critical care, long-term and acute illnesses are delivered systemically below the level of care provided in the community;

h. Defendant CSC is legislated and regulated structure of medical care interferes with the independence of licensed physicians and interferes with the physician-patient relationship with incarcerated persons by prioritizing CSC operations over patient centred care;

i. Defendant CSC's control over federal prisoners personal health records has caused… Delayed and restricted access to such records. In this impairs any prisoners ability to take necessary steps or otherwise make necessary decisions respecting their personal health;

j. There is and will be, a lack of competent supervision, regulation and accountability of those providing healthcare services to federal prisoners…

k. Healthcare and penitentiaries will not be responsive to the specific and local needs of prisoners…

l. Prisoners are not be [sic] able to immediately avail themselves of healthcare services once released from incarceration;

m. Other such evidence of unconstitutionality that may appear in the evidence tendered at the trial of this matter.

III - The position of Mr. Devlin and John Howard[5]

[18] In a written outline of their position, entitled "**Test for jurisdiction over CSC**" regarding the Attorney General of Canada, which was provided to the court and counsel at the hearing, the plaintiffs state as follows:[6]

Step 1: s. 21(1) *Crown Liability and Proceedings Act*

Jurisdiction over CSC (federal Crown) is governed by section 21(1) of the *Crown Liability and Proceedings Act*:

21(1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the Superior Court of *the province in which the claim arises* has concurrent jurisdiction with respect to the subject matter of the claim. [My italicization added]

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[5] The AGC and Mr. Devlin/John Howard agree that Canada is not subject to the Nova Scotia *CJPTA* as it is provincial legislation which cannot bind the federal Crown: *Conor Pacific Group Inc. v. Canada (Atty. Gen.)*, 2011 BCCA 403. The legal effects of the *CLPA* were discussed in *Al's Steakhouse and Tavern Inc. v. Deloitte & Touche*, (1997) 102 OAC 144, at paras. 24-27, and *Babington-Browne v. Canada (Att. General)*, 2016 ONCA 549, at paras. 11, 19 and 22-23. Federal Crown liability "must be created, and is limited by, statute" (per AGC brief at p. 4).

[6] Mr. Devlin's counsel provided a helpful two-page outline of its argument regarding the test for jurisdiction, firstly in relation to the AGC, pursuant to the *Crown Liability and Proceedings Act* and then a consideration of the *forum non conveniens*; and secondly in relation to the Dr. Haddad and the College.

Mr. Devlin states that the Nova Scotian facts that support 'the province in which the claim arises' against CSC are found in three of the four categories of intended evidence supporting the unconstitutional and negligent actions of CSC:

1. Psychiatric: Ontario (expert psychiatrist)

2. General practitioners: New Brunswick and Nova Scotia (Haddad and Springhill [Nova Scotia federal penitentiary] July 2020 incident)

3. Dental care: Nova Scotia (Springhill dental crisis 2019 – 2020)

4. Geriatric care: Nova Scotia (expert location, 200 inmate study)

Step 2: Forum non conveniens

Nonetheless, if the court finds that subject matter jurisdiction over the claim against CSC exists in Nova Scotia, it may decline to exercise that jurisdiction on the basis of the common law doctrine of *forum non conveniens*, but only where there is another forum 'clearly more appropriate'. Inconvenience of a party is not enough, and it cannot create an unfairness.[7]

Some of the factors traditionally considered at the *forum non conveniens* stage applicable to the facts at bar are:

1) [t]he parties' residence, that of witnesses and experts;

2) location of the material evidence; […]

6) the applicable law;

7) advantages conferred upon plaintiff by its choice of form, if any;

8) the interest of justice;

9) the interest of the parties.[8]

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[7] Mr. Devlin's brief, para. 62: *Bouch v. Penny*, 2009 NSCA 80: "While a party may be inconvenienced by the choice of forum, it may not constitute significant unfairness to that particular litigant"; and *Oakley v. Barry*, 1998 NSCA 68, that the jurisdictional ("reasonable and substantial connection") test…should not be rigidly applied. The Court in summary agreed with the hearing Justice that "there must be order and fairness to protect the rights of all parties".

[8] *Newfoundland and Labrador (Atty. Gen.) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, at para. 68.

[19] Mr. Devlin also provided a written outline of his position entitled the "**Test for jurisdiction over Haddad and the College**".

Step one: Real and substantial connection

Jurisdiction over Haddad and the College is governed by section 4 of the Nova Scotia *Court Jurisdiction and Proceedings Transfer Act* ["**CJPTA**", 2003 SNS (2nd sess.) c. 2], which sets out the circumstances in which the court has territorial competence in a given proceeding:

> 4 A court has territorial competence in a proceeding that is brought against the person only if…
>
> (e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.

Section 11 of the *CJPTA* sets out circumstances where a 'real and substantial connection' is presumed to exist, 'without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection.' Mr. Devlin's position is that the circumstances connecting all three defendants should constitute a non-enumerated 'real and substantial connection'.[9]

Step two: Forum non conveniens

Section 12 of the *CJPTA* provides that a court may, at its discretion, decline to exercise its territorial jurisdiction on the basis of *forum non conveniens* or otherwise:

> 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

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[9] The Plaintiffs rely on the reasoning in *Sakab Saudi Holding Company v. Jabri,* 2022 ONCA 496 at para. 67, wherein they say that the Court of Appeal confirms that in a case like the one at Bar, the interconnectedness between the actions of various defendants in other provinces constitutes a real and substantial connection to ground jurisdiction, without focusing the analysis on the actions of individual defendants in isolation. That case is distinguishable from the present one in that it involved a discrete private dispute between parties where what was in issue was the two competing characterizations of the claim in issue: "as an action in conspiracy to defraud which began with the misappropriation of assets in Saudi Arabia and continues with manipulation of assets from Toronto by Saad, with the assistance and cooperation of others, particularly Mohammed…[versus] the tort alleged is simply fraudulent misappropriation, and the tort would have been completed in Saudi Arabia. The interjurisdictional component is simply the remedy of tracing assets misappropriated elsewhere, and the tort alleged has no connection to Ontario." at para. 4. See also *Rieder zu Wallburg v. Plista Gmbh*, 2022 ONCA 281 at paras. 8-10; leave denied December 8, 2022 (Case No. 40228).

the ground that a court in 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 proceeding;

(d) the desirability of avoiding conflict decisions in different courts; […]

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

In recent cases, Nova Scotia courts have interpreted the *CJPTA* as a codification of the common law rules that had been applied in the existing case law.[10]

[20] In oral submissions Mr. Devlin/John Howard argued that:[11]

- the College has attorned to the jurisdiction of Nova Scotia by filing a Notice of Defence (see s. 4(b) of CJPTA)

- I should bear in mind the pleadings in the statement of claim, and particularly paragraph 34 thereof, which more precisely sets out the alleged unconstitutional aspects claimed by Mr. Devlin and John Howard which permit a context for understanding why Nova Scotia is clearly the appropriate forum

- while Mr. Devlin's personal claim against Dr. Haddad arises in New Brunswick, and though he effectively is making a breach of his Charter rights claim in New Brunswick as well, as a plaintiff he is also claiming breaches of his section 7, 12 and 15 Charter rights specifically in relation to the dental services/medical treatment continued to be provided to him at the Springhill institution in Nova Scotia from the time of his transfer there, to and including in the Spring of 2020

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[10] *RS v. GN*, 2021 NSSC 51, at para. 15, per Brothers, J.

[11] To be clear, I have also carefully reviewed all their written materials. I had as evidence the affidavits of Catherine Latimer, on behalf of the John Howard Society, and that of Mr. Devlin; as well as that of Edmund Schollenberg, MD, Registrar of the College; Dr. Camille Haddad; and Nathalie Waterbury on behalf of CSC.

- he emphasizes that "the Nova Scotian facts that support 'the province in which the claim arises' [*CLPA*] against CSC are found in three of the four categories of intended evidence supporting the unconstitutional and negligent actions of CSC:

  psychiatric: Ontario (expert psychiatrist)

  general practitioners: New Brunswick and Nova Scotia (Haddad and Springhill July 2020 incident)

  dental care: Nova Scotia (Springhill dental crisis 2019 – 2020)

  geriatric care: Nova Scotia (expert location, 200 inmates study)

- if Mr. Devlin's claims against CSC arose in significant part in Nova Scotia, then they should be heard in Nova Scotia unless New Brunswick is the "clearly more appropriate" forum[12]

- the law in New Brunswick and Nova Scotia has many similarities, or stated differently, they are not so dissimilar as to be in a material factor, insofar as the issues herein are concerned, hence the plaintiffs' choice of Nova Scotia as the forum should be respected

- in any event, there will also be evidence from other jurisdictions in Canada regarding the claims of institutional negligence/breach of Charter rights by CSC

- the plaintiffs anticipate calling as witnesses, inmates who are or have been housed in Springhill

- Catherine Latimer (para. 19) stated in her affidavit that "John Howard expects to rely on evidence related to correctional health care structures and dental services resource allocation at Springhill institution in Nova Scotia (involving over 40 Springhill inmates) in the years 2019 and 2020."

[21] Mr. Devlin (and John Howard) argues he has established that a significant part of his claims, both personal and constitutional, as well as those of other

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[12] See paras. 5-9 and 13 including Exhibit "A" of the Devlin affidavit, and that of Catherine Latimer generally. In the Waterbury affidavit at para. 7, there is a listing of Mr. Devlin's federal institutional placements, which include many outside of New Brunswick and Nova Scotia, but does show that he was in New Brunswick between 2004 - 2008, and 2017 - 2020 (being a total of approximately 7 years); whereas he was at Springhill in Nova Scotia between March and October 2020, and March 2021 to May 2021 (being a total of 9 months).

federally incarcerated inmates, arose in Nova Scotia,[13] and consequently, in relation to Canada/CSC (under the *CLPA)*, Nova Scotia has jurisdiction regarding the subject matter of the claims.[14]

[22] If the court is satisfied that this is the case, Mr. Devlin specifically argues against CSC's arguments that I should nevertheless decline to exercise the jurisdiction on the basis of the consideration of the doctrine of *forum non conveniens*. He notes that the CSC bears the burden of persuasion in relation to that issue.

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[13] The AGC argues that a claim does not "arise" in a province by virtue only of the fact that the federal government is located there. It cited *Babington-Browne v. Canada (AG)*, 2016 ONCA 549, at paras. 22-3 and *Blood Tribe v. Canada*, 2005 SKQB 105, in this regard. See also *Canada (Atty. Gen.) v. Whaling*, 2018 FCA 38, at para. 19: "A cause of action is a set of facts that provides the basis for an action in court: see *Markevich*, at paragraph 27. **A cause of action arises in a province when all of the elements of the cause of action are present in that province**: see *R. v. Maritime Group (Canada) Inc.*, [1995] 3 F.C. 124 (Fed. C.A.) at page 129, 1995 185 N.R. 104 (Fed. C.A.); *Apotex Inc. v. Sanofi-Aventis Canada Inc.*, 2013 FCA 186 (F.C.A.), at paragraph 105, 2013[2015] 2 F.C.R. 644 (F.C.A.)." Notably, on the matter being sent back to the Federal Court, 2018 FC 748, Justice Barnes stated: "**8** I am satisfied that these fresh pleadings are sufficient to survive these motions to strike. They assert, among other things, that the Executive Branch acted recklessly, abusively, and in bad faith by "proposing, pursuing and passing a bill into law that it knew or ought to have known was unconstitutional". According to the new allegations the retrospective application of the *Abolition of Early Parole Act*, SC 2011, c. 11 patently violated sections 7 and 11 of the *Charter* and was manifestly prejudicial to offenders who pleaded guilty in the expectation of a likely release from custody after one sixth of their served sentences. Furthermore, the Plaintiffs assert that the Defendant was clearly warned that this legislation was, in certain aspects, unconstitutional. **9** As I noted in my earlier Reasons, **the law remains unsettled as to the test to be applied to claims arising from the passage of unconstitutional legislation: see paras 18 to 20**. Until these threshold issues are judicially resolved, I cannot say that these claims are not legally viable. I am also not satisfied that the Defendant does not know the case to be met. Most of the uncertainty in this case comes from a lack of clarity in the law and not from the state of the pleadings. Depending on the test to be applied, difficult problems of proof may lie ahead for the Plaintiffs; but that is an issue for another day." See also *Power v Canada (AG),* 2021 NBQB 107 wherein the court determined that: "DISPOSITION 72 The Defendant asks the following legal questions: **1**- Can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently declared invalid by a court pursuant to s. 52(1) of the Constitution Act, 1982? and **2**- Can the Crown, in its executive capacity, be held liable in damages for Parliament enacting a Bill into law, which legislation was later declared invalid by a court pursuant to s. 52(1) of the Constitution Act, 1982? 73 For the reasons set out herein, the answer to both questions is "Yes." "affirmed 2022 NBCA 14; pending is a June 27, 2022 application for leave to appeal to the Supreme Court of Canada (case No. 40241).

[14] The "presumptive connecting factors" [except the third (i.e. whether the tort was committed in the province)] reasoning in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, does *not* apply in relation to the claims against the AGC herein, to the extent that those reasons are based on CJPTA legislation – however the reasoning in *Van Breda* can be relied upon for the second step under the CLPA based analysis, namely the *forum non conveniens* related reasons in *Van Breda* (see paras. 101-104 and 109. See also *Newfoundland and Labrador (AG) v. Uashaunnuat*, 2020 SCC 4 at para. 68, and para. 15 of *Gillis v. Canada (Attorney General)*, 2022 BCSC 604.

[23] If Nova Scotia has territorial (and subject matter) jurisdiction, the law requires the CSC (and the other defendants) to persuade this court that New Brunswick is nevertheless the "clearly more appropriate" forum. At this stage of the analysis (*forum non conveniens*) what Justice Lebel noted at para. 108 in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, becomes applicable:

> Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere.[15]

[24] Mr. Devlin says the CSC has not met that burden.

[25] Moreover, Mr. Devlin argues that the plaintiffs have established that there is a real and substantial connection between Nova Scotia and "the facts on which the proceeding against that person [CSC/Dr. Haddad and the College] is based" under s. 4 of the *CJPTA*; and there is a "real and substantial connection" between the pleadings and the Province of Nova Scotia as determined under the common law, such that in relation to all the defendants the matter should be heard in Nova scotia.

IV - The position of the Attorney General of Canada/CSC

[26] In essence, its position (paras. 29 and 36 of its brief) reads as if it is a motion for summary judgment on pleadings pursuant to CPR 13.03.[16]

[27] Although CSC uses language that appears to be drawn from summary judgment motions *on pleadings*, (see e.g. paras.1, 18, 29 and 36 of its brief – which

[15] Interestingly, as noted in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, at para. 24 per Lebel J.: "The first mention of a 'real and substantial connection test' in the courts modern jurisprudence can be found in the reasons of Dickson J in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 SCR 393… The test was formerly adopted in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077. …34 **This case concerns the elaboration of the 'real and substantial connection' test as an appropriate common law conflicts rule for the assumption of jurisdiction**. …" [My bolding added]

[16] See for example, the reasons in *EllisDon Corporation v. Southwest Construction*, 2021 NSCA 20.

is restricted to a consideration only of the pleaded facts), on reflection it is apparent that it relies more precisely on CPR 4.07 (1):

> A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction.

[28] I am satisfied that in relation to the question of where the causes of action arose (s. 21(1) *CLPA*), I must consider the affidavit evidence in the context of the pleadings.[17]

[29] Although not cited to me, I found a somewhat similar factual situation apparent in the British Columbia case: *Gillis v. Canada* (Attorney General), 2022 BCSC 604 (see para. 17 regarding my latter comment).

[30] Therein, Justice Walkem stated:

> 1 The Attorney General (Canada) ("AG") brought this application in response to a notice of civil claim filed by Mr. Gillis. **Mr. Gillis alleges negligence on the part of the AG during the time that he has been incarcerated in different federal institutions across several provinces.**
>
> 2 Mr. Gillis claims that he has been, at times, (1) denied access to a CPAP machine, a medical device that he requires as a result of his sleep apnea disorder; and (2) denied access to the medications necessary to treat the bi-polar condition he has been diagnosed with.
>
> 3 Mr. Gillis relies on *s. 86 of the Corrections and Conditional Release Act, S.C. 1992, c. 20*, [*CCRA*] that stipulates as follows:
>
>> Definitions
>>
>> 85 In sections 86 and 87,
>>
>> *health care* means medical care, dental care and mental health care, provided by registered health care professionals or by persons acting under the supervision of registered health care professionals; (*soins de santé*)
>>
>> *mental health care* means the care of a disorder of thought, mood, perception, orientation or memory that significantly impairs judgment, behaviour, the capacity to

[17] None of the affiants were cross-examined.

recognize reality or the ability to meet the ordinary demands of life; (*soins de santé mental*)

treatment means health care treatment. (Version anglaise suelement)

Obligations of Service

86 (1) The Service shall provide every inmate with

(a) Essential health care; and

(b) Reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community.

Standards

(2) The provision of health care under subsection (1) shall conform to professionally accepted standards.

Service to consider health factors

87 The Service shall take into consideration an offender's state of health and health care needs

(a) in all decisions affecting the offender, including decisions relating to placement, transfer, administrative segregation and disciplinary matters; and

(b) in the preparation of the offender for release and the supervision of the offender.

4 The AG sought orders that:

1. Mr. Gillis' claims against the defendant [AG] arising from periods while he was outside of the Province of British Columbia, be dismissed pursuant to Rule 21–8(1)(b) of the Supreme Court Civil Rules (the “Rules”).

2. In the alternative, the Notice of Civil Claim and Amended Reply be struck pursuant to Rule 21–8(1)(a) and/or Rule 9–5(1)(a) of the Rules, with leave to amend to constitute an action containing only claims arising in the Province of British Columbia.

3. In the alternative, the claims against the defendant [AG] arising outside of the Province of British Columbia be stayed pursuant to Rule 21–8(1)(a) or Rule 21–8(1)(b) of the Rules.

[. . .]

….

Position of Mr. Gillis

7 **Mr. Gillis argued that the issues covered in his notice of civil claim arose, and continued, through his incarceration in different Provinces, including British Columbia**. Mr. Gillis relies on *Stanway v. Wyeth Pharmaceuticals Inc*, 2009 BCCA 592 and the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, s. 10 [*CJAPTA*]. Mr. Gillis argues that if a plaintiff can show that factors under s. 10 of the CJAPTA exist, there is a presumption of a real and substantial connection to the jurisdiction. The matter can then be heard before a superior court in that jurisdiction.

8 Mr. Gillis argued that the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C–50, s. 21 [CLPA] applies:

> 21(1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

9 Mr. Gillis argues that as the *CCRA* applies from coast to coast to coast, and the Correctional Service of Canada ("CSC") is a national entity: "the jurisdiction for the plaintiff's claim must be adjudged as being within the plaintiff's ability to pursue based on the fact that both the entity responsible for the plaintiff's care and treatment issue from a piece of legislation having national jurisdiction".

10 Mr. Gillis argues that to allow the AG's application would constitute "an absurdity at law" as it would "break the Correctional Service of Canada into individualized entities" despite that the same federal rules and regulations are applicable to all. Mr. Gillis argued that the position of the AG risks "grant[ing] CSC the ability to avoid liability for its negligence by transferring a prisoner from one province to another" when civil proceedings are initiated.

11 In argument, Mr. Gillis pointed to the difficulty that he faces while incarcerated. He argued that CSC is one entity and that it does not make sense for him to bring separate actions. He further argued that his witnesses are in British Columbia and that bringing this action in British Columbia is most convenient for him.

Law

…

15 **The Court in *Conor* held that to bring a claim against the federal Crown, the plaintiff must first establish subject-matter jurisdiction. The *CLPA* s. 21(1) sets out the test to determine whether subject-matter jurisdiction has been conferred by Parliament.** *The Plaintiff bears the burden of proving an arguable case that the court has jurisdiction.* If subject-matter jurisdiction is not established, the superior provincial court cannot hear the matter: *Conor*, at para. 41. **Once subject-matter jurisdiction is established, common law principles, not the *CJAPTA*, are used to establish territorial jurisdiction**: *Conor*, at para. 43.

16 In *Babington-Browne v. Canada (Attorney General)*, 2016 ONCA 549, the Court of Appeal for Ontario discussed the interpretation of s. 21(1) of the *CLPA*. The issue was whether the Ontario Superior Court had jurisdiction in a negligence action against the federal Crown. …

17 **The Court cited *David S. LaFlamme Construction Inc. v. Canada (Attorney General)*, 2014 ONCA 775 at para. 7, for the proper approach to deciding whether a provincial superior court has the subject-matter jurisdiction to hear actions against the federal Crown at para. 22:**

> The court is required to examine the facts surrounding the claim in the light of the elements of the alleged cause of action in order to decide where the substance of the claim arose.

18 **Determining where the "substance of the claim" arose is determinative in deciding where a matter should be heard. In *Babington-Browne*, at para. 23, the Ontario Court of Appeal stated:**

> The focus on the "substance of the claim" means that, in a tort action, a province's superior court will not necessarily have jurisdiction over the claim simply because one of the alleged acts of negligence or one of the underlying facts took place in that province: *Rowe v. Canada (Attorney General) (2004)*, 2004 CanLII 18898 (ON CA), 186 O.A.C. 106 (C.A.), at para. 7. One has to look at where the accident and the main acts of negligence and damages occurred.

19 The Crown argues that the substance of Mr. Gillis' claim is the allegation of negligence, including the failure to provide proper healthcare, equipment and medication, on behalf of Crown servants, that mostly occurred outside of British Columbia. Of the time frames covered in Mr. Gillis' notice of civil claim, 17 out of 20 months where he was without a CPAP machine, and 47 of 64 months while he was without medication occurred outside of British Columbia. Within BC, Mr. Gillis was without a CPAP machine for about three months, and without medication to treat his mental health issues for about 17 months.

20 Mr. Gillis bears the burden of proving an arguable case that the court has subject-matter jurisdiction. The cases cited by Mr. Gillis, namely *Western Aerial Applications Ltd. v. Turbomeca USA, Inc*, 2009 BCSC 123, *Roth v. Interlock Services Inc*, 2004 BCCA 407,

> and *Stanway v. Wyeth Pharmaceuticals Inc*, 2009 BCCA 592, all bear on the issue of territorial competence.
>
> 21 Mr. Gillis has not established subject-matter competence over claims arising outside BC, as: the main acts of negligence occurred outside BC, and there is a lack of jurisdictional facts to support the allegation that its substance of claim arose in BC. …
>
> 22 I order as follows:
>
>> (1) **The claims against the defendant arising from periods while he was outside of the Province of British Columbia are struck** pursuant to R. 21-8(1)(a) of the *Rules*.
>
> [My bolding and italicization added]

[31] Notably in *Gillis* there was no constitutional issue (Charter of Rights, or "division of powers") as in this case.

[32] CSC's position is that although, pursuant to s. 21 of the *CLPA*, the Federal Court and provincial superior courts can have concurrent jurisdiction regarding claims against the federal Crown, that subsection specifically requires that it is "the superior court of *the province in which the claim arises*… with respect to the subject matter of the claim."

[33] It argues that that province is New Brunswick: all the elements of the causes of action are present in that province. New Brunswick is where the main acts of negligence and damages occurred, in relation to Mr. Devlin.

[34] Alternatively, even if the Nova Scotia Supreme Court has jurisdiction pursuant to s. 21 of the *CLPA*, CSC argues that on a *forum non-conveniens* analysis, New Brunswick is the proper jurisdiction rather than Nova Scotia.

[35] At the first stage, under the *CLPA*, the answer turns on what is the "subject matter of the claim", and did it arise in Nova Scotia, as the plaintiffs suggest?

V - My analysis of territorial jurisdiction - Stage 1

[36] There are two plaintiffs. They each plead causes of action in their own right.

[37] Let me briefly address the overall manner in which I will conduct the analysis herein.

[38] The point of reference for "real and substantial connection" to a territorial jurisdiction and *forum non conveniens* purposes generally, is firstly:

1. The examination of "connecting factors" that "[link] the subject matter of the litigation to the forum" (*Club Resorts Ltd. v Van Breda*, [2012] 1 SCR 572 at para. 100); and secondly:
2. the examination of "another forum that has an appropriate connection under the conflicts rules… using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum [the party relying on the *forum non conveniens* doctrine must show] what connections this alternative forum has with the subject matter of the litigation." (*Van Breda* at para 103).

[39] The analysis is focused on the connection between a forum and the subject matter of the litigation.

[40] Here we have two plaintiffs who make distinct, yet related claims.

[41] John Howard make systemic claims (against CSC) and Mr. Devlin makes personal claims (against CSC, Dr. Haddad and the College).

[42] I have opted to analyse the overall implications of the s. 21 *CLPA* "real and substantial connection" and *forum non conveniens* issues by isolating these claims by plaintiff, and analyzing them separately in an effort to maintain the focus on their distinctive aspects, while still recognizing that my ultimate analysis must recognize that their separate claims are made as part of one "proceeding".

i) Mr. Devlin's individual (or personal) claims against CSC – Stage 1

[43] Mr. Devlin was incarcerated in New Brunswick for approximately 7 years between 2004-2008, and 2017-2020 immediately before being transferred to Springhill Institution.

[44] He was at Springhill between March 2020 and May 2021 only for a total of 9 months. As the court stated in *Canada (Attorney General) v. Whaling*, 2018 FCA 38 at para. 19:

> A cause of action arises in a province when all the elements of the cause of action are present in that province.

[45] Mr. Devlin, as an individual, claims that Dr. Haddad negligently treated him while he was incarcerated in New Brunswick (paras. 5-7 affidavit).

[46] Inextricably associated with that claim, is Mr. Devlin's "bad faith/failure to regulate" claim against the College (para. 14 affidavit); and his individual claims against CSC.

[47] The only express references to his time at Springhill appear at paragraphs 8, 9 and 13 of his affidavit:

> (para. 8) "During my incarceration at Springhill Institution, I allege that I continued to suffer damage from the CSC related deficiencies in my medical care. In particular, I allege that an incident arose in July 2020 in which non-medical CSC staff arbitrarily terminated my pain medications… [See exhibit "A" and paragraphs 29 and 34 of the amended SoC].[18]
>
> (para. 9) In July 2020, while I was incarcerated at Springhill institution in Nova Scotia, I initiated with co-plaintiff John Howard Society of Canada this court action against the defendants. At the time I commenced this proceeding, I resided at Springhill Institution in Springhill Nova Scotia."
>
> (para. 13(a)) *My medicines were arbitrarily terminated by non-medical CSC staff in July 2020…* I expect to call at least three witnesses regarding this incident")

[48] As Justice Walkem stated in *Gillis v. Canada (Attorney General)*, 2022 BCSC 604:

> 18 Determining where the "substance of the claim" arose is determinative in deciding where a matter should be heard. In *Babington-Browne*, at para. 23, the Ontario Court of Appeal stated:
>
>> **The focus on the "substance of the claim" means that, in a tort action, a province's superior court will not necessarily have jurisdiction over the claim simply because one of the alleged acts of negligence or one of the underlying facts took place in that province**: *Rowe v. Canada (Attorney General) (2004)*, 2004 CanLII 18898 (ON CA), 186 O.A.C. 106 (C.A.), at para. 7. One has to look at where the accident and the main acts of negligence and damages occurred.

---

[18] Both paragraphs 29 and 34 of the amended statement of claim deal exclusively with the constitutional claims in respect of all federally incarcerated inmates, including Mr. Devlin. Exhibit "A" relates to only Mr. Devlin.

[My bolding added]

[49] Firstly, let me say that, I am satisfied that the subject matter of his personal claims against CSC did not arise in Nova Scotia.[19]

[50] Only in a *de minimis* sense (as alluded to in *Babington-Browne*) could one conclude that the subject matter of his individual claims against CSC (institutional negligence and associated breaches of sections 7, 12 and 15 of the *Charter* (per paras. 6 and 78 of the amended statement of claim) have arisen in Nova Scotia (see para. 13(c) affidavit).[20]

[51] Let me briefly explain that conclusion.

[52] Mr. Devlin's individual constitutional claims in Nova Scotia are referenced in paragraph 13 of his affidavit (paras. 7 and 80 of amended statement of claim). Therein, he does not specifically *allege* any further material negligent medical care of himself at Springhill (other than the "July 2020" arbitrary termination by non-medical CSC staff of his medicines).

[53] Moreover, beyond that one instance, there is no express reference in the amended statement of claim to Mr. Devlin having suffered any of the alleged harms at Springhill Institution in Nova Scotia.

---

[19] I recognize that the wording of the *CLPA* only requires me to analyse this issue in relation to CSC; however, using that language, I am also satisfied concurrently that, as a matter of fact, the claims against Dr. Haddad and the College arose in New Brunswick.

[20] Mr. Devlin put it in his oral argument as follows: if Mr. Devlin's claims against CSC arose "in significant part in Nova Scotia", then they should be heard in Nova Scotia unless New Brunswick is the "clearly more appropriate" forum. He also stated in his affidavit that: "the facts alleged herein support the proper issuance of the statement of claim in Nova Scotia… as it relates to CSC's unlawful conduct that occurred in Nova Scotia… this conduct is *inextricably intertwined* with the healthcare provided by the defendant Haddad in New Brunswick and the failure of the College to regulate his conduct". In her affidavit, Catherine Latimer states at paragraph 11: "… the concrete evidence with respect to the healthcare received by Mr. Devlin from Dr. Haddad in New Brunswick and healthcare he received in Nova Scotia when CSC interrupted the continuity of his medicine in the summer of 2020… is *inextricably factually linked* to the constitutional arguments John Howard intends to make as relates to federal correctional institutional healthcare because Canada." These latter statements by Mr. Devlin and Ms. Latimer are improper wherein they reference "inextricably intertwined" and "inextricably factually linked" as they are in the nature of the plea or submission – CPR 39.04(2)(a). It is for the court to determine whether those conclusions can be drawn. In any event, I will not strike those words from the affidavit, in order to permit the plaintiffs to rely thereon, as a matter of belief by each of those respective affiants.

[54] There is a general reference to inadequate “emergency dental care” at Springhill Institution, but as pleaded, that is relevant to the systemic claims for the cohort of federally incarcerated inmates.

[55] The remainder of the content of his affidavit is generally oriented toward providing support for John Howard’s claims on behalf of federally incarcerated inmates throughout Canada.

[56] Mr. Devlin *argued* that when he was at Springhill Institution there were inadequacies in relation to psychiatric medicine; dental care; geriatric care; and general practitioner doctors who were providing medical services under the auspices of CSC. However, there is no express reference in the evidence in support of these statements.

[57] Mr. Devlin’s individual constitutional claims against CSC are inextricable from, and follow, his individual claims (negligence against Dr. Haddad, institutional negligence against CSC, and bad faith/ failure to regulate as against the College). They also did not arise in Nova Scotia – they arose in New Brunswick.

[58] I therefore conclude that, in relation to s. 21(1) of the *CLPA*, against CSC, each of Mr. Devlin’s individual claims did not arise in Nova Scotia – they arose in New Brunswick.

ii) Mr. Devlin’s claims against Dr. Haddad and the College – Stage 1

[59] I conclude that there is not a statutorily presumed (s. 11(5) *CJPTA*) or established by common law (see s. 4(e) *CJPTA*), real and substantial connection with Nova Scotia for any of Mr. Devlin’s individual claims against Dr. Haddad (and the College).

[60] The College filed its Notice of Defence to the amended statement of claim yet did not therein dispute the jurisdiction of this court – therefore it has presumptively submitted/attorned to this jurisdiction. While its counsel submitted it did so, not appreciating and not intending this result, it is bound by its decision – see Justice Lynch’s decision in *Wamboldt Estate v. Wamboldt*, 2017 NSSC 288.

[61] Nevertheless, I find the College may still argue *forum non conveniens,* and s. 12 *CJPTA* (as it is consistent with the Legislature’s intention, and in the interests of justice to permit this, given no material prejudice to the plaintiffs in the

circumstances of this case, stemming from the fact that both s. 12 *CJPTA* ("after considering the interests of the parties to a proceeding and the ends of justice") and *forum non conveniens* address similar concerns).

[62] In the Nova Scotia *CJPTA*, we find a list of *presumptive* connecting factors relevant to Dr. Haddad:[21]

> 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
>
> [the only relevant statutorily factor is]
>
> …
>
> (g) concerns *a tort committed in the Province*; …"

[63] These torts alleged by Mr. Devlin against Dr. Haddad were not "committed in" Nova Scotia.[22]

---

[21] As a matter of law these CJPTA presumed connecting factors cannot be applied to CSC (or the College), however I recognize that those factors tend to reflect the jurisprudential factors in relation to a question of "real and substantial connection" to a jurisdiction. Pursuant to s. 4(b) of the *Act*, the College attorned to the jurisdiction of Nova Scotia, thereby making it also unnecessary for me to examine a real and substantial connection analysis vis-à-vis the College.

[22] Section 3(2) of the *CJPTA* reads: "The territorial competence of the court is to be determined solely by reference to this Part." Section 4 of the Act reads: "The court has territorial competence in a proceeding *that is brought against a person* only if…(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*." I note here that if the **defendants** are ordinarily resident in the Province, Nova Scotia will have territorial competence. CSC exercises its legislative mandate at the Springhill Institution (as well as the Nova Institution for female federally incarcerated inmates in Truro). **As a matter of fact and law I conclude CSC could be considered "ordinarily resident" in Nova Scotia** (see *Van Breda* at para. 90 and s. 4(d) *CJPTA*). As noted above however, neither the common law "real and substantial connection" test nor the *CJPTA* (and its presumptive real and substantial connection factors) are applicable to CSC. Neither of the other defendants has been argued to be ordinarily resident in Nova Scotia. Therefore, the fact that CSC is present on a continuous basis ordinarily carrying out its legislative mandate at two Federal Penitentiaries in Nova Scotia, may not be considered by me at stage I of this analysis.

[64] Nor is there a "real and substantial connection" under *CJPTA* between Nova Scotia and the facts on which this proceeding is based, insofar as the facts are specifically relevant to Dr. Haddad.[23]

[65] Section 12 of the *Act* permits the court, in the event of concluding there is a real and substantial connection between Nova Scotia and the present proceeding, to decline territorial competence "on the ground that a court of another state is a more appropriate forum in which to hear the proceeding."

[66] A list of non-exhaustive factors that must be considered are found in subsection 2:

> 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 judgement; and
>
> f) the fair and efficient working of the Canadian legal system as a whole.

[67] If one were to conclude that there was a real and substantial connection between Nova Scotia and the facts on which the proceeding is based (and bearing in mind the College's attornment) I would nevertheless have declined (re Dr. Haddad) and do decline (re the College) jurisdiction pursuant to section 12 of the *CJPTA*.

[68] In spite of the College's submission to the territorial jurisdiction of Nova Scotia, and my conclusion below that John Howard's claims may be said to "arise" under the *CLPA* in Nova Scotia *or* New Brunswick in relation to defendant CSC, in light of my conclusion that the College too may nevertheless argue *forum non conveniens* (and s. 12 *CJPTA*), I am satisfied that the claims of Mr. Devlin and

[23] For completeness, I will note here that I am satisfied that upon an analysis of common law factors, there is also no real and substantial connection between Nova Scotia and the facts upon which proceedings against the College are based (see paras. 83-94 *Van Breda*).

John Howard should be heard together, and that New Brunswick is favoured in that respect on an examination of the non-exhaustive list of factors in s. 12(2) *CJPTA*. Those factors permit me on a discretionary basis to decline jurisdiction, and can only be applied to Dr. Haddad and the College.[24]

iii) John Howard's systemic claims against CSC – Stage 1

[69] On the other hand, *vis-à-vis* CSC, I recognize that Mr. Devlin is part of the cohort of federally incarcerated inmates on behalf of whom John Howard is making claims of systemic negligence and the unconstitutionality (division of powers and sections 7, 12 and 15 of the *Charter of Rights*) in relation to the *CHA* and *CCRA*.

[70] *Vis-à-vis* CSC, the relevant question is: in what province do those claims "arise"?

[71] They are "systemic" claims. They are alleged in relation to the penitentiaries throughout Canada.

[72] Paragraph 14 of the amended statement of claim reads:

> John Howard has sufficient interest to be granted public interest standing, in that:
>
> …
>
> > (h) the claim raises a comprehensive challenge to the *CCRA* and *CHA* based on sections 7, 12 and 15 of the *Charter* as well as with respect to the federal/provincial division of powers under the *Constitution Act*; it is a systemic challenge that differs in scope from an individual challenge to a discrete issue.

[73] In her affidavit, Catherine Latimer, Executive Director of the John Howard Society of Canada, stated:

> 10 John Howard further anticipates that the evidentiary portion of its case relates to the provision of healthcare services by CSC across Canada. Its challenge relates to the constitutionality of the federal statute that is applicable to federal institutions throughout the country.

---

[24] As noted elsewhere, I reject the plaintiffs' claims that there is an "interconnectedness" writ large between the New Brunswick defendants and CSC such that there is a compelling circumstance of a real and substantial connection between these claims and Nova Scotia that should be respected.

> 11 Our claim is not restricted to the mere provision of healthcare services in New Brunswick to Mr. Devlin, although the concrete evidence with respect to the healthcare received by Mr. Devlin from Dr. Haddad in New Brunswick and healthcare he received in Nova Scotia when CSC interrupted the continuity of his medicine in the summer of 2020 (as per the affidavit of Mr. Devlin, which John Howard understands is expected to be sworn…) is inextricably factually linked to the constitutional arguments John Howard intends to make as relates to federal correctional institutional healthcare across Canada.
>
> 12 John Howard intends to adduce evidence of Mr. Devlin's treatment in federal institutions including at Springhill Institution, as well as of treatment he received at institutions in New Brunswick from Dr. Camille Haddad. In particular, John Howard expects to rely on evidence related to correctional health care structures and dental services resource allocation at Springhill Institution in Nova Scotia (involving over 40 Springhill inmates) in the years 2019 and 2020.

[74] From the evidence provided, and the context of the pleadings, it is evident that John Howard intends to mount a case in relation to federally incarcerated inmates, including Mr. Devlin, in a "systemic challenge to the *CCRA* and *CHA*", and that "the evidentiary portion of [John Howard's] case relates to the providing of healthcare services by CSC across Canada".

[75] I am satisfied that those underlying causes of action arguably may be said to arise in any province/territory in which there is a federal penitentiary, but more particularly in the present circumstances, either in Nova Scotia or New Brunswick.

[76] Despite the latter reference to "any province/territory", it is clear that the plaintiffs are also relying upon Mr. Devlin's circumstances and his incarceration in Springhill Institution to be "the thin edge of the wedge" to argue that Nova Scotia is where John Howard's systemic claims causes of action "arise".

[77] All indications are that the plaintiffs wish to proceed with their action as co-plaintiffs in Nova Scotia on all claims.

[78] But, I have found that none of Mr. Devlin's individual claims *arise* in Nova Scotia (bearing in mind I still must consider the *forum non conveniens* arguments) as against CSC.[25]

---

[25] Regarding the *Charter of Rights*, see also *Vancouver (City) v. Ward*, [2010] 2 SCR 28, which concerned an *individual's claim* of breaches of his *Charter* rights giving rise to "constitutional damages".

[79] I conclude that the John Howard's systemic claims of unconstitutionality of the federal legislation as against CSC, whether viewed through the lens of the *Charter of Rights and Freedoms* or a division of powers analysis, are of a *sui generis* nature.[26]

[80] I am satisfied that for s. 21(1) *CLPA* purposes, the systemic claims by John Howard (its constitutional and institutional or systemic negligence claims on behalf of the federal inmate cohort, including Mr. Devlin) arguably may be said to arise in both Nova Scotia and New Brunswick.

[81] Since the plaintiffs prefer Nova Scotia, let me then proceed presuming that the systemic claims by John Howard v*is-à-vis* CSC *arise* in Nova Scotia.

VI - Forum Non Conveniens[27]

[82] Let me then next examine, the *forum non-conveniens* arguments that the plaintiffs would make in relation to New Brunswick (for Mr. Devlin's individual claims), and the *forum non conveniens* arguments that the defendants would make in relation to Nova Scotia (for the John Howard systemic claims).

i) Whether Nova Scotia is the "clearly more appropriate" forum for Mr. Devlin's individual claims (instead of New Brunswick)?

[83] In relation to the CSC under section 21 of the *CLPA*, I have found Mr. Devlin's individual claims do not arise in Nova Scotia, but rather in New Brunswick; and in relation to Dr. Haddad and the College, I have found that there

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[26] See paras. 25, 32, and 57-65 of the reasons in *Newfoundland and Labrador (AG) v. Uashaunnuat*, 2020 SCC 4, where pursuant to section 35 of the *Constitution Act*, two aboriginal parties claimed portions of Québec and Newfoundland and Labrador, seeking compensatory and injunctive relief against mining companies for violations of their section 35 Rights which spanned territory in Québec and Newfoundland and Labrador. While not identical claims to those based on s. 35 of the *Constitution Act*, John Howard's constitutional claims herein are similar in nature to them and are dissimilar to and extricable from the individual claims of Mr. Devlin. Therefore, for present purposes, John Howard's systemic constitutional claims herein are properly characterized as *sui generis*.

[27] I requested and carefully considered the parties' positions regarding whether there may be prejudice (including a limitation period issue) to the plaintiffs should I conclude that the proceedings should be heard in New Brunswick, (before I considered the residual discretion in s.7 *CJPTA* (*vis-à-vis* Haddad and the College) and the common law (*vis-à-vis* CSC) *forum non conveniens* factors – see para. 68 *Newfoundland and Labrador (Attorney General) v. Uashaunnual (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4).

is no real and substantial connection between those claims and Nova Scotia, but that there is between the claims and New Brunswick.[28]

[84] The plaintiffs have the burden to persuade the court that nevertheless, Nova Scotia is the "clearly more appropriate" forum to hear Mr. Devlin's individual claims. I will examine this issue on its own merits and as if I had not declined jurisdiction pursuant to s. 12 *CJPTA*.[29]

[85] In *Newfoundland and Labrador (Attorney General) v. Uashaunnnuat*, 2020 SCC 4 the court stated at para. 68:

> 68 As this Court stated in *Spar Aerospace Ltd.*:
>
> > ... the doctrine of *forum non conveniens*, as codified at art. 3135, serves as an important counterweight to the broad basis for jurisdiction set out in art. 3148. In this way, it is open to the appellants to demonstrate, pursuant to art. 3135, that although there is a link to the Quebec authorities, another forum is, in the interests of justice, better suited to take jurisdiction. [para. 57]
>
> **Some of the factors traditionally considered at the *forum non conveniens* stage are:**
>
> > 1) [t]he parties' residence, that of witnesses and experts;
> >
> > 2) the location of the material evidence;
> >
> > 3) the place where the contract was negotiated and executed;
> >
> > 4) the existence of proceedings pending between the parties in another jurisdiction;
> >
> > 5) the location of Defendant's assets;
> >
> > 6) the applicable law;
> >
> > 7) advantages conferred upon Plaintiff by its choice of forum, if any;
> >
> > 8) the interest of justice;

---

[28] Moreover, had I found such connection to Nova Scotia, I would have declined jurisdiction in relation to Dr. Haddad, and do in relation to the College per s. 12 *CJPTA*.

[29] I keep in mind that *vis-à-vis* CSC the CJPTA legislation does not apply in this analysis, therefore I will look to the common law.

> 9) the interest of the parties;
>
> 10) the need to have the judgment recognized in another jurisdiction. [para. 71]
>
> (see also *Lexus Maritime inc. c. Oppenheim Forfait Gmbh* [1998 CarswellQue 638 (C.A. Que.)], 1998 CanLII 13001
>
> [My bolding added]

[86] Next, I'll review the "factors traditionally considered at the *forum non conveniens* stage".

1-the parties' residence, that of witnesses and experts

[87] Although Mr. Devlin has no control over his location, he was nevertheless present on an ongoing basis and arguably therefore "resident" in Nova Scotia while at Springhill Institution between March-October 2020 and March-May 2021 - being a total of 9 months. He has no control over his residence in future while incarcerated. However, he stated at paragraph 12: "I anticipate and look forward to returning to Nova Scotia upon completion of my current CEGEP studies in Québec, of which I am currently taking advantage as a resident in Québec." I put little weight on that statement.

[88] The residence of witnesses regarding his treatment at Renous, will involve numerous persons from New Brunswick - chiefly among them will be correctional officers and other staff at the Atlantic Institution, as well as Dr. Haddad, and the College staff witness(es).

[89] Ms. Waterbury, Assistant Warden, Interventions at the Atlantic Institution, stated in her affidavit at paragraph 10:

> Most of CSC's material evidence and CSC witnesses that can provide evidence related to the allegation made in the claim are located in New Brunswick. If the claim proceeds before the Nova Scotia Supreme Court, CSC will incur increased litigation costs associated with travel and accommodations.

[90] Edmund Schollenberg, MD stated in his affidavit:

> I am employed as the Registrar of the College of Physicians and Surgeons of New Brunswick… I have been in my current role since September 1992… The position is essentially the Chief Executive Officer of the organization. The principal responsibility is preparing for decisions to be made by committees, as well as the Council, on matters

> relating to registration, complaints, and when necessary, discipline.… The College maintains its office at… Rothesay New Brunswick. The College does not have any responsibility or connection to Nova Scotia. [I am] the sole individual responsible for the day-to-day operations of the College. The College is not only responsible for the licensing of physicians, monitoring practice standards and investigating complaints, but we are often approached for advice and ethical and quality of care matters. It would greatly prejudice the College if the Registrar was required to travel to Halifax to attend these proceedings.

[91] Dr. Camille Haddad stated in his affidavit:

> I am a general practitioner who has practised in New Brunswick since 1992… The entirety of my medical practice is based out of New Brunswick. I am not licensed to practice medicine anywhere other than New Brunswick.… I reside in Miramichi, in the province of New Brunswick and my entire medical practice is located in the province of New Brunswick… Litigation of this matter in Nova Scotia, which may include cross-examination of myself and participation in discovery examinations would be very disruptive to my medical practice. As a general practitioner, I am in a particularly difficult position, given the volume of patients I care for and see each day. The disruptions that would occur to my practice would be significant to me. The time associated with travelling to Nova Scotia as well as the disruption caused to my medical practice in the Miramichi would impede my practice and also has the potential to compromise the continued care of my patients in New Brunswick. Furthermore, I am advised by solicitor Boudreau and verily believe that the witnesses that would likely be called to give evidence at any hearing are based in New Brunswick. The witnesses include the following:
>
> a) Dr. Stephane Bourque (Moncton New Brunswick)
>
> b) Dr. Theriault (Moncton New Brunswick)
>
> c) Dr. Chris Levesque (Moncton New Brunswick)
>
> d) Dr. Stephen Bent (Miramichi New Brunswick)
>
> e) members of the nursing staff at the Atlantic Institution in Renous, New Brunswick
>
> f) prison guards at the Atlantic institution in Renous, New Brunswick.
>
> …
>
> It would be much more convenient for the litigation to occur New Brunswick, where the alleged incidents between myself and Mr. Devlin and the other defendants occurred, where most factual witnesses are located and documents were created, and where I had my only interactions with Mr. Devlin.

[92] Insofar as expert witnesses are concerned, Mr. Devlin stated he will "rely upon the evidence of at least 4 expert witnesses or experts located in Halifax, Nova Scotia." I will infer these to be relevant to his individual claims.

[93] I note that to the extent that the plaintiffs wish to present evidence regarding Mr. Devlin's 9 months at Springhill Institution, and if that trial is held in Nova Scotia, it would be in Halifax. Given John Howard's expectation of having "over 40 Springhill inmates in the years 2019 and 2020" testify, if those witnesses were still in Springhill at the time of trial, they would have to either travel to a place of trial in New Brunswick such as Moncton, or to Halifax in Nova Scotia - distances that are similar.

[94] I am satisfied that a very substantial portion of the witnesses likely required for a trial of Mr. Devlin's individual non-constitutional claims, are based in New Brunswick, whereas Mr. Devlin's "over 40" inmate and 4 expert witnesses, if based in Nova Scotia, are relatively easily transported to a proceeding in New Brunswick.

2-the location of the material evidence

[95] The factual evidence in relation to Mr. Devlin's individual claims is likely to emanate almost entirely from New Brunswick.

[96] I would expect that the plaintiffs' experts will give opinion evidence based on that evidence, and associated available relevant evidence, which to the extent that it was located outside New Brunswick, I find would not likely be a material factor.

[97] [factors 3 and 4 are not applicable here]

5- the location of the defendant's assets

[98] I infer that the assets of Dr. Haddad and the College are located in New Brunswick and will remain so.

6 – the applicable law

[99] All counsel agreed, and I concur that New Brunswick law should govern in relation to Mr. Devlin's individual claims.

[100] While Nova Scotia courts can apply New Brunswick law, it is generally preferable to have local courts deal with their own (New Brunswick) law.[30]

7- advantages conferred upon plaintiff by its choice of forum, if any

[101] As Mr. Devlin is a federally incarcerated inmate, his residence is determined by CSC. There is no guarantee where he will be at the time of trial. He is presently in Québec. As Ms. Waterbury's affidavit at paragraph 7 demonstrates, since he began serving his sentences in 2001, he has been moved between institutions 34 times. He has only served 9 months of his incarceration during that entire time in Nova Scotia.

[102] The evidence does not reveal that Mr. Devlin has any significant connection with Nova Scotia, other than his present counsel are located here.

8-the interests of justice

[103] In *Hryniak v. Mauldin*, 2014 SCC 7, Karakatsanis, J. stated (albeit in a different context):

> 27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> 28 This requires a shift in culture. **The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.**
>
> [My bolding added]

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[30] Particularly if the matter is appealed after a trial in Nova Scotia, and at issue are the interpretation of New Brunswick laws – the New Brunswick Court of Appeal is better suited and more appropriate to hear such cases.

[104] From the perspective of striving for efficiency, quality of service, and consideration of fairness concerns, including where the centre of gravity of the litigation lies *vis-à-vis* Mr. Devlin's individual claims, New Brunswick is clearly the more appropriate forum.[31]

9-the interest of the parties

[105] The court must remain mindful not to unreasonably interfere with Mr. Devlin's ability to access, consult and assist his chosen Nova Scotian counsel.

[106] However, there is no direct evidence (nor do I infer) that there is likely to be any greater difficulty in that regard if the trial is held in New Brunswick, rather than Nova Scotia. I appreciate and do consider that it would be more inconvenient for Mr. Devlin's counsel to attend a trial in New Brunswick rather than Halifax, Nova Scotia, where they are presently based.[32]

[107] On the other hand, I infer that the counsel for the two defendants from New Brunswick would presumably have similar inconvenience if they had to travel to Halifax, Nova Scotia. The AGC has not raised this is a concern for its counsel.

[108] I also keep in mind that the co- plaintiffs wish to have Mr. Devlin's individual claims and the John Howard systemic claims heard together, and that means in the same forum – their preferred choice being Nova Scotia.[33]

[109] A consideration of these traditional *forum non conveniens* factors leads me to conclude that the plaintiffs have not shown that Nova Scotia is a "clearly more

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[31] Hereunder, I also keep in mind the Supreme Court of Canada's statement in *Breda* (para. 90) regarding any case concerning a tort, that the presumptive connecting factors which *prima facie* entitle a court to assume jurisdiction over such a dispute include, in the present circumstances, consideration of: 1) is the defendant domiciled a resident in the province (Nova Scotia)? [2 of the defendants are not; I will presume that CSC defendant can be said to be resident/domiciled in Nova Scotia as a result of the Springhill Institution's location inside Nova Scotia]; 2) was the tort committed in the province? [I have concluded that the alleged torts were not committed in Nova Scotia].

[32] I note here, albeit in relation to Mr. Devlin's individual claims, that John Howard's legal position mirrors that of Mr. Devlin. Although its counsel is from British Columbia, I infer that, as there is no evidence presented on this point that as between Halifax and New Brunswick, John Howard's counsel could as conveniently appear in New Brunswick as Nova Scotia.

[33] See also our Court's statements in *Bouch v. Penny*, 2009 NSCA 80, at paras. 44-52, *vis-à-vis* the legal aspects of the *CJPTA* "the real and substantial connection" test, and the discretionary nature of a *forum non conveniens* analysis.

appropriate" forum.[34] On careful consideration of the available evidence, in light of the pleadings and arguments made, I am satisfied that for Mr. Devlin's individual claims, the plaintiffs have not shown that Nova Scotia is the clearly more appropriate forum.

[110] Therefore, **New Brunswick** remains the proper forum for Mr. Devlin's claims.

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[34] Throughout my *forum non conveniens* analysis for both Mr. Devlin's and John Howard's claims, I have considered any prejudice to their interests that might arise. In particular, I was concerned that *if* I was otherwise satisfied that New Brunswick is the proper forum for all the claims, and I consequently requested a transfer of this proceeding to, or a claim was struck here and had to be refiled in, New Brunswick, would the plaintiffs "be potentially or actually prejudiced by any applicable limitation periods in New Brunswick"? I wrote to counsel by letter November 8, 2022 requesting their positions. I received their detailed considered opinions. Most significant to my concerns was the response from plaintiffs' counsel on November 18, 2022. Therein, Mr. Wilband stated: "… pursuant to section 19(1) of the CJPTA, the proceeding being transferred continues in the receiving court and the Plaintiffs would not be required to re-file their action. The Plaintiffs further agree with the College that the New Brunswick *Rules of Court* do not contain provisions that would prohibit the transfer, nor inhibit the fair and proper conduct of the proceeding. *Although New Brunswick has not enacted comparable legislation to the CJPTA, for the reasons discussed in the cases Bishop v. Wagar and Hurley v. Zutz relied upon by the College, this Honourable Court may request the matter be transferred to New Brunswick if it finds New Brunswick is the more appropriate forum*. However, the issue of prejudice does not end there. The receiving court in New Brunswick would then, at its own discretion, apply its own interpretation of the applicable limitation periods in that Province if raised by counsel. The Plaintiffs agree with the College that the Claims against it are well within the applicable two-year (or 2.5 year) limitation period in New Brunswick. Further, as the activities of the Crown that are subject to constitutional challenge (on the basis of *Charter* claims and jurisdictional arguments) are ongoing, the Plaintiffs say the substance of the constitutional claims in this proceeding are not barred by any relevant limitation period. *However*, the Plaintiffs note that no allegation by the Plaintiff Mr. Devlin against Dr. Haddad with respect to negligence occurred after Mr. Devlin's transfer to Springhill institution in the spring of 2020. Since more than two years has transpired, and without any knowledge of what any of the Defendants intend to do, to the best of our knowledge *it is possible that Dr. Haddad could raise a limitation period defence to foreclose the proceedings against him*. We simply do not know what they may do. … To be clear, *it appears there is agreement between the Parties that, should this Court [transfer the proceeding and the transfer be accepted] … this would result in a continuation of present proceedings and the Plaintiffs would not be prejudiced by any limitation periods with respect to the time the claim was filed in Nova Scotia*. The difficulty with this, however, is that it is unknown what the response of the New Brunswick Court may be. *If the New Brunswick Court declines to accept the transfer, thereby requiring the Plaintiffs to re-file, then the Court could bar the claim if a limitation defence is pleaded*. … A refiling would not be a continuation; any of the defendants may thereafter raise a limitation period defence, the outcome of which we cannot say, as it will be within the interpretive discretion of that Court. … *there is a possibility that it could cause real prejudice to the Plaintiffs*. … this Court could decide there is jurisdiction but then move to the question of convenient forum, in which case the potential prejudice to the Plaintiff that may occur is a relevant consideration towards keeping the proceedings in Nova Scotia. … *In summary, the Plaintiff's position is that they should not be prejudiced by a transfer to New Brunswick, but that there is a significant question as to whether such prejudice will occur… The Plaintiffs submit that nothing prevents the Court from requesting a transfer of the proceeding as against all parties, including the federal Crown, under s. 15(2) of the CJPTA*, should it decide to do so. … it would be inequitable if [the Plaintiffs] were prejudiced by any delay of the Defendants in raising an objection to the jurisdiction of this Honourable Court." I am satisfied that no material prejudice would be occasioned thereby to the plaintiffs.

ii) Whether New Brunswick is the "clearly more appropriate" forum for John Howard's systemic claims (instead of Nova Scotia)?

[111] In relation to CSC and section 21 of the *CLPA*, I have found John Howard's systemic claims arise in Nova Scotia. I could have as easily found that they arise in New Brunswick.[35]

[112] Once I have determined that "jurisdiction *simpliciter* is established and not rebutted, [the defendants] may invoke *forum non conveniens,* in which case [they have] the burden to show why the court should decline to exercise its jurisdiction by:

1. identifying another appropriate forum;
2. establishing the connection between the litigation and the alternative forum using the real and substantial test; and
3. demonstrating why the alternative forum is more appropriate: *Van Breda* at para. 103.[36]

[113] The defendants specifically have the burden to persuade the court that New Brunswick is the "clearly more appropriate" forum to hear John Howard's systemic claims.

[114] Since CSC is the most relevant defendant in relation to these claims, it has the burden, although I will consider the perspectives of the other defendants as well.

1-the parties' residence, that of witnesses and experts

[115] I keep in mind here my earlier relevant factual references to the residences of the parties, witnesses and experts, cited during my analysis of Mr. Devlin's individual claims.

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[35] I keep in mind that *vis-à-vis* CSC the CJPTA legislation does not apply in this analysis – therefore I look to the common law regarding the *forum non conveniens* analysis. The defendants Dr. Haddad and the College are not claimed against insofar as the systemic claims by John Howard are concerned, however they may still have an interest in ensuring that the outcome of the John Howard claims does not skew the court's ultimate analysis in favour of Nova Scotia, if the Devlin and John Howard claims are to be heard together.

[36] See the reasons in *Algonquins of Barriere Lake First Nation v. Attorney General (Canada)*, 2015 ONSC 3505, at para. 20.

[116] In her affidavit Catherine Latimer states that:

> John Howard advocates for a just, effective and humane criminal justice system and generally for the rights and interests of prisoners throughout Canada… joined this action as a co-plaintiff of Michael Devlin in 2020 upon learning of concrete issues Mr. Devlin had experience with healthcare is delivered by CSC in Canada's federal prison system, *in particular in the Ontario and Atlantic regions and including at Millhaven institution in Ontario, Atlantic institution in Renous, New Brunswick and Springhill institution in Nova Scotia.* One of the factors motivating John Howard to join Mr. Devlin in this action was the experiential knowledge that problems related to the delivery of healthcare in Canada's federal institutions appear to be the case across the country and are not specific to any one region area or institution… As we understand it, *all matters relating to Mr. Devlin's experience with healthcare as delivered by CSC and by its contractors are factually linked to events and actions taken in federal institutions located in Ontario, New Brunswick, and Nova Scotia, and such events and actions that occurred in all three provinces are expected to provide evidentiary support for the issues being raised in this case.*
>
> …
>
> John Howard intends to adduce evidence of Mr. Devlin's treatment in federal institutions including at Springhill Institution, as well as of treatment he received at institutions in New Brunswick from Dr. Camille Haddad. In particular, **John Howard expects to rely on evidence related to correctional health care structures and dental services resource allocation at Springhill institution in Nova Scotia (involving over 40 Springhill inmates**).
>
> [My bolding and italicization added]

[117] Nathalie Waterbury stated in her affidavit (para. 10) :

> **Most of CSC's material evidence and CSC witnesses** that can provide evidence related to the allegation made in the claim **are located in New Brunswick**.
>
> [My bolding added]

[118] In his affidavit Mr. Devlin stated:

> 3 In 2000, at age 17, I was sentenced to life imprisonment, with eligibility for parole after seven years. I have been incarcerated since that time.
>
> …
>
> 13 My case will rely upon the following evidence related to the events that occurred in Nova Scotia to support my claim of unconstitutional and negligent care by CSC:

> a) My medicines were arbitrarily terminated by non-medical CSC staff in July 2020… I expect a call **at least three witnesses** regarding this incident;
>
> b) dental care in Springhill institution was significantly compromised by the inappropriate allocation of medical resources by CSC in 2019 and 2020… I expect a call **at least seven witnesses** to give evidence relating at least in part to unconstitutional conduct of CSC with respect to dental care at Springhill.
>
> c) I will be calling **a witness** who is a former correctional warden and director of correctional services in Nova Scotia who will give evidence regarding the provincial transition of healthcare responsibility from provincial corrections to Nova Scotia health in 2001, which led the nation in integrating correctional healthcare services into proper provincial health authorities and improving health outcomes for provincially incarcerated persons….
>
> d) I anticipate I will rely upon the evidence of at least **four expert witnesses** who are experts located in Halifax Nova Scotia. These include experts in health and criminal law and policy at Halifax area universities including Dalhousie University.
>
> [My bolding added]

[119] It is difficult to know whether any of the inmate witnesses will still be incarcerated, and if so, where in Canada they might be in the federal institutional system at the time of discoveries/ trial. [37]

[120] The bulk of John Howard's witnesses are expected to be CSC staff or inmates – leaving aside the suggested four experts who reside in the Halifax area. As I pointed out earlier, as between New Brunswick and Nova Scotia, most of the relevant non-inmate witnesses can be expected to be as proximate to one as they are to the other.

2-the location of the material evidence[38]

[121] Ms. Latimer stated that: "John Howard further anticipates that the evidentiary portion of its case relates to the provision of healthcare services by CSC across Canada … intends to adduce evidence of Mr. Devlin's treatment in federal institutions including at Springhill … as well as institutions in New

[37] I keep in mind as well Mr. Devlin's reference to CSC non-medical staff at Springhill; 7 witnesses regarding dental care; and a former correctional worker and Director of Correctional Services in Nova Scotia.

[38] See Ms. Waterbury's affidavit at para. 10 that "Most of CSC material evidence and CSC witnesses … are located in New Brunswick", albeit this was stated primarily in relation to Mr. Devlin's personal claims. Items 3 and 4 are not applicable and are omitted.

Brunswick"; which according to Ms. Waterbury's affidavit is where Mr. Devlin was located for all, but 9 months, between April 4, 2017 and June 30, 2021.

[122] It appears that John Howard will significantly draw in the presentation of its evidence on the experience of Mr. Devlin while incarcerated in federal penitentiaries in Ontario (most recently May 2008 to April 2017), New Brunswick and Nova Scotia.

[123] John Howard has therefore made Mr. Devlin and other inmates (in Springhill Institution around 2019 - 2020) its primary conduit for advancing the material evidence in support of its claims of institutional negligence and unconstitutionality (as buttressed by expert opinion evidence).

[124] I am satisfied that for John Howard's claims, the material evidence is "located" to similar degree in New Brunswick, as in Nova Scotia.

5- the location of the defendant's assets

[125] CSC is located in both New Brunswick and Nova Scotia.

6 – the applicable law

[126] All counsel agree, and I concur, that in relation to Mr. Devlin's claims, the applicable law will be that of New Brunswick.[39] In light of my conclusion that New Brunswick (or Nova Scotia) is a viable forum *vis-à-vis* John Howard's claims against CSC, it seems most appropriate to presume that New Brunswick law will prevail in relation to all claims being made.

[127] John Howard and Mr. Devlin suggest that Nova Scotia courts could easily, to the extent required, apply New Brunswick law. I stated my reservations about this earlier.

7- advantages conferred upon plaintiff(s) by its choice of forum, if any

[128] As I noted earlier, from the evidence presented, it is difficult to see any material advantages for John Howard in particular, in having the matter heard in Nova Scotia, although having said this I recognize there are sometimes intangibles

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[39] I find helpful Justice Bryson's reasons in *Coady v. Quandrangle Holdings Ltd*., 2015 NSCA 13, wherein he references the issues of limitation periods and "choice of law" analysis and considerations regarding the proper forum in circumstances where it was arguably difficult to know where the tort occurred (i.e. situs).

that may be difficult to articulate, and so by their choice of Nova Scotia I will infer there may be such advantages to the plaintiffs.

8-the interests of justice

[129] From the perspective of striving for efficiency, quality of service, and consideration of fairness concerns, including where the centre of gravity of the litigation lies *vis-à-vis* John Howard's systemic constitutional claims, it is difficult to say that Nova Scotia is preferable to New Brunswick, particularly since in my opinion, overall the centre of gravity of the litigation lies in New Brunswick.

9-the interests of the parties

[130] For John Howard's claims, there is also no significant prejudice to either the plaintiffs or defendants of having their preferred choice of forum rejected.

[131] In conclusion, *vis-à-vis* CSC, having considered all the factors and the relevant evidence, in the context of the pleadings, I am satisfied that the centre of gravity of the litigation is in New Brunswick, and having found Mr. Devlin's claims are properly brought there, CSC has discharged its burden of establishing that New Brunswick is the "clearly more appropriate" forum to hear John Howard's claims.

[132] *Vis-à-vis* Dr. Haddad and the College, regarding John Howard's claims, which are intertwined with Mr. Devlin's individual claims, causing them to have an interest in where John Howard's claims are heard, I am satisfied pursuant to s. 12 *CJPTA*, that the comparative convenience and expense for the parties and witnesses will best be served by the proceeding being heard in New Brunswick. New Brunswick law will be applicable. This outcome is most likely to ensure the fair and efficient working of the Canadian legal system as a whole.[40]

Overall conclusion[41]

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[40] See also the reasons of the court in *Bouch v. Penny*, 2009 NSCA 80 and Justice Brothers decision in *RS v. GN*, 2021 NSSC 51.

[41] I note that under section 7 *CJPTA, vis-à-vis* Haddad and the College only, there is a general discretion giving a court, which under section 4 lacks territorial competence, the option to hear the proceeding notwithstanding: "if it

[133] I have concluded that both Mr. Devlin's individual claims and John Howard's systemic claims should be heard in New Brunswick.

[134] I have given consideration to any residual fairness concerns of such decision but have been unable to identify any material unfairness in this result.

[135] I direct that the counsel for the CSC prepare an order to reflect my decision, to be signed by the remaining parties as their confirmation of its contents being consistent with my decision (as to form).

[136] I will hear from the parties on the matter of costs by no later than 30 days after the release of this decision. Their written submissions are limited to 10 pages.

Rosinski, J.

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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." I decline to resort to this recourse.