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IN ARTICLES -
PRACTISES UNDER CORPORATION j

October 23rd, 2007

Supreme Court of Newfoundland and Labrador
(Trial Division)
Court House
P.O. Box 937, 287 Duckworth Street
St. John's, Newfoundland A1C 5M3

Facsimile: (709) 729-6174

Attention: Mr. David Jones, Q.C.

Dear Sirs:

I have enclosed a copy of *Ward v. Canada (Attorney General)* (October 23rd, 2007), 2007 MBCA 123. Please draw this to the attention of the Honorable Mr. Justice Barry in anticipation of the November 1st, 2007 Chambers Hearing.

Yours truly,

MERCHANT LAW GROUP LLP

Per:

CASEY R. CHURKO

CRC*Is

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Citation: Ward v. Canada (Attorney General) et al.,
2007 MBCA 123

Date: 20071023
Docket: A106-30-06529

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Martin H. Freedman
Mr. Justice Richard J. Chartier

BETWEEN:

DOUG WARD

(Plaintiff) Respondent

- and -

**ATTORNEY GENERAL OF CANADA and
MINISTER OF NATIONAL DEFENCE**

(Defendants) Appellants

) **I. H. Fraser**
) *for the Appellants*

) **C.R. Churko and G. Alberts** ✓
) *for the Respondent*

) *Appeal heard:*
) **April 20, 2007**

) *Judgment delivered:*
) **October 23, 2007**

FREEDMAN J.A.

OVERVIEW

1 This appeal concerns a proposed class action. The claim is based on harm allegedly caused by the spraying of herbicides, including "Agent Orange," at Canadian Forces Base Gagetown, in New Brunswick, commencing as early as the mid-1950's and continuing in certain respects to the present day. The action is at an early stage, and this appeal is about the jurisdiction of the Court of Queen's Bench of Manitoba.

2 This action has been commenced by Doug Ward, a Manitoba resident (the "plaintiff"), against Ministers of the Federal Crown (the "Crown"),

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alleging that damage has been sustained by the plaintiff in Manitoba as a result of the spraying of herbicides in New Brunswick by the Crown. The Crown is resident in every province and territory of Canada. If a Manitoba resident plaintiff sues a Manitoba resident defendant alleging damage sustained here, the court will have, and will typically exercise, jurisdiction over that action. In this action, however, it is very likely that non-residents will be included in the class of plaintiffs, if and when that class is finally identified, and if and when this action is certified as a class action. Therein lies the source of the present problem.

3 There are two issues in this appeal. First, in light of the prospective inclusion of non-residents in the class of plaintiffs, does the Manitoba court have jurisdiction? Second, if it does, in the particular circumstances of this claim should the court exercise that jurisdiction? The first issue is a matter of law, while the second is a matter of judicial discretion.

4 The Crown moved before a judge to have the action dismissed or stayed. It argued that only the courts of New Brunswick could properly take jurisdiction over this action. It also argued that, even if a Manitoba court had jurisdiction as a matter of law, in the circumstances it should decline to exercise it and should defer to the courts of New Brunswick. The judge dismissed the Crown's motion. I agree with the conclusions reached by the judge, and, for the reasons that follow, would dismiss the Crown's appeal.

BACKGROUND

5 The amended statement of claim in this matter (no statement of defence has yet been filed) asserts that between 1956 and 2005 the Crown

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sprayed various chemicals, most of which included high levels of dioxins, on CFB Gagetown. The claim alleges that dioxin is "the most toxic chemical ever produced." The claim asserts that the chemicals sprayed included carcinogens and that the chemicals caused very serious damage to many persons. The claim lays out in considerable detail allegations that, if proven, and if applicable to a large number of plaintiffs, could result in a judgment of some magnitude.

6 The plaintiff lives in Manitoba and was a member of the military stationed at CFB Gagetown in the mid-1970's. He alleges that certain medical problems he has encountered are the result of the spraying of the chemicals by the Crown. He states that he is a representative of a class of persons which he describes as: "All individuals (including their estates) and other legal entities who claim to have suffered or expect to suffer injury to their persons or their property as a result of the spraying of various chemicals by the Defendant at CFB Gagetown between 1956 and 2005." The injuries allegedly suffered by these persons include cancer of various kinds, reproductive/birth disorders and many other kinds of illnesses.

7 Claims similar to the present one have been filed by the plaintiff's counsel in most or all Canadian provinces, in each case with a plaintiff resident in the particular province. In the provinces which, like Manitoba, have some form of class action legislation, the claims have been filed as class actions.

THE MANITOBA LEGISLATION

8 *The Class Proceedings Act*, C.C.S.M., c. C130 (the *Act*), came into force in this province on January 1, 2003. In the *Act*, a class action, the

commonly used term, is called a class proceeding. I will use the terms interchangeably. Among the provisions of the *Act* that should be noted is s. 6(3), which permits the division of a class of plaintiffs into resident and non-resident subclasses.

9 The *Act* is what the parties describe as “opt out” legislation. Members of a certified class of plaintiffs may opt out of the proceedings (s. 16), but if they do not do so they are treated as part of the class. This is contrasted with the situation in certain other provinces that have class action legislation where a plaintiff must “opt in” to participate. This “opt out” feature, together with favourable provisions on costs (discussed below), means that Manitoba is considered a “plaintiff-friendly” class action jurisdiction. See Ward K. Branch, *Class Actions in Canada*, looseleaf (Aurora: Canada Law Book, 2006) at para. 11.197.

THE REASONS OF THE JUDGE

10 The judge who heard the motion described the two issues as: Whether the court has jurisdiction *simpliciter*, and, if so, whether the Crown has established that a Manitoba court is *forum non conveniens*.

11 He noted that jurisdiction *simpliciter* challenges are rare where both plaintiff and defendant reside within the jurisdiction. The Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, developed the test of ascertaining whether there was a “real and substantial connection” (at p. 1080) between the action and the territory, where jurisdiction was an issue, but the judge said that test is normally reserved for claims where one of the parties is not resident in the province where the

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action was brought. That was not the case here. Therefore, he said, jurisdiction *simpliciter* would ordinarily be satisfied here without resort to that test.

12 The Crown had argued that an approach that is suitable for individual actions is not appropriate to a class action that is potentially national in scope. Application of the individual-action rules could lead to chaos, argued the Crown, with the same actions filed in many provinces. The Crown's solution was that the act complained of had to have been committed in the jurisdiction. The judge said that this would have little application in most class actions. Moreover, he said, this approach had been rejected by the Supreme Court of Canada in *Morguard*. The judge could find no principled reason to support this approach (apart from considerations that arise more properly in the *forum non conveniens* analysis).

13 According to the judge, the Crown had conceded that the connection of the claim to New Brunswick was "tenuous" (that is different from the position the Crown advanced in this court). He concluded that the "well established approach" to jurisdiction should be maintained and found that the plaintiff had established that the court had jurisdiction *simpliciter*.

14 He then turned to *forum non conveniens*, and observed that the burden was on the Crown in this regard. He said that the proper analytical approach had been well explained by Sharpe J.A. of the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 160 O.A.C. 1, 60 O.R. (3d) 20 at paras. 34-35. *Muscutt* was a case (not a class action) involving out-of-province defendants. In the course of a comprehensive judgment in which he concluded that the motions judge was correct in finding that the real and

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substantial connection test had been met (thus warranting the court's assumption of jurisdiction over the non-resident defendants), Sharpe J.A. also dealt with *forum non conveniens*. He said (at paras. 40-41):

Very often there is more than one forum capable of assuming jurisdiction and it is necessary to determine where the action should be litigated. As Sopinka J. explained in *Amchem*, [*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897], ... at p. 912 S.C.R., "[f]requently there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives". Where more than one forum is capable of assuming jurisdiction, the most appropriate forum is determined through the *forum non conveniens* doctrine, which allows a court to decline to exercise its jurisdiction on the ground that there is another forum more appropriate to entertain the action.

Courts have developed a list of several factors that may be considered in determining the most appropriate forum for the action, including the following:

- the location of the majority of the parties
- the location of key witnesses and evidence
- contractual provisions that specify applicable law or accord jurisdiction
- the avoidance of a multiplicity of proceedings
- the applicable law and its weight in comparison to the factual questions to be decided
- geographical factors suggesting the natural forum
- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.

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15 The judge in this matter referred to the following comment by the Supreme Court in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63 (at para. 137): "... the proper test is to ask whether the existence of a more appropriate forum has been clearly established to displace the forum selected by the plaintiff." He also referred to the analysis of Professor Paul M. Perell (now Perell J.) in an article entitled "A Litigator's New Primer on Conflict of Laws" (1995), 17 *Adv. Q.* 300 at 305-6, adopted by this court in *Craig Broadcast Systems Inc. v. Magid (Frank N.) Associates Inc.* (1998), 123 *Man.R.* (2d) 252 (at para. 25):

.....

When an issue of 'forum non conveniens' is raised, the domestic court will have jurisdiction simpliciter and the issue is whether there clearly is a more appropriate forum than the forum chosen by the plaintiff. Put somewhat differently, before staying its own proceedings, the domestic court must be satisfied that there is another jurisdiction connected with the matter in which justice can be done between the parties at substantially less inconvenience and expense. This test favours the plaintiff's right to choose a forum and recognizes that the needs of a world community may be advanced by domestic courts exercising jurisdiction in cases with a foreign element, but the test requires the domestic court to examine the natural forum, i.e., which jurisdiction has the most real and substantial connection with the action and the parties.

16 The judge concluded that the Crown had failed to establish that New Brunswick was the most convenient forum for the trial. It was of no significance, he said, that New Brunswick law would apply to the determination of liability, and there appeared to be some "real juridical advantages" to the plaintiff if the action was heard in Manitoba. Certain provisions of the *Act*, he said, were advantageous to the plaintiff as

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compared to the statutes in other provinces. New Brunswick did not yet have class action legislation in force, and proceeding in that province with a national class or representative action would be more difficult. Since the judgment, New Brunswick proclaimed in force, on June 30, 2007, its class action legislation (*Class Proceedings Act*, S.N.B., c. C-5.15).

ARGUMENT ON APPEAL

(1) The Crown's position

17 The Crown said that eight actions making similar claims (including this one) have been started in seven provinces. It said that each personal injury claim was made by a person, or a family member of a person, exposed to chemicals sprayed at CFB Gagetown. There is also a real property claim in all the actions (except this one) relating to property in New Brunswick.

18 The claims in the Manitoba action are all advanced, said the Crown, in New Brunswick. The real property claims will proceed in the courts of New Brunswick. It argued that, while there were about 1,300 potential class members who had "signed up" with the plaintiff's counsel, there was no evidence of how many were Manitoba residents. Moreover, except for the presence of the plaintiff in this province, there was no evidence of any kind connecting the Manitoba action to Manitoba.

19 While the Crown had conceded before the judge that, as it said in its factum, "... in terms of documentary productions and expert witnesses, there is, as yet, no evidence that this action has a specially strong connection to New Brunswick," it did not concede that the overall connection of the claim with that province was tenuous.

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20 The Crown acknowledged that "there would be no doubt" that the courts of this province would have jurisdiction if this was an individual action; but it said that in this opt out national class action, where many plaintiff class members will be non-resident, the courts will not have jurisdiction unless there is a "real and substantial connection" between the claim and this province.

21 Relying on a number of decisions, including *Morguard*, the Crown argued that the assumption of jurisdiction and the enforcement of judgments are two sides of the same coin; that is, since it is reasonable for the superior court of one province to enforce the judgment of the superior court of another province, that latter court should only exercise jurisdiction if it is reasonable to do so. La Forest J., for the court, in *Morguard* said that (at p. 1079):

... The taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives and recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction.

22 This raised, said the Crown, a particularly acute problem in the context of a national class action, which has posed difficulties for courts throughout Canada. The Crown argued that there have been decisions in class action proceedings in other provinces where one provincial superior court has refused to recognize the assumption of jurisdiction by another provincial superior court. The *Morguard* approach, developed in the context of an individual action where the issue relates to an out-of-province defendant, does not work, said the Crown, in a class action where the issue

relates to whether an out-of-province plaintiff should be subjected to the court's jurisdiction.

23 The test, according to the Crown, should be whether the courts of the province where a non-Manitoba plaintiff resides would accede to the assumption of jurisdiction over that non-resident by the Manitoba court, and deny that person, who is a resident of that other province, the right to sue in that other province's courts.

24 The Crown also argued that the judge "misapprehended the significance" of enforcement. Whereas he said (at para. 37) that enforcement against the Crown would not be a problem anywhere in Canada, the real question was whether the Crown could have a Manitoba judgment recognized in another province, and bar an action against the Crown in that province. Thus, restraint in assuming jurisdiction is required, argued the Crown. That is accomplished by the application of the concept of "real and substantial connection," a concept which is very case-specific. The Crown relied on the decision of the Ontario Court of Appeal in *Muscutt* (see para. 14).

25 The Crown proposed a set of principles to address the issue of whether a court has jurisdiction in a proposed national opt out class action. Each of the principles, it said, was supported by sound authority. These principles may be summarized this way:

1. a class action is not simply a collection of individual actions;
2. an opt out national class action raises unique jurisdictional considerations;

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3. where the essential elements of the case are widely spread over several provinces, and any province where a representative plaintiff lives may have a real and substantial connection to the case, the principles of *forum non conveniens* should govern whether a court should exercise jurisdiction;
4. where those elements are principally found in one province, that province may be the only jurisdiction with a real and substantial connection to the case; and
5. possibly, depending on the circumstances, no court has jurisdiction, because no province has a real and substantial connection to the case.

26 Since all the significant factors in the present action connect this claim to New Brunswick, that province alone has the required connection to found jurisdiction, said the Crown.

27 Turning to the discretionary issue of *forum non conveniens*, the Crown said that the claim should be litigated in the jurisdiction that has "the closest connection with the action and the parties." See *Amchem*. The judge erred, said the Crown, in concluding that the plaintiff achieved a juridical advantage by virtue of the Manitoba legislation. Most significantly, the Crown argued, the judge failed to consider properly all the factors that established that New Brunswick was clearly the province with the most substantial connection to the claim.

(2) The Plaintiff's position

28 The plaintiff's counsel were candid. Their factum states: "... this appeal is about preserving the opportunity to seek a national opt out class

action in Manitoba without exposing the Plaintiff to a costs award of several hundred thousand dollars if the attempt at certification is unsuccessful." Manitoba has a plaintiff-friendly costs regime whereas in New Brunswick, where there is a "full costs regime," the "risks to a representative plaintiff are overwhelming." The plaintiff described the *Act* as "the best in the country for Plaintiffs" while at the same time being fair to defendants.

29 The plaintiff has the right, he argued, to seek out and sue in a forum most suitable to his needs, so long as he did not engage in inappropriate "forum shopping"; that is, so long as his choice of forum does not cause "great hardship" to the defendant. The plaintiff pointed out that the Crown did not advance hardship or prejudice as an argument on this motion.

30 But the plaintiff made it clear that it was not only the advantages in the *Act* that warranted the action being heard in Manitoba. He relied on the dicta in *Amchem* that "... a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides" (at p. 920). He argued that the connectors to Manitoba were numerous, pointing to a Manitoba plaintiff, likely Manitoba class members, geographical convenience for Canadians, home of potential third parties and the presence of the Crown.

31 The plaintiff argued that the judge was clearly correct as a matter of law in holding that, based on the presence in Manitoba of the plaintiff and the Crown, the courts here had jurisdiction. He said that, in light of this presence-based jurisdiction, there was no need for the judge to examine the connections of the claim to this province, although they were significant. The matter of certification and definition of any class is still to come, and the

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certification stage, where “jurisdictional issues will resurface,” is the right place to consider the Crown’s arguments.

32 Indeed, according to the plaintiff, the Crown’s entire argument would be better heard at the certification stage. This action is not and may never become a class action, he argued, since it is only when certification occurs that a “class proceeding” can be said to exist (see s. 1 of the *Act*). There is at this point no legal basis to deny the resident plaintiff his right to bring this action against the resident defendants. Moreover, if certification does occur, he argued, any prospective non-resident class member could opt out and, if he or she wished, commence a separate action in another province; no rights of such a person would be restricted by permitting this matter to go ahead.

33 On the first issue (jurisdiction *simpliciter*), the plaintiff points to the following factors: he resides in Manitoba and has suffered damage here; class members reside here and have sustained damage here; the Crown is resident here; and from a functional perspective Winnipeg offers geographical advantages regarding witnesses, class members and counsel.

34 On the second issue (*forum non conveniens*), this court should be slow, the plaintiff said, to interfere with the “highly discretionary” order of the judge. He exercised his discretion on correct principles. That there may be other proceedings in other provinces is only one factor to be taken into account, and balanced along with all other factors. With the application of the principle of judicial comity and with the unique provisions of class action legislation across the country, which provide more than adequate protection, the plaintiff said there should be no concern about deleterious effects of parallel proceedings.

DECISION

1. Jurisdiction *Simpliciter*

35 The traditional basis of a court's jurisdiction in an action for injury to the person was explained by Dickson J. (as he then was) in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at 397 in these terms:

Traditionally, the view has been held that jurisdiction in a personal action rests upon physical power and the ability of the Court to enforce any judgment it may render. Jurisdiction, therefore, normally depends upon the presence of the defendant within the territorial limits of the Court or upon the voluntary submission of the defendant to the authority of the Court.

36 This view has a foundation grounded in longstanding practice and precedent. As was aptly expressed by Professor S.G.A. Pitel & C.D. Dusten, "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006), 85 Can. Bar Rev. 61 at 68-69: "... the historic roots of presence-based jurisdiction cannot be over-emphasized. As a matter of precedent, common law courts have taken jurisdiction based on presence for hundreds of years"

37 Many cases were cited to us where the defendant was not resident in the jurisdiction, a very important factor, which distinguishes those cases from this. It is central to the first issue here that the Crown's presence in this jurisdiction satisfies the traditional test outlined in *Moran*. The issue here is different than the one in those other cases. The issue may be described this way: should there be a new or modified approach to jurisdiction in a proposed class action, in circumstances where, if the action was an

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individual action, the court would clearly have jurisdiction? That issue will first be considered from the perspective of jurisdiction *simpliciter*.

38 As the judge correctly observed, challenges to jurisdiction *simpliciter* are rare where both the plaintiff and the defendant reside within the jurisdiction. I agree with his statement that in this action jurisdiction *simpliciter* would ordinarily be satisfied without consideration of whether there is a “real and substantial connection” between the claim and this province. After all, there is a resident plaintiff who is suing resident defendants, asserting damage suffered in this province, and those circumstances would usually be sufficient to vest jurisdiction *simpliciter* in the court. The *Morguard* “real and substantial connection” test was developed in an entirely different situation; in that case, the defendant was in a province different from the one where the action was commenced.

39 But, while this action at present has only one plaintiff, it is intended that it be certified as a class action. If it is certified, there will be many, probably a majority, of non-resident plaintiffs, or class members. For that reason, the Crown argued that jurisdiction *simpliciter* should not be found to exist here, notwithstanding the Crown’s presence, unless the acts or omissions in question occurred within Manitoba. The judge rejected this approach, and I agree with his doing so.

40 One of the clearest explanations for why the potential inclusion of non-residents in the class of plaintiff should not deprive a court of the jurisdiction *simpliciter* it would otherwise have can be found in the decision of the British Columbia Court of Appeal in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, 144 B.C.A.C. 51. That was a class action involving

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a number of issues, and the certification order included non-residents in the class, even though they had not used the product in British Columbia. For the majority, Huddart J.A. examined the jurisdictional issues (at paras. 69-99). She noted that jurisdiction *simpliciter* is a question of law. She reviewed the “real and substantial connection” test and then said (at para. 91):

Some cases will not require a court to move beyond the traditional rules. If a defendant is within the jurisdiction ... the test will normally be satisfied. This is the result because no injustice results from a court taking jurisdiction in such cases and orderly decision-making within Canada is respected.

She pointed out that the question of whether a more appropriate forum existed could be dealt with under the *forum non conveniens* analysis.

41 Huddart J.A. also said that (at para. 92): “Where the traditional rules are not adequate to ensure fairness and order then other considerations will become relevant” In this case, in my opinion, the Crown has not, or at least has not yet, shown that the traditional, presence-based approach to establishing jurisdiction would result in other than fairness and order. The traditional tests still apply, such that where the parties each have a presence within the province, and there is a connection such as the sustaining of damages within the province, there is normally no need to go further and see whether there exists the “real and substantial connection” referred to in *Morguard*. I agree with the views expressed by the British Columbia Court of Appeal in *Teja et al. v. Rai*, 2002 BCCA 16, 162 B.C.A.C. 187 (at para. 23, also *per* Huddart J.A.), that the “real and substantial connection”

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test does not override the traditional tests, since that test was “developed for non-traditional situations.”

42 More recently, the Ontario Court of Appeal confirmed that the traditional rules for the assumption of jurisdiction were alive and well, and had not been subsumed into the “real and substantial connection” test where the defendant was present in the jurisdiction. In *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431, 169 O.A.C. 1, leave to appeal dismissed, [2003] S.C.C.A. No. 186 (QL), Rosenberg J.A., for the court, said (at para. 29):

... The real and substantial connection test applies where a court seeks to assume jurisdiction over defendants that have no presence in the jurisdiction. The real and substantial connection test serves to extend jurisdiction of the domestic courts over out-of-province defendants. It is not a pre-requisite for the assertion of jurisdiction over defendants, even out-of-province defendants, that may be present in the jurisdiction.

43 Rosenberg J.A. discussed certain aspects of *Morguard*, in these terms (at para. 30):

.... The court held that provinces should recognize each other's judgments when it was appropriate for the court that gave the judgment to have assumed jurisdiction. At pages 1103-04 S.C.R., La Forest J. explained the traditional limits of jurisdiction. As he said, the question of appropriate jurisdiction “poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments – in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment”. Where the defendant is within the jurisdiction, the court has jurisdiction over the person.

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44 The “real and substantial connection” test was formulated in *Morguard*, where the defendant was in another province (and the case was about the enforceability of an Alberta judgment in British Columbia). At p. 1103, the judgment states that there was “no difficulty” in assuming jurisdiction based on the presence of the defendant. I agree with Pitel and Dusten, *op. cit.*, at p. 64, that there was no suggestion in *Morguard* that the court was modifying the traditional test for jurisdiction based on the presence of the defendant, and requiring a real and substantial connection, where the defendant was present. The “real and substantial connection” test was intended to deal with a different category of jurisdictional cases, namely, those involving assumed jurisdiction, and not jurisdiction based on presence or agreement.

45 But later cases have raised questions as to the scope of that test; see, for example, *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, where Major J., for the majority, said (at para. 37):

... A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties.

46 This is not readily reconcilable with *Morguard*, but perhaps the answer is that a court assessing jurisdiction based on the defendant’s presence can always stay proceedings based on *forum non conveniens* (see Pitel and Dusten, *op. cit.*, at p. 69). I am satisfied that, for the purposes of determining jurisdiction *simpliciter*, the real and substantial connection test has no application in this action, where the plaintiff and the defendants each

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have a presence in the jurisdiction and the plaintiff alleges he sustained damage here.

47 I return to the issue described in para. 37; does the prospective certification of this proceeding as a class action deprive the court of the jurisdiction *simpliciter* which it otherwise clearly has? In my view it does not. The Supreme Court of Canada recently discussed this very issue, in *Bisailon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666. Writing for the majority, LeBel J. said (at paras. 16-19, 22):

The class action has a social dimension. Its purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights ... This Court has already noted that legislation on class actions should be construed flexibly and generously.

The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights ... It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so ...

... Thus, unless otherwise provided, the substantive law continues to apply as it would in a traditional individual proceeding.

Similarly, recourse to this procedural vehicle does not change the legal rules relating to subject-matter jurisdiction.

.....

In short, the class action procedure cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal. Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals. Nor does it create new substantive rights.

[emphasis added]

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48 In these proceedings the Court of Queen's Bench of Manitoba has jurisdiction *simpliciter*. The prospective addition of non-resident plaintiffs to the class would only become relevant at certification, or in the *forum non conveniens* analysis, to which I now turn.

2. *Forum Non Conveniens*

49 Given that the court has jurisdiction *simpliciter*, should it nevertheless decline to exercise it? It should if there is a forum that is more appropriate or convenient for the judicial resolution of the claim. The standard to be met is quite high. In *Amchem*, the Supreme Court made it clear that "the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff" (at p. 921). In *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, LeBel J. cautioned that "the doctrine of *forum non conveniens* is to be applied exceptionally" (at para. 79).

50 In para. 14 above will be found an enumeration of most of the principal factors usually considered by a court when deciding which forum is most appropriate. See also the judgment of Greenberg J. in *Whirlpool Canada Co. v. National Union Fire Insurance Co. of Pittsburgh, PA et al.*, 2005 MBQB 205, 198 Man.R. (2d) 18 at para. 20. The judge in the present case considered these factors, and explained in some detail why he had concluded that the Crown, which carries the burden of establishing that there is a more appropriate forum than Manitoba, had not discharged that burden. I can find no fault with his analysis. Moreover, since his decision on this issue is based on the exercise of his discretion, we ought not to interfere with the decision, even if we disagree with it, unless the judge misdirected

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himself or his decision is so clearly wrong as to amount to an injustice. See *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1375. Neither of those circumstances exists here.

51 The Crown sought to show that New Brunswick was clearly the more convenient jurisdiction for litigating this action, in light of the obvious connection the claim has with that province. The burden on the Crown was quite high, but regardless of that burden, the outcome depends on a consideration of all relevant factors, with the overriding goal of preserving both fairness and order. See *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at 325.

52 The judge observed that the fact that New Brunswick law would apply in the determination of liability was not a significant factor. The courts of Manitoba could apply New Brunswick law. Perhaps most importantly, said the judge, the plaintiff has a right to choose the forum, provided that he is not "forum shopping," that is, simply suing in the most beneficial or advantageous place to litigate. See *Tolofson v. Jensen; Lucas (Litigation Guardian of)*, [1994] 3 S.C.R. 1022 at 1052. I agree with those comments, and wish to add one or two of my own. These relate directly to the issue posed above (see para. 37), that is, whether the proposed class action nature of this claim should modify the approach to the *forum non conveniens* analysis.

53 In explaining why he rejected the Crown's proposed rules for national class actions, the judge discussed a number of matters touching upon the degree of connection between New Brunswick and this claim. He noted that the records were stored in Ottawa, that it was unlikely that experts would come from New Brunswick, that the vast majority of class members

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“probably” do not live in that province, and few of the witnesses still reside there. Against this backdrop the judge was not satisfied that the courts of New Brunswick (the jurisdiction proposed by the Crown) could do justice between the parties at substantially less inconvenience and expense than could the courts of Manitoba.

54 The judge was influenced by his acceptance of the general right of a plaintiff to choose his forum, and he acknowledged that where there are juridical advantages for a plaintiff that right may be enhanced. In certain circumstances the exercise of that right may be constrained; that will typically be the case if a plaintiff is engaged in forum shopping. The Crown, in effect, argues that the plaintiff is doing just that. The judge rejected that argument, as would I. There are sound reasons for the judge to have concluded that, at least so far as the action stands today, Manitoba is an appropriate jurisdiction for the resolution of this claim.

55 Recognizing that this is a proposed class action, it is clear that there are some significant juridical advantages to the plaintiff in pursuing this action in this province.

56 First and foremost are the provisions of the *Act*. The *Act* offers to a plaintiff the potentially very considerable advantage that flows from the opt out nature of its provisions. All potential members of a class are included in the action unless they take steps not to be included. This differs from some other class action statutes, which require positive opt in action by a prospective class member (at least with respect to non-residents). For example, in New Brunswick, a person who is not a resident of that province must opt in, in order to become a member of the class (s. 18(3)). It is

undisputed that the Manitoba scheme is attractive from the perspective of a plaintiff, as one would intuitively expect that an opt out approach would result in a larger class than would an opt in approach.

57 Perhaps most significantly the costs regime under the Manitoba scheme is very attractive to a representative plaintiff in a class action. Such a person is significantly insulated from serious exposure to an award of costs. In New Brunswick, for example, costs are generally to be awarded in accordance with the Rules of Court (s. 39(1)), and there are no special costs provisions regarding representative plaintiffs. Costs in Manitoba can only be awarded against a representative plaintiff in limited circumstances, found in s. 37 of the *Act*:

Costs

37(1) Subject to this section, no costs may be awarded against any party with respect to any stage of a class proceeding, including a motion for certification under subsection 2(2) or section 3, or any appeal arising from a class proceeding.

Considerations re costs

37(2) The Court of Queen's Bench or The Court of Appeal may only award costs to a party in respect of a motion for certification or in respect of all or any part of a class proceeding or an appeal arising from a class proceeding if

(a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party;

(b) at any time that the court considers that an improper or unnecessary motion or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose; or

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(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive another party of costs.

Assessment of costs

37(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.

Class members not liable for costs

37(4) Class members, other than a person appointed as a representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.

58 The *Act* represents, of course, the expressed will of the Legislature, which has quite deliberately crafted this legislation in a fashion designed to encourage and facilitate class actions in this province, provided, of course, that there is a solid jurisdictional basis for such actions to be brought here. In *Amchem*, Sopinka J. discussed the concept of juridical advantage in these terms (at p. 920):

.... The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping." On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

59 So, given (1) the presence here of the plaintiff, (2) his as yet unchallenged assertion of damage sustained here, (3) the presence here of the Crown, (4) the clear juridical advantage to the plaintiff of prosecuting a

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class action in this province, and (5) no apparent significant juridical disadvantage to the Crown, there was sound reason for the judge to have exercised his discretion in favour of this province as *forum conveniens*. There is no reason, or basis, to interfere with his decision, and I would dismiss the appeal.

60

There is one further matter to address. That relates to the timing of the Crown's motion, and particularly to the *forum non conveniens* aspect of the motion. Frequently such motions are not brought until the certification stage. See *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441 (Gen. Div.), *McCutcheon v. The Cash Store Inc.* (2006), 27 C.P.C. (6th) 293 (Ont. S.C.J.), and *Pardy et al. v. Bayer Inc.*, 2003 NFSC TD 109, 229 Nfld. & P.E.I.R. 242, aff'd 2003 NLCA 45. *Contra*, see, for example, cases cited in I.F. Leach, "Preliminary Motions in Class Proceedings: Certification and Other Contenders" (2005) 2 Can. Class Act. Rev. 141 at 160-61. In *Englund et al. v. Pfizer Canada Inc. et al.*, 2006 SKQB 6, 274 Sask.R. 172, Klebuc J. (as he then was) held that granting a stay prior to certification would be premature. There were similar proceedings in Ontario, and in denying the stay the judge said (at para. 41) :

... A stay order in these circumstances would amount to an abdication of this court's responsibility to persons within its jurisdiction ... Should an Ontario court certify the Ontario Action with class provisions that protected the interests of claimants contemplated in the Sask Action, or vice versa, serious consideration then could be given regarding which action should be stayed, or whether a transfer of part of either action would be practical.

61

In *Pardy*, Mercer J. said (at para. 15):

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.... Prior to its certification as a class proceeding, an action should not be considered to have been commenced by a member of the putative class who is not a representative plaintiff, in the absence of class [*sic*] evidence of that member's participation in the action.

62 At present there is only one plaintiff. There is still a limited amount of evidence before the court. At some point the plaintiff must seek certification of the proceeding as a class proceeding, and further evidence will undoubtedly be presented. The proposed class of plaintiffs may comprise residents and non-residents or be divided into subclasses.

63 It would not be surprising if at the certification stage, depending on all the evidence before the court at the time, including the likely composition of the class, the Crown renewed its motion, or at least the *forum non conveniens* aspect of its motion. While the *Act* clearly contemplates that there could be a subclass of non-residents, the Crown may nevertheless decide to argue, perhaps only with respect to non-residents (whether or not they are a separate subclass), and based on all the evidence then before the court, that it has become clear that Manitoba no longer has jurisdiction *simpliciter* or has become *forum non conveniens*.

64 The case management powers in the *Act* (see ss. 12 and 13) permit the court "at any time" to make appropriate orders, including orders to stay proceedings. Such a motion would require the court to consider, on the basis of the additional facts before it, whether it had or should exercise jurisdiction over non-resident plaintiffs, or even over resident plaintiffs. In sustaining the judge's decision, I would expressly reserve the right to the Crown to make such a motion.

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65 There will be future opportunities, as the plaintiff acknowledges, for a Manitoba court to take into account events that might transpire in the courts of other provinces, and, if appropriate, to reflect in a subsequent order those principles of judicial comity referred to in *Morguard* and *Harrington*, among other cases. The present order is not necessarily the last Manitoba word in this case on the subject of jurisdiction.

66 As indicated above, I would dismiss the appeal. As to costs, s. 37 of the *Act* is quoted above. This action is not yet a "class proceeding," defined in s. 1 as a proceeding certified as such. It may become one, or it may never become one. The *Act* states that "no costs may be awarded against any party with respect to any stage of a class proceeding," except in certain limited circumstances. We did not hear argument on the question of costs, nor was the matter addressed to any extent in the *facta* submitted by the parties. I would, therefore, permit the parties to file written submissions on costs, within 30 days of the date of these reasons (the plaintiff within 15 days, and the Crown by the 30th day), and a decision on costs will follow soon after.

Walter Freedman J.A.

I Agree:

Ronnie Danis J.A.

I Agree:

[Signature] J.A.