IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *International Raw Materials Ltd. v. Steadfast Insurance Company,* 2023 BCSC 1389

Date: 20230810
File. No.: S219774
Registry: Vancouver

Between:

International Raw Materials Ltd.

Plaintiff

And

Steadfast Insurance Company

Defendant

-And-

File. No.: S224514
Registry: Vancouver

Between:

Ironshore Speciality Insurance Company

Plaintiff

And

Steadfast Insurance Company

Defendant

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Plaintiffs:	S. Ip S. Tessarolo
Counsel for the Defendant:	I. Wachowicz
Place and Date of Hearing:	Vancouver, B.C. June 23, 2023
Place and Date of Judgment:	Vancouver, B.C. August 10, 2023

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Introduction

[1] This is a ruling on preliminary motions concerning territorial competence in two separate but closely-related insurance actions. More specifically, the defendant seeks a determination that this Court lacks territorial competence over the claims brought by each of the plaintiffs, and argues in the alternative that the Court should decline to exercise its jurisdiction in favour of a more appropriate forum in the United States. I would dismiss the applications for the reasons that follow.

Background

[2] International Raw Materials Ltd. ("IRM") is a manufacturer and distributer of chemical raw materials. In 2018, there were multiple incidents in which sulfuric acid acquired by IRM was spilled on the highway near Trail, British Columbia. As a result, a total of 11 separate vehicle damage actions were brought in this Court against IRM and a number of other defendants. At the relevant time, IRM had multiple liability insurance policies, including policies with Ironshore Specialty Insurance Company ("Ironshore") and Steadfast Insurance Company ("Steadfast"). IRM sought coverage for the vehicle damage actions through both Ironshore and Steadfast. Ironshore provided coverage under its policy and assumed IRM's costs in defending the vehicle damage claims. Steadfast initially denied coverage, then later changed its position by claiming that its coverage was only for liability in excess of that covered by IRM's other insurer(s). IRM and Ironshore have now brought separate actions against Steadfast. IRM's claim rests on breach of contract, and Ironshore's claim rests on equitable contribution.

The Jurisdictional Arguments

[3] In both actions, Steadfast sought to preserve its right to dispute this Court's territorial competence, but did not follow the procedure provided for in the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. In particular, Steadfast filed responses to civil claim attempting to expressly reserve the right to dispute jurisdiction, prior to filing jurisdictional responses as provided for under Rule 21-8. Months later, Steadfast

filed its jurisdictional responses, and months after that Steadfast filed the current applications to dismiss or stay the claims based on lack of jurisdiction.

[4] To briefly describe the merits of Steadfast's position on the jurisdictional issue, Steadfast asserts that both actions are effectively disputes about the scope of coverage under a liability insurance contract that was entered into in the United States, by companies based in the United States. Steadfast says none of the circumstances required to establish territorial competence are present. In the alternative, Steadfast submits that even if there is jurisdiction *simpliciter* over the two actions, the Court should decline to hear them in favour of a more appropriate forum.

[5] For their part, the plaintiffs say (i) the defendant has submitted or attorned to the jurisdiction of the Court, by taking steps to defend the actions without first filing a jurisdictional response, and, in any event (ii) there is a real and substantial connection between British Columbia and the factual allegations on which the actions are based. Thus, the plaintiffs say the Court has territorial competence over the claims, that they should not be denied their forum of choice, and that the defendant has not identified any particular jurisdiction that would be a clearly more appropriate forum for the litigation of these claims.

<u>Summary of Facts Pleaded and Procedural History</u>

[6] The relevant facts and procedural history, taken from the pleadings as amplified by the affidavit evidence tendered on this application, can be summarized as follows:

(a) The plaintiff IRM describes itself as a raw materials production, marketing, and distribution company. IRM is incorporated in Pennsylvania and supplies and distributes chemicals in the United States, Canada, and elsewhere.

(b) The plaintiff Ironshore describes itself as a "speciality insurance company". Ironshore is incorporated in Arizona.

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(c) The defendant Steadfast describes itself as an “excess liability insurance company”. Steadfast is currently incorporated in Illinois. Steadfast focusses its business on “hard to place insurance risks, such as pollution coverage”.

(d) On 1 May 2012, IRM entered into an agreement with Teck Metals Ltd. (“Teck”) for the purchase of sulfuric acid from Teck’s smelting operation in Trail, British Columbia.

(e) Later in 2012, as a consequence of its contract with Teck, IRM assumed a contractual relationship with Westcan Bulk Transport Ltd. (“Westcan”) for the shipment of sulfuric acid away from the Teck smelting operation in Trail.

(f) On 29 October 2012, IRM obtained pollution liability coverage under an insurance policy with Steadfast. IRM submitted its application for insurance via its head office in Philadelphia, Pennsylvania, and the application was received and approved by Steadfast in Dover, Delaware.

(g) On 1 November 2015, IRM renewed its pollution liability insurance coverage with Steadfast, to cover the period from 1 November 2015 to 1 November 2018. At this point, Steadfast had become an Illinois company, with offices in Schaumburg, Illinois.

(h) On 10 April 2018, a truck operated by Westcan was transporting sulfuric acid from Teck’s smelting operation, when a quantity of the acid spilled onto the highway at or near Trail.

(i) On 23 May 2018, a second incident occurred in which a truck operated by Westcan spilled sulfuric acid on the highway at or near Trail.

(j) Shortly after the 23 May 2018 incident, IRM’s Manager of Sulfuric Acid temporarily relocated to Trail, where she stayed for some four to five months, so that IRM could have a “direct physical presence on the ground as matters unfolded” in the wake of the two acid spills.

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(k) On 22 August 2018, IRM terminated its transhipping arrangement with Westcan. Thereafter, IRM contracted another company, Trimac Transportation Ltd., to transport sulfuric acid away from the Teck site in Trail.

(l) On 22 September 2018, a third incident occurred in which a quantity of sulfuric acid being transported by truck from the Teck facility spilled on the highway near Trail.

(m) The plaintiffs allege that all three of the acid spill events were "pollution events" covered under IRM's pollution insurance liability policy with Steadfast.

(n) On 1 October 2018, an endorsement was added to the Steadfast policy, adding IRM's transshipment location in Trail as a "covered location" where a "known pollution event" had taken place. Both of these phrases are defined terms under the Steadfast policy.

(o) On 5 October 2018, IRM gave notice to Steadfast of the three acid spill incidents, and the potential claims against IRM arising from those incidents.

(p) On 9 October 2018, the first of 11 vehicle damage actions was commenced in the Supreme Court of British Columbia, in connection with the first two spill incidents. Several of the vehicle damage actions were brought by insurance companies – the Insurance Corporation of British Columbia, Economical Mutual Company, and Intact Insurance Company – as subrogated claims on behalf of hundreds of vehicle owners, many of whose vehicles were "written off" after exposure to sulfuric acid on the highway.

(q) In November of 2018, IRM took over the sulfuric acid transhipping operation in Trail with its own employees.

(r) On 8 November 2018, Steadfast advised IRM in writing that it was denying coverage in connection with the acid spill incidents. As a result, Steadfast refused to acknowledge a duty to defend IRM in the vehicle damage

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claims. (Steadfast later reconsidered and reversed its position on coverage, but refused to indemnify IRM for different reasons).

(s) In addition to its insurance policy with Steadfast, IRM also had insurance policies with several other insurers. One of these was Ironshore, who, at the relevant time, had subsisting environmental protection and environmental excess liability policies with IRM. Upon being notified of the claims against IRM, Ironshore acknowledged its duty to defend IRM in the vehicle damage actions, and thereafter assumed conduct of IRM's defence.

(t) On 17 July 2020, in a case management conference for the vehicle damage actions, the Court ordered the parties to those actions to participate in a mediation, to take place no later than 29 April 2022.

(u) On 5 November 2021, IRM filed a notice of civil claim against Steadfast, claiming breach of contract in connection with Steadfast's refusal to provide coverage under the Steadfast pollution liability insurance policy.

(v) On 10 December 2021, Steadfast reversed its position on coverage, acknowledging that the acid spill incidents constituted covered pollution events within the meaning of the Steadfast pollution liability insurance policy. However, Steadfast then took the position that its policy was in excess to IRM's insurance coverage with other insurers, including Ironshore.

(w) Commencing on 13 December 2021, the parties to the vehicle damage actions participated in a five-day all-party mediation session. Counsel for Steadfast attended the mediation, although it is not clear that counsel did anything other than observe.

(x) On 3 June 2022, Ironshore filed a notice of civil claim against Steadfast claiming, among other things, equitable contribution on the basis that Ironshore and Steadfast were co-insurers of IRM.

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(y) On 8 June 2022, IRM and Ironshore served their respective notices of civil claim on Steadfast.

(z) On 28 June 2022, Steadfast filed responses to civil claim in both the IRM action and the Ironshore action. Both responses included an assertion that they were filed "expressly without prejudice to and under reservation of [Steadfast's] position that the Courts of British Columbia do not have jurisdiction simpliciter over [Steadfast] or this action and are in any event *forum non conveniens*". Both responses went on to plead substantive defences.

(aa) On 23 November 2022, Steadfast filed jurisdictional responses in Form 108, as contemplated in Rule 21-8(1), with respect to both the IRM claim and the Ironshore claim.

(bb) On 5 December 2022, following a case management conference, the Court made an order providing, among other things, that any applications by Steadfast concerning jurisdiction or *forum non conveniens* were to be heard before 28 February 2023, subject to further order of the Court.

(cc) For various reasons – principally the availability of the parties and court time – the hearing of Steadfast's jurisdictional applications did not take place until 23 June 2023.

Legal Principles

[7] Territorial competence over a particular matter is to be determined "solely by reference" to Part 2 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA* or the *Act*]: *CJPTA*, s. 2(2). Although the *Act* represents a codification or re-statement of the law in relation to territorial competence, the common law that preceded its enactment retains some relevance. In other words, the principles first developed in the common law can "inform an analysis of the present legal regime": *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 [*Purple Echo*] at paras. 31-32, 59.

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[8] Broadly speaking, there are two branches to the jurisdictional analysis. Under the first branch, the Court must determine whether it has territorial competence over the matter under s. 3 of the *CJPTA*. Even where that question is answered in the affirmative, then under the second branch of the analysis the Court may decline to exercise its territorial competence on the basis that a court of another state is a more appropriate forum as contemplated in s. 11 of the *Act*.

[9] Under s. 3 of the *CJPTA*, a court has territorial competence over a matter if one of the circumstances listed in subparagraphs (a) through (e) are present. In the two matters before me, the plaintiffs rely on subparagraphs (b) and (e). Subparagraph (b) applies where a defendant "submits to the court's jurisdiction" in "the course of the proceeding". Subparagraph (e) applies where there is a "real and substantial connection between British Columbia and the facts on which the proceeding against [the defendant] is based".

[10] Where territorial competence is said to arise from a "real and substantial connection" under s. 3(e), the Court must consider the non-exhaustive list of circumstances in s. 10 of the *Act* in which a real and substantial connection is presumed to exist. A mandatory but rebuttable presumption of real and substantial connection arises where the Court is satisfied that any of the basic facts set out in s. 10(a) through (h) are present: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 22, leave ref'd, S.C.C. No. 33580 (27 May 2010).

[11] The plaintiff is entitled to rely upon "basic jurisdictional facts" drawn from the pleadings, which are taken to be true unless disputed. Where a defendant challenging jurisdiction contests those jurisdictional facts, then the burden is on the plaintiff to show that there is a good and arguable case that the pleaded facts can be proven: *Ewart v. Höegh Autoliners A.S.*, 2020 BCCA 181 at paras. 16-17, leave ref'd, SCC No. 39403 (29 April 2021). The Court's function on a preliminary motion to determine territorial competence is not to make findings of fact on a balance of probabilities, but rather to determine "whether there are facts alleged, which if true, would found jurisdiction": *Purple Echo* at paras. 34–35.

[12] If the party asserting jurisdiction meets its burden by pointing to facts that, if proven, would found jurisdiction under s. 3(e) and s. 10 of the *CJPTA*, then the presumption of a “real and substantial connection” is engaged. The burden then shifts to the opposing party to rebut the presumption by convincing the Court that it is “plain and obvious” that the matter is not within the Court’s territorial competence: *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 32, leave ref’d, SCC No. 34964 (17 January 2013).

[13] Even where the Court finds on a preliminary motion that it has territorial competence, the Court may decline to exercise its jurisdiction under s. 11 of the *CJPTA*. The operative question under s. 11 is whether “a court of another state is a more appropriate forum in which to hear the proceeding”. This is a codification of the common law doctrine of *forum non conveniens*: *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*, 2009 SCC 11 [*Teck*] at paras. 21-22.

[14] In determining whether there is a more appropriate forum in another jurisdiction, the Court must consider “the interests of the parties” and the “ends of justice” as contemplated in s. 11(1) of *CJPTA*, and all the relevant circumstances including but not limited to the factors listed in s. 11(2)(a) to (f). Section 11 of the *CJPTA* prescribes a “multifactored” analysis under which the presiding judge must consider and weigh all applicable factors, with no one factor being determinative: *Teck* at paras. 22-24.

[15] Finally, even after the codification of the law in the *CJPTA*, the Court is expected to consider the moving party’s right to its chosen forum as recognized in the common law. The existence of a more appropriate forum must be “clearly established” in order to displace the forum selected by the plaintiff: *Purple Echo* at para. 59, citing *Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*, [1993] 1 S.C.R. 897 at p. 921; *Ruloff Capital Corporation v. Hula*, 2013 BCSC 322 at paras. 34-35, 39, aff’d 2013 BCCA 514.

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Analysis

(1) Territorial Competence

[16] IRM and Ironshore say the Court has territorial competence to try their claims against Steadfast on two different bases. The first is that Steadfast has submitted to the Court's jurisdiction in the course of the proceedings as contemplated in s. 3(b) of the *CJPTA*. The second is that there is a "real and substantial connection" between British Columbia and the claims against Steadfast as contemplated in s. 3(e) of the *CJPTA*.

[17] I intend to address these two sub-issues in reverse order because, as explained below, the concept of attornment only applies where the Court does not otherwise have jurisdiction. Thus, if the plaintiffs can meet the real and substantial connection test in s. 3(e) of the *Act*, any consideration of whether the defendant submitted to the jurisdiction within the meaning of s. 3(b) of the *Act* would only be undertaken as an alternative basis for the exercise of the Court's jurisdiction.

(1)(a) Real and Substantial Connection

[18] The plaintiffs rely on s. 10(e)(i), (f), (g), and (h) of the *Act* in support of their position that there is a real and substantial connection between British Columbia and the facts on which the two actions are based. In each case, the presence of any one of the listed circumstances would give rise to a presumption of a real and substantial connection between this jurisdiction and the claim. I will therefore address each point in turn.

(i) Contractual Obligations to be Performed Substantially in British Columbia

[19] Section 10(e)(i) is engaged where the proceeding concerns contractual obligations which, to a substantial extent, were to be performed in British Columbia. IRM's claim rests on alleged breaches of the Steadfast insurance policy.

[20] Although the Steadfast insurance policy was issued in either Delaware or Illinois, IRM emphasizes that the policy provided pollution and transportation liability

coverage on a “worldwide basis”. IRM points to Section IV of the Steadfast policy, entitled “Coverage Territory”, which states that, “This policy applies worldwide where permitted by applicable law”.

[21] Steadfast asserts that the insurance policy was simply an agreement to indemnify IRM for claims or insured losses. Counsel submits that although an insured loss might occur anywhere in the world where IRM engages in activity that fits within the terms of the policy, the obligation to indemnify arises in the jurisdiction where the contract was entered into (in either Delaware or Illinois), or where the defendant carries on business (in Illinois). In short, Steadfast submits that the insurance policy represents nothing more than a commitment to indemnify IRM for insurable losses. Counsel submits that Steadfast’s duty to indemnify could be honoured in the jurisdiction where the policy was executed or where Steadfast carries on business. It follows, says counsel, that Steadfast’s contractual obligations do not have any substantial connection to British Columbia.

[22] The plaintiffs take a broader view of the contractual obligations under the Steadfast policy. Counsel for the plaintiffs refers to Steadfast’s obligation to provide coverage for, *inter alia*, “loss”, “claims expense”, “supplementary payments”, “crisis management payments”, and “clean up costs”. The Steadfast policy contains no territorial restrictions for any of these forms of coverage, many of which are necessarily jurisdiction and site-specific. Perhaps more importantly, IRM relies on the “duty to defend” provision in the Steadfast policy. Counsel for IRM says the duty to defend is not merely an obligation to cover insured losses, but rather a duty to take an active role in the defence of claims against the insured. IRM submits that since the underlying vehicle damage claims were brought in British Columbia, for pollution events that occurred within British Columbia, Steadfast had a contractual obligation to defend the claims in British Columbia. Thus, counsel submits, IRM’s claim against Steadfast concerns contractual obligations which, to a substantial extent, were to be performed in British Columbia.

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[23] IRM cites a number of cases in support of its position regarding the interpretation and application of s. 10(e)(i) in the context of insurance contracts. The two decisions which I find to be most pertinent are *Budget Rent a Car v. Philadelphia Indemnity Insurance Co.*, 2018 BCSC 163 [*Budget*], and *Pope & Talbot Ltd. (Re)*, 2009 BCSC 1014 [*Pope*].

[24] *Budget* involved a dispute about coverage priorities amongst a number of insurance providers, in connection with claims arising from a motor vehicle collision that occurred in British Columbia. The driver was an American, who was driving a van rented from Budget in California, with the intent to take a church group on a trip to British Columbia. While in British Columbia, the van was involved in a collision, as a result of which several claims were filed against the driver in the Supreme Court of British Columbia. The driver had personal automobile insurance through State Farm, and had purchased supplemental insurance from ACE at the time that he signed the rental agreement in California. The church also had its own insurance through Philadelphia Indemnity. All of the insurance companies were U.S. companies, and none of them were extra-provincially registered in or regularly carried on business in British Columbia. A dispute arose between the insurance companies as to coverage priorities, leading to litigation in both California and British Columbia.

[25] In British Columbia, Budget filed a claim in this Court seeking a determination of coverage priorities as between Budget, Philadelphia Indemnity, ACE, and State Farm. Philadelphia Indemnity then brought a challenge to the Court's territorial competence and sought a stay.

[26] Against this backdrop, Justice Sharma had to decide whether the claim concerned "contractual obligations which, to a substantial extent, were to be performed in British Columbia" as contemplated in s. 10(e)(i) of the *CJPTA*. In concluding that it did, Sharma J. reasoned that performance of contractual obligations is not limited to the jurisdiction where the contract was executed or where the contractual obligations first arose, because, "[t]he 'performance' of contractual duties is different from the execution of a contract": *Budget* at paras. 104-105.

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Nothing in the Philadelphia Indemnity policy limited the insurer's obligation to defend to things that happened in California: *Budget* at para. 105. Budget did not need to prove its claim on a balance of probabilities, but only had to establish a "good and arguable case" for saying that its action "concerns" contractual obligations that should have been or were performed in British Columbia: *Budget* at para. 108.

[27] In the instant case, Steadfast argues that *Budget* is distinguishable because each of the insurance companies, including the defendant Philadelphia Indemnity, had executed a Power of Attorney and Undertaking, or "PAU", expressly authorizing the British Columbia Superintendent of Insurance to accept service of court documents for any proceeding commenced against the insured for a motor vehicle accident in British Columbia: *Budget* at para. 31. Justice Sharma reasoned (at para. 93) that the PAU was not an "independent basis on which to exercise jurisdiction *simpliciter*", but went on to consider the PAU as part of the factual matrix supporting the conclusion (at para. 108) that Budget had a "good and arguable case" for saying the action concerned contractual obligations performed substantially within British Columbia. Steadfast says the PAU was a key and deciding factor in *Budget*, and nothing akin to a PAU is present in this case. Steadfast says *Budget* is distinguishable on that basis alone.

[28] In *Pope*, a pulp and paper company went into bankruptcy, and then a group of former employees who had worked at a number of pulp mills in British Columbia brought an action against the directors for unpaid wages, salaries, and pension benefits. The directors had liability insurance with four different insurance companies. The receiver in bankruptcy applied in this Court for a declaration that the claims were covered by the directors and officers liability policies. The insurers argued that the Court had no jurisdiction over them or the claims, because all of the insurers were U.S. companies, none of them were registered in British Columbia or directly carried on business anywhere in Canada, and none of the insurance policies were granted in British Columbia. However, after analyzing the performance obligations in the policies, Justice Walker was satisfied that s. 10(e) of the *CJPTA* applied, "since, with the possible exception of payment, a substantial number of the

contractual obligations" in the policies had to be performed in British Columbia: *Pope* at para. 98.

[29] IRM says the insurance policy in issue in the case at bar is comparable in many ways to the policies in issue in *Pope*. For example, the policies in *Pope* offered coverage for claims made anywhere in the world: *Pope* at para. 82. Further, the policies obligated the insurers to provide coverage for underlying claims that were "closely connected" to British Columbia: *Pope* at para. 85. Finally, while the policies did not specify a duty to defend, they nonetheless included contractual obligations to advance funds for the insured's defence, and to take an active role in the defence of the underlying claim by, among other things, providing consent to defence costs, admissions of liability, and settlement: *Pope* at paras. 85-86. Counsel for IRM emphasizes that all of this informed Walker J.'s conclusion in *Pope* at paras. 98-99 that the proceeding seeking a determination of coverage by the four insurers concerned contractual obligations to be performed substantially in British Columbia.

[30] I find the decisions in *Budget* and *Pope* to be informative as to the scope of s. 10(e)(i) in the context of insurance contracts covering insured activities that span multiple jurisdictions. I take guidance from Sharma J.'s observation in *Budget* that the jurisdiction where contractual obligations are to be performed is not necessarily limited to the jurisdiction where the contract was executed. I also accept the notion that a duty to defend contemplates the insurer's active participation or involvement in litigation within the jurisdiction where a claim arises or is brought.

[31] I am satisfied IRM has a good and arguable case for saying its claim against Steadfast concerns contractual obligations to be performed substantially in British Columbia. There is no dispute that the underlying claims arose from incidents that occurred in British Columbia, leading to claims filed in British Columbia. Considering the terms of the Steadfast policy and the facts alleged by IRM, there is an arguable case for saying that Steadfast had contractual obligations to IRM that ought to have been performed substantially in British Columbia. I am not convinced by Steadfast's

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position that it could fulfill its contractual obligations by simply paying out funds in Delaware or Illinois for the purposes of indemnifying IRM's insurable losses.

(ii) Restitutionary Obligations Arising Substantially in British Columbia

[32] Section 10(f) of the *CJPTA* applies where the claim concerns restitutionary obligations arising substantially in British Columbia. Ironshore's claim rests on alleged restitutionary obligations owed to it by Steadfast as a co-insurer. It is common ground that if the Steadfast insurance policy involved contractual obligations toward IRM that were to be performed substantially in British Columbia, then any associated restitutionary obligations owed by Steadfast to Ironshore as a co-insured would also arise substantially in British Columbia. Thus, my conclusion under s. 10(e)(i) of the *Act* in respect of the IRM claim necessarily leads to a comparable conclusion under s. 10(f) in respect of the Ironshore claim.

(iii) Tort Committed in British Columbia

[33] Section 10(g) of the *CJPTA* is engaged where the action concerns a tort committed in British Columbia. In this case, IRM's pleadings include a claim for damages based on the tort of "bad faith" in the denial of insurance coverage. To put it another way, IRM alleges that Steadfast's initial denial of coverage was done in bad faith, and that bad faith denial of coverage constitutes an independently actionable tort.

[34] Counsel for IRM conceded that the tort of "bad faith" denial of insurance coverage is novel. Perhaps more importantly, counsel conceded that in order to make out a good and arguable case that the tort was committed in British Columbia, IRM would need to show that the underlying or contemplated contractual obligations arose in or extended to British Columbia. In light of these concessions, I conclude that IRM's allegation of "bad faith" denial of coverage does not add anything to the territorial competence analysis.

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(iv) Business Carried on in British Columbia

[35] Section 10(h) of the *CJPTA* is engaged where the claim concerns a business carried on in British Columbia. The parties disagree about the scope and proper focus of s. 10(h). Building on the irrefutable proposition that the residence or presence of the plaintiff in the jurisdiction does not give the court territorial competence over the claim or the defendant, Steadfast submits that the focus of s. 10(h) must be on the business of the defendant, not the plaintiff. By contrast, IRM and Ironshore say that the focus of s. 10(h) is not on either the plaintiff's business or the defendant's business, but rather whether the subject matter of the claim is a business carried on in British Columbia.

[36] In my view, the case law supports the approach advocated by the plaintiffs. Justice Dickson, as she then was, explained in *Thumbnail Creative Group Inc. v. Blu Concept Inc.*, 2009 BCSC 1833 at para. 18 that the question is not whether the plaintiff is based in British Columbia, but rather "whether the plaintiff's business in British Columbia is, in fact, the subject matter of the action". To re-state the point in even more neutral terms, the focus of the analysis is not on whose business is in issue, but rather on determining the subject matter of the litigation, and then determining whether that subject matter "concerns" a business that is carried on in British Columbia.

[37] Applying that reasoning in the case at bar, I find that the plaintiffs have established a good and arguable case for saying that the subject matter of the litigation is insurance coverage for claims made against IRM, in respect of a series of pollution events arising from the insured's business activities, under an insurance policy that offered "worldwide" coverage for the type of loss in issue. Further, the business has connecting ties to British Columbia, in that the underlying claims made against IRM were in British Columbia, the business activities that led to the claims occurred in British Columbia, and the pollution events occurred in British Columbia. Thus, on the facts alleged in the pleadings and supporting affidavits, I conclude that there is a good and arguable case for saying both the IRM action and the Ironshore actions "concern" a business that was carried on in British Columbia.

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[38] Even if one were to focus the analysis on the defendant's business as urged by Steadfast, in my view the result would still be the same. I say that based on the reasoning in a series of cases dealing specifically with territorial competence in the context of disputes concerning cross-jurisdictional insurance coverage, namely *Pope* (in which Walker J. based his finding of territorial competence on both s. 10(e) and (h)), *Whirlpool Canada Co. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 2005 MBQB 205, and *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONCA 862 [*Vale*].[1]

[39] In the most recent of these cases, *Vale*, the plaintiff was a Canadian mining company that operated a number of sites, most of which were in Ontario. The plaintiff was facing six separate environmental class action suits in connection with its mining operations. The plaintiff's primary insurer defended the claims and commenced an action in Ontario for a declaration as to degrees of responsibility for the plaintiff's excess and occurrence-based insurers. Several of the excess insurers argued that the Ontario courts lacked jurisdiction *simpliciter* over the matter. The Court rejected that position, finding that the defendant insurance companies were "carrying on business" in Ontario.

[40] The Court reasoned that the question of "whether a defendant is carrying on business in Ontario" must be addressed in "two parts", with the first step being to ascertain "what activities constitute carrying on the relevant business", and the second step being to determine "where, for jurisdictional purposes, was the business carried on": *Vale* at para. 103.

[41] The fact that the defendant insurance companies were not registered or licensed in Ontario was relevant but not determinative in deciding, for jurisdictional purposes, whether they carried on business within the jurisdiction: *Vale* at paras. 102, 108-110. The more important consideration was the insurance contract

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[1] In *Vale*, an application for leave to appeal to the Supreme Court of Canada was filed on 10 February 2023, and appears to be still pending.

itself, specifically "the location of the object of the insurance and of contemplated performance, given what the claim is about": *Vale* at para. 110.

[42] The policies in *Vale* "put the parties into long-term relationships because they not only had policy periods of various lengths, but they were occurrence-based and thus created the potential for long-tail liabilities that might not be settled until beyond the policy periods". Further, while the policies provided coverage for liability arising out of occurrences "anywhere in the world", a substantial aspect of the plaintiff's operations were in Ontario, and the defendants offered excess insurance to primary policies that applied to the plaintiff's Ontario operations: *Vale* at para. 111.

[43] This reasoning does not go so far as to suggest that a court in a particular jurisdiction must have territorial competence over any and all claims brought against an insurer wherever that insurer provides coverage for a loss or liability arising in that jurisdiction. As the Court put it in *Vale* at para. 112, their approach would not recognize "a bald claim to universal jurisdiction over global insurance programs". Rather, the analysis was case-specific, and heavily influenced by "the location of the object of the insurance and of contemplated performance, given what the claim is about": *Vale* at para. 110.

[44] To return to the specifics of the case at bar, even accepting that Steadfast is an Illinois company, that the Steadfast policy was issued in Pennsylvania, Delaware, or Illinois, and that Steadfast was not registered or licensed for business in British Columbia, the facts alleged by IRM lead me to conclude that Steadfast was engaged in business that was "carried on in British Columbia" within the meaning of s. 10(h) of the *CJPTA*. I reach that conclusion based upon the scope of the coverage in the Steadfast policy, the performance obligations in the policy, the nature of the insured activities occurring in British Columbia, and the fact that the underlying claims arose in British Columbia and related to events that took place in British Columbia.

Conclusion on Real and Substantial Connection

[45] To briefly review and summarize my conclusions thus far, there is a good and arguable basis on which to find that a presumption of "real and substantial

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connection" between British Columbia and the facts on which the actions are based, under s. 10(e)(i) in respect of the IRM claim, under s. 10(f) in respect of the Ironshore claim, and under s. 10(h) in respect of both claims. I have considered the opposing arguments and evidence, but I am not satisfied that Steadfast has rebutted these presumptions by showing that it is "plain and obvious" that the matter is not within the Court's territorial competence. Thus, I am satisfied on the standard governing a preliminary motion to determine jurisdiction that the Court has territorial competence over the claims brought by IRM and Ironshore against Steadfast.

(1)(b) Attornment

[46] IRM and Ironshore also contend that Steadfast "has submitted to the jurisdiction of the Court in the course of the proceedings" as contemplated in s. 3(b) of the *CJPTA*. In other words, the plaintiffs say the defendant has attorned to the Court's jurisdiction.

[47] As Frankel J.A. explained in *Nordmark v. Frykman*, 2019 BCCA 433 at para. 48, "[t]he concept of attornment does not apply when jurisdiction already exists". My consideration of s. 3(b) is therefore undertaken an alternative basis for finding that the Court has jurisdiction *simpliciter* in this matter.

[48] Section 3(b) of the *CJPTA* is a statutory expression of the common law doctrine of attornment. At common law, any step taken to defend a claim brought in a particular court constitutes attornment to the court's jurisdiction. The underlying rationale is that a party who actively involves him or herself in litigation thereby accepts the court's jurisdiction: *Nordmark* at para. 47.

[49] Rule 21-8 establishes a mechanism for a responding party to formally dispute the Court's jurisdiction, without being found to have attorned by participating in the proceedings. Rule 21-8(1) allows for the filing of a jurisdictional response in Form 108. Rule 21-8(5) then provides that where certain conditions are met, (a) the party "does not submit to the jurisdiction of the court" by merely filing a jurisdictional response, an application for a preliminary determination of jurisdiction, or a pleading

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denying jurisdiction, until (b) the court has decided the jurisdictional issue raised in the application or responding pleading.

[50] The saving provision in Rule 21-8(5) only applies where the preconditions set out in that particular sub-rule are met. Thus, a party seeking to preserve the right to dispute the Court's jurisdiction without attorning must file a jurisdictional response, and then, within 30 days, must bring an application for preliminary determination, or file a responding pleading alleging a lack of jurisdiction.

[51] The combined effect of Rule 21-8(1) and (5) was aptly described by Justice Baker in *Highline Mushrooms West Limited v. 1895742 Alberta Ltd.*, 2021 BCSC 2464 at paras. 17-18 [*Highline Mushrooms*], as follows:

> [17] Rule 21-8(1) and (5) work together. Rule 21-8(1) requires a party to file a jurisdictional response **before** applying to dismiss or stay and **before** filing a pleading. If a party files a jurisdictional response, the party will only be found to have not submitted to the court's jurisdiction if the party files an application or pleading pursuant to Rule 21-8(1) within 30 days of filing the jurisdictional response. [bold emphasis in original]
>
> [18] As such, if a party wishes to challenge jurisdiction on a preliminary application, the party must file a jurisdictional response first, and then within 30 days of filing the response must serve its application to dismiss or stay. Similarly, if a party wishes to maintain jurisdiction as a triable issue, the party must file a jurisdictional response first, and must then file its pleading within 30 days of filing the jurisdictional response. [underlined emphasis added]

[52] In *Highline Mushrooms*, the defendant filed a response to civil claim, asserting among other things that (i) the action related to an agreement governed by the laws of Alberta and the federal laws of Canada, (ii) the parties had agreed to submit to non-exclusive jurisdiction of the Alberta courts, and (iii) the defendant did not attorn to the jurisdiction of the Supreme Court of British Columbia. However, the defendant did not file a jurisdictional response and an application for a preliminary determination of jurisdiction until some five months later.

[53] Justice Baker determined that by filing a response to civil claim prior to filing a jurisdictional response, the defendant failed to comply with the process contemplated in Rules 21-8(1) and (5). Thus, the defendant would only be able to take the benefit of Rule 21-8(5) by first obtaining an extension of time under Rule 22-

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4(2). Justice Baker declined to grant an extension of time, because the defendant provided no explanation for the delay in filing its jurisdictional response, and because the plaintiff was potentially prejudiced by the emergence of a limitation period in the alternate jurisdiction in the time between the filing of the response to civil claim and filing of the jurisdictional response. As a consequence, the defendant could not bring itself within the exception provided for in Rule 21-8(5), and its filing of the response to civil claim was taken as attornment to the jurisdiction of the Court: *Highline Mushrooms* at paras. 19-23.

[54] The present case is similar to *Highline Mushrooms*. Indeed, the defendant's position in the case at bar is potentially more tenuous, for a number of reasons. First, Steadfast's responses to civil claim pleaded not only a denial of jurisdiction, but also substantive defences to the claims. Second, there was a delay of four months between the filing of Steadfast's responses to civil claim and its jurisdictional responses, and a further delay of five months between the filing of Steadfast's jurisdictional responses and the preliminary jurisdictional applications.

[55] For its part, Steadfast explains that the delay between the filing of its jurisdictional responses on 23 November 2022 and the filing of its jurisdictional applications on 26 May 2023 can be attributed to the fact that the parties appeared before the Court at a case management conference on 5 December 2022, at which point certain procedural orders were made, including an order for scheduling the jurisdictional applications. However, no explanation has been offered for the initial four-month delay between the responses to civil claim and jurisdictional responses.

[56] My conclusion is that Steadfast cannot bring itself within the exception provided for in Rule 21-8(5), at least insofar as its applications for preliminary determination of jurisdiction are concerned. Steadfast filed responses to civil claim that included both a plea for lack of jurisdiction and substantive defences. The responses to civil claim were filed before the jurisdictional responses, contrary to what is required under Rule 21-8. Steadfast did not file its jurisdictional responses until four months later. Accepting the reasoning in *Highline Mushrooms* that this

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could be remedied by an extension of time, no explanation has been offered for the four-month delay in filing the jurisdictional responses. There is also some risk of prejudice to the defendants, although it is difficult to quantify the risk on the record as it now stands. For these reasons, I would not grant an extension of time to remedy the defect in Steadfast's jurisdictional pleadings.

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[57] Accordingly, even if not satisfied that the Court had territorial jurisdiction on the basis of a real and substantial connection under s. 3(e) of the *CJPTA*, I find in the alternative that Steadfast submitted to the jurisdiction of the Court under s. 3(b), in circumstances where Steadfast cannot take the benefit of the exception provided for in Rule 21-8(5)(a). This constitutes an alternative basis for ruling in favour of the plaintiffs on the preliminary application to determine territorial competence under s. 3 of the *Act*.

[58] I refrain from deciding whether the bare fact of filing the pleadings out of order deprives Steadfast of the ability to maintain jurisdiction as a "triable issue" as contemplated in Rule 21-8(1)(c). As explained in *Highline Mushrooms* at para. 16, this subrule "allows a party to keep a jurisdictional challenge alive as a triable issue, even if the plaintiff has established an arguable case on a preliminary jurisdictional challenge" as described in *Purple Echo* at para. 38. At this point, I need not decide whether the procedural mis-step in filing the responses to civil claim prior to filing the jurisdictional responses amounts to attornment in a manner that would bar the defendant from raising the issue of jurisdiction as an issue at trial as contemplated in *Purple Echo*.

(2) *Forum Non Conveniens*

[59] Steadfast argues that even if this Court has territorial competence over the claims, it should decline to exercise jurisdiction under s. 11 of the *CJPTA*. Although Steadfast asserts that "this is not the most appropriate forum for this dispute", the text of s. 11(1) is more specific in that it acknowledges the discretion to decline jurisdiction where "a court of another state is a more appropriate forum in which to hear the proceeding". Steadfast has not identified the particular court or jurisdiction

which is said to be more appropriate. The options would appear to be the state court in Pennsylvania (where IRM submitted its application for coverage under the Steadfast policy), the state court in Delaware (where Steadfast was located when the policy was initially granted in 2012), the state court in Illinois (where Steadfast was located when the policy was renewed in 2015), or possibly even a United States District Court servicing one of these jurisdictions.

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[60] In determining whether there is a more appropriate forum in another jurisdiction, the Court must consider “the interests of the parties” and the “ends of justice” as contemplated in s. 11(1) of *CJPTA*, and all the relevant circumstances including but not limited to the factors listed in s. 11(2)(a) to (f). I will address each of the factors in s. 11(2)(a) to (f) in turn.

(a) Comparative Convenience and Expense to the Parties

[61] Under s. 11(2)(a), the Court must consider the comparative convenience and expense to each of the parties and their witnesses. Steadfast asserts that most if not all of the necessary witnesses are located in Illinois, New York, and Pennsylvania, such that comparative convenience and expense weigh in favour of a U.S. forum. The plaintiffs respond that because the litigation will be focused primarily with interpretation of the Steadfast and Ironshore insurance policies, fact witnesses may not be necessary, and the matter may well proceed by way of a summary trial, largely neutralizing this factor. The plaintiffs add that proceedings have now been commenced in this jurisdiction, the parties have already engaged counsel here, and there are no outstanding proceedings in any other jurisdiction.

[62] In my view, it would be premature to determine whether the claims are suitable for summary trial, so one must start from the presumption that a full trial may be required. Standing alone, considerations of convenience and expense weigh in favour of allowing this matter to proceed in a U.S. court, although even then it would be necessary to select a particular forum. Whatever U.S. court were selected, some of the witnesses would still be required to travel from one state to another.

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(b) The Applicable Law

[63] I turn to s. 11(2)(b), under which the Court must consider the law to be applied to the issues in the proceedings. There is no choice of laws provision in the Steadfast policy. The plaintiffs point out that the choice of laws provision was "specifically removed by endorsement". Regardless, the contract itself does not identify the governing law.

[64] Steadfast submits that the applicable law is clearly not the law of British Columbia, and that it must be the law in the state of either Pennsylvania (where IRM was situate when the application for coverage under the Steadfast policy was submitted) or Illinois (where Steadfast was situate when the coverage was granted). Thus, Steadfast's position appears to be that the case will be governed by the law where the Steadfast insurance contract was formed.

[65] For their part, the plaintiffs take the position that the contract is governed by British Columbia law, as this is where the relevant "contractual obligations are engaged". In support of that position, the plaintiffs cite *Pope* and *Budget*.

[66] In *Pope*, the Court had to consider conflicting positions as to the law to be applied in a coverage dispute with respect to a directors and employers liability insurance policy. The contract appeared to have been executed in Oregon, but the underlying claims to which the coverage dispute related arose in British Columbia. Justice Walker reasoned at para. 136 that where "no express choice of law is made, courts determine if the proper law can be inferred from the circumstances, or failing this, determine the system of law which has the closest and most real connection with the subject matter", and went on to cite several other cases discussing the issue, namely *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443 at p. 448, and *Cansulex Ltd. v. Reed Stenhouse Ltd.* (1986), 70 B.C.L.R. 273 (B.C.S.C.) [*Cansulex*] at p. 290. Ultimately, Walker J. was unable to reach a definitive conclusion on the governing law, and thus appeared to treat this as a neutral factor in the *forum non conveniens* analysis.

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[67] *Budget* contains a detailed consideration of the applicable law in respect of both contract (at paras. 136–145) and restitutionary claims (at paras. 146-148) in the context of an insurance coverage dispute. After observing that both parties had presented "strong arguments" in support of their positions, Sharma J. was unable to reach a clear conclusion on the governing law, and therefore once again treated this factor as "essentially neutral" in the context of a *forum non conveniens* analysis: *Budget* at para. 146.

[68] It is perhaps unsurprising that the parties approach the issue of the applicable law from different perspectives. On the one hand, Steadfast emphasizes that the contract was formed in the United States, in either Pennsylvania or Illinois. On the other hand, IRM and Ironhorse highlight the subject matter of the current dispute, namely the nature and extent of Steadfast's coverage obligations in respect of underlying claims originating in British Columbia. I note the point made in both *Pope* and *Budget* that while at one time the case law seemed to place more weight on "where the contract was formed", the "modern law" appears to focus more on "other matters", most notably the "subject of the contract": *Pope* at para. 139; see also *Budget* at para. 142, both citing *Cansulex* at p. 290.

[69] In the end I find myself in more or less the same position as my colleagues in *Pope* and *Budget*. At this stage of the proceedings, namely a preliminary motion dealing with jurisdiction and *forum non conveniens*, and in the absence of a clear choice of laws clause in the Steadfast policy, I am unable to determine what law applies. I therefore treat this as a neutral factor.

(c) Desirability of Avoiding Multiple Proceedings or Conflicting Decisions

[70] Under s. 11(2)(c) and (d), the Court is required to consider the desirability of avoiding "multiplicity of legal proceedings" and of avoiding "conflicting decisions in different courts". I agree with the plaintiffs that these factors weigh in favour of allowing the actions to proceed in British Columbia, for the reasons that follow.

[71] IRM's claim against Steadfast is focussed on recovery of IRM's losses in connection with the vehicle damage actions. The amount of those losses is currently unknown, because there is a potential dispute between IRM and one of the co-defendants, Westcan, as to whether Westcan has a contractual obligation to pay IRM's legal fees in the vehicle damage actions.

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[72] Ironshore's claim against Steadfast is focused on the share or proportion of IRM's loss that must ultimately be borne by Ironshore and Steadfast respectively. And, since the amount of IRM's loss in the vehicle damage actions has yet to be determined, there are potentially conflicting positions as to the amount of the loss to be apportioned between Ironshore and Steadfast.

[73] All of this augers for a process under which the same court that determines the scope or quantum of IRM's loss in the vehicle damage actions is tasked with determining the extent and limits of Steadfast's responsibility for IRM's losses, and the respective contributions of both Steadfast and Ironshore. Further, since there are potentially conflicting positions as to the scope and or quantum of IRM's losses in the vehicle damage claims, there is a risk of conflicting decisions in different courts if the vehicle damage actions are determined in a separate jurisdiction from the claims regarding the extent and relative share of Steadfast's responsibility for IRM's losses.

[74] For all of these reasons, I find that ss. 11(2)(d) and (e) tilt heavily in favour of a conclusion that there is no other more appropriate forum for determination of the two actions which are the subject of this ruling.

(d) Enforcement of any Eventual Judgment

[75] Under s. 11(2)(e), the Court must consider any concerns about the enforcement of any eventual judgment. Steadfast maintains that this factor weighs in favour of a forum in the United States, since Steadfast is a U.S. company and any judgment against it would require further legal steps in the United States. I disagree. Given the degree of comity and reciprocity generally exhibited between courts in Canada and the United States, and in the absence of any case-specific evidence

suggesting that a judgment from this Court would be disregarded or open to dispute via the legal system in Illinois, I would not place any weight at all on this factor.

(e) Fair and Efficient Working of the Canadian Legal System as a Whole

[76] Section 11(2)(f) obliges the Court to consider the fair and efficient working of the Canadian legal system as a whole. The case law suggests that this factor is only relevant in matters involving a choice between different courts within Canada: *Rotor Maxx Support Limited v. Air Palace Co. Ltd.*, 2020 BCSC 1321 at para. 110, citing *Schwarzinger v. Bramwell*, 2011 BCSC 283 at para. 101. This approach fits with the legislative text, which speaks of the fairness and efficiency of the Canadian legal system "as a whole".

Conclusion

[77] On balance, I find that the factors listed in s. 11(2) weigh in favour of this Court retaining jurisdiction over the claims. Certainly the most telling factors are the interests of avoiding multiplicity of legal proceedings and conflicting decisions in different courts. One factor that points in the other direction is the possibility that the issues in this case may be governed by foreign law. If that is the case, then the Court would likely have to hear expert evidence concerning the governing law. However, as explained above, at this point it is not possible to make a considered determination of the governing law.

[78] I return to the text of s. 11(1), under which the Court is directed to consider "the interests of the parties" and the "ends of justice". I have already addressed the interests of the parties in my review of the factors set out in s. 11(2). With respect to the ends of justice, it seems to me that this speaks to, among other things, the overall fairness of the Court's decision to retain or decline jurisdiction as the case may be. It may also speak to the overall public interest, to the extent that it is engaged in civil litigation between private parties, none of whom are actually resident in or based in British Columbia.

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[79] In terms of fairness, the insurance policy that is at the heart of both actions provides "worldwide" coverage, and does not contain any forum selection clause. Against that backdrop, there would not appear to be anything unfair about this Court maintaining jurisdiction over proceedings to determine the defendant's responsibility to provide coverage for insurance claims arising out of underlying claims and events that occurred in this jurisdiction.

[80] In terms of the overall public interest, none of the parties are located or resident in this jurisdiction, however the events and underlying court actions that are the subject of the claims against Steadfast originate in British Columbia. There is something to be said for the notion that all of the claims arising out of losses allegedly suffered in British Columbia should be determined in British Columbia.

[81] Finally, there is the principle that, absent a compelling basis for doing so, the moving party should not be deprived of its forum of choice. Having determined that this Court has territorial competence over the claims under s. 3 of the *CJPTA*, I find no compelling grounds to conclude that a court in another jurisdiction is a more appropriate forum within the meaning of s. 11 of the *Act*.

Costs

[82] I did not hear submissions on costs. On the face if it, this presents as a situation in which the plaintiffs as successful parties should have their costs of the applications in the cause. In other words, if the plaintiffs succeed in their claims against the defendant, they would have their costs of these applications.[2] Otherwise, they would not. If any of the parties wish to argue for a different disposition as to costs, they can make arrangements to have the matter spoken to in court, through Supreme Court Scheduling.

"Riley J."

[2] This would include any costs thrown away as a result of the adjournment of the first hearing date, due to the defendant's oversight in failing to file and serve its notice of application and chambers record on time.