SUPREME COURT OF NOVA SCOTIA
Citation: *Mian v. Expro Group Canada Inc.*, 2024 NSSC 218

Date: 20240731
Docket: 524177
Registry: Halifax

Between:

Adam Mian

Applicant

v.

Expro Group Canada Inc. and Expro North Sea Ltd.

Respondents

Judge: The Honourable Justice Glen G. McDougall

Heard: December 12, 2023, in Halifax, Nova Scotia

Counsel: Alex Warshick, for the Applicant
James Green and Erin Mitchell, for the Respondents

By the Court:

FACTS AND BACKGROUND

[1] The Applicant in this matter is Adam Mian. The Respondents, Expro Group Canada Inc. and Expro North Sea Ltd., are subsidiaries of Expro Group Holdings ("EGH"). Expro Group Canada Inc. ("Expro Canada") is a limited liability company incorporated in Alberta with a head office in Newfoundland and Labrador. Expro North Sea Ltd. ("Expro North") is a limited liability company incorporated in the United Kingdom ("UK") with five offices throughout the UK.

[2] The Applicant was employed in November 2019 as a Product Line Director with Expro Canada. His employment was terminated in October 2022. The Applicant claims against the Respondents for wrongful dismissal and negligent misrepresentation. I will briefly outline the history between the parties.

[3] In October 2019 the Applicant applied for a position with Expro North. At that time, he was employed with Schlumberger Limited in Houston, Texas. In November 2019, he was offered a position ("the North Sea offer"). The offer contemplated that the Applicant would work in the UK and would report to Gary Peek, a Vice President with Expro North. The Applicant accepted the offer on November 18, 2019. He was living in Houston at the time, so the offer was conditional on the Applicant receiving approval to work in the UK.

[4] By January 2020, while the Applicant waited for approval of his Visa application, EGH, the Respondents' parent company, determined that the Applicant would be offered employment by Expro Canada. The Applicant relocated to Nova Scotia between November 2019 and January 2020. The Respondents maintain that this was intended to be a temporary offer. The offer was signed by the Applicant on January 27, 2020. It stipulated that the Applicant would report to Gary Peek. The offer also stipulated that the Applicant could work from his home but may be required to attend work at locations in Newfoundland and Labrador. The offer noted that the Newfoundland and Labrador *Labour Standards Act*, RSNL 1977, c. 52, applied to the Applicant.

[5] The Applicant's temporary contract was extended by three months in April 2020. On August 25, 2020, he was offered indefinite employment with Expro

Canada. That offer included a change to the Applicant's supervisor who would now be Neil Sims, a Vice President who worked in the UK. The offer stipulated that the Applicant would be eligible to participate in the Expro Canada Pension Plan, which was registered in Newfoundland and Labrador. The offer allowed the Applicant to work from home in Nova Scotia but required that he be able to travel to and work in other countries.

[6] In May 2022 the company restructured and Jean Mortiz, who worked out of the United States ("US"), replaced Neil Sims as the Applicant's supervisor. On October 17, 2022, the Applicant's employment was terminated without cause.

[7] The Applicant has brought an application against the Respondents alleging, among other things, that Expro North Sea made negligent misrepresentations during the hiring process, and that the Respondents acted in bad faith leading up to, and following, his termination.

[8] The Respondents filed a motion challenging this Court's jurisdiction. The Respondents admit that the Court has territorial jurisdiction over Expro Canada, but argues it lacks territorial jurisdiction over Expro North. The Respondents submit in the alternative that even if the court has territorial competence over Expro North, it should decline jurisdiction on the basis of *forum non conveniens*. In the further alternative, if the Court assumes jurisdiction, the Respondents say the application should be converted to an action pursuant to *Civil Procedure Rule* 6.02.

[9] Though the Respondents are the Respondents in the proceeding as a whole, they are the Applicants in this motion. For clarity, I will continue to refer to Expro Holdings as the Respondents and Adam Mian as the Applicant.

ISSUES

1. Does this court have territorial jurisdiction over Expro North?
2. If so, should the court exercise its discretion not to assert jurisdiction over the Respondents on the basis that Nova Scotia is a *forum non conveniens*?
3. Should this application be converted to an action pursuant to *Civil Procedure Rule* 6?

ANALYSIS

Does this court have territorial jurisdiction over Expro North?

Applicable Legal Principles

[10] The *Court Jurisdiction and Proceedings Transfer Act*, SNS 2002 (2d Sess.), c. 2, ("*CJPTA*") dictates that a Nova Scotia court can assume territorial jurisdiction pursuant to the categories set out in s. 4, which states in part:

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

[11] Section 11 of the *CJPTA* sets out presumptions that would suggest that there is a real and substantial connection between the jurisdiction and the dispute:

> 11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding
>
> …
>
> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in the Province,
>
> …
>
> (g) concerns a tort committed in the Province;
>
> (h) concerns a business carried on in the Province;

[12] In this case, s. 11(e), (i), (g), and (h) are applicable.

[13] The Respondents submit that while this Court has territorial jurisdiction over Expro Canada, it does not have jurisdiction over Expro North because Expro North's employment relationship with the Applicant, and the facts underpinning this proceeding, have no real and substantial connection with Nova Scotia as required by s. 11 of the *CJPTA*.

[14] The nature of the Applicant's claims suggest that there is no real and substantial connection to Expro North, the Respondents say, because the Applicant

does not have a contractual relationship with Expro North (he contracted with Expro Canada), Expro North does not conduct business in Nova Scotia, and the alleged torts were not committed in Nova Scotia. Expro North has no offices in Nova Scotia, is not incorporated or registered to do business there, does not have an office in Nova Scotia and does not have any registered agents or employees residing in Canada. Therefore, the Respondents say, Expro North was not conducting business in the province. Similarly, the contract with the Applicant did not require him to work from Nova Scotia, he did not report to people in Nova Scotia, and he was not compensated by Expro North in Nova Scotia.

[15] The Respondents say the fact that that the Applicant was employed by Expro Canada, not Expro North, refutes his argument that this Court should apply the common employer doctrine.

[16] The Respondents note that although the Applicant worked from Nova Scotia, he regularly travelled out of the province to perform duties, and the applicable payroll and pension plans were administered in Newfoundland and Labrador.

[17] The alleged negligent misrepresentations were communicated to, and relied on by, the Applicant when he was residing in Houston, Texas, not in Nova Scotia. Therefore, the Respondents say the tort was not committed in the province.

[18] The Applicant submits that Expro Canada and Expro North have highly intertwined operations and that these two companies acted as one and the same when employing him. He argues that they should be treated as common employers. His claims are against the Respondents jointly and severally.

Position of the Applicant

[19] The Applicant was working in Houston, in the US, at the time of the Expro North's offer of employment. When he accepted the offer, he ended his employment with his Houston-based employers. The Applicant is not a US citizen and was working in the US on a work visa sponsored by his employers. Because he was no longer employed in the US he could not continue to live there. As a result, he returned to Nova Scotia, where he had been living prior to moving to Houston for work.

[20] During the course of his employment, the Applicant worked from his home office in Nova Scotia. He worked closely with representatives from Expro North,

reported to Expro North executives, and worked with their human resources ("HR") contacts, rather than HR contacts at Expro Canada.

[21] The Applicant points to several pieces of evidence that he says establishes a real and substantial connection to Nova Scotia and highlights the common employer nature of the companies:

1. The Applicant preformed the same job at Expro Canada that he was hired for at Expro North;

2. The Applicant's anticipated compensation at Expro North was converted into the Canadian dollar amount;

3. The Applicant set up a home office in Nova Scotia. He expensed those costs to Expro North and was reimbursed by Expro Canada;

4. The Applicant's work laptop and cell phone were provided to him by Gary Peek, a Vice President at Expro North;

5. When working, the Applicant's schedule accorded with the working hours of Expro North, who are four hours ahead of the Applicant's own time;

6. When paying the Applicant's salary and bonuses, Nova Scotia income tax was withheld;

7. The Applicant met with a client contact in Dartmouth, Nova Scotia on four or five occasions during the course of his employment;

8. The Applicant was terminated from his employment while on a video call from his home office in Nova Scotia. He received a letter informing him of his termination in Nova Scotia as well; and

9. The Applicant's employment-related records are located in the head office of Expro North.

[22] The Applicant argues that none of the written employment offers or contracts are enforceable because they were either frustrated or void for lack of fresh consideration.

[23] The Applicant submits that because Expro Canada has already submitted to this Court's jurisdiction, should I agree with the Applicant that the common employer doctrine applies, I can assume that the Court has territorial jurisdiction.

[24] I will start by examining the common employer doctrine.

Are Expro Canada and Expro North common employers?

[25] The Applicant argues that Expro North and Expro Canada should be presumed to be common employers. Since Expro Canada has submitted to the Court's jurisdiction, the Applicant claims that because Expro North and Expro Canada are common employers, then Expro North's actions can be considered one and the same as Expro Canada's. The Applicant argues that the common employer doctrine is established by common law and enshrined in the Nova Scotia *Labour Standards Code*, RSNS 1989, c. 246, which states at s. 11:

> Related business
>
> 11 Where, in the opinion of the Director or the Board, associated or related activities or businesses are carried on, concurrently or consecutively, by or through more than one corporation, individual, firm, syndicate or association, or any combination thereof, under common control or direction, the Director or the Board may treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act.

[26] In *Downtown Eatery (1993) Ltd. v. Ontario*, (2001) 54 O.R. (3d) 161 (Ont. C.A.) (leave to appeal denied, [2001] S.C.C.A. NO. 397), Borin and Macpherson JJ., writing for the Court, reviewed the basis of the common employer doctrine:

> [30] The common employer doctrine, in its common law context, has been considered by several Canadian courts in recent years. The leading case is probably *Sinclair v. Dover Engineering Services Ltd*. (1987), 11 B.C.L.R. (2d) 176 (S.C.), affd (1988), 49 D.L.R. (4th) 297 (B.C.C.A.) ("*Sinclair*"). In that case, Sinclair, a professional engineer, held himself out to the public as an employee of Dover Engineering Services Ltd. ("Dover"). He was paid by Cyril Management Limited ("Cyril"). When Sinclair was dismissed, he sued both corporations. Wood J. held that both companies were jointly and severally liable for damages for wrongful dismissal. In reasoning that we find particularly persuasive, he said, at p. 181 B.C.L.R.:
>
> > The first serious issue raised may be simply stated as one of determining with whom the plaintiff contracted for employment in January 1973. The defendants argue that an employee can only contract for employment with

> a single employer and that, in this case, that single entity was obviously Dover.
>
> I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.
>
> There is nothing sinister or irregular about the apparently complex intercorporate relationship existing between Cyril and Dover. It is, in fact, a perfectly normal arrangement frequently encountered in the business world in one form or another. Similar arrangements may result from corporate take-overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.
>
> As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.

[27] The Court noted that corporations may develop complex corporate structures but emphasised that these structures should not preclude wronged individuals from compensation, stating that the "law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law" (para. 36).

[28] In *Davis v. Amazon Canada Fulfillment Services ULC*, 2023 ONSC 3665, the Court articulated the common employer doctrine in a slightly different and helpful way:

> [164] Under the common employer doctrine, an employee may simultaneously have more than one employer. An employee will have more than one employer when the employer with whom the employee has directly contracted to work is related to one or more others who can also be said to have also entered into a contract of employment with the employee.
>
> [165] The relationship necessary to establish a common employer group is not based on a corporate law relationship of a subsidiary company or an associated

> company or companies connected by some common ownership; rather the relationship is based on the evidence (the material facts) demonstrating that there was an intention to create an employer/employee contractual relationship between the worker and the company related to his or her direct employer.
>
> [166] To understand the common employee doctrine, it is important to keep in mind that it is a doctrine of contract formation and the intention to contract may be, but need not be, reflected in a written contract and a contract of common employment may be reflected by conduct reflecting an intention to contract between the employee and the common employer(s).

[29] This articulation of the common employer doctrine is useful because it focuses on the employment relationship between the parties as a way of determining whether there was a relationship of control as expressed above in *Downtown Eatery*. In *O'Reilly v. ClearMRI Solutions Ltd*, 2021 ONCA 385, Justice Zarnett, writing for the Court, reviewed types of conduct that could establish a common intention to employ. In *Davis*, Justice Perell summarized these observations as follows:

> [169] In *O'Reilly v. ClearMRI Solutions Ltd.*, Justice Zarnett in the Ontario Court of Appeal explained how conduct may demonstrate that there are common employers. He stated at paragraphs 55-57, and 68:
>
> > 55. A variety of conduct may be relevant to whether there was an intention to contract between the employee and the alleged common employer(s). As they bear upon this case, two types of conduct are important. One is conduct that reveals where effective control over the employee resided. The second is the existence of an agreement specifying an employer other than the alleged common employer(s).
> >
> > 56. The conduct most germane to showing an intention that there was an employment relationship with two or more members of an interrelated corporate group is conduct which reveals that effective control over the employee resided with those members: *Downtown Eatery*, at paras. 32-33. This is consistent with how the law distinguishes employment from other types of relationships. Control over such matters as the selection of employees, payment of wages or other remuneration, method of work, and ability to dismiss, can be important indicators of an employer/employee relationship: [...]
> >
> > 57. A written agreement that specifies an employer other than the corporation(s) alleged to be the common employers may also be relevant. The extent of its relevance depends on how the existence and terms of the written agreement, in light of the facts, informs the question of whether there was an intention that others were also employers.
> >
> > [...]

> 68. To summarize, the doctrine of common employer liability exists consistently with the principle of corporate separateness because it holds related corporations liable for obligations they actually undertook to perform in favour of the employee. It does not hold them liable simply because they have a corporate relationship with the nominal employer. Whether the related corporations actually undertook to perform those obligations is a question of contractual formation - did the parties objectively act in a way that shows they intended to be parties to an employment contract with each other, on the terms alleged? Of central relevance to that question is where effective control over the employee resided. The existence of a written agreement specifying an employer other than the alleged common employer(s) will also be relevant; the extent of the relevance will depend on the terms and the factual context.

[30] These cases establish that the common employer doctrine focuses on the employee's relationship with the various companies, rather than the relationships among the companies themselves.

[31] Expro North and Expro Canada are both subsidiaries of EGH. According to the Applicant, they are under common control. As noted in the case law, the determination of a common employer is highly fact specific. The Applicant says that the interconnected nature of his work, and the circumstances surrounding how he came to be employed by Expro Canada, demonstrate that the Respondents are common employers.

[32] The two companies appear to have significant connections. For example, the ease with which the Applicant's payroll and employment expenses were transferred between the companies suggests a close connection.

[33] However, as the case law establishes, the essential factor in determining if Expro North and Expro Canada are common employers is whether there was a relationship of common control that they exercised over the Applicant. The Applicant says the Respondents' joint submissions demonstrate this common control relationship.

[34] Following the guidance in *Davis*, which focuses on the intention to create a contract of employment with the employee, it is clear that Expro North and Expro Canada are common employers. Expro North had an intention to contract with the Applicant to employ him and did so until there was an issue with his visa. At this point, Expro Canada stepped in and created an employment relationship with the Applicant. Though the Applicant expressly contracted solely with Expro Canada, as noted in *O'Reilly*, this does not preclude a finding of a common employer. The

circumstances surrounding the contract with Expro Cananda suggest that Expro North still intended to employ the Applicant. Expro North did not step away from the Applicant. It continued to express an intention to employ him by taking steps to secure his visa and making representations that he would work temporarily for Expro Canada before transferring to Expro North. While the Applicant was employed by Expro Canada he continued to take direction from, and report to, directors at Expro North.

[35] In this analysis the comments from Justice Zarnett in *O'Reilly* are useful, particularly where he lists areas of control that may establish an employee/employer relationship. Those areas of control include; wages and remuneration as well as the ability to hire and dismiss the employee. The evidence establishes that the Applicant was hired by Expro North, that his salary was paid by Expro Canada, and that he was dismissed from his employment by a supervisor working for Expro North. The way that these companies share the essential elements of an employer/employee relationship indicates that they are common employers.

[36] I can imagine no other scenario where a common intention to contract is more clearly established.

[37] I shall now consider how this determination affects the issue of territorial jurisdiction.

> *Does the Court have territorial jurisdiction over the matter on the basis of Expro Canada submitting to the Court's jurisdiction?*

[38] Expro Canada has admitted that Nova Scotia has territorial jurisdiction over the Applicant's claim because Expro Canada was carrying on business in the province. The Applicant argues that because the Respondents acted as a common employer, it follows that this Court also has territorial jurisdiction over Expro North. In the alternative, the Applicant argues that Expro North had a real and substantial connection to Nova Scotia. The Applicant claims that by hiring him and allowing him to work from Nova Scotia and establish an office there, Expro North was carrying on business in the province.

[39] The Applicant relies on *Lozeron v. Phasecom Systems Inc. (cob Mastec Canada),* 2005 ABQB 328, for the premise that if the common employer doctrine is established, the Court can treat the entities as a group when determining territorial jurisdiction and *forum non conveniens*. The facts of *Lozeron* are similar to this case. In *Lozeron*, the plaintiff claimed wrongful termination against an employer who

operated in the US. The employee worked from home in Edmonton. After determining that the defendants were common employers, the Court went on to consider whether it had territorial jurisdiction over the matter, treating the defendants as one employer.

[40] The Applicant says this Court should take the same approach. I agree that jurisdiction should be considered by evaluating the employers as a group. However, I do not agree that this Court should assume territorial jurisdiction on the sole ground that Expro Canada submitted to the jurisdiction. An assumption of territorial jurisdiction must be based on a real and substantial connection, by considering the actions of both Expro North and Expro Canada as one common employer. This approach ensures fairness in the proceeding to the Respondents and to the Applicant by considering the circumstances as a whole, rather than holding the Respondents to a statement made by one of the employers when the other employer maintained an opposite position.

[41] Because I have found that the common employer doctrine applies, I will refer to Expro North and Expro Canada as the Respondents throughout the remainder of this decision. When I speak about the actions of the Respondents, I am speaking about both Expro Canada and Expro North.

> *Is there a real and substantial connection between this jurisdiction and the facts of this case?*

[42] The Applicant argues that because the alleged torts and the breach of contract occurred in Nova Scotia, there is a real and substantial connection between Nova Scotia and the facts of the claims against Expro North. The Applicant asserts that his reliance on Expro North's representations occurred in Nova Scotia, not in Houston. He had been told by Expro North that they would relocate the Applicant and his family to the UK after the Christmas holidays in 2019. The Applicant and his family went to Nova Scotia for Christmas. On January 2, 2020, the Applicant was told by Expro North that they had missed a step in the visa application process. It was due to this mistake that the Applicant was offered temporary employment. He says that he relied on Expro North's misrepresentations about his visa when he relocated to Nova Scotia, and therefore, the harm occurred in Nova Scotia.

[43] The Applicant also claims that Expro North made misrepresentations about the bonuses he would receive. He says this tort only crystallized when he received a smaller bonus than he expected, while he was working in Nova Scotia.

[44] In order to determine if a real and substantial connection exists, I will consider the applicable factors and presumptions under s. 11 of the *CJPTA*. The presumptions that are applicable to this case are found at ss.11(e), (g), and (h).

> (e) concerns contractual obligations, and
>
> > (i) the contractual obligations, to a substantial extent, were to be performed in the Province,
>
> …
>
> (g) concerns a tort committed in the Province;
>
> (h) concerns a business carried on in the Province…

[45] The real and substantial connection presumptions in s. 11 are substantially similar to the factors discussed by the Supreme Court of Canada in *Club Resorts Ltd v. Van Breda*, 2012 SCC 17. Lebel J., writing for the Court, used the Uniform Law Conference of Canada's proposed uniform Act to illustrate the relevant factors:

> [41] The *CJPTA* focusses mainly on issues related to the assumption of jurisdiction. Section 3(e) provides that a court may assume jurisdiction if "there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based" (text in brackets in original). Section 10 enumerates a variety of circumstances in which such a connection would be presumed to exist. For example, it lists a number of factors that might apply where the purpose of the proceeding is the determination of property rights or rights related to a contract. In the case of tort claims, s. 10(g) provides that the commission of a tort in a province would be a proper basis for the assumption of jurisdiction by that province's courts. Section 10 states that the list of connecting factors would not be closed and that other circumstances might be proven in order to establish a real and substantial connection. The *CJPTA* also includes specific provisions regarding forum of necessity (s. 6) and *forum non conveniens* (s. 11). A number of subsequent provincial statutes are clearly based on the *CJPTA* (see, e.g., *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1*; Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003 (2nd Sess.)*, c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7 (not yet in force)).

[46] Justice Lebel outlined the following presumptive factors for jurisdiction:

> [90] To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:
>
> > (a) the defendant is domiciled or resident in the province;

(b) the defendant carries on business in the province;

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.

[47] I will consider each of the presumptions noted above in s. 11 separately to determine if there is a real and substantial connection between the facts on which the proceeding is based and Nova Scotia.

11(e)(i) the contractual obligations, to a substantial extent, were to be performed in the Province

[48] The Applicant argues that he was employed by the Respondents as a common employer. He acknowledges that his work was global in scope and that he often travelled for work, but maintains that his obligations, to a substantial extent, were performed in Nova Scotia, including meeting with a client contact in Nova Scotia on multiple occasions. The Respondents argue that none of the Applicant's duties required performance in Nova Scotia.

[49] The evidence before me is that the Applicant worked from Nova Scotia in his home office. His employment contract stipulated that he would be working from home, which is in Nova Scotia. The Respondents provided tools to the Applicant for his remote work and reimbursed the cost of his home office. The Applicant was compensated in Nova Scotia for work that he performed in Nova Scotia. Nova Scotia income tax was deducted from his compensation.

[50] Regardless of whether the Applicant travelled during the course of his employment, I am satisfied that his contractual obligations were performed to a substantial extent in Nova Scotia because that is where he resided during the course of his employment. I will also note that for a significant portion of the Applicant's employment the COVID-19 pandemic restricted travel such that the Applicant was working solely from his home office in Nova Scotia.

11(g) concerns a tort committed in the Province

[51] Section 11(g) presumes a real and substantial connection for torts committed in the province. The Applicant was working in Nova Scotia when he received notice of his termination. He has made a claim for wrongful dismissal on the basis of a breach of contract. This is not a tort. However, the Applicant has also made claims against the Respondents for negligent misrepresentations regarding his relocation

and bonus payments. The Applicant alleges that he relied on these representations when he was in Nova Scotia and that the damages from these representations crystallized when he was in Nova Scotia. He says that he remained employed by the Respondents on the basis of continuing representations they made about promotions and relocation that occurred while he was working in Nova Scotia.

[52] Though I acknowledge that the initial alleged misrepresentations occurred and were relied upon while the Applicant was in Texas, I am satisfied that there were further alleged misrepresentations that were relied upon while he was in Nova Scotia.

[53] For these reasons, I am satisfied that this case involves an alleged tort committed in this province.

11(h) concerns a business carried on in the Province

[54] The Applicant argues that by virtue of him working for the Respondents in Nova Scotia, the Respondents were carrying on business in the province. The Respondents argue that this fact alone is not enough to establish that they carried on business.

[55] In *Van Breda*, the Court explained that carrying on business in a province requires more than a virtual presence:

> [87] Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction…

[56] The Supreme Court provided further guidance on what it means to carry on business in *Chevron Corp v. Yaiguaje*, 2015 SCC 42, where Justice Gascon, writing for the Court, held:

> [85] To establish traditional, presence-based jurisdiction over an out-of-province corporate defendant, it must be shown that the defendant was carrying on business in the forum at the time of the action. Whether a corporation is "carrying on

> business" in the province is a question of fact: *Wilson v. Hull* (1995), 174 A.R. 81 (C.A.), at para. 52; *Ingersoll Packing Co. v. New York Central and Hudson River R.R. Co.* (1918), 42 O.L.R. 330 (S.C. (in chambers)), at p. 337. In *Wilson*, in the context of statutory registration of a foreign judgment, the Alberta Court of Appeal was asked to assess whether a company was carrying on business in the jurisdiction. It held that to make this determination, the court must inquire into whether the company has "some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time": para. 13. These factors are and always have been compelling indicia of corporate presence; as the cases cited in *Adams v. Cape Industries Plc.*, [1990] 1 Ch. 433, at pp. 467-68, per Scott J., demonstrate, the common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor. LeBel J. accepted this in *Van Breda* when he held that "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there": para. 87.

[57] Justice Gascon also noted that the comments above of Justice Lebel in *Van Breda* were made in the context of tort actions and should not necessarily be expanded to other claims (para 91).

[58] The Court in *Shirodkar v. Coinbase Global, Inc*, 2024 ONSC 1399, provided an overview of the jurisdiction-based jurisprudence on the issue of carrying on business and proposed the following considerations:

> [30] The following factors may also be relevant to a finding that a defendant is carrying on business in the jurisdiction:
>
> a. Registration as an extra-provincial corporation: in *Turner v. Bell Mobility Inc.*, 2014 ABQB 36, at para. 47-48, the court considered that the fact that a telecommunications corporation had registered as an extra-provincial corporation to be relevant, particularly when "located in the midst of other existing facts" which included the corporation's contracts with over 4,000 Albertans with Albertan billing addresses, and the corporation's involvement in a commercial arrangement with a "nation-wide network" of co-operating corporations providing pan-Canadian coverage. The court found that the corporation was carrying on business in Alberta.
>
> b. Obtaining a licence or registration from a regulator in order to undertake a particular business activity within the jurisdiction: in *Vale Canada Limited v. Royal and Sun Alliance*, 2022 ONCA 862 ["*Vale CA"*], rev'g 2022 ONSC 12 ["*Vale SCJ*"], the Court of Appeal was dealing with a case involving an insurer, where the *Insurance Act* deemed a broad range of activities to constitute carrying on the business of insurance in Ontario. The court noted that legislative schemes do not determine, for the purpose

> of a jurisdictional analysis, where the business activity took place. However, it found that where an insurer was registered in Canada and licenced in Ontario, "that could be taken as an indicator it was engaged in the type of activities in Ontario that required it to be so registered and licensed, and thus is relevant to the existence of a jurisdictional connector to Ontario": at para. 109. See also *Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC*, 2016 ONCA 977, 135 O.R. (3d) 551, at para. 10.
>
> c. Whether executives and key decision makers within the corporation reside and work in the jurisdiction: *EM Technologies, Inc. et al.*, 2013 ONSC 5849, at para. 15.
>
> d. Whether the defendant has employees in the jurisdiction: *EM Technologies*, at para. 15.

[59] In this case, the Respondents do not have an office in Nova Scotia, but they are registered to do business in the province, under the Expro Group Canada name, and have an extra-provincially registered address and agent in the province.

[60] The Respondents employ five employees (not including the Applicant) who are based in Nova Scotia. It does not appear that any of these employees are key decision-makers. The evidence before me is that the Vice Presidents of the company reside in Houston or Aberdeen. As noted above, the Applicant performed his employment duties in Nova Scotia, including meeting with clients in the province. It seems that the Applicant, being a product line director during much of the course of his employment, may have been a key decision-maker within the company. I do not have enough information about the role of the Applicant, or the positions held by the current employees based in Nova Scotia to draw a conclusion on this matter.

[61] The Applicant submits that the Respondents' funding of the installation of his home office was akin to setting up a brick-and-mortar office in the province. I do not agree that the situations are analogous.

[62] Based on the evidence before me I am satisfied that the Respondents are carrying on business in the province. I come to this conclusion based on the employees who are currently based in Nova Scotia (regardless of the decision-making power they may hold) and the extra-provincial registration and appointment of an agent.

CONCLUSION ON JURISDICTION

[63] In *Van Breda*, the Court held if the Applicant establishes that one or more of the presumptive factors outlined in the *CJPTA* exist, and it is not rebutted by the

Respondents, then the Court will be entitled to assume territorial jurisdiction (para. 80).

[64] The Applicant has established that there are three presumptive connecting factors in this case: a contract with the Applicant that was substantially performed in the province, a tort that was committed in the province, and, the Respondents carrying on business in the province.

[65] The Respondents have not rebutted the existence of any of these presumptive factors. I find that a substantial connection between the dispute and the province exists and that this Court should assume territorial competence pursuant to s. 4(e) of the *CJPTA.*

Is Nova Scotia a *forum non conveniens?*

[66] Section 12 of the *CJPTA* allows a Court to decline jurisdiction even when territorial competence has been established if there is a forum that would be clearly more appropriate. Section 12 sets out the following factors for a court to consider when determining the most appropriate forum:

> 12 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

Position of the Respondents

[67] The Respondents agree that this Court has territorial competence over Expro Canada. The Respondents say that since this Court has no territorial competence over Expro North, this Court should decline jurisdiction over Expro Canada on the basis of *forum non convieniens* and that both the UK and Newfoundland and Labrador are more convenient forums. I have found that the Court has territorial competence but the question of forum must be dealt with.

[68] Many of the Respondents' witnesses are located in the UK or the US, and one witness lives in Newfoundland and Labrador. The Respondents claim that the cost to transport witnesses to Nova Scotia would be prohibitive and that the travel time would be costly due to lost productivity.

[69] The original contract was created in the UK and was expressly governed by the laws of the UK. In the subsequent contracts with Expro Canada, the contract expressly stated that the contract would be governed by the *Labour Standards Act* of Newfoundland and Labrador. The Respondents say these forum selection clauses are relevant to the *forum non convieniens* analysis and that these limited scope choice of law provisions are generally upheld by Courts.

[70] The Respondents say that the balance of circumstances point to both Newfoundland and Labrador and the UK as more appropriate forums for this dispute.

Position of the Applicant

[71] The Applicant says that the Respondents have failed to establish that there is a single jurisdiction that is more appropriate than Nova Scotia. The Applicant notes that Nova Scotia was his choice of forum and highlights that the onus is on the Respondents to displace that choice, which he says they have not done.

[72] Following the framework developed in *Bouch v. Penny (Litigation Guardian of)*, 2009 NSCA 80, once I have determined that this Court has territorial competence over the proceeding, I must determine whether to exercise my discretion to assume jurisdiction on the basis of *forum non conveniens*. Saunders JA, writing for the Court, held:

> [29] In disposing of the application before him, Justice Wright felt compelled to conduct a two-step analysis. He described it this way:
>
> > [20] The Act clearly recognizes and affirms the two step analysis required to be engaged in whenever there is an issue over assumed jurisdiction,

> which arises where a non-resident defendant is served with an originating court process out of the territorial jurisdiction of the court pursuant to its *Civil Procedure Rules.* That is to say, in order to assume jurisdiction, the court must first determine whether it can assume jurisdiction, given the relationship among the subject matter of the case, the parties and the forum. If that legal test is met, the court must then consider the discretionary doctrine of *forum non conveniens*, which recognizes that there may be more than one forum capable of assuming jurisdiction. The court may then decline to exercise its jurisdiction on the ground that there is another more appropriate forum to entertain the action.
>
> [30] In my view the Chambers judge correctly described the required analytical framework.

[73] Saunders, JA also explained that the onus on the party challenging jurisdiction on the basis of *forum non conveniens* is to establish that there is another forum that is *clearly* more convenient:

> [62] As Justice Sopinka made clear in *Amchem*, the existence of a more appropriate forum must be clearly established in order to displace the forum selected by the plaintiff. Where there is no one forum that is the most appropriate, the domestic forum chosen by the plaintiff wins out by default. Justice Wright was bound by the Supreme Court's ruling in *Amchem.* Nothing in the *Act* changes the test to be applied in such circumstances. Accordingly, I would not disturb Justice Wright's conclusion.

[74] *Van Breda* also provides useful commentary on *forum non conveniens* and the burden on the party seeking to establish a clearly more convenient forum:

> [103] If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

[75] The Respondents have demonstrated that both Newfoundland and the UK are jurisdictions where the Court could assume territorial competence based on the Respondents carrying on of business in those jurisdictions.

[76] In addition to the guidance from the common law on the principles regarding *forum non conveniens*, the *CJPTA* sets out a list of circumstances to consider when determining the most appropriate forum:

> 12 (2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole

[77] I will consider each of the circumstances as they relate to this case.

The Comparative Convenience and Expense for the Parties to the Proceeding and for Their Witnesses, in Litigating in the Court or in any Alternative Fourm

[78] Expro Group Holdings, the parent company of the Respondents, is an international company with subsidiaries in various locations including Houston, Newfoundland and Labrador, and the UK. There are clearly benefits associated with operating on an international scale. However, the choice to operate in this way also comes with the reality that sometimes employees may be required to travel to different locations to perform their work. This was certainly the case for Mr. Mian. The Respondents claim it will result in a hardship for them to be forced to defend this action in Nova Scotia and call witnesses that will have to travel to testify. Respectfully, this is a reality of choosing to operate on a global scale.

[79] Though there would certainly be costs associated with having witnesses based in the UK testify, the Respondents have not demonstrated how these costs would be prohibitive. Nor have they demonstrated that the Court can avoid the "lost productivity" of those witnesses. It is not the Court's responsibility to safeguard corporate parties against lost productivity. This Court has demonstrated that it is open to virtual testimony should the Respondents make a motion and show good reason for why it is necessary. This may avoid some of the issues the Respondents

complain about. This situation is similar to what the Court in *Lozeron* considered when they stated:

> [60] The Plaintiff lives in the Province of Alberta, and the Court should also take into consideration the relative discrepancy in resources between the Plaintiff and the Defendants. It is much easier for the Defendants to bring its representative to the Province of Alberta, than it would be for the Plaintiff to travel to another jurisdiction. Further, if the Plaintiff is forced to sue in another jurisdiction, he may have to pay security for costs which would seriously prejudice his ability to conduct this lawsuit.

[80] Given that the Respondents operate globally and have witnesses in several jurisdictions, moving this matter to another forum would not eliminate the travel expenses and the inconveniences the Respondents object to.

[81] I accept the Applicant's argument that he is the key witness and that a change in forum would be a significant hardship for him because it would involve hiring new counsel and significant travel costs. I have no trouble concluding that the Respondents have significantly more financial resources than Mr. Mian and will be exposed to less hardship should they be made to defend the allegations in Nova Scotia than if Mr. Mian is required to travel to an alternate location.

The Law to be Applied to Issues in the Proceeding

[82] The legal issues in this matter turn on breaches of contract and misrepresentations.

[83] The Respondents argue that the applicable law "varies by claim" (Respondents' Brief para. 85). For example, the claims regarding Expro North's misrepresentations will apply the law of Texas. They say that none of the applicable laws point to Nova Scotia being the appropriate forum and suggest splitting the Applicant's claims by pursuing separate claims against Expro Canada and Expro North or claiming against one or the other. The Applicant argues that the law of Nova Scotia is applicable because he claims that the misrepresentations (and the reliance on them) occurred in Nova Scotia.

[84] The Applicant further argues that if it is determined that the Newfoundland and Labrador employment standards legislation is applicable, the parties will be able to identify experts who can testify on the employment law of that province.

[85] Given that there are many laws that could potentially be applied to the issues in this proceeding, this factor does not weigh in favour of any forum.

The Desirability of Avoiding Multiplicity of Legal Proceedings

[86] The Respondents claim that there is no threat of a multiplicity of legal proceedings because the Applicant can bring his individual claims in any of the other relevant jurisdictions. The Respondents claim the contract with Expro North should be addressed in the UK, while the contract with Expro Canada should be litigated in Newfoundland and Labrador. The Applicant says that the Respondents' suggestion that the issues be split and addressed in different forums would create a multiplicity of proceedings, because the claims arise from the same chain of events.

[87] I agree.

[88] If I decline jurisdiction, it is unlikely that the Applicant will be able to successfully claim against both Respondents in a single proceeding in a different jurisdiction, as this decision will likely be referenced by the Respondents as a precedent to decline jurisdiction over such an action. The Applicant would then be left with the choice of pursuing separate claims against each Respondent or dropping the allegations against one of the Respondents. Should the Applicant choose to split his claims, he will be creating a multiplicity of proceedings.

[89] Because the Respondents are a common employer, the Applicant says that pursing separate claims against them would not be an efficient use of time or resources. I agree. The Respondents are interconnected, as are the claims against them. Pursuing claims in different forums would result in the same allegations being made, with the risk of different outcomes.

[90] The Respondents have not established that there is another forum that would avoid a multiplicity of proceedings. Indeed, their submissions suggest that if jurisdiction was declined by this Court, the Applicant may be forced to bring his claim against the Respondents in multiple forums. This factor weighs toward Nova Scotia being the appropriate jurisdiction, in order to avoid the risk of multiple decisions.

The Desirability of Avoiding Conflicting Decisions

[91] As noted above, the Respondents' argument that the Applicant's claim can be severed creates a risk of a multiplicity of proceedings. I have found that the

Respondents are common employers and their actions should be assessed in light of that finding. A severance of the claims could distort a Court's understanding of the Applicant's claim against the Respondents and could lead to conflicting decisions.

The Enforcement of an Eventual Judgment

[92] The parties agree that there is no indication that the Applicant would be unable to enforce a foreign judgment from one of the other jurisdictions suggested by the Respondents.

[93] This factor does not weigh for or against any forum.

The Fair and Efficient Working of the Canadian Legal System as a Whole

[94] The Applicant submits that if this Court were to decline jurisdiction, it would have significant repercussions on remote employees with employment law claims and would support employer avoidance of claims on the basis of corporate form.

[95] I accept the Applicant's argument that declining jurisdiction may have a chilling effect on potential litigants who may wish to sue an employer who does not reside in their province. I also accept that requiring individual litigants to advance claims in alternative jurisdictions may present a barrier to their access to justice.

[96] This factor supports Nova Scotia as the appropriate jurisdiction.

Conclusion on *Forum Non Conveniens*

[97] The Respondents bear the burden of demonstrating that there is a clearly more appropriate jurisdiction to hear this matter. The Respondents have not met this burden. They submit that both the UK and Newfoundland and Labrador are more appropriate jurisdictions without clearly articulating which would be preferable.

[98] On my analysis of the factors listed in s. 4(2) of the *CJPTA*, Nova Scotia remains the most appropriate forum.

Should this Application be Converted into an Action?

[99] The Respondents have made a motion to convert this application into an action pursuant to *Civil Procedure Rule* 6.02.

[100] The rules on converting an action to an application are set out in *Civil Procedure Rule* 6.02:

> **6.02 Converting action or application**
>
> **(1)** A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.
>
> **(2)** A party who proposes that a claim, that can be tried or heard in four days or less and within two years after the day it was started, be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application
>
> …

[101] Rule 6.04 requires the party seeking to convert to establish the following evidence:

> **6.04 Evidence for converting an application**
>
> (1) A party who makes a motion to convert an application to an action must, by affidavit, provide all of the following:
>
> (a) a description of the evidence the party would seek to introduce;
>
> (b) the party's position on all issues raised by the application;
>
> (c) disclosure of all further issues the party would raise by way of either a notice of contest, if the proceeding remains an application, or a statement of defence, if the proceeding is converted to an action.
>
> …

Position of the Respondents

[102] The Respondents argue that this matter is too complex and time-consuming to be dealt with by application and should be converted into an action pursuant to *Civil Procedure Rule* 6.02.

[103] The Respondents allege that this is more complicated that a simple wrongful dismissal claim because it involves witnesses from across the world. Furthermore, there are issues with securing information relating to claims of inducements and negligent misrepresentation. Finally, some of the witnesses are no longer employed

by the Respondents and will need to be located so that they can provide their testimony.

[104] The Respondents claim that it is not feasible to have this matter heard in less than two years from when it was started on May 1, 2023. Documents have not yet been exchanged and discoveries have not been planned.

[105] The Respondents argue that none of the presumptions in favour of an application are present and that a presumption in favour of an action arises on the ground that this matter cannot be heard in two years or less. The Respondents say the matter is more complex than a straightforward wrongful dismissal claim because it involves multiple parties and witnesses who are located in multiple jurisdictions.

[106] The Respondents further argue that there are multiple claims that must be addressed within the wrongful dismissal claim, including the misrepresentation and inducement allegations.

Position of the Applicant

[107] The Applicant argues that this matter is not as complex as the Respondents claim. He says that this is a simple wrongful dismissal matter and the case law on reasonable notice of termination is well established. The Court, he says, needs only to determine whether he waived his common law right to reasonable notice, an issue he says it determinable on the paper record. The Applicant claims that the allegations of inducement and issues respecting relocation will be assessed as part of the damages claim, not as independent torts.

[108] Finally, the Applicant argues that the claims of bad faith and misrepresentations are simple and discrete tests that rely on established legal principles and can be determined from the written record, affidavit evidence, and limited testimony.

Presumptions in Favour of Application (Rule 6.02(3))

[109] In *Jeffrie v. Hendriksen*, 2011 NSSC 292, Pickup J., set out the following framework to guide an analysis on a motion to convert:

> Under Rule 6.02 there are three stages to the court's analysis as to whether a matter proceeds by application or action:

(a) first, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3);

(b) second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4);

(c) third, the court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5) and determine the relative cost and delay as between an action and an application under Rule 6.02(6).

[110] Rule 6.02(3) states:

> **(3)** An application is presumed to be preferable to an action if either of the following is established:
>
> (a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, the party expeditiously brought a proceeding asserting these rights, and the erosion will be significantly lessened if the dispute is resolved by application;
>
> (b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.

[111] I am not satisfied of the existence of either of the presumptions set out in 6.02(3) that would favor an application over an action. There are no substantive rights that are at risk of eroding nor are there several hearings to be held within one proceeding.

Presumption in Favour of Action (Rule 6.02(4))

[112] Rule 6.02(4) sets out the following presumptions in favour of an action.

> **(4)** An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and any of the following is established:
>
> (a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;
>
> (b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility;

[113] The parties have not indicated that they wish to exercise the right to trial by jury. There is no indication that there will be witnesses who will be called upon solely for the purpose of impeaching credibility.

[114] The Respondents suggest that this matter cannot be heard in less than two years. The Applicant, on the other hand, says it can.

[115] This application was filed on May 31, 2023. The Respondents have not yet filed a Notice of Contest, disclosure has not occurred and discoveries have not yet been held. Given the significant time that has passed since the beginning of this application, and that the proceeding is at a very early stage, I agree with the Respondents that it is difficult to see how this matter could be heard before the two-year period ends on May 31, 2025.

[116] I am satisfied that there is a presumption in favour of an action on this basis.

[117] Following the *Jeffrie* framework, I must now analyze the factors set out in Rule 6.02(5) that favour an application over an action:

> **6.02(5)** On a motion to convert a proceeding, factors in favour of an application include each of the following:
>
> (a) the parties can quickly ascertain who their important witnesses will be;
>
> (b) the parties can be ready to be heard in months, rather than years;
>
> (c) the hearing is of predictable length and content;
>
> (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

[118] In *Group Savoie Inc. v. Eastbound Forestry Ventures Inc.*, 2020 NSSC 322, Justice Norton provided some further guidance for Courts facing a motion to convert:

> [7] The burden is on the Respondent to establish that it is appropriate to convert the proceeding to an action. The case law instructs that the Respondent must address each of the four requirements in Rule 6.02(5) and must provide more than a *pro forma* statement that they will introduce evidence relevant to the proceedings. *Hong v Lavy*, 2018 NSSC 54, at paras. 22-25.
>
> [8] However, the Respondent does not need to provide the actual evidence, only a description of evidence it wishes to provide at the hearing - enough that the court

can appreciate the flavour of the evidence to be brought at the actual hearing. *Fana (DCD) Holdings Inc. v Dartmouth Cove Developments*, 2017 NSSC 157.

[9] In *Fana Holdings*, Justice Chipman conducted an extensive review of the case law considering conversion motions and found that matters that either remained as applications or are converted to applications have most of the following characteristics:

> *fewer parties
>
> *discreet [*sic*], clearly detailed issues, sometimes narrowed by agreement
>
> *reasonable hearing estimates of relatively short duration (often five days or less)
>
> *readily available key documents and the like, central to the dispute
>
> *the parties being (realistically) ready for a hearing within a short timeline (usually within months, not years)
>
> *situations involving comparatively little time to conduct investigative work
>
> *agreement on admissible extrinsic evidence
>
> *limited, if any, discovery required
>
> *time being of the essence in bringing the matter forward to a hearing
>
> *identifiable (typically party) witnesses with evidence conducive to affidavit form
>
> *an absence of "unfriendly" witnesses, who might well be disinclined to swear affidavits
>
> *generally, an uncomplicated proceeding

[10] As with many such applications, these features are somewhat balanced as between the parties. I am instructed by the comments of Chief Justice MacDonald in *Nova Scotia v. Roué*, 2013 NSCA 94, at para. 47:

> [47] I acknowledge that, if time and cost were only incidental factors, then what the appellants characterize as these procedural safeguards for trial fairness might occupy their fullest scope. But time and cost clearly do pertain to the overall objective of access to justice. The motions judge's job under Rule 6.02 is to achieve a balance that shortens time and lessens cost, while ensuring that the proceeding at hand maintains the essential attributes of a fair fact-finding process.
>
> [48] There are some proceedings where the classic trial procedures will be essential. For instance, it may be important that the judge hear the witnesses tell their stories in person, as direct evidence, instead of just reading the ink on the lawyer-assisted affidavits. Or it may be that important evidence rests with unfriendly witnesses, who will not sign affidavits, and must be

> required to testify by subpoena. These are just examples, not an all-inclusive list. It is for the motions judge, in weighing the criteria under Rule 6.02, to assess whether fairness steps to the fore on such matters, whether the application in court under Rule 5.07 can accommodate the concern with an adjustment to the procedure, or whether it is preferable, in the interests of fairness, that the matter be tried in the traditional manner.
>
> [49] It would also be of assistance, in motions for conversion under Rule 6.02, for the court to have, in an affidavit, the projected time line to a hearing date, and projected length of hearing and costs of hearing, under both of the alternative scenarios.

[119] Finally, Rule 6.06(6) indicates that Courts should consider the impact of the cost and delay of hearing the issue:

> **(6)** The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

[120] The evidence before this Court is that the parties have already identified or can easily identify who the important witnesses will be. Though the Respondents have alleged that it will be difficult to determine the witnesses who can speak to the Applicant's alleged inducement from his previous job, I find that this is not a central issue to the dispute. This factor weighs in favour of an application.

[121] The Respondents have indicated that it will take a considerable amount of time to collect documentation and prepare it. The parties have not disclosed documents yet, nor have they held discovery examinations. The Respondents also note that many of the witnesses who have been identified are no longer employed by them. I accept that it may take considerable time and effort to locate these witnesses and prepare their evidence. Given the number of witnesses to be discovered, and the challenges with contacting and arranging discovery of witnesses who are located internationally, I accept that the parties will likely not be ready for trial in a matter of months. The factor weighs in favour of an action.

[122] The hearing is not of a predictable length or content. The parties have not made any agreements about the facts in dispute and how the issues should be addressed. For example, the Respondents seem to treat the inducement allegation as a distinct issue while the Applicant argues that it should be assessed as part of the damages analysis. Given the number of witnesses that have been identified, the intricacies of how the Applicant came to be employed by both Respondents, and the complex evidentiary record, I find it is very unlikely that this matter could be heard in four days or less.

[123] The Applicant claims that these issues can be determined on the written record between the parties and with limited testimony and credibility assessments. The Court in *Jeffie* considered this issue as follows:

> [55] The fourth factor is whether the evidence is such that credibility can be satisfactorily assessed by considering the whole of the evidence to be presented to the court. The respondents say the issues between the parties are primarily factual and credibility will play a crucial, if not determinative role in the hearing. They say that while credibility may be adequately assessed through affidavit and cross-examination where factual disputes are limited, that is not the case here.
>
> [56] Mr. Jeffrie acknowledges that the court will be faced with differing factual accounts for which an assessment of the credibility and reliability of the respective witnesses' testimony will be a key determinant, but maintains that the application route provides ample opportunity to make that assessment through cross-examination on the affidavits filed.
>
> [57] I am satisfied that despite the differing factual accounts and the need to determine credibility, the application route will provide ample opportunity to make these assessments through cross-examination on filed affidavits. Therefore, I am satisfied that the presumptions in Rule 6.02(5) favour an application.

[124] In this case there are significant credibility issues that will need to be addressed to deal with the claims of misrepresentation and bad faith. I expect that the credibility issues can be determined on the basis of all of the evidence presented before the Court.

[125] The comparative cost and time between an application and an action favours the Applicant's choice of an application, given that applications offer a streamlined process. In *Nova Scotia (Attorney General) v. ScoZink Mining Ltd.*, 2023 NSSC 235, Justice Rosinski addressed this issue as follows:

> [28] I keep in mind the supervening purpose of our Rules, per CPR 1.01:
>
> > These Rules are for the just, speedy, and inexpensive determination of every proceeding.
>
> [29] In my opinion, proceeding by way of an Application in Court could allow the matter to be heard earlier than an Action, but I conclude that it not likely that: it can be heard in four days or less, and be "ready to be heard in months, rather than years".
>
> [30] The extra pre-trial time, and greater costs should that be the case, that an Action may require, would better serve the interests of justice.

[126] His comments and reasoning are applicable to this case.

Conclusion on Converting the Application to an Action

[127] I find that there is a presumption in favour of an action over an application due to the length of time it will take to have this claim assessed and the lack of predictability of the hearing length. The factors set out in Rules 6.02(5) and 6.02(6) do not rebut this presumption.

[128] The Respondents' motion to convert this application to an action is granted.

CONCLUSION

[129] The Respondents were acting as common employers when they hired the Applicant. The facts on which the proceeding is based have a real and substantial connection to Nova Scotia. Nova Scotia has territorial competence.

[130] The Respondents have not demonstrated that this Court should decline to exercise jurisdiction on the basis of *forum non conveniens,* as they have not identified a single jurisdiction that is clearly more appropriate.

[131] Nova Scotia has jurisdiction over this proceeding.

[132] The Respondents have demonstrated that this application should be converted into an action based on the length of time it will take to prepare for trial.

[133] The parties have not made submissions on costs. If the parties cannot agree on costs within 30 days, I will accept their written submissions and decide the issue in due course.

McDougall, J.