**IN THE COURT OF APPEAL**
**OF NEWFOUNDLAND AND LABRADOR**

**Citation**: *Unifor Local 2002 v. Exploits Valley Air Services Ltd.*, 2023 NLCA 3
**Date**: February 3, 2023
**Docket Number**: 202201H0009

**BETWEEN:**

UNIFOR LOCAL 2002 APPELLANT

**AND:**

EXPLOITS VALLEY AIR SERVICES LTD. RESPONDENT

**Coram:** Fry C.J.N.L., Goodridge and Boone JJ.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador, General Division 202101G3077 (2022 NLSC 4)

**Appeal Heard:** December 8, 2022
**Judgment Rendered:** February 3, 2023

**Reasons for Judgment by:** Boone J.A.
**Concurred in by:** Fry C.J.N.L. and Goodridge J.A.

**Counsel for the Appellant:** Anthony F. Dale and Blake Scott
**Counsel for the Respondent:** Ruth E. Trask and Josh Merrigan

**Authorities Cited:**

**CASES CITED:** *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; *Clearwater Seafoods Limited Partnership v. Labour Relations Board (Nfld. and Lab.) et al.*, 2006 NLTD 121, 258 Nfld. & P.E.I.R. 170; *Re O'Brien and Canadian Pacific Railway Co.* (1972), 25 D.L.R. (3d) 230 (Sask. C.A.), [1972] 3 W.W.R. 456; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289; *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Canadian Media Guild v. Canadian Broadcasting Corporation* (January 20, 1995), Toronto 600/94 (Ont. Gen. Div.); *Purolator Canada Inc. v. Canada Council of Teamsters et al.*, 2022 ONSC 5009.

**STATUTES CONSIDERED:** *Canada Labour Code*, RSC, 1985, c. L-2, section 58(3); *Federal Courts Act*, RSC, 1985, c. F-7.

**Boone J.A.:**

[1] A judge of the Supreme Court of Newfoundland and Labrador declined to exercise jurisdiction to hear Unifor's application for judicial review of an arbitration award. He decided that any judicial review of the award should be heard by the Supreme Court of Nova Scotia. He therefore dismissed Unifor's application. Unifor appeals from that decision.

[2] The broad issue in this appeal is whether the Applications Judge erred in declining to exercise jurisdiction to review the arbitrator's decision. The answer to that question depends on the resolution of two narrower issues: whether the Applications Judge erred in finding that an agreement to arbitrate in Nova Scotia necessarily implied agreement that Nova Scotia would be the forum for any judicial review of the arbitrator's decision; and whether the Applications Judge erred in applying the doctrine of *forum non conveniens*.

**BACKGROUND**

[3] Exploits Valley Air Services Ltd. ("EVAS") is an airline headquartered in Newfoundland and Labrador that conducts operations and employs people in both this province and Nova Scotia. EVAS operates in a federally regulated

business sphere; therefore its relations with its employees are subject to the *Canada Labour Code*, RSC, 1985, c. L-2.

[4] Unifor is a national union; its Local 2002 is the certified bargaining agent for the pilots and first officers employed by EVAS. I will refer to the Appellant as "Unifor".

[5] EVAS laid off most of its pilots and first officers in the early period of the COVID-19 pandemic. Unifor filed a grievance regarding the recall rights of those laid-off employees. EVAS and Unifor agreed to arbitrate the dispute before a single arbitrator. They each proposed acceptable arbitrators, and settled on one based in Halifax. The parties' representatives then agreed on the hearing process: the hearing would take place in Halifax, with the arbitrator and the representatives together there, and with witnesses from Toronto and St. John's appearing by video link.

[6] The arbitrator dismissed the grievance. Unifor filed an application for judicial review in the Supreme Court of Newfoundland and Labrador, seeking an order setting aside the arbitrator's decision. Within that proceeding, EVAS' applied for an order setting aside or staying Unifor's application. EVAS' position was that the court of this province either did not have jurisdiction to hear the matter or, if it did, then it should decline to hear the matter because the Supreme Court of Nova Scotia is a more appropriate forum

[7] The Applications Judge allowed EVAS' jurisdictional application and therefore dismissed Unifor's application for judicial review. He decided that the agreement to arbitrate in Nova Scotia implicitly meant that any judicial review of the arbitration award should proceed in Nova Scotia. Further, he noted that, although there is no limitation period for judicial review in this province, there is one in Nova Scotia that had by then already expired, and he saw no reason to deprive EVAS of the resulting juridical advantage it would have if the judicial review was heard in Nova Scotia.

[8] Unifor appeals from that decision, which it says was based on errors of fact and law. I would allow the appeal for the reasons that follow.

## ANALYSIS

### The Standard of Review

[9] A decision to decline jurisdiction either because of a forum selection clause or by application of the doctrine of *forum non conveniens* is a

discretionary one (*Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450). A discretionary decision should be accorded considerable deference by an appeal court, which "should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision" (*Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, at para. 41).

**Jurisdiction Simpliciter**

[10] The Applications Judge decided that he had *jurisdiction simpliciter*; that he could assume jurisdiction over the judicial review of the arbitrator's decision. That finding is not in issue on the appeal as EVAS now accepts that the courts of both provinces have jurisdiction to hear the judicial review because there are sufficient connecting factors between each jurisdiction on one hand and the parties and the subject matter of their dispute on the other. EVAS' employees who are members of Unifor, and who would be affected by resolution of the grievance, reside in each province. Moreover, the *Canada Labour Code*, at section 58(3), provides that arbitrators appointed thereunder are not tribunals subject to review by the Federal Court under the *Federal Courts Act*, RSC, 1985, c. F-7. Provincial superior courts have the inherent jurisdiction to review decisions of those arbitrators.

**Declining Jurisdiction: Choice of Forum Clauses and *Forum Non Conveniens***

[11] Ordinarily, when a court has jurisdiction to hear a matter the plaintiff is entitled to be heard in that court; if the defendant chooses to oppose the proceeding, it must do so in that court (*Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 109). However, when another court also has *jurisdiction simpliciter* to hear the matter, the defendant can ask the court chosen by the plaintiff to decline to exercise its jurisdiction in favour of the jurisdiction of that other court.

[12] There are two bases upon which a court may decline to exercise jurisdiction in deference to the jurisdiction of another forum. First, the court may be persuaded that the parties have previously chosen to have the dispute resolved in that other forum, and that the court should respect that agreement. Second, the court may decide that it is *forum non conveniens* because it would be fairer and more efficient to resolve the dispute in the other forum (*Van Breda*, at para. 109).

[13] The Supreme Court of Canada, in *Z.I. Pompey Industrie* has directed that different modes of analysis should be applied to those two grounds for declining jurisdiction:

> [21] … In the [*forum non conveniens*] inquiry, the burden is normally on the defendant to show why a stay should be granted, but the presence of a forum selection clause in the former is, in my view, sufficiently important to warrant a different test, one where the starting point is that parties should be held to their bargain, and where the plaintiff has the burden of showing why a stay should not be granted. I am not convinced that a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered, is preferable.

**The Decision of the Applications Judge to Decline Jurisdiction**

[14] EVAS relied on forum selection and on *forum non conveniens* as alternative grounds on which the Supreme Court of Newfoundland and Labrador should decline jurisdiction.

[15] The Applications Judge decided that he should decline to exercise jurisdiction. It is not entirely clear whether his decision was based on forum selection or *forum non conveniens* analysis. He stated that he derived the law applicable to his decision from *Clearwater Seafoods Limited Partnership v. Labour Relations Board (Nfld. and Lab.) et al.*, 2006 NLTD 121, 258 Nfld. & P.E.I.R. 170, [*Atlantic Shrimp Co.*]. That case is a *jurisdiction simpliciter* decision. It did not involve a forum selection clause and it only tangentially refers to the doctrine of *forum non conveniens*.

[16] The Applications Judge decided that the parties' agreement to arbitrate in Nova Scotia necessarily implied that they had also agreed that any judicial review would be conducted in the Supreme Court of Nova Scotia. It is clear that he attributed significant weight to this finding in deciding to decline jurisdiction:

> [62] Overall, I am satisfied that this Court should not assume jurisdiction over Unifor's judicial review. The parties mutually agreed that the arbitration would take place in Nova Scotia. It proceeded there with an arbitrator based in Nova Scotia, with counsel for EVAS from Nova Scotia and a representative for Unifor, also from Nova Scotia. It flows logically from their agreement that the judicial review of the arbitrator's decision should also occur in Nova Scotia.

[17] However, the Applications Judge also gave weight to the time bar that potentially precluded the judicial review from proceeding in Nova Scotia:

> [59] EVAS offered a possible explanation for Unifor's *volte-face*: Rule 7.05 (1) of the Nova Scotia *Civil Procedure Rules* provides that an applicant must file an application

> for judicial review within 25 days of the ruling, excluding Saturdays, Sundays, and statutory holidays. Mr. Stern issued his ruling on March 8, 2021, so that Unifor had 25 clear days from that date to file its application for judicial review. It did not file it in Nova Scotia during that time, but submitted it to this Court on May 7, 2021, well outside the 25-day window that applied in Nova Scotia.
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> [60] By contrast, the NL *Rules of the Supreme Court, 1986*, do not specify a deadline when applying for *certiorari*, as Unifor is doing here, but says that the application must be filed within a "reasonable time". There is some possibility that Unifor may be governed by a 60-day time limit within the *Arbitration Act*, R.S.N.L. 1990, c. A-14, but that is unclear. In fact, neither EVAS nor Unifor submits that the *Arbitration Act* applies to this matter. In effect, EVAS is saying that Unifor may have missed the deadline that applies in Nova Scotia and has simply resorted to this Court so it could challenge Mr. Sterns' ruling and not have to apply to extend the time to file its application in Nova Scotia.
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> [61] EVAS also says it may lose a "juridical advantage" if this Court agrees to hear the matter. This is as counsel for EVAS expressed it in the brief she filed for the Interlocutory Application: "In the event that this Court assumes jurisdiction, EVAS potentially loses the benefit of the limitation period for judicial review provided in the Nova Scotia *Civil Procedure Rules*" (Paragraph 49 of the Memorandum of Fact and Law filed on October 6, 2021).
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> [64] Otherwise, I am loathe to deprive EVAS of any juridical advantage that may accrue to it by arguing that Unifor is out of time with its application under NS *Civil Procedure Rules* to judicially review Scott Sterns' March 8, 2021, arbitration ruling.

[18] Enforcing a forum selection agreement and the doctrine of *forum non conveniens* are conceptually and analytically distinct grounds for declining jurisdiction. It was an error of law for the Applications Judge to have conflated the two in his analysis. Deciding the outcome of this appeal requires separate consideration of each ground.

## Forum Selection: The Applications Judge Erred in Deciding that the Parties Implicitly Agreed to Judicial Review in Nova Scotia

[19] The Applications Judge decided that "[i]t flows logically from [the parties'] agreement [on the arbitration process] that the judicial review of the arbitrator's decision should also occur in Nova Scotia." (para. 62).

[20] The parties to a consensual labour arbitration are free to define the jurisdiction of the arbitrator, and there is no reason in principle why they may not also agree in advance as to the forum for judicial review of the arbitrator's

decision. As with any agreement, an agreement to arbitrate contains both express and implied terms. Terms may be implied into an agreement because of the surrounding circumstances, by legal necessity, or by custom or usage. The finding by the Applications Judge that a choice of forum for judicial review flows logically from the choice of forum for arbitration essentially amounts to a finding that the choice of the latter is implied from the choice of the former.

[21] However, there was no evidence before the Applications Judge that showed that the parties had turned their minds to the forum for judicial review. The evidence only showed that the parties chose the arbitrator and then the arbitrator and the parties' representatives agreed where the arbitration hearing would be held. There was no factual basis for a premise that would support the conclusion drawn by the Applications Judge.

[22] Moreover, EVAS did not demonstrate any legal principle that requires that judicial review of an arbitration award must take place in the court of the place where the arbitration was heard or decided.

[23] EVAS relied on the decision of the Saskatchewan Court of Appeal in *Re O'Brien and Canadian Pacific Railway. Co*. (1972), 25 D.L.R. (3d) 230 (Sask. C.A.), [1972] 3 W.W.R. 456, as support for its position that a choice of forum for arbitration necessarily implies a choice of forum for judicial review of the arbitral award. In that case, the railway operated in seven provinces (not including Quebec) but had agreed with other railways and the union to establish the Canadian Office of Railway Arbitration in Montreal to hear all disputes under their respective collective agreements. That office heard a dispute affecting employees on routes between Ontario and British Columbia. The union sought judicial review in Saskatchewan; the railway argued successfully before the trial court that the Saskatchewan court either did not have, or should decline to exercise, jurisdiction over the matter. The union's appeal was dismissed. The appellate decision in *O'Brien* was based on the following circumstances and reasoning, at 235:

> I think it is proper to say that both railway companies and unions fully appreciated the mandatory requirement for an arbitrator in their respective collective agreements, and further recognized that the collective agreements would be related to the activities of the company and to employees associated with the multiplicity of provincial jurisdiction. It seems to me that it was to overcome the problems necessarily inherent in determining the applicable law to arbitration procedure in a collective agreement connected with more than one legal jurisdiction, and to have certainty in regard thereto, that the railway companies and the unions completed the agreement for the establishment of the Canadian Railway Office of Arbitration at Montreal, Quebec; that

> in so doing they intended that the arbitrator, in arbitration thereunder, would be governed by the laws of Quebec and the Courts of that Province. Further, I am satisfied the inference is inescapable that in the collective agreement under consideration, the parties, by appointing the Canadian Railway Office of Arbitration at Montreal to be the arbitrator as required by the federal legislation, intended the arbitration procedure to be that set forth in the agreement of June 25, 1969, under which the proceedings would be governed by the law and the Courts of Quebec.

[24] The Court of Appeal in *O'Brien* expressly stated that its decision was not based on the kind of blanket conclusion posited by EVAS in this case. It instead characterized its decision as recognizing that the outcome was case-specific (note that the Court characterized its decision as one relating to choice of law), at 235:

> Such a conclusion is, in my opinion, in accordance with the views expressed by Lord Morris of Borth-y-Gest in *Compagnie d'Armement Maritime S. A. v. Compagnie Tunisienne de Navigation S.A.*, *supra*, when at p. 588 he said:
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> > An agreement to refer disputes to arbitration in a particular country may carry with it, and is capable of carrying with it, an implication or inference that the parties have further agreed that the law governing the contract (as well as the law governing the arbitration procedure) is to be the law of that country. But I cannot agree that this is a necessary or irresistible inference or implication: there is no inflexible or conclusive rule to the effect that an agreement to refer disputes to arbitration in a particular country carries with it the additional agreement or necessarily indicates a clear intention that the law governing the matters in dispute is to be the law of that country.

[25] In this case, there was no evidence or legal principle supporting the conclusion of the Applications Judge that the agreement to arbitrate in Halifax necessarily implied that EVAS and Unifor had chosen Nova Scotia as the forum for judicial review, and his exercise of discretion to decline jurisdiction was therefore unreasonable.

## ***Forum Non Conveniens*: The Applications Judge Erred in Deciding that Nova Scotia was the Clearly More Appropriate Forum for Judicial Review**

[26] The Applications Judge also considered the doctrine of *forum non conveniens*:

> [42] Deciding "whether jurisdiction *can* be assumed" entails asking whether a real and substantial connection exists between the application and the province. If jurisdiction *can* be assumed, it follows to ask "...whether jurisdiction *should* be assumed, or whether the matter may be more appropriately subject to adjudication in

> another province or country - the *forum non conveniens* issue" (Paragraph 9, *Atlantic Shrimp Co.*).
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> (Emphasis in original.)

[27] Applying the doctrine of *forum non conveniens* requires a comparative analysis to determine whether one of two or more forums with jurisdiction over a dispute is clearly the most appropriate to resolve it (*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at 931).

[28] The Supreme Court of Canada further described the exercise in *Van Breda*:

> [104] …When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. …

[29] The burden is on the party raising the doctrine to demonstrate that there is a forum other than the one chosen by the plaintiff that is "clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute." (*Van Breda*, at para. 109).

[30] The factors that a court will consider in applying the doctrine relate to questions of efficiency, fairness, and comity. These factors should be considered and weighed in a single process.

**Efficiency**

[31] Because the circumstances of litigation vary widely, it is not possible to set out an exhaustive list of factors that apply to determine which of multiple jurisdictions would provide the forum for the more effective resolution of a dispute. However, some of the factors which might be considered were listed in *Van Breda*, at para. 110: "the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties".

[32] The Applications Judge did not advert to those kinds of factors. Consideration of such factors in the circumstances of this case does not show a clear choice between Newfoundland and Labrador and Nova Scotia. Judicial review in this case will be conducted on the arbitration record, and no witnesses will testify at the hearing. Therefore, there is no obvious difference between the two jurisdictions in terms of convenience or expense for the parties or witnesses. There are factors that connect both jurisdictions to the parties and to the dispute: EVAS' employees represented by Unifor and affected by the grievance work and reside in both jurisdictions. EVAS does have its head office in this province, and the evidence suggests that its action that led to the grievance was based on decisions made here, but those facts do not add much weight to the scale because the record for judicial review is already complete.

**Fairness**

[33] Factors that relate to fairness are usually grouped together under the heading of juridical advantage. These factors tend to favour the jurisdiction which will decide the substantial heart of the dispute filtered through the fewest procedural and evidentiary barriers. The Supreme Court held in *Amchem*, and confirmed in later cases including *Van Breda*, that any juridical advantage should be weighed with all of the other factors in deciding on *forum non conveniens* (the Supreme Court rejected the English approach which treats juridical advantage as a separate limb or branch of the *forum non conveniens* doctrine). The Court also noted in *Amchem*, and confirmed in *Van Breda*, that although juridical advantage factors can be considered in the balancing exercise, they ordinarily do not carry much weight, because the existence of juridical advantage for one party necessarily comes at the expense of juridical disadvantage for the other.

[34] In this case, the only juridical difference arises from the Nova Scotia time bar on applications for judicial review that does not have an equivalent in this province. Each party relied on this factor as support for its position. Unifor argued that the expiry of the Nova Scotia limitation period was a factor favouring the Newfoundland and Labrador court refusing to decline jurisdiction; EVAS argued that it would be deprived of the juridical advantage resulting from the time bar if the judicial review proceeded in Newfoundland and Labrador. The Applications Judge rejected the Unifor argument and accepted the position of EVAS:

> [64] …I am loathe to deprive EVAS of any juridical advantage that may accrue to it by arguing that Unifor is out of time with its application under NS *Civil Procedure Rules* to judicially review Scott Sterns' March 8, 2021, arbitration ruling.

[35] Unifor argues that it was an error of principle for the Applications Judge to weigh the expiry of the limitation period against its choice of Newfoundland and Labrador as the jurisdiction in which to seek judicial review of the arbitrator's decision. I agree.

[36] Where a plaintiff demonstrates a legitimate juridical advantage in the chosen forum this will weigh in favour of the plaintiff's choice, and not the defendant's. In *Amchem*, at 920, the Supreme Court of Canada stated:

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

[37] The Applications Judge decided that Unifor was engaged in inappropriate forum shopping because it sought judicial review in this province to avoid the Nova Scotia limitation period. However, that is not the kind of forum shopping that the Supreme Court in *Amchem* warned against. There are an abundance of factors that demonstrate a real and substantial connection between this province and this case. There was no evidence that Unifor allowed the limitation period to run out in one forum in order to increase its chances of litigating in another in which, for other reasons, it expected to be treated more favourably. Both the relationship between EVAS and its Unifor member employees, and the law that governs the approach to judicial review, are governed by the same law in both provinces and in each province judicial review is conducted in a superior court. Other than the expiry of the limitation period, there is no reason discernible on the evidence for Unifor to prefer to proceed in this province.

[38] If the matter proceeds in Nova Scotia, then the expiry of the limitation period may preclude the resolution of the issues at the heart of a case between the parties.

[39] Therefore, even if given only little weight in this case, juridical advantage tips the scale toward Newfoundland and Labrador, not Nova Scotia. It was an error of principle for the Applications Judge to have decided otherwise.

**Comity and Constitutional Considerations**

[40] Comity or respect for the sovereignty reflected in the laws and judicial determinations of other jurisdictions is another basis for the doctrine of *forum non conveniens* (*Van Breda*, at para. 48). In the modern approach to conflicts of law, the principle of comity is based less on traditional notions of sovereignty, and rests more on the goal of promoting fairness through order and predictability (*Hunt v. T&N PLC*, [1993] 4 S.C.R. 289, at 313, 321-322). In Canada, considerations of comity between provinces also have a constitutional basis (*Hunt*, at 324-325).

[41] Labour arbitration, like most other forms of consensual arbitration (see *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at para. 51), exists outside of the judicial machinery of any particular jurisdiction. Therefore, considerations of comity, whether based on order and fairness, or on constitutional considerations, do not apply in the context of deciding whether the superior court of one province can conduct a judicial review of an arbitration governed by federal law and heard in another province. Judicial review of a consensual arbitral award is not the equivalent of a court of one province purporting to hear an appeal from a lower court decision of another.

[42] There is therefore no consideration of either comity or constitutional limitation which would suggest that the Applications Judge should have deferred to the jurisdiction of the Nova Scotia court in this case.

**The Precedents Relied on by EVAS Do Not Support its Position on *Forum Non Conveniens***

[43] The parties pointed to only three Canadian cases in which the appropriate jurisdiction for judicial review of an arbitrator's decision has been considered. One was *O'Brien*, a forum selection case which I previously discussed. The others were presented as *forum non conveniens* decisions. However, these other two cases were primarily *jurisdiction simpliciter* cases and the discussion of *forum non conveniens* was extraneous to each decision. More importantly, even those *obiter* discussions do not support EVAS' position that, within the doctrine of *forum non conveniens*, there is a general rule that the court of the jurisdiction

where an arbitration was heard is the more appropriate jurisdiction to conduct judicial review of the arbitral award.

[44] *Canadian Media Guild v. Canadian Broadcasting Corporation* (January 20, 1995), Toronto 600/94 (Ont. Gen. Div.), is an unreported decision of the Ontario Court (General Division). The decision took the form of a handwritten endorsement on the motion record. The Guild had applied to the Ontario court for judicial review of the decision of an arbitrator, based in Nova Scotia, who heard an arbitration in Newfoundland and Labrador arising out of a grievance filed on behalf of a CBC employee who worked in Newfoundland and Labrador. The Divisional Court determined that as a statutory court it did not have jurisdiction because the arbitrator did not issue his decision in Ontario, the grievor did not work or live in Ontario, and the event that gave rise to the grievance did not occur in Ontario. Therefore, as there was no connection between Ontario, on one hand, and the arbitration or the underlying dispute, on the other, there was no recognized basis for the Ontario court to assert jurisdiction. The Divisional Court did go on to say that even if it had jurisdiction, it would have declined to exercise it and deferred to the jurisdiction of the Newfoundland and Labrador court. However, that statement was not a necessary basis for the decision, and, in any event, was based on the strength of the connections between Newfoundland and Labrador (and no other province) and the dispute, and not merely on the place of the arbitration hearing.

[45] The other case is *Purolator Canada Inc. v. Canada Council of Teamsters et al.*, 2022 ONSC 5009. The Teamsters' British Columbia local filed a series of grievances concerning COVID-19 policies adopted by Purolator, a federally regulated business. The dispute arising from those grievances was arbitrated in British Columbia, but Purolator sought judicial review of the arbitrator's decision in Ontario. The Teamsters applied to have that judicial review application dismissed, arguing that the Ontario court did not have jurisdiction or, if it did, then it ought to decline to exercise it on the basis of *forum non conveniens*. The Ontario court decided that it did not have jurisdiction, but also that, even if Ontario did have sufficient connection to the parties and dispute, then he should decline to exercise that jurisdiction on application of the doctrine of *forum non conveniens*:

> [55] Teamsters Union Local 31 and the Arbitrator are in British Columbia. Purolator, which has workplaces across the country and which before Arbitrator Wilson's Award, was quite prepared to attend to grievances in at least three provinces, agreed, *i.e.*, attorned to the arbitration being conducted in British Columbia. Grievance disputes about the national Collective Agreement are typically resolved locally. The immediate

> Application in Ontario appears to be forum shopping for some unknown reason. Ultimately, the application is about labour relations in British Columbia, which does not have to be the same as labour relations in Ontario.
>
> [56] The parties and witnesses are in British Columbia. In this regard, it should be noted that the dispute is not just about the reasonableness of the Covid-19 policy, it is also about how the policy was applied in British Columbia. The dispute is also about how the science has changed since the policy was introduced. The location of the key witnesses and evidence is in British Columbia.
>
> [57] Any presumptive connection and any notion that British Columbia is not the more convenient forum is overborne by the above circumstances.

[46] The circumstances in *Purolator* are different than those in the instant case. The court in *Purolator* found that there was no connection between the dispute and Ontario, but substantial connection between the dispute and British Columbia. Considerations of efficiency (the location of the parties and witnesses) favoured the judicial review proceeding in British Columbia. Perell J. also appeared to have applied a sort of forum selection analysis in finding that there was a custom between the parties that grievances arising under their national collective agreement would be resolved where decided. There was no evidence here of such a custom existing either specifically between EVAS and Unifor or generally in the airline industry.

[47] Those decisions do not alter my conclusion that there is no principled basis for a general rule that would require a superior court with *jurisdiction simpliciter* over a labour dispute to defer to the jurisdiction of the court of another province to review an arbitral determination of the dispute simply because the arbitration took place in that other province.

**Conclusion on *Forum Non Conveniens***

[48] The onus is on the responding party to show that there is a clearly more appropriate forum for resolution of litigation. If it does not meet that onus, then the analysis should favour the forum chosen by the plaintiff so long as that forum has *jurisdiction simpliciter*. In this case, weighing the factors of efficiency and comity results in an evenly balanced scale. Unifor seeks a legitimate juridical advantage by proceeding in Newfoundland and Labrador, and as stated in *Amchem* at page 920, that should weigh in favour of the Newfoundland and Labrador court exercising jurisdiction. The Applications Judge erred in law by placing the expiry of the Nova Scotia limitation period on the wrong side of the scale and declining jurisdiction on that basis.

**SUMMARY AND DISPOSITION**

[49] The Applications Judge erred by failing to separately consider forum selection and *forum non conveniens*; by concluding without any supporting evidence that the parties had chosen the forum for judicial review and by misapplying the doctrine of *forum non conveniens*. Although the decision by the Applications Judge was a discretionary exercise entitled to considerable deference on appeal, these errors went to the essence of his decision. I would allow the appeal and set aside the order dismissing the Originating Application for judicial review. The application by EVAS for an order staying or striking the Originating Application for judicial review should be dismissed.

[50] I would allow Unifor its costs for one counsel, taxed on Column 3, in this Court and in the General Division.

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D.M. Boone J.A.

I Concur: _____

D.E. Fry C.J.N.L

I Concur: _____

W.H. Goodridge J.A.