

CANADA / JUDGMENT

Nordmark v. Frykman

2019 BCCA 433

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 433 Nordmark v. Frykman

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Nordmark v. Frykman,

2019 BCCA 433

Date: 20191202

Docket: CA45791

Between:

Dolores Nordmark,

by her litigation guardian Donald N. Manning

Respondent

(Plaintiff)

And

Hans Frykman

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated November 22, 2018 (Nordmark v. Frykman, 2018 BCSC 2219,

Vancouver Docket S175586).

Counsel for the Appellant:

K. Vimalasan

Counsel for the Respondent:

G.T. Behan

Place and Date of Hearing:

Vancouver, British Columbia

September 6, 2019

Place and Date of Judgment:

Vancouver, British Columbia

December 2, 2019

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Dickson

Summary:

Appeal by a defendant from an order dismissing his application under the Court Jurisdiction and Proceedings Transfer Act (B.C.), seeking to stay an action brought in the Supreme Court of British Columbia on the basis that Sweden is a more appropriate jurisdiction. The chambers judge held the defendant was barred from raising *forum non conveniens* because he had attorned to the jurisdiction by taking steps in the action such as filing a response to civil claim. In doing so, the judge considered himself bound by the decision of a single judge of the Court of Appeal dismissing a leave application. The chambers judge further held that the defendant had failed to establish Sweden is a more appropriate jurisdiction. Held: Appeal dismissed. The chambers judge erred in considering himself bound by the decision of the single judge of this Court. The defendant cannot be said to have attorned because he was otherwise subject to the Supreme Court's jurisdiction. In any event, the Supreme Court Civil Rules do not preclude a party that has attorned from raising *forum non conveniens*. As the chambers judge misapprehended material evidence, his decision was not entitled to deference. However, assessing the relevant factors, the defendant has not established that Sweden is clearly a more appropriate jurisdiction.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

INTRODUCTION

- [1] This appeal is concerned with whether an action commenced in the Supreme Court of British Columbia should be tried in British Columbia or in Sweden. It requires consideration of the doctrines of attornment and forum non conveniens (an inappropriate forum), having regard to the Supreme Court Civil Rules and the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA].
- [2] In an action commenced by her litigation guardian, the respondent Dolores Nordmark alleges her son, the appellant Hans Birger Frykman, effected the transfer of her wealth--approximately \$6 million in money and property--to himself and his children by means of misappropriation, undue influence, and breach of fiduciary duty. After filing a defence, Mr. Frykman brought an application for an order that the action be stayed on the ground that Sweden is a more appropriate jurisdiction in which to litigate Mrs. Nordmark's claims. Justice Basran dismissed that application for two reasons: 2018 BCSC 2219. First, with reference to the Supreme Court Civil Rules, he held that Mr. Frykman was barred from raising forum non conveniens because he had attorned (i.e., submitted) to the Court's jurisdiction. Second, with reference to the CJPTA, he held Mr. Frykman had not established Sweden is a more appropriate jurisdiction.
- [3] Mr. Frykman submits the chambers judge erred in holding that he is barred from raising forum non conveniens. He further submits the judge's reasons for holding that Sweden is not a more appropriate jurisdiction are inadequate because they do not address all the mandatory and relevant factors and because the judge proceeded on the basis Mrs. Nordmark was living in Vancouver when all three of the transactions in issue took place when, in fact, she was living in Sweden at the time of the last transaction.
- [4] For the reasons that follow I would dismiss this appeal. While I have concluded the chambers judge erred in holding that Mr. Frykman was barred from raising forum non conveniens and also misapprehended material evidence, I have also concluded that Mr. Frykman has not established that Sweden is a more appropriate jurisdiction.

BACKGROUND

- [5] What follows is intended as general background. Other aspects of the record are discussed later, in relation to the issues.
- [6] Mrs. Nordmark was born in 1930 and grew up in Vancouver, British Columbia. She moved to Sweden in 1953 following her marriage to Bengt Hedberg. Shortly after Mrs. Nordmark and Mr. Hedberg divorced in 1962, she married Hans Eric Frykman, Senior. Following his death in 1969, she married Carl Henrik Nordmark.

- [7] Mrs. Nordmark has two daughters from her marriage to Mr. Hedberg: Elisabeth Harrison and Anne Hedberg. Ms. Harrison currently lives in Vancouver; Ms. Hedberg currently lives in New York State.
- [8] Mr. Frykman is the only child born to Mrs. Nordmark and Mr. Frykman, Senior.
- [9] Mr. Nordmark died in 2009. That year Mr. Frykman and his family moved to Vancouver. In March of 2011, Mrs. Nordmark returned to Vancouver as she wished to spend time with Mr. Frykman and his family. She rented an apartment in an assisted-living facility where she lived until February 2015, when she returned to Sweden, where she currently resides.
- [10] In May 2017, a Swedish court appointed Ms. Hedberg as Mrs. Nordmark's legal guardian.
- [11] Ms. Hedberg retained Donald N. Manning, a licenced insolvency trustee in Vancouver, to act as Mrs. Nordmark's litigation guardian pursuant to Rule 20-2 of the Supreme Court Civil Rules. Ms. Hedberg was introduced to Mr. Manning by a lawyer with the law firm Mr. Manning later instructed to bring the within action.
- [12] The action focuses on three transactions:
- (a) In February 2013, Mrs. Nordmark, while in Vancouver, transferred 2,884,615 Swiss Francs from her account at a Swiss bank to Mr. Frykman's account at the same bank (the "Swiss Bank Transfer");
 - (b) In September 2014, Mrs. Nordmark, while in Vancouver, transferred 9,000,000 Swedish Krona to Mr. Frykman; those funds were from the proceeds of the sale of her apartment in Stockholm, Sweden (the "Apartment Proceeds Gift"); and
 - (c) In April 2015, Mrs. Nordmark, while in Stockholm, transferred her residence in Södertälje, Sweden, having a value of 6,000,000 Swedish Krona, to Mr. Frykman's four children (the "Country Home Transfer").
- [13] Mr. Frykman and his family moved back to Sweden after the action was commenced. He currently resides in Vancouver and in Sweden. He is a professor at the University of British Columbia.
- [14] Mr. Frykman does not dispute the transactions. His position is that Mrs. Nordmark was competent when she made them and did so of her own free will. In an affidavit filed in support of his forum non conveniens application Mr. Frykman says:
- (a) the Swiss Bank Transfer involved funds from the estate of Mr. Frykman, Senior, and was made to give effect to an agreement Mr. Frykman, Senior and Mrs. Nordmark signed in Sweden in October 1968, entitled "Will and Testament";
 - (b) the Apartment Proceeds Gift was made to give effect to a deed of gift Mrs. Nordmark signed in Vancouver on September 4, 2014, after receiving independent legal advice;

- (c) the Country Home Transfer was made to give effect to a letter Mrs. Nordmark signed in Vancouver on September 8, 2014, after receiving independent legal advice; because three of Mr. Frykman's children were minors, the approval of the Public Guardianship Board of Stockholm was required to effect the transfer; Swedish lawyers were retained to assist in obtaining that approval, which the Board gave after Mrs. Nordmark signed a deed of gift; and
- (d) Ms. Hedberg has received US\$2.3 million from Mrs. Nordmark.

[15] In her affidavit, Ms. Hedberg says:

- (a) starting in 2009 she has seen a progressive decline in Mrs. Nordmark's mental abilities and memory;
- (b) in early 2011, Swedish doctors noted Mrs. Nordmark's condition met the criteria for dementia;
- (c) Mrs. Nordmark spoke of dividing her assets equally among her children and never mentioned leaving her assets in Switzerland solely to Mr. Frykman; and
- (d) Mrs. Nordmark is in elder care in Sweden, is "penniless", and owes the Swedish government approximately 2,300,000 Swiss Krona in taxes (today approximately \$300,000).

LITIGATION HISTORY

[16] The following steps taken by the parties are relevant:

- June 13, 2017: Mrs. Nordmark's counsel files a notice of civil claim.
- July 6, 2017: Mr. Frykman, acting on his own behalf, files a response to civil claim.
- August 8, 2017: Mr. Frykman delivers a list of documents.
- October 25, 2017: Mrs. Nordmark delivers a list of documents.
- Late November 2017: Mr. Frykman retains counsel.
- February 1, 2018: Mr. Frykman's counsel advises that Mr. Frykman intends to bring a forum non conveniens application.
- February 16, 2018: Mrs. Nordmark's counsel indicates that a forum non conveniens application will be opposed both on the merits and on the basis Mr. Frykman has attorned.
- The parties agree to proceed with further document discovery and Mr. Frykman's examination for discovery; Mrs. Nordmark agrees not to use those steps as evidence of attornment. If Mr. Frykman proceeds with a forum non conveniens application, then a mutually convenient date for the hearing will be arranged.
- August 1, 2018: Mr. Frykman is examined for discovery.

- September 6, 2018: Mr. Frykman files an application for an order staying the proceedings on the ground Sweden is a more appropriate jurisdiction to hear the proceedings and granting him leave to amend his response to include, among other changes, a request for a stay based on the CJPTA.
- October 5, 2018: Mrs. Nordmark files a response to Mr. Frykman's application.
- November 8, 2018: Mr. Frykman's application is heard.
- November 22, 2018: The chambers judge dismisses the application.

RELEVANT PROVISIONS OF THE CJPTA AND SUPREME COURT CIVIL RULES

[17] Section 3 of the CJPTA deals with what at common law is referred to as jurisdiction simpliciter. It provides:

A court has territorial competence in a proceeding that is brought against a person only if

- (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
- (b) during the course of the proceeding that person submits to the court's jurisdiction,
- (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
- (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
- (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[18] Section 11 of the CJPTA deals with what at common law is referred to as forum non conveniens. It provides:

- (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 British Columbia 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.

[19] Jurisdictional disputes are addressed in Rule 21-8 of the Supreme Court Civil Rules:

- (1) A party who has been served with an originating pleading or petition in a proceeding, whether that service was effected in or outside British Columbia, may, after filing a jurisdictional response in Form 108,
 - (a) apply to strike out the notice of civil claim, counterclaim, third party notice or petition or to dismiss or stay the proceeding on the ground that the notice of civil claim, counterclaim, third party notice or petition does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
 - (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or
 - (c) allege in a pleading or in a response to petition that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.
- (2) Whether or not a party referred to in subrule (1) applies or makes an allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.
- (3) If a party who has been served with an originating pleading or petition in a proceeding, whether served in or outside British Columbia, alleges that the notice of civil claim, counterclaim, third party notice or petition is invalid or has expired or that the purported service of the notice of civil claim, counterclaim, third party notice or petition was invalid, the party may, after filing a jurisdictional response in Form 108, apply for one or both of the following:
 - (a) an order setting aside the notice of civil claim, counterclaim, third party notice or petition;
 - (b) an order setting aside service of the notice of civil claim, counterclaim, third party notice or petition.
- (4) If an application is brought under subrule (1)(a) or (b) or (3) or an issue is raised by an allegation in a pleading or a response to petition referred to in subrule (1)(c), the court may, on the application of a party of record, before deciding the first-mentioned application or issue,
 - (a) stay the proceeding,
 - (b) give directions for the conduct of the first-mentioned application,

- (c) give directions for the conduct of the proceeding, and
- (d) discharge any order previously made in the proceeding.
- (5) If, within 30 days after filing a jurisdictional response in a proceeding, the filing party serves a notice of application under subrule (1)(a) or (b) or (3) on the parties of record or files a pleading or a response to petition referred to in subrule (1)(c),
 - (a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or serving any or all of the following:
 - (i) the jurisdictional response;
 - (ii) a pleading or a response to petition under subrule (1)(c);
 - (iii) a notice of application and supporting affidavits under subrule (1)(a) or (b), and
 - (b) until the court has decided the application or the issue raised by the pleading, petition or response to petition, the party may, without submitting to the jurisdiction of the court,
 - (i) apply for, enforce or obey an order of the court, and
 - (ii) defend the proceeding on its merits.

[20] The substantive part of Form 108 reads:

JURISDICTIONAL RESPONSE

The defendant, ...[name].....,

[Check one or both of the following boxes as applicable.]

☐ disputes that this court has jurisdiction over this defendant

☐ submits that this court ought not to exercise its jurisdiction over this defendant

SUMMARY OF CHAMBERS JUDGE'S CONCLUSIONS

[21] The chambers judge held the Supreme Court of British Columbia had territorial competence with respect to Mr. Frykman on two bases: (1) Mr. Frykman had attorned (i.e., submitted) to the Court's jurisdiction by filing a response to the notice of civil claim (CJPTA, s. 3(b)); and (2) Mr. Frykman was ordinarily resident in British Columbia when the action was commenced (CJPTA, s. 3(d)). The judge went on to hold that Mr. Frykman was barred from raising forum non conveniens because he had attorned. In coming to the latter conclusion, the judge considered himself bound by *O'Brien v. Simard*, 2006 BCCA 410 (Chambers), 230 B.C.A.C. 120 [O'Brien (C.A.)], in which a judge of this Court dismissed an application for leave to appeal the decision in *O'Brien v. Simard*, 2006 BCSC 814, 55 B.C.L.R. (4th) 384 [O'Brien (S.C.)], refusing Ms. Simard's forum non conveniens application on the basis of attornment.

[22] The chambers judge went on to find that if he was incorrect in concluding that Mr. Frykman was barred from raising forum non conveniens, then he would nevertheless dismiss Mr. Frykman's application on the basis Mr. Frykman had not established that Sweden is clearly the more appropriate jurisdiction in which to litigate Mrs. Nordmark's claim.

GROUND OF APPEAL

[23] In his factum, Mr. Frykman states his grounds of appeal as follows:

The chambers judge erred in law by holding that a party that submits to the jurisdiction of the court may not ask the court to decline to exercise its jurisdiction.

In the alternative, the chambers judge erred in holding that [a] local defendant that is already subject to the domestic court's jurisdiction can submit to the jurisdiction of the domestic court under section 3(b) of the CJPTA.

The chambers judge erred in law by failing to provide adequate reasons for his decision that Sweden was the more appropriate forum to hear this proceeding under section 11 of the CJPTA.

[24] In connection with the third ground, Mr. Frykman submits the judge committed a serious factual error by treating the Country Home Transfer as having taken place while Mrs. Nordmark was living in Vancouver.

ANALYSIS

Was Mr. Frykman Precluded from Raising Forum Non Conveniens?

[25] The chambers judge held Mr. Frykman was barred from raising forum non conveniens solely on the basis that O'Brien (C.A.) is binding on the Supreme Court of British Columbia: para. 41. In other words, he held that the doctrine of stare decisis required him to follow O'Brien (C.A.). In so doing, he noted O'Brien (C.A.) was treated as binding in McIntyre v. Richardson Estate, 2012 BCSC 1347 at para. 58, and Andrew Peller Ltd. v. Mori Essex Nurseries Inc., 2017 BCSC 203 at para. 20, 97 C.P.C. (7th) 271. In addition, I note that judges of the Supreme Court have referred to O'Brien (S.C.) as having been "upheld" or "aff'd" (i.e., affirmed) by O'Brien (C.A.): Bevo Farms Ltd. v. Veg Gro Inc., 2007 BCSC 570 at para. 53; and O'Connor v. Chapman, 2007 BCSC 657 at para. 7.

[26] As I will explain, I am of the view O'Brien (C.A.) is not a binding authority and, therefore, stare decisis did not require the chambers judge to follow it. In addition, I am of the view Mr. Frykman was not barred from raising forum non conveniens.

The O'Brien Decisions

- [27] Mr. O'Brien was Ms. Simard's 82-year-old uncle. He resided in England; she resided in British Columbia. Mr. O'Brien commenced an action against Ms. Simard in the Supreme Court of British Columbia alleging that while she was caring for him in England she stripped him of his assets and moved those assets to British Columbia. He also obtained a Mareva injunction restraining Ms. Simard from disposing of certain property in British Columbia.
- [28] Ms. Simard filed a statement of defence that contained the following pleadings:
12. The Defendant says that the allegations contained in paragraphs 1 to 14 and 26 to 32 occurred outside of the jurisdiction of this Honourable Court and this Honourable Court does not have jurisdiction to hear said claims or in the alternative this [H]onourable Court ought to decline to exercise jurisdiction over said claims.
 13. The Defendant says that British Columbia is not the appropriate jurisdiction to determine the claims raised in this action generally and that this Honourable Court does not have the jurisdiction to hear this matter or in the alternative this Honourable Court should decline to exercise its authority over the entire action.
- [29] After filing her statement of defence Ms. Simard filed a notice of motion seeking a declaration that the court decline to exercise jurisdiction on the basis of forum non conveniens and for an order staying the action; she did not contest jurisdiction simpliciter. As well, she took other steps in the action including delivering a demand for discovery of documents and notice to produce and filing an application dealing with the terms of the Mareva injunction. Justice Preston heard the forum non conveniens motion prior to the CJPTA coming into force.
- [30] Ms. Simard's motion was governed by the then Rules of Court, the predecessor to the current Supreme Court Civil Rules. At the time of O'Brien (S.C.), the relevant portions of Rule 14 read:
- (6) A party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, may, after entering an appearance,
 - (a) apply to strike out a pleading or to dismiss or stay the proceeding on the ground that the originating process or other pleading does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
 - (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or

- (c) allege in a pleading that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

(6.1) Whether or not a party referred to in subrule (6) makes an application or allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.

(6.2) If a party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, alleges that the originating process in the proceeding is invalid or has expired or that the purported service of the process was invalid, the party may, after entering an appearance, apply for one or both of the following:

- (a) an order setting aside the process;
- (b) an order setting aside service of the process.

(6.3) If an application is brought under subrule (6)(a) or (b) or (6.2) or an issue is raised by an allegation in a pleading referred to in subrule (6)(c), the court may, on the application of a party of record, before deciding the first-mentioned application or issue,

- (a) stay the proceeding,
- (b) give directions for the conduct of the first-mentioned application,
- (c) give directions for the conduct of the proceeding, and
- (d) discharge any order previously made in the proceeding.

(6.4) If within 30 days after entering an appearance in a proceeding, a party of record delivers a notice of motion under subrule (6)(a) or (b) or (6.2) to the other parties of record or files a pleading referred to in subrule 6(c),

- (a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or delivering any or all of the following:
 - (i) the appearance;
 - (ii) a pleading under subrule(6)(c);
 - (iii) a notice of motion and supporting affidavits under subrule 6(a) or (b), and
- (b) until the court has decided the application or the issue raised by the pleading, the party may, without submitting to the jurisdiction of the court,
 - (i) apply for, and enforce or obey an order of the court, and
 - (ii) defend the action on its merits.

- [31] At the outset of his analysis, Justice Preston noted there was no issue with respect to jurisdiction simpliciter as Ms. Simard resided in British Columbia and some of the events underlying the cause of action took place in British Columbia: para. 14.
- [32] Based on the steps Ms. Simard had taken in the litigation, Preston J. concluded Ms. Simard had attorned to the jurisdiction of the Supreme Court and, as a result, was barred from raising forum non conveniens. He held that the protection from attornment afforded by Rule 14(6.4) only arises with respect to an application challenging jurisdiction simpliciter under Rule 14(6) and does not arise with respect to an application based on forum non conveniens under Rule 14(6.1): O'Brien (S.C.) at paras. 22-23.
- [33] Ms. Simard applied for leave to appeal to this Court from the order dismissing her application for a stay on the basis of forum non conveniens. By virtue of s. 7(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, that application was heard by a single judge sitting in chambers. In refusing to grant leave, Justice Low said this in O'Brien (C.A.):
- [9] There has been no case to date in this Court interpreting the purpose and scope of the new R. 14, but I am not persuaded that there is a meritorious argument that Preston J. erred in not applying R. 14(6.4) to R. 14(6.1). Rule 14(6.4) specifically mentions R. 14(6) and R. 14(6.2) (the latter deals with setting aside the originating process or service of it and has no application to the matter at hand). The sub-rule makes no mention of R. 14(6.1) and it is clear that the intention of the drafters was to preserve the common law rule that the right to challenge jurisdiction on the basis of forum non conveniens expires with attornment. To use the language of R. 14(6.4), once the defendant "submits to the jurisdiction of the court" he is precluded from asking the court to decline jurisdiction as opposed to contending that the court lacks jurisdiction as a matter of law.
- [10] I find the intended appeal to be without merit. I do not see that any point of significance to the practice has been raised. In addition, allowing this appeal to go ahead would delay resolution of the claim of the elderly respondent who, if his claim can be proven, is entitled to early relief. Granting leave to appeal the order made by the chambers judge would unduly hinder the progress of this action and could lead to injustice.

Was the Chambers Judge "Bound" to follow O'Brien (C.A.)?

- [34] Whether the chambers judge was "bound" by O'Brien (C.A.) can be stated more generally as follows:

Does the principle of stare decisis apply to an opinion on the merits of a proposed ground of appeal expressed by a single judge of the Court of Appeal in refusing leave to appeal?

I would answer this question "no".

- [35] It is important to keep in mind that the critical issue before a single judge on a leave application is whether the proposed appeal should be heard by a division of the Court, i.e., a minimum of three judges: Court of Appeal Act, s. 13. While the merit of a proposed appeal is

a factor, it is not the only factor. As discussed in *North American Tungsten Corporation v. Global Tungsten and Powders Corp.*, 2015 BCCA 426 at paras. 22-23, 81 B.C.L.R. (5th) 102, with reference to the oft-cited decision in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A., Chambers), the factors generally considered in determining whether to grant leave from an order of the Supreme Court of British Columbia are: (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and (4) whether the appeal will unduly hinder the progress of the action. The overriding factor is whether granting leave is in the interests of justice. It is apparent that all of these factors influenced Low J.A.'s decision to refuse leave in *O'Brien* (C.A.).

- [36] It is well-established that the Supreme Court of Canada's refusal to grant leave to appeal is not an indication that the Court agrees with the judgment sought to be appealed: *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 88, [2007] 2 S.C.R. 3; *Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 S.C.R. 281 at para. 31; *R. v. G.L.M.*, 1999 BCCA 467 at para. 35, 138 C.C.C. (3d) 383. Accordingly, the refusal of leave does not enhance the precedential authority of that judgment. In the Supreme Court of Canada, leave applications are decided by a minimum of three judges: *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 43(3).
- [37] I appreciate, as discussed in *Andrew Peller Ltd.* at paras. 24-25, that the Supreme Court of Canada's practice is to not provide reasons for refusing leave. In this Court, the practice is different because a decision by a single judge refusing leave can be reviewed by a division of the Court: *Court of Appeal Act*, s. 9(6). However, the fact that a single judge provides reasons for refusing leave does not give those reasons binding precedential authority. Indeed, as discussed in *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, even the reasons of a division of this Court on an appeal involving the issue of leave is not to be treated as binding.
- [38] *Sattva* involved an arbitration under the *Commercial Arbitration Act*, R.S.B.C. 1996, C. 55 (now the *Arbitration Act*). That Act provides that an arbitral award can be appealed to the Supreme Court of British Columbia on a question of law with leave. Creston's application for leave was dismissed by a Supreme Court judge (the "SC Leave Court"). Creston appealed that dismissal. A division of this Court allowed that appeal and granted leave (the "CA Leave Court"). The matter then returned to the Supreme Court where Creston's appeal was dismissed (the "SC Appeal Court"). Creston's appeal from that dismissal was allowed by a division of this Court (the "CA Appeal Court"). The Supreme Court of Canada allowed a further appeal by *Sattva* and reinstated the arbitral award.

- [39] In its decision, the CA Appeal Court held that it and the SC Appeal Court were bound by the findings made by the CA Leave Court regarding not only the granting of leave, by also regarding the merits of the appeal. In holding that the CA Leave Court's finding on the merits should not have been treated as binding, Justice Rothstein said this:
- [122] With respect, the CA Appeal Court erred in holding that the CA Leave Court's comments on the merits of the appeal were binding on it and on the SC Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 88). A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful (*Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii). This is true even where the determination of whether to grant leave involves, as in this case, a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal (*Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), at para. 32).
- [Emphasis added.]
- [40] Accordingly, while it was open to the chambers judge to consider O'Brien (C.A.) in deciding Mr. Frykman's forum non conveniens application, it was wrong for the judge to treat that decision as compelling the dismissal of the application.
- [41] It should be noted that it was not necessary for Mr. Frykman to apply for leave to appeal the chambers judge's order dismissing his application because of a change in the Court's practice brought about by an amendment to s. 7 of the Court of Appeal Act by the Justice Statutes Amendment Act, 2012, S.B.C. 2012, c. 11, s. 2. Leave is now only required if the order sought to be appealed is prescribed as a "limited appeal order" under Rule 2.1 of the Court of Appeal Rules. An order granting or refusing relief under Rule 21-8 of the Supreme Court Civil Rules is not a "limited appeal order".

Territorial Competence and Forum Non Conveniens

- [42] The CJPTA came into force on May 4, 2006: B.C. Reg. 117/2006. It was modeled on a statute drafted by the Uniform Law Conference of Canada. The CJPTA contains a code for determining: (1) whether a British Columbia court has territorial competence (s. 3); and (2) whether a British Columbia court with territorial competence should decline to exercise its jurisdiction (s. 11): *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 at para. 22, [2009] 1 S.C.R. 321, aff'g 2007 BCCA 249 at para. 55, 67 B.C.L.R. (4th) 101; *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 21, 314 D.L.R. (4th) 618, leave to appeal ref'd [2010] 1 S.C.R. xvi.
- [43] As Justice LeBel discussed in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, territorial competence and forum non conveniens are distinct concepts:

[101] As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of forum non conveniens. Forum non conveniens comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.

[102] Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes forum non conveniens. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.

[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. The court can stay proceedings brought before it on the basis of the doctrine.

See also: *Haaretz.com v. Goldhar*, 2018 SCC 28 at paras. 26-32, [2018] 2 S.C.R. 3.

[44] Because a court either has jurisdiction or does not, forum non conveniens is considered only if territorial competence exists: *Van Breda* at paras. 101-102; *Jordan v. Schatz*, 2000 BCCA 409 at paras. 25-28, 77 B.C.L.R. (3d) 134; *Lerner v. Lerner Estate*, 2017 BCCA 408 at para. 11, 6 B.C.L.R. (6th) 43.

[45] Under s. 3 of the CJPTA there are five bases on which a British Columbia court can acquire territorial competence (i.e., jurisdiction) over a defendant:

- (1) by the defendant having invoked the court's jurisdiction as a plaintiff (subs. (a));
- (2) by the defendant having submitted to the court's jurisdiction (subs. (b));
- (3) by the defendant having agreed that the court has jurisdiction (subs.(c));
- (4) by the defendant having been ordinarily resident in British Columbia when the proceeding is commenced (subs. (d)); and
- (5) by reasons of a real and substantial connection between British Columbia and the facts on which the proceeding is based (subs. (e)).

Subsections (a), (b), and (c), are forms of what is sometimes referred to as "consent-based jurisdiction": *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 at para. 82, [2015] 3 S.C.R. 69; *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 at para. 19 (Ont. C.A.).

Did Mr. Frykman Attorn to the Jurisdiction of the Supreme Court?

- [46] In my view, the chambers judge erred in holding Mr. Frykman had attorned. I say this because jurisdiction over Mr. Frykman was established by the fact he was ordinarily resident in British Columbia when the action was commenced.
- [47] Attornment is a stand-alone basis for the assumption of jurisdiction: *Kriegman v. Wilson*, 2016 BCCA 122 at para. 29, 86 B.C.L.R. (5th) 1. It arises when a defendant is deemed to have submitted to the jurisdiction of a court that otherwise would not have jurisdiction over them by actions inconsistent with a denial of that jurisdiction: *Kraupner v. Ruby* (1957), 7 D.L.R. (2d) 383 at 392 (B.C.C.A.), appeal quashed, [1957] S.C.R. viii; *Pope v. Pope*, [1940] 2 D.L.R. 661 at 664 (B.C.S.C), appeal on other grounds dismissed, [1940] 3 D.L.R. 454 (B.C.C.A.). Submission can be unintentional: *Edgar v. Ronald* (1994), 12 B.C.L.R. (3d) 194 at paras. 20-21 (C.A.). Put otherwise, a defendant can, by their actions, vest a court with jurisdiction the court otherwise would not have. Today attornment is captured by s. 3(b) of the CJPTA.
- [48] The concept of attornment does not apply when jurisdiction already exists. For example, it would be incorrect to say that a defendant ordinarily resident in British Columbia who files a defence to an action for damages arising out of a motor vehicle accident that occurred in British Columbia has attorned to the court's jurisdiction.
- [49] Apposite is *Charron v. Montreal Trust Co.* (1958), 15 D.L.R. (2d) 240 (Ont. C.A.). In that case, an action was commenced in Ontario against a defendant carrying on business in Ontario and served in Ontario. The defendant filed an appearance and a statement of defence in which it pleaded the court had no jurisdiction to hear the action or, in the alternative, should decline to hear it. The Chief Justice of the High Court held the defendant had attorned to the jurisdiction of the Ontario courts. On appeal, Justice Morden, in disagreeing with that holding, stated (at 245-246):

In my opinion, there was no question of attornment to the jurisdiction; the defendant was carrying on business here and was served within the jurisdiction. It was always subject to the Ontario Courts whether it entered an appearance or not. The cases relied upon by the learned Chief Justice were cases where process had been served *ex juris* and the non-resident party had entered an unconditional appearance. In the instance case, the defendant having been served within Ontario, it could not enter a conditional appearance under Rule 48: *Ingersoll Packing Co. v. N.Y. Central R. Co.* (1918), 14 O.W.N. 134. In the present case, the defendant was subject to the jurisdiction of the Ontario Courts and in my view, therefore, its entry of appearance could not deprive it from raising, in the circumstances of this case, the defence that the Court had no power to grant the relief claimed by the plaintiff. The Court had jurisdiction over the defendant and was not precluded by the appearance from deciding whether the defence raised was a valid one.

[Emphasis added.]

Supreme Court Civil Rules, Rule 21-8

- [50] Even if Mr. Frykman had attorned he would not be barred from raising forum non conveniens. As I will explain, Rule 21-8 treats assertions that the Supreme Court does not have jurisdiction differently from assertions that the Court should decline to exercise its jurisdiction. I note that in *Borgstrom v. Korean Airlines Co. Ltd.*, 2007 BCCA 263 at para. 22, 70 B.C.L.R. (4th) 206, a case dealing with the Rules of Court, this Court left open the question of whether attornment bars a defendant from raising forum non conveniens.
- [51] At one time, the rules of the Supreme Court of British Columbia provided for what was known as a "conditional appearance". A defendant wishing to challenge that Court's jurisdiction could file a "conditional appearance" without being deemed to have attorned. A defendant who filed an unconditional appearance would be deemed to have attorned: *Canadian Imperial Bank of Commerce v. Adderson* (1963), 45 W.W.R. 399 at 401 (B.C.C.A.). However, as discussed in *Stancroft Trust Ltd. v. Can-Asia Capital Co.* (1990), 43 B.C.L.R. (2d) 341 at 346 (C.A.), leave to appeal ref'd [1990] 2 S.C.R. xi, conditional appearances were abolished in 1976 when the Rules of Court were amended to permit a defendant to challenge jurisdiction, or to ask the court to decline jurisdiction, whether or not an appearance had been filed: B.C. Reg. 310/1976. At that time, the relevant portions of Rule 14 read:
- (6) Where a person served with an originating process has not entered an appearance and alleges that
 - (a) the process is invalid and has expired,
 - (b) the purported service of the process was invalid, or whether or not he has not entered an appearance, alleges that
 - (c) the Court has no jurisdiction over him in the proceeding or should decline jurisdiction,he may apply to the Court for a declaration to that effect.
 - (7) Where an application is made pursuant to rule 13 (10) [setting aside service ex juris] or subrule (6), the plaintiff or petitioner shall take no further step in the proceeding against the applicant, except with leave of the Court, until the application has been concluded.
 - (8) An application made under rule 13 (10) or subrule (6) does not constitute acceptance of the jurisdiction of the Court.
- [52] What today are Rules 21-8(1) to (5) of the Supreme Court Civil Rules were initially Rules 14(6) to (6.4) of the Rules of Court. The latter were approved on May 16, 2003, and came into force on June 1, 2003: B.C. Reg. 198/2003. It would appear the changes to Rule 14 were made in contemplation of the CJPTA coming into force. That Act passed third reading in the Legislative Assembly on May 5, 2003, and received royal assent on May 29, 2003. As previously mentioned, it came into force on May 4, 2006.

- [53] Rule 21-8 came into force on July 1, 2010, when the Supreme Court Civil Rules replaced the Rules of Court: B.C. Reg. 168/2009. The only change of any significance made by Rule 21-8 is the requirement that the party disputing jurisdiction or service file a jurisdictional response.
- [54] I turn now to the O'Brien decisions, which have been cited numerous times for the proposition that attornment bars a party from raising forum non conveniens: see, e.g., *Coulson Airplane Ltd. v. Pacific Helicopter Tours Inc.*, 2006 BCSC 961 at para. 45, 57 B.C.L.R. (4th) 226; *Andrew Peller Ltd.* at para. 11; *McIntyre* at para. 57; *Blazek v. Blazek*, 2009 BCSC 1693 at para. 61, 66 C.P.C. (6th) 128, leave granted, 2010 BCCA 188, but appeal abandoned. However, in *Liu v. Huang*, 2008 BCSC 288, 59 C.P.C. (6th) 1, a forum non conveniens argument succeeded even though the defendant was found to have attorned. In *Ackerman v. Saskatchewan Association of Health Organizations*, 2007 SKQB 146, [2007] 11 W.W.R. 751 at para. 32, attornment was held not to bar a forum non conveniens application.
- [55] In *O'Brien (S.C.)*, Preston J. interpreted then Rule 14(6.4)--now Rule 21-8(5)--as providing protection from attornment only with respect to a challenge to jurisdiction simpliciter: para. 23. In refusing leave to appeal, Low J.A. agreed with this interpretation which, in his view, reflected "the intention of the drafters to preserve the common law rule that the right to challenge jurisdiction on the basis of forum non conveniens expires with attornment": para. 9. However, Low J.A. does not cite any authority for this common law rule and I am not aware of any. In addition, in *Fredrick M. Irvine, "Submission to the Jurisdiction of the Supreme Court of British Columbia and Applications to have the Court Decline Jurisdiction, Case Comment: Liu v. Huang"* (2008), 59 C.P.C. (6th) 15 at 19, the author states he was unable to find any case or text authority for the proposition that attornment precludes an application to have a court decline jurisdiction.
- [56] How then should Rule 21-8 be interpreted? This is a task to be approached keeping in mind the following statement by Chief Justice Finch in *Wong v. Wong*, 2006 BCCA 540 at para. 23, 61 B.C.L.R. (4th) 280:

It is trite law that the Rules of Court are made to promote justice, and that they should be interpreted in a manner most likely to do justice between the parties. The rules are the servants, and not the masters of the court: see *Bell v. Wood and Anderson*, [1927] 2 D.L.R. 827 (B.C.S.C.); *Fenchurch Export Corp. v. Sitka Spruce Lumber Co.*, [1947] 2 D.L.R. 139 (B.C.C.A.); and *Mussell v. Cronhelm* (1994), 111 D.L.R. (4th) 95 (B.C.C.A.).

- [57] It is clear Rule 21-8 was drafted having regard to the fact that jurisdiction (i.e., territorial competence) and forum non conveniens are distinct concepts. It is also clear that an ex juris defendant who wishes to challenge jurisdiction must follow the procedures set out in Rules 21-8(1) and (5) to obtain protection from attornment. However, I am unable to accept Mr. Manning's submission that Rules 21-8(1) and (2) must be read together and interpreted such that a party seeking only to have the court decline to exercise jurisdiction must nevertheless file a jurisdictional response and then, as required by Rule 21-8(5), serve a pointless notice of application challenging territorial competence or disputing a pleading or service.

- [58] Mr. Manning says that in Rule 21-8(2) the expression "a party referred to in subrule (1)" refers to a party that has been served and has filed a jurisdictional response. I do not agree. In Rule 21-8(1) the word "party" is modified by the clause "who has been served with an originating pleading or petition in a proceeding". The comma after the word "proceeding" signals the end of this modifying clause. In addition, it is notable that although a jurisdictional response is specifically stated to be a prerequisite to applications under Rules 21-8(1) and (3), it is not mentioned in Rule 21-8(2).
- [59] Regardless of how jurisdiction is acquired, Rule 21-8(2) alone applies when a party seeks a stay on the ground that the Supreme Court of British Columbia ought to decline to exercise that jurisdiction. There is no reason why the ability of a person who has attorned to raise *forum non conveniens* should be different from that of a person who is subject to the court's jurisdiction on another basis. With respect to a person who has attorned, the following statement by Professor Stephen G. Pitel in "The Canadian Codification of *Forum Non Conveniens*" (2011), 7 J. Priv. Int'l. L. 251 at 256, is apt:

Seeking a stay is not a challenge to the court's jurisdiction, and so there is no inconsistency between seeking a stay and attorning. Indeed, attorning, which amounts to accepting that the court has jurisdiction, is entirely consistent with subsequently asking that court to decline to exercise that jurisdiction. Obviously, one would expect a motion for a stay to be brought in a timely manner, but that in itself is not a sufficient reason for holding that a defendant who attorns cannot seek a stay.

Conclusion on Attornment

- [60] For the above reasons, I am of the view the chambers judge erred in holding Mr. Frykman was barred from raising *forum non conveniens*.

Were the Chambers Judge's Reasons on *Forum Non Conveniens* Adequate?

The Chambers Judge's Reasons

- [61] At the outset of his reasons, the chambers judge noted Mr. Frykman was seeking a discretionary remedy. With respect to Mr. Frykman's burden, the judge cited Van Breda and set out a portion of para. 109 of LeBel J.'s reasons which includes the following statement:

The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules.

- [62] After referring to the *forum non conveniens* test codified in s. 11 of the CJPTA, including the mandatory factors in subs. (2), the chambers judge, with reference to *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200, 77 B.C.L.R. (5th) 139, listed the following as additional factors he could consider:

- a) where each party resides;
- b) where the cause of action arose;
- c) where the loss or damage occurred;
- d) any juridical advantage to Mr. Manning in this jurisdiction;
- e) any juridical disadvantage to Mr. Frykman in this jurisdiction;
- f) the convenience or inconvenience to potential witnesses;
- g) the cost of conducting the proceeding in this jurisdiction;
- h) the applicable substantive law;
- i) the difficulty and cost of proving foreign law, if necessary.

[63] In finding Mr. Frykman had failed to demonstrate Sweden is a more appropriate jurisdiction in which to litigate Mrs. Nordmark's claims, the judge referred to the following:

- The relevant transactions occurred while Mrs. Nordmark lived in British Columbia and the witnesses to her isolation, mental capacity, and intention at the relevant times are located here: paras. 47-48, 50, 51, 53.
- The transactions resulted in the transfer of significant portions of Mrs. Nordmark's wealth to Mr. Frykman in British Columbia; the relief sought is tied to assets here: para. 49.
- Mr. Frykman lives in Vancouver part of the time and works here; Mr. Manning (the litigation guardian) lives in Vancouver: para. 51.
- Ms. Harrison and her family live in Vancouver; Ms. Hedberg lives in New York State: para. 51.
- As all the transactions took place while Mrs. Nordmark was living in Vancouver, the laws of British Columbia apply to the alleged causes of action: para. 54.
- The Swiss Bank Transfer has no connection to Sweden; it was between accounts in Switzerland and would be subject to either Swiss law or British Columbia law: para. 56.
- The instructions for the Swiss Bank Transfer were given while Mrs. Nordmark lived in British Columbia and those funds ended up here; if there was a tort, etc., then those acts would have occurred here and would be subject to British Columbia law: para. 57.
- The Apartment Proceeds Gift took place while Mrs. Nordmark lived in British Columbia and those funds ended up here: para. 58.
- With respect to the Country Home Transfer, in September 2014, Mrs. Nordmark, while living in British Columbia, signed a letter evincing an intention to transfer that property and its contents to Mr. Frykman's children: para. 59.

Discussion

- [64] Mr. Frykman says the chambers judge's reasons are inadequate because they do not address all the submissions he made in support of granting a stay. In advancing that argument Mr. Frykman points to two factual errors the judge made, both of which are grounded in Mr. Manning's written submissions on the application. I am of the view that one of those errors is significant and that, in light of that error, the judge's decision is not entitled to deference.
- [65] It is evident from a comparison of the judge's oral reasons and Mr. Manning's written submissions that the judge adopted portions of those submissions either verbatim or by paraphrasing.
- [66] What I consider to be an inconsequential factual error relates to the judge referring to Mr. Frykman, Senior as Mrs. Nordmark's "first husband", when he was her second husband. The genesis of this error is the opening sentence in para. 93 of Mr. Manning's written submissions which states:

The Defendant has alleged that the transfer referenced in Part 1, para. 19(c) of the Notice of Civil Claim (the "Swiss Bank Transfer") is properly subject to Swedish law as it "relates to a contract" entered into between Mrs. Nordmark and her deceased first husband Frykman Senior. The purported "contract" the defendant has produced at Exhibit "D" to his affidavit is titled "Will and Testament" and is dated May 9, 1969. The Defendant is relying on an old Will of Mrs. Nordmark which has purportedly been superseded by several Wills, including a Will dated May 30, 2011. Further, there is nothing on the face of the 1969 will [sic] that connects it to the Swiss Bank Transfer.

[Emphasis added.]

In para. 55 of his reasons, the judge states:

Mr. Frykman alleges that the Swiss Bank Transfer is properly subject to Swedish law as it "relates to a contract" entered between Mrs. Nordmark and her deceased first husband. The purported "contract" Mr. Frykman has produced is entitled "will and testament" and is dated May 9, 1969. Mr. Frykman is therefore relying on an old will of Mr. Nordmark which has been superseded by several wills including a will dated May 30, 2011. Therefore there is nothing on the face of the 1969 will that connects it to the Swiss Bank Transfer.

[Emphasis added.]

- [67] What I consider to be a consequential error relates to the Country Home Transfer. In this regard, it is important to keep in mind Mr. Frykman submitted that all of the transactions were subject to Swedish law and there were witnesses in Sweden, including the lawyers who assisted in the Country Home Transfer, who could testify concerning Mrs. Nordmark's mental abilities.

[68] In his written submissions. Mr. Manning states, under the heading "Convenience of British Columbia":

44. The impugned Transactions occurred while Mrs. Nordmark lived in British Columbia. The Defendant agreed at this Examination for Discovery Mrs. Nordmark lived in Vancouver when each of the impugned Transactions occurred (EFD, Q498). The Plaintiff and Defendant disagree as to whether Mrs. Nordmark was domiciled in British Columbia.

Under the heading, "Comparative Convenience and Expense", he states:

86. The factors discussed at paragraphs 43-56 above are repeated here:

(a) The impugned Transactions occurred while Mrs. Nordmark lived in British Columbia. The witnesses to the [sic] Mrs. Nordmark's mental capacity are located in British Columbia. For example, Mrs. Nordmark's doctors during the material time period are located in British Columbia. In addition, the legal professionals that purportedly advised Mrs. Nordmark during the material times are located in British Columbia.

[69] "EDF, Q498" in para. 44 refers to a question Mr. Frykman was asked at his examination for discovery. That question concerned para. 19 of the notice of civil claim which lists a number of transactions, including those presently in issue. The Country Home Transfer is in sub-para. (f): "in or about April 2015, Mrs. Nordmark's country home, having an approximately value of \$6,000,000 [sic] SEK (Swedish Krona) was transferred to Frykman Junior's children." Mr. Frykman was asked this question and gave this answer:

Q With the exception of the Swedish country home at (f), do you agree that Mrs. Nordmark lived in Vancouver when each of these transactions occurred?

A Yes, so I think so, yes. So she lived in Vancouver Yeah.

[70] As is evident, Mr. Frykman did not agree Mrs. Nordmark was living in Vancouver when the Country Home Transfer occurred; indeed, it is common ground that she was then living in Sweden. However, the chambers judge mistakenly proceeded on the basis she lived in Vancouver: paras. 47, 53, 54, 59.

[71] I turn now to the standard of review, which is set out in *LeBel J.'s* reasons in *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18 at para. 41, [2012] 1 S.C.R. 636:

[41] The application of forum non conveniens is an exercise of discretion reviewable in accordance with the principle of deference to discretionary decisions: an appeal court should intervene only if the motion judge erred in principle, misapprehended or failed to take into account material evidence, or reached an unreasonable decision.

[72] In the present case, the chambers judge placed significant weight on Mrs. Nordmark living in Vancouver when the three transactions in issue took place. However, he misapprehended the evidence as to where she was living at the time of the Country Home Transfer. In light of this error, the judge's decision is not entitled to deference and it is necessary for this Court to

undertake an assessment of the relevant factors, having regard to the arguments advanced by Mr. Frykman in support of a stay. That assessment is to be made on the basis that the burden is on Mr. Frykman to show Sweden is the "clearly more appropriate" jurisdiction: Van Breda at para. 108; Haaretz.com at paras. 46, 183-191. This is a high threshold. As Justice Sopinka stated in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 931, "where there is no one forum that is the most appropriate, the domestic forum wins out by default".

[73] I will address the factors on which Mr. Frykman relies, keeping in mind that he did not provide any evidence with respect to Swedish law. This is unlike what occurred in the *Haaretz.com* case, where the defendant seeking a stay tendered opinion evidence on foreign law in support of its loss of juridical advantage argument: see *Goldhar v. Haaretz.com*, 2015 ONSC 1128 at paras. 52-63, 125 O.R. (3d) 619.

(1) Comparative Convenience and Expense to the Parties and their Witnesses

[74] Mr. Frykman's position is that since Mrs. Nordmark's capacity and intention will be key issues, the evidence of people who have known her throughout her life will be important. He says most of those people reside in Sweden, i.e., family members, extended family members, doctors, and lawyers. Further, he notes Mrs. Nordmark now lives in Sweden and that her ability to give evidence may well be an issue. However, Mr. Frykman accepts arrangements can be made to have witnesses from Sweden testify in British Columbia without the need for them to travel here.

[75] I do not agree that most of the witnesses relevant to determining Mrs. Nordmark's capacity and intention live in Sweden. Mrs. Nordmark lived in Vancouver from March 2011 until February 2015. The Swiss Bank Transfer and the Apartment Proceeds Gift took place during that period and the Country Home Transfer took place shortly thereafter. Mr. Frykman still lives in Vancouver part-time. On the basis of the limited and generalized information provided by Mr. Frykman, it cannot be said that witness-related expenses that will be incurred if the trial takes place in British Columbia weigh in favour of declining jurisdiction.

[76] Mr. Frykman further says because some of the relevant documents are in Swedish, the parties will have to incur unnecessary translation expenses if the trial takes place in British Columbia. As well, he says the British Columbia court may have to decide on the accuracy of conflicting translations, leading to increased trial time and expense to the parties.

[77] I begin by noting that both parties rely on documents written in Swedish as well as documents written in English. The exhibits to the affidavits of Mr. Frykman and Ms. Hedberg include English translations of documents in Swedish. The accuracy of those translations has not been challenged. Absent evidence from Mr. Frykman that Swedish courts do not require English documents to be translated into Swedish, it cannot be said that translation-issues will not arise at a trial in Sweden. Overall, the possibility that translation issues may arise does not favour declining jurisdiction.

(2) The Law to be Applied to the Issues

[78] Mr. Frykman's position is that the validity of the three transactions in issue falls to be decided on the basis of Swedish law. With respect to those transactions, he says:

- (a) The Swiss Bank Transfer was made in fulfillment of the "Will and Testament" Mrs. Nordmark and Mr. Frykman, Senior, signed in 1968, and is, therefore, subject to the Swedish law of contract;
- (b) The Apartment Proceeds Gift is subject to Swedish law because Mrs. Nordmark's domicile was Sweden at the time she gave the instructions to transfer the money; and
- (c) The Country Home Transfer is subject to Swedish law as it involves real property in Sweden.

[79] With respect to the Swiss Bank Transfer and the 1968 "Will and Testament", I note Mrs. Nordmark subsequently made other wills, including one signed in Vancouver on May 30, 2011. It, therefore, cannot be said with any degree of certainty that Swedish contract law will govern this transaction. That is a matter to be determined at trial.

[80] The applicability of Swedish law to the Apartment Proceeds Gift is also a matter to be determined at trial together with the issue of Mrs. Nordmark's domicile at the time of that transaction.

[81] I consider the connection between the Country Home Transfer and Swedish law to be tenuous given that title to that property is not in issue. The claim being advanced is a personal one against Mr. Frykman seeking damages. What is alleged is that he improperly influenced Mrs. Nordmark to transfer the property to his children and that he did so both in Vancouver and in Sweden.

[82] Based on the documents from the Public Trustee Guardianship Board of Stockholm provided by Mr. Frykman, it appears the Board did no more than give its approval for Mr. Frykman's minor children to receive interests in the property. It was not concerned with Mrs. Nordmark's capacity to make those transfers. Accordingly, the present action does not, as Mr. Frykman contends, involve a collateral attack on the Board's decision.

[83] Overall, I do not consider the possibility that the trial may require consideration of Swedish law weighs in favour declining jurisdiction.

(3) The Desirability of Avoiding Multiplicity of Legal Proceedings and the Enforcement of an Eventual Judgment

[84] Mr. Frykman contends that only a Swedish court can determine all of the issues raised by the notice of civil claim because only a Swedish court can deal with the title to the Country Home property. However, as discussed above, title to that property will not be affected should the action succeed.

- [85] Mr. Frykman further says Sweden is the preferable jurisdiction because, should the present action succeed, neither Mr. Manning nor Ms. Hedberg will have authority to receive any judgment or settlement that should result. This is because a committee would have to be appointed under the Patients Property Act, R.S.B.C. 1996, c. 349, to manage Mrs. Nordmark's affairs. Mr. Frykman says such an application would be contested, presumably by him. Given the need for a committee will arise only if judgment is granted against Mr. Frykman, he will effectively be ineligible to act as Mrs. Nordmark's committee due to a conflict of interest.
- [86] Although Mr. Frykman did not provide evidence with respect to how an action in Sweden would unfold, I am prepared to assume that since a Swedish court appointed Ms. Hedberg as Mrs. Nordmark's legal guardian, Ms. Hedberg has authority to commence an action on Mrs. Nordmark's behalf in Sweden and to receive any settlement or judgment that may result from that action. If that assumption is correct, then a successful action against Mr. Frykman in Sweden likely would not require a post-judgment application there similar to one under the Patients Property Act.
- [87] While I would attach some weight to avoiding a committee application in British Columbia, I do not consider the possible need for such a step as providing much support for declining jurisdiction.
- (4) Juridical Disadvantage to Mr. Frykman
- [88] Mr. Frykman contends he is disadvantaged because he is unable to examine Ms. Hedberg for discovery or obtain document discovery directly from her. Although Mr. Manning is obligated to provide document discovery under Rule 7-1 of the Supreme Court Civil Rules and can be examined for discovery under Rule 7-2(9), Mr. Frykman notes, correctly, that Mr. Manning has no first-hand knowledge of the matters in issue. Mr. Frykman's position is that Ms. Hedberg should not be allowed to "hide behind" Mr. Manning.
- [89] My difficulty with this argument, again, is that Mr. Frykman did not provide evidence with respect to how an action in Sweden would unfold. The extent to which Mr. Frykman would have discovery rights directly against Ms. Hedberg in Sweden is unknown. Accordingly, I do not consider the absence of such a right in British Columbia to weigh in favour of declining jurisdiction.
- [90] I would add that it may be possible for Mr. Frykman to seek a pre-trial examination of Ms. Hedberg under Rule 7-5.
- (5) Mr. Manning's Involvement
- [91] Mr. Frykman contends Mr. Manning cannot act in Mrs. Nordmark's best interests because she lives in Sweden and Mr. Manning is entirely reliant on Ms. Hedberg for information. Mr. Frykman says if Ms. Hedberg does not provide Mr. Manning with accurate and complete information, then Mr. Manning cannot make the best decisions for Mrs. Nordmark. I note that at the hearing of the application, Mr. Manning submitted Ms. Hedberg could not act as a

litigation guardian because she is not indifferent to the outcome of the action: see Rule 20-2(8)(b) of the Supreme Court Civil Rules. Mr. Frykman did not challenge that submission.

[92] While the circumstances giving rise to Mr. Manning's involvement are unusual, I am not prepared to find he will be unable to properly conduct this litigation in Mrs. Nordmark's best interests. I note that in his affidavit filed in response to Mr. Frykman's application, Mr. Manning states:

6. My client is Mrs. Nordmark. My duties are owed to Mrs. Nordmark. I have and will continue to make litigation decisions independently and based on what is, in my judgment, in the best interests of Mrs. Nordmark. The best interests of Mrs. Nordmark inform all of my decisions as Litigation Guardian.

(6) Timeliness of the Application

[93] Mr. Manning has not argued that the time that passed between when the action was started and when the forum non conveniens application was filed--approximately 15 months--should weigh in favour of dismissing it. This is, no doubt, due to the fact that the parties agreed further steps, such as Mr. Frykman's examination for discovery, were needed to create a proper record for the application. However, I agree with Professor Pitel that ordinarily such an application should be brought in a timely manner: see para. 59 above.

Conclusion on Forum Non Conveniens

[94] For the above reasons, I am of the view Mr. Frykman has not shown Sweden is a clearly more appropriate jurisdiction.

DISPOSITION

[95] I would dismiss this appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Dickson"

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