

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bit v. Krahn Engineering Ltd.*,
2025 BCCA 167

Date: 20250522
Docket: CA50022

Between:

Gino Bit

Appellant
(Defendant)

And

Krahn Engineering Ltd.

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Fenlon
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated
June 19, 2024 (*Krahn Engineering Ltd. v. Bit*, 2024 BCSC 1069,
Vancouver Docket S241481).

Counsel for the Appellant:

L. Inglis
R. Lew

Counsel for the Respondent:

S.R. Shuchat
S. Macdonald

Place and Date of Hearing:

Vancouver, British Columbia
March 11, 2025

Place and Date of Judgment:

Vancouver, British Columbia
May 22, 2025

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Chief Justice Marchand
The Honourable Justice Winteringham

Summary:

The respondent terminated the appellant’s employment and then commenced a lawsuit against him in BC. The appellant applied to stay the action so that both it and his counterclaims against the respondent could be addressed together in Alberta, where he resided. The chambers judge dismissed the application, finding that (1) BC had territorial competence, (2) the factors weighing in favour of the convenience of each province were evenly balanced such that the appellant had not established that Alberta was clearly the more convenient forum, and (3) the forum selection clause in the parties’ employment contract was not exclusive. In so doing, the judge relied on the fact that, when the hearing took place, no action had yet been started in Alberta. Shortly after the judge’s reasons were released, the respondent commenced an oppression action against the appellant in Alberta concerning an Alberta corporation.

Held: Appeal allowed. The new evidence concerning the Alberta action should be admitted because it arose after the hearing, is relevant to a decisive issue, is credible, and could have affected the result. Both actions will require the court to determine the extent to which the respondent’s CEO was involved in, and approved of, the misconduct it alleges against the appellant. If the actions are heard in different jurisdictions, there may be conflicting findings on that issue. The filing of the Alberta action therefore tips the scales in favour of Alberta being the clearly more appropriate forum.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] The question at the heart of this appeal is whether British Columbia or Alberta is the more appropriate forum for resolution of the parties’ disputes.

Background

[2] The appellant Gino Bit resides in Alberta. He was employed by the respondent Krahn Engineering Ltd. (“Krahn Engineering”) from 2014 until his termination in November 2023, allegedly for cause. Mr. Bit was recruited from another engineering firm, serving initially as Krahn Engineering’s VP of Operations in Alberta, and then as president and CEO of the company after 2018.

[3] The parties have widely divergent perspectives on the events leading up to Mr. Bit’s termination. Krahn Engineering contends Mr. Bit failed to respond to work emails, made improper use of a company vehicle and his corporate expense account, and breached fiduciary and contractual duties owed to his employer by spending time and company resources doing work for CTA Architecture and Design

Ltd. (“CTA”), a company in which he had an interest. Mr. Bit, for his part, contends that he and the principal of Krahn Engineering, David Krahn, came into conflict when Mr. Krahn began stripping Krahn Engineering of financial assets in order to decrease its value as he faced a divorce proceeding and division of assets.

[4] Where the truth lies in all of this must wait for trial. What is certain, however, is that Krahn Engineering has commenced a number of lawsuits concerning Mr. Bit and his companies, both in BC and Alberta. This appeal arises out of Mr. Bit’s application in the British Columbia Supreme Court to stay one of the proceedings commenced by Krahn Engineering in this province, so that claims relating to his employment and other issues between the parties can be addressed together in Alberta.

[5] A review of the procedural history is necessary before turning to the issues on appeal.

[6] As noted, Mr. Bit received a letter of termination on November 29, 2023. On February 16, 2024, Krahn Engineering filed a notice of civil claim in the BCSC against CTA to collect money it says CTA owes Krahn Engineering for services and rent (the “Debt Action”). On March 1, 2024, Krahn Engineering commenced a second action in the BCSC alleging Mr. Bit breached fiduciary and contractual duties owed to Krahn Engineering, causing it loss (the “Employment Action”).

[7] On March 14, 2024, Mr. Bit filed a jurisdictional response in the Employment Action challenging the jurisdiction of the BCSC to determine the claim. His application under the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [CJPTA] to strike the Employment Action—either for lack of jurisdiction or on the basis that Alberta was the more convenient forum—proceeded on May 15, 2024. The chambers judge dismissed the application in written reasons delivered on June 19, 2024.

The Chambers Hearing

[8] At the hearing before the chambers judge, Mr. Bit raised three arguments:

1. The Employment Action related to a contract performed largely in Alberta, by a resident of Alberta, such that it did not have a substantial connection to BC;
2. Even if there were a substantial connection to BC, the Court should decline to exercise jurisdiction on the basis that Alberta was clearly the more appropriate forum; and
3. The forum selection clause in the employment contract compelled the parties to settle their differences in Alberta.

[9] The judge was satisfied BC had territorial competence, noting that Krahn Engineering was required to establish only an arguable case that the facts it relied on to establish jurisdiction could be made out. The judge found that low threshold had been met because Krahn Engineering asserted the majority of its employees were located in BC, Mr. Bit's role as CEO applied to operations in both provinces, and his contractual obligations were to a substantial extent to be carried out in BC: at para. 24.

[10] Turning to the forum selection clause contained in the contract of employment, the judge concluded it was not exclusive. The clause in issue reads:

This Agreement shall be governed by and construed in accordance with the laws of the Province of Alberta and the laws of Canada applicable in that Province and shall be treated, in all respects, as a Albertan contract. Each of the Parties agrees that any action or proceeding related to this Agreement or the transactions contemplated herein may (but need not) be brought in any court of competent jurisdiction in the Province of Alberta, and for that purpose hereby attorns and submits to the jurisdiction of such Alberta court.

[11] Applying this Court's decision in *Hydro Aluminum Rolled Products GmbH v. MFC Bancorp Ltd.*, 2020 BCCA 295 at para. 23, the judge found the clause was not determinative but was, rather, a factor to be considered in determining whether the Court should decline to exercise jurisdiction on the basis of the test for *forum non conveniens*. Turning to that test, which is codified under ss. 11(1) and (2) of the *CJPTA*, the judge considered the circumstances identified in the section:

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(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.

[12] The judge found that Mr. Bit's residence in Alberta clearly favoured Alberta as the more appropriate forum given its comparative convenience and expense. With respect to witnesses, he observed that at least some, and perhaps the majority, appeared to reside in BC.

[13] Although the forum selection clause provided for the application of Alberta law, the judge noted that the laws in the two provinces were similar regarding contract and breach of fiduciary duty, and that BC would have no difficulty applying Alberta law to the circumstances of the case.

[14] Addressing Mr. Bit's submission that he wished to bring a wrongful dismissal case in Alberta, as his employment was governed by the *Alberta Employment Standards Code*, R.S.A. 2000, c. E-9, the judge observed that Mr. Bit had "not yet brought an action, and, again, BC courts could hear, and determine, his wrongful dismissal suit," noting that "[t]he possibility of a multiplicity of legal proceedings and conflicting decisions does not weigh heavily in the analysis."

[15] Finally, the judge addressed enforcement of a BC judgment in Alberta, commenting that any difficulty would disadvantage Krahn Engineering and not Mr. Bit.

[16] In considering whether the forum selection clause ought to be given weight, the judge said:

[39] As noted, Mr. Bit has not yet actually exercised his right to commence an action in Alberta. In my view, while the Forum Selection Clause should be given some weight in this case, it cannot be determinative. As indicated above, the Forum Selection Clause states that the parties *may* bring claims in Alberta, but it also expressly provides that they “need not” do so.

[40] Overall, in assessing all of the factors and evidence described above, I find that the CJPTA s. 11 factors are fairly evenly balanced, particularly because Mr. Bit will have to deal with a lawsuit in another province, but I am unable to find that Alberta is *clearly* the more appropriate forum.

[Underlining added; italics in original.]

Post-Hearing Events

[17] After the decision dismissing the jurisdiction application was released on June 19, 2024, Krahn Engineering pressed Mr. Bit to file a response in the Employment Action by July 12, 2024. Mr. Bit complied with that deadline. That same day, Mr. Krahn commenced an oppression action in Alberta under the *Business Corporations Act*, RSA 2000, c. B-9, s. 122 [*Alberta BCA*], against Mr. Bit, CTA, 2350896 Alberta Ltd. (the company through which Mr. Bit held shares in CTA), Craig Mitchell, and Craig Mitchell Architecture and Design Inc. (shareholders in CTA) (“the Oppression Action”). The appellant seeks leave to adduce new evidence on appeal concerning this action.

[18] The Oppression Action alleges that Mr. Bit, who held 74.5 percent of the CTA shares either directly or through his numbered company, held one-half of those shares in trust for Mr. Krahn. Mr. Krahn contends he did not receive dividends due to him, and says Mr. Bit and Mr. Mitchell diverted opportunities from CTA to Craig Mitchell Architecture and Design Inc., among other allegations grounded in breach of fiduciary duty.

[19] It is noteworthy that, when the judge made the jurisdictional decision, he was not aware of Mr. Krahn’s intention to file the Oppression Action in Alberta a few weeks later. The appellant contends this information would have made a difference to the outcome of the jurisdictional application given that:

1. The judge found the s. 11 factors to be evenly balanced such that Mr. Bit had not been able to meet the burden of showing that Alberta “is *clearly* the more appropriate forum”: at para. 40;
2. The judge took into account the absence of an Alberta action: at para. 39; and
3. Krahn Engineering relied on the absence of an Alberta action, and the Debt Action and the Employment Action being underway in BC, to oppose Alberta as the more convenient forum.

[20] With respect to the third factor, the appellant points to the respondent’s submissions at the chambers hearing: after referring to Mr. Krahn’s affidavit stating that he was not aware of any litigation actually commenced by Mr. Bit in Alberta, counsel for Mr. Krahn said:

We say that’s important because Mr. Bit keeps on saying, “Well, I want to be able to sue you in Alberta. I want to be able to sue you in Alberta.” He has not yet sued in Alberta to the best of our knowledge despite months of saying he plans to do that, and I don’t -- in our opinion, that is not a particularly persuasive point when that action has not been brought yet.

On a related point, my friend says we make the argument that, well, we filed in BC first. That is not -- I agree with my friend that that is not a determinative factor, but we say it’s a -- one factor amongst many factors that’s persuasive because it pushes the gravity of the litigation to BC when we already have the related action in CTA -- in BC. [...]

[21] The respondent opposes the new evidence application, contending it is irrelevant since the Oppression Action involves Mr. Krahn personally, not Krahn Engineering, relies on “totally different facts”, and is an unrelated claim.

On Appeal

[22] Mr. Bit accepts the judge’s characterization of the forum selection clause as a factor to be considered in the *forum non conveniens* analysis, given that it is not an exclusive clause. He contends, however, that the judge made two errors: first, in finding territorial competence based on a substantial connection between the facts giving rise to the Employment Action and this province; and second, in deciding that

BC is the more convenient forum in light of the new evidence relating to the Oppression Action. In my view, this appeal turns on the second ground.

[23] Because the second ground of appeal relies on new evidence rather than an error of the judge, the first question to be addressed is whether the new evidence should be admitted. It is trite law that an appeal is brought on the basis of the record before the court below. New evidence is generally not admissible absent exceptional circumstances. As set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, in determining whether to admit new evidence, the Court must consider whether:

1. The evidence could not, by the exercise of due diligence, have been obtained for trial;
2. The evidence is relevant in that it bears upon a decisive or potentially decisive issue;
3. The evidence is credible in the sense that it is reasonably capable of belief; and
4. The evidence is such that, if believed, it could have affected the result of the trial.

The first criterion focuses on the conduct of the party, whereas the latter three criteria focus on the evidence adduced: *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 44; *Lamarque v. Rouse*, 2023 BCCA 392 at para. 57.

[24] The first three criteria are easily met in this case. Admissibility of the new evidence turns on the fourth factor: whether the evidence could have affected the result of the application below. In my view, the answer to that question is “yes” and the new evidence should be admitted.

[25] The judge found the factors favouring each province to be fairly evenly balanced. He placed considerable weight on Mr. Bit’s residence in Alberta and the expense and burden of requiring him to litigate in another province, but noted that any risk of a multiplicity of proceedings did not weigh heavily in the analysis as no

action had been commenced in Alberta. As noted, Mr. Krahn, who is represented by the same counsel in both the Employment Action in BC and the Oppression Action in Alberta, did not inform the chambers judge of his intention to commence the Oppression Action. That information should have been disclosed, in particular because Krahn Engineering relied on the absence of an Alberta action to support its contention that BC was the more appropriate forum.

[26] Counsel for Krahn Engineering submits that the Oppression Action is entirely distinct and unrelated to the Employment Action because it deals with a different party (Mr. Krahn personally), sues parties in addition to Mr. Bit, and relies on different facts in support of a separate and distinct claim from those raised in the Employment Action. I do not agree with this characterization—in my view the two actions are related.

[27] First, although Krahn Engineering and David Krahn are distinct legal persons, Mr. Krahn is a director and CEO of Krahn Engineering. Second, the Oppression Action and the Employment Action raise issues that will require the court to consider the interrelationship between CTA, Mr. Krahn, and Krahn Engineering. In particular, the court will be required to determine the extent of Mr. Krahn’s involvement in and approval of Mr. Bit’s and Krahn Engineering’s assistance to CTA. For example, in the Employment Action, Krahn Engineering alleges Mr. Bit breached his fiduciary obligations to the company because of a conflict of interest with CTA:

E. Conflict of interest with CTA Architecture + Design LTD (“CTA”):

38. At all material times, Mr. Bit worked for and partially-owned CTA.
39. Mr. Bit caused CTA to enter into a general services agreement (“GSA”) between it and [Krahn Engineering].
40. Mr. Bit prepared the agreement on behalf of CTA and agreed to it on behalf of [Krahn Engineering] as its CEO.
41. Such positionings between the two companies put Mr. Bit in a conflict of interest.
42. When faced with this conflict in drafting the GSA, and when dealing with the two companies, Mr. Bit preferred his own interests and/or the interests of CTA to those of [Krahn Engineering].

43. As a result of Mr. Bit's conflict and his preference to favour his own self-interests, CTA received favourable pricing in the GSA, to the detriment of [Krahn Engineering].
44. [Krahn Engineering] was underpaid pursuant to the GSA, for years, which Mr. Bit knew and would not amend despite his power to do so.
45. Mr. Bit caused CTA not to pay the [Krahn Engineering] invoicing under the GSA, despite having the power to do so, and as a consequence, [Krahn Engineering] has large receivables for CTA which remain outstanding.
46. Mr. Bit was not acting in the best interests of [Krahn Engineering] and in accordance with his Fiduciary Obligations, Contractual Obligations and to the standard of care required of him when he let the CTA receivables grow and remain unpaid, and/or refused to follow direction to address the receivable issue.
47. As CEO of [Krahn Engineering], he failed to properly manage – despite repeated requests – to manage the receivables from CTA, such that now the receivable is approximately one million dollars.
48. Mr. Bit committed time theft by performing work for CTA and other entities or entity during hours he was expected to be performing work for [Krahn Engineering], and for generally not performing work for [Krahn Engineering]

[Emphasis added.]

[28] In the Oppression Action, Mr. Krahn pleads that, when CTA was up for sale in 2017, he advised Mr. Bit and/or Mr. Mitchell to acquire CTA. Mr. Krahn states that he helped the two men develop a business plan for CTA. The statement of claim continues as follows:

14. In order to advance their intended business for CTA and/or complete the purchase of the company, the parties agreed Mr. Krahn would assist, and/or did assist, with completing the acquisition by the Defendants, including through:
 - (a) Dealing with the solicitors;
 - (b) Dealing with the vendors, who would not complete the sale without Mr. Krahn's participation;
 - (c) Providing a personal guarantee to the vendor for the purchase price; and/or
 - (d) Other various efforts and consideration for which he was not compensated.(collectively, the “**Krahn Work**”)
15. The sale closed in or around June 2021.

16. The parties agreed that in consideration for the Krahn Work, or some of it, that 50% of the shares acquired by Mr. Bit in the Company, directly or indirectly, would be held in trust for the benefit of Mr. Krahn.
17. Mr. Krahn did in fact assist with the closing of the sale, as contemplated by the parties.
18. Over the course of at least 2021-2023, Mr. Krahn would direct assets, resources or funds, of which he owned directly or through his companies, including valued employees, to CTA for the advancement of its business.
19. He took these steps to his detriment, but in the interests of CTA, and on the understanding he would be, and eventually was, a significant shareholder of the Company.
20. Without the benefit of the Krahn Work, the sale would not have completed.
21. Mr. Krahn was not compensated for his work, resources and/or effort.
22. Following the completion of the sale in 2021, and throughout at least 2023, the Defendants continued to acknowledge that Mr. Bit and/or 235 held 50% of their shares in trust for Mr. Krahn.

[Emphasis added.]

[29] If the two actions are heard in different jurisdictions, there is a potential for conflicting findings on the critical question of whether Mr. Krahn was fully aware of and authorized Krahn Engineering's and Mr. Bit's involvement with CTA as a synergetic corporation acquired in order to build up Krahn Engineering's business. That issue is central to both the Employment Action and the Oppression Action. As Mr. Bit pleads in his statement of defence in the Oppression Action:

13. In or around 2018, with the express consent, approval, and direction of Mr. Krahn, Krahn Engineering paid for Mr. Bit to complete the Growth Driver Program for High-Impact Firms, through BDC (the "**BDC Program**"). The BDC Program is designed to assist executives with the development, implementation, and execution of strategic business plans. Mr. Bit discussed at length with Mr. Krahn the business plan developed with the BDC Program, with the intent to grow Krahn Engineering through the acquisition and creation of synergistic businesses. Mr. Krahn approved the execution of the strategic business plan.
14. Following this plan, with the explicit approval and at the direction of Mr. Krahn, who had a personal financial interest in both entities, Mr. Bit became involved in the operations of CTA Architecture + Design Ltd. ("CTA") and another company. At the direction and approval of Mr. Krahn, Krahn Engineering resources were used, as needed, for the operations of CTA.

15. CTA, in particular, was accretive to Krahn Engineering and its operations were designed to be symbiotic with those of Krahn Engineering. There was an express agreement and understanding that the use of Krahn Engineering resources would constitute consideration for Mr. Krahn to obtain a 35 percent equity interest in CTA. Mr. Krahn did not make any financial contribution to CTA and bore no other financial obligations to the company to otherwise justify that equity interest.

[...]

19. At all material times, between 2021 and 2023, all decisions made with respect to CTA’s operations were made with the full knowledge, consent and agreement of Mr. Bit, Mr. Mitchell, and Mr. Krahn. CTA held weekly or biweekly meetings to discuss operations, and meeting minutes were recorded and provided to Mr. Bit, Mr. Mitchell, and Mr. Krahn.

[...]

21. Through the course of Krahn Engineering’s involvement in CTA, Krahn Engineering benefitted from the relationship. From 2021 to 2024, Krahn Engineering was engaged on approximately nine CTA Projects, with an associated revenue of approximately \$1,500,000.00.

22. Through the course of its operations, CTA used some Krahn Engineering services, including but not limited to administrative services (including the services of Krahn Engineering’s Vice President of Finance), computer services (including the use of Krahn Engineering servers and IT department), and office space (the “**Services**”). There was an informal agreement between Krahn Engineering and CTA that a monthly fee would be paid to Krahn Engineering for those services. A General Services Agreement was drafted but not signed. For the service provided in fiscal year 2023, an excess of \$1,100,000.00 was paid by CTA to Krahn Engineering.

23. At all material times, Krahn Engineering and Mr. Krahn, as the directing mind of Krahn Engineering, were aware that Mr. Bit was involved in the operations of CTA in a limited capacity.

[Emphasis added.]

[30] I conclude that the filing of the Oppression Action in Alberta tips the scales in favour of that province. The respondent acknowledged at the hearing of the appeal that, since CTA is an Alberta corporation, the Oppression Action brought under the Alberta *BCA* must be heard by the Alberta Court of King’s Bench. Accordingly, that jurisdiction, which is in a position to address both the Oppression Action and the Employment Action, makes Alberta the clearly more appropriate forum given the potential for conflicting findings if the actions are not heard together.

Disposition

[31] I would accordingly allow the appeal, set aside the order below, and stay the Employment Action. Mr. Bit is entitled to costs of the application below and this appeal, payable by Krahn Engineering forthwith after assessment.

“The Honourable Madam Justice Fenlon”

I AGREE:

“The Honourable Chief Justice Marchand”

I AGREE:

“The Honourable Justice Winteringham”