

Date: 20250815  
Docket: CI 24-01-47510  
(Winnipeg Centre)  
Indexed as: SPG Construction Ltd. v. 15472296 CANADA INC. et al  
Cited as: 2025 MBKB 101

**COURT OF KING’S BENCH OF MANITOBA**

**B E T W E E N:**

SPG CONSTRUCTION LTD., ) Kevin D. Toyne  
 ) for the plaintiff  
 plaintiff, )  
 )  
 )  
 -and- )  
 )  
 )  
 )  
 15472296 CANADA INC. carrying on business ) Aram Simovonian  
 as DISCOUNT KITCHENS and the said ) Kimberley de Jaray  
 DISCOUNT KITCHENS, ) (Articling Student-at-Law)  
 ) for the defendants  
 )  
 defendants. )  
 )  
 ) JUDGMENT DELIVERED:  
 ) August 15, 2025  
 )

**ASSOCIATE JUDGE GOLDENBERG**

**INTRODUCTION**

[1] The defendants have brought a motion to permanently stay or dismiss the plaintiff’s action on the basis that the Manitoba Court of King’s Bench has no jurisdiction over the subject matter of the action. The defendants seek a declaration that the Superior Court of Justice of Ontario has jurisdiction *simpliciter* concerning the subject matter of the action, or in the alternative, a declaration that the Superior Court of

Justice of Ontario is the more appropriate jurisdiction as compared to the Manitoba Court of King's Bench.

### **PRELIMINARY ISSUE**

[2] At the outset of the hearing, I raised the jurisdiction of the associate judge as a preliminary issue. In particular, I pointed out that the defendants' notice of motion appeared to have been made returnable on the judges' uncontested list, not on the associate judges' uncontested list. Given that, and given that the relief sought in the motion included relief that can only be made by a judge (in particular see Rule 21.01(3), *infra*), I wanted to make sure that the defendants' wished to proceed with their motion before me, and/or that they were prepared to speak to the issue of jurisdiction. Counsel for the defendants indicated that they wished to proceed.

### **BACKGROUND**

[3] The plaintiff is a corporation duly incorporated pursuant to the laws of Manitoba. The defendant, 15472296 CANADA INC., is a corporation duly incorporated pursuant to the laws of Canada and carries on business as the defendant DISCOUNT KITCHENS. In early 2024, the parties agreed that the defendants would provide the plaintiff with 70 kitchen cabinets for a total cost of \$157,224. In accordance with that agreement, the plaintiff paid \$117,224 to the defendants before the delivery of the 70 kitchen cabinets.

[4] The delivery was to be made in two shipments. The defendants delivered the first shipment to the plaintiff, which included 35 kitchen cabinets, less the doors and some other parts. The defendants were in the process of delivering the second shipment to the plaintiff, which included the balance of the 70 kitchen cabinets, when

the second shipment was damaged during delivery. The cabinets were damaged in an incident at the Canadian National Railway (CNR) in Brampton, Ontario. TransX Group of Companies (TransX) was involved in shipping the cabinets.

[5] The plaintiff seeks judgment for \$117,224 for the monies it paid for the cabinets, damages for lost income estimated at \$140,000, interest and costs.

### **POSITION OF THE PARTIES**

[6] The defendants say that this action should be stayed or dismissed on the grounds that Manitoba lacks jurisdiction for the subject matter of the action, or alternatively, that Ontario is the more appropriate jurisdiction.

[7] The defendants say there is no real or substantial connection between the subject matter of the action and Manitoba. Instead, they say there is a real and substantial connection between the subject matter of the action and Ontario. They say that the jurisdiction *simpliciter* is that of Ontario, specifically because:

- a) the defendants are domiciled in Ontario;
- b) the defendants carry on business in Ontario;
- c) the alleged causes of action were committed in Ontario; and
- d) the agreement connected with the dispute was entered into in Ontario.

[8] In the alternative, the defendants say that Manitoba is *forum non conveniens* and should therefore decline jurisdiction to hear the matter. They say that the more convenient forum is Ontario, specifically because:

- a) The agreement was made in Ontario and Ontario law applies.

- b) The witnesses are located in Ontario, including a representative of the defendant corporation, a representative of TransX, and a representative of CNR.
- c) The evidence, including records, documents, the kitchen cabinets, the damaged containers, and the damaged crane are in Ontario.
- d) The factual nexus pertaining to the dispute arose in Ontario.
- e) The defendant will issue a claim against TransX, and CNR, for negligence, and contribution and indemnity, and those parties are located in Ontario. These claims could be made by way of third party claim in Ontario if the plaintiff had commenced the action in the appropriate forum, instead of the defendant being required to commence a new civil action in Ontario.
- f) The defendant will issue a claim against the plaintiff for failing to properly insure. This claim could be made by way of counterclaim in Ontario had SPG commenced the action in the appropriate forum, instead of the defendant being required to commence a new civil action against the plaintiff in Ontario.
- g) It would be inefficient for the immediate action to proceed in Manitoba while a separate action proceeds in Ontario in which the defendant litigates against TransX, CNR, and the plaintiff, and in that regard, there is a risk of inconsistent judicial findings.

h) The immediate action is in its infancy, and it would be cost-efficient for all parties to have the matter proceed in the appropriate jurisdiction, namely Ontario.

[9] The plaintiff takes the contrary position, namely that Manitoba has jurisdiction *simpliciter* over this proceeding, and says that Ontario is not a more convenient forum than Manitoba.

[10] The plaintiff's position is that because it accepted the defendant's quote for the cabinets in Winnipeg, the contract was formed in Manitoba. They say that the formation of the contract in Manitoba is dispositive of the issue of jurisdiction *simpliciter*. Further, the plaintiff says that it has suffered considerable loss and damage in Manitoba.

[11] On the issue of *forum non conveniens*, the plaintiff says that Ontario is not clearly preferable to Manitoba. They say that key witnesses and various types of evidence are in fact located in both jurisdictions. Furthermore, the plaintiff says that Rule 17.02 (*infra*) permits the defendant to commence the various claims it refers to in Manitoba.

[12] The plaintiff says it is agreeable to examinations for discovery taking place virtually and for trial witnesses who do not reside near Winnipeg testifying virtually. The plaintiff urges the court to consider a more modern approach to *forum non conveniens*, as traditional factors should have significantly less weight given the increasing frequency of counsel based in the greater Toronto area appearing in Manitoba courts, both in person and virtually.

[13] The plaintiff also says that the significant procedural differences between the Manitoba and Ontario rules mean that the plaintiff can obtain Winnipeg trial dates shortly after the close of proceedings by filing a pre-trial conference brief and proceeding to the pre-trial conference; whereas, trial dates can only be obtained in Toronto after several procedural steps including the completion of documentary and oral discovery and mandatory mediation.

[14] Overall, the plaintiff says there is no procedural disadvantage to the defendants if the matter is litigated in Manitoba.

## **ANALYSIS**

[15] In their notice of motion, the defendants rely upon section 38 of *The Court of King's Bench Act*, C.C.S.M. c. C280 (the *KB Act*), and on Rules 1.04(1), 2.01(1), 2.03, 3.02(1), 17.06(1)(2), 21.01(3)(a), and 37 of the Court of King's Bench Rules, M.R. 553/88 (the Rules). Those provide in part as follows:

From the *KB Act*:

### **Stay of proceedings**

38 The court, on its own initiative or on motion by a person, whether or not a party, may stay a proceeding on such terms as are considered just.

From the Rules:

### **General principle**

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

### **Not a nullity**

2.01(1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

- (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
- (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

### **General powers of court**

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

### **Motion to set aside**

17.06(1) A party who has been served with an originating process outside Manitoba may move, before filing or serving a defence, (a) for an order setting aside the service and any order that authorized the service; or (b) for an order staying the proceeding.

### **Order**

17.06(2) Where the court is satisfied that,

- (a) service outside Manitoba is not authorized by these rules;
- (b) an order granting leave to serve outside Manitoba should be set aside; or
- (c) Manitoba is not a convenient forum for the hearing of the proceeding; the court may make an order under subrule (1) or such other order as is just.

### **To defendant**

21.01(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

### **Jurisdiction**

(a) the court has no jurisdiction over the subject matter of the action;

. . .

and the judge may make an order or grant judgment accordingly.  
(emphasis added)

### **Associate judge**

37.02(2) An associate judge has jurisdiction to hear any motion in a proceeding, except a motion,

- (a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;

[16] While the defendants' written and oral arguments focused primarily on s.38 of the *KB Act*, and Rules 17.06(1) and Rule 21.01(3), I will also briefly address Rules 1.04(1), 2.01(1), 2.03, 3.02(1) and 37.

[17] Rule 37.02 provides that an associate judge has jurisdiction to hear any motion, with certain exceptions. One of those is where the power to grant relief is conferred expressly on a judge by a statute or rule.

[18] Section 11.15(1) of the *KB Act* sets out the jurisdiction of an associate judge. It provides as follows:

**Jurisdiction of an associate judge**

11.15(1) An associate judge has jurisdiction as provided by statutes, regulations made under statutes or the rules.

[19] Rule 37.02 concerns motions arising from the Rules or other legislation; it does not confer additional jurisdiction on the associate judge (see *Jewish Community Campus of Winnipeg Inc. v. Metaser et al*, 2013 MBQB 303).

[20] Associate judges do not have jurisdiction under section 38 of the *KB Act* or under Rule 21.01(3). We are not included in the composition of the court under the *KB Act* (see s.5 of the *KB Act*). While we are included in the definition of court under the Rules (see Rule 1.03), the relief under Rule 21.01(3)(a) may only be granted by a judge.

[21] The other Rules relied upon by the defendants in their notice of motion, i.e. the Rules relating to liberal construction of the Rules, non-compliance or irregularities, dispensing with the compliance of a Rule, or extending time prescribed by the Rules, do not assist the defendants. I am not satisfied that any of these Rules give me the jurisdiction to make an order under s.38 of the *KB Act* or under Rule 21.01(3)(a).

[22] Associate judges do have jurisdiction under Rules 17.06 (1) and (2). I can make an order to set aside service of the claim or stay the proceedings if I am satisfied that service outside of Manitoba was not authorized by the Rules or if I find that Manitoba is not a convenient forum for the hearing of this proceeding.

WAS THE SERVICE AUTHORIZED?

[23] Rule 17.02 addresses service outside Manitoba without leave and provides in part as follows:

17.02 A party to a proceeding may, without a court order, be served outside Manitoba with an originating process,

...

**Contracts**

(f) in respect of a contract, where

(i) the contract was made in whole or in part in Manitoba,

(ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Manitoba,

(iii) the parties to the contract have agreed that the courts of Manitoba are to have jurisdiction over legal proceedings in respect of the contract, or

(iv) a breach of the contract has been committed in Manitoba, even though the breach was preceded or accompanied by a breach outside Manitoba that rendered impossible the performance of the part of the contract that ought to have been performed in Manitoba;

...

**Loss or Damage Sustained in Manitoba**

(h) in respect of loss or damage sustained in Manitoba arising from any cause of action, wherever committed;

[24] Rule 17.04 sets out additional requirements for service outside of Manitoba and provides in part as follows:

**Statement of grounds**

17.04(1) An originating process served outside Manitoba without leave shall contain a specific statement of the grounds and the provisions of rule 17.02 relied on in support of such service.

[25] While not raised in this case by the defendants, I note that the Re-Amended Statement of Claim does not include a specific statement of the grounds and the provisions of Rule 17.02 relied upon in support of service outside of Manitoba without leave. Nevertheless, the plaintiff on this motion has argued, and submitted evidence to support its position, that leave was authorized by these rules.

[26] In this case, the plaintiff accepted the defendants' quote in Winnipeg. Specifically, the quote provided by the defendants was signed by an employee of the plaintiff in Winnipeg. (See the Affidavit of Harminder Walia sworn December 12, 2024.)

[27] In ***Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga***, 2021 SCC 22, Justice Rowe states at para. 35 that "A contract is formed where there is 'an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration'. In ***Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP***, 2016 SCC 30, Justice Abella states at para. 40 "Where the contracting parties are located in different jurisdictions, the contract will be formed in the jurisdiction where the last essential act of contract formation, such as acceptance, took place." I agree with the plaintiff that this contract was formed in Manitoba. In any event, the wording of Rule 17.02(f) is even broader in that it includes a contract made in whole *or in part* in Manitoba.

[28] In addition, the loss or damage was sustained in Manitoba. In ***Craig Broadcast Systems, Inc. v. Frank N. Magid, Associates, Inc.***, 1998 CanLII 4259, 123 Man.R. (2d) 252 (***Craig Broadcast Systems***) the Court of Appeal upheld the finding that the defendant's breach of a contract signed at the defendant's office in Iowa was "loss or damage sustained in Manitoba" because "[a]s both Craig and its shareholders are Manitoba residents, any loss occasioned by the breach of contract will be sustained in Manitoba" (see para. 12).

[29] Accordingly, I find that the Rules expressly provide that this action can be served in Ontario without leave of the court. Having found that service was authorized by the

Rules, I cannot make an order under Rule 17.06(1) to set aside the service or stay the proceeding on this basis.

*IS MANITOBA A CONVENIENT FORUM?*

[30] Rule 17.06(2) permits me to make an order setting aside service or staying the proceedings if I am satisfied that Manitoba is not a convenient forum for the hearing of the proceeding.

[31] In ***Craig Broadcast Systems***, the Court of Appeal makes the following findings regarding Rule 17.06 and the principle of *forum non conveniens*:

[27] Rule 17.06 appears, on a clear reading, to place the initial burden upon the party moving for a stay order to satisfy the court that Manitoba is not a convenient forum for the hearing of the proceeding. Nowhere in Rule 17.06 does there appear to be any onus upon the plaintiff. Clearly, if the defendant meets this initial burden, then the evidentiary burden shifts to the plaintiff to satisfy the court that Manitoba is the appropriate forum. There is no distinction drawn in Rule 17.06 between service *in juris* and service *ex juris*. Magid's submission leads to the conclusion that, despite the clear wording of the Rule, the onus rests with the plaintiff, both when there is a motion for a stay on the issue of jurisdiction and when an issue arises on *forum non conveniens*, to satisfy the court that Manitoba is the appropriate forum. The wording of the Rule does not allow for that interpretation, and I reject Magid's submission.

[31] . . . Rule 17.06 has no ambiguous meaning. The onus is on the moving party in a *forum non conveniens* application to satisfy the court that it is not a convenient forum. The only way to satisfy that onus is to satisfy the legal test that there is another forum clearly more appropriate for the hearing of the action.

[32] Accordingly, the onus here is on the defendants to establish that Manitoba is not a convenient forum. The only way it can satisfy that onus is to show that Ontario is clearly a more appropriate forum for the hearing of the proceeding. The standard to displace the plaintiff's chosen forum is high. For the reasons that follow, I find that the defendants have not met that onus.

[33] Much of the defendants' arguments on *forum non conveniens* relate to whether Ontario is clearly a more appropriate forum for their intended counterclaim and third party claims. They say that they cannot bring their intended third party claims against TransX and CNR in Manitoba; rather, they will be required to commence a new civil action in Ontario. They also say that they cannot bring their intended counterclaim against the plaintiff in Manitoba and will instead be required to commence a new civil action against the plaintiff in Ontario.

[34] The plaintiff disagrees with these assertions. It says that Rule 17.02 (m) and (n) permits the defendants to commence those claims against other parties in Manitoba.

Those paragraphs of Rule 17.02 provide as follows:

**Person Resident or Carrying on Business in Manitoba**

(m) against a person ordinarily resident or carrying on business in Manitoba;

**Counterclaim, Crossclaim or Third Party Claim**

(n) in respect of a counterclaim, crossclaim or third or subsequent party claim properly brought under these rules;

[35] Rule 17.02 governs service outside of Manitoba. The plaintiff carries on business in Manitoba. There is no procedural restriction on the defendants counterclaiming against the plaintiff in Manitoba.

[36] I agree with the plaintiff that paragraph (n) of Rule 17.02 would allow the third party claims against TransX or CNR to be *served* outside Manitoba. I make no finding on whether Manitoba has jurisdiction over those anticipated claims.

[37] I agree with the plaintiff's position that not all evidence and key witnesses for this proceeding are in Ontario. It appears likely that key witnesses and various types of evidence are in both jurisdictions. However, I do accept that for the proposed third party claims, all or most of the witnesses and evidence will be in Ontario. Nevertheless,

that is insufficient to persuade me that Ontario is clearly the more appropriate forum for the hearing of this proceeding.

[38] “Proceeding” is defined at Rule 1.03 as “an action or application”. Rule 25 specifies the pleadings that form part of an action. Rule 25.01(1) provides that in an action commenced by a statement of claim, the pleadings consist of the statement of claim, statement of defence and reply, if any. Rule 25.01(2) defines the pleadings for a counterclaim, and Rule 25.01(4) defines the pleadings for a third party claim.

[39] Even if Ontario is clearly the more appropriate forum for the hearing of the intended claims by the defendants against TransX and CNR (which I have not found), that does not necessarily mean that Ontario is clearly the more appropriate forum for the hearing of this action.

[40] The defendants say there are risks of conflicting judicial findings if separate actions proceed in Ontario. As stated, I do not accept that the defendants would need to make a separate claim in Ontario against the plaintiff, as opposed to bringing their counterclaim in Manitoba. With respect to the intended third party claims, these are separate actions that do not involve the plaintiff. The defendants have not identified any potential conflicting judicial findings between this action and their intended third party claims.

[41] The defendants argue that it would be inefficient for this action to proceed in Manitoba while separate actions proceed in Ontario, and that it would be the most cost-effective approach for all parties to have the matter proceed in Ontario. I disagree that it will be more efficient for the plaintiff to have any of the matters proceed in Ontario.

There is no evidence to support that assertion, and it is not logical. On the contrary, for the plaintiff, the claims against TransX and CPR could be seen as a distraction to the resolution of their litigation with the defendants. I am not satisfied that those claims need to be included for this action to be determined.

[42] I accept that it would be more convenient for the defendants to have all matters heard in Ontario. It is also desirable to avoid a multiplicity of proceedings. However, even the increased convenience to the defendants and the possibility that Manitoba is not a convenient forum for the third party claims, is not enough to meet the high standard needed to find that Ontario is clearly the more convenient forum for this proceeding. I find that Manitoba is a convenient forum for this proceeding and therefore decline to set aside the service or stay the proceeding.

### **CONCLUSION**

[43] Associate judges do not have jurisdiction under s.38 of the *KB Act* or Rule 21.01(3). I find that the service of the claim in Ontario was authorized by Rule 17.06. I am not satisfied that Ontario is clearly a more appropriate forum than Manitoba; therefore, I find that Manitoba is a convenient forum for the hearing of this proceeding. There is no basis for me to set aside service of the claim or to stay the proceeding. The defendants' motion is therefore dismissed. The parties may arrange to speak to costs if they cannot reach an agreement.

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J. L. Goldenberg  
Associate Judge