Ontario First: Inter Jurisdictional Spousal Support[1]

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Canada, and in particular, Ontario currently has some of the most generous spousal support provisions in the world for claimant spouses. The Supreme Court of Canada has recently denied leave to appeal the Ontario Court of Appeal decision in *Knowle*s *v. Lindstrom*, thereby taking a broad view of the ability of Canadian courts to take jurisdiction over spousal support cases.[2] The combination of generous spousal support laws operating within a generously circumscribed jurisdiction may well encourage Ontario as the jurisdiction of choice for those support seekers who can claim a connection.

Nancy Knowles is a Canadian citizen. James Lindstrom is an American citizen. The couple met in Florida in 2002. At the time they were both married to other partners. Nancy Knowles' husband was a Canadian. She left him in 2002, subsequently spent a few months in Ontario with him attempting to reconcile and then returned to Florida

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[1] This paper was presented at the 4th Annual Recent Developments and Complex Issues in Child and Spousal Support CLE, Osgoode Professional Development

[2] *Knowles v. Lindstrom*2013 ONSC 2818, 2014 ONCA 116, leave to appeal to the Supreme Court of Canada refused, 2014 CarswellOnt 10799

to live with James Lindstrom who had left his wife. Nancy Knowles divorced her husband in Florida on June 25, 2003 with the Florida court finding that she had been a *bona fide* resident of Florida for at least six months prior to the divorce.

Nancy Knowles and James Lindstrom lived together in a cohabiting relationship from 2002 to 2012. They wintered in Florida and spent some of the warmer months in Muskoka, at first in rental accommodation but in 2007 Mr. Lundstrom purchased a very substantial cottage in Muskoka through a holding company. He purchased a second Muskoka property in 2009. The parties lived in rental homes in Florida and in 2008 moved into a home in Florida purchased by Mr. Lundstrom. In 2009 he arranged for his holding company to buy a property in Toronto which he intended for investment as well as to be occupied by the parties from time to time and for Nancy Knowles' daughter. The parties differed on how much time they spent in Ontario: Ms. Knowles said 60% of the time, Mr. Lundstrom said 40% of the time.

Nancy Knowles did not work outside the home during the relationship. Mr. Lundstrom operates businesses in the United States and the vast majority of his assets are in the United States.

In February 2012, Mr. Lundstrom told Ms. Knowles that he wished to end their relationship. The conversation occurred at the Florida home. The parties' stories about how that conversation developed differ but the outcome is undisputed; Ms. Knowles immediately returned to Ontario.

Ms. Knowles started a proceeding in Ontario to claim that she is the sole beneficial owner of the two Muskoka properties. She joined this claim with a claim for spousal support under the *Family Law Act*. Mr. Lundstrom did not attorn to the jurisdiction of the Ontario court but brought a motion seeking to dismiss the claim for lack of jurisdiction.

The motion was heard at first instance by Perkins J..

One might suspect that a key motivating factor for Ms. Knowles choosing to start the proceeding in Ontario is that she had no remedy for her spousal support claim in Florida. Florida legislation provides only for spousal support rights to married couples. Even with respect to married couples, spousal support awards tend to be for shorter duration in Florida than in this jurisdiction.

Ms. Knowles applied for support under Ontario's *Family Law Act*. That statute does not have any express provisions to address jurisdiction in support claims. Perkins J., therefore, turned to the common law test for the assumption of jurisdiction against out of province defendants as recently clarified and elaborated by the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd*.[3]. A court may take jurisdiction *simpliciter* over a case if the defendant attorns to the court's jurisdiction or is present and served in the jurisdiction. Absent these factors, a court may take jurisdiction if there is a real and substantial connection between the forum and the subject matter or parties to the dispute. There are four presumptive connecting factors that *prima facie* direct a court to take jurisdiction: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province (*Van Breda* is a tort case); or (d) a contract connected to the dispute was made in the province.

Perkins J. considered the question of what constitutes "residence" in a jurisdiction for family law purposes. He held that in a family law case it is not solely the respondent's residence in a province

[3] *Van Breda v. Village Resorts Ltd*, 2012 CarswellOnt 4268 (S.C.C.)

that is determinative. Obviously in cases concerning children, their residency matters, not that of the parents. In a spousal support case, moreover, Perkins J. held that the residence of the support claimant is as significant as that of the support payor. Although Nancy Knowles conceded that her primary home and that of James Lundstrom was Florida, Perkins J. held that it is possible to have two ordinary residences. In summary, Perkins J. took jurisdiction on the basis of the equitable claim concerning Ontario land, and, on the spousal support claim, that the applicant is ordinarily resident in Ontario and that both parties were ordinarily resident in Ontario until separation even though their primary residence was in the state of Florida.

Having assumed jurisdiction, Perkins J. considered whether to exercise his discretion to decline the case on *forum non conveniens* principles. Once jurisdiction *simpliciter* is found, the burden shifts to the respondent to demonstrate that the Ontario court should decline jurisdiction. The relevant factors are the location of parties and witnesses, the costs of transferring the case to another place, the impact of the transfer on any related case, the possibility of conflicting judgments, any concerns about recognition or enforcement of judgments and whether declining jurisdiction would deprive the applicant of a legitimate juridical advantage. Perkins J. had little

difficulty in rejecting the *forum non conveniens* argument. Aside from the other factors, Ms. Knowles would clearly lose a juridical advantage if she could not make her claim in Ontario as she had neither a claim for spousal support under Florida law nor a claim for unjust enrichment.

As a final issue, Perkins J. had to decide which law to apply. Having rejected the *forum non conveniens* argument of Mr. Lundstrom in part because Ms. Knowles claims do not exist under Florida law, it would have been incoherent to apply Florida law in the case. Perkins J. held that Ontario law applies.

Mr. Lundstrom appealed this decision to the Ontario Court of Appeal. The Appeal was dismissed with Doherty J.A. writing for the court. Doherty J.A. affirmed that a person can be ordinarily resident in more than one jurisdiction at the same time. Furthermore, Doherty J.A. held that ordinary residence in Ontario at the time of separation is sufficient to ground jurisdiction for a support claim. Doherty J.A. accepted that the ordinary residence of the applicant alone may be sufficient to support jurisdiction, noting that this is justified as absent appropriate support the burden may otherwise fall on the state in which the applicant resides. For these reasons, Doherty J.A. concluded

Ontario has jurisdiction over the support claim and, also readily found that a dispute about land within the province unquestionably fell within the court's jurisdiction.

Doherty J.A. dismissed the *forum non conveniens* argument, deferring to Perkins J.'s analysis. Doherty J.A. also found that Ontario law should be applied.

Mr. Lindstrom sought leave to appeal this decision to the Supreme Court of Canada which was denied.

Knowles v. Lindstrom is now the leading case on jurisdiction with respect to family law claims. An important factual finding that there was no forum shopping by Nancy Knowles is also significant to the outcome. A more cynical attempt to take advantage of Ontario's jurisdiction might not be as successful. That the claim joined an unjust enrichment claim related to property in Ontario with a spousal support claim clearly was also a strong factor in the applicant's success. It is hard to argue that a party should not be able to assert a claim with respect to land in Ontario. Once that claim was permitted, the door was open to the support claim. The case has more general application to spousal support claims, however. Ontario, and in particular Toronto,

has many individuals with a foot in more than one jurisdiction. There are Canadians who reside abroad for work and business or because they have married a foreigner (as Ms. Knowles did) yet still return to Ontario regularly and may maintain property here. There are foreign nationals or dual citizens who live in Ontario and maintain property and primary or secondary residences abroad. The principle in *Knowles v. Lindstrom* that a couple may have more than one ordinary residence and, even further, that the ordinary residence of a support claimant alone may be sufficient for our courts to have jurisdiction even if that claimant has a primary jurisdiction abroad is extremely significant.

Tactically the different spousal support regimes available to a separating couple is now very much in play. Counsel need to consider whether an expeditious issue of claim in Ontario to secure jurisdiction here is helpful to their support claimant clients. A support payor might want to consider moving quickly to start litigation in his or her "other" jurisdiction of residence if the support laws there are more favourable. Mr. Lindstrom did not have that option as there do not appear to have been any Florida claims available for this relationship but if the parties had been married he would have been well served to have initiated an immediate application for divorce and determination of support in Florida. If he had done so his ability to argue that an Ontario

application is simply forum shopping would have been greatly enhanced. Ironically the consequence of *Knowles v. Lindstrom* may be to encourage forum shopping.

Subject to a legislative decision to impose statutory restrictions on jurisdiction for support cases under the *Family Law Act*, which seems most unlikely, *Knowles v. Lindstrom* will have a significant impact on how we practice with multi -jurisdictional families.