
CANADA / JUDGMENT

AtriCure, Inc. v. Meng

2020 BCSC 341

COURT

Supreme Court of British Columbia

DECIDED

10 March 2020

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2020 BCSC 341 AtriCure, Inc. v. Meng

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

AtriCure, Inc. v. Meng,

2020 BCSC 341

Date: 20200310

Docket: S196599

Registry: Vancouver

Between:

AtriCure, Inc.

Plaintiff

And

Jian Meng also known as Jian Yu Meng also known as Larry Meng

and Xi Ren

Defendants

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

Counsel for the Plaintiff:

J.D. Horswill

A. Lee

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T.C. Boyar

S. Arrandale

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 14 and 15, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 10, 2020

Nature of the Application

- [1] The defendant Xi Ren challenges the jurisdiction of this Court to decide the claims made against her by the plaintiff in this action.
- [2] Ms. Ren also seeks to cancel the registration of a Certificate of Pending Litigation ("CPL") that AtriCure has filed against her property.

Background

- [3] The plaintiff, AtriCure, Inc. ("AtriCure"), is a company incorporated in Delaware with its principal place of business in Mason, Ohio. AtriCure is in the business of developing medical devices and products.
- [4] Starting in 2005, AtriCure commenced relationships with a series of companies in the People's Republic of China ("PRC") for the distribution of its products. The timing of the agreements with the PRC companies is as follows:
 - a) From 2005 through 2009, AtriCure was party to a distribution agreement with Beijing Since Medical Scientific Co. Ltd. ("Beijing Since Medical");
 - b) From 2010 through 2015, AtriCure had distribution agreements with Uni Rainbow Ltd. ("Uni Rainbow") and Med Investment Limited ("Med Investment"); and
 - c) From 2016 through 2017, AtriCure had a distribution agreement with Beijing ZenoMed Scientific Co., Ltd. ("ZenoMed").
- [5] The PRC companies with which AtriCure formed distribution agreements are companies that were incorporated in and carried on business in the PRC. The PRC companies conducted no business in British Columbia.

- [6] The distribution agreement with Beijing Since Medical contains a "Choice of Law" clause, which provides that the agreement will be governed by the laws of the "United States and China". The clause also gives AtriCure the option to submit any dispute between the parties to the courts in the PRC.
- [7] The agreements with Uni Rainbow and Med Investment provide that the laws governing those agreements are the laws of the state of Ohio. In these agreements, both Uni Rainbow and Med Investment submit to the jurisdiction of Ohio.
- [8] The ZenoMed distribution agreement provides that the governing laws are to be the laws of the PRC and that any dispute in connection with or relating to the agreement will be resolved through arbitration conducted in Beijing pursuant to the China International Economic and Trade Arbitration Commission (the "CIETAC").
- [9] AtriCure alleges that the defendant Dr. Jian Meng controlled and directed each of the companies with which it formed distribution agreements in the PRC.
- [10] AtriCure further alleges that during the currency of the aforesaid agreements, the PRC companies received confidential and proprietary information from AtriCure about its products. It is alleged that under the direction of Dr. Meng, the confidential information was transferred to Beijing Medical Scientific Co. Ltd. dba Med-Zenith ("Med-Zenith"), another PRC company controlled by Dr. Meng. AtriCure alleges that Med-Zenith used the confidential information to create counterfeit AtriCure products and to sell those counterfeit products for profit.
- [11] AtriCure has commenced an action in the courts of Ohio against Dr. Meng, Dr. Guanglu Bai, and Med-Zenith (the "Ohio Action"). Dr. Bai is the Executive Director and General Manager of ZenoMed. In the Ohio Action, AtriCure claims that Dr. Meng, Dr. Bai, and Med-Zenith acted in concert with ZenoMed:
- a) to breach ZenoMed's distribution agreement;
 - b) to misappropriate trade secrets; and
 - c) to steal AtriCure's intellectual property,
- in order to develop and sell counterfeit medical devices.
- [12] In addition, AtriCure has commenced an arbitration proceeding in the PRC against ZenoMed claiming damages for breach of its distribution agreement with ZenoMed (the "CIETAC Arbitration").
- [13] The defendant Xi Ren is the wife of Dr. Meng. She is the sole shareholder of ZenoMed but is not a director or officer of that company and has never been involved with the business in a significant way. Ms. Ren is not a director, officer, or shareholder of Beijing Since Medical or Uni Rainbow. She is, however, a director of Med Investment.

- [14] Ms. Ren and Dr. Meng are joint owners of a property in West Vancouver, BC (the "West Vancouver Property"). AtriCure alleges that Ms. Ren resides at the West Vancouver Property.
- [15] The action in British Columbia is brought by AtriCure against Dr. Meng and Ms. Ren. AtriCure claims that the defendants conspired with or knowingly assisted the PRC companies:
- a) to defraud AtriCure;
 - b) to steal AtriCure's confidential information; and
 - c) to breach their fiduciary and confidentiality obligations to AtriCure.
- [16] Further, AtriCure claims that the defendants knowingly received monies derived from the profits generated by the illegal conduct of the PRC companies. It claims that the defendants used such receipts to purchase, pay for, improve, or maintain the West Vancouver Property.
- [17] The relief sought by AtriCure in the British Columbia action includes:
- a) an accounting of monies received by the defendants from the activities of the PRC companies;
 - b) an order for equitable tracing of the funds received by the defendants in British Columbia from the conduct of the PRC companies; and
 - c) a declaration that AtriCure has an equitable interest in the West Vancouver Property.
- [18] Based on the allegations in the notice of civil claim, AtriCure has registered a CPL against the West Vancouver Property.
- [19] The defendant Xi Ren applies for:
- a) An order dismissing this action on the basis that this Court has no territorial competence over the claims made by AtriCure;
 - b) In the alternative, if this Court has territorial competence over the claims made by AtriCure, then a stay of proceedings on the basis that another state is a more appropriate forum in which to hear the proceeding ("Forum Non Conveniens"); or
 - c) In the further alternative, a stay of proceedings pending the conclusion of the Ohio Action and the CIETAC Arbitration.
- [20] Xi Ren also applies for an order cancelling the CPL filed by AtriCure against the West Vancouver Property.

Jurisdiction Overview

- [21] The jurisdiction of the courts in British Columbia is defined by the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 (the "CJPTA"). The CJPTA provides in s. 3 that a British Columbia court has territorial competence (jurisdiction simpliciter) 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.
- [22] For the purposes of defining a "real and substantial connection", s. 10 of the CJPTA prescribes specific circumstances where a real and substantial connection between British Columbia and the facts on which the proceeding is based are to be presumed. The presumptions that are relevant to this application are set out in subsections 10(a), (f), and (g). Those subsections provide that a real and substantial connection is presumed to exist if the proceeding:
- (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property;
 - (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia; or
 - (g) concerns a tort committed in British Columbia.
- [23] If it is determined that the British Columbia court has territorial competence in a proceeding, s. 11 of the CJPTA gives the court a discretion to refuse to exercise its jurisdiction. Pursuant to s. 11(1) of the CJPTA, the court may decline to exercise its territorial competence if, in the interests of the parties and the ends of justice, a court of another state is a more appropriate forum in which to hear the proceeding.
- [24] Section 11(2) of the CJPTA provides that in deciding whether a court outside British Columbia is the more appropriate forum, the British Columbia court 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.

- [25] Even if the British Columbia court has territorial competence and is the court most appropriate to hear the proceeding, the court's jurisdiction may be limited or superseded by an arbitration agreement between the parties to the proceeding. In that case, the International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 and the Arbitration Act, R.S.B.C. 1996, c. 55 provide that court proceedings in respect of a matter agreed to be submitted to arbitration must be stayed unless the agreement is null and void, inoperative, or incapable of being performed.
- [26] The court also has an inherent jurisdiction to stay proceedings before it. That inherent jurisdiction is recognized by s. 8(2) of the Law and Equity Act, R.S.B.C. 1996, c. 253.
- [27] The process by which the issue of jurisdiction is brought before the court for determination is set out in Rule 21-8 of the Supreme Court Rules. Rule 21-8(1) provides as follows:
- (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.
- [28] Rule 21-8(1)(a) applies where the pleadings do not allege facts to establish the jurisdiction of the court. Rule 21-8(1)(b) applies where the evidence on the application fails to establish jurisdiction. Rule 21-8(1)(c) applies where the issue of jurisdiction is left to be decided as a triable issue.

- [29] While Rule 21-8(1) deals with whether the court has territorial competence, Rule 21-8(2) applies where a party seeks to have the court decline to exercise its territorial competence in an action. Rule 21-8(2) provides:
- (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.

Territorial Competence

- [30] The defendant Xi Ren applies for a dismissal of the plaintiff's claim pursuant to Rule 21-8(a) and (b) on the basis that this Court lacks territorial competence.
- [31] The burden is on AtriCure to establish that this Court has territorial competence in the action. AtriCure submits that this Court's territorial competence is engaged because Xi Ren is ordinarily resident in British Columbia [CJPTA s. 3(d)] and because there is a real and substantial connection between British Columbia and the facts on which this proceeding against Ms. Ren is based [CJPTA s. 3(e)].
- [32] At this stage in the proceeding, AtriCure is not required to establish territorial competence on a balance of probabilities. It is only necessary for AtriCure to:
- a) allege the facts necessary to give the court jurisdiction, if the jurisdictional challenge is brought under Rule 21-8(1)(a); or
 - b) present an arguable case, if the challenge to jurisdiction is brought under Rule 21-8(1)(b).
- [33] AtriCure would only be required to prove territorial competence on a balance of probabilities if the jurisdictional issue is alleged in a pleading and the action proceeds to a trial of that issue.
- [34] The Court of Appeal in *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85, considered the application of Supreme Court Rule 14(6), which was the former version of the current Rule 21-8(1). The chambers judge in that case required the plaintiff to establish jurisdiction on a balance of probabilities in an application pursuant to Rule 14(6)(b). The Court of Appeal held that proof on a balance of probabilities was too high a standard in an application pursuant to Rule 14(6)(b). The Court held that the plaintiff was required to establish only an arguable case. At para. 34 of the decision, the Court concluded:
- [34] The object is to determine whether there are facts alleged, which if true, would found jurisdiction. The court is not charged with the task of determining whether the facts are true. A plaintiff need show only an arguable case that they can be established.
- [35] Further, at para. 41, the Court commented as follows:

[41] Rule 14(6) gives a defendant the opportunity without attornment to apply summarily to end British Columbia proceedings if there were no arguable case to establish jurisdictional facts. If an arguable case were established, the defendant may abandon its position on jurisdiction and attorn or may keep the issue of jurisdiction alive if it pleads a lack of jurisdiction. The plaintiff would then be required to establish jurisdiction on a balance of probabilities.

Ordinarily Resident

[36] Pursuant to s. 3(d) of the CJPTA, territorial competence in British Columbia is established if a party is ordinarily resident in the province. AtriCure has specifically alleged in its notice of civil claim that the defendant Xi Ren is ordinarily resident in the province of British Columbia. Therefore, the defendant's application pursuant to Rule 21-8(1)(a) cannot succeed because AtriCure has pleaded facts which, if true, would establish jurisdiction.

[37] However, that conclusion does not end the matter because I must now consider the defendant's application under Rule 21-8(1)(b). Under this subrule, it is incumbent upon AtriCure to establish an arguable case that Xi Ren is ordinarily resident in the province of British Columbia.

[38] The CJPTA does not include a definition for "ordinarily resident" as it applies to individuals. However, the term was defined by the Supreme Court of Canada in *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209, and adopted by Gropper J. in *Blazek v. Blazek*, 2009 BCSC 1693 at para. 32 as follows:

[32] . . . one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question. . . .

[39] On this branch of the application, the evidence presented by AtriCure is:

- a) the land title registration documents for the West Vancouver Property indicate a British Columbia mailing address for Xi Ren;
- b) Xi Ren is an officer and director of a company registered in British Columbia;
- c) the mailing address for Xi Ren listed in the corporate records for the British Columbia company is an address in British Columbia;
- d) Xi Ren has a British Columbia phone number linked to the address of the West Vancouver Property; and

- e) counsel for AtriCure has represented to the Court that the defendant, Xi Ren, was personally served with the notice of civil claim in British Columbia.
- [40] While Xi Ren acknowledges that the burden on AtriCure is to establish an arguable case, she submits that the evidence of her residency falls short of fulfilling that burden.
- [41] The difficulty with Ms. Ren's position is that while she has filed affidavits in support of her application, the affidavits are silent on the question of her ordinary residence. Xi Ren gives no explanation for the evidence that connects her with British Columbia nor does she provide any evidence describing the nature or extent of her connection to this province.
- [42] AtriCure has offered evidence that is arguably indicative of an element of permanence, and Xi Ren has offered no contrary explanation. While the evidence of Xi Ren's ordinary residence in British Columbia may fall short of establishing it on a balance of probabilities, it is my view that the evidence presented by AtriCure establishes at least an arguable case that Xi Ren is ordinarily resident in this province.
- [43] Therefore, I find that the plaintiff, for the purposes of this application, has established territorial competence over the claims against Xi Ren on the basis that she is ordinarily resident in British Columbia.
- [44] Having found that there is territorial competence in this case based on the residence of Xi Ren, it is not necessary for me to address the issue of whether there is a real and substantial connection between British Columbia and the facts on which this action is based.

Forum Non Conveniens

- [45] Even though the court in British Columbia has territorial competence in these proceedings, s. 11 of the CJPTA gives the court discretion to decline to exercise territorial competence if there is a court of another state that is a more appropriate forum to hear the proceeding. In deciding whether to decline to exercise territorial competence in a proceeding, the court must consider 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 [British Columbia] court or any alternative forum,
 - (b) the law to be applied to the 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.

- [46] Rule 21-8(2) of the Supreme Court Rules provides the mechanism by which a party may apply to the court for a stay of proceedings on the ground that the court should decline to exercise its jurisdiction. It is important to note that Rule 21-8(2) of the Supreme Court Rules provides for only a stay of proceedings while Rule 21-8(1) provides for the striking out of a pleading, a dismissal of a proceeding, or a stay of proceedings.
- [47] The foundation for the action by AtriCure in British Columbia is that Dr. Meng and Dr. Bai, with the cooperation of the PRC companies, misappropriated trade secrets, stole AtriCure's intellectual property, and used it to develop and sell counterfeit medical devices (the "Foundational Issues"). In order for AtriCure to succeed in its action in British Columbia against Ms. Ren and Dr. Meng, it must successfully establish the Foundational Issues.
- [48] The agreement with Beijing Since Medical gives AtriCure the option to submit any dispute between the parties to the courts in the PRC. The agreements with Uni Rainbow and Med Investment provide that the laws governing the agreements are the laws of Ohio. The ZenoMed distribution agreement provides that the governing laws are to be the laws of the PRC and that any dispute is to be resolved through arbitration in Beijing.
- [49] AtriCure has commenced a legal proceeding in Ohio against Dr. Meng, Dr. Bai, and Med-Zenith in which the main focus is whether AtriCure can establish the Foundational Issues as against those defendants. If necessary, AtriCure could add the other PRC companies to the Ohio Action for a final determination of whether the conduct of the PRC companies, Dr. Meng, and Dr. Bai was contrary to the applicable laws.
- [50] If the Ohio court determines that the conduct of the defendants in the Ohio Action was contrary to law, then AtriCure would have a basis for a claim against the defendants in the British Columbia action. On the other hand, if the Ohio court determines that the conduct of the defendants in the Ohio Action was not contrary to law, then the foundation for a claim against the defendants in British Columbia disappears.
- [51] I find that the Ohio court is a more appropriate forum to hear and decide the Foundational Issues in this action. Therefore, the British Columbia action should be stayed pending a determination of those issues in the Ohio Action. I have reached this conclusion considering the following factors:
- a) the law to be applied to determine the Foundational Issues are, for the most part, the laws of Ohio;
 - b) it would be more convenient and less expensive for the parties to determine the Foundational Issues in one action in Ohio rather than requiring parties and witnesses to attend a trial in Ohio as well as one in British Columbia; and
 - c) it is preferable to have the Foundational Issues determined in one forum as opposed to multiple forums to avoid a multiplicity of legal proceedings and to avoid conflicting decisions in different courts.

[52] Therefore, while the court in British Columbia may have territorial competence to hear this action, the jurisdiction to decide the Foundational Issues should be declined. Should the Foundational Issues be found in favour of AtriCure in the Ohio Action, then the remaining issues in the British Columbia action may be tried here.

Inherent Jurisdiction

[53] The court's inherent jurisdiction and its jurisdiction under the Law and Equity Act to stay proceedings was recognized in *Peh v. The Owners, Strata Plan LMS 3837*, 2008 BCSC 291. In that case, Justice Sigurdson held that in exercising his inherent jurisdiction or his jurisdiction under the Law and Equity Act, he must consider the benefits of granting a stay and the possible prejudice that would be suffered by the parties if a stay was granted or refused.

[54] In his analysis, Sigurdson J. considered cases in which a stay of proceedings was ordered when related proceedings would "substantially reduce the issues to be determined" or would have a "material impact on the outstanding issues in the case". In *Peh*, Sigurdson J. stayed the proceedings until the completion of related litigation that was expected to resolve important issues or have a material effect on the issues before him.

[55] Similarly, a determination of the issues in the Ohio Action will likely substantially reduce the issues to be determined in the British Columbia action or may have a conclusive impact on the action. It is my view that a stay of proceedings in British Columbia until the Ohio Action is concluded is of benefit to all parties. On the other hand, I do not see any significant prejudice to any party if the British Columbia action is stayed.

[56] Therefore, the British Columbia action will also be stayed pursuant to the inherent jurisdiction of the court.

Arbitration Clause

[57] The distribution agreement between AtriCure and ZenoMed includes an arbitration clause. The arbitration clause provides that any dispute in connection with or relating to the agreement will be resolved through arbitration. The arbitration is to be conducted in Beijing pursuant to the CIETAC.

[58] Section 8(1) of the International Commercial Arbitration Act provides:

8(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first statement on the substance of the dispute, apply to that court for a stay of proceedings.

[59] Section 8(1) of the International Commercial Arbitration Act requires that the following three pre-requisites be met:

- a) The applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
- b) The legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
- c) The application must be brought before the applicant takes a step in the proceedings.

(Northwestpharmacy.com Inc. v. Yates, 2017 BCSC 1572 at para. 54, adopting para. 97 the defendants' argument).

[60] The action in British Columbia is an action by AtriCure against Xi Ren and Dr. Meng. While AtriCure may be a party to the distribution agreement, neither Xi Ren nor Dr. Meng are parties to the agreement. Therefore, the first pre-requisite in s. 8(1) has not been met because the action in British Columbia is not a proceeding "against another party to the agreement".

[61] There are circumstances in which a non-signatory to an arbitration agreement is considered to be a party to the agreement for the purposes of s. 8(1). Those circumstances are summarized by Justice Skolrood in DNM Systems Ltd. v. Lock-Block Canada Ltd., 2015 BCSC 2014 at para. 77, as follows:

- a) where the contractual agreement between a party and the non-party incorporates the arbitration clause by reference;
- b) where there is an agency relationship between a party and a non-party;
- c) where the corporate relationship between a parent and its subsidiary is sufficiently close so as to justify piercing the corporate veil; or
- d) where a non-party is bound by an estoppel.

[62] It is not necessary for Xi Ren to present evidence sufficient for the Court to make a final determination as to whether a party to the legal proceedings is a party to the arbitration agreement. However, she must present some evidence that establishes at least an arguable case that she or Dr. Meng should be considered as parties to the arbitration clause (Northwestpharmacy.com Inc. at para. 54, adopting paras. 98-99 of the defendants' submissions).

[63] Neither Xi Ren nor Dr. Meng offer any evidence of their involvement in arranging the distribution agreement between AtriCure and ZenoMed. In fact, Xi Ren specifically denies any significant involvement in the business of ZenoMed and further denies any significant knowledge of the matters alleged in AtriCure's notice of civil claim.

- [64] The Affidavit of Guanglu Bai, filed in these proceedings on September 6, 2019, deposes that he is the Executive Director and General Manager of ZenoMed. He further deposes that Xi Ren is the sole shareholder of ZenoMed but gives no information as to the involvement of Dr. Meng. The distribution agreement between AtriCure and ZenoMed is signed by Guanglu Bai on behalf of ZenoMed.
- [65] There is no evidence before me on this application to establish even an arguable case that either Xi Ren or Dr. Meng are non-signatory parties to the distribution agreement between AtriCure and ZenoMed. There is no evidence that either of them had any involvement in negotiating the agreement with AtriCure on behalf of ZenoMed. There is no evidence suggesting that ZenoMed was a party to the agreement in name only and that the true agreement was between AtriCure and Xi Ren or Dr. Meng.
- [66] Therefore, the arbitration clause in the ZenoMed distribution agreement does not apply to the action commenced in British Columbia because the action is not brought against a party to the ZenoMed distribution agreement.
- [67] I am mindful that the Foundational Issues in the British Columbia action involve claims against ZenoMed, which is a party to the arbitration clause. However, the claims made by AtriCure in the British Columbia action are not limited to those arising out of the ZenoMed distribution agreement. The claims made by AtriCure in British Columbia include losses arising from breaches of the distribution agreements made with Beijing Since Medical, Uni Rainbow, and Med Investment--none of which include arbitration clauses.
- [68] Therefore, I have also concluded that the action commenced in British Columbia is not a proceeding brought in respect of a matter agreed to be submitted to arbitration.

Certificate of Pending Litigation

- [69] AtriCure has registered a CPL against the West Vancouver Property pursuant to s. 215 of the Land Title Act, R.S.B.C. 1996, c. 250. Section 215 provides that a person who has commenced or is a party to a proceeding and who is claiming an estate or interest in land may register a CPL against the land.
- [70] There is no allegation by Xi Ren that AtriCure has failed to meet the requirements of the Land Title Act for the registration of a CPL. AtriCure clearly alleges in this action that it is entitled to an interest in the West Vancouver Property. However, Xi Ren submits that the Court should exercise its inherent jurisdiction to cancel the CPL because it would be in the interests of justice to do so when an action is stayed and because the claim for an interest in the West Vancouver Property has little or no merit.
- [71] Xi Ren does not allege any hardship caused by the registration of the CPL against her property. Therefore, s. 256 of the Land Title Act, which allows for the cancellation of a CPL based on hardship and inconvenience experienced by the owner, does not apply.

- [72] Xi Ren relies on *Shinatani v. Tang*, 2017 BCSC 1938, and *Ma v. Li*, 2016 BCSC 469, as authority for the submission that the court has inherent jurisdiction to cancel a CPL where the court declines to exercise its territorial competence in an action. The difficulty with both *Shinatani* and *Ma* is that in neither case did the court engage in any analysis or review of its authority to cancel a CPL.
- [73] In *Ma*, the court dealt with the CPL on the respondent's property in the following terms at paras. 40 and 41:
- [40] Under s. 106(4) of the FLA, I therefore decline to exercise jurisdiction in this matter. Ms. Li's application is granted and the family law action is dismissed.
- [41] As a corollary to this result, the Certificate of Pending Litigation will be removed from Ms. Li's B.C. property.
- [74] Similarly, in *Shinatani*, the CPL was cancelled at paras. 105 and 106:
- [105] Although I have determined that this Court has jurisdiction over the claim under s. 106(2), I decline under s. 106(4) to exercise it on the basis that jurisdiction is more appropriately exercised in Hong Kong.
- [106] It follows that the associated CPL registration should also be cancelled.
- [75] Further, both *Shinatani* and *Ma*, were decided before the BC Court of Appeal decided *Bilin v. Sidhu*, 2017 BCCA 429, and *Berthin v. Berthin*, 2018 BCCA 57. The Court of Appeal in *Berthin* recognizes the CPL as "an extraordinary pre-judgment mechanism intended to protect a valid claim to an interest in land until the issues in dispute are resolved". It prevents a defendant from disposing of the property and thereby defeating a plaintiff's claim.
- [76] *Berthin* establishes that the court does not have inherent jurisdiction to cancel a CPL even if the claim to an interest in land is dismissed. At para. 31 of the decision, Justice Fenlon writes:
- [31] The judge concluded he had inherent jurisdiction to cancel the CPL because he had dismissed the claims on which the interest in property were based. In my respectful view he erred in doing so.
- [77] If this Court does not possess an inherent jurisdiction to cancel a CPL when the underlying claim to an interest in land is dismissed, then this Court would have no such jurisdiction if the claim is stayed.
- [78] *Berthin* confirms that the court has jurisdiction to cancel a CPL if the notice of civil claim fails to plead a claim to an interest in land as required by s. 215 of the Land Title Act. However, there is no allegation in this application that AtriCure has failed to meet that requirement.

- [79] Xi Ren claims that the CPL should be cancelled because AtriCure's claim to an interest in the West Vancouver Property has little or no merit. Berthin addresses this submission at para. 40:
- [40] Bilin stands primarily for the principle that the court has jurisdiction to cancel a CPL which fails to meet the threshold criterion of a pleading claiming an interest in land as required by s. 215 of the Land Title Act. But it also stands for the principle that where an interest in land is claimed, but the claim is contended to be without merit, the proper approach is to apply under the summary judgment rule to dismiss the claim, in which case the CPL may only be cancelled in conformity with s. 254 of the Land Title Act
- [80] Section 254 of the Land Title Act provides that where an action is dismissed the registrar of land titles must cancel the registration of a CPL:
- a) as provided in the regulations; or
 - b) on production of a certificate issued by the court and endorsed by the Court of Appeal that the action has been dismissed and that no notice of appeal has been filed and the time limited for appeal has expired or that the dismissal of the action has not been set aside on appeal.
- [81] Accordingly, in order to cancel the CPL on the basis that the claim for an interest in the West Vancouver Property has little or no merit, Xi Ren must secure an order dismissing the claim and apply to the Registrar of Land Titles in accordance with s. 254 of the Land Title Act.
- [82] Based on the authority of Berthin and Bilin, I find that there is no basis upon which this Court can cancel the CPL registered against the West Vancouver Property.

Costs

- [83] The parties did not address the matter of costs during the application. Therefore, they have leave to make submissions on costs if they cannot agree on the appropriate costs order. However, the parties must make arrangements for the costs submissions within 30 days.

Summary

- [84] In summary, I have concluded as follows:
- a) AtriCure has established on this application that the court in British Columbia has territorial competence over the claims against Xi Ren on the basis that she is ordinarily resident in the province of British Columbia;
 - b) Even though the British Columbia court has territorial competence in this action, I have declined to exercise the Court's territorial competence over the Foundational Issues on the basis that the Ohio court is a more appropriate forum to hear and decide those Foundational Issues;

- c) The British Columbia action will be stayed until the issues in the Ohio Action have been decided;
- d) Should the Foundational Issues be found in favour of AtriCure in the Ohio Action, then the remaining issues in the British Columbia action may be tried here;
- e) The arbitration clause in the ZenoMed distribution agreement does not apply to the action commenced in British Columbia because the action:
 - i. is not brought against another party to the ZenoMed distribution agreement; and
 - ii. is not a proceeding brought in respect of a matter agreed to be submitted to arbitration.
- f) The application by Xi Ren to cancel the registration of the CPL is dismissed.

"Hori J."

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Prepared on 28 October 2026 · Esheria