

CANADA / JUDGMENT

## Ewert v. Höegh Autoliners AS

2020 BCCA 181

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 181 Ewert v. Höegh Autoliners AS

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ewert v. Höegh Autoliners AS,

2020 BCCA 181

Date: 20200629

Docket: CA44148

Between:

Darren Ewert

Respondent

(Plaintiff)

And

Höegh Autoliners AS and Höegh Autoliners, Inc.

Appellants

(Defendants)

And

Nippon Yusen Kabushiki Kaisha; NYK Line (North America) Inc.;

NYK Line (Canada), Inc.; Mitsui O.S.K. Lines, Ltd.;

Mitsui O.S.K. Bulk Shipping (U.S.A.), Inc.; Kawasaki Kisen Kaisha, Ltd.;

"K" Line America, Inc.; EUKOR Vehicle Carriers, Inc.;

Wilh. Wilhelmsen Holding ASA; Wilh. Wilhelmsen ASA;  
Wallenius Wilhelmsen Logistics Americas, LLC;  
Wallenius Wilhelmsen Logistics AS; Wallenius Lines AB;  
WWL Vehicle Services Canada Ltd.; Toyofuji Shipping Co., Ltd.;  
Compania Sud Americana De Vapores S.A.;  
CSAV Agency North America, LLC; Nissan Motor Car Carrier Co., Ltd.; and  
World Logistics Service (USA) Inc.

Respondents

(Defendants)

Before:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated  
November 23, 2016 (Ewert v. Nippon Yusen Kabushiki Kaisha, 2016 BCSC 2179,  
Vancouver Docket S134895).

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Place and Date of Hearing:

Vancouver, British Columbia

May 28, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 29, 2020

Written Reasons by:

The Honourable Madam Justice MacKenzie

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Fisher

Summary:

The issue on this appeal is whether the Supreme Court of British Columbia has territorial competence over two foreign defendants in a class action proceeding alleging a global price-fixing conspiracy for roll-on/roll-off marine shipping services that transport new foreign vehicles to British Columbia. The judge in the court below held the undisputed aspects of the pleadings establish a real and substantial connection between British Columbia and the facts on which the proceedings are based because the proceedings concern the tort of conspiracy committed in British Columbia for which the defendants are liable even assuming they do not ship vehicles to, or do business in, British Columbia. The defendants appeal. Held: Appeal dismissed. Under the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, a real and substantial connection is presumed to exist between British Columbia and the facts alleged against the foreign defendants because the pleadings allege the defendants committed the tort of conspiracy in British Columbia. The defendants did not dispute the pleading alleging the conspiracy or their membership in it, meaning this pleading is taken to be true. The tort of conspiracy occurs where the harm is suffered, regardless of where the acts in furtherance of the conspiracy occur. The defendants' evidence that they do not ship vehicles to or do business in British Columbia is irrelevant when considering whether the pleading alleges that they committed the tort of conspiracy in British Columbia. In light of the joint liability nature of conspiracy, the defendants' involvement in the conspiracy is causally connected to the harm suffered in the jurisdiction. The presumptive connecting factor of "a tort committed in British Columbia" having been established, the defendants fail to displace the presumption of a real and substantial connection. The defendants' argument and evidence on this point are irrelevant to the connecting factor of the tort of conspiracy.

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

## Introduction

- [1] On this appeal, the Court must consider whether there is a real and substantial connection between British Columbia and the claims against two foreign defendants who were allegedly parties to and acted in furtherance of a global price-fixing conspiracy. The conspiracy caused harm to purchasers of new imported vehicles in British Columbia, but the two foreign defendants did not themselves provide the price-fixed services to the British Columbia market.
- [2] The underlying proceeding is a class action. The appellants, Höegh Autoliners AS and Höegh Autoliners, Inc., are two of many named defendants. The plaintiff alleges that the defendants, roll-on/roll-off marine shippers who transport vehicles around the world, conspired to lessen competition and inflate prices, resulting in higher prices for those who purchased vehicles in British Columbia. During the class period, the appellants were amongst the world's largest operators of roll-on/roll-off marine shipping vessels.
- [3] The appellants applied to have the proceedings against them stayed or dismissed on the basis that the Supreme Court of British Columbia lacked territorial competence. For the purpose of the application below, the appellants did not dispute the pleading that they were parties to the conspiracy and the conspiracy resulted in higher prices paid by British Columbians who purchased the shipped vehicles. Nor did they dispute the more specific pleading that the defendants, including the appellants, allocated sales, territories, customers or markets for the supply of vehicle carrier services in furtherance of the conspiracy. However, the appellants filed evidence disputing the part of the pleadings claiming that they maintain a business presence in British Columbia and ship vehicles sold in British Columbia.
- [4] Accepting the undisputed aspects of the pleadings as true, the factual foundation for the chambers judge's decision was that British Columbians, because of the conspiracy and the appellants' acts in furtherance thereof, paid inflated prices for imported vehicles purchased in British Columbia. The judge assumed the appellants did not ship those vehicles.
- [5] Justice Myers dismissed the application (2016 BCSC 2179). He found the undisputed aspects of the pleadings concerned a conspiracy for which the appellants are liable in British Columbia, even assuming they do not ship vehicles here. Therefore, under s. 10 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA], the presumption of a real and substantial connection was triggered. I agree. I also agree with the implication of the judge's reasoning that the appellants failed to establish any facts sufficient to displace the strong presumption arising when a connecting factor is established. I would dismiss the appeal.

## Procedural History

- [6] The plaintiff brought the underlying action under the Class Proceedings Act, R.S.B.C. 1996, c. 50, alleging that operators of roll-on/roll-off marine shipping vessels conspired to limit competition and inflate prices for the transportation of vehicles worldwide. The proposed class is predominantly comprised of purchasers of new vehicles shipped by the defendants. These purchasers allegedly paid more for vehicles due to the price-fixing conspiracy, as increased vehicle shipping costs were incorporated into the ultimate vehicle purchase prices.
- [7] The appellant Höegh Autoliners AS is a Norwegian company, and the appellant Höegh Autoliners, Inc. is a New York corporation based in Jacksonville, Florida. Both companies are indirect subsidiaries of Höegh Autoliners Holdings AS Norway, which in turn is owned by two shareholders based in Europe.
- [8] At the time of the order now under appeal, the class certification application had not yet been heard. The Supreme Court of British Columbia subsequently dismissed the certification application on December 21, 2017: *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2017 BCSC 2357. This Court then adjourned this appeal pending the outcome of the plaintiff's appeal of the order denying certification. On May 29, 2019, this Court allowed the plaintiff's appeal and certified the action as a class proceeding: *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187. On December 19, 2019, the Supreme Court of Canada dismissed the defendants' application for leave to appeal on the class certification issue: [2019] S.C.C.A. No. 311. With the class certification issue finally determined, the appellants' appeal of the jurisdictional issue could proceed. The parties were granted leave to file supplementary factums. I need not address those brief further submissions, which only apply settled principles to different facts.

## Jurisdictional Challenges under the CJPTA

- [9] To understand how this application proceeded, it is important to set out the framework for assessing territorial competence challenges in British Columbia.
- [10] Pursuant to R. 21-8 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, and the CJPTA, a defendant may apply to stay or dismiss claims against it for lack of territorial competence.
- [11] The CJPTA sets out the circumstances in which a court of British Columbia has territorial competence in a proceeding against a person. The relevant provisions read:

### Application of this Part

2 (1) In this Part, "court" means a court of British Columbia.

(2) The territorial competence of a court is to be determined solely by reference to this Part.

### Proceedings against a person

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

- (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

### Real and substantial connection

10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

- (g) concerns a tort committed in British Columbia,
- (h) concerns a business carried on in British Columbia,

[12] Section 3(e) provides that a court has territorial competence in a proceeding brought against a person if there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based. Section 10 enumerates a list of non-exhaustive circumstances, or connecting factors, on the basis of which such a connection is presumed to exist: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 41 [Van Breda]. One of those circumstances is where the proceedings concern a tort committed in British Columbia. That is the connecting factor at issue in this case.

[13] Section 11 of the CJPTA, which deals with the court's discretion to decline to exercise territorial competence where the court of another state is the more appropriate forum (traditionally known as *forum non conveniens*), is not at issue in this appeal.

[14] The case law in British Columbia sets out, in varying language, the procedural and analytical stages of inquiry on a jurisdictional challenge. The parties agree that Justice Dillon summarized the applicable steps in *Canadian Olympic Committee v. VF Outdoor Canada Co.*, 2016 BCSC 238 at paras. 23-24 [Canadian Olympic] (and quoted by the chambers judge at para. 8):

[23] The party arguing for jurisdiction has the initial burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum (*Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 100 (*Club Resorts*); *Right Business Ltd. [Right Business Limited v. Affluent Public Limited]*, 2011 BCSC 783] at para. 27). The threshold for establishing territorial competence is not high (*JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 59 (*JTG Management*)). Generally, as long as the s. 10 claims are pleaded to trigger one of the presumptions of a real and substantial connection, the plaintiff need not support its allegations with evidence (*Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 21 (*Fairhurst*); *Right Business Ltd.* at para. 44; *Original Cakerie [The Original Cakerie Ltd. v. Renaud]*, 2013 BCSC 755] at para. 22). The basic facts are taken to be proven, if plead, but the presumption is rebuttable (*Stanway [Stanway v. Wyeth Pharmaceuticals Inc.]*, 2009 BCCA 592] at para. 22; *Fairhurst* at para. 14).

- [24] The burden of rebutting the presumption rests upon the party challenging the assumption of jurisdiction by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them" (Club Resorts at para. 95). It must be plain and obvious that the action as pleaded could not lie within the territorial competence of the court (Fairhurst at para. 32; JTG Management at paras. 35 and 60). If the defendant tenders evidence that challenges the plaintiff's jurisdictional facts or to demonstrate that the plaintiff's claim is tenuous or without merit, the plaintiff is required to adduce evidence that satisfies the court that it has a good, arguable case that the contentious facts can be established (Stanway at para. 70; Purple Echo Productions, Inc. v. KCTS Television, 2008 BCCA 85 at para. 35 (Purple Echo Productions); Right Business Ltd. at para. 44; Original Cakerie at para. 22). The burden on the plaintiff to show an arguable case in the circumstance where the defendant presents evidence will be discharged if there are facts, alleged or deposed, which, if true, would provide a foundation for jurisdiction (Purple Echo Productions at para. 34; Original Cakerie at para. 23; JTG Management at para. 34). The court is not going to determine whether the facts are true: the task for the plaintiff is to show an arguable case that they can be established (Purple Echo Productions at para. 34; Fairhurst at para. 20).
- [15] I agree with this summary of the law, but would outline the framework more simply. There is a risk of unnecessary confusion between two "presumptions": the "presumption" that pleaded facts are true, and the "presumption" that a real and substantial connection exists once a connecting factor is established.
- [16] At the first stage of the analysis, the plaintiff must show that one of the connecting factors listed in s. 10 exists. The basic jurisdictional facts relied on by the plaintiff are taken to be true if pleaded (sometimes referred to as a presumption that the pleaded facts are true). The defendant challenging jurisdiction is entitled to contest the pleaded facts with evidence. If the defendant contests the pleaded facts with evidence, the plaintiff is required only to show that there is a good arguable case that the pleaded facts can be proven. The role of the chambers judge is not to prematurely decide the merits of the case or to determine whether the pleaded facts are proven on a balance of probabilities; the plaintiff's burden is low: Purple Echo Productions, Inc. v. KCTS Television, 2008 BCCA 85 at para. 34; Fairhurst v. De Beers Canada Inc., 2012 BCCA 257 at para. 20, leave to appeal ref'd (2013), [2012] S.C.C.A. No. 367 [Fairhurst]; Environmental Packaging Technologies, Ltd. v. Rudjuk, 2012 BCCA 343 at para. 26.
- [17] At the second stage, if one of the connecting factors is established either on undisputed pleadings or on disputed pleadings but with a good arguable case, the "mandatory presumption" of a real and substantial connection (and, therefore, territorial competence) is triggered: Stanway v. Wyeth Pharmaceuticals Inc., 2009 BCCA 592 at para. 20, leave to appeal ref'd [2010] S.C.C.A. No. 68 [Stanway]. This is, of course, distinct from the "presumption" that pleaded facts are true. At this stage, because the connecting factor has already been

established, it is presumed that a real and substantial connection exists, and therefore that the court has territorial competence. The defendant may now attempt to rebut the presumption of real and substantial connection by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": Van Breda at para. 95; Canadian Olympic at para. 24. However, the presumption is strong and "likely to be determinative": Stanway at paras. 20-22. The burden on the defendant to rebut the presumption is heavy: Fairhurst at paras. 32, 42; JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., 2014 BCSC 715 at para. 35, aff'd 2015 BCCA 200; Mazarei v. Icon Omega Developments Ltd., 2011 BCSC 259 at para. 33. At this stage of the analysis, a connecting factor is already established: the defendant's task is to show why a real and substantial connection does not follow, despite the strong presumption that it does.

### The Pleadings, Evidence, and Positions on the Application

- [18] In response to the application, the plaintiff argued the pleadings established a connecting factor which triggered the presumption of a real and substantial connection on two grounds. First, the proceeding concerns a tort (civil conspiracy) committed in British Columbia. Second, the proceeding concerns a business carried on in British Columbia.
- [19] The plaintiff pleaded at paras. 36-38 of the Third Amended Notice of Civil Claim that Höegh Autoliners AS and/or its subsidiaries provide vehicle carrier services in British Columbia and maintain a business presence here, and that Höegh Autoliners, Inc. is affiliated with and controlled by Höegh Autoliners AS.
- [20] The plaintiff also pleaded that the named defendants, including the appellants, engaged in a number of "Conspiracy Acts" in furtherance of the conspiracy to fix vehicle carrier service prices and unduly lessen competition in British Columbia and elsewhere. Most importantly for our purposes, the Third Amended Notice of Civil Claim specifies some of the alleged Conspiracy Acts at paras. 47-48:
47. During the Class Period, senior executives and employees of the defendants, acting in their capacities as agents for the defendants, engaged in communications, conversations, and attended meetings with each other at times and places, some of which are unknown to the plaintiff. As a result of the communications and meetings the defendants and unnamed co-conspirators unlawfully conspired and/or agreed to:
- (a) unreasonably enhance the prices of Vehicle Carrier Services in Canada, including in British Columbia, and elsewhere;
  - (b) fix, maintain, increase, or control the prices of Vehicle Carrier Services in Canada, including in British Columbia, and elsewhere;
  - (c) monitor and enforce adherence to an agreed-upon pricing scheme;

- (d) restrain trade in the sale of Vehicle Carrier Services in Canada, including in British Columbia, and elsewhere; and
  - (e) lessen unduly competition in the sale of Vehicle Carrier Services in Canada, including in British Columbia, and elsewhere.
48. In furtherance of the conspiracy, during the Class Period the defendants and/or their servants and agents:
- (a) fixed, maintained, increased, controlled, and/or enhanced unreasonably the prices of Vehicle Carrier Services in Canada, including in British Columbia, and elsewhere;
  - (b) communicated secretly, in person and by telephone, to discuss and fix prices of Vehicle Carrier Services;
  - (c) made formal agreements with respect to the prices of Vehicle Carrier Services;
  - (d) exchanged information regarding the prices of Vehicle Carrier Services for the purposes of monitoring and enforcing adherence to the agreed-upon prices;
  - (e) rigged bids for the sale of Vehicle Carrier Services to [original equipment manufacturers] and their subsidiaries;
  - (f) allocated sales, territories, customers or markets for supply of Vehicle Carrier Services;
  - (g) fixed, maintained, controlled, prevented or lessened the supply of Vehicle Carrier Services; and
  - (h) disciplined any conspirator which failed to comply with the conspiracy.
- [21] Some of the language used in the pleadings mirrors the language of the Competition Act, R.S.C. 1985, c. C-34. The plaintiff pleaded both predominant purpose conspiracy and unlawful act conspiracy. With respect to the unlawful act conspiracy, the plaintiff pleaded that the Conspiracy Acts were unlawful under the Competition Act and in restraint of trade. Section 45 of the Competition Act provides:

## PART VI

### Offences in Relation to Competition

#### Conspiracies, agreements or arrangements between competitors

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or

- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.
- [22] "Product" includes a service. Section 36 of the Competition Act makes conduct contrary to s. 45 actionable by a person who suffers loss or damage.
- [23] Finally, at paras. 60-61 of the Third Amended Notice of Civil Claim, the pleadings particularize the harm suffered in British Columbia because of the conspiracy. Those paragraphs read:
60. As a result of the Conspiracy Acts:
- (a) the prices of Vehicle Carrier Services and new Vehicles transported by [roll-on/roll-off vessels] have been enhanced unreasonably and/or fixed at artificially high and non-competitive levels; and
  - (b) competition in the sale of Vehicle Carrier Services has been unduly restrained.
61. During the Class Period, the plaintiff and the other Class Members purchased Vehicle Carrier Services and purchased or leased new Vehicles transported by [roll-on/roll-off vessels]. By reason of the alleged violations of the Competition Act and the common law, the plaintiff and the other Class Members have been overcharged for those Vehicle Carrier Services and new Vehicles transported by [roll-on/roll-off vessels] by paying more than they would have paid in the absence of the illegal conspiracy and, as a result, the plaintiff and the other Class Members have suffered damages (the "Overcharge").
- [24] The appellants argued the pleadings were not sufficient to give rise to the presumption of a real and substantial connection.
- [25] The general pleading that all the defendants provide vehicle carrier services in British Columbia and maintain a business presence here was said to be insufficient to show a connection between the appellants themselves and British Columbia. The appellants argued the plaintiff did not plead any material facts as to the appellants' connection to Canada, how they "carried on" a business in Canada, or how they "provided" their services in Canada to establish a jurisdictional connection over the appellants relative to their competitors elsewhere.
- [26] Alternatively, the appellants adduced evidence in an effort to dispute the jurisdictional facts in the pleadings. The thrust of this evidence was to dispute any connection to British Columbia. The appellants denied having any business presence in British Columbia and said they did not ship any vehicles that were ultimately purchased in British Columbia. The appellants' position (below and on appeal) with respect to the connecting factor in s. 10(g)--"a tort committed in British Columbia"--is stated most concisely in their reply factum:

2. [C]ontrary to the Chambers Judge's reasoning in order for there to have been a "tort committed in B.C." under Section 10(g) - including the tort of conspiracy - the alleged tortfeasor itself must have had some connection to B.C., typically as a result of its goods or services entering into the channels of trade in B.C. It is only in such circumstances that the alleged tortfeasor could have committed an act or omission that caused damage in B.C.
6. To the extent that the Plaintiff's pleadings give rise to a presumption of a real and substantial connection under Section 10(g) Höegh is entitled to rebut that presumption with evidence. Höegh has done so in this case by way of extensive affidavit evidence that demonstrates Höegh never provided any services in B.C., and never foresaw or reasonably contemplated that any new vehicles it shipped would be sold in B.C.
7. [T]he Plaintiff has failed to plead, let alone show with evidence, how Höegh itself - as opposed to a generalized group of all of "the defendants", collectively - is alleged to have committed a tort in B.C.

[*Italic emphasis in original; underline emphasis added.*]

- [27] In short, the appellants argued that the plaintiff did not establish a connecting factor because the pleaded facts, as rebutted, failed to show that the appellants themselves operated a business in British Columbia or committed the tort of conspiracy in British Columbia. These arguments are all contained in what I have referred to as the "first stage" of the jurisdictional analysis: whether or not a connecting factor was established.
- [28] In their Notice of Application to challenge the court's jurisdiction, at para. 39, the appellants added: "In the alternative, the presumptions under Section 10 of the CJPTA have been rebutted." This argument falls under what I have referred to as the "second stage" of the analysis--i.e., that a connecting factor was established, but that the mandatory presumption of a real and substantial connection was rebutted. In their Notice of Application, however, the appellants offered no specific argument as to how the court could at once conclude that the proceedings against them concerned a tort committed in British Columbia, but there was nonetheless no real and substantial connection. Although the judge did not comprehensively address it, as I will explain, the argument that the appellants had rebutted the s. 10(g) presumption is without merit.
- [29] Importantly, the appellants did not deny their participation in the conspiracy generally, or that they committed the Conspiracy Acts, nor did they deny the conspiracy caused harm in British Columbia.
- [30] In response to the appellants' evidence, the plaintiff filed evidence to establish a good arguable case that the appellants did business in British Columbia. However, for reasons I explain below, the judge saw no need to resolve the evidentiary disputes. Nor do I.

## The Chambers Judgment

- [31] The judge began by setting out the relevant sections of the CJPTA, the "main procedural aspects of a jurisdictional challenge" as set out in *Canadian Olympic*, and the relevant sections of the pleadings.
- [32] The judge noted there were "factual disputes" surrounding whether or not the appellants had any business presence in British Columbia and/or actually shipped vehicles that were purchased by consumers in British Columbia. In the judge's view, it was not necessary to deal with those factual disputes because "the plaintiff has established a real and substantial connection based on 'a tort committed in British Columbia' even if Höegh did not have a business presence here or ship vehicles that were sold here". This is the critical conclusion now at issue on this appeal.
- [33] In the judge's view, this Court's decisions in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, leave to appeal ref'd (2007), [2006] S.C.C.A. Nos. 443-449 [*Imperial Tobacco*], and *Fairhurst* were a complete answer to the jurisdictional challenge. The judge cited *Imperial Tobacco* at para. 41 and *Fairhurst* at para. 45 for the proposition that a conspiracy occurs in British Columbia if the harm is suffered here, regardless of where the wrongful conduct occurred.
- [34] The judge also considered *Shah v. LG Chem, Ltd.*, 2015 ONSC 2628 [*Shah*]. The appellants relied on *Shah* for the proposition that their involvement in a conspiracy causing harm in British Columbia was not enough to trigger the presumption of territorial competence. In other words, the appellants used *Shah* in an attempt to persuade the judge to adopt a narrower reading of *Imperial Tobacco* and *Fairhurst*.
- [35] The judge rejected the appellants' arguments on *Shah*. He distinguished *Shah* primarily on the basis that the defendants in that case had filed affidavit evidence entirely denying their involvement in the conspiracy, unlike the appellants here, who only denied that their participation in the conspiracy was actionable in British Columbia.
- [36] The judge also noted *Shah* held that a real and substantial connection may exist where foreign defendants conspire to manipulate local markets, even if the foreign defendants do not sell their goods or services in the local market. An agreement to divide international markets may result in harm done by all the conspirators in all affected markets, even if one particular conspirator does not do business in or ship to a particular market. Such reasoning, the judge observed, is consistent with ss. 36 and 45 of the Competition Act, and the case law stipulating that foreign defendants should be held jointly liable for wrongs done in the jurisdiction by a local defendant when such harm occurred pursuant to a common design: *Morton-Norwich Products Inc. et al. v. Intercen Limited*, [1978] R.P.C. 501 at 514-15 (Ch.D.); *Imperial Tobacco*.

- [37] The plaintiff in this case specifically pleaded that the defendants furthered the conspiracy by allocating sales, territories, customers or markets. The fact the appellants' role in the market manipulation did not involve shipping vehicles to British Columbia did not mean the situs of their conspiracy could only be outside British Columbia.
- [38] Finally, answering the argument that the plaintiff's pleadings were too "thin and general" to trigger the presumption of real and substantial connection, the judge cited paras. 26-27 of Fairhurst for the proposition that each individual defendant's conduct need not be particularized in the pleading to establish a real and substantial connection.

## On Appeal

- [39] The appellants advance four arguments on appeal, all of which go to their core submission that territorial competence is not established. They argue the judge erred by:
- 1) Failing to apply the framework for assessing a challenge to jurisdiction under the CJPTA;
  - 2) Finding that a vague and general plea of conspiracy and joint liability was sufficient for the purposes of grounding territorial competence under the CJPTA;
  - 3) If the presumption applies, failing to inquire whether the appellants had rebutted the presumption under the CJPTA; and
  - 4) Concluding the appellants had an onus to lead evidence relating to the merits (i.e., that disputed the existence of the conspiracy) as part of their application under the CJPTA.
- [40] The appellants' second, third, and fourth arguments are in effect specific instantiations of their overarching first argument. The appellants also often rely on the same evidence and analysis to make distinct legal points--first, that the plaintiff failed to establish that the proceedings against the appellants concern a tort committed in British Columbia, and second, even if the plaintiff established that connecting factor, the appellants rebutted the presumption of a real and substantial connection.
- [41] To simplify matters, I will address the appellants' arguments as follows. Did the judge err by:
- 1) Failing to identify and apply the general framework applicable on an application challenging jurisdiction under the CJPTA;
  - 2) Concluding the plaintiff established the connecting factor of a tort committed in British Columbia (despite what the appellants call a "vague and general plea of conspiracy"); or
  - 3) Applying the presumption of a real and substantial connection once the plaintiff had established the connecting factor?

It will become evident that these issues overlap.

## Discussion

## Standard of Review

[42] I consider the question of whether a provincial superior court has jurisdiction over a matter is a question of law reviewable on the standard of correctness. In *Khan Resources Inc. v. W M Mining Co., LLC* (2006), 79 O.R. (3d) 411 (C.A.), Justice Feldman for the Ontario Court of Appeal said this:

[7] The determination of whether a provincial superior court has jurisdiction over a matter is a question of law. Therefore, although the court is required to address a list of factors in order to determine whether there is a real and substantial connection between the subject matter of an action and the jurisdiction of the court, the decision is not an exercise of judicial discretion. Consequently, on appellate review, the standard of review is correctness: see *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128 (C.A.), at para. 43; *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54, [2002] O.J. No. 2131 (C.A.), at para. 29; and *Phillips v. Avena*, [2006] A.J. No. 33, 2006 ABCA 19 (C.A.), at para. 60.

See also *Rolls-Royce Corporation v. Universal Helicopters Newfoundland Limited*, 2009 NLCA 58 at para. 22. A contrary view, however, appears in *IBC Advanced Technologies, Inc. v. Ucore Rare Metals Inc.*, 2019 NSCA 80 at para. 81, leave to appeal ref'd (2020), [2019] S.C.C.A. No. 328.

[43] In my opinion, the view expressed in *Khan* is consistent with this Court's judgment in *Scott v. Canada (Attorney General)*, 2017 BCCA 422, leave to appeal ref'd [2018] S.C.C.A. No. 25. There, the question concerned the standard of review to apply on an appeal from a decision as to whether pleadings disclosed a reasonable claim or defence. Justice Groberman reviewed conflicting authorities and said:

[44] As I have indicated, it is my view that the question of whether pleadings disclose a reasonable claim or defence will generally be a pure issue of law, and will not attract deference. In any event, in the case before us, I am satisfied that the issues that must be decided are extricable issues of law.

[44] Applying these authorities, I conclude the applicable standard of review on the question of whether the court has jurisdiction in this case is correctness. The judge's disposition in this case did not turn on an assessment of factual disputes and all the issues involve extricable questions of law.

Issue 1 - Did the judge correctly identify and apply the general procedural framework on an application challenging jurisdiction under the CJPTA?

[45] The appellants accept that the judge, in quoting *Canadian Olympic* at paras. 23-24, cited the correct framework for determining jurisdictional challenges under the CJPTA. As I explained above, pleaded facts are taken as true subject to the defendant's ability to challenge those facts. If undisputed jurisdictional facts bring the proceeding within any of the enumerated factors in s. 10 of the CJPTA, there is a mandatory rebuttable presumption of real and substantial connection within the meaning of s. 3(e).

- [46] The appellants accept that the judge properly identified this framework, but they complain that he "never used the words 'presumption', 'rebut' or 'good arguable case' outside of his quotation of Justice Dillon's decision". They say "[t]he implication of his reasoning is that once a plaintiff has pleaded a general and unparticularized allegation of conspiracy that results in harm in the province, the analysis is concluded". In effect, the appellants' argument is that the judge identified the correct framework, but then ignored it. This submission is without merit.
- [47] The chambers judge accurately reviewed the applicable law. It is implicit in his reasoning and conclusion that the appellants had not rebutted the material elements of the plaintiff's pleadings. It is also implicit in his conclusion that the appellants did not rebut the presumption of a real and substantial connection once the plaintiff established the proceedings against the appellants concerned a tort committed in British Columbia. A judge is not required to engage in a "watch me think" analysis, or to record every step in their reasoning, and it is no argument to say the judge's reasons could have been more comprehensive: *R. v. R.E.M.*, 2008 SCC 51 at para. 17; *F.H. v. McDougall*, 2008 SCC 53 at para. 100.
- [48] The judge did not engage directly with the evidentiary stages of the analysis because he found that undisputed pleaded facts established a connecting factor and brought the claim within the court's jurisdiction. As I explain below, he was correct on this point.
- [49] It is true the judge did not dedicate a specific subheading to the appellants' alternative argument that they rebutted the presumption of a real and substantial connection even if the proceedings concerned a tort committed in British Columbia. However, in substance, the judge responded to this argument. He clearly determined the presumption of a real and substantial connection applied in this case once the connecting factor of "a tort committed in British Columbia" was established. He said:
- [29] Höegh's argument places the emphasis on its connection to the jurisdiction. That is not the correct approach. This ground of jurisdiction is not presence-based; that is a separate ground for jurisdiction. Rather, the correct focus of the analysis is the case's connection to British Columbia and in turn, the defendant's connection to the case. That was so under the common law and explicitly remains so under the CJPTA: s. 3(e) refers to a "real and substantial connection between British Columbia and the facts on which the proceeding against that person is based" and that wording is echoed in the opening sentence of s. 10. A conspiracy case alleging harm within British Columbia is substantially connected to the jurisdiction. An alleged co-conspirator is connected to the case.
- [50] The core of the appellants' submission was that none of the connecting factors applied. Their Notice of Application identified no basis on which the judge could simultaneously conclude that the proceedings against them concerned a tort committed in British Columbia and yet there was no real and substantial connection, nor did their oral submissions or factum directly provide such a basis. It bears underscoring that the mandatory presumption

is likely to be determinative and the burden on a defendant to displace the presumption is very high: *Stanway* at para. 22; *Fairhurst* at paras. 32, 42. I cannot fault the judge for not providing a more comprehensive explanation as to why the presumption operated, given that the appellants relied on the same evidence to challenge both the pleaded facts and the presumption arising under s. 10(g). The appellants adduced no further evidence to rebut the s. 10(g) presumption once the connecting factor had been established.

- [51] The appellants' argument effectively reduces to the proposition that the s. 10(g) connecting factor--"a tort committed in British Columbia"--will not trigger a real and substantial connection unless the defendant who commits the tort in British Columbia also carries on business in British Columbia. The judge correctly rejected that argument at paras. 25 and 29. He was not required to say anything more.

Issue 2 - Did the judge correctly conclude the plaintiff established the proceedings against the appellants concerned a tort committed in British Columbia?

- [52] The thrust of the central argument addressed by the judge was that the pleaded jurisdictional facts, as challenged by the appellants' evidence, did not show the appellants were liable for tortious conspiracy in British Columbia. The appellants say the plaintiff did not establish that the proceedings specifically against the appellants concerned "a tort committed in British Columbia" (s. 10(g)), so there was no real and substantial connection between British Columbia and the proceedings, and no territorial competence (s. 3).
- [53] Interwoven through the appellants' position is their view that the judge read *Imperial Tobacco* and *Fairhurst* too broadly, and that *Shah* illustrates the correct, narrower reading of those cases. The central question is whether, on the correct interpretation and application of the law on jurisdiction over foreign conspirators, the appellants could be liable in British Columbia for the tort of conspiracy.
- [54] It is helpful to start briefly with the basic principles of civil conspiracy. In *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, Justice Estey set out the two possible situations in which the tort may arise. The Court more recently affirmed *LaFarge* in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57. While the tort of conspiracy is not well settled "in terms of its current utility or the scope of the remedy it affords two types of actionable conspiracy remain available under tort law": *Pro-Sys* at paras. 72-73. The two possible situations in which the tort arises are:
- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
  - (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[LaFarge at 471-72; Pro-Sys at paras. 74-83; XY, LLC v. Zhu, 2013 BCCA 352 at para. 43, leave to appeal ref'd (2014), [2013] S.C.C.A. Nos. 376, 378, 380.]

[55] To establish an actionable civil conspiracy, "the acts of the defendants must be causally related to loss or damage to the plaintiff": XY, LLC at para. 46.

[56] With that context, I turn to Imperial Tobacco, Fairhurst and Shah. These cases are by no means exhaustive of the law on jurisdiction over foreign conspirators, but they were central to the judge's reasoning and remain central to the parties' arguments on appeal. Much of the analysis that follows is also relevant to Issue 3.

## Imperial Tobacco

[57] In Imperial Tobacco, the Government of British Columbia sued, under the Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, a number of manufacturers of cigarettes for recovery of healthcare expenditures incurred in treating individuals exposed to tobacco products. Six foreign defendants "did not manufacture cigarettes sold in British Columbia but [were] alleged to be liable because of their relationship with one or more of the appellants who did manufacture cigarettes sold in British Columbia": Imperial Tobacco at para. 6.

[58] Section 4 of the Tobacco Damages and Health Care Costs Recovery Act provides for joint and several liability for joint breaches, conspiracy or acting in concert, cases of principle and agent, and cases of vicarious liability. Importantly, under s. 4, "defendants can only be held liable where, at common law, they would be liable for wrongs committed within British Columbia": Imperial Tobacco at para. 37 (emphasis added).

[59] The Government's position on foreign defendants who did not manufacture cigarettes that were sold in Canada was summarized by Justice Rowles:

[39] In its statement of claim, the Government alleges that all the joint breach defendants conspired or acted in concert with the manufacturers who sold cigarettes in British Columbia, to prevent consumers in British Columbia from acquiring knowledge of the harmful nature and addictive properties of cigarettes. The Government alleges that pursuant to the conspiracy or common design, the defendants who manufactured cigarettes sold in British Columbia carried out the alleged breaches of duty in British Columbia. The Government further alleges that those defendants who did sell cigarettes in British Columbia in violation of their duties owed in the province were acting as agents for the joint breach defendants. Thus all of the foreign defendants who did not manufacture cigarettes sold in British Columbia are implicated in a "joint breach" of duties owed to British Columbians. As such, all the activities alleged against the joint breach defendants are all wrongs whose locus is in British Columbia.

[Emphasis added.]

- [60] The appellants in the case at bar argue the Government's allegation in *Imperial Tobacco* that "those defendants who did sell cigarettes in British Columbia in violation of their duties owed in the province were acting as agents for the joint breach defendants" was central to this Court's decision that jurisdiction simpliciter was established. But that is not how I read the case. In my view, it is clear the conspiracy allegation, not the agency allegation, is what grounded British Columbia's jurisdiction.
- [61] *Imperial Tobacco* was decided under the common law, before the CJPTA came into force: see *Fairhurst* at para. 39. This is of some importance because the Court was directly applying *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 [*Moran*], the seminal case establishing the "real and substantial connection" test in Canada. In the context of a claim for negligent manufacturing, Justice Dickson (as he then was) noted in *Moran* that the state has an "important interest" in "injuries suffered by persons within its territory": at 409. He held that a negligent manufacturer may be liable in the jurisdiction where the damage is suffered if the product enters into that jurisdiction in the formal channels of trade and the manufacturer knows or ought to know that his carelessness might cause injury in that jurisdiction.
- [62] In *Imperial Tobacco*, Rowles J.A. reasoned that jurisdiction over the manufacturers who sold cigarettes in British Columbia was derived "directly from the analysis in *Moran*": at para. 32. She went on to conclude that "the *Moran v. Pyle* analysis that applies to the manufacturers who either now or previously sold cigarettes in British Columbia can properly be applied to the joint breach defendants": at para. 40.
- [63] Justice Rowles explained:
- [41] A conspiracy occurs in British Columbia if the harm is suffered here, regardless of where the "wrongful conduct" occurred. On that basis, the court has jurisdiction over the ex juris defendants who are alleged to be parties to the conspiracy. Further, once jurisdiction over any wrong, including conspiracy, is established, all defendants potentially liable to the plaintiff are properly joined in the action: *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* (2002), 20 C.P.C. (5th) 351 (Ont. S.C.J.); *Nutreco Canada Inc. v. F. Hoffmann-La Roche* (2001), 10 C.P.C. (5th) 351, 2001 BCSC 1146 at paras. 44, 46 and 52; *WIC Premium Television Ltd. v. General Instrument Corp.*, [1999 ABQB 460], [2000] 2 W.W.R. 417 at paras. 18, 22 and 23 (Alta. Q.B.); *aff'd* [2001] 2 W.W.R. 431, 2000 ABCA 233.
- [64] Justice Rowles then cited with approval *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* (2002), 20 C.P.C. (5th) 351 (Ont. S.C.J.) [*Vitapharm*], a case with strong similarities to the case now before this Court. In *Vitapharm*, a number of companies were allegedly parties to a global price-fixing conspiracy in the vitamin market. Justice Rowles explained that the "foreign defendants did not themselves sell the vitamins in Canada (or in some cases at all)", but jurisdiction in Ontario could be properly asserted over those defendants on the basis, *inter alia*, "of a tort committed in Ontario, because '[i]f an actionable conspiracy is proven and damage occurs in Ontario, then a tort has been committed in Ontario': see *Imperial*

Tobacco at para. 42.

- [65] In conclusion on the jurisdictional issue in *Imperial Tobacco*, at paras. 43-44, Rowles J.A. quoted with approval the reasons of Justice Holmes in the court below. The foreign defendants who did not manufacture cigarettes that were sold in Canada were "liable for the breaches of duty and consequent injury carried out pursuant to the conspiracy because it is alleged they conspired or acted in concert": *HMTQ v. Imperial Tobacco Canada Limited et al.*, 2005 BCSC 946 at para. 152 [*Imperial Tobacco S.C.*] (emphasis added). Further, citing *Furlan v. Shell Oil Co.*, 2000 BCCA 404, "[o]nce jurisdiction over the tort is established then any defendants potentially liable to the plaintiff for the tort are properly joined in the action": *Furlan* at para. 21 (emphasis added); *Imperial Tobacco S.C.* at para. 154.
- [66] In summary, relying on *Moran*, British Columbia had a real and substantial connection to the proceedings against the foreign defendants because those defendants conspired to prevent consumers in British Columbia from acquiring knowledge of the harmful nature and addictive properties of cigarettes, and the conspiracy caused harm in British Columbia when consumers bought cigarettes manufactured by the co-conspirators.
- [67] *Imperial Tobacco* was relied on in *Ontario (Attorney General) v. Rothmans Inc.*, 2013 ONCA 353 [*Rothmans Inc.*], for the proposition that it "is well established that a conspiracy occurs in the jurisdiction where the harm is suffered regardless of where the wrongful conduct occurred": at para. 37.

## Fairhurst

- [68] *Fairhurst*, like the case at bar, involved an allegation of a price-fixing conspiracy. The defendants were a group of major players in the international diamond market. The plaintiffs were British Columbia residents who alleged they overpaid for gem-grade diamonds because of the defendants' conspiracy to manipulate markets and fix prices of rough diamonds.
- [69] In *Fairhurst*, unlike *Imperial Tobacco*, the product sold by all defendants arrived in British Columbia through normal distribution channels. In the court below, the chambers judge found that territorial competence was established on the pleadings primarily because the defendants did not contest that their rough diamonds eventually made their way through the supply chain to British Columbia. "The diamonds arrived in British Columbia in the ordinary course of De Beers' business, and the defendants knew or ought to have known that the product would be sold in British Columbia": *Fairhurst v. Anglo American PLC*, 2011 BCSC 705 at para. 38 [*Fairhurst S.C.*].

- [70] On appeal, Justice Newbury cited Imperial Tobacco for the proposition that an actionable conspiracy occurs in the place where the harm is alleged to have occurred. The defendants argued that Imperial Tobacco was distinguishable on the facts. The defendants argued--as do the appellants in the case at bar--that "jurisdiction was not founded [in Imperial Tobacco] on 'the mere pleading of conspiracy alone'": at para. 41. Justice Newbury said:
- [42] It is certainly true that jurisdiction was not taken in any of the cases discussed above based on a "mere allegation of conspiracy". Rather, the courts found that the "real and substantial" connection was established on the basis that the pleading referred to torts "committed in British Columbia".
- [43] A recent decision of the Court of Appeal of Quebec, *Option Consommateurs v. Infineon Technologies AG*, indexed as 2011 QCCA 2116, provides further support for the view that an 'economic tort' such as conspiracy to fix prices illegally will be regarded as taking place where the economic damage is suffered. In *Option Consommateurs*, the personal plaintiff, Ms. Cloutier, had purchased online from her home a computer product with dynamic random access memory ("DRAM") supplied by Dell Computer Corporation ("Dell"). Some time later, she launched a proposed class action against various corporate defendants involved in the distribution chain, claiming they had artificially inflated the price of DRAM contrary to the Competition Act and breached other duties arising under the Civil Code of Quebec. Evidently, the applicable limitation in the Competition Act had expired; but the Court ruled that the conspiracy alleged by the plaintiffs could "ground an action in extracontractual liability pursuant to article 1457 C.C.Q. for all members of the class." (Para. 28.)
- [45] The parallels between *Option Consommateurs* and the case at bar are obvious, and in my opinion, similar reasoning applies with even greater force in this instance by virtue of the CJPTA. Indeed, no authority has been cited to us that would call into question the plaintiff's submission that the conspiracy as pleaded here concerns a tort committed in British Columbia and restitutionary obligations that to a substantial extent arose in the province. It appears that in cases of alleged conspiracy causing economic loss, no less than in cases of alleged negligent manufacture causing personal injury, Canadian courts recognize the "important interest a state has in injuries suffered by persons within its territory." (Moran, at 409.) It may seem inconceivable to the large European and South African corporate defendants in this proceeding that, in the phrase of Ms. Kay, they are being "called to the court" of a jurisdiction on the far side of North America that seldom, if ever, figures in their decision-making. However, consumers in this province, no less than in other jurisdictions, may be affected by conduct of the kind alleged by the plaintiff. The territorial competence of British Columbia courts over the defendants is the result of the operation of 'objective' rules of territorial competence that have been formulated to reflect the realities of modern commerce.

[Emphasis added.]

- [71] The pleadings in Fairhurst sufficiently alleged the defendants were part of a conspiracy that caused harm in British Columbia. "A corporation need not carry on business in British Columbia to affect prices illegally in the province": Fairhurst at para. 31. Therefore, on the pleadings, a tort was committed in British Columbia and territorial competence was established.

## Shah

- [72] I turn finally to Shah, another international price-fixing conspiracy case, this time in the lithium-ion battery market. The defendants advancing the jurisdictional challenge were two Japanese corporations. They adduced evidence to show they did not carry on business in Ontario and did not participate in a conspiracy to fix prices in Ontario. For example, an employee of the defendants testified that any changes to prices or output of the defendants' batteries were made solely on the defendants' business judgment and not due to any agreement or interaction with a competitor: para. 39.
- [73] As Justice Perell explained at paras. 10-13 of Shah, the plaintiffs' pleadings, in the absence of the defendants' rebuttal evidence, would have established that the defendants were party to a conspiracy to fix prices in Ontario. But the jurisdictional challenge succeeded because "the Plaintiffs failed to answer the challenge" of establishing a good arguable case in the face of the rebuttal evidence. Given that the statement of claim did not particularize what the defendants specifically had done in furtherance of the conspiracy and that the defendants had rebutted the conspiracy allegation, the plaintiffs had not established a good arguable case.
- [74] The plaintiffs in Shah, relying on cases including Imperial Tobacco, argued "when a conspiracy causes harm in a province, the court in that province can assume jurisdiction over all conspirators, even if some of the conspirators do not have any connection with the province": para. 106. Specifically, the plaintiffs argued that there was indisputable evidence that the defendants' co-conspirators sold batteries in Ontario and the defendants were therefore jointly liable.
- [75] In the crucial paragraphs rejecting this argument, Perell J. said:
- [108] I agree that the Plaintiffs have strong authority that the tort of conspiracy is committed in the jurisdiction where the damage from the conspiracy was suffered. However, I do not agree that this line of authority supports the proposition that a domestic court has jurisdiction simpliciter over a foreign co-conspirator who does not have any causal connection with the damage from the conspiracy committed in the domestic court's territory.

[109] In my opinion, in the case at bar, unless the Plaintiffs show a good arguable case that NEC did an act or omission (which may be acts or omissions anywhere in the world that caused damage in Ontario), the court has no jurisdiction simpliciter over NEC. Put somewhat differently, the joint liability of the tort of conspiracy committed in Ontario presupposes that each co-conspirator does some [sic] an act or omission in furtherance of the conspiracy that causes damage to occur in Ontario.

[110] I wish to be [sic] make it clear that the Plaintiffs could or might have been able to show a good arguable case that NEC was a party to a conspiracy to fix the prices of lithium-ion batteries being sold in Ontario by some admissible evidence that NEC was or ought to have known that it was a participant in the marketplace for lithium-ion batteries in Ontario or by some admissible evidence that NEC had agreed not to participate in the marketplace in Ontario so that others could fix the prices for lithium-ion batteries.

[Emphasis added.]

[76] The key point from this analysis, in my view, is that a defendant does not commit the tort of conspiracy in a jurisdiction if they do not do anything which is causally connected to the harm allegedly suffered in that jurisdiction. This is a well-accepted requirement for liability under the tort of conspiracy: see XY, LLC at para. 46. In the unique context of the pleadings and rebuttal evidence in Shah, there was no sufficient link between the defendants' conduct and the harm suffered in Ontario, so the presumptive connecting factor of a tort committed in Ontario was absent. As the chambers judge observed, Shah is distinguishable from the present case because in Shah the defendants adduced evidence denying their participation in the conspiracy. This imposed on the plaintiffs the burden of showing that there was a good arguable case the jurisdictional facts could be proven. The plaintiffs failed to discharge that burden.

[77] In summary, Imperial Tobacco and Fairhurst plainly stand for the proposition, for the purpose of assessing territorial competence, that the tort of conspiracy is committed by a defendant in British Columbia when, on unchallenged pleadings or a good arguable case, that defendant participates in a conspiracy and the conspiracy causes harm in British Columbia. Shah, in a manner consistent with the basic principles of civil conspiracy, simply adds that the defendant's involvement in the conspiracy must be causally connected to the harm suffered in the jurisdiction. Shah also explains that a generalized pleading of conspiracy will not be enough when the defendant specifically, with evidence, denies involvement in that general conspiracy.

## Application

[78] As the foregoing discussion shows, the judge was correct in concluding that the undisputed elements of the plaintiff's pleadings alleged the appellants were liable in British Columbia for civil conspiracy and therefore, the pleadings triggered the presumption of a real and substantial connection.

- [79] The appellants say the pleadings do not allege that the appellants specifically --as opposed to all defendants generally--committed a tort in British Columbia. I cannot sustain this argument. The appellants are allegedly joint tortfeasors through their participation in a global conspiracy to fix prices, contrary to the Competition Act and the common law. The pleadings allege that the defendants, including the appellants, took active steps in furtherance of the conspiracy, including by allocating sales, territories, customers or markets, and that the conspiracy caused harm in British Columbia (para. 48(f) of the pleadings). In the absence of any evidence to the contrary, the pleadings allege a tort for which the appellants would be liable in British Columbia: see also *Stanway* at paras. 69-70.
- [80] The judge put the point well:
- [25] In my view, an agreement to divide up international markets may result in harm done by all the conspirators in all affected markets and this is the case for a party to the agreement in a market to which it does not ship or do business. This is so because the conspiracy may result in increased prices in all the affected markets. A party to such a conspiracy does not escape liability in a jurisdiction in which it refrained doing business because it was not one of the markets allocated to it in the agreement. As I said above, the notice of civil claim alleges that the agreement resulted in lower competition and artificially higher prices for vehicles shipped to British Columbia by any of the defendants.
- [81] In a related argument, the appellants say the plaintiff is required to plead particularized material facts establishing jurisdiction over each named defendant. This argument is contrary to established law on conspiracy pleadings. The chambers judge answered this argument correctly by quoting the following passage from *Fairhurst* where, after acknowledging the lack of specificity of the conspiracy pleadings, the Court said:
- [27] The only task for the court below, however, was to consider whether territorial jurisdiction was made out. Section 10 of the CJPTA does not require that each individual defendant's conduct be particularized in the pleading; it refers only to the connection between British Columbia and "the facts on which [the] proceeding is based".
- [Underline emphasis in original; italic emphasis added.]
- [82] Similarly, *Newbury J.A.* also said the following, referring to *Vitapharm*:
- [33] As for the defendants' argument in *Vitapharm* that the plaintiffs had not sufficiently particularized the role of each defendant in the alleged conspiracies, the Court observed that by their nature, conspiracies and conspirators are secretive and that it was "far too early to put the plaintiffs to the task of unravelling the apparently complex corporate arrangements and of proving their case against specific entities", citing *Nutreco Canada Inc. v. Hoffmann* 2001 BCSC 1146.

- [34] In my view, it is also too early in this case to put the plaintiff to the task of "unravelling" the defendants' respective roles, if any, in the alleged conspiracy. I would not accede to the defendants' objections regarding the pleadings generally.
- [83] Moreover, as the respondent Darren Ewert submits, the appellants' argument ignores the appellants' own refusal to answer the written requests and questions put to their affiants in cross-examination about the alleged conspiracy and that the appellants did not adduce evidence challenging the existence of that conspiracy, their participation in it, or the harm to class members in British Columbia. The appellants chose not to challenge the critical jurisdictional facts relating to the alleged tort committed in British Columbia. I repeat that the judge accurately said this feature distinguished this case from *Shah*, on which the appellants relied. Further, the appellants had amended their jurisdictional application to delete their denial of conspiratorial conduct.
- [84] The appellants say the judge's approach to pleadings allows a plaintiff to establish jurisdiction by pleading a "ready-mix formula of 'multiple defendants + conspiracy + harm'", which would improperly create a reverse onus on a foreign defendant, undermining the purpose of the presumption of jurisdiction under the CJPTA. But this argument overlooks a defendant's opportunity to challenge the pleadings on which the presumptive connecting factor is based and to rebut the presumption of real and substantial connection triggered. As in *Shah*, if the defendant denies its alleged involvement in the conspiracy with compelling evidence, it may well be incumbent on the plaintiff to adduce particularized evidence in order to convince the chambers judge there is a good arguable case that the pleadings with respect to that specific defendant are true.
- [85] Contrary to the appellants' argument, this does not place an onus on defendants to contest the merits on a jurisdictional challenge. It simply puts an onus on defendants, to the extent they intend to argue that pleaded facts are false, to do so with relevant evidence.

Issue 3 - Did the judge err by failing to conclude that the appellants had rebutted the presumption of real and substantial connection once the plaintiff had established the connecting factor?

- [86] The appellants argue, citing the standard from *Van Breda* at para. 95, that the "presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum". The core of their argument on this point is that "in contrast to the facts of *Imperial Tobacco*, *Fairhurst* and other cases *Höegh* did not offer or sell a product or service that entered the channels of trade in B.C."
- [87] I accept that in *Fairhurst*, at the Supreme Court level, the fact the defendants' rough diamonds ultimately made their way through the supply chain and into the British Columbia gem-grade diamond market may have been material to the conclusion that a real and substantial connection was established: see *Fairhurst S.C.* at para. 38. However, that fact does not appear to have been central to this Court's judgment on appeal, where jurisdiction was rooted in the defendants' participation in a conspiracy that caused economic harm in British Columbia.

- [88] In any event, the appellants also fail to distinguish Imperial Tobacco. The basis for the real and substantial connection in that case was that the foreign defendants who did not manufacture anything that was sold in British Columbia--through the normal channels of trade or otherwise--were jointly liable as parties to the conspiracy.
- [89] The appellants' reliance on Moran is similarly unavailing. It is true in Moran that jurisdiction over a claim of negligent manufacturing rested on the defendant selling the product in the jurisdiction through the normal channels of trade. It does not follow that the jurisdiction over an international price-fixing conspiracy claim against a defendant lies only in the territory in which that defendant engages in business. The tort of negligent manufacturing has as its situs the place where harm occurs, and harm can only occur where the defendant sells its negligently manufactured goods. The tort of conspiracy likewise has as its situs the place where harm occurs, but harm can occur in markets manipulated or affected by the conspiracy even where the specific defendant member of the conspiracy does not operate in that market. The conspiracy alleged is an economic tort that takes place where the economic damage is suffered.
- [90] In short, the appellants' argument distills to the proposition that the connecting factor of "a tort committed in British Columbia" will always be rebutted if the tort is committed in British Columbia in some way that does not involve the defendant doing business in British Columbia or providing its goods and services in the British Columbia market. However, that is not a requirement of the mandatory presumption. Section 10(g) of the CJPTA is a connecting factor that operates independently from s. 10(h) ("concerns a business carried on in British Columbia").
- [91] In Rothmans Inc., the Ontario Court of Appeal observed that Van Breda "underscored the difficulty in rebutting the presumption where the connecting factor involves a tort committed in the jurisdiction": Rothmans Inc. at para. 50. In Van Breda, Justice LeBel said:
- [96] [W]here the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.
- [92] While Rothmans Inc. and Van Breda were not decided under the CJPTA, these observations are equally applicable here. In this case, there was no argument whatsoever that only a minor element of the tort of conspiracy was committed in British Columbia, or that the tort committed in British Columbia in this case was otherwise of a kind not meaningfully connected to the province. The appellants' argument was exclusively that they do not carry on business in British Columbia, and they relied on the same evidence to rebut the presumption as they adduced to challenge the pleaded facts. In the absence of a compelling reason to depart from the mandatory presumption in this case, the judge was bound by it, and so are we. I would not interfere with his decision.

## Conclusion

[93] For the reasons above, I conclude the claim as pleaded is presumed to have a real and substantial connection with British Columbia under s. 10(g) of the CJPTA. This meets the test for territorial competence required by s. 3(e). The appellants essentially repeat the arguments they made before the chambers judge. I discern no error in the order he made. It is unnecessary to address whether there is a connecting factor under s. 10(h) of the CJPTA. I would dismiss the appeal.

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice Fisher"

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