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Contesting Jurisdiction in British Columbia: A Primer

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The purpose of this article is to provide a brief primer on central issues when deciding to contest jurisdiction in British Columbia, along with some suggested best practices in relation to the same.

There are many different reasons why a defendant may want to dispute the jurisdiction where an action is brought. Some considerations may be strategic, and others may be practical. The Court in another jurisdiction, for example, may be more generous with their interpretation of a central legal principle to the action, or several of your key witnesses may be located elsewhere with limited resources/impaired ability to travel.

Whatever the reason for contesting the jurisdiction, the first step is to ensure that you do not accidentally attorn (submit to the jurisdiction) by engaging with or defending against the substantive claims brought. The second step is to assess the territorial competence of the Court in British Columbia, having regard to agreements between the parties, where the parties reside, and whether a real and substantial connection exists between British Columbia and the facts on which the proceeding is based. The third step is to determine whether another jurisdiction has a real and substantial connection and is overall favourable.

Avoiding Attornment

Contesting the jurisdiction where an action is brought must be done at the very beginning of litigation prior to any other steps being taken. If a defendant submits or attorns to a jurisdiction, they will be barred from later contesting the same.

In British Columbia, the defendant must file a Jurisdictional Response to contest jurisdiction at the outset of litigation. A Jurisdictional Response protects that party against default, while also not attorning to the jurisdiction. A Jurisdictional Response is distinct from a Response to Civil Claim in that it does not contemplate or respond to the substantive allegations made by the plaintiff, but instead focuses exclusively on the matter of jurisdiction.

Once a Jurisdictional Response is a filed, the defendant may formally contest the jurisdiction by bringing an application to strike or dismiss the plaintiff's action pursuant to Rule 21-8(1) of the *Supreme Court Civil Rules*, and/or have the matter transferred to another preferred jurisdictions pursuant to section 13(2) of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 ("*CJPTA*").

Rule 21-8 provides:

> (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,
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> > (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,
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> > (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
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> (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.

Section 13 of the *CJPTA* states:

> 13 (1) The Supreme Court, in accordance with this Part, may
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> > (a) transfer a proceeding to a court outside British Columbia, or
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> > (b) accept a transfer of a proceeding from a court outside British Columbia.
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> (2) A power given under this Part to the Supreme Court to transfer a proceeding to a court outside British Columbia includes the power to transfer part of the proceeding to that court.

As discussed below, it is not open to a Court to decline jurisdiction unless a defendant disputes its territorial competence or invokes *forum non conveniens* (*Club Resorts Ltd v Van Breda*, 2012 SCC 17 ("*Van Breda*") at para 102). Said another way, absent an objection, the Court must assume jurisdiction. Doing so preserves the security, stability, and efficiency in the design and implementation of a conflict of laws system (*Van Breda*, *supra* at paras 73, 80, & 94).

Jurisdiction Simpliciter: Territorial Competence

Jurisdiction simpliciter refers to a court's territorial competence to hear a matter. Both the *CJPTA* and the common law govern the determination of this question, but the starting point of the analysis is the *CJPTA*.

Pursuant to section 3 of the *CJPTA*, a BC Court has territorial competence (jurisdiction) 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.

If subsections (a)-(d) do not apply, subsection (e) is engaged. This subsection provides that the Court will have territorial competence in a proceeding if there is a real and substantial connection between the province and the facts of the case. The scope of section 3(e) relative to the common law analysis was discussed in *Roed v Schuffler*, 2009 BCSC 731 ("***Roed***"):

> [31] The real and substantial connection test was first articulated by the Supreme Court of Canada in Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077. In Morguard the court did not elaborate on the application of the test but **addressed its underlying intention**. As La Forest J. says at para. 51:
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> > It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having **little or no connection** with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a "power theory" or a single situs for torts or contracts for the proper exercise of jurisdiction.
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> …
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> [34] In my view, the language of s. 3(e) of the Act is equal to or broader than the common law test of real and substantial connection. **The real and substantial connection is not limited to the defendant or the subject matter of the litigation. Instead, the connection with British Columbia may be based upon "the facts on which the proceeding against the person is based**.

Section 10 of the *CJPTA* provides examples of circumstances that will give rise to a presumptive 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:**
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> > (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,
> > (b) concerns the administration of the estate of a deceased person in relation to
> > > (i) immovable property in British Columbia of the deceased person, or
> > > (ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in British Columbia,

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
    (i) property in British Columbia that is immovable or movable property, or
    (ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in British Columbia,
(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
    (i) the trust assets include property in British Columbia that is immovable or movable property and the relief claimed is only as to that property;
    (ii) that trustee is ordinarily resident in British Columbia;
    (iii) the administration of the trust is principally carried on in British Columbia;
    (iv) by the express terms of a trust document, the trust is governed by the law of British Columbia,
(e) concerns contractual obligations, and
    (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
    (ii) by its express terms, the contract is governed by the law of British Columbia, or
    (iii) the contract
        (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
        (B) resulted from a solicitation of business in British Columbia by or on behalf of the seller,
(f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
(g) concerns a tort committed in British Columbia,
(h) concerns a business carried on in British Columbia,
(i) is a claim for an injunction ordering a party to do or refrain from doing anything
    (i) in British Columbia, or
    (ii) in relation to property in British Columbia that is immovable or movable property,
(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in British Columbia,
(k) is for enforcement of a judgment of a court made in or outside British Columbia or an arbitral award made in or outside British Columbia, or
(l) is for the recovery of taxes or other indebtedness and is brought by the government of British Columbia or by a local authority in British Columbia.

It is very important to note that this provision is **not** exhaustive and is, in fact, expressly **non-exhaustive**. In arguing a novel real and substantial connection, the governing principles are order and fairness (*Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at paras 32-37).One interesting example of a case contemplating the broad interpretation of section 10 and what qualifies as a real and substantial connection is *Olney v Rainville* 2009 BCCA 380 ("*Olney*").

Olney, *supra* involved a mother appealing a decision by the Supreme Court of British Columbia dismissing her petition for a declaration that her present husband was the father of her child on the basis that the Court had no territorial jurisdiction over the matter (at paras 13). The respondent was the appellant's first husband and was married to the appellant at the time of the child's birth. The respondent had never resided in British Columbia and was domiciled in Quebec. The appellant mother

had lived abroad since 1990 but was domiciled in British Columbia. The child was born in Geneva, Switzerland (at para 9). The appellant lived in France at the time of the hearing, although she had never abandoned her intention of returning to British Columbia permanently. The appellant and respondent separated in 2002 and the appellant commenced divorce proceedings in France. She was married again in 2005. At issue was whether the BC Court lacked territorial jurisdiction, and if so, whether the Court ought to decline to exercise it as it would be preferable for the proceeding to be brought in the province of Quebec.

The chambers judge in *Olney*, *supra* found that there was little connection between the facts of the case and British Columbia, beyond the appellant being domiciled, which he found to be inconclusive to the question of territorial competence (at para 3). The BC Court of Appeal concluded instead that the mere possibility that the case was to be arguably governed by British Columbia law was a sufficient to find there was a real and substantial connection between the facts of the case and the province of British Columbia (at paras 32-34).

Elaborating on the issue of territorial competence and section 10 of the *Transfer Act*, Mr. Justice Groberman for the Court of Appeal in *Olney, supra* held:

> [26] While none of these presumptions is directly applicable on this appeal, they are of some assistance in determining the nature of those connections that are seen as "real and substantial". In particular, the broad range of the presumptions indicates that in some circumstances, British Columbia courts will have territorial competence notwithstanding that the antecedent facts of a case are not closely connected with the province. In particular, the fact that British Columbia law is applicable to a case may be a basis for territorial jurisdiction, as may the fact that the consequences of a decision will be closely connected to the province.
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> …
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> [34] The fact that this case is, arguably, governed by British Columbia law is, in my view, a real and substantial connection between the facts on which the case is based and British Columbia. While the case for territorial competence in this matter is not overwhelming, I am satisfied that the case does fall within s. 3(e) of the CJPTA.

Contesting the Presumption and/or Arguing Another Forum is Better.

A defendant may still seek the dismissal/stay of an action where the Court finds that there is a presumptive real and substantial connection between the province and the proceeding by rebutting the presumption. A defendant may also invoke the *forum non conveniens* doctrine. It is important to recognize that the first argument goes to the *existence* of jurisdiction, whereas the second goes to the *exercise* of jurisdiction.

Rebutting the Presumption

The presumption of territorial competence on the basis of a real and substantial connection may be rebutted. A defendant may argue that the presumptive connecting factor relied on does not actually point to any **real** relationship between the subject matter of the litigation and the forum, or that the relationship is sufficiently weak in light of the surrounding circumstances not to attract a real and substantial connection (*Van Breda, supra* at paras 80 & 95).

One example of such a rebuttal may be where the real and substantial connection is based exclusively on a defendant carrying on business in British Columbia. The sufficiency of a defendant "carrying on business" is dependent on the unique facts of each case. While a party may have some presence in the jurisdiction in relation to its business, if the connection is weak, a defendant may successfully rebut the presumption created by the *CJPTA*.

Forum Non Conveniens

The *forum non conveniens* doctrine comes into play when jurisdiction is established (and the presumption is not rebutted), but the defendant says the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff in favour of a different forum that also has a real and substantial connection and is overall favourable (preferred and clearly more appropriate). As set out in *Van Breda, supra*:

> [103] If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

The test for whether another forum has a real and substantial connection is the same as set out in the section above. With respect to the favourability of the forum, the court will consider the common law test and section 11 of the *CJPTA* (*Van Breda* at para 103).

Contemplating *forum non conveniens*, Mr. Justice Groberman for the Court of Appeal in *Olney, supra* held:

> [42] … In addressing a *forum non conveniens* argument, the court is not involved in a fine weighing of advantages and disadvantages; rather, it is determining whether there is another jurisdiction that enjoys **a significant advantage** over that in which the litigation was commenced.

Section 11of the *CJPTA* states:

> 11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
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> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
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> > (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,
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> > (b) the law to be applied to issues in the proceeding,
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> > (c) the desirability of avoiding multiplicity of legal proceedings,
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> > (d) the desirability of avoiding conflicting decisions in different courts,
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> > (e) the enforcement of an eventual judgment, and
> >
> > (f) the fair and efficient working of the Canadian legal system as a whole. (this applies only to inter-provincial disputes)

If both jurisdictions are equally suitable, whoever filed first in either forum will be the forum *(Westec Aerospace Inc. v. Raytheon Aircraft Company*, 2001 SCC 26). Fairness and efficiency are the main objects of *forum non conveniens*.

Best Practices

Having regard to the foregoing, the following are suggested best practices when considering whether to contest jurisdiction in British Columbia:

1) Before filing a Response to Civil Claim consider whether the BC Court has territorial competence over the proceeding and/or whether there is another jurisdiction that may be better.

2) Confirm that no agreements have been entered into attorning to the jurisdiction, or any other steps taken that may amount to attornment.

3) Consider if your client is ordinarily a resident in British Columbia at the time of the commencement of the proceeding.

4) Consider the viability of your position in contesting the jurisdiction. Contesting jurisdiction can be time consuming and expensive, and may expose your client to costs consequences if unsuccessful.

5) If (a)-(d) of section 3 of the *CJPTA* do not apply, turn to section 10 to determine whether any of the presumptive factors may apply. If not, is there an argument for a novel connection? If so, how strong is the connection? If it is weak, the presumption may be rebutted.

6) When invoking *forum non conveniens*, consider what other jurisdictions will have territorial competence, and the reasons why they might be overall more favourable. Turn your mind to the factors set out in section 11 of the *CJPTA*, and collect and preserve evidence in support of your position.

The author of this article, Bronwen Black, recently successfully represented her client in a jurisdictional dispute: SCP Distributors Canada, Inc. v Silver Pacific Investments Inc., 2020 BCSC 1573.

For more information, please contact Bronwen Black or Michael D. Silva.