

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20090225
Docket: S084256
Registry: Vancouver

Between:

Xiao Ying Jiang, 1300032 Alberta Inc., and 0777711 B.C. Ltd.

Plaintiffs

And

**Dave Mann, Narinder Kaur aka Narinder Mann and as Narinder Kaur Mann,
Kau Chan Yong, Henry Jung Yong, Gurjtej Samra, Redfort Alberta Inc.,
1264060 Alberta Ltd., Kanwal Capital Holdings Inc., Bansuri Enterprises Ltd.,
Singh & Partners LLP, Taranjeet S. Aujla, Yong's Holdings Ltd.,
Invention Dimension Consulting Inc., Awara Ventures Ltd.,
and Kanwal Investments Ltd.**

Defendants

And:

Hin Chung Chong

Third Party

Before: The Honourable Mr. Justice Sigurdson

Oral Reasons for Judgment

February 25, 2009

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Date and Place of Hearing:

February 2 & 9, 2009
Vancouver, B.C.

INTRODUCTION

[1] This is an application by the defendants for an order that the within action be stayed on the ground that this court has no jurisdiction over some or all of the defendants; or, in the alternative, that this court decline jurisdiction on the ground that Alberta, where a nearly identical lawsuit (with two additional defendants) has been commenced is the more appropriate forum on the basis of *forum non-conveniens*.

[2] As Sharpe J.A. said in ***Muscutt v. Courcelles*** (2002), 60 O.R. (3d) 20 at para. 43, 213 D.L.R. (4th) 577 (C.A.):

In "*Morguard v. De Savoye: Subsequent Developments*" (1993), 22 C.B.L.J. 29 at 33, Professor Elizabeth Edinger explains that "[j]urisdictional decisions are comprised of two elements: rules and discretion". While the real and substantial connection test is a legal rule, the *forum non conveniens* test is discretionary. The real and substantial connection test involves a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general against defendants in general given the sort of relationship between the case, the parties and the forum. By contrast, the *forum non conveniens* test is a discretionary test that focuses upon the particular facts of the parties and the case. The question is whether the forum should assert jurisdiction at the suit of this particular plaintiff against this particular defendant. ...

[3] The action in British Columbia is essentially in fraudulent misrepresentation and for unjust enrichment, and is a claim by Ms. Jiang, a B.C. resident, and two companies, 1300032 Alberta Inc. ("130 Alberta") and 0777711 B.C. Ltd. ("077 B.C."), against what are referred to as the "Mann defendants" and the "Yong defendants". The action concerns certain real estate properties near Airdrie, Alberta, and, in the case of the second transaction, Rocky View, Alberta.

[4] The Mann defendants include Dave Mann and his wife Narinder Mann, who live in Surrey. Mr. Mann was, at all material times, the director and officer of 1264060 Alberta Ltd. ("126 Alberta") and also of the defendant Kanwal Capital Holdings Inc. ("Kanwal Capital"). Narinder Mann is an officer of Redfort Alberta Inc. ("Redfort") and the defendant Bansuri Enterprises Ltd. ("Bansuri").

[5] The Yong defendants include Kau Chan Yong, who lives in Surrey, and his son, Henry Jung Yong, who resides in Vancouver. Henry Jung Yong was, as well, a director of 126 Alberta.

[6] The defendants, Singh & Partners LLP, are a law partnership in Calgary, and Taranjeet S. Aujla was an associate or partner of that firm. The claim against them is for professional negligence.

[7] The other defendants are Yong's Holdings, Invention Dimension Consulting, and Awara Ventures Ltd., all B.C. companies. The defendant, Gurtej Samra, lives in Calgary, and was at all material times an officer and director of Kanwal Investments, which is an Alberta company.

[8] The allegation, in short, is that from December 2006 to February 2007, the Mann defendants, the Yong defendants, Mr. Samra, Kanwal Investments, 126 Alberta, Redfort, and Kanwal Capital (collectively, "the first transaction defendants") represented in writing and orally that they had purchased the first transaction lands for \$10 million and offered a half-interest for \$6.23 million to the plaintiffs Jiang and 130 Alberta. The plaintiffs say it was a fraudulent representation because, among other things, Kanwal Investments had not offered to purchase the lands from the

owners (Habberfield Cattle Company) for \$10 million, but had instead entered into an agreement to purchase in January 2006 for \$6.615 million. The claim with respect to the first transaction was that the first transaction defendants were in a fiduciary relationship with Jiang and 130 Alberta, and that the actions of the defendants were fraudulent.

[9] The plaintiffs assert in the affidavit material and in argument that they were introduced to the defendants by Henry Chong, a B.C. resident, who had numerous meetings with the plaintiffs and is alleged to be a conduit or, it appears, the agent for the defendants. The defendants take quite a different position. They say that Chong was the plaintiffs' agent, not their agent, and all communications to him were truthful and, if there was a misrepresentation, it was Mr. Chong, not them, who is responsible and the Mann defendants have taken third party proceedings in British Columbia against him. Obviously, Mr. Chong will be a significant witness in this litigation.

[10] The allegation against the lawyers Singh and Aujla was that they acted both for the plaintiffs Jiang and 130 Alberta as well as the first transaction defendants throughout the transaction. The plaintiffs submit that the lawyers owed a duty of care, as well as a fiduciary duty to them, and breached it by failing to advise the plaintiffs that they should get independent legal advice, failing to advise of the misrepresentations, and failing to make adequate inquiries or exercise due diligence on behalf of the plaintiffs. That the lawyers acted for the plaintiffs is disputed by the defendants.

[11] In connection with the so-called second transaction, the allegation is again that between December 2006 and January 2007, the Mann defendants, the Yong defendants, and Samra, Kanwal Investments, Bansuri, Awara, Yong's Holdings, and Invention Dimension (collectively, "the second transaction defendants") represented that Kanwal Investments had entered into a contract with Bansuri for the sale of the second transaction lands for \$5.76 million, that Bansuri had assigned its interest in this transaction to the Isle of Mann Langdon Estates Ltd., and that the plaintiff 077 B.C. could acquire a fifty percent interest by contributing the sum of \$2.88 million to acquire a half interest in the Kanwal/Bansuri transaction. The plaintiffs Jiang and 077 B.C. say that they relied on this and advanced \$2.88 million, but that the Kanwal/Bansuri transaction was never entered into and the second transaction defendants contributed an amount significantly less than \$2.88 million to purchase an interest in the second transaction lands.

[12] Again, the plaintiffs sue for breach of duty to disclose, breach of fiduciary duty, and fraud or fraudulent misrepresentation. Against the lawyers, Singh and Aujla, it is alleged they acted for the plaintiffs Jiang and 077 B.C. as well as the second transaction defendants, and that they owed a fiduciary duty and a duty of care which they breached by failing to advise the plaintiffs to get independent legal advice, or advise of the misrepresentations as aforesaid.

[13] The plaintiffs claim that, by reason of the misrepresentations in connection with the first transaction and the second transaction, all profits or financial benefits earned by the defendants are held on an express or constructive trust. The plaintiffs say they are entitled to equitable remedies of constructive trust and tracing, and

assert a claim to an injunction, tracing, or an accounting of the financial benefits from the transactions, a declaration for a claim of unjust enrichment, as well as damages. In support of those claims, they sought a certificate of pending litigation against the titles to the Mann property at 13761 – 55A Avenue, Surrey, and the Yong property at 4207 Doncaster Way, Vancouver.

[14] The British Columbia action was started on June 13, 2008. The Alberta action, with the addition of two additional defendants named Singh and Chhoker, was commenced on June 25, 2008. That day, the plaintiffs in B.C. applied for a ***Mareva*** injunction and, in partial reliance on that injunction, the plaintiffs in Alberta on June 26, 2008 obtained a certificate of pending litigation or *lis pendens* against the Habberfield lands and the remaining Dugdale lands (those are the subject lands). The ***Mareva*** injunction in B.C. was set aside by consent, except for the claims against the plaintiffs for damages caused by that injunction.

[15] In B.C., pleadings have been exchanged. The plaintiffs, the Mann defendants, and the Yong defendants have delivered lists of documents, and the plaintiffs have examined for discovery certain of the defendants, pursuant to an agreement that the discoveries are deemed to be conducted in the B.C. and the Alberta proceedings, and are without prejudice to the defendants' position that B.C. does not have jurisdiction or should decline jurisdiction. In Alberta, pleadings have been exchanged. The Mann defendants, the Yong defendants, and Aujla have delivered an affidavit of documents. My understanding is the plaintiffs have not delivered an affidavit of documents in Alberta yet.

[16] All of the defendants in B.C. argued that B.C. has no jurisdiction, or alternatively, that jurisdiction should be declined so that the claim could proceed in Alberta. Mr. Yong, who had been third-partied by the Mann defendants, apparently takes the position in his affidavit that the litigation should be heard in British Columbia where he lives.

TERRITORIAL COMPETENCE OR JURISDICTION *SIMPLICITER* AND *FORUM NON-CONVENIENS*

1. Jurisdiction *Simpliciter*

[17] I will deal first with the issue of territorial competence, formerly called jurisdiction *simpliciter*.

[18] The ***Court Jurisdiction and Proceedings Transfer Act***, S.B.C. 2003, c. 28 (***CJPTA***) came into force in May 2006.

[19] Part 2 of the statute deals with the territorial competence of the courts in British Columbia and it provides in s. 3 as follows:

A court has territorial competence 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.

[20] In terms of the ordinary residence of corporations, the **CJPTA** provides at s. 7:

A corporation is ordinarily resident in British Columbia, for the purposes of this Part, only if

- (a) the corporation has or is required by law to have a registered office in British Columbia,
- (b) pursuant to law, it
 - (i) has registered an address in British Columbia at which process may be served generally, or
 - (ii) has nominated an agent in British Columbia upon whom process may be served generally,
- (c) it has a place of business in British Columbia, or
- (d) its central management is exercised in British Columbia.

[21] Section 10 deals with the concept of real and substantial connection referred to in s. 3(e), and it reads:

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

...

- (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, ...

[22] The defendants challenge the territorial jurisdiction of this court. The plaintiffs say that the defendants have attorned to the jurisdiction, but it became clear during submissions that the defendant lawyers have not attorned. Nevertheless, the plaintiffs say that this court has territorial jurisdiction because there is a real and substantial connection between British Columbia and the alleged causes of action and that, as well, all of the defendants except the lawyers have attorned to this court's jurisdiction: see *CJPTA*, s. 3(b). The *Rules of Court* dealing with the question of applying to stay a proceeding on the ground that the court does not have jurisdiction or that the court should decline jurisdiction appear at Rules 14(6) to 14(6.4). I find that the Mann and Yong defendants have attorned to this jurisdiction. They did not, as required by the *Rules of Court*, file a motion or a pleading challenging jurisdiction. However, the Alberta lawyers did file a pleading challenging the jurisdiction of this court and they may challenge the jurisdiction of this court, on this application.

[23] In *Stanway v. Wyeth Canada Inc.*, 2008 BCSC 847, Gropper J. noted that although the *CJPTA* codifies the law regarding jurisdiction, it is crucial to understand the common law because jurisdiction *simpliciter* depends on the existence of the common law concept of real and substantial connection. The parties agree that

jurisdiction *simpliciter* is a threshold issue. Gropper J. indicated in **Stanway** that s. 10 of the **CJPTA** contains a list of circumstances in which it is presumed that there is a real and substantial connection.

[24] Both counsel referred to the comments of Gropper J. in **Stanway**. She relied on the leading case of **Muscutt v. Courcelles** on the question of determining the issue of whether there is a real and substantial connection between B.C. and the facts on which the proceeding against that person is based:

[79] Section 10 of the **CJPTA** contains a list of circumstances in which it is presumed that there is a real and substantial connection. The list includes proceedings concerning a tort committed in British Columbia and proceedings concerning a business carried on in British Columbia (s. 10(g) and (h)).

[80] As stated by Sharpe J.A. in **Muscutt v. Courcelles** (2002), 60 O.R. (3d) 20 (C.A.) at ¶75:

... it is not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important.

[81] At ¶77 to 102 in **Muscutt**, Sharpe J.A. describes eight factors which are relevant in assessing whether the court should assume jurisdiction:

1. The connection between the forum and the plaintiff's claim.

The forum has an interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors.

...

2. The connection between the forum and the defendant

If the defendant has done anything within the jurisdiction that bears upon the claim advanced by the plaintiff, the case for assuming jurisdiction is strengthened.

...

3. Unfairness to the defendant in assuming jurisdiction

... Some activities, by their very nature, involve a sufficient risk of harm to extra-provincial parties that any unfairness in assuming jurisdiction is mitigated or eliminated.

...

4. Unfairness to the plaintiff in not assuming jurisdiction

[88] The principles of order and fairness should be considered in relation to the plaintiff as well as the defendant.

...

5. The involvement of other parties to the suit

... The twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations.

...

6. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis

... Every time a court assumes jurisdiction in favour of a domestic plaintiff, the court establishes a standard that will be used to force domestic defendants who are sued elsewhere to attorn to the jurisdiction of the foreign court or face enforcement of a default judgment against them.

...

7. Whether the case is interprovincial or international in nature

... [T]he assumption of jurisdiction is more easily justified in interprovincial cases than in international cases.

...

8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

... One aspect of comity is that in fashioning jurisdictional rules, courts should consider the standards of jurisdiction, recognition and enforcement that prevail elsewhere.

The Connection Between the Forum and the Plaintiffs' Claim

[25] The plaintiffs' core claim appears to be in fraudulent misrepresentation.

There is evidence filed on this application that the representations alleged to be misrepresentations, or at least some of them, were made in B.C. The evidence that deals with the discussions in B.C. alleged to be the misrepresentations, or include them, involved Henry Chong. The plaintiffs say that those misrepresentations are misrepresentations by the defendants, Chong being a conduit or an agent for the defendants. The defendants take quite a difference position as to Mr. Chong. They say he acted for the plaintiffs, not them. The role and evidence of Mr. Chong, it appears, will be key.

[26] Although the defendants argue that there is only a tenuous connection to B.C. in terms of the claim (i.e. that the joint venture agreement with respect to the Dugdale lands is expressly governed by B.C. law), there is evidence that much of the discussion and communication alleged to constitute the misrepresentations (i.e. faxes of the executed Habberfield/Kanwal agreement), were communicated or took place in B.C. That was summarized in a chart in the plaintiffs' argument.

[27] The plaintiffs' central or core claims are against defendants over whom the court has territorial jurisdiction and they have attorned. The claim against the defendant lawyers is related in the sense that, the plaintiffs argue, the lawyers acted for them, which is denied, and failed to warn them about the alleged

misrepresentations. The land which is the subject matter of the alleged misrepresentations and the lawyers are in Alberta. In terms of the connection between the forum and the plaintiffs' claims, the defendants point out that the injunction, the tracing remedy, and the declaration of interest all relate to an interest that they assert in and are seeking to prove in connection with Alberta lands.

The Connection Between the Forum and the Defendants

[28] Although the other defendants are resident or connected to B.C., the defendant lawyers are not. (The plaintiffs, I note, say that Mr. Mann has built over 700 homes in B.C., and the Yongs are key executives in companies, having had many projects in Surrey and Cloverdale between 1997 and 2008.) The defendants have third-partied Mr. Chong who has a close connection to B.C. as he is a resident here and the discussions that are said to be important appear to have taken place largely here. However, the defendant lawyers have no direct connection with this forum as they reside in Alberta and practice law there.

[29] Part of the question of the connection of the forum to the defendants is where the alleged negligence of the defendant lawyers took place. In this inquiry, questions arise under s. 10 such as whether the alleged tort was committed in British Columbia. The evidence of the involvement of the defendant lawyers is sparse and it essentially appears in the assertions and the denials in the pleadings.

[30] Both parties referred me to MacKenzie J.'s decision in *Roeder v. Chamberlain*, 2008 BCSC 624, where the defendant contended that there was no real and substantial connection to the Province of B.C. because the lawyer was to

perform work under his retainer agreement in Alberta. Madam Justice MacKenzie said, at paras. 38-39:

[38] I agree with the plaintiff that similar reasoning was applied in *Canadian Commercial Bank v. Carpenter* (1989), 62 D.L.R. (4th) 734 (B.C.C.A.) and that decision supports his position. In *Canadian Commercial Bank*, the defendants subscribed for units in two limited partnerships formed in Alberta to purchase oil rigs for lease or operation in Alberta or the United States. In the course of subscribing for the units, the defendants gave promissory notes to the general partner, who assigned them to the plaintiff bank. On the failing of the limited partnership, the plaintiff claimed against the defendants as a holder in due course. The defendants commenced third party proceedings on the basis that the notes were conditional, based on legal advice given by Alberta lawyers. The Alberta lawyers contested jurisdiction. The court set aside the third party notices and declined jurisdiction on the basis that British Columbia was not the appropriate forum.

[39] However, on appeal, the court found that since the legal advice in question was communicated by telephone by Alberta lawyers to persons in British Columbia, the negligent act was not complete and therefore not committed until the advice had been received in British Columbia. The court said at p. 741:

... it seems clear that the tort of misrepresentation or negligent advice, which is what is complained of here, is only committed and complete when, and where, the misrepresentation or negligent advice is received. It is true that Mah Toy [the Alberta lawyer] was in Calgary when he gave the advice complained of, but that advice was received by and on behalf of the appellants in this jurisdiction. Clearly, by this standard, the tort was committed in British Columbia.

[31] Madam Justice MacKenzie commented at para. 42:

[42] In *Moran*, the Supreme Court of Canada considered how a court ought to determine where a tort has been committed, and applied the following test at p. 408-9:

Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the

place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers' case* [*Distillers Co. (Bio-chemicals) Ltd. v. Thompson*, [1971] A.C. 458] and again in the *Cordova case* [*Cordova Land Co. Ltd. v. Victor Bros. Inc.*, [1966] 1 W.L.R. 793] a real and substantial connection test was hinted at. Cheshire, 8th ed., 1970, p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties.

The court went on to find that this test recognizes the interest a state has in injuries suffered by persons in its territory, and "recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered". This test was cited by our Court of Appeal in *UniNet* where the court noted *Moran* advocated a somewhat more flexible approach to determining jurisdiction.

[32] Madam Justice MacKenzie concluded, at para. 43:

[43] I find that there is a real and substantial connection between the facts this proceeding is based on and British Columbia, and that the alleged tort was committed in British Columbia.

[33] However, Ms. Engel for Singh & Partners referred me to the decision in *Foran Mining Corporation v. Theodoropoulos*, 2006 SKQB 376, aff'd 2007 SKCA 12, which was discussed by MacKenzie J. in *Roeder*. In that decision, the Saskatchewan trial and appellate court found there was no connection with Saskatchewan because, there, the lawyer was retained to provide legal services regarding the acquisition of property in Saskatchewan and all legal services were provided in B.C. Foran was not registered to do business in the Province of

Saskatchewan and was a British Columbia corporation with its head office in the Province of Manitoba and retained solicitors who were located in British Columbia.

[34] Thus, the appellate court found the trial judge was not in error in concluding that at the time the cause of action arose, neither party to the action had any connection whatsoever with Saskatchewan. The statement of claim set out numerous instances of alleged failures which if proven would have taken place in British Columbia where the defendants were located at the time and not in Saskatchewan. As Mackenzie J. said, at para. 72 of her reasons in *Roeder*.

The Saskatchewan Court of Appeal upheld the decision, finding at para. 5:

On a close analysis it is clear that at the relevant time, that is when the respondents were retained to do the work, Foran was not registered to do business in the Province of Saskatchewan, was a British Columbia corporation with its head office in the Province of Manitoba and retained solicitors who were located in the Province of British Columbia.

Thus, the court found that the trial judge was not in error in concluding that at the time the cause of action arose, neither party to the action had “any connection whatsoever” with Saskatchewan.

[35] Madam Justice MacKenzie, in the case before her, held that the wrongful act had a connection to British Columbia while the wrongful act in *Foran* was found to be unconnected to Saskatchewan.

[36] Now, turning back to the case at bar, the alleged clients, the plaintiffs, were in B.C. and were allegedly negligently advised by the defendant lawyers and there is, I think, a sufficient connection to B.C. In the circumstances, on the material before me, I conclude there appears to be a sufficient basis to find that it is arguable that

the alleged negligence occurred in B.C. It was suggested that there should be a distinction between negligent advice and the failure to provide advice, but I do not think that is determinative. Nevertheless, I will proceed in my analysis on the basis that I am wrong in concluding that there is an arguable case that s. 10(g) is established, i.e. that the proceeding concerns a tort committed in B.C., and it is presumed to constitute a real and substantial connection between B.C. and the lawyers and the facts on which the case is based. Rather, I will analyse this aspect in the terms that were referred to in *Muscutt* -- the extent of the connection between these defendants, the lawyers, and British Columbia -- and that, in my view, is nevertheless a factor that favours British Columbia assuming jurisdiction against the lawyer defendants. It is on that basis that I take this factor into consideration in my analysis of whether there is a real and substantial connection to B.C.

Unfairness to the Defendants in Assuming Jurisdiction

[37] If the allegation is correct that the defendants were acting for the plaintiffs, they were essentially acting for B.C. residents or B.C. directed companies in connection with a purchase, albeit of Alberta land, essentially from B.C. residents. This cross-border provision of legal advice to B.C. residents by Alberta lawyers about Alberta land purchases is probably quite common or at least is probably not unusual. Therefore, it is not unfair if Alberta solicitors who are engaged by clients in British Columbia who deal with other parties in B.C. might get involved in litigation in British Columbia. Therefore, I do not think that the assumption of jurisdiction by B.C. would be unfair to the defendant lawyers.

Unfairness to the Plaintiff in not Assuming Jurisdiction

[38] I do not think that this factor either supports or does not support a real and substantial connection to British Columbia.

The Involvement of Other Parties to the Suit

[39] In *Muscutt* at para. 91, the court said:

The decision in *McNichol, supra* indicates that the involvement of other parties bears upon the real and substantial connection test. The twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations. Where the core of the action involves domestic defendants, as in *McNichol*, the case for assuming jurisdiction against a defendant who might not otherwise be subject to the jurisdiction of Ontario courts is strong. By contrast, where the core of the action involves other foreign defendants, courts should be more wary of assuming jurisdiction simply because there is a claim against a domestic defendant.

[40] I note that the plaintiffs rely on the fact that the Singh defendants, the law firm, were necessary and/or proper parties to the proceeding, a term that appears to be a hangover from the rules for service *ex juris* and is no longer applicable, in my view, *per se*. However, the connection of the party in question, against whom jurisdiction is sought, to the main or core allegations in the case is still important. Here, the central allegation appears to be fraudulent misrepresentation and the allegation against the defendants is that they failed to advise in that respect. That allegation is closely connected to what I have ascertained to be the central allegation in the case. Therefore, even if the case against these defendants does not in itself support jurisdiction, as noted in *Muscutt*, where the core of the action involves

domestic defendants, the case for assuming jurisdiction against a defendant who might not otherwise be subject to the jurisdiction of British Columbia is strong.

The Court's Willingness to Recognize and Enforce an Extra-Provincial Judgment Rendered on the Same Jurisdictional Basis

[41] While B.C. and Alberta are reciprocal jurisdictions, the defendants in a supplemental argument pointed out that if the plaintiffs proceeded in Alberta they could obtain a declaration of resulting trust and enforce that judgment against lands in B.C., but the reverse is not true as in Alberta the *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, only provides for the registration of foreign monetary judgments. The argument is that a B.C. judgment in favour of the plaintiffs would not bring finality and there is the risk of further litigation in Alberta. Generally, the possible judgments appear to be reciprocal and, although this is a factor, it does not appear to be a significant factor in determining whether B.C. has jurisdiction.

Whether the Case is Interprovincial or International in Nature

[42] This case involved a failed business transaction between B.C. residents over land in Alberta involving alleged fraudulent representations by defendants at least some of which are alleged to be made in B.C. The Alberta lawyers are alleged to act for the plaintiffs who essentially are B.C. residents. This scenario, with these interprovincial elements, is hardly surprising given the numerous business transactions that are conducted across the border of these two adjoining Western Canadian provinces. I think that the comments of *Muscutt* at paragraphs 96 and 99 that support a more lenient approach to jurisdiction in interprovincial cases as opposed to international cases are applicable to this case.

Comity and the Standards of Jurisdiction, Recognition and Enforcement Prevailing Elsewhere

[43] Given that this is an interprovincial case, this factor does not appear to be relevant.

Conclusion on Real and Substantial Connection

[44] I have concluded that given all of these circumstances, the plaintiffs have established that there is a real and substantial connection between the facts of this case and the defendant lawyers and that there is jurisdiction *simpliciter* or territorial jurisdiction in British Columbia.

2. Forum non-conveniens

[45] I now turn to the issue of *forum non conveniens*. The defendants say that the action should proceed in Alberta as it is the more appropriate forum. The plaintiffs say it should proceed in B.C. and they are prepared to stay the Alberta action. In ***Teck Cominco Metals Ltd. v. Lloyd's Underwriters***, 2009 SCC 11, the headnote provided:

British Columbia's ***Court Jurisdiction and Proceedings Transfer Act*** creates a comprehensive regime that applies to all cases where a stay of proceedings is sought on the ground that the action should be pursued in a different jurisdiction (*forum non conveniens*). It requires that in every case ... all the relevant factors listed in s. 11 be considered in order to determine if a stay of proceedings is warranted. This includes the desirability of avoiding multiplicity of legal proceedings. Section 11 is a complete codification of the common law test for *forum non conveniens* admitting of no exceptions. ...

[46] At para. 22, McLachlin C.J.C. quoted the comments of drafters of the ***CJPTA***, the Uniform Law Conference of Canada, on s. 11:

Section 11 is meant to codify the doctrine of *forum non conveniens*, which was most recently confirmed by the Supreme Court of Canada in *Amchem Products* ... The language of subsection 11(1) is taken from *Amchem* and the earlier cases on which it was based. The factors listed in subsection 11(2) as relevant to the court's discretion are all factors that have been expressly or implicitly considered by courts in the past.

In *Teck Cominco*, the Chief Justice described the objective of the *CJPTA* and said:

[38] ... the *forum non conveniens* analysis, which is "to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties" (*Amchem*, at p. 912).

[47] The *CJPTA* provides at s. 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.
- (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
 - (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.

[48] The authorities appear to indicate that the applicant defendants must establish that the foreign jurisdiction is the more preferable one: ***Amchem Products Inc. v. British Columbia (Workers' Compensation Board)***, [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96. The task for the court is to apply the principles in order to determine the most appropriate forum based on the factors which connect the parties and the litigation to the competing fora. Having found that B.C. has jurisdiction, the question is whether Alberta is the more appropriate jurisdiction. I note that there is a question whether the defendants who have attorned can apply to have the court decline jurisdiction on the grounds of *forum non conveniens*. I find that I need not consider that issue as the defendant lawyers are clearly entitled to advance this argument for all defendants.

[49] Let me review the factors listed in s. 11(2) of the ***CJPTA***.

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

[50] The plaintiffs rely on the residence and location of the parties as a relevant and significant consideration on convenience and cost. Five of the corporate parties are registered in Alberta and five in B.C. However, the central management of all of the Alberta corporate defendants, with the exception of Singh & Partners, is in B.C. and the Alberta companies were essentially merely set up to carry on the business of B.C. parties pursuant to the agreements the plaintiffs say were resolved in B.C.

[51] The plaintiffs point out that the majority of the personal parties are in B.C. and the majority of the witnesses known to date are in B.C. The plaintiffs contend that most of the parties and, in the case of the corporate parties, their directors reside in

B.C. The plaintiffs and the principal defendants have counsel in B.C. who are acting in this litigation. Certain parties carry on business in both jurisdictions and some are only in Alberta -- Samra, Kanwal, and the lawyers -- and for them in terms of cost and convenience, having the matter tried in Alberta is preferable. The plaintiffs say that the action has progressed here with the acquiescence of the defendants and active participation in pleadings and document discovery, as well as a request for an assignment of a trial judge submitted in November 2008. The defendants have agreed that the discoveries that have been conducted here were done without prejudice to their position that Alberta was the proper and more convenient jurisdiction. The defendants, however, point to the cost of court filing fees in Alberta being significantly less and say that some of the liability witnesses live in Alberta, including the lawyers, the defendant vendor, as well as the realtors and appraisers. They submit that an expert on conveyancing and land title practice will likely be required, and that favours Alberta.

[52] At this stage, my assessment is that the central issues appear to concern and the key witnesses appear to be the individual parties who are resident in B.C. and Mr. Chong who is resident in B.C. They are parties and, at this stage, although there will be others, appear to be the significant witnesses, that is, Ms. Jiang, the Manns, the Yongs, as well as Mr. Chong, against whom third party proceedings have been taken in B.C. and who I was told, and as appears in his affidavit, would prefer the litigation to take place in B.C. Counsel for those parties are in B.C. I think that this is a significant factor both as to cost and convenience.

[53] The essence of the case or the core of this case, as it appears to be, is the question of the alleged fraudulent misrepresentation between B.C. residents, albeit over land in Alberta. It does not appear to me at this point that the issues of conveyancing practice or land title practice or the fact that the land is in Alberta are as significant or as potentially time-consuming as the issues of misrepresentation. The defendants concede that the cause of action arose possibly in both jurisdictions, but suggest that it was Alberta, anyhow, but that is by no means clear to me.

[54] While the plaintiffs say that a 60-day trial has been set in B.C. and the defendants' estimate was 45 days, the defendants say that is wrong and they believe that the trial length will be more in the range of 10 to 15 days. I do not think that the length of trial would be any different in either jurisdiction and in itself is not on the whole a significant factor on the question of the appropriate forum.

[55] I agree with the submission of the plaintiffs that the comparative convenience and cost given the location of the parties, the witnesses, most of the counsel, and the progression of the action to date clearly favours B.C. as the place to litigate this case. While the defendants say there is really no evidence on this point as to cost and that appraisers and realtors may be called, given the core allegations and the location of the main witnesses, this factor appears to favour B.C. as the convenient forum.

The law to be applied to the issues in this proceeding

[56] The defendants say there is unlikely to be any material difference in the law of Alberta and the law of B.C. concerning the issues in the statement of claim, except

that the transactions in issue involve the purchase and sale of land in Alberta and Alberta would be the law with the closest connection. On the other hand, the plaintiffs say that the law that applies will be the jurisdiction where the communications are received and where negotiations and misrepresentations took place inducing parties to a contract. They refer to *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, and say that the likely jurisdiction for the law to be applied is B.C. As the plaintiffs say, the bulk of the communications took place in B.C. and the representations were here. While B.C. law would logically be applied to the issue of misrepresentation, I do not think that this factor is particularly significant in the choice of the appropriate forum.

The desirability of avoiding multiplicity of legal proceedings, 11(2)(c), and the desirability of avoiding conflicting decisions in different courts, s. 11(2)(d)

[57] The plaintiffs say this is not a significant factor as they have maintained that they would stay the Alberta action if and when the case against the defendants proceeded in B.C. The defendants say that the plaintiffs have made claims against individual residents in Alberta against whom no claims have been made in B.C. and if the court held there was territorial jurisdiction over the existing defendants, the plaintiffs would still have to maintain the Alberta action for the purpose of pursuing their additional claims. Those claims appear tangential to the central allegations in this case.

The enforcement of an eventual judgment

[58] In terms of the enforcement of a judgment, the defendants say that under the *Enforcement of Canadian Judgments and Decrees Act*, S.B.C. 2003, c. 29, a

B.C. judgment is only enforceable if it is a monetary judgment. However, the defendants say that the rights of the plaintiffs are more restricted in enforcing a judgment from B.C. than the reverse. This is perhaps a minor factor that favours the trial taking place in Alberta.

The fair and efficient working of the Canadian legal system

[59] In terms of the fair and efficient working of the Canadian legal system, the final factor, the defendants say that absent the concern about the existing multiple proceedings, there is no advantage to be gained from the standpoint of this consideration if this action proceeds in B.C. or in Alberta.

CONCLUSION

[60] Considering all of these factors, and notwithstanding that the subject matter of the contracts was Alberta land, I have, upon a consideration of all the factors, concluded that B.C. is the jurisdiction with the closest connection to the action and the parties. The defendants have not demonstrated that Alberta is the more appropriate jurisdiction. I think that B.C. is the more appropriate jurisdiction and, after considering the interests of all of the parties to the litigation and the ends of justice, the defendants' application to decline jurisdiction must be dismissed.

[61] MR. MCKECHNIE: My Lord, thank you. I am just wondering -- I understand the order. I am wondering about the dismissal of the Alberta action and whether Your Lordship has given any consideration to whether that ought to be a condition of the matter proceeding in B.C.?

[62] THE COURT: Mr. Hewitt.

[63] MR. HEWITT: My Lord, I made representations to the court that it would be stayed if the case proceeds here and now the jurisdiction issue has been addressed. So I would suggest that the parties can take us at our word that we will proceed that way and if there is any issue about that and we do not do what we have indicated we would do, then obviously they can bring it back to court.

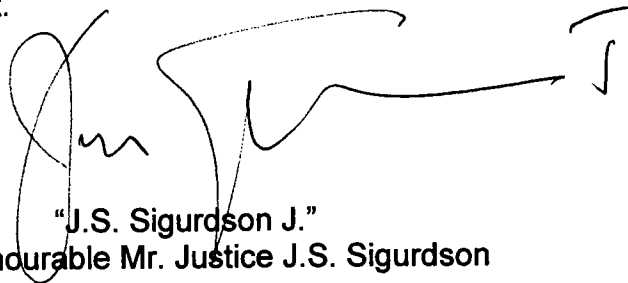
[64] THE COURT: Why can I not provide right now that the action in Alberta be stayed?

[65] MR. HEWITT: That is fine. If you prefer to do it that way, that is fine.

[66] THE COURT: Mr. McKechnie.

[67] MR. MCKECHNIE: That will be satisfactory.

[68] THE COURT: All right.



"J.S. Sigurdson J."
The Honourable Mr. Justice J.S. Sigurdson

