IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leaf v. Hershey Canada Inc.,*
2022 BCSC 1094

Date: 20220629
Docket: S202785
Registry: Vancouver

Between:

Scott Leaf

Plaintiff

And

Hershey Canada Inc., The Hershey Company and Hershey Chocolate & Confectionary Corporation

Defendants

Before: The Honourable Justice Ahmad

Reasons for Judgment
In Chambers

Counsel for the Plaintiff:	A. Tanel N. Gondek
Counsel for the Defendants:	S. Maidment J. Dent
Place and Date of Hearing:	Vancouver, B.C. December 8-9, 2021
Place and Date of Judgment:	Vancouver, B.C. June 29, 2022

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I. Introduction

[1] This matter involves a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, in which the plaintiff, Scott Leaf, seeks to certify a class action against the defendants, Hershey Canada Inc. ("HCI") and The Hershey Company ("THC") who manufacture, market, and distribute chocolate confectionary products. The claim is made in respect of alleged representations that THC and HCI oppose the use of "child labour and slavery". Mr. Leaf alleges that contrary to those representations, "child labour and slavery" are present in the defendants' supply chain. He asserts claims against the defendants in misrepresentation at common law and under the *Competition Act,* R.S.C. 1985, c. C-34.

[2] The defendants deny the allegations.

[3] THC is described in the notice of civil claim (the "Claim") as a "global chocolate food products company", incorporated in Delaware with a principal place of business in Hershey, Pennsylvania. On this application, THC seeks an order dismissing or permanently staying the proceeding against it on the ground that this court does not have jurisdiction in respect of the claim against it.

[4] HCI denies liability; it does not dispute jurisdiction. The plaintiff has discontinued his claim against the defendant, Hershey Chocolate & Confectionary Corporation.

II. Legal Framework

[5] The issue of this court's territorial competence in a proceeding is determined by reference to Part 2 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*]: *CJPTA*, s. 2(2).

[6] Pursuant to s. 3 of the *CJPTA*, British Columbia courts have territorial competence in a proceeding that is brought against a person in one of five specifically enumerated circumstances including if "there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based": *CJPTA, s.* 3(e).

[7] Section 10 of the *CJPTA*, in turn, sets out the circumstances in which a real and substantial connection exists. Without limiting the right of a plaintiff to prove others, that section sets out that "a real and substantial connection between British Columbia and those facts [on which the proceeding against that person is based] is presumed to exist" in any of twelve categories. Of those, the plaintiff relies upon the following:

- s. 10(g): that the proceeding concerns a tort committed in British Columbia; and
- s. 10(h): that the proceeding concerns a business carried on in British Columbia.

[8] The first step in a jurisdictional challenge is for the Court to examine the pleadings to determine whether the pleaded facts disclose a real and substantial connection between the jurisdiction and the facts on which the proceeding is based. The basic jurisdictional facts relied on by the plaintiff as taken to be true if pleaded: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at paras. 30-35 [*Purple Echo*]; *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 at para. 15 [*Ewert*].

[9] Where jurisdictional facts, that is, any of the facts set out in ss. 10(a) though 10(l), have been pleaded, the presumption of "a real and substantial connection" will be made out. While the presumption is rebuttable, it is likely to be determinative in almost all cases: *Stanway v. Wyeth Canada Inc.*, 2009 BCCA 592 at para. 22 [*Stanway*], leave to appeal ref'd, S.C.C.A. No. 68.

[10] If the pleading lacks jurisdictional facts, the plaintiff may adduce affidavit evidence to prove those facts. As the Court of Appeal held in *Purple Echo* at para. 34:

> [T]he nature of the inquiry does not change merely because evidence is adduced. The objective is to determine whether there are facts alleged, which if true, would found jurisdiction. The court is not charged with the task of determining whether the facts are true. A plaintiff need show only an arguable case that they can be established.

[11] A defendant challenging jurisdiction is entitled to contest the pleaded facts with evidence. In that case, too, 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: *Ewert* at para. 16.

III. Analysis and Discussion

1. Does the proceeding concern a tort committed in British Columbia?

a) Have material facts been pleaded to establish a misrepresentation occurred in British Columbia?

[12] In the Claim, Mr. Leaf asserts claims in misrepresentation, specifically, the common law tort of negligent misrepresentation, against the defendants, including THC.

[13] Rule 3-7(18) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 provides that if the party relies on misrepresentation, full particulars, with dates and items if applicable, must be stated in the pleading. In accordance with that Rule, at paras. 10-13 of the Claim, the plaintiff particularizes the alleged misrepresentations (the "Pleaded Misrepresentations") which are contained in three sources (collectively, the "Corporate Reporting"): (a) a statement on October 3, 2012, (b) "a 2014 Corporate Social Responsibility Report", and (c) a "Supplier Code of Conduct".

[14] The specific allegations are:

> 10. The Defendants have made numerous representations that create an impression that they oppose child labour and slavery. On October 3, 2012, the Defendants stated that they supported "programs to help eliminate child labor in the cocoa regions of West Africa."
>
> 11. In a 2014 Corporate Social Responsibility Report, the Defendants claimed that they were "actively involved in large-scale efforts that are committed to rooting out forced labor, especially forced child labor, in our cocoa supply chain."
>
> 12. The Defendants explicitly stated in a 2014 Corporate Social Responsibility Report that the Defendants have "zero tolerance for the worst

> forms of child labor in its supply chain (as defined by International Labor Organization Conventions 138 and 182)."
>
> 13. In their Supplier Code of Conduct, the Defendants affirm that they "are committed to the elimination of the 'worst forms of child labor,' as defined by International Labor Organization (ILO) Convention 138 & 182, from its supply chain." The Defendants specifically claim that the following child labor practices are prohibited in their supply chain:
>
> (a) Children should not be kept from school to work on the farm.
>
> (b) Children should not carry heavy loads that harm their physical development.
>
> (c) Children should not be present on the farm while farm chemicals are applied.
>
> (d) Young children, generally considered to be under 14 years of age, should not use sharp implements.
>
> (e) Trafficking of children or forcing children to work are included among the Worst Forms of Child Labor (WFCL).
>
> (f) Suppliers must not utilize or benefit in any way from forced or compulsory labor, including any forms of slavery.
>
> (g) The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force, coercion or other means, for the purpose of exploiting them is prohibited.
>
> [Emphasis added.]

[15] At para. 23 of the Claim, the plaintiff alleges that "the Defendants' corporate reporting conveys an impression that the Defendants prohibit and discourage child labour and slavery in their supply chain".

[16] No other alleged misrepresentations or sources of misrepresentations are set out in the Claim.

[17] The issue to be considered at this stage of the analysis is whether any jurisdictional facts have been pleaded to support a finding that misrepresentations occurred in British Columbia.

[18] On this application, there is no dispute that the tort of misrepresentation occurs in the jurisdiction where the negligent representation is received or where the plaintiff acts in reliance upon the misrepresentation: *Canadian Commercial Bank v.*

Carpenter, 62 D.L.R. (4th) 734, 1989 CanLII 2811 (B.C.C.A.) *Cannon v. Funds for Canada Foundation*, 2010 ONSC 4517.

[19] While not founded in tort, the claim for misrepresentation under ss. 36 and 52 the *Competition Act* also include the elements of misrepresentation and reliance.

[20] In this case, despite setting out the alleged misrepresentations, the plaintiff does not plead that he received the Corporate Reporting, or any of the Pleaded Misrepresentations set out in the Corporate Reporting, in British Columbia (or anywhere) at any time. It is clear that a person cannot act in reliance upon a representation that the person never received.

[21] In other words, the Claim contains no material facts to show that the plaintiff received or relied on the alleged misrepresentations within British Columbia. I cannot conclude that jurisdictional facts have been pleaded to support a finding that the claim of misrepresentation has any real or substantial connection to British Columbia.

b) Has the Plaintiff presented evidence to establish a misrepresentation occurred in British Columbia?

[22] Notwithstanding that conclusion, this court may nonetheless have jurisdiction if the plaintiff is able to show, by way of affidavit evidence, a “good arguable case” that jurisdictional facts exist: *Purple Echo* at para. 34.

[23] In case, the plaintiff has filed two affidavits to do so: his own affidavit and the affidavit of Michael Pucci, both of whom depose to belonging to the proposed putative class and both of whom reside in British Columbia.

[24] Both affiants depose that they purchased products manufactured by the defendants believing that the defendants did not “rely on and benefit from child slavery and trafficked children in their supply chains”.

[25] Mr. Leaf deposes at paragraph 5 of his affidavit:

> I saw the Defendants' marketing and packaging available on the shelves in stores in British Columbia. I also recall seeing the Defendants' advertising online while in the province, and on television broadcasted to my home in the province, for example on Global Television Network. Based on the representations in all these forms of advertising, marketing and packaging, I believed that the Defendants did not rely on and benefit from child slavery and trafficked children in their supply chains.
>
> [Added emphasis.]

[26] Mr. Pucci similarly deposes at para. 5 of his affidavit as follows:

> Based on the Defendants' marketing and packaging available on the shelves of stores in and around Prince Rupert, I believed that the Defendants did not rely on and benefit from child slavery and trafficked children in their supply chains. I also recall seeing the Defendants' advertising online while in the province, and on television broadcasted to my home in the province, which may have been through one of the following networks that I receive: NBC, ABC, CBS, FOX, TBS and their affiliates. Based on the representations in all these forms of advertising, marketing and packaging, I believed that the Defendants did not rely on and benefit from child slavery and trafficked children in their supply chains.
>
> [Added emphasis.]

[27] Mr. Leaf argues that the evidence contained in those paragraphs is enough on which to base a good arguable case to establish jurisdictional facts tying the alleged misrepresentations to British Columbia.

[28] As a starting point on this analysis, it is notable that neither Mr. Leaf nor Mr. Pucci depose that they received or relied on the Corporate Reporting or any of the Pleaded Misrepresentations. Rather, both affiants depose that they received and relied on the defendants' "advertising, marketing, and packaging" in British Columbia. Neither affiant expressly deposes that any of the Pleaded Misrepresentations are included in the "advertising, marketing and packaging" that they did receive and rely on. In other words, the evidence does nothing to rectify the plaintiff's failure to plead that the Pleaded Misrepresentations were received or relied on in British Columbia.

[29] However, Mr. Leaf argues that the misrepresentation claim does not turn on receipt or reliance on the Corporate Reporting, or any of the Pleaded Misrepresentations, directly. Citing the decisions in *Queen v. Cognos*, [1993] 1 S.C.R. 87 at 131 and *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, at para. 27, he argues that misrepresentations can be implied or, alternatively, made by omission. He argues that the misrepresentations in this case were made in those ways.

[30] The "implied" misrepresentation claim is set at out para. 34 of the Claim as follows:

> 34. Through . . . [the Pleaded Misrepresentations], the Defendants represented to Canadian consumers that the Defendants' products are not produced through child labour and/or slavery. This representation was untrue, deceptive and misleading.
>
> [Added emphasis.]

[31] In submissions, counsel for Mr. Leaf explained the claim as follows: that the "advertising, marketing and packaging" he received directly contained the message that was created "through" the explicit misrepresentations pleaded in the Claim.

[32] The claim of representation by omission is set out at para. 35 of the Claim as follows:

> The Defendants' omission of any information [in its marketing, advertising, and packaging] regarding its use of child labour and slavery was a material misrepresentation.

[33] THC submits that even with those pleadings and evidence, Mr. Leaf has still failed to establish the jurisdiction facts required to establish a connection to British Columbia. It emphasizes that the representations that comprise the factual basis of the claim are the Pleaded Misrepresentations that are set out in the Claim. On that basis, it argues that the jurisdictional challenge places upon the plaintiff an onus to adduce evidence that he received or relied on, in British Columbia, the Pleaded Misrepresentations; not the unidentified representations contained in "marketing, advertising, and packaging" referred to in the affidavit evidence but not in the Claim.

[34] Without intending to unduly simplify the comprehensive submissions of counsel, THC argues that the affiants' failure to adduce evidence of receipt of or reliance on the expressly Pleaded Misrepresentations is also fatal to its argument of "implied" misrepresentation (set out in para. 34 of the Claim) or misrepresentation by omission (set out in para. 35 of the Claim). Regarding the implied misrepresentation, THC argues that it is not clear how the plaintiff received the "message" he alleges is contained in the "advertising, marketing, packaging" if he did not see, read, or hear the explicit Pleaded Misrepresentations through which message was allegedly created.

[35] In response to THC's argument regarding the claim for misrepresentation by omission, THC refers to the decision in *Arora* v. *Whirlpool Canada LP*, 2013 ONCA 657 for the proposition that an omission is not actionable as a misrepresentation unless the defendant is obliged to disclose the omitted facts. It argues that no such duty exists in this case.

[36] THC argues that *Queen* v. *Cognos*, the decision on which the plaintiff relies, stands for the proposition that an omission is an actionable as a misrepresentation only if a plaintiff first receives an express representation that would lead to an inescapable inference. The express representation, it argues, is what give rise to the defendant's obligation to disclose omitted information. No claim for misrepresentation by omission can be made without the express representation. As neither Mr. Leaf nor Mr. Pucci depose to having received express representations, in this case being the Pleaded Misrepresentations, THC argues that the claim for misrepresentation by omission must fail.

[37] I do not accept any of those arguments as a basis on which to conclude that the plaintiff has failed to allege jurisdictional facts on which to ground this Court's territorial competence.

[38] First, the case authority is clear that the failure to plead jurisdictional facts will not be determinative on a jurisdictional challenge if affidavit evidence is adduced to establish such facts.

[39] At para. 30 of *Purple Echo*, the Court of Appeal quotes from the decision in *Roth* v. *Interlock Services, Inc.*, 2004 BCCA 407, in part, as follows:

> [30] …Affidavit evidence of facts relevant to jurisdiction *simpliciter* is admissible when facts are not alleged in the plaintiff's pleading because they are not material facts, or when they are, are not particularized in the pleading in sufficient detail to enable determination of the issue…

[40] It noted, "[i]t would be a startling departure from existing jurisprudence if the consideration of jurisdiction were confined solely to the pleadings with no opportunity for a plaintiff to support jurisdiction with evidence.": *Purple Echo* at para. 34.

[41] I am satisfied that the plaintiff is not confined to the facts alleged in the Claim, in this case, the Pleaded Misrepresentations, to establish that jurisdictional facts exist on which to establish territorial competence. He is entitled to adduce affidavit to provide details of the claim. He has done so. I will discuss that evidence in more detail below.

[42] THC's other arguments address the alleged deficiencies in the plaintiff's claim to make out the claim for misrepresentation, as alleged: firstly, the plaintiff's failure to establish that he received or relied on any of the Pleaded Misrepresentations or, alternatively, to particularize the misrepresentations he alleges are contained in the "marketing, advertising, and packaging"; and secondly, the absence of the elements required make out the claim as alleged. The fact that the arguments address the misrepresentation claim is notable. The plaintiff is not obliged on this application to establish that a cause of action has been made out: *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 20 [*Fairhurst*].

[43] In *Fairhurst*, the plaintiff in a proposed class action alleged that the defendants, the manufacturers and distributers of diamonds, conspired to fix prices, resulting in the plaintiff and the proposed class members paying more for their diamonds.

[44] The defendants applied for an order striking the claim. They also challenged the jurisdiction of the court to entertain the action. The chambers judge dismissed

the application, ruling that the plaintiff had pleaded the elements necessary to support a finding of territorial competence and that the defendants had not rebutted the finding. The defendants appealed.

[45] The Court of Appeal noted that many of the defendants' submissions on appeal were directed at deficiencies in the plaintiff's pleading, as opposed to the issue of territorial competence. The submissions made in that case were summarized at para. 19 as follows:

> [19] … In particular, the defendants contended, Ms. Fairhurst had not "properly pleaded that a conspiracy – or any other tort [had] occurred in British Columbia"; she had "failed to sufficiently describe the parties to the alleged conspiracy and their relationship as amongst each other"; she had failed to "identify any unlawful act or acts engaged in by the Defendants"; she had failed to show that "any alleged wrongful act was directed at her or others in British Columbia"; and it was "implausible" to assert a conspiracy by any of the defendants with persons who are their customers. Finally, it was said, the plaintiff had "made no allegation and adduced no facts that would make such an alleged conspiracy credible."

[46] At para. 20, the Court of Appeal rejected those arguments as being outside the scope of the application challenging jurisdiction. It stated:

> [20] With respect, many of these arguments assume incorrectly that the chambers judge was required to determine on this application whether a cause of action was made out. The only application before her related to territorial jurisdiction. . . . In the present application, it was not open to the court below, nor is it open to this court, to make findings of fact on disputed evidence. As this court stated in *Purple Echo Productions, supra*:
>
> > ... the nature of the inquiry does not change merely because evidence is adduced. The objective is to determine whether there are facts alleged, which if true, would found jurisdiction. The court is not charged with the task of determining whether the facts are true. A plaintiff need show only an arguable case that they can be established. [At para. 34.]
>
> [21] Nor is it our task to weigh the 'implausibility' of the claim as pleaded. Thus the defendants' objection that:
>
> > To allow the Plaintiff to benefit from the statutory presumption in circumstances where the Claim asserts nothing more than a bald allegation of conspiracy, is bereft of jurisdictional facts regarding the alleged involvement of each of the Defendants, and makes assertions on behalf of a class of indirect purchasers essentially renders foreign defendants subject to legal proceedings in British Columbia based on nothing more

> than legal drafting claiming an implausible and legally untenable allegation of injury arising in British Columbia and an indiscriminate "scatter gun" approach to naming defendants.
>
> misconceives the role of the court under s. 10 of the *CJPTA*. As *Stanway* makes clear, if the "facts on which the proceeding ... was based" come within any of the sub-paras. of s. 10, a real and substantial connection between British Columbia and those "facts" is presumed to exist.
>
> [Added emphasis.]

[47] Like the defendants in *Fairhurst*, in my view, THC's submissions on this application also are directed at deficiencies in the plaintiff's pleadings and what it says should preclude the plaintiff from succeeding on a claim for misrepresentation.

[48] THC's submissions boil down to its argument that the plaintiff has failed to establish that he received or relied on any of the Pleaded Misrepresentations that are particularized in the Claim. Alternatively, it argues that the plaintiff has failed to particularize the alleged misrepresentations contained in the "advertising, marketing, or packaging" which Mr. Leaf and Mr. Pucci received and on which they relied. Both arguments go to deficiencies in the pleading. By THC's argument, those deficiencies, in turn, dictate that the plaintiff is unable to establish the elements required to ground a claim for misrepresentation on the basis set out in the Claim.

[49] Without deciding the issues raised, there may be merit to THC's arguments. Indeed, the plaintiff's claim for misrepresentation may fail for any or all of the reasons argued by THC. As contemplated in *Fairhurst,* the claim may even be "implausible". However, those arguments go to the issue of whether the plaintiff has properly made out the claim for misrepresentation. That is not the issue to be determined on this application. In my view, THC's arguments do not address the issue of whether the plaintiff has established jurisdictional facts to support a finding that there is a real and substantial connection to the province, that being the sole issue to be determined.

[50] In this case, jurisdictional facts are raised in Mr. Leaf's and Mr. Pucci's affidavit evidence. Both affiants depose that the defendants, including THC, made

representations in their advertising, marketing, packaging. They also depose that they received and relied on those representations, alleged to be misrepresentations, in British Columbia. That evidence of receipt and reliance on an alleged misrepresentation in British Columbia are the jurisdictional facts that are required to establish a real and substantial connection to British Columbia.

[51] THC did not challenge those facts. The deposed jurisdictional facts, which I take to be true, are sufficient to establish a real and substantial connection to British Columbia. It follows that territorial competence has been proven.

[52] Having reached that conclusion, I do not have to consider whether the plaintiff has established that the proceeding against THC concerns a business carried on in British Columbia. However, for the sake of completeness, I have set out my analysis of that issue below.

2. Does the proceeding concern a business carried on in British Columbia?

a) Have material facts been pleaded to establish that THC carries on business in British Columbia?

[53] At first blush, as THC argues, there is no express plea contained in the Claim that THC carries on business in British Columbia. However, that is not to say that there is no reference to THC carrying on business in British Columbia at all.

[54] Throughout the Claim, the plaintiff does not distinguish between any of the defendants, referring not to any individual defendant, but referring to “the Defendants” collectively in the plural. In that way, he attributes the conduct of one to the conduct of all.

[55] The same is true with respect to the pleading setting out the place where the defendants’ products are sold. At para. 5 of the Claim, the plaintiff asserts:

> Mr. Leaf has purchased products manufactured and marketed by the Defendants at retail stores within British Columbia.

[56] No other facts are pled with respect to the conduct of THC's business in any location.

[57] In *Stanway*, the plea that the defendants "jointly 'marketed, tested, manufactured, labelled, promoted, sold, and otherwise placed'… products into the stream of commerce in British Columbia" was held to be in effect a plea that the defendants, including the US defendants who challenged jurisdiction, carried on business in British Columbia. That plea was sufficient to satisfy s. 10(h) of the *CJPTA* and the presumption of territorial competence was raised: *Stanway* at para. 63.

[58] Like the plea in *Stanway,* para. 5 of the Claim in this case also refers to the defendants in the plural, denoting that all of the defendants, including THC, manufactured and marketed products that were sold and purchased in British Columbia. While there is no express plea that the defendants did so "jointly" or that the defendants conducted a "joint enterprise", I am satisfied that the collective reference to all of the defendants is a sufficient plea that THC manufactured and marketed products that were purchased in British Columbia.

[59] In the circumstances, I accept that the jurisdictional facts contemplated by s. 10(h) of the *CJPTA,* that TCH carries on business in British Columbia, have been pleaded. That being the case, the question is whether THC has rebutted those pleaded facts.

b) Has THC adduced evidence to rebut the pleaded facts?

[60] In order to rebut the presumption that it carries on business in British Columbia, THC has adduced the affidavits of Kathleen Friesen, Charles Chappell and Andrew Mushing, all of whom are senior employees of either THC or HCI. THC argues that, collectively, their affidavits show that TCH does not manufacture Hershey products in Canada and is not responsible for advertising or distributing Hershey products anywhere in Canada. It argues that evidence rebuts any

presumption that THC carries on business in British Columbia as alleged in the Claim.

[61] Collectively, the affidavit evidence includes the following:

a) Since 2015, and as early as 2010, THC has not manufactured, sold or distributed any Hershey chocolate products anywhere in Canada;

b) HCI is the only company among THC and its affiliates that manufactures, sells and distributes Hershey chocolate confectionary products within Canada;

c) THC does not actively promote the sale of Hershey chocolate products within British Columbia through advertising;

d) All advertising purchases made by THC are directed to the United States marketplace. THC does not purchase advertising space directed to the Canadian marketplace through any advertising channel;

e) All decisions relating to Canadian advertising for any Hershey chocolate confectionary products are made independently by HCI and not by THC; and

f) Among THC and its affiliates, HCI is the only company responsible for the sale, marketing, merchandising, promotion and advertising of Hershey chocolate confectionary products within Canada.

[62] On its face, that evidence does appear to rebut the plea that THC either manufactured or marketed products sold in British Columbia as alleged in the Claim. However, as the plaintiff argues, the evidence is more notable for what it does not say, than for what it does say. Mr. Leaf argues that when the former is considered, the evidence is not sufficient to rebut the presumption in its favour.

[63] Regarding manufacturing, Ms. Friesen deposes that “THC does not manufacture, sell or distribute any Hershey chocolate confectionary products anywhere in Canada”. Her evidence is that HCI is the only company that manufactures, sells and distributes those products within Canada.

[64] However, the evidence does not preclude the possibility that chocolate manufactured by THC outside of Canada is available for distribution or sale in in British Columbia, either by HCI or otherwise. To unequivocally rebut that possibility, THC could have adduced evidence that stated, “No products manufactured by THC are available for distribution or sale in Canada”. It did not.

[65] The plaintiff makes a similar argument with respect to advertising. Mr. Chappell deposes that HCI, not THC, makes all decisions relating to Canadian advertising for Hershey chocolate confectionary products. He also deposes that all advertising purchases made by THC are directed to the United States’ marketplace.

[66] However, nothing in the evidence precludes the possibility that THC creates or produces the advertising that is purchased and distributed by HCI in Canada. In fact, Mr. Chappell deposes only that THC does not “actively” promote the sale of Hershey chocolate through advertising, leaving open the possibility of some involvement. He does not expand on what possible indirect promotion it may conduct in Canada. As is the case with manufacturing, it was open to THC to adduce direct evidence that no advertising created or produced by THC is directed to or distributed in Canada, by HCI or otherwise. Again, it did not. The possibility that advertising created by THC is distributed in British Columbia remains open.

[67] When the manner in which THC framed the conduct of its business in Canada is considered, it cannot be said with certainty that products manufactured by THC are not available for sale in British Columbia nor can it be said that no advertising created or produced by THC is available for viewing in Canada. It is at least arguable.

[68] That conclusion is supported by the relationship between THC and HCI, which, as the plaintiff argues, supports an inference that they conduct business as a "joint enterprise".

[69] Ms. Friesen describes HCI as an "affiliate" of THC, and that "THC is the ultimate parent company of HCI". David Dunlop, corporate counsel for HCI, more specifically deposes that the shares of HCI are owned by a Netherlands corporation, but confirms that the "ultimate parent company of HCI and [the Netherlands corporation] is [THC]". However, in both its filings with the Securities Exchange Commission and in an unsworn document that appears to have been prepared by THC for its shareholders, THC describes HCI as a "wholly owned subsidiary".

[70] I accept that THC's ownership of HCI, a company that does not deny the jurisdiction of this court, is not enough to satisfy the test for establishing that THC carries on business in British Columbia: *CIC Capital v. Rawlinson*, 2016 BCSC 516 at para. 38.

[71] However, the plaintiff does not base its argument that THC conducts business in joint concert with THC on the sole fact of that direct or indirect ownership. Among others, the following factors are notable:

a) In 2012, HCI acquired the shares of a company that manufactured chocolate in British Columbia, after which THC manufactured chocolate in British Columbia until 2016. Pursuant to its terms, notices under the share purchase agreement were to be sent to THC. That notice provision is some indication of THC's interest in, or perhaps even oversight of, HCI's manufacture of chocolate in British Columbia;

b) That HCI is included in THC's consolidated financial statements suggests that they share financial interests; and

c) HCI does not operate its own website. Rather, it appears to rely on online promotional materials operated by THC, which

> suggests that THC does have a say in the promotion and advertising conducted by HCI in British Columbia.

[72] None of those factors prove on a balance of probabilities that THC operates a joint enterprise with HCI in British Columbia (or otherwise). However, that is not the burden imposed on the plaintiff at this stage of the analysis. I am satisfied that, when considered with how THC framed its and HCI's conduct of business in in Canada, these factors are enough to establish a good arguable case that THC and HCI operate in joint concert and, furthermore, that they do so in respect of at least one of the manufacture, marketing, or sale of chocolate products in British Columbia.

[73] It is also significant that the plaintiff has not conducted any discoveries and as such, does not have any specific knowledge or the corporate or business arrangements between THC and HCI.

[74] In *Fairhurst,* the Court of Appeal considered the difficulties that a plaintiff faces in pleadings in light of defendants' "complex corporate arrangements", in that case to prove the particulars of a conspiracy. At paras. 33 and 34, it said:

> [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.
>
> [Added emphasis.]

[75] Although that decision and that passage, in particular, were made in respect of proving a conspiracy, in my view, it is equally applicable to the circumstances of this application in which the plaintiff is attempting to unravel the potentially complex corporate arrangements that could show the extent to which THC, a multinational company, may carry on business in British Columbia.

[76] On the evidence before me, I am satisfied that the plaintiff has met the low burden imposed on it to show a good arguable case that THC and HCI operate in joint enterprise in respect of manufacturing, marketing, and sale of Hershey products in British Columbia as alleged in the Claim. That being the case, I am satisfied that for the purposes of this application, THC carries on business on British Columbia.

[77] The plaintiff has established a real and substantial connection with British Columbia under s. 10(h) of the *CJPTA.* It follows that that he has met the test for territorial competence required by s. 3(e).

IV. Conclusion

[78] For the reasons set out above, I am satisfied that the plaintiff has shown a good arguable case that a real and substantial connection exists between British Columbia and the facts on which the action is based on the bases of ss. 10(g) and 10(h) of the *CJPTA*. Accordingly, pursuant to ss. 3(e) of the *CJPTA*, this court has territorial competence to determine the claim against THC.

V. Costs

[79] The plaintiff has succeeded on this application. It is entitled to costs against THC on Scale B.

"Ahmad, J."