COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Altria Group, Inc. v. Stephens,* 2024 BCCA 99

Date: 20240312
Docket: CA48660

Between:

Altria Group, Inc.

Appellant
(Defendant)

And

Jaycen Stephens and Owen Mann-Campbell

Respondents
(Plaintiffs)

Before: The Honourable Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated October 14, 2022 (*Stephens v. JUUL Labs Canada, Ltd.*, 2022 BCSC 1807, Vancouver Docket S1910927).

Counsel for the Appellant:	S.I. Sofer J.D. Sapers E. Hayes
Counsel for the Respondents:	A. Leoni J.K. Paul J.R. Kendall A. Dimson K. Shapiro
Place and Date of Hearing:	Vancouver, British Columbia January 17, 2024
Place and Date of Judgment:	Vancouver, British Columbia March 12, 2024

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals the dismissal of its challenge to the territorial jurisdiction of the British Columbia courts over it in this action. The action concerns the alleged conduct of the defendants in marketing JUUL e-cigarettes to young people as a fun and safe alternative to cigarettes, while failing to disclose the associated health risks. The appellant, an American corporation holding a 35% interest in one of its co-defendants, is alleged to have conspired with the other defendants in devising marketing and advertising strategies for JUUL e-cigarettes. The chambers judge held that the respondents had established a good arguable case that its pleaded jurisdictional facts could be proven, and that the appellant's evidence did not rebut the presumption of jurisdiction. Held: Appeal dismissed. The judge made no error of law or fact in concluding that the British Columbia courts had jurisdiction over the appellant in this proceeding.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Overview

[1] The appellant, Altria Group, Inc. ("Altria"), challenges the territorial jurisdiction of the British Columbia courts over it in this proceeding. The proceeding concerns the design, advertising, marketing, and sale of "JUUL", an e-cigarette or vaping product that has been available for sale in British Columbia since 2018. The respondents plead various causes of action relating to the alleged conduct of the defendants in falsely marketing JUUL as a desirable, safe, and healthier alternative to smoking. The respondents say that as a result of their use of JUUL, they have suffered adverse health conditions. They seek to certify this action as a class proceeding on behalf of a proposed class of persons in Canada who have suffered damages as a result of their purchase and use of JUUL.

[2] Altria is an American corporation with a business address in Richmond, Virginia. The other defendants to this action are JUUL Labs Canada, Ltd. ("JUUL Canada") and JUUL Labs, Inc. ("JUUL USA"). I will refer to these defendants collectively as the "JUUL Defendants". There is no question that the British Columbia courts have territorial jurisdiction over the JUUL Defendants. Altria is the only defendant to challenge the courts' jurisdiction.

[3] In the action, the respondents allege, among other things, that Altria conspired with the JUUL Defendants to employ strategies perfected in the cigarette industry to advertise and market JUUL to young people. It is alleged that the defendants exploited regulatory loopholes and relied on social media and other viral advertising methods to hook young people on JUUL, despite the defendants' knowledge of the dangers associated with vaping. Altria is alleged to have provided strategies, analyses, and services to the defendants in furtherance of the conspiracy.

[4] The chambers judge dismissed Altria's jurisdictional application. He found that: (1) the respondents had established a good arguable case that the claims against Altria concern a tort committed in British Columbia, thus establishing a presumption of a real and substantial connection under s. 10(g) of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], and (2) the evidence adduced by Altria on the application did not rebut that presumption. Altria argues on appeal that, in reaching these conclusions, the judge misapplied the test for jurisdiction and failed to consider important evidence filed by Altria that contradicts the conclusions.

[5] For the reasons that follow, I would dismiss the appeal.

Background

The notice of civil claim

[6] The respondents filed their original notice of civil claim in September 2019, and an amended notice of civil claim in February 2020. Altria was not a defendant at this time. The claims were limited to the JUUL Defendants. In September 2020, the respondents were given leave to add Altria as a defendant and file a second amended notice of civil claim ("SANOCC").

[7] In the SANOCC, the respondents plead that Altria is the parent company of Philip Morris USA, and is one of the largest tobacco companies in the world. It is alleged that in December 2018, Altria acquired a 35% interest in the JUUL

Defendants for $12.8 billion, and that, pursuant to the agreement, Altria provides marketing services and regulatory advice. It is further alleged that: “the business of JUUL Canada, JUUL USA and Altria is inextricably interwoven with that of the other and each is the agent of the other for the purpose of manufacturing, marketing, and/or distributing the products manufactured by JUUL Canada and/or JUUL USA”: SANOCC, Part 1 at para. 7.

[8] The causes of action alleged against the defendants include conspiracy, negligence, unjust enrichment, civil fraud, and breaches of various statutes including the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, and the *Tobacco and Vaping Products Act*, S.C. 1997, c. 13.

[9] The material facts underlying the claim of conspiracy, as set out in paras. 57 through 79 of Part 1 of the SANOCC, relate to the defendants’ marketing and advertising of JUUL. In general terms, it is alleged that the defendants have operated a long-term viral marketing campaign targeted at teenagers and young adults. The campaign represented that JUUL e-cigarettes were trendy, fun, and safer than traditional cigarettes, and without any harmful short or long-term effects. The respondents allege that, in fact, JUUL e-cigarettes are, to the defendants’ knowledge, highly addictive and expose users to significant health risks. They further allege that the defendants relied on similar techniques that were used to market traditional cigarettes, but the use of social media results in these techniques being more pervasive and insidious.

[10] It is also alleged that the defendants’ social media platforms—Facebook, Twitter (the platform now known as “X”), and Instagram—could be viewed by anyone regardless of their age or country of residence. As a result, it is alleged that adolescents and young adults in Canada were exposed to the defendants’ marketing campaign.

[11] In Part 3 of the SANOCC, the respondents plead that the conduct of the defendants, including Altria, constitutes the tort of conspiracy under both the “unlawful act” and “predominant purpose” prongs of the tort:

> 150. The Defendants conspired with other tobacco companies, including Altria Group, Inc., Philip Morris USA, Inc. and/or others to orchestrate efforts to addict a new generation of persons to nicotine. The predominant purpose of the conduct of the Defendants and their co-conspirators was to cause injury to the plaintiffs and similarly situated persons, namely addiction.
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> 151. Further, or in the alternative, the conduct of the Defendants and their co-conspirators was unlawful, by virtue of being either contrary to consumer protection legislation and/or the *Tobacco and Vaping Products Act*, and the Defendants and their co-conspirators should have known in the circumstances that injury to the plaintiffs and similarly situated persons would be likely to result.

[12] The respondents each allege that they began to use JUUL brand e-cigarettes in 2018, when they were 18-years old. They allege that they have suffered serious health conditions, and sustained damages, as a result of their use of JUUL.

Altria's jurisdictional application

[13] In December 2020, Altria filed a jurisdictional response disputing the British Columbia courts' jurisdiction over Altria in the action, and also an application pursuant to R. 21-8 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, seeking to dismiss or stay the claim against Altria.

Altria's evidence

[14] In support of its application, Altria filed affidavit evidence from: (1) W. Hildebrandt Surgner Jr., the Vice President, Corporate Secretary and Associate General Counsel of Altria, and (2) Kaitlin Longest, the Senior Director, Regulatory Planning for Philip Morris U.S.A. Inc., a wholly-owned subsidiary of Altria. From February through October 2019, Ms. Longest was a Senior Manager, Law, and Director of JUUL Services at Altria Client Services LLC ("Altria Client Services").

[15] In his affidavit, Mr. Surgner deposes that he has worked for Altria for 11 years, and, in his employment capacity, has knowledge of Altria's corporate structure, general business, subsidiaries, and the corporate transactions reviewed in his affidavit. Mr. Surgner's affidavit evidence on these matters is as follows:

a) Altria is a holding company that derives income from the earnings of its direct and indirect subsidiaries and other equity investments;

b) Altria does not engage in business in Canada—for example, Altria has no office, place of business, address, or bank account in Canada, no agent in Canada, no retail stores or employees in Canada, and it does not pay taxes in Canada;

c) On December 20, 2018, a subsidiary of Altria purchased a 35% interest in JUUL USA (the "Transaction");

d) Until November 2020, Altria's subsidiary initially only had non-voting shares in JUUL USA;

e) In November 2020, the subsidiary elected to convert its non-voting shares to voting shares, but to date has exercised no governance rights; and

f) Altria and JUUL USA are separate corporate entities, and Altria has never played any management role in the business of the JUUL Defendants.

[16] Ms. Longest deposes that in December 2018, Altria and JUUL USA entered into a services agreement (the "Services Agreement"). In her role as the Senior Manager, Law, and Director of JUUL Services, Ms. Longest was responsible for the coordination of all JUUL-related services provided by Altria pursuant to the Services Agreement. She states that from December 2018 to January 2020, Altria only provided three types of services pursuant to requests by JUUL USA:

a) Altria's subsidiaries (i.e., Philip Morris) disseminated marketing materials for JUUL USA products to certain adult smokers exclusively in the United States, and placed inserts with advertisements for JUUL in certain cigarette packages that were sold exclusively in the United States;

b) One of Altria's subsidiaries provided limited retail and distribution services to JUUL USA, exclusively with the United States;

c) Altria Client Services assisted JUUL USA with product and regulatory requirements in the United States.

[17] Ms. Longest deposes that JUUL USA never requested any services to be provided outside of the United States, and therefore Altria did not provide any services relating to JUUL Canada under the Services Agreement.

The respondents' evidence

[18] The respondents filed a large volume of evidence on the jurisdictional application. They relied, in part, on material available in the public record from ongoing litigation involving JUUL in the United States. For the purpose of the issues on appeal, it is only necessary to review three categories of evidence.

[19] First, the respondents tendered in evidence a collection of emails and other communications that reflect confidential discussions between Altria's Chief Executive Officer and Chief Financial Officer and directors of JUUL USA occurring over the course of approximately 20 months leading up to the Transaction. The emails arranging these meetings refer to the possibility of "collaboration" and "partnership" between the companies. In correspondence to United States Senators, Altria confirmed that it reached out to JUUL USA in early 2017 for "confidential discussions…to explore some type of strategic relationship".

[20] Second, the respondents were granted leave to cross-examine Mr. Surgner and Ms. Longest on their affidavits and the cross-examination transcripts were in evidence. In their cross-examinations, Mr. Surgner and Ms. Longest both testified that they were not involved in the confidential discussions leading up to the Transaction. Mr. Surgner confirmed that he had no role in negotiating or papering the Transaction. He was not aware of whether the Altria executives attending the confidential pre-Transaction meetings were providing any sort of advice or guidance to JUUL USA with respect to how to grow the business. Ms. Longest testified that she only started working at Altria in 2019, after the Transaction, and her role was limited to overseeing the execution of statements of work for services provided under the Services Agreement.

[21] At the cross-examinations, the respondents made a number of requests for additional information. Altria responded to these requests, and provided additional affidavits. All of this was before the judge on the jurisdictional application.

[22] Third, the respondents tendered the affidavit of Max Valiquette, who was presented as an expert in advertising, marketing, and communications. Mr. Valiquette opines in this affidavit that, based on his review of JUUL's marketing activities, there is significant evidence to support that "JUUL intentionally and effectively targeted young people, creating a business and a brand that was purpose-built to dominate the youth market." Mr. Valiquette's affidavit also speaks to the influence of product marketing in the United States—particularly through social media—in "priming" the Canadian market and building "pent-up demand" before the product is released in Canada. He opines that JUUL's activities in the United States had a "demonstrably and measured impact in the Canadian market, with tens of thousands of Canadians being exposed to JUUL's marketing activities."

The chambers judgment

[23] In the first part of his judgment, the judge reviewed the claims against Altria in the SANOCC, and the evidence filed by the parties on the application. The judge observed that the application record consisted of eight large binders, a two-volume compendium prepared by Altria, a condensed book prepared by the respondents, and two volumes of authorities. He indicated that he did not intend to refer to all of the materials and authorities that had been filed.

[24] Under the heading "Legal Principles", the judge reviewed the relevant provisions of the *CJPTA*, including s. 10. Section 10 provides that a real and substantial connection between British Columbia and the facts on which a proceeding is based is presumed to exist in the circumstances that are set out in subsections (a) through (l). This includes, in subsection (g), where the proceeding "concerns a tort committed in British Columbia".

[25] The judge cited this Court's decision in *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 at paras. 14–17, as setting out the governing analytical framework. The judge summarized the two stages of the analysis set out in *Ewert*:

> a) At the first stage, the plaintiff must show one of the connecting factors listed in the *CJPTA* exists, so as to give rise to a presumption of jurisdiction. The jurisdictional facts pleaded by a plaintiff are taken to be true. If the defendant contests the pleaded jurisdictional facts with evidence, the plaintiff is required to show there is a "good arguable case" for jurisdiction.
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> b) At the second stage, the defendant has the onus of rebutting the presumption arising from stage 1 of the analysis by establishing that there is no relationship between the subject matter of the action and the forum, or only a weak relationship.

[26] The judge rejected Altria's argument that the *Ewert* framework must be applied to each and every cause of action pleaded. He cited the decision of the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 99 [*Van Breda*] for the proposition that if a real and substantial connection exists between the forum, the subject matter of the litigation, and the defendant in respect of a factual and legal situation, then the court must assume jurisdiction over all aspects of the case.

[27] The judge listed and reviewed the cases that he considered key to his analysis: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398 [*Imperial Tobacco*]; *Stanway v. Wyeth Pharmaceuticals Inc*., 2009 BCCA 592; *Fairhurst v. De Beers Canada Inc*., 2012 BCCA 257; and *Shah v. LG Chem, Ltd*., 2015 ONSC 2628. The British Columbia cases establish that conspiracy occurs in British Columbia if the harm is suffered here, even if the wrongful conduct occurs elsewhere. *Shah* was a decision relied on by Altria in support of the proposition that the evidence must show a causal link between a defendant's wrongful conduct and the harm suffered in the forum.

Stage 1 of the jurisdictional analysis

[28] In his analysis of the first stage of the *Ewing* framework, the judge found that, in the absence of evidence from Altria, the allegations in the SANOCC would be sufficient to ground jurisdiction under s. 10(g) of the *CJPTA*. Among other things, the judge noted that the respondents' pleading of conspiracy established the commission of a tort in British Columbia. However, as Altria had contested the pleadings with evidence, it was necessary for him to determine whether the respondents had established a good arguable case.

[29] The judge referenced the evidence of Mr. Surgner and Ms. Longest, which was relied upon by Altria to dispute the pleaded jurisdictional facts. The judge gave a number of reasons for his conclusion that the respondents had made out a good arguable case for jurisdiction despite this evidence. He noted, presumably in relation to the tort of conspiracy, that it is not relevant that Altria did not do business in British Columbia since what mattered is that the respondents alleged they suffered injuries in British Columbia. The judge cited the evidence of Mr. Valiquette regarding the cross-border effects of advertising and marketing in the United States.

[30] In paragraphs that are a particular focus of Altria's arguments on appeal, the judge reasoned as follows:

> [80] Third, the evidence of Mr. Surgner and Ms. Longest does not negate any involvement of Altria in the advertising or marketing of JUUL products in Canada generally or British Columbia specifically. Neither of them had knowledge of what, if any, activities, direct or indirect, Altria engaged in within Canada or British Columbia.
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> …
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> [82] The affidavits of Mr. Surgner and Ms. Longest indicate, at a minimum, that Altria provided services to JLI under the Services Agreement, including in relation to the distribution of JUUL products and the marketing of JUUL products. Although Altria says this was only in relation to the American market, the evidence of Mr. Surgner and Ms. Longest falls short of establishing this.
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> [Emphasis added.]

[31] The judge also cited the Services Agreement, and the emails and presentations of high-level Altria executives speaking of "collaboration" and

"partnership" as indicative of a relationship that "is much more than shareholder and company": at paras. 83–84.

[32] Finally, the judge observed that Mr. Surgner and Ms. Longest did not expressly deny the allegations of conspiracy. Indeed, their evidence established that they were not involved in the discussions and meetings that defined the relationship between Altria and the JUUL Defendants:

> [85] …It is also apparent from the various emails put in evidence that the participants in these discussions were high level executives and directors, such as Mr. Crosthwaite, Mr. Valani, Mr. Gifford and Mr. Willard. They are the ones who determined the nature of the relationship between the two groups. They are the ones who wrote of "collaboration", a "partnership", and "strategy alignment". None of these individuals have provided affidavits.

[33] The judge concluded that evidence of the close relationship between Altria and JUUL USA supported the allegations of agency, joint venture, and conspiracy. Altria's evidence "has not shown it did not or could not have participated in the joint venture or conspiracy, as alleged": at para. 86. The judge also found there was some evidence of a causal link between Altria's activities and British Columbia, including Mr. Valiquette's evidence of the cross-border effects of advertising. On this basis, he distinguished *Shah*.

[34] Accordingly, the judge was satisfied that the respondents had established a good arguable case for jurisdiction, thus triggering the mandatory presumption of territorial competence under s. 10 of the *CJPTA*.

Stage 2 of the jurisdictional analysis

[35] The judge described Altria's submissions at the second stage of the analysis as essentially mirroring its submissions at the first stage. Altria again emphasized the evidence that it had no connections with British Columbia, did not sell and market JUUL products in British Columbia, and that Altria and JUUL USA are separate corporate entities. The judge did not find this evidence to be persuasive of a lack of connection. He emphasized, again, that the tort of conspiracy is committed

in British Columbia if the harm occurs here, even if the wrongful conduct occurred elsewhere. The judge stated:

> [96] Altria submits it did nothing in British Columbia with respect to the distribution, marketing and sale of JUUL products. I agree that there is an absence of positive evidence indicating that Altria had a direct involvement with the actual sale of JUUL products in Canada. However, the evidence of Mr. Surgner and Ms. Longest does not rule out the possibility that Altria had some involvement, direct or indirect, with the distribution, marketing or sale of JUUL products in Canada or British Columbia. As indicated, neither of them had any personal knowledge of JUUL Canada or the Canadian market for JUUL products. Moreover, their evidence does not rule out the possibility of a conspiracy or a collaborative joint venture.
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> [Emphasis added.]

[36] The judge rejected Altria's submission that any conspiracy could not have been directed to young people as this would be contrary to Altria's business interests. He characterized this submission as directed to motive, which is not relevant to the question of whether Altria committed the acts or omissions complained of.

[37] In the result, the judge found that Altria had failed to rebut the presumption of jurisdiction, and he dismissed Altria's application.

On appeal

[38] Altria alleges the following errors:

a) The judge failed to address evidence that was materially relevant to the factual conclusions he relied on to establish jurisdiction. Altria frames this error in two ways:

   i. The judge's reasons are inadequate, which amounts to an error in law; or

   ii. Alternatively, the judge committed palpable and overriding error in ignoring or misapprehending the evidence.

b) The judge committed an error in law by incorrectly applying the *Ewert* framework to his factual conclusions. Specifically, Altria alleges that:

i. The judge erroneously placed the onus on Altria at the first stage of the *Ewert* framework, and failed to properly analyze whether the respondents have a good arguable case that the pleaded jurisdictional facts can be proven against Altria; and

ii. The judge failed to address the different considerations that apply at the second stage of the *Ewert* framework, namely whether a presumed connecting factor is actually a real and substantial connection as opposed to a weak or tenuous connection.

Standard of review

[39] The parties agree as to the applicable principles of appellate standard of review. The question of whether a provincial superior court has territorial competence over a matter is a question of law reviewable on the standard of correctness: *Ewert* at paras. 42–44. However, where there is contested evidence in a jurisdictional challenge, an application judge may be required to resolve factual disputes based on the record for the purpose of determining the jurisdictional issue. Such factual findings are made for the limited purpose of the application and are not the ultimate findings of fact that would be made at trial. For the purpose of appellate review, they are treated as factual findings and appellate intervention is justified only on the ground of palpable and overriding error: *Hershey Company v. Leaf*, 2023 BCCA 264 at para. 36.

Analysis

Issue 1: Did the judge fail to consider materially relevant evidence?

[40] The first ground of appeal concerns the judge's findings at the first stage of the *Ewert* framework that Altria's evidence: (1) did not negate any involvement of Altria in the advertising or marketing of JUUL products in Canada; and (2) fell short of establishing that Altria had done nothing in relation to the Canadian market: at

paras. 80, 82. Altria says that in reaching these conclusions, the judge failed to consider evidence tendered by Altria that directly contradicted the conclusions. This is said to constitute an error of law (due to insufficiency of reasons), or alternatively a palpable and overriding error of fact (due to the judge ignoring or misapprehending material evidence).

Were the judge's reasons insufficient?

[41] Altria's first position is that the judge's reasons were insufficient and, on this basis alone, the appeal should be allowed and the matter remitted to the court below for a re-hearing of the application. Altria says that the judge's failure to address material evidence in reaching his factual conclusions renders it impossible for this Court to assess whether the evidence was "appropriately considered": Appellant's Factum, at para. 38.

[42] The Supreme Court of Canada has consistently emphasized the importance of a functional and contextual reading of reasons when there is an allegation of insufficient reasons. An appellate court must not finely parse the judge's reasons in search for error. The task of the appellate court is to assess whether the reasons, "read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review": *R. v. G.F.*, 2021 SCC 20 at para. 69. The reasons must be factually and legally sufficient. Factual sufficiency is a very low bar; the appellate court must simply be able to understand the factual basis of the judge's findings: *G.F.* at para. 71. Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: *G.F.* at para. 74.

[43] I see no basis upon which it can be said that the judge's reasons in this case are insufficient. The judge set out the relevant provisions of the *CJPTA*. He correctly identified the issues he had to decide and, by reference to *Ewert*, the applicable analytical framework. The judge explained the reasons for his findings at both stages of the *Ewert* framework. He clearly grappled with the substance of the live issues

that arose for determination. The pathway followed by the judge to reach his factual and legal conclusions is clearly laid out and intelligible.

[44] The essence of Altria's first ground of appeal is that the judge ignored or misconstrued evidence that was material to his impugned factual conclusions. The reasons are factually and legally sufficient to permit meaningful appellate review of this ground of appeal. However, as Altria's challenge is to the judge's factual findings, the proper standard of review is the deferential standard of palpable and overriding error. A judge's failure to address material evidence on a disputed issue may constitute palpable and overriding error, but only if it gives rise to "the reasoned belief that the [judge] must have forgotten, ignored or misconceived the evidence in a way that effected his or her conclusion": *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 125.

Did the judge ignore or misconceive material evidence?

[45] Altria says that the following evidence and submissions were ignored or misconceived by the judge:

a) Altria did not ship JUUL product to Canada;

b) Altria did not sell cigarette packages containing JUUL marketing inserts at duty free or airport locations at the Canada/United States border;

c) Altria did not send JUUL marketing materials to anyone with a Canadian mailing address;

d) Mr. Valiquette did not, in his report, mention Altria once or suggest that anything Altria did in the United States influenced Canadian consumers;

e) The comments reflected in emails pertaining to the pre-Transaction confidential discussions are not indicative of a conspiracy, but merely reflect Altria's commitment to assist JUUL USA through the Services Agreement;

f) JUUL USA only requested limited services under the Services Agreement, and only in relation to the United States market;

g) Altria played no governance role on JUUL USA's board, and had no management role in the business of the JUUL Defendants;

h) As a result of decisions by United States regulators, the design of JUUL products was "locked" in the American market as of 2016, thus Altria could not have been involved in the design of JUUL products.

[46] I do not agree with Altria's submissions that this evidence was either material to the judge's analysis, or overlooked by him. The judge reviewed Altria's evidence that it: did not directly distribute, market, advertise or sell JUUL products in British Columbia; played no governance or management role in relation to the JUUL Defendants; and provided only limited services to JUUL USA under the Services Agreement. The judge noted that Mr. Valiquette's evidence addressed the cross-border effects of advertising and marketing carried out in the United States. He found that, in light of Mr. Valiquette's expert report, Altria's evidence of its lack of physical presence in British Columbia was of less relevance. The judge referenced evidence of the pre-Transaction discussions at several points in his judgment, but clearly did not (at least for the purpose of the jurisdictional application) adopt Altria's interpretation of the evidence. While the judge may not have cited every piece of evidence and every point raised in argument, the law does not require this of him: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 72. The "uncited evidence" listed by Altria had limited relevance given the live issues before the judge.

[47] The judge's analysis focussed on the pleaded tort of conspiracy. It was, and is, common ground that a conspiracy occurs in British Columbia if the harm is suffered here, regardless of where the wrongful conduct occurs: *Imperial Tobacco* at para. 41; *Fairhurst* at para. 45; *Ewert* at para. 77. In other words, Altria's insistence that it did not directly distribute, market, advertise, or sell JUUL product in British Columbia was not an answer to the conspiracy claim. This was particularly so in light of evidence of the cross-border effects of advertising and marketing activities in the

United States. The judge found that the evidence on the application indicated a relationship between Altria and JUUL USA that goes "beyond that of a mere shareholder to a company": at para. 81. In support of that characterization, the judge cited evidence that included the services Altria provided to JUUL USA under the Services Agreement, and the confidential pre-Transaction discussions that took place over many months between high-level executives from Altria and JUUL USA. The judge noted, accurately, that no one involved in those discussions had provided affidavit evidence on the application. He also noted Mr. Surgner's evidence that Altria stood to benefit financially from JUUL's success in Canada.

[48] On the basis of the evidentiary record as a whole, the judge concluded, at the first stage of the *Ewert* framework, that Altria's evidence did not demonstrate that it did not engage in activities that were related to the advertising or marketing of JUUL products in British Columbia. In reaching this conclusion, the judge did not ignore or misconceive evidence that was material to his analysis. He was clearly alive to, and referenced at length, Altria's evidence of its lack of physical presence in British Columbia. He was simply not persuaded that the evidence was sufficient to undermine the good arguable case for jurisdiction that the respondents had put forward. I am not persuaded that Altria has shown any palpable and overriding error in relation to the judge's impugned findings.

Issue 2: Did the judge incorrectly apply the *Ewert* framework?

Did the judge reverse the onus at stage 1?

[49] In addressing Altria's arguments on this ground of appeal, it is convenient to reproduce the passage from *Ewert* describing the first stage of the framework for determining territorial competence:

> [16] At the first stage of the analysis, the plaintiff must show that one of the connecting factors listed in s. 10 exists. The basic jurisdictional facts relied on by the plaintiff are taken to be true if pleaded (sometimes referred to as a presumption that the pleaded facts are true). The defendant challenging jurisdiction is entitled to contest the pleaded facts with evidence. If the defendant contests the pleaded facts with evidence, the plaintiff is required only to show that there is a good arguable case that the pleaded facts can be proven. The role of the chambers judge is not to prematurely decide the

> merits of the case or to determine whether the pleaded facts are proven on a balance of probabilities; the plaintiff's burden is low: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34; *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 20, leave to appeal ref'd (2013), [2012] S.C.C.A. No. 367 [*Fairhurst*]; *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 343 at para. 26.

[50] Altria says, and I do not take the respondents to dispute, that a plaintiff has the onus at the first stage of the framework to demonstrate either: (1) pleaded facts that establish jurisdiction, or (2) where the defendant contests the pleaded facts with evidence, a good arguable case that the pleaded facts can be proven. *Ewert* describes the burden on a plaintiff at this stage as "low".

[51] Altria argues that the judge erroneously reversed the onus, placing the burden on Altria to "negate" the respondents' pleading that Altria was involved in the marketing or advertising of JUUL products in Canada. This is said to be inconsistent with the approach directed in *Ewert*, which only requires a defendant to "challenge" or "contest" the pleaded jurisdictional facts in order to impose a burden on the plaintiff to demonstrate a good arguable case. There is no burden on the defendant to prove, on a balance of probabilities, that the pleaded facts are not true. Altria says this error led the judge to distinguish *Shah*, when in fact that case was most directly relevant. Altria argues that here, as in *Shah*, the respondents did not make a good arguable case that Altria did anything that is causally connected to the harm suffered by the respondents in British Columbia.

[52] I am not persuaded that the judge made the error alleged by Altria. Altria acknowledges that the judge correctly described the governing provisions of the *CJPTA*. He quoted in full the passages from *Ewert* setting out the stages of the analytical framework for determining jurisdiction. The judge noted that Altria contested the pleaded facts, and, therefore, he defined the issue at the first stage of the analysis as whether the respondents had established a good arguable case that the pleaded jurisdictional facts could be proven: at para. 74. He explained in considerable detail the basis for his conclusion that the respondents had made out a good arguable case: at paras. 77–86. The judge also gave detailed reasons for his

conclusion, on the evidence and pleaded facts, that *Shah* was distinguishable: at paras. 87–89.

[53] Altria's argument focusses on para. 80 of the reasons for judgment, and the judge's observation that the evidence of Mr. Surgner and Ms. Longest "does not negate" any involvement of Altria in advertising or marketing JUUL products in Canada. This passage must be read in context. It is found in the course of the judge's review of the evidence that he relied on to conclude that the respondents had a good arguable case that jurisdiction could be established. The evidence includes Mr. Valiquette's report, and the evidence of the confidential pre-Transaction discussions that occurred between high-level executives of Altria and JUUL USA. Altria placed heavy reliance on the evidence of Mr. Surgner and Ms. Longest to contest the pleaded facts. The respondents argued that these witnesses did not have knowledge of Altria's conduct in Canada, and were not privy to the pre-Transaction discussions. In paragraph 80, the judge reviews the limits of the knowledge of these witnesses in terms of Altria's activities outside the United States. What I take the judge to be saying in this paragraph is that the evidence of Mr. Surgner and Ms. Longest, because of these limits, was insufficient to overcome the good arguable case for jurisdiction that the respondents had demonstrated on the pleadings and evidence as a whole.

[54] To similar effect, I see no error in the judge's conclusion that *Shah* is distinguishable. In *Shah*, the Court found that, in the absence of the defendants' evidence contesting jurisdiction, the pleading would have established that the court had jurisdiction because the defendants were alleged to be a party to a conspiracy to fix prices in Ontario. However, the defendants adduced evidence to show they did not carry on business in Ontario and did not participate in a conspiracy to fix prices in Ontario. In contrast, the plaintiffs adduced evidence that was described by the Court in *Shah* as "woefully inadmissible and inadequate": at para. 69.

[55] As the judge observed, in *Shah* there was a complete absence of evidence of a link between the alleged wrongdoer and the forum. In contrast, in the present case

there is evidence of what the judge described as a "significant relationship" between Altria and JUUL USA: at para. 89. There is evidence that JUUL was deliberately marketed as a device and brand for young people. There is evidence that Altria provided marketing assistance to JUUL USA through the Services Agreement, and also evidence of close collaboration between high-level executives of Altria and JUUL USA over many months leading up to the Transaction. There is evidence that marketing and advertising carried out in the United States has cross-border impacts. There is evidence that Altria stood to benefit financially from JUUL's success in Canada.

[56] In light of the evidentiary record that was before him, I see no error of law or fact in the judge's conclusion that the respondents met the low bar of showing a good arguable case that their pleaded jurisdictional facts in relation to the tort of conspiracy could be proven. On appeal, Altria does not press the argument that a real and substantial connection to British Columbia must be established in relation to every pleaded cause of action. The judge was clearly correct to reject this argument, based on *Van Breda*. The judge's finding that the respondents had shown a good arguable case that Altria committed the tort of conspiracy in British Columbia was sufficient to establish a presumptive connecting factor under s. 10(g) of the *CJPTA*.

Did the judge fail to address the different considerations at stage 2?

[57] At the second stage of the *Ewert* framework, the onus shifts to the foreign defendant to rebut the presumption of a real and substantial connection by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Ewert* at para. 17, quoting *Van Breda* at para. 95. This is described as a "heavy" burden given the strength of the presumption: *Ewert* at para. 17.

[58] Altria argues that even if the judge did not err in finding a presumptive real and substantial connection at the first stage of the analysis, he erred at the second stage in concluding that the presumption was not rebutted. Altria says that the

second stage of the analysis serves an important constitutional role. A connection between a state and a dispute cannot be "weak or hypothetical" as this would cast doubt on the legitimacy of the exercise of the adjudicative power of the state: *Hershey* at para. 48, citing *Van Breda* at para. 32.

[59] Altria's arguments on this ground of appeal misstate the basis for the judge's finding of a presumption of a real and substantial connection. Altria suggests that the judge found that the respondents met their onus at the first stage of the analysis because "Altria did not prove that no hypothetical class member 'hopped the border' and was influenced by something Altria did in the USA". Altria then argues that this circumstance is a "textbook example of a weak connection insufficient to ground jurisdiction at Stage 2": Appellant's Factum at para. 82.

[60] Respectfully, I consider that Altria's argument misconceives the judge's finding at the first stage, and the evidence and pleaded facts on which it is based. The judge did not find, and the respondents do not allege, that there is a real and substantial connection because a class member may have "hopped the border" and been influenced by Altria's activities in the United States. Rather, the judge found that the respondents established a good arguable case that Altria was a party to a conspiracy to advertise and market JUUL e-cigarettes to young people in a manner that was misleading about the health risks, including the risk of addiction. Altria, and the other defendants, are alleged either to: (1) have had the predominant purpose of causing injuries to young consumers such as the respondents, or (2) have acted unlawfully, knowing that their unlawful conduct would cause injury to young people like the respondents. The pleaded facts of conspiracy include that the marketing and advertising techniques employed by the defendants had cross-border impacts on young Canadians due to the defendants' use, in particular, of social media platforms.

[61] For the reasons I have already stated, the judge did not err in finding that the pleadings, and the evidence adduced on the application, established a good arguable case. Altria's arguments at the second stage of the analysis were, as the judge noted, repetitive of its arguments at the first stage: Altria does not do business

in British Columbia, Altria and JUUL USA are separate corporate entities, and Altria's activities in the United States were not causally connected to injuries suffered by JUUL consumers in Canada. I see no error in the judge's conclusion that these arguments were insufficient to rebut the presumption of a real and substantial connection of territorial competence based on Altria's alleged commission of the tort of conspiracy in British Columbia. Altria's submission that the judge erred at stage two of the analysis proceeds on a false premise as to the nature of the real and substantial connection that he found.

Disposition

[62] I would dismiss the appeal.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"