COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *VM Agritech Limited v. Smith*,
2024 BCCA 360

Date: 20241022
Docket: CA49535

Between:

VM Agritech Limited (formerly MyCo Sciences Limited)
and Christopher J. Wightman

Appellants
(Defendants)

And

Alan Gilbert Smith

Respondent
(Plaintiff)

Corrected Judgment: The cover page of the judgment was corrected on October 23, 2024.

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Newbury
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated November 7, 2023 (*Smith v. VM Agritech Limited*, Vancouver Docket S230800).

Counsel for the Appellants:	M. Ross
Counsel for the Respondent:	S. Lin
Place and Date of Hearing:	Vancouver, British Columbia September 23, 2024
Place and Date of Judgment:	Vancouver, British Columbia October 22, 2024

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Madam Justice Fisher

Summary:

In an action for debt brought by a plaintiff resident in B.C. against U.K. defendants, court below found it had jurisdiction under ss. 3 and 10 of the Court Jurisdiction and Proceedings Transfer Act and that defendants had attorned by applying under R. 21-8 to have the plaintiff's claim struck out. This had occurred after the 30-day period in subrule (5) had expired. Defendants appealed.

Held: Appeal dismissed. Judge below had not erred in finding BCSC had jurisdiction due to various "connections" between B.C. and the facts of the case; but had erred in finding defendants had attorned. Their jurisdictional response had not sought any determination on the merits, but only a determination of jurisdiction. However, attornment was irrelevant given that the presumption of territorial competence had not been rebutted by the defendants' jurisdictional response.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This is a technical and fact-intensive appeal that involves the interaction of the *Court Jurisdiction and Proceedings Transfer Act,* S.B.C. 2003, c. 28 *("CJPTA*"), and the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. That interaction continues to be informed by previous court rules and cases decided under them — despite the adoption by the framers of the *CJPTA* of largely objective criteria to replace the more subjective means by which jurisdiction was historically determined in cases involving 'foreign' parties or events.

[2] In that earlier context, foreign defendants often found themselves made subject to the jurisdiction of courts without intending to submit, or attorn, thereto. As this case demonstrates, the law has evolved, particularly with the enactment of R. 14 of the former *Supreme Court Rules*, B.C. Reg. 221/90 and its most recent iteration, R. 21-8 of the *Civil Rules.* They clarified the process by which a foreign defendant may, without attorning to the jurisdiction, challenge an initial determination of territorial competence by filing a "jurisdictional response". Both rules specified a 30-day limitation period within which a purported defendant may apply to challenge a claim on jurisdictional grounds and file a response to the claim without risking attornment. In the case at bar, however, the defendants did not file their application until after the 30-day period had expired. The court below declined to grant them an extension of time.

Jurisdiction

[3] I begin with an overview of the *CJPTA* and related court rules.

[4] The *CJPTA*, which came into force in British Columbia in 2006, was adopted by most Canadian provinces after the Uniform Law Conference of Canada issued a draft statute at its conference in 1993. (See the appendix to the *Proceedings of the 75th Annual Meeting of the Uniform Law Conference of Canada*, 1993.) The draft represented a response to the decisions of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* [1993] 3 S.C.R. 1077 and *Beals v. Saldhana* 2003 SCC 72 concerning the concept of "real and substantial connection" as a principle of private international law. Responding to criticisms that *Morguard* and cases following it were ambiguous and uncertain, the Conference recommended a largely objective method of determining issues of jurisdiction in Canadian courts. As recounted by Mr. Justice Smith in *Stanway v. Wyeth Pharmaceuticals Inc*. 2009 BCCA 592, *lve to app ref'd* 2010 S.C.C.A. No. 68:

> These difficulties and others were addressed by the *Uniform Law Conference of Canada in the Uniform Court Jurisdiction and Proceedings Transfer Act [Uniform Act]*, which was adopted by the British Columbia Legislature and enacted as the *CJPTA*. In its introductory comments to the *Uniform Act*, the Conference set out four "main purposes", of which two are relevant to this appeal:
>
> (1) to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction;
>
> (2) to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077....
>
> The Conference added that, to achieve these purposes,
>
> > ... this Act would, for the first time in common law Canada, give the substantive rules of jurisdiction an express statutory form instead of leaving them implicit in each province's rules for service of process. In the vast majority of cases this Act would give the same result as existing law, but the principles are expressed in different terms. Jurisdiction is not established by the availability of service of process, but by the existence of defined connections between the territory or legal system of the enacting jurisdiction, and a party to the proceeding or the facts on which the proceeding is based. The term "territorial competence" has been chosen to refer to this aspect of jurisdiction ....

Thus, "territorial competence", formerly described as "jurisdiction *simpliciter*", is defined in s. 1 of the *CJPTA* to mean,

> the aspects of a court's jurisdiction that depend on a connection between,
>
> (a) the territory or legal system of the state in which the court is established; and
>
> (b) a party to a proceeding in the court or the facts on which the proceeding is based.

Now, rather than jurisdiction *simpliciter* depending on the procedural rules for service of process as before, territorial competence is to be determined exclusively by the substantive rules set out in the *CJPTA*. Thus, s. 2 provides,

> (1) In this Part, "court" means a court of British Columbia.
>
> (2) The territorial competence of a court is to be determined solely by reference to this Part.

The substantive rules for determining territorial competence are set out in s. 3…. [At paras. 9–13; emphasis added.]

[5] Section 3 remains virtually the same as when it was first enacted. It states:

> 3. 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. [Emphasis added.]

[6] Section 10 sets out the connecting factors that are presumed to constitute a "real and substantial connection" for purposes of s. 3(e), including those for contractual claims:

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

> between British Columbia and those facts is presumed to exist if the proceeding
>
> ...
>
> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
>
> (ii) by its express terms, the contract is governed by the law of British Columbia, or
>
> (iii) the contract
>
> (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
>
> (B) resulted from a solicitation of business in British Columbia by or on behalf of the seller, … [Emphasis added.]

Section 11 goes on to codify the Court's discretion to decline territorial jurisdiction if it determines that the court of another jurisdiction, or "state", would be more appropriate (*forum conveniens*): see *Teck Cominco Metals Ltd. v. Lloyd's Underwriters* 2009 SCC 11 at paras. 21–4).

[7] A presumption of territorial competence drawn under s. 3 and/or 10 of the *CJPTA* is "not irrebuttable": see *Club Resorts Ltd. v. Van Breda* 2012 SCC 17 at paras. 95–100. Again in conjunction with the enactment of the *CJPTA*, Rules 14(6) to (8) of the *Supreme Court Rules* were replaced in 2003 by Rules 14(6) to (6.4) to provide a procedure by which a defendant could challenge territorial competence with evidence. Rule 14 was amended in 2010 and replaced by R. 21-8 of the *Civil Rules*, which provides:

> (1) A party who has been served with an originating pleading or petition in a proceeding, whether that service was effected in or outside British Columbia, may, after filing a jurisdictional response in Form 108,
>
> (a) apply to strike out the notice of civil claim, counterclaim, third party notice or petition or to dismiss or stay the proceeding on the ground that the notice of civil claim, counterclaim, third party notice or petition does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
>
> (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or

(c) allege in a pleading or in a response to petition that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

(2) Whether or not a party referred to in subrule (1) applies or makes an allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.

(3) If a party who has been served with an originating pleading or petition in a proceeding, whether served in or outside British Columbia, alleges that the notice of civil claim, counterclaim, third party notice or petition is invalid or has expired or that the purported service of the notice of civil claim, counterclaim, third party notice or petition was invalid, the party may, after filing a jurisdictional response in Form 108, apply for one or both of the following:

(a) an order setting aside the notice of civil claim, counterclaim, third party notice or petition;

(b) an order setting aside service of the notice of civil claim, counterclaim, third party notice or petition.

(4) If an application is brought under subrule (1) (a) or (b) or (3) or an issue is raised by an allegation in a pleading or a response to [a] petition referred to in subrule (1) (c), the court may, on the application of a party of record, before deciding the first-mentioned application or issue,

(a) stay the proceeding,

(b) give directions for the conduct of the first-mentioned application,

(c) give directions for the conduct of the proceeding, and

(d) discharge any order previously made in the proceeding.

(5) If, within 30 days after filing a jurisdictional response in a proceeding, the filing party serves a notice of application under subrule (1) (a) or (b) or (3) on the parties of record or files a pleading or a response to petition referred to in subrule (1) (c),

(a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or serving any or all of the following:

(i) the jurisdictional response;

(ii) a pleading or a response to petition under subrule (1) (c);

(iii) a notice of application and supporting affidavits under subrule (1) (a) or (b), and

(b) until the court has decided the application or the issue raised by the pleading, petition or response to petition, the party may, without submitting to the jurisdiction of the court,

(i) apply for, enforce or obey an order of the court, and

(ii) defend the proceeding on its merits. [Emphasis added.

[8] Recent jurisprudence has clarified the standard that must be met by a defendant in order to rebut a presumption of territorial competence under the *CJPTA*. In *Canadian Olympic Committee v. VF Outdoor Canada Co*. 2016 BCSC 238, Madam Justice Dillon summarized various authorities:

> The party arguing for jurisdiction has the initial burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum (*Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 100 (*Club Resorts); Right Business Ltd.* at para. 27). The threshold for establishing territorial competence is not high (*JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 59 (*JTG Management*)). Generally, as long as the s. 10 claims are pleaded to trigger one of the presumptions of a real and substantial connection, the plaintiff need not support its allegations with evidence (*Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 21 (*Fairhurst*); *Right Business Ltd.* at para. 44; *Original Cakerie* at para. 22). The basic facts are taken to be proven, if plead[ed], but the presumption is rebuttable (*Stanway* at para. 22; *Fairhurst* at para. 14).
>
> The burden of rebutting the presumption rests upon the party challenging the assumption of jurisdiction by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them" (*Club Resorts* at para. 95). It must be plain and obvious that the action as pleaded could not lie within the territorial competence of the court (*Fairhurst* at para. 32; *JTG Management* at paras. 35 and 60). If the defendant tenders evidence that challenges the plaintiff's jurisdictional facts or to demonstrate that the plaintiff's claim is tenuous or without merit, the plaintiff is required to adduce evidence that satisfies the court that it has a good, arguable case that the contentious facts can be established (*Stanway* at para. 70; *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 35 (*Purple Echo Productions*); *Right Business Ltd.* at para. 44; *Original Cakerie* at para. 22). The burden on the plaintiff to show an arguable case in the circumstance where the defendant presents evidence will be discharged if there are facts, alleged or deposed, which, if true, would provide a foundation for jurisdiction (*Purple Echo Productions* at para. 34; *Original Cakerie* at para. 23; *JTG Management* at para. 34). The court is not going to determine whether the facts are true: the task for the plaintiff is to show an arguable case that they can be established (*Purple Echo Productions* at para. 34; *Fairhurst* at para. 20). [At paras. 23–4; emphasis added.]

[9] In *Ewert v. Höegh Autoliners AS* 2020 BCCA 181, this court agreed with this summary of the law, but preferred to "outline the framework more simply." (At

para. 15.) Madam Justice MacKenzie described the two stages of the required analysis as follows:

> 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.
>
> At the second stage, if one of the connecting factors is established either on undisputed pleadings or on disputed pleadings but with a good arguable case, the "mandatory presumption" of a real and substantial connection (and, therefore, territorial competence) is triggered: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 20, leave to appeal ref'd [2010] S.C.C.A. No. 68 [*Stanway*]. This is, of course, distinct from the "presumption" that pleaded facts are true. At this stage, because the connecting factor has already been established, it is presumed that a real and substantial connection exists, and therefore that the court has territorial competence. The defendant may now attempt to rebut the presumption of real and substantial connection by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Van Breda* at para. 95; *Canadian Olympic* at para. 24. However, the presumption is strong and "likely to be determinative": *Stanway* at paras. 20–22. The burden on the defendant to rebut the presumption is heavy: *Fairhurst* at paras. 32, 42; *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 35, aff'd 2015 BCCA 200; *Mazarei v. Icon Omega Developments Ltd.*, 2011 BCSC 259 at para. 33. At this stage of the analysis, a connecting factor is already established: the defendant's task is to show why a real and substantial connection does not follow, despite the strong presumption that it does. [At paras. 16–7; emphasis added.]

[10] More recently, in *Altria Group, Inc. v. Stephens* 2024 BCCA 99, this court undertook an analysis in accordance with that described in *Ewert* and concluded that the judge below had not erred in finding that the pleadings and evidence adduced on the application established a good arguable case that the pleaded jurisdictional facts could be proven. This was a "low bar". The defendant's arguments at the second

stage, on the other hand, were found to be repetitive and ultimately "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." (See paras. 52–61.) Thus the action could proceed in the Supreme Court.

[11] Finally, I note that various other court rules were amended in British Columbia concurrently with the enactment of the *CJPTA,* including rules dealing with service outside the province. Rule 13(1) of the former Rules, for example, was amended in 2003 and then replaced in 2010 by what is now R. 4-5(1) of the *Civil Rules*. It specifies that service of an originating process or other document on a person outside the province may be effected without leave in the circumstances specified in s. 10 of the *CJPTA*. Any pleading so served must contain an endorsement in Form 11 and state the circumstances in s. 10 that are relied upon to permit service *ex juris* without leave.

Factual Background

The Plaintiff's Claim

[12] Against this background, I turn to the facts of the case at bar. The underlying cause of action, in debt, arises in connection with an alleged agreement between the defendant VM Agritech Limited ("VM Agritech"), a U.K. corporation, and Voice Mobility International Inc. ("Voice"), a company based in Vancouver, B.C. Its shares are traded on the TSX Venture Exchange. The defendant Mr. Wightman is a director of VM Agritech and resides in the U.K.; the plaintiff Mr. Smith is a shareholder of Voice and resides in Vancouver.

[13] In 2020, VM Agritech and Voice entered into a Share Exchange Agreement (referred to by Mr. Smith in his pleading as a "Reverse Take Over Transaction" or "RTO") which contemplated that subject to various conditions, VM Agritech would acquire the shares of Voice.

[14] Mr. Smith alleged at para. 5 of his Notice of Civil Claim ("NOCC") that as part of this transaction, Mr. Wightman "caused VM Agritech to retain" the services of the

Vancouver offices of a law firm, Cassels Brock, to provide legal advice *to VM Agritech* on the transaction. The NOCC continued:

> 5. ... Under the agreement between VM Agritech and Voice, VM Agritech was responsible for paying accounts of Cassels Brock related to work specific to the [Reverse Take Over] transaction and Wightman represented to Voice that he would cause VM Agritech to pay these accounts.
>
> 6. From time to time in 2020 and 2021 Cassels Brock issued legal accounts payable by VM Agritech for the legal services provided (the "Accounts"). Although the nature of the pursuit of the proposed RTO meant the accounts were nominally addressed to Voice, the work done was for the benefit of VM Agritech, and Wightman provided the instructions to Cassels Brock for the work done.
>
> 7. Wightman received copies of each of the Accounts. Wightman controlled the disbursement of funds by VM Agritech and paid several of the Accounts. While Wightman kept providing instructions to Cassels Brock for the work to be done, from December 2020 Wightman let the Accounts accrue unpaid but with the promise and representation, express or implied, that each of the Accounts would be paid at the closing of the RTO.
>
> 8. In or about June, 2021 Wightman caused VM Agritech to breach the proposed RTO between Voice and VM Agritech so he could cause VM Agritech to pursue a new Transaction, legally called the Proposed Qualifying Transaction (the "Qualifying Transaction"), on the TSX Venture Exchange with a different company in Canada, … in circumstances where Wightman believed a Qualifying Transaction with [the new company] would be more beneficial to him personally than concluding the proposed RTO with Voice.
>
> 9. Cassels Brock issued three small accounts after this breach for work that was in progress or needed to he completed as part of the intended RTO. The total of the outstanding Accounts as of December 31, 2021 was $24,155.91. [Emphasis added.]

[15] Mr. Smith pleaded that the Accounts were "nominally addressed" to Voice (although he does not say why) but were payable by VM Agritech, and that when the transaction failed to close, Cassels Brock looked to Voice as the "nominal recipient" of those Accounts for payment. He says that although he had no legal obligation regarding the Accounts, he felt a moral obligation to the law firm. In February 2022, he reached a "compromise" with Cassels Brock "whereby he agreed to and did pay $12,000 to the firm for an unreserved and complete assignment of the Accounts and the $24,155.91 outstanding ...". The effect of this assignment was of course that he

stepped into the shoes of Voice vis-à-vis any obligation on the part of VM Agritech to pay the Accounts.

[16] According to para. 12 of the NOCC, Mr. Smith gave Mr. Wightman and VM Agritech notice of the assignment and demanded payment of the $24,155.91. Mr. Wightman responded, denying the existence of any obligation to pay the firm and suggested that any future communications about the matter be directed to VM Agritech's counsel in Vancouver, Mr. Galanopoulos.

[17] As detailed at para. 15 of the NOCC, Mr. Galanopoulos wrote to Mr. Smith on January 26, 2023, confirming VM Agritech's denial of any obligation to pay for what were characterized as *Voice's* legal fees. He asked Mr. Smith to have his legal counsel correspond with him if there was "anything further."

[18] Mr. Smith, who was then unrepresented, filed his NOCC on February 1, 2023, and then purported to serve the defendants by providing Mr. Galanopoulos with a copy of the claim. The NOCC made no reference to service *ex juris* under R. 4-5(2) or to the basis on which it was alleged the Supreme Court had jurisdiction under the *CJPTA* as required.

[19] In due course, the defendants filed a jurisdictional response and applied *inter alia* to set aside the claim and service thereof on the ground that they had not been properly served. This application was granted by Madam Justice MacDonald on May 2, 2023, for reasons indexed as 2023 BCSC 729. At the same time, she declined to set aside the NOCC as failing to disclose a cause of action, preferring to restrict the scope of R. 21-8(3)(a) of the *Civil Rules* to "technical or procedural defects in the steps taken, and not substantive defects within a claim." (At para. 26.) No appeal was taken from her order setting aside the purported service of the pleading.

The Plaintiff's Second Try

[20] On May 9, 2023, Mr. Smith caused copies of his NOCC to be delivered by courier to the home of Mr. Thompson, VM Agritech's finance director, in the U.K.

(According to the plaintiff, his address is also VM Agritech's "registered address".) The package was accepted by someone in Mr. Thompson's household.

[21] On June 26, 2023, the defendants filed a second jurisdictional response and supporting evidence. Some correspondence between the parties took place over the ensuing weeks and according to the defendants, Mr. Smith filed a second NOCC on June 30 that purported to be endorsed for service *ex juris*. Evidently it was delivered to Mr. Thompson's office and was found by him on July 10. (We were provided only with the NOCC filed February 1, 2023, which contains no endorsement for service *ex juris*.)

[22] In early August 2023, the defendants again applied for an order setting aside the purported service, not only on the ground that the claim had not been served in accordance with the *Civil Rules*, but also on the bases that the endorsement to the NOCC for service *ex juris* without leave was deficient and that the Supreme Court lacked jurisdiction in the matter. The defendants again sought an order dismissing or staying the claim, or an order under Rules 21-8(4)(b),(c) or 22-4(2) extending the date for the service of an application "in order to attract the protections afforded" by R. 21-8(5), to the date on which their application was served. An affidavit of Mr. Wightman was filed for the purpose of challenging the Court's jurisdiction; this was affidavit No. 2, which supplemented his earlier affidavit, No. 1, filed in March.

[23] The application came before Mr. Justice Giaschi in the court below on November 7, 2023, and he was able to give brief oral reasons on the same day.

The Chambers Judge's Reasons

[24] The chambers judge began by noting the previous ruling of MacDonald J. regarding service and stated:

> [6] The Claim alleges that:
>
> a) In 2020, [VM Agritech Limited, which paraphrases as VMAL] entered into an agreement to acquire Voice and take VMAL public;
>
> b) Mr. Wightman retained Cassels Brock to provide legal services for VMAL;

> c) VMAL and Voice agreed that VMAL would pay for legal services rendered by Cassels Brock;
>
> d) VMAL failed to pay Cassels Brock's invoices for legal services for a total debt of $24,155.91 ...; and
>
> e) In February 2022, the plaintiff paid Cassels Brock $12,000 in exchange for an assignment of the Debt.
>
> I would add that it is further alleged in the notice of civil claim, and is undisputed, that the plaintiff is a resident of Vancouver, Voice is headquartered in Vancouver, the Cassels Brock office that was retained was the Vancouver office of Cassels Brock, VMAL is a U.K. company, and Mr. Wightman is a resident of the United Kingdom. [At paras. 4–5; emphasis added.]

[25] At para. 8, the chambers judge noted that R. 4-5(10) provides three different methods of service, namely:

> (a) in a manner provided by these *Supreme Court Civil Rules* for service in British Columbia,
>
> (b) in a manner provided by the law of the place where service is made if, by that manner of service, the document could reasonably be expected to come to the notice of the person to be served, or
>
> (c) in a state that is a contracting state under the [Hague] Convention, in a manner provided by or permitted under the Convention.

Since none of these routes had been properly followed, he concluded at para. 15 that the purported service of the NOCC on the defendants had been "defective."

[26] With respect to the defendants' application to have the proceedings stayed or dismissed due to lack of jurisdiction, the chambers judge did not accept that the Court was without jurisdiction under the *CJPTA*. In his analysis:

> ... There are several connecting factors with British Columbia. They include: the plaintiff is a resident of British Columbia, Voice is headquartered in British Columbia, and the Cassels Brock office retained was located in British Columbia. It seems abundantly clear to me that there is a substantial connection between the claim of the plaintiff and the jurisdiction of British Columbia.
>
> The applicants have continuously referred to the merits of the dispute and whether there is an arguable case but, in my view, they confuse arguable case on jurisdictional facts with arguable case on the ultimate merits. I am not to address the ultimate merits of the dispute. I am merely to address whether there is sufficient evidence of a real and substantial connection with British Columbia. Based on the evidence before me and what the parties have conceded, I am quite satisfied that there is a sufficient connection with British

> Columbia to clothe this court with jurisdiction. [At paras. 17–8; emphasis added.]

Accordingly, he declined to dismiss or stay the proceedings.

[27] The judge next considered the defendants' application for an extension of the time in which they could serve their application to apply under R. 21-8 to secure the protection of subrule (5). As mentioned earlier, since the defendants did not file their application for the dismissal or staying of the plaintiff's claim until August 2, the 30-day time limit, which runs from the date of the filing of the jurisdictional response, had expired. The chambers judge noted Mr. Wightman's explanation for the delay at para. 21 of his reasons — essentially that he had been too busy to deal with the matter in the month of July and had been working in a "relatively remote area", which made it difficult for him to meet with a notary to swear his affidavit. The judge did not find this explanation to be "very compelling". He found that Mr. Wightman had simply not given the matter the priority he should have and that the defendants could have applied earlier for an extension of time. Accordingly, he declined to exercise his jurisdiction to extend the time. (At paras. 22–3.)

[28] The judge then described the "overall result" of his rulings:

> So what is the result? The service was defective but the time has not been extended for the protections under Rule 21-8(5). I think it is reasonably clear that the result is that by the filing of the notice of application, the defendants have attorned to the jurisdiction. To paraphrase *Litecubes, L.L.C. v. Northern Light Products Inc.*, 2009 BCSC 181, at paras. 40-41 from the Annual Practice, attornment to the jurisdiction of a foreign court occurs as soon as the party asks the foreign court to make any decision on the merits, other than a decision determining jurisdiction. Attornment can occur by mistake, and by such simple actions as filing a statement of defence or seeking general relief, which is what has happened here. [At para. 24; emphasis added.]

[29] The defendants filed a notice of appeal in this court and sought leave to appeal the judge's orders declining their motions for the dismissal or staying of the proceeding and for the extension of the time to serve their application under R. 21-8(5), and the judge's declaration that the defendants had attorned to the

jurisdiction of the Court, such that it was unnecessary for the plaintiff to re-serve his NOCC.

[30] The defendants' application for leave to appeal came before Mr. Justice Hunter in chambers on January 29, 2024. He ordered that leave was not required for that portion of the judge's order declining the request to stay or dismiss the proceeding under R. 21-8(1)(b), nor for the declaration of attornment. Leave was required, however, and was granted, to challenge the judge's order declining the defendants' request for an extension of time in which to serve their application under Rules 21-8(4)(b), (c) or 22-4(2).

Events Subsequent to the Granting of Leave

[31] On February 6, 2024, the plaintiff obtained a default judgment in the Supreme Court in the amount of $24,155.91 plus pre- and post-judgment interest. In May 2024, the defendants sought an order setting the default judgment aside and declaring that the application would not constitute attornment to the Court's jurisdiction. On June 12, 2024, Associate Judge Muir rendered reasons indexed as 2024 BCSC 1017, in which she commented:

> A default judgment is clearly a very blunt instrument that deprives defendants of their day in court. There is a point, however, past which a plaintiff is not obliged to go. Based on the defendants' intentional failure to either file a response to civil claim or seek a stay of the Giaschi order, the length of time that this matter has been before the courts for what is a very minimal claim, and my rejection of the other arguments advanced by the defendants, I conclude that the application before me today should be dismissed. The default judgment will stand.
>
> As to the defendants' application for a declaration that they have not submitted to the jurisdiction of this court by making this application, in my view, given both the Giaschi order and the dismissal of today's application to overturn the default judgment, that order is unnecessary and that aspect of the application is also dismissed. [At paras. 55–7; emphasis added.]

Two weeks later, the defendants filed an appeal of Muir A.J.'s order, which appeal is to be heard later in October. It is perhaps unnecessary to state that the defendants have not paid the default judgment in the meantime.

On Appeal

[32] In this court, the defendants assert six grounds of appeal (the first in fact constituting two grounds) as follows:

> a. Having found, in reference to section 10(e) of the *Court Jurisdiction and Proceedings Act*, S.B.C 2003, c. 28, a real and substantial connection between British Columbia and the facts on which the proceeding against the defendants is based and, thus, that the court has territorial competence under section 3(e) of the *CJPA* – and so, in reference to Rule 21-8(1)(b), jurisdiction over the defendants in respect of the claim made against them –, the chambers judge erred in law by proceeding:
>
> i. to consider whether to extend under Rule 22-4 the latest date for the defendants to serve their notice of application in order to attract the protections afforded by Rule 21-8(5); and
>
> ii. to find that the defendants attorned and, thus, that the court also has territorial competence under section 3(b) of the *CJPA*.
>
> b. By ignoring or misconceiving the defendants' evidence disputing it, the chambers judge made a palpable and overriding error in drawing his conclusion that the plaintiff's allegation that they had retained Cassels to represent VMAL was undisputed.
>
> c. By assuming, contrary to the *CJPTA* framework, an overly narrow scope of the evidence the defendants could bring to dispute whether the plaintiff has an arguable case, the chambers judge erred in law.
>
> d. By relying on his finding that the defendants had referred to the merits in their notice of application, the chambers judge erred in law in holding that the defendants attorned when they filed their notice of application on August 2, 2023.
>
> e. By failing to consider the factor of prejudice in the exercise of his discretion regarding an extension of time to serve the notice of application, the chambers judge made a palpable and overriding error.

[33] In approaching this combination of legal and factual questions, I note the relevant standards of review as set out in *Altria Group, Inc. v. Stephens* 2024 BCCA 99:

> ... 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. [At para. 39.]

The First Ground

[34] The defendants' first ground of appeal is stated somewhat differently at page 15 of their factum than at para. 32 a.i above. The restated ground in the factum is that:

> Error a.i.: The Chambers Judge Proceeded to Consider Whether to Extend the Time for Serving the Notice of Application After Having Already Found a Real and Substantial Connection between British Columbia and the Facts on which the Proceeding is Based

[35] This argument may be answered by reference to the fact that there are two ways in which a British Columbia court may properly assume jurisdiction in a case such as this — either where the case falls within the terms of s. 3 (other than subpara. (b) thereof) of the *CJPTA,* or where the defendant "submits," or attorns, to the jurisdiction of the British Columbia court (s. 3(b).) As stated in *Nordmark v. Frykman* 2019 BCCA 433:

> Attornment is a stand-alone basis for the assumption of jurisdiction: *Kriegman v. Wilson*, 2016 BCCA 122 at para. 29, 86 B.C.L.R. (5th) 1. It arises when a defendant is deemed to have submitted to the jurisdiction of a court that otherwise would not have jurisdiction over them by actions inconsistent with a denial of that jurisdiction: *Kraupner v. Ruby* (1957), 7 D.L.R. (2d) 383 at 392 (B.C.C.A.), appeal quashed, [1957] S.C.R. viii; *Pope v. Pope*, [1940] 2 D.L.R. 661 at 664 (B.C.S.C), appeal on other grounds dismissed, [1940] 3 D.L.R. 454 (B.C.C.A.). Submission can be unintentional: *Edgar v. Ronald* (1994), 12 B.C.L.R. (3d) 194 at paras. 20–21 (C.A.). Put otherwise, a defendant can, by their actions, vest a court with jurisdiction the court otherwise would not have. Today attornment is captured by s. 3(b) of the *CJPTA*.
>
> The concept of attornment does not apply when jurisdiction already exists. For example, it would be incorrect to say that a defendant ordinarily resident in British Columbia who files a defence to an action for damages arising out of a motor vehicle accident that occurred in British Columbia has attorned to the court's jurisdiction. [At paras. 47–8; emphasis added.]

[36] Similarly, in *International Raw Materials Ltd. v. Steadfast Insurance Company* 2023 BCSC 1389, Mr. Justice Riley (as he then was) endorsed the proposition that attornment "does not apply" where jurisdiction already exists, and said he was undertaking an analysis of s. 3(b) of the *CJPTA* (i.e., attornment) in that case as "an

alternative basis for finding that the Court has jurisdiction *simpliciter* in this matter." (At para. 47.) He went on to describe the operation of R. 21-8 as follows:

> Rule 21-8 establishes a mechanism for a responding party to formally dispute the Court's jurisdiction, without being found to have attorned by participating in the proceedings. Rule 21-8(1) allows for the filing of a jurisdictional response in Form 108. Rule 21-8(5) then provides that where certain conditions are met, (a) the party "does not submit to the jurisdiction of the court" by merely filing a jurisdictional response, an application for a preliminary determination of jurisdiction, or a pleading denying jurisdiction, until (b) the court has decided the jurisdictional issue raised in the application or responding pleading.
>
> The saving provision in Rule 21-8(5) only applies where the preconditions set out in that particular sub-rule are met. Thus, a party seeking to preserve the right to dispute the Court's jurisdiction without attorning must file a jurisdictional response, and then, within 30 days, must bring an application for preliminary determination, or file a responding pleading alleging a lack of jurisdiction. [At paras. 49–50; emphasis added.]

[37] I agree that the plaintiff in the case at bar met the first hurdle of showing a "good arguable case" that the Supreme Court had jurisdiction over his claim by reason of a "real and substantial connection" in accordance with s. 3(e) of the *CJPTA*. The Share Exchange Agreement and its replacement concerned an exchange of the shares of a company "based in" (although not incorporated in) the province; as a condition of the share exchange, Voice was to be 're-domesticated', or continued, from Nevada to British Columbia; the legal services that gave rise to the alleged debt were performed by the Vancouver office of a (national) firm and presumably concerned the law of British Columbia; and the assignment of the debt was made by the law firm in favour of the plaintiff, a resident of the province. These 'connecting factors' were substantial enough to meet the plaintiff's burden at this stage. Further, since the Continuation Agreement and the assignment agreement contained choice of law clauses in favour of the law of British Columbia, it is likely the connection described in s. 10(e)(ii) was also shown.

[38] In these circumstances, it was not *necessary* for the chambers judge to *go on to consider* the question of attornment on the defendants' part under s. 3(b) of the *CJPTA*. As will be explained below, once the plaintiff's burden with respect to jurisdiction had been met on the basis of a real and substantial connection, whether

the defendants had also attorned was irrelevant. I do not agree, however, that the chambers judge committed some reversible *error of law* in considering the issue or in admitting into evidence the defendants' jurisdictional response and supporting affidavit filed under R. 21-8(1). *Subject to the time limit specified in R. 21-8(5)*, once the judge had found that an arguable case of territorial competence had been made out — the first stage of the analysis described in *Ewert* — the defendants were entitled to adduce evidence to challenge that 'threshold' finding. In theory at least, R. 21-8 may be invoked whenever a presumption of jurisdiction is challenged — regardless of which subparagraph(s) of s. 3 of the *CJPTA* were relied on to found the presumption. In practise, of course, it will be difficult in most instances for a defendant to rebut the presumptive finding of a real and substantial connection based on the basic facts asserted in a plaintiff's pleading. I repeat the following passage from *Ewert*:

> The burden on the defendant to rebut the presumption is heavy: *Fairhurst* at paras. 32, 42; *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.,* 2014 BCSC 715 at para. 35, aff'd 2015 BCCA 200; *Mazarei v. Icon Omega Developments Ltd.*, 2011 BCSC 259 at para. 33. At this stage of the analysis, a connecting factor is already established: the defendant's task is to show why a real and substantial connection does not follow, despite the strong presumption that it does. [At para. 17.]

[39] The defendants' second ground of appeal is that the chambers judge erred in finding that the defendants had attorned to the Court's jurisdiction. I will return to that issue later in these reasons.

Misconceived Evidence?

[40] The third ground of appeal — that the judge "Ignored or Misconceived The Appellants' Evidence" in concluding that the allegation that the defendants had retained Cassels Brock was "undisputed" — misstates Giaschi J.'s reasons. It is not correct to say the chambers judge found that that allegation was undisputed. Rather, he said it was undisputed that "the plaintiff is a resident of Vancouver, Voice is headquartered in Vancouver, the Cassels Brock office that was retained was the Vancouver office of Cassels Brock, VMAL is a U.K. company, and Mr. Wightman, a resident of the United Kingdom." (At para. 5; my emphasis.) Similarly, the judge

observed at para. 17 that there were “several connecting factors” between this case and British Columbia, including the fact that “the Cassels Brock office retained was located in British Columbia.” (My emphasis.) Again, he did not state or find *who* was alleged to have retained the firm. He did find it was “abundantly clear” that a substantial connection existed between the plaintiff’s claim and the “jurisdiction of British Columbia.”

The Jurisdictional Response

[41] The defendants’ second, fourth and fifth grounds of appeal relate to the chambers judge’s treatment of the defendants’ jurisdictional response under R. 21-8 and supporting evidence. In his affidavit No. 2, Mr. Wightman deposed that his lawyer had explained s. 10 of the *CJPTA* to him, including the fact that if Mr. Smith's allegations fit within one or more of the categories in s. 10 — the most obvious candidate being “contractual obligations” under s. 10(e) — the Supreme Court would be presumed to have territorial competence. However, Mr. Wightman continued, he was told it was open to the defendants to rebut the presumption by providing evidence “demonstrating [that] Mr. Smith’s claim is, in relation to section 10 of the *CJPTA*, tenuous or without merit.”

[42] Mr. Wightman categorically denied Mr. Smith’s two contractual allegations — i.e., that he caused VM Agritech to enter into a retainer agreement with Cassels Brock to provide legal services *for VM Agritech*, and that VM Agritech and Voice agreed that VM Agritech would pay for such services. According to the affidavit, Voice was incorporated in the state of Nevada and had to “re-domesticate into British Columbia” as a condition of the transaction to avoid becoming subject to certain rules of the U.S. Securities and Exchange Commission. Mr. Wightman quoted various provisions from the original letter of intent (“LOI”) entered into in 2020 between Voice and VM Agritech (then known as “MyCo Sciences Ltd.”). It contemplated that Voice would reimburse “actual paid expenses to arm’s-length parties related to the transaction” if Voice was “unable” to close due to its failure to fulfil certain conditions (referred to as the “Debt Settlement” and the “Re-domestication”) by the Closing Date (all as defined). If on the other hand, Voice

was "able to close" the transaction after the "Due Diligence Expiry Date", VM Agritech would be responsible for all expenses incurred by Voice "from that date."

[43] Mr. Wightman deposed that the foregoing terms were carried forward from the LOI to the original Share Exchange Agreement, which had an effective date of November 20, 2020. After it lapsed in March 2021, they were again carried forward in the so-called Continuation Agreement. Mr. Wightman affirmed that:

> … [VM] Agritech agreed to cover certain of Voice's legal expenses subject to the conditions mentioned above but add that Voice never satisfied the conditions (that is, fulfilment of the debt settlement and re-domestication) for being able to close the Acquisition. Since Voice did not fulfil the two aforementioned conditions, there was no period of time and, therefore, no expenses incurred 'from that date' when it could say it had fulfilled the conditions until the Closing Date.
>
> It is untrue that I ever committed to Voice, as Mr. Smith alleges in paragraph 5 of Part 1 of his Notice of Civil Claim, or to anyone else that I would cause VM Agritech to pay Voice's legal expenses regardless of the conditions recorded in section 7.3 of the Continuation Agreement.
>
> ...
>
> Mr. Nikolaos Galanopoulos of Galanopoulos and Company (Vancouver) and Mr. Patrick Martin of PTM Law (London) were retained to provide legal services for VM Agritech in its dealings with Voice.
>
> Sections 4.1 and 10.14 of the Continuation Agreement make it clear that Cassels Brock served as legal counsel to Voice. Section 10.14 expressly says that Cassels Brock ***only*** represents Voice.
>
> Contrary to Mr. Smith's allegation, I did not retain — or cause VM Agritech to retain — Cassels Brock to provide legal services for VM Agritech. I had no say in Voice's choice of Cassels Brock as legal counsel.
>
> ...
>
> The Debt Assignment Agreement, made February 28, 2022, by which Cassels Brock assigns a debt of $24,155.91 to Mr. Smith, is clear that the assigned debt is "a *bona fide* debt and constitutes the full extent of all debts, claims, and any other amounts owed by the Company [defined as Voice Mobility International, Inc., and its subsidiaries] to the Creditor [i.e. Cassels Brock]" (section 2.a). The Debt Assignment Agreement neither says nor implies that the $24,155.91 debt owed to Cassels Brock is also or instead owed by VM Agritech or anyone else.
>
> Cassels Brock never billed us for this debt. [Emphasis by underlining added.]

[44] The chambers judge did not carry out a detailed two-stage analysis of jurisdictional facts like the analyses carried out in *Ewert* and *Altria*, but reasoned as follows:

> I say at the outset, I do not accept that this court is without jurisdiction pursuant to s. 10 of the *Court Jurisdiction and Proceedings Transfer Act*. There are several connecting factors with British Columbia. ...
>
> The applicants have continuously referred to the merits of the dispute and whether there is an arguable case but, in my view, they confuse arguable case on jurisdictional facts with arguable case on the ultimate merits. I am not to address the ultimate merits of the dispute. I am merely to address whether there is sufficient evidence of a real and substantial connection with British Columbia. Based on the evidence before me and what the parties have conceded, I am quite satisfied that there is a sufficient connection with British Columbia to clothe this court with jurisdiction. [At paras. 17–8; emphasis added.]

[45] As for Mr. Wightman's jurisdictional facts, the judge found it was "reasonably clear" that by filing their application under R. 21-8, the defendants had attorned. In his words:

> … To paraphrase *Litecubes, L.L.C. v. Northern Light Products Inc.*, 2009 BCSC 181, at paras. 40-41 from the Annual Practice, attornment to the jurisdiction of a foreign court occurs as soon as the party asks the foreign court to make any decision on the merits, other than a decision determining jurisdiction. Attornment can occur by mistake, and by such simple actions as filing a statement of defence or seeking general relief, which is what has happened here.
>
> Therefore, I find there has now been attornment. [At para. 24; emphasis added.]

[46] The defendants respond in their factum that "Attornment is not entrapment. It requires a deliberate voluntary act from which it can be reasonably inferred that the party was prepared to submit to the jurisdiction of the court." This quotation is taken from a decision of a justice in chambers in *CNOOC Petroleum North America ULC v. 801 Seventh Inc.* 2020 ABCA 212 at para. 50. If what was meant was that there must be an intention on the part of the filing party to attorn, then I must respectfully disagree as far as British Columbia law is concerned. While the risk of attorning involuntarily has decreased since the former R. 14-6 of the *Supreme Court Rules* came into effect, unless a defendant has the protection of what is now R. 21-8(5), it

is still possible to do so. As Frankel J.A. observed in *Nordmark*, "Submission can be unintentional." (See also *Cleeves v. The Warden and Fellows of St. Antony's College in the University of Oxford* 2021 BCSC 686 at para. 82.)

[47] Where a defendant has failed to apply within the 30-day limit, the task of advancing jurisdictional facts that are sufficient to rebut a presumption of territorial compliance (the second stage of *Ewert*) without attorning to the jurisdiction is a difficult one. As stated by Gascon J. for the majority in *Barer v. Knight Brothers LLC* 2019 SCC 13 in connection with attornment under the *Quebec Civil Code*:

> … After having submitted to the jurisdiction of a foreign authority, a defendant cannot withdraw its consent for that authority to decide the dispute. The orderly administration of justice requires that, once jurisdiction has been validly established, the case proceed in the same forum regardless of the changing whims of the parties.
>
> The laconic art. 3168(6) does not explain the meaning of the terms "submitted to the jurisdiction", and the question of whether some acts amount to submission has divided authors and judges alike. The authorities agree on one thing, however: there is enduring confusion, notably about the standard applicable in situations where a defendant presents both jurisdictional and non-jurisdictional arguments before a court (Goldstein (2012), at para. 3168 590; Talpis (2001), at p. 113; Goldstein, fasc. 11, at para. 29; Goldstein and Groffier, at No. 183; *Cortas Canning*, at pp. 1241-42). [At paras. 52–3; emphasis added.]

Gascon J. continued:

> Some acts are consistently viewed as amounting to submission. Explicitly recognizing that the foreign tribunal had jurisdiction, in a transaction for example (*LVH Corporation (Las Vegas Hilton) v. Lalonde*, 2003 CanLII 27646 (Que. Sup. Ct.), at paras. 24-25), is one such act. Defending the action on its merits without contesting the court's jurisdiction also constitutes submission. [Authorities omitted] In such cases, the defendant's conduct unequivocally signals to the court and the plaintiff that there is acceptance of the forum's jurisdiction. Conversely, it is also uncontentious that some courses of action are sufficient to indicate that a defendant has not submitted to the plaintiff's choice of forum. Simply refraining from appearing before the court in question is one. [Authorities omitted.] Appearing merely to contest jurisdiction in a timely manner is another….
>
> I note that Quebec courts have also considered whether certain procedural steps other than filing a defence on the merits can amount to submission. A defendant who participated in proceedings without raising substantive arguments may have never submitted to the court's jurisdiction. This determination will normally depend on whether the procedural acts in question, when assessed objectively, reveal the defendant's implicit decision

> to have the dispute settled by the forum. In this regard, each case must be assessed on its own facts. [At paras. 60–1; emphasis added.]

[48] Although *Barer* was decided under Quebec legislation, these comments also resonate in common law jurisdictions. Certainly the filing of a Response to Civil Claim or of a counterclaim would, in the absence of a protective rule, lead to a finding of attornment. At common law, the rules were "narrow and inflexible": *per* Wood J.A. in a pre-*CJPTA* case, *Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd*. 1995 CanLII 2084 (B.C.C.A.) at para. 8. The Court in that instance held that by seeking an order that a claim of fraud be struck for lack of particulars, the defendants had attorned. In Wood J.A.'s analysis:

> To summarize, I am of the view that the law in British Columbia today entitles a party to an action to dispute an order for service *ex juris* upon him of an originating proceeding, and to challenge jurisdiction, both *simpliciter* and *forum conveniens*, without the risk that bringing such applications will constitute acceptance by him of the jurisdiction of the court. Beyond that, the common law prevails such that unless an appearance before the court is made under duress, it will be regarded as voluntary.
>
> In this case, all respondents who are presently before this court applied for an order that the plaintiff's claim of fraud be struck for lack of particularity. Had the Ohio court ruled in their favour on that application, they would unquestionably have accepted the judgment. In my view, they must equally accept the decision against them, because by combining that application with one that challenged the jurisdiction of the Ohio court, they thereby attorned to that courts jurisdiction over them in the dispute as a whole. The same effect resulted from the application of the respondent Trisca to have the complaint against him dismissed for failure to state a claim recognized by law. [At paras. 15–6; emphasis added.]

[49] I have already referred to the evidence filed in this case in support of the defendants' application under R. 21-8 of the *Civil Rules*. It is fair to say that Mr. Wightman's affidavit is concerned not with "*jurisdictional* facts", but with the merits of the claim itself. In their application, the defendants sought the following:

> 1 An order under Rule 21-8(3)(b) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ("*SCCR*") setting aside, as invalid, the Plaintiff's purported service of his Notice of Civil Claim as contravening:
>
> (a) Rules 4-3(1)(a), 4-3(2)(a) & (b), and 4-5(10) which require personal service on the *ex juris* Defendants;
>
> (b) Rule 4-5(2) which requires a copy of an originating pleading served outside British Columbia without leave of the court to state, by

> endorsement in Form 11, the circumstances enumerated in section 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ("*CJPTA*") on which it is claimed that service is permitted under Rule 4-5(1); and
>
> (c) Rule 4-5(1) which allows service on a person outside British Columbia without leave of the court in any of the circumstances enumerated in section 10 of the *CJPTA*.
>
> 2 An order under Rule 21-8(1)(b) dismissing or, alternatively, staying the proceeding on the ground that the court does not have jurisdiction over the Defendants in respect of the claim made against them in the proceeding.
>
> 3 An order under Rules 21-8(4)(b) & (c) and 22-4(2) to extend the latest date for the Defendants to serve their Notice of Application (the "Application #2") in order to attract the protections afforded by Rule 21-8(5) from July 26, 2023 (i.e. 30 days after they had filed their Jurisdiction Response on June 26, 2023 ["Jurisdictional Response #2"]) to the date Application #2 is served.
>
> 4 Direction under Rule 21-8(4)(c) that the Defendants have within 30 days after this Court's decision on their Application #2 to file and serve, if they so choose, a jurisdictional response in Form 108 to the Plaintiff's original service of his new Notice of Civil Claim (S-234733), filed June 30, 2023.
>
> 5 An order for costs in any event of the cause, payable forthwith.

[50] Each of these prayers was concerned with jurisdiction or how the Rules relate to jurisdiction, including service *ex juris*, the endorsement required by R. 4-5(2), the applicability of s. 10 of the *CJPTA* to the service of persons outside the province, the protections afforded by R. 21-8(5), and the filing of jurisdictional responses. As for Mr. Wightman's affidavit No. 2, while it is true that he touched on the merits of the plaintiff's claim by disputing that VM Agritech's alleged obligations under the Share Exchange and Continuation Agreements had ever 'kicked in', the defendants did not file a Response to the NOCC, nor seek summary judgment or any other order unrelated to jurisdiction.

[51] Similar circumstances to these arose in *Cleeves*. The defendants there also missed the 30-day limitation in applying under R. 21-8(5). The plaintiff argued that they were therefore precluded from applying under R. 21-8, and indeed that they had thereby attorned. The Court rejected the latter proposition. Punnett J. relied in

part on *Stewart v. Stewart* 2017 BCSC 1532, in which Abrioux J., as he then was, had discussed the consequences of a defendant's missing the deadline:

> Returning to the plaintiff's claim that the Australian Defendants have not complied with Rule 21-8(5), which is set out above, by virtue of failing to file their application within 30 days of their jurisdictional response, I do not consider the wording of Rule 21-8(5) to be as restrictive as the plaintiff suggests. It does not state that any application must be brought within 30 days. Rather it provides that if an application is brought in that time frame then certain consequences flow from the filing of the application. Accordingly, the fact the Australian Defendants did not file this application within 30 days of January 4, 2016 does not, in my view, preclude them from bringing it at a later date. [At para. 26; emphasis added.]

I agree with these comments, but for clarity I would add at the end of the last sentence the phrase "without the protection of R. 21-8(5)."

[52] Punnett J. also noted *Xi v. Zhang* 2018 BCSC 2559, where the Court had applied *Stewart.* In the analysis of Holmes J., as she then was, in *Xi*:

> It may well be that *Stewart* allows for an argument that a jurisdictional response does not protect a defendant who fails to apply within 30 days where other factors external to the process under R. 18-2(5) indicate that the defendant has attorned. Mr. Justice Abrioux in *Stewart* held that the failure to bring an application did not, of itself, constitute attornment, but he did not determine that attornment could not be established from other facts after the 30-day protective period has elapsed. That question is unnecessary to determine in this application and I do not do so, because Ms. Xi suggests no basis for attornment apart from the effect of the rule. [At para. 46; emphasis added.]

[53] The Court in *Xi* also distinguished various older cases finding attornment on the basis of the filing of an appearance by a defendant, or on the basis of a statement of intention to defend the action. These, Punnett J. observed in *Cleeves*, had been decided under the former *Supreme Court Rules*. Rule 21-8 of the *Civil Rules* had since clarified the issue of attornment. (At para. 82.) He continued:

> Rule 21-8(5) is clear under ss. (a) that a party does not submit to the jurisdiction of the court by filing a jurisdictional response or by filing a notice of application and supporting affidavits. In addition, ss. (b) provides that "until the court has decided the application" a party "may, without submitting to the jurisdiction of the court, defend the proceeding on its merits".

> Any reference to the merits by the defendants is in the context of the issue of jurisdiction in order to illustrate the lack of connection of the allegations to this jurisdiction. [At paras. 83–4; emphasis added.]

[54] Finally, Punnett J. noted *Re Dulles Settlement Trusts (No. 2)* [1951] 2 All E.R. 69 (C.A.), where Lord Denning had observed:

> I cannot see how anyone can say that a man has voluntarily submitted to the jurisdiction of a court when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits, and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. [At 72; emphasis added.]

"But", his Lordship added, "when he only appears with the sole object of protesting against the jurisdiction, I do not think he can be said to submit to the jurisdiction." On this point, Lord Denning was in the minority, but as noted in *Mid-Ohio*, his comments were characterized in some quarters as a "refreshing salute to common sense." (At para. 10.)

[55] We were also referred to *AG Armeno Mines and Minerals Ltd. v Newmont Mines Ltd*. 2000 BCCA 405, where the Court ruled that the defendant was entitled to adduce evidence under Rules 14(6)(c) or 13(10) of the former *Supreme Court Rules,* notwithstanding that the question of jurisdiction was regarded as an interlocutory matter. (See paras. 19–21.) The evidence filed by the defendant was similar to Mr. Wightman's evidence in the case at bar — it raised "defences" to the claim or the "merits" thereof, rather than making "attacks" on *jurisdictional* facts pleaded by the plaintiff. Mr. Justice MacKenzie for the Court commented:

> ... Some cases have suggested that only jurisdictional facts are in issue on challenges to jurisdiction and other facts, such as those raising affirmative defences, are not in issue. Jurisdictional questions are already complex. In my view, introducing a distinction between jurisdictional facts and other facts would introduce a further complication to little purpose. If the defendant can establish on evidence that the plaintiff's action as against it is bound to fail,

> because the plaintiff does not have a good arguable case, then I think jurisdiction should be refused irrespective of whether the failure rests on narrowly jurisdictional facts or other material facts. I emphasize that the defendant's case must rest on evidence not pleadings. The defendant must prove the facts relied on sufficiently for the court to be satisfied that the plaintiff does not have a good arguable case on all the evidence relevant to proof of those facts. [At para. 23; emphasis added.]

[56] *Armeno* was decided, however, under the pre-*CJPTA* framework and obviously prior to the enactment of R. 21-8 of the *Civil Rules*. Later cases under the new regime have emphasized that in a dispute about jurisdictional facts, the Court does not make findings of fact or about the merits of the case generally: see *Canadian Olympic Committee* at para. 24, citing *Purple Echo Productions Inc. v. KCTS Television* 2008 BCCA 85 at para. 34; *The Original Cakerie Ltd. v. Renaud* 2013 BCSC 755 at para. 22; *Fairhurst v. De Beers Canada Inc.* 2012 BCCA 257, *lve to app. dism'd* [2012 S.C.C.A. No. 367] at para. 20. After all, the case *for* territorial competence is not required to be shown, and is not decided, on the balance of probabilities: see *Ewert* at para. 16; *Purple Echo* at para. 42. The plaintiff at the first stage need show only *a good arguable case* that jurisdiction exists. The defendant's burden is then to *rebut the presumption* by showing that the action could not lie within the jurisdiction of a British Columbia court or, as stated in *Ewert*, that the presumptive connecting factor "does not point to any real relationship between the subject matter of the litigation and the forum, or points to only a weak relationship between them." (At para. 17; see also *Cleeves* at para. 94.)

[57] As mentioned earlier, the chambers judge did not carry out a two-stage analysis of this kind. He found that attornment had occurred 'accidentally' because the Court had been asked to make a decision "on the merits, other than a decision determining jurisdiction." (At para. 24.) Respectfully, I find that the relief sought by the defendants in this case related *only to jurisdiction*: their application did *not* seek summary judgment or any other result unrelated to jurisdiction.

[58] I tend to the view that a reference to the merits of the overall case should not *by itself* be fatal to an application under R. 21-8 unless the Court is asked to make

findings of fact on the merits. Again, however, at this stage the Court decides only whether a good arguable case has been made *for jurisdiction*.

[59] The Rules should not be a trap for litigants, foreign or otherwise. At the end of the day, I conclude that the chambers judge erred in finding that the defendants attorned to the jurisdiction by filing their jurisdictional response and supporting material. However, this does not change the result in this case because quite *apart from the issue of attornment*, Mr. Wightman's affidavit did not undermine the "real and substantial connection" between British Columbia and the cause of action as pleaded: to a substantial extent, the parties' obligations were to be performed in the province, and all the contracts contained express terms that they were to be governed by the laws of the province. In other words, and again leaving aside the issue of attornment, the defendants' evidence and arguments simply failed to cast doubt on any of the "connections" between the facts on which this proceeding is based, and the province.

Prejudice Not Considered

[60] It is unnecessary to address the defendants' final ground of appeal to the effect that the chambers judge erred in failing to consider the factor of prejudice in exercising his discretion not to grant an extension of time to the defendants to serve their notice of application. Whether or not attornment ultimately occurred, the presumption of territorial competence under the *CJPTA* arose, and was not weakened or rebutted by the defendants' evidence.

[61] As for the issue of re-service, I would not disturb the judge's order that re-service is unnecessary, since the previous service was found only to be "defective" and not "null": see R. 22-7 of the *Civil Rules* and *Gokturk v. Nelson* 2023 BCCA 164 at paras. 70–3 and *Mok v. The Owners, Strata Plan VR456* 2023 BCCA 401 at para. 44, both of which may be taken to have accepted that R. 22-7 had overtaken *William v. Lake Babine Indian Band* 1999 CanLII 6121 (B.C.S.C.) at para. 37. (See also *Ari v. Insurance Corporation of British Columbia* 2021 BCCA 180 at paras. 47, 51–2, 63.) The issue is now decided on a case-by-case basis. In this

instance, the defendants have had full and actual notice of the claim for many months (see *2538520 Ontario Ltd. v. Eastern Platinum Limited* 2022 BCSC 1101 at para. 42) and in fact told this court that they were not seeking re-service.

Application to Quash

[62] I turn finally to the plaintiff's application to quash this appeal (which he describes as an "interlocutory" one) for mootness on two bases — first, that since the default judgment (which he refers to as a "final" judgment) was granted by Muir A.J. on February 6, 2024, the appeal is moot; and second, that after the default judgment was issued, the appellants "submitted to the court's jurisdiction". As I understand it, the second argument is based on Giaschi J.'s finding that the defendants had attorned to the jurisdiction and consequently, that the plaintiff did not "need to re-serve the notice of civil claim in this matter." (At para. 25.) Whether or not the chambers judge erred on the question of attornment, I agree that the plaintiff need not re-serve the NOCC for the reasons I have already given.

[63] More to the larger point of mootness, it cannot be said that the present case is moot, given that a default judgment has been obtained and an appeal of Muir A.J.'s refusal to set aside the judgment is scheduled to be heard on October 23, 2024. Obviously, a "live" issue still exists. I would therefore dismiss the plaintiff's application to quash the appeal.

Disposition

[64] In the result, I would allow the appeal only to the extent of setting aside para. 4 of the judge's order. This court's order should also declare that attornment did not occur, that the courts of British Columbia have territorial competence in respect of the action (subject to any relevant determination regarding *forum*

conveniens), and that the plaintiff need not re-serve his NOCC on the defendants*.*

I would also dismiss the application to quash.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Chief Justice Marchand"

I agree:

"The Honourable Madam Justice Fisher"