IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Viking Air Ltd. v. Aevex Aerospace, LLC,* 2024 BCSC 502

Date: 20240326
Docket: S235093
Registry: Vancouver

Between:

Viking Air Ltd.

Plaintiff

And

Aevex Aerospace, LLC, Ikhana Group, LLC, and Ikhana Aircraft Canada, Inc.

Defendants

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:	C.S. Wilson N.P. Jones S. Atwal, Articled Student
Counsel for the Defendants:	C.E. Hunter, K.C. A.P. Calvert
Place and Date of Hearing:	Vancouver, B.C. November 16, 2023
Place and Date of Judgment:	Vancouver, B.C. March 26, 2024

Table of Contents

Overview

[1] Viking Air Ltd., and the defendants Aevex Aerospace, LLC, Ikhana, LLC and Ikhana Aircraft Canada, Inc. (“Aevex”, “Ikhana” and “Ikhana Canada”) have a dispute over modifications to 400 Series Twin Otter Aircraft which is the subject of proceedings in the British Columbia Supreme Court and in the Southern California U.S. District Court (Southern California Court). Viking is the plaintiff in this court. In the Southern California Court, Ikhana is the plaintiff, Viking is the defendant and plaintiff by counterclaim, and Ikhana and Aevex are defendants by counterclaim.

[2] Ikhana, Aevex and Ikhana Canada seek an order dismissing this proceeding on the basis that this court lacks territorial competence or alternatively staying this proceedings in favour of the Southern California Court proceeding.

[3] The dispute is over a design modification that Ikhana made to the maximum take off weight of the 400 Series Twin Otter aircraft used for commuter purposes (the “impugned modification”). Viking designed the 400 Series Twin Otter aircraft and holds its type certificate.

[4] Viking asserts that the impugned modification is unlawful because it is in breach of a data licence and royalty agreement, known as the DLA, between Viking and Ikhana. Viking purported to terminate the DLA and Ikhana purported to reject the termination. The DLA has a choice of law clause designate the law of New York State to govern. The DLA does not have a forum selection clause. Viking also asserts that the impugned modification is in breach of another agreement between Viking and Ikhana, the FESC agreement, whereby Ikhana was designated to be an endorsed service centre for Twin Otter aircraft. Viking purported to terminate the FESC agreement and Ikhana purported to reject the termination. The FESC agreement has a choice of law and forum selection clause designating the applicable law to be that of British Columbia and that British Columbia courts have exclusive jurisdiction.

[5] Ikhana commenced the Southern California Court proceeding asserting among other things that Viking wrongfully terminated the DLA. Viking responded to

that proceeding, filed a counterclaim and commenced this proceeding. The defendants filed a jurisdictional response to this proceeding and brought this application pursuant to Rule 21-8.

[6] The defendants assert that this court does not have territorial competence, but even if it does, it should exercise its discretion in favour of the Southern California Court as the preferable forum. Viking asserts that because of the forum selection clause in the FESC agreement, the defendants must show strong cause why the dispute should not be resolved in this court.

[7] There are aspects of this application that are unique and not the subject of substantial jurisprudence. One is that the forum selection clause in the FESC agreement is between Viking and one of the defendants, Ikhana, but Aevex and Ikhana Canada are not parties to an agreement with a forum selection clause. Another is that Viking seeks relief pursuant to the FESC agreement in this proceeding but not in the Southern California Court proceeding.

[8] Yet another significant factor is that the parties agree that the litigation will proceed in the Southern California Court regardless of what happens on this application. In the Southern California Court proceeding, Viking has not raised territorial competence in relation to the FESC agreement or based on anything else. Viking has pleaded that the court has subject matter and personal jurisdiction over its counterclaim. Viking has filed a counterclaim and has sought an injunction in the Southern California Court proceeding. Viking has not asked the Southern California Court to dismiss the claim in favour of this proceeding based on *forum non conveniens* principles.

Legal Principles And Framework

[9] The *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], codifies the circumstances in which the British Columbia Supreme Court has territorial competence over a matter (ss. 3 and 10), and the principles which govern the discretionary power to exercise or decline to exercise territorial competence based on a preferable forum elsewhere (s.11).

[10] If a forum selection clause applies to the dispute, then the decision whether to exercise territorial competence is not governed by s.11 of the *CJPTA*, but by the common law pertaining to forum selection clauses, including the "strong cause" test: *Douez v. Facebook, Inc*., 2017 SCC 33 [*Douez SCC*] at paras. 17, 18, 20, 22.

Territorial Competence

[11] Section 3 of the *CJPTA* sets out the circumstances which can ground territorial competence in the British Columbia Supreme Court.

[12] Territorial competence must be established for each defendant separately: *Hydro Aluminum Rolled Products GmbH v. MFC Bancorp Ltd.*, 2021 BCCA 182 [*Hydro Aluminum Rolled Products #2*] at para. 10.

[13] Once jurisdiction over one claim (i.e.: cause of action) is established for a given party on any ground, it will generally suffice to establish jurisdiction for related claims against that same party: *Hydro Aluminum Rolled Products GmbH v. MFC Bancorp Ltd.*, 2020 BCCA 295 [*Hydro Aluminum Rolled Products #1*] at para. 21 citing *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 99 [*Van Breda*].

[14] Section 3(c) provides that a court has territorial competence if there is an agreement between the plaintiff and the defendant to the effect that the court has jurisdiction in the proceeding.

[15] Section 3(d) provides that a court has territorial competence if the defendant is ordinarily resident in the province.

[16] Section 3(e) provides that territorial competence exists where "there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based."

[17] Section 10 of the *CJPTA* provides for section 3(e) to be presumptively satisfied in certain circumstances, including where the proceeding:

> (a) is brought to enforce, assert, declare, or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property;
>
> …
>
> (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
>
> …
>
> (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
>
> (g) concerns a tort committed in British Columbia,
>
> (h) concerns a business carried on in British Columbia,
>
> (i) is a claim for an injunction ordering a party to do or refrain from doing anything:
>
> (i) in British Columbia, or
>
> (ii) in relation to property in British Columbia that is immovable or movable property.

[18] If any of the s. 10 presumptive factors apply, then a real and substantial connection is presumed to exist for the whole proceeding. The court must then ask whether, given the circumstances of the claim as a whole, the presumption is rebutted. The circumstances of the claim as a whole include the entire legal and factual situation or the subject matter of the proceeding: *Van Breda* at para. 99. If the presumption is not rebutted, the court can then go on to consider whether to decline to exercise territorial competence.

[19] However, these analyses are not watertight compartments. For example, in its 2021 commentary on the model legislation on which the *CJPTA* is based, the Uniform Law Conference of Canada stated that while the presence of any of the s.10 factors will cause the court to have presumptive territorial competence over all aspects of the case, the court can address any concern that a particular claim was made purely to create or bolster territorial competence when analyzing whether the presumption is rebutted, or by declining to exercise territorial competence based on the lack of strength of the connection between the parties and the jurisdiction:

Uniform Law Conference, *Uniform Court Jurisdiction and Proceedings Transfer Act (2021)*, at 14. See also *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 912; and *Van Breda* at para. 110.

Whether to Exercise Territorial Competence

[20] Section 11 of the *CJTPA* codifies the test for the doctrine of *forum non conveniens*. Under s. 11(1), a British Columbia court may decline to exercise its territorial competence if, after considering the interests of the parties and the ends of justice, it finds that a court of another state is a more appropriate forum in which to hear the proceeding. Section 11(2) sets out a non-exclusive list of factors to be considered in making that assessment.

[21] The analysis of *forum non conveniens* codified in the *CJTPA* does not apply where there is a forum selection clause because the legislation was never intended to replace the common law pertaining to forum selection clauses and because forum selection clauses create certainty and security in transactions, the assessment must take that into account: *Douez SCC* at paras. 17, 18, 20, 22.

[22] Instead, the Court in *Douez SCC* set out a two-step approach to determine whether to enforce a forum selection clause or to stay an action contrary to the forum selection clause.

[23] First, the party seeking to enforce the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court": *Douez SCC* at paras. 20, 28. This determination is on a *prima facie* basis and subject to the further evidence and arguments at trial: *Douez v. Facebook, Inc.*, 2014 BCSC 953 at para. 48 [*Douez BCSC*].

[24] On the second step, the onus shifts and the party seeking to litigate in a jurisdiction different from the forum selection clause must show "strong reasons why the court should not enforce the forum selection clause": *Douez SCC* at para. 29. On this second step, the court must consider "all the circumstances", including the

convenience to the parties, fairness between the parties, the interests of justice, holding parties to their bargains, imbalance in bargaining power and the nature of the relationship. This list is not exhaustive: *Douez SCC* at paras. 29–34

[25] When there is another jurisdiction with territorial competence, comity requirements are not overriding and determinative because the preferable forum analysis should not be undertaken in a manner that encourages the first to file system: *Teck Cominco Metals Ltd. v. Lloyd's* Underwriters, 2009 SCC 11 at para. 29. Despite that in *Teck Cominco* the exercise of territorial competence was undertaken through the *CJPTA* s.11 analysis, this principle also applies where there is a forum selection clause and the strong cause test is used.

Framework for the Analysis

[26] The defendants submit that the following questions must be answered in this order:

a) Does the court have territorial competence based on a real and substantial connection pursuant to s. 3(e) of the *CJPTA*?

b) If the territorial competence is based on a presumptive connecting factor, is it rebutted?

c) If territorial competence is established, should the court exercise its territorial competence or decline to exercise it, based on *forum non conveniens* principles codified in s.11 of the *CJPTA* or the common law strong cause test for those claims which involve a forum selection clause?

[27] Viking submits that the following questions must be answered in this order because *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 at para. 20 mandates that the forum selection clause is the "starting point":

a) Strong cause analysis step 1: whether the forum selection clause is enforceable;

b) Strong cause analysis step 2: whether the party seeking to displace the forum selection clause can demonstrate a strong case for why it should not be enforced; and

c) whether British Columbia has territorial competence over the defendants.

[28] There is no authority for the proposition that the territorial competence is the last step, and it does not make sense that it would be. The two-step strong cause analysis is part of the court's consideration of whether to use its discretion to not exercise its territorial competence. Both *Z.I. Pompey Industrie* and *Douez* were addressing whether the court should exercise its territorial competence, not whether it has territorial competence.

[29] In *Hydro Aluminum Rolled Products #1*, Justice Fenlon for the Court of Appeal for British Columbia agreed that the chambers judge had used the correct framework by first asking whether British Columbia had territorial competence and secondly, by asking whether Germany was a more appropriate forum despite the forum selection clause: at para. 7. When analyzing the first question, the chambers judge did not expressly consider whether the forum selection clause was applicable. The Court of Appeal held the chambers judge erred in omitting this analysis and held that the forum selection clause provided a basis on which to determine territorial competence: at paras. 18 and 21.

[30] The second question in *Hydro Aluminum Rolled Products #1* was determined to be the *CJPTA* s.11 question because the forum selection clause was not an exclusive forum selection clause, but rather a non-exclusive one and therefore lacked the force and clarity to engage the "strong cause" analysis: at para. 23.

[31] In a case like this where there are defendants who are differently situated vis-à-vis the alleged forum selection clause, it is very important to undertake the analysis separately and not sweep all of the defendants into the forum selection clause analysis: *Hydro Aluminum Rolled Products #2* at paras. 9–10.

[32] Since a valid and enforceable forum selection clause provides a sufficient basis for territorial competence (*CJPTA s.* 3(c)), the first step of the strong cause test may serve to determine territorial competence if all defendants are parties to the contract with the forum selection clause. However, where not all defendants are parties to the contract with a forum selection clause, a valid and enforceable forum selection clause will only ground territorial jurisdiction for the contracting party. Territorial competence must still be established for the claims against the non-contracting defendants.

[33] I conclude that where territorial competence is in issue, it must be decided first. Where a forum selection clause is asserted, territorial competence can be established by determining whether the forum selection clause is valid, enforceable and applicable to the cause of action before the court in relation to each party. If so, then on a plain reading of s.3(c), the British Columbia Supreme Court has territorial competence. In addition, unlike the s.10 factors, which are “presumptive” real and substantial connecting factors to satisfy s. 3(e), an agreement between the parties that the court has jurisdiction is not presumptive and therefore is not subject to rebuttal. In other words, where a forum selection clause is part of the assertion of territorial competence, the first part of strong cause overlaps with a consideration of territorial competence pursuant to s. 3(c) of the *CJPTA* for each party.

[34] Accordingly, where territorial competence is in issue and the party asserting it does so in part or in whole on the basis of a forum selection clause, the framework is as follows:

a) Whether the court has territorial competence under s. 3 of the *CJPTA*, analyzed for each defendant separately, including:

    i. under s. 3(c) of the *CJPTA,* whether there is a valid and enforceable forum selection clause;

    ii. any other subsection of s. 3; and

    iii. if under s. 3(e), whether any presumptive s. 10 connecting factors are present, and if they are present, whether they have been rebutted.

b) If territorial competence is established, whether the court should exercise its territorial competence, analyzed separately for each defendant, as follows:

i. If that defendant is bound by a valid and enforceable forum selection clause, whether the defendant can show strong cause as to why the court should not exercise its territorial discretion; and

ii. If the defendant is not bound by a valid and enforceable forum selection clause, under s. 11 of the *CJPTA*.

[35] Whether a forum selection clause is valid and enforceable involves a consideration of whether that forum selection clause is broad enough to cover all of the claims brought by the plaintiff: *Schuppener v. Pioneer Steel Manufacturers Limited*, 2020 BCCA 19. That analysis distinguishes not only between contracting and non-contracting defendants, but also for each contracting defendant, whether each cause of action is brought pursuant to a contract that has a forum selection clause: *Schuppener* at paras. 8 and 29. That is pertinent in this case because only one of the three defendants, Ikhana, is a party to the FESC agreement. Only one of several claims against Ikhana is breach of the FESC agreement.

[36] With regard to the exercise of territorial competence, whether the analysis is the strong cause test due to a forum selection clause or s. 11 of the *CJPTA*, the question must be examined separately for each defendant, but also considering the claim as a whole including the claims against any other defendants.

Burden and Evidentiary Threshold

[37] In *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85, the Court of Appeal held that the jurisprudence developed in the pre-*CJPTA* era applied to consideration of territorial competence under the *CJPTA.* With regard to the role of evidence, at para. 34 the Court of Appeal held that the burden can be discharged through pleaded facts or evidence of jurisdictional facts. The latter are facts, which if found to be true, support jurisdiction. The court does not find whether they are true. The plaintiff must merely show an arguable case that they can be established. This

burden and evidentiary threshold is describe as “not high”: see e.g., *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 59.

[38] If the plaintiff’s pleadings support one of the s. 10 presumptive real and substantial connections, the plaintiff need not support its allegations with evidence: *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 21. The basic facts are taken to be proven, if plead, but the presumption is rebuttable: *Fairhurst* at para. 14.

[39] 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": *Van Breda* 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 goes to whether the plaintiff's claim is tenuous or without merit, the plaintiff is required to adduce evidence that satisfies the court that there is an arguable case that the contentious facts can be established: *Purple Echo Productions* at para. 35.

[40] In *Purple Echo,* the Court of Appeal also explained that if the arguable case is made out, jurisdiction has not been finally determined but rather remains a live issue at trial: at para. 37.

Background, The Dispute And The Claims

[41] I will begin by describing the background, the pleadings and evidence that are relevant to territorial competence and may also be relevant to the court’s decision whether to exercise territorial competence. Where jurisdictional facts are contentious, I will consider them only for the purpose of whether an arguable case can be advanced.

The Parties and the Twin Otter

[42] Viking is incorporated pursuant to the laws of British Columbia and has a head office in North Saanich, adjacent to the Victoria airport. Viking is in the

business of manufacturing aircraft and aircraft components. It provides aftermarket services and product support for its aircraft.

[43] Ikhana is in the business of aviation and aerospace maintenance, modification and component manufacturing. It has offices in Solena Beach, California and conducts its operations out the French Valley Airport in Murrieta, California.

[44] Ikhana Canada is an Ontario corporation that is extra-provincially registered in British Columbia. It is a holding company that facilitates Ikhana's dealings with Transport Canada Civil Aviation.

[45] Aevex is a Florida limited liability corporation which is headquartered in Solana Beach California. Aevex acquired Ikhana in 2020.

[46] De Havilland Canada manufactured the 100, 200 and 300 series of the DHC-6 Twin Otter aircraft in Ontario. These series are collectively referred to as the Legacy Series. Bombardier acquired De Havilland Canada in 1992. In 2005, Viking acquired the spare parts and product support business for the Legacy Series from Bombardier. In 2006, Viking acquired the type certificates for the Legacy Series from Bombardier.

[47] In 2007, Viking began to design and develop the Twin Otter DHC-6 400 Series. Viking has the type certificate for the Legacy Series and the 400 Series.

[48] The manufacture of the 400 Series is multi-jurisdictional. Some of the aerostructures are manufactured in Victoria, B.C. Some parts are manufactured elsewhere. The aircraft are assembled in Calgary, Alberta. The purchasers of 400 Series aircraft are in many different places around the globe. Two hundred are operated in Canada and the United States, with 70 of those being in Canada.

[49] Viking asserts it owns trademarks and tradenames used in the sale and marketing of Legacy Series and 400 Series aircraft ("Viking's Marks") and asserts it has a registered Twin Otter trademark.

[50] Ikhana develops and sells supplemental type certificates for Twin Otter aircraft to Twin Otter operators. It sells about 50% of its supplemental type certificates to Twin Otter operators in the United States, 30% to operators in South America, Oceania and the Indian Ocean regions. It sells about 20% of its type certificates in Canada, mostly to Viking. Since Aevex acquired Ikhana, it has also been engaged in this work.

The DLA and the 2005 MOU

[51] In August 2003, predecessors of Viking and Ikhana entered into the DLA by which the Legacy Series type certificate holder, then Bombardier, now Viking, agreed to licence to R.W. Martin, now Ikhana, confidential information for use in developing supplemental type certificates of the Legacy Series Twin Otters in exchange for royalties on the sales of the supplemental type certificates. The DLA also provides for Ikhana to purchase parts in relation to developing supplemental type certificates.

[52] By letter issued contemporaneously with the execution of the DLA, Bombardier agreed that R.W. Martin could use the DHC-6 and Twin Otter trade names so long as the DLA remained in force.

[53] In November 2005, Ikhana and Viking entered into a memorandum of understanding (the “2005 MOU”) by which they agreed that the DLA would govern their dealings pertaining to supplemental type certificates. For the purposes of this application, it appears common ground that the permission letter pertaining to Viking’s Marks and the Twin Otter Trademark also applies to Ikhana so long as the DLA is in force.

[54] One of the disputes between the parties is whether the DLA grants a general right to use confidential information to develop supplemental type certificates or only for the purpose of developing the supplemental type certificates listed in an appendix to the DLA. The DLA provides that parties would work together to identify additional enhancement programs to those identified in the appendix. According to Aevex and Ikhana, they did just that but did not formally amend the appendix to include the

additions. According to Viking, Ikhana is only permitted to develop and sell the supplemental type certificates listed in the appendix unless permission has been expressly granted in a memorandum of understanding or a statement of work.

[55] The DLA provides for the governing law to be that of the State of New York. It does not contain a forum selection clause.

The 2009 MOU

[56] In September 2009, Viking and Ikhana entered into a memorandum of understanding (the "2009 MOU") by which they agreed to develop supplemental type certificates for the 400 Series aircraft used in special missions such as military and search and rescue.

[57] In addition, the 2009 MOU gave Ikhana permission to develop a maximum take off weight upgrade in the Legacy Series aircraft used for commuter missions.

[58] In 2009, Ikhana developed a modification and an associated supplemental type certificate to upgrade the maximum take off weight of the Legacy Series aircraft used for special missions. It also obtained a supplemental type certificate to increase the maximum take off weight in some Legacy Series commuter operations.

[59] In 2014, Ikhana amended the Legacy Series special missions maximum take off weight supplemental type certificate to apply to 400 Series aircraft used for special missions.

[60] In 2018, Ikhana secured another supplemental type certificate pertaining to the maximum take off weight of the Legacy Series in the commuter category.

The FESC Agreement

[61] In September 2009 Ikhana and Viking also entered into the FESC agreement pursuant to which Ikhana is permitted to provide aircraft line and base maintenance, repair, and refurbishment to Legacy Series and 400 Series Twin Otters and DHC-7, also known as Dash 7, aircraft.

[62] Pursuant to the FESC agreement, Ikhana's service centre in California was designated a "Viking Endorsed Service Centre". Ikhana was required to procure and maintain current maintenance manuals, parts catalogues, service bulletins, airworthiness directives and OEM technical documentation. Viking asserts this material is proprietary confidential information which belongs to Viking and was wrongfully used by Ikhana and Aevex in developing the impugned modification.

[63] The terms of the FESC agreement require Ikhana to purchase a minimum quantity of spare parts from Viking. In addition to the choice of law and forum selection in the FESC agreement, it provides that Ikhana purchases the parts subject to Viking's general terms and conditions in effect at the time of the purchase and posted on Viking's website. The general terms and conditions stipulate that they are governed by the laws of British Columbia and any disputes must be resolved by the courts of British Columbia.

The 2014 GTA

[64] Viking and Ikhana entered into a general terms agreement in 2014 (the "2014 GTA") which expired in May 2019. It contained agreements pertaining to the development of supplemental type certificates for the 400 Series. It provided that the law of British Columbia governed and for the exclusive jurisdiction of the courts of British Columbia. It expired in May 2019 and was not renewed.

The Dispute

[65] The DLA expressly covered certain types of modifications to the 100, 200 and 300 series of Twin Otter aircraft. It is not disputed that modifications other than those set out in the original Appendix A to the DLA were made by agreement including the 2009 MOU. It is disputed whether and how the extension of the DLA to those modifications was formalized in all cases.

[66] In 2015, Ikhana and Viking discussed a proposal whereby Ikhana would use confidential information provided to it by Viking to develop a supplemental type certificate relating to the impugned modification.

[67] Viking asserts that one of the meetings to discuss a statement of work on the impugned modification took place in Victoria. Viking asserts that further discussions took place in 2020, but again, no agreement was reached. Despite that no agreement was reached, Viking also asserts that they did agree that the impugned modification would be for Viking's exclusive use.

[68] Ikhana and Viking did not come to terms on the impugned modification.

[69] In late 2022, Aevex and Ikhana announced the impugned modification as maximum take off weight increase to the DHC-6-400HG Twin Otter with an associated (and necessary) avionics suite upgrade developed by a third party. Aevex and Ikhana sought the supplemental type certificate for the impugned modification in the United States through the U.S. Federal Aviation Authority.

[70] Viking has led evidence from one of its engineers that in order for the avionics suite upgrade to be designed, the designer would have to have access to technical information and manuals that is part of Viking's confidential information provided to Ikhana pursuant to the DLA and FESC agreement. Viking asserts that disclosure to a third party for that purpose is a breach of the DLA and FESC agreement.

[71] Ikhana has led evidence that it did not make the disclosure alleged. Ikhana has led evidence that in the supplemental type certificate industry, it is not uncommon for modifications and upgrades to be designed absent a relationship with the OEM and access to the OEM's technical information. Ikhana's affiant deposed that it does not know if its third party avionics suite upgrade designer used Viking manuals and technical information to design the avionics suite upgrade, but if it did, Ikhana did not supply that information to the third party designer.

[72] The parties met about the impugned modification in December 2022 at Ikhana's French Valley Airport facility but did not resolve the dispute.

[73] In February 2023, Viking issued a notice of default of the DLA and the FESC agreement based on Ikhana's failure to obtain Viking's agreement for the

supplemental type certificate and the misuse of confidential information, Viking's Marks and the Twin Otter Trademark.

[74] Ikhana paid a royalty to Viking on a sale of the impugned modification after Viking asserted that the impugned modification was unlawful and around the same time that Viking issued its notice of default. Viking asserts that its management was not aware of the royalty payment as it was deposited into an account used regularly for royalty payments under the DLA.

[75] Viking, Aevex and Ikhana continued to meet and discuss the matter between February 2023 and June 2023. They did not resolve their dispute. Viking asserted that it was terminating the DLA and the FESC agreement. Ikhana purported to reject the purported terminations. On July 17, 2023, the parties had a further meeting in Toronto, Ontario to try to resolve the matter. On the same day, Ikhana filed its lawsuit in the Southern California Court. Two days later, Viking filed this proceeding.

[76] Viking alleges that Ikhana continues to purchase parts and some of those parts are ordered in connection with the impugned modifications. Viking asserts those parts were ordered subjected to the Viking General Terms and Conditions which include a forum selection clause as set out above.

Ikhana's Claim and Viking's Counterclaim in the Southern California Court

[77] Ikhana commenced a civil claim against Viking on July 17, 2023 in the Southern California Court. Ikhana seeks:

a) A declaratory judgment to settle the rights and duties of the parties under the DLA agreement, specifically:

   i. the DLA is valid and enforceable and remains in full force and effect;

   ii. Ikhana is not in default of a material obligation under the DLA with respect to the impugned modification;

   iii. Viking's purported termination of the DLA is null and void; and

iv. Ikhana has the right to sell the supplemental type certificate pertaining to the impugned modification upon approval by the Federal Aviation Authority.

b) Damages for breach of the implied covenant of good faith and fair dealing;

c) Damages for unfair competition pursuant to the California Businesses and Practices Code. Ikhana claims that Viking's termination of the DLA is part of a campaign to eliminate it from the market for supplemental type certificate upgrades.

[78] Viking answered Ikhana's Southern California Court claim on August 25, 2023. In its answer, Viking asserts that it does not have enough information to respond to the allegations of subject matter jurisdiction and does not challenge personal jurisdiction. Viking pleads that it is not challenging venue. Viking denies the core allegations pertaining to each cause of action pleaded by Ikhana and takes the position that Ikhana fails to state a claim for the various causes of action.

[79] Viking pleads that "[i]nsofar as the claim under Section 17200 of the California Business and Professions Code is premised on Viking's revocation of Ikhana's status as an authorized Viking service center, it should be dismissed, because the applicable contract [the FESC agreement] contains a forum selection clause giving exclusive jurisdiction to the courts of the Province of British Columbia, Canada".

[80] It is not facially apparent that Ikhana has raised the termination of the FESC agreement as part of its claim under s. 17200. Ikhana pleads that Viking has engaged in a campaign to eliminate Ikhana from the market for supplemental type certificates, upgrades and modifications to Twin Otter aircraft. While Ikhana, at paras. 10–11 of the claim, refers to Viking's revocation of the FESC agreement in relation to the failed attempts to resolve the dispute over the impugned modifications, and asserts that Viking is refusing to sell parts to Ikhana which will interfere with Ikhana's ability to maintain Twin Otters for Ikhana's customers, the focus of the claim is clearly the impugned modification.

[81] For example, Ikhana pleads that Viking abruptly took action to force Ikhana out of the market by asserting a “tortuous” interpretation of the DLA in relation to the impugned modification. Ikhana pleads that it is seeking the assistance of the court with regard to Ikhana and Viking’s respective rights and obligations, “specifically with respect to the disputed termination of the STC licence”. Ikhana’s allegation that Viking is trying to eliminate Ikhana from the market for supplemental type certificate upgrades and modifications to Twin Otter aircraft is not about Ikhana’s business servicing Twin Otter aircraft, but rather is about Ikhana’s business designing modifications to Twin Otter aircraft. Ikhana does not seek any relief in relation to the FESC agreement. Accordingly, Viking’s plea referencing the FESC agreement is not responding to the substance of Ikhana’s claim.

[82] On August 25, 2023, Viking filed a counterclaim in the Southern California Court naming Ikhana and Aevex as counter-defendants. The counterclaim makes no mention of the FESC agreement. In the counterclaim, Viking seeks:

a) damages for breach of contract pertaining to the DLA, misappropriation of trade secrets, unjust enrichment, trademark infringement, unfair competition;

b) a declaratory judgment that Viking has properly terminated the DLA;

c) orders directing Ikhana to return all Viking data to Viking and to sell to Viking at fair market value Ikhana’s rights and interests in aircraft modifications developed with Viking’s licenced data as Viking may elect;

d) preliminary and permanent injunctions barring Ikhana and Aevex from using Ikhana’s confidential and proprietary data, Viking’s marks, the Twin Otter Trademark, including in the development, marketing and sale of the impugned modification.

[83] In its counterclaim, Viking pleads that the Southern California Court has general personal jurisdiction and specific personal jurisdiction over Ikhana and Aevex. Viking pleads that the court has subject-matter jurisdiction for the

counterclaim. Viking pleads that the venue is proper in part because the events giving rise to Viking's claims occurred in whole or in part in the southern district.

[84] Viking references the FESC agreement in a footnote in the counterclaim, stating that the notice terminating the DLA also terminated the FESC agreement, which is the subject of separate proceedings between the parties in British Columbia.

[85] On August 25, 2023, Viking filed a notice of motion in the Southern California proceeding seeking a preliminary injunction to restrain Aevex and Ikhana in several regards, including requiring them to withdraw the application filed with the Federal Aviation Authority over the impugned modification; ceasing all regulatory approval and marketing efforts with regard to the impugned modification; restraining Aevex and Ikhana from using confidential information, except for supplemental type certificates it has already obtained and repairs to Twin Otter aircraft; and restraining Aevex and Ikhana from using certain Twin Otter marks.

[86] A Judge of the Southern California Court ordered that the preliminary injunction motion proceed on October 24, 2023. On November 7, 2023, Judge Bashant issued reasons for judgment granting some but not all of the preliminary injunctive relief sought by Viking. Judge Bashant enjoined Ikhana and Aevex from offering, marketing or selling the impugned modification.

Viking's Claim in the British Columbia Supreme Court

[87] Viking has named Ikhana, Aevex and Ikhana Canada in this proceeding.

[88] Viking claims that Ikhana and Aevex received confidential information knowing it was confidential, used it and disclosed it, including to develop the impugned modification, to the detriment of Viking. In various places in its pleadings in this court and in the Southern District Court, and in its affidavits filed in this proceeding, Viking defines "Confidential Information", and a subset of "Confidential Information" as "Viking Materials", and copies or summaries etc. of the confidential materials as "Derivative Materials". It also uses the term Viking Data. The

differences in the definitions in these defined terms are not material for this application. I am simply going to refer confidential information.

[89] Viking pleads the following causes of action and associated relief in relation to the alleged wrongful use of its confidential information:

a) breach of contract – both the DLA and FESC agreement - against Ikhana;

b) inducing breach of contract – both the DLA and FESC agreement – against Aevex;

c) breach of confidence against Ikhana and Aevex;

d) conversion of the confidential information and the Twin Otter type certificates against Ikhana and Aevex; and

e) unjust enrichment against Ikhana and Aevex.

[90] Viking claims that Ikhana and Aevex have wrongfully used Viking's Marks and the Twin Otter Trademark in association with the Twin Otter aircraft and have used other marks confusingly similar causing damage to Viking including Viking's goodwill and reputation. Viking pleads the following causes of action based on the use of Viking's Marks, the Twin Otter Trademark and other marks which are confusingly similar to Viking's Marks:

a) the common law tort of passing off; and

b) infringement of trademark rights pursuant to sections 7(b), 19, 20 and 22 of the *Trademarks Act*, R.S.C. 1985. C. T-13.

[91] Viking seeks:

a) Declarations that:

i. Ikhana and Aevex unlawfully used the confidential information;

ii. Ikhana breached the DLA and the FESC agreement;

iii. the DLA and FESC agreement were lawfully terminated by Viking;

iv. Viking is the owner of the Viking Marks and Twin Otter Trademark;

v. Ikhana and Aevex unlawfully used Viking's Marks and the Twin Otter Trademark; and

vi. the supplemental type certificates related to the impugned modification are held by Ikhana and Aevex in trust for Viking;

b) an injunction pertaining to the confidential information and the Viking Marks and Twin Otter Trademark;

c) orders requiring Aevex and Ikhana to deliver confidential information to Viking or destroy it;

d) orders for specific performance of certain provisions of the DLA and the FESC agreement; and

e) general damages, or in the alternative an accounting of profits, special damages, exemplary, aggravated and punitive damages.

[92] Viking does not make any allegation of wrongdoing in relation to Ikhana Canada, does not raise any cause of action against Ikhana Canada and does not assert that the legal bases to support the relief it seeks apply to any conduct of Ikhana Canada. Viking seeks some relief against Ikhana and some against Aevex and some against the "Defendants", which includes Ikhana Canada. The relief sought against the Defendants including Ikhana Canada is the injunctive relief, an order delivering up or destroying confidential information, and an order transferring supplemental type certificates pertaining to the impugned modifications to Viking.

Territorial Competence

[93] For the most part, the parties did not make their submissions separately for each defendant. Aevex, Ikhana and Ikhana Canada made reference to the differences in the positions of those defendants with regard to the FESC agreement

forum selection clause. I have attempted to address the arguments in relation to the defendants to which they apply.

Ikhana

[94] Viking asserts that the FESC agreement forum selection clause is such that Ikhana should be held to the bargain it made in the FESC agreement.

[95] Viking also argues that the choice of law and forum selection clause in the expired GTA "are indicative of the parties' expectations as they concern the resolution of the disputes".

Section 3(c) – FESC Agreement

[96] Clause 1.5 of the FESC agreement has a heading "Applicable Law" but it is clearly a choice of law and forum selection clause:

> **1.5 Applicable Law**
>
> This agreement shall be construed, interpreted and enforced in accordance with, and the respect rights and obligations of the parties shall be governed by, the laws of the Province of British Columbia and the federal laws of Canada applicable in such province, and each party hereby irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of such province.

[97] Under the FESC agreement, Ikhana was required to buy a minimum quantity of spare parts each year. The FESC agreement provides that the purchase of parts is subject to Viking's General Terms and Conditions in effect at the time of purchase, which in turn provided for a forum selection clause as follows:

> 16.1 These general Terms and Conditions and all related matters will be governed by, and construed in accordance with, the laws of British Columbia, Canada and the federal laws of Canada applicable therein.

[98] Ikhana does not take the position that these provisions are inapplicable or unenforceable. The thrust of the arguments of Ikhana on this point is that when one steps back and looks at the claim as a whole, Viking's claims are not about the FESC agreement. Ikhana asserts that it has only been pleaded to ground

jurisdiction, and there is no real *lis* between the parties that arises out of the FESC agreement.

[99] However, the evidence is that confidential information flowed from Viking to Ikhana both by way of the DLA and the FESC agreement. Viking also claims that the only means by which Ikhana would have the technical data necessary to contract out the necessary avionics upgrade for the impugned modification was through confidential information, such as 400 Series manuals, that Viking provided under the FESC agreement. Viking asserts that by terms of that agreement, the confidential agreement was only to be used for the purposes set out in the FESC agreement.

[100] Viking's claims that the FESC agreement has been breached by unauthorized use of confidential information are arguable and arguably not simply a means to manufacture territorial competence against Ikhana.

[101] Above I noted that the validity and enforceability first step of the strong cause test requires the court to consider whether the forum selection clause is broad enough to cover all of the claims.

[102] In this case, clearly the claim in breach of the FESC agreement against Ikhana, a party to the FESC agreement, is covered by the forum selection clause. While I agree with Ikhana that the focus of the claim is the DLA, Viking's claims also are about confidential information which might have come by way of the DLA or the FESC agreement. At this stage, it is arguable that the alleged breach of the FESC agreement is interrelated with all of the claims that Viking brings against Ikhana.

[103] In addition, for the purpose of whether the court has territorial competence, I read s. 3 as providing that if there is a forum selection clause that applies to some of the relief sought in the proceeding, then the court has territorial competence for the whole of the proceeding as against Ikhana.

[104] I conclude that the forum selection clause in FESC agreement, both on its own terms and by requiring Ikhana to purchase parts subject to Viking's general terms and conditions, is valid and binding as between Viking and Ikhana. Viking and

Ikhana agreed that courts of British Columbia have territorial competence over disputes arising under the FESC agreement and the purchase of spare parts made pursuant to the FESC agreement and the Viking general terms and conditions.

[105] I do not reach the same conclusion with regard to the GTA and its forum selection clause. The GTA expired on May 7, 2019 and was not renewed. Viking does not claim a breach of the GTA, but asserts that the GTA is relevant to the parties' expectations about the forum to resolve any disputes that arise. I am not persuaded that the GTA is evidence that the parties expected that disputes arising after the GTA expired would be governed by the GTA's forum selection clause. An equally compelling inference is that given that the agreement expired and was not renewed, the parties expected that the forum designated in the GTA no longer applied. That is especially so in the context of this relationship where another major agreement under which the parties were doing related work, the DLA, did not have a forum selection clause and did have a choice of law clause that differs from that in the GTA. In any event, a contract on which Viking has not sued cannot be an agreement to the effect that the court has jurisdiction in the proceeding.

[106] I find that the British Supreme Court has territorial competence pertaining to the claims made against Ikhana pursuant to s. 3(c) of the *CJTPA*.

Section 3(e) and s. 10 of the CJPTA

[107] Viking also asserts territorial competence pursuant to s. 3(e) of the *CJTPA,* relying on several of the presumptive real and substantial connecting factors in s. 10 of the *CJTPA.* Viking makes this argument in reference to the defendants as a group, and not each individual defendant. I have attempted to determine which arguments apply to which defendants and in this section, address those that apply to Ikhana.

Section 10(a) – Proprietary Rights over Property in British Columbia

[108] Viking asserts that its claims in the tort of conversion and in breach of confidence pertaining to Ikhana's unauthorized used of confidential information

relates to Viking's property, the confidential information, that is situated in British Columbia. These claims are brought against Ikhana and Aevex.

[109] Viking argues that the confidential information is property located in British Columbia because it is property that is in fact located in British Columbia, or it is property that was created in British Columbia and therefore deemed to be located here. Viking argues that if the property has no tangible location and is simultaneously everywhere in the world, that includes British Columbia. If the confidential information are choses in action, then they are located in British Columbia because Viking's rights to them can be enforced in British Columbia.

[110] Ikhana argues that the issue of whether s.10(a) applies to intangible property is not settled. In *Equustek Solutions Inc. v. Jack,* 2014 BCSC 1063 at para. 26, Justice Fenlon, then of this court, suggested that the s. 10(a) applies to intangible property, but on appeal, *Equustek Solutions Inc. v. Google Inc.,* 2015 BCCA 265, the Court of Appeal for British Columbia, focussed on the common-law carrying on business analysis to address territorial competence.

[111] In *Equustek Solutions,* the property at issue was intellectual property – alleged trade secrets pertaining to the design and manufacture of networking devices. Justice Fenlon held at para. 26, that plaintiff's property was moveable property. I presume there was evidence that the trade secrets originated from design work undertaken in British Columbia or that were stored in British Columbia. Justice Fenlon also considered that the sales of the plaintiff's networking devices took place outside of British Columbia in the vast majority of cases. For that reason, she considered s. 10(a) to apply, but to be a weak connecting factor.

[112] I do not agree that the Court of Appeal questioned Fenlon J.'s s. 10(a) analysis. Justice Groberman questioned whether it was necessary given the carrying on business analysis, but did not question whether it was correct.

[113] In this case, the confidential information consists of many different types including technical materials and manuals for the 400 Series aircraft. The evidence

is that Viking designed the 400 Series aircraft in British Columbia and the Transport Canada designation of Viking as a design approval organization is registered to Viking in Victoria, British Columbia. There are jurisdictional facts that support an arguable case that the confidential information that flowed to Ikhana, and allegedly from Ikhana to Aevex and to the third party that Ikhana contracted to develop the avionics suite upgrade for the impugned modification, originated with Viking in British Columbia and was sent to Ikhana in California.

[114] I conclude this is a presumptive connecting factor.

Section 10(e) – Contractual Obligations to be Performed in British Columbia or Governed by the Laws of British Columbia

[115] Viking claims against Ikhana for breach of the DLA and breach of the FESC agreement.

[116] The DLA, by its express terms, selects the law of New York state. Accordingly, its choice of law clause is not a connecting factor. The question is whether the DLA includes contractual obligations to be performed in British Columbia.

[117] The focus of the jurisdictional analysis is on the contractual obligations alleged to have been breached: *England v. Research Capital Corporation*, 2008 BCSC 580 at paras. 13–16. The place of substantial performance must be ascertained from the perspective of the parties at the time of contract formulation: *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200 at para. 37.

[118] Viking alleges that the DLA contained a contractual obligation to refrain from using the confidential information for anything not authorized by the DLA, which Ikhana breached by:

a) developing the impugned modification;

b) applying for and/or obtaining supplemental type certificates for the impugned modification;

c) using the confidential information to create derivative materials for unauthorized and unlawful purposes; and

d) disclosing the confidential information to Aevex, to the Federal Aviation Authority and to Transport Canada.

[119] So far as the place of substantial performance is concerned, Ikhana points out that when the DLA was made, the parties were the predecessors of Viking and Ikhana, neither of whom were located in British Columbia and so they could have had substantial performance in the jurisdiction in mind. I accept the counter submission of Viking that the MOU entered into between Viking and Ikhana's predecessor, R.W. Martin, to carry on the DLA, nullifies any suggestion that the parties to the DLA did not have it in their contemplation that the party supplying the confidential information, namely Viking, was doing so from British Columbia.

[120] Viking submits that Ikhana's contractual confidentiality obligations were global, and thereby include British Columbia.

[121] While I accept that the contract provided for Ikhana to not disclose the information anywhere, the contract was made in a context, and that context was that Ikhana would use the confidential information for development of supplemental type certificates. The evidence supports that Ikhana's work developing supplemental type certificates takes place in California. There is no evidence or pleading that Ikhana does so in British Columbia. Viking's allegation is that Ikhana used the confidential information for the development of the impugned modification including a supplemental type certificate. There is not an arguable case that Ikhana's obligations of confidentiality, as an element of substantial performance of DLA, were to take place in British Columbia.

[122] The same analysis applies to the allegations that Ikhana wrongfully disclosed confidential information to Aevex during Aevex's purchase of Ikhana. While that

might have occurred in California or in Aevex's home state, Florida, there is no evidence or pleading that supports an arguable case that the information was disclosed by Ikhana to Aevex in British Columbia. The same analysis applies to the alleged disclosure to the Federal Aviation Authority.

[123] Although Viking alleges that Ikhana provided confidential information to Transport Canada, there is no evidence or pleading to support an arguable case that occurred in British Columbia. There is no evidence that Ikhana sought approval of the impugned modification from Transport Canada.

[124] I conclude that the alleged breach of the DLA does not support a real and substantial connection with British Columbia.

[125] Viking characterizes the FESC agreement as a contract "made in British Columbia". There is no evidence or pleading to support an arguable case on that. However, it does, as noted, have a forum selection clause that provides a real and substantial connection to British Columbia for the claim against Ikhana.

Section 10(f) – Restitutionary Obligations that Arose in British Columbia

[126] Viking takes the position that the claims in unjust enrichment and breach of confidence potentially give rise to connecting factors under this provision.

[127] Ikhana points to law that is not settled about how to analyze where a restitutionary obligation arises. Legal commentary suggests that the focus should be on the conduct that give rises to the restitutionary claim: Vaughan Black, Stephen G.A. Pitel and Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceeding Transfer Act* (Carswell: Toronto, 2012) at 113.

[128] Neither the pleadings nor the evidence support an arguable case that Ikhana's obligations to not use the confidential information other than for authorized supplemental type certificates arose in British Columbia.

[129] There is also jurisprudence that stands for the proposition that the place of deprivation may be the place where the restitutionary obligation arises.

[130] In *Northwestpharmacy.com Inc. v. Yates*, 2017 BCSC 1572 at para. 36, Justice McIntosh held that for s. 10(f), restitutionary obligations arise at the place from which money was removed, or the place where the money was wrongfully received, citing *Laxton v. Jurem Anstalt*, 2010 BCSC 1002 at paras. 36–39, aff'd 2011 BCCA 212; and *Right Business Limited v. Affluent Public Limited,* 2011 BCSC 783 at paras. 59–61, aff'd 2012 BCCA 375.

[131] Ikhana argues that using the place of deprivation for where the restitutionary obligation arises is akin to finding the place where damage was suffered to be a connecting factor. The place of damage has received negative commentary as a presumptive connecting factor because it lacks reliability and may lack significance: *Van Breda* at paras. 55, 89.

[132] With regard to unjust enrichment, I am not persuaded that the place of deprivation is lacking in reliability and significance in the way that damages for personal injury have been found wanting as a connecting factor. Deprivation is one of the three elements of a cause of action in unjust enrichment. It must correspond to the defendant's enrichment. One of the shortcomings of the "place of damages" as a real and substantial connecting factor is that damages for personal injury may be suffered in more than one place, as the injured person moves around. The same is not true of deprivation, or put another way, it is no more true of deprivation than it is of enrichment, because the two must correspond. Because of the requirement of correspondence, deprivation is as significant to the cause of action as enrichment is. Because it must correspond to the defendant's enrichment, it is reliable and it does not offend the values of fairness, order and comity: *Van Breda* at para. 92.

[133] I agree with my colleagues who have decided that the place of deprivation in a claim for unjust enrichment is a place where a restitutionary obligation can arise for the purposes of s. 10(f) of the *CJPTA*: *Cheung v. NHK Spring Co.*, *Ltd.*, 2022 BCSC 1738 at para. 90.

[134] Viking pleads that the deprivation it suffered is "the funds attributable to Aevex's and Ikhana's wrongful conduct" and Viking's loss of control over its

confidential information. The pleadings and evidence do not assist with identifying the situs of the "funds", but in the context of the claim made, the loss of control of the confidential information is the place where Ikhana allegedly used it for a purpose other than an authorized purpose. Neither the pleadings nor the evidence support a good arguable case that occurred in British Columbia.

[135] With regard to breach of confidence, it is a *sui generis* cause of action: *Cadbury Schweppes v. FBI Foods*, [1999] 1 S.C.R. 142, 1999 CanLII 705 at paras. 20, 27–28. Its elements are: the information had a necessary quality of confidence about it; the circumstances under which the information was imparted gave rise to an obligation of confidence; and the defendant made unauthorized use of the information to the detriment of the plaintiff: *Linkletter v. Proctorio, Incorporated,* 2023 BCCA 160 at para. 21. The remedies are variable and must be determined based on the facts of the case: *Cadbury Schweppes* at para. 24.

[136] Following the same analysis as for unjust enrichment, one method of assessing where the restitutionary obligation arises is where the confidential information was received and used by Ikhana in circumstances imposing an obligation of confidentiality. Another is to consider where the detriment to Viking occurred. Viking makes no pleading about these matters and has led no evidence that I was directed to on this point. I conclude there is not an arguable case that the confidential information was received or used by Ikhana in British Columbia or that the detriment to Viking occurred in British Columbia.

[137] Viking seeks an order requiring Ikhana to deliver to Viking all materials containing or developed through use of the confidential information. That pleading, factually, would anchor the restitutionary obligation to the location of the material to be returned. The pleadings and the evidence do not support an arguable case that the material sought to be returned is in British Columbia.

[138] Accordingly, I consider this factor to not be a presumptive connecting factor to British Columbia.

Section 10(g) – Torts Committed in British Columbia

[139] Viking pleads the tort of conversion against Ikhana and the tort of passing off.

[140] The elements of the tort of conversion are: a wrongful act involving a chattel; consisting of handling, disposing or destruction of the chattel; with the intention or effect of denying or negating the title of another person to such chattel: Fridman, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) at 136, referred to by Justice Hinkson, as he then was, in *Ngo v. Go*, 2009 BCSC 146 at para. 44.

[141] In *Sarzynick v. Skwarchuk*, 2021 BCSC 443 at para. 260, Justice Morellato observed that the accepted view is that conversion does not apply to intangible property such as contractual rights or choses in action, but only to tangible personal property, citing Philip Osbourne in *The Law of Torts*, 6th ed. (Toronto: Irwin Law, 2020), at 330–331. Justice Morellato's analysis demonstrates the difficulty in determining whether certain assets are chattels that can be converted. I do not consider this application to be the appropriate time and place to determine whether any of the many items of confidential information that Viking pleads were converted are chattels. For the purposes of this application, I conclude there is an arguable case that there are chattels in that category.

[142] The question is where the converted goods were taken from: *Laxton* at para. 17. I accept that the confidential information originated in British Columbia with Viking. It was sent by Viking to Ikhana. Based on the pleadings and the evidence, it was sent pursuant to the DLA or the FESC agreement. It was not converted when it was sent. The conversion is alleged to have occurred when Ikhana received it for one purpose and used it for an unauthorized purpose. On those pleadings, and the evidence, there are insufficient jurisdictional facts to ground an arguable case that the converted goods were taken from British Columbia.

[143] With regard to passing off, the tort occurs in the jurisdiction in which the alleged tortfeasor does business or has customers: *Magnum Integrated Technologies Inc. v. Integrated Industrial Systems,* 2010 ONSC 3389. Ikhana's customers for supplemental type certificates are spread over the world, including

British Columbia. There is evidence that Ikhana and Aevex marketed the impugned modification, including in British Columbia. Ikhana points out that its British Columbia customer is Viking, and Viking "can hardly complain of products being 'passed off' to Viking". That submission goes to the merits, not on whether Ikhana's passing off was a tort arguably committed in British Columbia.

[144] Viking also argues that torts occur where the harm was suffered, not just where the harm was done.

[145] I have referred to the concerns expressed in *Van Breda* about damages for personal injury being an unreliable and insufficient connector to ground territorial competence. An aspect of the concern is that the tortious act can occur in one place and the plaintiff can suffer harm that travels with him or her to other places. That can be ameliorated by foreseeability; if the activities of a defendant have foreseeable effects in a jurisdiction, the defendant cannot reasonably avoid the process of the jurisdiction's courts: *Beals v. Saldanha*, 2003 SCC 72 at para. 178; *Moran v. Pyle National (Canada) Ltd.,* [1975] 1 S.C.R. 393, 1973 CanLII 192 at 408–409; and *Fairhurst v. De Beers Canada Ltd.*, 2012 BCCA 257 at para. 44.

[146] Given the relationship between the parties and the jurisdictional facts, both pleaded and about which there was evidence, there is an arguable case that Ikhana could foresee that if it committed the torts of conversion and/or passing off, the harm would be suffered by Viking in British Columbia.

[147] This is a presumptive connecting factor.

Section 10(h) – Business Carried on in British Columbia

[148] Business carried on in British Columbia by the defendant is a presumptive connecting factor when that business is the subject matter of the litigation: *International Raw Materials Ltd. v. Steadfast Insurance Company*, 2023 BCSC 1389 at paras. 35–36, citing *Thumbnail Creative Group Inc. v. Blu Concept Inc.,* 2009 BCSC 1833 at para. 18.

[149] In this case, the pleadings and affidavit evidence demonstrate an arguable case that Ikhana sells some of its supplemental type certificates to Viking in British Columbia and pays royalties to Viking, in British Columbia, pertaining to some supplemental type certificates.

[150] Ikhana's sales to Viking are also business carried on in British Columbia. Although no sales of the impugned modification have occurred other than to the one entity that is testing the modification, Viking is Ikhana's largest customer for 400 Series supplemental type certificates, and the parties negotiated (but failed to agree) whether the development of the impugned modification was for Viking's sole use. That is evidence that it is arguable that Ikhana was carrying on business in British Columbia in relation to sales of the impugned modification.

[151] I conclude that Ikhana's business dealings with Viking, including the DLA and the FESC agreement, both of which are part of the subject matter of this lawsuit, amounted to business carried on in British Columbia in relation to the subject matter of the litigation.

[152] This is a presumptive connecting factor.

Section 10(i) – Injunctive Relief Restraining Conduct in British Columbia

[153] In the notice of civil claim, Ikhana seeks an injunction restraining the defendants from:

a) offering for sale for use or any other purpose the impugned modification;

b) transferring, selling, leasing, licensing or using the confidential information without the express permission of Viking;

c) further breaching or inducing breaches of the DLA or the FESC agreement;

d) infringing its trademark;

e) using the Viking Marks, Twin Otter Trademark or any other marks likely to be confused with the Viking Marks as a trademark or trade name or for any other purpose;

f) depreciating the value of the goodwill associated with Viking's Marks and the Twin Otter Trademark;

g) directing public attention to any of Aevex and Ikhana's goods services and business in such a way as cause or likely to cause confusion between their goods, services and business and those of Viking including but not limited to holding themselves as a Viking endorsed service centre; and

h) passing off Ikhana and Aevex's goods, services and business as those and for those of Viking.

[154] In *Ngo,* Hinkson J. held that an injunction sought worldwide, including in British Columbia, satisfied s. 10(i). I conclude the same in this case for Ikhana.

Aevex

Section 3(c) – Applicability of the FESC Agreement Forum Selection Clause

[155] Aevex is not a party to the FESC agreement.

[156] In *Schuppener*, the Court of Appeal upheld the trial judge's analysis to determine that the forum selection clause was broad enough to cover all of the claims against the defendants in that case, even though one of the defendants was not a party to the agreement. The reasoning was very brief and does not assist in explaining why claims against a non-contracting party were held to be covered by the forum selection clause.

[157] Viking has not made any submissions, nor pleaded, that the FESC agreement forum selection clause applies to Aevex. All of its submissions relating to the FESC agreement are made in reference to Ikhana. However it does submit that Aevex and Ikhana function as one entity. In the notice of civil claim, Viking pleads that Aevex is

Ikhana LLC's parent company and directs the affairs of Ikhana LLC. While the notice of civil claim is not clear on this point, I understand that Ikhana LLC is a different entity than Ikhana.

[158] The "one entity" submission takes on significance because in *Hydro Aluminum Rolled Products #1*, the forum selection clause had a precondition that the defendant have an office in B.C. One of the defendant's did not, but another entity did, and the party seeking to enforce the forum selection clause took the position . that the defendant and that entity should be regarded as a single entity. At para. 15, Fenlon J.A. held that it was possible that an amendment to the pleading to formalize the single entity submission could impact the analysis of whether territorial competence could be grounded in the forum selection clause.

[159] It may be that some amendment could be made in this case that would bring the claims against Aevex into the forum selection clause. However, those submissions were not made.

[160] Indeed, in contrast to the statement on this application that Aevex and Ikhana operate like one entity, the claims pertaining to breach of contract of the DLA and the FESC agreement by Ikhana on one hand and inducing breach of contract by Aevex on the other hand would lose their distinction if Viking was to plead that one was the alter ego of the other. The other problem is the potential distinction that Viking is making in the notice of civil claim between the amalgamated entity Ikhana, against which it claims its relief, and the fact that Aevex directs the affairs of Ikhana LLC, one corporation in the amalgamated Ikhana.

[161] Accordingly, unlike in *Hydro Aluminum Rolled Products #1*, a simple amendment would not be possible. In order to formalize its position that Aevex is bound by the forum selection clause in the FESC agreement or under the general terms and conditions, Viking would have to amend its notice of civil claim extensively and perhaps structurally (in the sense of what causes of action are pleaded against which defendants).

[162] I conclude that the notice of civil claim does not provide a basis to ground territorial jurisdiction in a forum selection clause pertaining to the claims against Aevex.

[163] However, that is not the end of territorial competence. Viking relies on several of the s. 10 presumptive connecting factors. Again, it does not stipulate which ones apply to Aevex specifically. I have attempted to discern that in the analysis below.

Section 3(e) and s. 10 of the CJPTA

Section 10(a) – Proprietary Rights over Property in British Columbia

[164] Viking pleads the tort of conversion and breach of confidence pertaining to Aevex's unauthorized used of Viking's confidential information.

[165] For the same reasons given above pertaining to Ikhana, I find this to amount to a weak connecting factor.

Section 10(e) – Contractual Obligations to be Performed in British Columbia or Governed by the Laws of British Columbia

[166] Viking does not allege any contractual obligations to be performed by Aevex.

Section 10(f) – Restitutionary Obligations that Arose in British Columbia

[167] I apply the same analysis and reach the same conclusion as set out above for Ikhana, with the exception of the analysis pertaining to the contracts being the source of the obligation, as Aevex is not a party to either contract.

Section 10(g) – Torts Committed in British Columbia

[168] I apply the same analysis and reach the same conclusion as set out above for Ikhana with regard to the tort of passing off and the tort of conversion.

[169] Viking pleads that Aevex induced Ikhana to breach the DLA and the FESC agreement.

[170] I agree with the proposition that if those contracts are a real and substantial connecting factor for the claims against Ikhana, then the claim that Aevex induced a

breach of them would, through the same factual nexus, be presumptively substantively connected to British Columbia. I also conclude that if the contracts are not a real and substantial connection, inducing a breach of the contracts does not support a presumptive real and substantial connection.

[171] With regard to the DLA, Viking submits that the connection it asserts to British Columbia pertaining to Ikhana's alleged breach of the DLA provides a connection for Aevex's alleged inducement of that breach. For the same reasons as I gave above, I conclude that the DLA did not require performance of contractual terms in British Columbia and the allegations that Aevex induced Ikhana to breach the DLA do not have a real and substantial connection to British Columbia.

[172] However, for the reasons I have set out above regarding foreseeability of damages in claims of tort, I conclude that Viking's allegations of damages suffered in British Columbia from Aevex's allegedly inducing Ikhana to breach the DLA provides a real and substantial connection to British Columbia for this tort.

[173] With regard to the FESC agreement, I regard its forum selection clause to provide a presumptive real and substantive connection to British Columbia for the claim that Aevex induced breach of that contract, even though Aevex was not a party to it. This connection is presumptive and therefore subject to rebuttal since it arises under s. 10(e) and not s. 3(c). It is not a finding that there is contract with a forum selection clause that binds Aevex, and so the s. 11 analysis, not the strong cause analysis, applies if the resumption is not rebutted.

Section 10(h) – Business Carried on in British Columbia

[174] Above I concluded that Ikhana was carrying on business in British Columbia in relation to the subject matter of the litigation in two regards. First, it contracted with Viking through the DLA and the FESC agreement, two agreements that are said to have been breached, and second, there is evidence that Viking would have been a customer of the impugned modification.

[175] The first point does not apply to Aevex. While I have found that its alleged inducement of breaches of those contracts are presumptive connecting factors, there is no evidence that Aevex was engaged with Viking or any business in British Columbia in a way that could be said to carrying on business.

[176] However, with regard to the second, there is evidence that Aevex announced the development of the supplemental type certificate in relation to the impugned modification and was engaged in marketing it. Given the evidence that Ikhana may have been a customer for it, I conclude there is an arguable case that Aevex was carrying on business in British Columbia in relation to the subject matter of the litigation.

Section 10(i) – Injunctive Relief Restraining Conduct in British Columbia

[177] I apply the same analysis and reach the same conclusion as set out above for Ikhana.

Ikhana Canada

[178] Despite that Viking has pleaded that Ikhana Canada is an Ontario company that is extra provincially registered in British Columbia, it does not argue territorial competence based on s. 3(d) of the *CJPTA* with regard to Ikhana Canada.

[179] With regard to s. 3(c) of the *CJPTA*, Viking does not allege that Ikhana Canada is a party to any agreement with a forum selection clause, nor has it expressly made a submission that the court has territorial competence over Ikhana Canada because of the FESC agreement forum selection clause.

[180] Viking included Ikhana Canada in its submissions that there is a s. 3(e) real and substantial connection between British Columbia and the proceeding.

Section 3(e) and s. 10 of the CJPTA

Section 10(a) – Proprietary Rights over Property in British Columbia

[181] In its submissions on this application, Viking asserts that it claims in conversion and breach of confidence against the defendants, which include Ikhana

Canada. However, the notice of civil claim does not raise these claims against Ikhana Canada. This is not a presumptive connecting factor with regard to Ikhana Canada.

Section 10(e) – Contractual Obligations Governed by the Laws of British Columbia

[182] Viking does not allege that Ikhana Canada was a party to any agreement at issue in this litigation, it has not led any evidence connecting Ikhana Canada to the breaches on contract it alleges against Ikhana. This is not a presumptive connecting factor with regard to Ikhana Canada.

Section 10(f) – Restitutionary Obligations that Arose in British Columbia

[183] Viking does not seek restitutionary relief against Ikhana Canada. This is not a presumptive connecting factor with regard to Ikhana Canada.

Section 10(g) – Torts committed in British Columbia

[184] Viking does not allege that Ikhana Canada committed any torts. This is not a presumptive connecting factor with regard to Ikhana Canada.

Section 10(h) – Business Carried on in British Columbia

[185] As noted, Ikhana Canada is extra-provincially registered in British Columbia. However, there is no pleading or evidence that supports an arguable case that it was carrying on business in British Columbia in relation to the subject matter of this dispute. This is not a presumptive connecting factor with regard to Ikhana Canada.

Section 10(i) – Injunctive Relief Restraining Conduct in British Columbia

[186] The injunctive relief set about above in relation to Ikhana is sought against the defendants, which includes Ikhana Canada. It is apparent, however, when reviewing the specifics of the injunctive relief sought, that it relates to alleged ongoing conduct of Ikhana and Aevex. More fundamentally, Viking has not plead any cause of action against Ikhana Canada.

[187] Establishing a serious issue to be tried is a requirement for interlocutory injunctive relief: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 at 347. A requirement for permanent injunctive relief is to establish the claimant's legal rights: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 66; and *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para. 28.

[188] Establishing legal rights has also been described as the plaintiff proving all of the elements of a cause of action: *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46 at para. 72; and *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15 at para. 630. Viking cannot establish a serious issue to be tried or legal rights in relation to Ikhana Canada since it has not pleaded any cause of action against Ikhana Canada.

[189] I conclude that the pleadings do not support a claim for injunctive relief against Ikhana Canada and therefore it is not arguable that this factor is a presumptive connecting factor.

Conclusion on Territorial Competence for Ikhana Canada

[190] Viking has not established any connecting factors, presumptive or otherwise, for Ikhana Canada. I conclude that this court does not have territorial competence in relation to Ikhana Canada. I dismiss this proceeding against Ikhana Canada.

Rebutting Presumptive Connecting Factors

[191] I have found that the FESC agreement is a non-rebuttable connecting factor for Ikhana. I have also found presumptive connecting factors in relation to Ikhana and Aevex.

[192] I must consider whether to exercise the territorial competence based on the strong cause test for Ikhana. For Aevex, the discretionary analysis is the s. 11 *forum non conveniens* analysis.

[193] Both those analyses take into account many factors and require a broad based analysis of the claim as a whole. That will call for overlap of the analysis with whether the presumptions of certain connecting factors should be rebutted. As counsel for Ikhana, Aevex and Ikhana Canada submitted, the analyses of territorial competence and whether to exercise it are not watertight.

[194] Accordingly, I have decided to not undertake a separate analysis pertaining to the strength of the rebuttable connecting factors. Instead, I will consider the strength of the presumptive connecting factors as part of the determination of whether to exercise territorial competence for Aevex.

Whether To Exercise Territorial Competence

Ikhana

Applicability of the Forum Selection Clause

[195] In the commercial context, absent exceptional circumstances, forum selection clauses are generally enforced to hold sophisticated parties to their bargains: *Douez SCC* at para. 1; and *Z.I. Pompey Industrie* at para. 31.

[196] I have concluded that the FESC agreement forum selection clause is valid and enforceable as against Ikhana and so it is necessary to determine whether Ikhana has shown strong cause as to what it should not be enforced.

Strong Cause

[197] The question is whether there is compelling evidence that it would be against public policy to hold the parties to this aspect of their bargain.

[198] In *Z.I. Pompey Industrie* at para. 19, the Supreme Court of Canada set out a non-exclusive list of factors to be considered.

[199] I will consider the factors, and then discuss the public policy aspects of this analysis, which in my view, raises an additional factor for consideration.

Evidence, Convenience and Expense of Trial as between British Columbia and Southern California

[200] Based on the allegations, there will be evidence about discussions and interactions between Ikhana and Viking over the years about the impugned modification and about how they addressed supplemental type certificates other than those expressly listed in the DLA.

[201] Viking asserts that the development of any supplemental type certificate was the subject of some sort of written agreement through a statement of work and/or a memorandum of understanding or the DLA. Ikhana asserts that the matter of supplemental type certificates in addition to those identified in the DLA was dealt with less formally than that. It asserted that in practice, Ikhana would develop the supplemental type certificate and then the parties would agree to add it to the authorized supplemental type certificates. Those contrary assertions will be the subject of oral and documentary discovery. The documents will likely be in the records of Viking in British Columbia and Ikhana in California.

[202] The documentary disclosure will likely be extensive on both sides, including the confidential information and the dealings between the parties. However, the documentary discovery pertaining to the development and marketing of the impugned modification, including what source material it used for the developments, and whether any of it was confidential information, will largely come from Ikhana and/or Aevex. I expect that Ikhana's document discovery on the impugned modification to be more voluminous than that of Viking.

[203] Ikhana has listed its key witnesses, all of whom reside in California or the United States. Viking has listed its key witnesses, most of whom reside in British Columbia or Alberta. Ikhana's affiant has identified a couple of former Viking personnel who played significant roles in the dealings with Viking and Ikhana on the DLA and the FESC agreement who now reside outside of Canada, one in the State of Hawaii.

[204] I conclude this factor favours Southern California.

What Law Applies

[205] With regard to the claims against Ikhana, the law of British Columbia applies to the claim of breach of the FESC agreement. The law of New York applies to claim of breach of the DLA agreement.

[206] As between those agreements, based on the limited evidence before me, I agree with Ikhana that the DLA appears to be the agreement that is most connected with the substance of the claim, that is the impugned modification. I acknowledge that the FESC agreement is related to Viking's claims for unlawful use of its confidential information in the development of the impugned modification. However, the impugned modification was not developed or alleged to be developed pursuant to the FESC agreement. The only agreement in place that expressly and directly pertains to the development of supplemental type certificates was the DLA. In addition, in the Southern California proceeding, where Viking also alleges unlawful use of its confidential information, it does not refer to the FESC agreement.

[207] In British Columbia, the New York law would have to be proved through expert evidence. However, according to Ikhana's expert, Mr. Rushing, in Southern California, the law of New York would not have to be proved through expert evidence. In addition, according to Mr. Rushing, that court and U.S. courts generally are accustomed to apply the law of other states of the union outside their jurisdiction. This is an advantage to the parties in terms of the complexity of the proceeding and the expense of litigating it.

[208] For unjust enrichment, the choice of law is the law of the obligation, which can be the law applicable to the contract if the obligation arises out of a contract, the law of the place where that property is situated if it is an immoveable property, or the law of the place where the enrichment occurs if there is no contractual obligation and it is not immoveable property: *Minera Aquiline Argentina SA v. IMA Exploration Inc.,* 2006 BCSC 1102 at paras. 184–185.

[209] Viking asserts the choice of law rule is the proper law of the obligation, which is the contract in this case. The relationship between contract and unjust enrichment

is that the confidential information supplied by Viking to Ikhana allegedly occurred in relation to two contracts, the DLA and the FESC agreement. The DLA stipulates New York law governs. The FESC agreement stipulates British Columbia law applies.

[210] If the wrongful act did not arise out of the contracts, then the applicable law is likely the law where the enrichment occurred, California law: *Minera Aquiline Argentina* at para. 185. If the wrongful act could be said to arise out of both, then the court will have to consider relative strength of the connections between wrongful act and the potential choice of law jurisdictions: *Minera Aquiline Argentina* at paras. 182–200.

[211] The same analysis applies to the claim for restitution under breach of confidence. If the obligation to keep the information confidential arose out of contractual relations, then the law of the contracts applies; British Columbia for the FESC agreement and New York for the DLA: *Minera Aquiline Argentina* at paras. 182–185.

[212] With regard to the torts of conversion and passing off, the choice of law is where the wrongful activity allegedly occurred: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 1994 CanLII 44 at 1049–1050; and *Magnum Integrated Technologies* at para. 33(c).

[213] For conversion, the evidence and pleadings are such that the choice of law would likely be California. For passing off, that could include where the customers are located, and so could be a variety of jurisdictions, including California and British Columbia.

[214] For the claims pertaining to trademark law, Viking's British Columbia claims focus on the trademarks' infringements in Canada, which will mean applicability of Canadian law: Janet Walker, *Canadian Conflict of Laws*, 7th ed. Toronto: LexisNexis, 2023 (loose-leaf updated September 2023, release 101), 35.9.f (Intellectual Property

Rights). Viking's trademark claims in its counterclaim in the Southern California Court involve U.S. trademark claims to which United States law will be applied.

The Parties' Connections to British Columbia and California

[215] Ikhana is headquartered in California and does business in California. Viking is headquartered in British Columbia and does business in British Columbia. I cannot discern any relative difference in the strength of each party's connection to its place of business.

[216] Viking asserts that Ikhana is more closely connected to British Columbia than Viking is to California, because Ikhana's predecessor, RW Martin, contracted with Viking's predecessor, Bombardier, in Quebec. I do not accept that submission. The contractual and business relations between Ikhana and Viking occur in British Columbia and California as they do business with each other. Their business relations include that Viking supplies Ikhana with the confidential information from British Columbia and Ikhana uses it for its business which it carries out in California. Ikhana sells some of the supplemental type certificates that it develops in California to Viking in British Columbia.

[217] I accept that Ikhana has a subsidiary, Ikhana Canada, that is extra-provincially registered in British Columbia and therefore carries on business in British Columbia. However, as I have also observed, there is no allegation or evidence that connects Ikhana Canada's British Columbia connection with the subject matter of this dispute.

[218] The subject matter of this lawsuit is the impugned modification, including that it was unlawfully developed by Ikhana without Viking's permission, that Ikhana allegedly used Viking's confidential information to develop it, and that Ikhana and Aevex marketed it using Viking's Marks and the Twin Otter Trademark. With the exception of the marketing, which has been worldwide including British Columbia, the location of the alleged wrongdoing has been in California.

[219] I consider this factor pulls in favour of showing cause for this Court to not enforce the forum selection clause in the FESC agreement.

Whether Ikhana Genuinely Desires Trial in Southern California Or is Only Seeking Procedural Advantage

[220] Clearly Ikhana desires that this matter be resolved in Southern California proceeding. It commenced a claim there before Viking commenced this proceeding.

[221] Viking asserts that because Ikhana commenced the Southern California proceeding on the same day that the parties had a meeting to try to resolve the matter, I should conclude that the commencement in that court was tactical and not due to a genuine desire for that court to resolve this matter.

[222] I do not agree. The evidence shows that the parties had tried to resolve the matter through discussion more than once. At the time the proceeding was commenced, Viking had purported to terminate the DLA and the FESC agreement and refusing to supply parts to Ikhana, the result of which was that Ikhana's Twin Otter business was in peril. Ikhana evidently employed a two track strategy – a last attempt to resolve the matter and commencing litigation. It is not surprising or suspicious that Ikhana kept the second track confidential.

[223] There is also nothing about the Southern California proceeding that demonstrates an intention for procedural advantage as opposed to a chosen for genuine purposes. Ikhana is located in southern California and engages in the business that is the subject matter of the dispute in southern California. It is a logical place for Ikhana to have commenced the litigation.

Whether Viking Would Be Prejudiced if this Court Does Not Exercise Territorial Competence

[224] There is no indication that Viking would be prejudiced by proceeding in Southern California. Other than asserting that the forum selection clause should be adhered to, Viking has not asserted any potential prejudice in this regard.

Viking Has Attorned to the Southern California Court, Sought Relief by Counterclaim and Obtained an Interim Injunction in the Southern California Proceeding

[225] The *Z.I. Pompey Industrie* factors pull towards Southern California but not strongly. On their own, they would not override the public policy imperative of holding parties' to their bargain.

[226] However, Viking has undermined the importance of the bargain to have British Columbia be the forum for the resolution of the dispute pertaining to the FESC agreement by engaging the Southern California Court's jurisdiction by bringing a counterclaim and seeking an interlocutory injunction. In addition, Viking has attorned to the jurisdiction of the Southern California Court and has not disputed territorial competence or convenient forum in the Southern California proceedings.

[227] Viking has not included it its counterclaim in the Southern California proceeding that the actions of Aevex and Ikhana are a breach of the FESC agreement. The FESC agreement is one aspect of a multi-faceted dispute pertaining to the impugned modification. But it is raised on the same facts to resolve the same factual dispute that underlies all of the legal arguments: the alleged development and marketing of the impugned modification. While Viking has not engaged the Southern California Court on the FESC agreement, Viking has demonstrated that it is content to have the Southern California Court pass judgment on the other aspects of the claims over the same subject matter and which relate to the FESC agreement. It also seeks to litigate, in this court, all of these issues including the alleged breach of the FESC agreement.

[228] There is public interest in avoiding the multiplicity of proceedings, including the embarrassing situation courts of competent jurisdiction run the risk of reaching differing results. This consideration must be undertaken when applying s. 11 of the *CJPTA,* which is a codification of the common law *forum non conveniens* principles: *Teck Cominco* at para. 22. In my view, these policy principles are also relevant when considering whether there is strong cause to not apply the parties' forum selection clause. The Court must take multiplicity of proceedings into account where, as here,

a party asserting that the forum selection clause should be respected, has attorned to the jurisdiction of a court in another jurisdiction in claims closely intertwined with the claims pertaining to the contract with a forum selection clause.

[229] The reason that Viking asserts for not bringing a *forum non conveniens* application in the California proceeding is opinion evidence that the California Court would likely not stay the proceeding based on *forum non conveniens* principles.

[230] Ikhana led the opinion evidence of Don G. Rushing, a trial lawyer with experience in aviation cases including jurisdiction, venue and *forum non conveniens* matters. Mr. Rushing opined that there is no question that the California Court would exercise its jurisdiction subject to an application to the claim pursuant to *forum non conveniens* principles for several reasons. The reasons include that Ikhana alleged that the Southern California Court has subject matter jurisdiction on diversity of citizenship grounds; the Southern California Court has personal jurisdiction over Viking under California's long arm statute; venue is proper; Viking does not challenge personal jurisdiction or venue and Viking asserts subject matter jurisdiction in its counterclaim.

[231] Mr. Rushing opined that a motion to dismiss on *forum non conveniens* grounds must be brought in a timely manner. If it is, the court will consider deference to the plaintiff's choice of forum and whether an adequate alternative forum exists. If there is an adequate alternative forum, Mr. Rushing is of the view that British Columbia would be considered an adequate alternative forum and the Southern California Court would weigh private interest factors affecting the convenience of the litigants and public interest factors affecting convenience of the forum. Mr. Rushing opined that the Southern California Court would likely conclude that there was local interest in providing a forum to resolve the dispute given that the violations of the DLA and the FESC agreement were alleged to have occurred in California, and Ikhana is headquartered in California. Mr. Rushing opined that if the Southern California Court dismissed a *forum non conveniens* application, Viking would be

permitted to amend its counterclaim to plead the claims it has pleaded in British Columbia and not in the Southern California proceeding.

[232] With regard to the forum selection clauses in the FESC agreement (which Mr. Rushing refers to as the ESCA), Mr. Rushing opined that forum selection clauses set the venue for a case, which is a privilege of the defendant that can be waived. Venue selection is waived if there is not timely and sufficient objection by the defendant. Mr. Rushing opined that Viking has waived the venue selection clause by appearing, filing a counterclaim and seeking a preliminary injunction in the Southern California Court.

[233] With regard to the situation where both the British Columbia Supreme Court and the Southern California Court have proceedings continuing, Mr. Rushing opined that if an application to stay is refused by this court, that would factor into a *forum non conveniens* analysis if such an application were brought in the Southern California Court. It would not be a basis on its own to dismiss the Southern California proceeding due to *forum non conveniens*. Mr. Rushing opined that it is likely that the Southern California Court would reject a request to dismiss the Southern California proceeding on *forum non conveniens* principles given that the plaintiff is a United States entity and the court has subject matter over the case and personal jurisdiction over the parties.

[234] Viking led the evidence of Robert Knaier in response. Mr. Knaier agreed with Mr. Rushing that the Southern California Court would likely find subject matter and personal jurisdiction over all of the claims that Viking has made in British Columbia. However, Mr. Knaier opined that Viking may face difficulties recovering its alleged losses on the Canadian trademark claims in California, or the Southern California Court may decline to exercise jurisdiction over that claim. Mr. Knaier also opined that Viking has likely subjected itself to the personal jurisdiction of the Southern California Court by not challenging it. Mr. Knaier agreed with Mr. Rushing's description of *forum non conveniens* principles. Mr. Knaier opined that the Southern California Court would likely reject a *forum non conveniens* argument.

[235] Viking has not brought the forum selection clause to the attention of the Southern California Court nor sought it to stay the action because of the forum selection clause or *forum non conveniens* principles.

[236] Viking relies on *Teck Cominco* at para. 29, in which McLachlin C.J.C. held that a *forum non conveniens* decision ought not to be determined solely on the basis of another court asserting jurisdiction first, because that might result in the overriding principle of where the action was filed first or proceeded most quickly. However, what is important in that statement, for the present purposes, is the reference to the foreign court "asserting jurisdiction". In *Teck Cominco*, the foreign court had been asked to not exercise its territorial competence in a stay application based on *forum non conveniens* stay application. The foreign court declined to do so. The Canadian court had the fact of that application denial, and the reasons for it, to consider when deciding whether to exercise its jurisdiction.

[237] In addition, while in *Teck Cominco*, the Court held that a prior exercise of territorial competence by the foreign court was not determinative, it was an important factor: *Teck Cominco* at para. 29.

[238] In this case, it is not the assertion of jurisdiction by the court in the Southern California proceeding that is persuasively significant, it is the actions of Viking and Ikhana themselves. Despite the FESC agreement and its forum selection clause, both these parties have sought to sue in California by claim and counterclaim. Viking has not taken the position, in that jurisdiction, that the proceeding ought to be stayed in favour of this proceeding. By its actions in the Southern California proceeding, Viking has demonstrated weak commitment to the bargain it struck in the FESC agreement pertaining to the forum to resolve disputes.

[239] With regard to Aevex, it is common ground that the counterclaim against it will be proceeding in Southern California in any event since Viking made it a defendant by counterclaim. For the reasons I give below, in my view this Court should decline to exercise its jurisdiction with relation to Aevex based on the application of the s. 11 *CJPTA* principles.

[240] I have determined that this claim must be dismissed against Ikhana Canada for lack of territorial competence so its role is irrelevant.

Conclusion on Strong Cause

[241] In my view, these circumstances establish strong cause for this Court to decline to exercise its territorial competence with respect to the claims against Ikhana and Aevex.

Aevex - Section 11 of the *CJPTA*

[242] Section 11 of the *CJPTA* lists six non-exclusive factors. I address each below.

Section 11(a) – Comparative Convenience and Expense for the Parties and Their Witnesses

[243] The same analysis I undertook above about the location of evidence and witnesses applies.

[244] Aevex also submits that given that the Southern California Court would not require New York law to be proven for the claims pertaining to the DLA, the parties will have less expense if the DLA is litigated in Southern California. I agree. Since the FESC agreement is not in issue in the Southern California proceeding, British Columbia law will not have to be proved there.

[245] This factor weighs in favour of the Southern California proceeding.

Section 11(b) – The Law to Be Applied

[246] I repeat my analysis above under strong cause for the claims against Aevex that are also brought against Ikhana: unjust enrichment, conversion, passing off, and breach of trademark.

[247] With regard to inducing breach of contract, the applicable law is the law of where that tort is alleged to have occurred. Based on the pleadings and evidence, it is arguable that would be in California. There is some room for argument that because each contract that was allegedly induced to be breached has a forum

selection clause, the law of the contract would apply, which would be New York State law for the DLA and British Columbia for the FESC agreement. I repeat my conclusion above that the focus of the claim appears to be the breach of the DLA.

[248] This factor weighs in favour of the Southern California proceeding.

Section 11(c) – Avoiding a Multiplicity of Legal Proceedings

[249] I repeat my analysis above under the heading "Viking Has Attorned to the Southern California Court, Sought Relief by Counterclaim and Obtained an Interim Injunction in the Southern California Proceeding".

[250] This factor weighs in favour of the Southern California proceeding.

Section 11(d) – Avoiding Conflicting Decisions in Different Courts

[251] I repeat my analysis above under the heading "Viking Has Attorned to the Southern California Court, Sought Relief by Counterclaim and Obtained an Interim Injunction in the Southern California Proceeding".

[252] This factor weighs in favour of the Southern California proceeding.

Section 11(e) – Enforcement of An Eventual Judgment

[253] California and British Columbia are reciprocating jurisdictions under the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78. Money judgments made in either jurisdiction will be enforced in the other and so this factor is neutral so far as money judgments are concerned.

[254] However, Viking also seeks non-pecuniary orders such as orders that Ikhana to deliver up materials that are derivative of confidential information and refrain from undertaking acts in relation to marketing, Viking's Marks and the Twin Otter Trademark that are likely to cause confusion.

[255] The defendants assert that the non-pecuniary orders raise recognition and enforcement problems that, if judgment were granted in British Columbia, would become the problem of the enforcing jurisdiction, namely California. The defendants

assert this Court should be slow to make such orders and then foist the problem on another court.

[256] I do not accept this submission. The defendants point to what they assert are vague or unclear prayers for relief. I do not assume that any non-pecuniary judgment that a judge of this court would grant would be vague or uncertain or give rise to enforcement problems.

[257] This factor is neutral.

Section 11(f) – The Fair and Efficient Working of the Canadian Legal System as a Whole

[258] This factor is about preferring the forum that is most clearly and directly connected to the parties and the dispute and not permitting perceived strategic choices to obscure the analysis: *Wang v. Fu*, 2023 BCCA 247 at para. 60. The question of whether the s. 10(e) connecting factors are weak is relevant to this analysis: *Amchem* at 920.

[259] In my view, with regard to Aevex, the s. 10(e) connecting factors are weak, with the exception of the claim for injunctive relief.

[260] The proprietary claims pertaining to confidential information are about confidential information that Viking owns in British Columbia, but the wrongs in relation to it occurred in California. I consider *Equustek* to be analogous and to stand for the proposition that this is a weak connecting factor.

[261] Viking alleges that Aevex induced breaches of two contracts, one of which has a British Columbia forum selection and choice of law clause but the other, the DLA, has a New York State choice of law clause. As I have stated, the DLA appears, based on the pleadings and the evidence, to be more important to the claims than the FESC agreement.

[262] The only connecting factor for the tort claims are damages, based on the principle that foreseeable harm in a jurisdiction is a connecting factor. For the

reasons summarized above and articulated in *Van Breda* about personal injury damages as a connecting factor, foreseeability of harm is a weak connecting factor when one considers that the conduct alleged to be tortious occurred in California.

[263] While I do not regard the claim for injunctive relief as weak, at the same time, it is not a strong connecting factor because the injunctive relief is not limited to British Columbia, and relies on causes of action which by and large are not strongly connected to British Columbia.

Conclusion as to Whether the Court Should Exercise Territorial Competence Over the Claims Made Against Aevex

[264] Most of the s. 11 factors, considered in relation to Aevex, pull towards the Southern California proceeding. So far as Aevex is concerned, Southern California is the more appropriate forum. This Court should stay the claims against Aevex.

Disposition

[265] The application to dismiss this proceeding against Ikhana Canada for lack of territorial competence is allowed.

[266] The application to stay this proceeding against Ikhana and Aevex is allowed.

"Matthews J."