COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Hershey Company v. Leaf,* 2023 BCCA 264

Date: 20230628
Docket: CA48449

Between:

The Hershey Company

Appellant
(Defendant)

And

Scott Leaf

Respondent
(Plaintiff)

Corrected Judgment: The text of the judgment was corrected at paragraph 48 on April 19, 2024.

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated June 29, 2022 (*Leaf v. Hershey Canada Inc.*, 2022 BCSC 1094, Vancouver Docket S202785).

Counsel for the Appellant:	S. Maidment J. Dent
Counsel for the Respondent:	A. Tanel A. Angle
Place and Date of Hearing:	Vancouver, British Columbia May 17, 2023
Place and Date of Judgment:	Vancouver, British Columbia June 28, 2023

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Justice Griffin

Summary:

The respondent seeks to certify a class action against Hershey Canada Inc. and the appellant (The Hershey Company) in a claim alleging negligent misrepresentation. The appellant applied to dismiss or stay the proceeding against it on the basis that the courts of British Columbia lack territorial competence. The chambers judge dismissed the appellant's application. Held: Appeal allowed. The respondent's pleadings and evidence do not raise an arguable case that the appellant committed a tort in British Columbia, or elsewhere. Even assuming that the appellant's alleged business activities in British Columbia raised a presumption of real and substantial connection, that presumption is necessarily rebutted by the lack of a pleaded claim against the appellant.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Introduction

[1] This appeal concerns the territorial competence of the courts of British Columbia in a proceeding for negligent misrepresentation brought against a foreign corporation, The Hershey Company (the appellant).

[2] The respondent, Scott Leaf, seeks to certify a class action against Hershey Canada Inc. ("Hershey Canada") and the appellant under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, in relation to their activities in manufacturing, marketing, and distributing chocolate confectionary products in Canada. The appellant's head office is in Hershey, Pennsylvania. It is the ultimate parent company of Hershey Canada. Hershey Canada disputes the merits of the respondent's claims against it, but not the Court's jurisdiction to adjudicate the claims. The issue of territorial jurisdiction arises only in relation to the respondent's claims against the appellant.

[3] The respondent alleges that the appellant and Hershey Canada made public representations that they opposed the use of child labour and slavery in the cocoa supply chain, when in fact these companies facilitate and profit from child labour and slavery. The respondent says he would not have purchased Hershey products if their marketing and advertisements had disclosed the truth about the use of child labour and slavery in the supply chain. He pleads that the appellant and Hershey

Canada have committed the tort of negligent misrepresentation, and breached s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34.

[4] The appellant applied to dismiss or stay the proceeding against it on the basis that the courts of British Columbia lack territorial competence. The appellant did not, in the alternative, ask the court to decline jurisdiction on the ground of *forum non conveniens*; that is, that a court of another state is a more appropriate forum for the proceeding.

[5] The judge dismissed the appellant's application. Applying the relevant provisions of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], she held that the respondent had demonstrated a "real and substantial connection" between British Columbia and the facts on which the proceeding against the appellant is based. The appellant challenges this conclusion on appeal.

The legal framework for challenging the court's territorial competence

[6] The *CJPTA* has codified and modified the law relating to the territorial competence of the British Columbia courts: *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 7; *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at paras. 8–24.

[7] Section 3 of the *CJPTA* lists the circumstances in which the court has territorial competence in a proceeding. Section 3 provides, in part:

> **3** A court has territorial competence in a proceeding that is brought against a person only if
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> ...
>
> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
>
> (e) there is a real and substantial connection between British Columbia and the facts upon which the proceeding is based.

[8] Section 10 provides that a real and substantial connection is presumed to exist in the circumstances that are set out in subsections (a) through (l). The relevant provisions of s. 10 are as follows:

> **10** Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding
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> …
>
> (g) concerns a tort committed in British Columbia,
>
> (h) concerns a business carried on in British Columbia…
>
> [Emphasis added.]

[9] If the jurisdictional facts as set out in the subparagraphs of s. 10 are established (either through uncontested pleadings or a good arguable case that they can be proven), a real and substantial connection between the facts on which the proceeding is based and British Columbia is presumed to exist. Once raised, the presumption is rebuttable, but it is likely to be determinative in almost all cases: *Stanway* at para. 22.

[10] The procedure for challenging the court's territorial competence is set out in R. 21-8(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*]. Pursuant to R. 21-8(1)(a), a party objecting to the court's jurisdiction in an action may apply to strike, dismiss or stay the proceeding on the basis that the notice of civil claim does not allege facts that, if true, would establish jurisdiction. Rule 21-8(1)(b) entitles a defendant to challenge the court's jurisdiction even if a plaintiff has met the requirements of R. 21-8(a) in pleading facts that would, if true, establish jurisdiction: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 35 [*Purple Echo*].

[11] On an application under R. 21-8(1), the plaintiff may tender evidence to establish jurisdictional facts that are not contained in their pleadings, or to answer evidence tendered by the defendant. In *Purple Echo*, Chiasson J.A., writing for the Court, concluded that the enactment of the *CJPTA* did not change the pre-existing law permitting evidence to be led where the court's jurisdiction *simpliciter* is challenged: at para. 34. The pre-*CJPTA* law was set out in *Roth v. Interlock Services Inc.*, 2004 BCCA 407 at para. 15, which is quoted in *Purple Echo* at para. 30:

> [15] … Affidavit evidence of facts relevant to jurisdiction *simpliciter* is admissible when the facts are not alleged in the plaintiff's pleading because they are not material facts, or when they are, are not particularized in the pleading in sufficient detail to enable determination of the issue. If those unpleaded jurisdictional facts are contentious, the plaintiff bears the burden of showing a good arguable case that they can be established. Affidavit evidence is also admissible for the purpose of demonstrating that the plaintiff's claim is tenuous and without merit. In that situation, the plaintiff must show a good arguable case.

[12] This Court considered the relevant principles under the *CJTPA* in *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181. Justice MacKenzie, for the Court, emphasized the distinction between two presumptions potentially at play on a challenge to the court's territorial competence: the presumption that pleaded facts are true, and the presumption that a real and substantial connection exists once a connecting factor is established. At paras. 16–17 of *Ewert*, Mackenzie J.A. summarized the two stages of the analysis on a challenge to territorial competence:

> (1) At the first stage, the plaintiff must show that one of the connecting factors listed in s. 10 of the *CJTPA* exists. The pleaded jurisdictional facts are presumed to be true. The defendant challenging jurisdiction may contest the pleaded facts with evidence. In that event, the plaintiff is only required to show that there is a good arguable case that the pleaded jurisdictional facts can be proven.
>
> (2) At the second stage, if one of the connecting factors is established either on undisputed pleadings or on disputed pleadings but with a good arguable case, the presumption of a real and substantial connection is triggered. The defendant may then attempt to rebut the presumption by establishing facts showing that the connecting factor does not point to any real relationship between the subject matter of the litigation and the forum, or points to only a weak relationship. The burden on the defendant to rebut the presumption is a heavy one.

[13] The burden on the plaintiff to show a "good arguable" case for jurisdiction where there are disputed facts is a low one. The plaintiff is not, at this stage,

required to establish territorial competence on a balance of probabilities, and it is not the court's role to decide if the cause of action is made out: *Fairhurst* at para. 20; *Purple Echo* at para. 34; *Ewert* at para. 16.

The facts on which the proceeding against the appellant is based

The pleaded facts

[14] The appellant and Hershey Canada are together referred to as the "Defendants" in the notice of civil claim. None of the pleaded facts are specific to the appellant's activities in British Columbia. Rather, the pleadings allege activities carried on by both the appellant and Hershey Canada. In relation to the assertion that the appellant is carrying on business in British Columbia, the critical portion of the pleading, as I understand the respondent's case, is this:

> 5. Scott Leaf is a resident of the Port Coquitlam region, British Columbia. Mr. Leaf has purchased products manufactured and marketed by the Defendants at retail stores within British Columbia. At all material times, Mr. Leaf was unaware that the Defendants permit, encourage and benefit from child labour and slavery in their supply chain. Mr. Leaf would not have purchased the Defendants' products if the Defendants' product packaging, labelling and/or advertisements disclosed the truth about the child labour and slavery used in the Defendants' supply chain.
>
> [Emphasis added.]

[15] The notice of civil claim alleges that the Defendants have made numerous representations that create an impression that they oppose child labour and slavery. These alleged representations are particularized at paras. 11–13 of the notice of civil claim. They consist of:

i. The Defendants' claims in a 2014 Corporate Responsibility Report that they were "actively involved in large-scale efforts that are committed to rooting out forced labour, especially forced child labour, in our cocoa supply chain"; [para. 11]

ii. The Defendants' explicit statements in a 2014 Corporate Social Responsibility Report that they "have zero tolerance for the 'worst

forms of child labour' in their supply chain (as defined by International Labor Organization Conventions 138 and 182)"; [para. 12]

iii. The Defendants' affirmations in their Supplier Code of Conduct that they "are committed to the elimination of the 'worst forms of child labor', as defined by International Labour Organization (ILO) Convention 138 & 182, from [their] supply chain"; [para. 13]

iv. The Defendants' specific claims in their Supplier Code of Conduct that certain child labour practices are prohibited from their supply chain. [para. 13(a)–(g)].

(the "Corporate Document Representations")

[16] The notice of civil claim alleges that, contrary to these representations, child labour and slavery are prevalent in the Defendants' supply chain, specifically in relation to the production of cocoa in African countries: paras. 14–20. It is alleged that the use of child and slave labour in the Defendants' supply chain is material to consumers' willingness to pay for products, and that consumers would not have purchased chocolate products from the Defendants if they had known the truth: paras. 24–30.

[17] At paras. 21 to 23 of the notice of civil claim, the respondent pleads facts relevant to the Defendants' alleged failure to disclose their use of child labour in advertising their products in Canada:

> 21. At retail locations, Canadian consumers reviewing the packaging for the Defendants' products find no disclosure that the products were produced using child labour and slavery.
>
> 22. In the Defendants' advertisements, the Defendants omit the fact that they encourage and profit from child labour and slavery.
>
> 23. The Defendants' corporate reporting conveys an impression that the Defendants prohibit and discourage child labour and slavery in their supply chain. This impression that the Defendants have actively cultivated is demonstrably false.

[18] In Part 3, Legal Basis, the respondent alleges two causes of action: the tort of negligent misrepresentation and damages for breach of the *Competition Act*.

[19] In relation to the claim of negligent misrepresentation, the respondent alleges that the Defendants made material misrepresentations to Canadian consumers, consisting of both explicit misrepresentations and misrepresentations by omission: para. 32. The respondent describes these representations as follows:

> 34. Through their assertions set out in paragraphs 11–14 herein [the Corporate Document Representations], the Defendants represented to Canadian consumers that the Defendants' products are not produced through child labour and/or slavery. This representation was untrue, deceptive and misleading.
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> 35. The Defendants' omission of any information regarding its use of child labour and slavery was a material misrepresentation.

[20] As a result of these alleged misrepresentations, the respondent and members of the proposed class are alleged to have been deceived into believing that the Defendants' products were not produced using child labour and slavery: para. 36.

[21] The same alleged misrepresentations also ground the pleaded claim for damages for breach of the *Competition Act*. In relation to the *Competition Act* claims, the respondent also alleges that the Defendants intentionally conveyed "an image or impression" that they are ethically and socially responsible, when in fact they secretly encouraged and benefitted from child labour and slavery: para. 37(f).

The evidence on the application

[22] Both parties adduced evidence on the appellant's jurisdictional application.

The respondent's evidence

[23] The respondent tendered affidavits from himself and another putative class member, Michael Pucci. The evidence appears intended to address a gap in the pleaded claim with respect to the delivery and receipt of the Defendants' alleged misrepresentations in British Columbia. The respondent deposes:

> 5. I saw the Defendants' marketing and packaging available on the shelves of stores in British Columbia. I also recall seeing the Defendants' advertising

> online while in the province, and on television broadcasted to my home in the province, for example on Global Television Network. Based on the representations in all these forms of advertising, marketing and packaging, I believed that the Defendants did not rely on and benefit from child slavery and trafficked children in their supply chains.
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> ...
>
> 7. As soon as I became aware of these practices, I no longer purchase the Defendants' chocolate products. If I had been aware of the fact that the Defendants use of child slavery and trafficked children in their supply chains, I would have stopped purchasing their chocolate products sooner.
>
> [Emphasis added.]

[24] Mr. Pucci's evidence is similar in nature:

> 5. Based on the Defendants' marketing and packaging available on the shelves of stores in and around Prince Rupert, I believed that the Defendants did not rely on and benefit from child slavery and trafficked children in their supply chains. I also recall seeing the Defendants' advertising online while in the province, and on television broadcasted to my home in the province, which may have been through one of the following networks that I receive: NBC, ABC, CBS, FOX, TBS and their affiliates. Based on the representations in all these forms of advertising, marketing and packaging, I believed that the Defendants did not rely on and benefit from child slavery and trafficked children in their supply chains.
>
> …
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> 7. As soon as I became aware of these practices, I drastically reduced my consumption of the Defendants' products. I now look for alternative products whenever possible. If I had been aware of the fact that the Defendants use child slavery and trafficked children in their supply chains, I would have stopped purchasing their chocolate products sooner. I am appalled that they use child labour.
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> [Emphasis added.]

[25] The respondent also tendered evidence in the form of various corporate records of the appellant and Hershey Canada, including annual reports and financial statements.

The appellant's evidence

[26] The appellant led evidence tending to establish that it did not carry on business in British Columbia. The appellant's affiants included its Vice-President of Media, Senior Director of Transportation and Distribution, and corporate counsel, as

well as Hershey Canada's Manager of Marketing. In summary form, the relevant evidence of these affiants is as follows:

a) The appellant does not purchase advertising space directed to the Canadian market through any advertising channel. All decisions relating to Canadian advertising for Hershey chocolate confectionary products "are made independently by [Hershey Canada]";

b) Among the appellant and its corporate affiliates, Hershey Canada "is the only company that manufactures, sells and distributes Hershey chocolate confectionary products within Canada";

c) In 2012, Hershey Canada acquired all of the outstanding shares of Brookside Foods Ltd., which operated a leased chocolate manufacturing plant in BC. Hershey Canada, not the appellant, leased and operated the plant.

The chambers judgment: 2022 BCSC 1094

[27] The appellant applied to dismiss or stay the proceeding against it pursuant to R. 21-8(1)(a) and (b) of the *SCCR*.

[28] In her reasons for judgment ("Reasons"), the judge first addressed the respondent's assertion that the proceeding concerned a tort committed in British Columbia, which is an enumerated connecting factor under s. 10(g) of the *CJPTA*. She referenced the parties' agreement that the tort of negligent misrepresentation occurs in the jurisdiction where the representation is received or relied upon: Reasons at para. 18. The judge viewed the claim of negligent misrepresentation as founded on the Corporate Document Representations pleaded in the notice of civil claim. She noted that the respondent did not plead that he received the Corporate Document Representations in British Columbia, or indeed anywhere. The judge stated:

> [21] In other words, the Claim contains no material facts to show that the plaintiff received or relied on the alleged misrepresentations within British Columbia. I cannot conclude that jurisdictional facts have been pleaded to

> support a finding that the claim of misrepresentation has any real or substantial connection to British Columbia.

[29] The judge went on to consider whether the affidavit evidence adduced by the respondent established a "good arguable case" that a tort had been committed in British Columbia, despite the lack of a pleading to that effect. She noted that neither Mr. Leaf nor Mr. Pucci depose to having received the Corporate Document Representations in British Columbia. Instead, their evidence is that they received and relied on misrepresentations in the "advertising, marketing and packaging" of Hershey products in British Columbia. The judge concluded that the respondent was not confined to the pleaded claims, and was permitted to provide details of the claims through affidavit evidence: Reasons at para. 41. She held that the affidavit evidence was sufficient to establish that the claim against the appellant concerned a tort committed in British Columbia:

> [50] In this case, jurisdictional facts are raised in Mr. Leaf's and Mr. Pucci's affidavit evidence. Both affiants depose that the defendants, including [the appellant] made representations in their advertising, marketing, packaging. They also depose that they received and relied on those representations, alleged to be misrepresentations, in British Columbia. That evidence of receipt and reliance on an alleged misrepresentation in British Columbia are the jurisdictional facts that are required to establish a real and substantial connection to British Columbia.

[30] The judge then turned to analyze the second connecting factor relied on by the respondent to establish a real and substantial connection: the assertion that the facts of the claim concern a business carried on in British Columbia. The judge acknowledged that the notice of civil claim did not appear to contain an express plea that the appellant carried on business in British Columbia. However, she found an analogy in *Stanway*, where a plea that the defendants jointly carried out business activity was sufficient to establish territorial competence: Reasons at para. 58.

[31] Having concluded that the respondent had plead the necessary jurisdictional facts under s. 10(h) of the *CJPTA*, the judge framed the next issue as whether the appellant's evidence rebutted the presumption of a real and substantial connection arising from the pleaded facts: Reasons at paras. 59–60.

[32] The judge found that the appellant's evidence did not "preclude the possibility" that chocolate manufactured by the appellant outside of Canada was available for distribution or sale in Canada, or that the appellant created or produced the advertising that was purchased and distributed by Hershey Canada: Reasons at paras. 64–65. The judge also held that the evidence before her was sufficient to establish a good arguable case that the appellant and Hershey Canada operate in joint concert in respect of the manufacture, marketing, or sale of chocolate products in British Columbia: Reasons at paras. 71–72. The judge concluded, therefore, that the respondent had established a real and substantial connection with British Columbia under s. 10(h) of the *CJPTA*.

Issues on appeal

[33] The appellant alleges two errors by the chambers judge:

(1) The judge erred in finding that the alleged tort of negligent misrepresentation occurred in British Columbia in the absence of any jurisdictional facts to show that the affirmative representations made by the appellant were received and relied on in British Columbia;

(2) The judge erred in failing to apply the correct test for determining whether the appellant was carrying on business in British Columbia.

[34] Neither party made submissions specific to the pleaded claim for damages under the *Competition Act*. The parties appear to have proceeded on the assumption that the question of whether there is a real and substantial connection between British Columbia and the *Competition Act* claim will stand or fall on the outcome of the dispute over the connection between British Columbia and the tort of negligent misrepresentation. I will proceed on the same assumption.

Analysis

Standard of review

[35] The question of whether a provincial superior court has territorial competence is not a matter of discretion, but rather is generally considered a question of law

reviewable on a standard of correctness. The standard of correctness applies to a judge's conclusion about whether uncontested pleadings establish jurisdiction: *Ewert* at paras. 42–44; *Giustra v. Twitter, Inc.*, 2021 BCCA 466 at para. 22.

[36] Where there is contested evidence, as in this case, an application judge may be required to resolve factual disputes based on the record for the purpose of determining the jurisdictional issue. Such factual findings are made for the limited purpose of the application, and are not the ultimate findings of fact that would be made at trial. For the purpose of appellate review, they are treated as factual findings and accorded the usual appellate deference: *Smith v. National Money Mart Co.*, 80 O.R. (3d) 81 at para. 9, 2006 CanLII 1458 (C.A.). However, with limited exception, the appellant's arguments on appeal focus on alleged legal errors by the judge rather than her factual findings.

Issue 1: Do the jurisdictional facts establish a claim of a tort committed in British Columbia?

[37] There is no dispute that the tort of negligent misrepresentation is committed in the jurisdiction where the representation is received or acted upon: *Canadian Commercial Bank v. Carpenter* (1989), 39 B.C.L.R. (2d) 312, 1989 CanLII 2811 (C.A.). The only question is whether the respondent has, through his pleadings or affidavit evidence, established the necessary jurisdictional facts.

[38] On appeal, the respondent does not contest the judge's conclusion that his pleading does not contain material facts establishing that the tort of negligent misrepresentation was committed in British Columbia: Reasons at para. 21. The respondent relies, instead, on the affidavits of Mr. Leaf and Mr. Pucci to fill the gap. The respondent puts it this way in his factum:

> 49. In this case, while the Leaf Affidavit and the Pucci Affidavit do not specifically confirm that the Pleaded Misrepresentations were received in British Columbia, they do establish that other [appellant] representations were received in British Columbia which, if true, would independently found jurisdiction…
>
> [Emphasis added.]

[39] This submission appears consistent with the manner in which the judge interpreted the effect of the affidavit evidence: Reasons at para. 50.

[40] The appellant objects that reliance on affidavit evidence to establish a claim that a tort was committed in British Columbia, independent of the pleaded claims, is not permitted. While a plaintiff can undoubtedly tender evidence on an application challenging the court's territorial competence, the appellant says that the purpose of such evidence must be to advance an arguable case that the facts of the *pleaded claim* have a real and substantial connection to British Columbia. The appellant says that once the judge found that the pleaded claims did not allege a tort committed in British Columbia, she should have concluded that the connecting factor in s. 10(g) of the *CJPTA* was not established.

[41] There is some merit to the appellant's argument. The rationale for permitting the plaintiff to tender evidence of jurisdictional facts is that such facts may not be material to the pleaded claims, and thus they are either not pleaded or not pleaded with sufficient particularity to allow for determination of the jurisdictional issue: *Purple Echo* at para. 30, citing *Roth* at para. 15; *Furlan v. Shell Oil Co.*, 2000 BCCA 404 at para. 15. The affidavits of Mr. Leaf and Mr. Pucci do not simply fill in missing jurisdictional facts in the notice of civil claim. Rather, they are tendered to support the existence of an entirely new misrepresentation claim that exists independently of the pleaded claim. It is difficult to see how such evidence could establish a real and substantial connection between British Columbia "and the facts on which the proceeding against that person is based", within the meaning of s. 3 of the *CJPTA*.

[42] Regardless, even assuming it is open to the respondent to expand the scope of the proceeding in this manner, the affidavit evidence he has tendered does not establish an arguable case that the proceeding concerns a tort committed in British Columbia. The affidavits of Mr. Leaf and Mr. Pucci would have to, at the very least, comply with the requirements for a pleaded misrepresentation claim. Rule 3-1(2)(a) of the *SCCR* provides that a notice of civil claim must "set out a concise statement of the material facts giving rise to the claim". Material facts are comprised of every fact

that it would be necessary for the plaintiff to prove in order to support their claim. They must be pleaded in sufficient detail to ensure that the pleading serves its purpose of providing notice and defining the issues to be tried so the court and opposing parties "are not left to speculate as to how the facts will support the cause of action": *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 at para. 69.

[43] The affidavits do not contain a sufficient pleading of material facts, even assuming a claim of negligent misrepresentation could be advanced in this manner. The affidavits do not identify: who made the alleged representations, the content of the representations, when they were made, and through what means. Instead, there is just the bare allegation that there were "representations" contained in the marketing, packaging, and advertising of Hershey products sold in British Columbia that led the affiants to believe that the Defendants did not rely on and benefit from child labour and slavery.

[44] In the course of the hearing of the appeal, both parties made submissions as to what the content of the alleged representations might have been. The appellant suggested that the representations can only consist of a failure to disclose information about the Defendants' reliance on child labour and slavery, which is not in itself an actionable misrepresentation. It argued that any allegation of an affirmative representation would be inconsistent with the facts pleaded at paragraphs 21 and 22 of the notice of civil claim that the Defendants' advertising and packaging does not disclose their reliance on child labour and slavery. The respondent countered that the representations allegedly received by Mr. Leaf and Mr. Pucci might consist of an affirmative representation that the Defendants are socially and ethically responsible companies, combined with the omission of the relevant information that the Defendants benefit from child labour and slavery.

[45] This exchange of submissions simply illustrates the problem. In the absence of a pleading of material facts, it is an exercise in speculation to attempt to determine the content of the alleged representations, much less when and how they were received. This is not a case in which the material facts are unknown to the pleading

(or in this case deposing) party. Mr. Leaf and Mr. Pucci must surely know what representations were made to them, when they were made, and through what means. This is not, as the respondent argued, simply a matter of evidence to be left to trial. The new claims asserted in the affidavits of Mr. Leaf and Mr. Pucci, aside from the objection that they are not pleaded, are devoid of material facts. The bare allegation in an affidavit that "the Defendants" made representations to Mr. Leaf and Mr. Pucci in British Columbia is an insufficient basis to assert jurisdiction over a foreign defendant.

[46] For these reasons, I conclude that the judge erred in finding that the affidavit evidence of Mr. Leaf and Mr. Pucci was sufficient to establish a real and substantial connection to British Columbia pursuant to s. 10(g) of the *CJTPA*. The respondent has not established an arguable case that the facts on which the proceeding against the appellant is based concern a tort committed in British Columbia.

Issue 2: Did the judge err in concluding that there was an arguable case that the appellant was carrying on business in British Columbia?

[47] Given my conclusion that the respondent has failed to establish an arguable case that the appellant committed a tort in British Columbia, or outside of it, it is not necessary to address the issue of whether the judge erred in finding that the appellant was carrying on business in British Columbia. Any presumption arising under s. 10(h) of the *CJPTA* is necessarily rebutted in these circumstances.

[48] The parties agree that the judgment of the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, sets out the common law approach to determining the presence of the connecting factor of carrying on business in a jurisdiction. In *Van Breda*, the Court considered this factor in the context of a tort action. Justice LeBel, for the Court, observed that the real and substantial connection test has "given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication". A connection between a state and a dispute cannot be "weak or

hypothetical” as this would cast doubt on the legitimacy of the exercise of the adjudicative power of the state: *Van Breda* at para. 32.

[49] Section 10 of the *CJPTA* is, as the respondent emphasizes, disjunctive. It is possible to establish the presumption of territorial competence where a tort occurs outside of the province but the defendant carries on business in the province: *Van Breda* at paras. 119–124. However, the defendant can rebut the presumption 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. Where the presumptive connecting factor is carrying on business in the province, the defendant may rebut the presumption of a real and substantial connection by “showing that the subject matter of the litigation is unrelated to the defendant’s business activities in the province”: *Van Breda* at para. 96. In *Van Breda*, the presumption was not rebutted because the defendant’s business activities in the province were specifically directed at attracting residents of the province to stay as paying guests at the resort where the alleged tort occurred: at para. 123.

[50] The circumstances of the present case are unusual in that the respondent has failed to plead material facts to support *any* claim against the appellant. Necessarily, there is a weak to non-existent connection between the defendant’s business activities and this claim. No logical connection can be made between the appellant’s business activities and any representations made to the respondent. The appellant’s failure to plead material facts means that he has identified no such representations. It would be impossible to find that the appellant’s business activities gave rise to or contributed to the respondent’s reliance on misrepresentations made negligently. Thus, even if the judge was correct to hold that the presumption of territorial competence arose under s. 10(h), the appellant has successfully rebutted that presumption.

Disposition

[51] I would allow the appeal and set aside the judge's determination that the court has territorial competence over the respondent's claim against the appellant.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Justice Griffin"