IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Stanway v. Wyeth Canada Inc.,***
2008 BCSC 847

Date: 20080627
Docket: S87156
Registry: New Westminster

Between:

Dianna Louise Stanway

Plaintiff

And

Wyeth Canada Inc., Wyeth Pharmaceuticals Inc., Wyeth Holdings Canada Inc., Wyeth Canada, Wyeth-Ayerst International Inc. and Wyeth

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for Plaintiff	D. Klein S. S. Tucker
Counsel for Defendants Wyeth Pharmaceuticals Inc., Wyeth-Ayerst International Inc. and Wyeth	K. I. Chalmers D. F. Harrison
Date and Place of Trial/Hearing:	September 20, 21, 2007 New Westminster, B.C.

Introduction

[1] The defendants Wyeth, Wyeth Pharmaceuticals Inc. and Wyeth-Ayerst International Inc. (the "**US defendants**") apply for an order dismissing the plaintiff's action against them on the basis that the court does not have jurisdiction over them regarding the claim made in this proceeding.

[2] The US defendants' position is that the court lacks territorial competence over them pursuant to the ***Court Jurisdiction and Proceedings Transfer Act***, S.B.C. 2003, c. 28 (the "**CJPTA**"). Their position is that there is no real and substantial connection between British Columbia and the facts upon which the proceeding against the US defendants is based.

[3] The plaintiff's position is that there is a real and substantial connection between British Columbia and the subject matter of the litigation, and therefore this court has territorial jurisdiction over the US defendants.

[4] For the reasons that follow, I have determined that this court has territorial jurisdiction over the US defendants, and therefore their application for dismissal must be refused.

The Plaintiff's Action

[5] The plaintiff, Dianna Stanway, alleges that she contracted ductal and lobular breast cancer as a result of consuming Premarin (a medication containing estrogen). She alleges that Premarin and Premplus (which is a combination of conjugated estrogen and medroxyprogesterone acetate) are of limited efficacy and are unsafe.

She further alleges that, for most women, the risks of using these drugs outweigh the benefits.

[6] The plaintiff asserts two causes of action against all of the defendants. The first is in tort for negligence and the second is a statutory cause of action for deceptive acts and practices pursuant to the ***Trade Practices Act***, R.S.B.C. 1996, c. 457, which was repealed on July 4, 2004 by the ***Business Practices and Consumer Protection Act***, S.B.C. 2004, c. 2 (the "**BPCPA**", and collectively, the "**B.C. consumer protection legislation**").

[7] The plaintiff alleges that Premarin and Premplus were introduced into and maintained within the Canadian stream of commerce by all of the defendants. She alleges that the defendants are individually and jointly responsible for the negligent manufacturing, testing, marketing, labelling, distribution, promotion and sale of Premarin and Premplus to consumers in British Columbia and elsewhere in Canada and that they failed to warn her about the dangers of taking these drugs. In addition to negligence, the plaintiff claims the defendants engaged in deceptive acts and practices contrary to the B.C. consumer protection legislation. The plaintiff alleges that the defendants engaged in a joint enterprise for the promotion and sale of Premarin and Premplus to consumers in British Columbia and elsewhere.

The Defendants

[8] The defendants are Wyeth, Wyeth Canada Inc. ("**WCI**"), Wyeth Canada, Wyeth Holdings Canada Inc. ("**Wyeth Holdings**"), Wyeth-Ayerst International Inc. ("**Wyeth-Ayerst International**") and Wyeth Pharmaceuticals Inc. ("**Wyeth**

Pharmaceuticals"). WCI, Wyeth Canada, and Wyeth Holdings (the "**Canadian defendants**") are businesses operating in Canada. WCI is a corporation incorporated under the ***Canada Business Corporations Act***, R.S.C. 1985, c. C-44 (the "***CBCA***") with a head office in St. Laurent, Quebec. WCI carries on business in Canada through a partnership with Wyeth Holdings which is also incorporated under the ***CBCA***. The partnership is known as Wyeth Canada. It is a general partnership under Ontario law with a head office in Markham, Ontario. The Canadian defendants have appeared in this action and are not challenging the court's jurisdiction over them.

[9] Wyeth is incorporated in the state of Delaware, USA. It is a public company whose shares are listed on the New York Stock Exchange. Its headquarters are located in Madison, New Jersey, USA. WCI and Wyeth Holdings are wholly owned subsidiaries of Wyeth.

[10] Wyeth Pharmaceuticals is incorporated in the state of Delaware, USA. It is a wholly owned subsidiary of Wyeth. Wyeth-Ayerst International is incorporated in the state of New York, USA and is a wholly owned subsidiary of Wyeth.

[11] The US defendants have filed an appearance in this action but have not submitted to the jurisdiction of the court by virtue of entering such an appearance: Rule 14(6)(b) and 14(6.4) of the ***Rules of Court***, B.C. Reg. 221/90.

Evidence

Disclosure

[12] The US defendants are defendants in related litigation in the United States in a proceeding in the US Federal Court known as MDL1507. The plaintiff has obtained documents and depositions from disclosures made by the US defendants in that proceeding.

[13] The disclosure, made pursuant to a confidentiality agreement between the parties, involves some 15 million documents. The documents were provided on the express agreement that they remain confidential documents. While they were provided to me for my consideration, they do not form part of the court file nor are they appended to the affidavit material which has been filed in these proceedings.

[14] Because of the limitations imposed by the confidentiality agreement, the affidavit material provided by both sides goes beyond the merely factual. The affidavits are somewhat argumentative, reach conclusions on the facts, and in some cases provide opinions. The adequacy of the affidavit material is not the predominant issue before me, nor is it necessary to address or resolve issues relating to that material. I will refer to the affidavits, even those portions which may be objectionable, in order to maintain the confidentiality of the documents which have been voluntarily disclosed by the US defendants where it is, in my view, necessary to support the conclusions which I will reach about the evidence to determine the issue of this court's territorial competence over the US defendants.

The US Defendants' Evidence

General

[15] The evidence filed by the US defendants is in two affidavits of Robert McCluggage, the corporate counsel and secretary of the defendant WCI. These facts are derived from those affidavits.

[16] The US defendants say that they are not engaged in activities in Canada to the extent that they amount to a real and substantial connection. Wyeth is not engaged in a joint enterprise with Wyeth Canada. Wyeth Canada is managed and operated independently in Canada by its personnel. Operationally, Wyeth Canada functions independently and with a high degree of autonomy from Wyeth. WCI, Wyeth Holdings and Wyeth Canada separately observe all traditional corporate formalities.

[17] The executives and staff of the US defendants have not managed and do not manage North America as a single market. They have not interfered and do not interfere with the Canadian market. The US defendants do not play a controlling or decision-making role in the pharmaceutical operations of the Canadian defendants. When Wyeth Pharmaceuticals had a North American business unit in the early part of this decade, the president of Wyeth Canada reported to the head of that unit. Individuals within Wyeth Canada reported directly or indirectly to the president of Wyeth Canada, not to anyone at Wyeth Pharmaceuticals. Employees of Wyeth Canada may have liaised with counterparts at Wyeth Pharmaceuticals but did not answer to them.

[18] Wyeth Canada owns the Canadian patents and trademarks for Premarin, holds various approvals for Premarin from the Health Protection Branch (now known as the Health Products and Food Branch) of Health Canada, runs its own marketing campaign and designs its own packaging, independently from Wyeth. The same applies to Premplus, but for the fact that the Canadian trademark is owned by Wyeth and licensed to Wyeth Canada. The US defendants do not do any sales or promotional activity related to Premarin or Premplus in Canada.

[19] Wyeth provides certain treasury, tax and legal services to Wyeth Canada and maintains and/or incurs certain assets, liabilities, income, expenses, gains and losses of its subsidiaries where these assets, etc., are related to the overall management of Wyeth.

[20] Wyeth Canada owns the Canadian patents and trademarks for Premarin, holds various approvals for Premarin from Health Canada, runs its own marketing campaigns and designs its owns packaging. The same applies to Premplus, but for the fact the Canadian trademark is owned by Wyeth and licensed to Wyeth Canada. The US defendants do not do any sales or promotional activity related to Premarin or Premplus in Canada.

Manufacture

[21] The main active ingredient in both Premarin and Premplus is derived from pregnant mares' urine, which is gathered from horse farms in Brandon, Manitoba by the Wyeth Organics Division of Wyeth Canada. The horse farms are under contract with WCI and employees of Wyeth Organics are employees of Wyeth Canada.

[22] The only Premarin tablets sold in Canada during the period the plaintiff says that she was prescribed the product would have been manufactured in Canada (they are now manufactured in Ireland). Premplus is a two-tablet formulation consisting of Premarin and medroxyprogesterone acetate, which is manufactured in Canada by WCI. The medroxyprogesterone acetate taken by the plaintiff was not manufactured by WCI.

[23] The patent for Premplus, which has now expired, was sublicensed in the past to Wyeth Canada from Wyeth. Wyeth licensed it from WCO investments Ltd. of London, Ontario and Pre Jay Holdings Limited of Mississauga, Ontario.

[24] There are two trademarks associated with Premarin and Premplus that are owned by Wyeth and used in Canada: Premplus and Prem 30. These are both owned by Wyeth and are licensed by it to Wyeth Canada pursuant to an annual license agreement and a non-exclusive license agreement, respectively.

[25] At no time have any packages of Premarin or Premplus sold in Canada identified any association with Wyeth or American Home Products Association (the prior name of Wyeth).

Labelling and Regulatory Approval

[26] Harmonization of labelling is undertaken among Wyeth affiliates to ensure that consumers, pharmacists and physicians worldwide are presented with a consistent message and instructions about a particular product. One of Wyeth Pharmaceuticals' functions is to coordinate core requirements for all product

monographs and labelling in the Wyeth Group. Provided the core requirements for a particular products monograph and labelling are met, a local Wyeth subsidiary can modify the monographs and labelling for local market regulations and conditions. In Canada, Wyeth Canada develops labels for Canadian use. Health Canada decides whether a label is permissible.

Testing

[27] Wyeth Canada developed Premarin and Premplus and it relies upon extensive clinical research and trials that it has conducted or sponsored. Where the US defendants conduct clinical research or trials, that information has been shared with Wyeth Canada. Wyeth Canada determines what products are available to consumers in Canada.

[28] Wyeth Canada is responsible for reporting all Wyeth worldwide adverse event reports to Health Canada. Wyeth Pharmaceuticals acts as a central repository and coordinator of adverse event reporting for all of the Wyeth affiliates worldwide. Wyeth Canada receives that information in order to fulfill its obligations to Health Canada to report all adverse events.

Marketing, Promotion, Distribution and Sale

[29] Wyeth Canada runs its own marketing campaigns and designs its own packaging for Premarin. It does the same with regard to Premplus, except the Canadian trademark is owned by Wyeth and licensed to Wyeth Canada. Wyeth Canada generates its own promotional literature and a copy review committee of

Wyeth Canada signs it off. Warnings and other information are the responsibility of Wyeth Canada. It has its own independent training group and there is no functional reporting relationship between Wyeth Canada and Wyeth. Wyeth Canada's marketing employees meet with their worldwide counterparts to exchange ideas and practices. Wyeth Canada tracks sales and decides whether or not to market a particular product.

Plaintiff's Evidence

General

[30] The plaintiff filed an affidavit sworn by Bojan Petrovic. Mr. Petrovic attaches various documents from MDL 1507, which he suggests demonstrate that Wyeth has a global mandate along with its subsidiary companies in the promotion of estrogen-based hormone therapies in Canada and around the world.

[31] Wyeth owns the Canadian trademark for Premplus. It also owns a significant number of other Canadian trademarks relating to hormone replacement therapy.

[32] Mr. Petrovic's affidavit attaches a Form 10K filed by Wyeth with the US Securities and Exchange Commission for the year ended December 31, 2003. In that form, "Company" is defined to include Wyeth and its subsidiaries.

[33] The business of the Company is described at page I-1 to be:

> … [t]he discovery, development, manufacture, distribution and sale of a diversified line of products in three primary businesses: Wyeth Pharmaceuticals, … Consumer Health Care and … Animal Health …

On page I-2:

> The Company sells its diversified line of products to wholesalers, pharmacies, hospitals, physicians, retailers and other health care institutions located in various markets in more than 140 countries throughout the world.

On page I-13:

> The Company's operations outside the United States are conducted primarily through subsidiaries. International net revenue in 2003 amounted to 40% of the Company's total worldwide net revenue.

[34] Under the heading "Pharmaceuticals Segment" is this description (at page I-3):

> The Pharmaceuticals Segment manufactures, distributes, and sells branded human ethical pharmaceuticals, biologicals and nutritionals. These products are promoted and sold worldwide … Principal product categories and their respective products are: … women's health care products including Premarin, Prempro, Premphase, and Alesse (marketed as Loette internationally). The Company manufactures these products in the United States and Puerto Rico, and in 16 foreign countries.
>
> …
>
> In addition, sales of women's health care products totalling $1.865 billion, $2.456 billion and $2.777 billion accounted for more than 10% of consolidated net revenue in 2003, 2002 and 2001, respectively, which include sale of the Premarin family products of $1.275 billion, $1.880 billion and $2.074 billion, respectively.

[35] Mr. Petrovic's affidavit refers to a series of confidential documents which he suggests indicate that Wyeth is a global enterprise involved in the labelling, promotion and marketing of Premarin and Premplus and that the US defendants are intimately involved through collaboration in regard to regulatory material labelling and marketing; and that the US defendants are involved in the safety testing of Premarin and Premplus, as well as in clinical trials and adverse event reporting and

providing that information to Wyeth's subsidiaries. The statements in the following paragraphs are assertions which Mr. Petrovic derives from the confidential documents.

Labelling

[36] The plaintiff says that the Canadian defendants work jointly with the US defendants to harmonize the labelling of Premarin and Premplus, particularly the product monographs essential to government approval. The US defendants have the final say in determining the core content on product labels. The documents demonstrate the involvement of the US defendant Wyeth-Ayerst in labelling, and hence in promotions and marketing.

[37] The US defendants are involved in the Canadian drug approval process. The documents describe participation by senior executives of the US defendants in the Canadian regulatory approval process and in the labelling of Canadian products.

Testing and Safety

[38] The plaintiff says that Wyeth Pharmaceuticals has a global coordinating role in regard to Canadian clinical trials, labelling, safety or medical issues. Its global adverse reporting section is part of drug safety and pharmacovigilence. The section acts as a central repository and coordinator of adverse event reporting for Wyeth affiliates worldwide. Wyeth Canada submits reports of adverse events it receives to this section and it receives information which the section disseminates to subsidiaries and affiliates. Clinical research or trials conducted by the US

defendants are shared with Wyeth Canada. Clinical research or trials conducted by the Canadian defendants are shared with Wyeth, which in turn shares them with its subsidiaries and affiliates.

Marketing/Promotion/Sale

[39] The plaintiff says that Wyeth treats the market for hormone therapy products as global. The Canadian subsidiary sells the products pursuant to a uniform marketing strategy developed in collaboration with the US defendants. This includes establishing a global training and development model for all Wyeth affiliates, management of training and development efforts worldwide, and launching selling skill and coaching programs worldwide.

US Defendants' Reply Evidence

[40] The US defendants point out that Mr. Petrovic has reached conclusions about what the confidential documents state. The US defendants have provided a reply which addresses each document and challenges the conclusions that Mr. Petrovic has drawn.

[41] Mr. McCluggage provided a second affidavit sworn July 3, 2007, in which he responds to the assertions made in the Petrovic affidavit.

[42] Mr. McCluggage states that the executive and staff of the US defendants do not manage North America as a single market. Wyeth Canada does coordinate its operations with Wyeth to ensure that Wyeth Canada's disclosure of information and representations made about the products are consistent with the information

disclosed and representations made by Wyeth and its other subsidiaries. However, product information, such as adverse event reports, is shared globally among Wyeth and its subsidiaries.

[43] The Canadian trademark for Premplus is owned by Wyeth and is licensed to Wyeth Canada together with a number of other trademarks, pursuant to an annual license agreement. The Canadian patents and trademarks for Premarin are owned by Wyeth Canada. Wyeth owns other hormone replacement therapy trademarks but of those, only Prem 30 is used in Canada. Wyeth Canada has a non-exclusive license agreement with Wyeth in respect of Prem 30.

[44] There is no formal relationship between the marketing personnel of the Canadian subsidiary and the marketing personnel of Wyeth, only opportunities to meet and exchange information about marketing programs, successes and best practices in marketing Premarin. It is a “sharing of ideas, not a forum in which the US party dictated views to the Canadian party”.

[45] The business of Wyeth Pharmaceuticals is to coordinate regulatory affairs for companies in the Wyeth group on a global scale to ensure there is harmonization and consistency for a particular product with regulators in various countries. Employees of Wyeth Pharmaceuticals report internally on the status of regulatory matters in Canada.

[46] Employees of Wyeth Canada gain access to certain resources of Wyeth-Ayerst International in the US. The US companies and their Canadian counterparts try to harmonize information about Premarin before disseminating it to various

bodies, including Canadian provincial formulary bodies, to assist with the regulatory process.

[47] In some cases, Wyeth Canada has taken the initiative to change product labelling, while ensuring that the proposed changes conformed to the global core requirements, before submitting the changes to Health Canada. Wyeth Pharmaceuticals advises affiliates to submit changes and core requirements for Premplus to local regulators.

[48] Employees of Wyeth Canada may liaise with their counterparts at Wyeth Pharmaceuticals, but do not answer to them. The copy clearance review committee of Wyeth Pharmaceuticals has no oversight or sign off on promotional pieces for Wyeth Canada, which has its own copy clearance review committee. Canadian promotional literature was generated in Canada by the marketing group in Wyeth Canada and was circulated to the Canadian medical group, the regulatory group, the legal department and the heads of both sales and marketing in Canada for approval. Wyeth Canada has its own medical director who is the spokesperson for medical issues for Wyeth Canada.

[49] Wyeth Pharmaceuticals was mandated to help achieve the harmonization of labelling among Wyeth affiliates worldwide, but Wyeth Canada develops its own labels and Health Canada makes the final decision on the content.

[50] Wyeth Canada has it own sales training group and a separate corporate and management training group. There was no functional or reporting relationship

between Wyeth Canada and the US defendants' sales, training or management development, and there is none today.

[51] The global adverse event reporting section of Wyeth Pharmaceuticals plays the role of the central repository and coordinator of adverse event reporting for all Wyeth affiliates worldwide. Wyeth Canada submits reports of adverse events it receives to this section and also receives information that the section disseminates to affiliates. Wyeth Canada is responsible for reporting all Wyeth worldwide adverse events reports to Health Canada. The global market research development department at Wyeth Pharmaceuticals plays no role in Canadian market research.

Applicable Legislation

Court Jurisdiction and Proceedings Transfer Act (CJPTA)

[52] The ***CJPTA*** came into force in British Columbia on May 4, 2006.

[53] Section 2(2) provides that the territorial competence of the court is to be determined "solely in reference" to Part 2 of the ***CJPTA***.

[54] Section 3 of the ***CJPTA*** sets out the grounds upon which territorial jurisdiction may be based. Subsection 3(e) has application here. This court will have jurisdiction only if there is a real and substantial connection between British Columbia and the facts upon which the proceeding against the US defendants is based.

[55] Section 10 creates a presumption of territorial competence if the plaintiff can sufficiently bring its claim within one of the categories of that section. The relevant factors in this case are subsections 10(g) and (h):

> 10. Without limiting the right of the plaintiff to prove 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 ….
>
> (g) concerns a tort committed in British Columbia, [or]
>
> (h) concerns a business carried on in British Columbia.

Business Practices and Consumer Protection Act (BPCPA)

[56] The ***BPCPA*** is the successor statute to the ***Trade Practices Act***. In was enacted in March 2004. For the purposes of this action, the two statutes are virtually identical. The relevant sections are as follows:

> "consumer" means an individual, whether in British Columbia or not, who participates in a consumer transaction, but does not include a guarantor;
>
> "consumer transaction" means
>
> (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
>
> (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),
>
> and … includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer;

"goods" means personal property, fixtures and credit, but does not include a security as defined in the *Securities Act* or contracts of insurance under the *Insurance Act*;

"supplier" means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

a) supplying goods or services or real property to a consumer, or

b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person…

4 (1) In this Division [Deceptive Acts or Practices]:

"deceptive act or practice" means, in relation to a consumer transaction,

(a) an oral, written, visual, descriptive or other representation by a supplier, or

(b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

4 (2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

4 (3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(a) a representation by a supplier that goods or services

(i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,

(ii) are of a particular standard, quality, grade, style or model if they are not,

(iii) have a particular prior history or usage that they do not have, including a representation that they are new if they are not,

(iv) are available for a reason that differs from the fact,

(v) are available if they are not available as represented,

(vi) were available in accordance with a previous representation if they were not,

(vii) are available in quantities greater than is the fact, or

(viii) will be supplied within a stated period if the supplier knows or ought to know that they will not;

(b) a representation by a supplier

(i) that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have,

(ii) that a service, part, replacement or repair is needed if it is not,

(iii) that the purpose or intent of a solicitation of, or a communication with, a consumer by a supplier is for a purpose or intent that differs from the fact,

(iv) that a consumer transaction involves or does not involve rights, remedies or obligations that differs from the fact,

(v) about the authority of a representative, employee or agent to negotiate the final terms of a consumer transaction if the representation differs from the fact,

(vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

(vii) that a consumer will obtain a benefit for helping the supplier to find other potential customers if it is unlikely that the consumer will obtain the benefit,

(viii) that appears in an objective form such as an editorial, documentary or scientific report if the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or promotion, or

(ix) to arrange for the consumer an extension of credit for a fee, unless the fee is deducted from the advance, as defined in section 57 *[definitions]*;

(c) a representation by a supplier about the total price of goods or services if

(i) a person could reasonably conclude that a price benefit or advantage exists but it does not,

(ii) the price of a unit or instalment is given in the representation, and the total price of the goods or services is not given at least the same prominence, or

(iii) the supplier's estimate of the price is materially less than the price subsequently determined or demanded by the supplier unless the consumer has expressly consented to the higher price before the goods or services are supplied;

(d) a prescribed act or practice.

…

5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

5 (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

…

171 (1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention

> of this Act or the regulations, the person who suffered damage or loss may bring an action against a
>
> > (a) supplier …

Positions of the Parties

US Defendants

[57] The US defendants assert that they:

> (a) do not maintain an office in British Columbia;
>
> (b) are not now, nor have they ever been, registered or licensed to carry on business in British Columbia;
>
> (c) do not have any offices or employees situated in British Columbia;
>
> (d) do not have any manufacturing or distribution facilities in British Columbia;
>
> (e) do not maintain any bank accounts in British Columbia;
>
> (f) do not have a mailing address or telephone listing in British Columbia;
>
> (g) are not required to, nor do they pay, any sales, property or other taxes in British Columbia; and
>
> (h) do not hold, nor have they held, any notices of compliance from the Health Protection Branch of Health Canada to manufacture, distribute or sell any pharmaceutical products in Canada.

[58] The US defendants refer to the decision of the Supreme Court of Canada in ***Moran v. Pyle National (Canada) Ltd.***, [1975] 1 S.C.R. 393 at ¶28 where Dickson J. held that:

> [W]here a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the formal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or

> consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial discretion over that foreign defendant.

[59] The US defendants assert that in this case the damage allegedly suffered by the plaintiff occurred in British Columbia. The US defendants do not market Premarin or Premplus or put them into the Canadian market. They do not test, market, label, distribute, promote or sell the products in question.

[60] The defendants refer to ¶15 of the plaintiff's statement of claim where it is alleged that all of the defendants, including the US defendants, committed various negligent acts. The US defendants assert that the allegations cannot stand against them as a claim made by Canadian consumers of Premarin or Premplus.

[61] In reference to ¶16 to 21 of the amended statement of claim, the defendants refer to the allegations made by the plaintiff against the US defendants which depend on a finding that the US defendants are "suppliers" within the meaning of the B.C. consumer protection legislation. The defendants argue that the US defendants do not supply and have not supplied goods or services to consumers in British Columbia or elsewhere in Canada, nor do they solicit, offer, advertise or promote goods and services to consumers in British Columbia or elsewhere in Canada, nor have they ever done so.

[62] The US defendants assert that because the plaintiff cannot connect them to the alleged tort in British Columbia, the plaintiff attempts to bring the US defendants into this jurisdiction by an "unsubstantiated allegation of a joint or group enterprise".

[63] The US defendants point out the fundamental principle of corporate law in British Columbia and elsewhere that a corporation is a separate and distinct legal entity from its shareholders and that shareholders are not responsible for the corporation's liabilities. Courts in British Columbia have not endorsed the "group enterprise theory" which holds that in instances where to not do so would be unjust, related companies can be treated as one company for the purpose of providing compensation or imposing liability. Rather, the courts have held that the corporate veil can only be lifted in exceptional circumstances. Fraud and improper conduct alone is not sufficient. The coordination of operations among corporations in a business family does not give rise to an exception to the principle that the corporation is a separate and distinct legal entity from its shareholders. There is no presumption of agency or that a subsidiary is a parent's *alter ego*: ***Aluminum Co. of Canada v. Toronto (City)***, [1944] S.C.R. 267 at 271.

[64] In any event, the defendants argue, the plaintiff's allegations and the plaintiff's supporting affidavit materials do not demonstrate evidence of a group enterprise or that an injustice would occur if the Canadian and US defendants were not treated as one entity.

[65] Activities such as coordination and harmonization of practices among corporations and in a business family do not give rise to a duty of care, the defendants assert. Mandating policy is insufficient unless there is complete control such that a subsidiary does not function independently and is used as a shield for improper activity: ***Haskett v. Transunion of Canada Inc.*** (2003), 63 O.R. (3d) 577 (C.A.) at ¶61-62, leave to appeal to S.C.C. refused, 29752 (November 27, 2003).

Plaintiff's position

[66] The plaintiff points out that her burden to establish a real and substantial connection is low. She must establish a "good arguable case", a threshold described by the B.C. Court of Appeal in ***AG Armeno Mines and Minerals Inc. v. PT Pukuafu Indah***, 2000 BCCA 405 at ¶25, citing Steele J. in ***Ecolab Ltd. v. Greenspace Services Ltd.*** (1998), 38 O.R. (3d) 145 (Div. Ct.) at 153, as "not higher than a 'serious question be tried' or a genuine issue' or 'with some chance of success'".

[67] The ***CJPTA*** is a codification of the common law test for jurisdiction *simpliciter* articulated by the B.C. Court of Appeal in ***Cook v. Parcel, Mauro, Hultin & Spaanstra*** (1997), 31 B.C.L.R. (3d) 24 (C.A.) at ¶20 to 27. Section 10 of the ***CJPTA*** contains a list of circumstances in which it is presumed that a real and substantial connection exists. The list includes proceedings concerning a tort committed in British Columbia and proceedings concerning a business carried on in British Columbia.

[68] The plaintiff points out that the defendants have not challenged the allegation in her amended statement of claim that Premarin and Premplus were sold in British Columbia and used by consumers in British Columbia. The US defendants do not dispute that the injuries alleged by the plaintiff and other members of the proposed class were suffered in British Columbia. The plaintiff cites the same paragraph as the US defendants in ***Moran*** but includes the last two sentences to assert that the *situs* of the tort is generally the place where the injury was suffered:

> This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered.

[69] The plaintiff argues that while ***Moran*** deals with a careless manufacturer, the principle that a tort occurs where the damage is suffered is applied in other types of cases including ***Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.***, [2002] O.J. No. 298 (Sup. Ct. Jus.) (QL).

[70] The plaintiff relies on ***Furlan v. Shell Oil Co.***, 2000 BCCA 404, leave to appeal to S.C.C. refused, 28154 (April 5, 2001), in asserting that the defendants failed to adequately inform her and other class members and their physicians of the true benefits and risks of using Premarin and Premplus. She sets out the particulars of the failure to inform and the failure to warn in ¶15 of the amended statement of claim. The failure to warn British Columbia consumers who suffer damage is a tort committed in British Columbia.

[71] The plaintiff points out that the list of factors in s. 10 of the ***CJPTA*** is non-exhaustive. Under the common law test of real and substantial connection, the court must also consider whether the US defendants are proper parties to a proceeding otherwise properly brought within the jurisdiction: ***McNicol Estate v. Woldnik*** (2000), 52 O.R. (3d) 49 (Sup. Ct. Jus.), aff'd [2001] O.J. No. 3731 (C.A.) (QL), leave to appeal to S.C.C. refused, 28934 (June 20, 2002); ***Harrington v. Dow Corning Corp.***, 2000 BCCA 605, leave to appeal to S.C.C. refused, 28368 (September 6, 2001).

[72] The plaintiff asserts that the Canadian defendants which are wholly owned subsidiaries or affiliates of the US defendants have accepted the jurisdiction of the court. Thus the litigation will be proceeding in British Columbia. The plaintiff asserts that considerations of justice mandate in favour of the court taking jurisdiction if there is otherwise any doubt with respect to the matter. The plaintiff says that the roles of the defendants in placing and maintaining Premarin and Premplus in the Canadian market, together with the presence of the Canadian defendants in this country, satisfy the test of comity, fairness and justice.

[73] The plaintiff maintains that the defendants have not met the evidentiary burden which is required to address all the relevant facts alleged in the statement of claim: ***Roth v. Interlock Services, Inc.***, 2004 BCCA 407. Their affidavit material takes the form of mere denials and is, therefore, insufficient to put the pleadings in issue; the plaintiff has led evidence which, if accepted, supports her claim against these defendants and therefore she has made out a "good arguable case"; and a great deal of the defendants' own evidence confirms the participation of the US defendants in important aspects of the promotion and sale of Premarin and Premplus to consumers in British Columbia and elsewhere in Canada.

[74] In respect of the plaintiff's assertion that there is a joint enterprise as between the Canadian defendants and the US defendants, the plaintiff alleges that the defendants are individually and jointly responsible to the plaintiff and that they were engaged in a joint enterprise for the promotion and sale of Premarin and Premplus. The plaintiff does not seek to pierce the corporate veil; rather, she alleges that each defendant played a role or roles in placing the products into the stream of commerce

in Canada (including British Columbia) and the defendants are individually and collectively responsible to Canadian consumers for their roles in this joint endeavour. The plaintiff argues that evidence of a collaborative effort and a commonality of purpose will, for the purpose of a jurisdiction *simpliciter* motion, support an allegation of joint enterprise: ***Shaw v. Servier Canada, Inc.***, 2002 YKSC 3; ***Wilson v. Servier Canada Inc.*** (2002), 58 O.R. (3d) 753 (Sup. Ct. Jus.).

[75] The plaintiff's amended statement of claim, at ¶16 to 18, sets out the elements of a statutory cause of action under the B.C. consumer protection legislation. While Mr. McCluggage in his second affidavit denies that the US defendants are "suppliers" within the meaning of the B.C. consumer protection legislation because they cannot supply goods to consumers in British Columbia, the statutory definition of "suppliers" is broad and includes persons who are involved in the promotion of the goods. The plaintiff alleges in ¶2 of her statement of claim that the defendants "engaged in a joint enterprise for the promotion and sale of Premarin and Premplus in British Columbia". The plaintiff argues that there is "ample evidence" that the US defendants played a myriad of roles, often in concert with the Canadian defendants, in the regulatory approval process and in the labelling and marketing of Premarin and Premplus. The plaintiff asserts that there is a good arguable case that the US defendants are suppliers who may have engaged in deceptive acts or practices with regard to consumer transactions within the terms of the acts: ***Robson v. Daimler Chrysler Canada Ltd.***, 2002 BCCA 354, leave to appeal to S.C.C. refused, 29338 and 29339 (March 27, 2003).

Decision

[76] The ***CJPTA*** codifies the law regarding jurisdiction. However, it is crucial to understand the common law because jurisdiction *simpliciter* still depends on the existence of the common law concept of a real and substantial connection.

[77] Jurisdiction *simpliciter* requires the court to determine whether it has jurisdiction and whether it should exercise its discretion to decline jurisdiction. The two issues must be considered sequentially. Jurisdiction *simpliciter* is a threshold issue, and does not involve any discretionary considerations: ***Harrington*** at ¶69 and ¶86.

[78] As the court in ***Furlan*** states at ¶3, either the court has jurisdiction *simpliciter* or it does not, based on the existence of a real and substantial connection between British Columbia and either the defendant or the subject matter of the litigation. The application of the real and substantial connection test ensures that a court's assumption of jurisdiction is properly restrained and provides a balance of fairness between plaintiff and defendants. In other words, it ensures that the taking of jurisdiction comports with the standard of order and fairness: ***Harrington*** at ¶87, ***British Columbia v. Imperial Tobacco Canada Ltd.***, 2006 BCCA 398 at ¶87, leave to appeal to S.C.C. refused, 31715 to 31721 (April 5, 2007).

[79] Section 10 of the ***CJPTA*** contains a list of circumstances in which it is presumed that there is a real and substantial connection. The list includes proceedings concerning a tort committed in British Columbia and proceedings concerning a business carried on in British Columbia (s. 10(g) and (h)).

[80] As stated by Sharp J.A. in ***Muscutt v. Courcelles*** (2002), 60 O.R. (3d) 20 (C.A.) at ¶75:

> … it is not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important.

[81] At ¶77 to 102 in ***Muscutt***, Sharp J.A. describes eight factors which are relevant in assessing whether the court should assume jurisdiction:

> *1. The connection between the forum and the plaintiff's claim.*
>
> The forum has an interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors.
>
> …
>
> *2. The connection between the forum and the defendant*
>
> If the defendant has done anything within the jurisdiction that bears upon the claim advanced by the plaintiff, the case for assuming jurisdiction is strengthened.
>
> …
>
> *3. Unfairness to the defendant in assuming jurisdiction*
>
> … Some activities, by their very nature, involve a sufficient risk of harm to extra-provincial parties that any unfairness in assuming jurisdiction is mitigated or eliminated.
>
> …
>
> *4. Unfairness to the plaintiff in not assuming jurisdiction*
>
> [88] The principles of order and fairness should be considered in relation to the plaintiff as well as the defendant.
>
> …
>
> *5. The involvement of other parties to the suit*

> … The twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations.
>
> …
>
> *6. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis*
>
> … Every time a court assumes jurisdiction in favour of a domestic plaintiff, the court establishes a standard that will be used to force domestic defendants who are sued elsewhere to attorn to the jurisdiction of the foreign court or face enforcement of a default judgment against them.
>
> …
>
> *7. Whether the case in interprovincial or international in nature*
>
> … [T]he assumption of jurisdiction is more easily justified in interprovincial cases than in international cases.
>
> …
>
> *8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere*
>
> … One aspect of comity is that in fashioning jurisdictional rules, courts should consider the standards of jurisdiction, recognition and enforcement that prevail elsewhere.

Application of the Factors to this Case

[82] In considering the evidence before me, I am not making any findings of fact. That is the prerogative of the trial judge. I am considering whether the plaintiff has met her onus of establishing a good arguable case based on the low threshold enunciated in the jurisprudence. The eight factors in ***Muscutt*** are not a "formula or checklist", but they are relevant in this analysis: ***Power Measurement Ltd. v. Ludlum***, 2006 BCSC 157.

1. The connection between the forum and the plaintiff's claim.

[83] There is no dispute that the plaintiff alleges that she suffered damage in British Columbia. It is in the interest of this forum to protect the legal rights of its residents, and to allow injured plaintiffs generous access to litigation. On balance, this factor favours the plaintiff.

2. The connection between the forum and the defendant

[84] The US defendants say that they do not engage in any conduct which amounts to personal subjection in British Columbia. They did not market Premarin and Premplus or put them into the Canadian stream of commerce. They do not test, market, label, distribute or promote or sell the products in Canada. However, I find that the plaintiff has met the low onus of establishing that the defendants engage in "harmonization" and "coordination" of matters involving core monograph and labelling requirements, the efficacy of the products, and the collecting and sharing of other clinical research or trial information. Wyeth Pharmaceuticals' role of a central repository and coordinator for adverse event reporting for all the Wyeth affiliates worldwide demonstrates a sufficient involvement of the US defendants in promoting the efficacy of the drug and its safety. In my view litigation in this form and jurisdiction is a foreseeable risk of that activity.

3. Unfairness to the defendant in assuming jurisdiction

[85] In the present case, the assumption of jurisdiction in British Columbia would not result in any significant unfairness to the US defendants. The activity engaged in

by the defendants involves an inherent risk of harm to extra-provincial parties, such that the unfairness in assuming jurisdiction is mitigated.

[86] The plaintiff's case against the Canadian defendants will proceed in this jurisdiction. To also require the US defendants to participate in proceedings in British Columbia, does not, in my view, create unfairness to them.

4. Unfairness to the plaintiff in not assuming jurisdiction

[87] The principles or order and fairness must be considered in relation to the plaintiff as well as the defendant. As pointed out in ***Muscutt*** at ¶89: "given the realities of modern commerce and the free flow of goods and people across borders, plaintiffs should not be saddled with the anachronistic 'power theory' that focuses exclusively on subjection and territorial sovereignty".

[88] If jurisdiction is refused, the plaintiff would be compelled to litigate in the United States. Clearly this would be inconvenient to the plaintiff. Consideration of unfairness favours the plaintiff in my view.

5. The involvement of other parties to the suit

[89] The Canadian defendants are involved in this suit and the plaintiff says that the matter will proceed against them whether or not I exercise jurisdiction over the US defendants. The action involves the domestic defendants and thus the case for assuming jurisdiction over the US defendants is strong.

[90] I need not discuss factors 6, 7 and 8 in great detail. While it is a very serious consideration to involve an international defendant, I have not been provided with any international standards or the standards applied in the US defendants' jurisdiction to determine whether the real and substantial connection test has been met on the basis of damage sustained within the jurisdiction.

Conclusion

[91] In weighing all the factors, I find that the US defendants' admitted engagement in activities in relation to the Canadian companies and to consumers in Canada is sufficient to establish a real and substantial connection. In particular, these activities consist of "harmonization" and "coordination" of matters involving core monograph and labelling requirements, the efficacy of the products, and the collecting and sharing of other clinical research or trial information. The US defendants have failed to rebut the presumption in s. 10 of the ***CJPTA***. In the result, the plaintiff has brought her case within s. 10 of the ***CJPTA***.

[92] The plaintiff has established a real and substantial connection between British Columbia and the facts upon which the proceeding is based both in regard to the tort committed in British Columbia and the business carried on in British Columbia.

[93] Having reached my conclusion that the US defendants are proper parties to this litigation, it is unnecessary to address the plaintiff's statutory cause of action under the B.C. consumer legislation. I am not reaching any conclusion about the application of that legislation. I leave it to the trial judge to determine if it applies and whether the US defendants are liable under its provisions.

[94] The US defendants' application is dismissed. The plaintiff shall have her costs.

"Gropper J."