IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lantronix Canada, ULC v. Vrije Universiteit Brussel,* 2023 BCSC 1218

Date: 20230714
Docket: 2110181
Registry: Vancouver

Between:

Lantronix Canada, ULC dba Intrinsyc Technologies

Plaintiff

And

Vrije Universiteit Brussel aka University of Brussels

Defendant

Before: The Honourable Mr. Justice G.R.J. Gaul

Reasons for Judgment

Counsel for the Plaintiff:	S. H. Stephens
Counsel for the Defendant:	R.J.C. Deane N. Pandey
Place and Date of the Hearing:	Vancouver, B.C. October 3 & 5, 2022
Place and Date of Judgment:	Vancouver, B.C. July 14, 2023

Introduction

[1] The plaintiff alleges it entered into a binding contractual agreement with the defendant that permitted the defendant to use the plaintiff's computer software, in return for which the defendant would pay the plaintiff a licensing fee.

[2] By notice of civil claim filed 25 November 2021, the plaintiff has sued the defendant for breach of contract. The plaintiff also claims against the defendant for breach of copyright. An amended notice of civil claim was filed on 6 September 2022.

[3] On the present application, the defendant seeks an order dismissing or staying the plaintiff's action on the ground that the Supreme Court of British Columbia does not have jurisdiction over the defendant in respect to the plaintiff's claims. In the alternative, the defendant urges the Court to decline to exercise its jurisdiction on the basis that Belgium, and not British Columbia, is the more appropriate forum in which to litigate the parties' dispute.

Background

The Parties

[4] Lantronix Inc. is an international computer software company with its corporate headquarters in the United States of America ("Lantronix Inc.").

[5] Intrinsyc Technologies Corporation ("Intrinsyc") was a British Columbia software company located in Vancouver, British Columbia. One of Intrinsyc's software programs, known as J-Integra, enables data flow between computer systems so that the systems can synchronize and operate together (the "Software").

[6] In 2020 Lantronix Inc. purchased Intrinsyc. This corporate acquisition resulted in Intrinsyc changing its name to Lantronix Canada, ULC, doing business as Intrinsyc Technologies ("Lantronix").

[7] The defendant, Vrije Universiteit Brussels, also known as the University of Brussels (the "University"), is a large research-oriented university located in

Brussels, Belgium. Universitair Ziekenhuis Brussel, also known as the University Hospital Brussel ("UZ Brussel"), is the University's academic hospital.

The Software Licensing Process

[8] An entity wishing to access and use the Software can download it from the plaintiff's website for a 30-day evaluation period. Prior to doing so, they first must agree to the terms and conditions contained in the plaintiff's Evaluation License Agreement (the "ELA"). At the expiration of the evaluation period, the Software ceases to function, and access to the Software will be prohibited unless the entity enters into a Software License Agreement with the plaintiff (the "SLA"). Both the ELA and the SLA are contained in the same electronic document. That is, they are accessed from the same text box on the plaintiff's website and consequently anyone agreeing to an ELA will also receive a copy of the SLA that will be required if continued use of the Software is desired, once the evaluation period has expired.

[9] The ELA begins with the following note in capitals:

> IMPORTANT: READ THESE TERMS CAREFULLY BEFORE DOWNLOADING OR INSTALLING THIS SOFTWARE. BY SELECTING THE "I ACCEPT" BUTTON BELOW, DOWNLOADING, INSTALLING, OR OTHERWISE USING THIS SOFTWARE (EACH AN "ACCEPTANCE" OF THIS EVALUATION AGREEMENT), YOU OR THE ENTITY IDENTIFIED BY YOU WHEN ACCEPTING THIS EVALUATOIN AGREEMENT (THE "LICENSEE") ACKNOWLEDGE THAT YOU HAVE READ THIS EVALUATION AGREEMENT AND THAT YOU AGREE TO BE BOUND BY ITS TERMS AND CONDITIONS. IF YOU DO NOT AGREE TO ALL OF THE TERMS AND CONDITIONS OF THIS EVALUATION AGREEMENT, YOU ARE NOT AN AUTHORIZED USER OF THE SOFTWARE AND IT IS YOUR RESPONSIBILITY TO EXIT THIS DOWNLOADING / INSTALLATION PROCESS WITHOUT DOWNLOADING, INSTALLING OR OTHERWISE USING THE SOFTWARE BY SELECTING THE "I DO NOT ACCEPT" BUTTON BELOW, AND TO DELETE THE SOFTWARE FROM YOUR COMPUTER.
>
> [Emphasis added.]

[10] The terms and conditions of the ELA include the following:

> 1. Definitions.
>
> …

(b) Effective Date. "Effective Date" shall mean the date that Licensee first Accepts this Evaluation Agreement.

(c) Evaluation Term. "Evaluation Term" shall mean the period commencing on the Effective Date and continuing for a period of thirty (30) days thereafter unless earlier terminated pursuant to Section 3.

…

(g) Software License Agreement. "Software License Agreement" shall mean the Software License Agreement attached hereto as Exhibit A, under which Licensor may grant Licensee a license to use the Software perpetually, subject to the terms and conditions herein.

…

2. Evaluation License. Subject to the terms and conditions set forth in the Evaluation Agreement, Licensor grants to Licensee a limited, non-exclusive and non-transferable license, solely during the Evaluation Term, to install and operate the Software, in machine-executable form only, solely for Licensee's Authorized Use (the "License"). Licensee is solely responsible for acquiring, installing, operating and maintaining the hardware and software environment necessary to operate the Software. Licensee shall maintain accurate and up-to-date records of the number and location of any authorized copy Licensee makes of the Software.

3. Term: Termination; Effect of Termination; Entry into Software License Agreement.

…

(b) Effect of Termination: The termination or expiration of this Evaluation Agreement shall automatically, and without further action by Licensor, terminate and extinguish the License and all rights granted to the Licensee hereunder…Sections 3(b), 4, …and 11 shall survive the expiration or termination hereof for any reason.

(c) Entry into Software License Agreement. In the event that Licensee desires to enter into the Software License Agreement, Licensee shall notify Licensor in writing or by e-mail …of such desire and make payment to Licensor of the applicable license fees under the Software License Agreement. By making such payment to Licensor, Licensee thereby offers to enter into the Software License Agreement with Licensor. Licensor's acceptance of such payment in full and provision to Licensee of a license key enabling the Software to continue to be used beyond the Evaluation Term shall be considered an acceptance of such offer and the Software License Agreement shall then be deemed to have been entered into by and between Licensor and Licensee.

…

11. General. This Evaluation Agreement constitutes the complete and exclusive statement of the terms and conditions between the parties…The construction, interpretation and performance of this Evaluation Agreement and all transactions under it shall be governed by the laws of the Province of British Columbia, Canada, but excluding both British Columbia's choice of laws' rules and the U.N. Convention for the International Sales of Goods.

> The parties agree that any action relating to this Evaluation Agreement shall be instituted and prosecuted in a court of competent jurisdiction in British Columbia, Canada and each party waives its right to a change of jurisdiction or venue…
>
> [Emphasis in original.]

[11] As noted earlier in these reasons, the SLA is attached to the ELA as an exhibit. For the purpose of the present application, the relevant terms of the SLA include the following:

> 1. Definitions.
>
> (a) Authorized Use. "Authorized Use" shall mean, subject to the restrictions set forth below, internal use only on the number of machines for which Licensee subscribed and has paid the applicable License Fees to Licensor…
>
> (b) Effective Date. "Effective Date" shall mean the date that Licensee and Licensor enter into this Agreement as set forth in Section 3(c) of the Evaluation Agreement.
>
> …
>
> 2. Software License.
>
> (a) License. Subject to the terms and conditions set forth in this Agreement and Licensee's payment of the License Fees, Licensor grants to Licensee a limited, non-exclusive and non-transferable license, solely during the Term, to install and operate the Software, in machine-executable form only, solely for Licensee's Authorized Use (the "License"). Licensee is solely responsible for acquiring, installing, operating and maintaining the hardware and software environment necessary to operate the Software. Licensee shall maintain accurate and up-to-date records of the number and location of any authorized copy Licensee makes of the Software.
>
> (b) License Key. Upon Licensor's receipt from Licensee of the applicable License Fees, Licensor shall issue Licensee a license key which shall enable Licensee to use the Software beyond the Evaluation Term of the Evaluation Agreement.
>
> …
>
> 6. Proprietary Rights: Confidentiality; Indemnity; Warranty; Disclaimer; High Risk Activities; Export Restrictions; Governmental Licensees. Sections 4, 5, 6, 7 (other than 7(d)), 9 and 10 of the Evaluation Agreement are hereby incorporated herein by reference and such Sections shall survive the termination or expiration hereof.
>
> …
>
> 8. General. …The construction, interpretation and performance of this Agreement and all transactions under it shall be governed by the laws of the Province of British Columbia, Canada, but excluding both British Columbia's choice of laws' rules and the U.N. Convention for the International Sales of

> Goods. The parties agree that any action relating to this Agreement shall be instituted and prosecuted in a court of competent jurisdiction in British Columbia, Canada and each party waives its right to a change of jurisdiction or venue…
>
> [Emphasis in original.]

[12] Both the ELA and the SLA identify Lantronix under its prior names, as a company incorporated in British Columbia. Moreover, the agreements provide that the delivery of any notices to Lantronix pursuant to the agreements is to be made to Lantronix's offices in Vancouver, British Columbia.

The University's Evaluation and Use of the Software

[13] In or around October 2001, the University accessed Intrinsyc's website and downloaded the Software on a 30-day evaluation basis. It appears that the University wished to examine the Software to determine if it would be an effective and useful tool for UZ Brussel to use. In doing so, the University necessarily agreed to the terms of the ELA and by reference the SLA. Over the course of the next few months, a representative of the University corresponded with Intrinsyc's Software Support Team to address various coding and operational issues relating to the Software and its performance.

[14] At the expiration of the evaluation period, the University was no longer able to access or use the Software. The University complied with paragraph 3(c) of the ELA and corresponded by email with Intrinsyc regarding its desire to obtain a licence that would allow it to continue to use the Software.

[15] In mid-December 2002, the parties negotiated an SLA whereby the University agreed to pay $17,000 USD so that it could use version 1.5.4, the most recent version of the Software. On 13 December 2002, Intrinsyc sent its invoice for $17,000 USD to the University. The following notation in bold is at the bottom of the invoice:

> Please see our website for important terms and conditions governing this sale: http://www.intrinsyc.com/terms

[16] Accessing that web address brings the reader to a list of "Terms and Conditions", including the following:

> **Terms and Conditions**
>
> The following terms and conditions of use (the "Terms and Conditions") govern your use of the Intrinsyc Software Inc. Web site at www.intrinsyc.com, which shall include, without limitation, the home page, splash page, and all other pages under the same top level domain name, and all content thereon (the "Site") as provided by Intrinsyc Software Inc. ("Intrinsyc" or "we"). …
>
> …
>
> **Applicable Laws.** We control and operate this Site from our offices in Vancouver, British Columbia, Canada. …
>
> **Choice of Law / Forum; No Waiver; Severability; Claims Time Barred.** The Terms and Conditions and the relationship between you and Intrinsyc shall be governed by the laws of British Columbia, without regard to its conflict of law provisions. You and Intrinsyc agree that any cause of action that may arise under this Agreement shall be commenced and be heard in the appropriate court in British Columbia. You and Intrinsyc each agree to submit to the personal and exclusive jurisdiction of the courts located within British Columbia. …
>
> [Emphasis in original.]

[17] On 2 January 2003, Intrinsyc sent the University a License Key by email, in compliance with the SLA that they had agreed to.

[18] In subsequent years, the University subscribed to Intrinsyc's maintenance support service and also purchased and downloaded updated versions of the Software. For example, in May 2010, the University upgraded to the newest version of the Software, version 2.11.

[19] In March 2021, Intrinsyc performed an audit on the University's use of the Software. The results of the audit indicated that the University had used the Software on at least 2,843 machines, meaning it was using the Software on 1,543 more machines than the SLA permitted.

[20] The parties were not able to resolve their differences and that resulted in the plaintiff commencing the current legal proceedings.

Nature of the Application

[21] The University seeks an order pursuant to R. 21-8(1) of the *Supreme Court Civil Rules* [*Rules*] and s. 3 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], dismissing or staying the plaintiff's action because the Supreme Court of British Columbia does not have territorial competence over the University in relation to the action. In the alternative and in the event this Court finds it has territorial competence in this case, then the University contends the Court should decline to exercise that jurisdiction on the basis of *forum non conveniens*.

Territorial Competence

The Applicable *Rules* and Legislation

[22] Rule 21-8(1)(b) of the *Rules* provides:

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

[23] Section 3 of the *CJPTA* provides that the Court has territorial competence in a proceeding that is brought against a person only if:

> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction,
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
>
> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[24] Section 10 of the *CJPTA* identifies a number of factors or circumstances which, if present, will give rise to a presumption that the "real and substantial connection" referenced in s. 3(e) exists. Of particular relevance to the present case, s. 10 provides that the required connection will be presumed to exist if 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,
>
> …
>
> (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
>
> (i) 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
>
> …
>
> …
>
> (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,
>
> …

[25] I say these factors are relevant to the present application because it would appear, on the face of Lantronix's amended notice of civil claim, that each of these factors is relied upon to establish a real and substantial connection between British Columbia and the facts upon which this proceeding is based.

Forum Selection Clause (*CJPTA*, s. 3(c))

[26] Lantronix contends that its contractual relationship with the University includes a forum selection clause that identifies British Columbia as the exclusive jurisdiction to adjudicate any disputes between them. In advancing this position, Lantronix points to the ELA and the SLA, which it says the University agreed to, as foundational elements of the parties' contract. Consequently, Lantronix argues that this Court has territorial competence pursuant to s. 3(c) of the *CJPTA*.

[27] In most cases involving a forum selection clause, it is usually the foreign defendant that seeks to enforce it against a domestic plaintiff and have the litigation adjudicated in a jurisdiction other than the one chosen by the plaintiff. The instant case is unusual in the sense that it is the domestic plaintiff, Lantronix, which seeks to rely upon a forum selection clause to cloak this Court with territorial competence, and the foreign defendant, the University, which holds the opposite position.

[28] Specifically, the University argues that Lantronix has not, on the evidence presented on this application, shown that the University is bound by any agreement that contains a forum selection clause of any sort. In advancing this argument, the University denies that the negotiations that it engaged in with Intrinsyc more than 20 years ago, in 2001 and 2002, involved any agreement to be bound by a forum selection clause that identified British Columbia as the jurisdiction of choice to resolve disputes. As counsel for the University notes in his written submissions:

> [3] Lantronix's claim against the University concerns an alleged breach of a particular software licensing agreement (which is alleged to contain a forum selection clause in favour of the courts of British Columbia), as well as a claim for breach of copyright. However, the University disputes that it entered into such an agreement at all when it used the software in issue. It is difficult to even identify the specific agreement Lantronix sues upon. This is the heart of the issue presented to the Court on this application.
>
> …
>
> [5] …The entire contractual basis on which the plaintiff seeks to haul the foreign defendant into this Court is disputed. The Court cannot simply proceed on the basis that the contract exists, that it has territorial competence, and that the only question is whether there is a reason not to enforce the forum selection clause within it. The very existence of the

> contract containing the forum selection clause, which is said to underpin the Court's territorial competence, has been put in issue.

[29] I agree with Lantronix that a forum selection clause exists in its standard ELA and SLA. I also accept, for the purposes of this application, that there is a good argument that the clause is clear and enforceable against any contracting party that has agreed to it. However, in my view, the evidence on the present application suggests that how a party who wishes to purchase and use the Software today goes about doing so has evolved and is different from when the parties negotiated and reached their agreement in 2002. More particularly, the evidence suggests that the negotiations between Intrinsyc and the University in 2001 and 2002, which resulted in the University purchasing version 1.5.4 of the Software, were not strictly based on the University accessing Intrinsyc's website and electronically agreeing to the ELA or the SLA, as it would appear is the norm today. The evidence on the present application suggests that the parties' negotiations were more conventional in that they exchanged communications by email before reaching their final agreement. It may well be that the agreement the parties reached some 20 years ago did not contain a forum selection clause.

[30] In *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 [*Pompey*] and *Douez v. Facebook, Inc.*, 2017 SCC 33, [*Douez*] the Supreme Court of Canada confirmed that a two-stage inquiry applies when considering a forum selection clause. The first stage requires the party seeking to rely upon such a clause to show the clause is "valid, clear and enforceable and that it applies to the cause of action before the court": *Douez* at para. 28, referencing *Pompey* at para. 39. If the first stage of the inquiry is met, then the party seeking to displace the forum selection clause must satisfy the court that there is "strong cause" not to give effect to the clause: *Pompey* at para. 39; *Douez* at para 29.

[31] The parties disagree on whether and how the *Pompey* / *Douez* analytical framework is applicable to the present circumstances. As I have already noted, there is a fundamental difference between the parties and it involves a dispute over the terms of their contractual relationship, and more importantly whether one of the

terms of their agreement is a forum selection clause. Again, I refer to counsel for the University's written submissions, where he notes:

> [6] …To establish territorial competence under ss. 3 and 10 of the *CJPTA*, a plaintiff generally need only establish an 'arguable case' that the defendant is a party to a contract in which the parties attorn to the jurisdiction of this Court. Assume for the sake of argument that a plaintiff can show such an 'arguable case' that a forum selection clause exists. How does the second stage of the *Pompey/Douez* framework then apply? The second stage of the *Pompey/Douez* framework assumes a positive finding that there is a binding contract and that the forum selection clause is valid, applicable and enforceable. A party cannot use a finding under ss. 3 and 10 of the *CJPTA* that it is 'arguable' that a binding contract (containing a forum selection clause) exists to bootstrap itself into a conventional *Pompey/Douez* analysis, which takes as its premise a binding contract containing the forum selection clause in question. [Emphasis in original]
>
> …
>
> [8] Lantronix cannot have its cake and eat it too. It cannot raise, at best, only an 'arguable case' as to territorial competence under ss. 3 and 10 of the *CJPTA* based on the forum selection clause in an alleged contract, *i.e.*, not actually prove that the alleged contract is binding and that the University is even a party (which cannot be done on a preliminary application, and certainly not on this record), and then turn around and apply *Pompey/Douez* on the extended assumption that the University actually is a party to the contract. [Emphasis in original]

[32] I tend to agree with the University on this point. Given the University challenges the very existence of the agreement that Lantronix says contains the forum selection clause in question, I am not convinced that I can or should, on this preliminary application and on the state of the evidence, opine on whether the parties' agreement includes such a clause and then decide whether it is enforceable using a *Pompey / Douez* analysis. More importantly and in any event, in my opinion, there are other factors beyond the contested forum selection clause that determine the fate of this application.

Real and Substantial Connection (*CJPTA*, s. 3(e))

[33] Lantronix submits that even if the forum selection clause that it claims exists in its contractual relationship with the University is ignored, there is ample evidence before the Court to establish that s. 3(e) of the *CJPTA* applies, in that there is an

arguable case that there is a real and substantial connection between British Columbia and the facts upon which the action against the University is based.

[34] The University submits that Lantronix's evidence is internally contradictory or is contradicted by the evidence the University has tendered. Consequently, the University maintains that Lantronix has failed to establish an arguable case that any of the applicable grounds articulated in s. 3 of the *CJPTA*, including s. 3(e), which would grant this Court territorial competence exist in the present case.

[35] In *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181, leave to appeal to SCC ref'd, 39403 (29 April 2021), Madam Justice MacKenzie explained the two-stage analytical inquiry to determine whether the court has territorial competence based upon a s. 3(e) "real and substantial connection":

> [16] At the first stage of the analysis, the plaintiff must show that one of the connecting factors listed in s. 10 exists. The basic jurisdictional facts relied on by the plaintiff are taken to be true if pleaded (sometimes referred to as a presumption that the pleaded facts are true). The defendant challenging jurisdiction is entitled to contest the pleaded facts with evidence. If the defendant contests the pleaded facts with evidence, the plaintiff is required only to show that there is a good arguable case that the pleaded facts can be proven. The role of the chambers judge is not to prematurely decide the merits of the case or to determine whether the pleaded facts are proven on a balance of probabilities; the plaintiff's burden is low: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34; *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 20, leave to appeal ref'd (2013), [2012] S.C.C.A. No. 367 [*Fairhurst*]; *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 343 at para. 26.
>
> [17] At the second stage, if one of the connecting factors is established either on undisputed pleadings or on disputed pleadings but with a good arguable case, the "mandatory presumption" of a real and substantial connection (and, therefore, territorial competence) is triggered: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 20, leave to appeal ref'd [2010] S.C.C.A. No. 68 [*Stanway*]. This is, of course, distinct from the "presumption" that pleaded facts are true. At this stage, because the connecting factor has already been established, it is presumed that a real and substantial connection exists, and therefore that the court has territorial competence. The defendant may now attempt to rebut the presumption of real and substantial connection by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Van Breda* at para. 95;

> *Canadian Olympic* at para. 24. However, the presumption is strong and "likely to be determinative": *Stanway* at paras. 20–22. The burden on the defendant to rebut the presumption is heavy: *Fairhurst* at paras. 32, 42; *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 35, aff'd 2015 BCCA 200; *Mazarei v. Icon Omega Developments Ltd.*, 2011 BCSC 259 at para. 33. At this stage of the analysis, a connecting factor is already established: the defendant's task is to show why a real and substantial connection does not follow, despite the strong presumption that it does.

[36] While Lantronix's response to the present application relies on a number of the factors listed in s. 10 of the *CJPTA* as grounds to find a s. 3(e) "real and substantial connection", I am satisfied that I need only address the factors identified at ss. 10(e) and 10(h), as I find they are determinative of the issue.

[37] Section 10(e) incorporates three disjunctive portions and for the purposes of this application, I will accept that s. 10(e)(ii) does not assist Lantronix. I do so because of the University's vigorous challenge to Lantronix's assertion that the parties' agreement includes a forum selection clause that dictates the agreement is governed by British Columbia law. I also do so because I am satisfied the necessary "real and substantial connection" can and has been established without having to resort to the impugned forum selection clause or s. 10(e)(ii) of the *CJPTA*.

[38] In my opinion, Lantronix has shown a good arguable case that the contractual obligations to be performed under the parties' agreement were, to a substantial extent, to be performed in British Columbia. Lantronix is a company based in British Columbia with its offices and all of its operations located in Vancouver. Whenever the University has had questions about the Software and its use or has needed assistance in operating or maintaining the Software, it has contacted and liaised with Lantronix's agents who are all located in Lantronix's Vancouver offices. Any revisions or updating of the Software that the University has required has been performed by Lantronix agents located in its Vancouver offices. In other words, the delivery of the product and services that Lantronix is obligated to provide to the University pursuant to the parties' agreement all originates from a location in Vancouver, British Columbia. Even though the University uses the Software at its locations situated in Belgium, I am not convinced this constitutes a substantial

portion of the parties' obligations under their SLA. As a matter of fact, I am quite satisfied that the majority of the contractual obligations that flow from the parties' agreement are performed in British Columbia.

[39] The University argues that Lantronix is but a small division of Lantronix Inc., a much larger corporation located in the United States and not British Columbia. While this is true, the fact remains that Lantronix is a British Columbia-based company and it is responsible for the sale and support of the Software.

[40] In my view, the evidence the University has presented fails to rebut the strong presumption that a real and substantial connection exists pursuant to s. 10(e)(i) of the *CJPTA*.

[41] Similarly, I find that Lantronix has a good arguable case that its legal action against the University concerns a business carried on in British Columbia. In this regard, I accept Lantronix's evidence that its business operations have always been based in Vancouver, British Columbia. The Software's source code is kept and maintained in Lantronix's Vancouver offices and all sales and maintenance support for licensees of the Software are directed and managed from Lantronix's Vancouver, British Columbia offices.

[42] The University argues that Lantronix's action against it relates to the University's allegedly improper use of the Software in Belgium, and consequently this points to the fact that the action concerns the University's business in Belgium and not Lantronix's business in British Columbia. While the University's use of the Software certainly is a key and critical facet of Lantronix's action, I am satisfied the action principally concerns Lantronix's business in British Columbia of selling, servicing and maintaining the Software and of the parties' interpretation of the terms of their agreement that has permitted the University to use the Software.

[43] Having considered the evidence and submissions of the University, I am again not persuaded that the presumption of a real and substantial connection based on s. 10(h) of the *CJPTA* has been rebutted.

[44] Overall, I am satisfied that Lantronix has successfully established that this Court has territorial competence to adjudicate its action against the University.

Forum non conveniens

[45] Once the Court finds it has the territorial competence to hear and determine an action, it may still decline to do so on the basis that another jurisdiction is a more appropriate forum for resolving the parties' dispute. In the present case, the University contends that Belgium is the more appropriate forum.

[46] Section 11 of the *CJPTA* governs the Court's discretion to decline to exercise its territorial competence on the basis that another jurisdiction is the more appropriate forum to adjudicate the parties' dispute. The section provides:

> 11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[47] In *Olney v. Rainville*, 2009 BCCA 380, Mr. Justice Groberman explained the threshold that must be reached before the court will decline to hear a matter on the grounds that another jurisdiction is more appropriate:

> [41] In *Purple Echo*, at para. 59, this Court cited *Amchem Products* at p. 921 as follows:

> I agree with the English authorities that the existence of a more appropriate forum must clearly be established to displace the forum selected by the plaintiff. [emphasis in *Amchem*]
>
> [42] I do not read this passage from *Amchem* as establishing anything more than that there must be a clear basis for preferring a jurisdiction other than that chosen by the plaintiff (or, in this case, the applicant) before a court will decline jurisdiction. In addressing a *forum non conveniens* argument, the court is not involved in a fine weighing of advantages and disadvantages; rather, it is determining whether there is another jurisdiction that enjoys a significant advantage over that in which the litigation was commenced.

[48] The burden of proof is on the party who seeks to have the Court decline to exercise its jurisdiction over a claim on the basis of *forum non conveniens*. In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, Mr. Justice LeBel explained:

> [108] Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the *Civil Code of Québec*, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: "... it may exceptionally and on an application by a party, decline jurisdiction ...".
>
> [109] The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

[49] I have considered all of the factors contained in s. 11(2) of the *CJPTA* and find that most are either neutral or support this matter remaining before the Supreme Court of British Columbia.

Comparative Convenience and Expenses (*CJPTA*, s. 11(2)(a))

[50] The University asserts it would incur significant expenses and inconvenience if it is required to have its witnesses travel to British Columbia in order to attend a trial. Concurrently, it maintains that Lantronix is a large and sophisticated international corporation with more than sufficient resources to fund the present litigation, including if it is prosecuted in Belgium.

[51] I am not persuaded by the University's argument on this point. In my opinion, the University is conflating or confusing the plaintiff Lantronix with its American parent company, Lantronix Inc. While Lantronix is a corporate division of Lantronix Inc., it nonetheless is a separate corporate entity for the purposes of this litigation. I accept the evidence of Chris Palmer, Lantronix's Director of Information Technology and General Manager of Enterprise Interoperability Solutions, that Lantronix (as opposed to Lantronix Inc.) is a relatively small company that employs approximately 46 full-time employees. I further accept that Lantronix would incur significant expenses if it is compelled to litigate its claims against the University in Belgium. These expenses would include not only costs of having its witnesses travel to Belgium for court proceedings but also those associated with retaining new counsel in Belgium. Moreover, I accept that because of its relatively small work force, having employees away from their offices in order to testify at a trial in Belgium would put a tremendous strain on Lantronix's business operations.

[52] I am not convinced that this factor militates in favour of having the parties' dispute resolved in Belgium. In my opinion, this factor supports keeping this matter in British Columbia.

The Law to be Applied (*CJPTA*, s. 11(2)(b))

[53] The University submits that the law to be applied in this matter is in dispute and that even if the laws of British Columbia are to be applied, then the courts in Belgium are fully capable of applying them. While the University is presumably right about the courts in Belgium being capable of applying laws of foreign jurisdictions, this argument does not persuade me that Belgium, and not British Columbia, is the clearly more appropriate forum in which to litigate the parties' dispute.

[54] In my opinion, British Columbia law is to be applied to the parties' dispute and consequently this factor supports this Court retaining jurisdiction.

Avoiding a Multiplicity of Proceedings (*CJPTA*, s. 11(2)(c))
Avoiding Conflicting Decisions of Multiple Courts (*CJPTA*, s. 11(2)(d))

[55] The University is correct when it points out there are no other extant proceedings in relation to the matters in dispute, and consequently there is no risk of there being a multiplicity of proceedings or of there being potentially conflicting decisions from multiple courts. For the assessment that I am undertaking, these factors are neutral.

Enforcement of an Eventual Judgment (*CJPTA*, s. 11(2)(e))

[56] Because all of its assets are in Belgium, the University submits that it will be easier for Lantronix to execute on any judgment it may obtain if its action is prosecuted in Belgium rather than British Columbia. The University may be right about this; however, that is a strategic decision for Lantronix to make, not the University. Lantronix wishes to pursue its claims against the University in British Columbia. Having done so, it must be taken to have considered the additional efforts it may have to make in order to execute on any judgment it may obtain against the University.

[57] In my opinion, this factor either supports Lantronix's position or is neutral. In any event, I do not accept that it supports the University's position that Belgium is clearly the preferred forum to resolve the parties' dispute.

The Fair and Efficient Working of the Canadian Legal System (*CJPTA*, s. 11(2)(f))

[58] The University argues that permitting Lantronix to prosecute its action in British Columbia will unnecessarily divert the resources of the Canadian legal system to resolve a claim arising from the University's conduct in Belgium. I reject this argument. The issues between the parties do involve the conduct of the University, but that conduct goes beyond what it has done in Belgium. The crux of the dispute between the parties is their interpretation of their contractual relationship. In my opinion, it would not be an inefficient use of Canadian legal resources if the interpretation of the parties' agreement were determined by a British Columbia court. Again, I find this factor does not support the University's position.

[59] Having considered all of the factors listed in s. 11(2) of the *CJPTA* and having kept in mind that the overarching principles of fairness to the parties and the efficient and effective adjudication of their dispute, I am satisfied that British Columbia is the appropriate forum in this matter. To put it a bit differently, and adopting the words of Groberman J.A. in *Olney*, I am not persuaded that Belgium enjoys a significant advantage over British Columbia, making it the preferred forum for the prosecution of Lantronix's claims against the University.

Conclusion

[60] Based upon my review of the evidence and jurisprudence, and having considered the submissions of counsel, I am satisfied that this Court has the territorial competence to hear and adjudicate Lantronix's claims against the University, based on what I have concluded is the real and substantial connection that exists between British Columbia and the facts on which the claims are based. In particular, I am satisfied Lantronix's action against the University concerns contractual obligations that were, to a substantial extent, to be performed in British Columbia. Additionally, I am satisfied the action concerns a business carried on in British Columbia.

[61] Having concluded that this Court has the requisite territorial competence, I am not persuaded that British Columbia should relinquish its jurisdiction over this matter in favour of the Belgian legal system. In my opinion, the University has failed to show how or why Belgium is clearly the more appropriate forum for the parties to resolve their dispute.

[62] For all of these reasons, the University's application is dismissed.

[63] If the parties wish to address the issue of costs, then they are to advise me of their desire to do so within 30 days of the date of these reasons. Otherwise, costs will be in the cause.

"G.R.J. Gaul J"