The Standard of Proof of Facts going to Jurisdiction

The recent case of *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 (available here) addresses, at some length, the standard of proof required of jurisdictional facts.

I have recently co-written an article on a related topic – the standard of proof for jurisdiction clauses – in the Canadian Business Law Journal. See SGA Pitel & J de Vries, "The Standard of Proof for Jurisdiction Clauses" (2008) 46 C.B.L.J. 66.

In the main, the British Columbia Court of Appeal uses the language of the orthodox cases – facts need not be proven on the balance of probabilities, but rather only need to be proven to the "good arguable case" standard. And to some degree the decision may turn on the specifics of the province's regulatory provisions, which allow the defendant to keep jurisdiction a live issue up to and including trial (see paras. 38 and 39 of the decision). But overall I am troubled by the court's analysis.

In the article, we draw the distinction between the sort of facts that can found jurisdiction under the heads of service out, like the breach of a contract committed in Ontario, and other sorts of facts. For the former, the good arguable case standard seems right. The plaintiff does not have to show, at the jurisdiction stage, that there has, on balance of probabilities, been such a breach. That is for trial. For the latter, in which we include the existence of a jurisdiction clause, there is much less reason for the lower standard of proof. Indeed, in many jurisdictions the determination of the issue will be final in both law and fact. In a footnote at the end of the article we make the following argument:

"This article has focused on jurisdiction clauses because of the highly important role they play—greater than any other factor—in both the jurisdiction and stay of proceedings analyses. While it is beyond the scope of this article, there may be other factual disputes on jurisdictional motions that should also use the higher balance of probabilities standard of proof rather than the traditional lower standard. It is possible, for example, that in light of the importance of whether the defendant is present in the jurisdiction, the higher standard of care should be

used for a dispute over that issue. More problematic could be disputes over facts that are deemed or presumed to conclusively found jurisdiction. See for example *The Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, s. 10."

Purple Echo, it seems to me, is a case that fits into this area. The facts in issue were as to whether the defendant had a place of business in British Columbia. Why should the standard of proof for this, a "pure" jurisdictional issue (it goes to nothing else), not be the balance of probabilities? Why delay the resolution of this issue until some later stage of the litigation?

Stephen