

MINOR MATTERS: ENSURING THE ENFORCEABILITY OF CONTRACTS WITH MINORS IN THE ENTERTAINMENT INDUSTRY

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Minors occupy a prevalent and important role in contemporary entertainment, and yet at common law, minors do not have capacity to enter into legally binding relationships. As a result, minors may disaffirm their personal services contracts, which could have severe consequences for producers, including the inability to exploit the results of the performance. This paper considers the use of the superior courts' inherent parens patriae jurisdiction to obtain court approval of contracts with minors to protect producers from the risk of subsequent disaffirmance of the contract by the minor.

Les mineurs jouent un rôle étendu et important dans le secteur du divertissement contemporain. Et pourtant, en common law, ils n'ont pas la capacité juridique de nouer des relations juridiquement contraignantes. Par conséquent, les mineurs peuvent répudier leurs contrats de services personnels, ce qui peut entraîner de graves conséquences pour les producteurs, y compris leur incapacité à exploiter les résultats de la représentation. Cet article analyse l'utilisation de la compétence inhérente parens patriae des cours supérieures pour obtenir la reconnaissance judiciaire des contrats passés avec des mineurs afin de protéger les producteurs contre le risque de répudiation subséquente du contrat par le mineur.

1. Introduction

Minors¹ play an important role in the music and film industries.² Notwithstanding the prominent and profitable role that minors occupy in contemporary entertainment, minors' participation in the entertainment industry is riddled with uncertainty and confusion. In an industry

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¹ The definition of minor depends on the *Age of Majority Act* in each province, and is usually 18 (see e.g. *Age of Majority and Accountability Act* RSO 1990 c A.7, s 1; *Age of Majority Act* RSA 2000 c A-6, s 1) or 19 (see e.g. *Age of Majority Act* RSBC 1996 c 7, s 1(1)(a)).

² This paper will focus on minors participating in the television and film production industries; an analysis of the minors performing in the music industry is beyond the scope of this paper.

structured largely by contracts, engaging the services of minors can be problematic because in many common law jurisdictions minors do not have the legal capacity to enter into binding contracts. The common law holds that contracts with minors are *prima facie* voidable, either because minors have the right to rescind the contract before or shortly after reaching the age of majority, or because contracts with minors are not enforceable until ratified by the minor upon reaching age of majority.³

The right of minors to disaffirm contracts has serious implications for the entertainment industry. When production companies engage the services of performers, producers secure two sets of rights: (1) the rights to future services⁴ in the form of a personal service contract, which requires the performer to provide acting services at particular times and places;⁵ and (2) the rights to the performance,⁶ which gives the production company the right to exploit the results of the performance after the services have been rendered.⁷ The consequences of the common law position on minors' capacity to contract are far-reaching and severe; a minor could refuse to provide his or her acting services after several days of filming. More catastrophically, a minor could disaffirm the contract after filming is complete, rendering the producer unable to exploit the results of the performance. Such action could prevent theatrical release and result in significant financial losses.⁸

Given the risks for producers contracting with minors, the law must adapt to ensure that producers can enter into contracts with minors without fearing rescission. At the same time, retaining the common law protections for minors and balancing these rights with the competing interests of adults is equally necessary. In the United States, specifically in California and New York,⁹ legislation has been enacted to regulate contracts with minor performers.¹⁰ At the heart of the statutory regimes in both territories is the idea that if a court approves a minor's personal services contract, the minor is precluded from later rescinding the contract on the grounds of incapacity

³ Bob Tarantino, "A Minor Conundrum: Contracting with Minors in Canada for Film and Television Producers" (2006) *Hastings Comm/Ent LJ* 29:45 at 54. [Tarantino, "A Minor Conundrum"].

⁴ Donald Biederman *et al*, *Law and Business of the Entertainment Industries*, 4th ed (Westport: Praeger Publishers, 2001) at 71.

⁵ Tarantino, "A Minor Conundrum," *supra* note 3 at 46.

⁶ Biederman, *supra* note 5 at 71.

⁷ Tarantino, "A Minor Conundrum" *supra* note 3 at 46.

⁸ *Ibid.*

⁹ Biederman, *supra* note 4 at 70.

¹⁰ See *California Labor Code*, Cal Stat, c 90 § 1700.37 (1937); *California Family Code*, Cal Stat, c 162 at § 6750-6753 (1992) [*Cal Fam Code*]; *New York Art & Cult Affairs Law*, NY CLS, c 876, Art 35 (1983) [*NY Art & Cult Affr*].

due to infancy.¹¹ The advantages of these legislative measures are two-fold: on the one hand, they ensure that any contractual relations are to the minors' benefit, and on the other hand, they mitigate risks for adults engaging the services of young entertainers.

In Canada, the volatility of contracting with minors remains a live issue, and producers and minors alike must be aware of their contractual rights, obligations and liabilities.¹² British Columbia is currently the only Canadian jurisdiction to enact legislation similar to the legislation in New York and California. The BC *Infants Act* permits the Supreme Court to grant infants¹³ the capacity to enter into binding contracts when it is to the minor's benefit.¹⁴

How then should producers and minors in Canada protect their contractual interests? This paper suggests that if no legislative framework exists, parties contracting with minors may avail themselves of the courts' inherent *parens patriae* jurisdiction to approve the contract if the agreement is to the benefit of, or in the best interests of, the infant. Part 2 of the paper outlines the common law rules governing contracts with minors. Part 3 provides an overview of the legislative regimes regulating minors' contracts in New York, California and BC. Part 4 considers the possibility of relying on superior courts' *parens patriae* jurisdiction to approve the contract, and Part 5 of the paper contemplates conflicts of laws issues that may arise in relation to the exercise of *parens patriae* jurisdiction to approve minors' contracts.

2. Common Law Protections for Minors' Contracts

A) Historic Origins of the Infancy Defense

The common law generally presumes that individuals are in the best position to organize their private affairs. The principle of freedom of contract stipulates that individuals are free to contract with whomever they

¹¹ *Cal Fam Code*, *ibid* at § 6751(a); *NY Art & Cult Affr*, *ibid* at § 35.03(a)

¹² The Alliance of Canadian Cinema, Television and Radio Artists' Independent Production Agreement (ACTRA IPA), is the collective agreement that governs the majority of performers' contracts in Canada. The ACTRA IPA does not, however, regulate the enforceability of contracts with minors, and as such, absent provincial legislative intervention, common law principles remain determinative of the validity and enforceability of these legal relationships. ACTRA "Independent Production Agreement" (2013-15), online: ACTRA <<http://www.actra.ca/main/wp-content/uploads/2013.04.29-2013-15-IPA-Web-Final.pdf>>.

¹³ The terms "minor" and "infant" will be used interchangeably throughout this paper.

¹⁴ *Infants Act*, RSBC 1996, c 223, s 21.

wish, about any subject matter they wish.¹⁵ Legally enforceable contracts generally have few formal requirements, simply requiring the intention of the parties to enter into legally binding relations, as well as an offer, acceptance of that offer, and consideration flowing between parties.¹⁶ As a threshold requirement of contract law, however, individuals must have the capacity to enter into a contract.¹⁷ Minors are an exception to the presumption of capacity because the state paternalistically assumes that minors lack the judgement, maturity and foresight required to make important decisions about their own welfare.¹⁸ Minors' ability to rescind or void contracts is known as the "infancy defence."¹⁹

The presumption that minors' contracts are voidable is one of the oldest traditions of the English common law, dating back to as early as the fifteenth century.²⁰ One of the earliest leading cases concerning the enforceability of minors' contracts is *Zouch d Abbott and Hallett v Parsons*,²¹ in which the Court considered whether the conveyance of an infant mortgagee upon repayment of the mortgage was binding on the infant.²² The Court ultimately held that the contract was binding, but not before making several important statements about minors' contracts. Lord Mansfield CJ stated that "while the law protects an infant against the incapacity and imprudence which results from his lack of experience, and for that purpose renders void or voidable contracts into which he enters, an infant is able to do binding acts which are for his own benefit."²³ The Court held that all deeds, grants, releases, confirmations, obligations or other writings made by persons under the age of twenty one may be avoided,²⁴ but noted that the privilege must be used as a shield, not as a sword or weapon of fraud or injustice.²⁵

This law may seem anachronistic given that in contemporary society, children arguably mature faster, have more opportunities to be economically productive members of society and are often as technologically competent

¹⁵ Halsbury's Laws of Canada, "Contracts" (Markham, Ont: LexisNexis Canada, 2008) at HCO – 4 "Diverse values protected by contract law" (2013 Reissue).

¹⁶ *Ibid* at HCO – 90 "No general formal requirement."

¹⁷ *Ibid* at HCO - 99 "General Principle."

¹⁸ *Ibid* at HCO - 100 "Minors."

¹⁹ Victoria Slade "The Infancy Defence in the Modern Age: A Useful Vestige" (2010-2011) 43 Seattle U L Rev 613 at 614.

²⁰ Biederman, *supra* note 4 at 71.

²¹ (1765), 3 Burr 1794, 97 ER 1103.

²² *Ibid*, at 1.

²³ *Ibid*.

²⁴ *Ibid* at 7.

²⁵ *Ibid* at 1, 5.

as adults to contract.²⁶ This state of affairs has led some commentators to conclude that minors have become too sophisticated to deserve these continuing protections.²⁷ Most commentators, however, agree that retaining the common law protections for minors' contracts is desirable and necessary.²⁸ In the entertainment industry in particular, children are vulnerable to exploitation both because it is a culture governed by adults, and because minors may be susceptible to pressures of parental aspirations.²⁹

B) The Infancy Defence: Contemporary Canadian and American Jurisprudence

1) Canada: Toronto Marlboro Major Junior "A" Hockey Club et al v Tonelli

There is a paucity of modern case law regarding minors' disaffirmation of their contracts. This may be because the cost of seeking court resolution in the event of a dispute often outweighs the value of the contract entered into with the minor.³⁰ One of the leading Canadian cases regarding a minors' right to disaffirm a contract is *Toronto Marlboro Major Junior "A" Hockey Club et al v Tonelli*.³¹ In *Tonelli*, the Ontario Court of Appeal considered the enforceability of a contract for services between a minor hockey player, and the Toronto Marlboro Major Junior "A" Hockey Club, which was a team whose players were often drafted into the National Hockey League.³² Tonelli signed a contract with the Marlboros in 1974. He was seventeen at the time and his father also signed the agreement.³³

Pursuant to the terms of the contract, if the player was drafted by a professional hockey team, the player would pay the Marlboros twenty per cent of his gross earnings for a period of three years if such a contract was executed within three years after the player ceased being eligible to play junior hockey.³⁴ These monies were intended to compensate the club for

²⁶ Slade, *supra* note 19 at 614-15.

²⁷ *Ibid.*

²⁸ See e.g. Law Reform Commission of British Columbia, "Report on Minors' Contracts" (Vancouver: Law Reform Commission, 1976) at 20 [BC LRC Report]; see also Slade, *supra* note 19 at 615.

²⁹ Karrin Boehm and Maria Guzman "Legislative and Judicial Approaches to Minors' Contractual Rights in the Entertainment Industry" (1984) 1 Ent & Sports LJ 145 at 145.

³⁰ Tarantino, "A Minor Conundrum" *supra* note 3 at 46.

³¹ (1979), 23 OR (2d) 193 (CA) [*Tonelli*].

³² *Ibid* at paras 8-10.

³³ *Ibid* at para 18.

³⁴ *Ibid* at para 17.

its previous contributions to the players' development. In 1975, after reaching the age of majority, Tonelli repudiated the contract with the Marlboros, pleading infancy as a defence.³⁵ On the same day, Tonelli signed with the Houston Aeros to play professional hockey.

In the Ontario Court of Appeal, Blair JA found that the plaintiffs, Marlboro, had not met the burden of proving that the contract was beneficial to Tonelli and therefore held that the contract was unenforceable. The Court stated that to be enforceable, a contract of service with a minor must be to the benefit of the minor. Whether or not a contract is beneficial to a minor is a question of fact. To make this determination, the court must consider the contract as a whole to strike a balance between the beneficial and onerous elements of the agreement.³⁶

Considering the context of the agreement, the Court found that Tonelli had no realistic option but to sign the agreement. Refusal to sign the contract would have meant giving up any reasonable expectation of pursuing a career in professional hockey.³⁷ Furthermore, the Court found that the contract was economically disadvantageous to Tonelli because the sums due to Marlboro under the contract would have exceeded the expense incurred in training him.³⁸ The countervailing factors, such as the fact that if Tonelli had not played for the Marlboros he would not have been signed with the Aeros, were not sufficient to outweigh the disadvantages.³⁹ Weighing these factors, the Court found that the contract was not to Tonelli's benefit and was therefore properly voided when he disaffirmed the agreement.

2) *The United States: Berg v Traylor*

In the United States, the California Court of Appeal recently confirmed the right of a minor to disaffirm a contract on the grounds of infancy in *Berg v Traylor*.⁴⁰ *Berg* involved a contract between talent manager Berg and the infant Traylor and his mother. The contract provided that Berg would receive a commission based on a percentage of Traylor's gross earnings received during term of the agreement.⁴¹ Ms. Traylor signed the agreement; Traylor did not sign the contract, but his mother wrote his name

³⁵ *Ibid* at para 19.

³⁶ *Ibid* at para 50.

³⁷ *Ibid* at para 43.

³⁸ *Ibid* at paras 53 and 55.

³⁹ *Ibid* at para 59.

⁴⁰ 56 Cal Rptr (3d) 140 (2007), 148 Cal App 4th 809 [*Berg*].

⁴¹ *Ibid* at 2.

on the signature page.⁴² The agreement stipulated that any action that Traylor took to disaffirm the agreement would not affect Ms. Traylor's liability for any commissions due to Berg.⁴³

In June 2001, Traylor signed on for a recurring role on the television show *Malcolm in the Middle*. In September 2001, Ms Traylor advised Berg that they no longer required her services and could no longer pay her commission. Berg commenced action against Ms Traylor. In 2005, after years of arbitration, Traylor filed a "Notice of Disaffirmance" for both the original agreement and an arbitration award that had been awarded in favour of Berg.⁴⁴ Berg argued that minors may not disaffirm contracts signed by a parent or guardian⁴⁵ and that the agreement could not be disaffirmed because the contract was for Traylor and his family's necessities.⁴⁶ The Court disagreed with Berg's arguments⁴⁷ and concluded that Traylor was "permitted to and did disaffirm the agreement and any obligations stemming therefrom."⁴⁸ The Court also held, however, that notwithstanding Traylor's right to disaffirm the contract, Ms Traylor remained liable for the commissions under the terms of the agreement.

Berg and *Tonelli* highlight the fact that the infancy defence is alive and well, and that the paucity of case law is not indicative of a lack of risk for adults seeking to contract with minors. In fact, *Tonelli* was recently cited as an authority for the proposition that contracts with minors are void unless they are for the benefit of the minor.⁴⁹ Producers should thus

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid* at 6.

⁴⁵ *Ibid* at 9.

⁴⁶ *Ibid* at 11; See also *Cal Fam Code*, *supra* note 10, § 6712, which stipulates that a contract cannot be disaffirmed on the grounds of infancy where the contract is to pay reasonable value of things necessary for the support of the minor or the minor's family; See also Halsbury's Laws of Canada, *supra* note 15 at HCO – 100 "Minors." At common law, contracts for necessities are a rare exception to the general right of a minor to disaffirm a contract.

⁴⁷ *Berg*, *supra* note 40 at 9.

⁴⁸ *Ibid* at 6-7.

⁴⁹ *Cowderoy v Sorkos Estate* 2012 ONSC 1921 at para 50, (2012), 215 ACWS (3d) 781. In *Gretzky et al v Ontario Minor Hockey Association et al* (1976), 10 OR (2d) 759 (Sup Ct), the Court considered two applications for injunctions to prevent the defendants from doing anything that would prevent the boys from playing hockey. Southey J stated in obiter at 4 that "if there are contracts between the boys and the associations, they are voidable because of the ages of the boys and are not enforceable against the boys." In *Boduch v Harper et al* (1976), 10 OR (2d) 755 (HCJ), the Court considered an application by an infant for an order that would permit the infant to play for another hockey team closer to his home. Although the Court held that there was no

acquaint themselves with the decisions in *Tonelli* and *Berg*, because of the similarities between the sports and entertainment industries and the persuasive precedent set by the United States case law.

3. Legislative Frameworks: California, New York and British Columbia

Given the risks for producers seeking to engage the services of minors, the California, New York and British Columbian legislatures have intervened by overturning the common law default and creating statutory schemes that regulate contracts with minors. These legislative measures have been initiated primarily for economic and business reasons, as well as out of a concern to protect the financial and general wellbeing of children.⁵⁰

A) California

The common law right of a minor to disaffirm a contract is codified in section 6710 of the *California Family Code*.⁵¹ Sections 6750-6753 apply to unemancipated minors entering into contracts in the entertainment industry. Paragraphs 6750(a)(1)-(3) set out the scope of the provision, which applies, among other things, to contracts in which minors agree to render artistic services, and contracts in which minors agree to sell, licence or otherwise dispose of performance rights. These sections capture both sets of rights that producers seek to engage when contracting with minors: the rights to the acting services and the intellectual property rights associated with the performance and the exploitation of that performance.

Subsection 6751(a) of the *California Family Code* overturns the common law infancy defence by stipulating that minors may not disaffirm valid contracts on the grounds of minority if the contract has been approved by a superior court in the county in which the minor resides or is employed, or in which any party to the contract has its principal office. Pursuant to subsection 6751(b), either party to the contract may seek approval of the contract by way of petition to the superior court. Such petitions will often be framed in language stating that the contract is in the minor's best interests or to the benefit of the minor.⁵² Production

contract, Zuber J stated that if there was a contract between the plaintiff and the defendants, it would have been voidable because of his age.

⁵⁰ Diane Krausz and Glenn Litwak, "Contracting with Minors in the Entertainment Industry" in Kathleen Conkey, Elissa Hecker and Pamela Jones, eds, *Counseling Content Providers in the Digital Age: A Handbook for Lawyers* (New York: New York State Bar Association, 2010) 302 at 303.

⁵¹ *Cal Fam Code*, *supra* note 10 at § 6710.

⁵² Tarantino, "A Minor Conundrum," *supra* note 3 at 48.

companies will often seek approval of a minor's contract, since these companies face the most risk if a minor disaffirms.⁵³ In approving the contract, the court requires fifteen per cent of a minor's gross earnings to be held in a trust account for the benefit of the minor until he or she reaches the age of majority.⁵⁴

The California statute has prevented minors from frivolously disaffirming contracts on the grounds of infancy.⁵⁵ For example, in *Warner Bros Pictures v Brodel*,⁵⁶ the Court prevented a minor from disaffirming the option period in a contract that was previously approved by the California court.⁵⁷ It is however, important to note that court approval is not mandatory, and as such is easily avoided.⁵⁸ Given the low value of most minors' contracts, the expense associated with court proceedings, and the short-term nature of these contracts, there is often little incentive to request court approval.⁵⁹ Notwithstanding these deterrents, *Berg* highlights the lingering dangers for producers who fail to seek court approval for contracts with minors. Mandatory approval for contracts would provide more effective protections for both parties.⁶⁰

B) New York

In New York, section 101-3 of the *New York General Obligations Law*⁶¹ protects minors' ability to disaffirm a contract. The *New York Arts and Cultural Affairs Law*⁶² governs contracts with minors in the entertainment industry. Pursuant to paragraph 35.03(1)(a) of the *New York Arts and Cultural Affairs Law*, a contract where an infant is to perform services as an actor, musician or other cultural performer may be approved by the New York Supreme Court if the infant resides in New York or will be carrying out the contractual obligations in New York. After contracts are approved, minors may not disaffirm the contract upon reaching the age of majority.

⁵³ Krausz and Litwak, *supra* note 50 at 309.

⁵⁴ *Cal Fam Code*, *supra* note 10 at § 6752(b)(1).

⁵⁵ For a critique on the ability of the current New York and Californian laws to adequately protect minors from exploitation, see Erica Munro "Under Age, Under Contract, Under Protected" (1995-1996) 20 Colum – VLA JL & Arts 553.

⁵⁶ 192 P2d 949 (Cal 1948), cited in Biederman, *supra* note 4 at 72.

⁵⁷ *Ibid.*

⁵⁸ Munro, *supra* note 55 at 564.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at 569.

⁶¹ *New York General Obligations Law*, NY CLS, c 576, at § 3-101 (1963) [*NY Gen Oblig*].

⁶² *NY Arts & Cult Affr*, *supra* note 10 at Art 35.

The New York law does not regulate infant performers' intellectual property rights to their performances.⁶³ Rather, the *New York Arts and Cultural Affairs Law* focuses on the procedural aspects of court applications. Pursuant to paragraph 35.03(2)(c) of the *New York Arts and Cultural Affairs Law*, the parents of a minor must give written consent to the contract before it can be approved by the courts. The court may also withhold consent until the parents of the infant file consent to set aside a portion of the infant's earnings until the infant reaches the age of majority.⁶⁴ Proceedings to approve the contract are commenced by way of petition by the infant's parent or guardian or any interested person on behalf of the infant.⁶⁵ The legislation also requires certain documents must be annexed to the petition,⁶⁶ which function as evidence that the contract is in the best interests of the infant.⁶⁷

C) *British Columbia*

Despite flourishing entertainment industries in many major Canadian cities, BC's *Infants Act*⁶⁸ is currently the only Canadian legislation similar to the New York and California laws. The *Infants Act* applies to a broader range of infant contracts than merely entertainment-related contracts, and as such, does not specifically contemplate approving personal services contracts or the right to exploit a performance. Given, however, the wide scope of the *Infants Act*, contracts contemplating both sets of rights will likely be approved if the court concludes that such agreements are to the benefit of the minor.

Subsection 19(1) of the *Infants Act* codifies the common law rule that contracts with minors are unenforceable unless it: (a) is a contract specified under another enactment to be enforceable against an infant,⁶⁹ (b) is affirmed by the infant upon reaching the age of majority,⁷⁰ (c) is performed or partially performed by the infant within one year after reaching the age of majority⁷¹ or (d) is not repudiated by the infant within one year after the infant reaches the age of majority.⁷² On application by an infant's litigation guardian, the BC Supreme Court may either grant the infant full capacity

⁶³ *Ibid.*

⁶⁴ *Ibid.*, § 35.03(3)(a).

⁶⁵ *Ibid.*, § 35.03(4)(a).

⁶⁶ *Ibid.*, § 35.03(5)(a)-(k).

⁶⁷ *Ibid.*, § 35.03(5)(k).

⁶⁸ *Infants Act*, *supra* note 14.

⁶⁹ *Ibid.*, s 19(1)(a).

⁷⁰ *Ibid.*, s 19(1)(b).

⁷¹ *Ibid.*, s 19(1)(c).

⁷² *Ibid.*, s 19(1)(d).

to contract⁷³ or grant the infant capacity to enter a particular contract or class of contracts.⁷⁴ In order to grant capacity, the court must be satisfied that the order will be for the benefit of the infant, and that the infant does not need the usual protections for minors who are contracting with adults.⁷⁵

Producers in BC must also comply with Division 2 of the *British Columbia Employment Standards Regulations*,⁷⁶ which relates to children in the entertainment industry. Section 45.14 requires employers to remit twenty five per cent of any earnings over \$2000 CAD to the public trustee to hold in trust for the child. Collectively, the trust account provisions function as evidence of a benefit the child receives from a given personal services contract. Once capacity is granted pursuant to subsection 21(1), subsection 19(1) does not apply.⁷⁷

Section 21 of the *Infants Act* was introduced after the Law Reform Commission of British Columbia published the *Report on Minors' Contracts* in 1976.⁷⁸ The report recommended granting an appropriate authority the power to approve contracts in advance, so that adults contracting with minors can ensure that the contract is enforceable, and minors will not be deprived of the benefits of contractual capacity.⁷⁹ The Commission observed that pre-approval of contracts will have the added advantage of assessing the minor's circumstances in advance to determine whether the contract is to the minors' benefit.⁸⁰

Section 21 of the *Infants Act* has been employed at least twice to approve personal service contracts for minors in the film industry. In *Hann-Byrd (Re)*,⁸¹ the applicant was ten years old and sought capacity to enter into a binding contract to provide acting services in a film called *Digger*.⁸² In considering whether the contract was to the benefit of the infant, the Court observed that the contract provided for royalties from merchandising, as well as residuals from future showings of the film.⁸³ The Court also considered the sanctions for breach of contract and found that they were not severe enough to warrant the protections of the law

⁷³ *Ibid*, s. 21(1)(a).

⁷⁴ *Ibid*, s 21(1)(b).

⁷⁵ *Ibid*, s 21(2).

⁷⁶ BC Reg 396/95.

⁷⁷ *Infants Act*, *supra* note 14 at s 21(3).

⁷⁸ BC LRC Report, *supra* note 28.

⁷⁹ *Ibid* at 43.

⁸⁰ *Ibid* at 44.

⁸¹ (1992), 75 BCLR (2d) 65 [*Hann-Byrd*].

⁸² Now s 21(1)(b) of the *Infants Act*.

⁸³ *Hann-Byrd*, *supra* note 81 at 2.

relating to infants' contracts.⁸⁴ The Court granted the infant capacity to bind himself to the contract⁸⁵ subject to the condition that the infant's earnings, minus any fees or commissions due, be placed in a blocked trust account until the infant reached the age of eighteen.⁸⁶ Similarly, the *Aryana Engineer*⁸⁷ case involved a petition to grant contractual capacity to enter into a binding contract to perform acting services in the film *Resident Evil*.⁸⁸ The Court concluded that it had jurisdiction to grant capacity and did so pursuant to section 21(1)(b) of the *Infants Act*.⁸⁹

4. Exercising Parens Patriae Jurisdiction to Approve Minors' Contracts

A) Introduction

With the exception of BC, contracts with minors in Canada are governed by the common law. Currently, a common industry practice requires a guarantee from a minor's parents⁹⁰ that the parental guarantor will be liable for any failure on the part of the minor to perform his or her contractual obligations.⁹¹ Unfortunately, these guarantees are not fail-safe. For example, one of the aforementioned rights that producers seek to secure when contracting with minors is the right to exploit the intellectual property rights for the performance. The copyright in the performance belongs to the minor, not the parents, and as such, a parental guarantee that transfers these rights may not be valid.⁹² A further problem is that the guarantee itself may be unenforceable.⁹³ In order to enforce a guarantee, the underlying obligation must itself be enforceable.⁹⁴ Given that minors' contracts are *prima facie* unenforceable, it is debatable whether a contract with a minor can be the subject of a valid parental guarantee.⁹⁵

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* at 3.

⁸⁷ (July 6 2012), Vancouver S120124 (BCSC) (Oral Reasons for Judgment) [*Engineer*].

⁸⁸ *Ibid.* at paras 1, 4.

⁸⁹ *Ibid.* at paras 6-8.

⁹⁰ Bob Tarantino, "Major Concerns on the Rights of Minors" (2013) *The Lawyers Weekly*, vol 33 No 14, at 2 [Tarantino, "Major Concerns"].

⁹¹ Tarantino, "A Minor Conundrum," *supra* note 3 at 69-70.

⁹² Tarantino, "Major Concerns," *supra* note 90 at 2.

⁹³ Tarantino, "A Minor Conundrum," *supra* note 3 at 70.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

Furthermore, while it is true that unapproved contracts are not automatically void,⁹⁶ back-end disputes regarding the validity of a contract should be avoided for a number of reasons. First, there is the risk that a court may find the minor is entitled to disaffirm the contract. Disaffirmance or attempts to disaffirm may result in costly and time consuming litigation, far outweighing the time and cost of applying for court approval. Furthermore, if a minor disaffirms the producer's right to exploit the performance rights, it could delay the release of the final product, or result in injunctive relief with respect to future exploitation of a motion picture that has already been released, which would have significant financial ramifications for the producer.

Court approval of minors' contracts is likely the best solution for ensuring that agreements are valid and enforceable, however, absent legislative guidance, parties will need a common law basis on which courts may approve such agreements. The solution may be found in the 2012 *Engineer* case,⁹⁷ where Davies J stated in *obiter* that if he was wrong in his conclusions about the Court's jurisdiction to grant capacity under the *Infants Act*, he would have exercised his *parens patriae* jurisdiction to allow the contract to be administered because it was in the best interests of the child. This comment suggests that *parens patriae* jurisdiction may be a ground on which to base infant applications for contractual capacity.

B) Origins of Parens Patriae

Parens patriae jurisdiction refers to the court's inherent power to substitute its own authority for that of natural parents' over their children.⁹⁸ *Parens patriae* is an old doctrine, dating back to at least thirteenth century English law when the Crown exercised wardship over minor heirs with no guardian under the English tenurial system.⁹⁹ The Crown had a beneficial interest over these wards and ensured that any transfers of property by wards of the

⁹⁶ *Ibid* at 57, 72. Tarantino determines *Tonelli* to be the analytical framework governing the treatment of minors contracts in Ontario, and concludes his article with the observation that "producers should be relatively comfortable about engaging minors in Ontario" because the guiding analytical framework suggests that "a reasonably fair contract entered into with a minor will be deemed enforceable against the minor;" see also *Prinze v Jonas* 38 NY 2d 570 (1976), at 576. The New York Court of Appeal held that failure to obtain approval of a contract with a minor did not render the contract null and void when made; rather, the determination of its validity was merely postponed until attempted disaffirmance at which time the provisions of the *New York General Obligations Law* came into play.

⁹⁷ *Supra* note 87 at 21.

⁹⁸ Lawrence Custer "The Origins of the Doctrine of *Parens Patriae*" (1978) 27 Emory LJ 195 at 195.

⁹⁹ *Ibid.*

state were void.¹⁰⁰ In 1540, the Court of Wards and Liveries was established and granted jurisdiction over wards of the Crown.¹⁰¹ The role of the court was to serve as a protective institution, particularly in relation to transfers of property.¹⁰² By the sixteenth century, the Crown was viewed as protector of all his or her subjects, their goods, lands and tenements¹⁰³ but it was not until the 1772 case *Eyre v Shaftsbury* that the court held that “the Crown, as *parens patriae*, was the supreme guardian and superintendent over all infants.”¹⁰⁴

C) *Parens Patriae* in Canada and its Application to Infant Contracts

Parens patriae jurisdiction is part of the court’s inherent powers and is therefore not dependent on statute.¹⁰⁵ In Canada, the Supreme Court of Canada has interpreted the jurisdiction broadly, stating that “the limits of the courts’ *parens patriae* powers have not, and cannot, be defined”¹⁰⁶ but must be exercised in accordance with its informing principles¹⁰⁷ – that is, it must be exercised for the benefit of the protected person.¹⁰⁸ Recall that the primary reason for the existence of the infancy defence was to protect a vulnerable group from entering into contracts that were not in their own best interests. Given this, it is a logical step that the court’s *parens patriae* jurisdiction, which is also grounded in protecting the best interests of the child, may be relied on to approve contracts that are to the benefit of the infant. The availability of the *parens patriae* doctrine to approve minors’ contracts is affirmed by Davies J’s *obiter* remark in *Engineer* that he would have exercised his *parens patriae* jurisdiction to approve the contract had he lacked jurisdiction under the *Infants Act*.¹⁰⁹

The court will not, however, exercise *parens patriae* jurisdiction for the benefit of a third party.¹¹⁰ In practice, court applications for contract approval will be at the request of a third party seeking protection from the

¹⁰⁰ *Ibid* at 196.

¹⁰¹ *Ibid* at 195.

¹⁰² *Ibid* at 196.

¹⁰³ *Ibid* at 201.

¹⁰⁴ *Ibid* at 202.

¹⁰⁵ Donald Kramer, *Legal Rights of Children*, 2nd ed (Thompson West: Danvers, 2005) vol 3 at 4.

¹⁰⁶ *Re: Eve*, [1986] 2 SCR 388 at para 40, 31 DLR (4th) 1. Note that since *parens patriae* jurisdiction historically originated in the Court of Chancery in England, it cannot be exercised by the superior courts in the province of Quebec due to Quebec’s civil law system; see *VW v DS*, [1996] 2 SCR 108.

¹⁰⁷ *Re: Eve*, *ibid* at para 46.

¹⁰⁸ *Ibid* at para 73.

¹⁰⁹ *Engineer*, *supra* note 87 at para 8.

¹¹⁰ *Re: Eve*, *supra* note 106 at paras 77, 99-100.

infancy defence. Given the court's reluctance to exercise *parens patriae* powers for third parties, any applications relying on the court's *parens patriae* jurisdiction to approve the contract must be brought by the litigation guardian of the infant and must be careful to focus on the benefits that the contract will provide to the minor, rather than the benefit of certainty and enforceability that the producer will receive if the contract is approved.

In proving that a contract is in a minor's best interests, the analytical framework established in *Tonelli*¹¹¹ provides useful guidance on the principles involved in establishing benefit. The court will "construe the contract as a whole, and strike a balance between its beneficial and onerous features."¹¹² In balancing these factors, consideration will be given to the contract's economic advantages and disadvantages in terms of money and time, the view that the minor took of the contract, whether the contract will advance the development of the minor's career, whether there are other avenues through which the minor can develop his or her skills, and the relative bargaining positions of the parties,¹¹³ including whether a collective bargaining agreement is applicable to the infant's class of services.

In the entertainment context, courts have also considered royalties from merchandising, the payment of residuals, and the severity of the sanctions for breach of contract in assessing whether or not the agreement is beneficial to a minor.¹¹⁴ Compliance with provincial employment standards acts and with the terms of any applicable collective agreements, including the minors' provisions in the ACTRA IPA, specifically Art 2716, which establishes a mandatory minors' trust account, will also provide evidence that the contract is to the benefit of the minor.¹¹⁵

Reliance on the court's *parens patriae* jurisdiction to approve infant performers' personal services contracts is a novel use of the courts' power. The exercise of superior courts' inherent power to approve contracts was recently tested in Manitoba in *Styles v Real Heaven Films Ltd*¹¹⁶ and *Corum v Real Heaven Inc.*¹¹⁷ Both *Styles* and *Corum* were uncontested

¹¹¹ *Tonelli*, *supra* note 31.

¹¹² *Ibid* at para 50.

¹¹³ *Ibid* at paras 52 - 58.

¹¹⁴ *Hann-Byrd*, *supra* note 81 at 2.

¹¹⁵ Tarantino, "A Minor Conundrum," *supra* note 3 at 73; see also ACTRA IPA, *supra* note 12, at Art 2716.

¹¹⁶ (July 15, 2013) Winnipeg CI-13-01-84473 (Man QB) (Notice of Application) [*Styles*].

¹¹⁷ (August 9, 2013) Winnipeg CI-13-01-84900 (Man QB) (Notice of Application) [*Corum*].

civil applications made on behalf of two minors, each of whom had a leading role in a movie being filmed in Manitoba.¹¹⁸ The infant in *Styles* was domiciled and ordinarily resident in Manitoba.¹¹⁹ The infant in *Corum* was domiciled and ordinarily resident in Ohio. The applications were made to the Manitoba Court of Queen's Bench pursuant to Rule 7 of the *Court of Queen's Bench Rules*,¹²⁰ which governs proceedings involving persons under disability and minors. In the *Styles* application, the Court exercised its inherent jurisdiction to approve the agreement *nunc pro tunc*.¹²¹ The *Corum* application was dismissed due to lack of territorial jurisdiction¹²² and will be discussed further below. Thus, notwithstanding the outcome in *Corum*, the *Styles*, *Corum* and *Engineer* proceedings support the availability of the superior courts' inherent *parens patriae* jurisdiction as a basis for approving infant performers' contracts.

5. Jurisdiction

A) Statutory Jurisdiction

Assuming that parties to a contract with a minor will be able to rely on the courts' *parens patriae* jurisdiction to approve the contract, the absence of legislative guidance for such applications raises another important question: Where should these applications be made – that is, which court has the territorial jurisdiction to exercise such a power? It is not uncommon for production companies to operate in one jurisdiction, while the minor whose services are being engaged resides in another jurisdiction and the contractual obligations are being performed in a third jurisdiction. In jurisdictions where court approval of infant contracts has been codified in

¹¹⁸ Order in *Styles*, *supra* note 116.

¹¹⁹ See Jean-Gabriel Castel, *Canadian Conflicts of Laws*, 5th ed (Markham: LexisNexis Canada, Inc., 2004). In conflicts of laws, domicile is distinguished from ordinary residence. An individual's domicile is the legal unit in which they have or are deemed to have their permanent home; see Castel, *ibid* at 4.1. A domicile of origin arises at birth, and remains with an individual until a new domicile is acquired; see Castel, *ibid* at 4.3. A child's domicile is the domicile of his or her parents where both parents have the same domicile, or if the child lives with one parent, the domicile of the parent with whom the child habitually resides; see Castel, *ibid* at 4.17. Ordinary residence is a more flexible concept referring to the place where an individual is mainly physically resident; see Castel, *ibid* at 4.19-4.20.

¹²⁰ Manitoba, *Court of Queen's Bench Rules*, R 7.

¹²¹ Order in *Styles*, *supra* note 116. *Nunc pro tunc* means "then as now." *Nunc pro tunc* orders are part of the superior courts' inherent jurisdiction, and are used to make a legal entry, judgment, or decree made currently to have effect as of an earlier date when it ought to have been made, done or recorded. See Halsbury's Laws of Canada, *supra* note 15, "Civil Procedure" at HCV – 16 "Nature and types of inherent jurisdiction."

¹²² *Corum*, *supra* note 117 (Civil Disposition Sheet).

statute, the legislation will often set out the circumstances under which courts will have territorial jurisdiction to approve the contracts of infant performers.

For example, subsection 6751(a) of the *California Family Code*¹²³ states that minors' contracts may be approved by the superior court in any county in which the minor resides or is employed, or in which any party to the contract has its principal office. Californian courts thus have jurisdiction to approve the contract if any of the conditions apply, that is, if the infant resides in California or the picture is being filmed in California or the production company's head office is in California. In New York, paragraphs 35.03(1)(a) and (b) of the *New York Arts and Cultural Affairs Law*¹²⁴ provide that the court may approve the contract if the infant is a resident of New York or the picture is being filmed in New York. New York does not permit contractual approval where the only connection to New York is the production company's office.

The BC *Infants Act* is silent on the matter of jurisdiction, but the BC Supreme Court's territorial competence to hear applications under section 21 of the *Infants Act* is likely determined by the province's *Court Jurisdiction and Proceedings Transfer Act (CJPTA)*.¹²⁵ Pursuant to subsection 3(1) of the *CJPTA*, courts will have territorial competence in proceedings brought against a person if the person submits to the court's jurisdiction,¹²⁶ the person is ordinarily a resident of BC,¹²⁷ or there is a real and substantial connection to BC.¹²⁸ Pursuant to subsection 10(j) of the *CJPTA*, there will be a real and substantial connection to BC if the proceeding is for a determination of the capacity of a person who is ordinarily resident in BC. Arguably, a real and substantial connection will also exist when the contractual obligations are being substantially performed in BC,¹²⁹ which will cover situations where the picture is being filmed in BC. It is, however, unclear how courts will weigh these factors, and it is possible that subsection 10(j) will be interpreted to preclude applications for capacity if the infant is ordinarily resident in another jurisdiction.

Under the provisions of the *CJPTA*, it seems less likely that the court will have competence to grant infant applications for contractual capacity

¹²³ *Cal Fam Code*, *supra* note 10 at § 6751(a).

¹²⁴ *NY Arts & Cult Affr*, *supra* note 10, § 35.03(1).

¹²⁵ *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003 c 28 [*CJPTA*].

¹²⁶ *Ibid*, s 3(1)(b).

¹²⁷ *Ibid*, s 3(1)(d).

¹²⁸ *Ibid*, s 3(1)(e).

¹²⁹ *Ibid*, s 10(e)(i).

if the corporation's office is in BC, but the infant is domiciled and the picture is being filmed in other jurisdictions. This is because there is no defendant party in *Infants Act* applications. As such, the criteria in paragraph 3(1)(b), which permits jurisdiction based on a defendant's submission to the jurisdiction and/or paragraph 3(1)(d), which presumes jurisdiction based on the ordinary residence of the defendant, cannot be met.

Furthermore, notwithstanding the fact that subsection 2(2) of *CJPTA* states that "the territorial competence of a court is to be determined solely by reference to [Part 2 of the Act],"¹³⁰ the Court in *Engineer* stated that at least with regard to grants of capacity to contract under the *Infants Act*, the domicile of the infant remains an overriding concern.¹³¹ This suggests that despite other factors that raise a presumption of jurisdiction, the court will only exercise its *parens patriae* jurisdiction to approve infant contracts if the infant is domiciled, or perhaps, ordinarily resident in BC. Pursuant to subsection 11(1) of the *CJPTA*, the courts retain discretion to refuse to exercise territorial competence where another state is a more appropriate forum, which may be the case where a minor is ordinarily resident or domiciled in another jurisdiction

B) Conflicts of Laws

BC, along with Nova Scotia¹³² and Saskatchewan¹³³ and the Yukon¹³⁴ are the only Canadian territories to have adopted legislation like the *CJPTA*. As such, absent legislative intervention, the superior courts' territorial competence to exercise its *parens patriae* jurisdiction to approve infant contracts in other Canadian jurisdictions is determined by common law conflicts of laws principles. Conflicts of laws is the branch of law of each territory which, in a case involving at least one foreign element connecting it with more than one legal unit, determines which court, as between the units, should hear the case (also known as *jurisdiction simpliciter* or territorial competence) and which law as between the units, will apply.¹³⁵ Conflicts of laws principles are often applied in proceedings relating to family law, property, contracts, torts, bankruptcy and insolvency and the enforcement of judgments. Given the novel use of *parens patriae* to approve infant contracts, the applicable conflicts of laws principles are unclear because such an application does not fit neatly into any of the

¹³⁰ *Ibid*, s 2(2).

¹³¹ *Engineer*, *supra* note 87 at para 8.

¹³² *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 c 2.

¹³³ *Court Jurisdiction and Proceedings Transfer Act*, SS C-41.1.

¹³⁴ *Court Jurisdiction and Proceedings Transfer Act*, SY c 7.

¹³⁵ Castel, *supra* note 119 at 1-4.

traditional categories of proceedings contemplated by common law rules of territorial jurisdiction.

1) Club Resorts Ltd v Van Breda

Conflicts of laws is a complex body of law. The Supreme Court of Canada recently re-examined the conflicts rules relating to *jurisdiction simpliciter* in *Club Resorts Ltd v Van Breda*, which involved a tort that occurred in Cuba.¹³⁶ The Court held that jurisdiction may be presumptively assumed if the defendant is domiciled or resident in the jurisdiction,¹³⁷ the defendant is carrying on business in the jurisdiction,¹³⁸ a tort was committed in the jurisdiction,¹³⁹ a contract connected with the dispute was made in the province¹⁴⁰ or if a new factor establishing a real and substantial connection is identified and present.¹⁴¹ New presumptive factors may be determined by reference to the similarity of the proposed connecting factor with the recognized presumptive factors, the treatment of the connecting factor in case law, the treatment of the connecting factor in legislation and the treatment of the connecting factor in private international law.¹⁴² The party arguing that the court should assume jurisdiction has the burden of proving that one of the presumptive factors is present.¹⁴³

The Court in *Van Breda* was careful to limit the framework to tort cases. As such, the application of the *Van Breda* framework to contracts cases is uncertain, though most commentators believe that the analysis will be extended to other proceedings.¹⁴⁴ In the two years since *Van Breda* was decided, several superior courts of the provinces have applied the *Van Breda* framework to contract and family law disputes.¹⁴⁵ It is thus open to

¹³⁶ 2012 SCC 17, 1 SCR 572 [*Van Breda*].

¹³⁷ *Ibid* at para 86.

¹³⁸ *Ibid* at para 87. Whether or not a defendant corporation is “carrying on business” depends on the common law interpretation of the phrase. In *Van Breda*, *ibid* at para 87, the Supreme Court of Canada held that “carrying on business” requires presence in the jurisdiction, such as maintaining an office, or regularly visiting the territory. Mere promotional activities, or offering products for sale through a website is not sufficient.

¹³⁹ *Ibid* at para 88.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid* at para 90.

¹⁴² *Ibid* at para 91.

¹⁴³ *Ibid* at para 100.

¹⁴⁴ Brandon Kain, Elder Marques and Byron Shaw “Developments in Private International Law: The 2011-2012 Term – The Unfinished Project of the *Van Breda* Trilogy” (2012) 59 SCLR (2d) 277.

¹⁴⁵ For example, in *Avanti Management and Consulting Ltd v Argex Mining Inc*, 2012 ONSC 4395, 219 ACWS (3d) 555, the Ontario Superior Court of Justice considered

parties to argue that traditional common law factors used to determine *jurisdiction simpliciter* for other causes of action now fit into the *Van Breda* analysis under the category of new presumptive factors, although, courts may be cautious in finding new presumptive connecting factors.¹⁴⁶

2) Contract Law

The first potentially relevant area of conflicts of laws rules relevant to applications for contractual capacity is the principles related to contract disputes. These factors may apply as a freestanding analysis, but more likely now fit into the *Van Breda* framework. While an application for the grant of capacity is not in itself a contractual dispute, it is a threshold proceeding related to contract formation and involves an exercise in contract construction to determine whether the contract is for the minor's benefit. As such, the conflicts of laws rules establishing the courts' *jurisdiction simpliciter* over contracts may assist in determining which courts can exercise *parens patriae* jurisdiction to approve minors' contracts.

Contracts will typically have a choice of law clause setting out the governing law of the agreement; however, even where the parties have a choice of law clause in the contract, it is not clear that such a clause will govern territorial competence to grant infants capacity. This is because it is as a threshold issue therefore distanced from the contract itself. Further, territorial competence to approve a contract may be limited by statute. For example, if a New York production company engages a minor who resides in Ontario, for a movie being filmed in Ontario, and the choice of law is New York, the New York courts will not have territorial competence to approve the contract because, pursuant to paragraph 35.03(1) of the *New York Arts and Cultural Affairs Law*, New York courts may only approve a contract with a minor if the minor is domiciled in New York, or the

a motion to stay an action on the grounds of lack of jurisdiction and *forum non conveniens* in relation to a dispute regarding the breach of a services agreement. Goldstein J held at para 6 that the test for jurisdiction is whether there is a real and substantial connection to the forum based on objective factors as set out in *Van Breda*. The Court agreed with the parties to the dispute that, although the Supreme Court of Canada was careful in *Van Breda* to limit the list of presumptive factors to torts litigation, the factors should be applied to the current contractual dispute. The Court held at para 11 that Argex failed to rebut the presumption of jurisdiction that arose from the fact that the defendant was carrying on business in the territory.

¹⁴⁶ Kain, Marques and Shaw, *supra* note 144 at para 19. See also *Knowles v Lindstrom* 2014 ONCA 116 at para 21, (2014), 118 OR (3d) 763 for one example where the Ontario Court of Appeal held that in a family law dispute related to the division of real property, the court held that the location of the property was a presumptive factor establishing jurisdiction.

contractual obligations are performed in the jurisdiction.¹⁴⁷ Finally, there is an issue of whether a choice of law clause in a contract is a valid if made prior to the courts approving the contract or grant the infant capacity to contract.¹⁴⁸

If a choice of law clause cannot or does not establish the territorial competence, the governing law, that is, the proper law of the contract, will be the territory with the closest and most real connection to the transaction.¹⁴⁹ While this may seem fairly straightforward, in practice it is significantly more complex. The question of which law determines capacity to contract has been debated throughout common law jurisdictions, but there is currently no consensus on the question.¹⁵⁰ Capacity could be governed by the law of the domicile or by its governing law.¹⁵¹

The closest case on the subject is the Scottish case *Male v Roberts (1800)*.¹⁵² In that case, an infant domiciled in England made a contract in Scotland. As a defense to an action for breach of contract, the infant pleaded the infancy defense. The Court held that the effect of the infancy defense depended on the law of Scotland because “the contract must be ... governed by laws of that country where the contract arises.”¹⁵³ This decision suggests that the governing law of the contract determines capacity. That said, after the introduction of the closest and most real connection test in 1950,¹⁵⁴ the governing law of a contract is no longer necessarily the place where the contract arises. In Canada, recent jurisprudence supports the proposition that the proper law of the contract will be the law that determines capacity to enter into legally binding agreements.¹⁵⁵ While the proper law of the contract likely governs

¹⁴⁷ *NY Arts & Cult Affr*, *supra* note 10, § 35.03(1)(a), (b).

¹⁴⁸ David Edinger, Personal Correspondence, March 24, 2014 (Email). This issue may be resolved by a request to grant approval *nunc pro tunc*, so that the approval will be deemed to have occurred just prior to signing the contract, however, waiting to do so carries with it an inherent risk that the court will refuse to approve the agreement.

¹⁴⁹ Castel, *supra* note 119 at 31-4.

¹⁵⁰ Lawrence Collins, ed. *Dicey and Morris on the Conflict of Laws*, 13th ed (London: Sweet and Morris, 2000) vol 2 at 1272 [*Dicey and Morris*].

¹⁵¹ *Ibid.*

¹⁵² Reprinted in *Dicey and Morris*, *supra* note 150 at 1274.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid* at 1196-97. According to *Dicey and Morris*, the closest and most real connection test was adopted by the Privy Council in 1950 in the case *Bonython v Commonwealth of Australia*, [1951] AC 201, although it was derived from earlier authorities based on the intention of the parties.

¹⁵⁵ Castel, *supra* note 119 at 31-5; *Dicey and Morris*, *supra* note 150 at 1274. See also *Charron v Montreal Trust Co* (1958), 15 DLR (2d) 240, where the Court held, in

capacity to contract, the law of the territory of the domicile of the parties was previously believed to be the governing law¹⁵⁶ and may have residual influence on whether or not a court will assume jurisdiction.

The proper law of the contract will be the jurisdiction that has the closest and most real connection to the transaction. To determine whether this connection exists, courts will consider factors such as the place of contracting, place of performance, place of residence of the parties, place of business of the parties and the nature and subject matter of the contract.¹⁵⁷ While these factors may, of themselves, establish courts' jurisdiction over contracts, they likely now function as new presumptive factors in the *Van Breda* analysis for determining territorial competence.

3) Family Law and *Parens Patriae*

The other potentially relevant area of conflicts of laws rules is family law. In family law, courts exercise *parens patriae* jurisdiction in custody and guardianship disputes.¹⁵⁸ While these proceedings are often governed by provincial legislation, in absence of specific statutory rules, the common law conflicts of laws rules apply.¹⁵⁹ When exercising *parens patriae* jurisdiction, courts will usually have territorial competence if the territory where the proceedings are initiated is the ordinary residence of the minor.¹⁶⁰ If the court finds that making an order will be in the best interests of the child, it may exercise jurisdiction on the basis of the child's presence in the province.¹⁶¹ The court may also exercise jurisdiction where the infant has a real and substantial connection to the jurisdiction.¹⁶² Notably, the domicile of a child within a province has been discredited as a ground for exercising *parens patriae* jurisdiction.¹⁶³ These principles guiding the exercise of *parens patriae* jurisdiction in family law may provide a basis for superior courts' territorial competence to approve minors' contracts, if it is in the minor's best interests.

The courts' territorial competence to exercise *parens patriae* authority may also now be governed by the *Van Breda* framework. That said, in

relation to the validity of a separation agreement, that "a party's capacity to contract is to be governed by the proper law of the particular contract, that is, the law of the country with which the contract is most substantially connected."

¹⁵⁶ Castel, *supra* note 119 at 31-23.

¹⁵⁷ *Ibid* at 31-6.

¹⁵⁸ Castel, *supra* note 119 at 18-5.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid*.

¹⁶¹ *Ibid*.

¹⁶² *Ibid*, at 18-6.

¹⁶³ *Ibid*.

family law, with the exception of the first presumptive factor of the defendant's presence in the territory, the presumptive factors in *Van Breda* may not apply.¹⁶⁴ In exercising *parens patriae* jurisdiction to approve infant contracts, the second and fourth factors (that the defendant party is carrying on business in the territory, and the contract was made in the territory, respectively) may establish a presumption of territorial competence. It is open to parties to argue that the traditional factors such as the ordinary residence of the minor¹⁶⁵ and the presence of the minor in the jurisdiction if the order is to the benefit of the minor¹⁶⁶ are new presumptive factors in the *Van Breda* analysis.

C) Conclusions on Jurisdiction: Reconciling Parens Patriae and Jurisdiction with Engineer, Corum and Styles

The conflicts of laws principles discussed above are not easily reconciled with one another or with the outcomes of the aforementioned infant applications for contract approval. In the case of the *Corum* application, there were three possible territories that might have had *jurisdiction simpliciter*: Ohio, where the minor was domiciled; California, the state where the production company resided; and the province of Manitoba where the picture was being filmed and the infant was present at the time of the application.

Conflicts of laws principles governing contracts suggest that the proper law of the contract will govern capacity. Applying the traditional conflicts of laws factors, Manitoba had a close and real connection to the transaction because the contractual obligations were performed in the province, and therefore the Court ought to have had jurisdiction to approve the contract. If *Van Breda* now governs the assumption of jurisdiction for contracts, the court arguably had *jurisdiction simpliciter* because the respondent was carrying on business in the Manitoba. This factor ought to have raised a presumption of territorial competence, which was not rebutted because the application was uncontested.

Similarly, applying the conflicts of laws principles for the exercise of *parens patriae* jurisdiction in family law, the Court could have granted the application on the basis of the traditional factors for jurisdiction because the child was present in Manitoba and the agreement was to the minor's benefit. If the *Van Breda* analysis applies, it should yield the same result: the defendant was carrying on business in the jurisdiction by filming the

¹⁶⁴ Vaughan Black "Choice of Law and Territorial Jurisdiction of Courts in Family Matters" (2013) 32 CFLQ 53 at 60.

¹⁶⁵ Castel, *supra* note 119 at 18-5.

¹⁶⁶ *Ibid.*

picture in Manitoba, which raises a presumption of jurisdiction. The presumption was not rebutted and as such, the court could have exercised *parens patriae* jurisdiction to approve the agreement.

The outcome of the *Corum* application suggests the presence of other overriding considerations when infants' contractual capacity is at stake. The exercise of *parens patriae* jurisdiction in custody disputes commonly depends on the ordinary residence of the minor and this is often the primary factor that courts will consider in deciding whether to assume jurisdiction and exercise its *parens patriae* powers. There is some post-*Van Breda* jurisprudence supporting this conclusion. In *Detcheverry v Herriot*,¹⁶⁷ the Nova Scotia Supreme Court considered whether it could assume *jurisdiction simpliciter* to exercise its *parens patriae* jurisdiction to make an emergency custody order. The Court observed that "as between competing jurisdictions even within Nova Scotia, the ordinary residence and convenient forum are determining factors when a court must determine the appropriate forum for hearing a matter involving a child."¹⁶⁸ The Court ultimately declined jurisdiction in favour of Saint-Pierre Miquelon, which was the ordinary residence of the child.¹⁶⁹ The decision in *Detcheverry* suggests two things: First, it appears that *Van Breda* can apply to situations involving minors' interests, albeit with different presumptive factors. Vaughan Black has also suggested this conclusion.¹⁷⁰ Second, the case suggests that ordinary residence is an important, if not overriding, consideration in proceedings involving children, and arguably provides a solid basis for a new presumptive factor in the *Van Breda* analysis where minors' interests are at stake.

This conclusion is supported by, and helps to explain the outcomes in *Engineer*, *Styles* and *Corum*. In *Engineer*, the applicant was domiciled in British Columbia, and made the application to the BC Supreme Court. In the decision, Davies J held that "the domicile of the petitioner is ... an overriding consideration concerning the applicability of the *Infants Act* and the question of capacity."¹⁷¹ In *Styles*, the Court clearly had territorial competence because the infant was domiciled in Manitoba, the production company's residence was in Manitoba, and the contractual obligations were performed in Manitoba. Conversely, in *Corum*, the infant was not domiciled or resident in Manitoba, and the application was dismissed for want of jurisdiction. As such, absent further guidance from the Supreme Court of Canada or the legislature, and despite other factors that may have

¹⁶⁷ 2013 NSSC 315, (2013), 36 NSR (2d) 150 [*Detcheverry*].

¹⁶⁸ *Ibid* at para 69.

¹⁶⁹ *Ibid* at para 114.

¹⁷⁰ Black, *supra* note 164 at 60.

¹⁷¹ *Engineer*, *supra* note 87 at para 8.

raised a presumption of jurisdiction, the superior court of the territory in which the infant is domiciled or ordinarily resides is likely considered the only court with the territorial competence to exercise *parens patriae* powers to approve a minor's contract.

6. *Conclusions and Recommendations*

The right of a minor to disaffirm a contract plays an important role in protecting minors participating in the marketplace, and most commentators agree that the protection should be maintained. The voidability of minors' contracts creates risk for adults seeking to engage the services of minors. In the entertainment industry, these risks are magnified because most contracts relate to both the provision of services and the right to exploit the rights to the performance. While the law must adapt to mitigate these risks, it is important to strike the right balance between the rights of child performers and the adults who seek to engage their services.

Legislation permitting court approval of infants' contracts, such as the procedures outlined in the *California Family Code*, the *New York Arts and Cultural Affairs Law*, and the *BC Infants Act*, are the best mechanisms for achieving an appropriate balance between protecting minors' rights and producers' interests. Court approval has the advantage of protecting minors' best interests while simultaneously protecting producers from the risk of contractual disaffirmance by infant performers. Legislated approval procedures often have the added benefit of clarifying the courts' territorial competence.

While court approval may seem administratively onerous, increased use and careful legislative drafting can provide for streamlined application processes. Applying for court approval in California, for example, is now relatively expedient and cost effective due to the high volume of petitions received by the courts.¹⁷² To further decrease administrative burdens, it may not be necessary to approve all infant contracts, and legislation can be drafted to specify the circumstances that will trigger the court approval procedure. For example, the *Minors (Property and Contracts) Act*¹⁷³ in New South Wales only permits court approval of contracts where the proposed contract is to the value of \$10 000 AUD or more, and the contract is the benefit of the minor.¹⁷⁴ Canadian jurisdictions could employ similar thresholds, so that only contracts over a certain value require court approval.

¹⁷² Krausz and Litwak, *supra* note 50 at 317.

¹⁷³ *Minors (Property and Contracts) Act* 1970 (NSW).

¹⁷⁴ *Ibid*, s 27(3)(a), (b).

Absent legislated court approval procedures, parties contracting with minors may apply to have contracts approved on the basis of the superior courts' inherent *parens patriae* jurisdiction to act in the best interests of minors. Such applications should be made in the jurisdiction where the infant is domiciled or ordinarily resides, as the outcomes of *Engineer, Styles* and *Corum* suggest that the domicile or ordinary residence of the infant will trump any other countervailing factors that might speak to a real and substantial connection in another jurisdiction. Ultimately, it will be a business decision for producers to decide whether, in a given case, it is worth having the court approve the contract. In any case, and regardless of whether court approval of minors' contracts is based on statutory authority or the common law, it is important for Canadian lawyers to be aware of the issues associated with minors' contracts both when advising Canadian producers on risk, and when dealing with American production companies carrying on business in Canada, who are familiar with, and may expect, court approved contracts with minors.