Bound by Provisions

Choice of Forum in Common Law Canada

By Brian C. Elkin

Recent decisions reflect an important trend that risk managers and lawyers advising clients who deal in cross-border transactions with Canadian businesses should be aware of.

There is an old bridge that crosses the Detroit River and the Canada–United States border. It links Detroit, Michigan, to Windsor, Ontario. It is an aging structure that many say needs replacing. It carries thousands of Canadian sports fans into Detroit to support Detroit's professional sports franchises. It brings tourists to each country. It also carries goods having a value of $323 million across the border, a figure confirmed with the Canadian Consulate in Detroit. This volume is not annual or monthly. It is the value carried each and every day.

The overall value of the trade between Canada and the United States is over $640 billion a year. Commercial agreements direct how businesses buy and sell a significant portion of the goods crossing this border. The businesses concluding these agreements to buy or sell goods and services usually do not think about litigation when they sign these contracts.

When, as often occurs, one party to a commercial agreement starts a lawsuit it usually will initiate the proceeding where it carries on business. A defendant usually will prefer that an action take place on its home turf. Sometimes the parties will become involved in competing actions that lead to competing motions to stay or dismiss or motions for anti-suit injunctions. This will happen whether the protagonists are Canadian and American or Canadian and Australian.

One way to avoid forum shopping and a string of motions is to insert a clear choice of forum provision into cross-border commercial agreements. In the past, Canadian courts in the common law provinces, meaning every jurisdiction but the civil code jurisdiction of Québec, often considered the existence of a choice of forum provision as just one of the factors that they would take into account when they received forum non-conveniens motions.

That is no longer the case. A foreign business sued in a Canadian common law court or a Canadian plaintiff can now expect that a Canadian court in a common law jurisdiction will uphold a choice of forum provision whether the provision elects a Canadian forum, an American forum, or an Austrian forum.

In *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351 (*Expedition*),

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a decision released on May 14, 2010, the Ontario Court of Appeal took a robust approach to enforcing a forum selection clause in a commercial agreement. The court decided that if the parties agreed to a particular forum for the adjudication of disputes related to their agreement, that fact would trump and render insignificant the other factors usually considered.

Expedition, a Cochrane, Ontario-based helicopter operator, sued Honeywell, an American supplier of a temporary replacement engine for one of its helicopters. The replacement engine failed on a flight in Saskatchewan. The failure caused the death of the pilot and a passenger. Expedition sued Honeywell in Ontario claiming over $2.8 million dollars in financial losses plus out-of-pocket expenses. Expedition also started an action in Arizona, but attempted to advance the Ontario lawsuit.

Two tort actions arising from the deaths caused by the accident were commenced against Honeywell in South Carolina, where Honeywell converted the engine to Expedition's specifications. In one of those actions, Honeywell had initiated its own forum non-conveniens motion and specifically argued that Canada was a "significantly more convenient forum."

The contract under which Honeywell supplied the replacement engine included a provision that made Arizona law applicable to the interpretation of the agreement and gave its courts exclusive jurisdiction.

Shortly after it was served, Honeywell delivered a motion to stay the Ontario action based on this forum selection clause.

1. Clause in *Expedition*. CHOICE OF LAW. THIS AGREEMENT SHALL BE GOVERNED, CONTROLLED AND INTERPRETED UNDER THE LAW OF THE STATE OF ARIZONA, EXCLUDING ITS CONFLICT OR CHOICE OF LAW PROVISIONS. The parties (i) agree that any state or federal court located in Phoenix, Arizona shall have exclusive jurisdiction to hear any suit, action or proceeding arising out of or in connection with this Agreement, and consent and submit to the exclusive jurisdiction of any such court in any such suit, action or proceeding and (ii) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding to the extent permitted by the applicable law, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper, or that this Agreement or any of the transactions contemplated hereby may not be enforced in or by such courts.

The leading case respecting enforcement of a forum selection clause in Canada is *Z.I. Pompey Industries v. ECU-Line N.V.*, 2003 SCC 27 (CanLII), [2003] 1 S.C.R. 450 (*Pompey*). In *Pompey*, the Supreme Court of Canada held that the existence of a forum selection clause in an agreement, in that case in a maritime bill of lading, requires a plaintiff to "satisfy the court that there is good reason it should not be bound by the forum selection clause." The Supreme Court of Canada added that "it is essential that the courts give full weight to the desirability of holding parties to their agreements." *Id.* at. para. 20.

In the past, a defendant resisting a lawsuit in a particular forum had to convince a common law Canadian court that "a vastly more convenient forum" existed to obtain a stay of an action in favor of proceeding elsewhere. Frequently, in motions for stays, the Supreme Court of Canada decision in *RJ. MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.), [1994] 1 S.C.R. 311, is cited as the authority for the proposition that a defendant must meet a stiff injunction-type test when objecting to a plaintiff's choice of forum.

In *Pompey*, the Supreme Court of Canada specifically backed away from this approach and adopted the "strong cause" test articulated in the British case *Eleftheria*, [1969] 1 Lloyd's REP 237 (Admiralty Division). At paragraph 19 of *Pompey*, the following is cited from *Eleftheria*:

(1) Where plaintiff sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated or more readily available and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of the security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

Two paragraphs later, the Supreme Court of Canada held that "there is a similarity between the factors which are to be taken into account when considering an application for a stay based on a forum selection clause and those factors which are weighed by a court considering whether to stay proceedings in 'ordinary' cases applying the *forum non-conveniens* doctrine[.]" On the basis of that finding, it would appear that a judge would undertake a usual analysis when considering a stay due to a forum selection clause, but the plaintiff bears the burden of proof rather than the defendant. In fact, that has happened often.

In *Expedition*, the motion judge applied these criteria and found that on balance the plaintiff had met the "strong cause" test that *Pompey*, relying on *Eleftheria*, imposes. 2010 ONCA 351, para. 6. The motion judge then exercised her discretion to find the plaintiff ought to succeed.

Appellate courts in Canada, as elsewhere, are very reluctant to interfere with the exercise of judicial discretion by lower court judges. That may explain why the Ontario Court of Appeal in *Expedition* did not do so.

Rather than find that the motion judge's reasoning in exercising her discretion was "patently unreasonable," which would allow it to reverse her decision, the Ontario Court of Appeal explained its disagreement with the motion judge's approach by finding errors of law. The Ontario Court of Appeal held that

> …even though the literal wording of the test in The "*Eleftheria*" may imply a conventional *forum non-conveniens* analysis, *Pompey* makes clear that such an analysis is not to be used. Rather, the forum selection clause pervades the analysis and must be given full weight in the consideration of other factors. It is not enough for the plaintiff to establish a "strong" case that Ontario is the more convenient forum. The plaintiff must show "strong cause" that the case is exceptional and the forum selection clause should not be enforced.

Expedition, 2010 ONCA 351, para. 11.

The Ontario Court of Appeal found that the motion judge placed "marginal weight" on the forum selection clause, holding that she committed a reversible error of law when she treated the forum selection clause as simply among and of equal importance to the "other factors relevant to *forum non-conveniens*." *Id.* at para. 13.

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The Ontario Court of Appeal found that the motion judge erred in "…attaching weight to Honeywell's concession that Ontario is the appropriate convenient forum for the trial of the wrongful death action of the passenger in the helicopter. That action was not governed by the forum selection clause. As explained above, whether Ontario is the convenient forum is not the proper question in a case with a forum selection clause." *Id.* at para. 19.

The Ontario Court of Appeal's decision then takes the test that the Supreme Court of Canada adopted in *Pompey* to a more stringent level. It finds that "…the analysis of whether there is a 'strong cause' to decline to enforce a forum selection clause is not an analysis of the forum conveniens in the conventional sense." What this means is that even though the Supreme Court of Canada has identified typical issues from the forum non-conveniens case law that courts ought to address, those usual issues no longer carry the same weight as a choice of forum provision.

The Ontario Court of Appeal briefly referred to six factors that might cause it to decline to enforce a forum selection clause in a commercial agreement. Those factors are (1) whether a plaintiff was induced to agree to the clause by fraud or improper inducement; (2) whether the contract was otherwise unenforceable; (3) whether the court in the selected forum declined jurisdiction or could not otherwise deal with the claim; (4) whether the claim or circumstances raised in the case are beyond what was reasonably contemplated by the parties when they agreed to the clause; (5) whether the plaintiff could not expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated; and (6) whether enforcing the clause in a particular case frustrated clear public policy.

A plaintiff typically will find these criteria very difficult to prove.

A motion for leave to appeal to the Supreme Court of Canada in *Expedition* was dismissed.

Subsequent Cases

Shortly after *Expedition* was decided, the same court released a decision in *Momentous.ca Corporation v. Canadian Association of Professional Baseball Ltd.*, 2010 ONCA 722 (CanLII) (*Momentous*). This case arose from the demise of a minor league baseball team in Ottawa. The plaintiffs, who sued in Ontario, had two agreements. Both specified that parties to the agreements would arbitrate disputes and enforce them in North Carolina in accordance with North Carolina laws.

There were two added wrinkles. First, two defendants, the City of Ottawa and an individual defendant, were not party to either agreement. North Carolina courts had declined jurisdiction to hear an action that the individual defendant brought against two of the plaintiffs arising from an indemnity that he had provided for stadium rent. *Id.* at paras, 50, 52.

The second was an argument that the objecting defendants had attorned to jurisdiction by contesting the merits of the action. *Id.* at para. 32.

The Ontario Court of Appeal agreed that by defending on the merits the defendants had attorned to jurisdiction. It added, "But that does not end the matter." Rather, it determined that once jurisdiction exists, the court must decide whether it should, in its discretion, exercise its authority over the action. *Id.* at paras. 33, 36.

It then followed *Expedition* and *Pompey*, holding that the existence of the forum selection provisions created a reverse onus on the plaintiff to show strong cause why a court should not enforce the agreements. *Id.* at paras. 39, 40. It found that the plaintiffs could not meet that onus. In reaching that conclusion the court placed some emphasis on the existence of arbitration provisions, noting that their existence provided "an even firmer basis to preclude the plaintiff from suing in Ontario." *Id.* at paras. 46, 47.

The argument that two of the defendants were not parties to the contracts containing choice of forum and arbitration provisions was dismissed as a result of the manner in which the plaintiffs pleaded their claim. Specifically, the plaintiffs alleged that all the defendants were necessary parties to their action and that their claims for relief "arise out of the same transactions and occurrences." *Id.* at para. 52.

Momentous was appealed to the Supreme Court of Canada. The argument took place on February 10, 2012, and the decision was released on March 16, 2012. The Supreme

Court of Canada was not only extremely quick to dismiss the appeal but was also extremely clear in its reasons. The judgment is 12 paragraphs long in its entirety. Paragraphs 9 and 10 read:

> [9] In *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 (CanLII), 2003 SCC 27, [2003] 1 S.C.R. 450, this Court confirmed that, in the absence of specific legislation, the proper test in determining whether to enforce a forum selection clause is discretionary in nature. It provides that unless there is a "strong cause" as to why a domestic court should exercise jurisdiction, order and fairness are better achieved when parties are held to their bargains.
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> [10] The appellants did not argue that there was any reason, apart from the delivery of a statement of defence, for the court to determine that there was "strong cause" for Ontario to displace the forum that the parties have agreed should resolve their disputes. We agree with the Court of Appeal that the motion judge did not err in the exercise of her discretion to dismiss the action under Rule 21.01(3)(a).

When Choice of Forum Will Not Be Enforced

In several decisions Canadian common law courts issued judgments not to enforce a choice of forum provision when a party to a lawsuit was not bound by the provision. One example is *Stubbs v. Applied Tech Systems Inc.*, 2010 ONCA 879. The plaintiff sued, claiming wrongful termination of employment and that the shares that he held in a holding company related to the corporation that employed him had been undervalued. He also alleged that he had been misled about the financial position of the holding company when he purchased his shares. *Id.* at para. 53.

The share purchase agreement included an applicable law provision specifying that the laws of the Netherlands would apply and that "Any disputes" were to be "settled by the competent Court in Amsterdam." The plaintiff's employment agreement did not address applicable law and jurisdiction. *Id.* at para. 30.

The court found that the employer defendant and other related entities carried on business in Ontario and had been involved integrally in the employment relationship with the plaintiff. The court also found that the offshore affiliate defendants were necessary parties, and the holding company was "clearly linked" to the plaintiff's employment. His share purchase was a condition of employment with one of the offshore defendants for which he worked before the company located in Ontario hired him. The dispute over the value of his shares was "a critical component of his rights on termination." *Id.* at para. 55. In the end the court determined that forcing litigation in two jurisdictions, which would require separating issues about the share purchase and value from the rest of the relationship, created a risk of inconsistent results. It would, the court stated, "be like trying to unscramble an egg." *Id.* at para. 57.

In another case, *BTR Global et al. v. RBC Dexia Investor Services Trust et al.*, 2010 ONSC 316, a motion judge in Ontario refused to enforce a forum selection provision due to a delay in raising the issue, a decision maintained by the Ontario Court of Appeal. 2011 ONCA 620 (CanLII).

In this case, an insolvent broker failed to intervene in three applications with respect to the possession of private securities although it was well aware of the proceedings, which were brought in October 2008, October 2009, and April 2010. In fact, at one point, the court required the broker's English solicitor to be served with the application record.

It was only when the applicant sought to have a court declare the applicant the owner entitled to possess the private securities and a variety of publicly traded securities that the broker took steps. It started an action for a declaratory order in New York and moved to stay the plaintiff's two actions in Ontario based on an exclusive jurisdiction clause in its agreement with the plaintiff. Motion decision, paras. 13–21.

The motion judge dismissed the broker's motion. Among other things, he concluded that the broker's position amounted to a collateral attack on the earlier orders, to which the broker was not entitled due to its previous failure to challenge jurisdiction. Motion decision, para. 37. He also held that the broker's conduct in waiting over two years to raise its position meant that it could not meet the onus required to support a stay or dismissal. Motion decision, para. 42.

The Ontario Court of Appeal in *BTR Global* followed *Expedition* but held that in the *BTR Global* case sufficiently strong cause supported refusing to enforce the choice of forum clause, which arose from the broker's delay in raising the issue. The jurisdiction arguments were held to be the same for both the action concerning the private securities and the action concerning the public securities: "The fact that these are separate proceedings is really a distinction without a difference." 2011 ONCA 620 (CanLII), para. 9. The Ontario Court of Appeal specifically declined to endorse the motion judge's determination that the broker was engaged in a collateral attack on the earlier orders. *Id.* at para. 9.

Readers should note that when a common law court considers enforcing provisions in a *consumer* contract, it becomes much more likely that the court will not enforce a forum selection clause, especially in a class proceeding in which one of several defendants wants to rely on a choice of forum provision in its agreement.

CJPTA Jurisdictions

British Columbia, Saskatchewan, and Nova Scotia have enacted uniform statutes known as the Court Jurisdiction and Proceedings Transfer Act (CJPTA) to address choice of forum cases. None of these statutes refer to choice of forum provisions. In all the decisions that we have seen, the courts of these provinces have concluded that courts should follow the approach in *Expedition* and in *Momentous*. As stated by the British Columbia Court of Appeal in *Viviforce Systems Inc. v. R & D Capital Inc*, 2011 BCCA 260 (CanLII), "the *Act* does not alter the general approach to be taken when the parties agree to a forum selection clause." *Id.* at para. 14. The court specifically dismissed a submission that the statute overrode forum selection clauses. In that case the parties were sent to litigate in Québec.

In a decision released on January 23, 2012, the British Columbia Court of Appeal reiterated its conclusion and enforced a choice of forum provision electing the courts of Salzburg, Austria, as the forum for disputes. In *Preyman v. Ayus Technol-*

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ogy Corporation, 2012 BCCA 30 (CanLII), the added argument was made that the choice of forum provision did not choose an exclusive forum. The court was not swayed and relied on *Viviforce* to conclude that if the statute allows a finding of jurisdiction, a court must next undertake an inquiry based on the common law as set out in *Pompey* to decide if that the court should *assert* jurisdiction.

Courts in Saskatchewan and Nova Scotia have reached similar conclusions. *See Microcell Communications Inc. v. Frey*, 2011 SKCA 136 (CanLII); *Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137 (CanLII); *Instruments Concepts-Sensor Software Inc. v. Geokinetics Acquisition*, 2012 NSSC 62 (CanLII).

What to Take from These Decisions

When two commercial parties litigate, unless a party delayed raising the issue or there are multiple and inconsistent agreements, the courts in the common law provinces very likely will enforce choice of forum provisions. Lawyers should make corporate clients aware of choice of forum clauses, and should to try to make them consistent when more than one agreement with another business is involved.

Risk managers and lawyers advising clients who deal in cross-border transactions with Canadian businesses should make them aware of the trend described above. Business people must understand the message that if they have agreements with Canadian businesses that include a choice of forum provision, they will be bound by it. Unless they are prepared to undergo the expense and inconvenience of litigating in a jurisdiction away from home, they should negotiate which forum to choose in the event of litigation. Although business decision makers sometimes do not want to address possible litigation when undertaking transactions, it is prudent for them to do so.

American and European lawyers and risk managers should know that the Canadian legal environment can offer some surprises. Documentary discovery typically is far broader than the documentary discovery that most American lawyers have experience with. In Ontario, the largest province, parties must disclose all documents that are or were in their possession or control relevant to the litigation. A lawyer can examine a single representative of a party opposite in interest as part of the discovery process once, without consent or an order. Costs are usually awarded to a successful party after a trial on a scale that creates a serious consequence to a losing party. Costs will often approximate two-thirds of the actual bill for the services that the winning counsel rendered to a client. Assessable disbursements will be added to the award of costs.

Lawyers will need to balance the exposure to extensive documentary discovery and significant costs awards against giving up these weapons against another party and foregoing multiple depositions. In some situations, agreeing to a Canadian forum can best serve a client.

Commercial litigation will almost always take place before the superior court of a province. Diversity of citizenship jurisdiction does not exist. The judges in all superior courts are federally appointed. None are elected.

Civil jury trials are also still relatively rare in Canada. In cases in which sympathy factors may sway a jury, a litigant may wish to try cases in Canada, before a judge alone. That does not mean a litigant will never face a jury. It only means that it happens less often than in the United States. Judges may dismiss a jury. In Ontario it is difficult to convince a judge to take that step. Judges in some other provinces are somewhat less reluctant.

Will anyone ever look at an old bridge the same way? FD