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Highlights

FOREIGN DEFENDANTS

Muscutt v. Courcelles revisited?

In the recent decision of *Van Breda v. Village Resorts Limited*, the Ontario Court of Appeal had the opportunity to revisit and attempt to clarify the eight-factor test for determining when a court can assume jurisdiction over an out-of-province defendant in a lawsuit involving a tort committed outside of Ontario, a test previously developed by the Ontario courts in the so-called "Muscutt quintet" of cases originating with *Muscutt v. Courcelles*. Colin Fraser examines the decision in *Van Breda* and opines that having been given the opportunity to abandon the Muscutt test in favour of a more precise and structured model, the Court of Appeal nonetheless elected not to pursue a complete reform of the law. Following *Van Breda*, the test for the assumption of jurisdiction over an out-of-province defendant is reduced from eight factors to a single core factor – the connection between the forum and the parties. The remaining Muscutt factors are relegated to the domain of "guiding principles." 726

FORUM SELECTION CLAUSES

parties bound by contractual forum selection

In *Expedition Helicopters Inc. v. Honeywell Inc.*, the Ontario Court of Appeal determined that if the parties to a commercial agreement agree to a particular forum for the adjudication of disputes related to their agreement, that fact will trump and make the effect of the other factors usually considered in a choice of forum motion insignificant. Brian Elkin and Mary Delli Quadri review the decision upholding the validity of the forum selection clause and conclude that risk managers for Canadian companies involved in cross-border transactions need to ensure that the implications of a forum selection clause are known throughout the organization, including the costs and inconvenience that can arise from having to litigate offshore. 731

DUTY OF LOYALTY

a lawyer's duty of loyalty to a former client

The Ontario Court of Appeal in *Consulate Ventures Inc. v. Amico Contracting & Engineering Inc.* recently considered the circumstances under which a lawyer owed a duty of loyalty to a former client and thus was precluded from acting against the former client in an appeal case. As John Nicholson and Kevin Ross explain, the decision is a reminder to all counsel regarding the duties owed to both existing and former clients with the courts demanding fidelity and loyalty to both existing and former clients, no matter how ancient or brief the retainer was before the former client parted ways with the lawyer in question. 734

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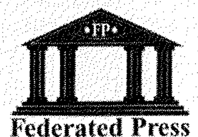

Federated Press

FORUM SELECTION CLAUSES

Expedition Helicopters Inc. v. Honeywell Inc. – Case Comment

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In *Expedition Helicopters Inc. v. Honeywell Inc.*,[1] a decision released on May 14, 2010, the Ontario Court of Appeal took a robust approach to the enforcement of a forum selection clause in a commercial agreement. The Court decided that if the parties agree to a particular forum for the adjudication of disputes related to their agreement, that fact will trump and make the effect of other factors usually considered in a choice of forum motion insignificant.

Facts

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 loss plus its out-of-pocket expenses. Although they also started an action in Arizona, Expedition 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 brought its own *forum non conveniens* motion and specifically argued that Canada was a "significantly more convenient forum."

The contract for the supply of the replacement engine provided:

> 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.

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

The leading case respecting enforcement of a forum selection clause in Canada is *Pompey Industrie v. ECU-Line N.V.*[2] In *Pompey*, the Supreme Court of Canada held that the existence of a forum selection clause in an agreement (in that case, 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 added "it is essential that the courts give full weight to the desirability of holding parties to their agreements."[3]

In the past, a defendant resisting a lawsuit in a particular forum had to convince the court that there was what some have called "a vastly more convenient forum" to have an action stayed in favour of proceeding elsewhere. Frequently, in motions for stays, the Supreme Court of Canada decision in *RJ. MacDonald Inc. v. Canada (Attorney General)*[4] is cited as authority for the proposition that there is a very stiff injunction-type test to be met by a

[1] 2010 ONCA 351, ("*Expedition*").

[2] 2003 SCC 27 (CanLII) [2003] 1 S.C.R. 450 ("*Pompey*").

[3] Ibid. at paragraph 20.

[4] 1994 CanLII 117 (S.C.C.) [1994] 1 S.C.R. 311.

defendant objecting to a plaintiff's choice of forum.

In *Pompey*, the Supreme Court specifically backed away from this approach and adopted the "strong cause" test articulated in the British case the "*Eleftheria*."[5] At paragraph 19 of *Pompey*, the following is cited from *Eleftheria*:

> (1) Where plaintiffs 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 held "... 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 usual analysis must be undertaken, but that the burden of proof is on the plaintiff, rather than upon the defendant.

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

It is easy to quarrel with the manner in which the motions judge applied the criteria. She paid very little attention to the second test set out in the *Eleftheria*. She also noted, but took nothing from the fact that she herself found, Honeywell had no known connection to Ontario other than through its dealings with Expedition.

There is a well-known reluctance of appellate courts in Canada to interfere with the exercise of judicial discretion by lower court judges. That may explain why the Court of Appeal did not do so in this matter.

Rather than find that the motions judge's reasoning in exercising her discretion was "patently unreasonable," which would allow it to reverse her decision, the Court of Appeal set out its disagreement with the approach of the motions judge in strong language. At paragraph 11, the Court of Appeal held:

> Thus, even though the literal wording of the test in "*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.

The Court of Appeal went on to hold that the motions judge placed "marginal weight" on the forum selection clause. They held it to be an error for her to leave the existence of it out of her assessment of "other factors relevant to *forum non conveniens*."[6]

[5] The "*Eleftheria*" [1969] 1 Lloyd's Rep. 237 (Admiralty Division).

[6] Supra note 1 at paragraph 13.

The Court of Appeal's rebuke criticized the motions judge for

> ... 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.[7]

The Ontario Court of Appeal's decision then takes the test adopted by the Supreme Court of Canada in *Pompey* to a more stringent level. It bluntly states "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 in spite of the Supreme Court of Canada setting out typical issues to be addressed in a case involving the enforcement of a forum selection clause, those issues are not to be considered except in "exceptional circumstances."

The Ontario Court of Appeal briefly addressed what factors might cause it to decline to enforce a forum selection clause in a commercial agreement. Those few factors are: (1) whether a plaintiff was induced to agree to the clause by fraud or improper inducement; (2) whether the contract is otherwise unenforceable; (3) whether the court in the selected forum declines jurisdiction or is otherwise unable to deal with the claim; (4) whether the claim or circumstances that have arisen are outside what was reasonably contemplated by the parties when they agreed to the clause; (5) whether the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been unreasonably anticipated; and (6) whether enforcing the clause in a particular case frustrates clear public policy.

These are criteria that will typically be very difficult to prove.

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

Assessment

Any corporation involved in cross-border transactions may be affected by this decision. Risk managers ought to make sure that the business people in their organizations understand that entering into a contract that includes a forum selection clause that picks a foreign jurisdiction that any litigation will ensue there. They should highlight the added cost and inconvenience that arise from having to litigate offshore and attempt to have the business people look for and address the issue.

What a well-drafted forum selection clause can do is allow a Canadian business to sue for breach of contract on their home turf. It does not, however, necessarily mean that a forum selection clause will always be given effect if a Canadian business is sued elsewhere. That will largely depend upon how the relevant foreign court interprets these clauses.

Insurers who write liability policies for businesses involved in cross-border transactions should, if the opportunity arises, stress the importance of these provisions to their insureds. The possibility of having to litigate in different jurisdictions may add to the risk assessments that underwriters need to undertake and may add to premium costs.

[7] Ibid. at paragraph 19.