

Ontario action against national law firm stayed in favour of Alberta

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A plaintiff has the right to commence a proceeding in a jurisdiction of their choosing. However, this right is not absolute. Where the issues in the proceeding are only weakly connected to the plaintiff's jurisdiction of choice or where the parties in a contract have expressly agreed to exclusively require issues to be determined in a specific jurisdiction, a court in the plaintiff's chosen jurisdiction can decline to hear or stay the proceeding in favour of a more appropriate jurisdiction or in the jurisdiction specified in the contract.

In *Pesorama Inc. v. Borden Ladner Gervais LLP*, 2023 ONSC 3670 (not available on CanLII), the plaintiff commenced a professional negligence action against a Calgary-based lawyer, M, and the defendant national law firm in Ontario rather than Alberta. Among other locations, the national law firm has regional offices in Calgary, Toronto and Ottawa.

The plaintiff had retained M in connection with a plan to open discount retail stores in Mexico. The legal services to be provided by M were set out in a retainer agreement that had been delivered to the plaintiff's principal, B, by email. The retainer letter was dated 6 June 2017.

On 31 July 2017, B executed the retainer agreement in Mexico and, more than a week later, delivered the "execution page" to M via email.

The retainer agreement contained a forum selection clause which stated that the agreement was governed by the laws of Alberta and the federal laws of Canada, and, moreover, that any dispute between the parties would "...be dealt with exclusively in the courts of [Alberta]".

After defending the plaintiff's action, M and the law firm brought a motion to have it stayed on the grounds that the claim had to be brought in Alberta. The motion judge agreed.

M and the law firm contended that the forum selection clause governed the jurisdiction in which the plaintiff's dispute needed to be determined. In general, as summarized in *Novatrax International Inc. v. Hägele Landtechnik GmbH*, 2016 ONCA 771, the law favours the enforcement of forum selection clauses in commercial contracts.

As well, M and the law firm relied on the decision of an Alberta taxation or assessment officer that any dispute about the retainer agreement and the legal services provided to the plaintiff had to be determined by an Alberta judge.

Before the plaintiff had commenced the Ontario action, M and the law firm brought an application in Alberta to assess their accounts. The plaintiff owed the law firm a substantial sum of money on outstanding invoices. In the assessment application, the plaintiff represented that the validity of the retainer agreement was going to be determined by an Ontario court, and accordingly no further steps should be taken in the assessment.

In response to the plaintiff's submission, the law firm argued that under the [Alberta Rules of Court](#) the validity of the retainer agreement had to be referred to an Alberta judge. The assessment officer agreed with the law firm's submission. The assessment officer's decision was not appealed.

Lastly, M and law firm argued that Alberta was a more appropriate forum in which to hear the plaintiff's professional liability claim.

With respect to the forum selection clause, the motion judge determined that it was valid, clear and enforceable. The plaintiff's principal was a sophisticated party and there was no evidence that he did not understand the clause. Although the plaintiff's principal contended that he had not read the agreement, the plaintiff

was still bound by the clause. The motion judge held:

As an adult who chose to sign what was obviously a legal document, without calling his lawyer to discuss it if he had questions or doubts,...[B] is not excused from his obligations because he made a choice to sign the agreement without reading it...

The fact that M and the law firm had defended the Ontario action did not preclude the motion judge from determining that the forum selection clause governed the jurisdiction in which the plaintiff was required to litigate its claim: See *Momontous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722 at paragraph 35.

In order to defeat a valid, clear and enforceable forum selection clause, a party must show strong cause why the forum selection clause should not be enforced. The plaintiff was unable to do so.

In the alternative, the motion judge found that the decision of the Alberta assessment officer was final and binding on the parties and that it would be an abuse of process to ignore or avoid it. The assessment officer had already determined that an Alberta judge was required to determine the validity of the retainer agreement.

Lastly, the plaintiff had only shown a weak connection to Ontario. Although the plaintiff showed that M had attended the law firm's Toronto office to participate in the plaintiff's board meetings, from time to time, Alberta was the most appropriate forum in which to litigate the plaintiff's claim. M was from Calgary and was based there. The plaintiff's head office was also first established in Alberta and other litigation, including the law firm's assessment of the plaintiff's account, was being litigated in Alberta. A PDF version is available to download [here](#).

Representation by Gardiner Roberts LLP

M and the law firm were represented on the stay motion by Gavin Tighe and Allison Farley.

Mr. Tighe is a senior partner in the Dispute Resolution Group at Gardiner Roberts LLP, and is a certified specialist in litigation and a Fellow of the Litigation Counsel of America.

Ms. Farley is a senior litigation associate in the firm's Dispute Resolution Group.

Mr. Tighe and Ms. Farley were assisted in the preparation of the written argument used to support the motion by Stephen Thiele, a partner at the firm and its Director of Knowledge Management.

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