Cassels

# British Columbia Court of Appeal Confirms “Ordinary Considerations” Not Enough to Override Forum Selection Clause

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On January 21, 2020, the BCCA released its decision in *Schuppener v. Pioneer Steel Manufacturers Limited*, 2020 BCCA 19 in which it allowed the appeal and transferred the action to the Ontario courts pursuant to a forum selection clause. The decision has important implications for the legal test applicable to the enforceability of forum selection clauses which was established by the Supreme Court of Canada in *Douez v. Facebook, Inc.*, 2017 SCC 33 (*Douez*).

## The Lower Court’s Decision

The respondent, Mark Schuppener, started an action in British Columbia against Pioneer Steel Manufacturers Limited (Pioneer Steel) for negligence and breach of contract after a steel storage building he purchased from Pioneer Steel and built on his property collapsed. Pioneer Steel applied for a stay of proceedings, relying on the forum selection clause in the contract of purchase and sale which required all claims be brought in Ontario.

The chambers judge held that the clause applied to the claims, but found there were strong reasons, including policy reasons, not to enforce the forum selection clause and refused to stay or transfer the action.

## The Appeal

Pioneer Steel appealed on the grounds that:

1. The chambers judge erred in his application of the strong cause analysis addressed in *Douez* in particular by elevating ordinary contextual matters to the status of public policy factors compelling enough to override the public interest in certainty of contract; and

2. The chambers judge erred by accepting, without evidence, that the financial burden on Mr. Schuppener would be greater if he was required to sue in Ontario.

Ultimately, the BCCA unanimously accepted the submissions made on behalf of Pioneer Steel that the judge erred in principle by characterizing ordinary considerations as matters of public policy compelling enough to justify overriding the forum selection clause. Specifically:

1. The chambers judge erred in concluding that that it was “highly relevant” that the forum selection clause was found in a standard form consumer contract. The BCCA clarified that the standardized form of the contract itself does not raise a public policy concern. What matters is whether there is gross inequality of bargaining power between the parties, not necessarily the form of the contract;

2. The chambers judge erred in relying on the fact that the action sought damages in negligence for personal injury and was not a mere commercial dispute over the breach of contract because both jurisdictions have roughly equivalent laws of contract, personal injury and product liability; and

3. The chambers judge erred in considering the argument that the product was unsuitable for the climatic conditions in British Columbia and that the public had an interested seeing the issues litigated in British Columbia as a factor weighing against enforceability of the clause.

Finally, the BCCA agreed with the chambers judge’s conclusion that the forum selection clause was broad enough to include all claims advanced by the plaintiff, and that Pioneer Sales signed the contract as agent for Pioneer Steel, which entitled Pioneer Steel to the benefit of the forum selection clause.

Having reached the decision that the chambers judge erred in principle and could not have reasonably concluded that Mr. Schuppener had established strong cause for overriding the forum selection clause, the BCCA found it unnecessary to consider Pioneer Steel’s second ground of appeal.

## Key Takeaway

The key takeaway from this decision is that courts will not accept “ordinary considerations” as constituting matters of public policy sufficient to override a forum selection clause. This decision confirms that courts will exercise judicial restraint in determining that considerations amount to public policy factors, and that circumstances will generally not amount to public policy factors sufficient to override freedom of contract unless they are of an exceptional nature.

*Matthew Nied and Danielle DiPardo of Cassels acted as counsel to the appellant in this matter.*

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