

CROSS-BORDER LITIGATION BULLETIN

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DON'T PANIC AND ATTORN, AS WHAT IS ATTORNEED CANNOT BE UNATTORNEED

A couple of months ago I received a panicked call from a prospective client in the southern United States. His company had been served with a Complaint issued in Ontario and he had just realized that its Answer was due the next day. He was desperate to buy some time, and, in a surprising display of knowledge of Ontario's rules of court, he suggested filing "one of those notices that provides you with an extra ten days to file an Answer".

The notice that he was referring to is a Notice of Intent to Defend, which, when filed within the time limit for the filing of an Answer will extend the time for the delivery of an Answer by ten days. However, for foreign litigants, the filing of such a Notice must be given careful consideration as it may be deemed to constitute attornment to the jurisdiction of the Ontario courts. As such, you may lose the ability to challenge the Ontario court's jurisdiction simpliciter.

This can be a significant tactical error as the ability to force a plaintiff located in Ontario to commence proceedings in a foreign jurisdiction could effectively end the litigation, or at least make the plaintiff more amenable to a reduced settlement offer.

In many cases, such as the one in point here, you may not have even had the opportunity to engage local counsel. In that case, the best course of action is to write a letter to plaintiff's counsel indicating that you are considering bringing a motion to stay the action on the grounds of jurisdiction and asking that no default proceedings be commenced until such time as such a motion can be brought, or you decide to attorn to the jurisdiction of the Ontario courts.

Although there is nothing to prevent plaintiff's counsel from noting you in default, it is likely that the court will take a dim view of this behaviour given your letter and will not only set aside the default judgement, but grant you the costs of doing so (as Ontario has a loser pays system).

Therefore, before instructing local counsel to file a Notice of Intent to Defend to obtain those extra ten days, make sure that you are not giving up a powerful tactical weapon in exchange.

Written by: Brett Harrison

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WHO WE ARE



BRETT G. HARRISON

ASSOCIATE

Direct Line: 416.865.7932

E-mail: brett.harrison@mcmbm.com

Brett is an associate in the firm's Commercial Litigation and Corporate Restructuring Groups. He has a general corporate commercial litigation practice with an emphasis on cross-border issues, financial institution litigation, insolvency and restructuring, debtor/creditor disputes and fraud. Brett regularly acts for US based corporations and financial institutions on a wide variety of litigation issues. Brett is also the editor of the firm's Cross-Border and Financial Services Litigation Bulletins.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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For more information please contact your McMillan Binch Mendelsohn lawyer or one of the members of the Litigation Group listed below:

Lisa Brost	416.865.7186	lisa.brost@mcmbm.com
Hilary E. Clarke	416.865.7286	hilary.clarke@mcmbm.com
Jeffrey B. Gollob	416.865.7206	jeff.gollob@mcmbm.com
Brett G. Harrison	416.865.7932	brett.harrison@mcmbm.com
Andrew J. F. Kent	416.865.7160	andrew.kent@mcmbm.com
Lisa H. Kerbel Caplan	416.865.7803	lisa.kerbel.caplan@mcmbm.com
Daniel V. MacDonald	416.865.7169	daniel.macdonald@mcmbm.com
Paul G. Macdonald	416.865.7167	paul.macdonald@mcmbm.com
Alex L. MacFarlane	416.865.7879	alex.macfarlane@mcmbm.com
Jason Murphy	416.865.7887	jason.murphy@mcmbm.com
Lisa Parliament	416.865.7801	lisa.parliament@mcmbm.com
Leonard Ricchetti	416.865.7159	leonard.ricchetti@mcmbm.com

MCMILLAN BINCH MENDELSON

TORONTO | TEL: 416.865.7000 | FAX: 416.865.7048

MONTRÉAL | TEL: 514.987.5000 | FAX: 514.987.1213

www.mcmbm.com