

THE LITIGATOR

NOVEMBER 14, 2005



Foreign litigants beware: A single piece of paper can force you to litigate a foreign-based action in Ontario

BY [KENNETH A. DEKKER](#), AFFLECK GREENE ORR LLP.

A Notice of Intent to Defend is the shortest of the pleadings that may be filed in an Ontario action and, in most cases, is of little consequence. Comprised of a single page and saying little beyond what its title already indicates, a Notice of Intent to Defend is normally used only to notify the plaintiff that the defendant has retained counsel and to obtain a few extra days to file a defence.

For a defendant served outside Ontario with a Statement of Claim, however, a Notice of Intent to Defend could end up being one of the most significant filings it ever makes. That single sheet of paper amounts to an appearance in the Ontario courts and may be attornment by a foreign defendant to the jurisdiction of the Ontario courts – even where the action itself might appear to have little connection to Ontario. While a defendant that has attorned to the Ontario court's jurisdiction might still ask the court to *decline* jurisdiction in favour of another more convenient forum, its ability to challenge the Ontario court's jurisdiction *simpliciter* over a particular action may be lost forever.

In the recent case of *Kinch v. Pyle*,¹ for example, an Ontario resident sued a Pennsylvania man for injuries suffered in a Pennsylvania car accident. The defendant moved to stay the action, saying that the Ontario courts have no jurisdiction over an action arising from a Pennsylvania car accident. However, before the motion, the Pennsylvania defendant had filed a Notice of Intent to Defend in Ontario. This single piece of paper led Madam Justice Aitken to dismiss his motion to stay the Ontario action, stating: "...an unconditional Notice of Intent to Defend was filed and only subsequently did the Defendants raise the issue of jurisdiction *simpliciter*

of the Ontario courts to hear this matter...I conclude that the Defendants have attorned to the jurisdiction *simpliciter* of the Ontario courts and cannot now challenge it...."

Similar reasoning led the Ontario Court of Appeal to stay an entire proceeding pending the decision of Canada's Supreme Court on whether to grant leave to appeal its decision assuming jurisdiction in *M.J. Jones v. Kingsway General Insurance Co.*² In that case, the two U.S. defendants had delayed in delivering a defence for more than two years while their jurisdictional challenge wound its way through the courts. The Court of Appeal further delayed the action until the Supreme Court of Canada could decide whether it would hear their jurisdictional challenge. The main reason for this stay was that *any step* taken by the foreign defendants in the Ontario action might constitute attornment and preclude any further steps to challenge the Ontario courts' jurisdiction. The court even went so far to speculate that even *involuntary attornment* (i.e. if the foreign defendants were *ordered by the court* to participate in the proceeding or face judgment) might constitute attornment and preclude any further jurisdictional challenges.

The rule precluding jurisdictional challenges after delivery of a Notice of Intent to Defend is not necessarily absolute, however. In another recent Ontario decision, *Coldmatic Refrigeration v. Leveltek Processing*,³ Pepall J. did grant the foreign defendant leave to withdraw its Notice of Intent to Defend and then stayed the action for lack of jurisdiction. However, the circumstances were somewhat unique: Leveltek's Notice had been filed by the lawyer its insurer retained without Leveltek's knowledge, and after Leveltek's counsel had

already advised the plaintiff of its intent to challenge jurisdiction.

The lesson from this is that an out-of-province defendant that is sued in Ontario must determine quickly whether it intends to challenge jurisdiction. If it decides to do so, the *only* steps that should be

taken are those associated with the challenge to jurisdiction. The law is clear that a foreign defendant taking issue with the court's jurisdiction should not do anything to defend the action on its merits and, most certainly, *should not* file a Notice of Intent to Defend!



For more information contact:

Kenneth Dekker, Affleck Greene Orr LLP
Tel: 416-360-6902
Email: kdekker@agolaw.com

¹ [2004] O.J. No. 5232 (SCJ)

² [2004] O.J. No. 3286 (CA)

³ (2004), 70 O.R. (3d) 758 (SCJ); affirmed (2005), 75 O.R. (3d) 641 (CA).