

**CITATION: Khamis v. Statel Capital Technology Partners Inc., 2010 ONSC 217**  
**COURT FILE NO.: 07-CV-335479SR**  
**MOTION HEARD: January 8, 2010**

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Saif Khamis and 1707570 Ontario Inc. v. Statel Capital Technology Partners Inc.  
and Saskatchewan Telecommunications Inc.

**BEFORE:** MASTER R.A. MUIR

**COUNSEL:** P. Lepsoe, for the Moving Party/Defendant Statel Capital Technology Partners  
Inc.

Y. D. Payne, for the Responding Parties/Plaintiffs

**REASONS FOR DECISION**

[1] This motion is brought by the defendant Statel Capital Technology Partners Inc. ("Statel") pursuant to Rule 13.1.02(2) of the *Rules of Civil Procedure* (the "Rules"). Statel seeks an order transferring this Toronto action to Ottawa. The plaintiffs oppose. The defendant Saskatchewan Telecommunications Inc. ("SaskTel") takes no position and did not appear on this motion.

**BACKGROUND AND STATUS OF THE ACTION**

[2] The plaintiffs bring this simplified rules action seeking damages for wrongful dismissal, negligence, breach of contract and other related relief.

[3] The plaintiff Saif Khamis ("Khamis") is the principal of the plaintiff 1707570 Ontario Inc. There appears to be some dispute as to which of the plaintiffs contracted with the defendant but that issue is not relevant to this motion. For the purposes of these reasons, I will refer to both plaintiffs collectively as "Khamis" or the "plaintiffs".

[4] Khamis resides in Toronto although he is currently working in Ottawa on a regular basis. It is alleged that Khamis was recruited and hired by the defendant Statel in the summer of 2006 to work as an information technology consultant on a project Statel was involved in with SaskTel. Statel is a corporation based in Ottawa. Both of its principals live in the Ottawa area.

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[5] The plaintiff alleges that shortly after the hiring of Khamis, the SaskTel contract was terminated. Khamis claims, among other things, that this amounted to a breach of his contract of employment which has resulted in damages to Khamis. Statel disputes this and requests in its statement of defence that the plaintiffs' claims be dismissed. The merits of the parties' respective positions are not germane to this motion.

[6] It appears that affidavits of documents were served by both parties at some point in 2008 and that an unsuccessful mediation took place on August 28, 2008. This action was pre-tried by Master Short on October 21, 2009 at which time a trial date was set for May 10, 2010 for a period of three days. Master Short's endorsement indicates that this matter is ready for trial subject to this change of venue motion.

### THE RULE AND THE POSITION OF THE PARTIES

[7] Rule 13.1.02(2) provides as follows:

(2) If subrule (1) does not apply, the court may, on any party's motion, make an order to transfer the proceeding to a county other than the one where it was commenced, if the court is satisfied,

(a) that it is likely that a fair hearing cannot be held in the county where the proceeding was commenced; or

(b) that a transfer is desirable in the interest of justice, having regard to,

(i) where a substantial part of the events or omissions that gave rise to the claim occurred,

(ii) where a substantial part of the damages were sustained,

(iii) where the subject-matter of the proceeding is or was located,

(iv) any local community's interest in the subject-matter of the proceeding,

(v) the convenience of the parties, the witnesses and the court,

(vi) whether there are counterclaims, crossclaims, or third or subsequent party claims,

(vii) any advantages or disadvantages of a particular place with respect to securing the just, most expeditious and least expensive determination of the proceeding on its merits,

(viii) whether judges and court facilities are available at the other county, and

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(ix) any other relevant matter.

[8] It was not disputed that the parties would receive a fair hearing if this matter were to remain in Toronto. Statel, however, takes the position that there is a preponderance of convenience to transferring this action to Ottawa. It argues that the events giving rise to the claim took place there, all of the parties reside and/or work there and several of the potential witnesses reside and/or work there. Ottawa has the necessary judicial and court resources to handle this matter and deliver the most just, expeditious and least expensive determination of the proceeding on its merits. Statel also takes the position that the issues in this action are of some importance to Ottawa's high technology industry, a factor which also favours Ottawa as the place of trial.

[9] The plaintiffs take a contrary position. Khamis resides in Toronto and plans to be in Toronto on the dates fixed for the trial of this action. Although he is currently working in Ottawa (ironically for Statel in connection with a contract for the federal government) he argues that the contract nature of his work provides no guarantee that he will be working in Ottawa in May, 2010. He points out that his security clearance expires on April 1, 2010 and he does not now know whether he will continue to work on his current contract after April 1, 2010. As well, he claims that the events that give rise to this action did not take place in Ottawa. Although Statel is located in Ottawa, he did not work there in connection with the SaskTel contract. He traveled from his home in Toronto to Saskatchewan to perform his duties under the contract until it was terminated.

[10] Khamis takes the position that only two of the potential witnesses listed by the parties in their Trial Management Briefs reside in Ottawa (namely the principals of Statel). Other than Mr. Khamis himself, two are based in the Greater Toronto Area (at least by virtue of their addresses registered with the Ministry of Transportation), and the others are in Saskatchewan. The plaintiffs point out that Statel has not put forward any evidence on this motion directly from any potential witnesses (other than Statel's principal, Jeff Telford), to the effect that they would be inconvenienced if the action were to remain in Toronto.

## ANALYSIS

[11] The history of the "change of venue" rules and jurisprudence was thoroughly reviewed by Stinson J. in *Eveready Industrial Services Corp. v. Jacques Daoust Coatings Management Inc.*, [2005] O.J. No. 2285 (S.C.J.). This analysis is fully set out at paragraphs 8 to 19 of *Eveready*. Following this extensive review, the court in *Eveready* concluded at paragraph 19 that the approach the court ought to take in considering change of venue motions under the current Rule 13.1.02(2) is "to weigh and consider each of the factors enumerated in Rule 13.1.02(2)(b) in order to determine whether a transfer of the action was desirable in the interest of justice".

[12] This approach to change of venue motions was adopted by D.M. Brown J. in the recent decision in *Hallman Estate v. Cameron*, [2009] O.J. No. 4001 (S.C.J.). See paragraph 29 of that decision.

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[13] Both parties to this motion agreed that this is the proper approach for the court to take in deciding motions of this nature. Moreover, both parties agreed that the onus on this motion rests on Statel who must satisfy the court that a transfer to Ottawa is in the interest of justice having regard to the factors set out in Rule 13.1.02(2). See *Skidmore v. Carleton University*, [2009] O.J. No. 1854 (S.C.J.) at paragraph 13.

[14] Consequently, I will now consider each of the factors set out in Rule 13.1.02(2) with a view to determining whether Statel has met the onus of establishing that a transfer of this action to Ottawa is desirable in the interest of justice.

#### **NATURE OF THE PROCEEDING**

[15] This appears to be a straightforward wrongful dismissal/breach of contract action in which the plaintiff is seeking damages of approximately \$50,000.00. The parties agree that the trial will require approximately three days of court time.

#### **WHERE DID THE SUBSTANTIAL PORTION OF THE EVENTS THAT GIVE RISE TO THE CLAIM OCCUR?**

[16] Statel takes the position that the events that give rise to the claim took place in Ottawa. It formulated and negotiated the contract with Khamis at its business premises in Ottawa and Ottawa is where the contract was accepted and entered into.

[17] The plaintiffs state that Ottawa has nothing to do with the events that give rise to this claim. Khamis lived in Toronto when the contract was entered into and he performed his job responsibilities under the contract in Saskatchewan. All of his discussions and negotiations with Statel leading up to the contract took place by email or fax. He did not travel to Ottawa either before or after the contract was entered into.

[18] I conclude that this is a neutral factor on this motion. The services provided by the plaintiffs were performed entirely in Saskatchewan. The only "event" that can be said to have taken place in Ottawa is the entering into of the contract between Statel and the plaintiffs, which happened in Ottawa by operation of law and not as a result of the plaintiffs ever being physically present there. This factor favours neither Toronto nor Ottawa.

#### **WHERE WERE A SUBSTANTIAL PART OF THE DAMAGES SUSTAINED?**

[19] The plaintiffs allege that they have suffered damages as a result of the termination of the SaskTel contract. At the time of the entering into of the contract, Khamis was living in Toronto. He signed the contract in Toronto. At the time of the alleged wrongful termination, Khamis was living in Toronto and working in Saskatchewan. In my view the damages are personal to the

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plaintiffs. I do not accept Statel's suggestion that he sustained those damages in Ottawa simply because that is the place where the contract was entered into by operation of law. In my view he sustained those damages in either Toronto or possibly Saskatchewan but certainly not in Ottawa. This factor favours Toronto as the venue for the trial of this action.

#### **WHERE IS THE SUBJECT MATTER OF THE CLAIM LOCATED?**

[20] The subject matter of the claim, namely the plaintiffs' contract with Statel, was entered into in Ottawa. However, for the reasons set out under the "Events Giving Rise to this Claim" portion of these reasons, above, I view this as a neutral factor in this case.

#### **LOCAL COMMUNITY INTEREST**

[21] Statel argues that this action is of interest to the local Ottawa high technology industry and community. I do not agree. This is a purely private contractual dispute with no public interest element. The determination by the court as to whether Statel had the right to terminate the plaintiffs' contract based on the facts of this case is not a matter of local public or community interest. There is no evidence before me to suggest any public interest in the matter. I conclude that this factor is not applicable to this motion.

#### **THE CONVENIENCE OF THE PARTIES AND THE WITNESSES**

[22] The parties agree that two potential witnesses live and work in Ottawa (Statel's principals, Christopher Stanton and Jeff Telford). They agree that another five witnesses live and work in Saskatchewan (the SaskTel employees). Statel contends that Khamis is really an Ottawa witness because he is currently working there. The plaintiffs disagree and state that Khamis lives in Toronto and plans to be in Toronto on the dates set aside for the trial. Two other witnesses are also in dispute. The plaintiffs argue that both Lance Huang and Kaz Nakamura are Toronto residents based on information recorded with the Ministry of Transportation. Statel has put forward evidence to suggest that Mr. Huang is working full time in Ottawa and that Mr. Nakamura has been working in New York for the past two years.

[23] I have concluded that this factor marginally favours Ottawa. Khamis and the principals of Statel all work in Ottawa as of the date of this motion. According to his affidavit, Khamis "do[es] not know whether [he] will continue to work [in Ottawa] past April 1, 2010". From this I conclude that the plaintiff may very well be working in Ottawa in May, 2010. Indeed, the plaintiff's current employer, Statel, states that his current assignment should last through 2010. However, Khamis does ordinarily reside in Toronto with his family and that fact must carry some weight when considering the convenience factor.

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[24] As for the other witnesses, I am not persuaded on the evidence that either Toronto or Ottawa is a more convenient choice. I am faced with conflicting evidence as to where Mr. Huang and Mr. Nakamura live. They appear to have addresses in the Greater Toronto Area but Statel's evidence suggests that they now work and/or live in Ottawa and New York. The onus on this motion rests on Statel and it has not provided any direct affidavit evidence from either Mr. Huang or Mr. Nakamura (or from any of the other out of province witnesses) confirming where they live and/or work and stating that they would be more inconvenienced by having the trial of this action in Toronto as opposed to Ottawa. Such evidence would have been easily available in the case of Mr. Huang for example, as he is currently under contract to Statel.

[25] Statel argues that given the fact that all interlocutory steps in connection with this case have been completed and only the trial remains, that this factor should be given more weight than the others. I do not agree. No one factor should be given more weight than any other. In this regard I adopt the observations of M.F. Brown J. in *Patry v. Sudbury Regional Hospital*, [2009] O.J. No. 1060 (S.C.J.) where the Court stated at paragraph 13:

13 The law is well established that change of venue motions are fact specific. The current rule makes it clear that none of the enumerated factors are more important than the other and all of those factors and any other factors relevant to the location of the action must be balanced to ensure that a proceeding is transferred from the county where it was commenced only if such transfer is "desirable in the interests of justice".

### **CONVENIENCE OF THE COURT**

[26] The evidence before me indicates that dates for a three day trial are readily available in Ottawa during the time period for which this trial has been scheduled. Although there may be some delay in securing a trial date simply due to the fact that the file would have to be transferred to Ottawa and added to the Ottawa trial list, I have no evidence to suggest that such a delay would be significant. Statel suggests that this factor favours Ottawa as the Toronto trial lists should not be clogged up with non-Toronto related cases. However, there is currently no significant delay in Toronto in obtaining trial dates for actions such as this. Moreover, there is at least some basis for characterizing this action as a Toronto related case as Khamis lives in Toronto. As a result, based on the evidence before me, this is a neutral factor on this motion.

### **ARE THERE ANY COUNTERCLAIMS, CROSSCLAIMS, THIRD PARTY OR SUBSEQUENT CLAIMS?**

[27] The pleadings in this action are limited to the statement of claim and a statement of defence from each of the defendants, along with a simple crossclaim from SaskTel against Statel, for contribution and indemnity. Consequently, I consider this to be a neutral factor on this motion.

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**ANY ADVANTAGES OR DISADVANTAGES OF A PARTICULAR PLACE WITH RESPECT TO SECURING THE JUST, MOST EXPEDITIOUS AND LEAST EXPENSIVE DETERMINATION OF THE PROCEEDING ON ITS MERITS?**

[28] The evidence before me does not point to any advantages or disadvantages to either Toronto or Ottawa under this factor. This is a neutral factor on this motion.

**ARE THERE JUDGES AND COURT FACILITIES AVAILABLE IN OTTAWA TO HEAR THIS ACTION?**

[29] There is no dispute that there are judges and court facilities available in Ottawa to hear the trial of this action. Those same facilities exist in Toronto. This is a neutral factor on this motion.

**ARE THERE ANY OTHER RELEVANT MATTERS?**

[30] Statel suggests that the fact that all interlocutory steps have been taken and that this matter has been pre-tried and the witness lists finalized is a factor the court should consider on this motion. While I agree that it is helpful to the court on motions such as this to have a clear idea of the issues to be tried and who the witnesses will be, I do not see that as a basis for favouring one venue over another. It simply makes the court's assessment of the enumerated factors under Rule 13.1.02(2) easier to carry out.

**CONCLUSION**

[31] Having considered the evidence, and having weighed and considered the factors set out in Rule 13.1.02(2), I am not satisfied that Statel has met the onus of establishing that a transfer of venue of this action from Toronto to Ottawa is desirable in the interest of justice. In my view, only one of the factors marginally favours Ottawa. One factor favours Toronto, six are neutral and one is not applicable. In coming to this conclusion, I am mindful of Justice Corbett's observation in *Siemens Canada Limited v. The Corporation of the City of Ottawa*, [2008] O.J. No. 3740 (S.C.J.) where he speaks of the comparison the court is required to make under Rule 13.1.02(2) between two suggested venues and states at paragraph 25:

25 . . . This comparison should not be a minute assessment designed to determine which is the "better" or the "best" choice. If there is something to be said for both of the suggestions, then the plaintiff's suggestion should prevail. However, if the defendant's suggestion is significantly better than the plaintiff's, then the change should be made.


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[32] The evidence before me does not demonstrate that Ottawa is a significantly better place for trial than Toronto having regard to the factors in Rule 13.1.02(2). Given this, the plaintiff's suggestion should prevail and I decline to exercise my discretion to order that this action be transferred to Ottawa.

### ORDER AND COSTS

[33] Statel's motion is therefore dismissed. If the parties are unable to agree on the issue of costs, they shall deliver brief written submissions by January 29, 2010. If the parties do agree to a costs disposition, I would ask that they promptly advise the Court.

[34] Finally I want to thank counsel for their very helpful submissions.



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Master R.A. Muir

**DATE:** January 12, 2010

SAIF KHAMIS and 1707570 ONTARIO INC.

v.

STATEL CAPITAL TECHNOLOGY PARTNERS INC. and SASKATCHEWAN TELECOMMUNICATIONS INC.

Plaintiffs

Defendants

Court File No: 07-CV-335479SR

*Jan. 8, 2010  
Miss Tel 516097*

SUPERIOR COURT OF JUSTICE  
PROCEEDINGS COMMENCED AT TORONTO

MOTION RECORD OF THE MOVING  
PARTY/DEFENDANT STATEL  
CAPITAL TECHNOLOGY PARTNERS  
INC.

*Jan. 8/10, P. Lepsoe for moving party/defendant  
Stated. Y.B. Payne for responding parties/plaintiffs.  
Decision reserved. *2010 Jan 12*  
Jan. 12/10. Order to go in accordance with  
My typewritten reasons for decision dated  
January 12, 2010.*

*Robert Muir*  
MASTER ROBERT MUIR

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