


# TO SEEK A STAY OR NOT TO SEEK A STAY

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## Is seeking a stay of foreign proceedings a prerequisite to obtaining an anti-suit injunction in Canada?

 An anti-suit injunction is an order granted by a domestic court that prevents a party from commencing or continuing legal proceedings in a foreign jurisdiction. It is an equitable remedy that functions in personam, binding the litigants rather than the foreign court directly. Nonetheless, given its practical effect of influencing matters before a foreign legal system, the issuance of an anti-suit injunction raises significant comity concerns.

*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 is the leading Canadian case on anti-suit injunctions. In that decision Justice John Sopinka, for the court, wrote (at para. 51):

In order to resort to this special remedy consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed.

For the purposes of this article, this will be referred to as the “deference principle.”

The deference principle is rooted in comity. Allowing the applicable foreign court to consider a request for a stay in respect of its proceedings prior to a Canadian court considering a request for an anti-suit injunction reduces the perceived interference by the Canadian court.

By making the deference principle a preference, rather than a pre-condition, *Amchem* left Canadian judges to their own devices, and sense of equity, to determine on a case-by-case basis whether the failure to first seek a stay of foreign proceedings is fatal to a particular request for an anti-suit injunction. The question of how strictly lower courts have interpreted and applied the deference principle in the 18 years since *Amchem* is the focus of this article.

Overall, a review of the case law demonstrates that the deference principle has not developed into an absolute rule. As discussed below, Canadian courts have granted anti-suit injunctions in several instances where the party seeking the injunction has

not first sought a stay of the foreign proceedings. Before reviewing that case law we first summarize the governing test articulated by the Supreme Court of Canada in *Amchem*.

## The Amchem Test

The Supreme Court set out a two-part test to determine whether a Canadian court should issue an anti-suit injunction.

First, the court should determine whether the domestic forum is the natural forum. In order to apply this test, the court must determine whether there is another forum that is “clearly more appropriate.” If a foreign court has already made this determination in its favor, while respecting the principles of forum non conveniens, then the Canadian court should show deference and refuse the request for an anti-suit injunction.

But if the Canadian court concludes that the foreign court could not reasonably have come to the conclusion that it is the appropriate forum, then the Canadian court should proceed to the second part of the test. The Supreme Court reasoned that if a foreign court has taken jurisdiction over a matter contrary to the principles of forum non conveniens, then that foreign court has not respected the rules of comity, and thus the Canadian judicial system need not respect the foreign court’s assumption of jurisdiction.

Second, the court is required to weigh the relative prejudice to the parties in restricting access to a foreign court versus the prejudice in allowing the action to proceed in the foreign jurisdiction.

Finally, and as noted above, independent of this two-part test, the court stated as a preliminary matter that it is preferable that the party seeking the anti-suit injunction first seek a stay of the foreign proceedings in the foreign jurisdiction on forum non conveniens grounds. As is evident from a review of the case law below, while in many cases this deference principle has been used to deny a request for an anti-suit injunction, there have been enough instances of this not happening that one can fairly conclude that the deference principle has not developed into an absolute rule.

## Deference Principle Applied

There are several cases where the deference principle has been applied to deny an anti-suit injunction:

*Speers Estate v. Reader’s Digest Association (Canada) ULC* (2009), 73 C.P.C. (6th) 281 (Ont. S.C.J.)

Richard Speers, in his capacity as estate trustee for his late mother, was the proposed

representative plaintiff in a class action that alleged the defendants used immoral and illegal business practices to target and exploit the vulnerable elderly across Canada. The action was commenced in Ontario. Most of the defendants were residents of Québec.

The defendants in the Ontario action brought their own action against Speers in Québec for defamation. Unlike Ontario, under Québec law parties to legal proceedings do not benefit from an absolute privilege for statements made in a court pleading and litigants may not be protected from an action for defamation for statements made in court documents. Speers brought a motion for an anti-suit injunction restraining the defendants from proceeding with their Québec action until the Ontario proceedings concluded.

Justice Paul Perell denied the request for an anti-suit injunction, holding (at para. 59):

In the case at bar, Dr. Speers’ requested order does not yet satisfy the criteria for an anti-suit injunction because he has not sought to stay the Québec action and the Québec court has not had an opportunity to rule on its own jurisdiction. As a matter of comity, the Québec court should be given an opportunity to decline jurisdiction.

Justice Perell seems to imply that the failure to seek a stay from the foreign court was fatal to the motion for the anti-suit injunction. In the Canadian jurisprudence on anti-suit injunctions, this decision is the high-water mark in terms of the application of the deference principle.

*Elga Laboratories Ltd. v. Soroko Inc.* (2002), 61 O.R. (3d) 324 (S.C.J.)

This is another example of a judge rejecting a request for an anti-suit injunction based on the deference principle. The respondent, Soroko Inc., was a New Jersey corporation that had launched an action in New Jersey for, among other things, damages for negligence and breach of contract arising from the recall of a cosmetic product that was manufactured by the corporate applicant in Toronto. The applicant sought an anti-suit injunction from the Ontario court and did not bring a motion to stay the New Jersey action prior to seeking the anti-suit injunction in Ontario.

Although Justice Alexandra Hoy found that, based on the record before her, it appeared Ontario would be an appropriate forum for the dispute, it had not yet been adjudged to be so. She also pointed out that the respondent had not attorned to the jurisdiction of Ontario.

The applicant claimed that it was impecunious,

and therefore it did not have the funds to seek a stay in New Jersey. This argument was dismissed by Justice Hoy. She had evidence before her that the respondent, too, was impecunious, and that this factor did no great injustice to the applicant such that the extreme remedy of the anti-suit injunction was warranted. The request for an anti-suit injunction before a stay of the New Jersey action had been sought was dismissed.

*Protiva Biotherapeutics Inc. v. Inex Pharmaceuticals Corp.* (2006), 25 B.L.R. (4th) 293 (B.C.S.C.)

The applicant was seeking an order restraining the respondent from proceeding with an action against it in California (the respondent had commenced a similar action in British Columbia).

The applicant had partially complied with the deference principle in that it had sought a stay of the California proceedings, but at the time its anti-suit injunction application was heard by the court in British Columbia the Californian court had not yet ruled on the stay application (it had ordered discovery but had not made any determination).

The British Columbia court found that the request for the anti-suit injunction could be disposed of summarily because the California court had not yet had the opportunity to determine its own jurisdiction by virtue of the stay application. As a result the court held that the request for an anti-suit injunction was premature and it was dismissed.

*Canadian Standards Assn. (c.o.b. CSA International) v. Solid Applied Technologies Ltd.*, [2007] O.J. No. 10 (S.C.J.)

In this case the respondent was an Israeli company that exported its products to Canada. It contracted with the applicant to evaluate its products. Some were certified and others were not. The contract required payment whether certification was granted or not. Certified products required annual licencing fees for the right to use the applicant's certification mark on the product. The respondent also agreed that the applicant could perform unannounced inspections of its manufacturing facilities to ensure that the products continued to meet the standards that resulted in certification. When the applicant refused to certify some of the respondent's products, the respondent refused to pay outstanding invoices and refused access to its facilities. The applicant purported to terminate the contract.

Not only did the respondent refuse to accept the termination, it obtained an ex parte injunction in Israel purporting to restrain the applicant from taking steps to withdraw certification or remove its certification mark from the respondent's products.

The injunction was later extended by the Israeli court without proper service of any materials on the applicant.

The applicant appealed the decision in Israel to grant the injunction on two grounds: it had not been properly served; and the courts of Ontario had jurisdiction. The appeal was dismissed on the question of service. The appeal court did not address the issue of jurisdiction. The applicant was therefore required to bring another motion in Israel seeking to stay the proceedings.

The Ontario court found that it had jurisdiction over the matter, and granted declaratory relief to the applicant. However, it refused the request for an anti-suit injunction to stop the respondent from proceeding with the Israeli action. It found that the jurisdictional issue was outstanding before the court in Tel Aviv. Based on the deference principle, the court found that the request for an anti-suit injunction was premature.

## Failure to Adhere to the Deference Principle

There are several cases where failure to adhere to the deference principle has not precluded the issuance of an anti-suit injunction:

*Hudon v. Geos Language Corp.* (1997), 34 O.R. (3d) 14 (Div. Ct.)

The plaintiff, a young woman, had travelled to Japan to teach English pursuant to an employment contract with the defendant. A condition of the employment contract was that the defendant would arrange all of the insurance coverage for the plaintiff. While on vacation from her teaching job in Japan, the plaintiff was involved in a serious accident in China and suffered permanent injuries. The insurance coverage that had been obtained by the defendant amounted to slightly more than C\$110,000, which the plaintiff claimed was negligently insufficient.

The plaintiff commenced her action in Ontario. The defendant sought a stay of the action. Before the motion was disposed of, the defendant commenced an action in Japan against the plaintiff for a declaratory judgment seeking to interpret the terms of the employment contract.

In response to the proceedings in Japan, the plaintiff brought a motion in Ontario for an anti-suit injunction. Before this motion was heard, the Ontario court ruled on the defendant's motion for a stay of the Ontario proceedings. The motion for a stay of the Ontario action was dismissed. The court found that because the employment contract was signed in Ontario, the plaintiff resided in Ontario, and many of the potential witnesses resided in Ontario, Ontario

would be an appropriate forum.

The Ontario court was then asked to rule on the plaintiff's motion for an anti-suit injunction. The plaintiff had not sought a stay of the Japanese proceedings. The court granted the injunction. In doing so it noted that Justice Sopinka had only stated that "it was preferable for an applicant for an anti-suit injunction to [first bring stay proceedings of the foreign action]. He did not say that such proceedings in the foreign jurisdiction were a condition precedent" (*Hudon* at 21).

## ▶ If a foreign court recognizes that it is not the appropriate forum and grants a stay, this solves the problem and the issue of comity, and the often difficult questions that it raises can be avoided.

The fact that no stay had been sought was not a bar to the anti-suit injunction. The court found persuasive the fact that an Ontario court had already ruled that it was an appropriate forum for the dispute. Although not explicitly relied on by the court for this point, one can assume that another relevant factor was the plaintiff's inability to travel to Japan to defend the proceedings as a result of her injuries from the very accident that was the ultimate cause of the legal proceedings.

*Dent Wizard International Corp. v. Brazeau* (1998), 31 C.P.C. (4th) 174 (Ont. Ct. J. (Gen. Div.))

The plaintiff corporation brought an action in Ontario against a former employee for injunctive relief relating to allegations of a violation of a non-competition agreement, as well as damages for breach of contract, breach of common-law duty, punitive damages and exemplary damages.

When the defendant employee brought a motion

for security for costs, the plaintiff launched arbitration proceedings in Missouri based on virtually the same allegations, and requesting the same relief as the Ontario action. The defendant sought an anti-suit injunction from the Ontario court restraining the plaintiff from pursuing the arbitration in Missouri.

The defendant took no steps to challenge the jurisdiction of the arbitration process in Missouri. However, Justice Webber ruled that this was not fatal to the application for the anti-suit injunction. Relying on *Hudon*, Justice Webber gave three reasons for his refusal to dismiss the application on this basis:

Case law (*Hudon, Amchem*) established that the failure to seek a stay is not fatal to an application for an anti-suit injunction;

The agreements of the parties did not clearly make Missouri the appropriate jurisdiction; and

Case law from Missouri showed that requests for stays in similar circumstances had been rejected.

In explaining this last reason, Justice Webber concluded that in a similar action, a request from an Ontario defendant not to proceed in St. Louis was rejected, notwithstanding "what appears from the evidence as proper and reasonable grounds to receive that relief" (*Dent Wizard* at para. 17). Justice Webber felt there was no reason

to believe that a request for a stay would have been accepted had it been made.

The purpose of requiring a litigant to seek a stay of the foreign proceedings is to allow a foreign court to determine its own jurisdiction. If a foreign court recognizes that it is not the appropriate forum and grants a stay, this solves the problem and the issue of comity, and the often difficult questions that it raises can be avoided. In coming to the conclusion he did, Justice Webber essentially declared that the Ontario court had no confidence in the Missouri arbitrator's ability to determine his or her jurisdiction over the dispute.

*Bell'O International LLC v. Flooring & Lumber Co.* (2001), 11 C.P.C. (5th) 327 (Ont. S.C.J.)

The defendant sought an anti-suit injunction to prevent the plaintiff from continuing with an action commenced in the state of New Jersey. A business relationship between the two parties had soured,

and the plaintiff had sought an injunction in Ontario to prevent the defendant from selling disputed merchandise. The injunction was denied. The plaintiff then commenced an action in the state of New Jersey, seeking essentially the same relief that had been denied in Ontario.

In order to obtain the anti-suit injunction, the defendant had to explain why it had not sought a stay of the action in New Jersey. The defendant offered as evidence an affidavit of its president, stating that:

It would also be prohibitively expensive to have to retain and fully brief solicitors in the United States in order to bring an application to stay the action in [New Jersey]. All of the financial resources available to the Defendants have been utilized to pay business expenses and the expenses associated with this action (at para. 12).

The plaintiffs argued that this was a bald assertion and that the defendant had not provided any specifics of its financial hardship. They also noted that the defendant had in fact retained counsel in New Jersey, although that counsel's involvement had been limited.

Justice Ian Nordheimer allowed the motion despite the defendant's failure to seek a stay of the foreign proceedings. While he noted that more information would have been preferable, he accepted the defendant's evidence, and noted that the plaintiffs had chosen not to cross-examine the president on his affidavit.

*Precious Metal Capital Corp. v. Smith*, [2008]  
O.J. No. 4956 (S.C.J. [Comm. List])

The plaintiff and some of the defendants were residents of Ontario. The dispute concerned the ownership and financing of two Peruvian mining properties that were, by virtue of loan agreements, subject to United Kingdom law with United Kingdom attornment clauses.

Litigation was commenced in both the United Kingdom and in Ontario. While the Ontario action requested relief that was broader than the relief sought in the United Kingdom, the actions asked for declarations that were opposite to one another. The plaintiff brought a motion for an anti-suit injunction to prevent the defendants from proceeding with the action in the United Kingdom. However, the plaintiff did not seek a stay of the United Kingdom action before doing so.

The plaintiff relied on two main grounds in support of its request for the injunction: the two actions largely duplicated one another and Ontario had already been found to be an appropriate jurisdiction in a previous stay application; and the plaintiff lacked the funds to proceed in the United Kingdom

for a stay and in all the circumstances it should not be forced to do so.

Justice Campbell was persuaded by the plaintiff's arguments. He found that it had demonstrated impecuniousness and therefore was not required to proceed with a stay motion in the United Kingdom. The anti-suit injunction restraining the United Kingdom proceedings was granted.

## Conclusion

The decision of whether to seek a stay of foreign proceedings is a proverbial fork in the road for parties in multi-jurisdictional litigation. It is not a decision that should be taken lightly. For one thing, the costs associated with such proceedings can be significant. It is perhaps telling that in the reported case law, there is no example of a party failing to obtain an anti-suit injunction on the basis that it did not first seek a stay from the foreign court, the party then going to the foreign court and seeking a stay unsuccessfully, and then coming back to the domestic court with a follow-up request for an anti-suit injunction.

Two conclusions can be drawn from the review of the case law above that may be of assistance to counsel advising clients faced with the decision of whether to first seek a stay of foreign proceedings.

First, Justice Sopinka's language in *Amchem* expressing a preference that a stay be sought in the foreign jurisdiction prior to a request being made in Canada for an anti-suit injunction has not been interpreted in all cases as a firm precondition. There are precedents for the issuance by a Canadian court of an anti-suit injunction notwithstanding a failure of the moving party to first seek a stay from the applicable foreign court. Specifically, courts have granted anti-suit injunctions where Ontario has previously been ruled to be an appropriate forum for the dispute between the parties; where a stay would be unlikely to be granted by the foreign court; and where the moving party demonstrates impecuniosity.

Second, if a party requires an anti-suit injunction quickly, that party may be best advised not to seek a stay of foreign proceedings. While a motion for a stay of the foreign proceedings is outstanding, a request for an anti-suit injunction will probably be refused by the domestic court.

In short, seeking a stay of the foreign proceedings is only advisable if two conditions are met: the applicant has the time and the resources to seek a stay in the foreign jurisdiction; and the circumstances are not compelling enough that a domestic court would grant the anti-suit injunction without the stay first being sought, that is, the applicant is not impecunious, Ontario has not previously been ruled an appropriate jurisdiction, etc.

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