Weighing Disputed Facts in Forum Non Conveniens Motions

The Court of Appeal for Ontario has released its decision in *Young v. Tyco International of Canada Ltd.* (available here). Those interested in the common law doctrine of *forum non conveniens* might find aspects of the decision of interest.

First, Justice Laskin states at para. 28 that "on a *forum non conveniens* motion, the standard to displace the plaintiff's chosen jurisdiction is high". For this notion he relies on the language of the Supreme Court of Canada's leading decision on the doctrine, *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, where that court notes that the existance of the more appropriate forum must be "clearly" established.

There is room for concern about Justice Laskin's statement. Many commentators have taken the language in *Amchem* to only indicate that in the very close cases, the benefit of the doubt goes to the party that does not bear the onus of establishing the more convenient forum. But in most cases, the court should be able to establish the more convenient forum on a balancing exercise. Justice Laskin's statement seems to suggest there could be cases in which another forum was shown to be more appropriate, but not more appropriate enough, than the plaintiff's chosen forum. For the most part Canadian courts have avoided deciding cases on such a basis. There is also room to debate whether the plaintiff should be entitled to the support contained in Justice Laskin's statement. In an era of tactical proceedings and multiple available jurisdictions, why should the plaintiff's choice be given particular protection under the doctrine?

Second, there is disagreement between the judges on how to handle facts in dispute on the stay motion. Justice Laskin holds that if, to resolve the motion, the court needs to get into the underlying facts of the case, the court should adopt the plaintiff's version of those facts as long as there is a reasonable basis for those facts in the record (paras. 32-34). In separate concurring reasons Justice Simmons disagrees with this approach. In her view (see paras. 67-70), if the motions judge cannot either resolve the motion against the plaintiff on the plantiff's view of the facts or resolve the motion against the defendant on the

defendant's view of the facts, he or she should conduct the *forum non conveniens* analysis on the basis that both views of the facts have a reasonable prospect of being adopted at trial. To some extent this will neutralize the role that facts in dispute will play in the analysis, since they will cut both ways depending on the plaintiff's or the defendant's view of the facts. Justice Simmons' approach aims to be fair, on the stay motion, to both parties, and so rejects Justice Laskin's quite pro-plaintiff analysis.

Neither approach addresses those situations in which the court, in order to resolve a motion for a stay, needs to actually reach a conclusion on a factual question on the balance of probabilities. I have argued that one of those situations arises when the parties dispute the existance of a jurisdiction clause: see Stephen Pitel and Jonathan de Vries, "The Standard of Proof for Jurisdiction Clauses" (2008) 46 Canadian Business Law Journal 66.

Third, the court discusses what will qualify as a legitimate juridical advantage which the plaintiff would lose if a stay were ordered (at paras. 56-61).

In the end, all of the judges agree that the defendant has not shown that Indiana was the more appropriate forum, and so the stay motion fails.