

LITIGATION BULLETIN

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HOW TO STAY CANADIAN PROCEEDINGS WHEN YOU HAVE A CLAIM IN THE UNITED STATES

You may be able to stay a Canadian action where an action is pending or commenced in the United States between the same parties in respect of the same subject matter. Canadian courts will consider all relevant factors, with emphasis on the following four factors, in an application to stay the Canadian proceeding:

- **Which action was commenced first:** The race often goes to the swiftest. Canadian courts are more likely to stay a Canadian action if the US action is commenced first.
- **Who has the chief burden of proof:** The court will favour the jurisdiction chosen by the party who has the burden to prove key issues. This is not always the plaintiff as many defendants have counterclaims and positive defences to prove.
- **Which claim is more comprehensive:** The court will look more favourably on proceedings that are more comprehensive and are more likely to stay a Canadian action where the US action includes, or could include, all of the matters in dispute in the Canadian proceeding.
- **The balance of convenience:** Canadian courts will attempt to determine which jurisdiction has the closest connection between the parties and the dispute. This includes issues such as where the witnesses reside and what law is to be applied.

If the above factors weigh in favour of staying the Canadian proceedings, the party bringing the action in Canada will have to demonstrate that a stay of the Canadian proceeding will deprive it of a legitimate legal advantage, for example, if the action is statute barred in the United States.

There are many other aspects that may affect a Canadian court's decision with respect to staying proceedings in circumstances of multiple proceedings commenced in both Canada and the United States. The facts and circumstances of each case are unique and critical in determining whether a court will grant a stay. If you become involved with proceedings in both the United States and Canada involving the same subject matter and the same parties, you should contact legal counsel before taking any steps to ensure you obtain every advantage with respect to jurisdiction.

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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