IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Coulson Aircrane Ltd. v. Pacific Helicopter Tours Inc. et al.,*** 2006 BCSC 961

Date: 20060621
Docket: S060062
Registry: Vancouver

Between:

Coulson Aircrane Ltd.

Plaintiff

And

Pacific Helicopter Tours Inc. et al.

Defendants

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiff	F.G. Potts C. Martin
Counsel for the Defendants	D.P. Church I. Schildt
Date and Place of Hearing:	May 17, 2006 Vancouver, B.C.

INTRODUCTION

[1] This is an application by the defendants for an order that the proceedings be stayed on the ground that the court ought to decline jurisdiction. The application is brought pursuant to the ***Court Jurisdiction and Proceedings Transfer Act***, S.B.C. 2003, c. 28 (the "***Act***").

[2] The plaintiff brought a motion seeking the following declarations: that the defendants had attorned to the jurisdiction of the court; that the matter is within the jurisdiction of the court; and an order striking the paragraphs in the Statement of Defence that raise the issue of jurisdiction. The defendants conceded that this court has territorial competence or jurisdiction *simpliciter*. Accordingly, the relief sought in the plaintiff's motion is subsumed into the consideration of the defendant's motion.

[3] The plaintiff brought an additional motion seeking a protective order concerning affidavit #3 of Wayne Coulson. That motion is adjourned generally.

FACTS

[4] The plaintiff, Coulson Aircrane Ltd. ("Coulson"), is a company incorporated under the laws of British Columbia with a registered office located in Vancouver, British Columbia. Coulson's head offices and repair facilities are located in Port Alberni, British Columbia. Coulson's business includes helicopter ventures involving

passenger transport, firefighting and heli-logging operations. Coulson is also in the business of inspecting, maintaining and repairing helicopters.

[5] The defendant, Pacific Helicopter Tours Inc. ("PHT"), is a company incorporated under the laws of Hawaii and operating from Kahului, Hawaii. PHT's business includes providing helicopter services for air rescue, medvac services, salvage, aerial spraying, environmental clean-up, passenger transport, construction, charters and firefighting. PHT has carried out operations in U.S. territories in the Pacific, in other U.S. states and in Greenland. It has never conducted flight operations in Canada.

[6] The defendant, Pacific Helicopter Services LLC ("PHS"), is a company incorporated under the laws of Hawaii with a mailing address in Kahului, Hawaii. PHS is the registered owner of a Sikorsky Model S-61N helicopter ("Helicopter N261F") which forms part of the subject matter of this litigation. PHS does not hold any operating certificates for the aircraft and does not actively undertake any business.

[7] The defendant, Thomas Hauptman, is a citizen of the United States of America who ordinarily resides in Maui, Hawaii. At all material times, Mr. Hauptman was an officer, director and shareholder of PHT and a member of PHS.

[8] In this action, Coulson advances the following claims:

(a) for the recovery of a debt incurred by the defendants in relation to the inspection and rebuild of Helicopter N261F (the "Rebuild Agreement"). Coulson alleges that as of January 5, 2006, $631,416.52 (USD) plus contractual interest was owing pursuant to this agreement;
(b) for the recovery of various helicopter parts that were installed in Helicopter N261F and rented to the defendants during the course of the Rebuild Agreement which the defendants have failed to return despite a demand being made;
(c) for the recovery of various helicopter parts that were rented to the defendants from 2001 until May of 2005 in relation to the firefighting venture in Arroyo Grande which the defendants have failed to return despite a demand being made; and
(d) for damages in conversion in relation to the alleged wrongful refusal to return the rented parts after demand.

[9] The parties began a business relationship in 2000 when Wayne Coulson approached Mr. Hauptman about bidding to provide helicopter services in support of the United States Forest Services ("USFS") firefighting operations in Arroyo Grande, California. The USFS required the bidding party to have a Federal Aviation Administration Part 135 Operating Certificate and to be registered with the U.S. Department of Transportation as an on-demand air taxi operator. PHT had the necessary qualifications.

[10] The bidding party was also required to have available a Sikorsky S-61 helicopter. PHT owned two such helicopters but at the time, both were committed to other operations. Coulson owned an S-61 and proposed that if the bid were successful, it would lease an S-61 to PHT to use in the Arroyo Grande project.

[11] The bid submitted by PHT was successful and PHT entered into a contract with the USFS to provide a helicopter for firefighting operations in Arroyo Grande during the 2001 firefighting season, with two one-year options to extend (the "Arroyo Grande Contract"). The options were exercised and PHT provided services under the contract with the USFS for each of the 2001, 2002 and 2003 firefighting seasons.

[12] Coulson and PHT entered into a services agreement dated June 15, 2001, in anticipation of the Arroyo Grande Contract (the "Services Agreement"). The Services Agreement provided:

ARTICLE 7
GOVERNING LAW

This Agreement shall be deemed to have been executed in Arroyo Grande, California and shall be

> governed by and construed in accordance with the laws of New York without regard to the internal conflict of laws, statues or case law thereof which would otherwise govern the law applicable to this Agreement. The parties agree that the courts of New York shall have jurisdiction over the parties with regard to any disputes arising under this Agreement or relating to the Aircraft.

[13] A Sikorsky S-61 helicopter owned by Coulson and leased and operated by PHT was used for the Arroyo Grande Contract. Pursuant to the Services Agreement, Coulson provided services and equipment to PHT in support of operations under the USFS contract.

[14] In 2004, Coulson and PHT successfully re-bid for the Arroyo Grande Contract. The parties continued to conduct themselves under the terms of the Services Agreement.

[15] In February of 2004, Mr. Hauptman, PHT and PHS made arrangements for Helicopter N261F to be delivered to Coulson's facilities in Port Alberni, British Columbia, pursuant to what Coulson alleges was a contract for it to disassemble, inspect and then rebuild the helicopter.

[16] The disassembly took place in February and March of 2004 at Coulson's premises in Port Alberni.

[17] The defendants allege that Helicopter N261F was to have been used in the Arroyo Grande operation, but there was significant delay with the work. As a result, PHT alleges that it was forced to lease a Coulson helicopter to carry out operations for the 2004 season and thus suffered loss. The plaintiff's position is that any delay was at the request of Mr. Hauptman.

[18] Coulson alleges that Mr. Hauptman issued instructions for it to proceed with the overhaul of the helicopter, which included rebuilding and inspection.

[19] The work was completed in May of 2005. Coulson alleges that the accounts were, and had been for some time, in arrears; however, it released the helicopter on the strength of assurances from Mr. Hauptman that payment was imminent. The helicopter was then used in the 2005 fire season under the Arroyo Grande Contract.

[20] The defendants, for their part, assert that during this period there was an ongoing issue with Coulson's failure to provide sufficient documentation to allow the invoices to be assessed.

[21] In August of 2005, Coulson retained counsel in Hawaii and made a formal demand with respect to the overhaul of Helicopter N261F. Counsel for PHT andPHS responded in September of 2005, taking issue with the amount owing and making demands for supporting documents. There followed an exchange of correspondence between counsel with respect to a number of issues, including, the debt owing for the overhaul, the return of helicopter parts in the possession of the defendants, and an allegation that Mr. Hauptman had diverted funds from the Arroyo Grande Contract.

[22] In October of 2005, the defendants assert that avionics were removed from Helicopter N261F which was stationed at the Arroyo Grande USFS station in California. The defendants allege that Coulson personnel removed the parts. The parts were subsequently returned to PHT; however there is an ongoing criminal investigation and the possibility of criminal charges in relation to that matter.

[23] Coulson commenced this action on January 5, 2006. The corporate defendants appeared on February 13, 2006 and filed Statements of Defence on February 27, 2006. Mr. Hauptman appeared on March 3, 2006 and filed a Statement of Defence on March 9, 2006.

[24] By letter dated February 14, 2006, counsel for the defendants requested production of documents pursuant to Rule 26(8) of the ***Rules of Court***.

[25] On February 24, 2006, PHT and PHS commenced legal action in the United States District Court, District of Hawaii, against Coulson, Wayne Coulson, Barry Coulson and a series of John Does (the "Hawaii Action").

[26] In the Hawaii Action, PHT and PHS raise the following allegations:

(a) that on October 29, 2005, Coulson personnel broke into the USFS Arroyo Grande station, sabotaged, and stole equipment from Helicopter N261F;
(b) that in or about July of 2005, a representative of Coulson forged Mr. Hauptman's signature on a lease agreement in order to fly a Coulson helicopter under PHT's Federal Aviation Administration Part 135 Operating Certificate;
(c) that Coulson inflated his expenses in relation to the Arroyo Grande Contract;
(d) that Coulson delayed the inspection to Helicopter N261F, resulting in economic loss to the plaintiffs in the Hawaii Action;
(e) that Coulson over-billed for the inspection of Helicopter N261F; and
(f) that Coulson refused to return PHT equipment which it retained after the completion of the inspection of Helicopter N261F.

[27] By letter dated February 28, 2006, the defendants gave notice that they would seek a stay of these proceedings on the basis that Hawaii is the more appropriate forum. On March 15, 2006, the defendants delivered the motion and supporting affidavits with respect to jurisdiction, and counsel for the plaintiff served its own motion with respect to jurisdiction, together with supporting affidavits.

[28] The defendants in the Hawaii Action brought a motion in that proceeding seeking to have the court stay the Hawaii Action on the basis of the doctrine of international abstention or alternatively, to dismiss the action on the basis of the doctrine of *forum non conveniens*. That motion has not yet been heard.

ISSUES

[29] There are two issues to be determined with respect to this application:

(a) have the defendants attorned to the jurisdiction of this court and, if so, does their attornment constitute a bar to their argument that this court should decline jurisdiction; and
(b) should this court exercise its discretion, pursuant to s. 11 of the ***Act*** and decline jurisdiction.

DISCUSSION

Have the Defendants Attorned to the Jurisdiction of the Court?

[30] The plaintiff submits that by defending on the merits, availing themselves of the ***Rules of Court*** with respect to discovery of documents and seeking "further and other relief" in the Notice of Motion, the defendants have attorned to the jurisdiction of the court and that having attorned, they therefore cannot maintain an application pursuant to the ***Act*** with respect to *forum non conveniens*.

[31] The defendants submit that this is not a correct statement of the law, such that a party who has attorned may nevertheless bring an action to have the court decline jurisdiction. The defendants submit further that the plaintiff's position, that a party who has attorned cannot bring a *forum non conveniens* application, would reduce the law and the newly amended Rules to an absurdity.

[32] In Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd., (1995), 13 B.C.L.R. (3d) 41 at para. 15 (C.A.), the Court of Appeal stated:

> [T]he law in British Columbia today entitles a party to an action to dispute an order for service ex juris upon him of an originating proceeding, and to challenge jurisdiction, both simpliciter and forum conveniens, without the risk that bringing such applications will constitute acceptance by him of the jurisdiction of the court. Beyond that, the common law prevails such that unless an appearance before the court is made under duress, it will be regarded as voluntary.

[33] In ***Imagis Technologies Inc. v. Red Herring Communications, Inc.***, 2003 BCSC 366, the defendants applied for a stay of the action on the basis that British Columbia was not the proper forum for the action. The defendants did not dispute that the court lacked jurisdiction *simpliciter*. The application was based upon Rule 14(6)(c) which at that time provided:

> (6) Where a person served with an originating process has not entered an appearance and alleges that
>
> (a) the process is invalid or has expired,
>
> (b) the purported service of the process was invalid, or
>
> whether or not the person has entered an appearance, alleges that
>
> (c) the court has no jurisdiction over him or her in the proceeding or should decline jurisdiction,
>
> the person may apply to the court for a declaration to that effect.

[34] Mr Justice Pitfield held that by filing an appearance followed by the filing of a Statement of Defence directed at both jurisdiction and the merits, and then delivering a defence and demand for discovery of documents, the defendants had attorned to the jurisdiction of the court and could not thereafter apply to have the court decline jurisdiction. He noted that the defendants pleading a challenge to the jurisdiction did not avoid the consequence of having attorned.

[35] In ***Balla v. Fitch Research Corp.***, 2006 BCSC 275 appeal as of right to the C.A., 2006 BCCA 212, the defendant Alliance brought a motion, in the 21st year of the action, seeking a stay on the basis of a challenge of the jurisdiction of the court. Mr. Justice Johnston concluded that, in the rather complex circumstances of the matter before him, the inclusion of the prayer for "further and other relief" was a prayer for relief that could well have allowed Alliance to go beyond the purely procedural in this claim and to have enabled it to seek relief on the merits. He concluded that Alliance had attorned to the jurisdiction of the court and dismissed the application.

[36] In ***Ngo v. Go*** 2006 BCSC 71, the defendants applied to strike the Statement of Claim on the grounds that the issues raised had previously been adjudicated in California and, in the alternative, that the court in British Columbia had no jurisdiction or should decline jurisdiction. Mr. Justice Smith held that, by defending on the merits and invoking the court's jurisdiction to dismiss the case on the merits, the defendants had attorned to the jurisdiction of the court. He held further that having attorned, the defendants could no longer challenge jurisdiction either on the basis of jurisdiction *simplicter* or of *forum non conveniens*.

[37] In the case at bar, the defendants have filed a Statement of Defence that, in addition to pleading jurisdiction, addresses the claim on the merits. They have issued a notice pursuant to Rule 26(8) requiring production of documents referred to in the pleading. They have inserted a clause seeking "further and other relief" in the Notice of Motion. In the present circumstances, I do not think that the prayer for "further and other relief" could be used by the defendants in the context of this motion to seek relief on the merits. Accordingly, if that were the only conduct at issue I would conclude that the defendants had not attorned. However, in addition they have defended on the merits and have availed themselves of the ***Rules of Court*** in relation to discovery of documents. On the authorities, they have attorned.

[38] The next question is whether having attorned, the defendants can seek to have the court decline jurisdiction. Under the authorities decided under the previous Rule, it is clear that they cannot. Those cases, however, were all decided on the basis of the earlier version of Rule 14(6). The Rule has been amended and now provides:

> (6) A party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, may, after entering an appearance,

(a) apply to strike out a pleading or to dismiss or stay the proceeding on the ground that the originating process or other pleading does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,

(b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or

(c) allege in a pleading that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

(6.1) Whether or not a party referred to in subrule (6) makes an application or allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.

(6.2) If a party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, alleges that the originating process in the proceeding is invalid or has expired or that the purported service of the process was invalid, the party may, after entering an appearance, apply for one or both of the following:

(a) an order setting aside the process;

(b) an order setting aside service of the process.

(6.3) If an application is brought under subrule (6) (a) or (b) or (6.2) or an issue is raised by an allegation in a pleading referred to in subrule (6) (c), the court may, on the application of a party of record, before deciding the first-mentioned application or issue,

(a) stay the proceeding,

(b) give directions for the conduct of the first-mentioned application,

(c) give directions for the conduct of the proceeding, and

(d) discharge any order previously made in the proceeding.

(6.4) If, within 30 days after entering an appearance in a proceeding, a party of record delivers a notice of motion under subrule (6) (a) or (b) or (6.2) to the other parties of record or files a pleading referred to in subrule (6) (c),

(a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or delivering any or all of the following:

(i) the appearance;

(ii) a pleading under subrule (6) (c);

(iii) a notice of motion and supporting affidavits under subrule (6) (a) or (b), and

(b) until the court has decided the application or the issue raised by the pleading, the party may, without submitting to the jurisdiction of the court,

(i) apply for, enforce or obey an order of the court, and

(ii) defend the action on its merits.

[39] The defendants conceded in the course of submissions that the British Columbia court has jurisdiction *simpliciter*, and that the basis of the application is *forum non conveniens*. Accordingly, it is common ground that the relevant Rule for purposes of the defendant's application is Rule 14(6.1).

[40] Mr. Justice Preston considered this issue in ***O'Brien v Simard***, 2006 BCSC 814. In that case, the defendant had filed a Statement of Defence that dealt with both the merits and jurisdiction. In addition, the defendant had issued a demand for discovery of documents and a notice to produce and had brought an application dealing with the terms of a Mareva injunction obtained by the plaintiff. The Notice of Motion sought a declaration that the court decline jurisdiction.

[41] Preston J. noted at para. 8:

> Before the 2003 amendments to Rule 14, the actions of the defendant in defending the claim on the merits and seeking discovery of documents would have precluded her from successfully contesting the jurisdiction of the Court to hear the proceedings. She would be found to have attorned to the jurisdiction.

[42] Thus the sole question was whether the amendment to the Rule made a difference. The defendant contended that the amendments permitted the application on the basis of *forum non conveniens*. The plaintiff contended that the amendment relaxed the strict rules of attornment only if the attack was based on jurisdiction *simpliciter*.

[43] After a thorough review of the jurisprudence, Preston J. concluded at paras. 22-23:

> On the basis of the terminology employed in these authorities, the proper interpretation of current ***Rules*** is that Rule 14(6) deals with jurisdiction *simpliciter* and Rule 14(6.1) deals with *forum conveniens*. The defendant has argued that both jurisdiction *simpliciter* and *forum conveniens* are captured by Rule 6 as a complete test for jurisdiction. That interpretation is contrary to the accepted use of terminology. Additionally, it would render Rule 6.1 redundant.
>
> For these reasons, the protection from attornment under Rule 14(6.4) is only activated by a notice of motion or pleadings challenging jurisdiction *simpliciter* under Rule 14(6), not a challenge on the grounds of *forum non conveniens* under Rule 14(6.1).

[44] In the result, he dismissed the defendant's application. In so doing, he further noted at para. 25:

> The ***Court Jurisdiction and Proceedings Transfer Act***, S.B.C. 2003 c. 28 which was proclaimed in force after the hearing of this application does not affect the result that I have reached.

[45] Mr. Justice Preston's decision was a considered decision. None of the exceptions identified in ***Re Hansard Spruce Mills Ltd.***, [1954] 4 D.L.R. 590 (B.C.S.C.) apply. Accordingly, I find that the defendants have attorned to the jurisdiction and that having done so, their application to have the court decline jurisdiction must be dismissed.

[46] That is sufficient to dispose of the defendant's application; however in the event that I am wrong, I will address the issue the defendant raises pursuant to s. 11 of the ***Act***.

Should the Court Decline Jurisidiction?

[47] The issue of whether the court should decline jurisdiction is now governed by the provisions of the ***Act***.

[48] The defendants conceded that the courts of British Columbia have territorial competence as that term is defined in Part 2 of the ***Act***. That is, it is conceded that there is a real and substantial connection between British Columbia and the facts on which the proceeding is based.

[49] The section that governs this application is therefore s. 11, which provides:

Discretion as to the exercise of territorial competence

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
(b) the law to be applied to issues in the proceeding,
(c) the desirability of avoiding multiplicity of legal proceedings,
(d) the desirability of avoiding conflicting decisions in different courts,
(e) the enforcement of an eventual judgment, and
(f) the fair and efficient working of the Canadian legal system as a whole.

[50] The annotation with respect to this section in the Uniform Law Conference of Canada notes that the section is meant to codify the doctrine of *forum non conveniens*, which was more recently confirmed in ***Amchem Products Inc. v. British Columbia,*** [1993] 1 S.C.R. 897 [***Achem***]. Accordingly, while the ***Act*** now governs, the principles from the earlier jurisprudence continue to provide a source of guidance.

[51] The factors listed in s. 11 must be addressed in the course of an application brought pursuant to s. 11. As an introductory matter, the defendants note that the matters at issue in this proceeding are narrower than the matters at issue in the proceedings commenced in Hawaii. They submit that the court's analysis in respect of this motion should focus on the entire range of the dispute between the parties.

[52] In my view, the existence and scope of parallel proceedings is a factor to be addressed in the analysis pursuant to s. 11 of the ***Act***. However, for purposes of that analysis, where the section refers to "the proceeding" the proceeding in question is the British Columbia proceeding.

(a) The Comparative Convenience and Expense for the Parties to the Proceeding and for their Witnesses, it Litigating in the Court or in any Alternative Forum

[53] With respect to the issue of residence, the plaintiff is resident in British Columbia and the defendants are resident in Hawaii.

[54] The defendant PHT operates primarily in Hawaii, but has operated in other states, territories and once in Greenland. It has never operated in Canada. PHS does not carry out business. Mr. Hauptman has never worked in Canada.

[55] Coulson carries on business in British Columbia and it carried out the work at issue in these proceedings at its facility in Port Alberni. In respect of its dealings with the Arroyo Grande Contract, it has done business in California.

[56] Coulson has identified 27 employees who had dealings with the defendants or who worked on Helicopter N261F and who are therefore potential witnesses. In addition, Wayne Coulson, Susan Merivitra and Jim Messer will be witnesses. All of the Coulson witnesses reside in British Columbia. There would be considerable expense and inconvenience to Coulson if these witnesses are required to travel to Hawaii for depositions and trial.

[57] Personnel associated with Maxcraft Avionics Ltd. and Acro Helipro Global Services have also been identified as potential witnesses. Both entities are located in British Columbia.

[58] The defendants have identified 7 PHT employees who are potential witnesses with respect to what PHT characterizes as the delay issue. These employees are residents in Hawaii. There would be expense and

inconvenience for them to travel to British Columbia.

[59] The defendants have also identified a number of other potential witnesses in Hawaii and California in relation to the matters that have been raised in the Hawaii Action that are not common to the British Columbia action.

[60] With respect to the California witnesses, the inconvenience and expense is likely close to the same with respect to both proposed forums.

[61] In my view, this factor is close to neutral with the balance in favour of British Columbia as the convenient forum with respect to the matters that are at issue in the British Columbia proceedings.

(b) The Law to be Applied to Issues in the Proceeding

[62] I agree with the submission of the defendants that it is not clear what law will govern the resolution of the issues in relation to the action for debt regarding the inspection and rebuild of Helicopter N261F given that the defendants deny the Rebuild Agreement alleged by Coulson. The question of when, where and under what terms any agreement was entered into is very much in dispute. However, it is clear that the helicopter was shipped to British Columbia and that the work was done in British Columbia. The loss alleged was suffered by Coulson in this jurisdiction.

[63] With respect to the claim for conversion, the damage alleged was suffered in British Columbia. The rebuild took place in this province. Accordingly, the laws of this province ought to have been in the contemplation of the parties during their course of dealings: see ***Moran v. Pyle National (Canada) Ltd.***, [1975] 1 S.C.R. 393 at 408-09. Thus the laws of this province are likely the substantive laws to govern with respect to the claims in tort in this proceeding.

[64] In my view the balance with respect to this element in relation to the British Columbia proceeding is in favour of British Columbia.

(c) The Desirability of Avoiding Multiplicity of Legal Proceedings

[65] Proceedings have been commenced in Hawaii. There is overlap between those proceedings and the matters at issue in the British Columbia action. The defendants in Hawaii have applied to have that action stayed or dismissed. That application has not yet been heard.

[66] Thus, this is not a case in which a court in another jurisdiction has assumed jurisdiction. Accordingly, while comity remains a factor to be considered, it does not become a determining factor: see ***Ingenium Technologies Corp. v. McGraw-Hill Companies, Inc.***, 2005 BCCA 358 at para. 21.

[67] If this court does not decline jurisdiction, there exists a possibility that there will be multiple proceedings. While that is a factor, in the circumstances it is not, in my view, a determining factor.

[68] The defendants submit that since there are matters alleged in the Hawaii Action that have not been alleged in the British Columbia proceeding, there will be litigation in Hawaii in any event. Therefore, they submit, the only way to avoid a multiplicity of proceedings is for this court to decline jurisdiction and to have the litigation proceed in Hawaii.

[69] I do not agree that that is the only way in which all of the issues could be resolved in a single proceeding in a single jurisdiction since the matters could all be litigated in British Columbia.

[70] Much depends on the results of the application in Hawaii. However, the possibility or even the likelihood that there could be parallel proceedings in circumstances in which the foreign court has not yet assumed jurisdiction does not, in itself, amount in my view, to a reason for this court to decline jurisdiction. To decline jurisdiction on that basis would be, in my view, to give too much significance to this factor. Further, while I am not suggesting that

this took place with respect to the allegations in the Hawaii Action, to give that much emphasis to the number and scope of allegations in the respective jurisdictions would provide an incentive to parties to artificially increase the number of causes of action alleged.

(d) The Desirability of Avoiding Conflicting Decision in Different Courts

[71] Conflicting decisions could arise if both this court and the court in Hawaii were to assume jurisdiction with respect to the matters that are alleged in this action. However, the magnitude of that risk materializing must be considered in light of the fact that the District Court of Hawaii recognizes the doctrine of *forum conveniens* and has not yet ruled with respect to forum.

(e) The Enforcement of an Eventual Judgment

[72] I agree with the submission of counsel for the plaintiff that this factor is neutral as the plaintiff in each jurisdiction would have to enforce its judgment in the other jurisdiction. There is no evidence before the court that either party would be unable to enforce its judgment in the foreign jurisdiction.

(f) The Fair and Efficient Working of the Canadian Legal System as a Whole

[73] One factor that has been cited in decisions applying ***Amchem*** is the question of any juridical advantage to the plaintiff and disadvantage to the defendant in this jurisdiction: see ***Stern v. Dove Audio Inc.***, [1994] B.C.J. No. 863 (S.C.) leave to appeal to C.A. refused, April 14, 1994, aff'd [1994] B.C.J. No. 2608 (C.A.). In that regard Coulson notes that PHT in the Hawaii Action has made allegations of conversion against Coulson and its personnel and intends on pursuing those allegations. Further, there is an ongoing investigation of Coulson regarding the alleged repossession of avionics parts taken from Helicopter N261F at the USFS Arroyo Grande station, in California, on or about October 29 or 30, 2005.

[74] Coulson submits that the jurisdictional advantage to Coulson of proceedings in British Columbia is that, any employee or personnel can answer the allegations of PHT and be protected by the ***Canadian Charter of Rights and Freedoms***, s. 5(2) of the ***Canada Evidence Act***, R.S.C. 1985, c. C-5, and s. 4(2) of the ***Evidence Act***, R.S.B.C. 1996, c. 124.. Further, Mr. Hauptman and/or any personnel of PHT can answer the allegations of conversion made by Coulson, under the same protection. These provisions create a protection of use and derivative use immunity. That is, a civil plaintiff or defendant under investigation by criminal or quasi-criminal authorities may be compelled to submit to civil discovery but that evidence cannot be used to incriminate such a witness at a later proceeding: see ***Hayward Securities Inc. v. Inter-Tech Resource Group Inc.*** (1985), 68 B.C.L.R. 145 (C.A.), leave to appeal to S.C.C. refused, [1986] 1 S.C.R.

[75] Coulson submits further that a party to civil ligitation in the United States does not enjoy such right. If a party chooses to answer criminal allegations in a civil proceeding his evidence could be used against him in subsequent regulatory or criminal proceedings. However, the party can elect to assert his or her 5th Amendment privilege against self-incrimination.

[76] It appears from the affidavits of Hawaiian counsel that in the United States Federal Court, there exists the possibility that if a party elects to assert 5th Amendment rights in the course of a civil proceeding, the proceeding will be stayed until the conclusion of the criminal investigation or proceeding. It is not clear how matters would proceed in the absence of a stay. The decision cited in the affidavit of Joy Yanagida states that "courts have held that the defendant must make the choice whether to plead the fifth amendment rather than forcing a delay in plaintiff's recovery".

[77] This suggests that the position of a party in the Hawaiian Action facing possible criminal jeopardy may well be more precarious than it is in this jurisdiction. In any event, it is clear that a party's right to proceed with the civil action while preserving the constitutional protections present in this jurisdiction is not present in Hawaii.

[78] This does amount in my view to a juridical advantage to the plaintiff in this jurisdiction. The significance

however of this advantage must be balanced against the fact that criminal proceedings are only a possibility.

[79] Coulson submits that an additional juridical advantage in this jurisdiction is that in British Columbia, a prevailing party is entitled to legal costs including lawyers fees as set by Appendix B of the Rules of Court. In Hawaii, the prevailing party is not entitled to attorney fees.

[80] The defendants submit that a juridical disadvantage to this jurisdiction is that while foreign law must be proved as a fact in British Columbia, it can be argued before the United States Federal Court in Hawaii as a matter of law. Thus, dealing with issues of foreign law will be more difficult and expensive in British Columbia than in Hawaii.

[81] Standing apart from the interests of the parties, there is nothing to suggest that the fair and efficient working of the Canadian legal system as a whole would be enhanced or impacted should the court exercise its discretion to decline jurisdiction.

[82] With respect to the interests of the parties, the defendants place considerable emphasis on the fact that Coulson has retained counsel in relation to this matter both in Hawaii and New York. Both the plaintiff and the defendants are represented both in British Columbia and in Hawaii. In the circumstances of the present proceeding, I do not find such representation to be a significant factor in the exercise of the court's discretion.

[83] Having regard to the factors listed in s. 11 of the ***Act***, and considering the factors identified in ***Stern***, I have concluded that British Columbia is the most appropriate forum for the resolution of the matters at issue in these proceedings.

[84] British Columbia is the forum that has the closest connection with the matters at issue in this litigation. The remaining question at issue is whether, by virtue of the scope of matters raised in the Hawaii Action, the court in Hawaii is the more appropriate forum.

[85] As stated earlier, the Hawaii Action is a parallel proceeding in the sense of subject matter. However, it is not a pending proceeding in the sense of the foreign court having asserted jurisdiction. In my view, Hawaii has not been shown to be a more appropriate forum.

[86] In the circumstances, I conclude that this is not an appropriate case for the court to exercise its jurisdiction to decline jurisdiction. The defendant's application is dismissed.

"C. Ross, J."
The Honourable Madam Justice C. Ross