"Cross-border High Anxiety? Offensive and Defensive Strategies in Transnational Litigation: Offensive Strategies"

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Cross-border High Anxiety? Offensive and Defensive Strategies in Transnational Litigation

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The cross-border case in Ontario courts is now a commonplace, no longer a rare occurrence. Principles applied by the courts to such cases—the realm of private international law or conflict of laws, a course some, but I suspect not all, of you may have elected to take, usually in your third year of law school—have also been transformed over the last 15 years or so. The materials which follow were presented at the 2007 Annual Institute in Toronto on 5 February 2007.

The Supreme Court of Canada’s legacy from its 1990 decision in Morguard through to its 2003 decision in Beals v. Saldanha, means that the vehicle for recognizing and enforcing a foreign judgment almost never reaches a trial situation; rather, it is a motion for summary judgment. Latterly, in the Pro-Swing case decided last year, the Supreme Court has opened up the field even further in the context of non-monetary relief. Incoming plaintiffs with judgments in hand from foreign courts have never had it so good.

Defensively speaking, things are a little less rosy, particularly when faced with recognition and enforcement proceedings in relation to litigation your client has either ignored (default judgment) or fought and lost abroad. But there is much more room to move creatively prior to trial in cases where your foreign client may be exposed to an originating process in Ontario; here we speak of things like motions to stay proceedings, and setting aside service.

To give you up-to-date insights from both perspectives, two seasoned civil litigators with 33 years of practice experience between them, have prepared excellent materials which merit publication in the pages of The Globetrotter with a view to reaching a wider audience. I commend them to you the reader as valuable reflections and careful observations from two members of the Bar who have clearly thought seriously about the ins and outs of transnational litigation.

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Offensive Strategies

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1. Introduction

In Beals v. Saldanha,1 the Supreme Court of Canada revisited its landmark decision in Morguard v. De Savoye2 relating to the recognition and enforcement of a default judgment obtained in Florida against four Ontario defendants arising from a mistaken property lot description. In a six to three split decision, the Supreme Court of Canada majority held that the “real and substantial connection” test, which until then only applied to interprovincial judgments, should equally apply to the recognition and enforcement of foreign judgments.

Both the majority and dissenting judgments in Beals affirmed that once the foreign court’s jurisdiction is recognized, there are only three limited defences to an action for enforcement in Canada; namely:

(1) Fraud,
(2) Denial of natural justice (procedural fairness/due process), and
(3) Public Policy.

2. Pro Swing Inc. v. Elta Golf Inc.

In Pro Swing Inc. v. Elta Golf Inc.,3 the Supreme Court of Canada held, by a narrow 4-3 margin, that the foreign (Ohio) court’s consent decree and contempt
order was unenforceable in Ontario. Both Madame Justice Deschamps, writing for the majority and Madame Chief Justice McLachlin for the dissenting minority, both agreed that the traditional common law rule restricting the recognition and enforcement of foreign orders to final money judgments should be revised.

However, Deschamps, J. suggested that such a change “must be accompanied by a judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system.” (at ¶ 15). The majority declined to clarify the scope or expand the existing defences of fraud, natural justice or public policy, or the finality requirement. (at ¶ 29)

The majority concluded that the consent decree and the contempt order were problematic and thus unenforceable, for the following reasons:

(i) the contempt order was quasi-criminal in nature and thus violated the rule against enforcing foreign penal law (at ¶s 34-36, 49-51 and 62);
(ii) the wording of the consent decree was unclear vis-à-vis the intended territorial scope of the injunctive relief sought (at ¶ 25)
(iii) there were alternative judicial assistance mechanisms (particularly letters rogatory) which were more appropriate methods in lending judicial assistance to the Ohio proceedings (at ¶s 42-44, 45-47); and
(iv) the public policy concerns over portions of the contempt order requiring disclosure of personal information that prima facie may be exempt from such disclosure based upon quasi-constitutional protections. (at ¶s 59-60)

McLachlin, C.J. in dissent, disagreed that the contempt order was penal in nature and held that the civil contempt order should be enforceable.

In the learned Chief Justice’s view, Elta Golf conceded that the general requirements for enforcement were met. The consent decree and the portions of the contempt order the motions judge held to be enforceable in Ontario were final, complete, clear, unambiguous and required no further elaboration. The hypothetical possibility of the need for future court supervision should not have precluded the recognition of a foreign order. Accordingly, if the offending parts of the contempt order could not be enforced for public policy reasons, they were, nevertheless, severable. (at ¶s 120-121 per McLachlin, C.J.)

3. The Five “C’s”: Coordination, Connection, Contradiction, Confirmation and Collection

1. Coordination - Plaintiff counsel must obtain all necessary information from foreign counsel and coordinate a foreign judgment enforcement strategy:
- carefully review both the foreign judgment and endorsement/written reasons to identify potential problems for Ontario court’s interpretation and ability to enforce locally - if injunctive relief is included, consider whether the judgment contemplates “extra-territorial and/or worldwide effect”;
- if a U.K. monetary judgment - consider a REJUKA application;4
- if a U.S. federal or state judgment - research Canadian caselaw for similar decisions recognizing American judgments.

2. Connection - it is crucial to establish jurisdiction simpliciter of the foreign (originating) court by identifying factors for “real and substantial connection”. Following Morguard, voluntary attornment by the defendant no longer remains a precondition to commence foreign enforcement proceedings in Canada. Thus, a foreign litigant is only required to show:

1. that the foreign judgment is final (must be final and conclusive in the originating jurisdiction in order to be considered enforceable by Canadian courts), based upon two factors: (1) all avenues of appeal are spent, and (2) that the foreign court has no further power to rescind or vary its own decision (res judicata);
2. that the foreign judgment was “issued by a court acting through fair process and with properly restrained jurisdiction;”
3. there exists a “real and substantial connection” between:
   • the issue in the action and the location where the action is commenced;
   • the damages suffered and the jurisdiction; and
   • the defendant and the originating forum; and
   • the defendant fails to raise a recognized defence. (i.e. fraud, natural justice or public policy).
Note: The US Supreme Court in *Sinochem v. Malaysia Int’l Shipping*, No. 06-102 (heard on Jan. 10/07-reserved) appears poised to hold that a district court may dismiss a suit on *forum non conveniens* grounds before determining conclusively that it has subject-matter or personal jurisdiction.

3. Contradiction - “The best offence is proving there’s no defence”

The traditional common law avenues of presence-based jurisdiction and/or consent-based jurisdiction (e.g., attornment, exclusive jurisdiction/forum selection clause) remain. Plaintiff’s counsel must anticipate all potential defences- fraud (extrinsic), natural justice (procedural fairness, “opportunity to be heard”), and public policy (foreign judicial bias or political/institutional corruption).

Compare Oakwell Engineering Ltd. v. Enernorth Industries Inc., with *State Bank of India v. Navarata*, two recent Ontario decisions dealing with alleged corruption/bias in the Singapore legal/judicial system, both of which highlight the substantive, procedural and evidentiary problems inherent in the traditional impeachment defences and the potential expansion of existing defences or creation of a new defence (duress).

In *Beals* at 442, Major, J. held:

Unusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment. However, “should the evolution of private international law require the creation of a new defence, the courts will need to ensure that any new defences continue to be narrow in scope, address specific facts and raise issues not covered by the existing defences.” [original emphasis]

Non-Monetary Judgments/Equitable Orders

Certainty - Traditionally, the final judgment also had to be for a certain or definite sum of money, easily ascertainable or calculable (e.g. in the form of liquidated damages).5

(i) Injunctive Remedies - *Mareva, Anton Piller, Norwich*, interim preservation (Rule 45-type) orders may now all be available to foreign litigants.7 While finality no longer appears a requirement,10 enforcement of the foreign interlocutory order must address the following considerations raised in *Pro Swing v. Elta Golf*:11

1. Are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her?
2. Is the order limited in its scope and did the originating court retain the power to issue further orders?
3. Is the enforcement the least burdensome remedy for the Canadian justice system?
4. Is the Canadian litigant exposed to unforeseen obligations?
5. Are any third parties affected by the order?
6. Will the use of judicial resources be consistent with what would be allowed for domestic litigants?2

(ii) Contempt Orders - Don’t bother. Deschamps, J. writing for the majority in *Pro Swing* held that contempt orders are quasi-criminal in nature and thus violated the rule against enforcing foreign penal law.13 There were also public policy concerns over portions of the contempt order requiring disclosure of personal information that *prima facie* may be exempt from such disclosure based upon quasi-constitutional protections.14

(iii) State Immunity - Canada’s *State Immunity Act*,15 provides that a foreign state cannot be subject to the jurisdiction of Canadian courts except for specific circumstances: where the damage occurred as part of the commercial activity of the state (section 5), or where the foreign state is responsible for death or personal injury that occurred in Canada or damage of loss of property that occurred in Canada (section 6). These exceptions reflect existing customary international law and the draft United Nations (U.N.) Convention on Jurisdictional Immunities of States and Their Property.16 17

(iv) Cross-border insolvency - Consider the jurisdictional issues relating to the bankruptcy/insolvency proceedings, in light of the nature of the debt (i.e. simple contract debt, goods sold and delivered, etc.). Are there parallel insolvency proceedings in the foreign jurisdiction? Is there a potential for cross-border judicial cooperation? Is the trustee instituting the creditors’ claim, or has the client obtained a s.38 Bankruptcy and Insolvency Act order? Does the original contract contain a forum selection/exclusive jurisdiction and/or choice of law clause?19

(v) "Anti-suit" Injunctions/Parallel Proceedings - An anti-suit injunction is a form of equitable relief ordered by court X enjoining one of the parties within court X’s personal jurisdiction from participating in pending or parallel proceedings in court Y. The threat of sanctions,
particularly contempt orders, is a powerful incentive; however, anti-suit injunctions are inapplicable at the post-judgment stage. According to the Supreme Court of Canada decision in *Amchem*, if a foreign court conforms to the Canadian approach of properly restrained jurisdiction, a Canadian court should not interfere by way of an anti-suit injunction.20

(vi) **Letters Rogatory/Letters of Request** - The Supreme Court of Canada in *Pro Swing* considered this to be the preferred procedural route.21 An Ontario court will only recognize a letter of request if the applicant can establish that the specified deponent:

(1) has some relevant knowledge to the issues in the foreign litigation;
(2) has exclusive possession of the required information and
(3) the evidence is not otherwise obtainable.22

(vii) **Cross-border class action litigation** – This is a complicated and developing area. The adequacy of notice to either opt-in or opt-out of the class proceedings or global settlement appears to be the prevailing consideration.23

4. **Confirmation**

Consider whether instructing foreign counsel has confirmed the foreign judgment in other domestic jurisdictions, if only to lend greater judicial weight to the prospective Ontario judgment proceedings.

If the foreign judgment is a confirmed international arbitration award, the foreign client/judgment creditor may alternatively proceed by way of application to enforce the foreign judgment under Rule 14.05(2) of the *Rules of Civil Procedure*.24

5. **Collection**

The ability to collect or realize on any Ontario domesticated foreign judgment should always be the top priority when accepting a transnational retainer or engagement.

Presumably, the foreign client or foreign instructing counsel already anticipates that the judgment debtor has exigible assets in Ontario.

**Rule 60 - Enforcement Mechanisms**

(a) writ of seizure and sale under rule 60.07;
(b) garnishment under rule 60.08;
(c) a writ of sequestration under rule 60.09; and
(d) the appointment of a receiver.

**Recent International Developments**

Saskatchewan has recently proclaimed the *Enforcement of Foreign Judgments Act*,25 modeled after the “Uniform Enforcement of Foreign Judgments Act” drafted by the Uniform Law Conference of Canada. Other provinces, including Ontario may soon follow.

The *Hague Choice of Court Convention* was signed on June 30th, 2005 at the Twentieth Session of the Hague Conference on Private International Law. The American Bar Association has strongly endorsed this multilateral convention. There are a number of reasons for Canada to adopt the Hague Choice of Court Convention, including:

(1) The Uniform Law Conference of Canada’s “Uniform Enforcement of Foreign Judgments Act” was drafted in the background of Canada’s participation at the Diplomatic Conferences and Working Groups at the Hague Conference on Private International Law and thus reflects the principles enshrined in the *Hague Choice of Court Convention*;
(2) it will provide greater certainty for Canadian businesses involved in international transactions;
(3) it will offer a viable alternative to arbitration as a method of dispute resolution;
(4) it will strengthen functional reciprocity between Contracting States on a multilateral level;
(5) it will codify the private international law principles of comity, reciprocity, good faith and order and fairness, espoused by most common law courts, including the Supreme Court of Canada.26

**Concluding Remarks**

Jurisdiction, choice of forum and law, and the potential for fast-moving assets, are threshold issues. Maintaining strong lines of communication with instructing foreign counsel; establishing a sound transnational litigation strategy; and anticipating potential substantive defences and defensive strategies (including parallel proceedings, anti-suit injunctions) will pay significant dividends to your clients seeking recognition and enforcement of foreign judgments in Canada.
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10 See Grace Canada Inc. (Re) [2006] O.J. No. 3643 (Ont. S.C.J. –CL) where Morawetz, J. allowed the Manitoba plaintiff class representative’s motion for recognition of a Manitoba court order declaring no conflict of interest in her counsel acting in the Ontario CCAA proceedings. Notwithstanding that the Manitoba order was non-monetary and interlocutory, it was appropriate for Ontario court to recognize it as the Manitoba order was clear and certain and its recognition presented little risk of prejudice to the defendant.

11 Pro Swing, ¶’s 31-32.

12 Id., at ¶ 25 per Deschamps, J.


14 Id., at ¶’s 59-60 per Deschamps, J.


20 Amchem Products Inc. v. British Columbia (Workers' Compensation Board) [1993] 1 S.C.R. 897, 102 D.L.R (4th) 96; Molson Coors, supra note 10. See also, Canadian Standards Assn. (c.o.b. CSA International) v. Solid Applied Technologies Ltd. [2007] O.J. No. 10 (Court File No. 06-CV-317771PD) (Ont.S.C.J.) where Morawetz J., held that in view of the outstanding issue of jurisdiction arising out of a forum selection clause was before the District Court of Tel-Aviv, it was premature for the Ontario court to consider the issuance of an anti-suit injunction. However, in the event that the District Court of Tel-Aviv decided to assume jurisdiction, or issued orders that impacted directly or indirectly on the Ontario court's decision, the applicant, CSA, was at liberty to reapply for an anti-suit injunction.

21 Id., at ¶'s 42-44, 45-47 per Deschamps, J.

22 Id., at ¶'s 25, 56-57 and 62 per Deschamps, J. See also, Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers, [2004] 2 S.C.R. 427 (S.C.C.). Cf. Re Presbyterian Church of Sudan (Re) [2006] O.J. No. 3822, (2006) 151 A.C.W.S. (3d) 571 (Ont. C.A.), where the Court of Appeal for Ontario held that a letter of request from the United States District Court could not be enforced in Ontario. Current and former residents of Sudan sued Talisman Energy Inc, a Canadian company, in the United States for acts of genocide, torture and other human rights violations, relying on the Alien Tort Claims Act for jurisdiction. Despite the Canadian government's formal diplomatic expression of its concerns over the litigation proceeding in the United States, the court held that the letter of request was not contrary to Canadian public policy. However, the court refused the request on the ground that the supporting evidence, in the form of an affidavit from New York counsel, was insufficient to establish that the evidence sought was relevant, necessary and not otherwise obtainable. The court viewed the affidavit as containing only “bald assertions” on the essential elements of the test for effecting a foreign letter of request.


