

LITIGATION NOTES

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Foreign Non-Monetary Judgments Now Enforceable in Canada

It has long been settled under the common law in Canada that monetary judgments of foreign courts may be enforced in Canada. This principle is in keeping with the notion of comity – Canadian courts will respect the authority of foreign adjudicative bodies that extend the same respect to decisions of the Canadian courts. Traditionally, a final and conclusive decision of a reciprocating foreign court could be recognized and enforced in Canada provided that it was a judgment for a debt or a definite sum of money. The courts reasoned that a foreign monetary judgment was evidence of the existence of a debt and that the courts here could issue an order for payment on the strength of that evidence. However, non-monetary judgments, particularly injunctions, were not enforceable under this traditional view. It had been considered inappropriate that the Canadian courts could be enlisted by a foreign authority to constrain the personal or commercial affairs of Canadian citizens within Canada. In an age of increasing cross border commerce, travel and communications, this view has come to be seen as antiquated. The Supreme Court of Canada has now ruled that the common law should be gradually updated to allow for enforcement of foreign non-monetary judgments in Canada in appropriate cases.

The case in question arose

from trade mark litigation brought by Pro Swing, the U.S. manufacturer and seller of golf clubs under the name Trident. The defendants were U.S. and Canadian companies selling clubs similar in appearance under names such as Rident and Trigoal. The parties settled the claim on the basis that the defendants would discontinue use of those names and would surrender the offending clubs and marketing material. However, one of the defendants that participated in the settlement continued to sell the infringing clubs by Internet. That company, Elta Golf Inc., operated in Ontario. Pro Swing obtained a contempt order in Ohio requiring compliance with the settlement agreement and brought a motion in Ontario for enforcement of that order. The enforcement order was granted by an Ontario judge. There was an appeal to the Ontario Court of Appeal and then to the Supreme Court.

The seven judges of the Supreme Court who heard the appeal agreed that the law needed to be revised to allow for enforcement of foreign non-monetary judgments, but were split on whether it was appropriate that this particular order be enforced. The majority decision of the court identified a number of considerations that Canadian courts should consider when exercising discretion as to whether to give effect to

foreign judgments of this sort. While no one factor was determinative in this case, the majority concluded that a number of deficiencies in the Ohio order, when taken together, were fatal to Pro Swing's enforcement motion.

The first factor identified by the majority was the fact that, under Canadian law, contempt is a quasi-criminal matter. Under U.S. law, a distinction is made between civil and criminal contempt. This particular contempt order was civil in nature in that it merely allowed for the settlement agreement to be incorporated into a judgment following Elta's breach of the agreement. However, the majority expressed concern that there might be unintended consequences of giving effect to civil contempt orders in Canada where such orders are invariably quasi-criminal. They were also concerned by the fact that contempt orders are viewed as a fairly serious offence by the Canadian public.

The majority was also concerned that the Ohio order was not explicit in stating that the order was intended to have extra-territorial effect. While the circumstances under which the order was obtained indicated that the order was intended to apply to Elta in Ontario, the majority stated that an important consideration in such cases is whether it is

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Non-Monetary Judgments (continued)

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clear that the foreign court intended the order to have world wide effect.

As well, the majority was troubled that Pro Swing approached the litigation in Ohio in a way that made it more expensive and difficult for Elta to respond, when a less costly procedure could have been adopted.

The minority reasons by three judges concluded that none of these factors were significant enough to warrant sheltering Elta from having to comply with the terms of a settlement that it had agreed to.

While the facts of this case leave matters somewhat muddy as to when foreign non-monetary judgments will be enforced, the court was unanimous in

deciding that Canadian courts are no longer constrained from exercising discretion to give effect to such judgments in appropriate circumstances.

Pro Swing v. Elta Golf Inc., [2006] S.C.C. 52

Perils of Attornment

In a decision arising out of a contract for the construction of an ocean fishing vessel, the Federal Court of Appeal has clarified the impact of attornment on the issue of enforceability of foreign judgments.

The case of *Morgan v. Guimond Boats Limited* arose from a contract under the terms of which the defendant, a New Brunswick corporation, agreed to construct a 50-foot ocean vessel for the plaintiff, a resident of the State of Hawaii. The boat was intended for use in the waters off Hawaii.

The boat was built, paid for and delivered in New Brunswick. After the plaintiff had taken the boat to Hawaii, a dispute arose over the boat's seaworthiness.

The purchaser commenced action in the District Court of the State of Hawaii. The defendant brought a motion to challenge the jurisdiction of the District Court and was unsuccessful. No appeal was taken from this decision. The defendant then filed a defence to the claim and did not make any further explicit reference to jurisdiction. This defence was filed in April of 2003 and the matter proceeded for approximately a year, during which time the defendant participated in a number of interim proceedings including a scheduling conference, a settlement conference and a final pre-trial conference. Then in March of 2004, counsel for the defendant filed a motion for leave to withdraw. Counsel advised the court that he was instructed

to withdraw and that his client would contest any attempt to enforce judgment in Canada.

The District Court granted the request to withdraw and proceeded to enter judgment against the defendant for approximately \$400,000.

In the fall of 2004, the successful plaintiff commenced an action in the Federal Court of Canada in order to enforce the District Court's judgment.

In resisting a claim for summary judgment, the defendant raised two main objections. In the first place, it argued that there was no federal statutory basis for the claim and that the Federal Court accordingly lacked jurisdiction to execute the foreign judgment. The summary judgment Judge had little difficulty with this aspect of the case. Paragraph 22(2)(n) of the *Federal Courts Act* assigns jurisdiction to the Federal Court in respect of "any claim arising out of a contract relating to the construction, repairs or equipment of a ship". This provision plus the Supreme Court of Canada's definition of Canadian Maritime Law in a string of cases from *ITO-International Terminal Operators Ltd. v. Meda Electronics Inc.*, to *Ordon Estate v. Grail* puts it beyond serious doubt that the Federal Court did have jurisdiction.

The Judge at first instance did, however, err in his disposition of the second issue raised by the defendant which he described as "much more troubling". Here the question was whether the District Court had personal jurisdiction over the

defendant. The Judge began by correctly observing that Canadian courts should, when considering whether a foreign judgment is enforceable, apply the "real and substantial connection" test. That test has been applied to inter-provincial disputes for 15 years and was clearly extended to foreign judgments by the Supreme Court of Canada in the case of *Beals v. Saldanha*, decided in 2003.

The Judge, applying the test, found that the connection of the defendant with Hawaii was "fleeting and relatively unimportant". He then turned his attention to the significance of the fact that the defendant had actively participated in the proceedings before the District Court. Here he found two difficulties. In the first place, he was of the view that the law of Hawaii with respect to raising and preserving an objection to jurisdiction was not clear. While the defendant was unsuccessful in his motion to oust the jurisdiction of the District Court, the Judge of first instance in the Federal Court was doubtful concerning the effect of the filing of a defence and the subsequent withdrawal of counsel. He concluded that it was not clear whether the defendant successfully preserved his objection to jurisdiction.

The Judge then turned to the more important part of his decision, namely the impact of the "real and substantial connection" test to the law of attornment. Whereas attornment is a well known and traditional source of jurisdiction, the Judge thought that it could not be ap-

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Perils of Attornment (continued)

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plied alone, without reference to the examination of connections to the jurisdiction. He expressed the view that a party could, by appearing and participating in a proceeding in a way which would give rise to attornment, “bolster” the connections between itself and the jurisdiction. However, in his view of the matter, the ultimate question should still be answered by considering the extent of those connections. If they turn out to be essentially non-existent, there is nothing to “bolster”.

Applying these considerations to the facts at hand, the motion Judge concluded that the test for summary judg-

ment had not been met. There were, he thought, complex questions of law which could not be answered without “a clear picture of the underlying jurisdictional facts”.

The Federal Court of Appeal, in a unanimous decision released early in December, did not agree that there are such difficulties. With respect to the first of the issues, it found the evidence clear enough: the defendant did not succeed in preserving a jurisdictional objection under the law of Hawaii. As to the second, the Justices on appeal found that the imagined legal complexity rested on a faulty assumption. While it is clear that the “real and substantial connection” test must be applied to determine enforceability, this test does not diminish the force of

attornment. The latter takes its effect, ultimately, from the choice of the party. By participating in a proceeding, a party expresses his willingness to be bound by the resulting determination. Indeed, the Supreme Court makes particular reference to this issue in *Beals*, where Justice Major, when speaking of the importance of connection to the jurisdiction, notes: “Although such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court.”

Morgan v. Guimond, FCA Docket A-138-06

Waiter, There’s a Fly in My Water

We have previously commented on decisions involving the concepts of mental distress or psychiatric damages.. Most recently we described (*Litigation Notes*, Volume 1, Issue 5) an important development in the law affecting mental distress claims in the law of contract. The Court of Appeal for Ontario has now brought much needed clarity to the way in which such claims should be dealt with in the law of tort.

The story in *Mustapha v. Culligan* is about a dead fly in a bottle of water and the extreme sensitivity of Mr. Mustapha, who had relied upon Culligan for drinking water. In the fall of 2001 he and his wife were placing a bottle in the home dispenser. Before the bottle was opened they both noted the presence of a foreign body which, on inspection, turned out to be a dead fly. Both had immediate reactions of revulsion and nausea, but only Mr. Mustapha went on to develop more significant problems.

Although no one actually drank any of the water, Mr. Mustapha became obsessed with the idea that he and his

family were, or might be, threatened with serious harm. The trial judge accepted that Mustapha “pictures flies walking on animal feces . . . and then being in his supposedly pure water”. As a result he had nightmares, slept poorly, became unable to drink water, experienced great difficulty taking showers, became argumentative, edgy and constipated. His work suffered and he lost his sexual drive. The trial judge awarded damages for psychiatric injury of approximately \$350,000.

The Ontario Court of Appeal set aside this judgment and required Mustapha to pay costs of the appeal. In doing so, the Court formulated a clear statement of the law. The central issues are with respect to foreseeability and policy considerations. What type of harm must be foreseeable? How are very extreme reactions which are peculiar to an individual to be viewed?

In the United Kingdom, a distinction has been made between “primary” and “secondary” victims with regard to nervous shock cases. The first are those who are involved in the actions which cause the harm while the second are passive witnesses. Significantly, the courts of the UK have found that foreseeability of physical

(as opposed to psychiatric) injury is sufficient for the first category. In respect of the second category it is necessary to show that some form of psychiatric illness in a person of normal fortitude was reasonably foreseeable.

The Ontario Court of Appeal rejected the distinction between primary and secondary victims. This it found to be a “mechanism constructed and deployed by the courts to put limits, for policy reasons, on the scope of recovery in psychiatric harm cases”. However, having rejected the distinction, the Court explicitly stated that the approach to liability must involve a consideration of policy issues in addition to foreseeability. The Court concluded that, as a matter of policy, it is not appropriate to impose liability for psychiatric injury where the harm suffered is significantly disproportionate to the relatively inconsequential nature of the incident and where the victim is not “a person of normal fortitude and robustness”. Thus the claim failed.

Mustapha v. Culligan,

Ontario C.A. Docket C43429



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Discoverability Not a Panacea

A recent decision of the Ontario Court of Appeal provides an example of circumstances in which plaintiffs who fail to add a party to proceedings before the expiry of a limitation period will not necessarily be able to avail themselves of the generous “discoverability” rule to cure their defect.

Mary Louise Pepper alleges that she suffered harm because her pharmacy mislabeled her medication. The pharmacy operated under the Zellers name and Pepper notified Zellers within days of the alleged problem. Zellers in turn notified the pharmacists who operated the pharmacy and these notified the dispensing pharmacist.

An action was commenced against Zellers, which informed the plaintiffs of the involvement of the operating pharmacists. Two years later a second action was commenced against the operating pharmacists. Counsel for the latter informed the plaintiffs’ lawyer of the identity of the dispensing pharmacist and of the fact that the pharmacy was actually owned by

a numbered company.

At this point, counsel for the plaintiffs brought a motion for permission to add the numbered company and the dispensing pharmacist as defendants. The motion ultimately succeeded as against the company, but failed as against the individual pharmacist.

The *Regulated Health Professions Act, 1991*, since amended, provided a limitation period of one year which commenced to run when the plaintiff “knew or ought to have known the fact or facts upon which the negligence or malpractice is alleged”. This limitation period was available to professionals regulated by the legislation as well as to “health profession corporations”. One of the facts determined by the Court of Appeal is that while the dispensing pharmacists clearly could claim the protection of the limitation period, the numbered company in question could not. This followed from the fact that the incorporators had failed to obtain a certificate of authorization which is

necessary to attain the status of “health profession corporation”.

Courts in Canada have often shown themselves disposed to come to the aid of plaintiffs who fail to name the proper parties in litigation before the expiry of a limitation period. Various devices such as discoverability and special circumstances have been relied upon to allow the late addition of defendants. This case illustrates however that there is a threshold to be met. Because the plaintiffs’ counsel failed to introduce any evidence of steps taken to obtain the necessary information within the limitation period, the Court refused to intervene. It concluded that this failure prevented the plaintiffs from discharging their onus of showing that they had exercised due diligence in attempting to learn the identity of the possibly liable party.

Pepper v. Zellers

Ont. C.A. Docket C44508