

## ENFORCING FOREIGN NON-MONETARY AWARDS IN CANADA

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The Supreme Court of Canada has opened the door to the recognition and enforcement of foreign non-money judgments in Canada. Prior to the Court's decision in *Pro Swing Inc. v Elta Golf Inc.*, 2006 SCC 52, Canadian common law limited the recognition and enforcement of foreign orders to final money judgments. This rule would preclude the enforcement of American equitable orders in Canada. These orders may now be recognized and enforced provided they meet the criteria outlined by the Court in the *Pro Swing* decision. These criteria should be instructive to American counsel when contemplating the recognition and enforcement of orders in Canada.

Pro Swing Inc. is a manufacturer of customized golf clubs and golf club heads and the holder of the U.S trademark for Trident. In April of 1998, Pro Swing filed a complaint for trademark infringement against, amongst others, Elta Golf Inc., a company based in Ontario, Canada. That complaint was filed in the United States Court for the Northern District of Ohio, Eastern Division. As a result of the complaint, a settlement was entered into between Pro Swing and Elta. Under that agreement, Elta stated that it had only three golf clubs or golf club heads bearing the offending trademarks, that it had discontinued marketing or using golf clubs or heads bearing those trademarks, that it would deliver up the offending items and that it would not purchase, sell or use golf club equipment bearing those trademarks in the future. This agreement was made a consent decree of the Ohio Court in July of 1998.

In December of 2002, Pro Swing filed a motion for contempt of court in Ohio on the basis that Elta had violated the settlement agreement and, in turn, the consent decree. The Ohio Court, after reviewing supporting evidence, issued a contempt order on February 25, 2003. In June of 2003, Pro Swing moved before the Ontario Superior Court of Justice to have the consent decree and contempt order recognized in Canada. Elta resisted recognition on the basis that the order was not a final judgment *in personam* for a fixed sum of money and that the contempt order should not be recognized and enforced because of its quasi-criminal nature. The motions court judge recognized the consent decree and found that the contempt order was restitutionary and not quasi-criminal in nature. The Ontario Court of Appeal reversed the motions court judge's finding on the basis that the decree and order were not sufficiently certain to be enforced and that Pro Swing could have alternatively taken an action in Ontario to enforce the settlement decree or obtain information that would have advanced its position in the Ohio Court.

The Ontario Superior Court of Justice and the Court of Appeal both articulated the view that the traditional approach of recognizing and enforcing only final monetary judgments needed to be revisited. This was a sentiment endorsed by both the majority and minority in the Supreme Court of Canada decision. In doing so, all three levels of Courts recognized that the globalization of commerce mandated such a change to the common law. However, the majority decision exhibits a cautious approach towards the recognition and enforcement of such orders and found, in the circumstances, that the

foreign order should not be recognized and enforced in Canada. The dissent, written by the Chief Justice, takes a more liberal approach to the application of the legal test and would have recognized the Ohio order.

The majority decision, authored by Justice Deschamps, reviews the requirements of equitable orders in general including the necessity that the order be clear and specific. To be recognized and enforced in Canada the order or judgment must also be final. This is a cornerstone of comity in that the receiving Court should not be required to go behind the order in the absence of fraud or a denial of natural justice and will focus on the obligation created by the order itself.

The Supreme Court went on to address the other factors to be addressed when reviewing the foreign order. The Court states that judicial assistance will not be extended, “if the Canadian justice system would be used in a manner not available in strictly domestic litigation”. It is in this context that a court can address the issues of clarity and finality and allows the Court suitable discretion not to enforce should the principles of fairness dictate.

The majority also accepted the position that Canadian courts are not required to enforce civil contempt orders on the basis of their quasi-criminal nature citing the rule that Canadian courts “will not enforce a penal order, either directly or indirectly.” In the Court’s view the nature of the remedies available upon a finding of contempt (i.e. the possibility of imprisonment) takes a civil contempt order beyond being simply restitutionary.

Canadian courts will also review whether the remedy is appropriate. As part of that evaluation, the appropriate use of judicial resources is one factor to examine. The Supreme Court, like the appeal court, noted that *Pro Swing* had other remedies available to it in Ontario. In particular, the Court identified the availability of letters rogatory as a means of providing the Ohio Court with information it might have required to enforce the order. In evaluating the appropriate use of judicial resources the Court also examined “the importance of the case compared to the damage the plaintiff would suffer if his or her request was refused.” It was noted that the number of golf clubs involved and the prospect that Elta was insolvent were factors that militated against the enforcement of the order.

A Canadian court must also be sensitive to the interpretation of the foreign order in the context of Canadian law and ensure no conflict exists between the two. A situation may arise where the interpretation is not the same based on differing interpretations of the law. This is illustrated in the nature of a civil contempt order. In the United States, such an order is remedial only and is issued for the benefit of the complainant while in Canada such an order is quasi criminal and may result in imprisonment for the offending party.

The Canadian court will also be required to look at the specific language of the order to determine whether the parties contemplated extraterritorial enforcement. In the *Pro Swing* case the order was silent as to the scope of enforcement. Justice Deschamps

commented, “In my view, in the absence of explicit terms making the settlement agreement a worldwide undertaking, the consent decree cannot be said to clearly apply worldwide.” This is an important consideration for U.S lawyers drafting orders where the parties contemplate enforcement beyond American boundaries. The original motions judge and the minority of the Supreme Court of Canada was of the view that a review of the order made it clear that it was to have extraterritorial effect. Clearly, to avoid such a debate the intended territorial scope of the order should be made clear.

While the Court has delineated some considerations impacting upon the recognition and enforcement of foreign non-monetary judgments of a final nature it seems equally clear that the list of considerations is not closed and will depend upon the facts of each specific case. Efforts to enforce foreign non-monetary orders and judgments will be entertained and will likely become a more frequent occurrence in Canada. American counsel should, when framing these orders and judgments, consider the guidance provided in *Pro Swing* and advise their clients that while Canadian courts are now receptive to enforcement that enforcement is by no means guaranteed.

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