

Litigation - Canada

Ontario court considers new defence to enforcement of foreign judgments

March 16 2010

[Introduction](#)
[Facts](#)
[Decision](#)
[Comment](#)

Introduction

In *Beals v Saldanha*⁽¹⁾ the Supreme Court of Canada noted the increasing prevalence of international cross-border transactions and concluded that there was a need for modernization of the principles of private international law as they relate to actions to enforce foreign judgments. The court applied the 'real and substantial connection' test to determine whether jurisdiction was proper and addressed the defences of fraud, denial of natural justice and offence to public morality that had been developed to guard against unforeseen unfairness. The court observed that "[u]nusual situations might arise that might require the creation of a new defence to enforcement of a foreign judgment", cautioning that the courts would need to ensure that any new defences continue to be "narrow in scope".⁽²⁾

In a recent Ontario Superior Court of Justice decision in *United States of America v Yemec*⁽³⁾ the court held, in dismissing a motion for summary judgment, that a "new defence" may be available to an action to enforce a foreign judgment in Canada, even where the court properly took jurisdiction and there was no fraud, denial of natural justice or offence to public morality. This new defence was described as the "loss of a meaningful opportunity to be heard".

The underlying facts and the court's reasoning are instructive to help to predict whether such a defence is likely to be found to be available in this case or other cases, as a matter of law.

Facts

The following summary is taken from the court's decision and was described as what "appears to have happened here".⁽⁴⁾

The US Federal Trade Commission (FTC) believed that Ontario defendants were targeting US senior citizens with a fraudulent telemarketing scheme involving Canadian lottery tickets. The FTC, acting through the United States as plaintiff, moved without notice and persuaded an Ontario judge to grant a Mareva injunction and an Anton Piller order, tendering evidence of fraudulent telemarketing activities that allowed the judge hearing the motion to conclude that there was a risk that assets would be dissipated. The defendants' offices and residences were raided, many boxes of business documents were seized and bank accounts were frozen. The defendants were evicted from their commercial premises, their business was effectively shut down, their reputations and credit ratings were damaged and the health of the defendants was profoundly affected.

The Ontario defendants retained US counsel to respond to a parallel proceeding in the United States but, lacking the resources to fight on both fronts, focused attention on the Ontario orders. Eventually, the Mareva injunction and Anton Piller orders were set aside. The reviewing judge concluded, and an appellate court affirmed, that the FTC had no basis for either the fraudulent telemarketing allegation or the allegation that the defendants were about to flee the jurisdiction or dissipate assets.

Meanwhile, the US proceeding continued, largely undefended. Relying on "undisputed facts" and "deemed admissions", the US court in due course granted summary judgment against the defendants for US\$19 million and issued a permanent injunction prohibiting them from telemarketing into the United States. The United States then moved to enforce this judgment in Ontario. At the same time, the defendants sought to

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enforce the undertaking to pay damages that were given as a condition to the granting of the Mareva injunction and Anton Piller orders.

Decision

The Ontario court was required to decide several related issues, including whether the United States was entitled to summary judgment to enforce the US judgment.⁽⁵⁾ The defendants had asserted that the judgment should not be enforced because (i) there was a denial of natural justice, and (ii) the foreign law underlying the judgment was contrary to the fundamental morality of the Canadian legal system.

The court held that there is no denial of natural justice where the focus is on the procedure employed by the foreign court to arrive at its decision, and not on any unfairness in the parties' conduct of the litigation. It noted that the defendants benefited from all the procedural safeguards, rights and remedies offered by the US federal court system, including the right to notice, the right to representation, the right to be heard and the right to a full appeal. The court also held that enforcement of the US judgment was neither penal in nature nor contrary to basic morality or public policy. In short, none of the three conventional defences succeeded. Nevertheless, the motion for summary judgment to enforce the US judgment was dismissed.

Referencing *Beals*, the court considered a new defence - the loss of a meaningful opportunity to be heard. It observed that this new defence must be different in scope and content from the natural justice defence and must relate not to the process and procedures of the foreign court, but to some significant unfairness in the way that the litigation itself has proceeded or been conducted.

The court considered the defendants' assertions that they did not receive a full and fair opportunity to defend the US proceedings because the plaintiffs strategically engaged in conduct that effectively denied the defendants a fair opportunity to be heard. It held that the evidence demonstrated that there were material facts in dispute raising genuine issues for trial, including whether:

- the admittedly novel 'new defence' was available in the circumstances of this case;
- the defendants were in fact denied a meaningful opportunity to be heard; and
- the US judgment should be enforced in Ontario.

The motion for summary judgment was dismissed and a trial was ordered.

Comment

The *Yemec* decision seems to open the door for creative defences to actions to enforce foreign judgments based on factual allegations that arise from the plaintiff's conduct in relation to the way in which the litigation has proceeded, even where such conduct is insufficient to support conventional defences of fraud, denial of natural justice and offence to public morality. As the decision was not a trial judgment, but only denied a summary judgment motion on the basis that such a defence may be available, it remains to be seen whether the defence will be held to be available as a matter of law and, if so, whether it will succeed in this case.

Nevertheless, the decision that such a defence may be available is somewhat disconcerting, given that the plaintiff appears to have followed all proper procedures to obtain the US judgment and the defendants voluntarily submitted to the jurisdiction of the US court and asserted their rights in the US litigation, albeit unsuccessfully. The absence of a "meaningful opportunity to be heard", as the court put it, seems to have resulted principally from a lack of sufficient resources to respond to the claim of a well-financed plaintiff, a circumstance that confronts defendants on a daily basis in courts in Canada, the United States and elsewhere.

However, to the extent that the defendants lacked resources to defend the US litigation effectively because of the consequences of the improperly granted Mareva injunction and Anton Piller orders, the remedy, if any, should perhaps be confined to damages in accordance with the undertaking that was given by the plaintiff as a condition to the granting of such orders. The damages could theoretically include the liability under the US judgment, and the defendants would have to demonstrate entitlement to such damages based on the same principles that apply to assessing damages for breach of contract, subject to principles of causation, remoteness, foreseeability and mitigation.

Whether a defence to enforcement of a foreign judgment based on loss of a meaningful opportunity to be heard will ultimately be added to the conventional defences of fraud, denial of natural justice and offence to public morality is by no means assured. However, if it is held to be available, it seems unlikely that there will be frequent occasions where such a defence is successfully asserted.

For further information on this topic please contact [Peter Cavanagh](#) at Fraser Milner Casgrain LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (peter.cavanagh@fmc-law.com).

Endnotes

(1) [2003] 3 SCR 416.

(2) *Beals, supra*, at para 42.

(3) (2010), 97 OR (3d) 409.

(4) *Yemec, supra*, at para 9.

(5) The court also addressed whether: (i) the undertaking to pay damages should be enforced, given allegations of "special circumstances", including illegality, deception and "unclean hands"; and (ii) the United States had standing to sue the defendants on behalf of US residents who remitted money to the defendants in response to the alleged fraudulent telemarketing scheme. It held that an inquiry into damages should be held, and that the United States lacked standing to sue on behalf of US residents.

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