



LITIGATING CROSS-BORDER DISPUTES: Essential Considerations

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CORPORATE PERSONAL INJURY REAL ESTATE **INTERNATIONAL** IP LITIGATION CRIMINAL FAMILY LABOUR & EMPLOYMENT ESTATES

Agenda



1. U.S. / Canadian Trade Introduction
2. Enforcement of Foreign Judgments in Canada
 - *Injunctive Relief*;
 - *Arbitral Awards*
3. Whether to Sue in U.S. or Canada
4. Obtaining Evidence in Canada
 - *Letters Rogatory*

Whether to Litigate/Arbitrate in the U.S. or Canada? And Why?

- ❖ Historically it has been very difficult to enforce U.S. (foreign) judgments and arbitral awards in Canada
- ❖ This has all changed radically within the last 14 years or so as a result of key Supreme Court of Canada Decisions
- ❖ In turn, the answers to the questions “where to litigate and why?” Have changed dramatically

U.S. / Canadian Trade: Unparalleled Worldwide

- ❖ Largest trade relationship in the world
- ❖ Well over \$2 billion dollars per day!
- ❖ The NAFTA Effect: 2-way trade has nearly doubled since its inception, reaching \$602.5 billion in 2008
- ❖ One of the world's largest bilateral investment relationships

Our Shared Border: Key to Security and Prosperity



Trade and Commerce = Litigation

- Inevitably increased commerce and trade leads to *increased Litigation!*
- How has the legal establishment reacted?

Canadian Courts Respond: The Importance of Comity

- Canadian Provincial and Federal Courts have become more flexible and liberal in enforcing foreign Judgments.
- The principal of “*Comity*” has taken on new importance.

Comity: “Canadian Style”

'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws“

***Morguard v. De Savoye* [1990] 3 S.C.R. 1077 (SCC),
quoting *Hilton v. Guyot*, (1895) 159 U.S. 113 at 163-64**

Comity: “Canadian Style”

- ***[The doctrine of comity] must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility.***

***Beals v. Saldanha (2003) Carswell Ont
5101 (SCC)***

Canadian Law of Foreign Enforcement Pre-Morguard

Enforcing foreign Judgments in Canada used to practically depend on:

- ✓ The Canadian Defendant being present in the foreign jurisdiction at the time of the action; or
- ✓ The Canadian Defendant attorning to the foreign jurisdiction voluntarily



Canadian Law of Foreign Enforcement Pre-Morguard

Effects on Advice of U.S. Counsel to their clients:

1. Sue in the U.S. and hope to prove:
 - a) presence in the jurisdiction; or
 - b) attornment to the jurisdiction

2. Litigate in Canada

Canadian Law of Foreign Enforcement Pre-Morguard

Constitutional Differences:

- U.S. - “Full Faith and Credit”
Constitutionally entrenched

- Canada – judge made law followed by
non-constitutional statutory
intervention

Morguard v. De Savoye: Opening the Canadian Frontier

- *General Principal:* Canadian courts should enforce “foreign” judgments where:
 - the foreign court has exercised its jurisdiction legitimately;
 - the foreign court has exercised due and fair process; and
 - the foreign judgment is “final”

Morguard v. De Savoye: Opening the Canadian Frontier

- The “Real and Substantial Connection Test” (RSC)
 - There must be a ***Real and Substantial Connection*** between the jurisdiction and the defendant or the subject matter of the action

Morguard v. De Savoye: Real and Substantial Connection Test

Indices of RSC include:

- ✓ defendant's presence in jurisdiction
- ✓ contract formed in jurisdiction
- ✓ contract breached in jurisdiction
- ✓ damages incurred in jurisdiction
- ✓ events in dispute occurred in jurisdiction
- ✓ choice of law clause in contract naming jurisdiction
- ✓ property in dispute located in jurisdiction

Requirements for Enforcement: Judgment must be “Final”

- ❖ To be enforceable in Canada a U.S. Judgment must be “final”

Requirements for Enforcement: Judgment must be “Final”

- ❖ A Judgment under Appeal is considered “final”
- ❖ but...the enforcement action may be stayed pending the Appeal.

Enforcement of U.S. Judgments: Defences

Four main Defences:

1. Lack of Jurisdiction
2. Fraud
3. Public Policy
4. Natural Justice

Enforcement of U.S. Judgments: Defences

1. Lack of Jurisdiction

- Test: Real and Substantial Connection
- Too late for arguments that Canadian Jurisdiction would be preferable

Enforcement of U.S. Judgments: Defences

2. The Judgment was obtained by Fraud
 - Test: Is there newly discovered proof of fraud which was *not* before the U.S. Court?
see. *Beals v. Saldanha* (2003) S.C.J. No 77 (S.C.C.)

Enforcement of U.S. Judgments: Defences

3. To Enforce the Judgment would offend Canadian Public Policy

- Largely Impotent Defence in light of similarities in legal systems cross-border

Enforcement of U.S. Judgments: Defences

4. The Judgment was obtained in contravention of Natural Justice
 - Test: Failure to provide substantive due process



Enforcement of U.S. Judgments: Defences

- ❖ What is not a defence?
 - The Judgment involved an error of law or fact.....it was *wrong!*

Assessing the Impact of Morguard

❖ Interprovincial Effect

- Judicially created “full faith and credit”



Assessing the Impact of Morguard

- ❖ International/USA Impact
 - All Canadian Provinces have applied *Morguard* liberally *vis a vis* U.S. Judgments
 - Has he “Comity Pendulum” swung too far toward Recognition?

Assessing the Impact of Morguard

- ❖ *Beals v. Saldanha* (2001) Carswell Ont 2285 (Ont. C.A.); (2003) S.C.J. No 77. (S.C.C.)
 - \$8,000 USD Florida Claim becomes \$260,000 USD Florida Judgment
 - \$260,000 USD Florida Judgment becomes \$800,000 CAD Ontario Judgment after exchange and interest

Historic Approach Re Enforcement of Foreign Injunctive Orders

- ❖ Historically non- monetary/injunctive orders have *not* been capable of enforcement in Canada
- ❖ Such judgments might render the matters dealt with *res judicata* in Canada
- ❖ Traditionally Cross-border injunctive relief required:
 - ✓ A Canadian action claiming injunction;
 - ✓ An interlocutory motion for injunctive relief in the Canadian jurisdiction

Historic Approach Re Enforcement of Foreign Injunctive Orders

- Historically non- monetary/injunctive orders were *not* capable of enforcement in Canada
 -foreign injunctive Orders were said to offend the traditional rules that required judgments to be:
 - for a ***fixed and ascertained sum*** and
 - to be ***final and conclusive***.

Historic Approach Re Enforcement of Foreign Injunctive Orders

Public Policy Reasons for these Rules:

- Judgments for money owed are:
 - Simple
 - Clear
 - Conclusive
 - Unambiguous
 - Unlikely to require knowledge of complex factual background matrix
- Judgments for Injunctive relief are often just the opposite of the above

Liberalization of Foreign Monetary Judgment Enforcement in Canada

- *Morguard v. De Savoye* (SCC) liberalized Enforcement of Judgments in Canada
 - Real and Substantial Connection Test – for establishing Legitimate Jurisdiction
 - Limited Defences to Enforcement

Effect of Liberalized Enforcement in Context of Non-Monetary/Injunctive Orders

Since *Morguard*:

- Traditional barriers to enforcement of Non-Monetary Relief have been scrutinized by Canadian Courts
 - *Uniforet Pate Port-Cartier Inc. v. Zerotech* [1998] B.C.J. No 192 (BCSC)
 - *Pro Swing Inc. v. Elta Golf Inc* [2003] O.J. No 5434 (Ont. S.C.J.); [2004] O.J. No 2801 (CA), leave to appeal to SCC granted March 17, 2005, [2004] S.C.C.A No 420 (SCC)

Effect of Liberalized Enforcement in Context of Non-Monetary/Injunctive Orders

- *Uniforet Pate Port-Cartier Inc. v. Zerotech*
[1998] B.C.J. No 192 (BCSC)

“Following the principles established in Morguard and subsequent authorities, I conclude that, even assuming the common law rule that a judgment be for a sum certain before it could be enforce, the rule has been abrogated. To paraphrase La Forest J. in Morguard, it would be a serious error to give effect to such a rule when the obvious intention of the Canadian Constitution is to create a single country. There is no principled reason why judgments other than monetary judgments should not be recognized and enforced”

Effect of Liberalized Enforcement in Context of Non-Monetary/Injunctive Orders

The Court Will Examine:

- traditional barriers to enforcement of foreign non-monetary orders
- public policy considerations founding traditional barriers to enforcement

Pro Swing Inc. v. Elta Golf Inc at the Supreme Court

Pro Swing Inc. v. Elta Golf Inc

- At trial, Ohio Injunctive Order found to be enforceable in Ontario
 - *Morguard, Hunt, Beals* etc. principles apply to non-monetary judgments
 - Injunctive Order in this case final and conclusive
- On Appeal, Ohio Injunctive Order found **Not** to be Enforceable in Ontario:
 - Ambiguous in respect of material matters

Impacts of Liberalized Enforcement of Foreign Injunctive Relief In Canada

- Impact on U.S. interests:
 - Improved access to Injunctive Relief Against Canadian Interests
 - Convenience
 - Less Expensive Access
 - Legal Comfort level/Home field advantage

Impacts of Liberalized Enforcement of Foreign Injunctive Relief In Canada

- Impact on Canadian interests:
 - Canadian interests would find themselves more and more fighting legal battles:
 - In foreign locales
 - Using foreign lawyers who employ different legal principles
 - At higher costs
 - Less convenience

Are International Arbitral Awards Enforceable In Canada?

- Yes
- pursuant to Statute or at Common Law

What You Need to Know To Enforce Your Arbitral Award

When applying to enforce an arbitral award you must supply the Court with the following:

- the duly authenticated original arbitral award or a duly certified copy;
- the original arbitration agreement or a duly certified copy;
- if the arbitral award is not made in an official language of Canada (English or French) a duly certified translation must be provided;



What You Need to Know To Enforce Your Arbitral Award

- ❖ The award will be *unenforceable* if the court finds that:
 - ☯ the subject matter of the dispute is not capable of settlement under the laws of the Canadian jurisdiction, or;
 - ☯ Contrary to public policy



What You Need to Know To Enforce Your Arbitral Award

- ☯ If a party *opposes* recognition and enforcement of an arbitral award it may be subject to an Order Requiring it to post *security for costs*

Can Evidence Be Obtained in Canada For Use in Arbitral Proceedings?

- Yes
- Evidence Given Voluntarily
- Evidence to be Obtained by Court Order

Whether to Sue in Canada or U.S.A.?

- ❖ Factors Favoring Commencement in the U.S.:
 1. Formal Jurisdictional Considerations:
 - a. The Legitimate Jurisdiction hurdle has been set very low for enforcement of U.S. Judgments in Canada
 - b. Forum selection contractual clause favoring U.S. jur.
 - c. Choice of law contractual clause favoring U.S. jur.
 - d. Balance of territorial connections: *forum non-conveniens* factors favoring U.S. jur.

Whether to Sue in Canada or U.S.A.?

- ❖ Factors Favoring Commencement in the U.S.:
 2. Defences to the enforcement of U.S. judgments in Canada are very restricted.
 3. Strategic and cost-benefit advantages:
 - a. Greater possibility of default
 - b. The “lawyer negligence” effect
 - c. Increased costs to Canadian party of litigating – effect on settlement position
 - d. Greater right to discovery: deposing witnesses before trial

Whether to Sue in Canada or U.S.A.?

- ❖ Factors Favoring Commencement in the U.S.:
 4. Territorial advantages in U.S.A. – typically not available in Canadian Jurisdictions:
 - a. Treble damages
 - b. Civil jury damages
 - c. Punitive damages
 - d. Substantive law advantages

Whether to Sue in Canada or U.S.A.?

- ❖ Factors Favoring Commencement in Canada:
 1. Where “Real and Substantial Connection” to the U.S. Jurisdiction in question is in doubt
 2. Formal Jurisdictional Considerations:
 - a. The availability of enforcement of a Canadian Judgment in the particular U.S. jurisdiction
 - b. Forum selection contractual clause favoring Can.
 - c. Choice of law contractual clause favoring Can.
 - d. Balance of territorial connections: *forum non-conveniens* factors favoring Can.

Whether to Sue in Canada or U.S.A.?

- ❖ Factors Favoring Commencement in Canada:
 3. Less Expensive litigation
 4. Legal Costs to the winner!
 5. Comfort Level with counsel in both jurisdictions and desire to eliminate any duplication in proceedings



Practical Advice Re Enforcement of U.S. Judgments in Canada

- For U.S. Counsel seeking to obtain and enforce a U.S. Judgment in Canada
 - ✓ Contact a Canadian lawyer practicing in the area
 - ✓ local legal nuances
 - ✓ pre-Canadian suit options such as judgment debtor examinations



Practical Advice Re Enforcement of U.S. Judgments in Canada

- Process by Which U.S. Judgment is enforced in Canada
 - Action is commenced “on the judgment”
 - Summary Judgment Motion is brought as quickly as possible

Practical Advice Re Enforcement of U.S. Judgments in Canada

➤ Summary Judgment Hurdles

1. “Genuine Issues for trial”

a. Credibility in issue

b. Judgment involves:

“weighing evidence”

“finding of facts”

Practical Advice Re Enforcement of U.S. Judgments in Canada

Options where Summary Judgment *Not* Available:

1. Trial of an Issue;
2. Speedy Trial List;
3. Regular Litigation to Trial

Practical Advice Re Enforcement of U.S. Judgments in Canada

- For U.S. Counsel advising Canadian Concerns which have been sued in the U.S.
 - ✓ Defend, Defend, Defend!

Letters Rogatory

Letters Rogatory (defn):

a request from a domestic Court to a foreign Court for something requiring cooperation

“Comity” and Obtaining Evidence in Canada

- International Legal Assistance Between Courts rests on the Principle of “Comity”
- Principle of International Comity

“Comity’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”

Morguard v. De Savoye [1990] 3 S.C.R. 1077 (SCC),
quoting *Hilton v. Guyot*, (1895) 159 U.S. 113 at 163-64

Comity: Enforcing Letters Rogatory

- Courts give assistance to each other across borders not as a matter of obligation, but rather out of mutual respect and deference

- A foreign request is given full force and effect unless:
 - ✓ contrary to public policy
 - ✓ Prejudicial to sovereignty
 - ✓ Prejudicial to citizens



Issuing Letters Rogatory In United States

- ✓ Addressed “To the Appropriate Authority In Canada”
- ✓ Who you wish to examine and why
- ✓ Clearly state evidence sought
- ✓ relevance



Issuing Letters Rogatory In United States

❖ Required:

- ✓ that evidence not obtainable in United States
- ✓ Under seal
- ✓ signed by a Judge



Issuing Letters Rogatory In United States

- ❖ Canadian Court wants to know all evidence before U.S. Court when Letters Issued

W.R. Grace Co. v. Brookfield Development Corp.[1995]
O.J. No. 1483 (Gen. Div.).

How do you Obtain Evidence In Canada?

- First Things First
 - ✓ Contact Canadian Counsel prior to pleading (if possible)
 - ✓ Determine what you need
 - ✓ Be careful of fishing expedition
 - ✓ Obtain letters of request from your Court be specific as to:
 - who is examined, why and for what



6 Factors Court Will Consider in Exercising Discretion

- 1) Evidence sought is relevant
- 2) Evidence sought necessary
- 3) Evidence is not otherwise obtainable
- 4) Order sought not contrary to Public Policy
- 5) Documents sought identified with reasonable specificity
- 6) Order not unduly burdensome



(1) Evidence Sought is Relevant

- Evidence must be Probative of Issues in the Action
- Must be greater than “Potentially Probative” (*Pecarsky v. Lipton, Weisman, Albain & Partners*, [1999] O.J. No. 2004 (S.C.J.))
- Must establish how and why it is relevant (*Giampo v. Canada Trust* [1998] CarswellOnt 3911)
- Judge stating the evidence is relevant in the Letters Rogatory is not sufficient



(2) Evidence Sought Is Necessary for Trial and Will be Used at Trial, if Admissible

- This factor is *no longer relevant* in Letters Rogatory seeking a discovery for Pre-Trial or Investigatory Proceedings

(3) Evidence Sought Is Otherwise Unobtainable

- Must Establish that Evidence Sought is *Otherwise Unobtainable*
- Exhausted *All Options* available
- that Letters Rogatory is a *last resort*

(4) *Contrary to Public Policy*

- Uranium Cartel Case (*Gulf Oil Corp. v. Gulf Canada Ltd.* [1980] 2 S.C.R. 390)
- Blocking Statutes in Canada
- *Business Records Protection Act* R.S.O. 1990, c. B-19
- *Foreign Extraterritorial Measures Act* R.S.C. 1985, Chap. F-29



(5) Documents Sought are Identified with Reasonable Specificity

- Can identify by class or topic
- terms and conditions can be placed by the Canadian Judge Ordering Letters Rogatory

(6) Not Unduly Burdensome

- Order sought *not unduly burdensome*, with attention paid to what relevant witnesses required to do and produce were the action tried in Canada
- Guidance from Rule 31.10 of the Ontario Rules of Civil Procedure
- Just because it's not done in Canada does not mean it can't be done



If you Get It Wrong Can you Go Back?

- *RE Friction Division Products, Inc. and E.I. Dupont de Nemours & Co. Inc. et al. (No.2) (1986) 546 O.R. (2d)*
 - Res judicata
 - Issue estoppel
 - Abuse of process

If you Get It Wrong Can you Go Back?

- The Ontario Court of Appeal held that Letters Rogatory could be re-submitted by U.S. Court to conform with requirements

“if he was trying to take another bite at the apple, it was from a different apple.”

RE Friction Division Products, Inc. and E.I. Dupont de Nemours & Co. Inc. et al. (No.2) (1986) 546 O.R. (2d)

Thank You!

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