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Recognition and Enforcement of Foreign Non-Money Judgments in Canada

The Supreme Court of Canada has recently held that, in proper circumstances, a foreign non-money judgment will be enforced in Canada. This decision marks a departure from the centuries old common law rule that prohibited the recognition and enforcement of foreign non-money judgments.

Background

In 1998, a United States company that manufactured and sold customized golf clubs and equipment filed a complaint in the United States against eight defendants, including a Canadian company, for trade-mark infringement. Subsequent to the filing of the complaint, the president of the Canadian company signed a declaration admitting trade-mark infringement. The declaration was incorporated into a settlement agreement which itself was later incorporated into a consent order in the US Court.

In February of 2003, the US Court found that the Canadian company had violated the consent order and issued a contempt order which included an injunction prohibiting the infringement of the trade-mark.

In June of 2003, the plaintiff filed a motion for recognition and enforcement of the US orders in Ontario, Canada. The Canadian judge recognized certain paragraphs of the US orders and

declared them to be enforceable. The matter was ultimately considered by the Supreme Court of Canada.

The Supreme Court of Canada concluded that the US orders were too problematic from many points of view to enforce. However, the Court left the door open to future enforcement of foreign non-monetary judgments where:

- (a) the order or judgment is not penal in nature;
- (b) Canadian judges are not overly burdened with interpreting foreign laws or supervising enforcement of foreign orders; and
- (c) the order does not offend the principle of territoriality.

Traditionally, in order to be recognizable and enforceable in Canada a foreign judgment must be for a debt or definite sum of money (not in respect of taxes or other charges in the nature of a fine or penalty) and final and conclusive.

The Supreme Court held, however, that there is a compelling rationale for changing the common law rule for non-money judgments. It added that, given a departure from the common law rule will necessarily effect both commercial activity and judicial assistance in an era of large scale cross-border commerce and litigation, it was important to proceed cautiously in implementing any changes.

(a) The Quasi-Criminal Nature of the Contempt Order

Canadian courts will not enforce a foreign penal order either directly or indirectly. An order, even when it is used to enforce a purely private order, still involved an element of public law because, in a contempt order, respect for the role and authority of the court is always at issue. As a matter of principle, the quasi-criminal nature of the contempt order precludes the enforcement of such orders in Canada.

(b) The Burden on the Justice System

The Supreme Court held that when deciding whether to issue an injunction, judicial economy is one of the many considerations the court must evaluate. In private international law, this concern is addressed in the principle of comity. Comity concerns not only respect for a foreign nation's acts, international duty and convenience, but also the protection of a nation's citizens and domestic values.

The Supreme Court held that in considering alternative means to reach a particular outcome, a judge may consider whether the matter merits the involvement of a Canadian court. The court must weigh the importance of the case against the damage the plaintiff would suffer if his or her requests were refused. When the circumstances give rise to legitimate concerns about the use of judicial resources, the litigant bears the burden of reassuring the court that the matter is worth proceeding with.

(c) The Extra-Territorial Nature of the Orders

The Court found that the extraterritoriality of the US orders was important because the infringing transactions were made over the internet and because the trade-mark was protected only in the United States. The internet component did not transform the United States trade-mark protection into a worldwide one. Whether the Canadian defendant could by consent have agreed to such an extension is a matter of interpretation. In the absence of explicit terms making the settlement agreement a worldwide undertaking, the consent order may not apply worldwide.

The Court concluded that to interpret the US orders as applying outside the US would offend the principle of territoriality and declined to enforce them.

This update is intended for general information purposes only and should not be relied upon as legal advice.

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