



## FOREIGN INJUNCTIONS NOW ENFORCEABLE IN CANADA

Canadian businesses operating abroad need to be aware of a recent decision of the Ontario Court of Appeal enforcing a foreign injunction against Canadian business people and businesses. This is the first case of its kind in Canada.

Canadian courts have always had the power to enforce the judgements of “foreign” courts as if they were their own. Their willingness to exercise that power has broadened over the years, as the world has become more globalized. By 1989, it was clear that the courts of one province would generally enforce judgments from other provinces, provided there was a “real and substantial connection” between the original province and the case. By 2003, it was clear they would do so for judgments of foreign states on the same basis, particularly the United States of America and members of the British Commonwealth.

Throughout this period it was generally good legal advice to a Canadian business sued in another province or a foreign jurisdiction to defend that lawsuit on the merits there. The available defences to the enforcement of a foreign judgment in the business’s home province were few (three to be precise) and very restricted in scope. Some businesses opted to ignore foreign lawsuits, gambling they could persuade the courts of their home provinces not to enforce the resulting judgments. Whatever the practical appeal of that strategy when the business first learned of the foreign lawsuit, its consequences were generally disastrous.

But there was always a significant limitation on Canadian courts’ willingness to enforce foreign judgments: they would only do so if the foreign judgment was for a

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specific amount of money. They would not enforce foreign judgments granting other kinds of relief, such as injunctions and specific performance orders.

Then, in 2006, the Supreme Court of Canada, considering the attempt of a U.S. plaintiff to enforce a U.S. District Court injunction against a Canadian business in Ontario, concluded the time was ripe to discard that limitation, to open the door to the enforcement of foreign judgments that were not for specific amounts of money.

Without setting out exhaustively the criteria a Canadian court should consider in deciding whether to enforce a non-monetary foreign judgment, the Court listed these considerations:

- As with monetary orders, the foreign judgment must not have been obtained by fraud and must not violate Canadian principles of natural justice or public policy;
- The foreign judgment must have been granted by a court of competent jurisdiction and must be final;
- The order must be a similar kind of order to that which the Canadian court itself would have granted had the foreign situation been before it;
- The order must be clear and specific, so the defendant knows what is expected of it in response;

- The order must be limited in its scope and the foreign court should have retained the power to issue further orders if necessary;
- The order should not expose the defendant to unforeseen obligations;
- The order should not affect third parties; and
- The use of judicial resources enforcing the order should be consistent with what would be done in a Canadian case.

But, having laid down those general considerations, the Court decided not to enforce the U.S. injunction in that case. The Court had laid out a roadmap for what kinds of non-monetary foreign judgments Canadian courts should enforce. But there was no concrete example of a Canadian court doing so.

Now there is. On June 8, 2010, the Ontario Court of Appeal considered whether a U.S. District Court injunction should be enforced against Canadian business people and businesses in Ontario. The Court repeated the considerations set out by the Supreme Court of Canada. It concluded that almost all of them favoured enforcement of the injunction. The Court ordered that the U.S. injunction be enforced.

Businesses operating in foreign jurisdictions should be aware that the enforcement of foreign injunctions and other non-monetary orders in Canada is no longer just a theoretical possibility. It is now a concrete risk (or opportunity, depending on which side of the order the business is on). More than ever, businesses generally have only one chance to defend a foreign claim – when it is made, in the foreign jurisdiction. More than ever, the consequences of ignoring that reality are likely to be disastrous.



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## WHAT TO DO ABOUT DELAY IN ARBITRATION?

“Dismissing a claim {for delay} is something, generally speaking, an arbitrator cannot do.”

Commercial arbitration can be a more efficient route to dispute resolution than litigation. Document production and examination of witness requirements are narrower, parties have more control of the process and there are fewer delays because of scheduling issues. As a result, the timelines are shorter and disputes are resolved more rapidly. At least in theory.

In reality, delays can still obstruct the arbitration process and, when faced with delays, you may not have the same remedies at your disposal as in litigation. If you are defending a claim in court and the plaintiff delays the process, you can eventually ask the court to dismiss the claim for "want of prosecution" — because the plaintiff has not been diligent in prosecuting its claim. If the court considers that the delay is inordinate and inexcusable, and has caused you harm, it can dismiss the claim. Essentially, the court has the power to decide whether it is fair for a plaintiff to continue its claim against a defendant after delaying for a long time without good reason.

But what if that situation arises in an arbitration? Does an arbitrator have the power to dismiss the arbitration when a claimant causes delay? A recent decision has confirmed that in British Columbia an arbitrator does not. In that case a dispute arose between a warehousing company and two manufacturers. It went to arbitration in June 2000. The arbitrator decided the liability issue, but not damages. Further work was required to calculate damages. But the years passed and no formal steps were taken. Then, in June 2009 the warehousing company delivered a report calculating its damages. The manufacturers asked the arbitrator to dismiss the arbitration because of the lengthy delay.

Even though the arbitrator thought that the delay was lengthy, inexcusable and harmful to the manufacturers, he concluded he did not have power to dismiss the arbitration. He said that an arbitrator, unlike a judge, only has the powers given him by the applicable statute and the

rules chosen by the parties in their arbitration agreement. In that case that statute and those rules did not give him the necessary power.

The law in this area is in a formative stage. In general, parties to arbitration are both expected to move the matter forward. In specific cases, the arbitrator can "terminate" the arbitration, such as where the claimant fails to comply with an order or the rules chosen by the parties, or where the arbitrator finds that the proceedings have become unnecessary or impossible. But a termination is different from a dismissal—it is a neutral term indicating the process is finished, and does not have the same force as the dismissal of a claim. Dismissing a claim is something, generally speaking, an arbitrator cannot do.

**Bottom line:** Keep in mind, when deciding whether to arbitrate disputes as opposed to litigating them, that the very differences between arbitration and litigation which make arbitration attractive may change the procedural remedies for delay available to you. Consider also whether to include in your arbitration agreement an express provision modifying the chosen arbitration rules to give the arbitrator the power to dismiss a claim for delay.

If your commercial arbitration is stalled, get the arbitrator involved. Make sure the arbitrator knows about any delays caused by the other parties. Have a teleconference or hearing to voice your complaints about the process. Ask for a tight schedule and ensure that it is followed.

If you are defending the arbitration, it may be in your best interest to let it lie. But do not forget the harm you yourself can suffer from delay, such as fading witness memories and loss of documents.



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## MORTGAGE FRAUD: IMPROVING RECOVERY THROUGH “WAIVER OF TORT”

“This can work quite well when underlying property values have appreciated since the placement of a fraudulently induced mortgage.”

Mortgage fraud litigation focuses on the loss suffered by the lender when it foreclosed on a fraudulently induced mortgage. But in cases of mortgage fraud through valuation manipulation in a rising real estate market, the lender may foreclose but suffer no loss. The fraudster can then defend on the basis that their fraud caused no damage. Superficially, the defence boils down to “no harm, no foul”.

But there is a way of framing a mortgage fraud claim which can overcome this difficulty: the rarely used legal theory of “waiver of tort”. This can work quite well when underlying property values have appreciated since the placement of a fraudulently induced mortgage.

Waiver of tort is essentially a restitutionary remedy. It requires the fraudster to disgorge their ill gotten gains, rather than to compensate the lender for its loss. It usually refers to the situation where a claimant seeks a restitutionary remedy (reversing the defendant’s wrongful enrichment) for a tort, rather than the usual remedy of compensatory damages. It is a misleading term because it has nothing to do with a tort being waived. On the contrary, the fraudster’s wrong is the foundation of the claim. One legal decision describes the concept:

*The nomenclature "waiver of tort" is somewhat confusing. A plaintiff is not waiving the right to sue in tort but rather, electing to base his/her claim in restitution. The plaintiff thereby seeks to recoup the benefits that the defendant has derived from the tortious conduct. For example, if the tortfeasor's gain exceeds the quantum of damages that the plaintiff might recover in an action in tort, the plaintiff might well choose to concurrently pursue the alternative (so-called "waiver of tort") remedy founded in restitution .*

The opportunities to use this concept continue to expand. In a recent decision, the B.C. Court of Appeal suggested that a claim of waiver of tort might be advanced by a class of claimants as a

whole, without requiring proof of individual losses, where the defendant realized a gain as a result of wrongful conduct. At this point, what constitutes “wrongful conduct” in that context has not been fully defined.

If a lender decides to pursue a mortgage fraud claim, it should assemble the evidence of wrongful conduct by all participating parties. This could lead to disgorgement of the benefits each participant received. For some, this could be simple. If a mortgage broker was involved, they may have to disgorge their commission. If an appraiser was involved, they may have to disgorge their fee.

But if a developer or prior owner was involved, the situation could be more complex. Would damages be the difference between the fraudulently appraised value of the property and its real value at the time? Would it be based on the cost of borrowing, had the developer or purchaser disclosed the real value of the property? Would it be the intervening appreciation in the value of the property? Or would it be some combination of the three? Investigation costs could also be a component of the claim.

If there was a conspiracy among several participants, then a mortgage fraud claim has one further interesting dynamic: damages may well be joint and several among all the participants in the conspiracy. Further, a damages award flowing from such a claim may survive a subsequent bankruptcy.

Mortgage fraud comes in many flavors. The common theme is that it causes loss, and increases costs, for all legitimate participants in real estate conveyances. It is only if the financial incentives for such fraud are fully recovered from those who conspire to commit them, or who turn a blind eye to them, that we can hope to reduce this scourge. A claim based on waiver of tort is one way to accomplish that.



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Dispute Resolution is general information, not legal advice. We would be pleased to provide additional details and to discuss the possible effects of these matters in specific situations.

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