

## Cross-border litigation gets complex



Ontario courts catching up as commerce becomes more internationally focused



By Daryl-Lynn Carlson | Publication Date: Monday, 09 August 2010

As the world gets smaller due to technology that enables entrepreneurs to open businesses in foreign jurisdictions, there are a number of legal issues lawyers must deal with to determine which court will have the authority to preside over litigation matters that arise.

In Toronto, the law firm of Charles B. Wagner & Associates is tackling those issues through a complement of litigation lawyers able to deal with them. "As the world has grown smaller, the courts have caught up with commerce that is interprovincial and also international," says Charles Wagner, founder of the firm.

He cites as examples the decisions in two respective cases in the United States. "If an American court renders a judgment for a certain amount of money, I find that generally, an Ontario court will enforce it unless there are problems that render the judgment unenforceable," he says.

Nevertheless, there have been problems that allow Canadian defendants to essentially avoid the consequences rendered by foreign courts.

While Ontario courts successfully asserted jurisdiction in the matters of *Van Breda v. Village Resorts Ltd.* and *Charron v. Bel Air Travel Group Ltd.*, Wagner also points to the case of *Beals v. Saldanha*, in which the Supreme Court of Canada affirmed its authority to enforce a judgment rendered in the United States only if the defendant was in a position to respond.

"A foreign plaintiff who expects to have a judgment in his or her favour enforced by a Canadian court has a responsibility to ensure that the defendant is in a position to make an informed decision about how to respond," the court asserted in the *Beals* matter.

"If the defendant can show that the plaintiff failed to discharge that responsibility, the court should refuse to enforce the judgment on the basis that the defendant was deprived of proper notice, a basic condition of natural justice."

The court continued: "In this case, the Florida claimants should have notified the appellants of the steps they could take after new versions of the amended complaint were filed and, more importantly, of the consequences of not taking those steps. Because they failed to do so, the appellants were unaware of the danger that their defence would lapse."

Gregory Sidlofsky, also of Charles B. Wagner & Associates, notes that there's a line that determines whether the province's courts will recognize matters litigated outside of Ontario.

"There has been some tinkering by the courts in terms of what constitutes a real and substantial connection for people with foreign interests, but what the *Beals* matter did is confirm that doing business in other jurisdictions is opening yourself up to lawsuits in foreign jurisdictions," he says.

"These cases have a large impact on Canadian businesses as well as individuals with assets and business interests outside of Canada because in general terms, if you get sued, you have to defend it because if you don't, with very few exceptions, they're going



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to be able to enforce [a court decision] against you in Canada.”

As a result, Sidlofsky says it’s important for companies doing business internationally to ensure they consult with a lawyer with experience in foreign commercial law matters in the event they run into problems.

There has also been an increase in the number of class action lawsuits seeking compensation for foreign plaintiffs. The trend is raising concerns for lawyers in both the defence and plaintiff bars who recognize that the enforcement of a settlement approved by a Canadian court won’t necessarily be upheld in a foreign country.

To date, there hasn’t been a class action with a proposed international plaintiff group that has gone to trial in Canada to examine all of the issues in detail.

Christopher Naudie, a litigation partner at Osler Hoskin & Harcourt LLP in Toronto, says defence counsel are concerned about the implications of such class actions.

“We want to know that a class proceeding will involve a final determination for all of the class members, and the question is, can or should a Canadian court or an Ontario court exercise jurisdiction, particularly when there’s a reasonable ground to believe that an Ontario judgment would not be granted preclusive effect in the jurisdiction in question?” says Naudie.

He notes that in the case of *Ramdath v. George Brown College*, the majority of the plaintiffs were foreigners who attended the college but are suing because the program they studied didn’t give them the professional qualifications promised to get jobs in their respective countries.

During the certification hearing in that case, Naudie notes that experts who testified about the legal systems in China and India asserted that those countries would likely not enforce a decision rendered by an Ontario court. “The inclusion of foreign members in a class action in Canada raises concerns,” says Naudie.

He adds it would be helpful if a lawsuit including an international class of plaintiffs achieved a trial level instead of reaching a settlement — as most matters do — so a judge can interpret the implications for defendants.

Otherwise, defendants risk facing similar lawsuits in foreign countries where plaintiffs reside if courts elsewhere don’t recognize a settlement approved in Canada.

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Having been through this myself, the best avenue is to make the courts amend the rules with better instruction up front attached to all legal proceedings. This statement is what is lacking n information to those who file motions in Ont. courts. Most lawyers are not aware of this and I this should be common knowlege. He adds it would be helpful if a lawsuit including an international class of plaintiffs achieved a trial level instead of reaching a settlement — as most matters do — so a judge can interpret the implications for defendants.

The latter is why many Canadian and even Chinese corp have filed patents and the like in the US and not at home. It is easier to file in the uS and the process is very self explanatory and is required to be so by law.

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