Court of Appeal for Ontario Rejects "Fourth Defence" to Enforcement of Foreign Judgments

The long-running litigation between the United States and a group of defendants who operated a cross-border telemarketing business selling Canadian and foreign lottery tickets to Americans has reached another mile-post with the decision of the Court of Appeal for Ontario in *United States of America v. Yemec*, 2010 ONCA 414 (available here). The defendants were likely riding high before this decision, having done quite well in resisting the enforcement of the judgment of an Illinois court finding them liable for $19 million and permanently enjoining them from telemarketing any product or service to anyone in the United States. But the tables are now turned, with the Court of Appeal for Ontario ordering enforcement of the Illinois judgment.

The most notable jurisprudential issue in the case concerns the scope of the defences at common law to an action to recognize and enforce a foreign judgment. At common law there are three central defences: fraud, denial of natural justice, and public policy. However, the Supreme Court of Canada indicated in *Beals v. Saldanha*, [2003] 3 S.C.R. 416 that this was not a closed list and in the appropriate circumstances a new defence might be created. In *Yemec* the motions judge of the Superior Court of Justice hearing the case was persuaded that there was a genuine issue requiring a trial on the question of a "fourth defence", namely "denial of a meaningful opportunity to be heard". The Court of Appeal has now held that there is no such defence: that concerns of this nature fall comfortably within the scope of the denial of natural justice defence. Further, on the facts, the appellate court

found that the defendants were not denied an opportunity to be heard in the courts of Illinois (paras. 26-29).

The case is one of several in the wake of *Pro Swing Inc. v. Elta Golf Inc*., [2006] 2 S.C.R. 612 to enforce a foreign non-monetary order, namely the permanent injunction. The Court of Appeal found the criteria for enforcement set out by the Supreme Court of Canada in *Pro Swing* were met in this case (paras. 45-53).

The case raises one other interesting issue. The United States had, at the outset of the litigation in Illinois and Ontario, obtained a freezing order (*Mareva*) and a civil seizure order (*Anton Piller*). These interlocutory orders were subsequently dissolved, in part for failure of the United States to make full disclosure when moving *ex parte* to obtain the orders. The defendants then insisted on a damages inquiry under the undertaking in damages the United States had provided as a condition of obtaining the orders. The plaintiff argued that such an inquiry should not proceed, given that in effect the defendants were seeking to recover lost profits from a business the Illinois court had concluded was illegal. The Court of Appeal for Ontario held that the damages inquiry should proceed, stressing the importance of enforcing the general undertaking in damages (paras. 69-72). It did note, though, that there was evidence that the defendants had violated both Canadian and American law (paras. 78-83) and that accordingly it would be difficult for them to establish compensable damages. But they were entitled to try (paras 85-86).