Navigating the Litigation Landscape in Canada:

Obtaining Evidence from Canadian Witnesses and Enforcing

Judgments Against Canadian Parties

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The U.S. shares a lot more than a very large border with its northern neighbour. Canada is also the United States' largest trading partner. The U.S. is certainly Canada's largest trading partner. These business dealings, like any other, often result in disputes and, at times, the need to resort to litigation.

A question that must be asked *before* embarking on a lawsuit against a Canadian resident is where that lawsuit ought to take place and, if in the U.S., whether the court's judgment would be enforceable in Canada (where the Canadian defendant's assets are presumably located).

On a separate front, it is also becoming increasingly common for lawyers, during the course of lawsuits taking place in the United States, to wish to depose, and/or obtain documents from, non-party witnesses (be they individuals or corporations) residing or situated in Canada.

This article intends to provide a brief, yet practical overview of the principal considerations that come into play in the scenarios described above.

Securing Evidence from Canadian Witnesses

In the situation in which a party seeks to secure evidence from a Canadian non-party witness, litigators often mistakenly assume that all they would need to do is serve a subpoena on the Canadian resident, who would then be legally compelled to produce the requested documents and/or attend at his or her deposition. It does not work that way. Since the subpoena powers of a U.S. court do not extend outside the country's borders, the subpoena would have no legal effect in Canada.

Instead, one must look to the Canadian courts to direct the Canadian witness accordingly. To do this, litigation counsel in the U.S. would first need to apply for the issuance of *letters rogatory* (also called "letters of request") from the court in which the U.S. action is taking place. Essentially, the letters rogatory is a document, signed by a judge or other court official, which simply politely requests the cooperation from the applicable Canadian court to compel the Canadian resident to give evidence for purposes of the pending U.S. lawsuit. Since this document is a necessary first step, the U.S. lawyer should consult, in advance, with a Canadian lawyer to ensure that the form and content of the U.S. court's letters rogatory are sufficient for the Canadian court's requirements.

After the letters rogatory are issued by the U.S. court, local Canadian counsel will need to be engaged to bring an application proceeding in the Canadian province in which the witness is situated, seeking an order compelling the witness to give evidence as requested by the letters rogatory. The enforcement of foreign letters rogatory in Canada is permitted under the *Canada Evidence Act* and similar applicable provincial statutes.

The enforcement of letters rogatory in Canada is based on the principle of judicial and international comity, by which the Canadian court is asked to give effect to the request for assistance being made in the U.S. court's letters rogatory out of courtesy and respect, not because it is under legal obligation to do so.

The Canadian application proceeding to enforce the U.S. court's letters rogatory is usually brought in a summary format, akin to a motion, with evidence submitted through affidavits.

The affidavit that is filed in support of the application is usually prepared by the Canadian counsel in the name of the litigation lawyer handling the case in the United States. The affidavit will need to establish that:

a. the evidence sought by the letters rogatory is relevant to the issues raised in the U.S. action;
b. such evidence cannot reasonably be obtained without the assistance of the Canadian court and that other methods for obtaining the evidence have been exhausted;exhausted;
c. the evidence sought is necessary for trial and will be adduced at trial if admissible; missible;
d. the enforcement of the letters rogatory would not be unduly burdensome in the circumstances, and would not impose obligations that are not otherwise available in Canadian actions; and
e. where the production of documents is also sought, such documents are identified with reasonable specificity.

If the above factors cannot be established to the satisfaction of the judge hearing the application, the application will likely be dismissed. With regard to (b) above, it is recommended that a letter be sent to the proposed deponent requesting that he or she voluntarily submit to the requested deposition and voluntarily produce the sought-after documents, before the issuance of any letters rogatory (and, therefore, before any court application is commenced in Canada to enforce those letters rogatory). A copy of that letter, along with a copy of any responding letter, would then be attached as exhibits to the affidavit to establish that the letters rogatory and court application were necessary given the deponent's unwillingness to attend at his/her deposition and/or produce documents voluntarily.

A party has the right, under the Canadian court's Rules, to cross-examine the other party on his or her affidavit filed in respect of the proceeding. These cross-examinations take place before the hearing, and are arranged by Canadian counsel. In the writer's experience, however, cross-examinations on affidavits are rarely done in these types of proceedings. Ultimately, if the proceeding is opposed, a court hearing takes place at which the lawyers make submissions before a judge based on the affidavit evidence filed, transcripts of any cross-examinations that may have taken place, and case law.

Given these steps, however, and depending on the court's availability, it can sometimes take several months before the application proceeding is ultimately heard by the Canadian court. This often comes as a surprise to U.S. lawyers who are frequently under the constraint of court-ordered timetables to complete all depositions within a short period of time (and are, therefore, upset to learn that it would simply not be possible to obtain an order requiring the witness in Canada to attend at a deposition within a few weeks). Accordingly, if it is anticipated that there will be a need to secure evidence from a Canadian witness, counsel should build a sufficient amount of time into any timetable to accomplish this step.

Generally speaking, the deposition would have to take place in the county where the Canadian resident lives. This is always subject to the witness agreeing otherwise. In one such case, we were able to secure the witness' cooperation to travel from Toronto to Florida for his deposition on the condition that he would be paid for his hotel expenses and airfare.

Considering that this was in the middle of winter in Canada, who could blame him?

Enforcing a U.S. Judgment in Canada

If you are about to commence an action against someone living in another country, it is understandable for you to want to bring the action in your "home court." Aside from the convenience factor, you are presumably more familiar with your state's laws and court procedures, and may have existing relationships with local lawyers.

However, before taking the plunge, you should look further down the road to the issue of the enforcement of your judgment. As with a subpoena issued by a U.S. court, a U.S. court judgment is not automatically enforceable in Canada. The judgment would essentially need to be converted into a Canadian judgment to make it enforceable against a debtor in the applicable Canadian province.

To do that, you would need to have Canadian counsel commence an action in the Canadian province where the debtor (or its assets) is situated for a judgment recognizing and enforcing the U.S. judgment. For ease of reference, I will use the example of a plaintiff commencing an action in Michigan against a defendant located in Ontario, and obtaining a money judgment against the defendant.

In such an action, the Ontario court will need to be satisfied that the Michigan court had "jurisdiction" (also known as "personal jurisdiction" or "*in personam* jurisdiction") over the Ontario defendant in the lawsuit.

Generally speaking, the Canadian courts recognize that the U.S. court had jurisdiction over the Canadian resident in a number of ways.

For example, jurisdiction will exist if the Ontario defendant submitted to the jurisdiction of the Michigan court. In that regard, if the Ontario defendant defended or otherwise sufficiently appeared in the Michigan action, he will be deemed to have submitted to the jurisdiction of the Michigan court against him. He will later not be able to argue, in the subsequent enforcement action in Ontario, that the Michigan court did not have jurisdiction over him.

Accordingly, the question of whether jurisdiction existed or not really only arises where the Ontario defendant elects not to defend the Michigan action and judgment is rendered against it on a default basis. In that situation, jurisdiction over the Ontario defendant by the Michigan court would have to be established in another way.

The Ontario defendant may be deemed to have consented to the Michigan court's jurisdiction over him if, for example, he agreed in his contract with the Michigan plaintiff that any actions arising from the contract could take place before the courts in Michigan. It is, therefore, highly recommended that such "choice of forum" clauses be included in all contracts with Canadian parties. "Choice of law" clauses (pointing to, for example, Michigan law as the governing law of the contract) should also be included in any such contracts, although such clauses are not determinative of the issue of jurisdiction.

Another basis for jurisdiction is presence-based jurisdiction. If, at the time the Michigan action was commenced, the Ontario defendant resided in Michigan or regularly carried on business in Michigan through a permanent office it maintained there, the Michigan court will likely be seen as having jurisdiction.

A further (more catch-all) basis for jurisdiction is based on the Michigan court *assuming* jurisdiction over the Ontario defendant. **In 1990, the Supreme Court of Canada, in its landmark decision of *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, established the *"real and substantial connection" test* that needs to be satisfied before a court is able to *assume* jurisdiction over a foreign defendant.** Applying that test to our example, jurisdiction may be found if there is a real and substantial connection between the state of Michigan and the subject matter of the lawsuit or the defendant.

Whether or not the "real and substantial connection" test is satisfied in any given case depends on the specific facts of each case. For example, if the Michigan lawsuit against the Ontario defendant was for breach of a contract that required the defendant to ship goods to, or perform services in, Michigan, chances are that the "real and substantial connection test" would be met and the Ontario court would recognize the Michigan court's jurisdiction over the Ontario defendant. If, on the other hand, the contract provided for the services to be performed entirely in Ontario, and the Ontario defendant had no ties whatsoever with Michigan, it is likely the case that this real and substantial connection test would not be met and that the Ontario court would find that the Michigan court did not have jurisdiction over the Ontario resident. In that event, the Ontario court would not recognize the Michigan judgment.

Generally speaking, in the Ontario action to enforce the Michigan judgment, the defendant would not be able to defend the action on the merits. He would not be able to allege, for example, that the products or services that the Michigan plaintiff supplied were deficient and therefore he should not have to pay the judgment. As long as the Michigan court had jurisdiction over him and he was given an opportunity to defend the Michigan action, the Ontario court would likely say that he should have asserted any defences on the merits in the Michigan action and it is simply too late for him to do so at the stage of the Ontario enforcement action.

In all the actions I have brought in Canada on behalf of U.S. clients seeking to have their judgments enforced, I have never been concerned about receiving defences based solely on the merits from the defendants. In those cases, I have always been successful in bringing motions for summary judgment on the grounds that such defences did not create any triable issues.

Conclusion

In summary, although anyone is free to bring a lawsuit against a Canadian defendant in one's "home court," a plaintiff ought to give serious thought as to whether its judgment will later be enforceable in the Canadian

province in which the defendant is situated. Obtaining a legal opinion on that issue from a Canadian lawyer, before commencing action in the U.S., can certainly help you to decide where your lawsuit should take place.

Similarly, early consideration should be given as to whether evidence may be needed from Canadian witnesses so that plenty of time can be allotted to obtain letters rogatory and complete the required proceedings in Canada to secure the desired evidence.