

Court of Appeal for Ontario Rejects Fourth Defence

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The Court of Appeal for Ontario has rejected a new, “fourth defence” and has ordered enforcement of an Illinois court judgment of USD 19 million against Canadian defendants.

The U.S. Federal Trade Commission brought proceedings in Chicago and Toronto to recover damages to consumers and prevent the defendants from continuing to operate a cross-border telemarketing business that sold Canadian and foreign lottery tickets to U.S. consumers. In 2005, the FTC amended its Ontario claim to include enforcement of the Illinois judgment. The defendants resisted enforcement in the Ontario proceedings, arguing that they did not have a “meaningful opportunity to be heard” in the Illinois action.

The motion judge agreed and, relying on the Supreme Court of Canada’s well-known decision in *Beals v. Saldanha*, held there were triable issues relating to the new defence. In *Beals*, the Supreme Court of Canada held that defences to a foreign judgment include fraud, denial of natural justice, public policy and that, in appropriate circumstances, a new defence might be created.

The Court of Appeal held that the “meaningful opportunity to be heard” was not a new, fourth defence under *Beals*. The Court found that the defendants were not deprived of a meaningful opportunity to be heard in the U.S. court proceedings. The Court reasoned that any new defence to enforcement of a foreign judgment must be narrow in scope and raise issues not covered by the existing defences. The Court found the defence indistinguishable from the natural justice defence and that the right to be heard is one of the cornerstones of natural justice.

The Court of Appeals also found no basis for refusing to enforce the injunctive relief component of the U.S. court judgment. In doing so, the Court followed the criteria set out in *Pro Swing, Inc. v. Elta Golf Inc.*, a case discussed in the firm’s February, 2006 client alert, “*Enforcing U.S. Court Judgments in Canada.*”

Whether other provinces follow the Court of Appeal for Ontario remains to be seen. In light of this decision, it should be clear that Ontario companies should defend U.S. lawsuits brought against them. For U.S. companies, the decision should provide additional confidence that U.S. court judgments will be enforced in Canada and particularly in Ontario.

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