In the Court of Appeal of Alberta

Citation: Yugraneft Corporation v. Rexx Management Corporation, 2008 ABCA 274

Date: 20080805
Docket: 0701-0230-AC
Registry: Calgary

2008 ABCA 274 (CanLII)

Between:

Yugraneft Corporation

Appellant (Applicant)

- and -

Rexx Management Corporation

Respondent (Respondent)

Corrected judgment: A corrigendum was issued on August 8, 2008; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on September 30, 2008; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on October 6, 2008; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Clifton O'Brien
The Honourable Madam Justice Patricia Rowbotham

Reasons for Judgment Reserved of
The Honourable Madam Justice Patricia Rowbotham
Concurred in by The Honourable Mr. Justice Costigan and
The Honourable Mr. Justice O'Brien

Appeal from the Order by
The Honourable Mr. Justice P. Chrumka
Dated the 27th day of June, 2007
Filed on the 18th day of July, 2007
(2007 ABQB 450, Docket: 0601-01294)

Reasons for Judgment Reserved of
The Honourable Madam Justice Patricia Rowbotham
Concurred in by The Honourable Mr. Justice Costigan and
The Honourable Mr. Justice O'Brien

2008 ABCA 274 (CanLII)

Introduction

[1] Where a party seeks the recognition and enforcement in Alberta of a foreign arbitration award, what is the relevant limitation period? Is it the two year discovery period in s. 3 of the *Limitations Act*, R.S.A. 2000, c. L-12, or the 10 year period prescribed in s. 11?

[2] The appellant, Yugraneft Corporation (Yugraneft), was denied an order recognizing and enforcing an international arbitration award because its application was brought more than three years after the award. Its appeal was dismissed with written reasons to follow. These are the reasons.

Background facts

[3] On September 6, 2002, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the Russian ICAC) granted an arbitration award in favour of Yugraneft, a Russian company, against the respondent, Rexx Management Corporation (Rexx), an Alberta company, in the amount of $952,614.43 USD. The award was granted based on Yugraneft's claim that money was paid for equipment not supplied. On January 27, 2006, more than three years later, Yugraneft applied pursuant to the *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5 (the *ICAA*) for an order recognizing and enforcing the award. Rexx sought either dismissal or a stay of the application pending resolution of a Racketeer Influenced and Corrupt Organizations (RICO) case relating to allegations that Yugraneft "obtained the award after Russian oligarchs used fraudulent Russian court proceedings and a machine-gun toting private army to take control of Yugraneft and initiate the arbitration."

Decision of the chambers judge

[4] The chambers judge identified two issues: (1) was the application barred by the *Limitations*

Act, and (2) if not, would the enforcement of the arbitral award be contrary to public policy in Alberta?

2008 ABCA 274 (CanLII)

[5] The relevant provisions of the *Limitations Act* are:

> 1(I) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right but excludes
>
> > (I) a declaration of rights and duties, legal relations or personal status,
> > (ii) the enforcement of a remedial order,
>
> ...
> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
>
> > (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> >
> > > (I) that the injury for which the claimant seeks a remedial order had occurred,
> > > (ii) that the injury was attributable to conduct of the defendant, and
> > > (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or
> >
> > (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.
>
> 11 If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of a claim.

[6] The chambers judge held that Yugraneft's application was an application for a "remedial order" as defined in s. 1(I) of the *Limitations Act*, and therefore the two year limitation period in s. 3(1)(a) applied.

[7] In his reasons, at 2007 ABQB 450, he noted that the *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, did not apply because Russia is not a reciprocating jurisdiction for purposes of that Act. He discussed the case law holding that in Canada there is a distinction between foreign and domestic judgments when it comes to enforcement and limitation periods. After acknowledging merit in the argument that a more modern approach in keeping with the principles

of comity may be required with respect to foreign judgments, he suggested that legislative intervention may be necessary. He held that an action to enforce a foreign judgment is an action upon a simple contract debt. The limitation period for the enforcement of a foreign judgment is therefore two years.

[8] He then considered whether foreign arbitrations should be given the same treatment as foreign judgments, noting the absence of case law addressing the appropriate limitation period for international arbitrations. At para. 69, the chambers judge stated that the limitation period for enforcement of a domestic arbitration award is two years. In light of the inapplicability of the *Reciprocal Enforcement of Judgments Act*, the two year limitation period also applies to foreign arbitral awards.

2008 ABCA 274 (CanLII)

Standard of Review

[9] The interpretation of the *Limitations Act* is a question of law and reviewed on a standard of correctness: *Daniels v. Mitchell*, 2005 ABCA 271, 371 A.R. 298.

Discussion

Section 1 of the Limitations Act

[10] The appellant submits that the order it is seeking does not fall within the definition of a remedial order in s. 1(I) which excludes "a declaration of rights and duties, legal relations or personal status". The appellant submits that the order it seeks is a two step process; first, recognition and second, enforcement. Recognition under the ICAA, which incorporates the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the *Convention*) and the *Model Law on International Commercial Arbitration* is in the nature of a declaration. As such, it is excluded in the definition of a remedial order. It submits that, once recognized, an arbitral award must stand on the same footing as a domestic judgment.

[11] The appellant's submission is not unlike that of the appellant in *Daniels*, who argued that an *order nisi* in a mortgage proceeding was a declaration which is excluded from the definition of "remedial order". This Court rejected that argument and found that it was a remedial order. Hunt J.A., for the court, stated at para. 51:

> An order nisi does much more than define or declare the mortgagee's legal rights. It sets in motion a chain of events that, ultimately, permits the mortgagee to realize on his security. Its essence is remedial, not declaratory.

> [12] In this case also, the essence of the order sought by the appellant is remedial and the declaration or recognition of the arbitral award is merely a step in a chain of events. As Castel and Walker in *Canadian Conflict of Laws*, 5th ed. (Toronto: Butterworths, looseleaf) at 14.3, point out, apart from statute, a foreign judgment is not enforceable directly by execution but can form the basis for a local order for its enforcement.

[13] The appellant needs more than a declaration in order to enforce its award in Alberta. There is no applicable statute permitting enforcement. Even assuming the arbitral award is to be treated as a foreign judgment, the *Reciprocal Enforcement of Judgments Act* at s. 5, does not apply to Russia, a non-reciprocating jurisdiction. Nor does the *Reciprocal Enforcement of Judgments Act* or any other reciprocating enforcement of judgments legislation alter the law applicable to private international law: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. The appellant is seeking more than a declaration. Its originating notice seeks both the declaration and enforcement. This is to be expected as the *Convention* clearly conjoins recognition and enforcement for the purposes of an application thereunder. The exception of a declaration from the definition of "remedial order" does not apply to the order which the appellant seeks.

[14] Moreover, for more than a century, Canadian courts have held that for limitation purposes, an action to enforce a foreign judgment is treated as an action upon a contract debt: *Rutledge v. United States Savings & Loan Co.* (1906), 37 S.C.R. 546; *Livesley v. E. Clemens Horst Co.*, [1924] S.C.R. 605. An arbitral award can be in no better position than a judgment.

[15] As explained in *Canadian Conflict of Laws* at 14.3, a foreign judgment is regarded as a debt because of the judgment debtor's implied promise to pay the amount of the foreign judgment. "The debt so created is a simple contract debt and not a specialty debt, and it is subject to the appropriate limitation period."

[16] The appellant relies upon two decisions which held that for policy reasons, foreign judgments should be treated as domestic judgments, rather than as debts. (See the *obiter* comments of Cumming J. in *Girsberger v. Kresz* (2000), 47 O.R. (3d) 145 (Sup. Ct.), adopted by Wilson J. in *Banque Nationale de Paris (Canada) v. Opiola*, 2000 ABQB 191, 263 A.R. 157.) This Court in *Pawlus v. Banque Nationale de Paris (Canada)*, 2001 ABCA 25, 277 A.R. 80, the appeal of *Opiola*, declined to comment on the issue.

[17] In *Girsberger* and in *Opiola*, the courts considered the modern approach of Canadian courts to the recognition and enforcement of foreign judgments that began with the Supreme Court of Canada's decision in *Morguard*. There, the court advocated giving "full faith and credit" to foreign judgments as long as the court rendering the decision had jurisdiction to deal with the matter and the judgment was not contrary to public policy, obtained by fraud or contrary to the principles of natural justice. Those principles were reaffirmed by the Supreme Court of Canada in *Beals v. Saldanha,* 2003 SCC 72, [2003] 3 S.C.R. 416. Thus, the courts in *Girsberger* and *Opiola* reasoned that foreign judgments should be recognized as judgments and not as simple contract debts.

2008 ABCA 274 (CanLII)

2008 ABCA 274 (CanLII)

[18] As the chambers judge in this case commented, while that approach has merit, it is not the law in Alberta. *Girsberger* has been overruled in Ontario by the Ontario Court of Appeal in *Lax v. Lax* (2004), 70 O.R. (3d) 520, which held that "judgment" for the purposes of the Ontario limitations legislation meant a domestic judgment, not a foreign judgment. The reasons of Feldman J.A., for the court, are applicable to this case. She held at para. 17 that the question to be determined was whether there were circumstances that made it appropriate to reinterpret the provisions of a statute that had been given a particular meaning and application over a very long period of time.

[19] Feldman J.A. noted that historically a domestic judgment was treated as a "specialty" with a limitation period of 20 years, while the holder of a foreign judgment from a non-reciprocating state had to sue on the foreign judgment to obtain a domestic judgment which could then be enforced in the ordinary way and subject to the 20 year limitation. She held that a foreign judgment, as a simple contract debt, was subject to the six year limitation under the applicable Ontario statute, a period consistent with the limit to register foreign judgments of reciprocating states in reciprocal enforcement statutes. However, the six year limitation to sue on a foreign judgment did not commence until the judgment debtor, if not in Ontario, returned to Ontario since the purpose of enforcing a foreign judgment is to execute on the assets of the judgment debtor that are within the province. This demonstrated that for purposes of enforcement, foreign judgments and domestic judgments were not equivalent. Domestic judgments could be enforced by execution, sale of lands, garnishment or the appointment of a receiver but foreign judgments could not be enforced until they were transformed into domestic judgments or registered. There is no parity of treatment. Feldman J.A. concluded that more significant changes were required to make the enforcement scheme achieve parity between domestic and foreign judgments. Interpreting "judgment" to include a foreign judgment was not sufficient; legislative action was required.

[20] Feldman J.A. concluded that the court ought to be reluctant to depart from the established interpretation as no constitutional document was involved, and the interpretation had been consistent for over a century. Moreover, there was new Ontario legislation that had radically changed the approach to limitations and enforcement of court orders.

[21] The reasons in *Lax* were adopted in *Pollier v. Laushway*, 2006 NSSC 165, where a plaintiff sought to enforce a Massachusetts judgment in Nova Scotia 15 years after obtaining the foreign judgment. The court held that the applicable limitation period was for an action upon simple contract debt.

[22] Similarly, in *Canada Mortgage & Housing Corp. v. Horsfall*, 2004 MBQB 124, 185 Man. R. (2d) 151, the Manitoba Queen's Bench held that the limitation period could not be extended for the reasons expressed in *Girsberger* and that any change to a limitation period relating to foreign judgments should attract legislative endorsement and expression.

2008 ABCA 274 (CanLII)

[23] The chambers judge in this appeal was correct in concluding that the law has not changed. As the court in *Lax* concluded, legislative action would be required to create parity between domestic and foreign orders. The award in this case cannot be treated as a domestic order for the purposes of the limitation period.

Section 3 of the Limitations Act

[24] Section 3(1)(a) provides that a remedial order must be sought within two years after the date the claimant first knew or ought to have known of its injury, which in this case is the need to enforce an award in a foreign jurisdiction.

[25] As explained in *Daniels* at para. 30, one of the main purposes of the *Limitations Act* was the simplification of limitations "by the imposition of one period (two years) for nearly all causes of action."

[26] The appellant complains that if the order it seeks is a remedial order, the two year limit is unfair because, often, it will take more than two years to commence the process for the recognition and enforcement of a foreign judgment or order. The judgment creditor may not know immediately whether the judgment can be enforced domestically. It may take time and effort to learn of the judgment debtor's circumstances and additional time to become familiar with the necessary steps for enforcement outside the jurisdiction. By the time the judgment creditor learns the appropriate facts, two years may have already passed.

[27] Section 3 of the *Limitations Act* may answer the appellant's concerns as it provides for a limitation period of two years after the claimant knew or ought to have known that the judgment or order needs to be enforced in a foreign jurisdiction. A judgment creditor may not know the whereabouts of the judgment debtor. This was the situation in *Lax* where the chambers judge declined to grant summary judgment in favour of the judgment debtors as there was a triable issue as to what the judgment creditor knew, what steps she had taken to determine the whereabouts of the judgment debtors, and what steps the judgment debtors had taken to prevent the discovery of their whereabouts.

[28] I note that the limitation period to register a foreign order under the *Reciprocal Enforcement of Judgments Act* is six years after the date of the judgment; no discoverability principle is expressed in the limitation period. The *Arbitration Act*, R.S.A. 2000, c. A-43 at s. 51, sets two years after the day the applicant receives the award or when all appeal periods have expired (whichever is later) as the limitation period for an award granted in Alberta or elsewhere in Canada. As the respondent noted, the *Convention* provides that substantially more onerous conditions are not to be imposed on the recognition or enforcement of foreign arbitral awards than are imposed on domestic awards. If the appellant's assertion was correct, that the limitation period for its award is 10 years, it would be in a substantially more favourable position than the holder of a domestic arbitration award.

Section 11 of the Limitations Act

2008 ABCA 274 (CanLII)

[29] Alternatively, the appellant submits that the 10 year limitation in s.11 applies because it is seeking a "remedial order in respect of a claim based on a[n] . . . order for the payment of money". It submits that the arbitral award is an order for the payment of money and that interpreting s.11 to apply to foreign judgments and awards is in keeping with comity, order and fairness.

[30] The term "order for the payment of money" essentially repeats the provisions of s. 4(1)(f) in the previous limitations statute, the *Limitations of Actions Act*, R.S.A. 1980, c. L-15, which provided:

> The following actions shall be commenced within and not after the time respectively hereinafter mentioned: . . . actions on a judgment or order for the payment of money, within 10 years after the cause of action thereon arose

[31] An order for the payment of money refers to situations such as r. 331 of the *Rules of Court*, where a judgment creditor with an unsatisfied judgment may bring a motion to obtain a new judgment for the unpaid amount, if such a judgment is not barred by the applicable limitation period. For example, the limitation under s. 4(1)(f) was applied in *Canada (Attorney General) v. Doucette* (1992), 133 A.R. 68 (Q.B.), to determine whether a judgment creditor had brought its motion in time to renew an unsatisfied judgment.

[32] Case authorities interpreting s. 4(1)(f) hold that a "judgment or order" for the purposes of the subsection means a domestic judgment or order, not a foreign judgment or order. As discussed, historically, foreign judgments have been considered contract debts, not judgments, and there is nothing in the *Limitations Act* explicitly or implicitly to support an interpretation that "judgment or order" in s. 11 includes a foreign judgment or order. An "order for the payment of money" for the purposes of the *Limitations Act* means an Alberta order.

Conclusion

[33] Given my conclusion on the limitations issue, it is unnecessary to consider the respondent's alternative submission on public policy. The appeal is dismissed.

Appeal heard on May 7, 2008

Reasons filed at Calgary, Alberta
this 5th day of August, 2008

Authorized to sign for: Costigan J.A.

O’Brien J.A.

Rowbotham J.A.

2008 ABCA 274 (CanLII)

Appearances:

S. A. Turner
for the Appellant

M. J. Donaldson
S. A. Morgan
for the Respondent

2008 ABCA 274 (CanLII)

2008 ABCA 274 (CanLII)

Corrigendum of the Reasons for Judgment Reserved of
The Honourable Madam Justice Patricia Rowbotham

This judgment has been corrected to read "Reasons for Judgment Reserved". This change is reflected on the cover and signature page, as well as on the first page of the judgment.

The judgment has been corrected in paragraph 13 “s. 51” to read “s. 5”.

The corrigendum dated September 30, 2008 has been corrected to reflect the corrigendum dated August 8, 2008.

The heading of this page has been amended to reflect that this judgment is Reasons for Judgment Reserved.