

## Living in Splendid Isolation: Ten Lessons Learned Enforcing an Ontario Judgment in Mexico

Blair Bowen, Fogler, Rubinoff LLP, Toronto

### Introduction

This article presents a cautionary tale for any person who wishes to take legal proceedings against an individual or company resident in Mexico.

More than 25 years ago, the Supreme Court of Canada's decision in *Morguard Investments Ltd. v. De Savoye*,<sup>1</sup> represented a sea change in the way Canadian courts recognized and enforced foreign judgments. The "foreign" aspect of *Morguard* involved British Columbia plaintiffs seeking to enforce an Alberta judgment. Writing for the court, Justice La Forest rejected the centuries' old principles regarding recognizing and enforcing foreign judgments which were anchored in the concept of territoriality. He held that modern states like Canada should no longer live in "splendid isolation" from the rest of the world and should give effect to judgments made in other countries. In arriving at its conclusion, the court relied heavily upon the concept of comity which had been adopted by the Supreme Court of the United States. It held that comity would "impel sovereigns to mutual intercourse".

These lofty ideals were written just four years before commerce between Canada and Mexico was facilitated by the North American Free Trade Agreement ("NAFTA"). NAFTA sought to reduce, and in some instances, eliminate barriers to trade and commerce between Canada, Mexico and the United States. Indeed, after NAFTA, trade between Canada and Mexico increased substantially and Mexico is now one of Canada's largest business partners and export destinations.

More recently however, a case in which I was involved drove home the very unsettling point that the Supreme Court's vision of greater ease in enforcing foreign judgments between trading partners has not been fully embraced by Mexico. You will learn from reading this offering that Mexico and its judicial system still exist in a state of "splendid isolation" when it comes to recognizing and enforcing judgments from Canada.

### A "Garden Variety" Breach Of Contract Case

Several years ago, I was retained by an Ontario company to sue defendants who resided in Mexico.<sup>2</sup> The client was a producer of live entertainment and theatre and was owed a substantial sum of money as a result of a failed business deal with a Mexican promoter. The

---

<sup>1</sup> [1990] 3 SCR 1077

<sup>2</sup> This saga began in 2008. It is not yet complete.

Mexican promoter had persuaded our client to allow a touring dance company to deliver several performances in Mexican venues, without first paying our client for the performances or without providing adequate security for payment. After several broken promises, our client soon determined that the promoter had no intention of honouring his contractual obligations.

At first review, this seemed like a straight-forward "garden variety" breach of contract case, the only wrinkle being the non-resident defendants. After receiving no response to its demands for payment, the client needed to make a decision. Should it sue the Mexican promoter in Mexico or in Ontario? The client's Mexican lawyers advised that so long as an Ontario court would take jurisdiction over the Mexican promoter and the other proposed defendants - the promoter's wife and his "theatre arts" company, a Mexican court would recognize and enforce a judgment obtained from the proceedings. This advice seemed promising and we commenced the action in the Ontario Superior Court of Justice.

### Lesson Number 1

**Before commencing proceedings in Ontario against Mexican defendants, obtain advice from Mexican lawyers describing in detail the process involved for recognizing and enforcing an Ontario judgment in Mexico and the defences that may be raised by Mexican defendants in resisting recognition and enforcement.**

### Doing Justice Formally

The defendants could be served with the statement of claim outside of Ontario without a court order because Ontario had *jurisdiction simpliciter*. A substantial connection existed between Ontario and the cause of action for many reasons: the contract was made in Ontario; a breach of the contract had been committed in Ontario; damage was sustained by our client in Ontario arising out of the defendants' breach of contract; and, the contract provided that the courts of Ontario had jurisdiction to resolve a dispute arising out of the contract.

Canada and Mexico are both signatories to the Hague Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters (the "Convention"). Normally, we would be able to serve the statement of claim on the Mexican defendants by any means legally provided for service of an originating document in Mexico. However, the client's Mexican lawyers warned that when Mexico ratified the Convention, it opposed the use of the simplest methods of serving a foreign statement of claim. Instead, it had designated a branch of its Foreign Ministry as the only competent authority to receive originating documents from another country.

### Lesson Number 2

**Mexican courts require foreign court and other inbound documents to be certified or authenticated. This generally means having all documents originally signed by the issuing authority, i.e. judge, clerk or other authority, and attesting that the documents are true and correct copies of the originals.**

Mexico, as we were just beginning to learn, is a jurisdiction that does justice very formally. We learned that Mexican courts required formalistic procedures for often the simplest administrative steps. At the advice of the Mexican lawyers, we followed a multi-step process to ensure that service of the statement of claim was properly effected on the Mexican defendants. Such steps included translating our request for service and the statement of claim into Spanish, providing the Mexican lawyers with a power of attorney from our client which needed to be notarized by us and then "legalized" at the Canadian consulate in Mexico City and then transmitting all documents in duplicate to the Mexican Foreign Ministry.

### Lesson Number 3

**Once authenticated, Mexican courts require that all inbound documents be "legalized". The process of legalization can be done by obtaining another document from the Mexican Consulate in Ontario called an "apostille" which will be attached to the documents in question. The apostille gives Ontario documents full binding effect in Mexico.**

The Mexican lawyers told us that we needed the Mexican Consulate in Toronto to apply a "legalization" stamp on the documents. We were also told that since our client was a foreign company, it would have to submit an original certificate of status showing it was in good standing, its articles of incorporation, an original copy of the company's by-laws and articles which included the powers vested in the board of directors authorizing the lawsuit, an original copy of the minutes of the relevant meeting of the board with the full names of all the directors and their official titles, an original copy of the minutes of the meeting of the board respecting the election of the present board of directors, an original copy of the minutes of the meeting of the board where it was resolved to confer the power of attorney.

All of this was necessary to serve the statement of claim on the defendants.

### Lesson Number 4

**Utilize the services of Global Affairs Canada where possible. Global Affairs Canada is the federal government agency that manages Canada's diplomatic and consular relations. It offers to authenticate a variety of documents so that they will be accepted for use abroad.**

We had two options available to us, (1) the client could present the notarized power of attorney to Global Affairs Canada. We needed Global Affairs Canada to apply an authentication stamp on the documents and then submit it to the Mexican Consulate to be legalized; or (2) the client's president could attend at the Mexican Consulate in Toronto to execute a power of attorney according to Mexican law. If he chose this option, he would have to present all of the corporate documents referred to above. Needless to say, we chose the former option.

The Mexican lawyers also advised that in addition to serving the statement of claim, it was customary to serve the plaintiff's certificate of status, articles of amendment, if any, and the power of attorney. While the defendants would not require those documents in order to file a

defence, we were advised that to be on the safe side and to avoid the possibility of a technical defence being raised, we should serve all of such documents with the statement of claim.

Having received that advice, we completed a request for service pursuant to the Convention together with a notice summarizing the nature of the documents that were to be served on the defendants. Since Mexico had objected to "other means of service" under the Convention, we needed to deliver the documents to Mexico using the Central Authority for Canada in Haileybury, Ontario ("**Haileybury**").

Haileybury sent the documents to the client's Mexican lawyers. The lawyers told us that the documents were "acceptable in principle" but were missing an official stamp and signature of the Canadian "requesting authority". It was essential to the Mexican Foreign Ministry that Haileybury officially stamp the documents so that it could process our request for service in Mexico. The Mexican lawyers sent the documents back to Haileybury. Haileybury stamped the documents and sent them back to the Mexican lawyers who then attempted to file the documents for service with the Mexican Foreign Ministry.

#### **Lesson Number 5**

**Ensure that all documents are translated by a certified translator. According to Mexico's Federal Code of Civil Procedure ("FCCP"), all documents pertaining to an action in Mexico must be translated into Spanish. I recommend that the translation work is performed by a certified translator appointed by the court where you intend to enforce the judgment and that such work is monitored by legal counsel in Mexico.**

After a month of waiting, we were informed that the Foreign Ministry had again returned the documents to the Mexican lawyers because of "technical deficiencies". The issue appeared to be that the Mexican court wanted an Ontario court to sign the request for service of the documents. Upon attendance at the registrar's office, our law clerk was informed by the Registrar of the Superior Court that he would not sign such a request. Haileybury also advised that they would not sign the request. However, after some persuasion by our law clerk, the Registrar relented and signed the request for service. To make them look more formal and official, our law clerk put a red paper seal on the documents.

#### **Lesson Number 6**

**Follow all instructions from Mexican courts completely, even the instructions that appear to be arbitrary.**

We intended to send the documents back to Haileybury for re-stamping. Before doing so, we noticed that the documents that had been returned from Mexico included new instructions in Spanish. The Mexican court was now requesting two sets of originally signed documents instead of one. We were told by the Mexican lawyers that the request for duplicate originals was new and was a criterion of an individual officer at the Foreign Ministry. It was not a requirement under the Convention or a requirement of Mexican law. It was simply a requirement of the

person dealing with the matter in Mexico. We were told that we would have to comply with the request in order to have the documents accepted.

Once we had sent the duplicate documents back to Mexico via Haileybury, the Mexican lawyers told us that the Foreign Ministry still refused to accept them because the preamble in the statement of claim did not specify whether the days required to respond to the claim were calendar days or business days. The Foreign Ministry wanted the Ontario Court to issue a "resolution" to confirm that the days referred to in the preamble were calendar days. Just as we were attempting to determine how we could obtain such a resolution from the Ontario Court, we were surprised by the Mexican lawyers who told us that the Foreign Ministry had relented. The Mexican lawyers had met with the Director of the Foreign Ministry and persuaded her that she did not require the Ontario court to explain its preprinted form by resolution after all. Apparently they felt they had tormented us long enough.

Several months after we were first retained, two of the three defendants (the promoter and his company) were finally served with the statement of claim. Service on the third defendant (the promoter's wife) was pending because the judge that received the request asked for extra copies of the documents even though the Convention did not require that these extra copies be provided.

### **No Cakewalk In Ontario Either**

The Mexican defendants subsequently attorned to the jurisdiction of the Ontario Court and defended the action. We hoped that the action would now proceed expeditiously. We were naive.

It quickly became apparent that the Mexican defendants would not willingly participate in the action or take any step towards furthering or resolving the proceeding unless ordered to do so by the court. As a result, we were required to initiate or threaten a number of useless interlocutory motions for, among other things, (a) requiring the defendants to deliver their affidavits of documents; (b) requiring the defendants to attend for discovery (in the end, it was much quicker and cost-effective to examine the defendants in Mexico City rather than to pay for the cost of their attendance in Ontario and wait for travel visas to be issued). At the time, Citizenship and Immigration Canada had just imposed a travel visa requirement on all Mexican nationals; (c) requiring the defendants to deliver answers to the undertakings given on their examinations for discovery; and (d) exempting the action from mediation.

### **Settling (Apparently) On The Eve Of Trial**

We set the matter down for trial and obtained a trial date. On the eve of trial, we heard from the trial coordinator in Toronto. Her office had overbooked trials and that there were no judges available to hear our trial. We were on standby until Wednesday of the trial week. Faced with having to actually purchase plane tickets to come to Toronto for the trial, the defendants became serious in their settlement negotiations. The trial coordinator further delayed the start of the trial advising that the matter would need to be put over from spring to the fall of that

year. Our client, wanting to end the matter instructed us to accept the last offer to settle that the defendants had served.

Once the action had been settled, it became abundantly clear that the Mexican defendants had no intention of paying any part of the settlement amount, just as they had originally no intention of paying my client the amount owed under the contract. The opposing lawyer attempted to reassure me that my client's rights were protected because the terms of the settlement which provided that my client could obtain consent judgment for a much higher amount if the defendants defaulted in paying any part of the settlement. Eventually communication with the other lawyer ceased. We were required to bring a motion to enforce the terms of the settlement.

### **Appealing From An Unopposed Judgment**

We scheduled a motion for judgment based on the accepted offer to settle, which the Mexican defendants did not oppose.

Three weeks later, the defendants' lawyers served their clients' notice of appeal from the unopposed judgment. Because the defendants had not opposed the motion for judgment, it was beyond me as to what their grounds for appeal might be.

We received a notice of change of lawyer in the appeal proceedings. However, just before the holiday season that year, the new lawyers for the defendants served a notice abandoning the appeal.

Once the appeal had been abandoned we set about, again, speaking with Mexican lawyers to understand the procedure involved in having the judgment recognized and enforced against the defendants in Mexico. As we were in the midst of doing so, we were contacted by a third Ontario law firm advising that they had been retained by the defendants to bring a motion to set aside or vary the judgment on the grounds that it had been obtained by mistake.

Not surprisingly, our client was losing its resolve. The defendants had put up numerous road blocks to prevent our client from seeing a penny of the amount it was owed. Our client was willing to substantially compromise its judgment in order to move on with its business. We began negotiating settlement with this third firm of lawyers. But in the end, the defendants' threat to move to amend or vary the judgment simply faded away.

### **Enforcing The Judgment - Part 1 - Obtaining "Novel" Letters Of Request**

The client's Mexican lawyers told us something that had become obvious - the Mexican legal system was very formalistic and rigid in its requirements, particularly when it dealt with any parties or procedures outside of Mexico.

## Homologación

The process involved for recognizing and enforcing a foreign judgment in Mexico is called "*homologación*". It is a procedure that involves both local and federal rules of procedure. This happens within a Mexican civil law system that relies heavily on strict and full compliance with all formalities. We were told at this late stage that it would have been wise to have considered all requirements and formalities for *homologación* before we commenced the proceedings in Ontario to make sure that all requirements and formalities would be strictly complied with. (See Lesson 1)

### Lesson Number 7

**Obtain letters of request in Ontario which ask the Mexican court to recognize and enforce the judgment. The letters of request should stress the principle of comity. Under the FCCP Mexican courts will not enforce a foreign judgment if it is proven that the issuing court would not enforce a Mexican judgment under similar circumstances. It is advisable that all letters of request include a short statement acknowledging that "under similar circumstances, this court would recognize and enforce a judgment coming from the requested court".**

The first such formality was that we were required to obtain from the Ontario court, a letter of request, signed by both a judge and the registrar of the Ontario court asking the Mexican court to recognize and enforce the judgment.

We could find only one Canadian case in British Columbia, *First Majestic Silver Corp.*,<sup>3</sup> in which such a request had been granted. The plaintiff in that case was seeking to enforce a British Columbia judgment, in you guessed it, Mexico. In that case, the court held that Canada's Superior Courts possess an inherent jurisdiction to request international judicial assistance to enforce a domestic judgment. The case also suggested that the Mexican court's requirement that the Ontario court must request its assistance before it will take steps to recognize and enforce the judgment could be fulfilled on the basis of comity. Under the common law, Ontario regularly enforced judgments from Mexico by way of an action on the judgment. The principles of "comity, order and fairness" dictated an expectation that judgments of Ontario would be recognized and enforced by the Mexican courts.

I made a motion before a judge of the Superior Court of Justice and asked her to sign letters of request that I had drafted. She refused to do so. The judge told me that she had never signed such a document and indicated that she would "feel better" if we obtained an affidavit from a Mexican lawyer setting out the requirements of the Mexican court. Accordingly, we drafted a short affidavit for our client's Mexican lawyer to sign and went back to court.

---

<sup>3</sup> 2015 BCSC1517

My second court appearance took place on the Friday before the Victoria Day holiday long weekend. I attended before another judge of the Ontario Superior Court of Justice. Our motion was unopposed. Having read my factum, the judge advised at the opening of court that he would hear my matter last. Late in the afternoon, after all of the other motions had been dealt with, the judge told me that he did not oppose, in principle, the relief that I was seeking but had some difficulties with the language of the draft letter of request that gave the Mexican court the power to, among other things, fine and arrest the judgment debtors. He told me that he would be "*more comfortable*" with language that reflected the enforcement powers contained in Ontario's *Rules of Civil Procedure*. He asked me to revise the draft letter of request and email it to him for approval before I appeared before him again. Approximately one week later, after appearing before the judge in chambers, and explaining the changes made to the draft letter, I received the signed order and letter of request. This I considered to be a small victory.

### **Enforcing The Judgment In Mexico - Part 2 - Doing Justice Very Formally**

The Mexican lawyers intended to take the letters of request to the Mexican court to initiate proceedings to enforce the Ontario judgment. In order to do so, we needed to send them an original or certified copy of the contract on which the action was based, an original or certified copy of the judgment, the letter of request and a power of attorney from our clients. We also were advised that all documents should be authenticated, translated into Spanish, and legalized by the Mexican consulate in Toronto and then sent to them in Mexico City.

We then sent the notarial copies of the documents to Global Affairs Canada and asked them to authenticate them. We received the authenticated documents back from Global Affairs Canada within a couple of weeks. We then sent all documents to the Mexican lawyers for the necessary translation and submission to the court in Mexico.

The Mexican lawyers arranged to have the document translated into Spanish. In addition, they made inquiries of the Office of Public Records in Mexico City to ascertain the status of the real properties owned by the defendants. Once they had done so, and received the translated documents they were ready to file. By that time, the courts in Mexico were on the November 1<sup>st</sup> "Dia de Muertos" (day of the dead) break and nothing was functioning.

The Mexican court acknowledged receipt of the client's documents in or about the middle of November. The next step would be to serve the judgment debtors. We were advised the service might take a few days to a week after which the defendants would have 9 working days to present evidence, pleas and arguments as to why the judgment should not be recognized and enforced in Mexico. The Mexican lawyers advised that the main defence to recognizing and enforcing a foreign judgment was to argue that the judgment was not final but Mexican judgment debtors would use every available defence to avoid execution on the judgment as a delay tactic.

## Lesson Number 8

Ensure that letters of request include a statement that the judgment is final and *res judicata*. The FCCP requires that the judgment to be enforced is final and *res judicata* in the sense that there is no legal recourse pending or available to the defendant in Ontario. It is advisable that a statement to that effect is contained in the letters of request.

After a few weeks of waiting, the Mexican lawyers advised that the defendants had not yet delivered a defence because they had not been notified of the judgment. Apparently the judge who was reviewing the documents could not determine whether the judgment emanated from an action involving real property or a personal action involving a payment of money. The Mexican lawyers also advised "*surprisingly and absurdly, the judge also requests us to demonstrate that the judgment presented before him is firm and res judicata*". They advised that they were appealing this decision because the letters of request clearly stated the judgment was *res judicata*.

The matter was then presented to an appeal judge of the Mexican court who advised that he had to study and analyze the matter before issuing a ruling. The Mexican lawyer advised us, "*please let me remind you that Mexican justice is not swift at all, quite the opposite*". He advised that the matter would not be wrapped up before the end of the year and then the courts would be on their year-end break for the holidays and the new year.

## Lesson Number 9

Ensure that the letter of request specifies that the judgment was a result of an action *in personam* and not an action *in rem*.

By the end of January, the client's Mexican lawyers had still not heard from the appeals judge. Finally, at the end of February, we received an answer but it was not one that we expected or desired. The judge who had reviewed the materials, ruled that he could not accept the claim because the materials had not demonstrated that the Ontario judgment was final and the materials that were submitted to him did not show that they were in respect of personal rights rather than rights *in rem*. When the client's Mexican lawyers submitted the appeal, they argued that the letters rogatory stated quite clearly that the judgment was final and was in respect of a contract between parties as opposed to real property situated in Ontario.

The appeal judge upheld the ruling of the lower court and added that all documents would have to be sent back to Toronto to be "legalized" by the Mexican consulate.

## Lesson Number 10

Be patient. This is perhaps the most important lesson.

The Mexican lawyers apologized to us saying that the delay was due to circumstances beyond their control and as a result of the "peculiar ways" of the Mexican judicial system. They presented two options:

1. To appeal to an even higher court in Mexico and ask for both decisions to be overturned. That outcome was uncertain and could take a few months with no guarantee of it going our client's way; or
2. To file the documents afresh. The Mexican lawyers indicated that that was the best way to proceed. The client agreed.

Accordingly, we sent the original contract between our client and the Mexican promoter to the Mexican lawyers to translate into Spanish to present to the judge to show that the judgment originated from an action *in personam* as opposed to an action *in rem*. In addition, the Mexican lawyers sent back all of the original documents that they had presented to the Mexican court so that we could take them to the Mexican consulate in Toronto to have them legalized. (See Lesson 3)

Once the documents had been duly stamped by the Mexican Consulate, we sent them back to the Mexican lawyers. The defendants presented the documents to the Mexican judge. This time, the judge could not determine whether the judgment had emanated from a civil action or an arbitration, thus necessitating an appearance before him of the Mexican lawyers to explain. Finally, at the end of August, the Mexican lawyers advised that the Mexican defendants had been served with the enforcement documents. That gave them 9 working days to file their answer with the court. A month later, when updating us as to the status of the proceeding, the Mexican lawyer commented, "as you might be aware by now, legal proceedings in Mexico tend to be slow and complicated". He then advised that they had been first informed unofficially and then officially, that the judge in charge of the case had declined jurisdiction on the grounds that the case was the matter of a local court and not of a federal court. Accordingly, he intended to send our client's file to a local court, i.e. with jurisdiction in Mexico City only. The Mexican lawyers advised that they strongly disagreed with that view and were already preparing an appeal to keep the matter in Mexican Federal Court.

The Mexican lawyers scheduled an appeal before a judge of the Federal Court. On the date of the appointment, they were told the judge was not available. As a result, they left their written argument with the judge's administrative assistant. They were advised that the matter would go to "study and resolution" but they were not advised how long it would take.

Recently a Mexican appeal court ruled that our client's enforcement proceedings should be dealt with by the local court in Mexico City rather than by the Mexican Federal Court. Although the client's Mexican lawyers disagreed with the ruling, in order to save time and expense, they conceded that the matter should be dealt with locally. It was now a matter for the Federal Court to transfer the complete file to the Mexico City court, which, we were told, would take some time.

## Summary Of Lessons Learned

**Lesson Number 1** - Before commencing proceedings in Ontario against Mexican defendants, obtain advice from Mexican lawyers describing in detail the process involved for recognizing and enforcing an Ontario judgment in Mexico and the defences that may be raised by Mexican defendants in resisting recognition and enforcement.

**Lesson Number 2** - Mexican courts require foreign court and other inbound documents to be certified or authenticated. This generally means having all documents originally signed by the issuing authority, i.e. judge, clerk or other authority, and certifying or attesting that the documents are true and correct copies of the originals.

**Lesson Number 3** - Once authenticated, Mexican courts require that all inbound documents be "legalized". The process of legalization can be done by obtaining another document from the Mexican Consulate in Ontario called an "*apostille*" which will be attached to the documents in question. The apostille gives Ontario documents full binding effect in Mexico.

**Lesson Number 4** - Utilize the services of Global Affairs Canada where possible. Global Affairs Canada is the federal government agency that manages Canada's diplomatic and consular relations. It offers to authenticate a variety of documents so that they will be accepted for use abroad.

**Lesson Number 5** - Ensure that all documents are translated by a certified translator. According to Mexico's Federal Code of Civil Procedure ("FCCP"), all documents pertaining to an action in Mexico must be translated into Spanish. I recommend that the translation work is performed by a certified translator appointed by the court where you intend to enforce the judgment and that such work is monitored by legal counsel in Mexico.

**Lesson Number 6** - Follow all instructions from Mexican courts completely, even the instructions that appear to be arbitrary.

**Lesson Number 7** - Obtain letters of request in Ontario which ask the Mexican court to recognize and enforce the judgment. The letters of request should stress the principle of comity. Under the FCCP Mexican courts will not enforce a foreign judgment if it is proven that the issuing court would not enforce a Mexican judgment under similar circumstances. It is advisable that all letters of request include a short statement acknowledging that "under similar circumstances, this court would recognize and enforce a judgment coming from the requested court".

**Lesson Number 8** - Ensure that letters of request include a statement that the judgment is final and *res judicata*. The FCCP requires that the judgment to be enforced is final and *res judicata* in the sense that there is no legal recourse pending or available to the defendant in Ontario. It is advisable that a statement to that effect is contained in the letters of request.

**Lesson Number 9** - Ensure that the letter of request specifies that the judgment was a result of an action *in personam* and not an action *in rem*.

**Lesson Number 10** - Be patient. This is perhaps the most important lesson.