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Ontario Court of Appeal Opens the Door to Enforcement of Non-monetary Judgments

By [Scott Maidment](#) and [Brett Harrison](#)



The Ontario Court of Appeal has recently confirmed that Ontario courts may enforce non-monetary foreign judgements. *Pro Swing Inc. v. ELTA Golf Inc.* (2004) 68 O.R. (3d) 443 (S.C.J.); rev'd ONCA C41279 (2004-06-30) (C.A.) marks a departure from the traditional rule that limited the enforcement of foreign judgments to monetary judgments. Counsel looking to enforce non-monetary judgments in Ontario should note that whether such a judgment is enforceable will likely depend upon its clarity.

Pro Swing involved the enforcement of a U.S. judgment obtained by Pro Swing, which operated in Ohio. In 1998, Pro Swing launched a U.S. complaint against ELTA Golf Inc., an Ontario company, for trademark infringement. In July of 1998, the parties signed a settlement agreement and the U.S. Court endorsed the consent decree that enjoined ELTA from using the trademark.

In December 2002, Pro Swing learned that ELTA was violating the decree and launched a civil contempt proceeding against ELTA. By order dated February 25, 2003, the U.S. Court again enjoined ELTA and required ELTA to provide an accounting of profits derived from these sales. When ELTA again violated the order, Pro Swing commenced proceedings in Ontario to enforce the consent decree and the U.S. enforcement order.

The issue before the Ontario Court was whether the consent decree was enforceable in Ontario, given that it was not a judgment for a fixed sum of money. The Court concluded that this traditional requirement may be relaxed or removed, depending upon the circumstances of the case. In doing so, the Ontario Court relied upon a series of Canadian cases that had emphasised the importance of comity and co-operation with foreign jurisdictions. The Ontario Court also noted that the decree was consensual in nature, and that the parties appeared to have intended extraterritorial application of the decree. As well, the underlying factual matrix was outlined in the settlement, and that provided the court with the details necessary to enforce the judgment. The Ontario Court determined that both of these factors favoured the enforcement of the order in Ontario.

On appeal, the judgment enforcing the consent decree was overturned. What is significant, however, is that despite the reversal the Court of Appeal agreed that the time was right for re-examination of the rules governing the recognition and enforcement of foreign non-monetary judgements. The Court of Appeal stated that a foreign non-monetary order could be enforced in Ontario provided the judgment is sufficiently certain in its terms, such that the Ontario court could enforce the judgement without the need for interpretation of the foreign order. The Court of Appeal held that the Pro Swing foreign order could not be enforced because it was ambiguous in material matters, but it has clearly opened the door to the enforcement of foreign non-monetary orders that are free of ambiguity.

Pro Swing contains a clear lesson for U.S. counsel and others who seek to enforce non-monetary judgments in Canada. To ensure that a Canadian court will enforce a non-monetary judgment, be careful to ensure that the terms of the judgment leave no room for doubt as to what is being ordered. The Court of Appeal's decision also suggests that an Ontario Court will be more likely to enforce a foreign non-monetary judgment where the order itself indicates that inter-jurisdictional compliance is expected.

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