



Enforcement of Foreign Judgments

in 29 jurisdictions worldwide

2014

Consulting editors: Mark Moedritzer and Kay C Whittaker



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Canada

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Canada is a federal state and, pursuant to Canada's constitution, treaties that relate to matters within the jurisdiction of the provinces must be implemented through provincial legislation. The Canadian constitution gives provincial legislatures the exclusive jurisdiction to make laws relating, to among other matters, 'property and civil rights' in the province. The result is that matters relating to civil and, more narrowly, commercial disputes, fall within the jurisdiction of the provincial legislatures. Other matters, such as maritime law, fall within the jurisdiction of the federal government.

Convention between Canada and the United Kingdom

On 24 April 1984, Canada and the United Kingdom entered into the Convention between Canada and the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Convention). The Convention has become part of Canadian law through federal and provincial legislation in the nine common law provinces (which excludes Quebec). This legislation provides for the application to the local court, through streamlined procedures, for an order for registration of a judgment relating to civil and commercial matters obtained in Great Britain or Northern Ireland. Such an application must be brought within six years after the date of the judgment. The Convention applies only to a judgment for the payment of money. The Convention is expressly without prejudice to any other remedy available to a judgment creditor for recognition and enforcement of a judgment of another contracting state.

Marine Liability Act

The Marine Liability Act implements certain provisions of the International Convention on Civil Liability for Oil Pollution Damages and of the International Convention on Limitation of Liability for Maritime Claims, 1976 (the Oil Pollution Convention). Under this act, foreign judgments from countries who are party to the Oil Pollution Convention and that relate to damages claims arising from oil spills within the territorial jurisdiction of the country of origin may on application be registered with the Federal Court of Canada. The Marine Liability Act also provides that foreign judgments related to civil liability for oil pollution damage may be registered by the judgment creditor in the Federal Court.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

The legislative scheme across Canada for the recognition of non-Canadian foreign judgments is not uniform. Each Canadian province has authority to make laws that govern recognition of foreign judgments in that province. Although there is considerable similarity in the law among the provinces, there are also significant differences. The main differences are described in question 3.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Recognition and enforcement of foreign judgments in Canada is determined principally by common law principles established by jurisprudence from provincial courts and the Supreme Court of Canada.

There is also legislation in each Canadian province and territory, except Quebec, providing for reciprocal enforcement of judgments issued by courts in other provinces and territories. The legislative regime in certain provinces, New Brunswick, Manitoba, Alberta, Newfoundland and Labrador, also applies to judgments from specified states of the United States of America and territories of the Commonwealth of Australia. The provincial reciprocal enforcement of judgments statutes are not intended to alter the rules of private international law. As a result, a plaintiff is not precluded from bringing an action for recognition of a foreign judgment, thereby taking advantage of the rules of private international law as they may evolve over time.

Only two provinces, New Brunswick and Saskatchewan, have enacted legislation that governs actions brought in the superior courts of record in those provinces for recognition of a foreign judgment of another country. Under the New Brunswick statute, the Foreign Judgments Act, a court in New Brunswick will recognise the jurisdiction of the court of a foreign country only if the defendant is ordinarily resident in that country at the time of commencement of the action or if the defendant submitted to the jurisdiction of that court. The New Brunswick reciprocal enforcement of judgments legislation prohibits registration of a judgment where it is shown that the judgment debtor has a defence under the Foreign Judgments Act. Under the Saskatchewan statute, The Enforcement of Foreign Judgments Act, a court in the state of origin has jurisdiction in a civil proceeding brought against a person if, among other things, there was a real and substantial connection between the state of origin and the facts on which the proceeding was based.

Quebec does not have a common law system of justice (as do all other provinces and territories) but has a civil code that follows the French tradition. In Quebec, recognition and enforcement of foreign

money judgments is governed by both the Civil Code of Quebec and the Code of Civil Procedure in that province. The Civil Code establishes that a foreign judgment shall be recognised and enforced except where one or more listed exceptions apply. Decisions of courts in Quebec that have interpreted the Civil Code provisions relating to recognition and enforcement of foreign judgments are not addressed in this chapter as they are particular to that province and differ somewhat from jurisprudence that applies in the rest of Canada.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Canada is not a signatory to this Convention.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

The time period within which a civil legal action for recognition of a foreign judgment must be commenced is governed by provincial limitation statutes. Under Canadian jurisprudence, a foreign judgment is treated as a contract debt, and not as a domestic judgment, for the purpose of determining the limitation period that applies to commencement of an action for recognition. In 2010, the Supreme Court of Canada held that foreign arbitral awards will also not be treated as domestic judgments for the purpose of determining the applicable limitation period (*Yugraneft Corp v Rexx Management Corp*, [2010] 1 SCR 649).

An action for recognition of a foreign judgment must therefore be commenced within the shorter limitation period for contract debts under the statute applicable in the province in which the judgment creditor seeks to enforce the judgment. This period generally ranges from two to six years beginning from the time that the judgment creditor under the foreign judgment discovered, using reasonable diligence, that the judgment debtor possessed assets in Canada. The British Columbia Limitation Act specifically provides that a court proceeding must not be commenced to enforce an extra-provincial judgment for the payment of money or the return of personal property, after the earlier of (i) the expiry of the time for enforcement in the jurisdiction where the extra-provincial judgment was made; and (ii) the date that is ten years after the judgment became enforceable in the jurisdiction where the extra-provincial judgment was made. The Saskatchewan statute, The Enforcement of Foreign Judgments Act, similarly so provides.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Until recently, only foreign money judgments were enforceable in Canada. However, in *Pro Swing Inc v Elta Golf Inc*, [2006] 2 SCR 612, the Supreme Court of Canada held that courts have jurisdiction to enforce non-monetary judgments (the New Brunswick and Saskatchewan statutes still provide only for the enforcement of money judgments). The court was clear, however, that Canadian courts will not enforce penal orders from foreign jurisdictions, including contempt orders, as such orders are quasi-criminal. In *Pro Swing*, the court did not enforce the contempt order sought.

The same requirements that apply to the recognition of foreign

monetary judgments generally apply to the recognition of non-monetary judgments. Additional factors must also be considered when a court decides whether to recognise a non-money judgment, including:

- the appropriateness of using of Canadian juridical resources to assist in enforcement;
- whether the Canadian court will have to interpret foreign law;
- the territorial scope of the order;
- whether the defendant has any equitable defences to the enforcement (such as laches); and
- defences of public policy (in *Pro Swing*, privacy concerns were raised).

In 2010, the Court of Appeal for Ontario applied the test set out in *Pro Swing* to enforce a foreign order for injunctive relief for the first time: *United States of America v Yemec*, [2010] ONCA 414. More recently, the Ontario Superior Court of Justice applied this test to enforce a California judgment that granted injunctive relief relating to the infringement of certain copyrights (*Blizzard Entertainment Inc v Simpson*, [2012] ONSC 4312).

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Each province has a superior court of record with inherent jurisdiction (for example, the Superior Court of Ontario). Such courts have the jurisdiction, power and authority historically exercised by the courts of common law and equity in England, except as precluded by statute. Consequently, each superior court of record in each province has the jurisdiction to hear actions concerning the recognition of foreign judgments, except in the limited instances where such jurisdiction has been removed.

The Federal Court of Canada only has jurisdiction to hear disputes relating to specific matters prescribed by the Federal Courts Act, namely, actions against the Federal government, intellectual property actions and maritime actions, among others. Consequently, the Federal Court has jurisdiction to decide cases relating to the recognition of foreign judgments pursuant to the federal legislation as described in question 1.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Recognition of a foreign judgment differs from enforcement of a foreign judgment. Enforcement is the process by which a party will collect on a judgment that has already been recognised by a court of competent jurisdiction. A foreign judgment must, therefore, first be recognised before it can be enforced.

Further, recognition differs from enforcement in that a defendant who has obtained a judgment dismissing a foreign action, and who later faces an attempt by the plaintiff to re-litigate the same issues in a domestic forum, would need the court in that domestic forum to recognise, but not enforce, the foreign judgment. Once the foreign judgment was recognised, the defendant would be able to assert the defence of *res judicata*.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

A defendant is not entitled to raise merits-based defences that were subject to adjudication by the foreign court. A defendant is limited

to challenging the jurisdiction of the foreign court or to asserting defences based upon fraud, denial of natural justice and public policy considerations.

In *Beals v Saldanha*, [2003] SCR 416, the Supreme Court of Canada addressed the available defences to enforcement of foreign judgments. The court identified the defences of fraud, public policy and denial of natural justice as the most recognisable situations in which injustice may arise, but noted that these were not exhaustive and that unusual situations may arise that might require the creation of a new defence.

Fraud

In *Beals*, the Supreme Court of Canada held that, as a general statement, neither foreign nor domestic judgments will be enforced if obtained by fraud. The court warned against the use of this defence as a means of relitigating an action previously decided and so thwarting the finality sought in litigation. Accordingly, the defence of fraud is treated narrowly by the courts. Where a foreign judgment was obtained by fraud that was undetectable by the foreign court, it will not be enforced domestically. In order to raise the defence of fraud, the defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due, or reasonable, diligence prior to obtaining of the foreign judgment.

Denial of natural justice

The Supreme Court of Canada in *Beals* held that denial of natural justice can be the basis of a challenge to a foreign judgment and, if proven, will justify the domestic court in refusing recognition and enforcement of a foreign judgment. The party seeking to impugn the judgment must prove, to the civil standard, that the foreign proceedings were contrary to Canadian notions of fundamental justice. The court held that a fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. The defence of natural justice is restricted to the form of the foreign procedure, and due process, and does not relate to the merits of the case. If that procedure, while valid in the foreign state, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made and that he or she be granted an opportunity to defend.

Public policy

The third defence of public policy prevents recognition of a foreign judgment where the foreign law is contrary to the Canadian view of basic morality. The public policy defence guards against the recognition of a judgment rendered by a foreign court proven to be corrupt or biased. Because the use of the defence of public policy involves impeachment of that judgment by condemning the foreign law on which the judgment is based, the Supreme Court of Canada in *Beals* held that it is not a remedy to be used lightly. The expansion of the defence to include perceived injustices that do not offend our sense of morality is unwarranted and the court held that the defence of public policy should have a narrow application. The public policy defence is not meant to bar enforcement of the judgment rendered by a foreign court for the sole reason that the claim in a foreign jurisdiction would not yield comparable damages in Canada.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

The proper course for a judgment debtor under a foreign judgment to prevent enforcement of the judgment in Canada is by defending the action brought in Canada for recognition of the foreign

judgment, not by seeking injunctive relief. A Canadian court would not grant an injunction to restrain a judgment creditor, under a Canadian judgment that has recognised a foreign judgment, from enforcing the domestic judgment.

In Canada, it is possible for a defendant in a foreign action to obtain an injunction, known as an anti-suit injunction, to restrain the plaintiff in the foreign action (who is subject to the in personam jurisdiction of the Canadian court) from initiating or, more commonly, continuing legal proceedings in the foreign jurisdiction where the domestic court is the most appropriate forum for adjudication of the merits of a given legal dispute and there would be injustice to the defendant if the plaintiff were to be allowed to pursue the foreign proceeding.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

In Canada, the basic mandatory requirements for recognition and enforcement of a foreign judgment are:

- the issuing court has properly asserted jurisdiction;
- the judgment is final and conclusive; and
- the judgment is not for a penalty, taxes, or enforcement of a foreign public law.

Whether the issuing court has properly asserted jurisdiction

Prior to the 1990 decision of the Supreme Court of Canada in *Morguard v DeSavoye*, [1990] 3 SCR 1077, judgments were enforceable only if the court that issued the judgment took jurisdiction over the defendant in one of two ways: (i) the defendant was present in the jurisdiction at the onset of the litigation; or (ii) the defendant attorned to the court's jurisdiction.

In *Morguard*, the Supreme Court of Canada introduced a new principle to determine when a court has exercised jurisdiction appropriately for the purpose of recognition by the court of another province – whether there was 'real and substantial connection' between the court of the other province and the conduct giving rise to the action. However, the court in *Morguard* did not decide whether this test would apply to foreign judgments. Further, the court did not seek to determine the precise content of the real and substantial connection test nor did it elaborate on the strength of the connection. Rather, the court held that the connections between the matters or the parties, on the one hand, and the court, on the other, must be of some significance in order to promote order and fairness.

In *Beals*, the Supreme Court of Canada held that the real and substantial connection test was also the proper test to be applied to determine whether a foreign court had appropriately taken jurisdiction, even in a case involving a default judgment. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) would serve to bolster the real and substantial connection to the action or parties.

Recently, in *Van Breda v Village Resorts Ltd*, [2012] 343 DLR (4th) 577, the Supreme Court of Canada again addressed the real and substantial connection test. The court noted the inconsistent application by provincial courts across Canada of a framework for the assumption of jurisdiction and uncertainty about the meaning and conditions of application of the real and substantial connection test, and provided greater direction on how the test should be applied. The court held that jurisdiction may also be based on traditional grounds, the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established.

The court identified a list of presumptive connecting factors relating to claims in tort that were intended to be illustrative of factual situations in which a real and substantial connection would typically exist. These factors must be established by the plaintiff and warrant presumptive effect, with the defendant bearing the burden of negating such effect or convincing the court that the proposed assumption of jurisdiction would be inappropriate.

The court identified the following presumptive connecting factors:

- the defendant is domiciled or resident in the jurisdiction;
- the defendant carries on business in the jurisdiction;
- the tort was committed in the jurisdiction; and
- a contract connected with the dispute was made in the jurisdiction.

The court wrote that the list of presumptive connecting factors is not closed and that in identifying new presumptive factors a court should look to connections that give rise to a relationship with the forum that is similar in nature to ones that result from the listed factors.

In *Yaiguaje v Chevron Corporation*, [2013] ONSC 2527, the Ontario Superior Court of Justice considered whether the decision in *Van Breda* added an additional requirement to the enforcement of a foreign judgment, namely, whether the plaintiff is required to establish that a real and substantial connection exists between the defendants to the enforcement action and Ontario. The court held that this was not case: a plaintiff in an action to enforce the judgment of a foreign court need only show that a real and substantial connection existed between the foreign court and the subject matter and/or defendant in the foreign proceeding. It need not establish a real and substantial connection between the defendants and Ontario, or that the defendant has assets in Ontario. The court emphasised that it 'should grant assistance in enforcing an outstanding judgment, not raise barriers'. The court, however, stayed the enforcement action on the basis that there was no realistic prospect of recovery from the defendant in light of the evidence that the defendant had no assets in Ontario (without prejudice to the plaintiffs' right to move to lift the stay on new evidence that the defendant possesses or is likely to shortly possess assets in Ontario). This decision is under appeal.

Whether the judgment is final and conclusive

A foreign judgment will not be recognised unless that judgment is final and conclusive (in the sense of being *res judicata* under foreign law) in the foreign court that rendered it. A pending appeal from the foreign judgment in the foreign court or that the time for appealing the judgment has not expired does not affect the finality of the judgment for enforcement purposes, although the defendant may be granted a stay of the recognition action pending the outcome of an appeal in the foreign court.

The judgment must be for a penalty or for taxes or for enforcement of foreign public law

Canadian courts will not recognise monetary judgments relating to penalties or the enforcement of tax decisions, *Huntington v Attrill*, [1893] AC 150 (PC) and *United States of America v Ivey*, 26 OR (3d) 533, since by enforcing such judgments, the domestic court would be facilitating the assertion of foreign sovereign power in Canada. For example, orders for either civil or criminal contempt are considered penal and thus unenforceable.

Other defences

A Canadian court will not enforce a foreign judgment that is inconsistent with a prior judgment of the Canadian court.

A foreign judgment that purports to resolve a question of title to immovable property in the forum will not be recognised (*Duke v Andler*, [1932] SCR 734).

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

In addition to the factors that determine whether the foreign court properly asserted jurisdiction, the Supreme Court of Canada in *Pro Swing* held that where equitable orders are concerned, courts must

take care not to emphasise respect for a nation's acts to the point of imbalance and that an equitable order, such as an injunction, triggers consideration of other factors, including the convenience to the enforcing jurisdiction. See question 6.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

The judicial proceedings that resulted in the foreign judgment that is sought to be recognised need not meet the requirements for due process in Canada. However, as noted, a defendant may raise as a defence that the judgment was obtained through a process that involved a denial of natural justice, such as denial of the right to be notified of the proceedings, the right to present evidence and the right to make submissions. Differences relating to rights of discovery between the judicial process in the country of origin and the process in Canada would be unlikely to qualify as a denial of natural justice such as to support a defence to an action for recognition of a foreign judgment.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

A court in Canada would consider whether the court of the country where the judgment was issued had personal jurisdiction over the defendant and, if so, this would be sufficient to satisfy the requirement for jurisdiction. However, there is no necessary requirement to show that the foreign court properly took jurisdiction following its own rules for such determination, nor is it necessary to show that the foreign court had personal jurisdiction over the defendant. A Canadian court asked to recognise and enforce a foreign judgment would apply the factors relevant to whether there was shown to be a real and substantial connection between the cause of action and the country in which the foreign judgment was issued.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

There is no requirement that the court where the judgment was issued had subject matter jurisdiction over the matter in dispute. A Canadian court asked to recognise and enforce a foreign judgment would consider the connection between the subject matter of the litigation and the country where the judgment was issued as part of its examination of the factors relevant to whether the real and substantial connection test was satisfied.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Non-compliance with technical or formal service requirements of the foreign country is not, per se, a defence to an action to recognise a foreign judgment, and would be considered by a Canadian court as part of its examination of the defence of denial of natural justice. Compliance with the service requirements of the foreign country is not necessarily sufficient. Whether the notice satisfied the

requirement of natural justice will depend upon the factual circumstances of a given case.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

The relative inconvenience of the foreign jurisdiction to the defendant would only be considered as part of the overall consideration of the applicable factors relating to whether the plaintiff had satisfied the burden of showing a real and substantial connection with the foreign state. The Supreme Court of Canada in *Van Breda* has held that the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. However, the relative inconvenience to the defendant, standing alone, would not likely be sufficient to rebut a presumption of jurisdiction established by other connecting factors.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

The Supreme Court of Canada in *Beals* held that, generally, neither foreign nor domestic judgments will be enforced if obtained by fraud. See question 9.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

The defence of public policy prevents enforcement of a foreign judgment that is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to the Canadian view of basic morality. See question 9.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Where a foreign judgment that is sought to be recognised conflicts with a prior judgment involving the same parties or their privies, and each judgment (i) was pronounced by a court of competent jurisdiction and (ii) is final and not open to impeachment, the general rule is that the first in time must be given effect to the exclusion of the later in time.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

For a Canadian judgment to be enforceable against a person, the person needs to be named as a judgment debtor. Principles of agency or alter ego would not be applied to permit enforcement against a third party who is not a judgment debtor. A plaintiff who seeks to impose liability on a third party under principles such as agency or alter ego is required to do so before the judgment has been issued by the court. After a judgment has been issued, the court has limited power to amend or vary the judgment based upon accidental errors or upon fraud or facts arising or discovered after the judgment was made.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

In principle, a defendant who objected to a judgment made against him or her in a foreign country on the grounds that there was an enforceable agreement to submit the matter in dispute to arbitration should be required to challenge the foreign judgment on this basis in the foreign court, by appeal or otherwise. Until such a challenge is successfully made, the foreign judgment would continue to be valid and should not be considered to be a nullity. Nevertheless, this factor could be relevant to a defence asserted by a defendant in an action to recognise and enforce the foreign judgment based upon denial of natural justice or fraud, if it were to be shown that the fact of the arbitration agreement was withheld from the court that issued the judgment.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Judgments of all foreign courts have the same legal effect for the purpose of an action in Canada for recognition and enforcement. However, in addressing a defence raised by a judgment debtor on the grounds of denial of natural justice, the Canadian court would consider the judicial process that was followed in the foreign court in order to determine whether requirements of natural justice have been satisfied. In foreign countries where the judicial process is similar to that followed in Canada, it is less likely that a judgment from this country would not be recognised on the grounds that there had been a denial of natural justice (where the process in that country had been followed), than where the judicial process that led to the foreign judgment differs in material ways from the process in Canada.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Although in principle it would be open to a defendant to raise a defence to an action on a foreign judgment on the grounds that the award is so excessive that it is contrary to the Canadian view of basic morality, courts in Canada have held that large awards for damages, even where based upon claims for multiple damages, do not violate Canadian principles of morality. However, if it were shown that the damages were awarded in an arbitrary manner, or that the amount of the award for compensatory or punitive damages was so large as to shock the conscience of reasonable Canadians, there could be a legal basis for a court to give effect to a defence on these grounds.

The Saskatchewan Enforcement of Foreign Judgments Act expressly provides for a limit to enforcement of damages added to compensatory damages as punitive or multiple damages or for other non-compensatory purposes to the amount of similar or comparable damages that could have been awarded in Saskatchewan.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Under procedural rules applicable in Canadian provinces, the judgment that recognises a foreign judgment is expressed in Canadian currency converted from the foreign currency at the exchange rate

Update and trends

The 2012 decision of the Supreme Court of Canada in *Van Breda* added considerable clarity to how Canadian courts should practically apply the real and substantial connection test, by identifying specific connecting factors that presumptively support a finding that the foreign court had properly taken jurisdiction. The decision in *Van Breda* reflects the court’s recognition of the increasingly global nature of commercial activity and the need for greater certainty in the law relating to jurisdiction in an international context.

Superior courts in Canadian provinces will be called upon to apply the principles established by *Van Breda* to particular fact situations raising new questions; for example, how commercial activity through electronic commerce should be treated. What it means to ‘carry on business’ in a given country, for the purpose of the real and substantial connection test (and how this term will be applied to internet businesses) will undoubtedly be addressed by trial courts in different contexts. The jurisprudence resulting from these decisions will, over time, promote greater certainty and predictability to the law of Canada in this evolving area.

In the past year, provincial superior courts have applied *Van Breda* in a number of cases. Of particular interest is *Yaiguaje v Chevron Corporation*, [2013] ONSC 2527, in which the Ontario Superior Court of Justice considered whether the decision in *Van Breda* added an additional requirement to the enforcement of a foreign judgment, namely, whether the plaintiff is required to establish that a real and substantial connection exists between the defendants to the enforcement action and Ontario. The court held that this was not case: a plaintiff in an action to enforce the judgment of a foreign court need only show that a real and substantial connection existed between the foreign court and the subject matter and/or defendant in the foreign proceeding. It need not establish a real and substantial connection between the defendants and Ontario, or that the defendant has assets in Ontario. The court emphasised that it ‘should grant assistance in enforcing an outstanding judgment, not raise barriers’. This decision is under appeal.

in effect as at the date of the Canadian judgment.

The Canadian court will allow interest, usually at the rate specified in the foreign judgment. If no rate is specified, Canadian courts will allow interest at a prejudgment interest rate that is set by provincial statutes and is tied to prevailing interest rates.

Canadian courts have jurisdiction to award full, substantial or partial recovery of legal fees and disbursements incurred as a result of the proceedings taken in Canada to have the foreign judgment recognised and enforced. The exercise of this jurisdiction is a matter of judicial discretion.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

There is a right of appeal from a judgment recognising or enforcing a foreign judgment, either directly to an appellate court or with leave of an appellate court. The appeal procedures vary by province, but the defendant is generally not required to post security as a condition to proceeding with an appeal.

There is usually an automatic stay of execution of the Canadian judgment pending the outcome of appeal but, in special circumstances, an appellate court would have jurisdiction to lift the stay of execution and permit enforcement. If the judgment creditor is able to demonstrate that the judgment debtor is taking, or is likely to

take, steps to remove assets from the jurisdiction to avoid execution, it is possible to obtain an injunction (known as a *Mareva* injunction) or other extraordinary remedy, such as the appointment of a receiver, to prevent the judgment debtor from dissipating his or her assets pending the outcome of the appeal.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once recognised, a foreign judgment is enforceable in the same manner as any other judgment. For example, enforcement can be effected through seizure and sale of real or personal property, garnishment of debts payable to the judgment debtor and, in certain cases, an order for the appointment of an equitable receiver. The procedural rules in Canadian provinces provide for the examination under oath of a judgment debtor with respect to matters relating to enforcement of a judgment.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

The most significant pitfall of which a judgment creditor under a foreign judgment should be aware is the existence of relatively short periods of limitation for an action to have a foreign judgment



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recognised in Canada. Under Canadian law, the foreign judgment is treated as a contract debt, and many Canadian provinces have a two-year limitation period before an action on the foreign judgment is statute-barred. Under the provincial limitations statutes, commencement of the limitation period begins on the day that the claim was discovered, meaning when the judgment creditor ought

reasonably to have known that a legal proceeding was warranted. Recognition and enforcement proceedings would only be warranted once a judgment creditor under a foreign judgment had learned, using reasonable diligence, that the judgment debtor possessed assets in the given jurisdiction.



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