

# Enforcing Foreign Judgments in Canada

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In today's increasingly global business landscape, disputes frequently cross international borders, resulting in non-Canadian businesses having to seek relief or assistance from Canadian courts. **Enforcing Foreign Judgments in Canada** provides non-Canadian parties with the information they need when navigating the Canadian judicial system. In particular, this guide offers insight into

- rules pertaining to service
- enforcement procedure
- effect of reciprocal enforcement legislation
- enforcement of arbitral awards
- interim and interlocutory orders
- relevant limitation periods
- obtaining evidence in Canada
- considerations unique to Québec

## Introduction

As transactions have become increasingly globalized, commercial disputes frequently cross international borders. This guide is intended to provide practical guidance with respect to the most common questions that arise when a non-Canadian party needs to seek relief or assistance from the Canadian courts in the context of commercial disputes. The interplay between Canadian judicial processes and those of other jurisdictions varies significantly and can be complex, giving rise to a host of factual and legal considerations. In particular, the Canadian legal landscape is unique as it incorporates both common law and civil law systems.<sup>1</sup> This guide is designed to give non-Canadian businesses a basic understanding of some of the issues at play when engaging the Canadian judicial system.<sup>2</sup>

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<sup>1</sup> To the extent that non-Canadian litigants seek to engage the judicial system in the Province of Québec, it will be important to be mindful of the unique jurisdictional features of this civil law province (discussed herein).

<sup>2</sup> Please note that this guide is not intended to substitute for bespoke advice from a Canadian lawyer, and should not be relied upon for such.

# 1. Service

## How do I serve a Canadian entity?

### Summary answer

As Canada is a signatory to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Hague Convention or Convention),<sup>3</sup> along with 73 other contracting states,<sup>4</sup> the Convention's protocols will typically govern service of a foreign process on a Canadian resident. To the extent that the foreign proceeding originates in a jurisdiction that is not itself a signatory to the Hague Convention, it will be important to be mindful of the local service requirements of that originating jurisdiction.

Where the jurisdiction in which the proceeding originates is itself a signatory to the Hague Convention, as will most often be the case, the Convention expressly contemplates a number of both formal and informal mechanisms by which litigants from other countries may serve Canadian parties, including by means of personal service.

### A. The formal Hague Convention process<sup>5</sup>

In order to serve a Canadian entity under the Hague Convention process, a party forwards its originating process to a “forwarding authority” in its own home country. What is considered an acceptable “forwarding authority” will depend on the law of your jurisdiction and can vary widely, although it will typically include domestic courts and certain court officers.<sup>6</sup>

In order to be validly served in Canada, the originating process must be translated into either English or French, which are Canada's two official languages.<sup>7</sup>

The forwarding authority will send the originating process to the relevant Canadian Central Authority, which then serves it on the recipient using the Hague Convention model form.<sup>8</sup> The Canadian government operates under a federal system, with both a federal government at the national level and separate provincial governments in each of its 10 provinces. The Minister or Department of Justice in each of Canada's 10 provinces acts as a Central Authority. Canada's federal Central Authority is Global Affairs Canada, Criminal, Security and Diplomatic Law Division.<sup>9</sup> Central Authorities do not have any authority to determine whether a particular document *should* be served.<sup>10</sup>

Canada's commentary to the Hague Convention notes: “[T]o save time, requests should be forwarded directly to the Central Authority of the province or territory concerned. They may, however, also be forwarded to the Federal Central Authority which will transmit them to the relevant Central Authority.”<sup>11</sup> The “province or territory concerned” is typically the provincial or territorial jurisdiction within Canada where the Canadian party being served resides or has assets.

<sup>3</sup> 15 November 1965, 658 UNTS 163 (entered into force 10 February 1969) [*Hague Convention*].

<sup>4</sup> See Appendix for a full list of contracting states.

<sup>5</sup> See *Ibid*, Arts 2–5.

<sup>6</sup> The Hague Conference on Private International Law, *Practical Handbook on the Operation of the Hague Service Convention*, 4th ed (The Netherlands: HCCH Publications, 2016) at 43 [*The Handbook*].

<sup>7</sup> *Hague Convention*, *supra* note 3, art 5(3).

<sup>8</sup> *Ibid*, art 3(1); see also *The Handbook*, *supra* note 6 at 47–51.

<sup>9</sup> The Hague Conference on Private International Law, “Central Authorities,” online: <https://assets.hcch.net/docs/15b5f973-5121-49f0-8a73-9b44d02c7dc5.pdf> PDF (a list of Canadian Central Authorities under the Hague Convention can be found in Appendix ‘A’) [*Canadian Central Authorities*].

<sup>10</sup> *The Handbook*, *supra* note 6 at 53.

<sup>11</sup> *Canadian Central Authorities*, *supra* note 9 at 1.

## B. Personal service under the Hague Convention

The most effective way to serve under the Hague Convention is to serve personally:

Provided the State of destination does not object, the present Convention shall not interfere with – ...  
 c) the freedom of **any person interested in a judicial proceeding** to effect service of judicial documents **directly through** the judicial officers, officials or **other competent persons of the State of destination**.  
 [emphasis added]<sup>12</sup>

Notably, Canada has not registered any “objections” under the Hague Convention with respect to service, such that the precondition to the alternative methods of service under the Convention (i.e., “Provided the State of destination does not object...”) is satisfied where a party seeks to effect service within Canada. Accordingly, a non-Canadian litigant can serve documents directly, provided he or she does so through a “competent person.”

Both case law and the Hague Convention text suggest that the domestic law of the recipient jurisdiction (i.e., Canadian law) determines who is a competent person. Canadian courts have not conclusively held that a Canadian process server is a competent person. However, the Ontario Superior Court of Justice has held that a process server was a competent person to serve documents in the U.S. state of Georgia because the process server was authorized to serve court documents in Georgia.<sup>13</sup> It logically follows that a Canadian process server will generally be regarded as a “competent person” to serve documents, given that personal service is accepted as a valid form of service in all Canadian jurisdictions. However, foreign litigants should be mindful of any restrictions under local service rules in the originating jurisdiction that may limit their service options abroad.

Out of an abundance of caution, a foreign litigant may also wish to contemporaneously invoke the formalized Hague Convention process (which is a slower and more cumbersome process than personal service) in the background, in order to limit any possible objections as to service by the responding party at a later stage in the proceedings.

## C. Other channels for service under the Hague Convention

The Hague Convention also contemplates a number of additional methods of service beyond the use of the formal Convention process. For example, it allows for service through “consular channels.” Service may also be different if Canada has a bilateral agreement with the originating jurisdiction.<sup>14</sup>

<sup>12</sup> *Hague Convention*, *supra* note 3 art 10(c).

<sup>13</sup> *Pitman v. Mol*, 2014 ONSC 2551 at paras. 57–59.

<sup>14</sup> *Hague Convention*, *supra* note 3, art. 8, 11; Canada is a party to 20 bilateral treaties concerning service in legal proceedings in civil and commercial matters, with contracting parties. See, for example, *Exchange of Notes between Canada and the Federal Republic of Germany constituting an Agreement giving effect to the Convention between His Majesty and the President of the German Reich regarding Legal Proceedings in Civil and Commercial Matters (March 20, 1928)*, 30 October 1953, 1953/17 (entered into force 1 November 1953); *Exchange of Notes extending to Canada as from April 1, 1939, the Convention between Great Britain and Northern Ireland and Hungary regarding Legal Proceedings in Civil and Commercial Matters signed on September 25, 1935*, March 1 and 23, 1939, 1936/6 (entered into force 1 April 1939); *Exchange of Notes extending to Canada as from February 1, 1939, the Convention between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Yugoslavia regarding Legal Proceedings in Civil and Commercial Matters signed at London, February 27th 1936*, December 1 and 27, 1938, 1939/4 (entered into force 1 February 1939); *Exchange of Notes extending to Canada as from July 1, 1938, the Convention between Great Britain and Northern Ireland and Greece regarding Legal Proceedings in Civil and Commercial Matters*, June 1 and 4, 1938, 1938/11 (entered into force 1 July 1938). For a complete list, see Global Affairs Canada: Treaty Law Division (Judicial Cooperation: civil and commercial) online: <http://www.treaty-accord.gc.ca/resultat.aspx?type=1>.

The Convention also provides for a “postal channel,” which allows the party serving the proceedings to mail the originating process to the recipient.<sup>15</sup> In general, service by mail is available if the recipient state has not objected, which Canada has not.<sup>16</sup> However, there is at least one Canadian case in which a court held that service by mail is not sufficient for the enforcement of a foreign judgment.<sup>17</sup> Further, there has been some controversy about whether delivery by a private courier is acceptable.<sup>18</sup> The postal channel is therefore not the safest choice as a sole method of service when attempting to enforce a judgment in Canada.

The uncertainty surrounding postal service, combined with delays in using forwarding authorities, makes personal service the most expedient method.

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<sup>15</sup> *Hague Convention*, *supra* note 3, art 10(a)

<sup>16</sup> See The Hague Conference on Private International Law, “Canada – Central Authority & Practical Information,” online: <<https://www.hcch.net/en/states/authorities/details3/?aid=248>>.

<sup>17</sup> *LLS America LLC (Trustee of) v. Grande*, 2013 BCSC 1745, as discussed in *The Handbook*, *supra* note 6 at 86.

<sup>18</sup> *The Handbook*, *supra* note 6 at 79–81.

## 2. Enforcement

### What is the procedure for having a final order issued by a non-Canadian court recognized and enforced in Canada?

#### Summary answer

There are two basic routes by which you can enforce a non-Canadian judgment in Canada.<sup>19</sup> The first is the common law route articulated in the Supreme Court of Canada's decision in *Morguard Investments Ltd. v. De Savoye*.<sup>20</sup> The second is by way of reciprocal enforcement legislation, such as the *Reciprocal Enforcement of Judgments (U.K.) Act*,<sup>21</sup> when the judgment in question is issued by a jurisdiction governed by such legislation.

#### A. Common law method

Enforcement at common law requires the enforcing party to start an enforcement proceeding in the relevant Canadian court and meet the test for enforcement ([as discussed below](#)). The procedures of that Canadian court will govern.<sup>22</sup>

In Ontario, enforcement proceedings may be commenced by way of ordinary action (i.e. statement of claim) or through the more streamlined application process where there are no material facts in dispute (with evidence adduced through written affidavits, without a formal discovery process and with any examinations on the affidavits taking place outside of court). Further, an enforcement proceeding commenced by way of action can be resolved by summary judgment, a procedure similar to an application.

In many cases, there will be no material facts in dispute so an application may be the preferred procedural route. The enforcing court is not permitted to look behind the foreign judgment at the merits of the case. A defendant to enforcement proceedings has a limited number of defences on which it can rely ([discussed in greater detail below](#)). Further, even where a defendant to enforcement proceedings advances a defence, there may still be agreement about the sequence of events that led to the entering of a foreign judgment against the defendant.

Two recent cases from British Columbia demonstrate situations where a dispute in material facts can arise in an enforcement proceeding, necessitating the full procedural mechanisms of a trial. In *Lonking (China) Machinery Sales*, the British Columbia Supreme Court held that it could not make the necessary determinations regarding the defences of fraud and breach of natural justice on a summary trial. The Court held that the facts going to key matters were highly contested, including whether certain statements were made, whether deponents of affidavits could be believed on certain matters or generally, and whether adverse inferences should be drawn based on failure to lead evidence. The Court also noted that the judgments in question totaled over \$5 million, such that it was not disproportionate for the enforcement proceeding to proceed to a conventional trial.<sup>23</sup>

In *Liu v. Luo*, the British Columbia Supreme Court held that it could not make a necessary determination regarding the alleged breach of natural justice on a summary trial. There was significant contested evidence regarding whether or not a Chinese court had correctly followed its own procedures for service. Like in the *Lonking (China)* case, the Court noted that as the amount in question was significant (exceeding \$2 million), it would be justified and proportionate for the enforcement proceeding to proceed to a conventional trial.<sup>24</sup>

19 Edwin G Upenieks & Robert J van Kessel, *Enforcing Judgments and Orders*, 2nd ed (Toronto: LexisNexis Canada, 2016) at 111–137.

20 [1990] 3 SCR 1077 [*Morguard*].

21 RSO 1990, c. R.6 [*U.K. Reciprocal Act*].

22 E.g., in Ontario, the *Rules of Civil Procedure*, RRO 1990, Reg 194.

23 *Lonking (China) Machinery Sales Co. Ltd. v. Zhao*, 2019 BCSC 1110, at paras. 119–121 and 129–131.

24 *Liu v. Luo*, 2018 BCSC 1237, at paras. 30 and 35.

Typically, the enforcing party should seek to recognize and enforce the judgment in the Canadian jurisdiction(s) in which the defendant holds assets. In *H.M.B. #2* (the facts of which are set out in the discussion of *H.M.B. #1*), the Ontario Court of Appeal held that “ricochet judgments” – whereby a foreign judgment is recognized in one Canadian province and is then re-registered in a second Canadian province – were impermissible. The more appropriate process would be to seek recognition and enforcement of the foreign judgment in each province individually under the laws and procedures of that province.<sup>25</sup>

## B. Legislation method

Because common law enforcement can be quite time-consuming and expensive, most Canadian provinces have created a more streamlined process for enforcing judgments from particular jurisdictions by way of “reciprocal enforcement of judgments” legislation. This allows a litigant to “register” a judgment by way of a court application.

Reciprocal enforcement of judgments legislation, as its name suggests, is only available to parties from reciprocating jurisdictions. Canadian provinces – except Québec – are all reciprocating jurisdictions of one another. A number of provinces have also enacted legislation to simplify the procedure for registering and enforcing foreign judgments. Each province has enforcement arrangements with different foreign jurisdictions.<sup>26</sup> Saskatchewan and New Brunswick, for example, have established fairly robust enforcement regimes,<sup>27</sup> whereas other provinces like British Columbia and Alberta have legislated more narrowly in this area.

In *H.M.B. #1*, the Supreme Court of Canada limited the application of Ontario’s *Reciprocal Enforcement of Judgments Act* (REJA). After the state of Antigua expropriated property owned by H.M.B., H.M.B. commenced litigation, and the Judicial Committee of the Privy Council ordered Antigua to compensate H.M.B. H.M.B. then brought a common law action in British Columbia to enforce the Privy Council judgment. Antigua chose not to defend, and H.M.B. received default judgment in B.C. H.M.B. then commenced an application to have the B.C. judgment registered under Ontario’s REJA. The Supreme Court held that H.M.B. was barred from registering the judgment because section 3(b) of Ontario’s REJA provides that

3 No judgment shall be ordered to be registered under this Act if it is shown to the registering court that, [...]  
(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court<sup>28</sup>...

In this case, Antigua was not “carrying on business” in British Columbia. The Supreme Court declined to answer the question of whether “ricochet judgments” – whereby a foreign judgment is recognized in one Canadian province, and that Canadian judgment is then re-registered in a second Canadian province – were permissible more generally at common law.<sup>29</sup> That question was later answered in the negative by the Ontario Court of Appeal in *H.M.B. #2* (described above).

Québec, as further explained below, is governed by the *Civil Code of Québec* (the CCQ) rather than the common law. This comprehensive piece of legislation, which is characteristic of civil law traditions, includes the substantive requirements for the enforcement of all non-Québec judgments.

<sup>25</sup> *H.M.B. Holdings Limited v. Antigua and Barbuda*, 2022 ONCA 630, at paras. 24 and 40–41.

<sup>26</sup> E.g., British Columbia has reciprocal agreements with Washington, Alaska, California, Oregon, Colorado and Idaho, among others: *Court Order Enforcement Act*, RSBC 1996, c. 78 [B.C. *Court Order Enforcement Act*]; Alberta has reciprocal agreements with Washington, Idaho and Montana: *Reciprocal Enforcement of Judgments Act*, RSA 2000, c. R-6 [Alberta *Reciprocal Enforcement of Judgments Act*]; Manitoba has reciprocal agreements with Idaho and Washington: *The Reciprocal Enforcement of Judgments Act*, CCSM c. J20; Prince Edward Island has a reciprocal agreement with Washington State: *Reciprocal Enforcement of Judgments Act*, RSPEI 1988, c. R-6 [P.E.I. *Reciprocal Enforcement of Judgments Act*].

<sup>27</sup> See Saskatchewan’s *The Foreign Judgments Act*, RSS 1978, c. F-18; New Brunswick’s *The Foreign Judgments Act*, RSNB 1973, c. 162.

<sup>28</sup> *Reciprocal Enforcement of Judgments Act*, RSO 1990, c. R.5, s. 3(b).

<sup>29</sup> *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44, at paras. 26, 44–49.



### i. How to register a judgment

To register a judgment, one must file documents proving the judgment in the applicable Canadian court and, in some cases, affidavit evidence. This must be done within a limitation period ([discussed below](#)) and typically on notice to the affected judgment debtor. However, courts in many Canadian provinces allow registration without such notice in certain circumstances. For example, in Alberta, British Columbia and Prince Edward Island, no notice will be required where (a) the judgment debtor was personally served with process in the original action, or appeared, defended, attorned or otherwise submitted to the jurisdiction of the original court and (b) the time in which an appeal may be made against the judgment has expired or any such appeal has been disposed of.<sup>30</sup> Upon registration, the judgment is given the same force and effect as a judgment of the Canadian court in which it has been registered.

### ii. Effect of international conventions on enforcement

Canada is also party to several international conventions that may affect the enforcement of non-Canadian judgments, including, for example, 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*.<sup>31</sup> This convention has been incorporated into Canadian law by way of federal<sup>32</sup> and provincial legislation,<sup>33</sup> which together allow Canadian federal and provincial governments, as well as the government of Great Britain and Northern Ireland, to mutually register and enforce judgments obtained in each other's jurisdictions, provided it is within six years of the judgment.<sup>34</sup> Once a judgment is registered, it has the same force and effect as a Canadian judgment.<sup>35</sup> Each statute and convention is unique and imports different procedural and substantive rules. However, generally, this legislation supplements but does not override the common law doctrine on the enforcement of foreign judgments.<sup>36</sup>

As noted above, a party cannot register a judgment under reciprocal enforcement legislation if the originating judgment is itself a registration of a judgment from a non-reciprocating jurisdiction. This loophole, whereby one could theoretically chain together reciprocating states in order to eventually enforce in the relevant jurisdiction, has been expressly rejected by Canadian courts,<sup>37</sup> including most recently the Supreme Court in *H.M.B. #1* on the facts of that particular case.

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<sup>30</sup> *Alberta Reciprocal Enforcement of Judgements Act*, *supra* note 26 s 2; *B.C. Court Order Enforcement Act*, *supra* note 26 s 29(2); *P.E.I. Reciprocal Enforcement of Judgements Act*, *supra* note 26 s. 2(2); see also *Reciprocal Enforcement of Judgements Act*, RSO 1990, c. R.5, s. 2(2).

<sup>31</sup> 24 April 1984, 1987/29 (entered into force 1 January 1987); see also *International Convention on Civil Liability for Oil Pollution Damages*, 29 November 1969 (as amended by protocol dated 27 November 1992), 973 UNTS 3 (entry into force 19 June 1975); *International Convention on Limitation of Liability for Maritime Claims*, 19 November 1976, 1456 UNTS 221 (entered into force 1 December 1986).

<sup>32</sup> *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, RSC 1985, c. C-30.

<sup>33</sup> See, e.g., *U.K. Reciprocal Act*, *supra* note 21. Similar legislation has been enacted in all Canadian provinces, with the exception of Québec.

<sup>34</sup> According to the *U.K. Reciprocal Act*, *supra* note 21, where a judgment has been given by a court of one Contracting State, the judgment creditor may apply in accordance with Article VI to a court of the other Contracting State at any time within a period of six years after the date of the judgment (or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings) to have the judgment registered, and on any such application the registering court shall, subject to such simple and rapid procedures as each Contracting State may prescribe and to the other provisions of this Convention, order the judgment to be registered: *Ibid.*, art. 3, s. 1.

<sup>35</sup> *Ibid.*, art. 3, s. 4.

<sup>36</sup> Stephen G A Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law Inc, 2016) at 201 [*Pitel & Rafferty*]; *Morguard*, *supra* note 20 at para. 56.

<sup>37</sup> *Owen v. Rocketinfo, Inc.*, 2008 BCCA 502.

## What is the difference between the “recognition” and the “enforcement” of non-Canadian judgments?

### Summary answer

Recognition of a judgment is the acknowledgement by a Canadian court that it will treat the foreign judgment as effective and legitimate. By comparison, enforcement gives effect to the remedial consequences of the judgment – for example, by permitting the judgment creditor to execute against assets located in Canada. All foreign judgments must be recognized before they can be enforced. However, in certain circumstances (for example, for the purposes of a *res judicata* argument), it may be sufficient to recognize a judgment without enforcing it.

In order to enforce a judgment, the Canadian court must first recognize it. Generally, a Canadian court will recognize a non-Canadian judgment where it is final, where the court that issued it had the necessary jurisdiction to do so according to Canadian conflict of laws rules and where the judgment was not otherwise obtained by fraud or in breach of natural justice or public policy ([as discussed below](#)).<sup>38</sup>

A court may recognize a judgment without enforcing it where a party raises the defence of *res judicata* (the doctrine prohibiting the re-litigation of settled issues). In those cases, a court’s acknowledgement of the relevant non-Canadian judgment is sufficient to treat the findings of that judgment as binding in the Canadian proceeding and to preclude the parties from re-litigating them.

In *Brown v. Miller*, the British Columbia Supreme Court recognized, without enforcing, a Florida judgment. In this family law proceeding, the British Columbia court found that the Florida court had appropriately taken jurisdiction over the matter and that its decision pertaining to the division of certain matrimonial property was final. The issue had therefore already been resolved by a competent court and could not be raised again.<sup>39</sup> The Ontario Superior Court found similarly in *Contacare Inc v. CIBA Vision Corp.*, where the defendant brought a successful motion to strike the plaintiff’s breach of contract claim on the grounds that a New York court with legitimate jurisdiction had already finally disposed of the issue.<sup>40</sup>

Conversely, where a party seeks to have the court actively enforce the remedial consequences of a non-Canadian judgment, that party will require both the recognition and enforcement of a non-Canadian judgment.

## When will a Canadian court enforce a non-Canadian judgment at common law?

Unless a defence to recognition and enforcement is shown to exist ([as discussed below](#)), a non-Canadian judgment is enforceable where the judgment (a) comes from a court of competent jurisdiction; (b) is final and conclusive; and (c) the order is adequately precise.

### A. When is a court one of “competent jurisdiction”?

A non-Canadian court is deemed to be one of “competent jurisdiction” when (i) the party in question is present in the court’s jurisdiction; (ii) the party otherwise attorns (i.e., accepts the court’s jurisdiction, either voluntarily or through its conduct); or (iii) there is a “real and substantial connection” between the non-Canadian court or state and the party or subject matter of the action. This third basis of competent jurisdiction is commonly referred to as “assumed jurisdiction.”

<sup>38</sup> *Beals v. Saldanha*, 2003 SCC 72, at paras. 39–40 [*Beals*].

<sup>39</sup> 2008 BCSC 1351 at paras. 73–93.

<sup>40</sup> 2011 ONSC 4276 at paras. 30, 34.

## i. Traditional grounds

In *Morguard*, the Supreme Court held that where a defendant was either physically within the jurisdiction of a foreign court at the time of the action (presence-based jurisdiction) or had accepted the jurisdiction of that court (consent-based jurisdiction), the court in question is rightly considered one of competent jurisdiction.<sup>41</sup> The Supreme Court recently reaffirmed these “traditional” jurisdictional grounds in *Chevron Corp v. Yaiguaje*.<sup>42</sup>

A party will be found to have attorned to the jurisdiction of a foreign court where it takes steps to litigate the merits of the claim in that court.<sup>43</sup> The British Columbia Court of Appeal has gone so far as to find that a litigant can attorn to the jurisdiction of a court by its acts of participating in litigation, even where it has no actual intention of attorning.<sup>44</sup> However, a party is generally considered not to have attorned to the jurisdiction of a court where it appeared for the sole purpose of challenging that court’s jurisdiction.<sup>45</sup>

## ii. Real and substantial connection

In the absence of presence-based or consent-based jurisdiction, a non-Canadian court can still be found to be of competent jurisdiction where there is a “real and substantial connection” between that court and an action or a defendant.<sup>46</sup> The Supreme Court of Canada has previously stated that a “fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction.”<sup>47</sup> In *Beals*, the Supreme Court found that the appellants’ acts of purchasing land in Florida were sufficient to establish a “real and substantial connection” between those litigants and Florida.<sup>48</sup> It may be possible for an action to have a “real and substantial connection” to multiple jurisdictions.<sup>49</sup>

There remains uncertainty as to the factors a court should consider in determining the existence of a “real and substantial connection” in the enforcement context.<sup>50</sup> However, the principles articulated in two leading Canadian cases on the “real and substantial connection” test, *Muscutt v. Courcelles*<sup>51</sup> and *Van Breda v. Village Resorts Ltd.*,<sup>52</sup> provide a helpful framework for understanding the relevant considerations.

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41 *Morguard*, *supra* note 20 at para. 43.

42 2015 SCC 42 at paras. 82-85 [*Chevron*].

43 *Van Damme v. Gelber*, 2013 ONCA 388 (leave to appeal refused) at para. 3.

44 *First National Bank of Houston v. Houston E & C Inc.*, [1990] 5 WWR 719 (BC CA), at paras. 11-12.

45 *Wolfe v. Wyeth*, 2011 ONCA 347, at paras. 43-44; see also *Litecubes LLC v. Northern Light Products Inc.*, 2009 BCSC 181, at paras. 41-44 (the Court seemed amenable to the position that a party could concurrently bring jurisdictional arguments and make submissions on the merits of a foreign action without a domestic court finding that the party had attorned to the jurisdiction of the foreign court).

46 *Beals*, *supra* note 38 at para. 32.

47 *Ibid.*

48 *Ibid.* at para. 33.

49 *Old North State Brewing Co v. Newlands Services Inc.*, (1999), 58 BCLR (3d) 144 (CA), at para. 36.

50 *Pitel & Rafferty*, *supra* note 36 at 175-177.

51 [2002] OJ No. 2128 (CA) [*Muscutt*].

52 2012 SCC 17 [*Van Breda*].

In *Muscutt*, the Court of Appeal identified eight factors for courts to consider when deciding whether or not to take jurisdiction over an action.<sup>53</sup> The Supreme Court “simplified and clarified”<sup>54</sup> the law on this matter in *Van Breda* and produced four presumptive connecting factors entitling a court to assume jurisdiction over a dispute:

- a. The defendant is domiciled or resident in the province.
- b. The defendant carries on business in the province.
- c. The tort was committed in the province.
- d. A contract connected with the dispute was made in the province.<sup>55</sup>

In *Chevron*, the Supreme Court confirmed that there need not be a “real and substantial connection” between the domestic enforcing court (i.e., Canada) and the action or defendant (e.g., the presence of assets belonging to the defendant); rather, the applicable jurisdictional analysis is limited to whether there was a real and substantial connection between the non-Canadian state and the defendant(s) or the subject matter of the dispute.<sup>56</sup>

In *Chevron*, the plaintiffs sought to enforce a very large damages award that they obtained in an Ecuadorian proceeding.<sup>57</sup> The plaintiffs brought an action for recognition and enforcement in Ontario against the defendant to the Ecuadorian proceeding, Chevron Corporation, as well as against a Canadian indirect subsidiary. The defendants argued that the Ontario court lacked jurisdiction to enforce the judgment because the judgment debtor (Chevron Corporation) had no assets in Ontario. Chevron Corporation argued that the lack of “real and substantial connection” between it or the action and Ontario precluded the Ontario Superior Court from asserting jurisdiction to enforce the foreign judgment. The Supreme Court dismissed this argument and cited the principles of comity as the reason for its decision:

[C]ross-border transactions and interactions continue to multiply. As they do, comity requires an increasing willingness on the part of courts to recognize the acts of other states. This is essential to allow individuals and companies to conduct international business without worrying that their participation in such relationships will jeopardize or negate their legal rights.<sup>58</sup>

Canadian enforcing courts will only concern themselves with whether or not the foreign court properly assumed jurisdiction over a dispute according to Canadian conflict of laws rules; it does not matter whether the court properly took jurisdiction pursuant to its own local laws.<sup>59</sup> For example, in *Braintech Inc. v. Kostiuik*, the British Columbia Court of Appeal found that a Texas court’s assumption of jurisdiction over a libel action, while perhaps compliant with local laws, was not consistent with Canadian conflicts rules because the only connection between Texas and the action was that an online bulletin board containing an allegedly libelous post was accessible in Texas (though there was no evidence that it actually was accessed by any individual in Texas). Accordingly, the enforcement action was dismissed.<sup>60</sup> Similarly, in *CIMA Plastics Corporation v. Sandid Enterprises Ltd.*, the Ontario Court of Appeal confirmed that the Ontario court was not bound by an Illinois judge’s determination of jurisdiction in considering whether there was a real and substantial connection between Illinois and the claim.<sup>61</sup>

53 *Muscutt*, *supra* note 51 at paras. 77–111 (the Court discusses the eight factors: (i) the connection between the forum and the plaintiff’s claim; (ii) the connection between the forum and the defendant; (iii) unfairness to the defendant in assuming jurisdiction; (iv) unfairness to the plaintiff in not assuming jurisdiction; (v) the involvement of other parties to the suit; (vi) the court’s willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis; (vii) whether the case is interprovincial or international in nature; (viii) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere).

54 *Sincies Chiementin S.p.A. (Trustee of) v. King*, 2012 ONCA 653 (leave to appeal refused), at para. 7.

55 *Van Breda*, *supra* note 52 at para. 90. Note that the Supreme Court in *Van Breda* explicitly limited the scope of its analysis to “a case concerning a tort,” and may therefore be inapplicable to certain cases falling outside the tort law regime.

56 *Chevron*, *supra* note 42 at paras. 75–77.

57 Although not at issue in the jurisdiction motion, the damages award has been found by the U.S. courts to have been obtained by conspiracy, fraud, bribing of the trial judge and other illegal acts.

58 *Chevron*, *supra* note 42 at para. 75.

59 *Moses v. Shore Boat Builders* (1993), 83 BCLR (2d) 177 (CA), at paras. 46–47.

60 1999 BCCA 169.

61 2011 ONCA 589.

In one case, a contractual clause requiring the parties to attorn to a certain jurisdiction was not determinative of whether or not a non-Canadian court had properly assumed jurisdiction. In *Sleep Number Corporation*, a Minnesota plaintiff sought to enforce a foreign judgment obtained in Minnesota against an Ontario defendant. The Ontario Court of Appeal affirmed the motion judge's finding that the underlying dispute had a real and substantial connection with Minnesota. The defendant argued that the contract between the parties contained an exclusive forum selection clause, precluding the Minnesota courts from taking jurisdiction. While the contract did contain a clause stating that the parties attorned to the jurisdiction of Ontario, it did not state that Ontario had exclusive jurisdiction. The Court of Appeal described the clause as permissive rather than exclusive: it did not deprive another forum of jurisdiction *simpliciter*, but was a relevant consideration as to whether the other forum should exercise its jurisdiction.<sup>62</sup>

In Québec, courts apply two different frameworks in deciding whether the issuing court had jurisdiction. As further explained below, which framework applies depends on whether there is any specific provision in place with respect to the type of proceeding at issue.

## B. What makes a decision “final and conclusive”?

A decision is final and conclusive when the court that pronounced the judgment no longer has the power to rescind it.<sup>63</sup> By way of example, the Alberta Court of Queen's Bench held in *Skaggs Companies Inc v. Mega Technical Holdings Ltd.* that a default judgment is a “final judgment” even though one party has failed to appear.<sup>64</sup> The Court reasoned in that case that to find otherwise would allow a defendant who contractually agreed to another court's jurisdiction to evade its agreement by simply not appearing at that court's proceeding.

While the fact that a judgment is under appeal does not technically undermine its finality,<sup>65</sup> it is generally not appropriate to commence an enforcement proceeding until the time to appeal the judgment in the foreign jurisdiction has expired. Canadian courts have exercised their discretion to stay the execution of a non-Canadian judgment pending the determination of the appeal of that judgment in a number of cases. For example, in *Global Connector Research Group Inc (cob Fleck Research) v. Apex Equity Partners Inc.*, the Ontario Superior Court determined that it was in the interests of justice to “maintain the status quo” until the appeal process in a California action had been completed.<sup>66</sup>

The importance of finality was emphasized by the Ontario Court of Appeal in *Re Cavell Insurance Co.*; in its decision, the Court highlighted three purposes served by the requirement of finality:

First, the domestic court knows precisely what it is agreeing to recognize and enforce ... Second, finality removes the risk of the injustice that would be done to the party against whom the foreign order is enforced if that order is subsequently changed... Third, finality removes the risk of undermining public confidence that might arise if the domestic court were to issue a recognition order and permit its enforcement, only to have the foundation of that order, namely the foreign order, disappear.<sup>67</sup>

The case law governing the enforcement of non-Canadian interim and interlocutory injunctions, discussed more fully below, also raises a number of issues related to the “finality” requirement.

<sup>62</sup> *Sleep Number Corporation v. Maher Sign*, 2020 ONCA 95, at paras. 5–6.

<sup>63</sup> *Four Embarcadero Center Venture v. Kalen* (1988), 65 OR (2d) 551 (HC), at para. 33 [*Four Embarcadero*].

<sup>64</sup> 2000 ABQB 480 at para. 36; see also *North Field Technology Ltd. v. Project Investors, Inc.*, 2022 ONSC 5731, at para. 17.

<sup>65</sup> *Four Embarcadero*, *supra* note 63 at para. 33.

<sup>66</sup> 2010 ONSC 6192 at para. 18.

<sup>67</sup> (2006), 80 OR (3d) 500 (CA) at para. 43 [*Cavell*].

### C. What is required for an order to be considered “adequately precise”?

The Supreme Court’s most recent analysis of the “precision” requirement for enforcing judgments from other countries came in *Pro Swing Inc. v. Elta Golf Inc.*,<sup>68</sup> where a majority of the Court refused to enforce a non-Canadian consent decree and contempt order. However, in so ruling, the Supreme Court explicitly broadened the traditional common law rules about the types of judgments that are enforceable in Canada.

Before *Pro Swing*, subject to certain exceptions, Canadian courts would only enforce judgments for a debt or definite sum of money. In *Pro Swing*, the Supreme Court confirmed that a judgment “for a debt, or definite sum of money” remains enforceable.<sup>69</sup> However, the Supreme Court went further and found that non-monetary judgments may also be enforceable in appropriate cases (notwithstanding that it declined to enforce the non-monetary judgment at issue in *Pro Swing* itself).<sup>70</sup> The Supreme Court stated that, generally, Canadian courts should enforce an order that is “of a nature that the principle of comity requires the domestic court to enforce.”<sup>71</sup>

#### Non-exhaustive considerations in deciding whether to enforce a non-monetary judgment

- Are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her?
- Is the order limited in its scope and did the originating court retain the power to issue further orders?
- Is the enforcement the least burdensome remedy for the Canadian justice system?
- Is the Canadian litigant exposed to unforeseen obligations?
- Are any third parties affected by the order?
- Will the use of judicial resources be consistent with what would be allowed for domestic litigants?<sup>72</sup>

The *Pro Swing* analysis has been applied in several subsequent cases, leading to the enforcement of a variety of non-monetary judgments, including injunction orders,<sup>73</sup> orders for specific performance,<sup>74</sup> orders establishing a constructive trust,<sup>75</sup> orders for declaratory relief<sup>76</sup> and approval orders of a scheme of arrangement in the insolvency context.<sup>77</sup>

68 2006 SCC 52 [*Pro Swing*].

69 *Ibid.* at para. 10.

70 *Ibid.* at paras. 21, 25.

71 *Ibid.* at para. 31.

72 *Ibid.* at para. 30.

73 *United States v. Yemec*, 2010 ONCA 414, at paras. 45–53 [*Yemec*]; *Blizzard Entertainment Inc v. Simpson*, 2012 ONSC 4312, at para. 17 [*Blizzard*], *Zashko v. Touchgate and Ahmed*, 2018 ONSC 3734; *Dish v. Shava*, 2018 ONSC 2867; and *Dead End Survival, LLC v. Marhasin*, 2019 ONSC 3453. See also the discussion below regarding the enforcement of interim and interlocutory injunctions.

74 *Van Damme v. Gelber*, 2013 ONCA 388 (leave to appeal refused), at paras. 28–31; see also *Lanfer v. Eilers*, 2021 BCCA 241, where the BCCA granted an order vesting title to a certain property to the appellant plaintiffs. In this case, the BCCA granted an order slightly different than the order of the German court. The Supreme Court of Canada granted leave to appeal, but that appeal was discontinued.

75 *Bienstock v. Adenyo Inc.*, 2015 ONCA 310, at paras. 4–5.

76 *PT ATPK Resources TBK (Indonesia) v. Hopaco Properties Limited.*, 2014 ONCA 466.

77 *Cavell*, *supra* note 67.

## What effect does reciprocal enforcement legislation have on the enforcement of non-Canadian judgments?

As noted above, a number of provinces have enacted legislation directed at simplifying the procedure for registering and enforcing non-Canadian judgments. Each province has enforcement arrangements with different jurisdictions.<sup>78</sup> Each statute and convention is unique and uses different procedural and substantive rules. This type of legislation generally supplements but does not override the common law.<sup>79</sup>

## What defences are available to parties opposing the enforcement of a non-Canadian judgment in Canada?

### Summary answer

Even where a non-Canadian judgment is final and the foreign court properly had jurisdiction, a judgment debtor can argue that a non-Canadian judgment should not be enforced on grounds of (a) public policy; (b) fraud; or (c) a lack of natural justice. In addition, depending on the nature of the underlying judgment, it is open to a judgment debtor to contest enforcement on the basis that the judgment in question is penal in nature or deals with an issue of taxation or public law, or that the judgment is inconsistent with a prior domestic judgment.

### A. When will a Canadian court refuse to enforce a non-Canadian judgment on public policy grounds?

The Supreme Court has explained the public policy defence on the basis that it is intended to prevent “the enforcement of a foreign judgment which is contrary to the Canadian concept of justice.”<sup>80</sup> Generally speaking, it seeks to “prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system [and also] guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.”<sup>81</sup> Notably, the public policy defence was unsuccessful on the facts of *Beals v. Saldanha*, where the Supreme Court concluded that the defendants had failed to prove that a Florida jury’s damages award, which was comparatively larger than Canadian awards in similar circumstances, was contrary to Canadian principles of morality.<sup>82</sup>

Similarly, in *Oakwell Engineering Ltd v. EnerNorth Industries Inc.*, the Ontario Court of Appeal emphasized that in order to succeed on the bias aspect of the public policy defence, a defendant must prove “actual corruption or bias.”<sup>83</sup>

The Court’s analysis in *Society of Lloyd’s v. Saunders* confirms that public policy considerations go beyond issues of procedural fairness and even reach “fundamental values” and “essential principles of justice.”<sup>84</sup> In that case, which predated *Beals*, the Court went so far as to state that “the protection of our capital markets [is] a fundamental value.”<sup>85</sup> *Saunders* was an application brought by Lloyd’s, the successful party to a U.K. insurance-related proceeding for enforcement under Ontario’s *Reciprocal Enforcement of Judgments (U.K.) Act*. The respondents to the application resisted enforcement on the basis of public policy, among other grounds. In particular, the respondents argued that, on the facts, had the dispute been litigated in Ontario, the applicant would have been found in breach of Ontario prospectus requirements. Although the Ontario Court of Appeal eventually dismissed the respondents’ public policy arguments,

<sup>78</sup> See *supra* note 26.

<sup>79</sup> *Pitel & Rafferty*, *supra* note 36 at para. 201; *Morguard*, *supra* note 20 at para. 56.

<sup>80</sup> *Beals*, *supra* note 38 at para. 71.

<sup>81</sup> *Ibid.* at para. 72.

<sup>82</sup> *Ibid.* at para. 76.

<sup>83</sup> (2006), 81 OR (3d) 288 (CA) (leave to appeal refused) at paras. 19–24 [*Oakwell*].

<sup>84</sup> (2001), 55 OR (3d) 688 (CA) at paras. 46–88 [*Saunders*].

<sup>85</sup> *Ibid.* at para. 65.

it first undertook a comparative analysis of Canadian and U.K. securities laws. The decision acknowledged that in some circumstances enforcing a U.K. judgment that permitted what would have been a breach of the *Securities Act* could be considered contrary to public policy.<sup>86</sup> Nonetheless, the Court cited the principle of international comity and previous Ontario decisions relating to this particular dispute and upheld the lower court's decision to enforce the judgment.<sup>87</sup>

In Québec, courts will similarly not enforce a foreign judgment that is considered to be contrary to public order. Similar to the common law jurisdictions, the focus of the analysis is not on the judgment itself or its legal basis, but on whether the outcome of the decision is manifestly contrary to any moral, social, political or economic values underlying the international legal order,<sup>88</sup> as illustrated by international legal instruments.<sup>89</sup>

## **B. When will a Canadian court refuse to enforce a non-Canadian judgment on the basis that it was procured by fraud?**

Canadian courts start from the general proposition that “neither foreign nor domestic judgments will be enforced if obtained by fraud.”<sup>90</sup> In *Beals*, the Supreme Court identified two types of fraud that provide a defence to enforcement: fraud going to jurisdiction and fraud going to the merits.

Where there is fraud going to jurisdiction of the non-Canadian court, this “can always be raised before a domestic [i.e., Canadian] court to challenge the judgment.”<sup>91</sup>

By contrast, the merits of a non-Canadian judgment can only be challenged for fraud “where allegations are new and not the subject of prior adjudication.”<sup>92</sup> The Supreme Court held that “new and material facts” are those “that a defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence.”<sup>93</sup>

On the facts of *Beals*, the Supreme Court found that the defendants' election not to defend a Florida action meant they were “barred from attacking the evidence presented to the Florida judge and jury as being fraudulent.”<sup>94</sup> Furthermore, the defendants did not claim that there was evidence of fraud that they could not have discovered had they defended the Florida action.

The British Columbia Supreme Court in *Garner Estate v. Garner* cited *Beals* in finding that a defendant should have raised fraud allegations at first instance.<sup>95</sup> The Court refused to hear the defendant's arguments about the alleged fraudulent practices of an Oregon probate court.

## **C. When will a Canadian court refuse to enforce a non-Canadian judgment due to a “lack of natural justice” in the foreign proceeding?**

A natural justice defence must focus solely on the procedure that was followed in respect of the original proceeding.<sup>96</sup> To succeed, “the party seeking to impugn the judgment [must] prove, to a civil standard, that the foreign proceedings were contrary to Canadian notions of fundamental justice.”<sup>97</sup> Examples include the following: where a party to the proceeding

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.* at paras. 79, 81–88.

<sup>88</sup> *Mutual Trust Company c. St-Cyr*, [1996] RD] 623 (QC CA) [*Mutual Trust*]; see also *R.S. v. P.R.*, 2019 SCC 49, at para. 52.

<sup>89</sup> Claude Emanuelli, *Droit international privé québécois*, 3e ed., (Montréal, Wilson & Lafleur, 2011), at paras. 298–299.

<sup>90</sup> *Beals*, *supra* note 38 at para. 43.

<sup>91</sup> *Ibid.* at para. 51.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* at para. 50.

<sup>94</sup> *Ibid.* at para. 54.

<sup>95</sup> 2007 BCSC 72 at para. 60.

<sup>96</sup> *Beals*, *supra* note 38 at paras. 59–70.

<sup>97</sup> *Ibid.* at para. 59.



is not given adequate notice of the proceeding,<sup>98</sup> where there is a lack of judicial independence in the foreign proceeding<sup>99</sup> and where the participants in a judicial system are not governed by “fair ethical rules.”<sup>100</sup> The burden of proving unfairness in a foreign legal system falls on the party seeking to resist enforcement on this basis.

In *JGB Collateral*, the respondents to an application for enforcement argued that they had been denied natural justice on the grounds that the lawyers who obtained the foreign judgment had a conflict of interest, having previously acted for the respondents providing estate planning services. The Ontario Superior Court rejected this argument, noting that the respondents could have raised this defence in the foreign proceeding, but failed to do so. Defences should not be raised in the enforcement proceedings that could have been but were not raised in the foreign proceeding. Among other reasons, it would be preferable for an American court to adjudicate upon the ethical standards required for New York lawyers than for an Ontario court to do so. Further, the Court had no expert evidence before it about the required ethical standards for New York lawyers.<sup>101</sup>

#### D. What are the additional grounds on which the enforcement of a non-Canadian judgment can be resisted?

Canadian courts will not enforce non-Canadian judgments that are “penal” in nature, including foreign judgments imposed with a “view to punishment of the party responsible.”<sup>102</sup> Foreign judgments based on taxation or “revenue laws,”<sup>103</sup> along with orders arising out of matters of public law,<sup>104</sup> are also generally not enforceable. However, it is also worth noting that Québec courts will recognize tax judgments from other jurisdictions where the tax laws at issue are those of a state that also recognizes and enforces the taxation laws of Québec.<sup>105</sup>

In *United States of America v. Ivey*, each of these three defences was acknowledged but ultimately dismissed on the facts.<sup>106</sup> At issue was a U.S. judgment obtained against the defendant for breaches of an environmental protection statute. The Ontario courts ruled that the statute in question established a compensatory scheme for rectifying environmental harms and therefore was neither a penal statute nor a veiled set of “revenue laws.”<sup>107</sup> While the U.S. legislation was directed at a public purpose, the principles of comity demanded that judgments aimed at reversing environmental harms be enforced in Canada.<sup>108</sup>

A final defence to the enforcement of non-Canadian judgments is the “inconsistent domestic judgment” defence. Where a Canadian judgment conflicts with a non-Canadian judgment, that non-Canadian judgment will not be enforced. In *South Pacific Import Inc v. Ho*, a defendant successfully pleaded this defence in an enforcement action brought by the defendant’s brothers in relation to a dispute over a family company. The brothers successfully brought an action, in the name of the company, against the defendant in California. However, the British Columbia Court of Appeal set aside registration of that judgment. In related proceedings before British Columbia courts, the defendant had been successful in arguing certain defences that the California court had refused to consider. Presented with conflicting decisions on the same dispute, the British Columbia Court of Appeal deferred to the Canadian ruling and refused to enforce the U.S. judgment.<sup>109</sup>

<sup>98</sup> *Walters et al v. Tolman et al*, 2005 BCSC 838, at para. 28; *Bank of Scotland PLC v. Wilson*, 2008 BCSC 770, at para. 61.

<sup>99</sup> *Oakwell*, *supra* note 83 at paras. 9, 25–29 (where this defence was unsuccessful).

<sup>100</sup> *Beals*, *supra* note 38 at paras. 62, 65.

<sup>101</sup> *JGB Collateral LLC v. John Rochon and Donna Jean Hewitt Rochon*, 2020 ONSC 1732, at paras. 5–16.

<sup>102</sup> *United States of America v Ivey*, [1995] OJ No 3579 at para. 28 [Ivey] aff’d [1996] OJ No. 3360 (CA); see also Janet Walker, *Castel & Walker: Canadian Conflict of Laws, 6th Edition* (LexisNexis Canada, 2005) (loose-leaf issue 64) §11.03 [Castel & Walker].

<sup>103</sup> *Castel & Walker*, *supra* note 102; see also *United States of America v. Harden*, [1963] SCR 366; *Fudger Estate (Re)*, [1984] OJ No. 578 (ON H Ct J), at para. 28; but see *Re Sefel Geophysical Ltd*, [1988] AJ No. 917 (ABQB), at para. 38, wherein the Alberta Court of Queen’s Bench enforced a foreign revenue claim in the insolvency context.

<sup>104</sup> *Castel & Walker*, *supra* note 102 at §11.03.

<sup>105</sup> *Arts*. 3155(6), 3162 CCQ.

<sup>106</sup> *Ivey*, *supra* note 102.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.* at para. 41.

<sup>109</sup> *South Pacific Import, Inc v. Ho*, 2009 BCCA 163, at paras. 55–56.

## E. Treatment of interest awarded on foreign judgments

Previous Canadian cases have held that where a foreign judgment contains interest, it is treated as an “integral part of the judgment debt”.<sup>110</sup> However, under section 347 of Canada’s *Criminal Code*, it is a criminal offence to charge interest at an effective annual rate above 60%, which would appear to bar the enforcement of a judgment with an effective annual interest rate above 60%.<sup>111</sup>

In *Wei*, the British Columbia Court of Appeal considered such a circumstance and how to reconcile these conflicting principles. The Court of Appeal held that notional severance (reducing the judgment interest rate) should be available to foreign judgments. In *Transport v. New Solutions*, the Supreme Court held that notionally severing the interest rate in a contract to reduce it to the maximum allowable rate of 60% did not amount to rewriting the parties’ contracts. The Court of Appeal acknowledged that domestic courts cannot rewrite a foreign judgment, but adopted the reasoning in *Transport v. New Solutions*, and held that notional severance of the interest rate does not amount to a rewriting of the judgment.<sup>112</sup>

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<sup>110</sup> *Dingwall v. Foster*, 2013 ABQB 424, at para. 24.

<sup>111</sup> *Criminal Code*, RSC 1985, c. C-46, s. 347.

<sup>112</sup> *Wei v. Li*, 2019 BCCA 114, at paras. 41–43.

### 3. Enforcement of non-Canadian arbitral awards

In Canada, the enforcement of non-Canadian arbitral awards is governed by the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (the New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). The federal government ratified these instruments in 1986,<sup>113</sup> and each of the common law provinces has subsequently done the same.<sup>114</sup>

A majority of the provinces ratified both the New York Convention and the Model Law in the same statute. However, British Columbia and Saskatchewan enacted separate legislation to recognize each of the two instruments individually. Notably, until the coming into force of Ontario's new *International Commercial Arbitration Act* in March 2017, Ontario had only explicitly recognized the Model Law while remaining silent on the applicability of the New York Convention. This silence raised doubt as to whether Ontario operated as a New York Convention jurisdiction. The explicit adoption of the New York Convention in the new *International Commercial Arbitration Act* eliminates any such concerns going forward. In Québec, the enforcement of non-Québec civil and commercial arbitration awards is governed by the *Code of Civil Procedure* (the CCP). The rules of the CCP are inspired by the New York Convention, and courts must consider the New York Convention in their interpretation of the relevant provisions.<sup>115</sup>

Article III of the New York Convention and Article 35 of the Model Law mandate the recognition and enforcement of arbitral awards arising out of signatory jurisdictions. Article V of the Convention and Article 36 of the Model Law provide narrow exceptions to this sweeping mandate. A court may refuse to enforce a foreign arbitral award where (i) a party lacked capacity; (ii) a party was unable to present its case; (iii) the arbitrator lacked jurisdiction; (iv) the arbitration was conducted with improper procedure or in front of an improperly organized tribunal; (v) the award has been set aside in the originating jurisdiction; or (vi) enforcement of the award would be contrary to local public policy. The grounds for setting aside an arbitral award, which are enumerated in Article 34 of the Model Law, are nearly identical to the grounds for refusing to enforce an arbitral award under Article 35.

In *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, the Ontario Court of Appeal emphasized that domestic courts have extremely limited jurisdiction to interfere with arbitral decisions made pursuant to the Model Law.<sup>116</sup> In that case, the Court refused to set aside an arbitral award ordered by a three-person arbitration tribunal in a construction dispute. The Court dismissed each of the appellants' arguments, which were based on jurisdiction, procedural fairness and public policy. In dismissing the appeal, the Court noted its hesitance to interfere with international arbitral awards:

...this court has repeatedly held that reviewing courts should accord a high degree of deference to the awards of international arbitral tribunals under the Model Law...<sup>117</sup>

<sup>113</sup> See *United Nations Foreign Arbitral Awards Convention Act*, RSC, 1985, c. 16 (2nd Supp).

<sup>114</sup> See *International Commercial Arbitration Act*, RSA 2000, c. I-5; *Foreign Arbitral Awards Act*, RSBC 1996, c. 154, and *International Commercial Arbitration Act*, RSBC 1996, c. 233; *The International Commercial Arbitration Act*, SM 1986-87, c. 32, s. 1; *International Commercial Arbitration Act*, RSNB 2011, c. 176; *International Commercial Arbitration Act*, RSN 1990, c. I-15; *International Commercial Arbitration Act*, RSNS 1989, c. 234; *International Commercial Arbitration Act*, 2017 SO 2017, c. 2, Sched. 5; *International Commercial Arbitration Act*, RSPEI 1988, c. I-5; *The Enforcement of Foreign Arbitral Awards Act*, 1996, c. E-912, and *The International Commercial Arbitration Act*, 1988-89, c. I-10.2.

<sup>115</sup> Art. 652 CCP.

<sup>116</sup> 2017 ONCA 939.

<sup>117</sup> *Ibid.* at para. 24.

## 4. Interim and interlocutory injunctions

### Are non-Canadian interlocutory injunctions enforceable in Canada?

#### Summary answer

Whether or not an injunction issued by the court of another country will be enforceable in Canada is a complex and unsettled area of law. The complexity arises for two main reasons. First, Canadian courts have historically refused to enforce any non-monetary foreign order until relatively recently,<sup>118</sup> so there are very few decisions on this issue.<sup>119</sup> Second, the decisions that do exist on this issue conflict with one another and lack detailed analysis of whether another country's interlocutory injunction should or should not be enforced.

#### A. First principles: the Supreme Court of Canada's decision in *Pro Swing*

In light of this contradiction, it makes sense to review the issue from first principles. In *Pro Swing*, the Supreme Court purported to eliminate the traditional common law rule that foreign judgments granting equitable relief are unenforceable. The Supreme Court clearly stated that the common law should evolve to permit the enforcement of foreign non-monetary judgments in appropriate circumstances. Although the Supreme Court did not expressly refer to foreign interim or interlocutory injunctions in its decision, a "first principles" analysis would suggest that a foreign interlocutory injunction will be enforceable where (i) the injunction comes from a court of competent jurisdiction; (ii) the decision is final and conclusive; and (iii) the order is adequately precise.<sup>120</sup>

An interlocutory injunction issued by a non-Canadian court can satisfy elements (i) and (iii) without any issue, at least in principle. The true point of contention is whether it can satisfy the requirements of finality and conclusiveness. By definition, interim and/or interlocutory orders do not "finally" resolve the dispute between the parties. Interlocutory injunctions would therefore fail the test set out in *Pro Swing*, making them unenforceable by Canadian courts. The following cases follow this reasoning.

In *Canadian Standards Association v. Solid Applied Technologies Ltd.*, for example, the Ontario courts refused to enforce an Israeli interim injunction against the Canadian Standards Association because it failed to meet the finality requirement from *Pro Swing*.<sup>121</sup> Similarly, the New Brunswick courts ultimately refused to enforce an interim injunction issued by the Superior Court of Québec in *Fédération des producteurs acéricoles du Québec v. S.K. Export Inc. and St-Pierre*, rejecting the argument that an interim order could be viewed as "final," insofar as it satisfies the requirements of *Pro Swing*.<sup>122</sup> In *2060770 Ontario Inc. v. Worsoff*, the Court went so far as to say that the "court will not recognize or enforce a foreign order, for interim or interlocutory relief."<sup>123</sup>

<sup>118</sup> *Pro Swing*, *supra* note 68.

<sup>119</sup> Of course, it must also be noted that the issuing court can also dissolve a perpetual injunction at any time if it becomes appropriate to do so; though courts have been willing to enforce these types of injunctions. See, e.g., *Yemec*, *supra* note 73; *Blizzard*, *supra* note 73.

<sup>120</sup> *Pro Swing*, *supra* note 68 at paras. 10, 11, 15, 30.

<sup>121</sup> 2007 CanLII 31 (Ont Sup Ct J) at paras. 12–13 (note that the court also considered a number of other arguments, and the court's analysis on this issue is vague at best, stating only that it found the respondent's arguments persuasive).

<sup>122</sup> 2015 NBCA 30 at para. 27 (leave to appeal refused). This case was about an interim injunction issued by an administrative tribunal and homologated by a court of law in Québec.

<sup>123</sup> 2013 ONSC 7630 at para. 13. Although the court did not provide a detailed analysis of this claim, and although the case did not involve an interim or interlocutory injunction, the holding appears broad enough to potentially apply to one.

However, three conflicting cases in Canada call this approach into question: the Ontario Court of Appeal's decision in *Cavell*,<sup>124</sup> the Ontario Superior Court's decision in *Johnson & Johnson v. Butt*<sup>125</sup> and the Alberta Court of Appeal's decision in *Pelletier (Re)*.<sup>126</sup>

## B. The Ontario Court of Appeal's decision in *Cavell*

In *Cavell*, which immediately predated *Pro Swing*, the Ontario Court of Appeal held that a foreign interlocutory order could be enforced despite the fact that it was not a final order. On the facts of the case, the company sought approval of a scheme of arrangement under section 425 of the *U.K. Companies Act, 1985*. The Court made an initial order, ordering *Cavell* to convene a creditors' meeting and provide affected creditors with notice and the location of the meeting. While the Court acknowledged that the U.K. order was not final, it considered the three purposes of the "finality" requirement as follows:

1. The domestic court knows what it is agreeing to recognize and enforce.
2. Finality removes the risk of injustice that would be done to the party against whom the foreign order is enforced if that order is subsequently changed.
3. Finality removes the risk of undermining public confidence that might arise if the domestic court were to issue a recognition order and permit its enforcement, only to have the foundation of that order – namely the foreign order – disappear.<sup>127</sup>

It then held that the purposes of finality would be served by recognizing the order in this instance.<sup>128</sup> It further held that other policy considerations, such as comity, reciprocity and fairness would be better served by recognizing the order.<sup>129</sup>

This case suggests that, in appropriate circumstances, Canadian courts may enforce a non-Canadian interlocutory order. Notably, this decision was not explicitly overruled by the Supreme Court in *Pro Swing*.<sup>130</sup>

A number of other Canadian cases have adopted the *Cavell* approach and granted the enforcement of interlocutory orders, including *Re Grace Canada Inc.*<sup>131</sup> (pre-*Pro Swing*), *Johnson & Johnson v. Butt*<sup>132</sup> (post-*Pro Swing*) and *Pelletier (Re)*<sup>133</sup> (post-*Pro Swing*). However, none of these provide much by way of analysis as to what factors would permit the enforcement of such foreign interlocutory orders.

Although the *Cavell* decision and those that have followed it were not rendered in the context of an injunction *per se*, the stated principles governing the enforcement of interlocutory orders more generally would seemingly apply to foreign injunctions (i.e., the enforcement of such judgments/orders could similarly be justified in the appropriate circumstances).

<sup>124</sup> *Cavell*, *supra* note 67.

<sup>125</sup> *Johnson & Johnson v. Butt*, 2007 CanLII 51527 (ON SC) [*Johnson*].

<sup>126</sup> *Pelletier (Re)*, 2021 ABCA 264 [*Pelletier*].

<sup>127</sup> *Cavell*, *supra* note 67 at para. 43.

<sup>128</sup> *Ibid.* at para. 44.

<sup>129</sup> *Ibid.* at paras. 47–50.

<sup>130</sup> *Pro Swing*, *supra* note 68.

<sup>131</sup> 2006 CarswellOnt 5506 at para. 23 (Sup Ct J). (The Court found that the non-monetary and interlocutory nature of a Manitoba Order did not preclude its recognition in Ontario).

<sup>132</sup> *Johnson*, *supra* note 125.

<sup>133</sup> *Pelletier*, *supra* note 126.

### C. The Ontario Superior Court's decision in *Johnson*

In *Johnson*, the defendants sought a declaration that an interim Anton Piller order issued by the United States District Court for the Eastern District of New York was of no force or effect. The plaintiff filed a cross motion to enforce the order for interim injunctive relief.<sup>134</sup> Had the Court allowed the plaintiff's cross motion, *Johnson* would clearly demonstrate the Court's willingness to enforce a non-Canadian interim injunction. However, the Court refused to grant the defendant's declaratory relief and therefore concluded that it was unnecessary to decide whether or not to enforce the interim injunction. The judge in *Johnson* did, however, comment that "[h]ad it been necessary to do so, I would have granted the relief sought by the Plaintiffs."<sup>135</sup>

Some commentators have seized on this latter statement, citing it for the proposition that Canadian courts will enforce interlocutory and interim injunction orders issued by the courts of other countries.<sup>136</sup> However, a review of all Canadian cases in the area does not lend itself to a definitive conclusion, particularly when the decision in *Johnson* did not turn on the issue of enforcing an interlocutory order and no meaningful analysis was done in this regard.

To date, only one decision (*Oesterlund v. Pursglove*) has purported to follow *Johnson*. In that decision, the Ontario Superior Court enforced a *Mareva* injunction issued by a Florida court in a complex family law case. The Court held that the temporary and *ex parte* nature of the injunction was not a bar to its enforcement in Ontario.<sup>137</sup>

On the facts of *Oesterlund*, a wife brought a motion to enforce the foreign *Mareva* injunction, as she was concerned that her husband would move his many Ontario assets offshore. The Florida interim order was issued in the context of a proceeding for divorce and other matrimonial relief.<sup>138</sup> A critical fact in this decision was that the husband had attorned to the Ontario court's jurisdiction by filing for divorce and corollary relief in Ontario, though his wife had not attorned by bringing the motion to enforce the Florida judgment.<sup>139</sup> The Ontario Superior Court cited *Johnson* for the principle that an *ex parte* order of another country may be enforceable.<sup>140</sup> The Court also cited *Pro Swing*, focusing on the Supreme Court's statement that the traditional rule of enforcing only foreign monetary judgments ought to give way to an approach that incorporates "the very flexibility that infuses equity," emphasizing that "equity is about [...] the prevention of unconscionable conduct."<sup>141</sup> The Court was moved by the equities of this case, holding that it would be unconscionable for the husband to be permitted to remove his assets from Ontario to defeat the wife's claims.<sup>142</sup>

Again, however, the lack of detailed analysis by the Court and the unique facts of that case make it difficult to draw any definitive conclusions as to Canadian courts' willingness to enforce non-Canadian interim or interlocutory injunction orders.

Québec similarly requires that the judgment sought to be enforced be final. It is generally recognized that interim or interlocutory injunctions cannot be recognized and enforced, as opposed to permanent injunctions, which would meet the finality requirement.<sup>143</sup>

<sup>134</sup> *Johnson*, *supra* note 125 at paras. 1–2, 4.

<sup>135</sup> *Ibid.* at para. 18.

<sup>136</sup> See, e.g., Michael D. Schafler & Ara Basmadjian, "Canada," *Enforcement of Judgments and Arbitral Awards*, 2nd ed. (London: Thomson Reuters (Professional) U.K. Limited, 2015) at 139.

<sup>137</sup> 2014 ONSC 2727 at para. 43 [*Oesterlund*].

<sup>138</sup> *Ibid.* at para. 5.

<sup>139</sup> *Ibid.* at paras. 5, 39.

<sup>140</sup> *Ibid.* at paras. 34–35.

<sup>141</sup> *Ibid.* at para. 38 (citing *Pro Swing*).

<sup>142</sup> *Ibid.* at para. 39.

<sup>143</sup> Gérald Goldstein, "Principes généraux et conditions générales de reconnaissance et d'exécution" in *Droit international privé*, Pierre-Claude Lafond ed., (loose-leaf consulted on January 24, 2023)(Montréal, LexisNexis, 2012), at para. 52; *Facebook Inc. c. Guerbuez*, 2010 QCCS 4649.

## D. The Alberta Court of Appeal's decision in *Pelletier (Re)*

In *Pelletier*, the Alberta Court of Appeal upheld the decision of a chambers judge who granted two applications brought by trustees in a foreign bankruptcy proceeding to recognize orders issued by the Grand Court of the Cayman Islands, including a freezing order of a similar nature to a *Mareva* injunction.

The appellants argued that the freezing order ought not to have been recognized because the bankruptcy proceedings were ongoing, such that the order was therefore not consistent with *Pro Swing*, which required that a foreign order be a final decision. The Court of Appeal rejected this argument, holding that the chambers judge acted within the statutory authority granted by the *Bankruptcy and Insolvency Act* (the BIA) and that recognition of the freezing order was consistent with *Pro Swing*.<sup>144</sup>

The Court of Appeal held that the requirement of finality was “not black and white” and may require a more complex analysis in the context of injunctions. The Court of Appeal relied on comments made by the dissenting judges in *Pro Swing*, which stated that finality did not require the foreign order to be the absolute last step in the litigation process, only that it was fixed and defined. The Court of Appeal held that although the bankruptcy proceedings were ongoing, the freezing order itself was final in the Cayman Islands, was limited in scope, and contained clear and specific terms. The freezing order therefore met the requirements articulated in *Pro Swing*.<sup>145</sup>

While the decision in *Pelletier* relied in part on the application of the BIA's statutory authority, other aspects may be more broadly applicable. For example, a time-limited freezing order in other contexts could meet the definition of finality articulated by the dissent in *Pro Swing*, being “fixed and defined”.<sup>146</sup>

## E. Future evolution

While Canadian courts' enforcement of non-Canadian interim and interlocutory orders remains unsettled, the growing global nature of commerce suggests that the enforcement of such orders will arise with increasing frequency. In keeping with this trend, recent Canadian decisions, including those rendered by the Supreme Court,<sup>147</sup> suggest an increasingly “global” approach to jurisdiction and enforcement (including a willingness to issue injunctions with worldwide application). It stands to reason, therefore, that the “finality” requirement for enforcement may be trumped by comity considerations when it comes to interim and interlocutory injunctions.

Given the above uncertainty, any non-Canadian litigant seeking to extend an existing injunction to a Canadian entity should consider whether or not it may be worthwhile to start a free-standing application for injunctive relief in the applicable Canadian court instead. While doing so would require a fresh hearing on the merits, it would avoid the uncertainty that may arise in the context of an enforcement proceeding.

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<sup>144</sup> *Pro Swing*, *supra* note 68 at paras. 38–45.

<sup>145</sup> *Pro Swing*, *supra* note 68 at paras. 57–59.

<sup>146</sup> *Pelletier*, *supra* note 126 at para. 48; *Pro Swing*, *supra* note 68 at para. 95, McLachlin CJ, dissenting.

<sup>147</sup> See, e.g., *Commissioner of Competition v. HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10, and *Google Inc. v. Equustek Solution Inc.*, 2017 SCC 34.

## 5. Limitation periods for the enforcement of non-Canadian orders

### What limitation period applies to the enforcement of a non-Canadian order?

#### Summary answer

Limitation periods for enforcement proceedings are governed by the applicable Canadian statute of limitations and are assessed from the date when all appeals are exhausted, or when the time for such appeals has expired.

The Ontario Court of Appeal decision in *Independence Plaza* determined that Ontario's basic two-year limitation period in civil matters applies to the enforcement of a non-Canadian order in Ontario.<sup>148</sup> The limitation period runs from the date when all appeals have been exhausted, as that is when the claim is deemed to have been "discoverable."<sup>149</sup> The basic limitation period differs depending on both the province and the specific applicable legislation in question.

In *Grayson Consulting*, the Ontario Court of Appeal elaborated on its holding in *Independence Plaza*. The plaintiff (Grayson Consulting) obtained a default judgment in South Carolina in 2014 in the amount of over US\$450 million against the defendant (Lloyd). The plaintiff brought an action in Ontario to, among other things, enforce the judgment. The defendant resisted, arguing that the claim was time-barred.

The plaintiff argued that the claim was not discovered until it had knowledge that the defendant had assets in Ontario. The Court of Appeal rejected this argument, holding that the enforcement action was time-barred under the *Limitations Act, 2002*. The plaintiff was under an obligation to conduct itself with due diligence with respect to seeking enforcement opportunities against the defendant. When the South Carolina judgment was obtained, the plaintiff had enough information about the defendant's connection to Ontario that it ought to have investigated whether the defendant had assets in Ontario as soon as the South Carolina judgment was final.<sup>150</sup>

The plaintiff also submitted that, because other parties to the South Carolina proceeding appealed, the limitation period did not begin to run until all proceedings were final. The Court of Appeal rejected this argument as well. Neither the plaintiff nor the defendant sought any relief against each other in the appeals. Therefore, they did not impact the limitation period. The limitation period began to run once the judgment between the foreign judgment creditor and the foreign judgment debtor was finalized.<sup>151</sup>

In Québec, the question has been the subject of some controversy, since the CCQ does not expressly set out the prescription period (i.e., limitation period) applicable to the enforcement of a non-Québec judgment. In 2004, the Québec Court of Appeal appears to have ruled that the applicable prescription period is the one that applies to the enforcement of the judgment in the foreign jurisdiction.<sup>152</sup>

<sup>148</sup> *Independence Plaza 1 Associates, L.L.C. v. Figliolini*, 2017 ONCA 44, at para. 66.

<sup>149</sup> *Ibid.* at para. 70.

<sup>150</sup> *Grayson Consulting Inc. v. Lloyd*, 2019 ONCA 79, at paras. 55–59.

<sup>151</sup> *Ibid.* at paras. 51–54.

<sup>152</sup> *Minkoff c. Society of Lloyd's*, EYB 2004-66709 (QC CA) [*Minkoff*].



## 6. Obtaining evidence in Canada

### What are letters rogatory?

#### Summary answer

Letters rogatory refer to letters of request issued by a court in one jurisdiction seeking assistance from a court in another jurisdiction, typically in respect of an ongoing proceeding in the issuing court's jurisdiction. For example, a party to a New York proceeding may want to compel a witness who lives in Toronto to give evidence in that proceeding. To do so, the party would seek a letter of request from the New York court, asking for judicial assistance from the Ontario court.

Letters rogatory or “letters of request” are a mechanism by which non-Canadian litigants can compel evidence from a Canadian party or otherwise seek the assistance of a Canadian court in furtherance of a non-Canadian proceeding. While courts typically cannot compel evidence from parties outside of their jurisdiction, in the absence of attornment by the party in question, Canadian courts will entertain letters of request from non-Canadian courts with respect to evidence gathering from parties within the Canadian courts' jurisdiction.

Generally speaking, letters rogatory are issued by a non-Canadian court seized with an ongoing proceeding and are directed to the appropriate Canadian courts. As long as certain threshold requirements are met, Canadian courts will generally grant these requests on the basis of comity and as a matter of mutual deference and international respect.<sup>153</sup> However, the Canadian courts must carefully review the letters rogatory to ensure that judicial assistance is not being used in a manner that is not otherwise available in strictly domestic litigation.<sup>154</sup>

### How are letters rogatory enforced?

#### Summary answer

To enforce letters rogatory in Canadian courts successfully, parties typically must bring the letters of request before the applicable court within the jurisdiction in which the evidence or witnesses are located. In general, the receiving Canadian court will require the enforcing party to demonstrate that the evidence sought is relevant, necessary and not otherwise available by means of procedural avenues in the requesting jurisdiction. To the extent that the subject of the letters rogatory request consents, a formal order of the Canadian court is not required. However, parties will often require the underlying “legal compulsion” for their own protection, even if they do not ultimately oppose the order itself.

The simplest method of enforcing a foreign subpoena or other order of a foreign court is by asking the Canadian witness or entity to voluntarily comply with the request. If they acquiesce, the matter is done; however, if they do not, an application or action may be brought to enforce the letters rogatory request. The burden of proof is on the party seeking to enforce the letters of request. Parties who require the protection of “legal compulsion” for the disclosure of records may not consent to the order, but similarly may not oppose it.

<sup>153</sup> *Zingre v. The Queen et al.*, [1981] 2 SCR 392, at 400–401, as cited in *Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Ltd.*, 2012 ONCA 264, at para. 57 [*Lantheus*].

<sup>154</sup> *Pro Swing*, *supra* note 68 at para. 30.

Generally, there are four preconditions that must be met before Canadian courts will exercise discretion to enforce a letter of request:

- a. It must appear that a foreign court is desirous of obtaining the evidence or that the obtaining of the evidence<sup>155</sup> has been duly authorized by commission, order or other process of the foreign court.<sup>156</sup>
- b. The witness whose evidence is sought must be within the jurisdiction of the court which is asked to make the order.
- c. The evidence sought must be in relation to a civil, commercial or criminal matter pending before the foreign court<sup>157</sup> or in relation to an action, suit or proceeding pending before the foreign court.<sup>158</sup>
- d. The foreign court must be a court of competent jurisdiction.<sup>159</sup>

Having satisfied the above threshold criteria, the party seeking to enforce the letters rogatory must typically satisfy the Canadian court as to the applicability of six oft-cited factors:

- a. The evidence sought is relevant.
- b. The evidence sought is necessary.
- c. The evidence is not otherwise obtainable.
- d. The order sought is not contrary to public policy.
- e. The documents sought are identified with reasonable specificity.
- f. The order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do were the action to be tried in Canada.<sup>160</sup>

While some courts describe these six factors as “preconditions,” there is recent Ontario jurisprudence that suggests the factors are only “useful guideposts” (with the exception of factor “d”, which is mandatory).<sup>161</sup> There is necessarily some overlap between the six factors. For example, letters rogatory which request irrelevant documents will also fail to meet the requirement that the evidence be necessary.

### A. The evidence sought is relevant

The evidence must only be “likely relevant” to the foreign proceeding.<sup>162</sup> Moreover, the evidence collected need not be used at trial; letters rogatory may also be enforced in the context of discovery.<sup>163</sup>

In *Actava TV*, the Court of Appeal overturned the application judge and declined to enforce the letter of request. In a U.S. action, the respondent obtained a letter of request for confidential and proprietary financial information from a non-party to assist its expert in calculating damages using comparative industry data. In addition to concerns regarding public policy and sovereignty ([discussed below](#)), the Court of Appeal held that the application judge erred in her analysis of relevance.

All documents related to the applicant and respondent’s relationship were already in the applicant’s possession. Further, the requested documents about the respondent’s financial information were extraordinarily broad. Third, the relevance

<sup>155</sup> *Canada Evidence Act*, RSC 1985 c. C-5, s. 46 [*Canada Evidence Act*].

<sup>156</sup> *Evidence Act*, RSO 1990, c. E.23, s. 60(1) [*Ontario Evidence Act*].

<sup>157</sup> *Canada Evidence Act*, *supra* note 155, s. 46.

<sup>158</sup> *Ontario Evidence Act*, *supra* note 156, s. 60(1).

<sup>159</sup> *King v. KPMG*, [2003] OJ No. 2881 (Ont Sup Ct J), at para. 6.

<sup>160</sup> *Lantheus*, *supra* note 153 at para. 47; see also *Lashmat c. Show Canada Industries (U.S.) Inc.*, 2017 QCCS 2223, at paras. 10–13; *Monster Energy Company v. Craig*, 2016 BCCA 290, at para. 13; *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 2005 ABQB 920, at para. 37.

<sup>161</sup> *Lantheus*, *supra* note 153 at para. 63; see also *Treat America Ltd. v. Nestlé Canada Inc.*, 2011 ONCA 560.

<sup>162</sup> *Connecticut Retirement Plans & Trust Funds v. Buchan*, 2007 ONCA 462, at paras. 9–13 [*Connecticut Retirement Plans*].

<sup>163</sup> *Morgan, Lewis & Bockius LLP v. Gauthier*, (2006), 82 OR (3d) 189 (Sup Ct J), at paras. 62–63.

of the requested evidence was entirely speculative; the applicant did not know what the respondent's financial evidence would actually disclose. Finally, the applicant's damages were not related to the respondent's financial performance. The production was sought solely to assist the applicant's damages expert with making calculations. Although framed by the Court of Appeal as an inquiry into relevance, these criticisms could also apply to whether the evidence was necessary or whether documents were identified with reasonable specificity.<sup>164</sup>

## B. The evidence sought is necessary

Where evidence is found to be relevant, it will generally be "necessary," subject to certain exceptions.<sup>165</sup> While courts may conclude that evidence is "necessary" where it is obtained for pre-trial discovery instead of use at trial, the enforcing party generally faces a higher burden in the pre-trial context.

## C. The evidence is not otherwise obtainable

While Canadian courts do not insist that no other evidence on the issue is available, they typically require proof that evidence of the same value as that sought pursuant to the letters rogatory cannot otherwise be obtained.<sup>166</sup>

In *N2 Packaging Systems*, the British Columbia Supreme Court declined to enforce letters rogatory from an Arizona court, holding that the petitioner failed to meet its burden to prove that the information and records were otherwise not obtainable. The petitioner alleged that the individual respondents, principals of Nitrofin, were refusing to produce documents and failed to appear for depositions in the Arizona proceeding. Nitrofin, a party to the Arizona proceeding and a respondent to the letters rogatory petition, provided evidence that the petitioner had in fact adjourned the depositions and that there was no evidence that the individual respondents would not comply with the process in the Arizona proceeding. Accordingly, the Court declined to enforce the letters rogatory.<sup>167</sup>

## D. The order sought is not contrary to public policy

This is the only mandatory factor that must be met to enforce letters rogatory.

In *Glegg*, the Ontario Court of Appeal affirmed the decision of the application judge, who declined to enforce the letters rogatory. The case involved a high-conflict parental custody and access dispute involving both Ontario and Florida courts. The father filed a claim against the mother and her new husband in Florida for damages related to parental alienation. The father brought an application to enforce letters rogatory obtained in the Florida proceeding to secure production of documents from the mother's former lawyers and from lawyers who had acted for the parties' daughter for use in the Florida action.

The letters rogatory sought facially privileged information and documents in the possession of the wife and daughter's former lawyers related to work they performed in respect of the Ontario litigation and in respect of which the clients had not waived privilege. Enforcing the letters rogatory would interfere with solicitor-client privilege and was against public policy.<sup>168</sup>

Further, the Court of Appeal noted that the appellant intended to use the letters rogatory to gain evidence to attack the validity of decision made by Ontario courts in the Florida proceeding. Using letters rogatory to seek evidence for the purpose of attacking orders made by Ontario courts amounted to a potential infringement of Canadian sovereignty.<sup>169</sup>

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<sup>164</sup> *Actava TV, Inc. v Matvil Corp.*, 2021 ONCA 105, at paras. 66–76 [*Actava TV*].

<sup>165</sup> *Sculley v. Pivot Acquisition Corp.*, 2015 ONSC 287, at para. 21.

<sup>166</sup> *Connecticut Retirement Plans*, *supra* note 162 at para. 19, as cited in *AstraZeneca LP v. Wolman*, 2009 CanLII 69793 (Ont SC), at para. 27 [*AstraZeneca LP*].

<sup>167</sup> *N2 Packaging Systems LLC v. Nitrofin, Inc.*, 2020 BCSC 1719, at paras. 11–22.

<sup>168</sup> *Glegg v. Glass*, 2020 ONCA 833, at paras. 52–66.

<sup>169</sup> *Ibid.* at para. 67.

In *Actava TV* ([discussed above](#)), the Court of Appeal held that the incursion into a non-party's confidential proprietary financial performance and valuation information was clearly wrong and contrary to public policy.<sup>170</sup>

The Court of Appeal also held that the application judge failed to give adequate consideration to Canadian sovereignty. Comity requires the court to engage in an analysis that takes into account the impact of the proposed order on Canadian sovereignty. Canadian sovereignty encompasses

whether the [letters rogatory] gives extra-territorial authority to foreign laws that violate Canadian or provincial laws; whether granting the request would infringe on recognized Canadian moral or legal principles; whether the order would impose an undue burden on the individual whose evidence is requested; and whether the order would do prejudice to that individual.<sup>171</sup>

The application judge's failure to inquire into the impact on Canadian sovereignty was a reviewable error.<sup>172</sup>

### **E. The documents sought are identified with reasonable specificity**

Courts have the power to narrow the request contained in letters rogatory to relevant documentation.<sup>173</sup>

### **F. The order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do were the action to be tried in Canada**

Courts will assess whether the enforcement of the request would place the proposed parties in an unfair or burdensome position.<sup>174</sup>

## **Requests of the Federal Court of Canada**

Note that the Federal Court of Canada does not have jurisdiction to enforce foreign letters of request. Parties therefore often rely on section 46 of the *Canada Evidence Act* and the relevant section of the provincial statute.

## **Requests in Québec**

In Québec, the enforcement of letters rogatory requests follows the same basic rules as in the other provinces and territories, subject to Articles 504 to 506 of the CCP.

For a more exhaustive discussion of the issues that arise in the context of evidence gathering in Canada in support of a U.S. proceeding, please see Christopher Naudie *et al.*, "[Obtaining Evidence in Canada for Use in U.S. Litigation](#)" [PDF](#).

<sup>170</sup> *Actava TV*, *supra* note 164, at paras. 87–88.

<sup>171</sup> *Ibid.* at para. 91.

<sup>172</sup> *Ibid.* at para. 98.

<sup>173</sup> *AstraZeneca LP*, *supra* note 166 at para. 30.

<sup>174</sup> *Ibid.* at para. 29.

## 7. Legal and procedural considerations unique to Québec

As a civil law jurisdiction, as a matter of substantive law, Québec is governed by one single and comprehensive piece of legislation and not by precedential decision making. This differentiates the province from the common law systems of other Canadian provinces. The requirements developed by the common law courts do not apply. Instead, the substantive requirements for the recognition and enforceability of non-Québec judgments are found in the CCQ. Meanwhile, the procedural requirements are outlined in the CCP.

### Process for enforcing a non-Québécois judgment in Québec

The recognition and enforcement of a non-Québécois judgment are sought by means of an originating application before the relevant Québec authority, mainly the Superior Court of Québec or the Court of Québec.<sup>175</sup> For instance, the Court of Québec has jurisdiction over applications where the subject matter is worth less than \$85,000.<sup>176</sup> The applicant may be required, at the defendant's request, to provide security for the legal costs associated with the proceeding.<sup>177</sup>

The applicant must attach a copy of the decision, together with a certificate from a competent public official of the issuing jurisdiction, confirming that the decision is final and enforceable or no longer subject to appeal in the issuing jurisdiction.<sup>178</sup> However, the certificate may not be necessary, for instance, when the judgment's authenticity, finality or enforceability is not opposed,<sup>179</sup> or when the issuing authority does not provide the required certificate.<sup>180</sup>

If the original judgment was rendered by default, the applicant must attach certified documents showing that the defaulting party was properly notified of the underlying proceedings, such as a certificate of service.<sup>181</sup>

Importantly, if any of the required documents are in a language other than French or English, the applicant must attach a translation certified in Québec.<sup>182</sup>

### Substantive requirements for establishing enforceability

Québec courts will recognize and enforce non-Québécois decisions except where

- a. the issuing court had no jurisdiction;
- b. the judgment is not final or enforceable;
- c. the judgment is contrary to the fundamental principles of procedure;
- d. a decision was already rendered or is pending between the same parties, based on the same facts and having the same subject;

<sup>175</sup> Arts. 33 & ff, 507 CCP.

<sup>176</sup> Art. 35 CCP. Note that Bill 40, *An Act mainly to improve access to justice by simplifying civil procedure in the Court of Québec and by bringing about the digital transformation of the notarial profession*, was introduced by the Minister of Justice on May 31, 2022, to, notably, give the Court of Québec exclusive jurisdiction to hear applications in which the amount claimed or the value of the subject matter in dispute is less than \$75,000 and to give the Court of Québec concurrent jurisdiction with that of the Superior Court where that amount or that value is equal to or exceeds \$70,000, but is less than \$100,000.

<sup>177</sup> Art. 492 CCP.

<sup>178</sup> Art. 508 CCP.

<sup>179</sup> *Re Gareau*, [1997] RJQ 1954 (QC SC).

<sup>180</sup> *Carreaux Céragrès Canada ltée c. Construction Canvar* (1991) Inc., BE 2000BE-962 (QC CQ).

<sup>181</sup> Art. 508 CCP.

<sup>182</sup> *Ibid.*

- e. the judgment is manifestly inconsistent with public order; and
- f. the judgment enforces obligations arising from the taxation laws of a non-Québec State.<sup>183</sup>

### A. The issuing court had no jurisdiction

The judgment must have been rendered by a court that had jurisdiction over the dispute. Québec courts apply two different frameworks in deciding whether the issuing court had jurisdiction. Which framework applies depends on whether there is any specific provision in place with respect to the type of proceeding at issue. Where a specific provision applies, for example in divorce matters, the Québec court will follow the rules set out in that provision.<sup>184</sup>

One notable specific provision concerns personal actions of a patrimonial nature (which include most claims for damages).<sup>185</sup> A Québec court will recognize the jurisdiction of the issuing court in a number of cases, including when the defendant was domiciled in the issuing jurisdiction, or when it had a place of business in that jurisdiction and the dispute relates to the defendant's activities in that jurisdiction. The jurisdiction of the issuing court will also be recognized, for instance, when the dispute results from a contract to be performed in the issuing jurisdiction. However, a Québec court will not recognize another court as being of competent jurisdiction where exclusive jurisdiction was explicitly given to a different court, for instance, by way of a choice of forum clause.<sup>186</sup>

Absent any such specific provision, Québec courts use the same analytic framework in deciding whether another court had proper jurisdiction as they do in determining their own jurisdiction over a non-Québécois dispute.<sup>187</sup> This is known as the “principe du miroir” or “mirror principle.” If those rules make the non-Québécois court competent over the dispute on its face, the Québec court will recognize the jurisdiction of that court, provided that the dispute is substantially connected with the jurisdiction where the judgment was rendered.<sup>188</sup> There are several factors that courts can consider to assess the necessary connection with the issuing jurisdiction, including, for instance, the parties' nationality or place of residence, as well as the jurisdiction where the relevant facts occurred.<sup>189</sup>

### B. The judgment is not final or enforceable

The judgment in question must not be subject to an ordinary remedy, such as an appeal. It must be final or enforceable. A judgment that is interlocutory in nature or that may be revised or appealed in its issuing jurisdiction will not be recognized, even if, for instance, the decision otherwise appealable is already enforceable in that jurisdiction.<sup>190</sup> It is worth noting that, in Québec, the enforcement of a foreign judgment should be sought within the prescription or limitation period for enforcement in the foreign jurisdiction.<sup>191</sup>

### C. The judgment is contrary to the fundamental principles of procedure

For the fundamental principles of procedure to be respected, the defendant must have attended at trial and must have had the opportunity to present his or her defence.<sup>192</sup> Any decision rendered before the defendant had a chance to be heard will not be recognized.

<sup>183</sup> Art. 3155 CCQ.

<sup>184</sup> Art. 3167 CCQ.

<sup>185</sup> Art. 3168 CCQ.

<sup>186</sup> Art. 3165 CCQ.

<sup>187</sup> Arts. 3134 & ff CCQ.

<sup>188</sup> Art. 3164 CCQ.

<sup>189</sup> *Ortega Figueroa c. Jenckel*, 2015 QCCA 1393 (leave to appeal dismissed).

<sup>190</sup> *M. c. S.*, 2005 QCCA 12; see also *Corporatek inc. c. Éditions Francis Lefebvre*, 2021 QCCA 1241, at paras. 24, 44–45.

<sup>191</sup> *Minkoff*, *supra* note 152.

<sup>192</sup> *Jules Jordan Video inc. c. 144942 Canada Inc.*, 2014 QCCS 3343.

#### **D. A decision was already rendered or is pending**

A Québec court will not recognize a decision of another court if the underlying dispute was between the same parties, based on the same facts and had the same subject as a decision already rendered in Québec. This is true whether or not the decision rendered in Québec was final.<sup>193</sup>

Further, a Québec court will not recognize the decision of another court if it involves the same parties, facts and subject (i) as a judgment already rendered by a court in a third jurisdiction, which equally meets the requirements for being recognized and rendered enforceable in Québec, or (ii) as a decision already pending before a Québec court.

#### **E. The judgment is manifestly inconsistent with public order**

In determining whether or not the judgment of another court is inconsistent with public order, a Québec court will not focus on the judgment itself or the legal basis for that decision. It will instead focus on whether the outcome of the decision is manifestly contrary to any moral, social, political or economic values underlying the international legal order,<sup>194</sup> as illustrated by international legal instruments, such as the United Nations Charter or the Universal Declaration of Human Rights.<sup>195</sup>

#### **F. The judgment enforces obligations arising from another country's tax laws**

Québec courts will only recognize tax judgments from other jurisdictions where the tax laws at issue are those of a state that also recognizes and enforces the taxation laws of Québec.<sup>196</sup>

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<sup>193</sup> Art. 3155(4) CCQ.

<sup>194</sup> *Mutual Trust*, *supra* note 9.

<sup>195</sup> *Claude Emanuelli, Droit international privé québécois*, 3e ed., (Montréal, Wilson & Lafleur, 2011), paras. 298–299.

<sup>196</sup> Arts. 3155(6) and 3162 CCQ.

# Appendix

## A. List of Canadian Central Authorities under the Hague Convention<sup>197</sup>

Jurisdiction	Authority	Location
Federal	Global Affairs Canada Criminal, Security and Diplomatic Law Division	Ottawa
Alberta	Ministry of Justice and Solicitor General Justice Services Division	Edmonton
British Columbia	Ministry of Justice Order in Council Administration Office	Victoria
Manitoba	Department of Justice Director of Civil Legal Services	Winnipeg
New Brunswick	Attorney General Director of Legal Services	Fredericton
Newfoundland and Labrador	Department of Justice	St. John's
Northwest Territories	Department of Justice	Yellowknife
Nova Scotia	Attorney General Legal Services Division	Halifax
Nunavut	Clerk of the Nunavut Court of Justice Court Services Division Department of Justice	Iqaluit
Ontario	Ministry of the Attorney General	Haileybury
Prince Edward Island	Attorney General Office of the Deputy Minister	Charlottetown
Québec	Direction des services professionnels Entraide internationale Ministère de la Justice	Québec City
Saskatchewan	Ministry of Justice Court Services Division	Regina
Yukon	Court Services Division	Whitehorse

<sup>197</sup> *Canadian Central Authorities, supra note 9.*



## B. List of contracting parties to the Hague Convention<sup>198</sup>

Contracting party	Entry into force
Albania	1 July 2007
Andorra	1 December 2017
Antigua and Barbuda	1 November 1981
Argentina	1 December 2001
Armenia	1 February 2013
Australia	1 November 2010
Bahamas	1 February 1998
Barbados	1 October 1969
Belarus	1 February 1998
Belgium	18 January 1971
Belize	1 May 2010
Bosnia and Herzegovina	1 February 2009
Botswana	1 April 1969
Bulgaria	1 August 2000
Canada	1 May 1989
China, People's Republic of	1 January 1992
Colombia	1 November 2013
Costa Rica	1 October 2016
Croatia	1 November 2006
Cyprus	1 June 1983
Czech Republic	1 January 1993
Denmark	1 October 1969
Egypt	10 February 1969

<sup>198</sup> See The Hague Conference on Private International Law, "Status Table: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters," online: <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>>.

Contracting party	Entry into force
Estonia	1 October 1996
Finland	10 November 1969
Former Yugoslav Republic of Macedonia	1 September 2009
France	1 September 1972
Germany	26 June 1979
Greece	18 September 1983
Hungary	1 April 2005
Iceland	1 July 2009
India	1 August 2007
Ireland	4 June 1994
Israel	13 October 1972
Italy	24 January 1982
Japan	27 July 1970
Kazakhstan	1 June 2016
Korea, Republic of	1 August 2000
Kuwait	1 December 2002
Latvia	1 November 1995
Lithuania	1 June 2001
Luxembourg	7 September 1975
Malawi	1 December 1972
Malta	1 October 2011
Mexico	1 June 2000
Monaco	1 November 2007
Montenegro	1 September 2012
Morocco	1 November 2011

Contracting party	Entry into force
Netherlands	2 January 1976
Norway	1 October 1969
Pakistan	1 August 1989
Poland	1 September 1996
Portugal	25 February 1974
Republic of Moldova	1 February 2013
Romania	1 April 2004
Russian Federation	1 December 2001
Saint Vincent and the Grenadines	27 October 1979
San Marino	1 November 2002
Serbia	1 February 2011
Seychelles	1 July 1981
Slovakia	1 January 1993
Slovenia	1 June 2001
Spain	3 August 1987
Sri Lanka	1 June 2001
Sweden	1 October 1969
Switzerland	1 January 1995
Tunisia	1 February 2018
Turkey	28 April 1972
Ukraine	1 December 2001
United Kingdom of Great Britain and Northern Ireland	10 February 1969
United States of America	10 February 1969
Venezuela	1 July 1994
Vietnam	1 October 2016

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