

## An Overview of Recognizing and Enforcing Foreign Judgments in Canada

### Introduction

Multinational transactions and international commerce fostered the growth of international legal disputes. One issue is when a plaintiff is granted a judgment against a non-resident defendant with no assets in the jurisdiction of the court issuing the judgment. To obtain recovery, the plaintiff must locate a jurisdiction with defendant's assets and apply to a court for recognition and enforcement of the judgment. This alert provides an overview of the framework developed by Canadian common-law provinces for the recognition and enforcement of foreign judgments.

### Requirements for Recognition of a Foreign Judgment

There are three requirements for the recognition and enforcement of a final judgment from a foreign jurisdiction. These requirements are:

- the foreign court properly asserted jurisdiction over the dispute;
- the remedy granted by the foreign judgment should be enforced in Canada; and
- the foreign judgment does not relate to the enforcement of a foreign public law.

### Whether the Issuing Court Properly Asserted Jurisdiction – The Real and Substantial Connection Test

When determining whether a foreign court properly asserted jurisdiction over a dispute, Canadian courts will apply the “real and substantial connection test.” The modern application of this test was developed in two decisions of the Supreme Court of Canada: *Beals v Saldanha, (Beals)*<sup>1</sup> and *Van Breda v Village Resorts Ltd, (Van Breda)*.<sup>2</sup> The real and substantial connection test requires a significant connection to exist between the cause of action and the foreign court, or that the defendant has participated in something of significance or was actively involved in the foreign jurisdiction.<sup>3</sup>

The Supreme Court refined the real and substantial connection test in *Van Breda*, setting out a non-exhaustive list of four “presumptive connecting factors,” which establish a presumption that jurisdiction was properly assumed. The presumptive connecting factors are:

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

In setting out these factors, the court noted that the plaintiff must establish one of the four presumptive factors exists. If the plaintiff satisfies one factor, a *prima facie* real and substantial connection between the claim and the foreign jurisdiction is presumed to exist. The burden shifts to the party resisting recognition to rebut this presumption. To rebut this presumption, the resisting party must establish facts that demonstrate the presumptive connecting factor does not point to a real relationship between the subject matter and the jurisdiction or points only to a weak relationship.

### The Remedy Awarded in the Foreign Judgment Should be Enforced in Canada

Until the recent Supreme Court decision of *Pro Swing Inc v Elta Golf Inc (Pro-Swing)*<sup>4</sup>, only foreign judgments awarding monetary judgments were enforceable in Canada. In *Pro-Swing*, the court



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recognized that certain non-monetary judgments could also be enforced. The principles for a court to consider when deciding whether to recognize a foreign judgment for a non-monetary remedy are:

- the requirements of comity;
- whether the Canadian court will have to interpret a foreign law;
- the territorial scope of the foreign judgment; and
- the burden of enforcing the foreign judgment on the Canadian judicial system.

A notable application of these criteria from *Pro-Swing* is by the Ontario Superior Court of Justice to enforce foreign judgments providing injunctive relief. For instance, in *Blizzard Entertainment Inc v Simpson*,<sup>5</sup> a judgment from the California District Court awarding injunctive relief for copyright infringement was enforced by an Ontario court.

### **The Foreign Judgment Does Not Enforce a Foreign Public Law**

A foreign judgment will not be recognized in Canada if it enforces a foreign jurisdiction's penal, taxation or other public law. This requirement stems from the principle that a Canadian court should not assist a foreign state to assert its sovereign powers within Canada.<sup>6</sup>

### **Defenses to the Recognition and Enforcement of Foreign Judgments**

A defendant can raise a limited number of defenses to the recognition and enforcement of a foreign judgment. The defenses available were outlined in *Beals* as (i) fraud, (ii) a denial of natural justice and (iii) public policy. The court also stated that these defenses are not exhaustive, as unusual situations may arise that require the creation of a new defense.<sup>7</sup>

#### **Fraud**

The first defense outlined in *Beals* is that the foreign judgment was obtained by fraud. Canadian courts narrowly apply this defense. The court commented in *Beals* that defendants should not be permitted to use this defense to re-litigate issues previously decided in the foreign proceeding so as to thwart the finality of litigation.

To raise a successful fraud defense in recognition proceedings, a defendant must raise "new and material facts" that could not have been discovered by the exercise of due diligence prior to obtaining the foreign judgment.

#### **Denial of Natural Justice**

The second defense to recognition and enforcement is a denial of natural justice. A Canadian court can refuse the recognition of a foreign judgment if the defendant proves, on a civil standard, that the foreign proceedings were "contrary to Canadian notions of fundamental justice." The Supreme Court's discussion of this defense demonstrates its limited application, particularly with respect to judgments from jurisdictions with similar legal systems, such as the United States and the United Kingdom.

This defense is restricted to the procedures of the foreign court in reaching its judgment and does not apply to the merits of the case. To successfully raise this defense, a defendant must demonstrate that it was not afforded a fair process in the foreign proceedings. In *Beals*, the court discussed a number of procedural safeguards necessary for a fair process that includes but is not limited to:

- judicial independence;
- ethical rules governing participants in the legal system;
- adequate notice of the claim; and
- an opportunity to defend the claim.

Notably in *Beals*, the court held that the plaintiff's failure to specify a specific dollar amount of damages sought in its complaint for a proceeding brought in Florida did not constitute a denial of natural justice.

## Contrary to Canadian Public Policy

The third defense outlined in *Beals* is public policy, which precludes recognition of a foreign judgment founded on a law contrary to the Canadian concept of justice. Two examples were outlined in *Beals*, including a foreign judgment based on a law that is contrary to the fundamental morality of the Canadian legal system or a judgment by a foreign court proven to be corrupt or biased.

The Ontario Superior Court's application of this defense in *Disney Enterprises Inc v Click Enterprises Inc (Disney Enterprises)*<sup>8</sup>, is of particular significance for those seeking to enforce a judgment from the United States. In *Disney Enterprises*, the plaintiff brought an action in the District Court of New York for copyright infringement relating to the defendant's website that was frequently used by residents of New York. The plaintiffs were awarded \$468,442.17 by the New York District Court. During enforcement proceedings in Ontario, the defendants contended that the New York judgment was contrary to Canadian public policy because the damages awarded were considerably more than what would have been awarded in Canada. The court rejected this argument, stating that it is not a defense to the recognition of a claim "that the claim in the foreign jurisdiction would not yield comparable damages in Canada."<sup>9</sup>

## Conclusion

The development of a framework for recognition and enforcement of foreign judgments by Canadian courts acknowledged the need for international comity and for a modernization of private international law in the face of increasing cross-border commerce. These principles led Canadian courts to approach this issue favoring enforcement. Plaintiffs obtaining judgments against defendants with assets in Canada should consider recovering the damages awarded to them through recognition and enforcement proceedings in Canada.

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**For additional information, please feel free to contact a member of the firm's Canadian office.**

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<sup>1</sup> 2003 SCC 72, 3 SCR 416.

<sup>2</sup> 2010 ONCA 84, 98 OR (3d) 721.

<sup>3</sup> *Beals* at para 32.

<sup>4</sup> 2006 SCC 52, 2 SCR 612.

<sup>5</sup> 2012 ONSC 4312.

<sup>6</sup> *United States of America v Ivey*, 26 OR (3d) 533

<sup>7</sup> *Beals* at para

<sup>8</sup> 267 DLR (4th) 291, 49 CPR (4th) 87, (Ont Sup Ct).

<sup>9</sup> *Disney* para 39