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Canada

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Efficiency and integrity of the Canadian courts

The cornerstone of the Canadian legal system is based on two principles: (1) the rule of law; and (2) the independence of the judiciary. The rule of law provides that everyone is subject to the law and no one is above the law. The preservation of such a principle is ensured by the independence of the judiciary, which dates back 300 years.

Generally, the Canadian court system is divided in two spheres: provincial/territorial, and federal. Within the provincial/territorial and federal realms are courts which have jurisdiction over different types of disputes. In Ontario, for example, the Superior Court of Justice (Ontario) hears civil matters where more than $50,000 is in dispute; the Divisional Court (Ontario) hears civil appeal matters of not more than $50,000 or small claims court matters. An appeal on a final order from those courts lies to the Ontario Court of Appeal and then to the Supreme Court of Canada.

In Canada, court procedures are governed by provincial/territorial rules of procedure. Within those rules, different procedural mechanisms are available for resolving disputes. In Ontario, for example, summary judgment is an available remedy to help litigants reduce costs and time. Most recently, the Supreme Court of Canada has clarified the summary judgment rule in *Hryniak v. Mauldin,* 2014 SCC 7. The Court held that a motions judge must:

1. without using the fact-finding powers (which are to weigh the evidence, evaluate the credibility of a deponent and draw reasonable inferences from the evidence (see Rule 20.04. (2.1) of the *Rules of Civil Procedure*, RRO 199, Reg. 194)), determine if there is a genuine issue requiring a trial. No genuine issue exists if the summary judgment process provides the judge with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure; and
2. if there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using fact-finding powers and hearing oral evidence. The judge may use such powers, provided that their use is not against the interest of justice. Such use is not against the interest of justice if it will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

Similarly, another mechanism that allows a party to reduce costs and time is to ask the court to determine, before the trial, a question of law where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs. (See Rule 21.01 of the *Rules of Civil Procedure.*)

Mediation and ADR

Mediation and ADR have grown in popularity in Canada over the years, and are now widely used. Numerous ADR bodies offer the services of experienced mediators, arbitrators and dispute resolution professionals, including many retired judges.

In addition to being privately available, mediation is now often part of the public justice system (and the process adopted by various administrative tribunals and boards) in Canada. There is a large variety of court-sponsored programs, some mandatory, some voluntary. For example, Ontario has a mandatory mediation program in three counties, including Toronto and Ottawa. Under this program, unless the court orders otherwise or the parties consent to a postponement, a mediation session has to take place within 180 days after the first defence has been filed. The parties can choose a mediator from a roster maintained by the court (who will charge court-approved rates) or a private-sector mediator. If the parties cannot agree on a mediator, the court assigns one from the roster. Some types of actions are excluded from the mandatory mediation program, including bankruptcy and insolvency actions, certified class actions, and actions that are on the Commercial List.

All Canadian provinces and territories have passed domestic arbitration legislation (international arbitration legislation is discussed in the next section below). For most Canadian provinces, this legislation is largely based on the Model Law on International Commercial Arbitration developed by the United Nations Commission on International Trade Law (UNCITRAL).

The competence-competence principle generally applies in Canada. The Supreme Court of Canada has laid down the rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systemic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law or on a question of mixed fact and law that requires for its disposition only a superficial consideration of the documentary evidence in the record. Further, before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding.

A number of provinces, including Ontario, Québec, Alberta and British Columbia, have adopted legislation that imposes limitations on arbitration clauses in consumer contracts. The Supreme Court of Canada considered the effect of such consumer legislation on a mediation/arbitration provision in *Seidel v TELUS Communications Inc.* In that case, part of the plaintiff's court action was stayed and referred to arbitration, and part was allowed to continue based on the particular language of the consumer legislation in issue. The Supreme Court held that the choice to restrict arbitration clauses in consumer contracts was a matter for the legislature. However, the Court also confirmed that, absent legislative intervention, an arbitration clause freely entered into would generally be given effect, even if it was found in a contract of adhesion.

International arbitration

The UNCITRAL Model Law has been adopted, subject to some modifications, by every jurisdiction in Canada. The implementing legislation applies to international commercial arbitrations (as defined in the Model Law) conducted in the particular province or territory. In most provinces, different legislation governs domestic arbitrations.

Similarly, with the exception of Ontario, all provinces and territories have legislation adopting the United Nations Convention on the Reciprocal Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). The Supreme Court of Canada considered the issue of the limitation period applicable to the recognition and enforcement of foreign arbitral awards in the province of Alberta in *Yugraneft Corp. v Rexx Management Corp*. After noting that, under international arbitration law, the matter of limitation periods was left to the local procedural law of the jurisdiction where recognition and enforcement was sought, the court found that an application for recognition and enforcement of an arbitral award was subject to the general two-year limitation period applicable to most causes of action, and not the ten-year limitation period applicable to an application for a remedial order based on a judgment or court order for the payment of money.

Costs and funding

Costs

Generally speaking, Canada has a "loser pays" costs system. That is, costs are usually awarded to the successful party at the conclusion of the proceeding to indemnify that party for allowable expenses and services that were reasonably incurred and that are relevant to the proceeding. Costs constitute a contribution to the successful party's actual expense, not a full indemnification. In the usual case, such contribution is in the range of 60% or less of the actual fees billed to the client. A higher level of indemnification can be ordered by the court, but such an order is only made in rare cases because it typically requires reprehensible or egregious conduct by the losing party.

Although the general principles above govern the law of costs in most cases, the power to order costs is discretionary and a court can depart from these principles. Further, special considerations apply to costs awards made in certain types of litigation, such as estate litigation. However, because the court's discretion must be exercised judicially, the ordinary rules of costs are followed unless the circumstances or special factors justify a different approach.

Class actions are subject to different rules regarding costs in certain jurisdictions. Thus, class actions in the Federal Court or in the courts of British Columbia, Manitoba, Newfoundland and Saskatchewan are under a no-costs regime. However, the normal "loser pays" system applies to class actions in the other provinces. A recent series of decisions in Ontario raise concerns regarding the size of costs awards in certification motions, and stress the importance of increased transparency and predictability in relation to costs awards in such motions. (See, e.g., *Dugal v Manulife Financial Corp.*)

Security for costs

Security for costs is available to defendants in particular circumstances. For instance, in Ontario, an order for security for costs may be made where, among others: (a) the plaintiff is ordinarily resident outside of Ontario; (b) the plaintiff has another proceeding for the same relief pending in Ontario or elsewhere; (c) the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part; (d) the plaintiff is a corporation or a nominal plaintiff and there is good reason to believe that the plaintiff has insufficient assets in Ontario to pay the costs of the defendant; and (e) there is good reason to believe that the action is frivolous and vexatious and that the plaintiff has insufficient assets in Ontario to pay the costs of the defendant. Security for costs, however, is discretionary and is not granted automatically once one of the factors above is established. Rather, in determining whether an order for security for costs would be just in the circumstances, the court will consider a multitude of factors, including the merits of the case, a balancing of the interests of the parties, the financial circumstances of the plaintiff and the effect of an order.

Contingency fee agreements

Compared to the United States, the use of contingency fee agreements is relatively recent in Canada. Contingency fee agreements are permitted in Canada, but their use is governed by statutes, regulations and/or rules that vary from province to province. Typically, the applicable rules include a requirement that the contingency fee be fair and reasonable, and provide for a mechanism by which such fee can be reviewed by the court. Contingency fee agreements that relate to class actions require court approval in all provinces except Québec.

Third-party funding

The use of third-party funding agreements is a new development in Canada, and has only been approved in a few cases in the context of class actions, mostly in Ontario. In *Fehr v Sun Life Assurance Co. of Canada*, Justice Perell of the Superior Court of Justice of Ontario summarised the state of the law as follows:

> […] the current state of the law in Ontario is that third party funding agreements are not categorically illegal but they may be. In ruling on the legality of third

> party agreements, Ontario courts have considered some of the issues that might be raised to challenge a third party funding agreement but there is much unexplored territory. […] Whether and the extent to which third party funding is permissible should be regarded as an unsettled issue and a work in progress.

The following principles can be gathered from the decisions released to date:

1. Third-party funding agreements must be promptly disclosed to the court and cannot come into force without court approval.
2. Such approval can be obtained by a plaintiff by motion on notice to the defendant.
3. Third-party funding agreements are not privileged documents.
4. Before approving a third-party funding agreement, the court must be satisfied that the agreement is necessary in order to provide the plaintiff (and the class members) access to justice.
5. Third-party funding agreements will only be approved if they are fair and reasonable. The court must be satisfied that the access to justice facilitated by the agreement remains substantively meaningful and that the plaintiff has not agreed to over-compensate the third-party funder for assuming the risks of an adverse costs award. Court approval will likely be easier to obtain if the agreement contains commission caps.
6. The plaintiff, as opposed to the third-party funder, must remain in effective control of the litigation. The agreement must not permit officious intermeddling in the conduct of the litigation by the funder. Further, the third-party funding agreement must not compromise or impair the lawyer and client relationship and the lawyer's duties of loyalty and confidentiality, or impair the lawyer's professional judgment and carriage of the litigation on behalf of the plaintiff.
7. The third-party funder may be required to provide security for costs.
8. With respect to the sharing of information pertaining to the litigation with the third-party funder, sufficient safeguards must be present in order to protect the defendant's rights to privacy and confidentiality.

Privilege

In Canada, solicitor-client privilege attaches to legal advice given by in-house counsel to the client company. The Supreme Court of Canada has held that to determine if a communication is subject to solicitor-client privilege, the following legal test should be applied:

1. the communication must take place between a lawyer and a client;
2. the communication must involve the seeking or giving of legal advice; and
3. the communication must be intended to remain confidential.

If a communication is privileged, the privilege belongs to the client and can only be waived by the client. It also survives the termination of the solicitor-client relationship.

If a lawyer is also a director or manager, no privilege attaches to work performed by a lawyer in his or her capacity as a director or manager. (See *Presswood v. International Chemalloy Corp*. and *Toronto Dominion Bank v. Leigh Instruments Ltd.*)

In-house counsel are often presented with issues of privilege that are unique to their situation. For example, advice given on non-legal matters, such as business advice, is not protected by privilege, even though the advice is given by a lawyer. (See *Pritchard v. Ontario (Human Rights Commission.*) There is also the issue of privilege in the context of internal corporate investigations. In *R. v. Dunn*, a decision rendered in the criminal proceeding involving three Nortel Networks executives, the Court was asked to rule on whether lawyers' notes of an investigation interview were compellable evidence against their clients. Even though this decision related to external counsel, it is equally applicable to in-house counsel. The Court

determined that the lawyers' notes were protected by litigation privilege and, therefore, were not compellable. However, litigation privilege was not an impediment to the lawyers reading their notes to refresh their memory prior to testifying and, in fact, the lawyers were ordered to do so.

It is important to note that the mere fact that a lawyer is involved in a communication does not trigger the doctrine of privilege. Rather, the legal test outlined above must be met in order for the communication to be subject to solicitor-client privilege. Thus, for example, corporate minutes will not be blankly privileged. The privilege would only extend to the portions of the minutes that deal with the giving of legal advice. If the communication is extensively circulated, the privilege may be lost.

There are many different types of privilege that can apply to communications. For example, as discussed above, litigation privilege may be an applicable doctrine; there is also common interest privilege, joint defence privilege and without prejudice settlement privilege. Each of these privileges has a different test that must be applied in order to make a privilege determination.

Cross-border litigation

Obtaining evidence from a non-party Canadian resident

When a litigant wants to obtain evidence from a non-party Canadian resident for use in a proceeding outside Canada, the litigant is required to bring a motion for a letter of request (or letters rogatory) from a judge in the jurisdiction of the proceeding. The litigant may then move to have the letter of request enforced in Canada against the non-party witness by bringing an application. In order to give effect to the letter of request, the Court considers whether the evidence establishes that: (1) the evidence sought is relevant; (2) the evidence sought is necessary for trial and will be adduced at trial, if admissible; (3) the evidence is not otherwise obtainable; (4) the order sought is not contrary to public policy; (5) the documents sought are identified with reasonable specificity; and (6) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried in Canada. (See *Neuwirth v. DaCosta.*)

The process in Canada is not just a rubberstamp on a letter of request. Rather, the Canadian court carefully considers the evidence requested. It is important that the letters rogatory are precisely drafted in order to enforce them in Canada. Counsel seeking to enforce the letters rogatory are required to provide a detailed list of documents as well as evidence of their relevance and necessity for trial.

A case that considers witness rights in parallel cross-border proceedings is *Treat America Limited v. Leonidas*. The Ontario Court of Appeal confirmed an order compelling the former CEO of a Canadian company to attend at a deposition in Canada to give evidence in a US class action; this happened despite the fact that the former CEO was the subject of criminal investigations in Canada. The former CEO opposed the order, arguing that it was unduly burdensome and that its enforcement would be contrary to public policy, as a result of his right against self-incrimination. In its reasons, the court addressed how the principles of sovereignty and comity co-relate in the context of enforcement of a letter of request, and when public policy or sovereignty override the comity principle. In this case, the Court of Appeal determined that the Appellant's rights under the *Canadian Charter of Rights and Freedoms* were not violated and, therefore, the enforcement of the letters of request was not contrary to public policy.

Norwich Pharmacal orders can also be used to obtain evidence from Canadian non-parties. These orders are discussed below.

Freezing orders

In Canada, an order can be made to prevent a party from removing, spending or dissipating his or her assets in the course of litigation. This order is called a *Mareva* injunction. Generally, the Canadian courts require that the applicant show a strong *prima facie* or good arguable case, and a real risk that the defendant will remove or dissipate assets to avoid judgment. Canadian courts

have also issued worldwide freezing orders. This means that the assets of the defendant are frozen, no matter where they are located. This extraterritorial order occurs when the Canadian courts have *in personam* jurisdiction over the defendant.

Conversely, Canadian courts have enforced freezing orders from foreign jurisdictions. Most of the case law on this issue originates from United Kingdom judgments.

Tracing assets

In Canada, generally, a victim of a fraudulent scheme can either follow or trace assets. These two processes are set out below.

Following the client's assets

"Following" is the exercise of following the client's assets as they move from hand to hand, and it relies on the *nemo dat* rule. *Nemo dat quod non habet* means that one cannot give that which one does not have. Once the original asset is followed to someone with good title, the victim can no longer claim the asset. However, in Canada, if fungible assets have been mixed with the fraudster's assets, there is an irrefutable presumption that those items remaining in the fraudster's possession are the innocent party's, subject to the "lowest intermediate balance" rule. The rule states that a claimant to a mixed fund cannot assert a proprietary interest in that fund in excess of the smallest balance in the fund during the interval between the original contribution and the time when a claim with respect to the contribution is being made against the fund. In Ontario, the Court of Appeal rejected the "lowest intermediate balance" rule in favour of one that allows constructive trust beneficiaries to claim a *pro rata* proprietary remedy in the entire fund, and to be reimbursed in full from the account as of the time it was frozen.

Claiming against substituted assets: tracing

"Substitution" allows the victim to substitute the traceable proceeds for the original asset as the subject matter of the claim. A trust is critical in order for the claimant to allege that the substituted property is his or hers where the fraudster is insolvent and the case involves competing creditors. In Canada, the law requires: unjust enrichment of the fraudster's estate by specific assets which belong in equity to the victim, and a connection between the asset in which ownership is claimed and the victim's contribution.

Canadian courts have identified some of the following principles in equitable tracing cases using a constructive trust:

(a) a fiduciary equitable duty is not required to trace in equity;

(b) to allow tracing, the value that the plaintiff gave to the defendant must be identified in the asset that is now claimed;

(c) at common law, the right to trace was often lost once the property being followed was mixed with other property. In equity, the mixing of the traced property is not always fatal; and

(d) trust property is not divisible among the creditors of the bankrupt.

Interim relief

Anti-suit injunctions

In appropriate circumstances, Canadian courts will grant an anti-suit injunction. The order is an *in personam* order preventing a party that is subject to the jurisdiction of Canada from participating in litigation in a foreign jurisdiction. The order has the effect of restraining the continuation of foreign proceedings. In recognition of the principles of comity and respect for foreign courts, anti-suit injunctions are rare in Canada. As established by the Supreme Court of Canada (*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*), the party seeking the order must show that the foreign court assumed jurisdiction in a manner contrary to the principles of *forum non conveniens*. Therefore, before an anti-suit injunction is brought in Canada, it is preferable if a foreign proceeding has already been commenced, and the defendant in the foreign proceeding has sought a stay or termination of that proceeding and lost. However,

this is not an absolute requirement. If the improper assumption of jurisdiction is established, the defendant to the foreign proceeding must then additionally establish that the continuation of the foreign action would result in an injustice. Determining whether there would be an injustice requires a balancing of: the loss of advantage to the plaintiff in the foreign proceeding if that foreign proceeding does not proceed, with the loss of advantage to the defendant in the foreign proceeding if the dispute is decided in the foreign court rather than a domestic court. This test, the importance of comity, and the respect for foreign courts were recently confirmed in the 2012 dismissal of an anti-suit injunction by the Ontario court in *Agemian v. Pactiv LLC*.

Forum non conveniens

Once a Canadian court has properly assumed jurisdiction in connection with a dispute, a defendant can nevertheless contest the exercise of that jurisdiction, under the doctrine of *forum non conveniens*. According to this doctrine, a Canadian court can, at its discretion, decline jurisdiction if a more appropriate forum clearly exists. The issue of *forum non conveniens* was considered and applied by the Supreme Court of Canada in 2012 (*Breeden v. Black*). The Supreme Court of Canada stated that, in considering whether a more appropriate forum clearly exists, the court can consider numerous and variable factors. Some of these factors have been codified in statutes in various Canadian provinces. While the possible factors are not limited, they include: inconvenience and expense for parties and witnesses; choice of law/applicable law; a forum selection clause (*2249659 Ontario Ltd. v. Sparkasse Siegen*); the avoidance of multiplicity of proceedings and conflicting results; enforcement of the judgment; and fairness to the parties.

Anton Piller orders

Canadian courts provide a remedy, known as an *Anton Piller* order, to preserve evidence. An *Anton Piller* order is a type of civil search warrant that permits a plaintiff to enter a defendant's premises to search for and seize evidence. *Anton Piller* orders are not easy to obtain and require the moving party to establish a strong *prima facie* case, clear evidence that the defendant has material evidence, and a real possibility that the material evidence will be destroyed if the ordinary rules of disclosure apply. Protocols are in place for carrying out the implementation of the order, including the involvement of an independent supervising solicitor, who explains the order to the defendant and ensures that the order is carried out fairly and in accordance with its terms.

Norwich Pharmacal orders

A *Norwich Pharmacal* order allows a party to obtain evidence needed to commence the action from a third party before an action is commenced. It is typically used in a suspected fraud. A *Norwich Pharmacal* order can be used to determine whether a cause of action exists, where the defendant is located, and where the defendant's assets are located. This kind of order is frequently obtained against a bank or an internet service provider.

In addition to *Mareva* injunctions (previously discussed), other interlocutory orders are available to freeze assets, in particular and limited circumstances. Instruments which have the effect of preventing a sale, mortgage or even a lease of real property can be registered on title where an interest in the land is in dispute. Different jurisdictions in Canada have a mechanism for preserving personal property where the dispute relates to specific personal property. In situations where a dispute involves a specific and identifiable fund, it may be possible to preserve those funds, pending the outcome of litigation.

Enforcement of foreign judgments

In Canada, the enforcement of foreign judgments is usually governed by provincial/territorial laws (with limited exceptions for matters falling within Canada's federal jurisdiction, pursuant to the *Federal Courts Act*).

In some instances, there is a legislative scheme for the recognition and enforcement of foreign

judgments. However, that legislative scheme is not uniform across the country. All provinces except Québec have enacted legislation making 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, part of the laws of those provinces. Some Canadian jurisdictions have enacted other reciprocal enforcement legislation governing the enforcement of certain foreign judgments, including foreign judgments from some states in the United States.

Where there is no reciprocal recognition and enforcement legislation, monetary judgments obtained in a foreign country will be recognised by Canadian courts provided that the foreign court properly exercised jurisdiction over the foreign action. Jurisdiction is properly exercised if there is a "real and substantial connection" between the foreign jurisdiction and the matter on which the foreign court adjudicated. In 2012, the Supreme Court of Canada reviewed the concept of a "real and substantial connection" in *Van Breda v. Village Resorts Ltd.* In an effort to establish parameters that would make this test more predictable and certain, the Supreme Court of Canada identified four factors which create the rebuttable presumption of a real and substantial connection: (1) domicile/residence of the defendant in a jurisdiction; (2) the defendant carrying on business in a jurisdiction; (3) a tort being committed in the jurisdiction; and (4) a contract connected to the dispute being made in the jurisdiction. This list is not exhaustive and a court can consider connections similar in nature to establish a real and substantial connection. However, neither residence of the plaintiff nor the location in which the plaintiff suffered damages are presumptive factors.

In the absence of specific legislation permitting the recognition and registration of a foreign judgment from a reciprocating jurisdiction, the enforcement of a foreign judgment in Canada is generally obtained by commencing an action. If the circumstances are such that the issues can be determined without oral evidence, it may be possible for the action to be heard by way of a summary procedure rather than a trial. The procedure is different in Québec, where the procedure is set out in the Québec *Code of Civil Procedure*. A foreign judgment is treated in the same manner as a debt, and the limitation period for commencing an action is the same limitation period that applies to a debt. In some Canadian provinces, this limitation period is as short as two years. In 2013, in *PT ATPK Resources TBK (Indonesia) v. Diversified Energy and Resource Corporation*, the Ontario Superior Court of Justice called in question whether the two-year limitation period applied to recognition of a non-monetary foreign judgment when it declined to dismiss the plaintiff's claim summarily.

Assuming jurisdiction has been established, the other criteria for the enforcement of a foreign judgment in Canada are: (1) the judgment has not been fully satisfied; (2) the judgment is final; (3) the judgment is not for a penalty, taxes or enforcement of a foreign public law; (4) enforcement of the foreign judgment does not violate Canadian public policy; (5) the judgment was not obtained by fraud; and (6) the procedure of the foreign court complies with the principles of natural justice.

In 2013, the Court of Appeal for Ontario permitted an action for enforcement of a foreign judgment to proceed not only against the defendant named in the foreign proceeding (Chevron Corp.), but also against the defendant's indirect Canadian subsidiary (Chevron Canada) (*Yaiguaje v. Chevron Corp.*). While the court did not go so far as to state that the judgment could be enforced against Chevron Canada, it did say that the issue should be determined at a trial and the action against Chevron Canada should not be summarily dismissed. Leave to appeal to the Supreme Court of Canada was granted in April, 2014.

Historically, the enforcement of foreign judgments was limited to monetary judgments. In 2006, the Supreme Court of Canada suggested that a non-monetary foreign judgment may be enforceable in Canada under certain circumstances, but declined to do so in that case (*Pro Swing Inc. v. Elta Gold Inc.*). More recently, in 2010, the Court of Appeal for Ontario permitted the enforcement of a non-monetary judgment for the first time (*United States of America v. Yemec*).

This case was soon followed by another case (*Hartzog v. McGriskin*) enforcing a foreign non-monetary judgment. The trend in Canada is now towards enforcing non-monetary foreign judgments in appropriate circumstances. Of paramount importance is that the order is clear in terms of geographic scope and in terms of what is expected of the defendant, and that the order will not unduly burden the Canadian legal system. Canadian courts recognise that a challenge in enforcing non-monetary judgments is that the enforcement could require the Canadian court to consider foreign law in order to determine the scope or intent of the order. Despite this difficulty, Canadian courts are showing an increasing willingness to enforce these orders.

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