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Transatlantic enforcement of Dutch collective settlement judgments: the case of Canada

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Abstract

This article aims to discuss the enforcement of foreign collective action and settlement judgments in Canada. More specifically, it investigates the enforceability of the decision by the Amsterdam Court of Appeal declaring binding a class settlement in the Ageas case.

The development of the Netherlands into a prime venue for (cross-border) collective settlements – including with respect to claimants and defendants residing across the Atlantic – renders a discussion of the enforceability of court decisions pertaining to the collective settlement of disputes of interest from a Dutch, EU and extra-EU perspective.

Keywords

Class action, enforcement, WCAM, Netherlands, Canada

1. Introduction

This article aims to discuss the enforcement of foreign collective action and settlement judgments in Canada. More specifically, it investigates the enforceability of the decision by the Amsterdam Court of Appeal declaring binding a class settlement in the Ageas case.

The development of the Netherlands into a prime venue for (cross-border) collective settlements – including with respect to claimants and defendants residing across the Atlantic – renders a discussion of the enforceability of court decisions pertaining to the collective settlement of disputes of interest from a Dutch, EU and extra-EU perspective.

This article proceeds in two parts. In Section 2 below, we discuss that the Dutch legal system allows for three types of recourse in mass damages situations. All these mechanisms may give rise

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to enforcement issues. These issues will become increasingly salient with the introduction of the possibility for claimants to not only collectively claim for declaratory relief, but also for monetary relief.

In Section 3 we set out the framework for enforcement of foreign judgments in Canada (between provinces and from abroad), and their particular application in the class action context. This provides for an introduction into the issues current in the context of the enforcement of both national and foreign judgments in Canada that informs Section 3. Against this background, we discuss in Section 4 the proper approach to the (transatlantic) enforcement of extraterritorial class action judgments and settlements in Canada.

We conclude (in Section 5) that there is no fundamental barrier to the recognition and enforcement of a Dutch WCAM declaration in Canada, although that result would not be automatic and the potential for refusal exists.

2. Settlement of mass claims in the Netherlands

A. Introduction

In the past ten years, the Netherlands has developed into a prime venue for (cross-border) collective settlements.[1] Examples are the settlements in *Royal Dutch Shell*[2] and *Converium*[3] and, more recently, *Ageas*[4] (formerly Fortis). These matters concerned the binding declaration of collective settlements with respect to damages allegedly suffered by (foreign) shareholders as a consequence of misleading statements.[5]

Apart from this mechanism for the binding declaration of collective settlements – laid down in the Act on the Collective Settlement of Mass Damages, known in the Netherlands as the 'WCAM'[6] – Dutch law provides for the possibility for a foundation or association which pursuant to its articles of association represents the interests of a group of claimants, to file a claim against a purported wrongdoer.[7] The WCAM has recently undergone a relevant revision, expanding the possibilities for claim vehicles to file for pecuniary (rather than just declaratory) relief.

1. T. Arons and W.H. van Boom, 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands', 21 *European Business Law Review* (2010), p. 857-884.
2. (NL) Amsterdam Court of Appeal, 29 May 2009, NL:GHAMS:2009:BI5744 (Shell). An English translation of this decision is available at: www.shellsettlement.com/docs/English-JudgmentTranslation29May09.pdf.
3. (NL) Amsterdam Court of Appeal, 12 November 2010, NL:GHAMS:2010:BO3908 (*Converium* Interim Decision); (NL) Amsterdam Court of Appeal, 17 January 2012, NL:GHAMS:2012:BV1026 (*Converium*).
4. (NL) Amsterdam Court of Appeal, 13 July 2018, NL:GHAMS:2018:2422 (*Ageas*).
5. It has been submitted that what has become known as the 'Volkswagen Diesel Scandal' might also give rise to (collective) legal action in the Netherlands. See Charles Dybus and J. Lemmen, 'Dieselgate and Consumer Law: Repercussions of the Volkswagen Scandal in the Netherlands', 6 *Journal of European Consumer and Market Law* (2017), p. 91-94.
6. WCAM is an abbreviation for *Wet Collective Afhandeling Massaschade*. The WCAM came into force on 27 July 2005. It consists of a procedural and a material part. The regulations contained in Article I of the law have been inserted in Book 7 of the Dutch Civil Code (DCC) (s. 907–910). Article II contains a new Title 14 for the Dutch Code of Civil Procedure (DCCP), in which the procedural rules are inserted (DCCP, s. 1013–1018). See H.-W. Micklitz, 'Development of Collective Legal Actions in Europe, Especially in German Civil Procedure', 17 *European Business Law Review* (2006), p. 1473-1504; and M. Parsons, 'European Class Actions', 4 *South Carolina Journal of International Law and Business* (2008), p. 35-60.
7. Article 3:305a of the DCCP.

In the following, we will shortly introduce the WCAM (Section 2.2). In Section 2.3, we discuss the other mechanism for collective recourse: the representative action. Our discussion includes an analysis of recent developments, more particularly the introduction of the possibility to claim monetary relief. Section 2.4 concerns the enforcement of settlements declared binding under the WCAM.

B. The Act on the Collective Settlement of Mass Damages or 'WCAM'

The WCAM is inspired by the U.S. damages class-action mechanism.[8] The fundamental difference with the American system is that the WCAM requires that parties representing the purported injured parties first agree a settlement with the alleged wrongdoer(s). Subsequently, the parties representing (potential) injured parties and the alleged wrongdoer(s) request the Amsterdam Court of Appeals (the 'Court') to declare the settlement binding on all injured parties, including those not represented in the discussions with the alleged wrongdoer and the application for a binding declaration of the settlement agreed in such discussions. The American system works the other way around. Here a (representative) claimant requests a competent court to order the alleged wrongdoer to pay damages to a class of injured persons.[9]

Although in practice also in the American system (binding) settlements are reached (often because litigating a damages class action is burdensome, both financially and legally), the approach under the WCAM allows for injured parties to be compensated on the basis of damage scheduling, that is, the customization of compensation for different categories of injured parties by taking into account differences in applicable law as to the compensation awarded.[10] This way lengthy and costly discussion on issues such as causality, contributory negligence, and damages incurred on the part of the individual plaintiff may be avoided. The injured party will only have to establish that he (or she) is part of a 'type of class' specifically defined in the settlement agreement.

Lastly, the WCAM brings the advantage of preventing so-called sweetheart settlements ('when class counsel allegedly settles meritorious claims for far less than they are worth') and blackmail settlements ('in which the defendant is bludgeoned into settling cases for more than they are worth' in view of the reputation and financial risks of a class action).[11]

The WCAM provides for a legal infrastructure aimed at facilitating amicable settlement. Its basic tenet is summarized in Section 907 of Book 7 of the Dutch Civil Code (DCC). Subsection 1 thereof reads:

8. See for a discussion of the WCAM's history: B. Krans, 'The Dutch Act on Collective Settlement of Mass Damages', 27 *Pacific McGeorge Global Business and Development Law Journal* (2014), p. 281, 302.
9. S.I. Strong, 'Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles', 17 *Harvard Negotiation Law Review* (2012), p. 234 et seq. For a discussion from a historical perspective: E.H. Cooper, 'Federal Class Action Reform in the United States: Past and Future and Where Next', 69 *Defense Counsel Journal* (2002), p. 432, 440.
10. H. van Lith, *The Dutch Collective Settlements Act and Private International Law* (Maklu, 2011), p. 115 and R. Polak, 'Approval of International Class Action Settlements in the Netherlands', in M. Davis, S. Carlson and F. Favia (eds.), *The International Comparative Legal Guide to Class & Group Actions 2009. A practical insight to cross-border Class and Group Actions work* (Global Legal Group, 2009).
11. B. Hay and D. Rosenberg, 'Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy', 75 *Notre Dame Law Review* (2000), p. 1377.

> An agreement concerning the payment of compensation for damage caused by an event or similar events concluded between a foundation or association with full legal competence and one or more other parties which have committed themselves by this agreement to pay compensation for this damage may, at the joint request of the parties that concluded the agreement, be declared binding by the court on persons to whom the damage was caused so long as the foundation or association represents the interests of these persons pursuant to its articles of association.

It follows from this provision that under the WCAM, the court may, irrespective of whether any litigation is pending, declare binding a settlement agreement concluded between one or more (alleged) wrongdoers and one or more foundations or associations representing the interests of a purportedly injured group or groups.

The WCAM requires that the agreed settlement in any case includes:

a) description of the group or groups of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss;
b) the most accurate possible indication of the number of persons belonging to the group or groups;
c) the compensation that will be awarded to these persons;
d) the conditions these persons must meet to qualify for the compensation;
e) the procedure by which the compensation will be established and can be obtained;
f) the name and place of residence of the person to whom the written notification referred to in Article 908(2) and (3) can be sent.[12]

The court will test, among other things, whether the amount of the compensation awarded is reasonable. In this context, the court will assess inter alia the extent of the damage, the ease and speed with which the compensation can be obtained, and the possible causes of the damage.[13] Moreover, the court will investigate whether (i) the foundation or association representing the (purported) injured parties is sufficiently representative; and (ii) whether the group of persons on whose behalf the agreement was concluded is large enough to justify a binding declaration of the settlement.[14]

In addition to these more substantive criteria, the WCAM includes certain requirements to ensure that the parties whose interests are at stake are properly notified. These requirements are aimed at safeguarding the fundamental right of access to a court established by law,[15] the right to a fair and public hearing,[16] and the fundamental principle of party autonomy.[17] More specifically, it is a requirement that interested persons are notified both at the litigation stage and after the binding declaration is issued. The former requirement is aimed at ensuring that the interested person(s) may

12. Section 7:907(2) of the DCC.
13. Section 7:907(3)(b) of the DCC.
14. Sections 7:907(3)(f) and (g) of the DCC. For a further discussion: H. van Lith, *The Dutch Collective Settlements Act and Private International Law*.
15. Laid down in Article 17 of the Dutch Constitution but also in Article 6 of the European Convention on Human Rights (ECHR).
16. Laid down in Article 6 of the ECHR.
17. This follows from the Explanatory Memorandum to the WCAM, Kamerstukken 2003/04, 29 414, No. 3, p. 4 (Explanatory Memorandum to the WCAM).

join the proceedings before the court in order to provide input on the settlement which is sought to be declared binding.[18]

The requirement that the binding declaration is properly notified to the interested persons known to the petitioners relates to the opt-out mechanism included in the WCAM.[19] This mechanism provides that a settlement that is declared binding binds all persons covered by its terms, unless an interested person opts-out in writing within a certain time period after the binding declaration. The opt-out period is set by the court, but is at least three months.[20]

For a more elaborate discussion on the technicalities of the WCAM – in particular in matters involving foreign claimants – we refer to the article entitled 'Class Actions and Arbitration: Alternative Approaches Based on the (Ever Evolving) Dutch Experiences with Collective Redress'[21] on which the above is based.

C. The Dutch collective action: from declaratory to monetary relief

1. Introduction

In addition to the possibility to request the binding declaration of a collective settlement, Dutch law provides for the possibility for a foundation or association which pursuant to its articles of association represents the interests of a group of claimants may file a claim against a purported wrongdoer. This mechanism was expanded very recently with the possibility for representative foundations to claim for monetary relief. Under the previous legislation, the representative foundation or association could (for example) claim for specific performance, for avoidance of an agreement or for declaratory relief that the wrongdoer has acted unlawfully. Also, it was permissible for the representative organization to file a petition for preliminary witness or expert hearings. Actions for damages were, however, not available.

The first proposal for revision of this part of the Dutch mechanism for collective redress dates back to 2011 but concerned relatively minor amendments.[22] A more substantive consultative proposal was published in July 2014.[23] By the end of 2016, the Minister of Justice sent a draft Bill for amendment of the collective redress mechanism to Parliament.[24] The Bill passed the House in January 2019,[25] and the Senate in in March 2019.[26] The law was announced on 1 April 2019,[27] and will be in force as of 1 January 2020.

18. Ibid.
19. Section 7:908(2) of the DCC.
20. Section 7:908(2) of the DCC.
21. B. van Zelst, 'Class Actions and Arbitration: Alternative Approaches Based on the (Ever Evolving) Dutch Experiences with Collective Redress', 35 *Journal of International Arbitration* (2018).
22. Kamerstukken II, 2011-12, 33 126, no. 2.
23. The consultation document is no longer online. For a discussion: T.M.C. Arons and G.F.E. Koster, 'Voorontwerp wet afwikkeling massachade in een collectieve actie. Het sluitstuk van de collectieve actie', *Ondernemingsrecht* No. 2014/137 (2014); and T. Bosters et. al., 'Voorontwerp afwikkeling massaschade in een collectieve actie', *NJB* No. 2015/1138 (2015).
24. Kamerstuk, 'Kamerstukken II 2016-17, 34 608, no. 2', *Kamerstuk* (2016), https://zoek.officielebekendmakingen.nl/kst-34608-2.html. For a discussion: T.M.C. Arons and G.F.E. Koster, 'Op weg naar collectief schadeverhaal in het Nederlands recht', *Ondernemingsrecht* No. 2014/86 (2014), para. 2.3.
25. Kamerstuk, 'Kamerstukken II 2018/2019, no. 46', *Kamerstuk* (2018), item 13.
26. Ibid., item 5.
27. Stb. 2019, 130.

The revised version of the Dutch collective action broadens the current scope of article 3:305a of the DCC, enabling the possibility of collective actions for monetary damages on a so called 'opt-out' basis.[28] The key features of the current legislation are the following.

2. Standing and admissibility

Under the revised collective action, representative entities have to meet certain criteria before they can bring a collective action. In short, the entity has to be 'sufficiently representative' with regards to those whom it represents and their claims. Therefore, the entity must meet several criteria regarding governance and funding; it must (i) have an appropriate and effective governance structure (including a supervisory board), (ii) be able to show that is has the experience and the expertise to bring a collective action, and (iii) have sufficient financial means to fund a collective action.

A representative entity will only be admitted in its claim if (i) the representative entity is a not-for-profit: its founders and their successors do not have the direct or indirect objective to make profit through the representative entity, (ii) the claim has a sufficiently close connection with the Netherlands, and (iii) the representative entity has made a reasonable attempt to settle the case. The legislative proposal provides that a letter that gives the defendant two weeks to respond on a settlement offer will suffice.

There are certain exceptions with respect to claims with an idealistic goal. Representative entities bringing an idealistic claim have a privileged position under the legislative proposal. First, the entity is not required to have a supervisory board. Moreover, it does not need the experience and the expertise to bring a collective action. It must however be noted that legal claims with an idealistic purpose and a very limited financial interest may not be used to obtain monetary damages. After all, this is not the primary objective of these claims.

3. Unmeritorious claims

The legislative proposal aims to protect defendants against unmeritorious claims. Unmeritorious claims are initiated, possibly with the help of third-party litigation funders, and that prevent a careful representation of collective interests. Although third-party litigation funding is not frequently used in the Netherlands, the Dutch government anticipates an increase in third-party litigation funding with regards to mass damages claims.

In order to prevent the emergence of a compensation culture, the legislative proposal includes the possibility for the court to verify and assess if the representative entity has sufficient means to finance the collective action. In addition, the court will assess whether the representative entity has sufficient control over the claim. For example, the funder may influence the decision of the representative entity whether it should enter into a settlement. Finally, the court will establish if the claim is not *prima facie* unfounded. If it does not pass the *prima facie* unfounded test, the court can order the representative entity to pay five times the normal court-approved scale of costs.

4. Jurisdiction and scope

The collective actions for mass damages can be filed at any District Court in the Netherlands. There is no specialized court that has exclusive jurisdiction on mass damages claims. The regular

28. The key features of the current legislation are discussed in B. van Zelst, 35 *Journal of International Arbitration* (2018).

Dutch laws on local jurisdiction and venue apply. In terms of international jurisdiction, the rules of the Brussels I Regulation apply.

In order to prevent foreign claimants settling disputes in Dutch proceedings with hardly any connection to the Netherlands, the legislative proposal includes a 'scope rule', entailing that the action must have a sufficiently close connection with the Dutch jurisdiction. This connection will exist if any of the following conditions are met: (i) the majority of the individuals on behalf of whom the collective action is initiated reside in the Netherlands; (ii) the defendant resides in the Netherlands; or (iii) the circumstance(s) on which the collective action is based took place in the Netherlands.

If the connection is based on the condition that the defendant resides in the Netherlands, additional circumstances should also point to a sufficient connection with the Dutch legal sphere.[29] The court assesses whether these circumstances have been met.

5. Central register

The representative entity has to register its collective action in a central register. The representative entity needs to enter the claim in a central registry of collective actions within two days after the filing of the action. This requirement is subject to disallowance. The registration includes a brief summary of the statement of claim. The entry in the registry triggers a three-month period, during which other representative entities can file alternative (competing) collective actions that are based on similar factual and legal events. After the period in which other interested entities have equally had the opportunity to file a collective action before the competent Dutch District Court, the handling of the claim will start.

6. The appointment of an exclusive representative

If several representative entities bring a collective action addressing the same legal events, the collective actions will be consolidated. The court will appoint an 'exclusive representative'. The exclusive representative represents and acts in accordance with the interests of 'the class', including the representative entities and the individual victims the collective action aims to protect. In some cases, there can be more than one exclusive representative. Although the other entities remain in the proceedings as parties, the court will decide whether to allow each entity to file their own briefs. The court also decides on the exact scope of the action and the proper definition of the 'class'.

7. Opt-out possibility

The legislative proposal is based on a single procedure on a collective claim between a representative entity, on the one hand, and a defendant, on the other hand. Individual victims are not part of the proceedings. As a general rule, a court decision granting or dismissing the collective action is binding on all members of the class who reside in the Netherlands. This also applies to members residing abroad, who joined the collective action by opting in. The decision of the court is subject to appeal to the Amsterdam Court of Appeal and, ultimately, to the Dutch Supreme Court.

Because of this, the legislative proposal offers members of the class the opportunity to indicate whether they do (not) want to be bound. Those who do not want to be represented in the collective

29. Relevant consideration may for instance be (i) the place where (a majority of) the aggrieved parties reside, and/or (ii) the location of the unlawful act that gives rise to the claim for damages.

action and bound by the decision of the court, can opt-out after the appointment of the exclusive representative. Class members will be given the opportunity to 'opt-out' of the collective action by giving notice to the court registrar. The minimum opt-out period is one month. Anyone who does not use its right to opt-out, is automatically bound by the outcome of the collective procedure.

A second opt-out option is introduced in case of a collective settlement. If in the course of the proceedings the exclusive representative and the defendant(s) reach a collective settlement, the court will review it and, if the court approves the settlement, determine a second opt-out period of at least a month. Class members who decide to opt-out of the collective settlement will have to pursue their actions individually. They can only do so by initiating legal action within six months after they have exercised their right to opt out.

8. Transitory law

Bringing a legal claim under the new legislation is only possible if the event causing the damage occurred on or after the 15th November 2016, the date on which the legislative proposal was submitted to Dutch Parliament. If a representative entity wants to bring a mass damage claim due to an event that took place before the 15th November 2016, the former legislation is applicable. If there is a series of events that took place both before and after November 15th, the applicable law is based on the date on which the last event to which the claim relates took place.

B. Enforcement of decisions under the WCAM in Europe

A last aspect relevant to international WCAM settlements is the enforceability of any (binding declaration of a) settlement abroad. On this issue, the Court in *Shell* considered that 'the binding declaration could result in the circumstance that, for example, the English court then has to recognize it.'[30] The Court implied that under the Brussels I-bis Regulation[31] courts in other Member States are in principle bound by a binding declaration by the Court. This seems a solid analysis in view of the principle of mutual trust and equivalence of the courts of the Member States, recognized by the European Court of Justice as early as 2003 in the *Gasser* case.[32] It is also congruent with the conclusions by Halfmeier and Werlauff.[33]

Ten Wolde and Peters note that a binding declaration under the WCAM may not qualify as a 'judgment' under Article 32 of the Brussels I Regulation[34] as this requires a decision by a court on points of controversy rather than an assessment of a settlement agreement between parties.[35] This

30. Shell, para. 5.22.
31. At that time: Brussels I Convention.
32. Case C-116/02 *Gasser*, EU:C:2003:657. This decision was rendered under the Brussels Convention 1968.
33. See A. Halfmeier, 'Recognition of a WCAM settlement in Germany', 2 *Nederlands Internationaal Privaatrecht* (2012); and E. Werlauff, 'A Settlement Forum for Stock Quoted Companies and Shareholders Claiming Damage: To Which Extent Does It Create Res Judicata?', 10 *European Company Law* (2013), p. 179.
34. Article 2(a) of Regulation No. 1215/2012/EU of of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1 (Brussels I-bis Regulation).
35. M.H. ten Wolde and N. Peters, 'De Wet collectieve afwikkeling massaschade: wat is zij waard in het buitenland?', 2 *Nederlands Tijdschrift voor Burgerlijk Rechtpara* (2012), p. 3; see for an analysis of the recognition issues, H. van Lith, *The Dutch Collective Settlements Act and Private International Law*, p. 34; and T. Arons and W.H. van Boom, 21 *European Business Law Review* (2010), p. 880 et seq. Bosters is of the opinion that a WCAM decision does qualify as a judgment under the Brussels I-bis Regulation. See. T. Bosters et. al., *NJB* No. 2015/1138 (2015), para. 12.4.

will in any event be the case when an interested party files a defence against the application for a binding declaration of the settlement agreement. After all, this will require the court to render a decision on this defence, thereby rendering a 'judgment on a point of controversy' under the Brussels I Regulation.

In any case, recognition and enforcement of a binding declaration in countries other than the EU Member States[36] or Switzerland, Iceland, or Norway[37] is subject to the local regime applicable in the state in which recognition and enforcement of the binding declaration is sought. In this context it is of relevance that there is no treaty in place which provides for an arrangement for recognition and enforcement in the United States or Canada of a decision by a Dutch court in a civil or commercial matter.

C. Interim conclusion

In sum, Dutch law provides for two separate mechanisms for the resolution of mass claims. These mechanisms have each proven effective. Their effectiveness is further increased by the fact that they may be applied in combination, that is, a request for binding declaration of a settlement under the WCAM may be preceded by a claim for declaratory relief that the purported wrongdoer has in fact acted unlawfully as well as a claim for monetary relief. These mechanisms also function in a cross-border or even a transatlantic context. This brings the question to what extent mass claims settlements originating in the Netherlands are enforceable in Canada.

3. The enforcement of mass claims settlements in Canada

A. The Canadian legal system – a primer

Canada is a federal state with ten provinces and three territories. Legal jurisdiction is divided, although occasionally overlapping, between the federal and provincial governments. Under the Canadian Constitution,[38] the provincial governments have authority over property and civil rights. The federal government's authority is focused principally on areas of national scope, including the criminal law, national defence, intellectual property, and inter-provincial and international undertakings.

Each province or territory has its own courts, as does the federal state for certain claims under federal law (such as tax, intellectual property and claims against the federal Crown). In civil (that is, non-criminal) matters, the provincial superior courts always have at least co-extensive jurisdiction with the Federal Court of Canada as courts of inherent jurisdiction in the tradition of the English courts.[39] Although Quebec operates primarily under a Civil Code unique to that province, its courts likewise have plenary jurisdiction in non-criminal matters touching on commercial and consumers claims, which are the types most frequently litigated in the class action context. The Supreme Court of Canada sits as the final court of appeal for all courts in the country, in both the provincial and federal systems.[40]

36. Under the Brussels I-bis Regulation.
37. Under the Lugano Convention.
38. (CA) Constitution Act, 1867 30 & 31 Victoria, c. 3 (U.K.), ss. 91-92.
39. Ibid. s. 129.
40. (CA) Section 26 of the Supreme Court Act, RSC 1985, c S-26.

B. Class actions in Canada

There is class action legislation in all but one province and the three territories.[41] Quebec was the first province to introduce class action legislation in 1978. Nine other common-law provinces introduced their own class action statutes beginning with Ontario in 1993. There is also a class proceeding procedure in the Federal Court of Canada.[42] In 2001, the Supreme Court of Canada established a common-law form of class proceeding for those provinces and territories that did not yet have explicit legislation.[43] As a consequence, it is possible to bring class proceedings anywhere in the country.

All Canadian class action legislation outside Quebec follows the same basic outline: a proposed representative plaintiff begins an action, and then brings an application for certification as a class proceeding. In deciding whether to certify the action, the adjudicating court must consider requirements of numerosity, preferability, commonality and a suitable representative plaintiff whose interests do not conflict with those of the class. There is no assessment of the underlying merits of the claim at certification, but the plaintiff must demonstrate that the claim as alleged pleads causes of action known at law. The certification criteria other than cause of action requirement must be proved on the basis of admissible evidence. Quebec's procedure imposes a somewhat lower hurdle at the 'authorization' stage, and the courts of that province do not usually consider evidence in deciding authorization.

All manner of claims have been brought as class proceedings in Canada. Among the more commonly litigated are tort claims (negligence, defective products, mass torts), competition claims (under the federal Competition Act), consumer claims (under the various provincial consumer protection statutes and at common law, such as contract or unjust enrichment), privacy claims (at common law and under statute), and breach of duty claims. Less frequent but no less significant are actions for breaches of the Canadian Charter of Rights and Freedoms, human rights, unlawful taxes or other government action, and historical wrongdoing against minority groups, such as Canada's First Peoples and LGBTQ+ persons.[44]

A class action in Canada can be resolved in one of several ways: through certification and judgment (successful or not) on the common issues at trial; through summary dismissal prior to, at or after the certification stage; by a failure to obtain certification; or by settlement, subject to court approval.[45] The principal remedy sought in most class proceedings is monetary damages, which is likely attributable at least in part to the fact that Canadian plaintiffs' lawyers operate on contingency arrangements. Infrequently, injunctive relief is sought, but not usually without an accompanying claim for damages. Relevant to the following discussion is that declaratory relief on its own has been found repeatedly not to be a suitable form of relief in a class proceeding if it is the only or principal form of relief.[46]

41. On background, see W. Branch and M.P. Good, *Class Actions in Canada* (2nd edition, Canada Law Book).
42. (CA) Federal Courts Rules, SOR/98-106, Part 5.1.
43. (CA) *Western Canadian Shopping Centres v Dutton*, [2001] 2 SCR 534.
44. See, generally: W. Branch and M.P. Good, *Class Actions in Canada*.
45. Although a claim that does not achieve certification is not as a matter of law dismissed (absent a specific application by a defendant), the practical reality is that almost all claims that do not obtain certification are not pursued further. At any stage prior to certification, a plaintiff can also discontinue their claim unilaterally, although some provinces (such as Ontario), require court approval; all jurisdictions require court approval to discontinue after certification.
46. See, for example: (CA) *Auton (Guardian of) v. British Columbia (Minister of Health)*, 1999 CanLII 5500 (BC SC); (CA) *Perron v. Canada (Attorney General of)*, 2003 CanLII 44366 (ON SC); (CA) *Roach v. Canada (Attorney*

C. The enforcement of foreign judgments: general approach

The enforcement of judgments in Canada has two aspects – recognition and enforcement. Recognition is the formal judicial acknowledgment that a foreign judgment is effective and legitimate. Enforcement permits the enforcing court to impose remedial consequences in the forum, such as permitting a judgment creditor to enforce against assets or letting the judgment creditor use other judgment enforcement processes (such as contempt orders or examination procedures to locate assets). While recognition without enforcement is rare, it is not unheard of.[47] Ordinarily, however, a judgment-holder will seek both recognition and enforcement.

Enforcement is undertaken in the superior court of a particular province or territory (or independently in more than one). Usually, the determination will be dictated by the existence of exigible assets in the jurisdiction, or the presence of the judgment debtor. As a practical matter, the party seeking to enforce the foreign judgment sues on the judgment, as one would on a debt. The enforcing court then applies the relevant common-law or statutory test to determine enforceability. Canada is not a signatory to the HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

Canada's modern approach to the recognition and enforcement of foreign judgments can be traced to the decision of the Supreme Court of Canada in 1990 in *Morguard Investments Ltd. v. De Savoye*.[48] Although ostensibly concerned only with the enforceability of judgments between the provinces and territories of the Canadian federation, the decision effectively established the framework for enforcement of all foreign judgments.[49]

In *Morguard*, the Court framed its recognition and enforcement regime around comity between states, and the principles of order and fairness which underlie the modern system of private international law. Taking inspiration from the European Economic Community, the Court 'adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants'.[50] *Morguard* has subsequently been affirmed and amplified in a series of decisions from Canada's highest court.[51]

1. The enforcement of judgments within Canada

Within the Canadian federation, judgments will be recognized and enforced in the courts of the other provinces and territories, whether at common law[52] or under specific statutory schemes designed to ensure a more streamlined process.[53] The exception, as is often the case, is Quebec,

General), 2009 CanLII 7178 (ON SC); and (CA) *Horner v. Saskatchewan (Worker's Compensation Board)*, 2009 SKQB 270.

47. See, for example: (CA) *Brown v. Miller*, 2008 BCSC 1351; and (CA) *Contacare Inc v. CIBA Vision Corp.*, 2011 ONSC 4276 (cases in which the Canadian court recognised the foreign judgment for the purpose of acceding to an argument regarding res judicata or re-litigation).
48. (CA) *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077.
49. A. Pribetic, '"Strangers in a Strange Land" – Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario', 13 *Journal of Transnational Law and Policy* (2004), p. 360.
50. (CA) *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077.
51. See, for example: (CA) *Hunt v. T&N, plc*, [1993] 4 SCR 289; (CA) *Beals v. Saldanha*, 2003 SCC 72; (CA) *Pro Swing Inc. v. Elta Golf Inc*., 2006 SCC 52; (CA) *Canada Post Corp. v. Lépine*, 2009 SCC 16; and (CA) *Chevron Corp. v. Yaiguaje*, 2015 SCC 42.
52. (CA) *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077.
53. See, for example, British Columbia's Enforcement of Canadian Judgments and Decrees Act, SBC 2003, c 29 and its Court Order Enforcement Act, RSBC 1996, c 78.

from which judgments are not automatically enforceable in the other provinces and territories and which does not automatically enforce judgments of its sister provinces.[54] Judgments and other court orders dealing with monetary awards as well as non-monetary relief (such as child custody arrangements, injunctive orders or declarations as to personal status) are equally enforceable. In some respects, the situation within the Canadian federation on cross-border enforcement of judgments is comparable to that within the EU.

2. The enforcement of non-Canadian judgments

With respect to foreign (non-Canadian) judgments, recognition and enforcement generally follows the common law procedure. Some provinces have statutorily enshrined reciprocity agreements with other jurisdictions, which permit judgments to be registered using the expedited procedure. For example, the province of British Columbia has reciprocal arrangements with each of the Australian federal states and territories, six American states, Germany, Austria, and the United Kingdom.[55] This legislation supplements but does not replace the common law.[56] No Canadian province presently has a reciprocity arrangement concerning civil or commercial judgments with the Kingdom of the Netherlands.

Under the common law procedure, a Canadian court will recognize and enforce a foreign judgment where the judgment is (a) from a court of competent jurisdiction, (b) final and conclusive, and (c) not subject to a recognized defence (including fraud, duress, or certain public policy grounds), so long as it is brought within the applicable limitation period (set in each province).

a) First requirement: Court of competent jurisdiction

The requirement that the issuing court be one of competent jurisdiction deals with its authority over the party said to be bound by the judgment. The law of Canada is that a court will have jurisdiction over a defendant where (i) the defendant is present in the forum, (ii) the defendant attorns to the court's jurisdiction, or (iii) there is a real and substantial connection between the court and forum and the party or subject matter of the underlying action. The first two grounds are known as the 'traditional' bases for jurisdiction and have lately been reaffirmed by the Supreme Court of Canada.[57]

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54. See C. Lockwood and A. Hirsh, 'Enforcing Foreign Judgments in Canada', *Osler LLP* (2018), https://www.osler.com/en/resources/regulations/2018/enforcing-foreign-judgments-in-canada. Generally, see also E. Upenieks and J. Van Kessel, *Enforcing Judgments and Orders* (2nd edition, LexisNexis Canada, 2016); and M. Koehnen and A. Klein, 'The Recognition and Enforcement of Foreign Judgments in Canada', *International Bar Association Conference 2010* (2010), https://mcmillan.ca/Files/132622_Paper_%20Recognition%20and%20Enforcement%20of%20Foreign%20Judgments%20in%20Canada%20%20-%20IBA%20Vancouver%20October%202010%20(co-%20(2).pdf.
55. (CA) Court Order Enforcement Act, RSBC 1996, c 78. Alberta, for example, has arrangements with the Commonwealth of Australia, and the American States of Washington, Idaho and Montana: Alberta Regulation 344/85 (Reciprocal Enforcement of Judgments Act – Reciprocating Jurisdictions Regulation). At the federal level, there is also the Convention between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters enacted in the Canada-United Kingdom Civil and Commercial Judgments Convention Act, RSC 1985, c C-30.
56. (CA) *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077, para. 56.
57. (CA) *Chevron Corp. v. Yaiguaje*, 2015 SCC 42.

The real and substantial connection test is a more recent articulation of the modern approach to jurisdiction over defendants. In the interests of promoting order and fairness, and respecting the comity of other nations, the Supreme Court of Canada outlined a series of presumptive factors that entitle a court to assume jurisdiction but ensured that new presumptive factors may be identified. The list of presumptive factors presently includes: (a) whether the defendant is domiciled or resident in the province; (b) whether the defendant carries on business in the province; (c) the tort was committed in the province; or (d) a contract connected with the dispute was made in the province.

Once a plaintiff has shown a presumptive connecting factor, it falls to the defendant to try and rebut it. If the court finds it has jurisdiction, it may still go on to consider whether another forum is more appropriate (the doctrine of *forum non conveniens*).[58]

The question of jurisdiction is assessed under Canadian rules, not foreign rules. As Lockwood and Hirsh noted, 'it does not matter whether or not the court properly took jurisdiction pursuant to its own local laws'.[59]

b) Second requirement: Final and conclusive judgment

The requirement of finality is considered under the law of the place where the judgment was pronounced. Under the law of that place, a judgment must be not be capable of being rescinded by the court that pronounced it. The fact that an appeal may be possible – or may change the result – is not determinative.[60]

c) Third requirement: No recognized defence

Even if the party seeking to enforce the judgment in Canada has satisfied the enforcing court that the issuing court had jurisdiction and that the judgment is final, the court may still decline to enforce it in certain circumstances. The Supreme Court of Canada has explained the public policy defence as being directed at a '"foreign law" which is contrary to the Canadian concept of justice (. . .) [and] our basic view of morality.'[61] Accordingly, a Canadian court 'will not give effect to foreign penal, revenue or other public laws, either directly or indirectly, nor will they enforce a foreign judgment for the payment of taxes or penalties or giving effect to the will of a foreign power.'[62] For the same reasons, it is a defence to enforcement if a judgment was obtained by fraud (going to either jurisdiction or the merits).[63]

A court may also refuse enforcement if the party resisting demonstrates a lack of natural justice in the foreign proceedings. This is not a question of the merits, but of the procedure employed. The Canadian judge must be satisfied that the defendant was granted a fair process. According to the Supreme Court of Canada, a '[f]air process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system.'[64]

58. (CA) *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.
59. C. Lockwood and A. Hirsh, 'Enforcing Foreign Judgments in Canada', *Osler LLP* (2018).
60. J. Walker, *Halsbury's Laws of Canada – Conflict of Laws* (LexisNexis Canada, 2016 reissue), HCF-75 at III.3(2).
61. (CA) *Beals v. Saldanha*, 2003 SCC 72, para. 71.
62. J. Walker, *Halsbury's Laws of Canada – Conflict of Laws*, HCF-75 at III.3(2).
63. (CA) *Beals v. Saldanha*, 2003 SCC 72, para. 43-53.
64. Ibid., para. 62.

A final, but rarely employed defence, is that of the inconsistent domestic judgment. Perhaps better understood as an application of the doctrine of *res judicata* or estoppel, if there is an existing Canadian judgment dealing with the same parties or subject matter, then the court may refuse subsequent enforcement of the foreign judgment.[65]

d) Differences between monetary and non-monetary foreign judgments

Historically, foreign judgments in *personam* had to be for a definite sum of money to be enforceable in Canada.[66] Generally, monetary judgments are unproblematic from an enforcement perspective, so long as the sum can be determined by simple arithmetic.[67]

Foreign non-monetary judgments may also be enforced in Canada, although the enforcing court may subject them to an additional degree of scrutiny. In 2006, the Supreme Court of Canada deliberately extended the common law rule that limited recognition and enforcement of foreign orders to final money judgments to include what it termed equitable orders.[68] In considering whether to enforce an equitable order, an enforcing Canadian court must assess the usual considerations regarding monetary judgments, and then review additional considerations including: whether the terms of the order are specific enough; whether the order is limited in scope; whether the originating court retained the power to issue further orders; whether enforcement is the least burdensome remedy for the Canadian justice system; whether the Canadian litigant is exposed to unforeseen obligations; whether third parties are affected; and whether the use of judicial resources will be consistent with what would be allowed for domestic litigants.[69] The enforcing court will be cautious, especially when the foreign order has the potential to conflict with public policy and successful examples are rare.[70]

D. The enforcement of class action certification and related judgments from sister provinces and foreign jurisdictions

There is relatively little case law in the Canadian class actions context dealing with the enforcement of class action certification orders, common issues judgments or settlements in either the inter-provincial or international sphere. The relevant decisions are set out below.

1. Certification of multi-jurisdictional classes in Canada

Important to the discussion that follows is that Canadian class proceedings statutes permit the certification of so-called 'national' or 'multi-jurisdictional' classes. That is, the statutes of most

65. See C. Lockwood and A. Hirsh, 'Enforcing Foreign Judgments in Canada', *Osler LLP* (2018), citing (CA) *South Pacific Import, Inc v. Ho,* 2009 BCCA 163.
66. J. Walker, *Halsbury's Laws of Canada – Conflict of Laws*, HCF-75 at III.3(2).
67. Ibid.
68. (CA) *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52.
69. Ibid., para. 30.
70. However, see: (CA) *United States of America v. Yemec*, 2010 ONCA 414; and (CA) *Blizzard Entertainment Inc. v. Simpson*, 2012 ONSC 4312 (foreign injunctions recognized and enforced); (CA) *Van Damme v. Gelber*, 2013 ONCA 388 (foreign order for specific performance of a contract recognized and enforced); (CA) *Bienstock v. Adenyo Inc.*, 2015 ONCA 310 (foreign order of a constructive trust recognized and enforced); and (CA) *PT ATPK Resources TBK (Indonesia) v. Hopaco Properties Limited*, 2014 ONCA 466 (foreign declaration regarding share ownership recognized and enforced).

provinces with class proceedings legislation include provision to include within the class – on an opt-out basis – residents of other Canadian provinces.[71] Although the constitutionality of these provisions has been debated at length,[72] the provincial legislatures have not altered their approach[73] and the Supreme Court of Canada has never pronounced definitively on the issue.[74] Because of constitutional limitations, a multi-district litigation (MDL) system like the one employed in the United States is not possible in Canada. It may be, therefore, that Canadian courts, legislators and practitioners have simply accepted the current reality – however infirm its juridical foundations – as the most pragmatic approach available.

When a Canadian court certifies a multi-jurisdictional or national class, there is no statutory or common-law requirement that the plaintiff, defendant or anyone else seek a recognition and enforcement order in the other provinces and territories.[75] Seeking an actual recognition and enforcement order, or parallel certification or other orders in each province or territory, is usually done reactively (in the event a new proceeding is commenced) or as part of a case management strategy by a plaintiff or defendant (that is, as part of applications to stay competing actions). If a proceeding makes its way to certification or, much less often, to judgment on the common issues, there is no precedent for seeking to enforce that judgment elsewhere in the country, as part of the ordinary practice. The cases described below will help illustrate the current realities.

2. Enforcement of 'foreign' class action judgments in Canada

This limited but not undeveloped body of jurisprudence informs the following discussion of how foreign mass claims should be enforced in Canada.

a) Enforcement of extra-provincial judgments

Within Canada, there are three notable decisions dealing with the enforceability of settlements. There are no reported decisions dealing with the recognition and enforcement of certification orders by themselves (absent settlement), or of judgments on the common issues.

The leading decision is *Canada Post Corp. v. Lépine* from the Supreme Court of Canada.[76] In that case, which dealt with an offer for life-time internet service, distributed by the federal postal corporation, an action seeking authorization was filed in Quebec in February 2002 on behalf of all Quebec residents. Another putative class action was filed in Ontario in March 2002 on behalf of all

71. See, for example: (CA) Sections 1 and 4(1) of the British Columbia Class Proceedings Act, RSBC 1996, c 50 ('multi-jurisdictional class proceedings'); and (CA) Section 6(3) of the Manitoba Class Proceedings Act, CCSM, c 130, ('resident and non-resident class members').
72. See, for example: P.W. Hogg and S.G. McKee, 'Are National Class Actions Constitutional?', 26 *National Journal of Constitutional Law* (2010), p. 279; and J. Walker, 'Are National Class Actions Constitutional? – A Reply to Hogg and McKee', 48 *Osgoode Hall Law Journal* (2010), p. 95.
73. By way of illustration, in October 2018, the British Columbia Class Proceedings Act, RSBC 1996, c 50 was amended to specifically permit national or multi-jurisdictional classes, and to bring it into line with other provinces including Alberta, Saskatchewan, Manitoba, Ontario and Quebec.
74. The Supreme Court of Canada did grant leave to consider this issue on an appeal in the Meeking decision described below, but the case was then settled before the appeal could be heard. The issue awaits a final pronouncement from the highest court in some future case.
75. Uniquely, Rule 68.10 of the Nova Scotia Civil Procedure Rules, permit a party to a class action in another jurisdiction may apply for a declaration as to the enforceability or effect in Nova Scotia of a remedy or finding in that extra-jurisdictional class action.
76. (CA) *Canada Post Corp. v. Lépine*, 2009 SCC 16.

affected persons, outside Quebec. A third proposed class action was filed in British Columbia in May 2002 for British Columbia residents. A settlement was negotiated and accepted by the Ontario and British Columbia plaintiffs. The Quebec plaintiff rejected the settlement and set a date for his authorization hearing.[77]

Before the Quebec court could render a decision on the authorization of the Quebec-only claim, the Ontario court approved the settlement and approved a class that included Quebec residents, despite being on notice that the Quebec plaintiff objected. The very next day, the Quebec court issued its reasons, authorizing the class of Quebec residents. In the face of the conflicting judgments in Ontario and Quebec, the defendant applied to recognize and enforce the Ontario settlement certification in Quebec, to prevent any further steps in the Quebec proceeding.[78]

The Quebec superior court denied recognition at first instance, holding that it did not meet the requirements of the Civil Code of Quebec. The Quebec Court of Appeal affirmed that result in unanimous reasons.[79]

On appeal to the Supreme Court of Canada, the Court held that although it found that the Ontario court had jurisdiction because the defendant was headquartered in that province, the Ontario judgment was not enforceable in Quebec because of a lack of procedural fairness. In particular, under Article 3155(3) of the Civil Code of Quebec – which mirrors the common law test for enforcement – the Court found that the notice of certification and settlement approved by the Ontario court was insufficient to enable class members residing in Quebec to understand the impact of the Ontario judgment on their rights.[80]

Justice LeBel, writing for the unanimous Court, observed:

> A class action takes place outside the framework of the traditional duel between a single plaintiff and a single defendant. In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights — in particular the possibility of opting out of the class action — they have under the judgment, and sometimes, as here, about a settlement in the case.
>
> Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights. These requirements constitute a fundamental principle of procedure in the class action context. In light of the requirement of comity between courts of the various provinces of Canada, they are no less compelling in a case concerning recognition of a judgment from within Canada. Compliance with these requirements constitutes an expression of such comity and a condition for preserving it within the Canadian legal space.[81]

77. Ibid., para. 2-11.
78. Ibid.
79. Ibid., para. 12-13.
80. Ibid., para. 46.
81. Ibid., para. 42-43.

In sum, while finding that it was potentially possible for a certified class action to capture residents of another province, the Supreme Court of Canada insisted on sufficient notice before it would enforce a binding settlement on residents of another province. On the facts, it found the notice insufficient. By reference to the test for recognition and enforcement of a foreign judgment outlined above, the Supreme Court found Ontario was a court of competent jurisdiction, made no comment on finality, but found that it was a defence to enforcement that inadequate notice led to procedural unfairness.

A similar result was reached in *Meeking v. The Cash Store Inc. et al.*[82] In that case, a plaintiff in the province of Manitoba initiated a proposed class action seeking to recover interest illegally charged on payday loans. The action in Manitoba followed an earlier claim in Ontario against some but not all of the same defendants. The Ontario action was certified and subsequently settled. The Ontario claim was certified as a national class, excluding residents of Alberta and British Columbia, where there were separate actions underway.[83]

The defendants in the Manitoba proceeding brought an application to recognize and enforce the Ontario settlement order in Manitoba to bar the action. In the result, the Manitoba court recognized and enforced the Ontario judgment in part.[84] Relying on *Lépine*, the court found that the Ontario court had jurisdiction over the defendants because they carried on business in that forum. The court further found that Ontario was an appropriate place for the action to be heard, and that it had the power to bind all class members – including those in Manitoba – observing that '[t]here is nothing inherently unfair in a court of one province making an order affecting class members resident in another province as long as the non-resident class members receive adequate notice and have an opportunity to opt out of the proceeding'.[85]

The key issue, once again, was the adequacy of notice.[86] The Manitoba court reached a conclusion similar to that in *Lépine*, finding that the notice was effective against two of the defendants, but that it failed to provide Manitoba class members sufficient information about the other defendants and types of affected loans.

The result was upheld on appeal.[87] However, the Manitoba Court of Appeal's reasoning diverged from that of the judge at first instance. On the issue of whether Ontario was a court of competent jurisdiction over non-resident class members, the Court held that the connection to the foreign forum must be examined from the perspective of the non-resident class members.[88] Applying the test from *Van Breda* regarding new presumptive factors, the Court concluded that

> in circumstances where the court has territorial jurisdiction over both the defendant and the representative plaintiff in a class action proceeding, *common issues between the claim of the representative plaintiff and that of non-resident plaintiffs is a presumptive connecting factor, sufficient to give the court jurisdiction over non-resident plaintiffs*.[89]

82. (CA) *Meeking v. The Cash Store Inc.*, 2012 MBQB 58 appeal dismissed *Meeking v. Cash Store Inc. et al.*, 2013 MBCA 81 leave to appeal to the Supreme Court of Canada granted 2014 CanLII 8254.
83. (CA) *McCutcheon v. Cash Store Inc.*, 2006 CanLII 15754 (ON SC).
84. (CA) *Meeking v. The Cash Store Inc.*, 2012 MBQB 58, para. 67.
85. Ibid., para. 51.
86. Ibid., para. 52.
87. (CA) *Meeking v. Cash Store Inc. et al.*, 2013 MBCA 81. As noted above, leave to appeal to the Supreme Court of Canada was granted, but the appeal was never heard.
88. Ibid., para. 34-97.
89. Ibid., para. 97 (emphasis added).

In the circumstances of *Meeking*, the Manitoba Court of Appeal found that there were sufficient common issues before the Ontario court in *McCutcheon* to justify the Ontario court's assumption of jurisdiction over non-resident Manitobans.[90] The Court of Appeal, however, went on to consider procedural fairness as a defence to enforcement, and agreed with the lower court that the notice was inadequate in part, and upheld the refusal to enforce the order in respect of those defendants and claims.[91]

The final relevant decision on recognition and enforcement of class proceedings orders within Canada again relates to a dispute between the Ontario and Quebec courts. In *HSBC Bank Canada v. Hocking*,[92] an Ontario plaintiff (Hocking) instituted an action against HSBC in 2003 on behalf of all Canadians relating to mortgage prepayments. Before the claim was certified, a second case was brought in Quebec on behalf of Quebec residents.

Before the Quebec claim could be certified, the parties to the Ontario action reached a settlement and sought certification. The claim was certified, notice issued and a hearing set to consider approval of the settlement. The Quebec plaintiff (Haziza) sought leave to intervene to oppose the settlement but was denied by the Ontario court. The settlement was approved.

The defendant then sought to have the judgment recognized and enforced in Quebec. The Quebec court rejected enforcement, holding that there was no real and substantial connection between HSBC's activities in Ontario and the claims of non-resident class members, since it was not headquartered in that province.[93]

In a split decision, the Quebec of Court of Appeal upheld the result and dismissed HSBC's appeal.[94] Though both the majority and minority engaged with the question of the constitutionality of national class actions in the interprovincial framework,[95] the Quebec Court of Appeal ultimately refused recognition because the Ontario judgment did not meet the requirements of the Civil Code of Quebec.

As in *Meeking*, and leaving to one side the particularities of the Civil Code, the Quebec Court of Appeal in *Haziza* held that the question of jurisdiction must be determined based on whether there is a real and substantial connection between the claims of *non-residents* and the forum.[96] Justice Bich, for the majority, wrote:

> As a class action, our case differs from the usual scenario, since the persons on whose behalf the proceeding was instituted did not consent beforehand and normally had nothing actually to do with the choice of forum or in most cases even with the designation of the person called upon to represent them. From that standpoint, the underlying logic of a class action is very different from an individual proceeding, particularly when the person who institutes the proceeding seeks to represent a group that includes non-residents or plaintiffs who, individually, are not within the jurisdiction of the forum seized. In my opinion, such a situation requires that the rules normally applied in matters of recognition of foreign judgments be adapted and, in particular, that the question of jurisdiction be examined from the standpoint of the non-residents or plaintiffs who, but for the class action, would not be within the jurisdiction of the forum seized.

90. Ibid., para. 106.
91. Ibid., para. 98-102, 109-115.
92. (CA) *Hocking v. Haziza*, 2006 QCCS 330.
93. Ibid., para. 36 and 55.
94. (CA) *Hocking v. Haziza*, 2008 QCCA 800.
95. Ibid., para. 164-165.
96. Ibid., para. 206.

On the facts, the majority of the Court of Appeal concluded that there was no real and substantial connection between Ontario and the Quebec class members[97] (although it might have ruled otherwise had the claim been pursued in British Columbia, where the defendant was headquartered).[98]

The Court of Appeal also observed that the mere acquiescence of the defendant to a proceeding cannot bind people who did not choose the forum in question, and the use of a class action cannot assign jurisdiction over those people to the foreign court merely through the defendant's consent.[99]

In addition, the Quebec Court of Appeal found that the Quebec class members had not been afforded procedural fairness in Ontario because, among other reasons, notice was inadequate. Acknowledging that the form of notice itself was sufficiently clear,[100] the impossibility of perfect notice[101] and the necessity of proportionality,[102] the majority of the Court of Appeal held that where parties seek to bind non-residents, the notice must be likely to attract the attention of individuals who otherwise had no reason to believe that their claims against the defendants would be decided by a foreign court.[103] On the facts, the Court ruled that the dissemination protocol was simply insufficient.[104]

b) Enforcement of extra-territorial judgments

There is only one reported decision in which a Canadian court has engaged with the question of the enforceability of a foreign class action settlement order. In *Currie v. McDonald's Restaurants of Canada Ltd.*,[105] the Ontario Court of Appeal ruled on two related proceedings dealing with the enforcement of a U.S. settlement in Canada.[106]

A fraud ring was uncovered in connection with various promotional contests at McDonald's restaurants worldwide. A lawsuit was brought in Illinois (McDonald's global headquarters) on behalf of a global class of customers. Eventually, a settlement was reached between the U.S. plaintiffs and McDonald's. The settlement would bind all potential claimants worldwide and provide McDonald's with a comprehensive release. A consent certification order was granted

97. Ibid., para. 220.
98. Ibid., para. 208.
99. Ibid., para. 217 ('*le seul acquiescement du défendeur à une telle procédure ne saurait lier des personnes qui n'ont pas choisi le for en question et l'utilisation du recours collectif, qui rompt avec la logique sous-jacente à l'article 3168 C.c.Q., ne peut avoir pour conséquence, grâce au consentement du défendeur, de donner au tribunal étranger compétence sur ces personnes, les assujettissant de surcroît à une procédure judiciaire et, surtout, à un droit substantiel qui ne s'appliqueraient pas à elles, individuellement considérées*'). See also ibid., para. 221 ('*le seul consentement du défendeur ne peut pallier l'absence de compétence du tribunal sur des personnes qui n'ont pas elles-mêmes manifesté (et pas même implicitement) leur volonté de participer au recours collectif institué devant un for étranger, en rapport avec un litige qui, quant à elles, n'a aucun lien réel et substantiel avec le for en question*').
100. Ibid., para. 232.
101. Ibid., para. 233-235.
102. Ibid., para. 236-237.
103. Ibid., para. 239 ('*En pareil contexte, il faut que l'avis soit de nature à attirer l'attention d'individus qui n'ont autrement aucune raison de croire que leurs réclamations contre HSBC seront ou pourront être décidées par un tribunal ontarien. Pour cela, l'avis doit être assez fréquent et visible pour qu'on puisse raisonnablement conclure à leur effet de «signal», tenant compte de la notoriété dont le recours peut jouir par ailleurs – et qui est ici inexistante*').
104. Ibid., para. 240-245.
105. (CA) *Canada Post Corp. v. Lépine*, 2005 CanLII 3360.
106. The two cases were (CA) *Currie* (2004), 4 CPC (6th) 299 (ON SCJ) and (CA) *Parsons v. McDonald's Restaurants of Canada Ltd.* (2004), 45 CPC (5th) 304 (ON SCJ).

by the Illinois state court, and further hearings set to consider settlement approval and notice. Notice to Canadian customers was specifically addressed, and dissemination through certain publications in that country was approved.[107]

After notice was published in Canada, but before the settlement was finally approved in the United States, a proposed class action on behalf of Canadians was instituted in Ontario by Preston Parsons. Parsons even made objections at the settlement approval hearing in the United States. While the American judge had his decision on settlement approval under reserve, a second action was instituted in Ontario by Greg Currie.[108]

The American judge subsequently approved the proposed settlement over the Canadians' objections. The defendants then moved in Ontario to dismiss or stay the Canadian actions on the basis that the Illinois judgment had finally disposed of their claims. At first instance, the motions judge agreed to stay the *Parsons* action because he had personally attorned to the Illinois court to object to the settlement. However, the motions judge refused to enforce the Illinois judgment against the *Currie* action because he found that notice was so inadequate as to violate the rules of natural justice. He declined to recognize and enforce the judgment in Ontario.[109]

On appeal, Justice Sharpe employed the real and substantial connection test from *Morguard* to determine whether the Illinois court had jurisdiction over the claims from the perspective of the non-resident class members.[110] In reasoning that was repeated and endorsed in *Haziza*, *Lépine* and *Meeking*, he held as follows:

> Recognition and enforcement rules should take into account certain unique features of class action proceedings. In this case, we must consider the situation of the unnamed, non- resident class plaintiff. In a traditional non-class action suit, there is no question as to the jurisdiction of the foreign court to bind the plaintiff. (. . .)
>
> Here, the tables are turned. It is the defendant who is seeking to enforce the judgment against the unnamed, non-resident plaintiffs. The settling defendants, plainly bound by the judgment, seek to enforce it as widely and as broadly as possible in order to preclude further litigation against them. (. . .) Before enforcing a foreign class action judgment against Ontario residents, we should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected.
>
> To determine whether the assumption of jurisdiction by the foreign court satisfies the real and substantial connection test and the principles of order and fairness, it is necessary to consider the situation from the perspective of the party against whom enforcement is sought. (. . .)
>
> The position of the class action plaintiff is not the same as that of a typical defendant. Rules for recognition and enforcement of class action judgments should reflect those differences. Class action regimes typically impose upon the court a duty to ensure that the interests of the plaintiff class members are adequately represented and protected. This is a factor favouring recognition and enforcement against unnamed class members (. . .).[111]

107. (CA) *Canada Post Corp. v. Lépine*, 2005 CanLII 3360, para. 3.
108. Ibid.
109. Ibid., para. 4-6.
110. Ibid., para. 18 and 21. Note that through we are concerned with residency and not with other concepts such as citizenship.
111. Ibid., para. 16-18, 20.

On the facts, the Ontario Court of Appeal did not come to a firm conclusion on whether the Illinois court was a court of competent jurisdiction vis-à-vis the Ontario class members, though it found that there were factors supporting both the assumption and denial of jurisdiction.[112] It did, however, uphold the conclusion of the judge at first instance that notice had been inadequate, on the evidence presented, and that alone was enough to deny recognition and enforcement of the Illinois judgment.[113]

There are some examples of cases in which Canadian actions – whether certified or not – have been settled and discontinued cooperatively as part of a U.S. settlement of related litigation.[114] In those cases, Canadian class members have been deliberately included among the settlement beneficiaries of the foreign judgment, with the involvement of Canadian plaintiffs' counsel. No doubt as a result of the active cooperation, these cases have not given rise to later disputes about recognition and enforcement of those settlements in Canada.

4. The WCAM in Canada: transatlantic enforcement in Canada of mass claim settlements?

Based on the existing Canadian precedent and doctrine, this Section considers how a Canadian court faced with a WCAM binding declaration that affects Canadians would approach the issue of enforceability. As noted at the outset, this issue is not merely academic, as the *Ageas* (*Fortis*) settlement and notice of the binding declaration was published in Canada.[115] It is worthwhile to carry out this exercise due to the prominent position of the Netherlands as a venue for collective settlements in the EU. Given the transnational nature of modern commerce – and the commercial links between Canada and the Netherlands – it is likely only a matter of time until this issue is the subject of court proceedings in Canada.

A. Would a Canadian court acknowledge jurisdiction in a Dutch court over Canadians?

Canadians are famously friendly towards the Netherlands on jurisdictional matters, having declared the maternity ward of the Ottawa Civic Hospital in Ontario to be extra-territorial to permit Dutch Princess Margriet to be born there during World War II without a conflict between the Dutch rule of *jus sanguinis* and the Canadian rule of *jus soli*.[116] We expect that a Canadian court approaching the question of enforceability of a WCAM binding declaration would start from a position of relative openness.

A Canadian court faced with a request for recognition and enforcement of a WCAM binding declaration would begin with the assessment of whether the Dutch court had jurisdiction over the dispute according to Canadian conflicts rules from the perspective of the Canadian residents affected.

112. Ibid., para. 22-24.
113. Ibid., para. 31, 34-43.
114. See, for example: (CA) *Wong et al. v. TJX Companies, Inc.*, 2008 CanLII 3421 (ON SCJ) (described in D.W. Kent, 'Cross-Border Class Action Settlements: Unwilling Litigants in the U.S. Courts', *American Bar Association* (2006), p 15.
115. Notice was published on at least once occasion in one of the leading national newspapers, the Globe & Mail on about August 20, 2018.
116. 'Proclamation', Canada Gazette, 26 December 1942.

If the defendant were a Dutch entity, then the analysis would be more straightforward. Applying the presumptive connecting factors from both *Van Breda*, if the defendant were domiciled or resident in the Netherlands, that would be a presumptive connecting factor, as in *Lépine*, *Meeking* and *Currie*.

If the wrongdoing took place principally in the Netherlands, and affected Canadians (and/or everyone else) identically or substantially similarly, then that might be a sufficient connecting factor, per *Van Breda* and *Currie*. Likewise, if the wrongdoing was of the same order and affected persons in Canada in the same way as others, thereby giving rise to common questions of law or fact, that would be a presumptive connecting factor, per *Meeking*. How this would be decided is an open question, given the form of proceeding under the WCAM process. Without a pleading in the traditional Anglo-Canadian sense, it would have to be an equivalency of facts to prove this presumptive connecting factor.

If, however, a defendant was only carrying on business in the Netherlands but not domiciled there, then its wrongdoing *in the Netherlands* might not be enough to justify an assumption of jurisdiction by the Dutch courts over a class including Canadians, per *Haziza*. Moreover, if a defendant is not domiciled or carrying on business in the Netherlands in a way that is material to its global operations or the wrongdoing said to affect Canadians, a defendant's *consent* to Dutch jurisdiction is likely not a sufficient basis for jurisdiction, per *Haziza*. Recognition and enforcement in Canada might be refused on that ground, too.

Based on the foregoing, it would be open to a Canadian court to find that a Dutch court acting under the Act on the Collective Settlement of Mass Damages was a court of competent jurisdiction.

B. Would a WCAM binding declaration be considered sufficiently final?

Under Canadian law, a settlement that has been approved by a court in a class proceeding would be a final judgment. Although there is the possibility of an appeal by an objector to the settlement (that is, a dissatisfied class member), that does not make the judgment any less final. The fact that settlement implementation can be a process ongoing over months or even years after settlement approval, and over which Canadian courts retain supervisory jurisdiction, does not alter the finality of the settlement order.

To extent that an approved WCAM binding declaration is not subject to further appeal or modification after the Amsterdam Court of Appeal issues the declaration, then it should be treated as final by a Canadian court in the enforcement process.

A complex situation may arise once the Dutch legislation is in force to permit opt-out claims for monetary damages. While a judgment on the merits after certification would likely be considered a final judgment capable of enforcement in Canada in the ordinary manner, a certification order alone would be less certain of enforcement. This is so for several reasons: First, in Canada, a certification order is purely procedural and a class action does not confer any rights on the parties,[117] nor does certification determine the underlying allegations. In addition, a certification order from a Canadian court is not final in the usual sense because it is always open to a court to vary it or even to de-certify the class at some later point.[118] It is perhaps

117. (CA) *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 226.

118. See, for example: Section 10 of the British Columbia, Class Proceedings Act, RSBC 1996, c 50, (if conditions for certification not satisfied, the court may at any time after certification amend the order or decertify the proceeding).

significant that the defendants in each of *Lépine*, *Meeking* and *Hocking* were not seeking to enforce the underlying certification judgment of the national class, but only the later settlement approval order.

C. Would a WCAM binding declaration be treated like a monetary or non-monetary judgment?

As set out above, a WCAM binding declaration is not a decision on the merits of the underlying controversy. Unlike a Canadian class proceeding, a Dutch court does not presently have the power to determine contested claims in a collective setting. That said, the Dutch court does adjudicate on the merits of any proposed settlement and would rule on any objections to it. If, however, Ten Wolde and Peters are correct in their view that a WCAM binding declaration is not a 'judgment' for the purposes of Brussels I-bis, the same argument could be made in a Canadian court.

For the purposes of recognition and enforcement in Canada, then, it makes sense to treat a WCAM binding declaration as a non-monetary judgment. As such, it would be subject to the more searching scrutiny standard outlined by the Supreme Court of Canada in *Pro-Swing*. Although declaratory judgments have been recognized and enforced on rare occasions,[119] it is by no means a settled area of the law. Moreover, the general reluctance of Canadian courts to permit certification of class proceedings in which the only or the principal form of relief is a declaration might weigh against enforceability.

The issue would likewise be complicated if the Dutch legislation is amended to permit opt-out claims for monetary damages. In that circumstance, for the same reasons posited above regarding finality, a certification order from a Dutch order that does not finally resolve a case would be more akin to an interlocutory or interim injunction. The enforceability of foreign interim and interlocutory injunctions in Canada remains unsettled and this might result in a higher degree of scrutiny from the enforcing court.[120]

However, given the substantive similarity between a consent certification and settlement (like *Lépine*) or a settlement following certification (like *McCutcheon/Meeking*) in Canada, and the purpose and form used to obtain a WCAM binding declaration, the focus of the inquiry (as in *Lépine, Meeking, Haziza* and *Currie*) would probably be the adequacy of notice, discussed in greater detail in the next section.

D. What defences might be raised against enforcement in Canada?

Given that the settlement review and approval procedure in a WCAM proceeding is substantially similar to the way that a Canadian court would review and assess a proposed settlement domestically, it seems realistic to assume that the principal defences would be lack of natural justice and inconsistent domestic judgments. Exceptionally, there might be an argument about whether the Act on the Collective Settlement of Mass Damages itself is a foreign public law that the courts ought not to enforce in Canada.

119. See (CA) *TBK (Indonesia) v. Hopaco Properties Limited*, 2014 ONCA 466.

120. On the current status of the enforceability of interim and interlocutory foreign judgments in Canada, see the helpful discussion in C. Lockwood and A. Hirsh, 'Enforcing Foreign Judgments in Canada', *Osler LLP* (2018).

1. Sufficiency of notice

As will be obvious from the foregoing discussion, the central question on an application for recognition and enforcement would be the sufficiency of the notice given to Canadians in connection with the WCAM binding declaration. In the context of judgment enforcement, this would be dealt with as part of the assessment of any defences, as was done in *Haziza*, *Lépine*, *Currie* and *Meeking*, even if not by reference to the test for foreign judgment enforcement from *Morguard*. Adequacy of notice is best characterized as part of the natural justice inquiry. The onus would be on the party resisting enforcement to show why notice was inadequate.

In theory, there is no reason why a WCAM binding declaration accompanied by a robust notice programme targeting Canadians could not be sufficient to overcome any objection to enforcement. In practice, however, given that the results in each of *Haziza*, *Lépine*, *Currie* and *Meeking* were conditioned by finding defects in the notice scheme, criticizing the adequacy of notice within the forum is a means of avoiding enforcement while paying lip service to comity. On this approach, fault is laid not at the feet of the responsible judge in the foreign jurisdiction, but on the parties that crafted and implemented the notice plan.

A defendant using the WCAM process and wishing to avoid this result would do well to have in place a comprehensive notice plan with specific reference to its reach to Canadian class members and evidence of how that plan was carried out.

2. Competing Canadian proceedings

The situation most likely to give rise to enforcement proceedings in Canada is if a WCAM binding declaration is issued when there are live proceedings in Canada and the defendant then seeks to enforce it against the Canadian plaintiffs. Consider the Ageas (Fortis) situation: If there had been a putative or certified Canadian class proceeding outstanding against the same or similar defendants at the time that the Amsterdam Court of Appeal made its binding WCAM declaration regarding the settlement, then the defendants would probably have tried to enforce the declaration in Canada. This would have brought the issue of enforceability into stark relief.

The usual approach in Canada to dealing with overlapping, competing or duplicative class proceedings – whether certified or not – in Canada is for a defendant to seek a stay of some or all proceedings.[121] A stay can be ordered at common law or by statute, including under the case management powers provided by the provincial class proceedings acts.[122] A stay may be permanent or temporary. One basis for a stay is res judicata – that a claim has already been determined in the same or another forum, and that the court should not permit the risk of conflicting decisions or the abuse of its offices. A stay is essentially what the defendants in *Haziza*, *Lépine*, *Currie* and *Meeking* were asking for.

In this scenario, enforcement seems less likely than in other circumstances. As was the case in *Haziza*, *Lépine*, *Currie* and *Meeking*, even where the local claim is initiated after the foreign proceeding – or in *Meeking*, after the foreign settlement – the Canadian court may reject either recognition or enforcement. If the Canadian claim had already been certified, then the inconsistent domestic decision defence might be employed.

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121. See, generally: W. Branch and M.P. Good, *Class Actions in Canada*, Chapter 12.
122. See, for example: Section 12 of the British Columbia Class Proceedings Act, RSBC 1996, c. 50, and Sections 8 and 10 of the Law and Equity Act, RSBC 1996, c 253.

3. Different defendants, different claims

One potential defence related to sufficiency of notice and conflicting claims, but not precisely the same, is the question of the parties to the WCAM binding declaration. As encountered in the *Meeking* case, the fact that the parties and claims were not identical between the foreign action sought to be enforced and the domestic action created a situation in which only part of the claim could be recognized and enforced. If the parties to the WCAM proceedings were not identical to the parties in the Canadian proceeding, then the judgment might be enforceable only against some of them.

Similarly, the fact that no legal and factual claims are asserted in a WCAM settlement and declaration in the same sense as they would be in a pleading in Canada may present a challenge for enforcement. Faced with a competing Canadian proceeding, it might be difficult for a defendant to argue res judicata when the Dutch settlement has not adjudicated the underlying allegations. It would be difficult to argue that a settlement has preclusive effect if no claims were in fact asserted or adjudicated at all. *Meeking* shows that a Canadian court may not be persuaded that a settlement covers its residents if the settled claims are not sufficiently described in the settlement or notice.

E. A potential alternative procedure

Parties to a Dutch proceeding desiring additional certainty that their WCAM settlement would be approved in Canada could consider taking advantage of the opportunities afforded by Brussels I-bis. That is, the WCAM binding declaration could be registered in a member state that is concurrently a reciprocal enforcement jurisdiction under any of the Canadian statutes. That judgment could then be registered under the streamlined process in a Canadian superior court.

By way of illustration, per Halfmeier and Werlauff, a WCAM declaration of settlement could be registered in Germany under Brussel I-bis. It would then be registered – on the basis of the German judgment – in British Columbia under its Court Order Enforcement Act, RSBC 1996, c 78, because Germany is a reciprocating jurisdiction with British Columbia.[123] Thus, without the need to go through the uncertainty and cumbersome process of suing on the Dutch judgment, the parties would have registration in Canada.

This approach would give the WCAM declaration the effectiveness and enforceability of a Canadian court at minimal cost. Based on the law from *Morguard* to *Lépine*, it would almost certainly be recognized and enforced by other Canadian courts, especially if accompanied by an effective notice programme. An unusual strategy, perhaps, but one worthy of consideration if there were a live issue concerning enforceability in Canada.

5. Conclusion

Based on the foregoing, Canadian law in theory permits the enforcement of a Dutch WCAM declaration in a Canadian court. There is no fundamental barrier to recognition and enforcement of a WCAM declaration. However, recognition and enforcement is not automatic and is not without potential difficulties. Nevertheless, these difficulties appear no greater for a WCAM declaration than they would be for a similar judgment from an American court or even from another court within the Canadian federation.

123. The authors are unaware of any law preventing this sort of chain or serial registration of judgments in Canada.

These issues may be worthy of careful consideration in the relevant case by defendants, Dutch jurists, and the judges of the Amsterdam Court of Appeal. In circumstances where there are competing proceedings in Canada and the Netherlands arising out of the same facts, or simply a material connection on the underlying situation to Canada as well as the Netherlands, parties should evaluate whether a WCAM declaration will be able to provide the relief that it is intended to. Alternatively, a WCAM declaration could be tailored to reflect the realities of litigation in multiple jurisdictions, for example by carving out Canadian residents from the scope of the relief or seeking proactive enforcement of the WCAM declaration in Canada as part of the settlement implementation process.

More broadly, it may be that Dutch legislators should assess whether enforcement challenges need to be addressed through bilateral arrangements with Canada or other similarly-situated states (such as the United States, Australia, New Zealand and the post-Brexit United Kingdom).

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