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# Finding Their Place: Plaintiff Efforts to Admit Foreign Findings in Canadian Proceedings

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## Introduction

In a limited number of exceptional cases, plaintiffs in disputes in Canada have tried to rely on findings from foreign courts in litigation involving the same products or issues to advance their cases in Canada. In this paper, we review the different ways plaintiffs have tried to rely on foreign decisions, their arguments for doing so, and the responses of the Canadian courts.

## The Plaintiff Perspective

There are a number of different reasons that plaintiffs may believe it is advantageous to admit findings from foreign judgments in Canada. These advantages vary based on the purpose for which they seek to have the findings admitted. A handful of plaintiffs in Canada have attempted to make use of foreign findings in three ways:

1. They may seek to tender the foreign judgment as admissible *simpliciter* for the fact that the judgment was rendered.

2. They may seek to tender some or all of the findings within the foreign judgment as binding facts that cannot be challenged by the Canadian defendants.

3. They may seek to tender some or all of the findings within the foreign judgment as admissible for their truth to be weighed along with other evidence led by the parties.

While each of these uses gives rise to different considerations for the court considering whether findings should be admitted, the arguments plaintiffs rely on for each use overlap.

One common argument plaintiffs advance is that fairness between the parties favours the admissibility of factual findings from foreign proceedings. They may argue that defendants should not be provided an opportunity for a 'second-kick-at-the-can' at proving or disproving a fact in a subsequent proceeding.

Plaintiffs also argue that efficiency favours the admissibility of foreign factual findings. They often assert that it is more efficient for the Canadian court to refer to findings made by the foreign court rather than reviewing the evidence underlying those findings (however, this is not necessarily true where there are factual or legal differences in the claim being advanced by the Plaintiff in the Canadian court).

A third prominent argument plaintiffs advance is that the integrity of legal systems can be undermined if findings from foreign courts are re-litigated. Inconsistent findings on factual issues may be viewed as concerning to the public or the legal community (this is an argument that has historically been advanced for recognition of judgments within Canada, but has been asserted in the context of foreign decisions more recently).

## The Traditional Responses to Re-litigation of Domestic or Foreign Proceedings

Since arguments in favour of the admissibility of foreign judgments tend to rely on (perceived) prejudices caused by re-litigation, the starting point for Canadian courts considering whether to

admit foreign findings tends to be the common law doctrines traditionally concerned with preventing re-litigation: issue estoppel and abuse of process.

Issue estoppel is a branch of *res judicata* that precludes the re-litigation of issues previously decided in another proceeding.[1] Issue estoppel is a fairly rigid and predictable rule as applied in Canada. It applies only to bar a claim under specific conditions, namely: the issue must be the same as the one decided in the prior decision; the prior judicial decision must have been final; and the parties to both proceedings must be the same or their privies.[2]

Abuse of process is a longstanding principle that the courts have a discretion to bar abusive claims. In the 2003 Supreme Court of Canada decision of *Toronto (City) v. C.U.P.E., Local 79*, the Supreme Court relied on this common law power to permit courts to dismiss claims that otherwise meet the criteria for issue estoppel except for the identity of the parties.[3] In its reasons, the Supreme Court emphasized that abuse of process is a flexible doctrine without precise boundaries. The courts have the inherent power to preclude re-litigation where the requirements of *res judicata* are not met, but the principles of judicial economy, consistency, finality and the integrity of the administration of justice are impugned. However, in our view, it is rare for the principles of judicial economy, consistency, finality and the integrity of the administration of justice to favour the admission of prior foreign findings, particularly if they involve different material facts, different parties, different evidentiary processes, and which are subject to appeal.

In the case of both issue estoppel and abuse of process, the outcome is that the offending party is prevented from raising the issue, fact or finding that is being re-litigated. They are precluded from raising the claim or the defence that has already been litigated. However, these doctrines do not necessarily inform circumstances where a plaintiff wants to admit prior findings without preclusive effect.

**The Supreme Court of Canada's Approach to Reliance on Prior Findings in *Malik***

In *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 the Supreme Court of Canada, opened the door to the admissibility of prior judicial findings even where the doctrines of issue estoppel and abuse of process do not apply. Importantly, *Malik* concerns findings from a prior Canadian decision and not a foreign court (but plaintiffs have sought to extend its reasoning).

*Malik* involved complex facts. Mr. Malik was criminally charged for offences related to the 1985 terrorist bombing of Air India Flight 182. Mr. Malik was acquitted at trial. However, the Province of British Columbia subsequently commenced proceedings for the reimbursement of legal expenses it paid for Mr. Malik's defence. In those proceedings, it sought court orders to search and seize Mr. Malik's property for evidence that he, and others, had concealed assets in order to obtain funding for his defence in the criminal trial. At first instance, the court granted an order permitting for the search and seizure of Mr. Malik's properties.

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[1] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, para. 23.

[2] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, para 23; citing *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44, para. 25.

[3] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63.

On appeal to the Supreme Court of Canada, the issue was whether the court of first instance was permitted to admit into evidence the findings and conclusions from an earlier decision of the same court (but a different judge). The prior decision in question arose from an application, in the midst of Mr. Malik's criminal trial, for an order requiring British Columbia to pay his legal defence expenses in aid of his constitutional right to a fair trial (known as a "*Rowbotham*" order).[4] That decision included a number of findings that Mr. Malik was not indigent, submitted erroneous or inconsistent evidence and that there was a collective effort by Mr. Malik and his family members to diminish the value of his estate. The British Columbia Court of Appeal held such prior findings were not admissible for their truth unless the doctrines of issue estoppel or abuse of process applied.

On appeal, the Supreme Court of Canada held that the prior findings of the trial court were admissible for their truth. In particular, it was "wrong to insist that the same series of financial transactions as had been exhaustively reviewed on the [prior] Rowbotham application had to be, in effect, tried de novo and ex parte by the [subsequent] chambers judge as if the Rowbotham proceedings had never taken place".[5]

In its reasons, the Supreme Court of Canada rejected the rule from so-called "*Hollington* Rule from the United Kingdom,[6] which stood for the proposition that prior judicial pronouncements are inadmissible hearsay or opinion.[7] This position was outright rejected as applicable in interlocutory hearings, such as the one before the Supreme Court in *Malik*, where hearsay can be admissible.[8] The Supreme Court went on to agree with jurisprudence stating that prior decisions may be admissible in a trial on the merits depending on the purpose for which it is tendered, but the courts should maintain flexibility and not prescribe rigid rules to the admissibility of prior findings.[9]

After rejecting the *Hollington* Rule, the Supreme Court of Canada went on in *Malik* to explain that the admissibility of a prior decision is separate from whether the prior finding is conclusive and binding under the doctrines of issue estoppel or abuse of process. Once admitted, the weight to be given to the earlier decision in subsequent proceedings will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity

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[4] *R. v. Malik*, 2003 BCSC 1439.

[5] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, para. 6.

[6] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, para. 52.

[7] Much like the United Kingdom, courts in Canada have grappled with the so-called "Hollington Rule" from *Hollington v Hewthorn* [1943] KB 587. The history and current status of the law in the United Kingdom is canvassed in detail in the companion paper "Recognizing and Minimizing the Potential Negative Impact of an Adverse Foreign Judgment on Settlement Discussions" authored by Ben Aram. Canadian courts have interpreted that case as standing for a narrow proposition that a criminal conviction is inadmissible as hearsay and opinion. This was reversed by statutory amendments in the common law provinces of Canada allowing the admissibility of prior criminal convictions. However, courts were left with the legacy of case law that historically viewed judicial pronouncements as inadmissible out-of-court hearsay statements tendered for their truth or as opinion evidence that has not been tendered through the regimented processes through which expert opinion is typically made admissible.

[8] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, para. 44.

[9] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, paras. 46-48.

given to the prejudiced party to contest it but on all "the varying circumstances of particular cases.[10] In summary:

> "a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues".[11]

**Two Contrasting Cases Involving Foreign Findings**

Two British Columbia Supreme Court decisions in 2014 illustrate how courts have approached the admissibility of findings from prior foreign decisions in civil litigation, although *Malik* is relied on in only one of these decisions. To our knowledge, these remain the only two cases considering the admissibility of prior foreign civil decisions in Canadian proceedings.[12]

In the decision of *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[13] the B.C. Supreme Court refused to admit foreign findings in a Canadian civil action largely because of legal and factual differences between the Canadian and foreign proceedings. That case involved a Canadian class action alleging anti-competitive business practices related to Microsoft's software. The plaintiffs sought to have the Court "adopt"[14] a list of findings from prior U.S. and European proceedings against Microsoft alleging anti-competitive conduct. The plaintiffs' principal argument was that it would be an abuse of process to allow the defendants to re-litigate adverse factual findings that had been made in prior foreign proceedings.

The B.C. Court did not find that the abuse of process doctrine had been satisfied and refused to adopt the foreign findings. The Court found, first, that competition and antitrust laws in Canada, the U.S. and the European Union had important differences. It therefore would be inappropriate to rely on factual findings drawing from different legal landscapes since many findings were "an amalgam of facts and legal tests".[15] Second, there were important factual differences between the Canadian and foreign proceedings. The relevant time period and relevant markets were different; it was not clear how helpful findings drawn from the foreign proceedings would be. Third, there were procedural differences between Canada and the foreign proceedings that affected how evidence was collected. Many of the findings from the European proceeding, for example, were

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[10] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, para. 48.

[11] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, para. 7.

[12] There are some examples where courts have relied on prior Canadian judgements involving one or more of the same parties. For example, findings were admitted in: *N.N.N. v D.E.B*, 2021 BCSC 2433 and *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47. However, other courts have read *Malik* narrowly including in *Sakab Daudi Holding Company v. Al Jabri*, 2021 ONSC 7681, para. 148 where the court held that *Malik* was not instructive of the admissibility of prior interlocutory civil decisions in a subsequent quasi-criminal matter with a different standard of proof.

[13] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2014 BCSC 1281.

[14] The decision suggests that there was some ambiguity in what the plaintiffs meant by "adopt" the findings, but the Honourable Mr. Justice Myers' reasons suggest that the plaintiffs were asking that the finding be both admitted and binding on the trial court.

[15] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2014 BCSC 1281, para. 36.

obtained in ways that would not meet the adversarial standard in Canada for establishing reliability and veracity. Finally, the Court found that adopting the findings was impractical. In the words of Justice Myers: “it will generate perpetual debates about the legal context in which the facts were found and how they should be interpreted”; and “[t]he admitting of facts on the massive and wholesale basis sought here will undoubtedly be fraught with unanticipated difficulties”.[16] The plaintiffs in *Pro-Sys Consultants Ltd. v. Microsoft Corporation* did not argue, and the Court did not consider, the impact of the *Malik* decision.

A second British Columbia decision of the same year grappled with admissibility of foreign findings but had a different outcome. In *Bank of China v. Fan*,[17] the plaintiff bank commenced proceedings in Hong Kong, the U.S., and Canada, attempting to recover its losses from a $480 million fraud originating in China. Civil and criminal judgments were obtained in Hong Kong and the U.S. against the alleged fraudsters. The plaintiff sought to rely on these prior decisions and transcripts of evidence from one prior proceeding to establish facts in the Canadian civil proceeding. A critical component of this decision is that the defendants consented to the admissibility of the foreign decisions and did not generally dispute the relevance of the prior decisions. The issue before the court was therefore confined to what use could be made of the foreign findings and evidence at trial.

The Court of first instance noted that there was a spectrum of uses for prior judicial findings. The findings could be contextual evidence to be weighed against other evidence, they could be *prima facie* proof of a fact that may be rebutted, or they may be conclusive and unassailable facts. Unlike in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, the Court did not engage in a close comparison of the law, procedures and factual similarities between the foreign proceedings and the Canadian proceeding. It appears to have been viewed as a given that the foreign proceedings were closely related. Rather, the Court reviewed the list of proposed findings and held that it would be an abuse of process to permit the defendant to re-litigate certain facts and that others would be admitted for context or as rebuttable. The exact use for each fact, however, was ultimately the discretion of the trial judge. Unfortunately, the Court’s reasons for admitting each particular fact are not detailed and therefore, offer little guidance to future litigants.

**Defence Responses**

While there are few reported decisions applying *Malik* to admit findings from a foreign judgment, the argument has been made by plaintiffs in a number of cases—both individual actions and class actions, involving different issues such as product liability and anti-trust claims. Defence counsel faced with a plaintiff seeking to admit foreign findings in Canada court proceedings have a number of arguments in response. Many of these arguments overlap and apply regardless of whether the plaintiff is seeking to admit the finding for context to be weighed with other evidence, for rebuttable proof of a fact, or as a binding preclusive finding.

The most important arguments emphasize the differences between the Canadian and foreign proceedings. These differences may include that the facts are irrelevant or inextricably intertwined

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[16] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2014 BCSC 1281, paras. 47-48.

[17] *Bank of China v. Fan*, 2014 BCSC 2043.

with irrelevant matters; tainted by material differences in substantive law; factually impacted by material differences in procedural and participatory rights; impacted by differences in parties, time periods, witnesses, experts, products, regulatory systems or documentary evidence, all of which may impact trial strategy, and ultimately the presentation and appreciation of the evidence. These arguments are important because they respond directly to all three of the plaintiff's reasons for admitting foreign findings: if the foreign proceeding was not sufficiently similar then there is no unfairness, no inefficiency and no undermining of the justice system by litigating the subsequent proceeding in the usual way.

There are also strong arguments that admitting foreign findings does not make for a more efficient trial. As identified in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, admitting prior findings can distract from the evidence before the court as the trial will break-down into a series of arguments over how to interpret findings from foreign proceedings. While there is one example where prior findings were relied on at trial,[18] that was also a case where the relevance of the foreign findings was essentially not in dispute and the same parties were involved.

An argument in opposition to the importation of foreign findings that has not been fully considered in Canada is the issue of whether the foreign findings were necessary or fundamental to the outcome of the foreign proceeding. This is an argument that features prominently in U.S. "collateral estoppel" case law. Arguably, an *obiter* finding or a fact that has not been fully considered by the foreign court may have a lower level of reliability and should not be binding. However, this may not prevent it from being admissible.

Another argument is that a trial decision that is subject to appellate review should not be relied on by the Canadian trial courts. It is unfair for a Canadian court to rely on findings that may ultimately be overturned. It may also be inefficient of the findings is overturned in the foreign court and the trial court must reconsider its admission of an overturned fact.

Finally, even if a decision is admissible against some defendants, it may not be admissible against a Canadian defendant who was not a party to the prior decision. There has been some case law suggesting that *Malik* should not apply where the prior proceeding did not involve the party against whom the prior findings are being used against.[19] However, the Supreme Court in *Malik* states that prior findings may be binding as against "the same or <u>related</u> parties or participants".[20]

**Conclusion**

In recent years, we have been involved in multiple cases where plaintiffs have tried to admit foreign findings. However, plaintiffs have largely been unsuccessful in making use of prior foreign decisions due to the strong arguments against their admission, including as identified in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*.

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[18] *Bank of China v. Fan*, 2015 BCSC 590.

[19] *Regional Municipality of Halton v. Greco*, 2021 ONSC 7339, paras. 67-69.

[20] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, para. 52.