Cross-Border Litigation Bulletin

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Enforcing US Judgments in Canada

Introduction

It may come as a surprise to hear that, although the US and Canada have entered into a number of bilateral agreements, there is no agreement that requires a Canadian Court to enforce a US judgment. As a result, there has been some uncertainty regarding when Canadian Courts will enforce US judgments. This doubt was recently removed by a decision of the Supreme Court of Canada, which confirmed the circumstances in which Canadian Courts will enforce US judgments.

In *Beals* v. *Saldanha* the Supreme Court of Canada observed that "[i]nternational comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in *Morguard* [a previous decision of the Supreme Court dealing with interprovincial enforcement of judgments]… can and should be extended beyond the recognition of interprovincial judgments".

Establishing Jurisdiction

In *Beals* the Supreme Court confirmed that a foreign judgment against a Canadian defendant is enforceable as long as there is a "real and substantial connection" between the cause of action and the foreign Court that granted the judgment. The Supreme Court explained that before a domestic Court will enforce a foreign judgment, it must determine whether there was a "significant connection" that went beyond a "fleeting or relatively unimportant" connection. When a Canadian Court determines whether to enforce a US judgment, it must examine whether there exists a "real and substantial connection" between the US jurisdiction and the proceedings. In doing so it will look at factors such as:

- The jurisdiction where the cause of action arouse.
- The jurisdiction where the parties reside.
- The jurisdiction where the physical evidence is located.
- The jurisdiction's law that applies to the action.

The Supreme Court has advised Canadian Courts against mechanically applying these factors. Instead, Courts are to view the factors as indicative of an overarching "order and fairness" requirement. Because "real and substantial connection" and "order and fairness" are inherently ambiguous concepts, this test continues to evolve through case law.

In addition to establishing that the "real and substantial connection" between the cause of action and the foreign Court which granted the judgment, the plaintiff must establish that the judgment is final in the originating jurisdiction. This does not mean that all appeals must be exhausted. If, however, the foreign judgment remains subject to appeal, a Canadian Court is likely to stay enforcement of its own judgment pending resolution of the

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US appeal. A Canadian defendant is free to appeal the US judgment in the US even after the Canadian enforcement proceedings have begun. Consequently, plaintiffs are wise to wait until after all appeal periods have lapsed before seeking enforcement in Canada.

With regard to default judgments, the Supreme Court has held that there was no logical distinction, barring unfairness, between a judgment after trial and a default judgment.

Defences Against Enforcement of Foreign Judgments

Although a Canadian Court will not retry a matter on its merits, a Canadian defendant may raise a limited number of defences regarding the US judgement in the Canadian enforcement proceedings. These include:

1. *The judgment was obtained by fraud*: The merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where previously undiscoverable material facts arise that potentially challenge the evidence that was before the foreign Court, the domestic Court could decline recognition of the judgment.

2. *The judgment was obtained in contravention of principles of natural justice*: The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. If the procedure used by the foreign Court, while valid there, is not in accordance with Canadian concepts of natural justice, the foreign judgment will be unenforceable. Natural justice encompasses guarantees of basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. It is unlikely that a judgment granted by a US Court would be found to contravene the principles of natural justice.

3. *Enforcing the judgment would be contrary to public policy*: The defendant must establish that the foreign law underlying the judgment violates the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign Court proven to be corrupt or biased. This argument would not likely succeed against a US judgment.

4. *The defendant was not a party to the foreign suit*: This simple factual question highlights the importance of ensuring that the party you are seeking enforcement against is the same entity you sued.

Procedure for Enforcing the Judgment

The lack of a reciprocal enforcement agreement between the US and Canada requires plaintiffs to initiate a separate proceeding in the Courts of the Canadian province where the defendant's assets are located to enforce the US judgment. To do so, the plaintiff issues a Statement of Claim for the amount of the US judgment, plus interest and costs. The Canadian Court then grants a judgment enforceable against the Canadian assets. Although Canada's Constitution has no explicit "full faith and credit" provision comparable to the US Constitution's provision, most Canadian provinces have enacted reciprocal enforcement legislation. These laws allow US plaintiffs granted judgment in one province to enforce the judgment in other provinces without initiating separate proceedings.

Although most US judgments are likely to be enforced by Canadian Courts, US plaintiffs who know that a Canadian defendant has significant assets in Canada might wish to consult Canadian counsel to develop an effective overarching litigation strategy before commencing proceedings in the US.

Who We Are

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Brett is an associate in the firm's Commercial Litigation and Corporate Restructuring Groups. He has a general corporate commercial litigation practice with an emphasis on financial institution litigation, insolvency and restructuring, debtor/creditor disputes and fraud. Brett regularly acts for a variety of US based corporations and financial institutions on a wide variety of litigation issues. Brett is also the editor of the firm's Financial Services Litigation Bulletin.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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