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ENFORCING U.S. JUDGMENTS IN CANADA: A PRACTICAL GUIDE

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I. INTRODUCTION

The economies of the United States and Canada are highly integrated. Canadian and American companies and citizens commonly conduct business in their neighbour's country. This transnational business sometimes leads to disputes, which can lead to litigation and court judgments. So, the question is, how does one enforce a United States (U.S.) judgment against a Canadian party in Canada?

As set out in this article, there have been significant developments in Canadian law respecting the recognition and enforcement of U.S. and other foreign judgments in Canada over the past 30 years. As a result of these developments, it is now easier, faster and cheaper to enforce foreign judgments in Canada. However, strict legal and procedural requirements remain. The purpose of this article is to provide U.S. lawyers practical advice respecting the legal and procedural requirements which will need to be met before a Canadian court will recognize and enforce a U.S. judgment. More unusual topics like foreign state immunity are beyond the scope of this paper.

II. RECOGNITION AND ENFORCEMENT IN CANADA: THE BIG PICTURE

A. Historical Approach

Historically, enforcing foreign judgments in Canada was a difficult, expensive and uncertain proposition due to the lack of legislation and clear common law principles. Prior to 1990, this resulted in repeated refusals by Canadian courts to enforce foreign judgments in cases where the Canadian defendant was either not present in the foreign jurisdiction at the time of the action or had not voluntarily attorned to the jurisdiction of the foreign court.

The effect of this restrictive approach to enforcing foreign judgments was that foreign plaintiffs in disputes with Canadian parties were either required to sue in Canada at the outset, or, where foreign judgment had been obtained, effectively re-litigate the entirety of the issues when seeking to enforce that judgment in Canada. If a foreign plaintiff did not pursue these options, a Canadian defendant could largely ignore the outcome of the foreign proceedings, knowing that a judgment on such proceedings was very likely unenforceable in Canada.

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B. The Sea Change: *Morguard Investments v. De Savoye*

In 1990, the Supreme Court of Canada dramatically changed Canada's approach to enforcement of foreign judgments in *Morguard Investments Ltd. v. De Savoye*.[2] In that case, the unanimous court set out a comprehensive set of principles and rules governing the enforcement of foreign judgments in Canada. *Morguard* dealt with the recognition and enforcement of Canadian inter-provincial judgments. Due to the absence of a "full faith and credit" type clause in the Canadian Constitution requiring the courts of one province to recognize the judgments of another province, the law respecting inter-provincial recognition and enforcement was technical, complicated and inconsistent. The Supreme Court swept away much of the old law and set down a comprehensive set of principles for the recognition and enforcement of domestic judgments.

The court's analysis centred on two main principles: comity and jurisdiction. The overarching public policy impetus was comity, i.e., the idea that a province's courts should show deference and respect to judgments from another province's courts where that court legitimately granted judgment according to its own process. The concept of jurisdiction determined whether the foreign court had legitimately granted judgment. Jurisdiction was resolved by determining whether there was a "real and substantial connection" between the court granting the judgment and the proceeding or the parties. Where such a connection existed, the court was entitled to have jurisdiction and grant judgment according to its own processes.

Applying this new analysis, the Supreme Court ruled that the court of one province should enforce a domestic judgment from another province where: (i) there was a real and substantial connection grounding the jurisdiction of the foreign province's court; and (ii) the foreign province's court reached its judgment by way of a fair process. The Supreme Court later held in *Hunt v. T & N plc*.[3] that the principle of reciprocal enforcement amongst provinces was a constitutional imperative inherent in the structure of the Canadian federal system, meaning that it was not merely a common law principle but a rule of constitutional law flowing from the Constitution itself.

Subsequent lower court decisions expanded the law to hold that the principles respecting recognition and enforcement of domestic judgments articulated in *Morguard* also applied to foreign judgments.[4] As a result of this evolution in the law Canadian courts could now enforce foreign judgments so long as the foreign court assumed and exercised its jurisdiction over the Canadian party legitimately (i.e., according to the real and substantial connection test) and reached its judgment by way of a fair process.

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[2] [1990] 3 S.C.R. 1077. [*Morguard*]

[3] [1993], 4 S.C.R. 289.

[4] See, for example, *Moses v. Shore Boat Builders, Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.) and *United States of America v. Ivery* (1996), 30 O.R. (3d) 370 (C.A.).

C. Clarification and Refinement: *Beals v. Saldanha*

In *Beals v. Saldanha*[5], a divided Supreme Court affirmed the lower court cases holding that the principles articulated in *Morguard* also applied to judgments from outside of Canada. The Supreme Court majority also clarified a number of principles relating to the enforcement of foreign judgments, including the circumstances in which a Canadian court can recognize and enforce a foreign default judgment. *Beals* is now considered the leading case in Canada respecting the recognition and enforcement of foreign judgments.

In *Beals*, two Ontario residents, Mr. and Mrs. Saldanha, owned and sold a bare piece of Florida land to two Florida residents, Mr. and Mrs. Beals, for the grand sum of U.S.$8,000. The purchasers, seemingly unhappy with the transaction, sued the Canadian vendors in Florida state court in 1986. The Florida plaintiffs properly served the Canadian defendants, who deliberately chose not to defend the Florida proceedings. The plaintiffs then took default against the Canadian defendants and subsequently obtained a U.S.$260,000 damages award from a jury. The Canadian defendants were provided notice of the judgment and damages award and again deliberately chose not to appeal on the advice of their Canadian lawyer. The Florida plaintiffs then commenced proceedings in Ontario for recognition and enforcement of the Florida judgment. By the time the enforcement proceeding was heard in Ontario court in 1998, the Florida judgment had grown to $800,000 due to interest. The trial court refused to enforce the judgment on the basis that the judgment was contrary to natural justice and public policy and had been obtained by “fraud” on the court. The Ontario Court of Appeal overturned the lower court, enforcing the judgment. The Saldanhas appealed to the Supreme Court of Canada.

In *Beals*, there was no issue over the Florida court’s jurisdiction. Because the Florida action involved a dispute over a Florida land transaction, and the Canadian defendants had been properly served according to Florida rules, there was a real and substantial connection between the Florida court, the proceedings and the Canadian defendants. The only issue was whether the affirmative defences asserted by the Canadian defendants should operate to prevent the enforcement of the Florida judgment. The Canadian defendants argued that because certain facts and evidence were not provided to the Florida court and jury, there was a “fraud” on the Florida court. The Supreme Court rejected this defence on the basis that the Canadian defendants’ decision not to defend the proceeding precluded them from challenging the evidence put before the foreign court. They had an opportunity to dispute the evidence against them, and declined it.

The Supreme Court also rejected the defendants’ argument that the Florida judgment was contrary to natural justice. The Florida judgment was made according to fair and due process pursuant to Florida law and rules which did not breach the Canadian concept of natural justice. Equally, the court dismissed the argument that the Florida judgment was, due to its nature and amount, contrary to basic Canadian morality. The Supreme Court held that such a defence was only available where the law underpinning the foreign judgment was so different from Canadian law that it violated Canadian principles of morality. While the Florida jury award was indeed large compared to Canadian law, it did not “shock the conscience” of Canadians. The Florida judgment was therefore enforceable in Canada.

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5 [2003] 3 S.C.R. 416, [*Beals*]

The reasoning in *Beals* has largely been consistently applied by Canadian lower courts.[6] The clear effect of the *Beals* decision and its progeny is that Canadian courts will be very reluctant to apply the traditional defences to enforcement of foreign judgments and where the Canadian court is satisfied that the foreign court properly assumed jurisdiction and granted judgment according to a reasonably fair process, the foreign judgment ought to be recognized and enforced in Canada.

D. Further Developments: ***Pro-Swing*** and ***Chevron***

In *Pro Swing Inc. v. ELTA Golf Inc.*,[7] the Supreme Court of Canada revisited the subject of recognition and enforcement of foreign judgments. This time, the Supreme Court recognized that the traditional common law rule limiting enforcement of foreign judgments to monetary awards was too restrictive and that foreign non-monetary orders were also enforceable in certain situations. While the court refused to enforce the specific foreign contempt order in issue, it held on a general basis that "equitable" foreign judgments, such as orders for specific performance, injunctions and asset freezing orders, were enforceable in Canada where the subject order was consistent with a broad set of enumerated guidelines, including whether the order is clear and specific, the order could and would have been made by a Canadian court in the first instance and the implementation of the order does not violate principles of public policy and natural justice. Subsequently, a number of lower court cases have further considered and refined the *Pro-Swing* principles as to when a Canadian court may enforce foreign injunctions.8

Most recently, in *Chevron Corporation, et al. v. Daniel Carlos Lusitande Yaiguaje*, *et al.*[9], the Supreme Court of Canada considered the enforcement of foreign judgments against the subsidiaries of multinational corporations. The issue before the court was whether a Canadian court had jurisdiction to hear an application by the Ecuadorian plaintiffs to enforce a U.S. $9.5 billion Ecuadorian judgment against Chevron Canada. In that case, the Supreme Court held that a foreign judgment against the corporate parent of a Canadian subsidiary could be enforced in Canada against the subsidiary where the foreign court properly assumed jurisdiction over the corporate parent and there was sufficient relationship between the corporate parent and the Canadian subsidiary. The court made it clear that in a proceeding to enforce a foreign judgment, there is no requirement for there to be a real and substantial connection between the Canadian court and the foreign proceeding or the parties. As result, the Supreme Court confirmed the Ontario court had jurisdiction and remitted the matter back to the Ontario court for determination on the merits (including whether the judgment could and should be enforced against Chevron's Canadian subsidiary). At the Ontario Court of Appeal[10], the appellants argued that the *Execution Act* allowed judgment to be enforced against Chevron Canada, and in the alternative, the court should pierce the corporate veil to allow judgment. The Court of Appeal affirmed

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6 See, for example, *Oakwell Engineering Ltd. Enerworth Industries Inc.* (2006) 81 O.R. (3d) 288 (C.A.) and *SNH Grundstuecksverwaltungsgesellschaft MBH v. Hanne*, 2104 ABCA 168.

7 2006 SCC 52. [*Pro-Swing*].

8 See, for example, *Blizzard Entertainment Inc. v. Simpson*, 2012 ONSC 4312 and *United States of America v. Yemec*, 2010 ONCA.

9 2015 SCC 42. [*Chevron*].

10 *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472.

the lower court's decision holding that the appellants were not entitled to enforce the Ecuadorian judgment against Chevron Canada.

III. RECOGNITION AND ENFORCEMENT IN CANADA: THE NUTS AND BOLTS

A. Should You Seek to Enforce in Canada?

Foreign judgment creditors seeking to enforce judgments in Canada should, as a threshold evaluation, consider whether they should seek to enforce the judgment in Canada. Is the foreign judgment against a Canadian company or citizen or simply someone who is believed to reside or have assets in Canada? Does the judgment debtor have assets in Canada? Where are the judgment debtor and its assets located? Answering these questions may require some preliminary investigation and due diligence beforehand. Without answers to these questions it is difficult to evaluate whether a foreign judgment should be enforced in Canada.

If the foreign judgment creditor knows with some certainty that the judgment debtor resides or has operations or assets in Canada, then it will need to bring the enforcement proceeding in the province where the judgment debtor or its operations or assets are located (discussed below). But if the foreign judgment creditor is uncertain whether the debtor resides, operates or has any assets in Canada, then enforcement should be delayed, subject to the limitation period, until this is determined. There is little point in beginning recognition proceedings in Canada unless the judgment creditor knows the location of the judgment debtor and has some idea whether it has exigible assets.

If the debtor can be located in Canada but it is unclear whether the debtor has any assets in Canada, then it is necessary for the foreign judgment creditor to decide whether it is prepared to take the risk of an unenforceable judgment after incurring the cost of recognition proceedings. While there are some publically accessible databases which can be searched to determine whether a judgment debtor has assets in Canada before beginning recognition proceedings, most discovery and enforcement mechanisms (e.g., examination of the debtor and compulsory production of financial documents) will normally not be available until after the foreign judgment is recognized in Canada.

B. Recognition and Enforcement at Common Law

1. The Canadian Legal System

Canada is a federal parliamentary democracy, organized into two levels of government: federal and provincial. Canada's judicial system is based upon the legal systems it inherited from its founding countries, the United Kingdom and France. The nine common-law provinces (Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia) and the three territories (Nunavut, Northwest Territories and Yukon) have legal systems based on the Anglo-common law tradition of *stare decisis* with a significant portion of the law being unwritten. The law of Quebec is based on the Franco-civil law tradition of France and is codified in the Quebec Civil Code. Federal statutory law, and the case law interpreting it, applies in all provinces.

The governmental and legal organization of Canada is set out in the Canadian Constitution which divides jurisdiction between the federal government and the provincial governments. The judicial system devolves from the Constitution and is organized into provincial superior courts and courts of appeal with a final right of appeal to the Supreme Court of Canada, whose decisions are binding on all superior courts. There is also a federal court system for certain limited subjects of federal jurisdiction and a statutorily created provincial court system in each province for lesser criminal and civil matters.

Enforcement of foreign judgments is matter of provincial jurisdiction under the Canadian Constitution. There is no national or federal method of enforcement. Rather, the judgment creditor must seek to enforce the foreign judgment in a court of the province where the judgment debtor resides or has assets. Proceedings must be brought in superior courts because the question of whether a foreign judgment ought to be recognized and enforced is a matter of "inherent jurisdiction" requiring determination by a judge appointed by the federal government under the Constitution.

Where the judgment debtor has assets in more than one province, it is normally only necessary to obtain recognition from the superior court of one province. The recognition judgment from that court can then normally be recognized and enforced in all other provinces, except for Quebec, and territories without further court proceedings through the statutory reciprocal enforcement regime which exists amongst all common law provinces. As the common law is essentially uniform in Canada with respect to the enforcement of foreign judgments, there is normally little juridical or procedural advantage to be gained by bringing action in one common law province versus another. It is usually best to seek to enforce in the province where the debtor's largest and most exigible assets are located. Quebec law, discussed below, is significantly different.

2. Procedure

It is normally necessary for the appeal period for the foreign judgment to have expired under the rules of the foreign jurisdiction. Once the appeal period has expired, and there is no appeal pending, proceedings to enforce the judgment in Canada can then be commenced.

The specific procedure for seeking recognition and enforcement of U.S. and other foreign judgments in Canada will be governed by the rules of procedure of the province where the claim is commenced. While the procedural rules of the Canadian common law provinces respecting the recognition and enforcement of foreign judgments are largely similar, they are not identical. It will be necessary to retain local counsel to advise upon and handle the proceeding. Procedural formalities are often strictly observed in recognition proceedings.

Provincial limitation statutes and substantive law will also govern limitation periods. Limitation periods vary significantly from province to province. As a result, it will be necessary to obtain local advice on the applicable limitation period. In Ontario, a recent Court of Appeal decision clarified that the applicable limitation period is the standard two year period.[11] However, the Court held that the limitation period only commences once the time to appeal the foreign judgment has expired, or if appealed, the

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[11] *Limitation Act,* SO 2002, c. 24.

date of the appeal decision.[12] British Columbia legislation expressly states there is a ten-year limitation period for enforcement of foreign judgments.[13] The limitation period will normally run from the date of the foreign judgment.

It is necessary to start a lawsuit against the judgment debtor. The action will normally seek an order for the recognition and enforcement of the foreign judgment as well as judgment for the principal amount of the foreign judgment plus interest.[14] Attorney's fees incurred in the foreign jurisdiction to obtain the foreign judgment are normally not recoverable unless they are expressly included in the foreign judgment. However, a portion of the Canadian legal fees incurred in recognizing and enforcing the judgment in Canada may be recoverable under the provincial rules of procedure.

As most provinces do not permit courts to award judgments in foreign currencies, it is normally necessary to seek the Canadian dollar equivalent of the amount of the foreign judgment. This needs to be expressly pleaded in the claim. Determining the Canadian dollar equivalent under the applicable legislation can sometimes be complicated depending on the province's legislation and rules.

Once the action has been commenced and pleadings are closed, if the judgment debtor has defended and opposed recognition, there may be some document disclosure relating to the underlying action. However, this is usually not significant as the parties are normally very familiar with each other and the issues. If the judgment debtor seeks to advance affirmative defences, document disclosure relevant to those defences may be required. Oral discovery is available but may not be requested.

Where the judgment debtor defends and opposes recognition, the plaintiff (judgment creditor) will normally bring a summary trial application seeking judgment. Such applications are typically supported by affidavits and there may be oral examination on the affidavit evidence. If the proceeding is particularly complex or controverted, summary trial application may be not suitable.[15] If a summary trial application is suitable, there will normally be an oral hearing on the merits before a judge alone. The judge will subsequently provide reasons for judgment and will either dismiss the application or grant recognition and enforcement, assuming the judge agrees the application is suitable for summary trial.

Once made, the judgment can then be converted into a form of order which will have the same force and effect as any other domestic order. The order can be enforced and executed upon as a domestic order according to the province's court order enforcement legislation and rules. The order can also be enforced and executed upon in other provinces, except for Quebec, through the reciprocal enforcement regime.

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12 *Independence Plaza 1 Associates, LLC v Figliolini*, 2017 ONCA 44

13 *Limitation Act*, SBC 2012, c. 13.

14 *Wei v. Mei*, 2019 BCCA 114. On the issue of rewriting the interest rate, the British Columbia Court of Appeal held that notional severance should be available to foreign judgments, and does not amount to a rewriting of the judgment. *Al-Marzouq v. Nafissah*, 2019 BCSC 1759. The Supreme Court of British Columbia interpreted s. 1 of the *Court Interest Rate Act* and suggested that it only applies when an amount is ordered to be paid. The court held that pre-judgment interest would be available to the plaintiff had he obtained a further judgment for interest and that amount still remained outstanding.

15 See, for example, *Lonking (China) Machinery Sales Co. Ltd. v. Zhao*, 2019 BCSC 1110. The Supreme Court of British Columbia dismissed an application for summary judgment holding that the defense of fraud and natural justice were not suitable for summary determination.

3. Substantive Test for Recognition and Enforcement

a. Recognition vs. Enforcement

At the outset, it is important to understand the distinction between recognition and enforcement. While the term "enforcement" is commonly used to describe both recognition and enforcement, the terms have different legal meanings under Canadian law. Recognition is generally considered to be the act of a Canadian court legally recognizing the validity of a foreign judgment. Enforcement is generally considered to be the act of positively putting the foreign judgment into effect. Recognition is required before enforcement. Sometimes only recognition is required, for example, where a Canadian party has obtained a dismissal order in a foreign proceeding and seeks to have that foreign dismissal order recognized in a Canadian proceeding for the purpose of asserting a res judicata defence.

b. The Test

Canadian court will recognize and enforce a foreign judgment if a foreign judgment creditor can establish the following on the evidence:

(a) the foreign judgment was issued by a court which:

(i) properly assumed jurisdiction according to the principles of private international law as applied by Canadian courts (i.e., there is a "real and substantial connection"); and

(ii) acted according to due process (i.e., assumed jurisdiction after proper service of process on the foreign defendant);

(b) the foreign judgment is final and conclusive in the original jurisdiction;[16] and

(c) the judgment is for a definite and ascertainable sum of money (or, if recognition of a foreign non-monetary order is sought, that the principles articulated in *Pro-Swing* are satisfied).

If the above elements can be established, the foreign judgment will be recognized and enforced subject to the judgment debtor establishing the existence of an affirmative defence (discussed below).

c. Jurisdiction of the Foreign Court

Due to the difficulty in establishing the affirmative defences (discussed below), opposition to enforcement often focusses on the issue of jurisdiction and due process. Judgment debtors often seek to oppose enforcement on the basis that the foreign court did not have proper jurisdiction according to Canadian conflicts of laws principles or did not provide due process. Such defences are difficult to prove, particularly where the debtor has failed to defend and oppose jurisdiction in the foreign court despite being properly served or has voluntarily attorned to the jurisdiction of the foreign court.

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[16] *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 SCR 612 at paras 29 and 91.

As set out by the Supreme Court in *Morguard* and *Beals*, the foreign court must have appropriately exercised its jurisdiction to try the case and acted in accordance with due process. Where the defendant is not physically present in the foreign jurisdiction at the time of the action (i.e., not present in the foreign state), and has not voluntarily submitted or attorned to the jurisdiction by defending or otherwise, the test for “appropriately exercised jurisdiction” is whether there is a “real and substantial connection” between the foreign court and the Canadian defendant or the subject matter of the action.

Determining whether there is a real and substantial connection, however, has often proved challenging in practice as the Supreme Court in *Morguard* and *Beals* did not articulate a comprehensive or detailed set of factors to guide judges in answering this question. As a result, there was significant variation amongst the various provincial courts as to what analysis or set of factors should be applied with concomitant result. In *Chevron*, the Supreme Court clarified matters by confirming that the analysis set out by the Supreme Court in *Beals* was the analysis to be applied.. The Supreme Court further confirmed that there is no need to apply the real and substantial connection test with respect to the jurisdiction of the enforcing Canadian court.

Accordingly, in order to prove that the foreign court properly assumed jurisdiction, the judgment creditor must establish one the following:

(a) the Canadian defendant was subject to the "personal" jurisdiction of the foreign court at the time of the foreign proceeding, for example, by residing or carrying on business, in the jurisdiction of the foreign court; or

(b) the Canadian defendant voluntarily submitted or attorned to the jurisdiction of the foreign court, for example, by appearing and defending the foreign proceeding on the merits; or

(c) there was a real and substantial connection between the foreign court and:

   (i) the subject matter of the foreign proceedings;

   (ii) the cause of action; or

   (iii) the Canadian defendant; and

   (iv) the Canadian defendant did not contest the foreign court's jurisdiction under the foreign court's laws in the foreign proceeding.[17]

The first element is fairly easy to identify and establish. Did the Canadian defendant live or carry on business in the foreign jurisdiction at the time of the foreign litigation?[18] Was the Canadian defendant served with the process for the foreign proceeding in the foreign jurisdiction according the law and rules of the foreign proceeding? If so, then the Canadian defendant will likely be found to be present in the foreign jurisdiction and subject to the jurisdiction of the foreign court. Normally, this criterion can be

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[17] *Moses v. Shore Boat Builders Ltd.* (1993), 83 BCLR (2d) 177 (CA).

[18] Note that in *Braintech v. Kostiuk*, 1999 BCCA 169, the British Columbia Court of Appeal rejected the idea that Internet statements which could be viewed by a resident in a foreign jurisdiction was insufficient to establish that the Canadian defendant was carrying on business in that jurisdiction.

established through affidavit evidence which sets out, for example, documents or other evidence that the Canadian party was resident or carried on business in the jurisdiction (e.g., property searches, corporate records) and that the defendant was properly served with the originating proceeding.

The second element can also be established fairly easily. Did the Canadian defendant take steps in the foreign proceeding which caused the defendant to submit or attorn to the jurisdiction of the foreign court according to the law and procedure of the foreign proceeding, such as, filing a defence or asking the foreign court to make any decision other than jurisdiction on the merits.[19] Was the Canadian defendant party to an agreement containing a choice of forum clause providing that the subject dispute would exclusively be resolved in the foreign court? Again, this criterion can normally be established through affidavit evidence setting out: (i) the law and procedure of the foreign jurisdiction (i.e., an affidavit of foreign law); and (ii) the steps taken by the Canadian defendant asserted to constitute submission or attornment.

The third element is the most challenging to identify and establish because there is no definitive list of factors or evidence which can be considered by a Canadian court in an enforcement proceeding. Rather, the party seeking enforcement must adduce affidavit or other evidence establishing a "real and substantial connection" between the foreign court and the foreign proceeding and/or parties. This connection must be of some significance, and must not be "fleeting or relatively unimportant."

The following factors have been found to be evidence of a real and substantial connection under Canadian conflict of law principles:

(a) the Canadian defendant was resident in the foreign jurisdiction;

(b) the Canadian defendant had a physical place of business in the foreign jurisdiction;

(c) the Canadian defendant sold goods or services into the foreign jurisdiction;

(d) the Canadian defendant was incorporated or registered to conduct business, or paid taxes, in the foreign jurisdiction;

(e) the alleged or determined wrongful conduct of the Canadian defendant occurred in the foreign jurisdiction or caused the plaintiff to suffer injuries or loss in the foreign jurisdiction;

(f) the nature of the facts and causes of action underlying the foreign proceeding.

The above list is not an exhaustive list of the connecting factors a Canadian court may consider when determining whether there was a real and substantial connection. Accordingly, it is necessary for the foreign judgment creditor to closely analyze the facts and evidence surrounding the foreign proceeding so as to marshal the best available evidence of a real and substantial connection.

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[19] Note that a Canadian defendant which opposes jurisdiction of the foreign court but otherwise simultaneously defends on the merits may be able to escape attornment under Canadian law. See, for example: *Litecubes LLC v. Northern Light Products Inc.*, 2009, BCSC 181.

It is also extremely important to show that the Canadian defendant was properly served in Canada according to the law and procedure of the foreign state and did not challenge jurisdiction in the foreign proceeding after being properly served with the originating process. Again, this can be done through affidavits of foreign law and service of process. Clear and undisputable proof of proper service of process is absolutely critical for the enforcement of foreign judgments in Canada. Many enforcement proceedings have failed due to the foreign plaintiff's failure to properly serve, and document the service, of the Canadian defendant at the outset of the foreign proceeding.[20]

C. Recognition and Enforcement by Reciprocal Enforcement Legislation

Numerous Canadian provinces have enacted legislation implementing treaties or agreements between Canada and other countries respecting the reciprocal enforcement of judgments, including the United Kingdom, Germany and Australia. Additionally, a number of provinces have legislation for the reciprocal enforcement of judgments from certain U.S. states. This legislation is a hodge-podge in that there is no uniform list of reciprocating U.S. states across Canada, since not all of the provinces' legislation includes the same reciprocating U.S. states.[21]

As a result of the differences between provincial legislation, if a judgment creditor from a U.S. state, meaning it has a judgment from the U.S. federal court in a district encompassing that state or from a state court, and the judgment creditor knows in which province it wants to enforce its judgment, then it will need to determine whether that province has reciprocating enforcement legislation and, if so, whether the subject U.S. state is a reciprocating enforcement state with that province.

If the judgment creditor is fortunate enough to have a situation where it seeks to enforce a U.S. judgment in a province which has legislation listing the originating state of the judgment as a reciprocating state, then it will have a simpler and easier process to recognize and enforce that judgment, depending on the province in question.

British Columbia, Alberta, Manitoba and Prince Edward Island allow for the statutory "registration" of reciprocal judgments, which provides a simplified procedure for the filing of a certified or sealed copy of the foreign judgment in the provincial superior court registry. Once filed, the registered judgment must be served on the Canadian defendant who then bears the onus to apply and set-aside the registration according to certain statutorily enumerated grounds[22] or any available common law defences.[23] If the

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[20] See *Beals v. Saldanha*, 2003 SCC 72 and *Wei v Li*, 2019 BCCA 114. A service procedure that is valid in a foreign jurisdiction will be rejected as invalid by Canadian courts if it does not align with Canada's concept of natural justice. However, if the minimum standard of fairness providing adequate notice and an opportunity to defend is met, a lack of personal service will not be fatal.

[21] British Columbia: *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78: Washington, Alaska, California, Oregon, Colorado and Idaho.

Alberta: *Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6. *Reciprocating Jurisdictions Regulation*, Alta Reg 344/1985: Washington, Idaho, and Montana.

PEI: *Reciprocal Enforcement of Judgments Act*, RSPEI 1988, c R-6. *Order Regulations*, PEI Reg EC846/78: Washington State.

Manitoba: *The Reciprocal Enforcement of Judgments Act*, CCSM c J20. *Reciprocal Enforcement of Judgments Regulation*, Man Reg 319/87 R: Idaho and Washington.

[22] British Columbia: *Court Order Enforcement Act*, RSBC 1996, c 78 s. 29(6): if the original court acted without jurisdiction or without authority, if the judgment debtor did not voluntarily appear or submit to the foreign court's jurisdiction, if the judgment debtor was not

defendant does not seek to set the registration aside, or is unsuccessful in seeking to set the registration aside, then the foreign judgment will have the same force and effect as a Canadian domestic judgment and can be enforced and executed upon according to Canadian law.[24] New Brunswick and Saskatchewan have different and more complex process for statutory enforcement.[25] . Ontario has reciprocal enforcement legislation allowing all Canadian jurisdictions, except Quebec, to enforce their judgments.[26] As such, the same process is followed when enforcing Quebecor foreign judgments in Ontario.

U.S. judgment creditors cannot use reciprocal enforcement legislative regimes to gain an unintended advantage in enforcement as judgment creditors can only use the legislation for the recognition and enforcement of *original judgments*.[27] For example, judgment creditors cannot take a judgment from one U.S. state which is not a reciprocating state under Canadian law and then have that U.S. judgment converted into the judgment of another U.S. state which is a reciprocating state under Canadian law. Equally, while there is no decision explicitly addressing it, foreign judgment creditors also likely cannot statutorily enforce a U.S. judgment in one province where the originating U.S. state is a reciprocating state and then enforce that judgment in another Canadian province through the inter-provincial domestic enforcement regime unless there is some legitimate basis to do so.

D. Defences to Enforcing a Foreign Judgment in Canada

1. Generally

In addition to challenging the foreign court's jurisdiction for want of due process or a real and substantial connection to the subject matter of the action, a Canadian party will always be able to assert certain "classic" affirmative common law defences to the enforcement of foreign judgments. These defences are available with respect to both common law and statutory enforcement. The onus is on the party opposing enforcement to prove an affirmative defence.

The recognized defences are as follows:

(a) the judgment was obtained by fraud;

(b) the judgment was obtained in contravention of the principles of natural justice;

(c) the enforcement of the judgment would conflict with Canadian public policy;

(d) the judgment is based on a penal, revenue (tax) or public law of the foreign jurisdiction.

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duly served, if the judgment was obtained by fraud, if an appeal was pending or the time for an appeal had not expired, if the judgment goes against public policy, if the judgment debtor would have a good defence if an action were brought on the judgment.

[23] *Walters et al v. Tolman*, 2005 BCSC 838.

[24] *Silverstar Properties Ltd., a Body Corporate v. Veinotte*, 1998 CanLII 3947 (BCSC) at para 40.

[25] New Brunswick: *Reciprocal Enforcement of Judgments Act*, SNB 2014, c 127

Saskatchewan: *Enforcement of Foreign Judgments Act*, SS 2005, c E-9.121

[26] Ontario: *Reciprocal Enforcement of Judgments Act of Jugments Act*, RSO 1990, c. R.5.

[27] *Owen v. Rocketinfo Inc.*, 2008 BCCA 502.

2. Fraud

The Supreme Court in *Beals* closely considered and significantly reduced the scope of the fraud defence. In particular, the Supreme Court abolished the concepts of "intrinsic" versus "extrinsic" fraud as being complicated, confusing and unhelpful. Instead, the court created two new concepts: (i) fraud going to jurisdiction; and (ii) fraud going to the merits of the case.

Fraud going to jurisdiction arises where, for example, it can be shown that the foreign plaintiff deceived the foreign court into assuming jurisdiction. The Supreme Court stated in *Beals* that this defence can always be raised as a defence to enforcement and that there is no requirement that the foreign defendant must have previously challenged the foreign court's jurisdiction; however, subsequent cases have viewed this statement narrowly. In numerous cases, lower courts have refused to apply the fraud going to jurisdiction defence on the basis that the foreign defendant either participated in the foreign proceeding or was aware of the facts alleged to ground jurisdiction yet did not to challenge jurisdiction or allege fraud in the foreign proceeding.[28] As a result, this defence will likely only be available where the foreign defendant either did not participate in or know of the alleged fraudulent deceptive conduct at the time of the foreign proceeding.

Fraud going to the merits of the case arises where the foreign plaintiff has committed some type of fraud or deception in the conduct of the foreign litigation which lead to the foreign court granting judgment. However, the Supreme Court in *Beals* placed serious restrictions on its availability. Fraud can only be raised as a defence where the fraud allegations are new and not the subject of prior adjudication, or where there are new and material facts not previously discoverable by the foreign defendant with due diligence at the time of the foreign proceeding. As a result, where it can be shown that the alleged fraud was raised and adjudicated, or could and should have been raised and adjudicated, in the foreign proceeding, the defence will not be available. This restriction prevents the enforcing Canadian court from essentially siting as a court of appeal over the conduct of the foreign court. Again, the circumstances in which this defence will be available and viable appear very limited.[29]

3. Denial of Natural Justice

While the foreign court is, of course, entitled to adjudicate the matter according to its own laws and procedure, for a foreign judgment to be enforceable in Canada, that law and procedure must be in accordance with the principles of natural justice recognized and applied in Canada. Where the foreign judgment was granted according to a law or procedure that is contrary to Canadian notions of fundamental justice, meaning a fair and independent process, it will not be enforceable.

Canadian courts generally view and apply this defence restrictively. Simply because the law and procedure of the foreign court is different than the laws and procedure of Canada will not, by itself, be sufficient for the operation of this defence. Rather, the Canadian court must be satisfied that one of the

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28 See, for example, *Cabaniss v. Cabaniss*, 2006 BCSC 1076, *Yeager v. Garner*, 2007 BCSC 72 and *Lang v. Lapp*, 2009 BCSC 638.

29 See, for example, *Wei v. Mei*, 2017 BCSC 157.

immutable principles of natural justice recognized in Canada has been contravened in the foreign proceeding. Such principles have been found to include the following:

(a) the defendant must be properly served with the originating process in strict accordance with the foreign court's laws respecting service of process and, where such laws differ from the laws of Canada respecting the service of process, the laws of Canada;[30]

(b) the defendant must have actual knowledge of the foreign proceeding and, upon such knowledge, have reasonable opportunity to prepare and present its case to the foreign court;[31] and

(c) the defendant must be granted a "meaningful" opportunity to be heard before a fair and independent tribunal.[32]

Canadian courts have applied this defence fairly restrictively, with exception of improper or inadequate service and notice (discussed below). As a result, it will be necessary for Canadian judgment debtors seeking to avoid enforcement to show clear and cogent proof of a major deficiency with the fairness and independence of the foreign court's process. Recently in *Kriegman v. Dill*[33], the British Columbia Court of Appeal held that a domestic court enforcing a foreign judgment has a heightened duty to ensure that the minimum standards of fairness have been applied by the court when it is alleged that natural justice was denied.

As improper or inadequate service of process is a common, and sometimes successful defence, it is critical that foreign plaintiffs take extraordinary efforts to ensure that Canadian defendants are properly served according to the laws of the foreign proceeding and, where such laws differ from Canada, the laws of Canada. Even where both the foreign law and Canadian law provide for some manner of service other than personal service, it is always recommended that Canadian defendants be served personally by way of process server and that the process server prepare a detailed affidavit attesting to such service. This avoid the potential situation of having the foreign service laws challenged as being contrary to Canada's notion of natural justice.

4. Contrary to Public Policy

The third main affirmative defence is that the enforcement of the foreign judgment would conflict with Canadian public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. It can be invoked to prevent, for example, the enforcement of foreign judgments based on foreign laws which are repugnant to basic tenets of Canadian morality or whose enforcement would "shock the conscience" of the average Canadian. In *Beals*, the Supreme Court emphasized that this defence should be narrowly applied.

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[30] *Al-Marzouq v. Nafissah*, 2019 BCSC 1759 and *Bank of Scotland PLC v. Wilson*, 2008 BCSC 770

[31] *Wei v Li*, 2019 BCCA 114 and *Walters et al v. Tolman*, 2005 BCSC 838.

[32] *United States of America v. Yemec*, 2010 ONCA 414 and *King v. Drabinsky* (2008), 91 OR (3d) 616 (CA).

[33] 2018 BCCA 86 [*Kriegman*].

5. Foreign Public Laws

There is a longstanding rule that Canadian courts will not enforce the criminal, tax or regulatory judgments of other countries.[34] This rule is based, in part, on the English principle of territorial sovereignty and the idea that one country's domestic powers should not be extra-territorially enforced. While the justifications for this rule have been challenged, and now seem artificial to some extent, the rule remains nonetheless. However, due to the increasing integration of the international tax and financial laws, the aspect of the rule relating to enforcement of foreign revenue judgments is being slowly eroded.

E. Enforcing Foreign Judgments in Quebec[35]

1. Generally

Enforcement of foreign judgments in Quebec is different from the rest of Canada. The principles and rules concerning the enforcement of foreign judgments in Quebec are codified in Title IV of Book Ten of the Civil Code of Quebec[36] and in the Code of Civil Procedure.[37]

The Code of Civil Procedure[38] requires that the application for enforcement of a non-Quebec judgment begin by way of a proceeding known as an "originating demand". Enforcement may also be sought through an application in the course of an ongoing action. The party seeking enforcement of the foreign judgment must attach to the demand or application a copy of the foreign judgment and a certificate from a "competent foreign public official" confirming that the decision is no longer appealable in the foreign state and that it is final or enforceable.

If the judgment was rendered by default in the foreign state, the Code of Civil Procedure further requires that certified documents establishing that the originating demand was properly served on the defaulting party be attached to the application or the originating demand.[39]

2. The Validity of Foreign Judgments

Once the party seeking enforcement of the foreign judgment has demonstrated that the foreign court properly took jurisdiction[40], the Civil Code of Quebec creates a presumption of validity of that

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34 *United States of America v. Ivey* (1996), 30 OR (3d) 370 (CA).

35 The Quebec law section was written by Ponora Ang of Fasken Martineau's Montreal office.

36 Civil Code of Quebec, CQLR c. C-1991.

37 Code of Civil Procedure of Quebec, CQLR, c. C-25.

38 Code of Civil Procedure of Quebec, CQLR, c. C-25, art. 507 and 508.

39 Code of Civil Procedure of Quebec, CQLR, c. C-25, art. 508.

40 *Zimmermann Inc. v. Barer*, 2016 QCCA 260 (C.A.Q.). In this decision, the Quebec Court of Appeal refused to enforce a judgment from Vermont because the plaintiff Zimmermann Inc. ("**Zimmermann**") failed to demonstrate that Vermont had any jurisdiction over the claims against the personal defendant Barer. There was initially a lawsuit between Zimmermann and Barer Engineering Company of America ("**BEC**") in Vermont. This litigation then settled and the principal of BEC signed a settlement agreement in his capacity of officer of BEC only. Later, BEC defaulted on its obligations under the settlement agreement. Zimmermann then brought a claim against Mr. Barer personally. The Quebec Court of Appeal found that Mr. Barer in his personal capacity never entered into

judgment.[41] Where the foreign court properly had jurisdiction, the Civil Code declares enforceable any judgment from that court, except in the following six circumstances:

(a) the authority of the state where the decision was rendered had no jurisdiction under the provisions of this Title;

(b) the decision, at the place where it was rendered, is subject to an ordinary remedy or is not final or enforceable;

(c) the decision was rendered in contravention of the fundamental principles of due process;

(d) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec;

(e) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations; or

(f) the decision enforces obligations arising from the taxation laws of a foreign state.

In the decision of *Mutual Trust Company v. St-Cyr*[42], the Quebec Court of Appeal interpreted article 3155 of the Civil Code of Quebec and concluded that it provides a presumption of validity to a foreign judgment. More recently, in the decision *Canada Post Corp. v. Lepine*[43], the Supreme Court of Canada confirmed that the Civil Code of Quebec creates a presumption that judgments issued by foreign courts which properly took jurisdiction must be recognized in Quebec, unless one of the exceptions cited-above is applicable.

A party resisting enforcement cannot plead that the foreign judgment was wrongfully decided on the merits and should be reversed. Article 3158 of the Civil Code of Quebec stipulates that Quebec courts are confined only to verifying whether the foreign judgment meets the prescribed requirements, without considering the underlying merits of the decision. This was confirmed by the Supreme Court of Canada in *Lepine*.[44] The Superior Court of Quebec also reiterated in *Marble Point Energy Ltd. v. Stonecroft Resources Inc.*[45] that its role is not to sit as a court of appeal over a foreign judgment.

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any agreement with Zimmermann in Vermont. Therefore, Vermont had no jurisdiction over the claim against Mr. Barer and the default judgment was unenforceable.

41 Civil Code of Quebec, CQLR c. C-1991, art. 3155.

42 CanLII 6010 (C.A.Q).

43 [2009] 1 SCR 549 [*Lepine*].

44 *Lepine*, at para 23.

45 2009 QCCS 3478 at para 51.

Recently in *Barer v. Knight Brothers LLC*,[46] the Supreme Court of Canada, interpreting the Civil Code of Quebec, considered when a foreign authority would assume proper jurisdiction for the purposes of enforcing judgment in Quebec. The Court held that a defendant submits to the jurisdiction of a foreign court when the defendant presents substantive arguments that, if accepted, would resolve the dispute - or part of the dispute - on its merits. Thus in this case, Mr. Barer submitted to the Utah Court's jurisdiction under Quebec law when he argued the merits of the case on his motion to dismiss. The Supreme Court of Canada reasoned that it would be unfair and inefficient if Mr. Barer was allowed to argue the claim on its merits in a foreign court, while still being able to challenge jurisdiction at home if he was unsuccessful.

Therefore, in the province of Quebec, once the party seeking enforcement has established that the foreign court properly took jurisdiction, the onus then shifts to the party resisting enforcement to demonstrate that the foreign judgment ought not to be enforced in Quebec under one of the stipulated exceptions.

3. Enforcement of Awards for Exemplary Damages, Punitive Damages and Legal Fees

Quebec courts have previously refused to enforce foreign judgments where the judgment was for payment of legal costs or for damages in an amount far in excess of damages which would be awarded by a Quebec court. For example, in *McKinson v. Polisuk*[47] , the Superior Court of Quebec refused to recognize a foreign judgment because it required the defendant to pay the plaintiff $1 million for legal fees. The court found that it would be contrary to the principle of public order of Quebec to enforce such an award since it is excessively onerous compared to what a Quebec court would normally award.

However, in *Société Fun Science Ciencia Divertida v. 2946033 Canada Inc.*[48], the Quebec Court of Appeal stated that the *Polisuk* decision was based on an old provision of the Code of Civil Procedure and that the existing article 3155 of the Civil Code of Quebec clearly states that the notion of public order is interpreted as understood in international relations, and not as understood in Quebec. The Quebec Court found that ordering a defeated party to reimburse the legal fees of the successful party was not in infringement of any public order rules as understood in international relations. The interpretation of article 3155 was recently narrowed by the Supreme Court of Canada in *R.S v. P.R*[49], holding that public order as understood in international relations is generally more limited than domestic law. Accordingly, if a foreign decision is inconsistent with the moral, social, economic or even political conceptions underpinning Quebec's legal order, than the decision will not be recognized.

In *Facebook Inc. v. Guerbuez*[50], the Quebec Superior Court recognized a California judgment where Facebook obtained an award of $1 billion against an individual in Quebec. While recognizing that the

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[46] 2019 SCC 13 [*Barer*].

[47] 2009 QCCS 5778 (S.C.Q) [*Polisuk*].

[48] 2014 QCCQ 238 (C.Q.).

[49] 2019 SCC 49 [*RS*].

[50] 2010 QCCS 4649 (S.C.).

$1 billion award was extraordinarily high compared to what the plaintiff would have been entitled to in Quebec, the court nonetheless enforced the judgment. Citing the Supreme Court of Canada decision in *Beals*, *supra*, the Quebec court rejected the argument that enforcing such a judgment from California would be against public order because of the shockingly high amount of the damages award.

IV. CONCLUSION

Canadian law governing the recognition and enforcement of U.S. and other foreign judgments has evolved dramatically over the past 30 years. Canadian provincial courts, including the courts of Quebec, will now enforce U.S. and other foreign judgments in most situations where the foreign court properly assumed jurisdiction according to Canadian conflicts of laws principles and provided the Canadian defendant due process. Further, in certain provinces, there is now a robust statutory regime for expedited and efficient recognition and enforcement of judgments from certain U.S. states. While traditional defences to enforcement remain, the application of these defences has been substantially narrowed.