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**Enforcing US Judgments in the Great White North**

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# ENFORCING U.S. JUDGMENTS IN THE GREAT WHITE NORTH

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## INTRODUCTION

It may come as a surprise to hear that, although the United States and Canada have entered into a number of bilateral agreements, there is no agreement that requires Canadian courts to enforce U.S. judgments. Until 1990, this meant that Canadian courts would not enforce a U.S. judgment unless a Canadian defendant had attorned (i.e., voluntarily submitted) to the U.S. court's jurisdiction or was in the U.S. during the proceedings.

All this changed dramatically in 1990 when the Supreme Court of Canada ruled that Canadian courts *should* enforce foreign judgments—including default judgments—in any case where the foreign court has acted in accordance with due process and exercised proper jurisdiction over the case under its own rules.

Explaining this dramatic reversal, the Supreme Court observed that "[t]he business community operates in a world economy...Accommodating the flow of wealth, skills and people across state lines has now become imperative." Since then, Canadian courts faced with U.S. judgments have consistently found that the issuing U.S. courts have acted in accordance with due process.

Thus, the only issue that typically arises in enforcing a U.S. judgment is whether the U.S. court appropriately

exercised jurisdiction. When a Canadian defendant has neither attorned to a U.S. court's jurisdiction nor been in the U.S. during the proceedings, Canadian courts ask whether there exists a "real and substantial connection" between the U.S. jurisdiction and the proceedings. In applying this test, Canadian courts consider, among other factors, the connection between the jurisdiction and the parties, the matters in issue, and the damages.

This means that where a defendant is not actively involved in pursuing business in the U.S. jurisdiction, a real and substantial connection between the litigation and the foreign jurisdiction may not be found. Suppose a contract between a British Columbia party and an Ohio party is executed and performed in B.C.; the B.C. court may be reluctant to enforce a judgment from an Ohio court.

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 the case law.

Canadian courts will not enforce a U.S. judgment unless the judgment is final in the originating jurisdiction, but this does not mean that all appeals must be exhausted.

However, it should be noted that if the foreign judgment remains subject to appeal, Canadian courts are likely to stay enforcement of its own judgment pending resolution of the U.S. appeal. A Canadian defendant is free to appeal the U.S. judgment in the U.S. 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.

Although Canadian courts will not retry a matter on its merits, a Canadian defendant may raise a number of defenses regarding the U.S. judgment in the Canadian enforcement proceedings. These include:

- *The judgment was obtained by fraud.* In this very limited defense, the defendant usually must prove that the facts relied on to establish fraud were not available to the originating court.
- *The judgment was obtained in contravention of principles of natural justice.* Here, the defendant must establish some procedural irregularity. An example might be that the defendant was not notified that the U.S. proceeding had been commenced.
- *Enforcing the judgment would be contrary to public policy.* The defendant must establish that the foreign law underlying the judgment violates "essential morality" by contravening a fundamental principle of justice, the prevalent conception of good morals, or deep-rooted tradition. This argument would not likely succeed against a U.S. judgment.

- *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.

In addition to the above, British Columbia courts have refused to enforce foreign judgments that exhibit a manifest error. However, this exception is used infrequently. It should also be noted that due to Quebec's separate legal system based on the Civil Code, Quebec courts apply a slightly different regime for enforcing foreign judgments.

The lack of a reciprocal enforcement agreement between the U.S. 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 U.S. judgment. To do so, the plaintiff issues a Statement of Claim for the amount of the U.S. 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 U.S. Constitution, most Canadian provinces have enacted reciprocal enforcement legislation. These laws allow U.S. plaintiffs granted judgment in one province to enforce the judgment in other provinces without initiating separate proceedings.

Although most U.S. judgments are likely to be enforced by Canadian courts, U.S. 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 U.S.