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

by

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In the past decade, the approach of Canadian courts to the enforcement of foreign judgments has been significantly liberalized - primarily with respect to judgments originating in the United States and the United Kingdom. Whereas the recognition and enforcement of foreign judgments was once the exception rather than the rule, today the reverse is true.

### **Background**

Enforcing a U.S. judgment in Canada used to be a difficult and expensive proposition. Unlike the U.S., Canada does not have an explicit “*full faith and credit*” provision in its Constitution. Prior to 1990, this translated into repeated refusals by Canadian courts to enforce foreign judgments in cases where the Canadian defendant was neither present in the foreign jurisdiction at the time of the action, nor had the Canadian defendant voluntarily attorned to the jurisdiction.

The practical effect of this approach was to force foreign plaintiffs to either litigate in a jurisdiction in which the Canadian defendant had assets or to sue the Canadian defendant anew in the appropriate Canadian court. If a foreign plaintiff chose not to pursue these options, the Canadian defendant could safely ignore the outcome of the foreign proceedings.

This approach changed dramatically, however, after the Supreme Court of Canada’s decision in *Morguard Investments Ltd. v. De Savoye*.<sup>1</sup> In that case, the unanimous Court emphasized the importance of comity, holding that Canadian courts should voluntarily enforce foreign judgments in cases in which the foreign court has exercised its

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<sup>1</sup> [1990] 3 S.C.R. 1077.

jurisdiction legitimately and has reached its judgment by way of a fair process. Thus, in essence, Canadian courts became subject to a judicially created “*full faith and credit*” obligation. The Supreme Court later clarified (in *Hunt v. T & N plc*)<sup>2</sup> that the “*full faith and credit*” principle is a constitutional imperative that is inherent in the structure of the Canadian federation.

*Morguard* and *Hunt* dealt with the enforcement of judgments between Canadian provinces, which under Canadian law have the jurisdiction to regulate enforcement of foreign judgments with respect to most areas of law. However, the Supreme Court specifically noted in *Morguard* the need in the modern world economy “*to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.*” As such, these cases must be considered in assessing the issue of the enforcement of foreign judgments in Canada.

Canada’s lower courts have almost universally applied the *Morguard* principles of enforceability to judgments originating outside Canada’s borders. This extension of *Morguard* has considerably simplified the enforcement procedure for foreign litigants.

### **Procedure for Enforcement**

An action on a U.S. judgment is usually begun by a writ endorsed with a statement of claim for the amount of the judgment, interest and costs, and can be pursued by way of a motion for summary judgment. Lawyer’s fees, court costs and the calculation of interest are handled in the same manner as any other action. Where a plaintiff is granted an order for enforcement, the plaintiff will be entitled to an award of costs, which will be assessed by the court pursuant to tariffs fixed by provincial statute.

### **The Basic Test for Enforceability**

Generally speaking, the enforceability of a U.S. judgment in Canada is determined by two guiding principles: 1) the foreign court that grants the judgment must have appropriately exercised its jurisdiction to try the case, according to its own rules; and 2) in trying the case, the court must have acted in accordance with due process. Where the defendant is not physically present in the jurisdiction at the time of the action, and has not voluntarily submitted to the jurisdiction, the test for “appropriately exercised jurisdiction” is whether there is a “real and substantial connection” between the jurisdiction and the defendant or the subject matter of the action.

As articulated in *Morguard*, the factors that point to a “real and substantial connection” between the jurisdiction and the wrongdoing at issue include the following:

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<sup>2</sup> [1993] 4 S.C.R. 289.

- Any nexus between the subject matter of the action and the territory in which the action is brought.
- Any connection between the damages suffered and the jurisdiction in which the action is brought.
- Any substantial connection between the defendant and the forum.
- Whether the defendant has “sufficient contacts” with the forum.

These factors are not to be mechanically applied to a given set of circumstances, but rather serve as illustrations of an overarching “order and fairness” requirement.

Further, to be enforceable in Canada, a foreign judgment must be final in the originating jurisdiction. A final judgment for this purpose is not a judgment that is subject to no further appeal, but one that the originating court has no further power to rescind or vary.<sup>3</sup> Where these principles are satisfied, and where the defendant fails to raise a recognized defence, a motion for enforcement will likely be successful.

There are defences to a motion for enforcement. 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, the recognized defences include the following:

- i. The defendant was not a party to the proceeding in which the judgment was obtained.
- ii. The judgment was obtained by fraud.
  - This defence has generally been limited to ‘extrinsic’ fraud, requiring proof of new or newly discovered facts that were not before the originating court, and from which the Canadian court may deduce that the original judgment was obtained by fraud.
  - Only fraud going to jurisdiction provides the limited basis for refusing to enforce a judgment.
  - A foreign judgment may not typically be reopened on the merits.

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<sup>3</sup> It should be noted that, where a foreign judgment is under appeal in the originating jurisdiction, a Canadian court will usually choose to stay its decision regarding enforceability, pending the decision of the foreign appellate court.

- iii. The judgment was obtained in contravention of the principles of natural justice.
  - There must be something more than a mere procedural irregularity in the foreign court's proceedings.
  - There must have been an inadequate opportunity for the defendant to effectively prepare and present its case to the foreign court.
- iv. The enforcement of the judgment would conflict with Canadian or provincial public policy.<sup>4</sup>

While these defences continue to be available, they have generally been the subject of strict and narrow construction. This may well benefit U.S. litigants seeking enforcement of a judgment in Canada, in light of the fact that U.S. non-pecuniary damage awards tend to be much higher than the damage awards typically granted by Canadian courts.<sup>5</sup>

### **Recommended Advice to Clients and U.S. Lawyers**

As a result of the changes precipitated by *Morguard*, Canadians who receive notice that they are being sued outside Canada are almost always advised to defend the action, provided they have the financial capacity to do so. Where there is any connection between the subject matter of the action and the originating jurisdiction, it is too great a risk to allow the action to go undefended.

That being said, U.S. litigants seeking to have a judgment enforced in Canada are also recommended to seek advice on the laws of the province in which the motion will be heard. This is particularly true because *Morguard and Hunt* have left the question of enforcement to be decided on a case-by-case evaluation of “*order and fairness*”.

### **Current Issues relating to the Real and Substantial Connection Requirement**

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<sup>4</sup> Foreign judgments that conflict with Canadian notions of “essential morality” or fundamental justice will not be enforced. In light of Canada’s close relationship with the U.S., and of the fact that our respective legal systems are comparable, this defence will only rarely apply with respect to U.S. judgments.

<sup>5</sup> The current state of the law in Canada is that the enforcement of a foreign judgment will not be refused on the ground that the foreign law on which the judgment is based is harsher than the law of the enforcing jurisdiction. It should be noted, however, that the public policy defence may be expanded in order to deal with ‘hard cases’ that involve either extremely generous damage awards or cause financial hardship to the defendant. This expansion has been specifically contemplated by the Uniform Law Conference of Canada in its draft *Uniform Enforcement of Judgments Act*.

Initially, the generous approach to comity espoused in *Morguard* made the requirement of a “real and substantial connection” relatively easy to meet – through satisfaction of the “*order and fairness*” test. In recent years, however, some provincial courts have narrowed the scope of what constitutes a real and substantial connection through a more restrictive conceptual application of the test.<sup>6</sup> As the British Columbia Court of Appeal put it in *Braintech, Inc v. Kostiuk*, there has been an attempt to put some flesh “on the bare bones of ‘real and substantial connection’.”<sup>7</sup>

In *Braintech* the British Columbia Court of Appeal held that, in the context of an action for defamation over the Internet, the mere possibility that someone could access comment on the Internet within the originating jurisdiction was insufficient to establish a real and substantial connection. The Court required better proof that the defendant had entered the jurisdiction (in this case Texas) and therefore refused to enforce a default judgment.<sup>8</sup>

### Summary

While it is not clear how much scope for application *Braintech* will have outside the Internet context, the case illustrates the Canadian courts’ emerging willingness to question the broad enforcement principles set out in *Morguard* and *Hunt*.

Given the dynamic state of the law, it is strongly recommended that advice on the law in the relevant province and subject area be sought prior to bringing an action in the U.S. against an absentee Canadian defendant. Doing so may ensure that time and expense are not incurred unnecessarily and that the judgment awarded does not ultimately amount to a hollow victory.

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<sup>6</sup> For a more detailed examination of the British Columbia courts’ application of the *Morguard* and *Hunt* decisions, see J. Sullivan, “The enforcement of foreign judgments in B.C. — Ten years after *Morguard*” (2001) 59 *The Advocate* 399.

<sup>7</sup> (1999), 171 D.L.R. (4<sup>th</sup>) 46 at para. 56 (B.C. C.A.).

<sup>8</sup> *Braintech Inc.* sought leave to appeal this decision to the Supreme Court of Canada, however its application for leave to appeal was dismissed by that Court: see *Braintech Inc. v. Kostiuk*, [1999] S.C.C.A. No. 236.