



Christophe Shammas

Associate

Commercial Litigation

416.748.5121

cshammas@loonix.com

Christophe has a broad litigation practice with an emphasis on construction litigation, shareholder disputes and securities litigation. He represents individuals, businesses and municipalities in a variety of complex and high-stakes matters.

Loopstra Nixon LLP
Woodbine Place
135 Queens Plate Drive
Suite 600
Toronto, Ontario
M9W 6V7
www.loopstranixon.com

ENFORCEMENT OF FOREIGN JUDGMENTS IN ONTARIO

A Brief Overview

By **Christophe Shammas**

The business world is becoming increasingly globalized. Companies and individuals in Ontario are doing more business abroad and, as such, foreign businesses are transacting with Ontario entities more often.

Due to this globalization, it has become important for non-Canadian parties to understand how to navigate the judicial system in Ontario when their business transactions become litigious. This is true even when a non-Canadian party has commenced legal proceedings in a foreign jurisdiction and obtained a judgment, which it seeks to enforce in Ontario.

This article is intended to give a concise summary of some important considerations for foreign creditors hoping to have their domestic judgments recognized and enforced against entities with assets in Ontario.

The Basics

Under Canadian constitutional law, the recognition and enforcement of foreign judgments is a matter of provincial jurisdiction and proceedings to enforce foreign judgments are taken before the Superior Courts of the provinces in which the judgment debtor resides.

As such, the first thing a foreign creditor should do is determine in what Canadian jurisdiction the Canadian entity has assets, against which their domestic judgment can be enforced.

The next step is to determine whether the province has legislation that provides processes for the recognition and registration of judgments from a specific

jurisdiction. When a foreign judgment is registered under this type of legislation, the judgment is considered to have the same force and effect as if it had been obtained in the registering court. The process provided for by legislation is usually less time-consuming and expensive than having to commence legal proceedings to have a judgment recognized under common law.

At the time of writing, Ontario's *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5 only applies to judgments obtained from the other provinces of Canada (other than Quebec). However, there is a separate legislative regime with respect to judgments obtained in the United Kingdom, which will be dealt with in more detail below. It should also be noted that other provinces' statutes provide for reciprocal enforcement of judgments from other non-Canadian jurisdictions including various US states, and Australia.ⁱ It is important for foreign creditors to consult each province's reciprocal enforcement legislation to check if their jurisdiction is recognized.

If there is no process provided for in provincial legislation, a foreign creditor must commence legal proceedings against the Canadian entity in the Ontario Superior Court of Justice ("Superior Court") if it seeks to enforce the judgment in Ontario. The legal proceedings can either be commenced by the relatively expedited process of an application to the Superior Court or, if they are likely to be opposed, by way of an action.

In Ontario, there is a two-year limitations period for commencing legal proceedings to have a foreign judgment recognized. According to the Ontario Court of Appeal, the two-year period begins to run from when the time to appeal the foreign judgment has expired or, if the judgment was appealed, the date of the final appeal decision.ⁱⁱ

It is important to note that the process of having a judgment recognized in Canada is different from the process of enforcing that judgment once recognized. Once a judgment is recognized and has the force and effect of a judgment obtained in that province, the judgment creditor will still have to use the enforcement tools available to it, which would include the seizure and sale of assets, garnishment and contempt proceedings.

Common Law Test for Recognition of a Foreign Judgment

If a foreign creditor is required to commence legal proceedings to have its judgment recognized and enforced in Canada, it must provide evidence to meet the common law test for recognizing foreign judgments. Under the common law, a foreign judgment is prima facie enforceable in Canada if:

1. the judgment originated from a court of competent jurisdiction;
2. the judgment/order is final and conclusive; and,ⁱⁱⁱ
3. the judgment is adequately precise.^{iv}

Importantly, courts will not allow a defendant to “relitigate” the underlying dispute that gave rise to the judgment. At common law, the foreign judgment is treated as a debt that can be enforced by a cause of action to claim payment of the debt. The Superior Court will only decline to recognize a foreign judgment if there is some defect in the judgment itself or how it was obtained.

Competent Jurisdiction

In Canada, a foreign court will be regarded as a court of competent jurisdiction if: (1) the Canadian defendant consented, submitted or otherwise attorned to the jurisdiction of the foreign court; or (2) there was a “real and substantial connection” between the foreign court and the cause of action or the defendant.^v

Having a foreign judgment recognized in Ontario will be relatively simple when the first factor is met. The most common area of dispute is whether there was a “real and substantial connection” between the foreign court and the cause of action or the defendant.

A foreign creditor only has to establish a real and substantial connection between the foreign jurisdiction and either the subject matter of the dispute or the defendant. As such, it is possible to prove that a foreign court is a court of competent jurisdiction even when the Canadian entity has no *personal* connection to that jurisdiction.

The court will look at several different factors to determine whether there is a real and substantial connection between the foreign jurisdiction and the defendant or the subject matter of the dispute. However, the Supreme Court of Canada has provided a non-exhaustive list of presumptive factors including:

1. the defendant is domiciled or resident in the jurisdiction;
2. the defendant carries on business in the jurisdiction;
3. the tort was committed in the jurisdiction; or
4. a contract connected with the dispute was made in the jurisdiction.^{vi}

Whether there is a real and substantial connection will depend on the particular facts of the case as the ways in which a jurisdiction may be connected to a dispute or the parties are very diverse. However, courts have generally taken an expansive view of whether a foreign jurisdiction has a real and substantial connection to the dispute or the defendant.^{vii}

In addition, it is not necessary that the foreign jurisdiction be the best or most appropriate forum for the dispute. There

may be several jurisdictions with a real and substantial connection to the dispute or the defendant, particularly in this globalized world.

One issue that often arises is where a foreign creditor has obtained a default judgment against a Canadian entity in a foreign jurisdiction even though there is a contract that provides that the parties are to pursue their legal action in Ontario. While the safest approach is likely to follow the terms of the contract and commence legal proceedings in Ontario, the case law suggests that it is still possible to have a foreign default judgment recognized in Ontario in these circumstances. In Ontario, the existence of an exclusive jurisdiction clause does not oust the jurisdiction of another court that has a real and substantial connection to the dispute. It is incumbent on the Canadian entity to challenge the jurisdiction of the foreign court by bringing a jurisdictional challenge in that court.^{viii}

Final and Conclusive

A judgment is considered final when the court that made the judgment no longer has the power to rescind it.^{ix} This principle applies equally to interlocutory or final orders that are subject to appeal.

Generally, a judgment creditor will have to show that the time period for an appeal has run out or, if the judgment has been appealed, that the appeal has been resolved and the judgment upheld. The Superior Court has the power to stay enforcement proceedings in Ontario if an appeal in the foreign jurisdiction is ongoing.^x

Adequately Precise

The final requirement to be met for the recognition of foreign judgments is that they be adequately precise. This is generally not controversial for monetary judgments.

However, for non-monetary judgments, such as injunctions, courts will generally exercise some discretion in determining whether the judgment should be recognized and enforced. The Supreme Court of Canada has set out some non-exhaustive factors that the court will consider in deciding whether to enforce a non-monetary judgment:

1. are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her;
2. is the order limited in its scope and did the originating court retain the power to issue further orders;
3. is the enforcement the least burdensome remedy for the Canadian justice system;
4. is the Canadian litigant exposed to unforeseen obligations;
5. are any third parties affected by the order; and

6. will the use of judicial resources be consistent with what would be allowed for domestic litigants?^{xi}

The precision of the foreign judgment is particularly important. If there is any uncertainty as to what the effect of recognizing the foreign judgment would be, the Superior Court will be reluctant to recognize the judgment.

Defences to Common Law Action for Recognition of Foreign Judgment

Once it is determined that a foreign judgment is *prima facie* enforceable, a judgment debtor can argue that the judgment should not be enforced on the grounds of: (a) public policy; (b) fraud; or (c) a lack of natural justice.

Public policy

The Supreme Court of Canada has held that Canadian courts should not enforce judgments that are contrary to the Canadian legal system's fundamental morality or where the judgment was rendered by a foreign court proven to be corrupt or biased.

The standard that a judgment debtor must meet is high. With respect to corruption or bias, the case law is clear that *actual* bias or corruption must be proven.^{xii} Further, it is not enough that the judgment would not have been obtained if litigated according to the laws of the province (i.e. that the laws in the foreign jurisdiction were different from Canadian laws).

Fraud

Canadian courts will not recognize or enforce a foreign judgment if it was obtained by fraud. However, courts are generally reluctant to find that a judgment was obtained by fraud and are careful to ensure that a judgment debtor is not simply trying to re-litigate the matter by alleging fraud.

As such, the Supreme Court of Canada has held that a foreign judgment can only be challenged for fraud where the allegations are new and material, not the subject of prior adjudication by the foreign court and could not have been discovered by the defendant by the exercise of reasonable diligence.^{xiii}

Lack of natural justice

In order to succeed in this defence, a defendant must prove "that the foreign proceedings were contrary to Canadian notions of fundamental justice".^{xiv} The focus of this defence is on the due process and procedure of the foreign court

as opposed to the merits of the case.^{xv}

The most common example cited is that a defendant is given adequate notice of the claim made against them and that they be granted an opportunity to defend. As such, it is critical to ensure that a Canadian defendant has received notice of the foreign proceedings. It may be necessary to go above and beyond what is provided for by the relevant rules or legislation if there is a risk that notice of the proceedings may not come to the attention of the defendant.^{xvi}

Another issue that can arise is the litigation process in the foreign jurisdiction. In Ontario, parties are entitled to pre-trial documentary and oral discovery. Not all jurisdictions provide for extensive pre-trial discovery. That is not fatal for the enforcement of a foreign jurisdiction as Canadian courts have held that as long as the fundamental essence of the discovery process is available to the parties in the foreign jurisdiction, they will not find the process to have denied natural justice.^{xvii}

The Canada-United Kingdom Civil and Commercial Judgments Convention Act

Canada is a party to the *Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*.

This convention has been incorporated into federal law in the *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, R.S.C. 1985, c. C-30 and Ontario law in the *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R.6.

A judgment creditor in the United Kingdom may apply to the Superior Court to have the judgment registered within six years of the date of the judgment (or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings).

Rule 73 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 sets out the requirements for an application for the registration of a judgment granted by a court of the United Kingdom. Under Rule 73.02, an application must be supported by an affidavit that sets out the facts necessary to establish that the applicant is entitled to register and enforce the judgment. In addition, the original or certified copies of the judgment and proof of service of the originating process of the United Kingdom court must be included in the supporting affidavit.

A registered judgment from the United Kingdom shall be of the same force and effect as if the judgment had been obtained from the Superior Court.

The legislative regime applies to any decision given by a United Kingdom court in a civil or commercial matter and includes an award in proceedings on an arbitration if the award has become enforceable in the United Kingdom. The legislative regime does not apply to orders for the periodic payment of maintenance, the recovery of taxes, duties, charges, fines or penalties, judgments given on appeal from decisions of tribunals and judgments relating to family, estate and bankruptcy matters.

The registration of the judgment can only be refused or set aside on fairly limited grounds. The grounds are:

1. the judgment has been satisfied;
2. the judgment is not enforceable in the United Kingdom;
3. the United Kingdom court is not regarded by the Superior Court as having jurisdiction;
4. the judgment was obtained by fraud;
5. the enforcement of the judgment would be contrary to public policy in Ontario;
6. the judgment is a judgment of a country or territory other than the United Kingdom which has been registered in the United Kingdom court or has become enforceable in the United Kingdom in the same manner as a judgment of that court; or
7. in the view of the Superior Court, the judgment debtor is entitled to immunity from the jurisdiction of that court or was entitled to immunity in the original court and did not submit to its jurisdiction.

With respect to the issue of jurisdiction, the legislation enumerates certain factors that, if met, would grant the foreign court jurisdiction. The factors are:

1. the judgment debtor, being a defendant in the United Kingdom, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings;
2. the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the United Kingdom court;
3. the judgment debtor, being a defendant in the United Kingdom court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the United Kingdom;
4. the judgment debtor, being a defendant in the United Kingdom court, was at the time when the proceedings were instituted habitually resident in, or being a body corporate had its principal place of business in, the United Kingdom;
5. the judgment debtor, being a defendant in the United Kingdom court, had an office or place of business in the United Kingdom and the proceedings were in respect of a transaction effected through or at that office or place; or

6. the jurisdiction of the United Kingdom court is otherwise recognized by the Ontario Superior Court.

Notwithstanding the above, the United Kingdom's courts shall not be regarded as having jurisdiction if the subject matter of the proceedings was immovable property outside the United Kingdom or if the bringing of the proceedings in the United Kingdom was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the United Kingdom.

There is clear overlap in the analysis of having a judgment obtained in the United Kingdom registered under the *Reciprocal Enforcement of Judgments (U.K.) Act* and having a foreign judgment recognized by the Superior Court under the common law. It should be noted that even if the criteria of the legislation is not met, it is still possible for a United Kingdom judgment creditor to take advantage of the common law test to have its judgment recognized in Canada.

Conclusion

While foreign judgment creditors should not worry about having to relitigate the merits of the dispute underlying their judgment in Ontario, the process for having a judgment recognized in Ontario can be complex.

Litigants should be prepared to present cogent and detailed evidence regarding the proceedings underlying the judgment and the facts necessary to establish a connection between the foreign jurisdiction and the dispute or the defendant. Further, where the procedure followed in the foreign jurisdiction is at issue, expert evidence will likely be required from a lawyer who practices in that jurisdiction.

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- ⁱ Court Order Enforcement Act, RSBC 1996, c 78, Online: <<https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/courtorderenflist>>. & Reciprocating Jurisdictions Regulation, Alta Reg 344/1985, Online: <<https://www.canlii.org/en/ab/laws/regu/alta-reg-344-1985/latest/alta-reg-344-1985.html>>.
- ⁱⁱ *Independence Plaza 1 Associates, LLC. v Figliolini*, 2017 ONCA 44.
- ⁱⁱⁱ *Beals v Saldanha*, 2003 SCC 72.
- ^{iv} *Pro Swing Inc. v ELTA Golf Inc.*, 2006 SCC 52.
- ^v *Select Comfort Corporation v Maher Sign Products Inc.*, 2019 ONSC 2478 at para 29.
- ^{vi} *Van Breda v Village Resorts Ltd.*, 2012 SCC 17.
- ^{vii} *Monte Cristo Investments v Hydroslotter Corporation*, 2011 ONSC 6011 at para 19.
- ^{viii} *Select Comfort Corporation v Maher Sign Products Inc.*, 2019 ONSC 2478 at paras 41-47.
- ^{ix} *Four Embarcadero Center Venture v Kalen et al*, [1988] OJ No 411 (ON SC).
- ^x *Global Connector Research Group Inc. v Apex Equity Partners Inc.*, 2010 ONSC 6192 at para 9.
- ^{xi} *Pro Swing Inc. v ELTA Golf Inc.*, 2006 SCC 52.
- ^{xii} *Oakwell Engineering Ltd. v Enernorth Industries Inc.*, 2006 CanLII 19327 (ON CA) at para 22.
- ^{xiii} *Beals v Saldanha*, 2003 SCC 72 at para 51.
- ^{xiv} *Beals v Saldanha*, 2003 SCC 72 at para 59.
- ^{xv} *Arcadia International LLC v. Janmeja*, 2008 NSSC 91 at para 5.
- ^{xvi} *Arcadia International LLC v. Janmeja*, 2008 NSSC 91.
- ^{xvii} *ATL Industries Inc. v Han Eol Ind. Co.*, [1995] OJ No 250 (ONCJ) at para 20 and *Cao v Chen*, 2020 BCSC 735 at paras 170-176.