IMPORTANT NOTE:

This article is an adapted from the Canada chapter of *Enforcement of Money Judgments*, Juris Publishing, Huntington, NY 2009. Canada chapter of Enforcement of Money Judgments is written by the authors in collaboration with J-P Sheppard, J. Hansen and J. Feingold (Quebec only) and deals comprehensively with the enforcement of money judgments across Canada. It is intended as information only and is not legal advice. If you require advice on a specific matter, please contact the authors.

Developments in the Enforcement of Foreign Judgments in Canada - 2009*

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Courts in Ontario, Canada, where more than one-third of Canada's population resides, are very receptive to the enforcement of final and conclusive foreign money judgments is subject to certain statutory exceptions and procedural requirements. [1] Since the 1990s, Canadian courts have recognized that the law relating to the recognition and enforcement of foreign judgments has been modernized significantly to reflect the changing needs and dictates of the forces of globalization. Canada's federal and provincial legislation respect for foreign money judgments made according to the rule of law, consistent with Canadian public policy considerations.

The judicial attitude is reflected in the statement of a commentator who wrote that "[i]t is a tribute to Canadian internationalism that our courts have seen no reason why Canadian defendants should be any less liable under a default judgment from the United States or the United Kingdom than under a default judgment from elsewhere in Canada.[2]

The principle of comity, which is the deference and respect due by other states to the actions of a state legitimately taken within its territory, underlies the recognition of foreign judgments in Canada. Canadian courts recognize that "full faith and credit" should be given to a judgment granted in another province, territory or country as long as the judgment-making court had properly and appropriately exercised jurisdiction in the action. Jurisdiction is proper where the legal forum has a "real and substantial connection" to the matter in question. The "real and substantial connection" test has been adopted as the appropriate test to determine if the courts of another province, territory or country had appropriately exercised its jurisdiction.[3]

Legislative schemes

The enforcement of foreign money judgments, with the exception of judgments which fall within Canada's federal jurisdiction,[4] is governed by provincial law.

Money judgments from the other Canadian provinces except Quebec and territories are enforceable according a legislative scheme.[5] Federal and provincial legislation exists to implement an international convention for reciprocal enforcement in Ontario of commercial judgments made by courts of the United Kingdom.[6]

The Federal Foreign Extraterritorial Measures Act,[7] also prohibits enforcement of certain types of foreign judgments in Canada. Section 7.1 prohibits the recognition or enforcement of any judgment under the U.S. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 in Canada. Under section 8(1), the Attorney General of Canada may direct that a foreign judgment in respect of an anti-trust or anti-competition law not be recognized or enforced in Canada if it has or is likely to adversely affect significant Canadian international trade or commerce business interests in Canada or Canadian sovereignty.

Further, Ontario courts will not recognize or enforce a foreign law or judgment that is contrary to the forum's fundamental public policies, "its essential public or moral interest", or its "concept of essential justice and morality."[8]

Reciprocal enforcement of judgments legislation exists in Ontario. It is not as broad as in some other Canadian provinces. For example, British Columbia's reciprocating enforcement legislation permits enforcement of judgments from each Canadian provinces and territories, except Quebec, and also from the U.S. states of Washington, Alaska, California, Oregon, Colorado and Idaho, all of Australia, Germany, Austria

and the United Kingdom.[9] In Ontario, however, employment standards legislation provides for the registration of final orders from other Canadian jurisdictions other than Quebec.[10]

Under the Ontario Reciprocal Enforcement of Judgments Act, registration of Canadian common law judgment is unavailable if (a) the original court acted without jurisdiction; (b) the judgment debtor did not attorn to the jurisdiction of the court; (c) the judgment debtor was not served with process; (d) the judgment was obtained by fraud; (e) an appeal is pending or contemplated; (f) the judgment debtor would have a good defence if an action were brought on the original judgment.

Under the Ontario Reciprocal Enforcement of Judgments (U.K.) Act,[11] registration of a judgment of a Court in Great Britain or Northern Ireland, will be refused or set aside if enforcement of the judgment would be contrary to public policy, which includes that judgment was obtained by fraud. Rule 73 of the Ontario Rules of Civil Procedure provide a mechanism for registration and enforcement.

In determining whether to refuse to register the foreign judgment on public policy grounds or natural justice grounds, the Court must consider the historical and factual context of the proceedings which led to the granting of the judgment, and where there are competing public policy imperatives, whether overall, registration would be contrary to public policy.[12]

Action on the foreign judgment

Where there is no reciprocating legislation, enforcement of foreign judgments is accomplished by commencing an action upon the foreign judgment. However, reciprocal enforcement legislation sometimes provides for a longer limitation period for the commencement of the enforcement proceedings than the common law.

Canada and Ontario are signatories to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[13] Recognition and enforcement of foreign arbitral awards is accomplished by means of the incorporation into the law of Canada and of most of the Canadian provinces and territories of the UNCITRAL Model Law on International Commercial Arbitration.[14] Articles 35 and 36 of the Model Law provide for recognition and enforcement of foreign arbitral award, including limitations on public policy, natural justice and jurisdictional considerations.

Ontario courts have traditionally treated an action to enforce a foreign judgment as an action upon a simple contract debt.[15] The traditional approach is that apart from reciprocating legislation or other statute, a foreign judgment is not enforceable by execution but it is capable for forming the basis of a local order for its enforcement. The debt is based the on the judgment debtor's implied promise to pay the amount of the foreign judgment based on litigation in the foreign court which has already been resolved and does not need to be re-litigated.[16]

Limitation Period Applicable to Foreign Judgments

A new Limitations Act[17] was enacted in Ontario and came into effect on January 1, 2004. The new Limitations Act generally had the effect of reducing the limitation for the institution of action for a debt and most other causes of action from six years to two years, except for business agreements where parties have specifically agreed to a different limitation period.[18]

In Hare v. Hare,[19] the Ontario Court of Appeal held that in general, the limitation period for enforcement of a demand promissory note runs from the date of the note not from the date of the demand.[20] As foreign judgments are treated like ordinary debts, the same limitation period applies. The decision is judicially consistent with decisions made in respect of the enforcement of foreign judgments under limitation statutes in Ontario and Nova Scotia.[21]

In Yugraneft Corp. v. Rexx Management Corp.[22] the Alberta Court of Appeal held that the limitation period for enforcement in Alberta of an arbitration award granted by the International Court of Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation an was two years. The Court reasoned that the foreign arbitration award was a remedial order under the Alberta Limitations Act[23] to

which a two-year limitation period was applicable. The decision is judicially consistent with similar decisions made in respect of the enforcement of foreign judgments under limitation statutes in other provinces.[24]

Some commentators[25] have noted that the decision of Alberta Court of Appeal carved a huge hole in Canada's commitment to enforcement for arbitral awards under the New York Convention by deciding that proceedings for recognition and enforcement must be commenced within two years of the date of the award. It has been suggested that if the Alberta Court of Appeal decision stands, it will not only severely restrict enforcement of foreign awards in Alberta but likely affect decisions across Canada unless other appellate courts rule differently when the issue comes before them. On February 26, 2009, the Supreme Court of Canada granted leave to appeal this decision but as of this writing, the appeal has not been heard. The decision will be binding in Ontario.

The two-year limitation period is subject to the principle of discoverability. The time runs from when the party making the claim knew or ought to have known that the claim arose. In the case of the enforcement of a foreign money judgment or foreign arbitral award, there are differing views as to whether the operative date is the date of the judgment or the date when the claimant knew or ought to have known that the defendant had assets in Ontario.

A policy decision to extend the limitation period would be helpful in the international commercial arbitration context but this requires a creative application of current limitation statutes.[26] Ontario and Canadian legislatures have decided that a two-year limitation period is a reasonable time for the commencement of domestic contract and tort claims. In a world where communications are instantaneous, it is not clear that a longer limitation period is required to commence proceedings to enforce a foreign arbitral award.

Uniform Foreign Judgment Enforcement Legislation

Canada's extra-provincial and foreign judgment enforcement system has a panoply of statutes, many similar but pan-Canadian uniformity has yet to be achieved. The essential principle of recognition and enforcement, i.e. the real and substantial connection test, is not found in a statute[27] but in a decision of the Supreme Court of Canada. Efforts to harmonize Canadian judgment enforcement law and procedure have been afoot for several years.[28] In August 2001, the Uniform Law Conference of Canada issued the final draft of its proposed Uniform Enforcement of Foreign Judgments Act, the Uniform Enforcement of Canadian Judgments, Court Jurisdiction and Proceedings Transfer Act. Currently, only the province of Saskatchewan has passed a UEFJA.[29]

On March 6, 2009, the Law Commission of Ontario issued a consultation paper entitled Reforming the Law of Crossborder Litigation-Judicial Jurisdiction.[30] The paper is the work of a private international law working group under the chairmanship of law professor Janet Walker to codify judicial jurisdiction in Ontario and is directed at "the improvement of the capacity of the judicial system to address cross-border litigation." [31]

The Law Commission consultation paper proposes the enactment in Ontario of the Court Jurisdiction and Proceedings Transfer Act, ("CJPTA") with due attention to changes that have occurred in the law and practice of cross-border litigation in the last 15 years since the uniform law was first proposed in 1994.[32]

When enacted, the CJPTA will establish several grounds for Ontario courts to assume jurisdiction, (1) consent of the parties either by attornment or agreement; (2) the defendant's ordinary residence; (3) a real and substantial connection between the subject matter of the dispute and the forum; (4) other criteria such as "forum of necessity, ancillary proceedings and a forum for urgent interim measures. The CJPTA will also establish a process for the Ontario Superior Court declining jurisdiction and transferring the case to the most appropriate forum.[33] There is no timetable for the enactment of the proposed legislation.

The debate over the jurisdiction has already attracted judicial and academic commentary. In Muscutt v. Courcelles[34], the Ontario Court of Appeal addressed whether the Ontario courts should assume jurisdiction over out-of-province defendants in claims for damage sustained in Ontario as a result of a tort committed elsewhere. The Court applied a broad approach, which included the connection or nexus between the tort and the place where it was committed and fairness considerations of all the litigants. The Court of Appeal

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conducted *a forum conveniens* analysis and concluded that Ontario should accept jurisdiction. One academic commentator has observed that Muscutt has blurred the lines between jurisdiction simpliciter and forum conveniens and that only passage of the uniform jurisdiction and transfer legislation will correct the problem.[35]

Ontario has been slower than other Canadian provinces in expanding its legislative scheme in the enforcement of foreign money judgments. As noted by the Law Reform Commission, "[t]he law of judicial jurisdiction in cross-border matters in Ontario is complex and uncertain. This can create the need for expensive and time-consuming litigation to resolve basic questions of whether a plaintiff will be permitted to bring a claim in an Ontario court and whether a defendant will be required to defend in Ontario." It is hoped that when the Law Commission of Ontario completes its work, legislation will be enacted in Ontario which will make the process simpler. In the meantime, Ontario courts must enforce foreign money judgments within existing parameters.

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[1] A foreign judgment is considered final and conclusive by Canadian courts if it determines the rights and liabilities of the parties to it so as to be *res judicata* in the place where it is pronounced, but not if the foreign court can still vary or rescind it: J. Walker & J.G. Castel, Castel & Walker: Canadian Conflict of Laws 6th ed. looseleaf (Markham, Ontario: Butterworths, 2005+), p.14-29-14-30; Four Embarcadero Center Venture Ltd. v. Kalen (1988) 65 OR (2d) 551(S.C.)
[2] J.Blom, "The Enforcement of Foreign Judgments: Morguard Goes Forth Into the World", (1997) 28. Can. Bus. Law Journal 373 at 382, quoted in Skaggs Companies Inc. v. Mega Technical Holdings Ltd., 2000 ABQB 480 (AltaSC).
[3] Beals v. Saldanha, [2003] 3 SCR 416, 2003 SCC 72 at paras. 27 and 164, which applied these principles to non-Canadian foreign judgments; Morguard Investments Ltd. v. De Savoye, [1990] 3 SCR 1077 at 1108 had earlier applied the same principles to judgments between Canadian provinces;
[4] As to federal jurisdiction, see Federal Court Act R.S.C. 1985, c. F-7, as am. Foreign Extraterritorial Measures Act R.S.C. 1985, c. F-29 29 as am. by S.C. 1996, c. 28, s. 7; Marine Liability Act S.C. 2001, c. 6, s. 64.
[5] Legislation varies across Canada and is referred to in this chapter. In every province and territory except Quebec, there is a Reciprocal Enforcement of Judgments Act (or a variation of it), which applies to the judgments of other Canadian provinces and territories, except Quebec. In seven provinces, there is a Canadian Judgments Enforcement Act.
[6] 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, http://www.accord-treaty.gc.ca/ViewTreaty.asp?Treaty_ID=101226.
[7] R.S.C. 1985, c. F-29, ss. 7 and 8(1) as am. by as am. by S.C. 1996, c. 28, s. 7.
[8] J. Walker & J.G. Castel, Castel & Walker: Canadian Conflict of Laws 6th ed. looseleaf (Markham, Ontario: Butterworths, 2005+) p. 8-10 and see cases cited therein at p. 8-12 f.n. 1.
[9] Court Orders Enforcement Act, RSBC, 1996, c. 78, s. 37, s.4.
[10] For example, in Ontario, the Employment Standards Act, 2000, S.O. 2000, c. 41, s. 130(1) provides for the reciprocal enforcement of employment standards orders for compensation made by jurisdictions which have legislation substantially similar to Ontario. Pursuant

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to O. Reg. 289/01, the reciprocating jurisdictions are the other provinces and territories of Canada except for Quebec.
[11] Reciprocal Enforcement of Judgments(UK) Act RSO1990, c. R.6.
[12] Society of Lloyd's v. Meinzer 2001 CanLII 8586 (ONCA), (2001), 55 OR(3d) 688 at 719 (C.A.).
[13] Referred to herein as "the New York Convention".
[14] Referred to herein as "the Model Law".
[15] Lax. Lax (2004), 70 OR(3d) 520, 2004 CanLII 15466 (ONCA) at paras 11-12; Rutledge v. The United States Savings and Loan Co. (1906), 37 SCR 546; Burchell v. Burchell (1926), 58 O.L.R. 515 (S.C. (H.C. Div.)); North v. Fisher (1884), 6 OR 206 (H.C.J.); Livesley v. Horst, [1924] SCR 605 at 609-610.
[16] J. G. Castel & J.Walker, Canadian Conflict of Laws, 5th ed., looseleaf at 14.3 (Toronto: Butterworths, 2002) as quoted in Lax v. Lax CanLII 15466 (ONCA) para. 13.
[17] Limitations Act, 2002, S.O. 2002, c. 24, Sch. B.
[18] Ontario Limitations Act, 2002, as am. S.22, as amended as of October 19, 2006. A. Cunningham & A. Lang, "Canada: Ontario's "Limitations Act" Amendments: A Win-Win for Business and Consumers," www.mondaq.com/ article.asp?articleid=44898.
[19] 2006 CanLII 41650 (ONCA).
[20] On Feb. 26, 2007, the Ontario Bar Assoc. made a submission to the Attorney-General of Ontario for amendment to the Ontario Limitations Act: www.oba.org/en/pdf/Limitations_Ltter-Final.pdf. However, no change has been made to date.
[21] See Lax v. Lax, 2004 CanLII 15466 (ONCA) and Pollier v. Laushway, 2006 NSSC 165, (NSSC).
[22] 2008 CarswellAlta 1035.
[23] R.S.A. 2000, c. L-12.
[24] See Lax v. Lax, 2004 CanLII 15466 (ONCA),and Pollier v. Laushway, 2006 NSSC 165,(NSSC).
[25] J. Redmond and B. Leon, "Canada: Will Supreme Court Of Canada Hear High-Profile International Arbitration Case?", http://www.mondaq.com/article.asp?articleid=71654.
[26] Lax v. Lax, 2004 CanLII 15466 (ONCA) and Pollier v. Laushway, 2006 NSSC 165, (NSSC) involved actions under the former Limitations Act, where the limitation period was six years. The Court of Appeal in Lax did not have to consider ss. 16(1)(b) and (d) of the Ontario Limitations Act, 2002 which provides that there is no limitation period for a "proceeding to enforce the order of a court" or to enforce a domestic arbitration award. There is no definition of "court" in new Act. It therefore leaves open the possibility that "a proceeding to enforce the order a court" could include an action to enforce a foreign judgment. There is no jurisprudence at the present time which touches on this matter but the Supreme Court of Canada will consider the matter in the appeal for which leave was granted on February 26, 2009 in Yugraneft Corp. v. Rexx Management Corp, 2008 ABCA 274, [2008].
[27] Except for the Saskatchewan Enforcement of Foreign Judgments Act, sections, 8-10. The New Brunswick Foreign Judgments Act does not refer to the real and substantial connection test.
[28] Some of these efforts are explained in the report of the Alberta Law Reform Institute found at www.law.ualberta.ca/ alri/docs/FR94.pdf.
[29] Enforcement of Foreign Judgments Act, S.S. 2005, c.E-9.121, came into effect April 19, 2006.
[30] Website of the Law Commission of Ontario www.lco-cdo.org/fr/jurisdictionconsultation.html
[31] Ibid.
[32] Ibid.
[33] www.lco-cdo.org/fr/jurisdictionconsultation.html, referring to Sections III-VII of the Consultation Paper on Reforming the Law of Crossborder Litigation-Judicial Jurisdiction
[34] 2002 CanLII 44957
[35] T. J. Monestier, A "Real and Substantial" Mess: The Law of Jurisdiction in Canada", Queen's Law Journal Fall, 2007, p.179.