

# The Recognition and Enforcement of Foreign Judgments in New Brunswick:

## *The Path Through Murky Water...*

COX & PALMER

Prepared by:

Monika M.L. Zauhar\* and  
Kathleen P.J. MacDougall  
Cox and Palmer\*\*

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### **I. INTRODUCTION**

Businesspersons and other litigants exhaust time, money and human resources to establish their right to a sum of money by obtaining a judgment in court. Once a judgment is obtained, the party owed becomes the judgment creditor, the party owing becomes the judgment debtor and the amount owing becomes the judgment debt. Often, not even a court decision against a judgment debtor will ensure the debtor will pay up. It is therefore crucial that the next steps to enforcing a judgment be prompt, certain and effective. Unfortunately, these steps are not simple. For that reason, we offer this paper in an attempt at clarifying how to enforce in the Province of New Brunswick, a judgment rendered in another jurisdiction.

Where the judgment was obtained outside of New Brunswick, the judgment must first be recognized in New Brunswick courts. Recognition is the process by which a New Brunswick court determines whether it will allow a foreign judgment to be enforced. Enforcement, on the other hand, is the process by which the judgment is satisfied, for example by seizing and selling property. Once a foreign judgment is recognized in New Brunswick, the enforcement measures available to the judgment creditor are the same as if the judgment had been originally obtained in New Brunswick.

The first portion of this paper, published herein, involves a discussion on the recognition of judgments in New Brunswick. It must be recognized that, there nonetheless remain certain situations or exceptions where a foreign judgment may not be as readily recognized in the Province of New Brunswick, or as directly enforced as in the original jurisdiction. This paper is intended to present the general guidelines by which a judgment creditor may obtain recognition and enforcement in this Province. The authors caution that this article is not intended to be exhaustive and a full and thorough review of the applicable legislations should be made in attempting to register and enforce foreign judgments in New Brunswick.

### **II. RECOGNITION OF FOREIGN JUDGMENTS IN NEW BRUNSWICK**

A judgment obtained from a court outside of New Brunswick will only be enforceable in New Brunswick if the judgment creditor re-litigates the cause of action and is successful, or, has the judgment recognized in the Province. Re-litigating the matter in New Brunswick is obviously not the preferred option, but it is one that is always open to judgment creditors if a New Brunswick court will not recognize the judgment, typically because the necessary criteria cannot be met. Judgment creditors will more often pursue recognition.

\*Monika M.L. Zauhar is a Partner with the law firm of Cox & Palmer, and practices in the areas of Insurance Defence and Administrative Law. Kathleen P.J. MacDougall is an articling student in the Fredericton, New Brunswick office.

\*\* Cox & Palmer is a member firm of Risk Management Counsel of Canada

As a general rule, if the original court had jurisdiction to decide the matter, New Brunswick courts will recognize that judgment, subject of course, to the defences available to the judgment debtor. However, whether or not the original court had jurisdiction is actually a question to be determined by *New Brunswick law* rather than the law of the place where the judgment was initially obtained. There are several applicable pieces of legislation under which to proceed, depending on the origin of the initial judgement. A judgment creditor may proceed in having the foreign judgment recognized in New Brunswick under the *Canadian Judgments Act [CJA]*<sup>1</sup> or, the *Foreign Judgments Act [FJA]*<sup>2</sup>. The *CJA* applies to judgments obtained in a province or territory *other than* New Brunswick<sup>3</sup> (i.e., a Canadian judgment), whereas the *FJA* applies to judgments from a country or part of a country other than Canada<sup>4</sup> (i.e. foreign judgments). It should be noted that both the *CJA* and the *FJA* apply to judgments for a sum of money only; for example, where the judgment obtained outside of New Brunswick was for an injunction, or return of property, etc. a New Brunswick Court will not recognize and subsequently enforce in such a judgment in this Province<sup>5</sup>.

#### ***A. Process for Recognizing a Canadian Judgment***

The purpose of the *Canadian Judgments Act*, [the *CJA*], is to provide a simple procedure for having a Canadian judgment recognized in New Brunswick. Under the *CJA*, no action need be brought. A judgment creditor may have his or her judgment registered<sup>6</sup> by the Clerk of the Court of Queen's Bench of New Brunswick<sup>7</sup> by submitting to the Clerk the following documentation:

- a certified copy of the Canadian judgment;<sup>8</sup>
- \$35 (registration fee);<sup>9</sup> and,
- an affidavit containing all of the information required by the regulations.<sup>10</sup>

The affidavit must set out the information required by section 3(1) of NB Reg 2003-18 under the *CJA*. The Regulation very clearly sets out the information that must be contained in the affidavit, similar to a "fill-in-the-blank" format.

It is vital that judgment creditors comply with this Regulation for their judgments to be registered and become enforceable in New Brunswick. Although not exhaustive, the following list outlines some of the most significant information to be included by way of affidavit:

- the name and address of the deponent (judgment creditor or agent or solicitor thereof);
- the amount owing on the judgment;
- the charges incurred for registration;
- the interest incurred on the judgment up to registration;

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(1) R.S.N.B. 2011, c 123.

(2) R.S.N.B. 2011, c 162.

(3) *Supra* note 1 at section 1, see the definition of "Canadian judgment".

(4) *Supra* note 2 at section 1, see the definitions of "foreign judgment" and "foreign country".

(5) *Supra* note 1 at section 3, judgments for a "fixed sum of money"; *supra* note 2 at section 1, judgments for "a sum of money with or without costs made payable or by which costs only are made payable."

(6) *Supra* note 1 at section 3.

(7) *Ibid* at sections 1, 4 and 5.

(8) *Ibid* at section 4(a).

(9) New Brunswick Regulation 2003-18, *General Regulation – Canadian Judgments Act*, at section 6.

(10) *Ibid* at section 3.

- the rate of interest payable on the judgment from the date of registration;
- the date the judgment became enforceable in the original jurisdiction;
- the date enforcement expires in the original jurisdiction;
- whether or not an order staying or limiting enforcement is in place in the original jurisdiction; and,
- whether or not the judgment debtor took part in the original proceeding.

Additionally, if the judgment debtor did not participate in the original proceedings, the judgment creditor must also include the following information in his/her affidavit:

- the basis for jurisdiction;
- a statement that the original proceeding which must be brought in New Brunswick, pursuant to the CJA;<sup>11</sup> and,
- if there is an order limiting the enforcement of the judgment, a copy of the Order.

Once the judgment is registered, it is considered recognized and enforceable as if it were originally obtained in New Brunswick.<sup>12</sup>

The CJA outlines certain limitations to registration of a Canadian judgment, the most significant of which are:

- judgments must be for a fixed sum of money;<sup>13</sup>
- judgments or Orders must be final in their original jurisdictions;<sup>14</sup>
- they must have been filed in the superior Court of the Province or territory where they were obtained;<sup>15</sup>
- they must be enforceable in their original jurisdiction;<sup>16</sup> and,
- judgment resulting from proceedings which were commenced before September 1, 2003, and where the judgment debtor did not take part in the proceedings<sup>17</sup> may not be registered in New Brunswick – for such proceedings, the law that existed at that time applies.

The best case scenario for registering a Canadian judgment in New Brunswick is that the judgment debtor took part in the original proceeding. Such a case would facilitate the Clerk of the court recognizing the jurisdiction of the Canadian court. Essentially, the jurisdiction of the Canadian court is recognized because the judgment debtor is said to have 'submitted' to that jurisdiction by virtue of his/her participation. In such circumstances, the judgment creditor need only submit a copy of the judgment, the prescribed fee, and an affidavit, and registration will generally follow.

(11) The regulation mistakenly refers to section 5(2) of the CJA but it should read section 6(2). There is no section 5(2) in the CJA.

(12) *Ibid* at section 7.

(13) *Ibid* at section 3.

(14) *Ibid* at section 1, see the definition of "Canadian judgment".

(15) *Ibid*.

(16) *Ibid*.

(17) *Ibid* at section 2(1).

Where the judgment debtor did not take part in the original proceeding additional steps are required to secure registration. Because the judgment debtor cannot be said to have submitted to the jurisdiction of the Canadian court in light of his/her lack of participation in the original court proceedings, jurisdiction of the court must be established on some other basis. Subsection 6(1) of the *CJA* sets out the circumstances pursuant to which the Clerk will recognize the jurisdiction of the court and register the judgment. The judgment creditor must satisfy the Clerk that of one of the stated criteria has been met, which criteria are as follows:

- the judgment debtor was resident in or carried on business in the province or territory where the Canadian judgment was made at the time the proceeding commenced;
- the cause of action related to acts done in the province or territory where the Canadian judgment was made, to property located there, to obligations that should have been performed there or to damage that was sustained there;
- the judgment debtor had agreed that the proceeding might be determined in the province or territory where the Canadian judgment was made, or,
- a court of the province or territory where the Canadian judgment was made gave leave for the service of process outside that province or territory, and the judgment debtor was so notified when process was served.<sup>18</sup>

Despite satisfying one of the above criteria, a court may nonetheless refuse to register the Canadian judgment in New Brunswick if it involved a New Brunswick resident sued under a contract for the supply of a consumer good or service within New Brunswick,<sup>19</sup> or, if the issue of the judgment involved a contract of employment under which the individual's place of employment was in New Brunswick.<sup>20</sup> It should be noted that these exceptions only apply to individuals and not to corporations.<sup>21</sup>

If a Canadian judgment cannot be registered under the *CJA* because the judgment creditor cannot meet the necessary criteria under the Act, the only option available to the judgment creditor is to bring a new action in New Brunswick on the original cause of action.<sup>22</sup>

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(18) *Ibid* at section 6(1)(a)-(d).

(19) *Ibid* at section 6(2)(a). This provision was judicially considered in *2063010 Ontario Inc. (cob Agent's Equity) v Barr et al*, 2011 NBCA 32. In this decision, Robertson J. refused to allow the respondent real estate agents to rely on this provision where they had contracted with an Ontario company. Robertson J. allowed the judgment to be enforced. The Ontario Company had advanced certain sums of money to the real estate agents that would be repaid at a later date or else interest would accumulate. The real estate agents failed to pay back the loaned amounts. Robertson J. said the contract was a business contract and not one for consumer goods or services within the meaning of what is now s. 6(2)(a) of the *CJA* (at the time of the decision was s. 5(2)(a)). See paragraph 5: "The true object of the provision is to force vendors and service providers who are dealing with non-business consumers in New Brunswick to sue in New Brunswick. It is unrealistic to expect this type of consumer to defend a lawsuit brought in another province."

(20) *Ibid* at section 6(2)(b).

(21) *Squire v Yamatech Group Inc.*, 2008 NBQB 278 at para. 27.

(22) *Supra* note 1 at section 12.

## ***B. Process for Recognizing a Foreign Judgment***

To have a foreign judgment recognized in New Brunswick, a judgment creditor must bring an action on the judgment. If the action is for a sum of money, it must be brought in accordance with the *FJA*.<sup>23</sup>

There is an important distinction between bringing an action on a foreign judgment and bringing a new action. Bringing a new action means completely re-litigating the matter to have a New Brunswick court render a judgment, irrespective of what a foreign court may have decided. Bringing a new action is not a recognition procedure. The judgment is enforceable in New Brunswick by virtue of the fact that it was rendered in New Brunswick. Bringing a new action is always an option available to judgment creditors, subject to any limitation periods.

On the other hand, bringing an action on a foreign judgment is a recognition procedure that is only available for foreign judgments and not for Canadian judgments.<sup>24</sup> The action brought is a request to a New Brunswick court to **recognize** a foreign judgment so that it may be enforced in New Brunswick. None of the issues are re-litigated. The decision for the New Brunswick Court in an action on a foreign judgment is simply whether or not the judgment should be recognized and thus, rendered enforceable in New Brunswick.

For economic reasons, judgment creditors seeking to enforce judgments from outside of Canada will most often pursue recognition of the foreign judgment, rather than re-litigating the matter, and recognition must be pursued under the *FJA*.

New Brunswick legislators have attempted to create an even simpler procedure for recognition of such foreign judgments with the enactment of the *Reciprocal Enforcement of Judgments Act [REJA]*.<sup>25</sup> The wording of the *REJA* allows judgment creditors to register foreign judgments in the same way the *CJA* allows for registration of Canadian judgments. Ultimately registration is the simplest procedure for recognition, and simpler than bringing an action on the foreign judgment under the *FJA*.

Interestingly, the *REJA* cannot be applied in New Brunswick. A reading of the legislation appears to reflect an intention that the *REJA* allow for registration of judgments from foreign countries which themselves implemented reciprocal legislation. The *REJA* stipulates that, the Lieutenant-Governor in Council of New Brunswick may make regulations specifying the countries to which the *Act*<sup>26</sup> applies, and according to which list a similar procedure would apply for registration of foreign judgments, as presently exists under the *CJA*. This legislation was aimed at eliminating the need to bring an action on the foreign judgment. However, as of this date of the publishing of this article, there exists no Regulation in force under the *REJA* in the Province of New Brunswick. The 'reciprocity' of the legislation is to be established through regulation, which 'reciprocity' would, in turn, allow for registration of foreign judgments from certain

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(23) *Supra* note 2.

(24) *Supra* note 22.

(25) RSNB 1973, c R-3.

(26) *Supra* note 5 at section 8.

jurisdictions identified in the regulations. The resulting effect is that, the *REJA* has no application in New Brunswick. In light of the non-application of the *REJA*, there remain only two options available to a judgment creditor under a foreign judgment; bringing an action on the foreign judgment pursuant to the *FJA*, or, bringing an action on the original cause of action.

In an action on a foreign judgment, the jurisdiction of the foreign court must be proved. This procedure differs from the registration process for Canadian judgments under the *CJA*, where jurisdiction of the Canadian court is basically assumed. The *FJA* specifically sets out the limited circumstances in which a New Brunswick court will recognize the jurisdiction of a foreign court. Those circumstances are set out in section 2 of the *FJA*, namely:

- if the defendant was resident in the foreign country when the action was commenced; or,
- if the defendant submitted to the jurisdiction of the foreign court by becoming a plaintiff, appearing as defendant, or expressly or impliedly agreeing to the jurisdiction of the foreign court.

Outside of these circumstances, a New Brunswick court will not recognize the jurisdiction of a foreign court.

There do exist a number of defences under the *FJA*; if any one of them is successfully argued in a New Brunswick court, such defence will result in the failure of the foreign judgment being recognized in New Brunswick. These defences are listed in sections 3 and 5 of the *FJA* and include:

- the action involved immovable property in New Brunswick;
- the original court did not have jurisdiction;
- the defendant was not served and did not appear;
- the judgment was obtained by fraud;
- the judgment is not final;
- the judgment is not for a sum of money;
- the judgment is for a sum due under the revenue laws of the foreign country;
- the judgment has been satisfied; and,
- the judgment would not have been entertained by the New Brunswick courts on public policy grounds.

If the judgment cannot be recognized under the *FJA*, the judgment creditor is free to bring a new action in New Brunswick against the judgment debtor on the original cause of action, albeit this is an expensive route to be forced to take. It should be further mentioned that, the judgment debtor may also apply for a stay of proceedings in New Brunswick, pursuant to section 6 of the *FJA*, if he/she decides to proceed with an action in the foreign jurisdiction.

In summary, the *FJA* presents some limitations to judgment creditors seeking to have foreign judgments recognized in New Brunswick. Unless the judgment debtor was resident in the foreign country when the action was commenced or submitted to the jurisdiction of the foreign court, a foreign judgment will not

be recognized in New Brunswick under the *FJA*. In such a case, the judgment creditor will only have the option of bringing a new action in the Province of New Brunswick on the initial cause of action, seeking a New Brunswick judgment.

The significant limitations presented by the *FJA*, as compared to the common law principles for recognizing foreign judgments has, on many occasions, begged the question: can a judgment creditor rely on the common law principles to have a foreign judgment recognized in New Brunswick, or, does the *FJA* effectively oust the application of the common law?

### ***C. Common Law Principles on Recognizing Foreign Judgments***

*Morguard Investments Ltd v De Savoye* [*Morguard*]<sup>27</sup> is the leading Canadian case on the recognition of foreign judgments. Although this case involved the enforcement of an Alberta judgment in British Columbia, the test enunciated by the Court for recognition of foreign judgments was later said to have application in the international context as well.<sup>28</sup>

In *Morguard*, the appellant mortgagor mortgaged certain lands in Alberta when he resided in that province. He subsequently moved to British Columbia and then defaulted on his Alberta mortgage. The respondent mortgagees commenced an action in Alberta against the appellant and served him in British Columbia. The appellant did not defend the action. The respondent mortgagees obtained judgment in Alberta and subsequently brought an action to have the Alberta judgment recognized in British Columbia for enforcement purposes.

The respondents succeeded at the Supreme Court of British Columbia in having their Alberta judgment recognized in British Columbia and on appeal by the mortgagor, the Court of Appeal upheld that decision. The mortgagor appealed to the Supreme Court of Canada.

At the *Supreme Court of Canada*, [SCC], La Forest, J. found that the courts in one province should “give full faith and credit”<sup>29</sup> to the judgments of a court in another province or territory, “***so long as that court has properly, or appropriately, exercised jurisdiction in the action***”.<sup>30</sup> It was held that, jurisdiction will be recognized where there is “a real and substantial connection”<sup>31</sup> to the province or territory where the matter *was originally brought*. This became known as the “real and substantial connection” test for the purpose of recognizing extra-provincial judgments.

Applying that test, the SCC in *Morguard* found that the Alberta court had jurisdiction. The mortgaged property was located in Alberta, the mortgage contract was made in Alberta, and the judgment debtor had been resident there at the time the action was initially commenced; accordingly, it could be said that, there existed a ‘real and substantial connection’ to the original jurisdiction where the initial judgment was issued. The SCC therefore recognized the Alberta judgment in British Columbia.

(27) *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 107 [*Morguard*].

(28) *Beals v Saldanha*, 2003 SCC 72 [*Beals*].

(29) *Supra* note 22 at p. 1079.

(30) *Ibid*.

(31) *Ibid* at p. 1080.



In the 2003 case of *Beals v Saldanha [Beals]*, the *Supreme Court of Canada* found that the “real and substantial connection” test was also applicable to international judgments.

The “real and substantial connection” test certainly gives Canadian courts a broader range of circumstances in which jurisdiction of a foreign court may be recognized. However, it must be recognized that, New Brunswick courts have said time and time again that judgment **creditors may not** rely on the “real and substantial connection” test to have a foreign judgment recognized in New Brunswick *because the circumstances where a foreign judgment will be recognized are specifically and exhaustively set out in the FJA*.

In *844903 Ontario Limited v Pluijm*, [1992] NBJ No 614, the judgment creditor and judgment debtor were parties to a contract made in Ontario. The judgment creditor brought an action against the judgment debtor in Ontario for amounts owing in relation to that contract. The judgment debtor, *Pluijm*, chose not to defend the action in Ontario and the judgment creditor obtained a default judgment. The judgment creditor subsequently sought to have the judgment enforced in New Brunswick where the judgment debtor *Pluijm* was resident.

*Pluijm* argued that he could make out a good defence under the *FJA*, as the Ontario court did not have jurisdiction under section 2 of the *FJA*, which sets out the “only” circumstances where a foreign court has jurisdiction. [AS A SIDE NOTE, AT THE TIME OF THIS DECISION “FOREIGN COURT” MEANT ANY COURT OUTSIDE THE PROVINCE, WHEREAS NOW IT REFERS TO AN INTERNATIONAL COURT.] The judgment creditor, on the other hand, argued that, the Ontario judgment should be recognized on the basis of the “real and substantial connection” test. The question before the New Brunswick Court of Queen’s Bench was whether or not the “real and substantial connection” test applied in New Brunswick, or whether the Court had to follow the criteria set out under the *FJA* to recognize the jurisdiction of the Ontario Court. In finding that, the ‘real and substantial connection’ test *did not* apply, the Court stated the following at p. 13:

[A]ssuming that the intent of the legislator corresponds with what the Commissioners intended when they recommended the adoption of what is our s. 2 of the *Foreign Judgments Act*, there is no question in my mind **that s. 2 is an obstacle to the application in New Brunswick of the “real and substantial connection” test.**

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For reasons which will become apparent, I have concluded that a reference to such proceedings does “certainly settle the matter one way or the other” in the sense that it has been made clear by the drafters of s. 2 of the *Foreign Judgments Act* that **the retention of the word “only” was for the purpose of “foreclosing further common law development”.**

*[Emphasis added by authors]*



Of further note is the fact that, in *Pluijm*, a constitutional argument was brought forward by the judgment creditor based on the fact that, the Supreme Court of Canada in the earlier case of *Morguard* had imposed a constitutional obligation and duty on every Province and Territory in Canada to follow the 'real and substantial connection' test. However, such argument was not considered by the Court in *Pluijm*, based on a procedural ground. Accordingly, it should be recognized that, a constitutional argument might be worthy of consideration by the courts in the future. However, until such challenge is presented to the New Brunswick Courts, the will of the legislator, as stated by the New Brunswick courts, must be respected.

The *Pluijm* case was subsequently followed in later New Brunswick cases, and the principles enunciated therein supported by the New Brunswick Court of Appeal: see *Sims v Bower* (1993), 138 N.B.R. (2d) 302 (CA); *Niles v Bahadoorsingh*, [2000] NBJ No 427 (QB); *Cormier v Theriault*, 2001 NBQB 211 (QB); and *Pegasus Consulting Ltd v OSI Software Inc.*, [2005] NBJ No 427 (QB).

In a more recent case of *Landsbanki Islands HF (Re)*, [2009] NBJ No 81, Rideout, J. ruled that, the *FJA* did not apply to the case before him and relied on the 'real and substantial connection' test enunciated in *Morguard*. In *Landsbanki Islands*, the Court allowed an ex parte application (i.e., without notice to a party) and recognized an Icelandic judgment. The judgment creditors were two Icelandic banks that had been hit badly in the financial crisis of 2008. As a result, the Icelandic government had taken control of the banks. As a measure aimed at stabilizing Iceland, the banks applied to Icelandic Court for a "moratorium Order". They sought an Order to have 'stayed' the actions of all potential creditors against them. The Order was granted. The judgment creditor banks subsequently sought to have that Order enforced in all Canadian jurisdictions, where they had creditors who could potentially bring actions against them, undermining the moratorium.

Rideout, J. first examined the *REJA* and found that it did not apply because the legislation is limited to only 'money' judgments;<sup>32</sup> interestingly, the Judge did not mention the lack of application of the *REJA* based simply on the fact that, Iceland had no reciprocating legislation. In addition, no reliance was placed by the Court on the *FJA*; although not discussed, this is likely due to the fact that, the *FJA* also applies *strictly* to money judgments. Had there been an opposing party, the *FJA* may very well have been argued and discussed in the judgment.

Ruling that the *REJA* did not apply, Rideout, J. relied on *Morguard* and *Beals* and found sufficient authority to recognize the judgment in New Brunswick. He did so through the application of the 'real and substantial connection' test. However, the Judge did impose one limitation; he ordered the banks to first notify its New Brunswick creditors of the Order, and, if no motions were brought to challenge the initial Icelandic Order, it would subsequently be recognized in New Brunswick.

As stated above, the *Landsbanki Islands* case is clearly distinguishable on the grounds that, the Order sought did not involve an amount of money, thus allowing

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(32) *Supra* note 5 at section 1, see the definition of "judgment".

for a determination on the basis of the “real and substantial connection” test, as earlier enunciated by the Supreme Court of Canada. Given the amount of jurisprudence in New Brunswick on the recognition of foreign judgments, should application be made in this Province for the recognition of a foreign judgment based on **a sum of money**, a judgment creditor will not be permitted to rely on the “real and substantial connection test” and the confines of the *FJA* will be applied by the Court. On the other hand, should the foreign judgment sought to be recognized in New Brunswick **not be** for a sum of money, a judgment creditor will be able to argue the common law for the purpose of recognition and rely on the ‘real and substantial connection’ test will apply.

Once recognized in New Brunswick, a judgment from an extra-provincial court, whether Canadian or foreign, is treated the same as a judgment originally obtained in New Brunswick and the same enforcement procedures are available to the judgment creditor.

### III. ENFORCEMENT OF JUDGMENTS IN NEW BRUNSWICK

Once recognized in New Brunswick, a judgment from an extra-provincial court, whether Canadian or foreign, is treated the same as a judgment originally obtained in New Brunswick and the same enforcement procedures are available to the judgment creditor.

#### **A. Initial Search**

The first step to take to enforce a New Brunswick judgment (whether originally obtained in New Brunswick or recognized in New Brunswick) is to determine what property, if any, the judgment debtor has to potentially realize. Judgment creditors may search New Brunswick’s real property database “Planet” to determine if the judgment debtor has any land in the province. Interests in land must be registered so it is very likely that if a judgment debtor has land, it will be revealed by a Planet search.

Judgment creditors should also search the Personal Property Registry (the “PPR”)<sup>33</sup> to see if there are registered interests against the judgment debtor’s personal property. The purpose of the PPR is for creditors to notify others of their interests in a debtor’s personal property. Whereas creditors might search land registries to determine whether or not a debtor owns land, the purpose of searching the PPR is not necessarily to ascertain whether or not the debtor has personal property. Personal property is only going to be found in a PPR search if a creditor has registered an interest in personal property.

#### **B. Register**

The next step in enforcement proceedings is to register the judgment against the debtor’s property. Registration in this sense is different than registering a Canadian judgment as discussed above. New Brunswick has three separate registries: the PPR, the Land Titles Registry<sup>34</sup>, and the Land Registry<sup>35</sup>. Subject to

(33) *Personal Property Security Act*, SNB 1973, c P-7.1 at section 42.

(34) *Land Titles Act*, SNB 1981, c L-1.1 at section 4.

(35) *Registry Act*, RSNB 1973, c R-6 at section 3(1).

a few exceptions, registration on the PPR binds all of the judgment debtor's present and after acquired personal property (i.e. personal property presently owned and personal property to be owned in the future); whereas, judgments registered in the other two bind the judgment debtor's real property (i.e. land).

The purpose of registering a judgment right away is to secure a position of priority among other creditors. Further, registration may help the judgment creditor to convince the judgment debtor to pay the debt.

#### *i. Personal Property Registry*

Essentially, registration of a judgment debt on the PPR<sup>36</sup> gives the judgment creditor a lien on the judgment debtor's personal property, which binds the property and makes it difficult to sell. Anyone can search the registry to see if there are any outstanding claims on a debtor's personal property. The registered judgment creditor obtains an interest in the judgment debtor's personal property which is prior to the interest of unregistered creditors and most subsequent registrants,<sup>37</sup> and encumbers the interest of the judgment debtor.

Registration in the PPR is a crucial step that should be undertaken as soon as possible after judgment or recognition. The judgment debtor's personal property is not bound until a notice of judgment is registered, meaning a judgment debtor is free to dispose of assets that could otherwise pay the judgment debt.<sup>38</sup> Furthermore, judgment creditors cannot start active enforcement proceedings against the judgment debtor until a notice of judgment is registered in the PPR.<sup>39</sup>

One common enforcement proceeding that will be discussed below is an Order for Seizure and Sale. Registered judgment creditors are entitled to share in the proceeds of a sheriff sale, even if another judgment creditor initiated the proceedings. Before registration on the PPR, there is no entitlement to share in such proceeds. Once registered on the PPR, judgment creditors may share in the proceeds of a sheriff's sale even though another creditor may have initiated the sale. Subject to limited exceptions, there is no priority between registered judgment creditors in a sheriff sale<sup>40</sup> so they will share the proceeds on a pro rata basis.<sup>41</sup>

#### *ii. Land Titles Office and Registry Office*

Money judgments can also be registered in the appropriate Land Titles office<sup>42</sup> or in the appropriate Registry office,<sup>43</sup> to create a lien on the judgment debtor's land. Both are systems for land registration, the Registry an older system that is being phased out over time, and the Land Titles a newer system that is in full effect. Judgment creditors should register their judgment debts in whatever registry office the judgment debtor maintains ownership of property.

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(36) Judgment creditors have the right to register their judgments on the PPR pursuant to section 2.2 of the Creditors Relief Act, RSNB 1973, c C-33 and must comply with Part V of General Regulation – Personal Property Security Act, NB Reg95-97 to affect registration. Judgment creditors may register their judgments on the PPR for up to 15 years for an initial registration fee and an annual fee thereafter.

(37) Creditors Relief Act, RSNB 1973, c C-33 at section 2.3(5).

(38) Supra note 37 at section 2.3(1).

(39) Ibid at section 2.3(9).

(40) Ibid at sections 2.3(12) and 3.

(41) Ibid at section 4(8).

(42) Supra note 34 at section 40.

(43) Memorials and Executions Act, RSNB 1973 c M-9 at sections 5-6.

### ***C. Convincing the Judgment Debtor to Pay***

Sometimes, the most cost efficient way for a judgment creditor to collect a debt is to convince the judgment debtor to pay. This should always be attempted before active enforcement procedures (ex: Order for Seizure and Sale, garnishment) are commenced as there is no guarantee as to the time, cost, and effectiveness of enforcement.

A judgment creditor should consider providing the judgment debtor with following messages in an attempt to get paid:

- The amount payable will increase with interest on the judgment and the costs to enforce it;
- Non-payment can affect the debtor's credit rating, which could prevent the debtor from getting a loan, buying property, or getting a credit card;
- Registration of the judgment will tie up the debtor's property for 15 years; and
- The judgment creditor can take further action to enforce payment.<sup>44</sup>

Judgment creditors may also use collection agencies to help convince the judgment debtor to pay the debt.

### ***D. Investigate the Debtor***

It is important to investigate the judgment debtor to ascertain whether or not there are sufficient assets to pay the judgment debt. Further, the judgment creditor will want to know if there are other creditors (secured or otherwise) who may share in the proceeds of a sale or who would have priority over the judgment creditor. Secured creditors may have an interest in particular property and therefore, an enforcement procedure by a judgment creditor could result in the proceeds going to the secured creditor.

There are a number of ways to investigate the debtor; we have already discussed searching the PPR and land registries. Judgment creditors may also search the Motor Vehicle Registration office to see if the judgment debtor has any vehicles (automobiles, snowmobiles, or all-terrain vehicles). If the debtor does have a registered vehicle, the judgment creditor may use the Lien Check Service in the PPR to find out if there is a lien on the vehicle.

There are also a couple of examination procedures available to judgment creditors to inquire with the judgment debtor about his or her ability to pay the judgment debt. Although not frequently used, Rule 61.14 of the New Brunswick Rules of Court allows judgment creditors to examine a judgment debtor without leave of the court and inquire about the debtor's assets, income, debts, and ability to pay.<sup>45</sup>

### ***E. Forced Examination***

If a judgment debtor refuses to say whether or not he can pay the debt, the judgment creditor may apply to the court for an order forcing the judgment

(44) Public Legal Education Information Service, Judgment Enforcement, (October 2007) online at: [http://www.legal-info-legale.nb.ca/en/index.php?page=judgment\\_enforcement](http://www.legal-info-legale.nb.ca/en/index.php?page=judgment_enforcement).

(45) Rules of Court, NB Reg 82-73 at Rule 61.14.

debtor to submit to an examination.<sup>46</sup> The court clerk presides over this examination and both the clerk and the judgment creditor may ask the judgment debtor about his or her ability to pay. The judgment debtor is required to answer and based on the information given, the clerk may make an order for payment in full or by installments. If the judgment debtor does not comply with such order, the judgment creditor may apply to hold the judgment debtor in contempt.<sup>47</sup> If the court finds the judgment debtor guilty of contempt, it may order a number of penalties against the judgment debtor including imprisonment.

It is important for creditors to be aware that once a payment order is obtained, regardless of the amount and number of installments in the order, the judgment creditor may not take any other forms of enforcement proceedings against the judgment debtor's property, including an Order for Seizure and Sale, as discussed below.

#### ***F. Order for Seizure and Sale***

An Order for Seizure and Sale is an order from the court directing the sheriff to seize some of the judgment debtor's assets, sell them, and share the proceeds among the creditors. To obtain an Order for Seizure and Sale, judgment creditors must complete Form 61A from the Rules of Court, obtain a verification of registration of judgment from the PPR and present these two documents at the sheriff's office in a district where the judgment debtor might have property. Rule 61 sets out certain instances in which the judgment creditor must obtain leave from the court for an Order for Seizure and Sale.

The sheriff will charge a registration fee and ask for instructions in writing as to how to proceed. The more information the judgment creditor gives, the faster the process will go (ex: judgment debtor's address, where certain property is located) and the sheriff may ask for a security deposit to cover expected expenses in carrying out the order. If the sheriff does not recover expenses incurred in the asset sale, the judgment creditor may lose his or her security deposit.

#### ***G. Exempt Property***

Before an Order of Seizure and Sale, a judgment creditor should consider certain restrictions placed on the sheriff. The sheriff must sell personal property before selling land.<sup>48</sup> Further, some property is exempt from seizure.

Pursuant to subsection 58(3) of the PPSA, judgment debtors may claim an exemption over the following property.

- Furniture up to a value of \$5,000;
- One motor vehicle (up to a certain value);
- Medical or health aids; and
- Certain consumer goods where they are not worth the cost of enforcement or where the judgment debtor would experience serious hardship if seized.

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(46) *Arrest and Examinations Act*, RSNB 1973, c A-12 at section 30(2).

(47) *Supra* note 44 at Rule 76.

(48) *Supra* note 43 at section 11.

- One motor vehicle (up to a certain value);
- Medical or health aids; and
- Certain consumer goods where they are not worth the cost of enforcement or where the judgment debtor would experience serious hardship if seized.

Section 33(1) of the *Memorials and Executions Act* also sets out a list of property that is exempt from seizure, including:

- Clothes;
- Food and fuel for the debtor and family for three months;
- Tools used in the debtor's trade; and
- Domestic animals.

Also exempt from seizure is life insurance money or rights designated in favour of beneficiaries.<sup>49</sup> It is important to keep these exemptions in mind when investigating and assessing the debtor's ability to pay and whether or not a judgment creditor should execute a sheriff sale.

#### **H. Attaching Order/Garnishment**

An order for garnishment is an order from the court to a third party who owes a debt to the judgment debtor. The order stipulates that the third party shall pay the judgment creditor the amount owed, rather than paying the judgment debtor directly. The judgment creditor may apply to the court for garnishment by way of affidavit<sup>50</sup> and if the court is satisfied the order should be made, it will issue an attachment order which can then be forwarded to the garnishee(s). Unlike most Canadian jurisdictions, New Brunswick is somewhat unique in that wages are exempt from garnishment.<sup>51</sup> Garnishment is not available at all unless the debt exceeds \$40 exclusive of costs and interests<sup>52</sup> and the amount owing on the debt exceeds \$80.<sup>53</sup>

To obtain a garnishment order, the judgment creditor must be aware of potential sources of money for the judgment debtor, such as a bank account, and be able to present information about such sources to the Court.

### **IV. POTENTIAL COMPLICATIONS WITH JUDGMENT ENFORCEMENT**

This paper is not intended to cover all issues that could arise when enforcing judgment but is meant to give a simplified overview of the steps that could take place and some of the options that are available to judgment creditors. Judgment creditors should always take the time to review the relevant regulations discussed in this paper and to proceed cautiously when complications arise. Here are some additional issues of which judgment creditors should be aware:

(49) *Insurance Act*, RSNB 1973 c I-12 at section 157(2).

(50) *Garnishee Act*, RSNB 1973 c G-2 at section 3(1).

(51) *Ibid* at 31.

(52) *Ibid* at 3(3).

(53) *Ibid* at 2(1).

- **Joint Interests or Ownership in Property** – There could be a dispute regarding who owns certain property or there could be joint ownership of the property. Registry searches may not reflect joint interests in certain property. For example, a marital home may be registered in the judgment debtor's name with no indication of a spouse. But a spouse's interest in a marital home takes priority over that of a judgment creditor.<sup>54</sup> Judgment creditors have no right to recover their debt by going after others' property and can be liable in damages to a third party if they improperly instruct a sheriff in an Order for Seizure and Sale. Judgment creditors must be careful not to instruct the sheriff to go after property unless they are absolutely certain there is no joint ownership.<sup>55</sup>
- **Priority Interests and Exemptions** – Judgment creditors should be aware of interests that other creditors might have in the judgment debtor's property and where they rank in terms of priority. Judgment creditors should also be aware of the property that may be exempt from execution. If amounts are recovered in a sheriff sale, the proceeds will be shared among creditors. It is important for the judgment creditor to assess whether or not his or her judgment debt will be recovered, in light of other registered creditors.
- **Instructing Sheriffs** - When instructing a sheriff on an Order of Seizure and Sale, judgment creditors should give all the information they have about the judgment debtor's property and should be upfront about what they are unsure or unaware of.
- **Bankruptcy** – If the judgment debtor is bankrupt, the rules of judgment enforcement change completely. The judgment creditor may make the trustee in bankruptcy aware of his or her interest but may not take enforcement steps on his or her own. Further, the judgment creditor will be considered an unsecured creditor and lose any priority he or she might have obtained through the registries.
- **Discharging Registrations** – Once a judgement creditor has collected the debt, he or she must discharge the registrations against property and/or land. Otherwise, the judgment creditor continues to place a lien on the land and could be liable in damage to the judgment debtor who has difficulty selling the property to a third party.<sup>56</sup>

Where complications do arise, judgment creditors should consult a lawyer to obtain proper legal advice. This cost will not necessarily be reimbursed by the judgment debtor but it may ensure that the judgment creditor does not face liability in the process of or after recovering the judgment debt.

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(54) *Supra* note 44.

(55) *Ibid.*

(56) *Ibid.*



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## V. CONCLUSION

Some authors are calling for legislative reform in New Brunswick<sup>57</sup> because of the criticisms that judgment enforcement is overly complicated, time consuming and ineffective. The rules on enforcement are contained within more than ten different statutes, rules of court and regulations. Until such reforms are addressed however, judgment creditors must navigate their way through the current system to recover their judgment debts in New Brunswick.

## CHECKLIST SUMMARY

For simplicity, the authors produce below a summary outlining the steps in the process for recognition and enforcement of judgments in New Brunswick. This list is not intended to be exclusive or exhaustive. Depending on the issues which may arise, additional steps may be necessary.

## RECOGNITION

- If the judgment was obtained outside New Brunswick, it must first be recognized by the New Brunswick Court of Queen's Bench.
- If the judgment obtained is from another Canadian province or territory, registration may proceed under the Canadian Judgments Act, R.S.N.B. 2011, c 123.
- Pursuant to the Canadian Judgments Act, *ibid*, registration may proceed by filing with the court Clerk a certified copy of the judgment from the original jurisdiction, a \$35 fee, and an affidavit, detailing the requirements set out in NB Reg 2003-18.
- If the judgment obtain is from outside Canada, [foreign judgment], and is for an amount of money, the party seeking to have it recognized may file an action on the judgment, pursuant to the Foreign Judgments Act, R.S.N.B. 2011, c 162.
- The criteria outlined in the Foreign Judgments Act, *ibid*, must be satisfied for the New Brunswick court to recognize the foreign judgment in New Brunswick.
- Once recognized by a New Brunswick Court, steps may be taken to enforce the judgment in the same manner as a judgment originating from a New Brunswick Court.

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(57) Gleixner et al., A Plea for a New Brunswick Judgment Enforcement Act, (May 2012) online at: <[http://professeure.umoncton.ca/umcm-gleixner\\_micheline/NBJEA](http://professeure.umoncton.ca/umcm-gleixner_micheline/NBJEA)>.

## ENFORCEMENT

- Search the registries
- Register the judgment on the PPR
- Register the judgment in the Land Titles and Registry Offices (optional)
- Search the Motor Vehicle Registry and Lien Check Service
- Try to convince the judgment debtor to pay
- Question the debtor on his or her ability to pay (possible examination under Rule 61.14)
- Be aware of exempt property
- Apply to the Court for a debtor examination (if necessary)
- File an Order for Seizure and Sale
  - Fill out Form 61A
  - Obtain a verification of registration statement from the PPR
  - Bring the above to the sheriff's office
  - Instruct the sheriff on all the information you have on the judgment debtor's property
  - Be prepared to pay a registration fee and security deposit (sometimes a few thousand dollars)
- Apply to the Court for a Garnishment Order (if necessary)
  - You must have information about the debtor's sources of income

## Contact

*Please direct questions  
or suggestions to:*

**Monika M.L. Zauhar,**  
(506) 453-9644  
mzauhar@coxandpalmer.com