The Enforcement of Foreign Judgments in Canada, 2004

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Our planet is really a global village thanks to the internet and technology and the fact that people and goods traverse the globe as never before in human history. This reality has recently affected even the area of the enforcement of foreign judgments.

For a better understanding of the of the state of Canadian and international law at the present time, we have to cast our minds back a little on history from the last millennium.

Twenty years ago, some Toronto business people were involved in a complex litigation matter involving a real estate project in the Antilles. To advance their strategy, they and their Toronto lawyers decided to commence an action in the court of one of the islands.

To help them advance their case, they with a local lawyer to explain the situation and to

retain him to start the action against the opposing parties.

After having commenced the action and served the defendant, the Toronto businessmen and their lawyers returned to Toronto, where they had to defend a lawsuit by the same party commenced in Ontario. The case went on for quite some time. Meanwhile, the Caribbean lawyer was, it seems, getting ready for, as he put it, one of the most important trials that his small island had ever known. Unfortunately for him, one fine day, the whole dispute was settled.

The Toronto entrepreneurs' problems had just begun. The island lawyer was not only disappointed that there would not be a trial but he also demanded an unbelievable amount for his legal fees and for the time two other local lawyers whom he retained to assist him, including the "dean" of the local bar. He did not want to hear of settling his account. He wanted nothing less than a figure the Torontonians considered outrageous.

So, some time later, the entrepreneurs and their Toronto lawyer found themselves as defendants in a lawsuit of the supreme court of this small island. And to make matters worse, one of the plaintiffs was the dean of the local bar. The best advice at that time was a defence strategy which today and from now on would be legally troublesome. The defendants decided to do nothing at all.

Because they had no personal connection and no assets in the Caribbean island, (and had not been served with the claim on the island), they simply let case go by default and waited

for the Caribbean lawyers to claim to enforce their judgment in the courts of Ontario.

Their decision was based on the jurisprudence of the day which held that a foreign court had no jurisdiction over a foreign individual unless the claim had been served within the territory of the court or if the defendant attorned voluntarily to the jurisdiction of the court.

If the foreign court had no jurisdiction over the Ontario defendant, when the judgment is sought to be enforced in Ontario, the defendant will be entitled to defend the claim on the merits in Ontario.

All of this was turned on its ear by the decision of the Supreme Court of Canada ("SCC") in *Morguard v. de Savoye* (1990) SCC 1077, where the SCC, and here I quote the words of Major J. in para. 20 of the decision:

> *20 Morguard, supra, altered the old common law rules for the recognition and enforcement of interprovincial judgments. These rules, based on territoriality, sovereignty, independence and attornment, were held to be outmoded. La Forest J. concluded that it had been an error to adopt this approach "even in relation to judgments given in sister-provinces" (p. 1095). Central to the decision to modernize the common law rules was the doctrine of comity. Comity was defined as (at pp. 1095 and 1096, respectively):*
> *. . . the deference and respect due by other states to the actions of a state legitimately taken within its territory. . . .*

The old rules of the common law were replaced by rules intended to facilitate the movement of goods, technology and people from one country to another, particularly,

within a federal state.

The *Morguard* case established that to determine whether a court has correctly exercised its jurisdiction over the defendant, two factors have to be considered. The first is the need for "order and equity" and the second is the existence of a "real and substantial connection" with the subject-matter of the action or with the defendant. The SCC decided that the existence of a real and substantial connection with the subject-matter of the action satisfies the criteria even if such a connection with the defendant does not exist.

The law did not change for 13 ½ years until the determination of the decision of the SCC in *Beals v. Saldanha.* In December 2003.

Beals v. Saldanha extends the "real and substantial connection" principle to foreign judgments not only from one Canadian province to another but also to judgments from other countries.

The facts in *Beals* are significant because they show far the principle has been extended. I quote paras. 5-11 of the judgment:

> *5 The appellants were Ontario residents. In 1981, they and Rose Thivy, who is Dominic Thivy's wife and no longer a party to this action, purchased a lot in Florida for US $4,000 . Three years later, Rose Thivy was contacted by a real estate agent acting for the respondents as well as for William and Susanne Foody (who assigned their interest to the Beals' and are no longer parties to this action) enquiring about purchasing the lot. In the name of her co-owners, Mrs. Thivy advised the agent that they would sell the lot for US $8,000. The written offer erroneously referred to "Lot 1" as the lot being purchased instead of "Lot 2". Rose Thivy advised the real estate*

agent of the error and subsequently changed the number of the lot on the offer to "Lot 2". The amended offer was accepted and "Lot 2" was transferred to the respondents and the Foodys.

6 The respondents had purchased the lot in question in order to construct a model home for their construction business. Some months later, the respondents learned that they had been building on Lot 1, a lot that they did not own. In February 1985, the respondents commenced what was the first action in Charlotte County, Florida, for "damages which exceeds $5,000". This was a customary way of pleading in Florida to give the Circuit Court monetary jurisdiction. The appellants, representing themselves, filed a defence. In September 1986, the appellants were notified that that action had been dismissed voluntarily and without prejudice because it had been brought in the wrong county.

7 In September 1986, a second action ("Complaint") was commenced by the respondents in the Circuit Court for Sarasota County, Florida. That Complaint was served on the appellants, in Ontario, to rescind the contract of purchase and sale and claimed damages in excess of US $5,000, treble damages and other relief authorized by statute in Florida. This complaint was identical to that in the first action except for the addition of allegations of fraud. Shortly thereafter, an Amended Complaint, simply deleting one of the defendants, was served on the appellants. A statement of defence (a duplicate of the defence filed in the first action) was filed by Mrs. Thivy on behalf of the appellants. The trial judge accepted the evidence of the Saldanhas that they had not signed the document. Accordingly, the Saldanhas were found not to have attorned. As discussed further in these reasons, Dominic Thivy's situation differs.

8 In May 1987, the respondents served a Second Amended Complaint which modified allegations brought against a co-defendant who is no longer a party, but included all the earlier allegations brought against the appellants. No defence was filed. A Third Amended Complaint was served on the appellants on May 7, 1990 and again, no defence was filed. Under Florida law, the appellants were required to file a defence to each new amended complaint; otherwise, they risked being noted in default. A motion to note the appellants in default for their failure to file a defence to the Third Amended Complaint and a notice of hearing were served on the appellants in June 1990. The appellants did not respond to this notice. On July 25, 1990, a Florida court entered "default" against the appellants, the effect of which, under Florida law, was that they were deemed to have admitted the allegations contained in the Third Amended Complaint.

9 The appellants were served with notice of a jury trial to establish damages. They did not respond to the notice nor did they attend the trial held in December 1991. Mr. Foody, the respondent Mr. Beals, and an expert witness on business losses testified at the trial. The jury awarded the respondents damages of US $210,000 in compensatory damages and US $50,000 punitive damages, plus post-judgment interest of 12% per annum. Notice of the monetary judgment was received by the appellants in late December 1991.

10 Upon receipt of the notice of the monetary judgment against them, the Saldanhas sought legal advice. They were advised by an Ontario lawyer that the foreign judgment could not be enforced in Ontario because the appellants had not attorned to the Florida court's jurisdiction. Relying on this advice, the appellants took

> *no steps to have the judgment set aside, as they were entitled to try and do under Florida law, or to appeal the judgment in Florida. Florida law permitted the appellants ten days to commence an appeal and up to one year to bring a motion to have the judgment obtained there set aside on the grounds of "excusable neglect", "fraud" or "other misconduct of an adverse party".*
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> *11 In 1993, the respondents brought an action before the Ontario Court (General Division) seeking the enforcement of the Florida judgment. By the time of the hearing before that court, in 1998, the foreign judgment, with interest, had grown to approximately C $800,000. The trial judge dismissed the action for enforcement on the ground that there had been fraud in relation to the assessment of damages and for the additional reason of public policy. The Ontario Court of Appeal, Weiler J.A. dissenting, allowed the appeal.*

But to enforce a foreign judgment, an Ontario court must be satisfied that certain conditions exist:

a. Whether the foreign court had a real and substantial connection with the subject-matter or the defendant;

b. Whether the defendant has submitted to the jurisdiction of the foreign court by agreement of the parties or the consent of the defendant.

In the case of a judgment of a foreign court having a real and substantial with the defendant, the defendant may, nevertheless, defend the claim in the Ontario court by raising defences of fraud, breach of public policy or denial of natural justice. Here I quote paras. 44-45 of the judgment of the SCC:

> *44 Inherent to the defence of fraud is the concern that defendants may try to use this defence as a means of relitigating an action previously decided and so thwart the finality sought in litigation. The desire to avoid the relitigation of issues previously tried and decided has led the courts to treat the defence of fraud narrowly. It limits the type of evidence of fraud which can be pleaded in response to a judgment. If this Court were to widen the scope of the fraud defence, domestic courts would be increasingly drawn into a re-examination of the merits of foreign judgments. That result would obviously be contrary to the quest for finality.*
>
> *45 Courts have drawn a distinction between "intrinsic fraud" and "extrinsic fraud" in an attempt to clarify the types of fraud that can vitiate the judgment of a foreign court. Extrinsic*

> *fraud is identified as fraud going to the jurisdiction of the issuing court or the kind of fraud that misleads the court, foreign or domestic, into believing that it has jurisdiction over the cause of action. Evidence of this kind of fraud, if accepted, will justify setting aside the judgment. On the other hand, intrinsic fraud is fraud which goes to the merits of the case and to the existence of a cause of action. The extent to which evidence of intrinsic fraud can act as a defence to the recognition of a judgment has not been as clear as that of extrinsic fraud.*

This is also a good place to mention some other examples of the subjects which international lawyers involved in the enforcement of foreign judgments deal with and appropriate links to the internet[1]:

- The Hague Convention on the Recognition and Enforcement of Foreign Judgments in civil and commercial matters.
- Enforcement of Judgments Conventions Act, 1999
- Interjurisdictional Support Orders Act, 2002
- Reciprocal Enforcement of Judgments Act (provinces du Canada);
- Reciprocal Enforcement of Judgments (U.K.) Act

I close by repeating this important word of advice — if your client tells you a story about a claim they have to defend in a court in another country, don't disregard it.

At the same time, it does not necessarily follow that you should send your client to retain a lawyer in the foreign jurisdiction. It may be that the foreign court will not accept jurisdiction over your client. The American principle to which I refer only briefly, seeks to determine whether there are minimum contacts between the defendant, served outside the court in question, so that it has an interest in deciding the case. So, it's the lawyer not the client who should retain counsel in the foreign state.

Thank you for your attention. June 4, 2004

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[1] Readers of this article on the internet are invited to consult Igor Ellyn, QC for assistance on these matters at iellyn@ellynlaw.com