



IMPORTANT EXPLANATORY NOTE:

The following article was published in 1994 in the National Law Journal <http://www.law.com>. Although the legal principles in it are still applicable, there has been a recent development in the Canadian law which has expanded its scope. In *Beals v. Saldanha*, 2003 SCC 72, released by the Supreme Court of Canada on December 18, 2003, the majority of the Court ruled that the "real and substantial connection" test applied to the enforcement of judgments from jurisdictions outside Canada. Further information about this matter can be obtained from [Igor Ellyn](#).

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**TOWARD A "GLOBAL VILLAGE" APPROACH
IN THE ENFORCEMENT OF FOREIGN JUDGMENTS:**

Recent Developments in Canadian Law
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In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce.²

Introduction³

The enforcement of foreign judgments has, until recently,⁴ followed a much narrower and 'judicially-protected' path in Canada than in the United States.

As international business and communications have expanded, Canadian courts have relaxed jurisdictional criteria for the enforcement of foreign judgments. These developments are important to legal counsel whose clients may have a Canadian

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² Hessel E. Ynatema, "The Objectives of Private International Law", (1957) 35 Can. Bar Rev. 721 at p. 741.

³ The authors gratefully acknowledge the assistance of Professor John Swan and of Blair W. Bowen, both of Toronto, Canada, for their valuable assistance in the preparation of this article.

⁴ The principal development is the decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* (1990) 76 D.L.R. (4th) 256, which is discussed in this paper in some detail.

connection through branch plants, NAFTA, divorce, support and custody proceedings and the myriad of other business and personal links among citizens of our two countries.

Differences Between Canadian and U.S. Law

An appreciation of the Canadian approach to the enforcement of foreign judgments is aided by recognizing two principal differences from the American jurisprudence, both rooted in the Constitution of the United States.

The first difference is the absence of a due process clause in the Canadian Constitution, as there is in the 14th Amendment of U.S. Constitution.⁵ As we understand it, the effect of the due process clause on the enforcement of foreign judgments is that "long arm" jurisdiction over a non-resident requires not only that the defendant be served with the complaint but also that the defendant have certain minimum purposeful contacts, whether direct or indirect,⁶ with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.⁷

In Ontario, for example, the rules of procedure which govern the Ontario Court of Justice permit service of judicial process upon a non-resident defendant, without leave of the court, in cases where damages in tort or contract were suffered in Ontario, wherever the tort or breach of contract may have been committed.⁸ Although, the Ontario Rules of Civil Procedure do permit the defendant the remedy of moving the court to set aside service on the ground, inter alia, that Ontario is the forum non conveniens for the suit, the connection of the defendant with Ontario is not a factor in permitting service upon the non-resident defendant.

⁵ The operative words of the 14th Amendment are "...nor shall any State deprive any person of life, liberty, or property, without due process of law." The only parallel in is section 7 of the Canadian Charter of Rights and Freedoms, which is limited to "life, liberty and security of the person" but does not include any reference to property.

⁶ P.W. Hogg, *Constitutional Law of Canada* 3d Ed. Supp. Vol. 1, Thomson Publications Limited, Toronto, 1992, p.13-17 referring to *Hanson v. Denckla* 357 U.S. 235 (1958) and to *World-Wide Volkswagen Corp. v. Woodson* 444 U.S. 298 (1980).

⁷ *Ibid.* at p. 13-17 referring to *International Shoe Co. v. Washington* 326 U.S. 310, 316 (1945).

⁸ Ontario Rules of Civil Procedure, Rule 17.02(g)-(h) made under the Courts of Justice Act, R.S.O. 1990, c.C.43.

All the provinces except for Quebec have enacted *Reciprocal Enforcement of Judgments Acts*. The court in *Morguard* at pp.279-80 (See note 14, *infra.*) commented that these statutes are merely an easier mechanism for registration of judgments from certain other provinces, it does not change the law of recognition of foreign judgments.

Another distinction is that unlike Art. IV, s.1 of the Constitution of the United States, Canada does not have a full faith and credit clause in its constitution. There is no statute which obliges a province to recognize judgments granted by other provinces. Strange as it may seem, a judgment granted, say, by the Ontario Court of Justice is considered a "foreign judgment" in the Supreme Court of British Columbia and historically was treated accordingly for enforcement purposes.

This distinction seems slightly less anachronistic when it is understood that the Canadian law developed by the adoption of English jurisprudence by Canadian courts. The limitations which worked well in a unitary state like Great Britain in the 19th century are not nearly as effective in a far-flung federal state with 10 regionally-focused provincial governments at the dawn of the 21st century.

Under the English jurisprudence, a foreign judgment in personam, was enforced if any one of the following five criteria were met, namely, (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where the defendant was resident in the foreign country when the action began; (3) where the defendant in the character of the plaintiff has selected the forum in which he is afterwards sued; (4) where the defendant has voluntarily appeared or attorned to the jurisdiction of the court; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.⁹ This test was adopted in Ontario more than 80 years ago.¹⁰

In the case of declarations in rem, like divorce judgments, the British jurisprudence adopted a somewhat broader principle. At first, judgments were recognized if the court of the forum state was governed by a similar statute and would have exercised jurisdiction in the same way in similar circumstances.¹¹ In 1969, the House of Lords, extended recognition of judgments in rem to cases in which there was a "real and

⁹ The speech of Buckley L.J. in *Emmanuel v. Symon* [1908] 1 K.B. 302 (C.A.) at p. 309 was treated for many years as a complete code for enforcement of foreign judgments.

¹⁰ *Metro Trust & Savings Co. v. Osborne*, (1909) 14 O.W.R. 135 aff'd 16 O.W.R. 226 (C.A.); *Ontario Power Co. v. Niagara Power Co.* (1922) 52 O.L.R. 168 at 173 (C.A.).

¹¹ *Travers v. Holly* [1953] 2 All E.R. 794 (U.K. H.L.); *Re Trepca Mines Ltd.*, [1960] 1 W.L.R. 1273 (U.K. C.A.).

substantial connection" shown between the petitioner and the country or territory exercising jurisdiction.¹²

Old Canadian Law

Until recently, Canadian courts uniformly followed the U.K. jurisprudence. The result was that foreign judgments were only recognized if the defendant was personally served within the foreign jurisdiction or if the defendant voluntarily submitted to the jurisdiction by contract or by defending the suit on the merits in the foreign court.¹³

New Developments

A ground swell of dissatisfaction with the limitations of the law developed in Canada over the last few years. It was felt that the jurisprudence was out of touch with commercial reality. A consideration of what it meant to be a partner in a federation gave rise to arguments that as between provinces, there should be a reciprocity of recognition of the judgments granted by other provinces.¹⁴ Canadian legal academics and some lower court judges have long called for the broadening of the enforcement net along the lines of the full faith and credit clause of the U.S. Constitution.¹⁵ It is within this context that the Supreme Court of Canada decision in *Morguard v. De Savoye*¹⁶ was decided.

In this case, *Morguard Investments* was the mortgagee of land in the province of Alberta. *De Savoye*, while resided in Alberta, became an owner of the land and assumed the obligations of mortgagor. He then moved to British Columbia. The mortgages fell into default and *Morguard* brought suit in the courts of Alberta on *De Savoye's* covenant. The defendant was served by registered mail in accordance with the Alberta procedure for service outside the jurisdiction. There were similar rules of

¹² *Indyka v. Indyka*, [1969] 1 A.C. 33.

¹³ *Deacon v. Chadwick* (1901) 1 O.L.R. 346 (C.A.); *Turcotte v. Dawson* (1879) 30 U.C.C.P. 23 (C.A.).

¹⁴ *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 at pp. 265-267.

¹⁵ Prof. G.D. Kennedy, *Reciprocity in the Recognition of Foreign Judgments: The Implications of Travers v. Holly* (1954) 32 Can. Bar. Rev. 359 et al. collected in *Morguard v. De Savoye* (1991) 76 D.L.R. (4th) 256 at 261, 266. and the judgment of Gow, Co.Ct. J. in *Marcotte v. Megson* (1987) 19 B.C.L.R. (2d) 300.

¹⁶ See Note 14, supra.

procedure for service out of the jurisdiction in British Columbia. De Savoye was not served with the suit in the province of Alberta.

There was no clause in the mortgage that the parties agreed to submit to the jurisdiction of the Alberta court. De Savoye did not defend the suit in the Alberta court and did not submit himself to its jurisdiction. Morguard obtained orders for the judicial sale of the properties and default judgment was entered against De Savoye for the deficiency. Morguard then sued in British Columbia to enforce the Alberta judgment.

The Supreme Court of Canada reviewed the difficulties in enforcing judgments between Canadian provinces and found that many of them had arisen were because of a misapprehension of the real nature of the doctrine of comity of nations. Comity, the court held, was not based just on respect for other jurisdictions, but on the convenience, if not necessity, where legal authority is divided among a number of sovereign states. Writing for a unanimous court of seven justices, Mr. Justice LaForest observed that the most complete formulation of the concept of comity was that adopted by the U.S. Supreme Court in *Hilton v. Guyot*:

" 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws"...¹⁷

The judicial reasoning of modern times must also grounded in the need to facilitate the flow of wealth, skills and people across state and international boundaries in a fair and orderly manner. Against this backdrop, the Supreme Court of Canada concluded that the courts of one Canadian province should give full faith and credit, to use the language of the U.S. Constitution, to the judgments given by a court in another province

¹⁷ *Hilton v. Guyot*, 159 U.S. 113 (1895) at pp. 163-4, as quoted by Estey J. in *Regina v. Spencer* (1985) 21 D.L.R. (4th) 756 at 759.

or territory, so long as the court has properly, or appropriately, exercised jurisdiction in the proceeding.¹⁸

In addressing the concept of jurisdictional fairness, along the lines of the due process clause of the U.S. Constitution, the Supreme Court of Canada sought to strike a balance between the interests of the plaintiff, who should not have to sue in another jurisdiction merely because the defendant has moved, and the defendant, in the sense that the forum jurisdiction must have assumed jurisdiction on reasonable grounds and there should be reasonable limits on the exercise of jurisdiction against persons who are outside the province.¹⁹

This conclusion was seen as an extension of the test adopted by the Supreme Court of Canada in a tort case which occurred in the province of Saskatchewan. The defendant's only connection with that province was that some its defective products were available there for retail sale and were in fact purchased by the plaintiff.

The court held that it was "inherently reasonable" that the suit be brought in Saskatchewan, notwithstanding that the defendant had no business office in that province.²⁰ The test adopted in *Moran v. Pyle* has far ranging consequences for manufacturers and retailers engaged in inter-provincial and cross-border trade.

Effect on Canada - U.S. Litigation

It is far from clear whether the criteria applied by Supreme Court of Canada in *Morguard* in the enforcement of interprovincial judgments will operate in precisely the same manner in the enforcement of a judgment from another country or from a state or federal court in the United States. In this connection, it is interesting to note, as Mr. Justice LaForest did in *Morguard*,²¹ that in the European Economic Community, reciprocal enforcement of judgments among member nations is considered to flow

¹⁸ *De Savoye v. Morguard, supra.*, per LaForest J. at p. 273.

¹⁹ *Ibid.* at 274.

²⁰ *Moran v. Pyle National (Canada) Ltd.* (1973), 43 D.L.R. (3d) 239 (S.C.C.).

²¹ *Morguard, supra.* at p.272.

naturally from economic integration and the member states have entered into a treaty to govern the enforcement of judgments.²²

Canadian courts have recognized that globalization applies even in the enforcement of judgments. These considerations will be even more important as we enter into the age of NAFTA and international free trade.

²² 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.