THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CANADA

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The Recognition and Enforcement of Foreign Judgments in Canada

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Introduction

A foreign judgment is *prima facie* enforceable in Canada if it meets the following three criteria:

A) the judgment originated from a court that had jurisdiction under the principles of private international law as applied by Canadian courts;

B) the judgment is final and conclusive in the original jurisdiction; and

C) the judgment is for a definite and ascertainable sum of money, or if not a money judgment, its terms are sufficiently clear, limited in scope and the principles of comity require the domestic court to enforce it.

Assuming a foreign judgment meets those three fundamental criteria, Canadian law offers affirmative defences to the enforcement of a foreign judgment if:

A) the judgment is based on a penal, revenue or other public law of the foreign jurisdiction;

B) the judgment was obtained by fraud;

C) the judgment was issued in circumstances that deprived the Canadian defendant of natural justice; and

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D) the judgment violates Canadian public policy.

As this paper explores, the overwhelming trend in Canada is towards greater ease of enforcement of foreign judgments. Traditional preconditions for enforcement have been expanded greatly and the traditional defences to enforcement have been and continue to be narrowed markedly.

**PART I - PRE-CONDITIONS TO ENFORCEMENT OF FOREIGN JUDGMENTS**

**Some Technical Notes**

Canada is a federal jurisdiction with ten provinces and three territories. Enforcement of foreign judgments is a matter of provincial law. As a result, there is no single method of national enforcement. A judgment that a foreign party seeks to have recognized and enforced is usually taken to the province in which a defendant has assets. If the foreign plaintiff seeks to enforce the judgment in more than one province (or territory), it must obtain recognition on a province-by-province basis. As a practical matter, judgments already recognized in most provinces can be automatically registered in most others. Although recognition and enforcement of foreign judgments is technically a matter of provincial law, Canadian common law generally does not tolerate differences between provinces. The Supreme Court of Canada exists to, *inter alia*, resolve those differences in a uniform common law.

Technically speaking, there is a distinction between the concepts of recognition and enforcement. Recognition is the process by which a Canadian court determines whether it will allow a foreign judgment to be enforced in Canada. Enforcement is the process by which
the judgment is actually monetized, such as by seizing and selling property. This paper, properly speaking, deals only with the recognition of foreign judgments. In common parlance, however, the terms have blended, with “enforcement” being used more commonly to refer to “recognition” than the term recognition is. Throughout this paper, the terms will be used interchangeably to refer to the classic concept of recognition; that is to say the circumstances in which a Canadian court will allow a foreign party to enforce a foreign judgment in Canada.

A) Jurisdiction of the Foreign Court

1) Some “Ancient” History

A fundamental cornerstone of the law concerning the enforcement of foreign judgments is that the enforcing court recognize the foreign court’s jurisdiction under the rules of the enforcing court. Until 1990, Canadian courts recognized the jurisdiction of foreign courts over a defendant and therefore recognized foreign judgments only if: (1) the defendant was a subject of the foreign country in which the judgment was obtained; (2) the defendant was a resident of the foreign country when the action began; (3) the defendant had sued as a plaintiff in the foreign country and the judgment resulted from a successful counterclaim in the foreign action; (4) the defendant voluntarily appeared in the foreign court; or (5) the defendant contracted to submit himself to the foreign court.

This more restrictive approach to the enforcement of foreign judgments originated in 19th century England and reflected some of the practical inconveniences of the time.

Difficulties of communication and transportation made defending litigation in a foreign

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2 All provinces except for Quebec have mutual registration arrangements. As the only non-common law jurisdiction, there are special recognition and enforcement procedures that a party must take in that province, notwithstanding any such proceedings already commenced or completed in other provinces.
jurisdiction highly impractical. As technology rendered the territorial basis of the 19th century approach anachronistic, courts slowly began to stretch the edges of the 19th century approach.

The first push came with the long-held view that in rem judgments could only be issued by the court in which the subject of the judgment was located. Courts then pushed further and began to entertain the possibility of recognizing a foreign judgment based on a statute that was similar to the statute of the domestic court.³

The true sea-change in the enforcement of foreign judgments in Canada began in 1990 with the Supreme Court of Canada decision in Morguard Investments Ltd. v. De Savoye⁴ and has continued with an ever more deferential approach to foreign judgments since.

2) Moreguard and the Real and Substantial Connection Test

In Morguard, the plaintiff was a mortgagee of land in Alberta. When the defendant mortgagor borrowed money and gave the mortgage as security, he resided in Alberta. After granting the mortgage, he moved to British Columbia. The defendant defaulted on the mortgage. The mortgagee sold the property and commenced an action in Alberta for the deficiency owing on the mortgage. The defendant was served in British Columbia but did not defend. The plaintiff obtained default judgment in Alberta and sought to enforce it in British Columbia. Under the traditional rules relating to the enforcement of “foreign”⁵ judgments, the

³ At least in family law cases. See Travers v. Holley, [1953] 2 All E.R. 794 where the English Court of Appeal recognized an Australian divorce judgment based on a statute, giving the Australian court jurisdiction to grant a divorce to a wife who was domiciled in Australia when deserted by her husband even though her husband had subsequently acquired another domicile. The English court found that where the Australian law corresponded to the law of England, the Australian law could not be said to infringe English interests and where there was in effect substantive reciprocity, courts should recognize the jurisdiction of others where they claim that jurisdiction for themselves. (at p. 800)

⁴ Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077

⁵ In Canada, the enforcement of a judgment by one province in another province is considered to be the enforcement of a foreign judgment, although as a practical matter, Canadian courts will scrutinize the judgments of those issued in another Canadian jurisdiction with less rigor than they will scrutinize judgments coming from another country.
British Columbia court would not have recognized the jurisdiction of the Alberta court and would not have enforced the judgment because the defendant was not a subject of Alberta when the judgment was obtained, was not a resident of Alberta when the action began, had not selected Alberta in which to sue, had not voluntarily appeared in Alberta and had not contractually bound himself to Alberta. The Supreme Court of British Columbia, the British Columbia Court of Appeal and the Supreme Court of Canada all allowed enforcement of the judgment in British Columbia.

The underlying theme in the Morguard judgment was one of comity. As La Forest J. noted, the world has changed since the development of the old common law rules in 19th century England. Greater comity is required in an era where the business community operates in a world economy and where accommodating the flow of wealth, skills and people across state lines has become imperative. In light of these changes, La Forest J. recognized that the traditional rules emphasizing sovereignty seemed to fly in the face of the obvious intention of the Constitution to create a single country with a single market. He further noted that in order to achieve greater comity, the courts in one province should give “full faith and credit” to the judgments given by a court in another province, provided that the court had properly exercised jurisdiction over the action. While the decision in Morguard was rendered in the context of inter-provincial enforceability of judgments and did not specifically address the issue of the

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6 Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 at 1098
7 Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 at 1099
8 Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 at 1102
enforcement of foreign judgments generally, the Supreme Court of Canada has since held that the “real and substantial connection” test also applies to judgments from outside Canada.\(^9\)

The Supreme Court then adopted a new test for the enforcement of foreign judgments and held that a foreign judgment could be enforced in Canada, provided that there was a “real and substantial connection” between the original court and: (i) the defendant; (ii) the cause of action, or (iii) the subject matter of the action. The Supreme Court of Canada did not elaborate on the nature of the real and substantial connection test, beyond observing that Alberta had a “real and substantial connection” with respect to lawsuits concerning land in Alberta and left it open to future courts to develop the list of “connecting” factors.

In light of Morguard, Canadian courts will recognize a foreign judgment where the foreign court had jurisdiction according to Canada’s real and substantial connection test. The initially counter-intuitive corollary of this is that the Canadian court will recognize the jurisdiction of the foreign court based on Canadian principles of jurisdiction and not based on the foreign court’s principles of jurisdiction. Thus, where the foreign court had jurisdiction under Canadian principles, its judgment will be recognized even if the foreign court did not have jurisdiction under its own law. This is because the Canadian court will never inquire into the legitimacy of the exercise of jurisdiction by the foreign court under its own laws. Any contestation of that court’s jurisdiction under foreign law must be raised in the foreign court, not in a Canadian court.\(^{10}\)


Thus, for example, in *Braintech Inc. v. Kostiuk*,\(^{11}\) the British Columbia Court of Appeal refused to enforce a default judgment out of Texas in circumstances where the Canadian defendant had allegedly posted defamatory comments on the internet about the Texas plaintiff. The Texas court’s jurisdiction was based on a statute which provided that a non-resident did business in Texas and subjected himself to Texas courts if, *inter alia*, the non-resident committed a tort in whole or in part in Texas.\(^{12}\) The statute clearly gave the Texas courts jurisdiction over the Canadian defendant because the tort would have been committed in part in Texas if any resident of Texas read the internet post in Texas. In refusing to enforce the judgment, the British Columbia Court of Appeal held that the ability to exercise personal jurisdiction for internet publications was directly proportional to the nature and quality of the commercial activity that the defendant conducted over the internet. This amounted to a sliding scale where at one end of the spectrum, the defendant clearly did business over the internet, as in cases where the defendant sells over the internet or actively markets itself within the jurisdiction. “At the opposite end of the spectrum, are situations where the defendant had simply posted information on an internet site which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those that are interested is not in and of itself grounds for the exercise of personal jurisdiction.”\(^{13}\)

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The Court of Appeal required the plaintiff to offer better proof that the defendant had entered Texas than the mere possibility that someone in Texas might have access to the website on which the defendant’s statements were allegedly published.\(^{14}\)

Similarly, in *Canadian Standards Association v. Solid Applied Technologies Ltd.*,\(^{15}\) Justice Morawetz of the Ontario Superior Court of Justice refused to enforce an Israeli judgment because he found that the Israeli court did not have jurisdiction according to Canada’s real and substantial connection test. In that case, the Israeli plaintiff had obtained an *ex parte* judgment for an interlocutory injunction in Israel even though the contract between the Israeli plaintiff and the Canadian defendant contained an exclusive jurisdiction clause in favour of Ontario courts. In the circumstances, the Ontario court issued a declaration to the effect that it had exclusive jurisdiction of any dispute arising from the agreement between the plaintiff and the defendant and declared that the agreement itself was terminated. By way of contrast, in *Old North State Brewing*, a contract provided that it was governed by the laws of British Columbia and that the parties “will attorn to the jurisdiction of the courts” of British Columbia. The British Columbia Court of Appeal nevertheless enforced a North Carolina judgment that was issued applying North Carolina law.\(^{16}\) The B.C. Court of Appeal noted that the attornment clause did not purport to confer exclusive jurisdiction and that it would have been simple enough for the draftsman to have used the word “exclusive” if that is what the parties had intended. In the circumstances, the court found that the plaintiff’s claim did have a real and substantial connection with North Carolina because the plaintiff resided there, the defendant’s goods had been delivered there and the problems with the defendant’s goods arose in North Carolina. As to

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\(^{15}\) 2007 CarswellOnt 8 (S.C.J.)
the application of North Carolina law, the court noted that the Canadian defendant could have
defended in North Carolina and could have pled British Columbia law. In the absence of any
evidence of British Columbia law, the North Carolina court had no obligation to make its own
inquiries and attempt to apply British Columbia law.\textsuperscript{17} \textit{Old North} demonstrates that a claim can
have a real and substantial connection with more than one jurisdiction. There is no doubt that in
\textit{Old North}, the claim would have had a real and substantial connection to B.C. by virtue of the
non-exclusive attornment clause.\textsuperscript{18} Similarly, it is likely that the real and substantial connection
would have been exclusively with B.C. had the choice of forum clause been exclusive.\textsuperscript{19}

A real and substantial connection also exists with the foreign jurisdiction if the
Canadian defendant was a resident of that jurisdiction when proceedings were commenced or if
the Canadian defendant was carrying on business in the foreign jurisdiction, had a physical
presence, business premises, employees or commercial relationships in the foreign jurisdiction.
It does, however, require something more than travelling to the foreign jurisdiction for business
purposes.\textsuperscript{20}

\textbf{3) Application of the Real and Substantial Connection Test}

Although the real and substantial connection test has been considered by
numerous courts when determining whether to enforce foreign judgments, it is also the test that
Canadian courts apply when determining whether they should take jurisdiction over a case. The
development of jurisprudence in this latter circumstance is substantially more developed than its

\begin{footnotesize}
\begin{enumerate}
\item \textit{Batavia Times Publishing Co. v. Davis} (1979), 105 D.L.R. (3d) 192 (Ont. C.A.); \textit{Metropolitan Trust and Savings Co. v. Osbourne} (1910), 16 O.W.N. 226 (C.A.)
\item See \textit{Canadian Standards Association v. Solid Applied Technologies Ltd.}, 2007 CarswellOnt 8 (S.C.J.)
\end{enumerate}
\end{footnotesize}
application to the enforcement of foreign judgments. Moreover, given the importance of comity in the enforcement of foreign judgments, the real and substantial connection test as it has been developed by Canadian courts when determining whether they should accept jurisdiction over a case will have a material impact on the development of the test as it applies to the enforcement of foreign judgments. More plainly put, what’s sauce for the goose, is sauce for the gander. If Canadian courts are willing to accept jurisdiction under the real and substantial connection test in certain circumstances, they should enforce foreign judgments rendered on a similar jurisdictional basis. As a result, jurisprudence on the ability of Canadian courts to assume jurisdiction will play a leading role in the determination of whether foreign judgments will be enforced. In this regard, there are two recent developments of note.

First, five Canadian jurisdictions\(^\text{21}\) have recently enacted a version of the Uniform Law Conference of Canada’s Model *Court Jurisdiction and Proceedings Transfer Act* (the “Model Law”) which codifies rules of jurisdiction. Section 10 of the Model Law lists a number of factors, which if they exist, are presumed to establish a real and substantial connection between the province and the facts on which a case is based. The enumerated factors tend to focus on things like claims that involve property within the jurisdiction, contractual obligations that were to be performed substantially within the jurisdiction and torts committed within the jurisdiction. Section 10 of the Model Law makes it clear, however, that the right of the plaintiff to prove other circumstances that amount to real and substantial connection between the province and the facts on which a proceeding is based is not limited by the factors enumerated in section


\(^{21}\) Saskatchewan, Yukon Territory, Nova Scotia, Prince Edward Island and British Columbia
10. Section 10 merely provides that the presence of the listed factors creates a presumption of jurisdiction.

Second, the Ontario Court of Appeal recently rewrote the rules of jurisdiction (at least for Ontario courts) in *Van Breda v. Village Resorts Ltd.* In doing so, the Court of Appeal tried to harmonize common law rules of jurisdiction with those of the Model Law. It noted that the factors listed in the Ontario rule allowing for service outside of the jurisdiction are very similar to those listed in section 10 of the Model Law. As a result, the Court of Appeal held that the factors that allowed a plaintiff to serve a defendant outside of the jurisdiction would henceforth also create a presumption of a real and substantial connection between the claim and the province. This new presumption is subject to two notable exceptions. Ontario’s rule allowing service outside of the jurisdiction allows such service for claims that, *inter alia*, relate to (i) claims for damages sustained in Ontario arising from conduct committed elsewhere; and (ii) claims against a person outside the province who is a “necessary and proper party” to a proceeding properly brought against another defendant who is served within the province. In these two circumstances there is no presumption of jurisdiction and the plaintiff must establish a real and substantial connection for the court to assume jurisdiction.

The court declined to presume jurisdiction in these two circumstances for three reasons. First, because they were not included in the Model Law which, to the court, indicated that they had not gained general acceptance as sufficiently reliable indicators of a real and substantial connection to justify jurisdiction. Second, there were many instances in which damages could be sustained in Ontario that “principles of order and fairness” demanded be

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litigated elsewhere. Third, given the generous scope of the rules for joining parties, the fact that a foreign defendant qualified as a necessary or proper party to a proceeding was not, by itself, a reliable indicator that there was a real and substantial connection to support the assertion of jurisdiction over that defendant.23

The Court of Appeal then set out a series of factors that it would use as analytical tools to help determine whether there was a real and substantial connection between the claim and Ontario, particularly in cases involving damage sustained in Ontario because of conduct outside of Ontario. These include:

a) Fairness;
b) Willingness to enforce foreign judgments;
c) Comity and standards of jurisdiction and enforcement prevailing elsewhere;
d) The interprovincial or international nature of the case; and
e) Involvement of other parties to the suit.

As is readily apparent from the list of factors, the application of the real and substantial connection test leaves considerable discretion for the court. The real and substantial connection test as the Supreme Court of Canada has pointed out, was crafted in deliberately general language to allow for flexibility in its application.

(a) Fairness

In explaining the benchmark of fairness, the Ontario Court of Appeal noted that the assumption of jurisdiction must ultimately be guided by the requirements of order and

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fairness, not a mechanical counting of contacts or connections. The fairness of assuming or refusing jurisdiction should be considered together. A proper assessment of a defendant’s position cannot be accomplished by merely looking at the acts or conduct that might render a defendant subject to the jurisdiction. It is the quality, strength and significance of those contacts that matter. Fairness serves as an analytic tool to assess the relevance, quality and strength of those connections to determine whether they amount to a real and substantial connection and whether assuming jurisdiction is appropriate.

In making this assessment, the primary focus should be on things done by the defendant within the jurisdiction. Where a defendant confines its activities to its home jurisdiction, it will not ordinarily be subject to the jurisdiction of a Canadian province. However, physical presence or activity within the jurisdiction is not always required. Acts or conduct that fall short of residence or carrying on business in the jurisdiction can support a real and substantial connection. Where, for example, the manufacturer of a product puts into normal channels of trade a product which it knows or ought to know would be used in the forum and which if defective could harm a consumer in the forum, jurisdiction may be assumed. The test is not, however, whether a defendant could reasonably have contemplated being called to account in the forum. That proposition was found too broad because it could subject anyone who has regular dealings with foreigners to the foreign jurisdiction. This would impose a

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heavy burden that was difficult to justify under principles of order and fairness. It would mean that a simple restaurant owner would be subject to the laws of innumerable foreign jurisdictions depending only on where their customers resided.\textsuperscript{30}

Real and substantial connection is not, however, determined only by looking at the defendant’s connection to the forum. It is also measured by the forum’s interest in allowing the plaintiff to proceed with the claim in the jurisdiction and is ultimately a matter of balancing the plaintiff’s and the defendant’s interests in this regard.

As part of the fairness consideration, the Court of Appeal introduced into Canadian common law the forum of necessity doctrine. As the court put it:

“The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction...it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.”\textsuperscript{31}

The inclusion of the forum of necessity doctrine poses particular issues for the enforcement of foreign judgments because it will allow a foreign court to assume jurisdiction even where the Canadian real and substantial connection test is not met.


(b) Willingness to Enforce Foreign Judgments

The willingness of the court to enforce foreign judgments rendered on the same jurisdictional basis provides a further benchmark for assuming or declining jurisdiction. If the court is not prepared to enforce an extra-provincial judgment against an Ontario defendant rendered on a similar jurisdictional basis, it ought not to assume jurisdiction. On its face, this seems like a somewhat circular argument when applied to the enforcement of foreign judgments. It does, however, underscore the fact that jurisprudence arising out of the enforcement of foreign judgments applies to the decision about whether to accept jurisdiction, just as jurisprudence on the issue of jurisdiction is relevant to the enforcement of foreign judgments. In the context of enforcing foreign judgments, the circumstances in which Canadian courts have been willing to assume jurisdiction over foreign defendants becomes a relevant benchmark by which to test the foreign court’s assumption of jurisdiction.

(c) Comity and Standards of Jurisdiction and Enforcement prevailing Elsewhere

Standards of jurisdiction, comity and the circumstances in which other courts enforce foreign judgments provide further indicia of whether Ontario courts should assume jurisdiction and presumably also when they should enforce foreign judgments. The court rejected as “surprisingly insular” arguments made by some scholars that courts should ignore foreign law when applying the real and substantial connection test. The court went on to point out that it would not insist on the evidence of foreign law in every case. For purposes of the real and substantial connection test, it may be sufficient to deal with foreign law by way of

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secondary sources. That said, if there were a particularly contentious point of foreign law, introducing evidence of it would be advisable.

(d) Inter-Provincial or International Nature of the Case

The Court of Appeal recognized that considerations underlying rules of comity apply with greater force between units of a federal state than between different countries. Differential treatment between inter-provincial and international cases was therefore justified.

(e) The Involvement of Other Parties to the Suit

This is not a separate factor to be considered in all cases but remains relevant to the real and substantial connection test in cases where it may serve as a possible connecting factor that justifies assuming or declining jurisdiction.

The tourist cases provide a useful indicator of how the real and substantial connection test is applied. Tourist cases typically involve residents of Canada who are injured on vacation elsewhere. In circumstances where the Canadian resident sues a party with whom he entered into a contract in Canada, courts have accepted jurisdiction. Where, however, the Canadian tourist entered the contract with a foreign service provider in the foreign country, courts have declined jurisdiction. In certain cases, there may be some ambiguity about where the contract was entered into. In those cases, where the foreign entity has conducted marketing

or promotional activities in Ontario, a real and substantial connection to Ontario has also been found.\textsuperscript{36}

The potential implications of a forum of necessity doctrine can be seen in a case like \textit{Muscutt v. Courcelles}.\textsuperscript{37} In \textit{Muscutt}, the plaintiff had been a resident of Ontario. He moved to Alberta to assume a new job. Shortly after he moved to Alberta, he was a passenger in a car which was involved in a serious accident, as a result of which the plaintiff suffered a “spinal process fracture” and was forced to return to Ontario to live with his parents. The Ontario Court of Appeal accepted jurisdiction. While the court did not refer to the forum of necessity doctrine, one cannot help but wonder whether similar sentiments underlay the result of the case.\textsuperscript{38} One also wonders whether a Canadian court would recognize and enforce a foreign judgment rendered on a similar basis. In a reciprocal case, considerations such as the difficulty of defending the case in the foreign jurisdiction and the comparability of the foreign jurisdiction’s damage awards with Canadian damage awards may become thorny issues.

B) Finality

The general rule is that a foreign judgment must be one that is final and binding in its own jurisdiction and conclusive on the merits, if it is to be enforced by Canadian courts.\textsuperscript{39}

A foreign judgment is final if the court issuing the judgment has ceased to have the power to “rescind, vary or re-open” the judgment. If by the procedural law of the foreign


\textsuperscript{37} (2002), 213 D.L.R. (4th) 577 (Ont. C.A.)

\textsuperscript{38} In \textit{Muscutt}, the Court of Appeal based its decision on the presence of insurance coverage by national carriers. In \textit{Van Breda}, however, the Court indicated that such insurance coverage should not be taken into account when dealing with jurisdiction.

\textsuperscript{39} \textit{Four Embarcadero Centre Centure v. Kalen} (1988), 65 O.R. 551 (Ont. C.A.)
jurisdiction, the defendant is entitled as of right to a re-hearing or to have the judgment itself re-opened, nullified or altered by the same court that granted the judgment, the foreign judgment will not be considered final.\textsuperscript{40}

In \textit{Re Overseas Food Importers \& Distributors Ltd. and Brandt},\textsuperscript{41} the defendant took the position that the judgment of a German court was not enforceable in a Canadian province because it could not be enforced in Germany until the plaintiff posted security there. The British Columbia Court of Appeal held that the requirement for security related to the enforcement of the judgment and not the judgment itself. Accordingly, the judgment was held to be final.\textsuperscript{42}

Although the possibility of variation by the original court will preclude the enforcement of a foreign judgment, the possibility of an appeal to another tribunal is generally not a bar to enforcement. A foreign judgment may still be considered final and conclusive where the appeal period has not expired\textsuperscript{43} or when an appeal is pending before the foreign court.\textsuperscript{44} Although in the latter case, it is open to a Canadian court to order that judgment in the enforcement action be stayed pending conclusion of the foreign proceedings.\textsuperscript{45}

\textsuperscript{40} \textit{Mcintosh v. Mcintosh}, [1942] O.R. 574 (C.A.)
\textsuperscript{41} (1981), 126 D.L.R. (3d) 422 (B.C.A.)
\textsuperscript{42} A foreign judgment which is subject to a condition may nonetheless be “final” where there is evidence before the enforcement court that the condition has been satisfied and that, under the foreign jurisdiction’s laws, the condition would not prevent the judgment from being enforced in the foreign jurisdiction: \textit{Aitkin v. Aitkin} (unreported decisions of the Ontario Divisional Court Appeal No. 549/88 December 1, 1988).
\textsuperscript{43} \textit{Castel \& Walker, Canadian Conflicts of Laws}, 6\textsuperscript{th} ed., looseleaf (Markham, ON): LexisNewis (2010) at 14-33; McLeod, \textit{J. The Conflict of Laws} (Calgary: Carswell Legal Publishers, 1983) at 624
\textsuperscript{44} That is, unless a stay of execution has been granted in the foreign legal unit pending the hearing of the appeal. Where no such stay has been granted, the judgment may be enforced in Canada.
Judgments on the merits include default judgments but do not include dispositions of a case on a basis other than on the merits, such as for example a dismissal based on a limitation period or a failure to post security for costs. Interim injunctions are, however, not final orders and will not be enforced.

C) Non-Monetary Judgments

Until recently, only monetary judgments from foreign courts could be enforced in Canada. The justification for this was that a foreign judgment is evidence of a debt and that the enforcing court was simply lending its judicial assistance by allowing the foreign litigant to use the domestic court’s enforcement mechanisms. Enforcement of a monetary judgment did not require the domestic court to interpret foreign law, nor did it impose much of a burden on the domestic court’s justice system.

In 2006, the Supreme Court of Canada revisited the issue in Pro Swing Inc. v. Elta Golf Inc. and held that non-monetary judgments could, in principle, be enforced although, on the facts of Pro Swing, the foreign judgment was not enforced.

Pro Swing concerned the enforceability of a foreign contempt order, which was issued when the defendant failed to comply with a consent order for injunctive relief (among other things) issued in a trademark dispute. In Pro Swing, the Supreme Court found that the


49 [2006] 2 S.C.R
contempt order was not enforceable because it was punitive in nature\textsuperscript{50} and because the intended territorial scope of the injunctive relief in the underlying consent order was uncertain.

In rewriting the rules on the enforceability of non-monetary judgments, the Supreme Court held that their enforceability would depend on balancing a number of factors against each other, which factors it was inadvisable to develop exhaustively but which should be developed over time as appropriate distinctions arise in case law. As a starting point, however, the court set out the following factors as relevant to balance when considering whether to recognize a foreign non-monetary judgment:

- Requirements of comity.
- Territorial scope of the order.
- Whether the judgment requires the Canadian court to interpret foreign law.
- The burden of enforcement on the Canadian judicial system.

\textbf{Comity:} Non-monetary judgments will only enforced if they are final, were rendered by a court of competent jurisdiction and where principles of comity require the domestic court to enforce them. This suggests that if the foreign court would not enforce a non-monetary judgment from a Canadian court, a Canadian court need not enforce the foreign judgment. Moreover, comity does not require the receiving court to extend greater judicial assistance to foreign litigants than it does to its own litigants.\textsuperscript{51} Thus, Canadian courts are

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\textsuperscript{50} See Part II of this paper below for more on the unenforceability of foreign penal laws.

\textsuperscript{51} \textit{Pro Swing Inc. v. Elta Golf Inc.}, [2006] 2 S.C.R at para. 31
unlikely to enforce a foreign judgment if doing so requires intervention by the judicial system that is greater than the judicial system would extend when enforcing a domestic judgment.

**Territorial Scope:** For a foreign non-monetary judgment to be enforceable in Canada, the court required that the territorial scope of the order be specific and clear. This was necessary to protect Canadian residents against unforeseen obligations in Canada from an order issued in a foreign court which, in principle, only has local application in the foreign territory.\(^{52}\) In *Pro Swing*, the American order was aimed at protecting trademarks. The order did not make clear in which territories it applied. In the absence of specific territorial application, interpreting the contempt order as applying outside of the United States could lead to the enforcement of the order in jurisdictions where the plaintiff had no trademark protection, as a result of which the court declined recognition.\(^{53}\)

**Interpretation of Foreign Law:** Enforcement of a monetary judgment does not involve the Canadian court in the application of foreign law. It simply enforces the payment of a specific sum of money. And enforces it using purely Canadian legal concepts. When a Canadian court agrees to enforce a non-monetary order, it may call for the interpretation of the order and foreign law because the foreign order may not be subject to the same types of enforcement mechanisms as a similar order issued by a Canadian court might be.\(^{54}\) The contempt order in *Pro Swing* is apposite. In the United States, civil contempt is a strictly remedial order that is issued for the benefit of the complainant. However, under Canadian law, a

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\(^{52}\) *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. at para. 25

\(^{53}\) *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. at para. 57

\(^{54}\) *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. at para. 13-14
contempt order has a quasi-criminal nature that exposes the offender to imprisonment.\textsuperscript{55} The transformation of the order from civil to criminal rendered the Canadian defendant subject to greater consequences on the enforcement of the order in Canada than it would suffer if the order were enforced in the United States. The court noted that it was important for the receiving court not to have to venture into the uncertain territory of interpreting foreign orders or foreign law with which the court is not familiar. The Supreme Court was not willing to sever the contempt aspects of the order from the purely remedial aspects because doing so would potentially interfere with the law and workings of a foreign legal system. Moreover, severance really begs the question. The same issue would arise if the defendant refused to abide by the Canadian “remedial” order. The only remedy in Canada would be contempt, which is quasi-criminal and which again would subject the Canadian defendant to more serious consequences than would a breach in the United States.

**Burden on the judicial system:** When enforcing monetary judgments, the burden on the domestic legal system is minimal. For the most part, enforcement mechanisms are private and judicial intervention is rare. Enforcing non-monetary judgments can lead to much more intensive judicial involvement in enforcement. In *Pro Swing*, the court gave as an example of this, cases like those in which courts retained jurisdiction to supervise compliance with orders to use best efforts to provide French language facilities in domestic schools.\textsuperscript{56} The potential for greater involvement in the enforcement of non-monetary judgments may require courts to balance the judicial “cost” of enforcement against the benefit to the parties and society as a whole. While the burden of judicial supervision of court orders may be warranted when dealing

\textsuperscript{55} *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. at para. 50

with constitutional protections of minorities, it may not be warranted for private parties if the cost to the judicial system is not proportionate to the importance of the order.\footnote{Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. at para. 24} As a practical matter, when dealing with domestic non-monetary orders the court takes this cost benefit analysis into account when deciding whether to issue the order. When dealing with a foreign judgment, the domestic court has not yet had an opportunity to consider that cost benefit analysis.

As part of the cost benefit analysis, it is appropriate for the domestic court to consider whether the foreign plaintiff has other possible courses of action that are less burdensome for the receiving court than enforcement of the foreign order. Take the \textit{Pro Swing} contempt order for example. The court seemed concerned that this would require activity on the part of the state or the judicial system and pointed out that a less burdensome remedy would have been to seek letters rogatory that would allow the private plaintiff to demand production from the Canadian defendant.\footnote{Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. at para. 42}

In balancing these interests in \textit{Pro Swing}, the court noted that the U.S. order was based on the sale of three golf clubs. The defendant chose not to appear because of financial circumstances. In that context, the court was concerned that judicial machinery would be deployed only to find that the defendant was insolvent and gave rise to legitimate concerns about the value of judicial intervention.\footnote{Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. at para. 46} When circumstances give rise to legitimate concerns about
the use of judicial resources, the foreign litigant bears the burden of reassuring the court that the matter is worth prosecuting.60

The qualifications contained in Pro Swing aside, it did mark a major change in the approach of Canadian courts to non-monetary judgments. Since the release of the Supreme Court of Canada’s reasons, Canadian courts have enforced foreign non-monetary orders to enforce permanent injunctions against Canadian defendants;61 to freeze accounts held with a Canadian bank;62 to recognize stays of proceedings;63 and to recognize procedural orders in insolvency matters.64

On the basis of Pro Swing, Canadian courts have also enforced interprovincial non-monetary orders dealing with such matters as letters of request to compel a witness to attend an examination,65 and deeming a solicitor entitled to represent parties to litigation.66

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61 United States v. Yemec, 2010 CarswellOnt 3839 (Ont. C.A.)
64 Cavell Insurance Co., Re. (2006), 80 O.R. (3d) 500 (Ont. C.A.). Although constructed similarly to plans of arrangement in insolvency proceedings, this circumstances in this case is actually known as a “solvent scheme of arrangement” as it regarded a U.K. solvent company that sought to wind up its affairs.
66 Grace Canada., Re., 2006 CarswellOnt 5506 (Ont. S.C.J.)
PART II - BARS TO ENFORCEMENT OF FOREIGN JUDGMENTS

Once a Canadian court has determined that the foreign court was correct to assume jurisdiction, there is a strong presumption in favour of the validity of the foreign judgment. The foreign judgment may nevertheless be impeached if it: (a) is based on a foreign penal, revenue or public law; (b) was obtained by fraud; (c) is contrary to natural justice; or (d) violates public policy.

A) Foreign Public Laws Exception

The general rule is that Canadian courts will refuse to enforce foreign judgments which enforce the penal, revenue or other public laws of a foreign jurisdiction.⁶⁷

This is an ancient rule, the precise origin of which has been lost in the mists of time. Some have pointed out that the revenue exception stems from nationalistic policies in eighteenth century Britain the object of which was to allow British business to benefit from the evasion of foreign tax laws.⁶⁸ Several more palatable justifications have been offered to support its continuation. First is the classic territorial concept of sovereignty and the notion that one nation’s sovereign power should not extend beyond its borders.⁶⁹ Second is the notion of reciprocity. Having courts enforce sovereign powers of a foreign state deprives the court’s own sovereign of the ability to insist on reciprocity.⁷⁰ Third, enforcement of judgments based on public laws of a foreign state requires the courts to pass judgment on the provisions of public

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order of another state. That is an executive function of government which involves foreign
relations and is therefore beyond the power of the courts. 71

The extension of the modern state into a variety of social and quasi-contractual
relationships with its citizens has led to pressure on the concept and has resulted in a state of
affairs which, at the moment, is characterized by some conceptual confusion.

With respect to revenue claims one can see that the issue of double taxation might
be a legitimate barrier to the enforcement of a foreign tax claim. That involves the question of
where income should legitimately be taxed and is dealt with by tax treaties between
governments. There are many tax claims though that do not raise any issue of double taxation.
It is difficult to see why those claims, which have been converted into a court judgment in the
foreign country should not be enforced by a domestic court. The foreign government is
following the same process that a private citizen would with a tort or contract claim. It is no
more exercising a sovereign power extra-territorially than a private actor would with a judgment
based on a foreign statute. Double taxation aside, it is also not depriving the domestic sovereign
of the right to insist on reciprocity any more than the domestic sovereign is deprived of the right
to insist on reciprocity with respect to civil claims.

The revenue law prohibition also leads to some perplexing consequences with
courts in some jurisdictions refusing to enforce state recovery of compulsory contributions to
national health insurance on the basis that such plans are revenue laws. 72 Presumably a private


72 For examples, see F.A. Mann, The International Enforcement of Public Rights, (1987) 19 N.Y. Int. J. Law in Politics 603 at 605. F.A. Mann argues that the determination of whether a state is allowed to enforce a judgment that involves the recovery of money wrongfully received turns on the distinction between whether the object of the action is a vindication of
party with a claim for fees for medical services would have no difficulty enforcing the judgment abroad.

Even more curious is the position into which the rule against revenue judgments places trustees and executors. If a trust or estate owes taxes in a foreign state but has no assets in the foreign jurisdiction against which the foreign state could enforce, the trustees are arguably prohibited from paying the tax. This is so even if the foreign trustee or executor were thereby prevented from travelling to the foreign country. Since the foreign state could not enforce the claim, there would be no compulsion to pay. The trustee’s duty is solely to the beneficiaries of the trust. For the foreign executor to put his own desire to travel to the foreign country above the interests of the beneficiaries of the trust places him into a position of conflict. 73

As with the other affirmative defences, Canadian courts have started whittling away at the revenue law prohibition. In Sefel Geophysical Ltd. (Re) for example, the Court held that the tax, unemployment insurance and workers compensation claims from the U.S. and U.K. were provable in bankruptcy. Commenting on the effect of comity, the Court noted:

“…current comity principles suggest that some foreign tax claims should be recognized in a Canadian liquidation setting. Comity is about respecting foreign judgments, proceedings and acts of state…comity does not allow [this court] to alter priorities set out in the Bankruptcy Act but it does dictate the recognition of foreign sovereigns and governments to some extent in liquidation proceedings.” 74

74 Sefel Geophysical Ltd., Re., 1998 CarswellAlta 303 (Alta. Ct. Q.B.) at para. 261. The principles from Sefel have not been widely applied in the Canada jurisprudence, however.
The prohibition against penal judgments equally has its origins in the practice of dealing with penal and criminal matters by treaty. It has, for example, led Canadian courts to refuse to enforce civil contempt orders from foreign countries on the basis that they are quasi-criminal in nature in Canada. Changing litigation realities have also led to limitations on its application. For example, although they are designed in part to penalize and deter wrongdoers, Canadian courts have generally found treble damage awards to not be penal in nature and have tended to enforce them. Moreover, the fact that the *Foreign Extraterritorial Measures Act* contains a specific provision that allows the Attorney General of Canada the discretion to hold a treble damage award made in a foreign anti-trust action unenforceable in Canada suggests that such treble damage awards are in principle enforceable. The act could have, but did not declare all treble damage awards made by foreign courts unenforceable in Canada. It could also have but did not provide the Attorney General of Canada with the discretion to declare such awards made outside of the anti-trust context to be unenforceable.

The “other public law” exception is the broadest and most misunderstood defence to the enforcement of foreign judgments. The root of the “other public law” exception is to refuse enforcement of judgments based on a foreign law which has some public purpose in the foreign state, as opposed to a law which governs the conduct of parties between themselves. It too is based on the concern about allowing a foreign sovereign to exercise power in the enforcing country without allowing the domestic sovereign to insist on reciprocity.

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75 See Pro Swing Inc. v. Eltia Golf Inc., [2006] 2 S.C.R at para. 28

76 *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 891 (5th Cir. 1982) (citations omitted), vacated on other grounds, 460 U.S. 1007, reaff’d on remand, 704 F.2d 785 (5th Cir.) (per curiam), cert. denied, 464 U.S. 961 (1983).


78 R.S.T. 1985, c.F-29
Although an older minority judgment of the Supreme Court of Canada suggested it may apply, more recent Canadian decisions have tried to reduce its scope. In *United States of America v. Ivey et al.* the U.S. government brought an action in Canada to enforce judgments that it had obtained in Michigan against the defendant corporation and its directors pursuant to an U.S. environmental statute. In the underlying action, the U.S. as plaintiff sought to recover the actual cost of clean-up and remediation in relation to a site owned and operated by the corporation. The court found that the statute was not a foreign public law because it was restitutinal much like an ordinary civil remedy, and not penal or otherwise an attempt by a foreign sovereign to exert its power in Canada. Noting that the public law exception rested on a “rather shaky foundation,” the court distinguished it from *Ivey* by observing that:

“In seeking enforcement of a judgment imposing civil liability for the cost of repairing the harm for which the defendants are being held to account, the United States is not insisting on depriving the defendants of property rights within Canada for some public purpose....”

The significant feature of *Ivey* that the court glosses over, however, is that in *Ivey*, the real target of the recovery appeared to be the directors. The directors did not commit the pollution. The corporation did. By allowing the United States government to pursue directors in Canada, the court was enforcing a policy choice made by American legislators for a very public purpose: holding directors personally liable for corporation pollution. Extending the liability to directors arguably takes *Ivey* beyond the scope of mere compensation from a wrongdoer. The

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80 *Laane v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530. In this case, the Court refused to recognize the nationalization of an Estonian ship in a Canadian port on the basis of the public law or political law exception whereas the majority justified the same result on the more traditional basis of refusing to recognize a foreign state’s jurisdiction to confiscate property located outside their territory.

fact that Canadian laws are similar and that directors of Canadian corporations can be held personally responsible by the state for corporate pollution, may indicate that our public policies are aligned but it does not take away the fundamental sovereign nature of the act of imposing liability on directors. Moreover, the policy alignment here is arguably no different than it is in the tax judgments which remain unenforceable.

It is difficult to see any rational basis for refusing to enforce civil judgments based on the sovereign power of tax collection (apart from the double taxation issue) but being willing to enforce civil judgments based on the sovereign power of imposing liability on a director for corporate pollution.

B) Fraud

In Beals v. Saldanha, the Supreme Court of Canada rewrote the rules concerning fraud and the enforcement of foreign judgments. A brief review of the facts gives more flavour to the restrictive treatment of fraud by Canadian courts than any exposition of legal doctrine.

Dominic and Rose Thivy purchased a lot in a Florida subdivision in 1981 for approximately $4,000 U.S. They neither visited the lot nor saw photos of it. In 1984, the plaintiff offered to purchase the lot from the Thivys for $8,000 U.S. After receiving the offer, Mrs. Thivy noticed that it referred to Lot 1, whereas she owned Lot 2. Mrs. Thivy amended the lot number on the offer, but the legal description of the property continued to be that of Lot 1. In 1985, after purchasing the property, the plaintiff phoned Mrs. Thivy stating that he had been sold the wrong lot. In March 1985, Mrs. Thivy received a statement of claim from a Florida court claiming damages “in excess of $5,000.” She dutifully prepared a defence herself and mailed it

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to the plaintiff and the court. That action was ultimately dismissed without prejudice. The plaintiff then commenced a second action. Again, Mrs. Thivy prepared and mailed her defence. The plaintiff amended the claim three times. The amendments concerned other parties to the action but not the Thivys. Under the Florida rules, a fresh defence was required with each amendment even if the amendment concerned only other parties. The defendants failed to respond to the amended Claims and did not respond to a Notice of Default hearing. Judgment was ultimately issued against the defendants, as a result of which the $8,000 U.S. sale of the property became a liability of $800,000 Cdn. The vast majority of the judgment was attributable to lost profits. The plaintiff bought the lot with the intention of building a model home with his business partner to induce owners of neighbouring properties to retain the plaintiff to build on the neighbouring lots.

The judge of first instance refused to enforce the judgment, noting that the following facts had not been presented to the Florida court:

- Construction of the model homes stopped not because of the erroneous lot purchase but because of a falling out between the corporate purchasers’ two shareholders;
- The corporate plaintiff had been dissolved before the law suit began and the shareholders who brought the suit had no status under Florida law to bring the claim;

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83 [2003] 3 S.C.R. 416

84 The judgment was for US$260,000 plus 12% per annum which amounted to Cdn$800,000 by the time the enforcement was sought in Ontario.
A Florida real estate expert had testified that it was implausible for a purchaser of land to rely on a representation of ownership in an agreement of purchase and sale instead of performing his own title search.

These facts led the judge of first instance to conclude that the plaintiff had deliberately misled the Florida court in obtaining the judgment.  

The Ontario Court of Appeal reversed and the Supreme Court of Canada upheld the Court of Appeal decision. The Supreme Court of Canada began its analysis by noting that the inherent concern with the fraud defence is that defendants would try to use it to re-litigate an action previously decided and in doing so, thwart the finality of foreign judgments.

The court next turned to the distinction that courts have drawn in the past between “extrinsic” and “intrinsic” fraud. Extrinsic fraud is fraud which has nothing to do with the merits of the case but has to do with fraud going to the jurisdiction of the court or fraud that misleads the court into believing that it has jurisdiction. If proven, extrinsic fraud has constituted grounds for refusing to enforce the foreign judgment. However, to establish extrinsic fraud, the aggrieved party must have been denied an adequate opportunity to present his or her case to the court.

Intrinsic fraud deals with the merits of the case; like, for example, an allegation that the plaintiff perjured himself or presented fraudulent evidence in the foreign proceeding. Courts have historically not allowed a foreign judgment to be impeached because of intrinsic

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fraud, since to allow such claims would infringe the principle of res judicata. Furthermore, such matters ought to have been raised and litigated within the proceedings of the foreign court. \(^{88}\)

After setting out the distinction between extrinsic and intrinsic fraud, the court did away with the distinction as being of “no apparent value and because of (its) inability to both complicate and confuse.” \(^{89}\) Instead, the court simplified the analysis by holding that:

> “Fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment. On the other hand, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication.” \(^{90}\)

The connection between fraud and jurisdiction is a curious one. Recall that a foreign judgment will only be enforced if the foreign court had jurisdiction according to Canadian principles of jurisdiction. As a result, if the foreign court assumed jurisdiction when it had none under Canadian rules, its judgment would not be enforced even in the absence of fraud.

With respect to fraud on the merits, the court added immediately that a foreign judgment can be challenged on the basis of fraud where the allegations are new and not the subject of prior adjudication only where those material facts could not have been discovered and brought to the attention of the foreign court through the exercise of reasonable diligence. \(^{91}\) If the evidence used in attempting to impeach a foreign judgment had already been considered by the foreign court, it cannot form the basis of a challenge to the judgment. \(^{92}\) In default proceedings, failing to defend the action should, by itself, prohibit the defendant from claiming that any of the

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\(^{91}\) *Beals v. Saldanha*, [2003] 3 S.C.R. 416 at paras. 50-52

\(^{92}\) *Jacobs v. Beaver* (1908), 17 O.L.R. 496 (C.A.)
evidence adduced or steps taken in the foreign proceedings amounts to fraud just discovered.\textsuperscript{93} In \textit{Beals}, the Supreme Court noted that the Canadian defendants made a conscious decision not to defend the Florida action against them, as a result of which they were barred from attacking the evidence presented to the Florida court as fraudulent.\textsuperscript{94} In this regard, it should be noted that after the default judgment was issued, the Canadian defendants received notice of it and had a further opportunity to set the judgment aside or to appeal it. The Canadian defendants received legal advice to the effect that the judgment was not enforceable in Canada and that they should therefore not move to set it aside or appeal it. As a practical matter, some of the apparent harshness of the judgment towards the defendants was alleviated by the possibility of recovery against the insurance of lawyer who provided the faulty legal advice.

C) Natural Justice

The natural justice defence requires the parties seeking to impugn the foreign judgment to prove to a civil standard of proof that the foreign proceedings were contrary to Canadian notions of fundamental justice.\textsuperscript{95} In assessing the defence, the Canadian court has a heightened duty to protect the interests of defendants where the judgment to be enforced is a foreign one.\textsuperscript{96} In determining whether natural justice was met, the enforcing court must be satisfied that the defendant was granted a fair process which reasonably guarantees basic procedural safeguards, such as judicial independence and fair ethical rules governing participants in the judicial system.\textsuperscript{97} Natural justice is restricted to the form of the foreign procedure and to

\begin{itemize}
  \item \textsuperscript{93} \textit{Beals v. Saldanha}, [2003] 3 S.C.R. 416 at para. 53
  \item \textsuperscript{94} \textit{Beals v. Saldanha}, [2003] 3 S.C.R. 416 at para. 54
  \item \textsuperscript{95} \textit{Beals v. Saldanha}, [2003] 3 S.C.R. 416 at para. 59
  \item \textsuperscript{96} \textit{Beals v. Saldanha}, [2003] 3 S.C.R. 416 at para. 60
  \item \textsuperscript{97} \textit{Beals v. Saldanha}, [2003] 3 S.C.R. 416 at para. 62
\end{itemize}
due process. It does not relate to the merits of the case.\textsuperscript{98} Natural justice includes but is not limited to the necessity that a defendant be given adequate notice of the claim and that he be granted an opportunity to defend.\textsuperscript{99} Notice is determined by the law of the foreign forum in which the claim was adjudicated.\textsuperscript{100} In \textit{Beals}, for example, the defendants argued that they had been denied natural justice on the basis that the claim against them merely disclosed a claim for “damages which exceed $5,000.” The defendants argued that this did not give them adequate notice that a judgment in the amount of $800,000 could be awarded against them and did not allow them the chance to assess the extent of their financial jeopardy. A majority of the Supreme Court rejected this argument, maintaining the narrowness of the defence of natural justice. The Court found that a defendant to a foreign action commenced in a jurisdiction with a real and substantial connection to the action can reasonably be expected to inform him or herself about the foreign law at issue.

Proceedings are not regarded as having been contrary to natural justice merely because the foreign court admitted evidence that would be inadmissible under Canadian law, or excluded evidence that would be admissible under Canadian law.\textsuperscript{101} For an allegation of a denial of natural justice to succeed, the evidence must establish a fundamental flaw in the foreign proceedings such as inadequate notice,\textsuperscript{102} denial of the right to be heard,\textsuperscript{103} or bias on the part of the presiding tribunal.\textsuperscript{104}

\textsuperscript{98} \textit{Beals v. Saldanha}, [2003] 3 S.C.R. 416 at para. 64
\textsuperscript{100} \textit{Minister of State of the Principality of Monaco v. Project Planning Associates (International) Ltd.} (1980), 32 O.R. (2d) 438n (Ont. C.A.)
\textsuperscript{101} \textit{Society of Lloyd’s v. Meinzer} (2001), 55 O.R. (3d) 688 (Ont. C.A.) at para. 21
D) Public Policy

The defence of public policy prevents the enforcement of a foreign judgment that is contrary to the Canadian concept of justice. Put another way, the defence turns on whether the foreign law is contrary to our view of basic morality. The essence of the defence is to prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, it guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.

In Beals v. Saldhana, the lower court judge held that easier enforcement of foreign judgments under the substantial connection test in Morguard called for the development of “some sort of judicial sniff test in considering foreign judgments.” This amounted to broadening the public policy defence where the conduct in the foreign court is not covered by the traditional public policy or natural justice defence but “is yet so egregious as to raise a negative impression sufficient to stay the enforcing hand of the domestic court.” The court rejected the notion of broadening the public policy defence and noted that the increased importance of international comity supported a narrower application of the public policy defence.

In Beals, the focus of the Supreme Court’s discussion of public policy was on the foreign law itself rather than on the result of the foreign law. In Beals, the Canadian defendants

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103 McLeod, J. The Conflict of Laws (Calgary: Carswell Legal Publishers, 1983) at 616
had argued that the public policy defence should be broadened to include cases where the outcome was so egregious as to shock the conscience of reasonable Canadians. The gist of the defendants’ argument was that a sale of property for $8,000 should not result in an $800,000 judgment. The court rejected the concept, noting that the award of damages did not violate Canadian principles of morality. Although the sums may have grown large and may be larger than what a Canadian court would render in comparable circumstances, the public policy defence is not meant to bar enforcement of such judgments.\footnote{Beals v. Saldanha, [2003] 3 S.C.R. 416 at paras. 76}

The public policy defence typically includes things such as foreign judgments obtained by criminal or quasi-criminal conduct, bribery or coercion or judgments that enforce something contrary to our fundamental sense of justice, like slavery.\footnote{Society of Lloyd’s v. Meinzer (2001), 55 O.R. (3d) 688 (C.A.) at para. 48}

The simple fact that the judgment contravenes a Canadian law does not mean enforcement will be denied. Even before gambling was decriminalized, Canadian courts held that it was not against public policy to enforce judgments based on gambling debts.\footnote{Boardwalk Regency Corp. v. Maalouf (1992), 6 O.R. (3d) 737 (C.A.); G.N.L.V. Corp. v. Wan, [1991] B.C.J. No. 3725 (S.C.)} Nor does the fact that the foreign law on which the judgment is based is harsher than Canadian law justify a refusal to enforce.\footnote{United States of America v. Ivey et al. (1995), 26 O.R. (3d) 533 (Gen. Div.) at 548. See also Old North State Brewing Co. v. Newlands Service Inc., [1998] B.C.J. No. 2474 (C.A.) at para. 49, cited in Re iTV Games, Inc., [2001] B.C.J. No. 2065 (S.C.) at para. 22}

The Ontario Court of Appeal dealt with the public policy defence in Society of Lloyd’s v. Meinzer.\footnote{Society of Lloyd’s v. Meinzer (2001), 55 O.R. (3d) 688 (C.A.)} In that case, the defendants challenged the enforceability of U.K.
judgments in Ontario because the plaintiffs had breached Ontario’s securities laws because they had not filed a prospectus making statutorily mandated disclosure pursuant to s.53(1) of the Ontario Securities Act.

The court held that the public disclosure requirements of Ontario’s securities legislation were sufficiently important to the protection of capital markets and the investing public that they amounted to a fundamental value, the breach of which could constitute a violation of public policy.\textsuperscript{116} The court also accepted that, had the action been brought in Ontario, it would have failed because of the breach of statute.\textsuperscript{117} The simple violation of a public policy does not, however, mean that the judgment is unenforceable. Whether a foreign judgment is unenforceable for reasons of public policy does not merely involve identifying a public policy that the judgment breaches but requires “a consideration of all of the dimensions of the case which carry implications for public policy.”\textsuperscript{118} In determining whether to refuse to enforce for reasons of public policy, the court must consider whether there are competing public policy imperatives and, whether, overall, enforcement would be contrary to public policy.\textsuperscript{119}

The court then engaged in an overt balancing of competing interests noting first that in an earlier decision, the Ontario Court of Appeal had held that Ontario was not the proper forum in which to try the action and that it should be tried in England. In doing so, the Ontario courts had deferred to English courts on the extent to which Ontario law should apply. Having permitted the English courts to make that decision, it would now be contradictory to reject enforcement of an English judgment because it did not apply Ontario law in the way an Ontario

\textsuperscript{116} Society of Lloyd’s v. Meinzer (2001), 55 O.R. (3d) 688 (C.A.) at para. 65
\textsuperscript{117} Society of Lloyd’s v. Meinzer (2001), 55 O.R. (3d) 688 (C.A.) at para. 69
\textsuperscript{118} Society of Lloyd’s v. Meinzer (2001), 55 O.R. (3d) 688 (C.A.) at para. 66
court might. Second, the court noted that these were international contracts made between residents of England and a variety of foreign jurisdictions (although the contract in question here involved residents of Canada.) All contracts provided for attornment to English courts. This raised issues of international comity and the respect for the parties’ own choice of forum.

CONCLUSION

Contemporary Canadian courts approach the enforcement of foreign judgments with a strong presumption in favour of enforcement. Overt recognition of international comity has led Canadian courts to accept that other systems may have different policies, laws and procedures than Canadian courts. Those differences, as a general rule, do not constitute a basis for refusing to recognize a foreign judgment even if the action on which the judgment is based would have failed in Canada.

Comity has also led courts to far narrower approaches to the foreign public law, fraud, natural justice and public policy defences than they may have been prepared to entertain in the past. Canadian courts have put a heavy burden on defendants to demonstrate that the foreign proceeding falls afoul of these exceptions to the enforcement of foreign judgments.

The “next frontier,” as it were, for expansion of the enforcement of foreign judgments in Canada probably lies in the penal, revenue and other public laws defence to enforcement. Ontario courts have already significantly weakened the other public law defence. Its weakening now puts into question the conceptual basis of the revenue law exception which appears ripe for challenge by future litigants.