CASE COMMENTARY | ANALYSE DE CAS

# Three More Pieces of the Puzzle: *Pro Swing Inc.* v. *ELTA Golf Inc.* and the Developing Law Concerning the Enforcement of Foreign Orders

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**Trois nouveaux morceaux du casse-tête : *Pro Swing Inc.* c. *ELTA Golf Inc.* et l'évolution du droit en matière d'exécution d'ordonnances étrangères**

Les tribunaux canadiens sont prêts à s'écarter de la règle de common law limitant l'exécution des ordonnances étrangères à des jugements définitifs pour des sommes d'argent déterminées et ils sont prêts à exécuter des ordonnances équitables, dans des causes appropriées. Il est possible, si les raisons de principe derrière l'exigence du caractère définitif sont par ailleurs acceptées, que l'on puisse même passer outre cette exigence, bien que la décision ultérieure de la Cour suprême dans l'affaire Pro Swing comporte des remarques incidentes qui ne sont pas tout à fait en harmonie avec l'approche adoptée par la Cour d'appel de l'Ontario dans l'affaire Cavell. L'approche est flexible et reconnaît que ce ne sont pas tous les facteurs pertinents qui peuvent être anticipés et définis au préalable. La préoccupation dominante est de s'assurer, en tenant compte de tous les facteurs, qu'il est juste que l'ordonnance étrangère soit exécutée au Canada.

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The decision of the Ontario Court of Appeal in *Pro Swing Inc.* v. *ELTA Golf Inc.*[1] has been the subject of comment here[2] and elsewhere.[3] In considering the appeal[4] from that decision the Supreme Court of Canada was hampered by the fact that the respondent elected not to file a factum or participate at the hearing. Perhaps in part because the respondent did not participate, Deschamps, J. speaking for the majority, undertook an examination of the public policy defence on her own initiative (*ex proprio motu*).[5] Nevertheless, it is clear that a cautious process of redefining the terms upon which Canadian courts will recognize and enforce foreign judgments is under way. While *Pro Swing* was awaiting hearing in the Supreme Court of Canada, the Ontario Court of Appeal dealt with two other foreign order enforcement proceedings. The first, *Currie* v. *McDonald's Restaurants of Canada Limited*[6] concerned the effect of a United States class action settlement on non-participating Canadians. The second, *Re Cavell Insurance Company Limited*[7] concerned the effect on Canadian creditors of a U.K. order made in the context of solvent scheme of arrangement proceedings of a U.K. insurance company. In neither of these two cases did the parties seek leave to appeal to the Supreme Court of Canada.

## *Pro Swing*

In *Pro Swing* the Ontario defendant had entered into a settlement of litigation in the United States District Court for the Northern District of Ohio in which it agreed that it would stop dealing in golf clubs or golf club heads bearing the trademarks TRIDENT, RIDENT, RIDEN or TRIGOAL. The settlement was incorporated into a consent decree. Some four years after the settlement Pro Swing Inc. commenced contempt proceedings in Ohio against ELTA Golf on the basis that an investigator had purchased two golf club heads from ELTA Golf over the Internet for delivery in Ohio, one of which was marked with the TRIDENT mark and the other with the RIDENT mark. ELTA Golf did not appear in Ohio to contest the contempt proceedings. Pro Swing, once it obtained an order in Ohio commenced proceedings in Ontario to enforce it. After ELTA Golf defended, Pro Swing moved for summary judgment. Justice Pepall, at first instance,[8] was prepared to enforce the provisions of the Ohio order that were final, notwithstanding the fact that they had been made in the context of contempt proceedings. The Court of Appeal reversed Justice Pepall, primarily on the basis that the Ohio orders, and the consent order in particular, were unclear on whether they were restricted to conduct within the United States, or purported to have extra-territorial effect.

The majority of the Supreme Court of Canada (Deschamps, LeBel, Fish and Abella JJ.) recognized that the traditional common law rule restricting enforcement of foreign orders to monetary awards was too restrictive, but that recognition of

equitable orders will require a balanced measure of restraint and involvement by the domestic court that is otherwise unnecessary when the court merely agrees to use its enforcement mechanisms to collect a debt. That relaxation requires judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system. In the test applied by the majority, the first step is to determine whether the foreign court had jurisdiction, applying the tests set out in *Morguard*[9] and *Beals* v. *Saldanha.*[10] The next step is to determine whether the equitable order is one suitable for enforcement. The last step is to consider the traditional defences relating to the merits or procedure as summarized in *Beals*. While expressed in different terms, the minority (McLachlin C.J., Bastarache and Charron JJ.) do not appear to have differed significantly on these principles.

The primary source of the difference between the majority and the minority reasons concerned the fact that the order sought to be enforced arose in contempt proceedings in the United States District Court. The majority started from the perspective that Canadian courts will not directly or indirectly enforce a foreign penal order. Relying in part on *Vidéotron*[11] the majority drew a distinction between the treatment of contempt in Canada and the United States. In particular, they pointed to Rule 60.11 of the Ontario *Rules of Civil Procedure* and noted that even in the context of civil proceedings contempt can result in a jail term, a fine or an order to perform community service.

The minority noted as well that Canadian courts will not enforce a penal law or judgment, as it is for each state to impose its own punishments, penalties and taxes. They also noted that a distinction was drawn in Canada between civil and criminal contempt, and suggested that Canadian courts should be prepared to enforce orders to secure compliance with a private remedy, even if granted in the context of civil contempt proceedings. Since the provisions of the order that Madam Justice Pepall had been prepared to enforce were remedial and not penal, even though they had been granted in a contempt proceeding, they would have enforced those provisions.

On this issue, the lack of a complete record and counsel arguing for the respondent seriously hampered the Court. ELTA Golf had only filed a memorandum in opposition to the grant of leave. Once leave was granted it did not file a factum, nor did anyone appear at the hearing on its behalf. Its leave memorandum restricted itself to the single point that the case lacked a sufficient factual record upon which the issues raised by Pro Swing could be explored: "The only evidence filed on the motion [before the Ontario Superior Court] was an affidavit by one of the solicitors in the firm in Akron, Ohio, who were attorneys for Pro Swing on the proceedings taken in 2002 for contempt of court. That affidavit essentially appended the court documents from the proceedings taken before the United States District Court in 1998 and 2002 and the Settlement Agreement. The affidavit did not contain, nor did any other materials before the court contain, evidence regarding the applicable substantive and procedural Federal and State law."[12] Consequently, the Supreme Court of Canada was left with trying to divine the nature of ELTA Golf's argument regarding enforcement of an order granted in foreign contempt proceedings from the portions of the materials it had filed in the Ontario Court of Appeal that made their way into the Supreme Court of Canada record, and also to undertake on its own initiative to consider other arguments, such as the public policy defence,[13] which ELTA Golf had elected not to address.

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However, even had ELTA Golf appeared in the Supreme Court of Canada, there was apparently no factual record regarding the state of the law that would have been in play in the Ohio proceedings that would have permitted the Supreme Court of Canada to properly explore the issue. If the United States District Court only had the legal authority under the applicable domestic to grant remedial orders in civil contempt proceedings, that might be a significant factor favouring enforcement. On the other hand, if the United States District Court could impose penal consequences to back up the remedial orders, then the question of enforcing foreign penal orders would have had to be explored. Under the circumstances, the majority was not prepared to sanction the process of separating the remedial from the penal aspects of a foreign contempt order in part because it puts the receiving court in the position of having to consider the details of the order on its merits, and also because it risks affecting the substance of the order, and tests the limits of the enforcing court's familiarity with the foreign law. The majority specifically referred to the fact that the plaintiff was not without remedy and could continue the Ohio proceedings with the judicial

assistance of the Ontario courts, although to a lesser extent than it had requested,[14] by using letters rogatory to secure the attendance of a representative of ELTA Golf in Ontario under the supervision and authority of the Ontario courts to provide the evidence needed to prove Pro Swing's damages.

The majority noted the need to take a balanced approach to comity.[15] The factors to be considered are respect for a nation's acts, international duty, convenience and protection of a nation's citizens. The majority was particularly concerned that emphasis on respect for a foreign nation's acts could result in imbalance. The majority was of the view that enforcement of foreign equitable orders, in particular, raised issues of convenience to the enforcing court and the need for the enforcing court to protect the integrity of its process. The majority specifically stated that in developing rules for the enforcement of foreign equitable orders, useful regard could be had to criteria developed for other processes based on comity such as the enforcement of letters rogatory and the principle of *forum non conveniens*.[16]

Another point of interest in the reasons of the majority is the discussion of territoriality.[17] They noted that the Ohio judgment had been based upon a United States trademark, and conduct with a component in Ohio. To interpret the contempt order as applying to conduct outside the United States would offend the principle of territoriality. "Extraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection. The Internet poses new challenges to trademark holders, but equitable jurisdiction cannot solve all their problems. In the future, when considering cases that are likely to result in proceedings in a foreign jurisdiction, judges will no doubt be alerted to the need to be clear as regards territoriality. Until now, this was not an issue because judgments enforcing trademark rights through injunctive relief were, by nature, not exportable. While couched in terms of what the judge must do when making an order that may require the assistance of a foreign court in enforcement, it is really a warning to counsel to think ahead when preparing submissions in such a case. The various considerations and tools that counsel might employ were discussed in this author's earlier comment[18] on the Court of Appeal decision. That comment noted that the most important consideration before commencing cross-border litigation is how any judgment is to be enforced. In a complex case where parallel litigation is required, counsel can consider the use of the "Protocol concerning court-to court communications in cross border cases."[19] If the dispute is resolved by agreement, then the agreement should be drafted in a way that it is easily enforced in the jurisdiction where the defendant has the bulk of its business and assets. If it seems likely that a matter will have to be prosecuted to a judgment, and if all other factors are roughly equal, a plaintiff is likely to save itself trouble and time if it sues in the jurisdiction where the defendant is located.

Before attempting to summarize the types of foreign non-monetary orders that a Canadian court might be prepared to enforce, and the basis for so doing, it is worth considering the Ontario Court of Appeal decisions in *Currie* and *Cavell*.

## *Currie*

*Currie* involved class proceedings in Ontario and in the United States arising from a series of promotional contests run by McDonald's Restaurants. Class proceedings against McDonald's and the promotional company were filed in the Circuit Court of Cook County, Illinois ("*Boland*") the day after Jerome Jacobson, a senior officer of the promotional company that had organized these contests for McDonald's, pleaded guilty to criminal charges of embezzling prizes allocated to the McDonald's contests. A settlement of the *Boland* proceedings was arrived at in April 2002, which included a release that would cover claims that might have been made not only by United States, but also Canadian residents. On June 6, 2002, the Illinois court issued an order that included a deadline of September 17, 2002 for members to opt out. Notice in Canada was to be given by publishing notices in three Québec newspapers and in MacLean's Magazine. On August 19, 2002, Mr. Jacobson testified at the trial of his alleged co-conspirators and stated, among other things, that McDonald's had instructed him to ensure that the "random" selection of winners did not award any of the "high value" prizes to Canadian contestants. The *Boland* proceedings, came to the attention of a firm of Ontario solicitors when a US attorney contacted the firm. They posted information regarding the US proceedings on their website, and in due course were contacted by Preston Parsons. A class proceeding naming him as plaintiff was filed in Ontario on September 13, 2002 ("*Parsons*").

On September 16, 2002, a group of Canadians, including Mr. Parsons, sought leave to intervene in *Boland* to object to the settlement. Such leave was granted, and the Final Fairness hearing was adjourned to permit written submissions. On October 28, 2002, while the Illinois court was considering its decision, the Ontario solicitors commenced a second class action in Ontario naming Greg Currie as plaintiff ("*Currie class action*"). On January 3, 2003 the Illinois court released its reasons, dismissed the objection

of the Canadian objectors, and gave the settlement, which include a release that applied to Canadian residents, final approval. Mr. Parsons' appeal of this order was dismissed July 31, 2003 on the basis that the order was not then final as the question of costs was still outstanding.

The defendants in *Parsons* and *Currie* moved to dismiss or stay those proceedings on the basis that the claims asserted had been finally disposed of in *Boland*. The motions judge dismissed *Parsons* on the basis that Mr. Parsons had attorned to the jurisdiction of the Illinois court, but refused to stay the identical *Currie* proceedings. Parsons did not appeal, but the defendants did appeal the refusal to stay *Currie*.

In its analysis of the propriety of enforcing the *Boland* judgment against non-attorning Canadian class members in the *Currie* proceedings, the Court of Appeal focused on the differences between a class action plaintiff against whom a foreign judgment was sought to be enforced and a defendant in a normal proceeding. In so doing, it approached the question from the perspective of an Ontario client of a McDonald's Canada restaurant who participated in a promotional contest sponsored by McDonald's Canada who had done nothing to invoke or attorn to the jurisdiction of the Illinois court.

While recognizing that the wrongful acts that gave rise to the cause of action all occurred in the United States and that McDonald's headquarters in Illinois served to provide a real and substantial connection with Illinois, the principle of "order and fairness" required an examination of the steps taken in *Boland* to protect the interests of the unnamed non-resident class members. As the motions judge had concluded that the notice given to non-resident non-participating class members was inadequate, and there was no basis for interfering with that finding, the Court of Appeal concluded that the *Boland* order should not be enforced against the *Currie* class members who had not intervened in the Illinois proceedings.

In the course of arriving at its conclusion, which was based primarily on the inadequate notice which had effectively deprived the *Currie* plaintiffs of the right to opt out of *Boland,*[20] the Court of Appeal set out the factors that would have to be considered in order to enforce a foreign class action judgment against Ontario class members. "In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by LaForest J. in *Hunt* v. *T&N plc,* above at p. 325, 'the exact limits of what constitutes a reasonable assumption of jurisdiction' cannot be rigidly defined and 'no test can perhaps ever be rigidly applied' as 'no court has ever been able to anticipate' all possibilities. Second, it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases: see *Muscutt* v. *Courcelles* (2002), 60 O.R. (3d) 20 at paras 95- 100 (C.A.)."[21]

## *Cavell*

Cavell Insurance Company Limited was incorporated in England to carry on the business of reinsurance. It carried on business in London, and overseas with branches in South Africa, Australia, New Zealand and Canada. In Canada it primarily reinsured insurers writing policies covering claims such as those arising from pollution, asbestos, sexual abuse, tobacco and tainted blood. These "long tail" claims might not come to light until many years after the policies in question had been written. In the mid-1990's Cavell ceased writing new reinsurance contracts, but continued to administer the "run-off" of its already written business, paying claims from its reserves. In 2004, Cavell decided to terminate the "run-off" and began to implement a scheme of arrangement with its policyholders that would value all present, future and contingent claims, and pay its policyholders that value in return for a surrender of their policies of reinsurance. To carry out this solvent scheme of arrangement, Cavell proceeded to follow the procedure of the *U.K. Companies Act, 1985*. This procedure required it to obtain the approval of a majority of its creditors, representing no less than 75% of the value of the claims, who were present and voting in person at a meeting convened for that purpose. The process of arranging the meeting required by the U.K. legislation is supervised by the High Court of Justice in the U.K., which must in the end sanction the scheme of arrangement.

When Cavell sought the order authorizing it to convene a meeting of its creditors and establishing the basis upon which that meeting would proceed, it did not serve any of the Canadian policyholders with the papers. However, about a month before the hearing, Cavell circulated a letter to the policy holders advising them of its intention to make such an application. None of the Canadian policyholders

appeared at the U.K. hearing. In obtaining the U.K. order on December 20, 2004, Cavell advised the court that it proposed to seek an order in Canada recognizing the U.K. proceedings and in particular confirming the directions given by the U.K. court regarding the meeting of creditors so that the scheme would ultimately bind the Canadian policyholders.

On December 21, 2004 Cavell appeared in the Ontario Superior Court and obtained an order recognizing the U.K. proceedings upon certain terms, including a "comeback" provision entitling any party to seek a further order or amend the order. On February 17, 2005 fifteen Canadian insurers used the "comeback" provision to set aside or vary the December 21, 2004 order. At that hearing the judge found that the notice given of the December 21 hearing was "not insufficient" and that the Ontario Superior Court had authority under the *Reciprocal Enforcement of Judgements (U.K.) Act*,[22] in conjunction with Rule 73 or its inherent jurisdiction and principles of private international law. He was prepared to do so even though the order was not one for the payment of money.

The Court of Appeal held that the *Reciprocal Enforcement of Judgements (U.K.) Act* and Rule 73 could not serve as a basis for recognition of the U.K. order since it was not a final order within the meaning of the statute, and turned to consideration of the principles of private international law, and in particular the need for a "real and substantial connection" and "order and fairness" set out in *Morguard* and *Beals* which were "fundamental considerations for a court to properly determine whether to recognize a foreign judgment pursuant to private international law."[23]

The court noted that the appellants did not challenge the ability of an Ontario court to enforce foreign orders other than orders for the payment of a fixed sum of money and that the decision of the Supreme Court of Canada from *Pro Swing* was under reserve, and thus proceeded on the basis that the non-monetary nature of the U.K. order was no impediment to its recognition in Ontario.

The attack instead concerned the issue of whether the U.K. order was sufficiently final to be accorded recognition and secondarily, that the appellant had not been served with the papers for the motion leading to the U.K. order. The court noted that the finality requirement served three purposes:[24]

1. The domestic court knows precisely what it is agreeing to enforce and recognize;
2. it removes the risk of injustice in the event the terms of the foreign order were subsequently changed; and
3. it removes the risk of undermining public confidence that might arise if the domestic court were to issue an order recognizing and permitting enforcement of a foreign order, only to have that foundational order subsequently disappear.

The Court of Appeal concluded that none of these concerns militated against recognition of the U.K. order, notwithstanding that it did not approve the scheme of arrangement, but merely specified the steps of a process leading to that approval. First, the nature of the order being recognized was clear, and the Ontario court knew precisely what it was recognizing. Secondly, even if the foreign order were to be modified to the extent of cancelling the meeting entirely, no right of the appellant would be affected in any meaningful way. Finally, the terms of the recognition order provided for continuing involvement of the Ontario court in the process. The Court of Appeal considered that the practical difficulties that would arise if the U.K. order were not recognized were also a factor for consideration. Absent such recognition any final order approving the scheme of arrangement might be met with a complaint by the Canadian policyholders that they had had no satisfactory way of participating in the U.K. process leading to that approval.

In considering the lack of notice of the U.K. order, the Court of Appeal distinguished the situation in *Cavell* from the situations in *Beals* and *Currie*. It determined that the ultimate question was whether in all the circumstances the party against whom the foreign order was to be enforced had been accorded a fair process. The court noted that the appellant had been notified of Cavell's intentions a month before it sought the U.K. order, but made no enquiries of Cavell. The court further noted that the appellant had elected not to appear on the first motion in Ontario, although served with the materials, and had ultimately availed itself of the "comeback" provision of the first Ontario order. In the circumstances, the Court of Appeal concluded that the appellant had been accorded a fair process. The Court of Appeal also referred to the fact that the form of the Ontario order provided that the Ontario court would co-ordinate and support the U.K. proceedings to the extent that it might affect interests in Ontario. Recognizing that the statutory framework of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* for foreign bankruptcy or insolvency proceedings did not apply, the Court of Appeal nevertheless found that the application of a similar procedure was appropriate.

Whether the Court of Appeal's approach to the requirement of finality in this case will find wider application remains to be seen, as the majority in *Pro Swing* stated that recognition and enforcement of a foreign order required, among other things, that it be final;[25] although they did recognize that the requirement, while indispensable, could be the object of further commentary.[26] The minority also stated that finality was a requirement for recognition and enforcement, in the sense that the obligation was fixed and defined, although not necessarily the last step in the litigation process.[27] However, the common law rule requiring finality was paired with the requirement that an enforceable foreign judgment also needed to be for a definite sum of money.[28] Having accepted that the common law rule that only monetary judgments of a foreign court were entitled to be recognized was overly restrictive, it is possible that the Supreme Court of Canada, if presented with a situation similar to that in *Cavell*, might be prepared to reconsider the finality branch of the common law rule.

## Conclusion

This author's earlier comment[29] touched on earlier international efforts to provide a framework for international enforcement, and in particular the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters which was adopted October 30, 1999 under the auspices of the Hague Conference on Private International Law. Unfortunately, very little progress has been made, and the most recent report on the draft convention appears to date from 2004.[30] While there is an existing convention,[31] as of December 2007 only Cyprus, Kuwait, the Netherlands and Portugal had ratified or acceded to it.[32] Canada is a party to a number of bilateral treaties including the one with the United Kingdom considered in *Cavell*, which are reflected in provincial reciprocal enforcement legislation. The Uniform Law Conference of Canada has also been active in this area, and some of its model acts have been adopted in some provinces.[33]

Notwithstanding some activity by diplomats and legislators to bring the law concerning the enforcement of foreign judgments into line with the realities of modern international commerce, judges are still called upon to deal with the problem on a case by case basis. While a number of significant pieces of the puzzle have now been put in place, the picture is still far from complete. Canadian courts now clearly recognize that the realities of international commerce require a more flexible approach to the enforcement of foreign orders and

that, in proper circumstances, foreign non-monetary orders ought to be enforced. The approach that appears to be developing focuses on assessing the fairness of enforcing the foreign order in the particular circumstances of the case instead of trying to develop a set of defined rules. It is possible that even the former requirement of finality may be dispensed with, so long as the policy bases for that rule will still be satisfied, although there are statements in the reasons in *Pro Swing* that cast some doubt on the approach taken by the Ontario Court of Appeal in *Cavell*. However, in light of the decision in *Pro Swing*, it appears that orders made in the context of foreign contempt proceedings will not be enforced in Canada, even if primarily remedial, rather than penal, in effect (or nature). The approach being developed takes into account the existence and practicality of alternate means of achieving the same result, the reasonable expectations of the party against whom the foreign order is to be enforced, and an assessment of the likelihood that the foreign court would recognize a similar order if brought to it from Canada. As stated by the majority in *Pro Swing*, comity is to be approached with a balanced consideration of respect for a foreign nation's acts, international duty, convenience and protection of the citizens of the enforcing jurisdiction.

These cases illustrate the importance of coordinating the efforts of the lawyers in both the originating and receiving jurisdictions at the earliest possible date. Clearly this was done in *Cavell*, and the process was specifically designed to ensure that the final order approving the scheme of arrangement would be held in Canada to bind Cavell's Canadian creditors. In *Currie* it appears that the attorneys in *Boland* elected to push ahead in the face of concerns raised by the Canadian opponents in *Parsons* concerning the adequacy of the notice given in Canada, and the different nature of the claim in Canada in light of the allegation that McDonald's itself had directed that no "high value" prizes were to be awarded to Canadian participants. The effect of failing to address those concerns was to make the *Boland* judgment unenforceable against any Canadian member of the class who had not attorned to the jurisdiction of the Illinois court.

## ENDNOTES

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[1] (2004), 71 O.R. (3d) 566 (C.A.)

[2] Wells, Peter E.J. "National Laws and the Global Economy" (2005), 6 Can. Int. Lawyer 156

[3] Berryman, Jeff. "Cross-Border Enforcement of Mareva Injunctions in Canada" (2005), 30 *Adv. Q.* 413; Black, Vaughn "Enforcement of Foreign Non-money Judgments: *Pro Swing* v. *Elta*" (2006), 42 Can. Bus. L.J. 81; MacDonald, Ken "A New Approach to Enforcement of Foreign Non-Monetary Judgments" (2006), 31 Adv.Q. 44

[4] [2006] 2 S.C.R. 612 [Deschamps J. (LeBel, Fish and Abella JJ. concurring), McLachlin C.J. (Bastarache and Charron JJ. concurring in dissenting opinion]

[5] *Pro Swing* ¶59-61

[6] (2005), 74 O.R. (3d) 321 (C.A.) [hereinafter *Currie*]

[7] (2006), 80 O.R. (3d) 500 (C.A.) [hereinafter *Cavell*]

[8] (2003), 68 O.R. (3d) 443; [2003] O.J. No. 5434

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

[10] *Beals* v. *Saldanha*, [2003] 3 S.C.R. 416 [hereinafter *Beals*]

[11] *Vidéotron Ltée* v. *Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065

[12] Elta Golf Inc. "Memorandum of Argument of the Respondent" in the Supreme Court of Canada, para. 1 – referring to pages 50-94 of the Application Record

[13] *Pro Swing* ¶59-61

[14] *Pro Swing* ¶63

[15] *Pro Swing* ¶27-31

[16] *Pro Swing* ¶30

[17] *Pro Swing* ¶52-58

[18] Wells, Peter E.J. "National Laws and the Global Economy" (2005), 6 Can. Int. Lawyer 156

[19] Commercial List – Superior Court of Justice "Protocol concerning court-to-court communications in cross border cases" http://www.ontariocourts.on.ca/superior_court_justice/commercial/protocol.htm.

[20] *Currie* ¶39

[21] *Currie* ¶30

[22] R.S.O. 1990, c.R-6

[23] *Cavell* ¶38

[24] *Cavell* ¶43

[25] *Pro Swing* ¶31

[26] *Pro Swing* ¶29

[27] ¶95, following a discussion beginning at ¶91

[28] See, for instance, *Four Embarcadero Centre Venture* v. *Kalen* (1988), 65 O.R. (2d) 551 (H.C.J.) in particular at p 563 and Castel & Walker, *Canadian Conflict Of Laws*, (6th ed.) VOL. 1, §14.6, (Markham: LexisNexis - Butterworths, 2005-2007)

[29] Wells, Peter E.J. "National Laws and the Global Economy" (2005), 6 Can. Int. Lawyer 156

[30] http://www.hcch.net/index_en.php?act=progress.listing&cat=5

[31] The Hague *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* concluded on February 1, 1971 and which entered into force August 20, 1979 http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=78

[32] http://www.hcch.net/upload/statmtrx_e.pdf

[33] http://www.ulcc.ca/en/cls/index.cfm?sec=3