

**CORPORATE CANADA BEWARE: A NEW CANADIAN
STATUS QUO FOR THE RECOGNITION AND
ENFORCEMENT OF FOREIGN JUDGMENTS**

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INTRODUCTION

The United States Environmental Protection Agency (the “USEPA”) sends a “Notice of Potential Liability” to two Canadian companies (“S and A”) in respect of a contaminated site in the State of Utah. S and A are named as “owners” and “operators” of an abandoned copper mine for which the USEPA has determined that an environmental cleanup is required. The USEPA invites S and A to remediate the property on their own; but, when S and A fail to do so, the USEPA undertakes the cleanup itself and sends S and A the bill. When the USEPA bill goes unpaid, the United States Department of Justice (the “USDOJ”), on behalf of the USEPA, sues S and A in Utah for the cleanup costs plus interest thereon from the date the cleanup was performed. S and A are served at their Toronto, Ontario offices with the “Complaint” as filed in U.S. Federal District Court for the District of Utah (the “Utah Court”). They retain Utah counsel to defend the action, but inexplicably abandon the Utah proceeding prior to trial whereupon the USDOJ moves for and obtains default judgment from the Utah Court.¹

Some time later, the USDOJ brings an action to recognize and enforce the Utah judgment in Ontario. In fact, Ontario counsel for the United States moves for summary judgment, arguing no triable issue remains for determination that could not have been raised and properly dealt with by the Utah Court at first instance. Defence counsel, opposing the motion, argue both lack of proper notice of the result of the U.S. proceeding and a “public policy” defence that S and A were unfairly singled out by the USEPA, alleging there were other potentially responsible U.S. corporations which could have been pursued to either remediate the abandoned site or compensate the USEPA for doing so. The Ontario Superior Court grants the

¹*United States of America v. Shield Development Co. Ltd. and Anyox Metals Ltd.*, Civil Action No. 2:98 CV 0375ST (19 June 2000).

United States' motion for summary judgment² and the Court of Appeal affirms³, noting in a brief endorsement:

As stated by the respondent, the real essence of this matter is that the appellants had received adequate notice of the U.S. proceeding and had adequate opportunity to raise any defence of fact and law before the U.S. District Court. In effect, they now plead the consequences of their decision to walk away from the U.S. proceeding, to which they attorned, in an attempt to create a triable issue...⁴

The message of this article to corporate Canada is that, however vexed by foreign litigation, which is felt at the time to be remote and/or unjustified, Canadian companies cannot ignore it. When the successful foreign litigant seeks to enforce in Canada, scant opportunity remains to re-litigate the foreign judgment on its merits. Provided the modern Canadian common-law rules for recognition and enforcement are met, defences to enforcement at home are few and far between and, in any event, a full defence on the merits is irretrievably lost. This was not always so.

THE GENESIS OF THE MODERN RULE: INTERNATIONAL COMITY

At the end of 2003, the Supreme Court of Canada released its decision in *Bears v. Saldanha*.⁵ This case had appeared some years before in the courts of Ontario where a Florida plaintiff had sought recognition and enforcement of a Florida Federal District Court decision awarding damages against Ontario-resident defendants in respect of a small land purchase that had gone bad. It was unexceptional, save perhaps for the impressive quantum of damages that enterprising Florida plaintiffs had managed to secure in default proceedings before the Florida court. Nevertheless, it became the chosen vehicle of Canada's highest court to complete the

² See *United States of America v. Shield Development Co. and Anyox Metals Ltd.* (2005), 74 O.R. (3d) 583 (S.C.J.).

³ *United States of America v. Shield Development Co. and Anyox Metals Ltd.* (2005), 74 O.R. (3d) 595 (CA.).

⁴ *Id.* at 595-596. (The authors were counsel to the Government of the United States at trial and on appeal.)

evolution of a judge-made transformation of Canadian conflict of laws principles specific to the recognition and enforcement of foreign judgments — an evolution that began thirteen years earlier with the Court’s seminal ruling in *Morguard Investments v. De Savoye*.⁶

Prior to *Morguard*, Canadian courts rigorously adhered to the English — and somewhat imperial — common-law approach to recognition and enforcement issues that allowed that, unless the Canadian corporate defendant had voluntarily attorned to the jurisdiction of the foreign court, or was otherwise deemed to be found within that jurisdiction in certain circumstances,⁷ the foreign proceeding could be safely ignored. The foreign plaintiff would be required to sue on its judgment, against which a full defence on the merits could then be waged at home. This rule applied co-equally to the enforcement of rulings from one province to another within the Canadian federation.

Morguard eschewed the traditional English formula in relation to the inter-provincial context, importing the American constitutional concept of “full faith and credit”⁸ as between co-ordinate jurisdictions within national boundaries, and posited a new formula. The enforcing

⁵ [2003] 3 S.C.R. 416, 113 C.R.R. (2d) 189 (subsequent references are to be numbered paragraphs of the S.C.R. version, (hereinafter *Beals*)

⁶ [1990] 3 S.C.R. 1077 (hereinafter *Morguard*)

⁷ see *Emanuel v. Symon*, [1908] 1 K.B. 13. 302 (C.A.), at 309 (per Buckley L.J.):

In actions *in personam* there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

For critical comment on the pre-*Morguard* approach of Canadian courts, see Vaughan Black, “Enforcement of Judgments and Judicial Jurisdiction in Canada”, 9 Oxford J. Leg St. 547 (1989)

⁸ *United States Constitution. Act IV*, §1.

court would recognize and enforce the judgment of the originating court, precluding any further defence on the merits, provided:

1. The adjudicating court had properly exercised jurisdiction under its own rules; and
2. The enforcing court could satisfy itself that there was “a real and substantial connection” between the adjudicating jurisdiction and determinative features of the *lis* or the defendant as a party.⁹

Further, the *Morguard* Court, in prophetic unanimous reasons in *obiter* authored by Justice LaForest, suggested that the same approach might apply to foreign judgments of comparably civilized jurisdictions. Justice LaForest premised his reasons on the notion of “international comity”, which he described as

the recognition [that] one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws...¹⁰

The rationale for resurrecting this 19th-century notion borrowed from American jurisprudence was, however, grounded in the late 20th-century realities of a trade-dependent country. Justice LaForest elaborated:

Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under the circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.¹¹

⁹ *Morguard*, *supra* note 2 at 1103 – 1109; for discussion, see H. Scoff Fairley, “Enforcement of Foreign Judgments by Canadian Courts: A New Age of Uncertainty” (1996) 2 Can. Int’l Lawyer 1 at 2 generally, Jost Blom, “Reform of Private International Law by Judges,” in *Reform and Development of Private International Law [:] Essays in Honour of Sir Peter North*, pp. 31 -49 (J. Fawcett, ed.) (Oxford: Oxford University Press, 2002) (hereinafter *Essays*).

¹⁰ *Morguard*, *supra* note 6 at 1096.

¹¹ *Id.* at 1098.

Lower courts across Canada enthusiastically took up this invitation to a dramatically liberalized approach and their endorsements entailed sometimes harsh consequences for Canadian defendants.¹² Many defendants were caught by the retrospective application of the new rule to their *pre-Morguard* decisions not to defend themselves against foreign law suits;¹³ others were caught by their exposure to damages awards — notably from U. S. civil juries — far in excess of anything a Canadian court would have awarded had they been sued in a Canadian jurisdiction at first instance.¹⁴ Nevertheless, the Supreme Court chose not to revisit such concerns until *Beals*, in which it affirmed the international comity branch of *Morguard*. With that, the lower Court applications of *Morguard* to transnational cases were essentially indicated.

IMPEACHING THE FOREIGN RULING: LIMITED DEFENCES STRICTLY CONSTRUED

The substantial connections test, as laid down in *Morguard*, forecloses any re-opening of a case on its merits. In the wake of adopting this new test in the enforcement of foreign judgments, the question arose whether existing defences to enforcement, elaborated under the previous Anglo-Canadian common law approach of formal attornment, should be revised. *Beals* answered this question — essentially, but not unequivocally — in the negative. Once the Court satisfies itself that a substantial connection to the foreign jurisdiction exists, defendants must rely

¹² See, *Fairley*, *supra* note 9, Blom, *supra* note 9, *passim*.

¹³ See e.g., *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R.(4th) 654 (B.C.C.A.), leave to appeal refused, (1994) 24 C.P.C. (3d) 294 (S.C.C.), *post-Morguard* enforcement of *pre-Morguard* Alaska Judgment; for other examples, see discussion in Blom, *supra* 9 at 38-39; Fairley, *supra* note 9 at 3-4.

¹⁴ See: Jost Blom, “The Enforcement of Foreign Judgments: Morguard Goes Forth Into the World”, (1997) 28 Can. Bus L.J. 373; Fairley, *supra* note 9 at 3-5; H. Scott Fairley, “In Search of a Level Playing Field: The Hague Project on Jurisdiction and the Recognition and Enforcement of Foreign Judgments” in C. Carmody et al., eds., *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Baltimore, MD: American Society of International Law, 2003) at 57 (hereinafter, “In Search of a Level Playing Field”).

on certain impeachment defences — namely, natural justice, public policy, and fraud — to oppose recognition and enforcement of the foreign judgment. These defences have relatively narrow application. For a defence based on natural justice, the enforcing court measures the foreign judgment against its own standards of natural justice, but does not impose requirements of conformity with its own procedural rules. The public policy defence must establish that the foreign law, on which the judgment is founded, is on its face, not in its application, offensive to the fundamental morality of the Canadian legal system.¹⁵ Finally, a “fraud” that was adjudicated upon in the foreign court cannot be re-litigated unless newly discovered and material evidence has become available.¹⁶

The trial court in *Beals* sought to broaden these defences to prevent what it viewed as an unjust result. Justice Jennings was concerned with the practical consequences of Florida justice for the Saldanhas as well as the limits of the law he felt obligated to apply. In the result, he chose to expand the defences of fraud and public policy. He found an element of fraud based on the absence of certain facts before the Florida jury and refused to enforce on grounds of public policy by extending the doctrine to encompass a ‘judicial sniff test’, which he said allowed for non-enforcement in particularly egregious circumstances, such as those with which he was confronted.¹⁷

The Ontario Court of Appeal reversed in favour of enforcement based on *Morguard* principles.¹⁸ Justice Doherty, joined by Justice Catzman on a three-judge panel, rejected the

¹⁵ *Beals*, *supra*. note 5 at paras. 71 and 72.

¹⁶ J.G. Castel & J. Walker, *Canadian Conflicts of Law*, 5th ed. (Toronto: Butterworths, 2002) at p. 14-25.

¹⁷ *Id.* at 144.

¹⁸ *Beals v. Saldanha* (2001), 54 O.R. (3d) 61 (C.A.).

enlarged defence of fraud, restricting it to *extrinsic* circumstances, which excluded any circumstances that the Saldanhas could have discovered with reasonable diligence and countered had they defended themselves in Florida. Further, the Court disagreed with Justice Jennings’ imaginative extension of public policy. No matter how egregious the totality of the circumstances, Justice Doherty concluded: “The fact of the matter is the respondents chose not to go to court in Florida and demonstrate just how ‘strange and wonderful’ the allegations in the complaint were” and that decision was fatal to any defence on the merits in Ontario.¹⁹

A majority of the Supreme Court of Canada affirmed the Court of Appeal’s decision.²⁰ Nevertheless, two dissenting opinions took issue with the majority’s application of the traditional impeachment defences. Justice Binnie, joined by Justice Iacobucci, rejected enforcement on the basis of the traditional defence of a failure of natural justice, purportedly without enlargement.²¹ He noted the idiosyncrasies of Florida procedural rules — at least from a Canadian perspective — requiring defendants to re-file in response to each and every amended claim, rendering their previous defence non-existent.²² He also placed significance on other information that the appellants did not know, such as the gradual removal of other domestic defendants, notably the Florida real estate agent and title insurer with whom the respondents settled for comparatively modest sums while retaining title to the property conveyed.²³ On these cumulative findings, Justice Binnie concluded that the appellants were not the authors of their own misfortune.²⁴

¹⁹ *Id.* at para. 78. (per Doherty J.A.).

²⁰ *Id.* at paras. 40-77.

²¹ *Id.* at para. 86.

²² *Id.* at paras. 105-109.

²³ *Id.* at paras. 110-121.

²⁴ *Id.* at paras. 124-125.

In a separate dissenting opinion, Justice LeBel expressed much stronger concerns. In reasons considerably more expansive than those provided by either the majority or the Binnie/Iacobucci dissent, Justice LeBel asserted that the possible circumstances arising within foreign legal proceedings, as illuminated in *Beals*, call for a reformulation of the traditional nominate defences to enforcement. He did not explicitly endorse an expansion of the public policy defence to include Justice Jennings' "judicial sniff test", writing that he would "continue to reserve the public policy defence for cases where the objection is to the law of the foreign forum, rather than the way the law was applied, or the size of the award *per se*."²⁵ Nevertheless, he was equally clear that "there is more work for this defence to do. It should also apply to foreign laws that offend basic tenets of our civil justice system, principles that are widely recognized as having a quality of essential fairness."²⁶ Justice LeBel cites the following as a candidate for non-enforcement:

A Canadian court presented with a judgment from a jurisdiction whose law provides, for example, that punitive damages can be awarded on the basis of simple negligence or strict liability ought to have a discretion to deny or limit the enforceability of the judgment on pounds of public policy.²⁷

With regard to the defence of fraud, Justice LeBel generally adhered to the majority approach of requiring fresh evidence of fraud not reasonably discoverable at first instance to properly invoke the defence. Justice LeBel

would not, however, rule out the possibility that a broader test should apply to default judgments in cases where the defendant's decision not to participate was a demonstrably reasonable one. If the defendant ignored what it justifiably considered to be a trivial or meritless claim, and can prove on the civil standard that the plaintiff took advantage of his absence to perpetrate a deliberate deception on the foreign court, it would be inappropriate to insist that a Canadian court asked to enforce the resulting judgment must turn a blind eye to those facts.²⁸

²⁵ *Id.* at para. 221.

²⁶ *Id.* at para. 223.

²⁷ *Id.* at para. 224.

²⁸ *Beals*, *supra* note 5 at para. 234.

Nevertheless, he found that neither of the two preceding defences would support a reversal in favour of the Saldanhas. Rather, Justice LeBel's principal concern, in common with the Binnie/Iacobucci dissent, was one of natural justice applied to the facts of the particular case before him. The LeBel dissent embraced the notion expressed by the English Court of Appeal in *Adams v. Cape Industries*²⁹ and by Justice Weiler, dissenting in the Ontario Court of Appeal in *Beals*, that the natural justice defence comprises both substantive as well as procedural elements "such as the proposition that damages should be based on objective proof and judicial assessment."³⁰ Applying substantive and procedural considerations to the case before him, Justice LeBel concluded that the Saldanhas were deprived of natural justice: first in relation to lack of proper notice on the basis of which to make an informed decision to continue defending in the Florida proceeding, and further, in terms of substantive unfairness in the quantum of general damages without apparent objective proof of the harm suffered, together with the awarding of punitive damages without proof of conduct deserving of punishment.³¹ Under this reasoning, in marked contrast to the six-justice majority of the Supreme Court, the natural justice defence was available, notwithstanding the Saldanhas' failure to defend.

What Justice LeBel appears to be allowing within the context of the natural justice defence is a subsidiary defence of reasonable expectation as to both process and consequences, even though such expectations may be uninformed and unjustified when placed in the context of the foreign legal proceeding. Justice LeBel observed:

²⁹ [1991] 1 All E.R. 929 (C.A.).

³⁰ *Beals*, *supra* note 5 at para. 242.

³¹ *Id.* at paras. 255-257.

The evidence at trial was that Florida's legal system provides all the appropriate protections for judgment debtors in the appellants' position and probably would have afforded them a remedy in these circumstances. But at the relevant time the appellants did not know this; they only knew that Florida's legal system had produced a judgment against them for an astronomical amount, a verdict that was difficult to reconcile with the simple facts they had set out in their defence. Their apprehensiveness about going back to that very legal system to seek relief was, in the circumstances, understandable.³²

Justice LeBel could have stopped there, but decided to go further. Even if his expanded view of natural justice did not avail, he would decline to enforce on a residual ground of general unconscionability:

The circumstances of this case are such that the enforcement of this judgment would shock the conscience of Canadians and cast a negative light on our justice system. The appellants have done nothing that infringes the rights of the respondents and have certainly done nothing to deserve such harsh punishment. Nor can they be said to have sought to avoid their obligations by hiding in their own jurisdiction or to have shown disrespect for the legal system of Florida. They have acted in good faith throughout and have diligently taken all the steps that appeared to be required of them, based on the information and advice they had. The plaintiffs in Florida appear to have taken advantage of the defendants' difficult position to pursue their interests as aggressively as possible and to secure a sizeable windfall. In an adversarial legal system, it was, of course, open to them to do so, but the Ontario court should not have to set its seal of approval on the judgment thus obtained without regard for the dubious nature of the claim the fact that the parties did not compete on a level playing field and the lack of transparency in the Florida proceedings.³³

The residual category of concerns resorted to by Justice LeBel is, on the one hand, a refuge for judicial discretion. In extreme cases, it may have a place where none of the bright-line rules quite fit. On the other hand, an unconscionability test in the hands of lower-court judges potentially lacking the worldview that informed Justice LaForest in *Morguard* could be equally regarded as something of a Trojan Horse undermining the substantial connections test which the Supreme Court of Canada has unanimously affirmed.

³² *Id.* at para. 263.

³³ *Id.* at para. 265.

CONCLUSION

Looking back at our introductory example of the new status quo, defence counsel's imaginative arguments concerning adequate notice and alleging the existence of other potentially responsible parties did not resonate with the Ontario Superior Court. The U.S. legislation applied by the Utah Court did not require direct causation to attach liability. The enforcing Ontario court found that the public policy defence was inapplicable and that there was no evidence the defendants had been unfairly singled out.³⁴ The defendants' arguments could have been engaged and reviewed in detail by the trial judge in Utah, but not, however, by an enforcing court in Ontario. In such cases there is no going back to the basic defences forfeited at first instance.

The new status quo merits a heightened appreciation of new levels of risk for Canadian corporate defendants engaged in any substantial business sited abroad or with foreign customers. Lawsuits successfully brought in foreign jurisdictions against Canadian companies carry with them the prospect of corollary exposure to the same degree at home. These relatively new enforcement standards of Canadian courts are a contemporary reality that must be dealt with by Canadian corporate risk managers and their counsel. Part and parcel of this reality is the application of foreign standards of justice that are unfamiliar and sometimes harsh when measured against likely outcomes in Canadian domestic litigation. The Supreme Court dissents in *Beals* sound a muted alarm in that regard, but the majority has confirmed a reality that will be difficult to alter significantly in future cases. Once the substantial connections test is met, and barring extensive procedural sloppiness by an originating court, the only latitude that remains for

denying recognition and enforcement by a Canadian court lies within the currently narrow parameters of the established impeachment defences discussed above. The Supreme Court of Canada has left open the possibility of expansion within those categories though, apart from Justice LeBel's vigorous dissent, there seems little current judicial appetite for residual protectionism in aid of hapless or unlucky Canadian defendants. Similarly, there is no suggestion that recognition or enforcement should be predicated on conditions of reciprocity within the originating jurisdiction. All of the above suggests the appropriateness of engaging Canadian counsel to properly instruct counsel in the applicable foreign jurisdiction. Such representation will better ensure that all available defences are established prior to the commencement of possible enforcement proceedings in Canada.

At this time, Canada taken as a whole, and specifically in individual provinces, is one of the most hospitable jurisdictions in the world for the recognition and enforcement of judgments from foreign jurisdictions. It has become so through perhaps an overly generous adoption of 19th-century common-law doctrine and its application to 20th and 21st-century circumstances. Unfortunately, at least for Canadian defendants, international comity is neither universally-shared doctrine, nor even championed any longer by the jurisdictions in which it was originally developed.³⁵ While Canada is also distinguished by a large and important civil law jurisdiction in the province of Quebec, where the applicability of common-law doctrine derived from *Morguard* and *Beals* may be debated, the statutory foundation for and pragmatic approach of Quebec courts to the recognition and enforcement of foreign judgments complements that of the

³⁴ See Reasons for Judgment of Herman J., *supra* note 2 at 592-594

³⁵ For contemporary discussion see Lawrence Collins, "Comity in Private International Law", in Essay, *supra* note 9 at 89-110; Fairley, "In Search of a Level Playing Field", *supra* note 14 at 63-69.

Canadian common-law approach overall.³⁶

Many of these concerns are being voiced in Canadian legislative precincts of law reform³⁷ and at the international level, notably by the Hague Conference on Private International Law.³⁸ Nevertheless, it remains to be seen whether any of those efforts will come to fruition. In the meantime, the *Morguard-Beals* legacy is with us for the foreseeable future.

³⁶ See: *Quebec Civil Code*, Book 10, Title Three, Arts. 3134-3140; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* [2002] 4 S.C.R. 205.

³⁷ See Uniform Enforcement of Foreign Judgments Act, Uniform Law Conference of Canada at <http://www.ulcc.ca>; see also *The Foreign Judgments Act*, R.S.S. 1978, c. F-18, which implements the uniform law.

³⁸ See The Hague Convention on Choice of Court Agreements, Final Act (30 June 2005) at <http://www.hcch.net>. This convention has limited application, but if ratified by enough states and brought into force, provides a very useful foundation for future growth. Canada and most of its major trading partners have signed the convention as members of the Hague Conference and have taken the resulting instrument home to begin the implementation process (Scott Fairley was a private sector member of the Canadian Delegation to the Hague Special Commission responsible for the convention from 1996 to 2005.)