CANADIAN LAW ON ENFORCEMENT OF FOREIGN JUDGMENTS, JURISDICTION SIMPLICITER AND FORUM NON CONVENIENS — AN OVERVIEW

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BY

PETER J. PLISZKA
Partner, Fasken Martineau DuMoulin LLP
Tel. 416 868-3336; E-Mail: ppliszka@tor.fasken.com

and

TATE E. McLEOD
Associate, Fasken Martineau DuMoulin LLP
Tel. 416 865-5499; E-Mail: tmcleod@tor.fasken.com
Introduction

The landscape of Canadian private international law has undergone substantial transformation over the past decade. This development reflects an abrupt change in the judicial attitude toward foreign courts. Canadian courts have abandoned the parochialism of the traditional common law concepts, and instead have embraced the doctrine of international judicial comity – i.e. respect accorded to legitimate exercises of jurisdiction by foreign courts.

This in turn has had a significant effect on the manner in which Canadian corporations must approach potential and actual legal disputes with parties in foreign jurisdictions. Canadian corporations have had to reconsider their strategies for responding to legal proceedings commenced against them in foreign jurisdictions, as well as their assessment of bringing claims against foreign parties in Canadian courts. As Canadian companies become increasingly “globalized” in their business activities, they are facing these issues with greater and greater frequency.

This paper will provide a summary overview of current Canadian law relating to two private international law issues which are central to these developments: (1) When will Canadian courts recognize and enforce a judgment obtained in a foreign jurisdiction against a Canadian defendant? and (2) When will a Canadian court assume jurisdiction over an action against a foreign defendant? (This second issue subdivides into the two issues of jurisdiction simpliciter and forum non conveniens).

This paper is not intended to be a detailed legal treatise. Rather, it is intended to provide readers with a general overview of the developing Canadian law on these issues. Various leading cases and articles are listed in the footnotes of this paper for the reference of readers who desire more detailed discussion of these issues.
(1) Recognizing and Enforcing Foreign Judgments

Traditionally, sovereign states have had exclusive jurisdiction over their own territory. This is perhaps the most basic tenet of international law. In the past, courts cited this principle of territorial sovereignty as the basis for refusing to recognize and give effect to foreign judgments against defendants residing in Canada who had been served ex juris and had not attorned to the jurisdiction of the foreign court. Practically speaking, this meant that a foreign plaintiff, who had obtained a judgment in a foreign jurisdiction, was forced to re-litigate the entire matter in the Canadian court.

As interprovincial and international trade and business grew in importance, that parochial attitude toward the jurisdiction of foreign courts was subjected to increasing criticism. There was mounting pressure for the courts to adjust and to adopt notions of judicial comity.

The Supreme Court of Canada confronted these forces in 1990 in Morguard Investments Ltd. v. De Savoye. The issue in Morguard was whether a British Columbia court should recognize and enforce an Alberta court’s default judgment against a British Columbia resident. The action related to events which had occurred entirely in Alberta. The plaintiff sought to enforce certain rights under a mortgage in respect of real property situated in Alberta. The defendant had been a resident of Alberta at the time he accepted the loan from the plaintiff and granted the mortgage security to the plaintiff. Subsequently, the defendant moved to B.C. The plaintiff served the Alberta statement of claim ex juris upon the defendant in B.C. The defendant did not submit to the jurisdiction of the Alberta court and did not defend the action. The plaintiff obtained default judgment, and then brought an action in B.C. to enforce the judgment.

In a ground-breaking decision, the Supreme Court of Canada held that the Alberta court’s default judgment against the defendant was enforceable in B.C. The court held that as a general rule, a judgment given by the courts of any province or territory is entitled to

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recognition and enforcement throughout Canada, provided there is a “real and substantial connection” between the action and the foreign court.²

The Supreme Court based this new approach on the principles of “order and fairness”, and the notion that in the modern global village, decisions made by foreign courts, acting in a manner consistent with Canadian concepts of jurisdiction and in accordance with fundamental principles of fairness, should be respected and enforced. LaForest, J., for a unanimous court, expressed this policy rationale as follows:

In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.

…

As is evident in his article, what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.

This formulation suggests that the content of comity must be adjusted in the light of a changing world order.

…

It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties.³

The Morguard decision arose in the context of an inter-provincial, as opposed to an international, context. However, subsequent courts have extended the same principles for recognition and enforcement of foreign judgments to judgments rendered by courts of other countries as well.⁴

As a result, the enforcement procedure for foreign litigants has been simplified considerably: if the jurisdictional test of “real and substantial connection” is met, then

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² The Supreme Court of Canada did not elaborate clearly on the nature of the real and substantial connection test, and consequently there has been a tremendous amount of uncertainty with respect to its application. This issue will be discussed at greater length in this paper under the heading entitled “Jurisdiction Simpliciter”.


the foreign judgment is not examinable on the merits of the underlying claim, and it need not be re-litigated in the Canadian court when the plaintiff seeks to enforce it in Canada. Generally, only a limited number of common law defences would remain available to the Canadian defendant to oppose the recognition of a foreign judgment by the Canadian court, such as the following:

(a) the foreign court did not validly exercise its jurisdiction according to its own rules;\(^5\)

(b) the foreign judgment was obtained by fraud;\(^6\)

(c) the foreign judgment was obtained in contravention of the principles of natural justice;\(^7\) or

(d) the enforcement of the foreign judgment would be contrary to public policy.\(^8\)

As a consequence of Morguard, Canadian residents who are sued outside of their home province must seriously consider whether to defend the action in the foreign jurisdiction. If a Canadian defendant chooses to ignore the foreign proceeding, it could lose its right to defend the action on its merits later, and find itself liable to the foreign plaintiff if a Canadian court subsequently holds that the foreign jurisdiction had a real and substantial connection to the action.\(^9\)

(2) **Jurisdiction of Canadian Courts**

When an action is commenced in one jurisdiction and the defendant believes that the action should proceed in another jurisdiction, the defendant may seek an order staying the action on one or both of the following grounds:


\(^6\) Ibid., at p. 295.


\(^9\) For example, see Beals *et al* v. Šaldanha *et al* (2001), 54 O.R. (3d) 641 (C.A.). There, a Florida plaintiff obtained a default judgment in Florida against the Ontario defendants. Florida had a real and substantial connection to the subject-matter of the action. When the plaintiff sought to have the Florida judgment recognized and enforced by the Ontario court, the defendants asserted that the judgment should not be recognized because the plaintiff had deliberately misled the Florida court on the quantum of damages. In a 2-to-1 split, the Court of Appeal held that the defendants had lost their right to contest the merits of the claim, and the Florida judgment was enforceable against them.
(a) the domestic court lacks jurisdiction to hear the action (this is often referred to as the “jurisdiction simpliciter” issue);\textsuperscript{10} and/or

(b) the domestic court is not the convenient or appropriate forum to hear the action (the “forum non conveniens” issue).\textsuperscript{11}

Conceptually, these are two separate issues, and each issue has its own test. However, the factors relevant to the two tests overlap to a certain extent. Consequently, for several years the tendency among many Ontario courts was to merge these two issues into one.\textsuperscript{12} However, in \textit{Unifund Assurance Co. v. Insurance Corp. of British Columbia},\textsuperscript{13} the Ontario Court of Appeal clarified that these are two separate issues which must be treated separately and determined sequentially in a two-step process.\textsuperscript{14}

The issue of jurisdiction simpliciter is a threshold issue. If the forum court holds that it does not have jurisdiction, then the forum non conveniens issue need not be considered. The forum court only needs to consider the issue of forum non conveniens if the court first concludes (or the defendant has conceded) that the forum court has jurisdiction over the action. The principles governing the issues of jurisdiction simpliciter and forum non conveniens are discussed below.

\textbf{(a) Jurisdiction Simpliciter}

The precise legal principles and test to be applied when determining whether a Canadian court has jurisdiction over an action involving a foreign defendant, who has been served \textit{ex juris}, is currently in a state of uncertainty. However, it is anticipated that some or all of these issues may be resolved in Ontario shortly. In February, 2002, the Ontario Court

\textsuperscript{10} In Ontario, the court’s jurisdiction to stay an action is found in S. 106 of the \textit{Courts of Justice Act} and rule 21.01\textsuperscript{(3)}(a) of the Rules of Civil Procedure. Section 106 confers a broad, discretionary power upon the court to stay any proceeding: “A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just”. Rule 21.01\textsuperscript{(3)}(a) provides that “A defendant may move before a judge to have an action stayed or dismissed on the ground that the court has no jurisdiction over the subject matter of the action”.\textsuperscript{11} In Ontario, this jurisdiction is found in S. 106 of the \textit{Courts of Justice Act} and rule 17.06\textsuperscript{(2)}(c) of the Rules of Civil Procedure.


\textsuperscript{13} (2001), 28 C.C.L.I. (3d) 38, 146 O.A.C. 162 (C.A.) [leave to appeal to S.C.C. granted].

\textsuperscript{14} \textit{Ibid.}, at pages 47-48 (C.C.L.I.).
of Appeal heard appeals of five cases, which raise these issues, at a special two-day joint hearing.\textsuperscript{15} As at the date of this paper, the court’s judgment remains under reserve.

The test for determining jurisdiction simpliciter is directly related to the test for recognition and enforcement of foreign judgments, described in the preceding section of this paper. As stated by Mr. Justice LaForest in \textit{Morguard}, “the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives … recognition in other provinces should be dependent on the fact that the court giving judgment “properly” or “appropriately” exercised jurisdiction”.\textsuperscript{16}

Following the Supreme Court of Canada’s approach in \textit{Morguard}, Canadian courts have applied the “real and substantial connection” test to the issue of whether a court has jurisdiction over an action involving a foreign defendant who was served \textit{ex juris}. However, the court in \textit{Morguard} did not clearly articulate the “real and substantial connection” test. The court did not clarify precisely what must be really and substantially connected to the territory of the forum court. Rather, the court referred variously throughout its reasons to connections between the forum and (1) the “defendant or the subject-matter of the suit”,\textsuperscript{17} (2) the “subject matter of the action”,\textsuperscript{18} (3) the “wrongdoing”,\textsuperscript{19} (4) the “damages suffered”,\textsuperscript{20} (5) the “action”,\textsuperscript{21} and (6) the “transaction or the parties”.\textsuperscript{22}

Ambiguity in the “real and substantial connection” test arising from \textit{Morguard} and subsequent Supreme Court of Canada decisions\textsuperscript{23} through the 1990s, which considered

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\textsuperscript{16} \textit{Morguard}, supra, note 1, at p. 1103.
\textsuperscript{17} \textit{Morguard}, supra, note 1, at p. 1103.
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\textsuperscript{19} \textit{Morguard}, supra, note 1, at p. 1108.
\textsuperscript{20} \textit{Morguard}, supra, note 1, at p. 1108.
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\textsuperscript{22} \textit{Morguard}, supra, note 1, at p. 1108.
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related issues of private international law, has resulted in inconsistent application of the jurisdiction simpliciter test by the lower courts.

One fundamental point of some debate in the lower courts’ decisions is whether the test requires that there be a real and substantial connection between the forum court’s territory and the defendant, or whether it is sufficient that there is a real and substantial connection between the forum court’s territory and the subject-matter of the action. Although it is not completely certain, the weight of the authorities establishes that the jurisdiction simpliciter test will be met if there is a real and substantial connection between the forum court and either the foreign defendant or the subject-matter of the action.\footnote{e.g. McNichol et. al v. Woldnik et. al (2001), 150 O.A.C. 68 (C.A.); Cook v. Parcel, Munro, Hutton, and Spunston, P.C. (1997), 143 D.L.R. (4th) 213 (B.C.C.A.).}

However, that does not resolve all of the ambiguity. Rather, it leads to the next question of what is the “subject-matter of the action”, to which the forum court must have a real and substantial connection? This issue has arisen in numerous recent cases, particularly in the context of rule 17.02(h) of Ontario’s Rules of Civil Procedure.

Rule 17.02 is the court rule that prescribes the procedure for serving an originating process \textit{ex juris}. (Most other provinces have a similar rule respecting service \textit{ex juris}). Rule 17.02 provides that a party to a proceeding may, without having to seek leave of the court, serve a statement of claim upon a defendant outside of Ontario if the proceeding consists of a claim that fits within one of various enumerated categories (e.g. where the claim relates to a contract made in Ontario, where the claim alleges a contractual breach committed in Ontario, where the claim involves real property in Ontario, etc.). Rule 17.02(h) provides that a plaintiff may serve a statement of claim \textit{ex juris} if the claim relates to damage sustained in Ontario regardless of where the tort or breach of contract was committed.

In recent years, many plaintiffs’ counsel have asserted that rule 17.02(h) is a statutory codification of the real and substantial connection test, and confers jurisdiction upon the
Ontario court. In other words, they have argued that if the plaintiff can demonstrate that the plaintiff is sustaining the damage — e.g. pain and suffering, or economic loss — in Ontario even if all events which gave rise to the cause of action occurred elsewhere, then there necessarily is a “real and substantial connection” between Ontario and the action, and the jurisdiction simpliciter test has been met.25

Counsel for many foreign defendants dispute that reasoning. They have submitted that the purpose of rule 17.02 is not to confer jurisdiction; rather, rule 17.02 is entirely procedural in nature. It simply prescribes the process by which an action against a non-Ontario defendant may be commenced. With respect to rule 17.02(h), counsel for foreign defendants have argued that the fact that the plaintiff may be sustaining the post-breach loss or damage in Ontario simply because the plaintiff happens to reside in Ontario (or, in some cases, has moved to Ontario subsequent to the occurrence of the events giving rise to the cause of action), does not constitute a real and substantial connection between Ontario and the action. They submit that the forum must have a real and substantial connection with the events which gave rise to the cause of action – i.e. the events and transactions which preceded, and led to, the tortious act or the breach of contract.26

In the alternative, they have submitted that if rule 17.02(h) is interpreted as conferring jurisdiction over a foreign defendant where the only connection to Ontario is the fact of the plaintiff’s residence or presence in Ontario while it “sustains” the damage, then the Rule is ultra vires the provincial Legislature as invalid extraterritorial provincial legislation.

All of those issues and submissions were raised in the above-noted five appeals which are currently under reserve before the Ontario Court of Appeal. The court’s decision will likely assist in clarifying the nature and application of the “real and substantial

26 e.g. see MacDonald v. Lasnier (1994), 21 O.R. (3d) 177 (Gen. Div.).
connection test”. However, until a definitive ruling is made in this regard, it is important for counsel to be aware of the various issues and positions summarized above.27

(b) Forum Non Conveniens

As mentioned above, the Ontario Court of Appeal recently confirmed in Unifund that the forum non conveniens issue only becomes relevant if the forum court determines (or the defendant concedes) that the forum court has jurisdiction over the action. Even if the jurisdiction simpliciter test is met, a Canadian court may still decline jurisdiction on the basis that it is not a convenient or appropriate forum to hear the action.

The test for determining the appropriate forum is much clearer than the jurisdiction simpliciter test. In the 1993 Supreme Court of Canada decision of Amchem Products Inc. v. British Columbia (Worker’s Compensation Board),28 Mr. Justice Sopinka wrote that in order to stay an action on the basis that the domestic court is forum non conveniens, the court must conclude that there is clearly a more appropriate jurisdiction to hear the case:

While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiffs.29

A year later in Frymer v. Brettschneider,30 Madam Justice Arbour of the Ontario Court of Appeal (as she then was) phrased the test as follows:

In all cases, the test is whether there clearly is a more appropriate jurisdiction than the domestic forum chosen by the plaintiff in which the case should be tried. The choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the parties.31

When applying this test to determine whether a competing jurisdiction is clearly more appropriate for the conduct of the action, the Court engages in a “factor analysis”. The

29 Ibid., at p. 111.
31 Ibid., at p. 79.
court weighs all relevant connecting factors of each competing forum to determine the one which has the closest connection to the conduct of the proceeding. Factors which the courts typically regard as relevant in this analysis include the following:

a. the location of the majority of the parties and key evidence;
b. the location of key witnesses;
c. geographical factors suggesting the natural forum;
d. the avoidance of a multiplicity of proceedings;
e. the governing law and its weight compared with the factual questions to be decided;
f. the presence of any governing law clause in a contract;
g. the presence of a jurisdiction clause in a contract;
h. whether a party would be deprived of a legitimate personal or juridical advantage that would be available if the action were conducted in the competing jurisdiction;
i. whether some witnesses or parties will have to travel a considerable distance for any steps in the proceeding regardless of where the proceeding is conducted;
j. the rules of evidence in the competing jurisdictions; and
k. the relative ability of the plaintiff to seek immediate execution after judgment in the competing jurisdiction.  

If, after weighing the relevant factors, it is evident that there is another jurisdiction that is clearly more appropriate than the one selected by the plaintiff, then the court will usually stay the action. In that event, the plaintiff would be required to recommence its action in the other forum.

**Conclusion**

The foregoing is a summary overview of the developing Canadian law on three private international law issues — recognition and enforcement of foreign judgments, jurisdiction simpliciter and forum non conveniens.

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Generally, a Canadian court will recognize and enforce a foreign court judgment against a Canadian defendant, that did not attorn to the jurisdiction of the foreign court, if the territory of the foreign court had a real and substantial connection with the action. If such a real and substantial connection exists, then the defendant will not be permitted to re-try (or try for the first time, in the case of a default judgment) the case on the merits. Instead the defendant will be restricted to a limited set of possible defences in attempting to oppose enforcement of the foreign judgment by a Canadian court.

The real and substantial connection test also applies to the issue of jurisdiction simpliciter. Generally, a Canadian court may only assume jurisdiction over an action involving a foreign defendant if the territory of the forum court has a real and substantial connection to the action or the defendant. At present, there is uncertainty and inconsistency regarding the scope and application of this test in the case law.

Even if the Canadian court has jurisdiction over an action, it has discretion to decline to assume jurisdiction if there is another forum that is clearly more appropriate for the conduct of the action. This issue involves an assessment of all relevant connecting factors to determine whether the competing forum is clearly more appropriate than the domestic forum for the trial of the action.