The Recognition and Enforcement of Foreign Judgments in Canada

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February 2002
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In Canada a foreign judgment has of itself no right to recognition and enforcement. Instead, effect will only be given to the judgment when a Canadian court determines that the judgment satisfies the rules of that particular forum.¹

The overwhelming trend in recent years has been one towards ease of recognition and enforcement of foreign judgments in Canada. If the foreign court had a “substantial connection” with the action, Canadian courts will enforce the judgment unless it was obtained by fraud, it violates public policy, it is contrary to natural justice or violates sovereign immunity. Notwithstanding the efforts of imaginative Canadian defendants, the judicial tendency in recent years is to give these defences very narrow scope.

This paper will examine the recognition and enforcement of foreign judgments in Canada in two parts. Part one will examine the prerequisites that a foreign judgment must have in order to be recognized and enforced in Canada. Part two will examine the defences of fraud, policy, natural justice and sovereign immunity.

As a general observation, it should be noted that Canada is a federal jurisdiction with ten provinces. There is no single method of national enforcement. A judgment is usually taken to the province in which a defendant has assets and recognized and enforced there. In the event it is necessary to enforce the judgment in more than one province, it will be necessary to obtain recognition for the judgment in each different province. All provinces except Quebec

¹ Ibid.
have mutual registration arrangements. As a result, if the judgment is recognized by one of Canada’s common law provinces, it can be automatically registered in any of the others.

PART I – THE FORMAL REQUIREMENTS FOR RECOGNITION

At common law, a foreign judgment is enforceable by action in Canada if it meets the following criteria:

1) the judgment originated from a court of competent jurisdiction according to the principles of private international law (i.e. the original court had jurisdiction in an international sense);

2) the judgment is for a definite and ascertainable sum of money, other than a sum payable in respect of taxes, penalties and other laws of a public nature; and

3) the judgment is final and conclusive in the original jurisdiction.

1) Competent Domestic Jurisdiction

Canadian courts will only enforce foreign judgments that originated from a court that had jurisdiction in accordance with the Canadian rules of the conflict of laws.²

Before 1990 Canadian Courts would recognize and enforce judgments only where:

(1) the defendant was a subject of the foreign country in which a judgment had been obtained;
(2) the defendant was a resident in the foreign country when the action began;

(3) the defendant submitted to the jurisdiction of the foreign court by appearing before the court as a plaintiff by counterclaim;

(4) the defendant voluntarily appeared before the foreign court; or

(5) the defendant agreed through contractual terms to refer all disputes to the exclusive jurisdiction of the foreign court. Buckley L.J. in Emanuel v. Symon, [1908] 1K.B. 302 at 309 (C.A.) [hereinafter Emanuel]

Since 1990, however, the Canadian approach to the recognition and enforcement of foreign judgments has become more accommodating of the notion of international comity and the old jurisdictional rules have essentially been replaced by the “substantial connection test”. That is to say, the test of jurisdiction will be satisfied where there was a “real and substantial connection” between the foreign jurisdiction and the subject matter of the proceedings or the defendant.³ This trend in Canadian common law jurisdictions has been led by the decision of the Supreme Court of Canada in Morguard Investments Ltd. v. De Savoye.⁴

In Morguard, the plaintiff-mortgagee in a foreclosure action on land in Alberta had obtained a deficiency judgment against the defendant-mortgagor from an Alberta court. Before the plaintiff had commenced that Alberta action, the defendant had moved to British Columbia and had ceased to carry on business in Alberta. The defendant was served ex juris in British Columbia under the Rules of Court for Alberta, however, the defendant failed to appear

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² Castel, supra note 1 at p.273.
³ See supra note 13.
or defend in the Alberta action. There was no clause in the mortgage by which the defendant-mortgagor had agreed to submit to the jurisdiction of the Alberta courts.

The plaintiff then made applications under the British Columbia Rules of Court for judgment on the Alberta judgment. The plaintiffs were granted judgment in British Columbia. The Supreme Court of Canada upheld the judgments on appeal and adopted a single test for determining whether at common law the court of one province or territory had the jurisdiction to enforce a money judgment from another province or territory. The Court held that a judgment rendered by any province or territory is entitled to enforcement throughout the country provided that there was a “real and substantial connection” between the original court and one or more of the following: 1) the defendant; 2) the cause of action, or 3) the subject matter of the action. The Supreme Court of Canada did not elaborate on the nature of the real and substantial connection test, but instead left it open to future courts to add to the list of “connecting” factors.

The underlying theme in the Morguard judgment was one of comity. As stated by La Forest J., the world has changed since the development of the old common law rules in Nineteenth 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.\(^5\) 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.\(^6\) He went

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\(^4\) [1990] 3 S.C.R 1077 [hereinafter Morguard].

\(^5\) Ibid. at 1098.

\(^6\) Ibid. at 1099.
on to state 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 or territory, provided that court had properly exercised jurisdiction in the action.7

While the decision in *Morguard* was rendered in the context of inter-provincial enforceability of judgments and, therefore, did not specifically address the issue of the enforcement of foreign judgments generally, it is by now widely acknowledged that it applies to judgments from outside Canada as well.8

Real and substantial connection is a broad test. The requisite connection has been found where: the subject matter of the action was located in the foreign state, the damages were suffered in the foreign state,9 and where a Canadian product has entered into the stream of commerce in a foreign jurisdiction and such entry into the foreign jurisdiction was foreseeable.10

The real and substantial connection need only be with the foreign state and not the court that granted the judgment. Thus, the absence of the fraud, public policy or natural justice deficiencies it is irrelevant to the recognition or enforcement of the foreign judgment that the

7 *Ibid.* at 1102.
foreign court lacked internal authority to adjudicate the matter. A complaint of that nature should be raised before the foreign court, not the Canadian court.

2) Money Judgment

It has consistently been held by the common law courts that foreign judgments will be enforced only if they are in personam and if they are for a debt or a definite and ascertainable sum of money. The justification for this requirement stems from the common law principle that foreign judgments, if given by a court of competent jurisdiction, impose a moral obligation upon the defendant to pay. This type of obligation then becomes enforceable as a simple contract debt.

Even money judgments, however will not be enforced where they are on account of taxes, penalties and possibly not where they are on account of a “law of public nature”.

(a) The Foreign Penal and Revenue Laws Exception

As a general rule, Canadian common law courts will refuse to recognize or enforce foreign judgments which enforce the penal or revenue laws of a foreign jurisdiction. Penal laws are those which enforce a punishment for a duty owed to the state as opposed to a remedial law which aims to compensate a private person. A judgment which enforces both


12 Castel, ibid. at p.289. In essence, a sum is sufficiently certain for the purpose of enforcing the judgment if it can be ascertained by a simple arithmetical formula: Castel, ibid.

13 Canadian courts will also not entertain an action for the enforcement, either directly or indirectly, of a foreign penal or revenue law. This rule, however, should not apply to a judgment from another province within Canada: Castel, supra note 1 at p.290. See also M. Hertz, Introduction to Conflict of Laws (Toronto: Carswell, 1978) at p.78.

civil and criminal liability is severable, and that part of it which awards a sum of money as damages is enforceable in Canada.\textsuperscript{15}

Since penal and revenue laws are thought to be sovereign acts, the enforcement of those laws in a foreign jurisdiction amounts to permitting the foreign government to exercise its jurisdiction in the domestic forum. Common law courts generally do not permit this to occur in the absence of an international treaty since to do otherwise would deny the government of the domestic forum the right to insist on reciprocity from the foreign jurisdiction.\textsuperscript{16}

To avoid enforcement, the defendant must establish that the penalty is a penalty “in the international sense”. In \textit{Huntington v. Attrill},\textsuperscript{17} the plaintiff sued the defendant in New York under a statute that provided liability on the part of officers of a corporation for making false representations in any certificate or report of a New York corporation. For recognition purposes, the Judicial Committee of the Privy Counsel distinguished between a “suit for penalty by a private individual in his own interest” which was recognizable as being in its nature protective and remedial in favour of creditors, and a “suit brought by the government or people of the state for the vindication of public law” which was penal in the “international sense” and not enforceable. Important with respect to the latter is that vindication of the right rest with the state itself.\textsuperscript{18}

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\textsuperscript{17} [1893] A.C. 150 (P.C.).
\textsuperscript{18} Ibid. at 155-158. Not all suits at the instance of a state, however, will fall into this category. In \textit{United States of America v. Ivey et al.} (1995), 26 O.R. (3d) 533 at 548 (Gen. Div.); affirmed (1996), 30 O.R. (3d) 370 (C.A.); application for leave to the S.C.C. dismissed [1996] S.C.C.A. No. 582 [hereinafter \textit{Ivey}], the government of the United States brought an action in Canada to enforce judgments that it had obtained against the defendants in Michigan pursuant to an American environmental statute. The United States, as plaintiff, sought to recover the clean-up costs of a site owned and operated by
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Moreover, not all suits at the instance of a state will result in judgments which constitute penalties. In *United States of America v. Ivey et al.*\(^{19}\) [hereinafter *Ivey*], the government of the United States brought an action in Canada to enforce judgments that it had obtained against the defendants in Michigan pursuant to an American environmental statute. The United States, as plaintiff, sought to recover the clean-up costs of a site owned and operated by the defendants. The court found that the statute was not penal or revenue law as the plaintiff sought to recover only the actual cost of removal and remediation. Since the aim was restitution and not punishment, the law could not be considered as penal in nature. The restitutionary nature of the claim also precluded it from being characterized as a revenue or tax law.

The definition of penal law creates interesting issues with respect to legal rules which are designed to punish but which assign vindication of the right to a private actor. The situation has often arisen with respect to American treble damages awards. Indeed, the 5\(^{th}\) Circuit Court of Appeals has stated that since treble damage awards are designed in part to penalize and deter wrongdoers, it would have no doubt that a foreign court would refuse to entertain claims based on them.\(^{20}\) It has also been observed, however, that such damages should be recoverable in a common law court if they are awarded for the benefit of a private plaintiff.\(^{21}\) In principle, the private pursuit of a civil remedy for breach of a statutory obligation is


\(^{21}\) Mann, *supra* note 41 at 614.
enforceable in a foreign jurisdiction and should not be viewed as penal.\textsuperscript{22} Using this approach, Canadian courts have generally refused to regard American treble damages as penal in nature and have tended to enforce them.\textsuperscript{23}

(b) The “Other Public Law” Exception

According to Dicey and Morris, English courts do not have the jurisdiction to entertain an action “for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state.”\textsuperscript{24} The exemption is thought to relate to the enforcement of rights which only a sovereign state can exercise. The authors concede that there is no House of Lords authority for the proposition to support the “public law” exception although there is authority from the English Court of Appeal.\textsuperscript{25} In Canada, the doctrine has been described as having a “rather shaky foundation”\textsuperscript{26} although an older minority judgment of the Supreme Court of

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  \item \textsuperscript{22} See Huntington, supra note 42.
  \item \textsuperscript{23} In Old North State, supra note 38 at ¶51-53, the British Columbia Court of Appeal acknowledged that the Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29 provides the Attorney General of Canada with the discretion to hold treble damage awards made in foreign anti-trust actions unenforceable in Canada. Anti-trust laws are defined as those which serve to preserve or enhance competition. The Court went on to state, however, that the Act could have, but did not, either declare all treble damage awards made by foreign courts unenforceable in Canada or provide the Attorney General of Canada the discretion to declare such awards based upon statutes other than anti-trust laws unenforceable. Furthermore, if the enforcement of treble damage awards generally was contrary to the public policy of Canada, the statute would be disregarded since such awards would not be enforceable at any time. From this reasoning, the Court held that until the Attorney General of Canada invokes the provisions of the Act, treble damage awards based even on anti-trust laws are enforceable and are therefore not contrary to the public policy of Canada. It should be noted that in Kidron v. Grean (1996), 48 O.R. (3d) 775 (Gen. Div.), Brennan J. took a more tentative approach to the issue of treble damages. He held that the enforcement of such damages would be contrary to the Supreme Court of Canada trilogy of decisions which placed a cap on awards for pain and suffering and loss of amenities in certain circumstances. Leave to appeal to the Ontario Superior Court of Justice (Div. Ct.) was ultimately refused [1996] CarswellOnt 5561 as it was held that Brennan J. had appropriately exercised his discretion to grant a stay having regard to the appeal being heard in California. In dismissing the appeal, however, Corbett J. stated that there was good reason to doubt the correctness of Brennan J.’s determination that a genuine issue for trial was raised in respect of the public policy of enforcing such a judgment for non-pecuniary loss and the application of a cap.
  \item \textsuperscript{24} Dicey & Morris, The Conflict of Laws, 12\textsuperscript{th} ed. (London: Sweet & Maxwell, 1993) at p.103 (emphasis added).
  \item \textsuperscript{25} Attorney General of New Zealand v. Ortiz, [1982] 3 All E.R. 432 (Q.B.).
  \item \textsuperscript{26} Ivey, supra note 43 at 547-548 (Ont. Gen. Div.) per Sharpe J.
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Canada suggested it may apply.\textsuperscript{27} New Zealand has questioned it while Australia has recognized and applied it.

The best example of the competing tensions which the exception creates is the “Spycatcher” case where the highest courts of New Zealand and Australia had the same issue before it and came to completely opposite conclusions on the application of the exception. The case involved a former agent of the British security services who had published a book about the service and his experiences in it. The British government sought damages and an injunction to restrain serialization of the book in newspapers in Australia and New Zealand.

When the issue came before the High Court of Australia in \textit{Attorney General for the United Kingdom v. Heinemann Publishers Australia Pty. Ltd.},\textsuperscript{28} the Court held that the exclusion was based on the principle that the court should only undertake a function if it can proceed by determining whether the law in question is proper.\textsuperscript{29} This was found to be similar to the public policy exemption which courts are free to apply when dealing with the application of foreign laws to private actors. To draw a distinction, however, between the good and the bad acts of a foreign sovereign would require that the courts engage in a political excursion which it was not equipped to undertake and which could provoke serious international complications. Accordingly, the only safe rule was one of universal rejection.\textsuperscript{30} In rendering the claim unenforceable, the Court emphasized that Britain’s central interest in bring the action was to

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\item \textsuperscript{27} \textit{Laane v. Estonian State Cargo & Passenger Steamship Line}, [1949] S.C.R. 530 where Rand J. 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.
\item \textsuperscript{28} (1988), 165 C.L.R. 30 (Aust. H.C.).
\item \textsuperscript{29} Citing \textit{Moore v. Mitchell}, 30 F.2d 600 (1929) per learned Hand J.
\item \textsuperscript{30} \textit{Buchanan Ltd. et al. v. McVey}, [1955] A.C. 516.
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ensure continued secrecy in the operations of the British Security Service and held that this was a purely governmental interest.

In contrast, when this issue came before the New Zealand Court of Appeal, the opposite conclusion was drawn.\textsuperscript{31} The New Zealand Court of Appeal defined the public law exemption in the same way as did the Australia High Court; that it relates to the assertion of a sovereign right which only government can exercise. The court found that the duty of confidentiality in question did arise from a breach of \textit{The Official Secrets Act} of the United Kingdom but also arose as a common law duty implicit in many employment contracts or fiduciary relationships. The court agreed that the United Kingdom’s action could be seen either as a sovereign act or as stemming from a common law employment contract. Since any private employer could enforce a duty of confidence in a foreign country, the court saw no reason to preclude a state actor from enforcing the same right.

The conflicting results of the Australia and New Zealand courts demonstrate that the issue has become needlessly complicated. Arguably, the New Zealand result more closely tracks the object and purpose of the rules in question: the prevention of the exercise of a foreign sovereign power on domestic soil without the permission of the domestic sovereign.

3) Final and Conclusive Judgment

A foreign judgment must be one which is final and binding in its own jurisdiction, and conclusive on the merits, if it is to be recognized and enforced by Canadian common law courts.\textsuperscript{32}

(a) **Finality**

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 and the existence of the debt recognized by the foreign judgment has been rendered \textit{res judicata} as defined by Canadian law. If by the procedural law of the foreign jurisdiction, the defendant is entitled as of right to a re-hearing or to have the judgment re-opened, nullified or altered by the same court that granted the judgment, the foreign judgment will not be considered final.\textsuperscript{33}

In \textit{Re Overseas Food Importers & Distributors Ltd. and Brandt},\textsuperscript{34} 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 a security in that jurisdiction. The British Columbia Court of Appeal held that the condition as to security related to the enforcement of the judgment and not the judgment itself. Accordingly, the judgment was held to be final.\textsuperscript{35}

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\item\textsuperscript{32} Castel, \textit{supra} note 1 at p.283.
\item\textsuperscript{33} Castel, \textit{supra} note 1 at p.291. In other words, where a decision may be altered in subsequent proceedings between the same parties in the same court, it is not final and conclusive so as to be actionable in the local forum. No interlocutory order for payment of money into court and no order for payment of costs to one party on his or her undertaking to repay them in the event of his or her failing upon appeal will be enforced by a Canadian court. However, a judgment for maintenance or similar periodical payments may be final and conclusive as regards payments already due, if the foreign court has no power to vary or remit arrears: Castel, \textit{supra} note 1 at 291.
\item\textsuperscript{34} (1981), 126 D.L.R. (3d) 422 (B.C.C.A.).
\item\textsuperscript{35} 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
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Although the possibility of variation by the original court will preclude the enforcement of a foreign judgment at common law, the possibility of an appeal to another tribunal is generally no bar to enforcement. A foreign judgment may still be considered final and conclusive where the appeal period had not expired \(^{36}\) and even where an appeal is actually pending before the foreign court. \(^{37}\) In a proper case, however, where foreign appeal proceedings are pending at the time of judgment in the enforcement action, the Canadian court may order that judgment in the enforcement action be stayed pending the conclusion of the foreign proceedings. \(^{38}\) If the foreign judgment is, in fact, varied on appeal, the judgment will be recognized and enforced in its varied form. \(^{39}\)

The common law courts will not reopen the judgments of foreign courts acting in good faith. Any errors ought to be corrected on appeal in the foreign country. \(^{40}\) It has been held, however, that a foreign judgment will not be enforced if it shows on its face a perverse and deliberate refusal to apply generally accepted doctrines of the conflict of laws. \(^{41}\) Furthermore, if

\(^{36}\) Castel, *supra* note 1 at p.291; McNeely, *supra* note 58 at p.35; McLeod, *supra* note 2 at p.624.

\(^{37}\) 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.


\(^{39}\) McLeod, *ibid.* at p.625.

\(^{40}\) McLeod, *ibid.* citing *First National Bank of Oregon v. Harris* (1975), 63 D.L.R. (3d) 628 (Ont. S.C.). The same principle is applied to the situation in which fresh evidence is discovered by the defendant after the date of judgment that could not reasonably have been discovered earlier and which shows the foreign judgment to be erroneous. Given that local judgments can be set aside on the basis of fresh material evidence, it seems most appropriate for the effect of that evidence to be governed by the law of the foreign country: McLeod, *ibid.* at p.601.

\(^{41}\) Castel, *supra* note 1 at p.284.
the foreign proceedings are disposed of on a basis other than the merits, the judgment may not be recognized as binding on the parties.

PART II – DEFENCES TO FOREIGN JUDGMENTS

Once a common law court has determined that a foreign court was correct to assume jurisdiction, the foreign judgment may be impeached only on the ground that it was obtained by fraud; that it was obtained in proceedings which were contrary to natural justice; that its recognition would be contrary to public policy or that it’s enforcement violates Canadian precepts of sovereign immunity. Although these defences to the recognition and enforcement of foreign judgments exist, the presumption is made in favour of the jurisdiction of the foreign court with a heavy burden of proof resting on the party who seeks to impeach it.

Thus even obvious mistakes or errors with respect to the law of the jurisdiction in which the judgment is sought to be enforced, will not constitute defences to enforcement. The foreign court has the right to reach a “wrong” conclusion of fact or law without the enforceability of the judgment being affected. Complaints about such errors should be raised in the foreign jurisdiction, not in Canada.

1. Fraud

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42 For example, on the basis of a limitation period having expired under local law or the failure to post security for costs.


44 Castel, supra note 1 at p.284.

45 McLeod, supra note 2 at p.600 citing Godard v. Gray (1870), L.R. 6 Q.B. 139 [hereinafter Godard]; Castel, supra note 1 at p.284. Note however, that British Columbia courts have held that a manifest error appearing on the face of the foreign judgment sought to be enforced will be a basis for review: McNeely, supra note 58 at p.41. In a recent decision of the British Columbia Court of Appeal (leave to appeal to the S.C.C. dismissed), the Court expressly limited the manifest error defence to errors on the face of the foreign judgment itself and not to the documents filed in a record of the foreign court proceedings: Moses v. Shore Boat Builders, supra note 34 at 668.
A foreign judgment which has been obtained by fraud will not be recognized or enforced in Canada. This defence applies equally to cases where the fraud was on the part of the court or on the part of the successful party. Canadian courts have shown a considerable degree of reluctance in applying the fraud defence as it seems to fly in the face of the principle that there should be an end to litigation and that foreign judgments are conclusive on their merits.

Some Canadian courts have drawn the distinction 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 by the court hearing the action. If proved extrinsic fraud will constitute ready grounds for refusing to recognize or enforce the foreign judgment. However, extrinsic fraud must have deprived the aggrieved party of an adequate opportunity to present his or her case to the court before it becomes a ground for refusing recognition of a foreign judgment.

Intrinsic fraud deals with the merits of the case. For example an allegation that the plaintiff perjured himself or presented fraudulent evidence in the foreign proceeding. The courts will not allow a foreign judgment to be impeached because of intrinsic fraud, since to allow such fraud would infringe the principle of res judicata. Furthermore, such matters ought to have been raised and litigated within the proceedings of the foreign court. This view was affirmed in Powell v. Cockburn.

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46 For example, where the foreign judge had a personal interest in the matter before the court or was bribed. Fraud in such situations tends to overlap with the defence of natural justice in that the court has deliberately failed to give the parties a fair and impartial hearing: McLeod, supra note 2 at p.614.

47 McLeod, supra note 2 at p.611; Castel, supra note 1 at p.285 citing Morguard among other cases.


It has been held very early on by some Canadian courts that, in the absence of fresh evidence or evidence which could not have been put before the original court, it is not in the interests of justice or public policy to allow the issue of fraud to be litigated again in the enforcing court.\textsuperscript{50} This principle was best illustrated in \textit{Jacobs v. Beaver}.\textsuperscript{51} 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.

In the very recent decision of \textit{Beals v. Saldanha},\textsuperscript{52} the Ontario Court of Appeal sent a clear message that defendants who choose not to defend foreign proceedings and have excessive damages assessed against them on default will receive no sympathy from Ontario courts. In rendering this judgment, the Ontario Court of Appeal gave a marked boost to the enforcement of foreign judgments by narrowly restricting fraud, public policy and natural justice as bases for avoiding the recognition of foreign judgments.\textsuperscript{53}

The defendants (Thivy) in the original cause of action purchased a lot in a Florida subdivision in 1981 for approximately $6,000 Cdn. They neither visited the lot nor saw photos of it. In 1984, the plaintiff offered to purchase the lot from the defendants for $12,000 Cdn. After receiving the offer, the defendant, Thivy, noticed that it referred to Lot 1 whereas the defendant group owned Lot 2. Thivy amended the figure on the offer, however, the legal description of the property continued to be that of Lot 1. In 1985, after purchasing the property, the plaintiff phoned Thivy stating that he had been sold the wrong lot. In March 1985, Thivy

\textsuperscript{50} Castel, \textit{supra} note 1 at p.285.  
\textsuperscript{51} \textit{Jacobs v. Beaver} (1908), 17 O.L.R. 496 (C.A.).  
\textsuperscript{52} (2001), CarswellOnt 2286 (C.A.) [hereinafter \textit{Beals (C.A.)}].  
\textsuperscript{53} The public policy and natural justice defences are discussed below.
received a Statement of Claim from a Florida court claiming damages “in excess of $5,000.” She prepared and mailed a Defence. That action was ultimately dismissed without prejudice and a new one commenced. Again, Thivy mailed a Defence to the court. The Florida plaintiff amended the Claim three times. Under Florida rules a fresh Defence is required with each amendment. The defendants failed to respond to the amended Claims and did not respond to a Notice of Default hearing. Judgement was ultimately issued against the defendants, as a result of which the $12,000 sale of the property became a liability of $800,000. Most of the judgment was attributable to lost profits as the plaintiff bought the land with the intention of building a model home with his business partner to induce owners of neighbouring properties to retain the plaintiff to build neighbouring lots.

When the plaintiffs attempted to enforce their judgment in Ontario, the lower court judge refused 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 corporation that would have earned the allegedly lost profits was dissolved before the law suit began and the shareholders had no status under Florida law to bring the claim;

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54 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.

Based on these omissions of fact, the judge at first instance refused to enforce the foreign judgment on the basis that the Florida plaintiffs had deliberately misled the Florida court in obtaining the judgment.\(^{55}\)

On appeal, the majority of the Court of Appeal rejected the lower court’s definition of the fraud exception and held that the Florida plaintiffs were entitled to succeed in the main action to enforce the Florida judgment. The Court of Appeal began its analysis by reiterating the principle that the correctness of a foreign judgment is irrelevant to its enforcement. The lower court’s concerns about enforcing the judgment all went to the correctness of the Florida decision. The Court of Appeal did recognize, however, that there was a tension between this principle and the principle that a judgment would not be enforced if it was obtained by fraud. The wider the scope of the fraud defence, the more likely a Canadian court would be drawn into re-examining the merits of the claim adjudicated upon in the foreign court.\(^{56}\)

The Court of Appeal therefore restricted fraud as a basis for refusing to enforce foreign judgments to cases where fraud is based on facts which came into existence after the foreign judgment was obtained or where the facts existed at the time the foreign judgment was obtained.\(^{55}\)


\(^{56}\) Beals (C.A.), supra note 88 at para. 38.
obtained but could not have been discovered through the exercise of reasonable diligence before the foreign judgment was granted.\textsuperscript{57}

The due diligence requirement was found to be consistent with judicial comity, the policy underlying the recognition and enforcement of foreign judgments. Furthermore, the Court noted that, in the absence of a reasonable diligence requirement, defendants could simply ignore foreign proceedings and seek to advance their version of the facts under the guise of a fraud defence in Canadian enforcement proceedings.\textsuperscript{58} In other words, defendants who ignored foreign proceedings would be able to re-litigate the merits while defendants who participated in foreign proceedings would be precluded from doing so.

When applying these principles to the case before it, the Court of Appeal held that the facts on which the Canadian defendants relied for their allegation of fraud were easily ascertainable had the defendants participated in the Florida proceedings.\textsuperscript{59}

2. Public Policy

A foreign judgment which is contrary to Canadian public policy or the public policy of the particular province in which enforcement is sought will not be recognized or enforced.\textsuperscript{60} Like the fraud defence, the public policy defence is narrowly construed and rarely applied.\textsuperscript{61} Foreign judgments will be denied recognition on public policy grounds only where they violate some fundamental principle of justice, some prevalent conception of good morals, or

\textsuperscript{57} Ibid. at para. 42.
\textsuperscript{58} Ibid.
\textsuperscript{59} Ibid. at para. 48.
\textsuperscript{60} Morguard, supra note 14 at 1110.
some deep-rooted tradition of the forum.\textsuperscript{62} This typically includes things such as foreign judgments based on criminal or quasi-criminal conduct, bribery, coercion, proposition or some other fundamental value which contravenes essential justice.\textsuperscript{63} What types of conduct fall within public policy changes over time. Until very recently, foreign judgments given to enforce gambling debts were a classic example of judgments which would be regarded by Canadian courts as unenforceable on the grounds of public policy.\textsuperscript{64} However, courts in both Ontario and British Columbia have held that this can no longer be the case in light of the widespread sponsorship of public lotteries by governments in Canada.\textsuperscript{65} The simple fact that the judgment contravenes a Canadian law does not mean enforcement will be denied. Nor does the fact that the foreign law on which the judgment is based is harsher than Canadian law justify a refusal to enforce.\textsuperscript{66}

In Beals \textit{v. Saldhana}, the lower court judge held that easier recognition and enforcement of foreign judgments under the substantial connection test \textit{Morguard} called for the development of “some sort of judicial sniff test in considering foreign judgments.”\textsuperscript{67} This amounted to broadening the public policy defence where the conduct in the foreign court is not

\begin{itemize}
\item \textsuperscript{61} Lloyd’s p. 717.
\item \textsuperscript{62} Castel, \textit{supra} note 1 at pp.171-172.
\item \textsuperscript{63} Lloyd’s p. 713.
\item \textsuperscript{64} See \textit{M & R Investment Co. v. Marsden} (1987), 63 O.R. (2d) 509 (Dist. Ct.).
\item \textsuperscript{66} Ivey, \textit{supra} note 43; see also \textit{Old North State, supra} note 38 at para. 49, cited in \textit{Re iTV Games, Inc.}, [2001] B.C.J. No. 2065 at para. 22 (S.C.).
\item \textsuperscript{67} Beals (Gen. Div.), \textit{supra} note 91 at 144.
\end{itemize}
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.”

On appeal, a majority of the Court of Appeal squarely disagreed with the trial judge’s analysis and rejected the suggestion that easier enforcement of foreign judgments required a broader public policy exception. On the contrary, the increased importance of international comity supported a narrower application of the public policy defence.

Even more recently the Ontario Court of Appeal dealt with the public policy defence in *Society of Lloyd’s v. Meinzer*. 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 which made 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. The court also accepted that, had the action been brought in Ontario, it would have failed because of the breach of statute.

The court then engaged in an overt balancing of interests noting that even the violation of an Ontario public policy is not necessarily grounds for refusing to enforce a foreign judgment.

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69 *Beals (C.A.), supra* note 88 at para. 83.
70 (2001), 55 O.R. (3d) 688 (C.A.) [hereinafter *Society of Lloyd’s*].
71 at p. 719.
judgement where the obligation which contravenes the public policy arose outside of the jurisdiction. Second the court observed that an earlier decision of 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 the English courts the question of 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.

3. **Natural Justice**

While the natural judgment defence exists in theory, it is rarely applied in practice.\(^{73}\)

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.\(^{74}\) A denial of natural justice must amount to more than a mere procedural irregularity on the part of the foreign court, provided that the unsuccessful party was given an opportunity to present his or her case. Finally, the objection that the foreign proceedings were contrary to natural justice cannot be taken in the enforcing court if it could have been or was taken before the foreign court.\(^{75}\)

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\(^{72}\) Ibid. at p. 720.

\(^{73}\) Lloyd’s at p. 704.

\(^{74}\) Lloyd’s at p. 704.

\(^{75}\) Castel, *supra* note 1 at p.287; cited in *Society of Lloyd’s, supra* note 106 at 704.
For an allegation of a denial of natural justice to succeed, then, the evidence must establish a fundamental flaw in the foreign proceedings. Such a flaw generally relates to inadequate notice, the right to be heard,\textsuperscript{76} or bias on the part of the presiding tribunal.\textsuperscript{77} Notice is determined by the foreign law, not by Canadian procedural rules.\textsuperscript{78}

In \textit{Beals}, Weiler J.A., dissenting in the Court of Appeal, would have found that the defendants were denied natural justice because the Florida complaint did not alert the defendants to “the extent of their jeopardy” but provided notice of a claim “over $5,000” because the plaintiffs failed to advise that they would be seeking “damages for loss of opportunity by a company owned by them”.\textsuperscript{79}

The majority rejected this concern and held that specific pleading rules cannot be confused with the rules of natural justice, nor should any particular pleading rule be viewed in isolation.\textsuperscript{80} The fact that Florida had different rules of pleading did not amount to a denial of natural justice. The majority went on to note that the defendants did not plead prejudice arising from the manner in which the complaint was framed in the Florida proceedings, and did not lead any evidence of prejudice flowing from the way the complaint was framed. Instead, they had earlier responded to a similarly framed complaint.

\textsuperscript{76} McLeod, \textit{supra} note 2 at p.616.
\textsuperscript{78} According to Castel, in such circumstances, it appears that any notice is sufficient provided it is in accordance with the law of the foreign legal unit: Castel, \textit{supra} note 1 at p.288.
\textsuperscript{79} \textit{Beals (C.A.)}, \textit{supra} note 88 at paras. 133, 146.
\textsuperscript{80} \textit{Ibid.} at para. 98. While rule 25.09(9) of the Ontario Rules of Civil Procedure requires that damage claims specify “the amount claimed for each claimant in respect of each claim”, the powers of amendment found in rule 26.01 demonstrate that the failure to comply with rule 25.06(9) does not mean that a defendant has been denied the opportunity to know the extent of jeopardy or the case it has to meet.
4. **Sovereign Immunity**

Aside from all of the above criteria for and defences to the recognition and enforcement of foreign judgments, it should be noted that generally speaking, a foreign state and/or sovereign is immune from the jurisdiction of Canadian courts. The relevant legislation in this regard is the *State Immunity Act*\(^81\) which confirms that a general sovereign immunity exists in Canada. The Act defines a “foreign state” as including:

- (a) the Sovereign or other head of the state or any political subdivision of a foreign state while acting in that public capacity;
- (b) the government of the foreign state or political subdivision of the state;
- (c) any department or agency of a foreign state; and
- (d) any political subdivision, such as a province, state or similar subdivision of a federal foreign state.

While this may appear to cast a broad net, the Act lists many exceptions to the general rule of sovereign immunity including commercial activity. Commercial activity is defined as “any particular transaction, act or conduct, or any regular course of conduct, that by reason of its nature is of a commercial character.”

Most litigation concerning sovereign immunity centres on whether a particular defendant falls within the definition of a foreign state or whether the activity in which the defendant is engaged amounts to a commercial activity. Both are highly factually intensive

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\(^{81}\) S.C. 1980-81-82, c.95.
exercises and depend in part on the extent to which defendant’s activity involves an act of state
or conduct more akin to that of a private actor. This depends on factors such as the nature of the
functions performed, to whom does the benefit of the activity accrue? The nature of the powers
that the defendant is entitled to exercise and the degree of control exercised over the defendant
by a state actor.⁸²

CONCLUSION

Contemporary Canadian courts approach the recognition and enforcement of
foreign judgments with a strong presumption in favour of recognition and enforcement. Overt
recognition of international comity has lead Canadian courts to accept that other systems may
have different policies, laws and procedures that 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.

International comity has lead courts to far narrower approaches to the fraud,
public policy and natural justice defences than they may have been prepared to entertain in the
past. Canadian courts have put the burden on defendants to defend foreign proceedings
vigorously.

SCOPE OF RESEARCH — SOURCES CONSULTED

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The States signatory to the present Convention, Desiring to establish common provisions on mutual recognition and enforcement of judicial decisions rendered in their respective countries, Have resolved to conclude a Convention to this effect and have agreed on the following provisions: This Convention shall apply to decisions rendered in civil or commercial matters by the courts of Contracting States. It shall not apply to decisions the main object of which is to determine -. Keywords: foreign judgments, recognition, enforcement, Canada, Beals v. Saldanha, Yaiguaje et al. v. Chevron Corporation et al., state immunity, fraud, natural justice, public policy, impeachment defences, conflict of laws. JEL Classification: K33, K41. Suggested Citation: Suggested Citation. Pribetic, Antonin I., Recognition and Enforcement of Foreign Judgments in Canada (January 15, 2014). Ontario Bar Association Institute 2014, 'Internationalizing Commercial Contracts'. Available at SSRN: https://ssrn.com/abstract=2379721. Antonin I. Pribetic (Contact Author). Ministry of the Att