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"Strangers in a Strange Land" -- Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario

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"Strangers in a Strange Land" – Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario

Cover Page Footnote

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**“STRANGERS IN A STRANGE LAND” —
TRANSNATIONAL LITIGATION, FOREIGN
JUDGMENT RECOGNITION, AND ENFORCEMENT
IN ONTARIO**

ANTONIN I. PRIBETIC*

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I. INTRODUCTION

Well into the new millennium, the landscape of international business commerce continues to change dramatically. As many companies expand into global markets, the extant business reality of prosecuting or defending lawsuits arises from companies relying upon standard or “boiler plate” contracts or invoices when selling goods and services to customers or buying products from suppliers or third parties. It is trite to say that a review of the wording of a company’s sales contracts or invoices is advisable. However, any domestic or foreign company which conducts business or sells products in Canada should be mindful of the conflict of law issues and jurisdictional disputes which may result in costly litigation affecting the company’s “bottom-line.”

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This article discusses transnational contractual and litigation issues in Canada,¹ with specific application to the province of Ontario. This article first addresses, from an Ontario company perspective, the importance of incorporating choice of forum, choice of law, and time of the essence clauses in standard international contracts, with particular reference to the United Nations Convention on Contracts for the International Sale of Goods.² The second part draws upon the jurisdictional issues prevailing when foreign defendants are sued in Ontario, including procedural and substantive law considerations. Finally, a discussion of the principles for recognition and enforcement of foreign judgments in Ontario necessarily involves a review of the Supreme Court of Canada's landmark decisions in *Morguard Investments Ltd. v. de Savoye*,³ and the recently released decision in *Beals v. Saldanha*.⁴ An appreciation of the complexities and subtleties within developing Canadian jurisprudence in the transnational litigation context offers foreign and domestic litigants an opportunity to consider the benefits and drawbacks of litigating in Ontario.

II. INTERNATIONAL SALES CONTRACT ISSUES

There are three types of clauses which most contracts or invoices should contain: a choice of forum clause; a choice of law and exclusive jurisdiction clause; and a time of the essence clause.⁵

A. Choice of Forum Clauses

Many contracts include a standard clause in which the parties agree that any dispute between them is subject to arbitration or to the exclusive jurisdiction of a given court. Where a plaintiff brings an action in a jurisdiction that violates such a clause and receives a judgment, the trend is for Ontario courts to assume jurisdiction, notwithstanding the agreement, on the grounds that such clauses are interpreted to confer concurrent, but not exclusive, jurisdiction on the foreign court. However, in interpreting the contract, Ontario

1. This article focuses on choice of forum and choice of law issues from a contractual perspective. For an analysis of choice of law, vis-à-vis tort and product liability issues, see Janet Walker, "Are We There Yet?" *Towards a New Rule for Choice of Law in Tort*, 38 OSGOODE HALL L.J. 331 (2000).

2. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. No. A/CONF.97/19 (1981), incorporated by, International Sale of Goods Act, R.S.O. 1990, c-I-10.

3. [1990] 3 S.C.R. 1077.

4. [2003] S.C.C. No. 72, WL No. 28829 (Can. Dec. 18, 2003) (slip opinion).

5. There are a variety of other contract indemnity (or risk allocation) clauses beyond the scope of this article, including limitation of liability, release, waiver, hold (and save) harmless, insurance-waiver of subrogation, etc.

courts generally are required to apply the governing law based upon the choice of forum (*lex fori*) clause⁶. Therefore, it is recommended that Ontario-based corporations, whether carrying on business inter-provincially or multi-nationally, ensure that any contracts or invoices specify Ontario as the choice of forum in the event of a dispute.

Forum selection clauses are generally treated with a measure of deference by Canadian courts. In *Rudder v. Microsoft Corp.*,⁷ Justice Winkler relied upon the decision of the British Columbia Court of Appeal in *Sarabia v. Oceanic Mindoro*, which held that:

[T]here is no reason for forum selection clauses not to be treated in a manner consistent with the deference shown to arbitration agreements. Such deference to forum selection clauses achieves greater international commercial certainty, shows respect for the agreements that the parties have signed, and is consistent with the principle of international comity.⁸

Justice Winkler also cited with approval the English case, *Eleftheria (Cargo Owners) v. Eleftheria*,⁹ relied upon by Justice Huddart in *Sarabia*, "as the decision most often followed in Canada in setting out the factors that a court will consider in determining whether it should exercise its discretion and refuse to enforce a forum selection clause in an agreement."¹⁰ Justice Winkler summarized the relevant factors as follows:

(1) In which jurisdiction is the evidence on issues of fact situated, and the effect of that on the convenience and expense of trial in either jurisdiction; (2) whether the law of the foreign country applies and its differences from the domestic law in any respect; (3) the strength of the jurisdictional connections of the parties; (4) whether the defendants desire to enforce the forum selection clause is genuine or merely an attempt to obtain a procedural advantage; and (5) whether the plaintiffs

6. See generally NICHOLAS RAFFERTY ET AL., PRIVATE INTERNATIONAL LAW IN COMMON LAW CANADA: CASES, TEXT, AND MATERIALS chs. 9, 10 (2nd ed. 2003); Neil Guthrie, 'A Good Place to Shop: Choice of Forum and the Conflict of Laws', 27 Ottawa L. Rev. 201 (1995-96)

7. [1999] 47 C.C.L.T. 2d 168, para 8.

8. *Sarabia v. Oceanic Mindoro*, [1996] 26 B.C.L.R.3d 143, cited in *Rudder v. Microsoft Corp.*, [1999] 47 C.C.L.T. 2d 168, para. 8.

9. *Eleftheria (Cargo Owners) v. Eleftheria*, [1969] 2 All E.R. 641.

10. *Rudder*, 47 C.C.L.T.2d at para. 19.

will suffer prejudice by bringing their claim in a foreign court because they will be (a) deprived of security for the claim; or (b) be unable to enforce any judgment obtained; or (c) be faced with a time-bar not applicable in the domestic court; or (d) unlikely to receive a fair trial.¹¹

In *Z.I. Pompey Industrie v. ECU-Line N.V.*,¹² Justice Bastarache, writing for the unanimous Supreme Court of Canada, characterized the appropriate test for enforcement of forum selection clauses as the “strong cause” test referred to in *Eleftheria*. Justice Bastarache states:

The “strong cause” test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the “strong cause” test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the “strong cause” test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.¹³

B. Choice of Law and Exclusive Jurisdiction Clauses

As a corollary to the choice of forum clauses discussed above, parties are free to specify that foreign law applies, despite a choice of forum clause stipulating Ontario as the *lex fori*.¹⁴ In most cases, the choice of law is a matter of negotiation and may include considerations such as imposing private mediation and

11. *Rudder*, 47 C.C.L.T.2d at para. 20.

12. [2003] 224 D.L.R.4th 577.

13. *Id.* at para. 20.

14. See generally J.G. CASTEL, CONFLICT OF LAWS; CASES, NOTES, & MATERIALS ch. 12 (5th ed. 1984); NICHOLAS RAFFERTY ET AL., *supra*, note. 6.

international commercial arbitration clauses. At a minimum, the contract should specify which law should govern in the event of a dispute. Moreover, depending on the nature of the claim, an Ontario-based company should seriously consider incorporating an “exclusive jurisdiction clause” stating that all disputes, whether contractual, quasi-contractual, tort-negligence, or product-liability based, etc., will be interpreted according to Ontario law.

From a contractual perspective, Ontario is a signatory to the United Nations Convention on Contracts for the International Sale of Goods (CISG).¹⁵ The CISG is incorporated by reference in Ontario by the International Sale of Goods Act (ISGA). Buyers or sellers, who wish to be exempt from the application of the CISG or the ISGA, should consider including a specific clause excluding the application of this legislation. It is noteworthy that the ISGA is silent on choice of forum and choice of procedural law, delegating these issues to buyers and sellers for inter se negotiation and pre-contractual bargaining.¹⁶

Furthermore, unlike the Ontario Sale of Goods Act,¹⁷ which was governed by a six-year limitation, the International Sale of Goods Act, imposes a two-year limitation and specifies a notice requirement. Articles 39(1) and 39(2) of the International Sale of Goods Act read:

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice [to the seller] specifying the nature of the non-conformity within a reasonable time after discovery.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-

15. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. No. A/CONF.97/19 (1981), *incorporated by*, International Sale of Goods Act (ISGA), R.S.O., ch. I-10 (1990) (Ont.). Section 6 of the ISGA reads: “Parties to a contract to which the Convention would otherwise apply may exclude its application by expressly providing in the contract that the local domestic law of Ontario or another jurisdiction applies to it or that the Convention does not apply to it.” Quaere whether any foreign court or tribunal would recognize any unilateral “opting out” provision as contemplated under section 6 of the ISGA. For an American perspective, see Allison E. Butler, *The International Contract: Knowing When, Why, and How to “Opt Out” of the United Nations Convention on Contracts for the International Sale of Goods*, 76 FLA. BAR J. 24 (May 2002).

16. *Id.*

17. R.S.O., ch S-1 (1990).

limit is inconsistent with a contractual period of guarantee.¹⁸

C. *Time of the Essence Clauses*

Often a buyer and seller will reach an agreement on price, quantity, and method of payment and description of the goods or services. However, delay in shipment or delivery is never welcome and, if the goods are perishable, may be disastrous. Insurance coverage is no guarantee. However, a precisely worded clause specifying that "time is of the essence" and providing a deadline will not only motivate both parties to complete the deal, but will also provide grounds for termination should one party unduly delay payment or delivery of the product. No contract or invoice is "bullet-proof" or will shield a company from a lawsuit. However, where provision is made for the choice of forum, time of the essence, and choice of law, a company will garner some advantage should it wish to either prosecute or defend an action in Ontario.

III. JURISDICTIONAL ISSUES

In 1990, the Supreme Court of Canada adopted the principles of international comity in the case of *Morguard Investments Ltd. v. de Savoye*.¹⁹ *Morguard* was primarily a constitutional decision regarding enforcement of inter-provincial judgments.²⁰ Nevertheless, the Court also applied its analysis to foreign judgments.²¹ Justice La Forest, writing for a unanimous Court, emphasized that Canadian courts should recognize international comity in deference to the reality of modern international commerce:

18. International Sale of Goods Act, R.S.O., ch. I-10, arts. 39(1)-(2) (1990) (Ont.). See also Camilla Baasch Andersen, *Reasonable Time in Article 39(1) of the CISG — Is Article 39(1) Truly a Uniform Provision?*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1998 63, 63-176 (1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html>; *La San Giuseppe v. Forti Moulding Ltd.*, [1999] 104 O.T.C. 213, paras. 28-31, 39 (Ont. Super. Ct. of Justice). For a detailed critique of the International Chamber of Commerce Model International Sale Contract, see James M. Klotz, *Critical Review of The ICC Model International Sale Contract*, Pace Law School Institute of International Commercial Law (Feb. 6, 1998), at <http://www.cisg.law.pace.edu/cisg/biblio/klotz.html>. Another helpful guide for drafting contract clauses in the CISG context may be found in John P. McMahon, *Drafting CISG Contracts and Documents and Compliance Tips for Traders* Pace Law School Institute of International Commercial Law (last modified Jan. 27, 2003), at <http://www.cisg.law.pace.edu/cisg/contracts.html>.

19. [1990] 3 S.C.R. 1077, 1096.

20. *Id.*

21. *Id.*

The business community operates in a world economy and we correctly speak of a “world community” even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these 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 Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments, to the general advantage of litigants.²²

The *Morguard* decision established that “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.”²³ Comity, defined by the Supreme Court of Canada as “the deference and respect due by other states to the actions of a state legitimately taken within its territory,”²⁴ needed to be contemporised “in light of a changing world order.”²⁵ Justice La Forest articulated the constitutional principles as follows:

The application of the underlying principles of comity and private international law must be adapted to situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the court of other constituent units of the federation. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.

....

A similar approach should, in my view, be adopted in relation to the recognition and enforcement of judgments within Canada. As I see it, the courts in one province should give *full faith and credit*, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court

22. *Id.* at 1098.

23. *Morguard*, [1990] 3 S.C.R. at 1096.

24. *Id.* at 1095.

25. *Id.* at 1097.

has properly, or appropriately, exercised jurisdiction in the action. Both order and justice militate in favour of the security of transactions.²⁶ (emphasis added)

Following *Morguard*, voluntary attornment by the defendant no longer was a prerequisite to initiating foreign enforcement proceedings in Canada.²⁷ A foreign litigant need only demonstrate that the foreign judgment was “issued by a court acting through fair process and with properly restrained jurisdiction,”²⁸ and there exists a “real and substantial connection” between:

the issue in the action and the location where the action is commenced;

the damages suffered and the jurisdiction; and

the defendant and the originating forum.²⁹

Justice La Forest, in *Hunt v. T & N plc*,³⁰ further clarified the approach by stating that the assessment of the “reasonableness” of a foreign court’s assumption of jurisdiction was not a mechanical accounting of connections between a case and a territory, but a decision “guided by the requirements of order and fairness.”³¹ In *Tolofson v. Jensen*,³² Justice La Forest prioritized these procedural requirements:

It may be unfortunate for a plaintiff that he or she was the victim of a tort in one jurisdiction rather than another and so be unable to claim as much compensation as if it had occurred in another jurisdiction. But such differences are a concomitant of the territoriality principle. *While, no doubt, as was observed in Morguard, the underlying principles of*

26. *Id.* at 1101-02.

27. The “personal subjection” approach was rejected by both Justice Sharpe in *Muscutt v. Courcelles*, [2002] 213 D.L.R.4th 577, paras. 59-109, and Justice Le Bel, dissenting, in *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 209 (Can. Dec. 18, 2003).

28. *Morguard*, [1990] 3 S.C.R. 1077, 1103.

29. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 177 (Can. Dec. 18, 2003)

30. *Hunt v. T & N plc*, [1993] 109 D.L.R.4th 16.

31. *Id.* at 42.

32. [1994] 3 S.C.R. 1022.

*private international law are order and fairness, order comes first. Order is a precondition to justice.*³³

A. Jurisdiction Simpliciter

The Ontario Court of Appeal, in a recent pentad of cases,³⁴ has attempted to clarify the “real and substantial connection” test. In *Muscutt v. Courcelles*,³⁵ the Court identified eight relevant factors when considering the threshold issue of jurisdiction simpliciter.³⁶ First, “[t]he connection between the forum and the plaintiff’s claim;” second, “[t]he connection between the forum and the defendant;” third, the “[u]nfairness to the defendant in assuming jurisdiction;” fourth, the “[u]nfairness to the plaintiff in not assuming jurisdiction;” fifth, “[t]he involvement of other parties to the suit;” sixth, “[t]he court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;” seventh, “[w]hether the case is interprovincial or international in nature;” and eighth, “[c]omity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.”³⁷

In *Muscutt*, Justice Sharpe identified three bases for jurisdiction simpliciter:

There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.

33. *Id.* at 1058 (emphasis added).

34. *Muscutt v. Courcelles*, [2002] 213 D.L.R.4th 577; *Gajraj v. DeBernardo*, [2002] 213 D.L.R.4th 651; *Leufkens v. Alba Tours International Inc.*, [2002] 213 D.L.R.4th 614; *Lemmex v. Sunflight Holidays Inc.*, [2002] 213 D.L.R.4th 627; *Sinclair v. Cracker Barrel Old Country Store Inc.*, [2002] 213 D.L.R.4th 643.

35. [2002] 213 D.L.R.4th 577.

36. Jurisdiction simpliciter is the preliminary question of whether the Ontario court lacks jurisdiction or whether the Ontario court should assume jurisdiction over a foreign defendant

37. *Id.* at paras. 77-101.

....

Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to Rule 17.02. Unlike presence-based jurisdiction and consent-based jurisdiction, prior to *Morguard* and *Hunt*, assumed jurisdiction did not provide a basis for recognition and enforcement.³⁸

B. *Service Ex Juris*

A foreign party defendant, who has no presence in Ontario and has neither consented nor attorned to the Ontario jurisdiction, has three avenues to challenge service ex juris and "assumed jurisdiction:"

First, Rule 17.06(1) allows a party who has been served outside Ontario to move for an order setting aside the service or staying the proceeding. Second, s. 106 of the *Courts of Justice Act* provides for a stay of proceedings, and it is well established that a defendant may move for a stay on the ground that the court lacks jurisdiction. Third, Rule 21.01(3)(a) allows a defendant to move to have the action stayed or dismissed on the ground that "the court has no jurisdiction over the subject matter of the action." Together, this procedural scheme adequately allows for jurisdictional challenges to ensure that the interpretation and application of Rule 17.02(h) will comply with the constitutional standards prescribed by *Morguard* and *Hunt*.³⁹

The relevant text of Rules 17.02 and 17.04 of the Ontario Rules of Civil Procedure, governing service and jurisdiction, read as follows:

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims . . . [(f) breach of contract] (iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside

38. *Id.* at paras. 19-20.

39. *Id.* at para. 53 (citing Ontario Rules of Civil Procedure).

Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario . . . (h) Damage Sustained in Ontario — damage sustained in Ontario arising from tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed. . . .⁴⁰

17.04(1) An originating process served outside Ontario without leave shall disclose the facts and specifically refer to the provision of rule 17.02 relied on in support of such service.⁴¹

Rule 17.06 provides the procedural framework for a foreign defendant to challenge service *ex juris*:

17.06(1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance, (a) for an order setting aside the service and any order that authorized the service; or (b) for an order staying the proceeding.

17.06(2) The court may make an order under subrule (1) or such other order as is just where it is satisfied that, (a) service outside Ontario is not authorized by these rules; (b) an order granting leave to serve outside Ontario should be set aside; or (c) Ontario is not a convenient forum for the hearing of the proceeding.

17.06(3) Where on a motion under subrule (1) the court concludes that service outside Ontario is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03, the court may make an order validating the service.

17.06(4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party.⁴²

40. Ontario Rules of Civil Procedure r. 17.02(f)(iv), 17.02(h) (2004).

41. *Id.* at r. 17.04(1).

42. *Id.* at r. 17.06(1)-(4).

Pursuant to sub-rule 21.03(1)(a) of the Ontario Rules of Civil Procedure, a defendant may concurrently 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.⁴³ Finally, under section 106 of the Courts of Justice Act, "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."⁴⁴

C. *Forum Non Conveniens*

If the Ontario court assumes jurisdiction over the dispute, the foreign defendant may concurrently bring a motion to stay the proceeding on the grounds that Ontario is not the convenient forum. The test for forum non conveniens "is whether there clearly is a more appropriate jurisdiction than the domestic forum chosen by the plaintiff in which the case should be tried."⁴⁵ Canadian courts have developed a non-exhaustive list of additional factors that may be considered in determining the most appropriate forum for the action, including the following:

the location of the majority of the parties;

the location of key witnesses and evidence;

contractual provisions that specify applicable law or accord jurisdiction;

the avoidance of a multiplicity of proceedings;

the applicable law and its weight in comparison to the factual questions to be decided;

geographical factors suggesting the natural forum;
and

43. Ontario Rule of Civil Procedure 21.01(3)(a) provides: "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. . . ."

44. Courts of Justice Act, R.S.O. 1990, ch. C.43, § 106.

45. Frymer v. Brettschneider, [1994] 19 O.R.3d 60, 78, 84.

whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.⁴⁶

D. Proper Law of Contract

In general terms, where a contract is made or where it is to be performed is presumed to be the law of the contract (the *lex loci contractus*).⁴⁷ J. G. Castel, a prominent scholar in the field of conflict of laws writes:

If there is no express choice of the proper law, the court will consider whether it can ascertain that there was an implied choice of law by the parties . . . [I]f the parties agree that the courts of a particular legal unit shall have jurisdiction over the contract, there is a strong inference that the law of that legal unit is the proper law. Other factors from which the courts have been prepared to infer the intentions of the parties as to the proper law are the *legal terminology in which the contract is drafted, the form of the documents involved in the transaction, the currency in which payment is to be made, the use of a particular language, a connection with a preceding transaction, the nature and location of the subject matter of the contract, the residence (but rarely the nationality) of the parties, the head office of a corporation party to the contract, or the fact that one of the parties is a government.*⁴⁸

In *Eastern Power Ltd. v. Azienda Comunale Energia and Ambiente*,⁴⁹ Justice MacPherson also considered the important issue of the legal relationship between a faxed acceptance of an offer and the place where the contract is formed. Writing on behalf of the Ontario Court of Appeal, Justice MacPherson stated that “[t]he general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance.”⁵⁰ The Court continues by citing *Imperial Life Assurance Co. of*

46. *Muscutt v. Courcelles*, [2002] D.L.R.4th 577, para. 41.

47. J.G. CASTEL, *CONFLICT OF LAWS; CASES, NOTES, & MATERIALS* 1-7 (5th ed. 1984).

48. J.G. CASTEL, *CANADIAN CONFLICT OF LAWS* 596-98 (4th ed. 1997) (emphasis added).

49. [1999] 178 D.L.R.4th 409.

50. *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente*, [1999] 178 D.L.R.4th 409, para. 28.

Canada v. Colmenares,⁵¹ saying, "It has long been recognized that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made."⁵² Justice MacPherson specifically rejected the plaintiff's contention that the rule with respect to facsimile transmissions should follow the postal acceptance exception stating:

EP has cited no authority in support of its position. There is, however, case authority for the proposition that acceptance by facsimile transmission should follow the general rule, which would mean that a contract is formed when and where acceptance is received by the offeror. I would hold that in contract law an acceptance by facsimile transmission should follow the general rule of contract formation, not the postal acceptance exception.⁵³

Therefore, in Ontario, a faxed contract is formed when and where the acceptance is received.⁵⁴

In sum, unless the jurisdictional and choice of law issues are considered and incorporated into an international sales contract, Ontario-based companies wishing to sue in Ontario may face a preliminary jurisdictional challenge from the foreign debtor, which may result in unnecessary legal costs, delays and an unrecoverable accounts receivable.

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Although *Morguard* involved the enforcement of interprovincial judgments, Canadian courts have uniformly applied *Morguard* in enforcing true "foreign" judgments. For foreign litigants, *Morguard* has streamlined the enforcement procedure. The foreign judgment will be enforced in Canada provided that: (1) the foreign court properly exercised its jurisdiction according to its own rules; (2) there is a "substantial connection" between the subject matter of the

51. [1967] S.C.R. 443, 447.

52. *Id.*

53. *Id.* at 418.

54. The Ontario courts have not yet resolved the issue of contract formation in the context of internet e-mail communications. Compare *Rudder v. Microsoft Corp.*, [1999] 47 C.C.L.T.2d 168, para. 9, where Justice Winkler held that an agreement reached on the forum placed a burden of showing "strong cause" as to why the forum selection should not be determinative on the plaintiff with *Holo-Deck Adventures Ltd. v. Orbotron Inc.*, [1996] 8 C.P.C.4th 376, para. 13, where Justice Molloy found that an agreement reached on forum is dispositive of the issue and no further inquiry is needed. See also *Koolatron a Div. of Urus Indus. Corp. v. Icode, Inc.*, [2002] O.J. No. 1709 (Ont. Div. Ct.).

litigation and the jurisdiction; and (3) the defendant fails to raise a recognized defense.⁵⁵

A. Finality of the Judgment

A foreign judgment must be final and conclusive in the originating jurisdiction in order to be considered enforceable by Canadian courts.⁵⁶ Finality presupposes two factors: (1) that the litigant has exhausted all avenues of appeal; and (2) that the foreign court judgment has no further power to rescind or vary its own decision. With respect to the first factor, if a foreign judgment is under appeal in the originating jurisdiction, a Canadian court will not refuse to enforce that foreign judgment; rather, it will often stay its decision on enforceability, pending the decision of the foreign appellate court.⁵⁷

B. Defenses to the Enforcement of Foreign Judgments

Once the foreign court's jurisdiction is recognized, the only available defenses to an action for enforcement in Ontario are: the foreign judgment was obtained by fraud, the foreign judgment involved a denial of natural justice, enforcement of the foreign judgment is contrary to public policy, or the foreign judgment involves a defendant who was not a party to the foreign suit.⁵⁸

In *Girsberger v. Kresz*,⁵⁹ the Superior Court declined to follow the well-established precedent that a foreign judgment is to be treated as a contract debt and not a judgment for the purposes of the Limitations Act.⁶⁰ The court accepted the argument that this rule was inconsistent with the modern conflict of laws principles, holding that, for the purposes of enforcement, foreign judgments are to be treated as judgments and are subject to a 20-year limitation period — not a six-year limitation period.⁶¹ Justice Paisley considered *Girsberger* in *Lax v. Lax*:

The plaintiff submits that the applicable limitation period is 20 years, pursuant to s. 45(1)(c) of that Act.

55. See *Morguard*, [1990] 3 S.C.R. at 1103-10.

56. *Four Embarcadero Centre Venture v. Kalen*, [1988] 65 O.R.2d 551, 563.

57. See generally PETER R. BARNETT, RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW (2001).

58. *Four Embarcadero*, 65 O.R.2d at 571. See discussion, *infra* Part IV, of the narrow scope of the available defenses of fraud, denial of natural justice, and public policy by the Supreme Court of Canada in *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829 (Can. Dec. 18, 2003).

59. *Girsberger v. Kresz*, [2000] 47 O.R.3d 145, *aff'd* [2000] 50 O.R.3d 157.

60. *Id.* at para 48.

61. *Id.* at para 49.

In *Girsberger v. Kresz* . . . Cumming J. concluded that the limitation period in respect of a foreign judgment which met the "real and substantial" test defined by the Supreme Court of Canada in *Morguard Investments Ltd. v. de Savoie* . . . [was 20 years.]

....

Although the Court of Appeal dismissed an appeal from the decision of Cumming J., the limitation issue was not expressly dealt with and it is submitted that the limitation issue is obiter dictum to the essential issue that Cumming J. had to decide.

I am persuaded that Cumming J. came to the correct conclusion on this issue and the defendants' motion is therefore dismissed.⁶²

In *Adelaide Capital Corporation v. Stinziani*,⁶³ Judge Thomson determined that the limitation period for enforcement of a Quebec judgment was 20 years, following *Girsberger*. "The Quebec court has appropriately exercised its jurisdiction: full faith and credit must be given to the Judgment which shall be recognized and can be enforced as a Judgment within twenty years after it is given."⁶⁴ Non-Ontario resident plaintiffs are, nevertheless, subject to the six-year limitation period for registration under the Ontario Reciprocal Enforcement of Judgments Act.⁶⁵ Therefore, depending

62. *Lax v. Lax*, [2003] O.J. No. 337, paras 3-5 (Ont. Super. Ct. of Justice) (citations omitted).

63. *Adelaide Capital Corp. v. Stinziani*, [2000] O.J. No. 1465 (Ont. Ct. of Justice (Small Cl. Ct.)).

64. *Id.* at para. 12.

65. The Ontario Reciprocal Enforcement of Judgments Act, R.S.O., ch. R.5, 2-3 (1990), reads:

2. (1) Where a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to any court in Ontario having jurisdiction over the subject-matter of the judgment, or, despite the subject-matter, to the Ontario Court (General Division) at any time within six years after the date of the judgment to have the judgment registered in that court, and on any such application the court may, subject to this Act, order the judgment to be registered.

....

3. No judgment shall be ordered to be registered under this Act if it is shown to the registering court that:

- (a) the original court acted without jurisdiction; or
- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or
- (c) the judgment debtor, being the defendant in the proceedings, was not

on the vintage of the foreign judgment, an inter-provincial litigant may have to sue on the judgment and address the four very limited defenses specified above.⁶⁶

C. Beals v. Saldanha — Morguard Revisited

The *Morguard* decision is not without controversy. Many Canadian courts appear to have taken an overtly laissez-faire approach in recognizing foreign judgments, which, on occasion, are clearly apocryphal. Some have criticized the practice of enforcing judgments rendered in foreign judicial systems that do not follow Anglo-Canadian standards of procedural fairness or American due process. Moreover, the spectre of compensatory or punitive damage jury awards that are exorbitant by Canadian standards is manifest.

duly served with the process of the original court and did not appear, despite the fact that the judgment debtor was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or

(d) the judgment was obtained by fraud; or

(e) an appeal is pending, or the judgment debtor is entitled and intends to appeal against the judgment; or

(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason would not have been entertained by the registering court; or

(g) the judgment debtor would have a good defence if an action were brought on the original judgment.

See also Reciprocal Enforcement of Judgments (U.K.) Act, R.S.O., ch. R-6, pts. III, V, VI (1990) (Ont.).

66. The Limitations Act, S.O., ch. 24-B (2002) (Ont.), represents an overhaul of the law of limitation periods in Ontario. The following are some of the highlights:

A basic limitation period of *two years* is introduced commencing from the day the “claim” is discovered, replacing the general limitation periods found in the present Limitations Act, as well as many of the numerous special limitation periods found in other statutes.

A schedule to the new Act contains a list of special limitation periods contained in other statutes, which will remain in force. If a limitation period set out in or under another act is not listed in the schedule, it is of no effect.

An “ultimate limitation period” of 15 years applies so that even if a claim has not been discovered within 15 years of the occurrence which gave rise to the claim, an action commenced after the fifteenth anniversary of that occurrence will be barred by statute. Special considerations apply to “incapable” parties and situations involving concealment.

Under the new Limitations Act, a claim will only be subject to no limitation period at all if expressly provided for in the Act.

There are transition provisions for claims based on acts or omissions that took place before the coming into force (the “effective date”) of the new Act where no proceeding has been commenced before the effective date.

In the Supreme Court of Canada decision of *Spar Aerospace Ltd. v. American Mobile Satellite Corporation*,⁶⁷ Justice Le Bel raised some uncertainty as to whether the *Morguard* principles, applicable inter-provincially, were correlative to international jurisdictional disputes:

I agree with the appellants that *Morguard* and *Hunt* establish that it is a constitutional imperative that Canadian courts can assume jurisdiction only where a “real and substantial connection” exists. . . . However, it is important to emphasize that *Morguard* and *Hunt* were decided in the context of interprovincial jurisdictional disputes. In my opinion, the specific findings of these decisions cannot easily be extended beyond this context. In particular, the two cases resulted in the enhancing or even broadening of the principles of reciprocity and speak directly to the context of interprovincial comity within the structure of the Canadian federation.⁶⁸

Recently, the Supreme Court of Canada released its long anticipated judgment in *Beals v. Saldanha*.⁶⁹ In a 6 to 3 split decision, the Court held that the “real and substantial connection” test, which until now only applied to interprovincial judgments, should apply equally to the recognition and enforcement of foreign judgments.⁷⁰ However, it is the dissenting opinion of Justice Le Bel (the Le Bel Dissent) which offers conceptual clarity by proposing a “purpose-driven and contextual” approach to the considerations of “comity, order and fairness [which] support the application of the ‘real and substantial connection’ test to the recognition and enforcement” of foreign judgments.⁷¹

At both the trial court⁷² and the Court of Appeal levels,⁷³ both parties conceded that the Florida court had jurisdiction over the plaintiffs’ action pursuant to the “real and substantial connection” test set out in *Morguard*. Accordingly, “presence-based jurisdiction”

67. *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205.

68. *Id.* at para. 51.

69. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829 (Can. Dec. 18, 2003). The majority decision was delivered by Justice Major, with Justices McLachlin (Chief), Gonthier, Bastarache, Arbour, and Deschamps. The two dissenting opinions were delivered by Justice Binnie (Justice Iacobucci concurring) and Justice Le Bel.

70. *Id.* at para. 79.

71. *Id.* at para. 205.

72. *Beals v. Saldanha*, [1998] 42 O.R.3d 127, 134.

73. *Beals v. Saldanha*, [2001] 202 D.L.R.4th 630, para. 31.

rendered moot the issue of jurisdiction simpliciter.⁷⁴ Moreover, “consent-based jurisdiction” was recognized by the majority opinion (the Majority Judgment), wherein Justice Major emphasized that the defendant, Dominic Thivy, had “attorned to the jurisdiction of the Florida court when he entered a defense to the second action. His subsequent procedural failures under Florida law do not invalidate that attornment.”⁷⁵ Nevertheless, the Supreme Court of Canada seized the opportunity to attempt to further contemporize the *Morguard* principles in the context of recognition and enforcement of foreign judgments. The factual matrix in the *Beals* case — at times disturbing and compelling — is outlined below.

i. The Facts in Beals v. Saldanha

In 1981 the Saldanhas and the Thivys, who were mutual friends, purchased a lot in Florida for \$4,000 in U.S. funds.⁷⁶ In the summer of 1984, James O’Neil, a Florida real estate agent, contacted Mrs. Thivy, who told her that he had a prospective purchaser for their lot.⁷⁷ After discussion with the Saldanhas and her husband:

Mrs. Thivy told Mr. O’Neil that the [Saldanhas and Thivys] would sell the lot for \$8,000 (U.S.). Subsequently, Mrs. Thivy received an Agreement of Purchase and Sale signed by Mr. William Foody and witnessed by Mr. O’Neil. In the description of the property on the agreement, the lot was referred to as “Lot #1.” The [Saldanhas and Thivys] owned Lot #2 and not Lot #1. After discussions with Mr. O’Neil, Mrs. Thivy changed the reference on the Agreement of Purchase and Sale from Lot #1 to Lot #2. At the trial of the Ontario action, Mrs. Thivy testified that she told Mr. O’Neil that she owned Lot #2, and he told her to change the lot number on the offer. Mrs. Thivy did not initial the change and she did not delete the rest of the description of the property. That description was of Lot #1.⁷⁸

74. *Id.*

75. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 34 (Can. Dec. 18, 2003) (quoting J.G. CASTEL & J. WALKER, *CANADIAN CONFLICT OF LAWS* 14-10 (5th ed. 2001)). If the defendants had retained Florida counsel, they would have been able to raise a preliminary challenge based upon *forum non conveniens* relying upon Rule 1.061 (“Choice of Forum”) under the Florida Rules of Civil Procedure. Fla. R. Civ. P. 1.061 (2003).

76. *Beals*, [1998] 42 O.R.3d at 129.

77. *Id.*

78. *Beals v. Saldanha*, [2001] 202 D.L.R.4th 630, para. 12.

This amended offer was signed by all four defendants and sent to the agent in Florida and accepted by the Beals. At trial, Mr. Beals said he did not read the closing documents referring to Lot 2.⁷⁹ Upon closing, the defendants received their asking price of \$8,000 (U.S.). Mrs. Thivy was later advised that the sale had closed and the defendants received a cheque for \$8,000 (U.S.).⁸⁰

In January 1985, about three months after the transaction closed, Mr. Beals told Mrs. Thivy that he was one of the purchasers. He said that he had been sold the wrong lot and that he had intended to purchase Lot #1. After discussing the matter with Mr. Beals, Mrs. Thivy suggested that he speak to Mr. O'Neil. Mr. Beals commenced the Florida action in February 1985, claiming \$5,000 (U.S.) in damages for inducing them to buy the wrong lot through false representation.⁸¹

The Saldanhas and the Thivys each submitted a defense to the Florida court. They were subsequently notified that the action had been dismissed "without prejudice." Several months later, the defendants received notice of a second action in a different court, similar to the first but for a higher claim in damages. The defendants filed a copy of the same defense as for the initial action and made no further response when the second action was amended three times.⁸²

In December 1991, the Saldanhas were advised that a default judgment had been entered against them by a Florida court. They sought legal counsel and were advised by an Ontario lawyer that the judgment could not be enforced in Ontario. They later received notice of a jury trial to assess damages, but did not appear. In December, the appellants received a default judgment against them for \$260,000 (U.S.), plus post-judgment interest at the rate of 12 per cent per annum.⁸³

The Beals then commenced a proceeding in Ontario to enforce the Florida judgment. At the Ontario trial, the Saldanhas called evidence in their defense to support their allegation that the Florida judgment had been obtained as a result of the Beals' false accusations to the jury assessing the damage claim. The Beals did not dispute this evidence.⁸⁴

The Saldanhas and Thivys defended the action in Ontario on several grounds, including claims that "the Florida court did not have jurisdiction, they were denied natural justice in the Florida

79. *Beals v. Saldanha*, [1998] 42 O.R.3d 127, 129, 131.

80. *Id.* at 129.

81. *Id.*

82. *Id.* at 130.

83. *Id.* at 133.

84. *Id.*

proceedings, the enforcement of the Florida judgment in Ontario was contrary to public policy, and the Florida judgment was obtained by fraud in the Florida court.”⁸⁵ Their primary submission was that the plaintiffs had deliberately misled the court in obtaining the Florida judgment. The defendant Thivy “also contended that she had made an assignment in bankruptcy in 1994 after the Ontario action had been commenced, and that she had subsequently been granted an absolute discharge,” which relieved her of any liability she may have had to the plaintiffs.⁸⁶

ii. Trial Judgment

The trial judge, Justice Jennings, dismissed the action, holding that while he could not consider allegations of fraud as they related to merits on liability, he could consider allegations of fraud as they related to the assessment of damages.⁸⁷

Accordingly I conclude that it is possible to apply the defence of fraud to the facts of this case. Liability of the defendants is accepted, because of the domestic policy on default judgments. However, on the question of the assessment of damages, the plaintiff gave at the very least, misleading evidence. That evidence was not considered by the Florida court in the context of fraud and so it is open to the Ontario Court to adjudicate upon it. Having considered it, I have found it to be fraudulent. In my opinion, the defence of fraud in the context that I described, must succeed. The Florida judgment will not be enforced by this court.⁸⁸

Justice Jennings further held that the enforcement of some foreign judgments, even where the fraud exception was not available, worked an injustice, and that the parameters of the public policy defense, “must be broadened to cover a situation where conduct which triggers neither the traditional defence of public policy nor the defence of natural justice is yet so egregious as to raise a negative impression sufficient to stay the enforcing hand of the domestic court.”⁸⁹ Furthermore, Justice Jennings found that

85. *Beals v. Saldanha*, [2001] 202 D.L.R. 4th 630, para. 4.

86. *Id.*

87. *Beals v. Saldanha*, [1998] O.R.3d 127, 143.

88. *Id.*

89. *Id.* at 145.

enforcement of the Florida judgment would contravene the public policy of Ontario:

I recognize the inherent danger of importing palm tree justice into an arena properly designed to recognize the reality of global commercial transactions, and, accordingly, I would expect the widened defence to be rarely available and only in very limited circumstances. I find however, that those circumstances are present in this case. If required to do so, I would have found enforcement of the Florida judgment would contravene the public policy of Ontario and accordingly I would have declined to enforce it.⁹⁰

iii. The Ontario Court of Appeal

Justice Doherty for the Court of Appeal majority, confirmed that in Canada:

fraud going to the basis upon which the foreign court took jurisdiction, or fraud which undermines the integrity of the foreign proceedings, may be proved in defence to an action for the enforcement of the foreign judgment. Some Canadian authorities permit a defendant to rely on allegations of fraud which go to the merits of the claim determined by the foreign judgment, but only where the defendant relies on facts to support the allegation of fraud which were not before the foreign court.⁹¹

The defendant must produce new and material facts, or newly discovered and material facts, which were not before the foreign court. "New" facts are facts which came into "existence after the foreign judgment was obtained." "Newly discovered facts" refers to facts which existed at the time the foreign judgment was obtained but were not known to the defendant" and could not have been discovered through the exercise of reasonable diligence.⁹²

The Court of Appeal held that the trial judge erred in treating any fact which was not before the Florida jury on the damage assessment as a newly discovered fact, rather than limiting

90. *Id.*

91. *Beals v. Saldanha*, [2001] 202 D.L.R.4th 630, paras. 39, 40.

92. *Id.* at para. 42.

newly discovered facts to those facts which could not have been discovered prior to the Florida judgment by the exercise of reasonable diligence.⁹³ “None of the facts relied on by the trial judge qualifies as a newly discovered fact.”⁹⁴ All of the facts would have been reasonably ascertainable by the defendants had they chosen to participate in the Florida proceeding.⁹⁵ The trial judge's finding that the enforcement of the Florida judgment would contravene public policy could not be upheld.⁹⁶

Justice Doherty found that the trial judge had erred in concluding that the “substantial connection” approach to jurisdiction compels a broader public policy defense to the enforcement of foreign judgments:

Even if what the trial judge described as “some sort of judicial sniff test” should be applied in considering whether public policy precludes enforcement of a foreign judgment, I can see no reason not to enforce this judgment. The Beals and Foodys launched a lawsuit in Florida. Florida was an entirely proper court for the determination of the allegations in that lawsuit. The Beals and Foodys complied with the procedures dictated by the Florida rules. There is no evidence that they misled the Florida court on any matter. Rather, it would seem they won what might be regarded as a very weak case because the respondents chose not to defend the action. I find nothing in the record to support the trial judge's characterization of the conduct of the Beals and Foodys in Florida as “egregious.” They brought their allegations in the proper forum, followed the proper procedures, and were immensely successful in no small measure because the respondents chose not to participate in the proceedings.⁹⁷

Despite the fact that the plaintiffs were not listed as creditors in Thivy's bankruptcy, her discharge released her from the debt represented by the Florida judgment. An order of discharge operates to release all provable claims made against the bankrupt,

93. *Id.* at para. 49.

94. *Id.*

95. *Id.* at paras. 48-49.

96. *Id.* at paras. 49.

97. *Beals v. Saldanha*, [2001] 202 D.L.R.4th 630, paras. 83-84.

even though a creditor has been omitted from the list provided to the trustee by the bankrupt. While a bankrupt is under a duty to give the trustee the names of all of his or her creditors, the failure to do so will not prevent the bankrupt from obtaining a discharge if that failure was not intentional or fraudulent.⁹⁸

Justice Weiler, dissenting, argued that it would be inappropriate for the court to enforce the Florida judgment for two reasons: fraud and the denial of natural justice.⁹⁹ The defendants were denied natural justice in the Florida proceedings because the claim failed to advise the defendants that the plaintiffs would be seeking damages for loss of opportunity by a company owned by them, with the result that they were not in a position to appreciate the extent of their jeopardy.¹⁰⁰

At the hearing to assess damages, damages were assessed beyond the pleadings. As a result of the lack of transparency with respect to the damages, the Ontario defendants were unaware that the major portion of the jury's assessment of damages related to the Florida plaintiffs' company's loss of opportunity to build an undefined number of homes in the future until the Florida plaintiffs sought to enforce the judgment in Ontario.¹⁰¹

Justice Weiler supported the trial judge's finding of fraud on the basis that plaintiffs concealed certain material facts from the jury, resulting in the jury being misled when assessing damages for loss of profit for lost opportunity to build the homes.¹⁰²

Justice Weiler further agreed that the failure of the defendants to move to set aside the proceedings before the Florida courts should not prevent them from successfully raising the defenses of denial of natural justice and fraud before the enforcing court in Ontario.¹⁰³ Upon "receiving the Florida judgment for damages, the defendants sought legal advice and were told that the Florida judgment could not be enforced in Ontario."¹⁰⁴ Moreover, it was not until the plaintiffs sought to enforce the Florida judgment in Ontario that the defendants learned that damages had been assessed beyond the pleading and of the circumstances relating to

98. *Id.* at para. 113.

99. *Id.* at para. 108.

100. *Id.* at para. 111.

101. *Id.* at para. 111.

102. *Id.* at para. 112.

103. *Beals v. Saldanha*, [2001] 202 D.L.R.4th 630, at para. 113.

104. *Id.*

the plaintiffs' fraud.¹⁰⁵ Justice Weiler proposed a "flexible approach" when deciding whether to "allow the defense of fraud to be raised in relation to a foreign default judgment," based upon the following factors:

- (i) the reason why the defendants did not defend the action;
- (ii) whether it is now possible or practicable to seek a remedy before the foreign court;
- (iii) any explanation as to why no steps were taken to seek a remedy before the foreign court;
- (iv) the likelihood of success had steps been taken before the foreign court;
- (v) the stage of the proceedings at which the circumstances of the fraud should have become or were known to the defendants;
- (vi) any delay in raising the defence once the circumstances became known; and
- (vii) whether there is any prejudice to the foreign plaintiffs that cannot be compensated by an order as to costs and strict terms if the defence is allowed to be raised.¹⁰⁶

iv. The Supreme Court of Canada

a. Majority Judgment

The Majority Judgment is premised on the view that "[i]nternational comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law."¹⁰⁷ This led the majority to conclude that, "subject to the legislatures adopting a different approach by statute, the 'real and substantial connection' test,"¹⁰⁸ which has until now

105. *Id.*

106. *Id.* at para. 162.

107. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 28. (Can. Dec. 18, 2003).

108. *Id.*

only been applied to interprovincial judgments, “should apply equally to the enforcement of foreign judgments.”¹⁰⁹

Surprisingly, there is no express approval, in either the Majority Judgment or dissents, of the eight factors set forth in *Muscutt*¹¹⁰ for the “real and substantial connection” test. The Majority Judgment generally states that the test “requires that a significant connection exist between the cause of action and the foreign court.”¹¹¹ Here, the “real and substantial connection” test was made out. “The appellants entered into a property transaction in Florida when they bought and sold land. . . . There exists both a real and substantial connection between the Florida jurisdiction, the subject matter of the action and the defendants.”¹¹² According to the majority, since the Florida court properly took jurisdiction, its judgment must be “recognized and enforced by a domestic court, provided that no defenses bar its enforcement.”¹¹³

The Majority Judgment approved Justice Sharpe’s approach to the fraud defense, concluding that the defense was not made out.¹¹⁴ The appellants had not claimed that there was evidence of fraud that they could not have discovered had they defended the Florida action. In the absence of such evidence, the trial judge erred in concluding that there was fraud.¹¹⁵

The Majority Judgment’s rejection of the fraud defense hinged on the appellants’ “conscious decision not to defend the Florida action against them. . . . As a result, the appellants are barred from attacking the evidence presented to the Florida judge and jury as being fraudulent.”¹¹⁶ However, the indictment leveled against the appellants, for ostensibly following their own solicitors’ negligent advice to not defend the action, may have been tempered if a transcript of the damage assessment proceedings, the evidence heard by the Florida jury, or the Florida judge’s instructions to the jury had been available. The harsh reality is that only the exercise of reasonable diligence in uncovering new and previously

109. *Id.* at para. 19.

110. See generally *Muscutt v. Courcelles*, [2002] 213 D.L.R.4th 577. The sole reference to *Muscutt* in the *Beals* decision is at paragraph 21, wherein Justice Major highlights the Ontario Court of Appeal’s reliance on *Morguard*, which established that the determination of the proper exercise of jurisdiction by a court depended upon two principles, the first being the need for “order and fairness,” the second being the existence of a “real and substantial connection.” *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829 (Can. Dec. 18, 2003); see also *Indyka v. Indyka*, [1969] 1 A.C. 33.

111. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 32 (Can. Dec. 18, 2003).

112. *Id.* at paras. 36, 34.

113. *Id.* at para. 79.

114. *Id.* at para. 58.

115. *Id.* at para. 55.

116. *Id.* at para. 54.

undiscoverable evidence of fraud will meet the threshold of unfairness. Equally significant was the finding that, “although the amount of damages awarded may seem disproportionate, it was a palpable and overriding error for the trial judge to conclude on the dollar amount of the judgment alone that the Florida jury must have been misled.”¹¹⁷

It appears that any unfairness to the defendant in incurring the substantial expense of retaining Florida counsel, defending the Florida action, exhausting all avenues of appeal, and marshalling new and undiscoverable evidence, is secondary to observing the principles of international comity and reciprocity.¹¹⁸

After rejecting the fraud defense, the majority then considered the natural justice argument:

The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. . . . However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof. . . .¹¹⁹

In the circumstances of the *Beals* case, the defense could not avail the appellants, which the majority concluded had “failed to raise any reasonable apprehension of unfairness.”¹²⁰ In the majority’s opinion:

the appellants were fully informed about the Florida action. They were advised of the case to meet and were granted a fair opportunity to do so. They did not defend the action. Once they received notice of the amount of the judgment, the appellants obviously had precise notice of the extent of their financial exposure.¹²¹

Furthermore, the majority held that “[t]heir failure to act when confronted with the size of the award of damages was not due to a lack of notice” but due to their reliance upon negligent legal advice.¹²² “[T]hat negligence cannot be a bar to the enforcement of

117. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, para. 54 (Can. Dec. 18, 2003).

118. *Id.*

119. *Id.* at para. 64.

120. *Id.*

121. *Id.* at para. 69.

122. *Id.*

the respondents' judgment."¹²³ This may be the most nettlesome aspect of the *Beals* decision, since the decision to not attorn or defend a foreign action can as easily be made without the benefit (or detriment) of legal advice.

It is submitted that the failure of adequate notice is a substantive impeachment defense, rather than a procedural one, such that the lack of familiarity with a foreign jurisdiction's procedure and insufficient notice of the extent of the defendants' financial jeopardy is tantamount to a denial of natural justice. Such an approach contextualizes both the *Morguard* requirements of "order and fairness" and should be a paramount consideration in the defense of denial of natural justice. For every right, there is a remedy. For example, while Florida law and procedure is fairly comparable to that of Ontario, the reality is that the rules of pleading are significantly different. In Ontario, a first defense filed applies to any subsequent amended claims, while, in Florida, unless a defendant refiles a new defense to each and every amended claim, the defendants are deemed to have not defended the action at all. This may be the most compelling argument against the "consent-based" jurisdiction approach adopted by the majority. After all, why should the filing of a defense in the first instance equate to attornment, when failure to follow Florida pleadings procedure ultimately results in a default, or undefended, judgment?

The majority also considered the public policy defense, which prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. This defense "turns on whether the foreign *law* is contrary to" a distinctly "Canadian" view of basic morality.¹²⁴ The award of damages by the Florida jury was held to not violate these principles of morality such "that enforcement of the Florida monetary judgment would shock the conscience of the reasonable Canadian."¹²⁵ The money involved, although it has grown to a sizeable amount, is not a reason to refuse enforcement and recognition of the foreign judgment in Canada.¹²⁶ "The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada."¹²⁷

123. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 36 (Can. Dec. 18, 2003).

124. *Id.* at para. 71.

125. *Id.* at para. 77.

126. *Id.* at para. 76.

127. *Id.* The Majority Judgment also rejected the appellants' argument that the recognition and enforcement of the Florida judgment by a Canadian court constituted a violation of section 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act

b. The Binnie Dissent

The Binnie Dissent acknowledges that the “real and substantial connection” test provides an appropriate conceptual basis for the enforcement of final judgments obtained in foreign jurisdictions.¹²⁸ However, given the “constitutional flavour of the *Morguard* analysis,” Justice Binnie adopts a flexible approach to the availability of defenses to enforcement of foreign judgments:¹²⁹

While I accept that the *Morguard* test (real and substantial connection) provides a framework for the enforcement of foreign judgments, it would be prudent at this stage not to be overly rigid in staking out a position on available defences beyond what the facts of this case require. Both Major J. and LeBel J. acknowledge (with varying degrees of enthusiasm) that a greater measure of flexibility may be called for in considering defences to the enforcement of foreign judgments as distinguished from interprovincial judgments.¹³⁰

Justice Binnie remarks that, had notice been sufficient, he would have “reluctantly” agreed with the majority that the Florida default judgment would be enforceable in Ontario “despite the fact the foreign court never got to hear the Ontario defendants’ side of the story.”¹³¹ This, notwithstanding that the Florida default judgment, which now commands payment of over \$1,000,000.00 Canadian dollars, was an award described by the Ontario trial judge as “breathtaking,” involving damages assessed by a Florida jury in less than half a day.¹³²

The source of Justice Binnie’s misgivings arises from the insufficiency (or lack) of notice, which Justice Binnie believed constituted a breach of natural justice:¹³³

(1982), Canada Act 1982, Schedule B, ch. 11., which came into force on April 17, 1982. It reads: “Life, liberty and security of person: Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Given that section 7 does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, the majority concluded that it should not shield a Canadian defendant from the enforcement of a foreign judgment. *Cf. Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 180 (Can. Dec. 18, 2003) (Justice Le Bel, dissenting).

128. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 86 (Can. Dec. 18, 2003).

129. *Id.* at para. 85.

130. *Id.* at para. 86 (citations omitted).

131. *Id.* at para. 83.

132. *Beals v. Saldanha*, [1998] 42 O.R.3d 127, 144.

133. *Beals*, [2003] S.C.C. 72, WL No. 28829, at para 83.

They were not served with some of the more important documents on liability filed in the Florida proceeding *before* they were noted in default, nor were they served with other important documents relevant to the assessment of damages filed after default but prior to the trial at which judgment was entered against them. Proper notice is a function of the particular circumstances of the case giving rise to the foreign default judgment. In this case, in my view, there was a failure of notification amounting to a breach of natural justice. In these circumstances, the Ontario courts ought not to give effect to the Florida judgment.¹³⁴

The suggestion that the appellants were the authors of their own misfortune on the basis that if they had hired a Florida lawyer they would have found out about subsequent developments in the action, was rejected.¹³⁵ Quoting the trial judge, Justice Binnie noted with chagrin that:

based on what was disclosed in the Complaint, litigation of an US\$8,000 real estate transaction in Florida hardly seemed to be “worth the candle.” The fact this evaluation proved to be disastrously wrong is a measure of the inadequacy of what they were told about the Florida proceedings.¹³⁶

He continued by discussing the majority opinion, arguing that Justice Major:

holds, in effect, that the appellants are largely the victims of what he considers to be some ostrich-like inactivity and some poor legal advice from their Ontario solicitor. There is some truth to this, but such a bizarre outcome nevertheless invites close scrutiny of how the Florida proceedings transformed a minor real estate transaction into a major financial bonanza for the respondents.

134. *Id.*

135. *Id.* at para. 89.

136. *Id.*

....

While the notification procedures under the Florida rules may be considered in Florida to be quite adequate for Florida residents with easy access to advice and counsel from Florida lawyers (and there is no doubt that Florida procedures in general conform to a reasonable standard of fairness), nevertheless the question here is whether the appellants *in this proceeding* were sufficiently informed of the case against them, both with respect to liability and the potential financial consequences, to allow them to determine in a reasonable way whether or not to participate in the Florida action, or to let it go by default.

....

To make an informed decision, they should have been told in general terms of the case they had to meet on liability and been given an indication of the jeopardy they faced in terms of damages. [The respondents' complaint] did not adequately convey to the appellants the importance of the decision that would eventually be made in the Florida court, the appellants were merely told, unhelpfully, that the claim exceeded US\$5,000.00.¹³⁷

Moreover, the appellants' initial comfort drawn from the fact that the action implicated both the real estate developer and title insurer was evanescent, given that the intervening settlement, which "radically transformed the potential jeopardy of the appellants," was not disclosed to the appellants.¹³⁸

In reviewing Rule 1.190(a) of the Florida Rules of Civil, Justice Binnie concludes:

In terms of procedural fairness, I think the appellants were entitled to assume that in the absence of any new allegations against them there was no need to refile a defence that had already been filed in the same action. To non-lawyers, a requirement for such apparently useless duplication would come as a surprise.

137. *Id.* at paras. 90-91, 103.

138. *Id.* at para. 104.

....

When a Canadian resident is served with a legal process from within his or her own jurisdiction, he or she is presumed to know the law and the risks attendant with the notice. There can be no such presumption across different legal systems.¹³⁹

Furthermore, a party must be made aware of the potential jeopardy faced. Some telling examples of lack of notice relied upon in the Binnie Dissent include:

The appellants were not notified that the treble damage claims against other defendants were dismissed on grounds that would have applied to the appellants had they known about it.¹⁴⁰

The appellants were not notified that the respondents had made a deal with the realtor to forego the treble damage, punitive, and statutory claims against it. These same claims were pursued on similar facts against the appellants.¹⁴¹

Because the respondents settled the claims against the realtor and the title insurers, the appellants were the only defendants at the damages hearing. The terms of the settlements were not disclosed to the appellants.¹⁴²

The appellants did not have adequate notice of the court order for mandatory mediation, requiring the participation of all the parties. In addition, the appellants were not served with notice of the experts the respondents intended to call at the damages hearing.¹⁴³

The original complaint did not state that the respondents would claim damages as a result of a lost

139. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 106, 108 (Can. Dec. 18, 2003).

140. *Id.* at para.112.

141. *Id.* at para. 116.

142. *Id.* at para. 119.

143. *Id.* at paras. 118, 120.

business opportunity. The complaint did not mention that the respondents “would be seeking damages for the corporation’s lost opportunity to build an undefined number of homes on land to which neither the respondents nor the corporation held title.”¹⁴⁴

Justice Binnie concluded by addressing a final issue raised by the appellants:

I would also reject the argument that the appeal should be dismissed because the appellants ought to have moved “promptly” to set aside the default judgment for “excusable neglect.” Such relief is normally available to a defendant who has formed an intention to defend but for some “excusable” reason had “delayed” in taking appropriate steps. The problem here is that the appellants had in fact filed a Statement of Defence but had decided, based on what they were told about the respondents’ action, not to defend it further. *The appellants’ problem was not that they failed to implement an intention to defend but that their intention not to further defend was based on a different case.*

In these circumstances, I would not enforce a judgment based on (in my view) inadequate notice — and thus violative of natural justice — just because the appellants did not appeal the Florida judgment to the Florida appellate court, or seek the indulgence of the Florida court to set aside for “excusable neglect” a default judgment that rests on such a flawed foundation.¹⁴⁵

c. The Le Bel Dissent

Justice Le Bel’s dissent follows his views expressed in the *Spar Aerospace v. American Mobile Satellite Corporation* case.¹⁴⁶ At the outset, Justice Le Bel outlines his divergence with the majority:

The enforcement of this judgment, which has its origins in a straightforward sale of land for US\$8,000

144. *Id.* at para. 123.

145. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at paras. 129-30 (Can. Dec. 18, 2003) (emphasis added).

146. [2002] 4 S.C.R. 205.

and has now grown to well over C \$800,000, is *unusually harsh*. In my view, our law should be flexible enough to recognize and avoid such harshness in circumstances like these, where the respondents' original claim was *dubious in the extreme* and the appellants are guilty of little more than *bad luck*. To hold that the appellants are the sole authors of their own misfortune, it seems to me, is to rely heavily on the *benefit of hindsight*; and to characterize the respondents' case in the original action as merely weak is something of an *understatement*. The implication of the position of the majority is that Canadian defendants will from now on be obliged to participate in foreign lawsuits no matter how *meritless* the claim or how small the amount of damages in issue reasonably appears to be, *on pain of potentially devastating consequences* from which Canadian courts will be *virtually powerless* to protect them.

In my opinion, this Court should avoid moving the law of conflicts in such a direction. Thus, I respectfully disagree with the reasons of the majority on *two points*. I would hold that this judgment should not be enforced because a *breach of natural justice* occurred in the process by which it was obtained. *I also have concerns about the way the real and substantial connection test, in its application to foreign-country judgments, is articulated by the majority.*¹⁴⁷

Justice Le Bel forcefully argues that the real and substantial connection test ought to "be modified significantly when it is applied to judgments originating outside Canada."¹⁴⁸ "[T]he assessment of the propriety of the foreign court's jurisdiction should be carried out in a way that acknowledges the "additional hardship" imposed on a defendant who is required to litigate in a foreign country."¹⁴⁹ The purposive, principled framework articulated in *Morguard*,¹⁵⁰ should not be confined only to the question of jurisdiction simpliciter.¹⁵¹ Moreover, Justice Le Bel urges that the impeachment defenses of

147. *Id.* at paras. 132-33 (emphasis added).

148. *Id.* at para. 135.

149. *Id.*

150. [1990] 3 S.C.R. 1077.

151. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 135 (Can. Dec. 18, 2003).

public policy, fraud, and natural justice ought to be reformulated. "Liberalizing the jurisdiction side of the analysis while retaining narrow, strictly construed categories on the defence side is not a coherent approach."¹⁵² From a private international law perspective, Justice Le Bel makes the following admonition:

The solution that the majority sets out to the question of recognition and enforcement of foreign judgments appears to go further than courts have gone in other Commonwealth jurisdictions or in the United States. . . . This discrepancy may place Canadian defendants in a disadvantageous position in international litigation against foreign plaintiffs. As a result, the risks and thus the transaction costs to our citizens of cross-border ventures will be increased, in some cases beyond what commercially reasonable people would consider acceptable. Canadian residents may consequently be deterred from entering into international transactions — an outcome that frustrates, rather than furthers, the purpose of private international law.¹⁵³

The locus of the Le Bel Dissent is "fairness." More specifically, whether any unfairness to the defendant occurs when applying the jurisdiction test, implicitly taking into account the differences between the international and interprovincial contexts. The constitutional requirements of "order and fairness" articulated in *Morguard* are more easily applied given that the "integrated character of the Canadian federation makes a high degree of cooperation between the courts of the various provinces a practical necessity."¹⁵⁴ Justice Le Bel distinguishes constitutional imperatives and international comity, outlining the difference between the two concepts. "One of those differences is that the rules that apply within the Canadian federation are 'constitutional imperatives.' Comity as between sovereign nations is not an obligation in the same sense, although it is more than a matter of mere discretion or preference."¹⁵⁵ He continues by adopting the definition of comity used by the United States Supreme Court in *Hilton v. Guyot*.¹⁵⁶

152. *Id.*

153. *Id.* at para. 136.

154. *Id.* at para. 164.

155. *Id.* at para. 167.

156. 159 U.S. 113 (1895).

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which 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.¹⁵⁷

In discussing international duty and convenience, Justice Le Bel notes that the phrase:

does not refer to a legally enforceable duty. No super-national legal authority can impose on sovereign states the obligation to honour the principle of comity. Rather, states choose to cooperate with other states out of self-interest, because it is convenient to do so, and out of “duty” in the sense that it is fair and sensible for State A to recognize the acts of State B if it expects State B to recognize its own acts.¹⁵⁸

The contextual and purpose-driven approach and the “real and substantial connection” test are reflected in Justice Le Bel’s observation that “Canada is a single country with a fully integrated economy, but the world is not.”¹⁵⁹ The learned justice discerns that:

the “real and substantial connection” test should apply to foreign-country judgments, but the connections required before such judgments will be enforced should be specified more strictly and in a manner that gives due weight to the protection of Canadian defendants without disregarding the legitimate interests of foreign claimants. In my view, this approach is consistent with both the flexible nature of international comity as a principle of enlightened self-interest rather than absolute obligation and the practical differences between the international and interprovincial contexts.¹⁶⁰

157. *Id.* at 163-64.

158. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para 168 (Can. Dec. 18, 2003).

159. *Id.* at para. 171.

160. *Id.* at para. 174.

Justice Le Bel's contextual and purpose-driven approach is predicated on a balance between the hardship to the defendant in litigating in the foreign jurisdiction¹⁶¹ and the strength of connections to the *lex fori*. The interplay between jurisdiction simpliciter and forum non conveniens is addressed as follows:

In some respects, this formulation of the jurisdiction test might overlap with the doctrine of *forum non conveniens*, although it is not exactly the same. Certain considerations, such as juridical disadvantage to a defendant required to litigate in the foreign forum, are relevant to both inquiries. When the issue is jurisdiction, however, the court should restrict itself to asking whether the forum was a reasonable place for the action to be heard, and should not inquire into whether another place would have been more reasonable.¹⁶²

Focusing on unfairness, Justice Le Bel continues by pointing out that “[i]f it is unfair to expect the defendant to litigate on the merits in the foreign jurisdiction, it is probably unfair to expect the defendant to appear there to argue *forum non conveniens*.”¹⁶³

The Le Bel Dissent appears to elevate the “loss of juridical advantage” as a predominant factor in the “real and substantial connection” test, particularly in light of a domestic defendant’s unfamiliarity with a foreign legal system in the context of language, continental versus common law systems, and procedural subtleties lost on an unsophisticated litigant.¹⁶⁴ Justice Le Bel also disavows the Majority Judgment’s views on reciprocity, suggesting that: “It makes sense that the jurisdictional rules on assumption and recognition should dovetail together in a federal state where the justice systems of the various provinces are interconnected parts of a harmonized whole. This reasoning does not extend to the

161. Referred to in the Le Bel Dissent as “additional expense, inconvenience and risk.” *Id.* at para. 183 and:

the expense and inconvenience of travelling, the need to obtain legal advice in the foreign jurisdiction, the perils of navigating an unfamiliar legal system whose substantive and procedural rules may be quite different from those that apply in the defendant's home jurisdiction, and even the possibility that the foreign court may be biased against foreign defendants or generally corrupt.

Id. at para. 188.

162. *Id.* at para. 184.

163. *Id.* at para. 186.

164. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at paras. 196-98 (Can. Dec. 18, 2003).

international setting.”¹⁶⁵ Justice Le Bel thereafter proposes a reformulation of the impeachment (nominate) defenses of public policy, natural justice, and fraud.

Firstly, Justice Le Bel proffers that the better approach is to continue to reserve the public policy defense “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*.”¹⁶⁶ He continues by saying the defense “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.”¹⁶⁷ Here, the defects in the judgment, while severe, did not engage the public policy defense.¹⁶⁸ “The enforcement of such a large award in the absence of a connection either to harm suffered by the plaintiffs and caused by the defendants or to conduct deserving of punishment on the part of the defendants would be contrary to basic Canadian ideas of justice.”¹⁶⁹ However, Justice Le Bel held that “there is no evidence that the law of Florida offends these principles. On the contrary, the record indicates that Florida law requires proof of damages in the usual fashion. . . . There is no indication that punitive damages were available where the defendant’s conduct is not morally blameworthy.”¹⁷⁰

Secondly, Justice Le Bel concurs with the majority that the defense of fraud must be based on previously undiscoverable evidence.¹⁷¹ Nevertheless, Justice Le Bel recommends that a broader test should be applied to default judgments, at least in cases where the defendant’s decision not to defend the claim was “demonstrably reasonable.”¹⁷²

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. . . . In my opinion, enforcement of a judgment that was obtained by intentionally

165. *Id.* at para. 203.

166. *Id.* at para. 221.

167. *Id.* at para. 223.

168. *Id.* at para. 246.

169. *Id.*

170. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para 246 (Can. Dec. 18, 2003).

171. *Id.* at para. 233.

172. *Id.* at para. 234.

misleading the foreign court in the kind of circumstances I have outlined could well amount to an abuse of the judicial process. In my opinion, a more generous version of the fraud defence ought to be available, as required, to address the dangers of abuse associated with the loosening of the jurisdiction test to admit a broad category of formerly unenforceable default judgments.¹⁷³

Notwithstanding this position, Justice Le Bel concludes that the defense of fraud was not made out. “All the facts that the appellants raise in this connection were known to them or could have been discovered at the time of the Florida action.”¹⁷⁴ Furthermore, even though “this is the kind of case for which a more lenient interpretation of the fraud defence would, in principle, be appropriate, because the appellants’ decision not to attend the Florida proceedings was a reasonable one,”¹⁷⁵ the defense could not succeed even on the view that the “judgment could be vitiated by proof of intentional fraud.”¹⁷⁶ The combination of a lack of transcript (or other record of the proceedings) and the appellants’ “failure to question either Mr. Beals or Mr. Groner [the Beals’ Florida solicitor who testified at trial concerning Florida procedure] either in discovery or at trial in Ontario, as to the information given in the damages hearing,” meant that the defense of fraud was inapplicable.¹⁷⁷

Finally, Justice Le Bel argues that the defense of natural justice “concerns the procedure by which the foreign court reached its decision.”¹⁷⁸ If a defendant can establish that the process by which the foreign judgment was obtained was contrary to the Canadian conception of natural justice, then the foreign judgment should not be enforced.¹⁷⁹ “[T]wo developments should be recognized in connection with this defence: First, the requirements of notice and a hearing should be construed in a purposive and flexible manner, and secondly, substantive principles of justice should also be included in the scope of the defence.”¹⁸⁰ On the issue of the notice requirement, Justice Le Bel states:

173. *Id.* at para. 234.

174. *Id.* at para. 248.

175. *Id.* at para. 249.

176. *Id.* at para. 251.

177. *Id.*

178. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 235 (Can. Dec. 18, 2003).

179. *Id.* at para. 236.

180. *Id.*

Notice is adequate when the defendant is given enough information to assess the extent of his or her jeopardy. This means, among other things, that the defendant should be made aware of the approximate amount sought. Canadian procedural rules require that the amount of damages claimed be stated in the pleadings. This is not the rule in all jurisdictions, and notice will still be adequate even where the pleadings do not conform to Canadian standards as long as the defendant is informed in some other way of the amount in issue.¹⁸¹

Justice Le Bel goes on to suggest that adequate notice should include “alerting the defendant to the consequences of any procedural steps taken or not taken . . . as well as to the allegations that will be adjudicated at trial.”¹⁸²

In assessing whether the defense of natural justice has been made out, the opportunities for correcting a denial of natural justice that existed in the originating jurisdiction should be assessed in light of all the relevant factors, including:

The plaintiffs’ failure “to give the defendants proper notice of the true nature of their claim and its potential ramifications.”¹⁸³

The defendants received “no notice as to the serious consequences to the defendants of failure to refile their defence in response to the claimant’s repeatedly amended pleadings. As a result, the notice afforded to the defendants did not meet the requirements of natural justice.”¹⁸⁴

“The only mention of [damages in the complaint] . . . was the formulaic reference to damages over \$5,000 required to give the Florida Circuit Court monetary jurisdiction. The form of pleading did not give the defendants a clear picture of what was at stake.”¹⁸⁵

181. *Id.* at para. 238 (citations omitted).

182. *Id.* at paras. 239-40.

183. *Id.* at para. 252.

184. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 252 (Can. Dec. 18, 2003).

185. *Id.* at para. 253.

The plaintiffs' complaint "did not set out with any precision the allegations on the basis of which damages, beyond the sale price of the land, were claimed." While the complaint mentioned construction costs and lost revenue, there was no reference "to the plaintiffs' assertion that the planned model home was to be rented to their company, Fox Chase Homes, and used to obtain further construction contracts. In fact, there is no mention at all of Fox Chase Homes."¹⁸⁶

The defendants were not given notice that they were required to file new defences to amendments to the complaint filed by the plaintiffs. Although the allegations against the defendants remained the same, there was no indication "on the face of the Amended Complaint that would alert them to the need to refile . . . The annulment of their defence resulted from a technicality of Florida procedure of which defendants from a foreign jurisdiction could hardly be expected to be aware."¹⁸⁷

The fact that the appellants received mistaken legal advice and did not avail themselves of the remedies available in Florida "should not operate to relieve the claimants entirely of the consequences of a significant or substantial failure to observe the rules of natural justice, and it should not bar the appellants from relying on this defence."¹⁸⁸

In the circumstances of this case, when all the relevant factors are considered, the appellants' apprehensiveness about going to Florida to seek relief was understandable.¹⁸⁹

As a "residual concern," Justice Le Bel suggests, "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."¹⁹⁰ In his view, the appellants

186. *Id.* at para 254.

187. *Id.* at para. 255.

188. *Id.* at para 261.

189. *Id.*

190. *Beals v. Saldanha*, [2003] S.C.C. 72, WL No. 28829, at para. 265 (Can. Dec. 18, 2003).

had not infringed upon the legal rights of the respondents and had "done nothing to deserve such harsh punishment."¹⁹¹ They did not seek "to avoid their obligations by hiding in their own jurisdiction" nor did they demonstrate disrespect for the Florida legal system.¹⁹² These facts demonstrated "good faith throughout" and an exercise of reasonable diligence based upon limited information and inaccurate legal advice.¹⁹³ The respondents' actions did not escape Justice Le Bel's ire:

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.¹⁹⁴

V. CONCLUSION

The Supreme Court of Canada's decision in *Beals* provides valuable insight into the substantive defenses of fraud and denial of natural justice, both of which remain attenuated. Regrettably, the *Beals* decision does not achieve decisional clarity, primarily due to the lack of unanimity on the scope and applicability of the "real and substantial connection" test. This lack of clarity begs the question whether financial hardship and other "hard cases" will continue to put pressure on the traditional doctrine that an enforceable foreign judgment is conclusive on the merits. Furthermore, cases involving truly "foreign" jurisdictions and forum non conveniens blocking statutes,¹⁹⁵ anti-suit injunctions, and

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. See Winston Anderson, *Forum Non Conveniens Checkmated? The Emergence of Retaliatory Legislation* 10 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 183, 186 (2001).

parallel proceedings¹⁹⁶ will continue to entangle both domestic and foreign litigants.¹⁹⁷

Ontario-based companies are well advised to review existing contracts, invoices, purchase orders, and related agreements as a measure of control over potential litigation. It is vital to take positive steps to shield the company from excessive jury damage awards, including treble and punitive damages, which may be

196. The late Justice Sopinka, writing for the unanimous Supreme Court of Canada, in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 914, provides insight into Canadian judicial views on parallel proceedings and anti-suit injunctions:

It has been suggested that by reason of comity, anti-suit injunctions should either never be granted or severely restricted to those cases in which it is necessary to protect the jurisdiction of the court issuing the injunction or prevent evasion of an important public policy of the domestic forum. A case can be made for this position. In a world where comity was universally respected and the courts of countries which are the potential fora for litigation applied consistent principles with respect to the stay of proceedings, anti-suit injunctions would not be necessary. A court which qualified as the appropriate forum for the action would not find it necessary to enjoin similar proceedings in a foreign jurisdiction because it could count on the foreign court's staying those proceedings. In some cases, both jurisdictions would refuse to decline jurisdiction as, for example, where there is no one forum that is clearly more appropriate than another. *The consequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases.*

Id. (emphasis added) (citations omitted). See also *Westec Aerospace Inc. v. Raytheon Aircraft Co.*, [1999] B.C.C.A. 0134, *appeal granted*, 86 A.C.W.S.3d 697, *rev'd*, [1999] 173 D.L.R.4th 498, *appeal dismissed without reasons*, [2001] S.C.R. iv. In *Westec*, the Supreme Court of Canada declined to consider directly the relevance of parallel proceedings in determinations of appropriate forum. [2001] S.C.R. at iv. Raytheon obtained summary judgment in its Kansas declaratory action and there was, accordingly, no parallel proceedings on which to base the appeal. *Id.* See Janet Walker, *Parallel Proceedings — Converging Views: The Westec Appeal*, THE CAN. YEARBOOK OF INT'L LAW 155, 185 (2000).

197. See *Buth-na-bodhiaga Inc. (c.o.b. Body Shop) v. Lambert*, [2002] 60 O.R.3d 787 (Ont. Ct. of Appeals), which involved a failed effort to petition into bankruptcy the debtor relying upon section 43 (1) (a) and (b) of the Canadian Bankruptcy and Insolvency Act, R.S.C., ch. C-3 (1992). The petitioning creditor obtained consent judgments under the U.S. bankruptcy (Chapter 11) legislation, 11 U.S.C. § 101 (2003), and further obtained assignments by Citibank resulting in default judgments against the Lamberts as personal guarantors of the security. *Lambert*, [2002] 60 O.R.3d at para. 30. The Court of Appeal dismissed the appeal and affirmed the decision of Justice Cameron which had dismissed the petition on the grounds that the "Body Shop's retention of the assets and asserting the full amount of the indebtedness of the Franchisees without accounting for the value of the retained assets ... constitutes sufficient cause to dismiss the Petition." *Id.* Cf. *Society of Lloyd's v. Saunders*, [2001] 210 D.L.R.4th 519 (upholding an application for enforcement of a foreign (U.K.) judgment, notwithstanding an assumed breach by Lloyd's of the prospectus requirements of the Ontario Securities Act when soliciting "names" in Ontario).

enforced by an Ontario court, depending on the circumstances. The policy considerations of certainty, ease of application, and predictability, which serve as signposts for Canadian courts, should also resonate with Ontario companies with cross-border business dealings and international suppliers and customers.

From the perspective of enforcement of foreign judgments in Ontario, it is noteworthy that, in *Beals*, the Saldanhas made a third party claim against their Ontario solicitor:¹⁹⁸

They claimed full contribution and indemnity for any amount owing on the Florida judgment and for the costs associated with the Ontario action. The Saldanhas alleged that they had not challenged the Florida judgment in Florida after it was made because Mr. Kelly [their solicitor] told them that the judgment was not enforceable in Ontario. They contended that the advice was wrong and that Mr. Kelly acted negligently and was in breach of his contract with them in giving that negligent advice. The Saldanhas took the position that had they contested the Florida judgment in Florida, it would have been set aside.¹⁹⁹

Fortunately, for the Saldanhas and Thivys, it appears that LAWPRO, the Ontario bar's insurer, will indemnify them due to their solicitors' negligent advice.²⁰⁰

There are significant transactional and litigation costs which can (and should) be avoided by taking the time to review a company's standard form contracts and invoices with a duly qualified lawyer. Given that the Supreme Court of Canada has solidified the rules on recognition and enforcement of foreign judgments in Canada, Ontario defendants who choose to ignore or fail to defend foreign actions (and, correspondingly, foreign

198. *Beals v. Saldanha*, [1998] 42 O.R.3d 127, 133, 146.

199. *Beals v. Saldanha*, [2001] 202 D.L.R.4th 630, para. 6.

200. Kirk Makin, *Family Must Pay Florida Bill*, THE GLOBE & MAIL, Dec. 18, 2003:

Fortunately for the Saldanha and Thivy families, an Ontario insurer that covers the province's legal profession — LAWPRO — will pay their legal bill because they received bad advice from local lawyers many years ago.

LAWPRO stepped up to the plate and said: 'We will take over, because we want to find out the real answer for lawyers,' said Brian Casey, a lawyer for the insurer. 'Everybody does business in foreign jurisdictions nowadays, and this ruling makes them aware of their jeopardy in foreign courts.'

defendants who choose not to defend actions in Canada) — ostensibly on the view that the foreign “nuisance” claims appear to be groundless or without merit — do so at their own peril: *caveat litigator*.

