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Currie v. McDonald's Restaurants of Canada Ltd. et al.

[Indexed as: Currie v. McDonald's Restaurants of Canada Ltd.]

Court File Nos. C41264/C41289/C41361

Ontario Court of Appeal
Sharpe, Armstrong and Blair JJ.A.

Heard: November 15, 2004
Judgment rendered: February 16, 2005

Civil procedure — Class actions — Procedure — Notices — Foreign court in class action directing that notice be given to Canadian residents by publication of advertisements in periodicals with circulation in Canada — Small number received notice compared to American residents — Notice inadequate — Illinois judgment not to be recognized and enforced in Ontario.

Conflict of laws — Foreign judgments — Jurisdiction of foreign court — Illinois court in class action directing that notice be given to Canadian residents by publication of advertisements in periodicals with circulation in Canada — Small number received notice compared to American residents — Notice inadequate — Illinois judgment not to be recognized and enforced in Ontario.

Courts — Abuse of process — Two Canadians represented by same law firm commencing class actions against international chain of restaurants — One plaintiff attorning to jurisdiction of foreign court — Other plaintiff not intervening in foreign action — Parties not privy — Second action not abuse of process.

Judgments and orders — Res judicata — Two Canadians represented by same law firm commencing class actions against international chain of restaurants — One plaintiff attorning to jurisdiction of foreign court — Other plaintiff not intervening in foreign action — Parties not privy — Foreign judgment not res judicata so as to prevent second action.

An American and international class of customers of a restaurant chain had brought a class action in Illinois. The action was settled after notice was given to those potentially affected. For Canada, the notice was given by advertisement in a Canadian magazine, three Quebec newspapers and two American publications with circulation in Canada. The evidence showed that, compared with American patrons of the restaurant chain, only a small proportion of Canadian patrons would have seen the advertisements. Before the action was settled, a Canadian brought a class action in Ontario against the restaurant chain. That action was based in part on alleged wrongdoing by the chain specifically against Canadian residents. The plaintiffs in that action obtained leave to intervene in the Illinois action to object to the settlement. However, the Illinois courts dismissed their objections. Meanwhile, the plaintiff in this action brought another class action in Ontario against the restaurant chain. The plaintiff was represented by the same law firm and his cause of

action was essentially the same. The defendants moved to dismiss or stay the action. The motions judge dismissed the motion. He held that while the first Canadian had attorned to the jurisdiction of the Illinois court and that action should be dismissed, the plaintiff had not attorned; that the Illinois court would otherwise have had jurisdiction over the plaintiff class members; but that the notice given in the Illinois action to Canadians was so inadequate as to violate the rules of natural justice. Thus, he held that the Illinois judgment should not be recognized and enforced so as to bind the plaintiff and those he sought to represent in his class action. The defendants appealed.

Held, the appeal should be dismissed.

To determine jurisdiction for conflict of laws purposes, the court must have regard to the principles of "order and fairness" and "real and substantial connection". The principles also apply to unnamed, non-resident plaintiffs in international class actions. Thus, before enforcing a foreign class action judgment against Ontario residents, the court should ensure that the foreign court had a proper basis for asserting jurisdiction and that the interests of Ontario residents were adequately protected. There was a real and substantial connection to Illinois. However, the Illinois court failed to give adequate notice to Canadian residents and that failure went to jurisdiction. Moreover, there was no reason to interfere with the motions judge's conclusion that there was a denial of natural justice because the notice was so inadequate. The motions judge's failure to consider the domestic standard of notice was not fatal, since that standard may be relevant but it is not determinative. Consequently, the Ontario courts should not recognize and enforce the Illinois judgment against the plaintiff and those he sought to represent. Moreover, the plaintiff was not precluded by the doctrines of *res judicata* or abuse of process from proceeding with his action in Ontario. The fact that the two Ontario plaintiffs were represented by the same law firm was not material and did not make the parties privy. The two parties were different and the plaintiff did not take part in the Illinois action. Nor could he be faulted for not taking part in that action.

Cases referred to

Adams v. Cape Industries plc., [1990] Ch. 433 — **refd to**

Bank of Montreal v. Mitchell (1997), 143 D.L.R. (4th) 697, 69 A.C.W.S. (3d) 109; affd 151 D.L.R. (4th) 574, 72 A.C.W.S. (3d) 1056 — **refd to**

Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 195 D.L.R. (4th) 308, 2 C.P.C. (5th) 1, 52 O.R. (3d) 161, 145 O.A.C. 349, 102 A.C.W.S. (3d) 302 [leave to appeal to S.C.C. refused 204 D.L.R. (4th) vi, 158 O.A.C. 198*n*, 284 N.R. 200*n* — refd to] — **refd to**

Beals v. Saldanha (2003), 234 D.L.R. (4th) 1, [2003] 3 S.C.R. 416, 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1, 113 C.R.R. (2d) 189, 182 O.A.C. 201, 314 N.R. 209, 70 O.R. (3d) 94*n*, 127 A.C.W.S. (3d) 648, 2003 SCC 72 — **refd to**

Boland v. Simon Marketing, Inc. and McDonald's Corp., No. 01 CH 13803 (Cir. Ct. Ill. 2001) — **refd to**

Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2), [1967] 1 A.C. 853 — **refd to**

Carom v. Bre-X Minerals Ltd. (1999), 46 B.L.R. (2d) 247, 35 C.P.C. (4th) 43, 44 O.R. (3d) 173, 88 A.C.W.S. (3d) 542 [affd 6 B.L.R. (3d) 82, 1 C.P.C. (5th) 82, 46 O.R. (3d) 315; revd 196 D.L.R. (4th) 344, 11 B.L.R. (3d) 1, 1 C.P.C. (5th) 62, 51 O.R. (3d) 236, 138 O.A.C. 55, 103 A.C.W.S. (3d) 17; leave to appeal to

S.C.C. refused 228 D.L.R. (4th) vi, 157 O.A.C. 399*n*, 283 N.R. 399*n*] — **refd to**

Chadha v. Bayer Inc. (1999), 43 C.P.C. (4th) 91, 91 A.C.W.S. (3d) 352 [leave to appeal to Ont. Div. Ct. granted 45 O.R. (3d) 478, 91 A.C.W.S. (3d) 713; stay granted pending appeal 48 O.R. (3d) 415; revd 200 D.L.R. (4th) 309, 15 B.L.R. (3d) 177, 8 C.P.C. (5th) 138, 54 O.R. (3d) 520, 147 O.A.C. 223, 105 A.C.W.S. (3d) 808; affd 223 D.L.R. (4th) 158, 31 B.L.R. (3d) 214, 23 C.L.R. (3d) 1, 31 C.P.C. (5th) 40, 63 O.R. (3d) 22, 168 O.A.C. 143, 119 A.C.W.S. (3d) 378; leave to appeal to S.C.C. refused 226 D.L.R. (4th) vi, 191 O.A.C. 397*n*, 320 N.R. 399*n*] — **refd to**

Hunt v. T&N plc (1993), 109 D.L.R. (4th) 16, [1993] 4 S.C.R. 289, 21 C.P.C. (3d) 269, [1994] 1 W.W.R. 129, 60 W.A.C. 161, 85 B.C.L.R. (2d) 1, 161 N.R. 81 *sub nom. Hunt v. Lac d'Amiante du Québec Ltée*, 43 A.C.W.S. (3d) 1070 — **refd to**

Mondor v. Fisherman (2002), 26 B.L.R. (3d) 281, [2002] O.T.C. 317, 114 A.C.W.S. (3d) 16 — **refd to**

Morguard Investments Ltd. v. De Savoye (1990), 76 D.L.R. (4th) 256, [1990] 3 S.C.R. 1077, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, 122 N.R. 81, 24 A.C.W.S. (3d) 478 — **refd to**

Muscutt v. Courcelles (2002), 213 D.L.R. (4th) 577, 13 C.C.L.T. (3d) 161, 26 C.P.C. (5th) 206, 60 O.R. (3d) 20, 160 O.A.C. 1, 114 A.C.W.S. (3d) 634 [supp. reasons 213 D.L.R. (4th) 661, 13 C.C.L.T. (3d) 238, 26 C.P.C. (5th) 203, 162 O.A.C. 122, 115 A.C.W.S. (3d) 211] — **refd to**

Parsons v. McDonald's Restaurants of Canada Ltd. (2004), 45 C.P.C. (5th) 304, 128 A.C.W.S. (3d) 58 — **refd to**

Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985) — **refd to**

Robertson v. Thomson Corp. (1999), 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 30 C.P.C. (4th) 182, 43 O.R. (3d) 161, 85 A.C.W.S. (3d) 1003 — **refd to**

Shaw v. BCE Inc. (2004), 42 B.L.R. (3d) 107, [2004] O.T.C. 28, 128 A.C.W.S. (3d) 76; affd 49 B.L.R. (3d) 1, 189 O.A.C. 9, 132 A.C.W.S. (3d) 478 — **distd**

Tolofson v. Jensen (1994), 120 D.L.R. (4th) 289, [1994] 3 S.C.R. 1022, 26 C.C.L.I. (2d) 1, 22 C.C.L.T. (2d) 173, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202, [1995] 1 W.W.R. 609, 84 W.A.C. 241, 100 B.C.L.R. (2d) 1, 77 O.A.C. 81, 175 N.R. 161, 52 A.C.W.S. (3d) 40 — **refd to**

Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. (2001), 11 C.P.R. (4th) 230, 6 C.P.C. (5th) 245, 102 A.C.W.S. (3d) 656; affd 212 D.L.R. (4th) 563, 18 C.P.R. (4th) 267, 20 C.P.C. (5th) 65, 159 O.A.C. 204, 113 A.C.W.S. (3d) 966; affd 223 D.L.R. (4th) 445, 23 C.P.R. (4th) 454, 30 C.P.C. (5th) 107, 121 A.C.W.S. (3d) 425 [leave to appeal to S.C.C. refused 232 D.L.R. (4th) vi, 28 C.P.R. (4th) vii, 327 N.R. 394 *sub nom. Ford v. Hoffmann-La Roche (F.) Ltd.*] — **refd to**

Webb v. K-Mart Canada Ltd. (1999), 45 C.C.E.L. (2d) 165, 99 C.L.L.C. ¶210-038, 36 C.P.C. (4th) 99, 45 O.R. (3d) 389, 89 A.C.W.S. (3d) 522 — **refd to**

Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere (2001), 201 D.L.R. (4th) 385, [2001] 2 S.C.R. 534, 8 C.P.C. (5th) 1, [2002] 1 W.W.R. 1, 253 W.A.C. 201, 94 Alta. L.R. (3d) 1, 286 A.R. 201, 272 N.R. 135, 2001 SCC 46, *sub nom. Western Canadian Shopping Centres Inc. v. Dutton*, 106 A.C.W.S. (3d) 397 — **refd to**

Wilson v. Servier Canada Inc. (2000), 49 C.P.C. (4th) 233, 50 O.R. (3d) 219, 99 A.C.W.S. (3d) 544 [leave to appeal to C.A. refused 52 O.R. (3d) 20, 143 O.A.C. 279, 101 A.C.W.S. (3d) 470; leave to appeal to S.C.C. refused 154 O.A.C. 198*n*, 276 N.R. 197*n*] — **refd to**

Wilson v. Servier Canada Inc. (2002), 213 D.L.R. (4th) 751, 59 O.R. (3d) 656, 114 A.C.W.S. (3d) 190 [motion to quash appeal granted 220 D.L.R. (4th) 191, 23 C.P.C. (5th) 1, 117 A.C.W.S. (3d) 367] — **refd to**

Statutes referred to

Class Actions Act, S.N.L. 2001, c. C-18.1
s. 7(2)
s. 17(2)-(5)
Class Actions Act, S.S. 2001, c. C-12.01
s. 8(2)
s. 18(2)
Class Proceedings Act, R.S.B.C. 1996, c. 50
s. 6(2)
s. 16(2)
Class Proceedings Act, S.A. 2003, c. C-16.5
s. 7(3)
s. 17(1)(b)
Class Proceedings Act, S.M. 2002, c. 14 (C.C.S.M., c. C130)
s. 6(3)
Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 17(2)
s. 20

Authorities referred to

Bassett, D.L., "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003), 72 Fordham L. Rev. 41
Dixon, J.C.L., "The *Res Judicata* Effect in England of a U.S. Class Action Settlement" (1997), 46 Int'l & Comp. L.Q. 134
Monaghan, H.P., "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members" (1998), 98 Col. L. Rev. 1148

APPEAL from a judgment of Cullity J., 4 C.P.C. (6th) 299, 70 O.R. (3d) 53, 130 A.C.W.S. (3d) 906, dismissing a motion to dismiss or stay an action.

Ronald Slaght, Q.C., for appellant, McDonald's Restaurants of Canada Ltd.
Joel Richler and *J.A. Prestage*, for appellant, McDonald's Corp.
Glenn Zakaib, for appellant, Simon Marketing Inc.
Chris G. Paliare, *Martin Doane* and *John Phillips*, for respondent, Greg Currie.

The judgment of the court was delivered by

[1] SHARPE J.A.:—The plaintiff Greg Currie brings a proposed class action alleging wrongdoing in relation to promotional games offered to customers of McDonald's Restaurants of Canada Ltd. ("McDonald's Canada"). He is met with an Illinois judgment approving the settlement of a class action brought on behalf of an American and international class of McDonald's customers, including the customers of McDonald's Canada (the "*Boland* judgment" [*Boland v. Simon Marketing, Inc. and McDonald's Corp.*, No. 01 CH

13803 (Cir. Ct. Ill. 2001)]). The Illinois court directed that notice of the class action to Canadian class members be given by means of an advertisement in Maclean's magazine. Currie did not participate in the Illinois proceedings but Preston Parsons, the named plaintiff in another Ontario class proceeding [*Parsons v. McDonald's Restaurants of Canada Ltd.* (2004), 128 A.C.W.S. (3d) 58], represented by the same law firm and purporting to represent the same class, appeared in the Illinois court to challenge the settlement.

[2] The central issue on this appeal is whether the *Boland* judgment is binding so as to preclude Currie's proposed class action in Ontario.

FACTS

[3] I adopt the following summary of the essential facts from the reasons of the motion judge.

> 1. In the period between January 1, 1995 and December 31, 2001 - and earlier - McDonald's sponsored numerous promotional games, or contests, of chance - or chance and skill - at its restaurants in North America. Some, but not all, of these were made available in the Canadian restaurants. Prizes of different kinds and amounts were to be awarded. Participation in the games was, to a large extent, tied to the purchase of food at the restaurants. Simon Marketing Inc - a corporation based in California that provided businesses with marketing services involving the provision and operation of promotional games - was retained for that purpose by McDonald's.
>
> 2. On August 21, 2001, Jerome Jacobson - a senior employee of Simon Marketing - and a number of other individuals were indicted for embezzling prizes allocated to McDonald's games.
>
> 3. The proceedings in *Boland* were commenced on the following day. The class-action complaint alleged that Jacobson had directed prizes to specific individuals and claimed damages against McDonald's and Simon Marketing Inc. for consumer fraud and unjust enrichment. The plaintiffs sued on behalf of themselves and "all customers of McDonald's who paid money for McDonald's food products in order to receive a subject contest game piece for subject contest promotions between 1995 and the present".
>
> 4. Settlement discussions in the *Boland* action were conducted from October 2001 and culminated in a settlement agreement between the plaintiffs and McDonald's on April 19, 2002.
>
> 5. The settlement agreement provided that the parties would apply to the Circuit Court of Cook County, Illinois for preliminary certification of the proceedings as a class action and for preliminary approval of the settlement as "fair, reasonable and adequate to the class and to members of the public". Further orders were to be requested to approve the terms of a notice to class members - and the manner in which it was to be disseminated - to provide class members with an opportunity to opt out of the class and the settlement by a date to be specified and to make

the settlement - and the releases to be provided to McDonald's and its subsidiaries - binding on those who did not do so. The terms of the releases were broad. They covered all claims - referred to in the settlement agreement as "Released Claims" - relating to McDonald's promotional games under common law or statute, and specifically for breach of the consumer protection laws of any jurisdiction, contract, unjust enrichment, fraud, negligent misrepresentation, breach of fiduciary duty, strict liability and unfair or deceptive trade practices. The Released Claims would have covered each of the claims subsequently pleaded in the Parsons and Currie actions even though not all of the material facts on which they were based had been pleaded in *Boland*. The original Complaint was amended to extend the class to persons who had participated, or attempted to participate, in promotional games sponsored by McDonald's since 1979.

6. On May 8, 2002, the application for the above orders was heard by Judge Stephen Schiller in Chicago and, on June 6, 2002, he granted the preliminary relief requested with some modifications to the proposed notice to class members. August 28, 2002 was designated as the final date for members to opt out and a final fairness hearing was to be held on September 17, 2002.

7. The manner in which notice was to be given to customers in Canada was specifically addressed at the preliminary hearing on May 8, 2002 and the order of the court provided for the approved form of notice to be published in each of three French-language newspapers in Quebec on July 15, 2002 and in Maclean's magazine on July 15 and July 22 as well as in two US publications that had circulation in Canada.

8. Jacobson had pleaded guilty to the criminal charges and, at the trial of his alleged conspirators, he gave evidence on August 19, 2002 that McDonald's had instructed Simon Marketing Inc that the "random" selection of winners of "high value" prizes was to be manipulated to ensure that no such prizes would be awarded to contestants in Canada. No such allegation had been - or was ever - made in the *Boland* action.

9. After a US attorney had notified the firm of Paliare Roland in Toronto, the firm placed information about the US proceedings on its website and was subsequently contacted by the plaintiff, Preston Parsons. The Parsons action was commenced by statement of claim on September 13, 2002. As I have indicated, the causes of action that were pleaded were based on allegations that reflected those made by Jacobson, to which I have just referred, as well as those in the Complaint filed in *Boland*.

10. On September 16, 2002, a group of Canadians, including Mr. Parsons, moved for leave to intervene in the *Boland* proceedings to object to the settlement of that action. The documents filed in the court in Illinois named Paliare Roland as solicitors for Mr. Parsons although members of the firm did not - and could not - represent him in proceedings in that jurisdiction.

11. At the Final Fairness Hearing on September 17, 2002, submissions were made by a US attorney on behalf of the Canadian objectors. The hearing was adjourned to October 10, 2002 to permit written submissions. It continued on that date after written submissions of the objectors and responding submissions on behalf of the plaintiffs in *Boland* had been filed.

12. The Currie action was commenced on October 28, 2002 with Paliare Roland as solicitors of record.

13. On January 3, 2003, Judge Schiller released his decision dismissing the objections of the Canadian objectors. The terms of the settlement were given final approval and the certification order was made final. On April 8, 2003, the formal order of the court was entered containing, among other things the release of McDonald's and its subsidiaries by the members of the class and a declaration that all members of the class who had not opted out were bound by the terms of the order.

14. An appeal by Mr. Parsons from the decision of Schiller J. was dismissed on July 31, 2003 on the ground that the order of the learned judge was not then a final order as the question of costs had not been dealt with.

Judicial Proceedings

[4] The appellants moved to dismiss or stay both the Parsons and Currie actions on the ground that the claims asserted in both actions had been finally disposed of in the *Boland* action.

[5] The motion judge dismissed the Parsons action on the basis that by appearing in the Illinois court to object to the settlement, Parsons had attorned to the jurisdiction of the Illinois court and that the *Boland* judgment should be recognized and enforced against him and the other Canadian objectors who appeared to contest the *Boland* settlement.

[6] The motion judge refused to stay or dismiss the Currie action. He found that Currie was not bound by the *Boland* judgment or by Parsons' attornment despite the fact that the claims were identical and that Parsons and Currie were both represented by the same law firm. The motion judge found that under the applicable conflict of law rules, the Illinois court had jurisdiction over the non-resident, non-attorning plaintiff class members. However, he further found that the notice given in that action to the Canadian members of the plaintiff class was so inadequate as to violate the rules of natural justice. The motion judge concluded, accordingly, that the *Boland* judgment should not be recognized and enforced so as to bind Currie and those he sought to represent in his proposed class action.

[7] McDonald's Corp., McDonald's Canada and Simon Marketing appeal the motion judge's refusal to dismiss or stay the Currie action. Parsons did not appeal the dismissal of his action.

ISSUES

[8] The following issues arise on this appeal.

1. Should the Ontario courts recognize and enforce the *Boland* judgment against Currie and the non-attorning Canadian class members he seeks to represent?
2. Did the notice to the Canadian class members satisfy the requirements of natural justice?
3. Is Currie precluded by the doctrines of *res judicata* or abuse of process from prosecuting his claim in Ontario?

Analysis

1. Should the Ontario courts recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent?

[9] It is common ground on this appeal that if the *Boland* judgment should be recognized in Ontario under the applicable conflict of laws principles, Currie and the members of the class he seeks to represent are bound by it and that Currie's proposed class action would be precluded. It is also common ground that the issue of whether the Ontario courts should recognize and enforce the Illinois judgment approving the settlement turns upon the application of the principles enunciated by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, and *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 234 D.L.R. (4th) 1.

[10] In *Morguard*, the Supreme Court of Canada identified the twin principles of "order and fairness" and "real and substantial connection" for the assessment of the propriety of conflict of laws jurisdiction. As La Forest J. explained at p. 1102, "order and justice militate in favour of the security of transactions", an interest fostered in the modern world of increased trans-border activity by freer recognition and enforcement of judgments from other jurisdictions. But embedded in the principles of order and fairness is also the notion of jurisdictional restraint. The interest of security of transactions gained by the party seeking enforcement must be balanced with the need for fairness to the party against whom enforcement is sought. As La Forest J. put it at 1103: "it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit...Thus, fairness to the [party against whom enforcement is sought] requires that the

judgment be issued by a court acting through fair process and with properly restrained jurisdiction."

[11] The "real and substantial connection" test serves to control the assertion of jurisdiction. It is described variously in *Morguard*, at pp. 1104-9, as a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the forum province", "with the transaction or the parties", and "with the action". The real and substantial connection test is a flexible one, "a term not yet fully defined" (*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1049, 120 D.L.R. (4th) 289), and there is no strict or rigid test to be applied. (*Hunt v. T & N plc.*, [1993] 4 S.C.R. 289 at 325, 109 D.L.R. (4th) 16).

[12] *Morguard* dealt with the recognition and enforcement of inter-provincial judgments. In *Beals*, those same principles were adapted and applied to international judgments. Writing for the majority, at para. 37, Major J. described real and substantial connection as "the overriding factor in the determination of jurisdiction." He stated at para. 32:

> The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

[13] The novel point raised on this appeal is the application of the real and substantial connection test and the principles of order and fairness to unnamed, non-resident plaintiffs in international class actions.

[14] Ontario residents frequently engage in cross-border activities that may become the subject of class action litigation in Ontario, in another province or in a foreign jurisdiction. Several Ontario trial courts have authorized national and international classes: *Robertson v. The Thompson Corporation* (1999), 43 O.R. (3d) 161, 171 D.L.R. (4th) 171 (S.C.J.) (international class), *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.) (national class), and *Wilson v. Servier* (2000), 50 O.R. (3d) 219 (S.C.J.) (national class). In *Mondor v. Fisherman; CC & L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2002]

O.T.C. 317, Cumming J. approved a settlement in a class action where the class included American and other foreign plaintiffs. Legislation in several provinces specifically contemplates the inclusion of non-resident class members: *Class Proceedings Act*, S.A. 2003, c. C-16.5, ss. 7(3) and 17(1)(b); *Class Proceedings Act*, R.S.B.C. 1996, c. 50, ss. 6(2) and 16(2); *The Class Proceedings Act*, S.M. 2002, c. 14 (C.C.S.M., c. C130), s. 6(3); Newfoundland and Labrador *Class Actions Act*, S.N.L. 2001, c. C-18.1, ss. 7(2) and 17(2)-(5); *The Class Actions Act*, S.S. 2001, c. C-12.01, ss. 8(2) and 18(2).

[15] There are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation: *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2001), 6 C.P.C. (5th) 245 (Ont. S.C.J.), at para. 27, aff'd (2002), 20 C.P.C. (5th) 65, 212 D.L.R. (4th) 563 (Ont. Div. Ct.), aff'd (2003), 30 C.P.C. (5th) 107, 223 D.L.R. (4th) 445 (Ont. C.A.); *Wilson v. Servier Canada Inc*,. above at 243-4 (S.C.J.); *Wilson v. Servier Canada Inc.* (2002), 59 O.R. (3d) 656 at 664-670, 213 D.L.R. (4th) 751 (S.C.J.). Conflict of law rules should recognize, in appropriate cases, the importance of having claims finally resolved in one jurisdiction. In some cases, Ontario courts will render judgments affecting the rights of non-residents and in other cases, Ontario residents will be affected by class action proceedings elsewhere. Ontario expects its judgments to be recognized and enforced, provided its courts assert jurisdiction in a proper manner and comity requires that, in appropriate cases, Ontario law should give effect to foreign class action judgments.

[16] Recognition and enforcement rules should take into account certain unique features of class action proceedings. In this case, we must consider the situation of the unnamed, non-resident class plaintiff. In a traditional non-class action suit, there is no question as to the jurisdiction of the foreign court to bind the plaintiff. As the party initiating proceedings, the plaintiff will have invoked the jurisdiction of the foreign court and thereby will have attorned to the foreign court's jurisdiction. The issue relating to recognition and enforcement that typically arises is whether the foreign judgment can be enforced against the defendant.

[17] Here, the tables are turned. It is the defendant who is seeking to enforce the judgment against the unnamed, non-resident plaintiffs. The settling defendants, plainly bound by the judgment, seek to

enforce it as widely and as broadly as possible in order to preclude further litigation against them. Henry Paul Monaghan, "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members" (1998) 98 Columbia Law Review 1148 at 1155-56, warns of the need to guard against potential abuses by settling class action defendants who "welcome class action suits as a vehicle for limiting overall liability, sometimes at bargain-basement prices." Before enforcing a foreign class action judgment against Ontario residents, we should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected.

[18] To determine whether the assumption of jurisdiction by the foreign court satisfies the real and substantial connection test and the principles of order and fairness, it is necessary to consider the situation from the perspective of the party against whom enforcement is sought. In many cases, the actions of the non-resident class member will assist in determining jurisdiction. Take, for example, the case of an Ontario resident who orders goods from a foreign mail order merchant or who buys securities on a foreign stock exchange. The Ontario resident has engaged in a cross-border transaction with a foreign entity. The cause of action arises at least in part in the foreign jurisdiction. It would not be unreasonable, from the perspective of the Ontario resident, to expect that legal claims arising from the transaction could be properly litigated in the foreign jurisdiction. Nor is it unreasonable, whether from the perspective of the foreign defendant or from that of the Ontario plaintiff, to expect that class action litigation in the foreign jurisdiction should dispose finally of the Ontario plaintiff's claim.

[19] In this case, however, the unnamed, non-resident class members have done nothing to invite or invoke Illinois jurisdiction. The respondents offer this analogy: would Ontario law recognize the jurisdiction of Illinois to entertain a suit by the appellants for a declaration of non-liability against the respondents? That is the legal and practical effect of the Illinois judgment so far as they are concerned. If a judgment of non-liability by the foreign court would be recognized and enforced in Ontario, so too should the courts of Ontario recognize and enforce the foreign class action settlement. However, if the foreign non-liability judgment would not be recognized and enforced, an Ontario court should hesitate to recognize

and enforce the foreign class action settlement against the non-resident plaintiff.

[20] This analogy is of some assistance, but I am not persuaded that a model entirely based upon the position of the defendant in a traditional two-party lawsuit can adequately capture the legal dynamics and complexity of the situation of an unnamed plaintiff in modern cross-border class action litigation. The position of the class action plaintiff is not the same as that of a typical defendant. Rules for recognition and enforcement of class action judgments should reflect those differences. The class action plaintiff is not hauled before a foreign court and required to defend him or herself upon pain of default judgment. As stated by Rehnquist J. in the leading American decision, *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985) at 809, "[un]like a defendant in a civil suit, a class-action plaintiff is not required to fend for himself." Class action regimes typically impose upon the court a duty to ensure that the interests of the plaintiff class members are adequately represented and protected. This is a factor favouring recognition and enforcement against unnamed class members: see John C.L. Dixon, "The *Res Judicata* Effect in England of a U.S. Class Action Settlement" (1997), 46 I.C.L.Q. 134 at 136, 150-51.

[21] On the other hand, I accept the respondent's basic point that it would be wrong simply to approach the issue of jurisdiction by asking whether the Illinois court would have jurisdiction over the respondents at the suit of Canadian plaintiffs. The court must have regard to the rights and interests of unnamed plaintiffs who did not participate in the *Boland* proceedings. The question of jurisdiction should be viewed from the perspective of the Ontario client of a McDonald's Canada restaurant, participating in a promotional prize giveaway presented by McDonald's Canada, who has done nothing to invoke or submit to the jurisdiction of the Illinois court.

[22] The principal connecting factors linking the cause of action asserted in Currie's proposed class action to the state of Illinois are that the alleged wrong occurred in the United States and Illinois is the site of McDonald's head office. The alleged wrongful conduct, manipulating the "random" selection of winners of "high value" prizes to ensure that no such prizes would be awarded to contestants in Canada, occurred in the United States. This factor is a "real and substantial connection" in favour of Illinois jurisdiction. While

constitutional arrangements may put interprovincial suits on something of a different plain, as noted by Cumming J. in *Wilson v. Servier Canada Inc.* (2000), above at 241, Ontario courts have certified national class actions "if there is a real and substantial connection between the subject-matter of the action and Ontario" in the expectation that "other jurisdictions on the basis of comity should recognize the Ontario judgment."

[23] On the other hand, the principles of "order and fairness" require that careful attention be paid to the situation of ordinary McDonald's customers whose rights are at stake. These non-resident class members would have no reason to expect that any legal claim they may wish to assert against McDonald's Canada as result of visiting the restaurant in Ontario would be adjudicated in the United States. The consumer transactions giving rise to the claims took place entirely within Ontario. The consumers are residents of Canada and the McDonald's Canada is a corporation that conducts its business in Canada. Damages from the alleged wrong were suffered in Ontario. The Currie plaintiffs themselves did nothing that could provide a basis for the assertion of Illinois jurisdiction, while McDonald's Canada invited the jurisdiction of the courts of Ontario by carrying on business here.

[24] The *locus* of the alleged wrong indicates a real and substantial connection with Illinois, but recognizing Illinois jurisdiction could be unfair to the ordinary McDonald's customer who would have no reason to suspect that his or her rights are at stake in a foreign lawsuit and who has no link to or nexus with the *Boland* action.

[25] To address the concern for fairness, it is helpful to consider the adequacy of the procedural rights afforded the unnamed non-resident class members in the *Boland* action. Before concluding that Ontario law should recognize the jurisdiction of the Illinois court to determine their legal rights, we should be satisfied that the procedures adopted in the *Boland* action were sufficiently attentive to the rights and interests of the unnamed non-resident class members. Respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with Illinois jurisdiction and alleviate concerns regarding unfairness. Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, it seems to me that the principles of order and fairness

could be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from those proceedings.

[26] In the circumstances of this case, it is not necessary for me to consider the issue of adequacy of representation in detail. I note, however, that American commentators have raised the "race-to-the bottom" concern: see Monaghan, above. A sophisticated defendant may persuade plaintiffs' counsel to accept a sharply discounted recovery rate for non-resident (including Canadian or Ontario) plaintiffs. The foreign representative plaintiff's interests may conflict with those of the Ontario class, or not fully encapsulate the interests of the Ontario class. Recognition and enforcement rules must be attentive to these possibilities and retain sufficient flexibility to address concerns of this nature.

[27] On the other hand, provided the interests of non-resident class members were adequately represented, recognition and enforcement of foreign class proceedings would seem desirable. Recognition of the judgment would encourage the defendant to extend the benefits of the settlement to non-residents. Non-resident class members would receive a benefit without resorting to litigation and the defendant would buy peace from further litigation.

[28] The right to opt out is an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows unnamed class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding. Although she was not referring to inter-jurisdictional issues, in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 201 D.L.R. (4th) 385, at para. 49, McLachlin C.J.C. identified the importance of notice as it relates to the right to opt out: "A judgment is binding on a class member only if the class member is notified of the suit and given an opportunity to exclude himself or herself from the proceeding." The right afforded to plaintiff class members to opt out has been found to provide some protection to out-of-province claimants who would prefer to litigate their claims elsewhere: *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.) at 404. It is obvious, however, that if the right to opt out is to be meaningful, the

unnamed plaintiff must know about it and that, in turn, implicates the adequacy of the notice afforded to the unnamed plaintiff.

[29] The respondent submits that recognition should be withheld absent an order requiring non-resident plaintiffs to opt in: see D.L. Bassett, "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003), 72 Fordham Law Review 41. In some provinces (Alberta: *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 17(1)(b); British Columbia: *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 16(2); Saskatchewan: *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 18(2); Newfoundland and Labrador *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 17(2)) legislation requires out of province plaintiffs opt in to class proceedings. There may well be cases where the nature of the rights and interests at stake would make such a requirement appropriate as a prerequisite to recognition and enforcement, but I do not accept the suggestion that unnamed plaintiffs should always be required to opt in as a prerequisite to recognition. In my view, the case at bar does not fall into the category where an "opt in" order should be required. Here, the interest of each individual plaintiff is nominal at best. An order requiring members of the plaintiff class to opt in would, as a practical matter, effectively negate meaningful class action relief.

[30] In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by La Forest J. in *Hunt v. T & N plc.*, above at p. 325, "the exact limits of what constitutes a reasonable assumption of jurisdiction" cannot be rigidly defined and "no test can perhaps ever be rigidly applied" as "no court has ever been able to anticipate" all possibilities. Second, it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases: see *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, 213 D.L.R. (4th) 577 (C.A.), at paras 95-100.

[31] The motion judge determined that the notice given to the non-resident class members was inadequate. He observed that traditional conflict of laws doctrine treats adequacy of notice as an element of natural justice that can be raised as a defence to enforcement, once the jurisdiction of the foreign court has been established. He did not find it necessary to decide, on the facts of this case, whether or not the notice issue had a bearing on jurisdiction. As I have already explained, it is my opinion that the notice issue does bear upon jurisdiction. I consider the motion judge's ruling on the adequacy of notice below and conclude that there is no basis upon which I would interfere with that ruling. I would apply it to the question of jurisdiction and hold that as the unnamed plaintiffs were not afforded adequate notice of the *Boland* proceedings, the Ontario courts should not recognize and enforce the *Boland* judgment against Currie and the non-attorning Canadian class members he seeks to represent.

[32] I would add this observation. Even if the *Boland* judgment is not accorded recognition and enforcement, it may still have some impact upon Currie's proposed class action in Ontario because of the principle against double recovery. As a result of the *Boland* judgment, certain benefits were conferred upon Canadian McDonald's patrons. If the Currie action succeeds on the merits, then the trial judge will likely take into account the benefits already received by the plaintiff class in order to determine the appropriate remedy and prevent over-compensation.

[33] Accordingly, I conclude that Currie and the unnamed members of the class he seeks to represent (excluding the Parsons group) are not bound by the *Boland* judgment.

2. *Did the notice to the Canadian class members satisfy the requirements of natural justice?*

[34] In the *Boland* action, the Illinois court ordered that notice be given in Canada by means of two advertisements in Maclean's Magazine for English Canada and in La Presse, Le Journal de Québec and Le Journal de Montréal for Quebec. Notice was also published in three U.S. publications with circulation in Canada, People Magazine, USA Today and four copies of TV Guide.

[35] The respondents rely upon the evidence of Todd Hilsee, an individual with experience in developing notice programs for class

actions. In Hilsee's opinion, the notice to Canadian members of the plaintiff class in *Boland* was inadequate. Relying on "net-reach" analysis, he asserts that the notice had reached only 29.9% of Canadian adults who frequent burger restaurants. The notice approved in the United States, meanwhile, would have reached 72% of American fast food patrons.

[36] In response to Hilsee's evidence, the appellants filed the affidavit of Wayne Pines, who prepared the *Boland* notice plan. He stated that Maclean's readership, in addition to circulation figures, should be considered, as should the impact of the notice in the U.S. publications with circulation in Canada. Pines also swore that the notice to Canadians in *Boland* was more effective and broader than the notice approved in *Chadha v. Bayer Inc.* (1999), 43 C.P.C. (4th) 91 (Ont. S.C.J.).

[37] The motion judge made the following findings at para. 58 with respect to the adequacy of the notice in the *Boland* action:

> I am satisfied that it would be substantially unjust to find that the Canadian members of the putative class in *Boland* had received adequate notice of the proceedings and of their right to opt out. Quite apart from the form and contents of the notice - Mr. Hilsee's reference to "wall to wall legalese" conveys no more than a hint of its eye-glazing opaqueness - I believe that its dissemination in Canada was so woefully inadequate that the decision should be held to offend the rules of natural justice recognized in this court and, on that ground, to be not binding on the Canadian members of the putative class in *Boland*, other than those whom I have found to have submitted to the jurisdiction of the court in Illinois. It would not, in my judgment, be at all reasonable to consider publication in two issues of Maclean's magazine as adequate notice to unilingual English-speaking Canadians - or, indeed, to French-speaking Canadians outside Quebec - who were customers of McDonald's. Nor, as the question is governed by the laws of this jurisdiction, do I believe it would be helpful to speculate whether the decision of Schiller J. on the adequacy of the notice plan would have been the same if, at the preliminary hearing, he had been provided with the true circulation of Maclean's magazine or if the mistake in the initial declaration had been drawn to his attention at the final hearing.

[38] I am not persuaded that we should interfere with the motion judge's findings. They are essentially factual in nature and therefore entitled to deference on appeal to this court.

[39] It was open on the evidence for the motion judge to conclude that the wording of the notice was so technical and obscure that the ordinary class member would have difficulty understanding the implications of the proposed settlement on their legal rights in

Canada or that they had the right to opt out. As I have already indicated, that right is of vital importance to the jurisdiction of the foreign court in international class action litigation. The right to opt out must be made clear and plain to the non-resident class members and I see no basis upon which to disagree with the motion judge's assessment of this notice.

[40] Nor would I interfere with the motion judge's finding that the mode of notice was inadequate. The appellants opted to publish the notice in a publication that is not ordinarily used in English-Canada for such purposes and there was evidence that this notice reached only a small proportion of the members of the plaintiff class. It was open on the evidence for the motion judge to conclude that such notice was inadequate.

[41] The appellants argue that the motion judge erred in law by applying a higher standard to the notice than would be applied in an Ontario class action. They point out that under Ontario law, there is no absolute requirement for effective notice in class actions and, where the stake of an individual class member is extremely low, notice requirements may be tailored accordingly. In the present case, the individual class member could assert no more than a mathematical chance to win a prize and given the low value of such a claim, Ontario law sets a very low standard. The *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss. 17 and 20 direct the Ontario courts making directions regarding notice to consider, *inter alia*, the cost of notice, the size of the class and the nature of the relief sought. The Act specifically permits the court, having regard to these matters, to dispense with notice where appropriate (s. 17(2)). In consumer class actions involving large plaintiff classes asserting claims that are essentially insignificant on an individual basis, Canadian courts have approved notice arguably less effective than that approved in the case at bar: *Chadha v. Bayer*, above; *Wilson v. Servier Canada Inc.* (2002), above.

[42] I agree that the motion judge appears not to have assessed the adequacy of the Canadian notice against the standard mandated by Ontario law for Ontario class actions. I disagree, however, that he erred is so doing. In assessing the fairness of the foreign proceedings, "the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or in the relevant foreign system, are designed to give effect

to those principles" (*Adams v. Cape Industries plc.*, [1990] Ch. 433 (C.A.) at 559. The adequacy of the notice had to be assessed in terms of what is required in an international class action involving the assertion of jurisdiction against non-residents. While Ontario's domestic standard my have some bearing upon that issue, I do not agree that it is conclusive, particularly in light of the importance of notice to the jurisdictional issues discussed above.

[43] In my view, the motion judge was entitled to look, as he did, to the standard the American court applied to its own residents. American and Canadian class members had similar if not identical interests at stake and there was no relevant basis upon which the Illinois court could have concluded that one standard of procedural fairness was appropriate for the American class and another for the Canadian. In the result, the Illinois court applied a different and lower standard in determining what notice should be given to the Canadian plaintiffs. I would not interfere with the motion judge's conclusion that there was a denial of natural justice. Natural justice surely requires that similarly situated litigants be accorded equal (although not necessarily identical) treatment.

3. Is Currie precluded by the doctrines of res judicata or abuse of process from prosecuting his claim in Ontario?

[44] The appellants argue that Currie should be bound by *Boland* judgment on the basis that he is in the same interest as or a privy to Parsons. Parsons did not appeal the motion judge's finding that he attorned to the jurisdiction of the Illinois court; therefore, he is bound by it. The allegations in the Currie action are the same as those advanced by Parsons. The Currie action was brought as a protective measure to preserve the right to bring an action in Canada on behalf of the same class of plaintiffs in the event of an adverse ruling against Parsons in Illinois. The same law firm that represented Parsons commenced the Currie action after Parsons' appearance in the Illinois court.

[45] The appellants submit that the Currie action should be dismissed on the basis of *res judicata* or as an abuse of process. They argue that Currie makes essentially the same allegations as were made by Parsons and that the Currie action is nothing more than a deliberate attempt to avoid the effect of an adverse ruling against Parsons. Currie and Parsons are, the appellants submit, alter egos of each other, neither having any significant personal interest in their

claims and both making the same allegations. The real plaintiff, and the only entity with a real stake in the claim, is the law firm that represents both Currie and Parsons. The appellants urge us to look to the practical realities of class actions. We are asked to focus on the centrality of the lawyers to a process in which the representative plaintiffs play what is at best a nominal role.

[46] I am not persuaded that *res judicata* applies here or that there are grounds for this court to interfere with the motion judge's refusal to apply the abuse of process doctrine. The parties are not the same - Currie took no part in the *Boland* proceedings and McDonald's Canada was not named as a defendant in that action. Further, Currie's allegations specifically related to the Canadian patrons were made by Parsons in objecting to the settlement, but they did not form part of the claim advanced by the representative plaintiff in *Boland.*

[47] The appellants say that Currie and Parsons are privies, relying on the extended definition of privity identified by Farley J. in *Bank of Montreal v. Mitchell* (1997), 143 D.L.R. (4th) 697 (Ont. Gen. Div.) at 739, aff'd (1997), 151 D.L.R. (4th) 574 (Ont. C.A.), and applied in *Banque Nationale de Paris (Canada) et al. v. Canadian Imperial Bank of Commerce et al.* (2001), 52 O.R. (3d) 161, 195 D.L.R. (4th) 308 (C.A.):

> For privity of interest to exist there must be a sufficient degree of connection or identification between the two parties for it to be just and common sense to hold that a court decision involving the party litigant that it should be binding in a subsequent proceeding upon the non-litigant party in the original proceeding ... [W]here that non-litigant party has sufficient interest in those original proceedings to intervene but instead chooses to stand by and have a battle in which he has a practical and legal concern fought by someone else, it is appropriate to have the non-litigant abide by that previous decision ...

[48] The motion judge rejected this submission. He found that there was no evidence that Currie deliberately stood by while the battle was being fought elsewhere. There was no evidence that Currie was even aware of the proceedings in the United States until shortly before his own action was commenced. Currie refused, on his counsel's advice, to provide any information that he had received from his counsel about the *Boland* and Parsons proceedings. The motion judge found, at para. 82, that even if he were to draw from Currie's refusal the adverse inference that the Currie was tainted by Parsons' attornment, that still did not provide a basis for finding Currie to be a privy of Parsons or the Currie action to be an abuse of

process. The motion judge found that protection of the interests of the putative class was a legitimate tactic:

> There is nothing to suggest that Mr. Currie's decision to commence the Currie action - and any involvement of his solicitors in that decision - was motivated by any consideration other than a desire to protect the interests of members of the putative class in the Parsons action who had not participated in the *Boland* proceedings. Such members could not then be compelled to participate in the Parsons action, I have found that Mr. Parsons had no authority to submit their rights to the jurisdiction of the court in Illinois and, in view of the inadequacy of the notice of the *Boland* proceedings given in Canada, I cannot assume that any of the members of the putative class in the Currie action, other than the objectors, were aware of the proceedings in Illinois or of the Parsons action. In these circumstances, I decline to find that they - or Mr. Currie - were privies of Mr. Parsons or that the commencement and continuation of the Currie action should be considered to be an abuse of process (at para. 83).

[49] I agree with the motion judge and I reject the submission of the appellants that we should analyze this issue on the basis that the law firm was the real litigant, or that the link provided by the law firm to both Parsons and Currie was sufficient to make them privies. No doubt from a purely financial perspective, the law firm had a greater stake in the outcome than Parsons, Currie or any individual member of the proposed class. However, the financial stake of the class as a whole exceeded that of the law firm. In any event, I am not persuaded that the legal rights of the parties are to be assessed on the basis of their lawyers' pecuniary interest in the outcome. The legal claims that are being advanced belong to Parsons, Currie and to the members of the proposed class, not to the law firm.

[50] Lawyers are not ordinarily considered to be in privity of interest with their clients: see *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.) at 910 and 937. The propriety of the procedures taken in the presentation of legal claims should be assessed from the perspective of the clients' legal rights. The law firm's job was to protect the legal interests of its individual clients and the legal interests of the proposed class. Currie had no contact with Parsons; nor, it would seem, did he know anything about the Parsons action or the steps that Parsons was taking to pursue it in Ontario and in Illinois. The same can be said for the unnamed members of the class Currie proposes to represent. In that light, it is difficult to see how Currie or those unnamed class members can be said to be bound under the *Bank of Montreal v.*

Mitchell principle because they have adopted a tactical "stand by" position, rather than participating in the Illinois proceedings.

[51] This case is distinguishable from *Shaw v. BCE Inc.*, [2004] O.T.C. 28. In *Shaw*, Farley J. struck out the statement of claim in a proposed class proceeding only to be met with another claim, substantially similar to the one he struck out, advanced by another representative plaintiff represented by the same law firm. Farley J. found that the new statement of claim failed to disclose a cause of action and he struck it out on that basis. He added that, in any event, the representative plaintiff fell within the extended definition of privity from *Bank of Montreal v. Mitchell*. An appeal to this court was dismissed on the ground that the new statement of claim failed to disclose a cause of action: (2004), 189 O.A.C. 9. This court declined to comment on the *res judicata* issue. In *Shaw*, the case for application of *res judicata* was significantly stronger than in the present case. There had been a determination on the merits that the claim lacked validity and that the new claim did not differ in substance from the claim that had been struck out. The merits of significant aspects of the *Parsons* claim, those specifically pertaining to Canadian customers, have never been considered. In any event, as I have already found that the expanded *Bank of Montreal v. Mitchell* definition of privity does not apply here, and as *Shaw* rests on that same principle, *Shaw* has no application here.

CONCLUSION

[52] For these reasons, I would dismiss the appeal.

[53] If the parties are unable to agree as to the costs of this appeal, brief written submissions may be filed. Respondent's submissions to be delivered within ten days after the release of these reasons; appellants' submissions to be delivered five days thereafter.

Appeal dismissed.

EXHIBIT 38

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

Douglas De Savoye *Appelant*

c.

Morguard Investments Limited
Intimée

et

Credit Foncier Trust Company *Intimée*

répertorié: morguard investments ltd. *c.* de savoye

N^{o} du greffe: 21116.

1990: 23 avril; 1990: 20 décembre.

Présents: Le juge en chef Dickson* et les juges La Forest, L'Heureux–Dubé, Sopinka, Gonthier, Cory et McLachlin.

en appel de la cour d'appel de la colombie-britannique

Droit international privé -- Procédure civile -- Jugements et ordonnances -- Reconnaissance et exécution des jugements d'une autre province -- Obtention par les intimées de jugements d'un tribunal albertain contre un résident de la Colombie-Britannique visant la forclusion et l'obtention du montant par lequel les créances hypothécaires dépassaient la valeur des biens–fonds -- Les jugements obtenus en Alberta devraient-ils être exécutés par un tribunal de la Colombie-Britannique?

Les intimées étaient créancières hypothécaires de biens−fonds situés en Alberta. L'appelant était le débiteur hypothécaire et résidait alors en Alberta. Il a déménagé en Colombie-Britannique et n'a plus résidé ni fait des affaires en Alberta depuis ce moment. Il y a eu défaut de paiement des créances hypothécaires et les intimées ont intenté des actions en Alberta. La signification a été effectuée conformément aux règles de signification *ex juris* du tribunal albertain. L'appelant n'a pris aucune disposition pour comparaître ou produire une défense aux actions. Dans les actes d'hypothèque, il n'y avait pas de clause dans laquelle il acceptait de se soumettre à la compétence de la cour de l'Alberta et il n'a pas reconnu sa compétence.

Les intimées ont obtenu des jugements conditionnels dans les actions en forclusion. À l'expiration de la période de rachat, elles ont obtenu des ordonnances de vente judiciaire des biens−fonds hypothéqués à elles−mêmes et des jugements ont été inscrits contre l'appelant pour le montant des créances hypothécaires dépassant la valeur des biens−fonds. Les intimées ont ensuite l'une et l'autre intenté une action distincte en Cour suprême de la Colombie-Britannique en vue de faire exécuter les jugements obtenus en Alberta pour le solde de la créance. La Cour suprême a rendu jugement en faveur des intimées et la Cour d'appel a confirmé ce jugement. En l'espèce, il s'agit de déterminer si les tribunaux d'une province doivent reconnaître un jugement rendu par les tribunaux d'une autre province sur une action personnelle intentée dans cette dernière à un moment où le défendeur n'y résidait pas.

Arrêt: Le pourvoi est rejeté.

La common law sur la reconnaissance et l'exécution des jugements étrangers est ancrée dans le principe de la territorialité tel que les tribunaux anglais l'interprétaient et l'appliquaient au XIX^{e} siècle. Ce principe traduit l'un des préceptes fondamentaux du droit international, selon lequel les États souverains ont compétence exclusive sur leur propre territoire. Par conséquent, les États hésitent à exercer leur compétence sur des événements qui se sont produits sur le territoire d'un autre État. Comme la compétence est territoriale, le droit d'un État n'a pas force exécutoire hors du territoire de celui-ci.

Les États modernes ne peuvent vivre dans l'isolement le plus complet et ils appliquent effectivement les jugements rendus dans d'autres pays dans certaines circonstances, comme les jugements *in rem* et les jugements sur les actions personnelles. Cela a été jugé conforme aux exigences de la courtoisie qu'on a définie comme la déférence et le respect que des États doivent avoir pour les actes qu'un autre État a légitimement accomplis sur son territoire. Mais la courtoisie ne consiste pas seulement à respecter un État souverain étranger, mais elle se fonde également sur des considérations de commodité et même de nécessité. L'époque moderne exige que l'on facilite la circulation équitable et ordonnée des richesses, des techniques et des personnes d'un pays à l'autre. Les principes d'ordre et d'équité, qui assurent la sécurité et la justice des opérations, doivent servir de fondement à un système moderne de droit international privé. Le sens de la courtoisie doit donc s'ajuster aux changements de l'ordre mondial.

Il n'y a pas vraiment de comparaison possible entre les relations interprovinciales actuelles et celles qui s'appliquaient aux pays étrangers au XIX^{e} siècle. Les tribunaux ont eu grandement tort de transposer les règles conçues pour l'exécution des jugements étrangers à l'exécution des jugements des autres provinces du pays. Les considérations qui sous−tendent les règles de la

courtoisie s'appliquent avec beaucoup plus de force entre les éléments d'un État fédéral.

Les règles anglaises du XIX^{e} siècle sont absolument contraires à l'intention manifeste de la Constitution d'établir un seul et même pays doté d'un marché commun et d'une citoyenneté commune. Les arrangements constitutionnels conclus pour réaliser cet objectif, comme la suppression des obstacles aux échanges interprovinciaux et les garanties de liberté de circulation et d'établissement, répondent à la nécessité impérieuse de pouvoir faire exécuter partout au pays les jugements obtenus dans une province.

Le système judiciaire canadien est organisé de telle manière que toute crainte de différence de qualité de justice d'une province à l'autre ne saurait être vraiment fondée. Tous les juges de cour supérieure −− qui ont également un pouvoir de contrôle sur tous les tribunaux judiciaires et administratifs provinciaux −− sont nommés et rémunérés par les autorités fédérales. Toutes les cours de justice sont sujettes à l'examen en dernier ressort de leurs décisions par la Cour suprême du Canada qui peut décider si les cours d'une province ont à bon droit exercé leur compétence dans une action et dans des circonstances où les cours d'une autre province devraient reconnaître ces jugements. En outre, les avocats canadiens observent tous le même code de déontologie.

Les tribunaux d'une province devraient "reconnaître totalement" les jugements rendus par un tribunal d'une autre province ou territoire, pourvu que ce tribunal ait correctement et convenablement exercé sa compétence dans l'action. L'ordre et la justice militent tous les deux en faveur de la sécurité des opérations. Il est anarchique et injuste qu'une personne puisse se soustraire à des obligations juridiques qui ont pris naissance dans une province simplement en déménageant dans une autre province.

Il faut cependant soupeser ces préoccupations en fonction de l'équité envers le défendeur. L'exercice de compétence par un tribunal dans une province et la reconnaissance de celle−ci dans une autre province doivent être considérés comme corrélatifs, et la reconnaissance dans les autres provinces devrait dépendre de ce que le tribunal qui a rendu jugement a "correctement" ou "convenablement" exercé sa compétence. Pareille solution peut satisfaire aux exigences de l'ordre et de l'équité de reconnaître un jugement rendu dans un ressort qui avait le plus de liens avec l'objet de l'action ou qui avait, à tout le moins, des liens substantiels avec lui. Mais cela n'est guère conforme aux principes d'ordre et d'équité que de permettre à quelqu'un d'intenter l'action dans un autre ressort sans tenir compte du lien que ce ressort peut avoir avec le défendeur ou l'objet de l'action. Si l'on veut que les tribunaux d'une province appliquent les jugements rendus dans une autre province, il doit y avoir certaines limites à l'exercice de la compétence à l'égard des personnes qui n'habitent pas la province. S'il est raisonnable de justifier l'exercice de la compétence dans une province, il est raisonnable que le jugement soit reconnu dans les autres provinces.

En adoptant la méthode qui permet de poursuivre à l'endroit qui a un lien réel et substantiel avec l'action, on établit un équilibre raisonnable entre les droits des parties. Cela fournit une certaine protection contre le danger d'être poursuivi dans des ressorts qui n'ont que peu ou pas de lien avec l'opération ou les parties.

En l'espèce, les actions sur solde de créance ont été intentées à bon droit en Alberta. Les biens−fonds étaient situés en Alberta et les contrats y avaient été conclus par des parties qui

résidaient dans cette province. En outre, l'action sur solde de créance fait suite aux procédures de forclusion, qui devaient manifestement avoir lieu en Alberta, et cette action devrait être jointe aux procédures de forclusion. Il existait un lien réel et substantiel entre le préjudice subi et le ressort. Ainsi, le tribunal albertain avait compétence à bon droit et son jugement devrait être reconnu et exécuté en Colombie−Britannique.

Les lois sur l'exécution réciproque des jugements des différentes provinces n'ont jamais visé à modifier les règles du droit international privé. Elles permettent simplement l'inscription des jugements comme procédure plus commode que celle qui consistait à intenter une action en exécution d'un jugement rendu dans une autre province. Rien n'empêche un demandeur d'intenter pareille action et de se prévaloir ainsi des règles du droit international privé telles qu'elles peuvent évoluer avec le temps.

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Arrêts mentionnés: *Comber v. Leyland*, [1898] A.C. 524; *Travers v. Holley*, [1953] 2 All E.R. 794; *Emanuel v. Symon*, [1908] 1 K.B. 302 (C.A.), inf. [1907] 1 K.B. 235; *Aetna Financial Services c. Feigelman*, [1985] 1 R.C.S. 2; *Marcotte v. Megson* (1987), 19 B.C.L.R. (2d) 300; *Singh v. Rajah of Faridkote*, [1894] A.C. 670; *Becquet v. Mac Carthy* (1831), 2 B. & Ad. 951, 109 E.R. 1396; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155; *Re Dulles' Settlement Trusts*, [1951] 2 All E.R. 69; *Harris v. Taylor*, [1915] 2 K.B. 580; *In re Trepca Mines Ltd.*, [1960] 1 W.L.R. 1273; *Schemmer v. Property Resources Ltd.*, [1975] 1 Ch. 273; *Indyka v. Indyka*, [1969] 1 A.C. 33; *New York v. Fitzgerald*, [1983] 5 W.W.R. 458; *Lung v. Lee* (1928), 63 O.L.R. 194; *Walsh v. Herman* (1908), 13 B.C.R. 314; *Marshall v. Houghton*, [1923] 2 W.W.R. 553; *Mattar v. Public Trustee* (1952), 5 W.W.R. (N.S.) 29; *Wedlay v. Quist* (1953), 10 W.W.R. (N.S.) 21; *Bank of Bermuda Ltd. v. Stutz*, [1965] 2 O.R. 121; *Traders Group Ltd. v. Hopkins* (1968), 69 D.L.R. (2d) 250; *Batavia Times Publishing Co. v. Davis* (1977), 82 D.L.R. (3d) 247 (H.C. Ont.), conf. (1979), 105 D.L.R. (3d) 192 (C.A. Ont.); *Eggleton v. Broadway Agencies Ltd.* (1981), 32 A.R. 61; *Weiner v. Singh* (1981), 22 C.P.C. 230; *Re Whalen and Neal* (1982), 31 C.P.C. 1; *North American Specialty Pipe Ltd. v. Magnum Sales Ltd.* (1985), 31 A.C.W.S. (2d) 320; *Archambault v. Solloway*, C.S.C.-B., 18 avril 1956, inédit; *Edward v. Edward Estate*, [1987] 5 W.W.R. 289; *Libman c. La Reine*, [1985] 2 R.C.S. 178; *Hilton v. Guyot*, 159 U.S. 113 (1895); *Spencer c. La Reine*, [1985] 2 R.C.S. 278; *Zingre c. La Reine*, [1981] 2 R.C.S. 392; *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812); *The Atlantic Star*, [1973] 2 All E.R. 175; *Re Wismer and Javelin International Ltd.* (1982), 136 D.L.R. (3d) 647; *Re Mulroney and Coates* (1986), 27 D.L.R. (4th) 118; *Touche Ross Ltd. v. Sorrel Resources Ltd.* (1987), 11 B.C.L.R. (2d) 184; *Roglass Consultants Inc. v. Kennedy, Lock* (1984), 65 B.C.L.R. 393; *Black c. Law Society of Alberta*, [1989] 1 R.C.S. 591; *Interprovincial Co−Operatives Ltd. c. La Reine*, [1976] 1 R.C.S. 477; *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393; *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *Dupont c. Taronga Holdings Ltd.*, [1987] R.J.Q. 124; *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *First City Capital Ltd. v. Winchester Computer Corp.*, [1987] 6 W.W.R. 212.

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Donald J. Livingstone, pour l'appelant.

Peter Reardon, pour les intimées.

//Le juge La Forest//

Version française du jugement de la Cour rendu par

LE JUGE LA FOREST −− Dans le présent pourvoi, il s'agit de déterminer si les tribunaux d'une province doivent reconnaître un jugement rendu par les tribunaux d'une autre province sur une action personnelle intentée dans cette dernière à un moment où le défendeur n'y résidait pas. Plus précisément, le pourvoi porte sur les jugements rendus à la suite de procédures de forclusion pour le solde dû après la vente de biens-fonds hypothéqués.

Les faits

Les intimées Morguard Investments Limited et Credit Foncier Trust Company sont devenues, en 1978, créancières hypothécaires de biens−fonds situés en Alberta. L'appelant Douglas De Savoye, qui résidait alors en Alberta, a commencé par être caution, mais il a plus tard acquis les biens−fonds et assumé les obligations du débiteur hypothécaire. Peu de temps après, il est allé vivre en Colombie−Britannique et n'a plus résidé ni fait affaires en Alberta depuis. Les créances hypothécaires n'ont pas été payées et les intimées ont intenté des actions en Alberta. Les actes de procédure de l'action ont été signifiés à l'appelant par courrier recommandé avec avis de réception adressé chez lui en Colombie−Britannique, conformément à des ordonnances de signification de la cour de l'Alberta rendues en vertu de ses règles relatives à la signification hors du ressort. Il existe des règles dans le même sens en Colombie−Britannique.

L'appelant n'a pris aucune disposition pour comparaître ou produire une défense à l'action. Dans les actes d'hypothèque, il n'y avait pas de clause dans laquelle il acceptait de se soumettre à la compétence de la cour de l'Alberta et il n'a pas reconnu sa compétence.

Les intimées ont obtenu des jugements conditionnels dans les actions en forclusion. À l'expiration de la période de rachat, elles ont obtenu des ordonnances de type Rice contre l'appelant. En vertu des ces ordonnances, il y a eu vente en justice aux intimées des biens−fonds

hypothéqués et inscription de jugements contre l'appelant pour le montant des créances hypothécaires dépassant la valeur des biens−fonds. Les intimées ont ensuite l'une et l'autre intenté une action distincte en Cour suprême de la Colombie−Britannique pour faire exécuter les jugements obtenus en Alberta pour le solde de la créance. La Cour suprême a rendu jugement en faveur des intimées et la Cour d'appel de la Colombie−Britannique a confirmé ce jugement. L'appelant a demandé et reçu l'autorisation de se pourvoir devant notre Cour, [1989] 1 R.C.S. viii.

Les décisions des tribunaux d'instance inférieure

La Cour suprême de la Colombie−Britannique

L'appelant a soutenu que les intimées n'avaient pas le droit de faire exécuter les jugements de l'Alberta parce qu'il n'avait jamais reconnu la compétence de la cour de l'Alberta. Le juge en chambre Boyd, juge local de la Cour suprême, a indiqué que la cour de l'Alberta avait manifestement compétence sur les biens−fonds en cause et sur les procédures de forclusion. Rien dans le dossier, selon elle, n'indique qu'en accordant les ordonnances de signification indirecte à l'appelant la cour de l'Alberta ait mal exercé le pouvoir discrétionnaire qu'elle possédait de décider qu'elle était compétente ou qu'un autre tribunal aurait été plus indiqué pour juger la question. Elle a donc conclu que la cour de l'Alberta avait compétence pour rendre les ordonnances en cause. Le juge a ensuite examiné le fond des ordonnances et statué que les intimées avaient droit à un jugement pour le solde des créances: (1987), 18 B.C.L.R. (2d) 262, [1988] 1 W.W.R. 87.

La Cour d'appel

La Cour d'appel a rejeté l'appel dans des motifs rédigés par le juge Seaton: (1988), 27 B.C.L.R. (2d) 155, [1988] 5 W.W.R. 650, 29 C.P.C. (2d) 52. Selon elle, il était possible d'exécuter les jugements par défaut de l'Alberta en vertu du principe de la réciprocité, plus précisément la réciprocité de l'exercice de la compétence dans les deux provinces. La Cour d'appel a statué qu'une cour de la Colombie−Britannique devrait reconnaître un jugement de l'Alberta si la cour de l'Alberta est compétente dans des circonstances où, si les faits s'étaient produits en Colombie−Britannique, la cour de la Colombie−Britannique aurait elle aussi été compétente.

En examinant le sujet de la compétence de la cour de l'Alberta, le juge Seaton a conclu que les jugements de l'Alberta relatifs au solde des prêts hypothécaires étaient exécutoires par action en Colombie−Britannique parce que les tribunaux de la Colombie−Britannique, dans un cas semblable, auraient exercé le pouvoir qu'ils ont en vertu des Règles de pratique de la Colombie−Britannique de permettre la signification hors du ressort sans autorisation. Le juge signale que ces motifs d'exercer cette compétence à l'égard d'un défendeur qui réside hors de la province sont reconnus depuis longtemps en droit anglais et canadien. Il mentionne l'arrêt *Comber v. Leyland*, [1898] A.C. 524 (H.L.), dans lequel on a statué, à la p. 527:

> ON] . . . lorsque les parties ont convenu que quelque chose sera fait au pays, qu'une partie quelconque de l'objet du contrat sera exécutée au pays, il y a une sorte de consentement de la part des parties, quel que soit l'endroit où elles habitent, où celui où le contrat est intervenu, à ce que la question soit jugée par les tribunaux du pays.

De l'avis du juge Seaton, ce raisonnement amène logiquement le tribunal à se déclarer compétent et, réciproquement, à reconnaître la compétence des autres tribunaux. Dans ce contexte, il cite l'arrêt *Travers v. Holley*, [1953] 2 All E.R. 794, dans lequel la Cour d'appel d'Angleterre a reconnu un jugement de divorce prononcé en Nouvelle−Galles du Sud pour le motif que les tribunaux anglais auraient, dans des circonstances semblables, exercé leur compétence de la même manière. Si le même raisonnement s'applique aux tribunaux des autres provinces, l'exécution des jugements des autres provinces doit avoir lieu si les tribunaux de la Colombie−Britannique exercent une compétence similaire.

Le juge Seaton reconnaît cependant que ce point de vue n'a pas prévalu dans les jugements *in personam* qui constituent la catégorie dans laquelle se situent les jugements en cause en l'espèce. Cependant, il signale que l'arrêt de principe en la matière, l'arrêt *Emanuel v. Symon*, [1908] 1 K.B. 302 (C.A.), a été rendu au début du siècle alors que les déplacements d'un pays à l'autre étaient difficiles (dans ce cas−là, entre l'Australie−Occidentale et l'Angleterre). Il fait remarquer aussi qu'il y avait à l'époque une présomption tacite que l'administration de la justice à l'étranger laissait à désirer.

Des considérations de ce genre, dit le juge Seaton, ne s'appliquent pas à l'espèce. Il préfère reconnaître une différence entre les jugements étrangers et ceux des autres provinces, faisant remarquer que cette différence avait été acceptée à certaines fins, comme pour déterminer les facteurs à prendre en compte pour décider s'il fallait accorder une injonction de type *Mareva* qui interdit le transfert de biens hors du ressort du tribunal; voir *Aetna Financial Services Ltd. c. Feigelman*, [1985] 1 R.C.S. 2, à la p. 35. Il se fonde aussi sur le fait que tous les juges de cour supérieure sont nommés, payés et destitués par le même gouvernement, et que la *Charte canadienne des droits et libertés* s'applique partout au Canada. Il mentionne de plus la Constitution australienne qui prévoit la reconnaissance par chaque État des jugements des autres États du Commonwealth.

Il analyse ensuite les décisions de la Colombie−Britannique qui ont suivi la position anglaise, mais n'en a trouvé aucune qui ait force obligatoire et il a opté pour la conception de la reconnaissance "réciproque" des jugements proposée dans certains articles de publications périodiques (voir Gilbert D. Kennedy, ""Reciprocity" in the Recognition of Foreign Judgments: The Implications of Travers v. Holley" (1954), 32 *R. du B. can.* 359; Gilbert D. Kennedy, "Recognition of Judgments in Personam: The Meaning of Reciprocity" (1957), 35 *R. du B. can.* 123; J.−G. Castel, "Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada" (1971), 17 *R.D. McGill* 11). Il mentionne alors et suit la décision du juge Gow (alors de la Cour de comté) *Marcotte v. Megson* (1987), 19 B.C.L.R. (2d) 300, qui avait accepté la méthode de la réciprocité de compétence pour les jugements *in personam*.

La question en litige

Personne ne conteste la compétence qu'a le tribunal de l'Alberta pour instruire les actions et les mettre à exécution dans cette province s'il le peut. Il serait surprenant que quelqu'un le fasse. Les actions portent sur des opérations conclues en Alberta par des personnes qui y résidaient à l'époque et visent des biens−fonds situés dans cette province. Même si le défendeur appelant

n'habitait plus l'Alberta au moment de l'introduction des actions, ni au moment du jugement, les règles de l'Alberta relatives à la signification hors du ressort permettaient de lui signifier les procédures en Colombie−Britannique. Ces règles sont semblables à celles d'autres provinces, plus précisément à celles de la Colombie−Britannique. La validité de ces règles ne semble pas avoir fait l'objet de beaucoup de contestation, mais je reviendrai sur le sujet plus loin.

La question en litige est donc de savoir, comme je l'ai déjà dit, si un jugement sur une action personnelle validement rendu en Alberta contre un défendeur qui n'a pas comparu peut être exécuté en Colombie−Britannique où il réside actuellement.

La jurisprudence anglaise

Le droit sur cette question est demeuré remarquablement constant pendant de nombreuses années. Il a sa source en Angleterre, au XIX^{e} siècle, et même s'il a fait l'objet d'un certain nombre de précisions, sa structure générale n'a pas profondément changé. Les deux arrêts les plus souvent invoqués, *Singh v. Rajah of Faridkote*, [1894] A.C. 670 (C.P.), et *Emanuel v. Symon*, précité, datent de la fin du siècle dernier. Je me bornerai à commenter le dernier arrêt parce qu'il est le plus fréquemment cité.

Dans l'arrêt *Symon*, pendant qu'il résidait et faisait des affaires en Australie−Occidentale, le défendeur avait formé une société en 1895 pour l'exploitation d'une mine d'or située dans la colonie et dont la société était propriétaire. Il a par la suite cessé de faire des affaires dans cette colonie et est allé résider de façon permanente en Angleterre en 1899. Deux ans plus tard, les autres sociétaires ont intenté une action dans la colonie pour faire dissoudre la société, vendre la mine et obtenir une reddition de comptes. Le bref a été signifié au défendeur en Angleterre, mais celui−ci n'a pris aucune mesure pour produire une défense à l'action. La cour de la colonie a ordonné la dissolution de la société et la vente de la mine et, après la reddition de comptes, a constaté une dette de la société. Les demandeurs ont versé la somme et intenté une action en Angleterre pour recouvrer la part qu'ils alléguaient due par le défendeur. Le juge Channell a accueilli l'action des demandeurs, [1907] 1 K.B. 235, mais la Cour d'appel, à l'unanimité, a infirmé le jugement.

Le résumé du droit que le lord juge Buckley fait dans cet arrêt ressemble remarquablement à un code et il a été cité à maintes reprises depuis. Il dit à la p. 309:

> ON] Dans les actions in personam, il existe cinq cas dans lesquels les tribunaux judiciaires d'un pays exécutent un jugement étranger: (1.) lorsque le défendeur est citoyen du pays étranger où le jugement a été obtenu, (2.) lorsqu'il résidait dans ce pays étranger lors de l'introduction de l'action, (3.) lorsque le défendeur, en qualité de demandeur, a choisi le tribunal devant lequel il est par la suite poursuivi, (4.) lorsqu'il a comparu volontairement, et (5.) lorsqu'il s'est engagé par contrat à se soumettre au tribunal auprès duquel le jugement a été obtenu.

Bien que la première de ces propositions puisse maintenant être contestable (voir Robert J. Sharpe, "The Enforcement of Foreign Judgments", dans M. A. Springman et E. Gertner, éd.,

Debtor−Creditor Law: Practice and Doctrine (1985), 641, à la p. 645), l'énoncé du droit du lord juge Buckley, sous réserve d'une exception à noter, correspond par ailleurs à l'état de la common law d'Angleterre à ce jour.

Il y a déjà eu quelques tentatives d'étendre le droit à la situation pertinente en l'espèce. Ainsi, d'après l'arrêt *Becquet v. Mac Carthy* (1831), 2 B. & Ad. 951, 109 E.R. 1396, il aurait pu sembler qu'une sixième catégorie aurait pu être ajoutée à la liste du lord juge Buckley, c'est−à−dire [TRADUCTION] "lorsque le défendeur possède un bien−fonds dans le ressort étranger, à l'égard duquel la cause d'action a pris naissance pendant qu'il s'y trouvait". Mais cette affaire a finalement été expliquée par le fait que le défendeur dans ce cas était titulaire d'une fonction publique dans le ressort où le jugement avait été obtenu et en conséquence [TRADUCTION] "présent par interprétation" au moment du prononcé du jugement; voir l'arrêt *Symon*, précité, aux pp. 310 et 311. On aurait aussi pu se demander si quelqu'un qui s'engage par contrat alors qu'il réside dans un ressort donné consent à être soumis à la compétence des tribunaux de cet endroit comme le juge Blackburn a paru disposé à le faire dans l'arrêt *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, à la p. 161, mais cette possibilité a été écartée dans l'arrêt *Symon*; voir les motifs du lord juge en chef Alverstone, à la p. 308.

Donc, jusque dans les années cinquante, les diverses circonstances identifiées par le lord juge Buckley dans l'arrêt *Symon* épuisaient la liste de cas où un jugement étranger pourrait être reconnu en Angleterre. Toutefois, l'arrêt *Travers v. Holley*, précité, a apporté un changement en 1953. Dans cette affaire, la Cour d'appel d'Angleterre avait à déterminer si elle devrait reconnaître un divorce accordé à une femme en Nouvelle−Galles du Sud en vertu d'une loi qui conférait aux tribunaux de la Nouvelle−Galles du Sud compétence pour accorder le divorce à une femme qui y était domiciliée au moment où elle avait été abandonnée par son mari, même si le mari avait changé de domicile par la suite. Il existait une loi semblable en Angleterre et, pour ce motif de réciprocité de compétence, la Cour d'appel a conclu qu'elle devrait accorder compétence. Comme le lord juge Hodson l'affirme, à la p. 800:

> ON] . . . lorsque l'on constate que le droit interne n'est pas limité à un ressort, mais correspond à celui d'un autre ressort, on ne saurait dire que ce droit interne empiète sur les intérêts de cet autre ressort. Je dirais que lorsqu'il y a, comme en l'espèce, réciprocité sur le fond, il serait contraire aux principes et incompatible avec la courtoisie que les tribunaux de notre pays refusent de reconnaître la compétence qu'ils réclament *mutatis mutandis* pour eux-mêmes.

Voir aussi les motifs du lord juge Somervell, à la p. 797.

Il y a lieu d'observer que l'Angleterre a elle aussi une règle de pratique (R.S.C. Ord. 11) qui, à l'instar de celle qui a permis à l'Alberta d'exercer sa compétence sur le défendeur en l'espèce, permet aux tribunaux d'exercer leur compétence sur ceux qui n'y résident pas en leur signifiant les procédures à leur lieu de résidence. Cette situation soulève la question de savoir si les tribunaux devraient, en vertu du principe de la réciprocité de compétence invoquée dans l'arrêt *Travers v. Holley*, reconnaître les jugements d'un tribunal étranger qui a exercé sa compétence en vertu d'une règle semblable. On peut voir une incitation à le faire dans l'opinion incidente qu'a formulée lord juge Denning dans l'arrêt antérieur *Re Dulles' Settlement Trusts*, [1951] 2 All E.R. 69 (C.A.).

Dans cette affaire, il fallait décider si les tribunaux anglais avaient compétence pour ordonner à un père, un Américain habitant hors du ressort, de payer des aliments à son enfant. Analysant l'arrêt *Harris v. Taylor*, [1915] 2 K.B. 580 (C.A.), lord juge Denning dit ceci, aux pp. 72 et 73:

> ON] Le défendeur n'habitait pas l'île, mais la cour du Man a permis que signification lui soit faite hors du ressort de la cour du Man pour le motif que la cause d'action résidait dans un délit civil commis dans son ressort. Le défendeur a produit un acte de comparution conditionnelle devant la cour du Man et a soutenu que la cause d'action ne s'était pas produite dans le ressort du Man. Cette question dépendait des faits de l'espèce et elle a été tranchée à sa défaveur de sorte qu'il a régulièrement reçu signification hors du ressort du Man conformément aux règles de pratique de la cour du Man. Ces règles sont semblables aux règles anglaises relatives à la signification hors du ressort du tribunal contenues à R.S.C., Ord. 11, et je ne doute pas que nos tribunaux reconnaîtraient un jugement régulièrement obtenu devant les tribunaux du Man pour un délit civil qui y a été commis que le défendeur reconnaisse volontairement ou non la compétence du tribunal, tout comme on s'attendrait à ce que les tribunaux du Man, dans une situation inverse, reconnaissent un jugement obtenu devant nos tribunaux contre un résident de l'île du Man qui aurait régulièrement reçu signification hors de notre ressort pour un délit civil commis ici. [Je souligne.]

Cette possibilité d'augmenter le nombre des catégories établies dans l'arrêt *Symon* a été carrément rejetée dans l'arrêt *In re Trepca Mines Ltd.*, [1960] 1 W.L.R. 1273 (C.A.), dans lequel la cour a affirmé que l'arrêt *Travers v. Holley* se limitait à un jugement *in rem* sur une question touchant l'état matrimonial et qu'elle refusait de prendre la mesure proposée par lord juge Denning dans l'arrêt *Dulles*. En bref, la jurisprudence anglaise ne permet pas d'étendre la méthode de l'arrêt *Travers v. Holley* à une obligation personnelle comme celle de l'espèce; voir aussi *Schemmer v. Property Resources Ltd.*, [1975] 1 Ch. 273.

Avant de terminer cette analyse des précédents anglais, je citerai l'arrêt *Indyka v. Indyka*, [1969] 1 A.C. 33, dans lequel la Chambre des lords a trouvé une autre façon d'aller au−delà des catégories strictes établies en vertu de l'arrêt *Symon*. Dans cette affaire, leurs Seigneuries ont statué que les tribunaux anglais reconnaîtraient un jugement de divorce prononcé dans un pays étranger en faveur d'une femme qui y habite même si son mari habitait alors en Angleterre. Dans ses observations, lord Wilberforce dit ceci, à la p. 105:

> ON] À mon avis, il serait conforme à l'évolution que j'ai mentionnée et à la tendance des disposition législatives −− principalement à la tendance chez−nous, mais aussi à celle des autres pays qui ont des systèmes sociaux semblables −− de reconnaître les divorces prononcés en faveur des femmes par les tribunaux de leur lieu de résidence chaque fois qu'il y a preuve d'un lien réel et substantiel entre le requérant et le pays ou le territoire qui exerce sa compétence.

Il faut toutefois souligner que cette affaire portait aussi sur l'état matrimonial et ne s'appliquait pas à une action *in personam*; voir *New York v. Fitzgerald*, [1983] 5 W.W.R. 458 (C.S.C.−B.), le juge local Sheppard de la Cour suprême.

La jurisprudence canadienne

Au Canada, les tribunaux ont jusqu'à ces dernières années unanimement accepté que l'arrêt *Emanuel v. Symon*, précité, fait autorité au sujet de la reconnaissance des jugements étrangers; voir, par exemple, l'arrêt *New York v. Fitzgerald*. Cette situation était évidemment inévitable à l'égard des jugements étrangers jusqu'en 1949, alors que les appels au Conseil privé ont été abolis. Cependant, cette façon de voir ne se limitait pas aux jugements étrangers. Elle s'appliquait aux jugements des autres provinces qui, aux fins de l'application des règles de droit international privé, sont considérées comme des pays "étrangers": voir, par exemple, l'arrêt *Lung v. Lee* (1928), 63 O.L.R. 194 (C.A.). Il y a donc une surabondance de cas partout au Canada dans lesquels deux personnes ont conclu un contrat dans une province, souvent au moment où les deux y résidaient, mais où le demandeur s'est trouvé dans l'impossibilité de faire exécuter un jugement rendu dans cette province parce que le défendeur était allé habiter dans une autre province au moment où l'action a été intentée. Ces instances comprennent: *Walsh v. Herman* (1908), 13 B.C.R. 314 (C.S.C.−B. (la cour siégeant au complet)); *Marshall v. Houghton*, [1923] 2 W.W.R. 553 (C.A. Man.); *Mattar v. Public Trustee* (1952), 5 W.W.R. (N.S.) 29 (C.S. Alb., Div. app.); *Wedlay v. Quist* (1953), 10 W.W.R. (N.S.) 21 (C.S. Alb., Div. app.); *Bank of Bermuda Ltd. v. Stutz*, [1965] 2 O.R. 121 (H.C.); *Traders Group Ltd. v. Hopkins* (1968), 69 D.L.R. (2d) 250 (C. terr. T.N.−O.); *Batavia Times Publishing Co. v. Davis* (1977), 82 D.L.R. (3d) 247 (H.C. Ont.), conf. (1979), 105 D.L.R. (3d) 192 (C.A. Ont.); *Eggleton v. Broadway Agencies Ltd.* (1981), 32 A.R. 61 (B.R. Alb.); *Weiner v. Singh* (1981), 22 C.P.C. 230 (C. cté. C.−B.); *Re Whalen and Neal* (1982), 31 C.P.C. 1 (B.R.N.−B.); *North American Specialty Pipe Ltd. v. Magnum Sales Ltd.*, C.S.C.−B., n^{o} C841410, 11 février 1985 (résumé dans (1985), 31 A.C.W.S. (2d) 320). Donc, essentiellement, pour que les tribunaux d'une province reconnaissent un jugement sur une action personnelle rendu contre un défendeur dans une autre province, il faut que le défendeur ait été présent à l'époque où l'action a été intentée dans la province où le jugement a été rendu, à moins que le défendeur se soumette d'une façon ou d'une autre à la compétence de la cour qui rend jugement.

Peu après l'arrêt *Travers v. Holley*, précité, le professeur Kennedy a commencé à préconiser l'application de la méthode de la "réciprocité", adoptée dans cette affaire, aux actions personnelles, au moins dans le cas des jugements rendus dans une autre province; voir ""Reciprocity" in the Recognition of Foreign Judgments: The Implications of Travers v. Holley", *loc. cit*. Un jugement inédit de la Colombie−Britannique, *Archambault v. Solloway*, C.S.C.−B., 18 avril 1956, l'a incité à écrire un autre article: "Recognition of Judgments in Personam: The Meaning of Reciprocity", *loc. cit*. Dans la décision *Archambault*, le juge Wilson de la Cour suprême de la Colombie−Britannique avait trouvé la méthode de la réciprocité de compétence [TRADUCTION] "très convaincante", mais il ne l'a pas appliquée uniquement parce que le Québec (d'où provenait le jugement dont on demandait l'exécution) ne reconnaissait la validité d'un jugement étranger qu'après en avoir vérifié le bien−fondé. Le résultat n'était donc pas comparable à l'effet accordé aux jugements étrangers dans les cas où ils sont reconnus dans les provinces de common law. Plus tard, le professeur Castel a, comme le professeur Kennedy, soutenu l'adoption de la méthode de la réciprocité; voir Castel, *loc. cit.* [TRADUCTION] "Il ne semble pas y avoir", dit−il, "de motif sérieux de ne pas reconnaître une compétence que le tribunal réclame lui−même" (p. 47).

Jusqu'en 1987, cependant, aucune décision ne semble avoir adopté cette solution. Cependant, cette année−là, le juge Gow de la Cour de comté, dans un jugement bien étoffé, a appliqué la méthode de la réciprocité à une action *in personam* dans la décision *Marcotte v. Megson*, précitée. Le sommaire résume la décision comme ceci:

> [TION] Le demandeur, qui réside en Alberta, a poursuivi le défendeur en Cour du Banc de la Reine de l'Alberta en vertu du par. 114(1) de la *Business Corporations Act* de cette province. Cette loi rend les administrateurs d'une société commerciale responsables de toutes les dettes que la société a envers ses employés jusqu'à concurrence de six mois de salaire. Le demandeur a été autorisé à signifier les procédures hors du ressort, en Colombie−Britannique. Le défendeur a reçu les procédures signifiées, mais n'a pas produit de défense. Le demandeur a obtenu un jugement par défaut contre le défendeur pour la somme de 6 307 $. Le demandeur a plus tard intenté une action en Colombie−Britannique en vertu de ce jugement. Le défendeur a opposé comme moyen de défense qu'il n'avait rien fait pour se soumettre à la compétence de la cour de l'Alberta et que cette dernière n'avait pas compétence en ce sens qu'elle n'avait pas compétence en vertu des règles (relatives au droit international privé) des tribunaux de la Colombie−Britannique.

Jugement -− L'action est accueillie.

> veut qu'à l'intérieur de la Confédération canadienne, le principe de la réciprocité de compétence s'applique. L'action porte seulement sur un jugement d'une province voisine, non sur celui d'un État étranger mais sur celui d'un membre de la Confédération; le jugement ne pouvait pas être inscrit comme un jugement interne parce que le défendeur ne s'est jamais soumis à la compétence de la cour de l'Alberta. Parce qu'il s'agit d'un jugement par défaut, on aurait pu en examiner le bien−fondé si le défendeur avait choisi de le faire, mais il a délibérément choisi de ne pas le faire, préférant faire valoir les moyens de défense fondés sur l'"absence du ressort" et le "fait de ne pas se soumettre à la compétence du tribunal". Dans ces circonstances, puisqu'il y avait réciprocité de compétence entre l'Alberta et la Colombie−Britannique, il convenait d'appliquer le principe que nos tribunaux devraient reconnaître une compétence qu'ils disent eux−mêmes avoir.

La Cour d'appel de la Colombie−Britannique a, en l'espèce, ajouté son appui à l'argument que la logique exige l'évolution de la common law de manière à permettre l'exécution des jugements *in personam* rendus dans d'autres provinces du pays.

En l'espèce, l'appelant invoque évidemment la règle de l'arrêt *Symon*, précité. Les intimées, cela va de soi, s'appuient sur l'arrêt de la Cour d'appel et plus précisément sur la méthode de la "réciprocité".

Avant d'aller plus loin, je veux faire remarquer que les auteurs de doctrine abordent maintenant la question sur un plan plus large que celui de la réciprocité; voir Robert J. Sharpe, *Interprovincial*

Product Liability Litigation (1982); John Swan, "Recognition and Enforcement of Foreign Judgments: A Statement of Principle", dans Springman and Gertner, *op. cit*., aux pp. 691 et suiv.; John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 *R. du B. can.* 271; Vaughan Black "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989), 9 *Oxford J. Legal Stud.* 547. Ces auteurs n'ont pas tous la même façon de procéder mais, d'une manière générale, on peut dire que leur thèse est qu'il faut considérer comme corrélatives les conditions qui régissent l'exercice de la compétence des tribunaux d'une province et celles en vertu desquelles les jugements sont exécutés par les tribunaux d'une autre province. S'il est équitable et raisonnable que les tribunaux d'une autre province exercent leur compétence en une matière, il serait, en règle générale, raisonnable que les tribunaux d'une autre province exécutent le jugement qui en résulte. Pour un certain nombre de ces auteurs, il y a des nuances constitutionnelles dans cette solution; voir aussi Peter W. Hogg, *Constitutional Law of Canada* (2e éd. 1985), aux pp. 278 à 280. Il est juste de dire que j'ai trouvé les ouvrages de ces auteurs très utiles à l'analyse que j'ai faite de ces questions.

Je dois signaler aussi que l'arrêt *Indyka*, précité, a été suivi au Canada; voir *Edward v. Edward Estate*, [1987] 5 W.W.R. 289 (C.A. Sask.).

Analyse

La common law sur la reconnaissance et l'exécution des jugements étrangers est profondément ancrée dans le principe de la territorialité tel que les tribunaux anglais l'interprétaient et l'appliquaient au XIXe siècle; voir l'arrêt *Rajah of Faridkote*, précité. Ce principe traduit le fait, qui constitue l'un des préceptes fondamentaux du droit international, que les États souverains ont compétence exclusive sur leur propre territoire. Par conséquent, les États hésitent à exercer leur compétence sur des événements qui se sont produits sur le territoire d'un autre État. Puisque la compétence est territoriale, il s'ensuit que le droit d'un État n'a pas force exécutoire hors du territoire de celui−ci. La Grande−Bretagne et plus précisément ses tribunaux ont appliqué cette théorie avec plus de rigueur que les autres États; voir l'arrêt *Libman c. La Reine*, [1985] 2 R.C.S. 178, lequel traite de cette question en matière criminelle. La règle anglaise a été inconsidérément adoptée par nos tribunaux, même pour des jugements rendus dans d'autres provinces du pays.

Les États modernes ne peuvent cependant pas vivre dans l'isolement le plus complet et ils appliquent effectivement les jugements rendus dans d'autres pays dans certaines circonstances. Ainsi les tribunaux d'un État reconnaissent un jugement *in rem*, tel un jugement de divorce rendu par les tribunaux d'un autre État en faveur d'une personne qui y habite. De même, dans certaines circonstances, nos tribunaux exécutent des jugements sur une action personnelle rendus par d'autres États. Ainsi, nous avons vu que nos tribunaux appliquent un jugement pour violation de contrat rendu par le tribunal d'un autre pays si le défendeur s'y trouvait lorsque l'action a été intentée ou si le défendeur a accepté de se soumettre à la compétence du tribunal étranger. Cela a été jugé conforme aux exigences de la courtoisie, qui constitue le principe de fond du droit international privé et qu'on a définie comme la déférence et le respect que des États doivent avoir pour les actes qu'un autre État a légitimement accomplis sur son territoire. Puisque l'État dans lequel le jugement a été rendu avait compétence sur les parties au litige, il y a lieu de respecter les jugements de ses tribunaux.

Cependant, un État n'a pas d'obligation d'exécuter les jugements qu'il considère hors de la

compétence du tribunal étranger. En particulier, les tribunaux anglais ont refusé d'exécuter les jugements en matière contractuelle d'où qu'ils proviennent, si le défendeur n'était pas dans le ressort du tribunal étranger à l'époque de l'action ou s'il ne s'est pas soumis à la compétence du tribunal. Il en était ainsi, nous l'avons vu, même des actions qui pouvaient très légitimement être jugées dans le ressort étranger, comme le cas en l'espèce où l'obligation personnelle souscrite dans le pays étranger concernait un bien−fonds qui y était situé. Même au XIX^{e} siècle, cette solution soulevait une difficulté qui, selon moi, découle d'une méprise quant à la nature véritable de la notion de courtoisie, qui ne consiste pas seulement à respecter les volontés d'un État souverain étranger, mais à tenir compte de la commodité, même de la nécessité, d'adopter une théorie de ce genre dans un monde où le pouvoir juridique est partagé entre plusieurs États souverains.

Quant à moi, je préfère de beaucoup la formulation plus complète de la notion de courtoisie adoptée par le Cour suprême des États−Unis dans l'arrêt *Hilton v. Guyot*, 159 U.S. 113 (1895), aux pp. 163 et 164, dans le passage suivant que cite le juge Estey dans *Spencer c. La Reine*, [1985] 2 R.C.S 278, à la p. 283:

> ON] La "courtoisie" au sens juridique n'est ni une question d'obligation absolue d'une part ni de simple politesse et de bonne volonté de l'autre. Mais c'est la reconnaissance qu'une nation accorde sur son territoire aux actes législatifs, exécutifs ou judiciaires d'une autre nation, compte tenu à la fois des obligations et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de ses lois . . .

Comme le juge Dickson l'a dit, dans l'arrêt *Zingre c. La Reine*, [1981] 2 R.C.S. 392, à la p. 401, en citant le juge en chef Marshall dans l'arrêt *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), "l'intérêt commun incite les souverains aux relations mutuelles" entre États souverains. En un mot, les règles du droit international privé sont fondées sur la nécessité qu'impose l'époque moderne de faciliter la circulation ordonnée et équitable des richesses, des techniques et des personnes d'un pays à l'autre. Von Mehren et Trautman font remarquer dans "Recognition of Foreign Adjudications: A Survey and A Suggested Approach" (1968), 81 *Harv. L. Rev.* 1601, à la p. 1603 que [TRADUCTION] "La justification ultime d'accorder une certaine mesure de reconnaissance tient à ce que, dans notre monde extrêmement complexe et intimement lié, si on laissait chaque société épuiser toutes les possibilités de faire valoir ses intérêts purement locaux, il en résulterait des injustices et une perturbation des modes de vie normaux".

Yntema (qui parlait plutôt alors du choix du droit) a saisi l'esprit dans lequel il faut aborder le droit international privé quand il dit: [TRADUCTION] "Dans une économie mondiale hautement intégrée, organisée politiquement selon divers systèmes juridiques plus ou moins autonomes, le rôle des règles du droit international privé est de choisir, d'interpréter et d'appliquer dans chaque cas le droit interne particulier le plus susceptible de promouvoir des conditions propices au commerce international ou, en d'autres mots, de servir d'intermédiaire entre les questions que soulève l'application des droits internes à ce commerce"; voir Hessel E. Yntema, "The Objectives of Private International Law" (1957), 35 *R. du B. can.* 721, à la p. 741. Comme le démontre tout son article, ce sont les principes d'ordre et d'équité, des principes qui assurent à la fois la justice et la sûreté des opérations qui doivent servir de fondement à un système moderne de droit international privé.

Cette formulation indique que le sens de la courtoisie doit s'ajuster aux changements de l'ordre mondial. La règle adoptée par les tribunaux anglais au XIX^{e} siècle pouvait bien convenir à la situation de la Grande−Bretagne à cette époque. On imagine facilement les difficultés que pouvait éprouver un défendeur demeurant en Grande−Bretagne à contester une action engagée à l'autre bout du monde dans les conditions de déplacement et de communication qui prévalaient alors. L'arrêt *Symon*, précité, dans lequel l'action avait été intentée en Australie−Occidentale fournit un bon exemple. Il va sans dire que cette méthode exige de faire abstraction des difficultés que le demandeur pouvait avoir à intenter une action contre un défendeur qui était allé habiter dans un pays lointain. Il se peut toutefois que les tribunaux anglais n'aient pas perçu cette difficulté comme trop grave à une époque où c'était surtout des Anglais qui exploitaient des entreprises dans des pays lointains. De même, il y avait une crainte exagérée au sujet de la qualité de justice qui pourrait être dispensée aux Britanniques résidant à l'étranger; voir lord Reid dans l'arrêt *The Atlantic Star*, [1973] 2 All E.R. 175 (H.L.), à la p. 181.

Le monde a évolué depuis que les règles précitées ont été formulées dans l'Angleterre du XIX^{e} siècle. Les moyens modernes de déplacement et de communication font ressortir le caractère purement local d'un bon nombre de ces préoccupations du XIX^{e} siècle. Le monde des affaires fonctionne dans une économie mondiale et on parle à juste titre de communauté internationale même si le pouvoir politique et juridique est décentralisé. Il est maintenant devenu impérieux de faciliter la circulation des richesses, des techniques et des personnes d'un pays à l'autre. Dans ces circonstances, il apparaît opportun de réexaminer nos règles relatives à la reconnaissance et à l'exécution des jugements étrangers. D'autres pays, notamment les États−Unis et les pays membres de la Communauté économique européenne ont certainement adopté des règles plus généreuses relativement à la reconnaissance et à l'exécution des jugements étrangers pour le plus grand bien des justiciables.

Quoi qu'il en soit, il n'y a pas vraiment de comparaison possible entre les relations interprovinciales actuelles et celles qui s'appliquaient aux pays étrangers au XIX^{e} siècle. Quant à cela, j'estime qu'il n'y en a jamais eu et les tribunaux ont eu grandement tort de transposer les règles conçues pour l'exécution des jugements étrangers à l'exécution des jugement des autres provinces du pays. Les considérations qui sous-tendent les règles de la courtoisie s'appliquent avec beaucoup plus de force entre les éléments d'un État fédéral et je ne crois pas qu'il importe qu'on les qualifie de règles de courtoisie ou qu'on ne fasse qu'appel directement aux motifs de justice, de nécessité et de commodité dont j'ai déjà parlé. Quelle que soit la terminologie utilisée, nos tribunaux n'ont pas hésité à coopérer avec les tribunaux des autres provinces lorsque cela était nécessaire pour les fins de la justice: voir *Re Wismer and Javelin International Ltd.* (1982), 136 D.L.R. (3d) 647 (H.C. Ont.), aux pp. 654 et 655; *Re Mulroney and Coates* (1986), 27 D.L.R. (4th) 118 (H.C. Ont.), aux pp. 128 et 129; *Touche Ross Ltd v. Sorrel Resources Ltd.* (1987), 11 B.C.L.R. (2d) 184 (C.S.), à la p. 189; *Roglass Consultants Inc. v. Kennedy, Lock* (1984), 65 B.C.L.R. 393 (C.A.), à la p. 394.

De toute façon, les règles anglaises me semblent absolument contraires à l'intention manifeste de la Constitution d'établir un seul et même pays. Cela présuppose un objectif fondamental de stabilité et d'unité où de nombreux aspects de la vie ne sont pas confinés à un seul ressort. La citoyenneté commune assure aux Canadiens la mobilité d'une province à l'autre, ce qui est aujourd'hui renforcé par l'art. 6 de la *Charte*; voir l'arrêt *Black c. Law Society of Alberta*, [1989] 1 R.C.S. 591. Plus précisément, d'importantes mesures ont été prises pour favoriser l'intégration

économique. L'un des principaux éléments des arrangements constitutionnels incorporés dans la *Loi constitutionnelle de 1867* était la création d'un marché commun. L'article 121 a écarté les obstacles aux échanges interprovinciaux. Dans l'ensemble, les échanges et le commerce interprovinciaux étaient considérés comme un sujet qui intéressait le pays dans son ensemble; voir le par. 91(2) de la *Loi constitutionnelle de 1867*. La disposition relative à la paix, à l'ordre et au bon gouvernement confère au Parlement fédéral la compétence sur les activités interprovinciales (voir *Interprovincial Co−Operatives Ltd. c. La Reine*, [1976] 1 R.C.S. 477, et aussi mes motifs de jugement dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401 (où j'étais dissident, mais sur un autre point); voir aussi *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161). Et il en est de même pour les entreprises et ouvrages interprovinciaux en raison de l'effet conjugué des par. 91(29) et 92(10).

Ces arrangements mêmes répondent à la nécessité impérieuse de pouvoir faire exécuter partout au pays les jugements obtenus dans une province. Mais ce n'est pas tout. Le système judiciaire canadien est organisé de telle manière que toute crainte de différence de qualité de justice d'une province à l'autre ne saurait être vraiment fondée. Tous les juges de cour supérieure −− qui ont également un pouvoir de contrôle sur tous les tribunaux judiciaires et administratifs provinciaux −− sont nommés et rémunérés par les autorités fédérales. De plus, toutes les cours de justice sont sujettes à l'examen en dernier ressort de leurs décisions par la Cour suprême du Canada qui peut décider si les cours d'une province ont à bon droit exercé leur compétence dans une action et dans des circonstances où les cours d'une autre province devraient reconnaître ces jugements. Tout risque d'inéquité procédurale est aussi écarté par d'autres facteurs non constitutionnels, comme par exemple, le fait que les avocats canadiens observent tous le même code de déontologie partout au Canada. En fait, depuis l'arrêt *Black c. Law Society of Alberta*, précité, nous avons constaté une prolifération de cabinets d'avocats interprovinciaux.

Ces divers arrangements et pratiques constitutionnels et non constitutionnels rendent inutile une clause de [TRADUCTION] "reconnaissance totale" comme il en existe dans d'autres fédérations comme les États−Unis et l'Australie. L'existence de telles clauses indique cependant qu'un régime de reconnaissance mutuelle des jugements à la grandeur du pays est inhérent à une fédération. En effet, la Communauté économique européenne a conclu qu'une telle caractéristique découle naturellement d'un marché commun, même sans intégration politique. À cette fin, les États membres ont conclu en 1968 la Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale.

Le caractère unificateur de nos arrangements constitutionnels, pour autant que ceux−ci visent la mobilité interprovinciale, fait en sorte que certains auteurs ont affirmé que la Constitution comporte implicitement une clause de "reconnaissance totale" et que le Parlement fédéral a, en vertu de la disposition relative à "la paix, [à] l'ordre et [. . . au] bon gouvernement", compétence pour légiférer en matière de reconnaissance et d'exécution des jugements partout au Canada; voir, par exemple, Black, *loc. cit.*, et Hogg, *op. cit.* L'affaire n'a cependant pas été plaidée selon ce fondement et je n'ai pas besoin d'aller aussi loin. Pour les fins des présentes, il suffit d'affirmer que, selon moi, l'application des principes sous−jacents de la courtoisie et du droit international privé doit être adaptée à la situation en présence et que, dans une fédération, il en résulte une reconnaissance plus complète et généreuse des jugements des tribunaux des autres entités constitutives de la fédération. En bref, les règles de la courtoisie et du droit international privé doivent, dans leur application entre les provinces, respecter la structure fédérale de la Constitution.

Notre Cour a, dans d'autres domaines du droit touchant l'extra−territorialité, reconnu la nécessité d'adapter la loi aux exigences d'une fédération. Ainsi, dans l'arrêt *Aetna Financial Services Ltd. c. Feigelman*, précité, notre Cour a annulé une ordonnance judiciaire, une injonction *Mareva*, rendue contre une société à charte fédérale, ayant son siège social à Montréal et des bureaux à Toronto, qui lui interdisait de transférer certains biens situés au Manitoba à l'un de ses bureaux hors de cette dernière province. Dans cet arrêt, notre Cour a clairement indiqué ce qui distinguait cette affaire des affaires anglaises où on avait voulu empêcher le transfert de biens dans d'autres pays. Le juge Estey dit, aux pp. 34 et 35:

> considérations qui précèdent, bien qu'importantes pour comprendre le fonctionnement de ce genre d'injonction, laissent sans réponse la question fondamentale sous−jacente: les principes dégagés par les tribunaux anglais restent−ils intacts une fois transplantés de cet État unitaire dans l'État fédéral qu'est le Canada? La question, dans sa forme la plus simple, se pose dans les principes énoncés au cours des premières affaires *Mareva* où le préjudice qu'on voulait prévenir était le transfert, hors du "ressort", des biens de l'intimée en vue de faire échouer la réclamation d'un créancier. Les tribunaux d'instance inférieure n'ont constaté aucun méfait de ce genre en l'espèce. Il faut donc répondre à une première question, savoir, qu'entend−on par "ressort" dans un contexte fédéral? Cela signifie tout au moins le ressort du tribunal manitobain. Mais le simple transfert de biens hors de la province du Manitoba suffit−il? L'appelante est une compagnie à charte fédérale qui a le pouvoir de faire affaire partout au Canada. Ce faisant, elle fait circuler ses biens entre les provinces du Manitoba, du Québec et de l'Ontario. L'intimée ne soutient pas qu'il y a eu infraction à la loi. Aucune fin irrégulière n'a été mentionnée. Il s'agit simplement d'un conflit entre des droits: le droit des intimés de préserver leur situation aux termes de tout jugement qui pourrait être rendu ultérieurement et celui de l'appelante, comme personne morale, d'exercer sa capacité, indubitable en vertu de sa charte fédérale (et dont la constitutionnalité n'est pas contestée) de faire affaire partout au Canada. L'appelante ne cherche pas à sortir les biens en question du ressort national où son existence comme personne morale est assurée. Le bref de la cour manitobaine dure jusqu'au jugement et est fondé sur la signification de l'acte introductif d'instance à l'appelante au Manitoba, en Ontario en vertu de la législation provinciale en matière de réciprocité, et au Québec en raison des lois précitées de cette province. Aucune de ces considérations essentielles n'étaient présentes au Royaume−Uni lorsque l'injonction *Mareva* a été conçue pour parer les déprédations de marins véreux opérant à partir de refuges lointains et habituellement à la limite du commerce légalement organisé. Dans le système fédéral canadien, l'appelante n'est ni étrangère ni même non−résidente au sens ordinaire de ce terme. Elle peut "résider" partout au Canada et elle l'a fait au Manitoba. Elle peut être assujettie à l'exécution d'un jugement manitobain partout au Canada. Il n'y a aucun transfert clandestin de biens en vue d'échapper aux voies de droit des tribunaux manitobains. Il n'y a aucune preuve que cette entité à charte fédérale ait organisé ses affaires de façon à frauder ses créanciers manitobains. La terminologie et les éléments que sous−tend l'injonction *Mareva* doivent être examinés en fonction du contexte fédéral. D'une certaine manière, le "ressort" s'étend jusqu'aux frontières nationales ou, en tout cas, au delà des frontières du Manitoba. Pour d'autres fins, il ne fait pas de doute que le ressort peut

l'endroit où peut être exécuté le bref des tribunaux manitobains. [Je souligne.]

À mon avis, il y aurait lieu d'adopter la même attitude à l'égard de la reconnaissance et de l'exécution des jugements à l'intérieur du Canada. Selon moi, les tribunaux d'une province devraient reconnaître totalement, selon l'expression employée dans la Constitution américaine, les jugements rendus par un tribunal d'une autre province ou d'un territoire, pourvu que ce tribunal ait correctement et convenablement exercé sa compétence dans l'action. J'ai déjà parlé des principes d'ordre et d'équité qui devraient s'appliquer à cette branche du droit. L'ordre et la justice militent tous les deux en faveur de la sécurité des opérations. Il semble anarchique et injuste qu'une personne puisse se soustraire à des obligations juridiques qui ont pris naissance dans une province simplement en déménageant dans une autre province. Pourquoi un demandeur devrait−il être tenu d'intenter une action dans la province où le défendeur réside présentement, quels que soient les inconvénients et le coût que cela puisse entraîner et quelle que soit la mesure dans laquelle l'opération pertinente peut avoir un lien avec l'autre province? Et pourquoi la possibilité de faire exécuter le jugement dans le ressort devrait−elle être l'élément déterminant du choix du tribunal par le demandeur?

Il faut cependant soupeser ces préoccupations en fonction de l'équité envers le défendeur. J'ai signalé qu'il faut considérer comme corrélatifs l'exercice de compétence par un tribunal dans une province et la reconnaissance de celle−ci dans une autre province et j'ai ajouté que la reconnaissance dans les autres provinces devrait dépendre de ce que le tribunal qui a rendu jugement a "correctement" ou "convenablement" exercé sa compétence. Pareille solution peut satisfaire aux exigences de l'ordre et de l'équité de reconnaître un jugement rendu dans un ressort qui avait le plus de liens avec l'objet de l'action ou qui avait, à tout le moins, des liens substantiels avec lui. Mais cela n'est guère conforme aux principes d'ordre et d'équité que de permettre à quelqu'un d'intenter l'action dans un ressort sans tenir compte du lien que ce ressort peut avoir avec le défendeur ou l'objet de l'action; voir Joost Blom, "Conflict of Laws −− Enforcement of Extraprovincial Default Judgment −− Reciprocity of Jurisdiction: *Morguard Investments Ltd.* v. *De Savoye*" (1989), 68 *R. du B. can.* 359, à la p. 360. Donc, l'équité envers le défendeur exige que le jugement soit rendu par un tribunal qui agit avec équité et avec retenue dans l'exercice de sa compétence.

Comme je l'ai déjà mentionné, l'équité de la procédure n'est pas en cause à l'intérieur de la fédération canadienne. La question qui reste alors à résoudre est de savoir quand un tribunal a−t−il exercé convenablement sa compétence pour les fins de la reconnaissance du jugement par un tribunal d'une autre province? Cela ne soulève pas de difficulté lorsque le tribunal a agi en vertu des motifs traditionnellement acceptés par les tribunaux comme autorisant la reconnaissance et l'exécution des jugements étrangers −− dans le cas d'un jugement *in personam* lorsque le défendeur résidait dans le ressort au moment de l'action ou lorsque le défendeur s'est soumis à son jugement soit par convention soit en reconnaissant la compétence du tribunal. Dans le premier cas, le tribunal avait compétence sur la personne et, dans le second cas, il l'a eue en vertu de la convention. Il n'en résulte pas d'injustice.

La difficulté survient, cela va de soi, quand, comme en l'espèce, le défendeur réside hors du ressort du tribunal et quand il a reçu signification des procédures hors du ressort. Dans quelle

mesure un tribunal d'une province peut−il convenablement exercer sa compétence sur un défendeur demeurant dans une autre province? Les règles relatives à la signification hors du ressort ont une portée large dans toutes les provinces, portée qui est même très large dans certaines provinces comme la Nouvelle−Écosse et l'{uIc}le−du−Prince−Édouard. Il est cependant manifeste que, si l'on veut que les tribunaux d'une province appliquent les jugements rendus dans une autre province, il doit y avoir certaines limites à l'exercice de la compétence à l'égard des personnes qui n'habitent pas la province.

Il ressortira de la manière dont j'aborde le problème que, selon moi, la "méthode de la réciprocité" n'apporte pas de solution à la difficulté soulevée par les jugements *in personam* rendus dans d'autres provinces, quelle que soit son utilité sur le plan international. Même là, je me sens plus à l'aise avec la solution adoptée par la Chambre des lords dans l'arrêt *Indyka v. Indyka*, précité, dans lequel la question soulevée, dans une affaire matrimoniale, était de savoir s'il y avait un lien réel et substantiel entre le requérant et le pays ou le territoire exerçant sa compétence. Je dois signaler cependant que, dans une affaire mettant en cause l'état matrimonial, l'objet de l'action et le demandeur sont manifestement au même endroit. Ce n'est pas forcément vrai pour une action personnelle dans laquelle il peut être nécessaire de chercher un lien entre l'objet de l'action et le ressort où l'action est intentée.

Même s'il y est question d'une action délictuelle, l'arrêt de notre Cour *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393, est intéressant quant à la manière dont un tribunal peut convenablement exercer sa compétence également dans des actions en matière contractuelle. Dans cette affaire, un électricien a été mortellement blessé en Saskatchewan en retirant une ampoule électrique grillée fabriquée en Ontario par une société qui ne faisait pas affaires et qui n'avait pas de biens en Saskatchewan. La société vendait tous ses produits à des concessionnaires et aucun à des consommateurs. Elle n'avait aucun vendeur ni aucun représentant en Saskatchewan. La veuve de l'électricien et ses enfants ont intenté contre la société une action en vertu de *The Fatal Accidents Act* de la Saskatchewan alléguant que la société avait fait preuve de négligence en fabriquant l'ampoule et en omettant d'appliquer un système de sécurité qui aurait empêché les ampoules dangereuses de sortir de l'usine et d'être vendues ou utilisées. Dans une requête entendue en son cabinet, le juge de première instance a statué que tout acte de négligence qui pouvait avoir été commis s'était produit en Ontario et qu'en conséquence le délit civil avait été commis hors de la Saskatchewan. Cependant, en vertu d'une disposition de *The Queen's Bench Act*, il a accordé une autorisation spéciale d'intenter l'action en Saskatchewan et il a rendu une ordonnance autorisant la signification en Ontario de la déclaration et d'un bref d'assignation. La société commerciale a interjeté appel avec succès devant la Cour d'appel de la Saskatchewan, mais notre Cour a infirmé l'arrêt de la Cour d'appel.

Les motifs du jugement ont été rédigés par le juge Dickson. Ce dernier signale que le situs d'un délit civil soulève une difficulté. Normalement, fait−il observer, une action pour délit civil est intentée là où se trouve le défendeur, du fait que le tribunal a une capacité matérielle d'exécution à l'égard de celui−ci. Mais il ajoute que l'action peut aussi être intentée à l'endroit où le délit civil a été commis. Il n'est cependant pas facile de déterminer où le délit civil a été commis. Selon une théorie, le délit est situé à l'endroit où l'acte dommageable a eu lieu (dans ce cas−là, l'Ontario). Une autre théorie veut que ce soit l'endroit où le préjudice a été causé. Mais, comme le juge Dickson le dit, à la p. 398:

> t, il semble que s'il faut diviser un délit civil et qu'une partie se soit produite dans l'État A et une autre dans l'État B, le délit civil peut raisonnablement être considéré, aux fins de la compétence, comme s'étant produit dans les deux États ou, suivant une approche plus restrictive, dans ni l'un ni l'autre. Il est difficile de comprendre comment on peut à bon droit considérer qu'il s'est produit seulement dans l'État A.

En fin de compte, il a rejeté l'application de toute règle rigide ou mécanique pour déterminer le situs d'un délit civil. Il a plutôt adopté "un critère qualitatif et quantitatif plus flexible" en se demandant, comme on l'avait fait dans les arrêts anglais qu'il cite, s'il était [TRADUCTION] "intrinsèquement raisonnable" d'intenter l'action dans un ressort particulier ou s'il y avait, pour reprendre une autre expression, [TRADUCTION] "un lien réel et substantiel" entre le ressort et l'acte dommageable. Le juge Dickson résume son avis de la façon suivante, aux pp. 408 et 409:

> ent parlant, pour déterminer où un délit civil a été commis, il n'est pas nécessaire, ni sage, d'avoir recours à un ensemble de règles arbitraires. Les théories du lieu de l'acte et du lieu du préjudice sont trop arbitraires et rigides pour être reconnues par la jurisprudence contemporaine. Dans l'arrêt *Distillers*, et également dans l'arrêt *Cordova*, on a fait allusion au rapport réel et substantiel. Cheshire, 8e éd., 1970, p. 281, a proposé un critère très semblable à ça; l'auteur dit qu'il conviendrait à la rigueur de considérer un délit civil comme étant survenu dans tout pays qui a été substantiellement touché par les activités du défendeur ou par ses conséquences et dont la loi, vraisemblablement, a été raisonnablement envisagée par les parties. Appliquant ce critère à une affaire de fabrication non diligente, la règle suivante peut être formulée: lorsqu'un défendeur étranger a fabriqué de façon non diligente, dans un ressort étranger, un produit qui est entré par les voies normales du commerce, et qu'il savait ou devait savoir, à la fois, qu'un consommateur pouvait fort bien subir un dommage par suite de ce manque de diligence et qu'il était raisonnablement prévisible que le produit serait utilisé ou consommé à l'endroit où le demandeur l'a effectivement utilisé ou consommé, alors le *forum* dans lequel le demandeur subit des dommages a le droit d'exercer ses pouvoirs judiciaires sur ce défendeur étranger. Cette règle reconnaît le grand intérêt qu'un État porte aux blessures subies par ceux qui se trouvent sur son territoire. Elle reconnaît que considérer la négligence comme un délit civil, c'est vouloir assurer une protection contre le préjudice infligé par manque de diligence, et donc que l'élément prédominant est le dommage subi. En mettant ses produits sur le marché directement ou par l'intermédiaire des voies normales de distribution, un fabricant doit être prêt à les défendre partout où ils causent un préjudice, à condition que le *forum* devant lequel il est convoqué en est un qu'il aurait dû raisonnablement envisager lorsqu'il a mis ainsi ses produits sur le marché. Ceci s'applique particulièrement aux produits défectueux placés dans le commerce interprovincial. [Je souligne.]

Avant de continuer, je veux faire remarquer que si notre Cour estime qu'il est intrinsèquement raisonnable qu'un tribunal exerce sa compétence dans des circonstances semblables à celles décrites, il serait vraiment étrange qu'elle ne trouve pas également raisonnable que les tribunaux d'une autre province reconnaissent et appliquent le jugement du premier tribunal. Cela ressort nettement du fait que, dans l'arrêt *Moran*, le juge Dickson a fait découler le caractère raisonnable de sa méthode des "voies normales de distribution" des marchandises et, plus précisément, du

"commerce interprovincial". Si, comme je l'ai dit, il est raisonnable de justifier l'exercice de la compétence dans une province, il semblerait également raisonnable que le jugement soit reconnu dans les autres provinces. L'affirmation du juge Dickson dans l'arrêt *Zingre*, déjà citée, selon laquelle la courtoisie repose sur l'intérêt commun des deux ressorts, celui qui a rendu le jugement et celui qui le reconnaît, étaye cette solution. En réalité, il y va de l'intérêt de l'ensemble du pays et la Constitution elle−même reconnaît cet intérêt.

Le raisonnement qui précède ne se limite pas, selon moi, aux délits civils. Il est intéressant de remarquer la grande ressemblance entre le raisonnement de l'arrêt *Moran* et celui que notre Cour a adopté au sujet de la compétence en matière criminelle; voir l'arrêt *Libman*, précité. En particulier, sauf convention contraire expresse ou tacite, le raisonnement de l'arrêt *Moran* s'applique manifestement aux contrats; en réalité, le même acte peut souvent donner naissance à une action pour inexécution d'un contrat et à une action pour négligence; voir *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147. Ainsi que le professeur Sharpe le fait remarquer, dans *Interprovincial Product Liability Litigation*, *op. cit.*, aux pp. 19 et 20:

> ON] Il est illogique, d'une part, de conférer compétence au tribunal dans une action pour délit civil parce que le défendeur aurait dû raisonnablement prévoir que ses marchandises parviendraient au demandeur et lui causeraient un préjudice dans le ressort dudit tribunal et, d'autre part, de refuser la signification hors du ressort dans des actions en matière contractuelle lorsque le défendeur savait certainement que ses marchandises seraient expédiées dans le ressort étranger.

Pour ce qui est de l'espèce, il est difficile d'imaginer un endroit plus raisonnable que l'Alberta pour intenter l'action sur solde de créance. Comme je l'ai déjà indiqué, les biens−fonds étaient situés en Alberta et les contrats y ont été conclus par des parties qui résidaient l'une et l'autre dans cette province. De plus, l'action sur solde de créance fait suite aux procédures de forclusion, qui devaient manifestement avoir lieu en Alberta, et l'action sur solde de créance devrait être jointe aux procédures de forclusion à la manière d'une ordonnance de type Rice. On peut difficilement imaginer un lien plus "réel et substantiel" entre le préjudice subi et le ressort. À mon avis, le tribunal de l'Alberta avait compétence et son jugement devrait être reconnu et exécuté en Colombie−Britannique.

Je me rends naturellement compte que la possibilité d'être poursuivi hors de sa province de résidence comporte des risques pour un défendeur. Cependant, la chose peut déjà se produire à l'égard des actions *in rem*. De toute façon, il faut évaluer cet aspect en regard du fait qu'en vertu des règles anglaises, le demandeur risque souvent d'avoir à poursuivre son débiteur dans une autre province, quelle que soit la justice, l'efficacité ou la commodité qu'il puisse y avoir d'intenter l'action à l'endroit où le contrat a été formé ou à l'endroit où le préjudice est survenu. Il me semble qu'en adoptant la méthode qui permet de poursuivre à l'endroit qui a un lien réel et substantiel avec l'action, on établit un équilibre raisonnable entre les droits des parties. Cela fournit une certaine protection contre le danger d'être poursuivi dans des ressorts qui n'ont que peu ou pas de lien avec l'opération ou les parties. Dans un monde où les objets les plus courants qu'on achète ou qu'on vend viennent d'ailleurs ou sont fabriqués ailleurs et où des gens déménagent constamment d'une province à l'autre, il est tout bonnement anachronique de s'en tenir à une "théorie de la capacité d'exécution" ou à un seul situs des délits civils on des contrats pour l'exercice convenable de compétence.

La limitation "à la province" de la compétence constitutionnelle de légiférer étaye la règle de droit international privé qui exige l'existence d'un lien substantiel avec le ressort où l'acte s'est produit. Ainsi que le juge Guérin l'a fait observer dans l'arrêt *Dupont c. Taronga Holdings Ltd.*, [1987] R.J.Q. 124 (C.S.), à la p. 127: "Dans les cas de signification hors de la province émettrice, la signification *ex-juris* doit être confrontée aux règles constitutionnelles". La limitation à la province exige certainement un lien minimal avec la province et il existe des sources qui appuient la proposition que le rapport exigé par la Constitution pour les fins de la territorialité est le même que celui qu'exige la règle de droit international privé entre les provinces du pays. C'est là l'avis exprimé par le juge Guérin dans l'arrêt *Taronga,* quand, à la p. 128, il cite le professeur Hogg, *op. cit.*, à la p. 278:

> ION] Dans l'arrêt *Moran c. Pyle*, le juge Dickson souligne que la "seule question" en litige était de savoir si les règles de la Saskatchewan relatives à la compétence fondée sur la signification *ex juris* avaient été respectées. Il n'a pas examiné s'il y avait des restrictions constitutionnelles à la compétence que l'assemblée législative de la Saskatchewan pouvait conférer aux tribunaux de cette province. Cependant, la règle qu'il a énoncée pourrait bien servir de formulation des limites constitutionnelles de la compétence d'un tribunal provincial sur les défendeurs résidant hors de la province, puisqu'elle exige qu'il y ait, entre le défendeur et le tribunal de la province, un lien qui soit substantiel et qui permette de conclure raisonnablement que le défendeur a volontairement assumé le risque d'être poursuivi devant les tribunaux de cette province.

Je dois admettre que je trouve cette façon de voir intéressante, mais comme je l'ai déjà mentionné, l'affaire n'a pas été plaidée sur le plan constitutionnel et il n'est pas nécessaire de nous prononcer de façon définitive sur ce sujet. Dans un autre passage que le juge Guérin cite (à la p. 128), le professeur Hogg (aux pp. 278 et 279) fait remarquer que cela ressemble à la position adoptée aux États-Unis en vertu de la disposition relative à l'application régulière de la loi de la Constitution des États-Unis; voir *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Il n'est pas nécessaire non plus de déterminer si l'équivalent canadien de la disposition relative à l'application régulière de la loi, c'est-à-dire l'art. 7 de la *Charte*, pourrait, dans certaines circonstances au moins, jouer un rôle même si cet article n'est pas expressément applicable aux biens.

Il existe aussi d'autres techniques discrétionnaires auxquelles les tribunaux ont eu recours pour refuser d'exercer leur compétence à l'égard de demandeurs qui n'avaient qu'un lien ténu avec le ressort, ou dans des situations où permettre les procédures aurait créé une injustice. Parmi ces techniques, il y a la théorie du *forum non conveniens* et le pouvoir du tribunal d'empêcher le recours abusif à ses procédures; on trouvera une étude récente de ce sujet dans Elizabeth Edinger, "Discretion in the Assumption and Exercise of Jurisdiction in British Columbia" (1982), 16 *U.B.C. L. Rev.* 1.

Il peut aussi y avoir des réparations que le tribunal à qui la reconnaissance d'un jugement est demandée peut accorder à un défendeur dans certaines circonstances, comme lorsqu'il y a fraude ou conflit avec le droit ou l'intérêt public du ressort où la reconnaissance du jugement est

demandée. Là encore, il peut y avoir possibilité d'application de l'art. 7 de la *Charte*. Cependant, aucune de ces questions n'est pertinente aux faits de l'espèce et je ne les ai pas examinées.

Pertinence des dispositions législatives sur l'exécution réciproque des jugements

Je traiterai enfin d'un moyen à peine invoqué par l'appelant, savoir que l'assemblée législative de la Colombie−Britannique, comme celles d'autres provinces, paraît avoir entériné les règles énoncées dans l'arrêt *Symon*, précité, dans la *Court Order Enforcement Act*, R.S.B.C. 1979, ch. 75, et qu'il est donc impossible d'invoquer d'autres motifs que ceux qui y sont mentionnés. Plus précisément, l'avocat a mentionné le par. 31(6), plus particulièrement l'al. 31(6)b) de cette loi. Le paragraphe 31(6) est ainsi conçu:

> ˙ION]
>
> ›rdonnance d'inscription ne sera rendue si le tribunal auquel la demande d'inscription est présentée est convaincu que
>
> n vertu des règles de droit international privé applicables au tribunal auquel la demande est faite; ou
>
> . . .
>
> jugement, qui ne fait pas affaires et ne réside pas ordinairement dans le ressort du premier tribunal, n'a pas volontairement comparu ni ne s'est, par ailleurs, soumis à la compétence du tribunal pendant les procédures;

On peut répondre brièvement à ce moyen. Les lois sur l'exécution réciproque des jugements des différentes provinces n'ont jamais visé à modifier les règles du droit international privé. Elles permettent simplement l'inscription des jugements comme procédure plus commode que la procédure antérieurement applicable, c'est−à−dire celle qui consistait à intenter une action en exécution d'un jugement rendu dans une autre province; voir *First City Capital Ltd. v. Winchester Computer Corp.*, [1987] 6 W.W.R. 212 (C.A. Sask.). Cela ressort clairement de l'art. 40 de la loi de la Colombie−Britannique qui prévoit que rien dans la Loi n'empêche un créancier, en vertu d'un jugement, d'intenter une action en exécution d'un jugement. Il n'y a rien alors qui empêche un demandeur d'intenter pareille action et de se prévaloir ainsi des règles du droit international privé telles qu'elles peuvent évoluer avec le temps.

Dispositif

Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant: Croft & Bjurman, North Vancouver.

Procureurs des intimées: Lawrence & Shaw, Vancouver.

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* Juge en chef à la date de l'audition.

EXHIBIT 39

Judgments of the Supreme Court of Canada

Citation:Beals v. Saldanha, 2003 SCC 72, [2003] 3 S.C.R. 416
Date:December 18, 2003
Docket: 28829
Other formats: PDF WPD
Printer Friendly

Beals *v.* Saldanha, [2003] 3 S.C.R. 416, 2003 SCC 72

Geoffrey Saldanha, Leueen Saldanha and Dominic Thivy *Appellants*

v.

Frederick H. Beals III and Patricia A. Beals *Respondents*

Indexed as: Beals *v.* Saldanha

Neutral citation: 2003 SCC 72.

File No.: 28829.

2003: February 20; 2003: December 18.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

Conflict of laws — Foreign judgments — Enforcement — Action brought in Florida

court over sale of Florida land valued at US$8,000 — Florida court entering default judgment against defendants resident in Ontario — Jury subsequently awarding US$210,000 in compensatory damages and US$50,000 in punitive damages — Defendants not properly defending action according to Florida law and not moving to have default judgment set aside or appealing jury award for damages — Whether "real and substantial connection" test for enforcing interprovincial judgments should be extended to foreign judgments — Whether defence of fraud, public policy or natural justice established so that foreign judgment should not be enforced by Canadian courts — Whether enforcing foreign judgment constitutes violation of s. 7 of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Fundamental justice — Whether s. 7 of Canadian Charter of Rights and Freedoms can shield a Canadian defendant from enforcement of foreign judgment.

Judgments and orders — Foreign judgments — Enforcement — Rules relating to recognition and enforcement of foreign judgments by Canadian courts — Nature and scope of defences available to judgment debtor.

The appellants, residents of Ontario, sold a vacant lot situated in Florida to the respondents. A dispute arose as a result of that transaction and in 1986 the respondents sued the appellants and two other defendants in Florida. A defence was filed but the appellants chose not to defend any of the subsequent amendments to the action. Pursuant to Florida law, the failure to defend the amendments had the effect of not defending the action. The appellants were subsequently noted in default and were served with notice of a jury trial to establish damages. They did not respond to the notice nor did they attend the trial. The jury awarded the respondents US$210,000 in compensatory damages and US$50,000 in punitive damages. Upon receipt of the notice of the monetary judgment against them, the appellants sought legal advice. They were advised by an Ontario lawyer that the foreign judgment could not be enforced in Ontario. Relying on this advice, the appellants took no steps to have the judgment set aside or to appeal the judgment in Florida. The damages were not paid and an action was started in Ontario to enforce the Florida judgment. By the time of the hearing in 1998, the foreign judgment with interest had grown to approximately C$800,000. The trial judge dismissed the action for enforcement primarily on the ground that there had been fraud in relation to the assessment of damages. The Court of Appeal allowed the respondents' appeal.

Held (Iacobucci, Binnie and LeBel JJ. dissenting): The appeal should be dismissed. The judgment of the Florida court should be enforced.

Per McLachlin C.J. and Gonthier, Major, Bastarache, Arbour and Deschamps JJ.: International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. Subject to the legislatures adopting a different approach, the "real and substantial connection" test, which has until now only been applied to interprovincial judgments, should apply equally to the recognition and enforcement of foreign judgments. The test requires that a significant connection exist between the cause of action and the foreign court. Here, the "real and substantial connection" test is made out. The appellants entered into a property transaction in Florida when they bought and sold land. As such, there exists both a real and substantial connection between the Florida jurisdiction, the subject matter of the action and the defendants. Since the Florida court properly took jurisdiction, its judgment must be recognized and enforced by a domestic court provided that no defences bar its enforcement.

While fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment, the merits of a foreign judgment can be challenged for fraud only where the allegations are

new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment. The defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment. Here, the defence of fraud is not made out. The appellants have 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. 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.

The defence of natural justice is restricted to the form of the foreign procedure and to due process, and does not relate to the merits of the case. 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. In the circumstances of this case, the defence does not arise. The appellants failed to raise any reasonable apprehension of unfairness. They were fully informed about the Florida action, 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. Their failure to move to set aside or appeal the Florida judgment 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. That negligence cannot be a bar to the enforcement of the respondents' judgment.

The public policy defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice, and turns on whether a foreign law is contrary to our view of basic morality. The award of damages by the Florida jury does not violate our principles of morality such that enforcement of the monetary judgment would shock the conscience of the reasonable Canadian. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. 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.

Finally, the recognition and enforcement of the Florida judgment by a Canadian court would not constitute a violation of s. 7 of the *Canadian Charter of Rights and Freedoms*. Given that s. 7 does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, it should not shield a Canadian defendant from the enforcement of a foreign judgment.

Per Iacobucci and Binnie JJ. (dissenting): The "real and substantial connection" test provides an appropriate conceptual basis for the enforcement of final judgments obtained in foreign jurisdictions. While there is no doubt the Florida courts had jurisdiction over the dispute since the land was located in that jurisdiction, the question is whether the appellants in this proceeding were sufficiently informed of the case against them to allow them to determine, in a reasonable way, whether to participate in the Florida action, or to let it go by default. In this case, the appellants come within the traditional limits of the natural justice defence and the Ontario courts ought not to give effect to the Florida judgment.

The suggestion that the appellants are 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 cannot be accepted. The appellants decided not to defend the case set out against them in the complaint. That case was subsequently transformed. They never had the opportunity to put their minds to the transformed case because they were never told about it.

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.

Cumulatively, the events demonstrate an unfair procedure which in this particular case failed to meet the standards of natural justice. Nowhere was it brought to the appellants' attention that, under the Florida *Rules of Civil Procedure*, they were required to refile their defence every time the respondents amended their complaint against other defendants. In terms of procedural fairness, 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. A Canadian resident is not presumed to know the law of another jurisdiction. As the basis of the respondents' judgment is default of pleading, this lack of notification goes to the heart of the present appeal.

Furthermore, a party must be made aware of the potential jeopardy faced. The appellants received no notice of a 1987 court order striking out the claim for punitive damages against the other defendants — the realtor and the title insurers — on grounds applicable, had they known about it, to the appellants. They were also not told, after being noted in default and before the jury trial, that the respondents had made a deal with the realtor to delete claims against the realtor for treble damages, punitive damages and statutory violations (though these claims were continued on almost identical facts against the appellants). Subsequently, the respondents settled with the realtor and with the title insurers, leaving the appellants as the sole target at the damages trial. They were not told about this. Nor were the appellants served with the court order for mandatory mediation which provided that all parties were required to participate or, as required by the Florida rules, with notice of the experts the respondents proposed to call at the damages assessment. Lastly, the respondents' complaint did not indicate that they were claiming damages on behalf of corporations, whose names appeared nowhere in the pleadings, in which they had an interest, and that they would be seeking damages for a corporation's lost opportunity to build an undefined number of homes on land to which neither the respondents nor the corporation held title.

A judgment based on inadequate notice is violative of natural justice. A default judgment that rests on such an unfair foundation should not be enforced. The fact that the appellants did not appeal the Florida judgment or seek the indulgence of the Florida court to set the default judgment aside for "excusable neglect" is a relevant consideration, but is not necessarily fatal, and in this case does not justify the enforcement in Ontario of the flawed Florida default judgment.

Per LeBel J. (dissenting): The "real and substantial connection" test should be modified significantly when it is applied to judgments originating outside the Canadian federation. Specifically, the 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. The purposive, principled framework should not be confined, however, to the question of jurisdiction. The impeachment defences of 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.

The jurisdiction test itself should be applied so that the assumption of jurisdiction will not be recognized if it is unfair to the defendant. This requires taking into account the differences between the

international and interprovincial contexts. The integrated character of the Canadian federation makes a high degree of cooperation between the courts of the various provinces a practical necessity. It is also a constitutional imperative, inherent in the relationship between the units of our federal state, that each province must recognize the properly assumed jurisdiction of another, and conversely that no court in a province can intermeddle in matters that are without a constitutionally sufficient connection to that province. Comity as between sovereign nations is not an obligation in the same sense. It follows from the contextual and purpose-driven approach that the rules for recognition and enforcement of foreign-country judgments should be carefully fashioned to reflect the realities of the international context, and calibrated to further to the greatest degree possible, the ultimate objective of facilitating international interactions. However, this does not mean that they should be as liberal as the interprovincial rule. Ideally, the "real and substantial connection" test should represent a balance designed to create the optimum conditions favouring the flow of commodities and services across state lines. The connections required before foreign-country 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. 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.

While the test should ensure that, considering the totality of the connections between the forum and all aspects of the action, it is not unfair to expect the defendant to litigate in that forum, it does not follow that there necessarily has to be a connection between the defendant and the forum. There are situations where, given the other connections between the forum and the proceeding, it is a reasonable place for the action to be heard and the defendant can fairly be expected to go there even though he or she personally has no link at all to that jurisdiction. Under this approach, the connection must be strong enough to make it reasonable for the defendant to be expected to litigate there even though that may entail additional expense, inconvenience, and risk. If litigating in the foreign jurisdiction is very burdensome to the defendant, a stronger degree of connection would be required before the originating court's assumption of jurisdiction should be recognized as fair and appropriate. In extreme cases, the foreign legal system itself may be inherently unfair. If the process that led to the judgment was unfair in itself, it is not fair to the defendant to enforce that judgment in any circumstance, even if the forum has very strong connections to the action and appears in every other respect to be the natural place for the action to be heard.

It follows from those propositions that the notion of interprovincial reciprocity is not equally applicable internationally. To treat a judgment from a foreign country exactly like one that originates within Canada fails to take into account the differences between the interprovincial and international contexts and fails to reflect the differences between assuming jurisdiction and enforcing a foreign judgment. Lastly, s. 7 *Charter* rights are not usually relevant to jurisdictional issues in civil disputes and do not arise in this case, although it is possible that there may be situations where fundamental interests of the defendant are implicated and s. 7 could come into play.

In this case, Florida was the natural place for the action to be heard because there were very strong connections between that state and every component of the action: the plaintiffs, who live there; the land, which is in Florida; and the defendants, who involved themselves in real estate transactions there.

The public policy defence should be reserved 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*. It should also apply to foreign laws that offend basic tenets of our civil justice system, principles that are widely recognized as having a quality of essential fairness. Here, the defects in the judgment, while severe, do

not engage the public policy defence. 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. But 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 and there is no indication that punitive damages are available where the defendant's conduct is not morally blameworthy.

In general, the rule that the defence of fraud must be based on previously undiscoverable evidence is a reasonably balanced solution. However, the possibility that a broader test should apply to default judgments in cases where the defendant's decision not to participate was a demonstrably reasonable one should not be ruled out. 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. Accordingly, 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. In the present case, the defence of fraud is 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. 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, given the lack of evidence, the defence could not succeed even on the view that the judgment could be vitiated by proof of intentional fraud.

The defence of natural justice concerns the procedure by which the foreign court reached its decision. 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. Two developments should be recognized in connection with this defence: the requirements of notice and a hearing should be construed in a purposive and flexible manner, and substantive principles of justice should also be included in the scope of the defence. 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. Adequate notice must also 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. In assessing whether the defence 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. Here, the Ontario defendants were not given sufficient notice of the extent and nature of the claims against them in the Florida action and its potential ramifications. Furthermore, there was no notice as to the serious consequences to the defendants of failure to refile their defence in response to the plaintiffs' repeatedly amended pleadings. As a result, the notice afforded to the defendants did not meet the requirements of natural justice. Finally, the mere fact that the appellants have received mistaken legal advice and did not avail themselves of the remedies available in Florida should not operate to relieve the respondents entirely of the consequences of a significant or substantial failure to observe the rules of natural justice, and it should not, in itself, bar the appellants from relying on this defence. 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.

Even if the natural justice defence did not apply, this judgment should not be enforced. The facts raise very serious concerns about the fairness of enforcing the Florida judgment which do not fit

easily into the categories identified by the traditional impeachment defences. The circumstances of this case are such that the enforcement of this judgment would shock the conscience of Canadians and cast a negative light on our justice system. The appellants have done nothing that infringes the rights of the respondents and have certainly done nothing to deserve such harsh punishment. Nor can they be said to have sought to avoid their obligations by hiding in their own jurisdiction or to have shown disrespect for the legal system of Florida. They have acted in good faith throughout and have diligently taken all the steps that appeared to be required of them, based on the information and advice they had. The plaintiffs in Florida appear to have taken advantage of the defendants' difficult position to pursue their interests as aggressively as possible and to secure a sizeable windfall. 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. The implication of the majority position 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 appears to be, on pain of potentially devastating consequences from which Canadian courts will be virtually powerless to protect them. Moving the law of conflicts in such a direction should be avoided.

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By Binnie J. (dissenting)

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By LeBel J. (dissenting)

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Jacobs v. Beaver (1908), 17 O.L.R. 496; *Duchess of Kingston's Case* (1776), 2 Sm. L.C. (8th ed.) 784; *Powell v. Cockburn*, [1977] 2 S.C.R. 218; *Adams v. Cape Industries plc*, [1991] 1 All E.R. 929; *Cité de Pont Viau v. Gauthier Mfg. Ltd.*, [1978] 2 S.C.R. 516.

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D.L.R. (4th) 630, 148 O.A.C. 1, 10 C.P.C. (5th) 191, [2001] O.J. No. 2586 (QL), reversing a judgment of the Ontario Court (General Division) (1998), 42 O.R. (3d) 127, 27 C.P.C. (4th) 144, [1998] O.J. No. 4519 (QL). Appeal dismissed, Iacobucci, Binnie and LeBel JJ. dissenting.

J. Brian Casey, *Janet E. Mills* and *Matthew J. Latella*, for the appellants Geoffrey Saldanha and Leueen Saldanha.

Neal H. Roth, for the appellant Dominic Thivy.

Messod Boussidan, *Larry J. Levine, Q.C.*, and *Kevin D. Sherkin*, for the respondents.

The judgment of McLachlin C.J. and Gonthier, Major, Bastarache, Arbour and Deschamps JJ. was delivered by

MAJOR J. —

I. Introduction

1 The rules related to the recognition and enforcement of foreign judgments by Canadian courts are the focus of this appeal. "Foreign" in the context of this case refers to a judgment rendered by a court outside Canada, as opposed to an interprovincial judgment.

2 The appellants, residents of Ontario, were the owners of a vacant lot in Sarasota County, Florida. They sold the lot to the respondents. A dispute arose as a result of that transaction. The respondents eventually commenced two actions against the appellants in Florida. Only the second action is relevant to this appeal. The appellants received notice at all stages of the litigation and defended the first action, which was dismissed without prejudice. A defence was filed to the second action without the knowledge of the Saldanhas.

3 The appellants chose not to defend any of the three subsequent amendments to the second action. Pursuant to Florida law, the failure to defend the amendments had the effect of not defending the second action and the appellants were subsequently noted in default. Damages of US$260,000 were awarded by a jury convened to assess damages. The damages were not paid and an action was started in Ontario to enforce the Florida judgment.

4 We have to first determine the circumstances under which a foreign judgment shall be recognized and enforced in Canada. Next, the nature and scope of the defences available to the judgment debtor must be established. For the purposes of these reasons, I assume the laws of other Canadian provinces are substantially the same as in Ontario and for that reason, Canada and Ontario are used interchangeably. A future case involving another part of Canada will be considered in light of whatever differences, if any, exist there.

II. Facts

5 The appellants were Ontario residents. In 1981, they and Rose Thivy, who is Dominic Thivy's wife and no longer a party to this action, purchased a lot in Florida for US$4,000. Three years later, Rose Thivy was contacted by a real estate agent acting for the respondents as well as for William and Susanne Foody (who assigned their interest to the Bealses' and are no longer parties to this action) enquiring about purchasing the lot. In the name of her co-owners, Mrs. Thivy advised the agent that they

would sell the lot for US$8,000. The written offer erroneously referred to “Lot 1” as the lot being purchased instead of “Lot 2”. Rose Thivy advised the real estate agent of the error and subsequently changed the number of the lot on the offer to “Lot 2”. The amended offer was accepted and “Lot 2” was transferred to the respondents and the Foodys.

6 The respondents had purchased the lot in question in order to construct a model home for their construction business. Some months later, the respondents learned that they had been building on Lot 1, a lot that they did not own. In February 1985, the respondents commenced what was the first action in Charlotte County, Florida, for “damages which exceed $5,000”. This was a customary way of pleading in Florida to give the Circuit Court monetary jurisdiction. The appellants, representing themselves, filed a defence. In September 1986, the appellants were notified that that action had been dismissed voluntarily and without prejudice because it had been brought in the wrong county.

7 In September 1986, a second action (“Complaint”) was commenced by the respondents in the Circuit Court for Sarasota County, Florida. That Complaint was served on the appellants, in Ontario, to rescind the contract of purchase and sale and claimed damages in excess of US$5,000, treble damages and other relief authorized by statute in Florida. This Complaint was identical to that in the first action except for the addition of allegations of fraud. Shortly thereafter, an Amended Complaint, simply deleting one of the defendants, was served on the appellants. A statement of defence (a duplicate of the defence filed in the first action) was filed by Mrs. Thivy on behalf of the appellants. The trial judge accepted the evidence of the Saldanhas that they had not signed the document. Accordingly, the Saldanhas were found not to have attorned. As discussed further in these reasons, Dominic Thivy’s situation differs.

8 In May 1987, the respondents served a Second Amended Complaint which modified allegations brought against a co-defendant who is no longer a party, but included all the earlier allegations brought against the appellants. No defence was filed. A Third Amended Complaint was served on the appellants on May 7, 1990 and again, no defence was filed. Under Florida law, the appellants were required to file a defence to each new amended complaint; otherwise, they risked being noted in default. A motion to note the appellants in default for their failure to file a defence to the Third Amended Complaint and a notice of hearing were served on the appellants in June 1990. The appellants did not respond to this notice. On July 25, 1990, a Florida court entered “default” against the appellants, the effect of which, under Florida law, was that they were deemed to have admitted the allegations contained in the Third Amended Complaint.

9 The appellants were served with notice of a jury trial to establish damages. They did not respond to the notice nor did they attend the trial held in December 1991. Mr. Foody, the respondent Mr. Beals, and an expert witness on business losses testified at the trial. The jury awarded the respondents damages of US$210,000 in compensatory damages and US$50,000 in punitive damages, plus post-judgment interest of 12 percent per annum. Notice of the monetary judgment was received by the appellants in late December 1991.

10 Upon receipt of the notice of the monetary judgment against them, the Saldanhas sought legal advice. They were advised by an Ontario lawyer that the foreign judgment could not be enforced in Ontario because the appellants had not attorned to the Florida court’s jurisdiction. Relying on this advice, the appellants took no steps to have the judgment set aside, as they were entitled to try and do under Florida law, or to appeal the judgment in Florida. Florida law permitted the appellants ten days to commence an appeal and up to one year to bring a motion to have the judgment obtained there set aside on the grounds of “excusable neglect”, “fraud” or “other misconduct of an adverse party”.

11 In 1993, the respondents brought an action before the Ontario Court (General Division) seeking the enforcement of the Florida judgment. By the time of the hearing before that court, in 1998, the foreign judgment, with interest, had grown to approximately C$800,000. The trial judge dismissed the action for enforcement on the ground that there had been fraud in relation to the assessment of damages and for the additional reason of public policy. The Ontario Court of Appeal, Weiler J.A. dissenting, allowed the appeal.

III. Judgments Below

A. *Ontario Court (General Division)* (1998), 42 O.R. (3d) 127

12 The trial judge declared the Florida judgment unenforceable in Ontario. Having concluded from the verdict of the Florida jury that it had not been made aware of certain facts, the trial judge dismissed the action on the basis of fraud. He also held that the judgment was unenforceable on the grounds of public policy. The trial judge recommended that the defence of public policy be broadened to include a "judicial sniff test" which would permit a domestic court to refuse enforcement of a foreign judgment in cases where the facts did not satisfy any of the three existing defences to enforcement but were nevertheless egregious.

B. *Ontario Court of Appeal* (2001), 54 O.R. (3d) 641

13 A majority of the Ontario Court of Appeal allowed the appeal. Doherty and Catzman JJ.A. concluded that neither the defence of fraud nor of public policy had application to this case.

14 As to the defence of fraud, Doherty J.A. held that that defence was only available where the allegations of fraud rest on "newly discovered facts", that is, facts that a defendant could not have discovered through the exercise of reasonable diligence prior to the granting of the judgment. He concluded that the trial judge erred in relying on assumed facts that conceivably might have been uncovered by the appellants had they chosen to participate in the Florida proceedings. Even if the trial judge had correctly defined the defence of fraud, Doherty J.A. held that there was no evidence that the judgment had been obtained by fraud.

15 On the defence of public policy, Doherty J.A. rejected the need to incorporate a "judicial sniff test" as part of that defence. Assuming a "sniff test" was required, he held that no reasons existed in this appeal for public policy to preclude the enforcement of the foreign judgment. He stated (at para. 84):

> 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.

16 Weiler J.A., in dissent, would have dismissed the appeal. She concluded that the defences of natural justice and fraud made it inappropriate for a domestic court to enforce the Florida judgment.

She stated that the appellants were deprived of natural justice by not having been given sufficient notice to permit them to appreciate the extent of their jeopardy prior to the judgment for damages against them. Weiler J.A. also held that the respondents had concealed certain facts from the Florida jury.

IV. Analysis

17 It was properly conceded by the parties, as explained below, in both the trial court and Court of Appeal, that the Florida court had jurisdiction over the respondents' action pursuant to the "real and substantial connection" test set out in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. As a result, the issues raised in this appeal were limited to the application and scope of the defences available to a domestic defendant seeking to have a Canadian court refuse enforcement of a foreign judgment.

18 In *Morguard*, *supra*, the "real and substantial connection" test for the recognition and enforcement of interprovincial judgments was adopted. *Morguard* did not decide whether that test applied to foreign judgments. However, some courts have extended the application of *Morguard* to judgments rendered outside Canada: *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.), leave to appeal refused, [1994] 1 S.C.R. xi; *United States of America v. Ivey* (1996), 30 O.R. (3d) 370 (C.A.); *Old North State Brewing Co. v. Newlands Services Inc.*, [1999] 4 W.W.R. 573 (B.C.C.A.).

19 The question arises whether the "real and substantial connection" test, which is applied to interprovincial judgments, should apply equally to the recognition of foreign judgments. For the reasons that follow, I conclude that it should. While there are compelling reasons to expand the test's application, there does not appear to be any principled reason not to do so. In light of this, the parties' concession on the point was appropriate.

20 *Morguard*, *supra*, altered the old common law rules for the recognition and enforcement of interprovincial judgments. These rules, based on territoriality, sovereignty, independence and attornment, were held to be outmoded. La Forest J. concluded that it had been an error to adopt this approach "even in relation to judgments given in sister-provinces" (p. 1095). Central to the decision to modernize the common law rules was the doctrine of comity. Comity was defined as (at pp. 1095 and 1096, respectively):

> . . . the deference and respect due by other states to the actions of a state legitimately taken within its territory. . . .
>
> . . .
>
> . . . the recognition which one nation allows within its territory to the legislative, executive and 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. . . .

21 Early common law rules were amended by rules intended to facilitate the flow of wealth, skills and people across boundaries, particularly boundaries of a federal state. *Morguard* established that the determination of the proper exercise of jurisdiction by a court depended upon two principles (relied on by the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577, at para. 34), the first being the need for "order and fairness". The second was the existence of a "real and substantial

connection" (see also *Indyka v. Indyka*, [1969] 1 A.C. 33 (H.L.); *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393).

22 Modern ideas of order and fairness require that a court must have reasonable grounds for assuming jurisdiction where the participants to the litigation are connected to multiple jurisdictions.

23 *Morguard* established that the courts of one province or territory should recognize and enforce the judgments of another province or territory, if that court had properly exercised jurisdiction in the action, namely that it had a real and substantial connection with either the subject matter of the action or the defendant. A substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action.

A. *The "Real and Substantial Connection" Test and Foreign Judgments*

24 The question then is whether the real and substantial connection test should apply to the recognition and enforcement of foreign judgments?

25 In *Moran*, *supra*, at p. 409, it was recognized that where individuals carry on business in another provincial jurisdiction, it is reasonable that those individuals be required to defend themselves there when an action is commenced:

> By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.

That reasoning is equally compelling with respect to foreign jurisdictions.

26 Although La Forest J. noted in *Morguard* that judgments from beyond Canada's borders could raise different issues than judgments within the federation, he recognized the value of revisiting the rules related to the recognition and enforcement of foreign judgments (at p. 1098):

> 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. [Emphasis added.]

Although use of the word "foreign" in the above quotation referred to judgments rendered in a sister province, the need to accommodate "the flow of wealth, skills and people across state lines" is as much an imperative internationally as it is interprovincially.

27 The importance of comity was analysed at length in *Morguard*, *supra*. This doctrine must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility. The doctrine of comity is

> 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.
>
> (*Morguard*, *supra*, at p. 1096)

This doctrine is of particular importance viewed internationally. The principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law. Although *Morguard* recognized that the considerations underlying the doctrine of comity apply with greater force between the units of a federal state, the reality of international commerce and the movement of people continue to be "directly relevant to determining the appropriate response of private international law to particular issues, such as the enforcement of monetary judgments" (J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth Into the World" (1997), 28 *Can. Bus. L.J.* 373, at p. 375).

28 International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in *Morguard*, *supra*, and further discussed in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. Subject to the legislatures adopting a different approach by statute, the "real and substantial connection" test should apply to the law with respect to the enforcement and recognition of foreign judgments.

29 Like comity, the notion of reciprocity is equally compelling both in the international and interprovincial context. La Forest J. discussed interprovincial reciprocity in *Morguard*, *supra*. He stated (at p. 1107):

> . . . if this Court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment.

In light of the principles of international comity, La Forest J.'s discussion of reciprocity is also equally applicable to judgments made by courts outside Canada. In the absence of a different statutory approach, it is reasonable that a domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a "real and substantial connection" test.

30 Federalism was a central concern underlying the decisions in *Morguard*, *supra*, and *Hunt*, *supra*. In the latter, La Forest J. stated that he did not think that "litigation engendered against a corporate citizen located in one province by its trading and commercial activities in another province should necessarily be subject to the same rules as those applicable to international commerce" (*Hunt*, *supra*, at p. 323). Recently, *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78, suggested, in *obiter*, that it may be necessary to afford foreign judgments a different treatment than that recognized for interprovincial judgments (*per* LeBel J., at para. 51):

> 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. . . .

Although La Forest J. and LeBel J. suggested that the rules applicable to interprovincial versus foreign judgments should differ, they do not preclude the application of the "real and substantial connection" test to both types of judgments, provided that any unfairness that may arise as a result of the broadened application of that test be taken into account.

31 The appellants submitted that the recognition of foreign judgments rendered by courts with a real and substantial connection to the action or parties is particularly troublesome in the case of foreign default judgments. If the "real and substantial connection" test is applied to the recognition of foreign judgments, they argue the test should be modified in the recognition and enforcement of default judgments. In the absence of unfairness or other equally compelling reasons which were not identified in this appeal, there is no logical reason to distinguish between a judgment after trial and a default judgment.

32 The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

33 In the present case, the appellants purchased land in Florida, an act that represents a significant engagement with the foreign jurisdiction's legal order. Where a party takes such positive and important steps that bring him or her within the proper jurisdiction of a foreign court, the fear of unfairness related to the duty to defend oneself is lessened. If a Canadian enters into a contract to buy land in another country, it is not unreasonable to expect the individual to enter a defence when sued in that jurisdiction with respect to the transaction.

34 The "real and substantial connection" test is made out for all of the appellants. There exists both a real and substantial connection between the Florida jurisdiction, the subject matter of the action and the defendants. As stated in J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at p. 14-10:

> For the recognition or enforcement in Canada of a foreign judgment *in personam*, the foreign court must have had jurisdiction according to Canadian rules of the conflict of laws.

In light of Canadian rules of conflict of laws, Dominic Thivy attorned to the jurisdiction of the Florida court when he entered a defence to the second action. His subsequent procedural failures under Florida law do not invalidate that attornment. As such, irrespective of the real and substantial connection analysis, the Florida court would have had jurisdiction over Mr. Thivy for the purposes of enforcement in Ontario.

35 A Canadian defendant sued in a foreign jurisdiction has the ability to redress any real or apparent unfairness from the foreign proceedings and the judgment's subsequent enforcement in Canada. The defences applicable in Ontario are natural justice, public policy and fraud. In addition, defendants sued abroad can raise the doctrine of *forum non conveniens*. This would apply in the usual way where it is claimed that the proceedings are not, on the basis of convenience, expense and other considerations, in the proper forum.

36 Here, the appellants entered into a property transaction in Florida when they bought and sold land. Having taken this positive step to bring themselves within the jurisdiction of Florida law, the appellants could reasonably have been expected to defend themselves when the respondents started an action against them in Florida. The appellants failed to defend the claim pursuant to the Florida rules. Nonetheless, they were still entitled, within ten days, to appeal the Florida default judgment, which they did not. In addition, the appellants did not avail themselves of the additional one-year period to have the

Florida judgment for damages set aside. While their failure to move to set aside or appeal the Florida judgment was due to their reliance upon negligent legal advice, that negligence cannot be a bar to the enforcement of the respondents' judgment.

37 There are conditions to be met before a domestic court will enforce a judgment from a foreign jurisdiction. The enforcing court, in this case Ontario, must determine whether the foreign court had a real and substantial connection to the action or the parties, at least to the level established in *Morguard*, *supra*. A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties. Although such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court.

38 If a foreign court did not properly take jurisdiction, its judgment will not be enforced. Here, it was correctly conceded by the litigants that the Florida court had a real and substantial connection to the action and parties.

B. *Defences to the Enforcement of Judgments*

39 Once the "real and substantial connection" test is found to apply to a foreign judgment, the court should then examine the scope of the defences available to a domestic defendant in contesting the recognition of such a judgment.

40 The defences of fraud, public policy and lack of natural justice were developed before *Morguard*, *supra*, and still pertain. This Court has to consider whether those defences, when applied internationally, are able to strike the balance required by comity, the balance between order and fairness as well as the real and substantial connection, in respect of enforcing default judgments obtained in foreign courts.

41 These defences were developed by the common law courts to guard against potential unfairness unforeseen in the drafting of the test for the recognition and enforcement of judgments. The existing defences are narrow in application. They are the most recognizable situations in which an injustice may arise but are not exhaustive.

42 Unusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment. However, the facts of this case do not justify speculating on that possibility. Should the evolution of private international law require the creation of a new defence, the courts will need to ensure that any new defences continue to be narrow in scope, address specific facts and raise issues not covered by the existing defences.

(1) <u>The Defence of Fraud</u>

43 As a general but qualified statement, neither foreign nor domestic judgments will be enforced if obtained by fraud.

44 Inherent to the defence of fraud is the concern that defendants may try to use this defence as a means of relitigating an action previously decided and so thwart the finality sought in litigation. The desire to avoid the relitigation of issues previously tried and decided has led the courts to treat the defence

of fraud narrowly. It limits the type of evidence of fraud which can be pleaded in response to a judgment. If this Court were to widen the scope of the fraud defence, domestic courts would be increasingly drawn into a re-examination of the merits of foreign judgments. That result would obviously be contrary to the quest for finality.

45 Courts have drawn a distinction between "intrinsic fraud" and "extrinsic fraud" in an attempt to clarify the types of fraud that can vitiate the judgment of a foreign court. Extrinsic fraud is identified as fraud going to the jurisdiction of the issuing court or the kind of fraud that misleads the court, foreign or domestic, into believing that it has jurisdiction over the cause of action. Evidence of this kind of fraud, if accepted, will justify setting aside the judgment. On the other hand, intrinsic fraud is fraud which goes to the merits of the case and to the existence of a cause of action. The extent to which evidence of intrinsic fraud can act as a defence to the recognition of a judgment has not been as clear as that of extrinsic fraud.

46 A restrictive application of the defence of fraud was endorsed in *Woodruff v. McLennan* (1887), 14 O.A.R. 242. The Ontario Court of Appeal stated, at pp. 254-55, that the defence could be raised where

> the recovery was collusive, [the] defendant had never been served with process, . . . the suit had been undefended without defendant's default, . . . the defendant had been fraudulently persuaded by plaintiff to let judgment go by default . . . or some fraud to defendant's prejudice committed or allowed in the proceedings of the other Court. . . .

Woodruff established that evidence of fraud that went to the merits of the case (intrinsic) was inadmissible. Only evidence of fraud which misled a court into taking jurisdiction (extrinsic) was admissible and could bar the enforcement of the judgment.

47 *Woodruff, supra*, was subsequently modified by the Ontario Court of Appeal. See *Jacobs v. Beaver* (1908), 17 O.L.R. 496, at p. 506:

> . . . the fraud relied on must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the Court and so passed on into the limbo of estoppel by the judgment. <u>This estoppel cannot, in my opinion, be disturbed except upon the allegation and proof of new and material facts, or newly discovered and material facts which were not before the former Court and from which are to be deduced the new proposition that the former judgment was obtained by fraud.</u> The burden of that issue is upon the defendant, and until he at least gives *prima facie* evidence in support of it, the estoppel stands. And it may be, as I have before stated, that when such evidence is given, and in order to fully prove this new issue, the whole case should be re-opened. [Emphasis added.]

The court, in *Jacobs*, acknowledged that in addition to evidence of extrinsic fraud, evidence of intrinsic fraud was admissible where the defendant could establish "proof of new and material facts" that, not being available at the time of trial, were not before the issuing court and demonstrate that the judgment sought to be enforced was obtained by fraud.

48 Contrary to the decision of the Ontario Court of Appeal in *Jacobs*, the courts of British Columbia take a different view. In *Roglass Consultants Inc. v. Kennedy, Lock* (1984), 65 B.C.L.R. 393,

the British Columbia Court of Appeal maintained the strict approach to the fraud defence set out in *Woodruff*. It held that only extrinsic fraud could be raised in defence of the enforcement of a foreign judgment.

49 In *Powell v. Cockburn*, [1977] 2 S.C.R. 218, it was clear that the aim in refusing recognition of a judgment because of fraud "is to prevent abuse of the judicial process" (p. 234). In that case, the Court did not address fraud going to the merits of a judgment but did confirm that fraud going to jurisdiction (extrinsic fraud) is always open to impeachment.

50 What should be the scope of the defence of fraud in relation to foreign judgments? *Jacobs*, *supra*, represents a reasonable approach to that defence. It effectively balances the need to guard against fraudulently obtained judgments with the need to treat foreign judgments as final. I agree with Doherty J.A. for the majority in the Court of Appeal that the "new and material facts" discussed in *Jacobs* must be limited to those facts that a defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence.

51 The historic description of and the distinction between intrinsic and extrinsic fraud are of no apparent value and, because of their ability to both complicate and confuse, should be discontinued. It is simpler to say that fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment. On the other hand, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment.

52 Where a foreign judgment was obtained by fraud that was undetectable by the foreign court, it will not be enforced domestically. "Evidence of fraud undetectable by the foreign court" and the mention of "new and material facts" in *Jacobs*, *supra*, demand an element of reasonable diligence on the part of a defendant. To repeat Doherty J.A.'s ruling, in order to raise the defence of fraud, a defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment. See para. 43:

> A due diligence requirement is consistent with the policy underlying the recognition and enforcement of foreign judgments. In the modern global village, decisions made by foreign courts acting within Canadian concepts of jurisdiction and in accordance with fundamental principles of fairness should be respected and enforced. That policy does not, however, extend to protect decisions which are based on fraud that could not, through the exercise of reasonable diligence, have been brought to the attention of the foreign court. Respect for the foreign court does not diminish when a refusal to enforce its judgment is based on material that could not, through the exercise of reasonable diligence, have been placed before that court. [Emphasis added.]

Such an approach represents a fair balance between the countervailing goals of comity and fairness to the defendant.

53 Although *Jacobs*, *supra*, was a contested foreign action, the test used is equally applicable to default judgments. Where the foreign default proceedings are not inherently unfair, failing to defend the action, by itself, should prohibit the defendant from claiming that any of the evidence adduced or steps taken in the foreign proceedings was evidence of fraud just discovered. But if there is evidence of fraud before the foreign court that could not have been discovered by reasonable diligence, that will justify a domestic court's refusal to enforce the judgment.

54 In the present case, the appellants made a conscious decision not to defend the Florida action against them. The pleadings of the respondents then became the facts that were the basis for the Florida judgment. As a result, the appellants are barred from attacking the evidence presented to the Florida judge and jury as being fraudulent.

55 The appellants have not claimed that there was evidence of fraud that they could not have discovered had they defended the Florida action. In the absence of newly discovered evidence of fraud, I agree with the Court of Appeal that the trial judge erred in admitting evidence he found established fraud. He erred in law by failing to limit "new and material facts" to facts which could not have been discovered by the appellants by the exercise of reasonable diligence.

56 There was no evidence before the trial judge to support fraud. In fact, the trial judge, himself, stated (at p. 131):

> No record of the damage assessment proceedings exists, and the evidence heard by the jury is unknown. There is similarly no record of the instructions given to the jury by the trial judge.

In the absence of such evidence, the trial judge erred in concluding that there was fraud. It is impossible to know whether the evidence now sought to be adduced by the appellants had been previously considered by the jury. The respondent Mr. Beals and an expert on business losses both testified before the Florida jury and gave uncontradicted evidence. Before the Ontario court, Mr. Beals was available for questioning but was not called upon by the appellants to address the allegations of fraud. Similarly, the respondents' counsel in the Florida action testified but no questions of fraud were raised with him.

57 No evidence was led to show that the jury was misled (deliberately or not) on the extent of the damages. The admitted facts presented to the jury included allegations of fraudulent misrepresentations and loss of profits. The claim by the respondents was for damages to recoup the purchase price of the land, loss of profits and punitive damages. The nature of the damages sought, as well as the admitted facts presented to the Florida jury, was evidence upon which that jury could reasonably reach the damages that it did. I agree with the majority in the Court of Appeal 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.

58 As the appellants did not provide any evidence of new and previously undiscoverable facts suggestive of fraud, the defence of fraud cannot form the basis of a valid challenge to the application for enforcement of the respondents' judgment.

(2) The Defence of Natural Justice

59 As previously stated, the denial of natural justice can be the basis of a challenge to a foreign judgment and, if proven, will allow the domestic court to refuse enforcement. A condition precedent to that defence is that the party seeking to impugn the judgment prove, to the civil standard, that the foreign proceedings were contrary to Canadian notions of fundamental justice.

60 A domestic court enforcing a judgment has a heightened duty to protect the interests of defendants when the judgment to be enforced is a foreign one. The domestic court must be satisfied that

minimum standards of fairness have been applied to the Ontario defendants by the foreign court.

61 The enforcing court must ensure that the defendant was granted a fair process. Contrary to the position taken by my colleague LeBel J., it is not the duty of the plaintiff in the foreign action to establish that the legal system from which the judgment originates is a fair one in order to seek enforcement. The burden of alleging unfairness in the foreign legal system rests with the defendant in the foreign action.

62 Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. This determination will need to be made for all foreign judgments. Obviously, it is simpler for domestic courts to assess the fairness afforded to a Canadian defendant in another province in Canada. In the case of judgments made by courts outside Canada, the review may be more difficult but is mandatory and the enforcing court must be satisfied that fair process was used in awarding the judgment. This assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts.

63 In the present case, the Florida judgment is from a legal system similar, but not identical, to our own. If the foreign state's principles of justice, court procedures and judicial protections are not similar to ours, the domestic enforcing court will need to ensure that the minimum Canadian standards of fairness were applied. If fair process was not provided to the defendant, recognition and enforcement of the judgment may be denied.

64 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. The defence is limited to the procedure by which the foreign court arrived at its judgment. 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 and, in this case, failed to raise any reasonable apprehension of unfairness.

65 In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend. The Florida proceedings were not contrary to the Canadian concept of natural justice. The appellants concede that they received notice of all the legal procedure taken in the Florida action and that the judge of the foreign court respected the procedure of that jurisdiction. The appellants submit, however, that they were denied natural justice because they were not given sufficient notice to enable them to discover the extent of their financial jeopardy.

66 The appellants claim to have been denied the opportunity to assess the extent of their financial jeopardy because the respondents' claim failed to specify the exact dollar amount of damages and types of damages they were seeking. The Florida claims, particularly the Third Amended Complaint, made it clear that the damages sought were potentially significant. The complaints filed in Florida raised allegations of fraud and sought punitive damages, both of which allow for the possibility of a substantial award of damages. Treble damages were sought. Repayment of the purchase price, the amount lost by the respondents due to their inability to construct a model home on the lot, the expenses incurred in preparing that lot and lost revenue due to the respondents' inability to construct a model home to be used in their construction business were all sought in the Third Amended Complaint. In light of knowing the types of damages claimed, not being provided with a specific dollar value of the amount of damages sought cannot constitute a denial of natural justice. The appellants were mistaken when they presumed

that the damages award would be approximately US$8,000.

67 The respondents did not give notice that an expert on the assessment of business losses would testify before the Florida jury. The failure to disclose witnesses in a notice of assessment is not a denial of natural justice.

68 LeBel J. would expand the defence of natural justice by interpreting the right to receive notice of a foreign action to include notice of the legal steps to be taken by the defendant where the legal system differs from that of Canada's and of the consequences flowing from a decision to defend, or not defend, the foreign action. Where such notice was not given, he would deny enforcement of the resulting judgment. No such burden should rest with the foreign plaintiff. Within Canada, defendants are presumed to know the law of the jurisdiction seized with an action against them. Plaintiffs are not required to expressly or implicitly notify defendants of the steps that they must take when notified of a claim against them. This approach is equally appropriate in the context of international litigation. To find otherwise would unduly complicate cross-border transactions and hamper trade with Canadian parties. A defendant to a foreign action instituted in a jurisdiction with a real and substantial connection to the action or parties can reasonably be expected to research the law of the foreign jurisdiction. The Saldanhas and Thivys owned land in the State of Florida and entered into a real estate transaction in that state. When served with notice of an action against them in the State of Florida, the appellants were responsible for gaining knowledge of Florida procedure in order to discover the particularities of that legal system.

69 My interpretation of the Florida legal system differs from that of LeBel J. in that I am of the opinion that 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. Their failure to act when confronted with the size of the award of damages was not due to a lack of notice but due to relying on the mistaken advice of their lawyer.

70 For these reasons, the defence of natural justice does not arise.

(3) The Defence of Public Policy

71 The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in Castel and Walker, *supra*, at p. 14-28:

> . . . the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts. . . .

72 How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biassed.

73 The appellants submitted that the defence of public policy should be broadened to include the case where neither the defence of natural justice nor the current defence of public policy would apply but where the outcome is so egregious that it justifies a domestic court's refusal to enforce the foreign

judgment. The appellants argued that, as a matter of Canadian public policy, a foreign judgment should not be enforced if the award is excessive, would shock the conscience of, or would be unacceptable to, reasonable Canadians. The appellants claimed that the public policy defence provides a remedy where the judgment, by its amount alone, would shock the conscience of the reasonable Canadian. It was argued that, if the respondents and their witnesses were truthful in the Florida proceeding, it must follow that the laws in Florida permit a grossly excessive award for lost profits absent a causal connection between the acts giving rise to liability and the damages suffered. Such a result, the appellants submitted, would shock the conscience of the reasonable Canadian. I do not agree.

74 Blom, *supra*, predicted the appellants' request for the expansion of the public policy defence (at p. 400):

> The only change that the *Morguard* approach to recognition may bring in its wake is a greater temptation to expand the notion of public policy, so as to justify refusing a foreign default judgment that meets the *Morguard* criteria, but whose enforcement nevertheless appears to impose a severe hardship on the defendant.

75 The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.

76 The award of damages by the Florida jury does not violate our principles of morality. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. Even if it could be argued in another case that the arbitrariness of the award can properly fit into a public policy argument, the record here does not provide any basis allowing the Canadian court to re-evaluate the amount of the award. 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.

77 There was no evidence that the Florida procedure would offend the Canadian concept of justice. I disagree for the foregoing reasons that enforcement of the Florida monetary judgement would shock the conscience of the reasonable Canadian.

C. *Section 7 of the Canadian Charter of Rights and Freedoms*

78 The appellants submitted that the Florida judgment cannot be enforced because its enforcement would force them into bankruptcy. It was argued that the recognition and enforcement of that judgment by a Canadian court would constitute a violation of s. 7 of the *Charter*. The appellants submitted that a *Charter* remedy should be recognized to the effect that, before a domestic court enforces a foreign judgment which would result in the defendant's bankruptcy, the court must be satisfied that the foreign judgment has been rendered in accordance with the principles of fundamental justice. No authority is offered for that proposition with which I disagree but, in any event, the Florida proceedings were conducted in conformity with fundamental justice. The obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment. As s. 7 of the *Charter* does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, I have difficulty accepting that s. 7 should

shield a Canadian defendant from the enforcement of a foreign judgment.

V. Disposition

79 The parties agreed that the Florida court had a real and substantial connection to the action launched by the respondents. Having properly taken jurisdiction, the judgment of that court must be recognized and enforced by a domestic court, provided that no defences bar its enforcement. None of the existing defences of fraud, natural justice or public policy have been supported by the evidence. Although the damage award may appear disproportionate to the original value of the land in question, that cannot be determinative. The judgment of the Florida court should be enforced.

80 The appeal is dismissed with costs.

The reasons of Iacobucci and Binnie JJ. were delivered by

81 BINNIE J. (dissenting) — The question raised by this appeal is the sufficiency of the notice provided to Ontario defendants (the appellants) of Florida proceedings against them by two Sarasota County real estate developers over the sale of an empty residential building lot in 1984 for US$8,000. The subject matter of their contract turned out to be the wrong lot. The respondents kept the lot (they say they did not intend to purchase) and sued the appellants for damages.

82 The Florida default judgment now commands payment of over C$1,000,000, an award described by the Ontario trial judge as "breathtaking". The damages were assessed by a Florida jury in less than half a day.

83 If the notice had been sufficient, I would have agreed reluctantly with the majority of my colleagues that the default judgment against them would be enforceable in Ontario despite the fact the foreign court never got to hear the Ontario defendants' side of the story. Their failure to participate using the procedures open to them in Florida would have bound them to the result. However, in my view, the appellants' inactivity in the face of their mushrooming legal problem is explained by the fact they were kept in the dark about the true nature and extent of their jeopardy. 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.

I. Real and Substantial Connection

84 I agree with Major J. that the "real and substantial connection" test developed in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at p. 325, and *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1058, provides an appropriate conceptual basis for the enforcement in Canada of final judgments obtained in foreign jurisdictions as it does for final judgments obtained in other provinces.

85 That said, I recognize that there are significant differences between enforcement of a foreign judgment and enforcement of judgments from one province or territory to another within the Canadian federation. As La Forest J. observed in *Morguard* (at p. 1098):

> The considerations underlying the rules of comity apply with much greater force between the units of a federal state. . . .

Morguard went on to refer to "[t]he integrating character of our constitutional arrangements" (p. 1100), including (1) common citizenship, (2) interprovincial mobility of citizens, (3) the common market among the provinces envisaged by our Constitution, and (4) the essentially unitary structure of our judicial system presided over by the Supreme Court of Canada. The constitutional flavour of the *Morguard* analysis was picked up and emphasized in *Hunt*, *supra*, and again in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78, at para. 53. We should not backtrack on the importance of that distinction.

86 It stands to reason that if the issues posed by the enforcement of foreign judgments differ from the issues encountered in the enforcement of judgments among the provinces and the territories, the legal rules are not going to be identical. Accordingly, 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. (paras. 39-41) and LeBel J. (paras. 217-18) 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. The time will come when such a re-examination of available defences will be necessary. The need for such a re-examination does not arise in this case. The appellants come within the traditional limits of the natural justice defence, and their appeal should be allowed on that ground.

II. The Foreign Judgment

87 In 1981, the appellants bought an empty lot in a Florida real estate subdivision near Sarasota for US$4,000. It was described as Lot 2. They did not build. They did not even visit it. They just paid the municipal taxes. In 1983, they thought they had sold it to the respondents for US$8,000. Despite the fact that all of the closing documentation referred to Lot 2, the respondents (who say they did not "catch" the reference to Lot 2 in the closing document) eventually claimed that they had *intended* to purchase the lot next door — Lot 1 — and that they had been falsely and fraudulently induced to buy Lot 2 by the appellants and a Florida real estate agent called O'Neill.

88 No doubt the Florida courts had jurisdiction over the ensuing dispute. The land was located in that jurisdiction. The appellants ought to have anticipated, and probably did anticipate, that disputes over Florida land would be decided by Florida courts. However, they could not fairly have anticipated that this pedestrian real estate deal gone sour would eventually explode into a Florida judgment against them said to be worth in excess of C$800,000 at the time of the trial in Ontario in November 1998 with interest continuing to run for the past five years at 12 percent per annum, producing an ultimate Kafka-esque judgment with an apparent value of over C$1,000,000.

89 It appears that soon after being served with the respondents' Complaint, the appellants decided to tell their story to the Florida court by filing a Statement of Defence, but to forgo the further expense of hiring a Florida lawyer to represent their interests. The costs would likely have exceeded the amount they thought was in issue. As the trial judge in Ontario put it, 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.

90 My colleague Major J. 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.

91 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.

III. The Initial Aborted Proceedings

92 The Florida action was initially commenced on February 15, 1985 by the two respondents and their then partners (who will collectively be referred to as the respondents) in the Twentieth Judicial Circuit in and for Charlotte County, Florida. The appellants duly filed a defence. Eventually, this first action was "voluntarily dismiss[ed] . . . without prejudice" by the Florida court, apparently on the basis that the respondents had commenced their action in the wrong Circuit. The respondents immediately started a second action in the Twelfth Judicial Circuit and again the appellants filed a defence. This suggests that when the appellants were notified of what pleading had to be done, they did it.

IV. The Nature of the Complaint Against the Appellants

93 The original plaintiffs, two real estate developers and their wives (including the present respondents), alleged that the appellants misrepresented that they owned building Lot 1, whereas they owned building Lot 2, and that this misrepresentation was "willfully false and fraudulent". The respondents said "they" (i.e., the individual respondents) began building on Lot 1, discovered the error, and "immediately ceased construction". As a result, the respondents incurred the expenses of preparing the lot for construction and lost revenue because they were unable to construct a model home on Lot 1, which was a corner lot.

94 It is not our function to get into the merits of the Florida case but I note the respondent, Frederick Beals III, eventually acknowledged in the Florida proceedings that work terminated in October 1984 not because of an error in the legal description of the lot but because of a falling out among the respondents. At that time, a "Johnny Quick toilet" had been delivered to the work site but the floor slab had not yet been poured. The error with regard to Lot 1 and Lot 2 was not discovered by the respondents until three months later in January 1985.

95 The total expenditures on the project, including the purchase price, the building permits, the survey tests, trusses and some other materials were about US$14,000. The respondent Beals later testified that the average profit experienced on the houses he built in 1984 was about US$5,000 per home. The respondents' eventual award on account of loss of profit was more than ten times that figure.

96 The Complaint, and each subsequent "as amended" Complaint, simply refers to the respondents' damages on "a model home" (emphasis added). "A" model home is expressed in the singular and would not normally be understood, I think, to encompass an undisclosed and unbuilt residential subdivision which the respondents now say they had in mind.

97 The respondents claimed treble damages, rescission, punitive damages and costs. In the end, the jury seems to have ordered reimbursement of the actual expenditures (about US$14,000) plus loss of profit (about US$56,000), all of which was trebled to make the total of US$210,000, plus punitive damages of US$50,000. The balance of the current million dollar claim consists of accumulated post-judgment interest compounding at the rate of 12 percent, plus the effect of a less favourable U.S. currency exchange rate.

V. The Complaint Against Other Parties

98 The respondents also alleged in their Complaint that, in August 1984, they — the developers — had initiated contact with a Sarasota real estate firm, O'Neill's Realty, who showed them Lot 1. The respondents go on to state in their Complaint that the realtor was only authorized by the appellants to sell Lot 2 (para. 25). Nevertheless, the realtor (both the corporation and James O'Neill personally), "knowingly and falsely" misrepresented that the appellants owned Lot 1 (para. 27) and "fraudulently" failed to stop the closing of the sale of the wrong lot (paras. 33 and 51). The respondents claimed the same relief against the realtor as they had against the appellants (para. 37). As will be seen, the respondents' allegation in their Complaint against the realtor O'Neill more or less corresponded with the appellants' version of events set out in their Statement of Defence.

99 The respondents subsequently added a complaint against a new defendant, the Commonwealth Land Title Insurance Company, alleging that the title insurer knew or should have known that all of the closing documentation erroneously referred to the appellants' Lot 2, instead of the desired Lot 1, and by "remaining silent" breached its corporate duty of disclosure.

100 With respect to the issue of notice, Florida rules require the written Complaint to expressly warn that "[e]ach defendant is hereby required to serve written defenses . . . within 20 days. . . . If a defendant fails to do so, a default [judgment] will be entered against that defendant for the relief demanded . . . ." This is what the appellants were told. The logical implication of this statement, it seems to me, is that if a written defence were served, the defendants would *not* be in default of the pleading. This also turned out not to be true.

VI. The Statement of Defence

101 The appellants filed, then refiled in the different judicial circuit, a Statement of Defence which pleaded in the relevant part, as follows:

> 2. The facts are as follows:
>
> a) At no time did the Sellers engage the services of O'Neill's Realty, Inc., and/or James O'Neill to sell the property above-referred to or any other property whatsoever.
>
> b) On or about 1984, the Defendant, James O'Neill, contacted the Sellers and informed them that he had a client who wished to purchase the above-referred to property. As there had been no previous communication of any kind whatsoever between the Sellers and James O'Neill, the Sellers believed that he, the said James O'Neill, represented the Plaintiffs.

c) During subsequent telephone conversations in or about August, 1984, the Sellers advised James O'Neill that they had never been in Port Charlotte, Florida, and that the only information in their possession with respect to the above-referred to property was the number allocated to same, that is to say: Lot 2, Block 3694 of Port Charlotte Subdivision, Section 65.

d) James O'Neill assured the Sellers that they were the owners of the lands that his client wished to purchase as he, the said James O'Neill, had perused the Public Records for the property in which his client was interested, and the names of the Sellers appeared thereon as owners. The Sellers were satisfied with his representations and therefore proceeded on that basis.

3. On or about August, 1984, the Sellers received a Contract for Sale of Real Estate which said Contract described the above-referred to property as being Lot 1. The Sellers contacted James O'Neill to advise him of the discrepancy.

4. James O'Neill once again assured the Sellers that they did own the property in which his client was interested and therefore the requisite change to the Contract was made. James O'Neill did not indicate to the Sellers that the change had to be initialled.

5. The Contract was returned to James O'Neill and on or about September 20th, 1984, the Sellers received a Warranty Deed which indicated that the property being sold was Lot 2.

6. As the discrepancy had been discussed with and pointed out to James O'Neill, and as the Warranty Deed specified Lot 2, Block 3694 of Port Charlotte Subdivision, Section 65, the Sellers had no reason to believe that the discrepancy in the Lot Number, that is to say Lot 2 as opposed to Lot 1, had not been discussed with the Plaintiffs and that the matter had not been efficiently and legally resolved. [Emphasis in original.]

102 The respondents never amended their Complaint against the appellants even though, as we will see, there was a good deal of activity in relation to the other defendants (before and after default was noted against the appellants) prior to the Florida court's final judgment against the appellants dated December 13, 1991.

VII. The Appellants' Dilemma

103 The appellants had to decide how to respond to the Complaint. To make an informed decision, they should have been told in general terms of the case they had to meet on liability and, more importantly on these facts, an indication of the jeopardy they faced in terms of damages. This is not a case where the plaintiffs were satisfied with the damages implicit in a failed minor real estate transaction. The Complaint, in my view, 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.

104 The appellants were entitled to draw some comfort from the fact that the respondents' guns were trained not on them alone, but on the real estate agent and the title insurer as well. Moreover, the respondent developers' allegations against the realtor O'Neill coincided with their own Statement of Defence, particularly the allegation that the appellants authorized the realtor to sell only Lot 2 — not Lot

1. On September 12, 1991, prior to the damages trial, the respondents settled with the realtor and the title insurer for US$10,750. This radically transformed the potential jeopardy of the appellants. They were never told of the settlement.

VIII. The Florida Pleadings Rule

105 Under Rule 1.190(a) of the Florida *Rules of Civil Procedure* (Fla. Stat. Ann. R. Civ. P. § 1.190(a)), the appellants were required to refile their Defence every time the respondents amended their Complaint, even if the amendments were solely directed at other defendants. This was nowhere brought to the appellants' attention. As mentioned earlier, I think the appellants could fairly understand from the "warning" in the original Complaint that only if no defence were filed would there be a pleadings default in the action. Otherwise there would be no pleadings default. The respondents never amended their Complaint against the appellants. There was therefore nothing further for the appellants "to answer". They were nevertheless noted in default for failing to file a defence.

106 The respondents' Amended Complaint, Second Amended Complaint, Third Amended Complaint and ultimately Fourth Amended Complaint modified the allegations against other parties. 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.

107 Yet we are told that:

> Under Florida law Dominic Thivy, Rose Thivy, Geoffrey Saldanha and Leueen Saldanha were under a mandatory obligation to deliver a defence to each of the new amended complaints. [Emphasis added.]

It seems to me the appellants were entitled to be told from the outset that their defence would be treated as non-existent if the Complaint were thereafter amended against *other* defendants.

108 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.

109 As the basis of the respondents' judgment is *default of pleading*, this lack of notification goes to the heart of the present appeal.

IX. Other Information the Appellants Did not Know

110 It is to be remembered that although the appellants had decided not to have a Florida lawyer, they were very much part of the liability phase of the action until noted in default on July 25, 1990, and very much interested in the assessment of damages phase of the action which did not take place until December 11, 1991. Even a defendant who concedes liability (as opposed to one who merely defaults) might want to contest what may appear to be "breathtaking" damages claimed by the successful party. Liability and assessment of damages are two distinct and separate issues. A defendant may choose to concede the one but contest the other.

111 In administrative law, where issues of notification have been extensively canvassed, albeit

in a different context, it is well established that a party must be made aware of "the potential jeopardy faced": D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at para. 9:5222. One of the criteria determining the stringency of natural justice requirements in particular circumstances is "the importance of the decision to the individual or individuals affected": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 25. There is a difference in "importance" between a minor real estate transaction whose defence is "not worth the candle" and a major claim which the respondents have successfully orchestrated into a million dollar liability.

(a) *During the Liability Phase which Concluded July 25, 1990*

112 The appellants received no notice of the court order dated November 6, 1987, striking out the claim for punitive damages against the realtor and the title insurance defendant on the basis, apparently, that treble damages are themselves intended to be punitive, and an additional claim for punitive damages is not permitted under Florida law. Despite this ruling, the appellants, as defaulters, were subsequently held liable for treble damages of US$210,000 *plus* punitive damages of US$50,000. The punitive damages issue went very much to the appellants' potential jeopardy, yet it seems they were not kept in the picture about court orders made in the same action as between the other parties relevant to the same head of damage alleged against them. This event predated being noted in default. If the appellants had received the advantage of this ruling, it would potentially have reduced the eventual damages against them by almost 20 percent. In other words, the oversight, if that is what it was, related to what is now claimed to be worth about a quarter of a million dollars.

113 On June 19, 1990, the appellants were sent a notice that an application would be made to the Florida court to note them in default for failure to file a defence to the Third Amended Complaint or "serve any pleading or other paper as required by law". The appellants had no reason to think that the defence they had already filed was not applicable to the Third Amended Complaint. (Indeed, there apparently was a Fourth Amended Complaint but it is not in the record before us.) Unless the appellants were made aware of the Florida pleadings rule, which they were not, such a notice would simply add to their confusion. It may be obvious to a Florida lawyer that every amended Complaint requires a fresh defence even if there are no changes relevant to the defendant called upon to plead, but such a requirement would not be obvious to an Ontario lawyer, still less to self-represented litigants such as the appellants.

114 The appellants were noted in default on July 25, 1990.

(b) *After Being Noted in Default but Prior to the Jury Trial on December 11, 1991*

115 In some cases, a court making an assessment of unliquidated damages might think it unnecessary to notify the defaulters of the ongoing proceedings. It would depend on the circumstances. For example, in Ontario, Rule 19.02(3) leaves notice in the discretion of the court (*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194). Whatever may be the minimum requirements in some cases, I believe the circumstances here cried out for notice of the subsequent proceedings because in the period between the noting of default on July 25, 1990, and the damages trial on December 11, 1991, the potential jeopardy changed radically to the appellants' disadvantage.

116 The appellants were not told that by Stipulation dated October 31, 1990, the respondents and realtor (both corporate and individual) made a deal "to delete claims against [the realtor] for treble damages, punitive damages, and statutory violations", leaving the respondents' claim against the realtor

(who had been the only contact between the respondents and the appellants) to proceed in simple negligence. The appellants were now the only parties against whom treble damages and punitive damages were sought, but they were not told of that fact. Had they been so advised, they would have been able to consider cross-proceedings against the realtor for indemnification in respect of the more substantial claims now asserted against them alone.

117 Nor were the appellants served with the court order dated March 27, 1991, striking out as improper the respondents' claim for attorney's costs against the realtor and the title insurance company. By way of contrast, the final judgment against the appellants dated December 13, 1991, specifically "reserves jurisdiction to tax costs, prejudgment interest, and attorney's fees" against the appellants.

118 Nor were the appellants served with an order dated June 17, 1991 for mandatory mediation which provided that "[a]ll parties are required to participate" (emphasis added). Even defendants who consider it uneconomical to litigate a US$8,000 building lot deal in a foreign country might well consider it to be in their best interest to participate in a mediation. The respondents say that the appellants were not entitled to notice of the order for mediation but it seems wholly incongruous to have a mediation order requiring "[a]ll parties" to participate when the *only* parties who were now the respondents' target for treble and punitive damages were not even told about it.

119 Nor were the appellants told that on September 12, 1991, the respondents settled with the realtor for US$8,250 and subsequently settled with the title insurers for US$2,500 while still retaining title to Lot 2. This left the appellants as the sole target at the damages trial. According to the documents they had received, the appellants were still entitled to believe that the respondents continued to make against the realtor essentially the same points as those the appellants themselves had set out in their Statement of Defence. This was no longer true. The appellants did not know that they were now on their own.

120 Nor were the appellants served, as required by the Florida rules, with notice of the experts the respondents proposed to call at the damages assessment. This too might have operated as a wake-up call to the appellants, who at this late stage were drifting obliviously toward financial disaster.

121 As mentioned above, the Third Amended Complaint claimed the respondents' damages on a model home. It is true that by their default, the appellants admitted the allegations of fact in the Complaint, but the facts thus admitted were specific to the respondents and to a single model home. There is surely a significant difference between damages on a single home (even a "model" home) and damages on a theory of lost profit from the construction of a non-existent residential subdivision. Yet it is a judgment largely based on the latter allegation, not the allegation in the Complaint, that is the basis of the bulk of the million dollar judgment now sought to be enforced against the appellants in Ontario.

122 On December 11, 1991, the Florida court entered a directed verdict for unliquidated damages against the appellants, and assessed the damages at US$210,000 plus US$50,000 punitive damages. It now appears that the out-of-pocket construction costs which formed a substantial part of the award of compensatory damages against the appellants were not incurred by the respondents, as had been alleged in their Complaint, but by Fox Chase Homes of Sarasota, Inc. or Fox Chase Homes of Charlotte County, Inc., whose names appeared nowhere in the pleadings. In the Ontario action, the trial judge found that under Florida law "causes of action of a corporation such as Fox Chase are the property of the corporation and cannot be passed through to its shareholders. Dissolved corporations cannot maintain actions except through their last directors with appropriate description in the Style of Cause not present in this matter." There was no such "appropriate description" in the Florida style of cause. In my view, the

intervention of one or two corporate entities could raise a number of potential defences not otherwise available in the assessment of damages. The purpose of a pleading is to give notice. It is certainly not implicit in anything said in the Complaint that the respondents were claiming damages on behalf of corporations in which they had an interest.

123 The appellants had not even been told 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.

124 I do not accept the suggestion that the appellants are the authors of their own misfortune on the basis that if they had hired a Florida lawyer they would have found out about all of these developments. The appellants decided not to defend the case set out against them in the Complaint. That case was subsequently transformed. They never had the opportunity to put their minds to the transformed case because they were never told about it.

125 I do not suggest that any one of the foregoing omissions of notice would necessarily have been fatal to enforcement of the respondents' default judgment in Ontario. Cumulatively, at all events, these continuing omissions seem to me to demonstrate an unfair procedure which in this particular case failed to meet the standards of natural justice.

X. Availability of an Appeal

126 The appellants had ten days to appeal the default judgment. They did not do so, apparently based on advice from their Ontario solicitor. I agree with Major J. that the appellants cannot be relieved of the consequences of their failure to appeal simply because they acted on legal advice.

127 The failure to exhaust local remedies in the foreign court is ordinarily a factor to be taken into account in determining whether a foreign judgment is enforceable in Ontario, but I do not think it is fatal here. We are dealing with a *default* judgment obtained, in my view, without compliance with the rules of natural justice. Morever, even if the appellants had appealed, we are told that no record of the damage assessment proceedings exists. There is no transcript of the evidence heard by the jury. There is similarly no record of the instructions given to the jury by the trial judge. If the respondents complied with the letter of the Florida rules, as they say they did, a Florida appellate court might well uphold the default judgment. The Ontario court is faced with a *different* issue than that which would have confronted a Florida appellate court. Was the notice, notwithstanding presumed compliance with Florida court rules, sufficient to alert the *foreign* defendants to the case they had to meet, and the potential jeopardy they faced?

128 I agree in this respect with the view of the English Court of Appeal in *Adams v. Cape Industries plc*, [1991] 1 All E.R. 929, at pp. 1052-53, that the availability of an appeal in the foreign jurisdiction is not necessarily determinative. *Cape Industries* was also a case of a default judgment.

129 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.

130 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.

XI. Disposition

131 I would allow the appeal to dismiss the action, with costs throughout to the appellants.

The following are the reasons delivered by

LEBEL J. (dissenting) —

I. Introduction

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

133 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.

134 Although I agree both that the "real and substantial connection" test should be extended to judgments from outside Canada and that the Florida court properly took jurisdiction over the defendants in this particular case, in my view the test should be modified significantly when it is applied to judgments originating outside the Canadian federation. Specifically, the 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.

135 Furthermore, the philosophy of *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, which replaces traditional categories with a purposive, principled framework, should not be confined to the question of jurisdiction, but should also be extended to the defences. In my view, liberalizing the jurisdiction side of the analysis while retaining narrow, strictly construed categories on the defence side is not a coherent approach. I would adopt a more flexible approach to the defences than the majority, and on that approach it is my view that the appellants have made out the defence of natural justice.

136 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 (as I will discuss below). 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.

II. Background

137 I agree with Major J.'s outline of the facts. I would, however, place additional emphasis on a number of details that emerge from the record.

138 The Saldanhas and the Thivys (to whom I will refer collectively as the "Sellers") purchased the lot in Florida thinking that they might eventually build a vacation home on it. In the meantime, they had little to do with it. They purchased it without having visited it, and they never saw it. They did not think seriously about selling the land until they received the unsolicited offer from the Bealses and Foodys (the "Buyers") in 1984. This was a relatively small investment from which they anticipated no more than modest returns and on which, it seems reasonable to infer, they did not expect to expend much energy.

139 The Sellers received the Buyers' offer to purchase from a Florida real estate agent, a Mr. O'Neill, in August 1984. They had had no prior dealings with Mr. O'Neill. Mrs. Rose Thivy, who worked in a law office and had done some work as a law clerk as well as some title searching and conveyancing, dealt with Mr. O'Neill on behalf of the group. She testified that she asked Mr. O'Neill how he found her telephone number, and he told her that he had searched the County records to find the owners of the lot his clients wanted to buy.

140 The Buyers' written offer was sent to Mrs. Thivy. She noticed that it erroneously referred to "Lot 1". She assumed that the Buyers were not interested in buying the Sellers' property and that the deal would not proceed. The Sellers did not pursue the matter. Mr. O'Neill then contacted Mrs. Thivy to ask why there had been no response to the offer. Mrs. Thivy pointed out the misidentification of the lot to Mr. O'Neill, who insisted that the Sellers were the registered owners of the lot the Buyers wanted. Mrs. Thivy changed the number on the document to "Lot 2". The Buyers accepted this counteroffer. Subsequently, the Sellers received a deed and other closing documents in the mail. All the documents referred to Lot 2 and not to Lot 1.

141 In January 1985, Mr. Beals telephoned Mrs. Thivy and complained that he had been sold the wrong lot. Mrs. Thivy told him about her conversation with Mr. O'Neill, and suggested that Mr. Beals resolve the problem with him.

142 In March 1985, the Sellers received a copy of a pleading initiating an action by the Buyers in a Florida Circuit Court (the "Complaint"). The Complaint stated that it related to "an action for damages which exceeds $5,000", as was required to give the Circuit Court monetary jurisdiction over the matter, but otherwise did not specify the quantum of damages claimed.

143 The Complaint alleged that the Sellers had fraudulently induced the Buyers to purchase the

wrong lot. The Buyers claimed damages based on the purchase price of the lot, the expenses they had incurred in preparing the lot for construction, and revenue they had lost because they had been unable to build a model home on Lot 1. There were also claims against two other defendants, O'Neill's Realty and the Buyers' title insurance company. Attached to the Complaint was the original offer to purchase referring to Lot 1. The contract of purchase and sale referring to Lot 2 was not attached.

144 Mrs. Thivy and Mr. Saldanha both testified that the Sellers had hoped to "rectify the situation" with the Buyers, perhaps by rescinding the transaction and refunding the Buyers' money. When they received the Complaint, however, they decided to defend the lawsuit. Mrs. Thivy telephoned the Florida court for instructions on procedure and form. She then drafted a defence for all the Sellers to sign, and sent it to the court in Florida. In the defence, the Sellers denied that they had ever represented that they owned Lot 1.

145 In the fall of 1986, the Sellers received notice that the action in Florida had been voluntarily dismissed, without prejudice. Mr. Saldanha testified that he thought the reason the action had been dismissed was that the facts the Sellers had set out in their defence were dispositive. As he put it, "when it went away I said, 'Okay, people know the facts, it's over'."

146 But it was not over. A short time later, the Buyers commenced a second action in the Florida court, and the Sellers received a new Complaint in the mail (the "Amended Complaint"). The Amended Complaint set out essentially the same allegations as the previous one. A claim for treble damages was added against the Sellers, and the language was somewhat different, alleging that "wilfully false and fraudulent" misrepresentations were made by the Sellers both directly and through Mr. O'Neill. The Amended Complaint also said that the Sellers had "willingly and wilfully" changed the contract of purchase and sale to read "Lot 2", without informing the Buyers. The damages claimed were spelled out in more detail than before; the Buyers claimed three times the amount they had paid for the land, three times their construction expenses and business losses, rescission of the contract and return of the purchase price, punitive damages, attorney's fees and court costs. Again, the original offer referring to Lot 1, without the Sellers' signatures, was attached, but the contract of purchase and sale, and the other closing documents which identified Lot 2 as the property being transferred, were not.

147 Mrs. Thivy prepared a new defence, which was simply a copy of the old one, and sent it to the Florida court purportedly on behalf of all four defendants. The trial judge accepted the evidence of the Saldanhas, which differed from that of the Thivys on this point, that the Saldanhas chose not to defend the second action and that Mrs. Thivy signed their names to the new defence without their authorization. The Saldanhas therefore did not attorn to the reinstated action, although the Thivys did.

148 Mr. Saldanha testified that when he and his wife learned of the Amended Complaint, they discussed the matter, and decided that "we were not going to respond to this, because we had already responded". Mr. Saldanha thought that the resurrection of the action was an error of some kind, because the new complaint "seemed to be the same thing regurgitated again" and, in his view, the Sellers had already informed the Florida court of facts that disproved the regurgitated allegations. At this point, as the trial judge put it, "[g]iven their share of the amount at issue, which they assumed to be one-half of $8,000 US, [the Saldanhas] decided the game was not worth the candle, and they would participate no further" ((1998), 42 O.R. (3d) 127, at p. 130).

149 The Thivys seem to have come to the same conclusion not long afterwards. After the action was relaunched, the Amended Complaint was amended three times, and the Sellers duly received copies of each new version. The Thivys sent their initial defence to the Florida court, but did not respond to any

of the new versions of the Amended Complaint. Mrs. Thivy testified that they decided "just to forget about it" because defending the action would probably cost them just as much as the lawsuit was worth, and because they thought that the Florida courts had no jurisdiction over them.

150 The successive versions of the Amended Complaint did not change the allegations against the Sellers in any way. The only changes were to claims against other defendants. Mr. Richard Groner, who acted for the respondents in the litigation in Florida, testified at the Ontario trial as an expert in Florida civil procedure. He testified that, under the applicable rules, each amendment to a complaint requires a response from all the parties on whom it is served, even parties to whom the changes in the pleading have no relevance. Such a party may simply resubmit a copy of his or her earlier defence, or may seek the court's permission to let the earlier defence stand over, but if these steps are not taken the defence that has already been filed ceases to have any legal effect. Therefore, the result of the Sellers' failure to respond to new versions of the Amended Complaint was that they were viewed under the Florida rules as not having raised any defence at all. There was nothing in the documents served on the Sellers to notify them that this was a potential consequence of failure to refile their defence.

151 The Sellers received notice of a default hearing on July 25, 1990, but did not attend or respond. In due course, they were noted in default. As a result, they were deemed to have admitted all the allegations in the Amended Complaint so far as they related to liability. Damages were still a live issue. A hearing was held before a judge and a jury in Florida to assess damages. The Sellers received notice of this hearing, too, but again they did not respond.

152 We do not know much about what was said in the damages hearing. There is no transcript of that proceeding. Mr. Groner testified that in Florida courts transcripts are not mandatory for civil trials; a reporter is provided at the option of and at the expense of the litigants. In this case, he decided not to incur the expense. There is no record of the judge's instructions to the jury. An expert witness testified on the valuation of the Buyers' business losses. No expert's report was filed. Mr. Groner testified that it is usual in civil litigation in Florida for parties to obtain information about an expert witness's qualifications and proposed testimony through the discovery process. Expert reports are generally not submitted to the court. All that survives to provide some clue as to how a simple $8,000 land transaction turned into the extraordinary amount now at stake in this appeal is a "Memorandum of Lost Profits Damage" prepared by Mr. Groner, which he submitted to the trial judge in Florida to support his submissions on jury instructions.

153 In late December 1991, the Sellers received the judgment of the Florida court in the mail. The total amount of the judgment was slightly over $270,000, of which $50,000 was punitive damages, with interest set at 12 percent per annum from the date of the judgment, December 12, 1991 (there seems some confusion in the record over the amount awarded, which the trial judge said was $260,000; the copy of the Florida court's judgment filed in the record is for two amounts which together total $270,886.57). The Sellers were surprised and dismayed at the size of this amount. Mr. Saldanha testified that at first he thought it was a joke. Mrs. Saldanha testified that when she read the number in print "it was like a real blow to the stomach".

154 The Sellers realized only at this point that the Florida action was not, as they had assumed, a minor dispute that would be more expensive to defend than to lose. They recognized that they needed to seek legal advice immediately. The Thivys and the Saldanhas separately consulted lawyers. They were advised that the judgment would not be enforced in Ontario because the Florida court did not have jurisdiction over them. Acting on this advice, the Sellers did not avail themselves of the various means available to them in the Florida system to challenge the judgment.

155 Mr. Beals was examined for discovery in the proceedings in Ontario, and his testimony was read in. His deposition in the Florida proceedings was also an exhibit in the Ontario trial. Based on that evidence, the trial judge made findings of fact that included the following:

> Mr. Beals signed all the closing documents referring to Lot 2 without reading them.
>
> Construction of the model home on Lot 1 stopped before the Buyers learned that they had bought the wrong lot. Mr. Beals and Mr. Foody decided to discontinue their business relationship for unrelated reasons, and Mr. Beals bought out his partner's interest in the company.
>
> Mr. Beals's company, Fox Chase Homes, was dissolved before the Florida action was commenced.

There is no suggestion that these factual findings were in error.

156 Mr. David Mulock, a Florida litigator, testified for the appellants as an expert on Florida procedural and substantive law. He testified that justifiable reliance is one of the essential components of a fraud claim in Florida law. He stated his opinion that reliance by the Buyers on misrepresentations that they were buying Lot 1 could not have been reasonable, because the ownership of land is a matter of public record which can easily be checked, and routinely is checked in any real estate transaction. Mr. Mulock said that the allegations in the Complaint, even if true, were therefore insufficient to support damages for fraud.

157 Mr. Mulock also testified that when a corporation that has a claim for damages is dissolved, its last directors can pursue the cause of action as long as they indicate in the pleadings that they do so in the capacity of representatives of the corporation. None of the many versions of the Complaint in the Florida action made any reference to Fox Chase Homes.

158 The trial judge inferred from the contents of the Memorandum of Lost Profits Damage and from the verdict reached by the Florida jury that the jury had not been informed of several key facts: that the decision to stop construction and the winding-up of Fox Chase Homes were unrelated to the mistake in the land transaction; that the corporation that had allegedly suffered business losses was not a party to the action; and that there was a contract of purchase and sale signed by both the Buyers and the Sellers referring to Lot 2. This was the basis for his finding that the jury was deliberately misled and the defence of fraud was made out.

III. The Extension of the "Real and Substantial Connection" Test to Foreign-Country Judgments

A. *The Need for Clarification*

159 The parties agreed before the trial judge that the Florida court had properly assumed jurisdiction. As a result, it is not strictly necessary to deal with the application of the "real and substantial connection" test to foreign-country judgments to dispose of this appeal. Although the issue is moot between these parties, the Court asked for additional submissions on it. My discussion of the jurisdiction question is more extensive than would ordinarily be necessary in light of the appellants' concession of this point and of my agreement with Major J. on what the result of the jurisdiction analysis should be in this case. I have set out my views on this issue in detail because the principles that ought to shape the

jurisdiction analysis should also inform the interpretation of the defences, on which I disagree with the majority.

160 I will follow Major J. in assuming that the relevant laws of other Canadian provinces are substantially the same as those of Ontario. I will be referring to Canada and Ontario interchangeably, except where the context indicates otherwise.

161 *Morguard*, *supra*, marked the beginning of a new era in Canadian conflicts law, and set out the basic principles and policy objectives underlying that new legal framework. At a practical level, however, it left many questions unanswered. Among them are whether the "real and substantial connection" test applies in international situations, and the precise nature of the connections that support the recognition of jurisdiction. The present appeal is a suitable occasion within which to clarify some of the implications of *Morguard* and to develop its ramifications in the international context. For these reasons, this Court decided to hear submissions on the international application of the test, in the hope of providing some guidance to lower courts on the issues that this case raises although those issues are no longer live between the parties.

162 Under the approach adopted by the majority, the "real and substantial connection" test applies in the international context just as it does within Canada, and if any unfairness results it may be dealt with only by arguing *forum non conveniens* in the foreign forum or invoking defences to the enforcement of the final judgment. My view is different. The jurisdiction test itself should be applied so that the assumption of jurisdiction will not be recognized if it is unfair to the defendant. To do so requires taking into account the differences between the international and interprovincial contexts as well as between the rationales that structure our conflicts law in these two spheres.

B. *Constitutional Imperatives Versus International Comity*

163 The adoption in *Morguard* of new, liberal and purposive rules governing recognition and enforcement of judgments from one province by the courts of another was based on two underlying rationales: constitutional considerations, particularly the intention of the framers of the Constitution to create an integrated national economy; and considerations of international comity, which La Forest J. held should be evaluated anew "in the light of a changing world order" (p. 1097). While the latter rationale extends to foreign-country judgments, the former does not.

164 In *Morguard*, La Forest J. emphasized that the integrated character of the Canadian federation makes a high degree of cooperation between the courts of the various provinces a practical necessity. As this Court later confirmed in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, it is a "constitutional imperative", inherent in the relationship between the units of our federal state, that each province must recognize the properly assumed jurisdiction of another, and conversely that no court in a province can intermeddle in matters that are without a constitutionally sufficient connection to that province. Provided that a court's assumption of jurisdiction is based on a real and substantial connection to the forum, the matter is within the sphere of provincial authority, and the resulting judgment is entitled to "full faith and credit", to borrow the language of the United States Constitution (Article IV), in all the other provinces.

165 As I observed in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78, at para. 53, it is clear from the reasoning in both *Morguard* and in *Hunt*, *supra*, "that federalism was the central concern underlying both decisions". At the same time, *Morguard* left little doubt that the old common law rules were as outdated in the international sphere as they were

inappropriate in the interprovincial context. La Forest J. noted that international borders are far more permeable, and international travel and communications much easier, than was the case when the traditional rules were developed in the nineteenth century. Business dealings with residents of other states are both commonplace and essential for any sophisticated modern economy. It is contrary to the interests of a modern state to retain rules of private international law that impede its citizens' participation in the increasingly integrated world economy. La Forest J. endorsed the view of H. E. Yntema that the rules of private international law ought to "promote suitable conditions of interstate and international commerce" ("The Objectives of Private International Law" (1957), 35 *Can. Bar Rev.* 721, at p. 741, cited in *Morguard*, at p. 1097).

166 *Morguard* thus strongly suggested that the recognition and enforcement of foreign-country judgments should be subject to a more liberal test informed by an updated understanding of international comity. It is equally clear from a reading of *Morguard* and its progeny that the considerations informing the application of the test to foreign-country judgments are not identical to those that shape conflict rules within Canada. As I observed in *Spar*, *supra*, at para. 51, "it is important to emphasize that *Morguard* and *Hunt* were decided in the context of interprovincial jurisdictional disputes . . . [and that] the specific findings of these decisions cannot easily be extended beyond this context". See also *Hunt*, *supra*, at p. 328. Although constitutional considerations and considerations of international comity both point towards a more liberal jurisdiction test, important differences remain between them.

167 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. In *Morguard*, La Forest J. adopted the definition of comity stated by the United States Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163−64 (cited in *Morguard*, at p. 1096):

> "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.

168 The phrase "international duty and convenience" 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.

169 The provinces, on the other hand, are constitutionally bound both to observe the limits on their own power to assert jurisdiction over defendants outside the province, and to recognize the properly assumed jurisdiction of courts in sister provinces; for them, this is "a matter of absolute obligation". This obligation reflects the unity in diversity that is characteristic of our federal state. In *Morguard*, *supra*, this Court acknowledged the shared values of the Canadian justice system which, as we know, fully accepts the relevance and importance of its two great legal systems, common law and civil law. The *Morguard* rule was designed in full awareness that Canada shares two legal systems.

170 A further point is that there are significant factual differences between the international and interprovincial contexts that should be reflected in the private international law rules applicable to each. These contextual differences are important because the doctrine of comity should be applied in a context-

sensitive manner. The ultimate purpose of rules based on the idea of comity is to "facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner" (*Morguard*, *supra*, at p. 1096). How this purpose is best to be achieved depends on the context in which the rules operate.

171 A context-sensitive jurisdiction test ought to take into account the difficulty of defending in a foreign jurisdiction and the possibility that the quality of justice there may not meet Canadian standards. Judgments should travel more easily across provincial borders than across international ones, both because of the relative ease of mobility between the provinces and because of the consistent nationwide standards of the Canadian justice system. When a judgment comes from a foreign country, the logistical difficulties of defending in the originating forum may be much greater, and the foreign legal system may be different from those with which Canadians are familiar. Canada is a single country with a fully integrated economy, but the world is not. In *Morguard*, at p. 1095, this Court rightly emphasized that "[m]odern states . . . cannot live in splendid isolation." But we still do not live in a borderless global village; our modern world is "home to widely varied cultures with radically divergent value systems" (*Yahoo!, Inc. v. Ligue contre le racisme et l'antisémitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001), at p. 1186).

172 In my view, it follows from the contextual and purpose-driven approach adopted in *Morguard* that the rules for recognition and enforcement of foreign-country judgments should be carefully fashioned to reflect the realities of the international context, and calibrated to further to the greatest degree possible, the ultimate objective of facilitating international interactions. This means that the rule should be far more liberal than the categorical approach that was followed before *Morguard* (and most influentially stated in *Emanuel v. Symon*, [1908] 1 K.B. 302 (C.A.)), but by no means does it follow that it should be as liberal as the interprovincial rule.

173 The traditional rules impeded cross-border commerce by making it difficult for judgment creditors to obtain effective remedies against defendants resident in other countries, thus undermining the security of transactions. But an excessively generous test would be unduly burdensome for defendants and might discourage persons with assets in Canada from entering into transactions that could eventually get them involved in international disputes. This result, too, would frustrate the purpose of private international law. Ideally, the test should represent a balance designed to create the optimum conditions favouring the flow of commodities and services across state lines. In our enthusiasm to advance beyond the parochialism of the past, we should be careful not to overshoot this goal.

174 I would conclude 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.

C. *The Nature of the Requisite Connecting Factors*

175 The "real and substantial connection" test is simply a way of asking whether it was appropriate for the originating forum to take jurisdiction over the matter. If the originating court is an appropriate forum, then it is reasonable to expect the defendant to defend his interests there and to live with the consequences if he decides not to do so. Conversely, if it is not reasonable in the circumstances to expect the defendant to go to the originating court, then it was probably not appropriate for it to take jurisdiction. I would also emphasize at the outset that the requirement that the originating court act "with

properly restrained jurisdiction" was expressly recognized by La Forest J. as a means of ensuring fairness to the defendant (*Morguard*, *supra*, at p. 1103).

176 In my view, it is important to take into account the burdens that defending in the foreign forum would impose on a defendant, in order to determine whether it is reasonable to expect the defendant to accept them. Among the factors that affect the onerousness of defending in a foreign forum are the difficulty and expense of travelling there and the juridical disadvantage that the defendant may face as a result of differences between the foreign legal system and our own. In *Morguard*, *supra*, this Court recognized the unfairness of forcing a plaintiff to bring an action in the place where the defendant now resides, "whatever the inconvenience and costs this may bring" (p. 1103). Correlatively, defendants should not be compelled to defend in the jurisdiction of the plaintiff's choosing regardless of the inconvenience and expense entailed; all of these factors should be taken into account by the court in arriving at a solution that justly accommodates the legitimate interests of both parties.

177 One question left open in *Morguard* was exactly what must be connected to the forum to satisfy the "real and substantial connection" test. At various points, La Forest J. refers to "significant contacts with the subject-matter of the action" (p. 1103), "contacts . . . to the defendant or the subject-matter of the suit" (p. 1103), "a nexus . . . between the subject-matter of the action and the territory where the action is brought" (p. 1104), a "connection between the damages suffered and the jurisdiction", and a "connection with the transaction or the parties" (p. 1108) (see J. Blom, "Conflict of Laws — Enforcement of Extraprovincial Default Judgment — Real and Substantial Connection: *Morguard Investments Ltd.* v. *De Savoye*" (1991), 70 *Can. Bar Rev.* 733; G. D. Watson and F. Au, "Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard" (2000), 23 *Advocates' Q.* 167, at p. 200).

178 The justification for requiring a defendant to go to the foreign forum is generally strongest when there is a link to the defendant. If the defendant has become involved in activities in the jurisdiction, or in activities with foreseeable effects in the jurisdiction, it is hardly reasonable for her to claim that she should be shielded from the process of that jurisdiction's courts. This reasoning is reflected in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, a case relied on in *Morguard*. In *Moran* it was held that, in a products liability tort case, the place where the victim suffered damages could assume jurisdiction over a foreign defendant manufacturer who knew or ought to have known that the defective product "would be used or consumed where the plaintiff used or consumed it" — i.e., if there was an indirect but substantial connection between the defendant and the forum (*Moran*, *supra*, at p. 409, cited in *Morguard*, at p. 1106).

179 But there may be good reasons why jurisdiction should be recognized even where there is little or no connection to the defendant, particularly when other considerations, such as fairness to the plaintiff and the importance of administering the justice system in an efficient manner, are taken into account along with the interests of the defendant. It is not unusual for cross-border litigation to arise out of complex transactions involving a number of parties with connections to several jurisdictions. Watson and Au, *supra*, point out, at p. 200, that when litigation involves "multiple defendants in different jurisdictions, insisting on a substantial connection between each defendant and the forum can lead to a multiplicity of actions and inconsistent findings". In such circumstances, a test that recognizes jurisdiction based on a connection to the subject matter of the action seems better suited to identifying whether the forum is a reasonable place for the action to be heard.

180 Moreover, the Canadian Constitution does not mandate that the jurisdiction test provide a minimum level of procedural protection to the defendant, regardless of other factors (see Watson and Au, *supra*, at p. 180). In this respect, Canada's Constitution can be contrasted with that of the United States.

In the U.S., defendants are protected by the due process clauses of the Fifth and Fourteenth Amendments, which expressly provide that a person cannot be deprived of property without due process of law. Because the defendant in a civil case stands to be deprived of property by an adverse judgment, the court's jurisdiction will not be recognized unless it accords with the defendant's due process rights — a requirement which has been interpreted to mean that there must be certain minimum connections between the defendant and the forum. By contrast, in the *Canadian Charter of Rights and Freedoms*, due process is enshrined in s. 7, which protects "life, liberty and security of the person", but not property rights. As a general rule, the defendant's life, liberty and security of the person are unaffected by the outcome of civil litigation. In Canada, therefore, the defendant's individual constitutional rights are not the starting point for jurisdictional analysis as they are in the U.S. — nor, indeed, would s. 7 rights usually be relevant to jurisdictional issues in civil disputes, although it is possible that there may be situations where fundamental interests of the defendant are implicated and s. 7 could come into play.

181 A broad interpretation of the "real and substantial connection" test, whereby the test may be satisfied even in the absence of a connection to the defendant, seems appropriate given both our constitutional arrangements and the ultimate objective of facilitating the flow of goods and services across borders. Jurisdiction should be acknowledged as proper where the forum was a reasonable place to hear the action, taking into account all the circumstances, including judicial efficiency and the legitimate interests of both parties. At the same time, it should not be forgotten that the jurisdiction test is a safeguard of fairness to the defendant.

182 The test should ensure that, considering the totality of the connections between the forum and all aspects of the action, it is not unfair to expect the defendant to litigate in that forum. It does not follow that there necessarily has to be a connection between the defendant and the forum. There are situations where, given the other connections between the forum and the proceeding, it is a reasonable place for the action to be heard and the defendant can fairly be expected to go there even though he personally has no link at all to that jurisdiction.

D. *Balancing Hardship to the Defendant Against the Strength of the Connections*

183 The approach outlined above suggests that when a court is asked to recognize and enforce a foreign judgment, and questions whether the originating court's jurisdiction was properly restrained, it should inquire into the connections between the forum and all aspects of the action, on the one hand, and the hardship that litigation in the foreign forum would impose on the defendant, on the other. The question is how real and how substantial a connection has to be to support the conclusion that the originating court was a reasonable place for the action to be heard. The answer is that the connection must be strong enough to make it reasonable for the defendant to be expected to litigate there even though that may entail additional expense, inconvenience and risk. If litigating in the foreign jurisdiction is very burdensome to the defendant, a stronger degree of connection would be required before the originating court's assumption of jurisdiction should be recognized as fair and appropriate.

184 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.

185 There is an important difference between the inquiry conducted by a court assuming

jurisdiction at the outset of the action and the test applied by a court asked to recognize and enforce a judgment at the end. In the former case, two steps are involved: the court must first determine that it has a basis for jurisdiction, and if it does it must go on to decide whether it should nevertheless decline to exercise that jurisdiction because another forum is clearly more appropriate for the hearing of the action. In the latter case of a receiving court, only the first step in this inquiry is relevant. Provided that the originating court had a reasonable basis for jurisdiction, the defendant had its chance to appear there and argue *forum non conveniens*, and cannot question the originating court's decision on that issue in the receiving court.

186 Nevertheless, the receiving court is not bound to agree with the originating court's opinion that it had a reasonable basis on which to assume jurisdiction. If the connections to the originating forum are tenuous or greatly outweighed by the hardship imposed on the defendant forced to litigate there, the receiving court may conclude that it was not even a reasonable place for the action to be heard. It is no good to say that the defendant should have raised the question of hardship by arguing *forum non conveniens* before the foreign court. If 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*.

E. *The Application of the Test in the Canadian and International Contexts*

187 A test which balances hardship to the defendant (with due regard to the interests of the plaintiff) against the factors connecting the action to the forum — including links to either party or any other aspect of the action — leads to a very generous approach to the recognition and enforcement of judgments originating in other Canadian provinces. The reason for this is that the hardship imposed on a defendant who has to appear in another province within the Canadian federation will generally be minimal and will usually be outweighed by a genuine connection between the forum and the defendant, the subject-matter of the action or the damages suffered — all of which are invoked as bases of jurisdiction in provincial service *ex juris* statutes and in the *Civil Code of Québec*, S.Q. 1991, c. 64, and each of which, as I noted in *Spar*, *supra*, at para. 56, appears to be an example of a real and substantial connection.

188 Litigation outside the defendant's home forum may entail a number of burdens, which vary depending on the context. Those burdens potentially include 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 biassed against foreign defendants or generally corrupt.

189 Within Canada, most of these problems do not arise. It is true that physical distances within this country can be significant, and the expense and inconvenience to a defendant in Newfoundland who is required to litigate in British Columbia, for example, would not be inconsiderable. As a rule, however, the distances involved are manageable for citizens of a modern country with an efficient transportation infrastructure. In any event, it may not be necessary for the defendant to go to the jurisdiction in person. Given the relative ease of travel and communications today, it is usually not an extraordinary burden to litigate in another Canadian province.

190 More importantly, there is very little concern that the defendant will be at a disadvantage because she is not familiar with the legal system in the other province, and still less that the legal systems

applied in Canada will actually treat her unfairly. As La Forest J. pointed out in *Morguard*, *supra*, there can be no genuine concern about "differential quality of justice among the provinces" (p. 1100). Indeed, *Morguard* establishes that the Canadian justice system should be understood as an integrated whole. Differences exist in both procedural and substantive matters, but the same basic values apply across the country, and our judicial system is basically unitary. Excessive discrepancies between the provinces will tend to become harmonized under the guidance of the federally appointed judiciary and the overall superintending authority of the Supreme Court of Canada. Furthermore, interprovincial law firms have become commonplace and lawyers across the country are required to abide by the same ethical standards (*Morguard*, at p. 1100).

191 It follows that the assumption of jurisdiction by a sister province, provided that it does not exceed the province's constitutional authority over property, civil rights and the administration of justice in the province and is not prompted by unfair forum−shopping tactics on the plaintiff's part, should be entitled to full recognition and enforcement throughout Canada. A connection to the subject matter of the action should usually suffice to meet the "real and substantial connection" test.

192 Exceptions may arise in cases where litigation away from home would involve travel of a particularly arduous nature for the defendant (which might arise, for example, where the defendant resides in the far north) and, at the same time, the connections to the forum are not especially strong (an example might be a case where all the facts giving rise to the cause of action took place outside the jurisdiction and the only connection is that the plaintiff has suffered damages there). Absent such exceptional circumstances, grounds such as a wrong committed in the jurisdiction or damages suffered there would probably support the assumption of jurisdiction by the province in accordance with the requirements of order and fairness.

193 A judgment which comes to a Canadian court from beyond our international borders is another matter altogether. The distances involved and the difficulty of travelling can be considerably greater when litigation is in a foreign country, and a Canadian defendant faced with a lawsuit outside this country will have to deal with an unfamiliar, and in some cases a very different, legal system.

194 In extreme cases, the foreign legal system itself may be inherently unfair. It is an unfortunate fact that not every country's courts are free of official corruption or systemic bias. In my opinion, it is to this possibility that La Forest J. alluded when he specified that "fairness to the defendant requires that the judgment be issued by a court acting <u>through fair process</u> and with properly restrained jurisdiction" (*Morguard*, at p. 1103 (emphasis added)). If the process that led to the judgment was unfair in itself, it is not fair to the defendant to enforce that judgment in any circumstance, even if the forum has very strong connections to the action and appears in every other respect to be the natural place for the action to be heard.

195 It should therefore be part of the plaintiff's burden in establishing a *prima facie* case of enforceability to prove that the system from which the judgment came is basically fair. When the originating jurisdiction is another democratic country with fair institutions, this burden will be easily met and may call for nothing more than reliance on judicial notice that the judgment emanates from a legitimate and respected legal system.

196 A less troubling but more common situation arises when there is nothing inherently wrong with the foreign legal system, but it is different enough from ours that a Canadian defendant may encounter considerable difficulties understanding her rights and obligations and the steps she needs to take to defend herself. To take a simple example, a defendant from a Canadian common law province

may find a civilian system such as that of France or Germany quite unfamiliar. Continental legal systems are, of course, just as fair and sophisticated as the legal system of Ontario. The fact remains that an Ontario defendant who is used to a very different system may suffer prejudice as a result of the foreign system's unfamiliarity. Such a defendant cannot hope to protect herself unless she retains local counsel who can both negotiate the process on her behalf and explain it to her in a language she knows. It is not a simple thing to find trustworthy, competent, bilingual counsel in a foreign country; nor is it cheap. The plaintiff, who chose the forum, will presumably not face these difficulties, and therefore the parties will not be on a level playing field. (Conversely, the plaintiff would face the same kind of disadvantage if required to come to Ontario to pursue his case; it is in the nature of international litigation that one party or the other must accept the hardship of litigation in a foreign jurisdiction. The touchstone for an enforcing court in reaching a fair decision as to which of them should bear this burden is the strength of the connections between the action and the originating jurisdiction.)

197 Even legal systems that are relatively similar to Canada's can differ from our system significantly, and in ways that affect a Canadian defendant's ability to make his case effectively and to understand the strengths and weaknesses of his position. The common law system in the United States remains very close in many respects to that of Canada. Yet this action itself provides numerous examples of substantive and procedural differences between the legal system in Florida and that of Ontario which created unforeseen perils for the Ontario defendants. Those differences include the following:

– Discovery in Florida is even broader in scope than it is in Ontario, and some of the functions of pleadings in Ontario are left to the discovery process. The record in this case indicates that it is standard practice for pleadings to disclose no more than a rough outline of the plaintiff's claim and for the defendant to find out the specifics through discovery. Thus, the Amended Complaint did not set out the amount of damages claimed, but simply stated a minimum amount necessary to support the monetary jurisdiction of the Circuit Court. The expert witness, Mr. Groner, testified that the Ontario defendants were expected to ascertain the actual amount being sought through the discovery process. This would, of course, involve expense and would probably necessitate retaining local counsel in Florida.

– Under Florida's procedural rules, the defence filed by the appellants ceased to have any effect once a new version of the Amended Complaint was filed, in spite of the fact that the allegations concerning the appellants were unchanged and the lack of any notification to the appellants that they were supposed to file a new defence.

– Even in cases where significant sums of money are at stake, transcripts are not produced in the Florida courts as a matter of course, but at the option and expense of the litigants. In a default case, this effectively means the plaintiff has complete control over whether there will be a record of what is said in the proceedings.

– Punitive damages appear to be available in a wider range of cases and in much larger amounts under Florida law than they are under Ontario law. An Ontario defendant sued in Florida may therefore be at risk of a far higher damage award than would be contemplated in Ontario.

198 These differences illustrate that for an Ontario defendant, litigation in Florida entails greater hardship and risk than litigation in another Canadian province — and of all 'truly foreign' jurisdictions, Florida, which is not very far away and has a legal system essentially similar to Ontario's, is one of the least foreign. In my opinion, therefore, fairness to defendants requires a stronger degree of connection to support Florida's assumption of jurisdiction than would be the case if the originating court were in a

sister province. Furthermore, if the judgment had originated from a more 'foreign' jurisdiction which involved greater difficulties for the defendant, the requisite degree of connection would be even higher.

199 In this case, the jurisdictional point is easily dealt with, not only because of the appellants' concession, but also because there were very strong connections between Florida and every component of the action: the plaintiffs, who live there; the land, which is in Florida; and the defendants, who involved themselves in real estate transactions there. Florida was the natural place for the action to be heard. If the connections were less robust, however, the conclusion might be different. For example, in a case where the only connection to Florida is that the plaintiffs are Florida residents and suffer damages there, it would, as a rule, be unfair to Canadian defendants to expect them to face the expense and risks of litigation in Florida.

F. *Should the Test for Jurisdiction Be Based on "Reciprocity"?*

200 It follows from the propositions set out above that I do not agree with the majority that the notion of "interprovincial reciprocity" is "equally applicable to judgments made by courts outside Canada" (Major J., at para. 29). The argument is that if the circumstances are such that an Ontario court could reasonably take jurisdiction based on equivalent connecting factors to Ontario, then the Ontario court should recognize the jurisdiction of the foreign court. Although there is some initial appeal to this idea, ultimately I do not agree with it. Its effect is to treat a judgment from a foreign country exactly like one that originates within Canada. This approach, in my view, fails to take into account the very real differences between the interprovincial and international contexts.

201 A few preliminary words should be said about the concept of "reciprocity". Some ambiguity is associated with this term. It is sometimes used to refer to the idea that State A should recognize the jurisdiction of State B's courts if State B would do the same for State A in the same circumstances. On the other hand, "reciprocity" sometimes refers to the quite different notion (invoked by the majority here) that State A should recognize the jurisdiction of State B if State A would have assumed jurisdiction in the same circumstances (see *Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 1, at p. 501). Blom has suggested that the latter approach is more properly one of "equivalence of jurisdiction" rather than "reciprocity" (Blom, *supra*, at p. 735).

202 I would note that in *Morguard*, *supra*, La Forest J. rejected reciprocity in the latter sense (equivalence of jurisdiction) as the basis for a new jurisdiction test in the interprovincial context, and also questioned its usefulness on the international plane (see *Morguard*, at p. 1104; Blom, *supra*, at p. 735). Instead, he espoused an approach whereby the assumption of jurisdiction by a court in a province would be governed by the same principles of order and fairness that guide a court in another province when it determines whether to recognize the first court's jurisdiction. Within Canada, the bases for assuming jurisdiction and the bases for recognizing it should be correlative; as La Forest J. pointed out, "[i]f it is fair and reasonable for the courts of one province to exercise jurisdiction over a subject-matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment" (p. 1094). The logic underlying this statement is not that the forum should recognize a jurisdiction that it claims for itself, but rather that the same principles define when it is reasonable to assume jurisdiction and when it is reasonable to recognize it.

203 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 international setting.

204 Nor does the concept of reciprocity in the sense of equivalence of jurisdiction serve the purposes of private international law well. This idea fails to reflect the differences between assuming jurisdiction and enforcing a foreign judgment. When a Canadian court takes jurisdiction over a foreign defendant, it need not inquire into the fairness of its own process, which can be taken for granted. Potential hardship to the defendant can be dealt with under *forum non conveniens*. The ultimate practical effect of the court's judgment will not be determined by its own decision to take jurisdiction, but by the decision of the courts in the defendant's home jurisdiction whether or not to recognize and enforce the Canadian judgment based on that jurisdiction's own domestic law and policy. Conversely, when a foreign judgment arrives in Canada, the enforcing court is the last line of defence for the Canadian defendant. The court should have a discretion to decide that it is not fair to the defendant to recognize the jurisdiction of the foreign court, even if the Canadian court would have decided it was fair to take jurisdiction itself based on the same connecting factors.

G. *Conclusion on Jurisdiction*

205 In conclusion, I agree with Major J. that considerations of comity, order and fairness support the application of the "real and substantial connection" test to the recognition and enforcement of judgments originating in foreign countries. In my view, however, the application of the test should be purpose-driven and contextual. What constitutes a connection sufficient to meet the test will not be the same in every context. The jurisdiction test should reflect the difference between the international and interprovincial contexts and the greater hardship that litigation in a foreign country can entail. There is no good reason why Ontario courts should have to treat a judgment from Florida — or one from China, Turkmenistan or Sierra Leone — exactly like a judgment from another Canadian province.

206 I would also question whether international comity requires us to move as far as the majority does in the direction of openness to foreign judgments when the position of jurisdictions with which we tend to compare ourselves is less generous. In England and Australia, for example, the *Emanuel v. Symon*, *supra*, framework remains substantially unchanged and the jurisdiction of a foreign court must be based on the presence or residence of the defendant in the foreign jurisdiction or on the defendant's voluntary submission (see, e.g., *Dicey and Morris on the Conflict of Laws*, *supra*, at pp. 487 and 503; P. E. Nygh, *Conflict of Laws in Australia* (6th ed. 1995), at p. 138). The U.S. position is more liberal, but still does not go as far as the majority does in this case. Generally, U.S. states will apply the "minimum contact test" to foreign-country judgments as they do to judgments of sister states. This test is made out when a non−resident defendant seeking to avail himself of some benefit within a state affirmatively acts in a manner which he knows or should know will result in a significant impact within the forum state (see, e.g., *Mercandino v. Devoe & Raynolds, Inc*., 436 A.2d 942 (N.J. Super. App. Div. 1981), at p. 943). Thus, a connection between the foreign jurisdiction and the cause of action alone, in the absence of purposive conduct by the defendant establishing a connection between himself and the forum, would be insufficient as a basis for jurisdiction and enforceability in the U.S. In such a case, however, the "real and substantial connection" test as it is interpreted by the majority would always be satisfied.

207 Finally, I would note that the logic on which the *Morguard* test is founded suggests that it should supersede, rather than complement, the traditional common law bases of jurisdiction. In my view, it is not necessary to ask whether any of the traditional grounds are present and then go on to ask whether there is a real and substantial connection (as the majority reasons suggest, at para. 37). There should be just one question: is the "real and substantial connection" test made out?

208 This Court noted in *Hunt*, *supra*, that the traditional grounds were generally sound bases of

jurisdiction and were "a good place to start", but also observed that "some of these may well require reconsideration in light of *Morguard*" (p. 325). Such factors as contractual agreement to accept jurisdiction and habitual residence in the foreign forum are usually very clear examples of the kind of connection that reasonably supports the assumption of jurisdiction. Attornment by actively defending the action in the foreign jurisdiction is a slightly different kind of connection; because the defendant has chosen to have his day in court in the foreign forum, no unfairness results from the enforcement of the foreign court's judgment.

209 In some cases, however, the traditional grounds may be more arbitrary and formalistic than they are fair and reasonable. Under the traditional rules, for example, jurisdiction could be acquired by serving a defendant who was present in the jurisdiction, even if her presence was only fleeting and was completely unconnected to the action, and in the absence of any other factor supporting jurisdiction. Another example is the common law rule that an appearance solely for the purpose of challenging the jurisdiction of the foreign court was an attornment to its jurisdiction, which was argued (but not commented on by the court) in *United States of America v. Ivey* (1995), 26 O.R. (3d) 533 (Gen. Div.). Circumstances such as these may not amount to a real and substantial connection, and in my view they should not continue to be recognized as bases for jurisdiction just because they were under the traditional rules.

IV. The Impeachment Defences

A. *The Principle Behind the Defences*

210 Claimants who seek to have foreign judgments recognized or enforced in this country ask for the support and cooperation of Canadian courts. They thus face the initial burden of showing that the judgment is valid on its face and was issued by a court acting through fair process and with properly restrained jurisdiction based on a real and substantial connection to the action. The petitioner must convince the receiving court that the values of international comity require it to exercise its power in favour of enforcing the judgment. Once this burden has been met, the judgment is *prima facie* enforceable by a Canadian court. The common law has long recognized, however, that the defendant can still establish that the judgment should not be enforced by showing that one of a number of defences to recognition and enforcement applies. The defences relevant to this appeal are commonly grouped under the heading of "impeachment" defences, since all are based on the notion that the way the foreign judgment was obtained was in some way tainted or contrary to Canadian notions of justice. (Other potential defences, such as the foreign public law exception to enforceability in Canada, which might apply, for example, to a tax claim, are not implicated by the facts of this case.)

211 A foreign judgment may be impeached on the basis that its recognition or enforcement would be contrary to public policy, that it was obtained by fraud, or that the foreign proceedings were contrary to natural justice. The burden is on the party raising one of these defences to prove that it applies; the foreign judgment is presumed to be valid, and there is a basic principle that the domestic court will not permit relitigation of matters tried before the foreign court (J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at p. 14-24). At the same time, the receiving court has both the authority and the responsibility to uphold the essential values of the domestic legal system and to protect citizens under the protection of its laws from unfairness. The three impeachment defences are established situations where the domestic court will intervene and refuse to enforce the judgment because the law on which it is based or the way it was obtained is simply too offensive to local notions of what is just and reasonable.

B. *The Need to Reconsider the Impeachment Defences as a Result of the Change in the Jurisdiction Test*

212 An intrinsic tension arises between the impeachment defences and the principle that the law and facts on which the foreign judgment is based cannot be reargued. Acknowledging the foreign court's jurisdiction would mean very little if the defences could be routinely used to discredit the legal, factual or procedural basis of its judgment. On the other hand, the principle of finality of judgments has its limits; it does not and should not mean that the enforcing court can do no more than rubber−stamp the foreign judgment while turning a blind eye to unfairness or impropriety in its provenance.

213 The impeachment defences represent the balance that the courts have found to be appropriate between security of transactions, on the one hand, and fairness in the individual case, on the other. Traditionally, they have been narrow in scope. The old, strict approach to these defences struck a balance appropriate to the requirements of international comity under the pre-*Morguard* common law, when the jurisdiction test was a difficult threshold for foreign plaintiffs to cross. Nearly all judgments that passed it did so because the defendant had either participated in the action in the foreign forum or selected it by agreement. As J. Walker notes in a comment on this case:

> Under such conditions, defendants resisting the enforcement of foreign judgments could be presumed to have defended the actions against them and to have benefited from the procedural safeguards available in the foreign legal systems. Alternatively, defendants could be presumed to have chosen, on the strength of some familiarity with the foreign legal systems, to let their matters be decided in default.
>
> ("*Beals v. Saldanha*: Striking the Comity Balance Anew" (2002), 5 *Can. Int'l Law.* 28, at p. 30)

In short, the potential for unfairness to the defendant was minimal, and accordingly there was no need for courts to be concerned with shortcomings in the way the judgment was obtained absent "some egregiously bad feature of the process or the result" (Walker, *supra*, at p. 30).

214 The balance that existed under the traditional approach is lacking in the new test set out by the majority. The category of foreign judgments that are *prima facie* enforceable in this country has been greatly expanded by virtue of the adoption of the *Morguard* test for foreign-country judgments. The law as it now stands will admit a default judgment emanating from a forum that the defendant did not consent to and may have been connected to only indirectly or not at all. This is a salutary development in our law on jurisdiction; if there are sufficient connections between the action and the forum, the judgment should not be shut out on the basis that the forum was inappropriate. But the possibility that the judgment should be unenforceable for some other reason should be considered anew in light of this new context. Castel and Walker, *supra*, have commented that if this Court confirms the application of the *Morguard* test to foreign judgments, "it would seem necessary to revise the defences . . . so as to protect persons in Canada who have been sued in foreign courts from the particular kinds of unfairness that can arise in crossborder litigation, and so as to prevent abuse from occurring as a result of liberal rules for the enforcement of foreign default judgments" (p. 14-26).

215 One example of the kind of unfairness Castel and Walker refer to is the increased vulnerability of Canadian residents to nuisance lawsuits in other countries. A defendant may be confronted with a claim that he knows to be frivolous brought by an overseas claimant. His choices are to defend, to settle, or to ignore the claim. Defending in a foreign country is often expensive and difficult. Many foreign jurisdictions do not award costs to the successful party, so that the defendant will

have to bear the expenses of litigation even if his position is fully vindicated. On the other hand, failure to defend brings with it considerable risk. The defendant may have little or no knowledge of the legal system and may be unable to predict with confidence that the foreign court will not be persuaded, or required by the operation of its own rules, to uphold a meritless claim.

216 A defendant faced with this dilemma ought to be afforded some protection by Canadian courts against foreign judgments that are clearly flawed, even if the flaws do not meet the stringent tests that traditionally defined the impeachment defences. If no such protection is available, in many cases the only safe option for defendants will be to settle with the claimant despite the fact that the claim is baseless. If the position of the Canadian courts is to be that defendants who fail to defend in the foreign forum do so entirely at their peril, regardless of whether the decision not to defend was based on a rational cost-benefit analysis and irrespective of the frivolousness of the claim and of the use of improper means to persuade the foreign court that it should succeed, Canadian residents may become attractive targets for opportunistic plaintiffs' lawyers in other jurisdictions.

217 In my opinion, the impeachment defences, particularly the defences of fraud and natural justice, ought to be reformulated. The law of conflicts needs to take these new possibilities for abuse into account and to ensure an appropriate recalibration of the balance between respect for the finality of foreign judgments and protection of the rights of Canadian defendants.

218 Furthermore, the nominate defences should be looked at as examples of a single underlying principle governing the exercise of the receiving court's power to recognize and enforce a foreign judgment. The claimant must come before the Canadian court with clean hands, and the court will not accept a judgment whose enforcement would amount to an abuse of its process or bring the administration of justice in Canada into disrepute. Serious consideration should be given to the possibility of a residual category of judgments, beyond those addressed by the defences of public policy, fraud and natural justice, that should not be enforced because they, too, engage this principle — in short, because their enforcement would shock the conscience of Canadians.

C. *Reformulation of the Nominate Defences*

(1) Public Policy

219 If the enforcement of a foreign judgment in Canada would be contrary to Canadian public policy, the judgment will not be enforced here. This defence addresses objections to the foreign law on which the judgment was based. It will be engaged if the foreign law is either contrary to basic morality or contrary to the fundamental tenets of justice recognized by our legal system.

220 The trial judge held that the public policy defence should be expanded to incorporate a "judicial sniff test" that would allow enforcing courts to reject foreign judgments obtained through questionable or egregious conduct (Jennings J., at p. 144). It has also been suggested that excessively high punitive damage awards should be unenforceable in whole or in part as a matter of public policy; see, e.g., J. S. Ziegel, "Enforcement of Foreign Judgments in Canada, Unlevel Playing Fields, and *Beals v. Saldanha*: A Consumer Perspective" (2003), 38 *Can. Bus. L.J.* 294, at pp. 306-7; *Kidron v. Grean* (1996), 48 O.R. (3d) 775 (Gen. Div.) (where the court refused to enforce on summary judgment a foreign judgment for $15 million for emotional distress based on evidence of "hurt feelings"). Ziegel notes that the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted in October 1999, and revised in June 2001, by the Special Commission of the Hague Conference on Private International Law, provides that a court asked to enforce an award of non-

compensatory damages may, if satisfied that the amount awarded is "grossly excessive", limit enforcement to a lesser amount (Article 33(2)). The Draft Convention may reflect an international consensus that large punitive damage awards can raise serious concerns, although this idea does not rise to the level of a customary norm.

221 In my view, the better approach is to continue to reserve the public policy defence for cases where the objection is to the law of the foreign forum, rather than the way the law was applied, or the size of the award *per se*. In other words, this defence should continue to be, as the trial judge put it, "directed at the concept of repugnant *laws*, not repugnant *facts*" (p. 144 (emphasis in original)). Public policy is potentially an expansive enough concept to subsume the other two defences; it is, of course, contrary to public policy in a broad sense to enforce a judgment that was fraudulently or unfairly obtained. But it is useful to maintain an analytical distinction between the three defences. Furthermore, the defence of public policy has long been associated with condemnation of the foreign jurisdiction's law. To extend it to cover situations where there is nothing objectionable about the foreign law but, rather, a defect in the way the law was applied might send the wrong message, one that conflicts with the norms of international cooperation and respect for other legal systems underlying the doctrine of comity.

222 In *Boardwalk Regency Corp. v. Maalouf* (1992), 88 D.L.R. (4th) 612, the Ontario Court of Appeal held that the public policy defence applies to laws that violate "conceptions of essential justice and morality" (p. 615). As an example, the court cited a contract relating to the corruption of children (p. 622). It emphasized that a mere difference between the policy choices reflected in the foreign law and those that prevail in Canada is not enough to engage the defence (pp. 615-16). This approach reflects the principle that diversity among the legal systems of the world should be respected, while at the same time establishing the limits of that principle. A law that offends fundamental or essential moral precepts will not be enforced. While the question is always whether the foreign law violates Canadian ideas of essential justice and morality, the relevant precepts of morality and justice are so basic that they can be said to have a universal character and will generally be respected by all fair legal systems.

223 The defence of public policy should not, however, be reserved for such shockingly immoral laws that one would be hard-pressed to find a non-hypothetical example of the kind of law that would engage it. In my opinion, there is more work for this defence to do. It should also apply to foreign laws that offend basic tenets of our civil justice system, principles that are widely recognized as having a quality of essential fairness. Among these, I would include the idea that civil damages should only be awarded when the defendant is responsible for harm to the plaintiff, and the rule that punitive damages are available when the defendant's conduct goes beyond mere negligence and is morally blameworthy in some way. These are basic principles of justice that are reflected in some form in most developed legal systems, although the particular form in which they are expressed may vary.

224 A law which violates these basic tenets of justice would be fundamentally unfair and worthy of condemnation. A Canadian court presented with a judgment from a jurisdiction whose law provides, for example, that punitive damages can be awarded on the basis of simple negligence or strict liability ought to have a discretion to deny or limit the enforceability of the judgment on grounds of public policy.

225 This does not dispose of all the difficulties raised by large punitive damage awards, which in practice seldom result from the application of unjust laws. The most common source of punitive damage awards that are unusually high by international standards is the United States. In that country, it is more common to use punitive damages as an instrument of social engineering than it is in Canada, and American law tends to permit larger awards as a way of modifying the behaviour of well-funded

defendants. There is nothing about that approach that is inherently offensive to Canadian ideas of basic fairness; it is simply a different policy choice, and it affords U.S. plaintiffs a level of protection of which they ought not necessarily to be deprived just because the defendant's assets are here. As far as I know, U.S. federal and state law generally allows for punitive damages only when the defendant's behaviour is morally blameworthy in some way. In this sense, their policy is similar in principle to ours even though the amounts awarded are sometimes startlingly high to Canadian eyes.

226 Serious problems can, however, arise when an exorbitant damage award is granted against a defendant whose actions were merely careless, rather than reprehensible, or where the defendant's actions were blameworthy enough to merit punitive damages in some amount but the amount awarded is so unimaginably large that it would only be justified as a response to the most heinous and despicable conduct. In many such cases, the applicable law does not, in theory at least, support the size of the damage award. Such awards may be fixed by juries or judges who may not apply the law with the utmost scrupulousness, and they are often overturned on appeal.

227 Some very large judgments of this kind have gained a certain level of notoriety and are probably the first to come to mind when concerns about the size of punitive damage awards are raised. A well-known example is *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), where the United States Supreme Court overturned a judgment of the Alabama Supreme Court which had awarded $2 million against BMW because they had sold the defendant a car without revealing that it had been repainted.

228 Another example is the *Loewen* case, where a Mississippi jury awarded $500 million (including punitive damages of $400 million) against a funeral company based in British Columbia for anti-competitive behaviour. The Mississippi court rules made the defendant's right to appeal conditional on the posting of a bond worth 125 percent of the damages owed. The defendants settled the case in 1996, and went on to file a NAFTA claim against the United States, arguing that the verdict amounted to an uncompensated appropriation of foreign investors' assets. This claim was ultimately unsuccessful, but the NAFTA tribunal remarked on the unfairness of the verdict and the appearance that improper considerations had played a part in inflating it; the trial judge had allowed the plaintiff's attorney to make irrelevant and prejudicial references to matters of race and class and to the fact that the defendants were foreign nationals (*Loewen Group, Inc. v. United States of America*, International Centre for Settlement of Investment Disputes, Case No. ARB(AF)/98/3, June 26, 2003, at para. 4). See also J. A. Talpis, "*If I am from Grand-Mère, Why Am I Being Sued in Texas?*" *Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001).

229 In cases like those referred to above, the problem is not that the law of the foreign jurisdiction conflicts with Canadian public policy, but that the facts of the case do not really justify the size of the award even under the foreign law. These are issues that, in my view, engage the defence of natural justice rather than that of public policy.

(2) Fraud

230 Fraud perpetrated on the court that issued the foreign judgment is a defence to its enforcement in Canada. The defence of fraud is hard to reconcile with the principle that the original court's findings of fact are final and binding. As Castel and Walker, *supra*, observe, "[t]he difficulty lies in defining the extent to which the defence of fraud can be considered without reviewing the deliberations of the foreign court or reconsidering the merits of the claims or defences adjudicated in the foreign proceeding" (pp. 14-24 and 14-25).

231 Courts have attempted to resolve this conflict by distinguishing between the kind of fraud of which evidence will be admitted by the domestic court, and allegations of fraud which are considered to have been directly or impliedly disposed of by the foreign judgment and cannot be raised again. Different courts have drawn the line in different places. At one end of the spectrum is the very strict rule followed in *Woodruff v. McLennan* (1887), 14 O.A.R. 242, admitting only evidence of "extrinsic fraud" (fraud going to the jurisdiction of the court that issued the judgment, or affecting the defendant's opportunity to present her case). At the other is the liberal rule followed by the English courts in *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 295 (C.A.), and recently affirmed by the House of Lords in *Owens Bank Ltd. v. Bracco*, [1992] 2 All E.R. 193, whereby the judgment will be vitiated by evidence that the foreign court was deliberately deceived on any matter, including on the merits of the case. A middle position was taken by the Ontario Court of Appeal in *Jacobs v. Beaver* (1908), 17 O.L.R. 496, and in this case, where it was held that fraud can only be argued on the basis of fresh evidence that was not known, and could not have been discovered with reasonable effort, at the time of the original decision.

232 It should be noted that each of these approaches represents a compromise between the conflicting propositions that the original judgment is conclusive and that a judgment obtained by deception or based on false facts should not be enforced. Even under the permissive English rule, the foreign court's factual conclusions can only be displaced by proof of conscious and intentional deception; it is not enough to argue that the foreign court drew the wrong conclusion from the evidence. In the *Duchess of Kingston's Case* (1776), 2 Sm. L.C. (8th ed.) 784 (cited in *Abouloff*, *supra*, at p. 300), de Grey C.J. remarked that "although it is not permitted to show that the [foreign] Court was mistaken, it may be shown that they were misled" (p. 794). None of these compromises has an absolute claim to be the correct solution to the conundrum. What is the best approach depends on the context in which the rule is applied, and the most appropriate rule will be the one that is most conducive in the circumstances to furthering the objectives of private international law.

233 I agree with Major J. that in general the rule that the defence of fraud must be based on previously undiscoverable evidence is a reasonably balanced solution. The distinction between extrinsic and intrinsic fraud is, as Major J. says, an obscure one which creates uncertainty. It is also unduly strict; as Jennings J. noted in the court below, it leaves space for the fraud defence that is not already occupied by a principled jurisdiction test and by the defence of natural justice (p. 140). On the other hand, defendants usually should not be allowed to reargue matters that they already raised before the foreign court, or chose not to raise there. These considerations suggest that the "extrinsic fraud" approach is too narrow and the "intentional fraud" approach too broad; the rule that only fresh evidence of fraud can be looked at by the enforcing court is, generally speaking, a good compromise.

234 I would not, however, rule out the possibility that a broader test should apply to default judgments in cases where the defendant's decision not to participate was a demonstrably reasonable one. If the defendant ignored what it justifiably considered to be a trivial or meritless claim, and can prove on the civil standard that the plaintiff took advantage of his absence to perpetrate a deliberate deception on the foreign court, it would be inappropriate to insist that a Canadian court asked to enforce the resulting judgment must turn a blind eye to those facts. In *Powell v. Cockburn*, [1977] 2 S.C.R. 218, at p. 234, Dickson J. (as he then was) observed that "[t]he aim of the Courts, in refusing recognition because of fraud, is to prevent abuse of the judicial process." In my opinion, enforcement of a judgment that was obtained by intentionally 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.

(3) Natural Justice

235 A foreign judgment will not be enforced in Canada if the foreign proceedings were contrary to natural justice. The defence concerns the procedure by which the foreign court reached its decision. The clearest examples of a deprivation of natural justice occur when the defendant lacks notice of the foreign proceedings or an opportunity to present his case to the court.

236 In my opinion, two 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. Secondly, substantive principles of justice should also be included in the scope of the defence. The ultimate inquiry is always whether the foreign judgment was obtained in a manner that was fair to the defendant and consistent with basic Canadian notions of justice.

237 The purposive interpretation of the notice requirement was addressed in some detail by Weiler J.A. in her dissenting opinion in the court below ((2001), 54 O.R. (3d) 641). The notice requirement is based on "the underlying fundamental principle of justice that defendants have a right to know the case against them and to make an informed decision as to whether or not to present a defence" (pp. 675-76).

238 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 (Weiler J.A., at p. 676). 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.

239 A requirement of particular relevance to this appeal is that adequate notice must include alerting the defendant to the consequences of any procedural steps taken or not taken, to the extent that those consequences would not be reasonably apparent to someone in the defendant's position. The claimant bears a certain responsibility for ensuring that a defendant who is not reasonably in a position to understand the particular workings of the foreign process does not inadvertently give up defences or waive rights as a result.

240 Proper notice also requires alerting the defendant to the allegations that will be adjudicated at trial. The defendant must be informed, by the pleadings or otherwise, of the basis on which damages are sought and the case to be answered. As Weiler J.A. noted, if in fact damages are assessed "beyond the pleadings", then the defendant will not have had true notice of what would take place in the proceedings and will have been deprived of the opportunity to make an informed decision as to whether to participate (p. 676).

241 Authority for the proposition that natural justice comprises substantive principles of justice, as well as minimum procedural standards, is to be found in the judgment of the English Court of Appeal in *Adams v. Cape Industries plc*, [1991] 1 All E.R. 929, the leading English case on the enforcement of foreign judgments. The judgment sought to be enforced in that case originated in Texas and arose from a complex asbestos-poisoning action involving numerous plaintiffs and defendants. Damages were assessed in a rather unconventional way. On the suggestion of plaintiffs' counsel, the judge arrived at a global amount of damages to be distributed among the plaintiffs in fixed amounts which were not based on proof of the damages suffered by each individual plaintiff. This method of calculating damages was

held by the English court to be contrary to natural justice because it was "not the result of a judicial assessment of the individual entitlements of the respective plaintiffs" and because no proper judicial hearing had been held on the quantum of damages (*Adams*, *supra*, at p. 1042). Slade L.J. held that it was a principle of substantive justice that unliquidated damages must be assessed "objectively by the independent judge on proof by the plaintiff of the relevant facts" (p. 1050).

242 *Adams* sets out a flexible and pragmatic approach to the natural justice defence which is appropriate for the Canadian context following *Morguard*. I agree with the English Court of Appeal that the defence can be triggered by principles of substantive justice, such as the proposition that damages should be based on objective proof and judicial assessment. In Weiler J.A.'s words, "the ultimate guidepost in deciding whether the defence of natural justice may be raised is procedural fairness based on underlying fundamental principles of justice" (p. 675). The category is not closed. If a defendant can establish that the process by which the foreign judgment was obtained was contrary to the Canadian conception of natural justice — because the process itself is flawed, by reason of the way the plaintiff manipulated the process, or both — then the foreign judgment should not be enforced.

243 Weiler J.A. understood La Forest J.'s allusion to "fair process" in *Morguard* to refer to the rules of natural justice (p. 671). My colleague Major J. also appears to be of this opinion when he states, under the heading of "The Defence of Natural Justice", that the enforcing court must ensure that the judgment originates from a fair legal system (para. 61). While these concepts are certainly related, in my view there is a meaningful distinction between the fairness of the legal system from which the judgment came and the fairness of the procedure followed in the particular case. Slade L.J. underlined this distinction in *Adams*, *supra*, when he observed that the Texas judgment originated from "an unimpeachable system of justice within one of the great common law jurisdictions of the world" (p. 1048). The defendants in *Adams* argued not that the judgment was a product of an unfair system of justice, but that the judge's method of assessing damages did not comply with the rules of that system.

244 I would also note that La Forest J. expressly stated, in *Morguard*, *supra*, at p. 1103, that "fair process is not an issue within the Canadian federation". I would not take this to mean that the defence of natural justice can never be available against enforcement of a Canadian judgment. Although the justice system in Canada is fair, it is possible for failures of the system to occur in individual cases. For these reasons, I would hold that the "fair process" referred to in *Morguard* means a legal system that is free from corruption and bias — a requirement which, it seems to me, is relevant to the questions of whether the foreign court's jurisdiction should be recognized at all. The defence of natural justice, on the other hand, is concerned with whether the procedural steps followed in the particular case ensured that the defendant was treated with basic fairness.

245 Finally, the obligation of a defendant to pursue remedies available in the originating jurisdiction must be addressed. In *Adams*, *supra*, Slade L.J. held that opportunities for correcting a denial of natural justice that existed in the originating jurisdiction should be taken into account in assessing whether the defence of natural justice has been made out. It does not follow that the existence of such remedies automatically cures a failure of natural justice. Slade L.J. also recognized that the significance and weight of the fact that remedies were available in the originating forum must be assessed in light of all the relevant factors, including "the reasonableness in the circumstances of requiring or expecting that [the defendants] made use of the remedy in all the particular circumstances" (pp. 1052-53).

D. *Application of the Impeachment Defences to the Facts of this Case*

(1) Public Policy

246 If the defence of public policy is understood as a bar to enforcing immoral or unjust foreign laws, it is not met here. 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. But 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. Treble damages are only available by statute to victims of crimes. There is no indication that punitive damages are available where the defendant's conduct is not morally blameworthy.

247 In my view, the defects in the judgment, while severe, do not engage the public policy defence.

(2) Fraud

248 Under the rule that an allegation of fraud can only be considered if based on fresh evidence, the defence of fraud is 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.

249 A further issue arises as to whether evidence of deliberate deception would be enough to vitiate the judgment. In my opinion, 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. Full participation in the Florida action would have been expensive, time−consuming and difficult. The appellants' own knowledge of the facts convinced them that the claim was frivolous, to say the least; they were amazed that it even resulted in a lawsuit. They thought, and they had every reason to think, that even if the claim succeeded they would be liable for no more than about US$8,000. Their conclusion that "the game was not worth the candle" was reasonable in the circumstances. Mr. Mulock testified that the defendants' non-participation might well have qualified as "excusable neglect" under Florida law due to the weakness of the claim and the fact that the defendants were foreign residents, among other factors. I see no reason why our law should deem these factors to be irrelevant.

250 If, in these circumstances, the plaintiffs took advantage of the opportunity to deceive the court by putting forward perjured or misleading evidence in order to obtain a higher award of damages, it would be unfair and contrary to the interests of the Canadian justice system for our courts to be obliged to enforce the judgment in spite of the fact that it was obtained by deception. Such conduct by counsel for the Florida plaintiffs would be contrary to the ethical obligations of Ontario lawyers to pursue their clients' interests by fair and honourable means and without misrepresentation of the facts, and Ontario courts should not be put in the position of having to reward that conduct handsomely when the perpetrator is a lawyer in another jurisdiction.

251 The difficulty the appellants face is that there is no evidence that anything of this kind happened, because no record exists of the evidence and arguments put forward in the Florida damages hearing. Given the jury's findings, it is certainly a possibility, perhaps a strong possibility, that they were deliberately misled, but there are other possible explanations — for example, the plaintiffs may have presented only true facts and the jury might have misunderstood how the law applied to those facts. The allegation of fraud is a serious one, and the onus remains on the appellants to support it. It is significant that the appellants did not use their opportunity to question Mr. Beals or Mr. Groner, either in discovery

or at trial, as to what was said in the damages hearing. Given the lack of evidence, even on the view that this judgment could be vitiated by proof of intentional fraud, the defence has not been made out. I agree with Major J. that the trial judge's findings of fact that the plaintiffs deliberately misled the jury are unsupported by the evidence and should not be upheld. The defence of fraud therefore does not apply. Natural justice, though, is a different matter.

(3) Natural Justice

252 The Ontario defendants were not given sufficient notice of the extent and nature of the claims against them in the Florida action. The claimants failed to give the defendants proper notice of the true nature of their claim and its potential ramifications. Furthermore, there was 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.

253 The amount of damages claimed was not stated in the Amended Complaint. The only mention of a monetary amount was the formulaic reference to damages over $5,000 required to give the Florida Circuit Court monetary jurisdiction. This form of pleading did not give the defendants a clear picture of what was at stake. Indeed, Mr. Groner testified that as a matter of Florida practice they were expected to find out exactly what was being claimed through discovery.

254 Nor did the Amended Complaint set out with any precision the allegations on the basis of which damages, beyond the sale price of the land, were claimed. There is reference to construction costs and lost revenue, but none 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. As Weiler J.A. noted, the plaintiffs could easily have provided the defendants with a copy of Mr. Beals's deposition, where he explained these matters, and thus ensured that the defendants were aware that significant business losses were being claimed (p. 677). But the plaintiffs failed to alert the defendants to the peril they faced in this or any other way.

255 Perhaps the most important failure of natural justice in this case is the fact that the defendants were not given notice of the consequences of failing to continue to file new defences to the repeated changes to the Amended Complaint. There was nothing on the face of the Amended Complaint that would alert them to the need to refile, especially since the allegations against them remained unaltered. 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. Again, the plaintiffs could easily have advised them that a new defence was required, but they did not. The defendants had no warning of the danger in which they placed themselves simply by assuming that their initial defence was, as it appeared to be, an adequate response to the Amended Complaint. Not only did they lack the information they needed to assess whether or not they should defend; their failure to defend was not in any genuine sense a product of their own volition.

256 A foreign plaintiff who expects to have a judgment in his or her favour enforced by a Canadian court has a responsibility to ensure that the defendant is in a position to make an informed decision about how to respond. If the defendant can show that the plaintiff failed to discharge that responsibility, the court should refuse to enforce the judgment on the basis that the defendant was deprived of proper notice, a basic condition of natural justice. In this case, the Florida claimants should have notified the appellants of the steps they could take after new versions of the Amended Complaint were filed and, more importantly, of the consequences of not taking those steps. Because they failed to

do so, the appellants were unaware of the danger that their defence would lapse.

257 I would also note that in this case it appears that the judgment may have offended substantive principles of natural justice of the kind addressed in *Adams*, *supra*. It seems likely that the quantum of damages was fixed without proof that damages flowed from harm suffered by the plaintiffs as a result of the defendants' actions, and that punitive damages were awarded without demonstration of conduct on the defendants' part that was deserving of punishment. The problem, again, is that we do not know what was offered in evidence in the damages hearing in Florida. The conclusion seems all but inescapable that one of two things happened: either the Florida court was presented with false evidence on the damages issue, or it reached its conclusion without a proper judicial assessment of the conditions required, both by Florida law and as a matter of natural justice, to support an award of unliquidated damages. But because there is no transcript of the damages hearing and no other clear evidence of what took place there, neither scenario has been proven.

258 A deficiency in the fairness of the procedure by which the Florida court reached its decision having been established, the availability of remedies for that deficiency in Florida falls to be considered. The defendants did have options for correcting the problem in Florida. They could have moved for relief based on excusable neglect, or appealed. They did not avail themselves of those remedies.

259 What this means for the appellants' entitlement to rely on the natural justice defence must be ascertained by considering the reasonableness in all the circumstances of requiring them to make use of the remedies available in Florida. We must look at the reasons why they decided not to go to Florida to attack the judgment, but chose instead to trust that the Ontario courts would not enforce it.

260 The defendants' main reason for deciding as they did was that they were following the advice (which turned out to be erroneous) of legal counsel. They were told that if they went to Florida to challenge the judgment, Ontario courts would regard them as having attorned to Florida's jurisdiction and would be more likely to enforce the judgment against them. Given the information they had, the decision not to take steps in Florida was not only understandable but the only sensible option.

261 The majority appears to be of the view that the appellants are not entitled to any relief from the consequences of relying on mistaken legal advice. In my view, the mere fact that a defendant has received mistaken legal advice should not operate to relieve the claimant entirely of the consequences of a significant or substantial failure to observe the rules of natural justice, and it should not, in itself, bar the appellants from relying on this defence. I agree with Weiler J.A. that the reasonableness of expecting a defendant to use a remedy in a foreign jurisdiction must be assessed from that person's point of view. If the defendants were under a misapprehension as a result of reasonable reliance on the advice of counsel as to the relative risks of the options open to them, their assessment of the risks should not for that reason be discounted. This Court recognized in *Cité de Pont Viau v. Gauthier Mfg. Ltd.*, [1978] 2 S.C.R. 516, that a party should not be penalized for an error which is solely that of counsel, where the party itself has acted with diligence. This is not to say that a lawyer's mistake will always be an excuse for not participating in foreign proceedings. The totality of the circumstances must be examined. In this case, the appellants did their best to deal with the dispute conscientiously. In retrospect, it seems that applying for relief in the Florida court would have been a wiser choice, but no reasonable person in their position would have thought so at the time the choice was made.

262 A second factor relevant to the appellants' decision not to make use of remedies in Florida is their knowledge of the circumstances that would entitle them to such a remedy. In *Adams*, *supra*, the

defendants' failure to appeal the judgment in Texas was not dispositive, because the procedural irregularities that would have formed the basis of an appeal were not apparent on the face of the judgment. The only way that the defendants could have known about those defects was if they had participated in the proceedings. The court did not consider it fair to charge the defendants with knowledge of procedural irregularities that they would have known about had they attended the proceedings. The plaintiffs had the responsibility of avoiding procedural errors that would prevent enforcement in England. I agree with this reasoning, which in my view is also applicable to the present case. When the appellants received the Florida judgment, all they knew was the amount awarded against them. There was nothing to inform them of the method by which the Florida court reached its conclusion or to alert them to problems with that method that might form the basis of an appeal or a motion to set the judgment aside.

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

(4) Residual Concerns

264 The facts of this appeal raise very serious concerns about the fairness of enforcing the Florida judgment which do not fit easily into the categories identified by the traditional impeachment defences. I have stated my conclusion that the facts do trigger the defence of natural justice, if it is interpreted in a purposive and flexible manner. Even if the natural justice defence did not apply, however, I would hold that this judgment should not be enforced.

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

266 On this last point, I would add that their failure to obtain a record of the proceedings in the Florida court does not reflect well on the respondents. In this case, the appellants, who had the burden of proving that one of the impeachment defences applied, failed to pursue their opportunity to investigate what transpired in the damages hearing by questioning those who were there. As a result, it would be inappropriate to draw any negative inference in their favour from the lack of evidence about the Florida proceedings. But defendants will not always have such an opportunity. When one party entirely controls whether there will be a transcript of the proceedings in the foreign court and chooses not to get one, thus depriving the enforcing court of a full record of what happened and an opportunity to verify that there

was no fraud and no procedural irregularities, Canadian courts should be highly circumspect about giving effect to the judgment.

V. Conclusion

267 In my view, this judgment should not be enforced in Canada. I would allow the appeal with costs to the appellants.

Appeal dismissed with costs, IACOBUCCI, BINNIE *and* LEBEL JJ. *dissenting.*

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