

# EXHIBIT 87

**SUPREME COURT OF CANADA**

**CITATION:** Pro Swing Inc. v. Elta Golf Inc., [2006] 2  
S.C.R. 612, 2006 SCC 52

**DATE:** 20061117  
**DOCKET:** 30529

**BETWEEN:**

**Pro Swing Inc.**  
Appellant  
and  
**Elta Golf Inc.**  
Respondent

**CORAM:** McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella and  
Charron JJ.

**REASONS FOR JUDGMENT:** Deschamps J. (LeBel, Fish and Abella JJ. concurring)  
(paras. 1 to 65)

**DISSENTING REASONS:** McLachlin C.J. (Bastarache and Charron JJ.  
(paras. 66 to 123) concurring)

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Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. 612, 2006 SCC 52

**Pro Swing Inc.**

*Appellant*

v.

**Elta Golf Inc.**

*Respondent*

**Indexed as: Pro Swing Inc. v. Elta Golf Inc.**

**Neutral citation: 2006 SCC 52.**

File No.: 30529.

2005: December 15; 2006: November 17.

Present: McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for ontario

*Private international law — Foreign judgments — Recognition and enforcement of foreign non-monetary judgments — Whether common law should be changed to permit enforcement of foreign non-monetary judgments — Considerations relevant to recognition and enforcement of such judgments or orders.*

Pro Swing manufactures and sells customized gold clubs and golf club heads. It owns the Trident trademark in the U.S. Elta Golf carries on business in Ontario, and it offered for sale on its Website goods bearing marks which resembled Trident. Pro Swing filed a complaint in Ohio for trademark infringement. The parties entered into a settlement agreement, which was endorsed by a consent decree of the U.S. District Court. The decree enjoined Elta Golf from purchasing, marketing or selling golf clubs or golf club components bearing the Trident mark or confusingly similar variations. In 2002, Pro Swing brought a motion for contempt of court alleging that Elta Golf had violated the consent decree, and a contempt order was issued. Pro Swing then filed in the Ontario Superior Court of Justice a motion for recognition and enforcement of the consent decree and the contempt order. The motions judge held that non-money foreign judgments can be enforced and declared the consent decree valid and enforceable in Ontario. She also found that the contempt order was restitutionary in nature and that parts of that order were duplicative of the consent decree and were not final, and concluded that the portions not offending the finality requirement could be severed. She recognized the severed portions of the contempt order and declared them to be enforceable. The Court of Appeal set aside the motions judge's decision, concluding that both foreign orders were not enforceable in Ontario because they were ambiguous in respect of material matters, in particular on the critical issue of the scope of the extraterritorial application of these orders.

*Held* (McLachlin C.J. and Bastarache and Charron JJ. dissenting): The appeal should be dismissed.

*Per LeBel, Deschamps, Fish and Abella JJ.:* The traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments should be changed. Such a change requires a cautious approach and must be accompanied by a judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system. A departure from the common law rule will necessarily affect both commercial activity and judicial assistance in an era of large-scale cross-border commerce, e-commerce and cross-border litigation and will open the door to equitable orders such as injunctions, which are key to an effective modern-day remedy. In contemplating considerations specific to the recognition and enforcement of equitable orders, courts can draw the relevant criteria from other foreign judicial assistance mechanisms based on comity. For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. Consequently, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether to enforce one. [14-16] [30-31]

Here, the consent decree and the contempt order are not enforceable in Ontario. These orders are problematic from many points of view. The contempt order is quasi-criminal in nature, and a Canadian court will not enforce a penal order, either directly or indirectly. While the U.S. distinguishes between civil and criminal contempt orders, in Canada, a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. Consequently, a motion for contempt of court cannot be reduced to a way to put pressure on a defaulting debtor or a means for an aggrieved party to seek indemnification. The gravity of a contempt order in Canada is underscored by the criminal law protections afforded to the person against whom such an order is sought and by the sanction that person faces, which could include imprisonment. The “public law” element of a declaration of contempt and the opprobrium attached to it eclipse the impact of a simple restitutionary award. Furthermore, when faced with the need to interpret the law, the receiving court must ensure that no conflict results from the nature attributed to the order after the enforcement judgment is rendered. In the case of a contempt order, because of the different approaches in the U.S. and Canada, the conflict is real. Courts should not expose litigants to consequences to which they would not be exposed under the foreign law. Aware of their limitations, receiving courts should use their discretion to refrain from enforcing orders that subject Canadian litigants to unforeseen obligations. [34-36] [49-51] [62]

If injunctive relief is to be enforced, its territorial scope has to be specific and clear. Here, the intended territorial scope of the injunctive relief in the consent decree is uncertain. In the absence of explicit terms making the settlement agreement a worldwide undertaking, the consent decree cannot be said to clearly apply worldwide. Moreover, the contempt order imposes an obligation to account for all sales, even sales that may fall outside the scope of Pro Swing’s trademark protection. To interpret the contempt order as applying outside the U.S. would offend the principle of territoriality. Extraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection. [25] [56-58] [62]

On the issue of the appropriate remedy and the use of judicial resources, it is unclear that recognition and enforcement of the judgment is the appropriate tool amongst the various judicial assistance mechanisms or that the matter is an appropriate one for lending judicial assistance in the form requested. Letters rogatory might have been a more useful means to obtain the evidence required by the American judge to finalize the damage award in the contempt proceeding in the U.S. Further, a court may also consider whether the matter merits the involvement of the Canadian court. Here, there is a concern that the judicial machinery could be deployed only to find that Pro Swing's debtor is insolvent. When the circumstances give rise to legitimate concerns about the use of judicial resources, the litigant bears the burden of reassuring the court that the matter is worth going forward with. [45-47] [62]

Finally, there are public policy concerns regarding parts of the contempt order inasmuch as it requires the disclosure of personal information that may *prima facie* be protected from disclosure. Courts should be mindful of the quasi-constitutional nature of the protection of personal information. [59-60]

Accordingly, in the case at bar, to refuse to enforce the consent decree and the contempt order is an appropriate exercise of equitable discretion and amounts to allowing the Ohio court to continue the proceedings with the judicial assistance of the Ontario courts, but to a lesser extent than has been requested. [63]

*Per McLachlin C.J. and Bastarache and Charron JJ. (dissenting):* The common law should be extended to permit the enforcement of foreign non-money judgments in appropriate circumstances. The common law must evolve in a way that takes into account the important social and economic forces that shape commercial and other kinds of relationships. That evolution must take place both incrementally and in a principled way, taking into account, in the context of foreign non-money judgments, the underlying principles of comity, order and fairness. [66] [78-79]

A court enforcing a foreign judgment is enforcing the obligation created by that judgment. In principle, it should not look beyond the judgment to the merits of the case. While different non-money remedies and different circumstances will raise different considerations, for the purposes of this case, there are three categories of restrictions on the recognition and enforcement of foreign non-money judgments that should be considered. First, with respect to the general requirements for enforcement, a foreign non-money judgment will not be enforced if the issuing court did not properly take jurisdiction, or if fairness considerations render such enforcement inadvisable or unjust. The existing defences of fraud, public policy and natural justice are designed to guard against unfairness in its most recognizable forms. Second, courts should decline to enforce foreign non-money orders that are not final and clear. Where finality is concerned, a foreign order must establish an obligation that is complete and defined; as regards clarity, an order must be sufficiently unambiguous to be enforced. A decision not to enforce on the grounds of lack of finality or clarity would have to be based on concerns apparent on the face of the order or arising from the factual or legal context. Mere speculation would not suffice. Third, Canadian courts will not enforce a foreign penal law or judgment, either directly or indirectly. [87-92] [95-101]

Here, the motions judge's decision should be restored. Elta Golf conceded that the general requirements for enforcement are met. The consent decree and the portions of the contempt order the motions judge held to be enforceable in Ontario were final. The orders were complete and in no need of future elaboration. The hypothetical possibility of the need for future court supervision should not preclude the recognition of a foreign order. The orders were also sufficiently clear. In particular, an examination of the content of the consent decree and the contempt order reveals no ambiguities about their extraterritorial application. Lastly, while foreign criminal contempt orders are clearly penal and cannot be enforced by Canadian courts, the same should not be said of foreign civil contempt orders. A distinction between civil and criminal contempt exists in Canada and there is nothing penal about the contempt order in this case. The terms of the order are designed to reinforce the consent decree and to provide Pro Swing with restitution for Elta Golf's violations. The motions judge found that the contempt order was restitutionary in nature, not penal. That conclusion is unassailable. [104-116]

While parts of the contempt order may raise privacy concerns, to bring up this issue at this stage when it was never argued before this or any other court would amount to an inappropriate transformation of the proceedings. In any event, if the offending parts of the contempt order cannot be enforced for public policy reasons, they can be severed. The public policy issue therefore should not determine the outcome of this appeal. [121]

### Cases Cited

By Deschamps J.

**Applied:** *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; **considered:** *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72; **referred to:** *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Hilton v. Guyot*, 159 U.S. 113 (1895); *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *P.-A.P. v. A.F.*, [1996] R.D.J. 419; *Westfair Foods Ltd. v. Naherny* (1990), 63 Man. R. (2d) 238; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *District Court of the United States, Middle District of Florida v. Royal American Shows, Inc.*, [1982] 1 S.C.R. 414; *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Re International Association of Machinists & Aerospace Workers and Qantas Airways Ltd.* (1983), 149 D.L.R. (3d) 38; *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, 2006 SCC 13; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416.

By McLachlin C.J. (dissenting)

*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Uniforêt Pâte Port–Cartier Inc. v. Zerotech Technologies Inc.*, [1998] 9 W.W.R. 688; *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Doucet–Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53.

### Statutes and Regulations Cited

*da Evidence Act*, R.S.C. 1985, c. C–5, ss. 4, 46.

*Code of Québec*, S.Q. 1991, c. 64, art. 3155(2).

*nce Act*, R.S.O. 1990, c. E.23, s. 60.

*nal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 7(3)(c).

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APPEAL from a judgment of the Ontario Court of Appeal (Moldaver, Gillese and Blair JJ.A.) (2004), 71 O.R. (3d) 566, [2004] O.J. No. 2801 (QL), setting aside an order of Pepall J. (2003), 68 O.R. (3d) 443, 30 C.P.R. (4th) 165, [2003] O.J. No. 5434 (QL). Appeal dismissed, McLachlin C.J. and Bastarache and Charron JJ. dissenting.

*Raymond F. Leach and Janet A. Allinson*, for the appellant.

No one appeared for the respondent.

The judgment of LeBel, Deschamps, Fish and Abella JJ. was delivered by

1            DESCHAMPS J. — Modern-day commercial transactions require prompt reactions and effective remedies. The advent of the Internet has heightened the need for appropriate tools. On the one hand, frontiers remain relevant to national identity and jurisdiction, but on the other hand, the globalization of commerce and mobility of both people and assets make them less so. The law and the justice system are servants of society, not the reverse. The Court has been asked to change the common law. The case for adapting the common law rule that prevents the enforcement of foreign non-money judgments is compelling. But such changes must be made cautiously. Although I recognize the need for a new rule, it is my view that this case is not the right one for implementing it.

### Background and Judicial History

2            The appellant, Pro Swing Inc., manufactures and sells customized golf clubs and golf club heads. It owns the Trident trademark in the U.S. On April 27, 1998, Pro Swing filed a complaint against eight defendants for trademark infringement in the United States District Court for the Northern District of Ohio Eastern Division (“Ohio court”). The respondent, Elta Golf Inc., an Ontario resident, was named as a defendant. In the action, Pro Swing alleged that Elta was offering and selling golf clubs or golf club heads on its Web site under the infringing trademark Trident. On July 6, 1998, in Ontario, Mr. Frank Lin, as president of Elta, signed a



declaration in which he stated that he now knew of Pro Swing's trademark. He declared that he had three golf clubs or golf club heads bearing the mark Rident, that he had never sold any and that he would discontinue advertising and distributing the clubs or club heads. The declaration was incorporated into a settlement agreement which stated that Pro Swing relied on the representations of Elta as to the use of Rident on golf clubs or golf club heads. Elta further represented in the agreement that it had discontinued marketing or using golf clubs or golf club heads bearing the mark Trident, Rident, Riden or Trigoal, and it undertook not to purchase, sell or use club components bearing those marks or a confusingly similar mark without the authorization of Pro Swing. It also undertook to deliver to Pro Swing's counsel any clubs or golf club heads and marketing material in its possession, and to modify its Web page. On July 28, 1998, a consent decree was endorsed by Matia J. of the Ohio court (see Appendix A).

3 On December 20, 2002, Pro Swing filed a motion for contempt of court, alleging that Elta had violated the consent decree by failing to surrender the items and by advertising and selling club heads. Pro Swing filed a declaration stating that an investigator had purchased two golf club heads on the Internet, one bearing the Trident and the other the Rident mark, for delivery in Ohio. On February 25, 2003, after finding that Elta had violated the consent decree, Matia J. issued a contempt order (see Appendix B).

4 As the Superior Court judge noted, the orders overlap to a certain extent ((2003), 68 O.R. (3d) 443). The relevant elements are as follows:

an injunction prohibiting Elta from purchasing, marketing, selling or using golf clubs or components bearing Pro Swing's trademark or any confusingly similar variations of it (consent decree, at para. 7; contempt order, at para. 2);

an order that Elta surrender and deliver all infringing clubs and/or components in its possession, along with any advertising, packaging, promotional or other materials, to counsel for Pro Swing (consent decree, at para. 8; contempt order, at para. 6);

an order for an accounting of all infringing golf clubs and/or components sold since the consent decree (contempt order, at para. 3);

an order for compensatory damages based on profits derived through sales of infringing goods since the consent decree (contempt order, at para. 4);

in order for costs and attorney's fees against Elta (contempt order, at para. 5);

an order that Elta provide the names of and contact information for the suppliers and purchasers of infringing goods, and that it pay the costs of a corrective mailing (contempt order, at paras. 7 and 8); and

an order that Elta recall all counterfeit and infringing goods (contempt order, at para. 9).

5 In June 2003, Pro Swing filed in the Ontario Superior Court of Justice a motion for recognition and enforcement of the consent decree and the contempt order. Elta objected

that the two judgments could not be recognized or enforced because they did not meet the common law requirements of being final judgments *in personam* for a fixed sum of money and that the contempt order was excluded from recognition and enforcement because it was quasi-criminal in nature.

6 While acknowledging that the traditional common law rule required that the judgment be for a fixed sum of money, the Superior Court judge found that the latest jurisprudence opened the way for a relaxation of the rule. She found it clear from the terms of the consent decree that extraterritorial application was intended. She declared the consent decree valid and enforceable in Ontario. On the contempt order, she was of the view that it was restitutionary in nature and engaged a dispute between private parties. She found that parts of the contempt order were duplicative of the consent decree and were not final, and concluded that the portions not offending the finality requirement could be severed. She recognized paras. 3, 7, 8 and 9 of the contempt order and declared them to be enforceable.

7 Elta appealed the Superior Court's judgment, asking for its reversal. Pro Swing cross-appealed, asking for recognition and enforcement of the entire contempt order. The Court of Appeal stated that it was inclined to agree that the "time is ripe for a re-examination of the rules governing the recognition and enforcement of foreign non-monetary judgments" ((2004), 71 O.R. (3d) 566, at para. 9), quoting the following passage from *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1098:

The world has changed since the above rules [concerning the recognition and enforcement of foreign judgments] were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. 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.

8 However, the Court of Appeal found that the orders were not "sufficiently certain in [their] terms" to be enforced, giving as an example the issue of extraterritoriality it qualified as critical. The Court of Appeal also noted that Pro Swing could have taken action in Ontario based on the settlement agreement, or for infringement of its trademark rights if such rights extended to Canada. As well, the court was of the view that Pro Swing could have instituted proceedings to obtain the information it required to provide to the Ohio judge the proposed damage award contemplated in the contempt order. The Court of Appeal allowed the appeal and dismissed the cross-appeal. Pro Swing was granted leave to appeal to this Court.

9 Two issues are raised in this appeal: whether foreign non-money judgments can be recognized and enforced, and whether such a change to the existing common law rule entails additional considerations reflecting the new needs created by expanding judicial assistance to foreign countries and litigants in this way. This last issue is not formally raised by the appellant, but it is inherently linked to the departure from the traditional rule. To allow for the recognition and enforcement of non-money orders will open the door to a number of equitable orders. The crux of this issue is to determine the considerations relevant to the recognition and

enforcement of such orders.

### Traditional Common Law Rule

10 The traditional common law rule is clear and simple. In order to be recognizable and enforceable, a foreign judgment must be “(a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and (b) final and conclusive, but not otherwise” (*Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 1, Rule 35, at pp. 474-75 (footnotes omitted)). Similarly, J.-G. Castel and J. Walker, in *Canadian Conflict of Laws* (6th ed. (loose-leaf)), at para. 14.6, state that “[a] foreign judgment *in personam* given by a court of competent jurisdiction is enforceable provided that it is final and conclusive, and for a definite sum of money.”

11 The foreign judgment is evidence of a debt. All the enforcing court needs is proof that the judgment was rendered by a court of competent jurisdiction and that it is final, and proof of its amount. The enforcing court then lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms. Professor Vaughan Black explains the consequences of the recognition and enforcement of a money judgment at common law in “Enforcement of Foreign Non-money Judgments: *Pro Swing v. Elta*” (2006), 42 *Can. Bus. L.J.* 81, at p. 89:

That is, [the Canadian court] always uses its own rules on such matters as the availability of garnishment, the effect of garnishment on employment, the effect of a payment into court, the date of conversion from a foreign currency into the local money, and the proper procedures for seizure and attachment. Likewise, even when enforcing a money judgment from [a foreign court, the Canadian court] employs its own exemptions legislation, its own rules for controlling competition among judgment creditors, and its own rules on post-judgment interest. In short, when a Canadian court recognizes a foreign judgment that says that the defendant must pay the plaintiff a sum of money, that foreign judgment is simply *evidence* of a debt. The recognizing court goes about collection (or limiting collection) of that debt in its own way. [Emphasis in original.]

12 As this Court confirmed in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72, absent evidence of fraud or of a violation of natural justice or of public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction in which the judgment sought to be enforced domestically was rendered.

13 It is significant that, under the traditional common law rule, the recognition and enforcement of a money judgment does not require an interpretation of the foreign law, nor does it reach deeply into the structure of the domestic court’s justice system, since the money obligation created by the foreign judgment is sufficient evidence to enforce it in the Canadian justice system. Care must thus be taken not to lose sight of the limited impact the common law rule has on our justice system. Judicial assistance under the new rule will move beyond triggering mechanisms necessary to collect a debt. The separation of judicial systems is thus likely to be altered, since a domestic court enforcing a foreign non-money judgment may have to interpret and apply another jurisdiction’s law. Professor Black illustrates this by way of the

following example (at p. 89):

A [foreign court] might issue an injunction which spells out in great detail what, when and how a defendant must do (or refrain from doing) something. If [a Canadian court] recognizes such an injunction then the courts in [the foreign country] have been permitted to reach deeply into the enforcement regime of [Canada]. It is the original [foreign order] (albeit confirmed by [a Canadian court]) that will control what the defendant must and must not do in [Canada]. Of course, if the defendant in [Canada] fails to comply with the order then any contempt proceedings in [Canada] will be conducted in accordance with [Canadian] procedure. But apart from that, when [a Canadian court] agrees to enforce an injunction issued by a court in [a foreign country], then [the foreign country] is dictating and controlling the enforcement process in [Canada], something that does not occur when [the Canadian court] enforces a foreign money judgment.

14 To depart from the fixed-sum component of the traditional common law rule will open the door to equitable orders such as injunctions, which are key to an effective modern-day remedy. The recognition and enforcement of equitable orders will require a balanced measure of restraint and involvement by the domestic court that is otherwise unnecessary when the court merely agrees to use its enforcement mechanisms to collect a debt.

15 I agree that the time is ripe to revise the traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments. However, such a change must be accompanied by a judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system.

#### Case for Changing the Common Law Rule

16 I have read the Chief Justice's reasons, and I agree that there is a compelling rationale for a change in the common law requirement. However, it must be recognized that a departure from the common law rule will necessarily affect both commercial activity and judicial assistance in an era of large-scale cross-border commerce, e-commerce and cross-border litigation.

17 For these reasons, it is important to bear in mind the need to proceed cautiously in implementing any change. Professor Black recognizes that the principles of comity, order and fairness articulated in *Morguard* favour the recognition and enforcement of foreign non-money judgments, but he tempers his observation by noting the need to develop a careful and nuanced approach that attends to the features of non-money orders. In the same vein, Professor Jeff Berryman, in "Cross-Border Enforcement of Mareva Injunctions in Canada" (2005), 30 *Adv. Q.* 413, underscores the fact that equitable remedies are context-dependent and subject to amendment at the time of enforcement; he maintains that they do not lend themselves well to simply being endorsed by Canadian courts.

18 On a more general note, a number of law professors and practitioners have commented on the enforcement of foreign judgments and have insisted on the need to adapt the possible defences and to redefine the approach to comity to ensure that foreign judgments do not conflict with domestic law. Professor Adrian Briggs, in “Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments” (2004), 8 *SYBIL* 1, comments positively on the *Morguard* test as applied to international law but questions whether the acceptance of new bases of jurisdictional competence should entail the development of new defences tailored specifically to them. Similarly, Professor Jeffrey Talpis and Joy Goodman, in “A comity of errors”, *Law Times*, vol. 14, No. 2, January 20, 2003, at p. 7, suggest that the public policy defence should be widened to allow a court to refuse to enforce a judgment that is manifestly unreasonable under the law of the domestic forum. Finally, Professor Janet Walker, in “*Beals v. Saldanha*: Striking the Comity Balance Anew” (2002), 5 *Can. Int’l Law*. 28, stresses that the “requirements of comity as they are reflected in the rules for enforcing foreign judgments are changing along with the circumstances in which they operate” (p. 29).

19 In summary, most of the commentators are not against finding new ways to adjust the law to suit modern realities, but they insist on the need for a cautious approach. As Briggs puts it, at p. 22: “It cannot be right to make radical changes to [jurisdiction] while supposing that this has no impact on the [defences]. . . . [I]ncremental, intuitive, coherent, development is what common law does best, and is how the common law conflict of laws works best.”

20 *Morguard* has led the way to developing the common law to better serve the interests of all litigants, foreign and domestic. The need to move towards a rule more flexible than a total bar is compelling. However, the change must be made having regard to issues that the old rule was not concerned with. The instant case provides an opportunity to consider how the rule against enforcing non-monetary judgments can be changed in the context of equitable orders, like injunctions, and how the specific nature of such orders makes it necessary to view enforcement from a new perspective.

#### Nature of Equitable Judgments

21 A change in the traditional common law rule will be as important as was the passage, for the purpose of establishing jurisdiction over a defendant, from the service or attornment of the defendant requirement to the real and substantial connection test. The latter test is flexible and its formulation has allowed it to be applied in various and evolving circumstances. Similarly, the change from the traditional common law rule to the recognition and enforcement of foreign non-money judgments should be accompanied by the incorporation of flexible factors that reflect the specific, and varied nature of equitable orders.

22 At common law, the typical remedy is an award for damages. However, a wide range of equitable remedies are available, and they take various forms. Their commonality is that they are awarded at the judge’s discretion. Judges do not apply strict rules, but follow general guidelines illustrated by such maxims as “Equity follows the law”, “Delay defeats equities”, “Where the equities are equal the law prevails”, “He who comes to equity must come with clean hands” and “Equity acts *in personam*” (*Hanbury & Martin Modern Equity* (17th ed. 2005), at paras. 1-024 to 1-036, and I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (6th ed. 2001), at p. 6). The application of equitable principles is largely dependent on the social fabric. As Spry puts it:

. . . the maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles. This ethical quality remains, and its presence explains to a large extent the adoption by courts of equity of broad general principles that may be applied with flexibility to new situations as they arise. [p. 6]

23 The traditional rule does not leave any room for discretion as regards such considerations or forms of relief. In contrast, equitable orders are crafted in accordance with the specific circumstances of each case. The most relevant equitable remedies for the purposes of the present case are specific performance, that is, an order by the court to a party to perform its contractual obligations, and the injunction, that is, an order to a party to do or refrain from doing a particular act.

24 Despite their flexibility and specificity, Canadian relief orders are fashioned following general guidelines. The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance. While the specificity requirement is linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources. This factor is discussed by R. J. Sharpe, in *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at para. 7.480:

From this perspective, the supervision concern differs from other criteria determining the availability of specific relief. It is based not upon the weighing of relative advantage and disadvantage to the parties but rather on the weighing of the advantage of doing justice by granting specific relief against the general cost to society of having justice administered. By way of contrast to specific relief, damage awards do hold certain advantages. A money judgment is final and enforcement is left to the administrative rather than the judicial machinery of the court. The cost of enforcement is largely borne by the parties. A decree for specific performance does involve a substantially higher risk that further judicial resources will be required. The more complex or extended the performance, the more likely further proceedings will be needed to ascertain whether the defendant has complied with his or her obligations. This fear of extended and complex litigation and the need for repeated requests for judicial intervention may be seen as a legitimate concern. The cost to society of providing the resources necessary to implement specific performance decrees is properly considered by the court when weighing the advantages the specific relief might otherwise offer.

*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62, a case in which the judge retained jurisdiction to supervise compliance with an order enjoining the Government of Nova Scotia to use its best efforts to provide French language facilities and programs, demonstrates the possible extent of judicial involvement where injunctive relief is ordered. This burden on the judicial system may be justified in the context of the constitutional protection afforded to linguistic minorities, but may not be warranted when the cost is not

proportionate to the importance of the order. The Latin maxim *de minimis non curat praetor* conveys the long-established rule that claims will be entertained only if they are important enough to warrant the expenditure of public resources.

25 Equally important concerns can be raised by other types of orders, like anti-suit injunctions, and search or freezing orders. The question of their territorial scope is highly relevant. In *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, and *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, the Court refused to give extraterritorial effect to provincial statutes. The frontiers of the foreign state are the very reason why its judgments need to be recognized and enforced abroad. Should the orders not be assessed to ensure that their form is compatible with domestic law? Under the traditional rule, the issue of clarity and specificity is not a concern, but if injunctive relief is to be enforced, its territorial scope has to be specific and clear. Canadian residents should not be made subject to unforeseen obligations from a foreign court or to orders in a form unknown to Canadian courts. This issue goes not to the jurisdiction of the foreign court, but either to the framing of new conditions for recognition and enforcement or to new defences.

#### Considerations Particular to Equitable Orders

26 Under the traditional common law rule, courts have relied on the notion of comity to justify the recognition and enforcement of foreign judgments. But it is worth noting that in *Morguard*, the Court took a balanced approach to comity. In that case, La Forest J. first referred to (at p. 1096):

. . . the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind.

He adopted the more complete formulation of the concept of comity (at p. 1096) developed by the U.S. Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (1895), at p. 164:

. . . 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.

27 Comity is a balancing exercise. The relevant considerations are respect for a nation's acts, international duty, convenience and protection of a nation's citizens. Where equitable orders are concerned, courts must take care not to emphasize the factor of respect for a nation's acts to the point of imbalance. An equitable order triggers considerations of both convenience for the enforcing state and protection of its judicial system. I mention these two considerations because they will be of particular relevance in the present case.

28 Under the traditional rule, once the jurisdiction of the enforcing court is established, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced. In the case of an equitable order, it is at this stage that considerations specific to the particular nature of such orders should be contemplated. If the

particular concerns raised by equitable orders are considered by the judge at the stage of determining whether the order is suitable for enforcement, they will not ordinarily need to be raised again at the defence stage. The traditional defences relating to the merits or to procedure, which are summarized in *Beals*, should not be different for equitable orders than for common law judgments. However, there might be other considerations, such as laches, that would make it inequitable to enforce a foreign judgment. Such considerations should not generally entail revisiting the merits of the case.

29 The present case does not require the consideration of defences particular to the nature of equitable orders. Thus, I do not have to expand on Major J.'s *dictum* in *Beals* that the evolution of private international law may require the creation of new defences (para. 42). The existing defences do not need to be broadened for the purposes of the case at bar. Similarly, the finality requirement, which is indispensable, although more complex in the context of an equitable order than in that of a common law order, could be the object of further commentary. However, these topics need not be fully addressed in the present case. Revisiting the defences and defining the finality requirement in the context of equitable orders are better left for another day.

30 In contemplating considerations specific to the recognition and enforcement of equitable orders, courts can draw the relevant criteria from other foreign judicial assistance mechanisms based on comity. *Forum non conveniens* and letters rogatory are mechanisms that, like the enforcement of foreign judgments, rely on comity. For these mechanisms, as for the enforcement of equitable orders, the balancing exercise of comity requires a careful review of the relief ordered by the foreign court. This review ensures that the Canadian court does not extend judicial assistance if the Canadian justice system would be used in a manner not available in strictly domestic litigation. It could be tempting to use form over substance as the distinctive criterion. However, the distinction between form and substance can sometimes be elusive or even misleading. In considering the order it is asked to enforce, the domestic court should instead scrutinize the impact of the order. Relevant considerations may thus include the criteria that guide Canadian courts in crafting domestic orders, such as: Are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her? Is the order limited in its scope and did the originating court retain the power to issue further orders? Is the enforcement the least burdensome remedy for the Canadian justice system? Is the Canadian litigant exposed to unforeseen obligations? Are any third parties affected by the order? Will the use of judicial resources be consistent with what would be allowed for domestic litigants?

31 The evolution of the law of enforcement does not require me, at this point, to develop exhaustively the criteria a court should take into account. As cases come up, appropriate distinctions can be drawn. For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. However, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether or not to enforce one.

#### Application to the Case at Bar



*Preliminary Comments*

32 I reviewed the facts at the beginning of these reasons and need not expand on them save to mention the peculiar circumstances in which the case proceeded in this Court. Elta's factum was due on September 7, 2005. On October 17, 2005, Elta's attorney filed a notice of withdrawal and on October 26, Mr. Frank Lin, who signed the 1998 declaration for Elta, informed the Registrar that the company's "financial circumstances" did not permit it to incur further legal fees. He confirmed the information by fax on a sheet of paper bearing no letterhead. The hearing proceeded *ex parte*, a circumstance that could not have been foreseen when leave was granted.

33 Since equity is about ethics and the prevention of unconscionable conduct, it may be tempting to spring into action to remedy conduct by Elta that looks like blatant defiance of the law and the judicial system. However, care must be taken to ensure that the law and the justice system are not harmed by engaging them too quickly in a manner that accommodates only one aspect of comity. Three issues are relevant to determining whether the orders rendered in this case meet the conditions for recognition and enforcement. The first, raised by Elta, relates to the quasi-criminal nature of a contempt order, the second to the burden on the judicial system and the third to the extraterritorial nature of the orders. In addition, I feel bound to say a few words concerning the public policy defence. While it might have been possible to resolve some of the issues had Elta appeared before the Court, its absence, and the reasons given for its absence, reinforce my conclusion that the circumstances do not lend themselves well to the recognition and enforcement of the orders.

*Quasi-Criminal Nature of the Contempt Order*

34 It is well established that Canadian courts will not enforce a penal order, either directly or indirectly (Castel and Walker, at para. 8.3). This point is pertinent only to the recognition and enforcement of the contempt order. The Superior Court judge reasoned that the contempt order was restitutionary in nature and engaged a dispute between private parties (para. 17). This narrow view of contempt of court conflicts with Matia J.'s finding that, "[b]ased upon these violations, Elta Golf is in contempt of this Court" (A.R., at p. 102), and with this Court's finding in *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065:

The penalty for contempt of court, even when it is used to enforce a purely private order, still involves an element of "public law", in a sense, because respect for the role and authority of the courts, one of the foundations of the rule of law, is always at issue. [p. 1075]

In *Vidéotron*, the Court opted for a unified approach to the nature of the contempt of court order, thus setting aside the distinction between the civil and criminal aspects that prevails in the United States: *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), at p. 441.

35 In Canadian law, a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. Consequently, a motion for contempt of court cannot be

reduced to a way to put pressure on a defaulting debtor or a means for an aggrieved party to seek indemnification. The gravity of a contempt order is underscored by the criminal law protections afforded to the person against whom such an order is sought. Not only is that person not compellable (*Vidéotron*, at p. 1078) but he or she is not competent to act as a witness for the prosecution: *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 4; *P.-A.P. v. A.F.*, [1996] R.D.J. 419 (C.A.). The significance of a contempt order is also evident from the sanction faced by the offender. In Canada, an individual in contempt of court can be committed to jail (see *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 60.11) or may face the imposition of any other sanction available for a criminal offence, such as a fine or community service: *Westfair Foods Ltd. v. Naherny* (1990), 63 Man. R. (2d) 238 (C.A.). Thus, both the process used to issue a declaration of contempt and the sanction bear the imprint of criminal law.

36 The “public law” element of a declaration of contempt and the opprobrium attached to it eclipse the impact of a simple restitutionary award. As a matter of principle, the quasi-criminal nature of the contempt order precludes the enforcement of such orders in Canada.

37 The Superior Court judge did not acknowledge the differences between the Canadian and American views on contempt. She ignored the declaration of contempt, expunged the duplicative parts from the contempt order and declared only the new injunctive relief to be recognizable and enforceable. I am not satisfied that it was appropriate to reconfigure the order in this way.

38 The reconfiguration led the court to attribute to the contempt order a nature different from the usual nature of such orders in Canada. To sidestep the difficulty by severing the order hardly addresses the argument based on the quasi-criminal nature of the order and is a course to be avoided. Severance requires the receiving court to consider the merits of the order and risks affecting its substance. Even if severance does not distort the purpose of the order, it tests the limits of the enforcing court’s familiarity with the foreign law, a topic discussed below.

39 Because of their criminal component, contempt orders should not be enforceable in Canada. I note, on this issue, that according to K. MacDonald, in “A New Approach to Enforcement of Foreign Non-Monetary Judgments” (2006), 31 *Adv. Q.* 44, at p. 56, citing the *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1987), Part IV, ch. 8, § 481, the U.S. courts, while allowing the recognition of judgments granting injunctions, will not generally enforce such orders. According to this view, neither the consent decree nor the reconfigured contempt order would be enforced in the U.S.

#### *Integrity of the Justice System*

40 In choosing a remedy, a court of equity must consider whether the remedy is appropriate. Such is the case when deciding whether to issue an injunction. Judicial economy is one of the many considerations the court must evaluate. In private international law, this concern is addressed in the principle of comity. As mentioned above, comity concerns not only respect for a foreign nation’s acts, international duty and convenience, but also the protection of a nation’s citizens and domestic values.

41 In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, the Court recognized that prejudice to a party is relevant to the choice of forum. Similarly, if a plaintiff has a choice between courses of action and one of these is less burdensome for the receiving court, he or she can rightly be asked to take the less burdensome one.

42 On the issue of the use of judicial resources, the Court of Appeal stated that the denial of recognition and enforcement did not leave Pro Swing without a remedy. It in fact mentioned two other possible courses of action for Pro Swing to take: a separate action and letters rogatory. The first would be burdensome for Pro Swing and would not give full faith and credit to the Ohio judgment. However, letters rogatory should have been considered.

43 Letters rogatory are used to obtain evidence in the form of testimony, statements or documents for use in proceedings before foreign courts: *Canada Evidence Act*, s. 46, and *Ontario Evidence Act*, R.S.O. 1990, c. E.23, s. 60. This form of judicial assistance, like the recognition and enforcement of foreign orders and *forum non conveniens*, rests on the principle of comity: *District Court of the United States, Middle District of Florida v. Royal American Shows, Inc.*, [1982] 1 S.C.R. 414.

44 Letters rogatory are allowed by virtue of s. 46 of the *Canada Evidence Act* and applicable provincial legislation. One of the requirements is that a proceeding be pending before the Ohio court: *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Re International Association of Machinists & Aerospace Workers and Qantas Airways Ltd.* (1983), 149 D.L.R. (3d) 38 (Ont. H.C.J.). In this case, the proceeding may be considered to be pending before the Ohio court because the very reason the order is rendered is to enable Pro Swing to return before Matia J. to determine the damage award.

45 Subject to their being duly obtained, letters rogatory may be viewed as a useful means to obtain the evidence required by Matia J. to finalize the damage award in the contempt proceeding in Ohio. This course of action would have the benefit of avoiding duplication of the enforcement proceedings in Ontario with those in Ohio. Moreover, letters rogatory are truly incidental to the proceedings, which is how the Superior Court judge characterized the parts of the contempt order she agreed to recognize and enforce.

46 In addition to considering alternate means to reach a particular outcome, a court may consider whether the matter merits the involvement of the Canadian court. The receiving court's willingness to extend its judicial resources may depend on the importance of the case compared to the damage the plaintiff would suffer if his or her request were refused. In the present case, given the facts that the consent agreement was concluded on the basis of only three golf clubs or golf club heads, that only two golf club heads were purchased in the investigation and that Elta chose not to appear owing to "financial circumstances", there is a concern that the judicial machinery could be deployed only to find that Pro Swing's debtor is insolvent.

47 True, it would encourage deceit, fraud and similar misconduct if courts were systematically to require litigants to demonstrate the damage they would suffer should enforcement be denied. Nevertheless, when the circumstances give rise to legitimate concerns about the use of judicial resources, the litigant bears the burden of reassuring the court that the

matter is worth going forward with.

48 The appropriateness of using local judicial resources is a factor included in the convenience aspect of the principle of comity. It does not allow judges to determine whether the order is correct, but provides minimal protection for our justice system.

#### *Familiarity With the Foreign Law*

49 I alluded earlier to the problem of interpreting a foreign order in light of Canadian law, which might be different from the foreign law. When faced with the need to interpret the law, the receiving court must ensure that no conflict results from the nature attributed to the order after the enforcement judgment is rendered.

50 In the case of a contempt order, because of the different approaches in the U.S. and in Canada, the conflict is real. In the U.S., according to *Gompers*, a civil contempt order is remedial only and is issued for the benefit of the complainant. However, if the same contempt order is recognized and enforced in Canadian law, it becomes a Canadian contempt order that has a quasi-criminal nature and exposes the offender to imprisonment.

51 Differences in laws might trigger different obligations. It is important that the receiving court does not have to venture into uncertain territory to interpret orders whose terms are based on rules with which the court is not familiar. Also, courts should not expose litigants to consequences to which they would not be exposed under the foreign law. Aware of their limitations, receiving courts should use their discretion to refrain from enforcing orders that subject Canadian litigants to unforeseen obligations.

#### *Extraterritoriality*

52 The Superior Court was of the view that the wording of the consent decree made it clear that extraterritoriality was intended by the parties. However, the judge did not comment on the contempt order. The Court of Appeal found both orders unclear as to the scope of their extraterritorial application. The issue is important both because the transactions were made over the Internet and because the trademark was protected only in the U.S.

53 Extraterritoriality is a long-recognized concern not only because a law normally applies solely in the jurisdiction where it is enacted, but also because courts lack familiarity with foreign justice systems. Courts will tend to find solutions to limit spheres of conflict. In *Hunt*, a Quebec statute was found not to prevent the enforcement of a B.C. order. In *Unifund*, an Ontario statute was held not to apply to a B.C. corporation. In *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, the Court was of the view that a *Mareva* injunction should have been refused because the assets in question were not at risk when moved to Quebec.

54 This Court commented on the particular nature of an Internet transaction in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45. It stated that “a telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, ‘is both here and there’” (para. 59).

55 Truly, when Mr. Frank Lin signed the declaration stating that he had three golf clubs or golf club heads in inventory and agreed to surrender them to Pro Swing's counsel, he must have understood that an eventual incorporation of the settlement agreement into a consent decree could bind him to deliver goods located in Ontario.

56 However, the same extraterritorial application cannot be said of the orders contained in the consent decree and the contempt order that enjoined him from purchasing and selling the material. Since the trademark protection is the one recognized in the U.S. and the Internet transaction took place in both Ohio and Ontario, the transaction can be said to have occurred in Ohio. The Internet component does not transform the U.S. trademark protection into a worldwide one. Whether Elta could, by consent, have agreed to such an extension is a matter of interpretation. The Superior Court found the terms clear, but the Court of Appeal found them doubtful. In my view, in the absence of explicit terms making the settlement agreement a worldwide undertaking, the consent decree cannot be said to clearly apply worldwide.

57 In addition to prohibiting the purchase and sale of designated material, the contempt order enjoins Elta "to make an accounting to Pro Swing of all golf club and/or golf club components it has sold which bear the TRIDENT or RIDENT marks, or any other confusingly similar designation, since the entry of the Consent Decree . . . [and to] include a sworn statement of account of all gross and net income derived from sales of TRIDENT and RIDENT golf clubs or golf club components . . .". It imposes an obligation to account for all sales, even sales that may fall outside the scope of Pro Swing's trademark protection. To interpret the contempt order as applying outside the U.S. would offend the principle of territoriality.

58 Extraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection. The Internet poses new challenges to trademark holders, but equitable jurisdiction cannot solve all their problems. In the future, when considering cases that are likely to result in proceedings in a foreign jurisdiction, judges will no doubt be alerted to the need to be clear as regards territoriality. Until now, this was not an issue because judgments enforcing trademark rights through injunctive relief were, by nature, not exportable.

#### *Public Policy Defence*

59 Elta did not raise a public policy defence. However, public policy and respect for the rule of law go hand in hand. Courts are the guardians of Canadian constitutional values. They are sometimes bound to raise, *proprio motu*, issues relating to public policy. An obvious example of values a court could raise *proprio motu* can be found in *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7. In that case, the Court took Canada's international commitments and constitutional values into consideration in deciding to confirm a direction to the Minister to make a surrender subject to assurances that the death penalty would not be imposed. Public policy and constitutional requirements may also be at stake when the rights of unrepresented third parties are potentially affected by an order. In the case at bar, over and above the concerns articulated by the Court of Appeal and the defences raised by Elta, there are, in my view, concerns with respect to parts of the contempt order inasmuch as it requires the disclosure of personal information that may *prima facie* be protected from disclosure.

60 The quasi-constitutional nature of the protection of personal information has been recognized by the Court on numerous occasions: *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, 2006 SCC 13, at para. 28; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53, at para. 24; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65–66. In *Burns*, the Court required assurances that our constitutional protections would be extended to individuals found on Canadian soil; in the same way, courts should be mindful of the values that merit constitutional or quasi-constitutional protection. In light of the quasi-constitutional status attributed to privacy, the order enjoining Elta to provide all credit card receipts, accounts receivable, contracts, etc. could be problematic. The range of documents is wide and most of them contain personal information that might be protected.

61 Because no submissions were made on this point, we do not know if there is any information or evidence relevant to applicable exceptions. The documents contain personal information that may *prima facie* be protected for the benefit not of the person from whom disclosure is sought, but of the persons to whom the information belongs. This is but an example of public policy considerations that judges must consider before agreeing to recognize and enforce a judgment on a foreign country's behalf.

#### *Summary*

62 In summary, the orders are problematic from many points of view. The contempt order is quasi-criminal in nature and the intended territorial scope of the injunctive relief in the consent order is uncertain. Moreover, it is unclear that recognition and enforcement of the judgment is the appropriate tool amongst the various judicial assistance mechanisms or that the matter is an appropriate one for lending judicial assistance in the form requested. Additional concerns relating to the potential violation of privacy rights should also be addressed.

63 The list of problems is long, too long to use the courts' equitable jurisdiction to accommodate Pro Swing. In *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), Blair J.A. stated that the courts had the choice of throwing up their hands in despair or protecting the public against impugned conduct. In the case at bar, the choice is not as clear, as this is an instance where a court's refusal to enforce the orders cannot be equated with an abdication of its duties. To refuse to enforce the orders is an appropriate exercise of equitable discretion and amounts to allowing the Ohio court to continue the proceedings with the judicial assistance of the Ontario courts, but to a lesser extent than has been requested.

#### Conclusion

64 Private international law is developing in response to modern realities. The real and substantial connection test and the enforcement of equitable relief granted in foreign countries are but two examples of its evolution. The Internet puts additional pressure on the courts to reach out to the same extent as the Web. At the same time, courts must be cautious to preserve their nation's values and protect its people. The time is ripe to change the common law rule against the enforcement of foreign non-monetary judgments, but, owing to problems with the orders the appellant seeks to have enforced, the Court cannot accede to its request.

65 For these reasons, I would dismiss the appeal.

The reasons of McLachlin C.J. and Bastarache and Charron JJ. were delivered by

THE CHIEF JUSTICE (dissenting) —

### Introduction

66 This case requires the Court to consider whether the common law should be extended to permit the enforcement of foreign non-money judgments and, if so, in what circumstances. I would hold that these judgments are enforceable in appropriate circumstances. On application to these facts, I would conclude that the motions judge did not err in enforcing parts of the order of an Ohio court.

### Facts

67 The appellant, Pro Swing Inc., is the owner of the Trident trademark for a type of golf club. Its trademark is registered in the United States, where it carries on business. The respondent, Elta Golf Inc., carries on business in Toronto, Ontario. In the course of that business, it offered for sale on its Website goods bearing marks which resembled Trident.

68 In April 1998, Pro Swing filed a complaint against Elta Golf for trademark infringement and dilution, use of a counterfeit mark, unfair competition, and deceptive trade practices. The complaint was filed in the United States District Court for the Northern District of Ohio Eastern Division.

69 In July 1998, the parties entered into a settlement agreement. It was endorsed by a consent decree of the court, signed by both parties. The consent decree acknowledged that Pro Swing was the owner of the Trident trademark and enjoined Elta Golf from purchasing, marketing, selling or using golf clubs or golf club components bearing that mark or confusingly similar variations. The order stated that the court would retain jurisdiction over the parties for purposes of enforcement and the parties agreed not to contest the jurisdiction of the U.S. courts in any action to enforce the settlement.

70 In December 2002, Pro Swing learned that Elta Golf was violating the consent decree and launched a civil contempt proceeding to enforce it and to obtain compensation for damages sustained. Elta Golf was served but did not respond. On February 25, 2003, the Ohio court found Elta Golf in contempt of court and confirmed the injunction. It also awarded compensatory damages to Pro Swing based on Elta Golf's profits and ordered Elta Golf to provide an accounting to the plaintiff for purposes of calculating these damages. Again, the court ordered Elta Golf to deliver up offending material, provide names and addresses of suppliers and purchasers to the plaintiff, and recall all counterfeit and infringing golf clubs or golf club components. Again, the U.S. court stated it retained jurisdiction to enforce the consent decree and contempt order. Finally, it awarded Pro Swing costs against Elta Golf subject to accounting.

71 Elta Golf did not comply with this order. As a result, Pro Swing was unable to provide the Ohio court with its proposed damage award or costs bill.

### Legal History

72 In 2003, Pro Swing commenced these proceedings in Ontario, asking the court to recognize and enter the 1998 consent decree and the 2003 contempt order. In response, Elta Golf filed a defence arguing that the U.S. orders could not be recognized and enforced in Canada because they were not final judgments for a fixed sum of money. Elta Golf raised two principal issues relating to the two U.S. orders:

Is the consent decree of July 28, 1998 unenforceable in Ontario in that it is in the nature of injunctive relief and not for a fixed sum of money?

Is the order of February 25, 2003 unenforceable in Ontario as it is not in the nature of a final order and is penal in nature?

73 The motions judge, Pepall J., reviewed the jurisprudence and concluded that there was no reason in principle why non-money judgments of foreign courts should not be enforced ((2003), 68 O.R. (3d) 443). In her view, the principles enunciated in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, apply equally to monetary and non-money judgments. She noted that Elta Golf conceded that the 1998 Ohio decree met the general requirements of *Morguard*. The only issue was whether the common law requirement of a fixed sum had been abrogated by *Morguard* and subsequent decisions. She concluded that it had not, but that the principles espoused in *Morguard* permitted the requirement to be relaxed or removed depending on the circumstances of the case. As a result, she held that in principle the orders might be enforceable in Canada. The motions judge then examined whether the orders in question were final and conclusive. She concluded that the 1998 decree was final and conclusive, noting that it reflected a settlement between the parties and that “[b]y its terms, it is clear that extraterritorial application was intended” (para. 16). By contrast, aspects of the February 2003 order were left outstanding and could not be enforced. However, the general declaration and the orders for an accounting and the provision of names, information and recalled clubs and components were, in her opinion, final and enforceable in Ontario.

74 Elta Golf appealed, on grounds that the motions judge had erred in concluding that non-money foreign orders could be enforced. The Court of Appeal agreed with the motions judge “that the time is ripe for a re-examination of the rules governing the recognition and enforcement of foreign non-monetary judgments” ((2004), 71 O.R. (3d) 566, at para. 9). However, it held that the orders in this case could not be enforced because they were ambiguous in that “the scope of the extra-territorial application of the foreign orders is unclear” (para. 11).

75 Pro Swing appeals to this Court. It endorses the view of the law taken by the courts below that non-money foreign judgments may be enforceable. It takes issue, however, with the Court of Appeal’s conclusion that the orders in this case could not be enforced because the extraterritorial application of the orders was unclear. Elta Golf did not appear on the proceedings before this Court.

### Analysis



76 Three questions arise. The first is whether Canadian courts can recognize and enforce foreign non-money judgments. If the answer to this question is affirmative, the question arises of when it is appropriate to recognize and enforce such judgments. Finally, the principles developed must be applied to the foreign orders at issue to determine whether they can be enforced in Ontario.

*Recognition of Foreign Non-Money Judgments*

77 The traditional common law position is that foreign judgments are recognizable and enforceable only if they meet two conditions. First, they must be for a definite sum of money. Second, they must be final and conclusive. These requirements ensure that in ordinary cases the merits of foreign judgments are not considered by an enforcing court. Barring exceptional concerns, a court's focus when enforcing a foreign judgment is not on the substantive and procedural law on which the judgment is based, but instead on the obligation created by the judgment itself.

78 In *Morguard*, La Forest J. discussed the need to ensure that the evolution of the common law keeps pace with the acceleration, intensification, and nature of cross-border social and economic activity. He noted:

The world has changed since the above rules were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. 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. [p. 1098]

In *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, La Forest J. further described rigidity in this area of the law as resting on an "outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness" (pp. 321-22). The common law must evolve in a way that takes into account the important social and economic forces that shape commercial and other kinds of relationships.

79 That evolution must take place both incrementally and in a principled way. Although the enforcement of money judgments across provincial boundaries raises unique considerations and constitutional dimensions, the underlying principles of comity, order and fairness must apply both interprovincially and internationally. As Major J. noted in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72, "[t]he principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law" (para. 27). These principles do not exclude the enforcement of non-monetary judgments from another country. At the same time, comity, which requires respect for the legitimate sovereignty of others and for the needs created by relationships that "involve a constant flow of products, wealth and people across the globe", may favour it: *Hunt*, at p. 322.

80 A number of law reform agencies have recognized the need for a more flexible approach to the enforcement of foreign non-money judgments. While the present case

concerns the enforcement of U.S. orders, the common law prohibition on such enforcement also applies between the Canadian provinces, reinforcing the need for its reconsideration.

81 At the interprovincial level, proposals for reconsideration of the rule have been advanced. The Uniform Law Conference of Canada proposed two statutes that would allow for the enforcement of non-money judgments within Canada: the *Uniform Enforcement of Canadian Decrees Act* (1997) and the *Uniform Enforcement of Canadian Judgments and Decrees Act* (1997). In an introductory comment to both proposed statutes, the Uniform Law Conference explained that:

Apart from legislation that addresses particular types of orders, there is no statutory scheme or common law principle which permits the enforcement in one province of a non-money judgment made in a different province. This is in sharp contrast to the situation that prevails with respect to money judgments which have a long history of enforceability between provinces and states both under statute and at common law. With the increasing mobility of the population and the emergence of policies favouring the free flow of goods and services throughout Canada, this gap in the law has become highly inconvenient. UECJDA [*Uniform Enforcement of Canadian Judgments and Decrees Act*] provides a rational statutory basis for the enforcement of non-money judgments between the Canadian provinces and territories.

(*Uniform Law Conference of Canada: Commercial Law Strategy* (2005 (loose-leaf)), Tab 7, p. 3)

82 The British Columbia Law Institute recommended the adoption of the *Uniform Enforcement of Canadian Judgments and Decrees Act* (or, alternatively the *Uniform Enforcement of Canadian Decrees Act*) in its *Report on the Enforcement of Non-money Judgments from Outside the Province* (August 1999). The Report cited the following passage from *Morguard* as an illustration of the existing deficiencies in Canadian private international law:

It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?

(Report, at p. 4; *Morguard*, at pp. 1102-3)

83 Finally, with respect to *all* non-Quebec judgments, the *Civil Code of Québec*, S.Q. 1991, c. 64, does not distinguish between money judgments and non-money judgments in its recognition and enforcement provisions, although the finality requirement has been maintained:

**3155.** A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:

...

(2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;

84 These developments establish that the absolute common law ban on the enforcement of all foreign non-money judgments may no longer be useful and should be reconsidered.

85 A final question is whether abolition of the rule against recognition and enforcement of foreign non-money judgments satisfies the principles this Court has recognized on the development of the common law. As a general rule, the common law must evolve to take into account societal changes, but that evolution must proceed incrementally: *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 666.

86 The possibility of enforcing foreign non-money judgments would represent an incremental change in the common law of Canada. The principled approach to recognition of foreign monetary judgments in cases such as *Morguard* and *Beals* invites application of the same principles to non-money judgments in order to preserve the consistency and logic of this body of the law. Lower courts have discussed the need to modify the traditional ban on enforcement of foreign non-money judgments or have suggested that the law may have already moved in that direction: *Uniforêt Pâte Port–Cartier Inc. v. Zerotech Technologies Inc.*, [1998] 9 W.W.R. 688 (B.C.S.C.); *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at para. 77. Provincial law reform agencies have done detailed studies on the issue and the Province of Quebec already permits recognition and enforcement. Loosening the common law strictures on enforcement is arguably a small and necessary step in the development of the common law in this area. On the other hand, the matter is complex and difficult, as attested to by the fact that reform proposals have not produced legislative reform. Acceptance of the possibility of recognizing and enforcing foreign non-monetary judgments is an incremental step. At the same time, care must be taken to ensure that recognition is confined to cases where it is appropriate and does not create undue problems for the legal system of the enforcing state or unfair results for the parties. Caution is in order.

87 The time has come to permit the enforcement of foreign non-money orders where the general principles of *Morguard* are met and other considerations do not render recognition and enforcement of the foreign judgment inadvisable or unjust.

#### *The Requirements for Enforcement of Foreign Non-Money Judgments*

88 If foreign non-money judgments may sometimes be enforceable, the next question is when that will be appropriate. This is not a simple matter. As Professor Vaughan Black cautions, “[a]ny move to enforce foreign non-money orders requires caution and close attention to the unique features of such remedies”: “Enforcement of Foreign Non-money Judgments: *Pro Swing v. Elta*” (2006), 42 *Can. Bus. L.J.* 81, at p. 96. Different non-money remedies and different circumstances will raise different considerations.

89 Before discussing the considerations applicable in this case, it may be useful to

reiterate the theoretical basis for the recognition and enforcement of foreign judgments. While established in the context of money judgments, the theory also applies to the enforcement of non-money judgments. The foreign court order is seen as creating a new obligation on the defendant. In the case of a money judgment, this is a debt. In the case of a non-money judgment, it is a different sort of obligation. A court enforcing a foreign judgment is enforcing the obligation created by that judgment. In principle, it should not look beyond the judgment to the merits of the case. It enforces the obligation created by the foreign judgment by its own machinery. As confirmed in *Beals*, as long as the foreign court properly has jurisdiction to adjudicate the dispute, absent evidence of fraud or a judgment contrary to natural justice or public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction. All the enforcing court needs is proof of the foreign order; its own legal mechanisms take over from there. This can be understood as the principle of the separation of judicial systems.

90 The first category of restrictions on the recognition and enforcement of foreign non-money judgments should flow from the general enforcement requirements set out in *Morguard*. These ensure that jurisdiction was properly taken by the issuing court and that there are no general fairness considerations that should require the court to hesitate before enforcing the foreign judgment. As noted in *Beals*, the existing defences of fraud, public policy and natural justice are designed to guard against unfairness in its most recognizable forms. Although designed to apply to money judgments, these requirements must also be applicable in cases involving non-money remedies. They are narrowly drawn and limited to particular cases where unfairness is clear. Both in the case of money and non-money judgments, they are non-exhaustive and may be supplemented in extraordinary circumstances: *Beals*, at paras. 41-42.

91 The second category of restrictions on the recognition and enforcement of foreign non-money judgments should relate to finality and clarity. These twin requirements are based on the principles of judicial economy and the separation of judicial systems, which themselves stem from comity, order and fairness. Finality and clarity are distinct concepts. The first requires completeness; the second lack of ambiguity. However, in practice they may overlap. An order that is not final is likely to be unclear and vice versa.

92 The related requirements of finality and clarity should ensure that the function of enforcing courts will be limited to enforcement of the obligation created by the foreign order and will not include re-litigation of the issues considered by the issuing court. On the level of principle, an attempt to enforce an order that is not final and clear will almost invariably amount to the inappropriate assumption of jurisdiction by the enforcing court over the dispute. It is settled law that the enforcing court does not consider the merits of the foreign decision, absent fraud, violation of natural justice or violation of public policy. On the practical level, it may be difficult for the enforcing court to supervise an incomplete or unclear order. Difficulties may stem from the enforcing judge's unfamiliarity with the foreign law and its procedures or from the cost burden on the enforcing court. An order that is not final may be changed by the foreign court, with the result that the enforcing court finds itself enforcing something that is no longer an obligation in the foreign country. Finally, an enforcing court should not be obliged to re-litigate foreign disputes or use valuable resources to duplicate what would be best done in the originating jurisdiction. For these reasons, courts should decline to enforce foreign non-money orders that are not final and clear.

93 The related requirements of finality and clarity should thus be seen as flowing from the theory by which foreign judgments are enforced. What is enforced, as discussed, is an obligation created by the foreign court, not the rights or responsibilities that gave rise to it. Finality and clarity will ensure that this distinction is respected. Requiring that the order to be enforced be final and clear also makes practical sense. Where supervision would be particularly difficult for the enforcing court and where the issuing court could engage in supervision much more efficiently, judicial economy suggests that it would be appropriate to decline to enforce.

94 The B.C. Supreme Court decision in *Uniforêt* rejected enforcement of a foreign non-money order for lack of finality. At issue was the enforceability of a Quebec arbitration award that ordered Zerotech, a B.C. company, to give Uniforêt access to documents and allow it to make copies. After reviewing the judgments in *Morguard*, *Hunt* and *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, Clancy J. opined at para. 26 that “[t]here is no principled reason why judgments other than monetary judgments should not be recognized and enforced.” Clancy J. nevertheless declined to enforce the order because it violated the finality requirement in that it was lacking in precision and would have required variation or addition before it could be enforced. Clancy J. stated: “If clarification or variation is required, particulars of how that must be done is a matter to be decided by the arbitrators or by the Superior Court of Quebec, not by this court” (para. 28). Similarly, art. 3155(2) of the *Civil Code of Québec* does not permit enforcement if the decision “. . . is not final or enforceable at the place where it was rendered”.

95 Finality demands that a foreign order establish an obligation that is complete and defined. The obligation need not be final in the sense of being the last possible step in the litigation process. Even obligations in debt may not be the last step; orders for interest and costs may often follow. But it must be final in the sense of being fixed and defined. The enforcing court cannot be asked to add or subtract from the obligation. The order must be complete and not in need of future elaboration.

96 Clarity, which is closely related to finality, requires that an order be sufficiently unambiguous to be enforced. Just as the enforcing court cannot be asked to supplement the order, so it cannot be asked to clarify ambiguous terms in the order. The obligation to be enforced must clearly establish what is required of the judicial apparatus in the enforcing jurisdiction.

97 Clarity means that someone unfamiliar with the case must be able to ascertain what is required to meet the terms of the order. Sometimes the judge who made the order is the best person to determine whether its terms have been fulfilled. For example, Rule 60.11 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that a contempt order to enforce an order requiring a party to do an act or refrain from doing an act “may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made”. This reflects the view that before finding a person in contempt — a serious imputation — the judge who made the order should assess the infringing conduct to be sure that it merits the sanction. This point is taken up by J.-G. Castel and J. Walker in *Canadian Conflict of Laws* (6th ed. (loose-leaf)), vol. 1, who posit that “[i]t stands to reason that the court that makes an order requiring a party to perform a contract or to deliver goods may be in a unique position to know whether the terms of the order have been met” (p. 14-21). A court asked to enforce a foreign judgment of this type would have to assess whether questions may arise as to what constitutes

compliance with the obligation. If there is a real risk that such questions may arise, enforcement of the judgment may be inappropriate.

98 Having discussed the requirements of finality and clarity and the rationale that supports them, I turn to how they may be assessed. A court should not refuse to enforce a foreign non-monetary judgment merely because there is a theoretical possibility that questions may arise in the course of enforcement. The hypothetical possibility that enforcement may require active supervision is not enough to permit a court to decline enforcement. A decision not to enforce on the grounds of lack of finality or clarity would have to be based on concerns apparent on the face of the order or arising from the factual or legal context. As elsewhere in the law, mere speculation would not suffice.

99 Deschamps J. suggests that the equitable nature of injunctions and other non-monetary judgments may require Canadian courts to revisit the meaning of the finality requirement and recognize new defences. She highlights the potential costs of supervising equitable orders. I agree that judicial economy is a legitimate consideration (see para. 93). But judicial economy should not be overemphasized. In recent years, courts have taken an active approach, imposing orders requiring supervision when necessary. *Doucet–Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62, is the best-known example, but search orders and freezing orders are part of the same general trend (see generally R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at paras. 1.260-1.490).

100 Orders with penal consequences would constitute a third type of restriction on the enforcement of non-money judgments. It is generally accepted that Canadian courts will not enforce a foreign penal law or judgment, either directly or indirectly. As Castel and Walker explain:

A penal law is a law that imposes a punishment for a breach of a duty to the state — as opposed to a remedial law, which secures compensation for a breach of a duty owed to a private person. . . . Liability that is restitutionary in nature and that is not imposed with a view to punishment of the party responsible is not regarded as penal in nature. [Footnotes omitted; p. 8-2.]

It is for each state to impose its own punishments, penalties and taxes, and other states are not obliged to help them. When we move to penal orders, we move out of the realm of private international law and into public law. As a result, Canadian courts will not entertain an action for the enforcement of a foreign penal, revenue, or other public law, nor will they enforce a foreign judgment ordering the payment of taxes or penalties that gives effect to the sovereign will of a foreign power.

101 For the purpose of this case, the three classes of restrictions on enforcement of non-money judgments discussed above should suffice. It may be that as the law develops other types of problems will be recognized. However, that can be left for future cases.

#### *Application*

102 The motions judge granted a declaration that the 1998 consent decree was valid

and enforceable in Canada.

103 More particularly, the motions judge accepted the following terms of the 2003 Ohio contempt order as enforceable in Canada:

An accounting by Elta Golf to Pro Swing for profits on all golf clubs sold bearing the Trident or Rident marks;

Provision by Elta Golf to Pro Swing of names and contact information of Elta Golf's suppliers of the Trident and Rident golf clubs;

Provision by Elta Golf to Pro Swing of the names and addresses of each purchaser of the Trident and Rident golf clubs or components since entry of the Consent Decree;

Recall by Elta Golf and delivery to Pro Swing of all counterfeit and infringing golf clubs or golf club components bearing Trident or Rident marks or confusingly similar designations.

The motions judge refused to enforce other parts of the February 2003 order on the ground that they were not final and conclusive in nature. The issue is whether the motions judge erred in these conclusions.

104 Elta Golf's first defence was that all the relief should have been refused on the ground that foreign non-money judgments are not enforceable at common law. As discussed above, the common law prohibition on enforcement of such judgments must be replaced by a principled approach which may permit the enforcement of foreign non-money judgments in appropriate circumstances. Elta Golf conceded that the general requirements for enforcement set out in *Morguard* are met here. Elta Golf's argument based on the common law rule against enforcement should therefore be rejected.

105 Elta Golf's second defence was that the orders should not be enforced because they were penal in nature. The motions judge rejected this defence on the ground that the orders were restitutionary in nature since they engaged a private dispute between the parties and sought to compensate the wronged party. In my view, this conclusion is unassailable.

106 I respectfully disagree with Deschamps J.'s characterization of the contempt order as "penal". This Court has long maintained a distinction between civil and criminal contempt orders. In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, it was held at p. 943 that "[t]he purpose of criminal contempt was and is punishment for conduct calculated to bring the administration of justice by the courts into disrepute. On the other hand, the purpose of civil contempt is to secure compliance with the process of a tribunal including, but not limited to, the process of a court" (Sopinka J. dissenting, but not on this point).

107 *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, which Deschamps J. cites as authority for the "unified approach" to contempt orders, is clearly distinguishable. *Vidéotron* dealt with the possibility of imprisonment for contempt under the Quebec *Code of Civil Procedure* and the guarantees against compulsory

self-incrimination under the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of Human Rights and Freedoms*. In my view, *Vidéotron* stands for the principle that persons cited for contempt are entitled to constitutional procedural protections *vis-à-vis* state coercion. It does not transform the private, restitutionary or compensatory aspects of a civil contempt order into public law.

108 Foreign criminal contempt orders are clearly penal and cannot be enforced by Canadian courts. The same should not be said of foreign civil contempt orders. When a foreign court issues a contempt order to secure compliance with a private remedy flowing from a private dispute, the order does not necessarily contain a “penal” aspect that should preclude enforcement by Canadian courts. Some foreign orders for “civil” contempt could nevertheless contain penal elements sufficient to disqualify them from enforcement by Canadian courts; in other cases, the penal elements could be severable, allowing Canadian courts to enforce the private elements only. The development of these principles can be left for future cases.

109 There is nothing penal about the contempt order in this case. The terms of the order are designed to reinforce the consent decree and to provide Pro Swing with restitution for Elta Golf’s violations. The motions judge held that the contempt order was restitutionary rather than penal. The Court of Appeal did not interfere with this holding, and I see no reason to do so now.

110 The next issue concerns the finality and clarity of the orders held to be enforceable in Ontario. The motions judge rejected parts of the U.S. order on this ground, but found other portions sufficiently clear and complete and thus enforceable. The Court of Appeal reversed this decision, finding that the orders were too ambiguous:

In our view, the foreign orders in question are ambiguous in respect of material matters. For example, the critical issue of the scope of the extra-territorial application of the foreign orders is unclear. Do the foreign orders mean that the appellant is enjoined from purchasing, marketing, selling or using infringing golf clubs within the jurisdiction of the U.S. District Court, or do they mean that the appellant is enjoined from doing those things anywhere in the world? [para. 11]

Elta Golf did not appear before us to defend the Court of Appeal’s conclusion. In my view, the record supports the findings of the motions judge, and the Court of Appeal was wrong to reverse her decision.

111 Finality, as discussed above, refers not to whether the order represents the ultimate step in the proceeding, but rather to whether the order is incomplete and not in need of future elaboration. This was how the motions judge understood it: “A domestic court does not wish to be faced with enforcing a foreign judgment that is later changed” (para. 18).

112 I am satisfied that the portions of the judgment that the motions judge held to be enforceable in Ontario are final in this sense. The orders for the accounting and the production of records, names, golf clubs and golf club components represent complete and finite obligations. It would be impossible to add more precision. As discussed above, finality does not mean that no further steps can be taken. Compliance with the order for an accounting and production of records might lead the United States court to issue an order quantifying damages,



for example. However, this does not detract from the finality and certainty of the orders as enforced in Canada.

113 If Elta Golf were to refuse to comply with a final order enforceable in Ontario, the remedy would be an application for an order that Elta Golf is in contempt of court. In theory, issues could arise as to whether the accounting or production is complete. This in turn could involve the Ontario courts in supervising the accounting or production. On the other hand, the prevalence of cross-border commerce suggests that in the absence of an indication that the accounting or production of names, records and goods may raise problems, the order for enforcement of the foreign order should not be refused.

114 Throughout these proceedings, Elta Golf has never suggested that accounting or production will pose difficulties, and has confined its defence to more general points. In these circumstances, the hypothetical possibility of the need for future court supervision should not preclude the recognition of the foreign order. There is therefore no reason to displace the motions judge's conclusions that the portions of the order she accepted were final.

115 The motions judge also found the order to be sufficiently clear. On the question of its territorial scope, she held: "By its terms, it is clear that extraterritorial application was intended" (para. 16). The Court of Appeal disagreed and found that ambiguity in the orders on this point made them unenforceable. Pro Swing argues that this conclusion is not supported by the record and that Elta Golf understood that the consent decree was intended to be enforced extraterritorially. As Elta Golf did not appear before this Court, we are left to evaluate the Court of Appeal's conclusion on the basis of the record and the findings of the motions judge.

116 An examination of the content of the consent decree and the contempt order reveals no ambiguities about their extraterritorial application. First, the decree is cast in general terms. There are no explicit limits on the territory in which it applies, and nothing to suggest such limits were contemplated. Second, the orders were premised on the operation of an Ontario-based Website by Elta Golf and so can be seen as pre-supposing extraterritorial application. Finally, and most compelling, the terms include the surrender of Elta Golf's offending inventory and all promotional, packaging or other materials containing the mark in question or confusingly similar marks. These terms only make sense if the prohibition was meant to be universal in application. An outright surrender of inventory and marketing materials is incompatible with sales of any kind, not simply with sales within a particular jurisdiction. These considerations undermine the Court of Appeal's conclusion that the order was ambiguous.

117 My colleague Deschamps J. acknowledges the extraterritoriality of the orders requiring Elta Golf to surrender inventory, but she declines to infer this same extraterritoriality in the orders enjoining Elta Golf from purchasing and selling the infringing goods. For the injunction to apply extraterritorially, Deschamps J. would require "explicit terms making the settlement agreement a worldwide undertaking" (para. 56). There is no need for such an artificially high standard when a plain reading of the decree makes its extraterritoriality sufficiently clear.

118 It might be argued that the words "any other confusingly similar designations" are ambiguous. To be sufficiently clear, however, an order need not describe in detail every

hypothetical violation of its terms. There is no argument before us that determining confusingly similar designations raises difficulties in this case. As already noted, enforcement concerns must be apparent on the face of the order or arise from the factual or legal context. No such concerns exist here.

119           It may be that the Court of Appeal was concerned that the contempt order was founded on a violation of a U.S. trademark, raising questions about whether that trademark extends to Canada. However, this issue is resolved by the terms of the order itself. As noted above, the order is clearly enforceable in Canada. None of the restrictions on enforcement apply. The principle of separation of judicial systems discussed above prevents the court in the enforcing jurisdiction, Ontario, from entering into the substantive merits of the case that led to the consent decree. Except in cases of fraud or where a judgment is contrary to natural justice or public policy, the court considering the issue of the enforcement of a foreign judgment cannot look behind its terms: *Beals*.

120           Finally, I address briefly the public policy concerns raised by Deschamps J. This Court has upheld the quasi-constitutional nature of privacy legislation as it applies to federal government authorities: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53, at para. 24. It is unclear whether the same status should be accorded to legislation governing information collected by private organizations such as Elta Golf. In this regard, I would note s. 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, which allows private organizations to disclose personal information without the knowledge or consent of the individual if this disclosure is “required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records”.

121           I agree with Deschamps J. that “the order enjoining Elta to provide all credit card receipts, accounts receivable, contracts, etc. could be problematic” (para. 60). To raise this issue at this stage however, when it was never argued before this or any other court, would amount to an inappropriate transformation of the proceedings. Furthermore, a majority of this Court has held that the public policy defence should be given a narrow application: *Beals*, at para. 75, *per* Major J. It may be necessary to revisit this holding in the context of the enforcement of non-monetary judgments, but it is not necessary to do so here. Finally, if the offending parts of the contempt order cannot be enforced for public policy reasons, they can be severed. The public policy issue therefore should not determine the outcome of this appeal.

122           I conclude that the Court of Appeal erred in holding that the portions of the orders enforced by the motions judge could not be enforced in Ontario because of ambiguity about the scope of their extraterritorial application.

### Conclusion

123           For the foregoing reasons, I would allow the appeal, reverse the decision of the Court of Appeal and reinstate the decision of the motions judge.

## APPENDIX A

### Consent Decree

Upon consideration of the parties' consent to judgment being entered against defendant Elta Golf Inc. ("ELTA") in this matter, NOW THEREFORE, IT IS STIPULATED AND AGREED by and between plaintiff Pro Swing, Inc. ("PRO SWING") and defendant ELTA that in connection with the settlement of this action, ELTA agrees to the following:

1. PRO SWING is the owner of U.S. Trademark Registration No. 1,941,922 for the mark TRIDENT in international class 28 which issued on December 19, 1995 (hereinafter referred to as the "MARK") for use in conjunction with golf clubs which it sells throughout the United States of America and overseas;

2. The MARK is valid and through use has come to identify PRO SWING as the source for golf clubs bearing the MARK;

3. ELTA has previously, without consent of PRO SWING, used and advertised golf clubs and/or golf club heads bearing the name RIDENT, a confusingly similar variation of the MARK;

4. ELTA has represented to PRO SWING the nature and extent of its use and advertising of golf clubs and/or golf club heads bearing the name RIDENT including the quantities in inventory or purchased from Third Parties, if any;

5. PRO SWING is, in entering this settlement, relying upon the representations of ELTA as to its use of RIDENT on golf clubs and/or golf club heads which representations are material hereto.

6. Each party will bear its own costs and attorney's fees. The Court shall retain jurisdiction over the parties for the purpose of enforcing this consent decree. The parties agree not to contest jurisdiction in any action in this Court to enforce this settlement.

7. ELTA is enjoined from purchasing, marketing, selling or using golf clubs or golf club components bearing the MARK or other confusingly similar variations of the MARK, including but not limited to RIDENT, RIDEN and/or TRIGOAL, other than on golf clubs or golf club components purchased by ELTA from PRO SWING or its authorized distributors.

8. Within ten (10) days of execution of this order ELTA will surrender and deliver to PRO SWING's counsel, postage prepaid, all infringing golf clubs and/or golf club components, if any, (TRIDENT, RIDENT, RIDEN and/or TRIGOAL) in its possession, along with all copies of any advertising, packaging, promotional or other materials, if any, containing the MARK or any confusingly similar mark, including but not limited to RIDENT, RIDEN and/or TRIGOAL.

9. This consent decree is binding upon the parties, as well as their respective shareholders, directors, officers, employees, representatives, agents, predecessors, successors, parents, subsidiaries, affiliates, assigns, and all other related business entities.

In consideration of the foregoing and conditioned upon compliance by defendant ELTA with the various terms and provisions of the settlement provided for above, this action shall be discontinued and dismissed with prejudice only with respect to defendant ELTA.

## APPENDIX B

### Contempt Order

Based upon the foregoing findings and conclusions, IT IS ORDERED that:

1. The Consent Decree entered on July 31, 1998 remains in full force and effect, and the Court retains jurisdiction to enforce the Consent Decree and this Order.

2. Elta Golf is again permanently enjoined from purchasing, marketing, selling or using golf clubs or golf club components which bear the TRIDENT mark, or any other confusingly similar designations, including but not limited to RIDENT, RIDEN and/or TRIGOAL, other than golf clubs or golf club components purchased by Elta Golf from Pro Swing.

3. Elta Golf is to make an accounting to Pro Swing of all golf clubs and/or golf club components it has sold which bear the TRIDENT or RIDENT marks, or any other confusingly similar designation, since the entry of the Consent Decree. Elta Golf shall provide this accounting to Pro Swing within fourteen (14) days from the date of this Order. The accounting shall include a sworn statement of account of all gross and net income derived from sales of TRIDENT and RIDENT golf clubs or golf club components, together with all business and accounting records relating to these sales, since the entry of the Consent Decree to present, including but not limited to:

a. records of all sales, credit card receipts, accounts receivable and contracts for all sales of golf clubs or golf club components bearing the TRIDENT or RIDENT marks;

b. records of all expenses related to all sales of golf clubs or golf club components bearing the TRIDENT or RIDENT marks; and,

c. any and all balance sheets, profit and loss statements, cash flow reports or other accounting reports or summaries.

4. Pro Swing is hereby awarded compensatory damages based upon the profits derived by Elta Golf through its sales of golf clubs or golf club components bearing the TRIDENT or RIDENT marks, or any other confusingly similar designation, since the entry of the Consent Decree. Pro Swing shall provide its proposed damage award to the Court after Elta Golf's compliance with the accounting requirements set forth in Section III(3) of this Order.

5. Pro Swing is hereby awarded costs and attorneys fees incurred herein. Plaintiff shall submit a cost bill and fee petition within fourteen (14) days of entry of the money judgment set forth in Section III(4) of this Order.

6. Elta Golf is to surrender for destruction, all golf clubs or golf club components which bear the TRIDENT or RIDENT marks, or any other confusingly similar designation. Elta Golf shall forward these golf clubs or golf club components to Pro Swing's counsel (Hahn Loeser & Parks LLP, 1225 West Market Street, Akron, Ohio 44313-7188) within fourteen (14) days from the date of this Order.

7. Elta Golf is to provide Pro Swing with the names and all contact information of Elta Golf's suppliers of the TRIDENT and RIDENT golf club components. Elta Golf shall provide this information within fourteen (14) days from the date of this Order.

8. Elta Golf is to provide Pro Swing with the names and addresses of each purchaser of the TRIDENT and RIDENT golf clubs or golf club components sold by Elta Golf since the entry of the Consent Decree. Elta Golf shall provide this information within fourteen (14) days from the date of this Order. Elta Golf is to pay Pro Swing the costs of a corrective mailing to each of these consumers.

9. Elta Golf is to recall all counterfeit and infringing golf clubs or golf club components which bear the TRIDENT and RIDENT marks, or any other confusingly similar designation. Elta Golf shall forward all such golf clubs or golf club components to Pro Swing's counsel within fourteen (14) days of the receipt of each of these items.

*Appeal dismissed, MCLACHLIN C.J. and BASTARACHE and CHARRON JJ. dissenting.*

*Solicitors for the appellant: Siskind, Cromarty, Ivey & Dowler, London.*

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# EXHIBIT 88

Date: 19980130  
Docket: C967326  
Registry: Vancouver

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**UNIFORÊT PÂTE PORT-CARTIER INC.**

PLAINTIFF

AND:

**ZEROTECH TECHNOLOGIES INC.**

DEFENDANT

**REASONS FOR JUDGMENT**

**OF THE**

**HONOURABLE MR. JUSTICE CLANCY  
(IN CHAMBERS)**

Counsel for the Plaintiff:

S.B. Armstrong

Counsel for the Defendant:

D.A. Brindle

Place and Date of Hearing:

Vancouver, B.C.  
November 14, 1997

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**FACTS**

[1] Uniforêt is the owner of a pulp mill in Port-Cartier, Quebec and carries on business in that province. Zerotech carries on business in Vancouver, British Columbia. On September 20, 1994 Zerotech entered into a contract with Uniforêt to design, engineer and construct an effluent system and a power boiler at the Uniforêt pulp mill.

[2] Clause 34.1 of the contract provides:

If any dispute or disagreement (a "dispute") shall arise between the Parties or any of them concerning the interpretation, operation or respective rights and obligations of the Parties under this Agreement or any part thereof, the Parties shall attempt in good faith to resolve such dispute. If the Parties have not agreed to a settlement of the dispute within thirty (30) days from the date on which the dispute first became known to all the Parties, then the Parties agree that the dispute shall, to the exclusion of the courts of civil jurisdiction, be submitted to arbitration pursuant to Article 940 ss of the Code of Civil Procedure of Québec, except as amended hereunder.

[3] In 1996 a dispute was submitted to arbitration. That dispute involved the right of Uniforêt to audit the books, payrolls and other records of Zerotech. An arbitration panel was appointed which subsequently ordered Zerotech to give Uniforêt access to documents and to allow it to make photocopies of specified documents. The critical finding of the arbitration panel reads as follows:



The arbitration panel concludes that the application submitted by Uniforêt under Clause 9 of the Agreement dated September 20, 1994, entered into with Zerotech, is a dispute subject to arbitration under Clause 34 of said Agreement. It further concludes that Uniforêt is entitled to be given access to Zerotech's books and records and to take photocopies of the following documents and orders Zerotech to give Uniforêt access thereto and to allow it to take photocopies thereof.

[4] There followed a list of documents. The award is dated July 10, 1996.

[5] On August 28, 1996 the Superior Court of Quebec homologated or confirmed the arbitration award in an order which provided:

WHEREFORE THE COURT:

1. GRANTS the motion of Uniforêt Pâte Port-Cartier Inc. for homologation of an arbitration award.
2. HOMOLOGATES the decision rendered on July 10, 1996, by M<sup>e</sup> Bernard A. Roy, M<sup>e</sup> Richard Nadeau and M<sup>e</sup> Raymond Lemoine, arbitrators appointed for the arbitration of the dispute opposing the parties.

[6] Zerotech has not complied with the order of the arbitration panel. The question for resolution is whether the order of the Quebec Superior Court will be recognized and enforced in British Columbia. The parties agree that, since the Province of Quebec is not a reciprocating state, the **Court Order Enforcement Act**, R.S.B.C. 1996, c. 78 has no application. Section 38 of that Act specifically provides that its

provisions do not deprive a judgment creditor of the right to bring an action on the judgment. Uniforêt has brought this action in the Supreme Court of British Columbia seeking the following relief:

- (a) a declaration that the judgment of the Superior Court homologating the arbitration award and the award itself be recognized and executed in the Province of British Columbia; and
- (b) an order that Zerotech give Uniforêt access to and permit photocopying of the listed documents.

**DISCUSSION**

[7] Pursuant to Rule 18A of the *Rules of Court* Uniforêt applies for judgment. Zerotech takes the position that the judgment of the Quebec Superior Court cannot be enforced in the Province of British Columbia.

[8] Mason Poplaw, a member of the Quebec Bar has set out in an affidavit that the rules contained in Articles 946 to 947.4 of the *Code of Civil Procedure* of Quebec ("CCP") apply to all arbitration proceedings and awards in that province. He deposes that, in his opinion, homologation of an arbitration award makes it executory as a judgment of the Superior Court of Quebec. He opines specifically that here the CCP was properly

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followed and the Uniforêt arbitration award is now executory as a judgment of the Superior Court of Quebec.

[9] It is not disputed that an arbitration award may be recognized and enforced in this province once it becomes a judgment of the foreign court. See: J.G. Castel, **Canadian Conflicts of Law** 4th ed., 1997 p. 330-331, para. 202.

Historically, however, not every foreign judgment has been enforced. An interesting dispute between the parties is whether at common law, only an action on a foreign judgment which is for a definite and ascertained amount will be recognized and maintained. That is the position of Zerotech. The submission of Uniforêt is that there is no authority for the proposition that only judgments for a fixed sum will be recognized by a court of another province. On the authorities, they say that the proposition should be stated to say that if a judgment is a money judgment, it will be enforced only if the amount is certain. They submit that there is no rule preventing the recognition and enforcement of judgments other than money judgments.

[10] Many authorities were cited in support of the position of each party. I have considered those authorities and it is sufficient for the purposes of these reasons to say that they support the position of Zerotech. At common law the authorities establish that, to be enforced, judgments must be money judgments. In **Re Reciprocal Enforcement of Judgments Act**

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*re Paslowski v. Paslowski* (1957), 22 W.W.R. 584 (Man. Q.B.)

Williams, C.J.Q.B. stated the rule in this way:

At common law the courts of one state will entertain an action on a foreign judgment, but only when it is a judgment for payment of money. Such a judgment of a foreign state creates only a simple contract debt and does not merge the original cause of action:  
**Cheshire, Private International Law** (1952) 4 ed., pp. 588-9. (p. 587)

[11] The texts and abridgments on the subject appear to be unanimous. J.G. Castel in *Canadian Conflict of Laws*, *supra*, at paragraph 172, at p. 289 makes the unconditional statement that the foreign judgment must be for a definite sum of money. Fraser and Horn, in Volume 2 of *The Conduct of Civil Litigation in British Columbia*, conclude that one of the defences which may be raised to an action upon a foreign judgment in *personam* is that the judgment is not for a certain sum of money. See also, 6 *C.E.D.* (Western) (3rd), pages 179-180.

[12] I am not persuaded that the authorities drawn to my attention by *Uniforêt* lead to the conclusion that the rule is limited to the principle that if the judgment is a money judgment it can be enforced only if the amount is certain. Those authorities included *C.I.B.C. v. Sebastian* (1984), 44 C.P.C. 207; *Touche Ross Ltd. v. Sorrel Resources Ltd.* (1987), 11 B.C.L.R. (2d) 184 (S.C.) and *Bonn v. National Trust Co.*, [1930] 4 D.L.R. 820.

[13] Whether I am correct in adopting the position of Zerotech is of little import. All of the authorities cited to me were decided prior to the decision of the Supreme Court of Canada in ***De Savoye v. Morguard Investments Ltd.*** (1990), 46 C.P.C. (2d) 1 (S.C.C.) which fundamentally changed the law relating to the enforcement of foreign judgments.

[14] Before considering ***Morguard*** further, there is a second common law principle which must be considered. Zerotech submits that no foreign judgment will be recognized or enforced if it is not final and conclusive. See Castel ***Canadian Conflicts of Law***, *supra*, p. 290, para. 174; 6 C.E.D. Western (3d), p. 621, para. (c).

[15] Zerotech contends that the order is not final but prospective in its language. Similarly, it is an order which will require ongoing supervision by the court during the execution of its provisions because it fails to specify when access to documents is required, where they must be produced, whether the documents to be produced must be under the control of the defendants, what is meant by access, whether the documents may be removed for photocopying, who has the responsibility for payment for photocopies and how the photocopying is to be carried out. Zerotech contrasts those deficiencies with Rule 26(7) and 26(8) of our ***Rules of Court*** which provide for how and when access is to be carried out and for payment of costs.

[16] Zerotech also submits that the award is uncertain in that it compels proof of receipt and proof of payment without specifying what proof must be produced. The arbitration award includes the following two paragraphs in the list of documents to which Uniforêt was to be given access and the right to take photocopies:

Proof that all materials and equipment invoiced to Uniforêt were delivered to site and received at site (receiving slips matched to the corresponding purchase orders and invoices); and

Proof of payment (photocopies of cancelled cheques) for all invoices issued by the suppliers, subcontractors, consultants and subconsultants for all amounts included in Zerotech's invoices to Uniforêt.

Zerotech contends that if all that is required by way of proof is receiving slips matched to purchase orders, invoices and photocopies of cancelled cheques, there would be no reason to refer to proof of delivery and proof of payment. It says further clarification of what is meant by "proof" in those provisions of the award is required before the award can be enforced.

[17] The position of Uniforêt is that the judgment is final and conclusive or, if not, the court in this province should supervise the disclosure of the documents to the extent necessary.

[18] I find that the judgment cannot be said to be final and conclusive. I agree that many of the problems raised by Zerotech in respect of enforcement of the judgment may be illusory and would not of themselves support a finding that the judgment is uncertain. Some of the objections raised are, however, legitimate. The award lacks essential ingredients which would be included in an order made under our **Rules of Court**. It seems to me that to be final and conclusive the award should, as a minimum, specify precisely which documents are to be produced, the time and place where the documents must be produced and who must absorb the expense of production and copying.

[19] In further answer to both objections raised by Zerotech, Uniforêt takes the position that the common law rules no longer have application. It relies on **Morguard**, *supra*, and submits that comity requires that the rules be set aside and the judgment enforced.

[20] No authority was provided to me in support of the proposition that the decision in **Morguard** has abrogated the fundamental principles that have guided the courts on the question of recognition and enforcement of foreign judgments. Professor Castel in **Canadian Conflicts of Laws**, *supra*, observes at p. 49:

[a]ny general text on the conflict of laws published before 1995 for common law Canada and 1992 for Quebec

is now out of date due to the considerable developments that have taken place recently in this area of law.

That assertion was made after a consideration of the judgments of the Supreme Court of Canada in *Morguard, Hunt v. T. & N. plc*, [1993] 4 S.C.R. 289 and *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. I conclude that Professor Castel is correct. Those authorities now govern the law respecting the enforcement of foreign judgments. It is interesting to note that, despite his conclusion that earlier texts are out of date, Professor Castel, in his text published in 1997, continues to state that the foreign judgment must be for a definite sum of money (p. 289, para. 172) and that the judgment must be final and conclusive (p. 290, para. 174). That statement requires further examination.

[21] In *Morguard* the court considered the jurisdiction of British Columbia courts to enforce an Alberta judgment where the defendant had not attorned to the jurisdiction of the Alberta courts. The judgment was for a fixed sum. The court declined to give effect to the English rules in respect of jurisdiction, holding that they appeared to fly in the face of the obvious intention of the Canadian Constitution to create a single country. It was held that courts in the past had made "a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister provinces." (p. 19)



[22] At p. 22 La Forest J. went on to say:

As I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. I referred earlier to the principles of order and fairness that should obtain in this area of the law. Both order and justice militate in favour of the security of transactions. It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province.

[23] In *Hunt* the issue before the Court was whether a Quebec statute which prohibited the removal from Quebec of business documents situate in that province was *ultra vires* or constitutionally inapplicable in British Columbia. The production of the documents in question had been sought by way of discovery for the purpose of litigation in British Columbia. After deciding that a court in one province has jurisdiction to decide on the constitutionality of a statute in another province, the Court held that the guiding elements in determining the appropriate forum are the *Morguard* principles of order and fairness, and that these are constitutional principles.

At p. 323-324 La Forest J. holds:

when a corporate citizen, situate in one province chooses to engage in trading and commercial activities in other provinces, the rules governing consequential litigation, specifically rules for the recognition and enforcement of judgments, should be

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adapted to the specific nature of the Canadian federation.

Here he reiterates the principle that he set out in *Morguard*, specifically that Canadian federalism requires a recognition regime that would ensure the interprovincial mobility of Canadian judgments (see: Catherine Walsh, "Conflict of Laws -- Enforcement of Extra Provincial Judgments and *In Personam* Jurisdiction of Canadian Courts: *Hunt v. T. & N. plc* (1994) 73 Canadian Bar Review 394).

[24] Thus, following the decisions of the Supreme Court of Canada in *Morguard* and *Hunt*, the starting point for determining whether or not a judgment from a foreign jurisdiction should be enforced is whether there was a real and substantial connection between the province whose court rendered the judgment and the subject matter of the proceeding. Canadian courts must, as a constitutional requirement, give full faith and credit to judgments rendered in other provinces where the original court had reasonable grounds for exercising jurisdiction defined in accordance with the broad principles of order and fairness.

[25] I have no difficulty in finding that there is a real and substantial connection between the action brought and the jurisdiction of the Superior Court of Quebec. The contract between the parties contemplates the exercise of the jurisdiction of the Quebec court and the contract was performed

in that province. In the absence of some rule to the contrary, this court should give full faith and credit to the judgment of the Quebec Superior Court.

[26] Following the principles established in **Morguard** and subsequent authorities, I conclude that, even assuming the common law rule required that a judgment be for a sum certain before it could be enforced, the rule has been abrogated. To paraphrase La Forest J. in **Morguard**, it would be a serious error to give effect to such a rule when the obvious intention of the Canadian Constitution is to create a single country. There is no principled reason why judgments other than monetary judgments should not be recognized and enforced.

[27] I find, however, that it would be wrong to hold that such a well established rule as the requirement that a judgment be final and conclusive should be set aside on the principles espoused in **Morguard**. I accept the definition of the phrase "final and conclusive" adopted by Gow J. in **Federal Deposit Insurance Corporation v. Vanstone** (1992), 63 B.C.L.R. (2d) 190. He referred to the judgment of Henry J. in **Four Embarcadaro Center Venture v. Kalen** (1988), 65 O.R. (2d) 551, 27 C.P.C. (2d) 260 (H.C.) where he said:

The foreign money judgment must be final and *res judicata* in the foreign jurisdiction. This occurs when the judgment of the foreign court is final in the sense that the court that made it no longer has the power to rescind or vary it (p. 198).

[28] I have found that there are issues that must be resolved by further defining what Zerotech must produce and how it is to be produced. The award as homologated lacks essential terms which would be included in an order made under our **Rules of Court**. The contract between the parties provided that Quebec law would govern. If this court were to vary or expand upon the arbitration award on the basis of British Columbia law that would not be the giving of full faith and credit to the Quebec judgment. I do not suggest that an order for access to documents cannot be enforced but if that order is lacking in precision to the point where variation or the addition of further terms is required, it cannot be said to be final and conclusive. There is nothing in **Morguard** which leads me to conclude that a foreign court should take upon itself the task of clarifying or extending the terms of such an order. If clarification or variation is required, particulars of how that must be done is a matter to be decided by the arbitrators or by the Superior Court of Quebec, not by this court.

[29] The affidavit of Mason Poplaw of the Quebec Bar who opined that the homologation of the arbitration award makes it executory as a judgment of the Superior Court of Quebec does not assist Uniforêt. That the award can be enforced as a judgment in Quebec does not mean that the award is final and conclusive.

[30] In summary, I am satisfied that the arbitration award as homologated is not sufficiently clear in its terms to justify an order for recognition and enforcement. Further supervision of the discovery process is required. The award as homologated by the judgment of the Quebec court dictates a course of future conduct and is sufficiently imprecise in its wording to leave room for serious disagreements over enforcement. The difficulties arising from the lack of precision in describing exactly what is to be done under the terms of the award lead me to conclude that the principles adopted in *Morguard* do not extend to the abrogation of the rule that judgments be final and conclusive. If a judgment requires variation or clarification and the law of the foreign court is applicable, the judgment cannot be enforced in this province.

**THE ARBITRATION CLAUSE**

[31] Zerotech submitted further, that in s. 34.1 of the contract the parties elected to exclude the courts of civil jurisdiction. Clauses of that nature are permissible under the CCP: *Zodiak v. Polish International*, [1983] 1 S.C.R. 529. They contend that Uniforêt is therefore precluded from proceeding in the courts in British Columbia.

[32] That submission ignores s. 34.9 of the contract which provides:

The decision of the arbitrators shall be final and binding upon the Parties and shall not be subject to appeal, and the provisions of articles 940 ss of the Code of Civil Procedure of the Province of Québec governing the homologation of arbitration awards shall apply.

[33] The homologation procedure in s. 940 of the CCP is expressly adopted. If the judgment of the Quebec Superior Court had been final and conclusive, it could have been enforced in this province. I have held that the award is not final in the sense that variation may be required in order to enforce it but Section 34.1 of the contract does not, of itself, prevent enforcement.

#### CONCLUSION

[34] I conclude that the judgment of the Superior Court of Quebec should not be recognized and enforced in British Columbia. The application of Uniforêt for judgment pursuant to Rule 18A of the **Rules of Court** is dismissed. The action brought by Uniforêt is also dismissed. Zerotech is entitled to its costs on Scale 3.

"The Honourable Mr. Justice Clancy"

The Honourable Mr. Justice Clancy

# EXHIBIT 89

COURT OF APPEAL FOR ONTARIO  
DOHERTY, LASKIN AND BLAIR JJ.A.

**B E T W E E N:**

BARRICK GOLD CORPORATION	)	Kent E. Thomson for the appellant
	)	
Plaintiff (Appellant)	)	
	)	
<b>- and -</b>	)	
	)	
JORGE LOPEHANDIA and CHILE	)	No one appearing for the respondents
MINERAL FIELDS CANADA LTD.	)	
	)	
Defendants (Respondents)	)	
	)	
	)	Heard: December 2, 2003

On appeal from the judgment of Justice Katherine Swinton of the Superior Court of Justice dated March 12, 2003, on a motion for default judgment.

**R.A. BLAIR J.A.:**

The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, *the Internet is also potentially a medium of virtually limitless international defamation* [emphasis added].<sup>1</sup>

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<sup>1</sup> Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2001), at para. 24.02



[1] The issues on this appeal concern the damages that may be awarded in Internet defamation cases, and whether the remedy of injunctive relief should be granted in such circumstances.

## **INTRODUCTION**

[2] Jorge Lopehandia has a grievance against Barrick Gold Corporation. The grievance emerges from a claim he asserts regarding one of Barrick's mining properties in Chile, known as the Pascua Lama project. Barrick insists that the grievance is unfounded.

[3] Following Barrick's refusal to settle the complaint in 2001, Mr. Lopehandia embarked upon what counsel for the appellant has accurately described as "a systematic, extensive and vicious campaign of libel . . . over an extraordinarily lengthy period" with the express purpose and intent of embarrassing Barrick and injuring its reputation. This campaign was conducted over the Internet, and involved the posting of hundreds of false and defamatory statements concerning Barrick on various websites.

[4] Barrick served a libel notice on October 8, 2002, after learning about the extent of the Internet campaign earlier that year. The campaign continued. Barrick served its statement of claim on October 31, 2002. Unrepentant, Mr. Lopehandia continued his campaign even more defiantly. Neither he nor his company defended the action, however, and the defendants were noted in default. On March 12, 2003, after a motion for default judgment, Swinton J. granted judgment, finding that the impugned statements were defamatory and awarding general damages for injury to Barrick's reputation in the amount of \$15,000. She dismissed the claim for punitive damages and for injunctive relief.

[5] Barrick appeals the quantum of general damages awarded and the refusal to award any punitive damages or grant injunctive relief. I would allow the appeal for the reasons that follow.

## **FACTS**

[6] Barrick is one of the largest producers of gold in the world. It has operating mines and development projects in Canada, the United States, Peru, Argentina, Tanzania, Australia, and Chile. It is incorporated pursuant to the laws of Ontario and has its head office in Toronto, Ontario.

[7] Barrick's shares are widely held. They trade under the ticker symbol "ABX" on the Toronto, New York, London and Swiss Stock Exchanges and the Paris Bourse.

[8] Mr. Lopehandia is a businessman who resides in North Vancouver, British Columbia. He is an officer and director, and the directing mind of the defendant Chile Mineral Fields Canada Ltd., a British Columbia corporation with head offices in Vancouver and purporting to deal in precious-base metals and strategic minerals. It is a deemed fact in this case that the actions of Mr. Lopehandia at issue in the proceeding were undertaken by him in his personal capacity and in his capacity as an officer, director and representative of CMFCL.

[9] Barrick obtained its interest in the Pascua Lama Project in 1994. Through a Chilean subsidiary it also acquired mining claims near the Project, known as the "Amarillo Claims", from two individuals named Rodolfo Villar Garcia ("Villar") and Alejandro Moreno ("Moreno"). The Pascua Lama Project is an important Barrick holding as its estimated gold reserves represent approximately 25% of Barrick's worldwide gold reserves.

[10] In January 2001, Barrick received a letter from Mr. Lopehandia claiming that he and three other individuals (including Villar) were the beneficial owners of the Amarillo Claims and that the Pascua Lama Project had been fraudulently obtained by Barrick. He threatened to sue and to commence "an all out war" against Barrick if his demands for the payment of U. S. \$3 million were not met within ten days. The campaign was to include complaints to various governmental, financial and regulatory authorities about the Company. In a letter dated January 11, 2002, he stated:

Since my time left is short; should we not Agree to Agree in 10 days; my actions will be very swift and unfortunately because of your profile; and Action will result to be extremely serious to the stance and Public Image of Barrick's Gold in Chile. Perhaps even in the world.

[11] Barrick investigated the allegations. It then notified Mr. Lopehandia that they were unfounded in its view, and that Barrick would not accede to his demands.

[12] True to his word, Mr. Lopehandia embarked upon an Internet campaign by posting a blizzard of messages on "bulletin boards" or "message boards" on various Internet web sites. The web sites in question are dedicated to providing information to those interested in the gold mining industry, including those interested in investing in the stocks of gold or gold-industry companies. Some of the web sites are dedicated to discussions

concerning Barrick specifically. The web sites include [www.lycos.com](http://www.lycos.com) (in the financial markets message board sections dedicated to Barrick and another company, Durban Roodeport Deep Limited (“Durban Deep”)); [www.yahoo.com](http://www.yahoo.com) and [www.yahoo.ca](http://www.yahoo.ca) (in the financial markets message board section dedicated to Barrick); [www.siliconinvestor.com](http://www.siliconinvestor.com); [www.theminingweb.com](http://www.theminingweb.com); and [www.miningindia.com](http://www.miningindia.com).

[13] The messages and e-mails complained of filled nine thick volumes of exhibits before the motions judge. They fall into three categories, chronologically, namely:

- a) statements published between July 31, 2001 and October 8, 2002 (the date of service of the libel notice) – 7 volumes;
- b) statements published after service of the libel notice but before the issuance of the statement of claim on October 30, 2002 – 1 volume; and
- c) statements published after service of the statement of claim and before the hearing on February 14, 2003 – 1 volume.

[14] Barrick attempted to file an additional volume of messages published after the hearing but before judgment. The motions judge declined to accept this evidence. It is unnecessary to resolve the debate over whether she was correct in doing so, as the additional evidence would simply have confirmed her finding that Mr. Lopehandia will continue to make defamatory statements against Barrick.

[15] The motions judge correctly found that the voluminous statements published by Mr. Lopehandia were defamatory of Barrick and, on the deemed facts, published with malice. Indeed, the libel was of a most serious nature. The libellous campaign was conducted over a prolonged period of time and in the face of – and in defiance of – Barrick’s protests and attempts to obtain redress. As well as attacking and undermining Barrick’s claim to ownership of the Pascua Lama Project – a serious allegation in itself, given the proportionate significance of the Project to the company’s overall gold reserves – the many postings accused Barrick of a long list of criminal misconduct. The list is extensive, comprising allegations of fraud, tax evasion, money laundering, manipulation of world gold prices for Barrick’s own benefit, misrepresentation to government officials, improperly influencing government officials, obstruction of justice, pursuing organized crime, attempted murder, arson, and genocide and crimes against humanity.

[16] It is true, as the motions judge found, that the messages are “emotional, often incoherent, rambling and highly critical of Barrick, its officers, directors and employees”. Nevertheless, the postings clearly conveyed the meaning in the allegations listed above. Some examples will suffice:

[www.theminingweb.com](http://www.theminingweb.com)

May 26, 2002

Comments posted to two Articles:

- i) "Barrick dusts off \$1.6bn projects";
- ii) "Barrick's Australian headache"

Barrick Gold never owned Pascua Lama and has assumed a posture of Financial Fraud just like ENRON on its audited financials re: Chile.

Acting in contempt, Barrick "got Pascua" in March 1997 for US\$25, frauded the rest and "created US\$ billions with the largest orebody in the planet".

However, Barrick forgot Chile and its Judicial system re: Civil Law of simulation of Contracts and Imaginary transactions.

Barrick engaged in documented fraud and theft of mining property rights and intellectual mining discoveries in Chile.

Homestake is guilty of the same sin with a parallel embargo in Maricunga Gold, III Region, Chile.

Barrick, tied to ENRON via Trizechann it's third largest real state provider. (Peter Munk), engaged itself in a POLICY of terror manipulation of Gold price and Gold markets, financial suffocation to Chilean miners and fraud at Exchanges worldwide, to try to corner the world GOLD Markets.

End result?

Over hedging and falsely reporting to IRS and SEC regarding Chile, losses, Audited Financials, cost of Pascua Lama, the US\$25 fraud, the string of coverup frauds thereof related is incredibly long and detailed...

Barrick and Associates, are today, short 20 million ounces of Gold and 592 million ounces of Silver, plus damages and punitive damages re Pascua Lama.

We, the real owners of Pascua Lama, will not give up and will pursue JUSTICE and satisfaction for the immoral crimes committed against us since 1996 in Chile and worldwide.

Forensic Audit for Barrick Gold re: Minera Nevada S.A. activities and financial dealings (its Chilean clone-aside of Barrick Chile S.A.)

Barrick GUILTY of the largest Gold fraud since Bre-X. Jorge Lopehandia Legitimate owner, co-owner of Pascua Lama, 111 Region, Chile.

[www.lycos.com](http://www.lycos.com):

July 12, 2002

Message Board: Drooy (Durban Deep)

Chileans, killed most Junior mining companies with the hedging programs, 'WHEREBY BARRICK MAKES MONEY WITH THE BANKS, ONLY IF GOLD PRICES ARE LOW AND EVERYONE ELSE LOSSES MONEY & GOLD'.

...

Mining is a highly scientific endeavour and DOES NOT RESPOND WELL to Market Prices Manipulation! However, 1,000's of little & medium miners are dead or close to it in Chile.

Similarly in Africa, Barrick's genocidal policy and theft policy of "MEASURING LESS OUNCES TO PAY LESS in Tanzania (Theft of 3+ million ounces in one pass)",

Barrick burned the country of Tanzania. Barrick is a DEVIL Killer.

So the reality?

A bunch of majors are today, more worried about he overall reserves and firing as many as possible to "HAVE THE ANALYSTS PUMP UP THEIR STOCK"!

What is the POLICY THEN? BRUTALITY or Business?

More like – GENOCIDE and control through force, financial suffocation, bank fraud, contract fraud & MONOPOLY?

Get a mental and ethics UPGRADE Gold fellows!

...

When it comes to GOLD, Barrick uses crime to GET IT!

Barrick will be brought to justice WORLDWIDE!

Write off Barrick's worldwide reserves obtained since 1996 (after the Pascua Fraud) as "product of crime" or "fruits belonging to a Chilean Law Suit".

Barrick is running on:

"Stolen Gold, Stolen Silver, Stolen cash, influence peddling, geological fraud, Stock Exchange Fraud, Accounting Fraud, Auditing Fraud, Internet Fraud, Material Facts suppression, False Public releases and false propaganda and media releases.

[www.lycos.com](http://www.lycos.com)

August 9, 2002

Message Board: ABX (Barrick Gold)

...

But neither Barrick nor Minerva S.A.....own "Pascua Lama" in Chile.... NEVER DID since 1996.

All the "TAXABLE EXPENSES" of ABX in Chile since 1997 to date are a FICTIONAL FABRICATION to MONEY LAUNDER and to PAUNDER shareholders MONEY!

We just feel SORRY for the Pension Funds, Pension Plans, Banks, Institutional Investors and shareholders at large, that believed this CRIMINAL GANG, when they purported to be...

BUILD TO LAST.....

More like BUILT on CRIME, THEFT, GENOCIDE and cheating on taxes worldwide

This Stock – Barrick et al....are a FRAUD!!!!!!!!!!!!

Jorge Lopehandia

[www.yahoo.com](http://www.yahoo.com)

October 31, 2002

Re: Pascua mine & project

EMBARGOED

By : peterisatheif

Barrick is under Civil and Criminal Investigation in Chile since June 2001.

Barrick “closed - Pascua 200” after I adverted Patrick Garver Tory’s law Firm et al, of my Legal situation with Barrick’s John Lill President of Barrick 2 Ltd – Barrick Chile and President of Minera Nevada S.A.

Barrick was the MAGNET used by John Lil to attract me 1996, Minera Nevada S.A. is the vehicle of FRAUD to steal Pascua in March 04, 1997 for US\$25 equivalent.

June 2001 Injunction (Embargo) in the form of medida Prejudicial precautoria, was decreed.

Barrick has sued me at lycos and is reading these Boards.

I am being sued for SLANDER for speaking the Documented TRUTH of Record, as per Chilean Mining Code.

Not the cooked and rigged “financials of Barrick”

even if it was for decency, check at goldsextant’s website the Gold peak and bull 1996, KILLED by ABX et al, at the inefficiency of their Legal Mining Department.

With CASH to shoot from the HIP and deceit to USA and Canadian leaders, Barrick has rigged and stolen the wealth of the world.

They do NOT own and IOTA of our Gold.

In Chile, they are one away from JAIL, all of them.

In Canada, I am being sued and the plot has thickened.

Barrick’s books are WORSE Than ENRON.

I can PROVE IT in a Court of LAW.

[17] There is evidence that Mr. Lopehandia’s numerous postings were read by users of the Internet, including people in Ontario, and that they have prompted enquiries from Barrick’s shareholders, from financial analysts, and from regulatory agencies including the Toronto Stock Exchange. These enquiries continue. Moreover, Mr. Lopehandia’s messages have elicited their own constituency of support and encouragement, thus amplifying the spread of the defamation throughout the Internet.

[18] The motions judge discounted Barrick’s evidence about the harm to its reputation as lacking in detail, and in some respects unsupported. She concluded that Mr. Lopehandia’s statements “come across as a diatribe or a rant” and were unlikely to be taken seriously by a reasonable reader, “especially those who are said to have read the

material, such as stock analysts or individuals working for the TSE.” She held that the defamatory words, notwithstanding their repetition, had not caused any serious damage to Barrick’s business reputation. At paragraph 44 of her decision, she concluded:

Given that the main concern in the litigation was to vindicate the corporation’s reputation and the lack of any evidence of adverse economic impact, but recognizing that general damages for libel are at large, and that there have been hundreds of repetitions of the libelous statements, I award general damages of \$15,000.00 for damage to reputation.

[19] The motions judge then went on to consider and reject Barrick’s claims for punitive damages and injunctive relief.

### **THE STANDARD OF REVIEW**

[20] Appellate courts should not lightly interfere with damage awards, particularly the award of a jury or judge alone in a defamation case where damages are “at large”: see *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at 1194-1196; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at 37-38; and *Hodgson v. Canadian Newspapers Co.* (2000), 49 O.R. (3d) 161 at para. 60. In *Botiuk*, at 38, Cory J said:

Perhaps the cautionary note expressed in *Hill* bears repeating. Namely, that appellate courts should, for the reasons expressed in *Hill*, proceed with restraint and caution before making any variation in assessments of damages in libel cases.

[21] In *Hill*, Cory J. relied heavily upon the decision of this court in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.). There, Robins J.A. observed (at 110):

An appellate court is not entitled to substitute its own judgment on the proper amount of damages for the judgment of the jury. The question is not whether the court would have awarded a smaller sum than was awarded by the jury; nor is the question whether the size of the verdict was merely too great. The question is whether the verdict is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate or, put another way, whether the verdict is so exorbitant or so grossly out of proportion to the libel as to shock the court’s conscience and sense of justice.



[22] *Walker* and *Hill* involved jury awards. There appears to be little jurisprudence in Ontario as to the standard that applies to appellate review of judge-alone damage awards in defamation cases. In my view – even though the bywords remain “caution” and “restraint” – an appellate court has more flexibility in reviewing an award of damages for defamation made by a judge alone than in the case of one made by a jury. When *Hill* was before this court, the court acknowledged the general rule in England “that an appellate court might more readily overturn an award by a judge sitting alone than an award by a jury: see *Blackshaw v. Lord*, [1984] Q.B. at p. 27”.<sup>2</sup>

[23] It makes sense that the standard of review should be somewhat different in such a case. When examining a jury award, in the absence of errors in the charge to the jury, the court is limited to a consideration of the amount in question. No reasons are provided for the damage calculation, and there is a purpose therefore in focusing on whether the award is inordinately high or low. In the case of a judge alone, however, the court has the benefit of the judge’s reasons for arriving at the quantum of damages, and, as well as considering quantum, can determine whether there have been any errors in law or in principle, or whether the judge has misapprehended or misapplied the facts. As the British Columbia Court of Appeal noted in *Brown v. Cole*, [1998] B.C.J. No. 2464 at para. 50, “error of law and serious misapprehension of the evidence go, almost without saying, as grounds for interference by a provincial appellate court”.

[24] Courts in other provinces have considered this question. They have generally concluded that appellate courts should only reluctantly interfere with judge-alone defamation awards but that they may do so where the judge has made an error in law, applied a wrong principle, seriously misapprehended the evidence, or made an award that is inordinately high or low. See *Brown v. Cole*, *supra*; *Safeway Stores Ltd. v. Harris*, [1948] 2 W.W.R. 211 (Man. C.A.); *Langille v. McGrath*, [2001] N.B.J. No. 414 (N.B.C.A.) at paras. 22-24; and *Farrell v. St. John’s Publishing Co. Ltd.*, [1986] N.J. No. 19.

[25] I accept the following statement from the decision of the Newfoundland Court of Appeal in *Farrell*, at 13, as an accurate outline of the law:

In assessing damages in a libel action a judge, sitting without a jury, has a great deal of latitude and the Court of Appeal will not readily interfere with his award unless it is satisfied that he arrived at his figure either by applying a wrong principle of law or through a misapprehension of the facts or that the amount awarded was so extremely high or so low as

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<sup>2</sup> The Court of Appeal citation for *Hill v. Church of Scientology of Toronto* is (1994), 18 O.R. (3d) 385 at 430

to make it an entirely erroneous estimate of the damages. (See *Flint v. Lovell*, [1935] 1 K.B. 354 at 360; *Associated Newspapers v. Dingle*, [1964] A.C. 371 at 393 applying *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601 and *Nance v. British Electric Railway Co. Ltd.*, [1951] A.C.601).

[26] This court has effectively applied that standard in the past, even if not acknowledging it specifically. In *Royal Bank of Canada (c.o.b. Chargex) v. Battistella* [1994] O.J. No. 1717, it increased the plaintiff's award on the basis that the trial judge had erred by assessing general damages based only on the plaintiff's economic loss without incorporating an element for injured feelings. *Botiuk, supra*, was the reverse (see [1993] O.J. No. 239 (C.A.)). The court interfered with the trial judge's award of general damages not only because it thought the damages inordinately high but also because he had failed to include an element of lost professional business in the damages.<sup>3</sup> Finally, in *Hodgson* at para. 60 the court relied on the fact "there was no error in principle in taking [the] aggravating factors into account when assessing general damages" in deciding not to interfere with the trial judge's award of general damages.

[27] With the foregoing principles in mind, then, I turn to an examination of the damages awarded in this case.

## **ANALYSIS**

### **General Considerations Concerning Internet Defamation**

[28] Is there something about defamation on the Internet – "cyber libel", as it is sometimes called – that distinguishes it, for purposes of damages, from defamation in another medium? My response to that question is "Yes".

[29] The standard factors to consider in determining damages for defamation are summarized by Cory J. in *Hill* at p. 1203. They include the plaintiff's position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any retraction or apology, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances.

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<sup>3</sup> The Court of Appeal ruled that the trial judge had erroneously awarded special damages, which had not been pleaded. The Supreme Court of Canada subsequently restored the award of special damages: *supra*, at 37-39.

[30] In the Internet context, these factors must be examined in the light of what one judge has characterized as the “ubiquity, universality and utility” of that medium. In *Dow Jones & Company Inc. v. Gutnick* [2002] HCA 56 (10 December 2002), that same judge – Kirby J., of the High Court of Australia -- portrayed the Internet in these terms, at para. 80:

The Internet is essentially a decentralized, self-maintained telecommunications network. It is made up of inter-linking small networks from all parts of the world. *It is ubiquitous, borderless, global and ambient in its nature. Hence the term “cyberspace”.*<sup>4</sup> *This is a word that recognizes that the interrelationships created by the Internet exist outside conventional geographic boundaries and comprise a single interconnected body of data, potentially amounting to a single body of knowledge.* The Internet is accessible in virtually all places on Earth where access can be obtained either by wire connection or by wireless (including satellite) links. *Effectively, the only constraint on access to the Internet is possession of the means of securing connection to a telecommunications system and possession of the basic hardware* [emphasis added].

[31] Thus, of the criteria mentioned above, the mode and extent of publication is particularly relevant in the Internet context, and must be considered carefully. Communication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed: see *Vaquero Energy Ltd. v. Weir*, [2004] A.J. No. 84 (Alta. Q.B.) at para. 17.

[32] These characteristics create challenges in the libel context. Traditional approaches attuned to “the real world” may not respond adequately to the realities of the Internet world. How does the law protect reputation without unduly overriding such free wheeling public discourse? Lyrisa Barnett Lidsky discusses this conundrum in her article, “Silencing John Doe: Defamation and Discourse in Cyberspace”, (2000) 49 *Duke L.J.* 855 at pp. 862-865:

Internet communications lack this formal distance. Because communication can occur almost instantaneously, participants in online discussions place a premium on speed. Indeed, in

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<sup>4</sup> *Dow Jones*, at footnote 100. The term was coined by Gibson, *Neuromancer*, (1984) at 51: see also Harasim (ed.), *Global Networks*, (1993) at 9.

many fora, speed takes precedence over all other values, including not just accuracy but even grammar, spelling, and punctuation. Hyperbole and exaggeration are common, and “venting” is at least as common as careful and considered argumentation. The fact that many Internet speakers employ online pseudonyms tends to heighten this sense that “anything goes,” and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world. While this view is undoubtedly overstated, certainly the immediacy and informality of Internet communications may be central to its widespread appeal.

*Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation.* Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. *The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that “the truth rarely catches up with a lie”.* The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse [emphasis added].

[33] These characteristics differentiate the publication of defamatory material on the Internet from publication in the more traditional forms of media, in my opinion.

[34] It is true that in the modern era defamatory material may be communicated broadly and rapidly via other media as well. The international distribution of newspapers, syndicated wire services, facsimile transmissions, radio and satellite television broadcasting are but some examples. Nevertheless, Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is

therefore a particularly significant consideration in assessing damages in Internet defamation cases.

### **General or Compensatory Damages**

[35] In my respectful opinion, the motions judge misapprehended the evidence, and erred in principle, in arriving at her award of \$15,000 for general and compensatory damages. She did so in five ways. First, her conclusion that a reasonable reader was unlikely to take what Mr. Lopehandia said seriously was contrary to the evidence. Secondly, that conclusion misjudged the target audience and the nature of the potential impact of the libel in the context of the Internet. Given the centrality of these two aspects of her findings to her reasons, they constitute both palpable and overriding error: see *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at paras. 289-307. Thirdly, she erred in treating the defamatory statements made against the directors, officers, and employees of Barrick as irrelevant to the damages to Barrick's reputation. Fourthly, she failed to take into account the refusal of Mr. Lopehandia to retract or to apologize. Finally, she erred in reducing the damages she might otherwise have ordered on the basis that her decision would play a significant role in vindicating Barrick's reputation.

[36] These flaws sufficiently undermine the award that it must be set aside and reconsidered, in my view.

### Not Taking the Libel Seriously

[37] The motions judge's conclusion that a reasonable reader was unlikely to take what Mr. Lopehandia said seriously, because of its emotional and intemperate nature and because of his use of capitals and pronunciation, lies at the heart of her finding that the defamatory messages did not cause any serious damage to Barrick's business reputation. In my view it is a finding of fact, or an inference drawn from the facts, that is not supported by the evidence.

[38] The notion that Mr. Lopehandia's Internet dialogue style – a style that may not be taken seriously in a traditional medium such as a newspaper – may undermine the credibility of his message has some appeal to those of us who are accustomed to the traditional media. However, as I have noted, the Internet is not a traditional medium of communication. Its nature and manner of presentation are evolving, and there is nothing in the record to indicate that people did not take Mr. Lopehandia's postings seriously. In fact, the uncontradicted evidence is to the contrary.

[39] For instance, several individuals took the messages seriously enough to contact Barrick by e-mail themselves. On October 25, 2001, Monique Lafleche of The Mining

Association of Canada forwarded a Lopehandia message to alert Barrick to the situation. On February 18, 2002, an individual named Jim Versa referred Barrick to two websites where postings could be found. One of these websites, [www.goldhaven.com](http://www.goldhaven.com), contained a defamatory posting by Mr. Lopehandia and a response posting from *another individual* referring Mr. Lopehandia to a different website where he could “relate his experience with the crooks at Medinah [Minerals]”. Barrick received a number of communications from John Hartley, one of its shareholders, stating that as a shareholder he was extremely upset that Barrick had not taken action against Mr. Lopehandia. In an e-mail dated September 5, 2002, Mr. Hartley said:

Since I wrote you on Friday August 29<sup>th</sup>, I have read a lot more of the outrageous slander against BARRICK and its Top Management, written by “Gadfly” Lopehandia on the Message Boards of ABX and MDMN at Finance.lycos.com website.

In my opinion this is going much too far and must come to an end very soon now, *because it is affecting the credibility, the image and the prestige of your Great Mining Company and its Top Management.*

It is really becoming a torture for me and many fellow ABX shareholders, to see that nobody is reacting nor suing [*sic*] this chilean-canadian reckless pimp, *who dares to challenge an exemplary leading international gold company called BARRICK, to whom we trusted our savings investment.*

We definitely don't like to see BARRICK treated openly as a “COWARD CORPORATION”, “CESSPOOL OF CRÈME AND THEFT”, “MONEY LAUNDERER THEIVES”, etc, etc; and to see statements like “BARRICK OWES AN APOLOGY TO MR. GEORGE BUSH SENIOR AND TO HIS SONE, THE PRESIDENT OF THE UNITED STATES”, “BARRICK GOLD'S REIGN OF FRAUD MUST STOP NOW”, “BARRICK IS THE NEXT ENRON” AND THE LIKE.

When we read this slander we suffer indignation and our blood starts to boil. Please find a way to stop this crap.

**BARRICK WAS BUILT TO LAST AND IN BARRICK WE TRUSTED OUR SAVINGS.**

[Italics and underlining added; block capitals in original]

[40] There is evidence as well that the Toronto Stock Exchange contacted Barrick during 2002 to enquire about Mr. Lopehandia's defamatory statements. An inquiry of that nature from a regulatory agency governing a public company is not to be taken lightly.

[41] In addition to the specific communications referred to, the evidence of Mr. Garver, the Executive Vice-President and General Counsel of the appellant, is that "Barrick continues to receive complaints and inquiries from concerned shareholders, analysts and other members of the public as a direct result of the Lopehandia defamatory postings".

[42] Finally, the record shows that many users of the message boards and bulletin boards have responded to and replied to Mr. Lopehandia's messages. Some invited and encouraged him to go to other websites with his message, thus expanding the scope of the campaign of libel against Barrick, and wishing him well: "may you find your mark", said one of them.

[43] These various communications demonstrate that individuals with a variety of interests in Barrick, and one major regulatory agency, were genuinely concerned about what Mr. Lopehandia had to say. There was no evidence to the contrary. In those circumstances, I find the motions judge's conclusion that people were unlikely to take Mr. Lopehandia's messages seriously, to be contrary to the evidence.

#### The Internet Context

[44] Secondly, the motions judge failed to appreciate, and in my opinion misjudged, the true extent of Mr. Lopehandia's target audience and the nature of the potential impact of the libel in the context of the Internet. She was alive to the fact that Mr. Lopehandia "[had] the ability, through the Internet, to spread his message around the world to those who take the time to search out and read what he posts" and indeed that he had "posted messages on many, many occasions". However, her decision not to take the defamation seriously led her to cease her analysis of the Internet factor at that point. She failed to take into account the distinctive capacity of the Internet to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature and the characteristics of Internet communications outlined in paragraphs 28-33 above.

[45] Had the motions judge taken these characteristics of the Internet more fully into account, she might well have recognized Barrick's exposure to substantial damages to its reputation by reason of the medium through which the Lopehandia message was conveyed.

The Defamatory Remarks against Officers, Directors and Employees

[46] Thirdly, the motions judge erred in dismissing the defamatory statements against the officers, directors and employees of Barrick as irrelevant to her determination of damages respecting Barrick. At paragraph 32 of her reasons she stated:

In assessing the plaintiff's damages, I have only considered the damage to the corporation's reputation. While the affidavit of Mr. Garver and the factum speak of the libel to Barrick and its officers, directors and employees, the only party to this action is Barrick. *Therefore, any defamatory statements regarding any of the officers, directors or employees which have caused damage to their reputations are irrelevant to the calculation of damages in this case. If their reputations have been damaged, it is for them to pursue their own actions [emphasis added].*

[47] However, a significant element in Mr. Lopehandia's defamatory campaign against Barrick consisted of lengthy attacks on the integrity and bona fides of its various officers, directors and employees. A corporation can only act through such individuals. False and defamatory statements concerning the people who are responsible for supervising and conducting the affairs of the corporation – particularly a public corporation such as Barrick – must inevitably affect the business reputation of the corporation, as well as that of the individuals. The authors of P.F. Carter-Ruck and H.N.A. Starte, *Carter-Ruck On Libel and Slander*, 5<sup>th</sup> ed. (Butterworths: London, 1997), at 197-198, state:

It is probable that a statement which reflects upon the honesty of the directors of a company, which is calculated by the imputations to which it gives rise to lead third parties no longer to deal with the company, would also entitle the company to seek substantial damages.

[48] I agree. Here, Mr. Lopehandia's campaign was admittedly designed to embarrass Barrick and to influence people to stop dealing with the company. A substantial part of the campaign consisted of the defamatory comments directed at the officers, directors and employees of Barrick for that purpose. While it is true that these individuals would have had to commence their own actions if they wished to recover damages for injury to their own personal reputations, these statements were relevant to the injury to Barrick's reputation. Had the motions judge thought about them in that context, she might well have been persuaded to award substantially higher general damages.



No Retraction or Apology

[49] Fourthly, when considering the question of general or compensatory damages, the motions judge did not take into account Mr. Lopehandia's refusal to retract or apologize. She correctly recognized that, while corporations are entitled, without proof of damage, to compensatory damages representing the amount necessary to vindicate the company's business reputation, they cannot receive compensation for injured feelings – and therefore are not entitled to aggravated damages. She also held, properly, that a corporation is entitled to recover more than nominal damages but that compensatory damages may be lower for a corporation than damages received by an individual (who is entitled to receive compensation both for injury to reputation and for injury to feelings): *Walker v. CFTO*, *supra*, at 113-114. However, there is a caveat to the latter principle. It is to be found in the following passage from Carter-Ruck on *Libel and Slander*, *supra* at p. 197 (quoted with approval from the 3<sup>rd</sup> ed. by Robins J.A. in *Walker*, *supra* at 113-114):

Limited companies, and other corporations, may also be awarded general damages for libel or slander, without adducing evidence of specific loss. However, it is submitted that in practice, in the absence of proof of special damage, or at least of a general loss of business, a limited company is unlikely to be entitled to a really substantial award of damages. As was made clear by Lord Reid in *Lewes v. Daily Telegraph Ltd.*, 'A company cannot be injured in its feelings; it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money.' . . . . *That there is an entitlement to general damages which are more than nominal damages is certain, but the amount likely to be awarded to a corporation may be small in commercial terms, unless the defendant's refusal to retract or apologize makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a really substantial award of damages* [emphasis added].

[50] The motions judge acknowledged the repetition of the defamatory statements by Mr. Lopehandia and that "normally, repetition of the libelous statements would increase the damages". However, she discounted the impact of the repetitious statements on the basis of her conclusion that they were unlikely to be taken seriously. She held that a large award of damages was not necessary to vindicate the plaintiff's reputation.

[51] Repetition, however, is only one factor to be considered in determining what award of damages is required to vindicate a plaintiff's reputation. Mr. Lopehandia's clear refusal to retract his statements, or to apologize for them – and, indeed, his dogged pursuit of the libelous campaign even after commencement of the proceedings – is an aggravating factor in this case, and a different factor than the repetition of the libel. The motions judge found that Mr. Lopehandia would likely continue his defamatory statements. Had she considered the lack of retraction and apology, along with repetition, in the context of determining whether “a really substantial award of damages” was required to vindicate Barrick's reputation in the circumstances, she might well have come to a different conclusion than she did.

#### The Judgment as Vindication

[52] Finally, the appellant submits the motions judge erred in reducing the damages Barrick would otherwise have been entitled to in the circumstances on the basis that her decision would play a significant role in vindicating Barrick's reputation. To the extent the motions judge may have done so, I agree. While Robins J.A. acknowledged in *Walker*, at 115, that a “judgment enables the plaintiff publicly to brand the defamatory publication as false or groundless, and, when there is no actual damage, can perform the vindicatory function of this cause of action”, he was not directing his mind to a *reduction* in damages that might otherwise be appropriate, as I read his reasons. It is readily apparent that a successful judgment in a defamation case will be of assistance to the plaintiff in vindicating the plaintiff's reputation. However, there is authority for the proposition that such a consideration should not form the basis for decreasing the amount of damages that are reasonably required to vindicate the reputation of a person or corporation: see *Safeway Stores Ltd. v. Harris*, [1944] 4 D.L.R. 187 (Man. C.A.) at 202-203; *Associated Newspapers Ltd. v. Dingle*, [1964] A.C. 371 (H.L.). I have difficulty accepting the concept that an otherwise appropriate damage award should be reduced on the principle that the judgment itself will operate as some form of vindication for the plaintiff. As Lord Morton of Henryton noted in *Associated Newspapers*, at 404, “a judge cannot tell how widely his judgment will be reported and read, nor can he tell how far the plaintiff's general reputation will be improved by his complimentary remarks.” Here, it is impossible to say, for instance, that Barrick's judgment will receive the same degree of publication and diffusion on the Internet as Mr. Lopehandia's postings have received.

[53] Respectfully, then, I believe the motions judge's award of general damages in the amount of \$15,000 is seriously undermined by errors in law and principle and by a misapprehension of the evidence regarding the impact of the libel and its Internet context. The award should be set aside and the amount reconsidered in light of the foregoing

principles. Had the motions judge taken the abovementioned factors into account I am far from satisfied that her award would have been as low as it was.

### **Punitive Damages**

[54] The motions judge dismissed Barrick's claim for punitive damages on several grounds. Relying on the decision of the Supreme Court of Canada in *McElroy v. Cowper-Smith*, [1967] S.C.R. 425, she decided that "the emotional and unreasoned tenor of [Mr. Lopehandia's] messages" was such that "no reasonable business person or investor would take him seriously", thus mitigating the claim for punitive damages. In addition, she held that there was no evidence of real vulnerability on the part of Barrick, which she viewed as "the powerful party here", and that this was not a case of Mr. Lopehandia abusing power. Finally, the motions judge concluded that her compensatory award, including costs, would be a sufficient deterrent to prevent the repetition of his conduct.

[55] The key principles regarding punitive damages, of which the motions judge was aware, are outlined below. For the reasons that follow, however, she erred in dismissing the claim, in my view.

[56] Appellate courts have greater scope and discretion in reviewing awards for punitive damages than is the case for awards of general or compensatory damages. Appellate review is based upon the court's estimation as to whether the punitive damages serve a rational purpose. See *Hill v. Church of Scientology*, *supra*, at 1208-1209; *Whiten v. Pilot Insurance Co.* (2002), 209 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) at 288-289.

[57] Cory J. described punitive damages in the following fashion in *Hill* at 1208:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[58] In *Whiten*, at 287-289, Binnie J. reviewed comparative principles regarding punitive damages in various common law jurisdictions, and outlined a number of factors that he found to be “consistent with Canadian practice and precedent”. The following observation is particularly apt to the present circumstances:

. . . [T]here is a substantial consensus that coincides with Lord Pratt C.J.’s view in 1763 that the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. put it in *Hill, supra*, at para. 196, they are “the means by which the jury or judge expresses its outrage at the egregious conduct”).

. . . [A]ll jurisdictions seek to promote rationality. In directing itself to the punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, *in particular*, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational.

. . . [T]he governing rule for quantum is *proportionality*. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus, there is broad support for the “if, but only if” test formulated, as mentioned, in *Rookes, supra*, and affirmed here in *Hill, supra* [emphasis in original].

[59] With these principles in mind, I am satisfied that the motions judge erred in failing to make an award of punitive damages for the reasons that follow.

[60] First, her reliance on the decision of the Supreme Court of Canada in *McElroy v. Cowper-Smith* was misplaced in the circumstances, and was influenced again by her flawed conclusion that the repeated libels of Mr. Lopehandia would not be taken seriously by readers. *McElroy* involved a single defamatory letter circulated to three clergymen and several religious organizations. The defendant was known to be temporarily unstable and given to making unreasoned and extravagant statements about the plaintiffs (who were a lawyer and an insurance executive). Although the majority of

the court recognized the serious damage that can be done to the reputation of a professional person from allegations of misconduct and dishonesty, and that punitive damages may be warranted in some such circumstances, they concluded that reasonable business people – the plaintiffs’ clientele – would not likely be affected in their dealings with the plaintiffs “by statements coming from the source which they did in this case”. Since the libel had not been published to business people, but only to the clergymen and religious organizations, who were very familiar with both the plaintiffs and defendants, punitive damages were not warranted in the circumstances.

[61] Such is not the case here. Mr. Lopehandia is not known to the unlimited numbers of persons who may have viewed his avalanche of defamatory postings on the Internet. He holds himself out to be a person of substance, knowledgeable in matters relating to the mining industry in Chile, where Barrick’s Pascua Lama Project is located, and a representative of many Chilean mining families and other affected persons worldwide. On the evidence referred to earlier, it is apparent that various individuals and organizations, and at least one regulatory agency, were taking his libelous campaign seriously. In my view, *McElroy* does not assist on the question of punitive damages in this case.

[62] Secondly, while vulnerability is a factor to be considered by the court in assessing punitive damages – see *Whiten* at pp. 300-301 – the motions judge misread that factor in the context of this case, in my respectful opinion. Barrick is not “the powerful party” in the context of the Internet. The impact of the Internet is to neutralize whatever “power” Barrick may have had, in terms of a communication battle with Mr. Lopehandia. In reality it is Barrick that is vulnerable to publications of this nature, and Mr. Lopehandia who is abusing his power. The Internet is one of the most powerful tools of communications ever invented and, as the *Collins* text cited at the outset of these reasons indicates, it is “potentially a medium of virtually limitless international defamation”.

[63] Thirdly, the motions judge’s conclusion that her compensatory award would operate as a deterrent to Mr. Lopehandia’s repeated publications is inconsistent with her own observation that “he has not done so”. She found that, in spite of her judgment, “Mr. Lopehandia will continue to make defamatory statements”. With respect, an award of general damages in the amount of \$15,000 is insufficient to fulfill the dual role of compensation plus punishment and deterrence in the circumstances of this case.

[64] Finally, punitive damages are simply required in a case such as this, in my view. Mr. Lopehandia’s conduct is malicious and high handed. It is unremitting and tenacious. It involves defamatory publications that are vicious, spiteful, wide-ranging in substance, and world-wide in scope. They involve the very type of misconduct that – in the words of Cory J. in *Hill* at 1208 – is “so malicious, oppressive and high-handed that it offends

the court's sense of decency", calling for an award of punitive damages as a "means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". While it is always important to balance freedom of expression and the interests of individuals and corporations in preserving their reputations, and while it is important not to inhibit the free exchange of information and ideas on the Internet by damage awards that are overly stifling, defendants such as Mr. Lopehandia must know that courts will not countenance the use of the Internet (or any other medium) for purposes of a defamatory campaign of the type engaged in here.

[65] I would therefore set aside the decision of the motions judge not to award punitive damages in favour of the appellant.

### **Quantum**

[66] The appellant does not seek a new trial on damages. Both in its notice of appeal and in its factum, it asks for an order awarding Barrick substantial general and punitive damages. The action was not defended. In the circumstances, therefore, this court can proceed on the basis that there is consent to our determining the appropriate damages to be awarded.

[67] Having regard to all of the factors referred to above, and the principles to be assessed in determining damages, as outlined in *Hill* and set out earlier in these reasons, I would set aside the award of the motions judge and substitute for it the following award:

For general damages:	\$75,000.00
For punitive damages:	\$50,000.00

### **Injunctive Relief**

[68] The motions judge dismissed Barrick's claim for a permanent injunction restraining Mr. Lopehandia from disseminating, posting on the Internet or publishing further defamatory statements concerning Barrick or its officers, directors or employees. She did so on the basis that the court did not have jurisdiction to make such an order, because in her view, (a) service was not properly made with respect to the claim for injunctive relief pursuant to rule 17.02(i) of the *Rules of Civil Procedure*, (b) there was no evidence Mr. Lopehandia had any assets or presence in Ontario, and (c) the claim for injunctive relief, being a claim *in personam*, should have been pursued against Mr. Lopehandia in British Columbia, where the courts have the ability to supervise any injunctive relief given.

[69] Rule 17.02 provides that:

A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

- (g) in respect of a tort committed in Ontario;
- (h) in respect of damage sustained in Ontario arising from a tort, wherever committed; or
- (i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario.

[70] The motions judge accepted jurisdiction over the action for damages for libel based upon the provisions of rule 17.02(g) and (h). However, she concluded that the claim for injunctive relief did not fall within rule 17.02(i) because the injunctive relief was not claimed with respect to acts by a party in Ontario.

[71] There are two problems with this approach. First, even if it is unclear on the evidence that Mr. Lopehandia is doing or refraining from *doing* anything in Ontario, he is, in his campaign of libel, doing something *affecting personal property* in Ontario. Barrick's goodwill – which includes as an important component what on the record is its unblemished corporate reputation in Ontario – constitutes “personal property”. The result of Mr. Lopehandia's conduct is to affect that goodwill or personal property negatively. Barrick's claim therefore falls within the provisions of rule 17.02(i). Secondly, there is evidence that Mr. Lopehandia is doing something in Ontario in connection with the publication of the libel. Although the motions judge concluded there was no evidence he had an Internet service provider in Ontario, at least one of the bulletin boards that he utilizes – the Yahoo site – is located in this Province. The affidavit of Mr. Garver shows that users of the Internet in Ontario and elsewhere can access that message board through seamless connections maintained by Yahoo Canada Inc., the offices of which are located in downtown Toronto.

[72] Consequently, I am satisfied that Barrick's claim for injunctive relief does fall within the provisions of rule 17.02(i).

[73] The more troubling point respecting the claim for injunctive relief is the *in personam* nature of the remedy, the marginal presence of the defendant in the jurisdiction, and the concerns about enforceability of such an order. The motions judge was correct to be worried about this. Courts have traditionally been reluctant to grant injunctive relief against defendants who are outside the jurisdiction. The reason for this

is explained by Robert J. Sharpe in his text, *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Canada Law Book, November 2002), at 1-54 to 1-55:

Claims for injunctions against foreign parties present jurisdictional constraints which are not encountered in the case of claims for money judgments. In the case of a money claim, the courts need not limit assumed jurisdiction to cases where enforceability is ensured. Equity, however, acts *in personam* and the effectiveness of an equitable decree depends upon the control which may be exercised over the person of the defendant. If the defendant is physically present, it will be possible to require him or her to do, or permit, acts outside the jurisdiction. The courts have, however, conscientiously avoided making orders which cannot be enforced. The result is that the courts are reluctant to grant injunctions against parties not within the jurisdiction and the practical import of rules permitting service *ex juris* in respect of injunction claims is necessarily limited. Rules of court are typically limited to cases where it is sought to restrain the defendant from doing anything *within the jurisdiction*. As a practical matter the defendant “who is doing anything within the jurisdiction” will usually be physically present within the jurisdiction to allow ordinary service [emphasis in original].

[74] As the motions judge noted, however, courts do in some circumstances permit service of claims outside the jurisdiction seeking to prevent publication in the jurisdiction of libelous material originating outside the jurisdiction: see Sharpe, *supra*, at 1-55; *Tozier and Wife v. Hawkins* (1885), 15 Q.B. 680. This is one such case, in my view. Moreover, it is also a case where there is a sufficient connection, actual and potential, between the parties and Ontario to justify the granting of a permanent injunction as sought. Not only is there a real and substantial connection between Barrick and Ontario, but there is a connection between the publication of the libel by Mr. Lopehandia and Ontario as well.

[75] Mr. Lopehandia is ordinarily resident in British Columbia, but there is no way to determine from where his postings originate. They could as easily be initiated in an Internet café in downtown Toronto or anywhere else in the world, as in his offices in Vancouver. Given the manner in which the Internet works, it is not possible to know whether the posting of one of Mr. Lopehandia’s messages on one of the bulletin boards in question, or the receipt of that message by someone accessing the bulletin board, traveled



by way of a server in Ontario to or from the message board.<sup>5</sup> It may have, however. The highly transmissible nature of the tortious misconduct at issue here is a factor to be addressed in considering whether a permanent injunction should be granted. The courts are faced with a dilemma. On the one hand, they can throw up their collective hands in despair, taking the view that enforcement against such ephemeral transmissions around the world is ineffective, and concluding therefore that only the jurisdiction where the originator of the communication may happen to be found can enjoin the offending conduct. On the other hand, they can at least protect against the impugned conduct re-occurring in their own jurisdiction. In this respect, I agree with the following observation of Kirby J. in *Dow Jones*, at para. 115:

Any suggestion that there can be no effective remedy for the tort of defamation (or other civil wrongs) committed by the use of the Internet (or that such wrongs must simply be tolerated as the price to be paid for the advantages of the medium) is self-evidently unacceptable.

[76] Here, at least one of the bulletin boards utilized by Mr. Lopehandia for the dissemination of his campaign against Barrick is operated by Yahoo Canada Inc. in Toronto. The posting of messages on that board constitutes at least an act done by the defendant that affects Barrick's reputation, goodwill, and personal property in Ontario, and arguably constitutes an act done by him in Ontario. The courts in Ontario must have jurisdiction to restrain such conduct. Even if an injunction may only be enforced in this Province against Mr. Lopehandia if he enters the Province personally, there are two reasons why the injunction may nonetheless be effective. The first is that it will operate to prevent Yahoo from continuing to post the defamatory messages: *McMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; *Attorney-General v. Times Newspapers Ltd.*, [1991] 1 A.C. 191 (H.L.). Secondly, it may be enforceable in British Columbia, where Mr. Lopehandia resides: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; J.-G. Castel and Janet Walker, *Canadian Conflict of Laws*, 5<sup>th</sup> ed. (looseleaf) (Butterworths: Toronto, 2004), at 14-31.

[77] Barrick's shares trade on the Toronto Stock Exchange. It is an Ontario corporation with its head offices and employees, and a business reputation, here. Indeed, the protection and vindication of that reputation in Ontario is what gives rise to the court's mandate in cases of this nature. These factors point to a real and substantial connection between Barrick and Ontario rather than to a jurisdictional link with the defendant. However, they suggest that if the appellant were to take an injunction granted by this Court to British Columbia – where Mr. Lopehandia does have a physical presence

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<sup>5</sup> For a brief discussion of the features of the Internet and how it works, see *Dow Jones & Company Inc. v. Gutnik*, [2002] H.C.A. 56 at 16-17; and Collins, *The Law of Defamation and the Internet*, *supra*, Chapter 2.

– and seek to enforce it there, in this “post-*Morguard* era”, the order might be enforced against him by the courts of that Province. The argument for enforcement would be based upon the principles of order and fairness and upon what Professor Hogg has referred to as “an implicit full faith and credit rule in the Constitution of Canada” as a result of the Supreme Court of Canada’s decision in *Morguard*: see P.W. Hogg, *Constitutional Law of Canada*, looseleaf ed., vol 1 (Carswell: Toronto, 1998), s. 13.5 at 13-20 to 13-21; *Morguard, supra*; *Muscutt et al. v. Courcelles et al* (2002), 60 O.R. (3d) 20 (C.A.); Edward Mazey, *The Enforcement of Labour Orders outside the Jurisdiction of Origin* (2002), 59 U.T. Fac. L. Rev 25, at 37-38. It is not for this court to usurp the role of the courts in another province, of course. However, the British Columbia Court of Appeal has held in two relatively recent cases that jurisdiction based upon the “real and substantial connection” test may be satisfied where the province asserting jurisdiction has a real and substantial connection with the subject matter of the litigation or the cause of action asserted: *Pacific International Securities Inc. v. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4<sup>th</sup>) 716 (B.C.C.A.) at 722; *Cook v. Pardcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4<sup>th</sup>) 213 (B.C.C.A.) at 219; see also *Braintech, Inc. v. Kostiuk* (1999), 171 D.L.R. (4<sup>th</sup>) 46 (B.C.C.A.). Such is the case here.

[78] I would set aside the decision of the motions judge in this regard and grant a permanent injunction as requested, restraining the defendants from disseminating, posting on the Internet or publishing further defamatory statements concerning Barrick or its officers, directors or employees.

### **Pre-Judgment Interest**

[79] Finally, the appellant submits the motions judge erred in failing to address Barrick’s entitlement to pre-judgment interest pursuant to s. 128 of the *Courts of Justice Act*, which it seeks to have awarded as of September 1, 2002 (the month after it became aware of the Lopehandia campaign). The judgment provides for post-judgment interest from the date of the judgment, March 12, 2003.

[80] The motions judge did not deal with the issue of pre-judgment interest, either in her main reasons for judgment or in the supplementary reasons respecting costs. It cannot be said, therefore, that she exercised her discretion with respect to pre-judgment interest.

[81] I would grant the appellant pre-judgment interest at the *Courts of Justice Act* rate from October 25, 2002, the date upon which the statement of claim was issued. Barrick took all reasonable steps to encourage Mr. Lopehandia to cease his libellous campaign. He not only ignored these demands, he became even more determined in his efforts to continue. In fact he has persisted in the campaign, at ever higher levels of intensity, at

least up to the time of trial, and, as noted, the motions judge “[had] no doubt that Mr. Lopehandia will continue to make defamatory statements”. In my view it is appropriate that pre-judgment interest should run from the date the action was commenced.

### **DISPOSITION**

[82] I would accordingly allow the appeal, set aside the judgment of the motions judge and in its place order:

- (a) that the defendants pay to the plaintiff general damages in the amount of \$75,000.00;
- (b) that the defendants pay to the plaintiff punitive damages in the amount of \$50,000;
- (c) that the defendants are permanently restrained from disseminating, posting on the Internet or publishing in any manner whatsoever, either directly or indirectly any defamatory statements concerning Barrick or its officers, directors or employees, all as claimed in paragraph 2 of the notice of motion for judgment before the motions judge.

[83] Barrick is entitled to its costs of the appeal on a partial indemnity basis. Brief written submissions may be made in that regard within thirty days of the release of this decision.

“R.A. Blair J.A.”  
“I agree J.I. Laskin J.A.”

**DOHERTY J.A. (Dissenting):**

[84] I have had the benefit of reading the reasons of Blair J.A. I join in those reasons in all respects save one. I do not agree that the trial judge misapprehended the evidence or erred in principle in awarding the appellant \$15,000.00 for general and compensatory damages. I would not set aside that part of her judgment.

[85] As my colleague observes, the award made by the trial judge is entitled to deference in this court as are the findings of fact upon which it is based. It is also germane to observe that the amount awarded at trial, \$15,000.00, is well beyond the range of nominal damages and is within the range established by earlier cases of corporate libel where the libel does not cause actual economic loss to the corporation.

[86] In *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 at 113, Robins J.A. said:

A company whose business character or reputation (as distinct from the character or reputation of the persons who compose it) is injuriously affected by a defamatory publication is entitled, without proof of damage, to a compensatory award representing the sum necessary to publicly vindicate the company's business reputation. ...

[87] To determine the quantum of the award necessary to publicly vindicate a corporation's business reputation, a trial judge must have regard both to the nature of the statements and their impact on those who have heard or read the statements.

[88] In the present case, the trial judge described the statements as diatribes or rants. She concluded at para. 38:

... They [the libellous statements] do not leave a reader with the impression that the writer has a credible case against Barrick. Rather, they leave the impression of someone with a grievance, who is emotional and highly intemperate in expressing his views.

[89] After considering the nature of the statements, the trial judge turned to their impact on those who read them. She held at para. 39:

... In my view, a reasonable reader is unlikely to take what is said seriously – especially those who are said to have read the material, such as stock analysts or individuals working for the TSE. In assessing damages, one must consider the impact of

the messages on the estimation of the plaintiff among right thinking members of society. While Mr. Lopehandia's words are defamatory, I do not believe that they have caused any serious damage to Barrick's business reputation.

[90] The trial judge's finding that a reasonable reader was unlikely to take the statements seriously was a finding of fact. This court cannot interfere with that finding absent clear and palpable error. If the finding stands, I do not think there is any basis upon which to interfere with the quantum awarded. Put bluntly, where the libellous statements are not likely to be taken seriously by any reasonable person, \$15,000.00 is ample to vindicate a company's business reputation.

[91] My colleague, Blair J.A., finds clear and palpable error both in the trial judge's assessment of the nature of the statements and in her conclusion that they were not likely to be taken seriously. As to the nature of the statements, my colleague notes the stylistic difference between Internet dialogue and statements in more traditional media. I am happy to take his word for this. I cannot, however, assume that the trial judge was unaware of this distinction and failed to consider it in arriving at her conclusion that the manner in which the allegations were made tended to undermine their credibility. I take her conclusion to be arrived at with a full understanding of the nature of the medium in which the statements were made.

[92] Blair J.A. also finds that the trial judge's conclusion that the libellous statements were not likely to be taken seriously by reasonable people was contrary to the evidence. My colleague refers to the evidence at paras. 38 to 48 of his reasons. The trial judge was alive to this evidence (paras. 34-35). She drew a much different inference. In her assessment, the evidence offered in support of the damages was neither detailed nor convincing. The trial judge noted that there were only two named individuals identified who had complained about the statements and only one of the thousands of the appellant's shareholders who was identified as registering complaints with the appellant. The trial judge also observed that the appellant had failed to provide any details concerning the nature of the inquiry made by the Toronto Stock Exchange. Based on this record, it could well be that the Toronto Stock Exchange acknowledged the falsity of the allegations in the inquiry it made.

[93] The non-specific evidence concerning the impact of the statements combined with the trial judge's finding as to the nature of the statements, led the trial judge to find that the statements were not likely to be taken seriously by any reasonable person. I think the evidence was open to the interpretation given to it by the trial judge. The fact that other interpretations, more favourable to the appellant, were also available on the evidence, does not justify appellate intervention.

[94] I am satisfied that the trial judge made no clear and palpable error in coming to the conclusion that reasonable persons were not likely to take the libellous statements seriously. I am further satisfied that considered in the light of that factual finding, it cannot be said that an award of \$15,000.00 for compensatory damages is inordinately low.

[95] I need not address the other specific errors identified by Blair J.A. I will, however, refer briefly to two. In holding that the trial judge erred in coming to the conclusion that reasonable persons would not take the statements seriously, Blair J.A. indicates that the trial judge failed to consider the Internet's capacity to cause "instantaneous irreparable damage to the business reputation of an individual or corporation". I do not agree that the trial judge failed to consider this possibility. The possibility identified by my colleague arises, however, only if the information being disseminated on the Internet is reasonably capable of belief. The trial judge's finding that the statements would not be taken seriously rendered the Internet's capacity to cause harm to a company's business reputation irrelevant.

[96] My colleague also concludes that the trial judge erred in holding that the defamatory statements made against officers and officials of the appellant were irrelevant to the calculation of the appellant's damages. I agree with Blair J.A. that the trial judge erred in so holding. However, I do not think that this error warrants any variation in the damage assessment given that I would uphold the trial judge's finding that the statements were not likely to be taken seriously by any reasonable person.

[97] I would dispose of the appeal as proposed by Blair J.A. except that I would affirm the trial judge's judgment awarding \$15,000.00 for general and compensatory damages.  
"D.H. Doherty J.A."

**RELEASED: June 4, 2004**

# EXHIBIT 90

**[2008 JLR 337]**  
**BRUNEI INVESTMENT AGENCY and BANDONE SDN BHD v. FIDELIS NOMINEES LIMITED and SEVEN OTHERS**

ROYAL COURT (Clyde-Smith, Commr. and Jurats Allo and Morgan): September 16th, 2008  
*Conflict of Laws—recognition of foreign proceedings—enforcement of judgments and orders—foreign in personam non-monetary judgment (e.g. final and conclusive order for transfer of shares) may be recognized and enforced in Jersey—recognition and enforcement of foreign judgments no longer to be limited to judgments for debt or definite sum of money—discretion to be exercised cautiously*

The first representor applied for orders for the transfer to the second representor of shares in two Jersey companies.

In 2000, the first representor (“the BIA”) and the Government of Brunei Darussalam brought proceedings against the eighth respondent (“Prince Jefri”) in the High Court of Brunei, alleging misappropriation of more than US\$15bn. of state funds. The parties agreed a settlement under which Prince Jefri was to return to the BIA any remaining funds and all the assets he had acquired with its funds. In return, he was to be immune from liability as at the date of the agreement. Prince Jefri refused to return many assets, including shares in two Jersey companies which were held for him by nominees (together, the first to seventh respondents). In 2006, the High Court of Brunei ordered him to perform his obligations under the settlement agreement, including the transfer of the shares in the Jersey companies (the BIA nominated the second representor to receive the shares).

Prince Jefri maintained his refusal to transfer the shares and the representors brought the present proceedings to enforce the Brunei judgment, seeking orders for the transfer of the shares to the second representor. The Jersey companies and the nominees did not object to the orders sought and understood what would be required of them if the orders were made.

The representors submitted that (a) the Royal Court should recognize the Brunei court’s *in personam* determination of the parties’ rights and enforce it in Jersey without reconsidering the merits; (b) the application to enforce the Brunei judgment was not an action for the direct or indirect enforcement of foreign public law or an action founded on an act of state;

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and (c) the Brunei judgment was *in personam*, within the Brunei court’s power and therefore enforceable in Jersey.

Prince Jefri opposed the application and submitted that (a) the Royal Court did not have power under its inherent jurisdiction to enforce foreign non-monetary judgments (alternatively, if it had such a power, it was confined to its supervisory jurisdiction under art. 51 of the Trusts (Jersey) Law 1984); (b) the court could not give effect to the settlement agreement or the Brunei judgment, as to do so would be directly or indirectly to enforce the public law of a foreign state; and (c) the Brunei judgment was a judgment *in rem*, over matters that were exclusively in the remit of the Royal Court, which the Brunei court had no power to make and it could not therefore be enforced in Jersey.

**Held**, making the orders sought:

(1) The judgment of the High Court of Brunei would be recognized and the Royal Court would make the orders sought to enforce it against the eighth respondent in Jersey. The Royal Court’s inherent jurisdiction to recognize and enforce foreign judgments should no longer be restricted to judgments for a debt or a definite sum of money. It was in the interests of public policy that in modern times the court should have a discretion, to be exercised cautiously, to enforce foreign *in personam* non-monetary judgments given by courts of competent jurisdiction without reconsidering the merits. That discretion was not confined to the court’s supervisory jurisdiction under art. 51 of the Trusts (Jersey) Law 1984. The Brunei judgment would be enforced in the present case because (a) the Brunei court had jurisdiction to make it and it was final and conclusive; (b) the terms of the judgment and of the orders sought in this application were clear and specific; (c) the first to seventh respondents did not object to the orders sought and knew exactly what to do under them, so it was unlikely that further judicial supervision would be required; (d) the court would not be required to give greater judicial assistance to the representors than it would to Jersey litigants; and (e) there were no grounds on which the court should refuse to exercise its discretion, on the contrary, this was a straightforward case in which the eighth respondent had refused to perform obligations he had accepted under the settlement agreement (paras. 28–35; paras. 59–61).

(2) The first representor’s application to enforce its *in personam* rights under the settlement agreement (as determined by the Brunei High Court) was a patrimonial claim, *i.e.* for the transfer of the shares, and was therefore enforceable in Jersey. The action was based on the settlement agreement which Prince Jefri had entered into voluntarily in Brunei and was governed by Brunei law, it effected a compromise of the original claim and vested beneficial title to the assets that were the subject of the agreement in the BIA. It was not an action to enforce a foreign public law or founded on an act of a foreign state, which would have been unenforceable, irrespective of the fact that the parties included the head of state of



Brunei (represented by his Government and the BIA), the action concerned state assets, and the settlement agreement had compromised claims by the state of Brunei based on alleged misappropriation of state funds. A direct claim by a foreign state, government or sovereign to recover stolen property or to enforce contractual rights was justiciable in Jersey (paras. 39–47).

(3) The Brunei judgment was a judgment *in personam*, not a judgment *in rem*, and the Brunei High Court had jurisdiction to make it. The Royal Court could therefore grant the orders sought to enforce it. A judgment *in rem*, in this context, would have involved a determination of the status or disposition of the property, operating against the shares themselves and valid against the whole world rather than merely between the parties. An *in rem* order, purporting actually to transfer or dispose of property, was to be distinguished from an *in personam* judgment, which determined the parties' contractual rights to property (paras. 49–50).

**Cases cited:**

- (1) *A Trust, In re*, Royal Ct., February 6th, 2006, [2006] JRC 020A, unreported, referred to.
- (2) *Adams v. Cape Indus. PLC*, [1990] Ch. 433; [1991] 1 All E.R. 929; [1990] BCLC 479; [1990] BCC 786, considered.
- (3) *Arab Monetary Fund v. Hashim (No. 3)*, [1991] 2 A.C. 114; [1991] 2 W.L.R. 729; [1991] 1 All E.R. 871; [1991] BCC 180, referred to.
- (4) *Att. Gen. (UK) v. Heinemann Publishers Australia Pty. Ltd.* (1988), 165 CLR 30; 78 ALR 449; 62 ALJR 344, referred to.
- (5) *Att. Gen. (Zambia) v. Meer Care & Desai (a firm)*, [2007] EWHC 952 (Ch); [2007] All E.R. (D.) 97, referred to.
- (6) *Austria (Emp.) v. Day* (1861), 3 De G.F. & J. 217; 30 L.J. Ch. 690; 45 E.R. 861, referred to.
- (7) *B Trust, In re*, 2006 JLR 562, referred to.
- (8) *Ball v. King*, Royal Ct., November 28th, 2006, [2006] JRC 171, unreported, referred to.
- (9) *Bandone Sdn Bhd v. Sol Properties Inc.*, Cayman Is. Grand Ct., June 5th, 2008, unreported, referred to.
- (10) *Castaneda v. Clydebank Engr. & Shipbuilding Co. Ltd.*, [1902] A.C. 524; (1902), 10 S.L.T. 237, applied.
- (11) *Colombia (Govt.) v. Rothschild* (1826), 1 Sim. 94; 57 E.R. 514, applied.
- (12) *Compass Trustees Ltd. v. McBarnett*, 2002 JLR 321, referred to.
- (13) *Esteem Settlement, In re*, 2002 JLR 53, referred to.
- (14) *Fountain Trust, In re*, 2005 JLR 359, referred to.
- (15) *Gotha City v. Sotheby's, The Times*, October 8th, 1998, referred to.
- (16) *Grupo Torras S.A. v. Al-Sabah*, [1999] CLC 1469, referred to.
- (17) *H Trust, In re*, 2006 JLR 280; further proceedings, 2007 JLR 569, referred to.
- (18) *Hullett v. Spain (King)* (1828), 2 Bli. (N.S.) 31; 4 E.R. 1041, referred to.

- (19) *IMK Family Trust, In re*, 2008 JLR 250, *dicta* of Birt, Deputy Bailiff considered.
- (20) *Iran (Islamic Republic) v. Barakat Galleries Ltd.*, [2008] 1 All E.R. 1177; [2008] 3 W.L.R. 486; [2007] EWCA Civ 1374, applied.
- (21) *Italy (King) v. de Medici Tornaquinci* (1918), 34 T.L.R. 623, referred to.
- (22) *Lane, Re*, [1986] 1 FLR 283, considered.
- (23) *Lane v. Lane*, 1985–86 JLR 48, considered.
- (24) *Mbasogo v. Logo Ltd.*, [2007] Q.B. 846; [2006] EWCA Civ 1370; [2007] 2 W.L.R. 1062, applied.
- (25) *Miller v. Gianne*, 2007 CILR 18, applied.
- (26) *Minorities Fin. Ltd. v. Ayra Holdings Ltd.*, 1994 JLR 149, referred to.
- (27) *Morguard Invs. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; (1990), 52 BCLR 2d 160, applied.
- (28) *Pattni v. Ali*, 2005–06 MLR 586; [2007] 2 A.C. 85; [2007] 2 W.L.R. 102; [2006] UKPC 51, applied.
- (29) *Pro Swing Inc. v. Elta Golf Inc.*, [2006] S.C.R. 612; 2006 SCC 52, applied.
- (30) *Sadler v. Robins* (1808), 1 Camp. 253; 107 E.R. 948, not followed.
- (31) *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155; 40 L.J.Q.B. 73; [1861–73] All E.R. Rep. 988, considered.
- (32) *Showlag v. Mansour*, 1994 JLR 113, referred to.
- (33) *Turino Consolidated Ltd. Retirement Trust, In re*, 2008 JLR N [27], referred to.
- (34) *Two Sicilies (King) v. Willcox* (1851), 1 Sim. (N.S.) 301; 61 E.R. 116, applied.
- (35) *United States v. McRae* (1867), L.R. 3 Ch. App. 79, referred to.
- (36) *United States v. Wagner* (1867), L.R. 2 Ch. App. 582; 36 L.J. Ch. 624, applied.
- (37) *Wimborne (Viscount), Ex p.*, 1983 J.J. 17, referred to.

**Texts cited:**

Dacey, Morris & Collins, *The Conflict of Laws*, 14th ed., vol. 1, para. 1–011, at 7; para. 5R–019, at 100–101; para. 14R–001, at 567; para. 14–003, at 567; para. 14R–018, at 574–575; para. 14–020, at 576; para. 14R–118, at 619; n.62, at 574 (2006).  
 Nicolle, *The Origin & Development of Jersey Law: An Outline Guide*, para. 15.33 (2005 ed.).

Sharpe, *Injunctions & Specific Performance*, 2nd ed., para. 7.480 (1992).  
K.J. Lawrence for the representors;  
R.J. Macrae for the first, second and third respondents;  
M.H.D. Taylor for the fourth, fifth, sixth and seventh respondents;  
F.B. Robertson for the eighth respondent.

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**1**CLYDE-SMITH, COMMISSIONER: In this case, the first representor ("the BIA") seeks orders for the transfer of shares in two Jersey companies, beneficially owned by the eighth respondent ("Prince Jefri"), to the second representor ("Bandone") under principles of comity. The Jersey companies concerned and the nominee shareholders (comprising the first to seventh respondents) rested upon the wisdom of the court and were released from participating in the hearing.

**Background**

Prince Jefri is the youngest 2 brother of His Majesty the Sultan and Yang-di Pertuan of Brunei Darussalam ("the Sultan"). In February 2000, the BIA and the Government of Brunei Darussalam began proceedings against Prince Jefri in the High Court of Brunei Darussalam, alleging misappropriation and misapplication of more than US\$15bn. of state funds by Prince Jefri whilst he had been the Minister of Finance for Brunei Darussalam and chairman of the BIA. These proceedings were compromised in May 2000, on the terms of a settlement agreement dated May 12th, 2000, and the proceedings were stayed by a "Tomlin order" dated May 13th, 2000 in conventional form.

The core terms of the 3 settlement agreement were that Prince Jefri was to be relieved of the civil claims against him, any potential criminal proceedings in respect of the alleged misappropriation and misapplication of state funds and that he would effectively be rendered immune from all liabilities owed by him and his family to other third parties as at the date of the settlement agreement. In exchange, Prince Jefri was to disclose to the BIA what had become of its funds and return to it the remainder of those funds and any and all assets acquired with them.

While some assets were 4 returned by Prince Jefri in 2000 and 2001, he refused to transfer many other assets, including the shares in the Jersey companies, which continue to be beneficially held by him through nominees.

In 2004, the BIA applied in 5 Brunei Darussalam for summary enforcement of the settlement agreement under the liberty to apply contained in the Tomlin order.

On March 25th, 2006, the 6 High Court of Brunei Darussalam ordered Prince Jefri to perform his obligations under the settlement agreement, including in particular his obligation to transfer the shares in the Jersey companies to the BIA or at its direction ("the Brunei judgment"). The BIA has nominated Bandone to receive the shares in the Jersey companies.

Prince Jefri's appeal to the 7 Court of Appeal of Brunei was dismissed on May 20th, 2006. Two further appeals to the Privy Council were dismissed on November 8th, 2007. In the second of its two judgments, the Privy Council made the following observations:

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"The Government and the BIA case is clear and simple. Prince Jefri settled the claims made against him by signing the settlement agreement under which he was to restore the assets that he was said to have misappropriated. He has not carried out the obligations he accepted under that agreement. None of this is, or can be, disputed. The case is a simple one. The complications are introduced by Prince Jefri's search for a means of extricating himself from the obligations he has accepted under the settlement agreement and, after careful examination of all the evidence, these complications fall away."

Shortly after the decisions 8 of the Privy Council, Prince Jefri did release into the sole custody of the BIA various valuable diamonds, but he has since refused to transfer to the BIA or Bandone any of the other assets which he owns and which he is obliged to transfer pursuant to the terms of the settlement agreement.

In January 2008, the BIA and 9 Bandone obtained judgment in the High Court of Malaysia ordering the transfer to Bandone of the shares in the ultimate holding company of a US hotel and, on June 5th, 2007, the BIA and Bandone obtained judgment in the Grand Court of the Cayman Islands substituting Bandone for Prince Jefri as the registered shareholder of the ultimate holding company of a further US hotel. Other proceedings commenced by the BIA and Bandone for the recovery of assets are currently pending in the courts of Singapore, Japan and Malaysia, and we are informed that further proceedings for the recovery of assets in other jurisdictions are being prepared.

**The representors' case**

The representors submit 10 that, pursuant to the principles of comity recognized by the court in *Lane v. Lane* (23) and *Compass Trustees Ltd. v. McBarnett* (12) and by reference to the principles set down by the Privy Council in *Patni v. Ali* (28) as to the basis on which the common law may recognize and give effect to *in personam* rights as validly determined by a

foreign court, this court should recognize the *in personam* determination of the parties' rights by the courts of Brunei Darussalam as binding upon Prince Jefri and his privies and be prepared to give such relief as may be appropriate to enable the decisions made by the foreign court to be given effect in Jersey.

Prince Jefri, whilst 11 accepting that he is personally bound by the settlement agreement and the Brunei judgment, says the court cannot make the orders sought in these proceedings for the following reasons:

(i) In reality, this is an application to enforce a foreign judgment which, under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, which Prince Jefri submitted governed the enforcement of all foreign judgments, or at English common law (which should be followed in Jersey), is not

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permitted in the case of a non-money judgment. There is no residual jurisdiction to enforce foreign non-money judgments and, in particular, the doctrine of comity is not relevant to the question of foreign judgments, whether or not they are for a definitive sum. Alternatively, any residual jurisdiction is confined to the court's supervisory jurisdiction under art. 51 of the Trusts (Jersey) Law 1984.

(ii) To give effect to the Brunei judgment would be to give extraterritorial effect to the public laws of a foreign state.

(iii) The Brunei judgment purports to take effect *in rem* over matters which are exclusively in the remit of this court and constitutes an exorbitant use of the Brunei court's jurisdiction.

(iv) To the extent that the court has a discretion to give effect to the Brunei judgment, it should not do so given that (a) there is no mutuality of remedy as between the parties, given that the BIA and Bandone are immune from suit; (b) the underlying Brunei proceedings did not adhere to the principles of natural justice applied by this court; (c) Prince Jefri has a substantial counterclaim in existing proceedings in New York against the BIA in relation to certain Brunei properties; and (d) there are public policy grounds against doing so relating to the desirability of fundamental changes to the law being properly a matter for the legislature and to Jersey's standing as a reliable and independent offshore jurisdiction.

We take the arguments in that order.

#### **Enforcement of a foreign judgment**

Whether you describe the 12 representors' application as enforcing a foreign judgment or giving effect to it, the real issue is whether the court should make the orders requested with or without reconsidering the merits. The representors understandably wish to avoid the potential delay and expense of a hearing on the merits. Although his judgment was not available at the time of the hearing, Birt, Deputy Bailiff in *In re IMK Family Trust* (19) put it this way (2008 JLR 250, at para. 62):

"We consider that 'enforcement' of a foreign judgment means the situation where the judgment creditor comes to this court and requests that this court give effect to the judgment in Jersey, either by registration (in the case of judgments covered by [the 1960 Law]) or by giving a judgment in identical form to the foreign judgment without reconsidering the merits, which can then be enforced against the debtor here in Jersey in the same way as any other Jersey judgment."

Using "enforcement" in 13 that sense (which we shall do in this judgment), it is clear that the representors are seeking to enforce the Brunei judgment.

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Dicey, Morris 14 & Collins, 1 *The Conflict of Laws*, 14th ed., para. 14-003, at 567 (2006), when considering the distinction between enforcement and recognition, makes it clear that it is the person in whose favour the judgment is pronounced who may seek to have that judgment executed or otherwise carried out as against the person against whom it is given.

In relation to private 15 international law, the Jersey courts have consistently had regard to English common law (see *The Origin & Development of Jersey Law: An Outline Guide* by Stéphanie Nicolle, para. 15.33 (2005 ed.)) and in particular to the rules in *Dicey*. For recent examples see *Ball v. King* (8) ([2006] JRC 171, at para. 27) and *In re IMK Family Trust* (19) (2008 JLR 250, at para. 37).

The 1960 Law has only been 16 extended to England and Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey, and would not therefore apply to any judgments issuing from Brunei. Whilst art. 8 provides that no proceedings for the recovery of the sum payable under a judgment to which the Law applies, other than proceedings by way of registration of a judgment, shall be entertained by any court in Jersey, there is nothing to support Prince Jefri's submission that the 1960 Law governs the enforcement of all other foreign judgments to the exclusion of the court's inherent jurisdiction. That would mean that the court had no inherent power to enforce judgments from territories other than those listed above and we reject the submission. We are therefore concerned with the inherent jurisdiction of the court to enforce foreign judgments.

The enforcement of a 17 foreign judgment under English common law is dealt with under Rule 35(1) of *Dicey*, but it is helpful to set out both Rules 34 and 35(1), which are as follows (para. 14R-001, at 567; para. 14R-018, at 574-575):

"Rule 34—A judgment of a court of a foreign country (hereinafter referred to as a foreign judgment) has no direct operation in England but may

- (1) be enforceable by claim or counterclaim at common law or under statute, or
- (2) be recognised as a defence to a claim or as conclusive of an issue in a claim."

"Rule 35—(1) Subject to the Exceptions hereinafter mentioned and to Rule 55 (international conventions), a foreign judgment *in personam* given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 36 to 39, and which is not impeachable under any of Rules 42 to 45, may be enforced by a claim or counterclaim for the amount due under it if the judgment is

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- (a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and
- (b) final and conclusive, but not otherwise."

18*Dicey* comments on cl. 1 of Rule 35 as follows (para. 14-020, at 576):

"For a claim to be brought to enforce a foreign judgment, the judgment must be for a definite sum of money, which expression includes a final order for costs, e.g. in a divorce suit. It must order X, the defendant in the English action, to pay to A, the claimant, a definite and actually ascertained sum of money; but if a mere arithmetical calculation is required for the ascertainment of the sum it will be treated as being ascertained; if, however, the judgment orders him to do anything else, e.g. specifically perform a contract, it will not support an action, though it may be *res judicata*."

Prince Jefri submits that 19 the courts in *Lane* (23) (and the trust cases which followed it, namely *Compass* (12); *In re Fountain Trust* (14); *In re A Trust* (1); *In re B Trust* (7); *In re H Trust* (17); and *In re Turino Consolidated Ltd. Retirement Trust* (33)) fell into error in so far as the doctrine of comity was relied upon in order to give effect to foreign judgments. Comity is not a basis for the recognition and enforcement of judgments and has been explicitly rejected as such by the English courts in *Schibsby v. Westenholz* (31) and *Adams v. Cape Indus. PLC* (2). In *Schibsby*, Blackburn, J. stated (L.R. 6 Q.B. at 159): ".□.□. [T]he judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce□.□.□." This principle (the theory of obligation) was cited with approval by the Court of Appeal in *Showlag v. Mansour* (32) (1994 JLR at 118). Accordingly, it is argued that the recognition and enforcement of judgments in Jersey is to be dealt with exclusively by rules of law, namely by the English common law rule set out in *Dicey* at Rule 35(1) and that, in the premises, the court has no jurisdiction to enforce a non-money judgment.

Rule 35(1) does not appear 20 to have been considered in *Lane* (23) (as far as can be ascertained from the judgment), in which it was held that where there was a declaration of a competent English court, properly made, submitted to by the same parties and not appealed, the doctrine of comity required that the declaration of the English court be given effect, provided that it was clear that the defendant had had every opportunity to raise all relevant defences at that hearing.

The facts in 21 *Lane* were that, on November 15th, 1977, the Family

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Division of the English High Court ordered by consent that the wife should transfer to the husband all her estate and interest in a property in Jersey of which they were the joint owners and to execute a power of attorney in favour of the person nominated by the husband and/or such other documents as were necessary to effect the transfer. The wife executed the power of attorney as ordered but, for reasons which were later accepted by both the English and Jersey courts, the transfer had not been effected by February 23rd, 1983, when the husband died. On his death, the property vested in the wife by right of survivorship and she cancelled the power of attorney. In March 1984, the husband's heir to his Jersey realty, his eldest son and principal heir and one of his executors, applied to the Family Division and obtained a declaration from Sheldon, J. (*Re Lane* (22) ([1986] 1 FLR at 288)) that the consent order of November 15th, 1977, in so far as it remained unperformed, remained valid and enforceable against the wife, notwithstanding the death of the husband. No consequential orders or directions were given by the Family Division. The proceedings in Jersey were pursued by the husband's heir to his Jersey realty (the plaintiff) against the wife (the defendant).

The plaintiff submitted 22 that the court ought, as a matter of comity, to enforce the declaration of the Family Division and that the method of doing so would be to invoke the court's equitable jurisdiction. Crill, Deputy Bailiff said (1985-86 JLR at 60):

"That same sense of fairness was expressed in a different manner by Sheldon, J. ([1986] 1 F.L.R. at 288). It offends this court's sense of fairness that whereas Mr. Lane completed what he had undertaken to do in November 1977, and to some extent Mrs. Lane also, except for the formal passing of the appropriate contract, she should now be able to keep 'Cramond.' However, are we able to do anything about it? We were told by Mr. Barlow, an experienced Chancery barrister, that if the position were reversed and an English court were asked to make a similar order, it would do so."

Thus, on the basis of 23 evidence from English counsel that the English courts would have reciprocated if the roles had been reversed, the court used comity as its reason for invoking its equitable jurisdiction which (following *Ex p. Viscount Wimborne* (37)) it equated to "équité" or fairness.

It is clear that the court 24 was familiar with English common law rules as set out in *Dicey*, in that it applied Rule 185(2) of the 1973 ed. (see 1985-86 JLR at 56) in finding that the declaration of the Family Division was conclusive between the parties. Rule 185(2) equates to Rule 42(2) of the current edition which provides (para. 14R-118, at 619): "A foreign judgment cannot, in general, be impeached on the ground that the court

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which gave it was not competent to do so according to the law of the foreign country concerned."

We note that there was no 25 judgment of the Family Division which the plaintiff in *Lane* (23) was in a position to enforce. She was not a party to the 1977 consent order which was made in favour of the husband, who had since died. Although she and the defendant were parties to the declaration of March 1984, a declaratory judgment is not capable of enforcement (see *Dicey, op cit.*, para. 14-003, at 567).

Thus, the plaintiff was 26 not a judgment creditor and did not have a judgment in her favour capable of enforcement. Apparently working outside the English common law rules in relation to enforcement of foreign judgments, the plaintiff relied upon the doctrine of comity as a means by which to invoke the jurisdiction of the court in order for it to give effect to the declaration of the Family Division.

Whether or not it was 27 necessary for the court in *Lane* (23) to have addressed Rule 35(1) of *Dicey*, the BIA is before us seeking to enforce a judgment in its favour and in our view we should work within the English common law rules which have direct application. We should either apply Rule 35(1) or amend it in so far as it is applied in Jersey.

According to 28 *Dicey*, the restriction in Rule 35(1) on the enforcement of non-money judgments is derived from the case of *Sadler v. Robins* (30), some two centuries ago (see *Dicey, op. cit.*, n.62, at 574). The world has changed considerably since then and the restriction has been the subject of reappraisal by the Canadian and Cayman courts. In *Pro Swing Inc. v. Elta Golf Inc.* (29), the Supreme Court of Canada held that there was a compelling case for adapting the common law rule that prevented the enforcement of foreign non-money judgments. Quoting from the majority judgment (2006 SCC 52, at para. 1):

"Modern-day commercial transactions require prompt reactions and effective remedies. The advent of the internet has heightened the need for appropriate tools. On the one hand, frontiers remain relevant to national identity and jurisdiction, but on the other hand, the globalisation of commerce and mobility of both people and assets make them less so. The law and the justice system are servants of society, not the reverse. The court has been asked to change the common law. The case for adapting the common law rule that prevents the enforcement of foreign non-money judgments is compelling. But such changes must be made cautiously."

The court recognized that departing from the fixed sum component of the traditional common law rule would open the door to equitable orders such as injunctions which are crucial to effective modern-day remedies (*ibid.*, at paras. 14-15):

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The recognition and enforcement of equitable orders "14 will require a balanced measure of restraint and involvement by the domestic court that is otherwise unnecessary when the court merely agrees to use its enforcement mechanisms to collect a debt.

.□.□. [S]uch a change must be accompanied by a 15 judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system."

Supervision of orders 29 often means re-litigation and the expenditure of judicial resources and the court referred to the following extract from Sharpe, *Injunctions & Specific Performance*, 2nd ed., para. 7.480 (1992):

"From this perspective, the supervision concern differs from other criteria determining the availability of specific relief. It is based not upon the weighing of relative advantage and disadvantage to the parties but rather on the weighing of the advantage of doing justice by granting specific relief against the general cost to society of having justice administered. By way of contrast to specific relief, damages awards do hold certain advantages. A money judgment is

final and enforcement is left to the administrative rather than the judicial machinery of the court. The cost of enforcement is largely borne by the parties. A decree for specific performance does involve a substantially higher risk that further judicial resources will be required. The more complex or extended the performance, the more likely further proceedings will be needed to ascertain whether the defendant has complied with his or her obligations. This fear of extended and complex litigation and the need for repeated requests for judicial intervention may be seen as a legitimate concern. The cost to society of providing the resources necessary to implement specific performance decrees is properly considered by the court when weighing the advantages the specific relief might otherwise offer.”

The Canadian court did not develop exhaustively the criteria a court should take into account but both the majority and minority judgments emphasized the need for caution.

Prince Jefri submitted 30 that the decision in *Pro Swing* (29) should itself be viewed with caution because in Canada comity is treated as a basis for the enforcement and recognition of judgments, whereas it has been explicitly rejected as such by the courts of Jersey and England. It cites the Canadian case of *Morguard Invs. Ltd. v. De Savoye* (27) as authority for that proposition. *Morguard* was concerned with the recognition and enforcement of judgments within the provinces of Canada. It is clear from the judgment ([1990] 3 S.C.R. at 1091) that the Canadian courts have until recent years unanimously accepted English authority

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when dealing with the recognition of foreign judgments, which was inevitable until 1949, when appeals to the Privy Council were abolished. It pointed out that those rules were developed in 19th-century England and flew in the face of the obvious intentions of the Canadian constitution to create a single country where there is a strong need for the enforcement throughout the country of judgments given in one province. In the view of the majority judgment in *Pro Swing*, *Morguard* led the way to developing common law to better serve the interests of all litigants, foreign and domestic, and it quoted from the following passage in *Morguard* (*ibid.*, at 1098):

“The world has changed since the above rules [concerning the recognition and enforcement of foreign judgments] were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. 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.”

It seems to us that the 31 Canadian court was not treating comity as a basis for the enforcement and recognition of foreign judgments but as a tool for adapting or reshaping the common law rule (see *Dicey, op cit.*, para. 1–011, at 7).

The case of 32 *Pattni* (28) concerned an application to enforce in the Isle of Man an order of the Kenyan High Court for the transfer by the respondent of shares in an Isle of Man company. The facts are therefore very similar to the case before us. The Privy Council was concerned with a preliminary issue as to whether the judgment of the Kenyan court was a judgment *in rem* which the Kenyan court had no jurisdiction to make. The Privy Council expressed the following opinion (2005–06 MLR 586, at para. 30):

“As presently advised, though the arguments did not address the point (or, it may be, need to under the terms of the two preliminary issues presently in issue), their Lordships would think it clear that, where a court in state *A* makes, as against persons who have submitted to its jurisdiction, an *in personam* judgment regarding contractual rights to either movables or intangible property (whether in the form of a simple chose in action or shares) situate in state *B*, the courts of state *B* can and should recognise the foreign court’s *in personam* determination of such rights as binding and should itself be prepared to give such relief as may be appropriate to enforce such

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rights in state *B*. The extent to which this was possible might be limited by the law of state *B* as the *situs* or, in the case of shares, as the place of incorporation of the relevant company (in this case, as both).”

Prince Jefri argues that 33 these comments of the Privy Council are *obiter* and certainly the Privy Council itself acknowledged that there had been no argument on the point. In *Miller v. Gianne* (25), the Chief Justice of the Grand Court of the Cayman Islands held that this was no basis for doubting that the Privy Council had disapproved *Sadler* (30) from which, as previously noted, the restriction under English common law appears to have been derived. In our view, the clear implication of the Privy Council’s judgment was to remove the bars that had been raised by way of preliminary points against the recognition and enforcement of the Kenyan order in the Isle of Man so that it was now enforceable in the Isle of Man. Certainly, the opinion of the Privy Council given in this context, even if strictly *obiter*, carries very substantial weight and gives a clear indication as to the direction in which this court should be proceeding.

The Cayman court in 34 *Miller*, following *Pro Swing* (29) and *Pattni* (28), held that the ability to enforce directly foreign judgments and orders made *in personam* is no longer confined in the Cayman Islands to judgments for debt or a definite sum of money. The Chief Justice commented that the jurisdiction to provide relief by way of recognition of foreign non-monetary judgments may well have existed in equity even before the emergence of the rule which was derived from the case of *Sadler* (2007 CILR 18, at para. 67):

“The inclination in modern jurisprudence to grant recognition and enforcement by way of equitable remedies such as specific performance, injunctive or declaratory relief and pleas of *res judicata*, may well be regarded as a re-emergence of that jurisdiction which has always existed in equity, even if rendered dormant over the years in deference to the limitations of the traditional common law rule. For an elucidatory discussion on the subject, see White, *Enforcement of Foreign Judgments in Equity*, (1980–82) 9 *Sydney Law Review* at 630–648.”

The reasons which have 35 compelled the courts in Canada and the Cayman Islands to change the common law rule are equally compelling here. In our view, the restriction in relation to non-money judgments under English common law (Rule 35(1) of *Dicey*) should, in its application to this jurisdiction, be amended so as to give the court a discretion (consistent with that exercised in *Lane* (23)) to enforce non-monetary judgments but, for the reasons set out in *Pro Swing*, it is a discretion that is to be exercised cautiously. That discretion is not confined, and we can see no

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good reason to confine it, to the court’s supervisory jurisdiction under art. 51 of the Trusts (Jersey) Law 1984.

**Giving effect to public laws of a foreign state**

Prince Jefri submits that 36 the court should not give effect to the Brunei judgment, on the basis that to do so would be directly or indirectly to enforce the public law of a foreign state. Rule 3 of *Dicey* (para. 5R–019, at 100–101) provides that—

“English courts have no jurisdiction to entertain an action:

- (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; or
- (2) founded upon an act of state.”

Prince Jefri argues that 37 to give effect to the settlement agreement and/or the Brunei judgment would constitute an extraterritorial expression by Brunei and the Sultan as its head of state of sovereign power within the meaning enunciated by the English Court of Appeal in *Mbasogo v. Logo Ltd.* (24) or, in the alternative, that the State of Brunei and/or the Sultan have a clear “governmental interest” in the enforcement of the settlement agreement in the Brunei judgment as announced by the Australian courts in *Att. Gen. (UK) v. Heinemann Publishers Australia Pty. Ltd.* (4) and as approved by the English Court of Appeal in *Islamic Republic of Iran v. Barakat Galleries Ltd.* (20). This was not a submission advanced by Prince Jefri before the Malaysian or Cayman courts.

Prince Jefri points to the 38 following features of the settlement agreement in support of this submission:

(i) The parties include the head of state of Brunei Darussalam, as represented by his Government and the BIA;

(ii) The subject matter of the agreement is the assets of the head of state;

(iii) The agreement compromised claims by the state based upon alleged misappropriation by a former member of Government;

(iv) The conclusion of the agreement is motivated by the desire to maintain the stability of the State of Brunei (in its current form) and the integrity of its head of state and their financial affairs; and

(v) It purports to bind the public prosecuting/criminal authorities of Brunei, criminal proceedings being proceedings brought in the public interest and not for any vindication of private law or individual rights.

It is for the court to 39 characterize the claim of the BIA (see *Mbasogo* (24) ([2007] Q.B. 846, at para. 50)), which we have no doubt is a

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“patrimonial claim” in which the BIA seeks to recover property due to it under the provisions of the settlement agreement and this is irrespective of the features relied upon by Prince Jefri. It is not a claim to enforce a public law or to assert sovereign rights or governmental interests. As was stated by the English Court of Appeal in *Mbasogo* (*ibid.*, at paras. 42–43):

As Lord Denning, M.R. made clear in the “42 *Ortiz* case, his judgment was influenced by the article by Dr. F.A. Mann ‘*Prerogative Rights of Foreign States and the Conflict of Laws*’ 40 *Tr. Gro. Soc.* 25, to which we have referred at para. 26 above. Dr. Mann said, at p. 34:

“Where the foreign state pursues a right that by its nature could equally well belong to an individual, no question of a prerogative claim arises and the state’s access to the courts is unrestricted. Thus a state whose property is in the defendant’s possession can recover it by an action in detinue. A state which has a contractual claim against the defendant is at liberty to

recover the money due to it. If a state's ship has been damaged in a collision, an action for damages undoubtedly lies. On the other hand, a foreign state cannot enforce in England such rights as are founded upon its peculiar powers of prerogative. Claims for the payment of penalties, for the recovery of customs duties or the satisfaction of tax liabilities are, of course, the most firmly established examples of this principle.'

We agree.

In a later article on '43 *The International Enforcement of Public Rights*' (1987) 19 New York University of International Law and Politics 603, 629-630 Dr. Mann said that the decisive question is whether the plaintiff asserts a claim that, by its nature, involves the assertion of a sovereign right. Quoting Grotius, he suggested that claims are capable of international enforcement if they arise from acts that may be done not only by the King, but also by anyone else: 'actus qui a rege sed ut a quovis alio fiant.' Again, we agree."

As was made plain from the 40 decision of the English Court of Appeal in *Islamic Republic of Iran* (20), claims by states to recover their stolen property do not fall within the "public law" preclusionary rule expressed by *Dicey* and cannot be characterized as being claims in respect of which the "central interest of the state bringing the action is governmental in nature" and therefore ought not to be entertained (see [2008] 1 All E.R. 1177, at paras. 112-121).

The representors point out 41 numerous recent examples of the English courts entertaining such patrimonial claims and recognizing such "patrimonial rights" in the context of foreign states or asset-holding agencies of

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foreign states seeking the recovery in England of misappropriated state assets, namely:

*Arab Monetary Fund v. Hashim (No. 3)* (3)—claim by an agency holding assets for certain Arab states brought against its former chairman to recover misappropriated assets and their proceeds.

*Gotha City v. Sotheby's* (15) (Moses, J.)—claim to recover a painting said to belong to the German state—referred to in *Islamic Republic of Iran* ([2008] 1 All E.R. 1177, at para. 135).

*Grupo Torras S.A. v. Al-Sabah* (16)—claims by wholly-owned subsidiary companies of the Kuwait Investment Agency ("KIA") against (amongst others) a former chairman of the KIA office in London and director of the companies for losses ultimately suffered by the companies and the KIA and recovery of assets owned by them as a consequence of the fraudulent conduct of its former officer.

*Att. Gen. (Zambia) v. Meer Care & Desai (a firm)* (5)—claims by the state to recover misappropriated state assets from its former president, other government officials and third parties.

*Islamic Republic of Iran*—claim to recover ancient artifacts belonging to the State of Iran ([2008] 1 All E.R. 1177, at para. 136): "□.□. [W]hen a state owns property in the same way as a private citizen there is no impediment to recovery."

The Jersey courts have 42 also entertained and recognized such patrimonial claims, for example, the *Esteem Settlement* series of judgments, in which the Jersey court presided over claims by wholly-owned subsidiaries of the KIA in parallel proceedings to the *Grupo Torras* litigation described above (see, for example, *In re Esteem Settlement* (13)).

As is plain from the 43 decisions of the English Court of Appeal in *Mbasogo* (24) and *Islamic Republic of Iran* (20), the ability of a foreign state, government or sovereign to sue in England to protect its "patrimonial"/proprietary rights and the recognition of such rights by the English courts has never been doubted and is of some antiquity, as illustrated by the following cases:

(i) *King of Two Sicilies v. Willcox* (34), in which the plaintiff claimed title to a ship situated in England and purchased with state funds stolen from the state. The plaintiff's title to the ship was recognized and given effect by the English court (1 Sim. (N.S.) at 333; 61 E.R. at 129):

"The case upon the record is a simply told tale, uniform from beginning to end, of the rebellious subjects of an absolute sovereign having taken the opportunity of the state of rebellion to possess themselves of some part of that Royal property which belonged to the Plaintiff as King. He succeeded in putting down the rebellion;

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and the parties who were in rebellion against him having made use of their actual power over the Royal fund, to send it, in the shape of bills, to this country, did not acquire thereby any right to the property as against their sovereign□.□.□. [I]t seems, to my mind, to be laid down as clear as any proposition can be, that the independent sovereign of a State is competent, in this country, to sue for his personal rights."

(ii) *Colombia (Govt.) v. Rothschild* (11), in which it was held (1 Sim. at 104; 57 E.R. at 517) that—"a foreign state is as well entitled as any individual to the aid of this Court in the assertion of its rights□.□.□."

(iii) *United States v. Wagner* (36), in which it was held that (L.R. 2 Ch. App. at 591)—



"the right of a foreign state which has been recognized by Her Majesty, whether it be a monarchy or a republic, to sue in the Courts of this country for public property belonging to the state, has not been, and cannot be, denied."

Other examples included: *Hullett v. King of Spain* (18); *Emperor of Austria v. Day* (6) (referred to in *Mbasogo* (24) ([2007] Q.B. 846, at paras. 22–27) and *Barakat* (20) ([2008] 1 All E.R. 1177, at paras. 112 and 129)); *United States v. McRae* (35); and *King of Italy v. de Medici Tornaquinci* (21), referred to in *Barakat* (*ibid.*, at paras. 128 and 136).

It is equally clear that 44 the English courts will entertain claims made by foreign states, governments or sovereigns or their agents which are claims to enforce contractual rights.

In 45 *Castaneda v. Clydebank Engr. & Shipbuilding Co. Ltd.* (10), the Earl of Halsbury, L.C. said ([1902] A.C. at 529–531):

"□.□. [T]he question here is whether or not the right parties are suing; and it appears to me to be perfectly immaterial to consider for this purpose whether or not the ultimate interest may be in the King of Spain or in whom it may be. The shipbuilders here have entered into an express contract with a person who is called in the contract the Minister of Marine of Spain to build certain ships; and what is incident to that contract, the right to enforce that contract and to enforce the penalties under that contract, is in the contracting party. That contracting party has brought the action, and it appears to me that it is impossible to say that there is no right in him to sue□.□.□.

Here is a lawful contract entered into between parties ascertained, and the simple question is whether that is a contract which can be enforced in this country by the present appellants."

Lord Robertson said (*ibid.*, at 531):

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"There is nothing in the municipal law of Scotland which places any obstacle which is unknown in England in the way of the enforcement of contracts, and therefore in the way of the making of contracts, with foreign governments. The judgment is rested, and rested solely, on grounds common to both England and Scotland."

Thus, the representors 46 submit that under English common law a direct claim by a foreign state, government or sovereign to recover property or to enforce a contract will not be held non-justiciable and the same principles should apply in Jersey. If the law were otherwise, it would mean that Jersey would be a jurisdiction where funds stolen from foreign states, governments and sovereigns could be remitted and held by the wrongdoers, without risk of the rightful owners being able to recover them through the courts, and where no contract with a foreign state, government or sovereign could be enforced.

We agree with the 47 representors that it must follow that a claim by the BIA in Jersey based upon the settlement agreement—

(i) entered into voluntarily by Prince Jefri in Brunei Darussalam and governed by the laws of Brunei Darussalam;

(ii) which effected a compromise of the original claim; and

(iii) which vests beneficial title to the assets the subject of the settlement agreement in the BIA—

cannot possibly fall foul of the preclusionary rule stated in *Dacey*. Therefore, it must equally be the case that proceedings by the BIA to have its *in personam* rights under the settlement agreement (as determined by the courts of Brunei Darussalam) recognized in Jersey cannot be precluded by the relevant rule.

#### **Judgment *in rem***

Prince Jefri submits that 48 the Brunei judgment—

(i) purports to take effect *in rem* over matters which are exclusively within the remit of this court; and

(ii) constitutes an exorbitant use of the Brunei court's jurisdiction, given its intended *in rem* effect and being directed at (a) the Jersey companies, when there is no evidence that any of the underlying Brunei proceedings have been served on them or that they have otherwise participated in the Brunei proceedings or submitted to the jurisdiction of the Brunei court; and (b) the Jersey nominee shareholders, who were not parties to the settlement agreement or the Brunei proceedings. Accordingly, the Brunei judgment should not be given effect to by this court.

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This was the issue dealt 49 with by the Privy Council in *Pattni* (28) on facts that, as we have said, are very similar. The respondents had agreed to sell to the appellant their shareholdings in a Manx company. The Kenyan judge gave judgment for the appellant and issued an order requiring the respondents "to transfer all the 100% shares in" the company to the appellant "as per the said sale and purchase agreement." It was held by the Privy Council that a judgment to have effect *in rem* had to be a determination regarding the status or disposition of property which was to be valid as against the whole world and not merely between the parties. An order purporting actually to transfer or dispose of the property was to be distinguished from a

judgment determining the contractual rights of parties to property. The obvious aim and effect of the Kenyan judgment was to establish and give effect to the parties' rights *inter se*, with regard to the shares and affairs of the company and that it did not constitute or involve any adjudication *in rem* relating to those shares, nor did it purport actually to transfer or deal with the shares as opposed to determining the parties' rights and duties relating to them. The order requiring the respondents to transfer the shares in the company was a classic order *in personam* for specific performance of an agreement which had been found by the judge to exist and which had been breached by the respondents.

This same argument was run 50 by Prince Jefri before the Cayman Islands court (in the proceedings brought there by the representors seeking similar relief in relation to companies beneficially owned in that jurisdiction by Prince Jefri (*Bandone Sdn Bhd v. Sol Properties Inc.* (9))) and rejected on the authority of *Pattni*. We too reject the submission. The Brunei judgment is a judgment *in personam*.

#### **Grounds for not exercising discretion**

Prince Jefri put forward a 51 number of reasons for the court not exercising its discretion to enforce the Brunei judgment, which we take in turn.

#### **Mutuality**

It was argued that there 52 is no mutuality of remedy as between the parties, given that the BIA and Bandone are immune from suit. The Privy Council did not deal with this issue, as it was precluded from doing so by the terms of the Brunei (Appeals) Order No. 2396, the statutory instrument giving the Privy Council jurisdiction to consider appeals from Brunei, but it was dealt with by the Brunei Court of Appeal, which found that the BIA is amenable to suit. Prince Jefri argues that the Court of Appeal only addressed itself to the question of amenability to suit rather than immunity. It is not disputed that the BIA is a statutory corporation which can sue and in the normal course be sued, and has therefore no immunity *rationae personae*. However, Prince Jefri's submission is that,

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by reason of art. 84B of the Constitution of Brunei, the representors are immune *rationae materiae* from claims where they are acting on behalf of or pursuant to the instructions of the Sultan. In other words, the representors are not liable to any proceedings whatsoever in respect of any acts done or not done with the authority of the Sultan.

We agree with the judgment 53 of the Cayman Islands court in *Bandone* (9) that this submission is bound to fail. The Court of Appeal of Brunei was considering the BIA's possible immunity from suit specifically in connection with the obligations imposed upon it by the settlement agreement and found in Prince Jefri's favour in that respect, namely that the BIA can be ordered by the High Court there to perform its remaining settlement agreement obligations. In any event, the matter having been determined by the courts of Brunei Darussalam, he is estopped from attempting to raise the issue in these proceedings (see *Minorities Fin. Ltd. v. Ayra Holdings Ltd.* (26) (1994 JLR at 162)).

#### **Fair trial**

Again, Prince Jefri's 54 submissions in relation to this issue were put to and rejected by the Cayman court in *Bandone* and we adopt its reasoning. It pointed out that the Privy Council dealt with these submissions conclusively.

It is, however, the case 55 that this court, unlike the Cayman court, is bound by the European Convention on Human Rights and, pursuant to art. 7(1) of the Human Rights (Jersey) Law 2000, we cannot exercise our powers in any way which is incompatible with a Convention right, namely, in this case, Prince Jefri's right under art. 6 of the Convention to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Privy Council considered the principles enshrined in art. 6 of the Convention (see para. 26 of its judgment on the procedural issue). In doing so, it confined itself to proceedings by the BIA to enforce summarily Prince Jefri's obligations under the settlement agreement into which he admittedly entered and concluded that there were no grounds to say that Prince Jefri could not receive a fair trial in relation to such proceedings (paras. 26–32 of the judgment on the procedural issue). Having regard to the findings of the Privy Council, we are satisfied that to enforce the Brunei judgment is not incompatible with Prince Jefri's Convention rights.

#### **Counterclaim in New York**

Prince Jefri seeks a stay 56 of these proceedings pending determination of a claim he is bringing against the BIA in New York in relation to certain properties in Brunei. New York has been chosen because of concerns both as to the immunity of the BIA in the courts of Brunei and that he will not

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receive a fair trial. His claim may need to be set off against any liabilities owed by him to the BIA, which set-off will not engage the immunity of the BIA. The assets in Jersey should be preserved for that purpose. This application is made in the face of the New York courts refusing to impose a restraining order on assets there for the same purpose.

A similar application was 57 made to and refused by the Cayman courts in *Bandone* (9), which pointed out that, in the judgment of the Supreme Court of the State of New York (March 6th, 2008), Freedman, J. found that Prince Jefri would suffer no irreparable harm in the absence of a preliminary injunction, that he had not shown a likelihood of succeeding on the merits and that the balance of equities did not weigh in his favour. We too reject the application for the same reasons.

**Public policy considerations**

Prince Jefri submits that 58 a significant number of holding companies and other offshore vehicles have been established in Jersey against the background of the Island's reputation as a significant and independent offshore financial centre. The establishment of such structures has no doubt been undertaken on the basis and understanding that they would be subject to the laws of Jersey as they existed at the material time, including, presumably, the laws and rules relating to the enforcement of claims against assets held in Jersey. To enforce foreign orders in the circumstances of this case would represent, in his submission, a fundamental change to the law relating to recognition and enforcement of foreign judgments, which would be undesirable. Such a change should be a matter for the States of Jersey to consider after proper consultation and debate.

Whilst we accept that 59 consistency in law is important, the court, in following English common law rules of private international law, has the power to adapt those rules to reflect the requirements of this jurisdiction. As stated in *Morguard* (27), those rules were developed in the main in the 19th century and there is a compelling case for the reappraisal of the restriction on the enforcement of foreign non-money judgments in order to meet modern needs. The law is there to reflect the interests of all litigants, whether plaintiffs or defendants, and in our view public policy dictates that the courts should at least have the discretion, to be exercised cautiously, of enforcing foreign non-money judgments given by courts of competent jurisdiction without reconsidering the merits. In making this change to English common law rules as applied in Jersey, we are following the lead given by the Supreme Court of Canada in *Pro Swing* (29) and the clear opinion expressed by the Privy Council in *Pattni* (28), noting that the Cayman Islands (and it would seem the Isle of Man) have made the same change.

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**Exercise of our discretion**

The caution with which our 60 discretion is to be exercised in this incremental evolution of the English common law (Rule 35(1) of *Dicey*) as applied in Jersey militates against our attempting to define the criteria that the court should take into account beyond saying that it is a discretion that should be exercised on the facts of this case for the following reasons:

(i) The Brunei court had jurisdiction to make the Brunei judgment in accordance with the requirements set out in Rule 35(1) of *Dicey* and it is final and conclusive.

(ii) The terms of the Brunei judgment and of the orders sought in this application are clear and specific.

(iii) The first to seventh respondents, who have raised no concerns as to the terms of the order sought, know exactly what they have to do. There is little likelihood of further supervision being required by the court.

(iv) We will not be required to extend greater judicial assistance to the representors than we would to our own litigants.

(v) In our view, there are no grounds upon which we should refuse to exercise our discretion. On the contrary, we are mindful of the observations of the Privy Council referred to in para. 7 above.

Accordingly, in the 61 exercise of our discretion and for the reasons set out above, we grant the application and make the orders set out in the prayer to the representation.

*Application granted.*