

RECOGNITION OF AMERICAN JUDGMENTS IN CANADA: RECENT CANADIAN LAW MOVES TOWARD A “FULL FAITH AND CREDIT” STANDARD

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Under the “Full Faith and Credit clause* of the American Constitution, judgments validly entered by the court of one state must be recognized by the courts of a sister state. However, no similar standard requires any Canadian court to recognize a judgment rendered by an American state or federal court. In fact, until recently, Canadian courts routinely denied recognition of valid U.S. default judgments (obtained pursuant to state long-arm statutes, subject to Fourteenth Amendment Due Process “minimum contacts* constraints) whenever a Canadian court determined that the defendant had not been subject to “jurisdiction in the international sense” in the U.S. forum.

Canadian courts examining judgments issued by U.S. courts typically found “jurisdiction in the international sense” only where: (1) A corporation carried on business at a definite and reasonably permanent place in the U.S.; (2) an individual resided in the U.S. at the time suit was filed; (3) a Canadian resident or entity had invoked the jurisdiction of a U.S. court against a U.S. party; (4) a Canadian resident or entity had entered an appearance in a U.S. court, other than for contesting jurisdiction; or (5) a Canadian resident or entity had agreed by contract to submit to the jurisdiction of a U.S. court. However, Canadian courts typically found no “jurisdiction in the international sense* where, for example, a Canadian entity manufactured or distributed a product that caused injury in the U.S., or where a Canadian defendant was not physically present in the U.S. when the action was instituted. Thus, in these and other situations, many U.S. plaintiffs obtained default judgments in the U.S. only to find the judgments worthless—the Canadian defendant had no U.S. -based assets, and no Canadian court would enforce the U.S. judgments.

However, this narrow approach was recently expanded by the Supreme Court of Canada, in *Morguard Investments Ltd v De Savoye*,¹ and as a result Canadian courts are now recognizing and enforcing a broader spectrum of U.S. judgments. *Morguard* itself only addressed recognition of judgments between Canadian provinces—previously Canada had had no requirement, constitutional or otherwise, that courts of one province recognize judgments rendered by courts of a sister province. In *Morguard*, two Alberta plaintiff-mortgagees obtained deficiency judgments by default in Alberta (pertaining to Alberta real estate) and sought to sue on their judgments in neighboring British Columbia, where the defendant had relocated before the Alberta action. The Court held:

...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 territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action....

It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action....fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction. Morguard, 76 D.L.R. (4th) at 273-74 (emphasis added).

Morguard thus established two prerequisites for “full faith and credit” recognition of a judgment—that the forum court acted through “fair process” and with “properly restrained jurisdiction?”

Morguard contains little discussion of “fair process”—the authoring justice expressly assumed that any court in Canada would act with “fair process? However, the opinion discusses at length the meaning of “properly restrained jurisdiction” and concludes that this requires a “real and substantial connection” to exist between the jurisdiction issuing the judgment and, for example, the subject matter of the action, the *damages* suffered by the plaintiff, the legal *obligations* arising in the jurisdiction, the relevant *transaction*, or the *defendant himself*. (Unfortunately, the opinion does not define what a “real and substantial connection” is, nor does it indicate the relative weights of these factors when they are not all “connected” to a single forum.) *Morguard* nonetheless significantly broadened the Canadian law of inter-provincial recognition of judgments.

Perhaps surprisingly subsequent cases have extended *Morguard**s analysis to recognition of U.S. judgments in Canada; the seminal case applying *Morguard* to a U.S. default judgment is *Clarke v Lo Bianco*,² in which the plaintiff had sued the defendant in California for medical malpractice arising out of defendant*s treatment of plaintiff in California. Because the defendant physician had moved to British Columbia (“B.C.”) before commencement of suit, he did not appear or defend in California, and, following an evidentiary hearing on damages, judgment was entered against him in 1986.³ Plaintiff thus sought enforcement of his judgment in B.C. In upholding recognition of the California judgment, the B.C. court expressed no concern regarding California*s quality of justice (the “fair process requirement”). In addition, because the defendant had resided in the U.S., had treated plaintiff there, and had caused injury there, the Canadian court easily found sufficient “real and substantial connections” to permit recognition of the U.S. judgment.

Similarly in *Federal Deposit Ins Co v Vanstone*,⁴ the defendant lived in Oklahoma for eight years, during which time he signed several promissory notes. After he moved to Canada, the F.D.I.C. brought suit on the notes in U.S. District Court, and obtained a default judgment. Following *Morguard*, the B.C. court had no difficulty concluding that the U.S. judgment was obtained by “fair process” and that because the defendant had executed the notes in Oklahoma and had been validly served with Oklahoma process after his return to Canada, a more real and substantial connection between the defendant, the transactions in question, and Oklahoma “could scarcely be dreamed of.”⁵

While the facts of *Lo Bianco* and *Vanstone* made it easy to conclude that the U.S. jurisdictions had sufficient “real and substantial connections” to the defendants and transactions at issue, Canadian courts have also found a sufficient nexus in cases in which the defendant did not reside or do business in the U.S.; and thus the “connection” is more tenuous.

In *McMickle v Van Straaten, etc.*,⁶ a California plaintiff mailed an order for the Canadian defendant’s facial cream to a Seattle post office box, and was subsequently injured during use of the product. The Canadian defendant had advertised extensively in California, but had never lived or conducted business there. The plaintiff sued in California, properly serving the defendant in BC; the defendant failed to appear or defend, and a default judgment was entered. When called upon to recognize the California judgment, the B.C. court did so, stating:

As a matter of principle, I cannot hold that the defendant’s residence or former residence in California is an essential prerequisite to a British Columbia court enforcing the California judgment. [The defendant] was attracting business in California by a vigorous advertising campaign [in the National Enquirer, Cosmopolitan and TV Guide] reaching Californians. His advertisements impacted upon this plaintiff in California, as did his many mail solicitations directed to her home. He was firing long-range artillery from Vancouver which landed in California. He must accept the risk of damage from his shells at the place where they landed. McMickle, 93 D.L.R. (4th) at 82.

Similarly, in *Stoddard v Accupress Mfg Ltd*,⁷ a B.C. court found sufficient connections to enforce a Connecticut judgment entered against a B.C. defendant who had never carried on business or advertised in Connecticut. Indeed, the defendant manufacturer’s only connection with Connecticut was the sale and delivery of the equipment at issue to the plaintiff’s employer some ten years previously. Nonetheless, the court found that this constituted a sufficient connection under the *Morguard* analysis. *Stoddard*, 84 B.C.L.R. (2d) at 202.

At least one case has arisen where both a Canadian court and an American court might have had “real and substantial connections” to the action.

In *Moses v Shore Boat Builders Ltd*,⁸ the plaintiff, an Alaska fisherman, contracted with the defendant B.C. company for design and construction of a boat to be delivered to Alaska. After delivery and expiry of the warranty problems developed with the engine, which the defendant failed to rectify. Plaintiff thus modified the boat himself and sued defendant, in Alaska, for defective design. After obtaining a default judgment, plaintiff sought enforcement in B.C. The B.C. trial court held:

I think it fair to say that the courts of either British Columbia or Alaska would have been a reasonable forum for Mr Moses’ cause of action for defective design, in the absence of any provision to the contrary in the agreement, despite the fact that Shore Boat has never carried on business in Alaska.... Mr Moses chose to sue in Alaska, where the boat was being used, where the damage was

suffered, where the boat was repaired, where he had signed the contract for its construction, where he lived when he signed the contract, and where the boat's purchase was financed. These are significant contacts with Alaska. indeed, I think they are sufficient to constitute the connection required by the Morguard test. Moses, 68 B.C.L.R. (2d) at 399.

Thus, the court recognized real and substantial connections to the U.S. forum, even where there were also significant connections to a Canadian jurisdiction. (The Supreme Court of Canada later denied leave to appeal in *Moses*.)

Not surprisingly where the sole “connection” with an American state is the plaintiff's residence, a Canadian court has found insufficient “connection” to permit recognition of a judgment issued by a court in that state.

In *Webb v Hooper*⁹ the defendant entered into various partnerships with plaintiff in the states of California and Colorado for real estate development in those states, and the subsequent dispute between the parties related to these partnership transactions. Plaintiff was a Kentucky resident, but neither the defendant, the transactions, nor the dispute had any connection with Kentucky. Plaintiff sued in Kentucky, obtained a default judgment, and then sought recognition of the judgment in Alberta. The Alberta court refused to recognize it, holding:

There must be a substantial connection to the subject-matter of the action before a foreign court's jurisdiction will be recognized by the private international law of Alberta.

[Morguard v] De Savoye cannot be stretched to allow forum shopping.... the residence of the plaintiff within the foreign court's jurisdiction is not of itself sufficient. Webb, 19 Alto L.R. (3d) at 274.

Beyond the general guidelines in these and similar cases, Canadian courts, including the Supreme Court of Canada, have left the exact parameters of the “real and substantial connection” test undefined. In *Hunt v Lac D'Amiante du Quebec*,¹⁰ a unanimous Supreme Court recently stated:

Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction.

...the assumption of... jurisdiction must ultimately be guided by the requirements of order and fairness. Hunt, 109 D.L.R. at 41-42.

Thus, although Canadian courts have not provided a bright-line test for when a U.S. judgment will be recognized,¹¹ they have clearly moved toward a “full faith and credit”

standard. Whether the new “real and substantial connection” test will be interpreted to be identical to the American “minimum contacts” requirement, remains to be seen. However, Michigan counsel should be aware that these recent changes in Canadian law will affect advice rendered here in Michigan.

For the defense practitioner, it will no longer be wise to advise a Canadian resident client to simply ignore a suit filed against it in the U.S. Where a defendant sued in the U.S. has connections of any sort with an American jurisdiction, now the safest course is to appear and defend in the U.S. (or perhaps to move for dismissal or a stay based on forum non conveniens, where this doctrine is recognized).

The plaintiff’s bar now has good reason to consider bringing suit in the U.S. against a Canadian resident or entity where the defendant has some connection to the state where suit may be brought, even if the defendant does not reside in the U.S. and has no U.S. assets. In addition to convenience, suit in the U.S. can provide certain procedural advantages, such as broad discovery and class actions, which are not provided for in all Canadian provinces.

Finally anyone who currently holds a judgment against a party living or doing business in Canada should consider whether these changes might make recognition of the judgment by a Canadian court possible.¹² (Recall that in *Lo Bianco*, a California-issued default judgment rendered five years before the Supreme Court of Canada’s *Morguard* decision was recognized and enforced by the Canadian court.)

Footnotes

1. *Morguard Investments Ltd v De Savoye* (1991), 76 D.L.R. (4th) 256; 52 B.C.L.R. (2d) 160 (S.C. Canada). [The Canadian citations of D.L.R. (Dominion Law Reports) in this article are obtainable on LEXIS using the LEXSEE feature with the Canadian citation, even though LEXIS has not assigned independent LEXIS citations to the cases.]
2. *Clarke v Lo Bianco* (1991), 84 D.L.R. (4th) 244; 59 B.C.L.R.(2d) 334 (S.C.) (trial level).
3. Under Canadian law in 1986, the California judgment could not have been enforced against the defendant in Canada because the California court did not have “jurisdiction in the international sense.” The *Lo Bianco* decision, based upon *Morguard*, brought life to a worthless judgment, which had been rendered five years before *Morguard*. (Actions in Canada on a foreign judgment generally must be brought within six years of the date of judgment. *Rutledge v United States Savings and Loan Co* (1906), 37 5CR. 546.)
4. *Federal Deposit Ins Corp v Vanstone* (1992), 63 B.C.L.R. (2d) 190; 11992] 2 W.W.R. 407; 88 D L.R. (4th) 448 (S.C.) (trial level).

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5. *Vanstone*, 88 D.L.R. (4th) at 463. *Vanstone* further states *in dicta* that, even after *Morguard*, the defenses of fraud, breach of natural justice, and violation of public policy survive and may prevent enforcement of a U.S. judgment in Canada in appropriate circumstances. See also *Beals v Saldanha* (Dec 9, 1993), (Action No. 93-CQ-40311) (Ont. Ct. Gen. Div.), in which defendant tried to sue on an American default judgment in Ontario. The trial judge found an absence of “fairness” on the basis that the complaint in the Florida action had sought “damages in excess of \$5,000,” whereas the resulting default judgment was for \$260,000. The Ontario judge thought that defendants were entitled to notice of the specific amount claimed so that defendant could determine whether to defend and to properly prepare a defense. But see *Resorts International Hotel Inc v Averbach* (1991), 89 D.L.R. (4th) 688; 43 Q.A.C. 75, in which the Quebec Court of Appeal recognized a New Jersey judgment arising out of defendant’s NSF check paid for gambling, despite defendant’s argument that this violated public policy, because by statute Quebec denies any action for recovery of a debt arising from a gambling contract. See also *Boardwalk Regency Corp v Maalouf* (1992), 6 OR. (3d) 737; 88 D.L.R. (4th) 612 (CA.) (same holding by Ontario Court of Appeal on similar facts, reversing the trial court).
 6. *McMickle v Van Straaten aka Van Straaton aka Straaten and Van Stratton dba Global Esthetics and dba Global Advertising, Inc* (1992), 93 D.L.R. (4th) 74 (B.C.S.C.) (trial level).
 7. *Stoddard v AccurPress Mfg Ltd* (1993), 84 B.C.L.R. (2d) 194; [1994] 1 W.W.R. 677 (B.C.S.C.) (trial level).
 8. *Moses v Shore Boat Builders Ltd* (1992), 68 B.C.L.R. (2d) 394; [1992] 5 W.W.R. 282 (S.C.) (trial level); aff’d (1993) 83 B.C.L.R. (2d) 177; [1994] 1 W.W.R. 112 (B.C. Ct. App); leave to appeal to the Supreme Court of Canada denied Mar 3, 1994 (1994), 87 B.C.L.R. (2d) at p. xxxii; [1994] 2 W.W.R. at p. lxxv
 9. *Webb v Hooper* (1994), 19 Alta.L.R. (3d) 269 (Q.B.) (trial level by a Master).
 10. *Hunt v Lac D’Amiante du Quebec Ltee. et al*, (1994), 109 D.L.R. (4th) 16 (S.C.C.). (decided Nov. 18, 1993).
 11. The effect of *Morguard*, which is of course common law, on provincial *statutes* that ban enforcement of foreign judgments is unclear. See e.g., *Cardinal Couriers Ltd v Noyes* (1993), 101 D.L.R. (4th) 712 (Sask. C.A.) (expressly rejecting *Morguard* as common law and not applicable to provincial statutes—Saskatchewan and New Brunswick, by statute, provide a defense to an action on a foreign judgment, essentially where the defendant was not residing or doing business in the foreign jurisdiction, or had not otherwise voluntarily submitted to the jurisdiction of the Court.) However, in *Hunt*, the Supreme Court of Canada declared unconstitutional a Quebec statute that relieved Quebec corporations from responding to document requests from litigation in

other jurisdictions. Some commentators conclude that *Hunt* invalidates any provincial statute limiting recognition of foreign judgments, to the extent the statute conflicts with *Morguard*.

12. Because the requirements of most provincial *registration* of judgments legislation are based upon pre-*Morguard* case law, in most situations a plaintiff seeking to enforce a foreign judgment will need to bring an *action* on the foreign judgment rather than attempt to register the judgment. For example, in *Acme Video Inc v Hedges* (1993), O.R. (3d) 503 (Ontario Ct. Gen. Div.), the trial judge was willing to use *Morguard* to extend the registration rules under Ontario's Reciprocal Enforcement of Judgments Acts, R.S.O. 1990 c.R. 5 in a registration case; however, the Ontario Court of Appeal reversed [at 1993, 12 O.R. (3d) 160 (C.A.)], holding that the requirements of the registration legislation must be fully met before a foreign judgment may be registered. The Court of Appeal did specifically note that "[t]his is of course no bar to the bringing of an action on the foreign judgment if the plaintiff is so advised." (Emphasis added). See also *T.D.I. Hospitality Management Consultants Inc v Browne* [Aug 29, 1994], Suit No. A1-93-30-0122Q (Manitoba Ct. App.) and cases cited therein.