

MORGUARD INVESTMENTS LTD: EMERGING INTERNATIONAL IMPLICATIONS

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INTRODUCTION

Events often gain a momentum of their own, sometimes well beyond that anticipated by those who set them in motion; this is as true in the field of law as it is in other areas of human endeavour. *Morguard Investments Ltd. v. De Savoye*¹ is a legal event which seems to be taking on a rapidly building momentum. Basing themselves on this decision, Canadian courts, especially those in British Columbia, are recognizing and enforcing judgments from other courts in civil matters, even when these judgments bear few, if any, of the hallmarks that traditionally entitled a foreign judgment to be recognized and enforced in Canada.

Now clearly the leading Canadian case on the enforcement of domestic judgments, *Morguard* brought about a sea change in Canadian practice and effectively reversed a century of judicial pronouncement, at least as far as Canadian judgments are concerned, *i.e.* judgments issued by the courts of the Canadian provinces and territories. In several recent cases, Canadian courts have shown themselves willing to push the principles of the *Morguard* judgment beyond the strict bounds of the case, and have been extending its innovative recognition and enforcement views to matters arising outside Canada. While this is not necessarily inappropriate, it does give rise to a certain degree of concern and could

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¹ *Morguard Investments Ltd. v. De Savoye*, [1991] 3 S.C.R. 1077, 52 B.C.L.R. (2d) 160, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 51 R.P.R. (2d) 1 (hereafter referred to as *Morguard* and cited to S.C.R.).

lead to a re-balkanization of Canadian practice—now towards foreign judgments—if the trend is not sanctioned and structured by the Supreme Court or by Parliament and the provincial legislatures.

Recognition and enforcement of *intra*-Canadian judgments: Then and now

The common law rules for asserting jurisdiction were based on the concept of territoriality which itself was closely linked to the power of a court to enforce any order it made. Thus, if a defendant was served within the territory of the court, or submitted to a court's jurisdiction, either by agreement or by attornment, that court would have jurisdiction in the case. To these two fundamental rules were added a myriad of other circumstances which provided for jurisdiction based on service *ex juris*, either as of right or with judicial permission.² The result, particularly in Canada, was to accord plaintiffs an almost unlimited³ right to litigate in their home courts to obtain a judgment which was enforceable at least in the territory of the forum.

The negative aspect of the resulting judgment was that it was generally not reliably enforceable anywhere other than within the territory of the forum. Hence, defendants who managed to spirit themselves and their assets to another jurisdiction before the institution of an action against them could avoid enforcement of such a judgment. This approach to recognition and enforcement of foreign judgments was summarized by Buckley L.J. in *Emanuel v. Symon*:⁴

In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign

² Finkle & Coakeley, "Morguard Investments Limited: Reforming Federalism from the Top" (1991), 14 Dalhousie Law Journal 340.

³ Subject to the limitations of the doctrine of *forum non conveniens*, where the defendant can persuade a competent court to decline jurisdiction on the ground that there exists another forum which has the *most* real and substantial connection to the action and is therefore the *more* appropriate and natural forum for the action.

⁴ [1908] 1 K.B. 302 (C.A.) at 309.

country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

While expressing some doubts about the continued validity of the first criterion, and noting that for judgments *in rem* the British courts have accepted jurisdictional reciprocity as a basis for recognition of foreign judgments,⁵ La Forest J. was of the view that this "accurately represents the common law in England to this day."⁶

Prior to *Morguard*, this approach had been adopted by Canadian courts, not only in their dealings with foreign judgments, but also in their dealings with judgments emanating from sister provinces:

Essentially, then, recognition by the courts of one province of a personal judgment against a defendant given in another province is dependant on the defendant's presence at the time of the action in the province where the judgment was given, unless the defendant in some way submits to the jurisdiction of the court giving the judgment.⁷

In La Forest J.'s view, "The English approach...was unthinkingly adopted by the courts of this country, even in relation to judgments given in sister-provinces".⁸

In *Morguard*, an Alberta court took jurisdiction, on the basis of service *ex juris*, over litigation arising out of the defendant's default on mortgages entered into while he was resident in Alberta. The defendant had neither agreed to the Alberta court's jurisdiction nor had he attorned to it. In accordance with prevailing wisdom of the day, the defendant made no attempt to contest the action until the plaintiffs requested its enforcement in his new home province of British Columbia.

⁵ See *Travers v. Holley*, [1953] 2 All E.R. 794 (C.A.).

⁶ *Morguard*, *supra*, note 1 at 1088.

⁷ *Ibid*, at 1092.

⁸ *Ibid*, at 1095.

Surprisingly, in view of the widespread opinion against enforcement in such circumstances, all eleven judges hearing the case favoured granting the order.⁹ Given "the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner",¹⁰ and his view that the adoption of the English approach by Canadian courts was a "serious error",¹¹ La Forest J., writing for a unanimous Supreme Court of Canada, left in place the traditional rules, but added a new basis for jurisdiction.

In developing his new test for recognition and enforcement of Canadian judgments, La Forest J. considered the inherent nature of a federation, as exemplified by practice in the United States and Australia. He also noted recent developments in the European Community, as well as the approach of the English House of Lords in *Indyka v. Indyka*¹² and Dickson J.'s (as he then was) views in *Moran v. Pyle National (Canada) Ltd.*¹³ On behalf of the Court, he then proposed a new test for the recognition and enforcement of inter-provincial judgments:

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.* [Emphasis added.]¹⁴

...fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.

As discussed, fair process is not an issue within the Canadian federation.¹⁵

⁹ At trial, and unanimously at the British Columbia Court of Appeal and Supreme Court of Canada levels.

¹⁰ *Morguard, supra*, note 1 at 1096.

¹¹ *Ibid*, at 1098.

¹² [1969] 1 A.C. 33.

¹³ [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, [1974] 2 W.W.R. 586 (hereafter referred to as *Moran v. Pyle*).

¹⁴ *Morguard, supra*, note 1 at 1102.

¹⁵ *Ibid*, at 1103.

...It seems to me that the approach of permitting suit where there is a *real and substantial connection* with the action provides a reasonable balance between the rights of the parties. [Emphasis added.]¹⁶

In order to complete his scheme, La Forest J. also recognized that the original court may need to use the doctrine of *forum non conveniens* or other powers to prevent injustices and that the recognizing and enforcing court may have to protect against fraud and deal with its own public policy in some instances.

Morguard was welcomed as a revolutionary advance in Canadian jurisprudence.¹⁷ Nevertheless, in addition to its obvious constitutional ramifications,¹⁸ it raises two major questions. The first concerns the nature and the limits of this new "real and substantial connection" test for jurisdiction. The second is whether the new basis for jurisdiction should apply only between sister provinces, or whether it can be extended to judgments from truly foreign states. It is somewhat ironic that before the courts have had an opportunity to begin to consider the first question, they are already applying the reasoning in *Morguard* to situations which it clearly was not intended to cover.

¹⁶ *Ibid*, at 1108.

¹⁷ See V. Black & J. Swan, "New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Ltd. v. De Savoye*" (1991), 12 *Advocates' Quarterly* 489; also J. Blom, "Conflict of Laws - Enforcement of Extraprovincial Default Judgment - Real and Substantial Connection: *Morguard Investments Ltd. v. De Savoye*" (1991), 70 *Canadian Bar Review* 733.

¹⁸ See Finkle & Coakeley, *supra*, note 2.

RECENT CASES WITH AN INTERNATIONAL ELEMENT

Clarke v. Lo Bianco

In *Clarke v. Lo Bianco*¹⁹ the British Columbia Supreme Court considered an application for recognition of a judgment rendered in a California court against a podiatrist who had moved to British Columbia before the institution of a malpractice action against him. At the date when the medical services in issue were rendered, both plaintiff and defendant were domiciled in the State of California. The defendant was served in British Columbia with notice of the action, but took no steps to appear, contest jurisdiction or defend the action. He did comply with an order obtained in British Columbia requiring him to attend and to give a deposition in the action. The Superior Court of California, having heard expert evidence and having considered the defendant's deposition, rendered judgment in the amount of approximately \$500,000.

Josephson J. considered two arguments in deciding whether to allow enforcement of the California judgment in British Columbia. The first question was whether the case fell within the categories established in 1908 in *Emanuel v. Symon*. He then considered the application of the notion of comity to the facts of this case. Josephson J. pointed out that the five categories set out in *Emanuel v. Symon* are non-exhaustive and subject to enlargement and qualification.²⁰ He then decided that the defendant's failure to contest jurisdiction permitted an inference that the defendant, by inaction, had indeed "voluntarily submitted himself to the risk of litigation in the State of California."²¹ Thus the case fell within the *Emanuel v. Symon* categories.

¹⁹ *Clarke v. Lo Bianco* (1991), 59 B.C.L.R. (2d) 334, 84 D.L.R. (4th) 244 (hereafter referred to as *Clarke*).

²⁰ *Ibid*, at 338 B.C.L.R., 248 D.L.R..

²¹ *Ibid*, at 341 B.C.L.R., 253 D.L.R.

Citing the now famous passage of La Forest J. in *Morguard*,²² Josephson J. went on to ask himself whether the notion of comity as applied by the Supreme Court of Canada should be limited to judgments between sister provinces. He found that it should not. He saw the *Morguard* judgment as compelling "a more comprehensive approach to the issue, ...which ensures that the rationale for reciprocity in a given case is weighed against concerns for fairness to the defendant."²³ The rationale outlined in *Morguard* is "less forceful, but is nonetheless compelling"²⁴ when applied to a judgment emanating from the State of California rather than from a sister province. No appeal was taken from Josephson J.'s decision.

Minkler and Kirschbaum v. Sheppard

In *Minkler and Kirschbaum v. Sheppard*,²⁵ a law firm sued in an Arizona court for services rendered to a company owned by the defendant's husband. The defendant and her husband had moved from British Columbia to Arizona before the husband requested the legal services. The couple lived in Arizona together for only ten months, then separated. Mrs Sheppard did not sign as co-obligor to the plaintiff for her husband's debt, but under the law of Arizona a spouse may be liable for the community debts of the couple despite not being a party to the contract creating them. The Arizona action was

²² "Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected." *Morguard*, *supra*, note 1 at 1095.

²³ *Clarke*, *supra*, note 19 at 341 B.C.L.R., 252 D.L.R.

²⁴ *Ibid.*

²⁵ *Minkler & Kirschbaum v. Sheppard* (1991), 60 B.C.L.R. (2d) 360 (hereafter referred to as *Minkler*).

commenced on the day Mrs Sheppard was moving from the matrimonial home to return to Canada. Spencer J. of the British Columbia Supreme Court found that Mrs Sheppard was no longer a resident of Arizona at the time the action was commenced. She was served *ex juris* in British Columbia, but never appeared or contested the action. A default judgment was entered against her and that judgment was the subject of the British Columbia case.

Spencer J. saw the effect of *Morguard, Marcotte v. Megson*²⁶ and *Clarke* as expanding the grounds for recognition of jurisdiction. He cited two justifications for this position: economic necessity and the "abandonment of insularity in the thinking of the courts".²⁷ Referring to La Forest J.'s view that the world had changed since the English rules were developed,²⁸ Spencer J. saw *Morguard* as approving the recognition of jurisdiction of a foreign state based on a real and substantial connection between the subject matter of the action and the foreign court. He then decided that Mrs Sheppard had voluntarily subjected herself to Arizona law by going there to live, so that a real and substantial connection was present between the subject matter of the action and the State of Arizona. In answer to the defendant's argument that it would be against British Columbia public policy to enforce a judgment imposing liability which did not exist in that province, Spencer J. opted for a restrained interpretation of the doctrine, observing that there was nothing about the judgment which was "contrary to our conceptions of essential justice and morality."²⁹

²⁶ *Marcotte v. Megson* (1987), 19 B.C.L.R. (2d) 300, 24 C.P.C. (2d) 201 (Co.Ct.). This judgment, written by Gow J. while on the County Court Bench, was considered by the British Columbia Supreme Court and the Court of Appeal in *Morguard*. La Forest J. referred to it as "a forceful judgment [which] applied the reciprocity approach to an *in personam* action," and quoted its headnote in its entirety, *Morguard, supra*, note 1 at 1093.

²⁷ *Minkler, supra*, note 25 at 363.

²⁸ *Morguard, supra*, note 1 at 1096-1098.

²⁹ *Minkler, supra*, note 25 at 366.

Federal Deposit Insurance Corp. v. Vanstone

In *Federal Deposit Insurance Corp. v. Vanstone*,³⁰ the British Columbia Supreme Court was asked to enforce judgments from the United States District Court in Oklahoma for amounts due by Vanstone under several defaulted promissory notes to Oklahoma financial institutions. Vanstone, a British Columbia resident who had signed the notes while living in Oklahoma, had been served *ex juris* with notice of the Oklahoma actions. He did not appear or defend the actions and default judgments issued.

Gow J. found that none of the categories of *Emanuel v. Symon* was present to justify recognition of the Oklahoma court's jurisdiction.³¹ He then went on to cite the passage of La Forest J. which defined the necessary nexus to found the application of full faith and credit between provinces, the plaintiffs having argued that it could be extended beyond interprovincial relations to apply to judgments obtained outside Canada. Gow J. enumerated the evidence connecting Vanstone with the state of Oklahoma and concluded:

...it is difficult to imagine a more reasonable place for the actions on the notes to be brought than in the Oklahoma courts. A more "real and substantial" connection between the indebtedness...and the Oklahoma jurisdiction can scarcely be dreamed of.³²

On this basis, he recognized the jurisdiction of the Oklahoma court and ordered the enforcement of the resulting judgments. Gow J. did not mention the rather crucial distinction between this case and *Morguard*, namely the fact that he was faced with a judgment originating outside Canada. He simply stated that the rule in *Morguard* applied. His authority for extending the notions of comity and full faith and credit between sister provinces to cases involving a genuinely foreign state is unclear.

³⁰ *Federal Deposit Insurance Corp. v. Vanstone* (1992), 63 B.C.L.R. (2d) 190 (hereafter referred to as *Vanstone*).

³¹ *Ibid*, at 200.

³² *Ibid*, at 205.

Resorts International Hotel Inc. c. Auerbach

In *Resorts International Hotel Inc. c. Auerbach*,³³ the Quebec courts faced the thorny question of public policy. Auerbach had given the plaintiff hotel a cheque for \$10,000 to pay a gambling debt he had incurred at the plaintiff's New Jersey casino. Although gambling is legal in New Jersey, article 1927 of the Civil Code of Lower Canada³⁴ denies any action for the recovery of a debt arising from a gambling contract. The defendant invoked article 1927 as a bar to recognition of the New Jersey judgment and argued that enforcement of the judgment would contravene Quebec public policy; the Provincial Court (now Quebec Court) rejected these arguments and enforced the judgment.³⁵

The Quebec Court of Appeal unanimously rejected the defendant's appeal. Rothman J.A. stated that even if article 1927 of the Civil Code, as a rule of public policy, applied to contracts entered into in Quebec, it should not extend so as to apply to contracts governed by foreign laws.³⁶ Mailhot J.A. found that the judgment was not based on a gambling debt but rather on the \$10,000 cheque given by the defendant.³⁷ The case is interesting in that the question of jurisdiction did not even arise: it seems to have been presumed by counsel for both parties.

³³ *Resorts International Hotel Inc. c. Auerbach* (1991), 89 D.L.R. (4th) 688, 43 Q.A.C. 75 (hereafter referred to as *Resorts*).

³⁴ Article 1927 reads:

Il n'y a pas d'action pour le recouvrement de deniers ou autres choses réclamées en vertu d'un contrat de jeu ou d'un pari; mais si les deniers ou les choses ont été payés par la partie qui a perdu, ils ne peuvent être répétés, à moins qu'il n'y ait preuve de fraude.

There is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet. But if the money or thing have been paid by the losing party he cannot recover it back, unless fraud be proved.

³⁵ *Resorts International Hotel Inc. c. Auerbach*, [1986] R.J.Q. 2479 (C.P.).

³⁶ *Resorts*, *supra*, note 33 at 76.

³⁷ *Ibid*, at 79.

Boardwalk Regency Corp. v. Maalouf

One month after the Quebec Court of Appeal released its judgment in *Resorts*, and coincidentally on the same day that the British Columbia Supreme Court released its judgment in *Vanstone*, the Ontario Court of Appeal addressed the same issue as the Quebec Court of Appeal in *Boardwalk Regency Corp. v. Maalouf*.³⁸ Maalouf, the defendant, had given the plaintiff casino operator a cheque for \$43,000 to pay for a gambling debt; the cheque was dishonoured and the plaintiff sued in New Jersey on the debt. A default judgment was issued and the plaintiff sought enforcement in Ontario. At trial,³⁹ O'Brien J. had held that the Ontario *Gaming Act*⁴⁰ prevented enforcement as it represented a public policy against gambling in Ontario. The majority of the Ontario Court of Appeal rejected this view and came to the same conclusion as their colleagues in Quebec, *i.e.* that a New Jersey judgment based on a gambling debt incurred there did not violate public policy in Ontario and, so, could be enforced. Again, though, the issue of the New Jersey court's jurisdiction was not addressed.

GENERAL IMPLICATIONS OF *MORGUARD* IN THE INTERNATIONAL SPHERE

While it is quite clear from the tone of La Forest J.'s comments in *Morguard* that he would be disposed to conducting a review of Canada's recognition and enforcement practices vis-à-vis truly foreign judgments,⁴¹ it must be remembered that he was faced with a fact situation that was purely Canadian and his analysis was based on the federal nature of the Canadian state. Hence, although he was drawn

³⁸ *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737, 88 D.L.R. (4th) 612 (C.A.) (hereafter referred to as *Boardwalk*).

³⁹ *Boardwalk Regency Corp. v. Maalouf* (1988), 68 O.R. (2d) 753, 59 D.L.R. (4th) 760 (H.C.J.).

⁴⁰ R.S.O. 1980, c. 183, now R.S.O. 1990, c. G.2.

⁴¹ *Morguard*, *supra*, note 1 at 1098.

into a discussion of the practices in other federal states, he grounded his analysis in the Constitution,⁴² the *Charter*⁴³ and other Canadian realities.

In proceeding to espouse the granting of "full faith and credit" in relation to the recognition and enforcement of judgments *within Canada*, he strongly emphasised the federal aspect of Canada and referred to many inherent protections in the system:

...The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges—who also have superintending control over other provincial courts and tribunals—are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada.⁴⁴

In emphasising these federal protections, he appeared to contrast the interprovincial situation with the truly international one.

By limiting his context to the Canadian federation, La Forest J. was able to address two sides of a symmetrical relationship: in laying down the rules for recognition and enforcement, he also lays down the rules for taking jurisdiction. Failure to follow the latter will result in non-enforcement. The reality of the international situation, though, is that there is an absence of symmetry and an inability of any one body to impose such symmetry on diverse regimes throughout the world.⁴⁵ In the absence of

⁴² *Constitution Act, 1867*.

⁴³ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11.

⁴⁴ *Morguard*, *supra*, note 1 at 1098.

⁴⁵ It is clear from the judgment that La Forest J. believes that times change and that the courts must adapt to the needs of the times. He also rejects rigid formulations of notions such as comity and reciprocity, favouring more comprehensive definitions:

(continued...)

symmetry, though, the enforcing court cannot assume that appropriate rules existed in the issuing court, let alone that they were followed, and so must embark upon an enquiry as to the propriety of the issuing court's actions before enforcing its orders. Hence, while Canadian enforcing courts can now assume that other Canadian courts will only take and exercise jurisdiction in appropriate situations, no such assumption can be made about the courts of other places; who, other than Canadian courts, will make sure that a Canadian defendant's *legitimate* interests will be protected in Europe, the United States, Australia or Upper Matabele Land?

Canadian courts, when asked to enforce foreign judgments, will have to have "...due regard both to international duty and convenience, and to the rights of [their] own citizens [and] other persons who are under [their] protection". In accomplishing this, the Canadian enforcing court will have to consider:

- 1 the basis on which foreign courts take jurisdiction;
- 2 the way in which foreign courts exercise their jurisdiction (*i.e.* the question of fairness to the defendant); and
- 3 whether, notwithstanding having passed the first two tests, there are public policy reasons not to enforce resulting judgments.

These concerns are discussed in greater detail in the remaining sections of this article.

⁴⁵ (...continued)

"Comity" in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws...

Hilton v. Guyot, 159 U.S. 113 (1895) at 163-4, cited by Estey J. in *Spencer v. The Queen*, [1985] 2 S.C.R. 278 at 283, *Morguard*, *supra*, note 1 at 1096.

He does not, however, consider how these principles might work on the international level, limiting his analysis to the needs of the Canadian federation.

THE BASIS ON WHICH FOREIGN COURTS TAKE JURISDICTION: The relationship with "real and substantial connection"

The notion of "real and substantial connection" is not novel. La Forest J. cited with approval the 1975 decision of *Moran v. Pyle*, where the Court decided that the province must have a "real and substantial connection" with the action in order to exercise jurisdiction over an Ontario corporate defendant who had no presence in Saskatchewan, but whose defective light bulb had caused the death of a Saskatchewan resident in that province. However, by using a variety of different terms to express the requisite nexus between a court and the matter before it, the Supreme Court has left open the possibility of several distinct possible connections. Must the forum province have real and substantial connections to the "damages suffered",⁴⁶ to "legal obligations" arising from the situation,⁴⁷ to the transaction or to the parties?⁴⁸ Are these connections alternative or cumulative? La Forest J. indicated that there must be some limit to the exercise of jurisdiction against persons outside the province. "[A] nexus may have to be sought between the *subject-matter of the action* and the territory where the action was brought [emphasis added]."⁴⁹ Paraphrasing the judgment, Joost Blom suggests that it leaves open an argument "for any connection that makes the province a 'reasonable place for the action...to take place'.⁵⁰

The lines of demarcation of the limits to competence established under the real and substantial connection test are unclear, although this requirement is designed to protect the defendant's interests

⁴⁶ *Morguard*, *supra*, note 1 at 1108.

⁴⁷ *Ibid*, at 1102.

⁴⁸ *Ibid*, at 1108.

⁴⁹ *Ibid*, at 1104.

⁵⁰ Blom, *supra*, note 17 at 741.

against being sued in "jurisdictions having little or no connection with transaction or the parties."⁵¹

Clearly, a Canadian court's duty to protect the legitimate interests of defendants is significantly higher when the judgment to be enforced comes from outside the enforcing court's symmetrical system, because there is no other available means to ensure that minimum Canadian notions of fairness have been applied to Canadian defendants.

Given North American realities, Canadian courts will be called upon to deal with many different types of American judgments. The American Fourteenth Amendment protection of due process provides one limit to extra-territorial jurisdiction in that country. To satisfy the requirements of due process, it is necessary that the defendant have some minimum contacts with the forum state.⁵² Whether the American minimum contacts are sufficiently "real and substantial" to meet the *Morguard* test will only become clear as Canadian courts recognize and exercise their obligations under *Morguard*.

The British Columbia Supreme Court, in three of the cases referred to above, saw no difficulty in extending the reasoning of *Morguard* to cases involving states of the United States, that is, to truly international situations. It is doubtful whether the Supreme Court of Canada really intended to go this far, this fast. The emphasis on the contrast between interprovincial and truly international cases certainly indicates that the Court was concerned specifically with the Canadian context. On the other hand, the second branch of the Court's reasoning—with its redefinition of comity and its concern for the evolving needs of international commerce—does leave room for expansion of the principle into the international forum. Clearly Gow and Spencer JJ. are willing to carry the logic into non-Canadian cases which would not benefit from the systemic protections inherent in our federal grouping. This may be appropriate, and even practical, insofar as American judgments are concerned, because they emanate from a legal system which is similar to our own. However, Canadian judges will eventually face more difficult

⁵¹ *Morguard*, *supra*, note 1 at 1108.

⁵² See *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945).

decisions when asked to recognize judgments from other foreign states where principles of justice, court procedures and judicial protections are less similar to ours. The provincial court judgments, so far, provide no workable grounds upon which to distinguish between one kind of foreign judgment and another, and they have not begun to consider what type of contacts between an issuing court and the action before it are sufficient.

The British Columbia Supreme Court seems unconcerned by this uncertainty, and as none of the recent cases will go to appeal, unfortunately we will not soon benefit from the wisdom of a higher court. In the Quebec and Ontario cases, the Courts of Appeal were not invited to express their views on this aspect of *Morguard*. In the meantime, defendants hoping to contest liabilities adjudicated in foreign jurisdictions should take care to make their arguments in the court of first instance, no matter how inconvenient or expensive it is to appear. Adopting the old "sit-tight" approach is no longer a safe alternative. Those who ignore foreign proceedings now face a serious risk of finding themselves bound in their home jurisdiction without recourse to traditional protections.

There is, of course, a danger to defendants in this approach: attorning to the foreign court's jurisdiction is one of the traditional grounds for enforcing a foreign judgment. Defendants would be well advised to make it abundantly clear that any challenge they make does not constitute an admission that the foreign court has jurisdiction.

THE WAY IN WHICH FOREIGN COURTS EXERCISE THEIR JURISDICTION: Fairness to the defendant

La Forest J. made it clear in *Morguard* that fairness to the defendant was an integral element of any scheme dealing with the recognition and enforcement of judgments from other jurisdictions. Permitting suit in accordance with the real and substantial connection test achieves a balance between the interests

of the defendant and the plaintiff as to *where* the suit will be decided. In addition, the way in which the suit is decided must also be fair to the defendant. In the Canadian context, though, this was not an issue.⁵³ Hence, the Supreme Court did not turn its mind to what would constitute a lack of fairness to defendants, e.g. whether the fairness which is sought is procedural, substantive or both, and offers no guidance to lower courts.

It is probably safe to say that proceedings which violate Canadian notions of natural justice would *prima facie* render a foreign judgment unenforceable in Canada. Hence, denying the defendant an opportunity to make a full defence (by, for example, unreasonably preventing the defendant from cross-examining and calling witnesses), denying the defendant access to counsel (although limiting the use of counsel in small claims courts might not be objectionable), obvious discrimination against the defendant on the basis of sex, ethnic or religious background, etc., would all likely be adequate grounds to deny enforcement of a foreign judgment. Presumably, too, a judgment which, while being free from any procedural defects, was based on substantive law which violated Canadian notions of justice and equality would not be enforced by Canadian courts. These issues, though, have only been addressed indirectly by the cases decided so far.

In *Clarke*, the Supreme Court of British Columbia commented, "No concern can be expressed about the quality of justice as *it relates to cases of this nature* in the state of California [emphasis added]."⁵⁴ Can one infer from this that there are, or could be, concerns about the quality of justice in the State of California in other types of cases? Whatever the answer, Josephson J. has not even explained how he came to his conclusion about California justice in this case. In *Minkler*, Spencer J. comments, the Arizona court's "process for service and for proceeding in default of appearance is similar to ours and

⁵³ See La Forest J.'s comments in *Morguard*, *supra*, note 1 at 1099-1100, quoted at page 12, *supra*.

⁵⁴ *Clarke*, *supra*, note 19 at 342 B.C.L.R., 252 D.L.R.

must be regarded as fair and properly restrained in terms of jurisdiction.⁵⁵ The fact that the United States minimum contacts test seems, on its face, quite different from our real and substantial connection test attracted no special attention from Spencer J. In *Vanstone*, Gow J. does not turn his mind to the matter, although he does appear to conclude that the Oklahoma judgment is free from "an odious taint", whatever that may be.⁵⁶ Neither *Boardwalk* nor *Regency* consider this question.

Even if one were to accept that in *all* civil actions the quality of justice in the State of California is more than acceptable, can the same be said for all jurisdictions in the United States? in the Americas? in Europe? In the rest of the world? How is this determination to be made? If it is an *ad hoc* one that each judge makes in each case, it would seem to become a question of fact which must be supported by the evidence.

It might, facetiously, be suggested that there is now a need for a Quality of Justice Rating Service, along the lines of the financial Bond Rating Services; the fact remains, though, that notions of fairness, justice and appropriate extra-territorial jurisdiction are different in different parts of the world. Eventually, Canadian courts will be faced with the problem of discriminating amongst judgments from many different jurisdictions. The *Morguard* decision seems to be aiming for a uniformity of approach across Canada; if its principles are to be adopted outside the Canadian context, it is hard to imagine how these issues could be addressed in a uniform way unless the Supreme Court develops appropriate rules for the enforcement of truly foreign judgments or Parliament adopts international agreements which pre-determine such issues. The most obvious other alternative is a case-by-case approach in each provincial court.

⁵⁵ *Minkler, supra*, note 25 at 354.

⁵⁶ *Vanstone, supra*, note 30 at 205-6.

PUBLIC POLICY EXCEPTIONS

Perhaps the most important symbolic aspect of the development of a practical international approach to recognition and enforcement is the manner in which Canadian and foreign courts resolve situations where there are significant differences in public policy between jurisdictions. Situations where there are significant differences in policy between the issuing court and the recognizing court provide, in a sense, the test for a recognition regime. These types of recognition and enforcement cases are also of special significance for another reason. The manner in which the public policy doctrine is interpreted and applied provides a useful indication of the attitude that courts are likely to take towards the enforcement of foreign judgments.⁵⁷

Viewed from this perspective, the outlook for easy and, perhaps, almost automatic recognition and enforcement of judgments emanating from American state and federal courts is very propitious, even if no coordinated legislative or judicial approach were to be adopted. In the five cases noted above, public policy grounds were raised directly or implicitly by defendants as a reason for declining recognition and enforcement of judgments from American state courts, and in all five the public policy argument was rejected. In *Clarke*, the defendant raised the public policy issue only indirectly and less persuasively by drawing the court's attention to the fact that the judgment awarded and being sued on was larger than would be typical in a similar British Columbia case.⁵⁸ This case probably provides little guidance on the developing post-*Morguard* judicial attitude towards the public policy element of foreign judgments, but the other four are very useful in that regard.

⁵⁷ See, for example, *Olshen v. Kaufman*, 385 P.2d 161 (Ore., 1963); *Lilienthal v. Kaufman*, 395 P.2d 543 (Ore., 1964), (hereafter referred to collectively as *Kaufman*).

⁵⁸ *Clarke*, *supra*, note 19 at 342 B.C.L.R., 252-3 D.L.R.

In *Minkler*, the public policy issue was raised directly and in a manner that might, quite conceivably, have been very persuasive, especially if the court had been generally disinclined to recognize foreign judgments. In this case, the defendant raised the public policy doctrine based on the considerable difference between the Arizona law on marital property and the law in British Columbia.⁵⁹ The Arizona law which imposes liability on a wife for the debts of her husband is, in fact, at opposite poles from the approach taken in British Columbia.⁶⁰ The debt in question was incurred in the normal course of the husband's business and his wife specifically declined to co-sign for the obligation. This defence was rejected on the grounds that the public policy exception should only apply in cases of "essential public or moral interests'...founded in moral turpitude' and 'inconsistent with the good order and solid interests of society.'⁶¹

The same issue arose in *Boardwalk and Resorts*, where New Jersey state courts gave judgment for the plaintiffs on legally incurred gambling debts. The judgments were sued on in Ontario and Quebec where the defendants asked that recognition and enforcement be refused on the grounds of public policy. The defendants' arguments would seem, at first glance, to be rather persuasive since gambling debts are often used in standard conflict of laws text books as an example of the type of foreign contract that should not be enforced on the basis of the public policy exception. Such debts are often seen as founded in moral turpitude and as inconsistent with public order and, in this case, the particular type of contracts, based as they were on gambling debts, would have been unenforceable in Ontario and Quebec.

⁵⁹ *Minkler*, *supra*, note 25 at 365.

⁶⁰ See *Family Relations Act*, R.S.B.C. 1979, c. 121.

⁶¹ *Nat'l Surety Co. v. Larsen*, [1929] 4 D.L.R. 918, [1929] 3 W.W.R. 299 (B.C.C.A), at 941 D.L.R., 320 W.W.R., *per* Macdonald J.A., quoted in *Block Brothers Realty Ltd. v. Mollard* (1981), 27 B.C.L.R. 17, 122 D.L.R. (3d) 323 (C.A.) *per* Craig J.A.

In *Boardwalk*, however, a divided Ontario Court of Appeal, notes that gambling is legal in the jurisdiction where the debt was originally incurred and, though it is formally illegal in Ontario, it is, in practice a regulated rather than a forbidden activity. In certain circumstances, gambling is permitted and, in the case of lotteries, even encouraged by the province. This persuaded the majority that gambling was no longer an activity that violated community moral standards in a manner which might call into play the public policy doctrine.

The Court's discussion of the morality of gambling gives rise to the question of whether the public policy doctrine has much further meaning for Ontario courts. Since gambling, prostitution, abortion and various once-forbidden sexual practices are now either completely legal or regulated in Canada, judgments from foreign jurisdictions that are based on such activity might well be enforceable in Ontario. Indeed, it is difficult to imagine a North American or western European court actually issuing a judgment which would be contrary to public policy as it has been interpreted in *Boardwalk*. While this is not necessarily a troubling outcome, it does suggest that there may be problems with the consistent application of this doctrine amongst the provinces. For instance, one wonders how a Nova Scotia or Alberta court might have dealt with the same case.⁶²

Another interesting aspect of these cases is that the Ontario, Quebec and British Columbia courts seem to make no distinction in their application of their respective public policy doctrines on the basis of the jurisdictional origin of the case. For example, the British Columbia court rejects the defence of public policy to a judgment emanating from Arizona on the basis of a definition of public policy drawn from a wholly domestic Canadian case involving parties in British Columbia and Alberta. In *Boardwalk* and *Resorts*, as well, no distinction is drawn between the application of the public policy doctrine to judgments from foreign or domestic Canadian courts. It is not surprising that no such distinction is

⁶² Based on *Clarke*, *Minkler* and *Vanstone*, there would appear to be little doubt that the British Columbia courts would have had no compunction enforcing either of the New Jersey judgments.

made because, pre-*Morguard*, no such distinction was drawn in the way foreign judgments were treated, regardless of whether they emanated from Canadian provincial courts or those of another nation.

This raises the question whether there may now be a need for different public policy standards depending on whether the judgment emanates from a Canadian or foreign jurisdiction. While it is unlikely that an interpretation and application of the public policy doctrine like that taken in *Boardwalk* would threaten to disrupt the development of a new Canadian standard based on *Morguard*,⁶³ there is no assurance that other provincial courts will take the *Boardwalk* approach. From the perspective of the future development of Canadian federalism, there is a risk that any public policy exception to what should now be the routine enforceability of judgments might compromise the development of a "full faith and credit" legal regime within Canada. Moreover, any public policy doctrine applicable to Canadian judgments creates risk and possible complications for plaintiffs using provincial enforcement procedures.

It is noteworthy, however, that American state courts have continued to use a public policy exception, albeit in very, very rare instances and without approval from the American Supreme Court, to refuse enforcement of domestic American judgments from sister courts, despite a constitutionally entrenched requirement that all courts afford "full faith and credit" to domestic legal decisions originating in other jurisdictions.⁶⁴ American practice on this point should be set in context before it is used as a precedent for Canadian legal development.

The United States has always had a constitutionally mandated requirement for "full faith and credit" while the Canadian version has only just begun to develop. The American requirement for "full faith and

⁶³ In fact, if Carthy J.A. is correct in looking to the *Criminal Code* for an indication of public policy, this would indicate that there is only one public policy in Canada. Hence, by definition, a valid judgment of a Canadian court would not violate the public policy of any other Canadian court. The defendant who wished to dispute a judgment on a public policy ground would be limited to appealing it in the province in which it was issued.

⁶⁴ Kaufman, *supra*, note 57.

credit" is grounded in the text of a revered Constitution while ours is derived from a virtually unknown recent court case. Since the American courts need not work to develop a full-faith-and-credit regime, they can afford a nascent, almost unused public policy exception applicable to domestic judgments. It is much less clear how a public policy exception applicable to judgments originating in Canadian courts might affect the future development of a "full faith and credit" legal regime in Canada.

In any case, since *Morguard*, it is increasingly evident that Canadian courts are likely to need to develop and apply at least two separate approaches to the public policy doctrine. There will likely be, first of all, a purely domestic public policy doctrine which admits of no or very, very few exceptions, much like that which exists in the United States. Any other approach to public policy in the domestic context could easily lead to either the diffusion or the defeat of full faith and credit within Canada. In practice, this would mean the Supreme Court of Canada would ultimately have to define the appropriate public policy standard and supervise its application in domestic decisions. If it did not, the promise of a new legal regime embodied in the *Morguard* decision would eventually be compromised.

The manner in which the public policy issue was raised and discussed in most of the cases noted above gives some cause for concern about the future development of the *Morguard* decision. While each of these decisions provided the courts some opportunity, at least in *obiter*, to refine the public policy doctrine which was raised by the defence, none did. Indeed, several courts defended their enforcement of non-Canadian judgments which might have been judged contrary to Canadian public policy by referring to *Morguard*. While such enforcement may be wholly appropriate, the cases did raise the issue of whether the same public policy doctrine should be applied to both foreign and domestic cases. It is, to an extent, understandable that the courts seem to have missed this point, because it is a new one in the Canadian context.

In the post-*Morguard* era, a meaningful public policy approach applicable to truly foreign judgments is probably both necessary and appropriate as a means to provide a regular review of, and perhaps a shield against, the enforcement of some judgments in Canadian courts. Such a doctrine needs to be carefully defined so that it does not disrupt the development of full faith and credit to Canadian judgments, where a very much more restricted doctrine may, perhaps, be appropriate.

CONCLUSION

That the *Morguard* decision will lead to a consideration and perhaps a restructuring of federalism in Canada is no longer any surprise. It is, however, interesting and noteworthy that a case involving the enforceability of a provincial judgment by other provincial courts may well lead to a re-consideration of the Canadian approach to the enforceability of truly foreign judgments. The British Columbia and other courts deserve applause for beginning to address the international implications of the *Morguard* case. If they have, so far, left the conceptual basis for their decisions undeveloped, that lacuna is understandable in the light of Canadian legal history. What must be of much greater concern is the implications of these cases for the future.

It is not at all clear, for example, whether the courts, by themselves, can develop a consistent and predictable and appropriate means for enforcing some foreign judgments and not others. Indeed, so far, the courts have done little to clarify either the jurisdictional basis on which they will judge the fairness of extra-territorial jurisdiction extended by foreign courts or their views about public policy in enforcement. While the common law tradition suggests that with time it will work out, in the present situation it might be more expeditious and convenient if Canadian and American governments helped the process of legal development along by defining appropriate extra-territorial jurisdiction and limited the operation of the public policy doctrine as between their courts by a treaty as the Europeans have done.

The Canadian courts face a difficult enough task working out the domestic implications of the *Morguard* decision without the added complexity and confusion of trying to define the implications of the case for foreign decisions. Governments should share this burden with the courts: it will not only lead to greater consistency and clarity in the international realm but would afford the courts a better chance to develop the domestic implications of *Morguard*; that is surely enough challenge for the next decade or so.