Foreign Judgments, the Commou Law and the Constitution: *De Savoye* v. *Morguard Investments Ltd*

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The Supreme Court of Canada, in *De Savoye* v. *Morguard Investments Ltd*, has expanded the grounds for recognition of foreign judgments at common law by adopting a test of whether there was a "real and substantial connection" between the action or damages suffered and the foreign, adjudicating jurisdiction. The author examines the historical, practical and constitutional reasons for the change, and draws attention to the likely consequences of the decision.

Dans l'arrêt *De Savoye* c. *Morguard Investments Ltd*, la Cour suprême du Canada a élargi les motifs de reconnaissance des décisions étrangères en *common law* par l'adoption d'un test de connexité (« lien substantiel et réel ») entre l'action ou le dommage encouru et la juridiction étrangère. L'auteur examine les justifications historiques, pratiques et constitutionnelles de cette évolution et discute des conséquences possibles de cette décision.

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Canadian courts have not been generous in recognizing foreign judgments, or even the judgments of the courts of other Canadian provinces. In *De Savoye* v. *Morguard Investments Ltd*[1] the Supreme Court of Canada chose to revise in a significant manner the grounds for recognition of foreign judgments at common law, and the decision has important implications for both interprovincial and international litigation. In the future, the jurisdiction of an extra-provincial court will be recognized if there is a "real and substantial connection" between the action or damages suffered and the adjudicating jurisdiction.[2] It is clear from the judgment that such a "real and substantial connection" can be established in many ways, far surpassing the previous and limited grounds for recognition of foreign jurisdiction. The result will be greater territorial effectiveness of judgments, though this will in itself give rise to a number of attendant problems.

There were three historical and practical reasons for the reluctance of Canadian courts to recognize extra-provincial judgments. The first was the traditional bias of both the common and civil law in looking to the defendant's location as the natural forum for litigation. Expressed in terms of the sovereign's power over the defendant, as evidenced by service of the writ within the jurisdiction, or through the maxim *actor sequitur forum rei*, the attitude of both legal traditions was to treat the as yet uncondemned defendant as the favoured party.[3] Any unjustified bias in this respect, as evidenced by an eventual judgment in favour of the plaintiff, would be compensated by the resulting ease of execution. Actions brought outside the defendant's natural forum should therefore not be recognized; they required a party presumed innocent to assume a major burden in resisting a claim, and gave rise to inevitable difficulties of recognition. Moreover, since most jurisdictions limited their own jurisdiction to cases where the defendant was served or domiciled within their territory, there was no asymmetry between their own territorial claims and those recognized as appropriate on the part of foreign tribunals.

These traditional reasons for jurisdictional reticence were considered appropriate for adoption in the Canadian Confederation in the nineteenth century. In his judgment on behalf of the Court, Justice La Forest states that the

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[1][1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [hereinafter *De Savoye* cited to S.C.R.]. For commentary on the decision see V. Black & J. Swan, "New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Ltd* v. *De Savoye*" (1991) 12 Advocates' Q. 489; J. Blom, "Conflict of Laws — Enforcement of Extraprovincial Default Judgment — Real and Substantial Connection: *Morguard Investments Ltd* v. *De Savoye*" (1991) 70 Can. Bar Rev. 733; P. Finkle & S. Coakeley, "*Morguard Investments Limited*: Reforming Federalism from the Top" (1991) 14 Dal. L.J. 340; for comment on the earlier decision of the British Columbia Court of Appeal, see V. Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989) 9 Oxford J. Legal Stud. 547; J. Blom, "Conflict of Laws — Enforcement of Extraprovincial Default Judgment — Reciprocity of Jurisdiction: *Morguard Investments Ltd* v. *De Savoye*" (1989) 68 Can. Bar Rev. 359.

[2]See *infra*, note 19.

[3]For the development of the common law tradition based upon personal service within the jurisdiction, see P.M. North & J.J. Fawcett, *Cheshire & North's Private International Law*, 11th ed. (London: Butterworths, 1987) c. 11, esp. at 185-87; for reception in common law Canada, see J.G. McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983) at 79-84. On the Roman, canonical and civilian origins of *actor sequitur*, see H. Solus & R. Perrot, *Droit judiciaire privé*, vol. II, *La compétence* (Paris: Sirey, 1973) at 288-94.

English historical approach was "unthinkingly" adopted by the common law courts of this country.[4] With respect, this language appears to be too harsh. While Canada had become a country in 1867, the distances between its constituent parts were to be greater than the distances between many European countries. The Canadian court structure, unlike that of the United States, was not federalized, and appeals from superior provincial courts of general jurisdiction could be taken directly to the Judicial Committee of the Privy Council until the mid-twentieth century, completely bypassing the Supreme Court of Canada.[5] No "full faith and credit clause" was included in the *British North America Act, 1867*,[6] and the federal presence was ensured in judicial matters only through the federal judicial appointing power and the possibility of creating, by statute, courts for the better administration of the laws of Canada. These federal powers came to be very important, but the autonomy of the provincial superior courts was perhaps the strongest reason for speaking of a Canadian Confederation, as opposed to Federation, and the political will to ensure a high level of judicial cooperation and collaboration appears to have been conspicuously lacking. In contemporary parlance, the institutional structure of nineteenth century Canada was dominated by a prineiple of "subsidiarity," in which only matters incapable of resolution at the local level could be elevated to a higher level of government or collaboration. Existing rules of recognition were apparently seen as entirely appropriate for these circumstances.

The third reason for the disinclination to expand the rules of recognition for foreign judgments is the universal and practical one that it is easier to begin lawsuits than to end them. A convincing case has thus recently been made that the dominant consideration in choice of forum is not ease of execution or even applicable law, but the civil procedure which will be used during the process of reaching a probable settlement.[7] It is more appropriate to think in terms of "settlement shopping" than in terms of "forum shopping." Rules of domestic jurisdiction had therefore first to be broadened; changing the rules for recognition of foreign judgments was necessary only for a much smaller number of cases, those which resisted the settlement process.

At the end of the twentieth century these reasons have lost much, though not all, of their force. Both common and civil law jurisdictions have seen great expansion in their grounds of domestic jurisdiction, to facilitate the cause of plaintiffs.[8] The expansion in domestic jurisdiction has been accompanied by a

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[4]*Supra*, note 1 at 1095.

[5]For the statistics relating to such appeals, see J.G. Snell & F. Vaughan, *The Supreme Court of Canada [:] History of the Institution* (Toronto: The Osgoode Society, 1985) at 180. Appeals from provincial jurisdictions directly to the Judicial Committee of the Privy Council outnumbered those from the Supreme Court of Canada to the Judicial Committee until the 1940s.

[6]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

[7]F.K. Juenger, "Forum Shopping, Domestic and International" (1989) 63 Tulane L. Rev. 553 notably at 573-74.

[8]In the common law provinces this has occurred through the legislative or rule-making process. See, for example, Rule 17 of the *Ontario Rules of Civil Procedure*, O. Reg. 711/89, providing eighteen grounds of domestic territorial jurisdiction. In Quebec it has been a largely jurisprudential development. See, for example, *Wabasso Ltd* v. *The National Drying Machinery Co.*, [1981] S.C.R. 578, 19 C.C.L.T. 177, 38 N.R. 224; *Air Canada* v. *McDonnell Douglas Corp.*, [1989] 1 S.C.R.

great increase in transborder circulation of goods, services and people, and an increase in transborder regulatory institutions. In Canada, the Supreme Court has gradually come to be accepted as a national institution, though still deprived of a firm constitutional base. The language of federation has in considerable measure supplanted that of confederation. The increase in transborder litigation has yielded more judgments susceptible of extra-provincial enforcement, and the possibility of such enforcement within Canada has been relied upon by the Supreme Court as an important reason for discouraging arbitrary seizure of defendants' assets prior to judgment.[9]

The financial difficulties of Mr. De Savoye therefore provided an excellent occasion for judicial re-statement of the rules for recognition of foreign judgments. De Savoye, while a resident of Alberta, became a guarantor of a mortgage debt owed to Morguard Investments and later took title to the lands, assuming the obligations of mortgagor. He then established residence in British Columbia and was served there by Morguard, which eventually obtained default judgments in Alberta against De Savoye for the deficiencies between the value of the property sold in foreclosure proceedings and the amount owing on the mortgages. De Savoye had not agreed to submit to the jurisdiction of the Alberta court. Morguard sued in British Columbia on the Alberta judgments for the deficiencies. After the British Columbia Supreme Court,[10] in a judgment upheld on appeal by the British Columbia Court of Appeal,[11] gave judgment on behalf of Morguard, De Savoye appealed to the Supreme Court, on the grounds that the common law permitted recognition of a foreign judgment in essentially only two circumstances: (i) where the defendant was present in the original jurisdiction when the action was commenced there; and (ii) the defendant had voluntarily agreed to submit to the jurisdiction of the original jurisdiction.

Speaking for the unanimous Court,[12] La Forest J. describes previous English and Canadian case law as firmly anchored in a principle of territoriality[13] which has become inappropriate for the modern world. He states that "the business community operates in a world economy" and that it is correct to speak of a "world community even in the face of decentralized political and legal power."[14] Accommodation of the flow of wealth, skills and people across state

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1554. The extent of the shift in thinking is evidenced by the language of Justice La Forest (*supra*, note 1 at 1103):

> 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?

These remarks are made, however, in the context of the actual litigation, in which the defendant had left the jurisdiction in which the cause of action had arisen, to establish himself elsewhere.

[9]*Aetna Financial Services Ltd* v. *Feigelman*, [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, commented on by H. Patrick Glenn, (1986) 64 Can. Bar Rev. 382.

[10][1988] 1 W.W.R. 87, 18 B.C.L.R. (2d) 262.

[11][1988] 5 W.W.R. 650, 27 B.C.L.R. (2d) 155.

[12]The Court was composed of Dickson C.J. (Chief Justice at the time of hearing), La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

[13]*Supra*, note 1 at 1095.

[14]*Ibid.* at 1098.

lines has therefore become imperative, and more generous rules adopted in the United States and the European Economic Community have operated "to the general advantage of litigants."[15] Such general considerations are reinforced within Canada by various constitutional and "sub-constitutional" arrangements (interprovincial mobility, federally appointed judges, a national code of legal ethics, interprovincial law firms), such that "a regime of mutual recognition of judgments across the country is inherent in a federation."[16]

Having thus reached the level of "integrating ... constitutional arrangements," Justice La Forest is led to ask whether a "full faith and credit clause" must be read into the constitution or whether the federal Parliament is empowered to create a legislative regime for the recognition and enforcement of judgments throughout Canada.[17] He declines to "go that far," however, since the case had not been argued on that basis, and concludes rather that:

> the underlying principles of comity and private international law must be adapted to the situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation.[18]

The general criterion of a "real and substantial connection" between the original adjudicating jurisdiction and the action or damages suffered should thus be used as the principal means of identifying foreign judgments susceptible of local recognition and enforcement.[19] The test of a "real and substantial connection" had been previously adopted by the House of Lords in *Indyka* v. *Indyka*[20] in relation to recognition of foreign divorce decrees.

The choice of the Supreme Court to adapt the rules of the common law as informed and limited by the constitution appears, with respect, to present clear advantages over the imposition of constitutional or federal legislative norms. It allows some (tolerable) diversity in the articulation of provincial rules of jurisdiction and recognition, whether in terms of content or sources of law. Quebec may therefore codify specific grounds of recognition without seeing a broad jurisprudential principle given ultimate authority. Other provinces remain enti-

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[15]*Ibid.*

[16]*Ibid.* at 1100.

[17]*Ibid.*

[18]*Ibid.* at 1101.

[19]*Ibid.* at 1108. La Forest J. refers to the "real and substantial connection" between the damages suffered by Morguard and the adjudicating jurisdiction (*ibid.*). In the next paragraph he refers to the test of a "real and substantial connection with the action (*ibid.*)." The two formulations could lead to different results. The "real and substantial connection" test is chosen in preference to that of "reciprocity," as developed in the judgment of Seaton J.A. in the British Columbia Court of Appeal, *supra*, note 11. The test of reciprocity would call for recognition where the jurisdiction assumed by the foreign court corresponded with a jurisdiction which would have been assumed by the local court in similar circumstances. La Forest J. refers to the reciprocity test as not "providing an answer to the difficulty regarding *in personam* judgments given in other provinces" (*supra*, note 1 at 1104), apparently because it provides no means of limiting overly broad claims of jurisdiction made by some jurisdictions, and would simply convert such broad claims to local jurisdiction into equally broad criteria for recognition of foreign judgments.

[20][1969] 1 A.C. 33.

tled to vary or supplement the common law as they consider appropriate. Invocation of an implicit and unarticulated constitutional norm would leave much to be decided in terms of its content, creating an unnecessary principle of uniformity while leaving a great deal of underlying uncertainty. Most importantly, reliance on the constitution would restrict the effect of more liberal recognition rules to interprovincial cases, while the reasoning of La Forest J. clearly points to the extension of such rules to foreign judgments as well. *De Savoye* has already been applied in two cases in British Columbia to permit recognition of U.S. judgments which would have been refused under previous rules.[21]

The constitution clearly remains relevant, however, to exorbitant provincial claims to jurisdiction and to illiberal efforts to re-structure recognition rules. La Forest J. states clearly that "if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province."[22] He cites with approval the judgment of Guérin J. of the Quebec Superior Court in *Dupont* v. *Taronga Holdings Ltd*,[23] to the effect that "service *ex juris* must measure up to constitutional rules."[24] Present jurisdictional rules of Prince Edward Island and Nova Scotia, permitting service *ex juris* upon any defendant within North America regardless of connection of the case with the province, are described as "very broad indeed."[25]

In the same manner, according to Justice La Forest, illiberal provincial efforts to exclude recognition of foreign judgments are subject to constitutional scrutiny, given the "inherent" necessity of some regime of mutual recognition of judgments across the country, requiring "a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation."[26] The threshold constitutional requirements relating to the conditions of recognition of extra-provincial judgments may, moreover, extend to foreign judgments. La Forest J. cites Professors von Mehren and Trautman to the effect that

> [t]he ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted.[27]

Constitutional scrutiny of conditions of recognition of foreign judgments would presumably be founded on section 7 of the *Canadian Charter of Rights and Freedoms*,[28] as opposed to limitation of provincial jurisdiction to questions of

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[21] *Clarke* v. *Lo Bianco* (1991), 59 B.C.L.R. (2d) 334, 84 D.L.R. (4th) 244 (S.C.); *Minkler & Kirschbaum* v. *Sheppard* (1991), 60 B.C.L.R. (2d) 360 (S.C.).

[22] *Supra*, note 1 at 1104.

[23] [1987] R.J.Q. 124, 49 D.L.R. (4th) 335.

[24] *Supra*, note 1 at 1109.

[25] *Ibid.* at 1104.

[26] *Ibid.* at 1101.

[27] *Ibid.* at 1096-97, citing A.T. Von Mehren & D.T. Trautman, "Recognition of Foreign Adjudications: A Survey and a Suggested Approach" (1968) 81 Harv. L. Rev. 1601 at 1603.

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

property and civil rights arising "in the province." Examples of existing provincial rules precluding enforcement of foreign judgments are found in British Columbia and Quebec legislation prohibiting recognition of foreign judgments in asbestos-related cases.[29]

The prospect of increased territorial effectiveness of judgments will of course give rise to difficulties of its own. Faced with a greater likelihood of enforcement, there will be more challenges to original jurisdiction, both on constitutional grounds and on grounds of *forum non conveniens*. The race to the courthouse will be accentuated, and more attention will have to be given in the future to the notion of *lis pendens* in interprovincial and international cases. There will also be development of the anti-suit injunction, as recent cases have already indicated.[30] All of these problems must simply be dealt with as they arise. The judgment of Justice La Forest is eloquent testimony to the need for judicial collaboration in a rapidly shrinking, but litigious, world.

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[29]See the *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 41.1(2); the *Civil Code of Lower Canada*, art. 8.1; the Quebec *Code of Civil Procedure*, arts 21.1, 180.1, commented on by H. Patrick Glenn, "La guerre de l'amiante" (1991) 80 Rev. crit. dr. int. privé 41.

[30]*T & N plc* v. *Workers' Compensation Board* (1990), 75 D.L.R. (4th) 1, [1991] 1 W.W.R. 243 (B.C.C.A.) (British Columbia residents enjoined from bringing asbestos-related suit in Texas); *Johns-Manville Corp.* v. *Dominion of Canada General Insurance Co.* (30 July 1991), Montréal 500-09-000372-912, J.E. 91-1251 (C.A.) (asbestos producer enjoined from reliance on injunction of California court to prevent suit in Quebec by insurer of asbestos producer for interpretation of insurance contract); *Southern Hills Investments Ltd* v. *Hamilton* (1991), [1992] 2 W.W.R. 51 (defendant enjoined from pursuing contempt action in U.S. designed to prevent litigation in Alberta).