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Supreme Court Creates New Risks for Canadian Defendants to Foreign Judicial Proceedings

In December 2003, the Supreme Court of Canada released an important decision with significant implications for Canadians who do business outside our borders. Specifically, the Court established new rules for determining the circumstances in which Canadian judges are to recognize and enforce decisions made by foreign judges in proceedings outside this country.

This case of *Beals v. Saldanha*, argued by a team of Baker & McKenzie lawyers, clarifies when Canadian individuals and businesses should retain foreign legal counsel to defend lawsuits in other countries. It sets out guidelines for Canadian courts to follow when faced with a situation in which a foreign judgment has been obtained against a Canadian party (or a party with assets in Canada) who is subsequently sued in Canada in an attempt to enforce that foreign judgment. The case is particularly applicable to circumstances in which the Canadian defendant fails to defend the foreign proceeding, resulting in the foreign judgment being obtained by default.

By a 6-3 majority decision, the Court ruled that, subject to the legislatures adopting a different approach by statute, the "real and substantial connection" test should apply to the law with respect to the recognition and enforcement of foreign judgments. That test allows for Canadians to be subject to the jurisdiction of a foreign court if a significant connection exists between the subject matter of the lawsuit and the foreign court. In *De Savoye v. Morquard Investments Ltd.*, a 1990 Supreme Court of Canada case, the "real and substantial connection" test was established as the appropriate standard for the recognition and enforcement of judgments as between provinces within Canada. The *Morquard* case suggested that the test might also apply to truly foreign judgments. However, the Supreme Court had never specifically decided a case addressing that situation before *Beals v. Saldanha*.

In upholding a divided 2-1 panel of the Ontario Court of Appeal, Mr. Justice Jack Major, writing on behalf of the six-judge majority, also clarified the scope of the defences available to Canadians facing enforcement proceedings. Specifically, he confirmed that if a foreign court has properly taken jurisdiction over a party, that

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party can only raise particular defences to the enforcement of a judgment granted by the foreign court. The merits of the dispute may be challenged in Canada on the basis that the judgment was obtained by fraud and, even then, only where the fraud allegations are new and not the subject of prior adjudication. Where the defendant can show that there are material facts not previously discoverable by the defendant and which potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment. The majority went on to state that a foreign judgment obtained by fraud that was undetectable by the foreign court will not be enforced in Canada.

The other defences to foreign judgments were identified as being: 1) fraud relating to the jurisdiction of the foreign court; 2) if the foreign court's procedure, while valid there, is not in accordance with Canada's concept of natural justice; and 3) the "public policy" defence, which prevents the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.

In rejecting the appellants' arguments and allowing the enforcement of a default judgment from Florida, the majority held that defendants are presumed to know the law of the jurisdiction seized with an action against them. This conclusion may come as quite a surprise to Canadians engaged in business around the world, which is frequently conducted in jurisdictions with very different legal traditions from those with which we are familiar in Canada. Presumably in recognition of the potentially problematic application of this decision to judgments from such jurisdictions, the majority offered caveats to their conclusions. Specifically, the majority prefaced its findings regarding foreign judgments obtained on default with the proviso that, "in the absence of unfairness or other equally compelling reasons ... there is no logical reason to distinguish between a judgment after trial and a default judgment." As an additional proviso, the court offered the following comment, which could form the basis for future refinement of the test: "Unusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment." It remains unclear what circumstances will constitute an "unusual situation", however it would appear that the bar has been set rather high as the facts of this case were somewhat unusual yet, according to the court, did not "justify speculating on that possibility".

The factual background of the case is as follows: In 1980 the Canadian defendants, the Saldanhas and the Thivys, were friends who paid US \$4,000 for a lot in Florida. In 1984 a real estate agent in Florida called one of the defendants, Mrs. Thivy to say that he had a prospective buyer for their piece of land. After consulting with the other owners, Mrs. Thivy told the agent that they were in agreement about selling the lot and were asking US \$8,000 for their lot. The American plaintiff Beals had been shown Lot 1 by the real estate agent. When the plaintiff's written offer arrived, the defendant noticed that it referred to "Lot 1", whereas her group owned Lot 2. In a telephone conversation with the Florida agent, the defendant was told to change the number "1" to "2" on the offer to indicate the correct lot to be sold. This amended offer was signed by the four defendants, sent to the agent in Florida, and accepted by the plaintiffs. The plaintiff Beals said he did not read the closing documents that referred to Lot 2. Upon closing, the Canadian defendants received their asking price of US \$8,000.

In early 1985 the plaintiff Beals discovered that he had been building on the wrong lot and called to inform Mrs. Thivy of this situation. She explained what had happened and referred Mr. Beals back to his agent. Two months later, the Canadian defendants received notice of an action brought by the American plaintiffs in Florida, claiming "damages in excess of \$5,000" [US] for inducing the plaintiffs to buy the wrong lot through false representation." The Canadian defendants submitted a defence to the Florida court. They were subsequently notified that the action had been dismissed "without prejudice". Several months later, the defendants received notice of a second action, virtually identical to the first one, but brought in a different Florida county. The Thivys filed a copy of the same defence on behalf of all of the defendants, thereby submitting to the Florida court's jurisdiction and rendering the "real and substantial connection" analysis moot in relation to those defendants. However, as the

Saldanhas were found not to have authorized their friends' filing of a defence on their behalf, they did not submit or "attorn" to the jurisdiction of the foreign court. None of the defendants filed any response to the three amended notices of the second action, as is required under Florida law (but not under Ontario law).

In July 1990 the Canadian defendants were advised that a Florida court had entered a default judgment against them. They later received notice of a Florida jury trial to assess damages, but did not appear. In December the Canadian defendants received a judgment against them for US \$260,000. They sought legal counsel and were advised by an Ontario lawyer that the judgment could not simply be enforced in Ontario and that the defendants would have an opportunity to fully defend any Ontario proceedings by explaining the merits of their position. The American plaintiffs then commenced a proceeding in Ontario to enforce the Florida judgment. At the Ontario trial, the Canadians called evidence in their defence to support their allegation that the Florida judgment had been obtained as a result of the plaintiffs' false accusations to the jury assessing the damage claim. The plaintiffs did not counter this evidence.

According to the Ontario trial judge, the Florida judgment ought not have been enforceable because of fraud based on the jury having been misled by the plaintiffs in their accusation of false misrepresentation. While one of the three Ontario appellate judges agreed, the majority of the Court of Appeal disagreed and held that the judgment was enforceable in Ontario. In upholding the decision of the majority of the Ontario Court of Appeal, the Supreme Court of Canada granted the American plaintiffs a damages award well in excess of CDN \$1 million (including interest and costs), damages the Canadian defendants could not have anticipated when entering into a Florida real estate transaction for US \$8,000.

The primary conclusion to be drawn from this case is that Canadians deciding how to respond to foreign judicial proceedings must take great care in assessing the situation and should always consult counsel with experience in the area. Preferably such consultation would take place at the point of entering into any business arrangement in a foreign country. In any event, Canadian defendants or those with assets in Canada should consult Canadian legal counsel with expertise in the enforcement of foreign judgments immediately upon learning that they have been or may be named as a defendant to a foreign legal proceeding.

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