Enforcing Foreign Judgements in Canada:
It Just Got A Lot Easier

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Since the Supreme Court of Canada decision in Morguard Investments v. DeSavoye, Canadian courts have become increasingly more willing to enforce foreign judgments. In essence, if the foreign jurisdiction has a real and substantial connection to the action giving rise to the foreign judgment, Canadian courts will enforce the judgment unless it was obtained by fraud, contravenes public policy, or it amounts to a denial of natural justice.

What constitutes a real and substantial connection depends on the facts of each case. Factors that have frequently been considered include the residency of the plaintiffs or defendants, the place of business of the defendants, and the place where the events giving rise to the action occurred.

In the recent case of Beals v. Saldanha, the Ontario Court of Appeal gave a marked boost to the enforcement of foreign judgments by narrowly restricting fraud, public policy or natural justice as bases for refusing to enforce foreign judgments.

The Facts

The case stems from dramatic facts.

In 1981, Mrs. Rose Thivy, her husband and two friends purchased a lot in a Florida subdivision for approximately (Can.) $6,000.00. They neither visited the lot nor saw pictures of it. In 1984, a Florida real estate agent phoned Mrs. Thivy and said he had a prospective purchaser. The Thivy group agreed to sell the lot for approximately (Can.) $12,000.

After receiving the offer, Mrs. Thivy noticed that it referred to Lot 1. She in fact owned Lot 2. She spoke with the agent who advised her to change the figure 1 to 2 on the offer. The legal description of the property continued to be the legal description of Lot 1.

In 1985, Mr. Beals, the principal of the corporate purchaser phoned Mrs. Thivy and told her he had been sold the wrong lot. Mrs. Thivy told him of her discussion with the real estate agent and suggested that Mr. Beals contact the agent. In March 1985 Mrs. Thivy received a Statement of Claim from a Florida court claiming damages “in excess of $5,000.” She prepared a Defence and mailed it to the court. That action was ultimately dismissed without prejudice and a new one commenced. Again Mrs. Thivy mailed a Defence to the Florida court.

* I would like to thank Amelia Cooper, a summer student at McMillan Binch for her research assistance.

1 (1990), 76 D.L.R. (4th) 256 (S.C.C.) [hereinafter “Morguard”]

2 June 29, 2001 as yet unreported. Computer citation: (2001), CarswellOnt 2286
The Florida plaintiffs amended their Claim three times. Under Florida rules a fresh Defence is required with each amendment. The defendants failed to respond to the amended Defences and did not respond to a Notice of Default hearing. Judgment was ultimately issued against them, as a result of which the $12,000 sale of the property became a liability of $800,000.³

Most of the judgment was attributable to lost profits. It appears that the plaintiffs had bought the land with the intention of building a model home to induce owners of neighbouring properties to retain the plaintiffs to build on neighbouring lots.

**The Lower Court Judgment**

When the plaintiffs attempted to enforce their judgment in Canada the lower court judge refused noting that:

- Construction of the model homes stopped not because of the erroneous lot purchase but because of a falling out between the corporate purchaser’s two shareholders;
- The corporation that would have earned the allegedly lost profits was dissolved before the law suit began and the shareholders had no status under Florida law to bring the claim;
- A Florida real estate expert had testified that it was implausible for a purchaser of land to rely on a representation of ownership in an agreement of purchase and sale instead of performing his own title search.

The judge of first instance in Canada concluded that these facts amounted to fraud on the Florida court and refused to enforce the judgment.

In addition, the lower court judge held that easier enforcement of foreign judgments under the substantial connection test meant that “Canadian courts will, of necessity, have to develop some sort of judicial sniff tests in considering foreign judgments.”⁴ This would require courts to broaden the public policy defence where the conduct in the foreign court is not covered by the traditional public policy or natural justice defence but “is yet so egregious as to raise a negative impression sufficient to stay the enforcing hand of the domestic court.”⁵

**The Judgment of the Court of Appeal**

The Court of Appeal roundly rejected the lower court’s definition of the fraud exception and broadening of the public policy exception.

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³ The judgment was for US$260,000.00 plus 12% per annum which amounted to Cdn$800,000.00 (approximately US$550,000.00) by the time enforcement was sought in Canada.

⁴ (1998), 42 O.R. (3d) 127 at 144

⁵ Ibid. at page 145.
The Court of Appeal began its analysis by reiterating the principle that the correctness of a foreign judgment is irrelevant to its enforcement. The lower court’s concerns about enforcing the judgment all went to the correctness of the Florida decision. The Court of Appeal did recognise, however, that there was a tension between this principle and the principle that a judgment would not be enforced if it was obtained by fraud. The wider the scope of the fraud defence, the more likely a Canadian court would be drawn into re-examining the merits of the claim adjudicated upon in the foreign court.  

The Court of Appeal therefore restricted fraud as a basis for refusing to enforce foreign judgments to cases where fraud is based on facts which came into existence after the foreign judgment was obtained or where the facts existed at the time the foreign judgment was obtained but could not have been discovered through the exercise of reasonable diligence before the foreign judgment was granted. 

The Court noted that, in the absence of a reasonable diligence requirement, defendants could simply ignore foreign proceedings and seek to advance their version of the facts under the guise of a fraud defence in Canadian enforcement proceedings. In other words, defendants who ignored foreign proceedings would be able to re-litigate the merits while defendants who participated in foreign proceedings would be precluded from doing so.

The due diligence requirement was also found to be consistent with judicial comity, the policy underlying the recognition and enforcement of foreign judgments. It respects the process of the foreign courts by requiring Canadian defendants to attorn to those courts if they have a substantial connection to the facts underlying the proceedings.

When applying these principles to the case before them, the Court of Appeal observed that the facts on which the Canadian defendants relied for their allegation of fraud were easily ascertainable had the defendants participated in the Florida proceeding.

The Court of Appeal equally rejected the suggestion that easier enforcement of foreign judgments required a broader public policy exception. On the contrary, the rationale underlying broader enforcement of foreign judgments supported a narrow application of the public policy defence.

A dissenting judgment in the Court of Appeal would have upheld the lower court’s decision and refused enforcement of the Florida judgment on both the fraud exception and on the basis that the Canadian defendants were denied natural justice in the Florida proceedings because the complaint did not alert them to “the extent of their jeopardy”. The Florida Statement of Claim indicated only that it claimed damages of “over $5,000.00” rather

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6 (2001), CarswellOnt 2286 at para. 38
7 Ibid. at para. 42
8 Ibid. at para. 42
9 Ibid. at para. 48
10 Ibid. at para. 83
than giving an indication of the specific amount of the claim or potential claim. The majority, however, noted that the defendants took no steps to set aside the Florida judgment when they did discover the exact amount awarded against them. By that time they surely knew the nature of their jeopardy yet did nothing.\footnote{Ibid. at para. 102}

**Conclusion**

The case is good news for foreign plaintiffs with potential actions against Canadian defendants. The strategic advantage of litigating on one’s “home turf” can be substantial. The *Beals* case sends a strong message to lower courts in Canada that those strategic advantages provide no basis for refusing enforcement, even on striking facts.