OPEN SEASON: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CANADA AFTER BEALS v. SALDANHA

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I. INTRODUCTION

At the end of last year, the Supreme Court of Canada handed down its decision in *Beals v. Saldanha.*[1] This case had appeared some years before in the courts of Ontario where a Florida plaintiff had sought the recognition and enforcement of a Florida federal district court decision awarding damages against Ontario resident defendants concerning a small land purchase that had gone bad. It was unexceptional, save perhaps for the impressive quantum of damages enterprising Florida plaintiffs managed to secure in default proceedings before the Florida court. Nevertheless, it became the chosen vehicle of Canada's highest court to complete the evolution of a judge-made transformation of Canadian conflict of laws principles specific to the recognition and enforcement of foreign judgments that it had embarked upon thirteen years earlier with its seminal ruling in *Morguard Investments Ltd. v. DeSavoye.*[2] For an American legal audience, the decision is significant. It confirms the correctness of lower court rulings which had applied the *Morguard* precedent— itself a case confined to inter-provincial recognition and enforcement within the Canadian federation—to foreign judgments. Most of these cases, not

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1. Beals v. Saldanha, [2003] 3 S.C.R. 416, 465.

2. Morguard Investments, Ltd. v. DeSavoye, [1990] 3 S.C.R. 1077.

surprisingly, emanated from various U.S. jurisdictions, with initially unanticipated and sometimes harsh consequences for Canadian defendants.[3]

From a Canadian legal standpoint, particularly from an incoming perspective on international litigation, *Beals* and the previous pattern of Canadian court decisions that it has vindicated, suggests a level playing field that may have been irretrievably lost, absent legislative redress domestically or, if possible, by treaty at the international level.[4] That too, should be of interest from an American law reform perspective that has perennially viewed the U.S. legal system as considerably more hospitable to the enforcement efforts of foreign plaintiffs than American plaintiffs tend to receive from other legal systems.[5] But my basic message today is that Americans have nothing to complain about north of the border. For hunters of compensation in Canada for damages done to them outside of Canada, we might even go so far as to say that the Supreme Court has declared an "open season" on Canadian assets.

II. A REVISED STATUS QUO

Not long ago, Canadian courts rigorously adhered to the English—somewhat imperial—common law approach to recognition and enforcement issues which allowed that, unless the Canadian defendant had voluntarily attorned to the jurisdiction of the foreign court, or was otherwise deemed to be found within that jurisdiction in certain circumstances,[6] the foreign proceeding could be safely ignored. The foreign plaintiff would be required to sue on its judgment, against which a full defence on the merits could then be waged at home. This

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3. The new standard for recognition and enforcement raised serious issues for Canadian defendants including the following: retrospective operation of *Morguard*, substantially different standards of foreign justice and unpredictability of outcomes. H. Scott Fairley, *Enforcement of Foreign Judgments by Canadian Courts: A New Age of Uncertainty*, 2 CAN. INT'L LAW. 1 (1996) [hereinafter *Enforcement of Foreign Judgments-Can. Cts.*].

4. H. Scott Fairley, *In Search of a Level Playing Field: The Hague Project on Jurisdiction and the Recognition and Enforcement of Foreign Judgments*, *in* TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: CONFLICT AND COHERENCE 57 (Chi Carmody *et. al.* eds., 2003).

5. Ronald A. Brand, *Foreign Judgments in U.S. Courts*, 2 CAN. INT'L LAW. 10 (1996); *see generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481–82 (1987).

6. Emanuel v. Symon, 1. K. B. 302, 309 (Eng. C.A. 1908) (per curiam):

> 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 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.

Vaughan Black, *Enforcement of Judgment and Judicial Jurisdiction in Canada*, 9 OXFORD J. LEGAL STUD. 546 (1989) (commenting critically on the pre-*Morguard* approach of Canadian courts).

rule applied co-equally to the enforcement of rulings from one province to another within the Canadian federation.

Morguard abandoned the traditional English formula in relation to the inter-provincial context, importing the American constitutional concept of "full faith and credit"[7] as between coordinate jurisdictions within national boundaries, and posited a new formula. The enforcing court would recognize and enforce the judgment of the originating court, precluding any further defense on the merits, provided that first, the adjudicating court had properly exercised jurisdiction under its own rules and second that the enforcing court could satisfy itself that there was "a real and substantial connection" between the adjudicating jurisdiction and determinative features of the *lis* or the Defendant as a party.[8] However, the *Morguard* Court, in prophetic unanimous reasons in *obiter* authored by Justice LaForest, suggested that the same approach might apply to foreign judgments of comparably *civilized* jurisdictions, premised on the notion of international comity. Citing *Spencer v. The Queen*, the *Morguard* court quoted, "[T]he 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..."[9]

The rationale for resurrecting this nineteenth century notion straight from the pen of Justice Gray in *Hilton v. Guyot*[10] was, however, grounded in the late twentieth century realities of a trade dependent country. Justice LaForest elaborated:

> Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under the circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.[11]

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7. U.S. Const. art. IV, § 1.

8. *Morguard*, [1990] 3 S.C.R. at 1103–1109. *See Enforcement of Foreign Judgments-Can.Cts.*, *supra*, note 3, at 2; Joost Blom, *Reform of Private International Law by Judges: Canada as a Case Study*, *in* REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF SIR PETER NORTH 31–47 (James Fawcett ed., 2002).

9. *Morguard*, [1990] 3 S.C.R. at 1096.

10. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

11. *Morguard*, [1990] 3 S.C.R. at 1098.

This invitation to a dramatically liberalized approach was taken up enthusiastically by lower courts across Canada.[12] These endorsements entailed harsh consequences for Canadian defendants. Many were caught by the retrospective application of the new rule to pre-*Morguard* decisions made not to defend foreign lawsuits;[13] others by exposure to damages awards—notably from U.S. civil juries—far in excess of anything a Canadian court would have awarded had the defendant been sued in a Canadian jurisdiction at first instance.[14] Nevertheless, the Supreme Court chose not to revisit such concerns until it granted leave to appeal in Beals.

III. CONFIRMING THE STATUS QUO: FACT AND LAW FROM *BEALS*

A. Compelling Facts

An ultimately very unlucky Canadian couple, the Saldanhas, together with another Canadian couple, the Thivys, had purchased in 1981 a vacant lot in Florida for $4000. Three years later, they were approached by a real estate agent to sell the lot to two American couples, which they agreed to do for the sum of $8000. There was a mistake in the property description in the original offer, which Mrs. Thivy corrected, and the transaction was completed. However, some months later, the American purchasers, the Beals and the Foodys, discovered they were building a model home for a development project they had in mind on the wrong lot, adjacent to the one they had actually purchased.

Predictably, in the spring of 1985, a variety of individuals were sued in Florida State Court, including the Saldanhas, who filed a defense on their own behalf; the suit was withdrawn, having been commenced in the wrong county. A second suit was commenced in the fall of 1986, this time in the Circuit Court of Sarasota County. The Canadian defendants were served in Ontario and Mrs. Thivy filed an unsigned duplicate of the Saldanhas' previous defense on their behalf. Thereafter, amended claims were served and filed in the Florida court, but no further defenses were forthcoming from the Canadians who, alas, had not retained Florida counsel. In the end, only the Canadians were left at the end of a default judgment on liability in the summer of 1990. A further jury award on damages followed in late 1991 for $210,000 in compensatory damages, an

12. *Enforcement of Foreign Judgments-Can. Cts.*, *supra* note 3; Blom, *supra* note 8.

13. Moses v. Shore Boat Builders Ltd., (1993) 106 D.L.R. (4th) 654 (BCCA), leave to appeal refused, (1994) 24 C.P.C. (3d) 294n (Can. Sup. Ct.) (post-*Morguard* enforcement of pre-*Morguard* Alaska Judgment). *See* Blom, *supra* note 8, at 38–39.

14. *See generally* Joost Blom, *The Enforcement of Foreign Judgments: Morguard Goes Forth into the World*, 28 CAN. BUS. L.J. 373 (1997); *Enforcement of Foreign Judgments-Can. Cts*, *supra* note 3, at 3–5.

additional $50,000 in punitive damages, and post judgment interest of twelve percent per annum, notice of which the Saldanha received for Christmas 1991.[15]

At this point, the Saldanhas did consult a lawyer in Ontario. Unfortunately, that lawyer was not aware of the *Morguard* precedent of the previous year or its possible application to foreign as well as interprovincial enforcement actions. He advised the Saldanhas to do nothing in Florida, as they had not secured legal representation in Florida, and, as and if necessary, they could offer a full defense in Ontario.[16] This was bad advice.

B. The Lower Court Rulings

Enforcement proceedings began in Ontario in 1993. At first instance, the Ontario trial court refused to enforce the Florida judgment, notwithstanding *Morguard*; however, not without some difficulty.[17] Justice Jennings expressed considerable discomfort with the practical consequences of Florida justice for the Saldanhas, and equal discomfort with the limits of the law he felt obligated to apply. In the result, Justice Jennings reached to find an element of fraud based on the absence of certain facts before the Florida jury, and also refused to enforce on grounds of public policy. Although none of the traditionally narrow grounds precluding application of penal, revenue or other foreign public law fit the situation, Justice Jennings posited an extension of doctrine to encompass a "judicial sniff test" allowing for non-enforcement in what he viewed as the particularly egregious circumstances that confronted him in this case.[18]

The Ontario Court of Appeal reversed in favor of enforcement based on *Morguard* principles.[19] Justice Doherty, joined by Justice Catzman on a three-judge panel, rejected the defense of fraud, restricting it to extrinsic circumstances, not those which the Saldanhas could have discovered with reasonable diligence and countered had they defended themselves in Florida. The Court viewed Justice Jennings' imaginative extension of public policy in like terms. No matter how egregious the totality of the circumstances, Justice Doherty concluded: "The fact of the matter is the respondents chose not to go to court in Florida and demonstrate just how 'strange and wonderful' the allegations in the complaint were,"[20] and that decision was fatal to any defense on the merits in Ontario.

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15. *Beals*, [2003] 3 S.C.R. at 427–31.

16. *Id.* at 431.

17. Beals v. Saldanha, 42 O.R.3d 127 (Gen'l Div., 1998).

18. *Id.* at 144.

19. Beals v. Saldanha, 54 O.R.3d 641 (C.A. 2001).

20. *Id.* at 662.

In lone dissent, Justice Weiler appealed to substantive elements of natural justice in the context of undisclosed jeopardy arising from features of the Florida legal system not readily apparent to foreign defendants. For her, the procedural requirement of notice was based on "the underlying fundamental principle of justice that defendants have a right to know the case against them and to make an informed decision as to whether or not to present a defence,"[21] an opportunity never squarely presented to the Saldanhas. To this perception was added, in the context of a potential fraud on the Florida court, the apparently less than frank disclosure of material facts by counsel for the Beals to the Florida judge and jury.[22]

Of course, all of the foregoing procedural pitfalls and consequential substantive liabilities would have become apparent had the Saldanhas engaged competent Florida counsel. What separated the majority and dissenting voices on the Ontario Court of Appeal, mirrored again in the Supreme Court, was their profoundly different views on the necessity of taking that critical step.

IV. THE LAST WORD AND A FEW DISSENTING VOICES

A majority of the Supreme Court of Canada (6-3) affirmed the Ontario Court of Appeal in favor of enforcement.[23] Justice Major opined:

International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in Morguard ... can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. 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 enforcement and recognition of foreign judgments.[24]

The question remains, of course, whether the common law result merits a statutory response. Hard cases often make bad law and perhaps they should not invite statutory revision of otherwise positive and necessary organic legal developments. Justice Major appears not unreasonable in noting:

> Here, the appellants entered into a property transaction in Florida when they bought and sold land. Having taken this positive step to bring themselves with the jurisdiction of Florida law, the appellants could reasonably have been expected ... to defend the claim pursuant to the Florida rules. Nonetheless, they were still entitled, within ten

21. *Id.* at 675–76 (Weiler J., dissenting).

22. *Id.* at 670.

23. *Beals*, [2003] 3 S.C.R. at 431.

24. *Id.* at 436.

> days, to appeal the Florida default judgment, which they did not. In addition, the appellants did not avail themselves of the additional one-year period to have the Florida judgment for damages set aside. While their failure to move to set aside or appeal the Florida judgment was due to their reliance upon negligent legal advice, that negligence cannot be a bar to the enforcement of the respondents' judgment.[25]

Leaving aside the retrospective application of *Morguard* to the circumstances confronted by at least the Saldanhas,[26] Justice Major does have a point. The substantial connections test, once accepted, appears unassailable because if a foreign court did not properly take jurisdiction, its judgment will not be enforced. Here, it was correctly conceded by the litigants that the Florida court had a real and substantial connection to the action and parties.[27] On this general proposition, the Court was essentially unanimous.[28] The more troublesome question, however, is whether, in the wake of adopting the new test, existing defenses to enforcement elaborated under the previous Anglo-Canadian common law approach of formal attornment, also require revision. Justice Jennings thought as much at first instance in resorting to his "judicial sniff test" and Justice Major was not unmindful of such considerations, in which respect it is appropriate to quote the Justice at length:

> The defenses of fraud, public policy and lack of natural justice were developed before *Morguard, supra,* and still pertain. This Court has to consider whether those defenses, when applied internationally are able to strike the balance required by comity, the balance between order and fairness as well as the real and substantial connection, in respect of enforcing default judgments obtained in foreign courts.

These defenses were developed by the common law courts to guard against potential unfairness unforeseen in the drafting of the test for the recognition and enforcement of judgments. The existing defenses are narrow in application. They are the most recognizable situations in which an injustice may arise but are not exhaustive.

Unusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment. However, the facts of this

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25. *Id.* at 440.

26. The Court found that the co-defendant Dominic Thivy had secured representation in Florida and had specifically submitted to the jurisdiction of the Florida Court. *Id.* at 438.

27. *Id.* at 441.

28. *Beals,* [2003] 3 S.C.R. at 456 (Binnie, J., Iacobucci, J., concurring); *Id.* at 473 (LeBel, J., concurring).

case do not justify speculating on that possibility. Should the evolution of private international law require the creation of a new defence, the courts will need to ensure that any new defences continue to be narrow in scope, address specific facts and raise issues not covered by the existing defences. (emphasis added)[29]

Justice Major goes on to apply the traditional defenses without enlargement, essentially concurring with the Ontario Court of Appeal.[30] It is with these applications, however, that the two dissenting opinions on the Supreme Court take issue with the majority.

Justice Binnie, joined by Justice Iacobucci, readily agrees that the substantial connections test "provides an appropriate conceptual basis for the enforcement in Canada of final judgments obtained in foreign jurisdictions...."[31] At the same time, however, the Binnie/Iacobucci dissent emphasizes the original domestic context and "constitutional flavour" of *Morguard* stressing: "We should not backtrack on the importance of that distinction."[32]

The difference between a known system of justice within national borders and the undisclosed mysteries of foreign legal systems provide the touchstone for Justice Binnie's dissent from the majority, but in the end, he does so within the traditional defence of a failure of natural justice as a ground for non-enforcement, purportedly without enlargement.[33]

My colleague Major J. holds, in effect, that the appellants are largely the victims of what he considers to be some ostrich-like inactivity and some poor legal advice from their Ontario solicitor. There is some truth to this, but such a bizarre outcome nevertheless invites close scrutiny of how the Florida proceedings transformed a minor real estate transaction into a major financial bonanza for the respondents.

While the notification procedures under the Florida rules may be considered in Florida to be quite adequate for Florida residents with easy access to advice and counsel from Florida lawyers (and there is no doubt that Florida Procedures in general conform to a reasonable standard of fairness), nevertheless the question here is whether the appellants *in this proceeding* were sufficiently informed of the case against them, both with respect to liability and the potential financial consequences, to allow them to determine in a reasonable way whether or not to participate in the Florida action, or to let it go by default.[34]

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29. *Beals*, [2003] 3 S.C.R. at 441-42.

30. *Id.* at 440–453.

31. *Id.* at 456 (Binnie J., concurring).

32. *Id.*

33. *Id.*

34. *Id.* at 458–59 (emphasis in original).

I do not propose to detail all the steps in Justice Binnie's argument. It emphasizes the idiosyncrasies of Florida procedural rules—at least from a Canadian perspective—requiring defendants to refile in response to each and every amended claim, rendering their previous defense non-existent.[35] additionally there was other information the appellants did not know. In particular, the gradual removal of other domestic defendants, notably the Florida real estate agent and title insurer with whom the respondents settled for comparatively modest sums while retaining title to the property conveyed,[36] all of which remained invisible to the Saldanhas. On these cumulative findings, Justice Binnie concludes:

I do not accept the suggestion that the appellants are the authors of their own misfortune on the basis that if they had hired a Florida lawyer they would have found out about all of these developments. The Appellants decided not to defend the case set out against them in the Complaint. That case was subsequently transformed. They never had the opportunity to put their minds to the transformed case because they were never told about it.

I do not suggest that any one of the foregoing omissions of notice would necessarily have been fatal to enforcement of the respondents' default judgment in Ontario. Cumulatively, at all events, these continuing omissions seem to me to demonstrate an unfair procedure which in this particular case failed to meet the standards of natural justice.[37]

In a separate dissenting opinion, Justice LeBel, expresses much stronger concerns. In reasons considerably more expansive than those provided by either the majority or the Binnie/Iacobucci dissent, Justice LeBel asserts that the possible circumstances arising within foreign legal proceedings as illuminated in *Beals* call for a reformulation of the traditional nominate defences to enforcement.

Justice LeBel does not explicitly endorse an expansion of the public policy defence to include Justice Jennings' "judicial sniff test," and notes international efforts at the Hague Conference on Private International Law to develop a treaty instrument that would confer discretion on a court to limit the quantum of a foreign judgment if the court was satisfied that the amount of the award was "grossly excessive."[38] However, he would "continue to reserve the public policy defence for cases where the objection is to the law of the foreign forum,

35. *Beals*, [2003] 3 S.C.R. at 464-65.

36. *Id.* at 465–69.

37. *Id.* at 470–71.

38. *Id.* (LeBel, J., dissenting) (citing Jacob S. Ziegel, *Enforcement of Foreign Judgments in Canada, Unlevel Playing Fields and Beals v. Saldanha: A Consumer Perspective*, 38 CAN. BUS. L.J. 294, 306–307 (2003) (citing Hague Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, art. 33, http://hcch.e-vision.nl/upload/wop/jdgm_drafte.pdf)).

rather than the way the law was applied, or the size of the award *per se*."[39] Nevertheless, Justice LeBel is equally clear that "there is more work for this defence to do. It should also apply to foreign laws that offend basic tenets of our civil justice system, principles that are widely recognized as having a quality of essential fairness."[40] One example Justice LeBel cites in this regard as a candidate for non-enforcement should resonate with an American legal audience is as such: a Canadian court presented with a judgment from a jurisdiction whose law provides, for example, that punitive damages can be awarded on the basis of simple negligence or strict liability ought to have a discretion to deny or limit the enforceability of the judgment on grounds of public policy.[41] It is important to note here, again principally for the benefit of an American legal audience familiar with statutory prescriptions for punitive damages in civil cases, that Canadian courts do currently enforce without serious question foreign judgments embracing extensive punitive damages awards where even the threshold of simple negligence is barely met.[42] Indeed, the majority of the Supreme Court did just that in *Beals*. It bears emphasis, however, that the LeBel dissent sees the future differently.

With regard to the defence of fraud, Justice LeBel generally adheres to the majority approach of requiring fresh evidence of fraud not reasonably discoverable at first instance to properly invoke the defence. Justice LeBel would not, however, rule out the possibility that a broader test should apply to default judgments in cases where the defendant's decision not to participate was a demonstrably reasonable one. If the defendant ignored what it justifiably considered to be a trivial or meritless claim, and can prove on the civil standard that the plaintiff took advantage of his absence to perpetrate a deliberate deception on the foreign court, it would be inappropriate to insist that a Canadian court asked to enforce the resulting judgment must turn a blind eye to those facts.[43]

Nevertheless, Justice LeBel finds that neither of the two preceding defences would support a reversal in favour of the Saldanhas. Rather, his principal concern, in common with the Binnie/Iacobucci dissent, is one of natural justice applied to the facts of the particular case before him. Justice LeBel embraces the notion expressed by the English Court of Appeal in *Adams v. Cape Industries*[44] and by Justice Weiler, dissenting in the Ontario Court of

39. *Beals*, [2003] 3 S.C.R. at 508.

40. *Id.*

41. *Id.* at 511.

42. *See e.g.*, Old North State Brewing Co. v. Newlands Services, Inc., [1999] 4 W.W.R. 573 (B.C.C.A.) (upholding North Carolina default judgment of treble damages and punitive damages).

43. *Beals*, [2003] 3 S.C.R. at 515.

44. Adams v. Cape Industries, [1991] 1 All. E.R. 929 (C.A. 1989).

Appeal on *Beals*, that the natural justice defence comprises both substantive as well as procedural elements "such as the proposition that damages should be based on objective proof and judicial assessment."[45]

Applying substantive and procedural considerations to the case before him, Justice LeBel concludes that the Saldanhas were deprived of natural justice: first in relation to lack of proper notice on the basis of which to make an informed decision to continue defending in the Florida proceeding, and further, in terms of substantive unfairness in the quantum of general damages without apparent objective proof of the harm suffered, together with the awarding of punitive damages without proof of conduct deserving of punishment.[46] Under this reasoning, in marked contrast to the six-justice majority of the Supreme Court, the natural justice defence was available, notwithstanding the Saldanhas' failure to defend.

What Justice LeBel appears to be allowing for here within the context the natural justice defence is a subsidiary defence of reasonable expectation as to both process and consequences, even though such expectations are uninformed and clearly unjustified when placed in the context of the foreign legal proceeding. Justice LeBel observes:

> The evidence at trial was that Florida's legal system provides all the appropriate protections for judgment debtors in the appellants' position and probably would have afforded them a remedy in these circumstances. But at the relevant time the appellants did not know this; they only knew that Florida's legal system had produced a judgment against them for an astronomical amount, a verdict that was difficult to reconcile with the simple facts they had set out in their defence. Their apprehensiveness about going back to that very legal system to seek relief was, in the circumstances, understandable.[47]

Justice LeBel could have stopped there, but decided to go further. Even if his expanded view of natural justice did not avail, he would decline to enforce on a residual ground of general unconscionability:

> The circumstances of this case are such that the enforcement of this Judgment would shock the conscience of Canadians and cast a negative light on our justice system. The appellants have done nothing that infringes the rights of the respondents and have certainly done nothing to deserve such harsh punishment. Nor can they be said to have sought to avoid their obligations by hiding in their own

45. *Beals*, [2003] 3 S.C.R. at 518.

46. *Id.* at 523.

47. *Id.* at 527.

> jurisdiction or to have shown disrespect for the legal system of Florida. They have acted in good faith throughout and have diligently taken all the steps that appeared to be required of them, based on the information and advice they had. The plaintiffs in Florida appear to have taken advantage of the defendants' difficult position to pursue their interests as aggressively as possible and to secure a sizeable windfall. In an adversarial legal system, it was, of course, open to them to do so, but the Ontario court should not have to set its seal of approval on the judgment thus obtained without regard for the dubious nature of the claim, the fact that the parties did not compete on a level playing field and the lack of transparency in the Florida proceedings.[48]

The residual category of concerns resorted to by Justice LeBel is, on the one hand, a refuge for judicial discretion. In extreme cases, it may have a place where none of the bright-line rules quite fit. On the other hand, an unconscionable test in the hands of lower court judges potentially lacking the world view that informed Justice LaForest in *Morguard*, could be equally viewed as something of a trojan horse undermining the substantial connections test which, simplicity, the Supreme Court of Canada has unanimously affirmed.

V. CONCLUSION AND PROSPECTUS

At this time, Canada taken as a whole, and specifically in individual provinces, is one of the most hospitable jurisdictions in the world for the recognition and enforcement of judgments from foreign jurisdictions. It has become so through perhaps, due to an overly generous adoption to twentieth and twenty-first century circumstances of the nineteenth century common law doctrine. Unfortunately, at least for Canadian defendants, international comity is neither universally shared doctrine, nor even championed any longer by the jurisdictions in which it was originally developed.[49] While Canada is also distinguished by a large and important civil law jurisdiction in the province of Quebec where the applicability of common law doctrine derived from *Morguard* and *Beals* may be debated, the pragmatic approach of Quebec courts to the recognition and enforcement of foreign judgments complements that of the Canadian approach overall.[50]

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48. *Id.*

49. *See* Lawrence Collins, *Comity in Modern Private International Law*, *in* REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF SIR PETER NORTH 89-110 (James Fawcett ed., 2002).

50. Civil Code of Quebec, R.S.Q. ch. 64, §3134-40 (2004)(Can.); Spar Aerospace Ltd. v. Am. Mobile Satellite Corp., [2002] 4 S.C.R. 205.

The result is a situation of opportunity for foreign plaintiffs and one of some risk and discomfort to Canadian defendants exposed at home to foreign standards of justice with which they are unfamiliar. The Supreme Court dissents in *Beals* sound a muted alarm in that regard, but the majority has confirmed a reality that will be difficult to substantially alter in future cases. Once the substantial connections test is met, and barring extensive procedural sloppiness by an originating court, the only latitude that remains for denying recognition and enforcement by a Canadian court lies within the currently narrow parameters of the established impeachment defences. The Supreme Court of Canada has left open the possibility of expansion within those categories, but apart from Justice LeBel in vigorous dissent, there seems little current judicial appetite for residual protectionism in aid of hapless or unlucky Canadian defendants.[51] Similarly, there is no suggestion that recognition or enforcement should be predicated on conditions of reciprocity within the originating jurisdiction. However, all of these concerns are voiced in the legislative precincts of law reform and by governmental private international law visionaries and putative legal engineers at the Hague.[52] It remains to be seen whether any of those efforts will come to fruition. But, from a Canadian perspective, critics of judicial methodology and legal consequences in *Beals* and the work of Canadian lower courts that *Beals* has implicitly endorsed, may have little alternative but to embrace and advocate some form of legislated law reform agenda. The Canadian courts are unlikely to re-engage in such a task any time soon. Indeed, as previously noted, Justice Major signaled with some clarity that legislative reform was an available alternative to the road taken since *Morguard*, but not one the Court was inclined to vary of its own accord.[53]

In the meantime, what does all this mean for American litigants bringing the results of American justice to Canada? A truly generous and hospitable environment! Given constitutionally imposed standards of "minimum contacts" required to support the assumption of *in personam* jurisdiction by American state and federal courts over foreign defendants, fulfillment of the substantial connections test as applied by Canadian enforcing courts would appear to be a virtually foregone conclusion.[54] Finally, notwithstanding some disquiet in

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51. Since *Beals* was decided, two of the judges supporting the majority opinion of justice Major (Gonthier, J. and Arbour, J.) have retired or resigned, together with one of the dissenting justices (Iacobucci). *See at* http://www.scc.csc.gc.ca (last visited June 12, 2005).

52. *See* Ronald Brand, *Concepts, Consensus and the Status Quo Zone: Getting to "Yes" on a Hague Jurisdiction and Judgments Convention, in* TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: CONFLICT AND COHERENCE 71-108 (Chi Carmody *et. al.* eds., 2003).

53. *Beals*, [2003] 3 S.C.R. at 416.

54. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (interpreting the "Due Process" clause of the Fourteenth Amendment of the U.S. Constitution to require out-of-state or foreign defendants to have certain "minimum contacts" with the jurisdiction before jurisdiction to adjudicate is established); Muscutt

Canada for the profligacy of American civil trial juries, Canadian courts are basically sending the message that different standards of justice between jurisdictions on the quantum of damages are not unenforceable ones. In short, the season is open, and the hunting is good. Welcome to Canada.

v. Courcelles, [2002] 60 O.R. 3d 20 (discussing Canadian standards for assumption of jurisdiction and the preferability of a broader approach—extending to substantial connections between the subject matter of the plaintiff's claim and the forum—than that suggested by U.S. "minimum contacts" analysis).