CASE COMMENTARY | ANALYSE DE CAS

Beals v. Saldanha: Striking the Comity Balance Anew

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In 1991, a lawyer in rural Ontario was asked by his clients what should be done about a Florida judgment that had been issued against them. The dispute had arisen when the purchaser of their vacant Florida lot thought that he had bought Lot #1 instead of Lot #2 and had stopped building a model home on it. The sale price of the lot was $8000(US). The purchaser had settled with the Florida real estate agent for $10,750(US).

They had not hired a Florida lawyer. They had not travelled there to defend the action. After various exchanges of documents,[1] they had offered to return the purchase money. Somehow, though, a default judgment had been issued against them in Florida for about $260,000(US).

It probably seemed inconceivable to Mr. Kelly, the Ontario lawyer, that the judgment could be enforceable. Nearly 95% of the award was for punitive damages and for lost profits in a business venture that appears to have been halted for reasons other than the mistake. Mr. Kelly did not know the current state of the law on foreign judgments. He recalled the timeworn rule that foreign courts lacked jurisdiction to issue internationally enforceable judgments against defendants served *ex juris* where those defendants had not submitted to the court's jurisdiction. He probably thought that that rationale would suffice to prevent enforcement in a case in which enforcing the judgment seemed so obviously unfair. He looked in vain for a text on the conflict of laws in the County Law Library, but as far as he could tell, his clients had no need to worry.

By the time the judgment was brought to Ontario for enforcement, though, its value had grown with interest to about $800,000(Cdn), and there were some signs of the need to worry. With its 1990 decision in *Morguard Investments Ltd v. De Savoye*[2] the Supreme Court of Canada had set in motion a series of striking developments in the law of foreign judgments that have since come to encompass not only Canadian judgments, as was contemplated by the Court in *Morguard*, but also foreign judgments. The new rule permitted the enforcement of default judgments against defendants who had been served in Canada with notices of foreign proceedings and who had not submitted to the foreign courts' jurisdiction, provided there was a real and substantial connection between the matters and the foreign fora.

Beals c. _Saldanha_: l'adhésion jurisprudentielle à un nouvel équilibre

Les conditions en vertu desquelles les tribunaux canadiens peuvent réaliser l'équilibre entre le respect des obligations internationales et les droits des personnes bénéficiant de la protection des lois locales ont été fondamentalement modifiées par l'application jurisprudentielle des principes énoncées dans l'arrêt *Morguard* aux décisions judiciaires rendues à l'étranger. Maintenant que la Cour suprême du Canada vient d'accorder l'autorisation d'en appeler dans l'affaire *Beals* c. *Saldanha*, celle-ci pourra examiner les conditions d'application des nouvelles protections applicables à la population canadienne en ce qui a trait aux jugements rendus à l'étranger, tout particulièrement les décisions ayant abouti à l'octroi de dommages-intérêts considérables, voire excessifs.

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Still, when the Florida plaintiffs sought to enforce the judgment in Ontario in 1998, the Court refused. The trial judge thought the Florida judgment stank. To be fair, Jennings J. did not use that word directly, but said

> It may be that a corollary of the public policy, which was set out in Morguard, and the broadening of the recognition rules for foreign judgments, is that Canadian courts will, of necessity, have to develop some sort of judicial sniff test in considering foreign judgments. In cases where fraud does not reach the level required for the defence of fraud, but is nevertheless egregious and where other matters do not engage either the traditional public policy or lack of natural justice defences, but are nevertheless egregious, the totality of the circumstances may argue against enforcement.[3]

The "totality of the circumstances that argued against enforcement" in this case included evidence that the jury must have been misled, both with respect to the merits of the claim and to the extent of the damages suffered. Further, as Jennings J. noted, the "breathtaking feature"[4] of the judgment was its size in relation to the disputed transaction.

Jennings J. wrestled with the defences against the enforcement of foreign judgments that remained in the wake of the expanded scope for recognizing the jurisdiction of foreign courts. Those defences — sometimes described as "impeaching" the foreign judgment — had not yet been revised in response to the elimination of the most common jurisdictional defences. And the impeachment defences had never included excessive awards of damages. Nevertheless, Jennings J. was convinced that the judgment was of the sort that was "so egregious as to raise a negative impression sufficient to stay the enforcing hand of the domestic court."

Jennings J. also held that Mr. Kelly was negligent in failing to advise his clients of the risk that the judgment might be enforced and of the need to obtain the advice of a Florida lawyer as to whether the judgment could be set aside. Had the Court held that the judgment was enforceable, it would have found Mr. Kelly liable for advising that it was not. Ironically, no allowance was made for Mr. Kelly's instinctive response that if it would be simply unfair to enforce such a judgment, a court in Canada would refuse to do so — despite the fact that Mr. Kelly's instinct was right and that this is what the Court did.

The Florida plaintiffs appealed the decision, and the Court of Appeal for Ontario overturned it.[5] The Florida judgment was held to be enforceable.[6] For the majority, Doherty JA held that the trial judge was unreasonable in finding that the Florida jury was misled. According to Doherty JA, while the claim "may well have failed on its merits had the respondents defended the action", an Ontario court could not "save them from the dire consequences of the course of action they chose to follow."[7] Therefore, it seems that it is now incumbent on defendants to participate in any foreign proceedings commenced against them to protect their rights regardless of the apparent size or merits of the claim. In dissent, Weiler JA reasoned that "It would be inappropriate to enforce this foreign judgment because the vast majority of the damages related to damages for which the Ontario defendants had no notice and that were assessed beyond the pleading."[8] How, it might be wondered, would defendants who prudently determine that the unrecoverable expense of defending an unmeritorious claim would be greater than any reasonable award know that they must police the foreign proceedings themselves to avoid an unjustifiable and highly disproportionate award?

The Comity Equation in Changing Circumstances

However one appraises the various opinions in the *Beals* decisions, it is important to understand that the requirements of comity as they are reflected in the rules for enforcing foreign judgments are changing along with the circumstances in which they operate. In its decision in *Morguard,* the Supreme Court of Canada endorsed comity as the guiding principle for giving effect to foreign judgments and the Court adopted the definition of comity as "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."[9] The need to strike this

balance continues today, but the conditions under which it must be struck have changed.

The rules for enforcing foreign judgments that were fashioned to meet the requirements of comity *prior* to the *Morguard* decision restricted the ambit of enforceable judgments to those issued by courts in the defendants' home fora or to courts to which the defendants had consented. Under such conditions, defendants resisting the enforcement of foreign judgments could be presumed to have defended the actions against them and to have benefited from the procedural safeguards available in the foreign legal systems. Alternatively, defendants could be presumed to have chosen, on the strength of some familiarity with the foreign legal systems, to let their matters be decided in default. Thus, defendants could be presumed either to have had their day in court, or to have made an informed decision to forego it. Any attempt to impeach a foreign judgment that was issued on these presumed bases would have to relate to some egregiously bad feature of the process or the result in order to rise above the estoppel that such circumstances would create.

Before *Morguard,* the rules for impeaching judgments issued by courts with internationally recognized jurisdiction were not designed to strike the balance required by comity for default judgments rendered by courts that are foreign to defendants. And yet, the post-*Morguard* context is one in which such foreign default judgments are enforceable. The requirements of comity may continue to be those endorsed by the Supreme Court of Canada in *Morguard,* but the circumstances in which the balance must be struck have changed.

Jennings J. described his approach to the new standards for the impeachment of foreign judgments as a corollary to the broadening of the recognition rules for foreign judgments. However, the majority in the Court of Appeal rejected the prospect of a broader or more prominent role for impeachment. Although the Florida plaintiffs had "won what might be regarded as a very weak case because the respondents chose not to defend the action"[10], apparently there was no reason to consider whether any special considerations arose from the fact that the decision not to defend was made in respect of a foreign proceeding conducted under unfamiliar procedures and that produced a judgment that could not reasonably have been anticipated by the defendants.

"International Duty and Convenience"

What are the requirements of comity for enforcing foreign default judgments issued by courts in legal systems that are foreign to the defendants? The definition of comity as requiring courts to "have due regard to international duty and convenience and to the rights of persons under the protection of Canadian laws" sounds impressive. However, on closer inspection "international duty and convenience" is a rather nebulous term in the equation — a laudable objective that lacks clear standards. Should "international duty and convenience" be determined by prevailing international standards? If so, then it might help to note that there is simply no obligation, pursuant to international duty and convenience, to enforce default judgments rendered against non-resident defendants. According to prevailing international standards,[11] such judgments are not enforceable, regardless how meritorious the claim, or how fair the proceedings, or how measured the award. In enforcing such judgments, Canadian courts are exceeding the requirements of this factor of the equation.

If the "international duty and convenience" factor of the equation is set at the maximum level possible, the requirements of comity would be "*to enforce all foreign judgments,* having due regard to the rights of persons under the protection of Canadian laws." Indeed, subject to considerations of public policy, this seems to reflect the prevailing Canadian attitude to foreign judgments. But, then the question is "What constitutes due regard to the rights of persons under the protection of Canadian laws"?

"The Rights of Persons..."

The dissenting opinion of the Court of Appeal cited the suggestion in the *Morguard* decision that section 7 of the *Canadian Charter of Rights and Freedoms* could be relevant. According to Weiler JA, "the Ontario defendants were not in a position to appreciate the extent of their jeopardy prior to the judgment for damages against them"[12] and it was only when the Florida

judgment was brought to Ontario for enforcement that they "learned that damages had been assessed beyond the pleading and of the circumstances relating to the Florida plaintiffs' fraud. By this time it was too late to move before the Florida courts to set aside the default judgment."[13] It would, therefore, be unfair to enforce this judgment.

The reference to *Charter* values in the dissenting opinion, like Jenning J's, "judicial sniff test" suggests the presence of some basic concerns of fairness to which the jurisprudence has yet to develop any meaningful response. It reflects the fact that in exceeding the requirements of comity, Canadian courts have ventured into largely uncharted waters. When the Supreme Court of Canada broadened the ambit of enforceable judgments to include those issued by courts other than the defendants' home fora or those to which the defendants had consented, it contemplated applying this only to Canadian judgments from other provinces. The Supreme Court explicitly acknowledged the concern for fairness to defendants of enforcing default judgments under these circumstances and it observed that the change in the law would not prejudice defendants because "any concerns about differential quality of justice among the provinces can have no real foundation"[14] and "fair process is not an issue within the Canadian federation."[15]

Clearly, the propensity of Canadian courts to enforce foreign judgments to the maximum extent possible reflects a strong desire to believe that fair process is generally not an issue in foreign courts either. In any event, there are no meaningful judicial standards to test the veracity of this proposition in particular cases, and there are few precedents to suggest that it is worth doubting. But does this mean that foreign default judgments are to be enforced even in circumstances in which domestic procedures would facilitate a determination on the merits that would be unlikely to result in any award, or would, in any event, be unlikely to result in an award of such "breathtaking" proportions? Does this mean that persons receiving notices of foreign proceedings must inevitably pursue vigorously their defences in foreign courts regardless of the expense, and regardless of how small the matter might seem or how groundless the claim?

In declaring the judgment enforceable in *Beals*, the majority of the Court of Appeal for Ontario acknowledged that the underlying claim was based on assertions of which the plaintiffs "would have a very difficult time convincing anyone"[16], and that the award was "disproportionate" and "excessive".[17] In short, this was a claim of dubious merit that seemed unlikely to result in an award much in excess of the limits for small claims court. And yet the result of deciding not to incur unrecoverable costs that were bound to exceed this amount was a judgment large enough to bankrupt most families. A nuisance claim turned into a nightmare when the judgment was held to be enforceable. With the greatest of respect, it misses the point to say that a Canadian court should not save defendants "from the dire consequences of the course of action they chose to follow" unless the course of action that could have prevented these dire consequences is one that can be recommended as a reasonable one for all prudent persons in Canada.

Restoring the Comity Balance

Canadian courts might be loathe to contemplate the potential for abuse in foreign proceedings, and they might be understandably uneasy about creating mechanisms for "having due regard to the rights of persons under the protection of our laws" to guard against such abuse. However, Canadian courts should be prepared to consider means to address the potential for loss of procedural fairness that can arise solely from the cross-border nature of a proceeding. Two possible areas of unfairness are illustrated by the *Beals* case.

The first potential for unfairness relates to the risk that the means that are used in the foreign legal system to ensure that resident defendants are given adequate notice will, in fact, fail to alert non-resident defendants of the nature and extent of their peril — or that such means will fail to do so in a timely fashion. Who should bear the risk of inadequate notice? *Within* a legal system, persons are presumed to know the law. Consequently, defendants bear this risk once notice of the proceeding has been served. However, *between* legal systems no such presumption has been established or tested because under the

prevailing international rule, such default judgments are unenforceable. That is, except within the European Union, where, pursuant to the Brussels Regulation, courts must stay their proceedings unless it is shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to arrange for a defence, or that all necessary steps have been taken to this end.[18] Similarly, pursuant to Article 3156 of the Quebec Civil Code foreign default judgments are not recognized where notice was inadequate or untimely.[19]

Further, with respect to ensuring that a defendant has an adequate opportunity to defend the foreign proceeding, defendants *within* legal systems are presumed to have, at least in theory, the opportunity to seek advice, and to defend themselves, regardless of their financial means. Again, *between* legal systems there has been no occasion to establish or test such a presumption.[20]

If it is unreasonable to rely on these presumptions *between* legal systems, but such default judgments are nevertheless to be enforced, how should the basic requirements of notice and an opportunity to be heard be secured? If foreign plaintiffs are to enjoy the benefits of trial in their own courts against defendants served elsewhere, perhaps *they* could be required to exercise some diligence in ensuring that defendants who can be presumed only to know their own law have, in fact, been adequately informed of the nature and extent of the proceedings and the basic steps that defendants should take to protect their rights in it. It is not clear how this would be imposed or assessed, but at a minimum it would be expected to prevent a situation, as in *Beals,* in which a claim that appeared uneconomical to defend grew exponentially and without warning.

Perhaps, also, measures would need to be devised for local defendants who simply lack the means to defend in the foreign court — either because they cannot afford to travel to do so *in personam,* or because the cost of hiring representatives in the foreign legal system is beyond their means. Special consideration is currently shown to *plaintiffs* who lack the resources to sue abroad.[21] It would seem, appropriate, therefore, to show similar consideration to *defendants* who lack the resources to defend abroad. Perhaps, defendants in such circumstances could be permitted to apply to local courts to have the matter heard locally.[22]

Lest we question such mechanisms as unduly burdensome, or simply suspect because they are unusual, it is worth remembering that the right to enforce such judgments is itself novel, and the refusal to enforce such judgments does not ordinarily deprive foreign plaintiffs of their claims, but merely requires them to sue in the defendants' fora. Accordingly, such mechanisms might better be understood not as superadded burdens imposed on foreign plaintiffs, but as means of ensuring that in extending to foreign plaintiffs benefits not otherwise available, Canadian courts are not failing to have due regard to the rights of persons under the protection of our laws. Further, the lack of well-established international precedents should not be seen as casting suspicion on such mechanisms because the need for them has not generally arisen in the absence of a willingness to recognize such judgments.

The second area of potential unfairness relates to the "breathtaking" feature of the *Beals* judgment: the quantum of the award. Under the traditional rules for the enforcement of judgments, the quantum of the award is determined by the court deciding the matter, and it constitutes a feature of the judgment that is generally not reviewable on enforcement. It is not clear whether this approach was developed on an outdated assumption that the primary determinants of the quantum of an award are the facts of the case, rather than localized approaches to the appropriate size of damages awards; or whether these are simply antiquated rules that have been shielded from serious scrutiny and refinement by narrow rules for determining jurisdiction.[23]

However, where these narrow rules for determining jurisdiction are being reconsidered — such as in the multilateral negotiations at the Hague towards a global judgments convention — the result has been a consensus proposal to make excessive damages awards reviewable by enforcing courts.[24] Accordingly, it now appears to be consistent with accepted international standards of comity to review excessive damages awards and to enforce foreign awards only to the extent that similar

or comparable damages could have been awarded by the enforcing court.

It is no small challenge for Canadian courts to strike anew the balance required by comity. Working, as they are, in relatively uncharted waters, it is difficult to resist resorting to the old rules, which were developed in other eras and under different conditions, and to take up the challenge to develop new standards and mechanisms to ensure that appropriate procedural safeguards are in place to protect the interests of persons in Canada. Sadly, the failure to do so could sound not only in losses to hapless or poorly-advised defendants, but in an invitation to an openly entrepreneurial plaintiffs' bar in the United States to rely on the deference of Canadian courts as a basis for promoting writs and judgments as a leading export.

Time was, when the hallmark of frauds and abuses perpetrated on ordinary Canadians involved the sale of vacant Florida lots for investment. It would be unfortunate and ironic, in an era of expanded consumer and commercial crossborder dealings, to have to update such cautionary tales to include devastating experiences occasioned by judicial proceedings. There is much important work to be done.

ENDNOTES

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Thanks are due to Scott Fairley for his observations on a draft of this comment.

[1] This comment does not consider whether, through the various exchanges of documents, the defendants attorned, nor does it address issues that could arise from the question of attornment.

[2] *Morguard Investments Ltd v. De Savoye* [1990] 3 SCR 1077.

[3] *Beals v. Saldanha* (1998) 42 OR (3d) 127 at 144.

[4] *Ibid.*

[5] *Beals v. Saldanha* (2001) 54 OR (3d) 641(CA) ("*Beals* CA").

[6] Subject to a successful appeal to the Supreme Court of Canada. Application for leave to appeal was granted on May 16, 2002.

[7] *Beals* CA at para 75.

[8] *Beals* CA at para 155.

[9] *Hilton v. Guyot*, 159 US 113, 163-64 (1895), as cited in *Morguard, supra* at 1096.

[10] *Beals* CA at para 84.

[11] The notable exceptions are many of the States in the United States, but query how often defendants object to having been sued *outside* the United States.

[12] *Beals* CA at para 111.

[13] *Beals* CA at para 113.

[14] *Morguard, supra* at 1100.

[15] *Morguard, supra* at 1103.

[16] *Beals* CA at para 67.

[17] *Beals* CA at para 82.

[18] Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters OJ L12/1, art 26.2.

[19] Article 3156 of the Quebec Civil Code provides: A decision rendered by default may not be recognized or declared enforceable unless the plaintiff proves that the act of procedure initiating the proceedings was duly served on the defaulting party in accordance with the law of the place where the decision was rendered. .... However, the authority may refuse recognition or enforcement if the defaulting party proves that, owing to the circumstances, he was unable to learn of the act of procedure initiating the proceedings or was not given sufficient time to offer his defence.

[20] However, the ability of a court to issue restraining orders preventing a plaintiff from suing in another member state's courts has just been referred to the European Court of Justice by the House of Lords: *Turner v. Grovit* (2001 UKHL 65). In that case the foreign litigation had been held to be intended to harass the defendant, who did not have the means to respond, and to intimidate him in his pursuit of a related claim in England.

[21] See for example *Oakley v. Barry* (1998) 158 DLR (4th) 679 at 699 (NS CA), leave to appeal to SCC refused, SCC Bulletin 1998 at 1524

[22] It would remain to be determined whether this should take the form of establishing a transfer mechanism, as exists under the Australian Cross-vesting legislation or the US Federal transfer mechanisms under 18 USC §1404, or the form of an injunction mentioned in note 20 above, or a declaration that a judgment issued by the foreign court in the case would not be enforced in the defendant's province.

[23] UK defendants are protected from multiple damages awards by the *Protection of Trading Interests Act, 1980,* which makes such awards unenforceable in their entirety. Persons with assets in Canada enjoy no such protection.

[24] Article 33, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted October 1999, and revised June 2001 by the Special Commission of the Hague Conference on Private International Law, available at www.hcch.net/e/conventions/draft36e.html