

Chapter 64

Recognition and Enforcement of Foreign Judgments and Arbitral Awards in Canada*

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§ 64.00. Preface.

Understanding the recognition and enforcement of foreign judgments in Canada requires some basic understanding of the Canadian legal system. This Chapter provides a brief introduction to the Canadian legal system in § 64.01 and then addresses the enforcement of judgments in § 64.02.

§ 64.01. The Canadian Legal System.

[1]—Canadian Federalism.

Canada is a federation with ten provinces and three territories. All of the provinces and territories have common law legal systems except for Quebec, which is a civil law jurisdiction. The current Quebec Civil Code came into force on January 1, 1994. The origins of private law in Quebec can be traced to the Coutume de Paris and the Napoleonic Code, but the current Civil Code, and the Quebec civil justice system have many features in common with those of the other provinces.

The division of legislative powers in Canada¹ allocates exclusive power to legislate in an enumerated list of subject areas to each of the federal and the

¹ The Constitution Act 1867 (UK), 30 & 31 Vict, c 3, as am, originally called the British North America Act, and The Canadian Charter of Rights and Freedoms, are contained in the Canada Act 1982 (UK) c 11, and in the Constitution Act 1982, RSC 1985, Appendix II. Sections 91 and 92 contain the Division of Powers.

provincial legislatures. A clause in the introductory paragraph to the list of subjects allocated to the federal parliament permits it “to make laws for the Peace, Order and Good Government of Canada.” This has been said to constitute a residuary clause in favour of the federal parliament. However, through judicial interpretation, one of the subjects in the list allocated to the provincial legislatures—section 92.13—Property and Civil Rights—has come to function in effect as a residuary clause in matters of private law.

Through the jurisprudence of the Privy Council and, more recently, the Supreme Court of Canada, the scope of provincial legislative authority has received so much support that Canada is now arguably more decentralized in terms of legislative authority than the United States and many other federations. This is particularly true in matters of private law, which fall almost entirely within the legislative authority of the provinces. Accordingly, although the historical practice of treating each of the provinces as separate countries for the purposes of the conflict of laws might seem odd by today’s standards, the relative autonomy of the provinces with respect to matters of private law once provided some foundation for it.

[2]—The Canadian Judicial System.

The Canadian judicial system² is federal in the sense that it is comprised of provincial superior courts and federal courts. However, it is not a truly federalized system such as exists in the United States.

In each of the provinces, the provincial superior courts have plenary authority over all matters of private and public law, except small matters (generally under \$10,000), certain provincial regulatory offences, and certain areas allocated to the Federal Court. In each of the provinces, there exists a trial division, which is variously called the “Queen’s Bench,” “Superior Court,” or “Supreme Court,” or even “General Division,” and an appellate division, generally called the Court of Appeal. In Ontario, there is also an intermediate division called the Divisional Court, which, among other things, hears appeals with leave from interlocutory matters.

The provincial superior courts in Canada are the only courts with inherent jurisdiction, and their inherent jurisdiction is construed generously and is accorded considerable respect in the Canadian legal tradition. Unlike the other branches of government in Canada—the executive and the legislature—the provincial superior courts were not created at Confederation;³ they trace their authority to the pre-Confederation courts in Canada and England.⁴ The plenary

² Useful information on the Canadian judicial system and the jurisdiction of Canadian courts can be found on the Supreme Court of Canada website at www.scc-csc.gc.ca/aboutcourt/system/index_e.html.

³ As explained in the Preamble, the Constitution Act 1867 provides only for executive and legislative authority in Canada.

⁴ Pursuant to section 129 of the Constitution Act 1867, “all Courts of Civil . . . Jurisdiction, . . . existing

authority of the provincial superior courts has been affirmed and defended over the years by the Supreme Court of Canada against the potential for encroachment by other tribunals, such as the federal courts and administrative tribunals.⁵

The Federal Court of Canada is a statutory court⁶ with a trial and an appellate division. It was created pursuant to the authority granted to the federal government in section 101 of the Constitution Act 1867, to establish courts “for the better administration of the laws of Canada.” Over a series of cases, the Supreme Court determined that the Federal Court’s mandate was limited to the adjudication of disputes involving matters falling within the classes of subjects allocated to the legislative authority of the Federal Government and on which the Federal Parliament had, in fact, legislated.⁷ These include matters such as bankruptcy, antitrust, consumer protection, anti-discrimination orders, intellectual property, taxation, admiralty, corporations law, and judicial review of administrative action and of certain federal tribunals.⁸

The Supreme Court has determined that the Federal Court has neither pendent,⁹ nor ancillary¹⁰ jurisdiction. In light of this determination, and so as to avoid situations in which cases would have to be split between the Federal Court and the provincial superior courts, the Federal Court Act was amended to make many of the matters that were once within its exclusive jurisdiction matters of concurrent jurisdiction with the provincial superior courts.¹¹ In addition, the Federal Court has no diversity jurisdiction. Accordingly, although the Federal Court is highly regarded within its areas of special expertise, its mandate is not framed in a manner that would foster competition with that of the provincial superior courts, and there is little scope for forum shopping or for jurisdictional uncertainty between the two levels of courts in Canada.

How does a court system that relies so heavily on provincially-administered courts guard against the ill-effects of local biases, and ensure that evenly high standards are maintained across the country? The answer lies in the provisions for shared federal-provincial responsibility for the operation of the provincial

therein at the Union, shall continue . . . as if the Union had not been made” subject to authorized and applicable legislation. The provincial legislation governing the courts, such as the Ontario Courts of Justice Act RSO 1990, c C-34 affirms this: “The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.”

⁵ See, for example, *Valin v. Langlois* (1879) 3 SCR 1; and *Ordon Estate v. Grail* [1998] 3 SCR 437.

⁶ Federal Court Act, RSC 1990, c F-7.

⁷ In particular, *Quebec North Shore Paper Co v. Canadian Pacific* [1977] 2 SCR 1054; and *McNamara Construction v. The Queen* [1977] 2 SCR 654.

⁸ Further information on the Federal Court of Canada can be found on its website at www.fja.gc.ca/pub/en/index.html.

⁹ *Roberts v. Canada* [1989] 1 SCR 322; *Quebec Ready Mix v. Rocois Construction* [1989] 1 SCR 695.

¹⁰ *R v. Thomas Fuller Construction* [1980] 1 SCR 695.

¹¹ Federal Court Act, SC 1990, c 8, which amended section 17 of the Federal Court Act, RSC 1985, c F-7.

superior courts, which are contained in sections 96–101 of the Constitution Act 1867.

The judges who sit in the provincial superior courts are appointed by the federal government from among the senior members of the provincial bars. Their salaries are fixed and paid for by the federal government, and they enjoy tenure until age 75. There are no public hearings in the appointment process and there are no judicial elections. Instead, the appointment process involves extensive consultation with several groups. These groups include the professional regulatory body—the Law Society—in the province, Members of Parliament and Senators from the province, the provincial and Canadian bar associations, and other special interest groups. From time to time, there is debate on the merits of public review of judicial candidates, but this debate has not produced any specific proposals, nor does it reflect any lack of public satisfaction with the current members of the judiciary.

Other aspects of the judicial system—such as the administration of the courts and the rules of civil procedure—are the responsibility of the provinces.¹² From time to time, differences in the common law arise between the provinces, but it would be considered unacceptable to Canadians to suggest that decision-making in the provincial superior courts was influenced by local loyalties or biases. It should also be noted that juries in civil matters in Canada are relatively rare. As the Supreme Court of Canada has affirmed, “the Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation.”¹³

[3]—The Supreme Court of Canada and Stare Decisis.

The Supreme Court of Canada is a statutory court of general appellate jurisdiction with nine judges, three of whom are appointed from Quebec. Pursuant to the Supreme Court Act,¹⁴ most appeals are heard only with leave of the Court, and on the basis that they are matters of national importance.¹⁵ Since many matters of public law are subject to federal statutes, such as criminal law, which is provided for in the Criminal Code of Canada, these matters are more likely to be considered matters of public importance than are matters of private law. This is particularly true now that the Canadian Charter of Rights and Freedoms applies to much of the public law in Canada. Accordingly, comparatively few appeals on private law matters are determined each year by the Supreme Court.

There is no “full faith and credit clause” in the Canadian Constitution, nor are property rights protected by the Canadian Charter of Rights and Freedoms.¹⁶

¹² Pursuant to section 92.14 of the Constitution Act, 1867.

¹³ *Morguard Investments Ltd v. De Savoye* [1990] 3 SCR 1077 at 1100.

¹⁴ Supreme Court Act, RSC 1985, c S-26.

¹⁵ Supreme Court Act, *supra* note 14, s 41.

¹⁶ Section 7 of the Canadian Charter of Rights and Freedoms guarantees “the right to life, liberty and security of the person.”

Thus, cases containing issues related to the exercise of jurisdiction over non-resident defendants or the enforcement of out-of-province judgments, which do not raise questions regarding the interpretation of explicit provisions of the Canadian Constitution, are therefore, not as likely to be granted leave to appeal to the Supreme Court of Canada.¹⁷ As a result, the provincial superior courts routinely refer to the decisions of the superior courts of other provinces, and to the appellate courts. Further, Canadian courts at all levels seem prepared to distinguish or reconsider precedents that would produce injustice in the cases before them,¹⁸ and, on the whole, they seem to take a more flexible approach to *stare decisis* than do the courts of other common law countries.

§ 64.02. Overview of the Law of Judgments in Canada.

[1]—Introduction—The Scope of this Chapter.

In Canada, generally it is possible to obtain execution against a judgment debtor only in respect of an order of a Canadian court. This chapter deals with the issues raised by the process of obtaining an order of a Canadian court that gives effect to an order of a foreign court. Issues that may then arise in the domestic execution of the order are not addressed here. In addition, a scheme of legislative and common law responses has been developed to deal with specialized questions arising in the area of family law. They are not addressed in any detail here. Finally, the law relating to secured transactions and to cross-border insolvencies has developed considerably in recent years, and these developments have obvious implications for execution against judgment debtors. However, these specialized topics are not addressed in this chapter.

Until 1990, the common law rules concerning the recognition and enforcement¹ of foreign judgments in the common law provinces of Canada were based on the traditional common law principles developed in England, and applied in most Commonwealth countries.² Although the substance of the rules in Canada

¹⁷ Although it was determined by the Supreme Court of Canada in *Hunt v. T&N plc* [1993] 4 SCR 289, that the new rules that it had established for the recognition and enforcement of out-of-province judgments were based on “constitutional imperatives.”

¹⁸ See, for example, *Hanlan v. Sernesky* (1997) 35 OR (3d) 603 (Gen Div); *affd* (1998) 38 OR (3d) 479 (CA) and Walker “Are We There Yet? Towards a New Rule for Choice of Law in Tort” (2000) 38 Osgoode Hall Law School 331.

¹ Judgments recognized by Canadian courts render the matters *res judicata* between the parties. In some situations, such as when an unsuccessful plaintiff is trying to relitigate the claim in Canada, the defendant will seek only the recognition of the foreign judgment without an order for further relief. In other situations, a judgment creditor may request an order giving local effect to the substantive relief ordered by the foreign court. However, the principles governing the *recognition* of foreign judgments and the *enforcement* of foreign judgments are the same and, accordingly, except where noted, these terms will be used interchangeably.

² See discussion of *Singh v. Rajah of Faridkote* [1894] AC 670 (PC) and *Emanuel v. Symon* [1908] 1 KB 302 (CA) in *Morguard Investments Ltd v. De Savoye* [1990] 3 SCR 1077 at 1100, in the discussion under the heading “The English Background.”

in this area of the law has changed dramatically since the 1990 decision of the Supreme Court of Canada in *Morguard Investments Ltd v. De Savoye*³, the basic analytic approach to foreign judgments has not changed.

Further, although there is generally no distinction made between the foreign legal systems in which judgments have been issued, most of the judgments sought to be enforced in Canada are judgments that have been issued in the United States. Accordingly, there is little doubt that the rules that have been developed in recent cases apply directly to judgments from the United States.

[2]—The Underlying Rationale: Comity, and “Order and Fairness.”

Under the traditional common law rules, there is no fixed or formal obligation for a court to give effect to a foreign judgment (*i.e.*, either to recognize a foreign judgment or to enforce it). However, effect has routinely been given to foreign judgments as a matter of comity. Comity has been affirmed as the rationale for the enforcement of foreign judgments in Canada. The Supreme Court of Canada clarified in *Morguard v. De Savoye* that while comity is the rationale, reciprocity is not the standard.⁴ Instead, the Court endorsed the statement in the decision of the United States Supreme Court in *Hilton v. Guyot* 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.”⁵

By adopting comity as the rationale for judgments, it does not appear that the Supreme Court intended to reject the obligation theory. There is no indication that the court thought that the primary implications of the recognition and enforcement of judgments were for the relations between nations and for their mutual respect for the decisions of their courts. There was no repudiation of the statement in *Godard v. Gray* that “the true principle on which the judgments of foreign tribunals are enforced . . . is . . . that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which the judgment is given, which the courts in this country are bound to enforce. . . .”⁶ Rather, in light of the recent jurisprudence as a whole, it seems that the adoption of the comity rationale was intended only to indicate that there was no *prima facie* reason to presume to accord the judgments of foreign courts any less respect than those of local courts.

In addition to comity, the Supreme Court of Canada described the underlying requirements for the rules of private international law as the “principles of order

³ *Morguard*, *supra* note 2.

⁴ *Morguard*, *supra* note 2 at 1104.

⁵ *Hilton v. Guyot*, 159 US 113, 163-64 (1895), as cited in *Morguard*, *supra* note 2 at 1096.

⁶ *Godard v. Gray* (1870) 6 QB 139.

and fairness.”⁷ The enforcement of foreign judgments was placed on much the same footing as the enforcement of local judgments, which is based on the estoppel principle. Where a litigant has had the benefit of an adequate opportunity to adjudicate the matter in the foreign court, it would be unfair to enable the defendant to relitigate the matter solely because the foreign judgment is not directly enforceable.

Following this principle, where there is a local judgment that is inconsistent with the foreign judgment sought to be enforced, the foreign judgment cannot be enforced. The rule that a foreign judgment cannot be enforced in the face of an inconsistent local judgment is so obvious that it has only recently been articulated as a specific ground for refusing to enforce a foreign judgment.

While the estoppel principle forms the foundation for many of the rules for the enforcement of foreign judgments, one feature of the law of foreign judgments that seems inconsistent with this is that the cause of action is said not to merge in the foreign judgment so as to prevent it from being pursued locally. The rule of non-merger traces its roots to a time in the common law when foreign courts were not accorded the respect that would warrant treating the cause of action as extinguished by their judgment. While that is no longer the case, the rule has been not been changed by statute in Canada as it has been elsewhere,⁸ and the matter has been left to be resolved equitably, in accordance with the courts’ discretion.

Thus, the rule of non-merger does not prevent a successful defendant from relying on the foreign judgment to preclude the foreign plaintiff from relitigating the matter in a Canadian court in the hopes of meeting with new success. However, it does prevent a situation from arising in which an unenforceable foreign judgment would preclude recovery. Accordingly, if for some reason the foreign judgment was determined to be unenforceable by a Canadian court, such as for want of jurisdiction, it would be possible to sue afresh on the underlying claim. However, where the foreign judgment had been satisfied, or where the local defendant was prepared to satisfy it, the foreign plaintiff would be precluded from relitigating the matter in a Canadian court to obtain a more favourable result.

[3]—The Conclusiveness of Foreign Judgments.

When a common law court in Canada is deciding whether to recognize and enforce a foreign judgment, it does not consider the correctness of the foreign decision or the merits of the claims or the defences advanced in the foreign court. Whether or not the foreign judgment is recognized and enforced, it is treated as conclusive on the merits and it is not reviewable for error of fact or of law.

⁷ *Morguard*, *supra* note 2 at 1097

⁸ Civil Jurisdiction and Judgments Act 1982 (UK) s 34.

A recent illustration of this can be found in the decision of the British Columbia Court of Appeal in *Old North State Brewing Co, Inc v. Newlands Service Inc.*⁹ In that case an action was commenced in North Carolina to resolve a dispute relating to a commercial contract containing clauses providing that it was to be governed by British Columbia law and that the parties would attorn to the courts of British Columbia. The North Carolina court granted a default judgment and, following a summary trial on damages, awarded treble and punitive damages. Since the jurisdiction clause was not exclusive and there was a real and substantial connection between the matter and North Carolina, the North Carolina court had jurisdiction to issue a judgment that was enforceable in British Columbia. In the absence of proof of British Columbia law by the defendants, the North Carolina court had properly applied its own law, including statute law providing for multiple and punitive damages. The judgment of the North Carolina court was enforceable in British Columbia even though the parties had agreed that British Columbia law would govern and the application of British Columbia law would have produced a different result.

The Quebec Civil Code takes a similar approach to the conclusiveness of foreign judgments. Article 3157 provides that “recognition or enforcement may not be refused on the sole ground that the original authority applied a law different from the law that would be applicable under the rules contained in this Book.” Article 3158 further provides that “a Quebec authority confines itself to verifying whether the decision in respect of which recognition or enforcement is sought meets the requirements prescribed in this Title, without entering into any examination of the merits of the decision.”

[4]—Procedural Matters.

Ordinarily, a person wishing to enforce a foreign judgment commences an action in the court of the province where the defendant’s assets are located, and then brings a motion for summary judgment based on the foreign judgment. If the court determines the judgment to be enforceable, an order is issued in the same manner as if the judgment had been issued by the enforcing court. The value of the judgment is converted into Canadian funds as of the date of the foreign judgment and interest may be awarded as of that date. Likewise, Article 3160 of the Quebec Civil Code provides that “where a foreign decision orders a debtor to pay a sum of money expressed in foreign currency, a Quebec authority converts the sum into Canadian currency at the rate of exchange prevailing on the day the decision became enforceable at the place where it was rendered. The determination of interest payable under a foreign decision is governed by the law of the authority that rendered the decision until its conversion.”

⁹ (1998) 58 BCLR (3d) 144 (CA).

[5]—The Three Main Considerations.

In deciding whether to give effect to a foreign judgment, a common law court in Canada is guided by three considerations.

First, if the judgment meets the basic requirements for an enforceable judgment: *i.e.*, it is the judgment of a court of competent jurisdiction and it is a final judgment for an ascertainable sum of money, it will generally be given effect. In the analysis below, these requirements will be discussed under the heading “Basic Enforceability.” They are a set of positive requirements that must be demonstrated by the judgment creditor to the court in Canada for recognition or enforcement.

Second, Canadian courts will not give effect to a judgment where to do so would be tantamount to giving effect to the sovereign will of a foreign power in Canada. The scope of this exception to recognition and enforcement will be discussed under the heading “Foreign Public Law Exception.” Although this is an exception to recognition and enforcement and, therefore, is used by the judgment debtor to resist enforcement, it is a neutral qualification in that it does not reflect the court’s view of the merits of the foreign judgment or of the merits of the law on which the claim is based, but only of the justiciability of the subject matter of the dispute.

Third, even if a judgment meets the basic requirements for enforceability and it is not the product of a foreign public law, it may still be denied recognition or enforcement if it is impeached on one of three grounds. These grounds are: that the judgment was obtained by fraud; that the process by which the judgment was reached violated the principles of natural justice; or that giving effect to the judgment would be contrary to the public policy of the forum. These are negative requirements (or positive defences). They will be discussed under the heading “Impeachment.” In addition, with the changes in the rules for Basic Enforceability, two issues have become more significant. First, now that foreign default judgments may be enforced even though the issuing court was not the defendant’s local court, there are concerns about whether special rules should be developed. Second, although excessive damages have not historically been identified as a discreet issue in the enforcement of judgments, there are indications that they are of increasing concern to Canadian courts.

The considerations addressed by Quebec courts in determining whether to enforce a foreign judgment in Quebec are surprisingly similar in substance to those addressed in the common law parts of Canada. However, the structure of the legal rules is somewhat different. Book X of the Quebec Civil Code contains the rules of Private International Law applied in Quebec Courts. Title Four of Book X contains the rules for the “Recognition and Enforcement of Foreign Decisions and Jurisdiction of Foreign Authorities.”

Article 3155 provides that “A Quebec authority recognizes and, where applicable, declares enforceable any decision rendered outside Quebec” subject to a series of exceptions that are then enumerated. This presumption of enforceability appears to be directly opposed to the lack of such a presumption in the common law. However, on closer inspection, the differences between the two approaches are not so significant. Comity obliges common law courts to enforce foreign judgments as a matter of routine; and the exceptions in the Civil Code occasionally require Quebec courts not to enforce foreign judgments. Accordingly, when these factors are taken into account, it becomes clear that the distinction is more theoretical than real.

§ 64.03. Basic Enforceability.

There are three basic requirements for an enforceable judgment: First, the court that issued the judgment must have had jurisdiction to do so. Second, the judgment must be final and conclusive. Third, the judgment must be a judgment for an ascertainable sum of money.

[1]—Jurisdiction.

It is important to note at the outset that whether or not the foreign court has jurisdiction under its own law is not relevant to the enforceability of its judgment—nor is any finding that the foreign court may make regarding its own jurisdiction. Canadian courts treat foreign judgments as conclusive, but only with regard to the merits of the dispute, and not with regard to the question of jurisdiction. Accordingly, there are certain situations in which a foreign court might regard itself as capable of issuing a judgment but in which a Canadian court will not recognize the foreign court’s jurisdiction to do so.

For example, there are certain cases over which it is generally accepted that a court has exclusive jurisdiction. These include disputes over title to real property (“immovables”) located in the territory of the forum and disputes over the status of locally incorporated entities. Canadian courts will not issue judgments purporting to affect title to foreign immovables, nor will they issue judgments purporting to affect the status of foreign corporations; and Canadian courts will not recognize foreign judgments that purport to affect title to immovables in a Canadian jurisdiction or to an entity incorporated in a Canadian jurisdiction.¹ Thus, when a California court ordered the conveyance of title to land in British Columbia, the successful plaintiff was unable to have the judgment enforced in British Columbia;² and when a plaintiff sought an order affecting the status of a Yukon incorporated entity in a British Columbia court, the court declined to make such an order. In these situations, even though a foreign court may have

¹ *Duke v. Andler* [1932] SCR 734.

² *Voyage Co Industries v. Craster* [1998] available on Quicklaw at BCJ No 1884.

assumed jurisdiction and issued a judgment, a Canadian court will not regard the foreign court as having had jurisdiction to do so.

Article 3165 of the Quebec Civil Code, which is discussed below under the heading “Jurisdiction under the Quebec Civil Code,” contains a similar provision. Because this limitation on jurisdiction is based on the subject matter of the dispute, and not on the parties to it, it cannot be cured by service in the territory of the foreign forum or by the defendant’s consent to the foreign court’s jurisdiction. Further, the Quebec legislators have determined that it is in the public interest that all civil claims for damages arising out of exposure to raw materials originating in Quebec should be determined in Quebec. Article 3151 grants exclusive jurisdiction to Quebec courts in these matters. It would seem to follow that a foreign judgment to which this provision applied would not be enforced in Quebec.

Whether the factor affecting the foreign court’s jurisdiction relates to subject matter jurisdiction or to personal jurisdiction, Canadian courts regard themselves as entitled to review the jurisdiction of foreign courts issuing judgments when enforcement is sought in Canada, and they conduct this review in accordance with Canadian rules of the conflict of laws. Further, while there is a general correlation between the standards for the assumption of jurisdiction by Canadian courts and the bases of jurisdiction Canadian courts recognize as sufficient for a foreign court to issue a judgment enforceable in Canada, the correlation may not be exact. Thus, the review of jurisdiction for the purposes of determining whether to enforce a foreign judgment is sometimes described as determining whether the foreign court had “jurisdiction in the international sense.”

There are now three bases of jurisdiction that are recognized by common law courts in Canada as enabling foreign courts to issue judgments that may be given effect in Canada: consent, presence/residence, and real and substantial connection.

[a]—Consent.

The first basis of “jurisdiction in the international sense” is the consent, or submission, of the parties to the jurisdiction of the court that has issued the judgment. The estoppel principle, which operates in domestic litigation to preclude parties from relitigating a dispute, similarly precludes parties from arguing that a foreign court that issued a judgment lacked jurisdiction to do so where they have submitted to the foreign court. The consent of the parties to the jurisdiction of the foreign court is independently sufficient for the foreign court to issue a judgment enforceable in Canada.

When are parties regarded as having submitted to the jurisdiction of a foreign court that has issued a judgment against them? Plaintiffs, either in the main claim, or in a counter-claim are regarded as having consented to the exercise of

jurisdiction by the issuing court because they have chosen that court for the resolution of their dispute. Defendants may be regarded as having consented to the exercise of jurisdiction by the issuing court in two situations: when they have appeared to defend on the merits (“attorned”), and when they have agreed to do so, usually in a contract.

[i]—Attornment.

Defendants are regarded as having consented to the jurisdiction of the issuing court where they have appeared in the foreign proceeding to address the merits of the dispute. This is sometimes described as “attornment.” Defendants are not regarded as having attorned if they appeared in the foreign court only to challenge the assumption of jurisdiction by the foreign court or to ask the court to exercise its discretion to decline to hear the case.

There have been instances of controversy arising from situations in which the procedure in the foreign court did not readily enable a defendant to participate in a preliminary determination of jurisdiction and, if unsuccessful, to withdraw from the proceeding so as not to attorn. In some of these instances, it has been found that the defendant went beyond the degree of participation required to resist the exercise of jurisdiction in order to address the merits of the claim.³ In other instances, differences in foreign rules of procedure were recognized as preventing the defendant from doing anything less than was done to resist the exercise of jurisdiction, and the defendant was not regarded as having attorned.⁴

The changes in the law discussed below under the heading “real and substantial connection,” have largely obviated the need to clarify this point, because even in the absence of the consent of the parties, jurisdiction may now be founded on a real and substantial connection between the matter and the forum of the issuing court. As a result, there is rarely anything to be gained by not responding to a foreign notice of proceeding.

[ii]—Agreement.

Defendants are also regarded as having consented to the jurisdiction of the court that issued the judgment where they have entered into agreements to do so with the other parties to the dispute. Where the party resisting recognition or enforcement agreed to submit to the jurisdiction of the issuing court, challenges to the recognition or enforcement of the foreign judgment are usually limited to those based on contractual grounds (*i.e.*, *non est factum*, unconscionability, etc).

More difficult questions are posed by jurisdiction agreements that nominate the courts of a place other than that in which the judgment was issued. Canadian

³ *Gourmet Resources Int Inc (Trustee of) v. Paramount Capital Corp* (1991) 5 CPC (3d) 140 (Gen Div).

⁴ *Roglass Consultants Inc v. Kennedy* (1984) 65 BCLR 393 (CA).

courts have held that the issuing court's jurisdiction will not be affected by a non-exclusive jurisdiction agreement, such as an attornment clause, nominating the courts of some other place.⁵ However, it would appear that an exclusive jurisdiction agreement nominating the courts of some other place could vitiate the "jurisdiction in the international sense" of the court that issued the judgment and thereby render it unenforceable.

[b]—Presence/Residence.

[i]—Individual Defendants.

The second basis of jurisdiction to issue a judgment enforceable in Canada relates to the contacts that the defendant has with the forum. This basis of jurisdiction is usually described in terms of the defendant's presence or residence in the territory of the forum when the proceeding is commenced. Presence is usually demonstrated by personal service of the notice of proceeding on the defendant in the territory of the forum. However, where there is evidence that the defendant was present in the territory of the forum when the proceeding was commenced, but left before being served, the inability to serve the defendant personally might not prevent the foreign court from having jurisdiction.

The availability of a defendant to be served in the territory of the forum often indicates the convenience of the forum for the defendant and the existence of additional contacts between the matter and the forum. However, where it does not, as when the defendant is only temporarily present in the forum and there is little or no connection between the matter and the forum, it could be inappropriate for the court to assume jurisdiction. The jurisdictional question is likely to be resolved indirectly in Canada, by the granting of a stay on a finding that the court is not a convenient forum for the resolution of the dispute.⁶

However, it has not yet been authoritatively determined whether, for the purposes of enforcing a foreign judgment, the defendant's presence in the territory of the forum will suffice as the sole basis of jurisdiction. While the Supreme Court of Canada decision in *Morguard Investments Ltd v. De Savoye* contains *dicta* that suggests that mere presence will support jurisdiction, it seems doubtful that this proposition would be upheld today if challenged directly. Why, it might be asked, would the result in a Canadian court differ from that reached in *Burnham v. Superior Court of California*?⁷ One explanation is that the Canadian constitutional principles of "order and fairness," which are said to form the foundation for the law of judgments in Canada, are not explicitly expressed to be based on "traditional" or historical understandings of fairness or justice. Accordingly, the historical acceptance of jurisdiction based on transient presence,

⁵ *Old North State Brewing Co, Inc v. Newlands Service Inc.* (1998) 58 BCLR (3d) 144 (CA).

⁶ For example, *SDI Simulation Group Inc v. Chameleon Technologies* (1994) 34 CPC (3d) 346 (Gen Div).

⁷ 495 US 604, 110 S Ct 2105 (1990).

which is sometimes described as “tag jurisdiction,” is unlikely to be regarded as a relevant factor supporting the retention of presence based jurisdiction.

The debate in the English jurisprudence and commentary over whether this jurisdictional basis is, in fact, *presence* or *residence* has not been resolved in recent Canadian jurisprudence⁸ and it seems unlikely that it soon will be resolved. Since the means of demonstrating this basis of jurisdiction is through service in the territory of the forum, presence would obviously suffice. However, where a person has an address at which they may be served, but happens to be away at the time of service, service at that address—their residence—will also generally meet this requirement. Accordingly, it is likely that either presence *or* residence will suffice provided that it indicates that the defendant has connections to the forum of the issuing court and that the defendant was given adequate notice of the proceeding.

[ii]—Corporate Defendants.

Corporations that have been incorporated in the forum of the issuing court will be regarded as subject to its jurisdiction with respect to most disputes involving them, regardless of where the disputes have arisen. Further, legislation exists in many places requiring foreign corporations to register and to provide a local address for service in order to carry on business in the jurisdiction. This would appear to render corporations subject to the jurisdiction of those courts with respect to all claims that might be brought against them.

It has not been resolved decisively in the common law provinces⁹ whether local business activities may subject foreign corporations to the jurisdiction of local courts only with respect to those activities, or whether local business activities may support general jurisdiction over the corporation (*i.e.*, permitting any claim to be brought against it regardless of where the claim arose).¹⁰ While the distinction between special jurisdiction and general jurisdiction and the question whether general jurisdiction may be derived from business activities alone would seem to be an important one, it does not seem likely that it will be resolved as a matter of jurisdiction *simpliciter* in the foreseeable future.

Where the only contacts between the corporation and the forum are business activities unrelated to the claim, there would likely be stronger connections between the matter and the forum in which the matter has arisen, or in which the corporation had been incorporated, and this would warrant the granting of a stay based on *forum non conveniens*.¹¹ Where, however, the dispute arose

⁸ See Frymer v. Brettschneider (1994) 19 OR (3d) 60 (CA) in which the Court of Appeal referred to this jurisdictional basis as residence.

⁹ This question is resolved for Quebec Courts by Article 3168(2) of the Quebec Civil Code.

¹⁰ As it would in the United States pursuant to the United States Supreme Court decision in *Helicopteros Nacionales de Colombia v. Hall*, 466 US 408 (1984).

¹¹ See discussion below of the *Braintech* case, *infra* note 24 and surrounding text.

out of the events related to the corporation that occurred in the territory of the forum, a real and substantial connection would exist on which jurisdiction could be founded.

[iii]—Assets.

A Canadian appellate court has held that Canadian courts may not assume jurisdiction over an individual or a business solely on the basis of the presence of the defendant's assets in the territory of the forum. The Manitoba Court of Appeal concluded that the Manitoba courts could not assume jurisdiction over a matter involving a defendant with assets in Manitoba where the dispute otherwise had no connection to Manitoba.¹² It would seem likely that a foreign court that issued a judgment in a matter in which its jurisdiction was based solely on the presence of the defendant's assets would also not be recognized.

[c]—Real and Substantial Connection.

[i]—The Traditional Rule.

Until 1990, the two bases of jurisdiction discussed above (*i.e.*, consent and presence/residence) were the only bases of "jurisdiction in the international sense" recognized by common law courts in Canada. Canadian courts regarded other courts as having jurisdiction to issue internationally enforceable judgments only if the defendants had been served in the territory of the forum, or had consented to the jurisdiction of the court, either by way of an agreement or by appearing and defending the matter on the merits.

Jurisdiction could not be founded solely on strong connections between the matter and the forum, even where, for example, the cause of action arose in the forum, the majority of witnesses and the bulk of the evidence were to be found there, or where litigation that was integrally related to the matter in question was already underway in the forum. In short, even if the court in question was clearly an appropriate forum, it could not issue a judgment binding on a defendant served outside the province without the defendant's consent to the court's jurisdiction. Moreover, the courts in Canada applied these rules equally to judgments of the courts of other provinces and to the courts of other countries.

[ii]—The *Morguard* Decision.

In 1990, the Supreme Court of Canada decided that this situation had to change. In *Morguard*, a mortgagor of land in Alberta, defaulted on the mortgage payments and moved to British Columbia. When Morguard Investments Ltd obtained a default judgment in the courts of Alberta for the shortfall owing on the mortgage after the sale of the property, and sought to enforce the judgment in the courts of British Columbia, it was clear to the British Columbia courts and the Supreme

¹² Torte Communication Inc v. Sutel Inc (1994) 120 DLR (4th) 100 (CA).

Court of Canada that the old rules, under which the judgment was not enforceable, needed to be reconsidered. According to the Supreme Court of Canada, a new rule had to be developed to accommodate the needs both of modern commerce and of the Canadian federation. Concerning the needs of modern commerce, the Supreme Court of Canada explained that,

[T]he business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.¹³

[W]hat must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.¹⁴

Concerning the needs of the Canadian federation, the Court observed:

The considerations underlying the rules of comity apply with much greater force between the units of a federal state.¹⁵

[T]he English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country.¹⁶

[V]arious constitutional and sub-constitutional arrangements and practices make unnecessary a “full faith and credit” clause such as exists in other federations, such as the United States and Australia. The existence of these clauses, however, does indicate that a regime of mutual recognition of judgments across the country is inherent in a federation.¹⁷

To meet the needs of modern commerce and the Canadian federation, the Supreme Court of Canada held that Canadian courts must regard a court issuing a judgment as having jurisdiction to do so provided that there was a real and substantial connection between the matter and the forum. Later, in its 1993 decision in *Hunt v. T&N plc*, the Supreme Court clarified that “the constitutional considerations raised are just that. They are constitutional imperatives”¹⁸ and, in *Hunt*, the Court applied these constitutional considerations to Quebec legislation demonstrating that the *Morguard* principles applied throughout Canada. Accordingly, the provisions of the Quebec Civil Code must be interpreted in a manner consistent with “the requirements of order and fairness.” This is reflected in Article 3164, which is discussed below in the section on the Quebec Civil Code.

Despite the Supreme Court’s determination that the *Morguard* principles are based on the Canadian Constitution, and are necessary to the functioning of the

¹³ *Morguard*, *supra* note 2 at 1098.

¹⁴ *Id.* at 1097.

¹⁵ *Id.* at 1098.

¹⁶ *Id.* at 1099.

¹⁷ *Id.* at 1100.

¹⁸ *Hunt v. T&N plc* [1993] 4 SCR 289.

Canadian federation, these principles and, in particular, the real and substantial connection test for jurisdiction to issue an enforceable judgment, have been applied to foreign judgments as well. In 1994, an Ontario court articulated the prevailing view, which endorsed “the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure.”¹⁹ By 1995, the accretion of judgments supporting the application of the *Morguard* principles to foreign judgments, including appellate level judgments,²⁰ seemed sufficient to the Ontario Court of Appeal to remove any doubt.²¹

[iii]—The Real and Substantial Connection Test.

What constitutes a “real and substantial connection”? In many ways, the real and substantial connection test resembles the minimum contacts doctrine enunciated by the United States Supreme Court in *International Shoe v. State of Washington*.²² However, there are subtle differences between the “traditional notions of fair play and substantial justice” in the American and the Canadian legal systems. For example, the jurisprudence would suggest that in Canada, although fairness to the defendant is an important consideration, it does not provide as strong a focal point for the analysis of jurisdiction as it appears to do in the United States. Further, the importance of promoting access to justice and avoiding multiplicity in the Canadian legal tradition tend to overshadow the proprietary interest of particular fora in determining particular disputes. Thus, there are no “public interest factors” considered in the analysis of appropriate forum such as those identified by the United States Supreme Court in *Gulf Oil v. Gilbert*.²³ Nevertheless, over the broad spectrum of situations giving rise to jurisdictional issues, similar determinations would be made in most situations in the United States and Canada.

While the real and substantial connection test is very generous to foreign courts in endorsing their assumption of jurisdiction, there remains the possibility that some bases for the assumption of jurisdiction will not be regarded by Canadian courts as sufficient to enable a foreign court to issue a judgment enforceable in Canada. For example, in *Braintech Inc v Kostiuk*,²⁴ the British Columbia Court of Appeal held that passive posting of information on an electronic bulletin board

¹⁹ *Arrowmaster Inc v. Unique Forming Ltd.* (1994) 17 OR (3d) 407 (Gen Div).

²⁰ Such as *Moses v. Shore Boat Builders Ltd* (1993) 106 DLR (4th) 654 (BC CA) leave to appeal to the Supreme Court of Canada refused (1994) 172 NR 157n (the first appellate court in Canada to apply these principles to a foreign decision—in this case a judgment from Alaska).

²¹ *United States of America v. Ivey* (1995) 26 OR (3d) 533 (Gen Div), *aff'd* (1996) 30 OR (3d) 370 (CA).

²² *International Shoe v. State of Washington* 326 US 310, 66 S Ct 154 (1945).

²³ *Gulf Oil Corp v. Gilbert* 330 US 501 (1947).

²⁴ (1999) 171 DLR (4th) 46 (BC CA) leave to appeal to SCC refused SCC Bulletin 2000 453.

did not establish a real and substantial connection with Texas—the jurisdiction in which the information could have been received—and, therefore, the Texas court lacked jurisdiction to issue a judgment enforceable in British Columbia.

Further, in *Braintech*, the court took the unusual step of describing the lack of jurisdiction not as a lack of any connection with the matter but as a sufficiently tenuous connection that the foreign court should have declined jurisdiction. As the court concluded, “in the circumstances revealed by record before this Court, British Columbia is the only natural forum, and Texas is not an appropriate forum. That being so, comity does not require the courts of this province to recognize the default judgment in question.”²⁵ In this way, the British Columbia Court of Appeal suggested that where the foreign court is an inappropriate forum, its judgment may be denied enforcement. This approach has yet to be confirmed, but it would seem that, in any event, where an injunction has been issued by a Canadian court to restrain proceedings in the foreign court, a judgment subsequently issued by the foreign court will not be enforceable in Canada.²⁶

[d]—Jurisdiction under the Quebec Civil Code.

As was noted above, pursuant to Article 3155 of the Quebec Civil code, “a Quebec authority (*i.e.*, court) recognizes and, where applicable, declares enforceable any decision rendered outside Quebec” except in certain specified situations. The first of these situations is that “the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title.”

[i]—Title 4, Chapter 2—Articles 3164–3167.

Title 4 has two chapters. The second of the two chapters in Title 4 deals with the “Jurisdiction of foreign authorities.” The first article in this chapter, Article 3164, sets out the general rule that

3164. The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Quebec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case.

This article gives Quebec courts some latitude to assess the jurisdiction of foreign courts, permitting them to refer to the bases of jurisdiction provided for Quebec courts in Title 3 subject to the overarching requirement, as set out in *Morguard*, that the dispute be substantially connected with the forum in question.

Article 3165 goes on to provide for three situations in which a foreign court will be regarded as lacking jurisdiction to issue a judgment capable of being recognized or enforced in Quebec. These situations arise because one of three

²⁵ *Braintech*, *supra* note 24 at 64.

²⁶ On the law in Canada relating to stays and anti-suit injunctions *see* Walker “A Tale of Two Fora: Fresh Challenges in Defending Multijurisdictional Claims” (1996) 33 *Osgoode Hall L J* 549.

other tribunals has exclusive jurisdiction. The other tribunals in question are: (1) the Quebec courts, (2) the courts of a third country, or (3) an arbitrator.

Articles 3166 and 3167 provide for the recognition of the jurisdiction of foreign courts in family law matters.

[ii]—Article 3168—Jurisdiction of Foreign Courts in Patrimonial Matters.

Article 3168, the final article in Title Four, establishes an exhaustive list of the situations in which the jurisdiction of foreign courts is recognized in *in personam* matters of a “patrimonial nature.” Patrimonial matters concern a person’s estate, property, and affairs—as opposed to “non-patrimonial matters,” which concern a person’s status and family relationships. This list includes two provisions for each of the three bases noted above in the discussion of the common law: consent, presence/residence, and real and substantial connection.

Consent

Paragraphs (5) and (6) relate to consent. Article 3168(6) contains the functional equivalent of the common law rule for attornment by providing that the foreign court’s jurisdiction to issue a judgment that is enforceable in Quebec will be recognized where “the defendant has recognized the jurisdiction of the foreign authority.”

Article 3168(5) contains the functional equivalent of the common law rule for contractual consent by providing that a foreign court’s jurisdiction will be recognized where “the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him.” The main difference in the Civil Code provision from the common law rule is that the Civil Code provision stipulates the availability of relief from the harsh effects of jurisdiction agreements that might occur in cases of unequal bargaining power where, in the common law, this relief might be available only on a discretionary basis.

Domicile/Residence

Paragraphs (1) and (2) provide for jurisdictional bases that are similar to those in the common law relating to the defendant’s presence or residence. Article 3168(1) provides that the foreign court’s jurisdiction to issue a judgment enforceable in Quebec will be recognized where “the defendant was domiciled in the country where the decision was rendered.” “Domicile” in the civil law is determined in a more pragmatic way than it is in the common law—the concept is closer to the common law concept of “residence” than to the common law

concept of “domicile.” However, by identifying the defendant’s domicile as the relevant criterion for establishing jurisdiction—and not the defendant’s *presence*—the provision clearly does not include the defendant’s temporary presence as a basis for jurisdiction.

Paragraph (2), concerning corporate presence, provides that jurisdiction is recognized where “the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country.” Accordingly, general jurisdiction derived from the business activities of branch plants is not recognized in Quebec. Further, by making the requirement of the possession of an establishment conjunctive with the requirement that the dispute relate to the activities of the corporation in the forum, paragraph (2) seems to preclude special jurisdiction based on the defendant’s activities alone.

Special Jurisdiction—Tort and Contract

Paragraphs (3) and (4) of Article 3168 set out the equivalents in the Quebec Civil Code to the common law bases for jurisdiction described above under the heading of “real and substantial connection.” These paragraphs relate to situations in which the court will not have jurisdiction over the defendant generally, but will have jurisdiction over the defendant with respect to particular claims with specific links to the place in which the foreign court sits.

For tort claims, pursuant to paragraph (3), jurisdiction is recognized where “a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country.” Thus, of the three elements of a tort that could occur in different places—*i.e.*, wrongful conduct, the occurrence of the tort, and the suffering of harm—two such elements must have occurred in the place where the matter was decided for the court to be regarded as having jurisdiction. These two elements must include *either* the wrongful conduct or the occurrence of the tort *and* the suffering of harm. Of course, if all three elements occurred in the place where the matter was decided, the foreign court will be regarded as having had jurisdiction.

For contract claims, pursuant to paragraph (4), jurisdiction is recognized where “the obligations arising from a contract were to be performed in that country.” Again, since the provisions of this article are the only bases on which jurisdiction is recognized, other bases of jurisdiction that are sometimes used in contract claims are not recognized. For example, an assumption of jurisdiction based solely on the execution of the contract in the place where the judgment was issued will not be recognized.

[2]—Finality.

A foreign judgment must be a final judgment for it to be enforced by a Canadian court. The judgment will be regarded as final in common law courts

if it conclusively determines the rights and obligations of the parties, and if it cannot be rescinded or varied by the court that pronounced it. Interlocutory judgments and judgments that can be reviewed *de novo* are not final and cannot be enforced.

A Canadian court may require evidence of the foreign law to determine whether the criteria for finality under Canadian law are met with respect to the foreign judgment in question, but the relevant test for finality is the test under the law of the Canadian enforcing court's jurisdiction, and not that of the foreign issuing court's jurisdiction.

The fact that a judgment is subject to appeal, or is under appeal, does not prevent the judgment from being regarded as final and, therefore, enforceable in the common law provinces and in the territories. Thus, even if a judgment subject to appeal is not regarded as final under the issuing court's law, it may be final under the enforcing court's law in the common law jurisdictions in Canada. If the Canadian court determines that the foreign judgment is enforceable but the judgment is under appeal in the foreign country, the Canadian court may grant a stay of execution on the judgment pending the outcome of the foreign appeal.

In Quebec, as in other civil law jurisdictions, judgments that are subject to appeal are not regarded as final, foreign judgments that are subject to appeal are not enforceable. Accordingly, article 3155(2) provides that Quebec courts will not enforce judgments where "the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered." It is worth noting that this distinction does not reflect a difference in the rules for the enforcement of judgments so much as a difference in the underlying concept of finality in judgments.

In addition, it should be noted that Article 3163 of the Quebec Civil Code permits direct recognition and enforcement of foreign contracts and transactions that could be enforced without a judicial determination in the foreign country. The Article provides that "a transaction enforceable in the place of origin is enforceable and, as the case may be, declared to be enforceable in Quebec on the same conditions as a judicial decision, to the extent that those conditions apply to the transaction." This would appear to permit the direct enforcement, for example, of minutes of settlement or of other contracts representing the negotiated resolution of disputes.

[3]—Ascertainable Sum of Money.

In keeping with the requirements that the foreign judgment be final and that it be treated as conclusive, Canadian courts enforce judgments only for ascertainable sums of money. This is because a judgment for an ascertainable sum does not require further adjudication for its enforcement either by the issuing court

or by the enforcing court. Therefore, it can be treated as conclusive and it is final for the purposes of enforcement. While the vast majority of local judgments are money judgments for ascertainable sums, the remainder—those for specific performance, or for injunctive relief—could require the supervision of the enforcing court and, in this way, could involve the court in assessments of the merits of the underlying dispute. Accordingly, they are not enforceable.

Where a judgment provides for the payment of interest at a specified rate on the award, the interest portion is enforceable where the interest can be calculated, but where a judgment provides for costs, and the costs portion of the award remains to be assessed, the costs portion is not enforceable.

The rule that a foreign judgment must award a fixed sum of money has impeded the enforcement of awards for periodic payments of support. This has been addressed in specialized provincial legislation for the reciprocal enforcement of support orders.²⁷ Article 3160 of the Quebec Civil Code provides that “a decision rendered outside Quebec awarding periodic payments of support may be recognized and declared enforceable in respect of both payments due and payments to become due.”

§ 64.04. Foreign Public Law Exception.

Canadian courts will not enforce foreign judgments based on foreign penal, revenue, or other public laws. They will not enforce orders for the payment of fines, or taxes, or orders that would in other ways give effect to the sovereign will of a foreign power. Historically, the key indicia that the laws in question were public laws have been that the claimant is a foreign state, and that the beneficiary of the award is the foreign state. However, as was clarified in the decision of the Ontario courts in *USA v. Ivey*¹ it is the substance of the matter that is determinative.

[1]—Penal Laws.

Canadian courts do not, of course, enforce sentences of incarceration, but penal laws may also give rise to the imposition of fines or other punishments in the form of money judgments. A penal law can be distinguished from other laws

²⁷ Alberta—Reciprocal Enforcement of Maintenance Orders Act 1980, RSA 1980, c R-7.1; British Columbia—Family Relations Act, RSBC 1996, c 128; Manitoba—Reciprocal Enforcement of Maintenance Orders Act, RSM 1987, c M20; New Brunswick—Reciprocal Enforcement of Maintenance Orders Act, SNB 1985, c R-4.01; Newfoundland—Reciprocal Enforcement of Support Orders, RSN 1990, c R-5; Nova Scotia—Maintenance Orders Enforcement Act, RSNS 1989, c 268; Ottawa—Reciprocal Enforcement of Support Orders Act, RSO 1990, c R.7; Prince Edward Island—Reciprocal Enforcement of Maintenance Orders Act, RSPEI 1988, c R-7; Saskatchewan—The Reciprocal Enforcement of Maintenance Orders Act, SS 1996, c R-4,2; Northwest Territories—Maintenance Orders (Facilities for Enforcement) Act, RSNWT 1988, c M-3; Yukon—Reciprocal Enforcement of Maintenance Orders Act, RSY 1986, c 148.

¹ *United States of America v. Ivey* (1996) 26 OR (3d) 533 (Gen Div), *affid* (1996) 30 OR (3d) (CA) leave to appeal to SCC refused SCC Bulletin 1997 at 1043.

as a law that provides for a punishment for failure to comply with requirements that are imposed on persons by the state, as opposed to a law that provides for compensation for a breach of the obligations between private parties.² Where the award in question is a fixed an arbitrary sum, designed to punish the defendant, and provide deterrence to others, rather than to compensate the plaintiff, particularly where this relates to harm caused to the public at large, the judgment may be denied enforcement because it is based on a foreign penal law.

[2]—Revenue Laws.

A revenue law, like those laws that give rise to the application of the Revenue Rule in the United States jurisprudence,³ is one relating to the monies payable to the state to be used by the state to further its policies. It has been held that enforcing such a judgment would render the court a tax collector on behalf of the foreign state.⁴ The revenue law has come under increasing criticism as governments become more involved in commercial activities and in restitutionary interventions on behalf of groups of individuals. Accordingly, where the judgment relates to an ascertainable sum of money recoverable by the government, or where the amount is tied to particular losses that the government is seeking to recover on behalf of a group of persons, the judgment is unlikely to be regarded as based on a revenue law and, therefore, denied enforcement.

[3]—Foreign Public Laws.

There has been some debate in the English jurisprudence about the existence of a residual category of “foreign public laws,” but it seems to be accepted in Canada that there exists a residual category of unenforceable judgments for claims arising from the sovereign power of a foreign authority.⁵ Nevertheless, in view of the fact that the vast majority of judgments sought to be enforced in Canada are judgments issued in the United States, and since Canada and the United States have shown such a high degree of cooperation in matters of shared interest, this exception has been construed narrowly.

In the *Ivey* case, a judgment granted pursuant to an administrative order under the Comprehensive Environmental Response and Compensation, and Liability Act, for the cost of repairing the environmental damage caused by the operation of a waste disposal site, was held to be enforceable in Ontario. The judgment was found not to be based on a penal or a revenue law, because the judgment was restitutionary in nature and the amount of the judgment was determined by

² *Huntington v. Attrill* [1893] AC 150 (PC Ont).

³ *Moore v. Mitchell*, 30 F 2d 600 (2d Cir 1929).

⁴ *Her Majesty the Queen in right of the Province of British Columbia v. Gilbertson* 597 F 2d 1161 (9th Cir 1979) and *United States of America v. Harden* (1962) 41 DLR (2d).

⁵ Castel and Walker, *Canadian Conflict of Laws* (5th ed, 2002+) chapters 8.5, 14.7.

the cost incurred to repair the environmental harm. The judgment was found not to be based on a foreign public law because, although the cost recovery action was pursued by a government, the claim was in substance similar to a private law claim for nuisance. Moreover, as Sharpe J. observed in the *Ivey* case,

Given the prevalence of regulatory schemes aimed at environmental protection and control in North America, considerations of comity strongly favour enforcement. In an area of law dealing with such obvious and significant transborder issues, it is particularly appropriate for the forum court to give full faith and credit to the laws and judgments of neighbouring states.⁶

The Quebec Civil Code does not establish general rules for judgments based on foreign public laws. Rather, it deals specifically with judgments for taxes. According to Article 3155(6) a Quebec court will not generally recognize or enforce a judgment where “the decision enforces obligations arising from the taxation laws of a foreign country.” However, Article 3162 provides that “a Quebec authority recognizes and enforces the obligations resulting from the taxation laws of foreign countries in which the obligations resulting from the taxation laws of Quebec are recognized and enforced.” Further, according to Article 3159 “recognition or enforcement may be granted partially if the decision deals with several claims that can be dissociated.”

[a]—Competition Act and Foreign Extraterritorial Measures Act.

The Competition Act⁷ and the Foreign Extraterritorial Measures Act⁸ represent rare legislative interventions into the field of the recognition and enforcement of foreign judgments. Section 82 of the Competition Act permits the Competition Tribunal, on an application by the Director to direct that certain foreign antitrust judgments not be given effect in Canada where this would adversely affect competition in Canada, or would adversely affect the efficiency of domestic trade or industry or foreign trade without improving competition or providing other advantages.

The Foreign Extraterritorial Measures Act provides for the declaration that certain judgments granted under antitrust or foreign trade laws shall not be recognized or enforced in Canada, and that recovery for amounts obtained in other countries in respect of those judgments will be recoverable from the assets in Canada of the foreign plaintiffs. The Act, was initially drafted in 1984, to provide for the refusal to enforce certain anti-trust judgments, as determined by regulation; but the Act was amended in 1996 in response to Title III of the Cuban Liberty and Democracy Solidarity (Libertad) Act.⁹ Judgments issued pursuant

⁶ *Ivey*, *supra* note 1 (Gen Div).

⁷ Competition Act, RSC 1985, c 19 (2nd Supp).

⁸ Foreign Extraterritorial Measures Act, c F-29 as am by SC 1996 c 28.

⁹ Cuban Liberty and Democracy Solidarity (Libertad) Act Pub L No 104-114, 110 Stat 785 (1996).

to that Act, should Title III come into force, have been declared unenforceable by regulation.

§ 64.05. Impeachment.

Canadian courts do not give effect to every judgment that meets the basic requirements for recognition and enforcement, even if recognizing or enforcing the judgment would not involve giving effect to the sovereign will of a foreign government. Foreign judgments may “impeached” and thereby refused recognition or enforcement. The three grounds for impeaching a foreign judgment are fraud, natural justice, or public policy.

Before the *Morguard* decision changed the law of judgments in Canada, the impeachment defences were very rarely invoked and even less often successful. Defendants who were served with notices of foreign proceedings and who had not agreed to have disputes resolved in the foreign court could usually prevent the judgment from becoming enforceable simply by refusing to attorn. Since the foreign court lacked “jurisdiction in the international sense”, there was no need for courts to go beyond this question to consider other objections that might arise in respect of the foreign judgment.

However, while there were occasions in which defendants exercised their prerogative to deny a foreign court jurisdiction by refusing to attorn when they had not agreed to its jurisdiction and had not been served within its territory, there were also occasions in which defendants refused to submit to the jurisdiction of a foreign court on the basis of legitimate concerns about the propriety of the proceeding or the likely fairness of the adjudication. When a judgment that was issued under those circumstances was sought to be enforced in Canada, it would not meet the jurisdictional requirements and, therefore, the question of impeachment would never be reached. Now that a defendant’s refusal to attorn no longer provides a defence, situations in which there has been some impropriety or inadequacy in the foreign proceedings are more likely to be considered directly.

One other factor should be noted before considering each of the impeachment defences. It might be anticipated that concerns about foreign proceedings would be most likely to arise with respect to judgments issued in countries with legal systems very different from the Canadian legal system. As it happens, the recent cases denying enforcement of judgments on the basis of these defences are almost all judgments issued by courts in the United States.

[1]—Fraud.

Canadian courts will not give effect to foreign judgments that have been obtained by fraud. While this principle is clear and uncontroversial, in practice it has proved difficult to identify the particular situations to which it should apply. To do so involves distinguishing between situations in which courts should refuse

to give effect to the foreign judgment because the foreign court was fraudulently persuaded to issue the judgment, and situations in which efforts to impeach a judgment for fraud should be rejected because it would require the Canadian court to review the merits of the claim or the adjudicative process in the foreign proceeding. In determining the scope of the fraud defence to foreign judgments, Canadian courts have also needed to consider what evidence they should be prepared to admit to challenge the foreign judgment and what evidence should be excluded on the basis that it would require the Canadian court to delve into a review of the foreign proceedings.

In establishing the scope of the fraud exception to enforcement, Canadian courts diverged nearly a century ago from the rule set down by the Court of Appeal in England that permitted an attack a foreign judgment as having been obtained by fraud even though the foreign court had itself addressed the dismissed the allegations.¹ In Canada, the courts have distinguished between *intrinsic* and *extrinsic* fraud. Allegations that a fraud was perpetrated on the foreign court by tendering untruthful witnesses or forged documents are regarded as *intrinsic* to the proceeding in the foreign court and they can not be considered on enforcement. Only allegations of fraud that were *extrinsic* to the record and that denied the complaining party the opportunity to present his or her case will have the potential to prevent the judgment from being enforced.

As was explained in the classic statement of the Ontario Court of Appeal:

[T]he fraud relied on must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the Court and so passed on into the limbo of estoppel by judgment. This estoppel cannot, in my opinion, be disturbed except upon the allegation and proof of new and material facts, or newly discovered and material facts which were not before the former Court and from which are to be deduced the new proposition that the former judgment was obtained by fraud²

As was suggested by the Court of Appeal in this passage, the test for fraud in impeaching a foreign judgment closely resembles the test in domestic proceedings for presenting fresh evidence on appeal. Evidence that was not considered by the foreign court but that could have affected the outcome will only be considered by a Canadian court in an enforcement action if the evidence could not with reasonable diligence have been discovered and tendered in the foreign proceeding.

There has been some controversy in the recent jurisprudence over the proper scope of this defence in default judgments. Following the application of the *Morguard* principles to foreign judgments, Canadian courts began to enforce

¹ Abouloff v. Oppenheimer (1882) 10 QBD 295 (CA).

² Jacobs v. Beaver Silver Cobalt Mining Co (1908) 17 OLR 496, 12 OWR 803 (CA) at 506 (OLR).

default judgments against defendants who had been served in Canada with notices of foreign proceedings and who had not submitted to the foreign court's jurisdiction, provided there was a real and substantial connection between the matter and the foreign forum. By what standards should it be determined that a defaulting party could with reasonable diligence have tendered the evidence in the foreign proceeding that the party now says should prevent enforcement?

In a recent case before the Ontario courts, the purchaser of a vacant lot in Florida owned by Ontario residents mistakenly thought that he had purchased Lot #1 instead of Lot #2 and he had stopped building a model home on it. The sale price of the lot was \$8000(US). After various exchanges of documents,³ the Canadian vendors had offered to return the purchase money. Somehow, though, a default judgment was then issued against them in Florida for about \$260,000(US). By the time the judgment came to be enforced, with interest, the award had grown to \$800,000(Cdn).

The trial judge concluded that the jury must have been misled, both with respect to the merits of the claim and to the extent of the damages suffered. Although he did not find that the fraud exception *per se* applied, he observed that "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."⁴

On appeal to the Court of Appeal, the decision was overturned. A majority of the Court held that 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."⁵ It would seem from this ruling that it is incumbent on defendants to be diligent in ensuring that evidence necessary to their defence is tendered in the foreign proceeding, and where the matter proceeds on default, there is little scope for them to argue that material facts were withheld or misrepresented. However, the matter has been granted leave to appeal to the Supreme Court of Canada.

On a point unrelated to the conduct of the proceeding and the diligence of the complaining party, it has been held that the fraud defence also applies to questions of jurisdiction. This would appear to follow from the rule that there can be no estoppel relating to determinations of the jurisdiction of the foreign court. As the Supreme Court of Canada observed "if the granting state takes jurisdiction on the basis of facts which, if the truth were known, would not give it jurisdiction the decree may be set aside. Fraud going to the merits may be

³ *Beals v. Saldanha* (1998) 42 OR (3d) 127.

⁴ *Id* at 144.

⁵ *Beals v. Saldanha* (2001) 54 OR (3d) 641(CA) at para 75.

just as distasteful as fraud going to jurisdiction, but for reasons of comity and practical difficulties, in the past we have refused to inquire into the former.”⁶

This approach would seem to reflect the view that where a defendant is confident that a foreign court patently lacks jurisdiction to decide the case, there is no positive obligation to appear and advise the foreign court of this. And where the foreign court could only have regarded itself as having jurisdiction as a result of the deliberate attempts on the part of the plaintiff to mislead it, it would appear that the defendant is entitled to raise this objection on enforcement.

[2]—Natural Justice.

Canadian courts will not give effect to foreign judgments that were obtained in a manner that violates the principles of natural justice. The term “natural justice” in this context does not mean the same as the term as it is used in the administrative law sense to connote the requirements of notice and an opportunity to be heard. It is both broader and narrower. It is broader in the sense that the English courts have described this basis for impeachment as a breach of “substantial justice”⁷ and Article 3155(3) of the Quebec Civil Code provides that a foreign judgment will not be enforced where “the decision was rendered in contravention of the fundamental principles of procedure.”

However, the defence is also narrower in that a foreign judgment will not be impeached for breach of natural justice solely because the rules of evidence applied in the foreign court were different or because there was some irregularity in the procedure before the foreign court. To consider such complaints would embroil the enforcing court in a review of the decision-making process of the issuing court. However, the judgment may be impeached where there is evidence of bias on the part of the foreign court or the complaining party was denied the opportunity to present his or her case. Complaints about inadequate notice of the proceeding will fail where the notice of the proceeding was given in accordance with the standards of the foreign country provided that the defendant was resident in the territory of the issuing court or consented to the jurisdiction of the issuing court. However, this is less clear where the defendant did not consent and was not resident in the foreign country.⁸

[a]—Default Judgments.

Special concerns about fairness are raised by default judgments because the defendant’s complaints about the procedure adopted in the foreign court relate to proceedings in which the ordinary mechanisms for ensuring fairness in the adversary system (i.e., through the participation of both parties) do not function

⁶ *Powell v. Cockburn* [1977] 2 SCR 218.

⁷ *Adams v. Cape* [1990] Ch 433 at 550 (CA).

⁸ *Beals*, *supra* note 5, *per Weiler* JA in dissent.

in the same way. Canadian courts have yet to pronounce definitively on whether, in a foreign default proceeding, the defendant should be taken to have waived the right to complain later that the procedure was unfair, or whether certain standards of fairness should nevertheless be required for the judgment to be declared enforceable.⁹

The Quebec Civil Code recognizes the special concerns raised by foreign default proceedings. Article 3156 provides that “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.”

[3]—Public Policy.

Canadian courts will not give effect to foreign judgments where this would violate the public policy of the forum. Accordingly, for example, a judgment based on a claim contrary to basic human rights would be unenforceable. Article 3155(5) of the Quebec Civil Code provides that a foreign judgment is not enforceable if “the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations.”

It is important to note that in the law relating to the enforcement of judgments a distinction is made between local public policy and international public policy. As the Court of Appeal for Ontario explained, “the common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.” Accordingly, even when gambling contracts were illegal and unenforceable in Canada, it was held that the enforcement of a foreign judgment for gambling debts incurred abroad was not contrary to public policy because this did not violate essential morality.¹⁰

[a]—Excessive Damages Awards.

It would be misleading to suggest that excessive damages awards constituted an established defence to foreign judgments. Moreover, there is no Canadian equivalent to the Protection of Trading Interests Act, 1980 (UK), which provides that awards for multiple damages are not enforceable. However, it would be

⁹ *Beals supra* note 3 *revd supra* note 5.

¹⁰ *Boardwalk Regency Corp v. Maalouf* (1992) 6 OR (3d) 737 (CA); *Society of Lloyd's v. Meinzer* (2001) 55 OR (3d) 688 (CA).

equally misleading to suggest that excessive awards of damages have not given rise to expressions of concern on the part of Canadian courts, or that they have not had an impact on the enforceability of foreign judgments. For example, in the *Beals* case, where a mistake in the sale of a vacant lot for \$8000(US) produced a damages award that, at the time of its enforcement, amounted to \$800,000(Cdn), the court regarded this as a “breathtaking” feature of the judgment—one that indicated that the jury must have been misled by the plaintiff with regard to the damages suffered.

Similar concern over the quantum of a California judgment for damages for mental distress in *Kidron v. Grean*¹¹ led an Ontario court to refuse summary judgment to enforce the California judgment because, pursuant to the Supreme Court jurisprudence, the limit on awards for non-pecuniary awards, “sometimes referred to as a cap on general damages, it is adhered to faithfully by Canadian courts. . . . Before such an award could be made an order of a Canadian court . . . a trial would be required at which the question of public policy would be open for full exploration.” Given these and other acknowledgements of the controversy associated with high damages awards it seems likely that this issue will be addressed decisively in the coming years.

§ 64.06. Registration of Judgments.

Provincial legislation provides for the enforcement of foreign judgments by registration.¹ While the legislation does not alter the standards for determining whether a judgment is enforceable, it streamlines the process for obtaining a local court order by obviating the need to commence a claim and seek summary judgment.

A judgment creditor applies to the court for an order registering the judgment. Where the judgment debtor was served personally with the notice of the proceeding in the original action within the territory of the court issuing the judgment, or where the defendant attorned to the jurisdiction of the foreign court, the enforcing court may exercise its discretion to grant the order *ex parte*. Where

¹¹ (1996) 48 OR (3d) 775 (Gen Div) leave to appeal to Div Ct refused (1996) 48 OR (3d) 784.

¹ Reciprocal Enforcement of Judgments Act, RSA 1980, c R-6 (Alberta); Court Order Enforcement Act, RSBC 1996, c 78, ss. 28-39 and BC Supreme Court Rules, R 54 (British Columbia); RSM 1987, c J-20 (Manitoba); RSNB 1973, c R-3.1 (New Brunswick); RSN 1990, c R-4 (Newfoundland); RSNWT 1988, c R-1 (Northwest Territories); RSNS 1989, c. 388 (Nova Scotia); RSO 1990, c R.5 (Ontario); RSPEI 1988, c R-6 (Prince Edward Island); SS 1996, c R-3.1 and the Judgment Extension Act, RSS 1978, c J-3 (Saskatchewan); RSY 1986, c 146 (Yukon). This legislation is based on the Uniform Law Conference of Canada Model Act, 1924 as revised and amended (see Consolidation of Uniform Acts of the Uniform Law Conference of Canada). And see the Enforcement of Judgments Convention Act 1999, SO 1999, c 12, Schedule C. Similar legislation has been passed to implement conventions with the United Kingdom and France (Convention Between Canada and the United Kingdom for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 1984, and Convention Between Canada and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1996).

the registration order is made *ex parte*, the judgment debtor must be served with notice of the order within one month, and the judgment debtor then may, within one month, apply to have it set aside. The grounds for setting aside the order include, among other things, lack of jurisdiction or of due service or appearance, lack of finality, fraud or public policy, or a good defence if an action had been brought on the judgment.

The legislation applies to states declared to be reciprocating states. In some provinces, these include foreign states,² while in others, such as Ontario, the only jurisdictions to have been declared reciprocating jurisdictions to date are other Canadian provinces and territories.

§ 64.07. Special Regimes.

Specialized regimes have been developed to facilitate the recognition and enforcement of foreign judgments in a variety of areas in which the ordinary process is too cumbersome and expensive to satisfy the public interest in facilitating the enforcement of foreign judgments.

Perhaps the most significant of these specialized regimes are the provincial legislative schemes devised to facilitate the cross-border enforcement of support orders.¹ The legislation provides for the granting of final orders by courts with jurisdiction over the respondent, and for provisional orders that may be confirmed by a court with jurisdiction over the respondent. These orders may be transmitted to the authorities in reciprocating states for registration and enforcement. Foreign states and countries may be declared to be reciprocating jurisdictions, for the purposes of receiving and transmitting provisional orders for confirmation, or for receiving and transmitting final orders for registration and enforcement. Most states within the United States have been declared to be reciprocating jurisdictions for, for example, Ontario's Reciprocal Enforcement of Support Orders Act.²

Other regimes facilitate the recognition and enforcement of judgments that would otherwise be uneconomical to pursue. For example, pursuant to section 198 of the Ontario Highway Traffic Act, the failure of persons to pay judgments in respect of personal injury or property damage caused by traffic accidents can result in the suspension of their drivers' licenses. Pursuant to section 198(3), the

² For example, the British Columbia Court Order Enforcement Act applies to judgments *inter alia*, from Alaska, California, Colorado, Idaho, Oregon and Washington.

¹ The legislation of the various provinces and territories is cited above in § 64.06, *supra*, note 1.

² Reciprocating States in the United States include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin.

judgments of jurisdictions designated as reciprocating jurisdictions³ can form the basis for the suspension of an Ontario driver's license.

Similarly, judgments issued in states parties to the International Convention on Civil Liability for Oil Pollution Damage of November 29, 1969 can be registered in the Federal Court pursuant to the Canada Shipping Act.⁴

§ 64.08. Judgments In Rem.

This chapter has focused on the recognition and enforcement of judgments in actions *in personam*. These judgments give rise to orders that bind the parties to the dispute. They comprise the vast majority of judgments issued. However, some judgments—judgments *in rem*—determine the status of a person or the ownership of a thing. The main difference between judgments *in rem* and judgments *in personam* is that judgments *in rem* purport to determine matters of status or ownership in a way that will bind not only the parties to the dispute, but also anyone who might be affected by the determination. For example, decrees in admiralty relating to the ownership of a ship could affect not only the litigants but also anyone else who might have an interest in the ship. Similarly, decrees in family law relating to the validity of a marriage could affect not only the couple, but also their children and others who might be affected by a determination of whether the couple is validly married.

The Federal Court of Canada has concurrent original jurisdiction in matters of Admiralty throughout Canada.¹ Accordingly, a foreign judgment *in rem* relating to a dispute about the title, possession, or ownership of a ship may be brought in the Federal Court.

A foreign court will be regarded as having jurisdiction to issue an enforceable judgment *in rem* relating to rights in a movable if the movable was located in the territory of the foreign forum when the proceedings were commenced. The foreign judgment will be recognized not only as conclusive of the rights in the movable but it will also be regarded as sufficient to found a valid transfer of those rights. Accordingly, where goods or ships are sold pursuant to an order *in rem* regarding the rights of persons in them, the title obtained by a *bona fide* purchaser will also be recognized.

The same rule applies to foreign land (“immovables”): judgments determining title to foreign immovables will be recognized provided that the judgments have

³ Reciprocating States in the United States include: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, District of Columbia: RRO 1990, Reg 607, s 2.

⁴ Canada Shipping Act, RSC 1985, S-9, ss 687-95.

¹ Federal Court Act, RSC 1985, c F-7.

been issued by courts in the territories in which the foreign immovables are located.

The jurisdiction of foreign courts to grant divorces after June 1, 1986, when the current Divorce Act² came into force, is recognized in Canada if either former spouse was ordinarily resident in the territory of the forum for at least one year immediately preceding the commencement of the divorce proceedings. The jurisdiction of foreign courts to grant divorces after July 1, 1968, when the previous Divorce Act came into effect, are recognized if the wife was domiciled in the foreign country (which is to be determined as if she was unmarried and of the age of majority). The Divorce Act is federal legislation that applies throughout Canada. It further provides, however, that these provisions do not supersede the common law rules for the recognition of foreign divorces.

While the recognition and enforcement of foreign divorces may be the most common question in this area that arises in respect of family law disputes, a range of other questions relating to marriage and divorce, custody and access, support, and adoption that involve judgments *in rem* have received special attention in the courts and the legislatures. They are beyond the scope of this chapter.³

§ 64.09. Foreign Arbitral Awards.

To implement the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1985 UNCITRAL Model Law on International Commercial Arbitration, legislation providing for the recognition and enforcement of foreign arbitral awards has been passed in every Canadian jurisdiction.

The recognition and enforcement in the Federal Court of both foreign and domestic arbitral awards is governed by the United Nations Foreign Arbitral Awards Convention Act¹ and the Commercial Arbitration Act.² Provincial legislation governing the recognition and enforcement of foreign and international commercial arbitration awards varies somewhat from province to province. Each province has passed an International Commercial Arbitration Act and, in some of the provinces and territories, that Act effectively implements both conventions.³ However, in others there is a second statute implementing the New York Convention the Foreign Arbitral Awards Act.⁴ Generally, the implementing

² Divorce Act, RSC 1985 c 3 (2nd Supp).

³ See Castel and Walker, § 64.04[3], *supra* note 5, chapters 16-21.

¹ United Nations Foreign Arbitral Awards Convention Act, RSC 1985, c 16 (2nd Supp).

² Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp).

³ International Commercial Arbitration Act: Alberta—SA 1986, c I-6.6; British Columbia—RSBC 1996, c 233; Manitoba—SM 1986-87, c 32; New Brunswick—SNB 1986, c I-12.2; Newfoundland—RSN 1990, c I-15; Northwest Territories—RSNWT 1988, c I.6; Nova Scotia—RSNS 1989, c 234; Ontario—RSO 1990 c I.9; Prince Edward Island—RSPEI 1988, c I-5; Saskatchewan—SS 1996 c I-10.2; Yukon—SYT 1987, c 14.

⁴ British Columbia—Foreign Arbitral Awards Act, RSBC 1996, c 154; Saskatchewan—Enforcement of Foreign Arbitral Awards Act, SS 1996, c E-9.12; Yukon—Foreign Arbitral Awards Act, RSYT 1986, c 70.

legislation consists of provisions for matters such as interpretation and scope of application and this is followed by a schedule containing the New York Convention or the Model Law.

Canada made only one of the two reservations possible in the New York Convention—the commercial reservation—and, accordingly, Canadian courts are obliged to enforce only awards regarded as commercial under the law applicable in Canada. Canada did not subscribe to the reciprocity reservation limiting the obligation to enforce foreign arbitral awards to those made in the territory of other contracting states.

The procedure for enforcing a foreign arbitral award is generally the same as the procedure for enforcing foreign judgments. An authenticated original or certified copy of the award and of the arbitration agreement must be supplied, and where these documents are not in English or French, a certified translation must be provided. The defences to the recognition and enforcement of foreign arbitral awards that are found in Articles V and VI of the New York Convention and Article 36 of the UNCITRAL Model Law are generally adopted by the provincial legislation as the sole means of resisting the enforcement of foreign arbitral awards.

§ 64.10. Appendix—Quebec Civil Code, Book X, Title 4.

The law respecting the recognition and enforcement of foreign judgments in Quebec is set out in Title 4 of Book X of the Quebec Civil Code. The provisions of Title 4 have been discussed in various parts of this Chapter. This appendix reproduces them as they appear in the Quebec Civil Code.

Title Four Recognition and Enforcement of Foreign Decisions and Jurisdiction of Foreign Authorities

Chapter I Recognition and Enforcement of Foreign Decisions

3155. A Quebec authority recognizes and, where applicable, declares enforceable any decision rendered outside Quebec except in the following cases:

- (1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;
- (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
- (3) the decision was rendered in contravention of the fundamental principles of procedure;
- (4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Quebec, whether it

has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Quebec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Quebec;

(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;

(6) the decision enforces obligations arising from the taxation laws of a foreign country.

3156. 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.

3157. Recognition or enforcement may not be refused on the sole ground that the original authority applied a law different from the law that would be applicable under the rules contained in this Book.

3158. A Quebec authority confines itself to verifying whether the decision in respect of which recognition or enforcement is sought meets the requirements prescribed in this Title, without entering into any examination of the merits of the decision.

3159. Recognition or enforcement may be granted partially if the decision deals with several claims that can be dissociated.

3160. A decision rendered outside Quebec awarding periodic payments of support may be recognized and declared enforceable in respect of both payments due and payments to become due.

3161. Where a foreign decision orders a debtor to pay a sum of money expressed in foreign currency, a Quebec authority converts the sum into Canadian currency at the rate of exchange prevailing on the day the decision became enforceable at the place where it was rendered.

The determination of interest payable under a foreign decision is governed by the law of the authority that rendered the decision until its conversion.

3162. A Quebec authority recognizes and enforces the obligations resulting from the taxation laws of foreign countries in which the obligations resulting from the taxation laws of Quebec are recognized and enforced.

3163. A transaction enforceable in the place of origin is enforceable and, as the case may be, declared to be enforceable in Quebec on the same conditions as a judicial decision, to the extent that those conditions apply to the transaction.

Chapter II Jurisdiction of Foreign Authorities

3164. The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Quebec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case.

3165. The jurisdiction of a foreign authority is not recognized by Quebec authorities in the following cases:

- (1) where, by reason of the subject matter or an agreement between the parties, Quebec law grants exclusive jurisdiction to its authorities to hear the action which gave rise to the foreign decision;
- (2) where, by reason of the subject matter or an agreement between the parties, Quebec law recognizes the exclusive jurisdiction of another foreign authority;
- (3) where Quebec law recognizes an agreement by which exclusive jurisdiction has been conferred upon an arbitrator.

3166. The jurisdiction of a foreign authority is recognized in matters of filiation where the child or either of his parents is domiciled in that country or is a national thereof.

3167. The jurisdiction of a foreign authority is recognized in actions relating to divorce if one of the spouses had his domicile in the country where the decision was rendered or had his residence in that country for at least one year before the institution of the proceedings, or if the spouses are nationals of that country or, again, if the decision has been recognized in that country.

3168. In personal actions of a patrimonial nature, the jurisdiction of a foreign authority is recognized only in the following cases:

- (1) the defendant was domiciled in the country where the decision was rendered;
- (2) the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;
- (3) a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;
- (4) the obligations arising from a contract were to be performed in that country;
- (5) the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;
- (6) the defendant has recognized the jurisdiction of the foreign authority.