

**THE ENFORCEMENT OF FOREIGN JUDGMENTS IN B.C. -
TEN YEARS AFTER MORGUARD**

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The Supreme Court of Canada's revolutionary decision in *Morguard v. De Savoye* [1990] 3 S.C.R. 177 ("*Morguard*") was rendered a little over ten years ago, on December 20, 1990. In what has been referred to as "the most important decision on the conflict of laws ever rendered by the Supreme Court of Canada"¹, the court dramatically changed Canadian law as to when our courts will recognize and enforce an *in personam* judgment from another province.² Prior to *Morguard*, the general rule was that such a judgment from another province would not be enforceable against a local resident, unless that resident had voluntarily submitted to the other court's jurisdiction in some fashion. The practical result of this was that plaintiffs often had to choose the province in which they would litigate based on the location of the defendant's assets.

The Pre-*Morguard* refusal to give "full faith and credit" to the decisions of other courts within our federation distinguished Canadian law from that of the American and Australian federations, both of which countries have express "full faith and credit" provisions in their constitutions.³ Without such language in our constitution, Canadian courts adopted the English approach to the recognition of foreign judgments, without modifying the principle to take into account the federal nature of our country, thus treating the decisions from other Canadian provinces the same as if they had been rendered by the courts of foreign countries.

All of this has changed with *Morguard* and the decisions that have followed it. In *Morguard*, the Supreme Court declared that the courts in one province should give "full faith and credit" to judgments given by the courts of other Canadian provinces and territories (subject to certain limitations), notwithstanding the absence of such wording in our constitution. In *Hunt v. T. & N. plc* [1993] 4 S.C.R. 289, the Supreme Court declared that the *Morguard* principle of "full faith and credit" is in fact an *unwritten* part of our constitution - a "constitutional imperative" such that provincial statutes may not conflict with it.⁴ In *Moses v. Shore Boat Builders* (1993) 83 B.C.L.R. (2d) 177 (C.A.), our Court of Appeal applied the *Morguard* principle to an Alaskan

judgment, thus showing that the principle goes beyond the borders of Canada. In *Braintech Inc. v. Kostiuk* (1999) 63 B.C.L.R. (3d) 156 (C.A.), our Court of Appeal considered the Morguard principle in the context of the internet, and demonstrated one circumstance where the principle will not be applied in the face of apparent forum shopping by a plaintiff.

The Morguard principle of “full faith and credit” is based on two rationales and is subject to two limitations. The two rationales are first, the unified nature of the Canadian federation under our constitution, and second, the need for a more generous approach to comity in an era of liberalized international trade. The two limitations are that the principle will not apply unless the out of province court that granted judgment acted first, through “fair process”, and second, with “properly restrained jurisdiction”. The growth and restrictions that the Morguard principle has seen over the past ten years flow out of these rationales and limitations (although as will be seen the “fair process” limitation has not yet been expressly explored).

Perhaps ironically, the end result ten years after *Morguard* is that B.C. Courts still treat judgments from other Canadian provinces in almost exactly the same way that they treat judgments from foreign countries.⁵ However, the situation is now reversed. Rather than a general rule *against* the recognition of foreign judgments, subject to certain exceptions, there is now a rule that generally favours the recognition and enforcement of foreign judgments, based on the notion of comity, subject to certain limitations and defences.

This article examines the *Morguard* decision, and the development and refinement of the Morguard principle over the past ten years. The first part of the article reviews four decisions that have been particularly important in the development of the Morguard principle: *Morguard* itself, *Hunt*, *Moses*, and *Kostiuk*. The second part examines the limitations on the principle, and the defences that remain to foreign judgments in B.C.

I. THE DEVELOPMENT OF THE MORGUARD PRINCIPLE

The Morguard Decision: full faith and credit for the judgments of other provinces

Prior to *Morguard*, Canadian courts treated judicial decisions from other provinces as though they were from foreign countries, adopting the English approach to the recognition of foreign judgments, and applying it to other Canadian judgments. This approach was outlined in

Emanuel v. Symon [1908] 1 K.B. 302 (C.A.) where Buckley L.J. held at 309 that there were five circumstances in which an English court would enforce a foreign judgment, as follows:

“(1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterward sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained”.

England is, of course, a unitary state. Thus, Buckley L.J. did not consider how to appropriately respond to a judgment that comes from a different jurisdiction, but not from a “foreign country”. Canadian courts apparently did not consider this distinction either, but instead, as La Forest J. tells us in *Morguard*, “unthinkingly” adopted the English approach in relation not only to foreign decisions, but also decisions of other provinces.⁶

Canadian Provincial Legislatures addressed the issue to some extent with reciprocal enforcement of judgments legislation. These provisions (found in Part II of our *Court Order Enforcement Act* (“COEA”)) allow a judgment creditor from a “reciprocating state” to apply to the Supreme Court of B.C. to have the judgment registered as a judgment of our court.⁷ However, there is an important exception: the out-of-province judgment will not be registered if the defendant was neither carrying on business nor ordinarily resident in the other jurisdiction, and did not voluntarily appear or otherwise submit to that court.⁸ Thus, although the legislation provides a stream-lined process, substantively it does not take plaintiffs much further than *Emanuel v. Symon*. What happens then, if you have a judgment from another Canadian province that clearly had jurisdiction over the subject matter of the dispute, but the defendant was not a resident of that province and did not appear? Must the judgment creditor re-litigate the matter in B.C. in order to enforce the judgment here?

This was the question that the Supreme Court of Canada faced in *Morguard*. *Morguard* dealt with a foreclosure on mortgaged land in Alberta and the resulting deficiency. The Defendant, Mr. De Savoye was mortgagor⁹ and *Morguard Investments* was mortgagee. The mortgages fell

in default, and Morguard Investments brought foreclosure proceedings, ultimately obtaining an Alberta judgment for the deficiency between the sale price of the property and the amount owing on the mortgages. However, the Defendant, De Savoye had moved to B.C. before the foreclosure proceedings commenced, and did not attorn to the jurisdiction of the Alberta Court, either by agreement, or by appearance.

Morguard Investments thus sued in B.C. to enforce its judgment on the deficiency. However, the Defendant argued that it was not enforceable because he had never attorned to the Alberta Court. In holding that the Alberta judgment was in fact enforceable in B.C., the unanimous Supreme Court of Canada gave us this important statement of principle, sometimes referred to as the “Morguard principle”, “...the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action”.¹⁰

This broad principle of “full faith and credit” was driven by two rationales, and is subject to two limitations. The two rationales are first, the unified nature of the Canadian Federation itself under the Canadian Constitution, and second, the need for a more generous approach to the question of comity generally in an age of liberalized international trade. The two limitations are that the Morguard principle will not apply unless the Court granting judgment acted first, through fair process, and second, with properly restrained jurisdiction.

The first rationale is constitutional. Specifically, La Forest J., writing for the unanimous Court, held that “the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country” and thus that “the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution”.¹¹ This rationale would suggest that *Morguard* would have no application to non-Canadian judgments, such as American judgments.

However, the second rationale put forward in *Morguard* - the need for a more generous approach to the question of comity in an era of liberalized international trade - would suggest that the principle applies to truly foreign judgments. In this regard, the Court noted that modern states “cannot live in splendid isolation”, stating:

“The 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”.¹²

The Court concluded that what must underlie a modern system of private international law are “principles of order and fairness, principles that ensure security of transactions with justice”.¹³ But how does the law ensure both “order *and* fairness”? How does it combine “security of transactions” with justice? This is where the two limitations on the Morguard principle come into play. In order to ensure fairness for Defendants, the principle will not apply unless the Court issuing judgment acted through fair process, and with properly restrained jurisdiction.¹⁴

The Court did not give any guidance with respect to the first limitation, holding that “fair process is not an issue within the Canadian federation”.¹⁵ However, the Court did consider what will be required in order to meet the “properly restrained jurisdiction” limitation, adopting for this purpose the “real and substantial connection” test, from *Moran v. Pyle National (Canada) Ltd.* [1975] 1 S.C.R. 393. Specifically, the original court will have acted “with properly restrained jurisdiction” if it passed judgment in a case where there was a “real and substantial connection” between that province and the subject matter of the litigation.¹⁶ The Court concluded that this approach provides “a reasonable balance between the rights of the parties” in that it “affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties”.¹⁷ As will be seen, the importance of this protection would be brought into sharp focus in 1999 in the context of a Texas judgment for an alleged defamation on the internet, in *Braintech Inc. v. Kostiuk* (1999) 63 B.C.L.R. (3d) 156 (C.A.).

The Hunt decision: Morguard as “Constitutional Imperative”

Although the Canadian Constitution loomed large in the Court’s reasoning in *Morguard*, the Court made clear that *Morguard* had not been argued in constitutional terms, and that it was thus unnecessary to go so far as to declare that a “full faith and credit” clause must be read into our constitution.¹⁸

As a result, although the Court strongly suggested that the “full faith and credit” principle is a constitutional principle, it left the question open. The Court answered the question in *Hunt v. T & N plc* [1993] 4 S.C.R. 289 (“*Hunt*”), where La Forest J., again writing for the unanimous Court, described the Morguard principles as “constitutional imperatives”.¹⁹

Hunt dealt with a provincial statute, the Quebec *Business Concerns Records Act*, and its effect on asbestos litigation in B.C. Mr. Hunt suffered from cancer, allegedly caused by the inhalation of asbestos fibres while working in Victoria. He and a number of other Plaintiffs brought action in B.C. against certain Quebec companies involved in the production and distribution of asbestos, and served demand for discovery of documents pursuant to our Rule 26. However, the Quebec *Business Concerns Records Act* made it an offence for anyone to remove from Quebec any document relating to any Quebec “business concern” pursuant to “any legislative, judicial or administrative authority outside Quebec”. This Act was patterned on an Ontario statute, and its purpose was purportedly to protect Quebec companies from the extra-territorial reach of American anti-trust laws, although there was nothing in the Act to limit it to such cases.

The Defendants thus argued that they had a “lawful excuse” under our Rule 2(5), such that the consequences for non-compliance with Rule 26 did not apply. In response, the Plaintiffs argued that the Quebec statute was inapplicable with respect to the courts of other provinces under the Morguard principle.

Mr. Hunt and the other Plaintiffs were successful. The Supreme Court held that the *Business Concerns Records Act* “should be read as not applying to the [other] provinces since such application would be *ultra vires* under the constitutional principle set forth in the Morguard case”.²⁰ The Morguard principle of “full faith and credit” is thus a “constitutional imperative” that is “inherent in the structure of the Canadian federation, and, as such, is beyond the power of provincial legislatures to override”.²¹ The Court ordered the Defendants to produce their documents within 30 days, including documents located inside Quebec.²²

The result in *Hunt* may seem surprising. A Quebec provincial statute had been found *ultra vires* and read down, not by virtue of any written provision in the Canadian Constitution, but instead by virtue of the Morguard “constitutional imperative”. Simply put, “full faith and credit” was “read in”, and the Quebec *Business Concerns Records Act* was “read down”. This demonstrates

the powerful nature of the tool that the Supreme Court of Canada gave itself and the other courts in *Morguard*. Although *Morguard* itself was, strictly speaking, about the recognition in one province of a default *in personam* judgment given in another, the *Hunt* decision shows that the *Morguard* principle has ramifications beyond that context, as a constitutional rule regarding the respect that the legal institutions of one province, including not only the courts but also the legislatures, must give to the legal acts of other Provinces.

The Moses Decision: Morguard Goes International

Thus, in rendering its decision in *Hunt* on November 18, 1993, the Supreme Court highlighted the Canadian Federalism rationale for the *Morguard* principle, elevating “full faith and credit” to a “constitutional imperative”. However, just a few weeks earlier, on September 28, 1993, the B.C. Court of Appeal seized upon the second rationale for the *Morguard* decision - the need for a more generous notion of comity in an era of liberalized international trade - to apply the *Morguard* principle to a truly foreign judgment, a default judgment from the State of Alaska, in *Moses v. Shore Boat Builders Ltd.* (1993) 83 B.C.L.R. (2d) 177 (C.A.) (“*Moses*”).

The Plaintiff Moses was an Alaskan resident who had purchased a boat from a B.C. company, the Defendant Shore Boat Builders Ltd. Shore Boat had no physical presence in Alaska and did not carry on business in that state. Shore Boat did agree, however, to construct the boat specifically for the Plaintiff, and provide it to a common carrier at Seattle for delivery to Moses in Alaska. The boat was specifically manufactured to American standards for Moses’ use in Alaska, and a loan from the Alaskan Department of Commerce facilitated the transaction.

Moses sued Shore Boat in Alaska in June, 1987 claiming that the boat was defective. Relying on legal advice obtained in both B.C. and Alaska, Shore Boat did not defend the action, believing that Moses would have to sue in B.C. if he wished to enforce his claim here, and that Shore Boat could defend such an action on its merits. As of that point in time, of course, the legal advice that Shore Boat had received appeared to be entirely correct. However, after obtaining default judgment in Alaska, Moses moved in the early 1990s for recognition and enforcement of his judgment in B.C., arguing that *Morguard* (December, 1990) had changed matters. Because there was a real and substantial connection with the State of Alaska, and no serious question but that

Alaska had employed a fair process, Moses argued that his Alaskan default judgment should be given full faith and credit.

In B.C. Supreme Court, Huddart J. agreed with the Plaintiff and held that Moses was entitled to enforce the Alaskan judgment in B.C. Shore Boat appealed, with its main ground being that the Supreme Court had erred in applying the *Morguard* principle to a default judgment from a truly foreign court.

The appeal was dismissed. Although noting the many passages from *Morguard* that refer to the Canadian Federalism rationale, the Court of Appeal rejected the argument that *Emanuel v. Symon* should still be the rule for truly foreign decisions, holding that such a view is “out of keeping with the modern understanding of the principle of comity”. The Court referred to the second rationale from *Morguard* to hold that *Morguard*’s “real and substantial connection test” extends to the enforcement of judgments from American courts. This was on the basis that “modern rules of international law must accommodate the flow of wealth, skills and people across state lines and promote international commerce”.²³ Shore Boat’s application for leave to appeal to the Supreme Court of Canada was dismissed on March 3, 1994.²⁴

Madam Justice Huddart did note, however, that there does remain at least one difference between the enforcement of the decisions of other provinces under *Morguard*, and the decisions of truly foreign courts such as this. If the judgment is Canadian, then the only question will be whether there was a real and substantial connection between the other province and the action. However, “if the judgment is not from a Canadian court, the fairness of the process of the foreign court may be challenged”.²⁵ The Court of Appeal quoted this passage, without commenting on that particular point.

The B.C. Courts were not alone in coming to the conclusion that *Morguard* applies to American judgments. The Ontario Superior Court of Justice came to the same conclusion with respect to an Illinois judgment the same year in *Arrowmaster Incorporated v. Unique Forming Limited* (1993) 17 O.R. (3rd) 407.²⁶

Braintech Inc. v. Kostiuk: Morguard meets the Internet

A good justification for extending *Morguard* to American judgments was given by Sharpe J. in *U.S.A. v. Ivey* (1995) 130 D.L.R. (4th) (O.S.C.J.) at 683 where the Court stated that “the law would be seriously deficient and at odds with the reality of modern commercial life if it were possible for a resident of this province to actively engage in a business in the United States for a period of several years, but then shelter behind the borders of Ontario from answering to a claim for civil liability for harm caused by that activity”.²⁷ This seems fair. But what about someone who is not engaging in business in the United States, but instead simply gets caught in what some might view as the aggressive approach to jurisdiction by some American states? Should not defendants be allowed to “shelter” behind our borders if the plaintiff has gone forum shopping?

In *Braintech Inc. v. Kostiuk* (1999) 63 B.C.L.R. (3d) 156 (C.A.), overturning [1998] B.C.J. No. 3201 (Q.L.) (S.C.) (“*Kostiuk*”) the generous approach to comity from *Morguard* met the aggressive approach to jurisdiction of the Texas “Long Arm” statute, in the context of the inherently international internet. This case brought into sharp focus the question of what “properly restrained jurisdiction” means, with the Court of Appeal stating that “some flesh must be put on the bare bones of ‘real and substantial connection’”.²⁸

The Plaintiff was a Nevada corporation traded on the OTC Bulletin Board, having its corporate head offices in Vancouver. The Defendant Kostiuk resided in West Vancouver and, it was alleged, made defamatory comments about the Plaintiff on an internet bulletin board site called “Silicon Investor”. Kostiuk was not the operator of Silicon Investor. Notwithstanding the connection to British Columbia, the Plaintiff saw fit to sue Kostiuk in the District Court of Harris County, Texas. Kostiuk did not appear, and default judgment was ultimately taken against him in the amount of \$300,000 (U.S.). The Plaintiff subsequently applied for enforcement of the Texas judgment in B.C., relying upon the decisions in *Morguard* and *Moses*. Although several defences were raised, the key question was whether in fact there was a real and substantial connection between the alleged wrongdoing and the State of Texas.

The B.C. Supreme Court considered this question and held that “the evidence strongly supports there being a real and substantial connection with the State of Texas”. The Court referred to these facts: the Plaintiff had maintained a research and development office in Austin, Texas which, although closed by the time of the B.C. proceedings, had been open at the time of the

alleged defamation; one of the Plaintiff's senior employees as well as a director reside and work in Austin; 10% of the Plaintiff's shareholders resided in Texas; and, perhaps most importantly, "the damages in part were incurred in Texas by means of Internet publication".²⁹

The Court of Appeal overturned this decision, holding that there was no real and substantial connection. The Court noted that the Texas Court had assumed jurisdiction under its "Long Arm" statute which deems that a non-resident of Texas "does business" within Texas, if that non-resident "commits a tort in whole or in part in this State".³⁰ However, the Court pointed out that it is trite law that a libel is only committed where the defamatory material is published to at least one person other than the complainant, and that there was no evidence that any person in Texas had actually read Kostiuk's alleged defamation. Of course, by virtue of being on the internet the comments *could have been read* by someone in Texas. Thus, the Court of Appeal faced this question: is it enough to found jurisdiction for an action in defamation that the comments in question were posted on the internet and thus accessible from that state? If yes, this would mean that internet defamation could be litigated virtually anywhere in the world, and, under *Morguard*, that Canadian courts would recognize the resulting foreign judgment, subject only to concerns about "fair process" (and the very limited defences listed below).

The Court of Appeal answered the question in the negative - the mere fact that the comment on the internet can be accessed from within a particular jurisdiction is not sufficient. Specifically, the Court stated:

"In these circumstances the complainant must offer better proof that the defendant has entered Texas than the mere possibility that someone in that jurisdiction might have reached out to cyberspace to bring the defamatory material to a screen in Texas... It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin could be obtained".³¹

The Court concluded that due to the lack of a real and substantial connection, “comity does not require the courts of this province to recognize the default judgment in question”.³² Braintech sought leave to appeal to the Supreme Court of Canada, but its application for leave was dismissed on March 9, 2000.³³

Would the result have been different if the Plaintiff had provided evidence that one or more Texans had in fact gone on to the website and read Kostiuk’s comments? The Court leaves this unanswered. However, the decision is based at least in part on the U.S. decision in *Zippo Manufacturing Company v. Zippo.com Inc.* 952 F. supp. 1119 (U.S.W.D.P.A. 1997) which held that a “sliding scale” is necessary in order to determine whether internet contacts with a state will make it suitable for that state to assert jurisdiction under the due process provisions of the U.S. Constitution (which require at least “minimum contacts” with the forum state). The Court stated in *Zippo* that “situations where a Defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions” do not provide grounds for the exercise of personal jurisdiction.

In reaching its conclusion in *Kostiuk*, the Court of Appeal made a specific finding that the Harris County Court had failed to follow the due process clause of the Fourteenth Amendment to the U.S. Constitution.³⁴ This raises a further question: would the result have been different if the Texas Court had in fact followed the U.S. Constitution? Although this is left open, the better answer again appears to be no. This flows from the decision in *Amchem Products Inc.* [1993] 1 S.C.R. 897 where, in the anti-suit injunction context, the Supreme Court held that it is the result of the decision by the foreign court to take jurisdiction “when measured against our principles that is important and not necessarily the reasoning that leads to that decision” by the foreign court (emphasis added).³⁵

II. DEFENCES TO FOREIGN JUDGMENTS

A. The Limitations on Morguard: Lack of Fair Process and Lack of Real and Substantial Connection

As noted, the court held in *Morguard* that “fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction”. This

creates two limitations to the broad principle of “full faith and credit” enunciated in *Morguard*. The second limitation - lack of properly restrained jurisdiction - perhaps should not be described as a “defence” since the decision of our Court of Appeal in *Kostiuk* suggests that the onus is in fact on the plaintiff judgment creditor to establish the real and substantial connection, rather than on the defendant to show lack thereof.³⁶ Regardless, concerns have been expressed with respect to the ambiguous nature of the “real and substantial connection” test.³⁷ At least one decision has stated that what constitutes a “real and substantial connection” has not yet been fully defined.³⁸ Uncertainty as to the precise nature of what will create a “real and substantial connection” no doubt flows in part from Mr. Justice La Forest’s statements in *Hunt* where his Lordship stated that the real and substantial connection test was not meant to be a rigid test, but rather:

“...was simply intended to capture the idea that there must be some limits on the claims to jurisdiction.... The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these.... Whatever approach is used, the assumption of jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections”.³⁹

Certainly, defendants sued in a foreign jurisdiction in which they have no assets are now faced with a much more difficult decision as to whether or not they should attend. Instead of being able to consider the relatively simple test from *Emanuel v. Symon* they must now carefully consider whether there might be such a “real and substantial connection” with that foreign jurisdiction that they must go and defend there anyway, in order to protect their B.C. assets. Nonetheless, there is some guidance on the question of what is a “real and substantial connection”. For instance, in *Global Light Telecommunications v. GST Telecommunications* (1999) 33 C.P.C. (4th) 206 (B.C.S.C.) the court stated at 212 that the factors “commonly considered” in determining whether a real and substantial connection is present are “the party’s residences and places of business, where the cause of action arose, where the damage was suffered, any juridical advantages and disadvantages, convenience and expense, governing law and the existence of any parallel proceedings”. Further, *Kostiuk* itself gives some guidance, and

there are at least three other Canadian cases that have refused to enforce American judgments on the basis of a lack of real and substantial connection - *Re Singer Sewing Machine Co.* (2000) 18 C.B.R. (4th) 127 (A.Q.B.) regarding an American Chapter 11 bankruptcy order which included in its scope a separately incorporated Canadian subsidiary; *R. v. Mar-Dive Corp.* (1996) 141 D.L.R. (4th) 577 (O.S.C.J.); and *Cortas Canning v. Suidan Bros. Inc.* [1999] Q.J. No. 1089 (Q.L.) (Q.S.C.).

However, there is no guidance for the first limitation - ie. when the lack of fair process defence will apply to block the enforcement of a foreign judgment. As noted above, the Supreme Court of Canada avoided the issue in *Morguard*, simply holding that “fair process is not an issue within the Canadian Federation”.⁴⁰ Subsequent cases have ignored the issue, dealing with any procedural concerns under the defence of breach of natural justice (referred to below). As will be seen, breach of natural justice is one of the “odious taint” defences to a foreign judgment - ie. that the foreign judgment is so odiously tainted by some matter such as fraud or breach of natural justice that it should not be recognized in B.C. These defences pre-date *Morguard*, and continue, to varying degrees, to be a part of our law. Although the court does not elaborate in *Morguard*, it is at least arguable that it is referring to something broader when it refers to “fair process” than simply compliance with natural justice, particularly given the narrow ambit of the breach of natural justice defence.

As noted above, Huddart J. did refer briefly to the “fair process” issue in *Moses* stating that “if the judgment is not from a Canadian court, the fairness of the process of the foreign court may be challenged”. This suggests that the onus is on the defendant to show a lack of fair process on the part of the foreign court.

Two Ontario decisions have touched upon this, although they did not explore the matter, and indeed did not even specifically refer to the lack of “fair process” reference in *Morguard*. The first was *Arrowmaster Inc. v. Unique Forming* (1993) 17 O.R. (3d) 407 (O.S.C.J.) (“*Arrowmaster*”) where MacPherson J., after holding that the *Morguard* principle extends to truly foreign judgments (in that case a decision from Illinois) stated as follows at 411: “This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different

from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process".

Jennings J. went a little further in *Beals v. Saldanha* (1998) 42 O.R. (3d) 127 (O.S.C.J.) where, in refusing to recognize and enforce a Florida jury award, he stated as follows at 144:

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

Even though Jennings J. did not refer to the lack of "fair process" defence enunciated in *Morguard*, this reasoning might express what the Supreme Court of Canada intended with its reference to "fair process" in *Morguard*. As will be seen, the "odious taint" defences of fraud, public policy, and natural justice are narrowly construed. By contrast, the reference to lack of "fair process" in *Morguard* is potentially very broad and arguably should be available as a safeguard for those circumstances where, as Jennings J. says, the traditional "odious taint" defences do not apply, but nonetheless the "totality of the circumstances...argue against enforcement". The courts may be concerned that any attempt to breath life into this defence will allow defendants to use it as a kind of backdoor into a reconsideration of the merits of the foreign decision, thus largely defeating the point of *Morguard*. Such a concern might be addressed, however, by the fact that the defence is already not available with respect to other Canadian judgments, and would likely only be available in severe cases when dealing with judgments from the United States, England, or other Commonwealth jurisdictions. It is only in those cases where, to use the wording from *Arrowmaster*, "the substantive law in the foreign country is so different from [B.C.'s] or ...the legal process that generates the foreign order diverges radically from [B.C.'s] process" that such a defence might be entertained.⁴¹

B. Specific defences (The “Odious Taints”)

There are numerous specific defences that pre-date *Morguard*, and which continue to apply, to varying degrees, in the post-*Morguard* era. The main defences are the “odious taints”, being fraud, public policy, breach of natural justice, and manifest error. There are other specific defences, which although not considered “odious taints”, nonetheless could be of use to a local defendant, being lack of finality of the foreign order, and certain specific statutory defences found in the COEA and in the federal *Foreign Extraterritorial Measures Act*. Finally, although it is not strictly speaking a defence, a local defendant can apply for a stay of proceeding or execution in B.C. pending any appeals in the foreign jurisdiction.

The “odious taints” doctrine is not a recent development of the law. A relatively early expression of these defences can be found in *Messina v. Petrocchino* (1872) L.R. 4 P.C. 144 where the Privy Council stated at 157 as follows: “A Foreign Judgment of a competent Court may indeed be impeached if it carries on the face of it a manifest error, if it be shown to have been obtained by fraud, or to be wanting in the conditions of natural justice”.

These defences can be raised even where the foreign court properly has jurisdiction, either through attornment or under the real and substantial connection test. They were not abrogated by *Morguard*. On the contrary, towards the end of *Morguard*, the Supreme Court stated at 1110 that “there may also be remedies available to the recognizing court that may afford redress to the defendant in certain cases such as fraud or conflict with the law or public policy of the recognizing jurisdiction”.⁴² Nonetheless, these defences are generally narrowly construed, and have an uneasy co-existence with the general principle, strengthened by *Morguard*, that if the foreign court properly had jurisdiction, then the domestic court is forbidden from re-considering the merits of the foreign judgment.⁴³

Fraud

An out of province judgment will not be enforced in B.C. if it was procured by an “extrinsic” fraud on the other court.

A seminal decision for the defence of fraud is *Jacobs v. Beaver* (1908) 17 O.L.R. 496 (O.C.A.), where the Ontario Court refused to enforce a Quebec judgment, notwithstanding attornment by

the defendants to the Quebec court, on the basis that the Quebec Judgment had been obtained by a fraud and deception practised upon the Quebec court. However, in one of the four written reasons, those of Garrow, J.A., this qualification is added: "...the 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". Instead, what is required is "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 fraud".⁴⁴

The decision in *Mueller v. Starcraft Aviation Ltd.* [1997] B.C.J. No. 691 (Q.L.) (B.C.S.C.) ("*Mueller*") provides a relatively recent statement of the fraud defence in British Columbia. There the court, after noting that it will not inquire into the merits of the foreign judgment, continued as follows:

"...allegations of intrinsic fraud, even if proven, do not provide a basis for refusing to enforce a foreign judgment. Only extrinsic fraud, that is, fraud of the type which deprives a person of an adequate opportunity to present his case in court, will lead to that result. For reasons of comity the court will not inquire into the merits of a foreign judgment even where fraud going to the merits is alleged. It is only fraud going to jurisdiction which provides the limited basis for setting aside a judgment".⁴⁵

Notwithstanding the strict limits placed on the fraud defence in *Mueller*, it should be noted that there is at least one Ontario decision that has rejected the distinction between "extrinsic" and "intrinsic" fraud, and has held that the fraud defence should be allowed a broader ambit - *Beals v. Saldanha* (1998) 42 O.R. (3d) 127 (O.S.C.J.). The facts in *Beals* are rather extreme, involving the sale of a lot in a Florida subdivision for \$8,000 U.S. The Canadian defendants owned lot no. 1. The American plaintiff wanted to purchase the adjacent lot no. 2 and, mistakenly, made an offer to purchase lot no. 2 from the Canadian defendants, which they did not own. The Canadian defendants recognized the error and amended the first page of the offer to indicate the correct lot (lot no. 1). After some negotiations, an agreement was reached at \$8,000 U.S. The American plaintiff then began building on the wrong lot, lot no. 2, spending approximately \$6,000 U.S. in

construction costs. Later, in January, 1995, the plaintiff realized that he had been building on the wrong lot, and sued the Canadian defendants in Florida alleging fraudulent misrepresentation. Default judgment was obtained and the matter went before a Florida jury to assess damages. Notwithstanding the small amounts of money involved, the Florida jury awarded the Plaintiffs \$260,000 U.S., including \$50,000 U.S. in punitive damages. Jennings J. of the Ontario Court referred to the quantum as “breathtaking”, stating “how that somewhat startling result was obtained was not made clear”. What was clear, however, was that the American plaintiff did not inform the Florida jury that the Canadian defendants had amended the offer to refer to the proper lot, and that the plaintiff had accepted this amended offer.⁴⁶ It appears that the Plaintiffs had submitted the *original* offer to the jury, and not the final amended and accepted offer.

After a detailed examination of *Jacobs v. Beaver*, supra, and other related case law, the Ontario Court came to the conclusion that the Florida jury award would not be enforced in Ontario due to the fact that it was procured by a fraud on the Florida Court. In reaching that result the Court stated that it is too narrow a reading of *Jacobs v. Beaver* to say that the fraud must be “extrinsic”, and the court rejected previous B.C. authority to that effect (*Roglass Consultants Inc. v. Kennedy* (1984) 65 B.C.L.R. 393 (C.A.)). However, the Court also rejected as overly broad the English approach from *Jet Holdings v. Patel* [1990] 1 Q.B. 335 (C.A.) to the effect that *any* fraud in the procurement of the foreign judgment will render it unenforceable. The Court confessed that “the exact limits of the defence are somewhat uncertain” and “difficult to articulate precisely”.⁴⁷

A different approach was taken by the B.C. Supreme Court in the face of “intrinsic” fraud in *Stanton v. Gudbranson* [1999] B.C.J. No. 896, where Macdonald J. found that the Plaintiff had “clearly committed a fraud on the Utah court in respect of her claim for spousal maintenance”. Nonetheless, the court accepted that such “intrinsic” fraud will not render the Utah judgment unenforceable. Instead, the Court granted judgment to the plaintiff as requested but also made an order under s. 48(2) COEA that the judgment would be payable only in such instalments as would not require the defendant to sell his home.

Public Policy

An out of province judgment will not be enforced in B.C. if it is contrary to the public policy of Canada.

This defence has two distinct aspects, as follows: first, Canadian Courts will not enforce the “penal”, “revenue”, or “other public laws”⁴⁸ of other countries, as such would be contrary to Canadian sovereignty; second, Canadian Courts will not enforce foreign judgments that are contrary to our “essential morality” and fundamentally inconsistent with our system of justice.

Both aspects of the defence are very strictly construed. A useful analysis of both aspects is *U.S.A. v. Ivey* (1995) 130 D.L.R. (4th) 674 (O.S.C.J.) affirmed (1996) 30 O.R. (3d) 370 (C.A.), leave denied May 29, 1997 [1996] S.C.C.A. No. 582 (Q.L.) (“*Ivey*”). This case involved a judgment by the United States District Court for the Eastern District of Michigan under the *Comprehensive Environmental Response, Compensation and Liability Act* (“CERCLA”), a U.S. federal law. The Canadian defendant was a majority shareholder of a company operating a waste facility in Michigan that apparently developed serious environmental problems leading to two fatalities and numerous injuries. Subsequent to the fatalities, the Environmental Protection Agency (“EPA”), a U.S. federal government body, drew up and implemented a multi-million dollar environmental clean-up plan for the site. Under CERCLA, the EPA can obtain court orders indemnifying it for clean-up costs from those responsible, which includes individuals who exercise control over any corporation involved. The EPA applied for such an order from the District Court. Mr. Ivey only appeared to contest jurisdiction, and the EPA ultimately obtained summary judgment against him in the amount of approximately \$4.8 million (U.S.).

The U.S. Government then sued in Ontario to have its judgment recognized and enforced. Mr. Ivey raised several defences in response, including that CERCLA was a “penal, revenue or other public law” and further that enforcement would be contrary to the public policy of Canada (breach of natural justice was also raised, which will be examined below).

The essence of the “penal, revenue or other public law” defence seems to be that foreign laws will not be enforced “if they involve an exercise by a government of its sovereign authority over property beyond its territory”.⁴⁹ After noting that successful cases invoking this defence had involved such things as the attempt by the United Kingdom to “export” its ban on the “Spy Catcher” novel to Australia, or an attempt by the Estonian Soviet Socialist Republic to confiscate a ship located in Canada, the Court went on to hold that the defence could have no application here.⁵⁰ The Court noted that there is a public element to all statutes and virtually all suits brought by any government, and that if a judgment such as this were to be refused on the grounds that it

represented an assertion of foreign sovereignty, it would be difficult to see how enforcement could ever be given to a judgment in favour of a foreign state.⁵¹

In affirming Sharpe J.'s decision in *Ivey*, the Ontario Court of Appeal agreed with Sharpe J.'s comment that "the public law exception to the enforceability of foreign judgments rests...on a shaky doctrinal foundation". However the Court also said that it was not necessary to "close the door on the possible existence of such an exception". This is significant, as such a defence could be important in the face of foreign legislative efforts such as the "*Cuban Liberty and Democratic Solidarity Act of 1996*" (the "*Helms-Burton Act*"), which is referred to below under "Specific Statutory Defences". Although as will be seen, there is a specific statutory defence to any judgment rendered under the *Helms-Burton Act*, and thus no need in that specific context for the public laws defence, the *Helms-Burton Act* nonetheless illustrates the kind of foreign law to which the defence can properly be applied, and for which the defence should remain available.

Along with the question of "penal, revenue or other public law", *Ivey* also dealt with the public policy defence more generally. It started by noting that "while the public policy defence exists in theory, it has rarely been applied", and that courts must be careful in relying upon public policy as a ground for refusing enforcement.⁵² Noting that "fundamental values must be at stake", the Court quoted from the decision of Carthy J.A. in *Boardwalk Regency v. Maalouf* (1992) 88 D.L.R. (4th) 612 at 616 that for this defence to succeed the public policy issue must be a question of "essential morality". Specifically "this must be more than the morality of some persons and must run through the fabric of society to the extent that (the foreign law) is not consonant with our system of justice and general moral outlook...". Thus, in rejecting Mr. Ivey's submission that the American judgment should not be enforced given the severity of the CERCLA liability regime, Sharpe J. stated "it is plainly not the case that enforcement will be refused on the grounds that [the] judgment sought to be enforced depends upon a law or basis of liability more strict or severe than the law of the forum".⁵³

One Ontario decision that raises the bar very high for the public policy defence is *Society of Lloyd's v. Saunders* [2000] O.J. No. 692 (Q.L.) (O.S.C.J.) where the Court referred to "contracts for slavery or prostitution" as examples of where a public policy defence would succeed. Where a public policy defence would not succeed, however, was on the (assumed) facts of that case, which was that Lloyd's had breached the prospectus requirements of the *Ontario Securities Act*

when soliciting “Names” in Ontario. Notwithstanding this favourable assumption, the Court concluded that enforcement of the U.K. judgment would not be contrary to public policy, indicating a reluctance to apply “domestic policy” at the “international level”.⁵⁴

B.C. authorities on the public policy defence are to similar effect. On the question of “penal laws”, the B.C. Supreme Court has rejected the argument that a U.S. District Court judgment in favour of the U.S. Securities and Exchange Commission for “disgorgement of ill-gotten gains” is “penal”, enforcing the judgment notwithstanding that the U.S. Attorney General had instituted criminal proceedings over the same matter -*U.S. (S.E.C.) v. Cosby* [2000] B.C.J. No. 626 (Q.L.) (B.C.S.C.). In the same decision, however, the Court also noted in *obiter* that the civil penalties imposed by the District Court pursuant to the U.S. *Securities Act* would not be enforceable here.

Further, our Court of Appeal held in *Old North State Brewing Co. v. Newlands* (1998) 58 B.C.L.R. (3d) that an award of triple damages plus punitive damages by a U.S. District Court under a U.S. “fair trade statute” was not contrary to the public policy of B.C, even though this had the effect of increasing the Plaintiff’s award from its proven damages of \$308,000 U.S. to a total of \$1,188,474 (U.S.) (including \$250,000 in punitive damages). In part on the basis of *Ivey*, our Court of Appeal stated that “enforcement of a foreign judgment will not be refused on the grounds that the foreign law on which the judgment is based is more harsh than the law of the forum”. In this regard see also *Minkler v. Sheppard* (1991) 60 B.C.L.R. (2d) 360 (S.C.) at 365 - 366 and *Clancy v. Beach* (1994) 92 B.C.L.R. (2d) 82 (S.C.) at 93.⁵⁵

Nonetheless, there have been instances where the public policy defence has received at least some limited success. In *Turtle Creek Condominium Association v. Skalbania* (1992) 83 B.C.L.R. (2d) 111 (S.C.) the Court, in the context of an application for production of documents by a defendant opposing enforcement of a default judgment from California, indicated that a discharge under the Canadian *Bankruptcy and Insolvency Act* would provide a good defence to a California default judgment, on the basis of the public policy exception.

Also, in *Beals v. Saldanha*, *supra*, after finding in favour of the Defendants on the basis of the fraud defence, the Court went on to indicate that, if it had been required to do so, it would have also rejected enforcement of the Florida judgment on the basis that such would contravene the public policy of Ontario. Although Jennings J. does not make it precisely clear, the factors from

the Florida jury award that seem to offend Ontario public policy is a combination of the size of the award combined with the “misleading evidence” by which the award was procured. In reaching this conclusion, Jennings J. conceded that this would not fit within the traditional perimeters of the public policy defence, but stated that “the perimeters of the public policy defence must be broadened to cover a situation where conduct which triggers neither the traditional defence of public policy nor the defence of natural justice is yet so egregious as to raise a negative impression sufficient to stay the enforcing hand of the domestic court”.⁵⁶

Natural Justice

An out of province judgment will not be enforced if it was obtained in a manner which violates the principles of natural justice. Koenigsberg J. reviewed this defence in *National American Insurance Co. v. Leong* (1996) 49 C.P.C. (3d) 246 (B.C.S.C.). There, the defendants argued that that their appeal in Washington State had been dismissed due to incorrect advice that they had received from a court registry official, and that such was a breach of natural justice. Allegedly, the official had informed the defendants that their notice of appeal could be signed by the defendant’s husband, even though he was not a lawyer and not a party to the action. Not surprisingly, such was contrary to the Rules, and lead to dismissal. In rejecting this argument, Koenigsberg J. held that a successful natural justice defence requires “a fundamental flaw” in the foreign proceedings, and that “mere irregularities” will not suffice. In reaching this decision, her Ladyship quoted at 252 from J.P. McLeod, *The Conflict Of Laws* as follows:

“The court ought not to refuse to enforce a foreign judgment merely because the procedure is alien to the local forum... The fundamental question in dealing with the defence of natural justice is whether, given the facts and foreign law, the defendant had an adequate opportunity to allow his case to be effectively prepared and presented to the court. Where the court has before it all the relevant facts, no denial of natural justice occurs”.

Ivey reviews this defence as well, and circumscribes it as narrowly as it did the public policy defence. There, the Canadian defendant argued that the procedural regime imposed by CERCLA is so unfair as to render the whole proceedings contrary to natural justice. In particular, the

defendant pointed to the fact that CERCLA involves a reversal of the onus of proof, precludes judicial review of EPA actions, limits the defences available to parties facing liability under CERCLA, and limits the right to be heard in opposition to the EPA's plans for removal and remedial action.

However, Sharpe J. rejected the argument, holding that the CERCLA regime was not contrary to natural justice. Specifically, the Court rejected the view that the imposition of strict liability or a relaxed or reversed burden of proof should render the judgment unenforceable, holding that "rules of liability and the burden of proof are pre-eminently matters for the law of the foreign jurisdiction". More generally, the Court indicated the very limited availability of this defence, noting that "while there is no doubt that the defence exists in theory, it is rarely applied in practice..."

Nonetheless, the defence has been invoked successfully at least once in B.C. in the post-Morguard era. In *Leaton Leather & Trading Co. v. Ngai* (1997) 33 B.C.L.R. (3d) 388 (S.C.) Saunders, J. held that the Supreme Court of Hong Kong had breached the principles of natural justice by refusing to consider a lay litigant's evidence and arguments in circumstances where that lay litigant had failed to comply with a provision of the Hong Kong Rules of Court that requires such evidence to be put in affidavit form and served three days in advance of the hearing. The B.C. Court thus refused to enforce the Hong Kong judgment.⁵⁷

Manifest Error

It has been said that B.C. Courts "will refuse to enforce a foreign judgment taken by default where manifest error in the judgment is shown". This was stated by McIntyre J. in *Re Gacs and Maierovitz* (1968) 68 D.L.R. (2d) 345 (B.C.S.C.). In *Re Gacs*, the Plaintiff had received a default judgment in Ontario for \$2,050 in an action on a promissory note. The promissory note specified that "principal [is] payable December 31, 1962", and that interest was \$50 per month. However, the Plaintiff had claimed and received default judgment for an amount that included interest at \$50 per month up to May 30, 1964. On the basis of authorities stating that no interest above the statutory rate can be collected by a creditor after maturity unless the agreement provides specifically for such, McIntyre J. found the award of interest at the agreement rate for a year and a half post-maturity to be a "manifest error", and would not allow the judgment to be registered

under the then *Reciprocal Enforcement Of Judgments Act* (which provisions are now found in the COEA). The key decision that McIntyre J. relied upon in reaching this conclusion is *Boyle v. Victoria Yukon Trading Co.* (1902) 9 B.C.R. 2 113 (S.C.). There, the Court, while acknowledging that it must be careful not to act as a Court of Appeal for foreign judgments, held that “if manifest error going to the root of the judgment appears, ...we may, and should, decline to perpetuate and enforce the error”.

The “manifest error” defence has been seriously denigrated in more recent decisions. In *FDIC v. Vanstone* (1992) 63 B.C.L.R. (2d) 190 (S.C.) it was held that manifest error is unique to the common law of British Columbia and that its “legitimacy is dubious and its reach is not to be extended”.⁵⁸ Our Court of Appeal explicitly adopted this reference in *Moses v. Shore Boat Builders*, supra.⁵⁹

With respect, it may overstate the matter slightly to suggest that the manifest error doctrine is entirely unique to B.C. The origins of the doctrine go back at least to the decision of the Privy Council in *Messina v. Petrocchino*, supra, quoted above. Furthermore, the doctrine has been relied upon in at least one Ontario decision - *Paulin v. Paulin* (1994) 29 C.B.R. (3d) 93 (O.S.C.J.), where the Court refused to enforce a judgment out of the United States Bankruptcy Court for Arizona.⁶⁰

Nonetheless, the B.C. Supreme Court has gone so far as to state that it is “doubtful” that the defence survives *Morguard* - see *Silver Star Properties Ltd. v. Veinotte* [1998] B.C.J. No. 2385 (Q.L.) (S.C.) at paragraph 57. For those who wish to continue to argue manifest error, the only sign of life in recent years for this defence is the decision in *Mid-Ohio Imported Car v. Tri-K Investments* (1995) 13 B.C.L.R. (3d) 41 (C.A.) where our Court of Appeal remitted a case to the Supreme Court for determination of whether there was a manifest error on the face of an Ohio State Court judgment.

Finality of the Order

In order for a foreign judgment to be enforceable it must be final in the sense that the foreign court “conclusively, finally, and forever established the existence of the debt...so as to make it res judicata between the parties” - see *Nouvion v. Freeman* (1889) 15 A.C. 1 (H.L.) at 9. The

judgment will be “final” if the foreign court that rendered it no longer has the power to rescind or vary it in any way. The fact that the judgment is under appeal, or might be appealed, does not affect its finality - *Nouvion v. Freeman*, supra at 10 - 11; *Four Embarcadero Centre v. Kalen* (1988) 65 O.R. (2d) 551 (O.S.C.J.) at 563.

In *Uniforet v. Zerotech Technologies* [1998] B.C.J. No. 192 (Q.L.) (B.C.S.C.) the court refused to enforce a Quebec order for production of documents on the basis that it was so lacking in precision that it could not be said to be “final and conclusive”. However, the court also held that any pre-existing common-law rule to the effect that a judgment must be for a sum certain before it could be enforced has been abrogated by *Morguard*. In this regard, the court held that “there is no principled reason why judgments other than monetary judgments should not be recognized and enforced.”⁶¹

Specific Statutory Defences

At least two statutory defences apply in B.C. to certain types of judgments. These are s. 40 COEA (relating to asbestos litigation), and the *Foreign Extra-Territorial Measures Act* (“FEMA”) of Canada. There may be other specific statutory defences of which I am unaware.

Section 40(2) COEA says that a “judgment” must not be registered or enforced by a B.C. court if it is “given for loss or injury that arises out of exposure to or the use of asbestos that has been mined in British Columbia”. The term “judgment” is defined in s. 40(1) in a way that does not include judgments originating from other provinces in Canada, but instead only truly foreign judgments. Under 40(3) the remedy for a person with a cause of action with respect to asbestos mined in B.C. is to “commence an action under the domestic law of British Columbia” for recovery.

FEMA provides in s. 7.1 a blanket prohibition against the recognition or enforcement of any judgment given under the *Helms - Burton Act*. Under s. 8 of FEMA, the Attorney General of Canada may by order declare that a foreign judgment “instituted under an anti-trust law” shall not be recognized or enforceable in any manner in Canada, or alternatively may order that only a portion of such judgment shall be recognized and enforced in Canada.

The *Helms-Burton Act* has not lately been a hot issue politically. However, it remains the law of the United States, having been signed into law by former President Clinton on March 12, 1996. Title III of this Act creates a cause of action in the hands of American citizens against Canadian or other foreign nationals who “traffic” in property “confiscated” by the Government of Cuba subsequent to January 1, 1959. The Act has not been in the news because former President Clinton repeatedly suspended, for six month intervals, the implementation of Title III of the Act.⁶² Whether President Bush will do the same remains to be seen.

The COEA asbestos defence highlights the second way in which judgments from other Canadian provinces are still treated differently from truly foreign judgments, notwithstanding *Moses* (the first difference being the availability of the lack of “fair process” defence, referred to above). This second difference is that the COEA provisions would be “constitutionally inapplicable” as contrary to *Morguard* if they were directed at judgments from Canadian courts, but are presumably constitutionally valid as they are restricted to truly foreign judgments. In this regard it is important to bear in mind the two distinct rationales underlying *Morguard* and the decisions that have followed it: the Canadian Federalism rationale, and the liberalized notion of comity rationale. Only the first rationale is backed up by the Canadian Constitution. By contrast, the second rationale is a rule of judicial public policy and thus a rule of the common law which presumably can be overridden by specific statutory provisions.

Stay of Execution Pending Appeal

If the out of province foreign judgment is in fact subject to an ongoing appeal in that other jurisdiction, protection may be provided to the defendant by way of a stay of execution pending the appeal. This is, of course, not strictly speaking a “defence”, but may nonetheless be of considerable practical value to a domestic defendant, should that defendant ultimately succeed in the appeal. However, a stay of execution on the out of province judgment pending appeal will not be given as a matter of course. Instead, the principles for granting such a stay of execution are the same as applying on an application under s. 18 of the *Court of Appeal Act* for a stay of proceedings on a local judgment. Thus, the fundamental principle is that a successful litigant is entitled to the fruits of his or her judgment, and will not be deprived of them unless the interests of justice so dictate - see *A.T.U. v. I.C.T.U.* (1998) 63 B.C.L.R. (3d) 335 at 349.

Although Rule 54(9) of the B.C. Rules of Court provides for a stay *of proceeding* on a “foreign judgment” pending appeals, the Courts appear more willing to grant stays *of execution* instead - see *A.T.U. v. I.C.T.U.*, supra; *Timberlands West Coast v. Nahanni Helicopters* [1995] B.C.J. No. 48 (Q.L.) (S.C.).⁶³

III. CONCLUSION

The *Morguard* decision corrected a long standing anomaly of Canadian law - the refusal of our courts to give full faith and credit to judgments from the courts of other provinces, on the basis of principles developed in England dealing with judgments from foreign countries.

Furthermore, as a result of *Moses* and related decisions, the *Morguard* principle has revolutionized how Canadian courts treat truly foreign judgments as well. Rather than a general rule against the recognition of foreign judgments, subject to certain exceptions, there is now a rule that generally favours the recognition and enforcement of foreign judgments. Several possible defences remain, but these tend to be strictly construed.

However, the results of *Morguard* have not been entirely beneficial. One negative consequence is that B.C. residents who are sued in a foreign jurisdiction in which they have no assets may now face a very difficult decision as to whether they should attorn and defend in that jurisdiction. Previously, we could look to the relatively simple and objective test from *Emanuel v. Symon* when advising such a client. Now, we must try and predict in advance whether a B.C. court would find a “real and substantial connection” between the cause of action and that foreign court, and thus enforce the foreign judgment. The subjectiveness of the “real and substantial connection” test is demonstrated by *Kostiuk*, where the B.C. Supreme Court held that “the evidence strongly supports there being a real and substantial connection” with Texas, whereas the Court of Appeal found no such connection at all.

Notwithstanding the above concern, the development of the *Morguard* principle over the past 10 years has been a major step forward for Canadian law. By reading into the Canadian Constitution the principle of “full faith and credit”, *Morguard* and the cases that have followed it have given Canadians a more coherent and unified legal system. Furthermore, by applying *Morguard* to American and other foreign decisions in circumstances where it was reasonable for

the plaintiff to sue in that foreign jurisdiction, our courts have acted in a manner consistent with comity and justice. The present state of law, including as it does the jurisdictional and “fair process” limitations to the Morguard principle, as well as those specific defences listed above, allows our courts to take a generous approach to the enforcement of foreign judgments, while still protecting B.C. residents from foreign judgments which are not deserving of comity.

JPS/pf

¹ See Professor Ziegel’s Introduction to “Recognition of Extra Provincial and Foreign Judgments: The Implications of *Morguard Investments Ltd. v. De Savoye*” (1993), 22 C.B.L.J. (2d) 2. I first came across this quote in the very useful article by Watson and Au, “Constitutional Limits on Service Es Juris: Unanswered Questions from *Morguard*” (2000) 23 *Advocate’s Quarterly* 167.

² It should be noted that there is at least one decision from Ontario, *R. v. Mar-Dive Corporation* (1996) 141 D.L.R. (4th) 577 where the Court held that *Morguard* applies equally to *in rem* foreign judgments as well as to *in personam* judgments (see page 624). The extent to which *Morguard* applies to foreign *in rem* judgments, and the enforcement of foreign *in rem* judgments generally, is beyond the scope of this article.

³ Constitution of the United States, Article IV, section 1: “Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State”; Australian Constitution, section 118.

⁴ Hunt, 332.

⁵ As will be seen, two distinctions still apply. First, the defence of lack of “fair process” is at least theoretically available as against truly foreign decisions, but not as against decisions from the courts of other Canadian provinces. Secondly, provincial statutes cannot override the Morguard principle with respect to the decisions of Canadian courts, but presumably could do so with respect to truly foreign decisions. These two issues are referred to within the text.

⁶ Morguard, 1095. Bear in mind that even though our Canadian judicial system is divided into ten provincial superior courts, the Supreme Court of Canada has described our judicial system as “unitary” in *Ontario A.G. v. Pembina Exploration Canada Ltd.* [1989] 1 S.C.R. 206 at 215, and as “essentially unitary” in *Hunt v. T & N plc* [1993] 4 S.C.R. 289 at 314, 322, and 323.

⁷ Section 29 COEA. The reciprocating states are all provinces and territories of Canada except Quebec, most of the states of Australia, certain Pacific islands, the Federal Republic of Germany, the Austrian Republic, the United Kingdom (pursuant to Schedule 4 to the Act), and, in the U.S.A., the following States: Washington, Alaska, California, Oregon, Colorado, and Idaho.

⁸ Section 29(6)(b) COEA.

⁹ In fact, Mr. De Savoye was initially a guarantor of the mortgage, but later assumed the obligations of mortgagor before Morguard Investments foreclosed.

¹⁰ Morguard, 1102.

¹¹ Morguard, 1099 and 1101.

¹² Morguard, 1095 and 1098.

¹³ Morguard, 1097.

¹⁴ Morguard, 1103.

¹⁵ Morguard, 1103.

¹⁶ Morguard, 1106 - 1108.

¹⁷ Morguard, 1108.

¹⁸ Morguard, 1100 - 1101 and 1109

¹⁹ Hunt, 324.

²⁰ Hunt, 332.

²¹ Hunt, 324.

²² Hunt, 332.

²³ Moses, 190.

²⁴ See [1993] S.C.C.A. No. 496 (Q.L.)

²⁵ Moses, 181.

²⁶ The Ontario Court was then known as the “Ontario Court (General Division)”. In this paper it is referred to throughout by its present name, the “Ontario Superior Court of Justice”. It should be noted that there was an interlocutory decision of our Court of Appeal (granting an extension of time for the filing of an appeal) which stated that it is “arguable” that *Hunt v. T & N plc*, supra, “casts doubt” upon the correctness of the application of the *Morguard* principle to truly foreign judgments, as opposed to judgments of other Canadian provinces - *Stoddard v. Accurpress Manufacturing* (1993) 39 B.C.A.C. 9. However, that appeal apparently did not proceed, and our courts have not pursued that notion further. Instead, the *Morguard* principle has been repeatedly applied to American judgments in the years subsequent to *Stoddard*.

²⁷ A more colourful statement of the same view is given in *McMickle v. Van Straaten* (1992) 93 D.L.R. (4th) 74 (B.C.S.C.) where McKenzie J. stated as follows in the context of a California judgment relating to skin cream sold by a B.C. resident to a California plaintiff that allegedly caused second degree burns: “[The defendant] was firing long-range artillery from Vancouver which landed in California. He must accept the risk of damage from his shells at the place where they landed”.

²⁸ Kostiuk, 169.

²⁹ *Braintech Inc. v. Kostiuk* [1998] B.C.J. No. 3201 (Q.L.) (B.C.S.C.) at paras. 20 and 22.

³⁰ Kostiuk, 161, referring to s. 17.042 of “Sub-Chapter C. Long-Arm Jurisdiction in suit on Business Transaction or Tort” of the Texas Civil Practice and Remedies Code.

³¹ Kostiuk, 171.

³² Kostiuk, 173-174.

³³ *Braintech, Inc. v. Kostiuk* [1999] S.C.C.A. No. 236.

³⁴ Kostiuk, 173.

³⁵ *Amchem Products Inc., 937*. See also *Beals v. Saldanha* (1998) 42 O.R. (3d) 127 (O.S.C.J.) at 140: “The foreign court’s determination of its jurisdiction has no impact on the adjudication by the domestic court which must decide for itself whether the foreign court properly had jurisdiction”. Yet another question that apparently remains unanswered is whether the result would have been different if Mr. Kostiuk had been served in Texas - ie. does the real and substantial connection test apply if the defendant, though not resident in the other jurisdiction, is served while physically present in that jurisdiction? In that regard, see *Ruwenzori v. Walgi* [2000] B.C.J. No. 1015 (Q.L.) (B.C.S.C.).

³⁶ See in particular paras. 62 and 64.

³⁷ See, for instance, Watson and Au, *Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard*, *The Advocate’s Quarterly*, Volume 23 Nos. 1 and 2, June, 2000, 167.

³⁸ *Jordan v. Schatz* [2000] B.C.J. No. 1303 (Q.L.) (B.C.C.A.) at para. 23.

³⁹ *Hunt*, 325 - 326

⁴⁰ *Morguard*, 1103.

⁴¹ There have been some cases applying *Morguard* to judgments outside of Canada, the U.S., and England. See, for example, *ATL Industries Inc. v. Han Eol Industries* [1995] O.J. No. 250 (Q.L.) (O.S.C.J.), particularly at paras. 33 - 37 where the court recognized a decision of the Seoul District Civil Court of Korea; *Leaton Leather v. Ngai* (1997) 33 B.C.L.R. (3d) 388 (S.C.) where the court refused to enforce a decision of the Supreme Court of Hongkong on the basis that the judgment offended the rules of natural justice; and *Oyj v. Reinikka* [1999] O.J. No. 2583 (Q.L.) (O.S.C.J.) where the court recognized and enforced a judgment of the District Court of Helsinki, Finland.

⁴² See also *Beals v. Saldanha* (1998) 42 O.R. (3d) 127 (O.S.C.J.) where the Court held at 135: I conclude that while *Morguard* and the cases which followed it have expanded the bailiwick of private international law, the old defences, including fraud, remain in place”; also *Lasersight Inc. v. Wiese* [2000] B.C.J. No. 1021 (Q.L.) (B.C.S.C.) at para. 11.

⁴³ Regarding the uneasy co-existence, see, for instance, *Beals v. Saldanha* (1998) 42 O.R. (3d) 127 (O.S.C.J.) at 135 and following. Regarding the rule against reconsidering the merits of the claims adjudicated in the foreign proceeding, see, inter alia, *Jacobs v. Beaver* (1908) 17 O.L.R. 496 (O.C.A.), and *Society of Lloyd’s v. Saunders* [2000] O.J. No. 692 (Q.L.) (O.S.C.J.) at para. 32.

⁴⁴ *Jacobs v. Beaver*, supra, at 506. Note that in *Beals v. Saldanha*, supra, Justice Jennings of the Ontario Superior Court of Justice suggests that “it is reading the judgment of Garrow J. A. too highly to say that the fraud has to be ‘extrinsic’”. See *Beals v. Saldanha* at 137 - 143 for a close examination of the *Jacobs v. Beaver* decision.

⁴⁵ Mueller, para. 17.

⁴⁶ There were other facts that the jury was not informed of as well, including the fact that the purchaser, a corporation, had been struck from the registry prior to the lawsuit, and that construction had stopped because of a dispute between the two partners, and not because of the realization that they were building on the wrong lot.

⁴⁷ The Court went on to note, however, at 141 that since a default judgment is considered under the Ontario Rules of Procedure to be a deemed admission of the truth of all allegations of fact made in a Statement of Claim, it may be considered that questions of fraud contained within those allegations have been adjudicated by the foreign court, once default is granted. However, that did not apply to the large damage award in this case since, on default, proof of unliquidated damages require supporting evidence and are not taken from the allegations in the Statement of Claim. Such is clearly the case in Florida since the question of unliquidated damages went to the jury notwithstanding the default order.

⁴⁸ It should be immediately noted that the inclusion of the words “other public laws” as a part of this defence is controversial. In *U.S. (S.E.C.) v. Cosby* [2000] B.C.J. No. 626 (Q.L.) (B.C.S.C.) the court refers at para. 8 to the decision of Ackner L.J. in *A.G. New Zealand v. Ortiz* [1982] 3 All E.R. 432(C.A.) as holding that this category of “public laws” is too vague. However, the B.C. Court does not explicitly adopt that view. As will be seen, the Ontario Courts considered the “public laws” defence in *U.S.A. v. Ivey* (1995) 130 D.L.R. (4th) 674 (O.S.C.J.) aff’d (1996) 30 O.R. (3d) 370 (O.C.A.) leave denied [1996] S.C.C.A. No. 582., and although referring to the doctrine as “shaky”, explicitly do not “close the door on the possible existence of such an exception”.

⁴⁹ *Ivey*, page 687 quoting from *Cheshire and North*.

⁵⁰ See *Huntington v. Attrill* [1893] A.C. 150 at 157 (P.C.), *A.G. of New Zealand v. Ortiz* [1984] 1 A.C. 1 (C.A.); *A.G. for the United Kingdom v. Heinemann Publishing* (1988) 165 C.L.R. 30 (H.C.A.); *A.G. for United Kingdom v. Wellington Newspapers* (1988) 1 N.Z.L.R. 129 at 174 (N.Z.C.A.); and *Laane and Baltser v. Estonian State Cargo* [1949] S.C.R. 530.

⁵¹ *Ivey*, 689. See also *U.S.A. v. Levy* (1999) 45 O.R. (3d) 129 (O.S.C.J.) which dealt with an order appointing a receiver and freezing assets, inter alia, by a U.S. District Court, and which reached the same conclusion on much the same reasoning as the *Ivey* decision.

⁵² Another case referred to public policy as “a very unruly horse, and when once you get astride it you never know where it will carry you” see *Patton v. Reed* [1972] 6 W.W.R. 208 (B.C.S.C.) at 213.

⁵³ *Ivey*, page 693.

⁵⁴ See paragraphs 40 - 53, and particularly paras. 41 and 45. The Court quotes from *Professional Castel* at paragraph 41 as follows: “public policy is relative and in conflict of law cases it represents a national policy operating on the international level”.

⁵⁵ The law appears to be different on this point in Quebec where, in a relatively recent decision, the Superior Court refused to recognize and enforce a Texas judgment involving treble damages, in part because the award was “so disproportionate with amounts awarded in similar situations in Canada and in Quebec that it could be said to be in non-conformity with public order as understood in the international context”: - *Cortas Canning v. Suidan Bros.* [1999] Q.J. No. 1089 (Q.L.) (Q.S.C.). The Quebec Court relied in part on the decision of our Court of Appeal in *Stoddard v. Accurpress Manufacturing* [1993] B.C.J. No. 2573 (Q.L.) (B.C.C.A.) where the Court asked, but did not answer, the question “whether a Canadian court will enforce against a Canadian resident a foreign judgment which is so disparate in terms of the law of Canada”.

⁵⁶ *Beals* is, in turn, based in part upon the earlier Ontario decision in *R. v. Mar-Dive Corp.* (1996) 141 D.L.R. (4th) 577 (O.S.C.J.) where Lissaman J. also asserts a much broader public policy defence than that which is usually accepted by Canadian courts, holding at 630 that “taking all the factors into consideration, it is my view that the U.S. judgments were obtained by means of half-truths and artificiality. As such, I would have found that the U.S. judgments ought not to be recognized and enforced in this jurisdiction as they are against public policy” (the Court had already held that it would not enforce the judgments due to a lack of real and substantial connection between the subject matter of the case and the California court that granted judgment).

⁵⁷ See also *Lasersight Inc. v. Wiese* [2000] B.C.J. No. 1021 (Q.L.) (B.C.S.C.) where, predictably, the Court found that a refusal by the U.S. District Court to grant an adjournment did not constitute a denial of natural justice.

⁵⁸ *FDIC v. Vanstone*, supra, paragraph 37.

⁵⁹ *Moses*, para. 42. See also *Stanton v. Gudbranson* [1999] B.C.J. No. 896 (Q.L.) (B.C.S.C.).

⁶⁰ It has also been suggested in *obiter* that the manifest error defence is part of the law of Prince Edward Island as well - see *Allen v. Lynch* [1993] P.E.I.J. No. 146 (Q.L.) (P.E.I.S.C.) at para. 28. But with respect to Ontario, see also *Four Embarcadero Centre v. Kalen* (1988) 65 O.R. 551 where Henry J. held at 579 that the manifest error doctrine “is not the law in Ontario and [Boyle] ought not to be followed here”. The *Four Embarcadero* decision is not referred to in *Paulin v. Paulin*, supra.

⁶¹ *Uniforet*, paras. 26 - 28.

⁶² At the time of writing, the latest six month suspension had been granted by then President Clinton on July 14, 2000 - see U.S. Department of State, International Information Programs, July 18, 2000 Press Release: “*Clinton Renews Suspension of Helms-Burton Sanctions for Cuba*”.

⁶³ With respect to applications to register judgments from reciprocating jurisdictions under Part II COEA, note that s. 29(6)(e) COEA bars the registration of foreign judgments where “an appeal is pending or the time in which an appeal may be taken has not expired”. Registration of a foreign judgment from the reciprocating State of Colorado was successfully opposed on this basis in *Dunton v. Whitewater West Recreations* [1996] B.C.J. No. 1399 (Q.L.) (S.C.).