



**Vermont Bar Association
Seminar Materials**

**Multijurisdictional Litigation Between the
U.S. & Canada**

**March 22-23, 2018
DoubleTree (formerly Sheraton)
S. Burlington, VT**

Speakers:

**Dr. H. Scott Fairley, Esq.
Ruzbeh Hosseini, Esq.
Mark Oettinger, Esq.**



Multijurisdictional Litigation Between the U.S. & Canada

Presented to:
Vermont Bar Association
Burlington, Vermont
23 March 2018

Speakers:

H. Scott Fairley, Partner, International Legal Services Group, Co-Chair Constitutional Law Practice Group

Ruzbeh Hosseini, Sr. Associate, International Legal Services and Business Litigation Groups

Cambridge LLP

Toronto, Canada

Relevance Heightened: Explosion of Canada / World Trade

- World Trade with Canada has Exploded over the past 25 years.
- Approximately one quarter of U.S. imports come from Canada and Mexico.
- U.S./Canada Economic Relationship
 - \$1.4 trillion in bilateral trade and investment.
 - \$627.8 billion in 2 way trade (2016).
 - Canada is second biggest trading partner with U.S. with Exports of \$320.1 billion and imports of \$307.6 billion.
- Canada/EU Free Trade Agreement – CETA (2016) and TPP 2018
- Other Trade Agreements:
 - Korea (2015); Honduras (2014); Panama (2013); Jordan (2012); Columbia (2011); Peru (2009); Costa Rica (2002); Chile (1997); Israel (1997); NAFTA (1994).

Agenda

1) The “Revolution” in Enforcement of Foreign Judgments in Canada

- 2 Key SCC Judgments:
- *Morguard* and *Beals*

2) Choice of Jurisdiction:

- *Van Breda* – the Revolution Continues

3) Choice of Jurisdiction:

Practical Considerations,
Canada/U.S. example

4) Forum Non-Conveniens

5) Treaty Initiatives to Codify Common Law

6) Canadian Interim Remedies:

- *Mareva* Injunctions
- *Anton Piller* Orders

7) The Enforcement of Non-Monetary Judgments

- *Pro-Swing*

8) Obtaining Evidence in Canada for Use in U.S. Litigation

9) Limitation Periods

10) Security For Costs Orders in Canadian Litigation

Canadian Law of Foreign Enforcement Pre-Morguard

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

Effects on Advice of U.S. and other Foreign Counsel to their clients:

- Sue in the foreign jurisdiction and hope to prove:
 - a) presence in the jurisdiction; or
 - b) attornment to the jurisdiction
- Litigate in Canada
- Limited and Dismal Options!
- Effects:
 1. Severely limited cross-border enforcement options
 2. Limited law suits in foreign countries against Canadian Entities

Canadian Law of Foreign Enforcement Pre-Morguard

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

Enforcing foreign Judgments in Canada used to practically depend on:

- The Canadian Defendant having some presence in the foreign jurisdiction at the time of the action; or
- The Canadian Defendant attorning to the foreign jurisdiction voluntarily

The Revolution In Enforcement of Foreign Judgments in Canada

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

Four Supreme Court of Canada Cases over 22 years build upon each other and form the basis of the “Revolution”:

Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077

- The leading decision of the Supreme Court of Canada on the enforcement of extra-provincial judgments. The main question placed before the court was the degree of recognition that should be accorded by the courts of one province to the judgments of another for a personal action brought forward in the second province when the defendant did not reside there. In a unanimous decision, the Supreme Court held that that a modern approach based on the principle of comity and reciprocity were needed a basis of recognizing judgments. Specifically, the Court adopted an approach taken by the Supreme Court of the United States in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), that recognizes comity between nations and the need to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. This led the court to develop the real and substantial connection test.

Morguard v. De Savoye : Real and Substantial Connection Test

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

The Most Important Development in *Morguard*:

Establishment of the “Real and Substantial Connection Test”
(RSC)

There must be a ***Real and Substantial Connection*** between the jurisdiction and the defendant *or* the subject matter of the action

Morguard v. De Savoye: Beginning of the Revolution

***General Principal:* Canadian courts should enforce “foreign” judgments where:**

- the foreign court has exercised its jurisdiction legitimately;
- the foreign court has exercised due and fair process;
- the foreign judgment is “final,” and
- enforcement comports with “order and fairness.”

Impact of *Morguard* and the Real and Substantial Connection Test

1. Set a new, much lower, “jurisdictional bar” for foreign plaintiffs for enforcement in Canada
 - UPSHOT: Very few judgments refused enforcement for failure to meet the RSC test
 - Test immediately applied by lower courts to truly foreign judgments (foreign countries)
2. Many more Foreign Judgments Enforced: see Fairley, “Enforcement of Foreign Judgments by Canadian Courts: A New Age of Uncertainty,” *2 Can. Int’l Lawyer* 1 (1996)
3. Barriers to trade and the movement of goods and services reduced in the name of comity by SCC

The Revolution In Enforcement of Foreign Judgments in Canada

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

- In this case, a lawsuit was commenced in Florida against two Canadians who were informed by a Canadian lawyer that the the judgment could not be enforced. They did nothing to defend the Florida action. Judgment was obtained in Florida and an action was brought in Ontario to enforce the Florida Judgment. At trial, the Ontario court refused to enforce the judgment on the basis that the damages were improperly assessed. The Court of Appeal reversed the trial decision and the case went to the Supreme Court.
- Citing to *Morguard* over a decade later, the Supreme Court held that foreign judgments were enforceable in Canada, as a matter of international comity, provided that there was a "real and substantial connection" between the foreign jurisdiction and the subject matter giving rise to the claim.

Morguard + Beals: Very Limited Defences to Enforcement

Jurisdiction

- 1) **Lack of Jurisdiction** – based upon the enforcing court’s application of the real and substantial connections test to the assumption of jurisdiction by the originating court.

Impeachment Defences

- 1) **Fraud** – on the originating court that was not otherwise discoverable at the time that case was heard.
- 2) **Public Policy** – a violation of Canadian public policy to enforce the foreign judgment (virtually non-existent in commercial cases involving monetary damages). Some previous examples included treble damages and gambling debts, which are now enforced.

Morguard + Beals: Very Limited Defences to Enforcement

- 3) **Natural Justice** – a perceived failure of due process in the originating court (some examples include lack of notice or a fair hearing) .

A fourth “**Interest of Justice**” defence (ill-defined; not generally considered)

- SCC Eviscerates Defences in *Beals*. See: Fairley, “Open Season: Recognition and Enforcement of Foreign Judgments After *Beals v. Saldanha*”, *11 ILSA J. Int'l & Comp. L.* 305 (2004-2005).
- See: Fairley, “Corporate Canada Beware: A New Status Quo for the Recognition and Enforcement of Foreign Judgments”, *8 North Am. Corp. Lawyer* 450 (2005)
- Defences May be Expanded but it Hasn't Happened Yet!

RSC Uncertainty Leads to Attempts to Simplify + Increase Objectivity

- RSC test Criticized:
 - Ever increasing list of “connections” cited
 - Leads to unpredictability re jurisdiction both in enforcement cases and domestically
- C.A. for Ontario develops an 8 point test for RSC (for jurisdiction *simpliciter*)
 - Criticized for being unwieldy

RSC Clarified: *Van Breda*

Club Resorts Ltd. v. Van Breda 2012 SCC 17 (SCC) (April 2012)

1. There are certain factors which will lead to a presumption that there is a real and substantial connection (and therefore legitimate jurisdiction) (Plaintiff's onus of proof)
2. These presumptive factors are “rebuttable” by the party seeking to deny jurisdiction
3. The list of presumptive factors may be added to in the right circumstances

RSC Clarified: *Van Breda*

Club Resorts Ltd. v. Van Breda 2012 SCC 17 (SCC) (April 2012)

Presumptive factors in tort cases:

- (a) the defendant is domiciled or resident in the province/state;
- (b) the defendant carries on business in the province/state;
- (c) the tort was committed in the province/state; and
- (d) a contract connected with the dispute was made in the province/state.

Choice of Jurisdiction: Practical Considerations

Where More than One Jurisdiction is Possibly Legitimate

- Substantive Law Advantages + Disadvantages of Jurisdictions
- Procedural Law Advantages + Disadvantages of Jurisdictions
- Costs Advantages + Disadvantages of Jurisdictions

Choice of Jurisdiction: Practical Considerations

	Ontario Jurisdiction	Foreign Jurisdiction Example U.S.A.
Documentary Discovery	Limited – Relevance and Proportionality (cost / benefit) No subpoena right	Broad Discovery most states
Examinations / Depositions	Limited – Proportionality Cannot exceed 7 hours regardless of the number of parties or persons. One party representative.	Broad Depositions, Experts, Multiple witnesses
Substantive Law	Mareva Injunctions Anton Piller Orders	Broader range of causes of action (U.S. does not have <i>Mareva</i> or <i>Anton Piller</i>)
Judgment Enforcement cross-border	Foreign judgments readily enforceable, very limited defences	Varies across the country but CDN judgments readily enforceable
Costs	Partial or substantial indemnity / Rule 49 offers	Limited in most cases
Summary Judgment	<i>Hryniak v Mauldin</i> 2014 SCC 7 Advantageous to SJ	Exists but may not be as advantageous or streamlined as in Ont.

Choice of Jurisdiction: Practical Considerations

	Ontario Jurisdiction	Foreign Jurisdiction Example U.S.A.
Forum Selection Clause	Favouring Ont? Case law re “exclusivity”	Favouring U.S. jurisdiction?
Choice of Law Clause	Favouring Ont?	Favouring U.S. jurisdiction?
Witnesses	Location and Importance	Location and Importance
“Negligence Effect”	Canadian parties/lawyers are still occasionally failing to defend U.S. lawsuits	U.S. parties/lawyers are still occasionally failing to defend Canadian lawsuits
Damages Differences	Generally Less!	Damages for PI much higher; Treble Damages (Securities; Antitrust); Higher punitive

Choice of Forum Clause – Treatment in Canada

Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd., [2012] 1 S.C.R. 359, 2012 SCC 9, [2012] 1 R.C.S. 359, [2012] S.C.J. No. 9, [2012] A.C.S. no 9.

- The court retains discretion as to whether to enforce a forum selection clause
- However, there must be “strong case” for deviating from a properly drafted forum selection clause

Forum *Non Conveniens*

- Where Jurisdiction *Simpliciter* exists, the jurisdiction may not be the most appropriate for the case.
- Canadian courts may choose to decline jurisdiction on the basis that another forum is more convenient.
- The Test: Is there a clearly more appropriate forum?
- The case law recognizes two different classes of cases.

Forum *Non Conveniens*

- **The First Case: Existence of Prior Agreement Re Forum**
- The parties have agreed to a forum to resolve their disputes:
 1. Arbitration Agreement.
 2. Forum Selection Clause.
- The **plaintiff has the onus** of showing why court should displace the forum chosen by the parties.
 - courts will substantially side with what parties have agreed to.

Forum *Non Conveniens*

- **The Second Case: No Prior Agreement re Forum**
- Court must determine whether there is a more convenient forum based on various factors: *Sullivan v. Four Seasons Hotels Ltd.* 2013 ONSC 4622
 1. Location of the majority of the parties;
 2. Location of key witnesses;
 3. Location of evidence;
 4. Choice of law agreements;
 5. The avoidance of multiplicity of proceedings;
 6. The location where the contract in dispute is signed;
 7. The applicable law of the contract; and
 8. The loss of legitimate juridical advantage.
- The **defendant has the onus** of showing a more convenient forum.

Treaty Initiatives To Codify Common Law

- Hague Convention on Choice of Court Agreements, 2005 (in force, October 2015
Canada and U.S. have both signed, but not ratified) See: Fairley & Archibald, “After The Hague: Some Thoughts on the Impact on. Canadian Law of the Convention on Choice of Court Agreements” (2006), 12 *ILSA J Int'l & Comp L* 417.
- (HCCH #37; Full Text www.hcch.net/en/instruments/conventions)
- Hague Project on Jurisdiction and Recognition and Enforcement of Foreign Judgments (see: www.hcch.net/en/projects/legislative-projects/judgments) Renewed efforts from 2011 following narrow success of Choice of Court Agreements Convention.
- Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February, 2017) Draft Convention, Hague working Doc. No. 170 E (rev) (<https://assets.hcch.net/docs/d6f58225-0427-4a65>)

Mareva Injunctions – Asset Freezing

- *Mareva* Injunctions In Canada

- Pretrial Asset Freezing Injunctive Order
- Difficult to Obtain
- Powerful and Intrusive
- Execution Before judgment

***Mareva Compania Naviera SA v. International Bulkcarriers SA*, [1980] 1 All ER 213 (C.A.)**

Mareva Injunctions – Asset Freezing

- *Mareva* Injunctions In Canada

- The Test:

- 1. Strong *Prima Facie* Case
 - 2. Real Risk that Defendant will remove assets from Jurisdiction or denude self of assets in jurisdiction
 - 3. Can be obtained *ex parte*, but a risky strategy (Costs)
-
- Duty to Reveal ALL the facts!
 - *Aetna Financial Services v. Feigelman*, [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 97, [1985] S.C.J. No. 1, 15 D.L.R. (4th) 161.

Anton Piller Order – Civil Search Order

- Anton Piller Orders In Canada

- Court Order Providing the right to search Premises and seize evidence without prior warning
- Purpose:
 - To prevent Destruction *or* Removal of Evidence

Anton Piller Order – Civil Search Order

- Anton Piller Orders In Canada

- Order Obtained *Ex Parte*
- The Test:
 1. Extremely strong prima facie
Case
 2. Potential Damage must
Be *very serious* for applicant
 3. *Clear Evidence of Real*
Possibility of destruction

Anton Piller Order – Civil Search Order

- Anton Piller Orders In Canada

- ISS Independent Supervising Solicitor

Must be retained to:

1. present the Anton Piller Order to the Defendant
2. oversee the search
3. record the evidence obtained
supervise storage of evidence
4. report to the Court as
necessary

Anton Piller K.G. v. Manufacturing Processes Ltd., [1976] 1 All E.R.
779 (C.A.)

Anton Piller Order – Civil Search Order

- Anton Piller Orders In Canada

- Plaintiff's Undertaking as to Damages
- Imperative for FULL disclosure of all material facts

Recent SCC decision: [*British Columbia \(Attorney General\) v. Malik*, 2011 SCC 18.](#) (The order was granted on clear and convincing evidence after meeting the following test; i) a strong prima facie case; (ii) serious damage to the plaintiff as a result of the defendant's alleged misconduct, potential or actual; (iii) convincing evidence that the defendant has in its possession incriminating documents or things; and (iv) a real possibility that the defendant may destroy such material before the discovery process can do its work).

Historic Approach Re Enforcement of Foreign Injunctive Orders

- Foreign injunctive Orders were said to offend the traditional rules that required judgments to be:
 - for a ***fixed and ascertained sum*** and
 - to be ***final and conclusive***

The Revolution In Enforcement of Foreign Judgments in Canada

Pro Swing Inc. v Eta. Golf Inc., [2006] 2 S.C.R. 612

- An American company that sells golf clubs commenced a lawsuit in Ohio against a Canadian retailer for selling golf clubs that infringed on the American company's trade-mark. A settlement was reached resulted in a consent decree that the Canadian retailer refrain from selling any products that infringed on the American company's trade-mark. The American company subsequently petitioned the Ohio court for a contempt order and injunction for an alleged breach of the settlement and consent decree by the Canadian company. The Ohio court agreed. The American company subsequently commenced an action in Ontario to enforce the contempt order and injunction. The Ontario court of first instance agreed to enforce the Ohio order, but found certain parts duplicative and had them severed from the order. On appeal, the court found the order was unenforceable due to ambiguity. The Supreme Court held that foreign non-monetary judgments may be enforced in Canada where 1) the foreign court has competent jurisdiction; the

Pro Swing Inc. v. Elta Golf Inc. at the Supreme Court

Pro Swing Inc. v. Elta Golf Inc 2006 SCC 52

- At a trial, Ohio Injunctive Order found to be enforceable in Ontario
 - *Morguard, Hunt, Beals* etc. principles apply to non-monetary judgments
 - Injunctive Order in this case final and conclusive
- On Appeal to the SCC, Ohio Injunctive Order found **Not** to be Enforceable in Ontario on its facts:
 - Ambiguous in respect of material matters
- SCC recognized that comity and liberalization of enforcement should allow the enforcement of injunctive relief cross-border in certain cases

Pro Swing Inc. v. Elta Golf Inc. **Applied Successfully**

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

Johnson & Johnson v. Butt, (2007) CanLII 51527 (ONSC)

- New York Court's order freezing the assets of Ontario residents in Ontario bank accounts was enforceable in Canada

Pro Swing Inc. v. Elta Golf Inc. Applied Successfully

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

Bienstock v. Adenyo Inc. (2014) CanLII 2014 ONSC 4997

- Bienstock commenced an action in Delaware against a U.K. company for breach of a joint venture agreement.
- During the course of the Delaware action, the Canadian parent:
 - transferred the assets of the U.K. company to Canada for no consideration; and
 - sold the entirety of the assets to a third party.
- The Delaware court held that the Canadian parent had acted fraudulently and ordered monetary and non-monetary relief – a constructive trust.
- The constructive trust order was successfully enforced and then used to sue approximately 100 shareholders who had received the proceeds of sale related to the fraudulently transferred assets.

Can Evidence be Obtained in Canada for use in Foreign Proceedings?

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

- Yes
- Evidence Given Voluntarily
- Evidence to be Obtained by Court Order

Letters Rogatory

Letters Rogatory or Letters of Request (defn):

A request originating from an originating court (e.g. U.S.) to a foreign court (e.g. Canada) for assistance in gathering evidence (e.g. compelling disclosure of documents or obtaining from a witness within the foreign court's jurisdiction)

“Comity” and Obtaining Evidence in Canada

- International Legal Assistance Between Courts rests on the Principle of “Comity”
- Principle of International Comity
“‘Comity’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is 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”

Morguard v. De Savoye [1990] 3 S.C.R. 1077 (SCC).
quoting *Hilton v. Guyot* (1895) 159 U.S. 113 at 163-64

Comity: Enforcing Letters Rogatory

- Courts give assistance to each other across borders not as matter of obligation, but rather out of mutual respect and deference
- A foreign request is given full force and effect unless:
 - contrary to public policy
 - prejudicial to sovereignty
 - prejudicial to citizens

Issuing Letters Rogatory in the United States

- **Letters rogatory must:**
 - Be addressed “To the Appropriate Authority in Canada” i.e. the proper court;
 - State who you wish to examine and why...or what documents you need and why;
 - Clearly state evidence the sought
 - State the relevance of the evidence sought

6 Factors Court will Consider in Exercising Discretion

- 1) Evidence sought is relevant
- 2) Evidence sought is necessary
- 3) Evidence is not otherwise obtainable
- 4) Order sought not contrary to Public Policy
- 5) Documents sought identified with reasonable specificity
- 6) Order not unduly burdensome

If you Get it Wrong Can you go Back?

RE Friction Division Products, Inc. and E.I. Dupont de Nemours & Co. Inc. et al. (No.2) (1986) 546 O.R. (2d)

The Ontario Court of Appeal held that Letters Rogatory could be re-submitted by U.S. Court to conform with requirements

“If he was trying to take another bite at the apple, it was from a different apple.”

Maybe better said: “You can get another kick at the can....but it may be a very expensive kick!”

Limitation Period Re Enforcement of Judgments In Ontario

CAMBRIDGE LLP

Toronto + Burlington + Ottawa + Elliot Lake

- *Independence Plaza 1 Associates, L.L.C. v. Figlioni* 2017 ONCA 44 (CanLII):
 - 2 year limitation period under the Limitations Act R.S.O. 1990 applies
 - The limitation period begins to run, at the earliest, when the time to appeal the foreign judgment has expired or, if an appeal is taken, the date of the appeal decision.

Security For Costs

Security for Costs:

R. 56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

(a) The plaintiff or applicant is ordinarily resident outside Ontario;

Security For Costs

Security for Costs:

- To Make a Security for Costs Order Less Likely (remains discretionary):
 - Insert a clause in Contract indicating that Canadian contracting party waives any claim to security for costs in the event of litigation in Canada
 - (Ask our office for precedent clauses)

Thank You!

Cambridge LLP

333 Adelaide Street West, 4th floor

Toronto, ON

M5V 1R5

www.cambridgellp.com

sfairley@cambridgellp.com; t. 647.427.3905

rhosseini@cambridgellp.com; t. 647.430.5375