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

Douglas De Savoye *Appellant*

v.

Morguard Investments Limited

Respondent

and

Credit Foncier Trust Company

Respondent

indexed as: morguard investments ltd. *v.* de savoye

File No.: 21116.

1990: April 23; 1990: December 20.

Present: Dickson C.J.* and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

on appeal from the court of appeal for british columbia

Conflict of laws -- Civil procedure -- Judgments and orders -- Recognition and enforcement of extraprovincial judgments -- Respondents obtaining judgments in Alberta court against British

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* Chief Justice at the time of hearing.

Columbia resident for foreclosure and for deficiencies between value of property and amounts owing on mortgages -- Whether or not Alberta judgments should be enforced by British Columbia court.

The respondents were mortgagees of lands in Alberta. The appellant was the mortgagor and then resided in Alberta. He moved to British Columbia and has not resided or carried on business in Alberta since then. The mortgages fell into default and the respondents brought action in Alberta. Service was effected in accordance with the rules for service *ex juris* of the Alberta Court. The appellant took no steps to appear or to defend the actions. There was no clause in the mortgages by which he agreed to submit to the jurisdiction of the Alberta court and he did not attorn to its jurisdiction.

The respondents obtained judgments *nisi* in the foreclosure actions. At the expiry of the redemption period, they obtained orders for a judicial sale of the mortgaged properties to themselves and judgments were entered against the appellant for the deficiencies between the value of the property and the amount owing on the mortgages. The respondents then each commenced a separate action in the British Columbia Supreme Court to enforce the Alberta judgments for the deficiencies. Judgment was granted to the respondents by the Supreme Court in a decision which was upheld on appeal to the Court of Appeal. At issue here was the recognition to be given by the courts in one province to a judgment of the courts in another province in a personal action brought in the latter province at a time when the defendant did not live there.

Held: The appeal should be dismissed.

The common law regarding the recognition and enforcement of foreign judgments is anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century. This principle reflects one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Because jurisdiction is territorial, a state's law has no binding effect outside its jurisdiction.

Modern states cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances, such as judgments *in rem* and personal judgments. This was thought to be in conformity with the requirements of comity, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. But comity is based not simply on respect for a foreign sovereign, but on convenience and even necessity. Modern times require that the flow of wealth, skills and people across boundaries be facilitated in a fair and orderly manner. Principles of order and fairness which ensure security of transactions with justice must underlie a modern system of private international law. The content of comity therefore must be adjusted in the light of a changing world order.

No real comparison exists between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. The courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state.

The 19th century English rules fly in the face of the obvious intention of the Constitution to create a single country with a common market and a common citizenship. The constitutional arrangements made to effect this goal, such as the removal of barriers to interprovincial trade and mobility guarantees, speak to the strong need for the enforcement throughout the country of judgments given in one province.

The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges -- who also have superintending control over other provincial courts and tribunals -- are appointed and paid by the federal authorities. All are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Further, Canadian counsel are all subject to the same code of ethics.

The courts in one province should give "full faith and credit" 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. Both order and justice militate in favour of the security of transactions. It is anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province.

These concerns, however, must be weighed against fairness to the defendant. The taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives and recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the

greatest or at least significant contacts with the subject matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject matter of the suit. If the courts of one province are to be expected to give effect to judgments given in another province, there must be some limit to the exercise of jurisdiction against persons outside the province. If it is reasonable to support the exercise of jurisdiction in one province, it is reasonable that the judgment be recognized in other provinces.

The approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties.

Here, the actions for the deficiencies properly took place in Alberta. The properties are situate there, and the contracts were entered into there by parties then resident in the province. Moreover, deficiency actions follow upon foreclosure proceedings, which should obviously take place in Alberta, and the action for the deficiencies cries out for consolidation with the foreclosure proceedings. There was a real and substantial connection between the damages suffered and the jurisdiction. Thus, the Alberta court properly had jurisdiction, and its judgment should be recognized and be enforceable in British Columbia.

The *Reciprocal Enforcement of Judgments Acts* in the various provinces were never intended to alter the rules of private international law. They simply provided for the registration of judgments as a more convenient procedure than by bringing an action to enforce a judgment given in another province. There is nothing to prevent a plaintiff from bringing such an action

and thereby taking advantage of the rules of private international law as they may evolve over time.

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184; *Roglass Consultants Inc. v. Kennedy, Lock* (1984), 65 B.C.L.R. 393; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591; *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Dupont v. Taronga Holdings Ltd.* (1986), 49 D.L.R. (4th) 335; *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *First City Capital Ltd. v. Winchester Computer Corp.*, [1987] 6 W.W.R. 212.

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Canadian Charter of Rights and Freedoms, ss. 6, 7.

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APPEAL from a judgment of the British Columbia Court of Appeal (1988), 27 B.C.L.R. (2d) 155, 29 C.P.C. (2d) 52, [1988] 5 W.W.R. 650, dismissing an appeal from a judgment of Boyd L.J.S.C. (1987), 18 B.C.L.R. (2d) 262, [1988] 1 W.W.R. 87. Appeal dismissed.

Donald J. Livingstone, for the appellant.

Peter Reardon, for the respondents.

//*La Forest J.*//

The judgment of the Court was delivered by

LA FOREST J. -- This appeal concerns the recognition to be given by the courts in one province to a judgment of the courts in another province in a personal action brought in the latter province at a time when the defendant did not live there. Specifically, the appeal deals

with judgments granted in foreclosure proceedings for deficiencies on sale of mortgaged property.

Facts

The respondents, Morguard Investments Limited and Credit Foncier Trust Company, became mortgagees of lands in Alberta in 1978. The appellant, Douglas De Savoye, who then resided in Alberta, was originally guarantor but later took title to the lands and assumed the obligations of mortgagor. Shortly afterwards, he moved to British Columbia and has not resided or carried on business in Alberta since. The mortgages fell into default and the respondents brought action in Alberta. The appellant was served with process in the actions by double registered mail addressed to his home in British Columbia pursuant to orders for service by the Alberta court in accordance with its rules for service outside its jurisdiction. There are rules to the same effect in British Columbia.

The appellant took no steps to appear or to defend the action. There was no clause in the mortgages by which he agreed to submit to the jurisdiction of the Alberta court, and he did not attorn to its jurisdiction.

The respondents obtained judgments *nisi* in the foreclosure actions. At the expiry of the redemption period, they obtained "Rice Orders" against the appellant. Under these orders, a judicial sale of the mortgaged properties to the respondents took place and judgments were entered against the appellant for the deficiencies between the value of the property and the amount owing on the mortgages. The respondents then each commenced a separate action in the British Columbia Supreme Court to enforce the Alberta judgments for the deficiencies. Judgment was granted to the respondents by the Supreme Court in a decision which was

upheld on appeal to the British Columbia Court of Appeal. The appellant then sought and was granted leave to appeal to this Court, [1989] 1 S.C.R. viii.

The Judgments Below

Supreme Court of British Columbia

The appellant argued that the respondents were not entitled to enforce the Alberta judgments because he had never attorned to the jurisdiction of the Alberta court. The chambers judge, Boyd L.J.S.C., noted that the Alberta court clearly had jurisdiction over the subject properties and the foreclosure proceedings. Nothing in the material, she noted, indicated that in granting orders for substitutional service upon the appellant, the Alberta court improperly exercised its discretion to assume jurisdiction, or that any other court would have been a more convenient forum in which to adjudicate the matter. She, therefore, concluded that the Alberta court had jurisdiction to make the orders in question. The judge then reviewed the substance of the orders and ordered that the respondents were entitled to judgment for the deficiencies: (1987), 18 B.C.L.R. (2d) 262, [1988] 1 W.W.R. 87.

Court of Appeal

The Court of Appeal, in reasons given by Seaton J.A., dismissed the appeal: (1988), 27 B.C.L.R. (2d) 155, [1988] 5 W.W.R. 650, 29 C.P.C. (2d) 52. In its view, the Alberta default judgments could be enforced on the basis of reciprocity, more specifically reciprocity of jurisdictional practice in the two provinces. A British Columbia court, it held, should recognize an Alberta judgment if the Alberta court took jurisdiction in circumstances in which,

if the facts were transposed to British Columbia, the courts of British Columbia would have taken jurisdiction as well.

In reviewing the question of the jurisdiction of the Alberta court, Seaton J.A. concluded that the Alberta judgments for the deficiency on the mortgage loans were enforceable by action in British Columbia because British Columbia's own courts, faced with a similar case, would have exercised jurisdiction under the British Columbia Rules of Court authorizing service *ex juris* without leave. He noted that such grounds for exercising jurisdiction over a defendant resident outside the province were long established in English and Canadian law. He referred to *Comber v. Leyland*, [1898] A.C. 524 (H.L.), which held, at p. 527, that:

> . . . where the parties have agreed that something is to be done in this country, some part of the subject-matter of the contract is to be executed within this country, it is a sort of consent of the parties that wherever they may be living, or wherever the contract may have been made, that question may be litigated in this country.

In Seaton J.A.'s view, this reasoning led logically to the assumption of jurisdiction, and reciprocally to the recognition by other courts. In this context, he cited *Travers v. Holley*, [1953] 2 All E.R. 794, where the English Court of Appeal had recognized a divorce decree granted in New South Wales on the ground that the English courts would in similar circumstances have exercised jurisdiction in the same way. If that reasoning were to be applied to courts of other provinces, judgments of other provinces should be enforced if the British Columbia courts exercise similar jurisdiction.

Seaton J.A. acknowledged, however, that this view has not prevailed in judgments *in personam* in which class the judgments concerned here fell. However, he noted that the leading case on the point, *Emanuel v. Symon*, [1908] 1 K.B. 302 (C.A.), had been decided at

the beginning of the century when travel from one country to another was impractical (in that case between Western Australia and England). As well, he observed, there was then an unstated assumption that the administration of justice in other countries was inferior.

Considerations such as these, Seaton J.A. stated, had no application to the situation here. He favoured acknowledging a difference between foreign judgments and judgments in other provinces, and he observed that such a difference had been accepted for certain purposes, such as in determining the factors to be taken into account in deciding whether to grant a *Mareva* injunction prohibiting the transfer of goods to a place outside the court's jurisdiction; see *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, at p. 35. He also drew support from the fact that all superior court judges are appointed, paid and removed by the same government, and that the *Canadian Charter of Rights and Freedoms* applies throughout Canada. He further referred to the Australian Constitution which provides for recognition by each state of judgments of other states in the Commonwealth.

He then reviewed the British Columbia decisions which had followed the English position, but found none that was binding and preferred the view of "reciprocal" recognition of judgments proposed in certain periodical writings (see Gilbert D. Kennedy, "`Reciprocity' in the Recognition of Foreign Judgments: The Implications of Travers v. Holley" (1954), 32 *Can. Bar Rev.* 359; Gilbert D. Kennedy, "Recognition of Judgments in Personam: The Meaning of Reciprocity" (1957), 35 *Can. Bar Rev.* 123; J.-G. Castel, "Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada" (1971), 17 *McGill L.J.* 11). He then referred to and followed the judgment of Gow Co. Ct. J. (as he then was) in *Marcotte v. Megson* (1987), 19 B.C.L.R. (2d) 300, which had accepted the jurisdictional reciprocity approach for judgments *in personam*.

The Issue

No one denies the Alberta court's jurisdiction to entertain the actions and enforce them there if it can. It would be surprising if they did. They concern transactions entered into in Alberta by individuals who were resident in Alberta at the time of the transactions and involve land situate in that province. Though the defendant appellant was outside Alberta at the time the actions were brought and judgment given, the Alberta rules for service outside the jurisdiction permitted him to be served in British Columbia. These rules are similar to those in other provinces, and specifically British Columbia. The validity of such rules does not appear to have been subjected to much questioning, a matter to which I shall, however, return.

The issue, then, as already mentioned, is simply whether a personal judgment validly given in Alberta against an absent defendant may be enforced in British Columbia where he now resides.

The English Background

The law on the matter has remained remarkably constant for many years. It originated in England during the 19th century and, while it has been subjected to considerable refinement, its general structure has not substantially changed. The two cases most commonly relied on, *Singh v. Rajah of Faridkote*, [1894] A.C. 670 (P.C.), and *Emanuel v. Symon*, *supra*, date from the turn of the century. I shall confine myself to a discussion of the latter because it is the more frequently cited.

In *Symon*, the defendant, while residing and carrying on business in Western Australia, entered into a partnership in 1895 for the working of a gold mine situated in the colony and

owned by the partnership. He later ceased to carry on business there and moved permanently to England in 1899. Two years later, other members of the partnership brought an action in the colony for the dissolution of the partnership, sale of the mine, and an accounting. The writ was served on the defendant in England, but he took no step to defend the action. The colonial court decreed a dissolution of the partnership and sale of the mine, and in taking the accounts found a sum due from the partnership. The plaintiffs paid the sum and brought action in England to recover the portion which they alleged was owed by the defendant. Channell J. gave judgment for the plaintiffs, [1907] 1 K.B. 235, but a unanimous Court of Appeal reversed the judgment.

Buckley L.J.'s summary of the law in that case bears a remarkable resemblance to a Code and has been cited repeatedly ever since. He stated, at p. 309:

> In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

Though the first of these propositions may now be open to doubt (see Robert J. Sharpe, "The Enforcement of Foreign Judgments", in M. A. Springman and E. Gertner, eds., *Debtor-Creditor Law: Practice and Doctrine* (1985), 641, at p. 645), Buckley L.J.'s statement of the law, with one qualification to be noted, otherwise accurately represents the common law in England to this day.

There had been some earlier attempts to extend the law to a situation relevant to this appeal. Thus from *Becquet v. Mac Carthy* (1831), 2 B. & Ad. 951, 109 E.R. 1396, it might have

appeared that a sixth class might have been added to Buckley L.J.'s list, namely, "where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction". But that case was ultimately explained on the basis that the defendant there was the holder of a public office in the place where the judgment was obtained and so "constructively present" there at the time of the judgment; see *Symon*, *supra,* at pp. 310-11. One might also have been permitted to speculate that one who enters into a contract while residing in a given jurisdiction consents to the jurisdiction of the courts there as Blackburn J. seemed prepared to do in *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, at p. 161, but this possibility too was scotched in *Symon*; see *per* Lord Alverstone C.J., at p. 308.

Until the 1950s, then, the various circumstances identified by Buckley L.J. in *Symon* exhausted the possible cases in which a foreign judgment would be recognized in England. A change came, however, with the case of *Travers v. Holley*, *supra,* in 1953. There the English Court of Appeal had to consider whether they should recognize a divorce granted to a wife in New South Wales pursuant to a statute giving the New South Wales court jurisdiction to grant a divorce to a wife who was domiciled there at the time she was deserted by her husband, even though her husband had later acquired another domicile. A similar statute existed in England, and on this ground of reciprocal jurisdiction the Court of Appeal held that it should grant jurisdiction. As Hodson L.J. put it, at p. 800:

> . . . where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves.

See also Somervell L.J., at p. 797.

It should be noted that England also has a rule of court (R.S.C. Ord. 11) that, like the rule under which Alberta exercised jurisdiction over the defendant here, permits the courts to assume jurisdiction over non-residents by service where he or she resides. This gives rise to the question whether, on the ground of jurisdictional reciprocity set forth in *Travers v. Holley*, the courts should recognize judgments of a foreign court which has exercised jurisdiction under a similar rule. Encouragement for this approach could be found in *dicta* by Denning L.J. in the earlier case of *Re Dulles' Settlement Trusts*, [1951] 2 All E.R. 69 (C.A.). At issue there was whether the English courts had jurisdiction to order a father, an American living outside the jurisdiction, to pay maintenance to a child. In discussing the case of *Harris v. Taylor*, [1915] 2 K.B. 580 (C.A.), Denning L.J. had this to say, at pp. 72-73:

> The defendant was not in the island, but the Manx court gave leave to serve him out of the jurisdiction of the Manx court on the ground that the cause of action was founded on a tort committed within their jurisdiction. The defendant entered a conditional appearance in the Manx court and took the point that the cause of action had not arisen within the Manx jurisdiction. That point depended on the facts of the case, and it was decided against him, whence it followed that he was properly served out of the Manx jurisdiction in accordance with the rules of the Manx court. Those rules correspond with the English rules for service out of the jurisdiction contained in R.S.C., Ord. 11, and I do not doubt that our courts would recognise a judgment properly obtained in the Manx courts for a tort committed there whether the defendant voluntarily submitted to the jurisdiction or not, just as we would expect the Manx courts in a converse case to recognise a judgment obtained in our courts against a resident in the Isle of Man on his being properly served out of our jurisdiction for a tort committed here. [Emphasis added.]

This possibility of further extending the categories in the *Symon* case was, however, firmly rejected in *In re Trepca Mines Ltd.*, [1960] 1 W.L.R. 1273 (C.A.), where the court stated that *Travers v. Holley* was limited to a judgment *in rem* in a matter affecting marital status, and that it was unwilling to take the step suggested by Denning L.J. in the *Dulles* case. In short, the English authorities afford no basis for extending the approach in *Travers v. Holley* to a personal obligation such as that existing in the present case; see also *Schemmer v. Property Resources Ltd.*, [1975] 1 Ch. 273.

Before concluding this review of the English background, I should make reference to *Indyka v. Indyka*, [1969] 1 A.C. 33, in which the House of Lords found another technique for going beyond the strict categories in *Symon*. In that case, their Lordships held that the English courts would recognize a divorce decree granted in a foreign country to a wife resident there though her husband was then domiciled in England. In the course of his remarks, Lord Wilberforce had this to say, at p. 105:

> In my opinion, it would be in accordance with the developments that I have mentioned and with the trend of legislation -- mainly our own but also that of other countries with similar social systems -- to recognize divorces given to wives by the courts of their residence wherever a real and substantial connexion is shown between the petitioner and the country, or territory, exercising jurisdiction.

It should be observed, however, that this case, too, involved matrimonial status and did not extend to an action *in personam*; see *New York v. Fitzgerald*, [1983] 5 W.W.R. 458 (B.C.S.C.), *per* Sheppard L.J.S.C.

The Canadian Background

In Canada, the courts have until recent years unanimously accepted the authority of *Emanuel v. Symon, supra*, in dealing with the recognition of foreign judgments; see, for example, *New York v. Fitzgerald*. This was, of course, inevitable so far as foreign judgments were concerned until 1949 when appeals to the Privy Council were abolished. But, the approach was not confined to foreign judgments. It was extended to judgments of other provinces, which for the purposes of the rules of private international law are considered "foreign" countries; see, for example, *Lung v. Lee* (1928), 63 O.L.R. 194 (C.A.). There is thus a plethora of cases throughout Canada where two persons have entered into a contract in one province, frequently when both were resident there at the time, but the plaintiff has found it impossible to enforce

a judgment given in that province because the defendant had moved to another province when the action was brought. These cases include: *Walsh v. Herman* (1908), 13 B.C.R. 314 (B.C.S.C. (Full Court)); *Marshall v. Houghton*, [1923] 2 W.W.R. 553 (Man. C.A.); *Mattar v. Public Trustee* (1952), 5 W.W.R. (N.S.) 29 (Alta. S.C., App. Div.); *Wedlay v. Quist* (1953), 10 W.W.R. (N.S.) 21 (Alta. S.C., App. Div.); *Bank of Bermuda Ltd. v. Stutz*, [1965] 2 O.R. 121 (H.C.); *Traders Group Ltd. v. Hopkins* (1968), 69 D.L.R. (2d) 250 (N.W.T. Terr. C.); *Batavia Times Publishing Co. v. Davis* (1977), 82 D.L.R. (3d) 247 (Ont. H.C.), aff'd (1979), 105 D.L.R. (3d) 192 (Ont. C.A.); *Eggleton v. Broadway Agencies Ltd.* (1981), 32 A.R. 61 (Alta. Q.B.); *Weiner v. Singh* (1981), 22 C.P.C. 230 (B.C. Co. Ct.); *Re Whalen and Neal* (1982), 31 C.P.C. 1 (N.B.Q.B.); *North American Specialty Pipe Ltd. v. Magnum Sales Ltd.*, B.C.S.C., No. C841410, February 11, 1985 (summarized in (1985), 31 A.C.W.S. (2d) 320). Essentially, then, recognition by the courts of one province of a personal judgment against a defendant given in another province is dependant on the defendant's presence at the time of the action in the province where the judgment was given, unless the defendant in some way submits to the jurisdiction of the court giving the judgment.

Soon after the decision in *Travers v. Holley*, *supra*, however, Professor Kennedy began to argue for the extension of the "reciprocity" approach adopted in that case to personal actions, at least in the case of judgments given in other provinces; see "`Reciprocity' in the Recognition of Foreign Judgments: The Implications of Travers v. Holley", op. cit. An unreported British Columbia case, *Archambault v. Solloway*, B.C.S.C., April 18, 1956, prompted a further article from his pen: "Recognition of Judgments in Personam: The Meaning of Reciprocity", op. cit. In *Archambault*, Wilson J. of the British Columbia Supreme Court had found the jurisdictional reciprocity approach "highly persuasive" and failed to apply it solely because Quebec (where the judgment sought to be enforced had been given) only gave effect to a foreign judgment after an enquiry on its merits. It was, therefore, not comparable to the effect given to foreign

judgments in cases where these are recognized in common law provinces. Subsequently, Professor Castel joined Kennedy in arguing for the adoption of the reciprocity approach; see Castel, op. cit. "There does not", he stated, "seem to be any compelling reason against recognizing a jurisdiction which the forum itself claims" (p. 47).

Until 1987, however, no case appears to have adopted that position. But in that year, Gow Co. Ct. J. in a forceful judgment applied the reciprocity approach to an *in personam* action in *Marcotte v. Megson, supra*. The headnote summarizes the case as follows:

> The plaintiff, an Alberta resident, sued the defendant in the court of Queen's Bench of Alberta pursuant to s. 114(1) of the Business Corporations Act of that province which renders directors of a corporation liable to employees of the corporation for all debts not exceeding six months' wages. The plaintiff was granted leave to serve the defendant ex juris in British Columbia. The defendant was served but filed no defence. The plaintiff obtained default judgment against him for $6,307. The plaintiff later sued on that judgment in British Columbia. The defendant defended the action on the grounds that he had done nothing to submit to the jurisdiction of the Alberta court and that the Alberta court was without jurisdiction in the sense that it acted without jurisdiction under the conflict of laws (private international law) rules of the courts of British Columbia.
>
> **Held** -- Judgment for plaintiff.
>
> Reason would suggest that inside the Confederation of Canada the principle of reciprocity of jurisdiction should apply. The action was concerned, and only concerned, with a judgment of a next-door province, not a foreign state but a partner in Confederation, which could not be registered as a domestic judgment because the defendant never submitted to the jurisdiction of the Alberta court. Because the judgment was a default judgment, it could have been opened up on the merits had the defendant chosen to do so, but he deliberately chose not to do so, preferring to rest his defence on the grounds of "no presence" and "no submission". In those circumstances, there being as between Alberta and British Columbia reciprocity of jurisdiction, it was appropriate to apply the principle that our courts should recognize a jurisdiction which they themselves claim.

The British Columbia Court of Appeal in the present case has now added its support to the call that reason dictates the evolution of the common law to permit the enforcement of *in personam* judgments given in sister-provinces.

The appellant in this case, of course, relies on the law as stated in *Symon*, *supra*. The respondents naturally rely on the Court of Appeal's judgment and particularly the "reciprocity" approach.

Before going on, I should observe that academic writers have now engaged the issue on a broader plane than reciprocity; see Robert J. Sharpe, *Interprovincial Product Liability Litigation* (1982); John Swan, "Recognition and Enforcement of Foreign Judgments: A Statement of Principle", in Springman and Gertner, op. cit., at pp. 691 *et seq.*; John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 *Can. Bar Rev.* 271; Vaughan Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989), 9 *Oxford J. Legal Stud.* 547. Their approaches are not identical but in a broad sense it may be said that their thesis is that the conditions governing the taking of jurisdiction by the courts of one province and those under which they are enforced by the courts of another province should be viewed as correlative. If it is fair and reasonable for the courts of one province to exercise jurisdiction over a subject-matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment. For a number of these writers, there are constitutional overtones to this approach; see also Peter W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at pp. 278-80. It is fair to say that I have found the work of these writers very helpful in my own analysis of the issues.

I should also note that the *Indyka* case, *supra*, has been followed in Canada; see *Edward v. Edward Estate*, [1987] 5 W.W.R. 289 (Sask. C.A.).

Analysis

The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century; see *Rajah of Faridkote*, *supra*. This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction. Great Britain, and specifically its courts, applied that doctrine more rigourously than other states; see *Libman v. The Queen*, [1985] 2 S.C.R. 178, which deals with the question in its criminal aspect. The English approach, we saw, was unthinkingly adopted by the courts of this country, even in relation to judgments given in sister-provinces.

Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.

But a state was under no obligation to enforce judgments it deemed to fall outside the jurisdiction of the foreign court. In particular, the English courts refused to enforce judgments

on contracts, wherever made, unless the defendant was within the jurisdiction of the foreign court at the time of the action or had submitted to its jurisdiction. And this was so, we saw, even of actions that could most appropriately be tried in the foreign jurisdiction, such as a case like the present where the personal obligation undertaken in the foreign country was in respect of property located there. Even in the 19th century, this approach gave difficulty, a difficulty in my view resulting from a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind.

For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the Unites States in *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64, in a passage cited by Estey J. in *Spencer v. The Queen*, [1985] 2 S.C.R. 278, at p. 283, as follows:

> "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 . . .

As Dickson J. in *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at p. 400, citing Marshall C.J. in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), stated, "common interest impels sovereigns to mutual intercourse" between sovereign states. In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. Von Mehren and Trautman have observed in "Recognition of Foreign Adjudications: A Survey and A Suggested Approach" (1968), 81 *Harv. L. Rev.* 1601, at p. 1603: "The ultimate justification

for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted."

Yntema (though speaking more specifically there about choice of law) caught the spirit in which private international law, or conflict of laws, should be approached when he stated: "In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws"; see Hessel E. Yntema, "The Objectives of Private International Law" (1957), 35 *Can. Bar Rev.* 721, at p. 741. As is evident throughout his article, what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.

This formulation suggests that the content of comity must be adjusted in the light of a changing world order. The approach adopted by the English courts in the 19th century may well have seemed suitable to Great Britain's situation at the time. One can understand the difficulty in which a defendant in England would find himself in defending an action initiated in a far corner of the world in the then state of travel and communications. The *Symon* case, *supra*, where the action arose in Western Australia against a defendant in England, affords a good illustration. The approach, of course, demands that one forget the difficulties of the plaintiff in bringing an action against a defendant who has moved to a distant land. However, this may not have been perceived as too serious a difficulty by English courts at a time when it was predominantly Englishmen who carried on enterprises in far away lands. As well, there

was an exaggerated concern about the quality of justice that might be meted out to British residents abroad; see Lord Reid in *The Atlantic Star*, [1973] 2 All E.R. 175 (H.L.), at p. 181.

The world has changed since the above rules were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. 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. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.

However that may be, there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already adverted. Whatever nomenclature is used, our courts have not hesitated to cooperate with courts of other provinces where necessary to meet the ends of justice; see *Re Wismer and Javelin International Ltd.* (1982), 136 D.L.R. (3d) 647 (Ont. H.C.), at pp. 654-55; *Re Mulroney and Coates* (1986), 27 D.L.R. (4th) 118 (Ont. H.C.), at pp.

128-29; *Touche Ross Ltd. v. Sorrel Resources Ltd.* (1987), 11 B.C.L.R. (2d) 184 (S.C.), at p. 189; *Roglass Consultants Inc. v. Kennedy, Lock* (1984), 65 B.C.L.R. 393 (C.A.), at p. 394.

In any event, the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the *Charter*; see *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591. In particular, significant steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the *Constitution Act, 1867* was the creation of a common market. Barriers to interprovincial trade were removed by s. 121. Generally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole; see *Constitution Act, 1867*, s. 91(2). The Peace, Order and Good Government clause gives the federal Parliament powers to deal with interprovincial activities (see *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477; as well as my reasons in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 (dissenting but not on this point); see also *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161). And the combined effect of s. 91(29) and s. 92(10) does the same for interprovincial works and undertakings.

These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province. But that is not all. The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges -- who also have superintending control over other provincial courts and tribunals -- are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction

in an action and the circumstances under which the courts of another province should recognize such judgments. Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada. In fact, since *Black v. Law Society of Alberta, supra*, we have seen a proliferation of interprovincial law firms.

These various constitutional and sub-constitutional arrangements and practices make unnecessary a "full faith and credit" clause such as exists in other federations, such as the United States and Australia. The existence of these clauses, however, does indicate that a regime of mutual recognition of judgments across the country is inherent in a federation. Indeed, the European Economic Community has determined that such a feature flows naturally from a common market, even without political integration. To that end its members have entered into the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

The integrating character of our constitutional arrangements as they apply to interprovincial mobility is such that some writers have suggested that a "full faith and credit" clause must be read into the Constitution and that the federal Parliament is, under the "Peace, Order and Good Government" clause, empowered to legislate respecting the recognition and enforcement of judgments throughout Canada; see, for example, Black, op. cit., and Hogg, op. cit. The present case was not, however, argued on that basis, and I need not go that far. For present purposes, it is sufficient to say that, in my view, the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation. In short, 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.

This Court has, in other areas of the law having extraterritorial implications, recognized the need for adapting the law to the exigencies of a federation. Thus in *Aetna Financial Services Ltd. v. Feigelman*, *supra*, the Court set aside a court order, a *Mareva* injunction, issued against a federally incorporated company with its head office in Montréal and offices in Toronto, enjoining it from transferring certain assets in Manitoba to one of its offices outside the province. There this Court clearly expressed the different considerations that distinguished that case from the English situations where it was sought to prevent the transfer of assets to other countries. Estey J. had this to say, at pp. 34-35:

> All the foregoing considerations, while important to an understanding of the operation of this type of injunction, leave untouched the underlying and basic question: do the principles, as developed in the United Kingdom courts, survive intact a transplantation from that unitary state to the federal state of Canada? The question in its simplest form arises in the principles enunciated in the earliest *Mareva* cases where the wrong to be prevented was the removal from "the jurisdiction" of assets of the respondent with a view to defeating the claim of a creditor. It has been found by the courts below that there was no such wrongdoing here. An initial question, therefore, must be answered, namely, what is meant by "jurisdiction" in a federal context? It at least means the jurisdiction of the Manitoba court. But is the bare removal of assets from the Province of Manitoba sufficient? The appellant is a federally incorporated company with authority to carry on business throughout Canada. In the course of so doing, it moves assets in and out of the provinces of Manitoba, Quebec and Ontario. No breach of law is asserted by the respondent. No improper purpose has been exposed. It is simply a clash of rights: the respondents' right to protect their position under any judgment which might hereafter be obtained, and the appellant's right to exercise its undoubted corporate capacity, federally confirmed (and the constitutionality of which is not challenged), to carry on business throughout Canada. The appellant does not seek to remove the assets in question from the national jurisdiction in which its corporate existence is maintained. The writ of the Manitoba court runs through judgment, founded on service of initiating process on the appellant within Manitoba, into Ontario under reciprocal provincial legislation, and into Quebec by reason of the laws of that province, *supra*. None of these vital considerations was present in the United Kingdom where *Mareva* was conceived to fend off the depredations of shady mariners operating out of far-away havens, usually on the fringe of legally organized commerce. In the Canadian federal system, the appellant is not a foreigner, nor even a non-resident in the ordinary sense of the word. It is capable of `residing' throughout Canada and did so in Manitoba. It is subject to execution under any Manitoba judgment in every part of Canada. There was no

> clandestine transfer of assets designed to defraud the legal process of the courts of Manitoba. There is no evidence that this federal entity has arranged its affairs so as to defraud Manitoba creditors. The terminology and trappings of *Mareva* must be examined in the federal setting. In some ways, `jurisdiction' extends to the national boundaries, or, in any case, beyond the provincial boundary of Manitoba. For other purposes, jurisdiction no doubt can be confined to the reach of the writ of the Manitoba courts. [Emphasis added.]

A similar approach should, in my view, be adopted in relation to the recognition and enforcement of judgments within Canada. As I see it, 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. I referred earlier to the principles of order and fairness that should obtain in this area of the law. Both order and justice militate in favour of the security of transactions. It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?

These concerns, however, must be weighed against fairness to the defendant. I noted earlier that the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives, and I added that recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the

subject-matter of the suit; see Joost Blom, "Conflict of Laws -- Enforcement of Extraprovincial Default Judgment -- Reciprocity of Jurisdiction: *Morguard Investments Ltd.* v. *De Savoye*" (1989), 68 *Can. Bar Rev.* 359, at p. 360. Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.

As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments -- in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.

The difficulty, of course, arises where, as here, the defendant was outside the jurisdiction of that court and he was served *ex juris*. To what extent may a court of a province properly exercise jurisdiction over a defendant in another province? The rules for service *ex juris* in all the provinces are broad, in some provinces, Nova Scotia and Prince Edward Island, very broad indeed. It is clear, however, that if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province.

It will be obvious from the manner in which I approach the problem that I do not see the "reciprocity approach" as providing an answer to the difficulty regarding *in personam* judgments given in other provinces, whatever utility it may have on the international plane.

Even there, I am more comfortable with the approach taken by the House of Lords in *Indyka v. Indyka*, *supra*, where the question posed in a matrimonial case was whether there was a real and substantial connection between the petitioner and the country or territory exercising jurisdiction. I should observe, however, that in a case involving matrimonial status, the subject-matter of the action and the petitioner are obviously at the same place. That is not necessarily so of a personal action where a nexus may have to be sought between the subject-matter of the action and the territory where the action is brought.

A case in this Court, *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, though a tort action, is instructive as to the manner in which a court may properly exercise jurisdiction in actions in contracts as well. In that case, an electrician was fatally injured in Saskatchewan while removing a spent light bulb manufactured in Ontario by a company that neither carried on business nor held any property in Saskatchewan. The company sold all its products to distributors and none to consumers. It had no salesmen or agents in Saskatchewan. The electrician's wife and children brought action against the company under *The Fatal Accidents Act* of Saskatchewan claiming the company had been negligent in the manufacture of the light bulb and in failing to provide an adequate safety system to prevent unsafe bulbs from leaving the plant and being sold or used. On a chambers motion, the trial judge held that any negligence would have occurred in Ontario and so the tort was committed out of Saskatchewan. He, however, granted special leave under a provision of *The Queen's Bench Act* to commence an action in Saskatchewan, and made an order allowing service of the statement of claim and a writ of summons in Ontario. The company successfully appealed to the Saskatchewan Court of Appeal, but the Court of Appeal's judgment was reversed by this Court.

Dickson J. gave the reasons of the Court. The location of a tort, he noted, was a matter of some difficulty. Normally, he observed, an action for a tort would be brought where the defendant happened to be, on the theory that the court had physical power over the defendant. But, he added, that suit could also be brought where the tort had been committed. Where the situs of the tort was, however, was not an easy question. One theory was that it was situated where the wrongful action took place (there Ontario). Another would have it that it is the place where the damage occurred. But as Dickson J. noted, at p. 398:

> Logically, it would seem that if a tort is to be divided and one part occurs in state A and another in state B, the tort could reasonably for jurisdictional purposes be said to have occurred in both states or, on a more restrictive approach, in neither state. It is difficult to understand how it can properly be said to have occurred only in state A.

At the end of the day, he rejected any rigid or mechanical theory for determining the situs of the tort. Rather, he adopted "a more flexible, qualitative and quantitative test", posing the question, as had some English cases there cited, in terms of whether it was "inherently reasonable" for the action to be brought in a particular jurisdiction, or whether, to adopt another expression, there was a "real and substantial connection" between the jurisdiction and the wrongdoing. Dickson J. thus summarized his view, at pp. 408-9:

> Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers'* case and again in the *Cordova* case a real and substantial connection test was hinted at. Cheshire, 8th ed., 1970, p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise

> judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce. [Emphasis added.]

Before going on, I should observe that if this Court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment. This is obvious from the fact that in *Moran* Dickson J. derived the reasonableness of his approach from the "normal distributive channels" of products and, in particular, the "interprovincial flow of commerce". If, as I stated, it is reasonable to support the exercise of jurisdiction in one province, it would seem equally reasonable that the judgment be recognized in other provinces. This is supported by the statement of Dickson J. in *Zingre*, cited *supra*, that comity is based on the common interest of both the jurisdiction giving judgment and the recognizing jurisdiction. Indeed, it is in the interest of the whole country, an interest recognized in the Constitution itself.

The above rationale is not, as I see it, limited to torts. It is interesting to observe the close parallel in the reasoning in *Moran* with that adopted by this Court in dealing with jurisdiction for the purposes of the criminal law; see *Libman*, *supra*. In particular, barring express or implied agreement, the reasoning in *Moran* is obviously relevant to contracts; indeed, the same activity can often give rise to an action for breach of contract and one in negligence; see *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. As Professor Sharpe observes in *Interprovincial Product Liability Litigation*, op. cit., at pp. 19-20:

> It is inconsistent to permit jurisdiction in tort claims on the basis that the defendant should reasonably have foreseen that his goods would reach the plaintiff and cause damage within the jurisdiction and, on the other hand, to refuse service out of the jurisdiction in contractual actions where the defendant clearly knows that his goods are going to the foreign jurisdiction.

Turning to the present case, it is difficult to imagine a more reasonable place for the action for the deficiencies to take place than Alberta. As noted earlier, the properties were situate in Alberta, and the contracts were entered into there by parties then both resident in the province. Moreover, deficiency actions follow upon foreclosure proceedings, which should obviously take place in Alberta, and the action for the deficiencies cries out for consolidation with the foreclosure proceedings in some manner similar to a Rice Order. A more "real and substantial" connection between the damages suffered and the jurisdiction can scarcely be imagined. In my view, the Alberta court had jurisdiction, and its judgment should be recognized and be enforceable in British Columbia.

I am aware, of course, that the possibility of being sued outside the province of his residence may pose a problem for a defendant. But that can occur in relation to actions *in rem* now. In any event, this consideration must be weighed against the fact that the plaintiff under the English rules may often find himself subjected to the inconvenience of having to pursue his debtor to another province, however just, efficient or convenient it may be to pursue an action where the contract took place or the damage occurred. It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply

anachronistic to uphold a "power theory" or a single situs for torts or contracts for the proper exercise of jurisdiction.

The private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power "in the province". As Guérin J. observed in *Dupont v. Taronga Holdings Ltd.* (1986), 49 D.L.R. (4th) 335 (Que. Sup. Ct.), at p. 339, [TRANSLATION] "In the case of service outside of the issuing province, service *ex juris* must measure up to constitutional rules." The restriction to the province would certainly require at least minimal contact with the province, and there is authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister-provinces. That was the view taken by Guérin J. in *Taronga* where, at p. 340, he cites Professor Hogg, op. cit., at p. 278, as follows:

> In *Moran v. Pyle*, Dickson J. emphasized that the "sole issue" was whether Saskatchewan's rules regarding jurisdiction based on service *ex juris* had been complied with. He did not consider whether there were constitutional limits on the jurisdiction which could be conferred by the Saskatchewan Legislature on the Saskatchewan courts. But the rule which he announced could serve satisfactorily as a statement of the constitutional limits of provincial-court jurisdiction over defendants outside the province, requiring as it does a substantial connection between the defendant and the forum province of a kind which makes it reasonable to infer that the defendant has voluntarily submitted himself to the risk of litigation in the courts of the forum province.

I must confess to finding this approach attractive, but as I noted earlier, the case was not argued in constitutional terms and it is unnecessary to pronounce definitively on the issue. In another passage cited by Guérin J. (at p. 341), Professor Hogg (at pp. 278-79) observes that this is similar to the position taken in the United States through the instrumentality of the Due Process clause of the Constitution of the United States; see *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Whether the Canadian counterpart to the due process

clause, s. 7 of the *Charter*, though not made expressly applicable to property, might, at least in certain circumstances, play a role is also unnecessary to determine.

There are as well other discretionary techniques that have been used by courts for refusing to grant jurisdiction to plaintiffs whose contact with the jurisdiction is tenuous or where entertaining the proceedings would create injustice, notably the doctrine of forum *non conveniens* and the power of a court to prevent an abuse of its process; for a recent discussion, see Elizabeth Edinger, "Discretion in the Assumption and Exercise of Jurisdiction in British Columbia" (1982), 16 *U.B.C. L. Rev.* 1.

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. Here, too, there may be room for the operation of s. 7 of the *Charter*. None of these questions, however, are relevant to the facts of the present case and I have not given them consideration.

Relevance of Reciprocal Enforcement Legislation

I turn finally to an argument faintly pressed by the appellant, namely that the Legislature of British Columbia, like that of other provinces, appears to have recognized the judicial rules as adopted in *Symon, supra,* in the *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, and no addition can, therefore, properly be made to the grounds there stated. In particular, counsel drew attention to s. 31(6) and especially para. (b) thereof. Section 31(6) reads as follows:

31. . . .

> (6) No order for registration shall be made if the court to which application for registration is made is satisfied that
>
> (a) the original court acted either
>
> (i) without jurisdiction under the conflict of laws rules of the court to which application is made; or
>
> . . .
>
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court;

There is a short answer to this argument. The *Reciprocal Enforcement of Judgments Acts* in the various provinces were never intended to alter the rules of private international law. They simply provided for the registration of judgments as a more convenient procedure than was formerly available, i.e. by bringing an action to enforce a judgment given in another province; see *First City Capital Ltd. v. Winchester Computer Corp.*, [1987] 6 W.W.R. 212 (Sask. C.A.). This is in fact made clear by s. 40 of the British Columbia Act which provides that nothing in the Act deprives a judgment creditor from bringing an action for enforcement of a judgment. There is nothing, then, to prevent a plaintiff from bringing such an action and thereby taking advantage of the rules of private international law as they may evolve over time.

Disposition

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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