

Northwestern Journal of International Law & Business

Volume 15

Issue 3 *Spring*

Spring 1995

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Recommended Citation

Ivan F. Ivankovich, Enforcing U.S. Judgments in Canada: "Things are Looking Up!", 15 Nw. J. Int'l L. & Bus. 491 (1994-1995)

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Enforcing U.S. Judgments in Canada: “Things Are Looking Up!”

*Ivan F. Ivankovich**

I. INTRODUCTION

Four years have now elapsed since the landmark decision in *Morguard Investments Ltd. v. De Savoye*,¹ a case most recently described as “the most important decision on the conflict of laws ever rendered by the Supreme Court of Canada.”² The domestic impact of *Morguard* has been truly profound. It has been used by some courts to broaden the common law grounds for the recognition and enforcement of Canadian extraprovincial judgments³ and by others to mandate such recognition via the existence of an implicit “full faith and credit” doctrine in the Canadian Constitution. The result is that many more intra-Canadian judgments are being recognized and enforced in Canada. Taken alone, this would be of limited interest to most American judgment creditors. What is of major interest is the extent to which *Morguard* has been used to date to broaden the basis for the recognition and enforcement of United States judgments and the prognosis for continued evolution in that direction.⁴ Because Canada

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¹ 76 D.L.R.4th 256 (Can. 1990).

² J. Ziegel, *Introduction, Symposium: Recognition of Extraprovincial and Foreign Judgments: The Implications of Morguard Investments Ltd. v. De Savoye*, 22 CAN. BUS. L.J. 1, 2 (1993).

³ The term “Canadian extraprovincial judgment” is used to denote a judgment rendered by a court of another Canadian province or territory.

⁴ “Recognition” of a foreign judgment occurs when a court in a Canadian province or territory deems a particular matter conclusively decided by the foreign court. “Enforcement” occurs when the local court grants the relief provided by the foreign judgment. Recognition must precede enforcement because a foreign judgment is not directly enforceable in a Canadian province or territory without first being reduced to a judgment of a local court. The same distinction

and the United States are the world's largest trading partners,⁵ the importance of this issue cannot be understated.

While *Morguard's* impact on the rules concerning the recognition and enforcement of judgments emanating from the courts of sister-provinces and territories within Canada is undeniable, differences of opinion about the desirability of applying its broader recognition principles to truly "foreign" judgments have emerged.⁶ Also, owing to specific statutory provisions in Saskatchewan and New Brunswick, *Morguard's* expansion of the common law grounds for recognition has been held inapplicable in its entirety to all extraprovincial judgments in those two provinces.⁷ In addition, owing to Quebec's civil law regime, *Morguard's* common law developments would not generally be applicable to the enforcement of international judgments in that province.⁸ The net effect, from the standpoint of American judgment creditors, is a balkanization in which uncertainty abounds.

Part I of this commentary will briefly review the *Morguard* decision and the underlying rationale for the Supreme Court of Canada's dramatic departure from precedent. Part II will analyze *Morguard's* judicial aftermath in an effort to ascertain the current likelihood of enforcing a United States judgment in the common law provinces and territories of Canada. Part III will discuss how lower courts to date

prevails in the United States. See Behrooz Moghaddam, *Recognition of Foreign Country Judgments - A Case for Federalization*, 22 TEXAS INT'L L.J. 331, 332 (1987).

⁵ For the year 1992, U.S. exports to Canada were \$90,594.3 million and imports from Canada were \$98,630.0 million. THE WORLD ALMANAC AND BOOK OF FACTS, 182 (Robert Famighetti et al. eds., 1994). For the year 1991, Canadian exports to the U.S. were C\$ 103.45 billion and imports from the U.S. were C\$86.62 billion. CANADIAN ALMANAC AND DIRECTORY, 60-95 (Liba Berry et al. eds., 1993).

⁶ Unless the context indicates otherwise, the term "foreign judgment" will be used hereinafter to designate a judgment rendered by a court of a country or unit of a federal country other than Canada.

⁷ See discussion, *infra*, accompanying notes 69-71. The constitutionality of these statutory formulations insofar as intra-Canadian judgments are concerned is doubtful. While *Morguard* was not argued in constitutional terms, the issue was raised directly in *Hunt v. T & N plc*, 1 W.W.R. 129, 153-55 (Can. 1994). La Forest J., in delivering the judgment of the Court, held that the minimum standards of order and fairness addressed in *Morguard* were "constitutional imperatives." This determination, however, would not likely effect the recognition and enforcement of non-Canadian judgments in the two provinces.

⁸ Although the Supreme Court of Canada recently determined that the *Morguard* principle constitutes a rule of Canadian constitutional law, such status would be limited to an intra-Canadian context: See *Hunt*, *supra* note 7, at 153-55. For a complete discussion of Quebec's rules for the recognition and enforcement of international judgments, see James A. Woods, *Recognition and Enforcement of Judgments Between Provinces: The Constitutional Dimensions of Morguard Investments Ltd.*, 22 CAN. BUS. L.J. 104, 107-115 (1993). The author notes that Art. 3164 of the new Civil Code of Quebec adopts a two-pronged test (reciprocity and substantial connection) which results in a narrower recognition rule than that suggested in *Morguard*.

have interpreted *Morguard's* "real and substantial connection" test for recognition and enforcement in its application to United States judgments. Part IV will discuss why the fairness and public policy concerns suggesting that *Morguard's* enforcement test should not be extended to judgments from other countries are generally inapplicable in the Canada-U.S. context. The commentary concludes with the suggestion that the *Morguard* test is the appropriate standard for Canadian common law courts to assess issues relating both to the assertion of jurisdiction and to the recognition and enforcement of United States judgments.

II. THE LANDMARK DECISION IN *MORGUARD*

A. Memories - The Pre-*Morguard* Regime

Pre-*Morguard*, Canadian courts utilized a rigid approach developed in nineteenth century England to determine whether a "foreign" judgment should be given local effect.⁹ It is important to note that, in Canada, for purposes of the rules of private international law, all jurisdictions external to the provincial forum were considered to be "foreign," with the same rules applied to the recognition and enforcement of foreign country judgments and judgments rendered by the courts of sister-provinces. These traditional rules provided that unless the judgment debtor was resident in the rendering court's territory, served with originating process within that territory or attorned to the rendering court's jurisdiction by appearing or agreeing to appear, the judgment would not be enforceable in any of the common law provinces and territories.¹⁰ Absent these circumstances, Canadian defend-

⁹ The *locus classicus* of the traditional threshold jurisdictional test was the dictum of Buckley L.J. in *Emanuel v. Symon*, 1 K.B. 302, 309 (C.A. 1908):

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.

¹⁰ Under the traditional rules, out-of-province judgments will not be enforced unless the rendering court had jurisdiction either over the defendant or over the subject matter of the dispute. However, questions about the enforceability of a judgment usually center on the former inquiry in circumstances where the defendant did not take part in the proceedings before the rendering court. For a complete discussion on the historical and practical reasons for the reluctance of Canadian courts to recognize extra-provincial judgments, see H. Patrick Glenn, *Foreign Judgments, the Common Law and the Constitution: De Savoye v. Morguard Investments Ltd.* 37 McGill L.J. 537, 538-40 (1992).

ants served *ex juris*¹¹ with extraprovincial process were customarily advised to demur. This, in turn, required many extraprovincial judgment creditors to relitigate their original causes of action in the defendant's provincial forum with attendant delays, inconvenience and expense.

B. The Times, They Are A' Changing - *Morguard Investments Ltd. v. De Savoye*

The facts in *Morguard* are uncomplicated. Mr. De Savoye, at the time a resident of Alberta, purchased some Alberta land financed by a mortgage to Morguard. Subsequently, De Savoye moved to British Columbia and defaulted on the mortgage. Morguard initiated a foreclosure action in Alberta and served De Savoye *ex juris* in British Columbia. De Savoye did not defend the action and in no way attorned or submitted to the jurisdiction of the Alberta court. Morguard obtained a default judgment for the deficiency between the value of the property sold in the foreclosure proceedings and the amount owing on the mortgage and then brought an action in British Columbia to enforce its Alberta judgment. De Savoye defended on the ground that the Alberta court, under the traditional enforcement rules, lacked jurisdiction over him. Both the court of first instance¹² and the British Columbia Court of Appeal,¹³ albeit for different reasons, eschewed the traditional rules and enforced the Alberta judgment.¹⁴ De Savoye's appeal to the Supreme Court of Canada was unanimously dismissed.

In delivering the decision of the Supreme Court, Mr. Justice La Forest asserted that the traditional enforcement rules were inappropriate to present-day commercial requirements in general and to the

¹¹ Canadian jurisdictional rules require personal service on the defendant within the province or service *ex juris* as permitted by the rendering province's rules of court.

¹² 1 W.W.R. 87 (B.C.S.C. 1988).

¹³ 5 W.W.R. 650 (B.C.C.A. 1988).

¹⁴ At first instance, Boyd J. held that the Alberta court had properly taken jurisdiction under its own rules. Conventionally, this has not been considered a relevant criterion. See Joost Blom, Case Note, *Morguard Investments Ltd. v. De Savoye*, 70 CAN. BAR REV. 733, 734 (1991). The Court of Appeal, on the other hand, upheld enforcement on the basis of a "reciprocity" test, viz., reciprocity of jurisdictional practice was established because the Alberta court took jurisdiction in circumstances where, if the facts had occurred in British Columbia, the British Columbia court would similarly have taken jurisdiction. The problems inherent in this equivalence of jurisdiction test have been documented: See Joost Blom, Comment, *Conflict of Laws—Enforcement of Extraprovincial Default Judgment—Reciprocity of Jurisdiction: Morguard Investments Ltd. v. De Savoye*, 68 CAN. BAR REV. 359 (1989). For a Canadian perspective on the principle of jurisdictional reciprocity, see Gilbert D. Kennedy, *Reciprocity in the Recognition of Foreign Judgments*, 32 CAN. BAR REV. 359 (1954).

enforcement of judgments from sister-provinces in particular. In the broader context, he negated the "power theory" of comity inherent in the traditional rules¹⁵ and adopted "the more complete formulation" of comity as set out by the Supreme Court of the United States in *Hilton v. Guyot*:

'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.¹⁶

Noting that modern rules of private international law must be based on the need "to facilitate the flow of wealth, skills and people across state lines," La Forest J. held 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."¹⁷

Specifically, concerning the recognition and enforcement of inter-provincial judgments from sister-provinces, La Forest J. expressed his view that Canadian courts had made a "serious error" in transposing the rules developed for the enforcement of foreign judgments to judgments from sister-provinces.¹⁸ Again, drawing on American experience, he noted that a "full faith and credit" regime of mutual recognition of judgments across the country would also be inherent in a federation such as Canada.¹⁹ What recognition rule, then, followed from these propositions? Canadian courts, he said, should recognize "judgments given by a court in another province or territory, so long as that court has properly or appropriately exercised jurisdiction in

¹⁵ The traditional common law rules regarding recognition and enforcement are anchored in the principle of territoriality, viz., a sovereign state has exclusive jurisdiction in its own territory and its law has no binding effect outside that territory. Comity has been described as the deference and respect due by other sovereign states to the actions of a sovereign state legitimately taken within its territory. Thus, if a state had "power" over the litigants via the traditional rules, the judgments of its courts should be respected. See *Morguard*, 76 D.L.R.4th at 268.

¹⁶ *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

¹⁷ *Morguard*, 76 D.L.R.4th at 269.

¹⁸ *Id.* at 270.

¹⁹ *Id.* It should be noted that La Forest J. stopped short of suggesting, as have some commentators, that a "full faith and credit" clause should be read into the Canadian Constitution thereby giving authority to the federal Parliament under its "peace, order and good government" power to legislate respecting the recognition and enforcement of judgments throughout Canada. What he did expressly suggest was 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." In *Hunt*, 1 W.W.R. 129, the *Morguard* standard was subsequently accorded constitutional status by the Supreme Court of Canada.

the action.”²⁰ In La Forest J.’s view, this criterion was clearly met when the rendering court exercised its jurisdiction on one of the traditional bases. But for cases not covered by the traditional rules, La Forest J. fashioned a new recognition rule based upon whether the rendering province had a “real and substantial connection” with the litigation.²¹ In the instant case, where the mortgaged properties were situated in Alberta, the mortgages entered into by parties then resident in Alberta and the natural venue for consolidated foreclosure and deficiency proceedings being Alberta, the requisite connection was obvious.²²

III. THE RECOGNITION AND ENFORCEMENT OF UNITED STATES JUDGMENTS: *POST-MORGUARD*

The decision in *Morguard* raises many important questions. Was its standard intended or should it be extended to permit recognition and enforcement of international judgments in general and United States judgments in particular, and, if so, what limitations should apply? Mr. Justice La Forest noted the correlative relationship between the taking of jurisdiction by a court in one province and its recognition in another on the basis of the real and substantial connection test. Yet, because the connections between the *Morguard* litigation and the rendering forum were incontrovertibly strong, there is a paucity of guidance in the judgment concerning the threshold requirements for and the limits of that test. In addition, while *Morguard* represents a major development in the evolution of common law recognition and enforcement principles, what is its relevance to two provinces [New Brunswick and Saskatchewan] where legislation specifically negatives enforcement of extraprovincial judgments except in accordance with statutory requirements? In the short time since *Morguard*, answers to these questions are emerging.

Canada is similar to the United States in that the recognition and enforcement of foreign judgments is not governed by federal law but

²⁰ *Morguard*, 76 D.L.R.4th at 273.

²¹ *Morguard*, 76 D.L.R.4th at 275. In fashioning this test, La Forest J. acknowledged borrowing from the language of the English House of Lords in *Indyka v. Indyka*, [1969] 1 App. Cas. 33, [in relation to the recognition of foreign divorce decrees] and the decision of Dickson J. in delivering the judgment of the Supreme Court of Canada in *Moran v. Pyle National (Canada) Ltd.*, 43 D.L.R.3d 239 (Can. 1973), [in relation to the situs of a tort for jurisdictional purposes].

²² *Morguard*, 76 D.L.R.4th at 277. To use Mr. Justice La Forest’s words: “A more ‘real and substantial’ connection between the damages suffered and the jurisdiction can scarcely be imagined.”

by provincial law.²³ In the common law provinces, short of relitigating the original cause of action, there are two methods of enforcing foreign judgments: (1) by registering the judgment, where permitted, under the respective provincial reciprocal enforcement of judgments legislation, and (2) by bringing an action on the judgment.²⁴

A. Registration under Reciprocal Enforcement Legislation

Each of the common law provinces and territories has enacted reciprocal enforcement of judgments legislation to provide a registration procedure for the enforcement of extraprovincial judgments.²⁵ The legislation provides an inexpensive and simple method for registering and enforcing the foreign judgments to which it applies instead of the more lengthy and expensive method of enforcing such judgments by action.²⁶ Before a judgment creditor may take advantage of its provisions, however, the Lieutenant-Governor of the enforcing

²³ A number of Canadian commentators have suggested that the federal Parliament has concurrent legislative authority over the recognition and enforcement of judgments. See Vaughn Black, *Enforcement of Judgments and Judicial Jurisdiction in Canada*, 9 OXFORD J. LEGAL STUDIES 547, 554-555 (1989); PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 563 (3d ed. 1992). Most recently, in *Hunt*, 1 W.W.R. at 155, La Forest J., delivering the judgment of the S.C.C., expressed the view that these suggestions were indeed, "well founded." In the United States, Congress possesses the power to regulate recognition of foreign judgments pursuant to Article IV, § 1 of the U.S. Constitution, but to date it has not exercised this power. Arguments have been made that for public policy reasons, federal law as opposed to state law should be used to determine the recognition and enforceability of foreign country judgments. See Willis L.M. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 788 (1950). For a full discussion see William C. Sturm, *Enforcement of Foreign Judgments*, 95 COM. L.J. 200, 201-202 (1990).

²⁴ The judgment creditor may sue on the original cause of action because Canadian courts treat a foreign judgment exclusively as a simple contract debt with the result that there is no merger with the original cause of action unless the foreign judgment has been satisfied. See J.G. CASTEL, *CANADIAN CONFLICT OF LAWS 3RD* (1994) and the authorities cited at 258.

²⁵ This legislation is largely based upon the Model Reciprocal Enforcement of Judgments Act prepared by the Commissioners on Uniformity of Legislation in Canada. For a discussion of its historical development, see Kurt Nadelmann, *Enforcement of Foreign Judgments in Canada*, 38 CAN. B. REV. 68 (1960). As to the legislation, see Court Order Enforcement Act, R.S.B.C., ch. 75 (1979) (B.C. Can.); Reciprocal Enforcement of Judgments Act, R.S.A., ch. R-6 (1980) (Alta. Can.); Reciprocal Enforcement of Judgments Act, R.S.S., ch. R-3 (1978) (Sask. Can.); Reciprocal Enforcement of Judgments Act, R.S.M., ch. J-20 (1987) (Man. Can.); Reciprocal Enforcement of Judgments Act, R.S.O., ch. R-5 (1990) (Ont. Can.); R.S.N.B., ch. R-3 (1973) (N.B., Can.); Reciprocal Enforcement of Judgements Act, R.S.P.E.I., ch. R-6 (1988) (P.E.I., Can.); S.N.S., ch. 388 (1989) (N.S., Can.); Reciprocal Enforcement of Judgments Act, R.S.Nfld., ch. R-4 (1990) (Nfld., Can.); Reciprocal Enforcement of Judgments Act, R.S.N.W.T., ch. R-1 (1988) (N.W.T., Can.); Reciprocal Enforcement of Judgments Act, R.S.Y., ch. 146 (1986) (Yukon, Can.).

²⁶ *Canadian Credit Men's Trust Ass'n Ltd. v. Ryan*, 1 D.L.R. 280, 281-82 (Alta. S.C. 1930). When registration is granted by a court in the enforcing province, the foreign judgment has the same effect as if it had been granted by the enforcing court.

province must have declared the rendering state to be a reciprocating state for purposes of the legislation.²⁷ In Saskatchewan, Ontario, New Brunswick and the Northwest Territories, such a declaration is limited to the sister-provinces and territories of Canada.²⁸ In the other provinces, the declaration of individual American states as reciprocating jurisdictions has been made sparingly. The states of Washington, Alaska, California, Oregon, Colorado and Idaho have been declared reciprocating states for purposes of British Columbia's Court Order Enforcement Act.²⁹ The states of Washington and Idaho are reciprocating jurisdictions under the Reciprocal Enforcement of Judgments Act in both Alberta³⁰ and Manitoba,³¹ and the state of Washington is additionally recognized as a reciprocating state in the province of Prince Edward Island.³²

Even in the few situations where it is applicable, the reciprocal enforcement legislation is of limited use to many United States judgment creditors because it basically preserves all the common law defenses which would apply if the judgment creditor had brought an action on the foreign judgment.³³ Thus, a judgment will not be registered if, *inter alia*, the defendant "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."³⁴ This, of course, is a statutory codification of the rigid, traditional jurisdictional rules that were rejected in *Morguard*. Does *Morguard's* broader recognition rule extend the basis for registration under the reciprocal enforcement legislation or is its application restricted to actions on the judgment? The Ontario Court of Appeal recently suggested that the statutory codifi-

²⁷ See *supra* note 25, § . 39 (B.C.); § . 8 (Alta.); § . 9 (Sask.); § . 12 (Man.); § . 7 (Ont.); § . 8 (N.B.); § . 11 (P.E.I.); § . 10 (N.S.); § . 12 (Nfld.); § . 8 (N.W.T.); § . 9 (Yukon).

²⁸ See *supra* note 25.

²⁹ See *supra* note 25: Washington (effective July 6, 1989); Alaska, California, Oregon (effective September 25, 1989); Colorado, Idaho (effective July 1, 1990). See Consolidated Regulations of British Columbia.

³⁰ Reciprocating Jurisdiction Regulation, Alta. Reg. 344/85 as am.: Washington [Alta. Reg. 179/90, s. 2(b)], Idaho [Alta. Reg. 279/90, s. 2].

³¹ Reciprocal Enforcement of Judgments Regulation as am., Man. Reg. 199/91, s. 3.

³² Reciprocal Enforcement of Judgments Act Order, EC845/90.

³³ The common law defenses include lack of jurisdiction, proper service and lack of appearance, fraud, finality, public policy and a good defense if an action were brought on the judgment. The latter means a good defense to the action on the judgment (i.e., a defense going to the jurisdiction of the rendering court) and not a good defense to the original cause of action. See *T.D.I. Hospitality Mgmt. Consultants Inc. v. Brown*, 3 W.W.R. 642 (Man. Q.B. 1993). For a full discussion of the common law defenses, see CASTEL, *supra* note 24, at 289-291.

³⁴ See *supra* note 25, § .31(6)(b) [B.C.]; § . 2 (6)(b) [Alta.]; § . 3(6)(b) [Man.]; § . 2(6)(b) [P.E.I.]; § . 3(5)(b) [N.S.]; § . 3(6)(b) [Nfld.]; § . 2(6)(b) [Yukon].

cation was a bar to the registration of a Saskatchewan default judgment in Ontario.³⁵ The basis of the court's reasoning was that common law developments will not displace express statutory language to the contrary. Even more recently, however, the Supreme Court of Canada conferred constitutional status on the *Morguard* test thereby requiring the courts in each province to give "full faith and credit" to the judgments of the courts of sister-provinces.³⁶ In delivering the judgment of the Court, La Forest J. explained:

This does not mean, however, that a province is debarred from enacting any legislation that may have some effect on litigation in other provinces or indeed from enacting legislation respecting modalities for recognition of judgments of other provinces. But it does mean that it must respect the minimum standards of order and fairness addressed in *Morguard*³⁷.

The result is that the substantive aspects of each province's reciprocal enforcement legislation will likely have to be modified in order to accommodate the registration of intra-Canadian judgments on the basis of *Morguard's* real and substantial connection test and its minimum standards of order and fairness.³⁸ What effect such amendments would have on United States reciprocating state judgments is indeterminate because the application of *Morguard's* constitutional imperative is obviously limited to an interprovincial context. Given these realities, and given that *Morguard's* new recognition rule is much broader than the present statutory substantive rules for registration, a United States judgment creditor who is otherwise eligible should apply for registration of the judgment only where the United States rendering court would have jurisdiction according to the traditional rules. In all other cases, the prospects for recognition and enforcement are, at present, better served by bringing an action on the judgment.

³⁵ *Acme Video Inc. v. Hedges*, 12 O.R.3d 160 (Ont. C.A. 1993), *rev'g* 10 O.R.3d 503 (Ont. Ct., Gen. Div. 1992).

³⁶ *Hunt*, 1 W.W.R. at 153-54. La Forest J., in delivering the judgment of the Court, held that the minimum standards of order and fairness addressed in *Morguard* were "constitutional imperatives."

³⁷ *Hunt*, 1 W.W.R. at 154.

³⁸ CASTEL, *supra* note 24, at 292, alternatively suggests that it may suffice to interpret the circumstances in which the court in the rendering province is deemed to have had jurisdiction in order to incorporate the *Morguard* standard into the statutory substantive rules. He notes, however, that this approach has generally been rejected by Canadian courts on the basis of legislative supremacy, i.e., express statutory provisions will not be modified by the courts.

B. Action on the Foreign Judgment Invoking *Morguard's*
Recognition Rule

Courts in all of Canada's provinces and the Northwest Territories have now had the opportunity to consider *Morguard's* application.³⁹ While the majority of these cases have dealt with *Morguard's* new recognition rule in an interprovincial context, several cases to date have addressed whether *Morguard's* real and substantial connection test should be extended to permit the recognition and enforcement of foreign judgments in general and United States judgments in particular. In many parts of the *Morguard* decision, La Forest J. emphasized the contrast between interprovincial judgments and truly "foreign" judgments. He did indicate, however, in a strongly-worded *obiter dictum*, a positive disposition towards reviewing Canada's recognition and enforcement rules for international judgments. His essential approach was that the content of comity must be adjusted in light of a changing world order to ensure the "security of transactions with justice."

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.⁴⁰

He went on to indicate that, in the absence of the systemic protections inherent in the Canadian confederation, greater caution may be required in recognizing the long-arm jurisdiction of non-Canadian courts.⁴¹ This has not deterred courts in three provinces from extending the *Morguard* principle to the enforcement of *in personam* United States judgments.

The greatest acceptance towards recognition has occurred in the province of British Columbia where *Morguard* has been applied eight times by lower courts and once by the British Columbia Court of Appeal to recognize default judgments emanating from Alaska,⁴² Ari-

³⁹ The greatest incidence to date occurs in British Columbia, its province of origin.

⁴⁰ *Morguard*, 76 D.L.R.4th at 272-73.

⁴¹ *Morguard*, 76 D.L.R.4th at 274. In his view, the overriding principle of fairness to the defendant "requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction."

⁴² *Moses v. Shore Boat Builders Ltd.*, 5 W.W.R. 282 (B.C.S.C. 1992), *aff'd* 106 D.L.R.4th 654 (B.C.C.A. 1993).

zona,⁴³ California,⁴⁴ Colorado,⁴⁵ Connecticut,⁴⁶ Oklahoma,⁴⁷ and Washington.⁴⁸ In each of these cases, notwithstanding that the defendant was not resident in the state when the action was commenced, did not attorn to the jurisdiction of the state court and did not appear in the action, the default judgment was recognized on the basis that there was a "real and substantial connection" between the original action and the rendering state. The same approach has prevailed on a single occasion in the lower courts of Alberta [to recognize a Hawaiian judgment]⁴⁹ and Prince Edward Island [to recognize a Massachusetts judgment].⁵⁰ The rationale employed by these courts is relatively homogeneous. *Morguard's* suggestion, albeit in *obiter*, that the jurisdictional curtain should be raised not only as between provinces but also for foreign countries has been called "compelling,"⁵¹ "logical and practical,"⁵² "more comprehensive"⁵³ and "suited to the modern circumstances of today."⁵⁴ Commercial necessity has been recognized as a dominant consideration favouring extension. The words of Jenkins J. in *Allen v. Lynch* are typical:

Comity calls for rules of private international law that 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. *The parochial interest of individual states must give way to the principles of order and fairness in a modern world where commerce as a rule rather than an exception crosses jurisdictional lines.* (emphasis added).⁵⁵

Another consideration, albeit underlying, is that in each of the foregoing cases, the requisite *Morguard* nexus sufficient to establish a "real and substantial connection" was not only met, but met by a very clear

⁴³ *Minkler and Kirschbaum v. Sheppard*, 60 B.C.L.R.2d 360 (B.C.S.C. 1991).

⁴⁴ *Clarke v. Lo Bianco*, 84 D.L.R.4th 244 (B.C.S.C. 1991); *McMickle v. Van Straaten*, 93 D.L.R.4th 74 (B.C.S.C. 1992).

⁴⁵ *Clancy v. Beach*, 92 B.C.L.R.2d 82 (B.C.S.C. 1994).

⁴⁶ *Stoddard v. Accurpress Manufacturing Ltd.*, 1 W.W.R. 677 (B.C.S.C. 1994).

⁴⁷ *Federal Deposit Ins. Corp. v. Vanstone*, 88 D.L.R.4th 448 (B.C.S.C. 1992).

⁴⁸ *Kirsch v. Kucera*, [1994] B.C.J. No. 432 (B.C.S.C.).

⁴⁹ *Amercan Savings and Loan Association v. Stechishin* (1976), 14 Alta.L.R.3d 255 (Alta. Q.B.).

⁵⁰ *Allen v. Lynch*, 111 Nfld. & P.E.I.R. 43 (P.E.I.S.C. 1993).

⁵¹ See *Clark v. Lo Bianco*, 84 D.L.R.4th 244, 252 (B.C.S.C. 1991); *Allen*, 111 Nfld. & P.E.I.R. at 48-49.

⁵² *Allen*, 111 Nfld. & P.E.I.R. at 48. See also, *Minkler and Kirschbaum v. Sheppard*, 60 B.C.L.R.2d 360, 363 (B.C.S.C. 1991) (Spencer J. identifies the "requirements of commerce in a shrinking world" as a primary motivation favoring extension of *Morguard*).

⁵³ *Clarke*, 84 D.L.R.4th at 252; *Allen*, 111 Nfld. & P.E.I.R. at 49.

⁵⁴ *Allen*, 111 Nfld. & P.E.I.R. at 48.

⁵⁵ See also *Minkler and Kirschbaum v. Sheppard*, 60 B.C.L.R.2d 360, 363 (B.C.S.C. 1991), where Spencer J. identifies the "requirements of commerce in a shrinking world" as a primary motivation favoring extension of *Morguard*.

margin.⁵⁶ Indeed, in each instance, it could be said that there was no more reasonable place for the plaintiff's original action to be brought than the rendering forum. Also, in each instance, the Canadian court had no concern about the "quality of justice to be meted out" by the rendering forum.⁵⁷

Against this current of otherwise universal judicial acceptance that *Morguard* does extend the common law principles under which a Canadian court would recognize the jurisdiction of a foreign court, is the very recent decision in *Evans Dodd v. Gambin Associates*.⁵⁸ An English firm of solicitors was requested by an Ontario lawyer to provide legal services in connection with an international business transaction in circumstances which rendered the Ontario lawyer directly responsible for payment of the solicitors' account. The business transaction aborted, the solicitors' account went unpaid and the firm obtained a default United Kingdom judgment against the Ontario lawyer. It then applied, under Ontario's reciprocal enforcement legislation,⁵⁹ to register the judgment. The legislation required the registering court to consider the common law principles under which a Canadian court will recognize the jurisdiction of a foreign court.⁶⁰ Sheard J., in dismissing the application for registration, limited *Morguard's* reach to domestic judgments:

Morguard did not alter the law relating to the enforcement in Canada of judgments of courts outside Canada. Although there have been judgments since *Morguard* that apply its test to judgments originating outside Canada, it is too soon to say that the extension of the *Morguard* test is now the law of Canada. The three cases that have been mentioned (*Lo Bianco*, *Minkler* and *Fabrelle*) are initiatives taken by judges responsive to the *obiter dictum* in *Morguard* and illustrate the process of development of the common law. However, and without comparing the circumstances in those cases with the case before me, I do not think it would be fair for me to take such an initiative and thereby to deprive the respondent of the opportunity to present its defences and cross-claims in a court in this jurisdiction.⁶¹

⁵⁶ The relevant variables to be considered in determining the existence of a "real and substantial connection" are fully discussed in Part III, *infra*.

⁵⁷ This lack of concern about the quality of justice in the rendering forum is seen in the opinion of Gow J. in *Federal Deposit Ins. Corp. v. Vanstone*, 88 D.L.R.4th 448, 463 (B.C.S.C. 1992).

⁵⁸ 17 O.R.3d 803 (Ont. Ct., Gen. Div. 1994).

⁵⁹ Reciprocal Enforcement of Judgments Act, R.S.O. ch. R-6 (1990) (Ont. Can.).

⁶⁰ The registration of a judgment shall be refused if the original court is not regarded as having jurisdiction. *Id.*, art. IV(1)(c). This Act also contains a basket-clause which provides that the original court shall be regarded as having jurisdiction if the jurisdiction of the original court is otherwise recognized by the registering court. *Id.*, art. V(1)(f).

⁶¹ 17 O.R.3d at 809-810.

It is unfortunate that Sheard J. was unaware of or chose to ignore the additional Canadian authorities, including appellate authority, suggesting that *Morguard's* recognition rule should be extended to international judgments. It is equally unfortunate that he did not choose to compare the circumstances in the case before him with those prevailing in the three cases he referred to. Had his examination of the authorities been more comprehensive and had he made the relevant factual comparisons, he might have concluded that the English forum was the only reasonable forum for the plaintiff's action to take place. The subject matter of the action concerned a contract for legal services. The contract was made in the United Kingdom, to be performed in the United Kingdom, with £ sterling the currency of the contract and English law its proper law. The commercial project to be financed was a United Kingdom project. The only connection with the province of Ontario was that an Ontario lawyer had requested the services of the English solicitors. Although Sheard J.'s terse rationale for refusing to extend *Morguard* centered on fairness, his judgment displays a complete absence of detail to substantiate why it would have been unfair to the Ontario solicitor to allow the natural forum to exercise jurisdiction. Indeed, if there was any credible jurisdictional argument to be advanced, the United Kingdom rules expressly authorized a procedure by which the jurisdiction of the court could have been challenged without submitting to its jurisdiction.⁶² While it is true that Sheard J. was not strictly bound by precedent to recognize the United Kingdom judgment, his refusal to apply the *obiter dictum* of a unanimous S.C.C. is all the more curious given the absence of any policy rationale for doing so. Ordinarily, lower courts incline to follow not only the strict *ratio decidendi* of S.C.C. judgments, but also any considered decision of that court on a question of law or principle.⁶³ The approach in *Evans Dodd* can be contrasted with the decision of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.*, wherein he suggested that *Morguard's* doctrinal principles are equally applicable in an international enforcement context unless the substantive law of the foreign state or its legal process is radically different from that of

⁶² See Rule 8 of Order 12, The Rules of the Supreme Court 1965, S.I. 1965/1776 (Eng.). If it is determined that the court does have jurisdiction from the standpoint of its domestic rules and procedures, the defendant is then required to decide whether or not to appear and defend.

⁶³ See *Sellars v. The Queen*, 110 D.L.R.3d 629 (Can. 1980), where it is made clear that even *obiter dicta* of the Supreme Court of Canada should be followed. For a summary of how lower courts, including courts of appeal, should treat such *obiter dicta*, see *Scarff v. Wilson*, 3 W.W.R. 259 (B.C.C.A. 1989).

Ontario.⁶⁴ Given this and the otherwise unanimous judicial extension of *Morguard's* new common law recognition rule, it was incumbent upon Sheard J. to provide a cogent rationale for his departure. His failure to do so renders the decision undeserving of support.

In summary, *Morguard* provides a strong rationale in favor of extending the real and substantial connection test to the enforcement of international judgments. The traditional jurisdictional rules set out in *Emanuel*⁶⁵ were not fashioned upon "the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner."⁶⁶ The *Morguard* test, in contrast, was specifically formulated to meet these modern transactional requirements under the redefined principle of comity. It is not without significance that in its first opportunity, post-*Morguard*, the Supreme Court of Canada again stressed the role of comity and the need to adjust its content in light of the changing world order.⁶⁷ The net result is that more U.S. default judgments are likely to be recognized and enforced in Canada's common law provinces and territories. Conversely, United States plaintiffs are likely to find an increasing number of Canadian defendants appearing in United States fora to contest jurisdiction and/or the substantive merits of litigation.

C. *Morguard's* Restricted Status in New Brunswick and Saskatchewan

The ability of a United States judgment creditor to bring an action on the judgment invoking *Morguard's* broad recognition rule is further complicated in the provinces of New Brunswick and Saskatchewan. These two provinces have enacted uniform legislation dealing with the conditions for recognition of all foreign judgments, whether by registration or action on the judgment.⁶⁸ The Foreign Judgments

⁶⁴ 17 O.R.3d 407, 411 (Ont. Ct., Gen. Div. 1993). Because the case dealt with the enforcement of an Illinois judgment rendered after the Ontario defendant attorned to the jurisdiction of the Illinois court and after a full trial, MacPherson J.'s comments regarding the scope of *Morguard's* application are *obiter dicta*.

⁶⁵ See *Emanuel*, 1 K.B. 302.

⁶⁶ *Morguard*, 76 D.L.R.4th at 274.

⁶⁷ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 102 D.L.R.4th 96, 118 (S.C.C. 1993). It is also of significance that in the province of Quebec, where developing common law principles are generally inapplicable, *Morguard's* broader definition of comity has been adopted by the Court of Appeal to recognize a default U.S. judgment in favor of a New Jersey casino: See *Resorts International Hotel Inc. v. Auerbach*, 89 D.L.R.4th 688 (Que. C.A. 1991).

⁶⁸ This legislation is based on the Uniform Law Conference of Canada's Model Foreign Judgments Act adopted in 1933 and revised and amended on a number of occasions. See Castel, *supra* note 24, at 176.

Act⁶⁹ of each province preserves the pre-*Morguard* common law defenses to enforcement, including the defense that the rendering court had no jurisdiction.⁷⁰ Significantly, however, for the present discussion, these Acts further provide that foreign courts have *in personam* jurisdiction “only” if the defendant was ordinarily resident in the rendering state at the time the action was commenced or submitted to the jurisdiction of the rendering court by counterclaiming, voluntarily appearing without protest or agreeing to submit expressly or impliedly.⁷¹ In the immediate aftermath of *Morguard*, there was judicial support for the view that non-compliance with such statutory prerequisites was not a bar to recognition of a foreign judgment under the broader *Morguard* principle.⁷² This was quickly negated,⁷³ however, and there is now appellate authority that *Morguard*’s “real and substantial connection” criteria for recognition has no application in New Brunswick and Saskatchewan on the basis that common law principles governing the enforcement of foreign judgments are displaced by the specific wording of the Act. In *Cardinal Couriers Ltd. v. Noyes*,⁷⁴ for example, an action to enforce a default Ontario judgment in Saskatchewan failed because the defendant was not resident in Ontario, did not carry on business there and did not submit to the jurisdiction of the Ontario court. In light of the recent decision of the Supreme Court of Canada in *Hunt v. T & N plc*,⁷⁵ the result in such cases can no longer be supported as a new interprovincial enforcement remedy based on “full faith and credit” has now come into force owing to *Morguard*’s “constitutional imperative.”⁷⁶ It remains to be seen how, if at all, the legislatures of New Brunswick and Saskatchewan will deal with the impact of *Hunt* on their respective Foreign Judgments Acts. Legislative inactivity could produce the judicial result of “reading

⁶⁹ The Foreign Judgments Act, R.S.N.B., ch. F-19 (1973) (Can.); The Foreign Judgments Act, R.S.S., ch. F-18 (1978) (Can.).

⁷⁰ Foreign Judgements Act (N.B.), § 5(a); The Foreign Judgments Act (Sask.), § . 6(a).

⁷¹ The Foreign Judgments Act (N.B.), § 2; The Foreign Judgment Act (Sask.), § . 3.

⁷² See, e.g., *Beaver Diversified Corp. v. Walker*, [1992] N.B.J. No. 527 (N.B.Q.B.); *Fabrelle Wallcoverings & Textiles Ltd. v. North American Decorative Products Inc.*, 6 C.P.C.3d 170 (Ont. Ct., Gen. Div. 1992); *Acme Video Inc. v. Hedges*, 10 O.R.3d 503 (Ont. Ct., Gen. Div. 1992).

⁷³ 844903 *Ontario Ltd. v. VanderPluijm* (1992), 12 C.P.C.3d 71 (N.B.Q.B.); *Mutuellistes Caisse d'Epargne et de Credit c. Fortin*, [1992] A.N.B. No. 613 (N.B.Q.B.); *Acme Video*, 100.R.3d 503.

⁷⁴ 101 D.L.R.4th 712 (Sask. C.A. 1993). An application to register a default Ontario judgment in New Brunswick was rejected on similar grounds. See *Sims v. Bower*, 108 D.L.R.4th 677 (N.B.C.A. 1993).

⁷⁵ See *Hunt* 1 W.W.R. 129.

⁷⁶ *Id.* at 153.

down”⁷⁷ the legislation to accommodate “full faith and credit” for interprovincial judgments while maintaining the clear legislative intent for non-Canadian foreign judgments. Alternatively, the legislatures could accomplish the same result by amending the definition of “foreign judgment” to delete intra-Canadian judgments from its reach.⁷⁸ In either of these instances, an extension of *Morguard’s* recognition rule to United States judgments would remain legislatively preempted. A more promising alternative, from the standpoint of achieving a broader recognition of United States judgments, would be to amend the legislation by deleting the word “only” from the section enumerating the circumstances where a foreign court has jurisdiction and, further, expressly providing that the Foreign Judgments Act does not prevent the recognition of foreign judgments in circumstances not covered by its provisions.⁷⁹ Only this latter approach would permit judicial extension of *Morguard’s* recognition rule to United States judgments in New Brunswick and Saskatchewan. For the time being, however, the only way a United States judgment can be enforced in these two provinces is under the existing “inelastic code” of the Foreign Judgments Act.⁸⁰

In all the common law provinces and territories, except New Brunswick and Saskatchewan, a United States judgment creditor can bring an action at common law to enforce his judgment. Historically, he could succeed only if the United States rendering court assumed jurisdiction in accordance with the traditional common law rules. Post-*Morguard*, he might succeed if the “real and substantial connection” standard is met.

⁷⁷ The “reading down” doctrine requires that, whenever possible, the general language in a statute which extends beyond the power of the enacting legislature be construed more narrowly so as to keep it within the constitutional scope of power. See Hogg, *supra* note 23, at 393 and the case authorities cited therein.

⁷⁸ The uniform legislation presently defines “foreign country” as “any country other than this province, whether a kingdom, empire, republic, commonwealth, state, dominion, province, territory, colony, possession or protectorate, or a part thereof.” Foreign Judgements Act (N.B.), § 1. See also The Foreign Judgements Act (Sask.), § (c).

⁷⁹ This was first proposed by Castel, *supra* note 24, at 284. A useful American precedent is provided by the Uniform Foreign Money Judgments Recognitions Act, § 5(b), 13 U.L.A. 263 (1962), which permits a court to recognize a foreign judgment on jurisdictional grounds not specifically enumerated.

⁸⁰ 844903 Ontario Ltd., 12 C.P.C.3d 71, 81 (N.B.Q.B. 1992).

IV. WHAT KIND OF REAL AND SUBSTANTIAL CONNECTION

Morguard is unclear on precisely what must be really and substantially connected with the rendering state.⁸¹ La Forest J.'s judgment refers imprecisely to the requisite nexus as between "the subject matter of the action and the territory where the action is brought,"⁸² the "action" and the province,⁸³ the "relevant transaction" and the rendering province,⁸⁴ "the damages suffered and the [rendering] jurisdiction,"⁸⁵ "the defendant and the forum province,"⁸⁶ and the [rendering forum's] connection with the transaction or the parties."⁸⁷ At first glance, it is readily apparent that some of these formulations would render Canada's "real and substantial connection" test for jurisdiction different from the "minimum contacts" test employed by American courts to resolve similar issues. In addition to recognizing traditional bases of jurisdiction, United States courts recognize jurisdiction based on service *ex juris* when a defendant has sufficient "minimum contacts" with the rendering forum.⁸⁸ A trilogy of United States Supreme Court cases in the 1980's reaffirmed that the "substantial connection" between the defendant and the forum necessary for a finding of mini-

⁸¹ This lack of precision has been criticized. See C.A. Walsh, *Canadian Private International Law After De Savoye v. Morguard Investments*, 8 SOL. JO. (N.B.), Issue 2, 1 (1992); Vaughn Black and John Swan, Comment, *New Rules for the Enforcement of Foreign Judgments*, 12 ADVOC. Q. 489, 499-500 (1990-91); Elizabeth R. Edinger, Notes of Cases, *Conflict of Laws—Jurisdiction—British Columbia Residents Bringing Action for Damages in Texas Against Non British Columbia Resident Defendants—Seeking Anti-Suit Injunction in British Columbia: Anchem Products v. Workers' Compensation Board*, 71 CAN. B. REV. 117, 139-140 (1992); Peter Finkle and Claude Labrecque, *Low-Cost Legal Remedies and Market Efficiency: Looking Beyond Morguard*, 22 CAN. B. REV. 58, 66-67 (1992); Woods, *supra* note 8, at 128-129.

⁸² *Morguard*, 76 D.L.R.4th at 275.

⁸³ *Id.* at 278.

⁸⁴ *Id.* at 274-75.

⁸⁵ *Id.* at 277.

⁸⁶ *Id.* at 278.

⁸⁷ *Id.*

⁸⁸ Challenges to state court jurisdiction on the failure to meet the "minimum contacts" standard are among the most frequently litigated in the United States. See V. Black, Note, *Legislation: Uniform Enforcement of Canadian Judgments Act et al.*, 71 Can. B. Rev. 721, 725 (1992). For recent United States Supreme Court decisions on the issue, see: *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Keeton v. Hustler Magazine Corp.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988); *Burnham v. Superior Court*, 495 U.S. 604 (1990).

mun contacts must come about by "an action of the defendant purposefully directed toward the forum State."⁸⁹

In a prescient analysis immediately following *Morguard*, Professor Blom opined that the imprecision of La Forest J.'s formulations suggested two underlying and competing theories of jurisdiction.⁹⁰ The first, an "administration of justice" theory, is based on the premise that the original forum must meet a minimum standard of suitability for adjudication. All relevant factors would be examined by the enforcement court in an effort to ascertain not whether the rendering court was the best possible forum for serving the interests of the parties and the ends of justice, but rather whether it was "a reasonable place for the action to take place."⁹¹ The alternative approach is based on a "personal subjection" theory of jurisdiction. Under this approach, the rendering court's assumption of jurisdiction is appropriate, providing the defendant lived or carried on business in the rendering territory or voluntarily did some act in relation to it whereby he either contemplated or should have contemplated that he might be sued there.

In terms of post-*Morguard* caselaw, lower courts appear, at first glance, to have indiscriminately applied either or both approaches in determining whether a sufficient "real and substantial connection" existed to enable the rendering court to assume jurisdiction.

A. Personal Subjection Approach

The personal subjection approach is clearly the most popular in personal injury litigation due, perhaps, to its aegis as a jurisdictional test in an interprovincial products liability case decided by the Supreme Court of Canada many years before *Morguard*. In *Moran v. Pyle National (Canada) Ltd.*,⁹² an electrician was fatally injured in Saskatchewan while removing a light bulb manufactured by an Ontario company that did not carry on business or have assets in Saskatch-

⁸⁹ *Burger King*, 471 U.S. at 476; *Keeton*, 465 U.S. at 774; *Asahi*, 480 U.S. at 112. The "purposeful availment" test was initially asserted in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958): "...[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum State, thus invoking the benefits and protections of its laws."

⁹⁰ Blom, *supra* note 14, at 741.

⁹¹ This phraseology was used by La Forest J. in *Morguard*, 76 D.L.R.4th, at 277.

⁹² 43 D.L.R.3d 239 (Can. 1974). In *Morguard*, La Forest J. quoted and applied *Moran's* principles. See *Morguard*, 76 D.L.R.4th at 276-77.

ewan.⁹³ The electrician's wife and children commenced an action in Saskatchewan against the company alleging that the company had been negligent in the manufacturing of the light bulb. In determining the situs of the tort for jurisdictional purposes,⁹⁴ Mr. Justice Dickson, speaking for a unanimous Court, employed a "real and substantial connection" test reasoning that when a manufacturer negligently manufactured products and placed them into the stream of commerce through normal distribution channels in circumstances where the manufacturer knew or ought to have known that the products might cause injury, the province where a plaintiff suffered injury had a real and substantial connection with the action sufficient to assert jurisdiction. The potentially lower threshold in personal injury cases for the sufficiency of the "real and substantial connection" fashioned by the S.C.C. in *Moran* and the "substantial connection" between the defendant and forum state to establish jurisdiction using the "purposeful availment" test in a minimum contacts analysis should be noted. The Canadian jurisdictional rule recognizes a paramount state interest in injuries suffered by persons within its territory.⁹⁵ In a products liability context, for example, it unequivocally asserts that a manufacturer, by tendering his products in the marketplace directly or through normal distributive channels, 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.⁹⁶ In contrast, while the United States Supreme Court is agreed that the necessary "substantial connection" between a defendant and the forum state must derive from an action of the defendant purposely directed toward the forum state, its decision in *Asahi Metal Industry Co. v. Supe-*

⁹³ All of the defendant's operations took place in Ontario. It sold its products exclusively to distributors and had no direct contact with consumers. It had no salespersons or agents in Saskatchewan.

⁹⁴ The Saskatchewan court rules provided for service ex juris when "the action. . . is founded on a tort committed within the jurisdiction."

⁹⁵ The recent decision in *Sobstyl v. Finzer*, [1993] B.C.J. No. 33 (B.C.S.C.) is illustrative. The British Columbia plaintiff brought a negligence action in her home province against an Albertan doctor for medical advice he provided when she was a transient employee in Alberta. *Moran* was applied to establish British Columbia's real and substantial connection with the action on the sole basis that the plaintiff acted on the doctor's advice there and the harm occurred there.

⁹⁶ In *Moran*, the province of Saskatchewan was held entitled to assert jurisdiction notwithstanding that the defendant, Pyle, did not carry on business in the province, had no property or assets there, carried on all of its manufacturing and assembly operations outside the province, sold all of its products to distributors and none directly to consumers and had no salesmen or agents within Saskatchewan. *Moran*, 43 D.L.R.3d at 240.

*rior Court*⁹⁷ illustrates a deep division on the question of whether the mere placement of a product into the stream of commerce can ever constitute the requisite purposeful availment even if it is done with an awareness that the stream will sweep the product into the forum state. For personal injury cases, therefore, the minimum threshold necessary to satisfy *Moran's* personal subjection test for jurisdiction may be less than a United States minimum contacts analysis would dictate. In the context of Canadian recognition and enforcement, what this means is that U.S. judgments meeting either interpretation of the "purposeful availment" standard would meet Canada's real and substantial connection test, providing the recognition court applies the personal subjection approach to its determination.

Given the lengthy judicial familiarity in Canada with the *Moran* test for jurisdiction, and given *Morguard's* new mandate that recognition is a correlative of jurisdiction,⁹⁸ the popularity of the personal subjection approach to determining the existence of a real and substantial connection is unsurprising. *McMickle v. Van Straaten*⁹⁹ is an example of its application for recognition purposes in a products liability context. The defendant was resident in British Columbia and advertised a facial cream product in United States national publications and television commercials in California. The California plaintiff used the product and suffered pain and facial disfigurement. She sued the defendant in California, obtained a default judgment and, invoking *Morguard*, brought an action to enforce that judgment in British Columbia. It was held that, notwithstanding that he did not carry on business in California, the defendant acted in such a way as to attract California business and that connection was of a kind which made it reasonable to infer that he had voluntarily submitted himself to the risk of litigation in California. In the words of McKenzie J.: "He was firing long-range artillery from Vancouver which landed in California.

⁹⁷ 480 U.S. 102 (1987). Justice O'Connor, joined by the Chief Justice, Justices Powell and Scalia, opined that the purposeful availment test would not be satisfied in the absence of additional conduct to clearly indicate an intent to serve the forum state market. In contrast, Justice Brennan, joined by Justices White, Marshall and Blackmun, disagreed with that interpretation. In their view, as long as a defendant was aware that its product was being marketed in the forum state, no showing of additional conduct would be required to find jurisdiction.

⁹⁸ It is noteworthy that while the jurisdiction of the Saskatchewan court to adjudicate the substantive merits of the *Moran* claim was recognized by the Supreme Court of Canada, the resulting judgment would have been unenforceable in Ontario under the traditional pre-*Morguard* rules.

⁹⁹ 93 D.L.R.4th 74. From a jurisdictional standpoint, the facts reveal that this case would pass *Moran's* personal subjection test as well as any requisite "purposeful availment" component of a minimum contacts analysis.

He must accept the risk of damage from his shells at the place where they landed.”¹⁰⁰ The identical approach has been readily applied to acknowledge United States state jurisdiction in other kinds of personal injury litigation.¹⁰¹

The personal subsection test has also been applied to recognize jurisdiction in commercial transactions litigation. In *Minkler and Kirschbaum v. Shepard*,¹⁰² the defendant and her husband moved from British Columbia to Arizona. The couple lived there for ten months and then separated, whereupon the defendant moved back to British Columbia. An Arizona law firm brought an action in Arizona for services rendered to her husband’s companies during the period when the couple were living there. Under Arizona statutory law a spouse may be liable for the community debts of the married couple whether or not that spouse contracts directly for liability. The defendant was served *ex juris*, a default judgment was obtained in Arizona and an action was subsequently commenced in British Columbia to enforce it. Using a personal subsection approach to find the requisite real and substantial connection, Mr. Justice Spencer stated:

Here, the defendant was in Arizona as a resident when the services were provided by the plaintiff to her husband’s companies and when he entered into the co-obligor’s undertaking She voluntarily subjected herself to Arizona law by going there to live. The fact that she might not have been aware of the community property laws of that State and their effect upon her to make her liable for her husband’s debts is not relevant. Ignorance of the law can not be a defence. Arizona law must be the law which governs the resolution of issues in the case. Thus there is a substantial connection between the subject matter of the action and the State of Arizona. (emphasis added)¹⁰³.

Similarly, in *Clancy v. Beach*, the fact that the British Columbia defendants solicited the plaintiff in Colorado by fax, telex, electronic mail and telephone and had many meetings with him in Colorado was sufficient to convince the enforcement court that “. . . .[the defendants] ought reasonably to have contemplated that the Colorado court could have exercised jurisdiction.”¹⁰⁴

¹⁰⁰ *Id.* at 82.

¹⁰¹ In *Clarke*, for example, the defendant podiatrist treated the plaintiff while both resided in California: Clark, 84 D.L.R.4th 244. After the physician had moved to British Columbia, the defendant brought a malpractice action against him in California. Her default judgment was enforced in British Columbia on the basis that he, too, in these circumstances, had “voluntarily submitted himself to the risk of litigation in California.”

¹⁰² *Minkler*, 60 B.C.L.R.2d 360.

¹⁰³ See *Minkler*, 60 B.C.L.R.2d at 364.

¹⁰⁴ *Clancy*, 92 B.C.L.R.2d at 95.

B. Administration of Justice Approach

Although the foregoing cases evidence the willingness of Canadian courts to apply the personal subjection test to determine the existence of a real and substantial connection, further examination reveals that many courts have applied the broader administration of justice approach to jurisdiction in commercial transactions cases. These courts appear to be assessing whether, under the circumstances, sufficient "contacts" exist with the subject matter of the litigation and the parties to permit the rendering court to assume jurisdiction, an approach not unlike the U.S. "minimum contacts" test but with the notable difference that the minimum sufficiency is not determined exclusively vis-a-vis the defendant and rendering forum but vis-a-vis all aspects of the litigation, including the parties, and the rendering forum. Several post-*Morguard* examples can be cited.

In *Allen v. Lynch*,¹⁰⁵ a Massachusetts default judgment for debt against a Florida resident was enforced in Prince Edward Island. The fact that both parties were resident in Massachusetts at the time when the defendant executed his promissory note and that Massachusetts law was the proper law of the contract were held to be sufficient connections between the "subject matter of the action" and the Massachusetts forum.¹⁰⁶ In *American Savings and Loan Association v. Stechishin*,¹⁰⁷ an Alberta court enforced a Hawaiian default judgment against Alberta residents who had borrowed money secured by a mortgage and promissory note from a Hawaiian lending institution. In concluding that Hawaii was the "most appropriate" original forum, the court was influenced by several factors including place of the contract, its proper law, its underlying subject matter (Hawaiian land) and the fact that the plaintiff resided and carried on business in Hawaii when the contract was made. Similar factors motivated a British Columbia court to find the requisite real and substantial connection between "the jurisdiction of the foreign [Oklahoma] court, the transaction in respect of which it has granted judgment and the defendant."¹⁰⁸

Lesser connections have sufficed. In *Kirsch v. Kucera*,¹⁰⁹ for example, the court found a real and substantial connection between the plaintiff's action in debt and the rendering Washington forum based

¹⁰⁵ *Allen v. Lynch*, 111 Nfld & P.E.I.R. 43 (P.E.I.S.C. 1993).

¹⁰⁶ *Id.* at 52.

¹⁰⁷ See *Stechishin*, 14 Alta.L.R.3d 255.

¹⁰⁸ *Federal Deposit Ins. Corp. v. Vanstone*, 88 D.L.R.4th 448, 463 (B.C.S.C. 1992).

¹⁰⁹ See *supra* note 49.

solely on the plaintiff's residence in Washington, the fact that meetings concerning the loans took place in Washington and the defendant's cheques were dishonoured when presented to a Washington bank. One court has even suggested that a sufficient connection between the territory and one or more of the plaintiff,¹¹⁰ defendant and subject matter of the action would suffice, adding that in complex cases the rendering territory does not have to be the only one with real and substantial connections or even the one with the most real and substantial connections. In *Moses v. Shore Boat Builders Ltd.*,¹¹¹ the defendant had agreed to build a fishing boat for the plaintiff, a resident of Alaska, who executed the contract in Alaska and received financing for his purchase from the Alaskan government. The defendant carried on business exclusively in British Columbia, designed and built the boat there and subsequently had it delivered to the plaintiff in Alaska. After problems developed with the boat, the plaintiff sued in Alaska and obtained a default judgment which he afterwards sued upon in British Columbia. Mr. Justice Huddart held that the courts of either British Columbia or Alaska would have been a "reasonable forum," and cited the following "sufficient contacts" to satisfy the *Morguard* standard: Alaska was the place where the plaintiff resided, where he signed the contract for construction of the boat, where he financed the boat, where he used it, where it was repaired and where he suffered damage.¹¹²

The administration of justice approach to resolving jurisdictional issues in complex international commercial transactions with multiple jurisdictional "contacts" was recently reinforced by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*.¹¹³ The case involved an anti-suit injunction against residents of British Columbia from bringing an action in Texas and the question of appropriate forum arose. Mr. Justice Sopinka, in

¹¹⁰ It should be noted that substantial authority exists to suggest that the requisite connection cannot be established solely on the basis of the plaintiff's relationship to the rendering forum. See *Canadian Int'l. Mktg. Distrib. Ltd. v. Nitsuko Ltd.*, 56 B.C.L.R.2d 130 (B.C.C.A. 1990); *Wilson v. Moyes*, 13 O.R.3d 202 (Ont. Ct., Gen. Div. 1993); *First City Trust Company v. Inuvik Automobile Wholesale Ltd.* [1993] N.W.T.J. No. 77 (N.W.T.S.C.); *Webb v. Hooper*, [1994] A.J. No. 335 (Alta. Q.B.).

¹¹¹ 5 W.W.R. 282 (1992).

¹¹² In contrast, Cumming, J.A., delivering the judgment of the British Columbia Court of Appeal, applied a personal subjection approach and held that the jurisdiction issue fit directly within the rule in *Moran v. Pyle* which "appl[ied] with even greater force in the case at bar, where the boat was specifically manufactured to American standards for Moses' use in Alaska." 106 D.L.R.4th at 665.

¹¹³ 102 D.L.R.4th 96.

delivering the unanimous judgment of the Court, made the following comments about choice of forum realities in today's complex global trading environment:

With the increase of free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and distributing their products or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to pinpoint the place where the transaction giving rise to the action took place. Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives. . . . I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum which is clearly more appropriate than others.¹¹⁴

He then went on to delineate the role that *forum conveniens* considerations should play when Canadian courts are called upon to assess the propriety of a foreign court assuming jurisdiction:

[W]hen a foreign court assumes jurisdiction on a basis that generally conforms to our rule of private international law relating to the forum non conveniens, that decision will be respected and a Canadian court will not purport to make the decision for the foreign court. The policy of our courts with respect to comity demands no less.¹¹⁵

Factors such as the governing law, the location in which the parties to the action carry on business, the location of witnesses, the location from which the majority of evidence emanates, the location where the principal facts in dispute are concentrated and geographical factors suggesting a natural forum have been identified as variables relevant in applying *Amchem* to the determination of the appropriate forum.¹¹⁶

Although *Amchem* was an anti-suit injunction case and directed to *forum conveniens* considerations, such considerations are interrelated with the issue of jurisdiction *simpliciter* in the context of recognition and enforcement. If the *Morguard* rule is to be extended to international judgments, *forum conveniens* considerations will have to be assessed by the recognition court whether as part and parcel of the

¹¹⁴ *Id.* at 102.

¹¹⁵ *Id.* at 120. It should be noted that jurisdiction *simpliciter* and *forum conveniens* in Canada are generally viewed as part of a two-stage sequential analysis, i.e. it is only if there is a finding of jurisdiction *simpliciter* that it becomes necessary to apply *forum conveniens* considerations to decide whether or not jurisdiction should be declined. See *Ell v. Con-Pro Industries Ltd.*, 11 B.C.A.C. 174 (B.C.C.A. 1992); *Exta-Sea Charters Ltd. v. Formalog Ltd.*, 55 B.C.L.R.2d 197 (B.C.S.C. 1991).

¹¹⁶ See, e.g., *Applied Processes Inc. v. Crane Co.*, 15 O.R.3d 166 (Ont. Ct., Gen. Div. 1993).

“real and substantial connection” test of jurisdiction or as part of a “fairness” check superimposed on it. Of importance to American plaintiffs suing Canadian defendants in American courts is that *Amchem* clarifies at what point in the proceedings these issues should be initially raised.¹¹⁷

C. Flexible Approach Based on “Order & Fairness”

The foregoing analysis suggests that Canadian recognition courts are likely to apply the personal subjection approach to determine the existence of a real and substantial connection for jurisdictional purposes in personal injury cases. In other types of cases, the courts appear to be using both personal subjection and administration of justice approaches to the jurisdictional question. Yet, in each of these latter cases, owing to multiple connections with the rendering forum, the results would arguably be the same regardless of which approach was used to determine the issue.¹¹⁸ *Moses v. Shore Boat Builders Ltd.*,¹¹⁹ is illustrative. The two courts to consider the jurisdiction issue both concluded that the rendering Alaska forum had the requisite real and substantial connection, yet each applied a different approach to determine its existence.¹²⁰ That this will often occur should not be unexpected. Unlike the United States “minimum contacts” approach which requires the defendant’s purposeful availment towards the plaintiff’s chosen forum state, the Canadian standard only requires that there be such sufficient contacts with that state to establish that it was or should have been in the defendant’s reasonable contemplation that he might be sued there. Therefore, when a Canadian court applies the

¹¹⁷ Post-*Amchem*, Canadian defendants will most likely be advised to appear in the U.S. forum to contest jurisdiction. It is unlikely that this would constitute a voluntary submission to jurisdiction under the traditional common law recognition rules. See *Clinton v. Ford*, 137 D.L.R.3d 281 (Ont. C.A. 1982); *Dovenmuehle v. Rocca Group Ltd.*, 34 N.B.R.2d 444 (N.B.C.A. 1981), *aff’d* 2 S.C.R. 534 (Can. 1982). These cases make the defendant’s submission to the merits of the case a minimum threshold to constitute a voluntary appearance. If the U.S. court refuses to stay or dismiss the action, the defendant could either bring an application before a Canadian court for an anti-suit injunction or allow the plaintiff to obtain a default judgment expecting to raise the jurisdictional issue in the enforcement action. In either case, however, *Amchem* makes it more difficult for the defendant to succeed because it mandates that a Canadian court’s assessment of whether it was “reasonable” for a foreign court to assume jurisdiction will not be tested *de novo* but by reference to whether it was reasonable for the foreign court to conclude that there was no alternative forum that was clearly more appropriate.

¹¹⁸ This is not to suggest that some future case will not require a choice of approach: See *Blom*, *supra* note 14, at 742-745.

¹¹⁹ 5 W.W.R. 282 (B.C.S.C. 1992).

¹²⁰ At first instance, Huddart, J., 5 W.W.R. 282 (B.C.S.C. 1992), applied the administration of justice approach to the jurisdictional issue, whereas Cumming, J.A., 106 D.L.R.4th 654 (B.C.C.A. 1993), reached the same conclusion applying the personal subjection approach.

broader administration of justice approach in applying *Morguard's* recognition rule and concludes that, in all the circumstances, there was a sufficient "real and substantial connection" which the litigation or transaction had with the rendering forum, the result usually can be easily rationalized on narrower personal subjection grounds because it can be said that the defendant, in such circumstances, should have reasonably had it in his contemplation that he could be sued there.

It is important to emphasize that the "real and substantial connection test" was merely the means employed by Mr. Justice La Forest in *Morguard* to arrive at a result which comported with the overriding principles of "order and fairness" essential to "ensure security of transactions with justice" in a modern system of private international law. Indeed, he expressly stated that he was attempting to fashion "a more flexible, qualitative and quantitative test"¹²¹ for the correlatives of jurisdiction and recognition. Most recently, he took the opportunity to reaffirm flexibility and eschew any "mechanical counting of contacts or connections" in applying the *Morguard* standard:

In *Morguard*, a more accommodating approach to recognition and enforcement was premised on there being a "real and substantial connection" to the forum that assumed jurisdiction and gave judgment. Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but 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. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. More than this was left to depend on the gradual accumulation of connections defined in accordance with the broad principles of order and fairness.¹²²

In short, post-*Morguard* caselaw has not clarified which, if either, of the personal subjection and administration of justice approaches is the "proper" approach to determine the existence of a "real and substantial connection." Nor, given Mr. Justice La Forest's most recent comments, is it likely to. Both approaches to determining its existence are legitimate, albeit not exclusive, means to the end of ascertaining whether it was "fair" and "reasonable" for the rendering court to assume jurisdiction over the defendant. If, as is suggested, the search for the existence of a real and substantial connection is in reality a fairness/reasonableness control on the assumption of jurisdiction and the

¹²¹ This formulation was adopted from *Moran*. See *Morguard*, 76 D.L.R.4th at 276.

¹²² *Hunt*, 1 W.W.R. at 155-66.

discretion not to exercise it, more than one approach may be needed to provide the flexibility that permits a court to decide in one case that the defendant's actions and its connection to the forum are sufficient to constitute a deemed voluntary submission to its exercise of jurisdiction over her while in another case to determine that, all things considered, it is not fair and reasonable to subject her to the jurisdiction of the rendering forum. However, as American experience demonstrates, this flexibility comes at the expense of imprecision. Consider, for example, the "traditional notions of fairplay and substantial justice"¹²³ that underlie the United States due process requirement that the defendant have "minimum contacts" with the rendering forum. After many decades of judicial experience, the nature of these requisite "minimum contacts" are, also, only vaguely defined.¹²⁴

V. FAIRNESS AND POLICY LIMITATIONS

Some of Mr. Justice La Forest's statements in *Morguard* indicate that greater caution will have to be exercised in the recognition and enforcement of international judgments.¹²⁵ The real and substantial connection test for jurisdiction attempts to achieve a fair balance between the competing interests of plaintiffs and defendants as to where the litigation should be adjudicated. But, as Professors Coakley, Finkle and Barrington have noted, the way in which the litigation is adjudicated upon must also be fair.¹²⁶ In addition, considerations of public policy may weigh against enforcement, notwithstanding the existence of the requisite nexus and the fairness of the process.¹²⁷

¹²³ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹²⁴ For a complete discussion, see Philip J. Loree Jr., *The Recognition and Enforcement of United States Judgments in the Canadian Common-Law Provinces: The Problem of In Personam Jurisdiction*, BROOK. J. INT'L L. 317, 355-359 (1989). The philosophical basis for the minimum contacts analysis is still unresolved. See ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS OF LAW* 114 & n.13 (1986).

¹²⁵ *Morguard*, 76 D.L.R.4th at 270-271. In *Moses*, 5 W.W.R. at 287, Huddart J. succinctly asserted, "Whether there was a real and substantial connection between the action and the territory where the action was brought will be the only question asked if the judgment is Canadian. If the judgment is not from a Canadian court, the fairness of the process of the foreign court may be challenged."

¹²⁶ See Simon Coakley et al., Comment, *Morguard Investments Ltd.: Emerging International Implications*, 15 DALHOUSIE L. J. 629, 641 (1992).

¹²⁷ La Forest, J., for his part, specifically noted that a Canadian court may have to deal with its own public policy in some instances: *Morguard*, 76 D.L.R.4th at 279.

A. Fairness

Canadian courts are unable to make the same assumptions about procedural and substantive fairness and the quality of justice in the international context that they are able to make domestically. Post-*Morguard*, the issue has received only cursory attention to date because the international judgments for which recognition was sought were from the United States and the United Kingdom, jurisdictions with legal systems similar to Canada's.¹²⁸ Thus, the fairness of Colorado's process was established because its procedures were "similar to ours,"¹²⁹ the fairness of Massachusetts' process because it was "not so different" from ours¹³⁰ and the fairness of practice in the United Kingdom courts because it was "almost identical" with ours.¹³¹ If *Morguard's* recognition rule continues to be extended to international judgments, the day will soon come when Canadian courts will have to address fairness issues arising out of judgments rendered by courts with systems of justice substantially different from that prevailing in the local forum. As these concerns are addressed on an *ad hoc* basis, as at present seems likely, different judicial approaches will emerge. The potential for an initial absence of uniformity,¹³² however, should not deter Canadian common law courts, in the interim, from continuing to recognize international judgments in those "easy" cases where a real and substantial connection exists and no fairness issue is substantiated. Most United States judgments would, of course, readily continue to fit into this category as American courts adhere to widely recognized notions of fairness in procedure and result. Also, it is important to keep in mind that in cases where a lack of fairness is alleged, it is incumbent upon the defendant to substantiate the allegation.¹³³

¹²⁸ Typical are the following comments, "No concern can be expressed about the quality of [California] justice." *Clarke*, 84 D.L.R.4th at 252; "[T]here is nothing in the Massachusetts law and practice that is contrary to our perceptions of essential justice. . . ." *Allen*, 111 Nfld. & P.E.I.R. at 49.

¹²⁹ *Clancy v. Beach*, 92 B.C.L.R.2d 82, 94 (B.C.S.C. 1994). In *Minkler and Kirschbaum v. Sheppard*, 60 B.C.L.R.2d 360, 364 (B.C.S.C. 1991), Arizona's process for service and for proceeding in default of defence was held to be fair because it was "similar to ours."

¹³⁰ *Allen v. Lynch*, 111 Nfld. & P.E.I.R. 43, 49 (P.E.I.S.C. 1993).

¹³¹ *Fabrelle*, 6 C.P.C.3d at 171-172.

¹³² Ultimately, uniformity could be addressed whether by way of judicial or legislative guidelines or via bilateral international agreements.

¹³³ *Boardwalk Regency Corp. v. Maalouf*, 88 D.L.R.4th 612, 613 (Ont. C.A. 1992); *Allen*, 111 Nfld. & P.E.I.R. at 49; *But cf. Clancy*, 92 B.C.L.R.2d 82, which suggests that the judgment creditor has the burden of proof to establish fairness but that this burden can be discharged by showing adjudicative processes similar to those employed locally.

B. Public Policy

The rules of public policy may afford a good defense against the enforcement of international judgments in Canada both under the reciprocal enforcement legislation and in actions on the judgment. But, describing what sort of public policy grounds would lead a Canadian court to refuse recognition of foreign judgments is no less difficult than defining what is or should be public policy itself. Because of the numerous variable and subjective factors involved, it is recognized that caution must be exercised in refusing recognition on this basis.¹³⁴ The common denominator underlying the public policy doctrine has been variously described as including "essential justice and morality" and "essential public or moral interests."¹³⁵ Understandably, the difficulty in each case is not with regard to the doctrine but whether the moral interest is sufficiently important to invoke it.

In several post-*Morguard* decisions the public policy defense has been raised, generally without success. In *Minkler*, it was argued that since Arizona's matrimonial community property law was so different from British Columbia law in imposing liability upon a wife for the debts of her husband, it would be against the public policy of the common law to enforce the United States judgment. Spencer J. gave short shrift to the submission, reasoning that mere differences in substantive law are insufficient grounds upon which to deny recognition. In the case before him, he found "nothing" about the Arizona community property regime which was "contrary to [British Columbia] conceptions of essential justice and morality."¹³⁶ It may, however, be a question of degree. His finding was no doubt influenced by the fact that the Arizona regime was "not altogether strange" to British Columbia's laws.¹³⁷ The same type of judicial observation appears to have

¹³⁴ See, e.g., *Block Brothers Realty Ltd. v. Mollard*, 122 D.L.R.3d 323, 329 (B.C.C.A. 1981).

¹³⁵ *National Surety Co. v. Larsen*, 4 D.L.R. 918, 920, 941 (B.C.C.A. 1929).

¹³⁶ See *Minkler*, 60 B.C.L.R.2d at 365. The U.S. equivalent can be found in *Toronto-Dominion Bank v. Hall*, 367 F. Supp. 1009, 1015 (E.D. Ark. 1973), where an Arkansas court enforced a Canadian judgment notwithstanding that the plaintiff bank's rights were broader under its contract with the debtor than would have been allowed under Arkansas law. The court concluded that there was nothing in the contract that could be considered shocking, immoral, unconscionable or unreasonably oppressive in violation of the public policy of the state of Arkansas. See also *Sturm*, *supra* note 23, at 208.

¹³⁷ Indeed, he noted specifically that there were "echoes" of the Arizona law in British Columbia's Family Relations Act which gives each spouse a share in family assets. A spouse has, before a triggering event, an inchoate interest in the other's business ventures where there has been an indirect contribution but that interest is subject to diminution by debts incurred by the owing spouse prior to the triggering event. Because a wife, to this extent, would be exposed to the risk of her husband's debts in British Columbia, the Arizona community property concept was not "altogether strange" to British Columbia. *Minkler*, 60 B.C.L.R.2d at 366.

motivated the majority of the Ontario Court of Appeal, in *Boardwalk*,¹³⁸ to hold that the enforcement of a gambling debt by a United States casino was not so contrary to Ontario public policy as to defeat an enforcement action on the casino's New Jersey judgment. This was despite the fact that the operations conducted by the New Jersey casino would have invoked criminal sanction if conducted in Ontario,¹³⁹ and despite the fact that Ontario law would have barred recovery of the gambling debt if it had been incurred in Ontario.¹⁴⁰ It was held that enforcement would not violate "conceptions of essential justice and morality"¹⁴¹ largely because the federal and provincial governments actively promoted gambling activities and derived substantial revenue from them.¹⁴²

The provincial legislature may bar recovery of the loan, but the statute doing so can hardly be interpreted as establishing a moral policy when the same government licenses the opportunity. In my view, activities occurring in an enterprise licensed by the state of New Jersey cannot carry a different colour of morality. The federal Parliament would be inconsistent in decreeing that what is licensed by the Province of Ontario or under the auspices of an annual exhibition has moral integrity, while what is licensed and regulated by New Jersey does not.¹⁴³

Such cases can be distinguished from those where instinctive moral repugnance finds confirmation in the criminal law:

[Public policy] must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.¹⁴⁴

¹³⁸ 88 D.L.R.4th at 613.

¹³⁹ If conducted in Ontario, the business would constitute operating a common gaming house contrary to the Criminal Code of Canada, R.S.C., ch. C-46, §§ 197, 201 (1985) (Can.) (amended).

¹⁴⁰ Gaming Act, R.S.O., ch. G.2, §§ 1, 4, 5 (1990). A similar conclusion was reached by the Quebec Court of Appeal which refused to extend the public policy embodied in Quebec legislation to prevent enforcement of a gambling debt governed by New Jersey law. *See Resorts Int'l*, 89 D.L.R.4th 688. (Que. C.A. 1991).

¹⁴¹ A foreign judgment "should not be declared unenforceable on grounds of public policy unless its enforcement would violate conceptions of essential justice and morality." *Boardwalk*, 88 D.L.R.4th at 615.

¹⁴² *Id.* at 623.

¹⁴³ *Id.* at 617.

¹⁴⁴ The example of a foreign judgment arising out of a contract relating to the corruption of children was provided by Carthy, J.A., who noted, "[I]t is unimaginable to consider an amendment to make [the corruption of children] an offence only if not licensed by a provincial body or conducted at an annual fair, but that very fact makes the point that the morality of gambling as a part of our social fibre is very different from other offences in the Criminal Code." *Id.* at 623.

Suffice it to say, for present purposes, that the scope of the public policy defence measured against this definition of essential morality would be extremely limited in its application to U.S. judgments.

Concern has been expressed by some Canadian commentators that U.S. damage awards may be too generous in comparison to what Canadian courts might award in similar circumstances.¹⁴⁵ *Clarke* addressed the issue but was a case where an American defendant moved to Canada after the cause of action arose. The court quite properly declined to impose upon the plaintiff Canadian standards on quantum of damages in such circumstances holding that concerns of fairness militated almost entirely against the defendant.¹⁴⁶ The same reasoning with respect to the issue of fairness was applied in *Stoddard*, even though the defendant was in Canada at all relevant times. The case is significant because the amount of the damage award exceeded by many times the limits to such awards in Canada by reason of the public policy decisions of the Supreme Court of Canada. In holding that these excessive non-pecuniary damages were not unfair, Errico J. left open the question as to whether they were contrary to public policy as that issue was not advanced before him.¹⁴⁷ In *Clancy*, the issue was advanced. Smith J., of the British Columbia Supreme Court, held that public policy would not be violated so long as the remedy granted by the United States court was "similar in kind" to the remedies which would be granted locally, even though "the amounts awarded. . . appear immoderate in comparison to what this Court might award in similar circumstances."¹⁴⁸

*Turtle Creek Condominium Association v. Skalbania*¹⁴⁹ is the lone post-*Morguard* decision demonstrating the unusual type of circumstances where the public policy defense might succeed in an American context. The plaintiff brought an action in British Columbia to enforce a California default judgment. The defendant brought an interim application for the discovery of documents. The main issue before the court was whether discovery should be permitted because the defendant's proposal and discharge under Canada's Bankruptcy and Insolvency Act¹⁵⁰ raised a potential defense to the action on the California

¹⁴⁵ Loree, *supra* note 124, at 351. See also Shirley Sostre-Oquendo, *Recognition and Enforcement of Foreign Judgments in the Canadian Common Law Provinces*, 4 DET. C.L. REV. 1019, 1026 (1992).

¹⁴⁶ 84 D.L.R.4th at 252.

¹⁴⁷ 1 W.W.R. at 688 (1994).

¹⁴⁸ 92 B.C.L.R.2d at 93.

¹⁴⁹ 83 B.C.L.R.2d 111 (B.C.S.C. 1992).

¹⁵⁰ Bankruptcy Act, R.S.C., ch. B-3 (1985) (Can.).

judgment. Sauders J. allowed discovery on the basis that the case could fit within the public policy exception to the enforcement of foreign judgments. He reasoned that the BIA provisions potentially protected the defendant from at least a portion of the plaintiff's claim depending upon the time when the claim was known or should have been known and the question of whether it was an obligation incurred before the date of the proposal. If, for example, the United States judgment creditor's original claim was provable in bankruptcy as being a liability to which the Canadian defendant was subject at the date of his proposal or one to which he became subject before his discharge, then s.121 of the Act would extinguish the debt. In these circumstances, to subsequently permit the recognition and enforcement of the related judgment would be contrary to the public policy articulated in the legislation. In a similar vein, public policy concerns could motivate the Attorney General of Canada to prohibit the recognition and enforcement of a United States money judgment arising out of anti-trust proceedings.¹⁵¹

On the basis of the foregoing cases, it appears that the public policy exception, like that of fairness, is capable of providing necessary limits on *Morguard's* extension to international judgments generally. Barring exceptional circumstances, however, these limitations on the *Morguard* principle are unlikely to inhibit the trend towards the recognition of United States judgments once a real and substantial connection has been established.

VI. CONCLUSION

The increase in transnational litigation between Americans and Canadians has likewise increased the number of judgment creditors seeking cross-border recognition and enforcement of their judgments. Until quite recently, United States judgment creditors were at a significant disadvantage vis-a-vis their Canadian counterparts. American courts recognized Canadian *in personam* default judgments even when jurisdiction was exercised exclusively on the basis of extraterritorial service of process, providing the defendant had sufficient "minimum contacts" with the rendering Canadian forum. Canadian courts, on the other hand, would not recognize a United States judgment unless the American court exercised jurisdiction in accordance with inflexible nineteenth century common law rules requiring either the judgment debtor's residence in the rendering state or the service of

¹⁵¹ Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29, s.8.

originating process therein. Providing the judgment debtor did not otherwise attorn to the jurisdiction of the rendering court, his Canadian assets were not exigible unless the United States plaintiff relitigated successfully in Canada.

The unanimous decision of the Supreme Court of Canada in *Morguard* dramatically changed the traditional rules for the recognition and enforcement of interprovincial judgments in Canada. An additional ground for recognition based upon the existence of a "real and substantial connection" was established. *Morguard* further suggested, albeit in *obiter dictum*, that the common law rules for the enforcement of international judgments were likewise ripe for reappraisal. Following upon this suggestion, several lower Canadian courts and one appellate court have extended the reach of the "real and substantial connection" test to permit the recognition of default United States judgments. While the trend has not been unanimous, it is strongly rooted both in principle and practicality. For this reason, it is likely to continue and, given the comments expressed in two recent S.C.C. decisions, likely to be definitively sanctioned.

While the common law rules governing the assumption of jurisdiction by a foreign court and the recognition and enforcement of foreign judgments evolved discretely, *Morguard* recognized their correlative nature and provided the rational justification for their reunification on the basis of the "real and substantial connection" test. Insofar as that test is concerned, its parameters are evolving. Canadian decisions to date have applied both personal subjection and administration of justice approaches to its determination. What appears to have emerged is a more flexible approach to jurisdiction based on order and fairness and the net result should not lack familiarity to American judgment creditors experienced in "minimum contacts" analyses.

Regarding present recognition and enforcement prospects for United States judgments, if jurisdiction was exercised by the rendering court on grounds traditionally recognized at common law, the U.S. judgment creditor will generally be able to enforce her judgment in Canada's common law provinces, whether by registration or action. Most United States default judgments, on the other hand, will require *Morguard's* assistance and, therefore, its continued extension. The prognosis for this is presently favorable and, in consequence, it is likely that increasing numbers of defendants with Canadian assets will be appearing in United States courts to contest both jurisdiction and the substantive merits of the litigation. This, in turn, will provide even

greater opportunities for United States judgment creditors to enforce their judgments in Canada on traditional grounds. However, residual sour notes remain. Absent legislative change, it is doubtful that the *Morguard* principle can be used to expand the traditional grounds for the recognition of international judgments in New Brunswick and Saskatchewan. Be that as it may, there can be little doubt that *Morguard* and its judicial aftermath has significantly improved the prospects for many United States judgment creditors. For them, in the familiar words of that Gershwin standard, "Things Are Looking Up!"