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Morguard at the Millennium: A Survey of Change

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Morguard at the Millennium: A Top Ten Survey

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A Top Ten Survey

by

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I - Introduction and Background

Introduction

- *Morguard Investments Ltd v De Savoye* was the most significant Canadian judgment in conflict of laws in last millennium
- this talk highlights ten ways in which the law is changing in response to the *Morguard* jurisprudence
- each section provides a brief description of the change, followed by references to illustrative cases and practice points

Caveats:

- the ten areas of change discussed are far from exhaustive of the changes underway
- a fuller explanation for the background to some of the points is contained in other current or forthcoming articles
- some of the points are more speculative than others and so remain to be tested in actual cases

Background - The Supreme Court of Canada's four key cases:

- *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 the court removed the attornment defence by holding that default judgments were enforceable against defendants served outside the forum who had not consented to the authority of the courts. The court based this important change on newly recognized constitutional requirements for interprovincial comity and on the needs of modern cross-border commerce
- *Amchem v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897 - the court reviewed the doctrine of *forum non conveniens* and clarified the tests for stays and injunctions. The court said the plaintiff's potential loss of a legitimate personal or juridical advantage was just another factor to be weighed along with the comparative extent of the connections between the matter and the alternative fora
- *Hunt v T&N plc* [1993] 3 SCR 289 - the court held that a provincial blocking statute was constitutionally inapplicable to litigation in another province and that the courts of the province in which the litigation was impaired were competent to determine this. The court emphasized the role of the provincial superior courts in respect of Canada's essentially unitary court system, and it confirmed that the *Morguard* principles were constitutional principles
- *Tolofson v Jensen* [1994] 4 SCR 1022 - the court held that the law of the place where a tort occurred must govern all cases in which the tort has occurred in Canada and this would include the limitation provisions of that law. Canadian federalism required legal certainty with respect to which law would apply to any given case regardless of where (i.e., in which province) the matter was to be decided. The court left the possibility open that there might be cases with connections to other countries in which the courts might apply some law other than that of the place where the tort occurred

II - Jurisdiction

- the constitutional test for jurisdiction established in *Morguard* (based on a "real and substantial connection" with the forum) has encouraged some to treat court jurisdiction as territorially defined
- as discussed in the first two sections below, two kinds of cases have emerged that demonstrate the limits of this interpretation of "real and substantial connection" test

1. Constitutional determinations of jurisdiction should not impede access to justice

- the first kind of case involves personal injury plaintiffs who serve defendants in another province in claims based on injuries that occurred in the other province
- some courts have dismissed these claims as beyond their constitutional jurisdiction because there was no real and substantial connection between the matter and the province even though in some instances this could effectively deprive the plaintiffs of access to justice
- this approach to the real and substantial connection test emphasizes territoriality as an absolute limit to judicial competence (treating it the same as provincial legislative competence) and it segregates the requirement of jurisdiction *simpliciter* from that of *forum non conveniens*
- this approach is contrary to the strong history of commitment to access to justice demonstrated in *Moran v Pyle National (Canada) Ltd* [1975] SCR 393 and *Hunt v T&N plc, supra, and Tolofson v Jensen, supra,* which emphasized flexibility in jurisdictional determinations and the collective responsibility of the provincial superior courts for the integrity of an essentially unitary court system within the Canadian federation
- comparable mechanisms for ensuring access to justice can be found Article 3136 of the Québec Civil Code and in the exception to the granting of stays based on *forum non conveniens* on the grounds that it would unjustly deprive the plaintiff of a legitimate personal or juridical advantage
- when staying proceedings in favour of another forum, courts will increasingly be asked to consider whether this would effectively deny the plaintiff access to justice. A key question in the next few years for the courts will be: "When should the courts allow someone to sue in a less convenient forum?"
- it will also be necessary for the courts to develop mechanisms to assist defendants incapable of defending in distant fora

Illustrative Caselaw

Cases stayed or dismissed because court lacked jurisdiction:

MacDonald v Lasnier (1994) 21 OR (3d) 177 (Gen Div)

Jean-Jacques v Jarjoura (Gen Div, 18 Jan 96) Quicklaw [1996] OJ 5174

Brookville Transport Ltd v Maine (Department of Transportation) (1997) 189 NBR (2d) 142 (QB)

Negrych v Campbell's Cabins (1987) Ltd (1997) 119 Man R (2d) 216 (QB)

Anderson v Coy (1998) 224 AR 345 (QB)

Daniels v Kwok (1998) 231 AR 95 (QB)

Cases not stayed due, in part, to factors affecting the ability to travel to litigate:

Reimer v Alvarez (1997) 132 Man R (2d) 161 (QB)

Dennis v Salvation Army Grace General Hospital (1997) 156 NSR (2d) 372 (CA), *revg* (1996) 153 NSR (2d) 211, leave to appeal to SCC dismissed (1997) 163 NSR (2d) 79*n*

Oakley v Barry (1998) 158 DLR (4^{th}) 679 (NS CA), *affg* Quicklaw: [1997] NSJ No 48, leave to appeal to SCC dismissed 15 Oct 98

Connelly v RTZ Corporation plc [1997] 4 All ER 335, [1997] 3 WLR 373 (HL)

Practice Point

- since the outcome seems to be capable of being influenced by whether the issues are framed as those of jurisdiction *simpliciter* or *forum non conveniens*, astute counsel will consider not only the decisions based on one or the other of these aspects, but also the underlying facts and the practical effect of the outcome

2. Constitutional determinations of jurisdiction should accommodate the parties' agreements

- the second kind of case demonstrating the weakness of the logic underlying a strictly territorial approach to jurisdiction is one in which the parties' agreement, either before or after litigation has been commenced, can affect the court's determination that it should exercise or decline jurisdiction
- if the parties can, through their agreement, establish jurisdiction where there otherwise would not be jurisdiction under the real and substantial connection test, or if they can prevent an exercise of jurisdiction where the court would otherwise have jurisdiction under the real and substantial connection test, then the strictly territorial interpretation of the test must be flawed unless it is accepted that parties can contract out of constitutional requirements
- the parties' consent at the time of litigation to litigate the matter in the forum in which it has been commenced is almost always decisive
- and, the parties' agreement in advance is generally decisive subject to verification of the agreement and to exceptions based on contract law regarding the fairness of the bargain
- the courts have retained the right to review exclusive jurisdiction clauses precluding them from exercising jurisdiction where the agreement would prevent access to justice
- as commercial parties become more generally more sophisticated with jurisdiction clauses, these clauses should be subject to review only for failure of the bargain

Illustrative Caselaw

Fairfield v Low (1990) 71 OR (2d) 599 (HC)

Fresh Mix Ltd v Bilwinco A/S (1999) 30 CPC (4th) 282 (Gen Div), *affg* Quicklaw [1999] OJ 1857 (Ont Master)

Practice Point

- in advising small businesses in cross-border commerce, it is increasingly important to attend to exclusive jurisdiction agreements both to ensure that they are acceptable if they have been included and to add them if they have not been included

3. The avoidance of multiplicity should be recognized as an independently sufficient basis for jurisdictional determinations

- the establishment of a system for the recognition and enforcement of judgments (as a result of the *Morguard* jurisprudence) implies a need to establish a mechanism to prevent or remedy situations in which there is a multiplicity of proceedings and the possibility of inconsistent results
- mechanisms like that in s. 138 of the Ontario *Courts of Justice Act* need to be extended to the interprovincial context
- the Europeans recognized this and provided for it in Article 21 of the Brussels Convention, and the Americans recognized this and provided for it in Article IV of the US Constitution

Illustrative Caselaw

427900 BC Ltd v Thrifty Canada [1999] 6 WWR 416 (BCCA)

Westec Aerospace Inc v Raytheon Aircraft Co (1999) 173 D.L.R. (4th) 498 (leave to appeal to SCC filed 18 June 1999)

Guarantee Co of North America v Gordon Capital Corp (1994) 18 OR (3d) 9 (Gen Div), leave to appeal dismissed (1994) 24 CPC (3d) 277; leave to appeal SCC dismissed (1994) 29 CPC (3d) 148

Canadian National Railway Co v Sydney Steel Corp (1998) 170 NSR (2d) 84 (CA) *affg* (1998) 167 NSR (2d) 28 (SC)

Practice Point

- Litigation strategies relying on opportunities to commence parallel proceedings in other provinces may need to be reassessed in light of the implications of *Morguard* and *Hunt* for the need to rationalize the assumption of jurisdiction within the Canadian judicial system

III - Judgments

- soon after *Morguard* was released, Canadian courts began applying the new rules to foreign judgments, treating them as they would the judgments of other provinces
- by eliminating the defence of non-attornment, Canadian courts became much more likely to face issues of the quality of justice or of the standards of conduct or of relief vindicated in the judgment

- while the outcome of enforcement actions for offensive judgments has remained clear, manageable standards must be developed for deciding the many cases in between, such as those granting relief of a nature or scope not available through the application of our legal standards or processes
- as Canadian courts meet this challenge, it is becoming increasingly clear that apart from the jurisdictional question considered in *Morguard*, the enforcement of foreign judgments can present issues quite different from the enforcement of Canadian judgments

4. Canadian judgments: The rules for enforceable orders are being extended beyond money judgments of superior courts for fixed sums

- The "*Morguard* revolution" continues for interprovincial judgments
- enforcing more than money judgments for fixed sums is not new to federal or regional systems, e.g., Article 25 Brussels Convention is very broad and Article 24 authorizes provisional and protective measures in support of proceedings in another member state

Illustrative Caselaw

Uniforêt Paté Port-Cartier Inc v Zerotech Technologies Inc [1998] 9 WWR 688 (BCSC)

Silverstar Properties Ltd v Veinotte unreported Quicklaw [1998] BCJ No 2385 (BCSC)

Practice Point

- increasingly, no matter is too inconsequential, no order too interlocutory for enforcement in another province but, it is hoped that mechanisms will be developed for defendants to challenge the exercise of jurisdiction or to defend effectively from a distance
- Will this trend soon extend to interprovincial enforcement of orders for specific performance and injunctions (i.e., other than *Mareva* injunctions)?

5. Foreign judgments: Canadian rules for declining to enforce judgments based on the foreign public law exception are changing

- indicia of whether the foreign public law exception to enforcement shoulc apply once included that the claimant was a foreign government and that it received the award
- recently the Ontario courts reasoned that such indicia might not be decisive in that a claim by a foreign government might just be a remedial procedural means for facilitating collective recovery in what was substantially a private law cause of action
- the correlative situation remains to be considered: What about claims in which statutory provisions regulating criminal or quasi-criminal conduct include private rights of action and give claimants the benefit of deeming provisions and other means of assistance in proof of their claim and multiple or punitive damages and legal fees?
- To what extent is this concern reducible to a concern about the quantum of damages, and if so, should we develop some means, legislative or common law, for preventing recovery that is clearly not compensatory?

Illustrative Caselaw

United States of America v Ivey (1995) 26 OR (3d) 533, *aff'd* (1996) 30 OR (3d) 370 (CA) (leave to appeal to SCC dismissed, 29 May 97)

Web Offset v Nagoya Venture; Web Offset v Montevideo unreported, 3 July 98 (Gen Div, *per* MacFarland J), leave to appeal to Div Ct dismissed, Quicklaw [1998] OJ 4292

Practice Point

- the attornment defence was not the only defence to enforcement — judgments that vindicate a criminal or otherwise public interest in another country could still be denied enforcement

6. Foreign judgments: Canadian rules for impeaching foreign judgments are changing

- the impeachment defences — fraud, natural justice and public policy — are regaining currency in the post-*Morguard* era., now that defendants have lost their *de facto* veto over forum selection and Canadian courts are being asked to enforce default judgments from fora in which defendants chose not to defend
- aspects which have troubled our courts include: jurisdiction assumed on the basis of assertions by plaintiffs' counsel with no practical opportunity to challenge the assertions, and assessments in default proceedings of unliquidated damages based on representations by plaintiffs' counsel that were not tested against evidence

Illustrative Caselaw

Ontario v Mar-Dive Corp (1996) 141 DLR 4th 577 (Ont Ct Gen Div)

Kidron v Grean, unreported, 10 April 96 (Gen Div, *per* Brennan J)

Beals v Saldanha (1998) 42 OR (3d) 127 (Gen Div)

Practice Point

- although it can still be unclear which of fraud, natural justice or public policy, should apply to a given case, Canadian courts are beginning to sense the necessity of a "judicial 'sniff-test'" for claims that, in the totality of the circumstances, should not be enforced

IV - Choice of Law

7. The provincial superior courts should take judicial notice of the law of other provinces

- this suggestion is not new; this is already permitted by statute in some provinces and could be occurring on an informal basis in others
- however, the *Morguard* jurisprudence, particularly *Tolofson*, might have established a constitutional imperative to do so
- the *Tolofson* mandate to apply the *lex loci* might not override the pleading requirements for applying another law but it could override the proof requirements with respect to the law of other provinces

Illustrative Caselaw

Nystrom v Tarnava (1996) 44 Alta LR (3d) 355 (QB) (*aff'g* on this point the Master's Order of 6 Mar 96)

Practice Point

- though this is perhaps more relevant to an agenda for legislative reform, support could be found in *Tolofson* for an obligation to take judicial notice of other provinces' laws

8. Tort: The *Tolofson* rule should be revised to prevent uncertainty (and accommodate the amazingly resilient flexible exception)

- *Tolofson* established a constitutional requirement of uniformity or decisional harmony in choice of law in tort in Canada
- *Tolofson* also established a choice of law rule requiring application of the *lex loci* always in interprovincial torts but acknowledged the need for flexibility in international torts
- so far, courts have confined themselves, in applying laws other than the *lex loci,* to international cases but it is far from clear that this will remain so where the application of the *lex loci* appears to work an injustice (rigidity does not always make for greater certainty)

Illustrative Caselaw

Hanlan v Sernesky (1998) 38 OR (3d) 479 (CA), *affg* (1997)35 OR (3d) 603 (Gen Div)

Wong v Wei (1999) 45 CCLT (2d) 105 (BCSC)

Practice Point

- A new, fairer rule will ultimately need to be developed — perhaps one based on the relationship between the parties (doctor-patient, consumer-manufacturer, etc). The law indicated by the parties' relationship might often coincide with the *lex loci,* but where it did not, it would prevail. In cases in which there was no definable relationship between the parties, the *lex loci* would apply

V - Contract Drafting and Opinion Writing

9. Contract Drafting: Choice of forum and choice of law clauses

- *Choice of forum clauses* - now, more than ever you get what you bargain for, e.g., a permissive choice of forum clause will be unlikely to preclude suit in an alternative forum, and an attornment clause will not preclude applications for *forum non conveniens* stays

Illustrative Caselaw

Underwriters at Lloyd's v Mauran (1997) 50 CCLI (2d) 219 (FC TD)

Practice Point

It is increasingly important to determine the precise effect on litigation that a jurisdiction clause will have when proposing or accepting particular terms

- *Choice of law clauses* - What do you bargain for with your choice of law clause?
- despite the fact that the governing law completes the terms of the contract and so is an integral part of it, if the dispute is litigated in a court other than that of the nominated governing law, entitlement to the application of that law could depend on pleading and proof
- accordingly, a choice of law clause may only be as good as the choice of forum clause that accompanies it or the willingness to litigate abroad to ensure that it is given effect to

Illustrative Caselaw

Old North State Brewing Co v Newlands [1999] 4 WWR 573 (BC CA) *aff'g* (1997) 47 BCLR (3d) 254

Practice Point

- choice of law clauses are no substitute for choice of jurisdiction clauses or for appearing in the foreign proceeding
- Could clauses tying enforceability to adherence to applicable law in dispute resolution provide added assurance?

10. Opinion Writing: The challenge of drafting opinions in a changing area of the law

- this area continues to develop rapidly, presenting a minefield of uncertainty for opinion writing
- typical examples of unfortunate advice have relied on the continued availability of the attornment defence — rather than gaining the ability to defend locally, defendants lost the ability to defend at all
- the "moving the goal posts" character of change in this area of the law, combined with the complexity of the area, and the general uneasiness about sending a client abroad to litigate or seek advice, can tempt lawyers to make unstated assumptions on which they base the advice
- also, the time frame for relevant change could be very different (e.g., in potential enforcement actions) from what it is in other litigation opinions
- this is not to recommend a particular standard of knowledge of the trends in this area of the law but to stress the need to frame advice in the alternative based on the various possible states of the law in this area

Illustrative Caselaw

Beals v Saldanha (1998) 42 OR (3d) 127 (Gen Div)

Practice Point

- despite complexity and uncertainty, clients should be sufficiently informed to maximize their ability to take responsibility for the risks inherent in crossborder transactions and/or litigation (e.g., despite the pitfalls of defending in other jurisdictions some clients *might* prefer it to the chance that they will not be permitted to defend at all)