Recent Conflict of Laws Cases

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THIS SURVEY COVERS THE years 1988 to 1991 because the incidence of Conflict of Laws cases in Manitoba is so small. The areas of Conflict of Laws which the surveyed cases involve are the effect of filing an appearance, *forum (non) conveniens* and *lis alibi pendens*, security for costs, and recognition of foreign judgments, including orders for costs.

I. FILING AN APPEARANCE

WHEN A DEFENDANT IS served *ex juris* with the originating process of a court and an aspect of the case is the subsequent recognition and enforcement of the court's judgment by the courts of some other place, including those of the place within which the defendant resides, the defendant must decide whether to respond at all and if so, how? Responses could be: filing an unconditional appearance (if the court is one in which the originating process is a writ of summons); filing a conditional appearance; moving (if the court is one in which the originating process is a statement of claim) to have the service *ex juris* set aside; or moving to have the action stayed or dismissed on the basis of abuse of process, *forum (non) conveniens*, *lis alibi pendens*, or a jurisdiction clause. Before making any of these responses, a defendant will want to determine whether the response will constitute a submission to the jurisdiction of the court, by either the law of the place of the court or the law of any place to which a judgment of the court may be taken for recognition and enforcement. Generally speaking, a judgment (including a default judgment) of a court to the jurisdiction of which the defendant has submitted will be recognized and enforced by the courts of other places. Whether a response constitutes a submission to jurisdiction can be determined by looking at the wording of any required forms for responses, at the rules of court, and at common law.

In *Canada Trustco Mortgage Co.* v. *Rene Management & Holdings Ltd.*,[1] the plaintiff sued the defendant in British Columbia, serving the defendant *ex juris* in Manitoba. The defendant filed an appearance

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[1] (1988), 53 Man. R. (2d) 276 (C.A.) [hereinafter *Canada Trustco*].

and took some other steps, ultimately allowing a default judgment to be entered. The judgment was registered in Manitoba by an *ex parte* order made pursuant to *The Reciprocal Enforcement of Judgments Act*.[2] On a reconsideration of the *ex parte* registration Mr. Justice Simonsen considered, inter alia, whether the filing of the appearance constituted a submission to the jurisdiction of the B.C. court.[3] He could have considered this matter in terms of the law of British Columbia or the law of Manitoba. The latter approach would involve considering the matter on a reciprocal basis: Had the action been commenced in the Manitoba Court of Queen's Bench, would the defendant's response be considered a submission to the jurisdiction of the Court? Mr. Justice Simonsen chose to look only to the law of British Columbia. He concluded that simply filing an appearance did not constitute a submission to the jurisdiction. The Manitoba Court of Appeal agreed with this conclusion, but decided that because of the other steps the defendant took, the defendant had submitted to the jurisdiction. Had the courts concluded that by the law of British Columbia a simple appearance constitutes a submission to the jurisdiction, and had the defendant not taken the additional steps, it would have been interesting to see if the courts would additionally have taken into account Manitoba's Queen's Bench Rule r. 17.06(4) to conclude that even though what the defendant did was a submission to the jurisdiction by the law of British Columbia, it would not be a submission to the jurisdiction by the law of Manitoba; and that, therefore, the defendant should not be held to have submitted to the jurisdiction.

II. *FORUM (NON) CONVENIENS* AND *LIS ALIBI PENDENS*

WHEN THERE ARE TWO or more courts in different places in which the parties could litigate their dispute, there are (besides abuse of process) two doctrines that courts have used to decide whether to stay, dismiss or enjoin proceedings, or to require an election. One of these two is the Scottish doctrine of *forum (non) conveniens*. *Forum (non) conveniens* is always stated in general terms. For instance, in *Antares Shipping Corp.* v. *The Capricorn*,[4] Mr. Justice Ritchie said:

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[2] C.C.S.M. c. J20.

[3] (1987), 45 Man. R. (2d) 161 (Q.B.).

[4] (1976), 65 D.L.R. (3d) 105 (S.C.C.) at 123.

> The factors affecting this doctrine ... include the balance of convenience to all the parties concerned, including the plaintiff, the undesirability of trespassing on the jurisdiction of a foreign State, the impropriety and inconvenience of trying a case in one country when the cause of action arose in another where the laws are different, and the cost of assembling foreign witnesses. In my view the overriding consideration which must guide the Court ... must ... be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.

English courts historically preferred a doctrine which, for convenience, can be labelled *lis alibi pendens*. The articulation of *lis alibi pendens* has always been more specific. For many decades Lord Scott's statement in *St. Pierre* v. *South American Stores (Gath and Chaves) Ltd.*,[5] was accepted as the gospel:

> The true rule about a stay ... may ... be stated thus: (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way and (b) the stay must not cause an injustice to the plaintiff. On both the burden is on the defendant.

In *The Atlantic Star*,[6] the House of Lords softened the second part of Lord Scott's statement. In *Rockware Glass Ltd.* v. *MacShannon*,[7] Lord Diplock said that the gist of the speeches made in *The Atlantic Star* is a restatement of the second part thus:

> (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.

Finally, in *Spiliada Maritime Corporation* v. *Cansulex Ltd.*,[8] the House of Lords clearly accepted the doctrine of *forum (non) conveniens*. This development may well mean that, for English courts, *lis alibi pendens* has gone by the board. However, in *SNI Aerospatiale* v.

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[5] [1936] 1 K.B. 389 at 392 [hereinafter *St. Pierre*].

[6] [1974] A.C. 436 (H.L.).

[7] [1978] A.C. 795 at 811–12 (H.L.).

[8] [1986] 3 All E.R. 843 (H.L.).

Lee Kui Jak,[9] the Judicial Committee of the Privy Council said "that the principles applicable to an injunction restraining foreign proceedings and those applicable to a stay of proceedings in favour of a foreign court [are] ... not the same."

Over the years, Canadian courts have variously used *forum (non) conveniens* and the two versions of *lis alibi pendens*.[10] In recent years the Manitoba courts, in cases in which a stay of the Manitoba action was requested, have made use of both *forum (non) conveniens*[11] and Lord Scott's *lis alibi pendens*.[12] In the most recent case, *Kornberg* v. *Kornberg*,[13] the Manitoba Court of Appeal indicated that it has clearly opted for *forum (non) conveniens* respecting a stay of a Manitoba action:

> In *Burt*,[14] the court approved the "clearly or distinctly more appropriate forum" test enunciated by Lord Goff ... in *Spiliada Maritime Corp.* v. *Cansulex Ltd.*, ... Although the test is simply stated, in its application "the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice." The matters the court should consider in determining whether a particular forum is clearly or distinctly the more appropriate forum will include factors connecting the case to the forum (and the important question as to whether jurisdiction is founded as of right), as well as personal and juridical advantages.

Kornberg also involved a request by the plaintiff for an (anti-suit) injunction against the defendant proceeding with her cross-action in Minnesota. The Manitoba Court of Appeal agreed with the Judicial Committee of the Privy Council in *SNI Aerospatiale* that different principles apply to the granting of a stay and the granting of an injunction. With reference to its earlier decision in *Aikmac Holdings*

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[9] [1987] 3 All E.R. 510 (P.C.) [hereinafter *SNI Aerospatiale*].

[10] *Bonaventure Systems Inc.* v. *Royal Bank of Canada* (1986) 32 D.L.R. (4th) 721 at 728–29 (Ont. H.C.).

[11] *Van Vogt* v. *All Canadian Group Distributors. Ltd.* (1967), 60 W.W.R. 729 (Man. Q.B.), aff'd without reasons 61 W.W.R. 704 (Man. C.A.); *Van Vogt* v. *All Canadian Group Distributors Ltd.* (1969), 71 W.W.R. 535 (Man. C.A.); *Suncorp Realty Inc.* v. *Reid*, [1984] 3 W.W.R. 219 (Man. C.A.); *Burt* v. *Clarkson Gordon* (1989), 60 Man. R. (2d) 149 (C.A.) [hereinafter *Burt*]; *Corrigal* v. *Hudson's Bay Co.* (1990), 63 Man. R. (2d) 274 (Q.B.); and *Dal Ponte* v. *Northern Manitoba Native Lodges Inc.* (1990), 64 Man. R. (2d) 241 (Q.B.) [hereinafter *Dal Ponte*] which is remarkable for being a motion for a stay by a plaintiff.

[12] *Capital Associations Ltd.* v. *All Canadian Group Distributors Ltd.* (12 May 1967), (Man. Q.B.) [unreported].

[13] (1990), 70 Man. R. (2d) 182 at 186 (C.A.) [hereinafter *Kornberg*].

[14] *Supra*, note 11.

Ltd. v. *Loewen*,[15] the Court said that an application for such an injunction respecting a foreign action raises the questions:

> If the [defendant] ... is permitted to proceed in the Minnesota court, will injustice result to the [plaintiff] ... ? Would those proceedings be vexatious or oppressive? Would an injunction restraining the [defendant] ... from continuing those proceedings result in an injustice to her?

The Court relied upon *SNI Aerospatiale* for these questions; they are virtually the second part of Lord Scott's *St. Pierre lis alibi pendens*.[16] Presumably, the first part of Lord Scott's *St. Pierre* statement is to be borne in mind as well. It is curious that the Privy Council and the Manitoba Court of Appeal have not stated the pertinent questions in terms of Lord Diplock's update of Lord Scott's statement.

III. SECURITY FOR COSTS

WHENEVER A DEFENDANT IS sued by a non-resident plaintiff, the defendant should consider applying for an order for security for costs. In Manitoba, such an application is made pursuant to Queen's Bench Rule r. 56. During the period being surveyed, the Manitoba Court of Queen's Bench considered such an application in three reported cases. The earliest of the three cases is *De Bono* v. *Smith*,[17] in which (according to the Court in one of the other two cases) Mr. Justice Hanssen "dealt exhaustively, extensively and very completely with rule 56."[18]

IV. RECOGNITION OF FOREIGN JUDGMENTS

MORGUARD INVESTMENTS LTD. V. *De Savoye*[19] is an important recent decision of the Supreme Court of Canada concerning the recognition of foreign *in personam* judgments. It supercedes, among others, a

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[15] (1989), 66 Man. R. (2d) 295 (C.A.).

[16] *Supra*, note 7.

[17] (1989), 62 Man. R. (2d) 98 (Q.B.).

[18] *Kennett* v. *Health Sciences Centre* (1990), 66 Man. R. (2d) 298 at 303 (Q.B.); but see *Dal Ponte*, *supra*, note 11 at 251–52, (aff'd without reasons 68 Man. R. (2d) 232 (C.A.)) in which Mr. Justice De Graves adds a point.

[19] [1990] 3 S.C.R. 1077 [hereinafter *Morguard*]. For a case comment see J. Blom, (1991) 70 Can. Bar Rev. 733.

Manitoba decision, *Rafferty's Restaurants Ltd.* v. *Sawchuk*,[20] which was a correct decision according to the law of its day. Recognition of foreign *in personam* judgments can be said to depend upon whether the court had jurisdiction in the international sense, which of course begs the question of what constitutes jurisdiction in the international sense. Usually, Lord Buckley in *Emanuel* v. *Symon*[21] is quoted for the answer. Lord Buckley reiterated the five bases of jurisdiction in the international sense. The Supreme Court of Canada has added two bases, namely reciprocity (insofar as judgments of courts of places other than Canadian provinces are concerned) and "real and substantial connection" (respecting judgments of courts of other Canadian provinces). As well, the Supreme Court added its voice to the doubt that has been expressed about the first of Lord Buckley's five bases.[22]

Reciprocity is recognizing the jurisdiction taken by a foreign court, which in similar circumstances would have been taken by the recognizing court. The real and substantial connection basis is borrowed from the proper law approach to choice of law. It remains to be seen how courts will apply it.[23] In any event it follows from this liberalization of the recognition of foreign *in personam* judgments that defendants cannot any longer so cavalierly ignore service *ex juris*.

Although a foreign court may have had jurisdiction in the international sense, its judgment may be refused recognition on a number of grounds, including, theoretically, public policy. In *Herzberg* v. *Manitoba*,[24] Mr. Justice Morse noted that in Canadian courts public policy has never been the basis of a refusal to recognize a foreign judgment. He did not accede to a public policy argument and neither did the Court of Appeal in the *Canada Trustco*[25] case, nor did his colleague, Mr. Justice Monnin, in *Honolulu Federal Savings and Loan Assoc.* v. *Robinson*.[26]

By common law, in an action for the recognition of a foreign judgment, the defendant can neither raise a defence that was or could

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[20] (1983), 20 Man. R. (2d) 440 (Man. Co. Ct.).

[21] [1908] 1 K.B. 302, 309 (C.A.).

[22] *Morguard, supra*, note 19 at 1088.

[23] Blom, *supra*, note 19 at 740–45.

[24] (1984), 27 Man. R. (2d) 262 at para. 17 (Q.B.).

[25] *Supra*, note 1.

[26] (1989), 62 Man. R. (2d) 150 (Q.B.).

have been raised in the foreign action nor argue error of fact or law.[27] For many years Manitoba was an odd jurisdiction in this regard, because the former s. 83 of *The Court of Queen's Bench Act*[28] allowed defendants to set up defences which were or could have been raised in the foreign action. Section 83 was not continued in the last revision of the *Queen's Bench Act*. Regarding the registration of foreign judgments pursuant to *The Reciprocal Enforcement of Judgments Act*, s. 3(6)(g) provides:

> 3(6) No order for registration shall be made if the court to which application for registration is made is satisfied that ....
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> (g) the judgment debtor would have a good defence if an action were brought on the judgment.

A similar or identical section exists in the comparable legislation of the other Canadian provinces. Until the Court of Appeal decision in *Canada Trustco*,[29] there was uncertainty in Manitoba about whether the words "good defence" in s. 3(6)(g) included a defence that was or could have been raised, either in the foreign action or if the plaintiff sued afresh in Manitoba. This was the interpretation given by Mr. Justice Simonsen in *Canada Trustco*.[30] As J.-G. Castel indicates,[31] in numerous other Canadian decisions the words "good defence" have been limited to a good defence to the recognition of the foreign judgment on bases other than a lack of jurisdiction in the international sense. These defences include lack of jurisdiction by the foreign court's rules, fraud, denial of natural justice, and that the judgment has to do with a revenue or penal law. The Court of Appeal in *Canada Trustco*[32] has apparently brought the interpretation of s. 3(6)(g) in line with the numerous other Canadian decisions.

Section 3(6)(g) was also the focus of Mr. Justice Hanssen's attention in *Technical Coatings Co. Ltd.* v. *Samuel Building Systems Ltd.*[33] The

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[27] *Godard* v. *Gray* (1870), L.R. 6 Q.B. 139.

[28] C.C.S.M. c. C280 [hereinafter *Queen's Bench Act*].

[29] *Supra*, note 1.

[30] *Supra*, note 3 at paras. 18–22; see also *Aero Trades Western Ltd.* v. *Ben Hocum & Son Ltd.*, [1975] 4 W.W.R. 412 (Man. Co. Ct.).

[31] *Canadian Conflict of Laws*, 2d ed. (Toronto: Butterworths, 1986) at 269 n. 192.

[32] *Supra*, note 1 at para. 35.

[33] (1990), 64 Man. R. (2d) 232 (Q.B.).

issue was whether the applicant was entitled to an order registering two foreign judgments for costs against the respondent. In *Koven* v. *Toole*,[34] the Manitoba Court of Appeal had rejected registration of a foreign order for costs on the basis of s. 3(6)(g) and three decisions, one of which the Court misread. The other two decisions were completely irrelevant. As Mr. Justice Hanssen indicates, *Koven* has been widely criticized and it is only in Manitoba that foreign orders for costs are not recognized and enforced. Pity, all the more so because Mr. Justice Hanssen felt constrained to conclude:

> I have been invited ... to overrule the decision in *Koven*. I cannot do so because it is a decision of a higher court. Even though I think it was wrongly decided ...[35]

[34] (1954), 13 W.W.R. (N.S.) 444 (Man. C.A.) [hereinafter *Koven*].

[35] *Supra*, note 33 at 235.