

Oakwell Engineering Limited v. Enernorth Industries Inc.: Questions of Burden and Bias in the Enforcement of Foreign Judgments

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In 1990 the Supreme Court of Canada made a strong statement in favour of comity in the recognition of out-of-province judgments in Morguard Investments Ltd. v. de Savoye. Thirteen years later, in Beals v. Saldanha, the Supreme Court of Canada confirmed that this generous approach to comity applies to judgments from outside of Canada as well, by relying on Morguard to recognize and enforce a judgment from Florida. Subsequently, many foreign judgments have been enforced in Canada pursuant to the generous rules provided in Beals. However, the large majority of these foreign judgments have been from one country - the United States.

In Oakwell Engineering Limited v. Enernorth Industries Inc. the Ontario Superior Court and Court of Appeal applied the generous Beals approach to comity to enforce a judgment from Singapore. In so doing, the Ontario courts addressed an allegation that the Singapore legal system had been systemically biased against the Canadian defendant. In rejecting that defence, the Ontario courts held that a reasonable apprehension of bias is insufficient to stop enforcement under Beals, and that actual bias must be established. The authors of this case comment argue against that strict approach.

En 1990, dans son arrêt Morguard Investments Ltd. c. de Savoye, la Cour suprême du Canada a formulé une déclaration très claire en faveur d'une adhésion courtoise aux jugements rendus dans d'autres provinces. Treize ans plus tard, dans Beals c. Saldanha, la Cour suprême du Canada a réaffirmé que son approche ouverte en matière d'adhésion courtoise s'applique aussi aux jugements de tribunaux étrangers, en se fondant sur l'arrêt Morguard pour reconnaître et faire exécuter un jugement rendu par un tribunal de la Floride. Ultérieurement, un grand nombre de jugements étrangers ont été exécutés au Canada en vertu des règles libérales découlant de l'arrêt Beals. Force est de constater, cependant, que la grande majorité de ces jugements étrangers ont été rendus dans un seul pays, à savoir les États-Unis.

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Dans l'arrêt Oakwell Engineering Limited c. Enernorth Industries Inc., la Cour supérieure de justice de l'Ontario et la Cour d'appel de l'Ontario ont appliqué les règles indulgentes de l'arrêt Beals pour faire exécuter un jugement rendu par un tribunal de Singapour. Pour ce faire, les tribunaux de l'Ontario ont traité d'une allégation selon laquelle le système juridique de Singapour avait systématiquement fait preuve de partialité contre le défendeur canadien. En rejetant cette défense, les tribunaux de l'Ontario ont statué qu'une crainte raisonnable de partialité ne suffit pas pour empêcher l'exécution d'un jugement en vertu de l'arrêt Beals, mais qu'il y a lieu d'établir l'existence d'une réelle partialité. Les auteurs du présent commentaire font valoir des arguments contre l'adoption de cette approche restrictive.

[Editor's note: After this comment was written, the Supreme Court of Canada refused leave to appeal. The authors have directed themselves only to the decisions of the Ontario courts.]

1. Introduction

When enforcing foreign judgments in Canada, should we presume that the legal systems of the world are unbiased, unless the defendant proves actual bias? The answer of the Ontario courts in *Oakwell Engineering Limited v. Enernorth Industries Inc.*¹ is that we should do so.

In its June 9, 2006 decision in *Oakwell v. Enernorth*, the Ontario Court of Appeal affirmed a Superior Court decision which held that defendants opposing the recognition of foreign judgments in the courts of Canada on the basis of alleged corruption or bias in the foreign court have the burden of proving "actual corruption or bias."² A reasonable apprehension of bias is therefore not sufficient to avoid enforcement in Canada.³

The context was an application by a Singapore company, Oakwell Engineering Limited, to enforce a judgment that it had received in contested hearings in the Singapore courts against a Canadian company, Enernorth Industries Ltd. Enernorth opposed enforcement primarily on the basis of an allegation that the Singapore judicial system is corrupt and biased, an allegation Oakwell denied. Enernorth was unsuccessful in

¹ (2006), 81 O.R. (3d) 288 (C.A.) [*Oakwell (CA)*], aff'g (2005), 76 O.R. (3d) 528 (Sup. Ct.) [*Oakwell (Sup. Ct.)*].

² *Oakwell (CA)*, *ibid.* at para. 22.

³ Leave to appeal requested at *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*, [2006] S.C.C.A. No. 343 (Q.L.) [*Oakwell(Leave request)*]; leave was denied on January 18, 2007.

both the Ontario Superior Court and Court of Appeal, both of which allowed enforcement of the Singapore judgment.

The decision in *Oakwell v Enernorth* demonstrates how far Canadian courts have gone in liberalizing the law on the enforcement of foreign judgments since *Morguard Investments Ltd. v. De Savoye*.⁴ Before *Morguard*, Canadian common law in this area was so conservative that we had the anomalous situation where judgments from one province were *prima facie* unenforceable in another province.⁵ In a revolutionary decision — one which eschewed the usual incrementalism of the common law — the Supreme Court of Canada in *Morguard* turned the law on its head, effectively holding that if there is a real and substantial connection between the dispute and the Canadian province that granted judgment, then the judgment is *prima facie* enforceable in all other provinces of Canada, even if such judgment was made by default. Subsequently, in *Beals v. Saldanha*⁶ the Supreme Court of Canada applied the generous *Morguard* approach to a judgment from a jurisdiction outside Canada.⁷

In *Oakwell v. Enernorth* the Ontario courts applied *Morguard* and *Beals*, but also took the law further. On the question of bias, the Ontario courts held as follows:

- (a) any question of bias in the foreign court is purely a defence such that the burden of proof lies solely with the defendant (the plaintiff is not required in any way to establish the fairness of the foreign process); and
- (b) the standard that the defendant must meet is to prove actual bias, rather than merely establishing a reasonable apprehension of bias.

This approach presumes that foreign courts are fair; if no evidence is led with respect to the foreign court system, the plaintiff succeeds on that point. Insofar as bias or corruption are concerned, this presumption in favour of the foreign court can only be rebutted by proof of actual bias

⁴ [1990] 3 S.C.R. 1077 [*Morguard*].

⁵ Pre-*Morguard*, a judgment from one Canadian province would not be enforceable in another province at common law unless the plaintiff could demonstrate that one of the requirements listed in *Emanuel v. Symon* applied, see *infra* note 10.

⁶ [2003] 3 S.C.R. 416 [*Beals*].

⁷ Several Canadian appellate decisions had already applied *Morguard* to American judgments prior to *Beals*; see e.g. *U.S.A. v. Ivey* (1996), 30 O.R. (3d) 370 (C.A.), leave to appeal refused [1996] S.C.C.A. No. 582; *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.), leave to appeal refused [1993] S.C.C.A. No. 496; and

or corruption. Thus, there has been a striking transition in Canadian law in the sixteen years since *Morguard*. Where Canadian courts once distrusted the judgments of fellow Canadian provinces, there is now a strong presumption of fairness in favour of all the courts of the world.

This generous approach creates a problem for Canadians involved in international commerce. If there is a real and substantial connection with a foreign jurisdiction whose courts are in fact biased, the foreign judgment coming out of such legal system will be enforced in Canada unless the defendant can meet the burden of actually proving such bias. This is impractical. The difficulty of proving actual bias is well-known.⁸ Further, in the absence of some tell-tale comment from the foreign court demonstrating bias, the Canadian defendant will be required to put the entire foreign judicial system on trial to attempt to prove that it is biased. The cost of such an exercise will be prohibitive to all but the wealthiest and most determined of Canadian litigants. Finally, our courts may be reluctant to make findings of actual bias with respect to a foreign legal system.

As will be argued below, the better approach would be to require Canadian defendants to establish only a reasonable apprehension of bias in respect of the foreign court. Such an approach would be consistent with how Canadian law treats allegations of bias in domestic courts, in that establishment of a reasonable apprehension of bias will generally invalidate a past decision of a Canadian court and give rise to a new trial.⁹

2. *The Development of the Law on Enforcement of Foreign Judgments: Emanuel, Morguard and Beals*

A. *The Pre-Morguard Approach to Interprovincial and Foreign Judgments*

For the better part of 100 years, the law in Canada relating to the enforcement of out-of-province *in personam* judgments stood as

Arrowmaster Incorporated v. Unique Forming Limited, [1993] O.J. No. 2737 (Gen. Div.).

⁸ See e.g. the reasons of Cory J. in *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 109 [*R.D.S.*]:

When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias.... It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.

⁹ See e.g. *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 at para. 6 [*Curragh*]; *R.D.S.*, *ibid.*

articulated by Buckley L.J. in *Emanuel v. Symon*¹⁰ in the following terms:

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 a 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.

As can be seen, the *Emanuel* approach to *in personam* jurisdiction was a private law or contractual type of approach. The focus was on whether the defendant had agreed, expressly or implicitly, to be subject to the jurisdiction of the foreign court.¹¹

Emanuel involved an attempt to enforce in England a default judgment from the courts of Western Australia. The plaintiff's application was unsuccessful on the basis that none of the five points listed by Buckley L.J. applied.

England, of course, is a unitary state. Despite the fact that Canada has been a federation since before *Emanuel*, "the English approach ... was unthinkingly adopted by the courts of this country, even in relation to judgments given in sister-provinces."¹²

As a result, in the pre-*Morguard* era Canadian defendants clearly had the ability to avoid losing their local assets as a result of adverse rulings in distant courts. They could refuse to submit to the jurisdiction of the out-of-province court and, assuming that they were not a subject or resident of that other province or country, they could require the matter to be relitigated on its merits in their home province.

at para. 102; and *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 [*Wewaykum*].

¹⁰ [1908] 1 K.B. 302 (C.A.) at 309 [*Emanuel*].

¹¹ Indeed the Supreme Court of Canada noted in *Morguard* that the first of the *Emanuel* criteria — where the defendant is a subject of the foreign country in which the judgment has been obtained, the judgment will be enforceable — was open to doubt; see *supra* note 4 at para. 16.

¹² *Ibid.* at para. 28. This anomalous situation was modified somewhat by the development of reciprocal enforcement of judgments legislation in most provinces of Canada, but those statutes contained an important exception: the out-of-province judgment will not be registered if the defendant was neither carrying on business nor ordinarily resident in the original jurisdiction, and did not voluntarily appear or otherwise submit to that court; see e.g. *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, s.

Even if the *Emanuel* criteria applied, so that the foreign judgment was *prima facie* enforceable, there were still certain defences — referred to as the “odious taint defences” — available to oppose enforcement. Specifically, the foreign judgment would not be enforced if it had been obtained by fraud, if there had been a breach of natural justice or manifest error in the foreign court,¹³ or if the foreign judgment was contrary to Canadian public policy. The defence of manifest error has fallen out of judicial favour, as has the term “odious taint.” The fraud, natural justice and public policy defences remain, though they are all narrowly construed.

B. Morguard v. de Savoye Investments

The *Emanuel* approach to the enforcement of foreign judgments was swept away with the Supreme Court of Canada decision in *Morguard* in December 1990.¹⁴

Morguard dealt with a claim by a mortgagee for a deficiency left owing subsequent to a foreclosure sale of real property in Alberta. The defendant de Savoye had resided in Alberta at the time the mortgage was granted, but moved to British Columbia shortly thereafter. The mortgage fell into default. De Savoye was a British Columbia resident by the time the action was brought in the Alberta Court; he was served in British Columbia but took no steps to defend, and default judgment was granted in Alberta.

When *Morguard* came to British Columbia to have its deficiency order recognized and enforced, it was met with the argument that the Alberta judgment was a “foreign” judgment that did not meet the *Emanuel* criteria. However, the Supreme Court of Canada jettisoned the *Emanuel* restrictions and this defence failed.¹⁵ Writing for a unanimous

29(6)(b).

¹³ *Messina v. Petrocchino* (1872), 4 L.R. P.C. 144 at 157.

¹⁴ There was some modifying and questioning of the *Emanuel* principles prior to *Morguard*. For example, the English courts adopted a different test with respect to the recognition of foreign divorce decrees, holding in *Indyka v. Indyka*, [1969] 1 A.C. 33 (H.L.) that English courts should recognize divorces from foreign courts wherever “a real and substantial connection” is shown between the petitioner and the territory whose courts granted the divorce. Also, in 1987 Gow J. of the B.C. County Court declined to follow *Emanuel* and instead enforced an Alberta default judgment on the basis of reciprocity (*i.e.* on the basis that if the facts had been reversed, British Columbia would have exercised jurisdiction in the same manner as the Alberta Court of Queens Bench) in *Marcotte v. Megson* (1987), 19 B.C.L.R. (2d) 300 (Co. Ct.).

¹⁵ Indeed, the B.C. Supreme Court and the B.C. Court of Appeal also refused to apply *Emanuel*, and both gave effect to the Alberta deficiency order.

Court, La Forest J. held that “the courts in one province should give full faith and credit ... to the judgments given by a court in another province or territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action.”¹⁶

The rejection of the *Emanuel* restrictions was based on public law concerns. The Supreme Court discussed the obvious intention of the constitution of Canada to create a single country, and concluded that this required a more generous approach to the recognition of judgments from other provinces (referred to here as “interprovincial” judgments, as distinct from foreign judgments). The Court also made certain comments with respect to private international law generally. Although *obiter dicta*, these are relevant to the enforcement of foreign judgments in Canada. Specifically, the Court stated that “accommodating the flow of wealth, skills and people across state lines has now become imperative.”¹⁷

The Court further held that “modern states ... cannot live in splendid isolation,”¹⁸ and cited with approval the following formulation of the concept of comity expressed by the United States Supreme Court in *Hilton v. Guyot*:¹⁹

“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.

However, the decision in *Morguard* did not signify that all out-of-province judgments would be enforceable. To the contrary, the Supreme Court stated that “fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.”²⁰

This creates two significant limitations on the *Morguard* principle: “fair process,” and “properly restrained jurisdiction.” In *Morguard*, the Court described at some length what would be required to find that a court had acted with such “properly restrained jurisdiction;” specifically, the plaintiff must show that there was a “real and substantial connection”

¹⁶ *Morguard*, *supra* note 4 at para. 41.

¹⁷ *Ibid.* at paras. 32, 34.

¹⁸ *Ibid.* at para. 29.

¹⁹ 159 U.S. 113 (1895) at 163-164 [*Hilton*].

²⁰ *Supra* note 4 at para. 42.

between the action and the territory of the court that granted the original judgment.²¹ On the issue of fair process, however, the Supreme Court gave very little guidance, holding instead that “fair process is not an issue within the Canadian federation” and that “the Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation.”²² Neither did the Supreme Court of Canada conduct any review with respect to the “odious taint” defences in *Morguard*.

C. Beals v. Saldanha

Morguard addressed the enforcement of a judgment from another Canadian province, rather than a truly foreign judgment. Thirteen years after its decision in *Morguard*, the Supreme Court of Canada applied in *Beals* the generous *Morguard* approach to a foreign judgment from the State of Florida.²³ The Supreme Court of Canada split six to three on whether the Florida judgment should be enforced.

The facts involved the sale of real property in Florida. The Canadian defendants purchased a vacant lot in Florida in 1981 for US\$4,000, referred to in the transfer documents as “Lot 2.” In 1983, they resold Lot 2 to the American plaintiffs for US\$8,000. Despite reference in the closing documents to “Lot 2,” the American plaintiffs claimed that they had intended to purchase another piece of property, Lot 1, and accused the defendants of falsely and fraudulently inducing them to buy Lot 2. The plaintiffs had purchased the lot for the purpose of building a model show home for their construction business. They began building on Lot 1. Some months after the sale, the plaintiffs learned that they were building on the wrong lot. In 1985, they commenced their first action against the defendants, claiming damages described in the pleadings only as “exceeding \$5,000.” The defendants filed a defence in that action, and it was subsequently dismissed without prejudice for having been brought in the wrong county. The plaintiffs brought a second action in 1986, in the correct county, in which they claimed not only damages in excess of \$5,000, but also treble damages on the basis of fraud. A Statement of Defence was filed for the defendants in this second action, though apparently without their knowledge.²⁴

²¹ *Ibid.* at para. 51.

²² *Ibid.* at paras. 37, 43.

²³ *Supra* note 6.

²⁴ *Ibid.* at paras. 5-7, 87-93.

The plaintiffs subsequently amended their Complaint²⁵ to include allegations against the title insurer. Under Florida rules of procedure, the defendants were required to refile their Statement of Defence every time the plaintiffs amended their Complaint, even if the amendments were solely directed at other defendants. The defendants never refiled, and they were found in default in 1990, after having received notice of the default application. The defendants were next served with notice of a jury trial to establish damages, which they apparently chose to ignore.²⁶ No doubt they regretted this decision in hindsight.

The plaintiffs' evidence before the Florida jury was that they had spent US\$14,000 in building on the wrong property. The jury awarded this actual expenditure plus US\$56,000 in lost profit. With treble damages, this came to US\$210,000. The jury also awarded US\$50,000 in punitive damages. Post-judgment interest was fixed at 12 per cent, compounding annually. With the then unfavourable exchange rate, this led to what Binnie J. described as the "Kafkaesque judgment"²⁷ of C\$800,000 by the time of the hearing in Ontario, on what was initially an US\$8,000 real estate transaction.

It is sometimes said that "hard facts make for bad law." The majority of the Supreme Court was not, however, willing to allow this to occur in *Beals*. Despite the stunning quantum of damages, the majority applied *Morguard*, and held that the Florida award was fully enforceable in Ontario.

Major J. wrote the reasons for a majority of six. He commenced by considering the question of jurisdiction, and held that the "real and substantial connection" test should apply equally to foreign judgments as to interprovincial judgments. In this respect, he noted that the need to accommodate the flow of wealth, skills and people across state lines is as important internationally as it is interprovincially.²⁸ There was clearly a real and substantial connection between this dispute and the state of Florida.

The majority held that once a real and substantial connection to the foreign jurisdiction has been found, the Canadian court should examine the defences that are available to resist enforcement of the foreign judgment — the "odious taint" defences. The majority noted that the three main defences are fraud, breach of natural justice and public policy.

²⁵ The equivalent of a Statement of Claim.

²⁶ *Beals*, *supra* note 6 at paras. 8-9, 98-109.

²⁷ *Ibid.* at para. 88.

²⁸ *Ibid.* at paras. 26-28.

They held, however, that these are not exhaustive, in that “unusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment.”²⁹

The majority gave detailed reasons on the defence of breach of natural justice. Unfortunately, these reasons seem somewhat contradictory on the question of which party bears the burden. On the one hand the majority stated that “the domestic court must be satisfied that minimum standards of fairness have been applied to the [Canadian] defendants by the foreign court,” and elaborated as follows:

Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. This determination will need to be made for *all* foreign judgments. Obviously, it is simpler for domestic courts to assess the fairness afforded ... in another province in Canada. In the case of judgments made by courts outside Canada, the review may be more difficult but it is *mandatory* and the enforcing court *must* be satisfied that fair process was used in awarding the judgment. This assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts.³⁰

The above language would seem to suggest that basic fairness of process is a positive requirement of the plaintiff’s case in attempting to enforce a foreign judgment in Canada. In other words, it suggests that if no evidence is led to address this “mandatory” review, the application to enforce the foreign judgment must fail. In the same passage, however, the majority also stated that it is *not* the duty of the plaintiff to establish that the foreign legal system is a fair one. Instead, the burden of “alleging unfairness” in the foreign legal system rests with the defendant.³¹ In *Oakwell v. Enernorth*, counsel for the Canadian defendant Enernorth seized upon the word “alleging” in the reference to the burden of “alleging unfairness,” and attempted to rationalize this apparent inconsistency as follows. The defendant has the evidentiary burden, Enernorth argued, to raise a credible issue of unfairness in the foreign process. Once the defendant meets that initial, evidentiary burden, the onus of proof shifts to the plaintiff to show substantively that the process giving rise to the foreign judgment was indeed fair.³² However, this argument based on shifting the onus was rejected by the Ontario courts.

²⁹ *Ibid.* at para. 42.

³⁰ *Ibid.* at paras. 60-62 [emphasis added].

³¹ *Ibid.* at para. 61.

³² *Oakwell (CA)*, *supra* note 1 (Memorandum of Fact and Law of the Appellant, at paras. 148 -161) [Memorandum].

The majority of the Supreme Court of Canada in *Beals* also addressed the defence of public policy. They upheld the longstanding notion that the defence based on public policy is “directed at the concept of repugnant laws and not repugnant facts.”³³ The majority stated that this defence would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. The majority also held that “similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.”

The use by the majority of the word “proven” in the sentence above was of considerable importance in *Oakwell v. Enernorth*. Both the Ontario Superior Court and the Court of Appeal relied upon that word from *Beals* to hold that a reasonable apprehension of bias in the foreign court would not be sufficient to deny enforcement of the foreign judgment. Instead, the defendant must establish actual bias. It will be suggested below that this was an error.

In *Beals*, the majority went on to hold that the defence of public policy is not a remedy to be used lightly, and that the expansion of the defence to perceived injustices that do not offend our sense of morality is unwarranted. In the circumstances of *Beals*, for example, the significant difference between the damages awarded in Florida and those which might have been awarded by a Canadian court was not sufficient to allow for the public policy defence.

There were two dissenting judgments in *Beals*. Binnie J. (for himself and Iacobucci J.) considered that the Florida judgment was unenforceable because of a breach of natural justice in the Florida proceedings. Binnie J. stated that “there is no doubt that Florida procedures in general conform to a reasonable standard of fairness.”³⁴ The question, however, was whether the Canadian defendants had been sufficiently informed of the case against them, both with respect to liability and potential financial consequences. Binnie J. considered that they had not been sufficiently informed for three reasons. First, the notice in the Complaint that damages were sought “in excess of \$5,000” did not give them any indication that they might end up with a judgment against them in the hundreds of thousands of dollars. Second, the Canadian defendants were not informed that, prior to the trial, the plaintiff settled with the realtor and the title insurer, which, as Binnie J. stated, “radically transformed the potential jeopardy.”³⁵ Finally, it was

³³ *Supra* note 6 at para. 71.

³⁴ *Ibid.* at para. 91.

³⁵ *Ibid.* at para. 104.

not brought to the Canadian defendants' attention that they were required to refile their Statement of Defence every time the plaintiff amended its Complaint, even if the amendments were solely directed at other defendants.³⁶

LeBel J. also dissented. He differed from the majority in two significant ways. First, he considered that the real and substantial connection test should be modified in the context of truly foreign judgments to take into account the potential burdens that Canadian defendants might face by being required to litigate in the foreign jurisdiction. Second, he considered that the defences available to defendants opposing enforcement in Canada needed to be re-examined in light of the liberal approach to comity taken by *Morguard*.

LeBel J. considered that the liberalizing philosophy that *Morguard* brought to foreign judgments should not be limited to the question of jurisdiction, but should also extend to the defences. He expressed the view that the majority had not used a sufficiently flexible approach to the defences, stating that "liberalizing the jurisdiction side of the analysis while retaining narrow, strictly construed categories on the defence side is not a coherent approach."³⁷ The former strict approach to the defences was appropriate pre-*Morguard* when the jurisdiction test was a difficult threshold for the foreign plaintiffs to cross. This balance was lost when the majority of the Court allowed a liberal approach to jurisdiction for plaintiffs, but maintained the strict approach to defences. Accordingly he considered that the majority had gone too far in liberalizing the law on foreign judgments, beyond that of other Commonwealth jurisdictions and the United States, and that this discrepancy could place Canadians in a disadvantageous position in international litigation against foreign plaintiffs.³⁸

LeBel J. stated that in extreme cases the foreign legal system itself may be inherently unfair, as not every country's courts are free of official corruption or systemic bias. He noted the two-fold requirement from *Morguard* that "fairness to the defendant requires that the judgment be issued by a court acting *through fair process* and with properly restrained jurisdiction."³⁹ He concluded that it should be part of the plaintiff's burden in establishing a *prima facie* case of enforceability to prove that the system from which the judgment came is basically fair. He further noted that when the foreign judgment comes from another democratic

³⁶ *Ibid.* at paras. 103-106.

³⁷ *Ibid.* at para. 135.

³⁸ *Ibid.* at paras. 136, 206, 212-218.

³⁹ *Ibid.* at para. 194 [emphasis in the original].

country with fair institutions, this burden will be easily met, and may even be dealt with through judicial notice.⁴⁰

In the result, the majority in *Bears* makes clear that the *Morguard* principle applies with full force to American judgments, and that the defences are to be narrowly construed. The wording of the *Bears* decision further suggests that this is not limited to American judgments, but can be applied to all foreign judgments, from any jurisdiction. This is significant because until very recently, and even post-*Bears*, almost all of the law concerning foreign judgments in Canada was related to judgments from the United States and the United Kingdom; there were very few cases where *Morguard* had been applied to foreign judgments from other countries, and the success rate for such judgments was seemingly lower.⁴¹

What has happened with the decisions in *Oakwell v. Enernorth* is that the very generous approach to American judgments outlined in *Bears* has been applied to a judgment from Singapore. That in itself is perhaps not surprising. What is surprising is that the Ontario courts have taken the one-line comment from *Bears* with respect to bias and have turned it into a strict rule requiring defendants to prove actual bias, as opposed to a reasonable apprehension of bias. Before turning to the *Oakwell v. Enernorth* decisions, however, it is useful to review the evidentiary record in that case.

3. The Evidentiary Record in *Oakwell v. Enernorth*

Oakwell v. Enernorth involved a joint venture between the Canadian company, Enernorth, and a Singapore company, Oakwell, to build and operate two barge-mounted plants in the state of Andhra Pradesh in India. Enernorth and Oakwell formed a project company that would finance, construct and operate the project, with Enernorth owning 87.5% of the company, and Oakwell the remaining 12.5%. Various disputes arose between the parties, in part due to delays and refusals by the Indian government to provide necessary licenses to the project company. The project stalled, and Oakwell commenced arbitration proceedings against Enernorth, claiming that it had failed to honour the joint venture

⁴⁰ *Ibid.* at paras. 193-195.

⁴¹ See e.g. *Leaton Leather and Trading Co. v. Ngai*, 147 D.L.R. (4th) 377, (*sub nom.* *Leaton Leather and Trading Co. v. Kong*) (Hong Kong judgment); *Angba v. Marie* (2004), 263 D.L.R. (4th) 562 (F.C.T.D.) (Ivory Coast judgment); *Cook Nook Hazelton Lanes Ltd. v. Trudeau Corp.*, [2003] 48 C.P.C. (5th) 330 (Ont. Sup. Ct.) (French judgment); *ATL Industries Inc. v. Han Eol Ind.*, [1995] 36 C.P.C. (3d) 288 (Ont. Gen. Div.) (Korean judgment).

agreement. These disputes were resolved by means of a settlement agreement in December 1998, which provided that any disputes that would arise in the future would be governed by Singapore law, and subject to the non-exclusive jurisdiction of the Singapore courts. As part of the settlement agreement, Enernorth bought out Oakwell's rights in the project in exchange for shares in Enernorth, a promise to pay US\$2.79 million when the project obtained successful financing (referred to as "financial closure"), and also royalty payments after the project became operational. Further difficulties arose, and financial closure was not achieved. Oakwell sued Enernorth in Singapore for non-payment of the US\$2.79 million, as well as non-payment of royalties.

Oakwell was successful in both the High Court of Singapore and in the Singapore Court of Appeal, with Enernorth actively participating in both proceedings.

Oakwell subsequently moved in the Ontario Superior Court to enforce its multi-million dollar Singapore judgment. In the Ontario proceedings, Enernorth put forward the affidavits of Nihal Jayawickrama, Ross Worthington, and Francis Seow, in an attempt to demonstrate significant problems with the Singapore judicial system.

Mr. Jayawickrama is a recognized expert on the world's legal systems, and the present Co-ordinator of the United Nations Program on Strengthening Judicial Integrity. He deposed that there is undeniably evidence of "quite widespread" corruption in the legal systems of many parts of the world, particularly in Asia, Africa, Eastern and Central Europe, and South and Central America.⁴² He deposed that corruption is associated with states that lack meaningful democracy and mechanisms of accountability, such as a free press and an active civil society.⁴³ Mr. Jayawickrama noted that judicial corruption is "a phenomena [sic] that is difficult to detect, because those who engage or benefit from corruption are rarely willing to admit it."⁴⁴ Mr. Jayawickrama gave numerous specific examples of judicial corruption throughout the world; though none of these were specifically related to Singapore, Mr. Jayawickrama did express in a reply affidavit some concerns relating to the exercise of control by the executive in Singapore.⁴⁵ Mr. Jayawickrama concluded with the opinion that "the integrity of the judicial system in many

⁴² *Oakwell (CA)*, *supra* note 1 (Appeal Book and Compendium of the Appellant, vol. 1, Affidavit of Nihal Jayawickrama at para. 9) [Jayawickrama Affidavit].

⁴³ Jayawickrama Affidavit, *ibid.* at paras. 37 to 40.

⁴⁴ *Ibid.* at para. 14.

⁴⁵ *Oakwell (CA)*, *supra* note 1 (Appeal Book and Compendium of the Appellant, vol. 2, Affidavit of Nihal Jayawickrama at paras. 4, 20).

countries is now compromised by corruption, making the product of those systems unreliable.”⁴⁶

Enernorth also filed a lengthy affidavit from Ross Worthington, an adjunct professor at Griffith University in Australia, who was described as having particular expertise on the subject of governance in Singapore.⁴⁷ His affidavit described a number of problems and autocratic tendencies within the Singapore government. In particular, he gave the unqualified opinion that the judicial branch of the government is not independent from the executive branch,⁴⁸ on the basis that “all aspects of governance in Singapore, including the judiciary, are carefully manipulated and ultimately controlled by a core executive of individuals...”⁴⁹

Finally, Enernorth relied on the affidavit of Francis Seow, a Singapore lawyer who had served as Solicitor General of Singapore from 1969 to 1972, as well as Judge Advocate-General to the Singapore Armed Forces, and President of the Singapore Law Society. Mr. Seow deposed that he was subsequently jailed in Singapore on what he described as an incorrect allegation that he had worked for the CIA;⁵⁰ he left Singapore permanently for the United States in 1988.⁵¹ Mr. Seow answered in the negative this question: “Is it reasonable to presume that the case at bar was heard by an independent judiciary in Singapore?”⁵² This is a question that has value in terms of reasonable apprehension of bias, but of course no value in terms of proving actual bias. Mr. Seow deposed that he knew from his long involvement in Singapore law and politics that the Singapore government is autocratic, and controls the judiciary.⁵³ Furthermore, Mr. Seow deposed that based on his knowledge of the judges that heard the case, as well as his knowledge of the identity of some of the shareholders in the Oakwell company, “[I]t cannot be stated with any confidence that the judiciary of Singapore... acted independently in relation to the interests involved in the present case.”⁵⁴ The evidence in this respect involved assertions that the principals of

⁴⁶ Jayawickrama Affidavit, *supra* note 42 at para. 45.

⁴⁷ *Oakwell(CA)*, *supra* note 1 (Appeal Book and Compendium of the Appellant, vol. 1, Affidavit of Ross Ronald Worthington, at para. 4) [Worthington Affidavit].

⁴⁸ See e.g. Worthington Affidavit, *ibid.* at para. 130.

⁴⁹ *Ibid.* at para. 22.

⁵⁰ *Oakwell(CA)*, *supra* note 1 (Appeal Book and Compendium of the Appellant, vol. 1, Affidavit of Francis Seow at para. 12) [Seow Affidavit].

⁵¹ Seow Affidavit, *ibid.* at para. 18.

⁵² *Ibid.* at para. 24.

⁵³ *Ibid.* at para. 25.

⁵⁴ *Ibid.* at para. 75.

Oakwell, the Koh Brothers, had connections with the Singapore government.⁵⁵

In defence of the Singapore judiciary, Oakwell countered with the affidavits of Robert Broadfoot, Jeffrey Pinsler, and Herman Jeremiah.

Mr. Broadfoot is the founder and managing director of Political & Economic Risk Consultancy Ltd., which he described as Asia's "premier country risk consulting firm."⁵⁶ Mr. Broadfoot had conducted various comparative surveys and risk reports on different southeast Asian countries, including Singapore.⁵⁷ These surveys measured the views of expatriate business executives living and working in southeast Asian countries. Mr. Broadfoot deposed that in 2004, as in virtually every previous year, Singapore had scored at the top of the surveys in most categories, including questions aimed specifically at the integrity of Singapore's legal system.⁵⁸ Mr. Broadfoot also challenged the allegation of corruption in Singapore, citing one of his firm's reports on perceptions of corruption, in which Singapore had the lowest level of perceived corruption in a survey which included the United States and Australia.⁵⁹

Jeffrey Pinsler is a member of the Faculty of Law at the National University of Singapore. Dr. Pinsler deposed as to the history and development of Singapore's legal system,⁶⁰ as well as the ability of a party to allege bias in a Singapore proceeding and apply to the judge to recuse himself.⁶¹ Dr. Pinsler also reviewed the proceedings in *Oakwell v. Enernorth* before the High Court of Singapore and stated his view that the decision was the product of a fair process in which the judge correctly applied the principles of law to the dispute.⁶² Moreover, he opined that the Singapore Court of Appeal was correct to dismiss the appeal.⁶³

Herman Jeremiah is a partner in the Singapore law firm that acted for Oakwell in the Singapore proceedings.⁶⁴ Mr. Jeremiah deposed to the

⁵⁵ *Ibid.* at para. 72.

⁵⁶ *Oakwell (CA)*, *supra* note 1 (Appeal Book and Compendium of the Appellant, vol. 2, Affidavit of Robert Broadfoot at para. 1) [Broadfoot Affidavit].

⁵⁷ Broadfoot Affidavit, *ibid.*

⁵⁸ *Ibid.* at para. 10.

⁵⁹ *Ibid.* at para. 14.

⁶⁰ *Oakwell (CA)*, *supra* note 1 (Appeal Book and Compendium of the Appellant, vol. 2, Affidavit of Jeffrey Pinsler at paras. 3 ff.) [Pinsler Affidavit].

⁶¹ Pinsler Affidavit, *ibid.* at para. 26.

⁶² *Ibid.* at paras. 29-30.

⁶³ *Ibid.* at para. 32.

⁶⁴ *Oakwell(CA)*, *supra* note 1 (Appeal Book and Compendium of the Appellant, vol. 2, Affidavit of Herman Jeremiah at para. 2) [Jeremiah Affidavit].

fairness of the Singapore proceedings and asserted that Enernorth had received a fair hearing before impartial judges.⁶⁵ He also denied an allegation by Mr. Seow that Oakwell is “well connected with the Government of Singapore.”⁶⁶

Finally, Oakwell defended the fairness of the Singapore process by pointing to the fact that Enernorth had won an important preliminary motion in Singapore, in which Oakwell had sought without success to strike Enernorth’s US\$175 million counterclaim.⁶⁷

4. *The Oakwell v. Enernorth Decisions*

Subsequent to receiving judgment in the Singapore courts, Oakwell brought application in the Ontario Superior Court for recognition and enforcement of its Singapore judgment in Ontario. Enernorth argued that Oakwell had to pass through three “filters” in order to enforce its judgment in Ontario:⁶⁸ first, jurisdiction under the real and substantial connection test; second, a determination by the Canadian court that the foreign legal system met Canadian constitutional standards; and third, a review of the available defences. The second filter proposed by Enernorth was controversial. In his judgment allowing Oakwell’s application, Day J. noted that although this proposed second filter found support in the dissent of LeBel J. in *Beals*, the majority in *Beals* did not provide for this second filter, but instead made clear that the burden of alleging unfairness in the foreign legal system lies with the Canadian defendant.⁶⁹ Day J. concluded that the majority decision in *Beals* stipulates only a two-stage test on recognition and enforcement of foreign judgments: first, whether the foreign court properly assumed jurisdiction under the real and substantial connection test; and second, whether the defendant can establish any of the defences.⁷⁰

Jurisdiction was not in issue, given the forum selection clause in the settlement agreement between the parties, and given Enernorth’s active participation in the Singapore proceedings. Day J. noted that Enernorth’s argument against enforcement related to the quality of justice in the Singapore courts, and he accordingly considered whether Enernorth had made out any of the defences enumerated in *Beals*.

⁶⁵ Jeremiah Affidavit, *ibid.* at para. 4.

⁶⁶ *Ibid.* at para. 5.

⁶⁷ *Oakwell (CA)*, *supra* note 1 (Factum of the Respondent at para. 18).

⁶⁸ Memorandum, *supra* note 32 at paras. 79-82. In *Oakwell (Sup. Ct.)*, *supra* note 1 at para. 13, the Court referred to the “quality of justice” rather than constitutional standards.

⁶⁹ *Oakwell (Sup. Ct.) ibid.* at paras. 13-15.

⁷⁰ *Ibid.* at para. 20.

Day J. first addressed the public policy defence. He noted the majority's comments in *Beals* that the defence is to have "narrow application," and that it is to be "directed at the concept of repugnant laws and not repugnant facts." He held that this defence did not apply because Enernorth was asserting repugnancy with respect to the facts arising out of the Singapore proceedings, and not repugnancy in the laws of Singapore.⁷¹

Day J. dealt with the question of bias in the Singapore courts at some length. He addressed first Enernorth's assertion that a reasonable apprehension of bias was sufficient to stop enforcement of the Singapore judgment. He noted that the Supreme Court of Canada has stipulated the test for reasonable apprehension of bias as follows in *Wewaykum*: "What would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude?"⁷² He also noted the requirement that there be serious grounds for such an allegation, as there is a strong presumption of judicial impartiality. He rejected the suggestion, however, that reasonable apprehension of bias could be sufficient to stop the enforcement of a foreign judgment. He noted that Enernorth had agreed to the forum selection clause in the settlement agreement and had not raised the issue of bias in Singapore. He further noted the majority's statement in *Beals* that "the public policy defence guards against the enforcement of a judgment rendered by a foreign court *proven* to be corrupt or biased." Since Enernorth was raising the issue of bias for the first time in the Canadian enforcement proceedings, he held that it must prove actual bias.⁷³

Day J. reviewed both the specific and the general allegations of bias proffered by Enernorth. The specific allegations related primarily to the fact that several of the judges involved were long time associates of the former Prime Minister of Singapore, who allegedly continued to be the key political figure in the country. Day J. concluded that "there would need to be much more specific and compelling evidence to prove bias or corruption."⁷⁴

The general allegations of bias were proffered in the expert witness affidavits of Jayawickrama, Worthington, and Seow. Day J. did not find these to be sufficient, concluding that "Enernorth has not discharged its

⁷¹ *Ibid.* at paras. 28-29.

⁷² *Supra* note 9 at para. 60, quoting *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at para. 19.

⁷³ *Oakwell (Sup. Ct.)*, *supra* note 1 at paras. 30-33. Day J. also stated that he would not have found a reasonable apprehension of bias, even if such was the test.

⁷⁴ *Ibid.* at paras. 34-40.

burden of proving unfairness in the foreign legal system.”⁷⁵ Of interest, however, is this comment:

Enernorth has alleged that because there is an institutional bias in Singapore’s courts, a fair trial is impossible. Oakwell, however, has drawn a distinction. While Oakwell acknowledges that Enernorth has tendered some evidence relating to possible government interference in trials, all of that evidence applies only to political cases. The case at bar is a commercial case. There is no evidence that Singapore courts are biased when deciding a commercial case between private parties.⁷⁶

Day J. was apparently concerned enough by the evidence of possible Singapore government interference in political trials to be careful to point out that this was a private commercial proceeding, and that there was no evidence of bias or unfairness in such proceedings.

With respect to the defence of breach of natural justice, Day J. noted the passage from the majority in *Beals* that “the domestic court must be satisfied that minimum standards of fairness have been applied to the Ontario defendants by the foreign court” but also noted that the majority had put “the burden of alleging unfairness in the foreign legal system” on the defendant. He noted several factors in favour of the Singapore legal system, such as its English common law tradition and the fact that its written constitution states that there shall be an independent and impartial judiciary. Finally, Day J. held that Enernorth should have alleged a failure of natural justice before the court in Singapore. He concluded that the evidence, taken as a whole, led to the conclusion on a balance of probabilities that both parties had enjoyed fair process in Singapore.⁷⁷

The Ontario Court of Appeal unanimously dismissed Enernorth’s appeal. Like Day J., the Court of Appeal rejected Enernorth’s proposed second filter — the requirement that the foreign legal system must meet Canadian constitutional standards — holding instead that the two requirements to enforce foreign judgments are a consideration of jurisdiction (the real and substantial connection test) and a consideration of the three defences of fraud, public policy and breach of natural justice.⁷⁸ The Court of Appeal also held that the burden with respect to

⁷⁵ *Ibid.* at para. 61.

⁷⁶ *Ibid.* at para. 58.

⁷⁷ *Ibid.* at para. 76.

⁷⁸ The court also noted that the Supreme Court of Canada in *Beals* had left open the possibility of the creation of new defences in special or unusual circumstances; see *Oakwell (C.A.)*, *supra* note 1 at para. 15.

the kind of fair process issues raised by Enernorth lies solely upon the defendant.⁷⁹

The Court of Appeal considered that *Beals* made it clear that “the party asserting bias must prove actual corruption or bias,” and concluded that the record supported the conclusion of Day J. that Enernorth had failed to prove actual corruption or bias.⁸⁰

The material filed in support of the application for leave to appeal to the Supreme Court of Canada included an affidavit from Schwebel J., who is the former President of the International Court of Justice at the Hague.⁸¹ Schwebel J. expressed the view that the Ontario Court of Appeal decision will have “a significant effect on the development of international law” in two respects.⁸²

First, Schwebel J. predicted that it will have an important impact on “conventional public international law,”⁸³ particularly with respect to the United Nations *International Covenant on Civil and Political Rights* (*ICCPR*). Article 14 of the *ICCPR* provides:

All persons shall be equal before the courts and tribunals. In the determination...of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.⁸⁴

Article 2 of the *ICCPR* requires the signatory states to provide an “effective remedy” to any person who has been denied such rights. Although Singapore is not a signatory to the *ICCPR*,⁸⁵ Schwebel J. noted that Canada is,⁸⁶ and thus has a treaty obligation to provide an effective remedy to any person that has suffered a violation of the *ICCPR* rights. He stated that in light of the Ontario Court of Appeal’s decision in

⁷⁹ *Ibid.* at paras. 12-16, 30.

⁸⁰ *Ibid.* at paras. 22-23.

⁸¹ *Oakwell(Leave request)*, *supra* note 2 (Evidence, Affidavit of Stephen M. Schwebel at para.3) [Schwebel Affidavit].

⁸² Schwebel Affidavit, *ibid.* at para. 9.

⁸³ Schwebel J. explains that “conventional public international law” refers to international law as expressed in treaties and other agreements to which states are parties, while “customary international law” arises out of the concordant practice of states accepted as law. Unlike conventional international law, which is binding only upon those signatories to the relevant treaties, customary international law is binding upon all states; see *ibid.* at paras. 10-13.

⁸⁴ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, art. 14, (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

⁸⁵ Schwebel Affidavit, *supra* note 81 at para. 17.

⁸⁶ *Ibid.* at para. 15.

Oakwell v. Enernorth, “there is room for the international legal community to question whether Canada adequately recognizes and enforces its international legal obligation under the *ICCPR* to ensure that judgments of its courts — including notably judgments that recognize and enforce foreign judgments through issuance of Canadian orders incorporating those judgments — reflect disposition by independent and impartial tribunals.”⁸⁷ He expressed the view that with respect to enforcing foreign judgments, Canada’s obligation is discharged only if the foreign judgment was itself rendered by an independent and impartial court.⁸⁸ Accordingly, he stated, the decision of the Ontario Court of Appeal will have an important effect on the integrity and legal effectiveness of the obligations undertaken by the signatories to the *ICCPR*.⁸⁹

Second, Schwebel J. suggested that *Oakwell v. Enernorth* will have an important effect regarding the status of judicial independence and the right to a fair hearing before an impartial tribunal as a principle of customary international law.⁹⁰ Customary international law, he stated, consists not of treaties but instead of “a general practice accepted as law” by states.⁹¹ It is binding upon all states. Schwebel J. noted that “it is notorious that the tribunals and courts of a number of States that are Members of the United Nations are neither regularly independent nor impartial” in practice, despite the fact that their constitutional documents formally require an independent and impartial judiciary.⁹² In the result, he said, it is at present open to question whether, as “a general practice accepted as law,” states are bound to operate independent and impartial courts.⁹³ Accordingly, he stated that the Ontario Court of Appeal decision in *Oakwell v. Enernorth* may be viewed as supporting the position that there is in fact no general practice accepted as international law establishing that states are bound to maintain independent and impartial courts.⁹⁴ Schwebel J. concluded, “In this case, however it is decided, Canada will necessarily provide evidence on whether there is, or is not, an effective obligation in international law for States to maintain independent and impartial courts.”⁹⁵

⁸⁷ *Ibid.* at para. 23.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* at paras. 9-23.

⁹⁰ *Ibid.* at para. 24.

⁹¹ *Ibid.* at para. 25.

⁹² *Ibid.* at para. 28.

⁹³ *Ibid.* at para. 24.

⁹⁴ *Ibid.* at para. 30.

⁹⁵ *Ibid.*

At the time of writing, Oakwell has not filed its responding material, and no decision on leave has been made by the Supreme Court of Canada.

5. *The State Bank of India v. Navaratna Decision*

As it happens, there is presently a second case making its way through the courts of Ontario regarding a request to enforce a Singapore judgment. In *State Bank of India v. Navaratna*,⁹⁶ Sachs J. of the Ontario Superior Court refused to allow a motion for summary judgment to enforce a Singapore judgment, in part on the basis that the Canadian defendants had raised a genuine issue as to whether the judgments were rendered by a court that was corrupt or biased. The Court decided that a trial should determine that issue.⁹⁷

The plaintiff bank obtained judgment against the Canadian defendants pursuant to personal guarantees the defendants gave on behalf of a company with which they were involved. The Canadian defendants asserted that they had a defence but they were not willing to appear in Singapore to argue it for fear of being arrested. They said according to the plaintiff, authorities in Singapore would detain them under the country's debtor laws.

The Canadian defendants in *Navaratna* relied on an affidavit from Mr. Seow,⁹⁸ as Enernorth had. Mr. Seow deposed that the Canadian defendants' fears of being imprisoned if they went to Singapore were well founded. Mr. Seow stated that banking is a dominant industry in Singapore and that to maintain favour with the international banks the Singapore government had passed laws which provide draconian remedies to ensure that the banks' economic interests are well protected. He further deposed that the Singapore courts actively apply such laws in furtherance of that policy.⁹⁹

The plaintiff challenged this evidence, and led evidence from a former Singapore judge to the effect that arrest is reserved for debtors who are guilty of conduct in the nature of fraud or contempt.¹⁰⁰ The plaintiff also gave evidence that they did file a formal complaint with the Singapore police, asking them to conduct an investigation of the defendants based on an allegation of criminal breach of trust, but the

⁹⁶ [2006] O.J. No. 1125 (Sup. Ct.) (Q.L.)[*Navaratna*].

⁹⁷ *Ibid.* at para. 57.

⁹⁸ *Ibid.* at para. 10.

⁹⁹ *Ibid.* at paras. 10-11.

¹⁰⁰ *Ibid.* at para. 24.

police concluded that there was insufficient evidence to prosecute.¹⁰¹ The defendant responded with evidence from a senior Singapore solicitor that under the Singapore *Debtors' Act* an affidavit alleging fraud, breach of trust or similar misconduct would be sufficient to trigger arrest.¹⁰²

Sachs J. concluded that the evidence did raise a genuine issue as to a material fact that would impede the enforcement of the Singapore default judgment — “namely, whether the judgments were rendered by a court that was corrupt or biased.”¹⁰³ Accordingly, a trial of the issue was required. Sachs J. stated that in finding this genuine issue, he was not accepting the allegation, or even stating that the case in support of the allegation was strong.¹⁰⁴

Thus, the Canadian defendants have enjoyed at least some temporary success in *Navaratna* on the basis of an allegation of corruption and bias in the Singapore court, unlike the defendant in *Oakwell v. Enernorth*. The cases have some similarities such as, of course, the particular foreign court in question. Further, Enernorth argued (without success) that it could not have raised the bias argument in Singapore without risking the possibility of imprisonment under Singapore's seditious laws. One difference is that Enernorth attorned to Singapore jurisdiction while in *Navaratna* the defendants did not.

6. Analysis and Conclusions

In *Oakwell v. Enernorth*, the record includes the affidavit of Nihal Jayawickrama, an undisputed expert on international legal systems. Mr. Jayawickrama deposed that there is undeniably evidence of “quite widespread” corruption in the legal systems of many countries, and particularly in Asia, Africa and Eastern and Central Europe, and South and Central America — in other words, in many and perhaps most of the world's legal systems.¹⁰⁵ The evidence of Schwebel J. on the application for leave to appeal is to the same effect.¹⁰⁶

The rule in *Oakwell v. Enernorth* can be described as follows. Regardless of the foreign country involved, if the real and substantial connection test for jurisdiction is met, the foreign judgment will be

¹⁰¹ *Ibid.* at para. 23-31. One might question whether this evidence was a double-edged sword.

¹⁰² *Ibid.* at para. 30

¹⁰³ *Ibid.* at para. 57.

¹⁰⁴ *Ibid.*

¹⁰⁵ Jayawickrama Affidavit, *supra* note 42 at para. 9.

¹⁰⁶ Schwebel Affidavit, *supra* note 81 at para. 28.

enforced unless the defendant can meet the burden of establishing one of the narrow defences outlined in *Beals*. On the specific question of alleged bias in the foreign court, a reasonable apprehension of bias is insufficient to stop enforcement. Instead, the defendant has the burden of proving actual bias in the foreign court.

This rule has the effect of treating all of the world's legal systems as presumptively fair. They will be treated as fair, in other words, unless the defendant can meet the burden of proving otherwise. And with respect to bias, nothing short of proof of actual bias will suffice.

The rule in *Oakwell v. Enernorth* is both jurisprudentially and logically problematic.

Jurisprudentially, in *Morguard* the Supreme Court of Canada stated that "fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction."¹⁰⁷ *Oakwell v. Enernorth* has effectively reworded these *Morguard* requirements to say that fairness to the defendant requires only that the foreign court acted with properly restrained jurisdiction, and that the defendant be granted in Canada an opportunity to establish one of the very narrow defences outlined in *Beals*.

What makes *Oakwell v. Enernorth* particularly significant is that it is the first appellate-level Canadian decision post-*Beals* to address an argument that a foreign judgment should not be enforced because the legal system that generated it is systemically unfair. Although both Day J. and the Ontario Court of Appeal relied heavily on *Beals* in holding that *Oakwell's* Singapore judgment was enforceable, *Beals* dealt with a different situation. There was no issue in *Beals* as to the fairness of the Florida judicial system as a whole. Instead, the issue was whether the Florida court documents that were served upon the Canadian defendants had failed to provide key information (such as that pertaining to the extent of their potential jeopardy), thus creating a specific unfairness within an otherwise fair process. Quite clearly, that is an appropriate matter for the natural justice defence. By contrast, in *Oakwell v. Enernorth* it is not alleged that there was a particular document or procedural step that had an unfair impact; instead it is alleged that the entire legal system that created the judgment is unfair and biased. Thus, the Ontario courts have erred in treating *Oakwell v. Enernorth* as though an unproblematic application of *Beals* can be made.

¹⁰⁷ *Supra* note 4 at para. 42-43.

At the highest and most abstract level, by treating *Oakwell v. Enernorth* as a straight application of *Beals*, the Ontario courts have failed to address the importance of the concept of comity in the post-*Morguard* era. As outlined by the United States Supreme Court in *Hilton* and quoted by the Supreme Court of Canada in *Morguard*, comity is a public law concept relating to the recognition and respect that our courts should give to the actions of foreign courts, “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.”¹⁰⁸ No one suggested in *Beals* that the courts of Florida were not entitled to comity in Canadian courts. The only question was whether there were particular problems with that specific case. By contrast, the defendant’s central assertion in *Oakwell v. Enernorth* is that the foreign court itself is not entitled to comity. That is a different issue than that raised in *Beals*, and it is not easily dealt with under the rubric of the narrow *Beals* defences.

On the specific question of bias, the Ontario courts in *Oakwell v. Enernorth* have taken one line of *obiter dicta* from the majority decision in *Beals* — “Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court *proven* to be corrupt or biased”¹⁰⁹ — and have turned it into a strict rule of law that evidence of bias in the foreign court has no impact on the Canadian enforcement application unless it rises to the level of proving actual bias, as part of a narrowly construed public policy defence. Further, the Ontario courts have done so in the face of Mr. Jayawickrama’s uncontradicted evidence that many and perhaps most of the world’s legal systems suffer from “quite widespread” corruption.

This leads to the logical problems with *Oakwell v. Enernorth*. If it is accepted that Mr. Jayawickrama is correct, and that there are significant problems with corruption in the legal systems of most parts of the world, why is Canada developing a legal rule that all of the world’s legal systems will be treated as presumptively fair when it comes to enforcement proceedings in Canada? And why are the courts taking it further and requiring defendants to prove actual bias in the foreign court in order to rebut this presumption, rather than the lower test of reasonable apprehension of bias?

The well-known test to set aside a previously-rendered Canadian decision on the basis of bias is reasonable apprehension of bias. As Cory J. stated in *R.D.S.*, only a reasonable apprehension of bias is required,

¹⁰⁸ *Hilton*, *supra* note 19 at 164, quoted in *Morguard*, *supra* note 4 at 1096.

¹⁰⁹ *Oakwell (Sup. Ct.)*, *supra* note 1 at para. 32, quoting from *Beals*, *supra* note 6 at 72 [emphasis added].

rather than actual bias, “because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.”¹¹⁰ Furthermore, the Supreme Court of Canada has stated clearly that where a reasonable apprehension of bias is shown it will ordinarily lead inexorably to a new trial.¹¹¹ Indeed, in *R.D.S.*, Cory J. indicated that if the trial judge’s reasons demonstrated actual or perceivable bias, then the appellate court not only had the jurisdiction to overturn, but indeed an obligation to order a new trial.¹¹² It is respectfully suggested that there is no basis upon which foreign courts should receive greater deference than Canadian courts on the question of bias, and indeed in light of Mr. Jayawickrama’s evidence, the deference if anything should be lower. The reference to the need to “prove” corruption or bias in the majority’s decision in *Beals* was *obiter dicta*, and the Ontario courts have erred in turning it into a rule of law.

The Manitoba Court of Queen’s Bench addressed the question of bias in the context of an application to enforce an Arkansas judgment in its 2005 decision of *Ultracuts v. Wal-Mart Canada*,¹¹³ and applied a reasonable apprehension test. The allegation was that Ultracuts had not received a fair hearing in Arkansas because two of the Arkansas judges had shareholdings in Wal-Mart. The Manitoba court held that the proper test was reasonable apprehension of bias, noting the passage from *R.D.S.* that actual bias is usually impossible to determine.¹¹⁴ Like Day J. in *Oakwell v. Enernorth*, the Manitoba court was concerned by the fact that the allegation of bias had not first been made in the foreign proceeding. However, the Court noted that “a party might be excused from making a motion to the judge to recuse where it can be shown that to do so would have been futile...”¹¹⁵ It would be futile in any matter like *Oakwell v. Enernorth*, where it is alleged that the entire foreign judicial system is biased. In such an instance, even if the foreign judge were to recuse, he or she would simply be replaced by another judge of the same impugned court. Equally, Canadians may be unfamiliar with the foreign court and may not come to the conclusion that the foreign court was biased until after the completion of the foreign court process.

On the question of bias, Day J. considered it important that Enernorth had attorned to the Singapore jurisdiction.¹¹⁶ However, the loss of the old *Emanuel* criteria on jurisdiction in favour of the real and

¹¹⁰ *Supra*, note 8 at para. 109.

¹¹¹ *Curragh*, *supra* note 9 at para. 5.

¹¹² *Supra* note 8 at para. 102.

¹¹³ (2005), 196 Man. R. (2d) 163 (Q.B.).

¹¹⁴ *Ibid.* at para. 17.

¹¹⁵ *Ibid.* at para. 89.

¹¹⁶ *Oakwell (Sup. Ct.)*, *supra* note 1 at para. 31.

substantial connection test virtually requires parties to attorn and participate in the foreign process where there is some meaningful connection between the foreign jurisdiction and the dispute in question. Furthermore, the suggestion that by participating in a proceeding a party loses its right to subsequently oppose enforcement in its home jurisdiction based on bias was expressly rejected by the United States Court of Appeals (2nd Circuit) in *Bridgeway Corp. v. Citibank*.¹¹⁷ The Court of Appeals rejected the suggestion that because Citibank had voluntarily participated in litigation in Liberia it was fundamentally inconsistent for Citibank to assert in the New York enforcement proceeding that the Liberian court was unlikely to have been an impartial forum, or one that followed due process. Instead, the Court of Appeals held that “defending a suit where one has been haled into court, and suing where jurisdiction and venue readily exist do not constitute assertions that the relevant courts are fair and impartial.”¹¹⁸

Oakwell v. Enernorth is an important case given the large numbers of Canadians involved in international commerce. Looking ahead, there will be many cases where Canadian courts will be asked to enforce foreign judgments that do not come from another Canadian province, as in *Morguard*, or an American state, as in *Beals*. No doubt, Canadians who engage in international commerce cannot expect to hide from their own wrongdoing behind the borders of Canada. But they can expect to have their rights and liabilities determined through a fair process — *Morguard* requires no less. In cases where credible allegations are made of bias or corruption in the foreign court, how are such to be resolved? The law as expressed in *Oakwell v. Enernorth* does not provide a satisfactory answer. It will lead to unfairness for many Canadians. Specifically, it will mean that where Canadians are faced with a biased court in a foreign country that had a real and substantial connection to the dispute, such Canadian defendants will only receive the unfair hearing in the foreign court, followed by a truncated hearing in Canada in which the burden lies entirely upon them to prove actual bias within the constraints of a few, narrowly construed defences. The Canadian defendant’s ability to raise the merits of the dispute in the context of such narrow defences will be severely restricted, as may be the rights of oral and documentary discovery. And as noted, actual bias is “usually impossible to determine.”¹¹⁹ For most defendants in that situation, there will never be a fair hearing on the merits.

¹¹⁷ 201 F. 3d 134.

¹¹⁸ *Ibid.* at para. 8.

¹¹⁹ *Supra* note 8 at para. 109.

Although it may not be a complete answer, a positive development would be for Canadian law to require only that a defendant establish a reasonable apprehension of bias in the foreign court, as opposed to proving actual bias. Such a burden could only be satisfied by producing credible and cogent evidence, but it would take into account the difficulties of proving actual bias.¹²⁰ A plaintiff in an enforcement application in Canada, faced with credible evidence of bias in the foreign court, would still have several options: it could lead evidence attempting to establish the fairness and propriety of the foreign court process; it could abandon the enforcement application and re-litigate the matter on the merits in Canada; or it could seek, where possible, to enforce its judgment outside of Canada. In other words, the foreign plaintiff would not be left without a remedy, though no doubt its expense would be increased. This is a preferable approach to that taken in *Oakwell v. Enernorth* which, as outlined above, can lead to the result where a defendant never receives a fair hearing on the merits.

Given the majority's *obiter dicta* on the need to "prove" bias or corruption in *Beals*, now bolstered by the Ontario courts in *Oakwell v. Enernorth*, it appears that the Supreme Court of Canada will have to revisit the question of foreign judgments in order for such an approach to become accepted as Canadian law. *Enernorth's* application for leave to appeal from the Ontario Court of Appeal provides the Supreme Court of Canada with such an opportunity.

¹²⁰ See e.g. *ibid.* at paras. 113, 158; and *Arsenault-Cameron v. P.E.I.*, [1993] 3 S.C.R. 851.