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(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

CLE OWNERS INC., OLFMAN BROTHERS INCORPORATED, S & J OLFMAN, JERRY ALAN OLFMAN, and SHAWN DAVID OLFMAN	)	Shawn D. Olfman for the (Plaintiffs) Respondents
(Plaintiffs) Respondents,	)	
- and -	)	
STANLEY GLEN WANLASS, and RENAISSANCE INTERNATIONAL INC.	)	David M. Wright for the (Defendants) Appellants.
(Defendants) Appellants.	)	
	)	JUDGMENT DELIVERED: February 11, 2004

GREENBERG J.

[1] Jerry and Shawn Olfman invented a game, called Capture, to be played on a three level game board. The game board and pieces were to be made out of bronze so that the game could be sold as both a game and a piece of art. To that end, they hired the defendant, Stanley Wanlass, an American sculptor, to design and sculpt the board and pieces.

[2] There was a falling out between the parties, as a result of which Wanlass commenced an action in the state of Oregon asking the court to declare that he had satisfied his obligations under his contract with the plaintiffs. Shortly thereafter, the plaintiffs commenced this action in Manitoba, asking the court for

a declaration as to their rights under the contract. The plaintiffs did not defend the Oregon action and Wanlass obtained a default judgment against them. The defendants now ask this court to strike the Manitoba claim on the basis that the plaintiffs' claim is *res judicata.* This is an appeal of the decision of the Master dismissing the defendants' motion.

BACKGROUND

[3] The Olfman brothers spent several years developing the game of Capture. They obtained patents in both Canada and the United States. In 1985 they ran an international competition to select a sculptor to design and sculpt the game pieces and game board.

[4] Stanley Wanlass entered and won the competition. The plaintiffs went to Oregon, where Wanlass resided, to meet Wanlass and to negotiate the terms of an agreement. On December 15, 1986, an agreement was executed by the parties in Oregon.

[5] The agreement provided that Wanlass would design the playing board and each of five different playing pieces. The designs would be subject to the approval of the Olfman brothers. Wanlass would assist in choosing a foundry to cast the pieces in bronze. The game would be produced in a limited edition of 2000 sets. Wanlass was to assist in the promotion of the game and was to provide the Olfmans with a list of his past customers for marketing purposes. Wanlass was to receive no fee for his work but instead would receive 6% of the retail selling price of the game sets which would be sold for $4,000 U.S. each.

[6] During the next two years Wanlass designed, with input from the Olfmans, the various playing pieces and the game board. He also produced the wax models that would be used by the foundry to create the moulds from which the pieces would be cast.

[7] In the summer of 1988, on Wanlass' recommendation, the Olfmans hired Wasatch Bronzeworks, a foundry in Utah, where Wanlass had moved, to cast the board and pieces. Wasatch used the models created by Wanlass to create moulds for the game board and pieces and then produced master copies from these moulds. The master copies were sent to the Olfmans in 1989.

[8] In August 1989, the Olfmans terminated their relationship with Wasatch. There subsequently arose a dispute as to what happened to the original moulds from which the master copies were cast. In their statement of claim, among other things, the plaintiffs ask for a declaration that Wanlass must return the moulds to them. Wanlass claims that he has never had the moulds; they were made and kept by the foundry. According to Neil Hadlock, the owner of Wasatch, the moulds, which are made of rubber, have a shelf life of only four to five years. The foundry stored the moulds for several years but destroyed them in 1994 because they had disintegrated.

[9] In the meantime, in September 1988, Wanlass and the Olfmans negotiated a new agreement to replace the 1986 agreement. It appears that the main reason for the new agreement was to include as a party Renaissance International Inc., a corporation that had been set up by Wanlass. The new

1988 agreement is essentially the same as the 1986 agreement. In fact, it incorporates the earlier agreement in its entirety. The only major changes are that the price of the game is raised to $8,000 U.S. and that Wanlass' commissions are to be paid to Renaissance. The agreement was signed by Wanlass on September 9, 1988 in Utah. It was subsequently signed by Jerry Olfman, on behalf of S & J Olfman, on September 14, 1988.

[10] Although the 1988 agreement shows the agreement as being signed by Olfman in Winnipeg, there is some dispute between the parties as to where it actually was signed. Wanlass recalls that Olfman signed the agreement while in Utah. The Olfmans insist that the agreement was signed in Winnipeg. The documentary evidence supports the Olfmans' recollection of events. The Olfmans attempt to place great emphasis on this discrepancy. They suggest that it is one of many "lies" that the defendants have put before this court and the court in Oregon. While I accept the plaintiffs' version of this event, I have no reason to find that Wanlass lied about it. He has sworn an affidavit in which he attempts to recollect events that occurred some 15 years ago. The Olfmans were in fact in Utah to visit Wanlass in June 1988, two months before the agreement was executed. Wanlass may be confusing the visits. No attempt was made by the plaintiffs to cross-examine Wanlass on his affidavit. In any event, as I will explain below, the event is not of great significance to the issues in this case.

[11] After the second agreement was executed, the Olfmans proceeded, without success, to try to market the game. Wanlass heard nothing from the Olfmans between 1992 and 2002. No games were ever sold during that period or since and the defendants have never received any remuneration for the work Wanlass did.

[12] In January 2002, the plaintiffs wrote to Wanlass to advise him that they were starting a new marketing campaign and to confirm Wanlass' participation. Wanlass' lawyer wrote back to the plaintiffs indicating that Wanlass had retired, that he had health problems related to his work and that he was no longer interested in being involved. It was essentially the defendants' position that they were entitled to treat the agreement as terminated considering the plaintiffs' delay in marketing the project and their failure to communicate with Wanlass for a decade.

[13] When the plaintiffs learned that Wanlass was no longer interested in the project, they wrote to Wanlass threatening to sue him for several million dollars if he did not begin to make new wax models of the game. They also threatened to contact the FBI if Wanlass did not return the moulds for the game pieces that had been created by Wasatch. In April 2002, Shawn Olfman wrote to the FBI to report Wanlass' "theft" of the moulds.

[14] On April 17, 2002, Wanlass and Renaissance commenced an action in Oregon seeking a declaration that they had performed all of their obligations under the agreement and owed no further performance on the agreement. The

plaintiffs were served with the claim on May 5, 2002, however, never filed a response to it.

[15] On May 21, 2002, the plaintiffs filed a statement of claim in Manitoba seeking a declaration as to their rights under the contract with the defendants. The plaintiffs' claim was served on the defendants on May 30, 2002.

[16] On July 23, 2002, the defendants obtained default judgment in the Oregon action. The default judgment was not served on the plaintiffs. The plaintiffs became aware of the default judgment when they were served in October 2002 with the motion, before the court now, seeking to strike the plaintiffs' claim.

[17] On November 12, 2002, the defendants filed a statement of defence claiming that the plaintiffs' claim was *res judicata* but also pleading to the merits of the plaintiffs' claim.

ISSUES

[18] The defendants' motion is based on *res judicata*. They claim, quite simply, that the issues raised in the plaintiffs' claim have already been decided by another court and, therefore, give rise to issue estoppel. However, there are two complicating factors in applying the law on *res judicata*. First, the judgment being relied upon to block the plaintiffs' claim is a default judgment. Second, the judgment is the judgment of a foreign court. The issues that arise as a result of these factors are:

1. Can a default judgment give rise to a claim of *res judicata*?

2. If so, have the defendants satisfied the preconditions for *res judicata* – Is the Oregon judgment i) a final decision, of a court with jurisdiction to decide the issue, ii) between the same parties iii) which addresses the same subject matter raised in the plaintiffs' action?
3. Can *res judicata* be relied upon where the earlier judgment is the judgment of a foreign court and, if so, on what basis?
4. Have the defendants met that test?
5. Are there any defences available to prevent reliance on the foreign judgment?
6. Should the court exercise its discretion to apply issue estoppel?

CAN A DEFAULT JUDGMENT GIVE RISE TO A CLAIM OF *RES JUDICATA*?

[19] The simple answer to this question appears to be yes (***Chackowsky v. Precision Toyota Ltd.*** (1990), 64 Man. R. (2d) 156 (Q.B.); ***Brass Tacks Concrete & Drilling Ltd. v. Gateway Construction & Engineering Ltd.***, 2000 MBQB 194).

[20] However, when dealing with a default judgment, the court must exercise caution in applying the test for issue estoppel, in particular in determining whether the judgment deals with the same issues raised in the challenged proceeding. As stated by Finch J. (as he then was) in ***Harland v. Williams***, [1993] B.C.J. No. 1047 (S.C.)(QL):

> 155 It appears to be well established that a restrictive operation must be given to an estoppel arising from a default judgment. A judgment in default can only be used to estop what must "necessarily and with complete precision" have been determined in that proceeding. The

> reasoning behind this cautious approach to estoppel pleas based on judgments obtained in default, is that the policy considerations which underlie the principle of estoppel per rem judicatam do not necessarily apply to uncontested proceedings. There are many reasons why a party might allow a default judgment to be entered against him or her. The litigation may be inconvenient, expensive, or the party might simply be unaware that he has a potential defence or counter-claim. Courts appear generally to be of the view that this should not prevent a litigant from subsequently raising important issues which were not necessarily decided by the default judgment.

HAVE THE DEFENDANTS SATISFIED THE TEST FOR ISSUE ESTOPPEL?

[21] In determining whether the plaintiffs are estopped from proceeding with this action, the court must apply a two-step process. First, the court must determine whether the moving party has established the preconditions to issue estoppel. Second, if the preconditions are established, the court must decide whether to exercise its discretion to apply estoppel (***Danyluk v. Ainsworth Technologies Inc.***, 2001 SCC 44, at par. 33).

[22] To establish the preconditions for estoppel, the defendants must show that the judgment of the Oregon court 1) was a final decision of a court with jurisdiction to decide the issues; 2) that it was between the same parties; and 3) that it decided the same issues that are before this court.

[23] There is no question that the Oregon judgment involved the same parties as are before the court now and that it was a final decision of that court. The contentious points are whether the Oregon judgment decided the same issues that are before this court and whether the Oregon court had jurisdiction to decide those issues.

DID THE OREGON COURT DECIDE THE ISSUES RAISED IN THE PLAINTIFFS' CLAIM?

[24] The plaintiffs argue that the Oregon judgment does not address the many issues raised in their claim. The plaintiffs point to the 24 heads of relief set out in their statement of claim and argue that the six declaratory paragraphs in the Oregon judgment do not address every issue that they raise. However, while the plaintiffs have broken down the questions that their claim raises into 24 constituent parts, the substantive claims in the two actions are identical.

[25] In the Oregon claim, the defendants sought a declaration as to their rights and obligations under their contract with the plaintiffs. They asked the court to find that they were not in breach of their obligations under the 1986 or 1988 contract and that they had no continuing obligations under the contracts. The court granted the declaration sought. The declaration granted necessarily covers the various heads of relief claimed by the plaintiffs.

[26] All the claims made by the plaintiffs in the Manitoba action relate to the interpretation of the contract with the defendants and the determination of the rights and obligations under it. By way of example, the plaintiffs' claim for a declaration that, pursuant to paragraph 3 of the contract, Wanlass is required to assist in selecting a suitable foundry to cast the game (statement of claim, par. 1(i)) is covered by the Oregon judgment's general declaration that the defendants have no liability stemming from their 1986 and 1988 agreement with the plaintiffs. The same is true of the plaintiffs' claim for a declaration, pursuant to paragraph 4 of the contract, that Wanlass is required to approve of all 2000

sets of the game when produced (statement of claim, par. 1(j)) and the claim for a declaration, pursuant to paragraph 5 of the agreement, that Wanlass is required to provide the plaintiffs with biographical material to use in promotion of the game (statement of claim, par. 1(k)). The separate heads of relief are all based on obligations under the contract that the plaintiffs claim have not been fulfilled. The Oregon judgment declaring that the defendants have no continuing obligations under the contract necessarily decides these claims. As explained by Binnie J. in ***Danyluk***, *supra*, (at par. 54):

> The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

[27] Where *res judicata* is relied upon, in deciding what questions were decided by the first proceedings, the court is entitled to look not only at the formal judgment but also at the pleadings and the history of the proceedings (***Pratt v. Johnson*** (1958), 16 D.L.R. (2d) 385 (S.C.C), at 399, per Cartwright J., in dissent but not on this point). An examination of the pleading in the Oregon action compared with the statement of claim in the case before this court confirms that the two actions deal with the identical matter. While the two claims, for obvious reasons, emphasize different facts, it is quite clear that both claims raise the same question – what are the continuing rights and obligations under the contract?

[28] The history of the proceedings also makes it clear that both actions relate to the same subject matter. When the defendants advised the plaintiffs that they were treating the contract as at an end, the plaintiffs threatened to sue

them. The defendants filed their claim in Oregon to resolve the question of their liability under the contract. Rather than defend that action, the plaintiffs chose to file a claim in Manitoba to determine the same issue. The purpose of both proceedings was to effect the same end – to determine the continuing obligations under the contract.

JURISDICTION OF THE OREGON COURT

[29] The plaintiffs argue that the Oregon judgment cannot estop them from proceeding with this claim because the Oregon court did not have jurisdiction to grant the judgment. There are two aspects to the plaintiffs' argument challenging the jurisdiction of the Oregon court. One relates to jurisdiction in a "conflicts of law" sense – the jurisdiction which is required for Canadian courts to recognize a foreign judgment. This issue is addressed below.

[30] However, even if the earlier judgment is not a foreign judgment, it will not create an estoppel if the court did not have jurisdiction in a "domestic" sense, for example, where a statutory court exceeds the statutory limits on its jurisdiction (*see e.g.* ***Pong v. Quong***, [1927] 3 D.L.R. 128 (S.C.C.)).

[31] The defendants filed their claim in the United States District Court for the District of Oregon. Their claim states that the court's jurisdiction is based on 1) its "diversity" jurisdiction, which the defendants' U.S. lawyer explains as being the court's jurisdiction over parties with different citizenship, and 2) its jurisdiction over actions based on U.S. laws, since the claim sought a declaration as to moral rights under the federal ***Visual Artists Rights Act***. The defendants

have filed the relevant U.S. statutes and an affidavit from their American lawyer explaining the basis for the jurisdiction of the Oregon court.

[32] The plaintiffs challenge the jurisdiction of the Oregon court but have provided no basis to question that court's acceptance of jurisdiction except to allege that the defendants lied to the Oregon court about their connection to that jurisdiction. I will address this issue of fraud on the court below since it also affects the impact of a foreign judgment in this court. At this point, it is sufficient to say that, absent a finding of fraud, there is no basis for finding the Oregon court lacked jurisdiction according to its own laws or rules of procedure.

[33] As explained in Lange, ***The Doctrine of Res Judicata in Canada*** (at p. 370):

> There are two kinds of lack of jurisdiction for the purposes of a judgment. An important distinction must be made between a judgment rendered where there is no jurisdiction, in and of itself, and a judgment rendered where there is no jurisdiction although jurisdiction is assumed to exist because of a set of facts which are assumed to exist. The former is a nullity and assailable in a subsequent proceeding as a defence to an estoppel argument. It is not viewed as a collateral attack on the judgment. The latter is only assailable by way of appeal. If it is attacked in a subsequent proceeding, it is viewed as a collateral attack on the judgment.

CAN *RES JUDICATA* BE RELIED UPON WHERE THE JUDGMENT IS A JUDGMENT OF A FOREIGN COURT AND, IF SO, ON WHAT BASIS?

[34] There appears to be no reason why the plea of *res judicata* cannot be relied upon where the first judgment is the judgment of a foreign court. In ***Law v. Hansen*** (1895), 25 S.C.R. 69, the Supreme Court held:

> It is now established in English law that a judgment of a foreign court of competent jurisdiction having the force of *res judicata* in the foreign country has the like force in England.
>
> [emphasis added]

[35] More recently, in ***Solomon v. Smith*** (1987), 45 D.L.R. (4th) 266 (Man. C.A.), the Manitoba Court of Appeal, although not able to rely upon issue estoppel because the parties in the Manitoba action were different than the parties in the earlier Alberta action, struck the plaintiff's claim as an abuse of process. The claim raised issues that had already been adjudicated upon by the Alberta court. Lyon J.A. stated (at p. 271):

> Should an Alberta court's finding that Mr. Solomon was not induced to buy property by any alleged improper description of it now prohibit Mr. Solomon from bringing a suit in tort in Manitoba based on the same alleged misrepresentations? I must say that I agree with the learned trial judge that the statement of claim in the Manitoba action raises issues already decided. It should therefor be struck out as an abuse of process.

And at pp. 275 –276:

> I agree with Philp J.A. that a plea of issue estoppel is not available. However, to permit the statement of claim to proceed would be an abuse of process and that is the principle applicable. ...
>
> Nor can I subscribe to the view that, because an issue was tried in another jurisdiction, a Manitoba court is somehow foreclosed from applying the principle based on those proceedings.
>
> [emphasis added]

[36] However, there is an added consideration when considering *res judicata* in the context of a foreign judgment. In ***Laws v. Hansen***, the Court made no comment on why it considered the American court, upon whose decision the claim of *res judicata* was based, to have been a "court of competent jurisdiction". However, the recognition of a foreign judgment as a basis for issue estoppel

necessarily has a "conflicts of law" dimension. One would not expect a foreign judgment to bar a Canadian action if a Canadian court would not recognize it for enforcement purposes. In other words, it is not sufficient for the foreign court to have had jurisdiction according to its domestic rules. It must also have had jurisdiction according to Canadian rules of conflicts of laws. The defendants argue that the Oregon court did have the necessary jurisdiction.

[37] The Supreme Court of Canada has recently considered the law related to the recognition and enforcement of foreign judgments in ***Beals v. Saldanha***, 2003 SCC 72. In upholding the enforcement of a default judgment obtained by the respondents in Florida, the Court held that foreign judgments should be recognized and enforced in Canadian courts on the same basis as judgments of sister provinces. Writing for the majority, Major J. said:

> [28] International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in *Morguard, supra*, and further discussed in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. Subject to the legislatures adopting a different approach by statute, the "real and substantial connection" test should apply to the law with respect to the enforcement and recognition of foreign judgments.
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> . . .
>
> [31] The appellants submitted that the recognition of foreign judgments rendered by courts with a real and substantial connection to the action or parties is particularly troublesome in the case of foreign default judgments. If the real and substantial connection test is applied to the recognition of foreign judgments, they argue the test should be modified in the recognition and enforcement of default judgments. In the absence of unfairness or other equally compelling reasons which were not identified in this appeal, there is no logical reason to distinguish between a judgment after trial and a default judgment.

> [32] The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.
>
> [emphasis added]

[38] The question then is whether there was a real and substantial connection between the Oregon court and the matter before it. If there was, then, absent the existence of the defences described below, the Oregon decision should be recognized by this court.

[39] ***Beals v. Saldanha*** was a case involving the enforcement of a foreign judgment in Canada. In other words, it was an action based on a foreign judgment. However, there is no reason why the principles articulated in that case would not also apply to the recognition of a foreign judgment when considering whether a local action is estopped. The reasons throughout speak of "recognition and enforcement" of foreign judgments. It would be illogical were the test for jurisdiction not to apply to recognition simpliciter.

[40] The plaintiff argues that the Oregon judgment should not be recognized because Manitoba is the more appropriate forum to rule on the issues. That the Manitoba court has jurisdiction to hear the plaintiffs' action is conceded by the defendants. The issue before the court now is not which of Manitoba or Oregon is the *forum conveniens* or more suitable forum. That may have been the issue if the Oregon action were still pending. However, as judgment has been entered

in the Oregon action, the question is not whether Oregon was the best forum but whether there was sufficient connection with Oregon to make it an appropriate forum. As stated by Helper J.A. in ***Craig Broadcast Systems Inc. v Frank N. Magid, Inc.***, [1998] M.J. No. 25 (C.A.)(QL) (at par. 13):

> La Forest J. noted in *Tolofson* that the term "real and substantial connection" has not been fully defined. He also speaks of a real and substantial connection between the subject-matter of the action and the jurisdiction, not the most real and substantial connection. Any real and substantial connection is sufficient to establish jurisdiction. The extent of that connection is examined when the issue of *forum conveniens* arises.
>
> [emphasis added]

DID THE OREGON COURT HAVE A REAL AND SUBSTANTIAL CONNECTION TO THE ACTION?

[41] I have no difficulty in concluding that Oregon had a real and substantial connection to the action before it. When the plaintiffs hired Wanlass for the project, Wanlass lived in Oregon. The plaintiffs went to Oregon to meet him and negotiated the terms of the original contract there. The 1986 contract was executed by both parties in Oregon. While the 1988 contract was not executed in Oregon, that contract changed none of the terms of the original contract other than to increase the selling price of the game and provide for Wanlass' commissions to be paid to his corporation. And although the 1988 contract was not executed in Oregon, the defendant corporation was registered in Oregon and the new contract continued to rely on Wanlass' Oregon address as his address for the purpose of any notification under the contract.

[42] The plaintiffs dispute Oregon's connection to the action because they say that the plaintiff moved to Utah in the Spring of 1988 and completed the design

of the game pieces there. In fact they say that most of the work done by Wanlass was done by him after he moved to Utah. While the pieces may have been completed by Wanlass after he moved to Utah, the reason for that seems to be that the plaintiffs were not satisfied with the original designs and asked for Wanlass to modify them. This does not detract from the fact that Wanlass had worked on the project while still in Oregon.

[43] The plaintiffs emphasize that they reside in Manitoba and that the design of the game and pieces was "controlled" from Manitoba (in the sense that the design drawings were sent back and forth between them and Wanlass). While that may support the fact that Manitoba would have a connection to the case, it does not mean that Oregon does not also have a connection.

[44] It is not significant, as asserted by the plaintiffs, that most of the investors in the project live in Manitoba. Those investors were not parties to the contract and have nothing to do with the performance of the contract. Nor is it significant that the game was designed by the plaintiffs in Manitoba. The design of the game has nothing to do with the contract. That design was completed and patented before the contract was negotiated. The contract with Wanlass was not about the dynamics or rules of the game but about transferring the plaintiffs' spartan design for the pieces into a work of art. That was accomplished by Wanlass in the United States.

[45] The plaintiffs went to Oregon to hire Wanlass. The contract was originally negotiated and executed in Oregon. No doubt the plaintiffs would have expected

the work to be completed in Oregon. (Wanlass did not move to Utah until two years after he was hired.) While Shawn Olfman drafted the contract, and the contract was very detailed, he did not choose to put a choice of law or jurisdiction clause in the contract. It would be reasonable to assume then that the parties expected any disputes under the contract to be dealt with in Oregon where the original contract was negotiated, executed and to be fulfilled.

[46] I am satisfied that the Oregon court had a real and substantial connection to the action before it.

DEFENCES TO THE RECOGNITION OF A FOREIGN JUDGMENT

[47] The plaintiffs argue that the Oregon judgment should not estop their proceedings because the judgment was obtained by fraud and without regard to principles of natural justice.

FRAUD

[48] The plaintiffs claim that Wanlass "knowingly lied" to the Oregon court to induce it into believing that it had jurisdiction. They have produced no evidence of any "lies". The fact that the plaintiffs take issue with the jurisdiction of the Oregon court does not establish that the court was misled by the defendants. The plaintiffs were free to dispute the defendants' Oregon claim and present their version of the facts. They chose not to do so. As was stated by Major J. in ***Beals***, *supra*:

> [53] Although *Jacobs*, *supra*, was a contested foreign action, the test used is equally applicable to default judgments. Where the foreign default proceedings are not inherently unfair, failing to defend the action, by itself, should prohibit the defendant from claiming that any of the

> evidence adduced or steps taken in the foreign proceedings was evidence of fraud just discovered. But if there is evidence of fraud before the foreign court that could not have been discovered by reasonable diligence, that will justify a domestic court's refusal to enforce the judgment.
>
> [54] In the present case, the appellants made a conscious decision not to defend the Florida action against them. The pleadings of the respondents then became the facts that were the basis for the Florida judgment. As a result, the appellants are barred from attacking the evidence presented to the Florida judge and jury as being fraudulent.

NATURAL JUSTICE

[49] The plaintiffs argue that a default judgment cannot give rise to issue estoppel unless there has been a hearing. They distinguish ***Beals*** because, while the case dealt with the enforcement of a default judgment, there had in fact been a hearing before the foreign court on the issue of damages. However, ***Beals*** does not suggest that a foreign judgment obtained without a hearing cannot be enforced.

[50] In ***Beals***, the appellants were Ontario residents who sold a lot in Florida to the respondents for $8,000. It turned out that the offer to purchase had described the wrong lot and the respondents had not purchased the lot they intended to buy. They filed a claim in Florida to rescind the contract of sale and for damages. The appellants did not defend the action and default was entered. The appellants were then served with notice of a jury trial to assess damages. They did not respond or attend the hearing. The jury awarded damages of $260,000, which by the time of the Supreme Court hearing, with added interest, had grown to $800,000.

[51] The Supreme Court rejected the appellant's argument that the judgment should not be enforced because of a denial of natural justice or, alternatively, on public policy grounds because the effect of the Florida judgment was egregious. In doing so, Major J. said:

> [59] As previously stated, the denial of natural justice can be the basis of a challenge to a foreign judgment and, if proven, will allow the domestic court to refuse enforcement. A condition precedent to that defence is that the party seeking to impugn the judgment prove, to the civil standard, that the foreign proceedings were contrary to Canadian notions of fundamental justice.
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> . . .
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> [61] The enforcing court must ensure that the defendant was granted a fair process. ...
>
> [62] 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. ... This assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts.
>
> . . .
>
> [64] The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise any reasonable apprehension of unfairness.
>
> [65] In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend.
>
> [emphasis added]

[52] The plaintiffs in this case were served with the Oregon claim. They had an opportunity to defend the claim. They chose not to. The entering of default

judgment is exactly what they should have expected considering the identical procedure under the rules of court in Manitoba. In fact, the summons that was served on the plaintiffs with the Oregon complaint specifically advised them that default judgment would be entered if the complaint was not answered. There is simply no basis here on which to conclude that the process before the Oregon court breached rules of natural justice.

SHOULD THE COURT EXERCISE ITS DISCRETION TO APPLY ISSUE ESTOPPEL?

[53] In ***Danyluk***, *supra,* (at par. 33), the Supreme Court said that the overriding consideration in the application of issue estoppel is "to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case." As a result, the Court set out a two-stage process. First, the court must determine whether the preconditions to estoppel have been established. I have found that they have in this case. Second, the court must examine the overall circumstances of the case to determine if the application of issue estoppel would work an injustice.

[54] For example, in ***Danyluk***, an employee had made a complaint under the Ontario ***Employment Standards Act***, 2000, S.O. 2000, c.4, seeking unpaid wages. The employment standards officer rejected her claim. When the employee brought a court action to collect the unpaid wages, the employer argued that the issue was *res judicata*. The Supreme Court held the fact that the earlier decision had been made without proper notice to the employee and without giving her an opportunity to meet the employer's case did not prevent

the Court from finding that the preconditions to issue estoppel had been met. The employee's remedy if there was a failure of natural justice was to pursue judicial review of the tribunal's decision. However, the Court went on to say that it could look at the process before the tribunal in determining, along with other factors, whether to exercise its discretion in applying issue estoppel.

[55] In ***Danyluk***, issue estoppel was argued on the basis of a prior decision of an administrative tribunal and all of the cases relied upon by the Court in developing the second stage of the test were cases where the prior decision was from an administrative tribunal. Many of the factors considered by the Court in assessing overall fairness, such as the legislative scheme governing the tribunal, the availability of an appeal, the nature of the process before the tribunal and the expertise of the decision-maker, have no relevance to assessing a prior decision of a court.

[56] There is no indication in ***Danyluk*** what factors a court should consider in the second stage of the analysis where the earlier decision is a decision of a court. However, Binnie J. did say (at par. 62):

> The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. In *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision ma kers.

[57] The plaintiffs make a number of arguments as to why the court should not apply issue estoppel in this case. First, they say that the defendants are not

entitled to rely on estoppel because they have not come to court with clean hands as they have lied to the court. As the Supreme Court points out in ***Danyluk***, issue estoppel, unlike promissory estoppel, is a common law doctrine, not an equitable doctrine (par. 63). Nevertheless, whether the defendants have lied to this court is a relevant factor for the court to consider.

[58] In the affidavit which he filed in response to the defendants' motion, Jerry Olfman states that virtually every piece of information put before the court by the defendants contains "lies and incomplete and falsified exhibits". The extreme nature of his assertions is evident by one of these alleged misstatements. Wanlass attached a "true copy" of the 1986 agreement as an exhibit to the affidavit that he filed on this motion. Olfman agrees that this exhibit is the 1986 agreement. However, he says that this copy of the agreement was one that was attached as an appendix to the 1988 agreement and not the original agreement. Therefore it is a "copy" of the agreement but not a "true copy". Needless to say this kind of gross and unnecessary overstatement does little to support the plaintiffs' argument in this regard.

[59] In any event, the plaintiffs have provided no basis on which I could conclude that the defendants' material contains lies or misstatements. Obviously, after 15 years, the parties' recollection of events is likely to differ. The fact that the plaintiffs offer a different version of events does not indicate that the defendants have lied or misled the court. If this matter were to proceed to trial, the accuracy and relevance of the information put before the court on

this motion could be resolved. There is no basis upon which to resolve it now. The plaintiffs made no attempt to cross-examine Wanlass on his affidavit. And I have no reason to find that he was not truthful.

[60] The plaintiffs argue that their action should proceed because the defendants have attorned to the jurisdiction of this court. While it is true that, by filing a defence in which they pleaded to the merits of the case, the defendants may be taken to have attorned, this fact is only relevant to establish the jurisdiction of the Manitoba court to hear this action. The defendants concede that jurisdiction. The question on this motion is not whether this court could hear the plaintiffs' action but whether it should hear the action in view of the fact that another court has issued judgment on the issues raised in the action. While the defendants did plead to the merits in their statement of defence, they also clearly set out their defence based on *res judicata*.

[61] The defendants argue that to allow the plaintiffs to proceed in this case would create the potential of conflicting decisions out of this court and the Oregon court. The plaintiffs say this possibility is not a relevant factor. They rely on the decision of the Manitoba Court of Appeal in ***Kornberg v. Kornberg,*** [1990] M.J. No. 659 (C.A.)(QL) where the court refused to grant an anti-suit injunction to prevent a wife from pursuing marital property proceedings in Minnesota when a similar proceeding had been brought by her husband in Manitoba. It is true that the court in that case did not seem concerned by the "spectre of disparate findings". However, more recently, in ***Westeel v.***

ConAgra Ltd., [1999] M.J. No. 134 (C.A.) (QL), the Court of Appeal refused to allow a Manitoba action to proceed where there was ongoing litigation in Saskatchewan because (per Scott C.J.M., at par. 6):

> It would be quite wrong ... to allow competing civil litigation, with the attendant expense and risk of inconsistent verdicts, to continue independently.

[62] Moreover, ***Kornberg*** was a *forum conveniens* case and the court acknowledged that, while it could not determine the best forum at the time of the motion before it, as the two proceedings progressed, the best forum might become apparent. In the case at bar, the foreign proceeding is no longer pending. The prospect of disparate findings is real. The defendants rightly ask: How will a Manitoba judgment be enforced against a U.S. resident where there is a conflicting U.S. decision in his favour?

[63] The plaintiffs argue that it would be unfair to apply issue estoppel in this case because there has been no determination of the case on the merits. But the case law makes it clear that issue estoppel does apply to default judgments and that Canadian courts will enforce default judgments from foreign jurisdictions. As explained above, there is no evidence in this case of any unfairness or breach of natural justice in the Oregon action. It was the plaintiffs' choice not to defend the Oregon claim but rather to initiate a claim in this court.

[64] The Court in ***Danyluk*** decided not to apply issue estoppel in the circumstance of that case. However, it did so because it found that there had been a breach of natural justice, describing the decision of the administrative

tribunal as "manifestly improper and unfair" (par. 19). I find no factors in this case that would lead me to conclude that the application of issue estoppel would result in injustice. While there was no hearing before the Oregon court, that was due to the deliberate choice of the plaintiffs. It is no less fair to recognize the defendants' judgment than it would be to require the defendants to respond to this action when they have already dealt with the issues in Oregon.

[65] In their Motion Brief, the plaintiffs explain why they chose not to respond to the Oregon action (at par. 40):

> Even if the plaintiffs herein and (sic) gone to Oregon and defended against the action initiated there by the Defendants herein, and even if the Plaintiffs' defence had been successful in Oregon, the Plaintiffs herein would have won nothing in Oregon, because they were defendants there, and not Plaintiffs. The only way that the Plaintiffs could have had their claim heard in Oregon, would be to have filed their own legal action against the Defendants in Oregon. Whether it was done by suit or counter-suit, it is the same thing. The Plaintiffs herein would have had to retain counsel, and instructed counsel on what they claimed against the Defendants, and then their counsel would have had to draw up American equivalent of a Counter-Claim or of a Statement of Claim, and filed it, and then served on the [Defendants] and the [Defendants] would have had to file a defense in Oregon etc., just as they did in Manitoba.

While the plaintiffs here explain why they should have had no obligation to respond to the Oregon claim, they do not explain why the same logic should not apply to the defendants' obligation to respond to the Manitoba claim.

[66] This case is very similar to the facts before the Saskatchewan Court of Queen's Bench in ***Diamond Comic Distributors, Inc. v. Tramp's Music & Books Inc.***, [1993] S.J. No. 245 (QB)(QL). In that case, the defendant, a Maryland company, had supplied comic books to the plaintiff. When the plaintiff failed to make payment, the defendant sued in Maryland. The plaintiff then

commenced an action in Saskatchewan for damages for breach of contract arising out of the same transactions as the Maryland action. Three weeks later the defendant obtained default judgment in Maryland and then sought to stay the Saskatchewan action. In granting the stay, Armstrong J. said (at p. 2):

> Accordingly, had the suit commenced in Maryland not been decided before Tramp's brought action here, the Court here would have to decide whether to accept jurisdiction. However, the fact is that the action commenced in Maryland has been decided and judgment entered against Tramp's. Tramp's in effect now seeks to defend the Maryland action by the action brought here. Tramp's would not have been able to allow action brought against it in Saskatchewan to go to judgment and then start a separate action here on matters arising out of the same transaction as the claim that was allowed to go to judgment.
>
> In my view the fact of there being concurrent jurisdiction is analogous to saying that because both have jurisdiction, it is as if there was but one jurisdiction when judgment is obtained. Otherwise one might find parties litigating exactly the same question twice and coming up with two different answers, neither answer having rank above the other. By Tramp's allowing the Maryland Court to provide the answer, the matter is settled.
>
> It is ironic that counsel for Tramp's should argue that Diamond simply took procedural advantage in bringing the action in Maryland. Maybe it did, but that is exactly what the contract says Diamond is entitled to do. On the other hand, Tramp's is trying to take procedural advantage by ignoring the action brought in Maryland, letting it go to judgment there and hoping to get a favourable judgment for itself here. This is an advantage Tramp's is not entitled to take. Tramp's should have taken steps to defend or otherwise stop the Maryland judgment from becoming a fact before Tramp's could apply to a court for a decision as to which action should proceed. I should think, but need not decide, that Tramp's would have to apply in Maryland to stay the Maryland action and have the Saskatchewan action proceed. Tramp's only recourse now, I should think, is to try to open up the Maryland judgment. Meantime, in my view, Diamond is entitled to a stay of the Tramp's action in Saskatchewan and I so order.
>
> [emphasis added]

[67] The above comments are apt here.

CONCLUSION

[68] The defendants have established the preconditions to issue estoppel. Preventing this action from proceeding would not create an injustice. Rather I find that any injustice would result by requiring the defendants to defend this action when they have taken the appropriate steps to deal with the issues raised by the claim in their own forum, a forum with which there was a real and substantial connection. Had the plaintiffs responded to the defendants' claim, it is likely that either this court or the Oregon court would have been required to determine which forum was the *forum conveniens*. However, as the Oregon claim has gone to judgment, there is no need to resolve that issue.

[69] The defendants' notice of motion seeks, alternatively, to have the plaintiffs' statement of claim stayed or struck or the action dismissed on the basis of summary judgment. The correct remedy is to strike the claim under Court of Queen's Bench Rule 25.11(c), as an abuse of the process of the court. The defendants' appeal is therefore allowed and the plaintiffs' statement of claim will be struck.

[70] Although counsel did not address costs, as the defendants have been successful, I would ordinarily grant costs in their favour on the basis of the tariff. If counsel wish to argue that there should be some other disposition, they can arrange an appearance before me to argue the issue.

J.