COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kriegman v. Wilson,*
2016 BCCA 122

Date: 20160316
Docket: CA42710

Between:

Bruce P. Kriegman, solely in his capacity as court-appointed Chapter 11 Trustee for LLS America LLC

Respondent
(Plaintiff)

And

Ana Wilson

Appellant
(Defendant)

Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated March 23, 2015 (*LLS America LLC (Trustee of) v. Wilson*, 2015 BCSC 441, Vancouver Registry Docket L130111).

Counsel for the Appellant:	P.J. Roberts J.R. Pollard
Counsel for the Respondent:	G.J. Tucker, Q.C. J.W. Zaitsoff
Place and Date of Hearing:	Vancouver, British Columbia February 18, 2016
Place and Date of Judgment:	Vancouver, British Columbia March 16, 2016

Written Reasons by:
The Honourable Mr. Justice Savage

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Madam Justice Stromberg-Stein

Table of Contents **Paragraph Range**

Summary:

The Appellant and her late husband unknowingly invested in and profited from the LLS America Ponzi scheme. Respondent, the U.S. bankruptcy trustee of LLS America, obtained, and subsequently registered in B.C., a Foreign Judgment against Appellant who had filed a proof of claim in the foreign proceeding. Appellant applied to set registration aside. The judge below was inclined to set aside registration but held he did not have jurisdiction to do so as the Appellant applied outside of the statutory limitation period contained in the Court Order Enforcement Act.
Held: Appeal Dismissed. The court below could not extend the statutory limitation period pursuant to the Law and Equity Act nor set aside the registration using its inherent jurisdiction. Characterizing the registration order as a nullity does not escape the application of the statutory limitation period.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. Introduction

[1] Ana Wilson (the "Appellant") appeals from the order of Mr. Justice Affleck pronounced March 23, 2015 in which he dismissed the Appellant's application to set aside registration of a foreign judgment based on a bankruptcy proceeding. The Respondent is the bankruptcy trustee (the "Trustee") of LLS America LLC ("LLS America"), a company involved in United States bankruptcy proceedings commenced in Nevada in July 2009 and continued in the United States Bankruptcy Court for the Eastern District of Washington (the "Washington Court").

[2] The bankruptcy proceeding involves an October 31, 2012 judgment of the Washington Court granting final default judgment in an adversary complaint filed by the Trustee against Larry Wilson and Ana Wilson (the "Wilsons") in the amount of $347,044.92 (the "Foreign Judgment"). The Foreign Judgment subordinated the claims made by the Wilsons against LLS America in their Proof of Claim to the Trustee's claims against the Wilsons. The Foreign Judgment was registered in British Columbia in *ex parte* proceedings which culminated in a registration order (the "Registration Order").

[3] LLS America was involved in a Ponzi scheme operating as the "Little Loan Shoppe". Little Loan Shoppe was established by Doris Nelson in British Columbia in 1997. It was relocated to Spokane, Washington in 2001. Over time LLS America

went from a storefront model to become a largely Internet based enterprise. Although LLS America operated as a payday loan business it was in fact a Ponzi scheme. The scheme involved issuance of promissory notes to lenders who were promised high rates of return (40 − 60%). Early lenders, such as the Wilsons, were paid, not from operations of the payday loan business, but from funds taken from later lenders. On $220,000 in loans the Appellant says they were paid $252,720, but on learning of the bankruptcy they submitted their Proof of Claim for $355,666.69 which included the interest they claimed under the promissory notes.

[4] The issues in the appeal are (1) whether the court below was correct in deciding that it could not extend the time limit in s. 34(1)(b) of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 (the "*COEA*") to allow the Appellant to challenge registration of the Foreign Judgment; (2) whether the time limit in the *COEA* is inapplicable because registration of the Foreign Judgment is in any event a nullity; and (3) whether the court below was correct in finding that it lacked jurisdiction to either extend the time for the appellant to set aside the Registration Order or otherwise challenge registration of the Foreign Judgment because of its inherent jurisdiction.

II. Background Facts

[5] The background facts are described in the court below at length in paragraphs 2−44. I summarize the essential facts as follows.

[6] The Wilsons met and invested $220,000 with Ms. Nelson in 2005, in what they thought was a payday loan business. The Appellant had no investment experience. She believed she could receive annual rates of return as high as 40 − 60% from the investment. There is no evidence that the Wilsons knowingly participated in the Ponzi scheme.

[7] All of the Appellant's dealings with Ms. Nelson took place in Canada. Her investment was in Canadian dollars and deposited into a Canadian bank account belonging to one of the British Columbian numbered companies operated by Ms. Nelson. The promissory notes she received were undersigned by Ms. Nelson's two

British Columbian companies. The notes stated that they were to be governed by the law of British Columbia. Although Ms. Nelson's signatures were witnessed and a seal applied by a Washington State notary public, there was no evidence the seal was applied at the time the notes were signed by her, nor was there evidence about where she signed them.

[8] In total the Appellant received $252,720 from her $220,000 investment, which she deposed resulted in a net after-tax profit of $13,460.

[9] In 2009 the Appellant learned from other LLS America investors of the bankruptcy. The Appellant was contacted by U.S. lawyers acting for creditors in the U.S. who ultimately declined to act for her. The Appellant received a "proof of claim" from the U.S. Bankruptcy Court District of Nevada which she completed, signed on November 17, 2009, and returned claiming $355,666.69. The basis for the claim was listed as "money loaned to LLS plus interest". The Proof of Claim lists "Wilson, Larry or Ana" as "Name of Creditor (the person or other entity to whom the debtor owes money or property)". It makes no reference to attornment, nor does it warn that it may be used as the basis for attornment of a claim against the creditor at a future time.

[10] Mr. Wilson died in November 2010. The Appellant travelled to Argentina in August 10, 2011 and returned on December 10, 2011. On July 15, 2011 an "adversary complaint" was filed in the Washington Court naming her as a defendant. An unsworn certificate signed by a Washington Court clerk claims the Adversary Complaint, and a summons, were sent by registered mail to the Appellant on July 29, 2011. Two delivery receipts, dated August 22 and 26, 2011, were later filed in the Washington Court as proof of service of these documents. Notably only the Appellant's son signed the delivery receipts, and the receipts do not list the documents sent. The Appellant deposed that her son did not advise her of the delivery of these materials while she was in Argentina.

[11] On August 19, 2011, the trustee in bankruptcy for LLS America, Witherspoon Kelley, a Washington State law firm, sent the Appellant a letter. The letter outlined

that the Appellant was a defendant in adversary proceedings in which the bankruptcy estate of LLS America sought to "claw back" any payments made to her and her husband:

> … under applicable bankruptcy and state law, LLS America and its related companies were involved in a "Ponzi scheme". This means that money received by LLS America from investors was generally used to pay back loans to previous investors in the companies. Under Bankruptcy Code terminology, these payments made by LLS America to prior investors using funds of subsequent investors constituted "fraudulent conveyances." Under applicable law, the bankruptcy estate of LLS America may be entitled to "claw back" any payments made, regardless of whether an investor received back from LLS America all of the money the investor may have invested.

[12] The letter further stated that the Appellant had until October 15, 2011 to file an answer to the Adversary Complaint. The Appellant deposed that she read the letter after returning from Argentina in December 2011 but did not understand it. Because the deadline had passed, she chose not to respond.

[13] In 2012 the Appellant continued to receive letters from Witherspoon Kelley, but did not answer them "because [she] was consumed with caring for" her son who was in hospital for all of the year. In September 2012 she wrote to Witherspoon Kelley explaining her family circumstances and stating she hadn't read or understood the letters she had received. She asked to be kept informed as to what was going on.

[14] The Washington Court issued the Foreign Judgment against the Appellant on October 31, 2012 in the amount of $347,044.92. On April 10, 2013 a master of the British Columbia Supreme Court granted the Registration Order. The parties agree the Appellant was personally served with the Registration Order in April 2013. The Appellant deposed that it was not until spring of 2013 that she realized she was being sued in the Washington Court. She did not file a notice of application to set aside the Registration Order until September 9, 2014.

[15] The effect of the Foreign Judgment was to claw back any payments made to the Appellant to put her on the same footing as the other creditors. The Appellant stands to collect a portion of her investment through her claim against LLS America

in the bankruptcy proceedings. I note that the amount of the Foreign Judgment, $347,044.92, far exceeded the total payments that Justice Affleck found the Appellant received of $252,720, although the discrepancy is that in the Washington Court proceeding transfers of $332,044.92 and $15,000 were alleged and ordered repaid.

[16] Justice Affleck found that he was inclined to set aside the Registration Order because the Appellant was not "duly served" with the process of the Washington Court, nor did she appear or defend or attorn to the jurisdiction of that Court. However, he held that he did not have jurisdiction to do so in the face of s. 34(1)(b) of the *COEA*, which required the Appellant to apply to set aside the Registration Order within one month of receiving notice of it.

III. Legislation

[17] The definitions applicable to Part 2 of the *COEA* are set out in s. 28:

> **28** (1) In this Part:
>
> "judgment" means a judgment or order of a court in a civil proceeding if money is made payable and includes an award in an arbitration proceeding if the award, under the law in force in the state where it was made, has become enforceable in the same manner as a judgment given by a court in that state, but does not include an order for the periodical payment of money as support, alimony or maintenance for a spouse, a former spouse, a reputed spouse, a child or any other dependant of the person against whom the order was made;
>
> "judgment creditor" means the person who obtained the judgment, and includes the person's executors, administrators, successors and assigns;
>
> "judgment debtor" means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable in the state in which it was given;
>
> "original court" in relation to a judgment means the court that gave the judgment;
>
> "registering court", in relation to a judgment, means the court in which the judgment is registered under this Part.
>
> (2) All references in this Part to personal service mean actual delivery of the process, notice or other document to be served, to the person to be served with it personally, and service must not be held not to be personal service merely because the service is effected outside the state of the original court.

[18] Section 29 of the *COEA* provides for the registration of judgments given in reciprocating states:

> **29** (1) If a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to have the judgment registered in the Supreme Court unless
>
> (a) the time for enforcement has expired in the reciprocating state, or
>
> (b) 10 years have expired after the date the judgment became enforceable in the reciprocating state.
>
> (1.1) On application under subsection (1), the Supreme Court may order that the judgment be registered.
>
> (2) An order for registration under this Part may be made without notice to any person in any case in which
>
> (a) the judgment debtor
>
> (i) was personally served with process in the original action, or
>
> (ii) although not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original court, and
>
> (b) under the law in force in the state where the judgment was made,
>
> (i) the time in which an appeal may be made against the judgment has expired and no appeal is pending, or
>
> (ii) an appeal has been made and has been disposed of.
>
> (3) In a case to which subsection (2) applies, the application must be accompanied by a certificate issued from the original court and under its seal and signed by a judge or the clerk of that court.
>
> (4) The certificate must be in the form set out in Schedule 2, or to the same effect, and must set out the particulars as to the matters mentioned in it.
>
> (5) In a case to which subsection (2) does not apply, notice of the application for the order as is required by the rules or as the judge considers sufficient must be given to the judgment debtor.
>
> (6) An order for registration must not be made if the court to which the application for registration is made is satisfied that
>
> (a) the original court acted either
>
> (i) without jurisdiction under the conflict of laws rules of the court to which application is made, or
>
> (ii) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor,
>
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did

> not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court,
>
> (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, even though he or she was ordinarily resident or was carrying on business in the state of that court or had agreed to submit to the jurisdiction of that court,
>
> (d) the judgment was obtained by fraud,
>
> (e) an appeal is pending or the time in which an appeal may be taken has not expired,
>
> (f) the judgment was for a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court, or
>
> (g) the judgment debtor would have a good defence if an action were brought on the judgment.
>
> (7) Registration may be effected by filing the order and an exemplification or certified copy of the judgment with the registrar of the court in which the order was made, and the judgment must be entered as a judgment of that court.
>
> (8) If a judgment provides for the payment of money and also contains provisions for other matters, the judgment may only be registered under this Part for the payment of money.
>
> [Emphasis Added.]

[19] The effect of registration of a judgment is set out in s. 33:

> **33** If a judgment is registered under this Part,
>
> (a) the judgment, from the date of the registration, is of the same effect as if it had been a judgment given originally in the registering court on the date of the registration, and proceedings may be taken on it accordingly, except that if the registration is made under an order made without notice to any person, a sale or other disposition of any property of the judgment debtor must not be made under the judgment before the expiration of one month after the judgment debtor has had notice of the registration or a further period as the registering court may order,
>
> (b) the registering court has the same control and jurisdiction over the judgment as it has over judgments given by itself, and
>
> (c) the reasonable costs of and incidental to the registration of the judgment, including the costs of obtaining an exemplification or certified copy from the original court and of the application for registration, are recoverable in the same manner as if they were sums payable under the judgment if the costs are taxed by the proper officer of the registering court and the officer's certificate is endorsed on the order for registration.
>
> [Emphasis Added.]

[20] In the event that a foreign judgment is registered *ex parte*, s. 34 applies:

> **34** (1) If a judgment is registered under an order made without notice to any person
>
> (a) within one month after the registration or within a further period as the registering court may at any time order, notice of the registration must be served on the judgment debtor in the same manner as a notice of civil claim is required to be served, and
>
> (b) the judgment debtor, within one month after he or she has had notice of the registration, may apply to the registering court to have the registration set aside.
>
> (2) On an application under subsection (1) (b), the court may set aside the registration on any of the grounds referred to in section 29 (6) and on terms the court thinks fit.
>
> [Emphasis Added.]

[21] Section 39 of the *COEA* provides that:

> This Part must be interpreted so as to effect its general purpose of making uniform the law of the provinces that enact it.

[22] Section 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 reads as follows:

> **24** The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

IV. Can Registration of the Foreign Judgment be set aside?

[23] This case concerns challenges to the registration of a foreign judgment which on its face was duly registered under the *COEA* and not challenged in a timely way under the statutory scheme.

[24] The statutory provisions at issue are based on a uniform model law enacted in similar terms in all common law provinces: see Uniform Law Conference of Canada, *Reciprocal Enforcement of Judgments* Act, 1994 (re adoption of the uniform model law). The statutory provisions with which we are concerned must be interpreted so as to effect its general purpose of making uniform the law of the provinces that enact it.

[25] A significant part of the Appellant's argument involved what she said were substantial issues in the proceedings both in respect of the obtaining of the Registration Order and the Washington Court assuming jurisdiction.

[26] For example, the Appellant argues that the "real and substantial connection" (with the foreign jurisdiction) test was not met, as found by Justice Affleck, because of the limited connection between the Wilsons' promissory notes and Washington State, the fact the transactions were in Canadian dollars, and the fact the promissory notes said they were subject to British Columbia law.

[27] The Respondent does not concede there were any such defects in the proceedings. For example, the Respondent argues that the "real and substantial connection" test was met, because jurisdiction exists where the foreign court has either a real and substantial connection with the subject matter of the action or the defendant.

[28] A real and substantial connection with the subject matter of the action will satisfy the real and substantial connection test, even in the absence of such a connection with the defendant: *Beals v. Saldana*, 2003 SCC 72, at para. 23, citing *Morguard Investments Ltd. v*. *De Savoye*, [1990] 3 S.C.R. 1077. On facts materially the same as those in the case before us, and in a related proceeding, Grauer J., seemed of the view that the real and substantial connection test had been met: *LLS America, LLC (Trustee of) v. Grande*, 2013 BCSC 1745 at para. 24 [*Grande*]. Bankruptcy proceedings have to take place somewhere, and it is normal practice in this jurisdiction, as well as in the District Courts in the US, to bring them all "under one roof".

[29] The Appellant refers to the judge below finding that there was no attornment to the jurisdiction. Attornment is a stand-alone basis for the assumption of jurisdiction. Even if there is no connection to a foreign state, the courts of that state obtain jurisdiction if the defendant attorns.

[30] The Respondent says that the appellant clearly attorned to the jurisdiction of the Washington Court by filing the Proof of Claim. Both Canadian and American courts have taken the view that by voluntarily availing oneself of the jurisdiction of a bankruptcy court, by filing a proof of claim, a party cannot deny the courts personal jurisdiction in a proceeding directly related to that case: *Grande* at para. 23-25, *LLS America, LLC et al,* U.S. Bankr. No. 09-06194-POW11.

[31] The Appellant also raised issues with respect to "due service", "natural justice", and "full and frank disclosure". The Respondent controverts those submissions.

[32] With respect to "due service" the Appellant says, as the judge below found, that she was not duly served with notice of the foreign proceeding because the method of service employed was insufficient to put her on notice of the proceedings. Thus she was denied natural justice in the adversary proceedings and the Foreign Judgment should not be enforced in Canada. The Respondent says there was no breach of natural justice. There was a return receipt showing delivery to the Appellant's address on the Proof of Claim. The Appellant does not deny receiving the Adversary Complaint and receiving many pieces of mail from the Trustee at the address on the Proof of Claim which, on any objective basis, could leave no doubt that adversary proceedings had been commenced against her.

[33] The Appellant says that the Trustee failed to make full and frank disclosure at the *ex parte* application for the Registration Order, and that the Registration Order should be set aside on that basis.

[34] The Appellant's position is based on two matters (1) that the fact the Proof of Claim was from the Nevada Court, and (2) the erroneous statement that the Appellant had attorned to the jurisdiction of the Washington Court.

[35] The Respondent says that this is a new issue on appeal that is a serious allegation and, if asserted in the court below, could have required evidence from the Trustee or counsel. In any event, the Respondent says there is no merit to this

position. With respect to the first point, the Respondent says that although the header on the Proof of Claim refers to the Nevada Court, the Proof of Claim, on its face, says that it was filed in the Washington Court to which the proceedings had been lawfully transferred. On the second point, the Respondent says there was attornment, by filing the Proof of Claim, which provided for attornment to legal proceedings as confirmed by the decision in *Grande*.

[36] I am not persuaded that it is necessary to resolve any of these issues unless it can be shown that the court below erred in concluding that it had no jurisdiction to extend the time period under s. 34(1)(b) of the *COEA*, or for any of the other reasons argued with respect to the validity of the Registration Order, the Registration Order is of no effect.

[37] The Appellant had an opportunity to set aside the Registration Order by an application made within one month of receiving notice of it. In my view, if any of those arguments had merit she would have been entitled to succeed in setting the Registration Order aside as provided for in s. 34(2), based on the defects enumerated in s. 29(6). The question is, having failed to make application in a timely manner can she now argue the merits of those positions and avoid the prescription contained in s. 34(1)(b) of the *COEA*?

A. Extending the Time Limits of the *COEA*

[38] In this case the judgment was registered *ex parte*. Accordingly, s. 34(1)(b) of the *COEA* gives the judgment debtor one month after notice of the registration to have the registration set aside. The judgment was registered on April 10, 2013 in British Columbia. It is agreed that the Registration Order was personally served on the Appellant in April, 2013, within the one month specified in s. 34(1)(a) of the *COEA*.

[39] In March 2014 the Registration Order was registered on title to the Appellant's home in Surrey, British Columbia. On September 9, 2014 the Appellant filed an application to set aside the Registration Order. Thus the application to set aside the

Registration Order was made 16 months after the time prescribed under s. 34(1)(b) of the *COEA*.

[40] Justice Affleck in the court below dismissed the Appellant's application to set aside the Registration Order. As s. 34(1)(b) requires that an application to set aside registration of a foreign judgment filed without notice under Part 2 of the *COEA* be brought within one month of notice of the registration, he held that failing to bring the application within the prescribed period was fatal to the application.

[41] Justice Affleck held that s. 24 of the *Law and Equity Act* does not allow a court to relieve against the statutory limitation period in s. 34(1)(b) of the *COEA*. In support of that proposition, the judge below relied on two decisions of this Court: *Martin Mine Ltd. v. British Columbia* (1985), 62 B.C.L.R. 107 (C.A.) at 116 and *Ganitano v. Metro Vancouver Housing Corporation*, 2014 BCCA 10 at para. 34.

[42] In *Martin Mine*, this Court applied the reasoning of the Supreme Court of Canada and Privy Council in *King v. Canadian Northern Railway Company*, [1923] A.C. 714 (P.C.), aff'g (1922), 64 S.C.R. 264, aff'g (1921), 58 D.L.R. 624 (Alta. S.C., A.D.) [*Canadian Northern Railway*]. In *Canadian Northern Railway,* a provision in Alberta legislation gave the court the power to relieve "against all penalties and forfeitures" similar to s. 24 of the *Law and Equity Act*. The main issue was whether the court had the power to relieve against financial penalties imposed upon the railway companies under the terms of provincial legislation.

[43] In *Martin Mine*, Craig J.A. writing for the Court said:

> … The main issue in the case was whether the Court had power to relieve against financial penalties imposed upon the railway companies under the terms of provincial legislation. The Appellate Division of the Supreme Court of Alberta unanimously held that the power to relieve against penalties in forfeitures did not authorize relief against statutory penalties (1921) 1 W.W.R. 178. The Supreme Court of Canada unanimously agreed with this view, including Idington J. and Anglin J. who dissented. At p. 269 Idington J. said:
>
> > The contention founded upon the power of the court to relieve from such penalties ... seems to me to be applicable only to such contractual penalties and forfeitures as the Court of Chancery had exercised jurisdiction in regard to.
>
> Duff J. said at p. 272:

> I am unable to accept the contention that the authority to relieve from forfeitures expressed in general terms and conferred upon the Supreme Court by the statute of 1907 extends to penalties and forfeitures declared by a public enactment and thereby made exigible upon the non-performance of a general duty created by such enactment, such as a duty to pay taxes or to make a return under a taxing statute.

The Privy Council agreed with this view. In giving the judgment of the Privy Council, Lord Parmoor said at p. 722:

> The Chief Justice (Chief Justice Harvey of the Appellate Division) expresses the opinion that if the power given to the Court to relieve against penalties applied to statutory penalties, this would, in effect, be giving an authority to enable the Court to repeal statutes. This decision was unanimously confirmed in the Supreme Court of Canada. Idington J. says in his judgment "that the power in the Court to relieve from penalties seemed to him to be applicable only to such contractual penalties, and forfeitures as those to which the Court of Chancery had exercised jurisdiction".

I think that these views are determinative of this issue and that a court cannot relieve against penalties or forfeitures which are statutory in origin.

[Emphasis Added.]

[44] In the result the Court in *Martin Mine* held that it had no power to relieve against the statutory forfeiture of a mineral claim upon a free miner failing to perform his obligations under the terms of a mining lease.

[45] In *Ganitano*, a five member division of this Court applied the reasoning in *Canadian Northern Railway* to the issue of whether s. 24 of the *Law and Equity Act* empowered a court to grant equitable relief against forfeiture of a residential tenancy for failure to make timely payment of rent, as provided for under ss. 46 and 47 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78. Frankel J.A. speaking for the Court said:

> [44] In my view, the Legislative Assembly has clearly and expressly stated that a tenant's failure to respond within the statutory time limits to a notice given in accordance with either s. 46(4) or s. 47(4) will, by operation of law, bring a tenancy to an end and entitle the landlord to regain possession of the rental unit. Such a termination is a statutory forfeiture (i.e., a taking back of the remainder of the term of the tenancy) and is beyond the reach of s. 24 of the *Law and Equity Act*. Indeed, it would be anomalous to allow a tenant to call in aid the equitable jurisdiction of the courts to reinstate a tenancy he or she is "conclusively presumed to have accepted" is at an end.
>
> [Emphasis in original]

[46] The one-month limitation on setting aside foreign judgments in s. 34(1)(b) of the *COEA* is a statutory prescription. I agree with the judge below that s. 24 of the *Law and Equity Act* does not empower the court to relieve a party from the limitation prescribed by s. 34(1)(b) of the *COEA*.

B. Nullity

[47] The Appellant argues that the judge below erred in law by failing to find that the Registration Order was a nullity on the basis of it being *void ab initio* and should be set aside regardless of the expiry of the one month time limit in s. 34 of the *COEA*.

[48] The Appellant says that the Registration Order was *void ab initio* for various reasons: (1) the conditions for an *ex parte* registration order were not met; (2) the Respondent failed to make full and frank disclosure of all material facts that could be reasonably expected to have a bearing on the outcome of the *ex parte* application; (3) s. 34 of the *COEA* has no application to an order that is void; (4) there was no real and substantial connection between the Appellant and the foreign jurisdiction; (5) the Appellant was not "duly served" in the adversary proceedings; and (6) the Respondent's non-compliance with the *COEA* allows the court below to grant relief against the statutory prescription contained in the *COEA*. The Respondent takes issue with most of the premises of these arguments, and says the judge below erred in several of his findings (although not in his conclusion).

[49] Each of these arguments is premised on there being substantial defects in the proceedings leading up to and culminating in registration of the Foreign Judgment. The Appellant says that, in effect, these defects go to the jurisdiction of making the Registration Order, and make the Registration Order a nullity. Thus she says there is no limitation provision which applies to setting aside such an order.

[50] One of the difficulties in these arguments, says the Respondent, is that the provisions of the *COEA* contemplate there being substantial defects in the making of registration orders, and specifically make provision for setting aside a registration order in a timely way based on such concerns. The Respondent says that Part 2 of

the *COEA* is a complete code. Fraud, natural justice and public policy are all relevant factors under Part 2 of the *COEA* as they fall within the grounds listed in s. 29(6) for setting aside registration of a foreign judgment, on a timely application, under s. 34(2). Were these matters raised as a ground to set aside registration, they would still be subject to the time limitation set out in s. 34 of the *COEA*.

[51] The grounds upon which one can oppose registration of a foreign judgment are varied, extremely broad and, in my opinion, encompass the appellant's arguments here. For convenience, I will repeat those grounds which are set out in s. 29(6) which provides:

> (6) An order for registration must not be made if the court to which the application for registration is made is satisfied that
>
> (a) the original court acted either
>
> (i) without jurisdiction under the conflict of laws rules of the court to which application is made, or
>
> (ii) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor,
>
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court,
>
> (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, even though he or she was ordinarily resident or was carrying on business in the state of that court or had agreed to submit to the jurisdiction of that court,
>
> (d) the judgment was obtained by fraud,
>
> (e) an appeal is pending or the time in which an appeal may be taken has not expired,
>
> (f) the judgment was for a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court, or
>
> (g) the judgment debtor would have a good defence if an action were brought on the judgment.
>
> [Emphasis Added.]

[52] It was available to the Appellant to raise any of these grounds with a timely application under s. 34 of the *COEA*. She did not do so. I do not think characterizing a defect (in the process leading up to obtaining a superior court order) as creating a 'nullity' escapes the application of s. 34 as a matter of statutory interpretation.

[53] In support of her position the Appellant cites a number of decisions including *South Pacific Import, Inc. v. Ho,* 2009 BCCA 163. She says that *South Pacific* supports the proposition that the court is not bound by s. 34 of the *COEA* where there is a common law basis to set aside the registration of a foreign judgment. I am unable to interpret *South Pacific* in the manner argued by the Appellant.

[54] The decision in *South Pacific* concerned an application to set aside registration of a foreign judgment. The limitation provision in s. 34 of the *COEA* does not appear to be at issue and was not referred to by this Court or the court below. The appeal concerned two orders of Blair J. with reasons indexed as 2007 BCSC 211 and 2007 BCSC 213. Neither of those decisions referenced the limitation found in s. 34 of the *COEA.* The matter appears to have proceeded simply on the basis that it was a timely application to set aside a registration order, and whether any of the grounds for setting aside such an order, enumerated in s. 29(6), had application. For that reason I do not find the case of assistance to the Appellant.

[55] The Appellant refers to a number of cases which she says support the proposition that the order is a nullity, including *TMR Energy Ltd. v. Ukraine*, 2005 FCA 28; *Bekar v. TD Evergreen*, 2006 BCCA 266; *McLean v. Retail Solutions Inc.* (1989), 37 B.C.L.R. (2d) 131 (S.C.); and *Lornal Construction Ltd. v. Lawrence*, (1984), 47 C.P.C. 99 (B.C.S.C.). These decisions draw a distinction between irregularities, which a court may be prepared to countenance, and substantial defects which do not meet the conditions requisite to being treated as irregularities subject to the available curative provisions of the court rules.

[56] The Respondent says that the Appellant's argument that the order is a nullity is misconceived. An order of a superior court is never a nullity no matter how wrong

it might be, and is binding and conclusive on all the world until it is set aside or varied on appeal: *Virani v. Virani*, 2006 BCCA 63 at para 37; *Canadian Transport Co. v. Alsbury* (1953), 1 D.L.R. 385 (B.C.C.A.), aff'd *Poje v. British Columbia (Attorney General)*, [1953] 1 S.C.R. 516.

[57] *TMR Energy* concerned a prothonotary acting beyond his jurisdiction under the *Federal Court Act* and *Federal Court Rules* granting registration of a foreign judgment. The rules allowed the court to set aside or vary an order that was made *ex parte*. The rule at issue set no time limit on the filing of such a motion. The Court noted that the authorities held that a motion to set aside or vary the order "must be brought with reasonable diligence". Although the Court drew a distinction between nullities and irregularities, in the case before it, there was no time limit as exists under the *COEA*. The motion was heard and dealt with. Tardiness could be addressed by costs (para. 33).

[58] In *Bekar*, this Court was dealing with the enforcement of an arbitral award by a certificate of judgment which was obtained *ex parte* by requisition from a registrar in BC Supreme Court. The filing of a certificate, and the ability to use the machinery of the courts to enforce it, required leave of the court by an originating application and notice to the respondent (para. 25) none of which was done. The Court found that the execution proceedings were flawed from the inception as a result of the failure to comply with s. 29 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, and there was no basis in the record for it to make an order *nunc pro tunc* (para. 51).

[59] In *McLean*, the defendants applied to set aside a writ of summons which had been served in the province of Alberta. No leave to serve the originating process outside of British Columbia had been obtained and a copy of the writ had not been endorsed with a notice in the required form. The defendants applied for a declaration that such service was invalid and the plaintiffs responded with an application for leave to serve the writ in Alberta *nunc pro tunc*. The Court set aside the service on the basis that failing to apply for leave was not an irregularity that could be cured.

[60] The *Lornal Construction* case was an application to set aside registration of a foreign judgment. Mr. Justice Gibbs, as he then was, set aside the registration on the basis that the affidavit in support of the application did not meet the requirements of Rule 54 (now Rule 19-3 of the *Supreme Court Civil Rules*), and was not merely an irregularity. There is no suggestion in the decision that the Court was relieving against a statutory limitation period.

[61] In *Virani*, this Court in brief reasons in a family claim addressed an attack on court orders which raised jurisdictional concerns:

> [37] At present before this Court are two substantive issues:
>
> 1. Does the *Divorce Act*, by its terms, empower a superior court in Canada to make a support order in favour of a child habitually resident in this jurisdiction whose parents were divorced by the order of a foreign court?
>
> 2. Does the **Family Relations Act** empower a court in British Columbia to make an original order for support against a non-resident parent who has never been a resident of this or any Canadian jurisdiction?
>
> It is convenient to note at this point that the notice of motion of the appellant seeking to have the order of the court declared a "nullity" was misconceived. An order of a court of superior jurisdiction is never a "nullity", no matter how wrong it may be.
>
> [Emphasis Added.]

[62] In *Mazepa v. Embree*, 2014 ABCA 438, the Court said:

> [10] In any event, there is an overriding principle that the orders of a superior court of record are never nullities. They perhaps should not have been granted, they may be based on procedural irregularities, and they may be undermined by reviewable error. They are, nevertheless, valid orders of the court until they are set aside. As the Court noted in *Virani v Virani*, 2006 BCCA 63 at para. 37, 52 BCLR (4th) 112:
>
> > It is convenient to note at this point that the notice of motion of the appellant seeking to have the order of the court declared a "nullity" was misconceived. An order of a court of superior jurisdiction is never a "nullity", no matter how wrong it may be.
>
> There are numerous other authorities to the same effect: *Preston v Preston*, 2014 ABCA 247 at para. 2; *Fiebich v Ortlieb*, 2004 ABCA 256 at para. 19, 31 Alta LR (4th) 1; *Isaacs v Robertson*, [1985] AC 97 at pp. 101-3 (PC (St V)); *Canadian Transport (U.K.) v Alsbury* (1952), 105 CCC 20, 7 WWR (N.S.) 49 (BCCA) affirmed sub nom *Tony Poje v Attorney General of British Columbia*, [1953] 1 SCR 516; *Harrison v Harrison*, 2007 BCCA 120 at para. 27, 64 BCLR (4th) 318; *Regina (City) v Cunningham*, [1994] 8 WWR 457, 123 Sask R 233 (CA).

[63] A thorough discussion of the point occurs in the *Canadian Transport* decision. In that case one picketer was committed to jail for three months for contempt for failing to abide an *ex parte* injunction restraining the picketing of a ship in Nanaimo harbour. It was argued that the injunction was a nullity that could be ignored with impunity because of various failings in the procedure for obtaining it and arguments that it was made without jurisdiction. Sidney Smith J.A. said:

> [59] The appellants attacked the chief justice's order on many grounds, of which I shall examine the foremost:
>
> [60] First it was said that the injunction order of Clyne, J. was a nullity that could be ignored with impunity, and could form no basis for contempt proceedings. Many objections were levelled at this learned judge's order, chief among them being: (1) That it was based on improper and inadmissible evidence; (2) That the injunction was in conflict with the *Trade-unions Act* and the *Laws Declaratory Act*, RSBC, 1948, ch. 179; (3) That the injunction was in permanent form and no court could grant a permanent injunction *ex parte*. To this the general answer is made that the order of a superior court is *never* a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to be established by the authorities cited by counsel for the Attorney-General, viz., *Scott v. Bennett* (1871) LR 5 HL 234, at 245; *Revell v. Blake* (1873) LR 8 CP 533, at 544, 42 LJCP 165; *Scotia Construction Co. v. Halifax (City)* [1935] SCR 124; and to these I might add *In re Padstow Assur. Assn.; Ex parte Bryant* (1882) 20 Ch D 137, at 145, 51 LJ Ch 344, and *Hughes v. Nor. Elec. & Mfg. Co.* (1913) 50 SCR 626, at 652-3. To these general authorities may be added the more specific line of cases holding that an injunction, however wrong, must be obeyed until it is set aside, as shown by the authorities cited in *Kerr on Injunctions*, 6th ed., p. 688, and 7 *Halsbury*, p. 32, which include the authoritative decision in *Eastern Trust Co. v. Mackenzie, Mann & Co.*, 31 WLR 248, [1915] AC 750, at 761, 84 LJPC 152, where a party was held to be rightly committed for disobeying an injunction, later set aside. Other authorities for holding that an injunction, though wrong, must be obeyed till set aside, are *Leberry v. Braden* (1900) 7 BCR 403, and *Bassell's Lunch v. Kick* [1936] OR 445, at 456. The cases cited by appellants for their proposition largely dealt with inferior courts and so were not in point. I may mention however that I venture to doubt whether *Lumley v. Osborne* [1901] 1 KB 532, 70 LJKB 416, is a good decision, even as applied to an inferior court. It seems clearly contrary to later authority.
>
> …
>
> [62] But to return to the objection that the injunction order was a nullity (which means made without jurisdiction) because founded on inadequate and inadmissible evidence: The idea that the sufficiency of evidence has any relation to jurisdiction is entirely novel and against principle. That would be so even if we were dealing with an inferior court. It should be sufficient to refer to *Rex v. Nat Bell Liquors Ltd.* [1922] 2 WWR 30, [1922] 2 AC 128, particularly at 151-2, 91 LJPC 146; but I might add *Haggard v. Pélicier Frères* [1892] AC

61, 61 LJPC 19, and *Hooper v. Hill* [1894] 1 QB 659, 63 LJQB 598, among many other cases in point.

[63] Next the appellant said that the injunction was a nullity because it went further than the *Trade-unions Act* permitted, and because it did not comply with the *Laws Declaratory Act* regulating *ex-parte* injunctions. This argument that a court, particularly a superior court, acts without jurisdiction when it errs in matters of statute law seems to be clearly against both authority and principle. Direct authority on the point is found in *Scott v. Bennett, supra; Bevell v. Blake, supra;* and *Leeds Corpn. v. Ryder* [1907] AC 420, at 423, 76 LJKB 1032. On principle it seems clear that a court's mistakes as to statute law are errors just like their mistakes in common law. Otherwise impossible situations would arise. There is always room for doubt as to what statutes mean and as to whether the facts of a particular case bring it within a statute. Parties resort to courts to find out what their legal rights are. But if a judgment was void whenever the judge made a mistake in statute law, resort to the courts would be useless. Every one would then become his own lawyer, and his own judge as well. The submission cannot be sound.

[64] The argument that the injunction was void because it took an unjustifiable form was based partly on the *Laws Declaratory Act*. I have already dealt with that. But many decisions were also cited to show that permanent injunctions could properly be issued in certain circumstances, but not in others. These were all authorities to show that Clyne, J. erred and that he could perhaps have been reversed if appeal had been taken from his injunction; but they are not authorities for his order being treated as a nullity and ignored. Far from it.

[Emphasis Added.]

[64] Bird J.A. concurred, saying:

[96] The order under review is that of a superior court of record, and is binding and conclusive on all the world until it is set aside or varied on appeal. No such order may be treated as a nullity.

[97] In *Scott v. Bennett* (1871) LR 5 HL 234, the House of Lords approved and adopted the unanimous opinion of the judges, who had been summoned by the House of Lords, as expressed by Baron Martin at p. 245:

> "It was said by the learned counsel that there was no jurisdiction to make this rule. That is entirely a mistake. The Court of Common Pleas is one of the superior courts of record. It may be that the Act of Parliament did not justify it, but nevertheless the judges had perfect jurisdiction to make it, and the rule being made by them, it is binding and conclusive on all the world, unless it can be altered by appeal or error."

[98] In *Revell v. Blake* (1873) LR 8 CP 533, 42 LJCP 165, the judges of the Exchequer Chamber expressed a like opinion. At p. 544, Blackburn J. said:

> "Reading these sections together I can come to no other conclusion than that the local courts are branches of this principal court of record, and so must be treated as courts of general jurisdiction, and we cannot treat a judgment of one of them as a nullity, but must leave it to the matter of appeal."

[99] In *Eastern Trust Co. v. Mackenzie, Mann & Co.*, 31 WLR 248, [1915] AC 750, 84 LJPC 152, Sir George Farwell, speaking for their Lordships of the Judicial Committee, said at pp. 255-6:

> "It [the injunction] was, of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged ---- ."

[100] Duff, C.J. approved the same principle in *Scotia Construction Co. v. Halifax (City)* [1935] SCR 124, and expressed the principle in these terms:

> "In any case, no appeal was attempted, and whether appealable or not, it was a judgment of a court of general jurisdiction, possessing --- authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction."

[101] In my opinion these submissions must be rejected.

[65] Speaking for the majority of the Supreme Court of Canada in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, McIntyre J. at 599 said:

> In the Manitoba Court of Appeal, Monnin J.A. said:
>
> > The record of a superior court is to be treated as absolute verity so long as it stands unreversed.
>
> I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.
>
> Authority for these propositions is to be found in many cases. A particularly clear statement of the law, together with reference to many of the authorities, is to be found in *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 D.L.R. 385, a judgment of the British Columbia Court of Appeal.

[66] Justice McIntyre then went on to cite and review other cases that confirm "the well-established and fundamentally important rule ... that an order of a court which

has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms" (at 604). Reference may also be made to the Saskatchewan Court of Appeal decisions in *Bank of Montreal v. Coopers Lybrand Inc.* (1996), 137 D.L.R. (4th) 441 (per Lane J.A.) and *Chaban v. Chaban Estate (Trustee of)* (1999), 172 D.L.R. (4th) 312.

[67] In my view the Appellant's cases are of no assistance to the court. They all involve timely applications to set aside the registration of a judgment, the registration of an arbitration award, or service *ex juris*. The references to matters being a 'nullity' in those cases are made in connection with arguments that the defects are minor enough that curative provisions can be applied *nunc pro tunc* to defeat a timely application to set aside the order.

[68] In my view the authorities establish that an order of a superior court of record is binding and conclusive unless set aside on appeal. The Appellant failed to apply to set aside the Registration Order within the limitation period proscribed by s. 34 of the COEA. This conclusion is consistent with the decisions referred to us by the Respondent such as *Alcor Pacific Lumber Sales Ltd. v. Janet Lumber Trading Co.* (1977), 11 A.R. 139 (Q.B.); *Mallett v. Yorkshire Trust Co.* (1986), 71 A.R. 23 (C.A.); and *Concord Mortgage Group Ltd. v. Northern Geophysics Ltd.*, [1994] N.W.T.J. No. 55 (S.C.).

[69] In a related argument, the Appellant says the judge below failed to correctly apply the test for enforcement of foreign judgments in *Beals*. The Appellant says that the judge below made two findings relevant to the application of *Beals*, namely, that (1) there was no real and substantial connection between the Appellant and the foreign jurisdiction, and (2) the Appellant was not "duly served" with the process in the foreign court.

[70] However, with respect, *Beals* is not a case involving an attempt to set aside a foreign judgment after the expiration of a limitation period. Rather, *Beals* concerns a timely defence to an application to enforce a foreign judgment: *Beals v. Saldana* (1998), 42 O.R. (3d) 127. It is of no assistance to the Appellant in her argument that

the Registration Order is a nullity and there was no need to comply with the statutory limitation period in order to set it aside.

C. Inherent Jurisdiction

[71] In argument it was suggested that there is inherent jurisdiction in the court below to set aside the Registration Order.

[72] *R. & J. Siever Holdings Ltd. v. Moldenhauer*, 2008 BCCA 59 demonstrates an application of the Court's inherent jurisdiction. In that case the Court of Appeal held at para. 14:

> In addition to the powers conferred by the *Rules of Court*, the Supreme Court of British Columbia, as a superior court of record, has inherent jurisdiction to regulate its practice and procedures so as to prevent abuses of process and miscarriages of justice: see I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Leg. Prob. 23 at 23-25. As the author said, at 25,
>
> The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by the Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

[73] Thus inherent jurisdiction exists to "prevent abuses of process and miscarriages of justice". While the precise boundaries of the Court's inherent jurisdiction are unclear, that jurisdiction "is a procedural concept and courts must be cautious in exercising the power which should not be used to effect changes in substantive law": *Goodwin v. Rodgerson,* 2002 NSCA 137 at para. 17.

[74] In this case there is a statutory procedure in the *COEA.* Subsection 34(2) of the *COEA* makes it clear that the court can set aside registration on any of the grounds referred to in s. 29(6) on terms the court finds fit, provided the application is made in a timely way. In my view it is a code for the grounds on which registration of a foreign judgment may be set aside: *LLS America LLC (Trustee of) v. Dill*, 2015 BCSC 1467. "Inherent jurisdiction" is not a basis upon which the statutory procedure and prescription set out in s. 34 the *COEA* can be avoided.

D. Failure to Comply with the *COEA*

[75] The Appellant argues that because the Respondent failed to comply with the provisions of the *COEA* the authorities establish that the court has jurisdiction to extend the time for setting aside the Registration Order. Thus the judge below erred in failing to recognize that if the plaintiff failed to comply with mandatory terms of the *COEA* then the court can extend the time limit under s. 34(1)(b).

[76] To support that proposition the Appellant cites *Augers v. Hume*, [1999] B.C.J. No. 118 at para 14 (S.C.) and *Walters v. Tolman*, 2005 BCSC 838 at para. 16. In *Augers*, although the *ex parte* registration order was made it was not served within one month of registration, contrary to s. 34(1)(a) of the *COEA*.

[77] The effect of the decision in *Augers* is that the one-month limitation in s. 34(1)(b) of the *COEA* does not commence until service has been effected as required by s. 34(1)(a), although in places the court expresses the principle as one where the court in such circumstances can make orders mutually extending the time periods. The decision in *Walters* follows that in *Auger*. Both decisions are restricted to circumstances in which there has not been timely service of the Registration Order. That is not the situation here.

[78] It is clear that s. 34(1)(a) expressly contemplates extending the time under which service of a registration order may take place, by requiring service "within one month after the registration or within a further period as the registering court may at any time order". In my view, the one-month limitation in s. 34(1)(b) can only start to run, after the date on which service has been perfected. These decisions, in my view, do not stand for the proposition that there is a general ability of the court to extend the time for compliance with the statutory limitation in s. 34(1)(b). Indeed, the language allowing the court to extend time under s. 34(1)(a) does not appear in s. 34(1)(b).

V. Conclusion

[79] Counsel for the Appellant has said all that could be said in support of the appeal, but I have concluded that there are no grounds raised on which the Registration Order can be set aside. As there are no grounds raised on which the Registration Order can be set aside it is unnecessary to determine whether the Registration Order could have been set aside on a timely application under s. 34(1)(b) of the *COEA*. I would dismiss the appeal.

"The Honourable Mr. Justice Savage"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"