INTELLENET NEWSLETTER

SEPTEMBER 2009

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Carino's Corner

James P. Carino, Jr. CPP, VSM
Executive Director

Perhaps we can never be at a level to achieve adequate knowledge to be able to foresee all future events. But that should not deter us from preparing for the widest possible range of contingencies. This notion was suggested by Sherry Horowitz, Editor-in-Chief of The ASIS Security Management, in the June 2009 issue column titled "Making Change Adaptive to Change and Complexity".

This notion is, of course applicable to virtually all problem challenging situations. One such is a point I have been "preaching" for over two years – developing a legislative or recession proof investigative/security niche if you plan to remain as a player in the investigative arena as the 21st century progresses. Certainly the economic downturn has adversely affected our bottom line. But that is not our only concern. NCISS and ISPLA have been diligently keeping us abreast of legislative activity in Congress. Those who have been following congressional actions closely are observing ominous clouds on the horizon. Intellenet, in heeding these warnings has been hard at work for its members in pursing initiatives to enhance business opportunities. These efforts are proving successful both for our US based and international members.

To achieve these goals we are using a three pronged approach – awareness, training and information sharing.

The first – regarding awareness, we are promoting Intellenet through exhibiting at high prospect conferences and publicizing Intellenet through other communications outlets. The second – training, is receiving increased focus and emphasis. Our annual conferences are including presentations

on niche development. Plans are in the works for widening our training platform. Our third approach has been on-going virtually since the inception of Intellenet in 1983. An important objective is to ensure our members remain current on new legislation in order that all investigations are not only professional but conducted within legal and ethical bounds. The second part of information sharing is to promote and foster a platform and arena for the open exchange of ideas, techniques, tools and methodology through our Listserve, extensive networking and through involvement and interface with other Associations.

Know Your Fellow Members

Adrian Charles
Taipei, ROC, Hong Kong, Hong Kong

Adrian's great grandfather left Canton during the Chinese Boxer Rebellion in the late 1800s, the irony being 100 years later Adrian was posted to the same city, although it had since been renamed Guangzhou.

Armed with an Australian Bachelor of Economics degree majoring in Mandarin with a minor in Japanese, his career began in investigative journalism covering political corruption and all manner of crimes throughout the Asia-Pacific. He then went undercover to investigate stock market fraud and counterfeit tobacco matters for a leading commercial investigation firm in Hong Kong. In the mid-nineties Adrian became Pinkerton's South China Branch Manager where anti-counterfeiting investigations dominated.

Adrian has been a Partner at Joseph Lee & Associates Ltd. (JLA) since late 1999, now speaks Cantonese and heads the commercial investigations and security divisions in Greater China and recently opened JLA'S first Intellectual Property office in Thailand.

Intellenet Officers and Board of Directors

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New Members

Eddy Sigrist, Aristeed BV, Soest, The Netherlands, **Dennis Lagan,** Dennis Lagan & Associates, Erie, Pennsylvania, **Jeff Stein,** ELPS Private Detective Agency, Exton, Pennsylvania, **Norm Williams,** Williams Financial Investigations, Lexington, Kentucky, **James Wood** Black Diamond Security Group, Waynesboro, Virginia, **Charles Rettstadt,** Research North, Petoskey, Michigan, **Joe Bode,** J&J Investigations, Farmington, Utah, **Suren Galustyan**, TORA LLC Yerevan, Armenia, **Bob Shannon**, Shannon Associates, Hockessin, Delaware, and **Kevin McClain**, Centralia, Illinois.

John Dillon, Comcast Cable, Pittsburg, Pennsylvania has been added to the D List.

Membership Changes

Earl Tomlinson, Brownwood, Texas, opted not to renew membership.

Members in the News

Jimmie Mesis, Freehold, New Jersey, and **Terry Cox**, Booneville, Mississippi, were speakers at the NALI Conference in Nashville June 18-20, 2009.

Burt Hodge, Tallahassee, Florida, is completing his final term as NALI's National Director.

Alan Goodman, Portland, Maine, **John Lajoie**, West Boylston, Massachusetts, and **Reggie Montgomery**, Allendale, New Jersey, will be speakers at the Maine Licensed Private Investigators Association Conference in Portland, Maine, September 25-25, 2009.

Cynthia Hetherington, Haskell, New Jersey, and **Jon McDowall**, Bettendorf, Iowa, were speakers at the ACFE Conference in Las Vegas, Nevada, July 12-17, 2009.

Paul Jaeb, Minneapolis, Minnesota, is the NALI National Director for 2009-2010; **Terry Cox**, Booneville, Mississippi, the Assistant National Director; **Jayne McElfresh**, Phoenix, Arizona, the Region 6 Regional Director; and **Sheila Klopper**, San Jose, California, the Region 7 Regional Director.

Brian Ingram, Consulting Investigation Services, Waxahachie, Texas, **Carrie Kerskie,** Marcone Investigations, Naples, Florida and **Kevin Ripa,** Computer PI, Calgary, Alberta, Canada, were presenters at the FAPI Conference in Tampa, Florida, August 20-23, 2009

Rest in Peace
George C. "Brad" Penny
November 14, 1929—June 27/2009
Intellenet Charter Member and Board of Directors

2010 Intellenet Conference

Now is the time to make arrangements to attend the 2010 Intellenet Conference in New Orleans, Louisiana, March 23-28, 2009. Our Louisiana host, Buddy Bombet, has promised us some "Louisiana Style" entertainment. The conference hotel is the Marriott Hotel, 614 Canal Street, New Orleans, with room rates of $155.oo single or double. These rates are good for three days prior to and after the conference. More information is available at www.intellenetagm.com.

Building Your Business

Bill Blake
Littleton, Colorado

There are numerous cost effective marketing tools. A goal of your marketing program is getting personal and business exposure. This is easily accomplished by seeking out speaking opportunities with potential client groups. Many professional organizations are constantly looking for free meeting and dinner speakers. This is an opportunity to distribute business cards and identify potential clients. It also provides potential clients with an opportunity to evaluate you and your business.

Writing guest articles for local newspapers is another method of getting introduced to the public. Consideration should be given to providing articles to the smaller neighborhood newspapers. Most cities have a weekly "business journal" and welcome business related articles. The business journals frequently produce a "Book of Lists" which will identify various business groups, along with some identifying information on each business.

Writing articles for professional journals is an effective marketing tool. This gives the public an opportunity to evaluate your professional and business knowledge; however this activity should not be restricted to professional journals pertaining to your area of expertise. This is similar to "preaching to the choir" and your clients will normally come from non-investigative sources. For example, consider authoring an article relating to the Employee Polygraph Protection Act of 1988 for a Human Resources or business publication. Such an article will provide advice to potential clients and demonstrate that you are aware of restrictions placed on your investigative activities.

The best method for initially developing a client base is working with the "good old boy" network, both within and without the investigation arena. Investigators who do pro bono work will eventually get clients through this activity. Pro bono work frequently becomes the subject of the local media and this is free advertising. It may be to your advantage to develop a subcontractor relationship with a larger firm but never succumb to "stealing" the firm's clients.

Some individuals have been successful in contacting large corporations or law firms and working as a contractor at reduced rates to develop a reputation within the community. While you may work as an investigator for one party in litigation, your adversary will form an opinion of your professional expertise which may lead to work for you, either through the adversary's firm or via referral to another firm.

One area that is often overlooked is the opportunity to market your services through information obtained from local newspapers. Almost every major city has a "Business Journal" that lists promotions, business start-ups and related information. If it reported that an attorney is opening a new office or has been promoted to a higher position, a congratulatory letter could be sent to the individual. A simple one-page letter should be concise and contain only a general one-paragraph description of the services you offer and your business card. If too much material is included, your letter will probably be destined for the waste basket.

Essential to obtaining repeat business from a client is the manner in which you treat your client. Business firms and attorneys normally have a very heavy appointment schedule and it is a cardinal sin to not keep an appointment or to be late for an appointment. Time is money to your clients and they will drop you as an investigative resource if your apathy or carelessness costs them productive time.

It is also imperative that you keep your commitments and perform tasks or provide reports on an agreed basis and timeframe. When meeting with a client, it is normally best to work at a highly professional level. It is not time for gossip or discussion of the latest sporting events. Again, time is money!

Interview Do's and Don'ts—Silencing Your Chatty Cathy

Laura J. Hazen, Esq
Denver, Colorado

- *"What a pretty ring! When are you getting married?"*
- *"How DO you do it all? Who watches your kids?"*
- *"What happened to put you in a wheelchair?"*

- *"Oh, that's how you pronounce your last name. Surprising. You don't look like you are from that country."*

Interviews. You either love them or you hate them. Those who love them view interviews as the best way to really get to know applicants. Those who hate them view interviews as a frustrating exercise in listening to what others think of themselves.

While interviews can be fantastic tools for learning about your applicants, they can also be fertile ground for creating unintended liability. If questions that a well-intended interviewer asks, intended to get at "who the candidate really is," solicit information that places the candidate in a protected class or information about protected off-duty conduct, then a decision not to hire that candidate could result in a verdict against the employer. State and Federal statutes prohibit adverse employment actions because of membership in a protected class and for lawful off-duty conduct. So, if you decide not to hire someone because of a protected characteristic (their race, national origin, gender, family responsibilities, religion or sincerely held belief, sexual orientation, disability, among others) or because of lawful off-duty conduct, that decision can give rise to liability.

How do you avoid liability for hiring decisions? The cleanest way is to avoid knowing anything about your applicants that could inappropriately influence your decision. It is also important to train the members of your staff who will interview applicants, and to encourage them to ask questions that allow you to compare apples to apples. If everyone asks the same questions, then your hiring decision will be more unbiased and easier to defend. Encourage them to avoid chatty questions. While the urge to ask questions might be based upon a genuine desire to find a "good fit," that "good fit" might be code for "individual biases." Questions about weekend plans could tease out lawful off-duty conduct (protected under Colorado law). Comments about a pretty diamond ring might encourage an applicant to discuss marital status. Commiseration about being a working parent might encourage sharing about child care responsibilities (a subset of gender discrimination). Comments about the ability of a candidate to perform a job, directed at one applicant in a wheelchair but not asked of an apparently able employee, could open an employer to an ADA claim.

Set your desire to make people feel comfortable aside. Sticking to the job description is the safest road. If you keep your questions focused on the ability of your applicant to perform the essential functions of the job, and standardize interview questions, your process should help you identify star employees and not star witnesses.

Laura J. Hazen is a Director at Ireland Stapleton Pryor & Pascoe, P.C. In her employment practice, Hazen provides day-to-day advice and coaching to public and private companies on various employment matters. She also has an active litigation practice where she concentrates on representing businesses in all aspects of complex business and employment disputes. You can contact her by email at lhazen@irelandstapleton.com or by phone at 303-623-2700.

The Hazards of Being a Check Thief

Ed Martin
Austin, Texas

In May 2009, Ed Martin, CFE, and Intellenet member participated as an Expert Witness for, Tom Garner, Special Prosecutor for Caldwell County, Texas. The theft case was indicted because the defendant embezzled in excess of $200,000. The case involved a small businessman who hired his former sister-in-law as the secretary and bookkeeper for his corporation. He trusted her and allowed her to keep the books and to sign payroll and business checks without his scrutiny and without his reconciling the bank account. Over her six years of employment, she stole in excess of $400,000 from the corporation by issuing extra payroll checks to herself and her husband (an employee of the corporation). She also issued checks for wages to her non-employee daughters. The businessman did not realize that something

was wrong until corporate revenue declined because of the nonrenewal of contracts.

Earlier in May 2009, the trial started in Lockhart, Texas. The court allowed Martin to be exempted from the rule. After the investigating police officer relayed his testimony and the businessman testified about his loss, Martin presented to the jury a one-page summary of an analysis of 390 fraudulent checks issued to her, her husband and her daughters. The defense attempted to confuse the jury with hypothetical scenario, which Martin was able to handle. In one instance, the defense attorney asked for Martin's opinion on the activities of his client. Martin told the jury that in his experience as a criminal investigator for the IRS, a forensic accountant, and certified fraud examiner he concluded that she defrauded the businessman, stole his money, and defied his trust. The next witness was an Expert Document Examiner that rendered an opinion that the 390 checks were forged by the defendant. The prosecution then rested. The following morning when the defense was to present its case, the defendant decided to enter a plea of guilty. Sentencing by the judge is pending.

Crossing Borders in Greater China

Adrian Charles
Joseph Lee & Associates Ltd.
Beijing, Guangzhou, Hong Kong and Taipei

The term "Greater China" can refer to commercial and cultural links between Hong Kong, Taiwan (R.O.C.) and the People's Republic of China (P.R.C.), although their legal systems and languages remain as distinct as their territorial borders. This can be a double-edged sword in investigations, especially those concerning Intellectual Property (IP) enforcement and anti-counterfeiting.

Briefly, Hong Kong's legal system is based on English common law and the Cantonese dialect is widely spoken along with English, while traditional (complex) Chinese characters are the written standard for locals.

Conversely, the P.R.C. uses a simplified Character writing system and Putonghua (Standard Mandarin) is the official spoken language. Meanwhile, Confucian, Legalist, German, Soviet, Han Chinese and Marxist influences, among others, have come and gone in the P.R.C. legal system before it modified trademark laws to better suit international IP practices and avoid a trade war with the U.S.A.

People in Taiwan write using traditional Chinese characters as in Hong Kong, although they speak a dialect from Fujian Province in the P.R.C. linguistically modified during 50 years of Japanese colonization, despite their official language being a version of Standard Mandarin. Today Taiwan's legal system has continued to adopt western legal concepts since terminating martial law in 1987 and repealing Japanese laws in 1946.

Consequently, beginning a prudent investigation regarding a Chinese individual or company will certainly require name searches to be conducted in English, Traditional Chinese characters, Simplified Chinese characters and every permutation of the above scripts. This is a result of large numbers of Taiwan and Hong Kong companies moving their manufacturing bases to the P.R.C. They then began using two styles of writing their Chinese names, irregular Romanization and translation of their names, key executives acquired additional ID of some description thus avoiding taxes, customs and sometimes their families back home. To further confuse matters it is extremely common for people in the P.R.C. to have multiple ID cards illegally fabricated for various reasons. With significantly smaller populations and more accountable law enforcement, Taiwan and Hong Kong do not suffer from the same extent of ID card fraud found in the P.R.C.

Many anti-counterfeiting investigations will therefore reveal a Taiwan manufacturer who once shifted production to low-cost P.R.C. factories and then set up holding companies in Hong Kong to enjoy an easier tax regime, relaxed foreign exchange controls and access to backdoor listing on a first-class stock exchange. In addition, many of the abovementioned issues relating to the true name of the infringer will come into play and it is common for clients to overlook important links if they are using separate investigators in the three jurisdictions. The result can be as simple as duplicating investigation costs under the mistaken impression one target is two different entities, when it is not. More tragically covers can be

blown, the target skips town and grounds for a countersuit become available to counterfeiter.

Nevertheless, if you have your investigators in Taiwan, Hong Kong and the P.R.C. talking directly real-time, adjusting for discrepancies between local dialects, translation and transliteration, then sharing documentary evidence at field level instead of via final reports, a 'Confucian confusion' can be well avoided.
For example, a European trademark owner found seven independently owned Internet sites in the USA and UK selling counterfeits of their product, namely branded adhesive panels of generic foam rubber placed inside PC terminal walls to reduce cooling fan noise and the general hum of a working computer.

The investigation began with some well coordinated sample purchases using buyers in all three jurisdictions and it was soon established, by comparing online chat statements and disclosures, the products were coming from the client's ex-manufacturer in Taiwan. This manufacturer was in turn using several sub-contractors in Taiwan for different aspects of production. Furthermore, some of the sub-contractors had already moved production to the Peoples Republic of China (P.R.C.), although the mainland factories had sales, shipping and distribution operations in Hong Kong.

The due diligence process was seamless and all targets for enforcement were clearly identified once business registration documents, shipping labels, email signatures, business cards and bank accounts had their Chinese character scripts compared by investigators working all other aspects of the case shortly, if not immediately, upon receipt. The client's legal counsel in Europe, the U.S.A. and Greater China were then all reading from the same sheet and the various infringing parties were more than surprised to be put on notice the same day as each other.

Had the client required the counterfeiters' premises to be physically raided by inland enforcement authorities in the Greater China territories; events may not have been so simultaneous. In Taiwan, inland raid actions will normally be conducted by the Police, while in Hong Kong this function is largely handled by the Customs and Excise Department, regardless of whether the counterfeit goods are being seized at a port, office premises or retail outlet. The Police in the P.R.C. will generally only take on Intellectual Property infringement cases involving serious criminal activities and quantities of significant value. On an hourly basis across the P.R.C. officers of the Administration of Industry and Commerce raid factories, warehouses, wholesalers and retailers – big and small for any type of trademark infringement.

The enforcement phase from lodging an official complaint to counting seized items can therefore vary from a few hours in the P.R.C. or days in Taiwan or could even be months in Hong Kong, although from an investigative perspective the level of evidence is limited in most cases across Greater China to the following:

- Registered Intellectual Property rights in the form of a trademark certificate or patent.
- Proof of sale in the form of a receipt stamped with a company chop or seal.
- Failure to produce documents authorizing manufacture the quantities being produced.

With this advantage, foreign clients who may be used to requiring investigators in their home countries to conduct expensive surveillance operations and unnecessary financial probing can avoid obstacles such as Hong Kong's strict data privacy laws, less 'responsible' financial and accounts reporting in the P.R.C. and the common Taiwan practice of including more information than necessary in documents thus clouding issues.

The above article outlines some fundamental aspects of investigations in Greater China, although casting the net globally at the outset is the best advice as the Chinese identity issues are not limited to Taiwan, the P.R.C. or Hong Kong. Some of your best asset trace findings will be located in other countries favored by ethnic Chinese speaking targets, such as Singapore, the Philippines, Mauritius, Macau etc. each with different legal systems and transliterations, modifications and Romanization of Chinese names.

The Law and Identity Theft

When does taking and using someone else's identity become a crime? Current federal law defines identity theft as a federal crime when someone

> "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." (18 U.S.C. § 1028(a)(7).

The current federal law also provides enhanced penalties for *aggravated identity theft* when someone "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" in the commission of particular felony violations. Aggravated identity theft carries an enhanced two-year prison sentence for most specified crimes and an enhanced five-year sentence for specified terrorism violations.

Identity Theft Assumption Deterrence Act

In 1998, Congress passed the Identity Theft Assumption Deterrence Act (P.L. 105-318), which criminalized identity theft at the federal level. In addition to making identity theft a crime, this Act provided penalties for individuals who either committed or attempted to commit identity theft and provided for forfeiture of property used or intended to be used in the fraud. It also directed the Federal Trade Commission (FTC) to record complaints of identity theft, provide victims with informational materials, and refer complaints to the appropriate consumer reporting and law enforcement agencies. The FTC now records consumer complaint data and reports it in the Identity Theft Data Clearinghouse; identity theft complaint data are available for 2000 and forward.

Identity Theft Penalty Enhancement Act

Congress further strengthened the federal government's ability to prosecute identity theft with passage of the Identity Theft Penalty Enhancement Act (P.L. 108-275). This Act established penalties for *aggravated identity theft*, in which a convicted perpetrator could receive additional penalties (two to five years imprisonment) for identity theft committed in relation to other federal crimes. Examples of such crimes include theft of public property, theft by a bank officer or employee, theft from employee benefit plans, false statements regarding Social Security and Medicare benefits, several fraud and immigration offices, and specified felony violations pertaining to terrorist acts.

Identity Theft Enforcement and Restitution Act of 2008

Most recently, Congress enhanced the identity theft laws by passing the Identity Theft Enforcement and Restitution Act of 2008 (Title II of P.L. 110-326). Among other elements, the Act authorized restitution to identity theft victims for their time spent recovering from the harm caused by the actual or intended identity theft.

Red Flags Rule

The Identity Theft Red Flags Rule, issued in 2007, requires creditors and financial institutions to implement identity theft prevention programs. It is implemented pursuant to the Fair and Accurate Credit Transaction (FACT) Act of 2003 (P.L. 108-259). The FACT Act amended the Fair Credit Report Act (FCRA) by directing the FTC, along with the federal banking agencies and the National Credit Union Administration, to develop Red Flags Guidelines. These guidelines require creditors and financial institutions with covered accounts to develop and institute written identity theft prevention programs. According to the FTC, the identity theft prevention programs required by the rule must provide for

- identifying patterns, practices, or specific activities—known as "red flags"—that could indicate identity theft and then incorporating those red flags into the identity theft prevention program;

- detecting those red flags that have been incorporated into the identity theft prevention program;

- responding to the detection of red flags; and

- updating the identity theft prevention program periodically to reflect any changes in identity theft risks.

Possible "red flags" could include

- alerts, notifications, or warnings from a consumer reporting agency;

- suspicious documents;

- suspicious personally identifiable information, such as a suspicious address;

- unusual use of—or suspicious activity relating to—a covered account; and

- notices from customers, victims of identity theft, law enforcement authorities, or other businesses about possible identity theft in connection with covered accounts.

Extracted from "Identity Theft: Trends and Issues", Congressional Research Service, May 27, 2009.

Debugging Services for Your Clients

Tim Johnson
Carrolton, Georgia

As an investigator/security consultant you may often be asked to locate someone who can do a debugging sweep for a client. Or they may ask you for a referral. In either instance, your reputation is on the line and you should make every effort before hand to insure that the person/company you select has the highest standards.

To determine the qualifications of the individual/company, first ask for a brochure or visit their site and determine where and when they received training. Solicit comments from your associates and any investigative list that you may belong to.

Once you have narrowed the field, call the individual/company and talk to the person in charge. Ask questions regarding their training, experience, time in business and ask them to have some of their clients contact you.

Let them know that you are shopping around as a result of an inquiry by a client (but don't let them know who the client is or where they are located).

Things to look for are length of time in business (the longer, the better), quality training by an approved school or government agency. Typically, people trained by a federal government agency and 2 or more years experience with the government are your better choice. Additional advanced training after the initial utilization tour is an added plus. (As with any field of endeavor, you never stop getting educated. It is an ongoing thing).

Once you have determined they are qualified in the area of training and experience and aren't a fly-by-night group, determine what kind of equipment they are using. Don't be impressed with the standard phrase of "we have more than $XXX,000.00 amount of equipment. Ask for a list and check around to see if it will be adequate for your clients needs. You should also be aware that the best equipment in the world is only as good as the ability of the person employing it. Too many times have I seen teams who were equippe3d with excellent equipment doing a mediocre job because of training, experience, attitude, etc.

The client may also ask that you monitor the activity so bone up on the procedures used in the conduct of sweeps.

I'm available at almost any time to answer any questions you might have regarding TSCM/Sweeps so don't hesitate to contact me.

FCRA Compliance

Jim Laws
Jim Laws Investigations
Las Cruces, New Mexico

Frequently questions have arisen on the means for legally obtaining credit reports. As a result, I queried the Intellenet membership who provided the following data which was provided by individual members for information purposes only and is not to be considered legal advice:

1. Under FCRA rules, you cannot access someone's commercial credit report without the expressed authorization from that person or a court order.

2. Under no circumstances can someone obtain a credit report on a Plaintiff because there is no Permissible Purpose under FCRA or FACT.

3. In some limited cases, someone can obtain a credit report without written consent on a "creditor" as that term is defined under the Act. For example: if Joe Jones loans money to Tom

Smith, or Joe Jones creates an account relationship with Tom Smith, then Joe Jones is entitled to review that account relationship at any time during the course of the account relationship. This includes an effort to collect a debt, collect a judgment, etc. In this illustration, Joe Jones would be the Plaintiff and Tom Smith would be the Defendant should Tom Smith not pay Joe Jones.

4. There are other permissible purposes for which no actual consent is needed by the consumer, but it depends on the fact scenario. I cannot envision any set of facts whereby the defendant is permitted to obtain a credit report on the plaintiff but it really depends on what the exact fact scenario may be.

5. It is a myth that one always needs written consent. This is not the case as otherwise how would someone collect on an account that is overdue; how would one review an account that is pending; how would one collect a child support order; how would on determine whether the parties are engaged in a legitimate business transaction that has been initiated by the consumer?

6. While I am not an attorney, nor a specialist on the FCRA, I do have access to the credit files and work with the FCRA almost every day. I am not sure if you have ever tried to read the FCRA, but it is almost 250 pages, so trying to summarize it probably won't happen.

7. I have always used the rule that I will not run a credit report unless one or more of the following guidelines apply:

» Signed release from the creditor
» Court certified past due child support issue
» Judgment Against Person and I have a copy of the judgment
» Judge signed court order-not a subpoena

8. If I was asked by an attorney to obtain a credit report and I did not believe the attorney had justifiable cause under the FCRA to obtain a credit report, before obtaining a credit report, I would ask the attorney for a signed, notarized release stating that the attorney would represent me for free in any subsequent civil/criminal action and be responsible for any financial loss suffered.

The Enforcement of Foreign Judgments in Canada

Igor Ellyn, QC, FCIArb.
Toronto, Ontario M5H 3T9

This article is for information only and not legal advice. The author discusses the enforcement of foreign judgments in Canada. This article was originally presented in French at the Conference of the Association of French Speaking Lawyers of Ontario (AJEFO) in Niagara Falls, Ontario, June 4, 2004. It has been translated into English by the author. The content is still current to 2009.

Our planet is really a global village thanks to the Internet and technology and the fact that people and goods traverse the globe as never before in human history. This reality has recently affected even the area of the enforcement of foreign judgments.

For a better understanding of the state of Canadian and international law at the present time, we have to cast our minds back a little on history from the last millennium. Twenty years ago, some Toronto business people were involved in a complex litigation matter involving a real estate project in the Antilles. To advance their strategy, they and their Toronto lawyers decided to commence an action in the court of one of the islands. To help them advance their case, they should meet with a local lawyer to explain the situation and to retain him to start the action against the opposing parties. After having commenced the action and served the defendant, the Toronto businessmen and their lawyers returned to Toronto, where they had to defend a lawsuit by the same party commenced in Ontario. The case went on for quite some time. Meanwhile, the Caribbean lawyer was, it seems, getting ready for, as he put it, one of the most important trials that his small island had ever known. Unfortunately for him, one fine day, the whole dispute was settled.

The Toronto entrepreneurs' problems had just begun. The island lawyer was not only disappointed that there would not be a trial but he also demanded an unbelievable amount for his legal fees and for the time of two other local lawyers whom he retained to assist him, including the "dean" of the local bar. He did not want to hear of settling his account. He wanted nothing less than a figure the Torontonians considered outrageous.

Some time later, the entrepreneurs and their Toronto lawyer found themselves as defendants in a lawsuit of the Supreme Court of this small island. And to make matters worse, one of the plaintiffs was the dean of the local bar.

The best advice at that time was a defense strategy which today and from now on would be legally troublesome. The defendants decided to do nothing at all. Because they had no personal connection and no assets in the Caribbean island, (and had not been served with the claim on the island), they simply let the case go by default and waited for the Caribbean lawyers to claim to enforce their judgment in the courts of Ontario. Their decision was based on the jurisprudence of the day which held that a foreign court had no jurisdiction over a foreign individual unless the claim had been served within the territory of the court or if the defendant attorned voluntarily to the jurisdiction of the court. If the foreign court had no jurisdiction over the Ontario defendant, when the judgment is sought to be enforced in Ontario, the defendant will be entitled to defend the claim on the merits in Ontario.

All of this was turned on its ear by the decision of the Supreme Court of Canada ("SCC") in Morguard v. de Savoye (1990) SCC 1077, where the SCC, and here I quote the words of Major J. in para. 20 of the decision: 20 Morguard, supra, altered the old common law rules for the recognition and enforcement of interprovincial judgments. These rules, based on territoriality, sovereignty, independence and attornment, were held to be outmoded. La Forest J. concluded that it had been an error to adopt this approach "even in relation to judgments given in sister-provinces" (p. 1095). Central to the decision to modernize the common law rules was the doctrine of comity. Comity was defined as (at pp. 1095 and 1096, respectively): the deference and respect due by other states to the actions of a state legitimately taken within its territory. . . . The old rules of the common law were replaced by rules intended to facilitate the movement of goods, technology and people from one country to another, particularly, within a federal state.

The Morguard case established that to determine whether a court has correctly exercised its jurisdiction over the defendant, two factors have to be considered. The first is the need for "order and equity" and the second is the existence of a "real and substantial connection" with the subject-matter of the action or with the defendant. The SCC decided that the existence of a real and substantial connection with the subject-matter of the action satisfies the criteria even if such a connection with the defendant does not exist.

The law did not change for 13 ½ years until the determination of the decision of the SCC in Beals v. Saldanha. In December 2003 Beals v. Saldanha extends the "real and substantial connection" principle to foreign judgments not only from one Canadian province to another but also to judgments from other countries. The facts in Beals are significant because they show how far the principle has been extended. I quote paras. 5-11 of the judgment:

5 The appellants were Ontario residents. In 1981, they and Rose Thivy, who is Dominic Thivy's wife and no longer a party to this action, purchased a lot in Florida for US $4,000. Three years later, Rose Thivy was contacted by a real estate agent acting for the respondents as well as for William and Susanne Foody (who assigned their interest to the Beals' and are no longer parties to this action) enquiring about purchasing the lot. In the name of her co-owners, Mrs. Thivy advised the agent that they would sell the lot for US $8,000. The written offer erroneously referred to "Lot 1" as the lot being purchased instead of "Lot 2". Rose Thivy advised the real estate agent of the error and subsequently changed the number of the lot on the offer to "Lot 2". The amended offer was accepted and "Lot 2" was transferred to the respondents and the Foodys.

6 The respondents had purchased the lot in question in order to construct a model home for their construction business. Some months later, the respondents learned that they had been building on Lot 1, a lot that they did not own. In February 1985, the respondents commenced what was the first action in Charlotte County, Florida, for "damages which exceeds $5,000". This was a customary way of pleading in Florida to give the Circuit Court monetary jurisdiction. The appellants, representing themselves, filed a defense. In September 1986, the appellants were notified that that action had been dismissed voluntarily and without prejudice because it had been brought in the wrong county.

7 In September 1986, a second action ("Complaint") was commenced by the respondents in the Circuit Court for Sarasota County, Florida. That Complaint was served on the appellants, in Ontario, to rescind the contract of purchase and sale and claimed damages in excess of US $5,000, treble damages and other relief authorized by statute in Florida. This complaint was identical to that in the first action except for the addition of allegations of fraud. Shortly thereafter, an Amended Complaint, simply deleting one of the defendants, was served on the appellants. A statement of defense (a duplicate of the defense filed in the first action) was filed by Mrs. Thivy on behalf of the appellants. The trial judge accepted the evidence of the Saldanhas that they had not signed the document. Accordingly, the Saldanhas were found not to have attorned. As discussed further in these reasons, Dominic Thivy's situation differs.

8 In May 1987, the respondents served a Second Amended Complaint which modified allegations brought against a co-defendant who is no longer a party, but included all the earlier allegations brought against the appellants. No defense was filed. A Third Amended Complaint was served on the appellants on May 7, 1990 and again, no defense was filed. Under Florida law, the appellants were required to file a defense to each new amended complaint; otherwise, they risked being noted in default. A motion to note the appellants in default for their failure to file a defense to the Third Amended Complaint and a notice of hearing were served on the appellants in June 1990. The appellants did not respond to this notice. On July 25, 1990, a Florida court entered "default" against the appellants, the effect of which, under Florida law, was that they were deemed to have admitted the allegations contained in the Third Amended Complaint.

9 The appellants were served with notice of a jury trial to establish damages. They did not respond to the notice nor did they attend the trial held in December 1991. Mr. Foody, the respondent Mr. Beals, and an expert witness on business losses testified at the trial. The jury awarded the respondents damages of US $210,000 in compensatory damages and US $50,000 punitive damages, plus post-judgment interest of 12% per annum. Notice of the monetary judgment was received by the appellants in late December 1991.

10 Upon receipt of the notice of the monetary judgment against them, the Saldanhas sought legal advice. They were advised by an Ontario lawyer that the foreign judgment could not be enforced in Ontario because the appellants had not attorned to the Florida court's jurisdiction. Relying on this advice, the appellants took no steps to have the judgment set aside, as they were entitled to try and do under Florida law, or to appeal the judgment in Florida. Florida law permitted the appellants ten days to commence an appeal and up to one year to bring a motion to have the judgment obtained there set aside on the grounds of "excusable neglect", "fraud" or "other misconduct of an adverse party".

11 In 1993, the respondents brought an action before the Ontario Court (General Division) seeking the enforcement of the Florida judgment. By the time of the hearing before that court, in 1998, the foreign judgment, with interest, had grown to approximately C $800,000. The trial judge dismissed the action for enforcement on the ground that there had been fraud in relation to the assessment of damages and for the additional reason of public policy. The Ontario Court of Appeal, Weiler J.A. dissenting, allowed the appeal.

But to enforce a foreign judgment, an Ontario court must be satisfied that certain conditions exist:

a. Whether the foreign court had a real and substantial connection with the subject-matter or the defendant;

b. Whether the defendant has submitted to the jurisdiction of the foreign court by agreement of the parties or the consent of the defendant. In the case of a judgment of a foreign court having a real and substantial with the defendant, the defendant may, nevertheless, defend the claim in the Ontario court by raising defenses of fraud, breach of public policy or denial of natural justice. Here I quote paras. 44-45 of the judgment of the SCC:

44 Inherent to the defense of fraud is the concern that defendants may try to use this defense as a means of relitigating an action previously decided and so thwart the finality sought in litigation. The desire to avoid the relitigation of issues previously tried and decided has led the courts to treat the defense of fraud narrowly. It limits the type of evidence of fraud which can be pleaded in response

to a judgment. If this Court were to widen the scope of the fraud defense, domestic courts would be increasingly drawn into a re-examination of the merits of foreign judgments. That result would obviously be contrary to the quest for finality.

45 Courts have drawn a distinction between "intrinsic fraud" and "extrinsic fraud" in an attempt to clarify the types of fraud that can vitiate the judgment of a foreign court. Extrinsic fraud is identified as fraud going to the jurisdiction of the issuing court or the kind of fraud that misleads the court, foreign or domestic, into believing that it has jurisdiction over the cause of action. Evidence of this kind of fraud, if accepted, will justify setting aside the judgment. On the other hand, intrinsic fraud is fraud which goes to the merits of the case and to the existence of a cause of action. The extent to which evidence of intrinsic fraud can act as a defense to the recognition of a judgment has not been as clear as that of extrinsic fraud.

This is also a good place to mention some other examples of the subjects which international lawyers involved in the enforcement of foreign judgments deal with and appropriate links to the Internet:

• The Hague Convention on the Recognition and Enforcement of Foreign Judgments in civil and commercial matters.

• Enforcement of Judgments Conventions Act, 1999

• Interjurisdictional Support Orders Act, 2002
• Reciprocal Enforcement of Judgments Act (provinces du Canada);
• Reciprocal Enforcement of Judgments (U.K.) Act

I close by repeating this important word of advice — if your client tells you a story about a claim they have to defend in a court in another country, don't disregard it. At the same time, it does not necessarily follow that you should send your client to retain a lawyer in the foreign jurisdiction. It may be that the foreign court will not accept jurisdiction over your client. The American principle to which I refer only briefly seeks to determine whether there are minimum contacts between the defendants, served outside the court in question, so that it has an interest in deciding the case. So, it's the lawyer not the client who should retain counsel in the foreign state.

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Book Review

"Someone's Daughter, the Search for Justice for Jane Doe"
Silvia Pettem

This is a new book that documents an investigation initiated by a writer and historian from Boulder, Colorado. She found the grave of a young woman who was murdered in Boulder in 1954 but she was never identified and her killer was never found. On her own initiative, she contacted the Boulder County Sheriff's Department and the Vidocq Society for help and raised thousands of dollars from her community. The Sheriff and the Society responded and the victim, known only as Boulder Jane Doe, was exhumed. Drs. Richard Froede, Walter Birkby and Robert Goldberg then performed a forensic autopsy and reconstructed the victim's skull. Enter to the scene comes Frank Bender who reconstructs the skull and gives the victim a face. The television program, America's Most Wanted featured the work, seeking someone who might recognize the victim.

This book will be out in October 2009, ISBN: 1-58979-420-6-978-1-58979-420-7 for $22.95 from Taylor Trade Publishing.

Identifying a Return on Your Investigation and Security Investment in Non-Financial Terms

Bill Blake
Littleton, Colorado

Security Program Objectives -- Mitigation of Risk Quantified In Non-Financial Terms	**Investment**
RISK ASSESSMENT PROGRAMS	
1. No major disruptions of business	CCTV surveillance, timely police or security officer response - physical interception of threat
2. No individual being taken hostage in the building	Controlled access, live surveillance, deterrent security officer presence
3. No serious workplace assault on an employee or other occupant, including during non-business hours	Controlled access, live surveillance, security officer deterrent and response
4. No crisis of confidence on the part of employees[i]	Comprehensive and visible security program and system
5. No protracted evacuation of the building	Live surveillance monitoring of risk areas, fast trained response, prevention procedures
6. No significant reduction in freedom of access for visitors to the building	Security officer visibility, security monitoring equipment
7. No unnecessary alienation of legitimate users of the building through "knee-jerk" reaction	A planned, comprehensive and "occupant friendly" security system
8. No loss of life because of poor threat recognition	Planned, audited and periodically updated security measures
9. No failure to provide a prompt and efficient emergency response	Coordinated emergency services planning, safety/security training, live surveillance and efficient communications
10. No excessive consequential cost incurred through inadequate emergency planning	Forward planning to cope with incident aftermath

11. Quality personnel with high degree of personal integrity	Initial and periodic background investigations to verify applicant and employee information
12. Elimination of theft of company products and other assets[ii]	Coordinated actions between auditors and investigators to identify losses and their cause
13. Amicable resolution of internal disputes in accordance with corporate objectives	Development of factual and impartial information to support human resources policies
14. No business transactions or acquisitions with unqualified businesses or individuals	Coordinated due diligence investigations by auditors and investigators to verify business credentials

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[i] The worst case scenario depicts a catastrophic event such as the "domestic terrorist" bombing of the Alfred Murrah Federal Building in Oklahoma City on April 19, 1995. Six months after the bombing, researchers from Washington University's School of Medicine in St. Louis, together with the Oklahoma State Department of Health interviewed 182 survivors, randomly selected from a register exceeding 1,000 names. They subsequently reported that 45 per cent of these survivors had experienced psychiatric problems, and 34 percent suffered from post-traumatic stress disorder. In addition to survivors suffering psychiatric disorders, such dramatic events are known to inflict crises of confidence among emergency services staff, rescue workers, people employed elsewhere within the same organization, and other observers of the aftermath. The inability of many to continue their normal working routines brings with it a significant and commonly protracted cost impact. For this reason alone, comprehensive incident prevention and mitigation measures offer a clear return on investment.

[ii] A RAND study sponsored by the American Electronics Association (AEA) and the International Electronics Security Group (IESG) places theft of high-tech products and components from U.S. manufacturers and their customers at more than $5 billion annually. The study estimates that direct losses due to theft from high-tech manufacturers and distributors totals $250 million per year and that indirect costs, such as loss of business and insurance, total more than $1 billion per year. Theft of high-tech products from manufacturers could cost another $4 billion, resulting in a total estimated loss of over $5 billion annually. Another finding concluded that companies that made the largest investments to reduce theft saw the largest reduction in theft.