Court of Appeal for Saskatchewan
Docket: CACV4216

Citation: *Arslan v Yapi ve Kredi Bankasi Anonim Sirketi*, 2024 SKCA 68
Date: 2024-07-11

Between:

Huseyin Arslan

Appellant
(Applicant)

And

Yapi ve Kredi Bankasi Anonim Sirketi

Respondent
(Respondent)

Before:	Caldwell, Barrington-Foote and Kalmakoff JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Court
On appeal from:	2023 SKKB 126, Regina
Appeal heard:	March 6, 2024
Counsel:	Deron Kuski, K.C., and Shawna Sparrow for the Appellant Michael Milani, K.C., and William Lane for the Respondent

The Court

I. OVERVIEW

[1] Huseyin Arslan appeals from a decision in which a judge of the Court of King's Bench [Chambers judge] held that a judgment [Judgment] obtained against Mr. Arslan by Yapi ve Kredi Bankasi Anonim Sirketi [YKBank] in the 1st Commercial Court of Turkey [Trial Court] was enforceable in Saskatchewan. See: *Yapi ve Kredi Bankasi Anonim Sirketi v Arslan*, 2023 SKKB 126 [*Decision*].

[2] Mr. Arslan submits that the Chambers judge made a variety of errors of law and of mixed fact and law in the interpretation and application of *The Enforcement of Foreign Judgments Act*, SS 2005, c E-9.121 [*EFJA*]. His primary focus is on alleged errors relating to s. 4(f) of the *EFJA*, which provides that a foreign judgment cannot be enforced in Saskatchewan if it "was rendered in a proceeding that was conducted contrary to the principles of procedural fairness and natural justice". Mr. Arslan contends that the Judgment was rendered in such a proceeding because he was denied the ability to exercise a right of appeal granted to him by Turkish law as he was unable to pay a mandatory filing fee that exceeded CA$1,000,000 [Filing Fee]. He says that this denied him access to justice, thereby offending procedural fairness and natural justice.

[3] Ms. Arslan further alleges that the Chambers judge erred by finding that the Judgment was a final decision and, thus, a foreign judgment within the meaning of s. 2 of the *EFJA*. Only a foreign judgment can be registered and enforced.

[4] Having reviewed the arguments in this appeal, we conclude that the Chambers judge did not err as alleged by Mr. Arslan. We therefore dismiss the appeal with costs to YKBank.

II. BACKGROUND

A. Facts

[5] The respondent is a Turkish commercial bank that loaned Turkish lira (₺) and American dollars to Arista Yatirim ve Yönetim Holding A.S., a Turkish investment business. Mr. Arslan was one of several guarantors of those loans [Guarantors], which totaled around ₺120,000,000. When

the debtor failed to repay the loans, YKBank looked to the Guarantors for payment and obtained the Judgment against them.

[6] As Mr. Arslan had succeeded in part in defending against YKBank's claim, the bank appealed that aspect of the Judgment, while the Guarantors appealed the relief that had been granted against them. Turkish law provided for the payment of filing fees for these appeals by both the Guarantors and the bank. The bank paid its filing fee, while Mr. Arslan requested a waiver of the Filing Fee for his appeal, which was ₺3,111,613.12 (approximately CA$1,027,138 in 2018). The Turkish Regional Court of Justice [Appeal Court] denied Mr. Arslan's request for a fee-waiver. He was required to pay the Filing Fee or his appeal would be considered waived. Mr. Arslan then sought to appeal the fee-waiver denial to the Supreme Court of Appeals of Turkey [Turkish Supreme Court], and once again requested a fee waiver of that Court's filing fees. That request and his appeal were denied. The matter was returned to the Appeal Court, which again directed payment of the Filing Fee. When he did not pay, the Appeal Court held that the appeal was deemed to have never been submitted due to his failure to pay the Filing Fee and was therefore required to be dismissed on that basis. There was no decision on the merits of Mr. Arslan's appeal in either of the appeal courts.

[7] While the appeals to the Turkish Supreme Court were taking place, Mr. Arslan also filed a further request for a fee-waiver with the Turkish Supreme Court. That request was overruled and returned to the Appeal Court, which once again directed him to pay the Filing Fee.

[8] When the Appeal Court denied YKBank's appeal from the Judgment, the bank also appealed that decision to the Turkish Supreme Court. After the Turkish Supreme Court had dismissed the bank's appeal, it filed an originating application with the Court of King's Bench, seeking to enforce the Judgment in Saskatchewan.

B. Legislation

[9] Upon registration under the *EFJA*, "a foreign judgment is enforceable as if it were a judgment of the enforcing court" (s. 14(1)). A *foreign judgment* is a "final decision made in a civil proceeding by a court of a foreign state, rendered by means of a judgment, order, decree or similar

instrument in accordance with the laws of that state…", and the term *enforcing court* means the Court of King's Bench for Saskatchewan (s. 2).

[10] Under s. 12(4) of the *EFJA*, a judgment creditor may register a foreign judgment in Saskatchewan by filing in the Court of King's Bench:

> (a) a copy of the foreign judgment certified as true by a proper officer of the court that made the order;
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> (b) a copy of the notice [to the judgment debtor of the intention to register the foreign judgment] mentioned in subsection (3);
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> (c) an application to modify the foreign judgment, if the judgment creditor is of the opinion that the judgment must be amended by the enforcing court to render it enforceable; and
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> (d) a certified translation of the foreign judgment into either English or French, if it was not given in one of those languages.

[11] Section 4 of the *EFJA* sets out defences for when an otherwise eligible foreign judgment may not be enforced in Saskatchewan. The defence at issue here is that provided by s. 4(f), which states:

> **4** A foreign judgment cannot be enforced in Saskatchewan if:
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> …
>
> (f) the judgment was rendered in a proceeding that was conducted contrary to the principles of procedural fairness and natural justice.

[12] When the enforcing court's inquiry into the merits of a judgment debtor's defence raised under s. 4(f) of the *EFJA* involves an assessment of foreign law or procedure, s. 4 of *The Evidence Act*, SS 2006, c E-11.2, applies; it states:

> **4**(1) In all cases, the determination of any law in question is the function of a judge and not of a jury.
>
> (2) Foreign law shall be determined by a judge as a question of fact.
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> (3) In determining a law of a jurisdiction outside of Canada, a judge shall consider only the evidence adduced by qualified expert witnesses, whether legal practitioners or not, except if the parties agree otherwise.
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> (4) In an action or matter, if a foreign law is not proved, it shall be presumed to be identical to the law of Saskatchewan.

C. Section 4(f) of the *EFJA* and the natural-justice defence

[13] The decision in *Beals v Saldanha*, 2003 SCC 72 at para 59, [2003] 3 SCR 416 [*Beals*], is the controlling authority on the common law test for enforcing a foreign judgment. In that case,

after concluding that the foreign court had jurisdiction, the Supreme Court of Canada analysed the common law defences to enforcement – fraud, public policy and the denial of natural justice – noting that "[t]hese defences were developed by the common law courts to guard against potential unfairness unforeseen in the drafting of the test for the recognition and enforcement of judgments. The existing defences are narrow in application. They are the most recognizable situations in which an injustice may arise but are not exhaustive" (at para 41). With respect to the defence of natural justice itself, the Court in *Beals* wrote:

> [59] …[T]he denial of natural justice can be the basis of a challenge to a foreign judgment and, if proven, will allow the domestic court to refuse enforcement. A condition precedent to that defence is that the party seeking to impugn the judgment prove, to the civil standard, that the foreign proceedings were contrary to Canadian notions of fundamental justice.
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> [60] A domestic court enforcing a judgment has a heightened duty to protect the interests of defendants when the judgment to be enforced is a foreign one. The domestic court must be satisfied that minimum standards of fairness have been applied to the Ontario defendants by the foreign court.
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> [61] The enforcing court must ensure that the defendant was granted a fair process. …[I]t is not the duty of the plaintiff in the foreign action to establish that the legal system from which the judgment originates is a fair one in order to seek enforcement. The burden of alleging unfairness in the foreign legal system rests with the defendant in the foreign action.
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> [62] Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. …
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> …
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> [64] The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise any reasonable apprehension of unfairness.
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> [65] In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend….

See also: *Pro Swing Inc. v Elta Golf Inc.*, 2006 SCC 52 at paras 12–13, [2006] 2 SCR 612; *Chevron Corp. v Yaiguaje*, 2015 SCC 42 at paras 43–53, [2015] 3 SCR 69 [*Chevron*]; *Double Diamond Distribution Ltd v Garman Turner Gordon LLP*, 2021 SKCA 61 at paras 71–74 and 79–83 [*Double Diamond*]; and *Britton v Simon (Estate)*, 2016 SKQB 30 at para 27, 395 DLR (4th) 139.

[14] The decision in *Chevron* also provides useful guidance on the principles at issue in this appeal:

> [43] Canadian law recognizes that the purpose of an action to recognize and enforce a foreign judgment is to allow a pre-existing obligation to be fulfilled; that is, to ensure that a debt already owed by the defendant is paid. …
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> [44] …[T]he purpose of an action for recognition and enforcement is not to evaluate the underlying claim that gave rise to the original dispute, but rather to assist in enforcing an already-adjudicated obligation. In other words, the enforcing court's role is not one of substance, but is instead one of facilitation: *Pro Swing*, at para. 11. The court merely offers an enforcement mechanism to facilitate the collection of a debt within the jurisdiction. …
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> …
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> [48] No concern about the legitimacy of the exercise of state power exists in actions to recognize and enforce foreign judgments against judgment debtors. As I have explained, when such an action comes before a Canadian court, the court is not assuming jurisdiction over the parties in the same way as would occur in a first instance case. The enforcing court has no interest in adjudicating the original rights of the parties. Rather, the court merely seeks to assist in the enforcement of what has already been decided in another forum. …

[15] The Court in *Chevron* also spoke to the application of judicial comity in such proceedings, noting that "the notion of comity has consistently been found to underlie Canadian recognition and enforcement law" (at para 51) and that "the need to acknowledge and show respect for the legal acts of other states has consistently remained one of the principle's core components. Comity, in this regard, militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored" (at para 53).

[16] In *Double Diamond*, these common law principles from *Beals* and *Chevron* were found by this Court to apply equally to an enforcement proceeding under the *EFJA*. When addressing the issue of the onus in such a proceeding, Leurer J.A. (as he then was) wrote:

> [79] As a matter of practical efficiency, if not common sense, many of the matters listed in both s. 4 of the *EFJA* and s. 6 of [*The Foreign Judgments Act*, repealed] are items that should be left to a judgment debtor to raise. By way of example, I can identify no reason why a judgment creditor should, in first instance at least, be required to prove that the judgment was not obtained by fraud, the judgment was rendered in a proceeding that was not conducted contrary to the principles of procedural fairness and natural justice, or that the judgment does not implicate principles of public policy if these issues do not arise on the record already before the court.

[17] In *Double Diamond*, the issue of onus related to a defence under s. 4(c) of the *EFJA*, which provides that a foreign judgment cannot be enforced in Saskatchewan if "the time within which an

appeal may be made or leave for appeal requested has not expired". Justice Leurer reached the following conclusion as to onus in the circumstances of that case:

> [83] [I]t is my conclusion that the evidential burden in relation to the non-expiration of the Nevada appeal period fell on Double Diamond, not GTG. As explained by Barrington-Foote J.A. in [*Yorkton (City) v Mi-Sask Industries Ltd.*, 2021 SKCA 43, [2021] 6 WWR 18], a "party that bears the evidential burden in relation to an issue must either adduce or point to evidence on the record that is *sufficient* to raise the issue" (at para 31, emphasis in original). In this regard, there was nothing on the record to indicate that there was an extant right of appeal and Double Diamond itself led no admissible evidence on the point. For this reason, it was not incumbent on GTG to lead evidence in relation to the expiration of the period for appealing the Nevada judgment. …

[18] We agree with Leurer J.A.'s observation that the onus or evidential burden also rests with a judgment debtor that advances a defence under s. 4(f). The nature of the evidence that is required to meet that onus will, of course, depend on the circumstances. By way of example, if the matter at issue turns on the nature of the applicable foreign law, expert evidence will be required to prove that law. If there is no evidence put forward, the presumption specified in s. 4(4) of *The Evidence Act* will apply. If there is an allegation of bias, evidence that would be sufficient to prove facts demonstrating actual bias will be required: *SHN Grundstuecksverwaltungsgesellschaft MBH & Co. Seniorenresidenz Hoppegarten-Neuenhagen KG v Hanne*, 2014 ABCA 168 [*Hanne*] at para 19.

III. ISSUES AND ANALYSIS

[19] In the *Decision*, the Chambers judge recognized the Judgment as being eligible for registration in Saskatchewan. He found that the Trial Court had jurisdiction over the dispute and that YKBank had met the requirements for registering a foreign judgment under s. 12 of the *EFJA*. In that circumstance, he correctly wrote that the onus passed to Mr. Arslan to "provide reason why the foreign judgment should not be registered" (at para 28).

[20] As the Chambers judge understood it, Mr. Arslan had advanced three defences to the registration of the Judgment in Saskatchewan: (1) the Judgment was not final; (2) the amount of the judgment debt was not certain; and (3) the judicial process by which YKBank had obtained the Judgment breached natural justice and procedural fairness, as the Filing Fee effectively denied him access to justice. Addressing those claims, the Chambers judge found that Mr. Arslan had failed

to prove that the Judgment was not a final decision or that the amount of the Judgment was uncertain.

[21] When he considered whether the proceedings in Turkey had breached natural justice, the Chambers judge found that filing fees in Turkish appeals were akin to a Canadian court's filing fees and, further, that they were something like a security for costs requirement. He recognised that Turkish litigants had the ability to seek fee waivers, which safeguarded their access to justice, and he understood that Mr. Arslan had availed himself of that process. Finally, the Chambers judge held that the timeline for payment of the Filing Fee had not contravened natural justice because Mr. Arslan had had "over two years to make payment" (*Decision* at para 75). He concluded his analysis of the defence under s. 4(f) of the *EFJA* by stating that Mr. Arslan had exercised his "full rights as a party" in the Turkish court proceedings (*Decision* at para 78). In the result, the Chambers judge ordered that the Judgment be recognised as enforceable in Saskatchewan.

[22] As noted, Mr. Arslan contends that the Chambers judge erred by rejecting his argument that the Judgment was not enforceable in Saskatchewan due to a breach of natural justice. More specifically, Mr. Arslan argues that the refusal to accept his s. 4(f) defence was the product of four discrete errors, which were as follows:

(a) finding that the Filing Fee was not contrary to natural justice;

(b) comparing the Filing Fee to security for costs in Canada;

(c) finding that he was solvent and could pay the Filing Fee; and

(d) finding that he had exercised his right to contest YKBank's appeal in the Appeal Court.

[23] Mr. Arslan also alleges that the Chambers judge made a fifth error:

(e) finding that the Judgment was a final decision, and thus, a foreign judgment within the meaning of s. 2 of the *EFJA*.

[24] We will deal with each of these five alleged errors in turn.

A. Did the Chambers judge err in finding that the process in which the Appeal Court held that Mr. Arslan had waived his appeal by failing to pay the Filing Fee was not contrary to natural justice?

[25] As we have explained, the test specified in s. 4(f) of the *EFJA* is that a judgment must have been "rendered in a proceeding that was conducted contrary to the principles of procedural fairness and natural justice" to make out the defence. To reiterate, *Beals* instructs that "[a] fair process is one that … reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system" (at para 62). This reflects the *nemo judex in causa sua debet esse* principle that, together with *audi alteram partem*, are the two main features of natural justice. The first of these was described as follows in Guy Régimbald, *Canadian Administrative Law*, 3rd ed (LexisNexis, 2021) Chapter VII.1 at 393 (Lexis+):

> Independent and impartial decision-making have been called the "cornerstone of the common law duty of procedural fairness." Natural justice, as discussed in Chapter VI, comprises two main features: *audi alteram partem* and *nemo judex in causa sua debet esse*. Bias and impartiality are included in the latter….
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> …
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> In essence, procedural fairness and the rules of natural justice require that decisions be made by an impartial decision maker based on the record before it, free from any reasonable apprehension of bias.

[26] *Beals* also makes the point that "[i]n Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend" (at para 65). This is the *audi alteram partem* principle, which Régimbald summarizes as follows:

> …the *audi alteram partem* principle requires that parties be allowed an opportunity to put forward their case, submit evidence (including possibly calling witnesses if the hearing is oral) and make their submissions and, consequently, some procedure must be set out. Moreover, the assessment of any case must be on the basis of evidence and the law, which means that the essence of the judicial hearing and the decision must be the treatment of facts revealed by the evidence in consideration of the substantive rights of the parties as set down by law.

[27] This brief summary of the meaning of "procedural fairness and natural justice" in s. 4(f) is sufficient for the purposes of this decision. We note that the Chambers judge wrote that "natural justice or procedural fairness…[is]…also referred to as fundamental justice" (at para 58). With respect, that overstates the matter. As Iacobucci J. explained in *Pearlman v Law Society (Manitoba)*, [1991] 2 SCR 869, "the principles of fundamental justice reflect the fundamental

tenets on which our legal system is based. Those tenets include, *but are not limited to*, the rules of natural justice and the duty to act fairly that have been developed over the years in the administrative law context" (at para 31, emphasis added). Accordingly, while a breach of the minimum standards of procedural fairness or natural justice will be contrary to the principles of fundamental justice, fundamental justice is a broader concept. A breach of fundamental justice does not necessarily relate to procedural fairness or natural justice.

[28] The issue to be resolved under this ground of appeal, accordingly, is whether the Turkish proceedings failed to meet these minimum standards of procedural fairness and natural justice. The Judgment that YKBank seeks to register was granted by the Trial Court. Mr. Arslan does not contend that the proceedings in that Court did not comply with natural justice. His concern relates solely to the *appellate* proceedings in the Appeal Court and the Turkish Supreme Court in which he sought to challenge the Judgment.

[29] The first question this raises is the relationship between the principles of procedural fairness and natural justice and a right of appeal. Mr. Arslan had initially submitted, citing *South Pacific Import, Inc. v Ho*, 2009 BCCA 163 [*Ho*], that the principles of procedural fairness and natural justice include a requirement for full appellate review. However, at the hearing of this appeal, he modified his position, asserting only that, if provision is made for an appeal, a foreign judgment cannot be registered unless the appeal proceeding meets the standard specified in s. 4(f).

[30] In our view, the principles of procedural fairness and natural justice do not include the right to a full, or indeed any, appellate review. We agree with the Chambers judge in that respect. *Ho* does not stand for that proposition, and we are aware of no other authority or principle that would justify such a conclusion. For that reason, proof that there is no right to appeal from a foreign judgment does not make out the s. 4(f) defence.

[31] However, that does not mean provision for an appeal, or what takes place in an appeal proceeding, cannot be relevant to the question of whether the foreign proceeding meets the s. 4(f) test. That will depend on the circumstances, including, among other things, the nature of the right of appeal; the nature of the appeal that the party asserting the defence pursued or, as here, sought to pursue; the nature of the alleged breach or breaches of natural justice; and the relationship of

those breaches to the process that resulted in the foreign judgment that the applicant seeks to enforce.

[32] We will note several examples of this. Section 4(f) is concerned with whether the foreign judgment was *rendered in a proceeding* that was conducted contrary to the principles of procedural fairness and natural justice. The foreign judgment at issue may not simply have been appealed but may have been rendered in whole or in part in an appeal proceeding. If that proceeding did not reasonably meet the s. 4(f) test in a manner that related in a way that is material to the foreign judgment, that judgment could not be enforced. A decision by an appellate court reversing a trial decision to the detriment of a judgment debtor, despite a lack of notice of the appeal or of an opportunity to put forward their case on appeal, would be an example of this.

[33] A lack of procedural fairness at the appellate level can also be relevant where the foreign judgment was not rendered by the appeal court. Where an appeal proceeding that could have resulted in the foreign judgment being set aside did not comply with the principles of natural justice, enforcement may not be available. The Saskatchewan court hearing such an application would have to consider the circumstances as a whole to determine whether the lack of procedural fairness or natural justice related in a material way to the foreign judgment. Mr. Arslan says that is the situation in this case.

[34] *Hanne* is an example of reasoning of this kind. There, the Alberta Court of Appeal considered and rejected an allegation that the fact that a single judge, rather than three judges, had heard the appeal in Germany demonstrated bias. It also addressed other issues raised regarding the fairness of the proceedings in the foreign appellate court, including that a "legal hint" had assisted counsel for the respondent and that evidence had been admitted that would not meet Canadian requirements for the admission of fresh evidence on appeal.

[35] These are not the only situations where the existence of an appeal right or what occurred on an appeal from a fairness perspective may be relevant. We would note one final example. If a party resisting enforcement of a foreign judgment under the *EFJA* alleges that the judgment was rendered in a first-level proceeding that did not meet the s. 4(f) standard, foreign appeal proceedings may – depending on the nature and outcome of those proceedings – be found to be relevant to a Court of King's Bench judge in deciding whether Canadian principles of procedural

fairness and natural justice have been satisfied by the foreign proceedings as a whole. The reasoning in *Ho* is an example of this. There, the British Columbia Court of Appeal, in assessing the fairness of the foreign proceedings, referred to the fact that the party resisting registration of a California judgment had been given a full hearing in the California Court of Appeal.

[36] Here, Mr. Arslan contends that the appeal proceeding did not meet the s. 4(f) standard because he was denied access to justice. The Chambers judge accepted the premise that a failure to comply with the principles of natural justice could be made out in that way. He relied in significant part on the reasoning in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31 [*Trial Lawyers*], in doing so.

[37] We note, however, that *Trial Lawyers* arose in a very different context. *Trial Lawyers* was concerned with whether court hearing fees imposed by the Province of British Columbia violated s. 96 of the *Constitution Act*, by infringing on the core jurisdiction of s. 96 courts. The Supreme Court of Canada found they did constitute such an infringement, as they had the effect of denying some people access to those courts. Having reached this conclusion, the Court went on to assert that "the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law" and it "affirmed that access to the courts is essential to the rule of law". As the Court then found:

> [39] The s. 96 judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel Ltd.*, "[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself" (para. 37). The very rationale for the provision is said to be "the maintenance of the rule of law through the protection of the judicial role": *Provincial Judges Reference*, at para. 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.

[38] Clearly, this analysis does not apply here. That is so despite the fact that procedural fairness and natural justice, like access to justice, are cornerstones of the rule of law as it is understood in Canada. We do not consider it necessary or useful to define the question at issue here as relating to "access to justice", whether to the extent specified in *Trial Lawyers* or otherwise. That would tend to result in a lack of clarity. The issue that arises where a party asserts a 4(f) defence is determined by the language of that section. As we have explained, it turns on whether minimum standards of procedural fairness and natural justice have been met.

[39] That does not mean that the Filing Fee issue raised by Mr. Arslan is not relevant. As we have explained, a foreign judgment cannot be enforced under the *EFJA* if the party that is subject to it did not have the opportunity to put forward their case and to have it heard and decided by an impartial decision maker. If a respondent can prove that the foreign proceedings did not provide that opportunity, they will have a s. 4(f) defence. That does not mean that every filing fee, deadline or procedural requirement will meet this standard. However, there are circumstances in which matters that are proven to have prevented a party from participating in the foreign proceeding would make out such a defence. That is so not because they were denied "access to justice" – which they would have been – but because the process did not meet the minimum standards fixed by s. 4(f).

[40] Mr. Arslan based his argument under this ground on two points. He submitted that the Turkish appeal-filing fee-waiver process was contrary to natural justice. He also took the position that the quantum of the Filing Fee was, in and of itself, a breach of natural justice. In our view, the question of whether the quantum of the Filing Fee resulted in a failure to meet minimum standards of natural justice cannot be separated from the ability to obtain relief from the requirement to pay it. We are satisfied that is how the Chambers judge dealt with this issue. We are also persuaded that he did not err in doing so. That is so for the following reasons.

[41] We would begin by noting the following statement by the Chambers judge, which he made at the outset of his analysis of the s. 4(f) argument:

> [57] There is no suggestion that Mr. Arslan was singled out for payment of these court filing fees. On the contrary, Mr. Arslan in his affidavit at para. 9 states that the appeal filing fees are a standard feature of Turkish law under Article 344 of the *Turkish Code*. The Bank pre-paid similar filing fees for its appeals (Agar Affidavit #2 at Exhibit "D" Trial Court decision at p. 7)
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> [58] In Turkey, as in Canada, court filing fees are payable upon filing. Failure to pay may result in the appeal not being filed or struck. This scheme is not contrary to natural justice or procedural fairness...

[42] We agree. Court fees do not, in and of themselves, offend natural justice. That is so despite the fact that they can be burdensome, particularly for those of limited means, and may sometimes have the effect of preventing a party from participating in a proceeding. Proof that this had occurred in a foreign proceeding would not, in and of itself, be sufficient to demonstrate that the

minimum standards of procedural fairness and natural justice at issue in this context had not been met.

[43] However, there are circumstances in which it could. The quantum of the fee would be a relevant consideration, as would any provision that would enable the party to avoid paying all or some of the fee. Here, there was evidence that the fee-waiver process under Article 334 of the Turkish *Code of Civil Procedure No. 6100* provided a means to obtain an exemption. That Article was described in a decision of the Appeal Court that had denied Mr. Arslan's application for a fee waiver, as follows:

> According to Article 334 of Code of Civil Procedure No. 6100; "People who are partially or completely incapable of paying the necessary trial or follow-up expenses, without causing significant difficulties for themselves and their family, can benefit from legal aid in their claims and defences, temporary legal protection requests and enforcement proceedings, provided they are convinced that they are right."

[44] While Mr. Arslan did not adduce any evidence about Article 334 of the Turkish *Code of Civil Procedure No. 6100*, YKBank's expert on Turkish law, Dr. Selcuk Öztek, provided a summary of the procedure, as follows:

> Pursuant to Article 344 of the Turkish Civil Proceedings Code … the Defendants are obligated to pay all related expenses, also including the appeal application fees and costs of notification. If these expenses and fees are not paid fully or partially, the concerned first degree court grants a time of one week to the appellant for payment of the expenses, or otherwise, warns the latter in writing that it will be deemed to have waived from its appeal application. In our concrete case, the Defendants have not paid the appeal public fees, but have filed a request of legal assistance for an exemption from payment of said public fees. The request of legal assistance has been examined … by 9th Civil Law Chamber of Adana Regional Court of Justice and has been overruled by an interlocutory judgment issued … An opposition has been filed against said interlocutory judgment, and that opposition has been dismissed…

[45] Dr. Öztek also summarized the proceedings that had been taken by Mr. Arslan in the Appeal Court pursuant to Article 344 in his attempt to obtain a fee waiver. He stated that the denial of Mr. Arslan's request for a fee waiver had been appealed and reconsidered multiple times by the Appeal Court. He opined that "it is obvious that the [Guarantors] were allowed to make full use of all procedural assurances and remedies in respect of the procedural impediment regarding '*failure in deposit of the required public fees*' in front of examination of both of their requests of intermediate appeal and their requests of appeal" (emphasis in original).

[46] Mr. Arslan does not claim that irregularities, whether in the Turkish trial or appellate court processes or under a fee-waiver mechanism, have called natural justice into question. He has not alleged that decisions made by the Turkish appeal courts to deny his fee-waiver applications were arbitrary or biased. Mr. Arslan essentially asserts only that the Filing Fee is *prima facie* contrary to natural justice because it is over CA$1 million, without providing the evidentiary context necessary to assess that assertion.

[47] While the Filing Fee, in this case, is undoubtedly high by Canadian standards, what is important is not the quantum of the fee but whether the Turkish judicial process met minimum standards of fairness in its design and application. Here, the Chambers judge had little evidence about the Filing Fee and the fee-waiver process, and none of it established any unfairness or injustice. Acting under the *EFJA*, the Chambers judge was required to respect the Turkish courts' legitimate decisions respecting their own procedures (*Hanne* at paras 24 and 29). It was not within his purview to speculate about the substance of the Turkish courts' decisions not to grant Mr. Arslan a fee waiver (*Double Diamond* at paras 36–41).

[48] In short, Mr. Arslan carried the burden of proof, and he failed to raise any reasonable apprehension of unfairness in this aspect of the Turkish court proceedings (*Beals* at para 64). Therefore, the Chambers judge did not err when he declined to declare that the Turkish appeal process did not meet the minimum standards of procedural fairness and natural justice so as to make out a defence under s. 4(f) of the *EFJA*.

[49] We would dismiss this ground of appeal.

B. Did the Chambers judge err in comparing the Turkish appeal filing fees to the Saskatchewan regime for security for costs?

[50] In the *Decision*, the Chambers judge drew a comparison between the Turkish appeal filing fees and an order for security for costs in Saskatchewan, finding that the Turkish fees "serve in significant part as security for costs" (at para 59). He also stated that, while an order for security for costs is discretionary, the differences in approaches between the two states were not, on their own, a breach of "fundamental justice" (at para 61). Under this ground of appeal, Mr. Arslan says

the Chambers judge erred because the two processes cannot be compared, particularly since Turkish appeal filing fees are exorbitant.

[51] Respectfully, Mr. Arslan mischaracterises the comparison exercise that the Chambers judge undertook in the *Decision*. It was open to the Chambers judge to consider whether anything like the Turkish filing fees existed in Canadian law so as to ascertain whether the foreign process operated in a manner that was inconsistent with our notions of natural justice. The comparison was a component of his analysis in that regard only; he did not conclude that the Turkish regime substantively paralleled the concept of security for costs in Canada. The Chambers judge merely used security for costs as an example when he was considering whether the Turkish regime met minimum standards of procedural fairness and natural justice. No error is revealed by that approach.

[52] We therefore dismiss this ground of appeal.

C. Did the Chambers judge err in finding that Mr. Arslan was solvent?

[53] Under this ground of appeal, Mr. Arslan seems to be asking this Court to review the fact-finding of the Turkish courts without providing any evidence upon which to evaluate those facts. As the Chambers judge noted, it is not the role of the enforcing court on an application to register a foreign judgment to "look behind the foreign judgment and re-consider the merits" (*Decision* at para 68; see: *Beals* at para 44). Nonetheless, he observed that, on the evidence available to him, the Turkish courts had found Mr. Arslan to have been solvent when he applied for the fee waivers.

[54] Although Mr. Arslan seems to contend that he was not solvent, he did not provide the lower court or this Court with any evidence about his financial circumstances. Such evidence would not have availed him in any event. As Leurer J.A. stated in *Double Diamond*, the facts "underlying the original judgment are irrelevant, except insofar as they relate to potential defences to enforcement" (at para 36). In that case, the appellant had alleged that a Nevada court had not properly accounted for jurisdictional rules when making its order. Rejecting that argument, Leurer J.A. held that enforcing courts should not inquire into the merits of a foreign judgment:

> [38] Because the enforcing court's focus is not on the substantive or procedural law on which the Nevada judgment is based, the arguments made by Double Diamond in this Court and in the Court of Queen's Bench had no place in the analysis as to whether that

> judgment should be registered in this province. It appears that, in substance, the Chambers judge sought to express this central principle of foreign judgments enforcement when he stated that Double Diamond's arguments amounted to a collateral attack on the Nevada judgment.

[55] Here, the fact that Mr. Arslan was or was not solvent was not at issue before the Chambers judge nor is it in issue on this appeal. That is so because the Turkish courts' finding that Mr. Arslan was solvent (or, at the very least, that he was not entitled to a fee waiver) does not amount to a finding of fact related to his potential defence in Saskatchewan under s. 4(f) of the *EFJA*. If he had alleged procedural unfairness or a breach of natural justice in the making of that finding of fact, then that would have been relevant to a potential defence to enforcement, per the exception to the relevancy rule described by Leurer J.A. in *Double Diamond*. For example, if Mr. Arslan had claimed that the Turkish courts had found him to be solvent in the complete absence of any evidence on that issue or in contravention of the *audi alteram partem* principle, it would have been relevant to the s. 4(f) defence. An enforcing court cannot refuse to register a foreign judgment unless it finds that a condition specified by the *EFJA* has not been met or a defence provided by the *EFJA* has been proven. An error of fact does not fit either of those categories.

[56] In short, as Mr. Arslan had framed his defence under s. 4(f) of the *EFJA*, his solvency or insolvency was irrelevant to the assessment of whether there had been a denial of natural justice in the proceedings undertaken in Turkey. There was no reason for the Chambers judge to inquire into the accuracy of the Turkish courts' finding that Mr. Arslan was solvent and, therefore, he did not err by accepting the Turkish courts' findings in that regard.

[57] We therefore dismiss this ground of appeal.

D. Did the Chambers judge err in finding that Mr. Arslan had exercised his right to contest YKBank's appeal?

[58] Under this ground, Mr. Arslan submits that the Chambers judge erred in finding that he had exercised his right to contest YKBank's appeal. He contends that he did not do so, as the Appeal Court would not hear his appeal on its merits. In this regard, Mr. Arslan challenges the Chambers judge's interpretation of the decision in *Ho*. He suggests that, based upon a proper reading of *Ho*, full appellate review is a component of the "right to be heard" aspect of natural justice and, therefore, of the defence under s. 4(f) of the *EFJA*.

[59] As we have explained, we do not agree that the Canadian concept of natural justice entails a "full appellate review", or that the decision in *Ho* stands for that proposition (at para 40). With respect, this ground of appeal adds nothing. The fact that Mr. Arslan's appeal was not heard on the merits was the result of his failure to pay the Filing Fee, a requirement that did not offend the minimum requirements of procedural fairness or natural justice so as to prove his s. 4(f) defence. As such, there is no basis to interfere with the Chambers judge's conclusion that Mr. Arslan had the opportunity to exercise his appeal rights in Turkey, and to the extent provided by Turkish law, did so.

[60] We therefore dismiss this ground of appeal.

E. Did the Chambers judge err in finding that the Judgment was a final decision?

[61] Early in the *Decision*, the Chambers judge described the finality issue in these terms:

> [31] Mr. Arslan argues that the Turkish judgment is not final because of references in the decision of the Turkish Supreme Court to referral back to the Trial Court, thereby allowing for further proceedings. This argument was only raised at the hearing.
>
> [32] The Turkish Supreme Court judgment, in the final paragraph of text at page 4, dismissed the appeal, approved the judgment of the Turkish Court of Appeal and then directed "that a copy of the case file be sent to the Court of First Instance for proceedings under Article 372 of the Turkish Civil Procedure Code, and a copy of this judgment be sent to the Regional Court of Justice …".

[62] In this appeal, Mr. Arslan says again that the Turkish Supreme Court's decision left the door open for further substantive proceedings in the Trial Court because "a copy of the case file" was to be sent there "for proceedings under Article 372 of the Turkish Civil Procedure Code".

[63] While it may appear that the text of the Turkish Supreme Court's decision could bear the meaning that Mr. Arslan suggests, the Chambers judge did not interpret it in that way. Instead, he relied properly on expert evidence about Turkish law that YKBank had adduced to find that the Judgment was a final decision:

> [33] First, I do not read the references as inviting continued litigation of the claim. That interpretation is contrary to the Oztek Opinion which addresses the issue of finality at pages 29, 46-48 and 59-62. While at page 59 he recognizes the possible remedy of retrial after appeal, he states that it "is an extraordinary (totally exceptional) remedy resortable only upon satisfaction of extremely strict certain conditions …". He concludes at page 62 that a retrial is not available in this case.

> [34] Second, the procedure of returning the case file to the Trial Court and providing a copy of the judgment to the court below are similar to the process in Canada. The Oztek Opinion at page 45 refers to the transmittal of the case file from the Trial Court to the Turkish Court of Appeal, similar to the process in Saskatchewan.
>
> [35] Third, Article 372 of the *Turkish Civil Procedure Code* [*Turkish Code*] was not filed by either party and does not appear to be described in the filed materials. So it is entirely speculative to suggest it allows for further litigation. (While I have not considered it for the purpose of this decision, the on-line version of the *Turkish Code* shows article 372 to be an innocuous provision titled "Notification of the Supreme Court Decision".)
>
> [36] Fourth, there is no evidence of further litigation of the claim in the Turkish courts. On the contrary, the Oztek Opinion at p. 62 states there were no further proceedings after the decision of the Turkish Supreme Court.
>
> …
>
> [38] From the materials filed, I find that the parties accepted and treated the decision of the Turkish Supreme Court as final. Given that court is the apex court in Turkey, that acceptance is not surprising.

[64] This analysis is not free from error. The Chambers judge should not have self-researched Turkish law (see: s. 4(3) of *The Evidence Act*). However, he did not find that the Judgment was a final decision on that basis. Further, the fact that files are returned to trial courts in Saskatchewan was not relevant to the interpretation of the Judgment and, in particular, as to whether the fact that the case file was sent back for proceedings under Article 372 meant that the Judgment was not final. The only evidence on that point was the evidence of Dr. Öztek. The Chambers judge well understood that foreign law is a question of fact that must be proven through expert evidence. In that regard, properly distinguishing *Sekerbank T.A.S. v Arslan*, 2019 SKQB 283, aff'd 2020 SKCA 104, he concluded his fact-finding by stating, "[i]n this case, there is a single expert report from a highly credentialed Turkish lawyer: see Öztek Affidavit at Exhibit "A" Curriculum Vitae. The report is clear, comprehensive and uncontradicted. It concludes that the decision sought to be registered is a final decision" (*Decision* at para 42).

[65] Mr. Arslan takes a different view, from his own reading of the Turkish Supreme Court's decision, of what Article 372 might require, but that is neither here nor there in this appeal. His is a lay opinion without an evidentiary foundation; he adduced no evidence, expert or otherwise, about what Article 372 requires. There is no evidence on the record that contradicts YKBank's expert evidence about the finality of the Judgment under Turkish law. It was, in our assessment, uncontroverted that the Judgment is a final decision.

[66] This ground of appeal must be dismissed.

IV. CONCLUSION

[67] We dismiss the appeal with costs to YKBank in the fixed amount of $3,000.

"Caldwell J.A."

Caldwell J.A.

"Barrington-Foote J.A."

Barrington-Foote J.A.

"Kalmakoff J.A."

Kalmakoff J.A.