

## Litigating in the Caribbean: Smooth sailing or heading into the eye of the storm?

In the dead of Canadian winters, it's not just snowbirds who escape to the Caribbean. Incentives such as low or no taxes, less robust financial regulation, and a high degree of privacy have long attracted companies and individuals from Canada and around the world to use Caribbean offshore companies and trusts to manage their assets. As a result, it's not uncommon for Canadian cases to take a tropical turn as clients get involved in litigation in international or offshore financial centres in the Caribbean or have to trace assets through the region. For many lawyers, these may be uncharted waters. So what do you need to know before you dive in?



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**1** Your client lives in Ontario. She is a shareholder and director of Caribbean Energy LLC, an offshore company incorporated in Nevis, which specializes in oil exploration. After Caribbean Energy's subsidiary found significant reserves in Belize and started making profits, the other directors froze your client out of management. She has been locked out of Caribbean Energy's Florida headquarters and has never received a dividend. She wants to bring an oppression action against Caribbean Energy, and the other directors. Since the defendants live in Ontario, she can sue here.

True

False

It depends

**2** You are retained by a company that rents trucks and drilling equipment to Caribbean Energy, which has breached the rental contract. Your client wants to find out about the company, its directors, and its assets before it spends any money on a claim. You can get this information from the local registrar of companies.

True

False

It depends

**3** Your client has commenced her claim against the Caribbean Energy directors in Nevis when she learns that they recently bought a luxury yacht in Barbados. She suspects they are draining funds out of the company before she can get a judgment against them. You tell her there are several interim remedies available to protect the assets of the company pending a final resolution of the claim.

True

False

**4** Your client gets a judgment against Caribbean Energy and the directors. One of the directors owns property in Toronto. Your client can enforce the judgment from Nevis in Ontario.

True

False

It depends

**1** **It depends.** When it comes to multi-jurisdictional business disputes, determining where to bring a claim can be one of the most important decisions you and your client make. You have to consider whether the court can — and will — assert jurisdiction. When you commence litigation in the Caribbean, your claim will often be answered with an application to stay the claim on the ground of *forum non conveniens*. If you're acting for a defendant, the first question to ask is whether you can challenge jurisdiction. Be sure to check the jurisdiction's civil procedure rules. In many Caribbean countries, a defendant must serve an acknowledgement of service or notice of appearance, notwithstanding that he intends to dispute the court's jurisdiction. Failure to file the acknowledgement may result in default judgment.

To avoid the cost and delay of a forum fight when dealing with offshore companies, you must carefully review the legislation pursuant to which the company is incorporated. The legislation that governs offshore or international companies may require that disputes regarding shareholder rights and directors' duties, among other issues, be heard by the court in the jurisdiction where the company is incorporated. For example, the client's oppression action against Caribbean Energy and its directors would likely have to be brought in Nevis, where the company is incorporated, regardless of where the defendants live or work.

When contemplating litigation related to an international or offshore trust, remember to check the governing statutes, which may require that disputes be heard by the court of the jurisdiction in which the trust is settled, unless the trust deed provides otherwise.

As a practical matter, you should consult counsel called to the bar and experienced in the Caribbean jurisdiction in the early stages of developing your litigation strategy. It will help you and your client to understand not only the law but also the realities of litigating in a foreign jurisdiction, and ensure that your client is in the best position to protect, or defend, its rights when litigating in the Caribbean.

**2** **It depends.** One of the most attractive features of offshore financial centres is confidentiality of financial information. Many Caribbean jurisdictions have strong statutory protections in place, which keep information about the assets and beneficial owners of companies (and beneficiaries of trusts) out of the public record. Some statutes make it an offence to try to obtain this information.

For example, in the British Virgin Islands, which is home to almost half of the world's offshore companies, the Business Companies Act, 2004 keeps the identities of directors and shareholders, as well as minutes and resolutions, confidential and out of the public record.

Other jurisdictions have strong statutory protections in place, which prevent the disclosure of confidential information related to financial or business interests located in the jurisdiction, including the identity of beneficial owners or the assets or property held by a company. Nevis' Confidential Relationships Act imposes serious penalties, including imprisonment, for divulging or obtaining or even attempting to divulge

or obtain confidential information. In the Cayman Islands, the 1976 Confidential Relationships (Preservation) Law prohibits the disclosure of "all confidential information with respect to business of a professional nature which arises in or is brought into the Islands."

While some degree of protection has been eroded by tax information exchange agreements it can be a challenge to obtain information about an offshore company in the Caribbean.

**3** **True.** When the money trail leads to and through the Caribbean, there are many interim and interlocutory remedies available. While these remedies are similar to those available in Canada, the case law has developed to reflect the realities of each jurisdiction and local counsel can help to navigate the options.

As set out in the civil procedure rules, the courts in the Caribbean have broad discretion to grant a wide variety of interim and interlocutory remedies, which can be used to prevent the dissipation of funds or trace assets that may have been moved into a foreign jurisdiction. In addition to freezing orders to restrain a party from dealing with assets in any jurisdiction or removing assets from the jurisdiction (Mareva injunctions), courts may make preservation orders, Anton Piller or search orders, and Norwich Pharmacal orders for the disclosure of the location of relevant property or assets.

**4** **It depends.** One of the most fundamental considerations in multi-jurisdictional litigation is the ability to enforce a judgment. Whether you will be attempting to enforce a judgment from the Caribbean in Canada, or you have a judgment from Canada that you want to enforce in a Caribbean jurisdiction, you need to consider if and how you can do that.

A foreign judgment has no direct operation in a Caribbean jurisdiction until it is recognized and/or registered by the court. A judgment creditor may enforce a foreign judgment either by a claim at common law, or under a statute. Many jurisdictions in the Caribbean have legislation providing for the reciprocal registration and enforcement of judgments. The relevant act will set out a summary procedure for the registration of a foreign judgment from specified countries, where the foreign judgment meets the statutory requirements.

If the judgment is from a country that is outside of the statute or does not meet the requirements, the judgment creditor must bring fresh proceedings in the domestic court.

Whether enforcing a foreign judgment under a statutory scheme or at common law, there are common requirements that the judgment be: (a) for the payment of a sum of money; (b) final and conclusive; (c) from a court that had jurisdiction over the matters; and (d) not obtained by fraud.

### YOUR RANKING?

- **One correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three correct:** *very well done, but not perfect*
- **Four correct:** *excellent*

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