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Enforcing foreign judgments in Ontario: here comes the story of the hurricane

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The tale of the fight between Antiguan company HMB Holdings Limited ("**HMB**") and the Government of Antigua and Barbuda enters a new decade and continues in the Great White North.

Earlier this month, a majority of Ontario's top court dismissed the appeal of a decision that refused an application by HMB to register a British Columbia judgment against the Government of Antigua in Ontario pursuant to the *Reciprocal Enforcement of Judgments Act*, RSO 1990, c. R5 ("***REJA***").[1] The split decision leaves some lingering doubt about how to determine whether a respondent to such an application "carries on business", to the extent that this is a relevant factor in registering a foreign judgment under *REJA*.

A long and spotted history

The history of this case dates back to September 1995, when Hurricanes Luis and Marilyn, two consecutive Category 5 storms, made landfall in Antigua and destroyed the luxury Half Moon Bay Resort, owned by HMB. The Resort was consistently ranked as one of the best in the world, and was reportedly frequented by the likes of Audrey Hepburn and Elton John.

With HMB unable to redevelop the property after the Resort's destruction, the Government of Antigua expropriated Half Moon Bay in 2005.[2] HMB unsuccessfully judicially reviewed the Government's decision to do so, and in 2007, the Government took possession of the property.

Robert Allen Stanford, a former Knight Commander in Antigua and financier, had plans to redevelop the property on behalf of the Government. One massive Ponzi scheme later, and Mr Stanford was sentenced to 110 years in federal prison in Florida, screeching redevelopment plans to a halt, and leaving the Government with property it claimed it could no longer afford to pay HMB for.

In 2010, litigation over the amount of compensation due to HMB for the expropriation began. The Judicial Committee of the Privy Council settled this litigation in February 2014 when it issued a judgment in favour of HMB in the amount of over US$26 million ("**Privy Council Judgment**").

In 2015, the Government of Antigua sold the property to Freetown Destination Resort Limited, an Antiguan subsidiary of the British Columbia-incorporated Replay Resorts Inc. ("**Replay**"), for US$23 million. Between 2015 and 2017, the Government paid HMB just under US$24 million, but there was a dispute between the parties about the balance remaining to be paid.[3] And so began efforts to enforce the Privy Council Judgment outside the Caribbean.

Enforcement efforts begin in Canada

In October 2016, HMB commenced a common law action in British Columbia to enforce the Privy Council Judgment.[4] With money

still owing by Replay, HMB hoped to intercept the balance of funds payable to the Government of Antigua. The Government, which is not resident in British Columbia, did not attorn to the jurisdiction or defend the claim. In April 2017, default judgment was entered in British Columbia ("**BC Judgment**").

Superior Court in Ontario refuses registration of the BC Judgment

In May 2018, HMB unsuccessfully applied to register and enforce the BC Judgment in Ontario pursuant to *REJA*. Justice Perell of the Superior Court of Justice dismissed the application on the basis of two conditions of registration set out in ss. 3(b) and (g) of *REJA*, which provide as follows:

Conditions of registration

3. No judgment shall be ordered to be registered under this Act if it is shown to the registering court that,

(…)

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or

(…)

(g) the judgment debtor would have a good defence if an action were brought on the original judgment.

With respect to s. 3(b), having not submitted to the jurisdiction of the British Columbia court, the Government of Antigua had to be carrying on business within that jurisdiction for registration under *REJA* to succeed. The parties agreed that if the Government did not carry on business in British Columbia, the BC Judgment could not be registered in Ontario.

At the relevant time, the Government of Antigua had a well-established citizenship by investment program ("**CIP**"), which allowed investors to acquire Antiguan citizenship and a passport by purchasing real estate or donating money to a local non-profit fund. The Government had four "authorized representatives" in British Columbia who promoted and disseminated information about the CIP and facilitated introductions between Government agents in Antigua and potential investors. If an application to the CIP was approved, the representative could receive a commission. The Government did not maintain an office or enter into contracts in British Columbia, and did not approve any CIP applications there.

Justice Perell applied the Supreme Court of Canada's decisions in *Chevron*[5] and *Van Breda*[6] about what it means to carry on business in a province. In brief, *Chevron* provides that a party must have a meaningful and sustained presence in a province for it to be carrying on business there, and *Van Breda* requires "some form of actual, not only virtual presence in the jurisdiction".

In the result, Justice Perell found that the Government of Antigua was *not* carrying on business in British Columbia. The Government had no actual or physical presence in the province, and it did not carry on sustained business activity there. He concluded that the "authorized representatives" were not agents of the Government, and that they carried on their own business in British Columbia. Therefore, registration of the BC Judgment should not be permitted.

With respect to s. 3(g), and whether the Government would have a good defence if an action were brought on the original judgment, the parties disagreed about whether "original judgment" referred to the BC Judgment or the Privy Council Judgment. Justice Perell determined that the "original judgment" was the Privy Council Judgment. Since the Government of Antigua would have had a limitations defence had a common law action to enforce the Privy Council Judgment been brought in Ontario, registration should not

be permitted.

Court of Appeal dismisses the appeal

The two issues before the Court of Appeal were: (i) was the Government of Antigua carrying on business in British Columbia at the relevant time?; and (ii) does the phrase "original judgment" in s. 3(g) of *REJA* mean the BC Judgment or the Privy Council Judgment?

A majority of the Court could not identify any errors in Justice Perell's application of *Chevron* or *Van Breda* to the issue of whether the Government carried on business in British Columbia. In this case, a determination that the Government did not carry on business in British Columbia was sufficient to dismiss the application to register the BC Judgment under *REJA*, and to dismiss the appeal.

The majority noted that the lower court's analysis of s. 3(b) of *REJA* does not deprive parties such as HMB of a remedy; apart from an application to register under *REJA*, parties can bring a common law action on a foreign judgment *within the applicable limitation period*. Unfortunately for HMB, it did not do so in this case.

Justice Nordheimer dissented. He noted that in *Chevron*, the Supreme Court rejected the idea that *Van Breda,* a case about jurisdiction at first instance, applies in cases involving the recognition and enforcement of foreign judgments. In cases involving the recognition and enforcement of foreign judgments, comity "militates in favour of generous enforcement rules".[7] In Justice Nordheimer's opinion, provisions of *REJA* must be interpreted in a way that supports the generous approach to enforcement rules.[8]

Against this backdrop, and using a "generous and liberal approach" to the application of *REJA*, Justice Nordheimer concluded that the Government of Antigua's conduct easily satisfied the requirement for "carrying on business". He found that the Government carried on business and promoted its CIP through the "authorized representatives" in British Columbia, and that this was sufficient to constitute carrying on business for the purpose of registration under *REJA*.[9]

Because he concluded that s. 3(b) of *REJA* did not preclude registration, Justice Nordheimer proceeded to examine s. 3(g) to see if this condition of registration was satisfied. He concluded that the lower court erred by interpreting "original judgment" in that subsection to refer to the Privy Council Judgment; rather, in his view, the "original judgment" in this case must be the BC Judgment. Justice Nordheimer looked to the interpretation section of *REJA*, which defines "original court" as "the court by which the judgment was given". Because the original court was the British Columbia court, the original judgment was the BC Judgment. Justice Nordheimer held that the Government of Antigua would not have had a good defence to the action commenced in British Columbia to enforce the Privy Council Judgment. He would have allowed the appeal.

The way forward

In *HMB Holdings,* the Court of Appeal provided its most extensive analysis of *REJA* in several years. The strong dissent suggests that HMB may want to seek leave to appeal to the Supreme Court of Canada.

Recent Supreme Court cases have made it clear that jurisdiction, *forum non conveniens* and the recognition of foreign judgments are intertwined in private international law. The analysis of these issues may involve similar considerations, and cannot be done in isolation. If HMB is successful in obtaining leave, the Supreme Court will have an opportunity to clarify how *Chevron*, a case involving common law recognition and enforcement of foreign judgments, is applied or extended to a case involving the reciprocal enforcement and registration of foreign judgments pursuant to statute, including pursuant to *REJA*. It will be an interesting case to keep an eye on.

[1] *H.M.B. Holdings Limited v Antigua and Barbuda*, 2020 ONCA 12 ("***HMB Holdings***").

[2] See *H.M.B. Holdings Limited v Antigua and Barbuda (Attorney General)*, 2017 BCSC 2196 at para. 1.

[3] *Ibid*.

[4] In or about October 2016, HMB commenced a flurry of other proceedings in British Columbia and other jurisdictions, including a claim in British Columbia against Replay and Freetown for conspiracy with the Government of Antigua.

[5] *Yaiguaje v Chevron Corp*, 2015 SCC 42 ("***Chevron***").

[6] *Club Resorts Ltd v Van Breda*, 2012 SCC 17 ("***Van Breda***").

[7] *HMB Holdings* at paras. 41 and 50, citing *Chevron* at paras. 27 and 42.

[8] *HMB Holdings* at para. 50.

[9] *HMB Holdings* at paras. 43-49.

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