Toronto Law Journal

H.M.B. Holdings: Clarifying the Limits of Reciprocal Enforcement of Judgments in Canada

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Enforcing foreign judgments in Canada remains a nuanced subject and the Supreme Court of Canada will revisit the question in 2021. Back in 2015, in *Chevron Corp v. Yaiguaje*, 2015 SCC 42 ("*Chevron*"), the Supreme Court of Canada reiterated that recognizing foreign judgments is important in our modern economy where international transactions are prevalent. However, a 2020 decision by the Ontario Court of Appeal highlighted that judgment creditors still face legal and practical challenges when enforcing foreign judgements in Canada.

In *H.M.B. Holdings Limited v. Antigua and Barbuda*, 2020 ONCA 12, the Court of Appeal for Ontario considered an application for an order pursuant to the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990 c. R.5 ("*REJA*") to register a judgment from the Privy Council in respect of a matter in Antigua that had already been recognized by the Supreme Court of British Columbia. This fact pattern — one province being asked to recognize another province's recognition of a foreign judgment — is a "ricochet judgment". The question was when should the second province register the first province's recognition of the foreign judgment.

A majority of the Court of Appeal decided the case on a threshold question, concluding that the requirement in the *REJA* that Antigua was carrying on a business in B.C. at the time H.M.B. commenced its action in B.C. was not met. The decision did not address the question of whether a party was permitted under the *REJA* to register a "ricochet judgment" in Ontario.

The Supreme Court of Canada recently granted leave in *H.M.B Holdings*. We anticipate that our top Court will aim to clarify the extent of recognition of foreign judgments among provinces' statutory regimes.

What led to the request for a ricochet judgment?

H.M.B. Holdings Limited ("H.M.B.") owned a 108-acre beachfront resort in Antigua. In 1995, a Category-5 hurricane destroyed the resort. H.M.B. sought to redevelop the land, whereas the Antiguan government wanted to expropriate and sell the property.

In 2002, the House of Representatives and Senate of Antigua and Barbuda approved the compulsory acquisition of the resort property pursuant to the country's *Land Acquisition Act*. H.M.B. unsuccessfully judicially reviewed Antigua's decision.

In 2007, Antigua and Barbuda took possession of the property. H.M.B. sued over the expropriation and for compensation for the forced taking.

While the dispute between H.M.B. Holdings and the Antiguan Government was still before the courts, in October 2013, the Antiguan Government introduced the Citizenship by Investment Program ("CIP"). The purpose of the CIP was to encourage investment in Antigua and Barbuda by granting investors (and their families) citizenship.

In 2014, the expropriation litigation was settled by a judgment of the Privy Council. The Privy Council fixed the compensation at approximately $26.6 million (USD) plus interest. Between 2015 and 2017, the Antiguan Government paid approximately $23.8 million (USD) to H.M.B. Holdings, but there is a dispute between the parties about the balance remaining to be paid.

In October 2016, H.M.B. Holdings commenced an action in B.C. to enforce the Privy Council's judgment against the Antiguan Government for the remaining balance. B.C. has a ten-year limitation period.

At the time of H.M.B.'s action in B.C., Antigua had contracts with four authorized representatives, each of which had businesses, premises, and employees in B.C. These authorized representatives were paid a finder's fee for directing applicants to apply for citizenship under the CIP. However, Antigua's office administering the CIP had no physical presence in B.C.

H.M.B. obtained a default judgment against Antigua as Antigua did not attorn to the jurisdiction of the B.C. courts.

H.M.B. then applied, pursuant to the *REJA*, to register the B.C. judgment in Ontario. The Antiguan government had assets in Ontario, but Ontario's general limitation period of two years meant that H.M.B. was barred from seeking recognition and enforcement of the Privy Council's decision in Ontario directly.

Under subsection 2(1) of the *REJA*, a creditor with a judgment from another province or territory (except Quebec) can enforce such a judgment in Ontario by way of an application.

The Superior Court refuses to recognize the ricochet judgment

The Ontario Superior Court dismissed the application.

Justice Perell based his decision on subsection 3(b) of the *REJA*, which requires that for registration of the B.C. judgment in Ontario Antigua had to be carrying on business in B.C. at the time of the B.C. lawsuit.

Justice Perell referred to *Chevron* where the Supreme Court stated that "for a party to be carrying on business within a province, he or she must have a meaningful presence in the province and that presence must be accompanied by a degree of business activity over a sustained period of time." He also referred to *Club Resorts Ltd v Van Breda*, 2012 SCC 17, para.

87, where the Supreme Court stated that "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction." He found that Antigua, through its CIP, was not carrying on a business.

Justice Perell also considered subsection 3(g) of the *REJA*, which bars registration of the judgment if "a judgment debtor would have a good defence if an action were brought on the original judgment."

H.M.B. argued that the words "original judgment" refer to the judgment from the Supreme Court of British Columbia: the jurisdiction that has a reciprocal connection with Ontario in enforcing each other's judgments.

Antigua argued that the "original judgment" is a "ricochet judgment" (a derivative of a judgment of a non-reciprocating jurisdiction), and this is an anomaly that the *REJA* did not contemplate.

Perell agreed with Antigua and found that it would circumvent the *REJA's* purposes to permit registration in Ontario of a "ricochet judgment":

> [70] The problem with including a ricochet judgment within the meaning of an "original judgment" is that, practically speaking, it allows a judgment of a non-reciprocating jurisdiction to be registered in Ontario, which circumvents the general policy of the Ontario law about foreign judgments that would normally apply when a party seeks to enforce a foreign judgment in Ontario from a non-reciprocating jurisdiction.

Since Antigua would have had a good defence under Ontario's *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, had a common law action to enforce the Privy Council judgment been brought in Ontario, the Court found that registration should not be permitted.

The majority of the Court of Appeal also refuses to recognize the ricochet judgment

A majority of the Court of Appeal affirmed Justice Perell's decision and found no error in the finding that Antigua was not carrying on a business in B.C. through its CIP. The majority found that the *REJA* provides a more convenient and expedited way to recognize and enforce judgments, but imposes a threshold requiring that the defendant had been carrying on business in the jurisdiction from which the judgment sought to be registered was obtained.

The majority noted that notwithstanding Justice Perell's findings, H.M.B. would not have been deprived of a remedy in Ontario if they brought the action within the two-year limitation period. In that time-frame there would have been no jurisdictional hurdle. Pointing to *Chevron*, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute (at paras. 32-33, citing *Chevron* at paras. 3, 27, 77).

Because the majority found that Antigua had not been carrying on a business in B.C., it did not address whether registering a "ricochet judgment" would run counter to the *REJA's* legislative objectives.

The dissenting Judge concludes that Antigua was carrying on business in B.C.

In a strongly worded dissent, Justice Nordheimer argued that Antigua was carrying on business in B.C., and that Justice Perell erred by applying a restrictive interpretation as to what constitutes carrying on business in the context of the principles underlying the reciprocal enforcement of foreign judgements.

Justice Nordheimer found that the Court failed to apply the principles from *Chevron*, which directs courts to apply a generous and liberal approach to the recognition and enforcement of foreign judgments. When a capacious approach is applied to the facts, Antigua was carrying on a business in B.C. and that it was not necessary for Antigua to have maintained a physical presence in B.C.

With respect to the meaning of the "original judgment" under subsection 3(g) of the *REJA*, Justice Nordheimer concluded that it refers to the B.C. judgment and not the Privy Council judgment. He pointed to the meaning of "original court" as "the court by which the judgment was given" in the *REJA's* interpretation section. Because "original court" was the B.C. court, the "original judgment" was the judgment from B.C. as well: "[t]o conclude otherwise would be to yield a result where the word 'original' is given a different meaning in s. 3(g) than it clearly bears in the definition section of the legislation" (para. 51).

Justice Nordheimer held that Antigua would not have had a good defence to the action commenced in B.C. to enforce the Privy Council Judgment given that H.M.B. would not be out of time.

Significance of the case

The Supreme Court of Canada recently granted leave to appeal, and will hear the case likely in late 2021 or early 2022. The Supreme Court will resolve the strong split between the majority and the dissent at the Court of Appeal. To do so, the top Court may have to refine its analysis in *Chevron* to consider whether to extend its analysis in that case to a case involving the reciprocal enforcement and registration of foreign judgments pursuant to the *REJA*.

In *Chevron*, the Supreme Court emphasized Canada's generous and liberal approach to recognition and enforcement proceedings and stressed the importance of comity. The Court also confirmed that there is no requirement for a connection between the substance of the dispute and the new jurisdiction where enforcement is sought. The enforcing court only needs proof that the judgment was issued by a court of competent jurisdiction, proof that it is final, and proof of its amount. There is no requirement for a debtor to have assets in Canada at the time enforcement is sought. The Court pointed out that in the global and electronic age, such

a requirement would impede a creditor's right to access assets that may eventually flow into Canada. The majority of the Court of Appeal's narrow reading of subsection 3(b) of the *REJA* may be at odds with the more generous approach set out in *Chevron* or it may be the proper interpretation of the statute. We look forward to more guidance from the top Court on this nuanced and difficult question.