

It's All Derivative: Will Ontario Courts Recognize and Enforce Ricochet Judgments?

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The Court of Appeal for Ontario recently considered if or when an Ontario court should recognize and enforce a recognition and enforcement judgment from another province pursuant to the common law. These “ricochet” or “derivative” judgments are generally rare, and the handful of Canadian courts that have permitted their recognition and enforcement have not addressed the court’s authority for doing so at common law. Accordingly, in *H.M.B. Holdings Limited v. Antigua and Barbuda*,¹ the Court of Appeal had the opportunity to conclude and clarify that the common law test for the recognition and enforcement of foreign judgments does not contemplate the viability of ricochet judgments.

The Appellant, HMB Holdings Limited (“HMB”), was granted an expropriation award against the Attorney General of Antigua and Barbuda (“Antigua”) by the Judicial Committee of the Privy Council of Antigua and Barbuda. HMB subsequently brought an action in British Columbia to recognize and enforce the Privy Council’s judgment and secured default judgment (the “BC Judgment”). In 2018, HMB commenced an application in Ontario for an order under the *Reciprocal Enforcement of Judgments Act*² against Antigua,³ which application was dismissed. After exhausting its appeals from the decision of the application judge at the Court of Appeal for Ontario⁴ and the Supreme Court of Canada,⁵ HMB commenced an action in Ontario, seeking to recognize and enforce the BC Judgment—not the Privy Council’s judgment—pursuant to the common law.

Following Antigua’s successful motion for summary judgment, in which the motion judge dismissed the Ontario action on the basis that there was no real and substantial connection between BC and the underlying action in Antigua and Barbuda, HMB appealed to the Court of Appeal.

The Court of Appeal agreed that the action should be dismissed but arrived at that conclusion on a different basis than the motion judge. In so doing, the Court provided important guidance on the legal regime around recognition and enforcement.

¹ [2022 ONCA 630](#), aff’ing *H.M.B. Holdings Ltd. v. Attorney General of Antigua and Barbuda*, [2021 ONSC 2307](#).

² *Reciprocal Enforcement of Judgments Act*, [R.S.O. 1990, c. R.5](#).

³ [2019 ONSC 1445](#).

⁴ [2020 ONCA 12](#), aff’ing *H.M.B. Holdings Limited v. Antigua and Barbuda*, [2019 ONSC 1445](#).

⁵ [2021 SCC 44](#) aff’ing *H.M.B. Holdings Limited v. Antigua and Barbuda*, [2020 ONCA 20](#).

1. “Real and substantial connection” test and bars to recognition and enforcement

The Court concluded that, as a general principle, courts in one jurisdiction will recognize and enforce the judgements of another jurisdiction, provided that the “real and substantial connection” test is met and none of the bars to recognition and enforcement are present. The “real and substantial connection” test refers to the connection between the proceeding and the parties to the action, on the one hand, and the original jurisdiction which issued the judgment, on the other hand. There is no need to assess the relationship between the enforcing forum and the defendant—the enforcing court has jurisdiction as long as there was effective service on the defendant against whom recognition and enforcement is being sought.

Even where a real and substantial connection is established, the court may nevertheless refuse to recognize and enforce a foreign judgment if it was obtained by fraud, the foreign court breached the rules of natural justice, or enforcement would be tantamount to an abuse of process or otherwise contrary to public policy.

2. Common law enforcement test does not apply to ricochet judgment

The Court of Appeal highlighted the difference between an original foreign judgment and a recognition and enforcement judgment. A decision about whether to recognize and enforce a foreign judgment is a local decision that must be made by each court in accordance with its own law. The enforcing court is not tasked with assessing whether the foreign judgment is enforceable in any and all other jurisdictions. Rather, the analysis is limited to whether the law of a local jurisdiction is available to assist the judgment creditor in accessing assets in that jurisdiction with a view to satisfying the judgment.

In British Columbia, the Court’s task was limited to assessing whether the Privy Council Judgment should be recognized and enforced in BC, having regard for the applicable laws of that province. The inquiry specifically considered whether: (1) pursuant to BC’s *Court Jurisdiction and Proceedings Transfer Act*, the Privy Council had jurisdiction over the dispute or the parties; (2) Antigua was properly served with HMB’s claim; and (3) Antigua had any defences to a judgment for recognition and enforcement in BC (e.g., a limitation-period defence).

Likewise, the Ontario Court’s task was limited to assessing whether, based on Ontario law, the Privy Council Judgment should be recognized and enforced in Ontario. It was not to assess whether BC’s recognition and enforcement judgment should, in turn, be recognized and enforced in Ontario.

3. Recognition and enforcement in multiple jurisdictions is possible if well-orchestrated

While the Court of Appeal seems to have foreclosed the viability of ricochet judgments at common law, it affirmed the ability of a judgment creditor to recognize and enforce a foreign judgment in multiple jurisdictions.

HMB argued that it was inefficient to require it to bring concurrent recognition and enforcement proceedings in multiple jurisdictions, and suggested that it should be allowed to first seek recognition and enforcement in BC and, if those enforcement efforts do not yield sufficient assets to satisfy the original foreign judgment, resort to Ontario and other jurisdictions for recognition and enforcement. The Court held that nothing precluded HMB from commencing sequential enforcement proceedings, so long as each proceeding was commenced within the limitation period applicable in each enforcing jurisdiction. HMB could have first brought an action for enforcement in Ontario within the applicable two-year limitation period, and then commenced similar proceedings in BC after the expiry of Ontario's two-year limitation period but before the expiry of BC's ten-year limitation period. In the Court's view, allowing HMB to proceed in the manner it desired would improperly circumvent Ontario's limitation period and deprive Antigua of a legitimate defence.

Takeaway

The Ontario Court of Appeal has effectively closed the door on the recognition and enforcement of ricochet judgments at common law in Ontario. The Court endorsed the Supreme Court of Canada's *obiter* statement in *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, that an enforcing court's judgment "has no coercive force outside its jurisdiction" and whether recognition and enforcement should proceed "depends entirely on the enforcing forum's laws". Litigants who secure a foreign judgment should implement a holistic strategy for enforcement, which takes into account all of the jurisdictions in which there are assets to satisfy the foreign judgment, as well as each jurisdiction's unique enforcement laws and limitation periods. While the Court signaled that the doctrines of *res judicata*, issue estoppel or abuse of process may assist litigants in simplifying subsequent recognition and enforcement proceedings, following *HMB Holdings*, Ontario litigants should not expect to avoid multiple proceedings altogether. The recognition and enforceability of a foreign judgment in Ontario will be assessed on the merits of the connection between Ontario and the original forum, not by reference to a subsequent enforcing forum.