HELMS-BURTON ACT

Cuba: Will New United States Law Hurt Canadians?

Geoff Creighton
Janet Walker
Tory Tory DesLauriers & Binnington
Toronto

Following the Cuban downing of two American private planes, Senator Jesse Helms and Representative Dan Burton secured the passage on March 12, 1996 of legislation furthering United States foreign policy objectives in Cuba by discouraging persons in other countries from investing in Cuba. The *Cuban Liberty and Democratic Solidarity (Libertad) Act*, or "Helms-Burton" Act has drawn protests from Canada and other countries with close ties to the United States. The Act allows United States nationals to sue persons who "traffic" in property expropriated by the Cuban government, and lays the groundwork for the United States government to deny entry to the United States to individual "traffickers," their families and others.

This article outlines important features of the civil liability and immigration provisions of the Helms-Burton Act. Then, it considers the key issue of whether, in light of recent developments in the Canadian approach to the enforcement of foreign judgments, a judgment obtained under the Helms-Burton Act in the United States poses a threat to assets in Canada. Finally, it identifies measures open to potential defendants and to Canadian legislators to avert such a threat.

The Helms-Burton Act

Prior to the passage of the current legislation, the long-standing United States embargo of Cuba focused on United States persons (who were prohibited from dealing with Cuba) and goods (goods with Cuban content were excluded from the United States). In contrast, the Helms-Burton Act targets foreign persons such as Canadians who do business with Cuba.

A Right to Sue

- United States nationals including those, such as expatriate Cubans, who were not United States nationals in 1959, whose property was expropriated by the Cuban government will be permitted to sue in a United States court any person who "traffics" in the property.
- The definitions of the key terms "property" and "trafficking" are extraordinarily broad. Property includes any interest in real, personal or intellectual property and trafficking includes most means of holding and dealing in property, as well as the management or use of property.
- Third parties who deal with the so-called trafficker could also be sued if they "engage in a commercial activity using or otherwise benefiting from confiscated property," or "participate in or profit from" trafficking by another person. It remains to be seen how close the nexus must be between the confiscated property and the business conducted by a third party dealing with the property holder for the third party to be held liable.
- The amounts in issue could be very large. Plaintiffs can be awarded triple damages, based on the value of the confiscated property, plus interest over three and a half decades.
- The Helms-Burton Act does not apply to publicly traded securities unless traded with a "specially designated national" (that is, an entity designated by United States officials as being tantamount to a Cuban entity). Nor does it apply to properties worth less than US$50,000 or, in most cases, residential properties.
- The right to sue will be available November 1, 1996 unless delayed by the President of the United States, who has the power to suspend the right for successive six-month periods. However, there is speculation that delay is unlikely in the run-up to the November Presidential election.

Denying Entry to the United States

The Helms-Burton Act also lays the groundwork for the United States government to deny entry to the United States to persons who traffic in confiscated Cuban property, including corporate officers, principals, controlling shareholders and their respective spouses, minor children and agents.

The definition of "trafficking" for visa and immigration purposes is narrower than for the lawsuit purposes described above. Generally, it requires that some active transaction relating to confiscated Cuban property has occurred, as opposed to the simple continued holding of property. Even so, these provisions hold the potential for considerable disruption for non-United States business persons and their families, depending on the interpretation given to them by United States immigration and other officials.

Enforcement in Canada of Helms-Burton Judgments

Under the Helms-Burton Act, a person who "traffics" in confiscated Cuban property, and who also has assets in the United States, is clearly at risk of having those United States assets seized to satisfy a judgment obtained under the Act. Many "traffickers," however, may not have assets in the United States at the time a judgment is obtained against them. It therefore becomes of critical importance to determine what position foreign courts may take when faced with a request to enforce in their own jurisdictions, a judgment obtained in the United States under the Act. The remainder of this article addresses the issue of enforceability in Canada of a Helms-Burton judgment.

Three kinds of issues are considered by common law courts in Canada in deciding whether to enforce a foreign judgment:

Prima facie enforceability: Whether the judgment is a final and conclusive judgment for a definite sum of a court of competent jurisdiction;

The foreign public law exception: Whether enforcing the judgment would be giving effect to a foreign penal, revenue or other public law; and

Impeachment: Whether the judgment is impeachable as obtained by fraud, or in a manner contrary to natural justice, or as contrary to public policy.

Prima Facie Enforceability

Although foreign judgments are not automatically entitled to enforcement, Canadian courts will generally enforce foreign judgments that are:

- final and conclusive;
- for a definite sum; and
- issued by a court of competent jurisdiction.

Since civil proceedings under the Helms-Burton Act are likely to give rise to final and conclusive judgments for definite sums, it is the jurisdictional competence of the court in the United States that would be in issue in determining whether a judgment would be *prima facie* enforceable.

Under the traditional rules, Canadian courts would generally regard a foreign court as having jurisdiction to issue a judgment only where the defendant was resident or present in the foreign country when the action was commenced or where the defendant submitted to the foreign court's jurisdiction by agreement or by appearing to defend the action. In *Morguard Investments Ltd. v. De Savoye,*[1] the Supreme Court of Canada expanded the rules for the recognition of judgments from other Canadian provinces to include default judgments against persons neither resident nor present in the province where those judgments were issued by a court with a real and substantial connection to the matter. Despite the emphasis on interprovincial comity, Canadian courts have generally extended this approach to the recognition of default judgments from other countries. It is therefore likely that a Canadian court would regard as *prima facie* enforceable a Helms-Burton judgment unless, on the facts of the case, the sole requirement in the Helms-Burton Act that the claimant be a United States national were regarded as insufficient to constitute a real and substantial connection between the claim and the United States. Although a Canadian court might be so persuaded, there does not appear to have been any occasion since the adoption of the real and substantial connection test in which the

[1] [1990] 3 S.C.R. 1077.

courts in Canada have declined to enforce a judgment on this basis.

Where Canadian individuals and businesses are duly served in the United States with notice of Helms-Burton claims, it is therefore likely that the judgments obtained would be *prima facie* enforceable in Canadian courts. As a result of recent developments in the jurisprudence, it is relatively likely, in addition, that default judgments against defendants served outside the United States would also be *prima facie* enforceable.

The Foreign Public Law Exception

Canadian courts generally will not apply, directly or indirectly, foreign laws of a penal, revenue or otherwise public nature because this would give effect to laws asserting the sovereign power of foreign states. Such laws are refused application or "excluded" in the resolution of disputes, and foreign judgments obtained through their invocation are not enforced. This does not entail an evaluation of the merit or wisdom of the foreign law, but relies simply on the principle that such laws are properly applied only in the courts of the country enacting them.

Despite the sparse jurisprudence, it appears that the Helms-Burton Act might well be characterized as a foreign public law. Examples of such laws include anti-trust and regulation of competition laws, securities legislation, price control and exchange control laws, import and export regulations, trading with the enemy legislation, requisition, confiscation, expropriation or nationalization laws and decrees, and national security laws. The civil liability provisions of the Helms-Burton Act are an extension of existing trading with the enemy legislation and are intended to further United States foreign policy objectives in Cuba and might thereby be characterized as foreign public laws. Moreover, it is arguable that the treble damages provisions of §302(a)(3)(C)(ii) are penal in that they are not compensatory. The treble damages provisions of American anti-trust legislation were described as penal in *British Airways Board v. Laker Airways Ltd.*,[2] However, the occasions in which this exception have prevented the enforcement of a foreign judgment are rare.

An Ontario Court recently granted enforcement in *United States v. Ivey*[3] to a United States statutory order for reimbursement of the cost incurred by the Environmental Protection Agency in cleaning up a waste disposal site owned by Canadian defendants. The court decided that the law was not properly characterized as a penal, revenue or other public law. Liability under it was restitutionary in nature and not imposed with a view to punishment, the damages claimed by the plaintiff reflected the actual cost of remedial measures, and it was not an attempt by a foreign state to assert its sovereignty within the territory of Ontario but a regime of civil liability for environmentally hazardous substances. In addition, the court counselled against expanding the public law exception in environmental disputes, in part, because this was an area with such obvious and significant transborder issues.

Given the increasing range of trans-border issues and the expansive approach currently taken to the enforcement of judgments from the United States, this decision might be taken to signal a narrowing of the foreign public law exception. However, it might be said that the reasoning in the Ontario decision does not bear on a Helms-Burton judgment since the Ontario decision suggests that the public law exception should only be disregarded when policy and principle indicate that the foreign judgment should be enforced. The ongoing regime of blocking orders under the *Foreign Extraterritorial Measures Act*[4] (FEMA), responding to previous United States legislation pertaining to Cuba, strongly suggests that an action to enforce a Helms-Burton judgment in Canada would be "an attempt by a foreign state to assert its sovereignty within the territory" of Canada and a response to a transborder issue that was unacceptable to Canada. Under these circumstances, a Helms-Burton judgment might be denied enforcement under the foreign public law exception, even accepting the analysis in the Ontario decision.

Impeachment

If a foreign judgment is *prima facie* enforceable and not subject to the foreign public law exception, it may still be "impeached" if it is obtained by fraud or in a manner contrary to natural justice or if its

[2] [1984] QB 142.

[3] (1995), 26 O.R. (3d) 533.

[4] R.S.C. 1985, c. F-29.

enforcement would be contrary to public policy. The first two bases for impeachment probably would not apply to a Helms-Burton judgment, but such a judgment might be impeachable as contrary to public policy. This would involve the rare finding that enforcing the judgment would violate some fundamental principle of justice, some prevalent conception of good morals or some deep-rooted tradition of the forum.

Since the Helms-Burton Act relates to foreign policy, evidence of the relevant public policy may be adduced not only from constitutional, statute and case law, but also from the views of the Executive. Therefore, in addition to the measures taken under FEMA, a court might welcome intervention by the Attorney-General of Canada on this question. There appears to be ample evidence to find that it would be contrary to public policy to enforce a judgment based on a statutory regime likely to adversely affect significant interests in relation to Canadian trade or commerce with a third country and based on liability for conduct lawful in Canada and encouraged by the Canadian government. Still, Canadian courts rarely refuse to enforce judgments on the basis of public policy.

This analysis indicates that Helms-Burton judgments may be among the rare examples of judgments that Canadian courts will not enforce. Litigation undertaken to prevent enforcement might, therefore, provide a remedy to Canadian individuals and businesses who would otherwise be held liable for the damages awarded in the United States However, it is almost certain that the Canadian process would be complex, costly and protracted.

An Alternative Judicial Remedy

Another option available to defendants to Helms-Burton claims would be to seek an injunction restraining the plaintiffs from proceeding. The English Court of Appeal held in *Midland Bank PLC v. Laker Airways Ltd.*,[5] concerning anti-trust proceedings brought in the United States against two English businesses that the entitlement to be free from the need to defend foreign extraterritorial proceedings justified the intervention of the court to enjoin the foreign proceedings. Like those English businesses, Canadian individuals and businesses subject to Helms-Burton claims could seek injunctive relief, but injunctions could be obtained to restrain only those claims brought by persons who could be served in Canada, and it does not appear that a Canadian court has yet granted this relief in a case where there did not exist an alternative forum for the proceedings in Canada. The concerns relating to cost, delay and uncertainty arising in resisting the enforcement of a Helms-Burton judgment would therefore also apply to seeking an injunction to restrain a Helms-Burton proceeding.

The Foreign Extraterritorial Measures Act

FEMA was passed in 1984 to protect Canadian businesses from various measures taken in the areas of foreign policy and competition that would otherwise have deleterious effects on the conduct of business in Canada. Three orders have been passed to date under section 5 of FEMA to create obligations to notify the Canadian government of, and refrain from compliance with, United States measures respecting Cuba that were likely to affect adversely Canada's international trade interests or to infringe Canada's sovereignty. Among the other provisions contained in FEMA are those designed to respond to foreign litigation purporting to hold Canadians liable for damages in connection with business conducted in Canada that is permitted under Canadian law.

However, when FEMA was drafted, foreign extraterritorial litigation was largely confined to the area of competition. Therefore, the provisions responding to it were specifically directed at anti-trust judgments. Section 8 authorizes the Attorney General of Canada to declare an anti-trust judgment unenforceable in Canada where it is likely to affect adversely significant Canadian international trade interests or to infringe Canadian sovereignty. Section 9 permits the defendant to sue in Canada, in respect of judgments declared unenforceable, to recover in damages from the foreign plaintiff amounts that the foreign plaintiff has recovered from the assets of the Canadian defendant outside Canada. This "claw-back" mechanism provides some protection for Canadians threatened by foreign extraterritorial judgments.

[5] [1986] Q.B. 689.

Now that the Helms-Burton Act has effectively enlarged the forum for the international debate over trade with Cuba to include civil litigation, Canadian legislators might adjust FEMA to permit orders declaring Helms-Burton judgments unenforceable in Canada, and to permit suits in Canada to "claw-back" amounts realized by foreign plaintiffs under such judgments. Such a legislative response would mitigate the effects in Canada of Helms-Burton judgments and, accordingly, reduce the extraterritorial effect of the latest American salvo against the current Cuban government.