Canada's Top Court to Hear Enforcement Dispute

By Stephen G.A. Pitel, Western University

The Supreme Court of Canada has granted leave in *H.M.B. Holdings Limited v Attorney General of Antigua and Barbuda*. Information about the appeal is available here. The decision being appealed, rendered by the Court of Appeal for Ontario, is available here. In the usual course the appeal will be heard in the late spring or early fall of 2021. The grant of leave is notable because Canada's top court only hears a small handful of conflict of laws cases in any given year.

In 2014 the Privy Council rendered a judgment in favour of HMB against Antigua and Barbuda for over US$35 million including interest. In 2016 HMB sued at common law to have the Privy Council judgment recognized and enforced in British Columbia. Antigua and Barbuda did not defend and default judgment was granted in 2017. HMB then sought to register the British Columbia decision (not the Privy Council decision) under Ontario's statutory scheme for the registration of judgments of other Canadian common law provinces. This required the Ontario courts to engage in a process of statutory interpretation, with one of the central issues being whether the scheme applied to the recognition and enforcement judgment or only to what have been called "original judgments".

The procedure used by HMB for getting the Privy Council decision enforced in Ontario might seem odd. The Ontario application judge referred to the process as involving a "ricochet judgment". As to why HMB did not bring a common law action on the Privy Council judgment in Ontario, as it had done in British Columbia, there appears to be some issue that such an action could be outside the applicable limitation period. British Columbia (10 years) has a longer limitation period than Ontario (2 years) for common law actions to enforce foreign judgments.

The Ontario courts held that the scheme did not apply to the British Columbia judgment or, in the alternative, if it did, Antigua and Barbuda were entitled to resist the registration on the basis that it was not "carrying on business" in British Columbia (which is a defence to registration under the Ontario scheme).

The majority of the Court of Appeal for Ontario, perhaps proceeding in an inverted analytical order, held that because Antigua and Barbuda was not carrying on business in British Columbia it did not need to address the (more fundamental) issue of the scope of the scheme. The dissenting judge held Antigua and Barbuda was carrying on business in British Columbia and so did address the scope of the scheme, finding it did apply to a recognition and enforcement judgment.

In my view, it is unfortunate that all of the Ontario judges focused quite particularly on the language of various provisions of the statutory scheme without greater consideration of the underlying policy question of whether the scheme, as a whole, truly was meant to allow knock-on or ricochet enforcement. Ontario's scheme is explicitly limited to allowing registration of judgments of other Canadian common law provinces. It strikes me as fundamentally wrong to interpret this as covering all foreign judgments those other provinces themselves choose to enforce. Nevertheless, it will be interesting to see whether the Supreme Court of Canada resolves the appeal solely on the basis of the intended scope of the registration scheme or instead devotes significant attention to addressing the meaning of "carrying on business".