

December 5, 2017

Enforcing Foreign Civil Judgments in Favour of Victims of Terrorism: New Ground at the Court of Appeal

The Ontario Court of Appeal has confirmed a robust and plaintiff-friendly framework for the recognition and enforcement of foreign judgments against state supporters of terrorism under the *Justice for Victims of Terrorism Act*, SC 2012 c 1 (the “JVTA”).

Since 2012, the JVTA has provided a statutory cause of action for claims against foreign individuals, entities, or state supporters of terrorism, where a victim suffered a loss or damage after January 1, 1985, and as a result of a defendant engaging in activities that are punishable under certain terrorism offences in the *Criminal Code*.

The JVTA also explicitly provides for the recognition of foreign judgments against supporters of terrorism, including foreign states, so long as the Governor in Council has identified that it has reasonable grounds to believe that the foreign state supported or supports terrorism. Where this occurs, the foreign state loses its immunity from court jurisdiction and enforcement proceedings.

In *Tracy v Iran (Information and Security)*, the Plaintiffs—a group of individuals who obtained judgment in the United States against a group of state-affiliated defendants from the Islamic Republic of Iran—brought a motion in the Superior Court of Justice to have the judgments enforced in Ontario. Iran initially ignored the enforcement action, but later brought a series of unsuccessful motions to dismiss the orders against it. Iran appealed the decisions in each of its unsuccessful motions.

The Court of Appeal dismissed Iran's appeal in its entirety. It held that to accept Iran's arguments would be to effectively render the enforcement provisions under the JVTA cumbersome and unworkable. Within the Court's detailed reasons for judgement is a useful analysis concerning the applicable limitations period as relating to retroactive causes of action, as well as the relationship between the common law test and statutory test for recognition of foreign judgements. Of interest is the Court's response to the following questions:

- Did the JVTA (and related amendments to the *State Immunity Act*, RSC 1985, c S-18 (the "SIA")), remove Iran's state immunity in the circumstances?
- Was the action for recognition of the foreign award barred by any limitation period?
- Does the JVTA modify the common law test for recognition and enforcement of foreign decisions?

State Immunity

On the first question, the Court rejected Iran's arguments that compliance with international law and the presumption against retroactive interpretation of statutes meant that state immunity should apply. The Court noted that a plain reading of the SIA and the JVTA indicated Parliament's clear intention to depart from these principles.

Iran argued that allowing Parliament to remove its immunity would eliminate a well-established immunity relied on by sovereign states in ordering their affairs and in international relations generally. The Court acknowledged that state immunity is a general rule of customary international law. Such presumptions are important tools in statutory interpretation, but they are subject to rebuttal by Parliament through the use of clear statutory language. In short, Parliament has the power to ignore international law. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates such an unequivocal legislative intention, absent constitutional concerns, which were not raised here.

The Court observed that a plain reading of the JVTA, together with the contemporaneous amendments to the SIA, established that Iran's immunity from civil proceedings related to terrorism was lifted in September 2012, exposing Iran to liability for acts of terrorism they supported that occurred on or after January 1, 1985.

Limitations Arguments

Iran argued that the motion judge erred when he found that the American judgments are "statutory claims" under s. 4(5) of the

JVTA and their recognition is not barred by any limitation period. Iran argued that the claims for recognition of the American judgements were common law claims that could have been brought previously by the plaintiffs even in the absence of the JVTA, subject to being stayed by virtue of state immunity.

Iran further argued that these proceedings were barred either by the basic two-year limitation period under the *Limitations Act* or its predecessor Act. Iran submitted that the suspension of limitation periods in the JVTA does not apply to recognition and enforcement proceedings.

The Court rejected Iran's arguments on the basis that the claims in question were not discovered until the JVTA came into force in 2012. Prior to September 7, 2012, Iran was not on the list of state sponsors of terrorism in the SIA and a recognition proceeding under the JVTA was not possible. Enforcement of the US judgments was not otherwise possible at common law because Iran was immune from civil suit in Canada. Thus, even if the proceedings could have been commenced before September 2012 (subject to being stayed by virtue of state immunity) it was not legally appropriate for the plaintiffs to commence them.

Recognition and Enforcement of the Foreign Judgment

The Common Law Test

On the third question, the Court held that where an enforcement action is brought under the JVTA, the language of the statute requires that a plaintiff meet the common law test to enforce a foreign judgment, in addition to proving that the plaintiff suffered "loss or damage," as per the wording of the JVTA.

Concerning common law recognition, the Court rejected Iran's argument that the United States had no connection to the events and that, therefore, the common law test was not met. The Court, in citing the Supreme Court of Canada's *Chevron* decision, noted that a foreign court will be found to have properly assumed jurisdiction where it had a real and substantial connection with the litigants or with the subject matter in dispute. A real and substantial connection existed in this case as a result of the American statute authorizing the actions. As a matter of comity, it was correct for the motion judge not to look behind the American statutory authority.

Once jurisdiction is properly established, the burden shifts to the foreign defendant to establish a defence. In this case, Iran argued it was against Canadian public policy to endorse the motion judge's decision. Iran advanced a series of arguments

suggesting, generally, that the retroactive application of the American statute and the excessive quantum of damages—US \$1,700,000,000—were contrary to Canadian public policy. The Court rejected each of Iran’s public policy arguments, observing that the American legislation served as a model for the JVTAs’ own retroactive application and therefore could not be considered contrary to Canadian public policy. Moreover, the Court held that recognizing large damage awards against Iran in this case is consistent with Canadian public policy because it animates the JVTAs’ mission to enable plaintiffs to bring lawsuits against terrorists and their supporters, ultimately creating a deterrent effect against support for terrorism.

The Additional Statutory Requirement for Recognition and Enforcement

The Court agreed with Iran that under the JVTAs, a plaintiff must also additionally show proof of loss or damage. However, the Court rejected Iran’s argument that the motion judge failed to properly consider whether loss or damage had occurred under s. 4(5) of the JVTAs.

Iran suggested, first, that proof of loss under the JVTAs required the plaintiff to show, beyond a reasonable doubt, that Iran had committed an offence under the *Criminal Code*. The court swiftly rejected this argument, noting that to require a judgment creditor seeking enforcement under the JVTAs to prove that a defendant’s acts actually contravened the *Criminal Code* would be inconsistent with the purpose of the JVTAs and the overall purpose of a recognition and enforcement action. It would also undermine Parliament’s intention that the JVTAs be retroactive to 1985. If Iran’s interpretation were accepted, there would be no recovery under the JVTAs for loss or damage suffered from a state-sponsored terrorist act that occurred prior to December 24, 2001—the date when the relevant terrorism provisions of the *Criminal Code* provisions came into effect.

The Court similarly rejected Iran’s related argument that the foreign judgment should not be recognized against it, because the groups Iran was shown to have supported— Hamas and Hezbollah—were not listed as “terrorist groups” under the relevant *Criminal Code* provisions at the time the underlying events occurred. The Court noted that the relevant question is not whether the Hamas and Hezbollah would be formally considered terrorist groups at the time the acts were committed. Rather, the question is whether they are now considered terrorist groups, and whether their action would be considered terrorism today.

Finally, Iran argued that “loss or damage” had not been proven

because the motion judge erred with respect to the *actus reus* element. Iran suggested that the US court finding under its applicable statute does not provide an evidentiary basis for concluding that Iran would have committed an offence under an analogous section of the *Criminal Code*. The Court disagreed, noting that motion judge was entitled to rely on the American courts' findings and the deemed admissions for the purpose of an enforcement action. The motion judge properly found that all three elements of the offence under the equivalent Canadian offence were met: Hamas and Hezbollah are both terrorist groups; Iran provided them with significant financial support; and Iran knew that its support would be used to facilitate and carry out terrorist activity.

Impact

The *Tracy* decision has a number of important implications.

First, though Iran advanced a series of technical legal arguments and appealed to principles of customary international law, the *Tracy* decision affirms that the presumption of compliance with international law is rebuttable where Parliament expresses a clear intention to default on an international obligation. This decision serves as a reminder that, when litigating the proper application of a newly enacted statute, counsel are advised to focus on the express legislative intent, even if that intent may run otherwise counter to broad-based customary legal principles.

Second, *Tracy* offers further assurance of courts' preferred approach in the context of recognition and enforcement of foreign judgments. As a matter of comity, except for cases of fraud or where a judgment is contrary to public policy, a court considering the issue of the enforcement of a foreign judgment cannot look behind its terms.

Third, with respect to the applicable limitations periods for retroactively created causes of action, the Court's analysis in *Tracy* confirms that the JVTAs are a powerful tool expanding the means by which victims of terrorism may seek restitution for their loss. In confirming that the limitation period for enforcement actions applies from the moment a state is placed on the Foreign State Supporters of Terrorism list, Ontario's Court of Appeal has sent notice that where Parliament has labelled a state as a Supporter of Terrorism, that state will be held to account in Ontario Courts for its conduct for as far back as 1985.

Iran has sought leave to appeal to the Supreme Court of Canada. Its leave application is currently under review.

With notes from Sean Lewis