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ONTARIO COURT RULES ON THE JUSTICE FOR VICTIMS OF TERRORISM ACT

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A. INTRODUCTION

On June 9, 2016, the Ontario Superior Court of Justice released its decision in *Tracy v The Iranian Ministry of Information and Security* ("*Tracy*"), in which it dismissed motions brought by the Iranian Ministry of Information and Security ("MOIS") to stay previously issued orders from the court to seize Ontario-based assets.[1] The property to be seized belonged to the Islamic Republic of Iran, MOIS, and the Islamic Revolutionary Guard Corps ("IRGC"), collectively identified by the court and here as "Iran" or "Iranian State Actors". The orders enforce a U.S. foreign judgment that ordered the seizure of $7 million worth of property belonging to Iran as damages to be paid to victims of terrorist attacks supported by Iran. The enforcement of orders against these types of assets and actors, which to date has failed in the U.S., is made possible by new Canadian legislation, namely the *Justice for Victims of Terrorism Act* ("JVTA"), that lifts the protection of diplomatic immunity for certain state actors involved in terrorism-related offences under the *Criminal Code*.[2]

B. PREVIOUS U.S. JUDGMENTS

The motions in this case stemmed from twelve judgments obtained in the United States against Iran which arose as a response to eight different terrorist attacks.[3] Although there is a general provision of immunity

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[1] *Tracey v The Iranian Ministry of Information and Security*, 2016 ONSC 3759.

[2] *Justice for Victims of Terrorism Act*, SC 2012, c 1; *Criminal Code of Canada*, RSC 1985 c C-46.

[3] *Ibid* at 6.

to foreign states, the U.S. courts assumed jurisdiction pursuant to an exception in the *Foreign Sovereign Immunities Act of 1976* ("FSIA"). Specifically, this exception removes immunity from civil actions if the injuries arose from acts of "torture, extrajudicial killing, aircraft sabotage, [or] hostage-taking" if the state is found to have provided "material support or resources".[4] To obtain such jurisdiction, the FSIA additionally requires that: "(1) the U.S. has designated the defendant state as a "state sponsor of terrorism"; (2) the act complained of occurred outside of the foreign state; and the claimant or victim is a US national, member of the U.S. Armed Forces, or employee of the U.S. government."[5]

In each action, the U.S. courts found that the FSIA requirements had been met and it was concluded that Iran was liable for significant damages for the terrorist attacks on the plaintiffs. These judgments were recognized by the Ontario Superior Court in default proceedings, as discussed in our *Anti-Terrorism and Charity Law Alert* No. 35 in March 2014. In fact, Iran did not defend any of the actions, either in the U.S. or Canada. Now, however, they seek a motion to set aside or stay the default judgments on the basis that they are entitled to immunity from the jurisdiction of Canadian courts.

C. CANADIAN LEGAL CONTEXT

In Canada, foreign states are generally granted immunity pursuant to the *State Immunity Act* ("SIA").[6] However, the SIA was amended in 2012 to authorize the Governor in Council to create a list of states that it reasonably believed to be supporters of terrorism. Section 2.1 states:

> …a foreign state supports terrorism if it commits for the benefit of or otherwise in relation to a listed entity as defined in section 83.01(1) of the *Criminal Code*, an act or omission that is, or had it been committed in Canada would be, punishable under any of sections 83.02 to 83.04 and 83.18 to 83.23 of the *Criminal Code*.

Notably, Iran is a member of this list. In turn, s 6.1(1) of the SIA provides that states that are identified on the list are "not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985."

[4] *Foreign Sovereign Immunities Act of 1976*, 28 USC § 1602.
[5] *Ibid*.
[6] *State Immunity Act*, RSC 1985, c S-18.

At the same time that the SIA was amended, the JVTA came into force. The JVTA provides a mechanism for victims of terrorism to sue perpetrators and supporters of terrorism. The particular advantage of the JVTA is the ability to enforce judgements against select state actors (and their assets) which might otherwise be protected by diplomatic immunity. Subsection 4(5) of the JVTA provides that a court of competent jurisdiction "must recognize" a judgment of a foreign court that, in addition to meeting the Comity Elements, is in favour of a person that has suffered loss or damage referred to in JVTA s 4(1) provided that, if the judgment is against a foreign state, the state is set out on the list referred to in s 6.1(2) of the SIA. It is on this basis that the lower court enforced the U.S. judgement against assets of Iran in Ontario.

D. THE DECISION

In the decision, Justice Hainey addressed the following issues:

1. Does the SIA remove Iran's immunity from the jurisdiction of the Canadian Courts?

   In the proceeding, Iran asserted that immunity is not lost simply because the suit was brought pursuant to the JVTA. Rather, they argued that the plaintiffs had an obligation to establish their case under the SIA by demonstrating that they are listed under s 6.1(2) and that they supported terrorism within the meaning of s 2.1 of the SIA.

   The court, however, found that the JVTA operates independently of the SIA and that the purpose of the JVTA, as stated in s 3, is to "deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters."[7] Justice Hainey found that the JVTA effectively provides, "a free-standing procedural and substantive mechanism for a plaintiff's recovery of losses caused by the acts of state sponsors of terrorism".[8] Moreover, s 4(5) of the JVTA references the SIA and provides that a plaintiff must establish the following elements:

   a) The foreign judgment must meet the criteria under Canadian law for being recognized in Canada,
   b) The foreign judgment must be in favor of the plaintiff for loss or damage referred to in s. 4(1) of the JVTA; and

[7] *Supra* note 1 at para 67.
[8] *Supra* note 1 at para 69.

c) The state sponsor of terrorism must be on the list referred to in s. 6.1(2) of the SIA.[9]

A plain reading of s 4(5) of the JVTA suggests that application of the SIA would therefore be redundant in claims brought specifically under the JVTA.

2. Does the JVTA require Canadian courts to recognize the U.S. judgments against Iran?

In this case, Iran argues that s 4(5) of the JVTA requires the following criteria to be satisfied in order that the U.S. judgements may be recognized in Canada:

a) The Plaintiffs suffered loss or damage referred to in s 4(1) of the JVTA

For numerous reasons, Iran argued that this did not occur. For instance, the JVTA requires that the loss or damage must have occurred after January 1, 1985. The fact that certain of the terrorist acts occurred prior to this date did not disqualify specific plaintiffs, however, because "[t]he US judgments were all granted after January 1, 1985. In each case the US court found that the plaintiffs were continuing to suffer harm at the time of the judgments as a result of the earlier terrorist attacks."[10]

The court was also not persuaded by the argument that the plaintiffs were required to establish a specific criminal offence under Part II.1 of the *Criminal Code* pursuant to s 4(1) of the JVTA. The court found that this was inconsistent with the purpose of the JVTA to facilitate lawsuits against terrorists. Furthermore, the court found that it was not necessary to apply the criminal standard of proof to establish the commission of a specific criminal offense and that the applicable standard under s 4(1) of the JVTA is the civil standard of a balance of probabilities.

The court also rejected Iran's argument that the U.S. courts' findings of fact could not be relied upon to establish liability under the JVTA. The court found that the findings of fact must be accepted as per the Supreme Court of Canada's decision in *Kuwait Airways v Iraq*.[11]

[9] *Supra* note 1 at para 71.
[10] *Supra* note 1 at para 76.
[11] *Kuwait Airways v Iraq*, [2010] SCJ No 40.

Furthermore, Justice Hainey stated that the findings of fact were sufficient to "establish conduct that would be punishable under Part II.1 of the *Criminal Code*, particularly s. 83.03…".[12]

b) The U.S. judgments meet the criteria for being recognized in Canada under Canadian statute law and, in particular, Ontario's statute of limitations

The court was not persuaded by the Iranian State Actors' argument that the Ontario proceedings were barred by either the current *Limitations Act, 2002* or its previous limitation period legislation in Ontario. Justice Hainey restated the "fundamental principle under Canadian law that a limitation period does not begin until a cause of action and a defendant who is capable of being sued exists".[13] Because the plaintiffs' claims were made under the JVTA, they did not exist prior to the JVTA coming into force and Iran being placed on the list of state sponsors of terrorism pursuant to s 6.1(2) of the SIA. Therefore, the possibility of such a claim came into existence in 2012 and does not contravene any limitation periods.

c) The U.S. judgments meet the criteria for enforced in Canada

In this case, it was found that the U.S. judgments did, in fact, meet the common law criteria for being recognized in Canada. The test for recognition of a foreign judgment established by the Supreme Court of Canada in *Beals v Saldanha* states that a domestic court can recognize a foreign judgment where jurisdiction was assumed on a similar basis upon which the domestic court would be able to do so.[14] Because of the similarity between the JVTA and the FSIA, the law that allowed the U.S. assumed jurisdiction, it was found that this test was met.[15] Furthermore, the court found that the U.S. judgments did not contravene Canadian public policy.

3. Does the SIA remove Iran's immunity from enforcement or attachment of Iran's exigible property?

Relying on the principle that enforcement immunity is distinct from jurisdictional immunity, the Iranian State Actors argued that even if the court has jurisdiction to recognize the U.S. judgments, the plaintiffs do not meet the test for the enforcement of the judgments. Specifically, they argued

[12] *Supra* note 1 at para 83.
[13] *Supra* note 1 at para 93.
[14] *Beals v Saldanha*, 2003 SCC 72.
[15] *Supra* note 1 at para 104.

that this would require s 12(1)(d) of the SIA, which permits the attachment of foreign judgments, to be applied retroactively to the U.S. judgments, which occurred before the enactment of the provision and that this would violate the principle that states that domestic law should not apply retroactively.

Justice Hainey, however, found that the appropriate date to consider in determining whether the property can be attached or executed against is the date that the plaintiffs attempted to enforce their claim against Iran's exigible property, as opposed to the date upon which the U.S. judgments were issued. This was subsequent to the enactment of s 12(1)(d) and therefore would not require a retroactive interpretation of the provision.

Section 12(1)(d) also bars enforcement of orders against property that has cultural or historical value. The property in question consisted of two bank accounts that were used to fund student expenses and two properties. The bank accounts were found not to have cultural or historical value within the meaning of the SIA and the court upheld the lower court's decision that the properties did not possess cultural or historical value.

4. Is Iran's exigible property immune from enforcement under international law or the FMIOA?

Iran also argued that the two bank accounts and two real properties are not exigible because they were used for diplomatic purposes and are therefore immune from attachment under s 12(1)(d) of the SIA. This argument was based on the assertion that diplomatic immunity extends beyond items mentioned in the *Vienna Convention* to items used for diplomatic purposes. However, Canada identifies Iranian diplomatic property in Minister's Certificates that are issued pursuant to ss 11(a) and 11(c) of the *Foreign Missions and International Organizations Act* ("FMOIA") and the bank accounts were not included therein.[16] Further, the Iranian State Actors argued that the two real properties were used as cultural centres and are also of a diplomatic nature. However, based on the content of the Minister's Certificates and the Department of Foreign Affairs website, the court found that the exigible property is not immune from attachment under domestic or international law.

[16] *Foreign Missions and International Organizations Act*, SC 1991 c 41.

5. Did the *Mareva* injunction require the plaintiffs to establish that s 11(3) of the SIA applied?

The Iranian State Actors also submitted that the court that granted the initial *Mareva* injunction was required to consider whether such an order would allow the attachment of its assets and this would further require the court to have made a finding that Iran supported terrorism and its acts constituted an offence under Part II-1 of the *Criminal Code* pursuant to s 11(3) of the SIA.

Justice Hainey found that s 11(1) of the SIA precludes a *Mareva* injunction in respect of a foreign state's property unless s 11(3) applies. Section 11(3) states "[t]his section does not apply either to an agency of a foreign state or to a foreign state that is set out on the list referred to in subsection 6.1(2) in respect of an action brought against that foreign state for its support of terrorism or its terrorist activity."[17]

It was therefore sufficient for the plaintiffs to establish that Iran was on the s 6.1(2) list to obtain the *Mareva* injunction. The Iranian State Actors' property was therefore subject to attachment before the injunction was issued.

6. Did the plaintiffs make full and frank disclosure on the application for the *Mareva* injunction?

The test to obtain a *Mareva* injunction involves establishing that there is a "strong *prima facie* case". The injunction obtained was subsequently varied on the grounds that the plaintiffs failed to disclose that an argument in favour of Iran's exigible assets was "at best highly contestable and 'merely a serious question to be tried'".[18]

In the instant proceeding, Iran submitted that the lack of disclosure was far more pervasive on the grounds that the plaintiffs did not anticipate all of the arguments that Iran has advanced. Justice Hainey did not find this persuasive on the basis that many of their arguments are novel and unprecedented and that it would be unreasonable to expect the plaintiffs to have raised them *ab initio* and, therefore, the *Mareva* injunction should stand.

[17] *Supra* note 6 at s 11(3).
[18] *Edward Tracy v The Iranian Ministry of Information and Security*, 2014 ONSC 1969 (SCJ) at 47.

E. CONCLUSION

The *Tracy* decision is perhaps the most comprehensive interpretation of the JVTA that has been rendered to date by a Canadian court. It sets a broad precedent and demonstrates that Canada is making an active attempt to make it easier for government agencies and private citizens to seek damages from entities involved in or supportive of terrorist activities. For charities and not-for-profits that work internationally and have contact with state actors or agencies in conflict zones, it is increasingly important to institute substantive due diligence measures to avoid inadvertent contravention of sweeping anti-terrorism laws and regulations.