

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN

H.M.B. HOLDINGS LIMITED

Applicant

-and-

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Respondent

**MEMORANDUM OF ARGUMENT OF THE RESPONDENT,
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PART I OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The present application for leave to appeal arises from a highly unique fact pattern on which the lower court and a majority of the Court of Appeal for Ontario (“**Ontario Court of Appeal**”) applied uniform appellate jurisprudence, including from this Honourable Court, on the test for “carrying on business”.

2. The majority of the Ontario Court of Appeal did not find it necessary to consider the Applicant’s second proposed question for appeal, namely the interpretation of the term “original judgment” under subsection 3(g) of Ontario’s *Reciprocal Enforcement of Judgments Act*¹ (“**REJA**”). The interpretation of “original judgment” under subsection 3(g) has never previously been the subject of judicial consideration.

3. Before this Honourable Court engages in such an interpretation there should be an opportunity for additional jurisprudence to develop and for a full bench of the Ontario Court of Appeal, as the highest court of that province, to address the interpretation of an Ontario statute.

4. Accordingly, this application for leave to appeal does not raise any issue of public importance or is otherwise of a nature or significance warranting this Court’s review. It should be dismissed.

¹*Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5

B. Statement of Facts

(i) Judgment of the Judicial Council of the Privy Council

5. The Judicial Council of the Privy Council settled on May 27, 2014 the monetary compensation payable by the state of Antigua and Barbuda to the Applicant for the compulsory acquisition of the Applicant's property (the "**Privy Council Judgment**").²

6. More than two years after the Privy Council Judgment, the Applicant commenced an action in British Columbia in October 2016 (the "**B.C. Enforcement Action**") to recognize and enforce that judgment.³ A default judgment was entered against Antigua and Barbuda.

7. The Applicant did not commence an action in Ontario to recognize and enforce the Privy Council Judgment within the two-year limitation period under Ontario law or at all.

8. Instead, more than four years after the Privy Council Judgment was issued, and after the lapse of the limitation period to enforce that judgment, the Applicant brought an application pursuant to REJA before the Ontario Superior Court of Justice to register the default judgment granted on the B.C. Enforcement Action (the "**B.C. Recognition & Enforcement Judgment**").⁴

²*H.M.B. Holdings Limited v. The Attorney General of Antigua and Barbuda*, 2019 ONSC 1445 (S.C.J.) ("**Application Decision**"), at para. 2, Application for Leave to Appeal, Tab 2D.

³*Ibid*, para. 3.

⁴*Ibid*, para. 5.

(ii) *Antigua and Barbuda's Citizenship by Investment Program*

9. The Government of Antigua and Barbuda did not attorn to the jurisdiction of the British Columbia court.⁵

10. Antigua and Barbuda has no physical presence in British Columbia. It does not have a consulate, an office or any premises in the province. It has no employees or agents in the province, and it does not direct any marketing activities specifically for residents of British Columbia.⁶

11. The Government of Antigua and Barbuda had contracts with four businesses in British Columbia to serve as authorized representatives for Antigua and Barbuda's Citizenship by Investment Program ("**CIP**").⁷

12. The CIP offers citizenship to approved investors and their families who make investments in certain projects in Antigua and Barbuda approved by the government.⁸

13. The CIP is not directed at residents of British Columbia. It is a program that is made known to interested persons throughout the world. Since the inception of the program, only nine CIP applications were made by persons born in Canada.⁹

⁵*Ibid*, para. 4.

⁶*Ibid*, para. 42.

⁷*Ibid*, para. 43.

⁸*Ibid*, para. 35.

⁹*H.M.B. Holdings Limited v. The Attorney General of Antigua and Barbuda*, 2020 ONCA 12, para. 16 ("**Appeal Decision**"), Application for Leave to Appeal, Tab 2B.

14. The CIP is administered by an Antiguan and Barbudan government agency, the Citizenship Investment Unit (“CIU”). The CIU determines whether to approve or deny an application.¹⁰

15. The review and approval of CIP applications is conducted by a government licensed CIP agent (“**Authorised Agent**”), all of whom are based in Antigua and Barbuda. The Authorized Agent communicates with any applicant to collect any information needed to complete the application process and collect the prescribed fees to process an application. The Authorised Agent remits the application to the CIU and liaises with the CIU on a potential investor’s behalf.¹¹

16. By contrast, the four authorized representatives in British Columbia were contracted to simply promote, advertise and disseminate information about the CIP. They could only assist interested persons to complete certain preliminary forms, which were then sent to an Authorised Agent. They had no authority to review or approve any application.¹²

17. They were not agents of the Antiguan and Barbudan government and carried on other businesses unrelated to the CIP.¹³

¹⁰*Ibid*, para.15.

¹¹*Ibid*, paras. 15 and 16.

¹²*Ibid*, paras. 12 and 14.

¹³*Ibid*, para. 13.

(iii) REJA Requirements for Registration

18. Pursuant to section 3 of REJA, no judgment shall be ordered to be registered if, among other things *any* one of the following applies:

- (a) The judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court;
or
- (b) The judgment debtor would have a good defence if an action were brought on the original judgment.¹⁴

(iv) Judgments Below

19. Antigua and Barbuda submitted to the Application Judge that the B.C. Recognition and Enforcement Judgment could not be registered pursuant to REJA because:

- (a) Antigua and Barbuda was neither carrying on business nor ordinarily resident within British Columbia, and did not voluntarily appear or otherwise submit during the B.C Enforcement Action to the jurisdiction of that court; or
- (b) Antigua and Barbuda would have a good limitation period defence if an action were brought in Ontario on the Privy Council Judgment.

¹⁴REJA, ss. 3(b) and (g).

20. The Application Judge agreed with Antigua and Barbuda and dismissed the application.¹⁵

21. Contrary to paragraph 14 of the Applicant's Memorandum of Argument, the Applicant was neither required to nor did it obtain leave to appeal the decision of the Application Judge. It had an appeal as of right to the Ontario Court of Appeal.

22. A majority of the Ontario Court of Appeal found no error in the Application Judge's assessment of whether Antigua and Barbuda was carrying on business in British Columbia. The Honourable Justices Pardu and Simmons further commented that the Application Judge's interpretation of carrying on business does not deprive parties like the Applicant of a remedy, provided they bring a common law action in Ontario upon the Privy Council Judgment within the applicable two-year limitation period in Ontario.¹⁶

23. Following the Ontario Court of Appeal's decision, the Applicant has commenced a fresh proceeding, at common law, to enforce in Ontario the B.C. Recognition and Enforcement Judgment. That relief is being opposed by Antigua and Barbuda and the proceeding is ongoing.

24. Having affirmed the finding that Antigua and Barbuda did not carry on business in British Columbia, the majority held this to be sufficient to dismiss the appeal and therefore found it unnecessary to consider the other ground upon which the Application Judge dismissed the application.¹⁷

¹⁵Application Decision, paras. 55 and 89, Application for Leave to Appeal, Tab 2D.

¹⁶Appeal Decision, paras. 29 and 32, Application for Leave to Appeal, Tab 2B.

¹⁷*Ibid*, para. 35.

25. The Honourable Justice Nordheimer dissented and would have granted the Applicant's appeal on grounds largely reflected in the Applicant's Memorandum of Argument.

PART II QUESTIONS IN ISSUE

26. The Applicant proposes two questions in issue:

- (i) Did the Application Judge and the majority of the Court of Appeal make a palpable and overriding error in concluding that Antigua and Barbuda was not carrying on business in British Columbia when the Applicant brought the B.C. Enforcement Action?
- (ii) Is the Application Judge's interpretation of section 3(g) of the REJA consistent with the purposes of this section, the REJA as a whole, and public policy?

27. Whether conduct rises to carrying on business in a jurisdiction is a question of fact.¹⁸ The facts in this case are highly unique. Further appellate review of the specific facts associated with Antigua and Barbuda's engagement with four businesses in British Columbia in relation to its CIP would offer no assistance of broader application.

28. Various courts have already held that retaining the commercial services of a business within a jurisdiction does not amount to carrying on business in that province, nor is advertising within a jurisdiction carrying on business.¹⁹

¹⁸*Chevron Corp. v. Yaiguaje*, 2015 SCC 42, ("**Chevron**") para. 85.

¹⁹*Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, para 87; *Sgromo v. Scott*, 2018 ONCA 5, affirming *Sgromo v. Imperial Toy, LLC*, 2017 ONSC 3978, paras. 10, 13-17; *Yemec and Rapp v.*

29. Furthermore, as outlined in *Cr r n k e c p v ø u " u w d o k u u k* applied in assessing carrying on business accords with appellate jurisprudence, including from this Honourable Court.

30. *N c u v n { . " f g u r k v g " d g k p i " g p c e v g f " h q t " f g e c f g u .* has previously never been judicially considered. A full panel of the Ontario Court of Appeal has *{ g v " v q " k p v g t r t g v " v j g " u w d u g e v k q p " c p f " k v u " w u g " q h* *h t q o " q v j g t " r t q x k p e g u " e q p e g t p k p i " v j q u g " r t q x k p* different statutory language and factual circumstances. The Applicant has taken fresh steps in commencing an action at common law to enforce the B.C. Recognition and Enforcement Judgment in Ontario. *V j c v " p g y " c e v k q p " y k n n " t g s w k t g " v j g " e q w t v " v*

31. *C n n " q h " v j g " h q t g i q k p i " r q k p v " v q " k v " p q v " d g k p* second proposed question in issue at this particular time until a conflicting interpretation emerges and the Ontario Court of Appeal has offered its interpretation of that specific registration requirement.

Atlantic Lottery Corporation 2012 ONSC 4207 at paras. 17, 18 and 21; and *Wilson v Hull*, 1995 C D E C " 5 9 6 . " 5 6 " C i l s o n v H u l l " * 5 f + " 4 5 9 " * ö

