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U.S. Court dismissal of Helms-Burton lawsuit suggests tough jurisdictional road ahead for plaintiffs

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On April 27, 2021, the United States District Court for the Southern District of Florida rendered a decision pursuant to the *Cuban Liberty and Solidarity Act of 1996* (commonly known as *Helms-Burton*) in the matter of *Herederos de Roberto Gomez Cabrera, LLC v. Teck Resources Limited* [PDF] (*Teck Resources Limited*). This is the first judicial decision under Title III of *Helms-Burton* involving a Canadian company.

In a previous post entitled "Helms-Burton poses litigation risk for Canadian businesses with ties to Cuba", we examined the implications of *Helms-Burton* and suggested that it would be prudent for Canadian businesses to seek legal counsel in assessing their activities with Cuban-owned entities and their own activities within Cuba. This post followed the announcement by the Trump administration on April 17, 2019 that the U.S. would no longer continue the suspension of Title III of *Helms-Burton*.

Title III creates a cause of action and allows for up to treble-damage claims to be brought against persons (including non-U.S. persons) engaged in "trafficking" in property confiscated in Cuba. Specifically, it provides U.S. nationals (including those who were, at that relevant time, Cuban nationals, and since then have become U.S. nationals), who have a claim to property that was confiscated by the revolutionary Cuban government on or after January 1, 1959, the private right to sue, in U.S. Federal courts, persons who "traffic" in that property. The definition of "traffic" is extremely broad under Title III, with limited exceptions.

In the *Teck Resources Limited* decision, the Court granted a motion brought by the defendant, Teck Resources Limited (Teck), to dismiss the action of the plaintiff, Herederos de Roberto Gomez Cabrera, LLC (HRGC), pursuant to Title III of *Helms-Burton*. HRGC alleged that Teck, a Canadian corporation with its principal place of business in Canada, violated Title III of *Helms-Burton*, and knowingly and intentionally trafficked in confiscated property.

In July 1956, Robert Gomez Cabrera, whose heirs own HRGC, purchased, through his company, 21 mines in the town of El Cobre in Cuba. These properties were later confiscated by the Cuban government. Cabrera's children inherited all rights, title and interests held by Cabrera's company, including the mines and mining equipment, in September 1969. The children, who became U.S. citizens in 1996, incorporated HRGC in Florida and assigned it their claims to the confiscated property.

In February 1994, Teck entered into a joint venture with a Canadian corporation, Joutel Resources Limited (Joutel), to explore and develop land holdings in Cuba. At the time, Joutel held exclusive mineral exploration and development rights over 2,485 miles of land in Cuba, including the confiscated mines. The two Canadian entities entered into a written contract in January 1996 giving Teck a 50% ownership in all of Joutel's holdings in Cuba. One month later, the two entities entered into a written agreement with a Cuban government-owned

company to explore and extract minerals from Cuban mining lands. Teck managed the mining operations through 2009.

The bulk of the Court's analysis concerned the issue of jurisdiction. Florida's long-arm statute provides two means for subjecting a foreign defendant to the jurisdiction of Florida courts: general personal jurisdiction if the defendant engages in substantial and not isolated activity in Florida, and specific personal jurisdiction for conduct specifically enumerated in the statute. The Court rejected the first means as Teck is not a Florida resident and is incorporated with its principal place of business in Canada. The second means was rejected as the plaintiff failed to explain how its claim for unlawful trafficking in Cuba was related to Teck's activities in Florida.

The Court also considered and rejected the HRGC's argument that the Court had jurisdiction under the federal long-arm statute, *Federal Rule of Civil Procedure* 4(k)(2), as Teck wasn't found to have enough minimum contacts in the U.S. as a whole, including through its subsidiaries, nor was it found that Teck's U.S. subsidiaries were related to the alleged unlawful trafficking in the confiscated property in Cuba. In the Court's eyes, an exercise of federal jurisdiction over Teck would have failed to comport with the due process right under the Constitution. Additionally, the Court refused to order jurisdictional discovery on Teck and found that HRGC failed to state an actionable ownership interest. As the Court noted, *Helms-Burton* requires that actionable claims be acquired before March 12, 1996, which HRGC didn't show.

For Canadian companies, this decision should be considered in light of Canada's *Foreign Extraterritorial Measures Act* (FEMA), which seeks to address the extra-territorial impact of *Helms-Burton* on Canadian businesses. Among other things, FEMA:

- allows the Attorney General to prohibit the disclosure of records that are in Canada or under the control of a Canadian person;
- allows the Attorney General to prohibit the enforcement of judgements issued by U.S. courts under Title III; and
- allows the Attorney General to make an order for the recovery of any amount obtained from a Canadian under a judgement made by U.S. courts under Title III, and allows the Canadian to file a suit in Canadian courts for the recovery of damages from the person in favour of whom the U.S. judgement was rendered.

The revival of Title III of *Helms-Burton* in April 2019 gave rise to heightened sensitivity around possible "trafficking" activities, as well as additional considerations for companies related to compliance with FEMA. The recent decision in *Teck Resources Limited* provides useful insight into how U.S. courts will interpret Title III. Canadian businesses that could be exposed to actions under Title III should review their activities in the U.S., including the activities of their subsidiaries, in light of the *Teck Resources Limited* decision.

Companies should seek Canadian and U.S. legal advice before attempting to navigate these obligations, which carry potential criminal penalties of fines and imprisonment.