Potential Revival of Controversial U.S. Cuban Claims Law Creates Risks for Canadian Companies

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In a little-noticed January 16, 2019 announcement by the U.S. Department of State, the Trump Administration indicated that it may revive a controversial and long dormant law, Title III of the *Cuban Liberty and Democratic Solidary Act* — better known as the *Helms-Burton Act* — which would allow U.S. nationals to sue foreign individuals and businesses over property that was confiscated by the Cuban Government after the 1959 revolution.

Although Title III was a prominent feature of *Helms-Burton,* and a testament to the willingness of Congress to extend the reach of U.S. law extraterritorially, it has never come into effect. One of its provisions enables the president to suspend its operation for six month periods if the president determines that the suspension is "necessary to the national interests of the United States and will expedite a transition to democracy in Cuba". Since the *Helms-Burton Act* came into force in 1996, each president has duly suspended Title III every six months, in part due to the hostile reaction it received from other countries, including Canada, whose nationals have business interests in Cuba.

In its January 16 announcement, however, the State Department indicated that it was extending the suspension of Title III for just 45 days, from February 1, 2019 to March 18, 2019, and that during the 45-day period it will review the rights of U.S. nationals to bring actions under Title III "in light of the national interests of the United States". The announcement is not entirely unexpected. In the run-up to last November's U.S. mid-term elections, John Bolton, President Trump's National Security Adviser, told Cuban-American voters that the Administration is considering activating Title III.

Title III deems foreign investors that purchase, manage or enter into joint ventures involving property confiscated by the Cuban Government to be "trafficking" in that property and makes those investors liable for monetary damages to U.S. nationals who have an ownership claim to the property. The limitation period for Title III claims is two years after the "trafficking giving rise to the action has ceased to occur".

When *Helms-Burton* was enacted, Canada responded in part by amending the *Foreign Extraterritorial Measures Act* (FEMA) to block the operation of Title III in Canada. Under those amendments, judgments of U.S. courts under Title III are neither recognized nor

enforceable in Canada and Canadians may counter-sue in Canadian courts to recover any losses suffered from a Title III judgment.

Nevertheless, if the Trump Administration does allow the suspension of Title III to lapse, it will expose Canadian companies doing business in or with Cuba to material litigation risks that are only partly offset by FEMA's protections. FEMA would neither prevent Title III claims from being initiated in the United States against Canadian businesses or individuals nor would it prevent the enforcement of any monetary damages awarded under those claims against U.S. or possibly other foreign assets of Canadian defendants. Accordingly, Canadian businesses with Cuban interests need to track this issue closely, take steps to assess their potential Title III exposure and determine how best to mitigate that exposure.

The following is an update to the above post (March 20, 2019):

The United States announced the partial lifting of the Title III (Helms-Burton Act) suspension. U.S. nationals can now bring actions against Cuban entities or sub-entities listed on the State Department's Cuba Restricted List. The list includes entities involved in the defence, security, and travel sectors, as well as several holding companies. The remainder of Title III, including the ability to bring actions against Canadian persons and businesses, remains suspended for an additional 30 days, until April 17, 2019. If the suspension is lifted in 30 days, it will trigger a more acute conflict with Canada's blocking order under the Foreign Extraterritorial Measures Act that prohibits compliance with US Cuba sanctions.

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