Helms-Burton Act Announcement Puts Canadian Companies with Cuba Business at Risk

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In an unprecedented move, U.S. President Trump has lifted the 23-year old suspension of the private right of action under Title III of the Helms-Burton Act, clearing the way for U.S. nationals to bring civil claims for treble damages against foreign businesses and individuals for "trafficking" in property confiscated by the Cuban government after the 1959 revolution. The change will take effect May 2, 2019. Until now, every U.S. president has suspended the application of Title III since its adoption by Congress in 1996.

The definition of "trafficking" is extremely broad. It applies to any business or individual that:

- sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
- engages in a commercial activity using or otherwise benefits from confiscated property, or
- causes, directs, participates in or profits from, trafficking.

The act requires proof that the trafficking is knowing and intentional.

The limitation period under Title III is two years after the "trafficking giving rise to the action has ceased to occur", meaning that Canadian companies still active in Cuba and who have business dealings in relation to confiscated property are at risk. Where a Canadian defendant in a Title III lawsuit has assets in the U.S., the U.S. plaintiff can be expected to target those assets for recovery in the event of a judgment.

Canada responded to the 1996 adoption of the Helms-Burton Act by amending the Foreign Extraterritorial Measures Act (FEMA) to block the operation of Title III in Canada. Judgments of U.S. courts under Title III are not enforceable in Canada and Canadian defendants may counter-sue in Canadian courts to recover any losses suffered from a Title III judgment.

Enforcement of Title III exacerbates a long-standing conflict between Canadian and U.S. law over the U.S. Cuba embargo. FEMA already prohibits Canadian companies, including Canadian subsidiaries of U.S. companies, from complying with the U.S. Cuba sanctions, creating the potential for significant intra-company conflict between Canadian subsidiaries and their U.S. parents.

The risk of Title III lawsuits against Canadian businesses engaging in Cuba-related business is real in light of the broad definition of "trafficking". Companies will need to assess their exposure by identifying points of contact with confiscated assets, and consider commercial and legal strategies to mitigate that exposure. Those contemplating new transactions with a Cuban connection will be well-advised to carry out targeted due diligence with respect to Cuban assets that are involved in the relevant business and to negotiate representations and warranties to mitigate exposure under Title III and have recourse to adequate indemnification.

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