

CUBA POLICY UNDER TRUMP: EXTRATERRITORIAL IMPLICATIONS FOR GLOBAL BUSINESS

26 February 2019

The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 strengthens and continues the United States embargo against Cuba. Title III of the Act (also known as "Helms-Burton") authorizes U.S. nationals with claims to confiscated property in Cuba to file suit in U.S. courts against persons that may be "trafficking" in that property.

In this on-demand webinar, Gowling WLG and Akerman provide a status report of the Trump Administration's Cuba policy and the extraterritorial implications to companies and individuals if Title III of Helms-Burton is implemented.

France Tenaille: Good afternoon everyone. Welcome to our live webinar that is presented in conjunction by Gowling WLG and Akerman on Cuba Policy Under the Trump Administration and extra-territorial implications. Very quickly, by way of background, since the 1960's as we all know, and as we're going to hear in the presentation today, the US imposed an embargo on Cuba. The provisions of this embargo have evolved over time and eventually resulted on imposition of extra-territorial measures that affected Canadian companies. The Canadian government responded by creating the 1992 blocking order, under the Foreign Extra-Territorial Measures Act, that prohibited Canadian companies from complying with the US requirements. In 1996, what is known as the Helms-Burton Act, was enacted and such legislation included a very controversial provision, Title III, which allows US nationals to take action against a foreign entity when the foreign entity's benefiting from United States property expropriated by the Cuban government. Given that the scope of Title III has virtually unlimited applications to foreign business operations the US government has suspended its applications since inception. But where now in an era, in a new era, and there is indication that Washington is preparing to very soon activate Title III.

To help us understand the effects of Title III and its implications for the Canadian businesses we have a highly qualified panel of experts from both law firms. Gowling WLG, a Canadian international law firm with over 1,500 professionals in 19 cities around the world, and Akerman, is an American law firm with more than 700 lawyers and business professionals across 24 offices in the US. Our first speaker is Matthew Aho. He's going to be speaking about Cuba policy making and the interplay between the key players. Matthew Aho is a special advisor on Cuba at Akerman's offices in New York. Matthew was involved in Cuba policy formulation to ... for Barack Obama's first term and joined Akerman in 2012 to help American companies develop strategies for the Cuban market. Since 2014 Matthew has successfully developed market entry strategies for a wide range of clients such as Airbnb, Orvis and Expedia and advised a marques deals such as major league baseball recently and also an agreement with the Cuban Baseball Federation. I'll pass it now on to Matthew.

Matthew Aho: Thank you France and thank you to everyone from Gowlings for the opportunity to talk with you today. I know that the topic of today's webinar focuses on the specific issue of Title III but I thought it would be helpful to take a quick step back and provide a little context about Cuba policy under the Trump Administration and how that fits into the United States historic approach to the island. For the past 60 years, essentially, the explicit goal of US policy, when it comes to Cuba, has been to promote regime change on the island. A change away from the Castro government and towards something freer

markets and democracy. To that end the United States has maintained a comprehensive set of sanctions on Cuba. The goal of which is to deny resources to the Cuban government with the hope of destabilizing their regime. Unlike in other cases where the US has decided to sanction a particular country or individual or industry sector, the Cuba sanctions are blanket sanctions. They prohibit all transactions by all Americans with all Cuban persons anywhere in the world. The starting point really is, as they would say in Spanish, Nada. You can't do anything. However, understanding that having no commerce and no transactions whatsoever isn't realistic, the embargo does provide some policy flexibility to the executive branch, the President, who retains the power through his or her control over the federal bureaucracy and the agencies that administer and enforce the embargo to authorize certain types of activities through the issuances of licences.

So to avoid confusion I'm just going to go through a few of the different parts of the US government that actually enforce and administer the embargo. The first one is the Office of Foreign Assets Control, which is housed within the US Treasury Department, and they maintain federal regulations called the Cuban Assets Control Regulations. Those are essentially the bulk of what we commonly referred to as the embargo. However, the United States Commerce Department, through its Bureau of Industry and Security, also administers certain regulations pertaining to the physical movement from goods from the United States to Cuba so there're export restrictions and those are maintained by the Commerce Department. All of this is supposed to be handled in coordination with the US Department of State, which is supposed to provide guidance to OFAC and the Bureau of Industry and Security, about questions that arise and whether those questions and how to answer those questions in a way that's consistent with US foreign policy goals. Lastly, the White House National Security Council at times has gotten involved in its role as a coordinating body, within the White House, between those agencies. A quick note on the Helms- Burton Law, of the full title of which is the Cuban Liberty and Democratic Solidarity Act of 1996, we're going to be talking about Title III, but it is important to note that it was the signing of Helms-Burton in 1996 that created a lot of the statutory restrictions and codification of the embargo at large, which Pedro's going to talk about. The reason why a President can't go and just lift the embargo by himself, through executive action, is precisely because of the codification through Helms-Burton.

I'm going to walk you real fast through the last several years of Cuba policy in the United States and kind of how we got to where we are. You'll all probably remember the historic announcement December of 2014 when Barack Obama and Raul Castro held simultaneous press conferences announcing their decision to normalize the relationship between the two countries. That was followed in July of 2015 with the opening of

embassies in Havana and in Washington for the two counterparts. Of course there was in March of 2016 the historic visit by President Obama to Havana. He was the first President, actually since Calvin Coolidge in 1928, to go to the island, and quickly thereafter the reestablishment of regularly scheduled US flights to Cuba. Not just limited to Miami, by the way, there are flights in Miami, Tampa, Charlotte, North Carolina, New York City and others, and cruise line service primarily through South Florida which has become the biggest news source of US origin traveler arrivals to Cuba since cruises were recommenced in 2016. In November, of course of 2016, the Presidential elections yielded an unexpected outcome, and for those of us in the United States who watch Cuba policy, there were a lot of question marks. President Trump, during much of his career as a hotel/real estate developer, and he had actually sent people down to Cuba to scout potential opportunities, so there were some people who felt, "Wait a minute. This guy probably just wants to do deals and we shouldn't worry too much about him messing with the policy." He had even acknowledged in numerous news interviews that he was basically okay with Barack Obama's policies regarding Cuba, but of course, he would have got a better deal. That quickly changed in October of 2016 when he pivoted in South Florida to a much more conservative and traditional Republican position, vis a vis Cuba, and announced that he would move to re-impose sanctions to end the period of normalization and to do everything within his power to hasten the end of the Castro government. That policy took form in June of 2017 when Trump gave a speech in Miami and issued what's called a National Security Presidential Memorandum, which is how the White House communicates its directives to the federal agencies, and within that National Security Presidential Memorandum, or NSPM, he outlined a variety of changes that were designed to further sanction Cuba. Those changes were enacted through OFAC and BIS, the agencies that I mentioned before, in November of 2017. And, a year later, we start to hear a lot of different feedback and a lot of different rumours about revisiting the infamous Title III of Helms-Burton.

A quick note on Trump form policy, vis a vis Cuba and its relationship to the normal way of doing form policy in the United States, few things. Number one, the sidelining of the US State Department's traditional role in foreign policy formulation. Since the founding of our Republic in the 18th century the State Department's role has been to handle relations with foreign governments. It still exists. We have that role but in historic context the State Department is playing a more diminutive role than it has traditionally played. It has given way, in large part, to the rise of a very muscular National Security Council at the White House. The NSC, as it's called, is really designed to be coordinating foreign policy at different parts of the federal bureaucracy. It's not typically a policy formulation outfit but we are very much seeing policy being formulated and driven out of the NSC under the

Trump Administration and key positions at the National Security Council are occupied by people with long time long held views, Cuban policy views, that I would describe as hawkish and very conservative.

Lastly, we have Senator Marco Rubio from Florida, who is very vocal on Cuba. He's very vocal on Venezuela and land America issues in general but Cuba is his main focus. He is very much in line with conservative South Florida Cuban American thinking on Cuba policy and has been very vocal on the issue. There's an anecdote that when the National Security Council first asked President Trump what he wanted to do on Cuba he said, "Go make Marco Rubio happy on it." So we've seen a very heavy influence coming from him. That of course is important because Cuba is, more than anything in the United States, a domestic electoral campaign related issue given Florida's prominence as the most important swing State in Presidential elections. A lot of this policy, I believe, is being driven by desire to please key constituency in South Florida more than it is traditional foreign policy, or international relations thinking, as they would apply to other countries.

The last thing I will note, and this is not inconsequential for, I think, our Canadian audience, therefore I will use Canadian terminology, is the idea within the National Security Council of a hat trick in Latin America. Basically, the end of left wing governments in Venezuela, Cuba and Nicaragua as being sort of end goal of some of the neo-conservatives that occupy important policy positions at NSC.

That's the rosy picture of my view of how foreign policy is being formulated in the Trump Administration. A quick word on Title III, and I will not dwell on it because we're going to hear from people who are more experienced than I am on the topic, but it really has been the ticking time bomb in US-Cuba relations for a long time. It purports to be a mechanism for helping claimants, property claimants, to seek recompense for confiscated property but its real goal is to discourage foreign investment to Cuba by creating new legal exposure for foreign companies who are in the United States. The last thing I'll note is that Title III was so controversial in 1996 when it was passed that President Clinton insisted on an executive option to suspend the provision before fighting Helms-Burton in the law. That's why we've seen every 6 months since 1996, under both Republicans and Democrats, the US President move to suspend the provisions of Title III.

What companies should do to prepare? Very quickly, number one, is encourage their governments and trade associations to raise Title III concerns in bilateral talks to the United States. We can talk more about that but the NSC is a good target. Number two, identify potential exposure to Title III law suits if you're a company that has dealings in Cuba and property that may be subject to a Title III claim. The second to last, explore possible counter measures under international law and then, finally, the last one is to

consider legal challenge to Title III in the United States under jurisdictional or other grounds, there are ample grounds, I believe, to challenge the law. I'll stop there. Hopefully Gregory has joined us from Havana and will be able to talk us through what the Cubans are thinking about all of this.

France: Thank you very much, Matthew. Before we get into the full analysis of Title III, sipping Mojitos directly from Havana, we have Gregory Biniowsky. Gregory Biniowsky is a Canadian lawyer who has been living and working in Cuba for the past 20 years. He's the Havana based business consultant for Gowling WLG. Gregory's going to let us know how Havana is reacting to the potential activation of Title III. Gregory.

Gregory: Yes. Hello, France, and hi to everyone from sunny and warm Havana, Cuba. What I want to do, very briefly, is talk a little bit about what I've been hearing from Cuban officials, what I've been able to observe amongst the Cuban population with regards to the potential Title III implementation, what I've heard from foreign business community, foreign diplomats here, and then finally, just very brief mention what other countries are doing in terms of potential blocking orders directed towards Title III.

With regard to the Cuban government, they've had a historical and very energetic rejection of Helms-Burton and this looming implementation of Title III, in their minds, is just part of the same story that's been going on since 1996. Of course Title III is coming at a very bad time for the Cuban economy so they're extra energetic with regards to their rejection of Title III. Now, one of the things that I've noticed the Cuban government constantly raises, is they question this whole notion of confiscation versus nationalization. This is, of course, a much more complex legal debate but they insist that they offered compensation for those properties that were nationalized and they raised many major Canadian and European companies were compensated during the first years of the revolution. They question the whole notion of whether there's arbitrary compensation. Interestingly, they have placed a lot of coverage of Title III on Cuban media, on Cuban TV. I think they're preparing the Cuban population for what might be coming and also the potential consequences of that being more difficult economic time. And, finally, the Cuban officials have said they're really hoping that there's going to be a bigger response from US trade partners such as Canada and the European Union. In terms of what I see on the ground, and what I hear on the ground, Cubans across the board, whether they agree with the government or they don't, they definitely do not like the notion of Helms-Burton squeezing their economy and same goes with Title III. There's a general popular rejection on the ground here that goes beyond politics. They're very fearful of how this is going to potentially impact the efforts by the Cuban government, more recently with the Díaz Canal Administration to open the country further to foreign investment. With regards to foreign

business people, again, they are very worried across the board. Canadian business people, European business people, are very worried and they're actively inquiring into what they're own countries are doing with regards to protective blocking measures to respond to Title III. One of the things that really strikes a lot of foreign business people is the vagueness of the terminology in Helms-Burton and how it could be used by Title III. I'm sure Pedro's going to talk a bit more about that, but a lot of these terms, they're not sure how they're going to be interpreted in US courts. That worries them.

In terms of the foreign diplomats goes a general silence as a wait and see attitude. One of the things that a Western European journalist, Nicolai, just recently told me is that just remember what the furor was in 1996 when we sought Title III for the first time which led Clinton to suspend it. Well that's what's going to be coming if they dare put in Title III. We know what to expect from US trading partners. And there's also a comment that this goes beyond Cuba. That this could set a very dangerous precedent for general trade relations between the United States and its commercial partners, beyond Cuba.

In terms of examples, Rick Dearden's going to talk about Canada's Foreign Extraterritorial Measures Act, but I can just say that a number of other jurisdictions have very similar blocking orders. The European Union, the United Kingdom, Mexico and all of them, all of them, have basic elements that the Canadian blocking order has. Notification requirements, not to comply with extraterritorial reach and specifically, Title III, non-recognition, non-enforcement of any US judgment and claw back mechanisms that can help companies that have been affected by Title III.

So that, in a very small nutshell, is essentially what I've been observing on the ground in Cuba and now I'll pass it back to France. Thank you.

France: Thank you Gregory. We now are going to get into the specifics of Title III which, as we've heard, is a very complex legislation. For that we have Pedro Freyre who was also last week sipping Mojitos with Gregory in Havana. Pedro is a partner at Akerman in Miami and is Chair of its international Practice. He represents US companies active in trade with Cuba and he's ranked by Chambers as a Cuban expert. He's also an adjunct professor at Columbia University Law School and University of Miami where he teaches a seminar entitled Cuba Law Policy and Transition. Pedro, over to you.

Pedro: France, thank you very much, and thank you to Gowlings for organizing this seminar. It's always a pleasure to be talking to our Canadian friends and sharing some concerning issues that involve all of us. I first want to start by reinforcing something that France said at the beginning which is the Helms-Burton legislation is very complex. It has a lot of moving parts. It has a lot of terms of art and inter-relationship with other US laws

and regulations so it bears careful scrutiny. I didn't want to get too deeply into the weeds in this presentation but I'm going to try to give what I think are the salient points and the actionable items for Canadian parties that may be interested in this.

The first thing I want to do, again without getting too deeply into the detail, but I think it's important to follow up on Matt's introduction on how the US embargo is structured. The architecture of the embargo, if you will. It all stems back from a 1917 law called the Trading With the Enemy Act which empowers the President of the United States to authorize regulation, financial and otherwise, to basically put a damper on the activities of an enemy of the United States and their ability to use financial resources associated with the United States. The other basis for the embargo are the Foreign Aid Act of the early 60's and then, by the early 90's, there was more activism on the part of the Cuban-American community in Washington and there was another Act called the Cuban Democracy Act, also known as Torricelli Law, which restricted the ability of US companies with foreign subsidiaries to trade with Cuba. But the key Act that concerns us today is the Helms-Burton Law. The formal title is the Cuban Liberty and Solidarity Act. You see the legal citation there and it's important to understand the context under which this law was enacted, and I'll get to that in a moment. The other two items to remember are the Cuban Assets Control Regulation, which are administered by the Office of Foreign Assets Control of the US government. These regulations interpret the law and they are subject to change by Presidential directive and influence and so forth. Please keep that in my mind that not only is Title III in the offing, but changes to the Cuban Assets Control Regulation, which basically governs everything having to do with the embargo, are also likely to be enacted and have already been changed by the Trump Administration as a result of the change in policy that you heard about. There's more to come in that arena and that's in the regulatory arena. Finally, there's the Export Administration Regulations and the way to understand that is that is the trade aspect of the embargo. Those are the regulations that authorize, or don't authorize, the sale of products to Cuba. For example, under those Regulations, the sale of food items is usually authorized. The sale of pharmaceutical items is usually authorized but there's a process behind that.

The next thing I want to address is how this law came to be. We have to go back to 1996 and what is a very famous, or infamous, incident in International waters in the Florida Straits, where two US registered aircraft with four US Nationals on board were shot down by the Cuban air force over International waters after they engaged in propaganda activities in the economic exclusion zone of Cuba, and sometimes they strayed into Cuban airspace, but not on the day they were shot down. As a result of that there was this sense of outrage. It's interesting to note that at the time this happened the

Clinton Administration was moving rapidly to engage Cuba in a process that later was carried forth by the Obama Administration, and President Clinton reversed course on the happening of this event. So, what that law basically did, if you would, is hardwire the US embargo. Because up until that time the provisions of the embargo were the provisions enacted under the Cuban Assets Control Regulations by the Treasury under the authority of the Trading with the Enemy Act. What this law did is, if you would, it took a snapshot of the way the embargo looked at that point in time and basically said, "This is now the law of the land." So, what used to be regulation under another statute became a free standing law. The corollary to that is that in order to lift the embargo, which is something many people have been trying to do for many years, it requires congressional action, or it requires compliance with the conditions of the law, which we will talk about in a moment. Basically it also prohibited financing of transactions involving confiscated property subject to a claim by a US person, as of March 12, 1996, and it also noted that the Code of Federal Regulations and Cuban Assets Control Regulations prohibited dealings in merchandise of Cuban origin, merchandise that has been transported through Cuba, or which is made in whole or in part from an article which is grown, produced or manufactured in Cuba. Once again you see a hardening, if you will, of US provisions against the Cuban regime by the enactment of a very comprehensive law.

Moving now to the core of what concerns us today. Let me talk about a couple of key definitions in the law. The first one is who is a US National? A US National under the purview of the law is any United States Citizen, that is a physical person, or any other legal entity organized under the laws of the United States. The importance of that definition, and the implications of that definition, is that people such as myself, who were born in Cuba but are now naturalized US citizens are, by definition, covered by the law. As we will see in a little bit, the types of claims that can be brought are divided into two very well defined categories. One is certified US claims, which belong to US citizens who were citizens at the time that the property was confiscated and those properties are listed in the Federal Register and went through a process of certification, or non-certified claims such as those that can be brought by Cuban Americans who were not Americans at the time the property was confiscated. In terms of what is actionable under this statute the definition is, to say the least, quite broad.

Let's just walk through the language if we have a minute. The definition of trafficking, and that term was used with full intent, because trafficking denotes drug use or an illicit activity and so forth. A person traffics in confiscated property if that person knowingly, it has to be the knowing element, sells, transfers, distributes, dispenses, brokers, manages or otherwise disposes, purchases, leases, receives, possesses, obtains control of, or

otherwise acquires direct or indirect control of a confiscated property. Let's stop there for a moment. This is basically a shopping list of every activity that you can conceive of in relation to a confiscated property that would result in some sort of financial benefit for the person engaging in that activity. And the importance of that broad definition is that folks who are active in Cuba and in any way, shape, or form, derive benefit or touch a confiscated US property, need to be aware that they are very likely to be caught in the definition of trafficking. Recently I was reading an article out of Spain where a layperson was interpreting Helms-Burton and basically said, "We have no risk because the risk follows ownership of the property and we don't own the property. We manage it." That is a fundamental error in analysis because the definition itself says very clearly that included in the concept of trafficking is the concept of managing a property which is what many, for example hotel owners and operators, do in Cuba through joint ventures and so forth.

Now the term trafficking has some interesting carve outs. Let's understand that what happens here is that by definition, by definition, certain activities are not considered trafficking. What would those activities be? Well, the term trafficking does not include the delivery of international telecommunication signals to Cuba. The trading or holding of securities publicly traded, or held, unless the trading is with, or by a person determined by the Secretary of Treasury, to be a specially designated National. I won't dive down that particular rabbit hole. That's a different technical problem. And number three, I want to call attention to this one, transactions and uses of property incident to lawful travel to Cuba to the extent that such transactions and uses of property are necessary to the conduct of such travel. Let's use an example there. Let's talk about, I'm not going to get into the ports. People are always wondering why not. I represent five cruise lines so obviously I am precluded to go very deeply into all of this for reasons of privilege. Let's talk about, as a hypothetical example, the runway at José Martí International Airport. Let us suppose, hypothetically, that that runway belonged to a private entity. A private American entity. And let us suppose that that entity is now considering bringing an action against American Airlines, who is not of my client, because they're using that runway. Under the black letter law that we see in the statute, that activity by American Airlines (ie: landing in the runway) would not be deemed to be trafficking because that activity, by reading, is an activity that uses the property as is necessary to the conduct of lawful travel. So there's an enormous carve out, if you will, for property used by persons in conjunction with lawful travel. Let me tell you one concern I would have if I were a Canadian. I think that the position that the US courts are likely to take is that this pertains to the use of that property by American companies engaged in authorized travel. I wonder whether they will read the statute broadly enough to say that it also includes the use by Canadian entities. So, for example, query if Air Canada were to use the runway at José Martí International Airport, would Air

Canada be excluded from the definition of trafficking? It is unclear.

Finally, transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba and who's not an official of the Cuban government or the ruling political party in Cuba. So that allows basically intra-Cuban transactions not to be deemed to be trafficking.

Other definitions that are important are property. And here it says that property, including intellectual property such as patents, copyrights, trademarks and other form of intellectual property, with a real person or mixed, and any present, future or contingent right, security or other interests therein, including any leasehold interest, is deemed to be property. Now what is not included, and this one goes to the heart of many Cuban-American issues, and my family had a beautiful compound in Medimar, and Greg can go look it up, [... Spanish ...]. We had four family houses. But for the purposes of Title III of the Act, the term property does not include real property use for residential property unless, as of the date of the enactment of the Act, the claim to the property is held by a US National and the claim has been certified under Title V of the International Claims Settlement Act of 1949. Those are the certified US claims, or the property is occupied by an official of the Cuban government, or the ruling political party in Cuba. Let's just parse that out for a moment. If a property, if a residential property, as of the date of the enactment of the Act back in 1996, is subject to a claim, a certified claim from a US National (ie: it was the home of an American citizen who was an American Citizen at that time), then it's subject to a claim. Or, if the property is occupied by an official of the Cuban government, and the ruling political party in Cuba. Good question. Because that beautiful property in Medimar used to be occupied by none other than Fidel Castro's older brother who passed away. So he's no longer occupying it. Query, is the Freyre family entitled to a claim or not? To be continued.

So, in order to protect the property rights of US Nationals, the law says that any person who traffics in property which was confiscated by the Cuban government, or and after January 1959, that's the bright date in which Fidel rolled into Havana in a tank, shall be liable to any US National who owns the claim to such property for money damages in an amount equal to the greater of the amount certified in the Claim Settlement Commission under 22 USCA, that's the process that we spoke about, or the fair market value of the property, and court and reasonable attorney's fee, if the claimant provides notice to a person against who the action is to be started, at least 30 days in advance of the case, and the person continues to traffic then they would be entitled to travel damages. This action may be suspended for a period of 6 months by the President of the United States. So, parsing that out, the amount of the claim, if you have a certified US

claim, is the amount that was determined by that process of the Foreign Claims Settlement Commission back in the early 60's, and by the way, if you're interested in seeing who holds the claims, go to the web and click on Certified Cuban Claims and you will be put into the section that lists all these claims and you will see it in detail. They now total something in the order of 8 billion dollars. The claimant would have to notify in advance and if the action continues then they'd be entitled to travel damages. But the precedent may suspend and the President suspended it but they did not suspend for 6 months. They suspended for 45 days and we're expecting an announcement March 1.

I believe I am running out of time so let me quickly move to the next section. There, what I will say in shorthand, is that it's evidence of ownership. Proving up your claim, if you would, certified claims out of the pre-socialist correctness for the amount that was certified by the Foreign Claims Settlement Commission. So you don't have to go through the difficult process of proving up your claim. Whereas the others are required to be proven up and may be subject to the decisions of a special master in equity.

I will skip over the rules of construction because I think that's a little bit of a technicality and we're running a little bit short of time. The other thing that is important to note is that if you are a US claimant that could have had access, the remedy under the Foreign Claims Settlement Act, and you did not avail yourself of your remedy then you're precluded from pursuing that remedy at this point. That's important because some US citizens will be left out of the process due to that.

Final point I wanted to make is that the law itself says that the act of state doctrine, which is a highly recognized ... bit of international law, where the actions of another government will not be subject to legal action in another country, is obviated and it specifically says so in the law. So that defense cannot be presented by someone subject to these one of these claims.

Finally I will wrap up by saying that there's also under Title IV, which is currently in effect, the ability for the Secretary of State of the United States to deny visas to any alien, any individual, who is actually conducting that activity. I will close by saying that one of the two instances where that was applied was against officials of Sherritt, the Canadian mining company. With that I will close my presentation. Thank you.

France: Thank you very much, Pedro. You really walked us through what it is, an extremely complicated legislation, and made it almost sound simple. Thank you. We now are going to hear how Canada struck back, as mentioned before, in 1992 Canada enacted what is called the Anti-Blocking Legislation. To talk about that we have Richard,

Rick, Dearden. He's a Fellow of the American College of Trial Lawyers and he's a senior litigation partner at Gowling WLG's Ottawa's office. Rick practices international trade law and he acted for the Government of Mexico, one of his external counsel doing negotiation and implementation of NAFTA. Rick provides advice to clients on Canada's Foreign Extraterritorial Measures Act, also known As FEMA, and he's going to talk to us about that. Rick.

Rick: Thank you France. Good afternoon everybody from minus 28 wind chilled Ottawa where no one's drinking Mojitos or sipping them. I'm going to be dealing with four matters. First, the Canada-Cuba relations. And then the Foreign Extraterritorial Measures Act which legislates the non-enforceability in Canada of Title III, Helms-Burton judgments. Thirdly, the powers of the Attorney General of Canada to issue an order declaring a Canadian can seek to recover damages and expenses in respect of a Title III judgment and, then lastly, to remind you of the obligations under Canada's Foreign Extraterritorial Measures United States Order.

Bilateral relations between Canada and Cuba are essentially the polar opposite of US-Cuba relations today. Cuba's a major export market for Canada and Canada is Cuba's fourth largest trading partner. The Cuban government is interested in the negotiation of a bilateral agreement on reciprocal promotion and protection of investments. That investment treaty negotiation has not launched yet but Canada's interested in it. Cuba's interested in it. So hopefully something will happen on that front. The Ambassador to Canada, Josefina Vidal, recently stated that Cuba's relations with Canada are a priority for Cuba and expressed appreciation for Canada's vote at the UN General Assembly in favour of the Cuban draft resolution demanding the end of the US blockade against Cuba. Now, I dare say that many of you didn't know the historical fact that is demonstrated by my next slide. Here you have Rosa Fay, a Canadian bull, father of the Cuban milk cow herd. As the legend goes this Canadian bull produced Cuba's renowned milk cow herd. That sale was apparently not appreciated by the US government at the time. Here you're looking at a bronze sculpture of Rosa Fay, commissioned by a Canadian lawyer, Carey Linde, but standing behind Rosa Fay is none other than our Gregory Biniowsky, who you just heard from, who worked with Cuban sculpture and the Cuban government to help make that statue in memory happen. I'm sure many of you will remember that as the most important fact to take away from this webinar.

Foreign Extraterritorial Measures Act. FEMA is blocking legislation designed to prohibit Canadians and corporations from complying with extraterritorial measures. As you heard from Pedro, in '96 the Helms-Burton Act, as I call it, was enacted. Canada then amended FEMA to strike back at Title III of the Helms-Burton Act

and what did we do in that regard, back in 1996? We passed a provision in the Act that said any judgment given under the Helms-Burton Act shall not be recognized, or enforceable, in any manner in Canada. To get your judgment in some court in the US but you aren't enforcing it up in this country. In addition, the Attorney General has power to order non-production or disclosure of records to a foreign court and that would include Title III proceedings. And has the power to prohibit a person from testifying before a foreign court and that would include also giving a deposition that would be used in Title III proceeding. A Canadian citizen, and that would be including a resident and a corporation, so a Canadian as I'm calling it in this slide, can apply to the Attorney General for an order declaring that the Canadian can sue in Canada for relief against a Title III judgment that's been awarded that citizen, resident or corporation. That relief can take three forms. Any or all amounts that was obtained under the Title III judgment, all expenses incurred in the course of defending the Title III action down in the US and all expenses incurred in instituting recovery proceedings in a Canadian court, pursuant to these provisions of FEMA, which include solicitor/client costs so that's a scale that's almost full indemnity, not quite, but it's higher than the normal award of cost you would get in a Canadian court action. The third area of relief is any loss or damages suffered by the Canadian by reason of the enforcement of the Title III judgment.

In addition, if there isn't final judgment, there's relief available as well. Canadian can ask the Attorney General to allow the Canadian to sue the person who instituted the Title III action, to recover the expenses in defending the Title III proceedings, and then the expenses in bringing the Canadian action in Canada, pursuant to FEMA with respect to that Title III action.

We also have the Foreign Extraterritorial Measures United States Order of 1992, and amended in 1996, in response to the Helms-Burton Act. That Order is aimed at counteracting any extraterritory measure that's aimed at impeding trade between Canada and Cuba. There's two important requirements of that Order. There's a notification obligation and a compliance obligation. The notification obligation has 6 parts to triggering notifying the Attorney General. So first, any Canadian corporation, and every director and officer of a Canadian corporation, so those people or entity. Secondly, must give notice to the Attorney General. Three, of any directive, instruction, intimation of policy or other communication. We call that the received communications. Fourth element, relating to an extraterritory measure of the United States. So that would be Helms-Burton, for instance. Five, in respect of trade between Canada and Cuba and the sixth element is receive from someone in a position to direct or influence the policies of the Canadian company. Now those terms, as you can see, are about as broad as could possibly be and

if a Canadian corporation, or the director or officer, is the recipient of received communication then there is a requirement under this Order to report the information that you see in the second bullet on this slide.

Then you have the compliance obligation which prohibits any Canadian corporation and its directors, officers, managers and employees from complying with any US legislation that seeks to prohibit, infringe or otherwise influence trade between Canada and Cuba. That prohibition applies to any act or omission constituting compliance with US extraterritorial laws regarding Cuba, even if compliance with that measure, or communication, is not the only purpose of the act or omission. So it's not an excuse, it's not a defense, that there's a valid business purpose for somehow backing out of the doing a deal or exporting goods to Cuba or whatever it is, that's not good enough. You're not supposed to abide by any directive or intimation of policy, etcetera, telling you to stop trading with Cuba. Note that that requirement, unlike the notice requirement, also applies to managers or employees in a position of authority. There could be situations where an American parent tells its US subsidiary to not do something to ensure that there's no violation of Helms-Burton, or in respect to Title III specifically, to somehow get out from under a possible Title III action and that would trigger the notification obligation as well as I think it would not comply with section 5 of the Order. The consequences, to wrap up, are serious. If charged by indictment the corporation faces a 1.5 million fine, and an individual, a 150 thousand with a maximum imprisonment term of 5 years.

So, that's my presentation. France, over to you.

France: Thank you Rick. Definitely not an easy question any side of the border, that's for sure. We have a few minutes for questions and we have a number of questions submitted. For the listeners, please note that the slides will be circulated to everybody who registered following the presentation. And those questions we don't manage to cover in the next few minutes will be answered, for sure, by email. Our first question, I believe, is Pedro or Matt. Do you believe that US Nationals can still register as foreign agents for Cuba or with increasing severity of US sanctions do you think that the US would deny such a registration?

Pedro: That's a separate statute and I think that's just a simple straight forward requirement under US law. That if what you're asking is a US person who is acting as an agent of the Cuban government, that's just a technical requirement and you have to do that if you're doing it. And it is completely separate from issues of US policy requirements or US policy implementations. You can be an agent of the North Korean government. Or you can be an agent of the Iranian government. All you would need to do is register and

that's it.

France: The next question is what risk would apply to Canadian, and they added here, or Mexican corporations involved in the online sales to US individuals of tours or excursions, organized in Cuba by Cuban suppliers?

Matthew: Wow. That's an excellent question and I think the risk there is the risk of what you don't know because if, let's work with this on a hypothetical basis. If those tours touch upon or impinge upon confiscated property, you don't even, I mean, if you don't know of it then you can always utilize what I don't know but there's an implicit duty for you to find out. So, my first reaction is you better do some due diligence and find out where those tours are going and if any of the tour destinations are in confiscated property, because I think that's where the exposure would come in.

France: We have a few other questions. I think they will apply to both Matthew and Greg. Is there anything Canada and Canadian companies can do to persuade the United States not to implement Title III?

Matthew: Yeah. This is Matt. I can speak to that. The answer, I think, is yes. It's a challenge to be able to say definitively that you, or anyone, is going to be able to persuade the Administration not to allow the Title to come into force. However, I would point to some significant geo-political issues in Latin America, that Canada and the United States have shared some interests in. I'm thinking, of course, of the situation in Venezuela. My best guess is that Venezuela is far more important to some of the people who are formulating policy at the White House right now than Cuba is. I think Canada's shared position with the United States on Venezuela is something that the US values. I would say, from a Canadian company perspective, work through your contacts with the Canadian government, work through your trade association contacts and, make sure that your government is aware that Title III is something that you're concerned about, and ask them to raise it with the United States. I think that Spain, Canada and all of our allies can, and should, consider doing that in the coming weeks.

France: We have a question that just came in. Would you be able to enforce a court decision regarding reimbursement of costs incurred to defend a Title III loss against a Canadian subsidiary of a US company?

Rick: Is that for me France?

France: I would think so.

Rick: I don't understand that question. Give it to me again.

France: Would you be able to enforce a court decision regarding reimbursement of costs incurred to defend a Title III loss against a Canadian subsidiary of a US company?

Rick: Enforce it in Canada. If that question's directed at the relief that a Canadian can obtain that has had a final judgment issued against them, then if there are assets that are available, I'll just speak for Canada, in Canada then absolutely you can enforce that cost order or the damages order, just like any other proceeding.

France: Okay. We have a few more minutes. One more minute, I think we have time for maybe one more. How should the Canadian government react if the Trump Administration decides to take action on Title III? I guess that's a very open question but, any thoughts? Again, I think it will be tied up to what Matthew was saying before.

Matthew: Well, yeah, I think there's kind of before the fact and after the fact. Before the fact, again, many of our clients, we're working here in the United States to communicate to US officials at the White House but also to members of congress that our clients are concerned about this issue and that it's important to them. Like I said, I think that there are avenues through your government and the governments of other companies that are involved in Cuba to push that. After the fact, I think that this will become a legal question. It may be possible at a future point to try to push for re-suspension. But once the wheels get moving on the legal side I think it can get a whole lot more complicated and explore ways to challenge the Title right out of the gates, if in fact the Administration pulls the trigger on this.

France: Thank you Matthew. So, we're at 12:59 and our webinar finishes at 1:00pm. I want to thank everybody and all our presenters. It was an excellent discussion. For all the listeners, both Gowling WLG and Akerman have very developed and fulsome practices relating to Cuba. We literally partnered to help our clients in their matters relating to Cuba. Please feel free to contact anybody. You have all of the contact information on the slide. Feel free to contact them directly and to ask any questions. As I mentioned there were a number of additional questions. We will be circulating answers to those questions, in writing, together with the slides within the next week or so to everybody that registered. My name is France Tenaille. I am the leader of the Cuba practice from Gowling WLG in Canada. Thank you everybody and thank you the presenters. Have a good day.

CPD/CLE

This webinar qualifies for up to one hour of substantive content toward the mandatory CPD requirements of the Law Society of Ontario. It will also count for up to one hour of CPD under the rules of the Law Society of British Columbia, and up to one hour of continuing education credit under the rules of the Barreau du Québec.

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

Speakers

France M. Tenaille

Partner - Co-Leader, Latin America,
Toronto

 Email

france.tenaille@gowlingwlg.com

 Phone

+1 416-369-7398

 vCard

France M. Tenaille

Gregory Biniowsky

Consultant - Havana-based member of
Cuba team, Toronto

 Email

gregory.biniowsky@gowlingwlg.com

 Phone

+1 416-702-5996

 vCard

Gregory Biniowsky

Richard G. Dearden

Partner - Leader, Mexico Country Desk,
Ottawa

 Email

richard.dearden@gowlingwlg.com

 Phone

+1 613-786-0135

 vCard

Richard G. Dearden