

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**DAVIS & COMPANY**

Applicant

- and -

**ELLEN M. DUNN**

Respondent

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Application to set aside registration of a judgment under the *Reciprocal Enforcement of Judgments Act*. Granted.

Heard at Yellowknife on August 16, 1996

Judgment filed: August 21, 1996

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicant: Charles F. McGee

Counsel for the Respondent: Olivia Rebeiro

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**DAVIS & COMPANY**

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- and -

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**REASONS FOR JUDGMENT**

1           This is an application by Ellen M. Dunn ("Dunn") to set aside an *ex parte* order made under the *Reciprocal Enforcement of Judgments Act*, R.S.N.W.T. 1988, c. R-1 ("the Act") for registration of a judgment against her.

2           The judgment in question is a Certificate of Fees made in the Supreme Court of the Yukon Territory. It is based on certain statements of account rendered by the law firm of Davis & Company ("Davis") to Dunn.

3           Dunn's husband had commenced a matrimonial, child custody and child support action in the Yukon Territory. In March of 1995, Dunn retained Davis, who had an office in the Yukon, to act for her. At that time, Dunn was resident in British Columbia.

4           Communications between Dunn and Davis were conducted by telephone and fax. Dunn attended one conference at Davis' office in May of 1995 and also during that month attended court in the Yukon with a lawyer from Davis' office for purposes of the

child custody and support matter.

5 All of the accounts rendered by Davis were sent to Dunn at her British  
Columbia address. In October, 1995, Dunn moved to Yellowknife, Northwest Territories  
and in February of 1996 she was served there with a Notice of Appointment to Review  
Bill. She did not appear for the appointment, which took place in the Yukon and the  
Certificate of Fees referred to above was issued by default on March 19, 1996.

6 Counsel for Dunn submits that the order for registration should be set aside  
under section 6(2) of the Act on the ground that, pursuant to section 2(4)(b):

- (b) 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;

7 In her affidavit filed on this application, Dunn states that she was neither  
ordinarily resident in the Yukon nor carried on business there at the time that the action  
by Davis was commenced and proceeded with and that she did not voluntarily appear or  
otherwise submit to the jurisdiction of that court.

8 The only issue is whether, by retaining counsel in the Yukon, Dunn was  
carrying on business there.

9 The matter she retained the law firm for was clearly personal and not  
commercial. But by retaining the law firm, whatever the purpose, can Dunn be said  
thereby to be carrying on business in the Yukon?

10 There is no definition of "carrying on business" in the Act. Only one of the  
cases cited by counsel provides any assistance with the meaning of those words. In *T.D.I.*

*Hospitality Management Consultants Inc. v. Browne*, [1994] 9 W.W.R. 153, the Manitoba Court of Appeal referred to *Mahon/Moore Group of Cos. v. Mercator Enterprises Ltd.* (1978), 7 C.P.C. 150 (N.S.T.D.) as a leading case on the subject of "carrying on business". That case involved an application to set aside a judgment registered under the *Reciprocal Enforcement of Judgments Act* 1973 (N.S.), c. 13. The court had to consider whether the applicant seeking to set aside registration was carrying on business in the province where judgment was obtained. Jones J. quoted with approval a passage from Dicey & Morris, *The Conflict of Laws* (8th ed., 1967), which sets out criteria for determining whether a corporation is carrying on business in a jurisdiction. The criteria include that the activity carried on by the foreign corporation must be a business, it must have been carried on for a substantial period of time and the business must have some fixed place in the jurisdiction.

11 In *T.D.I.* the Court also quoted from *Halsbury's Laws* for the proposition that carrying on business only exists where there is a joint relation of persons for the common purpose of performing jointly a succession of acts, and not where the relation exists for a purpose which is to be completed by the performance of one act.

12 In *Mahon/Moore*, Jones J. also quoted with approval from *Miller v. B.C. Turf Ltd.* (1969), 8 D.L.R. (3d) 383 (B.C.) wherein three essential elements of carrying on business were described, being the occupation of time, attention and labour by the person concerned or by his servants or employees, the incurring of liabilities to other persons and the purpose of a livelihood or profit.

13 The purpose of profit has been referred to in other cases, specifically those which consider whether a certain activity is or is not a business for purposes of

assessment or taxation. In *Regional Assessment Commissioner v. Caisse Populaire de Hearst*, [1983] 1 S.C.R. 57, McIntyre J. reviewed the preponderant purpose test used by the trial judge and then considered the word "business":

The preponderant purpose test is based upon a determination of the purpose for which an activity is carried on. If the preponderant purpose is the making of a profit, then the activity may be classified as a business. However, if there is another preponderant purpose to which any profit earned is merely incidental, then it will not be classified as a business. This test seems to have its roots in the words of Jessel M.R. in *Smith v. Anderson* (1880), 15 Ch. D. 247. At page 258, in considering what meaning should be attributed to the word 'business' and after discussing various dictionary definitions, he said:

Then taking the last edition of the *Imperial Dictionary*, which is a very good dictionary, we find it a little more definite, but with a remark which is worth reading: 'Business, employment; that which occupies the time and attention and labour of men for the purpose of profit or improvement.' That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business.

14                   While Davis would clearly come within some, if not all, of the above criteria and definitions, Dunn would not.

15                   Counsel for Davis relies on the decision of Veit J. in *Wilson v. Hull* (1993), 15 Alta. L.R. (3d) 286. He points to her statement (at p. 292) that "Part of carrying on business is paying for debts that are legitimately owed". But that statement must be taken in the context of the facts in that case. There was an application by Hull to set aside the registration in Alberta of an Idaho judgment. There was no question that Hull had done business in Idaho: he had ordered trailers on a commercial basis from Wilson and had dealt with Wilson at its place of business in Idaho. The issue was whether he was still doing business there by the time the proceedings which led to the Idaho judgment

were commenced in Idaho. Veit J. held that there was no need for Hull to be still carrying on business in Idaho at the time the proceedings were instituted so long as he was carrying on business there in the time frame that allowed legal action to be brought there.

16           Veit J. indicated that in the event that she was wrong, she would hold that Hull was still carrying on business when the Idaho proceedings were commenced because he had not yet paid for materials that he had taken when he admittedly was carrying on business there. The significance of the payment of debts clearly arose from the fact that there was a business carried on in the first place, in connection with which those debts arose.

17           So in this case we are still left with the issue whether Dunn's retainer of a Yukon law firm can be said to be carrying on business.

18           In my view, Dunn cannot be said to have carried on business. She clearly retained the law firm for the purpose of providing a service to her. That service was not intended to make a profit for her. The matter for which she retained the law firm was personal and not commercial.

19           Dunn was the consumer of services offered by the law firm. Her position is comparable to that of an individual who purchases an item or items for personal use and not for resale. Such an individual would not be carrying on business. Carrying on business must surely mean carrying on one's own business with a view to making one's own profit, not simply consuming services offered by another's business.

20           In my view both the *T.D.I.* case and the case cited by counsel for Dunn, *First*

*City Trust Company v. Inuvik Automotive Wholesale Ltd. and Vernon Komarnicki*, [1993] N.W.T.R. 273, support the proposition that the *Reciprocal Enforcement of Judgments Act* provides a convenient and summary procedure which must be strictly followed and which is not significantly affected by the "real and substantial connection" test used with respect to the recognition of foreign judgments where the statute is not applicable. So I need not consider that test.

21                   The onus is on Dunn to establish that she was not carrying on business in the Yukon. The only activity on her part which is argued to constitute the carrying on of business is the retainer of the Davis law firm for purposes of responding to matrimonial proceedings. For the reasons referred to above, that does not, in my view, mean she was carrying on business.

22                   Dunn's application is therefore granted and the registration of the judgment is set aside. Dunn will have her costs of this application.

V.A. Schuler  
J.S.C.

Yellowknife, Northwest Territories  
August 21, 1996

Counsel for the Applicant:       Charles F. McGee

Counsel for the Respondent:    Olivia Rebeiro