

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-030393-235
(500-11-060766-223)

DATE: March 14, 2023

BEFORE THE HONOURABLE MARTIN VAUCLAIR, J.A.

THE REPUBLIC OF INDIA
APPLICANT – Defendant

v.

CCDM HOLDINGS, LLC
DEVAS EMPLOYEES FUND US, LLC
TELECOM DEVAS, LLC
RESPONDENTS – Plaintiffs

and

AIRPORT AUTHORITY OF INDIA
AIR INDIA LIMITED
IMPLEADED PARTIES – Impleaded Parties

and

INTERNATIONAL AIR TRANSPORT ASSOCIATION
IMPLEADED PARTY – Third-Party Garnishee

JUDGMENT

[1] The applicant seeks leave to appeal from a judgment by the Honourable Michel A. Pinsonnault of the Superior Court of Quebec, District of Montreal, rendered on December 23, 2022, in the course of a proceeding. The judgment declared that the applicant is not immune from the jurisdiction of the Superior Court of Quebec as per the *State Immunity Act*, R.S.C. 1985, c. S-18.

[2] The applicant, the Republic of India, is a foreign state according to the Act. If leave is granted, the Court will have to consider the application of two exceptions to the principle of immunity provided by the Act. The initial dispute arose from an international arbitration award. The presence of the parties before the Superior Court is the result a seizure in the hands of the Impleaded Parties at the headquarters of IATA in Montreal.

[3] The applicant argues that the judgment is flawed in three respects. The judge allegedly erred (a) in the application of the commercial activity exception, (b) in the application of the statutory waiver of immunity, and (c) in his reliance on a judgment of the Supreme Court of India.

[4] As per section 31 of the CCP, a judgment rendered in the course of a proceeding is appealable with leave. With regard to the applicable criteria, I agree with what my colleague Bich said in *Francoeur c. Francoeur*, 2020 QCCA 1748, citing a large body of case law, which has been taken up by an abundance of jurisprudence. The applicant must first establish that the judgment appealed against determines part of the dispute or causes irreparable injury to a party, since error alone in a judgment is not sufficient. This error, or apparent error, must, however, be demonstrated and be of such a nature as to lead to the intervention of the Court. Finally, the proposed appeal must serve the "best interests of justice" and the sound administration of justice (arts. 9 and 18 *C.C.P.*) and respect the principle of proportionality (art. 18 *C.C.P.*). These latter conditions presuppose that the case raises an issue worthy of the Court's attention and offers a chance of success, since an appeal that is doomed to failure is not in the interests of justice. Also, the context of the case, including its stage of development and the manner in which the parties are conducting the case, should be considered.

[5] The respondents oppose the motion, stating the appeal have no reasonable chance of success. The respondents also oppose the request to suspend the proceedings before the Superior Court. Alternatively, the respondents ask that the applicant be ordered to provide a suretyship of \$20,000 to guarantee payment of the appeal costs.

[6] I must emphasize the quality of the submissions received from both sides at the hearing. It should be noted that the parties drew on virtually the same case law and doctrine to make arguments that were both rich and contradictory. It may well be, therefore, that the principles governing state immunity remain less clear-cut issues than they might appear at first glance. Further, the Court held in the *New Jersey* case that the question of state immunity is a "question d'ordre public qui, sauf circonstances exceptionnelles, doit être tranchée immédiatement, dès le stade de la requête en irrecevabilité, au même titre, par exemple, que celle de la compétence *ratione materiae* du tribunal": *New Jersey (Department of the Treasury of the State of), Division of Investment c. Trudel*, 2009 QCCA 86, at para. 22.

[7] Without commenting on the merits of the appeal, I am of the opinion that the application for leave to appeal raises viable questions for the Court. I would not, as invited

to do by the respondents, deny leave on the third ground. It is preferable, given the connection with the waiver, as argued by the applicant, to let the Court deal with it.

[8] The appeal will deal with the applicant's immunity from the jurisdiction of any court in Canada and I would therefore suspend the proceedings in file number 500-11-060766-223 as against the Republic of India, until a final determination on this appeal.

[9] Also, considering the particular circumstances of the dispute, the manner in which the parties are conducting the case and the appeal, I would order the suretyship sought by the respondents in the amount of \$20,000, to guarantee payment of the appeal costs.

FOR THESE REASONS, the undersigned:

[10] **GRANTS** the application for leave to appeal;

[11] **AUTHORIZES** the applicant to appeal the judgment rendered on December 23, 2022, by the Honourable Michel A. Pinsonnault of the Superior Court of Quebec in file number 500-11-060766-223;

[12] **ORDERS** the stay of the proceedings before the Superior Court of Quebec in file number 500-11-060766-223 as against the Republic of India until a final determination has been made by the Court on this appeal;

[13] **ORDERS** the applicant to provide, before March 31, 2023, a suretyship in the amount of \$20,000 to guarantee the appeal costs so as to be held in trust by the attorneys representing The Republic of India pending the resolution of the appeal;

[14] **REFERS** the matter to the Master of the role to set the date and time of the hearing and establish a calendar, with the parties, for the filing of documents.

[15] **THE WHOLE**, with legal costs to follow the outcome of the appeal.

MARTIN VAUCLAIR, J.A.

Mtre Éric Mongeau
Mtre Patrick Girard
Mtre Vincent Lanctôt-Fortier
STIKEMAN ELLIOTT
For The Republic of India

Mtre Mathieu Piché-Messier
Mtre Amanda Afeich
Mtre Dayeon Min
Mtre Karine Fahmy
Mtre Philippe Boisvert
Mtre Simon Grégoire
Mtre Marc Duchesne
BORDEN LADNER GERVAIS
For CCDM Holdings, LLC, Devas Employees Funds Us, LLC and Telecom Devas, LLC

Mtre William Brock
Mtre Corey Omer
DAVIES WARD PHILLIPS & VINEBERG
For Airport Authority of India

Mtre Ioana Jurca
WOODS
For Air India Limited

Mtre Claude Morency
Mtre Anthony Rudman
Mtre Charlotte Dion
Mtre Martin Poulin
DENTONS CANADA
For International Air Transport Association

Date of hearing: March 8, 2023