COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-029888-229
(500-11-060766-223)

MINUTES OF HEARING

DATE: October 20, 2022

THE HONOURABLE STEPHEN W. HAMILTON, J.A.

APPLICANT	COUNSELS
AIR INDIA, LTD	Mtre IOANA JUCA Mtre PATRICK OUELLETTE Mtre MARC-ANTOINE CÔTÉ (*Woods*)
RESPONDENTS	COUNSELS
CC/DEVAS (MAURITIUS) LTD **DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED** **TELECOM DEVAS MAURITIUS LIMITED** **CCDM HOLDINGS LLC** **DEVAS EMPLOYEES FUND US LLC** **TELECOM DEVAS LLC**	Mtre AMANDA AFEICH Mtre MATHIEU PICHÉ-MESSIER Mtre PHILIPPE BOISVERT Mtre KARINE FAHMY Mtre DAYEON MIN (*Borden Ladner Gervais*)

IMPLEADED PARTIES	COUNSEL
AIRPORT AUTHORITY OF INDIA	Mtre AMÉLIE LEHOUILLIER (*Davies Ward Phillips & Vineberg*) Par visioconférence
INTERNATIONAL AIR TRANSPORT ASSOCIATION	Mtre ANTHONY RUDMAN (*Dentons Canada*)
REPUBLIC OF INDIA	ABSENT AND UNREPRESENTED

DESCRIPTION: **Respondents' application to suspend the provisional execution of a judgment of the Court of appeal** (Art. 390 para 2 *C.C.P.* and 65.1 (1) *Supreme Court Act*)**.**

Clerk at the hearing: Ariane Simard-Trudel	Courtroom: RC-18

HEARING

10:14	Commencement of the hearing. Identification of counsel.
10:15	Submissions by Mtre Piché-Messier.
10:22	Discussion between the judge and Mtre Piché-Messier.
10:24	Mtre Piché-Messier resumes his submissions.
10:52	Submissions by Mtre Ouellette.
11:00	Discussion between the judge and Mtre Ouellette.
11:01	Mtre Ouellette resumes his submissions.
11:11	Discussion between the judge and Mtre Ouellette.
11:16	Mtre Ouellette resumes his submissions.
11:17	Submissions by Mtre Rudman. Discussion between the judge and Mtre Rudman.
11:19	Reply by Mtre Piché-Me
11:29	Reply by Mtre Ouellette.
11:32	**BY THE JUDGE**: Judgement – see page 4. Conclusion of the hearing.

Ariane Simard-Trudel, Clerk at the hearing

JUDGMENT

[1] On September 20, 2022, the Court quashed the seizure before judgment of a sum of US $17,734,542 held by the Mise en Cause International Air Transport Association for the benefit of the Appellant Air India.

[2] Announcing its intention to seek leave to appeal to the Supreme Court of Canada, the Respondents ask me to suspend the provisional execution of the Court's judgment.

[3] The Appellant contests the motion. Subsidiarity, it asks me to make any suspension order conditional on the Respondents providing security in the amount of $ 1,500,000.

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[4] The applicable statutory provisions giving me the power to suspend execution of the judgment and to order security are Article 390 of the *Code of Civil Procedure* and Section 65.1 of the *Supreme Court of Canada Act*:

390. L'arrêt est exécutoire immédiatement et il porte intérêt à compter de sa date, sauf mention contraire. Il est mis à exécution, tant pour le principal que pour, le cas échéant, les frais de justice, par le tribunal de première instance.	**390.** A decision of the Court of Appeal is enforceable immediately and bears interest from the date it is rendered, unless it specifies otherwise. Its execution, as regards both the principal and any legal costs, is carried out by the court of first instance.
Cependant, la Cour d'appel ou l'un de ses juges peut, sur demande, ordonner, aux conditions appropriées, d'en suspendre l'exécution, si la partie démontre son intention de présenter une demande d'autorisation d'appel à la Cour suprême du Canada.	However, the Court of Appeal or one of its judges, on an application, may order execution stayed, on appropriate conditions, if the party shows that it intends to bring an application for leave to appeal to the Supreme Court of Canada.
65.1 (1) La Cour, la juridiction inférieure ou un de leurs juges peut, à la demande de la partie qui a signifié et déposé l'avis de la demande	**65.1 (1)** The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of

d'autorisation d'appel, ordonner, aux conditions jugées appropriées, le sursis d'exécution du jugement objet de la demande.	application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.
(2) La juridiction inférieure ou un de ses juges, convaincu que la partie qui demande le sursis a l'intention de demander l'autorisation d'appel et que le délai entraînerait un déni de justice, peut exercer le pouvoir prévu au paragraphe (1) avant la signification et le dépôt de l'avis de demande d'autorisation d'appel.	**(2)** The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.
(3) La Cour, la juridiction inférieure ou un de leurs juges peut modifier ou annuler le sursis ordonné en vertu du présent article.	**(3)** The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section.

[5] The parties agree that the test for the suspension of the execution of the judgment is that set out in *Metropolitan Stores*[1], as summarized in *RJR-Macdonald*[2]:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

[6] The parties also agree that the "serious issue to be tried" test is not a high one. The Respondents argue that their position throughout these proceedings has been that the Appellant does not have a legal personality separate from the Republic of India and they cite in support of their position the Federal Court judgment in *Roxford Enterprises*[3]

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1 *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd*., [1987] 1 S.C.R. 110.
2 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, p. 334.
3 *Roxford Entreprises S.A. c. Cuba*, [2003] 4 FC 1182.

and the Alberta Court of Queen's Bench judgment in *Collavino*[4] as well as a number of international authorities. There are no Quebec judgments and no Supreme Court judgments on the issue. They argue that the Court misstated their position in paragraph 34 of its judgment and limited its analysis to the issue of lifting the corporate veil under Article 317 of the *Civil Code*, when they were arguing that there was no corporate veil.

[7] In my view, the argument is sufficiently serious to meet the first test. I adopt the conclusion of my colleague Justice Mainville in *Pereira*[5] :

> [18] Il n'appartient pas au soussigné de se prononcer sur le bien-fondé de la demande de permission d'appel que formuleront les demandeurs auprès de la Cour suprême du Canada. Il suffit de vérifier si les demandeurs ont l'intention de soulever des moyens qui ne paraissent ni frivoles ni vexatoires et qu'ils répondent ainsi au critère de la question sérieuse. C'est manifestement le cas ici.

[8] As for the second test, it is manifest that the Respondents will suffer irreparable harm if the suspension is refused. The seizure will be lifted and the sums held by IATA on behalf of the Appellant will be released to the Appellant and will in the ordinary course be taken beyond the jurisdiction of the Court. Because the Republic of India no longer owns the shares of the Appellant, it will not be possible for the Respondents to seize anew. With no seizure, the appeal to the Supreme Court will be moot. The second test is met.

[9] The principal debate was on the third test. The Respondents argue that their irreparable harm in losing the possibility of executing their arbitral award against the sum seized greatly outweighs the inconvenience to the Appellant of having the seizure continue until the Supreme Court decides. The Appellant argues, quite rightly in my view, that the analysis is not limited to the comparison of the potential harms or inconveniences but must also, in principle, factor in the likelihood of the harm or inconvenience occurring. However, this can never be a mathematical exercise. It might be possible, as in this case, to calculate the potential harms or inconveniences – the Respondents are at risk of losing US $17,734,542 and the Appellant, while not losing that amount, estimates that it is losing US $3,401.15 per day in interest by being deprived of the amount. It is not possible to state with any degree of confidence the percentage likelihood of the Supreme Court granting leave to appeal or overturning the Court's judgment in this matter. In my view, however, that possibility is not so remote that I should ignore the enormous difference in the potential harms or inconveniences. The third test is therefore met and the suspension should be granted.

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4 *Collavino Incorporated v. Yemen (Tihama Development Authority)*, 2007 ABQB 212.

5 *Pereira c. Commission des transports du Québec*, 2016 QCCA 765.

[10] The request for security is based on two elements, court costs and lost interest on the sums seized.

[11] The Appellant estimates the costs of an appeal on the merits at $28,124.30. However, in my view, security should be limited to the court costs that may be incurred in relation to the motion for leave to appeal to the Supreme Court. That amount seems to represent only $1,047.25, based on the Appellant's estimate. If leave is granted, the Appellant can ask the Supreme Court for security for the court costs of the appeal.

[12] I am informed that counsel for the Respondents currently hold $85,000 in trust as security for the court costs incurred to date in the Superior Court and the Court of Appeal. That amount appears adequate to also cover the court costs that may be incurred in relation to the motion for leave to appeal to the Supreme Court. If it is not adequate, I expect counsel to make the necessary arrangements to increase it.

[13] As for the potential lost interest, the Appellant is not currently entitled to any compensation for those amounts. No provision in the *Code of Civil Procedure* gives a party a right to be compensated for the inconvenience of a quashed seizure. No order for compensation was sought from the Superior Court or this Court or was issued by either court. In my view, and notwithstanding the broad discretion that I have under Article 390 of the *Code of Civil Procedure* and Section 65.1 of the *Supreme Court of Canada Act*, it would not be appropriate to order any security for the potential lost interest.

FOR THESE REASONS, THE UNDERSIGNED:

[14] **GRANTS** the Respondents' Application to Suspend the Provisional Execution of a Judgment of the Court of Appeal;

[15] **SUSPENDS** the execution of the judgment rendered by the Court on September 20, 2022 in file number 500-11-060766-223, until the first of (a) the expiration of the delay for filing a motion for leave to appeal to the Supreme Court of Canada, if no motion is filed, (b) the judgment of the Supreme Court of Canada refusing leave to appeal, (c) the judgment of the Supreme Court of Canada on the appeal, or (d) the discontinuance of the appeal;

[16] **DISMISSES** the Appellant's request for security;

[17] **THE WHOLE**, without legal costs.

STEPHEN W. HAMILTON, J.A.