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Civil Litigation

SCC clarifies what submission to foreign courts' jurisdiction means under Civil Code of Quebec

By **Cristin Schmitz**

(February 22, 2019, 2:22 PM EST) -- The Supreme Court of Canada has clarified that a Quebec resident sued abroad who challenges the foreign court's jurisdiction will be deemed by Quebec courts to have submitted to that foreign jurisdiction if the Quebecer made substantive arguments in the foreign court that, if accepted, would have resolved all or part of the dispute.

On Feb. 22, the Supreme Court divided 8-1 to dismiss the appeal of David Barer from judgments in the Quebec courts below that recognized and enforced a Utah District Court default judgment requiring the Montreal businessman personally, along with two companies he allegedly controlled, to pay about US$431,160 (now $1.2 million Canadian) for breaching a contract in 2009 with Utah-based Knight Bros LLC — which was subcontracted to do foundation work by one of the defendants, a company based in Vermont: *Barer v. Knight Brothers LLC* 2019 SCC 13.

Justice Clément Gascon

Justice Clément Gascon's private international law judgment, on behalf of seven judges, interprets the indirect international jurisdiction rules specified by the *Civil Code of Quebec* (CCQ) and settles, in particular, a controversy among Quebec legal authors and judges over when a Quebec resident submits to the jurisdiction of a foreign court.

The majority rejected the appellant defendant's so-called "save your skin" approach that defendants can both challenge jurisdiction and present substantive arguments to foreign courts, without submitting to the foreign court's jurisdiction.

"It is true, as stressed by Mr. Barer, that Quebec defendants sued abroad sometimes face a difficult strategic choice," Justice Gascon acknowledged. "Either they defend the foreign lawsuit and try to protect their assets in that jurisdiction, or they refrain from doing so in order to be able to challenge the foreign court's jurisdiction in eventual recognition proceedings in Quebec," he wrote.

"However, if they attempt to take advantage of the proceedings before the foreign court to obtain a judgment that would definitively settle the dispute, they must bear the consequences of their choice. It would be unfair if defendants could have the opportunity of convincing the foreign authority of the merits of their case while at the same time preserving their right to challenge the jurisdiction of that authority later if they are ultimately displeased with its decision. To use a colloquial expression, they would have 'two kicks at the can' or, put another way, what amounts to a legal 'mulligan.' "

Justice Gascon's judgment clarifies as well that the party seeking recognition of a foreign decision bears the burden of proving the facts upon which the foreign authority's indirect international jurisdiction is based.

Jeffrey Talpis, Université de Montréal

Université de Montréal law professor Jeffrey Talpis, who wrote the book, "*If I am from Grand-Mère, Why Am I Being Sued in Texas?*" *Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Cross-border Litigation*, told *The Lawyer's Daily* he disagrees with the majority judgment, and agrees "100 per cent" on the main points of Justice Suzanne Cote's lone dissent.

"In some places you can't even contest jurisdiction," Talpis pointed out. "In most jurisdictions in the United States you can't contest jurisdiction unless you raise, or deal with, some substantive arguments. ... Sometimes you can. Sometimes you can't. So you're in a Catch-22: You don't want to do too much because then you're going to be consenting [submitting to jurisdiction]. Sometimes you have no choice, but you have to do it alongside a jurisdictional argument. "

In Talpis's view, the majority judgment "probably hampers cross-border trade more than

anything," in particular to the extent that it enables foreign judgments to be enforced more often against Quebec corporate officers in their personal capacity.

He suggested the judgment is inconsistent with the Hague *Draft Convention on the Recognition and Enforcement of Foreign Judgments*, which stipulates in art. 5(f) that a judgment is eligible for recognition and enforcement if "the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law."

Art. 3155 of the CCQ, which aims to facilitate the free flow of international trade, establishes the principle that a court decision rendered outside Quebec will generally be recognized and declared enforceable in the province.

There are six listed exceptions that allow Quebec courts to depart from that general principle, and refuse to recognize a foreign decision — the first being where a judgment is rendered by an authority that had no jurisdiction over the dispute under the law as specified by the CCQ.

For personal actions of a patrimonial nature, CCQ art. 3168 lists six situations where Quebec courts may find that a foreign authority has indirect international jurisdiction, including that there was submission to the jurisdiction (CCQ art. 3168(6)).

The nub of the dispute at the Supreme Court of Canada was whether the appellant Barer had submitted to the Utah court's jurisdiction.

"The facts of this case illustrate a dilemma that persons doing business outside of their home jurisdiction sometimes face when they are sued abroad before a court that they believe has no jurisdiction over the dispute," Justice Gascon observed.

"They must decide whether to defend themselves against the foreign lawsuit and try to secure a favourable decision, or whether to abstain from doing so. One motivation for the latter is to avoid being found to have submitted to the foreign jurisdiction by a court of their home jurisdiction that is asked to recognize and enforce an unfavourable foreign decision. This choice no doubt involves an assessment of the comparative risks and benefits of protecting the assets located in each jurisdiction. Ultimately, it is up to each defendant to determine the best way to approach this conundrum, and each must bear the consequences of the strategy chosen."

Knight Bros. argued that Barer fraudulently misrepresented that the defendants would pay a certain amount for the foundation work (more than was originally agreed to); that the corporate veil of the two companies should be lifted; and that the defendants had been unjustly enriched.

Barer moved in the Utah District Court to have the claim dismissed on a preliminary basis, arguing that: (1) Knight's claim for fraudulent misrepresentation was barred at law; (2) the Utah court did not have jurisdiction over him personally; and (3) Knight had failed to show that the corporate veil should be lifted.

The Utah judge dismissed Barer's motion, and a default judgment was eventually rendered against Barer and the two companies. The Quebec courts agreed with Knight that the Utah decision should be recognized in Quebec and declared enforceable against Barer.

The Quebec Superior Court held that the Utah court's jurisdiction could be recognized on three possible grounds: the first two related to the contract between Knight and one of the companies, and the promise to pay allegedly made by Barer. However, the main ground the Superior Court

gave for recognizing the Utah decision was that Barer had submitted to the Utah court's jurisdiction. The Court of Appeal dismissed Barer's appeal in a terse judgment.

Justice Gascon held that Barer submitted to the Utah court's jurisdiction, in accordance with art. 3168(6) of the CCQ, by presenting to the Utah court substantive arguments on the merits in his motion to dismiss that, if accepted, would have resolved all or part of the dispute.

"The argument that Knight's fraudulent misrepresentation claim was barred at law could have led the Utah court to conclusively dismiss that claim," Justice Gascon reasoned. "Such a ruling would have attracted the authority of *res judicata* and precluded Knight from asserting that claim in another jurisdiction. Barer's argument was thus akin to a defence on the merits for the purposes of submitting to the Utah court's jurisdiction."

Justice Suzanne Côté

Justice Gascon also held that Barer failed to establish that, as a result of Utah procedural law, he had to proceed as he did and present all of his preliminary exceptions together. "None of the evidence he adduced before the [Quebec] Superior Court supports that claim, and thus the latter made no palpable and overriding error in determining that submission to jurisdiction was established on the record," the judge concluded.

In dissent, Justice Côté argued that the Utah court's decision could not be recognized against Barer. She would have allowed his appeal on that basis that the Utah Court's jurisdiction cannot be established under CCQ art. 3168 and that the dispute is not substantially connected with Utah as required by CCQ art. 3164.

In concurring reasons, Justice Russell Brown agreed with the majority that Barer's appeal should be dismissed, but argued that the appellant had not submitted to the Utah court's jurisdiction. Rather he urged that the jurisdiction of the Utah court was established under CCQ arts. 3168(4), 3164 and 3139.

Photo of Justice Clément Gascon by David Balfour Photography

Photo of Justice Suzanne Côté by Philippe Landreville

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