Quebec Court Refuses Jurisdiction on Forum of Necessity Basis

There has not been much to report from Canada for the past few months. The Supreme Court of Canada's jurisdiction decision in the Van Breda quartet of cases is still eagerly awaited. There was some thought these decisions would be released by the end of February but it now appears that will not happen. These cases were argued in March 2011.

Fortunately, Professor Genevieve Saumier of McGill University has written the following analysis of a recent Quebec Court of Appeal decision which might be of interest in other parts of the world. The case is *ACCI v. Anvil Mining Ltd.*, 2012 QCCA 117 and it is available here (though only in French, so I appreciate my colleague's summary). I am grateful to Professor Saumier for allowing me to post her analysis.

> *In April 2011, a Quebec court concluded that it had jurisdiction to hear a civil liability claim against Anvil Mining Ltd. for faults committed and damages inflicted in the Democratic Republic of Congo where the defendant exploits a copper mine.*
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> *The facts behind the claim related to actions alleged to have been taken by the defendant mining company in the course of a violent uprising in Kilwa in the Democratic Republic of Congo in October 2004 that caused the deaths of several Congolese (the number is disputed). In essence, the plaintiff alleges that the defendant collaborated with the army by providing them with trucks and logistical assistance.*
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> *The defendant, Anvil Mining Ltd, is a Canadian company with its head office in Perth, Australia. Its principal if not its only activity is the extraction of copper and silver from a mine in Congo. Since 2005, the company has rented office space in Montreal for its VP (Corporate Affairs) and his secretary. It is on the basis of this connection to the province of Quebec that the plaintiff launched the suit there. The plaintiff is an NGO that was constituted for the very purpose of instituting a class action against the defendant, for the benefit of the victims of the 2004 insurgency in Congo.*

The defendant contested both the Quebec court's jurisdiction and, in the alternative, invoked forum non conveniens to avoid the exercise of jurisdiction. At first instance, the court held that it had jurisdiction over the defendant on the basis of its establishment in Quebec (the office in Montreal) and that the claim was related to the activities of the defendant in Montreal (the two conditions for jurisdiction under 3148(2) Civil Code of Quebec given the foreign domicile of the defendant). Interpreting this second conditions broadly, the court held that the VP's frequent visits to Congo and his activities to attract investors in Quebec were linked to the defendant's activities in Congo and therefore to the claims based on those activities.

In rejecting the alternative forum non conveniens defense to the exercise of jurisdiction, the court considered the other fora allegedly available to the plaintiffs, namely Congo and Australia. A claim had already been made before a Congolese military court but it had been rejected. The plaintiff claimed that the process before the Congolese court, competent to hear the claim, was in breach of fundamental justice for a number of reasons. As to the Australian court, the plaintiff claimed that an attempt to secure legal representation in that country had failed because of threats made by the Congolese regime against both the victims and the lawyers they were seeking to hire in Australia. The Quebec court accepted this evidence and held that the defendants had failed to show that another forum was more appropriate to hear the case, a requirement under art. 3135 C.C.Q. It appears that the plaintiffs had also presented an argument based on art. 3136 C.C.Q. ("forum of necessity"), but since jurisdiction was established under art. 3148 and forum non conveniens was denied, the court decided not to respond to the argument based on forum of necessity. Still, the court did state that "at this stage of the proceedings, it does appear that if the tribunal declined jurisdiction on the basis of art. 3135 C.C.Q., there would be no other forum available to the victims," suggesting that Quebec may well be a "forum of necessity" in this case.

Leave to appeal was granted and the Quebec Court of Appeal reversed, in a judgment published on 24 January 2012. The Court of Appeal held that the conditions to establish jurisdiction under art. 3148(2) C.C.Q. had not been met. As a result of that conclusion, it did not need to deal with the forum non conveniens aspect of the first instance decision. This made it necessary to deal with the "forum of necessity" option, available under art. 3136 C.C.Q. The

Court found that the plaintiff had failed to show that it was impossible to pursue the claim elsewhere and that there existed a sufficient connection to Quebec to meet the requirements of article 3136 C.C.Q. In other words, the plaintiff had the burden to prove that Quebec was a forum of necessity and was unable to meet that burden.

The reasons for denying the Quebec court's jurisdiction under art. 3148(2) C.C.Q. are interesting from the perspective of judicial interpretation of that provision but are not particular to human rights litigation. Essentially the Court of Appeal found that the provision did not apply because the defendant's Montreal office was open after the events forming the basis of the claim. This holding on the timing component was sufficient to deny jurisdiction under 3148(2) C.C.Q. The Court also held that even if the timing had been different, it did not accept that there was a sufficient connection between the activities of the vice president in Montreal and the actions underlying the claim to satisfy the requirements of the provision.

The reasoning on art. 3136 C.C.Q. and the forum of necessity, however, are directly relevant to human rights litigation in an international context. Indeed, one of the challenges of this type of litigation is precisely the difficulty of finding a forum willing to hear the claim and able to adjudicate it according to basic principles of fundamental justice. In the Anvil case, the victims had initially sought to bring a claim in the country where the injuries were inflicted and suffered. While the first instance court had accepted evidence from a public source according to which that process was tainted, the Court of Appeal appeared to give preference to the defendant's expert evidence (see para. 100).

The Court of Appeal does not quote from that expert's evidence whereas the trial judge's reasons contain a long extract of the affidavit. And while the extract does not include the statement referred to by the Court of Appeal, it does include a statement according to which an acquittal in a penal court is res judicata on the issue of fault in a civil proceeding based on the same facts.

The obvious alternative forum was in Perth, Australia, where the defendant company had its headquarters (and therefore its domicile under Quebec law). There too the victims had sought to bring a claim but were apparently unable to secure legal representation or pursue that avenue due to allegedly unlawful interference by the defendant and government parties in the Republic of Congo.

While the first instance judge had accepted the plaintiff's evidence that Australia was not an available forum, the Court of Appeal quickly dismissed this finding, without much discussion.

Finally, the Court of Appeal returned to its initial findings regarding the interpretation of art. 3148 C.C.Q. to conclude that there was, in any event, an insufficient connection between Anvil and Quebec to meet that condition for the exercise of the forum on necessity jurisdiction. The court did not consider that under art. 3136 C.C.Q. it is unlikely that the timing of the connection should be the same as under 3148(2) C.C.Q. given the exceptional nature of the former basis for jurisdiction and the likelihood that the connections to the forum of necessity could arise after the facts giving rise to the claim.

The decision of the Court of Appeal in Quebec is disappointing in so far as its interpretation of the forum of necessity provision in the Civil Code of Quebec is quite narrow, particularly as regards the condition of a connection with Quebec; moreover, its application of the provision to the facts of the case deals rather summarily and dismissively with findings of fact made by the first instance judge without sufficient justification for its rejection of the evidence provided by the plaintiff and relied upon by the trial judge. Given the nature of the claims and of the jurisdictional basis invoked, it was incumbent on the Court of Appeal to provide better guidance for future plaintiffs as to what type of evidence will be required to support an article 3136 C.C.Q. jurisdictional claim and to what extent trial court findings in relation to such evidence will be deferred to in the absence of an error of law.