500-09-021701-115

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Please find enclosed a copy of the judgment rendered this day by the Court of Appeal in File No. 500-09-021701-115.

Marie-Claude Benoit
Clerk of the Court of Appeal
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COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL REGISTRY

NO.: 500-09-021701-115
(500-06-000530-101)

DATE: 24 JANUARY 2O12

CORAM: THE HONORABLE ANDRÉ FORGET, J.C.A.
LORNE GIROUX, J.C.A.
RICHARD WAGNER, J.C.A.

ANVIL MINING LIMITED,
APPELLANT – Respondent
v.
CANADIAN ASSOCIATION AGAINST IMPUNITY
APPELLEE – Petitioner

JUDGMENT

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[1] THE COURT; - Determining the appeal of a judgment rendered on 27 April 2011 by the Superior Court, District of Montreal (the Honourable Benoît Émery), which rejected a request for declinatory exception based on the absence of jurisdiction and, secondarily, according to the *forum non conveniens* theory;

[2] For the reasons of Judge Forget, with which Judges Giroux and Wagner concur;

[3] **ALLOWS** an appeal without costs;

[4] **QUASHES** the judgment undertaken;

[5] **ALLOWS** the request for declinatory exception;

[6] **REJECTS**, without costs, the motion for authorization to launch a class action on the grounds that the Superior Court of Québec does not have jurisdiction over the matter.

[Signature]
ANDRÉ FORGET, J.C.A.
[Signature]
LORNE GIROUX, J.C.A.
[Signature]
RICHARD WAGNER, J.C.A.

Mr. Jean-François Lehoux
Mr. Pierre-Jérôme Bouchard
McCARTHY, TÉTRAULT LLP
For the appellant

Mr. Bruce Johnston
Mr. Philippe Hubert Trudel
TRUDEL & JOHNSTON
For the appellee

Hearing Date: 25 November 2011

[7] In first instance, the Canadian Association Against Impunity (CAAI) presented a motion for authorization to launch a class action against Anvil Mining Limited (Anvil) for the benefit of this group of people:

> All people who lost a member of their family, who were victims of abuse, of pillage of their property or who had to flee the town of Kilwa in October 2004 following the illegal acts committed by the Armed Forces of the Democratic Republic of Congo;

[8] It is not contested that the alleged faults were committed in the Democratic Republic of Congo (DRC) and that the damages were suffered in this country, where all members of the group targeted by the class action reside.

[9] It is also recognized that Anvil's headquarters are in Perth, Australia.

[10] To establish the international jurisdiction of Quebec tribunals, the CAAI bases itself on section 3148(2) C.C.Q.:

> 3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where:
> (1) [...]
> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec.

[11] In first instance, Anvil presented a request for declinatory exception on the grounds that the dispute does not relate to its activity in Quebec; furthermore, it pleaded that it had no establishment or activity in Quebec in October 2004.

[12] Secondarily, Anvil pleaded that if Quebec tribunals had jurisdiction, the Superior Court should nonetheless decline it pursuant to the *forum non conveniens* theory under the terms of section 3135 C.C.Q.:

> 3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

[13] In first instance, the judge did not retain Anvil's claims either in the matter of jurisdiction or in that of the *forum non conveniens* theory and, consequently, rejected its request for declinatory exception.

[14] Given these conclusions, the first judge did not deem it useful to apply the "forum of necessity" theory in the sense of section 3136 C.C.Q.:

> **3136.** Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.

[15] Anvil lodged an appeal with the authorization of a judge of the Court.

THE PARTIES

[16] Anvil is a mining company that was incorporated pursuant to the *Business Corporation Act* of the Northwest Territories of Canada, on 8 January 2004, and whose headquarters, as mentioned earlier, are in Perth, Australia. Anvil's only activity consists of operating a copper mine near Dikulushi, in the DRC.

[17] Since 1 June 2005, Anvil has had a business place in a small office in Montreal (170 ft. sq.), where Mr. Robert Lavallière works.

[18] Mr. Lavallière retains the services of a person to handle secretarial work on a parttime basis.

[19] Mr. Lavallière primarily takes care of the company's relations with investors and stakeholders.

[20] The CAAI describes itself as follows in its motion for authorization:

> 2.9 The Canadian Association Against Impunity is an incorporated company pursuant to Part III of the *Québec Companies Act* (R.S.Q., c. C-38, s. 218);
>
> 2.10 The CAAI was implemented following the joint initiative of the following five nongovernmental organizations whose aim was to launch the current class action: l'Action contre l'Impunité pour les Droits Humains (hereinafter "ACIDH") (Action Against Impunity for Human Rights), the African Association for Human Rights in the Democratic Republic of Congo (hereinafter "ASADHO"), the Canadian Centre for International Justice (hereinafter "CCIJ"), Global Witness, and Rights and Accountability in Development (hereinafter "RAID");
>
> 2.11 The CAAI's mission is described as follows in its letters patent:
>
> > Assisting the victims of wrongful acts committed by companies or people in countries where the legal system does not allow reasonable access to justice.

> Representing, in the context of a class action, the interests of the victims of the incidents at Kilwa in the Democratic Republic of Congo in 2004.

Reproduced in full, as it appears in the letters patent, evidence **R-7**.

THE EVENTS AT KILWA

[21] On 13 October 2004, a small group of armed individuals, from neighbouring Zambia, claiming to act in the name of the Mouvement révolutionnaire pour la libération du Katanga (Revolutionary Movement for the Liberation of Katanga), entered the town of Kilwa et proclaimed the independence of Katanga.

[22] In the following days, the Government of the DRC asked the officers of the army to remove these individuals and regain control of the town of Kilwa.

[23] This town is located approximately 55 kilometres from the mine operated by Anvil.

[24] The High Military Court of the DRC affirmed that the battles have created victims and injured people on both sides.

[25] However, the United Nations Organization Mission in the Democratic Republic of Congo (MONUC) states that the armed forces conducted a veritable massacre involving summary executions and pillaging of the people's property. According to this mission, 70 to 80 civilians died.

[26] According to the CAAI's claims, Anvil provided logistical support to the military during these events. After evacuating part of its personnel by plane to Lumbumbashi, it used its planes, upon return, to transport the troops to Kilwa. It also made trucks and drivers available to the armed forces and provided food rations and fuel.

The Trial and the Appeal before the Court Martials of the DRC

[27] In 2007, following repeated pressure from the MONUC, seven military personnel and three of Anvil's managers, involved in the events, were tried for war crimes before the Court Martial of the Province of Katanga in the DRC.

[28] Victims of the events at Kilwa were identified as civil parties and requested varying amounts in damages, depending on the case, between $10,000 USD and $100,000 USD.

[29] Two military personnel were found guilty (of murder and not war crimes); all of the other accused were acquitted and the victims, who were identified as civil parties, did not obtain compensation.

[30] Ms. Louise Arbour, then-United Nations High Commissioner for Human Rights, shared her concerns following the verdict of first instance:

> [...] "I am concerned at the court's conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eyewitness testimony and material evidence pointing to the commission of serious and deliberate human rights violations," said the High Commissioner. "I am pleased that an appellate instance will have the opportunity to revisit these findings. I urge the appeal court to fully and fairly weigh all the evidence before it reaches the appropriate conclusions that justice and the rights of the victims demand." The High Commissioner also encouraged all competent authorities in the DRC to use all available legal means to bring justice to the victims of Kilwa.
>
> [...] The High Commissioner criticized the military court's assumption of jurisdiction over civilians in this case. "It is inappropriate and contrary to the DRC's international obligations for military courts to try civilians. While military personnel can in principle be charged by court martial, civilians may not – they should be tried before fair and independent civilian courts."[1]

[31] On appeal, before the High Military Court of the DRC, the two military personnel found guilty had their sentences reduced and were returned to the army. All of the acquittals were maintained. The appeal of the civil parties was declared inadmissible.

[32] In first instance, Anvil submitted a statement made under oath by Professor Raphaël Nyabirungu, a lawyer in Kinshasa, who estimates that the conditions of a fair and equal trial were satisfied in first instance and on appeal. Professor Nyabirungu is of the opinion that the victims could appeal their case before the Supreme Court of Justice, which they did not do.

[33] The United Nations High Commissioner for Human Rights (UNHCHR) is not of the same opinion;

> 869. The judicial decisions in the Kilwa case illustrate, in this specific case, the lack of impartiality and independence of military justice. The Court clearly indicates its position in favour of the accused, exonerating Colonel Adémar of most of the murder cases entrusted to him the Ministère public (Prosecutor's Office), either as personnel or as

1 United Nations – press release: available online at http://www.ohchr.org.

> hierarchical leader of the perpetrators of said murders. No reference is made in the judgment to international law as it applies to war crimes. Throughout this case of political interferences, a lack of cooperation on the part of the military authorities and numerous irregularities were observed.[2]

The Proceedings in Australia

[34] In 2007, a class action was launched in Australia on behalf of the victims of the events at Kilwa. At the very beginning of the proceedings, Anvil asked to have access to information relating to the instructions of the victims' lawyers, particularly the cost-related agreements. The judge granted the request.[3]

[35] The NGO representative who was supposed to meet with the victims to obtain their instructions for the lawyers did not manage to do so. According to the allegations of the CAAI's petition, the Government of the DRC impeded the movements of the victims and the NGO members. NGO members received death threats, prompting the victims and their supports to drop the case.

[36] The NGO representative explained these facts to the Australian tribunal.[4]

[37] The Australian firm Slater & Gordon, which had accepted instructions, withdrew in the end. According to the CAAI's claims, despite their efforts, the victims were unable to find other lawyers willing to take their case in Australia.

[38] Anvil provided a statement under oath from the Australian lawyer, S.K. Dharmananda (Senior Counsel). He expressed the following opinion:

> 39. As discussed above, the identified plaintiffs could bring an action in negligence in the SCWA. This is confirmed by the proceedings of pre-action discovery, referred to above, which show that a cause of action for negligence against Anvil related to the events at Kilwa in 2004 can be persued [*sic*].

[39] In another statement under oath, he said he did not have all of the information necessary to determine whether the recourse of the victims was prescribed.

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2 UN Report Mapping, August 2010.

3 *Pierre v. Anvil Mining Management NL*, [2008] SCWA 30.

4 *Pierre v. Anvil Mining Management NL*, [2008] SCWA 30 (S).

[40] Anvil's lawyers pleaded that it was difficult for their expert to give an opinion on the prescription in Australia of a recourse that has not yet been instituted.

[41] They also underscored that the CAAI intends to invoke the Democratic Republic of Congo Act in the current case, which provides a prescription of 30 years. It is not known if the situation would be different in Australia.

THE JUDGMENT UNDER APPEAL

[42] The first judge recalled the principles: that the CAAI must establish that Anvil has an establishment in Quebec and that the dispute relates to its activity in Quebec.

[43] The iudge did not retain Anvil's argument that the establishment must exist at the time when the facts underlying its responsibility took place. He affirmed that this alleged condition does not conform to the rule of law. According to him, this Court specified rather, in the *Rees c. Convergia* decision,[5] that the establishment referred to in section 3148(2) must exist at the time that the action is instituted.

[44] The judge is of the opinion that he must decide "if the dispute relates to Anvil's establishment in Place Ville-Marie in Montreal in the sense of section 3148(2) C.C.Q." He recalled that the interpretation of "the dispute relates to its activities in Québec" of section 3148(2) C.C.Q. was established by the Court of Appeal in the *Interinvest (Bermuda)* decision:[6] "a foreign moral person who has an establishment in Quebec may be prosecuted there if the case relates to its activity in Quebec, even if the decisions related to this activity were not reached by the establishment in Quebec."

[45] The Judge applied this principle to the facts of the case:

> [29] It appears that the role of Robert Lavallière, Vice-President, Corporate Affairs at Anvil in Montreal, is necessarily linked to the operation of the Dikulushi mine in the Congo, since this is Anvil's only, if not main, activity. Whether it is when he goes to the Congo to maintain relations with the local government or when he is in Montreal promoting investment in the company to businesspeople, Robert Lavallière's activities are necessarily linked to the operation of the mine in the Congo in the context of which the local employees provided, deliberately or not, logistical support to the army to counter a rebellion at Kilwa in October 2004. The tribunal recalls that the jurisprudence often reaffirmed the great jurisdictional basis of section 3148 C.C.Q., at the risk of the

5 *Rees c. Convergia*, 2005 QCCA 353, J.E. 2005-738.

6 *Interinvest (Bermuda) Ltd. c. Herzog*, 2009 QCCA 1428, J.E. 2009-1451 (C.A.)

tribunals intervening pursuant to section 3135 in cases where the link is neither real nor substantial.

[46] Having concluded that Quebec authorities had jurisdiction, the first judge examined the exception of the *forum non conveniens* invoked by Anvil. He noted that Anvil is not in a position to designate which State, the DRC or Australia, would constitute the more appropriate forum.

[47] The first judge noted that the events resulted in proceedings in both jurisdictions and that the victims experienced considerable difficulty in both. He seems to be of the opinion that the contradictory proof does not make it possible to conclude that the victims had access to a fair and equal trial in the DRC. Furthermore, according to the victims, they no longer have the option of a hearing in Australia due to a lack of lawyers willing to take on their case.

[48] The judge therefore concluded that Anvil did not prove that a foreign authority is clearly more appropriate than Quebec to decide.

[49] Given these conclusions, the first judge did not estimate that it would be useful to give an opinion on the "forum of necessity" (section 3136 C.C.Q.).

POINTS AT ISSUE

[50] The appeal raises the following three points:

1) Did the first judge err by concluding that the Quebec authorities had jurisdiction pursuant to section 3148(2) C.C.Q.?
2) If the Quebec authorities have jurisdiction pursuant to section 3148(2) C.C.Q., did the judge err by not declining his jurisdiction for the benefit of the DRC or Australian authorities pursuant to section 3135 C.C.Q.?

[51] If the Quebec authorities do not have jurisdiction pursuant to section 3148(2) C.C.Q., do they have jurisdiction pursuant to section 3136 C.C.Q. (forum of necessity)?

ANALYSIS

Jurisdiction pursuant to section 3148(2) C.C.Q.

[52] The rules concerning the international jurisdiction of Quebec authorities are set out in sections 3134 to 3154 of the Civil Code of Québec.

[53] The Supreme Court reached a decision of principle in this regard in the *Spar Aerospace Ltd v. American Mobile Satellite Corp.*, decision.[7]

[54] Although that decision concerned the application of the third paragraph of section 3148 C.C.Q.,[8] Judge LeBel set out general principles regarding the international jurisdiction of Quebec.

[55] In the first place, Judge LeBel recalled the bases of private international law:

> [21] The principles of courtesy, order and equity serve as a guide to settle the main issues of private international law: the simple recognition of jurisdiction, the *forum non conveniens*, the choice of the applicable law and the recognition of foreign judgments. Since these three principles arise in private international legal order, it is not surprising that the various issues it raises are closely linked. [...]
>
> [56] Judge LeBel estimates that it is not necessary to stray from these principles when interpreting the relevant provisions in this matter, although they are not restrictive:
>
> [23] In Quebec, because of the codification of the rules of private international law, the tribunals must interpret these rules by first examining the specific wording of the C.C.Q.'s provisions and then by trying to determine whether their interpretation is compatible with the principles underlying the rules. Since the provisions of the C.C.Q. and the C.P.C. do not refer directly to the principles of courtesy, order and equity, and at best these principles are vaguely defined therein, it is important to underscore that they do not constitute restrictive rules in and of themselves. Rather, they serve as a guide for interpreting the various rules of private international law and reinforce the close link between the points at issue. (For an analysis of the links between the various rules of private international law, see J. Talpis, "If I am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation (2001), pp. 22 and 43 to 69.) [...]
>
> (I underscore)

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7 *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205.

8 (3) A fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;

[57] Afterward, Judge LeBel examined the criterion of the "real and substantial connection" for determining the international jurisdiction of Quebec authorities. He noted that the Supreme Court has always recognized the importance of this criterion, particularly in the *Morguard* and *Hunt* cases,[9]more specifically in an interprovincial context:

> [51] As do the appellants, I estimate that the *Morguard* and *Hunt* decisions establish the existence of a constitutional imperative according to which Canadian tribunals cannot claim to have jurisdiction if there exists a "real and substantial connection": see the reasons of Judge La Forest in the *Hunt* decision, cited earlier, p. 328: "the tribunals are required, pursuant to constitutional constraints, not to claim to have jurisdiction unless there are real and substantial connections to that location" (I underscore). However, it is important to underscore that the *Morguard* and *Hunt* decisions were reached in the context of conflicts of interprovincial jurisdiction. In my opinion, the specific conclusions of these decisions cannot be easily be determined from this context. Particularly, these two decisions reinforced and even broadened the principles of reciprocity and they apply directly to the context of courtesy between provinces, which lies within the structure of the Canadian federation; see *Morguard*, cited earlier, p. 1109, and *Hunt*, cited earlier, p. 328.

[58] Judge LeBel was of the opinion that this criterion is included implicitly in the provisions of the Civil Code of Québec:

> [56] Upon examination of the very wording of section 3148, it can be maintained that the notion of "real and substantial connection" is already subsumed under the provisions of paragraph 3148(3). In fact, each of the reasons listed (the fault, the injurious act, the damage, the contract) seems to be an example of situations that constitute a "real and substantial connection" between the Province of Quebec and the action. I doubt that the appellant who manages to prove one of the four reasons to award jurisdiction would not be considered as having satisfied the criterion of the "real and substantial connection," at least for the purpose of simple recognition of jurisdiction.

[59] Regarding, more specifically, subparagraph 2 of section 3148 C.C.Q., the lawyers on both sides referred to the *Rosdev*[10], *Perez*[11] and *Interinvest*[12] cases.

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9 *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C. S. 1077; *Hunt c. T & N PLC*, [1993] 4 R.C.S. 289.

10 *Rosdev Investments Inc. v. Allstate Insurance Company of Canada,* [1994] R.J.Q. 2966 (C.S.).

11 *Perez v. Bank of Nova Scotia*, B.E. 2004BE-542 (C.S.).

12 *Interinvest (Bermuda) Ltd. c. Herzog*, 2009 QCCA 1428, J.E. 2009-1451 (C.A.).

[60] The first decision recorded in this regard was that of Judge Marcellin, in 1994 in the *Rosdev* case.

[61] Rosdev had instituted proceedings in Quebec against Allstate regarding a loan to refinance a building in Québec City that Allstate had granted him in Ontario.

[62] Allstate had an establishment in Quebec, but pleaded that there was no link in the sense of section 3148(2) C.C.Q., since in Quebec, it was involved only in insurance activities.

[63] Judge Marcellin did not retain this claim:

> [18] Allstate submits that the work of the establishment in Quebec does not involve the company's financing, only its insurance.
>
> [19] It is accurate that the dispute between the parties is not related to insurance, but it is related to Allstate's activities in Quebec.
>
> [20] The Tribunal is of the opinion that upon enacting a double criterion in section 3148 C.C.Q., the intention of the legislator was not to link the activity to the establishment, but to link the activity to the cause of the dispute between the parties.
>
> [21] In the case under review, even if the dispute between the parties is not linked to the Quebec establishment, the fact remains that Allstate pursues the company's financing activities there and it is these activites that are at issue. The two criteria of section 3148.2 are satisfied in this case.
> [...]
>
> [24] The evidence reveals that Allstate has an establishment in Quebec, that it has debt there and that it performs a number of activities there. It therefore has a number of ties and the criteria in sections 3148.2 and 3148.3 are satisfied.

[64] In the *Perez* case in 2003, Judge Lévesque concluded that it did not suffice that the Bank of Nova Scotia pursued banking activities in Quebec to give the Superior Court jurisdiction in a case related to a $100,000 deposit in Ontario:

> [5] The Bank of Nova Scotia, Scotia Capital Inc. and Scotia McLeod Corporation (hereinafter, the defendants, although the latter exists because of a merge) have an establishment in Quebec, but have not pursued activities there related to the $100,000 deposit in question in the conclusions listed above. In fact, all of the activities between the appellants and the defendants took place in Argentina, according to the statement (paragraphs 6 to 8).
>
> [6] Furthermore, paragraphs 9, 11 and 13 do not indicate that the dispute between the appellants and the defendants relates to its activity in Quebec.
>
> [7] On the contrary, paragraphs 7 and 12 refer to activities that took place in Toronto, Ontario.
>
> [8] Moreover, reference is made to activities related to the security certificates in question in the statement, in paragraphs 10 and 12 of the instance's introductory request. These activities took place outside of Quebec.
>
> [9] It does not suffice to affirm that the defendants practise banking and financial activities in Quebec in general, as the appellants plead, by referring to the financial statements produced as evidence to prove a connection in order to apply section 3148, paragraph 2 of the Civil Code of Quebec.
>
> [10] The applicants, who had the burden, did not establish that the dispute between the parties relates to their activities in Quebec.
>
> [11] The preceding statements make it possible to distinguish the judgments in the Rosdev Investment Inc. c. Allstate Insurance Company of Canada, H.L. Boulton & Co. S.A.C.A. c. Banque Royale du Canada and A.V.S. Technologies Inc. c. Goldstar Co. cases.
>
> (references omitted)

[65] The Court[13] rejected the appeal of Perez:

> [1] Appellants have not shown any error in the judgment of first instance. We are of the view that the trial judge has correctly interpreted section 3148(2) C.C.Q.

13 Perez c. Bank of Nova Scotia, AZ-04019613 (C.A.)

[66] In 2009, the *Intervest (Bermuda) Limited* case of this Court also concerned the interpretation and application of section 3148(2) C.C.Q.

[67] In the beginning, the "real and substantial connection" with Quebec was incontestable in this matter, since the operational centre of this company was in Montreal, although its headquarters are in Bermuda:

> [7] Bermuda is affiliated with the appellee Interinvest Consulting Corporation of Canada Ltd., a legal person that has offices in Montreal (in fact, it seems that the operational centre of the Interinvest group is in Montreal in a building called "Maison Interinvest"). On the Bermuda writing paper, the words "affiliated offices in Montreal & Toronto, Canada Boston, USA Zurich, Switzerland" can be read.

[68] Judge Dalphond proceeded with a review of the doctrine and the jurisprudence; his analysis concerned essentially the second criterion of section 3148(2) C.C.Q.:

> [29] However, the sole existence of an establishment in Quebec is not sufficient to give Quebec tribunals jurisdiction under section 3148(2) C.C.Q.; this refers back to the former law, in which the presence of property in Quebec was sufficient (section 68 C.P.C.). The case must also relate to the company's activities in Quebec.
>
> [30] A controversy seems to exist over this second element. For some authors, the case must relate to the activities in Quebec conducted from the establishment there, whereas Professor Glenn, *infra*, and the jurisprudence were more liberal.
>
> [31] In *Rosdev Investments Inc. c. Allstate Insurance Company of Canada*, J.E. 941891 (C.S.), Judge Marcellin seems to be the first judge to analyze the second requirement of paragraph 3148(2). In this case, Allstate did not contest being in possession of an establishment in Quebec, but maintained that it was used only for insurance activities, whereas the case related to a loan it was supposed to grant Rosdev, an operation directed from its headquarters in Toronto. The judge concluded that Allstate may nonetheless be assigned to Quebec since the case concerns its activities in Quebec. In her opinion, even if the case is not linked to the Quebec establishment, the fact remains that Allstate pursues financing activities in Quebec; [...]

[32] This interpretation was criticized on the grounds that it increases excessively the field of application of paragraph 3148(2) C.C.Q., since the activity related to the dispute of the case did not concern the Allstate establishment in Quebec.

[33] Jeffrey Talpis, mentioned earlier, expressed the following on p. 24:

> Where an establishment in Quebec *does* exist and a dispute arises only partly out of the activities of that establishment, this should be sufficient to establish jurisdiction since art. 3148 para. 1(2) C.C.Q. does not require that the activities in question arise solely from the establishment in Quebec. It is not, however, proper grounds for jurisdiction over the foreign company under art. 3148 para. 1(2) if the dispute arises out of the activities of the parent in Quebec, other than those of the establishment. A contrary result was obtained in *Rosdev Investments Inc. v. Allstate Insurance Co. of Canada*, but in my opinion, this interpretation attempts to authorize an expansion which is unwarranted.

[34] Gerald Goldstein and Ethel Groffier, *Droit international privé*, t. 1, Cowansville, Éditions Yvon Blais, 1998, on pages 349 and 350, also expressed the opinion that the recommended interpretation in *Rosdev* is erroneous. Although they are aware that the wording of art. 3148(2) C.C.Q. allows such an interpretation since "its" activity could just as well refer to the establishment or the defendant themself, they affirmed that such an interpretation is contrary to the legislator's intention when enacting this paragraph. They are of the opinion that the aim of this paragraph is to remove the presence of property as a connection in personal cases of a patrimonial nature (which is, however, in section 68 C.P.C.). Accepting that Quebec tribunals have jurisdiction "based on a dissociation between the defendant's activity in Quebec and the presence of an establishment not linked to this activity" refers back, according to the authors, to an interpretation that the legislator wanted to avoid.

[35] The author, Emmanuelli, seems to agree with this criticism when he writes in the excerpt cited earlier: "the activities of the legal person that constitute the grounds for the case must relate to the establishment it uses in Quebec."

[36] On my part, I am of the opinion that the approach proposed by the Judge Marcellin must be retained. The two criteria must be satisfied, but the decision regarding the activity at issue need not be reached at the Quebec establishment; it suffices that the activity at issue took place in Quebec and that the defendant has an establishment there.

[37] Furthermore, this seems to be the position that Professor H. Patrick Glenn teaches in "Droit international privé," in *La réforme du Code civil*, t. 3, *Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires*, texts gathered by the Barreau du Québec and the Chambre des notaires du Québec, Ste-Foy, P.U.L., 1993, p. 753, No. 89:

> Section 3148(2), para. 2, establishes a new charge of international jurisdiction that is the charge of the conducting of an activity in Quebec by a legal person that has an establishment there. However, the dispute must relate to the activity that the legal person conducts in Quebec. Although this charge of jurisdiction is new, it is not clear that the jurisdiction of Quebec authorities encompasses it. In the past, this jurisdiction could be founded, in most cases, on the presence in Quebec of the property of such a legal person, and the jurisdiction established was not limited to the activity of the legal person in Quebec. The new charge of jurisdiction therefore requires a more substantial link between the foreign legal person and Quebec in order to establish a basis for the jurisdiction of Quebec authorities.
>
> (I underscore)

[38] In this time of globalization and instantaneous communication through electronics or otherwise, it is increasingly difficult to identify the location where a decision has been reached. If certain documents related to a loan granted to a borrower from Quebec are submitted to the Montreal establishment of a foreign legal person for decision in New York, must it be concluded that the loan relates to the Quebec establishment or an activity of the headquarters abroad?

[39] Similarly, the fact that a financial institution that has one or more establishments in Quebec centralizes the decisions regarding some of its activities such as major commercial loans, at its headquarters in Toronto, New York or elsewhere does not in any way change the fact that it practises this financing activity in Quebec, a province where it has one or more establishments. The two elements of 3148(2) C.C.Q. are thus satisfied; if the institution, prosecuted in Quebec regarding this loan, wants to proceed elsewhere (without being able to invoke the forum selection clause), it is incumbent on the institution to convince the Quebec tribunal to decline jurisdiction under section 3135 C.C.Q. (*forum non conveniens*).

[40] This interpretation is certainly more liberal than the one proposed by the authors who criticize the *Rosdev* judgment, but it seems to me to concur more with the generous approach adopted by the tribunals with respect to the other provisions of section 3148

> C.C.Q., particularly paragraph 3148(3). In *Spar Aerospace Ltd. v. American Mobile Satellite*, [2002] 4 S.C.R. 205, Judge LeBel, in the name of the Supreme Court, mentions "the great jurisdictional basis provided in section 3148" (paragraphs 57 to 59).
>
> [41] In conclusion, a foreign legal person that has an establishment in Quebec may be prosecuted there if the case relates to its activity in Quebec, even if the decisions related to this activity were not reached by the establishment in Quebec. At that point, there are two elements required to create a sufficient connection to Quebec in the sense of section 3148(2) C.C.Q., which surpasses the simple presence of property in Quebec, since the case must also result from activities in Quebec, as underscored by Judge Lévesque in *Perez v. Bank of Nova Scotia*, B.E. 2004BE-542 (C.S.), conf. par SOQUIJ AZ-04019613, 2004-05-07 (C.A.)

[69] By favouring Judge Marcellin's approach over that of certain authors, the CAAI's lawyers pleaded that Judge Dalphond implicitly rejected Judge Lévesque's analysis in the *Perez* case; that is not the case at all, since Judge Dalphond referred to this decision with approval.

[70] There is now reason to apply these principles to the case in question.

[71] In the beginning, it was uncontested that Anvil had neither activity nor establishment in Quebec at the time of the events.

[72] The CAAI's lawyers claimed that this was insignificant since the requirements of section 3148(2) must exist at the time of the institution of the proceedings and not at the time of the facts underlying responsibility. They pleaded that, if it was otherwise, a company could delocalize its establishment after faulty behaviour to avoid legal action against it.

[73] Anvil's lawyers pleaded that the first judge and their adversaries disregarded their argument: they did not insist so much on the absence of <u>establishment</u> in Quebec, in October 2004, as on the absence of <u>activity</u> in Quebec at that time.

[74] The CAAI affirmed that, in the *Rees*[14] decision, this Court concluded that, in the analysis of the criteria provided in section 3148(2) C.C.Q., contemporaneousness must exist at the time of institution of proceedings; Anvil pleaded that the Court did not conclude in this sense and that, regardless, it would constitute, at the very most, an *obiter dictum*.

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14 *Rees v. Convergia*, supra, note 5.

[75] The *Rees* case concerned the application of section 3149 C.C.Q., which awards jurisdiction to Quebec authorities with respect to contract of employment and renders renunciation of this jurisidiction non-invocable to the worker.

[76] Mr. Rees, an American citizen, had resided in Montreal and had worked in Pointe-Claire for Convergia. After his dismissal, he terminated his lease and returned to the United States before instituting proceedings in Quebec.

[77] On behalf of the Court, Judge Rayle concluded that, in the case in question, contemporaneousness was rising at the time of the events and not at the time of institution of the proceedings; she wrote that the situation could be different under section 3148(2) C.C.Q.:

> [47] For the following reasons, I am of the opinion that the conditions for awarding jurisdiction to the Quebec authorities are not always present at the time the request is presented. It may suffice that these conditions exist when the right of action is established. The same applies to section 3149 C.C.Q. when the provision of work has taken place in Quebec.

[48] By referring back to section 3148 C.C.Q., it is noted that the elements for awarding jurisdiction provided in paragraphs 1 and 2 (the home or residence of the defendant or the establishment of the legal person) must necessarily exist at the time when the action is instituted.

[49] The situation is quite different in paragraphs 3, 4, 5 and the last paragraph of section 3148 C.C.Q. In these cases, the conditions for awarding jurisdiction must necessarily have existed before the legal action was taken.

[50] The contemporaneousness criterion is therefore not universal; it is even rather exceptional.

[78] Regardless, I do not think it is necessary in this case to affirm, absolutely, that the two conditions of section 3148(2) C.C.Q. must exist at the time of the facts underlying responsibility or at the time of the institution of the action or both.

[79] However, the total absence of establishment and activity at the time of the underlying facts and certainly a significant element to determine if the dispute relates to its activity in Quebec.

[80] That especially applies when the alleged acts committed in Anvil are considered.

[81] In short, the CAAI claims that Anvil is responsible for the damages caused to the members for having become accomplices of "war crimes" and "crimes against humanity."

[82] The following excerpts are cited from the motion for authorization:

> 2.105. If Anvil had acted in a reasonably prudent manner with the aim of avoiding becoming accomplice to the crimes that were committed with its assistance, it would have insisted on being provided with a requisition in due form before providing any logistical assistance to the FARDC;
>
> 2.106. If Anvil had acted in a reasonably prudent manner with the aim of avoiding becoming an accomplice to the crimes that were committed with its assistance, it would have above all insisted on obtaining insurance on the equipment and personnel being used;
>
> ...
>
> 2.167. It is clear that the exactions committed by the FARDC against the Kilwa people with the assistance of Anvil constitute war crimes and that by becoming accomplice to these crimes, Anvil assumes its responsibility pursuant to internal Congolese law;
>
> 2.168. Anvil also violated the *Principes volontaires sur la sécurité et les droits de l'homme* (Voluntary Principles on Security and Human Rights) that were developed in 2000, following collaboration between the United States, the United Kingdom, the companies of the energy and extractive industry sectors and certain NGOs (hereinafter, the "**Principes volontaires**" (Voluntary Principles) as it appears on a copy of the voluntary principles, evidence **R-30**);
>
> 2.179. Based on the above, it is clear that through its complicity in the serious crimes committed by the FARDC, Anvil committed several wrongful acts that directly caused the damages suffered by the members and that thereby assumes its responsibility;

[83] I have already mentioned that Mr. Lavallière's primary function – the only Anvil representative in Quebec – consists of maintaining relations with the investors and stakeholders. It must be said that Anvil is registered on the Toronto Stock Exchange and that its establishment has been located in Montreal, since June 2005, for the sole reason that Mr. Lavallière, who resides in Quebec, prefers to work in Montreal rather than in Toronto.

[84] Mr. Lavallière does not participate in the management of the mine; furthermore, there is reason to question whether the decision to "collaborate," or "not refuse to collaborate," with the military personnel was related to the management of the mine, per se.

[85] Anvil's activity in Quebec has no connection, directly or indirectly, to the "complicity" in committing "war crimes" or "crimes against humanity" during the operation of a mine.

[86] It is true that Mr. Lavallière participated, after taking up his position, in June 2005, in certain events that can be described as "crisis management."

[87] That does not make it possible to conclude that the dispute relates to Anvil's activity in Quebec. Furthermore, this seemed to be the understanding of the first judge at the hearing:

> THE TRIBUNAL:
>
> I always come back to the same question. But the dispute ...
>
> Mr. BRUCE JOHNSTON:
>
> Yes.
>
> THE TRIBUNAL:
>
> ... it concerns not the crisis management, it concerns the facts underlying responsibility, namely the decision, in this case, to assist, from the logistical point of view, the Congolese army.
>
> Mr. BRUCE JOHNSTON:
>
> Yes.
>
> THE TRIBUNAL:
>
> But I have nothing that links Mr. Lavallière, and even less the establishment, because it did not exist, to the facts underlying responsibility, because your class action, there again, concerns the fact that the company should not have, no, etcetera.
>
> Mr. BRUCE JOHNSTON:
>
> Yes.
>
> THE TRIBUNAL:
>
> It does not concern poor crisis management, which followed this.
>
> Mr. BRUCE JOHNSTON:
>
> No. It's true.

> THE TRIBUNAL:
>
> So, what do I have left, there, between Quebec, in two ... . In the end, in two thousand and four (2004), what do I have left?
>
> Mr. BRUCE JOHNSTON:
>
> Alright, in fact, Judge, we will concede right away that there is nothing, essentially nothing, between Quebec and the events that resulted in the case in two thousand and four (2004).

[88] I know very well that over the course of the argumentation, a judge can raise questions or objections that he will set aside during his deliberations; however, his initial reaction strikes me as conforming to the rule that must be applied.

[89] Judge Dalphond, in the *Interinvest (Bermuda)* decision, adopted a liberal interpretation of section 3148(2) C.C.Q. and recognized that it is not necessary to establish that the decision was reached at the Quebec establishment, but he added that that does not excuse the need for demonstration that the dispute objectively relates to its activity in Quebec.

[90] The CAAI's lawyers pleaded that it is a matter of fact and that the first judge's decision in this respect should not be targeted.

[91] With all due respect, I am of the opinion that the first judge failed to link the dispute to any of Anvil's activities in Quebec and, in doing so, commits an error at law.

[92] In the case in question, the dispute concerns more directly a form of "complicity" between Anvil's leaders and government authorities.

[93] I am unable to establish a link between the alleged wrongdoing committed by Anvil's leaders in October 2004 and an activity in Quebec that would have begun in June 2005, even less able to identify a "real and substantial link" with the Quebec authorities.

[94] I propose concluding that section 3148(2) C.C.Q. does not make it possible to recognize the jurisdiction of the Quebec authorities in the case in question.

THE *FORUM NON CONVENIENS*

[95] Given the absence of jurisdiction of the Quebec authorities, it is not necessary to address this matter, although the alleged facts in this regard may have an indirect impact on the next matter.

FORUM OF NECESSITY

[96] At this stage, the CAAI reiterates that the victims could not obtain justice in the DRC or apply successfully to the tribunals in Australia.

[97] The interpretation of sections 3135 and 3136 C.C.Q. involves a different approach, not to say opposite. Section 3135 C.P.C. specifies that if the Quebec authority has jurisdiction, it may decline this jurisdiction only in exceptional circumstances. Furthermore, section 3136 C.C.Q. states that if the Quebec authority does not have jurisdiction, it can assume it only in exceptional circumstances.

[98] In this respect, while Judge LeBel was at that Court, he wrote the following in the *Lamborghini*[15] case:

> According to its legislative sources, this provision represents rather a close exception to the normal rules of jurisdiction. It does not aim to allow the Quebec tribunal to appropriate jurisdiction that it would not have otherwise. It seeks to settle certain problems of access to justice, for a litigant who is in Quebec, when the foreign forum that usually has jurisdiction is inaccessible to him for exceptional reasons, such as an almost absolute impossibility in law or a practical impossibility. Thus, these results can be considered as resulting from the breakdown of diplomatic or commercial relations with a foreign State or the need for protection of a political refugee, or the existence of a serious physical danger, when beginning a debate before a foreign tribunal.
>
> This rule of awarding judicial jurisdiction, taken from Swiss law on conflicts of laws, according to the comments of the Minister of Justice and certain doctrine analysts, maintains an aspect of exception. It corresponds to the very concept of forum of necessity. Furthermore, the Minister of Justice's comment, under section 3136 L.A.R.C. indicates:
>
> "This section, of new law, is inspired by the Swiss 1987 *Loi fédérale sur le droit international privé* (Private International Law Federal Act). Since the provisions of the Title Three aim to comprehensively provide the Quebec authorities' international

15 *Lamborghini (Canada) Inc. v. Automobile Lamborghini S.P.A.*, [1997] R.J.Q. 58 (C.A.).

> jurisdiction, it was suitable to establish a new jurisdiction for the Quebec authorities in order to provide for the case where a proceeding abroad could not possibly be instituted or where the institution of such proceedings abroad could not possibly be required. However, the current case must present a sufficient connection to Quebec."

This interpretation was resumed by the doctrine. Thus, in the rule of jurisdiction of section 3136 C.C.Q., P. Glenn sees the creation of a forum of necessity:

> "74. The forum of necessity. By following the Swiss model once again, particularly section 3 of the *Loi fédérale sur le droit international privé* (Private International Law Federal Act), section 3136 creates a forum called "of necessity" in Quebec, in the case where proceedings abroad cannot possibly be instituted or if the institution of such proceedings abroad cannot possibly be required. This jurisdiction exists even though it is not usually a Quebec authority that will take on the case. However, it would still demand that the current case present "a sufficient connection" to Quebec (section 3136). The forum thus created is a subsidiary forum, but the aim is to avoid denial of justice and not simply accommodate one of the parties. Swiss law provides examples such as the refugee who cannot institute proceedings in the country in which he was persecuted, or the urgent request that could not be heard in time abroad. The Court of Appeal has also recognized that the jurisdiction of the Quebec tribunals in terms of custody may exist on the basis of the simple presence of the child in Quebec, in the case where an imminent, manifest and serious danger is present." (op. cit., p. 744; see also J.A. Talpis and G. Castel, "Interprétation de la règle de droit international privé," in La réforme du Code civil, Barreau du Québec et Chambre des notaires du Québec, P.U.L., Sainte-Foy, 1993, pp. 900-901.)
>
> Section 3136 C.C.Q. indicates a rule of exception based on the demonstrated impossibility of obtaining access to a tribunal abroad in a case that has a sufficient connection to Quebec. [...]
>
> (I underscore)

[99] The burden now lies with the CAAI, whereas it previous lied with Anvil, when it pleaded that Quebec was not a *forum conveniens*.

[100] Professor Raphaël Nyabirungu expressed the opinion that the victims could have appealed to the Supreme Court of Justice in the DRC. The CAAI did not present proof to the contrary; it simply files reports of the international organizations who have deplored the unfolding of proceedings before court martials.

[101] We can believe that, in several countries, citizens do not receive a fair and equal trial according to the criteria recognized by the international community. Evidently, that does not hold true in Australia. There, difficulties have been expressed about a lack of collaboration on the part of the authorities from the DRC. There are no indications on file that lead to the belief that the situation would be different if the proceedings were to take place in Montreal.

[102] In short, the only reason that prevents the victims from applying to the tribunals in Australia – the country where Anvil is headquartered, where the CAAI's alleged decisions were likely reached, unless they were reached in the DRC – is, according to the CAAI's allegation, the difficulty of convincing lawyers to institute proceedings. We have no way of knowing what measures have been taken to this end.

[103] The CAAI does not demonstrate the impossibility of obtaining access to a foreign tribunal and does not establish that the case has a sufficient connection to Quebec, to reiterate Judge LeBel's criteria in the *Lamborghini*[16] case.

CONCLUSION

[104] It is regrettable to note that citizens have so much difficulty obtaining justice. Despite all of the sympathy that must be felt for the victims and the admiration that the NGOs' involvement within the CAAI inspires, I am of the opinion that the legislation does not make it possible to recognize that Quebec has jurisdiction to hear this class action.

[105] Given the circumstances, there is no reason to award costs.

[Signature]

ANDRÉ FORGET, J.C.A.

16 *Supra*, note 15.