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Canada Post Corporation v. Lépine; Attorney General of Canada et al., Interveners

[Indexed as: Société canadienne des postes v. Lépine]

Court File No. 32299

2009 SCC 16

Supreme Court of Canada
McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ.

Heard: November 17, 2008
Judgment rendered: April 2, 2009

Conflict of laws — Foreign judgments — Jurisdiction of foreign court — Recognition procedure — Parallel class proceedings commenced in different provinces — Quebec court hearing application for recognition of foreign judgment not entitled to take account of doctrine of forum non conveniens in determining whether foreign authority had jurisdiction — Quebec residents not bound by Ontario settlement agreement because Ontario notice procedure contravened fundamental principles of procedure — Quebec and Ontario proceedings not giving rise to situation of lis pendens — Civil Code of Québec, S.Q. 1991, c. 64, art. 3155.

Civil procedure — Class actions — Procedure — Notices — Recognition procedure — Parallel class proceedings commenced in different provinces — Quebec court hearing application for recognition of foreign judgment not entitled to take account of doctrine of forum non conveniens in determining whether foreign authority had jurisdiction — Quebec residents not bound by Ontario settlement agreement because Ontario notice procedure contravened fundamental principles of procedure — Quebec and Ontario proceedings not giving rise to situation of lis pendens — Civil Code of Québec, S.Q. 1991, c. 64, art. 3155.

Canada Post terminated its commitment to lifetime Internet Service only one year after marketing the service. A customer in Quebec filed a motion for authorization to institute a class action on behalf of every natural person residing in Quebec who had purchased it. A class proceeding was certified in Ontario and led to a settlement agreement. According to the Ontario judgment, the settlement agreement was binding on every resident of Canada who had purchased the service except those in British Columbia.

The next day the Quebec Superior Court authorized the Quebec class action. Canada Post sought to have the Ontario judgment recognized under art. 3155 of the *Civil Code of Québec,* S.Q. 1991, c. 64. The application was dismissed on the basis that the notice of certification of the Ontario proceeding was inadequate in Quebec and created confusion with the Quebec class action.

The Quebec Court of Appeal affirmed the judgment and held that the Ontario court should have declined jurisdiction over Quebec residents by applying the doctrine of *forum non conveniens*. It also held that the two class proceedings gave rise to a situation of *lis pendens* since the Quebec proceeding was commenced first.

On further appeal to the Supreme Court of Canada, **held**, the appeal should be dismissed.

The Court of Appeal added an irrelevant factor to its analysis of the foreign court's jurisdiction in applying the doctrine of *forum non conveniens*. In reviewing an application for recognition of a foreign judgment, the Quebec court does not have to consider how the court of another province should have exercised jurisdiction or declined to exercise jurisdiction. Enforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised.

The application of the specific rules set out in arts. 3165 to 3168 of the Code are generally sufficient to determine whether the foreign court had jurisdiction. The Ontario Superior Court clearly had jurisdiction pursuant to art. 3168 since Canada Post had its head office in Ontario. This connecting factor alone justified finding that the Ontario court had jurisdiction.

The notices provided for in the judgment of the Ontario Superior Court of Justice, when considered in the context in which they were published, contravened the fundamental principles of procedure within the meaning of art. 3155, para. 3. Clarity of the notice was particularly important given the parallel proceedings. The Ontario notice was likely to confuse its intended recipients because it failed to properly explain the impact of the judgment certifying the class proceeding on Quebec members of the national class. It could have led those who read it in Quebec to conclude that it simply did not concern them.

The Quebec courts were also precluded from recognizing the Ontario judgment on the basis of *lis pendens* pursuant to art. 3155, para. 4. A class action does not exist only as of its filing date. The three identities required for *lis pendens* were present at the date of the authorization application. The basic facts in support of both proceedings were the same for Quebec residents, the object was the same and the legal identity of the parties was established.

Cases referred to

Birdsall Inc. v. In Any Event Inc., [1999] R.J.Q. 1344, 89 A.C.W.S. (3d) 249 *sub nom. Stageline Mobile Stage Inc. v. In Any Event Inc.* — **refd to**

Currie v. McDonald's Restaurants of Canada Ltd. (2005), 250 D.L.R. (4th) 224, 7 C.P.C. (6th) 60 *sub nom. Parsons v. McDonald's Restaurants of Canada Ltd.*, 74 O.R. (3d) 321, 195 O.A.C. 244, 137 A.C.W.S. (3d) 250 — **refd to**

Hocking v. Haziza, [2008] R.J.Q. 1189, 172 A.C.W.S. (3d) 84 *sub nom. HSBC Bank Canada v. Hocking*, 2008 QCCA 800, [2008] J.Q. No. 3423 [affd 172 A.C.W.S. (3d) 83, 2008 QCCA 801 *sub nom. HSBC Bank Canada v. Hocking*] — **refd to**

Hotte v. Servier Canada Inc., [1999] R.J.Q. 2598, 91 A.C.W.S. (3d) 715 — **refd to**

Masson v. Thompson, [1993] R.J.Q. 69, 36 A.C.W.S. (3d) 911 — **consd**

Roberge v. Bolduc (1991), 78 D.L.R. (4th) 666, [1991] 1 S.C.R. 374, 39 Q.A.C. 81, 124 N.R. 1 *sub nom. Dorion v. Roberge*, 25 A.C.W.S. (3d) 597 — **refd to**

Rocois Construction Inc. v. Quebec Ready Mix Inc., [1990] 2 S.C.R. 440, 31 Q.A.C. 241, 112 N.R. 241, *sub nom. Rocois Construction Inc. v. Dominion Ready Mix Inc.*, 22 A.C.W.S. (3d) 541 — **refd to**

Spar Aerospace Ltd. v. American Mobile Satellite Corp. (2002), 220 D.L.R. (4th) 54, [2002] 4 S.C.R. 205, 28 C.P.C. (5th) 201, 297 N.R. 83, 118 A.C.W.S. (3d) 368, 2002 SCC 78 — **refd to**

Statutes referred to

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arts. 3134-3154
arts. 3155-3168

Code of Civil Procedure, R.S.Q., c. C-25

Fair Trading Act, R.S.A. 2000, c. F-2

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Royer, Jean-Claude, *La preuve civile*, 4th ed. (Cowansville, Qué.: Éditions Y. Blais, 2008)

Saumier, Geneviève, "The Recognition of Foreign Judgments in Quebec — The Mirror Crack'd?" (2002), 81 Can. Bar Rev. 677

Talpis, Jeffrey A., and Shelley L. Kath, *"If I am from Grand-Mère, Why Am I Being Sued in Texas?": Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (Montréal: Éditions Thémis, 2001)

APPEAL from a judgment of the Quebec Court of Appeal, [2007] R.J.Q. 1920, 166 A.C.W.S. (3d) 632, 2007 QCCA 1092, [2007] SOQUIJ AZ-50446058, 2007 CarswellQue 13496, [2007] Q.J. No. 8498, dismissing an appeal from a judgment of Baker J., J.E. 2005-1631, [2005] SOQUIJ AZ-50325631, 2005 CanLII 26419, 2005 CarswellQue 5457, [2005] Q.J. No. 9806, authorizing a class action in Quebec.

Serge Gaudet, *Gary D.D. Morrison* and *Frédéric Massé*, for appellant, Canada Post Corporation.

François Lebeau and *Jacques Larochelle*, for respondent, Michel Lépine.

Alain Préfontaine, for intervener, Attorney General of Canada.
No one appearing for intervener, Cybersurf Corp.

The judgment of the court was delivered by

LEBEL J.:—

I. Introduction

A. Nature of the Appeal

[1] In September 2000, the appellant, the Canada Post Corporation ("Corporation"), began marketing a lifetime Internet service in Canada. Many consumers purchased the service. However, the Corporation terminated its lifetime commitment in September 2001 and discontinued the service, which led to complaints and various proceedings. There was a settlement in Ontario after the Ontario Superior Court of Justice had certified a class proceeding and approved a settlement agreement with the Corporation. A class action had also been instituted in Quebec. The Corporation sought to have the Ontario judgment recognized under art. 3155 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), and to have the Quebec proceedings dismissed, but the Quebec Superior Court dismissed its application. The Quebec Court of Appeal affirmed that judgment. For reasons that differ in part from those given by the Court of Appeal, I would dismiss this appeal, which concerns the conditions under the *Civil Code of Québec* for recognizing a judgment rendered outside Quebec. The appeal also raises issues concerning the management of parallel class actions instituted in different provinces.

B. Origin of the Case

[2] The events on which this case is based began in September 2000, when the Corporation offered its customers a lifetime Internet access package using software designed by the intervener Cybersurf Corp., an Internet service provider. The software came on a CD-ROM that was sold for $9.95. In exchange for free service, purchasers agreed to have advertising transmitted to their computers. According to the Corporation, it sold 146,736 CD-ROMs across Canada. For reasons not specified by the parties, the Corporation discontinued the lifetime Internet service on September 15, 2001. Some consumers were upset, and their reactions led, *inter alia*, to the proceedings now before this Court.

[3] In 2001, the Alberta government complained to the Corporation under the *Fair Trading Act*, R.S.A. 2000, c. F-2. Then, on February 6, 2002, Michel Lépine, the respondent in this appeal, filed a motion in the Quebec Superior Court for authorization to institute a class action under Quebec's *Code of Civil Procedure*, R.S.Q., c. C-25. He sought to institute the action against the Corporation on behalf of every natural person residing in Quebec who had purchased the Corporation's Internet package. On March 28, 2002, Paul McArthur also commenced a class proceeding against the Corporation in the Ontario Superior Court of Justice. He sought leave to represent everyone who had purchased the Corporation's CD-ROM and Internet service, except Quebec residents. Finally, on May 7, 2002, John Chen commenced a class proceeding in the British Columbia Supreme Court on behalf of residents of that province who had purchased the CD-ROM distributed by the Corporation. A settlement was reached in Alberta in December 2002, and the Corporation undertook to refund the purchase price of the CD-ROM to Canadian consumers who returned the CD-ROM to it.

[4] Negotiations were conducted to settle the class proceedings under way in Quebec, Ontario and British Columbia. The Corporation offered the same settlement as in Alberta, which it later enhanced by offering three months of free Internet access. According to information provided by the parties, the applicants for certification of the class proceedings in British Columbia and Ontario accepted the Corporation's offers. The applicant for authorization in the Quebec action, Mr. Lépine, rejected them.

[5] The application for authorization of the Quebec class action, which the Corporation contested vigorously, was still pending at the time of these negotiations. On June 18, 2003, the Quebec Superior Court decided to hear the application on November 5, 6 and 7 of that year.

[6] In the meantime, in Ontario in early July 2003, the parties to the Ontario and British Columbia proceedings entered into a settlement agreement with the appellant based on the offer they had accepted. The agreement created two classes of claimants. The first was limited to British Columbia residents. For the purposes of the Ontario proceeding, the second class included residents of every

province of Canada except British Columbia, as it no longer excluded Quebec residents despite the fact that the respondent, Michel Lépine, was proceeding with his application for authorization to institute a class action in Quebec and had rejected the proposed settlement. To give effect to the settlement, the Ontario application for certification was amended on November 19, 2003 to include Quebec residents in the class.

[7] Beginning at the time of negotiation of the settlement, various proceedings that had contradictory purposes and effects were commenced in the Ontario Superior Court of Justice and the Quebec Superior Court. When informed of the settlement with the Corporation, Mr. Lépine sought unsuccessfully to obtain safeguard orders from the Quebec Superior Court as well as a declaration that the Ontario agreement could not be set up against Quebec residents. His motion was heard on July 22, 2003, but the judge merely ordered the Corporation to give Quebec counsel details related to the applications for approval in Ontario and British Columbia.

[8] Nevertheless, the Quebec Superior Court heard Mr. Lépine's application for authorization on the scheduled dates, November 5 to 7, 2003, despite attempts by the Corporation to obtain a stay of the hearing and the judgment. The judge reserved his decision on November 7.

[9] The Ontario proceeding also continued. The Superior Court of Justice heard the application for certification of the class proceeding, to which the application for approval of the settlement agreement had now been added. Mr. Lépine's Quebec counsel did not appear in the Ontario proceeding. However, he sent the judge hearing the application for certification and approval a letter asking him to decline jurisdiction over Quebec residents for reasons he set out in detail. On December 22, 2003, the Superior Court of Justice certified the class proceeding and approved the settlement. It excluded British Columbia residents but not Quebec residents from the class. It did not comment on Mr. Lépine's request, but referred to that request in the following terms in its recitals: ". . . and upon being advised of the situation in the Province of Quebec and the correspondence forwarded to this Court by Quebec counsel, Francois LeBeau . . . ." Thus, the Ontario Superior Court of Justice approved the settlement reached with the Corporation without reservation and ordered that

notices of the judgment be published accordingly. The following are the most important heads of relief in its order:

> 1. THIS COURT ORDERS AND ADJUDGES that for purposes of the settlement, as set out in the Settlement Agreement attached as Schedule "A" ("the Settlement Agreement"), the within action is certified as a Class Proceeding pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.
>
> . . .
>
> 3. THIS COURT ORDERS AND ADJUDGES that, as set out in the Settlement Agreement, the group of persons who are members of the Ontario Class be:
>
> > "Any person in Canada, not a resident of the Province of British Columbia, who purchased a CD-Rom through any Canada Post outlet at a retail price of $9.95, exclusive of applicable taxes, the packaging of which displayed the words "free internet for life", on or after September 27, 2000."
>
> 4. THIS COURT ORDERS AND ADJUDGES that the claims asserted on behalf of the Class are for breach of contract and misrepresentation and the relief sought is damages, including punitive, aggravated and exemplary damages, interest and costs as set out in the Amended Statement of Claim.
>
> . . .
>
> 10. THIS COURT ORDERS AND ADJUDGES that any Class Member who does not opt-out within the time provided and in the manner described in the Settlement Agreement is bound by the Settlement Agreement and this Order and is hereby enjoined from pursuing any claims covered by the Settlement Agreement against the Defendants.

On the next day, December 23, 2003, the Quebec Superior Court rendered a judgment authorizing the institution of a class action against the Corporation on behalf of a group limited to residents of Quebec.

[10] Finally, on April 7, 2004, the British Columbia Supreme Court approved the settlement for the class of British Columbia residents. The settlement with the Corporation had accordingly been completed.

[11] In the meantime, the judgments rendered by the Ontario Superior Court of Justice and the Quebec Superior Court had created an unavoidable legal conflict. On the one hand, a class action against the Corporation was continuing in the Quebec Superior Court. On the other hand, the Corporation had obtained a judgment from the Ontario Superior Court of Justice declaring that the claims against it had been settled, including the claims of Quebec residents. To break

the impasse, the Corporation applied to the Quebec Superior Court in June 2004 to have the judgment of the Ontario Superior Court of Justice recognized and declared enforceable. To this date, more than four years later, the Ontario judgment has not yet been recognized in Quebec, and the class action authorized by the Quebec Superior Court has not yet been heard.

II. Judicial History

A. Quebec Superior Court, [2005] Q.J. No. 9806 (QL)

[12] On July 20, 2005, Baker J. of the Quebec Superior Court dismissed the Corporation's application for recognition of the judgment of the Ontario Superior Court of Justice on the basis that the application did not meet the requirements of art. 3155 *C.C.Q.* Baker J. based his decision to refuse recognition on the ground of contravention of the fundamental principles of procedure, which is provided for in art. 3155(3) *C.C.Q.* In his view, the notice of certification of the Ontario proceeding was inadequate in Quebec and created confusion with the class action under way in Quebec and the notices given in that action.

B. Quebec Court of Appeal (Delisle, Pelletier and Rayle JJ.A.), 2007 QCCA 1092 (CanLII), [2007] R.J.Q. 1920, 166 A.C.W.S. (3d) 632

[13] In a unanimous decision written by Rayle J.A., the Quebec Court of Appeal dismissed the Corporation's appeal from the Superior Court's judgment. Rayle J.A. found that there were three reasons to refuse recognition. She conceded that the Ontario Superior Court of Justice had jurisdiction over Mr. McArthur's application. But in her view, that court should have declined jurisdiction over Quebec residents by applying the doctrine of *forum non conveniens*. Next, she agreed with the trial judge that the confusion created by the notices concerning the class proceeding certified in Ontario had resulted in a contravention of the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.* Finally, the Court of Appeal found that the two class proceedings gave rise to a situation of *lis pendens*. Because the Quebec proceeding had been commenced first, art. 3155(4) *C.C.Q.* precluded the Quebec courts from recognizing the Ontario judgment. The Court of Appeal did not rule on the issue of violation of international public order under art. 3155(5) *C.C.Q.* However, Rayle J.A. stated that she was puzzled by the decision of the Ontario Superior Court of Justice

judge to exclude British Columbia residents but not Quebec claimants from the class. She wondered why the Ontario court had not adhered to the principles of interprovincial comity in relation to the Quebec court, which had been the first one seised of the dispute. The Corporation appealed that judgment to this Court, asking that it be reversed.

III. Analysis

A. Issues

(1) Nature of the Issues

[14] This appeal concerns the interpretation and application of art. 3155 *C.C.Q.* with regard to the recognition of a judgment rendered in a class proceeding in Ontario. I prefer to characterize that judgment as an external rather than a foreign one, despite the language used in the *Civil Code of Québec*. In essence, the dispute between the parties raises three issues. First, can a Quebec court hearing an application for recognition of an external judgment take account of the doctrine of *forum non conveniens*? Next, did the Ontario Superior Court of Justice adhere to the fundamental principles of procedure? If there were defects, did they entail a contravention of the fundamental principles of civil procedure within the meaning of art. 3155(3) *C.C.Q.*? Finally, did the application for authorization in Quebec and the application for certification in Ontario give rise to a situation of *lis pendens*?

[15] The discussion of these issues will also require some comment on the issue of interprovincial judicial comity in the conduct of interprovincial class actions. Although the outcome of this appeal does not depend on the resolution of this last issue, it is one that now seems likely to affect the conduct of class actions involving two or more Canadian provinces, as well as relations between the superior courts of different provinces. It therefore merits some thought, as can be seen from the problems or reactions it appears to have provoked in this case.

(2) The Parties' Positions

[16] The appellant submits that none of the provisions of art. 3155 *C.C.Q.* stood in the way of its application for recognition in Quebec and that the Quebec Superior Court should therefore have recognized the judgment of the Ontario Superior Court of Justice. According to the Corporation, the Quebec court could not raise the

application of the doctrine of *forum non conveniens* by the Ontario court as an issue. The Corporation adds that the notices given in Quebec were consistent with the fundamental principles of procedure. Finally, it denies that the conditions for *lis pendens* were met.

[17] The respondent relies primarily on the judgment of the Quebec Court of Appeal on the three issues being discussed. He also alleges that the Ontario proceedings were conducted in a manner inconsistent with international public order, which the appellant disputes. This argument need not be considered in the circumstances of this case. Finally, the Attorney General of Canada has intervened on the issue of the application of the doctrine of *forum non conveniens* in the procedure for the recognition of judgments rendered in the provinces of Canada. Before considering these questions, I believe it will be helpful to summarize the rules governing the recognition of external judgments by Quebec courts under the *Civil Code of Québec*.

B. Legal Framework for the Judicial Recognition of External Judgments

[18] The rules on the international jurisdiction of Quebec authorities and the recognition of foreign or external judgments are found, respectively, in Title Three (arts. 3134 to 3154) and Title Four (arts. 3155 to 3168) of Book Ten of the *Civil Code of Québec* on private international law. The two titles are closely related. I will come back to this in the course of my analysis.

[19] In substance, Title Three sets out general rules and specific rules for identifying the connecting factors that will give Quebec authorities jurisdiction in an international context. Where there are no specific rules, whether a Quebec authority has jurisdiction will depend on whether the defendant is domiciled in Quebec (art. 3134). As a whole, these rules ensure compliance with the basic requirement that there be a real and substantial connection between the Quebec court and the dispute, as this Court noted in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, 220 D.L.R. (4th) 54, at paras. 55-56.

[20] Other provisions of Title Three supplement these rules by giving the Quebec court a discretion to either intervene or decline to do so in a dispute. Article 3135 is particularly important, as it confirms the incorporation of the doctrine of *forum non conveniens* into private international law in Quebec. Under this provision, a Quebec

court may decline to hear a case over which it has jurisdiction if it considers that the authorities of another country are in a better position to decide.

[21] Title Four concerns foreign judgments or judgments rendered outside Quebec that are brought before the courts of that province. It establishes the conditions for the recognition and enforcement of such judgments.

[22] In accordance with the evolution of private international law, which seeks to facilitate the free flow of international trade, the basic principle laid down in art. 3155 *C.C.Q.* for all the rules in Title Four is that any decision rendered by a foreign authority must be recognized unless an exception applies. The exceptions are limited: the decision maker had no jurisdiction, the decision is not final or enforceable, there has been a contravention of the fundamental principles of procedure, *lis pendens* applies, the outcome is inconsistent with international public order, and the judgment relates to taxation. This legislative intent is clear from the wording of art. 3155:

> 3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:
>
> (1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;
>
> (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
>
> (3) the decision was rendered in contravention of the fundamental principles of procedure;
>
> (4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;
>
> (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
>
> (6) the decision enforces obligations arising from the taxation laws of a foreign country.

[23] Article 3158 limits the scope of a Quebec court's power to review a foreign decision. The court must confine itself to considering whether the requirements for recognizing the decision have been met. It cannot review the merits of the case or retry the case. Article 3158 expressly prohibits this:

> 3158. A Québec authority confines itself to verifying whether the decision in respect of which recognition or enforcement is sought meets the requirements prescribed in this Title, without entering into any examination of the merits of the decision.

[24] However favourable these principles may be to the recognition of foreign decisions, it must still be found that none of the exceptions provided for in art. 3155 *C.C.Q.* apply. In particular, as art. 3155(1) provides, the Quebec court must find that the court of the country where the judgment was rendered had jurisdiction over the matter. In this regard, Title Four also contains arts. 3164 to 3168, which set out rules the Quebec court is to apply to determine whether the foreign authority had jurisdiction. The main analytical tool for art. 3164 relates to the technique of referring to the rules in Title Three on establishing the jurisdiction of Quebec authorities.

[25] This provision creates a mirror effect. The foreign authority is deemed to have jurisdiction if the Quebec court would, by applying its own rules, have accepted jurisdiction in the same situation (G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at p. 416). To this principle, art. 3164 *C.C.Q.* adds the requirement of a substantial connection between the dispute and the foreign authority seised of the case:

> 3164. The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case.

[26] Articles 3165 to 3168 then set out more specific rules applicable to a variety of legal situations. Only art. 3168 is important for the purposes of this case. It identifies the cases in which a Quebec court will recognize a foreign authority's jurisdiction in personal actions of a patrimonial nature. This provision applies to the matters in dispute here. It provides for six situations in which a foreign authority's jurisdiction will be recognized in such actions:

> 3168. In personal actions of a patrimonial nature, the jurisdiction of a foreign authority is recognized only in the following cases:
>
> (1) the defendant was domiciled in the country where the decision was rendered;
>
> (2) the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;
>
> (3) a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;

(4) the obligations arising from a contract were to be performed in that country;

(5) the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;

(6) the defendant has recognized the jurisdiction of the foreign authority.

[27] Because of the way these rules of recognition are set out in the legislation, a problem rises that is of particular significance for the analysis of the instant case. Do the jurisdictional rules in arts. 3164 to 3168 incorporate, by reference to Title Three, the doctrine of *forum non conveniens*? Do they thus give a Quebec court the power, even if the foreign authority's jurisdiction has been established, to determine whether the court that rendered the decision should have applied the doctrine of *forum non conveniens*? Can a Quebec court refuse to recognize a judgment rendered outside Quebec because, in its opinion, the foreign court should, pursuant to that doctrine, have declined jurisdiction over the case?

C. Mirror Effect and Application of the Doctrine of Forum Non Conveniens

[28] The question of the mirror effect and its scope has been a problem in Quebec private international law since the *Civil Code of Québec* came into force. In art. 3164 *C.C.Q.*, the legislature has not been as clear as might be hoped about the scope of its reference to the provisions of Title Three of Book Ten (see, for example, Goldstein and Groffier, at p. 416). This drafting problem has led some Quebec authors and judges to support what is known as the "little mirror" theory. This theory seems to be based on a literal interpretation of the reference in art. 3164 to the general provisions of Title Three on determining whether a Quebec authority has jurisdiction and on the exercise of such jurisdiction. Under that interpretation, because the reference does not exclude any of Title Three's provisions, it necessarily encompasses the doctrine of *forum non conveniens*, which is accepted in Quebec private international law under art. 3135 *C.C.Q.*

[29] Thus, according to the theory, the possibility of applying the doctrine of *forum non conveniens*, when considering a motion for judicial recognition of a foreign or external judgment, supplements the provisions on establishment of the foreign court's jurisdiction by

enabling the Quebec authority to more effectively ensure compliance with the basic requirement under art. 3164 *C.C.Q.* of a substantial connection between the dispute and the country whose authority is seised of the case. Moreover, this interpretation means that, when considering whether a foreign court has jurisdiction over an action of a patrimonial nature, the Quebec authority will not limit itself to determining whether the application for recognition corresponds to one of the situations provided for in art. 3168 *C.C.Q.* The Quebec court can also consider how the foreign authority should have applied the doctrine of *forum non conveniens* to decide whether or not to decline jurisdiction.

[30] Goldstein and Groffier, who support the little mirror theory, stress the importance they attach to the wording of art. 3164 *C.C.Q.*, which does not limit the scope of the reference to the general provisions of Title Three (at p. 417):

> [TRANSLATION] It must first be noted that the jurisdiction of Quebec authorities that is extended to foreign authorities is logically determined not only through specific connecting principles, *but also through the general provisions* such as those on *forum non conveniens*, *forum conveniens* and exclusive jurisdiction. In referring to the Quebec rules on jurisdiction, art. 3164 C.C.Q. does not limit them to the specific rules (arts. 3141 to 3154 C.C.Q.) and therefore refers implicitly to arts. 3134 to 3140 C.C.Q. as well. The latter provisions considerably alter the specific rules on jurisdiction in Quebec by giving the courts a broad discretion. It should therefore be accepted that foreign authorities can have the same freedom to exclude heads of jurisdiction that the Quebec courts would have excluded. As Professor Glenn points out:
>
> > The foreign authority's jurisdiction is assessed not broadly, in light of the connections accepted under the various heads of jurisdiction, but in light of the specific circumstances of each case. The question is whether the Quebec authority would have agreed to exercise its jurisdiction in such circumstances. The mirror principle becomes the principle of a "little mirror" that reflects the specific circumstances of the case in light of the general provisions. (Emphasis in original)

These authors add that the Quebec court may therefore apply the doctrine of *forum non conveniens* to determine how, in its view, the foreign court should have applied that very doctrine (p. 417; along the same lines, see also: H.P. Glenn, "Droit international privé", in *La réforme du Code civil* (1993), vol. 3, 669, Nos. 117-19, at pp. 770-72).

[31] The Quebec Court of Appeal adopted this approach in the instant case. It recognized that the Ontario Superior Court of Justice had jurisdiction over the subject matter in the usual sense of the term (at para. 64). However, because it found that it had to consider the jurisdiction of the Ontario court through the prism of the reciprocity required by the little mirror theory, it concluded that the Superior Court of Justice should have applied the doctrine of *forum non conveniens* and should, on that basis, have excluded Quebec residents from the class in the class proceeding it was certifying (paras. 64-69). The Superior Court of Justice should have recognized that it was not the most appropriate forum with respect to this class of claimants, and thus deferred to the jurisdiction of the Quebec Superior Court.

[32] However, some Quebec authors reject the application of *forum non conveniens* in the recognition of foreign or external judgments. They would limit the effect of the reference to Title Three in art. 3164 by excluding *forum non conveniens* from it. For example, in a study on the rules for recognizing and enforcing foreign or external judgments in Quebec, Professor Geneviève Saumier is highly critical of the application of this doctrine ("The Recognition of Foreign Judgments in Quebec — The Mirror Crack'd?" (2002), 81 *Can. Bar Rev.* 677). According to her, this interpretation of art. 3164 *C.C.Q.* is not justified despite the very general language used in drafting that provision. In her opinion, to apply the doctrine of *forum non conveniens* when considering an application for recognition confuses the establishment of the foreign court's jurisdiction as such with the exercise of that jurisdiction (pp. 691-92). Thus the literal interpretation of art. 3164 *C.C.Q.* cannot be reconciled with the general principle in art. 3155 *C.C.Q.* that a foreign or external judgment should be recognized once the originating court has been shown to have jurisdiction in the strict sense, and it is inconsistent with the fact that this principle remains the cornerstone of the system of recognition of foreign judgments established by the *Civil Code of Québec*. The addition of a mechanism based on the discretion of the court to which the application has been made, one that depends in all cases on the existence of a specific factual context, is inconsistent with this principle (pp. 693-94).

[33] Professor Jeffrey Talpis refers to a few cases in which Quebec courts have favoured the application of the doctrine of

forum non conveniens in the recognition and enforcement of foreign decisions. However, he expresses serious reservations about the soundness of this approach, which he considers incompatible with the legal framework for the recognition of foreign or external judgments set out in the *Civil Code of Québec*:

> Despite the fact that some support obviously exists in jurisprudence and doctrine for the "little mirror" approach, it is somewhat distressing to note that a reviewing court can decide that the originating court should have declined jurisdiction on *forum non conveniens* grounds and that the first court's failure to do so may be justification for denial of recognition of the resulting judgment is rather distressing. To deny recognition for failure to do something that is only discretionary in the first court would seem to contradict the very foundations of the exceptional character of the *forum non conveniens* doctrine in Quebec. This "second guess" approach is even more disturbing in an inter-provincial context. Be that as it may, one cannot deny that application of the two grounds does provide a good antidote to inappropriate foreign forum shopping.
>
> (*"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), at p. 109; see also the critical comments of Bich J.A. of the Quebec Court of Appeal in *Hocking v. Haziza*, 2008 QCCA 800, [2008] R.J.Q. 1189, at paras. 174 *et seq.*)

[34] In my view, these reservations about extending the application of the doctrine of *forum non conveniens* to the recognition of foreign or external judgments in Quebec are justified. I do not deny that the application of this doctrine finds support, at first glance, in the very broad wording of the reference to Title Three in art. 3164 *C.C.Q.* However, such an interpretation disregards the main principle underlying the legal framework for the recognition and enforcement of foreign or external judgments set out in the *Civil Code of Québec*. Enforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised, apart from the exceptions provided for in the *Civil Code of Québec*. To apply *forum non conveniens* in this context would be to overlook the basic distinction between the establishment of jurisdiction as such and the exercise of jurisdiction. In this respect, I believe that it will be helpful to repeat the quotation of the first paragraph of art. 3155 of the *Civil Code of Québec*, which sets out the following exception to the obligation to recognize a foreign decision:

> ... the authority of the country where the decision was rendered had no jurisdiction ....

The words chosen by the legislature specify the nature of the analysis the court hearing the application for recognition must conduct. The court must ask whether the foreign authority had jurisdiction, but is not to enquire into how that jurisdiction was supposed to be exercised.

[35] Furthermore, this distinction between jurisdiction and the exercise thereof is recognized in the wording of the provisions of the *Civil Code of Québec* on the jurisdiction of Quebec authorities. Article 3135 *C.C.Q.* provides that a Quebec court may refuse to exercise jurisdiction it has under the relevant connecting rules. However, in reviewing an application for recognition of a foreign or external judgment, the Quebec court does not have to consider how the court of another province or of a foreign country should have exercised its jurisdiction or, in particular, how it might have exercised a discretion to decline jurisdiction over the case or suspend its intervention.

[36] Article 3164 *C.C.Q.* provides that a substantial connection between the dispute and the originating court is a fundamental condition for the recognition of a judgment in Quebec. Articles 3165 to 3168 then set out, in more specific terms, connecting factors to be used to determine whether, in certain situations, a sufficient connection exists between the dispute and the foreign authority. The application of specific rules, such as those in art. 3168 respecting personal actions of a patrimonial nature, will generally suffice to determine whether the foreign court had jurisdiction. However, it may be necessary in considering a complex legal situation involving two or more parties located in different parts of the world to apply the general principle in art. 3164 in order to establish jurisdiction and have recourse to, for example, the forum of necessity. The Court of Appeal added an irrelevant factor to the analysis of the foreign court's jurisdiction: the doctrine of *forum non conveniens*. This approach introduces a degree of instability and unpredictability that is inconsistent with the standpoint generally favourable to the recognition of foreign or external judgments that is evident in the provisions of the *Civil Code*. It is hardly consistent with the principles of international comity and the objectives of facilitating international

and interprovincial relations that underlie the *Civil Code's* provisions on the recognition of foreign judgments. In sum, even when it is applying the general rule in art. 3164, the court hearing the application for recognition cannot rely on a doctrine that is incompatible with the recognition procedure.

[37] It would accordingly have been sufficient had the Quebec authorities asked whether the Ontario Superior Court of Justice had jurisdiction, in the strict sense, over the dispute. If it did, their next step would have been to determine whether the respondent, Mr. Lépine, had established that there were other obstacles to the recognition of the Ontario judgment, as indeed the Quebec Court of Appeal found that he had.

D. Jurisdiction of the Ontario Superior Court of Justice

[38] There is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to art. 3168 *C.C.Q.*, since the Corporation, the defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction. The question whether there were obstacles to the recognition of the judgment is more problematic, especially given the allegations that it had been rendered in contravention of the fundamental principles of procedure and that the motion for authorization made in Quebec and the parallel application for certification made in Ontario had given rise to a situation of *lis pendens*.

E. Issue of Notices to the Quebec Members of the National Class

[39] One of the main arguments made by the respondent in contesting the application for recognition relates to the issue of contravention of the fundamental principles of civil procedure. Under art. 3155(3) *C.C.Q.*, such a contravention precludes enforcement. The Court of Appeal accepted this argument, among others, to justify dismissing the application for recognition.

[40] The issue of the application of art. 3155(3) arises in relation to the notices given pursuant to the Ontario Superior Court of Justice's judgment certifying the class proceeding. The respondent submits that the very content of the notices contravened the fundamental principles of procedure. In his opinion, the notices published in Quebec newspapers were insufficient and confusing. Their wording did not enable class members residing in Quebec to understand the impact of the Ontario judgment on their rights and on the

authorization of the class action by the Quebec Superior Court on December 23, 2003.

[41] This argument does not amount to a request to review the Ontario Superior Court of Justice's decision. The judge hearing the application for recognition does not examine the merits of the judgment (art. 3158 *C.C.Q.*). However, at the stage of recognition and, therefore, of enforcement of the judgment, he or she must consider whether the procedure leading up to the decision and the procedure for giving effect to it are consistent with the fundamental principles of procedure. The judge hearing the application is concerned not only with the procedure prior to the judgment but also with the procedural consequences of the judgment. This approach is particularly important in the case of class actions.

[42] A class action takes place outside the framework of the traditional duel between a single plaintiff and a single defendant. In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights — in particular the possibility of opting out of the class action — they have under the judgment, and sometimes, as here, about a settlement in the case. In the instant case, the question raised by the respondent relates not to the Ontario statute but to the way it was applied by the Ontario Superior Court of Justice in a case in which that court knew that a parallel proceeding was under way in Quebec. Were the notices provided for in the Ontario court's judgment therefore consistent, in the context in which they were published, with the fundamental principles of procedure applicable to class actions?

[43] The Ontario Court of Appeal stressed the importance of notice to members in a case involving an application for recognition of a judgment rendered in Illinois, in the United States. It emphasized the vital importance of clear notices and an adequate mode of publication (*Currie v. McDonald's Restaurants of Canada Ltd.*

(2005), 74 O.R. (3d) 321, 250 D.L.R. (4th) 224, at paras. 38-40). In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights. These requirements constitute a fundamental principle of procedure in the class action context. In light of the requirement of comity between courts of the various provinces of Canada, they are no less compelling in a case concerning recognition of a judgment from within Canada. Compliance with these requirements constitutes an expression of such comity and a condition for preserving it within the Canadian legal space.

[44] In the context of the instant case, I agree with the opinion expressed by the Quebec Court of Appeal and with the findings of the trial judge on the notice issue. The procedure adopted in the Ontario judgment certifying the class proceeding for the purpose of notifying Quebec members of the national class established in the judgment contravened the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.*, and enforcement was therefore precluded.

[45] The clarity of the notice to members was particularly important in a context in which, to the knowledge of all those involved, parallel class proceedings had been commenced in Quebec and in Ontario. The notice published in Quebec pursuant to the Ontario judgment did not take this particular circumstance into account. Those who prepared it did not concern themselves with the situation resulting from the existence of a parallel class proceeding in Quebec and the publication of a notice pursuant to the Quebec Superior Court's judgment authorizing the class action. The notice made it look like the Ontario proceeding was the only one. Nor, even though Quebec residents were also a group under the Quebec class action, did the notice clearly state that the settlement applied to them. In this regard, the Quebec Superior Court carefully described the problems

that had resulted from the procedure adopted to give effect to the Ontario court's judgment certifying the class proceeding in the context in which that procedure was conducted. Thus, on February 21, 2004, the designated representative in the Quebec class action published a notice of the authorization to institute a class action on behalf of a group that was limited to Quebec residents. The notice indicated that the members could request exclusion on or before April 21, 2004. In the Ontario class proceeding, the notice published on April 7, 2004, that is, shortly before the expiry of the time limit for requesting exclusion from the Quebec action, stated that a settlement had been reached in class proceedings commenced in Ontario and British Columbia but did not mention that the settlement also applied to Quebec residents. The way the notice was written was likely to confuse its intended recipients, as Rayle J.A. of the Quebec Court of Appeal correctly noted in her opinion (see para. 73).

[46] In sum, the Ontario notice did not properly explain the impact of the judgment certifying the class proceeding on Quebec members of the national class established by the Ontario Superior Court of Justice. It could have led those who read it in Quebec to conclude that it simply did not concern them. The argument made by the respondent in this respect was in itself sufficient to justify dismissing the application for recognition. However, another argument raised by the respondent and accepted by the Quebec Court of Appeal — *lis pendens* — should also be examined.

F. Lis Pendens

[47] The respondent has argued since the beginning of the recognition proceedings that enforcement was precluded by a situation of *lis pendens*, as provided for in art. 3155(4) *C.C.Q.* The Quebec Superior Court expressed no opinion on this point, but the Court of Appeal accepted this argument.

[48] There are two different legal situations in which *lis pendens* is dealt with in Quebec private international law. The first reference to *lis pendens* in the *Civil Code of Québec* appears in art. 3137, which is found among the general rules that establish the bases for the jurisdiction of Quebec authorities and the fundamental conditions for exercising that jurisdiction in relation to a dispute involving a foreign element. Under art. 3137, a Quebec court may stay its ruling on a dispute over which it otherwise has jurisdiction if there

is a situation of *lis pendens* with respect to an action under way before a foreign authority. *Lis pendens* depends on the existence of three identities, that of the parties, that of the facts on which the actions are based and that of the object of the actions:

> 3137. On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

[49] The second situation of *lis pendens*, the one with which we are concerned in this appeal, arises in respect of an application for recognition of a judgment rendered by a foreign authority. Under art. 3155, this situation is one of the cases in which a decision rendered outside Quebec cannot be declared enforceable in that province.

[50] The first situation concerns the discretion of a Quebec court to decide whether it will exercise its jurisdiction despite a finding of *lis pendens* (*Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344 (C.A.), at p. 1351). In the second situation, the one that arises in respect of an application for recognition of a foreign or external judgment, the court hearing the application has been given no discretion under art. 3155(4) *C.C.Q.* The legislature has precluded the application of the general principle of recognition of foreign or external judgments in a situation of *lis pendens* (see: Glenn, No. 105, at pp. 763-64). Thus, when the conditions for *lis pendens* are met, the *Civil Code of Québec* guarantees that the Quebec court has priority, provided that it was seised of the case first.

[51] What must now be determined is whether, as a result of *lis pendens*, the Quebec courts were precluded in the case at bar from recognizing the judgment of the Ontario Superior Court of Justice. The conditions for *lis pendens* are well established in the domestic context in Quebec civil law. Like *res judicata*, *lis pendens* depends on identity of the parties, identity of the cause of action and identity of the object (J.-C. Royer, *La preuve civile* (4th ed. 2008), Nos. 788-89, at p. 635; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440). However, in private international law matters, the nature of the required identities is altered somewhat in the *Civil Code of Québec* in the case of *lis pendens*. In particular, in art. 3137, as in art. 3155(4), the Code retains identity of the parties and

identity of the object but substitutes identity of the facts on which the actions are based for identity of the cause of action.

[52] This change takes account of the problems involved in reconciling the specific features of legal systems that come into contact with each other, as well as the diversity in their substantive law concepts and procedural rules. The Quebec judge therefore considers the facts on which the actions are based and does not go beyond the differences in the legal systems in question to try to find an identity of the cause of action. The analysis thus focuses more on the respective objects of the two actions (*Birdsall*, at pp. 1351-52; Goldstein and Groffier, at pp. 325-26).

[53] However, the appellant argues that, in any event, the Quebec courts did not even have to consider the question of *lis pendens*. According to art. 3155(4), *lis pendens* is relevant only if the Quebec proceeding predates the foreign action. The Corporation submits that the Quebec proceeding commenced no earlier than the date the Quebec Superior Court authorized the class action, that is, December 23, 2003. In support of this argument, the appellant relies, *inter alia*, on *Thompson v. Masson*, [1993] R.J.Q. 69, in which the Quebec Court of Appeal stressed that a class action does not commence until it is filed, that is, after the judgment authorizing the class action. Before that time, there is only an authorization proceeding whose purpose is to screen applications. In the instant case, according to the appellant, the Ontario proceeding predated the Quebec action because it was certified one day before the class action was authorized in Quebec.

[54] This interpretation is consistent neither with the wording of art. 3155(4) nor with the way that provision is applied in the context of a class action. While it is true that Mr. Lépine's action did not exist yet in Quebec at the time the judgment certifying the class proceeding was rendered in Ontario, an application for authorization was nevertheless before the Quebec Superior Court prior to December 23, 2003. The term "dispute" has a broad meaning that encompasses all types of legal proceedings (see *Black's Law Dictionary* (8th ed. 2004), at p. 505; see also, regarding the term "litige" used in the French version of art. 3155(4), H. Reid, *Dictionnaire de droit québécois et canadien* (3rd ed. 2004), at p. 355; *Le Grand Robert de la langue française* (2nd ed., enl. 2001), vol. 4, at p. 864; Goldstein and

Groffier, at p. 384). The application for authorization is a form of judicial proceeding between parties for the specific purpose of determining whether a class action will take place. The Quebec proceeding predated the one in Ontario, and the Quebec court was therefore seised before the Ontario court, which means that art. 3155(4) *C.C.Q.* was applicable.

[55] At that stage, the three identities were present. The basic facts in support of both proceedings were the same for Quebec residents, namely the purchase and discontinuation of an Internet access service. The object was also the same: compensation for breach of the undertaking. Identity of the parties was established: a legal representative, the applicant at the authorization stage, was acting for the entire group of residents. The identity of the representative in a class action may vary in the course of the proceeding, but there is always one representative for all the members. What the courts have required is not physical identity of the parties, but legal identity (*Hotte v. Servier Canada Inc.*, [1999] R.J.Q. 2598 (C.A.), at p. 2601; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374 at pp. 410-11, 78 D.L.R. (4th) 666). The *lis pendens* argument was well founded, and the Court of Appeal rightly accepted it. Like the contravention of the fundamental principles of procedure, the *lis pendens* situation precluded judicial recognition of the decision of the Ontario Superior Court of Justice.

G. National Classes and Parallel Class Actions

[56] In addition to its conclusions of law, the Quebec Court of Appeal seems to have had reservations or concerns about the creation of classes of claimants from two or more provinces. We need not consider this question in detail. However, the need to form such national classes does seem to arise occasionally. The formation of a national class can lead to the delicate problem of creating subclasses within it and determining what legal system will apply to them. In the context of such proceedings, the court hearing an application also has a duty to ensure that the conduct of the proceeding, the choice of remedies and the enforcement of the judgment effectively take account of each group's specific interests, and it must order them to ensure that clear information is provided.

[57] As can be seen in this appeal, the creation of national classes also raises the issue of relations between equal but different superior

courts in a federal system in which civil procedure and the administration of justice are under provincial jurisdiction. This case shows that the decisions made may sometimes cause friction between courts in different provinces. This of course often involves problems with communications or contacts between the courts and between the lawyers involved in such proceedings. However, the provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court's role to define the necessary solutions. However, it is important to note the problems that sometimes seem to arise in conducting such actions.

IV. Conclusion

[58] For these reasons, I would dismiss the appeal with costs.

Appeal dismissed.