

Commercial Litigation

June 5, 2007

Our Client Transat Tours Canada Inc. Prevails in the Supreme Court

**A Precedent Favourable to Canadian Businesses
Is Established in a Matter Involving Injunctions and Private International Law**

On May 25, 2007, the Supreme Court of Canada rendered a unanimous decision in favour of our client, Transat Tours Canada Inc., a subsidiary of the Transat A.T. Inc. group, which ranks among the ten largest tourism businesses in the world. This precedent is of crucial importance for Canadian firms carrying on business abroad.

The Supreme Court of Canada ruled that when a superior court in Canada has jurisdiction under the rules of private international law, it has the power to issue injunctive orders against a foreign (non-resident) corporation or individual, even if it or he does not have assets or activities in Canada. This is the first time the Supreme Court of Canada has ruled on the possibility of issuing purely extra-territorial injunctions.

This decision emphasizes the importance of including, in contracts entered into with foreign individuals or corporations, a clause that grants exclusive jurisdiction to Canadian courts.

A Lavery, de Billy team composed of Richard A. Hinse, Odette Jobin-Laberge, Élise Poisson and Bruno Verdon represented Transat Tours Canada Inc. in this matter.

Summary of the facts

In 2004, Tescor, S.A. de C.V. ("Tescor"), a Mexican corporation, signed an exclusivity contract with Transat Tours Canada Inc. ("Transat") for the sale, in Canada, of rooms at the Qualton hotel in Puerto Vallarta. The contract contained a choice of forum clause that conferred exclusive jurisdiction to the courts of Quebec.

In 2005, Transat learned that its competitor, MyTravel Canada Holidays Inc., which also carries on business under the name Sunquest Holidays ("MyTravel"), was offering its clients rooms at the same Mexican hotel. MyTravel defended itself by maintaining that it had entered into a contract with another company, which then controlled the hotel. Transat replied that seeing the close links existing between Tescor and the other Mexican corporations involved, including the one that allegedly contracted with MyTravel, these corporations could not hide behind their separate corporate identities to avoid complying to the contract entered into with Transat.

In order to enforce its exclusivity contract, Transat filed a motion for a permanent injunction and a motion for a provisional injunction against Tescor, the Mexican corporation with which it contracted, as well as MyTravel and the other Mexican corporations related to Tescor and involved in the ownership, rental or management of the Mexican hotel, namely Impulsora Turistica de Occidente, S.A. de C.V. ("Impulsora"), Vision Corporativa Y Fiscal, S.A. de C.V. ("Vision") and Hotelera Qualton, S.A. de C.V. ("Hotelera").

Impulsora, Vision and Hotelera petitioned the Superior Court to decline jurisdiction, alleging that it lacked the power to issue an injunction having purely extraterritorial effects against a person having neither assets nor activities in Quebec, and it was this that ultimately led to the proceedings before the Supreme Court.

The impact of the Supreme Court of Canada's judgment

The Supreme Court of Canada clearly confirmed that a court having jurisdiction has all the powers necessary for the exercise of its jurisdiction, including the power to issue injunctive orders, even those having extraterritorial effects. It also confirmed that the fact that a superior court may have difficulty sanctioning any failure to comply with its orders does not affect its power to issue such an injunctive order.

If the position of the Mexican corporations and MyTravel had been endorsed, it would no longer have been possible to apply to the Superior Court to demand the specific performance of and compliance with any contract entered into with a foreign party having neither assets nor activities in Quebec, even though such party had voluntarily agreed to the jurisdiction of the Quebec courts in a choice of forum clause.

In the context of market globalization, it would have been inappropriate to restrict the rights of the parties to a commercial contract containing a choice of forum clause only to an action in damages where specific performance is the remedy that appears to be the most appropriate to the party who wishes to claim it.

In this respect, the decision is of crucial importance for Transat. It regularly carries on its business abroad and, given the uncertainties that may result from doing so, Transat can, by using its choice of forum clause, seek as much as possible to enforce compliance with and specific performance of its clauses entitling it to exclusive distribution rights in Quebec.

This victory obtained by our firm on behalf of Transat also has a positive impact for any Canadian business developing its markets abroad. By taking care to insert a choice of forum clause granting jurisdiction to Canadian courts in their contracts, Canadian businesses or individuals will be able to seek injunctive orders from Canadian courts in order to enforce their rights.

To access the Supreme Court judgment, visit
<http://scc.lexum.umontreal.ca/en/2007/2007scc20/2007scc20.html>

The content of this text provides our clients with general comments on recent legal developments. The text is not a legal opinion. Readers should not act solely on the basis of the information contained herein.

Subscription: You may subscribe, cancel your subscription or modify your profile by visiting Publications on our website at www.laverydebilly.com or by contacting Carole Genest at 514 877-3071.