

## CASE SUMMARY



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## WORKING IN CANADA FOR FOREIGN STATES – CAN YOU SUE? CAN YOU LIEN?

### *Construction Excedra Inc. v. Kingdom of Saudi Arabia*

The majority of the world's countries are represented in Canada by ambassadors, high commissioners or consuls. There are currently 129 resident accredited diplomatic missions and 490 consular posts in Canada. These embassies, high commissions and consulates are either owned or leased by the countries they represent, as are many of the personal residences of the foreign heads of mission and their staff. In addition, foreign states may own or lease property to pursue commercial goals such as tourism or trade. A recent Ontario decision discusses the limited remedies available to builders when construction takes place on such property.

Two different immunities protect the interests of foreign states in Canada. State immunity limits the jurisdiction of domestic courts over foreign countries, generally rendering foreign states immune from civil suits in Canada, with some exceptions. Since ancient times, states have recognized the special status of diplomatic agents as a cornerstone of successful international relations. Diplomatic immunity therefore provides protection to diplomatic personnel and property from the reach of Canadian law and courts.

In *Construction Excedra Inc. v. Kingdom of Saudi Arabia*, Excedra entered into a contract with the Kingdom of Saudi Arabia for the construction of a cultural centre on property owned by Saudi Arabia. Construction proceeded over a period of three years. Excedra remained unpaid in the amount of \$964,150 and registered a construction lien against title to the property. Saudi Arabia argued that the

property was diplomatic property, entitled to the cloak of diplomatic immunity, and therefore protected from attachment in the form of a lien.

### Diplomatic Immunity

Diplomatic missions of foreign states in Canada are generally immune from search, requisition, attachment or execution. The *Foreign Missions and International Organizations Act* incorporates parts of the *Vienna Convention on Diplomatic Relations* into the laws of Canada in respect of all foreign states, regardless of whether those states are parties to the Convention. Article 22 of the *Vienna Convention* provides that:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

The status of a diplomatic mission is extended by a certificate issued by the Minister of Foreign Affairs. In the *Excedra* case, the diplomatic status was extended to the property and included that of immunity from attachment.

Article 1 of the *Vienna Convention* defines “premises of the mission” as the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission. “Head of mission” is defined as the person charged by the sending state with the duty of acting in that capacity.

To be immune, therefore, the premises must be used for the purposes of the mission. Whether the premises are leased or owned does not matter for immunity purposes.

The work done in this case was for a cultural bureau linked to the embassy. The Saudi Ministry of Higher Education has a number of diplomatic responsibilities related to education and culture. These responsibilities include the authority for post-secondary educational affairs and acting as the representative of the Saudi Arabian government abroad in all educational and cultural affairs. The latter work is done through cultural offices, such as the cultural bureau.

Excedra argued that the construction activities on the property amounted to commercial activities, and therefore the contract was entered into as part of those commercial activities. Saudi Arabia's position was that the status of the property had to be determined on the basis of the use to which the property ultimately had been put, and that use being cultural, the property at all times enjoyed status as a "diplomatic mission". The court accepted Saudi Arabia's position and declared the premises immune from attachment. Excedra's lien claim was therefore dismissed and the lien discharged from the title to the property.

The *Excedra* decision can be contrasted with the 1998 Ontario decision in *Croatia (Republic) v. Ru-Ko Inc.* In that case, a contractor performed construction work on property owned by Croatia and registered a lien when it remained unpaid. Croatia, just like Saudi Arabia in the *Excedra* case, argued that, based on the principle of diplomatic immunity, the lien ought to be discharged.

The court held that, before reaching the issue of inviolability of the mission or whether the lien was to be defined as either an attachment of execution, a determination had to be made on the threshold question as to whether the lands and buildings in question are or were "premises of the mission", and that the operative words in the *Vienna Convention* on this question were "used for the purposes of the mission including the residence of the head of mission". The court held that in this case, the premises were not so used:

There may be many buildings owned by foreign states in the City of Ottawa and in Canada, but it is clear that the *Vienna Convention* would allow immunity to be granted to only such lands and

buildings that are used for the purposes of the diplomatic mission of that foreign sovereign state.

On the material before me, it is clear that the present Ambassador never lived in the premises. There is no evidence that previous heads of mission or previous Ambassadors ever resided in the premises. There is no evidence that it was designated as a premises of mission. There is no evidence as to the present use, if any, of the premises.

[...]

The applicant argues that the Ambassador could not move into the building as it was not complete. That is understandable but wherever the Ambassador is living at present, would be the premises of the mission, and that location would be entitled to the inviolability and immunity of Article 22 of the *Vienna Convention*. When and if the Ambassador had taken up occupancy of these premises and used them, then the inviolability and immunity provisions would come into force.

In my opinion, the lands and buildings in this proceeding have never been used in the past or are used at present or in all likelihood will ever be used in the future as the premises of the mission.

In the result, therefore, no immunity attached to the premises, and the application to vacate the lien was dismissed.

### **State Immunity**

The second type of immunity extending to foreign states is state immunity. Under the federal *State Immunity Act*, a foreign state is immune from the jurisdiction of any court in Canada, with certain limited exceptions. One of the statutory exceptions relates to commercial activities of the foreign state. Determining whether a state activity is a "commercial activity" is not always a straightforward exercise. In a 1971 Supreme Court of Canada decision, *Venne v. Congo (Republic)* a Canadian architect was retained by Congolese diplomats to design the Congo's pavilion for Expo 67 in Montreal. The architect sued the Congo on that contract. The Supreme Court of Canada held that the common law doctrine of state immunity gave the Congo immunity from the suit because the transaction involved a public sovereign act on behalf of the country. In that decision, the Court reviewed a Quebec decision, *Allan Construction v. Venezuela*, where the

Quebec court was considering a contract for the construction of another national pavilion at Expo 67. In that case, however, the foreign state in question intended to incorporate in its pavilion a restaurant with the right to sell alcoholic liquor and to sell the products of Venezuela, and it was held that, as a result, the contract was a purely private and commercial one and Venezuela was subject to the jurisdiction of the Quebec courts.

Therefore, the activity ultimately carried out at each pavilion, once constructed, was the basis upon which the nature of the activity on the property of the foreign states was determined.

In *Sieniecki v. Shea Construction Ltd.*, an Ontario Master held that the supply and installation of electrical materials to the Polish consulate in Toronto, upon the request of representatives of the Government of Poland, was a commercial transaction. In that case, no lien was claimed, and the contractor sought a personal judgment only. The case was only argued on the basis of state immunity; diplomatic immunity was not discussed. The Master held that, due to the commercial activity exemption, the claim could proceed.

Case law makes clear that state immunity is preserved if the proceedings merely touch on or incidentally affect the commercial aspect of the activity. In other words, to deprive the defendant of state immunity, the proceedings must not seriously impact or interfere with a sovereign aspect of the activity.

While both immunities are distinct and separate, courts will, in both cases, look to the purpose for which the premises are used, and cases on one immunity may assist courts dealing with diplomatic immunity. As the court in *Excedra* held:

The defence raised in each of the Expo 67 Cases was one of sovereign (or state) immunity. Although, for the purpose of the motion before me, the defendant relies solely on diplomatic immunity, the Expo 67 Cases are relevant. In those cases, the activity ultimately carried out at each pavilion, once constructed, was the basis upon which the nature of the activity on the property of the foreign states was determined.

Contractors working on property owned or leased by foreign states should therefore be aware of the fact

that in case of disputes arising out of the construction, they may not have access to Canadian courts. Contractors, and especially trades working on such projects and their suppliers who have no contractual remedies against the owner, should be aware that the lien remedy might not be available to them.

### **Ontario Superior Court of Justice**

*Construction Excedra Inc. v. Kingdom of Saudi Arabia*  
Sylvia Corthorn J.  
January 9, 2017

### **CITATIONS**

- 15787855 Ontario Inc. v. Contract Glaziers Corp.*  
2016 ONSC 7934
- Allan Construction Ltd. v. Venezuela (Republic)*, [1968] C.S. 523 (C.S. Que.)
- Architectural Millwork & Door Installations Inc. v. Provincial Store Fixtures Ltd.*, [2015] O.J. No. 4083, 2015 ONSC 4913, affd [2016] O.J. No. 2357, 2016 ONCA 320
- Atos IT Solutions and Services GMBH v. Sapient Canada Inc.*, [2016] O.J. No. 6270, 2016 ONSC 6852
- Bhasin v. Hrynew*, [2014] S.C.J. No. 71, 2014 SCC 71
- Bombardier Transportation Canada Inc. v. Metrolinx*, [2017] O.J. No. 1903, 2017 ONSC 2372
- Construction Excedra Inc. v. Kingdom of Saudi Arabia*, [2017] O.J. No. 89, 2017 ONSC 105
- Croatia (Republic) v. Ru-Ko Inc.*, [1998] O.J. No. 128 (Gen. Div.)
- P.S.A.C. v. United States Defence Department*, [1992] S.C.J. No. 49, [1992] 2 S.C.R. 50
- R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] S.C.J. No. 13, [1981] 1 S.C.R. 111
- Sieniecki v. Shea Construction Ltd.*, [1987] O.J. No. 2589, 1987 CarswellOnt 2882 (Master)
- Smith v. Chin*, [2006] O.J. No. 4091 (S.C.J.)
- Surespan Construction Ltd. v. Saskatchewan*, [2017] S.J. No. 82, 2017 SKQB 55
- Venne v. Congo (Republic)*, [1971] S.C.J. No. 77, [1971] S.C.R. 997