



---

***The Supreme Court confirms that a Canadian bank must refuse payment to the beneficiary of a letter of credit due to fraud.***

In this appeal, the Court addressed the issue of whether a Canadian bank was required to refuse payment to the beneficiary of a letter of credit because of a third party's fraudulent behaviour, which was attributable to the beneficiary.

In 1998, Bombardier Inc., a Canadian aviation company based in Montreal, concluded a procurement contract with the Hellenic Ministry of Defence (HMOD) in Greece for the sale of 10 firefighting airplanes. They also concluded a second contract pursuant to which Bombardier agreed to subcontract some of the work associated with the airplane procurement to Greek companies. That contract said that if, at the end of a 10-year term, Bombardier did not fulfil its subcontracting obligation, it would owe HMOD a certain amount of money relative to the main contract.

To secure payment of the money Bombardier might owe HMOD under the second contract, the Greek bank at the time (now Eurobank Ergasias S.A., or, Eurobank) issued a letter of credit guaranteeing that Eurobank would pay if Bombardier did not (the Letter of Guarantee). For its part, Eurobank obtained a letter of credit from the National Bank of Canada to secure a reimbursement in the amount that it would need to pay HMOD under the Letter of Guarantee if the latter claimed that Bombardier failed to perform its obligations under the second contract (the Letter of Counter-Guarantee). In short, the letters would work as follows: if HMOD asked Eurobank to honour the Letter of Guarantee, Eurobank would then be entitled to turn to the National Bank to reimburse it under the Letter of Counter-Guarantee.

A dispute eventually arose between HMOD and Bombardier with respect to the latter's subcontracting obligations. HMOD demanded payment from Eurobank under the Letter of Guarantee. In response, Bombardier asked the Superior Court of Québec for an order to stop the National Bank from honouring a subsequent demand for repayment by Eurobank under the Letter of Counter-Guarantee. Bombardier alleged that HMOD, a third party to the Letter of Counter-Guarantee, committed fraud by demanding payment before the dispute was resolved by the planned arbitration procedure and that, because of Eurobank's knowledge and participation in the fraud, the National Bank should be prevented from needing to repay Eurobank on the basis of the "fraud exception". Under Canadian law, banks have a nearly absolute obligation to pay the beneficiary of a letter of credit when a valid demand is made, except when the beneficiary has committed fraud and it is brought to the bank's attention before payment. In this case, Bombardier argued that given HMOD's fraudulent conduct, Eurobank's demand for payment under the Letter of Counter-Guarantee was, by extension, also fraudulent.

The Superior Court rejected Eurobank's demand for payment under the Letter of Counter-Guarantee on the basis of the fraud exception. It held that the manner in which HMOD obtained payment under the Letter of Guarantee was fraudulent, and that Eurobank's own conduct was fraudulent because its payment to HMOD was a result of fraud of which it was aware. It therefore concluded the National Bank was not required to repay Eurobank. A majority of the Quebec Court of Appeal agreed and dismissed the appeal. Eurobank appealed to the Supreme Court of Canada.

The Supreme Court has dismissed the appeal.

**The fraud exception applies with respect to Eurobank's demand for payment under the Letter of Counter-Guarantee.**

Writing for the majority, Justice Kasirer explained that because Eurobank, as the beneficiary of the Letter of Counter-Guarantee, knew of and participated in fraud committed by HMOD, that fraud could be attributed to it as though it was its own. The requirement that there be fraud by the beneficiary to apply the fraud exception was therefore met. Moreover, there was no question that Eurobank's fraud was brought to the attention of the National Bank as the insurer of the Letter of Counter-Guarantee. On that basis, Justice Kasirer concluded that the National

Bank was rightly enjoined by the trial judge from paying out any amount under the Letter of Counter-Guarantee to Eurobank and the majority of the Court of Appeal made no mistake in that conclusion.

---

**Breakdown of the decision:** *Majority:* Justice [Kasirer](#) dismissed the appeal (Chief Justice [Wagner](#) and Justices [Rowe](#), [Martin](#), [Jamal](#), [O'Bonsawin](#) and [Moreau](#) agreed) | *Dissenting:* Justice [Côté](#) would have allowed the appeal, set aside the judgments rendered on appeal and in first instance, and dismissed the action instituted by Bombardier against Eurobank and National Bank (Justice [Karakatsanis](#) agreed).

**More information:** [Decision](#) | [Case information](#) | [Webcast of hearing](#)

**Lower court rulings:** [Judgment](#) (Superior Court of Québec) | [Appeal](#) (Court of Appeal of Quebec)

---