CANADA

- **Do you share our analysis concerning the current state of the settlement of disputes of a private character to which an international organisation is a party?**

The experience in Canada has been that Canadian courts recognize the essential nature of immunity for the efficient functioning of international organizations and have upheld the immunities enjoyed by those organizations. Canadian courts have, in some instances, provided remedies to litigants by finding that an activity falls outside the scope of the immunity enjoyed by the international organization in question. The concerns raised by the Netherlands in its paper have not arisen in the Canadian context.

- **What is your experience with the settlement of disputes of a private character to which an international organisation is a party in your legal system?**

Canadian courts have acknowledged that, without immunity, an international organization would be vulnerable to intrusions into its operations by the host state and that state's courts. Courts have therefore recognized that immunity is crucial to the efficient functioning of international organizations. In cases involving disputes of a private character to which an international organization is a party, Canadian courts conduct a contextual analysis of the relevant Canadian law and international law applicable to the organization to determine the specific scope of immunity enjoyed by that organization. In some instances, Canadian courts have provided remedies to litigants by finding that an activity falls outside the scope of the immunity enjoyed by the international organization. Where the scope of immunity enjoyed by an international organization is broad, Canadian courts have held that while it is unfortunate that a litigant may not have a forum in which to seek a remedy, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state's courts.

Summaries of some key cases are provided below to illustrate in greater detail the approach that has been taken by Canadian courts. Cases have tended to arise in the employment context.

***Amaratunga v. Northwest Atlantic Fisheries Organization* (Supreme Court of Canada)**

In the case of *Amaratunga v. Northwest Atlantic Fisheries Organization*[1] (NAFO), a former senior employee filed a statement of claim in a provincial court, the Nova Scotia Supreme Court, seeking damages for breach of his employment contract for wrongful dismissal and for breach of the contract under which NAFO was required to pay him a separation indemnity. NAFO, headquartered in Nova Scotia, claimed immunity as an international organization under the *Northwest Atlantic Fisheries Organization Privileges and Immunities Order (NAFO Immunity Order)*,[2] which had been made under Canada's *Foreign Missions and International Organizations Act*[3] ("FMIOA"). Under the Act, Canada's Governor in Council (the Governor General acting on the advice of the federal cabinet of ministers) is granted authority to determine the scope of the immunity for each international organization on a case-by-case basis. (This is the manner in which Canada implements obligations on privileges and immunities under treaty law into Canadian law.) Section 3(1) of the *NAFO Immunity Order* granted NAFO immunities "to such extent as may be required for the performance of its functions." Thus the court had to consider the scope of NAFO's immunity in this case.

The Supreme Court of Canada held that "immunity is essential to the efficient functioning of international organizations. Without immunity, an international organization would be vulnerable to intrusions into its operations and agenda by the host state and that state's courts."

[1] 2013 SCC 66, [2013] 3 SC.R. 866
[2] SOR/80-64
[3] S.C. 1991, c. 41

The Court found that the *NAFO Immunity Order* did not grant NAFO absolute immunity, but instead, "a functional immunity, that is, the immunity required to enable NAFO to perform its functions without undue interference." The Court held that "NAFO's autonomy to conduct its business and the actions it takes in performing its functions must be shielded from undue interference" and that "[w]hat is necessary for the performance of NAFO's functions, or what constitutes undue interference, must be determined on a case-by-case basis."

Applying such approach to the case before it, the Court ruled that to permit Amaratunga's claim, which asked the Nova Scotia Supreme Court to pass judgment on NAFO's management of its employees, would constitute undue interference with NAFO's internal management, which goes directly to its autonomy in performing its functions.

The Court therefore largely upheld NAFO's immunity claim. It allowed the appeal in part, however, to permit Amaratunga to proceed with his claim for the unpaid portion of his separation indemnity. The judge reasoned that this claim related solely to a provision of NAFO's staff rules, which required payment of the indemnity to all departing employees regardless of the reason for their termination and that to enforce this rule against NAFO "would not amount to submitting NAFO's managerial operations to the oversight of Canadian courts." NAFO had in fact conceded that its immunity did not protect it from a lawsuit seeking only payment of entitlements under its staff rules.

The Court found that the "absence of a dispute resolution mechanism or of an internal review process is not, in and of itself, determinative of whether NAFO is entitled to immunity." It considered that an employment relationship must be considered as a whole and in light of its context. The Court held that while it was unfortunate that Amaratunga had no forum in which to air his grievances and seek a remedy, "it is the nature of an immunity to shield certain matters from the jurisdiction of the host state's courts."

Ferrada c. International Civil Aviation Organization (Quebec Superior Court)

In *Ferrada c. International Civil Aviation Organization*[4] (ICAO), the claimant sued ICAO, AETNA Life Insurance Company, and the United Nations, Health and life insurance section (UN-HLI) to receive a death benefit for her husband, who had worked for ICAO from 1997 until 2008, which she should have received as his beneficiary. Ferrada's husband had joined the group life insurance plan offered by the defendants, and had paid premiums into the plan. The government of Canada intervened in the matter to invoke the jurisdictional immunities of both ICAO and UN-HLI. The applicant claimed that the matter involved acts of a private nature, and that the exception from jurisdictional immunity for commercial activity applied.

The Superior Court of Quebec first considered the immunities of the UN, which are set out in paragraph 105(1) of the UN Charter, and Articles II and III of the *UN Convention on Privileges and Immunities* (the Convention), and are incorporated into Canadian domestic law by way of the *Privileges and Immunities Accession Order (United Nations)*[5] issued under Canada's *Foreign Missions and International Organizations Act*[6] (FMIOA). In particular, the Court noted Section 2 of Article II of the Convention, which provides that "The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity." The Court characterized the UN's immunity as an "absolute immunity," and stated that as an administrative subdivision of the United Nations, UN-HLI did not have a separate personality from the UN, and therefore benefited from the same absolute immunity enjoyed by the UN.

The Court next considered the immunities enjoyed by ICAO within Canada, noting that Article 3 of the *Headquarters Agreement Between the Government of Canada and the International Civil Aviation Organization* (the Agreement) provides that ICAO, its property, and its assets

[4] 2015 QCCS 3121
[5] C.R.C., c. 1317
[6] S.C. 1991, c. 41

shall enjoy within Canada "the same immunity from suit and every form of judicial process as is enjoyed by foreign states." The Agreement is incorporated into Canadian domestic law by way of the *ICAO Privileges and Immunities Order*[7] (also made under the FMIOA), which provides that the privileges and immunities set out in Articles II and III of the Convention apply to ICAO to the extent specified in the Agreement (namely, the same level enjoyed by foreign states).

The privileges and immunities of foreign states in Canada are set out in the *State Immunity Act*[8] (SIA). The SIA provides that, "[e]xcept as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada." One of the exceptions provided for in the SIA is that "[a] foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state."

While Ferrada argued that: (a) the SIA was accompanied by common law exceptions to state immunity, and (b) that the commercial activity exception in the SIA applied to the payment of death benefits under the joint policy for ICAO employees, the Quebec court found that (1) it had already been decided by the Supreme Court of Canada that the SIA constitutes a complete codification of state immunity within Canada, and no common law exceptions could thus apply, and (2) that the commercial activity exception did not apply in the circumstances, as the working relationship between an international organisation or a state and its employees was not of a commercial nature. In addition, whether or not ICAO had set up a mechanism to resolve disputes pertaining to the payment of benefits (which was not a fact determined on the record) would not have been determinative of whether state immunity should apply, pursuant to the Supreme Court of Canada's decision in *Amaratunga* (see above).

Trempe c. Association du personnel de L'OACI (Quebec Court of Appeal)

In *Trempe c. Association du personnel de L'Organisation de l'aviation civile internationale*,[9] a former employee of the International Civil Aviation Organization (ICAO) brought an action against the ICAO Council, Senior staff members, the ICAO staff Association, and its president. Trempe raised a series of allegations, including improper failure to renew his one-term contract of employment, misinformation that caused him to miss an internal appeal deadline in ICAO's staff regulations and the failure of the staff association to properly represent his claim. The Attorney General of Canada appeared as an intervener to assert that ICAO and ICAO staff were immune from the jurisdiction of Canadian courts.

The Superior Court of Quebec found that, under the *Headquarters Agreement Between the Government of Canada and the International Civil Aviation Organization*, ICAO enjoyed almost absolute immunity from the jurisdiction of Canadian courts. The only exception to this immunity was where ICAO was involved in a commercial activity and had not provided for modes of settling disputes, as required under article 33 of the Headquarters Agreement. The Superior Court of Quebec also held that the impugned actions of ICAO officials were clearly within the performance of their duties, and therefore subject to jurisdictional immunity, under the *ICAO Privileges and Immunities Order*[10] (made under Canada's FMIOA) and the Headquarters Agreement. Finally, the Staff Association was, for the purposes of this action, encompassed within ICAO's immunity and its president was also entitled to immunity in any event through his staff role. The Court of Appeal, in a brief decision, confirmed the disposition reached by the Superior Court.

Institut de l'énergie et de l'environnement de la francophonie c. Kouo (Quebec Court of Appeal)

[7] SOR/94-563
[8] R.S.C., 1985, c. S-18
[9] 2003 CanLII 44121 (QC CS)
[10] SOR/94-563

In *Institut de l'énergie et de l'environnement de la francophonie c. Kouo*[11], the Quebec Court of Appeal held that the Institut enjoyed immunity from the jurisdiction of Canadian courts under the *Organisation internationale de la Francophonie and the Institut de l'énergie et de l'environnement de la Francophonie Privileges and Immunities Order*.[12] The Court therefore dismissed a claim by Mr. Kouo, a former manager at the Institut, who sought damages for breach of his employment contract for wrongful dismissal.

- **In particular, are there examples in your legal system of perceived shortcomings in the settlement of disputes of a private character to which an international organisation is a party leading claimants to turn to the member States?**

This has not been the experience in Canada. Please see the responses above to Questions 1 and 2.

- **Do you consider that the strengthening of the settlement of disputes of a private character to which an international organisation is a party merits attention?**

For the reasons set out above in the responses to Questions 1 and 2, it has not been Canada's experience that further initiatives are required to strengthen the settlement of disputes of a private character to which an international organization is a party.

- **Specifically in respect of settlement of private claims in UN peace operations, how do you see the merits of the possible measures described above?**

Should such steps be contemplated, it would be important to ensure that they do not fundamentally compromise the ability of the UN to carry out its mandate. Any such measures must be in compliance with the *Charter of the United Nations*, including article 105, which stipulates that the UN shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes. Immunities of the UN system are also addressed in the *Convention on the Privileges and Immunities of the United Nations*.

It would be important to consider whether an international organization can effectively be sanctioned separately from the countries carrying out the UN peace operation, in the sense that the UN levies funds through contributions by Member States. It would also be essential to consider that the potential increase in exposure to claims and/or claims resulting in large or numerous compensation awards could impact the UN's funding, and its willingness and ability to operate. It would be essential to consider the possibility of the unintended result that the UN would avoid engaging in peace operations when it could not meet a certain elevated standard of care or level of due diligence. There could in particular be an impact on the ability and willingness of the UN to undertake higher risk operations in areas where it may nevertheless have an important role to play.

[11] 2006 QCCA 50
[12] SOR/88-574