

## CASE COMMENTARIES

## ANALYSES DE CAS

**Qu'est-ce qu'un État étranger?**

**La Cour suprême du Canada refuse de se prononcer malgré l'intervention du procureur général**

La Cour suprême du Canada a refusé d'accorder la permission d'en appeler d'une décision rendue par la Cour d'appel de l'Ontario à l'effet que la Bank of New York et les Services de douanes des États-Unis bénéficient d'une immunité à l'encontre d'une action en dommages intérêts pour déclaration inexacte faite avec négligence et pour dol et séquestration. Les plaignants, un homme d'affaires canadien et ses enfants, ont invoqué en première instance le fait que les défendeurs avaient participé à une opération d'infiltration au Canada destinée à appliquer un règlement en matière d'exportation de la législation canadienne sur l'immunité de l'État intitulée la *Loi de 1982 sur l'immunité des États*. Dans cette décision, on avait invoqué l'exception au principe de l'immunité en raison d'une activité commerciale prévue à l'article 5 de la *Loi*. La cause *Walker*, quant à elle, examine la définition d' "état étranger" énoncée à l'article 2 et à l'exception pour blessures corporelles prévue à l'article 6 de la *Loi*.

Dans l'affaire *Walker*, le procureur général du Canada a pris une mesure inusitée en requérant une autorisation d'intervenir au soutien de la requête en autorisation d'interjeter appel, plutôt que de demander l'autorisation d'intervenir, comme c'est généralement le cas, après que l'autorisation a été accordée. La Cour suprême a accordé l'autorisation au procureur général. Sur le fond, le procureur général conteste le point de vue du tribunal de l'Ontario à l'effet que la banque

## Immunity for Extraterritorial Enforcement Measures in Canada: The Supreme Court Declines to Decide

*Janet Walker*<sup>1</sup>

On August 25, 1994, the Supreme Court of Canada denied leave to appeal the Ontario Court of Appeal decision in *Walkerv. Bank of New York*.<sup>2</sup> Ordinarily, this would be an entirely unremarkable event. Civil appeals to Canada's highest court cannot be heard without its leave and every year the Court declines far more applications than it grants. Its traditional criteria for granting leave are strict and it releases its rulings on leave applications without reasons. Accordingly, while the success of a leave application is not an indication of the Court's view of the correctness of the decision below, the Court's refusal to hear an appeal ordinarily signifies that the Court did not feel that the appeal raised issues of sufficient public or national importance to be heard by it.

Ordinarily this would be the case. However, there was nothing ordinary about this particular case on appeal and the decision to deny leave to appeal has brought the relationship between the judiciary and the executive branch of the Canadian government on issues of international law and policy to a truly extraordinary juncture. This article considers the more unusual features of the appeal and the action quashed by the Court's denial of leave to appeal, the current

uncertainty in the law and the practical implications of the present state of the law for persons in Canada.

### The appeal and the intervention that weren't

Pending leave, the governments of Canada and the United States were prepared to square off on key questions relating to the definition of a foreign state for the purposes of immunity and whether U.S. agents conducting sting operations in Canada should be shielded from suit by the *State Immunity Act* ("SIA")<sup>3</sup>. The prospect of two governments making opposing submissions in a matter before the Supreme Court was all the more remarkable in that the debate centred on the interpretation of the *SIA*, a statute designed to ensure that inter-governmental disputes are resolved through diplomatic channels by keeping them out of the courts.

Although not a party to the suit, the Attorney General of Canada had obtained leave to intervene to oppose the granting of immunity.<sup>4</sup> The Attorney General's position lent support to the plaintiffs' argument that neither the Bank of New York defendants nor the U.S. Customs Service and Justice Department defendants should be granted immunity

under the legislation. According to the Memorandum of Argument filed by the Bank defendants in opposition to the Attorney General's intervention application, leave to intervene at this early stage (*ie*, before leave to appeal has been granted) is a rarity.<sup>5</sup>

By seeking leave to intervene at this stage, the Attorney General demonstrated the Canadian Government's interest both in assisting in the proper interpretation of the *Act* and in having the Supreme Court pronounce on this particular case. In his Application, the Attorney-General noted the Government's concern that the decision of the Court of Appeal appeared to narrow the availability of civil remedies against foreign governments rather than broaden them as intended by the legislation:

... the Attorney General would endeavour to demonstrate to this Court ... [the] apparent inconsistency of the decision sought to be appealed with the underlying purpose of the statute. ... [producing] the inevitable result that Canadians would have less protection against foreign governments and their agents which operate in this country.<sup>6</sup>

Once he had been granted leave to intervene, the Attorney General went on to argue in support of the plaintiffs' application for leave to appeal that "such a fundamental change in the nature of the law, and such an obvious departure from what the legislators were apparently seeking to accomplish, should only come at the hands of this Court."<sup>7</sup>

With respect to the Attorney General's distinct interest in the matter, he

had stated in his application that "[i]t is he who will have to decide whether to propose an amendment to the *Act* if the judgment of the court below should be permitted to stand".<sup>8</sup> Proposals to amend the *SIA* differ from those to amend other federal legislation because s. 15 of the *SIA* provides for further restriction of the immunities available under the *SIA* by order in council where they would exceed the level accorded by the foreign state.<sup>9</sup> The decision of the Supreme Court of Canada to allow the ruling below granting immunity to stand may prompt the Secretary of State for External Affairs (now "Foreign Affairs") to form the opinion that the immunity provided by the *Act* exceeds the immunity accorded foreign states by the United States. This opinion would form the basis for a recommendation that an order in council be passed to restrict further the immunity available.

The existence of such a provision suggests that the refusal to grant leave indicated the Supreme Court's inclination to defer to the executive the determination of its jurisdiction in cases such as this. After all, had the Court wished to resolve the question of immunity itself, either for or against the plaintiffs, it would have granted leave and rendered a decision.<sup>10</sup> A carefully reasoned decision of Canada's highest court to uphold the Court of Appeal ruling granting immunity may have been a formidable impediment to an order in council denying immunity; in the present situation, no such impediment exists to prevent the Government of Canada from taking action to give effect to the interests expressed by it as intervenor in the application for leave to appeal.

While it may have seemed surprising for the federal government to take an

devient un "agent de l'État étranger" à des fins d'immunité en aidant les officiers des douanes américaines à fournir de faux renseignements à propos des actes commis de bonne foi par des agents d'infiltration et de leurs projets de transactions factices. La question en litige est l'interprétation qu'a donnée la Cour d'appel de l'Ontario à l'expression "État étranger" dans la *Loi* et plus précisément, dans son ensemble. Car cette interprétation entraînerait une protection moins importante pour les Canadiens lorsqu'ils veulent contester les actes commis par des gouvernements étrangers faisant affaires au Canada.

L'appel interjeté à propos de l'immunité accordée au Service des douanes américain et à ses employé(e)s concerne l'exception à l'immunité pour blessures corporelles, laquelle est rarement invoquée et permet d'intenter des procédures relatives à des blessures corporelles qui surviennent sur le territoire canadien. La Cour d'appel a statué que le plaignant n'avait pas été blessé au Canada au moment où les défendeurs l'avaient induit en erreur et mis dans un avion de ligne commerciale affrété à destination des États-Unis, mais plutôt par la suite lorsque l'avion a atterri à New York et qu'ils l'ont officiellement arrêté. La Cour suprême du Canada avait donc été chargée de réévaluer les conclusions susmentionnées, lesquelles n'autorisaient pas les plaignants à intenter une action. Les plaignants avaient soutenu que le fait de laisser les Canadiens faire affaires à l'étranger sans les mettre à l'abri des prétentions extraterritoriales des politiques de gouvernements étrangers est contraire tant à l'objectif qu'à la portée de la législation canadienne sur l'immunité actuellement en

vigueur et au droit antérieurement établi.

Il faut, à l'évidence, résoudre ce problème. Le ministère des Affaires extérieures étudie actuellement un décret pris conformément à l'article 15 de la *Loi*, lequel conférerait aux plaignants dans la situation évoquée dans l'arrêt *Walker* un droit d'action dans des cas de ce type.

active interest in the judicial determination of the availability of a civil remedy for individuals against foreign states, it is not entirely surprising that the Court first wished to hear the views of the Government of Canada as intervenor and then acted effectively to defer the final resolution of the question of immunity to the executive. After all, the *SIA* was passed to rationalize the exercise of court jurisdiction in relation to the acts of foreign governments affecting persons in Canada. The *SIA* limited the instances in which persons in Canada would be denied access to civil remedies to those occasions when the legislators regarded the government's conduct of foreign affairs as requiring it. Since the courts are primarily domestic institutions, it cannot be said that they curtail their jurisdiction in favour of foreign governments as defendants, but only that they do so in favour of their own government's conduct of foreign affairs with those governments. The federal government is not only the promulgator and administrator of the *SIA*, then, but also the principal beneficiary. Accordingly, when the government expresses a particular interest in the resolution of a difficult question of immunity, especially when it says there is no need to interpret the *Act* so as to deprive Canadians of access to the

courts, it is not surprising to find the Supreme Court responding in such a way as to turn the entire matter over to the executive.

### The underlying claim

The underlying claim is as intriguing as the motion to have it dismissed for lack of jurisdiction.<sup>11</sup> The plaintiffs, a Toronto-area business broker, Kenneth Walker, and his three children claimed damages against the U.S. Customs Service, the Bank of New York and their employees alleging that the defendants participated in the random ensnaring of Mr. Walker in an undercover operation involving a U.S. export regulation intended to apply only to Americans.

According to the pleadings<sup>12</sup>, Mr. Walker tried to verify the *bona fides* of the New York "business persons" (undercover Customs agents) seeking chrome-plated ceremonial pistols for a purchaser in Ecuador<sup>13</sup> by vetting their bank references first with the branch-level account officer and subsequently with a senior vice-president of the Bank of New York. He informed the Bank of the details of the transaction and related his concerns regarding its compliance with the regulations. The Bank undertook to conduct an investigation into the lawfulness of the transaction and their clients' dealings in general and inform him of anything that might adversely affect his participation in the purchase. Transcripts of telephone conversations<sup>14</sup> reveal that the Bank was then persuaded by the Customs agents to keep Mr. Walker in the dark about the true identity of its "corporate clients" and the fictitious purchase they proposed. Relying on the Bank's false assurances and other

deceptions of the Customs agents, Mr. Walker accepted a plane ticket from the agents for a direct flight to the Bahamas to meet the purchaser and satisfy himself of the legitimacy of the transaction. The agents surreptitiously routed him through New York and were waiting to arrest him when he changed planes at La Guardia Airport.<sup>15</sup>

### The courts below

The Walkers sued both the Bank and U.S. Customs for deceiving and falsely imprisoning Mr. Walker<sup>16</sup> and the defendants moved in the General Division to have the suit dismissed on the bases that they were immune and that he was re-litigating the American criminal proceedings. The Court considered the threshold issue of the Bank defendants' eligibility to claim immunity under the *SIA* as an agency of the U.S. government.<sup>17</sup> Rejecting the argument that it was sufficient that the Bank's employees had acted at the behest of the Customs agents, the Court ruled that an ongoing institutionalized relationship between the entity in question and the foreign state was required. The Court noted that no authority had been shown for the proposition that "*ad hoc* assistance to a foreign government served to transform an individual or private corporation into a government agency for the purposes of state immunity".<sup>18</sup> The Bank defendants were ineligible to claim immunity.

Turning to the Government Defendants, whom the plaintiffs had conceded were eligible to claim immunity, the Court considered whether the injury exception found in s. 6 of the *SIA*<sup>19</sup> applied to permit suit. The injury exception denies immunity *in-*

*ter alia* in any proceedings that relate to personal injury that occurs in Canada. Therefore, the Court examined the pleadings to determine whether a personal injury had occurred in Canada. With respect to the allegation of deceit, it found that, despite the lack of a physical presence of the defendants in Canada, the deceit occurred when the plaintiff acted upon the misrepresentations of the defendants and that “[t]hey were made by telephone calls to Mr. Walker in Canada from the United States, with the intent that they be acted upon in Canada and, in fact, they were acted upon in Canada.”<sup>20</sup>

In an expedited appeal to the Court of Appeal for Ontario, the Court reversed the General Division rulings and granted immunity to both the bank and government defendants. The Court found that “the use of the broad word ‘organ’ in the [SIA] ... indicates the intention of parliament to protect individuals and institutions who act at the request of a foreign state in situations where that state would enjoy immunity.”<sup>21</sup> In this regard, the Court of Appeal adopted a novel, functional approach to the question, diverging from the traditional method of determining agency status by analyzing factors that would indicate the inherent nature of the relationship such as incorporation, the public issuance of shares, the composition of the corporate executive, independence of policy-making and daily operations.<sup>22</sup>

Having found the bank and government defendants both entitled to claim immunity, the Court considered whether the action fell within the injury exception because it related to “personal injury ... that oc-

curred in Canada”. It found that the term “personal injury” was broad enough to encompass mental distress, but

... the facts are that he got on the plane at Pearson International Airport of his own free will (albeit encouraged by the false representation of the American customs officials) ... [and if he] suffered mental distress, emotional upset, or false imprisonment ... he did not suffer those injuries in Canada, but in the U.S. Consequently, all of the appellants enjoy the protection of the [SIA].<sup>23</sup>

The Court found that the claim did not satisfy the geographical requirements of the exception and could not proceed. Both the bank and government defendants were immune from civil suit in Canada.

### Questions proposed for the Supreme Court of Canada

In their application for leave to appeal to the Supreme Court, the plaintiffs sought to direct the Court’s attention on two aspects of the SIA that remain to be examined by it: the definition of “agency of a foreign state” and thus the scope of the entities entitled to claim immunity as part of a “foreign state”, and the operation of the s. 6 injury exception.<sup>24</sup>

The agency question is significant in a practical sense because it defines the scope of the grant of immunity in terms of the kinds of entities eligible to be included in the SIA definition of “foreign state”. As noted by the Attorney General:<sup>25</sup>

For example, on the approach of the court below, it seems that

in this case officials of the Government of the United States could have solicited the assistance of employees of a Canadian Bank, asking them to perform the same acts done by the employees of the Bank of New York, and the Canadian Bank and its employees would have enjoyed the same statutory immunity as was accorded to the American corporation and its employees.

This possibility has become quite real in recent developments to American criminal proceedings against Alan Eagleson where a U.S. Court ordered Labatt’s, a Canadian company, to withhold payment of some \$374,500. to Mr. Eagleson pending the resolution of the U.S. charges.<sup>26</sup> Following the reasoning of the Court of Appeal in the *Walker* case, Labatt’s could comply with the order if it wished to do so without fear of suit from Mr. Eagleson since it would be immune as an agent of a foreign state.

The agency question was also significant in a doctrinal sense in that it cut to the heart of the distinction between the competing underlying theories of immunity. Scholars studying the development of the doctrine of state immunity in the common law dubbed the two predominant theories of immunity the “absolute theory” and the “restrictive theory”. The absolute theory, which gained preeminence in the 1800’s with the decision of the U.S. Supreme Court in *The Schooner Exchange v. M’Faddon*,<sup>27</sup> and maintained its force for over a century as demonstrated in the 1938 decision of the House of Lords in *The Christina*,<sup>28</sup> focused judicial inquiry on the identity of the parties before the Court.

Once a defendant was found to be a sovereign, the court would decline to hear a case on the theory that the business of sovereigns is best resolved between sovereigns and not through judicial intervention.

Gradually, it was realized that this sort of inquiry was not entirely satisfactory.<sup>29</sup> It missed the mark in cases where local plaintiffs were engaged in trade with the agencies of states that had different economic and political structures. While a defendant might nominally be part of the foreign state in such a case, the disputes were unrelated to the solemn activities that were the proper subject of diplomatic negotiations; and the inability to seek judicial enforcement of contractual claims impaired commercial relations. This was especially true in cases involving trading activities with states that had economic or political structures that maximized governmental intervention in the economy such as communist or socialist countries. Moreover, in countries in which the governments had traditionally refrained from involvement in the economy, such intervention was becoming increasingly commonplace. As a result, courts became less willing to rely only on a formal analysis of the status of the defendant in any given case and the immunity inquiry turned to the context of the events giving rise to the dispute to determine through a functional analysis whether the subject matter of the dispute was one that was properly aired in the courts. In short, the focus of the inquiry shifted from asking *who* the defendant was to *what* the dispute was about.

Also at this time, the advent of the executive certificate resolved questions of whether or not a defendant

was to be regarded as a foreign state. This obviated much of any residual doubt remaining on the eligibility of a defendant to claim immunity. Accordingly, the change in approach to the analysis of immunity entitlement came to be regarded as a fundamental shift from one competing "theory" to another. Confusingly, the names of the theories - "absolute" and "restrictive" also implied a linear reduction in the availability of immunity.

All of this would suggest that the threshold question of the status of the defendant had ceased to be a question to be resolved by the courts. In terms of the structure of the Canadian Act, this would mean that despite the existence of definitions in *SIA* s. 2 of the entities eligible to claim immunity, judicial analysis of any claim to immunity would begin instead with the exceptions in *SIA* ss. 4 - 8 and a determination of whether the plaintiff could sue in spite of the defendant's *prima facie* entitlement to immunity. Put another way, the characterization of the change in the law as one of a shift between underlying theories suggested that the functional analysis had replaced the traditional formal analysis rather than merely supplementing it.

In considering whether this is so, it is acknowledged that plaintiffs are generally sufficiently well advised nowadays to know in advance whether the defendant is or is not a foreign state and therefore entitled to claim immunity; and since suits that arise from the commercial activities of the foreign state and its agencies are permitted when they fall within the commercial activity exception, the threshold question of the status of the defendant rarely arises as a discrete issue. Still, while executive certificates are

available to resolve doubts about the legitimacy of a defendant's claim to be a foreign state, no such mechanism for executive guidance exists in the case of defendants claiming to be *agencies* of foreign states.

Is it then to be assumed that an entity is an agency of a foreign state simply because it claims to be? While it is doubtful that Canadian courts would feel bound by such self-serving assertions, what if the entity claims to have acted in response to a request for assistance by the foreign state? In other words, what if the entity *acted* as an agent even if it had no formal or institutional ties to the foreign state that would otherwise qualify it as an "agency"? Are the courts to determine whether to grant immunity on a purely functional basis, or should they, in cases where the institutional relationship is not obvious, examine the nature of the ongoing relationship to determine whether the entity "is an organ of the foreign state"?

Surprisingly enough, the question does not appear to have arisen. In virtually every case that has addressed the point, the organic or institutional relationship with the foreign state has been clear and it has been the nature of the relationship in the particular context giving rise to the action that has been at issue.<sup>30</sup> Typically, the entity is a Crown corporation<sup>31</sup> or some other legal entity with some measure of independence from government, and it is the degree of that independence with respect to the activities in question that is at issue. Moreover, the courts had never before considered a case in which the damages resulted from an "agent's" false representations that his or her principal was *not* a foreign state.<sup>32</sup>

Given the nature of the jurisprudence, agency provisions in state immunity legislation have generally been drafted to indicate the degree of independence permitted within the scope of eligibility to claim immunity, and they do not elaborate much on any underlying requirement of an institutional tie. This led Dicey and Morris to comment on the agency ("separate entity") provision in the U.K. Act as follows<sup>33</sup>:

There is no express requirement that such a separate entity be owned or controlled by the foreign state, but it would be a considerable extension of the doctrine of immunity to apply the notion of separate entity to *any* agent of the foreign State, and it is therefore suggested that a separate entity not owned or controlled by the State is not capable of acting in the exercise of sovereign authority.

With the Supreme Court's refusal to hear the appeal in the *Walker* case, it is to be hoped that an order in council will, if only indirectly, provide guidance as to what constitutes an "organ of the foreign state" for the purposes of immunity in Canadian law.

The construction of the injury exception would have proved equally challenging to the Supreme Court. The determination of whether the proposed proceedings relate to personal injury that occurred in Canada tests the meaning of virtually every term employed in the provision. For example, while both the courts below were satisfied that the term "personal injury" encompassed the kinds of damages claimed by the plaintiffs, they differed on where the injury should

be regarded as having occurred. In keeping with the jurisprudence of the House of Lords in *Meering v. Grahame White Aviation Ltd.*<sup>34</sup> and more recently, *Murray v. Ministry of National Defence*<sup>35</sup>, the motions judge found that Mr. Walker's lack of awareness of his confinement in the airplane, did not prevent it from constituting a false imprisonment and, therefore, injury occurred in Canada at that moment. However, the Court of Appeal ruled that while "personal injury" included mental distress, the injury must be felt in order to be said to have occurred<sup>36</sup> and therefore, it was only upon his arrest at La Guardia that he was injured.

Deeper questions were raised as well as to whether the entire odyssey, beginning with the telephone conversations and ending with the plaintiffs' continuing damages upon Mr. Walker's return, should be considered as one event, or whether the various incidents should be examined individually to locate their "occurrence" and the courts' jurisdiction over them. These elements underscore the basic issue of whether the *SIA* should be construed according to traditional tort principles or whether a novel approach should be taken to its interpretation. In this way, the Supreme Court would have been challenged to resolve whether to apply the flexible approach to locating multi-jurisdictional torts – in this case, torts committed over the telephone – recommended by it in *Moran v. Pyle*<sup>37</sup>, or whether the principles underlying the legislation require a different interpretation.

While the opportunity to resolve these and other significant doctrinal issues will have to wait for future cases, the

Supreme Court's decision to relinquish this matter from the judicial decision-making process has the immediate practical result of preventing the existence of civil redress from operating as a deterrent to the unauthorized enforcement in Canada of the public laws of other countries. As long as the matter is not before the courts, the current availability of immunity has, as predicted by the Attorney General "the inevitable result that Canadians would have less protection against foreign governments and their agents which operate in this country."<sup>38</sup>

To many readers this may not, at first, seem to be of much moment. To the skeptics, an individual subject to censure by a foreign government is probably a likely candidate for censure by our own authorities. However, there are increasing reminders that this might not be the case, in part, because the public laws of other countries often differ from our own. A recent article, "Canadian writer in hiding after attack: Ordeal echoes Rushdie case"<sup>39</sup>, reported on the plight of a novelist accused of "blaspheming against Islam". Had this writer not been attacked in Canada, but rather invited to accept a flight abroad to give a lecture on his book, and then summarily executed under the fatwa, or even mutilated and permitted to return to Canada, his assailants would be immune from suit under Canadian law as it stands. Worse, any disincentive to luring Canadians abroad that may have existed before the current state of the law was established is gone.

In this way, the decision of the Supreme Court to allow the ruling of the Ontario Court of Appeal echoes the

1992 U.S. Supreme Court decision in *Alvarez-Machain*. In that decision, the U.S. Supreme Court ruled that the executive practice of abducting defendants abroad for trial in the U.S. was not subject to judicial censure by the courts' declining jurisdiction over them. To many, including the dissenting judges on the panel, this constituted a "monstrous" failure by the Court to respond to the implicit violation of international law by its government's officials. It may well be said that the decision of the Supreme Court of Canada to permit the ruling granting immunity to stand in this case represents a similar determination to refrain from intervening and, instead, to have the Executive determine court jurisdiction in matters involving the extraterritorial activities of foreign governments in Canada. Where the U.S. Supreme Court would not exercise jurisdiction to deprive U.S. agents of the incentive to engage in unauthorized extraterritorial activities abroad, so too, our Supreme Court was not prepared to consider whether Canadian courts should exercise jurisdiction to establish a disincentive to the activities of foreign agents in Canada.

It is ironic that after more than a decade of rising to the challenge of supervising and restraining government actions that infringe the liberties of individuals, our Supreme Court would refuse to address similar issues posed by the infringements of foreign governments. Nevertheless, it is clear that both Supreme Courts have clearly passed the question on to their respective Executives: the U.S. Supreme Court having left it up to the American government to devise alternative methods to assure friendly nations that it will not abduct their citizens in

violation of extradition treaties and the Canadian Supreme Court having left it to the Canadian government to resolve the issue of the availability of civil redress to protect Canadians by deterring such activities by foreign governments.

#### ENDNOTES

<sup>1</sup> CD, BA, MA, LLB, Law Clerk to the Justices of the Court of Appeal for Ontario.

<sup>2</sup> *Walker v. Bank of New York* (1993) 15 O.R. (3d) 596 (Gen. Div.), rev'd (1994), 16 O.R. (3d) 504 (C.A.); Amended application for leave to appeal to the Supreme Court of Canada filed April 29, 1994, S.C.C. Bulletin 1994, ;

<sup>3</sup> R.S.C. 1985, c. S-18 [hereinafter "SIA"].

<sup>4</sup> "Application by the Attorney General of Canada for leave to intervene in the proposed appeal of *Walker v. Bank of New York*", 11 April 1994. Leave to intervene granted 2 May 1994, *per* Major J. S.C.C. Bulletin, 1994 at 753.

<sup>5</sup> See B.A. Crane and H.S. Brown, "Supreme Court of Canada Practice 1994" (Scarborough, Ontario: Thomson, 1993) at 150.

<sup>6</sup> *Ibid.*, Affidavit of Gilles Lauzon, Department of Justice of Canada, 11 April 1994, at paras. 4-5.

<sup>7</sup> Memorandum of Argument of the Intervenor Attorney General of Canada, 9 May 1994, para. 16, at 8.

<sup>8</sup> *Ibid.*, "Submissions of the Attorney General of Canada", para. 3.

<sup>9</sup> Section 15 of the *Act* reads:

15. The Governor in Council may, on the recommendation of the Secretary of State for External Affairs, by order restrict any immunity or privileges under this Act in relation to a foreign state where, in the opinion of the Governor in Council, the immunity or privileges exceed those accorded by the law of that state.

<sup>10</sup> Given the usual absence of reasons for such a decision, the underlying reason for it can only be speculated upon. Scant explanation is to be found in examining the traditional criteria for determining leave in that the appeal related to the interpretation of two provisions of a national statute that had not yet been considered by the Court. All the more puzzling was that it followed upon an intervention by the Federal Government in-

dicating its desire that the Court hear the case.

<sup>11</sup> See, D.L. Carlson, "U.S. Loses Immunity from Law Suit in Ontario Case" *Law Times*, 5 October 1993, at 1; T. Blackwell "Entrapped' Canadian Wins Right to Sue U.S." *Ottawa Citizen*, 22 October 1993, at A3; D. Francis, "Conspiracy Victim Continues His Fight with U.S." *Financial Post*, 28 December 1993, at 9; J.J. Fialka, "Customs Service's 'Stings' to Curtail Arms Sales Draw Blood (Its Own) as Cases Collapse in Court" *Wall Street Journal*, 18 March 1994, at A12; D.L. Carlson, "Law Suit Against U.S. Attracts Government's Attention: Justice Department Wants to Intervene Before S.C.C." *Law Times*, 25 April 1994, at 1.

<sup>12</sup> The grant of immunity was sought in the course of a pre-trial motion to dismiss the action for want of jurisdiction pursuant to Rule 21 of the Ontario Rules of Civil Procedure. Pre-trial motions are decided on the basis of the pleadings which are considered proven for this purpose unless patently ridiculous or incapable of proof: *Air India Disaster Claimants v. Air India* (1987), 62 O.R. (2d) 130 at 135.

<sup>13</sup> The agents subsequently alleged that Mr. Walker ought to have known that they, as purchasers, might have intended to tranship the pistols to Chile, a destination prohibited by U.S. law. However, since this was a fictitious transaction, no pistols were ever shipped, and no applications for documents were ever made.

<sup>14</sup> The transcripts were provided to Mr. Walker as part of the prosecution's disclosure and contained records of conversations between the agents and other individuals. This particular conversation is cited in the Plaintiff's Application for Leave to Appeal to the Supreme Court at page 8 of the Memorandum of Argument.

<sup>15</sup> Mr. Walker remained in pre-trial custody for three months until he was released on bail to remain in New York City. Faced with the alternatives of a sentence of "time served" and permission to return to his family, who were then in financial difficulty if he pled guilty, and the prospect of a lengthy trial, he pled guilty a month later and went home. Applicant's Memorandum of Argument, p. 11, para. 30.

<sup>16</sup> Following Mr. Walker's initial indication of his intention to sue, the United States requested his extradition. Canada voiced its concerns about the matter via diplomatic

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## *Navigating NAFTA: A Concise User's Guide to the North American Free Trade Agreement*

Barry Appleton. Scarborough, Ontario: Carswell, 1994.

*Farah Jamal*

**R**ecent developments throughout the globe have made the trade landscape difficult to navigate for the unseasoned traveller. Even those familiar with the terrain can lose direction from time to time. *Navigating NAFTA* provides a useful roadmap to the lawyer or business person attempting to manoeuvre through the North American Free Trade Agreement (NAFTA).

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- links NAFTA provisions to the Canada-U.S. FTA and GATT; and
- explains relevant international law principles.

Appleton's discussions of intellectual property, administration of laws, antidumping and dispute resolution are especially good in targeting and explaining legal issues. With respect to dispute resolution, for example, Appleton provides a step by step account of how to bring a claim under NAFTA's dispute resolution scheme. Labour and environmental lawyers will also find the chapter on supplemental agreements to NAFTA to be both interesting and useful.

For the business person, *Navigating NAFTA*:

- defines legal and other technical terminology;
- provides the economic and political context for each NAFTA chapter; and
- devotes considerable attention to the temporary entry of business persons into NAFTA countries, including a list of qualifying professionals.

*Navigating NAFTA* is, therefore, recommended reading for those seeking a comprehensive, initial reference guide to NAFTA and its supplemental agreements.

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concerns about the matter via diplomatic channels and, in an extraordinary move, declined to prosecute the request and, ultimately, exercised its right discretion under the treaty to refuse it.

<sup>17</sup> Section 2 of the *State Immunity Act* defines "foreign state" as including "any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state" and "agency of the foreign state" is

defined as "any legal entity that is an organ of the foreign state but that is separate from the foreign state."

<sup>18</sup> *Supra*, note 15, at 601.

<sup>19</sup> Section 6 reads:

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to
- (a) any death or personal injury, or
  - (b) any damage to or loss of property that occurs in Canada.

<sup>20</sup> *Supra*, note 15, at 602-3. See *Diamond v. Bank of London and Montreal Ltd.*, [1979] 1 Q.B. 333, [1979] 2 W.L.R. 228, [1979] 1 All E.R. 561 (C.A.); *Original Blouse Co. Ltd. v. Bruck Mills Ltd.* (1963) 42 D.L.R. (2d) 174 at 182 (B.C.S.C.); *Elguindy v. Core Laboratories Ltd.* (1987), 60 O.R. (2d) 151 at 153-54 (Div. Ct.); and *Canadian Commercial Bank v. Car*

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- (e) Risk of loss and damage shall pass to the Buyer upon delivery. Title shall pass to the Buyer upon payment in full.
- (f) If the goods or any part thereof cannot be delivered when ready due to any cause referred to in the Excusable Delay provision herein, the Seller may place such goods into storage (which may be at the place of manufacture). In such event, (1) Seller's delivery obligations shall be deemed fulfilled and title and risk of loss and damage shall pass to Buyer; and (2) any amounts payable to the Seller on delivery shall be payable upon presentation of Seller's invoices and its certification as to such cause; and (3) all expenses incurred by the Seller, including, but not limited to, all expenses of preparation and shipment into storage, handling, storage, inspection, preservation and insurance shall be for Buyer's account and shall be payable upon Seller's presentation of invoices therefor.

Usually, risk of loss and title pass upon delivery. Often however, a seller will insert a title retention clause until payment is received. Without other steps being taken, this gives the seller few rights in the foreign jurisdiction, if any. With an export sale, if the goods could possibly cause environmental or other liability in the buyer's country, then the seller should give up title as soon as the goods are delivered.

Force Majeure clauses are commonly found in export sale agreements and tend to be treated as basic "boilerplate" provisions. These clauses provide that if the buyer cannot take delivery due to unforeseeable events such as natural disaster, war or civil strife, the obligations of the parties are suspended. However, an unforeseeable event which affects delivery of the goods can create the potential for a serious dispute. For example, if the goods are on a ship and the ship cannot land, the seller will have a serious financial penalty if it has fulfilled all aspects of the contract save for delivery due to force majeure. The seller may protect itself by inserting provisions which limit the effect of a force majeure provision, such as are found in the sample clause. Further, both parties should consider a termination provision in the event that the unforeseen event precludes performance for a specific period of time.

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*penter* (1989) 62 D.L.R. (d) 734 at 738-44.

<sup>21</sup> *Ibid.*, at 508.

<sup>22</sup> See *Mellenger v. New Brunswick Corporation*, [1971] 1 W.L.R. 604 (C.A.); *Ferranti-Packard v. Cushman Rentals Ltd.* (1980), 30 O.R. (2d) 194 (Div. Ct.) aff'd (1981), 31 O.R. (2d) 799 (C.A.); and see Halsbury's *Statutes of England and Wales* (4th ed., 1985), Vol. 10 at 651; and G.S. Vargas "Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention" (1985), 26 *Harvard Int'l L. J.* 103 at 115, 122-23.

<sup>23</sup> *Ibid.*, at 509-510.

<sup>24</sup> In fact, the provision regarding agency has not received judicial consideration and the injury exception has received appellate level consideration only twice: in this case and in *Jaffe v. Miller* (1993), 13 O.R. (3d) 745; leave to appeal to the Supreme Court of Canada dismissed, 20 January 1994, S.C.C. Bulletin, 1994, at 23.

<sup>25</sup> Affidavit of Gilles Lauzon, p. 3 para. 5.

<sup>26</sup> See R. Starkman, "Brewery Seeks Clarification from U.S. in Eagleson Order", 8 June 1994, *Toronto Star* at E1.

<sup>27</sup> 7 *Cranch* 116 (1812).

<sup>28</sup> [1938] AC 485.

<sup>29</sup> See Law Reform Commission - Australia, *Foreign State Immunity*, Report No. 24 (1984) at 35-45; H.L. Molot & M.L. Jewett, "The State Immunity Act of Canada" (1982) *Cdn. Yearbook Int. L.* 79;

and M.L. Jewett & H.L. Molot, "State Immunity Act - Basic Principles" (1983), 61 *Cdn. Bar R.* 343.

<sup>30</sup> Even in the recent House of Lords decision in *Kuwait Airways Corp. v. Iraq Airways Company Inc.*, 18 November 1993 (H.L.) not yet reported, which examined the agency provision in the U.K. *State Immunity Act*, the entity in question was a state-owned airway.

<sup>31</sup> Crown corporation: *Mellenger v. New Brunswick Corporation*, [1971] All E.R. 593 (C.A.); Securities and Exchange Commission: *Smith v. Canadian Javelin Ltd.* (1976), 12 O.R. (2d) 244 (H.C.); State Thruway Authority: *Ferranti-Packard v. Cushman Rentals Ltd.* (1980), 30 O.R. (2d) 194 (Div. Ct.), aff'd (1981) 31 O.R. (2d) 799 (C.A.).

<sup>32</sup> According to the pleadings, the Bank responded to Mr. Walker's inquiries by misrepresenting the Customs agents as reputable business persons. A truthful response would have put an end to the ruse before Mr. Walker was lured from the country.

<sup>33</sup> *The Conflict of Laws* (12 ed. 1993) Vol. 1, at 243-44.

<sup>34</sup> (1919), 122 L.T. 44 at 53-54.

<sup>35</sup> [1988] 2 All E.R. 521, at 528-29.

<sup>36</sup> Following this approach, there could be no claim for a latent injury occurring in Canada and first felt when the victim travelled abroad.

<sup>37</sup> [1975] 1 S.C.R. 393.

<sup>38</sup> *Ibid.*, Affidavit of Gilles Lauzon, Department of Justice of Canada, 11 April 1994, at paras. 4-5.

<sup>39</sup> D. Todd, "Canadian writer in hiding after attack: Ordeal echoes Rushdie case", *Toronto Star*, August 15, 1994, A2.