Editor's Note: A corrigendum for this judgment was issued on February 8, 2005; the corrections have been made to the text and the corrigendum is appended to this judgment.

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

1. TRIAL DIVISION

Citation:*TMR Energy Ltd. v. State Property Fund of Ukraine et al.,* 2004 NLSCTD 244

Filing Date: 2004 12 17

Docket: 2003 01T 3328

BETWEEN: TMR Energy Ltd., a duly constituted legal

person incorporated under the laws of

Cyprus APPLICANT

AND: State Property Fund of Ukraine, an organ

of the State of Ukraine RESPONDENT

AND: Aviation Scientific Technical Complex

named after OK Antonov (ANTK Antonov),

a State Enterprise duly constituted as a

legal person under the laws of Ukraine

FIRST INTERVENOR

AND: State of Ukraine SECOND INTERVENOR

Before: The Honourable Mr. Justice Robert Hall

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: October 6, 7, 21, 22, 28, 29 and November 16, 2004

Appearances: Augustus Lilly, Q.C., Richard Desgagnés, Azim Hussain, Brenda Horrigan and Cecily Strickland for TMR Energy Ltd.

Paul McDonald, George Pollack and Denis Fleming for State Property Fund.

Thomas Heintzman, O.C., Q.C., Peter Browne, Reagan O'Dea and David Platts for ANTK Antonov.

Frank Newbould, Q.C., Lubomir Kozak, Q.C., Thomas Kendell, Q.C. and Stacey O'Dea for State of Ukraine.

Reasons for judgment on applications of Respondent, First Intervenor and Second Intervenor to vary or set aside orders recognizing and enforcing a foreign arbitral award.

Authorities Cited:

Cases Considered: Canadian Paraplegic Assn. (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd. 1997 N.J. No. 122 (NLCA)**; Evans v. Silicon Valley IPO Network,** 2004 BCCA 149; 2004 Carswell BC 521**; Volhoffer v. Volhoffer**, [1925] 2 WWR 304; **TMR Energy Ltd. v. State Property Fund of Ukraine**, 2003 Carswell Nat. 4117; **Tritt v. United States of America et al.** (1989), 68 O.R. (2d) 284; **Softrade Inc. v. United Republic of Transenna**, [2004] O.J. No. 2325; **Toronto v. C.U.P.E., Local 79**, [2003] S.C.J. 64,

Statutes Considered: *International Commercial Arbitration Act*, RSNL 1990, c. I-15; *State Immunity Act*, RSC 1985, c. S-18

Rules Considered: *Rules of the Supreme Court, 1986*

Text Cited: Black's Law Dictionary, 4th Edition, West Publishing Company, St. Paul, Minnesota**; Spencer-Bower, Turner and Hagley, *Res Judicata*** (3rd Edition 1996); **Castel, *Canadian Conflicts of Laws*** (5th Edition 2002)**; Volume 18 (2) of *Halsbury's Laws of England*** (4th Edition Re Issue),

REASONS FOR JUDGMENT

Hall, J:

Background

[1] On August 28, 2003, the Applicant ("TMR") applied to this court to have a foreign arbitral award (the "Award") made in its favour against State Property Fund of Ukraine ("SPF") recognized and enforced pursuant to the Convention on the Recognition and Enforcement of Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 (the "New York Convention") which Convention applies in this Province pursuant to the provisions of the *International Commercial Arbitration Act*, RSNL 1990, c. I-15.

[2] The Award was rendered in Stockholm, Sweden, on May 30, 2002 by an arbitration panel of three arbitrators established under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce. On the title page of the Award the "Claimant" is described as TMR Energy Ltd. and the Respondent is described as "The State Property Fund of Ukraine". In s. 1 of the Award entitled "Introduction and Procedure" the arbitration panel set out the history of the various dealings giving rise to the disputes which were ultimately referred to arbitration and it stated:

"Failing an amicable settlement of these disputes TMR, as claimant, requested arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter the "Institute") against Linos, SPF and the State of Ukraine, as respondents ... TMR sought ... substantial pecuniary damages from the respondents jointly and/or severally."

Later in the same introductory section the arbitration panel states:

"TMR terminated without prejudice its action against the State of Ukraine and the arbitrators rendered a final award accordingly on January 22, 2001."

Apparently Linos and SPF had both objected to any form of consolidation of the arbitrations against them and the arbitrators in their decision indicated that the arbitration against Linos should be conducted separately from the arbitration against SPF

"... without any further communication between the two arbitrations. Accordingly this Award deals solely with TMR's claims against SPF."

Ultimately the final arbitral Award grants substantial damages in favour of TMR against "The State Property Fund of Ukraine".

[3] TMR has apparently made considerable efforts to have this Award recognized and enforced in various jurisdictions throughout the world. While recognition has occurred in some jurisdictions, TMR has been unsuccessful to date in collecting on the very substantial debt owed to it which now totals over 63 million Canadian dollars.

[4] The seeds of a large portion of the dispute before this Court, as well as in proceedings dealing with essentially the same subject matter in the Federal Court of Canada, Trial Division ("Federal Court"), were first planted when TMR made application, *ex parte*, to the Federal Court for registration, recognition and enforcement of the Award. In its application to the Federal Court TMR had defined the Respondent SPF in the same manner as it is defined in the title of the within matter, namely "State Property Fund of Ukraine, an organ of the State of Ukraine (emphasis added)". As can be readily perceived the additional words of description of SPF were not contained in the description of SPF in the Award.

[5] On January 17, 2003 Prothonotary Richard Morneau of the Federal Court ordered that the Award

"... is hereby registered, recognized and shall be enforceable as any other judgment of this Court. However, unless the Court orders otherwise, execution shall not be issued for 60 days following service of this order . ..."

In the Federal Court order, the additional words of description of SPF as "an organ of the State of Ukraine" appear in the title.

[6] Counsel for the parties have not referred me specifically to the supporting materials filed with TMR's original application for recognition and enforcement of the Award with the Federal Court. However I am given to understand that essentially the same material was filed with the Federal Court as was filed with this Court when TMR sought recognition and enforcement of the Award in this Court at the end of August 2003. Amongst the materials filed with this Court is an

affidavit of one Sarah Maxtone-Graham Francois-Poncet, an attorney practising law in Paris and a partner in the Paris based law firm of Salans who were acting as arbitration counsel for TMR. Madame Francois-Poncet, in her affidavit in support of the application in this proceeding for recognition of the Award, deposed *inter alia*, as follows:

"I have been informed by Professor Dr. Anatoly Dovgert, a Professor of Law at Kyiv National University, Ukraine, and verily believe that SPF is an organ of the State of Ukraine which implements Ukrainian national privatization policy. I am told that SPF is defined in Ukranian legislation as a "central organ of executive power with special status", similar to the Ukrainian State tax administration, State Customs Service and Ministry of Economics, and a claim against central organs of executive power such as the State Property Fund is identified in Ukrainian legislation as a "claim against Ukraine".

[7] A lengthy affidavit of Professor Dr. Dovgert was also filed, it having many attachments thereto and purporting to set out various laws and regulations of the State of Ukraine to support the argument that a claim against SPF is effectively a "claim against Ukraine". Having received and accepted this opinion from Professor Dr. Dovgert, counsel for TMR (many of whom were the same in both the application before the Federal Court and in this Court), apparently came to the conclusion that the expert opinion of Professor Dr. Dovgert to the effect that a claim against SPF was a claim against Ukraine justified the additional wording of description of SPF as "an organ of the State of Ukraine" in both the Federal Court application and in this application. TMR apparently claimed before the Federal Court and has claimed in this Court that because SPF is an organ of the State of Ukraine, it is in essence an *alter ego* of Ukraine. What logically follows from this argument is that the property of Ukraine is the property of SPF and vice versa. This position is an important one as it led to the seizure of a large cargo plane (the "Aircraft") which had landed at the airport in Goose Bay, Labrador, while in the course of performing a contract between the intervenor Antonov and the State of Italy whereby certain military equipment of the Italian Air Force was being transported to Goose Bay from Italy to be used by the Italian Air Force in flying exercises in Labrador. Apparently TMR asserted, firstly in the Federal Court, and subsequently to the Sheriff of Newfoundland, that the Aircraft was the property of the State of Ukraine and therefore, because SPF and Ukraine were *alter egos* of each other, and the Aircraft was the property of Ukraine, the Aircraft was available to satisfy the Award recognized in the Federal Court in favour of TMR against SPF. This seizure, effected on June 28, 2003, led to SPF on July 11, 2003 filing a Notice of Objection with the High Sheriff of Newfoundland and Labrador pursuant to the *Judgment Enforcement Act*, SNL 1996, Ch. J-1.1 (the "*JEA*"). That same date a Notice of Third Party Claim was filed by the First Intervenor ("Antonov") with the Sheriff also pursuant to the *JEA*.

[8] On August 1, 2003 TMR filed an Originating Application (*Inter Partes*) with this Court (styled 2003 01T 3136). At that time the present application to which this judgment and earlier judgments and orders relate had not yet been filed or commenced. The August 1st Originating Application sought, *inter alia*, dismissal of the Notice of Objection and the Notice of Third Party Claim mentioned in para. [7] and sought certain declaratory relief to enable the sale of the Aircraft. This Originating Application was returnable on October 31, 2003. However, on that return date the matter was enlarged *sine die*. In its prayer for relief, TMR sought rulings to the effect that the State of Ukraine was the Judgment Debtor and that the Aircraft was the property of the State of Ukraine or, alternatively, that the State of Ukraine had an exigible interest in the

Aircraft.

[9] On August 8, 2003 SPF filed a motion with the Federal Court to set aside the Enforcement Order and filed a further motion in support of the motion by Antonov (filed July 18, 2003) to set aside the Notice of Seizure and Sale issued by the Sheriff. Ultimately, and after diverse proceedings before the Federal Court, including interlocutory motions, appeals, further motions and hearings thereon, two orders were rendered in the Federal Court on September 22, 2004 by Mr. Justice Luc Martineau by reason of which the Enforcement Order issued by Prothonotary Morneau was set aside and all related proceedings, including enforcement proceedings, were immediately vacated. At the same time, Justice Martineau ordered that:

1. a motion by TMR for an order *nunc pro tunc* (or *de bene esse*) registering, recognizing and enforcing the Award be dismissed;

2. a motion by TMR for an order staying the Federal Court's Order setting aside the Enforcement Order be dismissed; and

3. a motion by TMR for an Interlocutory Injunction maintaining the seizure of the Aircraft be dismissed.

[10] As a result of the Orders of Justice Martineau the Sheriff of Newfoundland and Labrador released the Aircraft from seizure on September 24, 2004.

[11] Justice Martineau did not file separate reasons for the decisions indicated in his Orders. However, the Orders themselves reference the following factors.

(i) that a Prothonotary of the Federal Court of Canada did not have jurisdiction to issue the Enforcement Order, as this could only have been done by a Judge of the Federal Court of Canada (the Enforcement Order having been issued by the Prothonotary Morneau);

(ii) that the true identity and legal status of the foreign judgment debtor named in the Award had been the subject of debate and had not been disclosed to the Federal Court when TMR applied for the Enforcement Order;

(iii) that it was the position of TMR throughout that all claims made against SPF were in fact claims against the State of Ukraine itself;

(iv) that before a judgment or order can be obtained or made against a sovereign state, service of the originating document must be made in accordance with Section 9 of the *State Immunity Act*;

(v) that in the affidavits and representations made by TMR in support of its *ex parte* Application for the Enforcement Order, there was no reference whatsoever to possible problems with respect to the identity of legal status of the foreign judgment debtor, nor to the possible applicability of the *State Immunity Act* to the proceedings;

(vi) that pursuant to paragraph 3(1) of the State Immunity Act, "... except as provided by the Act, a foreign state is immune from the jurisdiction of any court in Canada ...";

(vii) that pursuant to paragraph 3(2) of the State Immunity Act, "... in any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1)

notwithstanding that the state has failed to take any step in the proceedings...";

(viii) that while the State Immunity Act provides for exceptions to the immunity of a foreign state, it remains that any such exceptions must be expressly invoked by the applicant [i.e., TMR] who must present evidence in this regard before any finding can be made in this regard by a court;

(ix) that pursuant to Rule 328(2) of the Federal Court Rules, on an *ex parte* application, the Court may direct that notice of the application be served on the foreign judgment debtor;

(x) that where a motion or application is made *ex parte*, the moving party or applicant has a duty of full and fair disclosure with respect to all material facts of the case;

(xi) that the facts disclosed and arguments made by TMR in the materials filed on January 15, 2003 in support of its Notice of application made *ex parte* to register and enforce the Award were clearly insufficient and did not permit the Court to make any finding of fact and law with respect to the true identity and legal status of the foreign judgment debtor, or in relation to the jurisdiction of the Court from a constitutional point of view (the latter being an issue also contested by SPF);

(xii) that the Court was not satisfied that no impediment to registration. recognition or enforcement of the Award existed;

(xiii) that pursuant to paragraph 11(1) of the *State Immunity Act*, "... no relief by way of an injunction, specific performance or the recovery of the land or the property may be granted against a foreign state unless the state consents in writing to that relief..."; and

(xiv) that neither the Notice of Application for registration of the Award and material filed by TMR on January 15, 2003, nor the Enforcement Order, were ever served in the manner specified by Section 9 of the *State Immunity Act*.

The Present Application in this Court

[12] Part of the lengthy proceedings before the Federal Court included motions before Madam Prothonotary Mireille Tabib challenging the validity of the Enforcement Order. These hearings commenced on the 26th of August and ran for several days continuing, after a break, in September 2003. It was at that same time that TMR filed its Originating Application with this Court wherein it sought recognition and enforcement of the Award in this Province. On August 28, 2003 counsel for TMR appeared *ex parte* before Madam Justice Dunn of this Court to speak to the Originating Application and by an Order of Justice Dunn styled as an "Interim Order on Application (*ex parte*)" it was ordered, *inter alia*, that

"the Award be recognized and enforced in the Province in the same manner as any other judgment of this Court and that SPF must pay to TMR the following sums: ...".

The Order additionally provided that

"the Originating Application (*ex parte)* will be returnable for hearing on an *inter partes* basis before the Judge presiding in Chambers at the Courthouse, Duckworth St. John's, Newfoundland

and Labrador, Canada on Monday, the 3rd day of November, A.D. 2003, at 10:00 a.m. or so soon thereafter as the Application can be heard. Should SPF not appear on that date, TMR may seek a final order."

I shall refer to this Interim Order as the "Dunn Order".

[13] On September 5, 2003 TMR caused the Dunn Order to be registered with the Sheriff and on September 25, 2003 TMR's counsel delivered to the Sheriff instructions to seize the Aircraft. On September 26, 2003 the Sheriff advised TMR's counsel that he would not be giving effect to the instructions for seizure received September 25, 2003 pursuant to the Dunn Order as the Aircraft was then under seizure pursuant to the proceedings in the Federal Court and that it was not the policy and practice of the Sheriff's Office to carry out multiple seizures of the same asset.

[14] TMR advised me, as they advised Justice Dunn, that the motivation of TMR in applying to this Court for the Dunn Order was to essentially "backstop" its application before the Federal Court because at the time the application for the Dunn Order was launched and was proceeding in this Court, the parties were arguing before Madam Prothonotary Tabib in the Federal Court. One of the arguments raised by SPF in Federal Court was that Prothonotary Morneau of the Federal Court had no jurisdiction to issue the Enforcement Order which he had issued in January 2003 because the Federal Court, being a statutory court, did not have jurisdiction *ratione materiae* due to the subject matter of the application for recognition being related to property and civil rights and thus was within the jurisdiction of a superior court of a province by reason of the *Constitution of Canada* and not in the jurisdiction of the Federal Court. Naturally TMR did not want to find itself in a position where Madam Prothonotary Tabib may accept this argument, order the release of the Aircraft and TMR, not having "backstopped" its Federal Court application with an application in this Court, would see the Aircraft released from the Sheriff's seizure before an application could be brought in this Court. Thus it was SPF who, by raising the defence of lack of jurisdiction *ratione materiae*, caused the need for an essentially duplicate application to that made by TMR in the Federal Court to be made to this Court. Ironically before this Court it was subsequently argued by all of the Ukrainian parties that such duplicate proceedings are in violation of the principle of judicial comity in that proceedings should not be commenced in a court of another jurisdiction where there are existing proceedings dealing with essentially the same subject matter in another court. The Ukrainian parties have also pleaded that the subsequent Orders of Mr. Justice Martineau of the Federal Court render this whole dispute *res judicata* or in the alterative there is a legitimate defence of issue estoppel against TMR. An appeal has been launched in the Federal Court of Canada, Court of Appeal, ("Federal Court of Appeal") by TMR seeking to have the Orders of Justice Martineau of the Federal Court, Trial Division, overturned. I am given to understand that this appeal will be heard commencing around January 10, 2005.

[15] In the period from mid-September up to November 3, 2003 (which was the return date in this Court with respect to the Dunn Order), the parties were merely awaiting a decision in the Federal Court by Madam Prothonotary Tabib. At the commencement of the hearings before Madam Prothonotary Tabib, the application of Antonov for intervenor status in the Federal Court proceedings had been allowed for the limited purpose of arguing matters with respect to the seizure of the Aircraft. On August 28th Mr. Lubomir Kozak, Q.C., counsel for the State of Ukraine, appeared before Madam Prothonotary Tabib and advised her that he was expecting to

receive instructions from the State of Ukraine to apply for full status before the Federal Court to argue against the jurisdiction of the Court both with respect to recognition of the Award as against the State of Ukraine and enforcement thereof as against the State by reason of state immunity rights granted to foreign states under the *State Immunity Act*, RSC 1985, c. S-18 (the "*SIA*"). Ultimately in early September Mr. Kozak did in fact appear before Madam Prothonotary Tabib. The State of Ukraine was granted intervenor status and arguments with respect to the immunity of the State of Ukraine against the registration and enforcement of the Award against it were argued. Madam Prothonotary Tabib reserved her decision and on December 23, 2003 rendered a lengthy and comprehensive decision wherein she ultimately upheld the recognition and enforcement of the Award, denied the State of Ukraine's arguments with respect to state immunity, found that SPF and the State of Ukraine were one and the same, and found that the State of Ukraine had an exigible interest in the Aircraft with the result that the seizure by the Sheriff of the Aircraft was found to be proper. The decision of Madam Prothonotary Tabib was of course overturned by reason of the Orders of Justice Luc Martineau of the Federal Court, referred to in paragraph [11]. Martineau, J. ordered that Prothonotary Morneau, who gave the original Enforcement Order recognizing and enforcing the Award, had no jurisdiction to do so and that therefore the whole process before the Federal Court ultimately resulting in the Enforcement Order on and the seizure of the Aircraft was null.

[16] Of course on November 3, 2003 (the return date for the Dunn Order) neither the decision of Madam Prothonotary Tabib nor the ultimate Orders of Justice Luc Martineau of the Federal Court had occurred. At that time Mr. Justice Thompson of this Court who was the presiding Judge on the return date of the Dunn Order, had before him:

(1) the Originating Application and supporting materials of TMR; and

(2) a memorandum of SPF; and

(3) an Amended Interlocutory Application *(inter partes*) by Antonov seeking intervenor status.

[17] The Memorandum of SPF provided to Justice Thompson set out for him some of the history of the proceedings to that time and referred to an affidavit of Attorney Jody Shugar with respect to the proceedings then before the Federal Court. In her affidavit she listed *inter alia* the following issues then before the Federal Court:

(1) whether the Federal Court had jurisdiction with respect to the recognition and enforcement of an award arising out of a purely contractual dispute (presumably the jurisdiction *ratione materiae* issue);

(2) the status of SPF;

(3) the correct identity of the Judgment Debtor;

(4) whether the Aircraft presently under seizure is an exigible asset of the Judgment Debtor;

(5) whether the Aircraft presently under seizure is exempted from seizure under the *State Immunity Act* or other applicable legislation;

(6) whether a determination can be made, at the enforcement stage of a foreign arbitral Award,

as to who the actual Judgment Debtor is;

(7) whether a Sheriff's Officer acting on the creditor's advice, can go beyond the strict wording of a Writ of Seizure and seize property which *prima facie* does not appear to belong to the Judgment Debtor; and

(8) whether there are any principles of international law which would prevent the seizure of assets held by Antonov in satisfaction of a judgment against the State of Ukraine.

[18] The Memorandum of SPF goes on to state in para. 8 thereof:

"... Given that the Federal Court will be turning its mind to, amongst other issues, the matter of jurisdiction, the decision of the Federal Court will obviously determine whether the within Originating Application and the related Originating Application ("2003 01T 3136") will even need to proceed. On the one hand, if the Federal Court accepts jurisdiction and deals with and disposes of the rest of the issues argued before it, then there will be no need whatever for the within Originating Application or the related Originating Application to proceed before this Court. On the other hand, if the Federal Court declines jurisdiction in the matter, TMR will have the option of reviving and proceeding with its two Originating Applications before this Court." [Emphasis added.]

[19] SPF then goes on to state that even if the Federal Court should decline jurisdiction in the matter, it is the intention of SPF to argue and contest the within Originating Application. It then states that at para. 10:

"... in the circumstances the within Originating Application by TMR (and indeed, the related Originating Application - '2003 01T 3136') is clearly unnecessary and premature."

[20] In the penultimate paragraph of its memorandum SPF goes on to state:

"For the foregoing reasons, SPF respectfully submits that it would be inappropriate and premature for this Court to entertain TMR's Application for recognition and enforcement of the Award in this Province at this time, and that accordingly the Interim Order granted August 28, 2003 should be set aside. Alternatively, the Order granted August 28, 2003 should be stayed and this Court can provide direction with respect to timelines and the future conduct of the matter, contingent of course on developments of the Federal Court of Canada."

[21] In its Amended Interlocutory Application (*inter partes*) filed October 30, 2003, Antonov set out much of the history of the proceedings in the Federal Court and this Court to that time. It then went on to seek the following relief:

(1) intervenor status;

(2) the right to call evidence and conduct cross-examination of the Respondents in respect to the proper identity of the Judgment Debtor and its legal relationship to Antonov;

(3) the right to make oral and written submissions in respect to the proper identity of the Judgment Debtor and its legal relationship to Antonov;

(4) the right to participate in the determination of the factual and legal basis upon which TMR

intends to seize the Aircraft as part of any enforcement of its arbitral Award;

(5) the adjudication of any claims by Antonov arising from any requests for seizure of the Aircraft by TMR including, but not limited to, a stay of proceedings, security for costs and general and specific damages; and

(6) an immediate setting aside or an immediate granting of a stay of the *ex parte* Interim Order of Madam Justice dated August 28, 2003 pursuant to Rule 29.13 of the *Rules of the Supreme Court, 1986*.

The Thompson Order

[22] On the return date of November 3rd, counsel for TMR, SPF and Antonov appeared. The formal order filed November 12, 2003 (the "Thompson Order") in relation to that hearing recites the originating application, the application of Antonov for intervenor status, the appearance of counsel for TMR, SPF and Antonov and continues:

"**AND UPON READING** the Originating Application (*ex parte*) herein, with verifying Affidavit of Azim Hussain, and the Affidavits of Sarah Maxtone-Graham Francois-Poncet, Jody Shugar and Richard Desgagnés

AND UPON READING the Interlocutory Application (*inter partes*) filed by ANTK Antonov,

IT IS ORDERED THAT

1. The Interim Order issued herein on 28 August 2003 on the direction of Hon. Justice Dunn shall be continued until further Order of this Court; and

2. The Interlocutory Application of ANTK Antonov shall be adjourned without day."

[23] Essentially, after the Thompson Order, the activities of the parties before this Court went into a state of suspension while the process ongoing before the Federal Court unfolded. The Orders of Justice Luc Martineau of the Federal Court setting aside the Enforcement Order issued by Prothonotary Morneau of the Federal Court made in January, 2003, set all of the parties hereto into a state of agitated activity because the up till then hypothetical need for an order of recognition and enforcement of the Award in this Court had just become a real need. Justice Martineau of the Federal Court, having ordered the release of the Aircraft, TMR immediately sought to have the Aircraft seized again by the High Sheriff, this time pursuant to the Thompson Order. Inexplicably, even though TMR argued that the Thompson Order was a final order of recognition and enforcement, TMR, on October 4, 2004 filed an interlocutory application (*inter partes*) again seeking a "final order" that the Award be recognized and enforced in the province in the same manner as any other judgment of the Court. TMR's Ukrainian opponents immediately countered these movements. SPF, on October 5th, filed an application seeking an order setting aside both the Dunn Order and the Thompson Order, and vacating all subsequent proceedings in relation thereto. The bases of the SPF application were:

(a) that TMR failed to make full and frank disclosure to the Court of the existence of certain material facts and applicable law with the result that in the absence of such disclosure the Dunn Order ought never to have been granted;

(b) substantive and procedural requirements of the *State Immunity Act* were never brought to the attention of the presiding Judge with the result that the presiding Judge neither heard the parties on the issues which should have been addressed, nor was she able to satisfy herself whether it was appropriate in the circumstances to give the order sought by TMR;

(c) that the Dunn Order should be vacated on materially the same grounds as those relied upon by Justice Luc Martineau when he vacated the Enforcement Order in the Federal Court and that the doctrines of *res judicata* and issue estoppel are applicable in the circumstances;

(d) that the purported seizure of the Aircraft on September 24, 2004 on the instructions of TMR's counsel was improper and unlawful inasmuch as the Interim Order on which it was based was improperly obtained and was, in any event, by its own terms, an interim order.

[24] Antonov renewed its application for intervenor status by filing a new application on October 5, 2004. It argued that this Court should make an order immediately releasing the Aircraft for the following reasons:

(a) The lack of respect of the mandatory provisions of the *State Immunity Act*.

(b) The lack of full and fair disclosure in the initial *ex parte* application by TMR.

(c) *Res judicata* arising out of the judgment of Martineau, J.

(d) The principle of judicial comity.

(e) Abuse of process.

(f) That the Interim Order of Justice Dunn was not a money judgment pursuant to the provisions of the *JEA* and therefore not capable of being registered and enforced for the purposes of seizure.

[25] The State of Ukraine, also on October 5,2004, launched its first attack in this Court against TMR. Ukraine states in its application that the evidence of TMR, filed in the Federal Court, stated clearly that from the outset TMR had an intention to execute the Award against assets of the State of Ukraine and that TMR had taken the position in the Federal Court that SPF and the State of Ukraine were one and the same and that TMR was entitled to seize the Antonov aircraft as an asset of the State of Ukraine. The State of Ukraine complains in its application that TMR had not disclosed to the Court the interest of the State of Ukraine, or presented any evidence or indication that the *State Immunity Act* required this Court to apply the immunity granted Ukraine under that *Act*. Ukraine contends that s. 3 of the *State Immunity Act* requires this Court to give effect to immunity rights conferred upon a sovereign state and that s. 9 of the *SIA* requires that a sovereign state be served with the originating document in the manner directed in that section, and that the State of Ukraine had not been served by TMR with any originating process issued out of this Court or in the Federal Court of Canada. It therefore sought leave to intervene in order to protect its immunity rights under the *State Immunity Act*. In memoranda subsequently filed in this Court in support of its application Ukraine argued both jurisdictional immunity and immunity from execution, as well as a lack of admissible evidence on the part of TMR, failure of TMR to make Madam Justice Dunn aware on the *ex parte* application of the interest of the State of Ukraine in the matter and to raise state immunity rights, abuse of process and *res judicata*.

Procedure Adopted by this Court

[26] Antonov and the State of Ukraine were both granted full intervenor status to appear, make filings and argue this matter fully. After the intervenor applications were disposed of, all of the Ukrainian parties took the position that their various arguments with respect to material non-disclosure by TMR, the applicability of the *State Immunity Act* and whether an *ex parte* order of recognition and enforcement is permissible thereunder, abuse of process, *res judicata* and judicial comity would, if accepted by this Court, result in an order setting aside, or staying, the Dunn Order and/or the Thompson Order. In essence, they argued that their arguments, if successful, would constitute a "knockout blow" to the TMR application. TMR argued that the Thompson Order, having been given in an interlocutory proceeding, at which SPF was present and heard and at which Antonov was given the courtesy of an audience by the Court even though its intervenor application was not adjudicated upon, constituted a final interlocutory order which could only be overturned or varied on appeal to the Court of Appeal.

[27] After extensive argument by the parties, I ordered that the issues with respect to whether the Thompson Order was a final order or not, and the various arguments and sub-issues raised by the Ukrainian parties alleged to constitute a "knockout blow" should be determined firstly by the Court as decisions favourable to the Ukrainian parties on these issues would obviate the need for more lengthy hearings at which opposing Ukrainian legal experts would be required to appear and be examined on their various affidavits. These affidavits were available to me at the time of my ruling on this aspect of the matter, and it was apparent to me that, if the examination of these experts on their affidavits was to proceed, the process would be lengthy and expensive and not necessarily the best utilization of the resources of this Court if the position the Ukrainian parties had merit.

Finality of Formal Orders

[28] Notwithstanding the fact that both the Dunn Order and the Thompson Order were formal orders of the Court issued in the normal manner after the hearing of the *ex parte* and *inter partes* applications related thereto, all parties before me made extensive additional reference to the transcripts of the hearings of these two applications in order to buttress their various arguments with respect to material non-disclosure and the disputed issue of the finality of these orders. A review of the Dunn Order, and the transcript of the hearing related thereto, make it abundantly clear that this Order, as described in its title, was an "Interim Order" and that it would be returnable for a hearing on an *inter partes* basis on November 3, 2003 and that should SPF not appear on that date, TMR was granted leave to seek a final order. Notwithstanding this apparent "Interim" nature to the Dunn Order, TMR, apparently regarded the Dunn Order as both an order recognizing the Award and authorizing the enforcement of the Award, presumably in reliance upon the wording of para.1 thereof wherein it is stated that:

"... the Award be recognized and enforced in the province in the same manner as any other judgment of this Court..." [Emphasis added.]

In reliance thereon, TMR actually instructed the Sheriff to seize the Aircraft pursuant to the Dunn Order which the Sheriff refused to do on the basis that it was not the policy of the Sheriff's Office to effect duplicate seizures of the same asset. Notwithstanding the wording of para.1 of

the Dunn Order, I am satisfied that its true nature was that of an interim order which could be affirmed, varied or set aside on an *inter partes* application heard on the return date.

[29] With respect to the Thompson Order, TMR vigorously argued that the wording of the Thompson order to the effect that the Interim Order of Justice Dunn "shall be continued" converted the interim nature of the Dunn Order into a final order of the Court notwithstanding that the Order stipulates that such continuation shall be ". . . until the further Order of this Court." Extensive reference was made by TMR to the transcript of the hearing before Justice Thompson to buttress this argument. The total time of the hearing before Justice Thompson, according to the Appearance Detail Report in the Court records, totals one hour and twenty-eight minutes. The version of the transcript of the hearing before Thompson, J., produced by TMR, is printed on standard letter sized paper with four "pages" on a single side of such paper. In reality therefore it is less than twenty standard letter-sized pages in length. In support of its argument that Justice Thompson intended that the Thompson Order be a final order, TMR refers to a number of excerpts from the transcript as follows:

(a) Page 59 Lines 9 to 13 where Justice Thompson is heard to say:

"Well, Mr. Lilly, it seems to me that you have the basis for the continuation of the order. I don't see anything which at this point would allow the Court to set aside the order for recognition and enforcement. But, I would have concern about that order continuing without there being a provision that it would continue until a further order of the Court. Do you want to comment on that? I mean, I can't see how your client's position is at this time prejudiced."

(b) At pages 61 and 62, from line 21 on page 61, Justice Thompson is heard to say:

"... So, I'm just trying to be as direct and clear about it as I can. I don't see any of the parties, and, Mr. Browne, (Antonov counsel), including anything that you on your intervenor application have placed before me which would disentitle the continuance based on the facts that are before the Court at the present time of the continuance of the order of Justice Dunn. Now, there - so long as the parties are preserved in their ability to do what they think is appropriate, it seems to me that even if something happened quickly, too quickly even under our *Judgment Enforcement Act*, there is room to be before the Court very quickly to deal with any immediate prejudice that would occur."

(c) At page 65 line 17 continuing to page 66 Justice Thompson is heard as follows:

"So the order continuing means that if the Federal Court seizure is set aside, then I would assume that under the *Judgment Enforcement Act* the Sheriff would affect the seizure and then that would be subject to your rights under the *Judgment Enforcement Act* (referring to Antonov) which I understand from what's filed have been recognized, but doesn't preclude, wouldn't preclude you coming back into this Court on an application to have any other recognition that you feel your client is entitled to other than under the *Judgment Enforcement Act* occur."

(d) And later, on page 66, Judge Thompson, at lines 20 to 23 is heard to say:

"So, Mr. Lilly, at this point you'd have to convince me, I guess, Mr. Lilly, as to whether or not I should be granting this order without an ability of a party to reapply?"

(e) At page 71, lines 7 to 9, Justice Thompson is heard to say:

"Well, I don't think that in granting the order we're denying, we're denying the recognition and enforceability. We're affirming it, effectively."

(f) At page 74, lines 9 to 19, the following exchange takes place:

"The Court:

Q. I haven't granted him intervenor status and I haven't dismissed his application either. So, effectively what's happening is we're continuing -

Lilly, Q.C.:

Q. The order.

The Court:

Q. - the order subject to further order of this Court and no other applications have been dealt with in any final way."

(g) At page 75 Justice Thompson is, at lines 15 to 20, heard to say:

"So, I haven't passed on Mr. Browne's application, but you can, yes, Mr. Lilly, I guess, technically consider it adjourned *sine die*, consistent with the order, and I wouldn't consider myself seized with having dealt with it either."

[30] The above quote is the last substantive section of the transcript. Counsel for TMR argues that these excerpts from the transcript of the hearing before Thompson, J. indicate that he dealt with the issue of material non-disclosure and that the issues which were allegedly not disclosed to Justice Dunn were before Justice Thompson and that he allowed recognition of the Order and enforcement of it by seizure. Therefore, there is nothing interim about the Thompson Order. TMR contends that it doesn't matter if Antonov was formally before Justice Thompson (i.e. he has not ruled on its intervenor application). What matters is that the issues were discussed. TMR contends that non-disclosure was clearly presented to Justice Thompson as an issue and he did not buy into that argument. TMR contends that while the Thompson Order is not indefinite in time, its interlocutory basis remains and the only basis on which it could be set aside would be on the basis of new evidence, but not evidence of non-disclosure, as Justice Thompson has dealt with this.

[31] SPF takes the position that the hearing before Justice Thompson has to be considered in its context. When the parties were before Justice Thompson they had six weeks previously just completed seven or eight days in Federal Court where a great deal of evidence was led on all of the issues presently in dispute between the parties on this application. SPF contends that all of the parties were expecting a dispositive order of the Federal Court dealing with these issues and did not want to embark upon another hearing. Counsel points to para.8 of its application wherein it clearly refers to the possibility that there will be no need for the application in this Court to proceed, but that if the Federal Court declined jurisdiction, then SPF indicated a desire to argue the matter. It therefore sought setting aside of Justice Dunn's Order or a stay of it to preserve the

option to do what it is now doing before this Court, namely to argue all issues. SPF points to the statement of Thompson, J. to the effect that he was continuing the Dunn Order subject to further orders and that no other applications have been dealt with in any way. SPF contends that this is tantamount to saying that Thompson, J. was preserving everybody in the position in which they were and that as a result there was not substantive disposition. He claims that it was plain and obvious what Justice Thompson was doing.

[32] SPF counsel argues that the cherry picking of selective passages from the transcript of the hearing before Thompson, J. are self-serving and are utilized by TMR to torture the transcript into absurdity. The argument of SPF simply is that the whole tenor of the hearing before Justice Thompson was that the matter should not proceed and that the rights of the parties be preserved in the interim.

[33] Counsel for Antonov points out, at page 55, line 25, the following statement to Thompson, J. by Richard Desgagnés, one of the counsel for TMR:

"To supplement the answer given by Mr. Lilly, Mr. Justice Thompson, at the very minimum if the Court were to postpone or continue this application, at the very minimum the status quo should be preserved in that the interim order should continue until such time as the Court determine the application in fair practice. But secondly, and something that I think we seem to think that if and when the Court, Appeal Court renders its decision on the validity of this issue, it's going to solve a lot of problems. But one must not forget that, a, the Court may decide I have no jurisdiction and therefore, I'm not ruling on anything, I'm throwing the case out, in which case nothing is settled, we have to bring this motion again. (Later in the transcript Richard Desgagnés makes it clear that he is speaking of the Federal Court of Canada.)"

Conclusion Respecting Finality of Thompson Order

[34] I agree with counsel for SPF that the interpretation which TMR is attempting to apply to the various musings by Thompson, J., referred to in the quoted excerpts from the transcript, constitute a tortured interpretation of the transcript. I am satisfied that on the wording of the Thompson Order itself, the Court intended that the Dunn Order be continued in its interim nature. The whole tenor of the transcript, backgrounded by the very clear memorandum of SPF to the effect that it was not a cost effective use of the resources of the parties, or the time of the Court, to deal with this matter fully while the Federal Court proceedings were unresolved, makes it clear to me that Justice Thompson was doing nothing more than preserving the status quo. I am therefore satisfied that the Thompson Order is interim and that, on proper grounds, I have authority to confirm, vary, stay or discharge it. Therefore, we shall now turn to a consideration of the other arguments of the Ukrainian parties in relation thereto.

Material Non-Disclosure to Justice Dunn

[35] The general thrust of the argument made by the Ukrainian parties on this issue centers largely on the following points:

1. that the only parties to the Award were the applicant TMR and the respondent SPF;

2. that the arbitration as against the State of Ukraine was withdrawn by TMR;

3. that TMR has, throughout the proceedings both before the Federal Court and this Court, taken the position that SPF and the State of Ukraine are *alter egos* of each other and that by reason of SPF executing a contract in which disputes are referred to arbitration, this is tantamount to the State of Ukraine similarly agreeing to submit to arbitration;

4. that the property of the State of Ukraine is the property of SPF;

5. therefore, the Award is, in reality, an Award against the State of Ukraine.

[36] The issue of whether or not SPF is the State of Ukraine brings into play the provisions of the *State Immunity Act*, RSC 1985 C.Q-18. The relevant provisions of that *Act* are as follows:

"**2.** In this Act,

'**agency of a foreign state**'

'agency of a foreign state' means any legal entity that is an organ of the foreign state but that is separate from the foreign state;

'**commercial activity**'

'commercial activity' means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character;

'**foreign state**'

'foreign state'includes

(*a*) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,

(*b*) 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

(*c*) any political subdivision of the foreign state;

'**political subdivision**'

'political subdivision' means a province, state or other like political subdivision of a foreign state that is a federal state.

State immunity

3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

Court to give effect to immunity

(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

Immunity waived

4. (1) A foreign state is not immune from the jurisdiction of a court if the state waives the immunity conferred by subsection 3(1) by submitting to the jurisdiction of the court in accordance with subsection (2) or (4).

State submits to jurisdiction

(2) In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it

(*a*) explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceedings commence;

(*b*) initiates the proceedings in the court; or

(*c*) intervenes or takes any step in the proceedings before the court.

Exception

(3) Paragraph (2)(*c*) does not apply to

(*a*) any intervention or step taken by a foreign state in proceedings before a court for the purpose of claiming immunity from the jurisdiction of the court;

or

(*b*) any step taken by a foreign state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained before the step was taken and immunity is claimed as soon as reasonably practicable after they are ascertained.

Third party proceedings and counter-claims

(4) A foreign state that initiates proceedings in a court or that intervenes or takes any step in proceedings before a court, other than an intervention or step to which paragraph (2)(*c*) does not apply, submits to the jurisdiction of the court in respect of any third party proceedings that arise, or counter-claim that arises, out of the subject-matter of the proceedings initiated by the state or in which the state has so intervened or taken a step.

Appeal and review

(5) Where, in any proceedings before a court, a foreign state submits to the jurisdiction of the court in accordance with subsection (2) or (4), that submission is deemed to be a submission by the state to the jurisdiction of such one or more courts by which those proceedings may, in whole or in part, subsequently be considered on appeal or in the exercise of supervisory jurisdiction.

Commercial activity

5. 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.

...

Service on a foreign state

9. (1) Service of an originating document on a foreign state, other than on an agency of the foreign state, may be made

(*a*) in any manner agreed on by the state;

(*b*) in accordance with any international Convention to which the state is a party; or

(*c*) in the manner provided in subsection (2).

(2) For the purposes of paragraph (1)(*c*), anyone wishing to serve an originating document on a foreign state may deliver a copy of the document, in person or by registered mail, to the Deputy Minister of Foreign Affairs or a person designated by him for the purpose, who shall transmit it to the foreign state.

Service on an agency of a foreign state

(3) Service of an originating document on an agency of a foreign state may be made

(*a*) in any manner agreed on by the agency;

(*b*) in accordance with any international Convention applicable to the agency;

or

(*c*) in accordance with any applicable rules of court.

(4) Where service on an agency of a foreign state cannot be made under subsection (3), a court may, by order, direct how service is to be made.

Date of service

(5) Where service of an originating document is made in the manner provided in subsection (2), service of the document shall be deemed to have been made on the day that the Deputy Minister of Foreign Affairs or a person designated by him pursuant to subsection (2) certifies to the relevant court that the copy of the document has been transmitted to the foreign state.

Default judgment

10. (1) Where, in any proceedings in a court, service of an originating document has been made on a foreign state in accordance with subsection 9(1), (3) or (4) and the state has failed to take, within the time limited therefor by the rules of the court or otherwise by law, the initial step required of a defendant or respondent in those proceedings in that court, no further step toward judgment may be taken in the proceedings except after the expiration of at least sixty days following the date of service of the originating document.

(2) Where judgment is signed against a foreign state in any proceedings in which the state has failed to take the initial step referred to in subsection (1), a certified copy of the judgment shall

be served on the foreign state

(*a*) where service of the document that originated the proceedings was made on an agency of the foreign state, in such manner as is ordered by the court;

or (*b*) in any other case, in the manner specified in paragraph 9(1)(*c*) as though the judgment were an originating document.

(3) Where, by reason of subsection (2), a certified copy of a judgment is required to be served in the manner specified in paragraph 9(1)(*c*), subsections 9(2) and (5) apply with such modifications as the circumstances require.

Application to set aside default judgment

(4) A foreign state may, within sixty days after service on it of a certified copy of a judgment pursuant to subsection (2), apply to have the judgment set aside.

No injunction, specific performance, etc., without consent

11. (1) Subject to subsection (3), no relief by way of an injunction, specific performance or the recovery of land or other property may be granted against a foreign state unless the state consents in writing to that relief and, where the state so consents, the relief granted shall not be greater than that consented to by the state.

Submission not consent

(2) Submission by a foreign state to the jurisdiction of a court is not consent for the purposes of subsection (1).

Agency of a foreign state

(3) This section does not apply to an agency of a foreign state.

Execution

12. (1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture except where

(*a*) the state has, either explicitly or by implication, waived its immunity from attachment, execution, arrest, detention, seizure or forfeiture, unless the foreign state has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal;

(*b*) the property is used or is intended for a commercial activity; or

(*c*) the execution relates to a judgment establishing rights in property that has been acquired by succession or gift or in immovable property located in Canada."

[37] The *International Commercial Arbitration Act*, RSNL 1990 c. I-15, deals with implementation in this province of the New York Convention which is set out as Schedule "A" to the *International Commercial Arbitration Act*. Section 3 of the *International Commercial*

Arbitration Act states that the New York Convention applies in this province with respect to arbitral awards and arbitration agreements, but only in respect of differences arising out of commercial legal relationships, whether contractual or not. Section 4 provides that for the purpose of seeking recognition of an arbitral award under the New York Convention application is made to the Trial Division of this Court. The relevant provisions of the New York Convention are as follows:

"Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified coy thereof.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II where, [sic] under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a

competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

[38] At the hearing of its Originating Application to have the Award recognized and enforced, TMR, as required by Article IV of the New York Convention, provided to the Court the materials set out in s. 1 thereof. TMR apparently took the position that, in its Originating Application, it was applying both for recognition by this Court of the Award, and an order contemporaneously authorizing enforcement of the Award. As stated previously, it has been the clearly articulated position of TMR, at lest in the hearings before me, that SPF and the State of Ukraine are one and the same. Therefore in the mind of TMR and its counsel, it was making an application to this Court for the recognition of an Award which it believed was an Award against the State of Ukraine and enforcement of that Award as against the State of Ukraine.

[39] The Ukrainian parties take the position that, under the *State Immunity Act*, the principal rule, as enunciated by s. 3, is that a foreign state is immune from the jurisdiction of any Court in Canada "except as provided by this Act". They also take the position that under s. 3(2), in any proceeding before a Court, the Court shall give effect to the immunity conferred on a foreign state by ss. (1) notwithstanding that the state has failed to take any step in the proceedings. The Ukrainian parties argue that the proper process to have been followed by TMR in seeking recognition and enforcement of the Award, as against the State of Ukraine, was to have its Originating Application served as an "originating document" on the State of Ukraine in accordance with the provisions of s. 9 of the *SIA*. They contend that the other preconditions of alternate forms of service upon the State as set out in s. 9 not being met the only valid means of service on Ukraine is in the manner set out in ss. 2 of s. 9 which was by delivering the originating document to the Deputy Minister of Foreign Affairs for Canada who would transmit it to the State of Ukraine. Under s. 9(5) where service is made by the Deputy Minister of Foreign Affairs, the originating document is deemed to have been served on the date that the Deputy Minister of Foreign Affairs certifies to the relevant Court that a copy of the document had been transmitted to the foreign state.

[40] Turning then to s. 10 of the *State Immunity Act*, the Ukrainian parties take the position that TMR was obliged to wait for a period of at least 60 days following the date of deemed service of the originating document on the State of Ukraine before it could take any further step towards judgment. They contend that seeking to have an arbitral award recognized and enforced is the same thing as taking a step towards judgment. The Ukrainian parties point to a transcript of the hearing before Justice Dunn on August 28, 2003, as well as the originating application in this matter filed with the Court. They point out that nowhere therein is there any mention of the *State Immunity Act* and the possibility of the State of Ukraine being immune from the registration of the Award or any execution on it by reason of the provisions of the *State Immunity Act*. They point out that the only inference of any involvement on the part of the State of Ukraine is in the

title of the originating application wherein SPF is referred to as "an organ of the State of Ukraine." Both the Originating Application and the transcript indicate there were representations made to the Court that there is no impediment to the registration, recognition or enforcement of the Award.

[41] The Ukrainian parties contend that any reasonable interpretation of the transcript of the hearing before Madam Justice Dunn would indicate great reluctance on her part to accede to the application of TMR on an *ex parte* basis. At lines 61 to 64 on page 1 of the transcript provided, Justice Dunn asks whether there is anything in the legislation which speaks to all remedies needing to be exhausted before the Award can be registered in this jurisdiction. Counsel for TMR then launches into a brief review of the New York Convention stating to the Court that recognition and enforcement of an award may be refused at the request of the party against whom it is invoked only if that party furnishes to the Court proof of the various grounds set out in Article V. He then goes on to say that the deponent Sarah Maxtone-Graham Francois-Poncet has reviewed the Convention, the issues relating to the nature of the Award, the arguments made at the Arbitration and before the Court of Appeal in Stockholm and knows of no impediment to the registration, recognition and enforcement of the final Arbitration Award. At this point, Judge Dunn states:

"Now, what about the ...and perhaps I'm reading Article V wrong, but this is *ex parte*?

Mr. Lilly confirms that it is *ex parte*.

[42] Justice Dunn then states:

"Is there not the suggestion there that the other party would have an opportunity to speak to the items ... "

[43] At this point Mr. Lilly, counsel for TMR, then states that a fair and reasonable interpretation in answer to Justice Dunn's question was that an application may be presented *ex parte* because notice to the respondent was not required by the New York Convention and that under the normal rules of practice of this Court any party which has been made subject to an *ex parte* order can apply to the Court to have the order set aside on notice. He then goes on to point out to Justice Dunn that the same Order is currently registered with the Federal Court and that the Federal Court is hearing motions by "the parties" with respect to the ownership and exigibility of a seized asset that is located in this province. Mr. Lilly then goes on to explain that there is an urgency to the application before Judge Dunn because, apart from those ownership issues, there was an application before the Federal Court challenging the validity of the registration of the Award itself based on a separation of powers issue previously referred to herein and that the possibility of a "gap...in jurisdiction" on the separation of powers issue would possibility see any Federal Court Order set aside. After this explanation, Mr. Lilly concludes:

"In the, you know, so that, that's the reasoning, I guess, behind the ...that's the urgency, if you like, behind the request for, for ex parte, and as I say, I think that the fact that an application can be made on relatively short notice to set aside the ex parte order that you've been requested to give, you know, does preserve the rights of all hands."

[44] To this Justice Dunn replies:

"Well, I would like the Order to reflect that."

[45] As mentioned at para. [8] of these reasons for judgment, TMR had earlier made another originating application to this Court (2003 01T 3136) on August 1, 2003. At para. 10 of that application TMR stated that the High Sheriff of Newfoundland had received the following notices pursuant to s. 159 and 161 of the *Judgment Enforcement Act*, namely:

(a) a Notice of Objection dated July 11, 2003 from SPF; and

(b) a Notice of Third Party Interest dated July 11, 2003 from Antonov.

[46] At para. 15 of the application, TMR applied to the Court, pursuant to s. 164 of the *Judgment Enforcement Act* to dispute the Notice of Objection of SPF and the Notice of Third Party Claim by Antonov and further, to determine whether the State of Ukraine is the judgment debtor and what interest it has in the Aircraft. At para.16 TMR applied for an order:

(a) that the State of Ukraine is the Judgment Debtor;

(b) that the Aircraft is the property of the State of Ukraine or, alternatively, that the State of Ukraine has an exigible interest in the Aircraft;

(c) that there is no impediment under the *State Immunity Act*, RSC 1985 c.S-18, for the execution of the Writ of Seizure and Sale.

[47] Also, on August 1, 2003 TMR filed a Notice of Motion with the Federal Court basically looking for the same things as it did in the aforementioned Newfoundland Originating Application and from that application, particularly paras. 17 to 22, it is clear that TMR is taking the position that SPF is no other than the State of Ukraine and that it is an organ of the State of Ukraine that is not separate from the State of Ukraine as for the meanings to be given those terms in the *State Immunity Act*. In addition it contends that under Ukrainian law the State of Ukraine is liable for the payment of the amounts due pursuant to the Award.

[48] In addition, a transcript of the August 28, 2003 hearing before Madam Prothonotary Tabib in the Federal Court of Canada shows that the State of Ukraine had filed with the Federal Court a diplomatic note claiming both jurisdictional and execution immunity.

[49] It is clear from these various items that the issue of immunity of the State of Ukraine was a live issue before the Federal Court and before the High Sheriff of Newfoundland in the enforcement of the Federal Court Writ of Seizure before TMR's application to Justice Dunn of this Court. These issues had been raised both by SPF and Antonov and, on August 28th had been raised with respect to jurisdictional and enforcement immunity in the Federal Court by counsel for Ukraine who, I am advised, had advised Madam Prothonotary Tabib that he was awaiting instructions to intervene in the then ongoing applications. Such instructions were, in fact, later received and the State of Ukraine was admitted as an intervenor in the Federal Court proceedings.

[50] It appears that the non-disclosure of the *State Immunity Act* issues to Madam Justice Dunn was predicated upon a number of considered views of counsel for TMR as follows:

1. That under s. 5 of the *State Immunity Act* a foreign state is not immune from the jurisdiction of the Court in any proceedings that relate to commercial activity of the foreign state. Counsel for TMR take the position that the Award clearly arises out of "commercial activity" and that based upon the expert opinion of Professor Dr. Anatoly Dovgert, SPF and the State of Ukraine are one and the same and therefore the commercial activity of SPF is the commercial activity of the State of Ukraine and thus the State of Ukraine is not immune from the application of TMR to have the arbitral Award recognized in this jurisdiction;

2. that the New York Convention is intended to operate as a summary procedure. TMR counsel points to Article III of the Convention which requires that contracting states "shall recognize arbitral awards as binding and enforce them." [Emphasis added.] They additionally point to Article IV which imposes very limited obligations upon an applying party seeking recognition and enforcement, namely, the requirement simply to provide an authenticated original award and a copy of the arbitration agreement. Turning then to Article V of the Convention they take the position that this Article implies that recognition and enforcement may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority various items set out. They take the position that as the New York Convention does not require any notice to be given to the party against whom the award has been made, to the effect that the successful party is applying to have it registered and enforced, then any application to the Court for registration and enforcement may be made ex parte, and the right of the party against whom it is made to apply to the Court to have the recognition and enforcement of the award refused is made at a later date.

[51] This argument of TMR does not take into consideration Article V(2) of the Convention which sets out as additional grounds on which recognition and enforcement of the arbitral Award may be refused, the fact that the Court can refuse recognition and enforcement where to do so would be "contrary to the public policy of that country."

[52] It may well be that the opinions held by counsel for TMR, with respect to the procedure to be followed in the recognition and enforcement of foreign arbitral awards, and their duty of disclosure to the Court in seeking such recognition and enforcement *ex parte*, were held honestly and in good faith by them. It is not necessary for the purpose of these reasons that I decide whether that was the case. It may well be that the greater emphasis upon "execution" as opposed to "recognition" by Antonov in particular in its various applications, both before the Federal Court and this Court, distracted TMR counsel from the "jurisdictional immunity" issue. As well, the provision of s. 5 of the *State Immunity Act* to the effect that a foreign state is not immune from the jurisdiction of a Court in any proceedings that relate to commercial activity of that foreign state, appears to have led TMR counsel to the belief that the determination of whether these proceedings related to commercial activity of the State of Ukraine was a matter for consideration only at the time that the State, if it chose to, applied to have the Recognition and Enforcement Order vacated.

[53] In **Canadian Paraplegic Assn. (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.** 1997 N.J. No. 122 (NLCA) Green, J. A. (as he then was) dealt with an appeal from a decision of the Trial Division allowing an *ex parte* application to join a fourth party. The appellant third party had brought an application to add a fourth party without notice to the respondent despite the fact that the respondent had objected previously and had requested that it

be notified of any such application. While the decision of Green, J.A. deals with the interaction of Rules 12 and 14, it was clear to Green, J.A. that the applications judge was understandably concerned about the failure to give notice to the respondent, especially where counsel knew that the respondent was opposing the application and requested advance notice of it. While Green, J.A. considered that the application judge's ruling was incorrect on the application of the Rules, he went on to consider the duty of parties to the Court on *ex parte* applications. At para.18 of the judgment he states:

"On any *ex parte* application, the utmost good faith must be observed. That requires full and frank disclosure of all material facts known to the applicant or counsel that could reasonably be expected to have a bearing on the outcome of the application. Because counsel for the applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard, counsel is under a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances."

[54] At para.22 Green, J.A. continues:

"Material mis-statements or non-disclosure on an *ex parte* application will justify the court, on a subsequent review of the order, in setting aside the order for that reason alone. This principle is one of long standing: Republic of Peru v. Dreyfus (1886), 55 L.T. 802; Sturgeon v. Hooker (1847), 63 E.R. 1158; R. v. Kensington Tax Commission [1917] 1 K.B. 486 (C.A.). The rationale is that the court, in exercise of its inherent jurisdiction to control its process, is justified in dealing with an abuse of its process and this is so regardless of whether the abuser might in fact otherwise have had a good case on the merits."

[55] In **Evans v. Silicon Valley IPO Network,** 2004 BCCA 149; 2004 Carswell BC 521, the British Columbia Court of Appeal dealt with a case where the plaintiff had obtained judgment against one of the defendants and his companies. This defendant was at the time in prison. There were funds in a bank account which had been frozen by the B.C. Securities Commission. The plaintiff obtained a garnishing order against the frozen account and served it on the party who was holding the funds, which party failed either to file a dispute notice or pay the funds into Court. The plaintiff then obtained and perfected an order absolute against the party holding the funds. Other parties brought a motion for an order that they had standing to set aside the garnishing orders, or that they be added as parties or permitted to appear with respect to the issue relating to the order absolute. The Court held that the plaintiff was not entitled to the equitable relief of an order absolute. The evidence indicated that a substantial amount of evidence relating to the disputed funds was known to the plaintiff, but not disclosed by him, at the time he obtained the order absolute. The Court held that plaintiff's counsel breached a clear duty to fully advise the Court of relevant circumstances at the hearing of the application, including the source and nature of the funds and the existence of other claims against the funds. The plaintiff did not disclose to the chambers judge that the funds in question were the product of fraudulent stock manipulations and did not serve other creditors with notice of the application for the order absolute. Plaintiff's counsel also inaccurately advised the chambers judge that the application for an order absolute was unopposed, relying on the lack of any formal opposition. Information might have persuaded the chambers judge not to grant the order absolute and to direct payment of the disputed funds into Court pending a full appeal. Donald, J.A. on the issue of non-

disclosure, at para.33 of the Carswell version of the decision, stated:

"The appellant may have convinced himself that no notice to the other parties was required and that their claims were immaterial in respect of his application for an order absolute, but his counsel was obliged as an officer of the court to disclose any facts which *might* have influenced the court's decision. In *Money In A Minute Auto Loans Ltd. v. Price*, 2001 BCSC 864 (B.C.S.C.) [in chambers])McKinnon, J. makes the point in a summary of the law with which I respectfully agree, at paras. 12-14:

[12] It is trite law to observe that an *ex parte* applicant must make full and frank disclosure of all material facts to the court and failure to do so allows the court to set the order aside without regard to the merits of the application: [citations omitted] . . . counsel must also display a high standard of candor and diligence in disclosure: . . .[Citations omitted.]

[13] A material fact is one that may or might affect the outcome of the application [citations omitted] . . . It is for the court to decide what is a material fact . . [Citations omitted.]

[14] The court also has jurisdiction to set aside an *ex parte* order on its merits, whether or not there was a material misrepresentation, if the person affected by the order applies under BCSC Rule 52(12.3) [citation omitted] . . . An application to set aside the order is heard *de novo* as to the law and facts of the original application . . ." [Citation omitted.]

[56] Rule 29.13 of the *Rules of the Supreme Court, 1986* states that the Court may set aside or vary an order made *ex parte* on such terms as it thinks just. In **Canadian Paraplegic** (supra) Green, J.A. dealt with the nature of any review of an *ex parte* order undertaken pursuant to Rule 29.13. At para. 25 he states:

"... As I have indicated previously in these reasons, such an application is not an inquiry, in the nature of an appeal, to determine whether the judge who granted the ex parte order was in error; rather, it involves a revisiting of the issue anew on the basis of additional information supplied by the party who was not heard the first time. Where the issue is one of material non-disclosure, the judge hearing an application under Rule 29.13 does not even have to speculate as to whether the disclosure of the extra information would have resulted in a different initial decision. If material non-disclosure is established, the fact that the non-disclosure occurred is, in itself, grounds for setting aside the order in the exercise of the discretion of the judge hearing the matter. Indeed, any judge of a superior court has inherent power to inquire into and judge the regularity, and prevent abuse, of its process. "

[57] In my view, the single most important consideration in any review of an *ex parte* order under Rule 29.13, based upon non-disclosure, is whether the information alleged not to have been disclosed is "material" and, in the wording of Justice Donald in **Evans v. Silicon Valley** is a "fact . . . that may or might affect the outcome of an application." Whether the non-disclosure arises by reason of accident, negligence, honestly but erroneously-held belief as to materiality, or by deliberate deceit or omission, it is the materiality of the facts omitted which should govern. It is not necessary for the reviewing court, under Rule 29.13 to have decided that the material fact or facts omitted would have affected the outcome of the application. It is simply necessary to determine that they " may or might" affect the outcome.

[58] It is clear to me that counsel for TMR, at the time of the filing of its Originating Application in this matter, and at the time both of its appearance before Madam Justice Dunn and before Mr. Justice Thompson, was aware of both the jurisdictional immunity and execution immunity issues put before the Federal Court of Appeal which, at the time, were live issues, argued at length before the Federal Court, and as yet were unruled upon by the Federal Court. Obviously they did not agree with these arguments. However, their apparently willing blindness to the possibility that these arguments "may or might" have affected the decisions of Madam Justice Dunn and Mr. Justice Thompson, led them to make errors of what I find to have been material non-disclosure to these justices. Antonov and the State of Ukraine had argued before the Federal Court that on a reading of s. 3(2) of the *SIA*, no Court has jurisdiction in any matter involving a foreign state unless the conditions giving rise to the exceptions provided in the *SIA* are specifically alleged, proven and determined to be applicable by the Court. TMR had argued that a failure of the Court or the parties to address the issue did not go to the jurisdiction of the Court *ratione materiae* so as to render its order a nullity. It argued that this proposition of nullity ignored the fact that some of the grounds upon which the lack of immunity may be founded can only occur after a proceeding is initiated (i.e. para. 4(2)(a) or (c), whereby a state may waive immunity by agreement or by intervention in the proceedings). They argued that if a Court were to lack jurisdiction until such time as an exception provided in the *SIA* were alleged and recognized, the ability of a foreign state to waive immunity after the commencement of a proceeding, would be nugatory, as absent another pre-existing exception to immunity, there could be no valid proceedings taken to which a foreign state could attorn. They further argued that a Court which lacked jurisdiction *ratione materiae* cannot be clothed with such jurisdiction through the consent of the parties. TMR contended that where the Federal Court had jurisdiction over the subject matter, it had the jurisdiction to make a determination as to whether or not the exceptions provided in the *State Immunity Act* existed. They argued that whether or not the Court discharged its burden in making a determination, or whether or not it erred in making its determination, are matters which do not effect the *prima facie* validity of the order of Prothonotary Morneau based on **Volhoffer v. Volhoffer**, [1925] 2 WWR 304, regarding collateral attacks:

"If a tribunal which has jurisdiction over a subject-matter, provided a given state of facts exists, makes an order in respect of that subject-matter in the absence of the existence of that state of facts, and, therefore, without jurisdiction, such order must be treated as valid and binding until it is reversed upon an appeal, and, generally speaking, it cannot be attacked in a collateral proceeding."

[59] TMR argued that the Registration Order of Prothonotary Morneau fell within the type of order described in **Volhoffer** and that the arguments of Antonov in the State of Ukraine are therefore constituted a collateral attack on the Registration Order that could not be permitted. They additionally argued the issue of state immunity.

[60] I note that while this argument was accepted by Prothonotary Tabib in her decision (reported as **TMR Energy Ltd. v. State Property Fund of Ukraine**, 2003 Carswell Nat. 4117) the subsequent Order of Mr. Justice Martineau renders this finding by Prothonotary Tabib nugatory because he concludes that Prothonotary Morneau had no jurisdiction as a prothonotary to make a recognition and enforcement order in the first instance. Nevertheless Justice Martineau, in obiter, in his Order of September 22nd concluded that:

(1) Whether SPF was an "agency of a foreign state" within the meaning of the *SIA* or is in fact the alter ego or a subdivision of the "foreign state" itself, it remains that before a judgment or order can be obtained or made, service of the originating document must be made upon the state in accordance with s. 9 of the *State Immunity Act*.

(2) The conditions and requirements found in the *State Immunity Act* have precedence over the Rules of the Federal Court.

(3) By virtue of para. 3(2) of the *SIA* a court is required to give effect to the immunity conferred upon a sovereign state by s. 1 of the *Act* notwithstanding that the state has failed to take any step in the proceedings.

(4) While immunity from the jurisdiction of the Court may not exist in any proceeding that relate to the commercial activity of a foreign state as provided in s. 5 of the *SIA*, such exceptions must be expressly invoked by the applicant who must present evidence in this regard before any finding can be made in this regard by the Court.

[61] With all due respect to the lengthy and thorough consideration of this issue by Madam Prothonotary Tabib, I am of the view that the views of Mr. Justice Martineau expressed in his Orders of September 22nd, albeit without the benefit of citation and extensive reasons therefor, is the correct interpretation of the interaction of the *SIA* with the New York Convention. In both **Tritt v. United States of America et al.** (1989), 68 O.R. (2d) 284, and in **Softrade Inc. v. United Republic of Transenna**, [2004] O.J. No. 2325, service of the originating document on a foreign state is required to be made according to s. 9 of the *State Immunity Act* and that unless and until that is done no jurisdiction exists in a Canadian Court to enter a judgment against foreign state. TMR has argued what occurs under the New York Convention is a mere "recognition" of a foreign arbitral award which is then "enforced". Their position is that such recognition and enforcement is not the same as a "judgment" and that therefore the steps taken by them are not steps taken towards a "judgment" which cannot be taken under s. 10(1) of the *SIA* until the expiry of at least 60 days following the date of service of the originating document.

[62] With respect, I cannot accept these positions. How can it be that the Award, having been recognized by a "Order" of this Court does not constitute a judgment as envisaged by s. 10(1) of the *State Immunity Act*. In that regard reference should be made to Rule 1.03(m) of the *Rules of the Supreme Court, 1986* which states:

"'Order' means an order of the Court and includes a judgment, decree or ruling;"

I find no difficulty in concluding that the "Orders" of Justice Dunn and Justice Thompson of this Court were intended to operate as "judgments" in that they envisaged enforcement proceedings whereby a party would be required to make a payment of money and costs or either. In this regard reference should be made to the definition in Rule 1.03(k) of the *Rules of the Supreme Court, 1986* which states:

"'judgment debtor' includes a party required to make a payment of money and costs, or either under an order ..."

What could SPF and the State of Ukraine be considered to be other than a judgment debtor.

[63] These arguments are material facts which ought to have been disclosed to Justices Dunn and Thompson. Thus on the argument of material non-disclosure alone, I am satisfied that the Orders of Madam Justice Dunn and Mr. Justice Thompson are to be vacated insofar as they purport in any way to recognize and enforce the Award in this Province in the same manner as any other judgment of this Court, notwithstanding that the Originating Application, the Dunn Order, and the affidavit of Sarah Maxtone-Graham Francois-Poncet may have been served upon the State of Ukraine pursuant to the provisions of s. 9 of the *SIA*. Additionally I make this ruling vacating the Thompson Order on the ground that on November 3, 2003 the 60 day period after service of the originating document before the taking of a next step to judgment as required by 10(1) of the *State Immunity Act* had not then expired. Therefore the Recognition and Enforcement Orders of Justice Dunn and Justice Thompson insofar as they relate to recognition and enforcement and all post recognition and enforcement proceedings to enforce same shall be immediately vacated. The Sheriff shall release the Aircraft to Antonov in accordance with his normal procedures related thereto under the *JEA*.

Additional Reasons for Decision

[64] My reasons with respect to (1) the issue of material non disclosure before Justices Dunn and Thompson; and (2) non-expiry of the 60 day period set out in s. 10 of the *SIA* effectively deal with whether or not the Dunn Order and/or the Thompson Order, or both, ought to be vacated to the extent indicated in these reasons. I am given to understand that this matter will next come before the Federal Court of Appeal around January 10, 2005. It is therefore unlikely, given my vacating the Dunn Order and the Thompson Order in the manner indicated, that this matter will come back before this Court or the Supreme Court of Newfoundland and Labrador, Court of Appeal, in the interim. This is so because counsel have advised me that the Case Management Judge in the Federal Court of Appeal has indicated a willingness to entertain on short notice an emergency application continuing the seizure of the Aircraft in the now realized eventuality that this Court would vacate the Dunn and Thompson Orders. In that regard I am given to understand that the Ukrainian parties have agreed not to attempt to remove the Aircraft from its present location in Goose Bay, Labrador, while such an emergency application, apparently to stay or vacate or vary the Orders of Martineau, J. in the Trial Division of the Federal Court, is made to the Federal Court of Appeal. However it is possible that the Federal Court of Appeal may not stay the Orders of Justice Martineau in the Trial Division of the Federal Court which might result in the parties being back before our Court of Appeal on an application to stay my rulings. It is therefore incumbent upon me to provide additional reasons for my decision on the various other preliminary arguments raised by the Ukranian parties. In this regard my reasons will not be extensive due to my desire to have these reasons for judgment filed at the earliest possible moment in consideration of the fact that the emergency application to be made to the Federal Court, Court of Appeal, will likely occur during the upcoming holiday season. I naturally wish to be attentive to the sensitivities of the season and the reduced availability of clients and counsel and judges during such a period.

Judicial Comity

[65] **Black's Law Dictionary**, 4th Edition, West Publishing Company, St. Paul, Minnesota, defines "judicial comity" as follows:

"The principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."

In its commentary on this definition Black's Law Dictionary states:

"There is no statute or common-law rule by which one court is bound to abide by the decisions of another court of equal rank. It does so simply for what maybe called comity among judges. ... Comity is not a rule of law, but one of practise, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative, comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided." [Citations omitted.]

[66] The Ukranian parties have argued that in recognition of the principle of judicial comity, the proceedings in this Court ought to be vacated or stayed because TMR is subjecting the Ukranian parties to a duplication of procedure and expense, as well as a delay in the realization of the rights which they would otherwise have by reason of the fact that the Federal Court has vacated the Enforcement Order initially issued by Prothonotary Morneau in that Court and vacated all subsequent execution processes related thereto. In this regard the principle of judicial comity requires consideration of many of the same issues as the principle of *res judicata* and the principle of issue estoppel. More on these other principles later in these reasons for judgment.

[67] As stated earlier in these reasons, the principle reason why TMR's application for recognition and enforcement of the Award was duplicated in this Court was to "backstop" TMR's rights in the event that the Federal Court of Canada were to decide that it had no jurisdiction *ratione materiae* over an application for recognition and enforcement of a foreign arbitral award by reason of the division of the powers under the *Canadian Constitution*. At the time TMR made its initial Originating Application to the Federal Court of Canada, the Aircraft subsequently seized was not situated in Labrador. I am not aware whether TMR had any information indicating that the Aircraft might subsequently arrive in a Canadian jurisdiction. TMR therefore logically sought recognition and enforcement of the Award from the sole court in the country with trial jurisdiction whose order would be recognized anywhere in Canada and would be enforced by local sheriffs in the various provincial and territorial jurisdictions across the country. SPF is the party who put the cat amongst the pigeons by raising the question of the Federal Court jurisdiction *ratione materiae*, thus creating the need for the "backstop" application in this Court. While I have not been directed to any materials before the Federal Court wherein Antonov and the State of Ukraine separately and on their own initiatives posed this challenge to the jurisdiction of the Federal Court, I have no doubt that Antonov and Ukraine were not disappointed that the argument was raised by SPF. A decision of this Court finding that this current proceeding by TMR ought to be stayed and vacated because of the principles of judicial comity would have substantial value in securing uniformity of decision and discouraging repeated litigation of the same questions. Already, in these reasons for judgment, I have come to conclusions about at what stage in an application for recognition and enforcement of a foreign arbitral award the immunity of a state is engaged and the timing of arguments with respect to the commercial activity exception to state immunity should be raised, decisions which are different

from those of Madam Prothonotary Tabib. Normally under the principle of judicial comity I would, in the absence of the challenge by SPF to the jurisdiction of the Federal Court *ratione materiae*, have stayed or vacated the Dunn Order and the Thompson Order in deference to judicial comity. To do so, however on the sole basis of judicial comity would have been to allow SPF, and its allies Antonov and the State of Ukraine, to gain advantage, at least in the form of delay, over TMR based upon a challenge to the jurisdiction *ratione materiae* of the Federal Court which challenge was dismissed by Madam Prothonotary Tabib and not ruled upon by Mr. Justice Martineau. This would be unreasonable in light of the fact that, in effect, SPF created the need for the duplicate applications by its challenge to the jurisdiction of the Federal Court in the first place.

[68] In conclusion on this issue therefore I am not prepared to find that the Dunn Order and the Thompson Order ought to have been stayed or vacated based solely upon principles of judicial comity and I make no decision related thereto. It may be that judicial comity may ground some future application to stay or vacate these proceedings when there is finality of judicial decision on the argument of jurisdiction *rational materiae*. Before that event occurring, any decision by me based on judicial comity is premature.

Res Judicata andIssue Estoppel

[69] Mr. Justice Martineau set aside the Registration Order obtained *ex parte* by TMR on the grounds that Prothonotary Morneau who granted the Order did not have jurisdiction to grant it. As a result Mr. Justice Martineau of the Federal Court set aside that Order and

"all related proceedings before this Court to enforce same, or in contestation or confirmation of the validity of any resulting seizure ...".

In making this Order, Mr. Justice Martineau refused different forms of relief requested by TMR. TMR had asked the Court "to make, *ex parte*, an order *nunc pro tunc* (or *de bene esse*) registering, recognizing and enforcing the Award on the basis of the record ... on January 15, 2003." TMR had asked Mr. Justice Martineau to grant a stay of the Order setting aside the registration and to grant an interlocutory injunction maintaining the seizure until TMR filed a new application. Mr. Justice Martineau refused to grant this relief on the various grounds which I more particularly detailed in para. [11] of these reasons. The Ukranian parties argue that given that the parties to the proceedings in the Federal Court and this Court are the same, and given that the same issues regarding service and full and frank disclosure decided against TMR by Martineau, J. in the Federal Court also arise in this present case, the judgment of Martineau, J. on these matters renders this proceeding *res judicata*. As a result, this Court, like the Federal Court of Canada, should set aside the recognition and registration of the Dunn Order and the Thompson Order.

[70] The Ukranian parties argue that the principles which underline the doctrine of *res judicata* are the promotion of finality of litigation and the prevention of a multiple fragmentation of proceedings. They argue that a party should not be able to re-litigate a cause of action or issues that were finally decided against the party in earlier proceedings before a judicial tribunal involving the same parties. They contend that the doctrine of *res judicata* can be invoked against a party if the following conditions are satisfied to constitute "issue estoppel":

(a) The issue must be the same as the one decided in the prior decisions;

(b) The prior decision must have been final; and

(c) The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action.

(**See Toronto v. C.U.P.E., Local 79**, [2003] S.C.J. 64, para. 23.)

The Ukranian parties correctly state that in order for *res judicata* to apply, the prior deciding court must be a court of competent jurisdiction. They argue that this is a simple case of *res judicata* insofar as the issues are the same as decided in the Federal Court, Justice Martineau's decision is a final one for the purposes of the doctrine even though TMR has filed a Notice of Appeal, and that the parties to the present proceedings are the same as the parties in the Federal Court. They assert that the Federal Court is a court of competent jurisdiction to determine the validity of a registration order notwithstanding that this very issue was put into dispute by SPF.

[71] The Ukranian parties contend that just as a foreign judgment may be enforced despite the fact that the judgment is under appeal, so too a judgment under appeal is nevertheless a final judgment for *res judicata* purposes, even if it is under appeal. In this regard they cite **Spencer-Bower, Turner and Hagley, *Res Judicata*** (3rd Edition 1996), para. 167:

"A judicial decision, otherwise final, is not the less so because it is appealable ...

It has sometimes been contended that it makes a difference if the decision is under appeal when it is set up as a*res judicata*. This contention is unfounded."

[72] Also in **Castel, *Canadian Conflicts of Laws*** (5th Edition 2002), para. 14.6:

"A judgment otherwise final is not the less so because it may be the subject of an appeal to a higher court, or because the appeal is actually pending."

[73] The also cite **Volume 18 (2) of *Halsbury's Laws of England*** (4th Edition Re Issue), para. 966:

"When the word 'final' is ... used with reference to a judgment, it does not mean a judgment which is not open to appeal but merely a judgment which is 'final' as opposed to 'interim'. A judgment which purports finally to determine rights is nonetheless effective for purposes of creating an estoppel because it is liable to be reversed on appeal, or because an appeal is pending."

[74] In her judgment, Madam Prothonotary Tabib dealt with the issue of the Federal Court's jurisdiction *ratione materiae* as it relates to recognition and enforcement of foreign arbitral awards and concluded that the Federal Court did in fact have jurisdiction to recognize and enforce such awards. However, because of the Order of Mr. Justice Martineau of the Federal Court vacating the recognition Order of Prothonotary Morneau and all subsequent proceedings in that Court in relation thereto, the issue of the Federal Court's jurisdiction *ratione materiae* remains unresolved, it not having been dealt with by Mr. Justice Martineau in his Order of September 22nd. In my view therefore this still leaves it open to the Ukranian parties to again

reassert this issue in the Federal Court. Undoubtedly in so doing their arguments before this Court implying that in fact the Federal Court did have jurisdiction *ratione materiae* and had ruled upon the application for recognition and enforcement, will be used against them. However as they themselves point out, the mere consent by parties that a court does in fact have subject matter jurisdiction, cannot confer such jurisdiction upon that court. Therefore it is still open to the Federal Court of Appeal to decide that the Federal Court does not in fact have jurisdiction *ratione materiae* over recognition and enforcement of foreign arbitral awards. While in my view such a decision is perhaps unlikely, that is a decision which should be left to the Federal Court of Appeal. However I must recognize it as a potentiality and therefore conclude that all of the decisions of the Federal Court, including those of Madam Prothonotary Tabib and Mr. Justice Martineau, are at risk of being found null and void by reason of the Federal Court not having jurisdiction *ratione materiae* over recognition and enforcement of foreign arbitral awards. How then at this stage can it be said that the Dunn Order and the Thompson Order ought to be vacated by this Court on the basis that the issues in dispute have already been decided by the Federal Court. In my view in order for the argument of *res judicata* and issue estoppel to be effectively raised, there must not be any question possible with respect to the jurisdiction *ratione materiae* of the Court whose earlier pronouncements are said to constitute *res judicata* and issue estoppel. In my view if any doubt exists in relation thereto, the principles of *res judicata* and issue estoppel cannot apply and cannot be used in and of themselves to deny TMR its right to argue these issues before this Court. Therefore until the issue of the jurisdiction of the Federal Court *ratione materiae* is decided, I decline to find that the issues in this application are *res judicata.*

Further Applications Before this Court

[75] Earlier in these reasons for judgment I have indicated that I am ordering the Dunn Order and the Thompson Order vacated insofar as they purport to recognize and enforce the Award. Logically that order must apply even with respect to recognition of the Award as against SPF because of the argument of TMR that SPF and the State of Ukraine are one and the same. *A fortiori* the Award is of no force and effect as against Antonov. However my decision vacating the recognition and enforcement of the Award shall not be interpreted to mean that the Originating Application of TMR is totally ineffectual for all purposes and ought to be vacated. After TMR's initial application before Madam Justice Dunn, the Dunn Order, together with the Originating Application and the supporting affidavit of Sarah Maxtone-Graham Francois-Poncet (but not the affidavit of Azim Hussain) were apparently served upon the State of Ukraine in apparent accordance with the requirements of s. 9 of the *State Immunity Act*. While insufficient time had elapsed between this service and the November 3rd hearing before Justice Thompson, it may well be arguable that nonetheless the Originating Application has been adequately served upon the State of Ukraine and, 60 days having elapsed since the date of that service, this Court is now entitled to proceed with a rehearing on still unresolved issues including, but not limited to, the true identity of the Judgment Debtor in the Award, the status of SPF vis-a-vis the State of Ukraine, the ownership rights of Antonov and whether jurisdictional immunity for the state of Ukraine exists or whether the "commercial activity" exception of state immunity is applicable. Whether TMR may seek to bring these issues and any other applicable ones back before this Court will have to be dealt with when that eventuality may arise. I make no decision on these issues as they have been deferred.

Costs

[76] The Ukranian parties have urged me to award costs in their favour in the event that I should order the Dunn Order and the Thompson Order to be vacated. At this juncture I am reluctant to do so. It may well be that such decisions better await resolution of all of the outstanding issues remaining in this matter. The possibility exists that TMR may convince the Court that SPF and the State of Ukraine are in fact one and the same and that the commercial activity exception to the jurisdictional and execution immunity claimed by the State of Ukraine in fact exists and the State of Ukraine has no immunity with respect to enforcement and recognition of the Award. These potentialities militate against a present award of costs in favour of the Ukranian parties. Also, I have not ruled in favour of the Ukranian parties on the issues of *res judicata*, judicial comity and issue estoppel. I therefore decline to award costs at this stage and therefore order that costs in this matter shall be costs in the cause.

Orders Consequent from Reasons

[77] (1) The Interim Order on application (*ex parte*) of Madam Justice Dunn filed int his matter on August 28, 2003 insofar as it constitutes an order recognizing and enforcing in the Province of Newfoundland and Labrador a foreign arbitral Award dated 30 May 2002 issued by the Arbitration Institute of the Stockholm Chamber of Commerce of Stockholm, Sweden in the dispute between TMR Energy Ltd. and State Property Fund of Ukraine is hereby vacated.

(2) The Interlocutory Order (inter partes) ordered by Mr. Justice Thompson and filed in this matter on November 23, 2003 insofar as it constitutes an order recognizing and enforcing in the Province of Newfoundland and Labrador a foreign arbitral Award dated 30 May 2002 issued by the Arbitration Institute of the Stockholm Chamber of Commerce of Stockholm, Sweden in the dispute between TMR Energy Ltd. and State Property Fund of Ukraine is hereby vacated.

(3) All post recognition and enforcement proceedings to execute on or in respect of the aforesaid Orders are hereby immediately vacated.

(4) The Sheriff of Newfoundland and Labrador is hereby authorized to release to the Applicant Antonov the Aircraft seized by the Sheriff on the 24th of September 2004, such release to be in accordance with the Sheriff's usual procedures under and pursuant to the *Judgment Enforcement Act*; and

(5) Costs in this matter shall be costs in the cause.

Justice

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *TMR Energy Ltd. v. State Property Fund of Ukraine et al.*, 2004 NLSCTD 244
Filing Date: 2005 02 08
Docket: 2003 01T 3328

BETWEEN:	**TMR Energy Ltd., a duly constituted legal person incorporated under the laws of Cyprus**	**APPLICANT**
AND:	**State Property Fund of Ukraine, an organ of the State of Ukraine**	**RESPONDENT**
AND:	**Aviation Scientific Technical Complex named after OK Antonov (ANTK Antonov), a State Enterprise duly constituted as a legal person under the laws of Ukraine**	**FIRST INTERVENOR**
AND:	**State of Ukraine**	**SECOND INTERVENOR**

Before: The Honourable Mr. Justice Robert Hall

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: October 6, 7, 21, 22, 28, 29 and November 16, 2004

Appearances: Augustus Lilly, Q.C., Richard Desgagnés, Azim Hussain, Brenda Horrigan and Cecily Strickland for TMR Energy Ltd.
Paul McDonald, George Pollack and Denis Fleming for State Property Fund.
Thomas Heintzman, O.C., Q.C., Peter Browne, Reagan

O’Dea and David Platts for ANTK Antonov.
Frank Newbould, Q.C., Lubomir Kozak, Q.C., Thomas Kendell, Q.C. and Stacey O’Dea for State of Ukraine.

C O R R I G E N D U M

Hall, J:

[1] The decision filed in this matter on December 17, 2004 is amended by deleting the “**Appearances**” paragraph on page 1 and substituting the following:

“**Appearances:** Augustus Lilly, Q.C., Richard Desgagnés, Azim Hussain, Brenda Horrigan and Cecily Strickland for TMR Energy Ltd.
Paul McDonald, George Pollack and Denis Fleming for State Property Fund.
Thomas Heintzman, O.C., Q.C., Peter Browne, Reagan O’Dea and David Platts for ANTK Antonov.
Frank Newbould, Q.C., Lubomir Kozak, Q.C., Thomas Kendell, Q.C. and Stacey O’Dea for State of Ukraine.”

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Justice