parents to endanger the lives of their children. Expanding the substantive rights guarantees to cover such activity would, with greatest respect, render them meaningless owing to a lack of definition. Just because it is self-evident that a rights limitation shall be upheld as comporting with fundamental justice or s. 1 does not mean that it is necessary to proceed to this level of analysis.

4. *Disposition*

[235] We conclude that the impugned provisions of the *Child Welfare Act* do not occasion any rights infringements in the first place. We would otherwise dispose of the appeal and cross-appeal in the manner proposed by La Forest J.

Appeal and cross-appeal dismissed.

International Association of Science and Technology for Development et al. v. Hamza et al. Hamza v. Hamza

[Indexed as: International Assn. of Science and Technology for Development v. Hamza]

Court File No. 15098

Alberta Court of Appeal, Harradence, Bracco and Conrad JJ.A.
January 26, 1995.

Civil procedure — Parties — Capacity — Unincorporated foreign legal entity has status to sue in Alberta.

The plaintiffs, two unincorporated societies claiming to be recognized as legal entities by Swiss law, instituted an action in Alberta. The defendant applied for an order striking out the statement of claim on the ground that the plaintiffs lacked the legal status to commence an action. The order was refused and the defendant appealed to the Alberta Court of Appeal.

Held, dismissing the appeal on this point, if recognized by Swiss law as legal entities with status to sue, the plaintiffs were entitled to initiate proceedings in Alberta, provided that by Swiss law persons were identifiable who would be subject to the court's directions and judgments.

Civil procedure — Consolidation — Litigation involving matrimonial property dispute — Separate action commenced by foreign entities — Subject matter of action having solely to do with matrimonial dispute — Foreign entities to be added as parties to matrimonial litigation.

Cases referred to

Block Bros. Realty Ltd. v. Mollard (1981), 122 D.L.R. (3d) 323, [1981] 4 W.W.R. 65, 27 B.C.L.R. 17, 7 A.C.W.S. (2d) 373; *Regas Ltd. v. Plotkins* (1961), 29 D.L.R. (2d) 282, [1961] S.C.R. 566, 36 W.W.R. 481; *Hal Commodities Cycles Management v. Kirsh* (1993), 17 C.P.C. (3d) 320, 38 A.C.W.S. (3d) 265; *Re Cummings and Ontario Minor Hockey Association* (1979), 104 D.L.R. (3d) 434, 10 R.F.L. (2d) 121,

26 O.R. (2d) 7; *Armstrong's Point v. Ladies of Sacred Heart* (1961), 29 D.L.R. (2d) 373, 36 W.W.R. 364 [leave to appeal to S.C.C. refused [1962] S.C.R. viii]; *Porter v. Freudenberg*, [1915] 1 K.B. 857; *Williston Basin State Bank v. Shearer* (1983), 38 C.P.C. 303, 28 Alta. L.R. (2d) 341, 53 A.R. 121; *Alexander Hamilton Institutes v. Chambers* (1921), 65 D.L.R. 226, [1921] 3 W.W.R. 520, 14 Sask. L.R. 489; *Bondholders Securities Corp. v. Manville*, [1933] 4 D.L.R. 699, [1933] 3 W.W.R. 1; *Henriques v. Dutch West India Co.* (1728), 2 Ld. Raym 1532, 92 E.R. 494; *Lazard Brothers & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289; *Skyline Associates v. Small* (1974), 50 D.L.R. (3d) 217, [1975] 1 W.W.R. 385; affd 56 D.L.R. (3d) 471, [1976] 3 W.W.R. 477; *Von Hellfeld v. Rechnitzer*, [1914] 1 Ch. D. 748; *Canadian Pacific Railway Co. v. Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405; *Robinson Engineering Co. v. Wasabi Resources Ltd.* (1988), 32 C.L.R. 243, 31 C.P.C. (2d) 241, 93 A.R. 321, 13 A.C.W.S. (3d) 112; *United Services Funds v. Richardson Greenshields of Canada* (1987), 40 D.L.R. (4th) 94, 16 B.C.L.R. (2d) 187, 5 A.C.W.S. (3d) 387; *Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America*, [1931] 3 D.L.R. 361, [1931] S.C.R. 321; *Wenlock (Baroness) v. River Dee Co.* (1887), 36 Ch. D. 674; affd 10 App. Cas. 354; *Arab Monetary Fund v. Hashim*, [1991] 2 A.C. 114; *Chaff and Hay Acquisition Committee v. J.A. Hemphill and Sons Pty. Ltd.* (1947), 74 C.L.R. 375; *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, *sub nom. Hunt v. T & N plc*, [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, 23 A.C.W.S. (3d) 101; *Korte v. Deloitte, Haskins & Sells* (1993), 15 C.P.C. (3d) 109, 33 W.A.C. 389, 8 Alta. L.R. (3d) 337, 135 A.R. 389, 38 A.C.W.S. (3d) 1115 [leave to appeal to S.C.C. refused 18 C.P.C. (3d) 48*n*, 63 W.A.C. 159*n*, 149 A.R. 159*n*, 160 N.R. 319*n*]

Statutes referred to

Business Corporations Act, S.A. 1981, c. B-15, ss. 15(1), 282(1)
Code of Civil Procedure (Que.), as amended to 1930, art. 79
Interpretation Act, R.S.A. 1980, c. I-7, s. 25(1)(*p*)
Labour Relations Act, S.A. 1988, c. L-1.2, s. 23(1)
Societies Act, R.S.A. 1980, c. S-18, s. 10

Rules and regulations referred to

Alberta Rules of Court, Alta Reg. 390/68, Rule 80

APPEAL from a judgment of Dixon J. refusing to strike out a statement of claim.

G.D. Roszler, for appellant, Christa Madeleine Hamza.

H. Derek Lloyd and *Douglas G. Byblow*, for respondents, International Association of Science and Technology for Development and International Society for Mini & Micro Computers.

The judgment of the court was delivered by

CONRAD J.A.:—This appeal relates to the status of foreign entities to initiate legal proceedings in Alberta.

Facts

The plaintiffs/respondents, the International Association of Science and Technology for Development ("IASTD"), and the International Society for Mini & Micro Computers ("ISMM"),

issued a statement of claim naming Christa Hamza and Mohamed Hamza as the defendants. IASTD and ISMM seek a declaration that they are each independent legal entities with the capacity to sue, be sued and possess property within the Province of Alberta, that the assets presently held in their names are their exclusive property, and that neither Mr. Hamza nor Mrs. Hamza have any legal or equitable interest in such assets. The plaintiffs claim to be registered in Switzerland as societies and recognized as legal entities under Swiss law. Neither plaintiff is incorporated, nor registered, as any form of society or trade union under any provincial or federal law.

Mrs. Hamza brought the notice of motion relating to this appeal seeking, amongst other things, an order striking out the statement of claim on the basis that IASTD and ISMM lack the legal status necessary to commence the action. The chambers judge dismissed that application, and the appellant now appeals that order.

This lawsuit arises out of and is closely related to a matrimonial property action involving Mr. and Mrs. Hamza. Mrs. Hamza alleges that in the early to mid-1970s, she and Mr. Hamza formed IASTD and ISMM to organize and conduct scientific conferences around the world. The conferences were conducted for profit which provided income for their family. Neither IASTD nor ISMM has ever been incorporated as a society in any jurisdiction. Mrs. Hamza states that prior to the commencement of the Hamza divorce and matrimonial property actions, these entities were always referred to by Mr. Hamza as family businesses. She claims that until the petition for divorce was commenced, she and Mr. Hamza made all of the decisions regarding the organization and promotion of any conferences, or society events, for both IASTD and ISMM, and at all times throughout, Mr. Hamza was the operating mind and will of the societies. It is her position that neither IASTD nor ISMM ever filed tax returns, or prepared or produced financial reports for the benefit of government or membership. She claims that Mr. Hamza treated IASTD and ISMM as his own. When IASTD and ISMM opened numerous bank accounts and investment accounts around the world, Mrs. Hamza says that the applications and banking resolutions authorized Mr. Hamza to deal with those accounts. She states he has used society money as his own, and included Canadian income from society investments as his own on his personal tax returns. She argues, therefore, that assets held in the names of IASTD and ISMM are owned *de facto* by Mr. Hamza and are therefore to be included as matrimonial property under the matrimonial property action.

Mr. Hamza refused to answer questions respecting the societies during the course of the matrimonial property proceedings on the grounds that they are independent legal entities. He was ordered by the Court of Queen's Bench to produce all information and answer all questions about IASTD and ISMM. Mr. Hamza appealed from that order and that appeal was dismissed.

The matrimonial property action was stayed by court order pending resolution of the within action.

The narrow issue on appeal is whether an unincorporated foreign entity, recognized within its home jurisdiction as a legal person with status to sue, should be accorded similar recognition in Alberta. On the material before the court, it is not possible to determine the location of the various assets in dispute, or whether any of the assets are within the Province of Alberta. It was likewise impossible to ascertain whether the assets are movables or immovables. Many issues relating to the jurisdiction of the Alberta court to determine title or ownership of foreign property were not argued at appeal, are not dealt with in this judgment, and remain outstanding. Thus, while IASTD and ISMM may have status to commence the action, this judgment goes no further than that with respect to IASTD and ISMM's claim.

Status of a foreign entity to sue

The first step in determining the right of a foreign entity to sue involves the identification of the applicable law for making that determination. Determination of the proper law governing an issue is made through characterization of that issue as either procedural or substantive in nature. Procedural matters usually pertain to the machinery for enforcing a right by action in the courts and include, among other things, the form of the action, the proper parties to the action, available remedies, admissibility of evidence and determination of the proper court. In contrast, substantive matters usually relate to the existence or nature of a legal right: see *Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323, [1981] 4 W.W.R. 65, 27 B.C.L.R. 17 (C.A.).

The status of a party to sue has been characterized as a procedural issue. In *Regas Ltd. v. Plotkins* (1961), 29 D.L.R. (2d) 282, [1961] S.C.R. 566, 36 W.W.R. 481, Martland J., in determining whether a creditor was properly entitled to maintain an action in Saskatchewan, stated at p. 287:

> The question is whether [the plaintiff] can maintain his action [in Saskatchewan] in his own name and that question, in my opinion, falls to be determined by the *lex fori*, for the question, in the circumstances of this case, is one of procedure and not of substance. It is not a question of the validity of the

> assignment, or of the capacity of the parties to it, but as to the proper parties to the proceedings in Saskatchewan, which is a question of procedure which should be governed by Saskatchewan law.

This principle has been recently applied in other provinces: for example, see *Hal Commodities Cycles Management v. Kirsh* (1993), 17 C.P.C. (3d) 320, 38 A.C.W.S. (3d) 265 (Ont. Ct. (Gen. Div.)).

Thus, the right of a foreign litigant to sue is properly determined by Alberta law. That law includes the Alberta rules relating to private international law applicable to foreign litigants.

Status to sue under Alberta law generally

The appellant argues that to sue in Alberta, an entity must be either a person or a corporation, and that this requirement should apply equally to foreign and resident entities. The statement of claim does not allege an incorporated body and, in fact, the respondent acknowledges that IASTD and ISMM are not incorporated.

Leaving aside the question of a foreign entity, in general, a resident entity has status to sue or be sued in Alberta if it is recognized under the statutory or common law as a natural or statutory person. The term "natural persons" simply refers to living beings, generally required to be of full age and mentally competent, but also includes aliens, non-residents, convicts and accused persons, and in a representative capacity, mentally incompetent persons and infants.

Statutory persons are non-living entities recognized by law as possessing legal personalities separate and apart from those of their constituent members. In Alberta, corporations are deemed legal persons by virtue of s. 15(1) of the Alberta *Business Corporations Act*, S.A. 1981, c. B-15, which reads:

> 15(1) A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

Societies duly registered pursuant to the *Societies Act*, R.S.A. 1980, c. S-18, are deemed to be corporations and are thus granted the status of a statutory person pursuant to s. 10 of that Act which reads:

> 10. From the date of the certificate of incorporation, the subscribers to the application and the other persons that from time to time become members of the society are a corporation and have all the powers, rights and immunities vested by law in a corporation.

Other statutorily recognized or juridical persons include the Crown (federal and provincial), as may be represented by the Attorney-General, designated Ministers, officials or other entities

depending on legislative provision, as well as foreign sovereigns and states.

Generally speaking, subject to certain statutory exceptions, other entities which are neither natural nor statutory persons will lack the status to commence an action. Thus, unincorporated associations and clubs are not legal entities capable of suing or being sued: see *Re Cummings and Ontario Minor Hockey Association* (1979), 104 D.L.R. (3d) 434, 10 R.F.L. (2d) 121, 26 O.R. (2d) 7 (C.A.); *Armstrong's Point v. Ladies of Sacred Heart* (1961), 29 D.L.R. (2d) 373, 36 W.W.R. 364 (Man. C.A.). Actions involving an unincorporated association must be brought in the name of the members involved, either personally or in a representative capacity.

Having stated the general rule, the right to sue or be sued may be conferred upon certain unincorporated associations by statute, either expressly or by legal implication. For example, in Alberta, a trade union is a legal entity capable of suing or being sued, in its own name, for limited purposes, by virtue of s. 23(1) of the *Labour Relations Act*, S.A. 1988, c. L-1.2, which states:

> 23(1) For the purposes of this Act, a trade union is capable of
>
> (*a*) prosecuting and being prosecuted, and
>
> (*b*) suing and being sued.

Similarly, pursuant to Rule 80 of the Alberta Rules of Court, any two or more persons claiming to be entitled or alleged to be liable as partners in respect of a cause of action and carrying on business *within the jurisdiction* may sue or be sued in the name of the firm of which they were partners at the time when the cause of action accrued. I note, however, Rule 80 does not deprive or release the legal persons behind the firm name from rights or liabilities which may arise from legal proceedings. The section simply provides an administratively simple way of collectively naming all individuals behind the partnership. So, while the action is brought in the name of a firm, there is behind that name legal persons who do have status to sue. It must be realized that what is essential is that some legal entity exists who is subject to court directions, judgments and costs. With respect to Rule 80, the law relating to partner liability would identify those legal entities responsible, and on whose behalf suit is really brought.

In this case, the appellant notes there is no statutory exception to the general rule which would allow an unincorporated resident entity, similar in nature to the respondents, to sue. This appears to be an accurate assessment of the law in this regard and were the respondents resident in Alberta, they would lack the status to

commence an action. However, as the respondents are foreign litigants, it is necessary to consider Alberta private international law rules.

Alberta law relating to foreign litigants

(i) *Foreign persons*

The term "person" is not defined by the Alberta Rules of Court or the Alberta *Business Corporations Act*. A definition provided by the *Interpretation Act*, R.S.A. 1980, c. 1-7, s. 25(1)(*p*), states a person "includes a corporation and the heirs, executors, administrators or other legal representatives of a person". Nothing in the legislative enactments of Alberta or the common law appears to limit the definition of "a person" to Alberta or even Canadian residents.

In relation to natural persons, it is trite law to state that a foreign individual has status to commence an action in Alberta. An alien or foreign person (excluding enemies of Canada) who voluntarily comes before an Alberta court undoubtedly has the legal status to sue or be sued: see *Porter v. Freudenberg*, [1915] 1 K.B. 857 (C.A.) at pp. 867-9. Whether the court has jurisdiction to hear the cause or grant the relief sought is another issue. As mentioned earlier, that issue is not the subject of this appeal.

(ii) *Foreign corporations*

The capacity of a foreign corporation to commence and maintain legal proceedings in Alberta seems to be constrained only by s. 282(1) of the Alberta *Business Corporations Act* which reads:

> 282(1) An extra-provincial corporation while unregistered is not capable of commencing or maintaining any action or other proceeding in any court in Alberta *in respect of any contract made in the course of carrying on business in Alberta while it was unregistered.*

(Emphasis added.) Section 282(1) curtails only legal action relating to contracts made in the course of carrying on business in the province. One might infer that unregistered foreign corporations are competent to commence legal action relating to any other substantive rights other than those derived from contracts "made in the course of carrying on business in Alberta". The prohibition is not to status itself. Rather, only particular causes are prohibited.

This issue was dealt with by the Alberta Court of Queen's Bench in *Williston Basin State Bank v. Shearer* (1983), 38 C.P.C. 303, 28 Alta. L.R. (2d) 341, 53 A.R. 121. The case involved an American bank which sued on guarantees signed in Alberta by Alberta defendants. The defendants applied to dismiss the action by

reason of s. 196(1) of the *Companies Act*, R.S.A. 1980, c. C-20, the wording of which was equivalent to s. 282(1) of the *Business Corporations Act*. In interpreting the intent of s. 196(1), Decore J. stated at p. 307:

> The important question though that must be answered concerning s. 196(1) of the Act is the effect of the words "in respect of" as contained in the Act. In my opinion, the placement of those words indicate that a foreign company which is not registered in the Province of Alberta cannot commence action in respect of or concerning a contract which was entered into in full or in part in the Province of Alberta. *This does not prevent a foreign company from commencing and maintaining an action in the Province of Alberta concerning a contract which was not entered into in the province either in whole or in part.*

(Emphasis added.)

This proposition was also recognized by the Saskatchewan Court of Appeal in *Alexander Hamilton Institutes v. Chambers* (1921), 65 D.L.R. 226, [1921] 3 W.W.R. 520, 14 Sask. L.R. 489. In that case, the plaintiffs had proceeded to carry on business in Saskatchewan without prior registration as required by a provincial law similar in substance to s. 282(1) of the Alberta *Business Corporations Act*. Their action to enforce a contract made in the course of business was dismissed by the court for their failure to comply with the strict statutory registration requirements. However, in considering the general status of a foreign corporation to sue in the province, Turgeon J.A. stated at p. 227:

> In the first place, the general rule is that while foreign corporations may sue in the Courts of this Province, they must prove that they are incorporated in the foreign country. (*The National Bank of St Charles v. De Bernales*, 1 Car. & P. 569).

This general rule was relied upon by the same court in the later case of *Bondholders Securities Corp. v. Manville*, [1933] 4 D.L.R. 699, [1933] 3 W.W.R. 1 (Sask. C.A.). The foreign corporate plaintiff in that action sought relief against persons domiciled in the province upon contracts made in another country. The court found that proof of the plaintiff's incorporation under the law of the country in which it alleged to be incorporated was sufficient to allow it to sue in the province notwithstanding it was neither licensed nor registered in the province. This principle has also long been recognized by the English courts: see *Henriques v. Dutch West India Co.* (1728), 2 Ld. Raym. 1532 at pp. 1534-5, 92 E.R. 494 at pp. 495-6 (H.L.); *Lazard Brothers & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289 (H.L.) at p. 297.

Statutory and common law suggest therefore, as a general rule, that a foreign corporation, duly incorporated under the laws of a

recognized foreign state and given power to sue, may sue in a common law province in its corporate name.

Questions concerning the status of a foreign corporation within its home jurisdiction fall to be determined, on the analogy of natural persons, by the law of the place of formation of the corporation: see *Skyline Associates v. Small* (1974), 50 D.L.R. (3d) 217, [1975] 1 W.W.R. 385 (B.C.S.C.); *Von Hellfeld v. Rechnitzer*, [1914] 1 Ch. D. 748 (C.A.); J.G. Castel, *Canadian Conflict of Laws*, 3rd ed. (Toronto: Butterworths, 1993) at p. 534. For the sake of consistency, I will refer to the place of formation, place of incorporation, or domicile of the corporation as the "home jurisdiction". This status must be specifically pleaded by the party relying on it and proven as a matter of fact. Expert testimony is often used to meet this burden.

The status to sue afforded foreign corporations is possibly founded upon general principles relating to the comity of nations. These principles, as they relate to the recognition of foreign corporations, were considered by the Supreme Court of Canada in *Canadian Pacific Railway Co. v. Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405. Idington J., in considering the right of an Ontario company to contract abroad, stated at pp. 447-8:

> What happens, once the corporation is thus created, is, that other provinces and foreign states either by the comity of nations, or perchance, in case of treaty, by force thereof, recognize the existence of such a corporate body as a legal entity, doing the like kind of business for the carrying on of which it was created.
>
> Its contracts are thus recognized, when made beyond, or in relation to property beyond, the bounds of its parent province. It may plead and be impleaded beyond such bounds, as effectually as in its home.
>
> It may, however, by the laws of the foreign province, or state, where it attempts to carry on business, be prohibited in whole, or in part, or conditionally.
>
> . . . . .
>
> Once incorporation, for some specific purpose, within the field or sphere of subjects assigned to the exclusive jurisdiction of a province, has been effected, the comity of nations may and generally does all that is required beyond the province.
>
> This doctrine of the comity of nations, carrying with it, subject to those limitations I have mentioned, this recognition of a foreign corporation, is as firmly embedded in, and an ever growing part of, international law as anything can well be.
>
> Short of treaties, securing a more definite basis, these legal entities, of the greatest nation, and the humblest province, stand on the same level, and receive but the same sort of recognition from a foreign state.
>
> This comity is but an extension of the earlier recognition of the individual foreigner.

The corporation is but a combination of individuals.

The recognition abroad of either the individual or the corporation, is begotten of the needs of civilized men. The alien individual or corporation formerly had no rights abroad.

(iii) *Unincorporated foreign entities*

Robinson Engineering Co. v. Wasabi Resources Ltd. (1988), 32 C.L.R. 243, 31 C.P.C. (2d) 241, 93 A.R. 321 (Q.B.), appears to be the only reported Alberta case in which the status of an unincorporated foreign entity to sue is considered. In that case, the foreign plaintiffs brought a motion to amend their statement of claim by naming individuals as plaintiffs rather than a trust. The plaintiffs conceded at the outset of argument that, notwithstanding they were legal entities in their home jurisdiction, they were incapable of commencing an action in Alberta in the trust name. The court was not required, therefore, to consider the merits of the issue of status to sue. The issue has, however, been considered in other jurisdictions.

In *Skyline Associates v. Small*, *supra*, a decision of the British Columbia Supreme Court, a British Columbia defendant attempted to strike the action brought by a Washington plaintiff on the basis the plaintiff had no status to sue in British Columbia under its own name. The plaintiff was a partnership which did not carry on business in the province. The court seems to accept as a general proposition, that a foreign legal entity, separate and distinct from its constituent members, is in the same position as a foreign corporation and may sue in British Columbia in its own name. Aikins J., whose decision was affirmed by the Court of Appeal, 56 D.L.R. (3d) 472, [1976] 3 W.W.R. 477 (B.C.C.A.), stated at p. 219:

> The position then is that in the present matter there is only one issue before the Court. It is this: is Skyline Associates, by the law of the State of Washington, a juridical person, separate and distinct from its members? If it is, then Skyline Associates may sue in its firm name ...

Mr. Justice Aikins ultimately determined, following consideration of Washington law, that the plaintiff was not recognized by the laws of its home jurisdiction as a juridical person, separate and distinct from its members, and thus it could not be accorded status to sue in British Columbia.

The general principles in *Skyline Associates* relating to recognition of foreign juridical persons were applied by the same court in *United Services Funds v. Richardson Greenshields of Canada* (1987), 40 D.L.R. (4th) 94, 16 B.C.L.R. (2d) 187, 5 A.C.W.S. (3d) 387 (S.C.). In issue was the capacity of a Massachusetts business trust

to sue in its own name in British Columbia. Gibbs J., as he then was, stated at p. 96:

> There is no provision in the statutes of this jurisdiction, or the rules of this court, under which the plaintiff trust can sue in the name which it has adopted for business purposes. However, if it has standing or capacity to sue in the trust name in its "home" jurisdiction, it may commence and conduct an action in that name here. That is the gravamen of the decision of Aikins J. (as he then was) in *Skyline Associates* ...

This reasoning seems to allow status to sue in a name, even if the entity is not an entity separate and distinct from its members.

Reasoning similar to that found in the above-quoted British Columbia cases also appears to have been the basis of the decision in the earlier Quebec case of *Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America*, [1931] 3 D.L.R. 361, [1931] S.C.R. 321. However, it must be noted that the reasoning in this case was dependent on art. 79 of the *Code of Civil Procedure*, [as amended to 1930], which reads as follows:

> 79. All foreign corporations or persons, duly authorized under any foreign law to appear in judicial proceedings, may do so before any court in the Province.

The court held that the foreign labour union was not a suable entity in Quebec as it was not a juridical person under the laws of its home jurisdiction.

A general statement of the law in Canada relating to the status of foreign corporations to sue in Canada is offered by J.G. McLeod in *The Conflict of Laws* (Calgary: Carswell, 1983), at p. 455:

> The willingness of the local courts to recognize the status of the foreign corporation as defined by the domicile (or place of formation) may be pointed up in connection with the recognition of legal personality. In certain systems of law an association of persons may be endowed with the attribute of a legal personality without express legal incorporation or formal recognition. In a number of continental countries partnerships and other unincorporated associations are regarded as persons or separate legal entities distinct from the members of the association in law. In dealing with such associations, the status granted to the association by the law of the country where the association was formed (the domicile) will be recognized by the local courts.

Mr. McLeod relies on the *Skyline Associates* case and two early English cases, *Wenlock (Baroness) v. River Dee Co.* (1887), 36 Ch. D. 674 (C.A.), affirmed 10 App. Cas. 354 (H.L.), and *Von Hellfeld v. Rechnitzer*, *supra*, in support of this position.

The status of a foreign entity to sue in another jurisdiction was also addressed by the House of Lords in *Arab Monetary Fund v. Hashim*, [1991] 2 A.C. 114. The issue before the court was whether an organization created by agreement between certain Arab states and Palestine should be afforded status to sue in the

English courts. A decree of the foreign states had conferred legal personality on the organization and created a corporate body. The court held that by the comity of nations, the courts of the United Kingdom could and should recognize the organization as being entitled to sue in the United Kingdom. Lord Templeton appears to cite, with approval, at pp. 161-2, the following proposition drawn from Australian case law:

> In *Chaff and Hay Acquisition Committee v. J.A. Hemphill and Sons Pty. Ltd.* (1947) 74 C.L.R. 375, a committee of four persons created under a statute of South Australia to acquire property in its collective name and to sue and be sued in its collective name was held by the High Court of Australia not to be a corporation but though unincorporated it was a legal entity in South Australia and as such was entitled to recognition outside the state in accordance with the principle of the comity of nations. McTiernan J. said succinctly, at p. 390: "The courts of one country give recognition, by a comity of nations, to a legal personality created by the law of another county." The courts of the United Kingdom can therefore recognise the [organization] as a legal personality created by the law of the [foreign states].

It is important to note that the foreign entity in *Arab Monetary Fund, supra*, was incorporated in the foreign states. The strict precedential value of the case is therefore limited to the proposition that a foreign entity incorporated by a foreign state will be recognized by the courts of the United Kingdom. However, the proposition of law drawn from the case of *Chaff and Hay Acquisition Committee v. J.A. Hemphill and Sons Pty. Ltd.* (1947), 74 C.L.R. 375 (Aust. H.C.), appears to be persuasive dictum in support of courts extending recognition to all foreign entities which have legal status to sue under the law of their domicile. The fact the foreign entity in *Chaff and Hay Acquisition Committee* was not incorporated, but was none the less a legal entity by the laws of its home jurisdiction, is particularly relevant in this regard.

Conclusion

Overall, the law tends to support a granting of status in cases where the entity in question is recognized as a legal or juridical person by the laws of its home jurisdiction, in the sense of having status to sue. The principle of comity of nations appears to further strengthen that position.

The appellant suggests such broad recognition of foreign entities by Alberta courts could result in preferable rules for foreign litigants over Alberta litigants. A foreign unincorporated entity could be extended a status denied a comparable domestic entity. Superficially, this may appear to be the case. However, the

appellant overlooks what is, in my view, the main concern. The entity before the court must be capable of assuming fully the rights and liabilities of a legal person. Someone must be answerable for judgments, court directions, costs, etc. The court can satisfy itself this concern will be met if the foreign litigant is proven to be a legal person, separate and apart from its members, under the law of the foreign jurisdiction. If the foreign jurisdiction recognizes an entity, such as a partnership, as a legal entity with status to sue, even if it is not for all purposes an entity separate and apart from its members, the above concern can still be satisfied if the law of the foreign jurisdiction is such that the actual legal persons who are responsible and subject to the court's directions and judgments are readily identifiable. For example, if the entity were a foreign partnership, able to sue in the partnership name under foreign law and the foreign law provides that the partners are liable for the actions of the partners, the concern may be satisfied. This court is entitled to know that its directions and judgments are enforceable against identifiable legal persons. If satisfied of that, by proof of the foreign law, I am of the view the foreign entity with status to sue in its home jurisdiction should be allowed to sue in Alberta. If a foreign litigant is incapable of proving it has status to sue in the foreign jurisdiction, or that there are identifiable legal persons who are answerable for court directions and orders against the foreign litigant, then the court should require that proper parties be named.

Moreover, the practice rules in Alberta are broad enough to address concerns which the appellant raises relating to an award of costs against unsuccessful litigants. The Alberta Rules of Court provide for security for costs from foreign litigants.

In conclusion, the status of IASTD and ISMM to sue in Alberta is, at the very least, a triable issue of law, subject to proof. The respondent societies in this appeal correctly state in paras. 11 and 12 of their supplemental factum that the court may strike an action only where it is "plain and obvious" and "beyond any reasonable doubt" that there is no genuine issue for trial: see *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, [1990] 6 W.W.R. 385; *Korte v. Deloitte, Haskin & Sells* (1993), 15 C.P.C. (3d) 109, 33 W.A.C. 389, 8 Alta. L.R. (3d) 337 (C.A.). The plaintiffs in this action might very well be accorded legal status to pursue their claim should they prove their existence as a legal person under Swiss law at trial. If they are the wrong party, they have sought leave to substitute named persons. Thus, I agree with the chambers judge that the statement of claim should not have been struck at this stage of the proceedings due to lack of status. I

note the chambers judge found in his reasons that IASTD and ISMM had capacity to sue. In my view "capacity" must be understood as limited to the right to proceed to prove they do have status to sue in Alberta. It may well be this narrow issue should be determined prior to any substantive issue of ownership in the property. But the way to do that is not by application to strike on the basis of the pleadings.

Other related jurisdictional issues

As mentioned previously, many other jurisdictional issues were not raised. Is the property in Alberta? If not, can Alberta determine title to such property? Such questions may, in turn, depend on the classification of the property. Is it movable or immovable? What law is determinative of the classification? Many questions arise with respect to the independent action of IASTD and ISMM which are not dealt with in this appeal.

Consolidation of actions

The last issue relates to whether the action of IASTD and ISMM should be tried prior to the matrimonial property action. Counsel for the respondent acknowledged that the claims of IASTD and ISMM are brought solely as a result of the issues raised in the matrimonial property action. They concede they could have applied to be added as interested parties to the matrimonial property action and, in my view, that is the more appropriate step in order to avoid multiplicity of proceedings. At the hearing of this appeal, counsel for IASTD and ISMM agreed that we were at liberty to consolidate this action with the matrimonial property action for the purpose of determining the issue of ownership of property if counsel for Mrs. Hamza preferred and we considered it more appropriate. We have not heard from her counsel in that regard.

Certainly, in the determination of the matrimonial property action, Mrs. Hamza is entitled to full participation in establishing the value of any assets owned by Mr. Hamza, either directly or indirectly. She has already had to resort to this court once for an order directing full disclosure by Mr. Hamza. Her rights to full participation and disclosure should not be hampered in any way. Moreover, if Mr. Hamza has so conducted his affairs that assets to which he once had full access have been placed in another name, that is a relevant consideration in any matrimonial property action.

Yet Mrs. Hamza's interest in an independent property action between Mr. Hamza and IASTD and ISMM may be limited, as her

claim is not solely one of existing, direct title. Counsel for IASTD and ISMM agreed she should have full rights to participate in the title action. She is interested in all the facts surrounding those assets and the manner with which they have been dealt. His conduct in dealing with assets may be one of the considerations that would prompt an unequal division of matrimonial property in her favour. Notwithstanding there may be issues with respect to an Alberta court's power to determine title and assets outside the jurisdiction, the court has the right to deal with Mr. Hamza and the matrimonial assets. It is open to Mr. Hamza to raise as a defence his non-ownership of certain assets. That can be done in the property action. If IASTD and ISMM can prove they are legal persons within the foreign jurisdiction they can be added as an interested party in the matrimonial action as they may have an interest in any order that would direct Mr. Hamza to deal with property to which they claim title. It was conceded that the only reason for the IASTD and ISMM actions is the matrimonial property action.

In my view, the facts relating to all the dealings surrounding use and title to the property in question are relevant in the matrimonial property action, and a trial of title prior to that action will simply result in a multiplicity of proceedings, and potential delay and prejudice to the matrimonial claim, a claim which already has a litigious history. I vacate the order allowing for the trial to title to proceed separately in advance of the matrimonial property action.

Counsel for the respondents conceded that the issue of status could and would have to be proved at a trial. He also agreed that he was flexible as to the manner of proceeding and that being added to the matrimonial cause was a possibility, as was consolidation of the two actions for trial on that issue.

In view of counsel's position, I direct that IASTD and ISMM be added as parties to the matrimonial action. The issue of their status to participate will be an issue to be tried in that action, either at the commencement of the trial or in a trial of an issue prior to the trial of the main action. That decision is left to the case management judge. If status is proven, they will have the right to participate as an interested party in the matrimonial property action. Duplicitous litigation can be avoided, and yet the needs of the parties can be met, particularly when the respondents acknowledge that their interest in proceeding relates solely to the matrimonial property action.

In summary, the appeal is allowed and this matter is referred back to the case management judge to deal with the issues in

litigation between Mr. and Mrs. Hamza and the two entities known as IASTD and ISMM.

Appeal allowed.

Cloutier v. Science Council of Canada*

Court File No. 643/94

Ontario Court (General Division), Divisional Court, Southey, White and Cunningham JJ. January 24, 1995.

Employment — Dismissal at pleasure — Public servants — Employee of Science Council dismissed without notice or cause — Council agent of Crown — Employee not servant of Crown — Employment not at pleasure — Science Council of Canada Act, R.S.C. 1985, c. S-5, ss. 3, 14, 15 — Interpretation Act, R.S.C. 1985, c. I-21, s. 23(1).

The appellant brought an action for wrongful dismissal against the Science Council of Canada after his employment as chief of finance, administration and personnel was terminated without notice because of the dissolution of the council. The respondent pleaded in its statement of defence that the plaintiff had been a servant of the Crown and that his employment was at pleasure. The appellant moved for an order to determine his employment status and for an order striking out part of the statement of defence. The trial judge held that the appellant was a servant of the Crown, and dismissed the motion to strike.

On appeal, **held**, Southey J. dissenting, the appeal should be allowed.

Per White J., Cunningham J. concurring: The appellant was an employee of the Science Council, even though the council was an agent of the Crown pursuant to s. 15 of the *Science Council of Canada Act*, R.S.C. 1985, c. S-5. The council was a separate legal entity from the Crown, as it was a corporation that could sue and be sued in its own name and enter into contracts in its own name. The appellant was an employee of the Science Council, hired by it under s. 14 of its Act. He did not hold public office, and he was not employed at pleasure. Therefore, the impugned paragraph of the statement of defence should be struck out.

Per Southey J. dissenting: The council was for all purposes an agent of the Crown and may only exercise its powers as an agent. Therefore, the plaintiff contracted for employment with the council as agent of the Crown, and he was a Crown employee or servant. The trial judge correctly determined that there were insufficient facts to determine if the plaintiff was a public officer or employed at pleasure.

Northern Pipeline Agency v. Perehinec (1983), 4 D.L.R. (4th) 1, [1983] 2 S.C.R. 513, [1984] 2 W.W.R. 385, 51 A.R. 10, 50 N.R. 248, 23 A.C.W.S. (2d) 102, **apld**

Washer v. British Columbia Toll Highways and Bridges Authority (1965), 53 D.L.R. (2d) 620, 65 C.L.L.C. 311, 53 W.W.R. 225, **consd**

Other cases referred to

Canada (Attorney-General) v. Public Service Alliance of Canada (1991), 80 D.L.R. (4th) 520, [1991] 1 S.C.R. 614, 48 Admin. L.R. 161, 91 C.L.L.C. ¶14,017, 123

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* Application for leave to appeal to the Ontario Court of Appeal filed February 3, 1995 (Court File No. M15240).