IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *United Mexican States v. British Columbia (Labour Relations Board),* 2014 BCSC 54

Date: 20140115
Docket: S132385
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, and the *Labour Relations Code*, R.S.B.C. 1996, c. 244

Between:

United Mexican States and Consulado General De Mexico en Vancouver

Petitioner

And

British Columbia Labour Relations Board, Certain Employees of Sidhu & Sons Nursery Ltd., Sidhu & Sons Nursery Ltd., and United Food and Commercial Workers International Union, Local 1518

Respondents

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Petitioner:	P.A. Gall, Q.C. L.J. Wihak
Counsel for the Respondent British Columbia Labour Relations Board	D.W. Garner J.M. O'Rourke
Counsel for the Respondent United Food and Commercial Workers International Union, Local 1518:	C. Buchanan
Respondents Certain Employees of Sidhu & Sons Nursery Ltd. and Sidhu & Sons Nursery Ltd.	No appearance
Place and Date of Trial/Hearing:	Vancouver, B.C. June 26 and 27, 2013
Place and Date of Judgment:	Vancouver, B.C. January 15, 2014

OVERVIEW

[1] The United Mexican States and Consulado General de Mexico ("Mexico") seeks judicial review of a decision of the British Columbia Labour Relations Board (the "Board") on the ground the Board erred in failing to give effect to certain sovereign privileges and immunities when considering whether to disregard a representation vote due to alleged improper interference, pursuant to s. 33(6)(b) of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Code*"), in the course of a decertification application under the *Code*.

[2] In the decision at issue, the Board concluded that:

a) the sovereign immunity codified in the *State Immunity Act*, R.S.C. 1985, c. S-18 (the "*SIA*") did not preclude the Board from considering and making findings regarding Mexico's conduct in a decertification application involving a Canadian union, a Canadian employer, and Mexican employees, for the purpose of deciding whether, because of improper interference, a representation vote is unlikely to disclose the true wishes of employees; and

b) the Board may consider testimony provided voluntarily by former consular employees of Mexico in respect of their official functions notwithstanding the absence of a waiver by Mexico of the privileges and immunities provided by the *Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 261 (the "*Vienna Convention*"), which is incorporated into Canadian law by the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 (the "*FMIOA*").

[3] This case turns on the construction of the *SIA* and the *Vienna Convention* in the context of a proceeding under s. 33(6)(b) of the *Code.* The relevant legislative context is addressed in more detail below, but a brief overview is provided here for context. The issue engaged by s. 33(6)(b) of the *Code* is whether the Board will refuse to cancel the certification of a union as bargaining agent for a unit without regard to the result of a representation vote on the basis that the vote is unlikely to disclose the true wishes of the employees due to "improper interference" by any

person. The *SIA* provides that, subject to certain exceptions (which do not apply in this case), Mexico "is immune from the jurisdiction of [the Board]" (s. 3(1)). The *Vienna Convention* provides that members of a consular post are "under no obligation to give evidence concerning matters connected with the exercise of their functions" (Article 44(3)) but that their home state may waive that privilege (Article 45(1)).

[4] The United Food and Commercial Workers International Union, Local 1518 (the "Union") is certified as bargaining agent for a unit comprised of Mexican workers hired by Sidhu & Sons Nursery Ltd. (the "Employer") under a federal government program called the Seasonal Agricultural Workers Program (the "SAWP"). The Union has asked the Board to dismiss a decertification application filed by certain employees (the "Employees") of the Employer on the basis that Mexico (and others) engaged in improper interference such that the decertification vote is unlikely to disclose the true wishes of the employees.

[5] Mexico is not a party to the proceedings before the Board. No order may be made against Mexico as a result of those proceedings. As noted above, the consequence of a finding of improper interference by the Board is the potential dismissal of the Employees' decertification application.

[6] In this judicial review proceeding, Mexico seeks, among other things, an order prohibiting the Board from making any findings of fact or law that Mexico engaged in improper interference, a declaration that the Board has no jurisdiction to inquire into or find that Mexico has engaged in improper interference, an order quashing the Board's decision in that regard, and/or an order remitting the matter to the Board with the direction that the Board resolve the matter in accordance with the reasons of this court.

[7] For the purpose of this proceeding, it is agreed that the *SIA* provides Mexico with immunity from the jurisdiction of Canadian courts and tribunals in relation to its participation in the SAWP. The issue is whether that immunity precludes the Board from making findings about Mexico's conduct in circumstances where the findings will have no legal consequences for Mexico. It is also agreed that the *Vienna*

Convention effectively provides immunity to the former consular employees of Mexico from being compelled to testify before the Board. The issue is whether it precludes the former consular employees from testifying voluntarily without Mexico's assent.

[8] For the reasons that follow, it is my view that the Board was correct in concluding that Mexico's *SIA* immunity did not preclude the Board from considering and making findings regarding Mexico's conduct in the course of determining whether the Employees' decertification application should be dismissed without regard to the representation vote due to improper interference, and in concluding that it could consider the evidence, voluntarily given, of the former consular employees of Mexico in doing so.

FACTUAL BACKGROUND

The Seasonal Agricultural Workers Program

[9] Mexico is a party to the SAWP, a federal program based on bilateral agreements between the government of Canada and foreign governments. The SAWP facilitates the employment by Canadian employers of seasonal agricultural workers from Mexico and the Commonwealth Caribbean countries.

[10] The SAWP requires the foreign government to designate an agent to look after the interests of its SAWP-participant workers while they are in Canada. In the case of Mexico, the agent in British Columbia is the Consulado General de Mexico en Vancouver.

[11] Under the SAWP, Mexico selects and approves its citizens for participation in the program. Mexico is responsible for the conduct of its citizens who are temporarily in Canada for the purpose of participating in SAWP and has the power to repatriate any of its citizens or otherwise terminate their participation in SAWP at any time.

Proceedings before the Board

[12] The Employer is an agricultural nursery and farming business with locations throughout British Columbia. The Employer employs, among others, SAWP participants from Mexico.

[13] The Union is certified to represent SAWP employees employed by the Employer.

[14] On April 11, 2011, the Employees, all of whom are SAWP participants from Mexico, applied to the Board for decertification of the Union pursuant to s. 33(2) of the *Code*.

[15] On April 19, 2011, the Union filed a complaint with the Board against Mexico, the Employer, and the Employees, naming Mexico, the Employer and the Employees as respondents to the complaint.

[16] The relief sought in the Union's complaint included the dismissal of the decertification application:

> a) on the basis that the respondents had engaged in unfair labour practices contrary to ss. 6 and 9 of the *Code*; and
>
> b) alternatively, on the basis that that the respondents had engaged in improper interference such that a representation vote would be unlikely to disclose the true wishes of the employees.

[17] In addition, the Union requested a number of orders including, but not limited to, a declaration that the respondents had breached ss. 6, 9, and 33 of the *Code*, an order that the respondents cease and desist from further breaches, and an order that the respondents make the Union whole for damage to its property and its commercial interests.

[18] The Union's complaint against Mexico was centered on the allegation that, in its administration of the SAWP, Mexico employs a policy of refusing to allow Mexican workers who support the Union to return to Canada, or has refused to send

them back to a unionized workplace, requiring them to work at non-union worksites instead. Most of the evidence in support of the Union's complaint concerned the internal administration of the SAWP from within the Mexican consulate in Vancouver.

[19] On August 19, 2011, Mexico raised a preliminary objection with the Board. Specifically, Mexico claimed immunity from the jurisdiction of the Board, pursuant to s. 3(1) of the *SIA,* in respect of the Union's complaint and objected to being named a party to the complaint as a result.

[20] In response, the Union asserted, among other things, that Mexico's activities in relation to SAWP fell within the "commercial activity" exception in the *SIA*.

[21] On February 1, 2012, the Board determined, in *Re Sidhu & Sons Nursery Ltd.*, BCLRB No. B28/2012 (the "Immunity Decision"), that it lacked jurisdiction over Mexico due to the *SIA* and, as such, the Board could not make any order against Mexico or require Mexico to participate in the proceeding. As a result, the Board dismissed the unfair labour practice complaint against Mexico, and it ceased to be a party to the proceeding.

[22] In the Immunity Decision, the Board found that Mexico's participation in the SAWP constitutes diplomatic activity and does not fall within the commercial activity exception to the immunity conferred by s. 3(1). Vice-Chair Wilkins then stated in part (paras. 46-47):

> I conclude that Mexico enjoys state immunity in this matter. The board has no jurisdiction to require Mexico to participate in these proceedings, and no remedial power to make orders against Mexico. Accordingly, I dismissed the union's unfair labour practice complaints against Mexico.
>
> While it is my finding that Mexico enjoys state immunity in this matter, facts arising with respect to the actions of Mexico are relevant and important to provide the background and context in which the Board may fully exercise its remedial powers, if it is appropriate to do so, once the evidence in this matter is heard and considered. I am of the view that the Board can and should take into account facts which take place in other jurisdictions in exercising its remedial authority within the province of British Columbia[.]

[23] An application for leave for reconsideration of the Immunity Decision was dismissed by the Board: *Re Sidhu & Sons Nursery Ltd.*, BCLRB No. B26/2013.

[24] The decertification application of the Employees and the Union's remaining complaints were set for hearing to commence February 20, 2012. In advance of the hearing, the Union advised the Board and the remaining parties (the Employer and the Employees) that it intended to call evidence from witnesses who had formerly been employed by the Mexican consulate in Vancouver.

[25] On February 14, 2012, the Board wrote to counsel for Mexico advising that the Union intended to call these witnesses and that if Mexico objected it should provide a submission concerning its standing to make the objection and the merits of the objection.

[26] On February 16, 2012, Mexico provided a written submission asserting that the former employees of the Mexican consulate could not testify unless Mexico waived the immunity provided by the *Vienna Convention*. Mexico also asserted that because of the immunity provided by the *SIA*, as acknowledged in the Immunity Decision, the Board could not, through evidence of the former consular employees or otherwise, make any factual or legal findings in relation to the actions of Mexico.

[27] On February 23, 2012, the Board issued a "bottom line decision" holding that the former consular employees of Mexico were under no obligation to testify but that if they wished to testify voluntarily, the Board "may hear their evidence". The Board confirmed that Mexico has sovereign immunity under the *SIA* and that it had not waived that immunity. Finally, the Board indicated that its reasons in relation to the bottom line decision would be provided in the Board's final decision on the decertification application.

[28] The hearing then proceeded before the Board and the former consular employees voluntarily testified about the administration of the SAWP. Their testimony focused on the internal administration of the SAWP from within the Mexican consulate in Vancouver.

[29] By letter dated May 22, 2012, Mexico again advised the Board of its position that the Board could not inquire into Mexico's conduct for the purpose of considering allegations of improper interference, nor make any findings of fact or law in relation to Mexico's conduct. Mexico asked that the Board rule on this issue prior to rendering a final decision on the Employees' decertification application and the Union's complaint.

[30] The Board agreed to do so and on September 21, 2012, in *Re Sidhu & Sons Nursery Ltd.*, BCLRB No. B194/2012, the Board issued a decision (the "Original Decision") concluding that the evidence of the former consular employees of Mexico was inadmissible because the immunity provided by the *Vienna Convention* had not been waived by Mexico. The Board also held that the *SIA* did not preclude the Board from considering other admissible evidence in making findings of fact concerning the actions of Mexico when considering allegations of improper interference under s. 33(6)(b) of the *Code*. The Board stated it would not issue a final decision on the merits of the decertification application pending final resolution by the courts concerning the Board's jurisdiction.

[31] Mexico, the Union, the Employer, and the Employees all filed applications to the Board for reconsideration of the Original Decision.

[32] On March 7, 2013, the Board issued its decision in *Re Sidhu & Sons Nursery Ltd.*, BCLRB No. B54/2013 on the reconsideration applications (the "Reconsideration Decision"). The majority of the panel upheld the Original Decision with respect to the scope of Mexico's *SIA* immunity, concluding that Mexico's immunity under s. 3(1) of the *SIA* does not prevent the Board from scrutinizing Mexico's conduct for the purpose of exercising its discretion under s. 33(6)(b) of the *Code*. The majority overturned the Original Decision in respect of the witnesses' evidence. The panel held that, because the witnesses had testified voluntarily, the Board could consider the evidence of the former consular employees notwithstanding Mexico had not waived the privileges and immunities provided by the *Vienna Convention*.

[33] In dissent on both points in the Reconsideration Decision, the Chair of the Board concluded that the immunity provided to Mexico pursuant to the *SIA* precluded the Board from considering and potentially finding, under s. 33(6)(b) of the *Code*, that Mexico had improperly interfered. Chair Mullin also concluded that the right to waive the privileges and immunities conferred by the *Vienna Convention* rests in the state, with the result that the Board is precluded from considering the evidence of the former consular employees in the absence of a waiver by Mexico.

[34] It is the Reconsideration Decision that is the subject of this application for judicial review.

ISSUES

[35] The following issues arise:

1. What is the appropriate standard of review for the decisions of the Board under review?

2. Did the Board err in holding that s. 3(1) of the *SIA* did not preclude the Board from considering Mexico's conduct in the course of determining whether the Employees' decertification application should be dismissed, in accordance with s. 33(6)(b) of the *Code*, on the basis that the representation vote is unlikely to disclose the true wishes of the employees due to improper interference?

3. Did the Board err in holding that it could consider voluntary testimony of former consular employees of Mexico about the internal Mexican administration of the SAWP in the course of determining whether the Employees' decertification application should be dismissed pursuant to s. 33(6)(b) of the *Code*?

LEGISLATIVE CONTEXT

[36] As stated above, the determination of the issues depends on the construction of the *SIA* and the *Vienna Convention* in the context of a decertification proceeding

under the *Code*. The material portions of these three sources of law are set out below.

Labour Relations Code

[37] The Union's unfair labour practice complaint is grounded in ss. 6 and 9 of the *Code*, which provide in part as follows:

> 6 (1) Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.
>
> …
>
> (3) An employer or a person acting on behalf of an employer must not
>
> (a) discharge, suspend, transfer, lay off or otherwise discipline an employee, refuse to employ or continue to employ a person or discriminate against a person in regard to employment or a condition of employment because the person
>
> (i) is or proposes to become or seeks to induce another person to become a member or officer of a trade union, or
>
> (ii) participates in the promotion, formation or administration of the trade union,
>
> (b) discharge, suspend, transfer, lay off or otherwise discipline an employee except for proper cause when the trade union is in the process of conducting a certification campaign for employees of that employer,
>
> (c) impose in a contract of employment a condition that seeks to restrain an employee from exercising his or her rights under this Code,
>
> (d) seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms or conditions of employment, to compel or to induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union,
>
> ...
>
> 9 A person must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union.

[38] The procedure applicable to an unfair labour practice complaint is set out in s. 14 of the *Code*, which provides in part:

> 14(1) If a written complaint is made to the board that any person is committing an act prohibited by section 5, 6, 7, 9, 10, 11 or 12, the board must serve a notice of the complaint on the person against whom it is made and on any other person affected by it.
>
> …
>
> (4) If, on inquiry, the board is satisfied that any person is doing, or has done, an act prohibited by section 5, 6, 7, 9, 10, 11 or 12, it may
>
> > (a) make an order directing the person to cease doing the act,
> >
> > (b) in the same or a subsequent order, direct any person to rectify the act,
>
> …

[39] The Employees' decertification application is governed by s. 33 of the *Code*, which provides in part:

> 33(1) If at any time after a trade union has been certified for a unit the board is satisfied, after the investigation it considers necessary or advisable, that the trade union has ceased to be a trade union, or that the employer has ceased to be the employer of the employees in the unit, it may cancel the certification.
>
> (2) If a trade union is certified as the bargaining agent for a unit and not less than 45% of the employees in the unit sign an application for cancellation of the certification, the board must order that a representation vote be conducted within 10 days of the date of the application or, if the vote is to be conducted by mail, within a longer period the board orders.
>
> …
>
> (4) After a representation vote ordered under subsection (2) is held the board must,
>
> > (a) if the majority of the votes included in the count are against having the trade union represent the unit as the bargaining agent, cancel the certification of the trade union as a bargaining agent for that unit …
>
> …
>
> (6) If an application is made under subsection (2), the board may, despite subsections (2) and (4), cancel or refuse to cancel the certification of a trade union as bargaining agent for a unit without a representation vote being held, or without regard to the result of a representation vote, in any case where
>
> > (a) any employees in the unit are affected by an order under section 14, or
> >
> > (b) the board considers that because of improper interference by any person a representation vote is unlikely to disclose the true wishes of the employees.

State Immunity Act

[40] Section 3(1) of the *SIA* states:

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

[41] The *SIA* applies not just to courts but also to quasi-judicial tribunals, including the Board: *Re Canada Labour Code*, [1992] 2 S.C.R. 50, para. 21. According to Janet Walker in *Castel & Walker: Canadian Conflict of Laws*, 6th ed. (Markham, ON: LexisNexis Canada Inc., 2005), ch. 10 at 12, it applies to any "person or body having powers to compel the production of evidence".

[42] The general scheme of the *SIA* is that the immunity provided by s. 3(1) applies unless it has been waived by the state or one of the specific exceptions in the *SIA* applies.

[43] Section 4 of the *SIA* provides that a foreign state is not immune "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)." It is agreed that Mexico did not waive its immunity in the proceedings before the Board.

[44] Section 5 of the *SIA* provides an exception to the immunity if the proceedings "relate to any commercial activity of the foreign state". "Commercial activity" is defined in s. 2 to mean "any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character." The earlier conclusion by the Board in the Immunity Decision that the commercial activity exception does not apply to Mexico's participation in the SAWP is not before the court. For the purposes of this application, it is agreed that the commercial activity exception does not apply.

[45] Sections 6 through 8 of the *SIA* provide additional exceptions to the presumption of immunity. None of these exceptions are engaged in this case.

[46] Section 9 provides the procedure to be followed to effect service of an "originating document" on a foreign state.

[47] Section 10 contains rules regarding the taking of default judgment against a foreign state.

[48] Sections 11 through 12.1 contain rules precluding the issuance of specific orders and execution against a foreign state, with limited exceptions.

[49] Section 13 immunizes a foreign state from orders to produce documents or other information, again with limited exceptions.

[50] Sections 14 through 18 contain some general provisions regarding, among other things, the method of proving the party is a foreign state, the resolution of conflicts between the *SIA* and certain other legislation, and the inapplicability of the *SIA* to criminal proceedings.

Vienna Convention on Consular Relations

[51] Section 3(1) of the *FMIOA* provides that Articles 1, 43 to 45, and 48 to 54 (among others) of the *Vienna Convention* "have the force of law in Canada in respect of all foreign states".

[52] The relevant provisions of the *Vienna Convention* provide as follows:

> Article 1
>
> Definitions
>
> 1. for the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
>
> …
>
> (d) "consular officer" means any person, including the head of the consular post, entrusted in that capacity with the exercise of consular functions;
>
> (e) "consular employee" means any person employed in the administrative or technical service of a consular post;
>
> (f) "member of the service staff" means any person employed in the domestic service of a consular post;
>
> (g) "members of the consular post" means consular officers, consular employees and members of the service staff[.]
>
> Article 43
>
> Immunity from Jurisdiction

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

2. The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either:

(a) arising out of a contract concluded by a consular officer or consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or

(b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

Article 44

Liability to give Evidence

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or member of the service staff shall not, except in the cases mentioned in paragraph 3 of this Article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.

…

3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

Article 45

Waiver of privileges and immunities

1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44.

2. The waiver shall in all cases be express, except as provided in paragraph 3 of this Article, and shall be communicated to the receiving State in writing.

3. The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

…

Article 53

Beginning and end of consular privileges and immunities

> 1. Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.
>
> …
>
> 3. When the functions of a member of the consular post have come to an end, his privileges and immunities… shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so, whichever is the sooner, but shall subsist until that time, even in case of armed conflict. …
>
> 4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.
>
> …

ANALYSIS

Issue 1. Standard of review

[53] The standards of review applicable to the Board's decisions are expressed in s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45:

> 58(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (d), the standard of review to be applied to the tribunal's decision is correctness.

[54] Both Mexico and the Board take the position that the standard of review applicable to the Board's decisions in issue in this case is that set out in s. 58(2)(c) of the *Administrative Tribunals Act*, namely, correctness.

[55] The Union submitted that the standard of review is that set out in s. 58(2)(a) of the *Administrative Tribunals Act*, namely, patent unreasonableness. In summary, the Union's position was that because the Board has the right to determine its own practice and procedure and is empowered to receive and consider evidence that would not be admissible in court, the applicable standard of review is patent unreasonableness because the Board was exercising its discretion as to the evidence it would consider and the use of that evidence in proceedings for which it has exclusive jurisdiction.

[56] While it is true that the Board was deciding what evidence it would consider and the use to which it would put that evidence, its decision in that regard depended entirely on its construction of the *SIA* and the *Vienna Convention*, matters clearly outside the Board's exclusive jurisdiction. Accordingly, I find that the correctness standard of review applies to the findings of the Board under review.

[57] Having said that, in the course of making the findings that are under review it was necessary for the Board to consider the nature and purpose of certain provisions in the *Code*. I agree with the Union that the Board's interpretation of the *Code* is to be given deference and, in accordance with s. 58(2)(a) of the *Administrative Tribunals Act*, should not be interfered with unless it is patently unreasonable.

Issue 2. Scope of immunity conferred by s. 3(1) of the *SIA* and whether it precludes inquiry under s. 33(6)(b) of the *Code*

[58] As noted above, the majority of the panel in the Reconsideration Decision concluded that s. 3(1) of the *SIA* does not prevent the Board from scrutinizing and making findings of fact regarding Mexico's conduct for the purpose of exercising its discretion under s. 33(6)(b) of the *Code*. For the reasons that follow, I have concluded that the panel was correct in this regard.

[59] In order to determine whether a consideration by the Board of Mexico's conduct, in the course of determining if there has been "improper interference" for the purpose of s. 33(6)(b) of the *Code*, would violate the immunity conferred on Mexico by s. 3(1) of the *SIA,* it is necessary to first appreciate the nature of the

inquiry undertaken by the Board pursuant to s. 33(6)(b) of the *Code* and then to determine whether that inquiry would violate the immunity conferred by s. 3(1) of the *SIA*.

Nature of Board's Inquiry under s. 33(6)(b) of the Code

[60] Section 33 of the *Code* provides that bargaining rights may be revoked if certain statutory preconditions are met. Among other things, the *Code* requires that at least 45% of the employees in the bargaining unit sign a decertification application, in which case the Board must order that a representation vote be conducted (s. 33(2)). A majority of the employees casting a ballot in the representation vote must support the application (s. 33(4)). However, even if this threshold is met, the Board retains the discretion not to cancel the certification if any employees in the unit are affected by a finding of unfair labour practices (s. 33(6)(a)), or if the Board "considers that because of improper interference by any person a representation vote is unlikely to disclose the true wishes of the employees" (s. 33(6)(b)).

[61] A finding by the Board of "improper interference" under s. 33(6)(b) is different in nature from a finding that someone has engaged in unfair labour practices. First, the *Code* expressly prohibits unfair labour practices. Unfair labour practices are defined in s. 6 of the *Code* and, by way of example, s. 6(3) provides in part that:

> An employer or a person acting on behalf of an employer must not
>
> …
>
> (d) seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms or conditions of employment, to compel or to induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union[.]

Thus, a finding that someone has engaged in an unfair labour practice is a finding that he or she has violated the *Code*. In contrast, the phrase "improper interference" is only referenced in s. 33(6)(b), there is no express prohibition against conduct amounting to "improper interference", and a finding of "improper interference" for the purpose of s. 33(6)(b) is not a finding that the *Code* has been violated.

[62] Second, if the Board is satisfied that someone has engaged in an unfair labour practice, the Board may grant orders directed at such person. The potential remedies include orders directing the person to cease doing the act or to rectify the act (s. 14(4)) and orders to pay monetary damages to any person who has suffered injury or loss as a result (s. 133(1)(d)). In contrast, the only consequence of a finding that there has been "improper interference" for the purpose of s. 33(6)(b) is that the Board may refuse to decertify the union notwithstanding the results of the representation vote. No order or other remedy may be issued by the Board against the person who has been found to have improperly interfered.

[63] Third, pursuant to s. 14(1) of the *Code*, on receiving a written complaint alleging that a person has committed an unfair labour practice, the Board is required to serve a notice of the complaint on the person against whom it is made and on any other person affected by it. That person then becomes a party to the proceeding before the Board. This requirement ensures that orders are not granted against such persons without them having the opportunity to be heard. In contrast, where the Board is considering only an allegation of improper interference for the purpose of s. 33(6)(b), no such special duty of the Board is invoked.

[64] In the Original Decision, at para. 46, the Board endorsed its earlier decision in *7-Eleven Canada Inc.*, BCLRB No. B91/2000, where it identified the above-noted distinctions between unfair labour practices and improper interference and stated that "'[i]mproper interference' captures a broader range of activities than are caught by the unfair labour practices spelled out in the Code" (*7-Eleven*, para. 180). The Board in *7-Eleven* also explained at para. 180 that in assessing whether the representation vote discloses the true wishes of the employees under s. 33(6)(b), the Board employs an objective test:

> The issue is determined not by evidence of actual impact upon the minds of employees but whether the Board could reasonably draw the inference from all the circumstances, that the true wishes of the employees are unlikely to be disclosed by a vote …

[65] The majority of the panel in the Reconsideration Decision expressly agreed with the original panel's interpretation of s. 33(6). The majority of the panel in the

Reconsideration Decision noted that "[t]he parties who have a direct and legally material interest in [a decertification application] are those bound by the certification-the employees, the employer and the certified trade union" (para. 25). The majority summarized the Board's jurisdiction under s. 33(6)(b) at para. 29 as follows:

> Section 33(6) permits the Board to cancel or to refuse to cancel the Union's certification without regard to the vote if improper interference is found. A finding of "improper interference" under Section 33(6)(b) is not a contravention of the Code: *7-Eleven* …. As such, the Board's remedial authority under Section 133 is not engaged. That is the case regardless of how the parties or strangers to the proceeding choose to perceive that conduct or choose to portray it in public forums. The fact remains that the Board does not have jurisdiction under Section 33(6)(b) to issue a remedy-declaratory or otherwise-against the person who has engaged in improper interference. The Board's sole mandate under Section 33(6)(b) is to remedy the consequences of such conduct by refusing to cancel the Union's certification regardless of the vote.

[66] In its written submissions, Mexico characterized the Board's undertaking pursuant to s. 33(6)(b) as "mak[ing] and report[ing] factual determinations… for the express purpose of determining whether the *Code*, a Canadian legal standard, was violated". In my view, this characterization of the nature of the Board's inquiry under s. 33(6)(b) is not correct. As outlined above, a finding that there has been "improper interference" under s. 33(6)(b) is merely a basis upon which the Board may dismiss a decertification application without regard for the result of a representation vote and does not constitute a finding that the *Code* has been violated.

[67] The conclusions of the majority in the Reconsideration Decision regarding the nature of the Board's jurisdiction under s. 33(6)(b) have not been shown to be patently unreasonable. In summary, a finding of "improper interference" under s. 33(6)(b) of the *Code* is unlike a finding that a party has engaged in "unfair labour practices". It is not a declaration that a person has breached the *Code*. Rather, it is a finding that may result in a decision by the Board to refuse to decertify a union notwithstanding the outcome of a representation vote. This is a consequence that has legal effect on the employer, the employees, and the union. There is no legal consequence for any other person who is found to have improperly interfered.

[68] The question, then, is whether the immunity conferred by s. 3(1) of the *SIA* precludes the Board from considering and making findings regarding Mexico's conduct in a decertification application to which Mexico is not a party, in which no remedy is sought against Mexico and no claim is advanced against any of Mexico's property, and as a result of which Mexico is exposed to no legal consequence.

SIA and the international law doctrine of sovereign immunity

[69] The *SIA* must be construed through the application of recognized principles of statutory interpretation. Those principles require a construction that reads the words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the statute: *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, para. 54. The task is to "first identify the scheme and purpose of the [statute] and then identify the interpretation … that best furthers its goals": *Novak v. Bond*, [1999] 1 S.C.R. 808, para. 63.

[70] The object of the *SIA* is to codify and continue the international law doctrine of sovereign immunity: *Re Canada Labour Code*, para. 30; *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, para. 13. Further, Parliament is presumed to have legislated in a manner consistent with established rules of international law: *Schreiber,* para. 50. Thus, the correct interpretation of s. 3(1) is the one that gives effect to the ordinary meaning of the words having regard for their context and read in a manner that is consistent with the international law doctrine of sovereign immunity. As such, it is useful to commence the analysis by considering the nature and scope of that international doctrine at common law.

[71] Sovereign, or state, immunity protects one state from another's enforcement jurisdiction. As explained by John H. Currie in *Public International Law*, 2d ed. (Toronto: Irwin Law, 2008) at 364:

> State immunity is a narrowly focussed but potent immunity in that it protects states from one another's enforcement jurisdiction. It is usually applied to forestall or halt domestic judicial proceedings against a foreign state. In other words, state immunity, a long-established and universally recognized doctrine of customary international law, essentially blocks a state's courts from exercising jurisdiction over foreign states. This immunity extends to all phases of the judicial process, including interlocutory or interim preservation

> orders as well as post-trial execution measures and appeals. It encompasses civil and criminal proceedings alike.

[72] Although sovereign immunity protects a foreign state from the legal processes of the host state, the doctrine does not suggest that the host state has no legal jurisdiction or that its domestic law does not apply. As stated by Currie at 365 and 381:

> It is important to note that state immunity does not imply an absence of jurisdiction *per se*. Rather, state immunity applies as a procedural bar to the exercise of jurisdiction that otherwise, substantially, exists. As has been observed by the International Court of Justice (ICJ), "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction." The significance of this feature of state immunity will be apparent when we consider the ability of a state to waive its immunity from the jurisdiction of foreign courts.
>
> …
>
> The capacity of states to waive their immunity and submit to the jurisdiction of local courts underscores a fundamental feature of state immunity: namely, that the immunity is from the process of application or enforcement of the local law rather than from the substance of the law itself. Again, notionally, states retain a duty to respect local law when operating within the prescriptive jurisdictional reach of a foreign state, all the while enjoying a general immunity from enforcement of the law. When the state waives its immunity, therefore, no issue generally arises as to the applicability *per se* of domestic law to the foreign state.

[73] The fundamental feature of sovereign immunity as a procedural bar is reflected in Lord Atkin's classic statement of the doctrine in *The Cristina*, [1938] A.C. 485 HL (Eng) at 490, as encompassing the following two propositions:

> The first is that the courts of a country will not implead a foreign sovereign, that is they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.

[74] The House of Lords discussed the question of whether there were any limits to the principle of sovereign immunity in *Sultan of Johore v. Abubakar Tunku Aris Bendahar*, [1952] A.C. 318, and concluded that it had not been established in England that there was an absolute rule that a foreign independent sovereign could

not be "impleaded" in the English courts in any circumstances. Viscount Simon explained at 343 what is meant by the word "impleaded" in this context:

> The word "implead" is capable of more than one meaning when used in relation to judicial proceedings, which themselves comprehend a great variety of forms, and further distinctions have been suggested between what is direct and what is indirect impleading: but for the present purpose the definition of "impleading" can be taken to be that which is laid down by Brett L.J. in [*The Parlement Belge*, 5 P.D. 197] where he compares the position of a shipowner, whose vessel is seized in proceedings alleging liability arising from a collision, with the position of a subsequent innocent purchaser of the vessel. The Lord Justice says: "Either is affected in his interests by the judgment of a court which is bound to give him the means of knowing that it is about to proceed to affect those interests and that it is bound to hear him if he objects. That is, in our opinion, an impleading." Impleading, in this sense, does not depend merely on an answer to the more technical question whether a person is actually a party, or ought to be regarded as a necessary party, to the proceedings.

[75] From this passage, it is apparent that, at common law, the doctrine of sovereign immunity applies in circumstances where the foreign state's legal interests could be affected by the judgment of the domestic court, even where the foreign state is not itself a party to the proceedings.

[76] The English Court of Appeal has held that the doctrine of sovereign immunity does not apply where the foreign state's legal interests are not affected, even where the foreign state's conduct would be the subject of inquiry: *Buttes Gas and Oil Co. v. Hammer*, [1975] 1 Q.B. 557 [*Buttes*]. In *Buttes,* a dispute had arisen between two American oil exploration corporations that had been granted oil concessions in the Persian Gulf. The plaintiff corporation claimed damages for alleged slander published by the defendant corporation and its chairman following a press conference held in London. The defendants pleaded truth in defence. The alleged slander concerned the conduct of, and an alleged conspiracy among, the plaintiff corporation and others including rulers of certain sheikdoms in the Persian Gulf and the governments of the United Kingdom and Iran pertaining to a territorial boundary between two sheikdoms. In addition to pleading justification as a defence, the defendants also counterclaimed against the plaintiff corporation for conspiracy and, in giving particulars of the overt acts of the alleged conspiracy, they repeated the particulars of their justification defence to the slander action. The plaintiff corporation

applied to strike the defence and the counterclaim on the basis that they raised matters that were acts of state and as such not justiciable in the courts of England.

[77] Lord Denning refused to strike the defence and counterclaim in *Buttes*, holding that the doctrine of sovereign immunity did not apply because no foreign sovereign was impleaded. He stated at 573:

> [The doctrine of sovereign immunity] applies when a foreign government or its agent is sued in our courts. If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the courts will grant immunity if asked to do so. The reason is because it may offend the dignity of the foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country.… That doctrine does not apply in the present case, because no foreign sovereign nor his agent was impleaded.

[78] In his analysis, Lord Denning used an example of a newspaper publishing an article alleging that a foreign state had been bribed by an oil company. He explained that the doctrine would not extend to prevent a defamation suit by the oil company against the newspaper even though the litigation would require the court to inquire into the conduct of the foreign state. Similarly, he explained the doctrine of foreign immunity would not prevent the defendants from pursuing their conspiracy counterclaim because they were not suing a foreign state but rather claiming damages from a private party for the consequences of the foreign state's conduct.

[79] The appeals committee of the House of Lords refused the plaintiff Buttes leave to appeal the 1975 Court of Appeal decision. However the House of Lords did, several years later, grant leave to appeal a subsequent decision of the English Court of Appeal in the same case concerning a claim of privilege over certain documents. That appeal gave rise to the 1982 House of Lords decision *Buttes Gas and Oil Co. v. Hammer*, [1982] A.C. 888. The House of Lords went beyond the issue of privilege and reconsidered the justiciability of the claims. In doing so, it reopened the 1975 decision, granting leave to the plaintiff to appeal that decision and discharging the previous order refusing leave.

[80] The House of Lords decision in *Buttes* concluded that the claims were not justiciable because they would involve consideration of whether the actions of one of

the sheikdoms and the governments of Iran and the United Kingdom, in setting the territorial boundary in issue, were unlawful under international law. Lord Wilberforce explained as follows at 938:

> [T]here are… no judicial or manageable standards by which to judge these issues, or to adopt another phrase … the court would be in a judicial no man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law.

[81] Although the House of Lords decided that the claims were not justiciable for the above-noted reasons, Lord Wilberforce expressly confirmed Lord Denning's conclusion regarding the inapplicability of the doctrine of sovereign immunity. In this regard, he stated at 926:

> The doctrine of sovereign immunity does not in my opinion apply since there is no attack, direct or indirect, upon any property of any of the relevant sovereigns, nor are any of them impleaded directly or indirectly.

[82] Other limits were placed on the doctrine of sovereign immunity at common law as it evolved from an absolute immunity that applied in any case where a foreign state was impleaded or where its property was attacked to a restrictive immunity that does not apply where the proceedings relate to transactions of a commercial or private character. The restrictive theory distinguishes between a foreign state's public or sovereign acts (sometimes referred to as *acta jure imperii)* and its private or commercial acts (sometimes referred to as *acta jure gestionis*).

[83] In *Re Canada Labour Code*, Mr. Justice La Forest summarized the evolution of the doctrine from one of absolute immunity to one of restrictive immunity (paras. 25-26):

> Historically, nation states enjoyed an absolute immunity from adjudication by foreign courts. Under international law, it was accepted that foreign states should not be "embarrassed" by subjection to the control of a foreign judiciary. Over time, however, as governments increasingly entered into the commercial arena, the doctrine of absolute immunity was viewed as an unfair shield for commercial traders operating under the umbrella of state ownership or control. The common law responded by developing a new theory of restrictive immunity. Under this approach, courts extended immunity only to acts *jure imperii*, and not to acts *jure gestionis*.

> The development and current status of the restrictive theory of immunity was well stated by Lord Wilberforce in *I Congreso del Partido*, [1983] 1 A.C. 244 (H.L.). Though he was dissenting in part in that case, the other Law Lords expressly agreed with him on these general principles. The case concerned the liability of a Cuban state enterprise for its failure to deliver a quantity of sugar. Lord Wilberforce explained the policy in support of the new approach to sovereign immunity in this way, at p. 262:
>
> > The relevant exception, or limitation, which has been engrafted upon the principle of immunity of states, under the so-called "restrictive theory," arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations: (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.

[84] From this passage, it is apparent that the rationale for the development of the restrictive theory is the recognition that to implead a foreign state and thereby require it to answer a claim related to its commercial activities would not interfere with its sovereign functions. As stated by Currie at 373:

> The distinction that emerged was between acts *jure imperii* (acts that are essentially sovereign or governmental in nature) and acts *jure gestionis* (acts that are essentially commercial or "private" in nature). By drawing such a distinction and denying immunity to the latter category, the essential *raison d'être* of state immunity would largely be preserved while accommodating the competing need to ensure that states that choose to enter the marketplace as economic actors do so on a relatively even playing field.

[85] As noted above, the *SIA*, which came into force on July 15, 1982 [S.C. 1980-81, c. 95], codified and continued the international law doctrine of sovereign immunity. By that time, the restrictive theory had been adopted by most states and it was that theory that was reflected in the *SIA*.

[86] Section 3(1) of the *SIA* establishes a general principle of immunity, subject to exceptions delineated elsewhere in the statute. One of the exceptions is the commercial activity exception (s. 5) which expresses the restrictive theory of sovereign immunity. Much of the modern jurisprudence in this area has been dominated by defining which acts qualify as "commercial" for the purpose of this exception.

[87] In *Re Canada Labour Code,* the Supreme Court of Canada confirmed that a "contextual approach" is used in determining whether the commercial activity exception applies: para. 28. The court recognized that any activity engaged in by a state could be said to have a sovereign aspect, and as such, the court's job as part of the analysis is to determine whether the proceedings impact on the commercial aspect, rather than the sovereign aspect, of the activity. This contextual approach requires a careful analysis of the aspects of the foreign state's conduct that are in issue in order to assess the impact of the proceedings on the foreign state's sovereignty or, in other words, the consequences of requiring the foreign state to submit to the jurisdiction of the court.

[88] The question in *Re Canada Labour Code* was whether labour relations at a United States military base located in Newfoundland constituted "commercial activity", thereby depriving the base of sovereign immunity in respect of labour relations. The majority of the Supreme Court of Canada acknowledged that the employment relationship between the base and its Canadian civilian employees had both sovereign and commercial aspects and applied a contextual approach to determine whether the proceedings under the *Canada Labour Code* related to the sovereign aspects.

[89] The court held that if the Canadian labour regime applied, the US would lose ultimate control over the labour force at its military base and this would constitute an unacceptable interference with its sovereignty. The court noted, by way of example, that if Canadian labour legislation governed the right to strike and the prohibition of replacement workers on a US base, it might threaten the US military mission because the US would be unable to pass legislation requiring those employees to return to work in times of crisis.

[90] The foregoing jurisprudential summary demonstrates, in my view, that the objective of the restrictive theory of sovereign immunity and thus of the *SIA*, which is a codification of it, is not to preserve the dignity of foreign states or prevent their embarrassment in a colloquial sense, but rather to protect foreign states from

domestic proceedings that would stand to interfere with their autonomy in performing their sovereign functions.

[91] With that objective in mind, I turn to the construction of s. 3(1) of the *SIA* and the specific issue before the court.

Construction of s. 3(1) of the SIA

[92] For ease of reference, s. 3(1) of the *SIA* is reproduced again here:

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

[93] The Board has already determined in the Immunity Decision that Mexico's participation in the SAWP constitutes diplomatic activity and does not fall within the commercial activity exception in s. 5 of the *SIA*. Thus, the specific question before the court is whether s. 3(1) of the *SIA* precludes the Board from considering and making findings regarding sovereign or public aspects of Mexico's conduct in a decertification application to which Mexico is not a party, in which no remedy is sought against Mexico and no claim is advanced against any of Mexico's property, and as a result of which Mexico is exposed to no legal consequence.

[94] The answer turns on the correct interpretation of the phrase "immune from the jurisdiction" in s. 3(1) of the *SIA*. The Union accepts that the Board is precluded from embarking upon a proceeding, such as an unfair labour practice complaint, in which the Board would consider and make findings about Mexico's sovereign activities and where Mexico would be exposed to potential legal consequences. However, the Union says in considering whether Mexico engaged in improper interference for the purpose of deciding whether to give effect to a representation vote, the Board is not asserting jurisdiction over Mexico and, as such, the immunity conferred by s. 3(1) of the *SIA* is not engaged. Mexico asserts that no such distinction may be drawn and that the immunity extends to prevent any inquiry into or consideration of Mexico's sovereign activities, even where no order or remedy may be issued against Mexico. Mexico says this view is consistent with the purpose of state immunity which Mexico says is to shield the state from any critical or embarrassing findings regarding the state's sovereign activities.

[95] As already noted, the words of *SIA* must be construed in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the *Act*.

[96] In *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2002) at 21 [*Sullivan*], the authors explain what is meant by "ordinary meaning" as it is used in statutory interpretation:

> The expression "ordinary meaning" is much used in statutory interpretation, but not in any consistent way. Sometimes it is identified with dictionary meaning, sometimes with literal meaning and sometimes with the meaning that results after the words to be interpreted are read in total context. Most often, however, it refers to the reader's first impression meaning, the understanding that spontaneously emerges when the words are read in their immediate context - in the words of Gonthier J. [in *Canadian Pacific Airlines v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at 735], "the natural meaning which appears when the provision is simply read through".

[97] In *TeleZone Inc. v. Canada (Attorney General)* (2008), 94 O.R. (3d) 19, the Ontario Court of Appeal addressed the meaning of the term "jurisdiction" at para. 3:

> The term jurisdiction has many meanings. In determining jurisdiction, a court may be deciding whether it has power to adjudicate over the person of the defendant or the subject matter of the claim asserted by the plaintiff in its statement of claim. As well, a court may be deciding whether the tribunal has territorial jurisdiction, whether the amount claimed is within the tribunal's monetary jurisdiction, or whether the person sitting as the tribunal has jurisdiction to determine the plaintiff's claim.

[98] When the word "jurisdiction" is read in the immediate context of s. 3(1) of the *SIA* and in particular the reference to "a foreign state" being "immune from the jurisdiction", the natural meaning of the word that emerges is the authority to adjudicate over the foreign state. I do not agree with Mexico's submission that the "jurisdiction" precluded by s. 3(1) encompasses considering the conduct of a foreign state and making findings about that conduct in proceedings between other parties in which the foreign state's legal interests are not affected. In my view, the natural or ordinary meaning of s. 3(1) is that Canadian courts may not embark upon proceedings that could affect a foreign state's legal rights, by impleading the state, directly or indirectly, or attacking its property, unless one of the exceptions provided elsewhere in the *SIA* applies.

[99] This meaning is reinforced, in my view, by the scheme of the *SIA* as a whole. First, none of the provisions of the *SIA* expressly prohibits a court from merely considering a foreign state's conduct and making findings regarding same irrespective of whether the state's legal rights are in issue. Section 3(2) of the *SIA* requires the court to give effect to the immunity conferred by subsection (1) notwithstanding that the state has failed to take any step in the proceeding. If the immunity was as broad as Mexico asserts, there would be a significant burden placed on courts and tribunals to be vigilant about ensuring that no evidence is ever admitted in any case regarding a foreign state's sovereign or public conduct even though the state's legal interests were not in issue. In my view, significant difficulties would arise in applying such a broad immunity. For example, would it apply to any consideration of the foreign state's conduct, without regard for the significance of that conduct in the case, and even where the potential findings could be characterized as tangential or even innocuous? If not, where and on what basis would the line be drawn? What standard would be applied? If the line is to be drawn somewhere, who would be expected to advance submissions in support of the foreign state where the foreign state is not a party and has no legal interest in the outcome? In my view, it is reasonable to assume that if Parliament intended to impose such a broad and unusual burden on courts and tribunals, it would have done so expressly.

[100] Second, the procedure sections of the *SIA* establish requirements for serving an originating document on a foreign state and taking default judgment against a foreign state where such service has been effected and the state has not taken the initial step required of a defendant or respondent. These provisions quite clearly apply to the process for impleading a foreign state. The state then has the option of waiving the immunity as contemplated by s. 4 of the *SIA* or applying to dismiss the proceedings by invoking the immunity conferred by s. 3 of the *SIA*. There is no equivalent process for notifying a foreign state that, although the state is not being impleaded and its legal interests are not being affected, its conduct might be relevant to the proceedings and therefore findings about its conduct might be made.

[101] As noted above, it is my view that the purpose of the *SIA* is to protect foreign states from domestic proceedings that would stand to interfere with the foreign state's autonomy in performing its sovereign functions. The interpretation that naturally arises from the ordinary meaning of the words used in s. 3(1) would achieve this purpose. It accords with the traditional view of the scope of sovereign immunity as articulated by Lord Atkin in *The Cristina,* elaborated upon by Viscount Simon in *Sultan of Johore*, and reiterated Lord Denning in *Buttes* (1975) and by Lord Wilberforce in *Buttes* (1982). It applies when a state's legal interests are in issue: that is, when a state is impleaded, directly or indirectly, or when its property is subject to seizure or detention.

[102] As noted above, Mexico submitted that the immunity conferred by s. 3(1) not only prohibits the impleading of Mexico and the imposing of a remedy against Mexico, but also extends to prohibit the Board from inquiring at all into Mexico's conduct. Mexico submitted that the jurisprudence establishes that the immunity applies as a "subject matter" immunity that attaches to the foreign state's conduct falling within the protected subject matter, and thereby precludes any inquiry into that conduct irrespective of whether there are any legal consequences for the state. Mexico relies on *Holland v. Lampen-Wolfe*, [2000] 1 WLR 1573; *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2011 NSCA 73; *Jones v. Kingdom of Saudi Arabia*, [2006] UKHL 26; *Teitelbaum c. 9093-8119 Quebec Inc*., 2008 QCCS 5625; and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgment of 3 February 2012), General List No. 143, online: ICJ <http://www.icj-cij.org> in support of its submission.

[103] I will address the jurisprudence relied upon by Mexico in more detail below but, before doing so, it is important to observe that in all of the cases relied upon by Mexico, the foreign state (or its agent) was actually impleaded. Accordingly, none of these cases can be said to have rejected the view that the immunity applies only where the state has been impleaded or where its property is subject to seizure. In contrast, the two *Buttes* decisions, *Sultan of Johore,* and *The Cristina* are authority for the proposition that sovereign immunity can only be invoked by a foreign state in

circumstances where the state has been impleaded or where its property is subject to seizure or other enforcement.

[104] Mexico cited *Holland*, in particular, in support of its submission that state immunity is a "subject matter" immunity. *Holland* was a defamation case brought by an employee of a United States military base against an official of the US Department of Defence in relation to a memorandum the official had written regarding the plaintiff's work performance. The US asserted sovereign immunity on behalf of the defendant. One of the issues to be determined was whether the defendant's conduct was properly characterized as *jure imperii* (sovereign or public conduct), in which case the immunity would apply, or *jure gestionis* (commercial or private conduct), in which case it would not. In the course of summarizing the doctrine of sovereign immunity, Lord Millett referred to it at 1583 as "a subject matter immunity", saying that it "operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another".

[105] Mexico relies on these statements as support for the proposition that courts may never, in any circumstance, review the sovereign acts of a foreign state, even when the foreign state has not been impleaded. However, *Holland* does not address the question of whether the immunity would apply where a foreign state has not been impleaded. To the contrary, Lord Millett commenced this part of his judgment by characterizing the immunity at 1583 as "an established rule of customary international law that one state cannot be sued in the courts of another for acts performed *jure imperii*" (underlining added). He went on to say: "As I explained in *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147, 269, it is a subject-matter immunity" (at 1583). In *Bow Street*, Lord Millett used the term "subject matter immunity" at 269 in distinguishing between immunity *ratione personae* (a form of common law sovereign immunity that attaches to the persons of key representatives of the foreign state but only while they hold office) and immunity *ratione materiae* (a form of common law sovereign immunity that applies with respect to the foreign state's official acts rather than to the persons representing it).

[106] As explained by Currie at 367, in determining whether immunity *ratione materiae* applies, the focus becomes the nature of the relevant act or transaction rather than the identity of the actor. If the act or transaction is an official act, the immunity will shield the foreign state from local judicial jurisdiction in respect of that act or transaction. Thus, in referring to sovereign immunity as a "subject matter immunity", Lord Millett was emphasizing that the immunity applies only with respect to conduct properly characterized as sovereign or public in nature. He did not express the view that the immunity would preclude a domestic court from considering a foreign state's official conduct in circumstances where the foreign state had not been impleaded.

[107] In *Amaratunga*, the plaintiff sought damages for wrongful dismissal from the Northwest Atlantic Fisheries Organization ("NAFO"), an international organization to which the *Privileges and Immunities (International Organizations) Act*, R.S.C. 1985, c. P-22 (the "*PIA*") applied. NAFO claimed immunity pursuant to s. 3(1) of *PIA*, which conferred immunity "to such extent as may be required for the performance of [NAFO's] functions". The construction of that phrase was in issue, not the construction of the *SIA*. The Nova Scotia Court of Appeal described the trial judge's interpretation of s. 3(1) of *PIA* as restricting the immunity to circumstances where the impugned lawsuit would jeopardize the organization's ongoing operations and held, at para. 28, that this approach was overly restrictive. Drawing parallels with parliamentary immunity, Chief Justice MacDonald, for the court, held that "immunity is rooted in 'necessity'" and "what is to be judged as 'necessary' is the preservation of the organization's autonomy to carry out its functions" (para. 42). As such, he concluded that the *PIA* conferred immunity "from any domestic suit that stands to interfere with NAFO's autonomy in performing its functions" (para. 44).

[108] Mexico characterized the Nova Scotia Court of Appeal's decision in *Amaratunga* as a rejection of the trial judge's conclusion that the immunity only applied where the outcome of the litigation would interfere with a sovereign's operations. In my view, that is a misreading of the Court of Appeal's decision. Both levels of court agreed that there would have to be interference with the agency's operations before the immunity would apply. As already noted, the trial judge held

that the immunity would only apply where the lawsuit would jeopardize the organization's ongoing operations. The Court of Appeal held that it would be enough if the lawsuit would interfere with the organization's autonomy, and that it was not necessary for the organization to establish significant, excessive, or impermissible interference. In other words, the trial judge in *Amaratunga* thought the interference would have to be very significant while the Court of Appeal concluded that any interference would suffice.

[109] The Supreme Court of Canada decision in *Amaratunga* (2013 SCC 66), released only after the case at bar had been heard, agreed with the Court of Appeal's broader interpretation of the *PIA*. In determining the scope of the immunity that applied to NAFO, Mr. Justice LeBel, for the court, stated at para. 53 that "NAFO's autonomy to conduct its business and the actions it takes in performing its functions must be shielded from undue interference. What is necessary for the performance of NAFO's functions, or what constitutes undue interference, must be determined on a case-by-case basis."

[110] Mexico's submission based on *Amaratunga* emphasized remarks by the Court of Appeal about the lawsuit requiring an inquiry into NAFO's operations. For example, MacDonald C.J.N.S. said that the lawsuit would "put NAFO's core operations under a microscope" (para. 58) and that the plaintiff was asking the court "to condemn NAFO's management structure" (para. 60). Mexico submitted that these statements support the proposition that the mere inquiry by the court would violate the immunity. I do not agree. Those statements were made in a case where the international agency was a defendant. Damages, including punitive damages, as well as special costs were sought against NAFO. The plaintiff sought to have the court impose legal consequences on the agency for the manner in which the agency had conducted its core operations. This was held to interfere with the agency's autonomy because it subjected the agency to control by a Canadian court.

[111] Similarly, the Supreme Court of Canada in *Amaratunga* concluded that the proceedings would constitute "undue interference with NAFO's autonomy in performing its functions and would amount to submitting its managerial operations to

the oversight of its host state's institutions" (para. 57). In my view, this statement does not support the proposition that the inquiry alone, in a case in which no legal consequences would be visited upon the foreign state, would amount to the submission of the foreign state to the control of the domestic court or would interfere with the foreign state's autonomy.

[112] Mexico also relied on the House of Lords decision in *Jones* to assert that immunity would extend to situations where the state is not a named party. In that case, the claimants alleged torture, assault, battery, and other torts, in a civil action against the Kingdom of Saudi Arabia as well as individual Saudi officials. Mexico's submission is drawn from para. 31 of the case, which reads in part:

> A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings. The prosecution of a servant or agent for an act of torture within article 1 of the [*Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 112] is founded on an express exception from the general rule of immunity. It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party. [Underlining added].

[113] *Jones* is not authority for the proposition that the scope of the immunity extends to a case where neither the foreign state itself nor any of its officials are named as parties. Taken in context, the underlined passage above indicates only that "the interests" of the Kingdom would be affected if the individuals could be sued for conduct undertaken while acting in their capacities as Saudi officials. The common law principle that officials or employees of foreign states enjoy the benefits of sovereign immunity when acting in pursuit of their duties is widely recognized: see e.g. *Jaffe v. Miller* (1993), 103 D.L.R. (4th) 315 (Ont. C.A.) at para. 34, *Jones* at para. 10, *Holland* at 1583, Currie at 367.

[114] Similarly, *Teitelbaum* does not stand for the proposition that state immunity applies to preclude all review of a particular sphere of activity. Again, in *Teitelbaum* the foreign state (in this case Israel) was named as a party. The petitioners were lawyers who leased offices on the same floor of an office building as the offices of

the Consulate General of Israel. Because of security concerns, the petitioners sought from the lessor and from the State of Israel, a mandatory injunction compelling the implementation of security measures. The Quebec Superior Court stated at para. 25 that "[t]he establishment of security measures at an embassy or consulate would certainly qualify as activities that should be immune from foreign court review" but made this statement in the context of the petitioners' submission that the activities were properly characterized as commercial and therefore falling within the commercial activity exception in the *SIA*. In concluding that these activities were not commercial, the court relied on Mr. Justice La Forest's analysis in *Re Canada Labour Code*, which in turn emphasized the need to avoid subjecting the sovereign affairs of a foreign state to Canadian regulation.

[115] In *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, the International Court of Justice considered an application by Germany for a declaration that, by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II to be brought against Germany, Italy had failed to respect Germany's jurisdictional immunity. The court referred to the immunity applying to particular conduct but, again, made this statement in the course of distinguishing between acts *jure imperii* and acts *jure gestionis*.

[116] None of the cases referred to by Mexico suggest that the principle of sovereign immunity applies to prevent a court from considering and making findings about the conduct of a foreign state in proceedings where the foreign state (or its agent) is not impleaded and no remedy or other legal consequence would issue against the foreign state. *The Cristina*, *Sultan of Johore*, and the two *Buttes* decisions suggest that the principle of sovereign immunity would not apply to such circumstances.

[117] Further, observations in other cases are consistent with the view that the immunity does not apply where the foreign state is not impleaded or where its property is not attacked. For example, in *Schreiber*, writing for a unanimous court, Mr. Justice LeBel made the following comments at paras. 14 and 18:

> 14 States have incorporated the principle of sovereign immunity into their domestic legal order in two ways. First, state practice has generally established that domestic courts do not exercise jurisdiction in actions brought against foreign states. Secondly, states have generally allowed foreign states a privilege, as a matter of comity, to appear as plaintiffs in domestic courts, if they so choose…
>
> …
>
> 18 The defence of sovereign immunity can be raised by a defendant state to be determined in a preliminary motion, as a matter for summary judgment or at trial. … However, even if the defendant state fails in its bid to dismiss the action at a preliminary motion, it is not precluded from raising the immunity defence sometime during the trial, as the case develops.
>
> [Underlining added].

[118] Similarly, Mr. Justice LeBel, writing for the court in *Kuwait Airways*, stated at para. 22 that s. 3 of the *SIA* "establishes a presumption of immunity from jurisdiction in legal proceedings against sovereign states" (underlining added).

[119] Lord Millett, in *Holland* at 1583, described the customary international law principle of state immunity as meaning that "one state cannot be sued in the courts of another for acts performed *jure imperii*" (underlining added).

[120] Mr. Justice La Forest in *Re Canada Labour Code*, explained at para. 25 that the rationale for the immunity is the acceptance "that sovereign states should not be 'embarrassed' by subjection to the control of a foreign judiciary" (underlining added).

[121] Thus, it is not the mere review of sovereign conduct by the court that interferes with the foreign state's autonomy. It is the subjection of that conduct to the control of a foreign court that is precluded.

[122] Mexico submitted that its interests would still be affected by a finding under s. 33(6)(b) of the *Code* that it had improperly interfered, even though no order or other remedy would be issued against Mexico, because such a finding would damage Mexico's reputation and because, in Mexico's view, it would be expected to change its ways in response.

[123] In *Holland,* Lord Millett said at 1583:

> The immunity does not derive from the authority or dignity of sovereign states or the need to protect the integrity of their governmental functions. It derives from the sovereign nature of the exercise of the state's adjudicative powers and the basic principle of international law that all states are equal.

[124] Thus, the purpose of sovereign immunity is not to protect the reputation of a foreign state. Rather, it is an acknowledgment that the equality of states precludes subjecting one state to the control of another.

[125] There are only two possible outcomes of the decertification application before the Board: the application will succeed and the Union will be decertified or the application will be dismissed on the basis that the vote does not represent the true wishes of the employees due to improper interference. In neither case is Mexico subjected to any control by the Board. Even if the Board makes findings about Mexico that are critical and that underlie, in whole or in part, a decision to dismiss the decertification application, those findings would not purport to affect Mexico's ability to operate the SAWP as it sees fit or to result in consequence to Mexico.

[126] As noted by the Union, the actions of foreign governments are routinely examined in refugee claims adjudicated in Canada, even when the resulting findings are critical of the foreign state. These cases illustrate the consequences of Mexico's position and, as such, they are of assistance in determining whether that position is consistent with Parliament's intentions as expressed in the *SIA.*

[127] Section 96(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*IRPA*"), requires the Immigration and Refugee Board (and, on review, the Federal Court) to determine whether a refugee claimant has "a well-founded fear" of persecution on one of five specified grounds and is "unable" (or, in some cases, "unwilling") to avail himself or herself of the protection of his or her country of nationality.

[128] The Union referred to the Federal Court decision in *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, which involved a claim by a Mexican citizen that the authorities in his country would be "unable" to protect him from persecution by his previous employer due to widespread corruption within the

Mexican police. The applicant submitted that, in dismissing his claim, the Immigration and Refugee Board failed to consider evidence of the corruption of and illegal conduct by Mexican police. The court agreed that consideration of such evidence was necessary, stating at para. 27 that the tribunal must "undertake a proper analysis of the situation in the country" and must "consider not only whether the state is actually capable of providing protection but also whether it is willing to act" in order to determine whether the claimant's submission that he was "unable" to avail himself of the protection of his country of nationality was valid.

[129] The Union also referred to *RPD File No. MA8-04150*, [2011] R.P.D.D. No. 8, where the Immigration and Refugee Board found that "Mexico is unable to provide adequate protection to transgender persons" (para. 44), noting in particular documentary evidence indicating that "police officers are themselves agents of persecution of transgender persons in Mexico" (para. 49).

[130] In some refugee determination hearings, the Immigration and Refugee Board is required to determine the risk of persecution at the hands of foreign authorities themselves: see, for example, *Canada (Minister of Citizenship and Immigration) v. B344*, 2013 FC 447, where the Federal Court upheld the tribunal's conclusion that a Sri Lankan claimant should be granted refugee status on the basis that he would be at risk of torture by the Sri Lankan authorities if he returned to that country.

[131] In its Original Decision, the Board in the present case drew from the refugee cases put before it by the Union in concluding at para. 52 that "the operation of state immunity under the *SIA* does not stretch so far as to be an absolute prohibition on courts or administrative tribunals finding facts or coming to conclusions concerning the actions of third party states." While the majority in the Reconsideration Decision did not refer specifically to this body of jurisprudence in reaching its decision, Chair Mullin did so in his dissent. At paras. 127-28 of the Reconsideration Decision, Chair Mullin drew a distinction between the determination of a "well-founded fear of persecution" in refugee cases and "improper interference" under s. 33(6)(b) of the *Code*. He described the former as a determination of the "subjective state of mind" of the applicant (para. 127) and the latter as a determination based upon "an objective

review of the actions" of the person in question (para. 128). With respect, the characterization of the test for a well-founded fear of persecution as being "subjective" is incorrect. The Supreme Court of Canada endorsed a bipartite test in the case of *Canada (Attorney-General) v. Ward*, [1993] 2 S.C.R. 689, stating at para. 47 that the "subjective" portion of the test is that fear must exist in the mind of the refugee claimant and the "objective" portion of the test is that the fear must be well-founded, i.e. there must be a valid basis for that fear. The *Ward* test was cited in *Avila* at para. 26.

[132] Under s. 33(6)(b) of the *Code*, the Board has to determine whether the vote is unlikely to disclose the true wishes of the employees because of improper interference by any person. Under s. 96(a) of the *IRPA*, the Immigration and Refugee Board has to determine if the refugee claimant has a well-founded fear of persecution and, in doing so, must consider in some cases the conduct of the foreign state. In both kinds of proceedings, the issue is the effect a third party's conduct has had on one of the parties to the proceeding. In my view, no distinction can be made between the two kinds of proceedings.

[133] It is one thing for Canadian courts to refrain from imposing Canadian labour law on a foreign employer if necessary to avoid interfering with a foreign state's sovereign functions. It is quite another thing to ignore conduct of a foreign state that is relevant to the imposition of Canadian labour law on a Canadian employer. In my view, a determination by the Board that Mexico's conduct has legal consequences for Canadian employers and their employees would not interfere with Mexico's autonomy. Such a finding, if made, would not purport to regulate, change, or interfere with Mexico's conduct. It would merely acknowledge that Mexico's conduct can have consequences for others under Canadian law. This is consistent with Lord Denning's explanation in *Buttes* that sovereign immunity would not prevent a defendant from leading relevant evidence about the conduct of a foreign state in defending a defamation action, and would not prevent a plaintiff from leading evidence about the conduct of a foreign state in prosecuting a conspiracy action against a private party based on an agreement between the private party and the foreign state.

[134] It is accepted that states have the right to operate within their own territory without restrictions other than those existing under the state's own law and under international law. In other words, it is accepted that Canadian courts and tribunals cannot purport to regulate the sovereign conduct of a foreign state. What is not accepted is the notion that the mere inquiry by a Canadian court or tribunal into the conduct of a foreign state in proceedings involving other parties, where no jurisdiction is asserted over the foreign state, where the state is not impleaded, where there is no possibility of any remedy being issued against the state, and where the state's legal interests are not imperiled, would constitute the regulation of the foreign state or in any way interfere with its sovereign functions or authority.

[135] The recognition of state immunity necessarily deprives other parties of their rights under Canadian law. While that has been held to be an acceptable consequence in cases that would result in actual interference in a foreign state's sovereign authority, it cannot, in my view, be justified in cases where there is no prospect of the foreign state's legal interests being affected by the proceedings.

Issue 3. Consideration of voluntary testimony

[136] As noted above, the majority in the Reconsideration Decision concluded that the Board could consider testimony provided voluntarily by former consular employees of Mexico in respect of their official functions, even in the absence of a waiver by Mexico of the privileges and immunities provided in the *Vienna Convention*. For the reasons that follow, I have concluded that the panel was correct in this regard.

[137] The question of whether the Board could consider the evidence of the former consular employees turns on the proper construction of the *Vienna Convention.*

[138] As already noted, s. 3(1) of the *FMIOA* provides that Articles 1, 43 to 45, and 48 to 54 (among others) of the *Vienna Convention* "have the force of law in Canada in respect of all foreign states". The proper approach to interpreting an international convention that has been incorporated into domestic legislation is addressed in

Sullivan at 431, where the authors quote from the Ontario Court of Appeal in *R. v. Palacios* (1984), 7 D.L.R. (4th) 112 at 120:

> [A]s Blair J.A. noted [in *Palacios*], in interpreting international conventions the courts are not bound by domestic law principles:
>
> > The principles of public international law and not domestic law govern the interpretation of treaties … These [international] rules of interpretation apply even where, as in this case, a treaty has been incorporated in a statute …

[139] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, Mr. Justice Bastarache, for the majority, adopted a consistent approach at para. 51 in interpreting the international *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137:

> Since the purpose of the Act incorporating Article 1F(c) [of the Convention] is to implement the underlying Convention, the Court must adopt an interpretation consistent with Canada's obligations under the Convention. The wording of the Convention and the rules of treaty interpretation will therefore be applied to determine the meaning of Article 1F(c) in domestic law.

[140] The primary rule of treaty interpretation is set out in Article 31 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (the "*VCLT"*). It does not differ significantly from the modern domestic principles of statutory interpretation (*Sullivan* at 433). Article 31 of the *VCLT* reads as follows:

> Article 31
>
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

[141] Article 32 of the *VCLT* allows courts to rely on supplementary means of interpretation, including anything related to the preparation of the convention, where the ordinary meaning of the provision in question is ambiguous or leads to an absurdity. The principles outlined in Article 32 of the *VCLT* do differ in some ways from domestic interpretation rules (*Sullivan* at 433); however, in my view, Article 32 is not relevant here. The interpretation of the *Vienna Convention* in accordance with Article 31 of the *VCLT* for the purposes of this case does not result in ambiguity or absurdity.

[142] I am not aware of any agreement, instrument, practice, rule of international law, or special meaning as contemplated in Article 31(2)(a) or (b), Article 31(3) or Article 31(4) of the *VCLT*. Thus, the correct interpretation to be given to the relevant provisions of the *Vienna Convention* is one that accords with the ordinary meaning of the terms of those provisions in their context and in light of the object and purpose of the *Vienna Convention* itself. The context for the purpose of construing the *Vienna Convention* comprises the text of the treaty, including its preamble.

[143] The preamble to the *Vienna Convention* reads as follows:

> *The States Parties to the present Convention,*
>
> *Recalling* that consular relations have been established between peoples since ancient times,
>
> *Having in mind* the Purposes and Principles of the Charter of the United Nation concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
>
> *Considering* that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,
>
> *Believing* that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations

> among nations, irrespective of their differing constitutional and social systems,
>
> *Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,
>
> *Affirming* that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,
>
> Have agreed as follows …

[144] Thus, the expressly stated purpose of the privileges and immunities provided by the *Vienna Convention* is to ensure the efficient fulfillment of the functions of consular posts. With that purpose in mind, I turn to the construction of the specific provisions of the *Vienna Convention* in issue here. Those provisions are set out above, but portions are repeated here for ease of reference:

> Article 1
>
> Definitions
>
> …
>
> (d) "consular officer" means any person, including the head of the consular post, entrusted in that capacity with the exercise of consular functions;
>
> (e) "consular employee" means any person employed in the administrative or technical service of a consular post;
>
> (f) "member of the service staff" means any person employed in the domestic service of a consular post;
>
> (g) "members of the consular post" means consular officers, consular employees and members of the service staff[.]
>
> Article 43
>
> Immunity from jurisdiction
>
> 1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.
>
> …
>
> Article 44
>
> Liability to give evidence
>
> 1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or member of the service staff shall not, except in the cases mentioned in paragraph 3 of this Article, decline to give evidence. If a consular officer should decline to do so, no current coercive measure or penalty may be applied to him.

…

3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

Article 45

Waiver of privileges and immunities

1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44.

…

Article 53

Beginning and end of consular privileges and immunities

…

3. When the functions of a member of the consular post have come to an end, his privileges and immunities… shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so, whichever is the sooner, but shall subsist until that time, even in case of armed conflict. …

4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.

…

[145] Article 43(1) provides that consular officers and consular employees are "not amenable to the jurisdiction" of domestic courts in certain respects. "Amenable", means "legally answerable" or "liable to being brought to judgment": *Black's Law Dictionary*, 8th ed, *sub verbo* "amenable". In the present case, the witnesses testified before the Board voluntarily. As such, there is no issue raised as to whether they are amenable, legally answerable, or liable to being brought to judgment. Accordingly, it is my view that Article 43 has no bearing on the question in issue.

[146] Article 44 states specifically in subsection (1) that "Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings" (underlining added). Subsection (1) goes on to say that consular employees or members of the service staff "shall not … decline to give evidence" (underlining added) except in the cases mentioned in subsection (3). Article 44(3) states that members of the consular post are "under no obligation" to

give evidence with respect to their official functions and are also "entitled to decline to give evidence as expert witnesses". Thus, Article 44 appears to suggest, with the words "may be called upon to attend", that a subpoena or other means of compelling a witness could be issued to a member of a consular post; however, it clearly provides a special privilege permitting certain personnel to decline to give evidence in certain circumstances.

[147] Article 45 permits the sending state to waive the privilege conferred by Article 44. Again, the privilege conferred by Article 44 is the right of a member of a consular post to decline to testify in certain circumstances. Thus, on a plain reading of Articles 44 and 45, the privilege that may be waived by the state is the privilege to decline to testify. In other words, the sending state may override the witness's decision to decline to testify. The effect of the waiver by the sending state under Article 45 is that the witness must testify if called upon to do so by the domestic court or tribunal.

[148] Nothing in the *Vienna Convention* says that, in the absence of a waiver by or the consent of the sending state, evidence of a consular employee is inadmissible or that a domestic court or tribunal may not consider the evidence of a consular employee. To the contrary, as already noted, it says that a consular employee "may be called upon" to attend as a witness. Nothing in the *Vienna Convention* says that a consular employee must not testify unless the sending state consents or that the sending state may decline on his or her behalf. To the contrary, as already noted, it says a consular employee may choose, in certain circumstances, to decline to testify unless his or her right to decline is waived by the sending state. If the consular employee testifies voluntarily or, in other words, chooses not to exercise the privilege to decline, there is no privilege for the sending state to waive.

[149] For the foregoing reasons, it is my view that the ordinary meaning of the terms of the *Vienna Convention* clearly leads to the conclusion that members of a consular post are free to testify voluntarily, notwithstanding the sending state has not waived any of the privileges or immunities conferred by the *Vienna Convention.*

[150] In Mexico's submission, based on Article 44(3) of the *Vienna Convention*, members of a consular post are "immune from testifying", and thus prohibited from

testifying unless the sending state expressly waives the prohibition. However, the text of the *Vienna Convention* simply does not support that construction. Article 44 does not state that members of a consular post are "immune" or prohibited from testifying. To adopt the construction urged by Mexico would require the court to read words into the *Vienna Convention* that simply are not there. In my view, there is no basis for doing so.

[151] I have considered whether the ordinary meaning of the provisions as discussed above accords with the object and purpose of the *Vienna Convention* itself. In my view, it does. A construction that permits consular employees to testify voluntarily is not, in my view, inconsistent with the efficient fulfillment of the functions of consular posts. Consular employees have the choice of declining to testify concerning matters connected to the exercise of their official functions. It is open to Mexico, like other employers, to structure its employment relationships to ensure it can pursue remedies in private law if its employees or former employees engage in conduct that it considers to be contrary to their employment obligations.

[152] Mexico submitted that a construction of the *Vienna Convention* that permits consular employees to testify voluntarily would be inconsistent with Mexico's state immunity under the *SIA*. I do not agree. In this regard, I agree with the following portions of the Union's written submission:

> 211. The testimony of the [witnesses] will not change the fact that the Board has found that Mexico enjoys immunity. Mexico will remain immune from the Board's orders. Thus allowing the [witnesses'] evidence could not, in any way, undermine Mexico's state immunity.
>
> 212. Allowing the [witnesses] to voluntarily give evidence, simply put, does nothing to diminish the effect of the Board's declaration that Mexico enjoys state immunity. It simply allows the Board to consider evidence which it has said is relevant.

[153] Finally, it has not been determined that the witnesses in question in this case actually are "consular employee[s]", "consular officer[s]", and/or "members of the consular post" as these terms are used in the relevant provisions of the *Vienna Convention*. The definitions of these terms provided in Article 1(d), (e), (f), and (g) of

the *Vienna Convention* appear to contemplate current, rather than former, employees of a consulate.

[154] Article 53 of the *Vienna Convention* appears to contemplate the cessation of some of the privileges and immunities when the functions of the consular employee have ended and either the person leaves the receiving state or on the expiry of a reasonable period of time thereafter. On a plain reading of Article 53, it appears that the privileges and immunities provided under Article 43 (which is headed “immunity from jurisdiction”) would survive in perpetuity pursuant to Article 53(4), while those provided under Article 44 (“liability to give evidence”) would cease some reasonable period of time after the member had ceased performing official functions pursuant to Article 53(3).

[155] The issue of whether the witnesses fall within one of the classes of persons contemplated in the *Vienna Convention* was not resolved by the Board in the Reconsideration Decision. The majority assumed they did (para. 54). Chair Mullin, in dissent, discussed the issue at paras. 148-156 but did not come to a conclusion on this point. I have concluded that it is not necessary to answer this question. For the reasons already expressed, even if the witnesses in question in this case do fall within one of the classes of persons contemplated in the *Vienna Convention* and even if the privileges and immunities provided by the *Vienna Convention* continue to apply to them notwithstanding they are no longer employed by the consulate, there is nothing in the *Vienna Convention* preventing them from testifying voluntarily.

Disposition

[156] For the foregoing reasons, the Board was correct in concluding that:

> (a) s. 3(1) of the *SIA* did not preclude the Board from considering Mexico’s conduct in the course of determining whether the Employees’ decertification application should be dismissed, in accordance with s. 33(6)(b) of the *Code*, on the basis that the representation vote is unlikely to disclose the true wishes of the employees due to improper interference, and

(b) it could consider voluntary testimony of former consular employees of Mexico about the internal Mexican administration of the SAWP in the course of doing so.

[157] The petition is dismissed, with costs to be paid to the Union by Mexico.

"Warren J."