COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *United Mexican States v. British Columbia (Labour Relations Board),* 2015 BCCA 32

Date: 20150130
Docket: CA041589

Between:

United Mexican States and Consulado General de Mexico en Vancouver

Appellants
(Petitioners)

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
(Respondents)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated January 15, 2014 (*United Mexican States v. British Columbia (Labour Relations Board)*, 2014 BCSC 54, Vancouver Docket S132385).

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Place and Date of Hearing:	Vancouver, British Columbia December 2, 2014
Place and Date of Judgment:	Vancouver, British Columbia January 30, 2015

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Willcock

Summary:

Certain Mexican workers in a union representing agricultural workers applied to the British Columbia Labour Relations Board to cancel the union's certification, following a representation vote. The union filed a complaint with the Board, arguing, inter alia, that Mexico had improperly interfered with the representation vote, within the meaning of s. 33(6)(b) of the Labour Relations Code, such that the vote was unlikely to disclose the true wishes of the union employees. Mexico raised a preliminary objection before the Board, arguing that the Board was barred by the doctrine of state immunity, as codified in s. 3(1) of the State Immunity Act, from adjudicating in relation to its conduct and was therefore prohibited from making a finding that it had engaged in "improper interference". Held: Appeal dismissed. A finding of "improper interference" under s. 33(6)(b) of the Code does not amount to an exercise of jurisdiction over the individual or organization that engaged in improper interference. That individual or organization is neither directly nor indirectly impleaded by such a finding. The doctrine of state immunity therefore does not apply.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] This is an appeal from the dismissal of a judicial review petition brought by the United Mexican States and Consulado General de Mexico en Vancouver ("Mexico"). The judicial review concerned the scope of state immunity codified in the *State Immunity Act*, R.S.C. 1985, c. S-18 [*SIA*]. The issue arose out of a decision of the British Columbia Labour Relations Board (the "Board") in the context of an application to decertify the United Food and Commercial Workers International Union, Local 1518 (the "Union") as the bargaining agent for a group of agricultural workers. The Board concluded that state immunity did not prevent it from considering and making findings regarding Mexico's conduct for the purpose of deciding whether a representation vote was unlikely to disclose the true wishes of the employees in the Union because of improper interference by Mexico. The chambers judge agreed.

[2] This appeal also raised the question of whether the *Vienna Convention on Consular Relations*, 24 April 1963, 596 U.N.T.S. 261 [*Vienna Convention*], precludes the Board from hearing the voluntary testimony of former consular employees of a

state without the consent of that state. The Board concluded that it could receive that evidence. The chambers judge agreed.

[3] Since the hearing of the judicial review, the Board has considered the merits of the decertification application, including receiving the evidence from the consular employees. I am satisfied that this issue is moot, given that a primary purpose of the immunity provided to consular employees is to protect confidentiality and that protection has now been lost. Accordingly, I will focus in these reasons only on the state immunity doctrine.

[4] At the outset, it is important to emphasize that the issue on this appeal is the extent of state immunity provided by the *SIA.* Section 3(1) of the *SIA* is the critical section. It provides:

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

[5] I emphasize that the issue is the extent of state immunity because, in my opinion, Mexico seeks to expand the scope of state immunity by reference to the related, but different, doctrine of act of state. As I will explain, the doctrine of act of state may confer a subject matter immunity that will lead a court to decline to adjudicate matters involving the sovereign acts of foreign states even in circumstances where there is no state immunity under the *SIA.* In this case, however, Mexico has not argued at any stage in the proceedings that the Board should decline to consider its conduct on the independent ground that its acts are also protected by the doctrine of act of state. Accordingly, the only question on this appeal is whether the Board, in considering the conduct of Mexico, exercised jurisdiction over it contrary to the protection provided by s. 3(1) of the *SIA.*

[6] For the reasons that follow I would dismiss the appeal.

Background

[7] A detailed background of the events leading to these proceedings is contained in the decision below: *United Mexican States v. British Columbia (Labour Relations Board)*, 2014 BCSC 54. For the purposes of this appeal, it is necessary to highlight only the following.

[8] The Union is the certified bargaining agent for workers employed by Sidhu & Sons Nursery Ltd. (the "Employer"), an agricultural nursery and farming business in British Columbia. The Employer hires its workers through the Federal Government's Seasonal Agricultural Workers Program ("SAWP"), a programme based on bilateral agreements between Canada and foreign governments, including Mexico. Under SAWP, Mexico is responsible for selecting and approving the citizens who will participate in the programme. It may repatriate its citizens or terminate their participation in SAWP at any time. Mexican workers were hired by the Employer, but not all members of the Union were Mexican; some came from other countries, it appears.

[9] Following a representation vote, on April 11, 2011, certain employees of the Union (the "Employees") applied to the Board to decertify the Union pursuant to s. 33(2) of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Code*].

[10] On April 19, 2011, the Union filed a complaint against Mexico, the Employer, and the Employees, seeking the dismissal of the decertification application on the basis that Mexico had engaged in: (a) unfair labour practices, contrary to ss. 6 and 9 of the *Code*; and (b) improper interference, within the meaning of s. 33(6)(b) of the *Code*, such that the representation vote was unlikely to reflect the true wishes of the employees in the Union. The Union alleged that Mexico employed a policy of preventing workers who supported the Union from returning to Canada or from working in unionized workplaces.

[11] Mexico raised a preliminary objection before the Board, claiming state immunity from the Board's jurisdiction under s. 3(1) of the *SIA*. In its February 1,

2012, decision on this issue, the Board found that it lacked jurisdiction to require Mexico to participate as a party in the proceedings and that it could not make any orders against Mexico. Accordingly, it dismissed the Union's unfair labour practices complaint. The Board held, however, that it could consider Mexico's conduct insofar as any improper interference by Mexico affected the exercise of its discretion to cancel or refuse to cancel the certification arising from s. 33(6) of the *Code*: *Re Sidhu & Sons Nursery Ltd.*, BCLRB No. B28/2012 at paras. 46–47.

[12] Following that decision but before the decertification hearing, the Union informed the Board and remaining parties that it intended to call former consular employees of Mexico to testify as to Mexico's SAWP policy. Mexico then made submissions asserting that the Board was barred from hearing the testimony of the former employees by the *Vienna Convention*, and that the *SIA* prevented it from making any legal or factual findings of improper interference by Mexico on the basis of their testimony.

[13] On February 23, 2012, the Board concluded that it could hear the evidence of the former consular employees if provided voluntarily, and started the decertification application, during which those former employees testified.

[14] Subsequent to the decertification hearing but before a decision was rendered, Mexico again argued that the Board was barred by state immunity from inquiring into Mexico's conduct for the purposes of an "improper interference" analysis under s. 33(6)(b) of the *Code*, and from making any legal or factual findings in relation to Mexico's conduct. It asked the Board to rule on this issue prior to deciding on the decertification application.

[15] The Board ruled on September 21, 2012, that the *Vienna Convention* prevented it from hearing the testimony of the former consular employees, but that it was not barred by the *SIA* from making findings of fact based on other admissible evidence concerning Mexico in relation to the allegations of improper interference: *Re Sidhu & Sons Nursery Ltd.*, BCLRB No. B194/2012.

[16] All parties, including Mexico, applied for reconsideration of that decision. On March 7, 2013, the Board issued its decision in which a majority held that the Board was neither precluded from hearing the testimony of the former consular employees, so long as they testified voluntarily, nor from making findings in relation to whether Mexico's conduct amounted to improper interference, within the meaning of s. 33(6)(b) of the *Code*: *Re Sidhu & Sons Nursery Ltd.*, BCLRB No. B54/2013.

[17] Mexico then applied for judicial review of the reconsideration decision, which was dismissed by Madam Justice Warren in the court below.

The Chambers Judgment

[18] Madam Justice Warren decided that the *SIA* did not preclude the Board from inquiring into, and making factual or legal findings in relation to, Mexico's conduct for the purpose of determining whether it had engaged in improper interference. In doing so, the Board was not exercising jurisdiction over Mexico contrary to s. 3(1) of the *SIA.* Mexico was no longer a party to the proceedings, no orders could be made against it, and no finding was made that it had violated the *Code.* She also held that nothing prevented former consular employees of Mexico from voluntarily giving evidence, even in the absence of a waiver of immunity by Mexico. In the result, she dismissed the petition.

[19] The chambers judge reasoned that 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 and thereby violated the *Code.* At para. 61, she said:

> [61] … 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.

[20] With respect to the nature of a finding of "improper interference" under s. 33(6)(b), Madam Justice Warren held that such a finding "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": at para. 66, Madam Justice Warren went on to hold:

> [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.
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> [Emphasis added.]

[21] The chambers judge next considered the scope of the immunity conferred by s. 3(1) of the *SIA*, which as noted above, reads, "Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada." She stated the issue before her in this way:

> [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.

[22] After a review of Canadian and international jurisprudence on the doctrine of state immunity, the chambers judge held that "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": at para. 98. Put another way, "[i]t is the subjection of [state] conduct to the control of a foreign court that is precluded" by s. 3(1) of the *SIA*: at para. 121.

[23] Ultimately, Madam Justice Warren held that the *SIA* did not preclude the Board from inquiring into or making findings relating to whether Mexico had engaged in improper interference because Mexico was not subject to the control of the Board

and remained free to administer SAWP in whatever manner it deemed appropriate: at para. 125. She stated, in summary:

> [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. …
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> [134] … 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.

Issue on Appeal and Mexico's Position

[24] The issue in this appeal is whether, by finding that Mexico's actions constituted "improper interference" within the meaning of s. 33(6)(b) of the *Code*, the Board exercised jurisdiction over Mexico, contrary to s. 3(1) of the *SIA*.

[25] Mexico submits that the Board did assume jurisdiction over it. Mexico contends that the doctrine of state immunity is not limited to instances where the state is a party to the proceedings and where there is some legal remedy sought against the state. It argues that the chambers judge failed to recognize that "the doctrine of state immunity precludes a domestic tribunal from adjudicating the conduct of a foreign state vis-à-vis its own citizens under domestic law regardless of whether a remedy is imposed on the foreign state for a breach of domestic law." Mexico asserts that the Board's finding regarding unlawful interference amounts to a finding that Mexico violated the *Code* and that this is a result barred by the doctrine

of state immunity. It contends further that the Board, in effect, took jurisdiction over it by indirectly impleading Mexico and making findings that implicate its legal interests.

Standard of Review

[26] In an appeal from a judicial review, this Court must first determine whether the reviewing court selected the correct standard of review and then whether it correctly applied that standard: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 at paras. 73 and 74. As a result, this Court will "for practical purposes be in the same position as it would be if it were reviewing the decision of the tribunal directly", since no deference is to be afforded to the reviewing court: *Henthorne* at para. 79.

[27] The Board's decisions are subject to the standards of review set out in s. 58(2) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]. The preferred approach for determining whether a matter falls within the exclusive jurisdiction of a tribunal and attracts the standard of patent unreasonableness under s. 58(2)(a), or does not and attracts the standard of correctness under s. 58(2)(c) "is simply to examine whether the privative clause [in the tribunal's enabling statute] covers the 'matters' in issue": *Kerton v. Workers' Compensation Appeal Tribunal*, 2011 BCCA 7 at para. 29. This analysis is required even where a tribunal is interpreting its home statute, as was the case in *Kerton*.

[28] Section 139 of the *Code* provides that the Board "has exclusive jurisdiction to decide a question arising under [the] Code". As the chambers judge correctly held, the scope of state immunity under the *SIA* is a matter that is clearly outside of the Board's exclusive jurisdiction: at para. 56. Consequently, the standard of correctness applies, pursuant to s. 58(2)(c) of the *ATA*. This Court must therefore determine whether the chambers judge was correct to find that the Board itself was correct in its conclusions as to the scope of state immunity under the *SIA*.

[29] Insofar as the Board's conclusions relating to the *Code* are concerned, and in particular, its conclusions regarding the legal character and consequences of a

finding of improper interference under s. 33(6)(b), the chambers judge correctly found patent unreasonableness to be the applicable standard of review: at para. 57. These are clearly “questions arising under [the] Code”. For this Court, the question then is whether in applying the patent unreasonableness standard, the chambers judge reached the correct result. Again, no deference is owed to the court below.

Discussion

[30] It is necessary at the outset to understand what it is that the Board did in examining the conduct of Mexico for the purpose of determining whether its conduct constituted improper interference such that the representation vote did not disclose the true wishes of the Union’s employees. This inquiry is necessary because it is critical to Mexico’s argument that the finding of improper interference by the Board is effectively a legal declaration that Mexico violated the *Code*.

[31] The context in which the issue arises is the Union’s unfair labour practice complaint. That complaint is rooted 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.
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> ...
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> 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.

[32] These sections are in aid of protecting the fundamental right of employees enshrined in s. 4 of the *Code*, which stipulates that every employee is free to be a member of a trade union and to participate in its lawful activities. Where the Board concludes that there has been an unfair labour practice, it may make orders against the person committing the practice: s. 14. The *Code* requires notice to be given to any person alleged to have committed an unfair labour practice.

[33] In this case, the Union complaint was made in the context of the Employees' decertification application governed by s. 33 of the *Code*. Section 33 allows bargaining rights to be revoked if certain statutory preconditions are met, including that at least 45% of the employees in the bargaining unit sign a decertification application. If this occurs, 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 for decertification: s. 33(4). Section 33(6), however, confers a discretion on the Board to refrain from cancelling the certification. That section reads as follows:

> 33. (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
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> (a) any employees in the unit are affected by an order under section 14, or
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> (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.

[34] As the chambers judge noted, the *Code* expressly prohibits unfair labour practices, which are defined in s. 6. Of particular relevance here is s. 6(3)(d), which provides 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[.]

[35] Unlike a finding that a person has engaged in an unfair labour practice, which necessarily involves a finding of a breach of the *Code*, a finding of "improper interference" for the purpose of s. 33(6)(b) is not a finding that the *Code* has been violated. That phrase is only referred to in s. 33(6)(b) and there is no express prohibition against conduct amounting to "improper interference". It seems to me that the purpose of a finding of improper interference by a person is simply a basis on

which the Board can conclude that the vote does not disclose the true wishes of the employees. No orders of any kind can be issued against such a person, whose only connection to the proceeding is the conduct found to constitute improper interference. And because no orders may issue against them, there is no requirement on the Board to give the person notice of the proceedings. The finding has no legal effect and, in my view, does not affect their legal interests.

[36] The majority of the panel in the Board reconsideration decision under review observed 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": at para. 25. The majority summarized the Board's jurisdiction under s. 33(6)(b) as follows:

> [29] 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.

[37] This is an accurate statement of the law, and it is certainly not patently unreasonable. It is in this context that the application of s. 3(1) of the *SIA* must be assessed.

[38] I am in substantial agreement with the analysis of s. 3(1) undertaken by the chambers judge. These principles have also recently been extensively reviewed by the Court of Appeal in England in *Belhaj v. Straw,* [2014] EWCA Civ 1394. The analysis of the Court of Appeal is directly pertinent to the issue before us. In particular, that court distinguishes between the scope of state immunity and situations in which there is no state immunity but courts nonetheless decline to

consider certain state conduct by applying the related but independent act of state doctrine, as a form of subject matter immunity.

[39] In the United Kingdom, as in Canada, state immunity as it existed at common law is now codified by statute. Section 3(1) provides, as we have seen:

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

[40] This case turns on whether, in making its findings, the Board exercised jurisdiction over Mexico. None of the exceptions to the immunity referred to in that section apply in this case.

[41] At common law, the courts would not directly implead a state as a party to proceedings, nor would a state be indirectly impleaded. This case does not give rise to a question of direct impleading – Mexico is not a party. Mexico argues, however, that it has been indirectly impleaded in the Board proceedings.

[42] The concept of indirect impleading captures proceedings in which the state is not a party but in which proceedings are brought in relation to property in the state's ownership, possession, or control: see *Compania Naviera Vascongado v. S.S. Cristina (The Cristina),* [1938] A.C. 485; *The Parlement Belge* (1879) 5 P.D. 197.

[43] Mexico argues that the finding of improper interference is a finding that it breached the *Code* in respect of which it could claim immunity, as it did in respect of the unfair labour practices complaint, if it were a party to the proceeding. It argues that to defend against that finding would, improperly, require it to waive its immunity. Mexico has been indirectly impleaded, it argues, because the finding affects Mexico's interest in the administration of SAWP, passes judgment on the legality of sovereign acts of Mexico conducted in its own territory, and achieves indirectly what could not be done directly.

[44] A similar argument was advanced and rejected in *Belhaj.* Mexico submits, as was submitted in that case, that the scope of state immunity was expanded by the

House of Lords in *Buttes Gas and Oil Co. v. Hammer (Nos. 2 and 3),* [1982] A.C. 888. The Court of Appeal noted that the decision in *Buttes* turned on the non-justiciability of the subject matter of the claims and expressly did not turn on state immunity. As Lord Wilberforce said in *Buttes* at 926 C-D:

> 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.

[45] The Court of Appeal in *Belhaj* noted that cases arise in which no state is directly or indirectly impleaded, so that no issue of state immunity arises, but nevertheless courts decline to adjudicate on claims that turn on the validity of public acts of a foreign state. This is the application of the act of state doctrine. After referring to cases from other jurisdictions, including the decision of the chambers judge in this case, the Court of Appeal observed at para. 39 that "[p]roceedings will not be barred on grounds of state immunity simply because they will require the court to rule on the legality of the conduct of a foreign state."

[46] The Court went on to analyze the scope of the concept of indirect impleading for the purpose of the application of state immunity. In brief, it recognized that a state may be indirectly impleaded in circumstances where, although not named as a party, the proceeding, in effect, seeks to affect the property, rights, interests, or activities of that state, citing Article 6(2)(b) of the *UN Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004 (not yet in force). The Court considered academic writing, among other sources, approving of the view that the legal effects engaged should be specifically legal effects, such as the imposition of a lien or declaration of title, rather than social, economic, or political effects. Similarly, the relevant state interests should be confined to legal interests, as opposed to "interests in some more general sense": *Belhaj* at para. 45.

[47] The Court summarized its view of the relationship between state immunity and act of state in the following passage:

> [48] The principles of state immunity and act of state as applied in this jurisdiction are clearly linked and share common rationales. They may both

> be engaged in a single factual situation. Nevertheless, they operate in different ways, state immunity by reference to considerations of direct or indirect impleader and act of state by reference to the subject matter of the proceedings. Act of state reaches beyond cases in which states are directly or indirectly impleaded, in the sense described above, and operates by reference to the subject matter of the claim rather than the identity of the parties. This is inevitably reflected in the different detailed rules which have developed in relation to the scope and operation of the two principles. In this jurisdiction exceptions to immunity are laid down in the 1978 Act. Limitations on the act of state doctrine, which are not identical, have now become established at common law. (See, in particular, *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No.2)* [2014] QB 458.) The extension of state immunity for which the respondents contend obscures these differences. Such an extension is also unnecessary. Any wider exemption from jurisdiction extending beyond state immunity in cases of direct or indirect impleader is addressed in this jurisdiction by the act of state doctrine and principles of non-justiciability. The extension of state immunity for which the respondents contend would leave no room for the application of those principles.

[48] I respectfully agree with this analysis. In my view, the argument advanced by Mexico is not a state immunity argument. Rather, to the extent it has merit, the argument invokes the related but separate principles of the act of state doctrine. Mexico did not argue act of state as an independent ground supporting a conclusion that the Board could not inquire into the sovereign acts of Mexico conducted within its own territory. It has not argued that proposition on appeal. Rather, its submission is, in substance, that the principle of indirect impleading should be expanded to incorporate principles drawn from the act of state doctrine. It submits that that is the proper meaning to be given to the exercise of jurisdiction by the Board in this case.

[49] For the reasons already given, I would reject that submission. I do not agree that the Board exercised jurisdiction over Mexico when it considered whether Mexico's conduct amounted to improper interference with the employees of the Union for the purpose of exercising its discretion to refuse to cancel the Union's certification. The Board made no orders in relation to property in the ownership, possession, or control of Mexico. It did not affect Mexico's legal interests. In my view, that conclusion is sufficient to dispose of this appeal.

[50] This is not a case in which it is necessary to consider the scope or content of the act of state doctrine. I would say only this: I am not persuaded that the act of

state doctrine has any application to the facts of this case. The Board did no more than examine Mexico's conduct for the purpose of exercising its remedial powers under the law of British Columbia, in respect of the rights of the Employees, the Union, and the Employer in British Columbia. The Board considered whether certain conduct had occurred, but in doing so, the Board was not adjudicating its legal validity in Mexico or under international law, and was not adjudicating whether the conduct breached the *Code.* The Board was doing no more than vindicating the rights of persons in British Columbia. I do not see that the act of state doctrine, however articulated, has any application to the case before us.

[51] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Willcock"