Exemption from the Jurisdiction of Canadian Courts

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Exemption from the Jurisdiction of Canadian Courts

J.-G. CASTEL

I Persons against whom the jurisdiction cannot be enforced

The first part of this note deals with the persons who claim immunity from the compulsory jurisdiction of Canadian courts.

(1) The Foreign State, Sovereign or Head of Foreign State as a Defendant

The law relating to the immunity of foreign states and sovereigns or heads of foreign states from Canadian jurisdiction is to be found in the common law and has been stated and re-stated in leading cases such as *The Parlement Belge*, *The Porto Alexandre*, *The Cristina*, *Dessaulles v. The Republic of Poland* and *Mehr v. The Republic of China et al.* Lord Atkin reduced this law to 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.

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1 [1880] 5 P.D. 197.
Canadian courts will not exercise jurisdiction over the person or property of a foreign sovereign unless he is willing to submit to process. Proceedings brought against a foreign government must be stayed if it remains passive or if it moves to set the writ aside.

A foreign "state" includes an independent country of the Commonwealth,\(^7\) or a state under British protection,\(^8\) or a state which is recognized de jure or de facto.\(^9\)

Several reasons have been given for the basis of the immunity from jurisdiction of a foreign state or sovereign or head of state, none of which is free from criticism and most of which are now obsolete in the light of modern conditions. For instance, it has been said that since all states are independent and equally sovereign, no state is amenable to the courts of another state. *Par in parem non habet imperium*—each state must respect the dignity, equality and independence of another state. It is an insult to implead a foreign sovereign or state; to do so would vex the peace of nations. In other words, it is incompatible with the dignity of a sovereign that he should be subject to the jurisdiction of a foreign court.\(^10\)

Sovereign immunity is also held to be based on reciprocity or comity. In return for a concession of immunity, other states or sovereigns of such states make mutual concessions of immunity within their territory.\(^11\)

Since, from a practical point of view, it is almost impossible to enforce a judgment against a foreign state or sovereign or head of state, any attempt to do so would be an unfriendly act.

The very fact that a state allows a foreign state to function within, or a foreign sovereign or head of state to visit, its territory, signifies a concession of immunity, as no foreign state or foreign sovereign or head of state would enter Canada on any other terms.

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\(^7\) *Kahan v. Pakistan Federation*, [1951] 2 K.B. 1003.


\(^9\) *The Arantzazu Mendi*, [1939] A.C. 256, *Re: Proof of Sovereignty*: The court takes judicial notice of the fact that a particular person is the sovereign or head of foreign state; in case of difficulty, the usual practice is to obtain a certificate from the Minister for External Affairs, whose statement is conclusive: see *ibid.*, 268.


Today the notion of dignity no longer provides an adequate basis for the doctrine of sovereign immunity. A better view was expressed by Lord Denning in *Rahimtoola v. Nizam of Hyderabad and Another*:

It is more in keeping with the dignity of a foreign sovereign to submit himself to rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction.\(^{12}\)

The immunity of a foreign sovereign or head of state not only extends to his official acts, but also to acts committed in his private capacity. In the case of *Mighell v. Sultan of Johore*,\(^{13}\) the Sultan of Johore, living incognito in England, could claim sovereign immunity in proceedings against him for breach of promise to marry an Englishwoman.

Although the rule that a foreign state or sovereign or head of state is immune from jurisdiction seems to be absolute, there are a few cases where sovereign immunity is denied. As Viscount Simon stated, "Their Lordships do not consider that there has been finally established in England . . . any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances."\(^{14}\) Sovereign immunity does not normally apply:

(a) to immovable property belonging to the foreign sovereign and situated in Canada, other than that used for the purpose of the diplomatic mission;\(^{15}\)

(b) where a foreign sovereign is one of the claimants to a trust fund falling within the jurisdiction of a Canadian court,\(^{16}\) except when the alleged trustee is the foreign sovereign or his agent;\(^{17}\)

(c) to the winding-up of a company in whose assets the foreign state or foreign sovereign claims an interest;\(^{18}\)

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\(^{13}\) [1894] 1 Q.B. 149.


\(^{15}\) *The Charkieh* (1873), L.R. 4 Ad. & E. 59, 97, *obiter* by Sir Robert Phillimore, and see Article 31 (1)(a) Vienna Convention on Diplomatic Relations, *infra*.


\(^{18}\) *Re Russian Bank for Foreign Trade*, [1933] Ch. 745, 769-70.
(d) to representative actions, such as debenture holder's actions, where a foreign state or foreign sovereign is a debenture holder;¹⁹
(e) in cases where the immunity is waived;
(f) to acts *jure gestionis* where the theory of limited immunity has been adopted by the courts.

Sovereign immunity also attaches to the government of a foreign state²⁰ and to its departments as well as to a foreign public corporation, which may be considered as a department of the state. The law is uncertain on the last point. Normally, if a foreign public corporation has the character of a department of state, with *no* separate juridical existence, the privilege of immunity may attach; but, if under the foreign law, the corporation *does* have a separate legal existence, and is *not* a department of the state, with the power to conduct its own business, no trespass upon the sovereignty of the state would result from denial of immunity to such a body.²¹ However, in the cases of *Krajina v. Tass Agency and Another*²² and *Baccus S.R.L. v. Servicio Nacional Del Trigo*,²³ it was held that even if it is a *separate* incorporated legal entity, it may, by reason of the *degree* of governmental control over it, be an organ (department) of the state and therefore have immunity attached to it.²⁴

(2) **The Foreign State, Sovereign or Head of State as a Claimant**

Although a foreign sovereign or state cannot be sued in Canadian courts, a recognized foreign state or sovereign or head of state may sue or appear as a plaintiff in our courts.²⁵

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²² [1949] 2 All E.R. 274.
(3) Property of the Foreign State, Sovereign or Head of State

The general rule with respect to proprietary immunity is that the courts 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."\(^2\)

It is not yet settled whether or not Canadian courts should always apply this rule absolutely with no restrictions or grant immunity only when the property which is the subject-matter of the suit was used for public purposes as opposed to commercial purposes.\(^2\)

However, according to section 47 (7) (c) of the Federal Court Act, no action \textit{in rem} may be commenced in Canada "against any ship owned or operated by a sovereign power other than Canada, or any cargo laden thereon, with respect to any claim where, at the time the claim arose or the action is commenced, such ship was being used exclusively for non-commercial governmental purposes."\(^2\)

In order to claim proprietary immunity, the foreign state, sovereign or head of state must be the owner of the subject-matter of the suit, such as a ship,\(^2\) or, if it is not the owner, it must show that it is in \textit{de facto} possession of the subject-matter through its own servants or is in control of it. For example, in \textit{The Cristina},\(^2\) actual ownership by the foreign state did not have to be established, and the foreign state could claim proprietary immunity of a ship which it had merely requisitioned.

A foreign state may claim proprietary immunity in a case where goods are in the possession of its bailee, such as in \textit{United States of America and Republic of France v. Dollfuss Mieg et Cie S.A. and Bank of England}\(^2\) or where goods are in the possession of its agent, such as in \textit{Rahimtoola v. H.E.H. The Nizam of Hyderabad and Others}.\(^2\)

In order to obtain proprietary immunity, the foreign state need

\(^2\) \textit{The Parlement Belge}, [1880] 5 P.D. 197.
\(^2\) [1952] A.C. 582.
not prove its title, but must only produce evidence showing that its claim is neither merely illusory, nor founded on a title manifestly defective. Also, in the case of Rahimtoola v. Nizam of Hyderabad and Others, where Pakistan had a legal title to a bank account but no beneficial interest in it, Lord Somervell of Harrow stated that the foreign sovereign only had to establish an arguable issue.

Proprietary immunity is also relevant in cases of taxation; the property of a foreign state used for public purposes is not liable to taxation. The basis of the immunity seems to be the principle that the foreign state is immune from coactio, direct or indirect. The exemption from municipal taxation applies to property used for public purposes as a consulate, and to property used for diplomatic purposes. This position is reaffirmed by the two Vienna Conventions. Article 23 of the 1961 Vienna Convention on Diplomatic Relations declares that the sending state and the head of the mission are exempt from all national, regional, or municipal dues and taxes in respect of the premises of a mission, except those that represent payment for specific services rendered. Article 34 of the same Convention provides for the exemption of diplomatic agents from taxation. Article 32 of the 1963 Vienna Convention on Consular Relations declares that consular premises and the official residence of the head of a career consular post of which the sending state is the owner or lessee are exempt from all national, regional, or municipal taxes, except those that represent payment for specific services rendered.

Exemption from taxation will also apply to leasehold interests held by companies as bare trustees for a foreign government. However, in the cases of Michigan State Bridge Commission v. Point Edward and Ogdensburg Bridge & Port Authority et al.

v. Township of Edwardsburg,\textsuperscript{41} the Bridge Authorities were liable to tax assessment with respect to lands on which international bridges were constructed.

(4) Acta Imperii and Acta Gestionis: The Doctrine of Limited Immunity

There is no international agreement as to the scope and extent of the doctrine of sovereign immunity. Before discussing the Canadian position, the British approach to the immunity of a foreign state, as opposed to the American approach, must be mentioned.

In Britain, the courts have not yet adopted the distinction between the public (acta jure imperii) and private (acta jure gestionis) acts of state and a foreign state can plead immunity when it engages in commercial activities.

The cases in which the doctrine of absolute immunity has been applied have been cases involving mainly government ships used for commercial purposes. The doctrine of absolute immunity which was laid down in 1880 in the case of The Parlement Belge,\textsuperscript{42} has been emphatically re-stated in succeeding English cases.\textsuperscript{43} Thus, in The Cristina, Lord Atkin said:

\begin{quote}
The courts of a country... 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. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is... well settled that it applies to both.\textsuperscript{44}
\end{quote}

Lord Maugham, in The Cristina,\textsuperscript{45} and Lord Denning in Rahimtoola v. Nizam of Hyderabad and Another\textsuperscript{46} tried to limit this

\textsuperscript{41} [1967] 1 O.R. 87.
\textsuperscript{42} [1880] 5 P.D. 197.
\textsuperscript{44} [1938] A.C. 485, 490.
\textsuperscript{45} [1938] A.C. 485, 521.
doctrine, but their lordships were not followed by the majority. Their opinions seem to indicate that if a suitable case arose, the House of Lords might take a different view.47

The United States courts, on the other hand, have departed from this traditional approach. Realizing the increasing participation of foreign governments in commercial activities, the American courts, after publication of the Tate Letter in 1952, have followed the doctrine of restrictive, limited or qualified immunity in respect to foreign governments: "It will hereinafter be the Department's policy to follow the restrictive theory of sovereign immunity."48 This doctrine is based on the view that the function of the state is to govern, that is, to exercise legislative, judicial and administrative authority. If it "descends into the arena of commerce" and engages in transactions of private businessmen, it can no longer claim to be accorded the dignity and equality of a sovereign.49 The grant of immunity is of an exceptional nature and should be confined within the rationale underlying the concept of immunity. When the state acts as a private individual or has entered into a transaction which does not involve its political or governmental powers, there is no reason to grant immunity.

There is a difficult problem to be solved with respect to the doctrine of limited immunity. Which test must be applied to distinguish between acta imperii and acta gestionis? Lord Denning laid down the test of the nature of the dispute:

If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.50

47 The immunity may, however, be waived by the foreign state. See infra.
Another test is the "purpose" or object of the act. An act is "public" if the object of the performance is "public" in character. A good test is that of the nature of the transaction. If the state uses the forms of transactions available in private law, for example, by purchasing goods from private traders this would indicate that the transaction is jure gestionis and the foreign state should be treated as a private individual.

Some of the judges in Quebec seem to favour the test of the centre of gravity of the transaction in order to determine whether it is public or private.\(^51\)

The Exchequer Court and the Supreme Court of Canada, influenced by English decisions, have applied the traditional doctrine of absolute immunity. In the case of Brown v. S.S. Indochine,\(^52\) the Exchequer Court held that all government-owned or government-requisitioned ships, whether used for military, political or commercial purposes, are in time of peace and war, immune from seizure or arrest. In Thomas White v. The Ship Frank Dale\(^53\) the Exchequer Court, citing The Cristina case\(^54\) again held that a public ship engaged in commerce could claim immunity. However, in the case of Flota Maritima Browning De Cuba S.A. v. The Republic of Cuba,\(^55\) the Canadian Supreme Court hinted that it might no longer consider the doctrine of sovereign immunity to be absolute. In this case, there was no evidence before the court of the purposes for which the public ships were to be used; the court said that since the ships were available to be used by the Republic of Cuba for any purpose which its government may select, the doctrine of immunity would apply. The court expressed no opinion as to whether sovereign immunity could apply to the commercial activities of a state.\(^56\) The distinction was raised between state activities of a


\(^{52}\) (1922), 21 Ex. C.R. 406.


\(^{54}\) [1938] A.C. 485.


\(^{56}\) See, however, per Ritchie J., ibid., 604:

"The material before us clearly indicates that at the time of their arrest the defendant ships, although lying idle in Halifax harbour and being equipped as trading or passenger ships, were nonetheless owned by and in possession of a foreign state and were being supervised by G.T.R. Campbell & Company which company was accounting for such supervision to 'a division of the
public nature and activities of a commercial nature, but the court left the question unanswered, and the problem unsolved.

The Quebec courts, however, were able to make use of the silence of the Supreme Court of Canada in the *Flota Maritima* case,\(^\text{57}\) and decided to adopt in the recent Expo 1967 cases, the doctrine of limited sovereign immunity. For example, in the case of *Allan Construction Ltd. v. Le gouvernement du Vénézuela*,\(^\text{58}\) the Superior Court drew a distinction between public and private acts of the state and held that the right of sovereign immunity can be pleaded by a foreign state only with respect to public or political acts (*jure imperii*) and not to acts having a commercial character (*jure gestionis*). The Republic of Venezuela could not plead sovereign immunity in an action for the recovery of the balance due under a contract for the construction of its pavilion at Expo '67 because the evidence showed that the pavilion was to be used principally for commercial purposes.

In *Venne v. Democratic Republic of the Congo*,\(^\text{59}\) the plaintiff sued the Republic of Congo for fees for professional services rendered in preparing plans for the construction of a pavilion at Expo '67. The Quebec Court of Appeal affirmed the dismissal of the defendant's declinatory exception based on the doctrine of absolute sovereign immunity. Brossard J. A. stated:

... the rule is no longer absolute, but it is subject in each case to the circumstances, to "reason and good sense", to the reciprocal acquies-

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The Jurisdiction of Canadian Courts

The jurisdiction of Canadian courts is influenced by the States whose sovereignty is in question, to the matter in dispute in which the rule is being invoked, to the purely private or commercial nature of the matter (jure gestionis), and to the direct relationship which may exist between the matter in dispute and the exercise by the sovereign State of its jus imperii, as the case may be.60

In *Penthouse Studios Inc. v. Venezuela*,61 the Quebec Court of Appeal again rejected a plea of sovereign immunity in a case involving the enforcement of a commercial contract. These cases reveal that Quebec courts have definitely departed from the traditional theory of absolute immunity; the plea of sovereign immunity cannot be successfully invoked when a state engages in commercial activities that are not manifestations of sovereign authority. The courts of this province have also justified their position by saying that a foreign sovereign, by entering into a private law relation, impliedly waives his immunity.

In *Le Gouvernement de la República Democrática del Congo v. Venne*62 the Supreme Court of Canada, by a majority of seven to two, set aside the judgments of the Court of Appeal and of the Superior Court of Quebec. Ritchie J., who wrote the opinion for the majority, refused to discuss the question whether Quebec courts should continue to apply the doctrine of qualified or restrictive sovereign immunity as he did not accept the finding of the trial judge that when the Government of the Democratic Republic of the Congo employed Mr. Jean Venne to prepare sketches of the national pavilion which it proposed to build at the International Exhibition, it was not performing a public act of a sovereign state but rather one of a purely private nature. His Lordship stated:

...in preparing for the construction of its national pavilion, a Department of the Government of a foreign State, together with its duly accredited diplomatic representatives, were engaged in the performance of a public sovereign act of State on behalf of their country and... the employment of the respondent was a step taken in the performance of that sovereign act. It therefore follows in my view that the appellant could not be impleaded in the Courts of this country even if the so-called doctrine of restrictive sovereign immunity had been adopted in our Courts, and it is therefore unnecessary for the determination of this appeal to answer the question posed by Mr. Justice Owen and so fully considered by the Court of Appeal. In an area of the law which

has been so widely canvassed by legal commentators and which has been the subject of varying judicial opinions in different countries, I think it would be undesirable to add further *obiter dicta* to those which have already been pronounced and I am accordingly content to rest my opinion on the ground that the appellant's employment of the respondent was in the performance of a sovereign act of State.\(^{63}\)

He also said:

...I am of opinion that the contract here sought to be enforced to which the appellant's diplomatic representative and one of its Departments of Government were parties, was a contract made by a foreign Sovereign in the performance of a public act of State and that whatever view be taken of the doctrine of sovereign immunity, it was a matter in respect of which the Republic of the Congo cannot be impleaded in our Courts. I would allow this appeal on that ground.\(^{64}\)

The decision of the majority is somewhat ambiguous as no attempt is made to clarify the law. To some, it might appear that the majority has rejected the distinction between acts *jure imperii* and *jure gestionis* and reaffirmed the doctrine of absolute immunity. However, this does not seem to be the proper interpretation to be given to this decision. The question is still open. If the act of the Government of the Democratic Republic of the Congo had been characterized by the court as *jure gestionis* it would have had to pass upon the doctrine of restrictive sovereign immunity.

In a very learned dissenting opinion, Mr. Justice Laskin stated: "To allow the declinatory exception is thus to reaffirm the doctrine of absolute immunity. I have made plain my opinion that the doctrine is spent."\(^{65}\) He points out that neither the independence nor the dignity of states, nor international comity require vindication through a doctrine of immunity: "Independence as a support for absolute immunity is inconsistent with the absolute territorial jurisdiction of the host State; the dignity, which is a projection of independence or sovereignty, does not impress when regard is had to the submission of States to suit in their own Courts. ... Nor is

\(^{63}\) At page 673.

\(^{64}\) At page 677-78.

\(^{65}\) At page 691. The Government of the Democratic Republic of the Congo challenged the suit by a declinatory exception. Quebec Code of Civil Procedure, Article 164. Thus, the interlocutory proceedings became the vehicle for the determination of the basic issue in the litigation, namely, the immunity of the foreign government from suit and from the jurisdiction of the Quebec Superior Court.
comity any more realistic a foundation for absolute immunity, unless it be through treaty.\textsuperscript{66}

Laskin J. also rejects extraterritoriality as a prop of absolute immunity.\textsuperscript{67} In his opinion, immunity must be considered from the standpoint of function rather than status.

Affirmatively, there is the simple matter of justice to a plaintiff; there is the reasonableness of recognizing equal accessibility to domestic Courts by those engaged in transnational activities, although one of the parties to a transaction may be a foreign State or an agency thereof; there is the promotion of international legal order by making certain disputes which involve a foreign State amenable to judicial processes, even though they be domestic; and, of course, the expansion of the range of activities and services in which the various States today are engaged has blurred the distinction between governmental and non-governmental functions or acts (or between so-called public and private domains of activity), so as to make it unjust to rely on status alone to determine immunity from the consequences of State action.\textsuperscript{68}

In other words, immunity should attach to certain classes of functions and not to others (for example, commercial transactions).

Section 43(7) (c) of the Federal Court Act\textsuperscript{69} which grants immunity to a ship owned or operated by a foreign sovereign power if at the time the claim arose or the action is commenced such ship was being used exclusively for non-commercial governmental purposes seems to recognize\textit{ a contrario} that an action\textit{ in rem} could be commenced against such ship if it were used for commercial purposes.

In the Quebec Court of Appeal, Owen J.A. had expressed the view that mere proof that the party seeking immunity is a sovereign state or any agency thereof is not sufficient. "Any attorney seeking immunity from jurisdiction on behalf of a sovereign state should be called upon to show, to the Court's satisfaction, that there is some valid basis for granting such immunity."\textsuperscript{70} In the Supreme Court of Canada, Ritchie J., for the majority, was of the opinion that the

\textsuperscript{66} At page 684.

\textsuperscript{67} See Rand J. in \textit{St. John v. Fraser-Brace Overseas Corp.}, [1958] S.C.R. 263, 267. A more realistic and flexible basis for immunity is to be found in the conception of "an invitation by the host State to the visiting State."

\textsuperscript{68} At page 687.

\textsuperscript{69} S.C. 1970-71, c. 1.

\textsuperscript{70} [1969] Que. Q.B. 818, 5 D.L.R. (3d) 128, 138. Note that in \textit{Sicard v. Le Gouvernement de la République du Vénézuéla}, [1970] R.P. 97, sovereign immunity was recognized as no sufficient proof was given that an act\textit{ jure gestionis} was involved.
burden of proof does not lie upon the sovereign to show that the act was a public one if it is to be granted sovereign immunity. He said:

...[T]he question of whether the contract in question was purely private and commercial or whether it was a public act done on behalf of a sovereign State for State purposes, is one which should be decided on the record as a whole without placing the burden of rebutting any presumption on either party.71

It must be noted that the Quebec courts have not distinguished between immunity from jurisdiction and immunity from execution. From a practical and logical point of view, if a foreign state is not immune from the jurisdiction of the Quebec courts with respect to transactions jure gestionis it should not be immune from execution of the judgment rendered against it. However, this judgment should not be enforced against the property of the foreign state used for public purposes.

The decision of the Supreme Court of Canada in Le Gouvernement de la République Démocratique du Congo v. Venne does not mean that the doctrine of limited immunity has been rejected in Canada. This doctrine is a sound one. Foreign states should not be immune from suit in relation to their acts when engaged in private enterprise. However, the best approach would seem to be that which denies immunity to a foreign sovereign or state except in some specific cases.72 This is more in keeping with the fact that the local sovereign has gradually surrendered parts of his immunity from suit.73

(5) Diplomats

Until recently, in Canada, the rules governing diplomatic immunities were based on customary rules of international law, incorporated in the domestic law of Canada. In addition, there was and still is one statute in force in Canada, the Diplomatic Immunities (Commonwealth Countries) Act.74 However, in 1961, the Vienna Convention on Diplomatic Relations was signed by a large

72 At page 674.
74 S.C. 1953-54, 55, c. 54.
number of countries including Canada. This Convention not only removed many of the uncertainties existing in the area of diplomatic immunities, but also codified the law on diplomatic immunities. The Convention was ratified by Canada on May 26, 1966.\(^7\) In the areas not covered by the Vienna Convention, the customary rules of international law will continue to govern.\(^8\)

An ambassador is the envoy or representative of a foreign sovereign, and he has been granted certain privileges both as a token of respect for the sending state and to ensure that he will be able to fulfil his duties properly with no pressure or fear. The fiction of extraterritoriality, namely, that the ambassador and his suite and property were legally outside the territory of the state, was also used as an explanation of the immunities granted to diplomats. However, this fiction, which for some time obtained a foothold in international law, was abandoned in the Vienna Convention, which offers no theoretical basis for the privileges and immunities it grants.

The most important feature of the Vienna Convention is that it abolishes the theory of absolute diplomatic immunity. Diplomatic immunity is now qualified.

The Convention draws a distinction between three categories of persons entitled to diplomatic immunity in varying degrees of importance—diplomatic agents, members of the administrative and technical staff, and members of the service staff.\(^7\)

According to Article 31 of the Convention, a diplomatic agent enjoys immunity from the criminal, civil, and administrative jurisdiction of the receiving state in respect both of his official and private acts except in three cases: (a) real actions relating to private immovable property in the territory of the receiving state, unless held for the purposes of the mission, (b) actions relating to succession in which the diplomatic agent is involved as a private person, and (c) actions relating to any professional or commercial activity in a private capacity. The person and private residence of a diplomatic agent are inviolable.\(^7\) But a diplomatic agent who is a

\(^7\) As to the effect of ratification and the necessity for implementing legislation, see Castel, *Public International Law* 827, 851. (1965).

\(^8\) The Diplomatic Privileges Act, 1708, 7 Anne, c. 12, was applicable in Canada. Other countries have implemented the Vienna Convention: for instance, Australia has passed the Diplomatic Privileges & Immunities Act, 1967 (Com.), s. 6 and the U.K. The Diplomatic Privileges Act, 1964.

\(^7\) All these terms are defined in Article 1 of the Convention. The Convention does not apply to foreign sovereigns themselves or their property.

\(^7\) Articles 29 and 30 of the Convention.
national of or permanently resident in the receiving state shall enjoy immunity only in respect of his official acts performed in the exercise of his functions.\textsuperscript{79} The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving state, enjoy the same privileges and immunities.\textsuperscript{80}

Members of the administrative and technical staff, such as secretaries and clerks, along with members of their families in their household, if they are not nationals of or permanently resident in the receiving state, enjoy the same immunities as diplomatic agents, except that immunity from civil and administrative jurisdiction does not extend to acts performed outside the course of their duties.\textsuperscript{81} Members of the service staff enjoy immunity only in respect of acts performed in the course of their duties.\textsuperscript{82} Private servants of members of the mission, if they are not nationals of, or permanently resident in the receiving state, may enjoy privileges and immunities only to the extent admitted by the receiving state.\textsuperscript{83} This would seem to mean that they would enjoy immunity only in respect of acts performed in the course of their duties.

Article 39 of the Convention provides that every person entitled to immunities shall enjoy them the moment he enters the territory of the receiving state and shall cease to enjoy them when he leaves the territory or upon expiry of a reasonable period in which he can leave. Immunity for acts done by a diplomatic agent in his official capacity continues after he has ceased to be a diplomatic agent.\textsuperscript{84} But, an action begun against a person who is not entitled to diplomatic immunity at that time, must be stayed as soon as he becomes entitled to diplomatic immunity.\textsuperscript{85} In all cases the immunity is only from jurisdiction in the receiving state and not from liability. Therefore an action can always be brought against a person entitled to immunity in his home state\textsuperscript{86} or after his mission or employment has ended in respect of acts done in his private capacity.

There are other new important provisions in the Vienna Convention. Article 22 places a special duty on the receiving state to

\textsuperscript{79} Article 38 of the Convention.
\textsuperscript{80} Article 37 (1) of the Convention.
\textsuperscript{81} Article 37 (2) of Convention.
\textsuperscript{82} Article 37 (3) of Convention.
\textsuperscript{83} Article 37 (4); also Article 38 (2).
\textsuperscript{84} Article 39 (2).
\textsuperscript{86} See Article 31 (4).
take all appropriate steps to protect the premises of the mission against any intrusion or damage; the premises of the mission shall be inviolable. Articles 23 and 34 provide for exemption from taxation of diplomatic premises and of the diplomatic agent, subject to a few exceptions; this exemption from taxation existed before the Convention, that is, in customary international law.

Article 24 provides for the inviolability of the archives and documents of the mission at any time and wherever they may be. However, one exception could be provided to Article 24. According to Rex v. Rose\(^87\) and Rex v. Lunan\(^88\) documents taken from the files of a foreign embassy and in possession of Canada were not entitled to diplomatic immunity when used in a prosecution against a Canadian citizen. The court also said that it might be necessary to consider whether a foreign ambassador is entitled to the privilege of diplomatic immunity in circumstances where the acts with which the prosecution is concerned are contrary to the safety and welfare of Canada. At any rate, immunity could be invoked only by the foreign government concerned, through its ambassador and should be made in the first instance to the Department of External Affairs; it could not be raised by a Canadian, on trial in a Canadian court, when the witness who was to produce the documents did not object to testifying and did not claim immunity.

In addition to the Vienna Convention, there is one Canadian statute, the Diplomatic Immunities (Commonwealth Countries) Act,\(^89\) which governs the rules concerning diplomatic immunities in Canada. Briefly, the Act states that the chief representative of a Commonwealth country, the members of the official staff and their families and domestic staff, are entitled to immunities from suit and legal process.\(^90\) A citizen of Canada is exempt only with respect to acts done or omitted to be done in the course of the performance of his duties as a member of such staff, nor are the members of his family entitled to any immunity.\(^91\) Persons who perform duties substantially corresponding to those which in the case of a foreign sovereign are performed by a consular officer may be granted the like immunities as are accorded to consular officers of foreign

\(^{87}\) (1947), 88 C.C.C. 114 (Que.).


\(^{89}\) S.C. 1953-54, c. 54.

\(^{90}\) Section 5.

\(^{91}\) Section 5 (4).
sovereign powers. Immunity may be waived. Section 7 of the Act states that if any question arises as to whether any person is entitled to immunity, a certificate issued by the Secretary of State for External Affairs shall be conclusive evidence. Reciprocity is the basis for granting immunity.

(6) Consuls

There is no Canadian legislation governing the immunities granted to foreign Consuls. Therefore, in order to find out the Canadian practice, it is necessary to examine first, the customary rules of international law which have been laid down in a few Canadian cases, and secondly, the 1963 Vienna Convention on Consular Relations.

According to a few Canadian decisions, which have followed international custom, foreign consuls are not entitled to the privileges and immunities of diplomats. The main reason for this is the fact that a consul is an agent and not a representative of his government. A consul’s main duty is to protect the commercial interests of the sending state, such as trade, and to assist nationals of the sending state, such as seamen. A consul enjoys merely a limited or qualified immunity from territorial jurisdiction. He can claim immunity with respect to his official acts only; he enjoys no personal immunity. In some cases, though, consuls may enjoy more extensive immunities where they combine their consular with diplomatic functions.

The position of a consulate is different; it cannot be sued for it is an agency of a sovereign country. As stated in the case of Lazaro-

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92 Section 6.
93 Section 8 of Act.
94 This provision concurs with the decision of Engelke v. Mussmann, [1928] A.C. 433: “A statement made to the Court by the Attorney-General on the instructions of the Foreign Office as to the status of a person claiming immunity from judicial process on the ground of diplomatic privilege, whether as ambassador or as a member of the ambassador’s staff, is conclusive.”
95 Section 3 (3).
98 Maluquer v. Rex (1924), 38 Que. K.B. 1.
vitch v. Consulat Général de Grèce et Pappas: "Un consulat est un organisme d'un pays souverain, qui ne peut être contraint de comparaître devant un tribunal du Québec ni de se soumettre à la juridiction d'icelui."

The 1963 Vienna Convention on Consular Relations attempts to codify and to define more concretely consular privileges and immunities. Although the Convention has not yet been ratified by Canada, it is on many questions declaratory of customary rules of international law and the principles stated in the Convention are followed by the Department of External Affairs. For instance, Articles 31 and 33 assure the inviolability of consular premises, archives and documents. Article 32 provides for the exemption from taxation of consular premises. Article 35 discusses freedom of communication on the part of the consular post for all official purposes. In addition, the receiving state shall take all steps to prevent any attack on the person, freedom or dignity of consular officers.

Article 41 refers to the personal inviolability of consular officers. Article 43 states that 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.

This immunity, however, cannot be invoked in the case of a civil action (a) arising out of a contract concluded by a consular officer or a 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.

(7) Foreign Armed Forces

The extent of the immunity of foreign armed forces depends on the circumstances in which the forces were admitted by the territorial sovereign, and in particular upon the absence or presence of legislation governing the entry of these forces. At common law, the armed forces of a foreign sovereign enjoy a limited, but not absolute immunity from the territorial jurisdiction. This immunity is necessary in order to maintain those forces efficiently for the service of the foreign sovereign. The leading Canadian case on the status of

100 [1968] Que. C.S. 486.
101 (1969) 7 Canadian Yearbook of International Law 304.
102 Article 40.
visiting forces is Reference Re Exemption of U.S. Forces From Canadian Criminal Law.' In this case, three different views were presented by the Supreme Court of Canada, thereby leaving the state of the law unsettled. Duff C.J. and Hudson J. held that foreign forces were not immune from Canadian criminal jurisdiction. Kerwin J. and Taschereau J. held that they were immune. Rand J. took the middle point of view and stated that foreign forces are exempt from Canadian criminal jurisdiction only for offences committed in their own camps or on their own warships.

This unsettled state of the law has been removed, for the criminal and civil liability of members of foreign armed forces is now extensively covered by the Visiting Forces Act. The immunity of foreign forces from Canadian jurisdiction is not absolute, but restricted; sections 5 and 6 of the Act list the offences over which Canadian civil courts and foreign military courts can exercise their jurisdiction respectively. Part III of the Act is concerned with claims for personal injuries and property damages. For instance, section 17 states that "A member of a visiting force is not subject to any proceedings for the enforcement of any judgment given against him in Canada in respect of a matter that arose while he was acting within the scope of his duties or employment." Part V covers exemption from taxation of members of foreign forces. Part IV is concerned with security provisions.

(8) International Organizations

In the past few decades, there has been an increase in the number of international organizations. In order to secure for them both legal and practical independence, and to enable them to carry out their functions efficiently, these organizations, their officials and representatives of member states have been granted certain privileges and immunities. All these privileges and immunities are to be found in international treaties and conventions. Article 105 of the United Nations Charter declares that the representatives of the member states and officials of the Organization shall enjoy "such privileges

103 [1943] S.C.R. 483. In this case two other well-known cases were referred to, namely, Schooner "Exchange" v. M'Faddon (1812), 7 Cranch 116, and Chung Chi Cheung v. The King, [1939] A.C. 160.

and immunities" as are necessary for the independent exercise of their functions in connection with the Organization. In 1946, the General Assembly adopted the Convention on the Privileges and Immunities of the United Nations and its officials. Canada ratified this Convention on June 22, 1948 with a reservation regarding taxation; by this ratification, Canada has bound herself to the provisions of the Convention. Article 19 of the Statute of the International Court of Justice declares that "The members of the Court, when engaged in the business of the Court, shall enjoy diplomatic privileges and immunities." In 1947, the United Nations General Assembly adopted the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations; Canada acceded to this Convention on March 29, 1966 with a reservation regarding taxes.\(^5\)

In Canada, two statutes have been passed with respect to the privileges and immunities accorded to international organizations. The Privileges and Immunities (NATO) Act,\(^106\) and the Privileges and Immunities (International Organizations) Act\(^107\) both provide for the immunity of the international organizations, their property and assets, from every form of legal process.\(^108\) The premises, archives and documents of the same organizations shall be inviolable.\(^109\) All official correspondence shall be free from censorship.\(^110\) Every representative of member states of the organization shall enjoy the immunities and privileges granted to diplomats.\(^111\) The above are just a few of the many provisions found in the two Canadian statutes. In general, the privileges and immunities granted to international organizations, their officials, and representatives of member states are very similar to those enjoyed by foreign states and diplomats.

\(^{105}\) (1969) 7 Canadian Yearbook of International Law 306.

\(^{106}\) R.S.C. 1952, c. 218.


\(^{108}\) Article 5 of Privileges and Immunities (NATO) Act, and section 2 of Privileges and Immunities (International Organizations) Act.

\(^{109}\) Articles 6 and 7 of Privileges and Immunities (NATO) Act, and sections 3 and 4 of Privileges and Immunities (International Organizations) Act.

\(^{110}\) Article 11 of Privileges and Immunities (NATO) Act and section 9 of Privileges and Immunities (International Organizations) Act.

\(^{111}\) Article 12 of Privileges and Immunities (NATO) Act and section 11 of Privileges and Immunities (International Organizations) Act.
(9) **Waiver of Immunity**

If any of the persons entitled to immunity under international law waives his immunity, that is to say, voluntarily submits to the territorial jurisdiction of the receiving state, that state is entitled to exercise jurisdiction over him. However, waiver, in order to be effective, must be done in the proper manner and form.

At common law, sovereign immunity is waived where the foreign sovereign voluntarily begins an action in a Canadian court as a plaintiff. When a foreign state or government sues in Ontario, it thereby submits to the jurisdiction of the Ontario court merely to the extent necessary to enable the court to do justice on the claims sued upon.\(^{112}\) The defendant is then entitled to raise any defence or set-off available to him, including a counter-claim,\(^{113}\) provided it is directly related to the plaintiff’s cause of action.\(^{114}\)

Sovereign immunity is also waived where the foreign sovereign appears as a defendant without objection and fights the case on its merits. However, as decided in the case of *Baccus S.R.L. v. Servicio Nacional Del Trigo*,\(^{115}\) the appearance must be made by a person with knowledge of the right to be waived and with the authority of the foreign sovereign.

Another method of waiver of sovereign immunity occurs where the foreign sovereign expressly submits to the jurisdiction of the court to hear and determine the very proceedings which have been commenced against him. Lord Esher, M.R. stated that the foreign sovereign’s submission to the jurisdiction must be done “when the Court is about or is being asked to exercise jurisdiction over him, and not any previous time.”\(^{116}\)

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\(^{112}\) *U.S.A. v. Motor Trucks Ltd.* (1922), 52 O.L.R. 262, 289.


\(^{115}\) [1957] 1 Q.B. 438.


“English law has been consistent in holding that waiver and submission to jurisdiction on the part of a foreign sovereign State must, to be effective, be made in the face of the court and at the time the court is asked to exercise its jurisdiction.”
The Jurisdiction of Canadian Courts

In view of the adoption by Quebec courts of the doctrine of limited immunity there is no reason why a foreign sovereign should not be bound by a clause in a commercial contract whereby he agrees in advance to submit to the jurisdiction of the court, or to arbitration.\footnote{See Allan Construction Ltd. v. The Government of Venezuela, [1968] P.R. 145, per Reid J. at 175 and 178. In Government of the Republic of Venezuela and Another v. Altschuler, [1970] B.R. 828 (res.), the Quebec Court of Appeal held that by asking security for costs the foreign state waived its immunity.}

Waiver of sovereign immunity also occurs where the foreign sovereign is bound by declaration, law, or treaty, to submit to particular proceedings against him. A foreign sovereign who is capable of undertaking binding stipulations with other sovereigns should also be able to do so in private law relations.

With respect to waiver of diplomatic immunity, the rules are now more definite, for they are governed by the 1961 Vienna Convention on Diplomatic Relations. Article 32 of the Convention declares that diplomatic immunity may be waived by the sending state; waiver must always be express. There is no provision that the waiver must take place at the time when the court is asked to exercise jurisdiction as is the case at common law. Article 32 (4) also declares that a waiver of immunity from jurisdiction does not imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.\footnote{At common law the question is not finally settled. See Re Suarez, [1917] Ch. 385; Duff Development Co. v. Government of Kelantan, [1924] A.C. 797, 810, 821, 830.} A diplomatic agent may not claim immunity with respect to a counterclaim against him relating to a claim he himself brought before the court.\footnote{Article 32 (3).} Where the Vienna Convention is not clear, the common law still applies. Therefore, where Article 32 (1) provides that diplomatic immunity “may be
waived by the sending state,” and says no more, it seems that the following rule with reference to waiver of diplomatic immunity would still apply, namely,

...[Ilt is clear that... waiver must be a waiver by a person with full knowledge of his rights and a waiver by or on behalf of the chief representative of the state in question. In other words, it is not the person entitled to a privilege who may waive it unless he does so as agent or on behalf of the representative of the country concerned; it must be the waiver of the representative of the state.120

The immunity is the privilege of the state, and not of the individual. From the above quotation, it is evident that members of the administrative and technical staff of the mission or of the service staff, or members of the family of a diplomatic agent entitled to diplomatic immunity cannot themselves waive their immunity; waiver, to be valid, can be done only by their superior, that is, the head of the mission. But it is not clear if the head of the mission can waive his own immunity. Schwarzenberger claims that the head of the mission cannot waive his own immunity, because the right to immunity is enjoyed by the state, and is not granted to any diplomat in a personal capacity. Therefore, the immunity of the head of the mission can be waived only by or with the permission of his own government.121 In Canada, in the Diplomatic Immunities (Commonwealth Countries) Act,122 section 8 states that “a chief representative may waive any immunity to which... he or his staff...” is entitled. But, it must be kept in mind that this Act refers only to diplomats from Commonwealth countries.

Consular immunities may be waived. Article 45 of the 1963 Vienna Convention on Consular Relations discusses waiver of immunity. It contains the same provisions with respect to waiver as Article 32 of the Vienna Convention on Diplomatic Relations, except that it states that waiver must not only be express but, in addition, shall be communicated to the receiving state in writing.

The immunities of international organizations and their representatives may also be waived.123

122 S.C. 1953-54, c. 54.
123 See Articles 5 and 15 of the Privileges and Immunities (NATO) Act, R.S.C. 1952, c. 218 and Sections 2 and 14 of the Privileges and Immunities (International Organizations) Act, R.S.C. 1952, c. 219.
II Persons who cannot invoke the jurisdiction of Canadian courts: Enemy Aliens

During the existence of a state of war between Canada and an enemy country, an enemy alien cannot bring an action before Canadian courts.\(^\text{124}\)

(1) Definition of Enemy Alien

At common law, “enemy alien” means any person who voluntarily resides or carries on business in a territory belonging to, or occupied by,\(^\text{125}\) a nation or power at war\(^\text{126}\) with Canada. Therefore, the test of enemy character of an individual is not nationality, but residence.\(^\text{127}\) This test is an objective territorial one, and depends on facts and not on the person’s prejudices or passions or his patriotism.\(^\text{128}\) A Canadian citizen voluntarily resident in, or carrying on business in, an enemy’s country is an enemy alien.

The subjects of enemy states residing in Canada are not necessarily “alien enemies.”\(^\text{129}\) They may be considered as “alien friends,”\(^\text{130}\) and entitled to the enjoyment of all personal rights of citizens including the right to sue in Canadian courts.\(^\text{131}\)

Under the War Measures Act, the Governor in Council may take such orders and regulations as he may, by reason of the existence of real or apprehended war, deem necessary for the security, defence, peace, order and welfare of Canada. Thus, during the last two

\(^{124}\) For example, Canadian Stewart Co. v. Perih (1915), 17 Que. P.R. 291, (1916), 25 Que. K.B. 158; Dangler v. Hollinger Gold Mines (1915), 23 D.L.R. 384 (Ont.).


\(^{127}\) Reventlow v. Rur Mun of Streamtown (1917), 37 D.L.R. 394, 396 (Alta S.C.); Lampel v. Berger (1918), 38 D.L.R. 47 (Ont.).


\(^{129}\) Latha v. Halyck (1918), 14 O.W.N. 219, 220. An alien residing in Quebec is not an enemy merely because he was born in a country at war with Canada: De Kozarijouk et al v. B. & A. Asbestos Co. (1914), 16 Que. P.R. 213; Sap v. Picard (1919), 20 Que. P.R. 178; Viola & McKenzie, Mann & Cie (1915), 24 Que. K.B. 31.


world wars, Defence of Canada Regulations were passed which dealt with the definition of enemy aliens and their rights and disabilities.132

Enemy character may also attach to corporations. The test normally used to determine enemy character is the place of incorporation and residence or domicile of the company. However, in the case of Daimler Co. Ltd. v. Continental Tyre & Rubber Co. Ltd,133 the court examined the character of the company’s agents or the persons in de facto control of its affairs.134 Although the company was incorporated and resident in England, it was assumed to have enemy character because the people de facto in control of its affairs resided in enemy territory. In Sovfracht etc. v. Van Udens etc.,135 the test of incorporation and residence of the company was applied, and a company incorporated in the Netherlands and having its principal place of business in Rotterdam was refused the right to proceed in an English court, because it acquired enemy character when the Netherlands were invaded by the enemy of England.

When a company moves its domicile or residence out of a country before it becomes occupied by the enemy, it will not be considered as an enemy alien.136

(2) Enemy Alien as Plaintiff

An enemy alien has no persona standi in judicio, in other words, he cannot sue in a Canadian court, either by himself or by any

132 R.S.C., 1927, c. 206. Now see R.S.C., 1970, c. W-2. See, for instance, The Consolidated Orders respecting Trading with the Enemy 1916, s. 1(1)(b). "'Enemy' shall extend to and include a person (as defined in this order) who resides or carries on business within territory of a state or sovereign for the time being at war with His Majesty, or who resides or carries on business within territory occupied by a state or sovereign for the time being at war with His Majesty, and as well any person wherever resident carrying on business, who is an enemy or treated as an enemy and with whom dealing is for the time being prohibited by statute, proclamation, the following orders and regulations or the common law..." See also Trasicati v. Roncarelli et al., [1945] Que. K.B 454. Now see Revised Regulations Respecting Trading with the Enemy (1943), in Schedule to the Trading with the Enemy (Transitional Powers) Act, S.C. 1947, c. 24, s. 1 (d).


134 "A company may... assume an enemy character... if its agents or the persons in de facto control of its affairs... are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies": Daimler Co. Ltd. v. Continental Tyre & Rubber Co. Ltd., [1916] 2 A.C. 307, 345.


136 The Pamia, [1943] 1 All E.R. 269.
person on his behalf, during the progress of the war, unless he is resident in Canada by a royal licence, express or implied, or unless he is protected by a proclamation. This rule, which is based on public policy, namely, the protection of the state in time of war, creates a procedural incapacity which lasts only as long as the war lasts.

In the earlier cases, it was decided that the outbreak of war completely prevented an enemy alien from bringing an action during war and if an action had begun before the war, the enemy alien could not continue his action until the war was over. It is deemed to be suspended by force majeure. Similarly, if he had given notice of appeal before the war, the hearing of his appeal had to be suspended until after the restoration of peace. In Ontario, section 18(6) of The Judicature Act which in certain cases provides for a "stay of proceedings" has been interpreted as applicable to enemy aliens. In Luczycki v. Spanish River Pulp & Paper Mills Co., the court said: "...so long as the plaintiff remained quiescent during the war, no order to stay proceedings till the close of the war was really needed. Should any intervention of the Court be asked, it is not to be by way of dismissal but at most by way of staying the proceedings till the termination of the war."

There must be sufficient evidence to show that the enemy will benefit from the action before a stay of proceedings will be ordered by the court. In the case of Will P. White Ltd. v. T. Eaton Co.,

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138 In Rex v. Bottrill, [1947] K.B. 41, 53, the court stated that the certificate issued by the Minister for External Affairs is conclusive evidence of an existing state of war.


141 R.S.O. 1970, c. 228.

142 (1915), 34 O.L.R. 549.

143 Ibid., 555. In the case of Dumenko v. Swift Canadian Company Ltd. (1914), 32 O.L.R. 87, where the plaintiff, an enemy alien, moved for an order staying all proceedings, the plaintiff's motion was dismissed, and then the action was dismissed on the defendant's motion. However, the Dumenko case was distinguished in the Luczycki case, and in the latter case the judge, in refusing to dismiss the action, justified the Dumenko decision on the fact that the plaintiff, an enemy alien, was in default of giving security for costs, and thus the action was well dismissed.

there was insufficient evidence to show that the money sued for was to be paid to enemy aliens, and the court refused to make an order, on the defendant's application, to stay the proceedings until the termination of the war; therefore, the action continued and the defendants had to pay the money sued for.145

Where the plaintiff, who later becomes an enemy alien on the outbreak of war, brings an action which is quite unsustainable and frivolous, the action is not suspended during war, but the defendant can move to have it dismissed.146

The common law rule strictly limiting an enemy alien in his civil rights has now been modified in his favour when he resides in this country by licence or under the protection of the Crown.147 For example, an enemy alien, provided he was resident in Canada, was given the right to maintain an action in Canadian courts, pursuant to the Order-in-Council of August 15, 1914,148 or Regulation 24 of The Defence of Canada Regulations, 1939.149 Both proclamations stated that:

All enemy aliens in Canada so long as they peacefully pursue their ordinary avocations shall be allowed to continue to enjoy the protection of the law and shall be accorded the respect and consideration due to peaceful and law-abiding citizens...150

Thus, it was held in Kristo v. Hollinger Consolidated Mines Ltd.,151 Topay v. Crow's Nest Pass Coal Company,152 Trefnicek v. Martin153 and Oskey v. City of Kingston154 that the 1914 proclamation meant that an enemy alien had the right to bring and maintain an action in a Canadian court during the war, provided he peacefully pursued

145 See also Radley v. Garber (1915), 50 Que. S.C. 264.
146 Eickengruen v. Mond, [1940] Ch. 785.
151 (1917), 41 O.L.R. 51.
152 (1914), 18 D.L.R. 784 (B.C.S.C.).
154 (1914), 20 D.L.R. 959 (Ont.).
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his usual occupation. The protection of the Canadian courts, as provided by the proclamations, did not extend to an enemy alien not resident in Canada, even if he were resident in a neutral state.

(3) Enemy Alien as Defendant

There is no rule of common law which prevents an enemy alien from being sued if service or substituted service can be effected. Rule 16 of the Rules of Practice of Ontario allows for substituted service by advertisement or otherwise where the plaintiff is unable to effect prompt personal service; this rule has been applied to enemy aliens. For example, in the case of Porter v. Freudenberg, substituted service was allowed upon an enemy alien in Germany.

But:

In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted.

Therefore, in the case of Saskatoon Mortgage & Loan Co. Ltd. v. Roton et al., an order for substitutional service of a writ of

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155 Raguez v. Harbour Commissioners (1916), 18 Que. P.R. 98.
In the case of Pescovitch v. Western Canada Flour Mills Co. (1914), 18 D.L.R. 786 (Man. K.B.), the court also held that there is no onus on the plaintiff, the enemy alien, to prove that the proclamation applies to him; the burden is on those asserting the fact that the enemy alien is not entitled to the protection of the law. Cf. Bassi v. Sullivan (1914), 18 D.L.R. 452 (Ont.). In Viola v. MacKenzie Mann & Co. (1915), 24 Que. K.B. 31 it was held that, unless hostile acts are alleged and proved against the alien, he must be deemed to have the same rights as before the war. In Baumfelder v. Sec. of State of Canada, [1927] Ex. C.R. 86, MacLean J. said at page 92: “A German national residing in Canada during the war and not deported or declared by the Governor in Council to be an enemy is clearly not an enemy within the terms of Part II of the Order, and I think as a matter of public policy such was not intended.”


summons on the defendant, residing in France, was not made where it appeared from the material filed that no information in respect of the proceedings would reach the defendant.

Once the alien enemy is sued:

...It follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentation of his defence. ... To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.

Equally it seems to result that, when sued, if judgment proceed against him, the appellate Courts are as much open to him as to any other defendant.\textsuperscript{161}

Once an enemy alien is sued, therefore, he has the right to appear and defend the action;\textsuperscript{162} he also has the right to appeal against any decision given against him. However, if the judgment is in his favour and is appealed from, the appellant may ask for the suspension of the proceedings in appeal.\textsuperscript{163} In \textit{Rydstrom v. Krom}\textsuperscript{164} the court held that alien enemies, who are successful defendants, should not be deprived of their costs. There are, however, some restrictions; an enemy alien may not counterclaim,\textsuperscript{165} nor take third party proceedings,\textsuperscript{166} nor execute a judgment for costs during the war,\textsuperscript{167} because in doing so, he would become an "actor."


\textsuperscript{162} For a special case where an enemy alien was sued in Alberta under conditions which compelled her to take action, see \textit{Reventlow v. Rural Mun. of Streamtown} (1917), 37 D.L.R. 394 (Alta.).

\textsuperscript{163} \textit{Canadian Stewart Co. v. Perih} (1916), 25 Que. K.B. 158.

\textsuperscript{164} (1915), 7 W.W.R. 1290 (B.C.S.C.).

\textsuperscript{165} \textit{Re Stahlwerk Becker A/G's Patent}, [1917] 2 Ch. 272.

\textsuperscript{166} \textit{Halsey v. Louwenfeld}, [1916] 2 K.B. 707.