State immunity — States — Entitlement to claim State immunity — Whether recognition by the government of the forum State a prerequisite to entitlement to State immunity — Taiwan — Canada State Immunity Act — Section 14 — Certificate by Ministry of Foreign Affairs conclusive evidence of whether or not defendant a State — Ministry declining to issue certificate in respect of department of the Government of Taiwan — Whether conclusive evidence that Taiwan not a State for purposes of State immunity — Whether Court entitled to enter into own examination of the question of statehood

States — Recognition — Criteria of statehood — Declaratory and constitutive theories of recognition — Implied recognition

Relationship of international law and municipal law — Statehood — Whether foreign entity a State under international law — Whether question within the exclusive preserve of the executive — The law of Canada

PARENT AND OTHERS *v.* SINGAPORE AIRLINES LIMITED AND THE CIVIL AERONAUTICS ADMINISTRATION[1]

Canada, Quebec Supreme Court. 22 *October* 2003

(St-Pierre J)

SUMMARY: *The facts*:—On 31 October 2000, a passenger airliner operated by Singapore Airlines Limited, a company incorporated in Singapore, crashed on take off at an airport in Taiwan controlled by the Civil Aeronautics Administration ("CAA"). The plaintiff was one of many passengers who were injured. He brought proceedings in the Quebec Supreme Court against the airline. The airline argued that the CAA was wholly or partly responsible and sought to join it as a defendant in warranty. The CAA claimed that it was part of a department of the Government of Taiwan and accordingly entitled to State immunity. The Minister of Foreign Affairs and Trade of Canada declined to certify, in accordance with Section 14 of the State Immunity Act,[2] that Taiwan was a State. The CAA nevertheless claimed that Taiwan met the criteria of statehood under international law.

[1] For related proceedings in the Singapore courts, see p. 371 below. In the present proceedings, the CAA was represented by James Woods of Woods et Associés and Singapore Airlines Ltd by Edouard Baudry of Lavery de Billy.

[2] The relevant provisions of the Act are set out in paragraph 8 of the judgment.

Held:—The CAA's motion was granted.

(1) The absence of a certificate was not conclusive evidence that Taiwan was not a State. The issue of a certificate did not confer the status of State, nor did refusal of a certificate deny that status. The Court had to examine for itself whether the entity asserting immunity met the criteria of statehood under international law (paras. 36-51).

(2) Taiwan possessed the conditions of statehood under customary international law. It had a defined territory, a permanent population, an effective government and the capacity to enter into relations with other States. As such, it had to be treated as a State under both international law and common law. Accordingly, it was entitled to immunity from the jurisdiction of the Court in the present proceedings. As the CAA was part of a department of the Government of Taiwan, that immunity covered the CAA (paras. 14, 52-9).

The following is the text of the judgment of the Court:

1. On October 31, 2000, François Parent, a passenger on Singapore Airlines Limited ("SAL") flight SQ006 from Singapore to Montreal with stops in Taipei, Los Angeles and Toronto, was injured when the aircraft crashed at Chiang Kai-Shek International Airport in Taipei.

2. The accident occurred as the aircraft took off from Taipei for Los Angeles.

3. Mr Parent and his companies instituted proceedings for damages against SAL.[1]

4. SAL argued that liability for the accident lies with the manager and operator of the airport, the Civil Aviation Administration of the Ministry of Transport of the Republic of China (Taiwan). Hence, it instituted proceedings in warranty against the Civil Aeronautics Administration (the "CAA").

5. The CAA invoked a foreign state's jurisdictional immunity before any court in Canada. It filed a motion to dismiss the action in warranty, based on the State Immunity Act.[2]

6. SAL contested that motion. It contended that the Court must dismiss it because Taiwan is not a foreign state within the meaning of the State Immunity Act, since the Minister of Foreign Affairs and International Trade refused to issue the certificate provided for in section 14 of the Act.

Question in Dispute

7. Does the CAA have jurisdictional immunity pursuant to the State Immunity Act?

[1] The principal action in this case. [2] State Immunity Act, RSC, c. S18.

The State Immunity Act

8. The following sections of the State Immunity Act (the "Act") are relevant to the resolution of the present dispute:

> 2. In this Act, "foreign state" includes
>
> (a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
> (b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
> (c) any political subdivision of the foreign state;
>
> 3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.
>
> (2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.
>
> 14. (1) A certificate issued by the Minister of Foreign Affairs, or on his behalf by a person authorized by him, with respect to any of the following questions, namely,
>
> (a) whether a country is a foreign state for the purposes of this Act,
> (b) whether a particular area or territory of a foreign state is a political subdivision of that state, or
> (c) whether a person or persons are to be regarded as the head [of] government of a foreign state or of a political subdivision of the foreign state,
>
> is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that question, without proof of the signature of the Minister of Foreign Affairs or other person or of that other person's authorization by the Minister of Foreign Affairs.

9. It should immediately be pointed out that the parties acknowledge that the exceptions under the Act that would limit the scope of any immunity[3] do not apply in this case.

Evidence

Evidentiary elements

10. The parties filed five affidavits in the record:

[3] Commercial activity (s. 5), damage in Canada (s. 6), maritime law (s. 7), property in Canada (s. 8).

10.1. First affidavit of Billy K. C. Chang, Director General of the CAA, dated February 25, 2003;
10.2. Second affidavit of Billy K. C. Chang, dated April 30, 2003;
10.3. Third affidavit of Billy K. C. Chang, dated July 3, 2003;
10.4. First affidavit of Mtre Janet Oh, of the law firm of Lavery de Billy, counsel for SAL, dated May 2, 2003; and
10.5. Second affidavit of Mtre Janet Oh, dated May 9, 2003.

11. The CAA filed exhibits R-1 to R-14:

- R-1: Fact sheet on Taiwan from the Internet site of the Department of Foreign Affairs Canada, dated February 25, 2003;
- R-2: Extract entitled "Taiwan" from the Report on Bilateral Relations between Canada and Foreign Countries regarding Air Transport, January 13, 2003 update;
- R-3: Air Services Agreement between the Government of the Republic of China and the Government of the Republic of the Marshall Islands, February 10, 1999;
- R-4: List of countries with diplomatic relations with ROC and translation, April 1, 2003;
- R-5: Extract entitled "Taiwan" from the Internet site of the World Trade Organization;
- R-6: Copies of several agreements between Canada and Taiwan:

– Memorandum of understanding for cooperation in the fields of communications and information technologies between the Ministry of Transportation and Communication in Taipei and the Canadian Trade Office in Taipei (January 21, 1997);
– Memorandum of understanding on maritime systems and technologies cooperation between the Ministry of Transportation and Communication in Taipei and the Canadian Trade Office in Taipei (January 19, 1998);
– Memorandum of understanding between the Postal Administrations of Canada and Taiwan, ROC concerning EMS (May 15 and September 23, 1998);
– Memorandum of understanding between the Taipei Economic and Cultural Office, Canada and the Canadian Trade Office in Taipei regarding cooperation in aviation safety (June 15, 1999);
– Exchange of letters between the Board of Foreign Trade, Ministry of Economic Affairs, Republic of China and the Canadian Trade Office in Taipei for the entry into force of the protocol concluded in 1994 between the Canadian Chamber of Commerce and the China External Trade Development Council (CETRA) for the organization of a system of international customs deposits

in respect of carnets for temporary admission of goods (April 22, 1996);
- Memorandum of understanding on the cooperation of aboriginal affairs between the Council of Aboriginal Affairs Executive Yuan in Taipei and the Canadian Trade Office in Taipei (December 20, 1998).

- R-7: Report on ROC–Canada Economic and Trade Relations, Taiwan Ministry of Foreign Affairs, and translation, April 23, 2003;
- R-8: SAL's brief of complaint against the CAA in the Court of the District of Taipei, April 30, 2003;
- R-9: Letter of formal notice from SAL to the CAA, October 25, 2002;
- R-10: Extract from the document entitled Opening Doors to the World: Canada's International Market Access Priorities, Chapter 6, Department of Foreign Affairs and International Trade Canada;
- R-11: Extract from the Webpage of the Canadian Trade Office in Taipei and visa application form;
- R-12: 2002 Aéroports de Montréal annual report;
- R-13: Request for service of document out of Singapore by SAL in record 1280 of 2002/W at the High Court of Singapore, January 11, 2003; and
- R-14: Notes for an address by the Honourable Sergio Marchi, Minister for International Trade, to the CanadaTaiwan Business Association, June 1, 1998.

12. The CAA added an extract from the debates in the House of Commons on May 30, 1969 on the Canadian position respecting sovereignty of Mainland China over Taiwan.[4]

13. SAL filed the following exhibits:

- Letter dated March 19, 2003 from Lavery de Billy addressed to Mr Keith Morrill of the Department of Foreign Affairs and International Trade Canada;
- Letter dated April 1, 2003 from Mr Keith Morrill of the Department of Foreign Affairs and International Trade Canada addressed to Lavery de Billy;
- Joint Communiqué of the Government of Canada and the Government of the People's Republic of China concerning the establishment of diplomatic relations between Canada and China, dated October 10, 1970;

[4] "Canadian position respecting sovereignty of Mainland China over Taiwan", House of Commons Debates, Official Report, First Session—Twenty-Eighth Parliament, 18 Elizabeth II, Vol. IX (Ottawa: Queen's Printer for Canada, 1969).

- Extracts from the Internet site of Chiang Kai-Shek Airport;
- Extracts from the Internet site of the CAA;
- Order of Court in the High Court of the Republic of Singapore, dated July 18, 2003 in the matter of *Anthony Woo and Singapore Airlines Limited and Civil Aeronautics Administration*, case number S1277/2002/W;
- Judgment of the High Court of the Republic of Singapore, dated August 28, 2003 in the matter of *Anthony Woo and Singapore Airlines Limited and Civil Aeronautics Administration*, [2003] SGHC 190.

Factual conclusions: the CAA and Taiwan

14. The Taiwan government owns Chiang Kai-Shek International Airport in Taipei. A public structure in Taiwan, the airport is operated and managed by the CAA, which is a department of the Ministry of Transportation and Communication of the Taiwan government, with no specific juridical existence apart from the Ministry.

15. Taiwan has been a member of the World Trade Organization (the "WTO") since January 1, 2002. The vocabulary used in the title of the "information by-country" page of the WTO Internet site concerning Chinese Taipei's participation in WTO activities is as follows:

Separate Customs Territory of Taiwan, Penghu, Kinmen, Matsu's (Chinese Taipei) and the WTO.[5] [Emphasis added.]

16. On the Internet site of the Department of Foreign Affairs and International Trade Canada,[6] the following public information is given about "the country of Taiwan or Chinese Taipei":

Government: Parliamentary democracy; Legislature: Legislative Yuan; Head of State: President CHEN, Shui-bian; Political parties: Democratic Progressive Party (PFP); Kuomintang (JTM—Nationalist Party); People First Party (PFP) and New Party (NP); Premier: YU, Shyi-Kun.

17. In an exchange of letters between the Board of Foreign Trade, Ministry of Economic Affairs, Republic of China, and the Canadian Trade Office in Taipei on April 22, 1996,[7] Hugh Stephens, Director of the Canadian Trade Office in Taipei, referred specifically to the Taiwan government and the existence of two countries (Taiwan and Canada). He wrote the following in particular:

I have the honour to notify you that *the Government of Canada has ratified* the protocol concluded between the Canadian Chamber of Commerce and the

[5] See Exhibit R-5. [6] See Exhibit R-1. [7] See Exhibit R-6.

China External Trade Development Council (CETRA) for the organization of a system on international customs deposits in respect of carnets for temporary admission of goods *between our two countries.*

(. . .)

I also want to inform you that *our government accepts* the China External Trade Development Council as the *only organization designated by the government of Taiwan* to issue customs carnets and give its guarantee starting from today. [Emphasis added.]

18. Canada recognizes the validity of a passport issued by Taiwan authorities. In fact, the following words are found on a page of the Internet site of the Canadian Trade Office in Taipei and on the application form for the issuing of an entry visa for Canada:

As of April 1, 2003, Taipei will be responsible for accepting and processing immigrant applications for *Taiwanese citizens* and other foreign nationals who permanently reside in Taiwan.
Please include the following with your application:

1. *Valid passport*, with at least one remaining blank visa page. *Taiwanese passport* can only be signed by the bearer to be valid. Note that the validity of a Canadian visa cannot exceed the validity of the passport.[8]

[Emphasis added.]

19. In a case in which it was sued before the Singapore courts further to the crash of the aircraft involved in this case, SAL acknowledged the existence of the Taiwan state and government. It alleged the following in support of its motion for service of documents on the CAA:

This action be sent through the proper channel to Taiwan for service on the Civil Aeronautics Administration, the Third Party in this action, at (. . .) Taiwan, Republic of China or *elsewhere in the state of Taiwan*, Republic of China and that it may be served:

(1) through the *government of Taiwan*, Republic of China (where the government is willing to effect service); or
(2) through a Singapore consular in Taiwan, Republic of China; or
(3) through the *judicial authorities of Taiwan*, Republic of China or any other method of service authorized by the law of Taiwan, Republic of China for service of any originating process issued by Taiwan, republic of China . . .[9]

[Emphasis added.]

[8] See Exhibits R-11. [9] See Exhibit R-13.

20. In short, regardless of the possible political, diplomatic or legal impact, the following facts are beyond question:

20.1. The island of Taiwan is a defined territory: according to Exhibit R-1, it has a surface area of 36,006 [square] km;
20.2. The island of Taiwan has a permanent population: according to Exhibit R-1, the population was 22.5 million in 2001;
20.3. Taiwan has an effective government: according to Exhibit R-1, it is a parliamentary democracy with a head of state (President Chen) and a Prime Minister (Shyi-Kun Yu);
20.4. The government of Taiwan has relations with other states: 27 countries maintain diplomatic relations with Taiwan[10] and a number of other countries maintain a variety of relations, either direct or indirect, with Taiwan.[11]

Factual conclusions: section 14 of the State Immunity Act

21. The evidence adduced by the CAA included no certificate prepared pursuant to section 14 of the State Immunity Act. The Court does not know whether the CAA tried to obtain such a certificate.

22. SAL, the adverse party, contacted the Department in that regard. In response to its request, the Department of Foreign Affairs and International Trade Canada indicated that it could not respond positively and that no certificate would be issued at that time.

23. It is important to cite the following in that regard.

24. On March 19, 2003, counsel for SAL sent the following letter to the Department of Foreign Affairs and International Trade Canada:

We represent the interests of Singapore Airlines Ltd concerning a lawsuit against the Civil Aeronautics Administration which administers the Chiang Kai-Shek International Airport in Taipei, Taiwan. The attorneys representing the Civil Aeronautics Administration have alleged that it being a department of the Ministry of Transportation and Communication of the Government of Taiwan and having no separate juridical existence, is immune from the jurisdiction of Canadian courts further to the State Immunity Act. As we are *uncertain as to the official recognition by the Government of Canada of the Government of Taiwan*, we request an issuance of a *certificate* under Section 14 of the State Immunity Act *to establish whether Taiwan is* indeed a foreign state for the purposes of the State Immunity Act *or whether it can be considered to be* a political subdivision of the Republic of China for the purposes of the State Immunity Act.

[10] See Exhibit R-4. [11] In regard to Canada, see exhibits R-1, R-2 and R-6 in particular.

As the attorneys representing Civil Aeronautics Administration will be presenting a Motion to Dismiss our client's claim on the basis of the application of the State Immunity Act on April 2 next, we would appreciate receiving *written confirmation from you* before that date *as to whether Taiwan is indeed to be considered a foreign state or a political subdivision* pursuant to Section 14 of the State Immunity Act. Should you require any further clarification, please do not hesitate to contact the undersigned.

We thank you in advance for your assistance in this matter and remain . . . [Emphasis added.]

25. On April 1, 2003, the Department of Foreign Affairs and International Trade Canada responded to the request by SAL counsel as follows:

This is in response to your letter of March 19, 2003, in which you requested that a *certificate be issued* by the Minister or his authorized person under s. 14 of the State Immunity Act *to establish whether "Taiwan" is a foreign state* for the purposes of that Act. I wish to inform you that the *Department cannot respond positively to your request* and *no such certificate will be issued* at this time. Canada has a one-China policy which recognises the People's Republic of China, with its government located in Beijing, and it has full diplomatic relations with that government. Canada does not have diplomatic relations with "Taiwan" or the "Republic of China". [Emphasis added.]

26. That response was in keeping with the context described in the joint communiqué of the Government of Canada and the Government of the People's Republic of China that was issued on October 10, 1970 and has since been applied. The communiqué reads as follows:

The Government of Canada and the Government of the People's Republic of China, in accordance with the principles of mutual respect for sovereignty and territorial integrity, non-interference in each other's internal affairs and equality and mutual benefit, have decided upon mutual recognition and the establishment of diplomatic relations, effective October 13, 1970.

The *Chinese Government reaffirms that Taiwan* is an inalienable part of the territory of the People's Republic of China. The *Canadian Government takes note of this position* of the Chinese Government.

The Canadian Government recognizes the *Government of the People's Republic* of China *as the sole legal Government of China.*

The Canadian Government and the Chinese Government have agreed to exchange ambassadors within six months, and to provide all necessary assistance for the establishment and the performance of the functions of diplomatic missions in their respective capitals on the basis of equality and mutual benefit and in accordance with international practice.
[Emphasis added.]

27. The following extract from the Hansard of the House of Commons in 1969 is eloquent as regards the delicate nature of the Canadian position:

Hon. Robert L. Stanfield (Leader of the Opposition): ... Can the Prime Minister say whether the government of Canada now accepts the claim of sovereignty of the government of Peking over the island of Taiwan?
Right Hon. P. E. Trudeau (Prime Minister): Mr Speaker, I have previously answered this question, saying that recognition of the government does not necessarily mean the recognition of all its territorial claims, and I gave some examples. I think that if a country wishes to recognize Canada we would not demand that it recognize, for example, our sovereignty over the Arctic islands.
Mr Stanfield: I have a supplementary question, Mr Speaker. May I assume from the answer given by the Prime Minister that the government of Canada does not accept the claim of the government of Peking as to its sovereignty over the island of Taiwan?
Mr Trudeau: That is not what I said, Mr Speaker, but let us hear what the Leader of the Opposition thinks about this.
Mr Baldwin: You are supposed to be answering questions.
Mr Speaker: Order, please.
Mr Muir (Cape Breton—The Sydneys): Why don't you take your responsibilities as the Prime Minister?
Mr Speaker: Is the hon. Gentleman rising on a supplementary question?
Mr Stanfield: Yes, Mr Speaker. I have no intention of violating the rules of the house, even at the invitation of the Prime Minister. I simply want to ask the Prime Minister when he is going to state forthrightly the position of the government with regard to the claim of sovereignty by the government of Peking over the island of Taiwan.
Mr Trudeau: Mr Speaker, obviously the question is—
An Hon. Member: Too much for you.
Mr Hess: You will bounce off the floor on that.
An Hon. Member: Smarten up, kid.
Mr Hess: Get them grinding. Where is that Liberal dialogue?
Mr Muir (Cape Breton—The Sydneys): You took the easy way out. You couldn't face it.
Mr Speaker: Orders of the day. The question period is over.
Some Hon. Members: Oh, oh.[12]
[sic]

[12] "Canadian position respecting sovereignty of Mainland China over Taiwan", House of Commons Debates, Official Report, First Session—Twenty-Eighth Parliament, 18 Elizabeth II, Vol. IX (Ottawa: Queen's Printer for Canada, 1969).

Position of the Singapore courts

28. In a judgment rendered August 28, 2003, the High Court of the Republic of Singapore refused the CAA the immunity provided for in the State Immunity Act.

29. The relevant sections of the State Immunity Act read as follows:

3(1) A state is immune from the jurisdiction of the Courts of Singapore except as provided in the following provisions of this part.

16(1) The immunities and privileges conferred by Part II apply to any foreign or Commonwealth State other than Singapore, and references to a state include references to

(a) the sovereign or other head of that state in his public capacity;
(b) the government of that state; and
(c) any department of that government.

But not to any entity (referred to in this section as a separate entity) which is distinct from the executive organs of the government of the state and capable of suing or being sued.

18. A certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question

(a) whether any country is a state for the purposes of Part II, whether any territory is a constituent territory of a Federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a state.[13]

30. The principal grounds for refusing immunity were as follows:

In the present case, the application for a certificate under s. 18 was *made in very explicit terms*, leaving the reader *no doubt* as to what was sought and why. The *reply* to that application, couched in polite and diplomatic terms, was nonetheless, *equally clear*. It said "no" in effect. There is *no ambiguity* in the answer from the Ministry of Foreign Affairs that the Republic of China is not a state, whether de facto or de jure, for the purposes of the Act.

[...]

In my view, there is *only one kind of state*. It must be real and satisfies all the criteria for statehood. That is, it must have territory, a population, and a government capable of maintaining effective control. There is, *however, more than one aspect of recognising such a state*. The state may be recognised as de jure or de facto, or in the courts of a foreign state, merely as an existing entity proclaiming to be a state. In this situation, no immunity is accorded and the "state" so recognised, may be sued in the courts of the foreign state. And lastly,

[13] Judgment of the High Court of the Republic of Singapore, dated August 28, 2003 in *Anthony Woo and Singapore Airlines Limited and Civil Aeronautics Administration*, [2003] SGHC 190 at 2.

such a "state" may not receive any recognition at all; that is, to be regarded as a nonentity.

[...]

I hold the view that *any entity that purports to be a state* or a government of a state *that is not recognised* de jure or de facto does not enjoy immunity from suit. (...) Whether such entities are given de jure or de facto recognition is *best left to the executive*, as the *legislature* in enacting the State Immunity Act *has seen fit*. Otherwise, it will not be possible—if I may use the words of Lord Atkin in the *Arantzazu Mendi* case ([1939] AC 256)—for the executive and the judiciary to speak with one voice on such matters. The proper recognition of a sovereign or a sovereign state is not normally a function of the judiciary. Recognition by the court follows recognition by the state to which that court belongs.[14]

[Emphasis added.]

Analysis and Decision

31. As the Court mentioned earlier, the question in dispute is as follows: Does the CAA have jurisdictional immunity pursuant to the State Immunity Act?

32. It is not contested that the CAA is a department of the Ministry of Transportation and Communication of Taiwan with no separate juridical existence apart from that Ministry. It remains to be determined whether the Ministry is a department "of a foreign state" within the meaning of the State Immunity Act or, in other words, whether the Republic of China (Taiwan) is a "foreign state" within the meaning of that Act.

33. Counsel for SAL contended that the absence of a certificate and the refusal of the Department of External Affairs and International Trade to issue one are conclusive: the CAA does not have the alleged immunity, since the Department refuses to officially recognize, by issuing the certificate provided for in the Act, that the CAA has the requisite status.

34. The attorneys for the CAA disagreed with that viewpoint. In their opinion, the certificate constitutes no more than a means of proof, albeit a major one, but not the only one admissible. The Department's letter must be analysed taking into consideration the diplomatic context that the Department must operate in. The letter is not a certificate within the meaning of section 14 of the Act and its content cannot be interpreted as a rejection of the legal position of the CAA as regards the applicability of the immunity sought. In any case, it is up to the Court

[14] Judgment of the High Court of the Republic of Singapore, dated August 28, 2003 in *Anthony Woo and Singapore Airlines Limited and Civil Aeronautics Administration*, [2003] SGHC 190 at 5, 6 and 10.

to apply the State Immunity Act in light of the evidence adduced and, therefore, to determine whether Taiwan is a "foreign state" within the meaning of the Act.

35. Two sub-questions arise from the positions argued by the parties:

35.1. What is the effect of the absence of a certificate issued under section 14 of the Act?

35.2. Is Taiwan a "foreign state" within the meaning of the Act?

What is the effect of the absence of a certificate issued under section 14 of the Act?

36. The terms used by the Canadian legislator in section 14 of the Act are as follows:

French version: Le certificat délivré (. . .) est *admissible en preuve* et fait foi pour toute question touchant (. . .)

English version: A certificate issued (. . .) is *admissible* in evidence *as* conclusive proof of any matter stated in the certificate (. . .)
[Emphasis added.]

37. In section 14 of the Canadian legislation, the legislator stipulates that it is not necessary for witnesses to be heard if a certificate is issued, since, in that case, everything indicated in the certificate is proven by merely filing the certificate as evidence. However, the legislator does not say it is necessary to file as evidence a certificate issued by the Department. Nor does the legislator say that the status of "foreign state" within the meaning of the Act is established by filing a section certificate as evidence.

38. The Singapore court concluded that the status of "foreign state" depended exclusively on the executive through the certificate, the sole conclusive evidentiary element, as confirmed by the following words in the judgment:

Whether such entities are given de jure or de facto recognition is best *left to* the executive, *as* the *legislature* in enacting the State Immunity Act *has seen fit.* [Emphasis added.][15]

39. The situation is not the same in Canada: the absence of a certificate issued under section 14 of the Act does not necessarily mean the absence of the right to immunity. The legislator does not say "the status of foreign state pursuant to the present Act is established by filing

[15] Judgment of the High Court of the Republic of Singapore, dated August 28, 2003 in *Anthony Woo and Singapore Airlines Limited and Civil Aeronautics Administration*, [2003] SGHC 190 at 10.

as evidence a certificate issued by the Department"; the legislator says "a certificate is admissible" in order to establish that status. To say that a certificate is admissible does not mean that a certificate is the only means of proof at the disposal of interested persons. Had the legislator wanted this to be so, the Act would have been framed in another way.

40. The words used by the Canadian legislator ("admissible in evidence" and "as conclusive proof" in English, and "admissible en preuve" and "fait foi pour toute question touchant" in French) make it possible to introduce conclusive evidence (the facts indicated in the certificate) without any formality besides the filing of the certificate and without witnesses having to come and testify.

41. In fact, the legislator uses those words, or similar expressions, in a number of other laws in order to facilitate the production of evidence.[16]

42. Issuing a certificate poses no problem when Canada's position as regards recognition of a foreign state is clear, accepted and not likely to cause or result in political or diplomatic dilemmas.

43. That may not be true in other cases. In such circumstances, nothing prevents the Department of Foreign Affairs and International Trade from leaving it up to the Court to determine whether immunity applies, without a certificate having been issued, but in light of the evidence adduced.

44. The American Journal of International Law describes the British position toward Taiwan as follows:

> The *truth*, of course, is that the United Kingdom is *compelled by political exigencies* to be vague. In some situations a government cannot be committed to a specific political maneuver merely at the instance of a private litigant or of a private member in the House. It is notable that Foreign Office certificates, which are binding on English courts, have since the days of the Spanish Civil War been couched in such cautious and frequently evasive language that *in fact the whole question has been passed back to the courts for factual finding.* This is, perhaps, the significance of the United Kingdom expressions of attitude towards Formosa described in this paper.[17] [Emphasis added.]

45. That analysis is reflected in the following words of Sellers J of the Court of Queen's Bench of England in *Luigi Monta of Genoa* v. *Cechofracht Co. Ltd*:

[16] See in particular: Criminal Code, RSC (1985) c. C-46; Canada Evidence Act, RSC (1985) c. C-5; Canada Labour Code, RSC (1985) c. L-2; Competition Act, RSC (1985) c. C-34; Bankruptcy and Insolvency Act, RSC (1985) c. B-3; Food and Drugs Act, RSC (1985) c. F-27; Government Property Traffic Act, RSC (1985) c. G-6; Tobacco Act, 1997 SC, c. 13; 2001 Excise Act, 2002 SC, c. 22.

[17] The American Journal of International Law, Vol. 50, copyright 1956 by the American Society of International Law, at 416.

It seems to me to be a very different question from a Sovereign seeking immunity from the jurisdiction of our courts. The principle of *Duff Development Co.* v. *Kelantan Government* was concisely stated by Lord Dunedin in these words ([1924] AC at p. 820):

> It seems to me that once you trace the doctrine for the freedom of a foreign Sovereign from interference by the courts of other nations to comity, you necessarily concede that the home Sovereign has in him the only power and right of recognition. *If our Sovereign recognises and expresses the recognition* through the mouth of his minister that another person is a Sovereign, *how could it be right for the courts of* our own Sovereign *to proceed upon an examination* of that person's supposed attributes to examine his claim and, refusing that claim, to deny to him the comity which their own Sovereign had conceded?

It may well be undesirable that in such a matter a conflict should arise between Her Majesty's Government and a British court. Even on such an issue as that, however, Lord Sumner, after stating (ibid., at p. 824):

> ..., a foreign ruler, whom the Crown recognises as a Sovereign, is such a Sovereign for the purposes of an English court of law, *and the best evidence of such recognition is the statement duly made* with regard to it in His Majesty's name. *Accordingly where such a statement is forthcoming no other evidence is admissible or needed,*

continued later in his speech to say this (ibid.):

> There may be occasions, when for reasons of state full, unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be temporary if not temporising, or even where some vaguer expression has to be used. In such cases not only has the court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions "sovereign" or "independent" sovereign used in the legal rule mean the same thing. Best, CJ, says in *Yrisarri* v. *Clement* ((1825), 2 C&P 223 at p. 225), *that recognition is conclusive, but, if there is no recognition yet given, the independence becomes matter of proof. I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the court might be entitled to accept secondary evidence in default of the best, subject,* of course, to the presumption that, in the case of a new organisation, which has de facto broken away from an old state, still existing and still recognised by His Majesty, the dominion of the old state remains unimpaired until His Majesty is pleased to recognise the change.[18]
>
> [Emphasis added.]

[18] *Luigi Monta* v. *Cechofracht Co. Ltd,* [1956] 2 All ER 769.

46. The Act actually compels the Court to take the necessary steps to ensure, even ex officio, the application of immunity. A matter of public order is involved.[19]

47. Hence, in the absence of a certificate, the Court must analyse the evidence adduced, including, in this case, the exchange of letters between the attorneys for SAL and the Department, and in light of that information as a whole, determine whether "Taiwan" is a "foreign state" for the purposes of the Act.

48. By leaving it to the courts to determine whether a party to a dispute qualifies as a "foreign state" within the meaning of the Act on the basis of the evidence (which may or may not include a certificate), the Canadian legislator separates the legal authority from the political and diplomatic ones.

49. When the political and diplomatic authorities can and want to admit the situation officially, or when they want to control it, the Department is empowered to issue a certificate pursuant to section 14 of the Act. Since that evidence filed of record is conclusive, the Court is then bound by the content, subject, however, to its interpretation thereof.[20]

50. But when the political and diplomatic authorities cannot officially recognize the situation or the Department refrains from issuing a certificate, the task of evaluating the facts and drawing the necessary legal conclusions from them lies with the Court seized of the request.

51. Thus interpreted, the Act achieves its purpose[21] (namely, to integrate into Canadian law the principle of jurisdictional immunity, with exceptions, stemming from international customary law) in keeping with the principles of public international law on which that immunity rests[22] (sovereignty, independence, dignity and equality of states). Is Taiwan a "foreign state" for the purposes of the Act?

[19] Claude Emanuelli, "Commentaire: La Loi sur l'immunité des Etats", *Revue du Barreau* Vol. 45, No 1, January–February 1985; Claude Emanuelli, *Revue critique de droit international privé* (Paris: Sirey, 1986).

[20] *Loane & Batzer* v. *Estonian State Cargo & Passenger Steamship Line*, [1949] RCS 530; Lauterpacht, *Oppenheim's International Law, A Treatise*, 8th ed. (London, New York, 1955) at 767; The Canadian Yearbook of International Law, Vol. IV, No XV (Vancouver, BC: The University of British Columbia Press, The Canadian Branch, International Law Association, 1977).

[21] Claude Emanuelli, "Commentaire: La Loi sur l'immunité des Etats", *Revue du Barreau*, Vol. 45, No 1, January–February 1985; Claude Emanuelli, *Revue critique de droit international privé* (Paris: Sirey, 1986); J. Maurice Arbour, *Droit international public*, 4th ed. (Cowansville, Qc.: Yvon Blais).

[22] Claude Emanuelli, "Commentaire: La Loi sur l'immunité des Etats", *Revue du Barreau*, Vol. 45, No 1, January–February 1985; Claude Emanuelli, *Revue critique de droit international privé* (Paris: Sirey, 1986); J. Maurice Arbour, *Droit international public*, 4th ed. (Cowansville, Qc.: Yvon Blais).

Is Taiwan a foreign state for the purposes of the Act?

52. The Act does not define the expression "foreign state".

53. The Act having incorporated into Canadian law the principle of jurisdictional immunity stemming from international customary law, it is in public international law that we must seek the definition to be used.[23] As Pigeon J wrote in *Daniel* v. *White*:

> . . . this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law.[24]

54. The existence of a state implies that four criteria have been met:

> [Translation]
> According to international law, the existence of a state implies that four criteria have been met. Those criteria are set forth in Article 1 of the Montevideo Convention on the Rights and Duties of States:
>
> – a defined territory;
> – a permanent population;
> – an effective government;
> – the capacity to enter into relations with the other states.
>
> Furthermore, to produce the maximum effect in the international community, the existence of the state must be recognized by the other states. That recognition is mainly, but not exclusively, bound to fulfilment of all the criteria for recognition of the status of state.[25]

55. The recognition of a state by the other states does not create the state: the birth and existence of a state is a question of fact:

> [Translation]
> In contrast, the declarative theory views the act of recognition as the simple acknowledgment of an established fact. That theory is inspired by legal sociology. The birth of a state is a question of fact; it does not depend on the consent of the other states. That theory has been confirmed by international practice.[26]

56. The evidence of record is conclusive as regards the four criteria for the recognition of Taiwan's status as a state: (1) the island of Taiwan is a defined territory; (2) the island of Taiwan has a permanent population;

[23] *Schreiber* v. *Canada (Attorney General)*, [2002] 3 SCR 2; *Re Canadian Labour Code*, [1992] 2 SCR 50; Nii Lante Wallace-Bruce, "Taiwan and Somalia: International Legal Curiosities", (1996) 22 Queen's LJ 453 at 455-6.

[24] *Daniel* v. *White*, (1968) SCR 517 at 541.

[25] Claude Emanuelli, *Droit international public* (Montreal: Wilson & Lafleur, 1998) paras. 262-3.

[26] Claude Emanuelli, *Droit international public* (Montreal: Wilson & Lafleur, 1998) para. 385 at 189.

(3) Taiwan has an effective government and (4) the government of Taiwan enters into relations with other states.

57. That reality has, in fact, been confirmed; particularly:

57.1 in a declaration by the Canadian Minister for External Affairs, the Honourable Paul Martin, in an address in Banff entitled "Canada and the Pacific" and reproduced in The Canadian Yearbook of International Law, Vol. VI, 1968:

> We consider that the isolation of Communist China from a large part of normal international relations is dangerous. We are prepared to accept the reality of the victory in mainland China in 1949 ... We consider, however, that the effective political independence of Taiwan is a political reality too:
>
> The Honourable Paul Martin 1
>
> 1 Secretary of State for External Affairs, Canada. This was part of an address entitled "Canada and the Pacific", given at The Banff Conference on World Affairs, and published in XVIII External Affairs 431 (1966).[27]

57.2 in the conclusion of a text written by D. Barry Kirkham entitled "The International Legal Status of Formosa" in The Canadian Yearbook of International Law:

> Thus, it would appear that the presumption against statehood created by universal non-recognition is capable of being rebutted. It is a strong presumption and the evidence to rebut it would have to be voluminous and cogent. *In the case of Formosa evidence is of that sort. The island has been completely independent of any foreign control for seventeen odd years: it has its own government and army: it easily passes all the traditional tests of international law for statehood. The only disabilities are* the lack of recognition of a Formosan state, the claims of its own government to be the government of another state of which Formosa is allegedly a part, and its somewhat murky beginnings resulting from political upheaval following the war. *None of these disabilities, however, are deemed sufficient to override those factors pointing to Formosan statehood. Thus the conclusion* is reached that by international law Formosa has achieved statehood and is accordingly entitled to the rights and subject to the obligations of a state.[28]
>
> [Emphasis added.]

[27] The Canadian Yearbook of International Law, Vol. IV, No XV (Vancouver, BC: The University of British Columbia Press, The Canadian Branch, International Law Association, 1977) at 144.

[28] D. Barry Kirkham, "The International Legal Status of Formosa", The Canadian Yearbook of International Law, Vol. IV, No XV (Vancouver, BC: The University of British Columbia Press, The Canadian Branch, International Law Association, 1977) at 163.

57.3 and in the Annuaire français de droit international:

> [Translation]
> Eighteen million inhabitants live on a defined territory and are governed by a government whose authority is well established. The island has a political, administrative and social organization similar to that of a state. If the notion of state stems from effectiveness, Taiwan has all the attributes of statehood.[29]

58. The Court therefore concludes that, for the purposes of the present case, the CAA is entitled to benefit from the immunity provided for in the Act.

59. That being so, and in closing, the Court subscribes to the following words of author Hugh M. Kindrer:

In pursuing this course, the courts may find themselves granting a degree of respect or even immunity for a foreign regime that superficially may seem wholly out of accord with the government's declarations of diplomatic distance. But the illusion will be in the denials of recognition by the government for diplomacy's sake and no longer in the fictions of the courts.[30]

Therefore, the Court:

Allows the CAA's motion to dismiss the action in warranty;

Dismisses SAL's action in warranty against the CAA;

The whole with costs.

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[29] XXVI Annuaire Français de droit international (Paris: Éditions du Centre national de la recherche scientifique, 1980) at 152.

[30] Hugh M. Kindrer, "Foreign Governments Before the Courts", (1980) 58 Can. Bar Rev. 602 at 620.