COURT OF APPEAL FOR ONTARIO

CITATION: Canadian Planning and Design Consultants Inc. v. Libya, 2015 ONCA 661
DATE: 20150929
DOCKET: C60679

Cronk, Hourigan and Benotto JJ.A.

BETWEEN

Canadian Planning and Design Consultants Inc.

Applicant (Appellant)

and

State of Libya aka Libya aka People's Bureau of the Great Socialist People's Libyan Arab Jamahiriya-Canada aka the Great Socialist People's Libyan Arab Jamahiriya-Canada aka Embassy of Libya in Canada aka Embassy of Libya aka Libyan Embassy Canada

Respondent

(Respondent in Appeal)

and

Royal Bank of Canada

Garnishee/Respondent

(Respondent in Appeal)

and

Attorney General of Canada

Intervener

John J. Adair and David Quayat, for the appellant

John I.G. Melia, Jennifer L. Radford and Katherine Humphries, for the respondent, the State of Libya

Catherine M. Francis, for the respondent, Royal Bank of Canada

Jacqueline M. Dais-Visca and Jessica M. Winbaum, for the intervener, the Attorney General of Canada

Heard: September 24, 2015

On appeal from the order of Justice Catrina D. Braid of the Superior Court of Justice, dated July 2, 2015, with reasons reported at 2015 ONSC 3541.

By the Court:

[1] Are funds held in bank accounts maintained by a foreign state with a financial institution in Canada available for execution by a judgment creditor in Ontario, or are they insulated from execution by reason of state or diplomatic immunity?

[2] Are certificates issued by or on behalf of Canada's Minister of Foreign Affairs certifying that the relevant bank accounts are used by the foreign state for diplomatic purposes in Canada determinative of the immunity inquiry regarding the accounts?

[3] Does an agreement to submit to arbitration under the International Chamber of Commerce Rules of Arbitration, and to waive any right to any form of

recourse in respect of such arbitration, constitute a waiver of immunity concerning enforcement of a resulting arbitral award?

[4] This appeal engages these important questions. They are matters of first impression for this court.

[5] The appellant, Canadian Planning and Design Consultants Inc. ("Canadian Planning"), appeals an order quashing notices of garnishment obtained by it in respect of identified bank accounts of the State of Libya ("Libya"), maintained in the name of the Libyan Embassy with the Royal Bank of Canada ("RBC"), together with associated relief. Canadian Planning asks that the order be set aside and that Libya's motion to quash the notices of garnishment be dismissed on the grounds that Libya waived diplomatic immunity in respect of the bank accounts or that diplomatic immunity does not extend to the bank accounts in question. Canadian Planning also seeks various forms of alternative relief.

[6] The respondents, Libya and RBC, oppose the relief sought on numerous grounds. They raise, among other matters, state and diplomatic immunity considerations and the interpretation of provisions of the *State Immunity Act*, R.S.C. 1985, c. S-18 (the "*SIA*") and the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 (the "*FMIOA*"), to which the *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 U.N.T.S. 95 (entered into force 24 April 1964) (the "*Vienna Convention*") is attached as Schedule I.

I. Background in Brief

[7] The litigation among the parties has a complicated history. It is unnecessary to recite that litigation history in detail. In brief, the pertinent background facts are as follows.

[8] Canadian Planning made a claim against Libya for breach of contract arising out of a hospital management agreement made in Libya in 2007. The terms of this agreement provided that any dispute would be resolved at the International Chamber of Commerce International Court of Arbitration in Paris (the "ICC"), in accordance with ICC Rules of Arbitration (the "ICC Rules").

[9] The ICC Rules include a provision by which each party agrees to honour any award and waives immunity from recourse. Article 28(6) of the ICC Rules states:

> Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, *the parties* undertake to carry out any award without delay and *shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made*. [Emphasis added.]

[10] A dispute did arise and both parties submitted to the ICC and argued the dispute on its merits. Libya was represented by counsel and prosecuted a counterclaim in the ICC proceeding.

[11] On May 4, 2012, the ICC issued its award. It ordered Libya to pay damages to Canadian Planning for breach of contract. The award, together with interest and costs, now exceeds approximately $11 million.

[12] In November 2013, Canadian Planning brought an application in the Superior Court of Justice for a registration and enforcement order concerning the ICC arbitral award. On June 20, 2014, D. Parayeski J. of the Superior Court of Justice issued the requested order (the "REO"). The REO provides that the ICC award is recognized and enforced as an order of the Superior Court. Paragraph 8 of the REO states:

> THIS COURT ORDERS that the respondent has by implication waived its immunity from attachment, execution, seizure and forfeiture within the meaning of Section 12 (1)(a) of the [*SIA*].

Paragraph 8 of the REO appears to be based on Libya's agreement to abide by the ICC Rules, including Article 28(6), set out above.

[13] Libya was not present at the registration and enforcement hearing and appealed from the REO to this court, asserting procedural unfairness. On December 19, 2014, the appeal was dismissed on the basis that, in light of the evidentiary record then before this court, there was no basis for appellate intervention with the REO on procedural fairness grounds: *Canadian Planning and Design Consultants Inc. v. Libya*, 2014 ONCA 924.

[14] In its reasons, this court indicated, at para. 10, that the appropriate procedure to set aside the REO "was, and still may be" a motion in the Superior Court pursuant to rule 38.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on a proper factual record. The court added that if such a motion was brought, "it will be for the Superior Court to determine the availability of that remedy."

[15] Since the matter might return to the Superior Court on a rule 38.11 motion, this court also held that it was premature to consider the substantive issues raised, including the issue of waiver of state immunity.

[16] On December 29, 2014, the Superior Court issued notices of garnishment naming Libya as the debtor. Canadian Planning promptly served the notices on RBC in respect of bank accounts held by the Libyan Embassy with RBC in Ottawa.

[17] In the meantime, Libya moved in January 2015 to set aside the REO pursuant to rule 38.11. For a variety of reasons, discussed further below, its rule 38.11 motion has yet to be heard.

[18] On March 12, 2015, Fathi Mohammed Baja, the Ambassador of the State of Libya in Canada, swore a statutory declaration in which he indicated that the funds in the relevant bank accounts held by the Libyan Embassy at RBC "exist and are utilized for the sovereign and diplomatic purposes of the proper

functioning of the Libyan Embassy in Canada". Paragraph three of the Ambassador's statutory declaration states:

> Neither the execution of this Statutory Declaration nor any statements herein represent or are intended to be construed as a waiver of the state immunity of the State of Libya or the diplomatic immunity afforded to me.

[19] On March 30, 2015, Canada's Minister of Foreign Affairs personally certified that the RBC bank accounts specified in the notices of garnishment were the accounts of the Embassy of Libya and that they were used by that Embassy for "diplomatic purposes". The Minister's certificate, which was transmitted to the Superior Court, also indicated that the accounts "enjoy the privileges and immunities accorded to embassy bank accounts under the customary international law".

[20] An earlier certificate delivered by the Department of Foreign Affairs, Trade and Development, dated November 12, 2014, had stipulated that the same bank accounts at RBC were "diplomatic property of Libya" and that they "continue to enjoy privileges and immunities under the [*FMIOA*]". We will refer to the Minister's and the Department's certificates, collectively, as the "Certificates".

[21] These events led to a series of motions heard by Braid J. of the Superior Court. Libya sought, among other things, to quash the notices of garnishment.

[22] On July 2, 2015, Braid J. quashed the notices of garnishment, ordered that no new notices of garnishment shall be issued, and restrained Canadian

Planning from any further enforcement in respect of bank accounts listed in the notices of garnishment. She held that the garnished bank accounts enjoy diplomatic immunity and are therefore immune from attachment (the "Motion Judge's Order").

[23] Canadian Planning appeals to this court from the Motion Judge's Order.

[24] On July 17, 2015, MacFarland J.A. of this court granted a stay of the Motion Judge's Order pending determination of the appeal (the "Stay Order"). In so doing, she noted that: "Counsel for Libya ... made it crystal clear in his submissions that Libya is not going to pay this judgment … If a stay is not granted, there is a real risk that the bank accounts will be emptied and the funds transferred elsewhere." Justice MacFarland expedited the appeal to be heard on September 23, 2015.

II. Preliminary Question: Is This Appeal Premature?

[25] At the outset of the appeal hearing, this court requested the parties to address, as a preliminary question, whether the hearing of the appeal on the merits is premature having regard to Libya's pending rule 38.11 motion in the Superior Court. The concern was that, if Libya succeeds on its rule 38.11 motion and a new recognition and enforcement application by Canadian Planning follows, the issues for adjudication in the Superior Court could be germane to the issues raised on this appeal. If so, depending on the outcome of the proceedings

in the Superior Court and any appeals therefrom (including, potentially, an eventual appeal to this court), this court's decision on the matters now advanced before it could be rendered moot.

[26] At the conclusion of argument on this preliminary question, the court adjourned the appeal *sine die*, for reasons and on terms to follow. These are those reasons.

III. Discussion

(1) Libya's Rule 38.11 and Leave to Appeal Motions

[27] On its rule 38.11 motion, Libya seeks to set aside the REO on the ground that it was denied a right to be heard on the application leading to the REO. In its notice of motion, dated January 14, 2015, Libya requests an order directing a new hearing of Canadian Planning's application for registration and enforcement of the ICC arbitral award, as well as an interim and permanent order staying all execution activities under the REO. In support of its rule 38.11 motion, Libya filed an affidavit sworn on January 13, 2015 by the Libyan Ambassador to Canada, among other affidavits.

[28] The rule 38.11 motion was originally returnable in the Superior Court in Hamilton on February 3, 2015. On that date, the court directed that the motion be scheduled for hearing on March 13, 2015. Other motions between the parties were also then pending.

[29] On March 13, 2015 – the return date for the rule 38.11 motion – Canadian Planning sought an adjournment of the motion and an order compelling the Libyan Ambassador to attend for cross-examination on his January 2015 affidavit. Justice Braid granted the relief sought. She adjourned the rule 38.11 motion and ordered the Libyan Ambassador to attend for cross-examination on or before March 25, 2015, failing which she indicated that the court would assign no weight to his January 2015 affidavit.

[30] Libya sought leave to appeal to the Divisional Court from Braid J.'s March 13, 2015 ruling. The leave motion has yet to be decided.

[31] None of the parties, including Libya, has taken any steps to date to expedite the hearing of Libya's leave motion, or the rule 38.11 motion itself.

[32] In its oral submissions before this court, Libya confirmed that it is intent on proceeding with its rule 38.11 motion.

[33] By order dated April 2, 2015, Braid J. granted Libya's request for a stay of her March 13, 2015 ruling, pending the determination of Libya's proposed appeal. She also adjourned Libya's rule 38.11 motion *sine die*, until Libya's appeal from her March 13, 2015 ruling had been exhausted. In so doing, she commented:

> I expect that counsel will be in communication with each other. I know that the application for leave to appeal has already been filed by Libya, and I expect you will get a decision on the leave issue within a fairly short period of

> time. If that is disposed of by the court, I expect that all counsel will immediately get in contact with each other and set a new date for the hearing of the 38.11 motion. In the meantime, that motion is adjourned *sine die*.

[34] Unfortunately, for reasons that are not entirely clear on the record before this court, Braid J.'s forecast as to the timeliness of resolution of Libya's leave motion was not borne out by subsequent events.

(2) Issues on Appeal

[35] The question whether Libya waived immunity from execution, expressly or impliedly, by agreeing to arbitrate before the ICC and under the ICC Rules is a key issue on this appeal. The parties take disparate positions on this question.

[36] Both Canadian Planning and Libya challenge the motion judge's finding that the waiver to which Libya agreed in the ICC arbitration applies only to state immunity. In its factum, Canadian Planning submits that:

> Libya has waived *all* immunity from execution (whether sovereign immunity or diplomatic immunity) and, as such, cannot now rely upon diplomatic immunity to quash the garnishments. [Emphasis in original.]

[37] Libya disagrees. It asserts in its factum that there was no express waiver by it of either state or diplomatic immunity in this matter.

[38] RBC, for its part, submits that the waiver referenced in para. 8 of the REO relates to a waiver of "execution immunity" as contemplated under s. 12 of the *SIA*, not waiver of state immunity under s. 3 of that statute. RBC maintains that

there is no evidence that Libya waived sovereign immunity, that Parayeski J. made no finding that Libya waived sovereign or state immunity under s. 3 of the *SIA*, and that Libya's waiver of "execution immunity" arising from its agreement to arbitrate under the ICC Rules is "tenuous".

[39] In its factum, the Attorney General, relying on the Certificates, raises the following two issues:

> i) in Canada, is it for the Minister or the court to determine whether an embassy's bank account has diplomatic status? [and]
>
> ii) if the answer to Issue #1 is "the Minister", should [Braid J.] have accepted the [C]ertificates as conclusive of the fact that the [bank accounts at issue] were diplomatic?

[40] In respect of these issues, the Attorney General submits, among other matters, that Article 25 of the *Vienna Convention* obliges Canada to "accord full facilities" for the performance of the functions of a foreign state's mission in Canada. Further, customary international law requires Canada to respect the immunity of embassy bank accounts used for diplomatic purposes. On these and other grounds, the Attorney General argues that the recognition of the diplomatic status of bank accounts of a foreign state mission in Canada falls with the exercise of the Crown's prerogative power over foreign affairs, the supervision of which is beyond the purview of the courts.

[41] The Attorney General emphasizes, however, that the *effect* of recognized diplomatic status is a legal question for the courts to determine. In other words, the Attorney General takes the position that, while deference is owed to the recognition of diplomatic status by the Minister of Foreign Affairs, the courts are responsible for determining what immunities flow from recognized diplomatic status under international law.

[42] In this context, the Attorney General argues that Braid J. erred in refusing to accept the Certificates as conclusive of the diplomatic status enjoyed by the Libyan Embassy's RBC bank accounts, although she was correct to hold that civil enforcement rules do not apply to those bank accounts.

[43] It is thus clear that, while the parties' positions on this matter differ, the nature and effect of Libya's waiver under the ICC Rules, the proper interpretation of para. 8 of the REO, and the legal effect of the Certificates are squarely at play on this appeal.

[44] Critically, Canadian Planning and Libya acknowledged during their oral submissions before this court that these are also live issues on Libya's rule 38.11 motion and, if a new registration and enforcement application follows after the determination of that motion, that they will also be engaged on that application.

[45] Specifically, Canadian Planning and Libya agree that if Libya succeeds on its rule 38.11 motion and the REO is set aside, it is likely that a new registration

and enforcement application will proceed. In this event, Libya will be entitled to oppose a new registration and enforcement order, on all available grounds. These include its claims that: i) its RBC bank accounts are exempt from execution by reason of diplomatic immunity under one or both of the *SIA* and the *Vienna Convention*, as incorporated in the *FMIOA*; ii) the Certificates are conclusive evidence that the bank accounts are used for diplomatic purposes and, consequently, that they are immune from attachment or execution; and iii) Libya has not waived any immunity applicable to the RBC bank accounts.

[46] RBC argues that the question of diplomatic immunity is not engaged on the rule 38.11 motion at all, and that it will not arise on any subsequent registration and enforcement application, since diplomatic immunity is a "different regime" than state immunity. RBC says that if Libya succeeds on its rule 38.11 motion and Canadian Planning seeks a fresh registration and enforcement order, the court hearing that application will be required to address: i) whether state immunity applies in this case; ii) any defence on the merits that Libya may put forward; and iii) whether "execution" immunity applies in respect of the relevant bank accounts. Only after the determination of these issues, will the question of diplomatic immunity arise. Central to these issues, RBC argues, is the effect of the Certificates.

[47] As a result, RBC says, the diplomatic immunity issues raised on this appeal, and the associated question whether Libya has waived diplomatic

immunity concerning its RBC bank accounts, are stand–alone issues for adjudication by this court. RBC therefore argues that this appeal should proceed.

[48] We reach a different conclusion.

(3) Prematurity

[49] Canadian Planning's entitlement to enforce its ICC arbitral award against Libya in Ontario is dependent on a valid registration and enforcement order in this jurisdiction. If the REO is set aside on Libya's rule 38.11 motion, the foundation for the notices of garnishment obtained by Canadian Planning collapses.

[50] We do not accept RBC's contention that the diplomatic immunity arguments advanced on this appeal can readily be severed from the other immunity and waiver issues identified by the parties. Even on RBC's own argument, it appears that it is premature to hear this appeal on the merits at this time. Recall that RBC maintains that the diplomatic immunity and waiver issues arise only *after* the resolution of questions relating to the application of state and "execution immunity" and any defence on the merits by Libya to registration and enforcement in Ontario of Canadian Planning's ICC arbitral award. Libya and Canadian Planning have acknowledged that at least some, if not all, of these issues will be engaged on Libya's rule 38.11 motion and any new registration and enforcement proceeding.

[51] In our view, in these circumstances, Libya's pending rule 38.11 motion and the future registration and enforcement proceeding that the parties anticipate may flow from it are highly relevant to the issues on this appeal. Moreover, depending on the outcome of the rule 38.11 motion and associated proceedings in the Superior Court, this appeal may be rendered moot.

[52] There are also additional, significant considerations.

[53] It is not an efficient or appropriate use of judicial resources to have two different courts determining the merits of the same issues in what is essentially the same litigation, especially where multiple appeals to this court may result: see *e.g.*, *Korea Data Systems (USA) Inc. v. Aamazing Technologies Inc.*, 2012 ONCA 756, 29 C.P.C. (7th) 51, at paras. 19 and 23. Both the interests of judicial economy and the avoidance of the detrimental risk of inconsistent rulings favour the adjournment of this appeal pending resolution of Libya's rule 38.11 motion.

[54] We also cannot ignore the possibility that further evidence may be tendered on the rule 38.11 motion, by one or more of the parties. If this occurs, that additional evidence may have a direct bearing on the issues before this court. This, too, militates in favour of the adjournment of this appeal: see *e.g.*, *EOG Resources Canada Inc. v. Saskitoba Farms Ltd.*, 2013 MBCA 99, at para. 10; *Ludlow v. Ludlow*, 2011 MBCA 29, at paras. 17–20 and 27.

[55] We are mindful that Libya, on the authority of *Alcom Ltd. v. Republic of Colombia*, [1984] A.C. 580 (H.L. (Eng.)), argues that this appeal should proceed at this time regardless of prematurity and potential mootness concerns.

[56] For two reasons, we disagree.

[57] First, the determination whether to adjourn a proceeding on the grounds of prematurity is a highly discretionary matter falling within the court's jurisdiction to control its own process in the interests of the administration of justice. As this court commented in *Cannock v. Fleguel*, 2008 ONCA 758, 303 D.L.R. (4th) 542, outstanding proceedings in the Superior Court that raise issues germane to the determination of issues raised on appeal to this court by the same parties in the same case can give rise to prematurity concerns warranting a stay of the appeal pending in this court.

[58] Second, although the facts in *Alcom* are similar to those in this case in several respects, *Alcom* is nonetheless distinguishable. In *Alcom*, as here, the legal issue was whether the bank accounts of a foreign state were protected from execution by a judgment creditor under state immunity legislation in England. The creditor had obtained garnishee orders in respect of the bank accounts pursuant to a default judgment issued in its favour. The foreign state's ambassador certified that the funds in the bank accounts were intended to be used only in the day-to-day running of his country's diplomatic mission in

England. The judge of first instance set aside the garnishee orders but the Court of Appeal reversed and restored the orders. The foreign state then appealed to the House of Lords.

[59] Unlike this case, prior to the appeal hearing in *Alcom*, the creditor's default judgment was set aside. As a result, the garnishee orders necessarily fell. Thus, by the time of the appeal hearing, the issues on appeal had been rendered moot. The House of Lords elected to address the appeal on the merits, in any event, on the basis that the issues raised were of "outstanding international importance".

[60] The issues on this appeal are not moot. They may or may not become moot in the future depending on the outcome of outstanding proceedings in the Superior Court. The issue in this case is not whether this court will hear Canadian Planning's appeal but, rather, when it is appropriate to entertain the appeal on the merits. The question before us at present is not whether the legal issues advanced on this appeal should be resolved because they are important and not moot. The question is how and when those legal issues should be resolved by this court.

(4) Adjournment of Appeal

[61] Given the uncertainty arising from Libya's pending rule 38.11 motion in the Superior Court and its associated outstanding leave application in the Divisional

Court, we conclude that it is premature to consider this appeal on the merits at this time. The appeal is therefore adjourned *sine die*, on the terms set out below.

[62] Several months have passed since Libya sought leave to appeal the motion judge's March 13, 2015 ruling directing that Libya's Ambassador submit to cross–examination on his affidavit filed by Libya in the Superior Court. As we have said, that leave motion has yet to be determined. As a result, the hearing of Libya's rule 38.11 motion concerning the REO has stalled. This, in turn, has contributed to this court's decision to adjourn a major, multi-party appeal in a complex matter on the ground of prematurity.

[63] In these circumstances and on the record before us, it is apparent that it is in the interests of justice for the parties, as well as the interests of the administration of justice, that Libya's outstanding proceedings in the Divisional Court (the leave motion) and in the Superior Court (the rule 38.11 motion) be heard on the merits as soon as possible.

[64] It is, of course, for the Divisional Court and the Superior Court to schedule proceedings in their courts as they consider appropriate. And it is the obligation of counsel for the parties to take those steps necessary to advance this litigation through the courts. In this case, it is Libya who seeks leave to appeal to the Divisional Court from the motion judge's ruling regarding cross-examination of Libya's Ambassador. It is also Libya's rule 38.11 motion. It is within Libya's

control, and that of the other parties to this appeal, to take those steps necessary to seek orders expediting the hearing of the outstanding leave motion and the scheduling of the rule 38.11 motion. Counsel for Canadian Planning has undertaken to this court to co-operate fully with Libya in this regard.

[65] The adjournment *sine die* of this appeal is therefore granted on the following terms:

i) Libya shall move forthwith in the Divisional Court for an order expediting the consideration by that court of Libya's pending leave motion in Hamilton or, if need be, in Toronto;

ii) Libya shall also move forthwith in the Superior Court for directions regarding the scheduling of its outstanding rule 38.11 motion. It may be advisable for the parties to seek the assistance of a Superior Court case management judge for this purpose;

iii) Canadian Planning shall co-operate fully with all reasonable steps taken by Libya to comply with the steps outlined in (i) and (ii), above. This court anticipates that RBC's co-operation will also be forthcoming in this regard; and

iv) Canadian Planning shall provide a copy of these reasons to the Divisional and Superior Courts in Hamilton.

(5) Stay Order

[66] It remains to consider the impact of the adjournment of the appeal on the Stay Order.

[67] Canadian Planning argues that the Stay Order should continue as a term of the adjournment of this appeal.

[68] Libya and RBC oppose the continuation of the Stay Order, advancing the following arguments. First, they submit that the effect of the notices of garnishment has been to "freeze" Libya's use of its RBC bank accounts. They argue that this court ought to presume that the freezing of the bank accounts has impaired Libya's ability to continue to operate its embassy in Canada and fulfill its diplomatic role. They rely on *Liberian Eastern Timber Corp. v. Government of Republic of Liberia*, 659 F. Supp. 606 (D.C. 1987), and *Philippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, 13 December 1977, for the proposition that a diplomatic mission will suffer a severe hardship if a civil judgment creditor is permitted to freeze bank accounts used for the purpose of the mission. Second, they submit that the garnishments and the Stay Order constitute, in effect, an improper injunction contrary to s. 11 of the *SIA*. That section prohibits injunctions against a foreign state unless the foreign state has consented in writing to the granting of such relief.

[69] The Attorney General also opposes the continuation of the Stay Order on the ground that it would be a breach of Canada's obligation under Article 25 of the *Vienna Convention* to "accord full facilities for the performance of the functions of the mission".

[70] We would not give effect to these arguments in the circumstances of this case.

[71] In our view, the impairment of embassy operations as a consequence of the freezing of its bank accounts is not a fact that is capable of judicial notice and cannot be presumed by the court. In this case, there is no evidence before this court from Libya or any other party that Libya's ability to operate its embassy has been adversely affected by the notices of garnishment or the Stay Order. To the contrary, the freezing of the accounts has been in effect for approximately nine months and there is nothing before us to suggest that Libya is not continuing to effectively operate its embassy or that its mission in Canada has suffered any hardship.

[72] With regard to s. 11 of the *SIA*, we note that s. 12(1)(a) of that statute provides that the property of a foreign state located in Canada is immune from attachment and execution except where "the state has, either explicitly or by implication waived its immunity from attachment [or] execution." The issue whether a stay order qualifies as an injunction under the *SIA* aside, there can be no question that, as discussed above, the existence, nature and scope of any waiver of immunity by Libya are live issues in this case.

[73] We also disagree with Libya's submission that the waiver issue is distinct from the prohibition against an injunction. Sections 11 and 12(1)(a) of the *SIA*

must be interpreted in a manner that promotes internal harmony in the statute and does not create conflict: *R. v. Tapaquon*, [1993] 4 S.C.R. 535, at p. 550.

[74] In our view, read together, the sections provide that if a foreign state elects to waive its protection against attachment and execution under s. 12, it foregoes its right under s. 11 to be protected from injunctive relief that is ordered in the context of attachment or execution proceedings. To hold otherwise would be to interpret the sections in a manner that places them in conflict. Therefore, until the waiver issues are determined, the prohibition in s. 11 cannot operate to prevent a continuation of the Stay Order.

[75] In response to the Attorney General's argument regarding Article 25 of the *Vienna Convention*, there is no evidence before us that the continued operation of the Stay Order would violate Canada's obligation under that Article. As mentioned above, the accounts have been subject to the garnishment notices for several months and there is nothing to suggest that this has rendered the Libyan Embassy unable to perform its functions.

[76] We adopt and rely upon MacFarland J.A.'s analysis in her reasons on the stay motion.

[77] First, for the reasons set out above, there is a serious issue to be determined about whether the accounts are subject to execution.

[78] Second, we also agree that Canadian Planning will suffer irreparable harm if the Stay Order is not continued. Libya has made clear that it has no intention of paying the ICC arbitral award. There is a real risk, therefore, that the funds could be removed from the accounts if the stay is lifted. We note that counsel for Libya informed this court that his client would be willing to notify Canadian Planning if it was going to close the bank accounts in question or its embassy, but his client made no commitment to maintain the current funds in the accounts.

[79] Finally, the same considerations that caused MacFarland J.A. to conclude that the balance of convenience favoured the granting of a stay militate in favour of the continuation of the Stay Order. We recognize that, in granting a stay, MacFarland J.A. contemplated a stay order of short duration. However, even if the stay must continue for a number of months, there is nothing in the evidence before us to suggest that the Libyan Embassy cannot continue to function properly.

[80] Accordingly, the factors enumerated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R.199 favour the continuation of the Stay Order.

[81] We therefore order the continuation of the Stay Order until further order of this court.

[82] In so ordering, it should not be understood that the Stay Order will continue in place indefinitely, without any remedy for Libya. If, following the release of

these reasons, Libya's leave and Rule 38.11 motions are not scheduled expeditiously for hearing, Libya or any of the other parties to this appeal may move before this court, on a proper record, for further directions regarding both the Stay Order and the status of this appeal.

IV. Disposition

[83] Accordingly, this appeal is adjourned *sine die* and the Stay Order is continued in accordance with these reasons. The costs of today's attendance and the costs of the stay motion before MacFarland J.A. of this court are reserved to the Panel hearing the appeal.

Released:

"SEP 29 2015"
"EAC"

"E.A. Cronk J.A."
"C.W. Hourigan J.A."
"M.L. Benotto J.A."