TMR Energy Ltd. v. Ukraine, 2005 FCA 28 (CanLII)

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- **Federal Court of Appeal**

  TMR Energy Ltd. v. Ukraine, 2005 FCA 231 (CanLII) - 2005-06-17

Legislation cited (available on CanLII)

- Courts Administration Service Act, S.C., 2002, c. 8 — 14 • 20
- Federal Courts Act, R.S.C., 1985, c. F-7 — 1
- Federal Courts Rules, SOR/98-106,
- State Immunity Act, R.S.C., 1985, c. S-18 — 3

Decisions cited

- Blueberry River Indian Band v. Canada (Department of Indian Affairs and Norther Development), 1999 CanLII 8853 (FC) — 189 FTR 111
- Canadian National Railway Co. v. Canadian Transport Commission, reflex — [1988] 2 FC 437 • 13 FTR 52
- Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd., 1997 CanLII 14645 (NL CA) — 150 Nfld & PEIR 203
- First Canadians' Constitution Draft Committee v. Canada, 2004 FCA 93 (CanLII) — 238 DLR (4th) 306 • 247 FTR 319
- Gibb v. Nigeria et al., reflex — 341 AR 339 • 20 Alta LR (4th) 190
- Iscar Ltd. v. Karl Hertel GmbH (T.D.), reflex — [1989] 3 FC 479 • 25 CPR (3d) 116 • 27 FTR 186
- McGrath v. St. Phillip's, reflex — 51 Nfld & PEIR 276
- Prenor Trust Company of Canada v. Seawood Enterprises Ltd., 1993 CanLII 3190 (NS CA) — 121 NSR (2d) 144
- TMR Energy Ltd. v. State Property Fund of Ukraine, 2003 FC 1517 (CanLII) — 244 FTR 1
- Vaughan v. Canada, 2000 CanLII 15069 (FC) — 184 FTR 197

A-496-04

A-497-04

2005 FCA 28

TMR Energy Limited, a duly constituted legal person incorporated under the laws of Cyprus (*Appellant*) (*Applicant*)

v.

State Property Fund of Ukraine, an organ of the State of Ukraine (*Respondent*) (*Respondent*)

and

ANTK Antonov and **State of Ukraine** (*Respondents*) (*Interveners*)

Indexed as: TMR Energy Ltd. v. State Property Fund of Ukraine (F.C.A.)

Federal Court of Appeal, Décary, Nadon and Sexton JJ.A.--Toronto, January 10 and 11; Ottawa, January 24, 2005.

Judges and Courts -- Prothonotaries -- Whether prothonotary has jurisdiction to grant Federal Court Rules, 1998, r. 327 application for registration, recognition and enforcement of foreign arbitral award -- While prothonotaries' powers have,

over time, increased, that has been in relation to pre-trial, post-judgment proceedings -- Review, exposition of statutory provisions, Rules and case law on powers of prothonotary -- Enforcement of foreign judgment is an "application", not mere post-judgment proceeding, and outside Prothonotary's jurisdiction -- Making by non-judge of order only judge may make not merely non-compliance with Rules but going to jurisdiction -- Reference to cases where Masters' decisions set aside for want of jurisdiction -- Nor had Prothonotary acted under colour of authority.

Practice -- Judgments and Orders -- Ex parte order for enforcement of foreign arbitral award -- Upon ex parte motion, moving party having duty of full, fair disclosure -- Must file affidavit knowing of no impediment to enforcement -- Applicant must advise Court of any facts, law favouring other side -- Necessity for utmost good faith on any ex parte application as invoking procedure going against fundamental justice principle that all sides of dispute to be heard -- In instant case, non-disclosure of material fact in that description of judgment debtor such as to create confusion as to entity against which recovery sought -- Court not alerted State Immunity Act might apply.

These were consolidated appeals from two orders made by Federal Court Judge, Martineau J. The first order granted a *Federal Court Rules, 1998*, rule 399 motion, setting aside an *ex parte* order granting a rule 327 application for registration, recognition and enforcement of a foreign arbitral award on the ground that a prothonotary lacked jurisdiction to grant such an order. The Prothonotary's order was held to be a nullity, incurable under the *de facto* officer doctrine or under any rule of practice. The other order denied the appellant's request for an *ex parte* order *nunc pro tunc* (or *de bene esse*) to enforce the award based on the record as of January 15, 2003--the date of the original application. The Judge was of the view that appellant had failed to disclose to the Prothonotary certain impediments to registration and enforcement of the award. On May 30, 2002 the Arbitration Institute of the Stockholm Chamber of Commerce rendered a final arbitral award in the appellant's favour against the

State Property Fund of Ukraine (SPF), one of the respondents herein, in the amount of US $40 million. Appellant then filed a registration application under rules 327 and 328. It was alleged that SPF was an organ of the State of Ukraine and its Canadian address was the Embassy of Ukraine. The Prothonotary's order, in the appellant's favour, was served on SPF. The appellant then obtained a writ of seizure and sale against "State Property Fund of Ukraine, an organ of the State of Ukraine" and wrote to a Newfoundland sheriff regarding the seizure of property used for a commercial activity. The sheriff seized "Antonov--124-100 aircraft", situated at Goose Bay Airport, Nfld, which belonged to Ukraine but was operated by Aviation Scientific Technical Complex or Antonov. When the sheriff issued a notice of sale, SPF filed a notice of objection while Antonov put in a third party claim and moved in Federal Court to set aside the seizure notice on the grounds that the property was not that of SPF, the judgment debtor, and that to allow the seizure would reintroduce the State of Ukraine as a judgment debtor, against which arbitration proceedings had been discontinued. In turn, appellant moved to dispute the notices of objection and third party claim, for a determination as to whether Ukraine is a judgment debtor and also to validate the seizure. SPF later sought an order setting aside the Prothonotary's *ex parte* order on the grounds that the Federal Court lacked jurisdiction *ratione materiae* and because Canada was an inappropriate forum. When Prothonotary Tabib granted the appellant's motion, SPF and Antonov appealed and Ukraine sought leave to intervene. Ukraine later moved under rule 399 for a declaration that Prothonotary Morneau lacked jurisdiction (1) due to *State Immunity Act*, section 3, and (2) because a prothonotary does not have power to grant relief upon an application under rules 327, 328. Martineau J. held a case management conference at which he indicated his unwillingness to entertain arguments concerning state immunity or Federal Court jurisdiction when the "new jurisdictional issue" came on for hearing.

Held, the appeals should be dismissed.

Dealing first with the rule 399 motions, it was suggested that SPF's motion was out of time. While the rule does not impose a time limit within which a motion may be filed, Hugessen J. stated in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, that the "public interest in the stability and finality of the judicial process . . . lend[s] weight to the case law which holds that motions of this sort must be brought with reasonable diligence". Here, 12 months had elapsed before SPF raised the issue and, in normal circumstances, such delay would be fatal. This was not, however, a normal situation; the case was still very much alive when the issue was at last raised and it was advanced the first time the case came in front of a judge. This was an important jurisdictional issue and, in all the circumstances, the Court was prepared to entertain SPF's rule 399 motion. The delay could go to costs.

The powers of prothonotaries were reviewed recently by this Court in *First Canadians' Constitution Draft Committee, The United Korean Government v. Canada*. It was therein recognized that prothonotaries' powers have, over time, been augmented, but mostly in respect of pre-trial and post-judgment proceedings. The Rules no longer allow them to act merely on the parties' consent. *Federal Courts Act*, subsection 12(1) provides for the appointment of prothonotaries who are necessary for the efficient performance of "the work of the Court that, under the Rules, is to be performed by them". Their general powers are set out in rule 50. They are to hear motions (subject to some 12 exceptions) as well as certain actions in which the amount claimed does not exceed $50,000. In addition, they play a role in case management, pre-trial and dispute resolution conferences. Proceedings can be commenced only by an action, application or appeal. They cannot be launched by motion. Motions are governed by specific rules found in Part 7: rules 358-371. Rule 2 defines a motion as a request to enforce the Rules but it is clear that such "request" lacks the standing of an action, application or appeal to which a motion is most often incidental. Rule 50 does not grant prothonotaries any power with respect to the final disposition of an appeal or application; an application for the registration and

enforcement of a foreign judgment is an "application" and accordingly falls outside the scope of their authority. Regardless of what the practice is--or was under the former Rules--a prothonotary does not have the jurisdiction to determine an application under rules 327-334. The Court was unable to agree that the enforcement of a foreign judgment was nothing more than a post-judgment proceeding and so within a prothonotary's jurisdiction.

Nor could the Prothonotary's order be saved by rule 56, which concerns non-compliance with the Rules. The appellant relied upon an English Court of Appeal case, *Harkness v. Bell's Asbestos and Engineering, Ltd.*, in which leave of the "court" to bring an action was granted by a district registrar (similar to a prothonotary) rather than by a judge in chambers. The Court found this to have been a mere irregularity curable under a rule much like our rule 56. This Court could not agree that the making by a non-judge of an order which only a judge can make is a mere non-compliance with the Rules. Rather, it is a matter of jurisdiction. An "irregularity" could, under the *Federal Courts Rules*, be equated with "nullity" in certain circumstances. Under the Rules of the Federal Court of Canada, the concept of "non-compliance" has always been confined to matters of form as opposed to matters of jurisdiction. The entire exercise herein was essentially flawed, in both form and substance. The decision in *Harkness* could, perhaps, be explained by its highly unusual circumstances. Years had passed before the problem came to light and a new rule conferring authority upon a judge rather than a master had not come to the attention of the profession. Even if what had taken place herein could be looked upon as "non-compliance", it would be non-compliance with the Act, not the Rules. If a prothonotary purports to exercise an authority he does not possess, he acts outside the Rules and in non-compliance with the Act. Reference could be made to a number of Canadian cases in which decisions of masters were set aside as made without jurisdiction. Rule 56 was not applicable.

Nor could the impugned decision be saved by the "*de facto* doctrine", which imparts validity to the official acts of those who make decisions under colour of

authority. There was here no colour of authority to start with. It may be that the Prothonotary acted under a mistake on the part of the person induced to assign the file to him rather than to a judge, but he did what only a judge can do. No case law supported the proposition that the *de facto* doctrine could justify the performance of judicial duties by a non-judge. Furthermore, an order enforcing the award ought not to have been granted *ex parte*.

Turning to the *nunc pro tunc* motion, Martineau J. did not err in noting that, upon an *ex parte* motion, the moving party bears a duty of full and fair disclosure of all the material facts. Under paragraph 329(1)(*g*) of the Rules, an applicant must file an affidavit that "having made careful and full inquiries, the applicant knows of no impediment to registration, recognition or enforcement of the foreign judgment". That is in addition to the common law requirement of a high duty of disclosure upon an *ex parte* applicant. As was said by Sharpe J. in *United States of America v. Friedland*, such an applicant "is not entitled to present only its side of the case in the best possible light, as it would if the other side were present . . . the moving party . . . must inform the Court of any points of fact or law known to it which favour the other side". Although that was said in the *ex parte* injunctions context, the principle was applicable herein. On any *ex parte* application, the utmost good faith must be observed because the applicant is invoking a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard. The appellant, TMR Energy Limited, supplied an affidavit that it knew of no impediment to registration though in fact the corporation was of the view that the judgment debtor under the award was the State of Ukraine (not SPF) and its intention was to use Canadian registration of the award against SPF in order to enforce the award, in Canada, against Ukraine. This was very much material. Where, as here, the judgment creditor describes the judgment debtor in such a way as to create confusion from which it plans to seek benefits, the Court has a right to know, prior to granting on *ex parte* order, that the creditor's intention is to enforce the award against an entity which is not, properly speaking, the judgment debtor under the award. TMR ought to have disclosed the

impediments of which it was aware in order to alert the Court that the *State Immunity Act* might apply.

statutes and regulations judicially considered

Federal Court Rules, C.R.C., c. 663, R. 336.

Federal Courts Act, R.S.C., 1985, c. F-7 , ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 12(1) (as am. *idem*, s. 20), (3), 46(1)(*h*) (as am. by S.C. 1990, c. 8, s. 14; 2002, c. 8, s. 44).

Federal Court Rules, 1998, SOR/98-106, rr. 2 "action", "appeal", "application", "Court", "motion", 24, 50, 56, 57, 58, 59, 60, 61, Part 4 (rr. 169-299), Part 5 (rr. 300-334), Part 6 (rr. 335-357), Part 7 (rr. 358-371), 383, 387, 399.

Federal Courts Rules, SOR/98-106, (as am. by SOR/2004- 283, s. 2).

State Immunity Act, R.S.C., 1985, c. S-18 , s. 3.

cases judicially considered

applied:

Canadian National Railway Co. v. Canadian Transport Commission, reflex, [1988] 2 F.C. 437; (1987), 13 F.T.R. 52 (T.D.); *Coppard v. Customs and Excise Commissioners*, [2003] EWCA Civ 511; [2003] E.W.J. No. 2101 (QL); *Iscar Ltd. v. Karl Hertel GmbH*, reflex, [1989] 3 F.C. 479; (1989), 24 C.I.P.R. 202; 25 C.P.R. (3d) 116; 27 F.T.R. 186 (T.D.); *Gibb v. Nigeria* (2003), 341 A.R. 339; 20 Alta. L.R. (4th) 190; 2003 ABQB 604; *Anlaby v. Praetorius* (1888), 20 Q.B.D. 764 (C.A.); *Foster v. Chubb Insurance Co. of Canada*, [1998] O.J. No. 2283 (Gen. Div.) (QL); *McGrath v. St. Phillips's (Town)* reflex, (1985), 51 Nfld. & P.E.I.R. 276 (Nfld. C.A.); *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.); *Landhurst Leasing plc v. Marcq*, [1997] E.W.J. No. 1490 (C.A.) (QL); *Canadian Paraplegic Assn. (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.* 1997 CanLII 14645 (NL CA), (1997), 150 Nfld. & P.E.I.R. 203 (Nfld. C.A.).

reversed:

TMR Energy Ltd. v. State Property Fund of Ukraine 2003 FC 1517 (CanLII), (2003), 244 F.T.R. 1; 2003 FC 1517.

considered:

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development) 1999 CanLII 8853 (FC), (1999), 189 F.T.R. 111 (F.C.T.D.); *First Canadians' Constitution Draft Committee, The United Korean Government v. Canada* 2004 FCA 93 (CanLII), (2004), 238 D.L.R. (4th) 306; 317 N.R. 352; 2004 FCA 93; *Vaughan v. Canada* 2000 CanLII 15069 (FC), (2000), 184 F.T.R. 197 (F.C.T.D.); *Harkness v. Bell's Asbestos and Engineering, Ltd.*, [1966] 3 All E.R. 843 (C.A.); *Prenor Trust Co. of Canada v. Seawood Enterprises Ltd.* 1993 CanLII 3190 (NS CA), (1993), 121 N.S.R. (2d) 144; 16 C.P.C. (3d) 30 (N.S.C.A.); *Norsk Hydro ASA v. State Property Fund of Ukraine and Ors*, [2002] EWHC 2120 (Comm.).

referred to:

Fawdry & Co. v. Murfitt, [2002] EWCA Civ 643; [2002] E.W.J. No. 2149 (QL).

CONSOLIDATED APPEALS from Federal Court orders (1) setting aside a prothonotary's *ex parte* order granting an application under rule 327 of the *Federal Court Rules, 1998* in respect of a foreign arbitral award and (2) denying an *ex parte* order *nunc pro tunc* to register and enforce the award. Appeals dismissed.

appearances:

Richard L. Desgagnés, François Fontaine, Azim Hussain and *Brian R. Daley* for appellant (applicant).

George J. Pollack and *Louis-Martin O'Neill* for respondent (respondent).

Thomas G. Heintzman, Q.C. and *David E. Platts* for respondent (intervener) ANTK Antonov.

Frank J. C. Newbould, Q.C. and *Lou Kozak, Q.C.* for respondent (intervener) State of Ukraine.

solicitors of record:

Ogilvy Renault, Montréal, for appellant (applicant).

Davies Ward Phillips & Vineberg LLP, Montréal, for respondent (respondent).

McCarthy Tétrault LLP, Toronto and Montréal, for respondent (intervener) ANTK Antonov.

Borden Ladner Gervais LLP, Toronto, for respondent (intervener) State of Ukraine.

The following are the reasons for judgment rendered in English by

[1]Décary J.A.: In an order dated September 22, 2004, Martineau J. granted the respondents' motions under rule 399 [of the *Federal Court Rules, 1998*, SOR/98-106] and set aside an order made *ex parte* by Prothonotary Morneau. He found that the Prothonotary did not have jurisdiction to grant an application brought under rule 327 of the *Federal Court Rules, 1998* for registration, recognition and enforcement of a foreign arbitral award. He went on to conclude that the Prothonotary's order was a nullity, that "such a fundamental jurisdictional error cannot be saved or cured under the *de facto* officer doctrine, Rule 56, Rule 399, or for any reason invoked by TMR", and "that all proceedings occurring subsequent to and in furtherance of said order" were "null and void and of no force and effect."

[2]In a parallel order dated the same day, Martineau J. denied the request made by the appellant TMR Energy Limited (TMR) for an *ex parte* order *nunc pro tunc* (or *de bene esse*) registering, recognizing, and enforcing the award on the basis of the record as it then was at the time the original application was made to the Court, that is on January 15, 2003. The Judge was of the view that TMR had not fully disclosed to the Prothonotary the impediments to the registration, recognition and enforcement of the award. His order was made "without prejudice to TMR's right to re-present its original application or present a fresh application. . . , provided that the notice of application be served on the judgment debtor in the manner specified in section 9 of the *State Immunity Act*."

[3]TMR appealed the two orders in files A-496-04 (the second order) and A-497-94 (the first order). The appeals were consolidated and heard together. The reasons that follow will dispose of both appeals, the original being filed in A-496-04, copy in A-497-04.

The facts

[4]A brief recital of the relevant facts and proceedings is warranted at this stage.

[5]On May 30, 2002, the Arbitration Institute of the Stockholm Chamber of Commerce (the Institute) renders a final arbitral award (the award) in favour of TMR against the respondent the State Property Fund of Ukraine (SPF). The award is for a total sum of some US$40 million.

[6]It appears from the record (A.B., Vol. 1, pages 42 and 128) that TMR had also joined the State of Ukraine as a respondent separate entity in the same proceeding before the Institute, but had eventually discontinued that proceeding without prejudice.

[7]On January 15, 2003, TMR files *ex parte*, in Montréal, a "Notice of Application for Registration of Foreign Arbitral Award" under rules 327 and 328 of the *Federal Court Rules, 1998* (as they were then referred to), the award being that "granted against the State Property Fund of Ukraine." The notice of application names as respondent "State Property Fund of Ukraine," whom it describes in the style of cause as "an organ of the State of Ukraine" (A.B., Vol. 1, page 29).

[8]In the material filed in support of the notice of application, TMR alleges that SPF is "an organ of the State of Ukraine" (A.B., Vol. 1, page 35) whose Canadian address is believed to be the Embassy of Ukraine, in Canada. A French and a Swedish lawyer state in their respective affidavits that they "know of no impediment to the registration, recognition or enforcement of the Final Arbitral Award" (A.B., Vol. 1, pages 131, 295). A Canadian lawyer makes the same statement in an affidavit, but only on the basis of the two affidavits referred to above (A.B., Vol. 1, page 37). Two letters emanating from TMR and addressed to SPF, dated respectively June 14, 2002 and July 1, 2002, are also filed, in which TMR puts SPF on notice that (A.B., Vol. 1, pages 288, 290):

In the event we do not receive payment in the above indicated time frame, we would be left with no choice but to instruct our attorneys to take all appropriate measures in Ukraine and in all jurisdictions where the State of Ukraine has assets in order to obtain compulsory enforcement of the Final Award . . . .

. . .

Before we commence enforcement proceedings in various jurisdictions on the assets of the State of Ukraine to satisfy the Final Award . . . .

[9]The application is referred by the Registry to a prothonotary. On January 17, 2003, Prothonotary Morneau, after hearing from counsel for TMR, grants the *ex parte* application in the following terms:

HAVING READ the Applicant's *ex parte* Notice of Application for Registration, Recognition, and Enforcement of Foreign Arbitral Award under Rules 327 and 328 of the *Federal Court Rules, 1998*, and the material in support thereof and having heard representations by counsel for the Applicant, it is ordered that:

1. The Final Arbitral Award granted against the State Property Fund of Ukraine by the arbitral tribunal constituted pursuant to the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, on 30 May 2002, is hereby registered, recognized and shall be enforceable as any other judgment of this Court. However, unless the Court orders otherwise, execution shall not be issued for 60 days following service of this Order;

2. The State Property Fund of Ukraine must pay to the Applicant the sum of $56,363,127.57 CDN, being the equivalent of $36,711,475.00 USD, in damages;

3. The State Property Fund of Ukraine must pay to the Applicant the sum of $3,963,170.35 CDN, being the equivalent of $2,546,533.67 USD, in interest accruing until 31 December 2002;

4. The State Property Fund of Ukraine must pay to the Applicant the sum of $1,535,300 CDN, being the equivalent of $1,000,000 USD, as the Applicant's arbitration costs;

5. The State Property Fund of Ukraine must pay to the Applicant the sum of $397,773.40 CDN, being the equivalent of 277,426, as the Arbitrators' fees and expenses;

6. The State Property Fund of Ukraine must pay to the Applicant the sum of $775.50 CDN, being the equivalent of 5,000 Swedish Kroner, as the Arbitrators' fees and expenses;

7. The State Property Fund of Ukraine must pay to the Applicant the sum of $551.17 CDN, being the equivalent of $359 USD, as the Arbitrators' fees and expenses;

8. The State Property Fund of Ukraine must pay to the Applicant, as per the terms of the Final Arbitral Award, interest at a rate equivalent to the one-month LIBOR rate plus 5% on the sum of $30,545,045 USD, from 1 January 2003 up to payment;

9. The grand total amounts to $62,260,697.99 CDN plus the interest calculated under para. 8;

With costs and post-registration interest on the sum of $11,401,720.05 CDN at the rate set out in the *Interest Act*, s. 3 (5%), against the State Property Fund of Ukraine.

[10]The Prothonotary's order, as required therein, is served on SPF on March 4, 2003. Even though not so required, TMR attempts, on January 22, 2003, to serve the order on the State of Ukraine through the offices of the Canadian Department of Foreign Affairs and International Trade. TMR is, however, advised by the Department on July 2, 2004 that the State of Ukraine had refused, some time in February 2003, to be served with the order (A.B., Vol. 2, page 420):

As explained to you earlier, since the Order was not an originating document (s. 9) nor an order arising from an originating document served under the "State Immunity Act" (s. 10) it could not be served in accordance with the method set out in the "State Immunity Act."

[11]SPF does not appeal the Prothonotary's order.

[12]On June 11, 2003, TMR makes a request for a writ of seizure and sale directed to the sheriff of any county of any province in Canada and/or to the bailiff of the province of Quebec. According to the summary of the recorded entries, the request was made "to seize the State of Ukraine further to the registration of the Foreign Arbitral Award" but a draft was prepared by Prothonotary Morneau with respect to the "Respondent `State Property Fund of Ukraine, an organ of the State of Ukraine' *tel qu'indiqué sur le projet de Bref ci-joint*" (Supp. A.B., Tab 3, pages 121, 122).

[13]On June 11, 2003, a writ of seizure and sale is issued by the Registry in Montréal with respect to the property of the respondent, the respondent being referred to in the style of cause as "State Property Fund of Ukraine, an organ of the STATE of UKRAINE" (Supp. A.B., Tab 4, page 71).

[14]On June 27, 2003, counsel for TMR sends the following letter to a sheriff in St. John's, Newfoundland (Supp. A.B., Tab 5, page 78):

As per our telephone conversation of this morning please find herewith original Order from the Federal Court of Canada.

I confirm to you that the Respondent was served on March 4th, 2003 with an official translation in Ukrainian of the said Court Order and that, since then, the Respondent is aware of the proceedings instituted in Canada and of the fact that the above-referred Order is now executable on any of its property.

I also confirm to you that based on information available the property to be seized is "*property used or intended for a commercial activity*" as per the meaning of section 12(1)(b) of the *State Immunity Act* and that therefore it is not immuned from attachment and execution as per section 12 of the *Act*.

[15]On June 27, 2003, the sheriff issues the following notice of seizure (Supp. A.B., Tab 6, page 68):

To: STATE PROPERTY FUND OF UKRAINE AN ORGAN OF THE STATE OF UKRAINE

KUTUZOVA ST. 18/9 KIEV, 252133, UKRAINE

In the action of: T-60-03 Registration Number: 2003003306

Creditors

TMR ENERGY LIMITED / OGILVY RENAULT

Debtors

STATE PROPERTY FUND

OF UKRAINE /

AN ORGAN OF THE STATE OF UKRAINE

TAKE NOTICE THAT TO SATISFY THE CLAIM(S) AGAINST YOU AS DETAILED ON THE ACCOMPA-NYING ENFORCEMENT DEBT REPORT, WE HAVE BEEN INSTRUCTED BY TMR ENERGY LIMITED TO SEIZE THE FOLLOWING:

Description: "Antonov -124-100 Aircraft" Serial No. 19530501005

Location: Goose Bay Airport, NL

Other Details: Property of the State of Ukraine

The aircraft seized on June 28, 2003 is owned by the State of Ukraine, but is operated by Aviation Scientific Technical Complex name OP (ANTK) Antonov (Antonov).

[16]On July 4, 2003, the sheriff issues a notice of sale of property. The sale is to be made on August 18, 2003 (Supp. A.B., Tab 6, page 69).

[17]As a result of a notice of objection filed by SPF and of a notice of third party claim filed by Antonov on July 11, 2003, the sheriff, on July 17, 2003, finds both notices "to be effective" and informs the "Creditor" that it "may apply to a court of competent jurisdiction to dispute an objection or a claim within 15 days" failing which "the property shall be released from seizure" (Supp. A.B., Tab 7, pages 103-109).

[18]On July 18, 2003, Antonov serves a notice of motion in the Federal Court for an order setting aside the notice of seizure on the grounds, essentially, that the property seized was not the property of the judgment debtor SPF, that to permit the seizure would be to reintroduce the State of Ukraine, against which arbitration proceedings had been discontinued, as a judgment debtor and that neither the State of Ukraine nor Antonov was served with the Prothonotary's order dated January 17, 2003 (Supp. A.B., Tab 9).

[19]On August 1, 2003, pursuant to the sheriff's notice, TMR serves a notice of motion in the Federal Court to dispute the notice of objection and the notice of third party claim. The motion also seeks to determine whether the State of Ukraine is a judgment debtor and to validate the seizure of the aircraft (Supp. A.B., Tab 10).

[20]On August 8, 2003, SPF serves a notice of motion for an order setting aside the *ex parte* order of Prothonotary Morneau issued on January 17, 2003 on the grounds, *inter alia*, that the award was not yet enforceable, that the Federal Court had no jurisdiction *ratione materiae* and that Canada was not the appropriate forum (Supp. A.B., Tab 11).

[21]The motion served by TMR on August 1, 2003 is heard by Prothonotary Tabib in August and September 2003. Both SPF and Antonov appear at the hearing, the latter as an intervener.

[22]On December 23, 2003 [2003 FC 1517 (CanLII), (2003), 244 F.T.R. 1], Prothonotary Tabib grants TMR's motion, finds that the State of Ukraine is the judgment debtor under the award and validates the seizure of the aircraft.

[23]On January 15 and 16, 2004, SPF and Antonov file an appeal from the order of Prothonotary Tabib. On January 19, 2004, the State of Ukraine seeks leave to intervene in the appeal. Motions for directions filed by SPF and the State of Ukraine are heard by the case management Judge, Martineau J., on February 19, 2004. The day before, i.e. on February 18, 2004, counsel for Antonov had informed Martineau J. that he intended to argue that Prothonotary Morneau lacked authority to issue the order of January 17, 2003.

[24]On March 11, 2004, Martineau J. orders, *inter alia*, that "the new jurisdictional issue be raised by way of a motion under Rule 399 to set aside the order made by Prothonotary Richard Morneau on January 17, 2003" (A.B., Vol. 2, page 602).

[25]On March 24, 2004, the State of Ukraine serves a notice of motion under rule 399 for an order declaring that Prothonotary Morneau had no jurisdiction by reason of section 3 of the *State Immunity Act* [R.S.C., 1985, c. S-18] and by reason of the lack of jurisdiction of a prothonotary to make orders in an application under rules 327 and 328 (A.B., Vol. 2, page 381).

[26]Also on March 24, 2004, SPF serves a notice of motion for an order declaring that Prothonotary Morneau's order was issued without jurisdiction (A.B., Vol. 2, page 383).

[27]Also on March 24, 2004, Antonov serves a notice of motion under rule 399 for an order declaring that Prothonotary Morneau's order was issued without jurisdiction (A.B., Vol. 2, page 387).

[28]On June 23, 2004, at a case management conference, Martineau J. directs that, at the hearing on the "new jurisdictional issue," he does not want to hear arguments regarding state immunity or the Federal Court's jurisdiction. He also

directs TMR to file a motion for "protective measures" in the eventuality that he would grant the motion challenging the authority of Prothonotary Morneau.

[29]On July 7, 2004, TMR serves its motion for protective measures in which it seeks different orders, including an order *nunc pro tunc* registering, recognizing and enforcing the award "as of 17 January 2003 on the basis of the record as it then was" (A.B., Vol. 2, page 390).

[30]Hearings are held with respect to the motions served by SPF, the State of Ukraine and Antonov on March 24, 2004 (the rule 399 motions) and with respect to the TMR motion served on July 7, 2004 (the *nunc pro tunc* motion) in August 2004. On September 22, 2004, Martineau J. issues the orders which are impugned in these appeals and which have been referred to in paragraphs 1 and 2 of these reasons.

The rule 399 motions (file A-497-04)

[31]Rule 399 allows the Court to set aside or vary an order that was made *ex parte* if the party against whom the order is made discloses a *prima facie* case why the order should not have been made. It is not clear to me on what basis Antonov, and to a lesser extent the State of Ukraine, against neither of whom Prothonotary Morneau's order of January 17, 2003 had been issued, were invited by Martineau J. to file a motion under rule 399, but nothing turns on this as SPF was a proper party applicant.

[32]I will deal first with TMR's argument that SPF's motion was made out of time. Rule 399 sets no time limit for the filing of the motion. As noted, however, by Hugessen J. in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* 1999 CanLII 8853 (FC), (1999), 189 F.T.R. 111 (F.C.T.D.), paragraph 14, "that is not to say that Rule 399 establishes an endless open reason for attacks upon judgments. Quite the contrary. The public interest in the stability and finality of the judicial process . . . all lend weight to the case law which holds that motions of this sort must be brought with reasonable diligence."

[33]In the case at bar, Prothonotary Morneau's order was served on SPF in March 2003. The issue of the Prothonotary's authority was first raised in February 2004 and the rule 399 motions were served in March 2004. A period of 12 months thus elapsed, during which SPF had multiple occasions, if one was needed, to raise the issue, including when it served its first rule 399 motion on August 8, 2003 (see paragraph 20). In normal circumstances, this lengthy delay would have been fatal to SPF. But these are not normal circumstances. The issue could obviously have been raised earlier and I am not insensitive to the suggestion made by TMR that the attack on the authority of Prothonotary Morneau is a strategical afterthought springing from Prothonotary Tabib's decision to uphold the seizure of the aircraft. The fact is, however, that the case was still very much alive when the issue was finally raised, that the issue was raised the very first time the case went to a judge, that the issue of the nullity of the Prothonotary's order could probably have been raised at that time by the Judge himself, that TMR itself could have raised it from the start, when it first appeared before Prothonotary Morneau, and that the motion was filed at that late time at the very invitation of Martineau J. We are dealing here with an important jurisdictional issue. The award is yet to be enforced. A fresh application for registration, recognition and enforcement of the award under rule 327 may yet be made and disposed of by the proper authority. All in all, I am prepared to entertain SPF's rule 399 motion. The argument with respect to tardiness may be better addressed when we reach the issue of costs.

[34]Turning now to the merit of the appeal, I agree with Martineau J. that a prothonotary does not have the authority to dispose of an application for registration, recognition or enforcement of a foreign judgment brought under rules 326-334. I also agree with him that the Prothonotary's order cannot be cured by the application of rule 56 which deals with non-compliance with the Rules nor by the *de facto* doctrine.

The authority of the prothonotary

[35]An examination of the powers of the prothonotaries has recently been done by this Court in *First Canadians' Constitution Draft Committee, The United Korean Government v. Canada* 2004 FCA 93 (CanLII), (2004), 238 D.L.R (4th) 306 (F.C.A.). While it is true, as noted in *First Canadians'*, that the jurisdiction of prothonotaries has been greatly expanded over time, the fact is that this expansion has essentially been circumscribed to pre-trial proceedings (except injunctions) and post-judgment proceedings and is by law limited to the powers determined by the rules committee of the Federal Court. There is no longer any provision in the Rules whereby prothonotaries are empowered to act on the mere consent of the parties (see former Rule 336 [of the *Federal Court Rules*, C.R.C., c. 663]).

[36]Subsection 12(1) [as am. by S.C. 2002, c. 8, s. 20] of the *Federal Courts Act* [R.S.C., 1985, c. F-7 , s. 1 (as am. by S.C. 2002, c. 8, s. 14)] provides for the appointment of prothonotaries "who are . . . necessary for the efficient performance of the work of the Court that, under the Rules, is to be performed by them" (my emphasis). Subsection 12(3) then goes on to specify that "the powers, duties and functions of the prothonotaries shall be determined by the Rules" (my emphasis). Rule 2 defines "Court" as including "a prothonotary acting within the jurisdiction conferred under [the] Rules" (my emphasis). Paragraph 46(1)(*h*) [as am. by S.C. 1990, c. 8, s. 14; 2002, c. 8, s. 44] of the *Federal Courts Act* states by whom and the manner in which powers are to be vested in prothonotaries:

46. (1) Subject to the approval of the Governor in Council and subject also to subsection (4), the rules committee may make general rules and orders

. . .

(*h*) empowering a prothonotary to exercise any authority or jurisdiction, subject to supervision by the Federal Court, even though the authority or jurisdiction may be of a judicial nature;

[37]The general powers, duties and functions of prothonotaries are set out in rule 50. Subsection 50(1) states that:

50. (1) A prothonotary may hear, and make any necessary orders relating to, any motion under these Rules other than a motion [there follows a list of twelve exceptions, none of which is applicable here]. [My emphasis.]

Subsections 50(2) and (3) of the Rules give prothonotaries the power to hear certain actions in which the amount claimed does not exceed $50,000. Rules 266, 383 and 387 expressly recognize the role of prothonotaries in pre-trial conferences, case management and dispute resolution conferences.

[38]To understand the jurisdiction of prothonotaries under the *Federal Court Rules, 1998*, it is important to distinguish between actions, applications and appeals, which are the only ways allowed by the Rules to commence proceedings, on the one hand, and motions, on the second hand.

[39]Rule 61 provides that proceedings may be commenced as an action, as an application or as an appeal. An "action" is defined in rule 2 as "a proceeding referred to in rule 169" (i.e. in Part 4 of the Rules, which extends from rule 169 to rule 299). An "application" is defined in rule 2 as "a proceeding referred to in rule 300" (i.e. in Part 5 of the Rules, which extends from rule 300 to rule 334). An "appeal" is defined in rule 2 as "a proceeding referred to in rule 335" (i.e. in Part 6 of the Rules, which extends from rule 335 to rule 357).

[40]A motion is not, therefore, a manner to bring proceedings to the Federal Court and "motions" are governed by specific rules found in Part 7 (which extends from rule 358 to rule 371). Rule 24 goes so far as making sure that notices of motion for extension of time to bring an action, an application or an appeal that has not yet commenced are kept in separate files. Even though a "motion" is defined in rule 2 as "a request to the Court under, or to enforce, these Rules," it is clear from the Rules when read in their totality that such "request" does not have the same standing or function as that of actions, applications and appeals and that motions are generally incidental to actions, applications or appeals that have commenced or are about to commence.

[41]When read in that context, it is obvious that rule 50 does not grant to prothonotaries any power with respect to the final disposition of applications and

appeals and grants them a limited jurisdiction with respect to the final disposition of actions. As noted by McGillis J. in *Vaughan v. Canada* 2000 CanLII 15069 (FC), (2000), 184 F.T.R. 197 (F.C.T.D.), at paragraph 14, "Rule 50 expanded the jurisdiction of prothonotaries to permit them to hear and make orders relating to any motion, except those specifically exempt by the Rule, and to hear certain actions" (my emphasis). And in *First Canadians'*, this Court, in paragraph 9, noted that the "distinction between `motion' and `action' was clearly in the mind of the regulator." The same may be said with respect to the distinction between "motion" and "application." An application for registration, recognition or enforcement of a foreign judgment is described as an "application" in paragraph 300(*h*) and it is governed by rules 327-334, which are found in Part 5 of the Rules. It cannot therefore be disposed of by a prothonotary even though motions pertaining to it may be entertained by the prothonotary.

[42]Whatever might have been the law or practice under the former Rules or whatever might be the practice under the present Rules, a prothonotary does not have the jurisdiction, under the present Rules, to determine an application brought under rules 327-334. Jurisdiction is to be found in the Rules of the Court; it cannot be found in mere rules of practice, even more so where such rules of practice are inconsistent with the Rules.

[43]The appellant argues that an application for registration, recognition or enforcement of a foreign judgment does not result in any substantive rights being granted and amounts to a post-judgment proceeding which falls typically within the realm of prothonotaries. I do not agree. The effect of a registration, recognition or enforcement of a foreign judgment order is to give the foreign judgment creditor the same rights as if the judgment had been obtained in Canada; in that sense, the order is a "judgment" rather than a "post-judgment".

[44]I, therefore, find that Prothonotary Morneau did not have jurisdiction to dispose of the application made under rule 327. The appellant suggests, in the event of a finding by the Court of lack of jurisdiction, that rule 56 could save the order made by the Prothonotary and that the respondents are out of time, under

rule 58, to attack what the appellant describes to be a mere "irregularity." I am prepared to accept that a rule 56 motion was implicitly made by the appellant.

Rule 56 and non-compliance with the Rules

[45]Rules 56 to 60 deal with non-compliance with the Rules. They read as follows:

Failure to Comply with Rules

56. Non-compliance with any of these Rules does not render a proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under rules 58 to 60.

57. An originating document shall not be set aside only on the ground that a different originating document should have been used.

58. (1) A party may by motion challenge any step taken by another party for non-compliance with these Rules.

(2) A motion under subsection (1) shall be brought as soon as practicable after the moving party obtains knowledge of the irregularity.

59. Subject to rule 57, where, on a motion brought under rule 58, the Court finds that a party has not complied with these Rules, the Court may, by order,

(*a*) dismiss the motion, where the motion was not brought within a sufficient time after the moving party became aware of the irregularity to avoid prejudice to the respondent in the motion;

(*b*) grant any amendments required to address the irregularity; or

(*c*) set aside the proceeding, in whole or in part.

60. At any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Court considers just.

[46]The appellant relies essentially on statements made by Lord Denning, M.R., and by Lord Justice Diplock in *Harkness v. Bell's Asbestos and Engineering, Ltd.*, [1966] 3 All E.R. 843 (C.A.). In that case, the applicable limitation statute required that the plaintiff obtain leave of the "court" to bring an action. Leave was granted

by a district registrar (similar to a master or a prothonotary) as opposed to a judge in chambers. The English Court of Appeal found that this was an irregularity that could be cured through a rule bearing a close resemblance to our rule 56:

This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that "it is not possible. . . for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. [Lord Denning, M.R., at pages 845-846.]

If [the plaintiff] has followed, as I have no doubt that he has, the intricacies of the interlocutory proceedings in this case, he must have thought that the law is an ass. I am not sure that this judgment will change his opinion, but at any rate he will not feel it to be so unjust an ass as he must previously have felt it to be. It was to remedy just this kind of injustice that the new R.S.C., Ord. 2, r. 1 was made. [Diplock L.J., at page 846.]

[47]I pause here to point out that the language used by Lord Denning, "the old distinction between nullities and irregularities," is somehow misleading, at least in a Canadian perspective. The focus should be on whether a given act or omission may be described as a "non-compliance with the Rules," "*une inobservation des Règles*." For reasons which I will express forthwith, the making by a non-judge of an order which only a judge can make cannot be characterized as a mere "non-compliance with the Rules." It is a matter of lack of jurisdiction. An additional reason to be cautious in adopting Lord Denning's language in interpreting the *Federal Courts Rules* [as am. by SOR/2004-283 , s. 2] is that by virtue of paragraph 59(*c*), where there is non-compliance with the Rules that constitutes an irregularity for the purposes of rule 56, nullity may still ensue. In Lord Denning's own language, therefore, "irregularity" could, under the *Federal Courts Rules*, be equated with "nullity" in some circumstances.

[48]Rule 56, in its earlier formulation, was never intended to treat as non-compliance with the Rules an act in excess of jurisdiction by a prothonotary and it has never been interpreted in that fashion. The very concept of "non-compliance" has always been confined to matters of form as opposed to matters of jurisdiction. As observed by McNair J. in *Canadian National Railway Co. v. Canadian Transport Commission*, reflex, [1988] 2 F.C. 437 (T.D.), at page 449:

Matters of practice and questions of jurisdiction are two separate and distinct things.

[49]One wonders, also, what it is that could be corrected, amended or remedied, and how it could be done under rules 59 and 60, when an order has been made outside jurisdiction. Whether the alleged "irregularity" be that of the Chief Justice or of the Registry in assigning the matter to the prothonotary or that of the prothonotary in exercising the jurisdiction, surely one cannot substitute the name of a judge to that of a prothonotary on the order, nor can a new order be signed by a judge without a *de novo* hearing of the application. It is the whole exercise which is flawed at its base, both in form and in substance. In these circumstances, I find Lord Denning's statement, when applied to the facts before him, incompatible with the later observations made by Lord Justice Sedley, for the England and Wales Court of Appeal, in *Coppard v. Customs and Excise Commissioners*, [2003] EWCA Civ 511, [2003] E.W.J. No. 2101 (QL), paragraph 13:

The one answer to the appeal which in our judgment is unacceptable in principle is that advanced, perhaps more out of hope than out of conviction, by counsel for the Commissioners, Mr. Michael Patchett-Joyce, that the want of authority was a simple error of procedure which by virtue of CPR 3.10 does not of itself invalidate any step taken on the basis of it. It would do little for the rule of law and for constitutional propriety to relegate an issue as important as qualification for judicial office to the realm of procedure. [My emphasis.]

[50]The decision of the English Court of Appeal in *Harkness* may perhaps be explained by the very exceptional circumstances that led to it and which are not

to be found in the present case. There had been no oral hearing of the application for leave, therefore no opportunity to question the authority of the decision maker. Years had gone by before the flaws in the proceedings had been discovered. The new rule that conferred the authority to a judge rather than to a master had not been circulated or published in such a way as to come to the notice of practitioners. It was far too late to make a fresh application for leave to a judge. "Nothing else would do," said Lord Denning [at page 844], "[s]o he [the applicant] had to get the registrar's order rectified and treated as good as at that date, April, 1964, or he would surely fail." And, perhaps more importantly, it was not argued that the order, had it been decided by the proper authority, might have been different.

[51]Assuming for the sake of discussion that the lack of authority of the prothonotary could be described as some form of "non-compliance," such non-compliance would be, not with the Rules, but with the Act. As noted by Jerome A.C.J. in *Iscar Ltd. v. Karl Hertel GmbH*, reflex, [1989] 3 F.C. 479 (T.D.), at page 484, the jurisdiction of the prothonotary "springs from subsection 46(1) [of the *Federal Court Act*]" and "does not originate in our rule or my practice note, but in the *Federal Court Act*." I might add that the jurisdiction of prothonotaries also springs from subsection 12(3) of the *Federal Courts Act*, which provides that "the powers, duties and functions of the prothonotaries shall be determined by the Rules." The Chief Justice of the Federal Court, in assigning to the prothonotary a matter over which he has no jurisdiction, or a prothonotary, in exercising an authority he or she does not possess, acts outside of the Rules and fails in reality to comply with the Act.

[52]My interpretation finds support in many decisions rendered by other Canadian courts. In *Gibb v. Nigeria* reflex, (2003), 341 A.R. 339 (Q.B.), Hutchinson J. found that a default judgment obtained by application to the Master was a nullity as the Master had no authority to deal with such application (paragraph 2). In finding that the plaintiff had "acted outside of the Rules of Court in making an application for judgment before the Master and not before a judge

resulting in an invalid judgment" (paragraph 22), Hutchinson J. relied on the old decision of the English Court of Appeal in *Anlaby v. Praetorius* (1888), 20 Q.B.D. 764 (C.A.), where a default judgment had been entered prematurely and where Lord Justice Fry had stated, at page 769:

But in the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any judgment at all.

[53]In *Foster v. Chubb Insurance Co. of Canada*, [1998] O.J. No. 2283 (Gen. Div.) (QL), Morin J. found that the Master had no jurisdiction to determine a question of law in a motion for summary judgment and he set aside the Master's decision. He granted leave to the defendant to renew its motion for summary judgment before a judge.

[54]In *McGrath v. St. Phillip's (Town)* reflex, (1985), 51 Nfld. & P.E.I.R. 276, the Newfoundland Court of Appeal held that the practice which had developed to refer a matter to a Master to determine the measure of damages should be disregarded as a Master had no such authority. The Master's report was declared null and void.

[55]I note that in *Prenor Trust Co. of Canada v. Seawood Enterprises Ltd.* 1993 CanLII 3190 (NS CA), (1993), 121 N.S.R. (2d) 144 (C.A.), a prothonotary had made an order extending the time within which an application for a deficiency judgment could be filed. The prothonotary had no jurisdiction to issue such an order. A judge in chambers found this was an irregularity but [at page 146] "not one that the court was prepared, in the circumstances, to cure." The Nova Scotia Court of Appeal allowed the appeal on the basis that, subsequent to the prothonotary's order, an order made by a judge on consent had [at page 146] "conclusively resolved the issue of the timelines." The Court of Appeal does not make any comment on the "irregularity" issue.

[56]I, therefore, reach the conclusion that rule 56 is not applicable. Be that as it may, argues TMR next, the Prothonotary's decision could yet be saved by the "*de facto* doctrine."

The *de facto* doctrine

[57]The *de facto* doctrine imparts validity to the official acts of persons who, in certain circumstances, make decisions under colour of authority. One of the many difficulties I have with this argument in this appeal is that there was no colour of authority to start with. There was, simply, no valid statutory authority under which the Prothonotary could be acting. He had proper legal title to his office, there was no irregularity in his appointment, and he was acting as a prothonotary, not as a judge. He was, perhaps, acting pursuant to a mistake, i.e. the mistake by whomsoever was induced to assign the file to him rather than to a judge, but he was doing something that only a judge could do and he was not a judge nor purporting to be a judge.

[58]Whatever arguments may be made on the *de facto* doctrine, no case law has been quoted to us to the effect that a non-judge may be found under the doctrine to have validly performed judicial duties. This case, it seems to me, is easily distinguishable from those cases where a judge duly appointed and qualified to sit exercises an aspect of his or her court's jurisdiction which he or she is not authorized to entertain (see *Coppard v. Customs and Excise Commissioners*; *Fawdry & Co. v. Murfitt*, [2002] EWCA Civ 643; [2002] E.W.J. No. 2149 (QL)).

[59]In any event, I would not be prepared to hold, on the basis of the *de facto* doctrine, that parties, which are entitled to have an order made by a judge, do not have at least the right to have the matter determined anew by a judge, albeit retroactively. As I find, for the reasons given below, that the order recognizing and enforcing the award ought not to have been made *ex parte*, I would have rejected this first appeal anyway.

[60]I am of the view, therefore, that Prothonotary Morneau had no authority to make the impugned order and that neither rule 56 nor the *de facto* doctrine can be invoked to save the validity of his order.

[61]In the end, the Prothonotary's order dated January 17, 2003 must be set aside on a rule 399 motion for the simple reason that the *ex parte* order could not have been made by him as a Prothonotary. I would therefore dismiss appeal A-497-04.

The *nunc pro tunc* motion (file A-496-04)

[62]Turning to the appeal in file A-496-04, I will assume that Martineau J. had jurisdiction to entertain a *nunc pro tunc* motion where the order at issue has been found to be null for lack of jurisdiction. I need not decide the matter as I have reached the conclusion that no *nunc pro tunc* order should issue in any event.

[63]I have found no reviewable error in Martineau J.'s conclusion that "where a motion or application is made *ex parte*, the moving party or applicant has a duty of full and fair disclosure with respect to all material facts."

[64]TMR chose to make its application under rule 357 *ex parte*, as it was entitled to do. In so doing, however, TMR assumed a duty of full disclosure of all relevant facts. To start with, paragraph 329(1)(*g*) of the Rules requires an applicant to file an affidavit stating that "having made careful and full inquiries, the applicant knows of no impediment to registration, recognition or enforcement of the foreign judgment." In addition to this regulatory requirement, there is a requirement, at common law, of a high duty of disclosure on the part of applicants on *ex parte* applications. The principle was well stated by Sharpe J. (as he then was), in *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.), at paragraph 27:

For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in

any situation where a Judge is asked to grant an order without hearing from the other side.

[65]While stated in the context of *ex parte* injunctions, which are immediately enforceable, as opposed to *ex parte* orders such as the one here at issue which are only enforceable 60 days from the date of their service to the other party, this principle applies beyond the realm of *ex parte* injunctions (see *Landhurst Leasing plc v. Marcq*, [1997] E.W.J. No. 1490 (C.A.) (QL), *per* Beldam L.J., at paragraphs 63-66):

With respect to the Judge I do not think this was quite the right way of looking at the matter. As was held by this Court in *Brinks Mat Ltd. v. Elcombe*, [1988] 1 WLR 1350 the Court, notwithstanding proof of material non-disclosure where an injunction was originally obtained on an *ex parte* application, has still a discretion to continue the injunction or to grant a fresh injunction in its place.

This is, however, a discretion which will be exercised with great caution. It will rarely, if ever, be exercised in a case where the material non-disclosure was deliberate, or where it has caused prejudice to the party enjoined by enabling the applicant to obtain interim relief which he would not otherwise have obtained.

The reasoning behind the rule which requires full and frank disclosure by an applicant on an *ex parte* application, is of course that the Court is being asked to grant relief without the person against whom the relief is sought having the opportunity to be heard. Differing from the Judge on this particular point, I do not think that any different considerations arise merely because the order obtained *ex parte* in the present case was not the grant of an injunction, but an order for the registration of a judgment, application for which the Rules of the Supreme Court require to be made *ex parte* (see Ord. 71, r. 27). Ord. 71, r. 28(1)(d)(ii) placed on the plaintiff an explicit obligation to inform the Court that the relevant judgment had been satisfied in part, and as the Judge rightly held, its failure so to inform the Court constituted a failure to disclose a material fact.

In my judgment the obligation of disclosure imposed on an applicant by Ord. 27, r. 28(1) is no less weighty and serious than the obligation imposed on any *ex*

parte applicant. The duty of full and frank disclosure and the potential consequences of a failure to perform that duty are in my opinion of the same degree as in all other *ex parte* applications. There is no logical reason for distinguishing different types of *ex parte* application in this context.

See *Canadian Paraplegic Assn. (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.* 1997 CanLII 14645 (NL CA), (1997), 150 Nfld. & P.E.I.R. 203 (C.A.), *per* Green J.A., at paragraph 18:

On any *ex parte* application, the utmost good faith must be observed. That requires full and frank disclosure of all material facts known to the applicant or counsel that could reasonably be expected to have a bearing on the outcome of the application. Because counsel for the applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard, counsel is under a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances.

[66]In the case at bar, TMR stated in the affidavits supporting its application that it knew "of no impediment to registration, recognition or enforcement of the foreign judgment." Accepting for the sake of discussion that the filing of vague affidavits by two foreign lawyers satisfies the requirement of "careful and full enquiries" imposed by paragraph 329(1)(*g*) of the Rules, the fact is that at the time it filed its application, TMR was of the view, and had been for some time, that the judgment debtor under the award was the State of Ukraine rather that SPF and that its intention was to use the registration in Canada of the award against SPF in order to enforce the award against the State of Ukraine in Canada. This information was very much material.

[67]I appreciate that the task of a court enforcing an award should be as "mechanistic" as possible and "that the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions" (*Norsk Hydro ASA v. State*

Property Fund of Ukraine and Ors, [2002] EWHC 2120 (Comm.), Gross J. at paragraph 17).

[68]However, where, as here, the judgment creditor describes the judgment debtor in such a way as to create some confusion from which it is planning to seek benefits, the Court has the right to know, before making an *ex parte* order, that the judgment creditor is already preparing to enforce the award in Canada against a debtor which is not, properly speaking, the judgment debtor under the award. Paragraph 329(1)(*g*) of the Rules is clear and mandatory. TMR knew of impediments to the enforcement of the award. It should have disclosed them to the Court in an outright fashion, if only to alert the Court as to the possible application of the *State Immunity Act*. The Court would then have been in a position to determine the opportunity of not proceeding *ex parte* and of having the application served on the State of Ukraine. This is precisely the effect of Martineau J.'s order and I find no fault with it.

[69]Martineau J.'s refusal to stay the proceedings or issue an interlocutory injunction pending a fresh application under rule 327 has not been seriously challenged by TMR and, in my view, it could not have been.

[70]In the end, I would dismiss the appeal in A-496-04.

Costs

[71]I would grant costs to the respondents in both appeals, but on the basis of one set of costs only.

Nadon J.A.: I agree.

Sexton J.A.: I agree.

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