

STATE IMMUNITY IN CANADIAN COURTS

The Act to Provide for State Immunity in Canadian Courts, the short title of which is the State Immunity Act, became law on July 15, 1982. The Act established the principle of the immunity of foreign states from jurisdiction, except where commercial activities and certain other exceptions are concerned. Thus, a foreign state may be prosecuted in a Canadian court in connection with activities of a commercial nature. By restricting the immunity of foreign states, the Act places them in a legal position more or less identical to that of any person or entity subject to court action in regard to commercial activities.

Before this Act was passed by the Canadian Parliament, the case law reflected uncertainty as to the extent of the immunity that a foreign state should have. In some decisions, the principle of limited immunity was upheld, but in the majority the principle of absolute immunity, which was developed in other times and circumstances, had gradually fallen into disuse in a number of states. Canada needed to pass legislation that would dispel the uncertainty in the case law.

The two reasons why Canada has adopted the principle of limited immunity were for some time invoked by many observers and experts in international and constitutional law. To begin with, there was the position of the federal government and the provincial governments before the Canadian courts: over the past 30 years and more, the principle of Crown immunity has changed considerably and, as a rule, these governments are now accountable before the courts. This development supports the view that foreign states should be liable to prosecution in the Canadian courts, at least in so far as their commercial activities are concerned. A second factor cited in Canada and abroad in favour of limiting the immunity of foreign states is the considerable increase in the commercial activities of state in recent years. As they have become involved in all kinds of commercial activities, it has become increasingly difficult to justify the concept of absolute immunity.

The Act stipulates that the rule of immunity shall have effect even when the foreign state has failed to take any steps in the proceedings. However, it also specifies the cases where immunity does not apply in the form of specific exceptions to the general rule of immunity from jurisdiction.

The main exception is that of commercial activity, which is not defined in a specific sense in the statute. As a result, it is not always possible to predict which activities of a foreign state will be regarded as "commercial".