

**SUPREME COURT OF CANADA**

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| **Citation:** Amaratunga *v.* Northwest Atlantic Fisheries Organization,2013 SCC 66, [2013] 3 S.C.R. 866 | **Date:** 20131129  **Docket:** 34501 |

**Between:**

**Tissa Amaratunga**

Appellant

and

**Northwest Atlantic Fisheries Organization, a body corporate**

Respondent

- and -

**Canadian Civil Liberties Association**

Intervener

**Coram:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 68) | LeBel J. (McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring) |

Amaratunga *v.* Northwest Atlantic Fisheries Organization, 2013 SCC 66, [2013] 3 S.C.R. 866

Tissa Amaratunga Appellant

v.

Northwest Atlantic Fisheries Organization, a body corporate Respondent

and

Canadian Civil Liberties Association Intervener

**Indexed as: Amaratunga *v.* Northwest Atlantic Fisheries Organization**

2013 SCC 66

File No.:  34501.

2013:  March 28; 2013:  November 29.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for nova scotia

*Public international law — Jurisdictional immunity — International organizations — Former senior manager of international organization headquartered in Canada filing wrongful dismissal suit — International organization claiming immunity under Order reflecting agreement with Canada — Whether claimed immunity applies — Meaning of immunities “required” for performance of functions — Northwest Atlantic Fisheries Organization Privileges and Immunities Order, SOR/80‑64, s. 3(1).*

NAFO is an international organization headquartered in Nova Scotia. Its mandate is to manage and preserve fishing resources in the Northwest Atlantic Ocean. A worked at NAFO as a senior manager from 1988 until 2005 when NAFO terminated his employment. When A then commenced a wrongful dismissal suit, NAFO claimed immunity as an international organization under its *Northwest Atlantic Fisheries Organization Privileges and Immunities Order* (“*NAFO Immunity Order*”) agreement with Canada. The Supreme Court of Nova Scotia rejected NAFO’s immunity defence and determined that A’s wrongful dismissal suit could proceed to trial, including A’s claim for a separation indemnity under NAFO Staff Rules. The Court of Appeal, however, allowed NAFO’s appeal and determined that NAFO enjoyed immunity from all of A’s claims.

*Held*: The appeal should be allowed in part.

NAFO is entitled to immunity, except from A’s separation indemnity claim under the Staff Rules. Without immunity, an international organization would be vulnerable to intrusions into its operations by the host state and that state’s courts. However, no rule of customary international law confers immunity on international organizations. Instead, they derive their immunity from treaties, or in the case of smaller international organizations like NAFO, from agreements with host states.

NAFO reached an agreement with Canada, which is reflected in the *NAFO Immunity Order*. Section 3(1) of the *NAFO Immunity Order* grants NAFO immunities “to such extent as may be required for the performance of its functions”. In accordance with modern statutory interpretation, the meaning of that phrase must be read in its entire context and in its grammatical and ordinary sense, harmoniously with the object and scheme of the *NAFO Immunity Order* and in light of the grant of authority and the intention of Parliament. The meaning of the phrase, including the word “required”, is determinative of the disposition of this appeal.

While the grammatical and ordinary sense of the word “required” is “necessary”, the context of s. 3(1) suggests instead a broader interpretation. Indeed, the word “required” in s. 3(1) should be interpreted to have the same broad meaning as in s. 3(3) because the Governor in Council is presumed to have been consistent in making the *NAFO Immunity Order*. The Governor in Council is granted authority to determine the scope of the immunity for each international organization on a case‑by‑case basis. For NAFO, the Governor in Council conferred a broad functional immunity as can be seen from the very words of s. 3(1) — “for the performance of [NAFO’s] functions”. To not interpret s. 3(1) broadly would run counter to the object and scheme of the *NAFO Immunity Order* as well as Parliament’s intention of modernization, flexibility and respect for the independence of international organizations.

In this case, NAFO requires immunity from A’s claims for it to perform its functions, except A’s separation indemnity claim under the Staff Rules. A was the second‑in‑command in the Secretariat. He directly supervised other staff and was responsible for the scientific aspect of NAFO’s mission. NAFO must have the power to manage its employees, especially those in senior positions, if it is to perform its functions efficiently. To allow employment‑related claims of senior officials to proceed in Canadian courts would constitute undue interference with NAFO’s autonomy in performing its functions and would amount to submitting its managerial operations to the oversight of its host state’s institutions. The absence of a dispute resolution mechanism or of an internal review process is not, in and of itself, determinative of whether NAFO is entitled to immunity. While the fact that A has no forum in which to air his grievances and seek a remedy is unfortunate, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state.

For NAFO to perform its functions, however, it does not require immunity from A’s separation indemnity claim. The separation indemnity does not interfere with NAFO’s functions. Indeed, NAFO recognizes that it owes a separation indemnity to A under its Staff Rules and concedes that the *NAFO Immunity Order* does not immunize it from A’s claim. This claim should be allowed to proceed and the appeal should be granted to that extent.

**Cases Cited**

**Considered:** *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Re Canada Labour Code*, [1992] 2 S.C.R. 50; **referred to:** *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, I.C.J. (February 3, 2012); *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571; *Contino v. Leonelli‑Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217; *Glykis v. Hydro‑Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285; *Bristol‑Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Islamic Republic of Iran v. Hashemi*, 2012 QCCA 1449, [2012] R.J.Q. 1567; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40.

**Statutes and Regulations Cited**

*Canadian Bill of Rights*, R.S.C. 1985, App. III, s. 2(*e*).

*Diplomatic and Consular Privileges and Immunities Act*, R.S.C. 1985, c. P‑22 [rep. 1991, c. 41, s. 14].

*Foreign Missions and International Organizations Act*, S.C. 1991, c. 41, ss. 5(1), 16.

*Northwest Atlantic Fisheries Organization Privileges and Immunities Order*, SOR/80‑64, s. 3.

*Privileges and Immunities (International Organizations) Act*, R.S.C. 1985, c. P‑23 [rep. 1991, c. 41, s. 15].

*State Immunity Act*, R.S.C. 1985, c. S‑18.

**Treaties and Other International Instruments**

*Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221.

*Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, Can. T.S. 1979 No. 11, art. II.

*Convention on the Privileges and Immunities of the Specialized Agencies*, 33 U.N.T.S. 261.

*Convention on the Privileges and Immunities of the United Nations*, 1 U.N.T.S. 15, art. II(2).

*Headquarters Agreement between the Government of Canada and the International Civil Aviation Organization*, Can. T.S. 1992 No. 7.

*International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 14.

*Supplementary Agreement between the Government of Canada and the International Civil Aviation Organization regarding the Headquarters of the International Civil Aviation Organization*, Can. T.S. 1999 No. 20.

*Supplementary Agreement between the Government of Canada and the International Civil Aviation Organization regarding the Headquarters of the International Civil Aviation Organization*, 2013 [not yet in force].

*United Nations Convention on Jurisdictional Immunities of States and Their Property*. New York: United Nations, 2004 [not yet in force].

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United Nations. International Law Commission. “Jurisdictional immunities of States and their property”, in *Report of the Commission to the General Assembly on the work of its thirty‑second session*, U.N. Doc. A/35/10, published in *Yearbook of the International Law Commission 1980*, vol. II, Part Two. New York: United Nations, 1981, 137.

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Beveridge and Bryson JJ.A.), 2011 NSCA 73, 306 N.S.R. (2d) 380, 968 A.P.R. 380, 94 C.C.E.L. (3d) 198, 337 D.L.R. (4th) 668, [2011] N.S.J. No. 453 (QL), 2011 CarswellNS 587, reversing a decision of Wright J., 2010 NSSC 346, 295 N.S.R. (2d) 331, 935 A.P.R. 331, 85 C.C.E.L. (3d) 144, [2010] N.S.J. No. 508 (QL), 2010 CarswellNS 618. Appeal allowed in part.

*David A. Copp*, for the appellant.

*John T. Shanks* and *Richard Dunlop*, for the respondent.

*Ewa Krajewska* and *Heather K. Pessione*, for the intervener.

The judgment of the Court was delivered by

LeBel J. —

I. Introduction

1. International organizations are active and necessary actors on the international stage. Although they are subjects of international law, they have to operate on the territories of sovereign states with political and legal systems of their own. To avoid undue interference in the operations of an international organization, the treaty that establishes it will recognize certain privileges and immunities. If not, the host state will promise to do so. In this regard, some form of immunity from legal process in domestic courts is critical, and commonly granted.
2. This appeal pits the Northwest Atlantic Fisheries Organization (“NAFO”), an international organization responsible for the management of fishery resources in the Northwest Atlantic, against one of its former employees, the appellant, Tissa Amaratunga. The appellant sued NAFO for breach of his contract of employment in the Nova Scotia Supreme Court, as NAFO is headquartered in Dartmouth, Nova Scotia. NAFO successfully claimed immunity from this action. The Nova Scotia Court of Appeal held that NAFO was entitled to immunity in this matter by virtue of s. 3(1) of the *Northwest Atlantic Fisheries Organization Privileges and Immunities Order*, SOR/80-64 (“*NAFO Immunity Order*”). For the reasons that follow, I conclude that NAFO is entitled to immunity and that the appeal must fail in this respect, but must be allowed in part, in respect of the right to the separation indemnity payment granted in accordance with the NAFO Staff Rules, with costs to the appellant.

II. Background Facts

1. NAFO, which was founded in 1979 as a successor to the International Commission of the Northwest Atlantic Fisheries, is an intergovernmental body concerned with fisheries science and management. As stated in art. II(1) of the *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, Can. T.S. 1979 No. 11 (“Convention”), its overall objective is “to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources” of the Northwest Atlantic. Canada is a contracting party to the Convention.
2. NAFO consists of four bodies: the General Council, the Scientific Council, the Fisheries Commission, and the Secretariat. The functions of these bodies are detailed in the Convention.
3. Article II(4) of the Convention provides that NAFO’s headquarters is to be located in Dartmouth. The Convention also provides that NAFO has legal personality. As a corollary to this legal personality, the organization enjoys certain immunities and privileges. The Convention provides in art. II(3) that NAFO and Canada are to agree on what those immunities and privileges will be in Canada. The resulting agreement is set out in the *NAFO Immunity Order*, which was made by the Governor in Council on January 11, 1980.
4. The appellant joined NAFO in 1988 as Assistant Executive Secretary (the position’s title was later changed to Deputy Executive Secretary); his position was a senior one within the Secretariat. In that role, he had to be familiar with all aspects of NAFO’s operations and requirements. His responsibilities included directly supervising four of the Secretariat’s eleven staff members; assuming the duties of the Executive Secretary as needed; providing operational and advisory services to the Scientific Council; liaising with chairpersons within NAFO and the administrators of national and international bodies to fulfill the needs of the Scientific Council; managing scientific information and NAFO’s biological and statistical databases; managing and editing NAFO’s scientific and statistical publications; and managing computer systems as necessary for NAFO’s operations.
5. The appellant was dismissed from his employment by the Executive Secretary on June 24, 2005. As can be seen from the statement of claim, the working relationship between the appellant and this Executive Secretary, who had been appointed in January 2003, had been deteriorating.
6. On the day of his dismissal, the appellant was informed by letter that he would receive a sum of $153,149. That sum comprised two amounts. The first amount of $102,193 represented his salary up to July 31, 2005, his leave entitlement and the separation indemnity due to him under rule 10.4 of the NAFO Staff Rules. The second amount of $50,956, provided on a gratuitous basis, was intended to compensate the appellant for any financial disadvantages that might result from the termination of his employment. The appellant agreed with NAFO that the separation indemnity in the amount of $80,987 would be paid in a first instalment of $30,987 in 2005 and a second instalment of $50,000 in 2006. The appellant also requested confirmation from NAFO that the gratuitous payment of $50,956 would be paid without prejudice. NAFO did not respond to this request.
7. NAFO paid the appellant the amount due for salary, accrued leave and the first instalment of the separation indemnity in 2005. In February 2006, the appellant received a single cheque for both the second instalment of the separation indemnity and the gratuitous payment. Because he had not received confirmation from NAFO that the gratuitous payment was without prejudice, he returned the cheque. A second cheque in the same amount was sent to the appellant in April 2006, and he returned it for the same reason.
8. On June 15, 2006, the appellant filed a statement of claim in the Nova Scotia Supreme Court seeking damages for breach of his contract of employment and for breach of the contract under which NAFO was required to pay the separation indemnity in two instalments. More specifically, the appellant claimed the following damages: the balance of the separation indemnity in the amount of $50,000; salary in lieu of reasonable notice; general damages; and punitive or aggravated damages.
9. In its statement of defence, NAFO submits that under the *NAFO Immunity Order*, it enjoys immunity from the appellant’s claims, and that the Nova Scotia Supreme Court lacks jurisdiction to entertain them.

III. Judicial History

1. By notice of motion, NAFO sought a determination of its claim that it enjoys immunity from the appellant’s lawsuit by virtue of the *NAFO Immunity Order*. Robertson J. ordered that NAFO’s defence of immunity be determined separately from the trial of the appellant’s claims. The proceedings that led to this appeal concerned the determination of NAFO’s claim of immunity.

A. *Nova Scotia Supreme Court, 2010 NSSC 346, 295 N.S.R. (2d) 331*

1. Wright J. rejected NAFO’s claim of immunity. In his view, the word “required” as used in the phrase “to such extent as may be required for the performance of its functions” in s. 3(1) of the *NAFO Immunity Order* means “demand as necessary” or “essential” (para. 56). NAFO had to demonstrate that immunity from the appellant’s claim was necessary or essential to the performance of its functions. Wright J. concluded that immunity was not necessary or essential for that purpose.
2. Wright J. found that NAFO’s functions were to “contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fish resources in the Northwest Atlantic Ocean” (para. 57). He held that little factual evidence supported NAFO’s argument that it would be an impermissible intrusion into the organization’s internal management for the court to take jurisdiction. According to Wright J., the following factors militated against immunity: the appellant’s claims relate to a private contract of employment voluntarily entered into by NAFO; the claims are limited to monetary damages for breach of that contract and NAFO is not asserting just cause; no right to interfere with the internal organization, management or governance of NAFO is being claimed; the appellant is not seeking to subject NAFO to Canadian legislation; and no sovereign, political or security elements arise in this case.
3. Wright J. added that his conclusion that NAFO is not entitled to immunity in this case was reinforced by the fact that if the Canadian court lacked jurisdiction, the appellant would be left with no recourse to pursue his claims. He said that the *NAFO Immunity Order* should be interpreted in a way that is consistent with the right of an individual with a legitimate claim to a fair hearing by a competent, independent and impartial tribunal established by law in accordance with the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (“*ICCPR*”).

B. *Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Beveridge and Bryson JJ.A.), 2011 NSCA 73, 306 N.S.R. (2d) 380*

1. MacDonald C.J.N.S., writing for the court, held that the immunity provided for in s. 3(1) of the *NAFO Immunity Order* shielded NAFO from the appellant’s claims. In reaching that conclusion, he adopted a functional approach to the immunity granted in the *NAFO Immunity Order*.
2. MacDonald C.J.N.S. said that Wright J. had set the bar for a finding that NAFO is entitled to immunity too high, essentially requiring that the appellant’s suit represent “an impermissible intrusion into NAFO’s internal management”, “NAFO’s official functions [being] significantly impeded”, or “excessive interference or hindrance in [its] actual operations” (para. 27). In MacDonald C.J.N.S.’s view, that approach was overly restrictive.
3. MacDonald C.J.N.S. relied on this Court’s decision in *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, for guidance in interpreting the *NAFO Immunity Order*. He found that it was appropriate to apply the rationale of necessity and autonomy adopted in the context of parliamentary privilege to the determination of the scope of the immunity granted to NAFO. He reasoned that just as parliamentary immunity exists to preserve Parliament’s autonomy as a legislative and deliberative body, NAFO’s immunity has been granted to preserve its autonomy as an international organization consisting of many nations.
4. MacDonald C.J.N.S. drew three guiding principles from *Vaid*. First, immunity is rooted in “necessity”, and a broad view should be taken of the concept of “necessity”. Second, what is “necessary” is the preservation of the organization’s autonomy to carry out its functions. Third, in the employment context, the closer an aggrieved employee’s tasks come to the organization’s core function, the more likely it is that the organization’s autonomy will be affected and, therefore, the more likely it is that immunity will be required.
5. MacDonald C.J.N.S. concluded that Wright J. had erred in his interpretation of s. 3(1) of the *NAFO Immunity Order*, stating that he “would declare [NAFO to be immune] from any domestic suit that stands to interfere with NAFO’s autonomy in performing its functions” (para. 44). He would not require “significant”, “excessive” or “impermissible” interference (*ibid.*).
6. On whether the appellant’s claims interfered with NAFO’s autonomy in performing its functions, MacDonald C.J.N.S. found that Wright J. had committed a palpable and overriding error in finding that NAFO was not challenging the merits of the appellant’s case. In MacDonald C.J.N.S.’s view, it was clear from the record that NAFO had in fact asserted just cause in dismissing the appellant. This error is important because Wright J. had relied on his conclusion that NAFO was not challenging the merits of the case to conclude that the appellant’s claim did not represent an impermissible intrusion into NAFO’s operations.
7. MacDonald C.J.N.S. also took issue with Wright J.’s overall characterization of the appellant’s claims. He viewed the claims as a much more significant encroachment on NAFO’s operations than did Wright J. In MacDonald C.J.N.S.’s opinion, wrongful dismissal actions by their very nature represent critical and far-reaching reviews of the employer-employee relationship. He concluded on the basis of the appellant’s position and responsibilities that the appellant’s claims would inevitably put NAFO’s core operations under the microscope. Moreover, the appellant’s claims for punitive damages and for solicitor-client costs focused on NAFO’s alleged misconduct. According to MacDonald C.J.N.S., the appellant was asking the Nova Scotia Supreme Court to review and condemn NAFO’s management structure. For the court to do so would amount to interference with NAFO’s autonomy.
8. MacDonald C.J.N.S. acknowledged that a finding that NAFO is entitled to immunity in this case would leave the appellant with no enforceable remedy, and noted Wright J.’s concern with the *ICCPR*. However, he stated that “it is one thing to interpret legislation in a manner that reflects the values and principles of international treaties. It is quite another to deny immunity in circumstances where, by legislation, it clearly exists” (para. 73). He therefore concluded that NAFO enjoyed immunity from all the appellant’s claims.

IV. Analysis

A. *Issues*

1. Two issues must be addressed by this Court. The main one is whether the immunity granted to NAFO applies. It raises the question of the interpretation to be given to the words “to such extent as may be required for the performance of its functions” set out in s. 3(1) of the *NAFO Immunity Order*. These words determine the scope and purpose of the immunity granted to the respondent.
2. If the Court concludes that NAFO enjoys immunity from the appellant’s claims, a second issue related specifically to the separation indemnity will have to be resolved: Does the immunity also apply to the appellant’s claim with respect to the separation indemnity due to him under the NAFO Staff Rules?
3. Before addressing the interpretation to be given to s. 3(1) of the *NAFO Immunity Order*, I will make some general comments on immunities and privileges granted to international organizations. More specifically, I will highlight certain differences between state immunities on the one hand and immunities granted to international organizations on the other.

B. *State Immunities and Immunities Granted to International Organizations*

1. According to a general rule of customary international law, states enjoy immunity from the jurisdiction of other states: *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, I.C.J. judgment (February 3, 2012), at para. 56; International Law Commission, “Jurisdictional immunities of States and their property”, in *Yearbook of the International Law Commission* *1980* (1981), vol. II, Part Two, 137, pp. 147-48. The International Court of Justice has held that state immunity “derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order”: *Jurisdictional Immunities of the State*, at para. 57. The *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004) is the first attempt to codify the rules relating to state immunity in a general international convention, but it has not yet entered into force.
2. Like other jurisdictions, Canada has legislated on state immunity. Parliament has enacted the *State Immunity Act*, R.S.C. 1985, c. S-18, which confers immunity from the jurisdiction of Canadian courts on foreign states, except in proceedings that relate to a “commercial activity”. Canada has adopted a restrictive approach to state immunity and rejected the absolute approach under which states had historically enjoyed immunity in all circumstances: J. H. Currie, C. Forcese and V. Oosterveld, *International Law: Doctrine, Practice, and Theory* (2007), at pp. 494-501; see also *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571.
3. In the case of international organizations, unlike that of states, the prevailing view at present is that no rule of customary international law confers immunity on them. International organizations derive their existence from treaties, and the same holds true for their rights to immunities: H. Fox, *The Law of State Immunity* (2nd ed. 2008), at pp. 725-26. Such an organization must operate on the territory of a foreign state and through individuals who have nationality and is therefore vulnerable to interference, since it possesses neither territory nor a population of its own: Fox, at p. 724. This reality makes immunity essential to the efficient and independent functioning of international organizations. It also shapes the immunities and privileges that are granted to international organizations. Such immunities and privileges are created through a complex interplay of international agreements and the national law of host states.
4. International organizations vary greatly in size, sphere of activities and powers. This is reflected in the source and the scope of their immunities and privileges. For example, the *Convention on the Privileges and Immunities of the United Nations*, 1 U.N.T.S. 15, and the *Convention on the Privileges and Immunities of the Specialized Agencies*, 33 U.N.T.S. 261, contain detailed provisions conferring broad immunities and privileges on the United Nations and its agencies. In addition to international conventions granting uniform immunities and privileges that apply in all member states, the most important international organizations such as the United Nations and its agencies also negotiate exhaustive and detailed headquarters agreements with host countries: see, e.g., *Headquarters Agreement between the Government of Canada and the International Civil Aviation Organization*, Can. T.S. 1992 No. 7, and the Supplementary Agreements of 1999 and 2013.
5. In the case of smaller international organizations, each organization must enter into an agreement with the host state regarding the immunities to be enjoyed in that state’s territory. Such is the case for NAFO. Article II of the Convention provides that NAFO is to come to an agreement with the contracting party (i.e. Canada) regarding the immunities and privileges it will enjoy in the territory of that party. NAFO and Canada reached an agreement in this regard, and it is reflected in the *NAFO Immunity Order*.

C. *Content and Meaning of the NAFO Immunity Order*

1. The *NAFO Immunity Order* is an order made by the Governor in Council pursuant to the *Privileges and Immunities (International Organizations) Act*, R.S.C. 1985, c. P-23 (“*PIIO Act*”). That act was subsequently repealed and replaced by the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 (“*FMIO Act*”), but s. 16 of the *FMIO Act* provides that every regulation and order made under the *PIIO Act* is deemed to have been made under the *FMIO Act*.
2. The authority of the Governor in Council to make orders in respect of the immunities of international organizations is granted in s. 5(1)(*b*) of the *FMIO Act*, which reads as follows:

**5.** (1) The Governor in Council may, by order, provide that

. . .

(b) an international organization shall, to the extent specified in the order, have the privileges and immunities set out in Articles II and III of the Convention on the Privileges and Immunities of the United Nations, set out in Schedule III;

1. Section 3(1) of the *NAFO Immunity Order* specifies the scope of NAFO’s immunities:

**3.** (1) The Organization shall have in Canada the legal capacities of a body corporate and shall, to such extent as may be required for the performance of its functions, have the privileges and immunities set forth in Articles II and III of the Convention for the United Nations.

Both the *FMIO Act* and the *NAFO Immunity Order* refer to the *Convention on the Privileges and Immunities of the United Nations*. For the purposes of this appeal, the only relevant provision of the *Convention on the Privileges and Immunities of the United Nations* is art. II(2), which grants immunity to the United Nations from every form of legal process, except where it has expressly waived its immunity.

1. This appeal requires the Court to determine the meaning of the phrase “to such extent as may be required for the performance of its functions” found in s. 3(1) of the *NAFO Immunity Order*. In other words, the Court must establish the scope of the immunity granted to NAFO by the Governor in Council. This is a matter of legal interpretation.
2. Regulations and orders in council must be interpreted in accordance with the modern principle of statutory interpretation: *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217, at para. 19; *Glykis v. Hydro-Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285, at para. 5; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 368. As Binnie J. explained in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 38, however, it is necessary, in interpreting a regulation, to consider the words granting the authority to make the regulation in question in addition to the other interpretive factors. In this regard, Binnie J. quoted the following comment by E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 247:

It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.

1. The words “to such extent as may be required for the performance of its functions” found in s. 3(1) of the *NAFO Immunity Order* must therefore be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme and object of the *FMIO Act*, and in light of the grant of authority and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; E. A. Driedger, *The Construction of Statutes* (1974), at p. 67.
2. The appellant contends that the word “required” in s. 3(1) of the *NAFO Immunity Order* should be understood in its ordinary and grammatical meaning of “necessary”. He also submits that any interpretation of s. 3(1) must be consistent with Canada’s international obligations, as this Court explained in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, and *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292. This means that the *NAFO Immunity Order* must be interpreted in a manner consistent with the right to a fair hearing provided for in the *ICCPR*. The intervener, the Canadian Civil Liberties Association, takes a similar view, submitting that the interpretation of the *NAFO Immunity Order* should not violate the fundamental principle of access to justice. The respondent argues that, if a proper functional approach to interpretation is taken, it is entitled to immunity from the appellant’s claims.
3. I will now turn to the interpretation of the phrase “to such extent as may be required for the performance of its functions” found in s. 3(1) of the *NAFO Immunity Order*. This issue will be determinative of the disposition of this appeal.

Ordinary and Grammatical Meaning of the Word “Required” and Context

1. The first question concerns the ordinary and grammatical meaning of the words. In this regard, it is argued that the word “required” can be defined as “necessary”. Wright J. accepted that argument and concluded that the immunity provided for in the *NAFO Immunity Order* applies only to the extent that it is necessary, indeed indispensible, to NAFO’s performance of its functions. On this basis, since NAFO’s functions relate to the utilization, management and conservation of fisheries resources, the organization does not require immunity in employment-related matters. In my view, the analysis must be taken beyond this admittedly common, although limited, definition of the word “required”. Other interpretive factors are relevant to a determination of the meaning of s. 3(1) of the *NAFO Immunity Order*. These other factors point toward a broader interpretation of the word “required” than the one advanced by the appellant.
2. The appropriateness of adopting a broad interpretation is evident from a cursory review of the context of s. 3(1) of the *NAFO Immunity Order*. If the word “required” were to be interpreted as meaning “necessary” in the strictest sense, officials working for NAFO would enjoy only such personal immunities and privileges as are required for the performance of their duties. This is so because the same words — “to such extent as may be required for the performance of their functions” — appear in s. 3(3) as in s. 3(1). Such a narrow interpretation of the word “required” would mean that NAFO officials would not be entitled to import their furniture and effects free of duty — arguably a common immunity enjoyed by individuals working for international organizations — because, in light of NAFO’s mission, the importation of such items would not, in this strict sense, be “required” for the performance of their duties.
3. The appellant contends that the word “required” in s. 3(1) should not be coloured by the use of the same word in s. 3(3), because the former provision concerns NAFO as a corporate entity, whereas the latter concerns NAFO’s officials. This argument is without merit. The Governor in Council is presumed to have been consistent in making the *NAFO Immunity Order*. In this context, the word “required” must be deemed to have the same meaning in s. 3(1) as in s. 3(3).

2. Objective of the *FMIO Act*

1. In enacting the *FMIO Act*, Parliament sought to accomplish three things: consolidate the contents of the *Diplomatic and Consular Privileges and Immunities Act*, R.S.C. 1985, c. P-22, and the *Privileges and Immunities (International Organizations) Act* in a single statute; modernize the immunities it grants to foreign states and international organizations in accordance with developments in international law and practice; and provide for immunities and privileges to subunits of foreign states so that the provinces’ missions abroad can receive reciprocal immunities: *House of Commons Debates*, vol. III, 3rd Sess., 34th Parl., October 4, 1991, at pp. 3332 ff. In referring specifically to international organizations, the Honourable Marcel Danis said the following on behalf of the Secretary of State for External Affairs:

International law also grants a special status to international organizations. Membership in the UN, the OECD, and other organizations of states, carries with it the obligation to grant those organizations and their officers certain privileges and immunities. Without legislation permitting the grant of such privileges and immunities, Canada could not be a member of those organizations. Nor could we act as host for such organizations as the International Civil Aviation Organization in Montreal or the Commonwealth of Learning in Vancouver.

At present, such organizations are granted privileges and immunities by Order in Council under the Privileges and Immunities (International Organizations) Act. The level of treatment which Canada can grant international organizations has not changed since the predecessor to that act, the Privileges and Immunities (United Nations) Act, was passed in 1947. But international standards of treatment for such organizations have changed significantly, and the restrictions of the existing legislation have created difficulties for Canada’s relations with international organizations, including the largest international organization with headquarters in Canada.

. . .

One way in which we can enhance our role in such organizations is by encouraging them to establish offices, or preferably headquarters, in Canada. With modernized legislation Canada can pursue more vigorously its policy of working to attract the offices of international organizations in Canada. [pp. 3333-34]

1. Thus, Parliament’s objective in enacting the *FMIO Act* was, where international organizations are concerned, to modernize the rules respecting the immunities and privileges it could grant them. This was done both to reflect recent trends in international law and to make Canada an attractive location for such organizations to establish headquarters or offices. To limit the immunity granted in s. 3(1) as narrowly as the appellant proposes would run counter to Parliament’s objectives of modernization, flexibility and respect for the independence of international organizations hosted by Canada.
2. It bears repeating at this point that immunity is essential to the efficient functioning of international organizations. Without immunity, an international organization would be vulnerable to intrusions into its operations and agenda by the host state and that state’s courts. See W. M. Berenson, “Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS”, in H. Cissé, D. D. Bradlow and B. Kingsbury, eds., *The World Bank Legal Review* (2012), vol. 3, 133. See also L. Preuss, “The International Organizations Immunities Act” (1946), 40 *Am. J. Int’l* *L.* 332, at p. 345.

3. Granting of Authority in the *FMIO Act*

1. As I mentioned above, in interpreting a regulation or an order in council, a court must consider, in addition to the usual interpretive factors, the statutory provision that grants the authority to make the regulation or order in council in question: *Bristol-Myers Squibb*, at para. 38. Section 5(1)(*b*) of the *FMIO Act* authorizes the Governor in Council to make an order providing that an international organization

shall, to the extent specified in the order, have the privileges and immunities set out in Articles II and III of the Convention on the Privileges and Immunities of the United Nations . . .

The *FMIO Act* therefore grants to the Governor in Council the power to confer on an international organization all, or some of, the privileges and immunities conferred on the United Nations in arts. II and III of the *Convention on the Privileges and Immunities of the United Nations*. The *FMIO Act* gives the Governor in Council flexibility to determine the scope of the immunities and privileges to be granted to each international organization on a case-by-case basis. The Governor in Council is delegated a broad regulatory authority to frame the immunities in a way that is consistent with the functions to be discharged by various international organizations. The immunities are not limited to the narrowest possible range. Rather, the Governor in Council must assure the international community that, as a host, our country will be mindful and respectful of the roles and the institutional independence of international organizations.

4. Scheme of the *NAFO Immunity Order*

1. The context and objectives discussed above are reflected in the *NAFO Immunity Order.* The order sets out a scheme by which Canada confers certain immunities and privileges on NAFO. These immunities and privileges are found in s. 3, which reads as follows:

**3.** (1) The Organization shall have in Canada the legal capacities of a body corporate and shall, to such extent as may be required for the performance of its functions, have the privileges and immunities set forth in Articles II and III of the Convention for the United Nations.

(2) Representatives of states and governments that are members of the Organization shall have in Canada, to such extent as may be required for the performance of their functions, the privileges and immunities set forth in Article IV of the Convention for representatives of members.

(3) All officials of the Organization shall have in Canada, to such extent as may be required for the performance of their functions, the privileges and immunities set forth in Article V of the Convention for officials of the United Nations.

(4) All experts performing missions for the Organization shall have in Canada, to such extent as may be required for the performance of their functions, the privileges and immunities set forth in Article VI of the Convention for experts on missions for the United Nations.

(5) Nothing in this Order exempts a person who is a Canadian citizen residing or ordinarily resident in Canada from liability for any duties or taxe[s] imposed by any law in Canada.

1. The *NAFO Immunity Order* provides privileges and immunities for all those who are associated with NAFO’s activities. Section 3(1) grants immunity to NAFO itself, given that it has the legal capacities of a body corporate. Sections 3(2) through (4) confer privileges and immunities on certain individuals: representatives of member states of NAFO; NAFO officials; and experts performing missions for NAFO. The privileges and immunities thus conferred on NAFO and on its officials, representatives and experts are the ones set forth in the *Convention on the Privileges and Immunities of the United Nations*, and they are granted “to such extent as may be required for the performance of [its/their] functions”.
2. In limiting these immunities and privileges to the extent required for NAFO to perform its functions, the Governor in Council did not grant NAFO the absolute immunity conferred on the United Nations in the *Convention on the Privileges and Immunities of the United Nations*: P. Sands and P. Klein, *Bowett’s Law of International Institutions* (6th ed. 2009), at p. 494. Rather, the Governor in Council granted NAFO a functional immunity, that is, the immunity required to enable NAFO to perform its functions without undue interference.
3. In interpreting this functional immunity, the Court of Appeal drew a parallel with parliamentary privilege and based its analysis on this Court’s decision in *Vaid*. At issue in that case was whether the Canadian Human Rights Commission could investigate Mr. Vaid’s complaint that he had been constructively dismissed by the Speaker of the House of Commons for reasons that amounted to workplace discrimination and harassment. The Court had to decide whether the hiring and firing of House employees are “internal affairs” to which parliamentary privilege applies. Since the object of parliamentary privilege is the same as that of an immunity conferred on an international organization (or any other immunity), that is to remove the subject of the immunity from the jurisdiction of the courts, *Vaid* is relevant to the interpretation of s. 3(1) of the *NAFO Immunity Order*.
4. In *Vaid*, Binnie J. said that the foundation of parliamentary privilege is the concept of “necessity”, which is to be broadly construed and is understood to relate to the “dignity and efficiency of the House”: para. 29. He observed that dignity and efficiency are linked to autonomy, which is necessary in order for Parliament to conduct its business: *ibid.* In consequence, a functional approach should be taken in assessing parliamentary privilege: only those acts that are necessary (in the broad sense mentioned above) in order for Parliament to conduct its business will be exempt from the jurisdiction of the courts.
5. In my view, this same approach should be taken in determining the scope of the immunity granted to NAFO in the *NAFO Immunity Order*. The drafters of the *NAFO Immunity Order* adopted a functional approach to immunity, as can be seen from the very words they chose for s. 3(1): “to such extent as may be required for the performance of its functions”.
6. It follows that NAFO’s autonomy to conduct its business and the actions it takes in performing its functions must be shielded from undue interference. What is necessary for the performance of NAFO’s functions, or what constitutes undue interference, must be determined on a case-by-case basis.

D. *Application to This Case*

1. In this appeal, the Court must determine whether the management of relationships with senior officials should come under the protection of the immunity granted to NAFO. In my view, immunity from the appellant’s claims is “required”, within the meaning of the *NAFO Immunity Order*, in order for NAFO to perform its functions.
2. The overall objective of NAFO is to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fisheries resources of the Northwest Atlantic. Wright J. found that hearing the appellant’s claims would not constitute an impermissible intrusion into NAFO’s internal management. With respect, I cannot accept that conclusion.
3. This Court has recognized that labour relations are important to the achievement of an organization’s mission: *Re Canada Labour Code*, [1992] 2 S.C.R. 50. Indeed, without employees, NAFO could not further its overall objective. In *Re Canada Labour Code*, this Court had to determine whether labour relations at a U.S. military base in Newfoundland constituted a sovereign activity that was immune from the jurisdiction of Canadian courts. Although the case dealt with the *State Immunity Act*, S.C. 1980-81-82-83, c. 95, and with the concept of “commercial activity” for which no immunity exists in Canada, it is nonetheless relevant because of what La Forest J., writing for the majority, said about employment in the context of immunity. He held that the employment relationship is a “multi-faceted” one that must be considered as a whole and in light of its context: pp. 76 and 80.
4. In the case at bar, the appellant was the Deputy Executive Secretary of NAFO, the second-in-command in the Secretariat. He directly supervised other staff and was responsible for the scientific aspect of NAFO’s mission. That alone would be sufficient to conclude that immunity is required in this case in order for NAFO to perform its functions. NAFO must have the power to manage its employees, especially those in senior positions, if it is to perform its functions efficiently. To allow employment-related claims of senior officials to proceed in Canadian courts would constitute undue interference with NAFO’s autonomy in performing its functions and would amount to submitting its managerial operations to the oversight of its host state’s institutions.
5. This result would flow from the very nature of the appellant’s legal proceedings. In his statement of claim, he alleges that the Executive Secretary “engaged in improper management practices”: A.R., vol. II, at p. 13. He also seeks punitive damages. In doing so, he is asking the Nova Scotia Supreme Court to pass judgment on NAFO’s management of its employees. That, in my view, would constitute interference with NAFO’s internal management, which goes directly to its autonomy.

E. *Denial of Justice*

1. One last issue needs to be addressed with respect to s. 3(1) of the *NAFO Immunity Order*. In slightly different arguments, both the appellant and the intervener submit that to find that NAFO is entitled to immunity would constitute a denial of justice, because the appellant would be left without a forum to air his grievances and without a remedy. The intervener, relying on the *Canadian Bill of Rights*, R.S.C. 1985, App. III, and European case law, submits that the absence of a dispute resolution mechanism at NAFO should militate against such a finding.
2. The absence of a dispute resolution mechanism or of an internal review process is not, in and of itself, determinative of whether NAFO is entitled to immunity. As I mentioned above, an employment relationship must be considered as a whole and in light of its context. Furthermore, the European cases upon which the intervener relies arose in a different legal context, namely that of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221.
3. As for the *Canadian Bill of Rights*, the “right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations” recognized in s. 2(*e*) does not create a substantive right to make a claim. Rather, it provides for a fair hearing if and when a hearing is held. (See also *Islamic Republic of Iran v. Hashemi*, 2012 QCCA 1449, [2012] R.J.Q. 1567, at para. 109; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, at paras. 59-61.) Section 2(*e*) is the source of a procedural right, not of a substantive right.
4. The same holds true for the appellant’s argument based on art. 14 of the *ICCPR*, a provision which guarantees that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Like s. 2(*e*) of the *Canadian Bill of Rights*, art. 14 creates a guarantee of a procedural nature. Furthermore, in its commentary on the *ICCPR*, the United Nations Human Rights Committee explains that a limitation on this right that is based on an immunity deriving from international law would not violate art. 14: *General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, U.N. Doc. CCPR/C/GC/32, August 23, 2007, at para. 18.
5. The fact that the appellant has no forum in which to air his grievances and seek a remedy is unfortunate. However, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state’s courts. As La Forest J. said in *Re Canada Labour Code* in the context of sovereign immunity, it is an “inevitable result” of a grant of immunity that certain parties will be left without legal recourse, and this is a “policy choice implicit” in the legislation: p. 91. The same holds true in the instant case.

F. *Appellant’s Claim for the Separation Indemnity*

1. The appellant also claims the balance of the separation indemnity in the amount of $50,000. Although the Court of Appeal did not address this issue directly, it concluded that NAFO enjoys immunity from all the appellant’s claims. NAFO submits that because the appellant’s statement of claim inextricably links his attacks on its management with its failure to pay the second allotment of the separation indemnity, it enjoys immunity from this claim as well. In my view, this position is untenable.
2. First, this claim relates solely to rule 10.4 of the NAFO Staff Rules, which provides that a separation indemnity must be paid to any departing employee, regardless of the reasons for the termination of the employment relationship. The enforcement of rule 10.4 would not amount to submitting NAFO’s managerial operations to the oversight of Canadian courts. The separation indemnity claim would in no way interfere with NAFO’s performance of its functions.
3. Second, the resolution of this issue is made even simpler in this case because NAFO recognizes that a separation indemnity is owed to the appellant under the Staff Rules and concedes that the “Immunity Order does not immunize NAFO from a lawsuit that only seeks payment of entitlements under the NAFO Staff Rules”: R.F., at para. 57; see also para. 93.
4. In sum, no compelling reason exists for finding that s. 3(1) of the *NAFO Immunity Order* applies to the appellant’s claim with respect to the separation indemnity. This claim should be allowed to proceed.

V. Conclusion

1. I conclude that pursuant to s. 3(1) of the *NAFO Immunity Order*, NAFO enjoys immunity from the appellant’s claims, with the exception of the claim concerning the separation indemnity. The appeal is therefore allowed in part, with costs to the appellant. The matter is remanded to the Nova Scotia Supreme Court for adjudication of the remaining claim.

*Appeal allowed in part with costs.*

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Solicitors for the respondent:  Stewart McKelvey, Halifax.

Solicitors for the intervener:  Borden Ladner Gervais, Toronto.