Cases / Jurisprudence

Canadian Cases in Public International Law in 2018

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Jurisprudence canadienne en matière de droit international public en 2018

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Demande de contrôle judiciaire — exportation des véhicules blindés légers vers l'Arabie saoudite — requête de radiation

Turp c Canada (Affaires étrangères), 2018 CF 12 (9 janvier 2018). Cour fédérale.

Tel que noté dans le tome précédent de l'*Annuaire*, en janvier 2017 la Cour fédérale a rejeté la demande du professeur Daniel Turp que la Cour se prononce sur la légalité et le caractère raisonnable d'une décision du ministre des Affaires étrangères approuvant l'octroi de licences d'exportation pour des véhicules blindés légers (VBL) vers l'Arabie saoudite.[1] (L'appel de cette décision est examiné ci-dessous.) Dans la présente affaire, le professeur Turp invite la Cour à se prononcer sur le refus — exprès ou implicite — de la ministre actuelle de suspendre ou d'annuler ces mêmes licences en se prévalant des pouvoirs énoncés à l'article 10 de la *Loi sur les licences d'exportation et d'importation*.[2] Le demandeur s'appuie sur de nouvelles preuves de l'utilisation saoudienne des VBL canadiens contre des civils en 2017. La ministre répond avec une requête de radiation de cette nouvelle demande au motif qu'il est clair et évident que celle-ci ne présente aucune chance de succès, qu'elle est redondante et qu'elle constitue ultimement un abus de procédure.

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[1] Gib van Ert, "Jurisprudence canadienne en matière de droit international public en 2017" (2017) 55 ACDI 571 aux pp 571–74 [van Ert 2017].

[2] LRC 1985, c E-19, art 10 [*LLEI*].

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Le juge Martineau rejette la requête de radiation. Contrairement aux arguments de la ministre, la présente demande n'est ni redondante ni un abus de procédure. Elle repose plutôt sur une nouvelle décision ministérielle et de nouveaux faits: le refus ministériel de suspendre ou d'annuler les licences d'exportation en dépit de la preuve que l'Arabie saoudite se prévaut des VBL contre sa propre population. Le juge accepte que cette demande de contrôle judiciaire soulève une nouvelle cause d'action à la lumière des faits nouveaux allégués dans l'avis de demande.[3]

Bien que les faits allégués par le demandeur sont tenus pour avérés pour les fins d'une demande de radiation, le juge Martineau n'hésite pas de décrire le fond de l'affaire comme suit:

> L'Arabie saoudite est une monarchie absolue islamique dont le pouvoir s'appuie sur une puissante armée. Selon la preuve documentaire, l'État saoudien viole de façon routinière, grave et systématique les droits fondamentaux de ses citoyens. Ces violations (peine de mort, exécution de cette peine par décapitation, torture et autres traitements cruels, inhumains et dégradants, notamment les châtiments corporels tels que la peine de fouet et l'amputation) ont été maintes fois dénoncées par les organismes de protection des droits de la personne. De plus, l'État saoudien considère toute critique pacifique du gouvernement comme du terrorisme — incluant le fait pour les minorités religieuses de réclamer la protection de leurs droits. De fait, la minorité chiite du royaume est particulièrement à risque. L'Arabie est par ailleurs à la tête d'une coalition intervenant au Yémen. Plusieurs rapports révèlent de graves violations des droits de la personne et du droit international humanitaire par cette coalition qui attaque des cibles civiles telles que les hôpitaux, des écoles et des lieux de culte, faisant de milliers de victimes innocentes.[4]

De plus, le juge qualifie les allégations du demandeur comme n'étant "pas dépourvues de tout fondement et … pas faites gratuitement," incluant les allégations que l'ambassade saoudienne a elle-même reconnu que des VBL canadiens avaient été utilisés contre la population civile pendant le siège d'Awamiyah, que la ministre refuse d'agir, et que la ministre détient la preuve que des VBL canadiens ont été utilisés contre des minorités religieuses.[5]

Aspect remarquable de ce jugement, le juge Martineau fait référence au *Traité sur le commerce des armes* de 2013,[6] traité auquel le Canada n'est ni partie ni même signataire. Après avoir cité un échange dans la

[3] *Turp c Canada (Affaires étrangères)*, 2018 CF 12 aux paras 70, 75 [*Turp* CF].

[4] *Ibid* au para 41.

[5] *Ibid* au para 76.

[6] Rés AG 67/234B, 2 avril 2013 (entrée en vigueur: 24 décembre 2014).

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Chambre des Communes entre un député et la ministre où le député fait référence au désir du gouvernement de faire entériner le traité, le juge explique:

> Au passage, le député de Montcalm faisait référence au projet de loi C-47 intitulé *Loi modifiant la Loi sur les licences d'exportation et le Code criminel (modifications permettant l'adhésion au Traité sur le commerce des armes et autres modifications)*. Rappelons que selon l'article 7, paragraphe 7, du *Traité sur le commerce des armes*, 2 avril 2013, (entré en vigueur le 24 décembre 2014) [*TCA*], un État Partie exportateur est encouragé à réexaminer son autorisation, après avoir consulté au besoin l'État importateur, s'il obtient de nouvelles informations pertinentes montrant qu'il existe un risque prépondérant que les armes visées soient utilisées pour servir à commettre une violation grave du droit international humanitaire ou du droit international des droits de la personne, ou à en faciliter la commission. Le projet de loi C-47 a été déposé en première lecture le 13 avril 2017. Depuis, il a passé le stade de la deuxième lecture et a été renvoyé au Comité permanent des Affaires étrangères et de développement national le 3 octobre 2017. Aucune modification législative aux articles 7 et 10 de la [*Loi sur les licences d'exportation et d'importation*] n'est envisagée pour le moment — le gouvernement étant d'avis que le régime actuel de licences d'exportation est compatible avec les dispositions du *TCA* et les autres engagements du Canada.[7]

Il s'agit d'un cas rare où un juge canadien prend note de la pratique courante du gouvernement fédéral de s'appuyer sur des lois en vigueur pour s'acquitter d'obligations conventionnelles envisagées ou nouvellement acquises.

Les motifs du juge font quelque peu fausse note lorsqu'il dit: "À proprement parler, le Canada n'est lié par des normes internationales consignées dans un traité que si celui-ci a été incorporé au droit canadien par une loi."[8] La vérité est exactement le contraire: les obligations internationales du Canada lient le Canada, en tant qu'État sur le plan international, que le Canada les ait ou non mises en œuvre en droit interne.[9] Un traité ne peut entrer directement en vigueur en

[7] *Turp* CF, *supra* note 3 au para 112.

[8] *Ibid* au para 80.

[9] Voir par ex l'article 27 de la *Convention de Vienne sur le droit des traités*, 23 mai 1969, 1155 RTNU 331, RT Can 1980 nº 37 (entrée en vigueur: 27 janvier 1980) [*VCLT*]: "Une partie ne peut invoquer les dispositions de son droit interne comme justifiant la non-exécution d'un traité" ou encore l'article 3 du *Projet d'articles sur la responsabilité de l'état pour fait internationalement illicite*, Doc NU A/56/10 (2001): "La qualification du fait de l'État comme internationalement illicite relève du droit international. Une telle qualification n'est pas affectée par la qualification du même fait comme licite par le droit interne."

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droit canadien sans mise en œuvre législative ou réglementaire. Mais un manquement de mise en œuvre au plan interne ne libère pas l'État de ses obligations internationales.

Hague Convention on the Civil Aspects of International Child Abduction — *determination of habitual residence — hybrid approach*

Office of the Children's Lawyer v Balev, 2018 SCC 16 (20 April 2018). Supreme Court of Canada.

A Canadian couple living in Germany agreed that the mother would take the children to Ontario for sixteen months in the hope that they would do better in school. While the mother and children were in Germany, the father changed his mind and sought the children's return under the *Hague Convention*.[10] He proceeded in Germany initially and later in Ontario. The trial court in Ontario ordered the children's return to Germany. The Divisional Court reversed, and the Court of Appeal for Ontario reversed again. The case was moot by the time it reached the Supreme Court of Canada. The German courts had granted the mother sole custody, and she had returned with the children to Ontario. The Supreme Court nevertheless heard the case and gave reasons.

The key question that divided the lower courts, and, as it turned out, the Supreme Court of Canada, was how in law to determine where the children had been habitually resident at the time of the mother's allegedly wrongful retention of them in Ontario. If the children were habitually resident in Germany, the mother's retention was in breach of the *Hague Convention* (which, the Court noted, is implemented by legislation in every province and territory).[11] If, however, the children's habitual residence had become Ontario, the mother's retention of them was not wrongful. The parties, including the Ontario Office of the Children's Lawyer, advanced three approaches to determining habitual residence. The first was a child-centred approach that emphasized the situation and perspective of the children at the time of the father's application for their return to Germany. The second was a parental intention approach whereby the parents' intention as to the children's residence at the time they left Germany would govern. The third was a hybrid approach that considered both parental intentions and the children's circumstances.

Chief Justice Beverley McLachlin for the majority of the Supreme Court of Canada eschewed the parental intention approach — which had prevailed in most Canadian jurisdictions to this point — and the child-centred

[10] *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can TS 1983 No 35 (entered into force 1 December 1983) [*Hague Convention*].

[11] *Office of the Children's Lawyer v Balev*, 2018 SCC 16 at para 22 [*Balev*].

approach in favour of the hybrid approach. In doing so, McLachlin CJC made a number of significant comments on the meaning of habitual residence under Article 3 of the *Hague Convention*, the significance of a child's views under Article 13(2), and the interpretation of multilateral treaties by domestic courts. In dissent, Justices Suzanne Côté and Malcolm Rowe (Justice Michael Moldaver concurring) would have approved the parental intention approach. Both the majority and the dissent contended that their approaches best represented the meaning of the *Hague Convention*.

The chief justice began by summarizing the relevant principles and provisions of the *Hague Convention*, which aims to enforce custody rights and secure the prompt return of children to their habitual residence in cases where they have been wrongfully removed or retained. Return orders under the *Hague Convention* are not custody determinations; rather, their purpose is to facilitate the child's return to the jurisdiction in which determinations of custody and access are properly made. Prompt return is key to the scheme because it protects children from the harmful effects of wrongful removal or retention, it deters parents from abducting children, and it encourages speedy adjudication of the merits of custody and access disputes. The heart of the *Hague Convention*'s prompt return mechanism is Article 3, which provides that the removal or retention of a child is wrongful where it is in breach of custody rights in the child's state of habitual residence. Where Article 3 applies, Article 12 requires the judge in the requested state to order the child's return forthwith unless certain exceptions apply. Article 13(2) includes an exception where a child of sufficient age and maturity objects to being returned.[12]

The chief justice next turned to the relevant principles of treaty interpretation. She began by noting that the *Hague Convention* is implemented in Ontario by section 46(2) of the *Children's Law Reform Act*[13] and that "[s]ince the purpose of that section is to implement the underlying convention, this Court must adopt an interpretation consistent with Canada's obligations under it."[14] She noted Canada's adherence to the 1969 *Vienna Convention on the Law of Treaties* (*VCLT*) and the requirements of Article 31(1), which she described as generally paralleling the domestic approach to statutory interpretation.[15] She then observed:

> A clear purpose of multilateral treaties is to harmonize parties' domestic laws around agreed-upon rules, practices, and principles. The *Hague Convention* was intended to establish procedures common to all the contracting states that would

[12] *Ibid* at paras 24–29.

[13] RSO 1990, c C.12, s 46(2) [*Children's Law Reform Act*].

[14] *Balev*, *supra* note 11 at para 31.

[15] *VCLT*, *supra* note 9, art 31(1); *Balev*, *supra* note 11 at para 32.

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ensure the prompt return of children: see preamble. The objective of multilateral treaty making "would be seriously weakened if the courts of every country interpreted [the treaty at issue] without any regard to how it was being interpreted and applied elsewhere": *Connaught Laboratories Ltd. v. British Airways* (2002), 61 O.R. (3d) 204 (S.C.J.), at para. 46. To avoid frustrating the harmonizing purpose behind the *Hague Convention*, domestic courts should give serious consideration to decisions by the courts of other contracting states on its meaning and application: see *Vienna Convention*, Article 31(3)(b); *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 50; *Stag Line, Limited v. Foscolo, Mango and Co.*, [1932] A.C. 328 (H.L.), at p. 350; *Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446 (H.L.), at p. 471; *Air France v. Saks*, 470 U.S. 392 (1985), at pp. 403-4; *L.K. v. Director-General, Department of Community Services*, [2009] HCA 9, 237 C.L.R. 582, at para. 36.[16]

The chief justice returned to this theme later in her reasons, dubbing the imperative of adhering to other state courts' decisions on multilateral treaty questions the "principle of harmonization":

> As discussed above, a prime consideration in interpreting treaties is the principle of harmonization. The aim of treaties like the *Hague Convention* is to establish uniform practices in the adhering countries. This Court has faithfully followed this precept: see, for example, *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at paras. 82, 126, and 178; *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, at paras. 30 and 42. It follows that this Court should prefer the interpretation that has gained the most support in other courts and will therefore best ensure uniformity of state practice across *Hague Convention* jurisdictions, unless there are strong reasons not to do so.[17]

Continuing her consideration of the relevant principles of treaty interpretation, McLachlin CJC noted (in response to submissions from a party) that there was, "[f]or present purposes … no conflict between" the *Hague Convention* and the *Convention on the Rights of the Child* of 1989.[18] She also rejected the notion that the *Hague Convention* should be interpreted consistently with the *Canadian Charter of Rights and Freedoms*.[19] "The *Charter* cannot be used to interpret the *Hague Convention* or any international agreement," said the chief justice, citing *Febles v Canada (Citizenship and*

[16] *Balev*, *supra* note 11 at para 33.

[17] *Ibid* at para 49.

[18] *Ibid* at para 34, citing the *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990).

[19] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

Immigration) and Articles 27 and 31 of the *VCLT*.[20] In any event, McLachlin CJC observed, the *Hague Convention* as interpreted by her revealed no conflict with the *Charter*.[21]

Having reviewed the applicable treaty interpretation considerations, McLachlin CJC turned to the three prevailing approaches to habitual residence under Article 3 of the *Hague Convention*. She noted that the parental intention approach has support in US and UK case law and "currently dominates Canadian jurisprudence, where courts in a number of jurisdictions consider parental intent to be the primary consideration in determining a child's habitual residence."[22] Her discussion of the child-centred approach was brief, citing one Québec and two US authorities.[23] Finally, the chief justice reviewed the hybrid approach, whereby the application judge determines the focal point of the child's life immediately prior to removal or retention, considering all relevant links and circumstances. Relying heavily on European Union authorities, McLachlin CJC endorsed such considerations as the duration, regularity, conditions, and reasons for the child's stay in the territory as part of a review of the child's entire circumstances. These circumstances included the intention of the child's parents, but the chief justice noted that "recent cases caution against over-reliance on parental intention." In particular, there is no rule that the actions of one parent cannot unilaterally change the habitual residence of a child. Quoting a UK authority, the learned judge warned against "overlay[ing] the factual concept of habitual residence with legal constructs."[24]

The chief justice concluded that the hybrid approach to the determination of habitual residence should be adopted in Canada. Two considerations favoured its adoption here. First, the hybrid approach is supported by the principle of harmonization, introduced above. "Absolute consensus" in favour of the hybrid approach "has not yet emerged," yet "the clear trend is to rejection of the parental intention approach and to adoption of the hybrid approach."[25] McLachlin CJC illustrated this trend with reference to recent decisions of the Court of Justice of the European Union, the Supreme Court of the United Kingdom, the New Zealand Court of Appeal, the High Court of Australia, and certain US appeal court decisions. "The desirability of harmonization weighs heavily in favour of following

[20] *Balev*, *supra* note 11 at para 35, citing *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68; *VCLT*, *supra* note 9, arts 27, 31.

[21] *Balev*, *supra* note 11 at para 35.

[22] *Ibid* at para 40.

[23] *Ibid* at para 41.

[24] *Ibid* at paras 43–47.

[25] *Ibid* at para 50.

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the dominant thread of *Hague Convention* jurisprudence, unless there are strong reasons to the contrary," observed the chief justice.[26]

This brought the chief justice to the second consideration in favour of the hybrid approach, namely the text, structure, and purpose of the *Hague Convention* itself. Her discussion here particularly emphasized that the *Hague Convention* requires courts to determine a child's habitual residence immediately prior to the wrongful removal and detention and not at the time the parents initially formed an intention as to the child's residence.[27] In particular, courts must not treat time-limited consent agreements (such as the Ontario agreement at issue on the facts of this case) as

> a contract to be enforced by the court. Such an agreement may be valuable as evidence of the parents' intention, and parental intention may be relevant to determining habitual residence. But parents cannot contract out of the court's duty, under Canadian laws implementing the *Hague Convention*, to make factual determinations of the habitual residence of children at the time of their alleged wrongful retention or removal.[28]

The chief justice next turned to Article 13(2) of the *Hague Convention*, according to which domestic judicial or administrative authorities may refuse to order a child's return where the child objects "and has attained an age and degree of maturity at which it is appropriate to take account of its views." After noting that the *Hague Convention* does not specify particular requirements or procedures to prove the Article 13(2) exception to the prompt return rule, McLachlin CJC described the decision as a determination of fact for the application judge, which, in most cases, "can be achieved by a single process in which the judge decides if the child possesses sufficient age and maturity to make her evidence useful, decides if the child objects to return, and, if so, exercises his or her judicial discretion as to whether to return the child."[29] Expert evidence may be appropriate in some cases, but "this should not be allowed to delay the proceedings."[30]

The chief justice's reasons concluded with a notable consideration of delay in *Hague Convention* proceedings. She remarked that the proceedings in this case were "unacceptably long" and cited the *R. v Jordan* decision, observing: "Complacency towards judicial delay is objectionable in all contexts, but some disputes can better tolerate it. *Hague Convention* cases cannot."[31]

[26] *Ibid* at para 57.

[27] E.g., *ibid* at paras 66–67.

[28] *Ibid* at para 73.

[29] *Ibid* at para 78.

[30] *Ibid* at para 79.

[31] *Ibid* at para 82, citing *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.

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The chief justice reviewed the *Hague Convention*'s provisions requiring expeditious procedures, noting, in particular, that "[r]esponsibility for performing Canada's Article 11 obligation" to act expeditiously "falls to judges and court administrators"[32] and observing: "I am doubtful that we did so."[33] The chief justice concluded on this point:

> In light of this appeal, this Court has taken steps to ensure that *Hague Convention* cases are flagged internally and expedited by our registry. I hope other Canadian courts will consider what further steps they can take to ensure that *Hague Convention* proceedings are determined using the most expeditious procedures available. Judges seized of *Hague Convention* applications should not hesitate to use their authority to expedite proceedings in the interest of the children involved. Unlike much civil litigation in Canada, *Hague Convention* proceedings should be judge-led, not party-driven, to ensure they are determined expeditiously.[34]

As noted earlier, Côté and Rowe JJ, in dissent (Moldaver J concurring), would have endorsed the parental intention approach. In remarkably strong language, these judges accused the majority of "an unprincipled and open-ended approach — untethered from the text, structure, and purpose of the *Hague Convention* — that creates a recipe for litigation."[35] Like the majority, the dissent asserted that its interpretation was consistent with international treaty interpretation principles. As for the "emerging international consensus" in favour of the hybrid approach, Côté and Rowe JJ would not afford this factor significant weight because "the hybrid approach stems from an improper analysis of the *Convention*'s text, structure, and purpose."[36] The dissent also cautioned that the exception to prompt return found in Article 13(2) "should not be lightly invoked so as to systematically undermine custody rights of left-behind parents" and that "[j]udges should therefore not apply this exception in a manner that does not routinely override shared parental intention."[37] This direction seems unlikely to be followed by lower courts, however, given the majority's rejection of the parental intention approach.

Investor–state arbitration — North American Free Trade Agreement — *Chapter 11 — application to set aside award*

Canada (Attorney General) v Clayton, 2018 FC 436 (2 May 2018). Federal Court.

[32] *Balev, supra* note 11 at para 84.

[33] *Ibid* at para 87.

[34] *Ibid* at para 89.

[35] *Ibid* at para 111.

[36] *Ibid* at para 139.

[37] *Ibid* at para 159.

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The Government of Canada applied to the Federal Court to set aside the arbitral award against it under Chapter 11 of the *North American Free Trade Agreement* (*NAFTA*)[38] in *Bilcon of Delaware Inc. v Government of Canada*.[39] The claim arose from Canada's and Nova Scotia's failures to approve a proposed quarry and marine terminal in Nova Scotia following the recommendation of a joint federal-provincial environmental review panel against the project. The investors claimed to have invested many years and millions of dollars into the project, only to see it refused. The majority of the tribunal affirmed the investors' claim that Canada had violated *NAFTA* Articles 1105 (minimum standard of treatment) and 1102 (national treatment). The dissenting panelist, Donald McRae, found no violation.

Canada argued that the majority of the tribunal exceeded its jurisdiction by asking itself whether the joint review panel's actions complied with Canadian law when the question ought to have been whether the panel breached international law. Canada relied on the majority's findings that the panel's environmental assessment was "a fundamental departure from the methodology required by Canadian and Nova Scotia law" and that the investors had not been treated "in a manner consistent with Canada's own laws."[40] Canada also sought to rely on the well-known (indeed, notorious) decision of the Supreme Court of British Columbia setting aside a *NAFTA* arbitral award in *United Mexican States v Metalclad Corporation* to the effect that the tribunal had decided a matter beyond the scope of the submission to arbitration.[41] *NAFTA* tribunals do not sit in appeal of decisions made under domestic law, Canada noted, and not every regulatory deficiency will rise to the level of a breach of the international law obligation to accord fair and equitable treatment to investors.[42] For their part, the investors accused Canada of attempting to re-argue the merits of the case and argued that the majority of the tribunal had only treated Canadian law as part of the factual matrix against which the relevant international law principles were applied.[43]

Justice Anne Mactavish dismissed Canada's set-aside application. The errors Canada alleged were not true questions of jurisdiction of the sort reviewable by the Federal Court under the *Commercial Arbitration Act*, Canada's federal legislation implementing the United Nations Commission on International Trade Law's (UNCITRAL) Model Law.[44] Relying on the Court of Appeal for

[38] 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*].

[39] PCA Case no 2009-04, Award on Jurisdiction and Liability, 17 March 2015.

[40] *Canada (Attorney General) v Clayton*, 2018 FC 436 at para 85 [*Clayton*].

[41] *United Mexican States v Metalclad Corporation*, 2001 BCSC 664.

[42] *Clayton*, *supra* note 40 at paras 86–88.

[43] *Ibid* at paras 89–90.

[44] *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp).

Ontario's decision in *United Mexican States v Cargill, Inc.*,[45] Mactavish J structured her review of the arbitral award around three questions: (1) what was the issue the tribunal decided; (2) was that issue within the submission to arbitration; and (3) is there anything in *NAFTA*, properly interpreted, that precluded the tribunal from making the award it made?[46]

The issue the tribunal decided, said Mactavish J, was whether Canada's conduct in relation to the environmental assessment and approvals process for the project and its treatment of the investors breached *NAFTA*.[47] Turning to the second question, the learned judge affirmed that this issue was within the investors' submission to arbitration and that the tribunal's consideration of domestic law was incidental to the international law issues and not an excess of jurisdiction. In particular, Mactavish J explained:

> Although claims under Chapter Eleven of *NAFTA* are unquestionably to be decided based on international law, questions of compliance with a State Party's domestic law can nevertheless be a material and relevant factor in that analysis, and can form an important part of the factual matrix underlying *NAFTA* disputes.[48]

She added: "Indeed, some disputes giving rise to international claims can likely only be assessed by considering the requirements of domestic law incidentally to the issue of international liability."[49] Concluding on this point, Mactavish J succinctly observed:

> While Canada takes issue with the majority's findings regarding Canada's non-compliance with the requirements of Canadian environmental law, it is not open to this Court, sitting on an application to set aside an Award under Chapter Eleven of *NAFTA*, to review the merits of the Tribunal's decision and to second-guess its findings, as any error that the Tribunal may have made in this regard was not jurisdictional in nature.[50]

This brought Mactavish J to the third *Cargill* question — namely, whether anything in *NAFTA* precluded the award. She recalled the standard of review applicable here: "I am not judicially reviewing the reasonableness of the decision of the majority of the *NAFTA* panel, nor am I determining whether the Tribunal erred in fact or law in arriving at its decision."[51] She noted that

[45] 2011 ONCA 622.

[46] *Clayton*, *supra* note 40 at para 77.

[47] *Ibid* at para 104.

[48] *Ibid* at para 134.

[49] *Ibid* at para 139.

[50] *Ibid* at para 146.

[51] *Ibid* at para 152.

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the dissenting arbitrator, McRae, described his disagreement with the majority as being, in large part, with the majority's assessment of the facts and that the assessment of facts does not involve a jurisdictional question.[52] She then noted the "fierce" criticism of the *Metalclad* decision in the Supreme Court of British Columbia for being "far too intrusive into the merits of the case"[53] and distinguished it. She concluded that nothing in *NAFTA* precluded the majority of the tribunal from making the award it made. She dismissed Canada's application.

The temptation to intervene and set aside the *Bilcon* decision was no doubt real. Mactavish J. acknowledged "there may be many reasons to criticize" the award[54] and noted both academic criticism of the decision and the *NAFTA* parties' own express disapproval of its Article 1105 reasoning in a joint submission filed in *Mesa Power Group, LLC v Government of Canada*.[55] The learned judge nevertheless commendably applied the limited grounds for setting aside international arbitral awards set out in Article 34(2)(a)(iii) and underscored the inapplicability of domestic review standards to international arbitral awards.

Freedom of information — application to records of Children's Lawyer — Convention on the Rights of the Child

Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner), 2018 ONCA 559 (18 June 2018). Court of Appeal for Ontario.

In a custody dispute between a mother and a father, the court appointed the Children's Lawyer to investigate, report, and make recommendations. The Children's Lawyer decided to represent the children pursuant to section 89(3.1) of the *Courts of Justice Act*.[56] The court eventually terminated the father's access to the children and all forms of communication with them. The father later sought to vary that order, and the Children's Lawyer represented the children in that proceeding as well. The father then applied to the Ministry of the Attorney General for Ontario (MAG) for the Children's Lawyer's litigation files, relying on provisions of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).[57] The Assistant Information and Privacy Commissioner of Ontario, acting as adjudicator, granted the request. The Children's Lawyer applied for judicial review to the Divisional Court, which upheld the adjudicator.

[52] *Ibid* at paras 162–63.

[53] *Ibid* at para 165.

[54] *Ibid* at para 199.

[55] PCA Case No 2012-17, Award, 24 March 2016.

[56] RSO 1990, c C.43.

[57] RSO 1990, c F.31.

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Justice Mary Lou Benotto for the unanimous Court of Appeal for Ontario allowed the appeal. Whether the child–client's litigation records with the Children's Lawyer were subject to a freedom of information request turned on whether those records were "in the custody or under the control" of the MAG for the purposes of section 10(1) of *FIPPA*. Benotto JA held that they were not and that the adjudicator's decision betrayed a fundamental misunderstanding of the role of the Children's Lawyer, her relationship to the MAG, and her statutory duty to protect children.

A preliminary question for the court was what standard of review should be applied to the adjudicator's decision. The Divisional Court had applied the more deferential standard of reasonableness, in keeping with recent Supreme Court of Canada decisions requiring deference to administrative decision-makers' legal interpretations of their "home statutes." There is an exception, however, for questions of general law that are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise."[58] Benotto JA determined that that exception applied here. In support of that conclusion, she relied on a recent Supreme Court decision applying correctness review in the interpretation of freedom of information legislation where it might impact solicitor–client privilege.[59] Notably for our purposes, however, Benotto JA also invoked Canada's status as a party to the 1989 *Convention on the Rights of the Child* (*Children's Convention*).[60]

The learned judge began by situating the legal issue in the following context: "[T]he best interests of the child; the voice of the child; the confidential role of the Children's Lawyer; the child's privacy interests; the fact that confidentiality is broader than solicitor-client privilege; and the fact that the records belong to the child."[61] She derived this statutory context directly from the *Children's Convention*, beginning with Article 3(1) ("In all actions concerning children … the best interests of the child shall be a primary consideration") and approving an earlier Court of Appeal authority that the convention "can help inform the contextual approach to statutory interpretation and judicial review."[62] In her view, the *FIPPA* and other statutes at issue in the appeal "must be viewed through this lens and interpreted in a way that gives primacy to the best interests of the child." The adjudicator and the Divisional Court had fallen into error by failing to consider the best interests of the child.[63]

[58] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 60.

[59] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53.

[60] *Convention on the Rights of the Child*, *supra* note 18.

[61] *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 at para 55 [*Ontario (Children's Lawyer)*].

[62] *Ibid* at para 59, citing *Bhajan v Bhajan*, 2010 ONCA 714 at paras 12–14.

[63] *Ontario (Children's Lawyer)*, *supra* note 61 at para 60.

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Benotto JA also relied on Article 12 of the *Children's Convention*, requiring states parties to assure that children capable of forming their own views have the right to express them freely in all matters affecting them. The institution of the Children's Lawyer is a model for addressing the challenge "to find a way for children to express their views without exposing them to further trauma or causing more damage to the family" in custody disputes or child protection proceedings.[64] The learned judge continued:

> [70] The Children's Lawyer not only represents the child's interests; she provides a safe, effective way for the child's voice to be heard. For her to do this, she must provide a promise of confidentiality. Children must be able to disclose feelings and facts to the Children's Lawyer that cannot or will not be communicated to parents …
> [71] It is difficult enough for children to be the subject of litigation. For their voices to be heard, they must be guaranteed confidentiality when they say, "please, don't tell my mom," or "please, don't tell my dad."
> [72] To allow a disgruntled parent to obtain confidential records belonging to the child would undermine the Children's Lawyer's promise of confidentiality, inhibit the information she could obtain and sabotage her in the exercise of her duties.

Benotto JA invoked the *Children's Convention* again in considering the threat that disclosure of the Children's Lawyer's documents would represent to children's privacy interests. Relying on both the convention's preamble and Article 40(2)(b)(vii) (requiring respect for children's privacy at all stages of proceedings), she noted that the Children's Lawyer gathers information from and about her child clients in numerous ways, including with the assistance of social workers, therapists, and teachers, to ensure the child's voice is heard. Not all of these records will be subject to solicitor–client privilege, but the Children's Lawyer's duty of confidentiality will apply to all of them.[65] Furthermore, children enjoy heightened privacy rights "as mandated by the *Convention*."[66]

Having established the context in which the interpretive exercise must occur, Benotto JA turned to the question of whether the MAG had custody or control of the Children's Lawyer's records. She rejected the adjudicator's conclusion that the Children's Lawyer is a branch of the MAG, finding that while the Children's Lawyer is "administratively structured under and has a funding relationship with MAG, they are not connected with respect to her core functions: there is no statutory relationship between the two entities; she does not receive direction from MAG; she does not report

[64] *Ibid* at para 65; see also paras 64, 66.

[65] *Ibid* at paras 73–81.

[66] *Ibid* at para 88.

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to MAG; and her fiduciary duties are to her child clients, not to MAG."[67] Nor were the records of the Children's Lawyer within the MAG's custody or control. These records did not contain government information or any information that would advance the goals of government accountability and transparency.[68] Notably, Benotto JA rejected the Privacy Commissioner's reliance on the MAG's past practice of forwarding certain *FIPPA* requests to the Children's Lawyer for response, calling past practice not determinative, and adding that "the evolving nature of the functions of the Children's Lawyer with respect to advancing children's interests and the voice of the child, particularly in light of the *Convention*, requires new scrutiny."[69]

Scholars of the *Children's Convention* as a purely international legal instrument may not learn much from this decision. The Court's engagement with the *Children's Convention* is not (and did not need to be) interpretively profound. The importance of this decision lies in the Court's reliance on the *Children's Convention* to enable judicial review of an administrative decision and to inform the interpretation of domestic law. In *Baker v Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada declared — wrongly, in my view and that of others — that the *Children's Convention* is unimplemented in Canadian law.[70] But the Court allowed that Canada's treaty obligations can be a contextual consideration in scrutinizing executive decisions on judicial review. Benotto JA's reasoning here rightly ignores *Baker*'s depiction of the *Children's Convention* as unimplemented and rightly follows (without citing) *Baker*'s resort to the convention as a relevant (perhaps even a mandatory) consideration in judicial review.

The Court of Appeal's resort to the *Children's Convention* here is framed entirely as a contextual analysis and not as an application of the interpretive presumption that statutes conform with Canada's international obligations. The presumption of conformity is nowhere mentioned in Benotto JA's reasons.

[67] *Ibid* at para 99.

[68] *Ibid* at para 127.

[69] *Ibid* at para 125.

[70] [1999] 2 SCR 817 [*Baker*]. It is unsafe, particularly in the human rights context, to conclude that a treaty is unimplemented in domestic law merely from the absence of express implementing legislation. As Canada has explained to the UN human rights system: "It is not the practice in Canada for one single piece of legislation to be enacted incorporating an entire convention on human rights into domestic law, primarily due to the division of jurisdiction between federal and provincial/territorial levels. Rather, many different federal, provincial and territorial laws and policies together serve to implement Canada's international human rights obligations." Canada, Core Document Forming Part of the Reports of States Parties, Doc HRI/CORE/CAN/2013 (28 January 2013). A much superior account of the *Children's Convention*'s implementation status in Canada can be found in Martinson J's reasons in *BJG v DLG*, 2010 YKSC 44 at paras 34–36.

In my view, however, the court's strong application of the *Children's Convention* as a contextual factor in statutory interpretation is, in effect, an application of the presumption. The two ideas are closely related. Courts apply the presumption of conformity with international law at the contextual stage of statutory interpretation "in keeping with the international context in which Canadian legislation is enacted."[71] Even without expressly invoking the presumption of conformity, Benotto JA's *Children's Convention*-informed approach to the *FIPPA* in this case achieves the presumption's objective — namely, to promote the domestic performance of Canada's obligations under the *Children's Convention*.

Exportation des véhicules blindés légers vers l'Arabie saoudite — effet interne des Conventions de Genève — *connaissance d'office du droit international*

Turp c Canada (Affaires étrangères), 2018 CAF 133 (6 juillet 2018). Cour d'appel fédérale.

Tel que noté dans le tome précédent de l'*Annuaire*, en janvier 2017 la Cour fédérale a rejeté la demande de contrôle judiciaire initié par le professeur Daniel Turp d'une décision du Ministre des Affaires étrangères approuvant l'octroi de licences d'exportation pour des véhicules blindés légers (VBL) vers l'Arabie saoudite.[72] Dans la présente décision, l'appel par le professeur Turp est rejeté, le juge Nadon exprimant au nom de la Cour d'appel fédérale son accord entier avec les motifs de la juge de première instance.[73]

Les motifs du juge Nadon sont admirables dans au moins deux aspects: leur considération de la retenue judiciaire qui s'impose lorsqu'un tribunal est appelé à réviser une décision impliquant la conduite des affaires étrangères, et la connaissance d'office que doivent prendre les tribunaux quant au contenu et à la signification du droit international. Pourtant, il y a raison de douter la conclusion du juge Nadon que les individus manquent l'intérêt voulu pour se plaindre d'une violation des *Conventions de Genève* devant les tribunaux canadiens.[74]

[71] *Bo10 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 48; see also paras 47, 49.

[72] Van Ert 2017, *supra* note 1 aux pp 571–74.

[73] Ce jugement n'est peut-être pas le dernier mot dans l'affaire, comme le suggère la décision notée ci-haut. *Turp* CF, *supra* note 3.

[74] *Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne*, 12 août 1949, 75 RTNU 31, RT Can 1965 nº 20; *Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer*, 12 août 1949, 75 RTNU 85, RT Can 1965 nº 20; *Convention de Genève relative au traitement des prisonniers de guerre*, 12 août 1949, 75 RTNU 135, RT Can 1965 nº 20; *Convention de Genève relative à la protection des personnes civiles en temps de guerre*, 12 août 1949, 75 RTNU 287, RT Can 1965 nº 20 [*Conventions de Genève*].

Les parties conviennent, et le juge Nadon affirme, que la norme de contrôle applicable est celle de la décision raisonnable. En outre, le juge Nadon conclut, compte tenu du libellé de la *Loi sur les licences d'exportation et d'importation* (*LLEI*),[75] que la cour "doit exercer une grande retenue lorsqu'elle est appelée à réviser une décision du ministre, à savoir s'il doit ou non accorder des licences d'exportation telles que celles demandées en l'instance."[76] Il poursuit:

> [L]es tribunaux ne sont nullement autorisés à s'ingérer dans le processus d'évaluation conduit par le ministre dans la mesure où le ministre a considéré tous les facteurs pertinents eu égard à la législation applicable et à ses objets. Il ne s'agit donc pas pour la Cour de déterminer le poids devant être accordé à un facteur ou à un autre, mais plutôt de s'assurer que les facteurs qui devaient être considérés l'ont été. En outre, considérant que les questions portant sur la conduite des relations internationales et les décisions relatives aux intérêts du Canada en matière de défense et d'économie sont de l'apanage du cabinet fédéral, les tribunaux doivent agir avec beaucoup de prudence et de retenue à l'égard de ces questions (*Canada (Premier ministre) c. Khadr*, 2010 CSC 3) …
>
> Par conséquent, en l'absence d'une contestation fondée sur la *Charte canadienne des droits et libertés*, ce qui n'est pas le cas en l'espèce, ni la Cour fédérale ni notre Cour ne peuvent intervenir en révisant une décision discrétionnaire telle que la présente décision, sauf si elle a « été prise arbitrairement ou de mauvaise foi, qu'elle n'est pas étayée par la preuve ou que [le] ministre a omis de tenir compte des facteurs pertinents ».[77]

Dans cette même optique, le juge ajoute: "Il va sans dire qu'il pourrait y avoir des conséquences ou répercussions politiques résultant de la décision du ministre d'accorder les licences mais il ne peut faire de doute que le débat qui pourrait s'ensuivre n'est pas du ressort de notre Cour."[78] L'application de ces propos est souvent controversée dans les cas difficiles, mais leur explication par le juge Nadon en l'espèce ne l'est sûrement pas.

L'aspect le plus important des motifs du juge Nadon est peut-être ses observations, bien qu'elles soient exprimées en *obiter*, sur le recours à l'expertise afin de prouver le contenu et la signification des obligations juridiques internationales du Canada. Dans une discussion intitulée, "La preuve du droit international par expertise," le juge exprime son avis qu'il "n'est pas nécessaire pour les parties de déposer des rapports d'expertises pour faire la preuve du droit international puisque la Cour peut prendre

[75] *LLEI*, *supra* note 2.

[76] *Turp c Canada (Affaires étrangères)*, 2018 CAF 133 au para 60 [*Turp* CAF].

[77] *Ibid* aux paras 60–61.

[78] *Ibid* au para 69.

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connaissance judiciaire de ce droit."[79] Le juge tire cette conclusion de trois autorités, à savoir *R v The North*, *Jose Pereira E Hijos, SA c Canada (Procureur général)*, et la décision écossaise bien connue, *Lord Advocate's Reference (No 1 of 2000)*.[80] Il conclut:

> Par conséquent, j'estime que dans une affaire comme celle devant nous, il n'est pas nécessaire pour les parties d'avoir recours à des expertises portant sur le droit international. Le droit international, étant une question de droit, est de l'apanage des tribunaux qui peuvent prendre connaissance judiciaire de ce droit avec l'aide des procureurs plaidant la cause.[81]

Les propos du juge Nadon laissent espérer que le droit canadien rattrapera enfin les autorités britanniques et australiennes[82] et qualifiera les avis juridiques d'experts sur des questions de droit international de généralement inadmissibles. Les positions juridiques doivent être avancées par les avocats et non par les experts. Les questions de droit international doivent être réglées par les tribunaux comme des questions de droit et non de fait.

Les observations du juge Nadon quant à la preuve du droit international méritent un accueil chaleureux, mais ses conclusions quant à l'intérêt nécessaire des individus pour soulever une violation des *Conventions de Genève* méritent un examen minutieux. Le juge s'exprime ainsi:

> À mon avis, seuls les États signataires des conventions de Genève peuvent se plaindre d'une violation des conventions et plus particulièrement d'une violation de l'article premier commun. Une lecture du texte de l'article premier commun ne laisse aucun doute à ce sujet. C'est aux parties contractantes que les conventions de Genève confient le droit, et puis-je dire, la responsabilité de « faire respecter la présente convention en toutes circonstances » (article premier commun des conventions). Par conséquent, il n'est pas loisible à des individus comme l'appelant de soulever des violations aux conventions de Genève et d'en demander le respect devant les tribunaux. Évidemment, tout individu peut soulever ces questions dans le cadre de débats politiques et démocratiques et demander à son gouvernement d'agir. Cependant, il n'est pas possible pour un individu de le faire, comme l'appelant tente de le faire, par voie de demande de contrôle judiciaire à l'encontre d'une décision du ministre d'octroyer des licences sous le régime de la LLEI que j'ai décrit plus haut.

[79] *Ibid* au para 82.

[80] *R v The North* (1906), 37 SCR 385; *Jose Pereira E Hijos, SA c Canada (Procureur général)*, [1997] 2 CF 84; *Lord Advocate's Reference (No 1 of 2000)*, [2001] ScotHC 15.

[81] *Turp* CAF, *supra* note 76 au para 88.

[82] Notamment *Australian Competition and Consumer Commission v PT Garuda Indonesia (n° 9)*, [2013] FCA 323 (Federal Court of Australia).

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À cet égard, je souscris entièrement aux propos de l'expert de l'intimée, le professeur Schmitt, que l'on retrouve aux paragraphes 20 à 22 de son affidavit en date du 29 juin 2016 où il se dit d'avis qu'une violation des conventions de Genève par un État signataire constitue un « internationally wrongful act » à l'égard des États non responsables de la violation. Par ailleurs, selon le professeur Schmitt, la violation ne donne aucunement ouverture à un recours par des individus affectés par la violation.

Autrement dit, les individus ou personnes affectées par la violation ne peuvent exercer aucun recours contre l'État responsable de la violation des conventions de Genève. Ce droit appartient uniquement à un État signataire non responsable. Par conséquent, selon le professeur Schmitt, un individu tel l'appelant en l'instance ne peut soulever devant les tribunaux une violation des conventions. Cette conclusion est partagée par l'auteure Kate Parlett dans son ouvrage *The Individual in the International Legal System : Continuity and Change in International Law*, Cambridge, Cambridge University Press, 2011. Plus particulièrement, à la page 182 de son ouvrage, sous la rubrique *The Individual in International Humanitarian Law*, l'auteure énonce ce qui suit, sous le titre *The 1949 Geneva Convention*:

> The substantive provisions of the four Geneva Conventions generally express the protection of individuals as protective obligations on state parties to a conflict, rather than as specific rights conferred directly on individuals. Common Article 1 of each of the Geneva Conventions states that the High Contracting Parties "undertake to respect and to ensure respect for the present Convention in all circumstances." Additionally, the first and second Geneva Conventions provide that "[e] ach Party to the conflict … shall ensure the detailed execution" of the provisions of those conventions. The provisions relating to execution in all four conventions refer exclusively to obligations incumbent upon states.
>
> The vast majority of the provisions of the conventions which provide for the protection of various categories of individuals are expressed in terms which indicate that obligations are imposed on states parties to a conflict, rather than rights directly conferred on the relevant individuals.

Par conséquent, comme l'a conclu la juge, l'appelant n'a pas l'intérêt voulu pour soulever la violation de l'article premier commun des conventions de Genève, même si ce dernier était incorporé en droit interne.[83]

Avec beaucoup d'égards au juge Nadon, qui est (à mon avis) parmi nos juges les plus sophistiqués quant à la réception du droit international en droit interne, ces propos confondent la position en droit international avec la position en droit interne. Il est vrai que les individus ne peuvent exercer de recours contre un État responsable d'une violation des *Conventions de Genève* — en droit international. Mais il est beaucoup moins clair

[83] *Turp* CAF, *supra* note 76 aux paras 78–81.

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que ces mêmes conventions obligent aux états parties d'interdire en droit interne qu'un individu puisse invoquer ces conventions pour des fins internes telles la révision judiciaire de décisions gouvernementales.

De plus, si les *Conventions de Genève* incluaient une telle obligation, la règle voulant que les dispositions conventionnelles soient mises en œuvre par voie législative pour avoir un effet direct en droit interne s'appliquerait. Comme le constate le juge Nadon plus tôt dans ses motifs,[84] un traité doit normalement être expressément intégré au droit canadien pour avoir force de loi. Cette règle s'appliquerait tant à un traité qui supprime un droit qu'à un traité qui l'octroie. Il est dejà clair en droit canadien qu'un justiciable peut invoquer une obligation découlant d'un traité à l'appui d'une demande de contrôle judiciaire.[85] Comme l'affirme le juge Stratas:

> Dans une affaire de droit administratif comme celle dont la Cour est saisie en l'espèce, le droit international peut d'une autre manière intervenir dans l'analyse de manière restreinte … [I]l est possible qu'il soit loisible au décideur administratif d'exercer son pouvoir discrétionnaire de différentes manières, et il se pourrait aussi qu'une approche soit davantage compatible avec les normes de droit international que d'autres. Dans les cas où le décideur administratif s'abstient d'exercer son pouvoir discrétionnaire de la façon davantage compatible avec les normes du droit international et où il emprunte plutôt une autre voie, une partie peut faire valoir qu'il n'a pas exercé son pouvoir de manière raisonnable du fait qu'il n'a pas suivi les normes de droit international.[86]

Pour que, dans le cadre d'une demande de contrôle judicaire, le droit d'un justiciable d'invoquer une obligation internationale du Canada — et la liberté d'un tribunal de considérer cet argument — ne s'applique pas à l'égard des *Conventions de Genève*, il faudrait que cette interdiction soit mise en œuvre par une loi.

International commercial arbitration — recognition and enforcement of judgments — meaning of "binding" in UNCITRAL Model Law *art. 35(1)*

Popack v Lipszyc, 2018 ONCA 635 (12 July 2018). Court of Appeal for Ontario.

[84] *Ibid* au para 28.

[85] *Baker*, *supra* note 70 au para 70: "Les valeurs exprimées dans le droit international des droits de la personne peuvent, toutefois, être prises en compte dans l'approche contextuelle de l'interprétation des lois et en matière de contrôle judiciaire." Voir également *Budlakoti c Canada (MCI)*, 2015 CAF 139 au para 54: " L'appelant peut également invoquer la Convention comme élément dont le ministre devrait tenir compte: *Baker*"; *Németh c Canada*, 2010 CSC 56 au para 105.

[86] *Nation Gitxaala c Canada*, 2015 CAF 73 au para 18.

Popack and Lipszyc were businessmen with a commercial real estate dispute in the Greater Toronto Area. They submitted their dispute to arbitration before a rabbinical court in New York known as the Beth Din. The arbitration agreement provided that the Beth Din was a tribunal subject to the *International Commercial Arbitration Act, 2017*, an Ontario statute that implements the *New York Convention* and the *UNCITRAL Model Law*.[87] In August 2013, the Beth Din made an award in favour of Popack and his associated entities, though for much less than they had sought. They applied to set aside the award under Article 34 of the *UNCITRAL Model Law*. That application was dismissed,[88] and this dismissal was upheld by the Court of Appeal for Ontario.[89] The Popack parties then applied for recognition and enforcement of their award. Lipszyc resisted, saying he planned to return to the Beth Din to claim further costs and damages arising from the Popack parties' unsuccessful set aside proceedings. In June 2017, the Beth Din purported to stay the award pending a hearing of Lipszyc's further claim.

The application judge heard both the Popack application to enforce the award and the Lipszyc application to stay it. He agreed with Lipszyc that the award was not yet "binding" within the meaning of Article 36(1)(a)(v) of the *UNCITRAL Model Law* and Article V(1)(e) of the *New York Convention* and, therefore, could not yet be enforced. The Popack parties appealed.

Justice David Brown for the Court of Appeal for Ontario allowed the appeal, set aside the order below and substituted an order recognizing and enforcing the Beth Din's award. The standard of review was correctness,[90] and the application judge had erred in his interpretation of the *UNCITRAL Model Law*. Brown JA began his analysis with an observation by the well-known practitioner and author, Gary Born, to the effect that the meaning of the term "binding," as found in the *New York Convention* and the *UNCITRAL Model Law* "has always been a mystery."[91] While Born takes the view that an award should be considered binding "when the parties' arbitration agreement provides that it is either final or binding, regardless of the possibility of subsequent judicial challenges of any sort," a number

[87] *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sched 5; *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, Can TS 1986 No 43 (entered into force 7 June 1959) [*New York Convention*]; United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2008* (Vienna: United Nations, 2008) [*UNCITRAL Model Law*].

[88] *Popack v Lipszyc*, 2015 ONSC 3460.

[89] *Popack v Lipszyc*, 2016 ONCA 135.

[90] *Popack v Lipszyc*, 2018 ONCA 635 at paras 31–34 [*Popack* 2018].

[91] *Ibid* at para 43, quoting Gary B Born, *International Commercial Arbitration*, 2nd ed, vol 3 (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2014) at 3611.

of national courts do not share his view.[92] In particular, Brown JA noted that some courts distinguish between "ordinary" and "extraordinary" avenues of recourse and consider an award binding when avenues of ordinary recourse (excluding set aside proceedings under the *New York Convention* and the *UNCITRAL Model Law*) have been exhausted.[93]

Yet, Brown JA observed, the Supreme Court of Canada appears not to take this approach. In *Yugraneft Corp v Rexx Management Corp*, the Court held that the availability of set aside proceedings under the *New York Convention* and *UNCITRAL Model Law* may render an award not binding under Article V(1)(e) of the *New York Convention*.[94] Having pointed out this apparent discrepancy between Canada and other jurisdictions, Brown JA observed that he need not "express any definitive view on whether an award is not 'binding' while an avenue of 'ordinary recourse,' such as a review or appeal, remains open to a party," for in the case before him the arbitration agreement expressly forbade appeals, thus precluding "ordinary recourse" against the award on the merits.[95]

Brown JA went on to reject Lipszyc's other arguments that the award was not yet binding. Article 33(1)(a)'s provisions for correcting computational, clerical, or typographical errors did not apply, nor did Article 33(1)(b)'s provisions for seeking an interpretation of a specific point or part of the award. Also inapplicable was Article 33(3)'s provision that a party may request that the tribunal make an additional award as to claims presented in the proceedings but not addressed in the award. Quoting Born, Brown JA explained that all of these provisions represent "very narrow categories of 'errors' that may be corrected under the *Model Law*" and that "errors in the tribunal's reasoning in the body of its award are not subject to correction."[96] In response to Lipszyc's argument that the Beth Din enjoyed continuing jurisdiction, Brown JA held that the court below had wrongly conflated two issues: whether the award was "binding" for the purposes of recognition and enforcement and whether the tribunal had jurisdiction to accept new claims following issuance of the award.[97] Arbitration proceedings are terminated by the final award (Article 32(1)), and the Beth Din had made such an award.

[92] *Popack* 2018, *supra* note 90 at paras 45–46, quoting Born, *supra* note 91 at 3617.

[93] *Popack* 2018, *supra* note 90 at paras 47–48.

[94] *Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19 at paras 54–55.

[95] *Popack* 2018, *supra* note 90 at para 52.

[96] *Ibid* at para 66.

[97] *In the Matter of an Application by [Redacted] for Warrants pursuant to Sections 16 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23 and In the Matter of [Redacted]*, 2018 FC 738 at para 74 [*CSIS Warrants* FC].

The Lipszyc respondents countered that the tribunal had yet to award costs. But this, said Brown JA, was because their request that the Beth Din consider costs came only after issuance of the award and was therefore a new issue. Even if the Beth Din enjoyed continuing jurisdiction to make a costs award (about which Brown JA made no comment), that did not affect the binding nature of the existing award.[98]

Canadian Security Intelligence Service — foreign intelligence collection power — extraterritoriality

In the Matter of an Application by [Redacted] for Warrants pursuant to Sections 16 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23 and In the Matter of [Redacted], 2018 FC 738 (date redacted). Federal Court.
In the Matter of an Application by [Redacted] for Warrants pursuant to Sections 16 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23 and In the Matter of [Redacted], 2018 FCA 207 (date redacted). Federal Court of Appeal.

These proceedings arose from an application by the Canadian Security Intelligence Service (CSIS) for a warrant pursuant to sections 16 and 21 of its governing statute.[99] What precisely CSIS sought judicial authority to do is not revealed by the reasons, which are redacted at various points on national security grounds. We know only that CSIS, at the behest of either the minister of national defence or the minister of foreign affairs, and with the approval of its own minister, the minister of public safety, sought to collect information or intelligence with respect to the capabilities, intentions, and activities of an unidentified foreign state. Section 16(1) grants CSIS the power to do this "within Canada." But the proposed operation had an extraterritorial dimension (the nature of which is redacted from the reasons). The legal question was whether section 16(1), properly interpreted, included some tolerance for extraterritoriality.

Justice Simon Noël found it did not. He rejected the Attorney General's purposive interpretation of section 16(1) and adopted the *amicus curiae*'s submission that section 16, unlike section 12, was territorially limited. The learned judge's reasoning was rooted in a textual, contextual, and purposive interpretation of the disputed provision, including considerations of international law and comity. He also relied on Federal Court jurisprudence insisting on "[s]trict limitations and controls on intelligence gathering powers," which he called "guiding principles in the interpretation of national security legislation."[100]

[98] *Ibid* at paras 80–85.

[99] *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*].

[100] *CSIS Warrants* FC, *supra* note 97 at para 25.

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The *CSIS Act* sets CSIS's primary mandate in section 12(1) as to "collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada." CSIS may perform these duties and functions within or outside Canada; section 12(2) expressly says so. CSIS also has secondary mandates, one of which (section 16(1)) is to assist, "within Canada," the minister of national defence or the minister of foreign affairs "in the collection of information or intelligence relating to the capabilities, intentions or activities of" foreign states, persons, and companies. This activity is not limited to threats to the security of Canada, as is section 12(1), but is limited — on its express wording — to activities within Canada. Finally, section 21 permits CSIS to apply to a Federal Court judge for a warrant "to enable the Service to investigate, within or outside Canada, a threat to the security of Canada or to perform its duties and functions under section 16." The extraterritorial powers in the *CSIS Act* were added in 2015 by Bill C-44. Notably, no extraterritorial expansion of the section 16 power was included in those amendments.

Reviewing these provisions individually, in their statutory context, and in light of legislative history (notably, the McDonald and Pitfield reports that led to the creation of CSIS), Noël J considered there was no extraterritorial dimension to section 16(1). He then considered, but rejected, the Attorney General's arguments for a purposive interpretation that would support an extraterritorial dimension when providing assistance "within Canada." The nature of the Attorney General's arguments in favour of this approach is considerably obscured by the redactions in the reasons. Whatever the nature of the activity for which CSIS sought a warrant, it appears to have been one that would involve CSIS acting from within Canada to collect information or intelligence from abroad. It appears also to have involved signals intelligence of the sort for which the Communications Security Establishment (CSE) has primary jurisdiction.[101] The Attorney General argued that to confine section 16(1) to a strictly territorial reading would create a "foreign intelligence gap" in its powers. Yet Noël J considered that the historical record indicated that

> the inclusion of a geographical limitation was aimed to mitigate the political, diplomatic and moral risk of conducting foreign intelligence collection, which had the potential to breach international law, foreign domestic law and bring disrepute to Canada's international reputation and defence policies.[102]

[101] *Ibid* at para 114.

[102] *Ibid* at para 119.

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He added: "[C]ollecting foreign intelligence outside Canada was deemed to be too high of a risk to our diplomatic relations by Parliament to be permitted in law."[103]

Finally, under the heading "The Presumption of Conformity with International Law," Noël J set out certain international legal considerations. Applying *R v Hape*, the learned judge recalled that "customary international law is adopted directly into Canadian domestic law through the common law without any need for legislative action" and that respect for the sovereignty and equality of foreign states are "foundational parts" of that custom.[104] Sovereignty and equality "mandate the non-intervention and the respect for the territorial sovereignty of all foreign states."[105] Similarly, adherence to the principle of international comity requires those interpreting domestic law to "avoid interpretations that could impact or infringe the sovereignty of a foreign state out of deference and respect for a state's action legitimately taken within its borders."[106] Finally, the learned judge recalled "the well-established principle of statutory interpretation that legislation is presumed to conform to international law, unless clearly contradicted by an Act of Parliament" and the related presumption against extraterritoriality.[107]

Having reviewed these principles, Noël J observed that the Attorney General's interpretation of "within Canada" in section 16(1) "undermines interstate relationships and cannot be said to conform with the principle of comity of nations."[108] He was prepared to assume that the activity CSIS sought to engage in was contrary to the foreign state's domestic law. The legality of the act as a matter of international law was, however, unclear.[109] Yet the learned judge nevertheless concluded, following a heavily redacted discussion, that to adhere to the Attorney General's argument he would "need to turn a blind eye to settled principles of international law."[110] While this turn of phrase suggests the learned judge's unwillingness to do so, he observed later in his reasons that Parliament could easily give the court the power to grant warrants for extraterritorial activities but that, for now, "*much as I wish I could*, I cannot stretch the words of the *Act* as they are currently written to remedy this worrisome situation"[111] — as if to say he

[103] *Ibid* at para 122.

[104] *Ibid* at paras 133–34; *R v Hape*, 2007 SCC 26.

[105] *CSIS Warrants* FC, *supra* note 97 at para 134.

[106] *Ibid* at para 135.

[107] *Ibid* at para 136.

[108] *Ibid* at para 142.

[109] *Ibid* at para 143.

[110] *Ibid* at para 147.

[111] *Ibid* at paras 175–78 [emphasis added].

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would willingly endorse the internationally unlawful warrant sought in this case had he the power to do so.

The Attorney General's appeal of Noël J's order was dismissed by the Federal Court of Appeal, but without endorsing his reasoning. Instead, Justice John B. Laskin for the court concluded that the record before the court did not provide an adequate evidentiary basis to fully consider whether the warrant CSIS sought was available under sections 16 and 21 of the *CSIS Act*. "Sufficient details are lacking to explain what would be done under the warrant if it was granted and how these activities would be carried out," despite the designated judge's request for such evidence.[112] The inadequacies the Court of Appeal found in the record are obscured by the redactions to its reasons, but one difficulty, it seems, was knowing the location of the activities for which the warrant was sought.[113] Laskin JA therefore dismissed the appeal, but left CSIS with some hope of overcoming Noël J's concerns another day: "I would not foreclose the possibility that in a future warrant application, the evidence might be sufficiently specific to demonstrate that the granting of the authority refused in this case would be consistent with the 'within Canada' requirement of section 16."[114]

Briefly noted / Sommaire en bref

Solitary confinement — Mandela Rules — legal significance in Canada

British Columbia Civil Liberties Association v Canada (Attorney General), 2018 BCSC 62 (17 January 2018). Supreme Court of British Columbia.

The plaintiffs British Columbia Civil Liberties Association and the John Howard Society of Canada brought a series of constitutional challenges to the practice of administrative segregation as authorized by sections 31–33 and 37 of the *Corrections and Conditional Release Act*.[115] They contended that the impugned provisions permit indeterminate and prolonged solitary confinement, as that term is understood in international law and accepted worldwide. The Attorney General of Canada defended, arguing that administrative segregation as practised in federal correctional facilities is not solitary confinement since inmates have daily opportunities for meaningful human contact and that administrative segregation is a necessary tool in certain circumstances.

[112] *In the Matter of an Application by [Redacted] for Warrants pursuant to Sections 16 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23 and In the Matter of [Redacted]*, 2018 FCA 207 at para 29.

[113] *Ibid* at para 35.

[114] *Ibid* at para 5.

[115] *Corrections and Conditional Release Act*, SC 1992, c 20.

In lengthy reasons, Justice Peter Leask found for the plaintiffs and declared the impugned provisions unconstitutional as contrary to sections 7 (life, liberty, and security of the person) and 15 (equality) of the *Charter*.[116] The learned judge found (among other things) that administrative segregation conforms to the definition of solitary confinement in the 2015 *United Nations Standard Minimum Rules for the Treatment of Prisoners* (*Mandela Rules*),[117] that inmates in administrative segregation are confined without meaningful human contact,[118] and that a central feature of administrative segregation is its indefiniteness.[119]

While Leask J clearly considered, and to some extent engaged with, the *Mandela Rules*, he gave no guidance as to their legal significance in Canada. Aside from briefly declining to address the plaintiffs' argument that the rules reflect *jus cogens* and, as such, principles of fundamental justice for the purposes of section 7 of the *Charter*,[120] the court's reasons included almost no consideration of the legal status of the *Mandela Rules* in international law or how a formally non-binding, but widely supported, international instrument is to be used in *Charter* interpretation.[121] His review of the general international law position on solitary confinement was only slightly more thorough.[122] It begins, and very nearly ends, with the claim that there is "an emerging consensus in international law that under certain circumstances solitary confinement can cross the threshold from a legitimate practice into cruel, inhuman or degrading treatment, … even torture."[123] This is a defensible claim, but there is little reasoning offered in support of it.

An appeal from this decision was heard by the Court of Appeal for British Columbia in November 2018 and is, at the time of writing, under reserve. It will be addressed, if warranted, in a future edition of the *Canadian Yearbook of International Law*.

[116] *Charter*, *supra* note 19, ss 7, 15.

[117] *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 at paras 57 (quoting from UN General Assembly Resolution A/RES/70/175 (17 December 2015)), 137 [*BCCLA*].

[118] *BCCLA*, *supra* note 117 at para 137.

[119] *Ibid* at para 154.

[120] *Ibid* at para 304.

[121] There is an unremarkable exception at para 560 of the court's reasons: "It is an important fact that the Mandela Rules prohibit solitary confinement for a period in excess of 15 consecutive days. As the Supreme Court recognized in *Suresh* ... 'the principles of fundamental justice expressed in s. 7 of the Charter and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect'."

[122] *BCCLA*, *supra* note 117 at paras 50–58.

[123] *Ibid* at para 50.

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Child abduction — States not parties to the Hague Convention — Convention on the Rights of the Child

Ojeikere v Ojeikere, 2018 ONCA 372 (17 April 2018). Court of Appeal for Ontario.

In a custody dispute, the father argued that the Nigerian courts had jurisdiction, while the mother (supported by the Office of the Children's Lawyer) argued for Ontario. The court below found for the father. Justice John I. Laskin for the majority of the Court of Appeal agreed that Ontario lacked jurisdiction but nevertheless reversed on the ground that the children would likely suffer serious harm if returned to Nigeria. The jurisdictional point was not governed by the *Hague Convention* because Nigeria is not a party.[124] It therefore fell to be decided under sections 22 and 23 of the *Children's Law Reform Act*.[125]

The Court of Appeal nevertheless made some notable observations about both the *Hague Convention* and the *Convention on the Rights of the Child*.[126] For the majority, Laskin JA held that the "serious harm" standard established by section 23 of the *Act* is less stringent than the "grave risk" of harm standard in Article 13(b) of the *Hague Convention*. Thus, Ontario courts considering child abduction cases involving non-parties to the *Hague Convention* have somewhat greater latitude to refuse to order an abducted child's return to the child's habitual residence. In Laskin JA's view, the section 23 standard must be less stringent than the Article 13(b) standard for two reasons. First, the Legislature was clearly aware of the Article 13(b) requirement of grave risk of harm placing the child in an intolerable situation, yet opted instead for the concept of serious harm.[127] Second, Laskin JA ventured that the *Hague Convention* standard is

> exacting, at least in part, because under the preamble to the *Convention* all signatories accept and are "firmly convinced that the interests of children are of paramount importance in matters related to their custody." Signatories have accepted this principle and its enforcement by their agreement to adhere to their reciprocal obligations under the *Convention*. In *Hague Convention* cases Ontario courts can have confidence that whatever jurisdiction decides on a child's custody it will do so on the basis of the child's best interests. Ontario courts cannot always have the same confidence in section 23 cases.[128]

[124] *Hague Convention*, *supra* note 10.

[125] *Children's Law Reform Act*, *supra* note 13, ss 22–23.

[126] *Ojeikere v Ojeikere*, 2018 ONCA 372 at para 34 [*Ojeikere*], citing the *Hague Convention*, *supra* note 10; *Convention on the Rights of the Child*, *supra* note 18.

[127] *Ojeikere*, *supra* note 126 at para 59.

[128] *Ibid* at para 60.

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Laskin JA turned to Article 13(b) of the *Hague Convention* again in considering the views of the three children at issue, as required by section 64(1) of the Act ("a court where possible shall take into account the views and preferences of the child to the extent that the child is able to express them"). Laskin JA considered this provision to be a parallel to the second clause of Article 13(b), which provides that judicial or administrative authorities may refuse to order the return of a child if they find the child "objects to return and has attained an age and degree of maturity at which it is appropriate to take account of its views." Having previously concluded that the children faced a serious risk of physical harm from their father if returned to Nigeria, he observed that the children's views were relevant to assessing the risk of psychological harm they would face were they returned. While noting again that the case before him was not a *Hague Convention* case, he nevertheless considered Article 13(b) "relevant because it reflects widespread international agreement that in jurisdictional disputes over custody, a mature child's objection to returning to the place of habitual residence should be considered."[129]

In concurring reasons, Justice Bradley Miller agreed that the children ought not to be returned, but for different reasons. Like Laskin JA, Miller JA found that there was a risk of physical harm to the children that justified their retention in Ontario. He disagreed, however, that the children faced a risk of psychological harm. In his view, the children's views about returning to Nigeria amounted to disappointment, but not harm, let alone serious harm. Additionally, Miller JA did not accept that the Act's serious harm standard (in section 23) ought to be interpreted as a lower threshold than that imposed by the *Hague Convention*. In particular, Miller JA observed:

> [T]he fact that a state is not a signatory to the *Convention* does not entail that it is not committed to resolving custody and access disputes according to best interests [of the child] criteria. Nigeria is not a signatory to the *Convention* but is a signatory to the *United Nations' Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which is a substantive declaration committing signatories to adopting best interests standards in their domestic law.[130]

Immunité de poursuite — Organisation des Nations Unies — UNICEF

Bouchard c IKEA Canada, 2018 QCCS 2690 (13 juin 2018). Cour supérieure du Québec.

[129] *Ibid* at para 77.

[130] *Ibid* at para 113.

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Dans cette affaire, la Cour supérieure du Québec rejette la tentative de la demanderesse de poursuivre l'UNICEF pour violation de ses droits d'auteur en invoquant l'immunité de l'Organisation des Nations Unies (ONU) (dont fait partie l'UNICEF). La demanderesse soutient que l'UNICEF et le Groupe Ikea collaboraient pour la production et vente de peluches ayant les mêmes caractéristiques que celles qu'elle a créées.

En traitant d'une demande d'exception déclinatoire initiée par le Procureur général du Canada, le juge Jacques affirme l'immunité absolue de l'UNICEF. Il commence avec l'article 105 de la *Charte des Nations Unies*,[131] qui prévoit pour l'ONU "des privilèges et immunités qui lui sont nécessaires pour atteindre ses buts." Ensuite, il prend note de la *Convention sur les privilèges et immunités des Nations Unies* de 1946,[132] qui, dans son article 2, prévoit une immunité de juridiction complète et absolue à l'ONU et, dans son article 34, oblige à chaque pays membre de l'ONU d'appliquer cette immunité dans son droit interne. Passant au droit canadien, le juge Jacques conclut que l'immunité de l'ONU est établi par l'effet conjoint de l'article 5(1) de la *Loi sur les missions étrangères et les organisations internationales* (*LMEOI*)[133] et l'article 3 du *Décret d'adhésion aux privilèges et immunités (Nations Unies)*.[134] Le fait que l'UNICEF bénéficie de l'immunité de l'ONU est établi par l'article 11 de la *LMEOI* et un certificat délivré en vertu de celle-ci. L'article 11 établit que le ministre des Affaires étrangères peut délivrer un certificat attestant de l'assujettissement d'une organisation à un décret pris en vertu de l'article 5: "Or, un tel certificat a été délivré par le ministère … reconnaissant que l'UNICEF est bel et bien sujet au décret et à la même immunité que celle dévolue à l'ONU."[135]

En réponse à la prétention de la demanderesse selon laquelle l'ONU était obligée, en vertu de l'article 29 de la convention, de mettre sur pied un mode approprié de règlement des différends, ce qu'elle a omis de faire, le juge Jacques affirme que ce défaut "n'a pas pour effet de lever l'immunité absolue et de conférer compétence à la Cour."[136]

[131] 26 juin 1945, RT Can 1945 nº 7 (entrée en vigueur: 24 octobre 1945).

[132] 13 février 1946, 1 RTNU 15 et 90 RTNU 327, RT Can 1948 nº 2 (entrée en vigueur: 17 septembre 1946).

[133] LC 1991, c 41, art 5(1).

[134] CRC, c 1317, art 3.

[135] *Bouchard c IKEA Canada*, 2018 QCCS 2690 au para 23.

[136] *Ibid* au para 29.

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