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Exclusion from refugee protection — complicity in crimes against humanity — effect of change in the law

Tapambwa v Canada (Citizenship and Immigration), 2019 FCA 34 (21 February 2019). Federal Court of Appeal.

The appellants, Stensia and Richard Tapambwa, were a married couple and citizens of Zimbabwe who both served in its army. They left the country in 2001 for the United States, then came to Canada in 2011. They made no claim for refugee protection in the United States but made such a claim in Canada. The Refugee Protection Division (RPD) found the Tapambwas excluded from protection by section 98 of the *Immigration and Refugee Protection Act* (*IRPA*)[1] on the ground that there were serious reasons to believe they were complicit in crimes against humanity committed by the Zimbabwe National Army. The RPD nevertheless went on to consider the substance of their claims and concluded that, even if they were not excluded by section 98, they faced nothing more than a remote risk of persecution in Zimbabwe and therefore were not refugees under section 96. Nor were the Tapambwas or their children persons in need of protection under section 97.

Later, the Immigration Division determined the Tapambwas inadmissible for crimes against humanity and ordered their deportation. They sought

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[1] SC 2001, c 27 [*IRPA*].

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leave to apply for judicial review of the RPD decision, but it was denied. Then, in July 2013, the Supreme Court of Canada released its decision in *Ezokola v Canada (Citizenship and Immigration)*.[2] The court castigated the prior jurisprudence on complicity as "guilt by association" and effectively overturned a key decision relied on by the RPD in the Tapambwas' case.[3] The court adopted a new approach to complicity under Article 1F(a) of the *Refugee Convention*,[4] with the purpose of bringing Canadian law in line with the convention, international law generally, and the approach to complicity taken by other states.[5] The new test for complicity requires a finding that the claimant made a "significant and knowing contribution" to an organization's crime or criminal purpose before being excluded under Article 1F(a).

Facing both a removal order and a change in the law under which they had been excluded from refugee protection, the appellants applied for a pre-removal risk assessment (PRRA) under section 112(1) of the *IRPA*. Before the PRRA officer, they argued that their exclusion had to be reconsidered due to the *Ezokola* decision and advanced constitutional arguments under the *Canadian Charter of Rights and Freedoms*.[6] The officer concluded that there was no jurisdiction to reconsider the exclusion finding or to consider the *Charter* arguments. The appellants were granted leave to judicially review that decision. Justice Richard Southcott of the Federal Court dismissed the application for judicial review and certified three questions for the Federal Court of Appeal. Justice Donald Rennie for the unanimous Federal Court of Appeal answered all three questions in the negative and dismissed the appeal. At the outset of his reasons, the learned judge clearly sets out how the *Ezokola* change in the law affects the PRRA determination:

> The main issue in this appeal is whether persons who have been excluded from refugee protection under section 98 of the [*IRPA*] on the basis of Article 1F(a) of the [*Refugee Convention*] for committing crimes against humanity are entitled to have the exclusion finding reconsidered prior to deportation. This question arises in the unique and limited circumstances where the interpretation of Article 1F(a), and thus the legal foundation for the finding that the appellants were excluded from consideration as refugees under the

[2] *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]. See further Gib van Ert, Greg J Allen & Rebecca Robb, "Canadian Cases in Public International Law in 2013 / Jurisprudence canadienne en matière de droit international public en 2013" (2013) 51 Can YB Intl L 535 at 553–56.

[3] *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306.

[4] *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 (entered into force 4 June 1969) [*Refugee Convention*].

[5] *Ezokola*, *supra* note 2 at para 30.

[6] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

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> *Convention*, changed between the date of the exclusion finding and the hearing before the pre-removal risk assessment (PRRA) officer.
>
> The answer to this question matters. If the appellants are excluded from consideration as *Convention* refugees on the basis of Article 1F(a), the nature and scope of the risks assessed by the PRRA officer are limited and the legal burden the appellants must meet in establishing those risks is elevated (*IRPA*, ss. 112(3)(c), 113(d)).
>
> In a risk assessment under section 97 of the *IRPA*, referred to as a restricted PRRA, the appellants must establish on a balance of probabilities that removal would more likely than not subject them to a personal risk of torture, death or cruel and unusual treatment. … On the other hand, should they succeed in convincing the PRRA officer that they face a section 97 risk, their removal is temporarily stayed (*IRPA*, s. 114(1)(b)).
>
> In contrast, failed refugee claimants have their pre-removal risks assessed under section 96 (*IRPA*, s. 113(c)). In a section 96 risk assessment, sometimes called *Convention* grounds assessment, the appellants must establish that they "subjectively fear[] persecution and that this fear is objectively well-founded". … The latter element requires that there is a "reasonable chance", a "reasonable possibility", or a "serious possibility" of persecution on *Convention* grounds.[7]

The appellants' first argument before the Federal Court of Appeal turned on the interpretation of section 112(3)(c) of the *IRPA*. This provision is part of the *IRPA*'s Division 3 (Pre-removal Risk Assessment), which sets out how and when a person subject to a removal order may apply to the minister for protection. The relevant provision reads:

112 (3) Refugee protection may not be conferred on an applicant who … (c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the *Refugee Convention*.	112 (3) L'asile ne peut être conféré au demandeur dans les cas suivants: … (c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la *Convention sur les réfugiés*.

On its face, this provision excluded the appellants from refugee protection: they claimed protection and were rejected under Article 1(F)(a) according to the "guilt-by-association" approach to that provision that governed prior to *Ezokola*. The appellants nevertheless argued that section 112(3)(c) should be interpreted in light of section 7 of the *Charter* and Canada's international obligation to protect against refoulement. In particular, they argued that the

[7] *Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 at paras 1–4 [*Tapambwa*].

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Tapambwas' claim had not been rejected on the basis of Article 1F, given the Supreme Court of Canada's change of the law in *Ezokola*.

Rennie JA rejected this submission, saying it depended "on the assumption that there is an uncertainty or ambiguity in the legislation and so the interpretation that more greatly conforms to international law or the *Charter* should be selected," but "in this case there is no ambiguity" — an exclusion under Article 1F(a) means that the PRRA officer's risk assessment is necessarily restricted.[8] The text of section 112(3) and the scheme of the *IRPA* demonstrated that there is no authority in a PRRA officer to reconsider an exclusion finding.[9] On the appellants' invocation of public international law, Rennie JA noted the "well-established presumption that, where possible, Canada's domestic legislation should be interpreted to conform to international law" and that "both Canada's international law obligations … and principles underlying international law play a role in the contextual interpretation of Canadian laws."[10] But he invoked "the doctrine of Parliamentary supremacy" as "an important counter-weight to these principles" and affirmed that an "unambiguous provision must be given effect even if it is contrary to Canada's international obligations or international law."[11]

I have frequently noted, in these pages and elsewhere, the confusion to which the concept of ambiguity can give rise in applying (or refusing to apply) the presumption of conformity with international law. Rennie JA is unquestionably right that parliamentary supremacy includes the raw power to enact laws that violate the state's international obligations. But when should courts conclude that legislatures have exercised that power? The answer, "when the legislation is unambiguous," is not especially helpful. Depending on how ambiguity is deployed, it can serve both as a technique to promote the state's compliance with international law and as a technique to avoid consideration of international law or excuse interpretations that fail to comply with it. The claim, "a statute that is unambiguously contrary to international law must be followed," resembles the claim, "a statute that is unambiguous must be given effect even if it is contrary to international law." But the two claims are very different. The first recognizes parliamentary sovereignty while also advancing compliance with international law in all but exceptional cases. The second makes a judicial finding of ambiguity a prerequisite to considering international law in the first place, with the predictable result that non-compliant interpretations are made more likely.

Which approach Rennie JA is advocating here is unclear, but it seems to be the latter. When *Tapambwa* was first released, its discussion of ambiguity and

[8] *Ibid* at para 35.

[9] *Ibid* at para 41.

[10] *Ibid* at para 43.

[11] *Ibid* at para 44.

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parliamentary supremacy at paragraph 44 cited the Federal Court of Appeal's decision in *National Corn Growers*, where Chief Justice Frank Iacobucci (as he then was) refused to consider a relevant international agreement on the ground that the provision under consideration was unambiguous.[12] For Rennie JA to cite this authority was surprising, for Iacobucci CJ was overturned on this very point in the Supreme Court of Canada.[13] Later, having been appointed to the Supreme Court himself, Iacobucci J expressly affirmed that "a court may refer to extrinsic materials [in this case, international agreements] which form part of the legal context … without the need first to find an ambiguity before turning to such materials."[14] Since that time, the Supreme Court of Canada has routinely invoked and applied the presumption of conformity with international law without first asking itself whether the provision to be interpreted was ambiguous. Rennie J's citation of *National Corn Growers* (Federal Court of Appeal) was therefore deeply problematic.

However, on 31 May 2019, a little more than three months after *Tapambwa* was released, the Federal Court of Appeal issued a correction to the decision. The citation to Iacobucci CJ in the Federal Court of Appeal was replaced with a citation to Gonthier J in the Supreme Court of Canada, with no other change to Rennie J's reasons or result. This correction is welcome in that it brings the reasons in *Tapambwa* at least superficially in line with binding precedent. But citing *National Corn Growers* (Supreme Court of Canada) in support of the point Rennie JA was making about parliamentary sovereignty ousting the presumption of conformity with international law is bizarre.

Rennie JA went on to explain that "to permit a PRRA officer to reconsider a prior inadmissibility finding would usurp the processes set out in the *IRPA* and would be contrary to the legislative scheme," which accords the responsibility for exclusion and admissibility determinations to the RPD and the Immigration Appeal Division (IAD), subject to oversight by the Federal Court.[15] One only ends up before a PRRA officer if one is determined to be inadmissible. Admissibility is therefore not a determination that an officer can make or remake. Rather, that officer is charged with considering whether, on new evidence or a change in country conditions, the risks of removing them (as set out in section 97(1) of the *IRPA*) had changed.[16]

[12] *National Corn Growers Assn v Canada (Canadian Import Tribunal)*, [1989] 2 FC 517 at 530 [*National Corn Growers* (FCA)].

[13] *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 [*National Corn Growers* (SCC)].

[14] *Crown Forest Industries Ltd v Canada*, [1995] 2 SCR 802 at para 44.

[15] *Tapambwa*, *supra* note 7 at para 46.

[16] *Ibid* at para 57.

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Rennie JA then considered the second constitutional question, which he summarized as "must the Minister exercise discretion under s. 25.2 of the *IRPA* to exempt the Applicants from the application of s. 112(3), such that failure to consider their request for an exemption vitiates the PRRA decision?" Section 25.2 provides:

Public policy considerations 25.2(1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.	*Séjour dans l'intérêt public* 25.2(1) Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, si l'étranger remplit toute condition fixée par le ministre et que celui-ci estime que l'intérêt public le justifie.

On its face, this provision creates a discretion for the minister. The appellants argued that the minister was obliged to exercise this discretion in their favour here, given the change in the law brought about by *Ezokola*, and that the minister must do so consistently with international law and the *Charter*. Rennie JA rejected these submissions on several grounds, notably that the *Refugee Convention* does not compel the minister to consider applications for relief under section 25.2 in circumstances where the law has changed.[17]

Solitary confinement — Mandela Rules — role in constitutional analysis

Canadian Civil Liberties Association v Canada (Attorney General), 2019 ONCA 243 (28 March 2019). Court of Appeal for Ontario.

British Columbia Civil Liberties Association v Canada (Attorney General), 2019 BCCA 228 (24 June 2019). Court of Appeal for British Columbia.

Both of these appeals arose from challenges to the constitutionality of provisions of the federal *Corrections and Conditional Release Act* (*CCRA*) authorizing "administrative segregation."[18] Of interest for readers of the *Canadian*

[17] *Ibid* at paras 110–11.

[18] SC 1992, c 20.

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Yearbook of International Law is the courts' reliance on the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) in their consideration of the constitutionality of these provisions.[19]

In the Ontario proceedings, the Canadian Civil Liberties Association (CCLA) was partly successful at first instance. Associate Chief Justice Marrocco found that the legislation authorizing administrative segregation violates section 7 of the *Charter* (protection of life, liberty, and security of the person) because it does not provide for an independent review of the decision to place an inmate in administrative segregation. But the learned judge dismissed the alleged breach of section 12 of the *Charter* (freedom from cruel and unusual treatment or punishment) on the basis of the *CCRA*'s provisions requiring daily monitoring of inmates' medical conditions.

Justice Mary Lou Benotto for the Court of Appeal allowed the CCLA's appeal on this point, finding that the impugned provisions were indeed contrary to section 12. The learned judge began by observing that the "distinguishing feature of administrative segregation is the elimination of meaningful social interaction or stimulus."[20] She then turned to international norms regarding solitary confinement, relying mainly on the Mandela Rules, which she characterized as "an authoritative interpretation of international rules including the *Convention against Torture*" to which Canada is a party.[21] The key features of the Mandela Rules, for present purposes, is the prohibition of solitary confinement for more than fifteen days.

Benotto JA relied on opinion evidence led at first instance from the former UN special rapporteur on torture, Juan E. Méndez. Méndez described the Mandela Rules as representing "an international consensus of proper principles and practices in the management of prisons and the treatment of those confined." Benotto JA observed that the application judge had accepted this evidence, concluding there was an international consensus on the fifteen-day rule.[22] As to the legal relevance or effect of the Mandela Rules for *Charter* interpretation or domestic law generally, Benotto JA said little. She noted that the rules are not binding on Canada, without saying why not. She immediately added that "Canadian representatives had a role in drafting the Mandela Rules" but without explaining why or how that matters legally.[23] Benotto JA concluded that

[19] UNGA Res 70/175, UN Doc A/RES/70/175 (17 December 2015).

[20] *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243 at para 20.

[21] *Ibid* at para 23.

[22] *Ibid* at para 28.

[23] *Ibid* at para 29.

> [t]he [Mandela R]ules reflect a general shift in social views regarding acceptable treatment or punishment. Public perceptions of the appropriate way to treat inmates have evolved, thanks in large part to the efforts of inmates and their advocates. What was once considered acceptable — the death penalty for example — is no longer. Today, as society has become informed about the harm caused by solitary confinement, the public's views have changed.[24]

This may be true, but it is unclear how the Mandela Rules or any of the evidence before the court proved it. At the risk of sounding old-fashioned, a judge might be expected to look to an Act of Parliament as the dispositive statement of the public's views on a controversial issue of criminal law.

Of course, the public's views are not necessarily determinative in a constitutional democracy with entrenched human rights protections. The courts have a paramount duty to enforce the constitution, whether doing so aligns with the public's views or not. But where a court proposes to invalidate legislation as unconstitutional and relies on a non-binding international instrument such as the Mandela Rules in doing so, some explanation of the legal relevance and weight to be given to that instrument must be offered. Benotto JA's reasons go on to explain that the evidence before the court below led the application judge to conclude that inmates face foreseeable and expected harm where administrative segregation exceeds fifteen consecutive days.[25] I certainly take no issue with that finding, nor with the Court of Appeal's conclusion that sections 31–37 of the *CCRA*, insofar as they permit administrative segregation for more than fifteen days, infringe section 12 of the *Charter* and are not saved under section 1. But it is disappointing that so little explanation was offered of how the Mandela Rules ought properly to inform the constitutional analysis.

Three months after the decision in Ontario, the Court of Appeal for British Columbia released its decision on a similar constitutional challenge. The first instance judge there, Justice Peter Leask, had struck down several provisions of the *CCRA* as contrary to sections 7 and 15 (equality rights) of the *Charter* as well as granting other relief. Notably, the trial judge found that administrative segregation permits resort to a form of solitary confinement, including prolonged solitary confinement (meaning beyond fifteen days), contrary to the Mandela Rules.[26]

At the Court of Appeal, Justice Gregory Fitch for the court allowed Canada's appeal in part but upheld the trial judge's key finding that the impugned *CCRA* provisions authorized indefinite and prolonged solitary confinement contrary to section 7 of the *Charter*. The learned judge's

[24] *Ibid*.

[25] *Ibid* at para 98.

[26] *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 at para 13 [*BCCLA v Canada*].

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extensive reasons reviewed (as those of the trial judge had done) the "troubled history of solitary confinement in Canada's penitentiaries."[27] Next, under the heading, "The Development of International Norms," Fitch JA turned to the Mandela Rules and their precursors. He began with the first UN Congress on the Prevention of Crime and the Treatment of Offenders (1955), which adopted draft Standard Minimum Rules for the Treatment of Prisoners. These rules, the judge explained, were adopted by the UN Economic and Social Council two years later and remained largely unchanged for sixty years. "While the Rules are not legally binding," Fitch JA observed, "they have influenced legislation and prison rules in many countries and played an important role in giving interpretive content to key human rights provisions."[28] The learned judge added that, in the ensuing sixty years, "it is fair to say that the consciousness of the international community was raised regarding the harmful impact of long-term segregation, largely as a consequence of the experience of Nelson Mandela, who spent 27 years in prison, the first 18 of which were in solitary confinement."

Fitch JA then reviewed the development of the 2015 Mandela Rules, beginning with a July 2008 interim report of the UN special rapporteur on torture concerning the psychological harm caused by solitary confinement. The rapporteur noted that negative health effects can occur after only a few days in solitary confinement and that health risks rise with each additional day. The rapporteur recommended that solitary confinement be used only in exceptional cases for the shortest time possible and only as a last resort.[29] Then, in August 2011, the special rapporteur submitted an additional interim report to the UN General Assembly in which he found that solitary confinement constitutes torture or cruel, inhuman, or degrading treatment as defined in Articles 1 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*CAT*)[30] and Article 7 of the *International Covenant on Civil and Political Rights* (*ICCPR*).[31] Finally, in December 2015, revised Standard Minimum Rules—the Mandela Rules—were adopted by the UN General Assembly.[32]

[27] *Ibid* at para 31.

[28] *Ibid* at para 71.

[29] *Ibid* at paras 72–73, citing the *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGAOR, 63rd Sess, UN Doc A/63/175 (2008).

[30] 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36 (entered into force 26 June 1987).

[31] 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976).

[32] *BCCLA v Canada*, *supra* note 26 at paras 74–75.

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The learned judge opined that the Mandela Rules "reflect generally accepted best practices in the treatment of prisoners and prison management."[33] He quoted Rules 43, 44, and 45 (the solitary confinement provisions). Later in his reasons, as he considered Canada's arguments against the trial judge's finding that the impugned provisions unjustifiably infringed inmates' right to liberty, Fitch JA returned to the Mandela Rules. He held:

> [A] legislative provision that authorizes the prolonged and indefinite use of administrative segregation in circumstances that constitute the solitary confinement of an inmate within the meaning of the Mandela Rules deprives an inmate of life, liberty and security of the person in a way that is grossly disproportionate to the objectives of the law. In addition, the draconian impact of the law on segregated inmates, as reflected in Canada's historical experience with administrative segregation and in the judge's detailed factual findings, is so grossly disproportionate to the objectives of the provision that it offends the fundamental norms of a free and democratic society.
>
> This conclusion is supported by reference to the international context. As explained in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 59, "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." While those international norms do not dictate a particular result, they inform constitutional interpretation and, in particular, our understanding of the principles of fundamental justice. Relevant, in this context, are the Mandela Rules that prohibit the use of prolonged solitary confinement.[34]

Here, Fitch JA attempts to give some legal rationale for resort to the Mandela Rules in the section 7 analysis. The court in *Suresh* spoke of international treaty norms, not non-binding resolutions of the UN General Assembly.[35] Yet, as Fitch JA noted, the UN special rapporteur's view is that the Mandela Rules provisions on solitary confinement are required by the prohibitions of torture and cruelty in the *CAT* and the *ICCPR*. Fitch JA's reliance on the Mandela Rules for section 7 purposes is also supported by paragraph 60 of *Suresh*, where the court observed that its concern was not with Canada's international obligations *qua* obligations but, rather, with the principles of fundamental justice: "We look to international law as evidence of these principles and not as controlling in itself."

[33] *Ibid* at para 75.

[34] *Ibid* at paras 167–68.

[35] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

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Climate change — federal jurisdiction to enact the Greenhouse Gas Pollution Pricing Act *— role of treaties in peace, order, and good government analysis*

Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40 (3 May 2019). Court of Appeal for Saskatchewan.

The government of Saskatchewan referred to the Court of Appeal the question of whether Parliament's *Greenhouse Gas Pollution Pricing Act* (*GGPPA*)[36] was unconstitutional in whole or in part. Saskatchewan challenged the law as an unconstitutional tax and *ultra vires* the Parliament of Canada because it concerned property and civil rights and other matters within the exclusive legislative authority of the provinces. This note focuses on the latter challenge, as it raises questions about the relevance of Canadian treaty obligations in determining the power of Parliament to legislate for the "Peace, Order and good Government of Canada" (POGG), pursuant to section 91 of the *Constitution Act, 1867*.[37]

The *GGPPA* introduces a national pricing scheme on greenhouse gas (GHG) emissions. It does so, first, by requiring all provinces and territories to establish their own carbon pollution pricing schemes that meet minimum national standards set by means of the Act. Provinces and territories that fail to do so, or opt not to do so, are subjected to the "backstop" federal scheme, whereby the *GGPPA*'s own pricing scheme is applied instead. The pricing standards involve a charge to identified types of fuel and combustible waste (in Part 1 of the Act) and an output-based pricing system applicable to large industrial polluters (in Part 2). The funds collected under the Act are remitted to the jurisdictions from which they are collected, either through government transfers or tax credits to residents. These remittances are in keeping with the stated purpose of the pricing scheme, which is to discourage polluting behaviour rather than to raise revenue.

Chief Justice Robert Richards, for the majority of the Court of Appeal for Saskatchewan, upheld the constitutionality of the *GGPPA* in its entirety. Canada acknowledged that the Act did not come within any head of power expressly enumerated in section 91 of the *Constitution Act, 1867*. Instead, it relied on Parliament's residual POGG jurisdiction. In particular, Canada invoked the so-called national concern branch of POGG, under which Parliament has a rather uncertain jurisdiction to legislate in respect of new matters (meaning ones that did not exist at Confederation) and matters that, although originally of a local or private nature (and, therefore, within provincial legislative jurisdiction) have become matters of national concern.

The first step in any division of powers inquiry, Richards CJ explained, is to determine the impugned Act's pith and substance (that is, its essential

[36] SC 2018, c 12, s 186 [*GGPPA*].

[37] (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

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character). The chief justice observed that the *GGPPA*, in very general terms, is aimed at pricing greenhouse gases. The context, he noted, can be traced back to Canada's climate change treaty obligations.[38] These instruments all sought to limit global GHG emissions. The *GGPPA* was, in the chief justice's view, "the product of Canada's efforts to meet its commitments under the *Paris Agreement*."[39] This statement is probably true in some respects, but it risks misleading. The *Paris Agreement* does not require states parties to adopt carbon pricing regimes.[40] While Canada's prospects of meeting its obligations under the *Paris Agreement* will clearly improve with a carbon pricing regime in place, the *GGPPA*'s carbon pricing scheme is not in implementation of any international obligation. Similarly, later in his reasons, Richards CJ found that the factual record before the court indicates that GHG pricing is "regarded as an *essential* aspect or element of the global effort to limit GHG emissions," which is a difficult conclusion to square with the absence of carbon pricing requirements from the *Paris Agreement* or any other international agreement.[41]

The chief justice concluded that the pith and substance of the *GGPPA* is "the establishment of minimum national standards of price stringency for GHG emissions."[42] This is a narrower characterization of the Act than Canada initially sought. Canada's first position was simply that the matter of national concern in issue was GHG emissions. Saskatchewan and several interveners challenged this as being overbroad. Richards CJ agreed, noting that a general jurisdiction of Parliament to legislate in respect of GHGs would expand federal legislative and regulatory power enormously "because almost every kind of human action generates GHG emissions."[43] Furthermore, since legislative jurisdiction under the *Constitution Act, 1867* is generally exclusive, the provinces would lose jurisdiction to legislate in relation to GHGs themselves.[44]

Turning to the application of the POGG test set out in the leading case, *Crown Zellerbach*,[45] Richards CJ considered whether "the establishment of

[38] *United Nations Framework Convention on Climate Change*, 12 June 1992, 1771 UNTS 107, Can TS 1994 No 7 (entered into force 21 March 1994) [*UNFCCC*]; *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 148 (entered into force 17 December 2002); *Paris Agreement*, 22 April 2016, UN Doc FCCC/CP/2015/Add.1, Can TS 2016 No 9 (entered into force 4 November 2016). Chief Justice Richards also noted a non-treaty instrument in which Canada participated, the *Copenhagen Accord*, UN Doc FCCC/CP/2009/L.7 (18 December 2009).

[39] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 119 [*Saskatchewan Reference*].

[40] *Paris Agreement*, *supra* note 38.

[41] *Saskatchewan Reference*, *supra* note 39 at para 147 [emphasis in original].

[42] *Ibid* at para 125.

[43] *Ibid* at para 127.

[44] *Ibid* at para 129.

[45] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

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minimum national standards of price stringency for GHG emissions has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."[46] He found this test was met in part through consideration of the fact that GHG emissions do not respect provincial boundaries, such that the failure of one province to take action will impact others.[47] The learned chief justice added that climate change is a global problem calling for a global response that "can only be effectively developed internationally by way of state-to-state negotiation and agreement."[48] He continued:

> In participating in these international processes, Canada is expected to make national commitments with respect to GHG reduction or mitigation targets. Those commitments are self-evidently difficult for Canada, as a country, to meet if not all provincial jurisdictions are prepared to implement GHG emissions pricing regimes — regimes that, on the basis of the record before the Court, are an essential aspect of successful GHG mitigation plans. This is not to suggest Parliament must somehow enjoy a comprehensive treaty implementation power in relation to the GHG issue. But, it is to say that the international nature of the climate change problem necessarily colours and informs an assessment of the effects of a provincial failure to deal with GHG pricing.[49]

On this point, Richards CJ's reasons resemble those of Justice Gerald Le Dain in *Crown Zellerbach*, in which he looked in part to Canada's obligations under the *Convention on the Prevention of Marine Pollution*[50] in determining whether impugned legislation was within Parliament's POGG jurisdiction, and Justice Louis-Philippe Pigeon's reasons in *The Queen v Hauser*,[51] in which he considered various multilateral narcotics conventions to which Canada was a party in upholding the federal *Narcotic Control Act* under POGG.[52]

There is a clear jeopardy to Canada's federalism in giving too much weight to federally incurred treaty obligations when determining federal claims to expanded legislative jurisdiction under POGG. Later in his reasons,[53] Richards CJ rightly recalled Lord Atkin's dictum in the *Labour Conventions Reference* that Canada "could not, merely by making promises to foreign

[46] *Saskatchewan Reference*, *supra* note 39 at para 149.

[47] *Ibid* at para 154.

[48] *Ibid* at para 156.

[49] *Ibid.*

[50] 29 December 1972, 1046 UNTS 120, Can TS 1979 No 36 (entered into force 30 August 1975).

[51] [1979] 1 SCR 984 [*Hauser*].

[52] RSC 1970, c N-1.

[53] *Saskatchewan Reference*, *supra* note 39 at paras 175–77.

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countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth."[54] The fact that Canada is bound by international law to do something in its domestic law does not mean Parliament must do it. Yet it is also true that the POGG inquiry, as described in *Crown Zellerbach*, invites consideration of any international aspects of the matter alleged to have been of national concern and, therefore, within Parliament's residual POGG jurisdiction. The existence of a relevant international legal regime may support the argument that a new matter, not known at Confederation, has arisen.[55] An international legal regime may also support the federal government's claim that a matter, originally of a local or private nature in a province, has become a matter of national concern. Finally, international agreements may help show that the matter enjoys the required singleness, distinctiveness, and indivisibility. Multilateral, multiparty treaties are likely to be more probative of these points than bilateral agreements. The line courts must walk here is somewhat fine, but still clear: the mere fact that Canada has incurred a treaty obligation does not increase Parliament's jurisdiction under POGG, but the existence and content of international agreements on a matter may tend to prove it is of national concern and, therefore, within Parliament's POGG jurisdiction.

The dissenting judges, Justices Ralph Ottenbreit and Neil Caldwell, agreed with the majority about the point on which this note has focused—namely, the relevance of international obligations to the POGG analysis.[56] They disagreed, however, that the *GGPPA* was valid under Parliament's POGG power and found it to be an unconstitutional tax.

Refugee protection — "subsidiary protection" — standard of review applicable to international legal questions

Kalaeb v Canada (Public Safety and Emergency Preparedness), 2019 FC 345 (22 March 2019). Federal Court.

The applicant, Tesfaldet Kalaeb, sought judicial review of the decision of an officer of the Canada Border Services Agency finding him ineligible to be referred to the RPD for determination of his claim for refugee protection, apparently on the ground that Kalaeb already enjoyed refugee protection in

[54] *Attorney-General for Canada v Attorney-General for Ontario*, [1937] AC 326 at 327 (PC) [*Labour Conventions Reference*].

[55] See *Hauser*, *supra* note 51, where (as noted) Pigeon J for the majority relied on various multilateral narcotics conventions in finding (at 1000) that the federal *Narcotic Control Act*, RSC 1970, c N-1, was validly enacted under Parliament's residual power "to deal with a genuinely new problem which did not exist at the time of Confederation."

[56] *Saskatchewan Reference*, *supra* note 39 at para 344.

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Italy. Kalaeb disputed this, arguing that his status there was "subsidiary protection" and that such status is not equivalent to refugee protection.

Justice Catherine Kane agreed with Kalaeb and allowed his judicial review application. She directed that his eligibility to be referred to the RPD be redetermined. Paragraph 101(1)(d) of the *IRPA*[57] provides that a claim is ineligible if "the claimant has been recognized as a *Convention* refugee by a country other than Canada and can be sent or returned to that country." Kane J concluded, based in part on the expert opinion of an Italian lawyer on the meaning and ambit of subsidiary protection in Italy, that such status does not involve a recognition by Italy of the applicant's well-founded fear of persecution in his home state, Eritrea. The learned judge also relied on two Federal Court precedents on the meaning of "*Convention* refugee" in section 101(1)(d).[58]

Kalaeb contended that the issue of whether subsidiary protection is equivalent to being recognized as a Convention refugee is a matter of interpretation of international law and should be reviewable for correctness, relying on the Federal Court of Appeal's decision in *Febles v Canada (Citizenship and Immigration)*.[59] The respondent disputed that questions of international law must be reviewed for correctness, relying on another Federal Court of Appeal decision, *Majebi v Canada (Citizenship and Immigration)*.[60] Kane J concluded that the jurisprudence on this issue had "evolved" and agreed that *Majebi* signalled a reasonableness standard.[61] While Kane J's conclusion suggests that the debate in the federal courts about which standard of review applies to international legal questions may now be resolved in favour of reasonableness, the decision predates the Supreme Court of Canada's ruling in *Canada (Minister of Citizenship and Immigration) v Vavilov* (noted below).[62]

Human smuggling — humanitarian and mutual aid — elements of the defences

R v Rajaratnam, 2019 BCCA 209; *R v Christhurajah*, 2019 BCCA 210 (18 June 2020). Court of Appeal for British Columbia.

Rajaratnan was a Crown appeal from the acquittal of three defendants on charges of human smuggling contrary to section 117 of the *IRPA*.[63]

[57] *IRPA*, *supra* note 1, s 101(1)(d).

[58] *Wangden v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1230; *Aghazadeh v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 99.

[59] 2012 FCA 324 at paras 22–25 [*Febles* (FCA)].

[60] 2016 FCA 274 at para 5 [*Majebi*].

[61] *Kalaeb v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 345 at paras 17–21.

[62] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[63] *IRPA*, *supra* note 1, s 117.

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Christhurajah was an appeal from conviction. The charges arose from the arrival in Canadian territorial waters in the summer of 2010 of the MV *Sun Sea*, a cargo vessel carrying 492 Tamil migrants claiming refugee status. The Crown alleged that the respondents were human smugglers. The respondent Emmanuel was the ship's captain. The respondent's Rajaratnam and Mahendran were not on board but were alleged to have been involved in provisioning the vessel and organizing the migrants' transfer. The appellant Christhurajah was on board. He was alleged to have been a director of the company that owned the vessel and to have occupied a privileged position on it. Emmanuel's defence was that he boarded the ship as a passenger but reluctantly took charge of it when the crew abandoned it. He relied on the exceptions for humanitarian, mutual, and family aid recognized by the Supreme Court of Canada in *R v Appulonappa*[64] and *Bo10 v Canada (Citizenship and Immigration)*.[65] Christhurajah also relied on these exceptions. Rajaratnam and Mehendran claimed to have been misidentified.

There were two trials, both by jury. In the first trial, the jury returned not guilty verdicts for Emmanuel, Rajaratnam, and Mehendran but failed to return a verdict for Christhurajah. A mistrial was declared in his case, and a second trial was held, at which he was convicted. In the Court of Appeal, the Crown argued that the judge erred in charging the jury that the accused were to be acquitted if they were involved in humanitarian aid or mutual aid because those defences were without an air of reality. It also appealed the decision of the first trial judge that section 36 of the *Mutual Legal Assistance in Criminal Matters Act* (*MLACMA*) was unconstitutional.[66] Christhurajah, for his part, argued on appeal that the trial judge erred in unduly narrowing the mutual aid defence and withholding from the jury the humanitarian aid defence.

The mutual legal assistance issues arose when the Crown sought to have admitted into evidence, pursuant to section 36 of the *MLACMA*, affidavits from a Thai official involved in a human smuggling investigation. Section 36 permits admission into evidence records from foreign states, despite their hearsay or opinion content. The accused challenged this provision under sections 7 and 11(d) of the *Charter*. The first trial judge, Justice William Ehrcke, found section 36 to infringe an accused's rights to a fair trial and to make full answer and defence. The Court of Appeal agreed but declared it to be of no force and effect only in the criminal trial context. It being clear constitutional law that the Crown cannot tender hearsay evidence at a criminal trial under a common law exception unless that exception is consonant with the principled approach to hearsay, the Court of Appeal concluded that the

[64] 2015 SCC 59, noted in Gib van Ert, "Canadian Cases in Public International Law in 2015 / Jurisprudence canadienne en matière de droit international public en 2015" (2015) 53 Can YB Intl L 534 at 556–59 [van Ert, "Canadian Cases 2015"].

[65] 2015 SCC 58 [*Bo10*], noted in van Ert, "Canadian Cases 2015," *supra* note 64 at 552–56.

[66] RSC 1985, c 30 (4th Supp).

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Crown likewise cannot rely on a statutory provision to secure the admission of hearsay evidence at a criminal trial unless the provision is either consonant with the principled approach or justified under section 1 of the *Charter*.[67]

The main issue before the Court of Appeal was the application of the humanitarian, mutual, and family aid exceptions to human smuggling as recognized by the Supreme Court of Canada in *Appulonappa* and *Bo10*. In those cases, the Supreme Court, after reviewing the international legal framework governing human smuggling and refugee protection, concluded that Canadian human smuggling offences exclude from liability persons who provide support to asylum seekers for humanitarian reasons or on the basis of close family ties as well as asylum seekers who mutually aid each other. In the two trials at issue in this appeal, Ehrcke J regarded these exceptions as elements of the offence of human smuggling, while Justice Catherine Wedge regarded them as defences.

The Court of Appeal agreed with Wedge J that humanitarian aid, family aid, and mutual aid should be regarded as defences to a charge of human smuggling.[68] The court then went on to consider the elements of the humanitarian and mutual aid defences, beginning with the observation that "Canada's international obligations require both the humane treatment of refugees and the punishment of transnational organized crime. The defences ensure that s. 117 of the *IRPA* does not capture the laudable and necessary conduct of humanitarians, family members, and fellow asylum seekers. Even so, they must not prevent s. 117 from criminalizing the conduct of those involved in transnational organized crime."[69]

The Court of Appeal began by affirming that family aid and mutual aid are separate defences. In particular, a family member can invoke the family aid defence without being an asylum seeker herself.[70] Despite distinguishing family aid from mutual aid, the court did not proceed to define the elements of the family aid defence, presumably because none of the accused persons before it sought to rely on it. The court identified the four elements of the humanitarian aid defence as follows:

(i) The accused's purpose must be to provide humanitarian aid. The accused cannot act for the purpose of obtaining, directly or indirectly, a financial or other material benefit in the context of transnational organized crime.
(ii) The accused must provide aid in order to save the life or alleviate the suffering of an asylum seeker, defined as "a person from another state

[67] *R v Rajaratnam*, 2019 BCCA 209 at paras 121–32 [*Rajaratnam*].

[68] *Ibid* at paras 155–73.

[69] *Ibid* at para 175.

[70] *Ibid* at paras 198–204.

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who intends to seek refuge in Canada from some form of persecution or physical harm".

(iii) The aid must have been humanitarian. This is a matter of assessing how well the accused's actions conformed to the principles of impartiality, neutrality, and independence. How well the accused's conduct conforms to these principles must be determined by the trier of fact with regard to all the circumstances.

(iv) The accused must have a reasonable belief that the person they assisted is an asylum seeker.[71]

With regard to the first element of the offence, the Court of Appeal held that providing humanitarian aid need not be the accused person's sole purpose. However, if any purpose is for financial or other material benefit in the context of transnational organized crime, as defined in the Palermo Protocols, then the defence is not available. Turning to the third element, the Court of Appeal accepted the Crown's submission that humanitarian aid must accord with the principles of humanity, impartiality, neutrality, and independence — principles that the court derived from definitions of humanitarian assistance and that aid a variety of international sources.[72]

Turning to mutual aid, the Court of Appeal held that it also has four elements:

(i) The accused's purpose must be to provide aid to a fellow asylum seeker. The accused cannot act for the purpose of obtaining, directly or indirectly, a financial or other material benefit in the context of transnational organized crime.

(ii) The accused must be an asylum seeker.

(iii) The accused must have a reasonable belief that the person they are assisting is an asylum seeker.

(iv) The accused and the asylum seeker they are aiding must have the common purpose of seeking refuge.[73]

[71] *Ibid* at paras 208, 210–54.

[72] These were: the definition of "humanitarian aid" used by the Good Humanitarian Donorship Initiative, online: <www.ghdinitiative.org/ghd/gns/principles-good-practice-of-ghd/principles-good-practice-ghd.html>; the definition of "humanitarian assistance" used by the United Nations Office for the Coordination of Humanitarian Affairs's *Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflict* (New York: United Nations, 2004); the objective of the European Union's "humanitarian aid" (European Commission, *Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission*, [2008] OJ C 25/1 at para 8); and comments made by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, [1986] ICJ Rep 14 at para 242, in a description of the Red Cross.

[73] *Rajaratnam*, *supra* note 67 at paras 257, 259–74.

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In response to the Crown's submission that the mutual aid defence should require that the accused and asylum seekers work together for the common purpose of seeking refuge, the court agreed that there must be a mutual purpose but not a mutuality of effort. Thus, persons tasked with looking after small children, the elderly, or the disabled were not disqualified from the defence even where those individuals were not "aiding back."

Applying these principles to the cases before it, the Court of Appeal affirmed the acquittals of Emmanuel, Rajaratnam, and Mahendran. As for Christhurajah, the court held that his humanitarian aid defence did not have an air of reality because no jury could conclude that his conduct conformed to humanitarian principles. But the court below erred in defining the mutual aid defence. A new trial was ordered on that basis.

Climate change — federal jurisdiction to enact the GGPPA *— role of treaties in POGG analysis*

Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544 (28 June 2020). Court of Appeal for Ontario.

As in the Saskatchewan reference noted above, the question put to the Court of Appeal for Ontario in this case was whether the federal *GGPPA* was unconstitutional.[74] The Attorney General of Ontario contended that both Part 1 (creating a charge on carbon-based fuels) and Part 2 (creating a pricing mechanism for industrial GHG emissions) were outside Parliament's jurisdiction. The Attorney General of Canada defended the Act as within Parliament's residual POGG power. In particular, Canada relied on the national concern branch of POGG.[75] The majority of the Court of Appeal affirmed the Act's validity with one judge dissenting. This note of the case focuses (as the Saskatchewan note did) on the court's consideration of the relevant international instruments.

Chief Justice George Strathy wrote the lead opinion, in which Justices James MacPherson and Robert Sharpe concurred. Almost at the outset of his reasons, the chief justice quotes the *Paris Agreement*'s description of climate change as "an urgent and potentially irreversible threat to human societies and the planet."[76] The learned judge added that "the principal effect of GHG emissions — climate change — often bears no relationship to the location of the source of the emissions," such that low-emitting provinces and territories may nevertheless experience significant adverse impacts:

[74] *GGPPA*, *supra* note 36, s 186.

[75] Canada also adopted an intervener's alternative submission that the Act was valid under the emergency branch of peace, order and good government of Canada (POGG): *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 61 [*Ontario Reference*].

[76] *Ibid* at para 6, quoting the preamble of the *Paris Agreement*, *supra* note 38.

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"[A]s a practical matter and indeed as a legislative matter, there is nothing these provinces and territories can do to address the emission of GHGs by their geographic neighbours and constitutional partners. Without a collective national response, all they can do is prepare for the worst."[77]

The international community, Strathy CJ observed, "has recognized that the solution to climate change is not within the capacity of any one country and has, therefore, sought to address the issue through global cooperation."[78] The chief justice went on to review the major international instruments, from the 1992 *Framework Convention* to the 2015 *Paris Agreement*.[79] From here, the chief justice turned to Canadian efforts to address climate change since 2015 in the run-up to the *GGPPA*,[80] followed by a concise account of the Act's key provisions.[81] Strathy CJ characterized the Act's subject matter as "establishing minimum national standards to reduce greenhouse gas emissions."[82] There being no express head of power within which to bring the Act so characterized, the chief justice turned to the national concern branch of POGG advanced by Canada. The matter identified by the chief justice is said to be a new one (that is, one not recognized at Confederation), but he added that, whether it is characterized as new or as a matter originally of local and private concern that has since become a matter of national concern, "the need for minimum national standards to reduce GHG emissions is a matter of national concern in the commonly-understood sense, given the consequences of climate change."[83]

In considering whether the *GGPPA*'s matter is one of national concern, the chief justice said that it is appropriate to consider, as a contextual factor, that the Act "was enacted, as its Preamble demonstrates, to give effect to Canada's international obligations."[84] The chief justice immediately noted that "Parliament cannot implement treaties or international agreements that fall outside its constitutional powers" (citing *Labour Conventions*[85]) but added that "the fact that a challenged law is related to Canada's international obligations is pertinent to its importance to Canada as a whole" and that the "existence of a treaty or international agreement in relation to the matter also speaks to its singularity and distinctiveness."[86]

[77] *Ontario Reference*, *supra* note 75 at paras 17, 20.

[78] *Ibid* at para 21.

[79] See *UNFCCC*, *supra* note 38; *Paris Agreement*, *supra* note 38.

[80] *Ontario Reference*, *supra* note 75 at paras 26–29.

[81] *Ibid* at paras 33–53.

[82] *Ibid* at para 77.

[83] *Ibid* at paras 104–05.

[84] *Ibid* at para 106.

[85] *Labour Conventions Reference*, *supra* note 54 at 351–54.

[86] *Ontario Reference*, *supra* note 75 at para 106.

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These statements are generally right, but some care must be taken in characterizing the *GGPPA* as giving effect to, or implementing, the *Paris Agreement*. The Act does associate itself, in its preamble, with Canada's commitments under the *Paris Agreement*, and one can readily see that a successful national carbon pricing system would assist Canada in performing its obligations under that treaty. But the Act is not implementing legislation in the narrow sense of giving legal effect to the *Paris Agreement* in domestic law. In particular, the *Paris Agreement* does not legally require Canada to adopt a carbon pricing scheme. It is free to meet its *Paris Agreement* commitments by other means, if it can.

There was a concurrence by Associate Chief Justice Alexandra Hoy (who characterized the subject matter of the legislation more narrowly) and a dissent by Justice Grant Huscroft (who found the legislation *ultra vires* Parliament). The latter judge acknowledged that climate change was, "in common parlance," a matter of national, and, indeed, international, concern, "as the history of treaties to which Canada is a party demonstrates. But the national concern branch of the POGG power does not authorize federal plenary lawmaking authority wherever there is intense, broadly based concern."[87]

Occupied territories — product labelling — false, misleading, or deceptive

Kattenburg v Attorney General of Canada, 2019 FC 1003 (29 July 2019). Federal Court.

David Kattenburg challenged the legality of labelling on certain wines sold in Canada. The labels indicated the wines were products of Israel. Kattenberg contended that this labelling was wrong as the wines in question were produced in Israeli settlements in the West Bank territories occupied by Israel. The complaint was initially accepted by the Canadian Food Inspection Agency (CFIA). The agency later reversed its decision, prompting Kattenberg to appeal to the agency's Complaints and Appeals Office. This office dismissed the appeal. Kattenberg sought judicial review of the office's decision in Federal Court.

Justice Anne Mactavish set aside the Complaints and Appeals Office's dismissal of Kattenburg's appeal and remitted the question to the office for redetermination. She noted the "profound disagreement between those involved in this matter as to the legal status of Israeli settlements in the West Bank" but concluded she did not need to answer that question because the parties and the interveners all agreed that the Israeli settlements were not part of the State of Israel.[88] The CFIA's initial response to Kattenburg's complaint was that to label wines made in Israeli settlements in the West Bank as products of Israel was contrary to section 5(1) of the *Food and Drugs*

[87] *Ibid* at para 222.

[88] *Kattenburg v Attorney General of Canada*, 2019 FC 1003 at para 5 [*Kattenburg*].

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Act,[89] which provides that no one shall "label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety."[90] The CFIA changed its view based on consultation with Global Affairs Canada, which drew to the agency's attention provisions of the *Canada-Israel Free Trade Agreement*,[91] including Article 1.4.1(b), which defines the territory to which the agreement applies as including the territory where Israeli customs laws apply.[92]

The Complaints and Appeals Office disposed of Kattenburg's appeal with the observation that, as questions relating to Canadian foreign policy were outside the CFIA's mandate, it rightly sought advice from Global Affairs Canada. That department had drawn the agency's attention to the definition of "territory" in the *Canada-Israel Free Trade Agreement*, causing the agency to reverse its original decision. The office found no reason to reconsider this second decision.[93] Mactavish J began her review of the office's decision by determining the standard of review. She held that a reasonableness, rather than a correctness, standard applied, given that the question before her was one of mixed fact and law (involving the application of product labelling laws to the facts of this case) and involved the expertise of both the agency and the office (in questions of product labelling) and Global Affairs Canada (in questions of international geopolitics).[94]

The learned judge went on to find the Complaints and Appeals Office's decision to dismiss Kattenburg's appeal to be unreasonable. She began by noting that the parties and interveners provided "extensive international law arguments with respect to the legal status of Israeli settlements in the West Bank," including an expert opinion. But it was unnecessary to decide this issue because both parties and both interveners agreed that, "whatever the legal status of the settlements may be, the fact is that they are not within the territorial boundaries of the State of Israel."[95] The question was whether the office's recommendation that settlement wines continue to be labelled as products of Israel was reasonable in light of the fact that the settlements are not within the territory of the State of Israel.

[89] RSC 1985, c F-27.

[90] *Kattenburg*, *supra* note 88 at para 21.

[91] *Free Trade Agreement between the Government of Canada and the Government of the State of Israel*, 31 July 1996, Can TS 1997 No 49 (entered into force 1 January 1997) [*Canada-Israel Free Trade Agreement*].

[92] *Kattenburg*, *supra* note 88 at para 23.

[93] *Ibid* at paras 32–33.

[94] *Ibid* at paras 48–54.

[95] *Ibid* at para 70.

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The Attorney General relied on a variety of international instruments involving Canada, Israel, and the Palestinian Authority[96] to argue that, in the absence of a recognized country denomination for the West Bank and given the customs arrangements entered into by Israel and the Palestinian Authority, it was reasonable for the CFIA and the Complaints and Appeals Office to conclude that West Bank wines could be labelled as products of Israel for the purpose of Canadian labelling laws.[97] The Attorney General also relied on *Richardson and another v Director of Public Prosecutions*, in which the court rejected a similar challenge to product labelling on the grounds that the legislative intent concerned consumer safety, not the accuracy of the political status of the territories in question or matters of public international law.[98]

Mactavish J rejected the Attorney General's arguments and distinguished the decision of the Supreme Court of the United Kingdom in *Richardson*. She held that one of the principles underlying Canada's product labelling laws was the provision of full and factual information. Given that all of the parties agreed that Israeli settlements in the West Bank are not part of the territory of the State of Israel, for the wines to be identified as products of Israel was false, misleading, and deceptive.[99] As for the reliance placed on provisions of the *Canada-Israel Free Trade Agreement*, this agreement creates a customs union between Canada and Israel, but "[d]omestic consumer protection legislation of general application requiring that product labels be true and non-misleading is not a barrier to trade."[100] Furthermore, the agreement's definition of "territory" applies only to matters coming within it and has no application outside that context. Reliance on that definition for the purpose of Canadian product labelling requirements leads to a false and misleading result and is thus unreasonable.[101]

Mactavish J also found the decision under review unreasonable for failing to consider the freedom of expression issues implicated in Kattenberg's appeal.[102] She noted the argument of an intervener that "consumers have long expressed their political views through their purchasing choices" and that some opponents of Israeli settlements in the West Bank express this opposition by boycotting settlement products. "In order to be able to express their political views in this manner," the learned judge observed, "consumers need to have accurate information as to the origin of the products under consideration."[103] That is no

[96] See *ibid* at paras 77–82.

[97] *Ibid* at para 83.

[98] *Ibid* at paras 88–91; *Richardson and another v Director of Public Prosecutions*, [2014] UKSC 8.

[99] *Kattenburg, supra* note 88 at paras 93–101.

[100] *Ibid* at paras 107–08.

[101] *Ibid* at para 112.

[102] *Ibid* at paras 114–24.

[103] *Ibid* at paras 116–17.

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doubt true, though it seems in tension with the judge's earlier conclusion that product labelling requirements are not a barrier to trade.

The court therefore set aside the Complaints and Appeals Office's decision and remitted the question to it for redetermination. It was not for the court to determine how the wines should be labelled. That was a matter for the CFIA.

Administrative law — standard of review — relevance of public international law

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 (19 December 2019). Supreme Court of Canada.

Alexander Vavilov was born in Toronto in 1994 as Alexander Foley, one of two sons of supposed Canadians Tracey Lee Ann Foley and Donald Howard Heathfield. In fact Vavilov's parents were Russian spies who assumed false Canadian identities before their children were born. The US Federal Bureau of Investigation arrested both parents in Boston in 2010 for espionage. Not long after, Vavilov's two attempts to renew his Canadian passport were rejected, and he was directed to obtain a certificate of Canadian citizenship before trying again. He did so in January 2013. In July, however, the Canadian Registrar of Citizenship wrote him to say that the certificate had been issued in error and that Vavilov was not, in fact, a Canadian citizen. One year later, Vavilov's Canadian citizenship was cancelled.

The registrar's rationale, briefly stated, was that the effect of section 3(2)(a) of the *Citizenship Act*[104] was that a child born in Canada is not a Canadian citizen if his or her parents were employees of a foreign government and not themselves either citizens of Canada or permanent residents. Vavilov's parents were Russian spies and, therefore, according to the registrar, Russian government employees. This meant that the general Canadian rule of acquisition of nationality *jus soli*, given effect by section 3(1)(a) of the Act, did not apply. This reasoning was upheld on judicial review on a correctness standard by Justice Richard Bell of the Federal Court of Canada,[105] but rejected by a majority of the Federal Court of Appeal[106] on a reasonableness standard. Justice David Stratas concluded that section 3(2)(a) did not apply to Vavilov's case because that provision's exclusions for foreign government employees were intended to apply only to those enjoying diplomatic privileges and immunities not granted to spies. Stratas JA reached this conclusion through an analysis of the *Foreign Missions and International Organizations Act*

[104] RSC 1985, c C-29.

[105] 2015 FC 960.

[106] 2017 FCA 132 [*Vavilov* (FCA)], noted in Gib van Ert, "Canadian Cases in Public International Law in 2017 / Jurisprudence canadienne en matière de droit international public en 2017" (2017) 55 Can YB Intl L 571 at 579–82.

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(*FMIOA*)[107] and the provisions of the *Vienna Convention on Diplomatic Relations*,[108] which it partly implements.

At the Supreme Court of Canada, all nine judges agreed that the standard was reasonableness and that the registrar's decision was unreasonable. Vavilov was Canadian. The Court split seven to two on the administrative law questions that dominated the two judgments. The majority reasons are jointly attributed to Chief Justice Richard Wagner and Justices Michael Moldaver, Clément Gascon, Suzanne Côté, Russell Brown, Malcolm Rowe, and Sheilah Martin. Together, they claimed to "chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision" and "provide additional guidance for reviewing courts to follow when conducting reasonableness review."[109] Justices Rosalie Abella and Andromache Karakatsanis (also writing together) characterized the majority's reasons as "dramatically revers[ing] course — away from this generation's deferential approach and back towards a prior generation's more intrusive one." I leave that debate aside and focus on the role of international law considerations in the majority's new approach.

Before turning to what the *Vavilov* court says about international law, it is helpful to recall that there has been a debate in the Federal Court and the Federal Court of Appeal about which standard of review should apply to a decision involving questions of international law. In *Febles v Canada (Minister of Citizenship and Immigration)*,[110] the majority (Justice John Evans, Justice Karen Sharlow concurring) preferred correctness review, despite the fact that the decision-maker there was interpreting its home statute because the question concerned "a provision of an international Convention [Article 1F(b) of the *Refugee Convention*[111]] that should be interpreted as uniformly as possible" and correctness review was "more likely than reasonableness review to achieve this goal."[112] The minority view (Stratas JA) was that, while "[w]orld-wide uniform interpretations of the provisions in international conventions may be desirable," this "depends on the nature of the provision being interpreted and the quality and acceptability of the interpretations adopted by foreign jurisdictions."[113] Notably, when *Febles* reached the Supreme Court of Canada,

[107] SC 1991, c 41 [*FMIOA*].

[108] 18 April 1961, 500 UNTS 95, Can TS 1966 No 29 (entered into force 24 April 1964) [*Vienna Convention on Diplomatic Relations*].

[109] *Vavilov*, *supra* note 62 at para 2.

[110] *Febles* (FCA), *supra* note 59, noted in Gib van Ert, Greg J Allen & Eileen Patel, "Canadian Cases in Public International Law in 2012 / Jurisprudence canadienne en matière de droit international public en 2012" (2012) 50 Can YB Intl L 539 at 565–67.

[111] *Supra* note 4.

[112] *Febles* (FCA), *supra* note 59 at para 24.

[113] *Ibid* at para 76.

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that Court ignored the standard of review question entirely, with both the majority and the dissent implicitly approaching the international legal question as one to be determined on a correctness standard.[114] Despite that approach at the Supreme Court, and Evans JA's majority reasons in the Federal Court of Appeal expressly preferring the correctness review, subsequent decisions in the Federal Court[115] and the Federal Court of Appeal[116] have frequently applied reasonableness review to international legal questions determined by tribunals. When the issue came back before the Supreme Court of Canada in *Bo10 v Canada (Citizenship and Immigration)*, that court noted the controversy but declined to resolve it.[117]

It would have been difficult for the Supreme Court to duck the issue again in *Vavilov*. The key difference between the majority (Stratas and Webb JJA) and the dissent (Justice Mary Gleason) in the Federal Court of Appeal was whether to defer to the registrar's interpretation of the relevant *Citizenship Act* provisions, even if both the majority and the dissent purported to apply the reasonableness standard. In the end, the majority of the Supreme Court in *Vavilov* did not duck the issue, but it did not squarely engage it in *Febles* terms either. Indeed, the majority's account of the place of public international law in judicial review comes off a bit like a footnote — important enough to mention but not warranting lengthy treatment.

I do not say that as criticism. Public international legal questions arise only rarely before Canadian administrative decision-makers, and the mission that the Supreme Court of Canada gave itself in *Vavilov* was to reconsider its standard of review jurisprudence as it applies to the entire administrative state. To cast public international law in a starring role in the court's new administrative law framework would have been surprising. It might even have provoked a race to spurious international law arguments by litigants in judicial review proceedings. The majority was right not to overemphasize international law in its analysis. And while the majority did not say much in the abstract about the role of public international law in judicial review, what it did say, and where it said it, seems likely to promote Canadian compliance with its international obligations — whichever standard of review applies.

First, let us situate the majority's public international law comments in its reasons. Those reasons are carefully constructed and organized. Where public international law is addressed is, to my mind, nearly as important as what the majority says. The majority's first major discussion is headed

[114] *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68.

[115] See e.g. *Druyan v Canada (Attorney General)*, 2014 FC 705 at para 38; *Haqi v Canada (MCI)*, 2014 FC 1167 at paras 24–26; *Tapambwa v Canada (Citizenship and Immigration)*, 2017 FC 522 at para 20.

[116] *Majebi*, *supra* note 60 at para 5; *Bo10 v Canada (MCI)*, 2013 FCA 87 at para 71.

[117] *Bo10*, *supra* note 65 at paras 22–26; van Ert, "Canadian Cases 2015," *supra* note 64.

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"Determining the Applicable Standard of Review." There, the majority affirms that reasonableness is the presumptive standard of review and sets out how that presumption can be rebutted. Legislative intent, as indicated by legislated standards of review and statutory appeal mechanisms, are two ways in which the reasonableness presumption is rebutted. In addition, correctness review will apply where required by the rule of law. Constitutional questions are an instance of this, as are general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between administrative bodies. These five situations are the ones the majority presently regards as warranting "a derogation from the presumption of reasonableness review."[118]

Canada's obligations under public international law are given no place in this new framework for determining the applicable standard of review. The most obvious place to have inserted public international law was under the rubric of general questions of law of central importance to the legal system as a whole. For an administrative decision-maker to disregard or misinterpret an international legal question (most likely arising from a treaty obligation) risks "risks incursion by the courts in the executive's conduct of foreign affairs and censure under international law."[119] It does not seem a stretch, at least in some cases, to characterize the need to avoid internationally unlawful results as a matter of central importance to the legal system. Public international law considerations might also fit, in some cases, within the concept of constitutional questions that rebut the reasonableness presumption, given the centrality of separation and division of powers issues to our reception of international law domestically.

So there are places where the majority could have identified public international law considerations as grounds for rebutting the reasonableness standard. But it did not do so. The majority's consideration of public international law does not fall under its discussion of "Determining the Applicable Standard of Review" at all. Instead, the majority situates public international legal considerations in the second major part of its reasons, headed "Performing Reasonableness Review." The majority begins this part of its reasons by noting: "This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice."[120] The lengthy discussion that follows seeks to provide such guidance, beginning with the observation that "reasonableness review finds its starting point in judicial restraint and respects the distinct role

[118] *Vavilov*, *supra* note 62 at para 69.

[119] *Bo10*, *supra* note 65 at para 47.

[120] *Vavilov*, *supra* note 62 at para 73.

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of administrative decision makers."[121] Later in this discussion, the majority identifies "two types of fundamental flaws" that make a decision unreasonable, the second of which is "when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it."[122]

Explaining this type of fundamental flaw, the majority considers "a number of elements that will generally be relevant in evaluating whether a given decision is reasonable." These elements are not a checklist and may vary in significance depending on the context. They are: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision-maker and the facts of which the decision-maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies.[123]

It is under the somewhat inapposite heading of "Other Statutory or Common Law" that public international law makes its brief, but significant, appearance in the majority's new framework. After explaining that "both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide,"[124] the majority adds this:

> We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with … the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69–71.[125]

That's it. The majority's revised administrative law framework says nothing more about the role of public international law in judicial review. (The majority comes back to public international law when it applies its new framework to Vavilov's case.) At first blush, this single paragraph in the majority's long and careful reasons may not seem like much. We already knew (as the majority notes) that statutes are subject to the interpretive presumption of conformity with international law. The court's well-known

[121] *Ibid* at para 75.

[122] *Ibid* at para 101.

[123] *Ibid* at para 106.

[124] *Ibid* at para 111.

[125] *Ibid* at para 114.

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invocation of the (supposedly unimplemented) 1989 *Convention on the Rights of the Child* in *Baker v Canada (Minister of Citizenship and Immigration)*, might also be regarded as old news.[126]

Yet paragraph 114 of *Vavilov* is important. The *Febles* question — should a reviewing court apply correctness or reasonableness to questions of international law? — is not directly answered because it turns out to have been the wrong question. Even in reasonableness review, the state's international obligations are a potential constraint on administrative decision-makers. In seemingly the same way that statutory and common law will impose constraints on how and what an administrative decision-maker can lawfully decide, Canada's international obligations, including unimplemented treaties, are factors in reasonableness review. The majority's observations at paragraph 114 are qualified by the phrase "in some administrative decision making contexts." This qualification appears to be descriptive rather than legal. The majority's point seems to be only that not all Canadian administrative decisions involve matters to which public international law is a potential constraint. That is unarguably so. Beyond that, however, the qualification that introduces paragraph 114 does not appear to do any work.

The majority's explanation of why international law is sometimes an important constraint on administrative decision-makers is the presumption of conformity, particularly as enunciated in *R v Hape*. There, the Court identified the values and principles of customary and conventional law as "part of the context in which Canadian laws are enacted" and founded the presumption on the "judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result."[127] The presumption, and the notion that international law is part of the legal context in which Canadian legislation is enacted and read, was also relied upon in the *Baker* passages cited by the *Vavilov* majority.

This reliance on the presumption, with its depiction of Canadian law within an international context and its strong preference for internationally compliant interpretations of domestic law, suggests that an administrative decision will not be unreasonable merely for disregarding some relevant international obligation. A decision-maker might ignore the obligation but still reach a result that conforms with it. Where, however, the decision under review is contrary to, or inconsistent with, an international obligation of the state, that decision will be unreasonable. Put another way, the presumption that Canadian laws conform to Canada's international obligations means

[126] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990); *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[127] *R v Hape*, 2007 SCC 26 at para 53.

that an administrative decision-maker cannot reasonably interpret a domestic provision inconsistently with the state's obligations.

By situating public international legal considerations within the type of legal constraints administrative decision-makers will be held to even under reasonableness review, the majority in *Vavilov* gives public international law a potentially significant place in judicial review on either standard. International law remains on the periphery of judicial review, for it will only be relevant in "some administrative decision making contexts." But, where it is relevant, it can really matter. The state's international legal obligations are among the "legal constraints" that, if disregarded, make a decision "untenable." For an administrative decision-maker to decide inconsistently with the state's obligations is a "fundamental flaw."

The potential importance of public international legal considerations under the majority's new framework is illustrated by its decision in Vavilov's case. After 145 paragraphs of theoretical discussion, the majority came to the application of its new framework to the case before it. The standard of review is presumptively reasonableness, and the majority found no basis for departing from that presumption.[128] The majority concluded that the registrar's decision was not reasonable:

> [She] failed to justify her interpretation of s. 3(2)(a) of the *Citizenship Act* in light of the constraints imposed by the text of s. 3 of the *Citizenship Act* considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter … the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).[129]

This paragraph makes clear that it was not the registrar's disregard of Canada's treaty obligations alone that doomed her analysis. We will see, however, that in this case the relevant treaties cannot be considered in isolation from the legislative provisions that implement and reflect them nor from the precedents that previously considered the international aspect of the issue before her.

[128] *Vavilov, supra* note 62 at para 170.

[129] *Ibid* at para 172.

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The relevant provisions of the *Citizenship Act* are as follows:

Persons who are citizens 3 (1) Subject to this Act, a person is a citizen if (a) the person was born in Canada after February 14, 1977; …	*Citoyens* 3 (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne : a) née au Canada après le 14 février 1977; …
Not applicable to children of foreign diplomats, etc. (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government; (b) an employee in the service of a person referred to in paragraph (a); or (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).	*Inapplicabilité aux enfants de diplomates étrangers, etc.* (2) L'alinéa (1) a) ne s'applique pas à la personne dont, au moment de la naissance, les parents n'avaient qualité ni de citoyens ni de résidents permanents et dont le père ou la mère était: a) agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger; b) au service d'une personne mentionnée à l'alinéa a); c) fonctionnaire ou au service, au Canada, d'une organisation internationale — notamment d'une institution spécialisée des Nations Unies — bénéficiant sous le régime d'une loi fédérale de privilèges et immunités diplomatiques que le ministre des Affaires étrangères certifie être équivalents à ceux dont jouissent les personnes visées à l'alinéa a).

The phrase "diplomatic or consular officer" in section 3(2)(a) is defined in the *Interpretation Act*[130] and does not apply to spies. But the phrase "other representative or employee in Canada of a foreign government" is undefined. The registrar considered that Vavilov's parents came within that phrase. The majority accepts that this phrase, considered in isolation, could apply to a foreign spy.[131] But the phrase is not to be read in isolation.

[130] RSC 1985, c I-21.

[131] *Vavilov*, *supra* note 62 at para 175.

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First, it must be read in the light of section 3(2)(c). This provision excludes from section 3(1)(a)'s *jus soli* rule "an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization *to whom there are granted*, by or under any Act of Parliament, *diplomatic privileges and immunities* certified by the Minister of Foreign Affairs to be *equivalent to those granted to a person or persons referred to in paragraph (a)*" if neither of the person's parents was a citizen or permanent resident. This provision (particularly, it seems, the portions I have italicized) gives clear support for the conclusion that all of the persons contemplated by section 3(2)(a) — including those who are "employee[s] in Canada of a foreign government" — must have been granted diplomatic privileges and immunities in some form.[132] Vavilov's parents, needless to say, were not.

The majority then turned to the rest of the statutory context, being the *FMIOA*[133] and the two treaties it implements—namely, the *Vienna Convention on Diplomatic Relations*[134] and the *Vienna Convention on Consular Relations*.[135] The majority observed that these instruments are "the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts" and that "Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the *FMIOA*."[136] The majority then noted that "Canada affords citizenship in accordance both with the principle of *jus soli*, the acquisition of citizenship through birth regardless of the parents' nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent," citing Professor Brownlie.[137] The majority called *jus soli* and *jus sanguinis* "a backdrop to s. 3 of the *Citizenship Act* as a whole,"[138] returned to Brownlie's discussion in quoting from a 2007 Federal Court decision,[139] and noted

[132] *Ibid* at para 176.

[133] *FMIOA*, *supra* note 107.

[134] *Vienna Convention on Diplomatic Relations*, *supra* note 108.

[135] 24 April 1963, 596 UNTS 261, Can TS 1974 No 25 (entered into force 19 March 1967).

[136] *Vavilov*, *supra* note 62 at para 177.

[137] *Ibid* at para 178, citing Ian Brownlie, *Principles of Public International Law*, 5th ed (Oxford: Oxford University Press, 1998) at 391–93. Note that this is the same edition of Brownlie relied on by the majority in the Court of Appeal, seemingly because, as Stratas JA noted (*Vavilov* (FCA), *supra* note 106 at para 71), Brownlie specifically mentions Canada's first *Citizenship Act* as "embodying the principle that the *jus soli* is excluded in respect of the children of persons exercising official duties on behalf of a foreign government who enjoy immunities."

[138] This is cribbed from Stratas JA in the court below (*Vavilov* (FCA), *supra* note 106 at para 69).

[139] *Vavilov*, *supra* note 62 at paras 178–79, citing *Al-Ghamdi v Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559.

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Vavilov's arguments before the registrar that section 3(2) was intended to mirror the *FMIOA*, the *Vienna Convention on Diplomatic Relations*, and Article 2 of the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*.[140]

The majority also noted that the registrar's analyst appeared to overlook the possibility that a person can be granted privileges or immunities despite not being considered "diplomatic or consular officer[s]" under the *Interpretation Act*, as the majority of the Federal Court of Appeal had rightly appreciated.[141] This would be the case, for instance, of employees of an embassy or consulate who are not themselves diplomatic or consular officers as defined in the *Interpretation Act* but enjoy protections as service staff or private servants under the two Vienna conventions. The majority's discussion of the international legal issues concluded:

> It is well established that domestic legislation is presumed to comply with Canada's international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law. … Yet the analyst did not refer to the relevant international law, did not inquire into Parliament's purpose in enacting s. 3(2) and did not respond to Mr. Vavilov's submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

This passage is another strong statement from the Supreme Court of Canada of the presumption of conformity with international law. Clearly, the majority regarded the registrar's failure to consider the international law context of section 3(2)(a) of the *Citizenship Act* as deeply problematic. Whether that failure alone would have been enough to justify judicial intervention on a reasonableness standard is less certain. But we can see which way the wind is blowing. In appropriate cases, administrative decision-makers who disregard relevant international legal considerations and fail to apply the presumption of conformity with international law run a serious risk of having their decisions set aside.

The majority went on to criticize the registrar for disregarding three Federal Court decisions interpreting section 3(2), including in the light of

[140] *Vienna Convention on Diplomatic Relations*, *supra* note 108; *Optional Protocol to the Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 223 (entered into force 24 April 1964).

[141] *Vavilov*, *supra* note 62 at para 181.

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the privileges and immunities accorded to diplomatic and other foreign officials by international law,[142] and to observe that "rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations."[143] The majority concluded that the registrar's "failure to justify her decision with respect to" the constraints imposed by section 3 of the *Citizenship Act* as a whole, other legislation and international treaties that inform the provision's purpose, relevant jurisprudence, and the potential consequences of the registrar's decision "point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities."[144] The majority declared Vavilov a Canadian citizen and dismissed the minister's appeal.

The concurring judges said almost nothing about the role of international law, either in administrative law generally or as it relates to Vavilov's case.[145] This should not necessarily be taken as disputing the majority's conclusions on international law. Certainly, the concurrence does not hesitate to point out where it disagrees with the majority on other points. I have argued, in this *Yearbook* and elsewhere, that a deferential standard of review ought not to apply to administrative decisions that conflict with the state's international obligations.[146] My point has been that for courts to tolerate administrative decisions that risk putting Canada offside its international obligations is deferential to one part of the executive—that is, the tribunal in question—but utterly non-deferential to another part of the executive—namely, the federal Cabinet members and the civil servants charged with conducting Canada's foreign relations. A Cabinet decision to incur a treaty obligation in exercise of the royal prerogative over foreign affairs is not taken lightly. It is preceded by a complex process including policy formulation, consultations of stakeholders, negotiation with foreign partners, and the weighing of political factors. This is true even of relatively straightforward bilateral agreements between Canada and likeminded states and all the more so for multilateral treaties, the negotiation and implementation of which can take many years. For the courts to permit administrative decision-makers to upset the results of these deliberate, polycentric, and time-consuming processes in the name of deference is faintly absurd. Real deference would see

[142] *Ibid* at paras 183–88.

[143] *Ibid* at para 192.

[144] *Ibid* at para 194.

[145] But see *ibid* at para 251.

[146] See e.g. van Ert, Allen & Patel, *supra* note 110 at 565–67 (discussing *Febles* (FCA), *supra* note 59). See also Gib van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong" (2018), online: <www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.2web.pdf>.

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the courts protect the federal government's responsibility for the conduct of foreign relations through intolerance of administrative decisions that disregard Canada's international obligations.

Until *Vavilov*, I had thought only insistence upon correctness review for international legal questions could afford this sort of protection. But the majority in *Vavilov* has reformulated — or perhaps just better explained — the latitude that courts have to insist upon certain legal constraints even under a reasonableness standard. By identifying international law as one such constraint, and insisting upon the presumption of conformity as an interpretive rule in administrative decision-making just as it is in judicial decision-making, *Vavilov* shows deference both to administrative decision-makers and those charged with the conduct of Canada's foreign affairs.

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