# *Cases / Jurisprudence*

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# Canadian Cases in Public International Law in 2015 / Jurisprudence canadienne en matière de droit international public en 2015

*compiled by / préparé par*
GIB VAN ERT

*Judicial review of Crown prerogatives — jurisdiction of federal courts — justiciability or political questions doctrine*

*Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada),* 2015 FCA 4 (9 January 2015). Federal Court of Appeal.

The appellant, a British Columbia (BC) First Nation and band under the *Indian Act*, challenged the decision of the minister of foreign affairs to negotiate and conclude a Canada–China investment treaty without first consulting it and, if necessary, accommodating it as required by such well-known Aboriginal law decisions as *Haida Nation v British Columbia (Minister of Forests)* and *Rio Tinto Alcan Inc v Carrier Sekami Tribal Council.*[1] The band argued that the investment treaty might affect its Aboriginal rights and interests in BC lands. At trial in the Federal Court before Crampton CJ, the treaty was found not to be a potential threat to the band's asserted rights and interests. The trial judge found that any effect on the band was "non-appreciable" and "speculative."[2]

The band appealed that finding to the Federal Court of Appeal. In oral argument, the court invited the parties to make submissions on a second issue, namely whether the federal courts have jurisdiction to review exercises of prerogative power such as the negotiation and conclusion

Gib van Ert is the Executive Legal Officer at the Supreme Court of Canada.

[1] *Indian Act*, RSC 1985, c I-5; *Agreement between Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, 9 September 2012, Can TS 2014 No 26; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73; *Rio Tinto Alcan Inc v Carrier Sekami Tribal Council*, 2010 SCC 43.

[2] *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900 at para 147.



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of international agreements. In responding to that invitation, Canada raised a new defence to the band's claim, namely that the federal Crown's exercise of a prerogative power is non-justiciable. The treaty at issue came into force between Canada and China while the decision of the Federal Court of Appeal was under reserve.

Justice Stratas for the Federal Court of Appeal affirmed the federal courts' jurisdiction, rejected Canada's non-justiciability argument, and dismissed the band's appeal. On the issue of the federal courts' jurisdiction, Stratas JA began by noting that, in principle, exercises of pure Crown prerogatives can be judicially reviewed.[3] That was not the issue. The question was whether that power rests only with provincial superior courts, by virtue of their inherent jurisdiction, or was also accorded to the federal courts under sections 2(1) and 18.1(3) of the *Federal Courts Act*.[4] The only appellate authority on that question, namely the decision of the Court of Appeal for Ontario in *Black v Canada (Prime Minister)*, held that the federal courts lacked the power to review exercises of the prerogative.[5] The Federal Court of Appeal was not bound by *Black*, however, and considered its correctness for itself.

Section 18.1(3) of the *Federal Courts Act* empowers the Federal Court to review a "federal board, commission or other tribunal." Section 2(1) defines that phrase to mean "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown." The decision of the Governor in Council to authorize the Minister of Foreign Affairs to ratify the Canada–China investment treaty was founded on a pure Crown prerogative. Was this act a power conferred "by or under an order made pursuant to a prerogative of the Crown"? Stratas JA held that section 2(1) could plausibly bear both the narrow reading given to it in *Black* and a broader reading whereby a power conferred "by … a prerogative of the Crown" can be reviewed by the federal courts.[6] Furthermore, the Supreme Court of Canada's admonitions against narrowing the jurisdiction of the federal courts and finding gaps in the *Federal Courts Act* supported a purposive interpretation of that Act in keeping with the federal courts' general administrative, supervisory jurisdiction over all federal decision makers.[7] Stratas JA concluded that

[3] *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 34 [*Hupacasath*], citing *Council of Civil Service Unions v Minister for the Civil Service*, [1985] 1 AC 374 (HL).

[4] RSC 1985, c F-7.

[5] (2001), 54 OR (3d) 215 (CA).

[6] *Hupacasath*, *supra* note 3 at paras 50–51.

[7] *Ibid* at paras 52–53, citing *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at paras 32, 34.

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to deny the federal courts jurisdiction would be to advance a technical distinction that serves only to trap the unwary and obstruct access to justice.[8]

The learned judge then turned to the question of justiciability. In a rare case of the doctrine being considered in a Canadian court, Stratas JA observed that justiciability, sometimes called the political questions doctrine, concerns the appropriateness and ability of a court to deal with an issue before it.[9] He observed:

> In rare cases … exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way.[10]

Here, the allegedly non-justiciable issue was Canada's decision to conclude an investment treaty with China. Stratas JA approved the English decision of *R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte Everett* suggesting that executive decisions to sign a treaty, without more, are not justiciable.[11] "This makes sense," observed the learned judge, "as the factors underlying a decision to sign a treaty are beyond the courts' ken or capability to assess, and any assessment of them would take courts beyond their proper role within the separation of powers."[12] Yet Stratas JA concluded that the appellant's challenge here was not to the executive's decision to sign the treaty but, rather, "to bring the Agreement into effect" in spite of the band's enforceable legal rights to be consulted beforehand. Assessing whether or not the band has such legal rights is not non-justiciable; to the contrary, it "lies at the core of what courts do."[13]

Having rejected Canada's justiciability objection, Stratas JA went on to review the merits of the decision and dismiss the band's appeal, essentially for the reasons of Crampton CJ. In particular, Stratas JA noted that there was no evidence that Canada's other foreign investment promotion and protection agreements have impaired the ability of any level of government to protect Aboriginal rights and interests or the rights and interests themselves.[14]

[8] *Hupacasath, supra* note 3 at para 56.

[9] *Ibid* at para 62.

[10] *Ibid* at para 66.

[11] [1989] 1 All ER 655 at 690 (CA).

[12] *Hupacasath, supra* note 3 at para 68.

[13] *Ibid* at paras 69–70.

[14] *Ibid* at para 100.

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*Freedom of association — right to strike — relevance of international law to interpretation of the Canadian Charter of Rights and Freedoms*

*Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (30 January 2015). Supreme Court of Canada.

In this appeal, the Supreme Court of Canada recognized the right to strike as an aspect of freedom of association constitutionally protected by section 2(d) of the *Canadian Charter of Rights and Freedoms*.[15] This innovation was prompted by a Saskatchewan law, the *Public Service Essential Services Act*, which limited strike action by certain public sector employees who were designated as performing essential services.[16] The constitutionality of this law was challenged by the Saskatchewan Federation of Labour and other unions. The trial judge concluded that the right to strike was a fundamental freedom protected by section 2(d) of the *Charter* and that the prohibition on the right to strike substantially interfered with the section 2(d) rights of the affected public sector employees in a manner that was not saved by section 1 of the *Charter*. The Saskatchewan Court of Appeal allowed the government of Saskatchewan's appeal on this point.

Justice Rosalie Abella for herself and four others allowed the appeal and affirmed that "the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations" and that this conclusion was supported "by history, by jurisprudence and by Canada's international obligations."[17] The prohibition on striking for essential service employees, and the lack of any legislative mechanism in the place of striking where collective bargaining reaches an impasse, rendered the Saskatchewan law unconstitutional.[18] After a review of Canadian jurisprudence under section 2(d), the history of strike actions in English and Canadian law since the nineteenth century, and the *Wagner Act* model of labour relations as adopted in Canada in the twentieth century, Abella J concluded that "the ability of employees to withdraw their labour in concert has long been essential to meaningful collective bargaining."[19]

The learned judge then turned to Canada's international human rights obligations, which, in her view, "mandate protecting the right to strike as part of a meaningful process of collective bargaining" and "clearly

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

[16] SS 2008, c P-42.2.

[17] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 3 [*Saskatchewan Federation*].

[18] *Ibid* at para 4; see also para 25.

[19] *National Labor Relations Act*, 49 Stat 449, 29 USC §§ 151–69 (1935) [*Wagner Act*]; *Saskatchewan Federation*, *supra* note 17 at paras 34–51.

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argue for the recognition of a right to strike within s. 2(d)."[20] In support of this conclusion, Abella J relied chiefly on Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*) and Article 45(c) of the *Charter of the Organization of American States* (*OAS Charter*).[21] She also cited the International Labour Organization's (ILO) *Convention no. 87 Concerning Freedom of Association and Protection of the Right to Organize*, which, she acknowledged, "does not explicitly refer to the right to strike."[22] She noted, however, that the ILO supervisory bodies, including the Committee on Freedom of Association, have recognized the right to strike in their decisions, which, in Abella J's view, "have considerable persuasive weight."[23] Finally, Abella J described "an emerging international consensus that, if it is to be meaningful, collective bargaining requires a right to strike."[24] The learned judge cited decisions of the European Court of Human Rights, German and Israeli authorities, the constitutional provisions of France, Italy, Spain, and South Africa, and Article 6(4) of the *European Social Charter*.[25]

Of potential importance for the development of *Charter* jurisprudence more generally, Abella J invoked the presumption, first enunciated by Chief Justice Brian Dickson in dissent in *Reference re Public Service Employee Relations Act (Alta)*, that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[26] The learned judge cited *R v Hape* and *Divito v Canada (Public Safety and Emergency Preparedness)* in support of this presumption.[27]

Abella J then enunciated the following test for an infringement of section 2(d)'s protection of the right to strike: does the legislative interference with the right to strike in a particular case amount to a substantial interference with collective bargaining?[28] If so, the impugned provision

[20] *Ibid* at paras 62, 65.

[21] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46, art 8(1) [*ICESCR*]; *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3, Can TS 1990 No 23, art 45(c) [*OAS Charter*].

[22] *Convention no 87 Concerning Freedom of Association and Protection of the Right to Organise*, 9 July 1948, 68 UNTS 17, Can TS 1973 No 14 [*Convention no. 87*]; *Saskatchewan Federation, supra* note 17 at para 67.

[23] *Saskatchewan Federation, supra* note 17 at para 69.

[24] *Ibid* at para 71.

[25] *European Social Charter*, 18 October 1961, 529 UNTS 90; *European Social Charter (Revised)*, 3 May 1996, 2151 UNTS 277; *Saskatchewan Federation, supra* note 17 at paras 71–75.

[26] *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313; *Saskatchewan Federation, supra* note 17 at para 64.

[27] *R v Hape*, 2007 SCC 26 at para 55 [*Hape*]; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 23 [*Divito*].

[28] *Saskatchewan Federation, supra* note 17 at para 78.

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must be justified under section 1 to avoid unconstitutionality. Having found that the Saskatchewan law does substantially interfere with collective bargaining, Abella J moved on to the justification analysis. At the minimal impairment stage, she returned to Canada's international obligations, quoting with approval an expert report admitted at trial that opines on the circumstances in which states may, consistently with international instruments and jurisprudence, restrict or prohibit the right to strike.[29] She noted that the ILO's Committee on Freedom of Association defined essential services as those needed to prevent a "clear and imminent threat to the life, personal safety or health of the whole or part of the population."[30] In contrast to these international authorities and also to similar Canadian schemes, the trial judge had found the Saskatchewan law not to be minimally impairing of the right to strike as protected by section 2(d) of the *Charter*. Justice Abella agreed.

The co-written dissent of Justices Marshall Rothstein and Richard Wagner is a vigorous refutation of the majority's position, based in significant part on what it describes as the "unclear" state of international law on the right to strike.[31] The dissenting justices noted that *Convention no. 87* does not refer to the right to strike and that ILO bodies disagree on the interpretation of that treaty.[32] They also observed that the right to strike is not expressly protected by the *International Covenant on Civil and Political Rights* (*ICCPR*) and that the UN Human Rights Committee has found that Article 22 of that covenant does not protect that right.[33] As for the *ICESCR*, the dissenting justices observed that it "protects a qualified right to strike … subject to explicit restrictions as it applies to public sector workers."[34] The dissenting justices did not consider the *OAS Charter* provisions relied upon by the majority.

On the question of the relative significance of international sources for domestic interpretive purposes, the dissenting justices invoked the Court's prior jurisprudence in support of the propositions that "obligations under international law that are *binding* on Canada are of primary relevance to this Court's interpretation of the *Charter*" and that "[w]hile other sources

[29] *Ibid* at para 86.

[30] *Ibid* at para 92.

[31] *Ibid* at para 150.

[32] *Ibid* at paras 152–53.

[33] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47, art 22 [*ICCPR*]; *Saskatchewan Federation, supra* note 17 at para 154, citing *JB v Canada*, Comm no 118/1982 (1986), reprinted in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, UN Doc CCPR/C/OP/2, vol 2 (New York: United Nations, 1990) 34, online: OHCHR <http://www.ohchr.org/Documents/Publications/SelDec_2_en.pdf>.

[34] *ICESCR, supra* note 21; *Saskatchewan Federation, supra* note 17 at para 155.

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of international law can have some persuasive value in appropriate circumstances, they should be granted much less weight than sources under which Canada is bound."[35] As for foreign constitutions, the dissenting judges considered them to be of little relevance and, indeed, as supporting the view that Canada intended to exclude the right to strike from the *Charter*.[36] The dissenting judges cautioned that "[j]udicial review and the use of international law as an interpretive aid should not become a euphemism for this Court interfering in the government's prerogative over foreign affairs."[37]

*State immunity — act of state doctrine — improper interference in labour relations*

*United Mexican States v British Columbia (Labour Relations Board)*, 2015 BCCA 32 (30 January 2015). Court of Appeal for British Columbia.

The United Mexican States and the Consulado General de Mexico en Vancouver (Mexico) appealed the dismissal of its judicial review petition of a decision of the British Columbia Labour Board. In the course of an application before the board to decertify a union as the bargaining agent for a group of agricultural workers, the board found that Mexico had improperly interfered with a representation vote for the purposes of section 33(6)(b) of the BC *Labour Relations Code*.[38] In so doing, the board rejected Mexico's argument that state immunity prevented it from considering and making findings regarding Mexico's conduct.

The union was the certified bargaining agent for workers employed by a BC agricultural nursery and farming business that employed Mexican workers (and others) through the federal government's Seasonal Agricultural Workers Program. Certain employees applied to the board to decertify the union. In response, the union filed a complaint against Mexico alleging that it had engaged in unfair labour practices and improper interference contrary to the *Labour Relations Code*. The union alleged that Mexico prevented workers who supported the union from returning to Canada or from working in unionized workplaces.[39]

Mexico raised state immunity as a preliminary objection, claiming that section 3(1) of the *State Immunity Act* precluded the board from considering the union's allegation.[40] On this basis, the board dismissed the union's

[35] *Saskatchewan Federation*, *supra* note 17 at para 157 (emphasis in original).

[36] *Ibid* at para 158.

[37] *Ibid* at para 159, citing *Turp v Canada (Justice)*, 2012 FC 893.

[38] RSBC 1996, c 244.

[39] *United Mexican States v British Columbia (Labour Relations Board)*, 2015 BCCA 32 at paras 8–10 [*United Mexican States*].

[40] *State Immunity Act*, RSC 1985, c S-18, s 3(1): "Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada."

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unfair labour practices complaint. But it held that it could consider Mexico's conduct in connection with the alleged improper interference. The union then advised the board that it intended to call former consular employees of Mexico to give testimony. Mexico resisted based both on state immunity and on the *Vienna Convention on Consular Relations*.[41] The board ultimately ruled that it was neither precluded from hearing the voluntary testimony of former consular employees nor from making findings as to whether Mexico's conduct amounted to improper interference within the meaning of the *Labour Relations Code*.[42]

On judicial review to the Supreme Court of British Columbia, the chambers judge held that the board was not exercising jurisdiction over Mexico contrary to section 3(1) of the *State Immunity Act* as Mexico was not a party to the proceedings and no orders or findings could be made against it. She also held that the *Vienna Convention on Consular Relations* did not prevent the board from hearing the evidence, voluntarily given, of former consular employees. The learned judge noted that a finding of improper interference under section 33(6)(b) of the *Labour Relations Code* was "merely a basis upon which the Board may dismiss a decertification application without regard for the result of a representation vote and does not constitute a finding that the *Code* has been violated … There is no legal consequence for any other person who is found to have improperly interfered."[43] Given this, the chambers judge held that the *State Immunity Act* did not preclude the board from inquiring into or making findings relating to whether Mexico had engaged in improper interference.

Harris JA for the Court of Appeal for British Columbia dismissed Mexico's appeal. He agreed with the chambers judge that a finding of improper interference for the purpose of section 33(6)(b) of the *Labour Relations Code* is not a finding that the code has been violated but is simply a basis on which the board can conclude that a representation vote does not disclose the true wishes of the employees. No order can be made against a person found to have improperly interfered. The finding has no legal effect and does not affect the person's legal interests.[44]

On the issue of state immunity, Harris JA agreed with the chambers judge's analysis, noting a recent English case, *Belhaj v Straw*, in which the chambers judge's decision had been cited.[45] In *Belhaj*, the Court of Appeal for England and Wales distinguished between state immunity and the act

[41] 24 April 1963, 596 UNTS 261, Can TS 1974 No 25.

[42] *United Mexican States*, *supra* note 39 at paras 11–16.

[43] *Ibid* at para 20.

[44] *Ibid* at para 35.

[45] *Belhaj v Straw*, [2014] EWCA Civ 1394 [*Belhaj*].

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of state doctrine. That doctrine, explained Harris JA, "may confer a subject matter immunity that will lead a court to decline to adjudicate matters involving the sovereign acts of foreign states even in circumstances where there is no state immunity."[46] But Harris JA agreed with the court in *Belhaj* that proceedings will not be barred on grounds of state immunity simply because they require a court to rule on the legality of a foreign state's conduct. Harris JA quoted approvingly from *Belhaj* as follows:

> The principles of state immunity and act of state as applied in this jurisdiction are clearly linked and share common rationales. They may both be engaged in a single factual situation. Nevertheless, they operate in different ways, state immunity by reference to considerations of direct or indirect impleader and act of state by reference to the subject matter of the proceedings. Act of state reaches beyond cases in which states are directly or indirectly impleaded, in the sense described above, and operates by reference to the subject matter of the claim rather than the identity of the parties. This is inevitably reflected in the different detailed rules which have developed in relation to the scope and operation of the two principles. In this jurisdiction exceptions to immunity are laid down in the 1978 Act. Limitations on the act of state doctrine, which are not identical, have now become established at common law. (See, in particular, *Yukos Capital Sarl v OJSC Rosneft Oil Co (No. 2)* [2014] QB 458.) The extension of state immunity for which the respondents contend obscures these differences. Such an extension is also unnecessary. Any wider exemption from jurisdiction extending beyond state immunity in cases of direct or indirect impleader is addressed in this jurisdiction by the act of state doctrine and principles of non-justiciability. The extension of state immunity for which the respondents contend would leave no room for the application of those principles.[47]

Harris JA agreed with this analysis and observed that Mexico's position was truly not one of state immunity but, rather, an act of state. Yet he saw no need to consider the scope or content of that doctrine, being unpersuaded that it had any application to the facts of the case before him. "The Board," in his view,

> did no more than examine Mexico's conduct for the purpose of exercising its remedial powers under the law of British Columbia, in respect of the rights of the Employees, the Union, and the Employer in British Columbia. The Board considered whether certain conduct had occurred, but in doing so, the Board was not adjudicating its legal validity in Mexico or under international law, and was not

[46] *United Mexican States, supra* note 39 at para 5.

[47] *Belhaj, supra* note 45 at para 48, quoted in *United Mexican States, supra* note 39 at para 47.

[48] *United Mexican States, supra* note 39 at para 50.

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adjudicating whether the conduct breached the *Code*. The Board was doing no more than vindicating the rights of persons in British Columbia.[48]

The court dismissed the appeal.

*Leave to intervene — presumption of conformity with international law — international law and judicial review*

*Gitxaala Nation v R*, 2015 FCA 73 (16 March 2015). Federal Court of Appeal.

In litigation arising from the Northern Gateway Pipeline Project, Amnesty International and the Canadian Association of Petroleum Producers applied for leave to intervene. Stratas JA for the Federal Court of Appeal granted the applications on terms and, in so doing, gave guidance on how would-be interveners should proceed in cases where questions of public international law arise.

Stratas JA framed his analysis according to the test for intervention in Federal Court of Appeal proceedings set out in *Canada (Attorney General) v Pictou Landing First Nation*,[49] a test based on the older authority of *Rothmans, Benson & Hedges Inc v Canada (Attorney General)*.[50] This test requires, in short, that (1) the applicable procedural requirements be met; (2) the proposed intervener have a genuine interest in the matter; (3) the proposed intervener advance different and valuable insights; (4) it be in the interests of justice to permit the intervention; and (5) the intervention be consistent with Rule 3 of the *Federal Courts Rules*, which requires that the rules be interpreted and applied so as to secure the just, most expeditious, and least expensive determination of every proceeding on its merits. The issue in both proposed interventions, in Stratas JA's view, lay in the third and fourth elements of this test.

Amnesty International's application offered the court an international law perspective on the issues before it. "A reading of its memorandum suggests that international law is very much at large on all issues in many different ways," observed Stratas JA. That was, in the learned judge's view, incorrect. Rather, international law potentially affected the issues before the court "in only limited ways."[51] Stratas JA then offered this account of the relationship between international and domestic law in Canada:

> Domestic law, not international law, forms the law of the land, unless the domestic law expressly incorporates international law by reference: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193 at paragraph 137; *Capital Cities*

[49] 2014 FCA 21.

[50] [1990] 1 FC 74 (TD), aff'd [1990] 1 FC 90 (CA).

[51] *Gitxaala Nation v R*, 2015 FCA 73 at paras 11–12 [*Gitxaala Nation*].

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*Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141 at pages 172-73, 81 D.L.R. (3d) 609; and see sections 91 and 92 of the *Constitution Act, 1867*, which give Parliament and the legislatures the "exclusive" power to make laws. If a legislative provision is clear and unambiguous, international law cannot be used to change its meaning: *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281 at paragraph 35; *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 at paragraph 50.

However, if there are multiple possible interpretations of a legislative provision, we should avoid interpretations that would put Canada in breach of its international obligations: *Ordon Estate, supra* at paragraph 137. This canon of construction is based on a presumption that our domestic law conforms to international law: *R. v. Hape*, [2007] 2 S.C.R. 292 at paragraph 53. For example, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paragraphs 69–71, the Supreme Court considered the statutory words "humanitarian and compassionate" to be ambiguous and so it used international law to resolve the ambiguity. As a practical matter, this canon of construction is seldom applied because most legislative provisions do not suffer from ambiguity and, thus, "must be followed even if they are contrary to international law": *Daniels v. White*, [1968] S.C.R. 517 at page 541, 2 D.L.R. (3d) 1. Overall, then, international law can play a role in the interpretation of legislative provisions — indeed, sometimes an important one — but it is a well-defined, limited role.[52]

Aspects of this depiction of the reception and role of public international law in contemporary Canadian law are, with respect, outdated. While Pigeon J (for himself alone) did indeed describe the presumption of conformity as "seldom applied" in 1968, whatever truth that statement may have held at the time has been worn away since by repeated endorsements and applications of the presumption by the Supreme Court of Canada.[53] Furthermore, Stratas JA's account of the need for ambiguity before applying the presumption of conformity overlooks the Supreme

[52] Ibid at paras 16–17.

[53] In the twenty-first century, the Supreme Court of Canada's application or approbation of the presumption of conformity has been an almost annual phenomenon. See *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 48 [*B010*]: "In keeping with the international context in which Canadian legislation is enacted, this Court has repeatedly endorsed and applied the interpretive presumption that legislation conforms with the state's international obligations … This interpretive presumption is not peculiar to Canada. It is a feature of legal interpretation around the world"; *Saskatchewan Federation, supra* note 17 at para 64; *Thibodeau v Air Canada*, 2014 SCC 67 at para 113; *Divito, supra* note 27 at para 23; *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 117: "I accept, of course, that to the extent possible domestic legislation should be interpreted so that it is consistent with Canada's international obligations"; *Németh v Canada (Justice)*, 2010 SCC 56 at para 34: "I also accept, of course, that, where possible, statutes should be interpreted in a way which makes their provisions consistent with Canada's international treaty obligations and principles of international law … [I]t is presumed that the legislature

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Court of Canada's important qualification of the ambiguity requirement in *National Corn Growers Assn v Canada (Import Tribunal)* and is at odds with the Court's current practice.[54]

The learned judge's comments immediately following the above-quoted passage strike a rather different note:

In an administrative law case such as this, international law can enter into the analysis in another limited way. For the purposes of this discussion, I shall assume we are dealing with an unambiguous legislative provision that does not expressly incorporate international law by reference. Under such a provision, despite its clarity, an administrative decision-maker might be able to exercise its discretion in more than one way. And it may be that one particular exercise of discretion is more consistent with international law standards than others. When the administrative decision-maker refrains from exercising its discretion in the way that is more consistent with international law standards and instead exercises its discretion in another way, a party can challenge the reasonableness of that exercise of discretion, invoking the decision-maker's failure to follow international law standards. But given the status of international law where domestic law is unambiguous, this is simply an argument that the decision-maker failed to follow a non-binding policy consideration. That failure may or may not render the decision unreasonable. Much will depend on the importance of the international law standard in the context of the particular case and the breadth of the margin of appreciation or range of acceptability and defensibility the decision-maker enjoys in interpreting and applying the legislative provision authorizing its decision: see, e.g., *Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56 at paragraphs 88-105 for the general approach.[55]

acts in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community as well as in conformity with the values and principles of customary and conventional international law"; *United States of America v Anekwu*, 2009 SCC 41 at para 25; *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 70; *Hape*, *supra* note 27 at paras 53–54 (the most lengthy and significant consideration of the presumption in Canadian law); *GreCon Dimter Inc v JR Normand Inc*, 2005 SCC 46 at para 39: "The interpretation of the provisions in issue, and the resolution of the conflict between them, must necessarily be harmonized with the international commitments of Canada and Quebec"; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 31; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 30 (approving Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994), to the effect that "the values and principles enshrined in international law … constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred").

[54] *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371 [*National Corn Growers*]. See also *Crown Forestries Ltd. v Canada*, [1995] 2 SCR 802 at para 44.

[55] Gitxaala, *supra* note 51 at para 18.

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Here Stratas JA hesitantly embraced (if I may borrow the phrase)[56] a potentially significant place for international law in Canadian judicial review. The approach suggested here would appear to be consistent with the majority decision in *Baker v Canada (Minister of Citizenship and Immigration)*, although it is arguable that the Supreme Court has not yet gone as far as Stratas JA here allows.[57]

Having made these observations, Stratas JA concluded that while it was "a close call" he would exercise his discretion to allow Amnesty International leave to intervene "on terms, primarily because of its expertise in international law issues and the potential that international law issues may be relevant, albeit in limited ways."[58] The terms imposed were that Amnesty

> explain, in legal terms, how and why the particular international law submission is relevant and necessary to the determination of a specific issue, with specific reference to the law set out above or other law bearing on the point. For example, it will have to identify a legislative provision that is ambiguous or that authorizes more than one exercise of discretion and then identify the international law that it says is relevant to the issue.[59]

So long as the concept of ambiguity is applied in keeping with *National Corn Growers*, these terms are not only reasonable but represent good practice for any counsel making submissions on a point of international law before a Canadian court or tribunal.

*Freedom of religion — religious education — relevance of international law to interpretation of Canadian Charter of Rights and Freedoms*

*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 (19 March 2015). Supreme Court of Canada.

The mandatory curriculum in Quebec schools from September 2008 required a program that taught students about the beliefs and ethics of world religions from a neutral and objective perspective. A private Catholic high school sought an exemption from this requirement on grounds of religious freedom and was refused. It challenged that refusal by judicial review of the minister's decision.

The decision of the Supreme Court of Canada did not address international legal issues at length, yet the references to religious freedom in

[56] Jutta Brunnée & Stephen Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" [2003] Can YB Int'l L 3.

[57] [1999] 2 SCR 817 [*Baker*].

[58] *Gitxaala Nation*, *supra* note 51 at para 25.

[59] *Ibid* at para 27.

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international human rights law were notable. Abella J for the majority of the Court overturned the minister's refusal of the high school's objection and sent the matter back to the minister for reconsideration. In doing so, the learned judge applied the framework for reviewing discretionary administrative decisions involving *Charter* rights propounded in *Doré v Barreau du Québec*.[60] In the course of this analysis, Abella J quoted Article 18(4) of the *ICCPR*, noting that it "protects the rights of parents to guide their children's religious upbringing."[61]

In separate reasons, Chief Justice Beverley McLachlin and Justice Michael Moldaver (with Rothstein J's concurrence) concurred that the appeal should be allowed but preferred to grant the exemption sought rather than send the matter back to the minister. In reaching this result, the concurring judges applied a traditional *Charter* analysis rather than the *Doré* approach. In particular, they held that the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified. Thus, the collective aspect of freedom of religion recognized in Article 18 of the *Universal Declaration of Human Rights* (as well as in Article 9 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* and Article 18 of the *ICCPR*) should, in their view, find protection under the *Charter*.[62]

*Wrongful conviction — Charter damages — relevance of international law to interpretation of Canadian Charter of Rights and Freedoms*

*Henry v British Columbia (Attorney General),* 2015 SCC 24 (1 May 2015). Supreme Court of Canada.

The appellant, Ivan Henry, served almost twenty-seven years in jail on ten convictions for sexual offences. In October 2010, all of his convictions were quashed and substituted with acquittals by the Court of Appeal for British Columbia on the basis of serious errors in the conduct of the trial and the unreasonableness of the guilty verdicts in light of the evidence as a whole. Henry later sued the Attorney General of British Columbia for damages for violations of his constitutional rights under section 24(1) of the *Charter* ("[a]nyone whose rights or freedoms … have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances").

[60] 2012 SCC 12.

[61] *ICCPR, supra* note 33, art 18(4); *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 at para 65 [*Loyola High School*].

[62] *Universal Declaration of Human Rights,* GA Res 217 A (III), reprinted in UN GAOR, 3d Sess, Part 1, UN Doc A/810 (1948), at 71–77, art 18; *Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950, 213 UNTS 221, art 9; *Loyola High School, supra* note 61 at paras 96–97.

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Henry contended that the Crown had failed to make full disclosure of relevant information prior to, during, and after his trial. This information included victim statements, forensic evidence, and the existence of another suspect.

The attorney general moved to strike Henry's claim for *Charter* damages. The application judge rejected the application, holding that malice was not a necessary element of a plea for *Charter* damages. The Court of Appeal allowed the Crown's appeal and held that Henry could not seek *Charter* damages for non-malicious acts and omissions of Crown counsel.

Moldaver J for the majority of the Supreme Court of Canada allowed Henry's appeal. The learned judge held that section 24(1) of the *Charter* permits damages awards against the Crown for prosecutorial misconduct even without proof of malice. However, the claimant must show that the Crown, in breach of its constitutional obligations, caused harm to the accused by intentionally withholding information when it knew, or would reasonably be expected to know, that the information was material to the defence and that failure to disclose it would likely impinge on the accused's ability to make full answer and defence. This standard of proof is lower than malice but remains a high threshold so as to strike a reasonable balance between remedying serious rights violations and maintaining the efficient operation of the public prosecution system. As Moldaver J's reasons did not address issues of public international law, I need not review them further.

The joint concurring reasons of McLachlin CJ and Justice Andromache Karakatsanis set a lower threshold for proof of a *Charter* damages claim, a result the learned judges justified in part by resort to international human rights law. In the concurring judges' view, Henry was not required to allege that the Crown breached its constitutional obligations to him either maliciously or intentionally. He need only plead facts that, if true, proved a breach of his *Charter* rights and that damages are an appropriate and just remedy to advance the purposes of compensation, vindication, or deterrence. McLachlin CJ and Karakatsanis J emphasized that prosecutors have a legal duty to disclose relevant evidence, and, therefore, concerns about chilling the exercise of prosecutorial discretion were misplaced. They found "no principled basis for imposing any threshold of fault or intention on Mr. Henry's claim for *Charter* damages."[63]

This result, in the concurring judges' view, was both right in law and justice and consistent with Canada's international obligations. They noted that Canada had "committed itself internationally to compensating those who have been wrongfully convicted" by ratifying the *ICCPR*, Article 14(6) of which provides:

[63] *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at para 133 [*Henry*].

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> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.[64]

While Parliament had not "passed legislation to implement this obligation domestically," and, therefore, Article 14(6) was not "directly enforceable in Canadian courts," the Supreme Court of Canada "has stated many times that the *Charter* should be interpreted consistently with Canada's international obligations," most recently in *Saskatchewan Federation of Labour* (noted above).[65] The concurring judges continued:

> Canada has committed itself to providing compensation to those who have been wrongfully convicted, as expressed in art. 14(6) of the ICCPR. Mr. Henry alleges that he was wrongfully convicted following a trial that was rendered unfair through violation of his right to disclosure. Section 24(1) authorizes the courts to award damages to compensate Mr. Henry for the harm suffered as a result of this *Charter* breach. It would be inconsistent with the international obligation undertaken by Canada through art. 14(6) of the ICCPR to predicate an award of damages under s. 24(1) on Mr. Henry's ability to establish an intentional violation of his *Charter* rights. To require proof of intention would be to lower *Charter* protection below the level of protection found in an international human rights instrument that Canada has ratified. The commitment embodied in art. 14(6) thus further supports our conclusion that Mr. Henry need not establish fault to justify an award of damages under s. 24(1).[66]

*Citizenship — statelessness — prematurity*

*Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139 (4 June 2015). Federal Court of Appeal.

The appellant was born in Canada to Indian nationals in 1989. His parents were employees of India's High Commission. In 1992, all three were granted permanent resident status in Canada. In 1995, the appellant's parents applied for citizenship, which they eventually obtained. For unclear reasons, no citizenship application was made on the appellant's behalf, with the result that he was never granted it. He was, however, eventually issued a Canadian passport.

[64] *ICCPR*, *supra* note 33, art 14(6), quoted in *Henry*, *supra* note 63 at para 135.

[65] *Henry*, *supra* note 63 at para 136.

[66] *Ibid* at para 137.

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The appellant was convicted of breaking and entering in 2009 and of weapons trafficking, possession of a firearm while prohibited, and narcotics trafficking in 2010. The minister of citizenship and immigration later determined that the appellant was not a citizen and applied to the Immigration and Refugee Board for an order permitting him to remove the appellant from Canada on grounds of serious criminality. Before the board, the appellant argued that his parents were not employees of the Indian High Commission at the time of his birth, with the result that he acquired Canadian citizenship by birth. The minister disputed this, relying on section 3(2)(a) of the *Citizenship Act* (which bars the acquisition of citizenship by birth in Canada to persons one or both of whose parents was a diplomatic or consular officer or other representative or employee in Canada of a foreign government).[67] The board found as a fact that his parents were still employed by the High Commission at the time of his birth. He was therefore not a citizen, and the removal order became effective.

In March 2013, India advised the minister that it would not issue the appellant a travel document because it did not recognize him as an Indian national. In September 2013, the appellant applied to the Federal Court for a declaration that he is a Canadian citizen. The Federal Court dismissed the application. Stratas JA for the Federal Court of Appeal dismissed the appellant's appeal. He began by noting that the fact that the appellant had once been issued a Canadian passport was not determinative of his citizenship.[68]

He then observed that while the appellant was not, at present, recognized as a citizen of any country, he was nevertheless not stateless in the international law sense. According to the learned judge, under Article 1 of the *Convention on the Reduction of Statelessness*, a person is stateless "only where the person does not have national status or citizenship in Canada and the person is 'otherwise stateless' — *i.e.*, as a legal or practical matter the person cannot get citizenship of national status elsewhere."[69] Given that the appellant still had avenues before him to obtain citizenship either in India or Canada, he was "not yet stateless."[70]

Stratas JA accepted the minister's submission that the appellant's application was premature given that he had not yet applied for citizenship either in India or Canada. While Canada had declared him inadmissible as a permanent resident for serious criminality, it had not yet received or considered his application for citizenship. Likewise India did not yet have the question before it, and the evidence did not show any legal or practical

[67] *Citizenship Act*, RSC 1985, c C-29, s 3(2)(a).

[68] *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139 at para 22 [*Budlakoti*], citing *Pavicevic v Canada (Attorney General)*, 2013 FC 997.

[69] 30 August 1961, 989 UNTS 175, Can TS 1978 No 32, art 1.

[70] *Budlakoti*, *supra* note 68 at para 23.

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obstacle to his acquiring citizenship there.[71] Stratas JA added that, in the event that the minister refused the appellant's application for citizenship on grounds of "special and unusual hardship" under section 5(4) of the *Citizenship Act*, he could invoke the *Convention on the Reduction of Statelessness* as a matter the minister should consider.[72]

Stratas JA concluded that the appellant had impermissibly bypassed the administrative scheme established by Parliament under the *Citizenship Act* for determining issues of citizenship. He dismissed the appeal, while expressly declining to express any views on the merits of any future citizenship application the appellant might make or any judicial review proceedings that might follow.[73]

*Diplomatic immunity — frozen embassy bank accounts — Vienna Convention on Diplomatic Relations*

*Canadian Planning and Design Consultants Inc v Libya*, 2015 ONCA 661 (29 September 2015). Court of Appeal for Ontario.

This case arose from enforcement proceedings between a Canadian creditor and the state of Libya. It raised important and interesting questions about the availability for execution by judgment creditors of a foreign state's funds held in a Canadian bank account, the legal significance of certificates issued by the minister of foreign affairs to the effect that a bank account is used by a foreign state for diplomatic purposes and whether an agreement to submit to arbitration under the International Chamber of Commerce *Rules of Arbitration* waives a state's immunity from enforcement of a resulting arbitral award. In this judgment, however, all these questions were deemed premature by the Court of Appeal for Ontario and therefore left unanswered pending further proceedings in the court below.

The decision is nevertheless of interest for the following point. On a motion in the Ontario Superior Court, the chambers judge quashed certain notices of garnishment the creditor had obtained and restrained it from further enforcement against Libya's bank account on the basis of diplomatic immunity. That order was then stayed by a judge of the Court of Appeal in chambers, who observed: "If a stay is not granted, there is a real risk that the bank accounts will be emptied and the funds transferred elsewhere."[74] Having adjourned the creditor's appeal pending further proceedings below, the Court of Appeal had to dispose of the stay order. Libya and its bank opposed the continuation of the stay order on the basis that the court should

[71] *Ibid* at paras 46–52.

[72] *Ibid* at para 54, citing *Baker, supra* note 57.

[73] *Budlakoti, supra* note 68 at paras 70–73.

[74] *Canadian Planning and Design Consultants Inc v Libya*, 2015 ONCA 661 at para 24 [*Canadian Planning*].

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presume that freezing Libya's bank accounts impaired its ability to continue to operate its embassy. The Attorney General of Canada also opposed the continuation of the stay, arguing that it would breach Canada's obligation "to accord full facilities for the performance of the functions of a mission" under Article 25 of the *Vienna Convention on Diplomatic Relations*.[75]

The Court of Appeal nevertheless continued the stay. It held that "the impairment of embassy operations as a consequence of the freezing of its bank accounts is not a fact that is capable of judicial notice and cannot be presumed by the court." Having no evidence that Libya's ability to operate its embassy had been adversely affected by the notices of garnishment or the stay order, it could not find that a continuation of that order would violate Canada's obligations under Article 25 of the *Vienna Convention on Diplomatic Relations*.[76] The court also agreed with the creditor that it would suffer irreparable harm if the stay order were not continued.

*Refugee protection — human smuggling — financial or material benefit*

*B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 (27 November 2015). Supreme Court of Canada.

This appeal involved five appellants who sought to apply for refugee status from within Canada but had been declared inadmissible, and therefore ineligible for consideration of the merits of their claims, on the ground of people smuggling. Four of the appellants were Sri Lankan passengers aboard the *Sun Sea*, a cargo ship from Thailand. The other appellant was a Cuban who had transported other Cubans to the United States and was convicted there for alien smuggling.

At the relevant time, section 37(1)(b) of the *Immigration and Refugee Protection Act* (*IRPA*) provided:

| | |
|---|---|
| 37. (1) [Organized criminality] A permanent resident or a foreign national is inadmissible on grounds of organized criminality for | 37. (1) [Activités de criminalité organisée] Emportent interdiction de territoire pour criminalité organisée les faits suivants : |
| . . . | . . . |
| (b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering. | b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.[77] |

[75] 18 April 1961, 500 UNTS 95, Can TS 1966 No 29.

[76] *Canadian Planning*, *supra* note 74 at paras 71, 75.

[77] SC 2001, c 27, s 37(1) [*IRPA*].

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The issue before the Supreme Court of Canada was whether this provision captures anyone who assists another in illegally entering Canada or is limited to those who further the illegal entry of asylum seekers for a financial or other material benefit.

McLachlin CJ for the unanimous Court began by observing that the courts below had differed on the standard of review applicable to decisions of the Immigration and Refugee Board on questions of statutory interpretation involving consideration of international instruments. The chief justice noted that the presumptive standard of review, the *IRPA* being the board's home statute, was reasonableness. The question was whether that presumption was displaced. The chief justice saw no need to resolve the issue, concluding that the board's interpretation of section 37(1)(b) was not within the range of reasonable interpretations.[78]

Turning to the merits, McLachlin CJ observed that the range of conduct captured by section 37(1)(b) of the *IRPA* is a matter of statutory interpretation. She proceeded with an extensive interpretive exercise structured around the modern rule of statutory interpretation. Beginning with the words of the provision read in their ordinary and grammatical sense, she found that the phrase "transnational crime" could not be read as including non-organized individual criminality. The ordinary and grammatical sense of the provision suggested that it applies to acts of illegally bringing people to Canada when those acts are connected to transnational organized criminal activity.[79]

McLachlin CJ then considered the provision's statutory context. The provision, read in the light of section 37(1) as a whole, was focused on organized criminal activity. Subsection 37(1) introduces the concept of inadmissibility on grounds of "organized criminality." This phrase is logically and linguistically related to the concept of "criminal organization" as defined in section 467.1(1) of the *Criminal Code*.[80] This definition expressly requires that the commission of offences by groups be for a financial or other material benefit. The concepts of "organized criminality" in section 37(1) of the *IRPA* and "criminal organization" in section 467.1(1) of the *Criminal Code* should be given a consistent interpretation. This conclusion is strongly supported by the fact that both provisions were enacted in anticipation of Canada's obligations under the *United Nations Convention against Transnational Organized Crime* (*Palermo Convention*).[81] The apparent similarity between the provisions of the *IRPA* and the *Criminal Code* was no coincidence.[82]

[78] *B010*, *supra* note 53 at paras 22–26.

[79] *Ibid* at paras 30–35.

[80] RSC 1985, c C-46, s 467.1(1).

[81] 15 November 2000, 2225 UNTS 209 [*Palermo Convention*].

[82] *B010, supra* note 53 at paras 36–46.

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Continuing her statutory interpretation exercise, McLachlin CJ turned to the international context of section 37(1)(b). Her reasons at this point merit extensive quotation:

This Court has previously explained that the values and principles of customary and conventional international law form part of the context in which Canadian laws are enacted: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53. This follows from the fact that to interpret a Canadian law in a way that conflicts with Canada's international obligations risks incursion by the courts in the executive's conduct of foreign affairs and censure under international law. The contextual significance of international law is all the more clear where the provision to be construed "has been enacted with a view towards implementing international obligations": *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1371. That is the case with the *IRPA*, the refugee protection aspects of which serve principally to discharge Canada's obligations under the 1951 *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, and its 1967 *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 267 (together the "Refugee Convention"), but also, as explained below, Canada's obligations under the *Smuggling Protocol*.

In keeping with the international context in which Canadian legislation is enacted, this Court has repeatedly endorsed and applied the interpretive presumption that legislation conforms with the state's international obligations: see, e.g., *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at pp. 409-10; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at paras. 128-31; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 39; *United States of America v. Anekwu*, 2009 SCC 41, [2009] 3 S.C.R. 3, at para. 25; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 34; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 113. This interpretive presumption is not peculiar to Canada. It is a feature of legal interpretation around the world. See generally A. Nollkaemper, *National Courts and the International Rule of Law* (2011), at ch. 7.

These principles, derived from the case law, direct us to relevant international instruments at the context stage of statutory interpretation. Furthermore, two interpretive provisions from s. 3 of the *IRPA* make Parliament's presumed intent to conform to Canada's international obligations explicit. Section 3(2)(b) expressly identifies one of the statute's objectives as "to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement." Similarly, s. 3(3)(f) instructs courts to construe and apply the *IRPA* in a manner that "complies with international human rights instruments to which Canada is signatory" (see de *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655, at paras. 82-83 and 87). There can be no doubt that the Refugee Convention is such an instrument, building as it does on the right of persons to seek and to enjoy asylum from persecution in other countries as set out in art. 14 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

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I conclude that it is appropriate to consider the relevant international instruments in interpreting s. 37(1)(*b*): the *Palermo Convention* and its protocols, and the *Refugee Convention*.[83]

Having thus explained the basis for considering the relevant international instruments, the chief justice considered in turn the *Palermo Convention* and its protocols, the *Refugee Convention*, and the role of the "financial or other material benefit" requirement in these instruments. She began by observing that, "[i]n addition to the international context of Canadian legislation generally, and of the *IRPA* in particular, s. 37(1)(b) finds its origin in international law, namely the *Palermo Convention* and the related *Smuggling Protocol*."[84] She noted the "key distinction" between the *Smuggling Protocol* and the *Human Trafficking Protocol*, namely that the former applies to cases where the smuggler and smuggled agree and the latter applies to cases of coercion.[85] The chief justice concluded that section 37(1)(b)'s express mention of people smuggling, trafficking in persons, and money laundering refer to the *Palermo Convention* and its two protocols.[86]

McLachlin CJ then considered the *Refugee Convention*, in particular, its prohibition on penalizing asylum seekers on the basis of how they sought or secured entry into the country.[87] Obstructed or delayed access to the refugee process, she concluded, is such a prohibited penalty. Section 37(1)(b) must be read consistently with the *Refugee Convention*.[88] Taking the *Palermo Convention*, the *Smuggling Protocol*, and the *Refugee Convention* together, the chief justice found support for the view that "people who are not themselves members of criminal organizations, who do not act in knowing furtherance of a criminal aim of such organizations, or who do not organize, abet or counsel serious crimes involving such organizations, do not fall within s. 37(1)(b)."[89]

The final stage in McLachlin CJ's statutory interpretation exercise was to read section 37(1)(b) harmoniously with the intention of Parliament, which she derived not only from the considerations already discussed

[83] B010, *supra* note 53 at paras 47–50.

[84] *Ibid* at para 51.

[85] *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2237 UNTS 319, Can TS 2002 No 25; *B010, supra* note 53 at para 51.

[86] *B010, supra* note 53 at paras 52–56.

[87] *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6. See also *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267, Can TS 1969 No 29.

[88] *B010, supra* note 53 at paras 57–59.

[89] *Ibid* at para 66; see also paras 60–65.

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(the wording, the legislative scheme, and the context) but also from the Parliamentary record. She found "no evidence that Parliament sought to ignore" the distinction between "those who act for financial or material benefit and those who act for humanitarian purposes or give mutual assistance."[90] To the contrary, she found positive evidence that Parliament understood "people smuggling" in the sense that "migrant smuggling" is used in the *Smuggling Protocol*.

McLachlin CJ therefore concluded that to justify a finding of inadmissibility against the appellants on the grounds of people smuggling under section 37(1)(b), they must be shown to have procured a person's illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational crime. The appellants could escape inadmissibility if they "merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety."[91] The appeals were allowed and the cases remitted to the board for reconsideration.

*Refugee protection — human smuggling — relevance of international law to Charter's overbreadth analysis*

*R v Appulonappa*, 2015 SCC 59 (27 November 2015). Supreme Court of Canada.

The Crown alleged that the appellants were the organizers and crew of a human smuggling expedition. Their vessel, the *Ocean Lady*, was apprehended off the west coast of Vancouver Island in 2009 with seventy-six Sri Lankan Tamils aboard. The Crown alleged that most passengers paid or promised later to pay CDN $30,000 to CDN $40,000 for the voyage. The Crown charged the appellants under section 117 of the *IRPA*, which creates the offence of organizing, inducing, aiding, or abetting the coming into Canada people in contravention of the *IRPA*.[92] Before trial, the appellants challenged the constitutionality of this provision, arguing that it was impermissibly overbroad as it criminalized not only the act of people smuggling but also the acts of humanitarian workers, family members, and other asylum seekers, none of whom Parliament intended to expose to prosecution.

This constitutional challenge was resolved in the appellants' favour before trial. The trial judge found section 117 to be an unjustified infringement of the right to liberty under section 7 of the *Charter*. He ordered the charges quashed. The Court of Appeal for British Columbia reversed. Justice of Appeal Kathryn Neilson for the court held that the purpose of

[90] *Ibid* at para 68.

[91] *Ibid* at para 72.

[92] *IRPA*, *supra* note 77, s 117.

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section 117 was to prevent all organizing or assisting of all unlawful entry into Canada, including assistance by family members and humanitarian workers. The provision was therefore not overbroad and the infringement of section 7 was justified. The appellants were remitted for trial.

McLachlin CJ for the unanimous Supreme Court of Canada allowed the appeal but remitted the appellants for trial. As there was no dispute that the provision, being a criminal offence imposing a custodial sentence, engaged the right to liberty, the main question was whether it did so contrary to the principles of fundamental justice. As noted, the principle upon which the appellants relied was overbreadth, meaning that the impugned law "goes too far and interferes with some conduct that bears no connection to its objective."[93] The first step was to determine the object of section 117. Next the court must determine whether that provision deprives individuals of life, liberty, or security of the person in cases that do not further that object.

McLachlin CJ found that the object asserted by the Crown was incorrect. While the text of section 117 was admittedly broad, a narrow purpose emerged from (1) the international instruments to which Canada has subscribed; (2) the role of section 117 in relation to the statute as a whole, in particular, section 37(1); (3) the *IRPA*'s statements of legislative purpose; (4) the evolution of section 117; and (5) the parliamentary debates. The true purpose of section 117 was to combat people smuggling since that concept was defined in section 37(1)(b) of the *IRPA*, considered by the Court in the companion case of *B010*.[94] Specifically, people smuggling excludes mere humanitarian conduct, mutual assistance among asylum seekers, and aid to family members.[95]

Beginning with Canada's international obligations, McLachlin CJ observed:

> [L]egislation is presumed to comply with Canada's international obligations, and courts should avoid interpretations that would violate those obligations. Courts must also interpret legislation in a way that reflects 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; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 34. Section 3 of the *IRPA* also requires that the *IRPA* be interpreted in a manner that complies with Canada's international obligations, including "international human rights instruments to which Canada is signatory": s. 3(3)(f); see also s. 3(2)(b). The relevant international instruments to which Canada has subscribed should therefore shed light on the parliamentary purpose behind s. 117 of the *IRPA*.[96]

[93] *R v Appulonappa*, 2015 SCC 59 at para 26 [*Appulonappa*], quoting *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 101.

[94] See text summarizing *B010, supra* note 53.

[95] *Appulonappa, supra* note 93 at para 34.

[96] *Ibid* at para 40.

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The chief justice then summarized her conclusions about the relevant international instruments in *B010*. Canada's refugee protection obligations require our law "to recognize that persons often seek refuge in groups and work together to enter a country illegally."[97] Canada's human smuggling treaties are not directed at family members or humanitarians. "It would depart from the balance struck in the *Smuggling Protocol* to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid."[98]

McLachlin CJ concluded her consideration of the international instruments as follows:

> In dealing with conflicting statements of the legislative objects of a statute, the way forward lies in an interpretation which harmonizes obligations in the international instruments to which Canada is a party in a way that avoids conflict and gives expression to each of the various commitments. I conclude that read together in this way, Canada's international commitments support the view that the purpose of s. 117 is to permit the robust fight against people smuggling in the context of organized crime. This excludes criminalizing conduct that amounts solely to humanitarian, mutual or family aid.[99]

The chief justice then considered the four other indicia of section 117's purpose, all of which she found to be inconsistent with the Crown's argument that the provision's object was to criminalize all acts of organizing or assisting unlawful entry into Canada, including by family members or humanitarians. Instead, the chief justice held that the purpose of section 117 was "to criminalize the smuggling of people into Canada in the context of organized crime" and not to permit "prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada."[100]

Moving on to the second part of the overbreadth analysis, McLachlin CJ concluded that section 117's scope exceeded its purpose by "catching those who provide humanitarian, mutual and family assistance to asylum-seekers coming to Canada." The learned chief justice rejected the Crown's submission that this overbreadth was saved by interpreting the provision as not permitting prosecution of persons providing humanitarian, mutual, or family assistance. Such an interpretation ignores the ordinary meaning of the provision as well as statements in the parliamentary record acknowledging that the provision was overbroad.[101] Nor could section 117 be cured

[97] *Ibid* at para 43.

[98] *Ibid* at para 44.

[99] *Ibid* at para 45.

[100] *Ibid* at para 70.

[101] *Ibid* at para 72.

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by the prosecutorial discretion created by subsection (4), which requires the attorney general to authorize prosecutions under the provision. The chief justice noted the Court's decision in *R v Anderson* that "prosecutorial discretion provides no answer to the breach of a constitutional duty."[102]

McLachlin CJ therefore held that section 117 infringed the right to liberty under section 7 of the *Charter*. Turning to the justification analysis, the chief justice acknowledged the provision's pressing and substantial objective of combating people smuggling and found there to be a sufficient rational connection between the legislative objective and the infringement. However, McLachlin CJ concluded that the Crown had not satisfied its burden of showing that the overbroad provision was nevertheless minimally impairing of the *Charter* right. It was not enough for the Crown to allege that there was no better alternative to section 117; it had to provide a demonstrable justification for its inconsistency with the protected right.[103]

While the appellants asked the Court to strike down section 117 in its entirety, McLachlin CJ concluded that the preferable remedy was to read down section 117 so as not to be applicable to persons who give humanitarian, mutual, or family assistance since this remedy reconciled the provision with the requirements of the *Charter* while leaving the prohibition on human smuggling for the relevant period in place.[104] The charges were therefore remitted for trial on this basis.

[102] *Ibid* at para 74, quoting *R v Anderson*, 2014 SCC 41 at para 17.

[103] *Appulonappa, supra* note 93 at paras 79–82.

[104] *Ibid* at paras 79–85.

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