# *Cases / Jurisprudence*

# Canadian Cases in Public International Law in 2021

# Jurisprudence canadienne en matière de droit international public en 2021

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*Greenhouse gas emissions — national concern doctrine — relevance of international agreements*

*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (25 March 2021). Supreme Court of Canada.

The Supreme Court of Canada heard appeals from three provincial references concerning the constitutionality of a federal statute, the *Greenhouse Gas Pollution Pricing Act*.[1] The question was whether Parliament had legislative jurisdiction to enact the law or whether, instead, the law concerned matters of provincial legislative jurisdiction. Saskatchewan, Ontario, and Alberta contended that the first two parts of the Act (establishing a so-called "carbon tax" fuel charge applicable to producers, distributors, and importers and creating a pricing mechanism for industrial greenhouse gas emissions) and its four schedules impermissibly trenched on the legislative competence of the provinces. Canada contended that the Act came within Parliament's

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Each summary is followed by the initials of its author.

[1] SC 2018, c 12, s 186. For notes on the Saskatchewan and Ontario appeal decisions, see Gib van Ert, "Canadian Cases in Public International Law in 2019" (2019) 57 CYIL 558 at 568–71, 576–78.



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jurisdiction to enact laws for the peace, order, and good government of Canada (the POGG power).

Chief Justice Richard Wagner, for the majority of the court, agreed with Canada. Justice Suzanne Côté dissented in part, and Justices Russell Brown and Malcolm Rowe dissented. This note focuses on the court's observations about climate change, international climate change agreements, and the relevance of treaties in the interpretation of Parliament's POGG power.

The chief justice began by observing that the "essential factual backdrop" to the three appeals was uncontested: "Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. The only way to address the threat of climate change is to reduce greenhouse gas emissions."[2] He described how the emission of greenhouse gases (GHG) warms the planet by trapping solar energy in the atmosphere and how the concentration of greenhouse gases has increased at an alarming rate since the 1950s, causing extreme weather, rising sea levels, and diminishing Arctic sea ice. The chief justice noted particularly severe and devastating effects in Canada, including on Indigenous peoples, whose ability to sustain themselves and maintain their traditional ways of life were threatened.[3]

Importantly for the POGG analysis, Wagner CJ emphasized climate change's international character and the need for "collective national and international action" to combat it.[4] He noted Canada's international climate change commitments — namely, the 1992 *United Nations Framework Convention on Climate Change* (*UN Framework Convention*),[5] the 1997 *Kyoto Protocol to the UN Framework Convention*,[6] the 2009 Copenhagen Accord,[7] and the 2015 *Paris Agreement*[8] — observing that Canada had failed to meet its commitments under all those preceding the *Paris Agreement*.[9] The chief justice also reviewed several internal agreements between the

[2] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 2 [*References re GHG Pricing Act*].

[3] *Ibid* at paras 7–11.

[4] *Ibid* at para 12.

[5] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, Can TS 1994 No 7 (entered into force 21 March 1994). Strangely, the court did not cite to the Canada Treaty Series or the United Nations Treaty Series for this or the other climate change treaties to which it referred. Where available I have added those citations here.

[6] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) [*Kyoto Protocol*]. Canada withdrew from the *Kyoto Protocol* on 15 December 2012.

[7] UN Doc FCCC/CP/2009/11/Add.1 (18 December 2009). This instrument is not a treaty and therefore not reported in the Canada Treaty Series or United Nations Treaty Series.

[8] *Paris Agreement*, 22 April 2016, Can TS 2016 No 9 (entered into force 4 November 2016).

[9] *References re GHG Pricing Act*, *supra* note 2 at para 13.

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federal government and the provinces concerning climate change[10] and measures taken by the federal and provincial governments. Despite these actions, Canada's overall GHG emissions had decreased only by 3.8 percent between 2005 and 2016, well below its target of 30 percent by 2030: "Illustrative of the collective action problem of climate change, between 2005 and 2016, the decreases in GHG emissions in Ontario, Canada's second largest GHG emitting province, were mostly offset by increases in emissions in two of Canada's five largest emitting provinces, Alberta and Saskatchewan."[11]

This is the international background against which Wagner CJ considered the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. He noted the Act's preambular references to the *UN Framework Convention* and the *Paris Agreement*,[12] while also noting that the latter agreement does not require states parties to adopt GHG pricing systems but leaves it to states themselves to determine their preferred means of reducing emissions.[13] He added that there is "a broad consensus among expert international bodies … that carbon pricing is a critical measure for the reduction of GHG emissions."[14]

When determining which legislature — federal or provincial — has jurisdiction under the Canadian Constitution, courts first identify the "pith and substance" or true subject matter of the contested law. The Act's true subject matter, in Wagner CJ's view, was "establishing minimum national standards of GHG price stringency to reduce GHG emissions."[15] The next question was whether this subject matter falls within the legislative competence of Parliament or the provincial legislatures. Canada argued for Parliament's jurisdiction under a branch of the POGG power known as the national concern doctrine. Under this doctrine, Parliament enjoys jurisdiction where there is "a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces."[16] The chief justice observed that "to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern."[17] One key determinant of this qualitative difference is whether

[10] *Ibid* at paras 14–15.

[11] *Ibid* at para 24.

[12] *Ibid* at para 28.

[13] *Ibid* at para 63.

[14] *Ibid* at para 170.

[15] *Ibid* at para 80.

[16] *Ibid* at para 104, quoting Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, looseleaf updated 2019) at 261.

[17] *References re GHG Pricing Act*, *supra* note 2 at para 146.

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the matter is "predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects."[18] The chief justice continued:

> International agreements may in some cases indicate that a matter is qualitatively different from matters of provincial concern. Consideration of international agreements figured into the Court's national concern analysis in *Johannesson* and in *Crown Zellerbach*. … Significantly, the existence of treaty obligations is not determinative of federal jurisdiction: there is no freestanding federal treaty implementation power and Parliament's jurisdiction to implement treaties signed by the federal government depends on the ordinary division of powers: *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.). Treaty obligations and international agreements can be relevant to the national concern analysis, however. Depending on their content, they may help to show that a matter has an extraprovincial and international character, thereby supporting a finding that it is qualitatively different from matters of provincial concern.[19]

Applying this consideration later in his reasons, the chief justice observed that "GHG emissions represent a pollution problem that is not merely interprovincial, but global, in scope"[20] and relied on provisions of the *UN Framework Convention* and the *Paris Agreement* as proof, saying both agreements "help illustrate the predominantly extraprovincial and international nature of GHG emissions and support the conclusion that the matter at issue is qualitatively different from matters of provincial concern."[21]

Another factor in the POGG analysis, which the chief justice found to be satisfied in this case, is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. The chief justice pointed to several considerations establishing provincial inability.[22] Returning to the international character of the problem, Wagner CJ observed:

> As a global problem, climate change can realistically be addressed only through international efforts. Any province's failure to act threatens Canada's ability to meet its international obligations, which in turn hinders Canada's ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole. This is not to say that Parliament has jurisdiction to implement Canada's treaty obligations — it does not — but simply that the inherently global nature of

[18] *Ibid* at para 148.

[19] *Ibid* at para 149.

[20] *Ibid* at para 173.

[21] *Ibid* at para 174.

[22] *Ibid* at paras 182–89.

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> GHG emissions and the problem of climate change supports a finding of provincial inability in this case.[23]

This is an interesting, and in some ways difficult, paragraph. Canada's distribution of legislative jurisdiction over treaty implementation according to its ordinary division of powers — with Parliament implementing federal aspects of international agreements and the provincial legislatures implementing their provincial aspects — means that the chief justice's statement that "[a]ny province's failure to act threatens Canada's ability to meet its international obligations" will very often be true. The chief justice seems aware of this for he promptly reaffirms that the mere potential for provincial obstruction does not grant Parliament exclusive treaty-implementing jurisdiction. The consideration motivating the chief justice's conclusion here, it seems, is not simply that provinces may prevent Canada from meeting its obligations but, rather, that the nature of those obligations — responding to a global climate crisis — makes the possibility of provincial obstruction constitutionally intolerable. International legal obligations are a policy response to the predicament, but it is the predicament itself that founds Parliament's jurisdiction under the national concern doctrine.

In dissent, Rowe J rejected the notion that GHG pollution could become a matter of national concern, and therefore fall into Parliament's jurisdiction, "because of its importance and the existential threat that climate change poses": "How important a matter is does not determine which order of government has jurisdiction. While the seriousness or the immediacy of the threat that climate change poses may be relevant to an argument under the emergency branch [of the POGG power], it has no place in the national concern analysis."[24] Similarly, Rowe J denied that "the presence of international agreements indicates that the matter is of national concern," finding the argument both inconsistent with the residual nature of the POGG power and damaging to the holding, in *Labour Conventions*,[25] that "the federal government does not gain legislative competence by virtue of entering into international agreements" and that to say otherwise would permit "the federal Cabinet to expand the competence of Parliament by the exercise of its authority in respect of foreign relations."[26]

Rowe J's observation that the importance of a matter can inform the question of Parliament's residual POGG jurisdiction under the emergency branch of that power is thought provoking. Canada justified the Act under the national concern branch of POGG rather than the emergency branch,

[23] *Ibid* at para 190.

[24] *Ibid* at para 577.

[25] *Attorney-General for Canada v Attorney-General for Ontario*, [1937] AC 326.

[26] *References re GHG Pricing Act*, *supra* note 2 at para 578.

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and the court decided the case on that basis. One may wonder, however, whether emergency may not have been the more appropriate lens. The objection that emergency laws must be temporary,[27] while climate change and the Act seem not to be, is, I suggest, unconvincing. The dissenting justices complain that the majority distorted the national concern analysis to fit the Act within it. If that is so, they could equally have reimagined the requirement of temporariness to recognize that the emergency of climate change will take decades — but not an eternity — to resolve. (GvE)

*State immunity — statutory exception for terrorism — Ukraine International Airlines Flight 752*

*Zarei v Iran*, 2021 ONSC 3377 (20 May 2021). Ontario Superior Court of Justice.

Shortly after take-off from Tehran on 8 January 2020, Ukraine International Airlines Flight 752 was shot down by two missiles fired by Iran's Islamic Revolutionary Guard Corps. The plane crashed, killing all 167 passengers and nine crew, including fifty-five Canadian citizens, thirty permanent residents of Canada, and fifty-three others travelling to Canada via Kyiv. This was a proceeding by family members and others seeking damages from the state of Iran and related parties under the *Justice for Victims of Terrorism Act* (*JVTA*).[28] The *JVTA* creates an exception to the immunity accorded to foreign states under the *State Immunity Act* (*SIA*).[29] The exception permits claims against foreign states that commit specified acts of terrorism and which are identified as state sponsors of terrorism under an order-in-council. Iran has been so identified since 2012.

The Iran defendants failed to defend the proceeding (no doubt, on grounds of state immunity) and were noted in default. Before granting default judgment, however, Justice Edward Belobaba considered whether the plaintiffs had shown that Iran was not immune from the proceeding under the *SIA*. In brief and unsatisfying reasons, Belobaba J held that Iran came within the *JVTA*'s immunity exception and granted judgment against it. The most peculiar feature of Belobaba J's reasoning must be his reliance on the terrorist financing offence in section 83.02(a) of the *Criminal Code*.[30] He gave no explanation of how the shooting down of an aircraft constitutes the *actus reus* of the offence of providing property intending that it be used to carry out terrorist activity.[31] Why he proceeded under the unlikely financing

[27] *Re Anti-Inflation Act*, [1976] 2 SCR 373 at 423, 427.

[28] SC 2010, c 1, s 2 [*JVTA*].

[29] RSC 1985, c S-18.

[30] RSC 1985, c C-46.

[31] *Zarei v Iran*, 2021 ONSC 3377 at para 27 [*Zarei*].

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offence instead of, say, the offence of committing an indictable offence for a terrorist group (section 83.2) is not explicitly stated, but his reason for doing so may be that the definition of "terrorist activity" in the section 83.02 financing offence includes offences under the 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation*,[32] while (strangely) such civil aviation offences do not found a cause of action under the *JVTA*.[33]

Having determined, to his own satisfaction at least, that the missile attacks on Flight 752 sufficed to bring the defendants within the *JVTA*'s exception to state immunity, Belobaba J next asked himself whether the missile attacks were intentional and whether they occurred in the course of an armed conflict.[34] The first question is bewildering: if the *Criminal Code* offence being relied upon was terrorist financing, surely the question must be whether that act was intentional. In any case, the learned judge concluded, based on reports from Iran itself, a special advisor to the Canadian prime minister, a special rapporteur to the UN Human Rights Council, and opinion evidence advanced by the plaintiffs, that the missile attacks on Flight 752 were intentional "on a balance of probabilities."[35] The judge explained in a footnote that this degree of proof, rather than the higher criminal law standard, was sufficient here because *JVTA* proceedings are civil in nature,[36] despite the fact that liability under that statute is triggered by an act or omission "that is, or had it been committed in Canada would be, punishable under" specified *Criminal Code* provisions.[37]

Turning to the second question, Belobaba J concluded, again "on a balance of probabilities," that the *JVTA*'s armed conflict exception was not available to the Iran defendants. This exception, the learned judge explained,[38] arises from the definition of "terrorist activity" in section 83.01(1) of the *Criminal Code*:

> …for greater certainty, ["terrorist activity"] does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

[32] 23 September 1971, CanTS 1973 No 6 (entered into force 26 January 1973).

[33] See *Zarei*, *supra* note 31 at para 28.

[34] *Ibid* at para 34.

[35] *Ibid* at paras 38–44.

[36] *Ibid* at para 34, n 12.

[37] *JVTA*, *supra* note 28, s 4(1)(b).

[38] *Zarei*, *supra* note 31 at para 29.

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In referring to this provision as the "armed conflict exception," Belobaba J followed the lead of the Supreme Court of Canada in *R v Khawaja*.[39] It may be more accurate, however, to describe this provision as recognizing two exceptions, one for lawful armed conflict and another for official military activities.[40] Unsurprisingly, given the absence of defendants to this proceeding, Belobaba J neglected that distinction. Indeed, he neglected generally the international legal determinations that Parliament's definition of "terrorist activity" requires courts to make in considering whether a given act constitutes terrorist activity for the purposes of the *Criminal Code*. Instead, he was content to "make a finding on the 'armed conflict' issue on a balance of probabilities based on the evidence adduced by the plaintiffs."[41] The motion judge noted that a UN special rapporteur had concluded that there was no armed conflict in the region when the plane was downed and that the plaintiffs' two "Iran experts" were of the same view.[42] On the strength of this reasoning, Belobaba J concluded that the plaintiffs had proved the defendants were liable to them under the *JVTA* and granted their motion for default judgment on liability. In a later proceeding, the same judge awarded the plaintiffs at total of $107 million in damages plus interest and costs.[43]

One must wonder what is gained by any of this. The *JVTA* itself is very likely contrary to international law. The judgments it produces are very likely to be dry. The jurisprudence it generates is, to date, unenlightening (to put it mildly) on the international legal questions it purports to tackle. No one wishes to deny justice to the victims of state-sponsored terrorism. But it is hard to see what justice comes from proceedings under the *JVTA*. (GvE)

*Crimes against humanity — widespread or systematic attack — inadmissibility to Canada*

*Canada (Minister of Citizenship and Immigration) v Verbanov*, 2021 FC 507 (28 May 2021). Federal Court.

Section 35(1)(a) of the *Immigration and Refugee Protection Act* (*IRPA*)[44] provides that permanent residents or foreign nationals are inadmissible to

[39] 2012 SCC 69.

[40] See Leah West & Michael Nesbitt, "Noble Cause, Terrible Reasoning: *Zarei v Iran*, 2021 ONSC 337," *Intrepid Podcast*, online: <www.intrepidpodcast.com/blog/2021/5/25/noble-cause-terrible-reasoning-zarei-v-iran-2021-onsc-3377>.

[41] *Zarei*, *supra* note 31 at para 47.

[42] *Ibid* at paras 49–50.

[43] *Zarei v Iran*, 2021 ONSC 8569.

[44] SC 2001, c 27.

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Canada on grounds of violating human or international rights for committing an act outside Canada that constitutes an offence referred to in sections 4–7 of the *Crimes against Humanity and War Crimes Act*.[45] The Minister of Citizenship and Immigration brought inadmissibility proceedings against the respondent, Mr. Verbanov, on this basis, alleging that he was a former officer of the Moldovan police force, a body that routinely tortures detainees to such an extent as to constitute a crime against humanity. Verbanov defended on the ground that Moldovan police torture does not constitute a crime against humanity because it is not committed pursuant to a state or organizational policy. The Immigration Appeal Division (IAD) agreed. The minister challenged this decision by way of judicial review in Federal Court.

The minister's argument was that the IAD's decision was unreasonable for disregarding the Supreme Court of Canada's decision in *Mugesera v Canada (Minister of Citizenship and Immigration)*.[46] In that case, the Supreme Court held that the customary international legal definition of crimes against humanity did not, at the relevant time (1992), include a requirement that the act in question be committed pursuant to a government policy or plan. Justice Sébastien Grammond dismissed the minister's judicial review application, concluding that *Mugesera* was no longer the controlling authority on this point. The facts of *Mugesera* took place before the coming into force of the 1998 *Rome Statute of the International Criminal Court* (*Rome Statute*)[47] and the *Crimes against Humanity and War Crimes Act*[48] enacted by Parliament to fulfill Canada's obligations thereunder.[49] Article 7(2)(a) of the *Rome Statute* now establishes a policy requirement; the Canadian implementing law explicitly refers to the *Rome Statute*'s definitions of international crimes, and thus any discrepancies between prior customary international law and the *Rome Statute* must be resolved in favour of the latter.[50] Finally, when deciding on the admissibility of a foreign national, section 35(1)(a) of the *IRPA* requires the IAD to consider the *Crimes against Humanity and War Crimes Act* and, by extension, the *Rome Statute*.[51] In reaching these results, the learned judge reviewed the legal framework for crimes against humanity as it

[45] SC 2000, c 24 [*Crimes against Humanity and War Crimes Act*].

[46] 2005 SCC 40.

[47] 17 July 1998, Can TS 2002 No 13 (entered into force 1 July 2002).

[48] *Crimes against Humanity and War Crimes Act*, *supra* note 45.

[49] *Canada (Minister of Citizenship and Immigration) v Verbanov*, 2021 FC 507 at para 22 [*Verbanov*].

[50] *Ibid* at paras 23, 25.

[51] *Ibid* at para 25.

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existed in both international law and Canadian law before and after the adoption of the *Rome Statute*.[52]

In applying the reasonableness standard of review to the IAD's decision, Grammond J noted that the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*[53] requires administrative decision-makers "to take into account their own governing statute and any relevant source of law applicable to their decisions, including international law," and that the "interpretive value of international law is especially relevant where a statute is explicitly enacted for the purpose of implementing international obligations, as is the case with both the *IRPA* and the *Crimes Against Humanity Act*."[54] (GvE)

*Extradition — interaction between treaty and* Extradition Act *— treaty implementation*

*Grenada v Canada (Minister of Justice)*, 2021 BCCA 275 (13 July 2021). Court of Appeal for British Columbia.

Mr. Grenada has been serving a sentence in Canada for second-degree murder since 1995. In 2003, the Minister of Justice ordered his surrender, upon his grant of parole or release from custody, to the United States to stand trial for armed bank robbery. Mr. Grenada requested that the minister authorize a temporary surrender in which he would plead guilty to the offence in the United States and then serve his sentence in Canada. An amendment to the extradition treaty between Canada and the United States in 2001 dealt with temporary surrender. However, it was unclear whether that amendment applied to Mr. Grenada's case given that the request for his extradition was made before the amendment came into force.[55] The minister concluded that he could not authorize a temporary surrender in the circumstances.[56]

The British Columbia Court of Appeal disagreed. It noted that the provision in the treaty was ambiguous. However, it was not necessary to resolve the ambiguity because whether or not the treaty provision was applicable to Mr. Grenada's situation, the minister was authorized under section 66 of the *Extradition Act* to order temporary surrender.[57] The minister had erred in law in concluding that he could not make a temporary surrender order

[52] *Ibid* at paras 6–26.

[53] 2019 SCC 65 [*Vavilov*].

[54] *Verbanov, supra* note 49 at para 49.

[55] *Grenada v Canada (Minister of Justice)*, 2021 BCCA 275 at paras 69–71 [*Grenada*].

[56] *Ibid* at paras 36–37.

[57] *Ibid* at para 72; *Extradition Act*, SC 1999, c 18, s 66.

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under section 66 unless the extradition treaty also authorized a temporary surrender:

> It is true that … a request properly made under a treaty can be implemented only if the *Act* authorizes it. However, the converse is not true. The authority given to the Minister of Justice under the *Act* can be exercised as long as the extradition partner is agreeable, even if it is not expressly permitted by the applicable treaty.[58]

The circumstances of the case illustrate a simple point: treaties need to be implemented to have direct domestic effect, but domestic legislation need not be limited to the terms of the treaty. The Court of Appeal essentially determined that the temporary surrender provision in the *Extradition Act* was more generous than the provision in the treaty, which is an approach that Parliament is entitled to take. (DS)

*Environmental law — public consultation rights — relevance of human rights treaties*

*Greenpeace Canada (2471256 Canada Inc.) v Ontario (Minister of the Environment, Conservation and Parks)*, 2021 ONSC 4521 (3 September 2021). Ontario Divisional Court.

Three environmental advocacy organizations brought a judicial review application alleging that ministers of the Ontario government had failed to conduct public consultations in accordance with the 1993 *Environmental Bill of Rights* (*EBR*)[59] prior to enacting the 2020 *COVID-19 Economic Recovery Act* (*CERA*).[60] The *EBR* requires ministers to give notice to the public of a proposed policy or Act at least thirty days before implementation where they determine that (1) the proposed policy or Act could have a significant effect on the environment and (2) the public should have an opportunity to comment on it before implementation.[61]

Among other things, the *CERA* amended aspects of the environmental assessment process under the *Environmental Assessment Act*.[62] The Minister of the Environment chose not to consult the public on these amendments, relying on a proposed (and later enacted) amendment to the *EBR* (section 33.1) that retroactively exempted the amendments from the thirty-day posting requirement.[63] One of the advocacy organizations,

[58] *Grenada*, *supra* note 55 at para 73.

[59] SO 1993, c 28 [*EBR*].

[60] SO 2020, c 18.

[61] *EBR*, *supra* note 59, s 15.

[62] RSO 1990, c E.18.

[63] *Greenpeace Canada (2471256 Canada Inc) v Ontario (Minister of the Environment, Conservation and Parks)*, 2021 ONSC 4521 at paras 48–49 [*Greenpeace*].

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Earthroots, argued that the amendments to the environmental assessment process were inconsistent with Ontario's obligations under the *International Covenant on Civil and Political Rights* (*ICCPR*)[64] relating to the right to life and the right of citizens to take part in public affairs.[65] It further argued that Ontario had denied a minor applicant's right to freedom of expression under the *Convention of the Rights of the Child*.[66]

Justice Katherine Swinton dismissed these arguments. The learned judge was of the view that Earthroots was attacking the substance of the amendments themselves rather than the reasonableness of the minister's decision not to post them for public consultation.[67] She noted that international treaties or declarations do not have automatic force in Canada; they must be implemented by domestic legislation. As Ontario had not implemented the *ICCPR* with respect to its environmental laws, it had no "mandatory effect and cannot provide justification to make the declaration of a violation of international law."[68] Further, the decision not to post the amendments was reasonable in light of section 33.1 of the *EBR*, and the challenge was premature given that the new powers for environmental assessment had not yet been exercised.[69]

Essentially, Swinton J dismissed Earthroots's arguments on the basis that it was attacking the substance of the amendments rather than the reasonableness of the minister's decision not to post them for public consultation. This distinction is somewhat blurred given that the *CERA* simultaneously amended the environmental assessment process and exempted the amendments from the public consultation requirement. Rather than focus on this distinction, Swinton J should have asked whether the *ICCPR* was a relevant constraint on the minister, in line with the Supreme Court of Canada's affirmation in *Canada (Citizenship and Immigration) v Vavilov*, that international law can act as an important constraint in some administrative decision-making contexts.[70] Importantly, even "unimplemented" obligations can inform the reasonableness of a decision.[71] If the *ICCPR* was a relevant constraint, was the decision not to post the amendments for consultation unreasonable in light of it? Perhaps the answer would still be no, given the

[64] 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976).

[65] *Greenpeace, supra* note 63 at paras 87–89.

[66] *Ibid* at para 89, citing the *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990) [*CRC*].

[67] *Greenpeace, supra* note 63 at para 91.

[68] *Ibid* at para 92.

[69] *Ibid* at para 93.

[70] *Vavilov, supra* note 53 at para 114.

[71] *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70.

presence of section 33.1. But the analysis should have been guided by *Vavilov*'s account of the potential relevance of international legal considerations to administrative decision-making. (DS)

*Droit du travail — rôle du droit international dans l'interprétation des lois — présomption de conformité*

*Fédération des policiers et policières municipaux du Québec c Procureur général du Québec*, 2021 QCCS 4105 (18 octobre 2021). Cour supérieure du Québec.

La Fédération des policiers et policières municipaux du Québec (la "Fédération") a réclamé une déclaration que la *Loi concernant le régime de négociation des conventions collectives et de règlement des différends dans le secteur municipal* (*Loi 24*)[72] contrevenait à l'article 2(d) de la *Charte canadienne des droits et libertés*.[73] La *Loi 24* modifie le *Code du travail* et, en particulier, le régime de négociation collective pour les policiers et pompiers.[74]

Le juge Lukasz Granosik conclut que la *Loi 24* contrevenait à l'article 2 (d) de la *Charte*.[75] Bien qu'il n'était pas (à son avis) nécessaire de les considérer, le juge a traité brièvement des arguments sur le droit international.[76] Il a commencé par mettre l'accent sur les limites sur l'application du droit international au Canada:

> Le recours au droit international connait aussi des limites. D'abord, il n'y a pas lieu de remettre en cause d'aucune façon la supériorité du droit national ou interne sur le droit international et la hiérarchie des normes que nous connaissons place le droit international comme une source secondaire. En effet, le droit international ne permet que d'interpréter des dispositions en cause de façon harmonieuse avec les engagements internationaux du Canada et du Québec au motif de la présomption que le législateur est censé ne pas vouloir légiférer d'une manière inconciliable avec ses obligations internationales.[77]

À l'avis du juge, cette présomption est un "exercice peu démocratique, car on substitue à la législature la volonté de l'exécutif, qui décide s'il y a lieu de négocier, souscrire ou participer à un tel ou autre pacte ou accord

[72] RLRQ c R-8.3.

[73] *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11.

[74] *Code du travail*, RLRQ c C-27.

[75] *Fédération des policiers et policières municipaux du Québec c Procureur général du Québec*, 2021 QCCS 4105 au para 132.

[76] *Ibid* au para 133.

[77] *Ibid* au para 139.

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international."[78] L'exercice est "d'autant moins démocratique" lorsqu'un traité a été ratifié par le Canada mais non pas transposé en droit interne: "On peut même avancer que dans ce cas il n'y a pas lieu d'en tenir compte, car justement le pouvoir législatif aurait refusé ou minimalement omis de le faire."[79]

Le juge Granosik a ensuite souligné que les droits de syndicats diffèrent de façon significative entre les pays.[80] Il a conclu que "le droit international peut soutenir une interprétation législative, mais ne peut remplacer la législation locale applicable et les principes découlant des autorités en vertu de la règle du *stare decisis*. À coup sûr, il ne peut pas ouvrir la porte à une interprétation différente de la loi que celle résultant de l'application de la méthode moderne."[81] En somme, le recours au droit international ne peut "se substituer à une analyse rigoureuse du droit interne, de l'autorité du précédent, du principe de la séparation des pouvoirs et de la primauté de la Constitution."[82]

Avec égard, le juge Granosik semble ne pas apprécier la logique de la présomption de conformité, ni la place du droit international dans l'interprétation des lois internes. L'idée que la présomption soit "peu démocratique" ignore la réalité de la procédure selon laquelle le Canada conclut les traités. Avant de ratifier un traité, le gouvernement fédéral fait des efforts importants (y compris des discussions avec les provinces lorsqu'un traité aura un effet sur la juridiction provinciale) pour s'assurer que le Canada puisse se conformer au traité *au moment de sa ratification* — que ce soit en vertu des lois existantes ou par l'introduction de nouvelles lois.[83] La présomption "découle du fait que donner à une loi canadienne une interprétation qui va à l'encontre des obligations internationales du Canada risque d'amener les tribunaux à s'ingérer dans la conduite des affaires étrangères de l'exécutif et la censure en droit international."[84] Autrement dit, la présomption *respecte* la séparation des pouvoirs. Le juge Granosik

[78] *Ibid* au para 140.

[79] *Ibid*.

[80] *Ibid* aux paras 141–43.

[81] *Ibid* au para 144.

[82] *Ibid* au para 145.

[83] Pour une explication plus détaillée de ce processus, voir Elisabeth Eid & Hoori Hamboyan, "Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical" dans Oonagh Fitzgerald, dir, *The Globalized Rule of Law: Relationship between International and Domestic Law*, Toronto, Irwin Law, 2006, 339; Maurice Copithorne, "National Treaty Law and Practice: Canada" dans Monroe Leigh, Merritt R Blakeslee & L Benjamin Ederington, dir, *National Treaty Law and Practice: Canada, Egypt, Israel, Mexico, Russia, South America*, Studies in Transnational Legal Policy No 33, Washington, DC, American Society of International Law, 2003, 1.

[84] *Bo10 c Canada (Citoyenneté et Immigration)*, 2015 CSC 58 au para 47.

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ignore aussi que le droit international *fait partie* de la méthode moderne d'interprétation des lois. Il est bien établi que "les valeurs et les principes du droit international coutumier et conventionnel font partie du contexte d'adoption des lois canadiennes."[85]

Bref, l'exécutif et la législature agissent normalement de manière à se conformer aux obligations internationales du Canada. La meilleure façon de respecter la séparation des pouvoirs est d'être conscient de ces efforts et de présumer que la législature désire agir conformément aux obligations internationales du pays. (DS)

*Exclusion from refugee protection — acts contrary to principles and purposes of the United Nations (UN) — violence against women*

*Canada (Minister of Citizenship and Immigration) v Algazal*, 2021 FC 1212 (9 November 2021). Federal Court.

This was an appeal by the Minister of Citizenship and Immigration from a decision of the Refugee Appeal Division of the Immigration and Refugee Board finding that the respondent, Mr. Algazal, was not excluded from refugee protection by his history of committing acts of domestic violence against women. Algazal had twice faced criminal charges in Canada for abusive treatment of two former girlfriends. The charges were stayed due to lack of cooperation from the alleged victims. The minister contended that such acts were contrary to the principles and purposes of the UN and, therefore, that Algazal was excluded by article 1F(c) of the *Refugee Convention*.[86] The minister relied on the 1993 *United Nations Declaration on the Elimination of Violence against Women*, while also referring to the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*[87] and the 1995 Beijing Declaration and Platform for Action.[88]

Justice Avvy Yao-Yao Go dismissed the minister's appeal. She relied on the Supreme Court of Canada's consideration of Article 1F of the *Refugee Convention* in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*,[89] where the court concluded that drug trafficking, while illegal and reprehensible, was not contrary to the purposes and principles of the UN as that concept is understood in Article 1F(c). In particular, the learned

[85] *Ibid.*

[86] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Can TS 1969 No 6, as amended by the *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267, Can TS 1969 No 29 (entered into force 4 October 1967).

[87] 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31 (entered into force 3 September 1981).

[88] *Canada (Minister of Citizenship and Immigration) v Algazal*, 2021 FC 1212 at paras 28–29 [*Algazal*].

[89] [1998] 1 SCR 982.

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judge found that *Pushpanathan* and other authorities supported the Refugee Appeal Division's conclusion that Algazal's conduct did not amount to systemic violations of fundamental human rights constituting persecution. Rather, Algazal was but a common criminal.[90] (GvE)

*Tax treaties — treaty interpretation — general anti-avoidance rule (GAAR)*

*Canada v Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 (26 November 2021). Supreme Court of Canada.

The respondent, Alta Luxembourg, was incorporated in Luxembourg for the purpose of effecting a purchase of the shares of Alta Energy Partners Canada in 2012. The following year, Alta Luxembourg sold the shares and realized a capital gain of over $380 million. Alta Luxembourg did not receive any of the sale proceeds and conducted no further business. The capital gain was reported to the Luxembourg tax authorities where it was taxable. In its Canadian tax return, Alta Luxembourg claimed an exemption from taxation under the "treaty-protected property" provisions of Article 13(4) and (5) of the 2000 *Canada-Luxembourg Tax Treaty*.[91] The exemption applies to residents of Luxembourg arising from capital gains on share sales where the value is derived principally from immovable business property situated in Canada.

The minister denied the treaty exemption. Alta Luxembourg successfully appealed to the Tax Court, and this decision was upheld by the Federal Court of Appeal. The remaining issue before the Supreme Court of Canada was whether the GAAR in section 245 of the *Income Tax Act*[92] should apply to the transaction. Côté J, for the majority of the Court, held that the GAAR should not apply. The impugned transactions were not abusive and were consistent with the treaty. While the GAAR applies both to the abuse of provisions of the *Income Tax Act* and to abuse of provisions in tax treaties, it "cannot be used to judicially amend or renegotiate a treaty."[93] Canada agreed to the business property exemption to encourage investment in Canada by Luxembourg residents, without any requirement that such residents show "sufficient substantive economic connections" to Luxembourg (as the minister contended).[94] The GAAR was enacted to catch unforeseen tax strategies, but the use of conduit corporations such as Alta Luxembourg

[90] *Algazal*, *supra* note 88 at paras 42–46.

[91] *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, 10 September 1999, Can TS 2000 No 22 (entered into force 17 October 2000).

[92] RSC 1985, c 1 (5th Supp).

[93] *Canada v Alta Energy Luxembourg SARL*, 2021 SCC 49 at paras 30, 9 [*Alta Energy*].

[94] *Ibid* at paras 6, 67.

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was not such a strategy, and Canada must be presumed to have known that Luxembourg is an international tax haven.[95] Canada, in Côté J's view, "weighed the pros and cons and concluded that its national interest in attracting foreign investors, using Luxembourg as a conduit to take advantage of the carve-out, outweighed its interest in collecting more tax revenues on such capital gains."[96]

In the course of her reasons, Côté J made several notable observations about the interpretation of tax treaties:

- Like other treaties, the interpretation of tax treaties is governed by the 1969 *Vienna Convention on the Law of Treaties* (*VCLT*).[97] That treaty's interpretive methodology is "not radically different from the modern principle applicable to domestic statutes in Canada," but treaties must be interpreted "with a view to implementing the true intentions of the parties."[98]
- "The national self-interest of *each* contracting state must be reconciled in the interpretive process in order to give full effect to the bargain codified by the treaty."[99]
- Article 31 of the *VCLT* permits courts to consider contextual factors such as other agreements and instruments made by parties in connection with the treaty. The Organisation for Economic Co-operation and Development's Model Treaty and its commentaries are examples.[100] Where such commentaries postdate the treaty, they may still be used as interpretive aids (under Article 31(3) of the *VCLT*, rather than Article 31(2)) but must be considered against the intentions of the treaty's drafters.[101]
- Where GAAR is applied to a treaty-based transaction, the first step of the GAAR analysis (namely, to ascertain the object, spirit, and purpose of the relevant provisions) must be done "with a view to implementing the true intentions of the parties." This is a question of law subject to the correctness standard of review.[102]
- A broad assertion of "treaty shopping" does not conform to a proper GAAR analysis.[103]

[95] *Ibid* at paras 80–81.

[96] *Ibid* at para 87.

[97] 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980).

[98] *Alta Energy, supra* note 93 at para 37.

[99] *Ibid* at para 37 [emphasis in original].

[100] *Ibid* at para 38.

[101] *Ibid* at paras 39–41; see also para 45.

[102] *Ibid* at para 50.

[103] *Ibid* at para 96.

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In dissent, Rowe and Martin JJ (Wagner CJ concurring) would have allowed the appeal on the basis of the lack of any genuine economic connection to Luxembourg. The GAAR was adopted by Parliament to curb abusive international tax avoidance such as Alta Luxembourg engaged in here. (GvE)

## BRIEFLY NOTED

### Convention on the Rights of the Child — *new provisions of the* Divorce Act — *implementation*

*SS v RS*, 2021 ONSC 2137 (22 March 2021); *EMB v MFB*, 2021 ONSC 4264 (11 June 2021). Ontario Superior Court of Justice.

These two cases presented an opportunity for Justice Renu Mandhane to interpret newly enacted amendments to the *Divorce Act*.[104] In doing so, she offered an interpretation "consistent with children's human rights and Canada's obligations under international law,"[105] noting that a "human rights-based approach to the new *Divorce Act* calls on courts to recognize, respect and reflect each child as an individual distinct from their parents, and to empower children to be actors in their own destiny."[106] At various points of her analysis, Mandhane J explained how the new provisions of the *Divorce Act* were consistent with, and implemented, Canada's obligations under the *Convention on the Rights of the Child*.[107] The learned judge relied on the Department of Justice's legislative background to the amendments,[108] interpretations of the convention by the UN Committee on the Rights of the Child, and reports submitted by Canada to the committee regarding the implementation of the convention in Canadian law. [109]

Mandhane J concluded that the new requirement in section 16(3)(e) that courts consider the "child's views and preferences" was consistent with Article 12 of the convention and required courts to make a "reasonable effort to glean and articulate the child's views and preferences wherever

[104] SC 2019, c 16.

[105] *SS v RS*, 2021 ONSC 2137 at para 26 [*SS*]; *EMB v MFB*, 2021 ONSC 4264 at para 57 [*EMB*].

[106] *SS*, *supra* note 105 at para 27; *EMB*, *supra* note 105 at para 58.

[107] See e.g. *EMB*, *supra* note 105 at paras 60, 64; *SS*, *supra* note 105 at paras 31, 38, 45; *CRC*, *supra* note 66.

[108] Canada, Department of Justice, "Legislative Background: An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to Make Consequential Amendments to Another Act (Bill C-78 in the 42nd Parliament)" (June 2019), online: *Government of Canada* <www.justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/legislative_background_E.PDF>.

[109] Canada, "Canada's Fifth and Sixth Reports on the Convention on the Rights of the Child", online: *Government of Canada* <open.canada.ca/data/en/dataset/50a1f207-ef60-4f9a-9d97-9b2bfa45a17a>.

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possible," even where there is no direct evidence about those views and preferences.[110] She also held that the judicial determination of the "best interests of the child" is broader and more holistic than a child welfare agency's determination of whether a child needs protection.[111] (DS)

[110] *EMB*, *supra* note 105 at para 61.

[111] *Ibid* at para 68; *SS*, *supra* note 105 at para 36.

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