*Cases / Jurisprudence*

# Canadian Cases in Public International Law in 2017

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# Jurisprudence canadienne en matière de droit international public en 2017

*compiled by / préparé par*
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*Exportation de véhicules militaires vers l'Arabie saoudite* — Conventions de Genève — *contrôle judiciaire de la conduite des affaires étrangères*

*Turp c Canada (Affaires étrangères)*, 2017 CF 84 (24 janvier 2017). Cour fédérale.

Le demandeur, le professeur Daniel Turp, fait une demande de contrôle judiciaire d'une décision du Ministre des Affaires étrangères approuvant l'octroi de licences d'exportation pour des véhicules blindés légers (VBL) vers l'Arabie saoudite. La nécessité des licences provient du fait que les VBL sont des marchandises soumises à un contrôle d'exportation en vertu de la *Loi sur les licences d'exportation et d'importation* (*LLEI*).[1] Le demandeur prétend que l'octroi des licences d'exportation des VBL vers l'Arabie saoudite va à l'encontre des objectifs de la *LLEI* et de la *Loi sur les conventions de Genève* (*LCG*),[2] puisqu'autant le législateur que le gouvernement voulaient s'assurer que des armes canadiennes ne seraient pas exportées vers des pays qui risqueraient de les utiliser contre leur population ou contre des civils dans le cadre d'un conflit armé. Le demandeur prétend également que la *LCG* a incorporé en droit canadien les *Conventions de Genève* de 1949, le premier article commun desquelles oblige le Canada à faire respecter les *Conventions* et leurs protocoles

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[1] LRC 1985, c E-19.

[2] LRC 1985, c G-3.



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additionnels en toutes circonstances. Selon le demandeur, la preuve établit qu'il existe un risque raisonnable que des VBL exportés en Arabie saoudite seraient utilisés au Yémen, où l'Arabie saoudite est actuellement impliquée dans les hostilités.

Le défendeur, le Ministre des Affaires étrangères, soutient que la seule obligation du Ministre était de tenir compte de l'ensemble des facteurs pertinents eu égard au cadre législatif en place, à son objet et aux circonstances de l'affaire, ce qu'il a fait. Il appartient au Ministre d'évaluer le risque que les VBL seraient utilisés contre la population civile, ce qu'il fait à l'aide des recommandations expertes des fonctionnaires de son ministère. D'ailleurs, le défendeur note que le premier article commun aux *Conventions de Genève* n'a pas été incorporé en droit canadien et que, même s'il l'était, cet article n'engage que les États et ne confère aucun droit aux particuliers tels que le demandeur. Néanmoins, le défendeur soutient que la décision du Ministre n'enfreint pas l'article premier et qu'elle est compatible avec les valeurs exprimées dans les *Conventions*. Le défendeur prétend que la preuve est incertaine quant à la possible violation du droit international humanitaire par l'Arabie saoudite au Yémen.

La juge Tremblay-Lamer rejette la demande de contrôle judiciaire. La norme de contrôle appropriée est celle de la décision raisonnable. Le demandeur ne manquait pas la qualité nécessaire d'agir dans l'intérêt public en ce qui a trait à la question du caractère raisonnable de la décision.[3] Le Ministre bénéficie d'une large discrétion dans l'octroi de licences, guidé par les facteurs précisés au paragraphe 7(1) de la *LLEI*. Leur évaluation ainsi que le poids à accorder à chaque facteur lui revient dans la mesure où il exerce son pouvoir selon la finalité et dans l'esprit de la *LLEI*.[4] En prenant sa décision, le Ministre avait devant lui un rapport indiquant que "[r]ien ne donne à croire que du matériel — VBL ou autre — de provenance canadienne ait été utilisé dans la perpétration d'actes contrevenant au droit international humanitaire."[5]

Quant aux obligations internationales du Canada, la juge rappelle que la Cour suprême, dans *Baker c Canada (Citoyenneté et Immigration)*,[6] a conclu que les valeurs exprimées dans le droit international pouvaient être considérées afin de déterminer le caractère raisonnable d'une décision. Pourtant, la

[3] *Turp c Canada (Affaires étrangères)*, 2017 CF 84 aux para 26–32 [*Turp*]. (Je cite la numération des paragraphes dans la version HTML du jugement qui se trouve à http://canlii.ca/t/gx77k. La numération dans la version PDF est, au moment de la rédaction, erronée.)

[4] *Ibid* aux para 36–37.

[5] *Ibid* au para 42.

[6] [1999] 2 RCS 817 aux para 70–71.

juge accepte la prétention du Ministre que l'article premier des *Conventions de Genève* confère des droits et des obligations aux États parties aux *Conventions*, mais non pas aux individus.[7] Néanmoins, la juge fait certains commentaires quant à la pertinence du droit international en droit interne: "Généralement, les obligations contractées par voie conventionnelle, comme celles des *Conventions*, doivent recevoir l'aval du Parlement et être expressément intégrées au droit canadien pour avoir force de loi, particulièrement si le respect de la règle de droit international implique une modification du droit interne."[8] La mise en œuvre des *Conventions* par la *LCG* n'est que partielle; le Parlement a incorporé les dispositions concernant les infractions graves, mais n'a pas donné force de loi à l'article premier des *Conventions*.[9] Pourtant, la juge admet, sans statuer sur la question, qu'"il se peut que l'article premier des *Conventions* ait été intégré au droit canadien. Les obligations qui en découlent sont contextuelles. Il n'a pas été démontré que leur incorporation nécessite une quelconque modification au droit interne."[10]

Dans tous les cas, la juge conclut que le conflit au Yémen n'est pas un conflit armé international, et les règles applicables aux conflits armés non-internationaux se confinent à l'article 3 commun aux *Conventions de Genève*. Le conflit au Yémen "oppose les forces rebelles Houthi aux forces du président yéménite Hadi, qui sont soutenues par une coalition formée par plusieurs pays de la péninsule arabique, dont l'Arabie saoudite. La présence de forces étrangères dans ce contexte ne transforme pas la nature du conflit en un conflit armé international, puisqu'il ne s'agit pas d'un conflit opposant différents États les uns contre les autres."[11] La juge note que la jurisprudence canadienne a déterminé que l'article premier commun aux *Conventions* n'impose aucune obligation dans le cadre de conflits armés non-internationaux.[12]

En conclusion, la juge rappelle que "l'exécutif, plutôt que les tribunaux, possédait l'expertise nécessaire pour prendre les décisions relatives aux relations internationales et que la Cour ne pouvait intervenir que lorsque l'exercice par le gouvernement de ses pouvoirs discrétionnaires pourraient porter atteinte aux droits garantis par la *Charte canadienne des droits et libertés*." Puisque le demandeur ne prétend que l'entrave alléguée à l'article premier résultait en une violation de la *Charte*, "[l]es obligations

[7] *Turp, supra* note 3 au para 58.

[8] *Ibid* au para 60.

[9] *Ibid* au para 62.

[10] *Ibid* au para 64; voir également au para 65.

[11] *Ibid* au para 69.

[12] *Ibid* au para 71, citant *Sinnapu c Canada (Citoyenneté et Immigration)*, 1997 CanLII 16216 (CF).

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du Canada en vertu de cet article s'inscrivent strictement dans le cadre de sa politique étrangère."[13] La portée de ces dernières déclarations est peut-être trop large. Bien que le rôle des tribunaux dans de tels cas est circonscrit, il n'est probablement pas strictement limité aux affaires relevant de la *Charte*.[14]

Canada–United States Tax Convention — *mutual agreement procedure — effect of agreements on Minister's power to reassess taxpayers*

*Sifto Canada Corp. v The Queen*, 2017 TCC 37 (10 March 2017). Tax Court of Canada.

The taxpayer, Sifto Canada Corporation, appealed from reassessments of three of its taxation years. The key issue, for the purpose of this note, was whether the Minister of National Revenue was precluded from issuing the reassessments by virtue of the 1980 *Canada-United States Tax Convention* (*Tax Convention*),[15] as implemented by the 1984 *Canada-United States Tax Convention Act* (*CUSTCA*).[16]

Sifto was a Canadian corporation that owned and operated a salt mine in Goderich, Ontario. During the disputed taxation years, it sold about 50 percent of its production to a US corporation that was related to it for the purposes of Article IX of the *Tax Convention*. Sifto later determined that it had under-reported its income during the taxation years and made a voluntary disclosure to the Minister of National Revenue. The ensuing reassessments resulted in Sifto being taxed twice: once in Canada and once in the United States. Sifto therefore applied to the Canadian Competent Authority (CCA), and Sifto's US parent, Compass, applied to the United States Competent Authority (USCA). Both applications sought relief from double taxation under Articles IX and XXVI of the *Tax Convention*. The competent authorities reached two agreements under Article XXVI's mutual agreement procedure (MAP) to establish the proper transfer price of Sifto's rock salt to the related US corporation and, thus, its true income for the disputed taxation years.

[13] *Turp*, *supra* note 3 au para 75.

[14] Voir, e.g., *Operation Dismantle c La Reine*, [1985] 1 RCS 441 au para 38 ("Je ne doute pas que les tribunaux soient fondés à connaître de différends d'une nature politique ou mettant en cause la politique étrangère"); et, généralement, *Black v Canada (Prime Minister)*, 2001 CanLII 8537 au para 47 (CA Ont). Contre cette position, et conformément à l'opinion de la juge Tremblay-Lamer, voir *Turp c Canada (Justice)*, 2012 CF 893 au para 18.

[15] *Convention between Canada and the United States of America with respect to Taxes on Income and on Capital*, 1980, Can TS 1984 No 15.

[16] SC 1984, c 20.

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In the Tax Court of Canada, the main issue was whether or not Sifto and the Minister of National Revenue had agreed on the transfer price. Most of Owen J's reasons were directed at that question. He found that the agreements were concluded, that they amounted to a settlement of the issue as between Sifto and the minister, and that they fixed the transfer price of the salt. Owen J then turned to the minister's submission that, regardless of any agreement that may exist, the minister was nevertheless required by the *Income Tax Act* (*ITA*)[17] to reassess Sifto for the taxation years once the minister had determined through an audit that the transfer price used by the CCA and the USCA was incorrect. Owen J rejected this argument, finding as a matter of law that the settlement agreements were binding on the minister.[18]

In the alternative, Owen J concluded that the MAP agreements between the CCA and the USCA were binding on the Minister of National Revenue as mutual agreements reached under paragraph (2) of Article XXVI of the *Tax Convention* and that the minister was not permitted to assess Sifto in a manner inconsistent with those agreements. Owen J's analysis on this point began by quoting Articles 26 and 27 of the 1969 *Vienna Convention on the Law of Treaties* (*Vienna Convention*).[19] Article 26 provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 27 provides in relevant part: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Owen J noted that the *Tax Convention* was given the force of law in Canada by section (3)(1) of the *CUSTCA* and that section 3(2) requires any inconsistency between the *CUSTCA*, or the *Tax Convention*, and any other law, to be resolved in favour of the *CUSTCA* and the *Tax Convention*. Owen J characterized section 3(2) as giving "domestic legal effect to Article 27 of the *Vienna Convention*."[20]

The learned judge held (if in the alternative) that by reassessing Sifto the Minister of National Revenue had "breached Canada's obligations under the *Convention* by failing to give continuing effect to MAP agreements reached with the United States."[21] While the *ITA* did not limit the minister's ability to reassess Sifto in the circumstances, "the issuance of the Reassessments is subject to subsection 3(2) of the *CUSTCA* and to Article 27 of the *Vienna Convention*, which afford paramountcy to

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

[18] *Sifto Canada Corp v The Queen*, 2017 TCC 37 at paras 138–45 [*Sifto*].

[19] Can TS 1980 No 37.

[20] *Sifto*, *supra* note 18 at para 151.

[21] *Ibid* at para 154.

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the provisions of the *Convention*. As well, Article 26 of the *Vienna Convention* requires Canada to perform the *Convention* in good faith."[22] Owen J called it "obvious" that the minister cannot enter into an agreement with the US Internal Revenue Service (IRS) under paragraph (2) of Article XXVI of the *Tax Convention* "and then simply choose to ignore that agreement," despite the fact that Article XXVI does not explicitly state that MAP agreements are binding on the parties.[23] In support of this conclusion, Owen J quoted *Gladden Estate v The Queen*[24] to the effect that "[c]ontrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view of implementing the true intentions of the parties."[25] The learned judge concluded:

> The manifest object of Article XXVI of the *Convention* in the context of transfer pricing is to resolve by mutual agreement issues of juridical and economic taxation. An issue is not resolved if it is open to one state to simply disregard the MAP agreement that resolves the issue. It is also antithetical to the very notion of an agreement between two treaty partners to suggest that either party may simply choose to ignore the agreement. Not only is such a suggestion contrary to common sense but the adoption of such a principle would effectively neuter the mutual agreement procedure not only in the *Convention* but in all of Canada's tax treaties. After all, why would a treaty party agree to the resolution of a tax treaty issue if Canada could simply ignore that resolution and assess as it sees fit?

On a more technical front, subsection 3(2) of the *CUSTCA* gives paramountcy to the provisions of the *Tax Convention* when they are inconsistent with the provisions of the *ITA*. In this case, the power of the minister to further reassess the appellant under the *ITA* is inconsistent with the power of the CCA and the USCA to resolve cases by mutual agreement under Article XXVI of the *Tax Convention*. Accordingly, the effect of the provisions of the *Tax Convention* must be given paramountcy over the effect of the provisions of the *ITA*.[26]

Owen J concluded that the reassessments were inconsistent with the settlement agreements between Sifto and the Minister of National Revenue as well as inconsistent with the MAP agreements between the minister and the IRS. All of these agreements were binding on the minister,

[22] *Ibid* at para 155.

[23] *Ibid* at para 157.

[24] [1985] 1 CTC 163 (FCTD).

[25] *Sifto, supra* note 18 at para 157.

[26] *Ibid* at paras 158–59.

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and, therefore, Sifto's appeal was allowed and the reassessments were referred back to the minister for reconsideration and reassessment.

*Boundary waters — domestic remedy — interpretation of statutes in light of treaties*

*Pembina County Water Resource District v Manitoba (Government)*, 2017 FCA 92 (3 May 2017). Federal Court of Appeal.

The appellants were North Dakotan governmental and private parties who alleged that the Manitoba respondents were harming their farmlands by blocking floodwaters that otherwise naturally flow north from the United States into Canada. The appellants founded their claim on the *International Boundary Waters Treaty Act* (*IBWTA*),[27] which implements the 1909 *Canada-US Boundary Waters Treaty* (*Boundary Waters Treaty*).[28]

The water at issue was the Pembina River. The Pembina originates in Manitoba, crosses into North Dakota, and flows eastwards before joining the Red River, which flows northward back into Canada. The appellants claimed that the Pembina overflows its banks in North Dakota virtually every year and that these flood waters would naturally disperse were it not for a raised road running along the Manitoba side of the international boundary. This road functions as a dike, causing the waters to accumulate in North Dakota and damage the appellants' land.[29]

Article II of the *Boundary Waters Treaty* provides in relevant part that any interference with, or diversion from, their natural channel of waters on either side of the boundary, resulting in injury on the other side, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs. Section 4(1) of the *IBWTA* implements this provision almost word for word, creating a cause of action in Canada for Americans alleging such an injury. Section 5 of the *IBWTA* grants the Federal Court jurisdiction over such claims.

Also relevant is Article IV of the *Boundary Waters Treaty*. There, the states parties agree not to permit the construction or maintenance on their sides of the boundary of "any remedial or protective works or any dams or other obstructions in waters … the effect of which is to raise the natural level of waters on the other side of the boundary" unless

[27] RSC 1985, c I-17.

[28] *Treaty between Great Britain and the United States relating to Boundary Waters and Questions arising along the Boundary between Canada and the United States*, 1909, UKTS 1910 No 23.

[29] *Pembina County Water Resource District v Manitoba (Government)*, 2017 FCA 92 at paras 5–6 [*Pembina*].

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approved by the International Joint Commission created by the *Boundary Waters Treaty*.

On a motion by the respondents three weeks into trial, and after having heard the appellants' evidence, Russell J struck the claim for want of jurisdiction. The appellants' difficulty was the phrase "any waters in Canada" in section 4(1), for the Pembina's flood waters were not in Canada. The appellants' complaint was precisely that the Manitoba road prevented the water from entering Canada and dispersing there. This interpretation of the *IBWTA* was confirmed by Article IV of the *Boundary Waters Treaty*, which contemplated the wrong the appellants were alleging — that is, obstruction of waters with the result of raising the water level on the other side of the boundary — but did not require the states parties to provide a local remedy in such cases. In this, Article IV differed fundamentally from Article II. Russell J concluded that the Federal Court lacked jurisdiction to hear the appellants' claim.

Declaring himself in "complete agreement" with the trial judge's reasons,[30] Nadon JA for the unanimous Federal Court of Appeal dismissed the appeal. He began by noting that the *Boundary Waters Treaty* is incorporated in Canadian law by the *IBWTA* and that the Supreme Court of Canada "has recognized that treaties play a role in interpreting the domestic legislation that implements them."[31] Nadon JA then importantly observed that "recourse can be had to international treaties even where the legislative provision is not ambiguous"[32] and noted the presumption "that the legislature intends to comply with Canada's international obligations."[33]

The appellants impugned Russell J's reasons as failing to read the *IBWTA* in light of the *Boundary Waters Treaty* as a whole. Addressing this concern, Nadon JA considered other relevant articles of the *Treaty*, notably Articles II and IV. He noted that Article II begins by confirming the states parties' jurisdiction with regard to the use and diversion of waters on their side of the boundary and their right to use and divert those waters subject to the rest of Article II, which goes on to provide that remedies for injuries resulting from interference or diversion of "such waters" (that is, waters on a state party's side of the boundary) may be pursued in the state where the diversion or interference occurred. All of this makes "crystal clear" that the waters referred to in Article II of the *Boundary Waters Treaty* (and likewise in

[30] *Ibid* at para 40.

[31] *Ibid* at paras 44–46. The learned judge rightly treats the concepts of treaty incorporation and treaty implementation as synonymous here, although implementation is the term preferred by legislative drafters.

[32] *Ibid* at para 46, citing *National Corn Growers Association v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at para 75.

[33] *Pembina, supra* note 29 at para 46.

section 4(1) of the *IBWTA*) are waters on the offending state's side of the boundary. "Consequently," concludes Nadon JA, "as the appellants allege in their amended statement of claim that the respondents interfered with or diverted waters situated in the United States … the factual scenario raised in the appellants' pleadings does not fall within the ambit of Article II of the *Treaty*."[34]

Turning to Articles III and IV, Nadon JA noted that these provisions concern works that require approval of the International Joint Commission. He noted that the situation the appellants complain of falls within Article IV: "The difficulty which the appellants face is that no provision of the *IBWTA* does for Articles III and IV of the *Treaty* what section 4 of the *IBWTA* does for Article II of the *Treaty*."[35] Rather, breaches of these provisions are "the Commission's responsibility."[36]

An application for leave to appeal this decision to the Supreme Court of Canada was dismissed on 21 December 2017.

*Citizenship — acquisition* jus soli *— exception for children of foreign government employees*

*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 (21 June 2017). Federal Court of Appeal.

Alexander Vavilov appealed from Bell J's dismissal of his application for judicial review of a decision of the Registrar of Citizenship cancelling his Canadian citizenship. Vavilov was born in Canada and lived the first sixteen years of his life thinking he was Alex Foley, the son of Canadian parents living (most recently) in Boston, Massachusetts. Following the Federal Bureau of Investigation's (FBI) arrest of Vavilov's parents in 2010 for espionage, the Registrar cancelled his citizenship saying that section 3(2)(a) of the *Citizenship Act*[37] applied and that its effect was that a child born in Canada is not a Canadian citizen if his or her parents were employees of a foreign government and not themselves either citizens of Canada or permanent residents. Vavilov's parents, being Russian spies, were employees of the government of Russia and, therefore, Vavilov did not acquire citizenship by birth.

Stratas JA for the majority of the Federal Court of Canada allowed the appeal. He held that Vavilov was entitled to citizenship under section 3(1)(a) of the *Citizenship Act*. He reached this conclusion by interpreting the relevant provisions of the *Citizenship Act* in conformity with the law

[34] *Ibid* at paras 60–62.

[35] *Ibid* at para 65.

[36] *Ibid* at para 69.

[37] *Citizenship Act*, RSC 1985, c C-29.

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of diplomatic privileges and immunities set out in the 1961 *Vienna Convention on Diplomatic Relations*[38] (*VCDR*) and the customary international law of *jus soli* acquisition of nationality:

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

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

Canada argued that Vavilov, while born in Canada for the purpose of section 3(1)(a), nevertheless was not a citizen because his Russian parents were employees of a foreign government under section 3(2)(a). Stratas

[38] Can TS 1966 No 29 [*VCDR*].

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JA rejected this interpretation. Instead, he found that the exclusions in section 3(2)(a) for employees of foreign governments were intended to apply only to foreign government employees who benefit from diplomatic privileges and immunities from civil and/or criminal law.[39]

Stratas JA came to this result by a comparison of section 3(2) of the *Citizenship Act* with provisions mirroring it in the *Foreign Missions and International Organizations Act*[40] and the *VCDR*. He explained:

> [57] Together, the *Foreign Missions and International Organizations Act* and the *Vienna Convention on Diplomatic Relations*, among other things, provide for civil and criminal immunity for consular officials who carry out their responsibilities in Canada. The mirroring between these two and subsection 3(2) of the *Citizenship Act* strongly indicates a relationship between the two — *i.e.*, that the presence of diplomatic immunity matters.
>
> [58] According to the *Vienna Convention on Diplomatic Relations*, a consular officer is to protect in the receiving state (here Canada) the interests of the sending (or foreign) state and its nationals within the limits set out in international law. It defines a consular official as any person entrusted with that capacity and diplomatic agents as members of the diplomatic staff of the mission. Persons not associated with the mission are not considered diplomatic staff and are outside of the *Convention* and, thus, are outside of the *Foreign Missions and International Organizations Act*. The appellant's parents, who as we shall see, in no way possessed diplomatic immunity, cannot fall under paragraph 3(2)(*a*) of the *Citizenship Act*.

From here, Stratas JA invoked the presumption of conformity with international law, calling it "trite" that section 3(2) "should be interpreted in accordance with relevant principles of customary and conventional international law," meaning here the relevant articles of the *VCDR* as implemented by the *Foreign Missions and International Organizations Act*. "This is all the more," the learned judge added, "where the provision to be construed has been enacted with a view towards implementing international principles or against the backdrop of those principles: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1234 at p. 1371."[41]

Stratas JA's interpretation of section 3(2)(a) also relied on the provision's statutory context, particularly paragraph (c)'s exception for officers or employees in Canada of international organizations "to whom

[39] *Vavilov v Canada (Citizenship and Immigration)* 2017 FCA 132 at paras 45, 48 [*Vavilov*].

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

[41] *Vavilov*, *supra* note 39 at para 59.

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there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (*a*)." In Stratas JA's view, this passage suggests that the persons referred to in paragraph (a) have also been granted diplomatic privileges and immunities. "Thus," the learned judge concluded, "paragraph 3(2)(*a*) covers only those 'employee[s] in Canada of a foreign government' that have 'diplomatic privileges and immunities'."[42]

The learned judge also relied on customary international law's *jus soli* principle, which he described as "[a]nother important element of context" and "a backdrop to section 3 of the *Citizenship Act*." Section 3(1)(a) expresses the *jus soli* principle in Canada, while section 3(2)(a) derogates from it. As a derogation of rights, section 3(2)(a) should be interpreted narrowly. A reading by which not all foreign government employees fall within the exclusion, but only those enjoying diplomatic immunity (that is, not spies), narrows the derogation.[43] In support of this interpretation, Stratas JA relied on Ian Brownlie's discussion of *jus soli* in *Principles of Public International Law*, in which the learned author confirms that under international law, children born to those in a foreign nation who enjoy diplomatic immunities do not acquire the nationality of the foreign state.[44] Stratas JA notes that Brownlie cites Canada's 1946 *Citizenship Act* as illustrative of this point and then asks: "Is it conceivable that since 1946, by virtue of subsequent amendments to the *Citizenship Act*, Canada has departed from this international law principle? I would suggest not. Again, to the extent possible, Canadian legislation should be interpreted as being consistent with international law."[45]

In dissent, Gleason JA would have upheld Bell J's decision to dismiss the judicial review application. She concludes that section 3(2)(a) admits of at least two rational interpretations and that, where this is so, "the choice of the administrative decision-maker to adopt one among competing interpretations must be afforded deference."[46] In sharp contrast to the reasons of Stratas JA, Gleason JA gives no consideration to the presumption of conformity with international law. Indeed, implicit in her reasons seems to be the proposition that reviewing courts must defer to administrative decision-makers even where their decisions would put Canada in breach of its international obligations.

[42] *Ibid* at para 62.

[43] *Ibid* at para 69.

[44] Ian Brownlie, *Principles of Public International Law*, 5th ed (Oxford: Clarendon Press, 1998) at 391–93.

[45] *Vavilov*, *supra* note 39 at paras 70–71.

[46] *Ibid* at para 96.

*State immunity — terrorism exception — execution of judgments against foreign state property*

*Tracy v Iran (Information and Security)*, 2017 ONCA 549 (30 June 2017). Court of Appeal for Ontario.

This was an appeal from the decision of the Ontario Superior Court of Justice reported in last year's *Yearbook*.[47] The respondents held judgments in the United States against Iran and two of its state organs in respect of eight terrorist attacks Iran was found to have supported. The US courts held Iran liable pursuant to the state-sponsored terrorism exception to state immunity in the 1976 *US Foreign Sovereign Immunities Act*.[48] Having obtained these judgments in the United States, the respondents applied for their recognition and enforcement in Ontario, which they obtained upon Iran's default. Iran later applied to set aside the default judgments on various grounds, notably state and diplomatic immunities. The motion judge rejected Iran's numerous arguments, relying mainly on section 6.1 of the *State Immunity Act* (*SIA*),[49] which creates an exception to immunity claims for specified state sponsors of terrorism, including Iran, and section 4(5) of the *Justice for Victims of Terrorism Act* (*JVTA*),[50] which provides that Canadian courts must recognize an otherwise enforceable foreign judgment granted in favour of a person who has suffered a loss or damage as a result of a terrorism offence.

Iran's appeal largely reargued its failed application. Hourigan JA for the court dismissed the appeal almost in its entirety. The first issue was whether Iran continued to enjoy immunity from the jurisdiction of Canada's courts despite the provisions of the *JVTA* and section 6.1 of the *SIA*. Iran contended that to interpret the *JVTA* as lifting Iran's state immunity was contrary to the interpretive presumption of conformity with international law. Hourigan JA described this interpretive rule as a presumption "that domestic legislation will be interpreted in a manner that is consistent with or minimizes contravention of international law."[51] This is a novel gloss on the presumption, which has not previously been characterized as seeking to minimize contraventions but, rather, to avoid them entirely. The case cited for this statement, *R v Appulonappa*,[52] does not support this new element.

[47] Gib van Ert, "Canadian Cases in Public International Law in 2016" (2016) 54 CYIL 568 at 574–77.

[48] 28 USC §§ 1602 [*Foreign Sovereign Immunities Act*].

[49] RSC 1985, c S-18, as amended.

[50] SC 2012, c 1, s 2.

[51] *Tracy v Iran (Information and Security)*, 2017 ONCA 549 at para 42, leave to appeal to SCC refused, 37759 (15 March 2018) [*Tracy*].

[52] 2015 SCC 59 at para 40.

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But Hourigan JA went on, quite correctly, to note that the presumption is "subject to rebuttal by Parliament through the use of clear statutory language" given that Parliament "has the power to ignore international law" and "Parliamentary sovereignty requires courts to give effect to a statute that demonstrates such an unequivocal legislative intention, absent constitutional concerns."[53] The learned judge found that the *JVTA*, together with the contemporaneous amendments to the *SIA*, established that Iran's immunity from civil proceedings related to terrorism has been lifted, at least with respect to terrorist acts occurring in 1985 or later. The presumption of conformity with international law (if applicable here) was rebutted.[54] Having dealt with the matter in this way, Hourigan JA did not need to consider whether the *JVTA* and the *SIA* amendments were, in fact, contrary to international law. As he observed later in his reasons, "[t]he recognition of the foreign judgments under the *JVTA* may violate international law, but Parliament has expressly authorized their recognition."[55]

Hourigan JA disagreed with the motion judge on one point. He accepted Iran's submission that, to the extent that section 6(1) of the *SIA* lifted Iran's immunity from civil proceedings related to terrorism, it did so only for terrorist acts occurring on or after 1 January 1985. The learned judge noted that the *SIA* codified customary international law's state immunity rules as recognized at common law.[56] On the issue of when that immunity is lifted in respect of terrorist acts, Hourigan JA acknowledged "some ambiguity" in section 4(1) of the *JVTA*, which suggests an ability to sue on terrorist actions carried out before 1985, but found that such ambiguous language did "not constitute a sufficiently clear intention from Parliament to defeat" the presumption of conformity with international law (or, for that matter, the presumption against retrospectivity and retroactivity).[57] Thus, while Hourigan JA recognized and gave effect to Parliament's clear intention to rebut the presumption of conformity (if applicable) in respect of terrorist acts committed after 1984, he applied the presumption in respect of such acts committed prior to 1 January 1985. This is a nice illustration of the tenacity of the presumption of conformity — even its admitted rebuttal by part of an enactment is insufficient to oust it entirely.

As the motion judge had done, Hourigan JA rejected Iran's argument that the respondents were required to prove that Iran was a state sponsor of terrorism and that criminal acts had been committed under Part II.1 (terrorism) of the *Criminal Code*, before proceeding to enforcement

[53] *Tracy, supra* note 51 at para 43; see also para 45.

[54] *Ibid* at para 46.

[55] *Ibid* at para 90.

[56] *Ibid* at paras 51–52.

[57] *Ibid* at para 58.

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of their judgments.[58] The only proof required to bring an enforcement proceeding under section 4(5) of the *JVTA* was the listing of the state in question pursuant to section 6.1(1) of the *SIA*. Otherwise, the motion judge could rely on the findings of the US courts.[59]

Iran argued that, despite its partial loss of state immunity, it continued to enjoy diplomatic immunities under the *VCDR*[60] and customary international law. Hourigan JA began his consideration of this submission by stating that "the Minister alone has the power to recognize diplomatic status"[61] and that this power comes from the Crown prerogative over foreign affairs and the *Foreign Missions and International Organizations Act* (*FMIOA*).[62] The only authority offered for this proposition was *Canada (Prime Minister) v Khadr*,[63] which speaks generally about the Crown's foreign affairs prerogative but does not address the supposed prerogative power to recognize (or refuse) diplomatic status. Assuming (as seems reasonable) that this power does arise from the Crown prerogative over foreign affairs, it is seemingly more susceptible to judicial review than, say, the prerogative power to conclude or decline to conclude a treaty. The latter exercise of the prerogative is largely, if not wholly, discretionary. But a prerogative power to recognize or refuse to recognize the diplomatic status of a foreign mission or its members would seemingly be reviewable for conformity with international law. In a recent submission to the Ontario Superior Court of Justice, Canada submitted that the "requirement" to "accord full facilities" to foreign missions is founded on Article 25 of the *VCDR* and reflects mandatory rules of customary international law incorporated into Canadian common law.[64]

Hourigan JA went on to reject Iran's attempt to rely on the *VCDR* and custom to preserve its immunity from the respondents' enforcement efforts. He asked himself whether, on the evidence, the Minister of Foreign Affairs had "conferred diplomatic status on the Iranian Assets,"[65] meaning certain lands and bank accounts against which the respondents sought execution.

[58] RSC 1985, c C-46.

[59] *Tracy*, *supra* note 51 at paras 59–66.

[60] *VCDR*, *supra* note 38.

[61] *Tracy*, *supra* note 51 at para 104.

[62] *FMIOA*, *supra* note 40.

[63] 2010 SCC 3 at paras 25–27, 36–37. The pinpoints are as cited by Hourigan JA. Paragraphs 25–27 do not appear to be on point at all. The other paragraphs are about the prerogative but not about diplomatic status.

[64] Hugh Adsett, "Canadian Practice in International Law: At Global Affairs Canada in 2015" (2015) 53 CYIL 435 at 435–36, quoting from Canada's submissions in *Canadian Planning and Design Consultants Inc v Libya*, 2015 ONCA 661 at paras 34, 37, 38. I am indebted to John Currie for calling my attention to this.

[65] *Tracy*, *supra* note 51 at para 118.

This way of putting the matter is somewhat imprecise. In respect of the land, the issue was whether those properties constituted a mission having diplomatic immunities under the *VCDR* as implemented by the *FMIOA*. As for the bank account, the issue was whether Iran enjoyed state immunity from execution against the account's funds.[66]

On both points, Hourigan JA relied on a certificate issued, and later amended, by the Department of Foreign Affairs under section 11 of the *FMIOA* setting out the addresses of the mission (excluding the disputed lands) and certain bank accounts (excluding the account at issue).[67] The learned judge held that "[w]hile a certificate is the best evidence of [the] Minister's communication of diplomatic status, it was not an error for the motion judge to look at the whole context, including the Department of Foreign Affairs' website" and a letter from the Department to counsel for some of the respondents, to determine what Iranian property enjoyed diplomatic status.[68]

These observations raise two points. First, on its face, section 11 of the *FMOIA* does not appear to grant the Minister of Foreign Affairs a power to issue certificates about bank accounts at all. But perhaps a diplomatic mission's bank accounts are so integral to its operations that section 11 can be reasonably interpreted to include them. Second, the notion that a trial judge may go beyond the certificate to look at the whole context may seem unobjectionable where the judge's ultimate finding of fact accords with the certificate, but could be problematic where context is used to impugn the certificate. The point of the section 11 and similar certificate regimes (for example, section 14(1) of the *SIA*) seems to be to ensure that the government and the courts speak with one voice on important points of international relations.[69] That objective may be imperilled by a precedent that permits finders of fact to go behind lawfully issued executive certificates. The phrase "conclusive proof" is missing from section 11, but should perhaps be read in.

*Extradition — torture and other mistreatment — diplomatic assurances*

*India v Badesha*, 2017 SCC 44 (8 September 2017). Supreme Court of Canada.

India sought the extradition of two Canadian nationals, Surjit Singh Badesha and Malkit Kaur Sidhu, on a charge of conspiracy to commit murder.

[66] See *ibid* at paras 97–101, where Hourigan JA found that any such immunity was lifted by the *Foreign Sovereign Immunities Act*, *supra* note 48, s 12(1).

[67] See *Tracy*, *supra* note 51 at paras 24–25.

[68] *Ibid* at para 119.

[69] *Re Chateau-Gai Wines Ltd. and Attorney-General of Canada* (1970), 14 DLR (3d) 411 at 422 (Ex Ct).

India's theory was that Badesha and Sidhu arranged the honour killing of Sidhu's daughter (and Badesha's niece), Jaswinder Kaur Sidhu, in Punjab. Badesha and Sidhu were committed for surrender after an extradition hearing. The Minister of Justice ordered their surrenders pursuant to the *Extradition Act*[70] and Canada's extradition agreement with India,[71] but on the condition that India provide diplomatic assurances concerning the death penalty, consular access, and Badesha and Sidhu's safety and medical care while in prison.

Badesha and Sidhu applied for judicial review of the Minister of Justice's decision in the Court of Appeal for British Columbia. Donald JA (Newbury JA concurring) set aside the minister's surrender order as unreasonable. He agreed with Badesha and Sidhu that the diplomatic assurances the minister had obtained from India regarding their health and safety in India's prisons, in particular, concerning the risk of torture, were inadequate and could not reasonably be accepted by the minister given India's poor human rights record. Goepel JA, dissenting, expressed concern that "the applicants' positions amount to a general indictment of India's criminal justice system and the conditions in its prisons" and that "such general sweeping indictments of another country's criminal justice system and prisons are an unsatisfactory underpinning for finding that an individual's s. 7 *Charter* rights will be violated if surrendered."[72]

Moldaver J for the unanimous Supreme Court of Canada allowed the appeal and restored the Minister of Justice's surrender order. He began by affirming the "basic principle of extradition law" that "when a person is alleged to have committed a crime in another country, he or she should expect to be answerable to that country's justice system" and noted that the *Extradition Act* "implements Canada's international obligations under extradition treaties to surrender persons for prosecution, or to serve sentences imposed, in another country."[73] He then struck a rather different tone, noting that "the extradition process also protects the rights of the person sought."[74] Expanding on this point, Moldaver J observed:

> In extradition cases, s. 7 of the *Charter* should be presumed to provide at least as great a level of protection as found in Canada's international commitments regarding non-refoulement to torture or other gross human rights violations. … Extraditing a person to another state where there are substantial grounds for

[70] SC 1999, c 18.

[71] *Extradition Treaty between the Government of Canada and the Government of India, 1987*, Can TS 1987 No 14.

[72] *India v Badesha*, 2016 BCCA 88 at para 125 (Goepel JA).

[73] *India v Badesha*, 2017 SCC 44 at para 35 [*Badesha*].

[74] *Ibid* at para 36.

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believing that he or she would be in danger of being subjected to torture is prohibited under art. 3(1) of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36 ("CAT"). It follows that in the extradition context, surrendering a person to face a substantial risk of torture or mistreatment in the requesting state will violate the principles of fundamental justice.

Section 44(1)(a) of the *Extradition Act* requires the Minister of Justice to refuse to make a surrender order if satisfied that surrender "would be unjust or oppressive having regard to all the relevant circumstances." Moldaver J noted that where the person sought for extradition faces a "substantial risk of torture or mistreatment" in the receiving state, surrender would violate the principles of fundamental justice (according to section 7 of the *Charter*) and the minister must refuse.[75] Applying *Suresh v Canada (Minister of Citizenship and Immigration)*,[76] Moldaver J affirmed that the minister's assessment of whether the potential deportee faces a substantial risk of torture is a "fact-driven inquiry."[77] "[I]t logically follows," said Moldaver J, "that the Minister can consider evidence of the general human rights situation in that state," adding that he was "unable to accept" Goepel JA's "too sweeping" statement against such evidence.[78] Similarly, the learned judge rejected the Attorney-General's submission that generic evidence of human rights conditions in the receiving state cannot, on its own, establish a substantial risk of torture or mistreatment. Moldaver J "would not foreclose the possibility that there may be cases in which general evidence of pervasive and systemic human rights abuses in the receiving state can form the basis for a finding that the person sought faces a substantial risk of torture or mistreatment."[79]

Moldaver J then considered the role of diplomatic assurances in the Minister of Justice's decision. Such assurances may be taken into account by the minister in assessing whether the person sought faces a substantial risk of torture or mistreatment. Where the minister determines that assurances are needed, the reviewing court must consider whether the minister has reasonably concluded that, based on the assurances provided, there is no substantial risk of torture or mistreatment. Moldaver J emphasized that "diplomatic assurances need not eliminate any possibility of torture or

[75] *Ibid* at para 42.

[76] 2002 SCC 1 [*Suresh*].

[77] *Badesha*, *supra* note 73 at para 44.

[78] *Ibid*. In favour of such evidence, J Moldaver cited *Chahal v United Kingdom* (1997), 23 EHRR 413 at paras 99–100 and *Said v The Netherlands*, No 2345/-02, [2005] VI ECHR 461 at para 54.

[79] *Badesha*, *supra* note 73 at para 45.

mistreatment; they must simply form a reasonable basis for the Minister's finding that there is no substantial risk of torture or mistreatment."[80] Moldaver J quoted approvingly the dictum of the European Court of Human Rights in *Othman (Abu Qatada) v United Kingdom* that the proper inquiry for the reviewing court is to determine "whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment" for the purposes of Article 3(1) of the *Convention against Torture* (*CAT*).[81]

Again relying on *Othman* as well as *Suresh*, Moldaver J explained that the reliability of diplomatic assurances "depends crucially on the circumstances of the particular case." Among the factors to be weighed in evaluating the reliability of diplomatic assurances, the Minister of Justice may take into account the human rights record of the government giving the assurances, that government's record of compliance with past assurances, and its capacity to fulfill its assurances.[82] Expanding upon these factors (previously established in *Suresh*), Moldaver J quoted the following "detailed list of contextual factors" given in *Othman*:

1. whether the assurances are specific or are general and vague;
2. who has given the assurances and whether that person can bind the receiving state;
3. if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;
4. whether the assurances concern treatment that is legal or illegal in the receiving state;
5. the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;
6. whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the individual's lawyers;
7. whether there is an effective system of protection against torture in the receiving state, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights non-governmental organizations) and whether it is willing to investigate allegations of torture and to punish those responsible; and
8. whether the individual has previously been ill-treated in the receiving state.[83]

[80] *Ibid* at para 46.

[81] *Ibid* at para 47, citing *Othman (Abu Qatada) v United Kingdom*, No 8139/09, [2012] I ECHR 817 [*Othman*]. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, [1987] Can TS no. 36.

[82] *Badesha*, *supra* note 73 at para 48.

[83] *Ibid* at para 51, quoting *Othman*, *supra* note 81 at para 189; see also *Badesha*, *supra* note 73 at paras 49–50.

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Applying this contextual approach to the Minister of Justice's decision to rely on India's diplomatic assurances in Badesha and Sidhu's cases, Moldaver J noted several factors favouring reliance. These included the availability of consular monitoring, the evidence of adequate medical facilities in Punjabi prisons, diplomatic reasons why India would likely live up to its assurances, the fact that India is a state party to the 1966 *International Covenant on Civil and Political Rights* (*ICCPR*),[84] and its "efforts to enact domestic legislation that would permit them to ratify the CAT."[85] Moldaver J also noted the minister's observation that India had no history of not complying with its diplomatic assurances, no evidence of corruption in India's investigation of Badesha and Sidhu, and no evidence that they would be "particular targets of ill-treatment in India because of their political or religious affiliations."[86]

Moldaver J concluded that the majority of the Court of Appeal had effectively substituted its view for that of the Minister of Justice. The appeal was allowed.

*Income assistance — rights to social security and adequate standard of living — presumption of conformity with international law*

*Sparks v Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82 (8 November 2017). Nova Scotia Court of Appeal.

Brenton Sparks was refused a statutory income assistance benefit due to his failure to participate in an employment services program. His challenges of that decision were unsuccessful before the Assistance Appeal Board and the Supreme Court of Nova Scotia. In the Court of Appeal, Sparks conceded that that part of the benefit payable in respect of himself was properly withheld, but he argued that those parts of the benefit payable in respect of his wife, and as a shelter allowance for family (including three children), were unlawfully withheld.

Chief Justice Macdonald for the Court of Appeal agreed with Sparks and allowed his appeal. The chief justice began by noting that the Board's decision was entitled to deference and must be upheld so long as it is reasonable, meaning that it falls within a range of possible, acceptable outcomes.[87] Turning to the relevant provision,[88] Macdonald CJ found it ambiguous as to who was ineligible for the statutory benefit as a result of

[84] Can TS 1976 No 47 [*ICCPR*].

[85] *Badesha*, *supra* note 73 at para 60.

[86] *Ibid* at para 61.

[87] *Sparks v Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82 at paras 9–13 [*Sparks*].

[88] *Employment Support and Income Assistance Regulations*, NS Reg 25/2001, s 20(1).

Sparks' failure to participate in the employment program — Sparks only or also his wife and children?[89]

Macdonald CJ therefore turned to other interpretive aids. After briefly considering the *Charter* value of equality,[90] he turned to international human rights law, observing: "In a similar vein, we should interpret ambiguous legislation in a manner that is consistent with Canada's (more specifically Nova Scotia's) international human rights obligations."[91] The learned judge accepted the appellant's submission that "Canada is under an obligation to provide social assistance to all persons in need under international human rights law to which it is a party" and that,

> [a]s a State party to the [1966 *International Covenant on Economic, Social and Cultural Rights*], Canada is under an obligation at international law to guarantee that 'everyone' enjoys the right to social security and the right to an adequate standard of living … Moreover, the UN Committee on Economic, Social and Cultural Rights has issued a General Comment (i.e., an interpretive direction for State parties clarifying their obligations under the Covenant) making clear that the rights, such as that to social security (art. 9) and the right to an adequate standard of living (art. 11) cannot be differentially/discriminatorily protected on the basis of one's "family status".

Similarly, under the *Convention on the Rights of the Child*, Canada has committed itself to ensuring that every child enjoys "the right to benefit from social security."[92]

Later in his reasons, Macdonald CJ quoted approvingly the following passage from the intervenors' factum:

> In a recent report on Canada's compliance with its international human rights obligations, the United Nations Human Rights Committee noted that persistent income inequalities between men and women are particularly pronounced in Nova Scotia, and disproportionately affect "low income women, minority and Indigenous women". [Human Rights Committee, Concluding Observations, CCPR/CO/Can/6, August 15, 2015][93]

Having considered these interpretive aids, the chief justice concluded that the only reasonable interpretation of the benefits-rescinding provision was that only the defaulting party (here, Sparks) was made ineligible by reason

[89] *Sparks*, *supra* note 85 at paras 20, 30, 48.

[90] *Ibid* at para 49.

[91] *Ibid* at para 50, citing *R v Appulonappa*, *supra* note 51 at para 40.

[92] *Sparks*, *supra* note 87 at para 51, quoting from the appellant's factum.

[93] *Ibid* at para 60, quoting from the intervenors' factum.

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of his default. He therefore allowed the appeal and quashed the Board's decision to suspend those parts of the benefit destined for his wife and the family's shelter.

*Pleadings — customary international law as a cause of action — act of state*

*Araya v Nevsun Resources Ltd*, 2017 BCCA 401 (21 November 2017). Court of Appeal for British Columbia.

This was an appeal from a decision, noted in last year's *Yearbook*,[94] dismissing an application aimed at preventing a trial of the plaintiffs' claims on grounds including *forum non conveniens*, the act of state doctrine, and non-justiciability. The motion judge dismissed the application, allowing the matter to proceed to trial.

Nevsun, the defendant, is a BC mining company. The plaintiffs are Eritrean nationals. They alleged that Eritrea conscripted them (and others) to build a gold, copper, and zinc mine known as the Bisha mine. This conscription, they alleged, constituted forced labour and slavery. The plaintiffs also alleged other grave human rights violations by Eritrea, and corporations controlled by it, in connection with the mine, including torture and crimes against humanity. The claims against Nevsun are for complicity in these human rights violations. The plaintiffs also alleged that Nevsun is liable for the misdeeds of its indirect subsidiary, Bisha Mine Share Company (BMSC). The plaintiffs framed their claims in tort law (battery, unlawful confinement, negligence, conspiracy, and so on) and as breaches of peremptory norms of international law (prohibiting forced labour, slavery, torture, inhuman or degrading treatment, and crimes against humanity) as incorporated in Canadian law.

Nevsun denied the plaintiffs were mistreated at all. It also pleaded that Eritrea's military and personnel were not subject to the control, direction, or supervision of Nevsun or its subsidiary BMSC and that Nevsun owed the plaintiffs no duty of care. Nevsun also relied on the several layers of corporate legal personality separating it from BMSC. Furthermore, Nevsun challenged the territorial jurisdiction of the BC courts over the dispute, asserting that British Columbia is not a convenient forum, and denied the courts' subject-matter jurisdiction over the dispute based on the so-called act of state doctrine. Finally, Nevsun pleaded that the plaintiffs' custom-based claims do not found causes of action against it.

Like last year's note, this note focuses on the act of state and customary international law bases for Nevsun's application to stay the proceeding or strike out the plaintiffs' claims. Newbury JA for the Court of Appeal dismissed Nevsun's appeal. Beginning "[w]ith some trepidation," with the act

[94] Van Ert, *supra* note 47 at 582–84.

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of state doctrine "if such it be," Newbury JA noted that "questions continue concerning [its] nature and scope … in English law" and that "[t]he situation in Canada is more uncertain, given that act of state has never been directly applied by a Canadian court." She remarked, however, that old English authorities like *Duke of Brunswick v King of Hanover*[95] were part of the English common law received into the law of British Columbia in 1858.[96] She then reviewed English act of state jurisprudence at length[97] as well as the positions of Nevsun (which contended that the act of state jurisprudence precluded domestic courts from sitting in judgment of foreign state conduct and that the so-called *Kirkpatrick* public policy exception to this rule applied only in cases of clear violations of international law)[98] and the plaintiffs (who contended that, on the prevailing view of act of state in England and Australia, it would not apply in this case).[99]

Newbury JA for the court concluded that act of state does not apply here for several reasons. Each reason she proposed was based on a slightly different formulation of the act of state doctrine, underscoring how unsettled and uncertain it is. She noted that the plaintiffs' claims are not aimed at the legality or validity of Eritrea's legislation or other laws, but seek only compensation for acts by Nevsun not contemplated by Eritrean law or policy.[100] She added that the lawfulness of Eritrean sovereign acts need not be analyzed by the BC court since the conduct at issue is Nevsun's complicity in acts that "could only be unlawful under both domestic and international law."[101] She observed that, if the act of state is limited to questions of property or title thereto (which she described as "the traditional view"), there is no suggestion that Eritrea's ownership or possession of property, or indeed its legal position in general, would be affected by a judgment in favour of the plaintiffs.[102] "Most importantly," she concluded,

> no matter what formulation of the doctrine is chosen, the public policy exception would in my view clearly apply. The nature of the grave wrongs asserted is such that they could not be justified by legislation or official policy; nor has it been argued in this case that they are. As Lord Sumption observed, torture (and I would add, forced

[95] (1848), 9 ER 993 ("no court in this country can entertain questions to bring Sovereigns to account for their acts done in their Sovereign capacities abroad").

[96] *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 at para 123 [*Nevsun*].

[97] *Ibid* at paras 130–53.

[98] *Ibid* at paras 154–58.

[99] *Ibid* at paras 159–64.

[100] *Ibid* at para 166.

[101] *Ibid* at para 167.

[102] *Ibid* at para 168.

labour and slavery) is "contrary to both peremptory norms of international law and a fundamental value of domestic law." (*Belhaj*, at para. 266.) Having adopted the *Convention* and other agreements condemning the wrongs asserted here, states (and *ipso facto*, corporations acting in association therewith) cannot rely on the doctrine of act of state to claim immunity from the consequences of violating same.[103]

Importantly, in considering the so-called *Kirkpatrick* public policy exception to act of state, the learned judge concluded:

[T]he Court is not being asked to inquire into the legality, validity or "effectiveness" of the acts of laws or conduct of a foreign state. If the conduct complained of is proven "as an existential matter," the only remaining issue will be whether Nevsun "aided and abetted", "condoned" or was otherwise complicit in it. Its "validity" or "wrongfulness" will not be the subject of adjudication; nor could it be, given that torture, slavery and forced labour are by their nature unlawful. …

In summary, I am of the view that the *Kirkpatrick* limitation would also apply to the act of state doctrine if it were engaged in the case at bar. To paraphrase the U.S. Supreme Court in *Kirkpatrick*, the plaintiffs here are not attempting to undo or disregard any act of government, but only to obtain damages from private parties who are alleged to have been complicit therein. (At 705.) Further, paraphrasing Lord Sumption in *Belhaj*, Nevsun's exoneration under act of state would "serve no interest which it is the purpose of the doctrine to protect."[104]

Newbury JA then turned to Nevsun's argument that the plaintiffs' pleas founded on customary international legal norms as incorporated into Canadian law disclosed no reasonable claim. She noted that attempts to rely on the customary international law prohibition of torture in Canadian and English courts had failed on state immunity grounds in such cases as *Bouzari*, *Jones*, and *Kazemi*, but distinguished those cases from the plaintiffs' claim on the ground that the defendant here was a private party and therefore did not benefit from state immunity as the defendants in those other cases had done.[105] After reviewing Nevsun's far-reaching challenge to the plaintiffs' attempt to found its claim on incorporated rules of customary international law, Newbury JA concluded that, despite the plaintiffs' "significant legal obstacles," it could not be said that their claims were bound to fail.[106]

[103] *Ibid* at para 169.

[104] *Ibid* at paras 172–73.

[105] *Ibid* at para 188, referring to *Bouzari v Islamic Republic of Iran* (2004), 71 OR (3d) 675 (CA); *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62.

[106] *Nevsun*, *supra* note 96 at paras 196–97.

In the result, Newbury JA dismissed the appeal and allowed the case to proceed to trial.

*Briefly noted / Sommaire en bref*

UN Declaration on the Rights of Indigenous Peoples — *domestic legal status — honour of the Crown*

*Ross River Dena Council v Canada*, 2017 YKSC 59 (23 October 2017). Supreme Court of Yukon.

The status of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*)[107] was considered briefly by Gower J in the course of lengthy reasons arising from a complicated (indeed, somewhat bewildering) trial of numerous claims advanced by the Ross River Dena Council (RRDC). The gist of the RRDC's position was that Canada had breached its duty to negotiate a comprehensive land claim agreement in good faith since negotiations began in 1973. In his reasons, Gower J sets out eighteen issues arising from the proceedings. In this note, I consider only issue 13, which the learned judge described as follows:

> Has Canada refused or failed to take the necessary steps to honour and/or implement the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") (and in particular Article 26 thereof) in respect of RRDC's Aboriginal title and rights in and to the lands in question? If so, is such conduct inconsistent with the honour of the Crown?[108]

It was not disputed by the parties that the *UNDRIP*, being a declaration of the United Nations General Assembly, is a non-binding international instrument. Justice Gower noted that "Canada has endorsed *UNDRIP*, meaning that it has expressed its political support for the Declaration."[109] He also noted that Canada and the RRDC agreed that the Declaration can be used as an aid to the interpretation of domestic law, although "there may be an issue about whether *UNDRIP* can be used to interpret the Constitution."[110] On this latter point, Gower J felt unable to follow a recent suggestion by Veale J that the Supreme Court of Canada had confirmed that the Declaration may be used to interpret the Constitution. Gower J pointed out that the case Veale J relied upon was not a Supreme Court of Canada decision but, rather, a Federal Court decision[111] in which Strickland J observed

[107] UNGA Res 61/295 (13 September 2007).

[108] *Ross River Dena Council v Canada*, 2017 YKSC 59 at para 301 [*Ross River*].

[109] *Ibid* at para 302.

[110] *Ibid* at para 303.

[111] *Nunatukavut Community Counsel Inc. v Canada (Attorney General)*, 2015 FC 981.

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that "*UNDRIP* cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult" and there was no authority before the court that the Declaration applies to interpreting Canada's constitutional obligations to Aboriginal peoples.

After these preliminaries, Gower J turned briefly to the question of whether Canada had failed to implement the *UNDRIP* contrary to the honour of the Crown. Gower J confirmed that the Declaration was not implemented, "at least not yet,"[112] but found that the facts established that Canada's failure to do so were not inconsistent with the honour of the Crown. The facts Gower J relied on were Canada's May 2016 endorsement of the Declaration at a meeting of the United Nations Permanent Forum on Indigenous Issues in New York City, a September 2016 speech by the Minister of Justice in Vancouver in which she discussed the challenges around implementing the Declaration, and a February 2017 press release by the Government of Canada announcing the creation of a working group of Ministers charged with examining "relevant federal laws, policies, and operational practices" to ensure, among other things, adherence to the Declaration. "On this evidence," Gower J concluded, "it cannot fairly be said that Canada is refusing to implement *UNDRIP*."[113]

Canadian Charter of Rights and Freedoms — *freedom of religion — presumption of conformity with international law*

*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (2 November 2017). Supreme Court of Canada.

The Ktunaxa sought judicial review of the decision of the BC Minister of Forests to approve the construction of a year-round ski resort in a part of their traditional territories known to them as Qat'muk. Qat'muk is a place of spiritual significance for the Ktunaxa because it is home to the Grizzly Bear Spirit, a principal spirit within Ktunaxa religious belief. The Ktunaxa challenged the minister's decision on two grounds: that it violated their constitutional right to freedom of religion as guaranteed by section 2(a) of the *Charter* and that it breached the Crown's duty of consultation and accommodation. The Ktunaxa lost in the courts below.

The chief justice and Rowe J for the majority of the Supreme Court of Canada dismissed the appeal. The majority reasons turned on Canadian constitutional law, but the discussion of the right to freedom of religion touches briefly, but significantly, on international human rights law and its reception in Canada. The majority held that freedom of religion under section 2(a) of the *Charter* has two aspects: the freedom to hold religious

[112] *Ross River*, *supra* note 108 at para 307.

[113] *Ibid* at para 311.

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beliefs and the freedom to manifest those beliefs. The majority cited the Court's precedents for this conclusion[114] but also noted that these two aspects "are reflected in international human rights law,"[115] citing Article 18 of the 1948 *Universal Declaration of Human Rights* (*UDHR*)[116] and Article 18(1) of the *ICCPR*.[117] On the relevance of Article 18(1) of the *ICCPR* to section 2(a) of the *Charter*, the majority relied on Tarnopolsky JA's observation in *R v Videoflicks Ltd*[118] that section 2(a) should be interpreted in conformity with Canada's international obligations. The majority added that later, in *Reference re Public Service Employee Relations Act (Alta.)*,[119] Dickson CJ proposed, "as Tarnopolsky J.A. had done, that the *Charter* be presumed to provide at least as great a level of protection as is found in Canada's international human rights obligations" and that the Court "has since adopted this interpretive presumption."[120]

The majority went on to note that the two aspects of freedom of religion enunciated in the *UDHR* and the *ICCPR* are also found in international human rights instruments to which Canada is not a party, namely the European and American human rights conventions. The majority observed: "While these instruments are not binding on Canada and therefore do not attract the presumption of conformity, they are nevertheless important illustrations of how freedom of religion is conceived around the world."[121]

Having concluded that neither the Ktunaxa's freedom to hold their beliefs about Grizzly Bear Spirit, nor their freedom to manifest those beliefs, was infringed by the Minister of Forests's decision to approve the ski resort project, the majority rejected the Ktunaxa's *Charter* argument. It went on to hold that the minister's decision that the Crown had met its duty to consult and accommodate under section 35 of the *Constitution Act, 1982* was reasonable. In concurring reasons, Moldaver J (Côté J concurring) would have found an infringement of section 2(a) that was nevertheless justified under section 1 of the *Charter*.

[114] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 63 [*Ktunaxa*].

[115] *Ibid* at para 64.

[116] UNGA Res 217 A (III) (10 December 1948).

[117] *ICCPR*, *supra* note 84.

[118] (1984), 48 OR (2d) 395 (CA).

[119] [1987] 1 SCR 313.

[120] *Ktunaxa*, *supra* note 114 at para 65.

[121] *Ibid* at para 66.

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