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Canadian Cases in Public International Law in 2023

Jurisprudence canadienne en matière de droit international public en 2023

compiled by / préparé par

Gib van Ert[1], Dahlia Shuhaibar[1] and Liam Andrews[2]

[1]Counsel, Olthuis van Ert, Ottawa and Vancouver, Canada and [2]Student, Faculty of Law, University of Ottawa
Corresponding author: Gib van Ert; Email: gvanert@ovcounsel.com

Genocide Convention — justiciability of foreign state acts — Uyghurs

Uyghur Rights Advocacy Project v Canada (Attorney General), 2023 FC 126 (26 January 2023). Federal Court.

The Uyghur Rights Advocacy Project (the Project) is a group founded to protect the rights of the Uyghur population. The Project brought judicial review proceedings against the Government of Canada relating to the alleged ongoing genocide of the Uyghur population within the People's Republic of China. The Project claimed that Canada's action or lack thereof on the issue violated its international legal obligations under Article 1 of the *Convention for the Prevention and Punishment of the Crime of Genocide* (*Genocide Convention*), which provides that genocide is an international crime that all states parties will take steps to prevent and punish.[1] The Project sought declarations that a Uyghur genocide is underway, that Canada is bound by the *Genocide Convention*, that Canada should have been aware of the genocide or risk of genocide, and that Canada is in breach of the convention.[2]

Canada applied to strike the proceeding without leave to amend. It raised three issues: the applicants failed to pose a cognizable administrative law claim, the issues contested in the application were political and thus non-justiciable, and the court had no jurisdiction to consider the matter as Article 1 of the *Genocide Convention* is not implemented in Canadian law.[3] Justice Alan Diner of the Federal Court agreed with

Each summary is followed by the initials of its author.

[1]*Convention for the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, [1949] Can TS no 27 (entered into force 12 January 1951).

[2]*Uyghur Rights Advocacy Project v Canada (Attorney General)*, 2023 FC 126 at para 4 [*Uyghur Rights Advocacy Project*].

[3]*Ibid* at paras 13, 69–70.

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the first two arguments and considered them sufficient to strike the application, expressly declining to comment on the jurisdictional question.[4] Although the administrative law argument is beyond the scope of this article, the court's discussion and evaluation of justiciability is of interest.

Canada argued that the proposed remedies raised issues of a non-justiciable nature because the declarations sought required finding that the People's Republic of China is engaged in internationally wrongful activity.[5] The case therefore hinged on reviewing the legality of the actions of a foreign state, and for a court to rule on such an issue would unduly trespass upon the role of the executive branch.[6] Furthermore, Canada argued that the judiciary lacks the jurisdictional competence and institutional resources to properly assess treaty compliance of a foreign state, making the courtroom an inappropriate setting to manage a foreign policy issue.[7] In response, the Project argued that a determination of unlawful action by the Chinese state was unnecessary to grant the remedy sought as it was solely concerned with Canada's compliance with the *Genocide Convention*.[8]

Diner J agreed with Canada that a hypothetical Canadian breach of *Genocide Convention* obligations would necessarily be based on a determination of unlawful activity by a foreign state.[9] He agreed that judicial review is an inappropriate avenue for such analysis and that a finding of genocide is properly a matter of international affairs and the domain of the federal executive.[10] Diner J further agreed that "it is up to the Federal Government to decide whether a genocide has taken place or is ongoing against the Uyghur population in China."[11] The learned judge added that "the political questions doctrine … is a showstopper, or knockout punch, that fatally flaws the Application."[12]

Diner J also referenced the justiciability test outlined in *La Rose v Canada*,[13] which provides that justiciability can be assessed on the basis of whether a court possesses the institutional capacity and legitimacy to decide the matter at hand. *La Rose* states that institutional capacity can be assessed using some of the criteria described in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, the relevant criterion here being whether the matter at hand could be resolved with an "economical and efficient use of judicial resources."[14] Diner J considered that it "would not be an economical and efficient investment of judicial resources for this Court to hear the Application on its merits when it is plain and obvious that it will eventually be dismissed."[15]

Without casting doubt on the decision reached by Diner J, one might wish that his reasons considered further why a finding of genocide must be an issue falling solely

[4] *Ibid* at paras 77–78.
[5] *Ibid* at para 52.
[6] *Ibid* at paras 51–52.
[7] *Ibid* at para 53.
[8] *Ibid* at para 54.
[9] *Ibid* at para 63.
[10] *Ibid.*
[11] *Ibid* at para 66.
[12] *Ibid* at para 67.
[13] *La Rose v Canada*, 2020 FC 1008 at para 29.
[14] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 34.
[15] *Uyghur Rights Advocacy Project*, *supra* note 2 at para 61.

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within the executive's foreign affairs power. The *Genocide Convention*, and the customary international law of genocide, are applicable in Canada, and though a finding of genocide may have political ramifications, the actual determination is a process of applying law to facts and is the ordinary work of Canadian courts. One can readily sympathize with Diner J's view that he was in no position to make such a finding in the course of the judicial review application before him, but that is a separate issue from whether a finding of genocide is a matter of exclusively executive jurisdiction.

The learned judge's resort to the American concept of a "political questions doctrine" is also regrettable.[16] In *Operation Dismantle*, Justice Brian Dickson (as he then was) expressed "no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts."[17] (LJA)

State sovereignty — extraterritorial application of the Charter *— unreasonable search and seizure*

R v McGregor, 2023 SCC 4 (17 February 2023). Supreme Court of Canada.

Corporal McGregor was a member of the Canadian Armed Forces posted to the Canadian Embassy in Washington, DC, and residing in Virginia. Following a complaint, he was investigated by the Canadian Forces National Investigation Service (CFNIS). The CFNIS determined that there were reasonable grounds to believe McGregor had committed voyeurism and a related offence. It sought assistance from the local police to obtain a search warrant over his residence. The Canadian Embassy waived McGregor's diplomatic immunity for this purpose. The search produced various electronic devices, analysis of which uncovered evidence of other offences, including a sexual assault. The evidence was removed to Canada, and warrants were obtained from the Court Martial for further analysis of the devices.

Following his arrest, McGregor brought a motion to exclude the evidence under section 8 of the *Canadian Charter of Rights and Freedoms* (*Charter*), which guarantees the right to be free from unreasonable search and seizure as the fruit of unreasonable searches.[18] The military judge, following the much-criticized decision of the Supreme Court of Canada in *R v Hape*,[19] held that McGregor could not rely on section 8 of the *Charter* here because the *Charter* does not apply extraterritorially

[16]*Ibid* at para 67.

[17]*Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 459. In fairness to Diner J, his use of the phrase is in connection with an excerpt from *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 62, where the Federal Court of Appeal describes justiciability in relation to a "political questions objection."

[18]*Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[19]*R v Hape*, 2007 SCC 26 [*Hape*]. Noted in the (2007) 45 Can YB Intl L 527 at 544; see also John H Currie, "Khadr's Twist on Hape: Tortured Determinations of the Extraterritorial Reach of the Canadian Charter" (2008) 46 *Can YB Intl L 307*; Leah West, "'Within or Outside Canada': The Charter's Application to the Extraterritorial Activities of the Canadian Security Intelligence Service" (2022) 73:2 *UTLJ* 1; Maureen Webb, "The Constitutional Question of Our Time: Extraterritorial Application of the Charter and the Afghan Detainees Case" (2011) 28 *Natl J Const L* 236; Robert Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020) at 634; Kent Roach, "*R v Hape* Creates Charter-Free Zones for Canadian Officials Abroad" (2007) 53:1 *Crim LQ* 1.

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(save in exceptional cases). The learned judge added that, in any event, the search was not contrary to section 8. The Court Martial Appeal Court affirmed those determinations and upheld McGregor's conviction.

On further appeal to the Supreme Court of Canada, McGregor argued that the *Charter* ought to apply extraterritorially in his case because the *National Defence Act*[20] and the *Criminal Code*[21] both do. Yet his counsel chose not to question the correctness of *Hape* itself. Unsurprisingly, the Crown was also content to rely on *Hape*'s judge-made carve-out to the *Charter*'s constraint of government action. The interveners, however, sought in varying degrees to challenge *Hape.* One went so far as to submit that the case was wrongly decided and must be overturned. Others contended that the majority in *Hape* erred in its appreciation of the international law of state jurisdiction — particularly its confusion of adjudicative jurisdiction with enforcement jurisdiction — without seeking to overturn the decision as a whole.[22]

Justice Suzanne Côté, for the majority of the Supreme Court of Canada, purported to affirm *Hape* while, at the same time, dismissing the appeal for reasons that violate its erroneous principle that judicial scrutiny of government action outside Canada offends the sovereignty of foreign states. Côté J found it "unnecessary to deal with the issue of extraterritoriality to dispose of this appeal … because the CFNIS did not violate the *Charter.*"[23] The learned judge continued:

> Working within the constraints of its authority in Virginia, the CFNIS sought the cooperation of local authorities to obtain and execute a warrant under Virginia law. The warrant which issued authorized the search, seizure, and analysis of Cpl. McGregor's electronic devices expressly. The evidence of sexual assault was discovered inadvertently by the investigators in the process of triaging the devices at the scene of the search; its incriminating nature was immediately apparent. Although the warrant did not contemplate such evidence, the digital files in issue fell squarely within the purview of the plain view doctrine. Furthermore, the CFNIS obtained Canadian warrants before conducting an in-depth analysis of these devices. It is difficult to see how the CFNIS investigators could have acted differently to attain their legitimate investigative objectives. I conclude that they did not infringe Cpl. McGregor's rights under s. 8 of the Charter.

All of which is eminently sensible but ignores *Hape*'s fundamental international law error — namely, its holding that "[w]ere *Charter* standards to be applied in another state's territory without its consent, there would by that very fact always be interference with the other state's sovereignty."[24] An intellectually honest application of *Hape* to McGregor's case would make no determination at all about whether the CFNIS's conduct was contrary to the *Charter*, for to do so (according to *Hape*) will always involve an interference in the foreign state's sovereignty. Instead, Côté J conducted a twenty-paragraph-long analysis of the CFNIS's investigation against section 8 of the *Charter.*[25]

[20] RSC 1985, c N-5.

[21] RSC 1985, c C-46.

[22] Dahlia Shuhaibar and I were counsel for one such intervener, the BC Civil Liberties Association.

[23] *R v McGregor*, 2023 SCC 4 at para 4 [*McGregor*].

[24] *Hape*, *supra* note 19 at para 84.

[25] *McGregor*, *supra* note 23 at paras 25–44.

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While Côté J. and her colleagues in the majority purported to affirm *Hape* as "the governing authority on the territorial reach and limits of the *Charter*,"[26] their willingness to scrutinize the CFNIS's acts against section 8 of the *Charter* makes plain that they do not believe in *Hape* any more than the interveners do. Nor should they. It is simply not true, as a matter of international law, that Canadian judges sitting in Canadian courts applying the Canadian Constitution to Canadian government officials necessarily interfere with the sovereignty of some foreign state where the government conduct at issue took place outside Canada. If any further proof of the truth of this proposition were needed, I note that there has been (to my knowledge) no diplomatic protest lodged by US authorities consequent upon the Supreme Court's blatant scrutiny of the CFNIS's Virginia-based actions against the *Charter*'s section 8 protections.

In concurring reasons, Justices Andromache Karakatsanis and Sheilah Martin compellingly put the case for a course correction, noting correctly that the "extraterritorial application of the *Charter* is squarely before the Court and it is an issue that arises infrequently, may easily escape judicial review, and has been subject to significant and sustained criticism by experts in international law."[27] They considered at length the academic criticism of *Hape*, particularly its misapplication of the relevant state jurisdiction principles. The learned judges grouped these criticisms around three main flaws: "(1) *Hape* applied improper interpretive principles, including jurisdictional principles of international law and a principle of statutory interpretation, to its interpretation of s. 32(1) [of the *Charter*]; (2) *Hape* mischaracterized the extraterritorial application of the *Charter* as an unlawful exercise of enforcement jurisdiction; and (3) *Hape*'s three exceptions are inadequate."[28] Like the majority, however, Karakatsanis and Martin JJ preferred to leave the question of whether *Hape* was wrongly decided to another day.

In further concurring reasons, Justice Malcolm Rowe agreed with the majority and criticized the interveners for having exceeded their proper role in their critiques of *Hape*. Where all this leaves the law is far from clear. Ironically, the majority reasons did exactly what the interveners asked the court to do — namely, to scrutinize state officials' conduct against the *Charter* despite that conduct having taken place outside Canada. Yet that is precisely what *Hape* prohibits, unless one of the exceptions to *Hape*, invented by the *Hape* majority itself in a breathtaking exercise of judicial lawmaking, is made out. Yet *Hape* is said to still be good law, and, indeed, the interveners acted wrongly in pointing out that the emperor had no clothes. But the emperor is as naked as he ever was.

What should a court of first instance do when next confronted with the *Hape* problem? Were it to take *Hape* seriously and decline to scrutinize extraterritorial state conduct against the *Charter* for fear of offending a foreign state's sovereignty, it would be acting consistently with those parts of *McGregor* that purport to uphold *Hape*. But it would be acting inconsistently with the twenty paragraphs of *McGregor* that ignore *Hape* and apply the *Charter* to the extraterritorial conduct. If the first instance court takes the view that there is no *Charter* breach, it can presumably say so (despite *Hape*)

[26] *Ibid* at para 3.
[27] *Ibid* at para 47.
[28] *Ibid* at para 66.

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since that is what the Supreme Court did in *McGregor*. But what if there is a breach? Does that change the analysis? Whyever should it?

One thing at least seems certain. The next time defence counsel are confronted with a possible *Charter* breach arising from government action abroad, they should expressly challenge the correctness of *Hape*. Only by doing so, it seems, will the Supreme Court of Canada be persuaded to reconsider the decision's flawed international legal analysis. In the meantime, the Government of Canada will continue to enjoy the unprincipled exception to *Charter* scrutiny that the Supreme Court of Canada bestowed on it, unbidden, in 2007. (GVE)

Detention of Canadians by a foreign non-state actor — mobility rights — judicial deference in foreign relations

Canada v. Boloh 1(a), 2023 FCA 120 (31 May 2023). Federal Court of Appeal.

This was an appeal from a decision of the Federal Court[29] requiring the Government of Canada to take steps to cause four Canadian citizens detained in northeastern Syria by a non-state entity — the so-called Autonomous Administration of North and East Syria (AANES) — to be returned to Canada. AANES suspected the detainees of being combatants for the Islamic State of Iraq and Syria (ISIS). It was detaining them illegally in deplorable conditions. The Federal Court found that Canada was in no way complicit in the detainees' presence in Syria or detention. Nevertheless, the Federal Court, relying on the mobility rights guaranteed by section 6(1) of the *Canadian Charter of Rights and Freedoms*, granted declaratory relief to the effect that the detainees were entitled to the Government of Canada's assistance in returning to Canada.

Justice David Stratas for the Federal Court of Appeal allowed the appeal. In the learned judge's view, the Federal Court "took the right of Canadian citizens 'to enter … Canada' and transformed it into a right of Canadian citizens, wherever they might be, regardless of their conduct abroad, to return to Canada or to have their government take steps to rescue them and return them to Canada."[30] Stratas JA rejected the detainees' submission that international law supported their position. He noted that section 6(1) of the *Charter* is modelled upon Article 12(4) of the 1966 *International Covenant on Civil and Political Rights*, which provides: "No one shall be arbitrarily deprived of the right to enter his own country."[31] He relied on the decision of the Grand Chamber of the European Court of Human Rights in *Case of H.F. and others v France*,[32] observing that the case "tells us that article 12(4) prohibits state actions that arbitrarily prevent citizens from entering their country of citizenship and does not extend to a right to be returned to their country of citizenship."[33] He rejected reliance on a letter advanced by the detainees from a United Nations (UN) special rapporteur, noting that, while it supported the Federal Court's view, it was contrary to *H.F.* and that "international court decisions in adjudicative contexts … deserve far more

[29] *Boloh 1(A) v Canada*, 2023 FC 98.

[30] *Canada v Boloh 1(a)*, 2023 FCA 120 at para 12 [*Boloh 1(a)*].

[31] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, [1976] Can TS no 47 (entered into force 23 March 1976) [*ICCPR*].

[32] ECtHR, *Case of HF and Others v France*, Applications nos 24384/19 and 44234/20 (14 September 2022).

[33] *Boloh 1(a)*, *supra* note 30 at para 48.

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weight than the non-adjudicative individual opinions of other international actors" such as the special rapporteur.[34]

Stratas JA for the court concluded that the *Charter* did not apply to the respondents' case:

> Canadian state conduct did not lead to the respondents being in northeastern Syria, did not prevent them from entering Canada, and did not cause or continue their plight. The respondents' own conduct and persons abroad who have control over them alone are responsible. In no way is the Government of Canada infringing the respondents' right to liberty nor on these facts is it violating a principle of fundamental justice (section 7), arbitrarily detaining the respondents (section 9), inflicting cruel and unusual punishment on them (section 12) or discriminating against them (section 15). To the extent these rights are being infringed, entities other than the Government of Canada are responsible.
>
> Further, the application of the Charter in this case would be extraterritorial and invalid. True, sometimes the Charter can apply to circumstances outside of Canada: see *e.g., Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44. But for that to happen, there must be some action or involvement by the Government of Canada to attract the application of the Charter. In particular, there must be either evidence of "Canadian participation in a process that violates Canada's international law obligations" or "consent by the foreign state to the application of Canadian law": *R. v. McGregor*, 2023 SCC 4 at para. 18; see also *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paras. 51–52 and 101 and *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 at paras. 18–19. Neither is present here.

The learned judge added that courts "must appropriately defer to the executive when it acts on matters quintessentially and uniquely within its ken" and that "[s]ensitive issues of foreign relations and international affairs are just such a matter."[35] (GVE)

Safe Third Country Agreement — non-refoulement — right to life, liberty, and security of the person

Canadian Council for Refugees v Canada (Citizenship and Immigration), 2023 SCC 17 (16 June 2023). Supreme Court of Canada.

Several individuals from the United States attempted to claim refugee protection in Canada. Their claims were ineligible to be referred to the Refugee Protection Division for consideration because of a treaty between Canada and the United States commonly known as the *Safe Third Country Agreement.*[36] According to that treaty,

[34] *Ibid* at paras 49–50. Remarkably, neither the Federal Court of Appeal decision nor the decision of the court below indicate which UN special rapporteur wrote this letter.

[35] *Boloh 1(a), supra* note 30 at para 66.

[36] *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 5 December 2004, [2004] Can TS No 2 (entered into force 29 December 2004).

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refugee claimants must, as a general rule, seek protection in whichever of the two countries they first enter after leaving their country of origin. The treaty is given effect through the *Immigration and Refugee Protection Act* (*IRPA*).[37]

In recent years, concerns have been raised about the *Safe Third Country Agreement* and whether Canada should continue to consider the United States a "safe third country" in view of certain changes to its immigration and refugee law. For example, it has been alleged that women facing gender-based persecution and sexual violence are often denied refugee status in the United States, such that Canada, in requiring such women to make refugee claims in the United States pursuant to the *Safe Third Country Agreement*, could be violating its *non-refoulement* obligation contrary to Article 33 of the 1951 *Convention Relating to the Status of Refugees* (*Refugee Convention*).[38] Further, concerns have been raised about the use and conditions of immigration detention in the United States.

The appellants in this case made several administrative law arguments relating to the designation by regulation of the United States as "safe third country." They also alleged that provisions of the *IRPA* and its regulations violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* — respectively, the rights to life, liberty, and security of the person, and the right to equality — because the legislative scheme resulted in Canadian immigration officers summarily returning claimants to the United States without considering whether that country would respect their rights under international law, including those related to detention and *non-refoulement*.

Although the *Safe Third Country Agreement* is a treaty, the case centred largely on complex domestic administrative law and constitutional law principles rather than the interpretation or application of that treaty or the *Refugee Convention*. However, of note for our purposes are some aspects of the Court's analysis of section 7 of the *Charter* (the right to life, liberty, and security of the person). The Court accepted that a risk that a refugee claimant can be returned to their place of origin, where they allege that they would face persecution, engages the claimant's "security of the person" interest:

> There is no question that a risk of *refoulement* — whether directly from Canada or indirectly after return to a third country — falls within the scope of the security of the person interest. This Court has noted that the *non-refoulement* principle is the "cornerstone of the international refugee protection regime" (*Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 18). By definition, *refoulement* exposes individuals to threats to their life or freedom (*Refugee Convention*, Article 33), torture (*Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, Article 3) or other serious human rights violations. It is because these potential consequences are so grave that this Court in *Singh* considered it "unthinkable" that *refoulement* would fall outside the scope of s. 7's protections (p. 210).[39]

[37] *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[38] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, [1969] Can TS no 6 (entered into force 22 April 1954) [*Refugee Convention*].

[39] *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 95 [*Canadian Council for Refugees*].

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In section 7 case law, a claimant must show, first, that their life, liberty, or security is affected by a measure and, second, that the effects on their life, liberty, or security of the person are in accordance with the principles of fundamental justice. As it can often be challenging to satisfy the first part of that test, the court's affirmation that a security of the person interest was engaged is significant.

At the second stage of the section 7 analysis, the court drew on several international legal instruments in determining whether the effect on refugee claimants' security of the person interest was consistent with the principles of fundamental justice. It explained that the primary goal of the *IRPA* provisions implementing the *Safe Third Country Agreement* was to share responsibility for determining refugee claims, subject to two limits: the *non-refoulement* principle and the requirement for fair consideration. But these limits did not require that the American asylum claim system mirror the Canadian system in every respect.[40] A "degree of difference as between the legal systems applicable in the two countries can be tolerated, so long as the American system is not fundamentally unfair."[41]

Beginning with the allegations that refugee claimants could be unjustly detained in the United States, the court held that the evidence did not support this allegation. The court noted that the Office of the UN High Commissioner for Refugees's *Detention Guidelines* recognized that detention of refugee claimants "is neither prohibited under international law *per se*, nor is the right to liberty of person absolute."[42] The *Guidelines* require that safeguards be in place, leaving the form of safeguards to state practice. The court was satisfied that adequate mechanisms that create opportunities for release from detention and review by administrative decision-makers and courts existed in the United States.[43] Nor was it fundamentally unfair to isolate individuals awaiting tuberculosis test results to control public health risks; this was consistent with the *United Nations Minimum Rules for the Treatment of Prisoners* (*Nelson Mandela Rules*).[44] Furthermore, although the appellants alleged that isolation was used more broadly in the United States, the court found that the evidence was insufficient on this point.[45]

As for the allegation that refugee claimants faced a risk of *refoulement* to the country they were fleeing, the court again was not persuaded on the evidence. It noted that "[s]ubjecting returnees to real and not speculative risks of *refoulement* would bear no relation to the purpose of the impugned legislation, which has respect for the *non-refoulement* principle at its core. A provision mandating return to a risk of *refoulement* would therebefore be overbroad" as well as grossly disproportionate.[46] Again, however, the court was not satisfied on the evidence that the *IRPA* provisions mandated return; safeguards such as administrative deferrals of removal, temporary resident permits, humanitarian and compassionate exemptions, and public policy exemptions existed to guard against a risk of *refoulement*.[47]

[40] *Ibid* at para 139.

[41] *Ibid* at para 142.

[42] *Ibid* at para 143.

[43] *Ibid*.

[44] *United Nations Minimum Rules for the Treatment of Prisoners*, UN Doc A/RES/70/175 (17 December 2015).

[45] *Canadian Council for Refugees*, *supra* note 39 at para 145.

[46] *Ibid* at para 148.

[47] *Ibid* at paras 148, 151.

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In the result, the *IRPA* provisions implementing the *Safe Third Country Agreement* did not violate section 7 of the *Charter*. However, the Supreme Court remitted the issue of whether it infringed the equality guarantee (section 15 of the *Charter*) to the Federal Court, which had declined to consider the issue given its conclusion that the scheme violated section 7. As such, the debate over the *Safe Third Country Agreement* is far from over and may be addressed in future Yearbook comments. (DAS)

Denominational schooling in Ontario — presumption of conformity with international law — continuing applicability of Supreme Court precedents

Grassroots v His Majesty the King, 2023 ONSC 3722 (21 August 2023). Ontario Superior Court of Justice.

This litigation is a fresh attempt to challenge the lawfulness of Ontario's public funding of Roman Catholic primary and secondary schooling as discriminatory against other religions. The Supreme Court of Canada upheld the constitutionality of the system in *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)* and *Adler v. Ontario*.[48] Those decisions held that public funding of denominational schools is immune from judicial scrutiny under the *Canadian Charter of Rights and Freedoms* as such schools are expressly sanctioned by another part of Canada's written Constitution — namely, section 93 of the *Constitution Act, 1867*.[49] The UN Human Rights Committee later condemned Ontario's funding of Roman Catholic schools as contrary to Article 26 (equality and non-discrimination) of the *International Covenant on Civil and Political Rights*[50] in *Waldman v Canada*.[51] The applicants here were trying again to challenge Ontario's regime, this time relying on two twenty-first-century Supreme Court of Canada decisions — *Bedford*[52] and *Carter*[53] — on when lower courts may permissibly depart from otherwise binding Supreme Court precedents.

The respondents — Canada and Ontario — moved to strike the application as having no reasonable prospect of success given existing precedents. The main question for Justice Eugenia Papageorgiou was whether it was plain and obvious that the applicants will not bring themselves within the *Bedford/Carter* principles for revisiting binding precedents. The learned judge found that the applicants plainly and obviously had no claim against Canada (education being a matter of provincial jurisdiction) but declined to strike the claim against Ontario. Her reasoning was not based on any single argument advanced by the applicants but on "the combined effect and totality of the new circumstances (social, political and legislative) and developments in the law they have raised."[54]

That said, the first change cited by Papageorgiou J was this:

[48] *Reference Re Bill 30, An Act to Amend the Education Act (Ont)*, [1987] 1 SCR 1148; *Adler v Ontario*, [1996] 3 SCR 609.

[49] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

[50] *ICCPR*, *supra* note 31.

[51] *Waldman v Canada*, (1999) Comm 694/1996, UN Doc A/55/40, vol II (3 November 1999).

[52] *Canada (Attorney General) v Bedford*, 2013 SCC 72.

[53] *Carter v Canada (Attorney General)*, 2015 SCC 5.

[54] *Grassroots v His Majesty the King*, 2023 ONSC 3722 at para 17 [*Grassroots*].

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> A jurisprudential change in the importance of international law to the interpretation of Canadian laws, which now includes a presumption of conformity that did not exist at the time of the binding authority. The Grassroots Applicants argue that interpreting the Constitution and the *Charter* in such a way as to render government action immune from scrutiny is inconsistent with the presumption of conformity; had this principle been present at the time of the binding precedents, it would have affected the outcome. International law obligations include an obligation to not discriminate with respect to education and so international law, and how it has been applied, is also arguably relevant to the underlying s. 15 *Charter* claim.[55]

Elaborating on this point, the learned judge considered that the presumption of conformity with international law, as recognized in several Supreme Court of Canada decisions, was "fully adopted by the Supreme Court only *after* the decision in *Adler*"[56] and that the presumption did not exist when *Adler* was decided in 1996.[57] The learned judge added, "Previously, courts would first consider the wording of a statute. If an interpretive issue could be resolved based upon the words, there was no need to consider international law. Now, courts must apply the presumption at the start."[58]

The learned judge went on to consider specific international law sources relied upon by the applicants including Articles 2(2) (non-discrimination, particularly as to religion) and 13 (right to education) of the 1966 *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*),[59] Articles 2 (non-discrimination), 18 (freedom of religion), and 26 (equality) of the *ICESCR*, the *Waldman* decision, and other international instruments and materials.[60] She concluded that there was "an arguable case that developments in international law (in particular the principle of conformity) raise new issues which are relevant to the interpretation of and interplay between" section 93 of the *Constitution Act, 1867*, and the *Charter*. The decision has been appealed. (GVE)

International law a "new issue" on appeal — presumption of conformity — Refugee Convention

Mason v Canada (Citizenship and Immigration), 2023 SCC 21 (27 September 2023). Supreme Court of Canada.

Earl Mason and Seifeslam Dleiow are foreign nationals who were both involved in the criminal justice system but, for different reasons, were not convicted of the offences they were charged with. Mason was charged with two counts of attempted murder and two counts of discharging a firearm, but the charges were eventually stayed because of delay. Some of Dleiow's charges were stayed, and he pleaded guilty to three

[55] *Ibid* at para 18.

[56] *Ibid* at para 180 [emphasis in original].

[57] *Ibid* at para 189; see also paras 190–95 [emphasis in original].

[58] *Ibid* at para 197.

[59] *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 UNTS 3, [1976] Can TS no 46 (entered into force 3 January 1976) [*ICESCR*].

[60] *Ibid.*

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others and received a conditional discharge (which allows an individual to plead guilty but not have a conviction registered on their criminal record).

Canadian immigration authorities prepared inadmissibility reports for Mason and Dleiow under section 34(1)(e) of the *Immigration and Refugee Protection Act* (*IRPA*), which states that an individual is inadmissible to Canada for "engaging in acts of violence that would or might endanger the lives or safety of persons in Canada."[61] The question before the immigration tribunals and the courts was whether, for an individual to be inadmissible under section 34(1)(e), the act of violence needed to have some connection to a threat to the security of Canada (in the same way that the other paragraphs in section 34(1) all appeared to have). The first-level tribunal, the Immigration Division, concluded that a nexus with the security of Canada was required. The second-level tribunal, the Immigration Appeal Division, took the opposite view, concluding that inadmissibility under section 34(1)(e) related to security in a broader sense: to ensure that individual Canadians are secure from acts of violence that would or might endanger their lives or safety.

On judicial review, Justice Sébastien Grammond of the Federal Court agreed with the Immigration Division. However, the Federal Court of Appeal, *per* Justice David Stratas, reverted to the Immigration Appeal Division's view. Much of the appeal court's reasoning centred on administrative law principles and, specifically, the standard of review (that is, whether the court should apply the deferential "reasonableness" standard pursuant to which there can be several reasonable answers or the stricter "correctness" review, where there is only one correct answer). Stratas JA critiqued the Federal Court's approach, concluding that Grammond J had purported to apply reasonableness review but, in fact, applied a disguised correctness review. The learned judge concluded that the Immigration Appeal Division's interpretation was reasonable and must be upheld.

Of relevance for our purposes is Stratas JA's brief but stern commentary on the appellants' reliance on the *Refugee Convention*[62] and the *Protocol Relating to the Status of Refugees* (*Refugee Protocol*).[63] After observing that neither Mason nor Dleiow had made arguments on these treaties before the Immigration Appeal Division, he stated:

> [73] Mr. Mason attempted to invoke the Refugee Convention in argument before us. But in this Court that is a new issue and we should not entertain it: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 23–26. It goes to the merits of the interpretation of paragraph 34(1)(e). That issue should be made to the merits-deciders under this legislative regime, in particular the Immigration Appeal Division, not a reviewing court or a court sitting in appeal from a reviewing court: *'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75.

[61] *IRPA*, *supra* note 37, s 34(1)I.

[62] *Refugee Convention*, *supra* note 38.

[63] *Protocol Relating to the Status of Refugees*, 4 October 1967, 606 UNTS 267 (entered into force 4 October 1967).

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> [74] As well, certain background documents and other instruments needed to understand any international obligations are not in evidence before us. This is because they were not placed in evidence before the administrators. The forum for the introduction of evidence is the proceeding before the administrators, not a reviewing court and not a court sitting in appeal from a reviewing court: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297, at paragraphs 14–20; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 9 Admin. L.R. (6th) 296, at paragraphs 13–28; *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123, 17 Admin. L.R. (6th) 175, at paragraphs 7–11.

On further appeal to the Supreme Court of Canada, the appellants renewed their arguments about the relevance of the *Refugee Convention* and the *Refugee Protocol* to the interpretation of section 34(1)(e). In support of this position, the intervener Amnesty International Canadian Section (English Speaking)[64] submitted that arguments relating to these treaties were not in fact "new issues": the Supreme Court's seminal case of *Vavilov* had affirmed that international law can be an "important constraint" in administrative decision-making,[65] and, in the case of the *IRPA* specifically, the statute actually mandates consideration of the *Refugee Convention* and international human rights law.[66]

Justice Mahmud Jamal, writing for the majority,[67] concluded that the Immigration Appeal Division's interpretation was unreasonable for three reasons. The first two were purely administrative law grounds, which are not relevant for our purposes. The third reason was that the tribunal had "failed to interpret and apply s. 34(1)(e) in compliance with international human rights instruments to which Canada is a signatory," contrary to the express direction in the *IRPA* that it be interpreted to comply with binding international human rights instruments.

Whereas the Federal Court of Appeal had been quick to dismiss the appellants' international law arguments as "new issues" unworthy of consideration, the Supreme Court of Canada discussed in detail the relevance of the *Refugee Convention* and the *Refugee Protocol* and the necessity that they be considered.[68] Again, this was one of the three bases on which the Immigration Appeal Division's interpretation was held to be unreasonable. Jamal J affirmed that international law can operate as an important constraint on an administrative decision-maker and that Canadian legislation is presumed to operate in conformity with Canada's international obligations and the values and principles of customary and conventional international law — the latter principle known as the presumption of conformity with international law.[69]

[64] I was counsel for Amnesty International Canadian Section (English Speaking) in this appeal.

[65] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 114 [*Vavilov*].

[66] Section 3(2)(b) of the *IRPA*, *supra* note 40, states that "[t]he objectives of this Act with respect to refugees are … to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement," and section 3(3)(f) instructs that "[t]his Act is to be construed and applied in a manner that … complies with international human rights instruments to which Canada is signatory."

[67] Côté J agreed with the majority and offered concurring reasons on an administrative law question not relevant for the purposes of this *Yearbook*.

[68] *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 104–17 [*Mason*].

[69] *Ibid* at paras 72, 105. See also *Vavilov*, *supra* note 65 at para 114.

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The learned judge explained that the Immigration Appeal Division's interpretation could allow foreign nationals to be returned to countries where they may face persecution, contrary to Canada's *non-refoulement* obligation in article 33 of the *Refugee Convention*. By contrast, interpreting s. 34(1)(e) to require a nexus to national security or the security of Canada would mean that a removal order would not breach article 33.[70] Justice Jamal explained that while this argument had not been made to the Immigration Appeal Division, the tribunal was required by the *IRPA* itself to interpret s. 34(1)(e) in a manner that complied with Canada's international human rights obligations, including article 33.[71] The presumption of conformity with international law "assume[d] added force when interpreting the *IRPA*" given the statutory direction to interpret it in a manner that complies with Canada's international human rights law obligations.[72]

Justice Jamal went so far as to say that the *Refugee Convention* acted as a constraint in this case even though neither Mr. Mason nor Mr. Dleiow was a refugee claimant. It was an "important legal constraint on the interpretation of s. 34(1)(e) generally, irrespective of whether the specific foreign national subject to deportation is a refugee claimant."[73] He rejected Stratas JA's objection to considering the *Refugee Convention*, noting that the appeal court had not specified which documents and instruments it thought were missing and that, in any event, the role of the *Refugee Convention* in constraining the interpretation of the *IRPA* was a question of law that Parliament had expressly directed a court or administrative tribunal to consider.[74]

This conclusion must be correct. If international law is a constraint on what a decision maker can reasonably decide,[75] it will constrain what is reasonable whether or not a party makes a specific argument about it. Dismissing such an argument without any analysis risks upholding an unreasonable decision — one that is inconsistent with a relevant legal constraint. Moreover, it "risks incursion by the courts in the executive's conduct of foreign affairs and censure under international law," when the presumption of conformity is meant to avoid that very result.[76]

Unfortunately, the Supreme Court's decision does not appear to have put this issue to rest. Jamal J focused on the fact that the *IRPA* required courts and tribunals to interpret the statute to comply with Canada's binding international human rights law obligations, including the *Refugee Convention* and the *Refugee Protocol*. He did not comment more generally on whether binding international law can be considered on judicial review when not raised before the tribunals below. Litigants seeking to make such arguments on judicial review in non-*IRPA* cases may therefore continue to face pushback, at least before the Federal Court of Appeal. Indeed, Stratas JA wasted little time in critiquing the Supreme Court of Canada's approach. In a decision released only eight days after *Mason*, he admonished:

> [8] The applicant also submits that the delay of the Board in this case constitutes an abuse of process. The applicant did not place this issue before

[70] *Ibid* at para 104.
[71] *Ibid*.
[72] *Ibid* at para 106.
[73] *Ibid* at para 115.
[74] *Ibid* at paras 116–17.
[75] *Vavilov*, *supra* note 65 at para 114.
[76] *B010 v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58 at para 47.

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> the Board for consideration in his written submissions and, thus, it is a new issue in this Court that should not be heard: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. We do not consider that the Supreme Court's recent willingness (in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21) to decide a case on the basis of a new issue, one of international law, for the first time on the third level of appeal should be taken to undercut the longstanding, unquestioned authority of *Alberta Teachers' Association*.[77]

Similarly, the Court of Appeal for Ontario refused to consider an argument by an intervener that a housing statute be interpreted in conformity with the *ICESCR*.[78] Admittedly, that decision pre-dates *Mason*, so it remains to be seen whether that court will change its approach. For now, the "new issue" concern is likely to remain a live issue among appellate courts. (DAS)

Diplomatic immunity — execution against foreign state property — executive certificates

Zarei v Iran (Islamic Republic of), 2023 ONCA 713 (27 October 2023). Court of Appeal for Ontario.

Mehrzad Zarei and the other appellants are the relatives and estates of persons killed in the downing of Ukrainian Airlines flight PS752 by Iran in 2020. The appellants obtained a default judgment in Ontario against Iran in 2021, but their motion to enforce the judgment against assets of the Iranian government in Canada was dismissed by the motion judge.[79] The motion judge held that Iranian property in Canada continues to enjoy diplomatic immunity based on an executive certificate issued by the minister of foreign affairs pursuant to section 11 of the *Foreign Missions and International Organizations Act* (*FMIOA*).[80] The certificate stated the Government of Canada's view that the property at issue continues to enjoy privileges and immunities under the *FMIOA*.[81] The motion judge considered the presence of diplomatic status as a determination exclusively for the executive to decide and thus treated the certificate as determinative of the issue.

The appellants challenged the motion judge's decision by arguing that the law of diplomatic immunity in Canada is governed by Article 1 of the *Vienna Convention on Diplomatic Relations* as implemented by the *FMIOA* and that, under this framework, the property of a state only possesses diplomatic immunity when it is being used "for the purposes of the [diplomatic] mission."[82] As Canada and Iran ended diplomatic relations in 2012, the appellants contended that the property was not being actively

[77] *Klos v Canada (Attorney General)*, 2023 FCA 205 at para 8.

[78] *MacKenzie v Ottawa Community Housing Corporation*, 2023 ONCA 43 at paras 65–67 [*MacKenzie*]; *ICESCR*, *supra* note 59.

[79] *MacKenzie*, *supra* note 78 at para 2.

[80] *Foreign Missions and International Organizations Act*, SC 1991, c 41.

[81] *Zarei v Iran (Islamic Republic of)*, 2023 ONCA 713 at para 5 [*Zarei*].

[82] *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), art 1; *Zarei, supra* note 81 at para 7.

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used in a manner that provided it with diplomatic immunity.[83] Additionally, the appellants argued that a section 11 *FMIOA* certificate is not irrefutable evidence and should not be treated as determinative of the issue of diplomatic relations and associated immunities.[84] The Attorney General of Canada intervened in the appeal (Iran having not appeared) and argued that, regardless of Iran's actual usage of its property since 2012, the recognition of diplomatic status is reserved to the executive and is non-justiciable.[85]

In reasons attributed to the court as a whole, Justices Sarah Pepall, Katherine van Resnburg, and Patrick Monahan agreed with the motion judge, finding that the granting of diplomatic status is a question to be determined solely by the executive branch owing to its foreign affairs prerogative.[86] The court found that a section 11 certificate is evidence of the executive's intent to grant diplomatic immunity pursuant to that Act and that the issued certificate is authoritative and must be treated as conclusive.[87] The issue of whether the property is being actively used for diplomatic purposes is irrelevant given the government's unequivocal certification of its diplomatic status.[88]

In this ruling, the Court of Appeal has continued the jurisprudential thread of *Tracy v Iran (Information and Security)*[89] and *Construction Excedra v Saudi Arabia*,[90] representing the recently dominant approach to executive certificates and their relation to diplomatic immunities. *Tracy* was a case distinguishing exigible Iranian assets from those that were diplomatically protected, wherein Justice Glenn Hainey declared that diplomatic immunity is reliant on recognition from the Government of Canada and that an executive certificate is conclusive evidence of such recognition.[91] *Construction Excedra* involved a construction company placing a lien upon property owned by the Saudi Arabian government and followed *Tracy* in concluding that executive certificates are conclusive on the question of diplomatic immunities.[92] Questions arising from *Tracy* and *Construction Excedra*, and now *Zarei*, include whether executive certificates should be considered evidence of fact or law, and, if the latter, whether courts relying on executive certificates give them too much deference on questions of law.

While the government is entitled to establish certain facts within the foreign affairs prerogative, such as whether diplomatic relations are present, for courts to allow an executive certificate to be singularly determinative may give too much deference to government. Diplomatic immunities are still governed by law, and it is the role of courts to interpret legal questions when they arise. Allowing the executive to unilaterally decide the outcome of diplomatic immunity disputes via executive certificates is a potentially problematic challenge to that state of affairs. (LJA)

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[83] *Zarei, supra* note 81 at para 7.
[84] *Ibid* at para 9.
[85] *Ibid* at para 11.
[86] *Ibid* at paras 17–20.
[87] *Ibid* at para 21.
[88] *Ibid* at para 24.
[89] *Tracy v Iran (Information and Security)*, 2016 ONSC 3759 [*Tracy*].
[90] *Construction Excedra v Saudi Arabia*, 2017 ONSC 105 [*Construction Excedra*].
[91] *Tracy*, *supra* note 89 at paras 150, 153.
[92] *Construction Excedra*, *supra* note 90 at paras 43–44, 52.

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Canada-European Union Comprehensive Economic Trade Agreement 2016 — non-discrimination — public safety exception

Thales DIS Canada Inc. v Ontario (Transportation), 2023 ONCA 866 (29 December 2023). Court of Appeal for Ontario.

This case, briefly noted at the Divisional Court level in last year's *Yearbook*, was an appeal from a judicial review of two decisions by the Ontario Ministry of Transportation arising from a contract for tender for the production of government identity cards. Thales, a French company, produced such cards from its facility in Poland. It challenged the Ontario Ministry of Transportation's decision not to award it the contract, alleging that the decision contravened the non-discrimination provisions of the 2016 *Canada-European Union Comprehensive Economic and Trade Agreement* (*CETA*).[93] Thales alleged that the Ministry had added an eleventh hour Canadian production requirement to its request for bids. The Province contended that this requirement was permitted by the "public morals, order or safety" exception in art. 19.3 of the *CETA*.

The majority of the Divisional Court found both the decision and the tender process to be contrary to the *CETA* and granted the application for judicial review. The majority relied, as the parties had done, on the test adopted by the Appellate Body of the World Trade Organization in *Brazil – Measures Affecting Imports of Retreaded Tyres (Complaint by the European Communities)* (2007), WTO Doc. WT/DS332/AB/R. It concluded that the decision unreasonably disregarded the applicable international legal principles as expressed in the government procurement provisions (Chapter 19) of the CETA and the *Brazil* case. The majority also found that the request for bids process itself (as distinct from the decision resulting from that process) was reviewable for reasonableness and was unreasonable for contravening the *CETA*.

On appeal to the Court of Appeal for Ontario, Favreau JA for the court allowed the appeal and dismissed Thales's application. Much of the decision concerns the correct application of the reasonableness standard in Canadian administrative law. Justice Favreau held that the majority had misapplied that standard. Reassessing the reasonableness of the decision according to correct principles, Favreau JA found the decision reasonable. Of most interest to *Yearbook* readers, the learned judge held, contrary to the court below, that it was unclear that the two-part material necessity test established in the *Brazil* case was a legal constraint on the Minister's decision for the purposes of Canadian administrative law. Rather, the legal constraint was to be found in the wording of the relevant *CETA* provisions, namely arts. 19.3 and 19.4.[94]

Justice Lise Favreau for the court also held that the Divisional Court erred in holding that the issuance of a request for bids itself is subject to judicial review. Without deciding the general issue of whether a request for bids can ever be subject to judicial review, the learned judge held that Ontario's process was compliant with

[93] *Canada-European Union Comprehensive Economic and Trade Agreement*, 30 October 2016, online: <trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> (provisionally applied 21 September 2017) [*CETA*]. *CETA* is described on the federal government's treaty website as not yet in force but provisionally applied, online: <www.treaty-accord.gc.ca/details.aspx?lang=eng&id=105208&t=638593102236473680>.

[94] *Thales DIS Canada Inc. v Ontario (Transportation)*, 2023 ONCA 866 at para 115.

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CETA.[95] That agreement does not prescribe a specific process but instead sets out general requirements and leaves it to governments to establish processes that meet them.[96] The learned judge also doubted whether it was the role of the court to determine whether Ontario's process complies with *CETA*: "If Ontario has failed to meet its obligation to set up an appropriate dispute process, this may well be a matter more properly addressed under Article 29 through mediation and arbitration between the parties to the *CETA*."[97] (GVE)

Briefly noted / Sommaire en bref

United Nations Declaration on the Rights of Indigenous Peoples — status in Canadian law — Aboriginal title and rights

Colville Lake Renewable Resources Council v Northwest Territories, 2023 NWTSC 22 (11 August 2023). Supreme Court of the Northwest Territories.

Gitxaala v British Columbia (Chief Gold Commissioner), 2023 BCSC 1680 (26 September 2023). Supreme Court of British Columbia.

R. v Montour and White, 2023 QCCS 4154 (1 November 2023). Quebec Superior Court.

Each of these cases is a first instance decision relying on the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) in the context of an Aboriginal rights claim under Canadian constitutional law.[98] These decisions are not the first in which the *UNDRIP* has been cited by Canadian courts. Nor are they the only judicial considerations of the declaration in 2023. What makes each case notable is the greater weight accorded to the *UNDRIP* than in previous cases. Given the likelihood of these cases being considered further on appeals, they are noted only briefly here.

The *Colville* case was a judicial review of a decision by the Northwest Territories' minister of environment and natural resources relating to harvesting the Bluenose West Caribou Herd.[99] The *UNDRIP* is considered only briefly by the court and does not appear to have done much work in the court's analysis. What is remarkable, however, is the following passage:

> The Applicants assert *UNDRIP* informs the scope of the government's obligations when interpreting and implementing modern treaties. This point is not in dispute and, even if it were, this court agrees that *UNDRIP* is relevant to the interpretation of modern treaties. Domestic laws are subject to a presumption of conformity in relation to binding international instruments. *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32, at para 32. The

[95] *CETA*, *supra* note 93.

[96] *Thales DIS Canada*, *supra* note 94 at para 132.

[97] *Ibid* at para 134.

[98] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (13 September 2007).

[99] *Colville Lake Renewable Resources Council v Northwest Territories*, 2023 NWTSC 22.

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legislature is presumed to act in compliance with Canada's international obligations. In the case at bar, I find that the domestic instruments, such as the Treaty, the *Constitution Act, 1982*, and domestic case law satisfy the presumption of conformity and provide adequate bases on which to determine the objectives of reconciliation. It is, therefore, unnecessary to delve more deeply into the application of *UNDRIP* in this case.[100]

In short, the *UNDRIP* is treated as binding on Canada at international law and relevant for interpretive purposes in the same way that international agreements are.

The issue in *Gitxaala* was whether British Columbia's mineral tenure system, as established by the *Mineral Tenure Act*,[101] breached the petitioners' rights to be consulted pursuant to section 35 of the *Constitution Act, 1982.* The scheme permits free miners to register mineral claims over unclaimed Crown land, and thereby acquire various exploration rights, without any consultation of affected First Nations at the time of the first grant. In addition to relying on their section 35 rights, the petitioners sought to rely on the *UNDRIP* and BC legislation concerning it.[102] The chambers judge, Justice Alan Ross, held that the section 35 duty to consult was triggered by the BC scheme but that the scheme is not unconstitutional because the chief gold commissioner has discretion, within the current scheme, to create a structure for consultation of affected First Nations. As for the *UNDRIP*, the learned judge held that it is not implemented in BC law[103] but may be used as an interpretive aid in construing the *Mineral Tenure Act.* The learned judge noted a recent amendment to the *BC Interpretation Act* requiring that every Act and regulation "be construed as being consistent with the Declaration,"[104] characterizing this new provision as "a statutory overlay" to the interpretive process.[105]

The *Montour* case arose from a criminal prosecution of two Mohawk men on charges relating to the unlawful importation of tobacco into Canada from the United States. The defendants alleged that they had a right to trade in tobacco, and related rights, under a series of treaties with the Crown that were made between 1664 and 1760, known together as the *Covenant Chain.* They sought a permanent stay of the proceedings based on section 35 of the *Constitution Act*, *1982.*[106] In a judgment running over 1,600 paragraphs, Justice Sophie Bourque declared section 42 of the federal 2001 *Excise Act*[107] constitutionally inapplicable as contrary to the applicants' Aboriginal and treaty rights. In particular, she found that the governing Supreme Court of Canada authority on the test to be applied in determining an Aboriginal right protected by section 35, *R. v Van der Peet*,[108] must be departed from in large part because of Canada's acceptance of the *UNDRIP.*[109] Of the three cases briefly noted here, *Montour* is the most striking judicial use of the declaration, essentially to

[100] *Ibid* at para 93.

[101] *Mineral Tenure Act*, RSBC 1996, c 292; *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 [*Gitxaala*].

[102] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

[103] *Gitxaala*, *supra* note 101 at paras 444–70.

[104] *Interpretation Act*, RSBC 1996, c 238, s 8.1(3).

[105] *Gitxaala*, *supra* note 101 at para 409; see also paras 410–18.

[106] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[107] *Excise Act*, SC 2002, c 22.

[108] *R v Van der Peet*, [1996] 2 SCR 507.

[109] *R v Montour and White*, 2023 QCCS 4154 at paras 1171–1204.

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liberate the trial court from the constraints of a leading and long-established Supreme Court of Canada precedent. (GVE)

Sovereignty — Nootka Conventions — Aboriginal land title claims

The Nuchatlaht v British Columbia, 2023 BCSC 804 (11 May 2023). Supreme Court of British Columbia.

This was an Aboriginal title claim by the Nuchatlaht, one of the Nuu-Chah-nulth First Nations, to a portion of Nootka Island, famous since the late eighteenth century as the location of the Nootka Crisis and the subject of the *Nootka Conventions* between Britain and Spain. The Canadian law of Aboriginal title requires title claimants to show "sufficient occupation" of the claimed land to establish title at the time of the assertion of European (here, British) sovereignty. The date for the assertion of sovereignty over British Columbia has generally been accepted as 1846. However, the province (defendant to the title claim) challenged that date for Nootka Island, contending instead that the date "could be as early as 1790."[110]

Justice Elliot Myers criticized the province for not committing to a specific sovereignty date and rejected its attempt to rely on a date earlier than 1846. After reviewing precedents establishing 1846 as the relevant date for British Columbia as a whole,[111] he followed BC precedents to the effect that a mere assertion of sovereignty by a Royal Navy officer would not suffice; rather, actual effective control is required. He concluded: "[T]he jurisprudence, international law and logic all lead to the conclusion that dispute the use of the phrase 'assertion of sovereignty', actual establishment of sovereignty is required and not its mere assertion."[112]

The learned judge also found, based on expert testimony, that the *Nootka Conventions* "left the issue of sovereignty unresolved" and that the text of the 1794 convention expressly disclaimed assertions of sovereignty by the treaty's parties.[113] (GVE)

[110] *The Nuchatlaht v British Columbia*, 2023 BCSC 804 at para 75.
[111] *Ibid* at paras 79–88.
[112] *Ibid* at para 95.
[113] *Ibid* at paras 96–106.

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