Court File No: 37748

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE FEDERAL COURT OF APPEAL)

BETWEEN

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

APPELLANT
(Respondent in the Court below)

- AND -

ALEXANDER VAVILOV

RESPONDENT
(Appellant in the Court below)

APPELLANT'S FACTUM ON APPEAL

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW & STATEMENT OF FACT

A. OVERVIEW

1. Ten years after *Dunsmuir,* courts are still struggling to determine and apply the appropriate standard of review. In response to this Court's invitation to reconsider the nature and scope of judicial review since that decision was issued, Canada provides a proposed framework for the standard of review. This proposal seeks to provide a simpler analytical framework that yields more certain and predictable outcomes in judicial review. The foundation for the proposed approach is that the standard of review should be deferential, subject only to very limited exceptions where the foundational democratic principle and the rule of law make it clear that the courts must have the final word. The primary example is where an administrative body is considering the constitutionality of statutes. This framework seeks to bolster *Dunsmuir*'s core finding that a deferential approach best respects a legislature's decision to delegate a decision-making mandate to an administrative body.

2. In finding that Alexander Vavilov ("Vavilov") was not a Canadian citizen by birth based on his parents' employment as Russian spies in Canada, the Registrar of Citizenship ("Registrar") adopted an interpretation of s. 3(2)(a) of the *Citizenship Act* that was rational and defensible. The Registrar's conclusion that spies constitute employees of a foreign government should have been upheld and as such the exception to citizenship by birth should apply in his case. His parents' purpose for being in Canada was akin to that of other employees of a foreign government: they were dedicated to serving their home country, except that in their case, the employment was carried out clandestinely.

3. Even if there is room to debate the interpretation of s. 3(2)(a) of the *Citizenship Act*, in a review for unreasonableness, the interpretive task falls to the administrative decision-maker responsible for these matters, the Registrar of Citizenship. The majority of the Federal Court of Appeal purported to apply a reasonableness standard of review but did so in an "exacting" manner foreclosing meaningful deference to the Registrar's interpretation. On a proper understanding of reasonableness, the majority erred.

4. The Registrar's interpretation was based on the factors she found compelling and applicable. She gave the provision a rational, reasonable meaning. She did not and should not have been expected to undertake the type of formalized exercise of statutory interpretation that even courts do not always undertake. The majority of the Federal Court of Appeal summarily dismissed the rationale for her decision, conducted its own formal statutory interpretation exercise and found the decision unreasonable because it did not accord with the majority's analysis. That is not a proper application of a deferential standard of review. This appeal should be allowed.

B. SUMMARY OF THE FACTS AND HISTORY OF THE PROCEEDINGS

5. The respondent Alexander Vavilov's parents, Elena Vavilova ("Vavilova") and Andrey Bezrukov ("Bezrukov"), were born in Russia and are citizens of that country.[1] Sometime in the late 1980s or early 1990s, they entered Canada illegally, acquired birth certificates for two dead infant Canadians, Donald Howard Heathfield and Tracey Lee Ann Foley, and assumed their identities.[2]

6. The real Donald Howard Heathfield was born in Ontario on February 4, 1962 and died as an infant in Burlington, Ontario on March 24, 1962.[3] The real Tracey Lee Ann Foley was born in Montreal on September 14, 1962 and died in Hampstead, Quebec on October 31, 1962.[4]

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[1] Registrar's Decision Letter and Report to the Registrar [Registrar's Decision], **Appellant's Record [AR] vol I, tab 1, p 8**; US Department of Justice Office of Public Affairs "Ten Russian Agents Plead Guilty and Are to Be Removed from the United States" July 8, 2010 [US DOJ News Release] **AR vol II, tab 10(b), p 154**

[2] Registrar's Decision, **AR vol I, tab 1, p 9**; FBI Charges in South. Dist. New York [FBI Charges], **AR, vol II, tab 10(a), pp 132-133**; RCMP General Report, **AR, vol II, tab 10(d), p 166**

[3] Registrar's Decision, **AR, vol I, tab 1, p 9**; RCMP General Report, **AR, vol II, tab 10(d), pp 163-166**; FBI Charges, **AR, vol II, tab 10(a), pp 132-133**

[4] *Ibid*

1) Russia's "Illegals" Espionage Program

7. Throughout their time in Canada, Vavilova and Bezrukov worked as "Illegals" on an undercover assignment for the Foreign Intelligence Service of the Russian Federation (the *Sluzhba vneshney razvedki* [the External Intelligence Service] or "SVR").[5] The SVR has long emphasized human source intelligence, and it remains a focus and strength of Russian intelligence gathering.[6]

8. "Illegals" are employees of a foreign intelligence service who are deployed to other countries to operate covertly under assumed identities, specifically for the purpose of collecting information at the behest of their employer.[7] In Russia's case, the SVR provides its agents with extensive training before their deployment. These agents assume false identities, known as "legends," so that they can live in other countries on long-term "deep cover" assignments. They work to hide all connections between themselves and Russia even as they act under the direction and control of the SVR.[8]

9. The crafting of a legend can involve agents initially establishing themselves in a "host" country prior to arrival in the "target" country where intelligence will ultimately be collected.[9] The time spent in a host country is used to build the legend, which can be complex and elaborate, and can take years to develop.[10] Illegals will often undertake higher education, obtain employment and join professional associations to make their legends

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[5] Registrar's Decision, **AR, vol I, tab 1, pp 7-13**; FBI Charges, **AR, vol II, tab 10(a), pp 118, 120-121, 124, 126-128, 134, 147-148**; US DOJ News Release, **AR, vol II, tab 10(b), p 154**

[6] Anderson, Julie, "*The HUMINT Offensive from Putin's Chekist State*" International Journal of Intelligence and Counter Intelligence, 2007 [Anderson], **AR, vol II, tab 10(g), p 20**1

[7] Registrar's Decision, **AR, vol I, tab 1, p 9**

[8] *Ibid* at page 10; FBI Charges, **AR, vol II, tab 10(a), p 120**

[9] Registrar's Decision, **AR, vol I, tab 1, p 10**

[10] *Ibid* **p 10**

more credible.[11] Illegals assigned to operate together will also often have children to deepen their legends.[12]

10. Here, Vavilova and Bezrukov were deployed to Canada to steal identities and build their legends before relocating to the United States, the target country. While in Canada, they built their legends under their assumed Canadian aliases, Donald Howard Heathfield and Tracey Lee Ann Foley. Vavilova took courses at the Computer Institute of Canada and worked as a payroll manager. Bezrukov owned a business and graduated from York University in 1995 with a Bachelor's degree in International Economics.[13] They had two children – Timothy, born in 1990,[14] and then the respondent, Alexander, born in 1994.

11. Illegals never hold any form of diplomatic or consular status in the states to which they are deployed. Such a direct and overt association with Russian authorities would risk jeopardizing their capacity to create convincing legends.[15] To prevent the exposure of their true identities, they carefully limit their interactions with their home state. Illegals are supported by SVR officers posted to Russian "*rezidenturas*" [residences] abroad, who conduct clandestine meetings with them, provide surveillance and financial support, check their contacts, and so on.[16] The US indictment for Vavilova and Bezrukov also noted their direct, covert communication with Moscow Center over the years. This included "info tasks" (directives on intelligence gathering from Center), exchanges on intelligence gathering and the cultivation of potential sources, and itemized reports of the clandestine compensation Vavilova and Bezrukov received for their work on behalf of Russia.[17]

12. Vavilova and Bezrukov were not the first SVR agents deployed to Canada. Canada has proven to be an attractive "host" country in the past, as a Canadian passport is

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[11] *Ibid* at page 10; FBI Charges, **AR, vol II, tab 10(a), p 121**
[12] FBI Charges, **AR, vol II, tab 10(a), p 121**
[13] Registrar's Decision, **AR, vol I, tab 1, p 12**
[14] see *Timothy Vavilov v. Canada (MCI)*, 2018 FC 450
[15] Registrar's Decision, **AR, vol I, tab 1, pp 10-11, 13**
[16] Interview with Alexander Kouzminov, California Literary Review, **AR, vol III, tab 10(i), pp 273-275**; Anderson, *supra*, **AR, vol II, tab 10(g), p 206**
[17] FBI Charges, **AR, vol II, tab 10(a), pp 128, 147-148**

conducive to the mobility and credibility of deep cover Russian agents. Thus, agents like Vavilova and Bezrukov have relied on Canada's openness and international reputation to develop their legends before moving on to target countries, and using their false Canadian identities to open doors, cultivate contacts and gather intelligence.[18]

2) <u>Departure from Canada, Further Progress as Illegals, Arrest in USA</u>

13. In 1995, one year after Vavilov was born, the family moved to France so Bezrukov could pursue an MBA at the celebrated *École des ponts et chaussées*. This was the last time the family lived in Canada. In 1999, they moved to Boston, where Bezrukov completed an MPA at Harvard's prestigious John F. Kennedy School of Government.[19] All of the family members became naturalized American citizens. In the United States, Bezrukov was tasked by the SVR with collecting information on a variety of national security issues, including nuclear non-proliferation, Iran's nuclear program and US policy on Afghanistan and Central Asia.[20]

14. In June, 2010, Federal Bureau of Investigation ("FBI") agents arrested Vavilova and Bezrukov, and charged them with espionage-related offences. On July 8, 2010, Vavilova and Bezrukov admitted they were Russian citizens and that they were acting as agents on Russia's behalf.[21] That same day, they pleaded guilty to the charge of "conspiracy to act in the United States as unlawful agents of a foreign government" and were returned to Russia in a spy swap the next day.[22]

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[18] Registrar's Decision, **AR, vol I, tab 1, p 11**; Lefebvre, Stephane, "*Russian Intelligence Activities in Canada: The Latest Case of an "Illegal*," **AR, vol II, tab 10(h), pp 263-272**
[19] *Alexander Vavilov v. Canada (Citizenship and Immigration)*, 2015 FC 960 [FC Decision], **AR, vol I, tab 2, para 3**; Affidavit of Alexander Vavilov, **AR, vol I, tab 8, paras 2(b) and (c)**
[20] Registrar's Decision, **AR, vol I, tab 1, p 12**; FC Decision, **AR, vol I, tab 2, para 27**
[21] Registrar's Decision, **AR, vol I, tab 1, p 8**; US DOJ News Release, **AR, vol II, tab 10(b), p 154**
[22] Registrar's Decision, **AR, vol I, tab 1, pp 1, 3, 8**; US DOJ News Release, **AR, vol II, tab 10(b), p 154**

15. A few days earlier on July 5, 2010, Vavilov and his brother used their US passports to fly to Russia. They had applied for and received Russian tourist visas in May 2010 which Vavilov stated was in preparation for a holiday visit they planned to take in Russia. After their parents' arrest, the brothers carried on with their planned trip to Russia. Russian government officials met them at the airport.[23] Shortly thereafter, the United States revoked Vavilov's American passport and citizenship; on December 10, 2010, Russian authorities issued him and his brother Russian passports, and subsequently, Russian birth certificates.[24]

3) Applications for Canadian Documents

16. Vavilov made two unsuccessful attempts to obtain a new Canadian passport, one in 2010 and the other in 2011. In June 2012, he applied for a Canadian student visa, which was issued but then cancelled as a result of security, identity, and citizenship concerns regarding him and his family. At the request of Canadian officials, he amended his Ontario birth certificate by correcting his surname from Foley to Vavilov and by changing his parents' names and birth information to reflect their true Russian identities.[25]

17. Based on this amended birth certificate, the respondent applied for and obtained a Certificate of Canadian Citizenship ("certificate") in January 2013. In his application, Vavilov admitted his parents did not have Canadian citizenship and were Russian citizens, but answered "no" to the question asking if his parents were "employed in Canada by a foreign government or international agency" at the time of his birth.[26]

18. After he applied for a new Canadian passport, the Registrar of Citizenship, the official responsible for certificates under Canada's citizenship legislation,[27] advised

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[23] Affidavit of Alexander Vavilov, **AR, vol I, tab 8, paras 2(e), (g) and (h)**
[24] Affidavit of Alexander Vavilov, **AR, vol I, tab 8, paras 2(n) and (o)**; FC Decision, **AR, vol I, tab 2, para 6**
[25] FC Decision, **AR, vol I, tab 2, para 8**
[26] *Ibid*, **para 8**; Alexander Vavilov's Application for a Citizenship Certificate, **AR, vol II, tab 10(c), p 159**
[27] *Citizenship Regulations*, SOR/93-246 s. 26

Vavilov of her view that his certificate had been issued due to an administrative error. The Registrar informed Vavilov of her belief that Vavilova and Bezrukov were not Canadian citizens at the time of his birth and that they were acting as employees or representatives of the SVR on behalf of Russia. As such he was not entitled to citizenship under s. 3(2)(a) of the *Citizenship Act*.[28] That section provides an exception to citizenship by birth in Canada in certain circumstances:

Not applicable to children of foreign diplomats, etc.	*Inapplicabilité aux enfants de diplomates étrangers, etc.*
3(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	3(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*; (emphasis added)	a) agent diplomatique ou consulaire, représentant à un autre titre ou *au service au Canada d'un gouvernement étranger*; (italiques ajoutés)

19. The Registrar provided Vavilov with an opportunity to respond to her concerns and invited submissions from him. In his response, Vavilov now argued that his parents *were* Canadian citizens at the time of his birth and that their citizenship had not been revoked. He also argued that s. 3(2)(a) should be interpreted narrowly and that its application was limited only to those whose parents benefitted from diplomatic privileges and immunities.

C. DECISION OF THE REGISTRAR OF CITIZENSHIP

20. The Registrar considered the Report and Recommendation prepared by the Citizenship Analyst,[29] as well as Vavilov's submissions[30] and concluded pursuant to her

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[28] Procedural Fairness Letter, **AR, vol II, tab 7**
[29] Registrar's Decision, **AR, vol I, tab 1, pp 3-15**
[30] Alexander Vavilov's Submissions in Response to Fairness Letter, **AR, vol IV, tab 10(p), pp 431-725**

authority under s. 26(3) of the *Citizenship Regulations*[31] that Vavilov's citizenship certificate should be canceled and recalled. The Registrar found that Vavilov was not entitled to Canadian citizenship because he fell under the exception to citizenship by birth contained in s. 3(2)(a) of the *Act*.[32]

21. The reasons for the Registrar's decision are found in her letter and in the Analyst's Report, which the Registrar accepted. The Report included a review of the legislative history of the provision and noted that the previous iteration of the exception to the right to citizenship to persons born in Canada, enacted in 1950, was narrower than the current version in s. 3(2)(a). While the previous version of the exception explicitly linked the terms "representative" and "employee" to an official (or recognized) accreditation or to a diplomatic mission, the current provision did not link the "other representative or employee" of the foreign government to a diplomatic mission or consulate in Canada.[33]

22. The Report recognized that s. 3(2)(a) made reference to both "diplomatic or consular officers" and "other representatives or employees of a foreign government." Section 35(1) of the *Interpretation Act* was also canvassed and the term "diplomatic or consular officers" was found to encompass a large number of positions associated with official or recognized accreditations or posts within a foreign mission or consulate.[34] The Report concluded that the legislative change resulting in the current wording was intended to broaden the exception to citizenship to include individuals beyond those encompassed in the definition of "diplomatic or consular officer" in the *Interpretation Act*.

23. The jurisprudence dealing with s. 3(2)(a) was also considered and found to relate to individuals whose parents had diplomatic status in Canada at the time of their birth. The portion of s. 3(2)(a) that was relevant to this matter – "other representative or employee in Canada of a foreign government" – had yet to be judicially analysed.[35]

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[31] *Citizenship Regulations*, SOR/93-246 s. 26(3)
[32] Registrar's Decision, **AR, vol I, tab 1, p 1**
[33] Registrar's Decision, **AR, vol I, tab 1, at pp 6-7**
[34] *Interpretation Act*, RSC 1985, c I-21 s. 35(1)
[35] Registrar's Decision, **AR, vol I, tab 1, p 7**

24. The Report also canvassed the factual context of the matter. It noted that, following their arrest by the FBI in 2010, Vavilov's parents admitted to being Russian citizens and to working as agents on Russia's behalf. The Report reviewed information about the Illegals program and Vavilova and Bezrukov's activities to conclude that Vavilov's parents worked as employees of the SVR in Canada. His argument that his parents had been Canadian citizens at the time of his birth was rejected, as they had never applied for or been granted permanent resident status in Canada or Canadian citizenship.

25. The Registrar concluded that Vavilov was not entitled to Canadian citizenship because, at the time of his birth, his parents were neither permanent residents of Canada nor Canadian citizens, and they were employees of Russia. Vavilov was advised of this decision and that he was no longer recognized as a citizen of Canada.[36]

D. DECISION OF THE FEDERAL COURT

26. Vavilov sought judicial review in the Federal Court. Justice Bell applied the correctness standard to the Registrar's interpretation of s. 3(2)(a) of the *Citizenship Act* and upheld the Registrar's interpretation.[37] Under a contextual and purposive reading, considering the plain meaning, he found s. 3(2)(a) must include representatives and employees in Canada of foreign governments regardless of diplomatic or consular status. To hold otherwise and require diplomatic status would render the words "other representative or employee in Canada" meaningless and offend the rule that Parliament intends each word in a statute to have meaning.[38] It would also lead to an anomolous result, inasmuch as the children of a foreign diplomat who was registered at an embassy but in fact engaged in espionage would not be able to claim citizenship by birth, but the children of those who entered Canada unlawfully for the same purpose would become citizens.[39]

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[36] Registrar's Decision, **AR, vol I, tab 1, pp 1-2**
[37] FC Decision, **AR, vol I, tab 2, para 16**
[38] *Ibid*, para 23
[39] *Ibid*, para 25

27. Thus, the Registrar did not err in finding that individuals living in Canada under an assumed identity and working to establish "deep cover" to collect intelligence for a foreign government were included in the definition of "other representative or employee in Canada of a foreign government." The French version reinforced this interpretation, as it referred "even more broadly" to "représentant à un autre titre ou au service au Canada d'un gouvernement étranger." The provision was "clearly meant to cover individuals who are in Canada as agents of a foreign government, whatever their mandate."[40] He noted, "[a]nyone who moves to this country with the explicit goal of establishing a life to further a foreign intelligence operation, be it in this country or any other, is clearly doing so in the service of (French version), or as an employee or representative of, a foreign government."[41]

28. Regarding the application of s. 3(2)(a) to the case, Justice Bell rejected Vavilov's claim that his parents were Canadian citizens simply because they had obtained Canadian passports. The Registrar's decision was reasonable. There was sufficient evidence to conclude that the parents were Illegals working on a deep cover assignment for Russia's Foreign Intelligence Service, the SVR, while in Canada and that they were therefore captured by s. 3(2)(a).[42] Justice Bell also rejected Vavilov's allegations of a breach of procedural fairness[43] and certified two questions of general importance:

> *What is the standard of review applicable to the determination of whether Mr. Vavilov is not a Canadian citizen by reason of the application of paragraph 3(2)](a) of the Citizenship Act?*
>
> *Are the words "other representative or employee of a foreign government in Canada" found in paragraph 3(2)(a) of the Citizenship Act limited to foreign nationals who benefit from diplomatic privileges and immunities?*[44]

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[40] *Ibid*, para 24
[41] *Ibid*, para 24
[42] *Ibid*, paras 26-28
[43] *Ibid*, paras 18-20
[44] *Ibid*, para 31

E. DECISION OF THE FEDERAL COURT OF APPEAL

29. The Federal Court of Appeal allowed the appeal and quashed the Registrar's decision to cancel Vavilov's certificate. The Court unanimously upheld the Federal Court's decision on the fairness issue, holding that Vavilov knew the case to be met and was able to make meaningful submissions.[45] Although the majority (Stratas and Webb, JJA), per Stratas JA, found the standard of review for matters of procedural fairness to be in dispute in that court,[46] it found on the facts that it was unnecessary to resolve the issue in this case.[47]

30. The Court of Appeal also unanimously agreed that reasonableness was the appropriate standard of review for the Registrar's interpretation of the statutory provision.[48] For the majority, however, discussion of the standard of review was "not of great practical import" because an "exacting" reasonableness review with little "margin of appreciation" was required in this case.[49] It concluded this for three reasons: (1) this was a case where the interests of the individual were high;[50] (2) the Supreme Court had been applying reasonableness in an exacting way to statutory interpretation in the immigration context;[51] and (3) as the Registrar had "said nothing" on the statutory interpretation issue, and the analysis in the Report to the Registrar was "very limited," it could not give much deference to the decision because the Court could not be sure if the statutory interpretation issue was adequately considered.[52]

31. Thus, the majority afforded the Registrar only a narrow margin of appreciation and undertook a lengthy statutory interpretation exercise of its own. It found the provision

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[45] *Alexander Vavilov v Canada (Minister of Citizenship and Immigration)*, 2017 FCA 132 [FCA Decision] **AR, vol I, tab 3, paras 16-17, 92**
[46] *Ibid*, paras 11-13
[47] *Ibid*, para 14
[48] *Ibid*, paras 24-36, 92
[49] *Ibid*, paras 34-36
[50] *Ibid*, para 36
[51] *Ibid*, para 37
[52] *Ibid*, paras 38-39

applied only to the children of foreign government employees who benefitted from "diplomatic immunities and privileges."[53] It viewed this as consistent with international law and held that reading-in this qualification was the only reasonable interpretation.[54]

32. In dissent, Justice Gleason rejected the notion that because the Registrar was acting under the *Citizenship Act*, her decision was entitled to a lesser degree of deference.[55] She concluded that in assessing the reasonableness of a statutory interpretation, the Registrar's decision to adopt a particular interpretation had to be afforded deference if the text of the provision rationally admitted of more than one interpretation and the context and purpose did not clearly necessitate another interpretation. To conclude otherwise was to engage in correctness review. The court would be substituting its view as to the correct interpretation, even though the decision-maker's interpretation was defensible as a rational textual interpretation that was not negated by the context or purpose of the provision.[56]

33. Justice Gleason found the text of s. 3(2)(a) of the *Citizenship Act* to admit of at least two rational interpretations. Either the term "employee" meant what it plainly stated and included all employees of a foreign government who had children in Canada, or it could apply to only those foreign government employees who enjoyed diplomatic immunity. A strong case could be made for the former interpretation, as the latter required the reading-in of text that Parliament had deleted in 1976 when the words "attached to or in the service of a foreign diplomatic mission or consulate in Canada" were removed. It was reasonable to interpret this amendment to be substantive. Gleason JA disagreed that international law principles required a specific interpretation of s. 3(2)(a) of the *Act*. Thus neither the context nor the purpose of the provision mandated the majority's interpretation. It was open to the Registrar to conclude as she did.[57] Justice Gleason would have dismissed the appeal.

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[53] ***Ibid,*** para 45
[54] *Ibid,* para 72
[55] *Ibid,* para 93
[56] *Ibid,* paras 93-96
[57] *Ibid,* paras 98-103

F. LEGISLATIVE SCHEME

34. To be recognized as a Canadian citizen, an individual must meet the statutory requirements of Canada's citizenship legislation, the *Citizenship Act*.[58] Section 3 of the *Citizenship Act* defines who is a Canadian citizen. Section 3(1)(a) provides:

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;

35. However, entitlement to citizenship by birth in s. 3(1)(a) is qualified by s. 3(2)(a):

Not applicable to children of foreign diplomats, etc.	*Inapplicabilité aux enfants de diplomates étrangers, etc.*
3(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	3(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*; (*emphasis added)*	a) agent diplomatique ou consulaire, représentant à un autre titre ou *au service au Canada d'un gouvernement étranger*;

36. In 1947, Canada's first statute to define Canadian citizenship status, the *Canadian Citizenship Act,*[59] came into force ("*1947 Act*"). In 1950, the predecessor provision to present-day s. 3(2)(a) was added to the *1947 Act*. This created an exception to citizenship by birth for children of foreign nationals who were diplomatic or consular officers or

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

[59] *Canadian Citizenship Act*, RSC 1970, c C-19, **Appellant's Book of Authorities [ABOA], vol I, tab 2**

representatives accredited to Her Majesty, or employees attached to or in the service of a diplomatic mission or consulate.[60] Section 5(3) of the *1947 Act* read:

5(3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent	5(3) Le paragraphe (1) ne s'applique pas à une personne si, au moment de la naissance de cette personne, son parent responsable
(a) is an alien who has not been lawfully admitted to Canada for permanent residence; and	(a) était un étranger n'ayant pas été licitement admis au Canada pour y résider en permanence ; et
(b) is	(b) était
(i) a foreign diplomatic or consular officer or representative of a foreign government accredited to Her Majesty;	i) un agent diplomatique ou consulaire étranger ou un représentant d'un gouvernement étranger accrédité auprès de Sa Majesté,
(ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada; or	ii) un employé d'un gouvernement étranger, attaché à une mission diplomatique ou à un consulat au Canada, ou au service d'une telle mission ou d'un tel consulat, ou
an employee in the service of a person referred to in subparagraph (i).	un employé au service d'une personne mentionnée au sous-alinéa (i).

37. In 1977 a new *Citizenship Act* came into force with the present wording in English.[61] After the 1985 statutory revision process, the French text was amended to reflect the present wording. Thus, in both English and French, the present version of s. 3(2)(a) contains less restrictive wording than the prior version of this provision. By contrast to the prior wording, the present provision does not specify that employees of foreign governments must be attached to or accredited by a mission.

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[60] *An Act to amend The Canadian Citizenship Act*, SC 1950, c 29, s 5(2), **ABOA, vol I, tab 1**. This provision became s 5(3) in RSC 1970 and is referred to as such throughout this memorandum

[61] *Citizenship Act*, SC 1974-75-76, c 108, **ABOA, vol I tab 3**; *Citizenship Act*, RSC 1985, c C-29

38. The Registrar's authority to cancel and recall the certificate is found in s. 26(1) of the *Citizenship Regulations*.[62] It provides:

26 (1) The Registrar shall, in writing, require a person to surrender to the Registrar any certificate of naturalization, certificate of citizenship, miniature certificate of citizenship or other certificate of citizenship that contains the person's photograph, or certificate of renunciation, issued or granted to the person under the Act or prior legislation or any regulations made under them if there is reason to believe that the person may not be entitled to the certificate or has violated any of the provisions of the Act, and the person shall forthwith comply with the requirement.	26 (1) Le greffier ordonne par écrit à une personne de lui restituer tout certificat de naturalisation, certificat de citoyenneté, certificat de citoyenneté petit format ou autre certificat de citoyenneté portant sa photographie, ou certificat de répudiation qui lui a été délivré ou attribué en vertu de la Loi, la législation antérieure ou de leurs règlements d'application lorsqu'il y a des raisons de croire qu'elle n'y a pas droit ou a enfreint l'une des dispositions de la Loi. En pareil cas, la personne obtempère sans délai.

39. For completeness, s. 5(4) of the *Citizenship Act* provides the Minister discretion to grant citizenship "to alleviate cases of statelessness or of special and unusual hardship or to reward services of an exceptional value to Canada." Consideration under this provision can be requested by any applicant for Canadian citizenship.

PART II – POINTS IN ISSUE

40. What principles should govern standard of review, and in particular, how should a deferential standard be applied?

41. Is the decision of the Registrar of Citizenship unreasonable?

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[62] *Citizenship Regulations*, SOR/93-246 s 26(1)

PART III – ARGUMENT

A. PROPOSED FRAMEWORK FOR JUDICIAL REVIEW

1) The rule in standard of review is deference subject to very limited exception

42. In this Court's seminal decision in *Dunsmuir*,[63] the Court affirmed the purpose of judicial review in the preservation of the rule of law.[64] At the same time, the Court recognized the tension between the rule of law in this context and the foundational democratic principle: courts must respect a legislature's choice to entrust certain administrative actions and decisions to administrative tribunals.[65] It also sought to simplify the process of judicial review by reducing the number of standards from three to two.[66]

43. The task of determining the appropriate standard of review, however, has continued to be difficult.[67] The difficulties have spawned conflicting decisions and a variety of views about what the analysis should be, over which there is little consensus. Canada proposes that the Court further simplify the process by recognizing that generally the standard of review will be a deferential one, subject to very limited exception, as discussed below. This approach seeks to sharpen the focus of judicial review on the decision itself, rather than selection of a standard of review. The analysis emphasizes principle over categories or "contextual factors".[68] It is applicable to the substantive review of all types of administrative decisions or action (*e.g.* adjudicative, policy, enforcement),[69] it is consistent with the purpose of judicial review, and it builds on the key principles of respect for both the rule of law and the democratic principle, as articulated in *Dunsmuir* and the decisions that have followed.

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[63] *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]
[64] *Ibid*, para 27
[65] *Ibid*
[66] *Ibid*, paras 44-45
[67] Paul Daly, "The Signal and the Noise in Administrative Law" (2017) 68 UNBLJ at 68, **ABOA, vol II, tab 7**
[68] Swati Jhaveri, "The Survival of Reasonableness Review: Confirming the Boundaries" (2018) 46 Fed L Rev at 141, **ABOA, vol II, tab 10**; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, para 83 (Deschamps J., concurring)
[69] See *Dunsmuir*, paras 48, 51 and see paras 121, 123 (Binnie J., concurring)

2) <u>Fundamental constitutional principles underpin the determination of the standard of review</u>

44. The purpose, nature and scope of judicial review informs the selection of the standard of review in administrative law. Under the judicature provisions of the *Constitution Act, 1867*[70] and as required by the rule of law, courts have an inherent supervisory power to review administrative decisions or actions.[71]

45. The manner in which the court's supervisory power should be exercised must reflect the complementary relationship between that power, based on the rule of law, and the foundational democratic principle allowing legislatures to create and empower administrative bodies to make decisions.[72] Given this supervisory power, a legislature can never completely shield administrative actors from judicial review.[73] Each branch of government, including the courts, must respect the role of the other branches of government in Canada's constitutional framework.[74]

46. The balance between these complementary constitutional principles is reflected in the choice of the "standard of review" – namely, what degree of deference should be shown to an administrative body on judicial review?[75] In other words, when should a court defer

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[70] *Constitution Act, 1867* (UK), 30 & 31 Vict, c3, ss. 96 - 101, reprinted in RSC 1985, Appendix II, No 5

[71] *Dunsmuir*, para 31

[72] *Ibid* at para 27; See also: David Dyzenhaus, "*Dignity in Administrative Law*" (2012) 17:1 Rev Const Stud at 106 **ABOA, vol II, tab 8** ; Mark Walters, "Theorizing Administrative Law" (13 February 2018), *Double Aspect* (blog), online: <https://doubleaspect.blog/2018/02/13/theorizing-administrative-law/>. Jonathan M Coady, "*Time Has Come: Standard of Review in Canadian Administrative Law*" (2017) 68 UNBLJ at 94, **ABOA, vol I, tab 4**

[73] *Crevier v AG (Quebec)*, [1981] 2 SCR 220 at 234-235; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, para 103 [*Alberta Teachers*] (Cromwell J., concurring); *Dunsmuir*, para 159 (Deschamps J., concurring)

[74] *Dunsmuir*, para 27; Paul Daly, *A Theory of Deference in Administrative Law* (Cambridge: Cambridge University Press, 2012) [*Theory of Deference*] at page 1, **ABOA, vol I, tab 5**

[75] Coady, *supra* note 72 at 94-97, **ABOA, vol I, tab 4**

to the legislative choice to leave matters in the hands of administrative decision-makers and when must the court maintain a standard of correctness when reviewing administrative decisions? [76]

3) A legislative provision explicitly setting out a standard of review must be followed

47. Consistent with the principle of legislative supremacy, a legislative provision clearly imposing a standard of review must be applied.[77] While a legislature cannot oust judicial review entirely, it can explicitly direct courts to conduct that review with more or less deference. In the absence of a legislative pronouncement that explicitly identifies a standard of review, the principles set out in the next section should guide the courts in determining the appropriate standard of review.

4) Deference is the rule when no legislative provision explicitly states a standard of review

48. Absent a statutorily prescribed standard of review, deference is the rule. To succeed on deferential review, an applicant must demonstrate that a decision is unreasonable.

49. Subject to the limited exception explained below, the fact of the legislature having granted authority to an administrative body is all that is required to indicate that it intended that courts defer to that administrative decision-maker.[78] A stance of deference respects the legislature's allocation of authority to an administrative body to exercise particular powers within its mandate, including the determination of facts, the exercise of non-adjudicative powers, the interpretation of statutes and any other steps required or permitted by that

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[76] *Dunsmuir*, paras 48-50

[77] *R v Owen*, 2003 SCC 33, paras 31-32; *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, paras 26-29; *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, para 35; see also *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd [Edmonton East]*, 2016 SCC 47, paras 27-31

[78] Coady, *supra* note 72 at 100, **ABOA, vol I, tab 4** ; See generally Daly, *Theory of Deference*, *supra* note 74 at 55, **ABOA, vol I, tab 5**

mandate. A legislature grants authority to an administrative body so that the body, and not the courts, will render the decision or otherwise exercise the administrative power.

50. The adoption of a firm stance of deference also serves to promote the objectives of access to justice and judicial economy. Access to justice is promoted by ensuring decision-making is taking place in front of bodies which have familiarity working in a subject matter, and are usually able to deliver justice with less cost and formality than courts. According deference to the decisions of administrative bodies promotes judicial economy by promoting respect for and public confidence in those bodies and in the finality of their decisions. Judicial economy is further served through the adoption of a more straightforward analysis in judicial review, minimizing time and resources spent on determining what standard of review should apply.

51. A firm stance of deference, as manifested in a review for unreasonableness, is also consistent with the discretionary nature of judicial review: the onus rests with an applicant to demonstrate that a decision is so flawed that a court should exercise its remedial discretion to intervene. The court does not begin with the presumption that a decision brought before it on judicial review contains errors. It is always for the applicant to show that an error has been made which merits the exercise of the court's remedial jurisdiction to quash the decision. A review for unreasonableness begins from the position that the decision or action is valid until it has been shown to be unreasonable.

5) Contextual analysis is unhelpful and unnecessary to conclude that deference is owed

52. It is the allocation of the authority itself that justifies deference. Recourse to a contextual analysis is neither necessary, nor helpful. Lists of factors that may not be relevant to all circumstances have proven unhelpful in determing and applying the standard of review analysis. Privative clauses have consistently been found to be non-determinative of the legislature's intent with regard to the standard of review.[79] Apart from an explicit

[79] *Dunsmuir*, para 52; *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at 591; *Association des courtiers et agents immobiliers du Québec inc v*

legislative indication of the standard of review that should be adopted, the search for other signals of legislative intent regarding the choice of standards of review has proven to be an artificial exercise yielding unpredictable results.[80] This Court has held in a variety of contexts that a deferential approach applies regardless of the nature of the administrative body.[81] Therefore, absent the exceptional circumstance described below, deference is the rule. This respects legislative decisions to create administrative bodies and to vest them with particular powers.

6) Margins of appreciation should be rejected

53. When this Court stated in *Dunsmuir* that "[t]ribunals have a margin of appreciation within the range of acceptable and rational solutions,"[82] it did not purport to create a sliding scale of reasonableness in which varying degrees of deference would be applied on judicial review. Such an interpretation would be odds with *Dunsmuir*'s collapsing of patent unreasonableness and reasonableness *simpliciter* into a unified reasonableness standard and would risk undoing *Dunsmuir*'s streamlining of the judicial review analysis.

54. Although review for unreasonableness takes its colour from the context,[83] it is neither necessary, nor useful to conduct a preliminary analysis aimed at pinpointing the degree of judicial scrutiny to be applied to a particular administrative decision or action. There are no – and should not be any – varying levels of deference, "intensities of review" or "narrow" and "broad" margins of appreciation, as the majority found in this case and the Federal Court of Appeal has found in numerous other cases.[84] The "margins of

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Proprio-Direct inc, 2008 SCC 32, para 20; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, paras 23, 25 [*Khosa*]

[80] Dyzenhaus, *supra* note 72 at 108, **ABOA, vol II, tab 8**

[81] *Dunsmuir* at para 24 (adjudicative functions); *Khosa*, paras 17, 54 (policy); *Cataylst Paper Corp v North Cowichan (District)*, 2012 SCC 2 [*Catalyst*], paras 12-13 (regulatory)

[82] *Dunsmuir*, para 47

[83] *Catalyst*, para 18; *Khosa*, para 59

[84] See *eg*, *Re: Sound v Canadian Association of Broadcasters*, 2017 FCA 138, para 3; *Canadian National Railway Company v Emerson Milling Inc*, 2017 FCA 79, paras 66-67; *Maple Lodge Farms Ltd v Canadian Food Inspection Agency*, 2017 FCA 45, para 24;

appreciation" approach creates an additional, unnecessary analytical step, and creates uncertainty for lower courts and litigants: should review be "fully" deferential, or "exacting"?[85] Should the margin of appreciation be "narrow" or "wide"? Or somewhere in between? In effect, it replaces two standards of review with an indefinite number of standards.

55. The confusion inherent in a "margins of appreciation" approach has led to calls for this Court to "cement" its position, as outlined above: "[d]eference as a singular obligation, absent any conception of a spectrum of degrees or a sliding scale, would rightly direct parties to the merits of the administrative decision being reviewed."[86] This reinforcement of a unified approach to substantive judicial review is consistent with the existing jurisprudence of this Court.[87]

7) Conducting review for unreasonableness

56. A deferential analysis should begin, first, with a recognition that the onus lies squarely on an applicant to demonstrate that an action or decision is *un*reasonable and that the court should exercise its remedial discretion to intervene.[88] A respondent bears no onus to prove an action or decision is reasonable. An applicant must point to some error, whether stemming from the facts or the words of the statute, to question the validity of the

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Bergey v Canada (AG), 2017 FCA 30, paras 74, 76; *Turner v Canada (AG)*, 2017 FCA 2, para 52; *Canada (AG) v Bri-Chem Supply Ltd*, 2016 FCA 257, para 15; *Bell Canada v Canada (AG)*, 2016 FCA 217, para 51

[85] FCA Decision, **AR, vol I tab 3**, paras 35-36

[86] Coady, *supra* note 72 at 100-101, **ABOA, vol I, tab 4**

[87] *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, paras 51-53 [*Halifax*]; *Agraira v. Canada (Citizenship and Immigration)*, 2013 SCC 36, para 91 [*Agraira*]; *Inverhuron & District Ratepayers Assn v Canada (Minister of the Environment)*, 2001 FCA 203, para 40 [*Inverhuron*]

[88] *Lake v Canada (Minister of Justice)*, 2008 SCC 23, paras 34, 49; *Law Society of New Brunswick v Ryan*, 2003 SCC 20, para 48 [*Ryan*]; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, para 108 [*Williams Lake*]; Beverley McLachlin, "*Administrative Law is Not for Sissies: Finding a Path Through the Thicket*" (2010), 29 Can J Admin L & Prac 127 at 133, **ABOA , vol II, tab 12**

administrative decision or action.[89] Provided the outcome is defensible in light of the facts and the law, it is not open to a reviewing court to substitute its preferred result for that of the administrative decision-maker.[90]

57. Second, review for unreasonableness requires careful ("respectful") attention to the "reasons offered or which could be offered in support of a decision."[91] The administrative decision or action must be considered in the context of the record as a whole with a view toward understanding the basis for the decision reached by the administrative body.[92] The reviewing court is not to criticize every possible inconsistency, ambiguity or omission. The only issue is whether the decision meets the threshold requirements of justification, intelligibility and transparency.

58. In applying a deferential standard of review, the analysis focuses first and foremost on the administrative decision itself. A reviewing court must work "from *within* the decision" to assess if the outcome is unreasonable.[93] This requires that the court consider whether the decision discloses a rational basis for the conclusions drawn by the administrative body in light of its statutory mandate ("justified"); whether the decision is logical and internally consistent ("intelligible"); and whether it is possible to appreciate what the administrative body has decided and why ("transparent").[94]

59. A deferential analysis inevitably "takes its colour from the context."[95] The analysis turns in part on the nature of the question before the reviewing court: findings of fact should

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[89] *Workplace Health, Safety and Compensation Commission v Allen,* 2014 NLCA 42, paras 41-42
[90] *Khosa,* para 59; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, paras 12-13 [*Newfoundland Nurses*]
[91] *Dunsmuir,* para 48
[92] *Newfoundland Nurses,* paras 12, 15; Coady *supra* note 72, **ABOA, vol I, tab 4**, at 99-101
[93] Paul Daly, "*Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness*" (2016) 62:2 *McGill LJ* 527 at 563, **ABOA, vol II, tab 6**; Coady, *supra* note 72, **ABOA, vol I, tab 4**, at 102; *Ryan,* paras 50-51
[94] *Newfoundland Nurses,* paras 13, 16; *Vancouver International Airport Authority v Public Service Alliance of Canada,* 2010 FCA 158, para 16(d)
[95] *Khosa,* para 59

be upheld if they are supported by some evidence in the record, recognizing that it is not necessary for the administrative body to canvass every piece of evidence.[96] Exercises of discretion or determinations of mixed fact and law should not be disturbed if they are supported by a rational basis.[97]

60. With respect to questions of law or statutory interpretation, a deferential stance requires meaningful engagement with the result reached by the administrative body. Recognizing that formal reasons are not required in every instance – and that, if required, transparency as to the reasons behind the decision may be provided in various ways depending on the context[98] - an implicit finding on a question of law or statutory interpretation is similarly entitled to deference.[99] The rationale for the administrative body's decision or action may be discerned from the reasons provided, the underlying record, or if necessary, other material generated by the administrative decision-maker (*e.g.*, prior decisions, guidelines, circulars).[100]

61. As consistently confirmed by this Court, a deferential standard of review recognizes the legitimacy of multiple reasonable interpretations.[101] In performing its judicial review function, a reviewing court should refrain from measuring an interpretive outcome by reference to its own exercise of statutory interpretation, "finding any inconsistency to be unreasonable."[102] Nor should a reviewing court be too quick to find that only one possible

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[96] *British Columbia (Worker's Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25, para 30; *Newfoundland Nurses,* para 16
[97] *Halifax,* paras 44-47 & 52-53; *Agraira,* para 91; *Inverhuron,* paras 39, 60
[98] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, para 44 [*Baker*]
[99] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, paras 71- 72 [*McLean*]; *Agraira,* paras 57-58
[100] *Alberta Teachers,* paras 57, 61-62; *McLean,* paras 71-72; *Williams Lake,* paras 36-37; David Mullan, "*Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – the Top Fifteen*" (2013) Advoc Q 1 at 71-72, **ABOA, vol III, tab 13**
[101] See eg *Canada (Canadian Human Rights Commission v AG (Canada)*, 2018 SCC 31, para 55; *McLean,* paras 32-33, 40
[102] *Delios v Canada (Attorney General),* 2015 FCA 117, para 28; *Ryan,* paras 50-51

outcome exists.[103] Rather, a legal interpretation will be unreasonable only if it cannot be justified, recognizing that an administrative body may assign different weight to meaning, legislative intent, legal norms, and administrative norms and policies than would a reviewing court.[104] In a proper deferential analysis, it is not the role of the court to determine the "correct' interpretation. The only question is whether the applicant has demonstrated that the interpretation adopted by the administrative body is unreasonable.[105]

62. Such an approach respects the legislative choice to delegate primary decision-making responsibility to an administrative body. It is that body – not the reviewing court – that gets to decide among competing interpretations and to resolve any statutory ambiguity.[106] Judicial deference in such instances entails respect for the discretion exercised by the administrative body: the court must defer to "any interpretation that the statutory language can reasonably bear."[107] The adoption of a deferential analysis is not, however, equivalent to the automatic upholding of a decision: if an applicant can demonstate a decision is unreasonable, a court can intervene.

8) <u>Non-deferential review exceptional</u>

63. As this Court explained in *Dunsmuir*, "[j]udicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle."[108] The rule of law requires that "all exercises of public authority must find their source in law," while the democratic principle recognizes that "Parliament and legislatures [have] create[d] various administrative bodies and endow[ed] them with broad powers."[109] In the vast majority of cases, reasonableness review resolves this tension. There are, however,

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[103] *Ryan*, paras 50-51
[104] Ruth Sullivan, "*Judicial Review of Interpretations by Administrative Tribunals of their Home Legislation: What's Ambiguity Got To Do With It*?" [unpublished speech] at p 7, **ABOA, vol III, tab 14**
[105] *Williams Lake*, para 108
[106] *McLean*, paras 32-33, 40; *Williams Lake*, para 35
[107] *McLean*, para 40
[108] *Dunsmuir*, at para 27
[109] *Dunsmuir*, at paras 27, 28

exceptional situations where these two fundamental constitutional principles are not in tension but instead point towards a need for the courts to have the final word.

64. Correctness review is required not because an issue falls within a list of categories or because of a universally-applicable set of contextual factors, but because the question of law necessarily falls outside the justification for reasonableness review of an administrative body's decision-making. The primary example is where an administrative body is considering the constitutional invalidity of a provision. This can arise where an administrative body has to determine, for example, whether a particular provision is within the constitutional jurisdiction of the enacting legislature.[110] The reasons for deference described above fall away in such a circumstance, because the body is considering whether to decline to apply the statutory framework that Parliament prescribed for its processes and is engaged with an issue, the constitutionality of statutes, on which the Constitution gives the courts preeminent authority. In such circumstances, the foundational democratic principle and the rule of law are not in tension.

65. Outside the context of determinations on the constitutional validity of statutes (that should continue to be assessed on correctness) deference should continue to apply where administrative bodies make decisions that balance *Charter* rights or values with the applicable statutory objectives – as this Court has affirmed in *Doré* and the decisions that follow it.[111]

9) No standard of review for compliance with principles of natural justice

66. A standard of review analysis applies only with respect to review of the substance of an administrative decision or action.[112] It does not apply to review of whether an administrative body complied with the principles of natural justice. Procedural fairness is

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[110] *Dunsmuir,* para 58
[111] *Doré v Barreau du Québec*, 2012 SCC 12, para 57; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, paras 37-39; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, para 59
[112] *Brooks v Ontario Racing Commission*, 2017 ONCA 833, para 5

concerned with the manner in which the decision-maker went about making a decision, whereas the standard of review is applied to the substance of the decision itself.[113] A court assessing a procedural fairness argument is required to ask whether the adopted procedure satisfied the duty of fairness, having regard to the circumstances, and in consideration of the factors set out in *Baker*.[114] While deference is required in respect of a tribunal's choice of procedure, no further standard of review analysis is applicable in determining whether the procedure was fair.

10) Conclusion on proposed framework

67. In allocating authority to an administrative decision-maker, the legislature entrusts that administrative body with a mandate to interpret and apply its delegated powers. The legislature's choice to grant that authority to the administrative body, and not to the courts, should be respected. Other than in the exceptional circumstance outlined above, where constitutional principles require courts to have the final word, a deferential standard of review, therefore, applies to the judicial review of the exercise of a delegated power. In accordance with that deferential standard of review, the onus will be on the applicant to demonstrate that a decision is unreasonable and that a remedy is warranted.

B. STANDARD OF APPELLATE REVIEW

68. As this is an appeal from a judicial review, the task for this Court is to determine whether the lower court identified and properly applied the appropriate standard of review. This Court has described this as "stepping into the shoes of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision."[115]

69. Here, although the majority of the Federal Court of Appeal identified reasonableness as the appropriate standard of review, it erred in applying this standard with

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[113] *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, para 102; *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11, para 74; See also; *CPR v Canada (AG)*, 2018 FCA 69, paras 34-55
[114] *Baker*, paras 23 -28
[115] *Agraira*, para 46

an exacting margin of appreciation, in a manner akin to correctness. On any proper application of the reasonableness standard – either on the basis of the revised framework for analysis described above or on existing principles – the Registrar's decision and interpretation of s. 3(2)(a) of the *Citizenship Act* was reasonable.

C. APPLICATION OF FRAMEWORK - REGISTRAR'S DECISION REASONABLE

1) Majority's approach must be rejected

70. When the proposed framework for judicial review is applied to this case, or even when this Court's prior jurisprudence on standard of review is applied, it is clear that the majority of the Court of Appeal erred in its "margins of appreciation" approach to the standard of review. It did not adopt a general stance of deference towards the Registrar's decision. Instead, and despite this Court's repeated exhortations in favour of deference, the majority engaged in an insupportable contextual analysis to arrive at the determination that an exacting and narrow version of reasonableness was appropriate.

71. As argued above, an approach that applies varying degrees of deference, intensities of review, or margins of appreciation creates confusion. It permits – and indeed encourages – disguised correctness review, as Justice Gleason noted in dissent.[116] Here, despite selecting the right standard of review, the majority indicated that "to some extent, the standard of review debate in this case is not of great practical import."[117] This is revealing as the majority proceeded to an "exacting" review which afforded no deference.[118] The Registrar's interpretation was found unreasonable because it did not conform to the majority's preferred interpretation.

72. The majority offered three reasons for conducting an "exacting" review: the elevated interests of the individual, what the majority viewed as this Court's propensity for

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[116] FCA Decision, **AR, vol I tab 3, para 96**
[117] FCA Decision, **AR, vol I tab 3, para 34**
[118] *Ibid* at paras 35-39

conducting an exacting reasonableness review in immigration cases, and the claimed inadequacy of the Registrar's reasons.[119] These rationales are misplaced and cannot be reconciled with this Court's jurisprudence.

73. First, other than its own limited jurisprudence, the majority cited no authority that a more "exacting" approach was required where the "interests of the individual" were high.[120] Individuals' interests are relevant to the content of the duty of fairness, but not to the choice of standard of review. A focus on individual interests would lead to more intrusive review as most decisions subject to judicial review involve the interests of individuals. Further, the legislature left the task of making the decision to the administrative decision maker; the interests of the individual may be considered at that stage, when appropriate, *not* at the stage of choosing the standard of review.

74. Second, the majority's suggestion that "exacting" review was appropriate because "it has been a while since the Supreme Court has afforded a decision-maker in the immigration context much of a margin of appreciation on statutory interpretation issues" is problematic.[121] This statement ignores the principled basis for this Court's decisions about standard of review, imports a new and additional analysis in which subject-matter categories of greater or lesser deference need to be divined and sows uncertainty and confusion in the law. The principles behind standard of review jurisprudence and theory provide no justification for an automatic application of intrusive review in some subject-matter areas.

75. Third, the majority found that it was "hard to give much deference to the decision" because "we cannot be sure that the statutory interpretation issue was adequately

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[119] *Ibid* at paras 36-39
[120] *Ibid* at para 36, citing *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56, para 92; *Attaran v Canada (AG)*, 2015 FCA 37, para 49; and *Walchuk v Canada (Justice)*, 2015 FCA 85, para 33 (all decisions *per* Stratas JA)
[121] *Ibid*, para 37

considered."[122] This assertion is inaccurate, given the contents of the Report. It is also at odds with the post-*Dunsmuir* jurisprudence that emphasizes that courts should consider both the reasons which could be offered in support of the decision,[123] as well as implied interpretations of statutory provisions.[124] The majority's approach invites disguised application of the correctness standard of review.

2) Registrar's decision is reasonable

76. Applying the proposed framework for judicial review outlined above, or for that matter in accordance with the current jurisprudence, the Registrar's decision must be upheld. In concluding that Vavilov's parents were included in the wording of s. 3(2)(a) of the *Citizenship Act* and that he was therefore not a Canadian citizen based on his parents' admitted employment as Russian spies, the Registrar adopted an interpretation of s. 3(2)(a) that was justified, intelligible and transparent. It deserves deference.

77. The burden in judicial review is on the applicant challenging a decision to demonstrate that it is unreasonable and a remedy is required. Here, Vavilov bears the burden of establishing that the Registrar's interpretation of s. 3(2)(a) is unreasonable. He should not succeed.

78. Applying the necessary respectful attention to the Registrar's interpretation reveals its discernible rationality. Even if s. 3(2)(a) of the *Citizenship Act* were to admit of more than one rational interpretation, it is the task of the Registrar to choose between these interpretations, as the decision-maker entrusted by the legislature with interpreting and applying the *Act*. Her interpretation must be upheld if it is reasonable. The existence of more than one reasonable interpretation is not a basis on which to invalidate a decision.[125] Rather, the judicial review applicant must show that the interpretation that the decision-maker chose is unreasonable. Here, the Respondent cannot do so.

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[122] *Ibid*, para 39
[123] *Dunsmuir*, paras 48-49; see also *Newfoundland Nurses*, para 16; *Edmonton East*, paras 38, 40
[124] *Agraira*, paras 56-58; *McLean*, paras 71-72
[125] *McLean*, paras 38-41

79. The conclusion that spies in Canada constitute employees of a foreign government for the purpose of s. 3(2)(a) of the *Citizenship Act* is logical and justified. The text, in English and French, as well as the legislative evolution of the provision to deliberately remove the prior requirement of accreditation and connection to a foreign mission in Canada, all make clear that the purpose is broader than that articulated by the majority of the Court of Appeal.

80. Further, as noted by the Registrar, foreign agents engaged in surreptitious activity like the Illegals program will avoid disclosing their true identity and connection to their real country of citizenship. Although clearly employees of the foreign government, the purpose of their mission and the building of their legends could not be carried out if they were to expose their connection to Russia by accreditation as Russian diplomatic or consular staff. The application of s. 3(2)(a) to such employees of a foreign government is logical, irrespective of accreditation or diplomatic status. The broadly worded formulation of the provision seeks to treat the children of all employees in Canada of foreign governments in the same fashion, regardless of whether they are the children of diplomats, consular officials, or spies.

81. The Registrar's interpretation of s. 3(2)(a) thoughtfully considers the text and legislative evolution to come to an understanding of the meaning and applicability of the provision. While the Registrar does not canvas every possible rule of statutory interpretation – and is not obliged to do so – the basis of her decision is clear and defensible. Moreover, even upon consideration of such additional further factors, as addressed below, the reasonableness of the Registrar's decision is not displaced.

a) Cogent basis for Registrar's decision

82. Although other arguments were advanced below, including the somewhat astonishing claim the Registrar erred in applying s. 3(2)(a) because Vavilov's parents "were, and continue to be, citizens of Canada,"[126] the principle issue remaining on appeal

[126] FC Decision, **AR, vol I tab 2, para 21**

relates to the meaning of the phrase "other representative or employee" of a foreign government in s. 3(2)(a) of the *Act*.

83. The reasoning for the Registrar finding s. 3(2)(a) applicable in this case is found in the Report from the Citizenship Analyst she endorsed. Although the majority of the Court of Appeal appears to have faulted the Registrar for not providing her own separate, extensive analysis, the adoption of recommendations and reports by senior decision makers is a well-established means of providing reasons in administrative decision-making.[127]

84. Here, the Report to the Registrar provided a 12-page explanation for her decision. The Report includes a consideration of the legislative evolution of the exception in s. 3(2)(a), highlighting that by contrast with the prior version of the provision, there is no longer any requirement that representatives or employees of foreign governments have official accreditation, or any connection to a diplomatic mission.[128]

85. The Report referenced the *Interpretation Act*'s definition of "diplomatic and consular staff" to conclude that the wording used in s. 3(2)(a) was meant to encompass additional individuals[129] and considered the limited case law relating to this provision.[130] The report also addressed Vavilov's contention that s. 3(2)(a) did not apply because his parents did not hold any diplomatic or consular status when they resided in Canada. As was noted in the Report, the very nature of Bezrukov and Vavilova's employment as undercover SVR agents meant they would not be "afforded diplomatic or consular privileges because such direct and overt association with Russian authorities would risk jeopardizing their capacity to create convincing and 'non-Russian' legends."[131]

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[127] *Baker*, para 44; *Oberlander v Canada (Attorney General)*, 2004 FCA 213, paras 35-36; *Bigstone Cree Nation v Nova Gas Transmission Ltd*, 2018 FCA 89, para 65
[128] Registrar's Decision, **AR, vol I, tab 1, pp 6-7**
[129] *Ibid*, p 7
[130] *Ibid*, p 7
[131] *Ibid*, pp 10-11, 13

86. The Report also included considerable and detailed analysis of why Bezrukov and Vavilova should be considered "employees" of the Russian government, including an overview of the Illegals program and its *modus operandi*, and the clandestine activities of Vavilov's parents in both Canada and the United States.

87. These reasons and the interpretation provided in the Report were cogent and, as noted by Gleason JA in dissent, there is a "strong case" for the Registrar's interpretation.[132] The Report plainly met the threshold requirements of justification, transparency and intelligibility. Assessed in its entirety, it provides a reasonable explanation for the Registrar's interpretation of s. 3(2)(a). Reasons must be reviewed with an eye towards understanding the basis for the administrative body's decision, not critiquing every possible inconsistency, ambiguity or omission.[133]

b) Interpretation remains reasonable – other factors considered

88. The proposed standard of review framework outlined above reaffirms the importance of deference and respect for a tribunal's decisions and interpretations of its governing statute. It discourages courts from engaging in the type of disguised correctness review employed by the majority of the Court of Appeal here.[134]

89. In conducting review for unreasonableness, if there are additional relevant interpretive factors which the administrative decision-maker did not consider, a court may examine such factors in order to discover whether the administrative decision-maker's interpretation can be sustained. That was Gleason JA's approach in upholding the Registrar's interpretation. As she noted, even when such additional factors are considered, the Registrar's interpretation remains reasonable in light of the plain text of the statute, its context or purpose.

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[132] FCA Decision, **AR, vol I tab 3, para 98**
[133] *Newfoundland Nurses*, para 16; *Canada (MCI) v Ragupathy*, 2006 FCA 151, para 15
[134] See: *Rizzo and Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27; *Bell ExpressVu Limited Partnerships v Rex*, 2002 SCC 42

i. Text – Primary indicator of meaning

90. While the majority of the Court of Appeal gave short shrift to the text of the provision in its statutory interpretation exercise, this Court has instructed that the proper approach to statutory interpretation requires that the text be the starting point of the analysis and that the words of the legislation be viewed as the primary indication of its object and of the legislature's intent.[135] It was therefore not unreasonable for the Registrar to place emphasis on the particular words Parliament chose.

91. In this case, the plain language of the provision – "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" – supports the Registrar's interpretation that the exception to citizenship by birth includes representatives and employees of a foreign government whether or not they benefit from any diplomatic immunity or privilege. There is nothing in the provision itself which restricts its application to a particular subset of representatives or employees.

92. This French text, "*au service au Canada d'un gouvernement étranger,*" which the majority did not consider, reinforces this interpretation of "employee" and provides additional support to the Registrar's interpretation. The shared meaning of the English and French text is one of serving or working for a foreign government, without any additional requirement of a formal employment contract, title or status of any particular sort.[136]

93. Further, as noted by the Registrar, the term "diplomatic and consular officer" is a defined term in subsection. 35(1) of the *Interpretation Act*[137] which provides a lengthy definition of personnel included as diplomatic or consular officers. If possession of a type of diplomatic status were necessary for the application of s. 3(2)(a) as the majority reasoned, there would be no need to specify employees, as the provision does, because a

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[135] *R v Conception*, 2014 SCC 60, para 14; *Montreal v Dorval*, 2017 SCC 48, para 88 (dissent per Côté and Brown JJ)
[136] *R v Daoust*, 2004 SCC 6, paras 26-31
[137] *Interpretation Act*, RSC 1985, c I-21, s 35(1); *Hitti v Canada (Citizenship and Immigration)*, 2007 FC 294, para 37

wide variety of persons are included in the definition already set out in the *Interpretation Act*.

94. The majority's textual interpretation of s. 3(2)(a) of the *Citizenship Act* must be rejected because it leaves without effect[138] the language of "other representative or employee in Canada of a foreign government."[139] Meaning should be given to both the first and second phrases in s. 3(2)(a) of the *Citizenship Act*, and, as the Registrar found, the meaning of the first phrase must be different from the second.[140] The presumption against redundancy was not rebutted.[141] The majority's interpretation of s. 3(2)(a) is not supported by the text and applicable statutory interpretation principles.[142] Rather these support that "other representative or employee in Canada of a foreign government" covers employees or representatives of a foreign government in Canada without consular or diplomatic status.

ii. Context

95. The contextual factors that the majority considered were problematic. Although the majority relied on s. 3(2)(c) of the *Citizenship Act* to inform its contextual interpretation, this separate exception to citizenship by birth relates to employees of international organizations who expressly benefit from diplomatic privileges and immunities. By contrast, the provision at issue in this appeal contains no such express exception. Both sections were enacted at the same time and the absence of qualifying language in s. 3(2)(a) supports the reasonableness of the Registrar's interpretation.

96. It is also unclear how the majority came to the conclusion that the coming into force of both ss. 3(2)(a) and (c) in 1977 "merely clarified the legislative intent and eliminated a

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[138] *Tower v MNR*, 2003 FCA 307, para 16 [*Tower*]; *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20, paras 45-46
[139] FCA Decision, **AR, vol I, tab 3, paras 51-55, 67, 72**
[140] *Tower*, paras 15-17; FCA Decision, **AR, vol I, tab 3, para 51**; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham: Butterworths, 2002), at 158-159 **ABOA, vol III, tab 15**
[141] FCA Decision, **AR, vol I, tab 3, para 67**
[142] *Ibid* at para 52

redundancy."[143] As Justice Gleason held in dissent, the parallelism between the two sections still "leaves unanswered the question that was before the Registrar in this case, namely, what the term "employee" in s. 3(2)(a) of the *Act* means."[144] It was for the Registrar of Citizenship to interpret this term.

97. Little can be drawn from Hansard regarding either the *1947 Act* or the current *Act*. The one brief reference to s. 3(2) in the history provides no meaningful assistance in the interpretation of the provision at issue in this appeal because it relates to a different provision, s. 3(2)(c), which is about employees of "large foreign corporations."[145] It is not about employees of foreign governments. As the dissent held, the comments in the history about s. 3(2)(c) "are not dispositive as they concern a different provision, and indeed, the difference in wording between paragraphs 3(2)(c) and 3(2)(a) of the Act can reasonably be read to support the interpretation of the Registrar."[146]

98. The Registrar's interpretation is also consistent with the interpretive principle of avoiding absurdity. The result of the majority's interpretation is that the children of foreign intelligence agents posted to an embassy and benefiting from diplomatic privileges and immunities (*e.g.* by posing as "economic development officers") are caught by s. 3(2)(a), while the children of undercover intelligence agents engaged in surreptitious espionage are not. Justice Bell recognized this absurdity on judicial review,[147] but the majority dismissed it on appeal as a policy choice – despite the presumption against absurdity being a well-established principle of statutory interpretation.[148]

99. Indeed, the policy preference that the majority cited is itself somewhat illogical and results in anomalous outcomes. Here, Vavilova and Bezrukov's purpose for being in

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[143] *Ibid* at para 67
[144] *Ibid* at para 100
[145] *Ibid* at para 68; see House of Commons, Standing Committee on Broadcasting, Films and Asistance to the Arts, Bill C-20 (Tuesday, February 24, 1976) (Hon. J.H. Faulkner, Secretary of State), **AR, vol IV, tab 10(p), pp 656-657**
[146] FCA Decision, **AR, vol I, tab 3, para 99**
[147] FC Decision, **AR, vol I, tab 2, para 25**
[148] FCA Decision, **AR, vol I, tab 3, paras 80-84**; *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, paras 105, 108 [*Wilson*]

Canada was the same as the other categories of persons in s. 3(2)(a) of the *Act*, namely, to serve their home government, in their case through their undercover work as long term Illegals for Russia's Foreign Intelligence Service. Like the other persons listed in s. 3(2)(a), their presence and employment in Canada was intended to advance their state's interests.

100. As the majority indicates, its preferred interpretive policy choice for s. 3(2)(a) of the *Act* tries to avoid visiting "the sins of the parents" upon Vavilov, whose parents were undercover Russian spies, but has no difficulty in visiting those same "sins" on the children of accredited diplomats or foreign spies merely because they operate out of an embassy. In any event, this is not a case about the "sins" of Vavilov's parents, but rather their employment as Russian spies and their duty and service to Russia at the time of his birth in Canada. When considered in this way, the provision provides for the same outcome for both of these categories of persons in Canada in the service of a foreign government. In both cases, the children's citizenship status is a result of their parents' chosen employment. By contrast, the majority's interpretation results in a more favourable outcome for the children of those whose employment is surreptitious and undertaken by fraudulent means.

101. Since it must be presumed that Parliament did not intend to produce illogical results, the majority's interpretation is unjustified. In any event, it is certainly not the only reasonable interpretation.

102. This Court has recognized that sometimes statutory language admits of more than one reasonable interpretation.[149] Here, the dissent held that the text of s. 3(2)(a) admitted of at least two rational interpretations: that of the Registrar and that of the majority.[150] The Registrar of Citizenship was empowered to resolve any statutory uncertainty with respect to the exception in s. 3(2)(a). The interpretation she adopted is logical, gives meaning to the words in the provision and results in consistency of outcome for the children of employees of foreign governments. By contrast, the majority's formalistic approach to

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[149] *McLean*, paras 37-39
[150] FCA Decision, **AR, vol I, tab 3, para 98**

statutory interpretation undermines the purposes of the *Citizenship Act* and the exception in s. 3(2)(a). The Registrar's interpretation should prevail.

iii. Legislative purpose

103. In the absence of any explicit statement of purpose in the legislation for s. 3(2)(a) of the *Act*, it was reasonable for the Registrar to interpret the provision in the manner that she did. Conversely, the majority ignored the plain language of the provision and cited no authority when it set out to "demonstrate" that the purpose of s. 3(2)(a) was to "bring Canadian law into accordance with international law and other domestic legislation, including the *Foreign Missions and International Organizations Act*, SC 1991, c 41"[151] ("*FMIOA*"). The *FMIOA* merely serves to implement provisions of the *Vienna Convention on Diplomatic Relations* ("*VCDR*") and the *Vienna Convention on Consular Relations* ("*VCCR*") into Canadian law with respect to the privileges and immunities of foreign missions and international organizations.[152] Neither the *FMIOA* nor its predecessors deal with citizenship nor do they define the meaning of "employee in Canada of a foreign government" in the *Citizenship Act*. Not only does the purpose articulated by the majority misapprehend the relationship between the *FMIOA* and Canadian citizenship law, it fails to take into consideration the broader purpose of the provision indicated by the legislative amendment.

a) Legislative amendment sheds light on purpose

104. In her interpretation of s. 3(2)(a), the Registrar took note of the legislative evolution of the provision noting the change in wording from its prior more restrictive application and giving this weight. By contrast, in arriving at its chosen purpose, the majority did not appreciate the significance of legislative intent demonstrated by Parliament's explicit broadening of the principled exception to citizenship by birth. In effect, the majority read into the provision the very requirement that Parliament removed from it in the current legislation.

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[151] *Ibid* at para 45

[152] *Foreign Missions and International Organizations Act*, SC 1991, c 41, s 3 and Schedule 1 (*Vienna Convention on Diplomatic Relations*) [VCDR] and Schedule II (*Vienna Convention on Consular Relations*) [VCCR]

105. Section 3(2)(a) of the current *Citizenship Act* replaced s. 5(3) of the *1947 Act*, which precluded citizenship by birth for children of foreign nationals who were diplomatic or consular officers or representatives accredited to Her Majesty, or employees *attached to or in the service of a diplomatic mission or consulate*.[153] Thus, the legislative amendment removed the need for any accreditation or connection or link between the representative or employee to a diplomatic or consular mission.

106. The current provision excepts from citizenship by birth in Canada a broader range of persons than the previous iteration. As the Registrar noted, it applies to all employees of foreign governments without the former requirement of accreditation or a link to a diplomatic mission.[154] This exception should apply equally to children of undercover foreign spies and registered foreign diplomats, both of whom are employees of a foreign government and both of whose primary duty and service is to that foreign state.

107. The best indication of Parliament's intent is the provisions it has enacted.[155] Reading the term "employee of a foreign government" to include Vavilov's parents is consistent with the *Act's* safeguarding of the rights and privileges of Canadian citizenship, and rejects an overly narrow or rigid application of s. 3(2)(a) of the *Act*.[156]

b) Principle of *jus soli* does not dictate who becomes a citizen

108. The majority also pointed to *jus soli* (which it considered a customary international law principle and a backdrop to s. 3 of the *Act*) to justify assigning its preferred purpose to s. 3(2)(a). *Jus soli* is one form of acquisition of citizenship, namely automatic acquisition of citizenship through birth in the country regardless of the parents' nationality or status. However, most states do not grant citizenship on the basis of *jus soli* and international law does not require them to do so. To be considered customary international law, a rule must

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[153] *An Act to amend The Canadian Citizenship Act*, SC 1950, c 29, s. 5(2). This provision became s. 5(3) in RSC 1970 and is referred to as such throughout this memorandum.
[154] Registrar's Decision, **AR, vol I, tab 1, p 7**
[155] *R v Knott*, 2012 SCC 42, para 54
[156] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed, Ontario: LexisNexis, 2014 at 58, 211-216, **ABOA, vol III, tab 16**

be supported both by (1) consistent state practice, and (2) states' understanding that the rule is obligatory as a matter of international law (*opinio juris*).[157] Neither element is met here.

109. Most states do not bestow citizenship according to the *jus soli* principle. Indeed, no European countries, for example, grant an unqualified automatic citizenship by birth and they have no obligation to do so.[158] Only 34 countries grant the automatic acquisition of citizenship through birthplace regardless of parents' nationality or status.[159] This practice is not consistent and uniform enough to ground a rule of customary international law.[160] Indeed, in the last several decades some countries have even ended or modified their application of birthright citizenship.[161] Moreover, there is no evidence that, when followed, *jus soli* is driven by a sense of international legal obligation. Accordingly, there is no basis for the majority's conclusion that the *jus soli* approach is required by customary international law.

110. Even those states that have chosen to grant citizenship on the basis of automatic *jus soli* are not prohibited from applying exceptions. A review of citizenship entitlements in various countries reveals a multitude of variations and restrictions on automatic citizenship by birth.[162] Some *jus soli* states exclude from automatic citizenship by birth only the children of diplomatic officials or diplomatic agents or foreign personnel on a diplomatic mission.[163] Others exclude both the children of a foreign envoy parent with immunity and

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[157] *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, paras 38, 102
[158] See Annex A; See: *Acquisition and Loss of Nationality, Policies and Trends in 15 European States*, by IMISCOE (International Migration, Integration and Social Cohesion) Research, Amsterdam University Press, 2006, Volume 1: Comparative Analyses (500 pages) Link: https://www.imiscoe.org/docman-books/280-bauboeck-ersboll-groenendijk-waldrauch-2006/file; Volume 2: Country Analyses (588 pages), see generally and also 1.2.1, 1.2.2 [IMISCOE]
[159] See Annex A
[160] See *Asylum Case (Colombia v. Peru)*, [1950] ICJ Rep 266, pp 276, 277
[161] See Annex A
[162] See Annex A
[163] See Annex A

those of the occupying enemy.[164] Importantly, some countries simply exclude children of foreign parents who are in the service of their country or government without requiring that service to be tied to diplomatic status.[165]

111. In short, nothing in international law requires Canada to bestow citizenship on the basis of birth, much less to give citizenship to children born to parents in the service of a foreign government. To the contrary, international law affords substantial discretion to individual states to determine citizenship.[166] Given the above, the majority's conviction that international law requires s. 3(2) to be construed narrowly is unfounded. Sovereign states are not obligated by international law to have identical citizenship regimes, to grant citizenship based on *jus soli* or to limit the exceptions to citizenship by birth to those whose parents had diplomatic status or immunity.

c) Immunities and privileges: One-size does not fit-all

112. Crucially, the majority did not adequately appreciate the nature and wide variety of diplomatic and consular privileges and immunities, further undermining its finding on the provision's purpose. Rather than determining if the Registrar's interpretation could be supported, the majority determined that the purpose of s. 3(2)(a) was to bring Canadian law in line with international law so that the provision applies only to those employees of foreign governments "who benefit from diplomatic privileges and immunities from civil and/or criminal law." The majority relied on the fact that while Canadians are subject to the law, persons with diplomatic privileges and immunities do not have duties and

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[164] See Annex A

[165] See Annex A

[166] Craig Forcese, "A Tale of Two Citizenships: Citizenship Revocation for 'Traitors and Terrorists'" (2014) 39:2 Queen's LJ 556 at 559-560, **ABOA, vol II, tab 9**; *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 12 April 1930, 179 LNTS 89 art 1 (entered into force 1 July 1937), **ABOA, vol III, tab 20**; *Nottebohm Case (Liechtenstein v Guatemala)*, [1955] ICJ Rep 4, p 20, **ABOA, vol III, tab 21**. To be clear, Canada is not a signatory or a party to the Optional Protocol concerning Acquisition of Nationality of the *VCDR* [18 April 1961: 55 *United Nations Treaty Series*, vol 500], p 223

responsibilities to Canada and are not subject to all Canadian laws.[167] This reflects an overly simplistic understanding of the applicability and extent of diplomatic privileges and immunities[168] and undermines the rationale for the majority's interpretation.

113. Indeed, privileges and immunities accorded to the staff of a diplomatic mission and their families under the *VCDR* and the *VCCR* vary widely according to job classification and function. For example, diplomatic agents (the head of a mission and other diplomatic staff) and their families have immunity from criminal, civil and administrative jurisdiction,[169] but staff in the domestic service of the mission do not have such personal immunity. They enjoy immunity only in respect of acts performed in the course of their duties.[170] Career consular officers under the *VCCR* are not protected from criminal prosecution in their personal capacities[171] and their family members are also not entitled to those immunities or to personal inviolability.

114. Once it is recognized that the concept of "diplomatic privileges and immunities" is composed of a spectrum of protections and exemptions and that some of those who "benefit" from diplomatic protection in reality enjoy only minimal privileges and virtually no immunities, it becomes harder to reconcile the majority's chosen purpose with the language of s. 3(2)(a). The heterogeneity of privileges and immunities undermines the central premise of the majority's analysis and provides no basis for concluding s. 3(2)(a) is meant to reflect the *FMIOA* or the *VCDR* and the *VCCR*.[172]

d) Fundamental purpose of the provision

115. In its effort to establish that the purpose of s. 3(2)(a) could only be related to diplomatic immunity, the majority failed to consider the more fundamental purposes that

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[167] FCA Decision, **AR, vol I, tab 3, paras 46-47**
[168] *Ibid* at para 101
[169] VCDR, Articles 29, 30, 31, 33, 34, 35 and 36.
[170] VCCR, Art. 41; *Satow's Diplomatic Practice*, (6th edn, Oxford: Oxford University Press, 2009) at 161 [*Satow's*] **ABOA, vol III, tab 17**
[171] *Satow's*, at 269-271, **ABOA, vol III, tab 17**
[172] FCA Decision, **AR, vol I, tab 3, paras 57-60**

the *Citizenship Act* serves, namely governing how Canadian citizenship can be acquired and lost, as well as establishing what the Honourable Paul Martin Sr. described as "the fundamental status upon which the rights and privileges of Canadians will depend."[173]

116. While the majority noted that Canadian citizens have "duties and responsibilities to Canada,"[174] it failed to consider the normative foundation for the status of citizenship, which has been characterized as more than a mere "legal status, defined by a set of rights and responsibilities." It is also "an identity, an expression of one's membership in a political community."[175] This political community envisages "the nation as 'the bearer of sovereignty, the central object of loyalty, and the basis of collective solidarity.'"[176]

117. As this Court stated, "[c]itizenship is membership in a state; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status."[177] The US Supreme Court has similarly stated that citizenship can be understood as "membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society."[178] The Registrar's interpretation of s. 3(2)(a) was consistent with this more fundamental meaning and purpose of citizenship.

D. CONCLUSION

118. This case highlights the mischief that can result from the application of a reasonableness standard that lacks true deference and allows a reviewing court to apply disguised correctness review to administrative decisions. A "margins of appreciation"

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[173] *House of Commons Debates*, 20th Parl, 2nd Sess, No 1 (2 April 1946) at 503 (Hon. Paul Martin) **ABOA, vol III, tab 18**
[174] FCA Decision, **AR, vol I, tab 3, paras 46-47**
[175] Will Kymlicka, "New Forms of Citizenship" in Thomas J Courchene & Donald J Savoie, eds, *The Art of the State: Governance in a World Without Frontiers* (Montreal: Institute for Research in Public Policy, 2003) 265 at 268 (referencing T.H. Marshall, 1965), **ABOA, vol II, tab 11**
[176] *Ibid* at 274
[177] *Winner v SMT (Eastern) Ltd.*, [1951] SCR 887 at 918, cited with approval in *Lavoie v Canada*, 2002 SCC 23, para 57
[178] *Luria v United States*, 231 US 9 (SC 1913) at 22

approach is one in which courts have felt at liberty to apply various intensities of reasonableness review and substitute their own views of the issues, paying scant attention to the actual reasoning of the administrative-maker.

119. Deference should be re-affirmed as the central pillar and primary guiding principle of judicial review of administrative action. A deferential standard of review which conveys respect for the allocation of decision-making authority and for the rational choices of administrative decision-makers should be the norm.

120. Here, it has not been demonstrated that the decision-maker the legislature entrusted to interpret and apply the *Act*, the Registrar of Citizenship, adopted an unreasonable interpretation after a review of the provision's text and legislative history. The Registrar's interpretation was reasonable and no convincing analysis has been put forward to show that it was unreasonable. The decision was justified, transparent and intelligible. On a proper application of the proposed standard of review, consistent with the importance of deference to Parliament's chosen decision-maker, the decision should be upheld.

PART IV –COSTS

121. The Minister does not seek costs of this proceeding.

PART V – NATURE OF ORDER SOUGHT

122. The Appeal should be allowed and the Registrar's decision restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 3rd day of August, 2018.

Michael H. Morris
Of Counsel for the Appellant

Marianne Zoric
Of Counsel for the Appellant

John Provart
Of Counsel for the Appellant

ANNEX A

Note	Category	List of Applicable Countries
158 159	Countries with automatic citizenship by birth (*jus soli*)	Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, United States, Uruguay, Venezuela, Pakistan, Fiji, Tuvalu, Lesotho, and Tanzania

Note	Category	List of Applicable Countries
161	Examples of countries which have ended or modified automatic birthright citizenship in recent decades	Thailand (1972), Portugal (1981), United Kingdom (1983), Australia (1986), India (1987), Malta (1989), Ireland (2005), New Zealand (2006), Dominican Republic (2010)

Note	Category	List of Applicable Countries
162	Countries with automatic birthright citizenship which have one or more explicit exceptions	Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Dominica, Grenada, Guatemala, Guyana, Honduras, Jamaica, Nicaragua, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, United States, Pakistan, Fiji, Tuvalu, Lesotho, Tanzania

Note	Category of Exception to Automatic Birthright Citizenship	List of Applicable Countries
163	Countries with automatic birthright citizenship which exclude children of diplomatic officials or agents or foreign personnel on a diplomatic mission	Guatemala, Honduras, Bolivia, Argentina and Nicaragua, Canada
164	Countries with automatic birthright citizenship which exclude children of a foreign envoy parent with immunity	Antigua and Barbuda, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Pakistan, Fiji, Tuvalu, Lesotho (unless the child would be stateless as a result), Tanzania, United States
164	Countries with automatic birthright citizenship which exclude children of the occupying enemy	Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Pakistan, Tuvalu, Lesotho, Tanzania, United States **[only difference from above is Fiji]**
165	Countries with automatic birthright citizenship which exclude children of foreign parents who are in the service of their own country or government without requiring that service to be tied to diplomatic status	Brazil, Chile, Nicaragua, Canada

NOTE – As based on review of constitutional documents – some countries may have further exceptions in other domestic legislation.

The Americas

Antigua and Barbuda
Constitution of Antigua and Barbuda 1981, art 113, online: Constitute https://www.constituteproject.org/constitution/Antigua_and_Barbuda_1981.pdf?lang=en [text]; https://www.constituteproject.org/ontology/Antigua_and_Barbuda?lang=en

Argentina
Citizenship and Nationalization Law 346 (revised 23 November 2004), art 1. http://www1.hcdn.gov.ar/dependencias/dip/textos%20actualizados/346-240805.pdf *(Spanish)* http://cadmus.eui.eu/bitstream/handle/1814/40846/EUDO_CIT_CR_2016_04.pdf.

Barbados
Constitution of Barbados 1966 (rev. 2007), art 4, online: Constitute https://www.constituteproject.org/constitution/Barbados_2007.pdf?lang=en [text]; https://www.constituteproject.org/ontology/Barbados?lang=en

Belize
Constitution of Belize 1981 (rev. 2011), art 24, online: Constitute https://www.constituteproject.org/constitution/Belize_2011.pdf?lang=en [text]; https://www.constituteproject.org/ontology/Belize?lang=en
Belizean Nationality Act, CAP 161, R.E. 2000, s 5. http://www.belizelaw.org/web/lawadmin/PDF%20files/cap161.pdf

Bolivia
Constitution of Bolivia (Plurinational State of) 2009, art 141, online: Constitute https://www.constituteproject.org/constitution/Bolivia_2009.pdf?lang=en [text]; https://www.constituteproject.org/ontology/Bolivia?lang=en

Brazil
Constitution of Brazil 1988 (rev. 2017), art 12, online: Constitute https://www.constituteproject.org/constitution/Brazil_2017.pdf?lang=en [text]; https://www.constituteproject.org/ontology/Brazil?lang=en

Canada
Citizenship Act, RSC 1985, c C-29, s 3. http://laws-lois.justice.gc.ca/PDF/C-29.pdf

Chile
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APPENDIX "A" – STATUTES RELIED ON

A. CHARTER, STATUTES, AND REGULATIONS	**Para. Number(s)**
An Act to amend The Canadian Citizenship Act, SC 1950, c 29, s. 5(2)	36, 105
Canadian Citizenship Act, RSC 1970, c C-19, s. 5(3)	36
Citizenship Act, SC 1974-75-76, c 108	37
Citizenship Act, RSC 1985, c C-29, s. 3(2)(a)., 5(4)	34, 37
Citizenship Regulations, SOR/93-246. s. 26(1) and (3)	18, 20, 38
Constitution Act, 1867 (UK), 30 & 31 Vict, c3, ss. 96 - 101	44
Foreign Missions and International Organizations Act, SC 1991, c 41, Schedule 1 (Vienna Convention on Diplomatic Relations), Schedule II (Vienna Convention on Consular Relations)	103, 113
Interpretation Act, RS, c I-23, s 35(1)	22, 93
B. JURISPRUDENCE	
Agraira v. Canada (MPSEP), 2013 SCC 36	55, 59, 60, 68, 75
Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61	45, 60
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PART VI – STATUTES & REGULATIONS

An Act to amend The Canadian Citizenship Act, SC 1950, c 29, s. 5(2)

Born after commencement of the Act

5. (1) A person, born after the commencement of this Act, is a natural-born Canadian citizen,

(a) if he is born in Canada or on a Canadian ship; or

(b) if he is born outside of Canada elsewhere than on a Canadian ship, and

(i) his father, or in the case of a child born out of wedlock, his mother, at the time of that person's birth, is a Canadian citizen, and

(ii) the fact of his birth is registered, in accordance with the regulations, within two years after its occurrence or within such extended period as the Minister may, under the regulations, authorize in special cases.

Not applicable to children of foreign diplomats, etc.

(2) Subsection one does not apply to a person if, at the time of that person's birth, his responsible parent

(a) is an alien who has not been lawfully admitted to Canada for permanent residence; and

(b) is

(i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to His Majesty,

(ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or

(iii) an employee in the service of a person referred to in sub-paragraph (i).

The Canadian Citizenship Act, RSC 1970, c C-19, s. 5(3) [Repealed]

Person born after December 31, 1946	***Personne née après le 31 décembre 1946***
5. (1) A person born after the 31st day of December 1946 is a natural-born Canadian citizen,	5. (1) Une personne née après le 31 décembre 1946 est un citoyen canadien de naissance,
(a) if he is born in Canada or on a Canadian ship; or	a) si elle est née au Canada ou sur un navire canadien; ou
(b) if he is born outside of Canada elsewhere than on a Canadian ship, and	b) si elle est née hors du Canada ailleurs que sur un navire canadien, et si

(i) his father, or in the case of a child born out of wedlock, his mother, at the time of that person's birth, is a Canadian citizen, and
(ii) the fact of his birth is registered, in accordance with the regulations, within two years after its occurrence or within such extended period as the Minister may authorize in special cases.

Not applicable to children of foreign diplomats, etc.

(3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent
(a) is an alien who has not been lawfully admitted to Canada for permanent residence; and
(b) is
(i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
(ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
(iii) an employee in the service of a person referred to in subparagraph (i).
R.S., c. 33, s. 5; 1952-53, c. 23, s. 14.

(i) son père ou, dans le cas d'un enfant ne hors du mariage, sa mère, au moment de la naissance de cette personne, était un citoyen canadien, el si
(ii) le fait de sa naissance est inscrit, en conformité des règlements, au cours des deux années qui suivent cet événement ou au cours de la période prolongée que le Ministre peut autoriser en des cas spéciaux.

Ne a 'applique pas aux enfants de diplomates étrangers, etc.

(3) Le paragraphe (I) ne s'applique pas a une personne si, au moment de la naissance de cette personne, son parent responsable
a) était un étranger n'ayant pas été licitement admis au Canada pour y résider en permanence; et
b) était
(i) un agent diplomatique ou consulaire étranger ou un représentant d'un gouvernement étranger accrédité auprès de Sa Majesté,
(ii) un employé d'un gouvernement étranger, attache a une mission diplomatique ou a un consulat au Canada, ou au service d'une telle mission ou d'un tel consulat, ou
(iii) un employé au service d'une personne mentionnée au sous-alinéa (i). S.R., c. 33, art. 5; 1952-53, c. 23, art. 14.

***Citizenship Act*, SC 1974-75-76, c 108, s.** 2

Not applicable to children of foreign diplomats, etc.

(2) Paragraph 30(1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent. residence and either of his parents was

(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
(b) an employee in the service of a person referred to in paragraph (a); or
(c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there is granted, by or under any Act of the Parliament of Canada, diplomatic privileges and immunities certified by the Secretary of State for External Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a),

Inapplicabilité aux enfants de diplomates étrangers, etc.

(2) L'alinéa 3(l)(a) ne s'applique pas à une personne si au moment de sa naissance ni son père ni sa mère n'était ni citoyen ni légalement admis au Canada à titre de résident permanent et si son père ou sa mère était
a) un agent diplomatique ou consulaire ou un autre représentant ou employé au Canada d'un gouvernent étranger;
b) un employé au service d'une personne mentionnée à l'alinéa a); ou
c) un fonctionnaire ou un employé, au Canada, d'une organisation internationale, notamment d'une institution spécialisée des Nations unies, auquel une loi du Parlement du Canada reconnaît des privilèges et immunités diplomatiques dont l'équivalence avec ceux accordés aux personnes mention·nées à l'alinéa a) est certifiée par le secrétaire d'État aux Affaires extérieures.

***Citizenship Act*, RSC 1985, c. C-29, s. 3(1) and (2) and 5(4)**

Persons who are citizens

3 (1) Subject to this Act, a person is a citizen if

(a) the person was born in Canada after February 14, 1977;

(b) the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen;

Citoyens

3 (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :

a) née au Canada après le 14 février 1977;

b) née à l’étranger après le 14 février 1977 d’un père ou d’une mère ayant qualité de citoyen au moment de la naissance;

(c) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship;

c) ayant obtenu la citoyenneté — par attribution ou acquisition — sous le régime des articles 5 ou 11 et ayant, si elle était âgée d'au moins quatorze ans, prêté le serment de citoyenneté;

Not applicable to children of foreign diplomats, etc.

(2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was

(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

(b) an employee in the service of a person referred to in paragraph (a); or

(c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

Inapplicabilité aux enfants de diplomates étrangers, etc.

(2) L'alinéa (1)a) ne s'applique pas à la personne dont, au moment de la naissance, les parents n'avaient qualité ni de citoyens ni de résidents permanents et dont le père ou la mère était :

a) agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger;

b) au service d'une personne mentionnée à l'alinéa a);

c) fonctionnaire ou au service, au Canada, d'une organisation internationale — notamment d'une institution spécialisée des Nations Unies — bénéficiant sous le régime d'une loi fédérale de privilèges et immunités diplomatiques que le ministre des Affaires étrangères certifie être équivalents à ceux dont jouissent les personnes visées à l'alinéa a).

Special Cases

5(4) Despite any other provision of this Act, the Minister may, in his or her discretion, grant citizenship to any person to alleviate cases of statelessness or of special and unusual hardship or to reward services of an exceptional value to Canada.

Cas particuliers

5(4) Malgré les autres dispositions de la présente loi, le ministre a le pouvoir discrétionnaire d'attribuer la citoyenneté à toute personne afin de remédier à une situation d'apatridie ou à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada.

***Citizenship Regulations*, SOR/93-246. s. 26(1) and 26(3)**

26(1) The Registrar shall, in writing, require a person to surrender to the Registrar any certificate of naturalization, certificate of citizenship, miniature certificate of citizenship or other certificate of citizenship that contains the person's photograph, or certificate of renunciation, issued or granted to the person under the Act or prior legislation or any regulations made under them if there is reason to believe that the person may not be entitled to the certificate or has violated any of the provisions of the Act, and the person shall forthwith comply with the requirement.

26(1) Le greffier ordonne par écrit à une personne de lui restituer tout certificat de naturalisation, certificat de citoyenneté, certificat de citoyenneté petit format ou autre certificat de citoyenneté portant sa photographie, ou certificat de répudiation qui lui a été délivré ou attribué en vertu de la Loi, la législation antérieure ou de leurs règlements d'application lorsqu'il y a des raisons de croire qu'elle n'y a pas droit ou a enfreint l'une des dispositions de la Loi. En pareil cas, la personne obtempère sans délai.

(3) Where the Minister has determined that the holder of a certificate of naturalization, certificate of citizenship, miniature certificate of citizenship or other certificate that contains the holder's photograph, or certificate of renunciation, issued or granted under the Act or prior legislation or any regulations made thereunder is not entitled to the certificate, the Registrar shall cancel the certificate.

(3) Lorsque le ministre a déterminé que le titulaire d'un certificat de naturalisation, d'un certificat de citoyenneté, d'un certificat de citoyenneté petit format ou autre certificat de citoyenneté portant sa photographie, ou d'un certificat de répudiation délivré ou attribué en vertu de la Loi ou de la législation antérieure ou en application de leurs règlements n'a pas droit à ce certificat, le greffier annule le certificat.

***Constitution Act, 1867* (UK), 30 & 31 Vict, c3, ss. 96 – 101**

VII. JUDICATURE
Appointment of Judges
96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

VII. JUDICATURE
Nomination des juges
96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

Selection of Judges in Ontario, etc.
97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Choix des juges dans Ontario, etc.
97. Jusqu'à ce que les lois relatives à la propriété et aux droits civils dans Ontario, la Nouvelle-Écosse et le Nouveau-Brunswick, et à la procédure dans les cours de ces provinces, soient rendues uniformes, les juges des cours de ces provinces qui seront nommés par le gouverneur-général devront être choisis parmi les membres des barreaux respectifs de ces provinces.

Selection of Judges in Quebec
98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Choix des juges dans Québec
98. Les juges des cours de Québec seront choisis parmi les membres du barreaude cette province.

Tenure of office of Judges
99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Durée des fonctions des juges
99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.

Termination at age 75
(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

Cessation des fonctions à l'âge de 75 ans
(2) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera d'occuper sa charge lorsqu'il aura atteint l'âge de soixantequinze ans, ou à l'entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge.

Salaries, etc., of Judges
100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof

Salaires, etc. des juges
100. Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont

are for the time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

alors salariés, seront fixés et payés par le parlement du Canada.

General Court of Appeal, etc.
101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a
General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Cour générale d'appel, etc.
101. Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.

***Foreign Missions and International Organizations Act*, SC 1991, c 41, including Schedule 1 (Vienna Convention on Diplomatic Relations) and Schedule 2 (Vienna Convention on Consular Relations)**

Conventions on diplomatic relations and consular relations

3 (1) Articles 1, 22 to 24 and 27 to 40 of the Vienna Convention on Diplomatic Relations, and Articles 1, 5, 15, 17, 31 to 33, 35, 39 and 40, paragraphs 1 and 2 of Article 41, Articles 43 to 45 and 48 to 54, paragraphs 2 and 3 of Article 55, paragraph 2 of Article 57, paragraphs 1 to 3 of Article 58, Articles 59 to 62, 64, 66 and 67, paragraphs 1, 2 and 4 of Article 70 and Article 71 of the Vienna Convention on Consular Relations, have the force of law in Canada in respect of all foreign states, regardless of whether those states are parties to those Conventions.

Conventions sur les relations diplomatiques et consulaires

3 (1) Les articles 1, 22 à 24 et 27 à 40 de la Convention de Vienne sur les relations diplomatiques sont applicables sur le territoire canadien à tous les États étrangers, qu'ils soient ou non parties à celle-ci. Il en va de même pour les articles 1, 5, 15, 17, 31 à 33, 35, 39 et 40, les paragraphes 1 et 2 de l'article 41, les articles 43 à 45 et 48 à 54, les paragraphes 2 et 3 de l'article 55, le paragraphe 2 de l'article 57, les paragraphes 1 à 3 de l'article 58, les articles 59 à 62, 64, 66 et 67, les paragraphes 1, 2 et 4 de l'article 70 et l'article 71 de la Convention de Vienne sur les relations consulaires.

Privileges, immunities and benefits

4 (1) For the purpose of according to the diplomatic mission and consular posts of any foreign state, and persons connected therewith, treatment that is comparable to

Privilèges, immunités et avantages

4 (1) Le ministre des Affaires étrangères peut, par arrêté, afin d'assurer l'équivalence de traitement entre, d'une part, la mission diplomatique ou un poste

the treatment accorded to the Canadian diplomatic mission and Canadian consular posts in that foreign state, and persons connected therewith, the Minister of Foreign Affairs may, by order, with respect to that state's diplomatic mission and any of its consular posts, and any person connected therewith,

(a) extend any of the privileges and immunities accorded thereto under section 3, other than duty and tax relief privileges;

(b) grant thereto any of the benefits set out in the regulations;

(c) withdraw any of the privileges, immunities and benefits accorded or granted thereto; and

(d) restore any privilege, immunity or benefit withdrawn pursuant to paragraph (c).

Duty and tax relief privileges

(2) For the purpose of according to the diplomatic mission and consular posts of any state, and persons connected therewith, duty and tax relief privileges that are comparable to the duty and tax relief privileges accorded to the Canadian diplomatic mission and Canadian consular posts in that state, and persons connected therewith, the Governor in Council, on the joint recommendation of the Minister of Foreign Affairs and the Minister of Finance, may, by order, with respect to that state's diplomatic mission and any of its consular posts, and any person connected therewith,

(a) extend any of the duty and tax relief privileges accorded thereto under section 3; and

(b) grant thereto any duty or tax relief privilege not provided for in the Vienna

consulaire canadiens dans un État étranger ou toute personne ayant un lien avec l'un ou l'autre et, d'autre part, les mission, poste ou personne correspondants de cet État étranger au Canada :

a) étendre les privilèges ou immunités dont ils bénéficient en vertu de l'article 3, à l'exception des privilèges d'exonération fiscale ou douanière;

b) leur octroyer les avantages déterminés par règlement;

c) leur retirer, en tout ou en partie, ces privilèges, immunités ou avantages;

d) les leur restituer, en tout ou en partie.

Privilèges d'exonération fiscale ou douanière

(2) Afin d'assurer l'équivalence de traitement prévue au paragraphe (1), le gouverneur en conseil peut, par décret pris sur recommandation conjointe du ministre des Affaires étrangères et du ministre des Finances :

a) étendre les privilèges d'exonération fiscale ou douanière des mission diplomatique ou postes consulaires d'un État étranger ou des personnes ayant un lien avec l'un ou l'autre au-delà de ceux qui leur sont accordés en vertu de l'article 3;

b) leur octroyer des privilèges d'exonération fiscale ou douanière non prévus à la Convention de Vienne sur les relations diplomatiques ou à la Convention de Vienne sur les relations consulaires, selon le cas.

Convention on Diplomatic Relations or in the Vienna Convention on Consular Relations.

Idem

(3) For the purpose of according to the diplomatic mission and consular posts of any foreign state, and persons connected therewith, duty and tax relief privileges that are comparable to the duty and tax relief privileges accorded to the Canadian diplomatic mission and Canadian consular posts in that foreign state, and persons connected therewith, the Minister of Foreign Affairs may, by order, with respect to that foreign state's diplomatic mission and any of its consular posts, and any person connected therewith,

(a) withdraw any duty or tax relief privilege accorded thereto under section 3 or by an order made under subsection (2); and

(b) restore any duty or tax relief privilege withdrawn pursuant to paragraph (a).

Detention of goods

(4) The Minister of Foreign Affairs may, by order, authorize the detention by officers under the *Customs Act* of goods imported by a diplomatic mission or consular post of a foreign state for any period during which, in the opinion of the Minister, the foreign state applies any of the provisions of the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations restrictively with the result that the privileges and immunities accorded to that state's diplomatic mission and consular posts in Canada exceed those accorded to a Canadian diplomatic mission and Canadian consular posts in that foreign state.

1991, c. 41, s. 4;

Idem

(3) Le ministre des Affaires étrangères peut, par arrêté, toujours afin d'assurer l'équivalence de traitement prévue au paragraphe (1), leur retirer, en tout ou en partie, les privilèges d'exonération fiscale ou douanière dont ils bénéficient en vertu de l'article 3 ou par suite du décret visé au paragraphe (2); il peut de même les leur restituer, en tout ou en partie.

Rétention de marchandises

(4) Le ministre des Affaires étrangères peut, par arrêté, autoriser la rétention par les agents, au sens de la *Loi sur les douanes*, de marchandises importées par la mission diplomatique ou un poste consulaire d'un État étranger pour la période pendant laquelle, à son avis, cet État applique de façon restrictive toute disposition de la Convention de Vienne sur les relations diplomatiques ou de la Convention de Vienne sur les relations consulaires, de sorte que les privilèges et immunités accordés aux mission diplomatique et postes consulaires de cet État au Canada dépassent ceux que cet État accorde à la mission diplomatique

1995, c. 5, s. 25;
2002, c. 12, s. 2.

SCHEDULE I (Section 2) **Vienna Convention on Diplomatic Relations**
Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1 The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2 His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

Article 31

1 A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

canadienne et aux postes consulaires canadiens.
1991, ch. 41, art. 4;
1995, ch. 5, art. 25;
2002, ch. 12, art. 2.

ANNEXE I (article 2) **Convention de Vienne sur les relations diplomatiques**
Article 29

La personne de l'agent diplomatique est inviolable. Il ne peut être soumis à aucune forme d'arrestation ou de détention. L'État accréditaire le traite avec le respect qui lui est dû, et prend toutes mesures appropriées pour empêcher toute atteinte à sa personne, sa liberté et sa dignité.

Article 30

1 La demeure privée de l'agent diplomatique jouit de la même inviolabilité et de la même protection que les locaux de la mission.
2 Ses documents, sa correspondance et, sous réserve du paragraphe 3 de l'article 31, ses biens jouissent également de l'inviolabilité.

Article 31

1 L'agent diplomatique jouit de l'immunité de la juridiction pénale de l'État accréditaire. Il jouit également de l'immunité de sa juridiction civile et administrative, sauf s'il s'agit :

a) d'une action réelle concernant un immeuble privé situé sur le territoire de l'État accréditaire, à moins que l'agent diplomatique ne le possède pour le

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

compte de l'État accréditant aux fins de la mission;

b) d'une action concernant une succession, dans laquelle l'agent diplomatique figure comme exécuteur testamentaire, administrateur, héritier ou légataire, à titre privé et non pas au nom de l'État accréditant;

c) d'une action concernant une profession libérale ou une activité commerciale, quelle qu'elle soit, exercée par l'agent diplomatique dans l'État accréditaire en dehors de ses fonctions officielles.

2 A diplomatic agent is not obliged to give evidence as a witness.
3 No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
4 The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

2 L'agent diplomatique n'est pas obligé de donner son témoignage.
3 Aucune mesure d'exécution ne peut être prise à l'égard de l'agent diplomatique, sauf dans les cas prévus aux alinéas a), b) et c) du paragraphe 1 du présent article, et pourvu que l'exécution puisse se faire sans qu'il soit porté atteinte à l'inviolabilité de la personne ou de sa demeure.
4 L'immunité de juridiction d'un agent diplomatique dans l'État accréditaire ne saurait exempter cet agent de la juridiction de l'État accréditant.

Article 33

1 Subject to the provisions of paragraph 3 of this Article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.
2 The exemption provided for in paragraph 1 of this Article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:

Article 33

1 Sous réserve des dispositions du paragraphe 3 du présent article, l'agent diplomatique est, pour ce qui est des services rendus à l'État accréditant, exempté des dispositions de sécurité sociale qui peuvent être en vigueur dans l'État accréditaire.
2 L'exemption prévue au paragraphe 1 du présent article s'applique également aux domestiques privés qui sont au

(a) that they are not nationals of or permanently resident in the receiving State; and

(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3 A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State shall impose upon employers.
4 The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.
5 The provisions of this Article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

service exclusif de l'agent diplomatique, à condition :

a) qu'ils ne soient pas ressortissants de l'État accréditaire ou n'y aient pas leur résidence permanente; et

b) qu'ils soient soumis aux dispositions de sécurité sociale qui peuvent être en vigueur dans l'État accréditant ou dans un État tiers.

3 L'agent diplomatique qui a à son service des personnes auxquelles l'exemption prévue au paragraphe 2 du présent article ne s'applique pas doit observer les obligations que les dispositions de sécurité sociale de l'État accréditaire imposent à l'employeur.
4 L'exemption prévue aux paragraphes 1 et 2 du présent article n'exclut pas la participation volontaire au régime de sécurité sociale de l'État accréditaire pour autant qu'elle est admise par cet État.
5 Les dispositions du présent article n'affectent pas les accords bilatéraux ou multilatéraux relatifs à la sécurité sociale qui ont été conclus antérieurement et elles n'empêchent pas la conclusion ultérieure de tels accords.

Article 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf

Article 34

L'agent diplomatique est exempt de tous impôts et taxes, personnels ou réels, nationaux, régionaux ou communaux à l'exception :

a) des impôts indirects d'une nature telle qu'ils sont normalement incorporés dans le prix des marchandises ou des services;

b) des impôts et taxes sur les biens immeubles privés situés sur le territoire

of the sending State for the purposes of the mission;

(c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 36

1 The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

de l'État accréditaire, à moins que l'agent diplomatique ne les possède pour le compte de l'État accréditant, aux fins de la mission;

c) des droits de succession perçus par l'État accréditaire, sous réserve des dispositions du paragraphe 4 de l'article 39;

d) des impôts et taxes sur les revenus privés qui ont leur source dans l'État accréditaire et des impôts sur le capital prélevés sur les investissements effectués dans des entreprises commerciales situées dans l'État accréditaire;

e) des impôts et taxes perçus en rémunération de services particuliers rendus;

f) des droits d'enregistrement, de greffe, d'hypothèque et de timbre en ce qui concerne les biens immobiliers, sous réserve des dispositions de l'article 23.

Article 35

L'État accréditaire doit exempter les agents diplomatiques de toute prestation personnelle, de tout service public de quelque nature qu'il soit et des charges militaires telles que les réquisitions, contributions et logements militaires.

Article 36

1 Suivant les dispositions législatives et réglementaires qu'il peut adopter, l'État accréditaire accorde l'entrée et l'exemption de droits de douane, taxes et autres redevances connexes autres que frais d'entreposage, de transport et frais afférents à des services analogues sur :

(a) articles for the official use of the mission;

(b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.

2 The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

a) les objets destinés à l'usage officiel de la mission;

b) les objets destinés à l'usage personnel de l'agent diplomatique ou des membres de sa famille qui font partie de son ménage, y compris les effets destinés à son installation.

2 L'agent diplomatique est exempté de l'inspection de son bagage personnel, à moins qu'il n'existe des motifs sérieux de croire qu'il contient des objets ne bénéficiant pas des exemptions mentionnées au paragraphe 1 du présent article, ou des objets dont l'importation ou l'exportation est interdite par la législation ou soumise aux règlements de quarantaine de l'État accréditaire. En pareil cas, l'inspection ne doit se faire qu'en présence de l'agent diplomatique ou de son représentant autorisé.

SCHEDULE II (Section 2) Vienna Convention on Consular Relations
Article 41
Personal inviolability of consular officers

1 Consular officers shall not be liable to arrest or detention pending trial except in the case of a grave crime and pursuant to a decision by the competent judicial authority.
2 Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.
3 If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities.

ANNEXE II (article 2) Convention de Vienne sur les relations consulaires
Article 41
Inviolabilité personnelle des fonctionnaires consulaires

1 Les fonctionnaires consulaires ne peuvent être mis en état d'arrestation ou de détention préventive qu'en cas de crime grave et à la suite d'une décision de l'autorité judiciaire compétente.
2 À l'exception du cas prévu au paragraphe 1 du présent article, les fonctionnaires consulaires ne peuvent pas être incarcérés ni soumis à aucune autre forme de limitation de leur liberté personnelle, sauf en exécution d'une décision judiciaire définitive.
3 Lorsqu'une procédure pénale est engagée contre un fonctionnaire

Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and except in the case specified in paragraph 1 of this Article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this Article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

consulaire, celui-ci est tenu de se présenter devant les autorités compétentes. Toutefois, la procédure doit être conduite avec les égards qui sont dus au fonctionnaire consulaire en raison de sa position officielle et, à l'exception du cas prévu au paragraphe 1 du présent article, de manière à gêner le moins possible l'exercice des fonctions consulaires. Lorsque, dans les circonstances mentionnées au paragraphe 1 du présent article, il est devenu nécessaire de mettre un fonctionnaire consulaire en état de détention préventive, la procédure dirigée contre lui doit être ouverte dans le délai le plus bref.

Interpretation Act, RSC 1985, c I-21, s 35(1)

Definitions

General definitions

35 (1) In every enactment,

diplomatic or consular officer includes an ambassador, envoy, minister, chargé d'affaires, counsellor, secretary, attaché, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul, acting consular agent, high commissioner, permanent delegate, adviser, acting high commissioner, and acting permanent delegate; (*agent diplomatique ou consulaire*)

Définitions

Définitions d'application générale

35 (1) Les définitions qui suivent s'appliquent à tous les textes.

agent diplomatique ou consulaire Sont compris parmi les agents diplomatiques ou consulaires les ambassadeurs, envoyés, ministres, chargés d'affaires, conseillers, secrétaires, attachés, les consuls généraux, consuls, vice-consuls et leurs suppléants, les suppléants des agents consulaires, les hauts-commissaires et délégués permanents et leurs suppléants. (*diplomatic or consular officer*)