Court File Number: 37748

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant
(Respondent on Appeal)

- and -

ALEXANDER VAVILOV

Respondent
(Appellant on Appeal)

- and -

(Continued on next page)

RESPONDENT'S FACTUM

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

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Interveners

- and -

DANIEL JUTRAS and AUDREY BOCTOR

Amicus Curiae

PART I: Overview

A. Summary

1. This appeal concerns a statutory provision that confers one of the most fundamental of rights – citizenship. Persons born in Canada have a presumptive right to citizenship under paragraph 3(1)(a) of the *Citizenship Act*, consistent with one of the primary international rules for the acquisition of citizenship, *jus soli* ("right of the soil"). This right to citizenship by birth in Canada is subject to very limited exceptions set out in subsection 3(2) of the *Act*.

2. In the decision under review, the Respondent was denied Canadian citizenship by the Registrar, despite the fact he was born in Toronto, Ontario, and identifies as a Canadian. According to the Registrar, at the time of his birth the Respondent's parents were in Canada as agents working for Russia's Foreign Intelligence Service. Although the Respondent's parents did not have any official diplomatic, consular or other status in Canada, and did not benefit from any diplomatic privileges and immunities, the Registrar nevertheless concluded that they were "unofficial employees or representatives" of the Russian government and therefore their children were excluded from Canadian citizenship at birth by operation of paragraph 3(2)(a) of the *Citizenship Act*.

3. The Federal Court of Appeal ruled in favour of the Respondent, overturning the Registrar's decision and holding that the narrow purpose of subsection 3(2) of the *Citizenship Act* was to deny citizenship by birth only to children of persons who have diplomatic privileges and immunities. The Respondent maintains that, in light of the text, context and purpose of subsection 3(2) of the *Act*, this is the only correct interpretation of the provision. The Appellant's challenge before this Court is largely based on whether or not the Federal Court of Appeal applied the appropriate standard of review and argues the Registrar's decision should stand as a reasonable interpretation of the statute.

4. This Honourable Court has chosen this appeal to revisit the standard of review jurisprudence and to determine the proper analytical approach for all administrative decision-makers. This is sometimes characterized as the tension between legislative supremacy and the rule of law. In Canada, judicial review has an explicit constitutional foundation: statutory decision-makers cannot be immunized from all review of their decisions and must exercise their powers according to the rule of law. The Respondent submits that the standard of review analysis cannot be too simplistic and must be sensitive to the wide range of decisions and administrative decision-makers. Some decisions by government officials or bodies are highly discretionary and policy-

laden, whereas others, as in this case, deal with significant determinations of rights that can have an enormous impact on individuals. Further, some decisions are made by highly specialized and quasi-adjudicative tribunals, while others, as in this case, are made through a paper process by relatively low level government officials without any particular expertise.

5. Citizenship has been aptly described as "the right to have rights".[1] The Respondent's future will be significantly impacted by whether this Honourable Court rules that the comprehensive legal analysis by the Federal Court of Appeal should be upheld, or the cursory statutory interpretation by a government analyst be restored. The Respondent submits that this Honourable Court should adopt an approach to standard of review that is in keeping with its constitutional role to safeguard the rule of law and protect the fundamental rights of individuals. The appeal should be dismissed.

B. Facts

1. Alexander Vavilov

6. The two inescapable facts about this appeal are that Alexander Vavilov was born in Toronto on June 3, 1994, and that his parents were not who he thought they were until two days before his 16th birthday.[2]

7. Alexander Vavilov was born Alexander Foley into what was to all appearances an ordinary Canadian family. While he had always understood that his parents were Canadians named Tracey Lee Ann Foley and Donald Howard Heathfield, they were in fact nationals of Russia, living in Canada illegally and posing as Canadians under assumed names. Their names were Elena Vavilova and Andrey Bezrukov. While in Canada, Alexander's parents attended school and operated a family business based in Toronto.[3]

8. Alexander was raised initially in Canada and later, for a few years, in France, while his father attended University there. In 1995 the family moved to the United States where Alexander's father continued his postgraduate studies and was later employed. Alexander attended a public

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[1] U.S. Supreme Court Chief Justice Earl Warren, as quoted in Brouwer, Andrew, "Statelessness in Canadian Context: A Discussion Paper" (UNHCR, 2003) at 2.

[2] Affidavit of Alexander Vavilov, dated March 17, 2014 [Appellant's Record ("AR"), Vol. IV, Tab 10P at 493-494]

[3] Affidavit of Alexander Vavilov, dated March 17, 2014 [AR, Vol. IV, Tab 10P at 493-498]; Affidavit of Alexander Vavilov Affidavit, dated November 7, 2014 [AR, Vol. II, Tab 8 at 88, para. 3v-3x]; Submissions of Alexander Vavilov and Timothy Vavilov, dated April 22, 2014 [AR, Vol. IV at 432-433]

school. Throughout his life Alexander lived as a Canadian and identified as a Canadian and proud of it.[4]

9. Unbeknownst to Alexander and his brother, his parents had entered Canada from Russia and assumed false Canadian identities prior to his birth.[5] On June 27, 2010, Alexander's parents were arrested in the United States and charged with acting as unregistered agents of a foreign government in that country where their true identity as Russian nationals became known for the first time.[6] Alexander was left feeling traumatized by this, being in a state of disbelief and facing unwanted media attention in and around their house. Alexander and his brother felt they had no choice but to depart the US, on a trip their parents had already scheduled in May of that year. On July 5, 2010, Alexander and his brother flew to Paris and subsequently from there to Russia, a country with which he was wholly unfamiliar and to which he had no ties whatsoever and he could not speak the language.[7] He and his brother have tried to remain outside of Russia as much as possible since then, studying in other countries while being barred from coming to Canada, the only country he feels he belongs.[8]

10. Alexander had renewed his Canadian passport several times, since birth, until 2010. He travelled to Russia on his US passport in 2010 which was subsequently cancelled by the US authorities and his US citizenship was revoked. However, contrary to the Minister's assertion, his brother, Timothy Vavilov, was not a US citizen and did not hold a US passport. Rather, he travelled to Russia on his Canadian passport in 2010.[9]

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[4] Affidavit of Alexander Vavilov, dated November 7, 2014 [AR, Vol. II, Tab 8 at 83, para 1a-1c, at 88, para. 3v-3x]; Submissions of Alexander Vavilov and Timothy Vavilov, dated April 22, 2014 at 434 - 436 [AR, Vol. IV at 433, 438]

[5] Submissions of Alexander Vavilov and Timothy Vavilov, dated April 22, 2014 [AR, Vol. IV at 432]; Report to the Registrar [AR, Vol. I, Tab 1 at 9]

[6] Affidavit of Alexander Vavilov, dated March 17, 2014 [AR, Vol. IV, Tab 10P, at 494, para 7]; Submissions of Alexander Vavilov and Timothy Vavilov, dated April 22 2014 [AR, Vol. IV at 434-436, paras 14-16]

[7] Affidavit of Alexander Vavilov, dated March 17, 2014 [AR, Vol. IV, Tab 10P, at 494, para 7-9]; Submissions of Alexander Vavilov and Timothy Vavilov, dated April 22, 2014 [AR, Vol. IV at 434-436, paras 14-16]

[8] Submissions of Alexander Vavilov and Timothy Vavilov, dated April 22, 2014 [AR, Vol. IV at 432-434, 437-438]; Affidavit of Alexander Vavilov, dated March 17, 2014 [AR, Vol. IV, Tab 10P, at 494, 497]; Report to the Registrar [AR, Vol. I, Tab 1 at 3, 13-14]

[9] Affidavit of Timothy Vavilov, dated April 7, 2014 [AR, Vol. IV, Tab 10P, at 476]; Affidavit of Alexander Vavilov, dated March 17, 2014 [AR, Vol. IV, Tab 10P, at 494, para. 8]

11. While in Russia, in October 2010, Alexander attempted to renew his Canadian passport through the Canadian Embassy in Moscow. He was told by passport authorities in Russia that to renew his Canadian passport he must change his name to match the identities of his parents which was now known. For Alexander this change of name reinforced the identity crisis he had already be experiencing. [10] He nonetheless had no choice but to comply and began the process of amending his documents bearing Vavilov as his last name, hoping he could ultimately legally change his name back once in Canada. However, notwithstanding having completed these required amendments and DNA testing, he was not issued a Canadian passport. His request for his Canadian passport remained unanswered.[11] In July 2012 having had no success in getting an answer from the Canadian passport authorities, he made an application for a study permit in order to attend the University of Toronto for which he had been granted admission. However, the application too was rejected after having been subjected to a hostile interview.[12]

12. Alexander then made an application for his Canadian passport in January 2013 through the Canadian Embassy in Buenos Aires, Argentina. When it was clear he would not be issued a passport as it was being unduly delayed, he retained counsel in Toronto and filed a mandamus application in the Federal Court. This application was settled out of Court with the Minister undertaking to issue Alexander his passport. However, once the mandamus application was withdrawn, instead of receiving his passport, Alexander received a so-called "fairness letter" dated July 18, 2013 stating that he was not entitled to a Certificate of Canadian Citizenship and his certificate would be revoked pursuant to paragraph 3(2)(a) of the *Citizenship Act*. He was invited to make submissions.[13] By decision dated August 15, 2014, the Registrar cancelled Alexander's certificate of Canadian citizenship based upon a determination, pursuant to subsection 26(3) of the *Citizenship Regulations*,[14] that Alexander was "not entitled" to citizenship.[15] That is the decision under review.

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[10] Affidavit of Alexander Vavilov, dated March 17, 2014 [AR, Vol. IV, Tab 10P, at 495, para. 11]
[11] Affidavit of Alexander Vavilov, dated March 17, 2014 [AR, Vol. IV, Tab 10P, at 495, paras 11-14]
[12] Affidavit of Alexander Vavilov, dated March 17, 2014 [AR, Vol. IV, Tab 10P, at 496, para. 17]
[13] Affidavit of Alexander Vavilov, dated March 17, 2014 [AR, Vol. IV, Tab 10P, at 495-497, paras 11, 14, 17, 21-22]; Fairness letter, dated July 18, 2013 [AR, Vol. I, Tab 7 p. 81-82]; Decision of Citizenship Registrar, dated August 15, 2014 [AR, Vol., Tab 1 at p. 1-2]
[14] *Citizenship Regulations*, SOR-93/246 ss. 26(3)
[15] Decision and Reasons of the Registrar of Citizenship, dated August 15, 2014 ("Registrar's Decision") [AR, Vol. I, Tab 1 at 1]; Judgment and Reasons of the Federal Court, dated August 10, 2015 ("FC Judgment") at para. 12 [AR, Vol. I, Tab 2 at 21]; Reasons for Judgment of the Federal Court of Appeal, dated June 21, 2017 ("FCA Reasons") at para. 5 [AR, Vol. I, Tab 3 at 36]

2. The Registrar's Decision

13. The Registrar's decision was based upon a report of a citizenship analyst which found that although Alexander had been born in Toronto, neither of his parents were Canadian citizens or lawfully admitted to Canada.[16] In addition, the report found that Alexander's parents were charged of being foreign intelligence agents operating against the United States in that country.

14. To be clear, Alexander did **not** have his citizenship revoked by the Minister under section 10 of the *Citizenship Act* due to fraud, false representation, or the knowing concealment of material circumstances. Such a decision would have entitled Alexander to notice, the opportunity to make representations, and a hearing in Federal Court.[17] Rather, the Registrar simply cancelled Alexander's citizenship pursuant to subsection 26(3) of the *Citizenship Regulations*, on the basis that he was not entitled pursuant to paragraph 3(2)(*a*) of the *Citizenship Act*.[18]

15. The Registrar of Citizenship is **not** a statutory decision-maker: her office was created by regulation. The *Citizenship Act* at paragraph 27(1)(*k*) allows the Governor in Council to adopt regulations for the cancellation of certificates of citizenship "if their holder is not entitled to them," while sections 2 and 26(3) of the *Citizenship Regulations* create the position of Registrar and allow her to cancel certificates.[19]

16. The *Regulations* give the Registrar no power to determine questions of law; she also has no discretion, because she must cancel a certificate "[w]here the Minister has determined that the holder… is not entitled to the certificate."[20] In fact, the record in this case includes no formal determination by the Minister, though he concedes it was the analyst's report that preceded the Registrar's decision by a few weeks.[21]

17. Unlike an individual whose citizenship was revoked, Alexander did not have a statutory right of appeal, which is accorded even to alleged war criminals.[22] Instead, he was obliged to seek judicial review of the Registrar's decision, which is a discretionary remedy.[23] The practical result

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[16] Registrar's Decision [AR, Vol. I, Tab 1 at 1]; Report to the Registrar [AR, Vol. I, Tab 1 at 3]
[17] *Citizenship Act*, RSC 1985, c C-29, s. 10.
[18] *Citizenship Act*, RSC 1985, c C-29, s. 3(2)(a); *Citizenship Regulations*, SOR/93-246, s. 26(3).
[19] *Citizenship Act*, RSC 1985, c C-29, s. 27(1)(k); *Citizenship Regulations*, SOR/93-246, ss. 2, 26(3).
[20] *Citizenship Regulations*, SOR/93-246, s. 26(3).
[21] *Citizenship Act*, RSC 1985, c C-29, s. 23; Appellant's Factum on Appeal, para. 83.
[22] *Citizenship Act*, RSC 1985, c C-29, s. 10; *Canada (Minister of Citizenship and Immigration v Tobiass*, [1997] 3 SCR 391.
[23] *Strickland v Canada (Attorney General)*, 2015 SCC 37, para. 37.

of the Registrar's decision for Alexander, however, was the same as citizenship revocation: "banishment, disenfranchisement and repudiation."[24]

3. Report to the Registrar

18. The reasons provided in the report to the Registrar invoked paragraph 3(2) of the *Citizenship Act* to conclude that the Respondent was not entitled to citizenship. The report alleged that Alexander's parents had been working as employees or representatives of a foreign government within paragraph 3(2)(a) during the time they resided in Canada, including at the time of his birth. There was no dispute that neither of Alexander's parents had any ties to the Russian diplomatic missions in Canada; that neither held any form of diplomatic, consular or equivalent status or enjoyed any of the privileges or immunities that are attached to such status.

19. The Report from the Analyst recommending cancelling the Respondent's citizenship certificate makes a number of factual determinations, legal interpretations and other references. This report was never disclosed to the Respondent. They include the following:

- The association of the term "employee in Canada of a foreign government" to that government's foreign diplomatic mission or consulate in Canada was expressly provided in a previous enactment of the *Citizenship Act 1950*, but omitted from the most recent version of said act. Read in conjunction with the definition of "diplomatic or consular officer" in the *Interpretation Act* leads to the conclusion that the term employee of a foreign government intends to encompass individuals not included in the definition of "diplomatic and consular staff."[25]

- The parents of the Respondent, Mr. Bezrukov and Ms. Vavilova, were never permanent residents nor Canadian citizens. As such, they did not obtain citizenship by fraud, misrepresentation or by concealing material circumstances because neither individual has ever held status in Canada. As such, the argument that the appropriate remedy against his parents' misrepresentation is revocation pursuant to subsection 10(1) of the *Citizenship Act* is incorrect because neither individual has ever held status in Canada.[26]

- After reviewing information from CSIS and the FBI on the practices of the *Sluzhaba Vneshney Razvedki* (SVR), Ms. Lamothe concludes that deep cover Russian agents limit interactions with their official representatives stationed in the host or target countries and "as such, illegals never hold any form or level of diplomatic or consular status."[27]

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[24] Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," (2014) 40:1 Queen's LJ 1-54, p. 7.
[25] Report to the Registrar [AR, Vol. I, Tab 1 at 6-7]
[26] Report to the Registrar [AR, Vol. I, Tab 1 at 8]
[27] Report to the Registrar [AR, Vol. I, Tab 1 at 10-11]

20. The author then refers to past instances of such operatives operating in Canada and concludes as follows:

> On the balance of probabilities, it is submitted that Ms. Vavilova and Mr. Bezrukov were deployed to Canada, a "host country," specifically for the task of stealing the identities of Canadians and building their respective Canadian legends prior to relocating to the United States, the "target country", as Canadians.[28]

21. In reply to arguments and evidence submitted that neither of the Respondent's parents were paid or in contact with Russian authorities while they were in Canada, the author states:

> In keeping with CIC's position that Ms. Vavilova and Mr. Bezrukov worked as intelligence operatives for the SVR since they departed from the Russian Federation, CIC has reasonable grounds to believe that both individuals received orders and were compensated or financially supported by the SVR from the moment they arrived on Canadian soil.[29]

22. The author errantly states the Respondent's counsel had argued that CIC cannot invoke subsection 3(2) because it had not requested or obtained verification with the Foreign Affairs Protocol to prove that Ms. Vavilova and Mr. Bezrukov held diplomatic or consular status with the Russian Federation while they resided in Canada.

> Agents of the SVR are not afforded diplomatic or consular privileges because such a direct and overt association with Russian authorities would risk jeopardizing their capacity to create convincing and 'non-Russian' legends.
>
> CIC maintains that Ms. Vavilova and Mr. Bezrukova were unofficial employees or representatives of the Russian Federation throughout the entirety of their stay in Canada.
>
> At the time of his birth, Mr. Vavilov was erroneously recognized by CIC as being a Canadian citizen pursuant to paragraph 3(1)(a) of the *Citizenship Act.*
>
> It is important to note that Timothy and Alexander have signed affidavits (included in the submissions package) claiming to have been completely unaware of their parents' involvement with the SVR prior to the FBI's 2010 operation. CSIS has since informed CIC that Timothy Vavilov had been sworn in by SVR prior to his parents' arrest. Timothy's pledge of allegiance to the SVR is documented in both American/Canadian and Russian mainstream media. It is not known if Alexander has also pledged allegiance to the SVR.
>
> After a thorough review of all of the information on file and submissions received by counsel, Alexander Vavilov's parents were both employees of a foreign government while residing in Canada at the time of Mr. Vavilov's birth in Toronto, Ontario, and they were neither citizens or lawfully admitted to Canada for permanent residence.[30]

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[28] Report to the Registrar [AR, Vol. I, Tab 1 at 12]
[29] Report to the Registrar [AR, Vol. I, Tab 1 at 12-13]
[30] Report to the Registrar [AR, Vol. I, Tab 1 at 13-14]

4. Decisions Below

23. On judicial review of this decision before the Federal Court, Mr. Justice Bell held that the standard of review for interpretation of the *Citizenship Act* was correctness. He further held that the requirements of procedural fairness were not at the higher end, and did not require disclosure of the Analyst's report, and, further, that the interpretation of paragraph 3(2)(a) by the analyst was correct.[31] The term employees of a foreign government applied to all such persons, regardless of diplomatic or consular status.[32] He held that to interpret paragraph 3(2)(a) in any other way would leave the section without any meaning, implying that there are no employees of a foreign government in Canada who have diplomatic or consular status.[33]

24. The Federal Court of Appeal allowed the Respondent's appeal, setting aside the judgment of the applications judge, and quashing the Registrar's decision to cancel Alexander's citizenship on the basis that it was unreasonable.[34] Writing for the majority, Justice Stratas considered and applied the analysis in three decisions of this Honourable Court - *Dunsmuir*, *Alberta Teachers' Association*, and *Edmonton East* – in holding that the appropriate standard of review on issues of statutory interpretation was reasonableness.[35]

25. Justice Stratas found the Registrar's analysis with respect to paragraph 3(2)(a) of the *Citizenship Act* was unreasonable within the meaning established by this Honourable Court in *Dunsmuir*, because it lacked the requisite consideration of the provision's context and purpose, legislative history, and relevant principles of international law.[36] Justice Stratas determined that, consistent with international law, paragraph 3(2)(a) of the *Citizenship Act* only denies citizenship to the children of those employees of foreign governments who also enjoy diplomatic privileges and immunities.[37]

26. Justice Stratas concluded that paragraph 3(2)(a) of the *Act* is not engaged solely through employment with a foreign government, but requires the additional element of diplomatic

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[31] FC Judgment at paras 15-16, 19-20 [AR, Vol. I, Tab 2 at 22-25].
[32] FC Judgment at paras 22-24 [AR, Vol. I, Tab 2 at 26-27].
[33] FC Judgment at para. 12 [AR, Vol. I, Tab 2 at 21]
[34] Reasons for Judgment of the Federal Court of Appeal, dated June 21, 2017 ("FCA Reasons") at para. 91 [AR, Vol. I, Tab 3 at 63]
[35] FCA Reasons at paras 25-33 [AR, Vol. I, Tab 3 at 42-43], citing *Dunsmuir v New Brunswick*, 2008 SCC 9; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61; and *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47.
[36] FCA Reasons at paras 40-44 [AR, Vol. I, Tab 3 at 46-47]
[37] FCA Reasons at paras 45-48 [AR, Vol. I, Tab 3 at 47-48]

immunity.[38] He held that the term "employee" as it appears in the phrase "diplomatic or consular officer or other representative or employee" in paragraph 3(2)(a) must be interpreted as referring only to those employees who, like other diplomatic or consular officers or representatives referred to, enjoy diplomatic immunity and privileges.

27. Justice Stratas further observed that this interpretation is confirmed by paragraph 3(2)(c) of the *Act*, which refers to "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)." It is a matter of a clear and explicit statement in the statute itself, in paragraph 3(2)(c) of the *Act*, that the "representatives or employees" referred to in paragraph 3(2)(a) are only those "representatives or employees" of a foreign government who have diplomatic privileges and immunities.[39] These findings were based on an analysis of the entirety of subsection 3(2), its legislative history, and of corresponding provisions regarding diplomatic immunity in the *Vienna Convention on Diplomatic Relations* and the *Foreign Missions and International Organizations Act*.[40]

28. Given that the essential facts of the case were not in dispute that no such privileges or immunities applied to Alexander's parents, the Federal Court of Appeal concluded that revocation of Alexander's citizenship on the basis of paragraph 3(2)(a) could not be sustained.[41]

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[38] FCA Reasons at para. 56 [AR, Vol. I, Tab 3 at 51]
[39] FCA Reasons at paras 61-62 [AR, Vol. I, Tab 3 at 52-53]
[40] FCA Reasons at paras 57-60 [AR, Vol. I, Tab 3 at 51-52]
[41] FCA Reasons at para. 79 [AR, Vol. I, Tab 3 at 60]

PART II: Questions in Issue

29. The questions in issue on this appeal are as follows:

a. What is the standard of review to be applied to administrative decision-making in order to ensure that it respects the rule of law?

b. Whether the Registrar of Citizenship erred in law in revoking the Respondent's citizenship or, alternatively, made an unreasonable decision?

c. More particularly, are the words "other representative or employee [in Canada] of a foreign government" in paragraph 3(2)(*a*) of the *Citizenship Act* limited to such foreign nationals when they also benefit from diplomatic privileges and immunities?

PART III: Statement of Argument

A. The State of the Law

1. Introduction

30. In this factum, the Respondent provides only a brief survey of the state of the law on standard of review given the appointment of expert *amici curiae*, the parallel appeals to be heard at the same time, and the leave granted to 27 parties to intervene.

2. The Origins and Purpose of Judicial Review

31. Judicial review has its origins in the former prerogative writs and in the modern writs of prohibition, *mandamus* and *certiorari*, whose "application has always been flexible as the need for their use in differing social conditions down the centuries had changed."[42] Like all modern nation states, Canada's government provides a variety of programs and services to citizens and non-citizens alike under a variety of legal regimes. The evolution of this "large and complex administrative state in Canada was not created according to a blueprint – it evolved organically in response to problems as they arose over the years."[43] Delegated decision-making, which is the primary ambit of administrative law and judicial review, is neither intrinsically good nor intrinsically bad: it is simply a reality of life in complex society governed as a parliamentary democracy.

32. In response, judicial review is now the means by which the superior courts maintain the rule of law by ensuring "the legality, the reasonableness and the fairness of the administrative process and its outcomes."[44] According to this Court, the rule of law – a principle upon which the Preamble to the *Constitution Act, 1982* says that Canada is founded – means "that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power."[45] It "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for

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[42] *Martineau v. Matsqui Institution*, [1980] 1 SCR 602 at 617, citing Roskill L.J. in *Re Liverpool Taxi Owners' Association*, [1972] 2 All E.R. 589 at 596.
[43] Colleen Flood and Jennifer Dolling, "An Introduction to Administrative Law: Some History and a Few Signposts for a Twisted Path" in Colleen Flood and Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed. (Toronto: Emond Montgomery, 2013), p. 13.
[44] *Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 27.
[45] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11, preamble; *Re Manitoba Language Rights*, [1985] 1 SCR 721 at para. 59.

individuals from arbitrary state action."[46]

33. While the administrative state has brought many benefits, it is worth recalling that some of the most deeply-regretted episodes in Canadian history were the work of federal statutory decision-makers exercising delegated authority. For example, Japanese-Canadians were deported from British Columbia during World War II pursuant to orders-in-council adopted under the *War Measures Act*[47] and their property turned over to the Custodian of Enemy Property, who could decide to sell it without their consent;[48] and the Minister of Indian Affairs could decide under the *Indian Act* to require any Indian child to attend the school he designated, including residential schools, and he could appoint a truant officer with the power to "convey the child to school, using as much force as the circumstances require."[49]

34. This context is important because to say that judicial review vindicates the rule of law is also to say that judicial review protects legal rights. In the words of the Chief Justice of New Zealand: "Rights may not be infringed except in accordance with law, determined by the ordinary courts of the land."[50] In the words of the former Chief Justice of this Court: "it is therefore incumbent on the courts to ensure that anybody relying on power delegated by the legislature abide by the terms and conditions on which that power was granted."[51]

35. The superior court's jurisdiction to exercise these powers can be found in the separation of powers between Parliament, the executive and the judiciary that is an underlying principle of the constitution of the United Kingdom[52] and therefore a principle of the constitution of Canada as well, by virtue of the Preamble to the *Constitution Act, 1867*. In Canada, judicial review also has an explicit constitutional foundation: statutory decision-makers cannot be immunized from all review of their decisions because the federal power to appoint superior court judges under s. 96 of the *Constitution Act, 1867* also protects the core of the superior court's jurisdiction, which includes

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[46] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 70.
[47] *The Co-operative Committee on Japanese Canadians v The Attorney-General of Canada*, [1947] AC 87, [1947] 1 DLR 577 (JCPC).
[48] *Iwasaki v. R.*, [1970] SCR 437.
[49] *Indian Act*, RSC 1985, c I-5, ss. 116(1), 119(6); repealed *Indian Act Amendment and Replacement Act*, S.C. 2014, c. 38, s. 17.
[50] Rt Hon Dame Sian Elias CJNZ, "National Lecture on Administrative Law: 2013 National Administrative Law Conference," *Australian Institute of Administrative Law Forum* No. 74, 1 ("Elias") at 3.
[51] Rt. Hon. Beverley McLachlin, PC, "Administrative Tribunals and the Courts: An Evolutionary Relationship," 27 May 2013.
[52] Elias, *supra* at 2.

judicial review.[53]

3. Standards of Review

a. Pre-*Dunsmuir*

36. The standard of review is the means by which a superior court reconciles the rule of law with the constitutional authority of Parliament and the legislature to delegate their powers to a variety of administrative decision-makers and for a variety of purposes, as they see fit. Concretely, the standard of review addresses both the scope of the issues that the court has the right to review and the nature or intensity of that review once undertaken.

37. At one time, the only issue on judicial review was considered to be whether the decision-maker had acted within its powers so that the superior court was not even to consider whether an error of law had been made; over time, however, the "*ultra vires* theory of administrative law" has gradually given way to a common law of judicial review.[54]

38. For the past 40 years, the common law in Canada has increasingly sought to balance the rule of law and parliamentary supremacy with the idea of deference to an administrative tribunal when it interprets a provision of its enabling (or "home") statute or statutes closely related to its functions and when a privative clause provides that its decisions are not subject to judicial review for error of law: in that case, the court would defer to the tribunal if its decision was reasonable.[55] The impetus toward deference came from the creation of specialized expert adjudicative tribunals like the Public Service Labour Relations Board of New Brunswick during the preceding decades and this Court's view that their expertise deserved respect.

39. Reasonableness is a very deferential standard on its face, as this Court explained:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam* at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam* at para. 79).[56]

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[53] *Crevier v. A.G. (Québec) et al.*, [1981] 2 SCR 220 at 236-237.
[54] Elias, *supra* at 9.
[55] *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 SCR 227.
[56] *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, para. 55 (emphasis added).

40. Deference still allowed for review of issues going to the decision-maker's jurisdiction on a correctness standard, but distinguishing those from issues intended by the legislature to fall within the jurisdiction conferred proved difficult. The initial solution was the "pragmatic and functional approach" that required a weighing of four factors: (1) the presence or absence of a privative clause in the enabling statute; (2) the purpose of the statute; (3) the expertise of the tribunal; and (4) the nature of the issue.[57] Later, this Court also recognized two different deferential standards of review: patent unreasonableness, which was most deferential to the decision-maker, and reasonableness *simpliciter*, which was perched on the middle of the way to correctness.[58]

b. *Dunsmuir* and Beyond

41. By 2008, the difficulties in applying the test prompted this Court in *Dunsmuir* to reduce the standards of review to correctness or a single deferential standard of reasonableness:

a. the questions that would normally attract deference were: (1) questions of fact; (2) questions of mixed law and fact; (3) decisions involving the application of policy or the exercise of discretion; and (4) a tribunal's interpretation of its home (enabling) statute and those closely related to it;

b. the correctness standard was maintained for: (1) questions of law of general importance that fell outside the expertise of the decision-maker; (2) constitutional questions; and (3) interpretations of the jurisdictional boundaries between two or more competing specialized tribunals.[59]

42. While the language of *Dunsmuir* referred to administrative decision-makers in general, the case concerned an adjudicator named pursuant to New Brunswick's public service labour relations legislation, with an acknowledged specialized expertise.

43. After *Dunsmuir*, the case law added a number of rules and presumptions:

a. an instruction to reviewing courts, on deferential review, to determine only whether the outcome falls within a range of reasonable outcomes and not to reweigh the evidence or substitute their own appreciation of the appropriate solution;[60]

b. the presumption of reasonableness review for administrative interpretations of home statutes;[61]

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[57] *U.E.S., Local 298 v. Bibeault*, [1988] 2 SCR 1048, para. 122.
[58] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748.
[59] *Dunsmuir v. New Brunswick*, 2008 SCC 9 ("*Dunsmuir*").
[60] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12.
[61] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61.

c. a presumption of tribunal expertise;[62]

d. the extension of both presumptions past specialized adjudicative tribunals to statutory delegates;[63]

e. the obligation to read the reasons together with both the outcomes and the reasons that could have been offered, even if they are not explicit in the decision.[64]

44. Despite the high expectations, Professor Sossin has concluded *Dunsmuir* has left "fissures in how the remaining two standards were to be determined and applied" and "deep divisions had resurfaced challenging the coherence of the standard of review analysis and the meaning of deference itself."[65]

4. Afterword

45. One crucial aspect of the *Dunsmuir* judgment has often been ignored, namely, the result. This Court actually held that the public service adjudicator could not apply the statutory provisions at issue to the dispute before him and had mistakenly applied public law rules to a private contract governed by the common law.

46. For the majority, the *Dunsmuir* adjudicator's decision "was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded" and for Binnie J., the adjudicator had "stretched the law too far." For Deschamps, Charron and Rothstein JJ., "even if deference had been owed to the adjudicator, his interpretation could not have stood," but in any case, the common law rules relating to the dismissal of an employee were outside of his expertise and were to be reviewed for correctness.[66]

47. The irony is that it is now difficult to imagine *Dunsmuir* being decided the same way based on *Dunsmuir*. The challenge posed in this appeal is to realign the standard of review with the principles that animated the original judgment.

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[62] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47.
[63] *Agraira v. Canada (Public Safety and Emergency Preparedness*, 2013 SCC 36.
[64] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.
[65] Lorne Sossin, "Dunsmuir – Plus ça change Redux", 7 March 2018, citing *Wolf v. Minister of Immigration*, [2004] NZAR 414 (H.C.), para. 47.
[66] *Dunsmuir*, *supra*, paras. 76, 157, 171, 168.

B. A Revised Approach to Standard of Review

1. Introduction

48. The "administrative process" that is the subject of judicial review extends from disputes over foreign policy[67] to concrete determinations of individual rights and obligations. It is carried out by public bodies that range from the federal Cabinet exercising the Crown prerogative to administrative tribunals that adjudicate disputes between parties, equipped with the explicit power to decide issues of constitutional law, members guaranteed independence and decisions that are protected by a strong privative clause.[68]

49. Judicial review therefore takes place across a spectrum whose intensity varies from issues of constitutional law at one end, where the superior courts owe no deference,[69] to an independent adjudicative tribunal's authority to control its own process at the other end, where the courts will seldom if ever intervene, absent a breach of natural justice.[70]

50. For a standard of review to be functional, it must allow for judicial review of legality, reasonableness or fairness that takes the full range of decisions and decision-makers into account.

2. The Appellant's Proposal

51. The Appellant Minister proposes a stripped-down version of *Dunsmuir* with reasonableness as the standard of review for **all** issues other than constitutional questions, which would still be decided on the correctness standard, or procedural fairness for which the Appellant proposes no standard.

52. The Appellant summarizes the existing case law on the definition of reasonableness, without meaningful guidance on how to apply it more easily; he would allow **no** recourse to either a contextual analysis or "margins of appreciation," yet concedes that a deferential analysis must still "take its colour from the context" and "turns in part on the nature of the question before the reviewing court."[71]

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[67] *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, p. 459.
[68] *Okwuobi v. Lester B. Pearson School Board)*, 2005 SCC 16, para. 22, 23, 25, 32.
[69] *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 SCR 322, para. 40.
[70] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, para. 68.
[71] Appellant's Factum, para. 59.

53. While he maintains all-but inevitable reasonableness review would promote access to justice and judicial economy,[72] the Appellant has left out the considerable advantage his new approach would give the federal government over the parties against whom it litigates:

a. its decisions would almost always be presumed to be reasonable, no matter how important they are to those affected or how deficient the record;

b. its decision-makers would always have presumed expertise, no matter how limited the statutory discretion that Parliament gave to the decision-makers or how insubstantial their real expertise.

54. The Appellant also ignores the considerable procedural advantages that public decision-makers already enjoy:

a. judicial review is ordinarily subject to a very short 15 to 30-day limitation period;[73].

b. the rules of discovery do not apply;[74]

c. it is a discretionary remedy that a superior court is not obliged to grant;[75] and

d. statutory instruments benefit from a presumption of validity.[76]

55. It is not clear why public bodies should enjoy the additional advantage of having all their decisions shielded from anything more than "a somewhat probing examination,"[77] as the Appellant proposes, except on constitutional issues or for breach of natural justice.

56. Apparently, the Appellant's approach would discard the standard of correctness for a question of law that is of central importance to the legal system, or for a question regarding the boundaries between the jurisdiction of two or more competing specialized tribunals. The result would be, for instance, that competing interpretations of the same human rights code by different tribunals could presumably co-exist, as could competing decisions by those tribunals as to their respective jurisdictions.[78]

57. The Appellant's approach, to the extent that it would mark a change from the current law, therefore appears to be neither equitable nor particularly practical.

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[72] Appellant's Factum, para. 50.
[73] *Federal Courts Act*, RSC 1985, c F-7, s. 18.1(2).
[74] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, para. 26.
[75] *Strickland v. Canada (Attorney General)*, 2015 SCC 37, para. 37.
[76] *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, para. 25.
[77] *Law Society of New Brunswick v. Ryan*, [2003] 1 SCR 247, 2003 SCC 20, para. 55.
[78] See: *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, paras. 81, 97, 110.

3. A Revised Standard of Review

a. In Short: Discretionary Decisions Should be Reviewed for Reasonableness and Questions of Law for Correctness

58. A recurring concern in principled judgments about judicial review has been to avoid forcing litigants to devote their time and energy and the court's resources to debates about the standard of review when the focus should be on the decision itself. It is no longer clear that *Dunsmuir* produces this result.

59. The Respondent therefore proposes a simple test that refines this Court's approach in *Dunsmuir* to something simpler: discretionary decisions are to be reviewed for reasonableness and questions of law are to be reviewed for correctness. More particularly, under this approach:

a. discretionary decisions to be reviewed for reasonableness will generally include matters of policy, decisions made pursuant to a body's authority to control its own process, or findings of fact;

b. mixed questions of fact and law will not be reviewed for correctness unless they are affected by an extricable error of law;

c. on questions of law, a decision-maker's interpretations of the purpose and policy of its own statute will continue to deserve respect, but the courts will test for compliance with that purpose and not simply defer to any interpretation that the statutory language can reasonably bear;

d. as before, "the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness'."[79]

60. It should go without saying that Parliament retains the power to apply a legislated standard of review which would replace the common law rules.

b. Reconsidering Certain Presumptions

(i) Expertise and Deference

61. Obviously, the legislature has the power to designate tribunals as expert and to require deference to their decisions.[80] However the common law presumptions of expertise and deference have made a Procrustean bed that has stretched some decision-makers like the Registrar past their role or function while cutting off from view the distinguishing characteristics of tribunals that actually possess expertise or independence.

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[79] *Mission Institution v. Khela*, 2014 SCC 24, para. 79.
[80] *Administrative Tribunals Act*, SBC 2004, c 45, s. 58(1).

62. This appeal demonstrates the mixed results produced by the presumption that the standard of review is reasonableness whenever any decision-maker interprets its "home statute." This presumption has sometimes been referred to as the "Paul Weiler Syndrome" for its unspoken premise that every administrative decision-maker is as expert as the Harvard law professor and former chair of the Ontario Labour Relations Board, though that is clearly not the case.[81]

63. More particularly, it is neither useful nor convincing to ask the parties and the reviewing court to presume that a minor civil servant without legal training like the Registrar has the same expertise as, for instance, a member of the Specific Claims Tribunal who is a superior court judge sitting on a body devoted to adjudicating specialized disputes.[82] It is no more satisfactory to presume that even though the Registrar answers to the Minister when making her decisions after which he defends them in court, she is nevertheless entitled to the same deference as an expert tribunal whose members have security of tenure and operate independently from either party.

64. In place of presumptions, judicial review must remain sensitive to the statutory and administrative context in which decision-makers operate, their functions, role and powers.

(ii) Multiple Interpretations

65. There is a danger that standard of review analysis may do more to conceal than to reveal what occurs on judicial review of statutory interpretation. So far in this case, the reviewing judge upheld the Registrar's interpretation of paragraph 3(2)(*a*) of the *Citizenship Act* using the correctness standard, two appellate judges have rejected it using the reasonableness standard, and a third upheld it as reasonable.

66. The notion that the interpretation of paragraph 3(2)(*a*) of the *Citizenship Act* must only be reasonable is misleading because there cannot be multiple and competing interpretations or else the Registrar's task would become impossible. The interpretation the Minister is defending will either be upheld or rejected by this Court but in either case, the result must be definitive or else the rule of law is at risk.

67. Judicial review is above all "the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority."[83] It is therefore difficult to understand why the simple legislative act of charging a decision-maker with the administration

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[81] Hon. Joseph T. Robertson, QC, "Administrative Deference: The Canadian Doctrine That Continues to Disappoint," 18 April 2018, fn. 148.
[82] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, para. 33.
[83] *Dunsmuir*, *supra* para. 28.

of a statute should be understood to give that decision-maker, "first and foremost, …the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear"[84] and why the superior courts should defer to that interpretation.

68. In practice, moreover such a high level of deference is not always seen: this Court has often reassessed findings of law in depth before ultimately upholding the decision as reasonable, a method described as "disguised correctness review."[85] At other times, rather than reviewing a decision-maker's interpretation of its statutory powers for correctness, this Court has held there was only one reasonable answer to the question (including in *Dunsmuir* itself).[86] Alternatively, this Court has held that because the provision rationally allowed for more than one interpretation, the tribunal's choice deserved deference, but only after the Court had itself tested that choice against "the text, context, and purpose of the statute" and still found no definitive answer.[87]

69. Any public body to which Parliament has chosen to grant decision-making authority is entitled to a reviewing court's "respectful attention" to its reasons,[88] but it is difficult to find a principled reason why such decision-makers should be the preferred interpreters of the same statute that empowers them.

70. It is of course open to Parliament to create adjudicative tribunals that apply a statute while operating without the rule of *stare decisis*; this Court has also emphasized the importance of avoiding unnecessary disputes about conflicts between decisions that are more apparent than real.[89]

71. But Parliament has a range of tools at its disposal to indicate its preference for delegated decision-makers' interpretations of their own authority: privative clauses;[90] the explicit power to determine any question of law;[91] or a legislated standard of review.[92] In their absence, it is difficult

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[84] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 ("*McLean*"), para. 40 (underlining added).
[85] *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, para. 27.
[86] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 ("*Mowat*"), para. 34; *Dunsmuir, supra* para. 75.
[87] *McLean, supra*, para. 39.
[88] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*"), para. 65.
[89] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, para. 91.
[90] *Dunsmuir, supra*, para. 64.
[91] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, para. 30.
[92] *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, para. 28.

to understand what makes a statutory decision-maker not just an interpreter of legislative intent entitled to respect, but a better interpreter than the superior courts. It is still more difficult to justify a rule that would allow a simple administrative officer like the Registrar of Citizenship, who lacks both expertise and independence, to put forward multiple competing interpretations on an issue as important as who is entitled to Canadian citizenship.

72. Moreover, once an issue is brought before a superior court for judicial review, the consequences inevitably change: whether or not the court has declared the decision to be correct, the resulting determination of the legal issue still has the same precedential status.[93] In practice, the courts have remained conscious of their constitutional role in maintaining the rule of law by ensuring that all parties are subject to the same legal rules, especially in the interpretation of public statutes.[94]

73. No principled basis is offered by the Minister for his view that the executive's interpretation of Parliament's laws should always prevail so long as its interpretation is not unreasonable, even when the decision-maker lacks any statutory power to decide questions of law. To use Mainville J.A.'s words, "[t]his harks back to the time before the *Bill of Rights* of 1689 where the Crown reserved the right to interpret and apply Parliament's laws to suit its own policy objectives."[95] As Elias CJNZ has said: "Generally, the courts cannot defer to the views of the Executive in matters of interpretation because to do so would be to abdicate their responsibility when adjudicating between the state and the private individual." [96]

74. To the extent that the Appellant's position is inconsistent with the separation of powers between Parliament, the executive and the judiciary, it is contrary to the preamble to the *Constitution Act, 1867*[97] and fails to uphold the courts' role in maintaining the rule of law.

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[93] *Taub v. Investment Dealers Association of Canada*, 2009 ONCA 628, para. 67; *Altus Group Limited v Calgary (City)*, 2015 ABCA 86, para. 17.
[94] *Altus Group*, para. 30, citing L.J. Wihak, "Wither the Correctness Standard of Review? Dunsmuir, Six Years Later" (2014), 27 Can J Admin L & Prac 173, p. 174.
[95] *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40, para. 98.
[96] Elias, *supra* at 9.
[97] *Canada (House of Commons) v. Vaid*, 2005 SCC 30, para. 21.

c. Reviewing Discretionary Decisions

(i) Measuring Discretion

75. The reasonableness standard should be applied with the understanding that what is reasonable varies according to the discretion granted to the decision-maker. This is the best way to ensure that reasonableness is both a single standard and one that "takes its colour from the context."[98]

76. As this Court explained, discretionary decisions are "where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries."[99] Where no such choice of options is given to the decision-maker, no discretionary power is actually exercised.[100]

77. An example at the high end of discretion would be subsection 5(4) of the *Citizenship Act* that provides: "Despite any other provision of this Act, the Minister may, in his or her discretion, grant citizenship to any person… to reward services of an exceptional value to Canada." An example at the opposite extreme where discretion is probably non-existent is the Minister's duty under subsection 12(1) to issue a certificate of citizenship to any individual who meets the statutory criteria.

78. Even where the statute does not expressly grant or exclude discretion, the extent of the discretion exercised can be measured using the same factors that determine a public body's duty of fairness:

a. the nature of the decision and the decision-making process employed by the public body;

b. the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates;

c. the importance of the decision to the individuals affected;

d. the legitimate expectations of the party challenging the decision.[101]

79. As Elias CJNZ has suggested: "What is at stake and questions of institutional competence have always affected the intensity of judicial supervision. That is a matter of rationality."[102]

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[98] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, para. 59.
[99] *Baker, supra* para. 52.
[100] *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, para. 86.
[101] *Baker, supra*.
[102] Elias, *supra* at 10.

(ii) The Nature of the Decision and the Decision-Making Process

80. As set out above, judicial review deals with a wide range of decisions and not all of them are equally discretionary: a rough typology would include legislative, adjudicative and administrative decisions. Some decisions, however, are unique and will not fall into the typology, for instance, a decision on membership in the Order of Canada.[103]

81. A decision that is legislative in nature embodies a rule of conduct, has the force of law and applies to an undetermined number of persons or situations,[104] but a decision can be a statutory instrument without being legislative in nature.

82. For example, the Governor-in-Council's power to adopt regulations that govern leasing lands in the national parks in general is a legislative act, but the responsible Minister's decision to create or cancel a particular interest in land is not.[105] So long as public bodies remain within the limits of their enabling statute, they are exercising highly discretionary powers when they adopt delegated legislation.[106] Sometimes, however, the boundaries will be blurred because a nominally normative act, such as adopting zoning by-laws, is a *de facto* decision on a particular case, as in the case of disguised expropriation.[107]

83. The distinction between an administrative and an adjudicative decision also reflects differences in discretion. The hallmark of an adjudicative process "is a *lis* between parties" that "deals primarily with the rights of the parties to the dispute."[108] So long as the tribunal has correctly applies the body of rules it is charged with administering in a manner consistent with fairness, it has a quasi-judicial discretion.

84. In a decision such as this case, however, the Registrar does not adjudicate between an individual about to lose his citizenship and another party, since she cannot be adjudicating between the Respondent and herself. Instead, the Registrar is merely the Minister's delegate for the purpose of cancelling citizenship and she makes a purely administrative decision: her role "is to administer legislation that determines the question" and she therefore has no discretion.[109]

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[103] *Drabinsky v. Canada (Advisory Council of the Order)*, 2015 FCA 5.
[104] *Reference re Manitoba Language Rights*, [1992] 1 SCR 212, pp. 224-225.
[105] *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage)*, [2007] 2 FCR 475, 2006 FCA 190, paras. 67-70.
[106] *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, para. 19.
[107] *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35.
[108] *Re Residential Tenancies Act*, [1981] 1 SCR 714, p.743.
[109] *Gehl v Canada (Attorney General)*, 2017 ONCA 319, para. 87.

(iii) The Statutory Scheme

85. The statutory scheme will usually indicate the nature of a decision and whether it is legislative, adjudicative or merely administrative in nature, thus also indicating the existence and extent of the discretion. Even in an anomalous case like membership in the Order of Canada, the very fact that the decision is not made pursuant to any statute, but only the Crown prerogative, is an indication that the discretion involved is broad.

86. Moreover, the statute remains the best indication of the discretion that Parliament intended to grant. As pointed out above, Parliament has a number of other means at its disposal to indicate the breadth of delegated decision-makers' discretion, including privative clauses, the explicit power to determine any question of law, or an explicit grant of discretion (phrases such as "in its discretion" and "as is reasonable" or "considers appropriate in the circumstances").

87. While the Appellant would have the courts ignore private clauses,[110] they remain an indicator relied upon by this Court to conclude that the legislature intended to give the decision-maker full latitude to rule on the issue in dispute.[111]

(iv) The Importance of the Decision to Those Affected

88. Noting that the importance of the decision for those affected is already part of the procedural fairness analysis, Professor Sossin has suggested that Canadian law should follow New Zealand's example by generally acknowledging "the vulnerability of the affected party and the intensity of the decision's impact on that party" as part of judicial review.[112] This Court has taken into account the effects on the individual where humanitarian and compassionate considerations are an express part of the legislative scheme for the discretion exercised by the decision-maker.[113]

89. If all discretionary decisions are to be reviewed for reasonableness and accorded deference, it would be useful to acknowledge that the consequences of the decision also determine the extent of discretion that the decision-maker may exercise. On the facts of this case, for example, it is difficult to justify the proposition that the Registrar has the same discretion to cancel the citizenship of someone who has held it since birth as she would have to decline to issue a new certificate before a person had satisfied her it was genuinely lost or stolen.

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[110] Appellant's Factum, para. 52.
[111] *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45, para. 89.
[112] Lorne Sossin, "Dunsmuir – Plus ça change Redux", 7 March 2018, citing *Wolf v. Minister of Immigration*, [2004] NZAR 414 (H.C.), para. 47.
[113] *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61.

(v) The Legitimate Expectations of the Parties

90. The legitimate expectations of the parties form the bridge between a decision-maker's authority to determine its own procedure, subject to its enabling legislation, and the obligation to respect the rules of procedural fairness.

91. For instance, where the rules do not require an oral hearing, it is a matter for the decision-maker's discretion to decide whether those affected should appear before the decision-maker in person. However if a procedure is offered and accepted, such as written submissions for example, then the decision-maker no longer has the discretion to change the procedure nor to ignore submissions provided by those affected in a timely manner.

d. Reviewing Questions of Law

92. Reasonableness review was first defined as "respectful attention" to the reasons offered in support of a decision,[114] but with regard to legal rules, it came to be defined as "adopting any interpretation that the statutory language can reasonably bear."[115] In practice, the implications of this approach often led to the conclusion that the statute only afforded one reasonable interpretation, which is a conclusion difficult to distinguish from correctness.

93. Under the revised approach proposed by the Respondent, a correctness standard will simply mean that on a true question of law, the body in our legal system with the responsibility to state definitively what the law is will remain the superior court, not the executive. Obviously, outside of constitutional law, this role will always be subject to Parliament's power to amend the statue so that its preferred interpretation nevertheless prevails.

94. Correctness review need not take the unduly interventionist approach that this Court has previously rejected; correctness review can continue to show "respectful attention" to a decision-maker's determination of legal issues. More particularly, the interpretations of legal rules offered by the public bodies who apply them in their decisions will remain extremely valuable to the reviewing courts, especially in specialized areas. As in tax law, a public body's administrative interpretations may not be binding on the court, but they are an aid to statutory interpretation that may have considerable persuasive weight, especially when the text is ambiguous or unclear.[116]

95. The principles of judicial economy, mootness and justiciability will retain their full effect so that the correctness standard will not mean that the courts will rule on every question of law

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[114] *Dunsmuir, supra* para. 48.
[115] *McLean, supra* para. 40.
[116] *Canada v. Ast Estate*, [1997] 3 FC 86, 1997 CanLII 6330 (FCA), text corresponding to fn. 18.

brought before them. The discretionary nature of judicial review generally and the available remedies in particular mean there will be no return, for instance, to interlocutory review on the basis of "preliminary questions."[117]

96. In addition, it remains open to Parliament to legislate a different standard of review if it actually prefers questions of law to be reviewed for reasonableness.[118]

C. The Registrar's Decision was Contrary to Law

1. The Registrar's Role

97. The Registrar of Citizenship exercises a role similar to that described by the Ontario Court of Appeal for the Registrar of Indians:

> The Registrar's obligation is to administer legislation that determines the question of Dr. Gehl's entitlement. It follows that the Registrar must get it right in accordance with the statutory criteria, and is subject to an appeal to the Superior Court of Justice on the standard of correctness. Although the Registrar, or more likely the officials working under the Registrar, might develop some kind of "field sensitivity" and facility in researching historical records, in no sense does the Registrar exercise discretionary power. Nor is any special expertise exercised by the Registrar in determining entitlement. This court does not owe deference to the Registrar....[119]

98. As the Ontario appellate court further explained, the Registrar is **not** exercising discretion when she is trying to discern "what the law is" or "what the legislator meant to say" because that is not her statutory role.[120]

99. In the alternative, like the Registrar of Indians in another recent case,[121] the Registrar of Citizenship is not entitled to deference where she puts forward a new interpretation of the statute that she had not applied before and that, if applied in future cases, is likely to lead to put into question the entitlements of others and thereby create injustice.

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[117] *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, para. 34.
[118] *Administrative Tribunals Act*, para. 58(2)(*a*).
[119] *Gehl, supra* para. 87 (parenthetical remarks omitted).
[120] *Ibid.*, citing James L.H. Sprague, "Another View of Baker" (1999), 7 RAL 163 at 164.
[121] *Landry c. Procureur général du Canada (Registraire du registre des Indiens)*, 2017 QCCS 433, para. 202, 277, 347.

2. Paragraph 3(2)(*a*) Applies Only to Foreign Nationals with Diplomatic Privileges and Immunities

a. Introduction

100. The Registrar concluded that the Respondent was not entitled to Canadian citizenship because at the time of his birth his parents were "unofficial agents" of Russia and therefore were representatives or employees of a foreign government in Canada within the meaning of paragraph 3(2)(a) of the *Citizenship Act*. The analyst's report relied upon by the Registrar interpreted paragraph 3(2)(a) of the *Act* in a textual vacuum without reference to the wording of the entire subsection, the contents of a related statute, or the crucial backdrop of international law.

101. A closer look at this broader context demonstrates that the Registrar's interpretation is not simply incorrect, it is unreasonable.

102. The Respondent submits that a proper interpretation of the *Citizenship Act* shows that the three exceptions to citizenship by birth in paragraphs (a), (b) and (c) of subsection 3(2) all involve parents who possess certain diplomatic privileges and immunities. A careful examination of the statutory history, text, context and purpose[122] of subsection 3(2) of the *Act* reveals that the Analyst overlooked key language and ignored the broader context and purpose of the provision. The analyst's approach was inconsistent with the modern principles of statutory interpretation: "[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[123] As the analyst conceded under examination, she could not find the sources required to interpret the statute.[124] In defending her decision, the analyst allowed that she was "not a lawyer" and therefore did not know the legal "significance" of words in the provision.[125]

103. Moreover, the analyst and Registrar interpreted the words "other representative or employee of a foreign government" divorced from their statutory and broader context. This is inconsistent with principles of modern statutory interpretation because:

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[122] The Supreme Court of Canada has endorsed this approach to statutory interpretation in several cases: *Mowat, supra* at para. 32; *R. v. A.D.H.*, 2013 SCC 28 at paras 21, 75; *Copthorne Holdings Ltd. v Canada*, 2011 SCC 63 at para. 87; and *Mavi v. Canada (Attorney General)*, 2011 SCC 30 at para. 52.
[123] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, para. 21.
[124] Transcripts of Cross-Examination of Sophie-Marie Lamothe, dated October 15, 2015, at 15-16 [Respondent's Record ("RR"), Tab 7 at 114-115]
[125] Transcripts of Cross-Examination of Sophie-Marie Lamothe, dated October 15, 2015, at 41 [RR, Tab 7 at 140]

> Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context, including the apparent purpose, the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652, 1999 CanLII 678 at paragraph 26).[126]

b. Statutory History

104. When Canada's first *Citizenship Act* was promulgated in 1946, it provided that any person was entitled to citizenship as of right "if he is born in Canada or on a Canadian ship", with no exceptions for diplomats or others.[127] This reflects one of the main international legal principles on which the acquisition of nationality is based, namely the fact of birth within a state territory, or *jus soli*.[128]

105. In 1950, this enactment was amended to prohibit the acquisition of Canadian citizenship for children born in Canada to foreign diplomats and consular officers. The immigration minister at the time, W. E. Harris, explained to the House of Commons:

> A new provision is that which excludes from the status of natural-born Canadian citizens the children born in Canada of parents who are the diplomatic or consular representatives of foreign governments in Canada, or who are employees in the service of these representatives. It is proposed that it would not be appropriate to permit children who come within this category to be designated as Canadians by birth.[129]

106. The 1950 amendment to section 5 read as follows:

> 5. (2) Subsection one does not apply to a person if, at the time of the person's birth, his responsible parent
>
> (a) is an alien who has not been lawfully admitted to Canada for permanent residence; and
>
> (b) is

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[126] *Canada (Attorney General) v. Stanford*, 2014 FCA 234, para. 44.
[127] *The Citizenship Act*, S.C. 1946, c. 15, para. 5(a).
[128] Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at p. 391.
[129] *House of Commons Debates*, Second Session, Twenty First Parliament, 14 George VI, 1950 (June 22, 1950) at 4021 (Hon. W.E. Harris).

> (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 (1).[130]

107. Canada subsequently participated in international negotiations involving the *Vienna Convention on Diplomatic Relations* ("*VCDR*") and the *Vienna Convention on Consular Relations* ("*VCCR*"). The *VCDR* was signed in 1961 and came into force in 1964. The *VCCR* followed a few years later, concluded in 1963 and entering into force in 1967. These conventions extended different levels of diplomatic privileges and immunities to diplomatic and consular officers as well as employees providing "administrative or technical service", "domestic service" to the mission or post, and "private servants" who provide personal service to diplomatic or consular officers or the administrative and technical staff of a mission or post.[131]

108. In 1974, Parliament introduced Bill C-20 to replace the *Citizenship Act*. Section 3 of the proposed new *Citizenship Act* was very similar to the original section 5, but the exception to citizenship for those born in Canada was revised. The relevant paragraph of Bill C-20 as introduced in 1974 read:

> (2) Paragraph 3(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; or
>
> (b) an employee in the service of a person referred to in paragraph (a).[132]

109. Comparing this language to the subsection it was to replace, it is first noted that the wording is more economical. For example, "accredited to his Majesty" is dropped along with "attached to or in the service of a foreign diplomatic mission or consulate in Canada". It is obvious that

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[130] *An Act to Amend the Canadian Citizenship Act*, SC 1950, c 29 (emphasis added) [Appellant's Book of Authorities, Vol. I, Tab 3].

[131] *Vienna Convention on Diplomatic Relations*, Sched. I to the *Foreign Missions and International Organizations Act*, SC 1991, c 41 ("*FMIOA*"); and *Vienna Convention on Consular Relations*, Sched. II to the *FMIOA*.

[132] Canada, House of Commons, *Bill C-20, An Act respecting citizenship* (First reading, October 10, 1974).

diplomatic or consular officers are accredited by the Canadian government so the wording was unnecessary. As well, "diplomatic or consular officer" is included in the same paragraph as "other representative or employee". The Respondent submits that this was essentially consolidating subparagraphs 5(2(b)(i) and (ii) from the previous statute. Thus, it is clear that "other representative or employee of a foreign government" is a person working at a mission or consulate alongside diplomatic or consular officers. There is no indication, then or now, that some other category of foreign government employees were suddenly entering Canada in 1974 for some non-diplomatic or consular purpose.

110. Bill C-20 did propose a substantive change to employees providing personal services. Under subparagraph 5(2)(b)(iii) of the previous *Act*, personal servants of diplomatic or consular officers were covered, but personal servants of foreign government employees attached to a mission or consulate were not. Paragraph 3(2)(b) in Bill C-20 expanded the definition to cover personal employees of other representatives or employees of a foreign government. It is reasonable to assume this language was revised because the recently adopted *VCDR* and *VCCR* extended privileges and immunities to the personal servants of administrative and technical employees, who were non-diplomatic staff.[133]

111. Before Bill C-20 was enacted, it was amended in Committee to add paragraph 3(2)(c), the provision that exempts children born to officials with the United Nations and other international organizations. The Minister at the time, J. Hugh Faulkner, Secretary of State of Canada, explained the revision as follows:

> The next amendment is to Clause 3(2). This is a clause which conforms to international customs and excludes children born in Canada to diplomats from becoming Canadian citizens. This part of the bill is somewhat different from the provisions in the present act because under the bill a child may derive citizenship from either parents. After the bill was printed, the external affairs people became concerned that there are a number of people in Canada working for international organizations like the United Nations, who also desire to be exempt in the same way as fully recognized diplomats. This seemed reasonable but there was a danger that in writing some provision for these people, a number of other people would be affected such as those working for large foreign corporations. Lengthy

[133] *VCDR*, Articles 33(2), 33(4); and *VCCR*, Articles 47(2), 48(2). Denza discusses at pp. 329-330 that there were extensive negotiations and disagreements over whether "administrative and technical staff" should enjoy full diplomatic privileges and immunities. However, this position prevailed due to concerns that senior non-diplomatic staff may have access to important secret information. Limited privileges and immunities were therefore also given to their personal servants. (Denza, Eileen, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations, 4th ed.* (Oxford: Oxford University Press, 2016))

> discussions took place and the result is the amendment you have before you which adds a new subclause (c).
>
> The import of this subclause is that we will exempt people working for specialized agencies if the Secretary of State for External Affairs will declare such people to be essentially the same as diplomatic or consular officers.[134]

112. Bill C-20 was passed in this form and received Royal Assent in 1976.[135] The Respondent submits that the above statutory history supports the view that the relevant subsection of the *Citizenship Act* was amended to ensure that it covered all persons in Canada who have diplomatic privileges and immunities. This included adding personal servants of non-diplomatic staff as well as officials with the United Nations and other international organizations. There is no indication that Parliament was attempting to craft some other exception to citizenship for some heretofore unknown category of foreign government employee that does not enjoy some level of privileges and immunities.

113. Finally, it is important to note that Parliament enacted the *Diplomatic and Consular Privileges and Immunities in Canada Act* at nearly the same time as the new *Citizenship Act*.[136] This new statute directly incorporated into Canadian law at Schedules I and II the *VCDR* and *VCCR*, the international treaties that formalized and codified the customary international law of diplomatic privileges and immunities. This is further evidence that concerns about diplomatic immunities and privileges were in the minds of Parliamentarians at the time the *Citizenship Act* was replaced.

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[134] House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts*, No. 34 (February 24, 1976), 34:23-24 (emphasis added).
[135] *Citizenship Act*, SC 1974-75-76, c 108.
[136] The statute received Royal Assent in 1977: *Diplomatic and Consular Privileges and Immunities in Canada Act*, S.C. 1976-1977, c. P-22.

c. Text of subsection 3(2) of the *Citizenship Act*

114. It is trite law that the primary indicator of the meaning of any statute is the text itself.[137] But the wording of a phrase, clause or paragraph cannot be interpreted without regard to the entire statutory provision.[138] By focussing only on paragraph 3(2)(a) of the *Citizenship Act*, the analyst overlooked other paragraphs and language in subsection 3(2) that pointed to a different interpretation.

115. The analyst held that the way paragraph 3(2)(a) of the Act was written meant that "diplomatic or consular officers" were something very different from "other representatives or employees of a foreign government".[139] In the analyst's view, "representative or employee of a foreign government" was a deliberately broad category that encompassed "unofficial employees or representatives" who worked "without the benefits or protections (i.e.: immunity) that accompany diplomatic, consular or official status positions."[140]

116. The analyst's interpretation did not address or deal with paragraphs 3(2)(b) or (c) of the Act and their relationship with paragraph 3(2)(a). For clarity, section 3 of the *Citizenship Act*, including subsection 3(2) in its entirety, reads as follows:

Persons who are citizens	**Citoyens**
3(1) Subject to this Act, a person is a citizen if	3(1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne:
(a) the person was born in Canada after February 14, 1977;	(a) née au Canada après le 14 février 1977;
[…]	[…]
Not applicable to children of foreign diplomats, etc.	**Inapplicabilité aux enfants de diplomates étrangers, etc.**

[137] *Montréal (City) v. Dorval*, [2017] 2 SCR 250, 2017 SCC 48 at para. 88.
[138] In *Ontario v. Canadian Pacific Ltd*, [1995] 2 S.C.R. 1031, Gonthier J. observed at 1081 (para. 64) that "legislative provisions must not be considered in a vacuum" and that the content of a provision "is enriched by the rest of the section in which it is found". See also Ruth Sullivan, *Sullivan on the Construction of Statutes*, Sixth Edition (LexisNexis Canada Inc, 2014) at pp 231-232, where she comments that Gonthier J. relied on a shared feature of several paragraphs to narrow the scope of one paragraph that was "potentially quite broad".
[139] Report to the Registrar [AR, Vol. I, Tab 1 at 7]
[140] Report to the Registrar [AR, Vol. I, Tab 1 at 13] (emphasis added)

(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)**. [Emphasis added]	(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)**. [Non souligné dans l'original]

117. The majority of the Federal Court of Appeal drew significance from the underlined portions above in para. 3(2)(c), which directs back to all "persons" in paragraph 3(2)(a) who have "diplomatic immunities and privileges". In the majority's view, this must mean that all persons in paragraph 3(2)(a), including "representative[s] or employee[s] in Canada of foreign government", have "diplomatic privileges and immunities."[141]

118. In her dissenting reasons, Gleason J.A. acknowledged that this was a reasonable interpretation of subsection 3(2) of the *Citizenship Act*. However, Gleason J.A. found that paragraph 3(2)(a) of the Act admits two rational but alternative interpretations, with strong support for the Registrar's interpretation in light of the deleted words from the previous version of the Act. Gleason J.A. was not persuaded that the context and purpose flowing from the *VCDR* and the *Foreign Missions and International Organizations Act* ("*FMOIA*") necessarily mandated a

[141] FCA Reasons, paras 61-62 and 67 [AR, Vol. I, Tab 3 at 52-53, 55]

different result.[142]

119. With respect, the Respondent submits that a close reading of subsection 3(2) of the Act in its entirety reveals that it can only be properly understood by reference to the *VCDR* and the other related treaties incorporated in to the *FMIOA*. Before turning to that analysis, it is important to consider the other portions of subsection 3(2) of the Act underlined above.

120. First, subsection 3(2) of the Act only operates to deprive Canadian citizenship at birth if two conditions are met: neither parent is a Canadian citizen "or lawfully admitted to Canada for permanent residence" and either parent falls under paragraphs 3(2)(a), 3(2)(b) or 3(2)(c). This means that children born to persons in Canada illegally can still acquire citizenship. As well, the conjunctive nature of these conditions means that all persons covered by paragraphs (a), (b) and (c) necessarily have some kind of special status in Canada because they cannot be Canadian citizens or lawfully admitted permanent residents. For "a diplomatic or consular officer" under paragraph (a), the answer is straightforward – they have legally entered and remain in Canada by virtue of their diplomatic or consular status.[143] Similarly, all those who work for the United Nations or other accredited international organizations under paragraph (c) are lawfully in Canada as a result of their diplomatic immunities and privileges.[144]

121. But assuming the analyst's interpretation of subsection 3(2) of the *Act* is correct, how can "other representative[s] or employee[s] of a foreign government" referred to in paragraph (a) be legally present in Canada if they are not citizens or "lawfully admitted to Canada for permanent residence" and otherwise do not have diplomatic or consular status? Presumably, Parliament did not draft the provision specifically to address "unofficial agents" who have no status and are illegally in the country. The only logical answer is that it was understood by Parliament that representatives or employees of foreign governments will have some status under the applicable treaties that allows them to be legally present in Canada.[145]

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[142] FCA Reasons, paras 98 and 101-103 [AR, Vol. I, Tab 3 at 66-69]

[143] Denza says the right of diplomatic staff to enter and remain in the territory of the receiving state is implicit and flows from Article 7 of the *VCDR* which permits the Sending state to "freely appoint" diplomatic staff. (Denza, Eileen, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations, 4th ed.* (Oxford: Oxford University Press, 2016), p. 50). Identical language is found in Article 10 of the *VCCR*, although Article 46 also confirms consular staff are exempt from any residence or alien registration.

[144] Section 18(d) of the *Convention on the Privileges and Immunities of the United Nations* grants U.N. officials and their families immunity from immigration restrictions and alien registration.

[145] As will be explained below, it is the Respondent's submission that this lawful status can only derive from the *VCDR* or *VCCR*, as incorporated in the *FMIOA*.

122. Paragraph 3(2)(b) of the *Act*, which covers "an employee in the service of a person referred to in paragraph (a)", also does not make any express reference to the basis or status justifying the person's lawful presence in Canada, despite not being a Canadian citizen or permanent resident. The *VCDR* and *VCCR*, both of which provide that "private servants" of staff employed at a diplomatic mission or consular post are "entitled to privileges and immunities", though obviously in a much more limited form than their employers.[146] The Respondent therefore submits that the only logical interpretation of the Act is that personal employees falling under paragraph 3(2)(b) cannot confer citizenship at birth on their children because they enjoy certain diplomatic privileges and immunities from Canadian law.

123. It is also worth noting that under the *Convention on the Privileges and Immunities of the United Nations*, as incorporated under the *FMIOA*, there are no special provisions or any privileges and immunities for private staff of United Nations officials. This would explain why paragraph 3(2)(b) of the Act only covers private employees of diplomatic mission and consular post staff under 3(2)(a), but not private employees working for U.N. officials under 3(2)(c).

124. Finally, and significantly, under the *VCDR* and *VCCR*, diplomatic mission employees, consular post employees and their "private servants" do not enjoy privileges and immunities if they are nationals or permanent residents of the host country.[147] This mirrors the chapeau of subsection 3(2) of the Act which provides that children born to a parent who is "a citizen or lawfully admitted to Canada for permanent residence" still acquire citizenship under paragraph 3(1) even if the parent is working as diplomatic or consular staff for a foreign government. The Respondent submits that this text demonstrates that any uncertainty about the proper interpretation of paragraph 3(2)(a) of the *Citizenship Act* disappears when the provision is understood and read together with the *FMIOA* and the treaties incorporated in its Schedules.

d. Purpose and Context

125. The Respondent submits that the applicable treaties governing privileges and immunities granted to certain persons in Canada are the necessary context for understanding and interpreting subsection 3(2) of the *Citizenship Act*. These treaties are directly incorporated into Canadian law under the *FMIOA* and deal with the same subject matter – diplomatic and consular officers and their employees and U.N. officials - as subsection 3(2) of the Act. As a matter of statutory

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[146] Under the *VCDR*, private staff are defined in Article 1(h) and their privileges and immunities are specified in Articles 10(c) and (d), 33(2) (social security), and 37(4) (income tax). Under the *VCCR*, private staff are defined in Article 1(i) and their privileges and immunities are specified in Articles 24(c) and (d), 47(2) (work permits), and 48(2) (social security).

[147] *VCDR*, Article 38(2); and *VCCR*, Article 71(2).

interpretation, the two statutes should be presumed to be drafted with one another in mind and should be read together to be coherent and consistent.[148]

126. Stratas J.A. held that the purpose of subsection 3(2) of the Act is to bring Canadian law in line with these international treaties and the *FMIOA*. In particular, the aim is to ensure that exceptions to citizenship conferred on any person born on Canadian soil only cover those persons whose parents have privileges and immunities from civil and/or criminal law.[149] Persons who have privileges and immunities from Canadian laws do not have the same duties and responsibilities as citizens, or even others who reside in the country. Stratas J. endorsed the following observation of the Federal Court in *Al-Ghamdi* with respect to the purpose of subsection 3(2) of the Act:

> It is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship.[150]

127. The Appellant rejects this premise, arguing that the fact that there is a wide variety of diplomatic privileges and immunities undermines the rationale for the majority's interpretation. The Appellant suggests that Stratas J.A. has "an overly simplistic" understanding of the applicability and extent of diplomatic privileges and immunities, and then goes on to add that domestic service staff do not have the same immunity from criminal, civil and administrative jurisdiction as "diplomatic agents".[151]

128. While the Appellant is correct to note that there are indeed a range of privileges and immunities under the *VCDR* and *VCCR*, it is the Appellant's own analysis that is inaccurate and simplistic. For example, the *VCDR* essentially has five categories of persons who enjoy privileges and immunities: (1) the head of mission; (2) other diplomatic staff who have "diplomatic rank"; (3) administrative and technical staff of the mission; (4) service staff who provide domestic

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[148] Sullivan, R. *Sullivan on the Construction of Statutes, Sixth Edition* (LexisNexis Canada Inc, 2014), pp. 416 and 417.
[149] FCA Reasons, para. 45 [AR, Vol. I, Tab 3 at 47]
[150] *Al-Ghamdi v. Canada (Foreign Affairs and International Trade),* 2007 FC 559 at para. 63. In *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 294, the Federal Court also emphasized that diplomatic privileges and immunities were the crucial factor in paragraph 3(2) of the *Citizenship Act*. In that case, the applicant worked in Canada for the League of Arab States, an organization that did not have any formal international legal status. However, the Canadian Government conferred privileges and immunities on the applicant as being "administrative and technical staff" working for Lebanon, even though he did not work for that government. It was acknowledged this was a "legal fiction", but the possession of privileges and immunities governed the outcome and his children were denied citizenship. See *Hitti*, paragraphs 33-37.
[151] Appellant's Factum, paras. 112-113

services to the mission; and (5) "personal servants" to the head of mission, diplomatic staff or administrative and technical staff.[152] The range of privileges and immunities include criminal and civil immunity, immunity from customs and inspections, immunity from income taxes and social security levies, and so on.[153] The Appellant refers only to "diplomatic agents" (categories 1 and 2 above) and domestic service staff (category 4), but ignores "administrative and technical staff" (category 3, being employees without diplomatic rank but who have nearly the same protections and immunities as diplomatic staff) and personal servants (category 5). [154]

129. The Appellant suggests that because some of these persons "enjoy only minimal privileges and virtually no immunities" it undermines the statutory purpose expressed by the majority.[155] Although the majority did not engage in an exposition on the range of diplomatic privileges and immunities, the point remains that all of the persons covered by the relevant treaties enjoy some immunities from Canadian laws. In fact, the category of persons under the *VCDR* with the fewest such privileges and immunities is "personal servants", but even they benefit from being exempt from payment of income taxes and "social security".[156] It is doubtful that most Canadians would describe being exempt from income tax as a "minimal" privilege.

130. Significantly, while the Appellant rejects the majority's characterization of the purpose of subsection 3(2) of the *Citizenship Act*, no meaningful alternative is proffered. The Appellant expresses some important principles and values associated with citizenship as membership in a political community, but does not tie these principles to the purpose or aim of denying citizenship to a person "natural-born" in the territory of that community. But if the majority is correct, the common feature of paragraphs (a), (b) and (c) of subs. 3(2) is that persons in each category have some degree of immunity to Canadian laws. Thus, consistent with the purpose enunciated by Stratas J.A. and the Federal Court in *Al-Ghamdi*, persons born in Canada to parents with privileges and immunities to any Canadian laws should not receive citizenship by birth. The Appellant's interpretation fails to provide any alternative rationale or purpose that explains what persons in paragraphs (a), (b) and (c) may have in common.

131. Finally, it is clear that the analyst did not have any appreciation for the range of persons

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[152] *VCDR*, Article 1(a), (d), (f), (g), (h). Note that some of these categories are defined collectively in different ways under Article 1. E.g., (e) "diplomatic agent" includes the head of mission as well as other diplomatic staff holding diplomatic rank. There is a similar range of staff categories and differing privileges under the *VCCR*.
[153] *VCDR*, Articles 29-37.
[154] Appellant's Factum, para. 113
[155] Appellant's Factum, para. 114
[156] *VCDR*, Articles 33(2) and 37(4).

who enjoy diplomatic privileges and immunities under the applicable treaties. The analyst's main point is that paragraph 3(2)(a) differentiates "diplomatic or consular officers" from "other representatives or employees of a foreign government", and that the latter group is no longer explicitly defined as being attached to a mission or consulate.[157] However, this ignores the fact that the *VCDR* and *VCCR* cover categories of employees who have very significant diplomatic privileges and immunities but who are not "diplomatic or consular officers". For example, "administrative and technical staff" are not diplomatic officers under the *VCDR*, but they enjoy nearly the same privileges and immunities as diplomatic staff, including full immunity from criminal law.[158] The analyst's report does not demonstrate any awareness of this important context.

e. International Law and *jus soli*

132. The Appellant has disputed a conclusion that the Federal Court of Appeal never reached when he insists that "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."[159] The majority never stated that *jus soli* requires Canada to grant citizenship to anyone born in Canada. The *ratio* of the Court of Appeal is that, where citizenship is granted according to the rule of *jus soli*, under international law there is an exception to children born to parents who enjoy diplomatic immunities.[160]

133. According to Stratas J.A., this exception to *jus soli* at international law is the principle that pervades subsection 3(2) of the *Citizenship Act*. Stratas J.A. quotes the analysis of the eminent expert on international law, Professor Ian Brownlie,[161] on this point (footnotes omitted):

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[157] Report to the Registrar [AR, Vol. I, Tab 1 at 7]

[158] Under Article 1 of the *VCDR*, only those "diplomatic staff" who have some "diplomatic rank" are defined as "diplomatic agents", which is really the same as "diplomatic officers" under paragraph 3(2)(a) of the Citizenship Act. However, under Article 37(1) of the VCDR "administrative and technical staff" enjoy nearly the same range of privileges and immunities as diplomatic staff. The only difference is that immunity from "civil and administrative jurisdiction" does not extend to acts performed outside the course of their duties. However, there is no such limitation on criminal immunity. Denza explains that this is because "[m]any non-diplomatic members of the mission had access to secret information, and the sending State must be assured that they would be protected from possible action by the authorities of the receiving state which might endanger their personal safety, in an attempt to make them divulge secrets." (Denza, Eileen, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations, 4th ed.* (Oxford: Oxford University Press, 2016), p. 330)

[159] Appellant's Factum, para. 111.

[160] FCA Reasons, para. 70 [AR, Vol. I, Tab 3 at 56-57].

[161] Professor Ian Brownlie has been cited by the Supreme Court of Canada as authority on the

> A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: "This article is believed to be declaratory of an established rule of international law". The rule receives ample support from the legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: "Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs."[162]

134. Professor Brownlie also cites the Optional Protocols to the *VCDR* and *VCCR* concerning Acquisition of Nationality. [163] These short treaties further enunciate the principle that children born to members of a diplomatic mission or consular post "shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State".[164] While Canada never signed these Optional Protocols, it did adhere to the *Convention on Certain Questions relating to the Conflict of Nationality Laws*, (1930) 179 UNTS 89, with the clear statement of principle quoted above by Professor Brownlie in Article 12.[165]

135. Stratas J.A. correctly observes that *jus soli* is necessarily the backdrop to section 3 of the *Citizenship Act*. Gaining citizenship at birth under paragraph 3(1) of the Act is an important right, and paragraph 3(2)(a) derogates from that right. As Stratas J.A., holds,

> Since paragraph 3(2)(*a*) takes away rights that would otherwise benefit from a broad and

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principles of public international law on several occasions: see, e.g., *Alberta Government Telephones v. (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 SCR 225; *National Corn Growers Assn. v. Canada (Import tribunal)*, [1990] 2 SCR 1324; *R. v. Finta*, [1994] 1 SCR 701; *R. v. Cook*, [1998] 2 SCR 597; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3; *Schreiber v. Canada (Attorney General)*, [2002] 3 SCR 269; and *R. v. Hape*, [2007] 2 SCR 292.

[162] FCA Reasons, para. 70 [AR, Vol. I, Tab 3 at 56-57]. See Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at p. 392.

[163] Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at pp. 392-393.

[164] *Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Acquisition of Nationality*, (1961) 500 UNTS 223, Article 2; and *Optional Protocol to the Vienna Convention on Consular Relations concerning the Acquisition of Nationality*, (1963) 596 UNTS 469, Article 2.

[165] *Convention on Certain Questions relating to the Conflict of Nationality Laws*, (1930) 179 UNTS 89

> liberal interpretation, it should be interpreted narrowly: *Brossard v. Quebec*, [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609 at para. 56. The narrower interpretation is that not all employees of a foreign government fall in paragraph 3(2)(a); only those who have diplomatic immunity fall within it.[166]

136. Finally, the Appellant's efforts to devalue the importance of the *jus soli* principle at international law are highly questionable.[167] It is true that countries maintain the right to determine their own citizenship laws, and there is no requirement to bestow citizenship according to *jus soli*. However, consistent with the fundamental human right to acquire a nationality, there are some experts who say that "the principle of *jus soli* has emerged as the default international norm governing the conferral of nationality on children born to non-citizen parents."[168] This norm derives from human rights law and the goal of reducing statelessness and promoting and securing the rights of children.[169] To be clear, Stratas J.A. did not engage this emerging principle or rely on it in any way, and it is not necessary to do so for the disposition of this appeal. But the Respondent submits that this Honourable Court should be skeptical about the Appellant's attempt to discredit the *jus soli* principle as a primary means of acquiring citizenship. That is an argument for another day.

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[166] FCA Reasons, para. 69 [AR, Vol. I, Tab 3 at 56]. Also see: *Brossard v. Quebec,* [1988] 2 S.C.R. 279, at para. 56.

[167] Appellant's Factum, paras. 108-111.

[168] Special Rapporteur on the rights of non-citizens, *Progress report*, UN Doc E/CN.4/Sub.2/2002/ (2002) at 48, quoted in Andrew Brouwer, "Statelessness in Canadian Context: A Discussion Paper" (UNHCR, 2003) at 14.

[169] Andrew Brouwer, "Statelessness in Canadian Context: A Discussion Paper" (UNHCR, 2003) at 14, highlighting that the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child* stress that every child has the right to acquire a nationality. Also see *Convention on the Reduction of Statelessness* (1975) 989 UNTS 175 which gives primacy to *jus soli* in Article 1: "A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless."

f. Conclusion

137. This Court held in *Baker* that it is neither part of Canada's laws nor its values to visit the sins of the parents upon their innocent children; the judgment under appeal properly applied the same approach.[170] While the Minister protests that this is not his intent in this appeal, his essential argument is precisely that it was reasonable for the Registrar to find that Alexander "was not a Canadian citizen by birth based on his parents' employment as Russian spies in Canada."[171]

138. In fact, the Registrar's reasoning was not that the children of spies are excluded from citizenship by birth because of their parents' role, but that the children of **any** "representative or employee in Canada of a foreign government" are excluded by para. 3(2)(*a*).

139. The implications are broad: for example, work permits can be provided under the *Immigration and Refugee Protection Regulations* to "an officer of a foreign government sent, under an exchange agreement between Canada and one or more countries, to take up duties with a federal or provincial agency" but such a foreign national does **not** fall into the separate category of accredited diplomatic or consular officers.[172] Under the Minister's approach in this case, the children born in Canada to foreign officers on an exchange are nevertheless as ineligible for citizenship as the children of ambassadors.

140. In fact, on the Registrar's theory, if the White House chef crossed over from New York State to Niagara Falls, Ontario, for the afternoon with his pregnant wife and she suddenly went into labour and gave birth in Canada, that child too would fall under the exception in para. 3(2)(*a*) due to the father's employment.

141. This is a new theory of citizenship law, contradicted by previous government positions, which have always restricted the exception to children of diplomats.[173] If applied consistently, the Registrar's new position would cancel the Canadian citizenship of an unknown but potentially vast number of individuals born in this country while their parents were employed by foreign governments in any number of roles.

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[170] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 67; see also *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, para. 664; FCA Reasons, para. 82 [AR, Vol. I, Tab 3 at 61].
[171] Appellant's Factum, para. 100.
[172] *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 186(b) and (e).
[173] Global Affairs Canada, "The birth in Canada of children of foreign representatives," last modified 11 July 2017; Canada, House of Commons, *Updating Canada's Citizenship Laws: It's Time; Report of the Standing Committee on Citizenship and Immigration*, October 2005, pp. 5-6.

142. However it seems that after Alexander's case, the Minister does not expect to apply the sweeping implications of the Registrar's decision because he argues only that the exception from citizenship by birth "should apply equally to children of undercover foreign spies and registered foreign diplomats."[174] (Contrary to the Minister's suggestion,[175] incidentally, treating the two categories as the same would not actually solve any absurdity because registered foreign diplomats and their children are immune from criminal prosecution for espionage in Canada,[176] but undercover foreign spies and their families are not.)

143. It is open to Parliament to amend the *Citizenship Act* in order to make the children of "undercover foreign spies" just as ineligible for citizenship by birth as those of registered foreign agents, but it has not yet done so. The exclusion in para. 3(2)(*a*) therefore does not apply to Alexander.

D. In the Alternative, the Registrar Breached the Rules of Procedural Fairness

144. The standard of review for a determination of procedural fairness is correctness and, as the Minister concedes, this Court owes no deference to the courts below on this issue but "steps into their shoes."[177]

145. With respect, the Federal Court erred in concluding that the requirements of procedural fairness were "not at the upper end" because the Registrar's decision would not have rendered Alexander stateless, due to his Russian citizenship.[178] The decision was of enormous importance to Alexander because citizenship gave him a right under s. 6 of the *Charter* to enter and remain in Canada, a right the Registrar was able to take away without a hearing.

146. With respect, the Federal Court of Appeal erred when it agreed that the Registrar should have provided Alexander with more disclosure than her fairness letter in order to make his submissions, but nevertheless concluded he had suffered no prejudice because he was able to learn of the case he had to meet through access to information requests.[179]

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[174] Appellant's Factum, para.107.
[175] Appellant's Factum, para. 98.
[176] *Foreign Missions and International Organizations Act*, SC 1991, c 41, s. 3; Sched. I, *Vienna Convention on Diplomatic Relations*, art. 29; Sched. II, *Vienna Convention on Consular Relations*, art. 41.
[177] Appellant's Factum, para. 66; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, para. 45.
[178] FC Judgment at para. 19 [AR, Vol. I, Tab 2 at 24].
[179] FCA Reasons, para. 17 [AR, Vol. I, Tab 3 at 39].

147. A person about to be deprived of citizenship should be informed of the case against him and be allowed to respond to that case: it should not be his obligation to assemble the Minister's case as best he can in order to respond. Without full disclosure by the decision-maker, the reviewing court cannot be certain that it had the whole factual picture before it and that it was able to apply the relevant law to those facts.

148. A breach of the fundamental principles of procedural fairness and natural justice is generally the only prejudice required to render a decision void, in the absence of exceptional circumstances.[180] The Minister did not justify his failure to disclose all the relevant evidence before the Registrar decided to deprive Alexander of the citizenship he had held since birth and the right to enter the country where he was born.

[180] *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, pp. 660-661; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, p. 228.

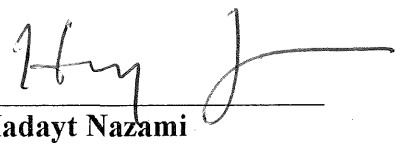
PART IV: Costs

The Respondent seeks costs on a party – party basis throughout regardless of the outcome of the Minister's Appeal. While recognizing the importance of the issues identified by this Court to be addressed by the parties, the Respondent notes that it has considerably lengthened the time spent by counsel in preparing the written argument. The Respondent respectfully submits that in the circumstances as an individual litigant costs would be appropriate in any event.

PART V: Order Sought

The Respondent asks that this Court dismiss the appeal, allow the application for judicial review and quash the decision of the Registrar to cancel the Respondent's citizenship.

All of which is respectfully submitted.



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PART VI: Table of Authorities

Legislative Enactments	**Paras Cited**
Administrative Tribunals Act, SBC 2004, c.45, ss. 58(1) and (2)	61, 96
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