

International law in judicial review after *Vavilov*

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The Supreme Court of Canada chose the unlikely case of *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65 as its platform for an extensive rewrite of Canadian administrative law. The decision will mostly be cited for its discussions of how to determine the standard of review applicable in judicial review of administrative decision-making and how to conduct such review on a reasonableness standard. But *Vavilov* is also important for its consideration of the place of public international legal considerations in judicial review. While the decision might not seem to say much about international law, what it does say, and where it says it, are developments to be welcomed. *Vavilov* brings the interpretive presumption of conformity with international law to administrative decision making, and reasserts that presumption in judicial reviews of those decisions.

Facts and decisions below

Alexander Vavilov was born in Toronto in 1994 as Alexander Foley, one of two sons of supposed Canadians Tracey Lee Ann Foley and Donald Howard Heathfield. In fact Mr. Vavilov's parents were Russian spies who assumed false Canadian identities before their children were born. The US Federal Bureau of Investigation arrested both parents in Boston in 2010 for espionage. Not long after, Mr. Vavilov's two attempts to renew his Canadian passport were rejected, and he was directed to obtain a certificate of Canadian citizenship before trying again. He did so in January 2013. In July, however, the Canadian Registrar of Citizenship wrote him to say that the certificate had been issued in error and that Mr. Vavilov was not, in fact, a Canadian citizen. One year later, Mr. Vavilov's Canadian citizenship was cancelled.

The registrar's rationale, briefly stated, was that the effect of s. 3(2)(a) of the Citizenship Act¹ was that a child born in Canada is not a Canadian citizen if his or her parents were employees of a foreign government and not themselves either citizens of Canada or permanent residents. Mr. Vavilov's parents were Russian spies and therefore, according to the registrar, Russian government employees. This meant that the general Canadian rule of acquisition

¹ Citizenship Act RSC 1985 c C-29.

of nationality *jus soli*, given effect by s. 3(1)(a) of the Act, did not apply.

This reasoning was upheld on judicial review on a correctness standard by Bell J. of the Federal Court of Canada,² but rejected by a majority of the Federal Court of Appeal³ on a reasonableness standard. Stratas J.A. concluded that s. 3(2)(a) did not apply to Mr. Vavilov's case, because that provision's exclusions for foreign government employees were intended to apply only to those enjoying diplomatic privileges and immunities not granted to spies. Stratas J.A. reached this conclusion through an analysis of the Foreign Missions and International Organizations Act⁴ and the provisions of the Vienna Convention on Diplomatic Relations 1961⁵ which it partly implements.

Vavilov's new course

At the Supreme Court of Canada, all nine judges agreed that the standard was reasonableness and the registrar's decision was unreasonable. Vavilov was Canadian. The court split 7-2 on the administrative law questions that dominate the two judgments.

The majority reasons are jointly attributed to Wagner C.J., and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ. Together they claim to "chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision" and "provide additional guidance for reviewing courts to follow when conducting reasonableness review".⁶ Justices Abella and Karakatsanis (also writing together) characterize the majority's reasons as "dramatically revers[ing] course — away from this generation's deferential approach and back towards a prior generation's more intrusive one". I leave that debate aside and focus on the role of international law considerations in the majority's new approach.

The Febles question

Before turning to what the *Vavilov* court says about international law, it is helpful to recall that there has been a debate in the Federal Court and the Federal Court of Appeal about which standard of

² 2015 FC 960.

³ 2017 FCA 132.

⁴ SC 1991 c 41.

⁵ [1966] CanTS no 29.

⁶ *Vavilov* SCC at para. 2.

review should apply to a decision involving questions of international law. In *Febles v Canada (Minister of Citizenship and Immigration)* 2012 FCA 324, the majority (Evans J.A., Sharlow J.A. concurring) preferred correctness review, despite the fact that the decision-maker there was interpreting its home statute, because the question concerned “a provision of an international Convention [article 1F(b) of the United Nations Convention relating to the Status of Refugees 1951⁷] that should be interpreted as uniformly as possible” and correctness review was “more likely than reasonableness review to achieve this goal”.⁸ The minority view (Stratas J.A.) was that while “[w]orld-wide uniform interpretations of the provisions in international conventions may be desirable”, that “depends on the nature of the provision being interpreted and the quality and acceptability of the interpretations adopted by foreign jurisdictions”.⁹ Notably, when *Febles* reached the Supreme Court of Canada, that court ignored the standard of review question entirely, with both the majority and the dissent implicitly approaching the international legal question as one to be determined on a correctness standard.¹⁰ Despite that approach at the Supreme Court, and Evans J.A.’s majority reasons in the Federal Court of Appeal expressly preferring correctness review, subsequent decisions in the Federal Court¹¹ and Federal Court of Appeal¹² have frequently applied reasonableness review to international legal questions determined by tribunals. When the issue came back before the Supreme Court of Canada in *B010 v. Canada (Citizenship and Immigration)* 2015 SCC 58, that court noted the controversy but declined to resolve it.¹³

It would have been difficult for the Supreme Court to duck the issue again in *Vavilov*. The key difference between the majority (Stratas and Webb J.J.A.) and the dissent (Gleason J.A.) in the Federal Court of Appeal was whether to defer to the registrar’s interpretation of the relevant Citizenship Act provisions—even if both the majority and the dissent purported to apply the reasonableness standard. In the end, the majority of the Supreme Court in *Vavilov* does not duck the issue, but does not squarely engage it in *Febles* terms, either.

⁷ [1969] Can TS no 6.

⁸ *Febles* at para. 24.

⁹ *Febles* at para. 76.

¹⁰ *Febles v. Canada (Citizenship and Immigration)* 2014 SCC 68.

¹¹ See e.g. *Druyan v Canada (Attorney General)*, 2014 FC 705 at para 38; *Haqi v Canada (MCI)*, 2014 FC 1167 at paras 24–26; *Tapambwa v Canada (Citizenship and Immigration)*, 2017 FC 522 at para 20.

¹² *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 5; *B010 v Canada (MCI)*, 2013 FCA 87 at para 71.

¹³ *B010 v. Canada (Citizenship and Immigration)* 2015 SCC 58 at paras. 22–26.

Indeed, the majority's account of the place of public international law in judicial review comes off a bit like a footnote—important enough to mention but not warranting lengthy treatment.

I do not say that as criticism. Public international legal questions arise only rarely before Canadian administrative decision-makers, and the mission the Supreme Court gave itself in *Vavilov* was to reconsider its standard of review jurisprudence as it applies to the entire administrative state. To cast public international law in a starring role in the court's new administrative law framework would have been surprising. It might even have provoked a race to spurious international law arguments by litigants in judicial review proceedings. The majority was right not to overemphasize international law in its analysis. And while the majority did not say much in the abstract about the role of public international law in judicial review, what it did say, and where it said it, seems likely to promote Canadian compliance with its international obligations— whichever standard of review applies.

Public international law's place in the Vavilov framework

First let us situate the majority's public international law comments in its reasons. Those reasons are carefully constructed and organized. Where public international law is addressed is, to my mind, nearly as important as what the majority says.

The majority's first major discussion is headed "Determining the Applicable Standard of Review". There the majority affirms that reasonableness is the presumptive standard of review and sets out how that presumption can be rebutted. Legislative intent, as indicated by legislated standards of review and statutory appeal mechanisms, are two ways in which the reasonableness presumption is rebutted. In addition, correctness review will apply where required by the rule of law. Constitutional questions are an instance of this, as are general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between administrative bodies. These five situations are the ones the majority presently regards as warranting "a derogation from the presumption of reasonableness review".¹⁴

Canada's obligations under public international law are given no place in this new framework for determining the applicable standard

¹⁴ *Vavilov* at para. 69.

of review. The most obvious place to have inserted PIL was under the rubric of general questions of law of central importance to the legal system as a whole. For an administrative decision-maker to disregard or misinterpret an international legal question (most likely arising from a treaty obligation) risks “risks incursion by the courts in the executive’s conduct of foreign affairs and censure under international law”.¹⁵ It does not seem a stretch, at least in some cases, to characterize the need to avoid internationally unlawful results as a matter of central importance to the legal system. PIL considerations might also fit, in some cases, within the concept of constitutional questions that rebut the reasonableness presumption, given the centrality of separation and division of power issues to our reception of international law domestically.

So there are places where the majority could have identified PIL considerations as grounds for rebutting the reasonableness standard. But it did not do so. The majority’s consideration of public international law does not fall under its discussion of “Determining the Applicable Standard of Review” at all. Instead, the majority situates public international legal considerations in the second major part of its reasons, headed “Performing Reasonableness Review”.

The majority begins this part of its reasons by noting, “This Court’s administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice”.¹⁶ The lengthy discussion that follows seeks to provide such guidance, beginning with the observation that “reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers”.¹⁷ Later in this discussion, the majority identifies “two types of fundamental flaws” that make a decision unreasonable, the second of which is “when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it”.¹⁸

Explaining this type of fundamental flaw, the majority considers “a number of elements that will generally be relevant in evaluating whether a given decision is reasonable”. These elements are not a checklist, and may vary in significance depending on the context.

¹⁵ *B010 v. Canada (Citizenship and Immigration)* 2015 SCC 58 at para. 47.

¹⁶ *Vavilov* at para. 73.

¹⁷ *Vavilov* at para. 75.

¹⁸ *Vavilov* at para. 101.

They are: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies.¹⁹

It is under the somewhat inapposite heading of “Other Statutory or Common Law” that public international law makes its brief but significant appearance in the majority’s new framework. After explaining that “both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide”,²⁰ the majority adds this:

We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada’s international obligations, and the legislature is “presumed to comply with . . . the values and principles of customary and conventional international law”: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71.²¹

That’s it. The majority’s revised administrative law framework says nothing more about the role of public international law in judicial review. (The majority comes back to public international law when it applies its new framework to Mr. Vavilov’s case.) At first blush, this single paragraph in the majority’s long and careful reasons may not seem like much. We already knew (as the majority notes) that statutes are subject to the interpretive presumption of conformity with international law. The court’s well-known invocation of the (supposedly unimplemented) Convention on the Rights of the Child 1989 in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 might also be regarded as old news.

¹⁹ *Vavilov* at para. 106.

²⁰ *Vavilov* at para. 111.

²¹ *Vavilov* at para. 114.

Yet paragraph 114 of *Vavilov* is important. The *Febles* question— Should a reviewing court apply correctness or reasonableness to questions of international law?—is not directly answered because it turns out to have been the wrong question. Even in reasonableness review, the state’s international obligations are a potential constraint on administrative decision makers. In seemingly the same way that statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide, Canada’s international obligations, including unimplemented treaties, are factors in reasonableness review.

The majority’s observations at paragraph 114 are qualified by the phrase “in some administrative decision making contexts”. That qualification appears to be descriptive rather than legal. The majority’s point seems to be only that not all Canadian administrative decisions involve matters to which public international law is a potential constraint. That is unarguably so. Beyond that, however, the qualification that introduces paragraph 114 does not appear to do any work.

The majority’s explanation of why international law is sometimes an important constraint on administrative decision makers is the presumption of conformity, particularly as enunciated in *Hape*. There the court identified the values and principles of customary and conventional law as “part of the context in which Canadian laws are enacted” and founded the presumption on the “judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result”.²² The presumption, and the notion that international law is part of the legal context in which Canadian legislation is enacted and read, was also relied upon in the *Baker* passages cited by the *Vavilov* majority.

This reliance on the presumption, with its depiction of Canadian law within an international context and its strong preference for internationally compliant interpretations of domestic law, suggests that an administrative decision will not be unreasonable merely for disregarding some relevant international obligation. A decision maker might ignore the obligation but still reach a result that conforms with it. Where, however, the decision under review is contrary to or inconsistent with an international obligation of the state, that decision will be unreasonable. Put another way, the presumption

²² *R. v. Hape* 2007 SCC 26 at para. 53.

that Canadian laws conform to Canada's international obligations means that an administrative decision maker cannot reasonably interpret a domestic provision inconsistently with the state's obligations.

By situating public international legal considerations within the type of legal constraints administrative decision makers will be held to even under reasonableness review, the majority in *Vavilov* gives public international law a potentially significant place in judicial review on either standard. International law remains on the periphery of judicial review, for it will only be relevant in "some administrative decision making contexts". But where it is relevant, it can really matter. The state's international legal obligations are among the "legal constraints" that, if disregarded, make a decision "untenable". For an administrative decision maker to decide inconsistently with the state's obligations is a "fundamental flaw".

Application of the new framework to Mr. Vavilov's case

The potential importance of public international legal considerations under the majority's new framework is illustrated by its decision in Mr. Vavilov's case. After 145 paragraphs of theoretical discussion, the majority comes to the application of its new framework to the case before it.

The standard of review is presumptively reasonableness, and the majority finds no basis for departing from that presumption.²³

The majority concludes that the registrar's decision was not reasonable. She

failed to justify her interpretation of s. 3(2)(a) of the *Citizenship Act* in light of the constraints imposed by the text of s. 3 of the *Citizenship Act* considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his

²³ *Vavilov* at para. 170.

submissions in response to the procedural fairness letter...the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).²⁴

This paragraph makes clear that it was not the registrar's disregard of Canada's treaty obligations alone that doomed her analysis. We will see, however, that in this case the relevant treaties cannot be considered in isolation from the legislative provisions that implement and reflect them, nor from the precedents that previously considered the international aspect of the issue before her.

Section 3(2)(a) of the Citizenship Act provides that children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" are excluded from the general (*jus soli*) rule in s. 3(1)(a) that individuals born in Canada after 14 February 1977 acquire Canadian citizenship by birth. The phrase "diplomatic or consular officer" is defined in the Interpretation Act²⁵ and does not apply to spies. But the phrase "other representative or employee in Canada of a foreign government" is undefined. The registrar considered that Mr. Vavilov's parents came within that phrase. The majority accepts that that phrase, considered in isolation, could apply to a foreign spy.²⁶

But the phrase is not to be read in isolation. First it must be read in the light of s. 3(2)(c). That provision excludes from s. 3(1)(a)'s *jus soli* rule

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)

if neither of the person's parents was a citizen or permanent resident. This provision (particularly, I think, the portions I have underlined) gives "clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) — including those who are

²⁴ *Vavilov* at para. 172.

²⁵ RSC 1985 c I-21.

²⁶ *Vavilov* at para. 175.

“employee[s] in Canada of a foreign government” — must have been granted diplomatic privileges and immunities in some form”.²⁷ Mr. Vavilov’s parents, needless to say, were not.

The majority then turns to the rest of the statutory context, being the Foreign Missions and International Organizations Act²⁸ (FMIOA) and the two treaties it implements, namely the Vienna Convention on Diplomatic Relations 1961²⁹ and the Vienna Convention on Consular Relations 1963.³⁰ The majority observes that these instruments are “the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts” and that “Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the FMIOA”.³¹ The majority then notes that “Canada affords citizenship in accordance both with the principle of *jus soli*, the acquisition of citizenship through birth regardless of the parents’ nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent”, citing the discussion in Brownlie, *Principles of Public International Law* (5th ed. 1998), at pp. 391-93.³² The majority calls *jus soli* and *jus sanguinis* “a backdrop to s. 3 of the *Citizenship Act* as a whole”,³³ returns to Brownlie’s discussion in quoting from a 2007 Federal Court decision,³⁴ and notes Mr. Vavilov’s arguments before the registrar that s. 3(2) was intended to mirror the FMIOA, the Vienna Convention on Diplomatic Relations, and art. 2 of the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality.³⁵

The majority also notes that the registrar’s analyst appeared to overlook the possibility that a person can be granted privileges or immunities despite not being considered “diplomatic or consular

²⁷ *Vavilov* at para. 176.

²⁸ SC 1991 c 41.

²⁹ Can TS 1966 No 29.

³⁰ Can TS 1974 No 25.

³¹ *Vavilov* at para. 177.

³² *Vavilov* at para. 178. Note that this is the same edition of Brownlie relied on by the majority in the Court of Appeal, seemingly because, as Stratas J.A. noted (2017 FCA 132 at para. 71), Brownlie specifically mentions Canada’s first Citizenship Act as “embodying the principle that the *jus soli* is excluded in respect of the children of persons exercising official duties on behalf of a foreign government who enjoy immunities”.

³³ This is cribbed from Stratas J.A. in the court below (2017 FCA 132 at para. 69).

³⁴ *Vavilov* at paras. 178-9, citing *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)* 2007 FC 559.

³⁵ 500 UNTS 223. Canada is not a party to this treaty.

officer[s]” under the Interpretation Act, as the majority of the Federal Court of Appeal had rightly appreciated.³⁶ The majority’s discussion of the international legal issues concludes:

It is well established that domestic legislation is presumed to comply with Canada’s international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law: *Appulonappa*, at para. 40; see also *Pushpanathan*, at para. 51; *Baker*, at para. 70; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46 (CanLII), [2005] 2 S.C.R. 401, at para. 39; *Hape*, at paras. 53- 54; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 (CanLII), [2015] 3 S.C.R. 704, at para. 48; *India v. Badesha*, 2017 SCC 44 (CanLII), [2017] 2 S.C.R. 127, at para. 38; *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16 (CanLII), [2018] 1 S.C.R. 398, at paras. 31-32. Yet the analyst did not refer to the relevant international law, did not inquire into Parliament’s purpose in enacting s. 3(2) and did not respond to Mr. Vavilov’s submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

This passage is another strong statement from the Supreme Court of Canada of the presumption of conformity with international law. Clearly the majority regards the registrar’s failure to consider the international law context of s. 3(2)(a) of the Citizenship Act as deeply problematic. Whether that failure alone would have been enough to justify judicial intervention on a reasonableness standard is less certain. But we can see which way the wind is blowing. In appropriate cases, administrative decision makers who disregard relevant international legal considerations and fail to apply the presumption of conformity with international law run a serious risk of having their decisions set aside.

The majority goes on to criticize the registrar for disregarding three Federal Court decisions interpreting s. 3(2), including in the light of the privileges and immunities accorded to diplomatic and other

³⁶ *Vavilov* at para. 181.

foreign officials by international law,³⁷ and to observe that “rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada’s international obligations”.³⁸ The majority concludes that the registrar’s “failure to justify her decision with respect to” the constraints imposed by s. 3 of the Citizenship Act as a whole, other legislation and international treaties that inform the provision’s purpose, relevant jurisprudence and the potential consequences of the registrar’s decision “point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities”.³⁹

The majority declared Mr. Vavilov a Canadian citizen and dismissed the Minister’s appeal.

The concurrence

The concurring judges say almost nothing about the role of international law, either in administrative law generally or as it relates to Mr. Vavilov’s case.⁴⁰ This should not necessarily be taken as disputing the majority’s conclusions on international law. Certainly the concurrence does not hesitate to point out where it disagrees with the majority on other points.

Conclusion: real deference

I have argued elsewhere that a deferential standard of review ought not to apply to administrative decisions that conflict with the state’s international obligations.⁴¹ My point has been that for courts to tolerate administrative decisions that risk putting Canada offside its international obligations is deferential to one part of the executive, i.e., the tribunal in question, but utterly non-deferential to another part of the executive, namely the federal cabinet members and civil servants charged with conducting Canada’s foreign relations. A Cabinet decision to incur a treaty obligation in exercise of the royal prerogative over foreign affairs is not taken lightly. It is preceded by a

³⁷ *Vavilov* at paras. 183-8.

³⁸ *Vavilov* at para. 192.

³⁹ *Vavilov* at para. 194.

⁴⁰ But see *Vavilov* at para. 251.

⁴¹ G. van Ert, “The Reception of International Law in Canada: Three Ways We Might Go Wrong” (2018):

<https://www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.2web.pdf>

complex process including policy formulation, consultations of stakeholders, negotiation with foreign partners, and the weighing of political factors. This is true even of relatively straightforward bilateral agreements between Canada and likeminded states, and all the more so for multilateral treaties, the negotiation and implementation of which can take many years. For the courts to permit administrative decision makers to upset the results of these deliberate, polycentric and time-consuming processes in the name of deference is faintly absurd. Real deference would see the courts protect the federal government's responsibility for the conduct of foreign relations through intolerance of administrative decisions that disregard Canada's international obligations.

Until *Vavilov*, I had thought only insistence upon correctness review for international legal questions could afford this sort of protection. But the majority in *Vavilov* has reformulated—or perhaps just better explained—the latitude courts have to insist upon certain legal constraints even under a reasonableness standard. By identifying international law as one such constraint, and insisting upon the presumption of conformity as an interpretive rule in administrative decision making just as it is in judicial decision making, *Vavilov* shows deference both to administrative decision makers and those charged with the conduct of Canada's foreign affairs.