Cases / Jurisprudence

Canadian Cases in Public International Law in 2020

Jurisprudence canadienne en matière de droit international public en 2020

compiled by / préparé par
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Article 1E of the Refugee Convention — *treaty implementation — presumption of conformity*

Celestin v Canada (Minister of Citizenship and Immigration), 2020 FC 97 (22 January 2020). Federal Court.

Ms. Celestin, a Haitian citizen, was denied refugee status in Canada based on section 98 of the *Immigration and Refugee Protection Act* (*IRPA*).[1] This section states that a person referred to in Article 1E of the *Refugee Convention*[2] is not a refugee. In turn, Article 1E states:

> This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the

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Each summary is followed by the initials of its author. For greater clarity, Dahlia Shuhaibar took no part in the summaries of *Nevsun Resources Ltd. v Araya* and *Quebec (Attorney General) v 9147-0732 Québec inc.*

[1] SC 2001, c 27.

[2] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Can TS 1969 No 6 (entered into force 4 June 1969).

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rights and obligations which are attached to the possession of the nationality of that country.

The Refugee Appeal Division (RAD) affirmed the decision of the Refugee Protection Division (RPD) that Celestin was excluded from refugee protection by virtue of section 98 as she had initially fled Haiti to Brazil and obtained status there.

The Federal Court dismissed the judicial review and, in doing so, clarified the approach to section 98. Justice Peter Pamel found the RAD's conclusion that Celestin had status in Brazil to be reasonable.[3] He then considered the RAD's finding that Celestin was not at risk of persecution in Brazil, a finding that was held to be unreasonable.[4] Interestingly, however, he found that the RAD should not have conducted the analysis. Rather, the risk assessment was to be done by a pre-removal risk assessment (PRRA) officer.[5] In interpreting section 98, Pamel J explained that the provision incorporates Article 1E by reference, meaning that "Parliament accepts the international obligations flowing from [it]."[6] He noted that "international interpretative documents are part of the context" of section 98, citing various examples of Supreme Court of Canada case law using international sources to interpret the *IRPA*.[7]

The foregoing principles, in Pamel J's view, showed that interpreting Article 1E in a way that does away with a risk analysis altogether would be contrary to the presumption of conformity and would risk putting Canada in breach of its international obligations.[8] To the contrary, Article 1E should be interpreted "to exclude only refugee protection claimants who do not genuinely need protection."[9] Yet, it is one thing to recognize the need for a risk analysis; it is another to determine how Canada has decided to implement that obligation.[10]

Here, amendments to the *IRPA* demonstrated that Parliament had delegated the risk assessment to the PRRA officer rather than to the RPD or the RAD.[11] The quality of risk assessments done by PRRA officers, and their suitability for performing those assessments, is beyond the scope of this comment.[12]

[3] *Celestin v Canada (Minister of Citizenship and Immigration)*, 2020 FC 97 at para 54.

[4] *Ibid* at paras 64–70.

[5] *Ibid* at para 104.

[6] *Ibid* at para 83.

[7] *Ibid* at paras 84–87.

[8] *Ibid* at paras 88–89.

[9] *Ibid* at para 91.

[10] *Ibid* at para 92.

[11] *Ibid* at paras 103–04, 111–13.

[12] See, however, Jamie Chai Yun Liew & Donald Galloway, *Immigration Law*, 2nd ed (Toronto: Irwin Law, 2015) at 362–63, noting that only about 3 percent of claimants are granted

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However, Pamel J's analysis of the *IRPA* as a whole seems correct. Importantly, he recognized that implementation of a treaty can take different forms: Parliament was entitled to implement Article 1E by delegating the risk assessment to PRRA officers rather than to RPD or RAD adjudicators. As long as the international obligation is met, Parliament has flexibility in how it is carried out. (DS)

Act of state doctrine — incorporation of customary international law — corporate complicity in human rights violations

Nevsun Resources Ltd v Araya, 2020 SCC 5 (28 February 2020). Supreme Court of Canada.

The plaintiffs were Eritrean workers who claimed they had been conscripted by Eritrea into its military and forced to work at an Eritrea mine owned by the defendant, Nevsun. The plaintiffs sued Nevsun in British Columbia, asserting various claims including damages for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. Nevsun applied to strike the claims, arguing that the foreign act of state doctrine applied and that customary international law violations were not actionable in BC law. The courts below dismissed Nevsun's motion.

The majority of the Supreme Court of Canada dismissed the appeal. Justice Rosalie Abella (Chief Justice Richard Wagner and Justices Andromache Karakatsanis, Clément Gascon and Sheilah Martin concurring) concluded that the act of state doctrine is not part of Canadian common law and that Nevsun had not shown (as required in a motion to strike pleadings) that it is plain and obvious that claims founded on customary international could not succeed. Justices Russell Brown and Malcolm Rowe, dissenting in part, agreed that act of state was not a part of Canadian law but would have concluded that the plaintiffs' customary claims disclose no reasonable cause of action. Justices Michael Moldaver and Suzanne Côté, dissenting, would have allowed Nevsun's appeal on both act of state and custom.

Abella J described the act of state doctrine as a "known (and heavily criticized) doctrine in England and Australia" that has "played no role in Canadian law."[13] She observed that there is "no single definition that captures the unwieldly collection of principles, limitations and exceptions that have been given the name 'act of state' in English law" but adopted as a "starting point" Lord Millet's description of act of state as "a rule of domestic

status by a pre-removal risk assessment (PRRA) officer, their methods have been criticized, and some claimants have lost access to a PRRA by virtue of legislative amendments.

[13] *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 28 [*Nevsun*].

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law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state."[14] She noted act of state's overlap with, but distinction from, the state immunity doctrine and its origins in seventeenth- and eighteenth-century English cases.[15] Abella J also reviewed the numerous exceptions and qualifications of the doctrine that have attached to it in English and Australian jurisprudence.[16] In contrast to these cases, the learned judge held that Canadian law addresses act of state concerns through the principles of conflicts of laws and judicial restraint:

> Our courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law.[17]

In support of this conclusion, Abella J relied on a variety of Supreme Court of Canada precedents[18] in which the court did not hesitate, where necessary, to express views about the lawfulness of a foreign state's conduct. She explained that courts "will refrain from making findings which purport to be legally binding on foreign states" but are "free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court."[19] There is, she held, "no jurisdictional bar to a Canadian court dealing with the laws or acts of a foreign state where 'the question arises merely incidentally'" and recalled the court's holding, in *Reference re Secession of Quebec*, that, "in certain circumstances, the adjudication of questions of international law by Canadian courts will be necessary to determine rights or obligations within our legal system."[20]

Abella J concluded that, while English common law

> was generally received into Canadian law at various times in our legal history … Canadian jurisprudence has addressed the principles underlying the doctrine within our conflict of laws and judicial restraint jurisprudence, with no attempt

[14] *Ibid* at para. 29, quoting *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)*, [2000] 1 AC 147 at 269 (HL).

[15] *Nevsun*, *supra* note 13 at paras 30–33.

[16] *Ibid* at paras 34–44.

[17] *Ibid* at para 45.

[18] See *ibid* at paras 46–55, concluding: "Even though all these cases dealt to some extent with questions about the lawfulness of foreign state acts, none referred to the 'act of state doctrine'" (at para 55).

[19] *Ibid* at para 47.

[20] *Ibid* at para 49. *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

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> to have them united as a single doctrine. The act of state doctrine in Canada has been completely absorbed by this jurisprudence.[21]

The learned judge then turned to the plaintiffs' claims based on breaches of customary international law. She noted that the plaintiffs specifically relied on "customary international law as incorporated into the law of Canada and domestic British Columbia law" and pleaded that such human rights violations as forced labour, slavery, and cruel, inhuman or degrading treatment are "actionable at common law" and can found an award of damages.[22] Abella J affirmed, as the courts below had done, that there was no need "to determine definitively whether the Eritrean workers should be awarded damages for the alleged breaches of customary international law" but only whether the plaintiffs' custom-based claims "should be struck at this preliminary stage" as disclosing no reasonable claim.[23] The test on a motion to strike is whether it is plain and obvious that the claim has no reasonable prospect of success, assuming the facts as pleaded to be true unless they are manifestly incapable of being proven.[24]

Abella J expressed her agreement with the chambers judge, Justice Patrice Abrioux (as he then was), that "[t]he current state of the law in this area remains unsettled, and assuming that the facts set out in the [notice of civil claim] are true, Nevsun has not established that the [customary international law] claims have no reasonable likelihood of success."[25] From this starting point, Abella J made some notable observations about Canadian courts' "important role in the ongoing development of international law."[26] She saw "no reason for Canadian courts to be shy about implementing and advancing international law" and affirmed that "[u]nderstanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the 'choir' of domestic court judgments around the world shaping the 'substance of international law.'"[27]

Returning to Nevsun's motion to strike, Abella J considered that the court must

[21] *Ibid* at para 57.

[22] *Ibid* at para 60.

[23] *Ibid* at paras 62–63.

[24] *Ibid* at para 64.

[25] *Ibid* at para 69.

[26] *Ibid* at para 70.

[27] *Ibid* at paras 71–72; see also para 79 on the "crucial role" of national courts in "shaping norms of customary international law."

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> start by determining whether the prohibitions on forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, the violations of which form the foundation of the workers' customary international law claims, are part of Canadian law, and, if so, whether their breaches may be remedied. To determine whether these prohibitions are part of Canadian law, we must first determine whether they are part of customary international law.[28]

From here, Abella J reviewed the elements of customary international law and the incorporation or adoption of custom by the common law, concluding: "There is no doubt then, that customary international law is also the law of Canada" and "must be treated with the same respect as any other law."[29]

Briefly but significantly, Abella J considered the question of whether customary international law norms are to be judicially noticed. She explained: "Unlike foreign law in conflict of laws jurisprudence … which is a question of fact requiring proof, established norms of customary international law are law, to be judicially noticed."[30] She added:

> And just as the law of contracts, labour law and administrative law are accepted without the need of proof, so too is customary international law. Taking judicial notice — in the sense of not requiring formal proof by evidence — is appropriate and an inevitable implication both of the doctrine of adoption and legal orthodoxy.[31]

As a partial qualification of this principle, however, the learned judge noted commentary to the effect that "when recognising *new* norms of customary international law, allowing evidence of state practice may be appropriate" and that "permitting such proof departs from the conventional approach of judicially noticing customary international law" but "in no way derogates from the nature of international law as law."[32] In the case before her, however, Abella J found that "the inquiry is less complicated and taking judicial notice is appropriate since the workers claim breaches not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms." She went on to affirm that the international prohibitions on crimes against humanity, slavery, forced labour, and cruel, inhuman, or degrading treatment are all recognized as *jus cogens* norms.[33]

[28] *Ibid* at para 73.

[29] *Ibid* at paras 74–95.

[30] *Ibid* at para 97.

[31] *Ibid* at para 98.

[32] *Ibid* at para 99 [emphasis in original].

[33] *Ibid* at paras 100–03.

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Nevsun contended that, even if the customary international law norms relied on by the plaintiffs formed part of the common law, its status as a corporation protected it from liability for their breach. Abella J rejected that proposition, observing that, while "certain norms of customary international law, such as norms governing treaty making, are of a strictly interstate character and will have no application to corporations, others prohibit conduct regardless of whether the perpetrator is a state."[34] Abella J cited various scholarly authorities on the development of human rights law as it applies to non-state actors, including corporations. Referring back to the legal standard that governs Nevsun's motion to strike the plaintiffs' pleadings, Abella J held that "it is not 'plain and obvious' that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations" of universal international law norms or indirect liability for complicity in such violations.[35] She added, however, that given that some customary law norms are of a strictly interstate character, it would be for the trial judge to determine whether that is so in respect of the customary norms relied upon by the plaintiffs and, if it is so, "whether the common law should evolve so as to extend the scope of those norms to bind corporations."[36]

Abella J considered whether there were any Canadian laws that conflict with the customary norms relied on by the plaintiffs so as to prevent their adoption by the common law and quickly found there were not.[37] She then considered whether "a civil remedy for a breach of this part of our common law" was available.[38] She reframed the question as: "can our domestic common law develop appropriate remedies for breaches of adopted customary international law norms?" In answer to this question, she relied on the principle *ubi jus ibi remedium* (for every wrong, the law provides a remedy), including the international law affirmation of that principle in Article 2 of the 1966 *International Covenant on Civil and Political Rights* (*ICCPR*)[39] and the Human Rights Committee's General Comment No. 31.[40] Contrasting the present case with that of *Kazemi Estate v Islamic Republic of Iran*,[41] where the *State Immunity Act* prevented a remedy, Abella J found that "it was not 'plain and obvious' that Canadian courts cannot

[34] *Ibid* at para 105.

[35] *Ibid* at paras 105–13.

[36] *Ibid* at para 113.

[37] *Ibid* at para 114–15.

[38] *Ibid* at paras 117–22.

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

[40] *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004).

[41] 2014 SCC 62 [*Kazemi*].

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develop a civil law remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law."[42]

In answer to Nevsun's argument that the harms alleged by the plaintiffs are adequately addressed by tort law, Abella J considered it "at least arguable" that the plaintiffs' allegations are not captured by existing law. She noted that customary norms are "inherently different from existing domestic torts" in that their "character is of a more public nature."[43] How the plaintiffs' claims should proceed to remedy (assuming a breach) was a matter to be left to the trial judge and could occur through the recognition of new nominate torts or through a direct remedy based solely on a breach of customary international law.[44] Abella J expressed concern that, since the customary norms advanced by the plaintiffs are already part of the common law, to require the development of new torts to remedy them "may not only dilute the doctrine of adoption, it could negate its application."[45]

In partial dissent, Brown and Rowe JJ raised numerous objections to the majority's reasons. Some are intriguing and likely to be revisited in future decisions. Others are difficult to follow. I note here four aspects of the reasons.

First, Brown and Rowe JJ rightly observed that Justice Louis LeBel's account of the incorporation doctrine in *R v Hape* was "ambivalent as to whether incorporation means that rules of customary international law are incorporated (at para. 36), should be incorporated (at para. 39) or simply may aid in the interpretation of the common law (at para. 39)."[46] The learned judges noted that the "traditional English view is the first" but expressed the view that the decision of the House of Lords in *R v Jones (Margaret)*[47] "puts that view in doubt, and rightly so." This point is left undeveloped, however, and may exaggerate the holding in *Jones*. That case involved the incorporation of the customary international law prohibition of the crime of aggression. In short, the House of Lords held that incorporation of that norm was prevented by the United Kingdom's constitutional principle that it is for Parliament, not the courts, to create new criminal laws. Clearly, *Jones* involves an important qualification of the incorporation doctrine, but it is not a qualification that maps neatly onto LeBel J's ambivalence in *Hape*, nor one that is irreconcilable with the principles enunciated by Abella J's majority reasons.

[42] *Nevsun*, *supra* note 13 at para 122; *State Immunity Act*, RSC 1985, c S-18.

[43] *Nevsun*, *supra* note 13 at paras 123–26.

[44] *Ibid* at para 127; see also at para 131.

[45] *Ibid* at para 128.

[46] *Ibid* at para 176, citing *R v Hape*, 2007 SCC 26 [*Hape*].

[47] [2006] UKHL 16.

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Second, Brown and Rowe JJ pointed briefly, but compellingly, to international law authorities doubting whether corporate responsibility for human rights violations has been recognized in international law.[48] The rejoinder to this, of course, is that the case before the court was only a motion to strike the pleadings, and it is too early in the litigation to say that such liability plainly and obviously does not exist. But there was more to be said by both the majority and the dissent on this question, and the decision in this case certainly cannot be taken as having settled the point.

Third, Brown and Rowe JJ asked pertinently how Abella J deduced potential liability on the part of a defendant from the international prohibitions she relied upon.[49] International law provides the prohibition, but that does not necessarily mean it also requires Canada and other states to impose private liability for breach of the prohibition. This concern is particularly relevant where, as here, the international law prohibitions appear to be directed at states, while the liability that Abella J contemplated is directed at private parties. Again, Abella J's response might be that the case at bar is only a motion to strike the pleadings; the question is simply whether it is plain and obvious that no private liability arises.

Finally, Brown and Rowe JJ pursued further the question of how customary international law should be treated as a matter of evidence. While they criticized the majority's approach as "creating an unwieldy hybridization of law and fact,"[50] their own approach strikes me as an elaboration, rather than a contradiction, of the majority's. Brown and Rowe JJ proposed the following method: first, the court must find the facts of state practice and *opinio juris*. In easy cases, this step may be dispensed with due to judicial notice. Where, however, the existence of a customary norm is contested, judges should rely on the pleadings or the evidence adduced before them. Both elements of the contested norm must be proven in evidence. Once the necessary facts of state practice and *opinio juris* are found, the court may identify whether any customary norm must be recognized. This is a determination of law.[51]

The dissenting reasons of Moldaver and Côté JJ touched briefly on the customary international law question, expressing the view that the "widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations."[52] The focus of their opinion, however, was the act of state doctrine, which they would have recognized in

[48] *Nevsun*, *supra* note 13 at paras 188–91.

[49] *Ibid* at paras 193–203.

[50] *Ibid* at para 178.

[51] *Ibid* at paras 179–82.

[52] *Ibid* at para 269.

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Canadian law. In their view, "a court should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law."[53] While a Canadian court has the institutional capacity and legitimacy to consider international law questions, it oversteps "the limits of its proper institutional role" by allowing a private claim which impugns the lawfulness of a foreign state's conduct under international law."[54]

The majority decision in *Nevsun* does much to reaffirm, and, to a lesser extent, clarify, the incorporation doctrine in Canadian law. It is also convincing in its rejection of the act of state doctrine in this country. The justiciability concerns raised by Moldaver and Côté JJ can be accommodated within the approach described by Abella J and concurred in by Brown and Rowe JJ. Somewhat less light is shed on the substantive international law question of whether corporations may be responsible for human rights violations, but a motion to strike pleadings may not be the ideal forum for such a judicial discussion.

Two aspects of the incorporation doctrine are left less settled after *Nevsun*. First, the decision of the English Court of Appeal in *Trendtex Trading Corp. v Central Bank of Nigeria* (relied upon in *Hape*) appeared to establish that new rules of customary international law could enter domestic law despite contrary judicial precedent.[55] Without addressing the point expressly, Abella J's reasons repeatedly rely upon older authorities to the effect that incorporation is pre-empted both by statute and by prior judicial decisions of final authority. The result is to leave uncertain the relationship between custom and inconsistent common law rules.

Second, both the majority and the partial dissent of Brown and Rowe JJ display confusion about LeBel J's reference, in *Hape*, to the incorporation of "prohibitive" rules of customary international law.[56] Regrettably, both opinions neglect LeBel J's own clarifying discussion of this point in *Kazemi*.[57] What I understand LeBel J to have meant is this: custom that requires states to do, or prohibits states from doing, certain things is incorporated in domestic law. If, however, custom simply permits states to do something, Canada's decision whether to avail itself of that right or power is not properly made by the judiciary. It must be left to the political elements of the constitution. Permissive customs are therefore not incorporated. This qualification of the incorporation doctrine is in keeping with Herscht Lauter-

[53] *Ibid* at para 286.

[54] *Ibid* at para 296.

[55] *Trendtex Trading Corp v Central Bank of Nigeria*, [1977] 1 QB 529.

[56] *Hape*, *supra* note 46 at paras 36, 39.

[57] *Kazemi*, *supra* note 41 at para 61.

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pacht's influential explanation of *R. v Keyn*.[58] The reasons of Brown and Rowe JJ make more of LeBel J's comments in *Hape* on this point than they can reasonably bear. (GvE)

Canadian Charter of Rights and Freedoms — *damages* — *good governance concerns* — *use of international materials*

Brazeau v Canada (Attorney General), 2020 ONCA 184 (3 March 2020). Court of Appeal for Ontario.

This case followed decisions[59] by the Courts of Appeal for Ontario and British Columbia that struck down parts of the *Corrections and Conditional Release Act* (*CCRA*)[60] relating to administrative segregation. These decisions held, respectively, that the *CCRA* violated sections 12 and 7 of the *Canadian Charter of Rights and Freedoms (Charter)*[61] as it lacked the safeguards necessary to prevent inmates from remaining in segregation for more than fifteen days and thus to prevent grossly disproportionate treatment.[62] Canada subsequently amended the *CCRA* to introduce "structured intervention units" that would provide inmates with four hours a day out of their cells, at least two hours of meaningful human contact, and a mechanism for independent review.[63]

The court below granted summary judgment, finding Canada liable for *Charter* damages due to the previous administrative segregation regime. The central issue on appeal was the availability of *Charter* damages against Canada.[64] Justices Robert Sharpe and Russell Juriansz wrote jointly for the court. They began by setting out the framework for *Charter* damages

[58] Hersch Lauterpacht, "Is International Law a Part of the Law of England?" in *Transactions of the Grotius Society*, vol 25, *Problems of Peace and War: Papers Read before the Society in the Year 1939* (London: Sweet & Maxwell, 1940) 51 at 61, discussing *The Franconia (R v Keyn)*, (1876) 2 Ex D 63.

[59] *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228. Leave to appeal to the Supreme Court of Canada was granted in both cases; however, Canada discontinued both appeals: *Canada (Attorney General) v Canadian Civil Liberties Assn*, [2019] SCCA No 96; *Canada (Attorney General) v British Columbia Civil Liberties Assn*, [2019] SCCA No 308. See the discussion of these cases in Gib van Ert, "Canadian Cases in Public International Law in 2019" (2019) 57 Can YB Intl L 558 at 563–67.

[60] SC 1992, c 20.

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

[62] As summarized in the reasons of the Court of Appeal for Ontario: see *Brazeau v Canada (Attorney General)*, 2020 ONCA 184 at paras 4–5 [*Brazeau*].

[63] *Ibid* at para 7.

[64] *Ibid* at para 11.

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established by the Supreme Court of Canada in *Vancouver v Ward*.[65] At issue was whether a countervailing factor existed that rendered damages inappropriate. Specifically, Canada argued that the "good governance" defence applied, described in *Ward* as being "a defence of immunity for state action under valid statutes subsequently declared invalid, unless the state conduct is 'clearly wrong, in bad faith or an abuse of power.'"[66]

The court accepted that good governance concerns arose here.[67] It determined that the appropriate threshold for the state conduct in this case was a "clear disregard for the claimant's *Charter* rights."[68] Canada argued that this threshold was not met as it could not have known that administrative segregation violated section 12 until the court's 2019 ruling.[69] The Court of Appeal rejected Canada's submission. It began by highlighting that a breach of section 12 in itself meant that the state conduct had been found to be "so excessive as to outrage standards of decency" and "grossly disproportionate [treatment] for the offender, such that Canadians would find the punishment abhorrent or intolerable." On the facts, the *Charter* breach had "caused severe harm to very vulnerable people and the state's conduct has been condemned as being cruel, excessive, abhorrent and intolerable. The state should be expected to be particularly vigilant to avoid inflicting such harm."[70]

Then, through an extensive review of both domestic and international instruments and reports, the court emphatically rejected Canada's argument that it could not have known that administrative segregation would violate section 12. Since the nineteenth century, it explained, there had been a consistent stream of medical opinion showing that solitary confinement causes and exacerbates mental illness.[71] Moreover, there had been a growing recognition in international law for at least thirty years of the need to eliminate the use of solitary confinement for prisoners with mental illness and to limit its use for all prisoners. This was demonstrated by a 1990 resolution by the United Nations (UN) General Assembly, reports of international organizations, and reports of a UN special rapporteur.[72]

[65] *Ibid* at paras 35–38, citing *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*]. The framework requires a court to determine (1) whether a *Charter* right has been breached; (2) whether damages would fulfil one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches; (3) whether the state has demonstrated countervailing factors that would render damages inappropriate or unjust; and (4) the appropriate quantum of damages.

[66] *Ward*, *supra* note 65 at para 43.

[67] *Brazeau*, *supra* note 62 at paras 56, 59, 61.

[68] *Ibid* at para 67.

[69] *Ibid* at paras 67–68.

[70] *Ibid* at para 72.

[71] *Ibid* at para 74.

[72] *Ibid* at paras 76–78.

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More telling still, Canada's correctional authorities, including the independent Correctional Investigator, had noted these international developments as early as its 2011–12 annual report, and Canada's practice had been specifically criticized by the UN Committee against Torture in 2012 and the Inter-American Commission on Human Rights in 2013.[73] Canada also voted for, and played a role in, the development of the UN Mandela Rules,[74] which established a fifteen-day cap on solitary confinement.[75] The court also reviewed various domestic reports criticizing Canada's practices.[76] Informed by these materials, the court found that Canada had exhibited a "clear disregard" for the claimants' *Charter* rights, negating the good governance concerns and rendering *Charter* damages appropriate.[77]

The court's reference to international materials and practice on solitary confinement in the determination of a *Charter* damages claim is novel but persuasive. Unlike cases that consider the scope of a *Charter* right, or the interpretation to be given to a statute, in light of international law, the court here used the fact of international activity on an issue, including Canada's participation in that activity, to affix Canada with knowledge of the harmfulness of its legislation and practices. The decision provides authority for the proposition that failure to repeal or amend an enactment in the face of international consensus that a given practice is harmful can support a claim for *Charter* damages. (DS)

Copyright — "making available right" — presumption of conformity with international law

Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada, 2020 FCA 100 (5 June 2020). Federal Court of Appeal.

This was an appeal to the Federal Court of Appeal from a decision of the Copyright Board of Canada on the meaning of the so-called "making available right" set out in section 2.4(1.1) of the *Copyright Act*,[78] as introduced by the *Copyright Modernization Act*[79] in November 2012. The provision reads:

[73] *Ibid* at paras 79–81.

[74] *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UNGAOR, 70th Sess, UN Doc A/Res/70/175 (2015).

[75] *Brazeau, supra* note 62 at paras 71, 82.

[76] *Ibid* at paras 83–86.

[77] *Ibid* at para 100.

[78] RSC 1985, c C-42.

[79] SC 2012, c 20.

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For the purposes of this Act, communication of a work or other subject- matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.	Pour l'application de la présente loi, constitue notamment une communication au public par télécommunication le fait de mettre à la disposition du public par télécommunication une œuvre ou un autre objet du droit d'auteur de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement.

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) contended that the introduction of this provision had changed the law as enunciated by the Supreme Court of Canada, only months before section 2.4(1.1) came into force, in *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* (*Entertainment Software 2012*).[80] In that case, the court held that transmission over the Internet of a musical work resulting in a download of the work was not, for the purposes of the *Copyright Act*, a communication by telecommunication, such that SOCAN could not collect royalties for such downloads.

Before the Copyright Board, SOCAN now contended that section 2.4(1.1) had overtaken the decision in *Entertainment Software 2012*. Relying on the amendment, SOCAN filed proposed tariffs arising from the operation of online music services. Such services were now required, in SOCAN's view, to pay royalties when making musical works available to the public online, and this was so whether those works were eventually transmitted to customers by download or by stream (or even if they were never accessed by the public at all). It therefore fell to the Copyright Board to decide whether section 2.4(1.1) had these consequences. The answer to that question would determine whether SOCAN's proposed tariff could be set. The board gave notice that it intended to determine the meaning of section 2.4(1.1) as a question of law and invited people who might be affected by the decision to participate in the proceeding. Well over thirty parties opted to make submissions, including several copyright collective societies, rights holders, and users (including the operators of online music services).

The Copyright Board largely agreed with SOCAN. It concluded that the effect of section 2.4(1.1) was to deem to be a communication to the public by telecommunication the act of placing a work or other subject matter on a server of a telecommunications network in such a way that the public can access it and cause it to be transmitted by downloading or streaming. The board took the view that a narrower interpretation of section 2.4(1.1),

[80] 2012 SCC 34.

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limiting it to works made available for streaming but not downloading, would fail to comply with Canada's international obligations. The "fundamental reason for the enactment" of section 2.4(1.1), in the board's view, was "for Canada to comply with Article 8" of the *World Intellectual Property Organization Copyright Treaty* (*WIPO Copyright Treaty*).[81]

The Copyright Board's assessment of Canada's obligations under the *WIPO Copyright Treaty* and other international instruments requires close consideration, both for its importance in the board's decision and for the vociferousness with which it was rejected in the Federal Court of Appeal.

The board began by noting that prior to the enactment of the *Copyright Modernization Act* in 2012, the *Copyright Act* "did not explicitly provide protection for works and other subject-matter in relation to the act of making these available to the public."[82] Several government bills to reform copyright, including one with an explicit "making available" protection, were introduced in Parliament but never enacted.[83] The *Copyright Modernization Act*, which introduced section 2.4(1.1), included the following passages in its preamble:

Whereas in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms; Whereas those norms are reflected in the *World Intellectual Property Organization Copyright Treaty* and the *World Intellectual Property Organization Performances and Phonograms Treaty*, adopted in Geneva in 1996; Whereas those norms are not wholly reflected in the *Copyright Act*; …

Attendu: … que la protection du droit d'auteur, à l'ère numérique actuelle, est renforcée lorsque les pays adoptent des approches coordonnées, fondées sur des normes reconnues à l'échelle internationale; que ces normes sont incluses dans le *Traité de l'Organisation mondiale de la propriété intellectuelle sur le droit d' auteur* et dans le *Traité de l'Organisation mondiale de la propriété intellectuelle sur les interprétations et exécutions et les phonogrammes*, adoptés à Genève en 1996; que ces normes ne se trouvent pas toutes dans la *Loi sur le droit d'auteur.*

[81] *Scope of Section 2.4(1.1) of the Copyright Act — Making Available* (25 August 2017), CB-CDA 2017-085 at para 13 [*Board Decision*], citing the *World Intellectual Property Organization Copyright Treaty,* 20 December 1996, 2186 UNTS 121, Can TS 2014 No 20 (entered into force 6 March 2002). See also *Board Decision, ibid* at para 137 ("one of the main purposes of the Bill was to implement the [*WIPO Copyright Treaty*] and [*Performances and Phonograms Treaty, infra* note 84]").

[82] *Board Decision, supra* note 81 at para 97.

[83] *Ibid* at para 97.

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The Copyright Board considered that the preamble "makes it clear that Parliament intended to implement new copyright protections … based on internationally recognized norms" and that "one of the main purposes of the [*Copyright Modernization Act*] was to establish copyright protection that is based on internationally recognized norms, as reflected in" both the *WIPO Copyright Treaty* and the *Performances and Phonograms Treaty* (collectively, *WIPO Internet Treaties*).[84] The board also considered government statements on the *Copyright Modernization Act*. The board quoted the following from a Government of Canada publication entitled *What the Copyright Modernization Act Means for Copyright Owners, Artists and Creators*:[85]

> The *WIPO Copyright Treaty* and the *Performances and Phonograms Treaty*, collectively known as the *WIPO Internet Treaties*, establish new rights and protections for authors, performers and producers. Canada signed the treaties in 1997. The proposed Bill will implement the associated rights and protections to pave the way for a future decision on ratification. All copyright owners will now have a "making available right," which is an exclusive right to control the release of copyrighted material on the Internet. This will further clarify that the unauthorized sharing of copyrighted material over peer-to-peer networks constitutes an infringement of copyright.[86]

As for the World Intellectual Property Organization's (WIPO) treaties themselves, the Copyright Board began by noting that the Supreme Court of Canada did not consider the effects of the *WIPO Copyright Treaty* in *Entertainment Software 2012* since Canada had not yet implemented either it or the *Performances and Phonograms Treaty* when that decision was rendered.[87] In fact, the two treaties remained both unimplemented and unratified by Canada when *Entertainment Software 2012* was decided. Consistently with the board's conclusion that the *Copyright Modernization Act* sought to align Canadian law with those two treaties, Canada proceeded to ratify them following Parliament's enactment of the new act, including section 2.4(1.1).[88]

[84] *Ibid* at paras 98–99; *World Intellectual Property Organization Performances and Phonograms Treaty*, 20 December 1996, 2186 UNTS 203, Can TS 2014 No 21 (entered into force 19 May 2002) [*Performances and Phonograms Treaty*].

[85] Government of Canada, *What the Copyright Modernization Act Means for Copyright Owners, Artists and Creators*, online: <web.archive.org/web/20130123093243/http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/rp01189.html>.

[86] Quoted in *Board Decision*, *supra* note 81 at para 101.

[87] *Ibid* at para 110; *Performances and Phonograms Treaty*, *supra* note 84.

[88] It has long been Canadian (and British) practice not to ratify treaties that require changes to domestic law until those changes are secured by legislation. In the case of multilateral

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The Copyright Board described the *WIPO Copyright Treaty* as "a special agreement among Berne Convention contracting parties … intended to expand the rights set out in that Convention," and described the "new protection for the act of making a work available by telecommunication" as "intended to provide rights holders with a basis to hold liable those who make copyrighted works available to the public online even where no evidence of reproduction or actual communication to the public was present."[89] Later, the board noted that "there does not appear to be any significant dispute that the *WIPO Internet Treaties* were intended to cover the making available of works and other subject-matter in a way that they may be downloaded or streamed."[90]

Also of note is the fact that the Copyright Board had extensive expert opinion before it on the relevant treaties[91] and particularly on the scope of article 8 of the *WIPO Copyright Treaty*, which provides:

> Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the *Berne Convention*, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

One such expert, a former assistant director general of WIPO, opined that the intention of the two *WIPO Internet Treaties* was "that the making available right is applicable both where the resulting interactive use takes the form of transmissions only allowing perception of and where they may result in downloading of the works (performances and/or phonograms) thus made available."[92] Another expert opined that the "technological means of

agreements that require implementation, Canada's practice is to sign the treaty first (thus confirming its intent to become bound by the treaty at a later date), then to secure in domestic law (federal, provincial, or both) the necessary changes to ensure its performance of the treaty's obligations and, finally, to ratify the treaty (thus bringing it into force internationally for Canada).

[89] *Board Decision*, *supra* note 81 at para 11.

[90] *Ibid* at para 138.

[91] I have often criticized in these pages the practice of putting international law (particularly treaties) before courts by means of expert opinion evidence. There is increasing judicial support against this practice. See *Turp v Canada (Foreign Affairs)*, 2018 FCA 133 at paras 82–89; *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras 89, 97–99 [*Nevsun*]. Whether the practice is equally problematic before administrative tribunals may depend on the practice and procedure of those bodies.

[92] *Board Decision*, *supra* note 81 at para 142.

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'making available' are irrelevant" and that the right applies to the work and is not limited to performances of it.[93] The Copyright Board relied on this and other expert evidence in concluding that article 8 "requires signatories to provide to authors the exclusive right of authorizing the communication to the public of their works,"[94] that "the act of making available can occur without any communication taking place,"[95] and that "to the extent that a country's existing law grants an exclusive right of authorizing the communication to the public of a work, but does not cover the mere 'making available' of that work, a gap exists, and such country is not compliant with Article 8."[96]

In order, it seems, to ensure that such a gap not exist in Canada, the Copyright Board concluded that section 2.4(1.1) must be interpreted as "a deeming clause" — that is, "a statutory fiction that imports into a word or expression an additional meaning that it would not otherwise have."[97] In other words, section 2.4(1.1) stretches the ordinary meaning of the phrase "communicate … to the public by telecommunication" to include merely making a work available for such communication, whether the work is in fact transmitted or not. As the board explained,

> the effect of the deeming provision in subsection 2.4(1.1) of the Act is to expand the meaning of the right of communication to the public by telecommunication, by reason that no definition of "communication" includes the preparatory act — that is, the "making available" of content in and of itself. The word, in its grammatical and ordinary meaning, includes only the successful transmission or conveyance of information from one person to another. Therefore, subsection 2.4(1.1) creates the legal fiction that the act of "making available" a work in the manner described is an act of communication to the public by telecommunication of that work. The previous interpretation of "communicate" in [*Entertainment Software 2012*] focussed only on the transmission element of that right and is distinguishable; it does not restrict the interpretation of subsection 2.4(1.1).[98]

In short, the Copyright Board concluded that its interpretation of section 2.4(1.1) as expanding the concept of "communication … to the public" to include making it available to the public, whether accessed by the public or not and whether access occurs by downloading or streaming,

[93] *Ibid* at para 143.
[94] *Ibid* at para 145.
[95] *Ibid* at para 146.
[96] *Ibid* at para 147.
[97] *Ibid* at paras 115–16.
[98] *Ibid* at para 117.

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complied with both the *WIPO Internet Treaties* and Parliament's intent to implement those treaties by means of the *Copyright Modification Act*.

At the Federal Court of Appeal, these conclusions were not only rejected but also derided. Justice David Stratas for the unanimous court accused the Copyright Board of having "skewed its analysis in favour of one particular result,"[99] acting "contrary to binding jurisprudence that limits the ways in which international law can influence the interpretation of domestic law,"[100] and providing "no meaningful reasons to support" its interpretation of section 2.4(1.1). All this despite having assumed, without deciding, that the applicable standard of review was "the one most generous to the Board" — namely, reasonableness.[101]

Stratas JA's fundamental complaint about the Copyright Board's decision was its readiness to set aside the Supreme Court of Canada's decision in *Entertainment Software 2012* in favour of its understanding of section 2.4(1.1) as illuminated by international law and particularly article 8 of the *WIPO Copyright Treaty*. In his view, the *Copyright Modernization Act* did not support the board's reliance on international law. He described the preambular provisions quoted above as being "at a level of generality that does not support the interpretation reached by the Board." While acknowledging that the preamble "suggests that the *Copyright Modernization Act* is aimed at implementing certain norms in international law … it is vague as to the extent to which it does so" and "certainly does not encourage anyone to ignore the specific terms of the Act and just interpret and apply international law wholesale."[102] As for the federal government's publication saying that the Act (then still a bill) "will implement the associated rights and protections to pave the way for a future decision on ratification" of the treaties, Stratas JA regarded this statement as suggesting that section 2.4(1.1) was a "narrow, limited-purpose provision."[103]

Coming to *Entertainment Software 2012* and its interpretation of "communication by telecommunication" as being fundamentally a performance right that does not extend to reproduction-based activities, Stratas JA found (and one can hardly disagree) that the Copyright Board "set aside" this reasoning "because it predated the Treaty." From that point on, said the learned judge, "the Board no longer looked to anything else to do with the text, context or purpose of subsection 2.4(1.1). The Treaty became

[99] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 49 [*Entertainment Software*].

[100] *Ibid* at para 50.

[101] *Ibid* at para 21.

[102] *Ibid* at para 53.

[103] *Ibid* at paras 55–56.

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everything."[104] Stratas JA rejected the board's "very expansionist view of what the Treaty did," even saying the board had offered no "reasoning in support"[105] — a surprising conclusion given the extensive evidence considered by the Copyright Board on the meaning and negotiating history of the treaty. The learned judge also rejected the board's conclusion that section 2.4(1.1) acted as a deeming provision, observing that "despite the plain meaning of the word 'communicate', the Board made subsection 2.4(1.1) fit its view of what the Treaty required."[106] Instead of explaining the meaning of "communicate to the public by telecommunication" by examining the text, context, and purpose of that phrase, the Copyright Board "imposed a meaning derived from its own view of the Treaty."[107] While it was open to Parliament to depart from the Supreme Court of Canada's construction in *Entertainment Software 2012*, "clear legislative text would be required."[108]

In Stratas JA's view, instead of starting from the text of section 2.4(1.1), the Copyright Board started with article 8 of the *WIPO Copyright Treaty*, interpreted it, and then made section 2.4(1.1) confirm with that interpretation. The board "assumed without analysis that subsection 2.4(1.1) implemented that particular meaning of article 8."[109] Elaborating, Stratas JA observed:

> In effect, the Board made subsection 2.4(1) fit its view of the Treaty to the extent of making the *Copyright Act* mean something other than what it says. It is as if the Board considered the Treaty — in particular its view of what the Treaty means — to be the superior law that governs domestically in Canada and made the domestic statute passed by Parliament fit with that meaning.[110]
>
> …
>
> Just because Canadian domestic legislation is enacted against the backdrop of a treaty that Canada has signed and just because the preamble to legislation, as here, suggests that it is aimed at implementing a treaty, it cannot be assumed that Parliament has adopted the treaty wholesale, no more and no less. Parliament, in fact, may have whittled down the provisions of the treaty or may have extended them. Indeed, it may have done something completely different.[111]

[104] *Ibid* at para 59.
[105] *Ibid* at para 60.
[106] *Ibid* at para 63.
[107] *Ibid* at para 64.
[108] *Ibid* at para 66.
[109] *Ibid* at para 70.
[110] *Ibid* at para 71.
[111] *Ibid* at para 74.

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From here, Stratas JA offered an account of the "proper interrelationship between international law and domestic law."[112] After complaining of incorrect invocations of "international law — or sometimes just the vibe of it" by litigants, administrative decision-makers, and the judiciary,[113] the learned judge reminded us that domestic law "that says something different" than international law "always prevails." "For this reason," said Stratas JA, "when domestic law and international law both potentially bear upon a legal problem, one must always start by discerning the authentic meaning of the domestic law."[114] He continued: "Under our Constitution, the power to make laws is not vested in anyone else" than Parliament and the provincial legislatures, "and certainly not the unelected functionaries abroad who draft and settle upon international instruments."[115]

This was the reason for the requirement that international instruments cannot become Canadian law without domestic legislative action.[116] The learned judge elaborated:

> Sometimes international instruments prompt legislation or influence its terms in whole or in part. Thus, international instruments can play an important role in legislative interpretation, legitimately entering into the analysis of the text, context and purpose of legislation. But this is no result-oriented free-for-all where anything goes: they enter the analysis, but only in specific ways for specific purposes.
>
> Sometimes the text of a legislative provision explicitly adopts the international instrument wholesale. In such a case, there is no doubt and so the task of legislative interpretation boils down to interpreting the international instrument. …
>
> Sometimes the text of a legislative provision is ambiguous but international law may have influenced its purpose or context. In such a case, the relevant international instrument should be examined as part of the overall task of discerning the authentic meaning of the legislation. In this context, ambiguity means that the provision is "reasonably capable of more than one meaning," has "two or more plausible readings, each equally in accordance with the intentions of the statute" or "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning". …
>
> Sometimes the text of a provision seems clear but there is international law surrounding the subject-matter of the provision. In such a case, one should still

[112] *Ibid* at para 76 (heading).

[113] *Ibid*.

[114] *Ibid* at para 78.

[115] *Ibid* at para 79.

[116] *Ibid* at para 80.

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> examine the international law to see whether there are latent ambiguities in the legislative text to be resolved and, if so, to use it alongside other elements of context and purpose to resolve the latent ambiguity: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449; *Baker*; *Canada v. Seaboard Lumber Sales Co.*, [1995] 3 F.C. 113, 184 N.R. 364 (C.A.); *Pembina County Water Resource District v. Manitoba (Government)*, 2017 FCA 92, 409 D.L.R. (4th) 719. This is nothing more than a particular application of the general rule that even where the legislative text is clear, the context and purpose of the legislation nevertheless must be examined in order to see whether there are latent ambiguities that must be resolved. …
>
> If, after interpreting the domestic legislation in this way, the Court concludes that the legislation is clear and has no patent or latent ambiguities, the Court must give it its authentic meaning and apply it. This must be done even if it conflicts with international law. … Given our constitutional arrangements, international law cannot be used to displace or amend the authentic meaning of domestic legislation.[117]

In response to arguments by some of the respondents that the Copyright Board applied the presumption of conformity with international law, Stratas JA acknowledged that it was "true that certain cases speak of a 'presumption of conformity'" but warned that "the word 'presumption' can lead some dangerously off track."[118] While domestic legislation is presumed to comply with a relevant treaty, "the focus, as always, must be on what the legislator actually did" through a "rigorous, dispassionate and objective search for the authentic meaning of the legislation by analyzing its text, context and purpose."[119] However, Stratas JA continued, "the presumption does not permit those interpreting domestic legislation to leap to the conclusion, without analysis, that its authentic meaning is the same as some international law. Nor does it permit them to twist or amend the authentic meaning of domestic law to make it accord with international law."[120]

Returning to the Copyright Board's decision, Stratas JA explained that it "in essence … went to article 8 of the Treaty, asserted its view of that article's meaning without any supporting reasoning, and then made subsection 2.4(1.1) conform to its view." In doing so, the board misused

[117] *Ibid* at paras 81–85.

[118] *Ibid* at para 89. Advice not heeded, it must be noted, by the Supreme Court of Canada in such cases as *Hape*, *supra* note 47; *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34; *Kazemi*, *supra* note 41; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa Nation*]; and, most recently, *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 [*9147-0732 Québec*].

[119] *Entertainment Software*, *supra* note 99 at para 90.

[120] *Ibid* at para 91.

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international law and even "exalted international law over domestic law."[121] In the learned judge's view, no purpose was served in sending the matter back to the board for re-decision. Instead, the decision was quashed.

The Supreme Court of Canada has granted leave to appeal the decision of the Federal Court of Appeal. One must hope that the Copyright Board's approach is treated more sympathetically there, whether its decision is restored or not. While many of Stratas JA's observations on the interrelationship between international and domestic law are sound (indeed, illuminating), he is too dismissive of the board's attempt to conform to the *WIPO Internet Treaties*. There is nothing in the board's reasons to support Stratas JA's supposition that the board considered international law "to be the superior law." Rather, everything points to the board's conviction — be it right or wrong — that Parliament's intent in enacting the *Copyright Modernization Act* was to implement the *WIPO Internet Treaties* by the addition of section 2.4(1.1). The Copyright Board cannot be faulted for noting the Act's preamble, which expressly refers to the *WIPO Internet Treaties* and expresses Parliament's view that those treaties' "norms are not wholly reflected in the *Copyright Act*." While reference in a preamble without more is surely insufficient to implement a treaty in domestic law,[122] Parliament's reference to the two treaties, and to the gap between their requirements and the *Copyright Act* as it then stood, strongly suggests an implementing intent. That intent was supported, as the board noted, by a government statement that expressly described the *Copyright Modernization Act* as implementing legislation serving to permit Canada to ratify the treaties — something Canada could not safely do until its internal law met the contemplated new obligations. While Stratas JA depicts the Copyright Board as abjectly applying article 8 of the *WIPO Copyright Treaty* for reasons of its own, the board's concern appears to have been directed instead at giving effect to Parliament's intent to ensure Canada's ability to perform its obligations under the treaties as the necessary precursor to the federal government's ratification of them.

If there is a culprit in this story, it is not the overzealous Copyright Board. Nor is it the "unelected functionaries abroad who draft and settle upon international instruments" — a gross mischaracterization of how Canada makes treaties. Nor is it even Stratas JA and his colleagues in the Federal Court of Appeal whose critique of the board was so uncharitable. The culprit, instead, is Parliament or, more to the point, the parliamentary drafters of the *Copyright Modernization Act*. If Stratas JA and his colleagues were not persuaded upon reading that Act that it effected changes to the *Copyright Act* in implementation of treaties signed and soon to be ratified by

[121] *Ibid* at para 93.

[122] See *Quebec (Minister of Justice) v Canada (Minister of Justice)* (2003), 228 DLR (4th) 63 at para 91 (Que CA).

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Canada, the chief fault for that lies with the legislator. Instead of the *Copyright Modernization Act*, Parliament could have enacted the *WIPO Treaties Implementation Act*, with express provisions requiring the Copyright Board and the courts to reach treaty-conforming results. There is no magical form of words, or specific constitutional disposition, that Parliament must invoke to implement a treaty in domestic law. Parliament is free to make such legislative amendments or additions as, in its view, suffice to meet the treaty's requirements. It may expressly mention the treaty[123] or not.[124] It may bring the entire text of the treaty into federal law[125] or only parts of the treaty.[126] But, however Parliament chooses to proceed, it must make its intent sufficiently clear that a court, considering the law one day, can detect within it an intent to discharge some obligation assumed by Canada under international law. If Parliament's words are not clear enough, Parliament's implementing intent may fail, with the result that Canada finds itself in violation of a treaty it had intended to discharge. While one may argue whether Parliament made itself sufficiently clear here, the fact remains that the Federal Court of Appeal was left uncertain. Parliament could have been clearer.

The fundamental question that the Supreme Court of Canada must answer in the upcoming appeal appears to be this: how quick should courts and tribunals be to reach internationally conforming, or non-conforming, interpretations of statutes? One may be forgiven for thinking the Court has answered this question already. The Supreme Court has told us that it is a "rule of 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."[127] It has told us that "the values and principles enshrined in international law, both customary and conventional … constitute a part of the legal context in which legislation is enacted and read."[128] It has warned us that "to interpret a Canadian law in a way that conflicts with Canada's international obligations risks incursion by the courts in the

[123] E.g. *Civil International Space Station Agreement Implementation Act*, SC 1999, c 35.

[124] E.g. *Criminal Code*, RSC 1985, c C-46, s 269.1 (performing Canada's obligation to criminalize acts of torture as set out in art 4 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36 (entered into force 26 June 1987) [*Convention against Torture*].

[125] See e.g. *Canada–Namibia Tax Convention Act*, SC 2013, c 27, s 2.

[126] E.g. *Foreign Missions and International Organizations Act*, SC 1991, c 41 s 3(1).

[127] *Hape*, *supra* note 47 at para 53.

[128] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at para 70 [*Baker*] (quoting with approval Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 330). See also *Hape*, *supra* note 47 at para 53.

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executive's conduct of foreign affairs and censure under international law."[129] It has explained that there is no need to find ambiguity on the face of a statute before resorting to international law as an aid in interpreting it.[130]

Despite these authorities, Stratas JA's doubts that the *Copyright Modernization Act* was enough to import Article 8 of the *WIPO Copyright Treaty* and, in so doing, set aside a Supreme Court of Canada decision made only months earlier, are understandable. In giving as little guidance as it did in the *Copyright Modernization Act*, Parliament asked a lot of subsequent interpreters. The Copyright Board responded by attempting to give effect to the apparently shared intent of Parliament and the federal government to conform to the treaties, even if that intent had to be cobbled together from a preamble and a government publication external to the Act itself. The Federal Court of Appeal responded by requiring Parliament to express itself more clearly instead of leaving the job of performing Canada's WIPO obligations to administrative and judicial bodies. Both responses are defensible. But which is best?

Despite Stratas JA's trenchant and principled comments, I am inclined to prefer the Copyright Board's approach. There seems to be enough — if barely — in the *Copyright Modernization Act* to support an interpretation of it in conformity with the *WIPO Internet Treaties*. All legislation is presumed to conform with international law. The presumption is necessarily rebuttable because, as Stratas JA rightly said, Parliament and the provincial legislatures are the ultimate source of Canadian laws. International law is not entrenched in our law by section 52 of the *Constitution Act, 1982*.[131] There is, therefore, no power in a Canadian court to invalidate or disapply a law that breaches our treaty obligations or any other international norm. Parliament and the provincial legislatures remain undoubtedly sovereign to enact laws that contravene Canada's international obligations. And yet the presumption of conformity must not be rebutted too readily, particularly where (as here) there is reason to believe that the legislation under consideration was intended to perform an international obligation that the federal government has undertaken for Canada in exercise of the royal prerogative over foreign affairs. Wherever possible, the judiciary and executive should speak with one voice in matters of foreign affairs. When courts reject the presumption of conformity, and adopt legal constructions of domestic law that risk creating responsibility for Canada on the international plane, the government's conduct of international relations may be hindered or

[129] *Bo10 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 47 [*Bo10*].

[130] *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371–2, 74 DLR (4th) 449; *Crown Forest Industries Ltd v Canada*, [1995] 2 SCR 802 at para 44, 125 DLR (4th) 485.

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

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complicated. Such a result is rarely intended by Parliament and, therefore, ought only rarely to be ascribed to it by our courts.

Of course, courts can only do so much. They cannot jettison the principles of statutory interpretation in their haste to rescue governments from the international legal consequences of poorly drafted or ill-considered laws. Stratas JA's reasons exhibit an admirable concern for the proper bounds of judicial power. But Supreme Court of Canada jurisprudence in the last quarter century or more has reconciled the modern approach to statutory interpretation with the two-centuries-old presumption[132] that Parliament does not intend to breach international law by explaining that international law forms part of the context in which domestic laws are made. Canada's international legal obligations, such as those examined by the Copyright Board, fall to be considered at the context stage of statutory interpretation.[133] They were not improper considerations for the board, as Stratas JA's reasons appear at points to suggest. (GvE)

Migrant workers — public health measures — relevance of international instruments

Schuyler Farms Limited v Dr Nesathurai, 2020 ONSC 4711 (27 August 2020). Ontario Superior Court of Justice (Divisional Court).

This case arose in the context of the COVID-19 pandemic. Dr. Nesathurai, the medical officer of health for the Haldimand-Norfolk Health Unit, issued an order to employers of migrant farm workers (MFWs) that required, among other things, that no more than three MFWs self-isolate together in a bunkhouse shelter. The Health Services Appeal and Review Board struck that aspect of the order. Dr. Nesathurai appealed.

Ontario's Divisional Court allowed the appeal and reinstated the order, finding that the board had erred in several respects. Of interest for our purposes is the board's conclusion that the order was arbitrary. In its view, the limit of three MFWs to a bunkhouse was arbitrary as it applied regardless of the design, size, layout, or amenities of a given bunkhouse; there was "no convincing reason" for that number.[134]

The Divisional Court found several palpable and overriding errors with this conclusion. One of these related to the status of MFWs as a "priority

[132] The earliest judicial statement of the presumption I know of is *Le Louis* (1817), 2 Dods 210 at 239, 165 ER 1464 at 1473–74. By 1875, the first edition of Peter Benson Maxwell, *On the Interpretation of Statutes* (London: W Maxwell and Son, 1875) offered six pages of authorities to the effect that "every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law" (at 122).

[133] *Bo10*, *supra* note 129 at para 49.

[134] *Schuyler Farms Limited v Dr Nesathurai*, 2020 ONSC 4711 at para 66 [*Schuyler Farms*].

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population." The court affirmed that "MFWs are exceptionally vulnerable because of their immigration status, race and the precarious employment relationships imposed by the structure of the programs under which they are employed."[135] Moreover, guided by submissions of the intervener Canadian Lawyers for International Human Rights, the court held that the Health Services Appeal and Review Board had failed to interpret the *Health Protection and Promotion Act*[136] in a purposive and contextual manner consistent with relevant international human rights principles.[137] It highlighted the guidance from *Vavilov* that "statutory interpretation requires a purposive and contextual analysis that engages human rights principles and that international law should inform administrative decision-making where relevant."[138]

The court proceeded to consider protections in the *Universal Declaration of Human Rights* (*UDHR*)[139] and the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*),[140] noting that they were acceded to by Canada and "form part of Canada's international legal obligations."[141] It also described the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (*UNDROP*)[142] as "part of the body of human rights law and norms to which Canadian adjudicators may look in interpreting statutory or common law obligations and in reviewing administrative decisions," citing *Baker*.[143] The court explained:

> [93] Both *ICESCR* and *UNDROP* provide that everyone has a right "to the enjoyment of the highest attainable standard of physical and mental health," which applies regardless of national origin, race, other status or rural employment. This right also extends to the determinants of health, including adequate housing and healthy occupational and environmental conditions. States are expected to respect, protect and fulfil the right to health, including regulating industrial hygiene. In particular, the obligation to protect requires

[135] *Ibid* at para 86.

[136] RSO 1990, c H.7.

[137] *Schuyler Farms*, *supra* note 134 at para 89.

[138] *Ibid* at para 91, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 114 [*Vavilov*].

[139] GA Res 217 A (III), UN Doc A/810 (1948) at 71 [*UDHR*]. The court mistakenly says (*Schuyler Farms*, *supra* note 134 at para 92) that Canada acceded to the *UDHR* in May 1976, apparently confusing the *UDHR* with the *ICCPR*, *supra* note 39.

[140] Can TS 1976 No 46.

[141] *Schuyler Farms*, *supra* note 134 at para 92.

[142] *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, UN Doc A/HRC/RES/39/12 (28 September 2018).

[143] *Schuyler Farms*, *supra* note 134 at para 92, citing *Baker*, *supra* note 128 at para 70.

States to prevent third parties from interfering with the right to health, which includes an obligation to adopt and enforce "preventative measures in respect of occupational … diseases" and to minimize, as far as is reasonably practical, the causes of workplace health hazards. In the context of a pandemic, States have a duty to adopt strategies of infectious disease control. The right to adequate housing includes providing the inhabitants with a space that will protect them from threats to their health and "disease vectors."

[94] The *UDHR* and *ICESCR* state that everyone is entitled to the rights and freedoms "without distinction of any kind" on the basis of protected grounds such as race and national or social origin. Migrants and non-citizens are recognized as a class to be protected from discrimination under international law. The *Convention on the Protection of Migrant Workers* and the *Safety and Health in Agriculture Convention* specifically provide that migrant farm workers are entitled to "treatment no less favourable than that which applies to nationals of the State of employment" and "comparable permanent workers in agriculture" in accessing workplace health and safety, housing and social and health services.

[95] In the public health context, these principles require implementing measures that recognize the vulnerability and health inequities experienced by MFWs so as to eliminate the disproportionate impact of COVID-19 on them. … Again, the Board erred by finding that Dr. Nesathurai's Order was arbitrary in the face of the equity concerns that drove his Order and were mandated by both the Health Equity Guideline, 2018 and the need to conform to Canada's international obligations.[144]

The Divisional Court's general conclusion that Canada has international human rights obligations, including health-related obligations, with respect to the migrant workers at issue here cannot be faulted. Regrettably, however, the court's discussion of the relevant instruments makes no distinction between those that are binding on Canada and those that are not. Particularly notable in this regard is the court's reliance on the 1990 *Convention on the Protection of Migrant Workers*[145] and the 2001 *International Labour Organization's Convention No. 184 on Safety and Health in Agriculture*,[146] neither of which Canada has joined as a party nor even signed. Similarly, the *UNDROP* is a non-binding declaration of the United Nations General Assembly, and Canada abstained from the vote to pass it. This case predates the Supreme Court of Canada's decision in *9147-0732 Québec* (reviewed below).[147] While

[144] *Schuyler Farms*, *supra* note 134 at paras 93–95 [citations omitted].

[145] *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

[146] *Convention No 184 Concerning Safety and Health in Agriculture*, 21 June 2001, 2227 UNTS 241 (entered into force 20 September 2003).

[147] *9147-0732 Québec*, *supra* note 118.

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that case dealt with *Charter*, rather than statutory, interpretation, its emphasis on the distinction between binding and non-binding international law instruments is pertinent.[148]

The Divisional Court's conclusion that Dr. Nesurathurai's order was necessary in part to "conform to Canada's international obligations" is not as well supported as it believed. But the court did explain that the instruments it reviewed were "by no means determinative," "serve[d] to reinforce the points that have already been made" and formed part of the context of statutory interpretation, following *Appulonappa*, *Vavilov*, and *Baker*.[149] This approach might be regarded as being more consistent with persuasive, rather than binding, norms. Ultimately, however, the court's failure to distinguish binding from non-binding instruments, and the relevance of that consideration to its review of the Health Services Appeal and Review Board's decision, is unsatisfying. (DS)

Cruel and unusual treatment or punishment — application to corporations — international law in the interpretation of the Canadian Charter of Rights and Freedoms

Quebec (Attorney General) v 9147-0732 Québec inc., 2020 SCC 32 (5 November 2020). Supreme Court of Canada.[150]

A Quebec company sought to avert liability for a fine on the basis of section 12 of the *Charter*, which reads: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."[151] A majority of the Quebec Court of Appeal found that section 12 applies to corporations. The Supreme Court of Canada unanimously reversed this decision but split on the question of how courts may use international and comparative law in interpreting the *Charter*. The majority reasons were those of Brown and Rowe JJ (Wagner CJ and Moldaver and Côté JJ concurring). The lead concurring reasons were by Abella J (Karakatsanis and Martin JJ concurring). Justice Nicholas Kasirer wrote separate concurring reasons that made no comment on international legal issues.

It is convenient to start with Abella J's reasons as all members of the Court agreed with her disposition of the appeal. She concluded that the purpose of section 12 is to prevent state-inflicted physical or mental pain and to protect human dignity and individual worth. The intended beneficiaries of this

[148] *Ibid* at paras 30–38.

[149] *Schuyler Farms*, *supra* note 134 at paras 89–92, citing *R v Appulonappa*, 2015 SCC 59 at para 90; *Vavilov*, *supra* note 138 at para 114; *Baker*, *supra* note 128 at para 70.

[150] Gib van Ert was counsel to an intervener in this appeal.

[151] *Charter*, *supra* note 61, s 12.

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protection are people, not corporations.[152] She affirmed the purposive approach to *Charter* rights set out in *Big M Drug Mart*: "The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect."[153] While noting that the text of a *Charter* provision may "be of comparatively limited assistance in interpreting [the] scope" of a *Charter* right,[154] she nevertheless reviewed dictionary definitions of the key terms of section 12 in this case — namely, "cruel" and "everyone."[155] She then reviewed section 12's historical origins in the *English Bill of Rights*, the Eighth Amendment of the United States Constitution and section 2(b) of the *Canadian Bill of Rights*.[156]

Abella J then turned to consider prohibitions of cruelty in international instruments and the decisions of foreign and international tribunals. Her review included Article 5 of the *UDHR*,[157] Article 7 of the *ICCPR*,[158] Article 5 (2) of the 1969 *American Convention on Human Rights*,[159] and Article 3 of the 1950 *European Convention on Human Rights* (*ECHR*).[160] She noted that while the *ECHR* has been interpreted to include corporate rights, that treaty's prohibition of torture or inhuman or degrading treatment or punishment has been held not to apply to corporations.[161] The learned judge also noted that Article 16(1) of the *Convention against Torture* has never been extended to include corporations.[162] She also considered the position in South Africa and New Zealand.[163] Abella J concluded from this review of international and comparative sources that it is "widely acknowledged that the right to be free from cruel and unusual punishment is intended to protect human dignity by prohibiting degrading, inhuman, or dehumanizing treatment or punishment that causes physical or mental pain and suffering."[164]

[152] *9147-0732 Québec*, *supra* note 118 at para 51.

[153] *Ibid* at para 68, quoting *R v Big M Drug Mart*, [1985] 1 SCR 295 at 344, 18 DLR (4th) 321.

[154] *9147-0732 Québec*, *supra* note 118 at para 75.

[155] *Ibid* at paras 81–87.

[156] *Ibid* at paras 88–95.

[157] *UDHR*, *supra* note 139.

[158] *ICCPR*, *supra* note 39.

[159] 1144 UNTS 123.

[160] 213 UNTS 221.

[161] *9147-0732 Québec*, *supra* note 118 at paras 114–15, citing *Kontakt-Information-Therapie v Austria*, Application No 11921/86 (12 October 1988) at 81; *Identoba v Georgia*, Application No 73235/12 (12 May 2015) at para. 45.

[162] *9147-0732 Québec*, *supra* note 118 at para 117, citing *Convention against Torture*, *supra* note 124.

[163] *9147-0732 Québec*, *supra* note 118 at paras 118–22.

[164] *Ibid* at para 123.

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Abella J's explanations (or perhaps justifications) for resorting to international and comparative sources in the interpretation of section 12 included that "Canada's rights protections emerged from the same chrysalis of outrage as other countries around the world,"[165] that "numerous human rights instruments [contain] provisions that closely mirror the language of s. 12,"[166] and that the Supreme Court of Canada "has frequently relied on international law sources to assist in delineating the breadth and content of *Charter* rights."[167] Abella J noted that "both those sources which are binding and those which are not have proven to be indispensable in almost all areas of the law."[168] Non-binding sources, however, are "relevant and persuasive" and not obligatory. "Simply put, such sources *attract* adherence rather than command it."[169]

It is here that we must return to the majority reasons. Brown and Rowe JJ agreed with Abella J's result but expressed dissatisfaction with her approach. As they put it, "[i]f [international and comparative] sources are to be accorded a persuasive character, it must be done by way of a coherent and consistent methodology."[170] There was no need "to dispose of this matter by referring extensively to international and comparative law," as the dissent of Justice Jacques Chamberland in the Court of Appeal demonstrates.[171] The majority claimed to "differ fundamentally" from Abella J "on the prominence she gives to international and comparative law in the interpretive process."[172] In particular, the majority disputed Abella J's "claim that all international and comparative sources have been 'indispensable' to Canadian constitutional interpretation."[173] The *Charter*, we are told, was "made in Canada" and is "primarily interpreted with regards to Canadian law and history."[174]

To this point in the majority reasons, the difference between its position and that of Abella J may seem a matter of emphasis rather than substance. Yet the majority went on to enunciate a novel restraint on internationally informed *Charter* interpretation:

> [22] While this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a

[165] *Ibid* at para 98.

[166] *Ibid* .

[167] *Ibid* at para 99; see also para 101.

[168] *Ibid* at para 100.

[169] *Ibid* at para 102 [emphasis in original].

[170] *Ibid* at para 3.

[171] *Ibid* at para 5.

[172] *Ibid* at para 19.

[173] *Ibid.*

[174] *Ibid* at para 20.

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limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms. As Professor Beaulac and Dr. Bérard explain:

> [TRANSLATION] In addition to distorting the relationship between the international and domestic legal orders, *the suggestion that domestic courts are bound by international normativity is inconsistent with the constitutional mandate and the function of the judiciary*, which is to exercise decision-making power under the applicable Canadian and Quebec law. Seeing international law as having persuasive authority is a more appropriate, consistent and effective approach.
>
> …
>
> [E]ven though international normativity is not binding in domestic law, what it can and, indeed, should do in appropriate circumstances is *to influence the interpretation and application of domestic law by our courts*. Except among a few zealous supporters of the internationalist cause, there is general agreement that, in this regard, the criterion for referring to international law in domestic law is that of "persuasive authority."[175]

Later, the majority claims that the role of international and comparative law in interpreting *Charter* rights "has properly been to *support* or *confirm* an interpretation arrived at through the *Big M Drug Mart* approach; the Court has never relied on such tools to define the scope of *Charter* rights."[176]

In these passages, the majority appears to introduce a restraint on the use of international and comparative law sources not previously enunciated in Supreme Court jurisprudence. The new rule is said to be that international and comparative sources may serve only to support or confirm interpretive results reached by means of the interpretive approach set out in *Big M Drug Mart*. International and comparative sources may not, it seems, be used to define the scope of a *Charter* right.

The majority went on to explain that "even within that limited supporting or confirming role, the weight and persuasiveness of each of these international norms in the analysis depends on the nature of the source and its relationship to our Constitution." The reason for this was said to be twofold: "[T]he necessity of preserving the integrity of the Canadian constitutional structure, and Canadian

[175] *Ibid* at para 22, quoting S Beaulac & F Bérard, *Précis d'interprétation législative*, 2nd ed (Montreal: LexisNexis, 2014) at paras 5, 36 [emphasis added by the majority].

[176] *9147-0732 Québec*, *supra* note 118 at para 28 [emphasis in original].

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sovereignty."[177] The majority was of the view that Abella J's reasons "indiscriminately [draw] from binding instruments *and* non-binding instruments, instruments that pre-date the *Charter and* instruments that post-date it, and decisions of international tribunals and foreign domestic courts."[178]

Against this approach, the majority insisted on the "significant difference between international law that is binding on Canada and other international norms."[179] Turning to Chief Justice Brian Dickson's consideration of international sources in *Charter* interpretation in *Re Public Service Employee Relations Act (Alta.)* (*Re Public Service*), the majority noted that the chief justice distinguished between non-binding sources and "international human rights documents which Canada has ratified."[180] In respect of the latter, Dickson CJ held that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions" in those instruments. Notably, the majority described this approach as "the presumption of conformity," thus equating it with the presumption that applies in respect of statutory provisions and called the presumption "a firmly established interpretive principle in *Charter* interpretation."[181]

What follows is a helpful account of *Re Public Service*, yet with one notable oversight. The majority explained Dickson CJ's approach as applying the presumption of conformity in respect of binding international instruments, while treating non-binding sources as "relevant and persuasive, but not determinative, interpretive tools."[182] Such non-binding instruments are not irrelevant, said the majority, but their non-binding legal quality must be recognized. The majority pointed to the Court's discussion of international legal sources in *Ktunaxa Nation*, noting that the court there began with binding instruments, then moved to non-binding ones while "being careful to specify that" the non-binding sources "do not attract the presumption of conformity."[183] The majority concluded:

> It follows from all this — and, specifically, from the presumption of conformity — that binding instruments necessarily carry more weight in the analysis than

[177] *Ibid* at para 23. The meaning of the latter point is left unexplained, as though it were somehow self-evident. It is not. The sovereignty of Canada as a state in the international legal order is not threatened in any way by how the country's top court decides to interpret a part of its constitution in light of international legal considerations.

[178] *Ibid* at para 24.

[179] *Ibid* at para 25, quoting Jutta Brunnée & Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Intl L 3 at 41.

[180] *9147-0732 Québec*, *supra* note 118 at paras 30–31, quoting *Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 348–49, 38 DLR (4th) 161.

[181] *9147-0732 Québec*, *supra* note 118 at para 31.

[182] *Ibid* at paras 32–36.

[183] *Ibid* at para 37, quoting *Ktunaxa Nation*, *supra* note 118 at para 66.

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> non-binding instruments. While resort may be had to both, courts drawing from a non-binding instrument should be careful to explain why they are drawing on a particular source and how it is being used.[184]

The majority's insistence on differentiating binding and non-binding instruments in the course of *Charter* analysis, and giving greater weight to the former, is to be welcomed. What is missing from the majority's account, however, is any attempt to reconcile Dickson CJ's approach in *Re Public Service* with the majority's new rule that international and foreign sources may only be used to support or confirm an interpretation arrived at through the *Big M* analysis. Neither *Big M* nor *Re Public Service* enunciated such a rule, and the presumption of conformity as described by Dickson CJ and other Supreme Court jurisprudence is at odds with it. In principle, it is hard to see what is gained by a "support or confirm" limitation on the use of international instruments (particularly binding ones) in *Charter* interpretation. The whole point of the presumption of conformity is to reach, where possible, interpretations of domestic law that perform and comply with the international obligations freely undertaken by the executive on behalf of the Canadian state in the international legal system. Such compliant results keep Canada onside its international obligations and also avoid putting the judiciary at odds with the executive in the conduct of foreign affairs. The presumption is necessarily rebuttable, both in its statutory and constitutional varieties. But there seems to be no reason in the abstract to insist that the state's international legal obligations may only inform *Charter* interpretation where they support or confirm reasoning arrived at without consideration of the *Charter* provision's international context.

The majority's reasons also introduced another new consideration in the use of international instruments in *Charter* cases. An "important distinction" is to be made, said the majority, between "instruments that pre- and post-date the *Charter*":

> International instruments that pre-date the *Charter* can clearly form part of the historical context of a *Charter* right and illuminate the way it was framed. Here, whether Canada is or is not a party to such instruments is less important, as the "drafters of the *Charter* drew on international conventions because they were the best models of rights protection, not because Canada had ratified them". … Similarly, it is entirely proper and relevant to consider the *Universal Declaration of Human Rights* … which Canada voted to adopt and which inspired the *ICCPR*, the *International Covenant on Economic, Social and Cultural Rights* … and related protocols Canada has ratified.

[184] *9147-0732 Québec*, *supra* note 118 at para 38.

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As for instruments that post-date the *Charter*, however, the question becomes once again whether or not they are binding on Canada and, by extension, whether the presumption of conformity is engaged. It can readily be seen that an instrument that post-dates the *Charter* and that does not bind Canada carries much less interpretive weight than one that binds Canada and/or contributed to the development of the *Charter*.[185]

Despite the majority's description of these chronological considerations as "important," their practical significance is unclear. For instruments that pre-date the *Charter*, the majority rightly observes that both binding and non-binding international sources inspired the *Charter*'s drafters. This would seem to negate the importance of chronological considerations pre-1982. As for post-*Charter* instruments, the majority's concern appears not to be chronology *per se* but whether the instrument is binding on Canada at international law. The implication is that even a post-1982 instrument may attract the presumption of conformity so long as it is binding on Canada and the presumption is not otherwise rebutted. Notably, the majority appears to eschew the concern sometimes expressed by commentators that to apply the presumption of conformity in respect of obligations that post-date the *Charter* permits the federal government effectively to amend the *Charter* through treaty making.

The majority concluded its discussion of international law in *Charter* interpretation as follows:

> In all, courts must be careful not to indiscriminately agglomerate the traditional *Big M Drug Mart* factors with international and comparative law. The analysis must be dominated by the former and draw on the latter only as appropriate, accompanied by an explanation of why a non-binding source is being considered and how it is being used, including the persuasive weight being assigned to it.[186]

If this were the only stricture the majority's reasons introduced, it would be a positive development. The majority is right to be chiefly concerned, and to insist that litigants be chiefly concerned, with legal instruments to which Canada has freely bound itself under international law and to legal obligations to which Canada is necessarily bound as a consequence of its statehood. But the majority's reasons go further than this. They introduce a new restraint on the use of international and comparative law sources in *Charter* interpretation — namely, that these may serve only to support or confirm interpretive results reached by means of the interpretive approach set out in *Big M Drug Mart*, rather than being used to define the scope of a *Charter* right. Whether this new restraint will matter in practice is unclear. (GvE)

[185] *9147-0732 Québec*, *supra* note 118 at paras 41–42.

[186] *Ibid* at para 47.

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