Cases / Jurisprudence

Canadian Cases in Public International Law in 2014 / Jurisprudence canadienne en matière de droit international public en 2014

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Extraterritoriality — application of Charter *to Canadian law enforcement abroad — state consent*

R v Tan 2014 BCCA 9 (10 January 2014). British Columbia Court of Appeal.

The appellant was convicted of second-degree murder following a lengthy investigation. As part of the investigation, RCMP officers travelled to Malaysia to interview the appellant. The RCMP officers had sought permission to interview the appellant from Malaysian authorities and received assistance from the Royal Malaysian Police. In the course of that interview, the RCMP obtained fingerprints from the appellant. At trial, the appellant applied for a *voir dire* to exclude the fingerprints from evidence on the basis that they were obtained in a manner that breached his rights under the *Canadian Charter of Rights and Freedoms*. The trial judge refused to hold a *voir dire* on the basis that the *Charter* did not apply to the actions of RCMP officers abroad per *R v Hape*.[1]

On appeal, the appellant argued that the *Charter* did apply because the Malaysian authorities had consented to its application in the RCMP's investigation (consent being one of the exceptions to the aforementioned *Hape* rule that the *Charter* does not apply abroad). In her reasons, Bennett JA held that the operative

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[1] 2007 SCC 26.

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question was whether there was any "positive, authoritative and effective consent by the foreign state to the application of the *Charter*."[2] The facts as found by the trial judge were that the Malaysian authorities believed that their laws on search and seizure, rather than the *Charter*, were operative.[3] Accordingly, the "foreign consent" exception to the rule in *Hape* was not applicable, and the *Charter* did not apply to the investigative steps taken in Malaysia. The fact that the RCMP officers who travelled to Malaysia believed that their actions would pass *Charter* scrutiny was of no moment.[4]

In reaching this decision, Bennett JA turned to the law of state responsibility in considering whether Malaysia had consented to the *Charter*'s application there. The learned judge explained that the nature of state consent to activities that would otherwise constitute violations of their sovereignty was considered by the International Law Commission (ILC) in its Articles on the Responsibility of States for Internationally Wrongful Acts, which are generally regarded as a restatement of customary international law.[5] Madam Justice Bennett went on to quote at length from the ILC's commentary to Article 20.[6] She then offered the following "general framework" to guide courts in determining whether consent to the application of Canadian constitutional law over a Canadian investigation abroad was given:

- The foreign official or entity purporting to give consent to the application of Canadian constitutional law must be an agent or "state organ" of the foreign state (Articles 4-6 of the *Articles on State Responsibility*);
- The foreign official or entity purporting to give consent must have apparent or actual authority to consent to the application of the

[2] *R v Tan*, 2014 BCCA 9 at para 72.

[3] *Ibid* at para 78.

[4] *Ibid*.

[5] *Ibid* at para 60, citing *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th Sess, UN Doc A/RES/56/83 (2001).

[6] *R v Tan, supra* note 2 at para 62, quoting the International Law Commission (ILC), *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, reprinted in *Report of the International Law Commission on the Work of its Fifty-Third Session*, UN GAOR, 56th Sess, Supplement No 10 (A/56/10) at 73.

Canadian *Charter* to an investigation by Canadian authorities in that foreign territory. Obviously, officials with "full powers" to make international treaties suffice (Articles 7 and 8 of the *Vienna Convention*), but in most cases, the issue will not be as clear. The Court must determine whether the official or entity at issue is able to agree to the Canadian investigation and the application of Canadian law. In other words, the question is whether this official or entity purporting to proffer consent has the apparent or actual authority to give a binding expression of the sovereign will of the state;

- Consent of the foreign state must be informed and freely given; error, coercion, fraud or corruption vitiate consent (*Commentaries on Articles of State Responsibility*);
- The consent must be in accordance with any domestic laws of the state purporting to give consent; and
- The foreign state must specifically consent to the application of the Canadian *Charter*…[7]

This framework is likely to prove very useful to courts in future cases. Indeed, the decision as a whole is likely to be frequently cited for its lucid and helpful exposition of the practical application of *Hape* by lower courts.

The only frailty of *R v Tan* is one for which the court that rendered it bears no responsibility; it is built on the *Hape* fiction that for a Canadian court to apply the Canadian constitution to a Canadian criminal trial arising from a Canadian police investigation that took place partly in a foreign state somehow violates or affronts that state's sovereignty. The *Hape* question of the foreign state's consent to such a supposedly wrongful act is absurd if the act was not, in fact, wrongful in the first place. Just as the Turks and Caicos authorities in *Hape* (meaning the United Kingdom) could not possibly have cared whether or not Mr. Hape could rely on the *Charter* in his defence at trial in Ontario, the Malaysian state must have been utterly indifferent to whether Mr. Tan's fingerprints were put in evidence in his Vancouver trial. The issue of state sovereignty simply does not arise in these cases. Until *Hape* is overruled on this point, however, *R v Tan* will guide other Canadian courts in their adventures through Wonderland.

[7] *R v Tan, supra* note 2 at para 64.

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Liberté d'association — droit d'affiliation — statut pour le Canada de la Déclaration américaine des droits et devoirs de l'homme

Syndicat des employées et employés professionnels et de bureau, section locale 573 (CTC-FTQ) c Commission de la construction du Québec, 2014 QCCA 368 (25 février 2014). Cour d'appel du Québec.

L'article 85 de la *Loi sur les relations du travail, la formation professionnelle et la gestion de la main-d'œuvre dans l'industrie de la construction*[8] a eu pour effet d'empêcher l'appelant syndicat d'être accrédité pour représenter le personnel d'enquête de la Commission de la construction du Québec (CCQ), et ce, en raison de son affiliation à deux organisations, le SEPB-Québec (un conseil régional établi par le Syndicat canadien des employées et employés professionnels et de bureau) et la Fédération des travailleurs et travailleuses du Québec (FTQ). L'article se lit:

85. Les salariés de la Commission autorisés à exercer les pouvoirs prévus par les articles 7, 7.1 et 7.3, par les paragraphes e et f du premier alinéa de l'article 81 et par l'article 81.0.1 constituent une unité de négociation pour les fins de l'accréditation qui peut être accordée en vertu du Code du travail (chapitre C-27).

L'association accréditée pour représenter les salariés visés par le premier alinéa ne peut être affiliée à une association représentative ou à une organisation à laquelle une telle association ou tout autre groupement de salariés de la construction est affilié ou autrement lié, ni conclure une entente de service avec l'un d'eux. [Italiques ajoutés.]

L'appelant a soutenu que l'article 85, en particulier l'alinéa 85(2), portait atteinte à la liberté d'association protégée par l'alinéa 2 d) de la *Charte canadienne des droits et libertés*[9] et l'article 3 de la *Charte québécoise des droits et libertés de la personne*.[10]

La Commission des relations du travail a conclu que l'article 85 portait atteinte à la liberté d'association mais que cette atteinte était justifiée en vertu de l'article 1 de la *Charte canadienne* et de l'article 9.1 de la *Charte québécoise*. En révision judiciaire, la Cour supérieure n'a trouvé aucune faiblesse constitutionnelle dans l'alinéa.

[8] LRQ, c R-20.

[9] Partie 1 de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11.

[10] LRQ, c C-12.

La Cour d'appel a rejetté l'appel. La juge Dutil, pour la cour, a conclu que le droit d'association inclut celui de constituer une association en fonction du choix de s'affilier ou se lier de manière différente à une autre association.[11] La juge a indiqué son accord avec le témoignage expert que, dans l'histoire des relations du travail, l'affiliation représente une composante fondamentale du fait associatif chez les salariés,[12] et a noté les décisions de la Cour suprême du Canada qui affirment la légitimité de l'action politique des syndicats et le rôle de ces derniers dans l'expression collective des intérêts des travailleurs.[13] La juge Dutil a conclu que le droit d'adhérer à un syndicat est lié au droit d'affiliation, et que ce droit fait partie de la liberté d'association. L'affiliation, a constaté la juge, "permet non seulement de réaliser des objectifs reliés au travail, par exemple influencer les débats publics et les législations qui peuvent affecter les droits des travailleurs, mais elle peut également servir des objectifs sociaux plus larges."[14]

Le droit international reconnaît que l'affiliation fait partie intégrante de la liberté d'association, d'après la juge. À l'appui de cette conclusion, la juge a cité plusieurs instruments internationaux, y compris la Déclaration universelle des droits de l'Homme (aux articles 20, 23 et 29), la *Convention (no 87) concernant la liberté syndicale et la protection du droit syndical* (aux articles 1 à 8), le *Pacte international relatif aux droits civils et politiques* (à l'article 22), le *Pacte international relatif aux droits économiques, sociaux et culturels* (à l'article 8) et la Déclaration américaine des droits et devoirs de l'homme (aux articles XXII et XXVIII).

Quant à ce dernier instrument, la juge a expliqué son statut juridique pour le Canada comme suit:

> [La Déclaration] a été adoptée en 1948 à la neuvième Conférence internationale américaine tenue à Bogota, en Colombie. En janvier 1990, le Canada est devenu membre de l'Organisation des États américains (OEA) en ratifiant sa Charte constitutive. En mai 2003, le Comité sénatorial permanent des droits de la personne du Parlement du

[11] *Syndicat des employées et employés professionnels et de bureau, section locale 573 (CTC-FTQ) c Commission de la construction du Québec*, 2014 QCCA 368 au para 49 [*Syndicat des employés*].

[12] *Ibid* au para 53.

[13] *Ibid* au para 55.

[14] *Ibid* au para 60.

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Canada écrivait: "Au moment où le Canada est devenu membre de l'OEA, la Cour interaméricaine des droits de l'homme avait confirmé que la *Déclaration américaine* était une source d'obligations juridiques pour tous les États membres de l'OEA." Référant ensuite à la position des États-Unis qui contestent le caractère obligatoire de la Déclaration américaine, le Comité affirme:

> Il serait cependant difficile pour le Canada d'adhérer à cette position car, tel que mentionné précédemment, il est devenu membre de l'OEA après l'avis consultatif de la Cour interaméricaine confirmant le caractère obligatoire de la Déclaration américaine.[15]

Cette discussion est, à notre connaissance, la déclaration la plus considérée et significative sur le statut juridique international de la Déclaration pour le Canada jamais faite par un tribunal canadien.

Quant à la portée juridique de ces instruments, la juge Dutil a noté l'affirmation par la Cour suprême dans *Health Services* que les engagements du Canada en vertu du droit international et l'opinion internationale en matière des droits de la personne constituent des sources persuasives pour l'interprétation de la *Charte canadienne*.[16] Elle a noté aussi l'observation de cette cour dans l'affaire *Fraser* que "les droits constitutionnels *doivent* être interprétés à la lumière des valeurs canadiennes et des engagements internationaux du pays en matière de droits de la personne."[17]

La juge Dutil a conclu que l'alinéa 85(2) de la loi contestée enfreignait le droit des salariés de tisser et maintenir, par le fait de l'affiliation, des liens associatifs avec l'association de leur choix. La juge partageait la conclusion du commissaire. Passant à la question de la justification, la juge a défini l'objectif général de la loi comme étant la lutte à la corruption dans le secteur de la construction au Québec. La juge a ensuite conclu, avec peu d'hésitation, que l'atteinte à la liberté d'association était justifiée dans les circonstances, en vertu de la *Charte canadienne* ainsi que la *Charte québécoise*.

[15] *Ibid* au para 66 (citations omises).

[16] *Ibid* au para 68, citant *Health Services and Support – Facilities Subsector Bargaining Assn c Colombie-Britannique*, 2007 CSC 27.

[17] *Syndicat des employés*, *supra* note 11 au para 69, citant *Ontario (Procureur général) c Fraser*, 2011 CSC 20.

Maritime law — limitation of liability — exclusion of coverage

Peracomo Inc v Telus Communications, 2014 SCC 29 (23 April 2014). Supreme Court of Canada.

A fisherman fishing in the St. Lawrence River snagged a cable with his anchor and proceeded to cut it. In doing so, he caused the respondents nearly $1 million in damage. The chief issues before the court were whether the fisherman, his company, and the vessel could limit their liability to $500,000 by reliance on the 1976 *Convention on Limitation of Liability for Maritime Claims*[18] and whether the loss was covered by insurance. Cromwell J for the majority of the Supreme Court of Canada held that the convention's $500,000 limit applied but that the loss was excluded from insurance coverage due to the wilful misconduct that gave rise to it.

Section 29 of the *Marine Liability Act*[19] limits liability for property damage caused by ships such as the one involved in this appeal at $500,000, unless the loss resulted from the defendant's "personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." This language derives from Article 4 of the convention, which is given force of law in Canada by section 26 of the act. In determining the meaning of Article 4, Cromwell J engaged in a lengthy review of the convention, beginning with its purpose, turning next to its text, all in light of decided cases and leading commentary.[20] From this review, the learned judge concluded that the contracting states intended the fault requirement to be a high one, and the limitation on liability to be difficult to break. In particular, the phrase "the intent to cause such loss" meant that the person committing the act can only lose the benefit of the convention's limitation of liability if he intended or envisaged the actual loss suffered by the claimant. Here, while the fisherman undoubtedly knew he was cutting a cable that might be in use (though he believed it was not), he did not intend or foresee the actual loss that followed. The nearly unbreakable limit on liability imposed by Article 4 of the convention was therefore available to him.

[18] 1456 UNTS 221.

[19] SC 2001, c 6.

[20] *Peracomo Inc v Telus Communications*, 2014 SCC 29 at paras 24–35 [*Peracomo*].

The appellants' insurance policy was subject to section 53(2) of the *Marine Insurance Act*,[21] which excludes coverage for losses attributable to "wilful misconduct" by the insured. The trial judge had applied this provision to exclude the appellants' conduct from coverage. Cromwell J agreed. He held that the fault standard under Article 4 of the convention was not the same as the "wilful misconduct" standard in section 53(2) of the *Marine Insurance Act*. The convention's purpose was to create a nearly unbreakable upper limit on liability. The purpose of section 53(2), by contrast, was to distinguish between insurable risks and wilful misconduct. The latter standard included both intentional acts and conduct that constitutes a very marked departure from the standards by which responsible and competent people govern themselves.[22] The fisherman's act was wilful misconduct in this sense and was therefore excluded from coverage.

Crimes de guerre et crimes contre l'humanité — juridiction des tribunaux canadiens — génocide rwandais

Munyaneza c R, 2014 QCCA 906 (7 mai 2014). Cour d'appel du Québec.

L'appelant a contesté le verdict de culpabilité prononcé contre lui au terme du premier procès canadien découlant du génocide rwandais de 1994. Munyaneza est originaire du Rwanda et s'est établi au Canada en 1997. En 2005, il a été arrêté et accusé des sept chefs d'accusation en vertu de la *Loi sur les crimes contre l'humanité et les crimes de guerre* (la Loi),[23] y inclus de génocide (par meurtre intentionnel et atteinte grave à l'intégrité physique ou mentale), crimes contre l'humanité (par meurtre intentionnel et violence sexuelle) et crimes de guerre (par meurtre intentionnel, violence sexuelle et pillage). Le jugement de la Cour d'appel du Québec (Dalphond, Hilton et Doyon JCA) est le premier examen par une cour d'appel canadienne de la Loi.

L'appelant soutenait que les trois crimes de guerre dont il a été accusé n'existaient pas en droit international puisque les actes sous-jacents allégués (meurtre, violence sexuelle, etc) auraient été commis dans le cadre d'un conflit armé non-international, par

[21] SC 1993, c 22.

[22] *Peracomo, supra* note 20 at paras 49–53, 56; see also para 61.

[23] LC 2000, c 24.

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opposition à un conflit armé international. Selon lui, de tels actes ne sont devenus des crimes en droit international qu'en 1998 avec l'adoption du *Statut de Rome*. Subsidiairement, l'appelant soutenait que si les actes posés étaient reconnus en droit international en 1994, il demeure qu'ils ne pouvaient faire l'objet d'une poursuite au Canada puisque le para 7(3.76) du *Code criminel* alors en vigueur définissait le "crime de guerre" comme un fait commis au cours d'un conflit armé international.

La cour a rejeté ces arguments. Pour déterminer l'existence de crimes de guerre non-internationale en 1994, la cour a tenu compte du *Protocole additionnel aux Conventions de Genève relatif à la protection des victimes des conflits armés non internationaux (Protocole II)* de 1977,[24] mise en œuvre en droit canadien par la *Loi sur les conventions de Genève*.[25] La cour a également fait référence à la jurisprudence internationale des années 1990 traitant du contenu du droit coutumier en matière de crimes de guerre.[26] La cour a conclu qu'il n'y avait aucun doute que des actes graves commis dans le cadre du conflit armé non-international au Rwanda en 1994 constituaient des crimes de guerre. La cour a également rejeté l'argument de l'appelant que le pillage d'une résidence et de commerces ne constituait pas un crime en droit international.[27]

Quant à l'argument subsidiaire de l'appelant que les actes posés ne pouvaient faire l'objet d'une poursuite au Canada puisque le para 7(3.76) du *Code criminel* en vigueur en 1994 définissait le "crime de guerre" comme un fait commis au cours d'un conflit armé international, la cour a expliqué que la Loi criminalise en droit canadien tous les actes constituant des crimes au sens du droit international au moment où ils ont été commis. Bien que les crimes reprochés à l'appelant ont été commis en 1994 — six ans avant l'adoption de la Loi — cela ne voulait pas dire que la Loi a créé des crimes de façon rétroactive. La Loi ne crée pas les crimes du tout; elle permet la poursuite au Canada de personnes qui ont posé, avant son entrée en vigueur, des gestes qui constituaient, au moment où ils sont survenus, un crime contre l'humanité, un crime de guerre ou un acte de génocide.[28]

[24] 1125 RTNU 609, 8 juin 1977.

[25] LRC 1985, c G-3, art 2(2).

[26] *Munyaneza c R*, 2014 QCCA 906 aux para 30–32.

[27] *Ibid* aux para 34–45.

[28] *Ibid* aux para 46–54.

L'appelant a tenté d'invoquer l'article 11 de la Loi, selon lequel l'accusé peut se prévaloir des justifications, excuses et moyens de défense reconnus, au moment de la prétendue perpétration, par le droit canadien. Sous le titre "La fin de l'impunité: un effet valide de la Loi" la cour a hardiment, et brièvement, rejeté cet argument dans les termes suivants:

> De l'avis de la Cour, on ne saurait prétendre que le fait de savoir que l'on pourra se réfugier dans un pays où il ne peut y avoir de poursuite à l'égard d'un crime international constitue une justification, une excuse ou un moyen de défense au moment de la perpétration de ce crime.
>
> En d'autres mots, la perte de l'immunité pour l'auteur d'un crime international désormais résidant au Canada ne constitue pas un moyen de défense et n'entre pas dans le cadre de l'art. 11 de la *Loi*.[29]

L'appelant a invité la cour de reprocher le juge de première instance d'avoir consulté le site internet de la Croix-Rouge pour conclure que le Rwanda est signataire de la *Convention sur le génocide* de 1948. Heureusement, la cour d'appel a refusé:

> À cet égard, la Cour estime que le juge n'a commis aucune erreur en prenant connaissance de la liste des États parties à un traité international auquel le Canada est lui-même partie. Contrairement à ce que prétend l'appelant, la Cour suprême n'a jamais énoncé dans l'arrêt *Finta*, p. 867-868, que la signature d'une convention par un état s'établit à l'aide d'un expert; elle évoque uniquement le fait qu'il faille souvent recourir à l'expertise et à la doctrine pour interpréter le droit international, dont plusieurs principes ne sont pas codifiés.
>
> Certes le juge aurait mieux fait de consulter la source officielle, soit la Collection des traités des Nations Unies, plutôt que le site de la Croix-Rouge. Cela est toutefois sans conséquence.[30]

Après avoir traité de ces questions préliminaires, la cour a entrepris un long examen des éléments constituants des crimes contre l'humanité, de génocide et de guerre. La cour a affirmé que, pour interpréter et définir ces crimes, ainsi que leurs infractions ou actes sous-jacents, un tribunal canadien peut tenir compte du droit

[29] *Ibid* aux para 59–60.

[30] *Ibid* aux para 109–10.

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international, notamment des décisions des tribunaux internationaux. Faire autrement, d'après la cour, serait susceptible de créer une dichotomie qui pourrait résulter en des situations d'impunité au Canada pour des actes commis à l'étranger constituant des crimes selon le droit international, sans qu'il en soit de même en droit canadien.[31] La discussion qui suit fait recours fréquent à la jurisprudence internationale, surtout celle des tribunaux pénaux internationaux pour le Rwanda et l'ex-Yougoslavie.

Après un examen complet des arguments de l'appelant sur chacun des sept chefs d'accusation pour lequel il a été reconnu coupable, le tribunal a conclu que son pourvoi devait être rejeté. Une demande d'autorisation d'appel a été rejetée par la Cour suprême du Canada en décembre 2014.

Extradition — reliance on evidence from international intelligence agencies — evidence derived from torture

France v Diab, 2014 ONCA 374 (15 May 2014). Ontario Court of Appeal.

France sought the extradition of the appellant to stand trial for his alleged role in a 1980 bombing in Paris. The extradition judge had committed the appellant for extradition and the Minister of Justice had subsequently ordered the appellant's surrender to French authorities. The appellant appealed the decision of the extradition judge and sought judicial review of the minister's decision.

In the course of his judicial review of the minister's decision, the appellant argued that surrender to France would be in breach of his *Charter* rights because he would not face a fair trial in France. In particular, the appellant raised a concern that the upcoming French proceeding would rely on unsourced reports from international intelligence agencies, including evidence that was obtained using torture.

The court acknowledged the frailties of using evidence from international intelligence agencies. Both the source of the evidence and the circumstances in which it was gathered are often unknown, and the person facing trial is often denied access to the evidence for national security reasons.[32] The court noted that these concerns are reflected in Canadian and international law,

[31] *Ibid* aux para 124–25, 128; voir aussi la discussion aux para 174–76.

[32] *France v Diab*, 2014 ONCA 374 at para 205 [*Diab*].

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including Article 14(3)(e) of the *International Covenant on Civil and Political Rights* (*ICCPR*),[33] which states as follows:

> Article 14
>
> …
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> …
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[34]

The appellant argued that it would be unacceptable to extradite someone where there is a potential that unsourced intelligence information would be used against that person in criminal proceedings in the requesting state. The court refused to draw a categorical exclusionary rule, as the imposition of such a rule would undermine the ability of Canadian and international authorities to bring terrorists to justice.[35] Rather than an exclusionary rule, the court held that the minister must be satisfied that adequate protections against the frailties of unsourced intelligence information exist in the requesting state to ensure a fair trial for the person facing extradition.[36]

The appellant also argued that the surrender order was unreasonable because there was a real risk that the aforementioned intelligence information to be used in the French proceedings was obtained through torture. Citing the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*Convention Against Torture*),[37] along with jurisprudence from the Supreme Court of Canada and the European Court of Human Rights, the court held that the societal abhorrence of torture

[33] 19 December 1966, 999 UNTS 171.

[34] *Ibid,* art 14.3(e).

[35] *Diab, supra* note 32 at para 209.

[36] *Ibid* at para 214.

[37] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, 1465 UNTS 85.

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necessitates a rejection of torture-derived evidence.[38] The court also noted that a person facing surrender falls within the protection offered by the *Convention Against Torture*, the *European Convention on Human Rights*,[39] and the *ICCPR*, each of which protects the right to a fair trial and prohibits the use of evidence derived from torture.[40]

With reference to existing jurisprudence in the area, the court established a two-step inquiry to be used in circumstances where a person is facing surrender and risks being prosecuted on the basis of torture-derived evidence in the requesting state. First, the person facing surrender must establish that there is a plausible connection between the evidence in question and the use of torture.[41] Second, the onus shifts to the minister who must satisfy him or herself that there is no real risk that torture-derived evidence will be used in the proceedings in the requesting state.[42] The court arrived at a "real risk" standard over a "balance of probabilities" standard after careful consideration of the jurisprudence from the European Court of Human Rights and a review of the approach taken by international expert bodies including the UN Special Rapporteur on Torture.[43]

Enforcement of arbitral awards — New York Convention — interlocutory relief

Sociedade-de-fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Limited, 2014 BCCA 205 (2 June 2014). Court of Appeal for British Columbia.

This appeal decision reviews the availability of interlocutory relief in the enforcement of foreign arbitral awards. At issue was whether the chambers judge of the British Columbia Supreme Court had erred in deciding that an injunction to secure an international arbitration award ought not to have been issued because the parties had little connection to British Columbia and the award could

[38] *Diab, supra* note 32 at paras 234–36.

[39] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.

[40] *Diab, supra* note 32 at para 220.

[41] *Ibid* at para 241.

[42] *Ibid* at para 244.

[43] *Ibid* at paras 245–49.

have been enforced in Pakistan. The chambers judge had found that the appellant, Sociedade-de-fomento Industrial Private Limited (SFI), failed to make full, fair, and frank disclosure to the court in its *ex parte* application for a *Mareva* injunction to enforce the award it had obtained abroad. SFI had allegedly failed to disclose a material fact — that SFI could have enforced its award in Pakistan — and the chambers judge had set aside the injunction. SFI was found to be liable to Pakistan Steel Mills Corporation (Private) Limited (PSM) for damages.

SFI was incorporated in India and PSM was incorporated in Pakistan. SFI and PSM had been parties to an arbitration for breach of contract for the supply of iron ore before the International Chamber of Commerce's International Court of Arbitration. SFI was successful in obtaining an award, but after making repeated demands for payment from PSM, to no avail, SFI was faced with the difficult task of enforcement. SFI eventually learned that PSM had purchased coal in British Columbia. SFI filed a petition in British Columbia to enforce the award and obtained a *Mareva* injunction to prevent the shipment of PSM's coal. SFI was required to provide an undertaking as to the damages for any innocent third party. The arbitration award was subsequently recognized and enforced by the British Columbia Supreme Court. By the time the application was brought by PSM to set aside the *Mareva* injunction, the award had been paid in full.

Garson JA, writing for the court, allowed the appeal. She found that the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (*New York Convention*),[44] and the principal legislation implementing the *New York Convention*, required the British Columbia Supreme Court to recognize and enforce an international arbitration award on the same basis as a domestic award. She noted that section 4 of British Columbia's *Foreign Arbitral Awards Act*,[45] which incorporates the *New York Convention*, provides that foreign arbitral awards may be enforced in British Columbia. She also noted that under section 35(1) of the *International Commercial Arbitration Act*,[46] an arbitral award, irrespective of the state in which it was made, must be recognized as binding and, on application

[44] Can TS 1986 No 43.

[45] RSBC 1996, c 154.

[46] RSBC 1996, c 233.

to the Supreme Court, must be enforced. Finally, she noted that under section 10(k) of the *Court Jurisdiction and Proceedings Transfer Act*,[47] a real and substantial connection is presumed to exist in a proceeding to enforce an arbitral award made outside of British Columbia. It would be illogical to ignore the presumed jurisdictional connection for interlocutory purposes but recognize it for final judgment. The chambers judge ought to have approached the application on the basis that it was akin to a domestic proceeding and had erred in her assumption that there was an onus on SFI to turn first to Pakistan's courts because of the parties' limited associations with British Columbia.

Garson JA further found that the *Mareva* injunction in this case was properly ordered. The merits of SFI's claim were strong, given the limited grounds upon which the claim could be defended. The assets of PSM were about to leave the jurisdiction, and it had refused to pay the award for over ten months. Any damages to a third party could be relieved by SFI's undertaking.

Garson JA observed that the availability of enforcement in other jurisdictions may be relevant in certain instances. In cases where there is no risk of dissipation because of the availability of other jurisdictions for enforcement, this factor would be relevant in the balance of convenience analysis. That was not the case here. In any event, Garson JA was not satisfied that full disclosure had not been made. She noted that SFI had informed the judge who granted the *Mareva* injunction that enforcement in Pakistan would be challenging. While no evidence was filed in support of that statement, the parties did tender expert evidence before the chambers judge in PSM's application to have the *Mareva* injunction set aside. That evidence suggested that the delay in enforcement proceedings in Pakistan was "endemic" and that SFI's claim to interest under the award might be disallowed in a Pakistani court. The chambers judge ought to have taken into account the delay as well as the considerable doubt as to whether SFI would be able to enforce a significant part of its award in Pakistan in examining whether it was just and convenient to grant the injunction. Garson JA allowed the appeal. The Supreme Court of Canada refused PSM's application for leave to appeal.[48]

[47] SBC 2003, c 28.

[48] [2014] SCCA No 342.

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International transfer of offenders — 1977 Canada–US Treaty on the Execution of Penal Sentences — 1983 Convention on the Transfer of Sentenced Persons

Khadr v Edmonton Institution, 2014 ABCA 225 (8 July 2014). Alberta Court of Appeal.

Chambers v Daou, 2014 BCSC 1284 (7 July 2014). Supreme Court of British Columbia.

Both of these cases involved transfers of offenders under the *International Transfer of Offenders Act* (*ITOA*).[49] On 13 October 2010, Mr. Khadr pleaded guilty to five offences before an American military commission, which included "murder in violation of the law of war," in exchange for assurances from the US Convening Authority for Military Commissions that his sentence would not be greater than eight years and that the US authorities would take all appropriate steps to facilitate his transfer to Canada. Mr. Khadr was fifteen years old when he committed the offences to which he pleaded guilty. On 28 September 2012, Mr. Khadr was advised by Canada's Minister of Public Safety and Emergency Preparedness that his transfer to Canada had been approved under the *ITOA*. Mr. Khadr was transferred the following day and placed in a federal penitentiary. At that time, he was twenty-six years old. Mr. Khadr applied to the warden for a transfer to a provincial correctional facility for adults pursuant to section 20(a)(ii) of the *ITOA*. Section 20 provides:

20. A Canadian offender who was from 12 to 17 years old at the time the offence was committed is to be detained	20. Si le délinquant canadien transféré avait entre douze et dix-sept ans à la date de la commission de l'infraction, le lieu de sa détention est déterminé de la façon suivante:
(a) if the sentence imposed in the foreign entity could, if the offence had been committed in Canada, have been a youth sentence within the meaning of the *Youth Criminal Justice Act*,	a) dans le cas où la peine qui lui a été imposée aurait pu, si l'infraction avait été commise au Canada, être une peine spécifique au sens de la *Loi sur le système de justice pé- nale pour les adolescents*, il est placé:

[49] SC 2004, c 21.

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(i) in the case of an offender who was less than 20 years old at the time of their transfer, in a youth custody facility within the meaning of that Act, and

(ii) in the case of an offender who was at least 20 years old at the time of their transfer, in a provincial correctional facility for adults; and

(b) if the sentence imposed in the foreign entity could, if the offence had been committed in Canada, have been an adult sentence within the meaning of that Act,

(i) in the case of an offender who was less than 18 years old at the time of their transfer, in a youth custody facility within the meaning of that Act,

(ii) in the case of an offender who was at least 18 years old at the time of their transfer, in a provincial correctional facility for adults if their sentence is less than two years, and

(iii) in the case of an offender who was at least 18 years old at the time of their transfer, in a penitentiary if their sentence is at least two years.

(i) dans un lieu de garde au sens de cette loi s'il est âgé de moins de vingt ans au moment de son transfèrement,

(ii) dans un établissement correctionnel provincial pour adultes s'il est alors âgé de vingt ans ou plus;

b) dans le cas où la peine qui lui a été imposée aurait pu, si l'infraction avait été commise au Canada, être une peine applicable aux adultes au sens de cette loi, il est placé:

(i) dans un lieu de garde au sens de cette loi s'il est âgé de moins de dix-huit ans au moment de son transfèrement,

(ii) dans un établissement correctionnel provincial pour adultes s'il est alors âgé de dix-huit ans ou plus et si sa peine d'emprisonnement est de moins de deux ans,

(iii) dans un pénitencier s'il est alors âgé de dix-huit ans ou plus et si sa peine d'emprisonnement est d'au moins deux ans.

Despite these provisions, Correctional Services of Canada treated Mr. Khadr's global sentence of eight years as separate, concurrent sentences of eight years for each offence. As a result, his

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transfer fell within section 20(b)(iii) of the *ITOA*, which provides that if (1) the sentence could have been an adult sentence; (2) the offender was at least eighteen years' old at the time of the transfer; and (3) the foreign sentence was at least two years, that offender will be placed in a federal penitentiary. Mr. Khadr's application was denied and he applied for *habeas corpus*. The Alberta Court of Queen's Bench denied his application, finding that if his sentence had been imposed in Canada, it would have been five eight-year sentences, served concurrently.

In *per curiam* reasons for judgment, the Alberta Court of Appeal reversed. It held that on his transfer to Canada, Mr. Khadr ought to have been placed in a provincial correctional facility for adults pursuant to section 20(a)(ii) of the *ITOA* because his sentence imposed in the United States could only have been available as a youth sentence under Canadian law. In treaties governing the international transfer of prisoners, there are two methods by which the sentence imposed in the foreign state may be dealt with by the home state: either conversion or continued enforcement. The latter option has been adopted in the *1977 Treaty between Canada and the United States of America on the Execution of Penal Sentences*[50] and implemented under the *ITOA*. Under this procedure, the home state is bound by the legal nature and duration of the sentence imposed in the foreign state, and the home state continues to enforce it as if it had imposed that sentence. Canada can only "adapt" the foreign sentence if it is incompatible with Canadian law.[51]

The court found that Mr. Khadr's cumulative sentence of eight years was not incompatible with Canadian law and did not require any adaptation. The chambers judge fell into error by framing the issue as "if sentenced in Canada, how would this sentence be applied?" Under the treaty and the *ITOA*, the sentence is to be enforced as if it had been imposed by a Canadian court. It was clear, in the Court of Appeal's view, that Mr. Khadr had been sentenced cumulatively for five offences, which is not incompatible with Canadian law for both youth and adult offenders. In addition, there was no incompatibility because of the length of Mr. Khadr's sentence. It fell well below the maximum sentence for either a youth or an adult who commits first degree murder. There was nothing in the *ITOA* or the treaty mandating that a unitary foreign

[50] Can TS 1978 No 12.

[51] *Khadr v Edmonton Institution*, 2014 ABCA 225 at paras 30–34 [*Khadr*].

sentence for multiple offences be adapted to concurrent sentences of the same length for each offence. To do so would contravene section 5 of the *ITOA*, which prohibits any increase in the foreign sentence.

The court further found that the issue under section 20 is whether a foreign sentence "could have been" a youth sentence or an adult sentence within the meaning of the *Youth Criminal Justice Act* (*YCJA*).[52] Article IV(2) of the treaty gives Canada the express authority to treat youth offenders in accordance with the provisions of the *YCJA*, regardless of that person's status under American law. Mr. Khadr's sentence could have been a youth sentence, and, accordingly, section 20(a) as opposed to section 20(b) of the *ITOA* applied. In reaching this conclusion, the court found section 19(3) of the *ITOA* supportive of this finding, since that section provides that if the offender receives a determinate sentence of less than ten years for first degree murder, the offender is deemed to have received a youth sentence.[53] Since Mr. Khadr was over twenty years old at the time of the transfer, he fell under section 20(a)(ii) of the *ITOA* and was to be placed in a provincial correctional facility for adults. The Court of Appeal granted Mr. Khadr's application for *habeas corpus*.

This case sets out the important proposition that the courts and the Canadian government must respect the substance of the sentence imposed in the foreign state, along with its right to determine the sentence. The Supreme Court of Canada dismissed an appeal from this decision orally in brief reasons on 14 May 2015.[54]

The *ITOA* was also at issue in a BC Supreme Court decision released the day before *Khadr v Edmonton Institution, Chambers v Daou*. There, the petitioner had applied for his transfer to Canada from the United States pursuant to the *ITOA*, which, if granted, would have resulted in his immediate release upon arriving in Canada. The petitioner's application had been rejected on the basis that the *ITOA*, the treaty, and the 1983 *Convention on the Transfer of Sentenced Persons*[55] only permit the transfer of prisoners that still have six months left to serve under Canadian law. Silverman J held that the *ITOA* did not bar a prisoner from being eligible for a

[52] SC 2002, c 1.

[53] *Khadr, supra* note 51 at para 109.

[54] 2015 SCC 26.

[55] Can TS 1985 No 9.

transfer as a result of having less than six months, or any sentence at all, left to serve in Canada. While the treaty and the convention expressly refer to the threshold of six months, the *ITOA* is silent on the issue. Silverman J found the exclusion of this provision to be intentional and rejected the respondent's argument that the purpose of this threshold was to assist the prisoner in their rehabilitation and reintegration into society. Silverman J ordered *habeas corpus* with declaratory relief in aid that the petitioner had been, and continued to be, unlawfully detained, and that his *Charter* rights had been breached as a result of the error in the interpretation of the *ITOA*.[56]

State immunity — torture — civil remedies

Kazemi Estate v Islamic Republic of Iran, 2014 SCC 62 (10 October 2014). Supreme Court of Canada.

This was the further appeal to the Supreme Court of Canada of the judgment of the Quebec Court of Appeal summarized in the 2012 edition of the *Yearbook*. In June 2003, Canadian citizen and dual Iranian national Zahara Kazemi was arrested by Iranian authorities while taking photographs of a protest outside a Tehran prison. She was detained, beaten, sexually assaulted, and tortured before her death.[57] Unable to obtain justice in Iran, Kazemi's estate, and her son Stephan Hashemi, sued the state of Iran, the head of state Ayatolalah Sayyid Ali Khamenei, and two Iranian officials, Saeed Mortazavi (Tehran's chief public prosecutor) and Mohammad Bakhshi (deputy chief of intelligence of the Evin Prison), alleging that they had ordered, tolerated, or actually caused Kazemi's detention, torture, and moral injuries. Hashemi also alleged that he himself had suffered damage.

The defendants brought a motion to dismiss the action on the basis of state immunity. They participated in the hearings below but not in the Supreme Court appeal. Hashemi and the

[56] On 12 February 2015, the British Columbia Court of Appeal set aside Silverman J's order of *habeas corpus* with declaratory relief in aid because the matter was not one that could properly be dealt with by way of *habeas corpus*. The appeal was limited to the question of the scope of the court's *habeas corpus* jurisdiction in respect of international transfers of offenders. The British Columbia Court of Appeal's reasons are indexed at 2015 BCCA 50.

[57] *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at paras 4–8 [*Kazemi*].

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estate resisted the motion on several grounds including express and alleged exceptions under the *State Immunity Act*[58] and constitutional challenges. The relevant provisions of the act are as follows:

State immunity

3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

Court to give effect to immunity

(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

Death and property damage

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to
   (a) any death or personal or bodily injury, or
   (b) any damage to or loss of property that occurs in Canada.

Immunité de juridiction

3. (1) Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada.

Immunité reconnue d'office

(2) Le tribunal reconnaît d'office l'immunité visée au paragraphe (1) même si l'État étranger s'est abstenu d'agir dans l'instance.

Dommages

6. L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant:
   a) des décès ou dommages corporels survenus au Canada;
   b) des dommages aux biens ou perte de ceux-ci survenus au Canada.

LeBel J for the majority of the Supreme Court of Canada identified five core issues: (1) is section 3(1) of the act a complete codification of state immunity from civil suits in Canada; (2) does the "bodily injury" exception in section 6(a) apply to Hashemi's claim; (3) are the respondents Mortazavi and Bakhsi entitled to immunity under the act; (4) if there is no exception, is the act contrary to the *Bill of Rights*; and (5) if there is no exception, does the act unjustifiably infringe section 7 of the *Charter*. LeBel J's conclusion, in brief, was that the act is a complete codification of state immunity from civil suits and leaves no exceptions, whether under

[58] RSC 1985, c S-18 (as amended).

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section 6(a) or outside the act, upon which the claimants could successfully overcome the procedural bar to their claims. Furthermore, this result is not susceptible to challenge under either the *Charter* or the *Bill of Rights*. The majority of the court therefore dismissed the appeal on largely the same grounds as the Quebec Court of Appeal had in 2012.

In the course of his reasons on these issues, LeBel J made a number of notable observations about the reception of public international law in Canadian law, particularly in regard to the international prohibition of torture. We review these aspects of the judgment below, then return to the central issue of state immunity from civil proceedings.

In response to the submission that an exception to the international law rule of state immunity in civil proceedings had developed in customary international law for acts of torture, LeBel J observed that even if that were true (which he did not accept) "such an exception could not be adopted as a common law exception to section 3(1) of the *SIA* as it would be in clear conflict with the *SIA*."[59] This proposition follows unavoidably from the logic of the incorporation doctrine, which recognizes applicable customary norms as rules of Canadian common law and, as such, subjects them to statutory curtailment or even abolition. LeBel J also observed that "the mere existence of a customary rule in international law does not automatically incorporate that rule into the domestic legal order" because the rule might be permissive and not mandatory, in which case it would require legislative action to become Canadian law.[60] Finally, in response to Abella J's reliance, in her dissenting reasons, on "equivocal" international jurisprudence on the issue of the immunity or liability of government officials in civil suits for torture, LeBel J noted that no customary norm is established in the absence of consistent state practice and *opinio juris*, and, therefore, neither the presumption of conformity nor the incorporation doctrine could apply in construing the terms of the *State Immunity Act*.[61]

On the elusive question of what role international human rights law (or international law more generally) plays in *Charter*

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

[60] *Ibid.*

[61] *Ibid* at para 102.

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interpretation, LeBel J added the following observations to the assortment of other Supreme Court dicta on the issue:

> It is true that the *Charter* will often be understood to provide protection at least as great as that afforded by similar provisions in international human rights documents to which Canada is a party (*Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at pp. 348–49, per Dickson C.J. dissenting). In my view, however, this presumption operates principally as an interpretive tool in assisting the courts in delineating the breadth and scope of *Charter* rights (see *Health Services and Support*, at paras. 71–79; also Beaulac, at pp. 231–39).

The first sentence of this passage is new and, with respect, unwelcome. As recently as *Divito v Canada (Public Safety and Emergency Preparedness)*,[62] the Supreme Court of Canada appeared strongly to affirm Dickson CJ's presumption of minimum protection, whereby the *Charter* is rebuttably presumed to be at least as protective of human rights as are Canada's international human rights obligations. LeBel J's formulation here appears to distance the law from a commitment to this presumption and move it back towards the methodological confusion that has plagued the question of internationally compliant *Charter* interpretation for decades now. The second part of the quoted passage reaffirms that the doctrine is a presumption (as Dickson CJ proposed) but is otherwise somewhat inscrutable, particularly given that in *R v Hape* the Dickson CJ approach was affirmed and purportedly applied in a case involving section 32 of the *Charter* rather than a substantive *Charter* right.

By contrast, LeBel J's comments on international law and the "principles of fundamental justice" component of section 7 of the *Charter* are helpfully clear. They came in response to the appellants' alternative submission that, if section 3(1) of the *State Immunity Act* barred their claims, that provision unjustifiably infringed the section 7 right to security of the person by exacerbating the trauma of torture victims and their families by preventing them from seeking redress. LeBel J was prepared to accept that the impugned procedural bar could cause serious psychological harm to torture victims and their families, but concluded that no principle of fundamental justice was violated by the application of section 3(1). The principle contended for by the appellants arose from Article 14

[62] 2013 SCC 47.

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of the 1984 *Convention Against Torture*,[63] which was said to require Canada to ensure a civil remedy to torture victims in the circumstances of this case. LeBel J's principal objection to this argument was that Article 14 does not require states parties to provide civil redress for torture occurring abroad.[64] To this, he added the following observations on how an international legal norm may and may not be recognized as a principle of fundamental justice for the purpose of section 7 of the *Charter*:

> When a party points to a provision in an international treaty as evidence of a principle of fundamental justice, a court must determine (a) whether there is significant international consensus regarding the interpretation of the treaty, and (b) whether there is consensus that the particular interpretation is fundamental to the way in which the international legal system ought to fairly operate (*Malmo-Levine*, at para. 113; *Suresh*, at para. 46). The absence of such consensus weighs against finding that the principle is fundamental to the operation of the legal system. As indicated above, when it comes to art. 14, no such consensus exists.
>
> Even if we were to adopt the appellants' interpretation of art. 14 and there was international consensus on this issue, it must be noted that the existence of an article in a treaty ratified by Canada does not automatically transform that article into a principle of fundamental justice. Canada remains a dualist system in respect of treaty and conventional law (Currie, at p. 235). This means that, unless a treaty provision expresses a rule of customary international law or a peremptory norm, that provision will only be binding in Canadian law if it is given effect through Canada's domestic law-making process … The appellants have not argued, let alone established, that their interpretation of art. 14 reflects customary international law, or that it has been incorporated into Canadian law through legislation.
>
> …
>
> The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy. The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be

[63] Can TS 1987 No 36.

[64] *Kazemi* , *supra* note 57 at paras 140–45.

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destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy.[65]

In short, a treaty norm that is not declaratory of a custom or peremptory norm universally recognized in international law necessarily lacks the qualities of a principle of fundamental justice identified in *Malmo-Levine*. Consistently with this reasoning, LeBel J makes the following observations about peremptory norms:

> I am prepared to accept that *jus cogens* norms can generally be equated with principles of fundamental justice and that they are particularly helpful to look to in the context of issues pertaining to international law. Just as principles of fundamental justice are the "basic tenets of our legal system" (*Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, at p. 503), *jus cogens* norms are a higher form of customary international law. In the same manner that principles of fundamental justice are principles "upon which there is some consensus that they are vital or fundamental to our societal notion of justice" … *jus cogens* norms are customs accepted and recognized by the international community of states from which no derogation is permitted.

The logic of this reasoning appears unassailable, yet its consequences for future cases may prove intriguing when one recalls that the international prohibition on the unlawful use of force is an uncontroversial example of such a norm.[66]

Also notable (and welcome) in LeBel J's judgment are his comments on the status of torture in Canadian law. Ever since the Supreme Court of Canada's equivocal comments in *Suresh v Canada*[67] about the prohibition of torture both in international law and the *Charter*, the court's commitment to the issue has been questioned. It is difficult not to read the following observations as a response to those concerns:

> In 2002, in the case of *Suresh* … although there were "compelling indicia" to confirm that the prohibition of torture had reached peremptory status, the Court did not make a binding statement to this effect … Twelve years later, our Court cannot entertain any doubt that the prohibition of torture has reached the level of a peremptory norm …

[65] *Ibid* at paras 147, 149–50.

[66] See e.g. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, Merits, [1986] ICJ Rep 14 at para 190.

[67] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

There are a number of multilateral instruments which explicitly prohibit torture … International jurisprudence also recognizes the prohibition of torture as a non-derogable norm …

The prohibition of torture is a peremptory international norm. But, in Canada, torture is also clearly prohibited by Conventions and legislation. Canada is a party to the CAT, which has been in force for over twenty years …

Torture is also a criminal offence in Canada. Section 269.1 of the *Criminal Code* states that "[e]very official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."

If the Canadian government were to carry out acts of torture, such conduct would breach international law rules and principles that are binding on Canada, would be illegal under the *Criminal Code*, and would also undoubtedly be unconstitutional. As was held in *Suresh*, the adoption of the *Charter* confirmed Canada's strict opposition to government-sanctioned torture. In particular, torture is blatantly contrary to section 12 of the *Charter* … Torture is also likely contrary to section 7 of the *Charter*.[68]

Later in his judgment, LeBel J observes that the prohibition of torture is "very likely" a principle of fundamental justice.[69]

Returning now to the state immunity issues at the heart of the appeal, LeBel J agreed with the courts below that the *State Immunity Act* is a complete codification of Canadian law as it relates to state immunity from civil proceedings, and, therefore, reliance cannot be placed on the common law or international law to create exceptions to immunity. The learned judge observed that the act, "in its present form, does not provide for an exception to foreign state immunity from civil suits alleging acts of torture occurring outside Canada" and added: "This conclusion does not freeze state immunity in time. Any ambiguous provisions of the Act remain subject to interpretation, and Parliament is at liberty to develop the law in line with international norms as it did with the terrorism exception."[70] This final observation must

[68] *Kazemi*, *supra* note 57 at paras 47–49, 51–52.

[69] *Ibid* at para 152.

[70] *Ibid* at para 56.

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be regarded as *obiter*, however, as "the nature or constitutionality of" the act's new terrorism exception (section 6.1) was not expressly before the court.[71]

LeBel J also held that Hashemi's claim under the section 6(a) personal injury exception was unavailable to him because the alleged injury did not occur in Canada. The subsection had to be read as requiring that the acts causing injury or death occur within Canada. An interpretation that required only that the injury manifest itself in Canada could expose a foreign state's decisions and actions in its own territory to scrutiny by Canadian courts, "the exact situation sovereign equality seeks to avoid."[72] In any case, LeBel J added, Hashemi's injury did not stem from a physical breach of personal integrity and therefore could not come within section 6(a).[73]

The final issue addressed by LeBel J for the majority of the court was whether Iran's officials, Bakhshi and Mortazavi, also enjoyed immunity from claims against them under the *State Immunity Act*. First, LeBel J observed that the plain wording of the *State Immunity Act* was "unclear" as to "which actors Parliament intended to capture when it included the term 'government' in the definition of 'foreign state'" in section 2 of the act.[74] In particular, were public officials such as Bakhshi and Mortazavi part of the "government" for immunity purposes? LeBel J observed that this uncertainty had to be resolved "in context and … against the backdrop of international law."[75] The learned judge then reviewed the 2004 *UN Convention on Jurisdictional Immunities of States and Their Property* (not yet in force) and certain decisions of UK and European courts, together with the leading decision of the Ontario Court of Appeal in *Jaffe v Miller*,[76] all of which pointed to the conclusion that public officials may benefit from state immunity. Against these authorities stood the decision of the US Supreme Court in *Samantar v Yousuf*,[77] which LeBel J distinguished on the ground that it turned on the specific language of the US legislation.[78] LeBel J concluded

[71] See *ibid* at para 44.

[72] *Ibid* at paras 69–70.

[73] *Ibid* at paras 74–78.

[74] *Ibid* at para 84.

[75] *Ibid*.

[76] (1993), 13 OR (3d) 745.

[77] 560 US 305 (2010).

[78] *Kazemi*, *supra* note 57 at para 92.

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that "public officials, being necessary instruments of the state, are included in the term 'government' as used in the *SIA*" so long as they are acting in their official capacity.

This brought LeBel J to the vexed question of whether a public official who commits torture may be said to be acting in an official capacity. The learned judge declared himself "not prepared to accept that the acts were unofficial merely because they were atrocious," pointing out that "it is the state-sanctioned or official nature of torture that makes it such a despicable crime."[79] Thus, LeBel J held that Bakhshi and Mortazavi were captured by the term "government" in section 2 of the act and are immune from the jurisdiction of Canadian courts. In reaching this conclusion, LeBel J rejected the argument of an intervener that *jus cogens* violations can never constitute official conduct under international and common law, finding no evidence of a rule of customary international law that courts have universal civil jurisdiction over civil cases alleging acts in violation of *jus cogens*.[80] LeBel J acknowledged an exception to immunity for *jus cogens* violations in the criminal context, observing: "Whether or not these distinctions are convincing as a matter of policy is of secondary importance," given Canada's decision, in the *State Immunity Act*, to create an exception to immunity for criminal proceedings only.[81]

In addition to these particular objections against refusing immunity to Bakhshi and Mortazavai, LeBel J sounded a further cautionary note about using international law to develop the common law or, indeed, using the common law in an attempt to develop international law:

> [T]he development of the common law should be gradual and … should develop in line with norms accepted throughout the international community … The common law should not be used by the courts to determine complex policy issues in the absence of a strong legal foundation or obvious and applicable precedents that demonstrate that a new consensus is emerging. To do otherwise would be to abandon all certainty that the common law might hold. Particularly in cases of international law, it is appropriate for Canadian courts only to follow the "bulk of the authority" and not change the law drastically based on an emerging idea that is in

[79] *Ibid* at para 95.

[80] *Ibid* at paras 99–101; see also para 102.

[81] *Ibid* at paras 103–4.

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its conceptual infancy (*Jones v United Kingdom*, at para. 213). The "bulk of the authority" in this situation confirms that a "[s]tate's right to immunity may not be circumvented by suing its servants or agents instead" (*ibid.*) …

I agree with Lord Hoffman in *Jones v Ministry of the Interior of Saudi Arabia* that "it is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states" or by the forum state (para. 63).[82]

The lone dissent of Abella J was limited to the question of whether officials enjoyed immunity and, in particular, whether torture can qualify as official state conduct. In her view, "the legal fluidity created by this question and the challenges it imposes for the integrity of international law leave this Court with a choice about whether to extend immunity to foreign officials for such acts."[83] Abella J's reasons emphasized the international law right to reparation for human rights violations, and she noted the International Court of Justice's observation, in *Jurisdictional Immunities (Germany v Italy; Greece intervening)*,[84] that its decision in that case addressed only the immunity of the state itself. In Abella J's view, customary international law permits states to recognize immunity for foreign officials but does not preclude them from denying immunity for acts of torture.[85] The learned judge concluded that torture cannot be an official state act for the purposes of immunity *ratione materiae* and that assuming civil jurisdiction over torture committed abroad would not impair the objectives sought to be protected by international comity.[86]

Civil aviation — Official Languages Act — availability of damages

Thibodeau v Air Canada, 2014 SCC 67 (28 October 2014). Supreme Court of Canada.

The Thibodeaus filed complaints with the Office of the Commissioner of Official Languages against Air Canada for failures to provide services in French. In the Supreme Court of Canada, there

[82] *Ibid* at paras 108–9.

[83] *Ibid* at para 173.

[84] [2013] ICJ Rep 99 at para 91.

[85] *Kazemi*, *supra* note 57 at para 211; see also para 228.

[86] *Ibid* at paras 229–30.

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was no longer any dispute that Air Canada was in breach of section 22 of the *Official Languages Act*.[87] Rather, the issue was whether the trial judge erred in awarding damages against Air Canada despite the limitation on damages liability established by the 1999 *Convention for the Unification of Certain Rules for International Carriage by Air* (*Montreal Convention*),[88] as implemented in federal law by the *Carriage By Air Act*.[89] The Federal Court of Appeal overturned the trial judge and held that the *Montreal Convention* precludes the lower court's damages remedy. That court also held that a second remedial order made below — a sort of injunction referred to in the judgment as a structural order — was inappropriate.

Cromwell J for the majority of the Supreme Court of Canada (Abella and Wagner JJ dissenting) dismissed the appeal. The learned judge concluded that, when properly interpreted, there was no conflict between the general remedial powers under the *Official Languages Act* (which include, but are not limited to, awards of damages) and the exclusion of damages under the *Montreal Convention*.[90] He added: "The general remedial power under the *OLA* to award appropriate and just remedies cannot — and should not — be read as authorizing Canadian courts to depart from Canada's international legal obligations under the *Montreal Convention*."[91]

Justice Cromwell began by construing the relevant portions of the *Montreal Convention* according to the interpretive requirements of Articles 31 and 32 of the 1969 *Vienna Convention on the Law of Treaties* (*VCLT*),[92] from which he concluded that the treaty's

> text and purpose as well as the strong current of jurisprudence make it clear that the exclusivity of the liability scheme established under the *Montreal Convention* extends at least to excluding actions arising from injuries suffered by passengers during flight or embarkation and debarkation when those actions do not otherwise fall within the scheme of permitted claims.[93]

[87] RSC 1985, c 31 (4th Supp).

[88] 2242 UNTS 350.

[89] RSC 1985, c C-26.

[90] *Thibodeau v Air Canada*, 2014 SCC 67 at para 5 [*Thibodeau*].

[91] *Ibid* at para 6.

[92] Can TS 1980 No 37 [*VCLT*].

[93] *Thibodeau, supra* note 90 at para 48.

Before turning to a review of foreign decisions on the point, Cromwell J explained the significance of such case law for the purpose of interpreting a multilateral agreement to which Canada is a party:

> In light of the *Montreal Convention*'s objective of achieving international uniformity, we should pay close attention to the international jurisprudence and be especially reluctant to depart from any strong international consensus that has developed in relation to its interpretation.[94]

This is an important point. Where foreign courts have determined legal issues arising from a multilateral treaty, and particularly where a "strong international consensus" has arisen in respect of a given interpretive issue, Canadian courts (out of deference to the executive and legislative efforts made to establish internationally and implement domestically a harmonized regime) should hesitate before frustrating these harmonization efforts by "made-in-Canada" approaches. This approach may be seen as an aspect, or cousin, of the well-established presumption of conformity with international law.

Cromwell J's review of foreign cases confirmed the exclusivity rule. He noted that the rule has been affirmed in decisions of the House of Lords, the Supreme Court of the United States, the French Cour de cassation, the Court of Appeal of Hong Kong, the High Court of Ireland, the Singapore Court of Appeal, and the High Court of South Africa, as well as by lower courts in Canada.[95] Cromwell J rejected the appellants' attempts to overcome the exclusivity principle, saying in part that the scope of that principle "cannot be modeled on national definitions of damages"[96] and cannot be curtailed by a distinction (based in decisions of the European Court of Justice) between "individual damages" and "standardized damages."[97]

Having found that the Thibodeaus could not be awarded damages consistently with the *Montreal Convention* as implemented in federal law, Cromwell J turned to their submission that any conflict between the treaty and the *Official Languages Act* must be resolved in favour of the latter. In his view, there is no conflict between the two provisions, as section 77(4) of the *Official Languages Act*

[94] *Ibid* at para 50.

[95] *Ibid* at paras 51–56.

[96] *Ibid* at para 77.

[97] *Ibid* at paras 80–81.

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empowers the Federal Court to "grant such remedy as it considers appropriate and just in the circumstances," and an award of damages that would constitute a breach of Canada's international obligations under the *Montreal Convention* is not "appropriate and just."[98] In a passage reminiscent of (but not referring to) the comments of LeBel J in *R v Hape* on the international context in which domestic legislation is enacted,[99] Cromwell J observed:

> As I see it, the OLA, read in its full context, demonstrates that Parliament did not intend to prevent section 77(4) from being read harmoniously with Canada's international obligations given effect by another federal statute.
>
> It is unlikely that, by means of the broad and general wording of s. 77(4), Parliament intended this remedial power to be read as an exclusive and exhaustive statement in relation to the Federal Court's remedial authority under the OLA, overriding all other laws and legal principles. The appellants' position in effect is that Parliament, through s. 77(4), intended that courts should be able to grant damages even though doing so would be in violation of Canada's international undertakings as incorporated into federal statute law. This proposition runs afoul of the principle of interpretation that Parliament is presumed not to intend to legislate in breach of Canada's international law obligations …
>
> I find it impossible to discern any such intent in the broad and general language of s. 77(4). Instead, this provision should be understood as having been enacted into an existing legal framework which includes statutory limits, procedural requirements and a background of general legal principles — including Canada's international undertakings incorporated into Canadian statute law — which guide the court in deciding what remedy is "appropriate and just."
>
> Moreover, a review of the legislative history of this provision provides no evidence that Parliament intended to authorize awards of damages in violation of Canada's international commitments.[100]

Cromwell J concluded that there is "no hint in the text, scheme or purpose of the *OLA* that the brief, broad, general and highly discretionary provision in section 77(4) was intended to permit

[98] *Ibid* at paras 89–90, 110.

[99] 2007 SCC 26 at para 53.

[100] *Thibodeau, supra* note 89 at paras 112–15.

courts to make orders in breach of Canada's international undertakings which have been incorporated into federal law."[101]

Refugee protection — exclusion — serious criminality

Febles v Canada (Citizenship and Immigration), 2014 SCC 68 (30 October 2014). Supreme Court of Canada.

Mr. Febles left Cuba in 1980 for the United States, where he was accepted as a refugee on the grounds of political dissidence. In 1984 and again in 1993, he pleaded guilty to assault with a deadly weapon, serving two-year prison sentences for each offence. In 2010, the United States revoked his refugee status and ordered him deported. He escaped to Canada and sought refugee protection here.

The issue was whether Febles was excluded from refugee status by Article 1F(b) of the 1951 *Convention Relating to the Status of Refugees* (*Refugee Convention*),[102] as implemented by section 98 of the federal *Immigration and Refugee Protection Act*.[103] This article excludes from the protections of the convention "any person with respect to whom there are serious reasons for considering that … he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." On a literal interpretation of Article 1F(b) (for which the minister contended), a convicted person who has served his sentence is nevertheless excluded from refugee status. The competing interpretation (for which Febles and the intervener the UN High Commissioner for Refugees advocated) was that this provision was intended only to prevent abuse of refugee status by unconvicted fugitives from justice and did not apply to persons who had served their sentences and were deserving of protection at the time of their refugee application.

McLachlin CJ, for the majority of the Supreme Court of Canada, held that the literal meaning of Article 1F(b) applied — only factors related to the commission of the criminal offences can be considered and whether those offences were serious within the meaning of Article 1F(b). The chief justice reached this result

[101] *Ibid* at para 117.

[102] Can TS 1969 No 6 [*Refugee Convention*].

[103] SC 2001, c 27.

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through an application of the principles of treaty interpretation set out in Articles 31 and 32 of the *VCLT*,[104] saying "[i]nterpretation of an international treaty that has been directly incorporated into Canadian law is governed by Articles 31 and 32."[105] She began with the ordinary meaning of Article 1F(b), which "refers only to the crime at the time it was committed" and not to "anything subsequent to the commission of the crime."[106] Furthermore, there is "nothing in the text of the provision suggesting that it only applies to fugitives, or that facts such as current lack of dangerousness or post-crime expiation or rehabilitation are to be considered."[107]

The context of Article 1F(b), and the object and purpose of both that provision and the treaty as a whole, were (in the chief justice's view) consistent with the ordinary meaning. In particular, the majority held that Article 1F(b) was "central to the balance the *Refugee Convention* strikes between helping victims of oppression by allowing them to start new lives in other countries and protecting the interests of receiving countries."[108]

Recourse to the convention's *travaux préparatoires* on this point was not, in the majority's view, available, given Article 32 of the *VCLT*, which permits such recourse in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. The majority held that those conditions were not met here, as the meaning of Article 1F(b) was clear and admits of no ambiguity, obscurity, or absurd or unreasonable result. Despite this, the majority expressed the view that the *travaux* supported the minister's position.[109] The chief justice also noted that courts around the world had agreed that Article 1F(b) is not limited to fugitives. She cited UK, Australia, New Zealand, and German/European Court of Justice decisions to this effect, while noting that decisions in Belgium and France went the other way.[110]

[104] *VCLT, supra* note 91.

[105] *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 11.

[106] *Ibid* at para 17.

[107] *Ibid.*

[108] *Ibid* at para 35; see also para 29.

[109] *Ibid* at paras 38–42.

[110] *Ibid* at paras 43–59.

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In response to Febles' submission that his interpretation of Article 1F(b) (as implemented by section 98) was more consistent with the *Charter*, McLachlin CJ observed that the provision

> is part of an international treaty, the meaning of which is not affected by the provisions of the *IRPA*. However, the [Immigration and Refugee] Board is bound by the *IRPA*, and not by the *Refuge Convention* itself. Parliament has the power to pass legislation that complies with Canada's obligations under the *Refugee Convention*, or to pass legislation that either exceeds or falls short of the *Refugee Convention*'s protections.[111]

In most cases in which the Supreme Court of Canada and other courts acknowledge legislative sovereignty to violate international law, such statements are quickly followed by an affirmation of the interpretive presumption of conformity with the state's obligations. This dictum is unusual in that sense, but the point is seemingly academic as McLachlin CJ proceeded to observe that "[s]ection 98 of the *IRPA* expressly incorporates Article 1F(b) of the *Refugee Convention*" and, "[a]s such, it is clear that Parliament's intent was for section 98 to exclude from refugee protection in Canada all persons falling under Article 1F(b) of the *Refugee Convention*."[112] The chief justice went on to express the view (without elaboration) that section 98 is consistent with the *Charter* and that even if excluded from refugee protection the appellant could apply for a stay of removal if he faced death, torture, or cruel and unusual treatment or punishment in Cuba.[113]

In dissent, Abella J (Cromwell J concurring) held that a human rights approach to the interpretation of Article 1F(b) requires a "less draconian interpretation," whereby "an individual should not automatically be disqualified from the humanitarian protection of the *Refugee Convention* under this provision and should be entitled to have any expiation or rehabilitation taken into account."[114] Like the chief justice, Abella J framed her analysis in Articles 31–32 of the *VCLT*. Unlike the chief justice, she relied heavily on the convention's preparatory work, which, in her view, revealed that the states parties were concerned "only about refugee claimants who

[111] *Ibid* at para 64.

[112] *Ibid* at para 66.

[113] *Ibid* at para 67.

[114] *Ibid* at para 74.

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had committed a crime outside of the country of refuge *but had not been convicted or served a sentence for that crime.*"[115]

Briefly noted / Sommaire en bref

Non-refoulement — human smuggling — interpretation of domestic legislation in light of international obligations

R v Appulonappa, 2014 BCCA 163 (30 April 2014). British Columbia Court of Appeal.

The respondents were Sri Lankan nationals who served as the captain and crew of a ship containing seventy-six Sri Lankan asylum seekers. The Crown alleged that they had organized the voyage and charged them with the offence of "human smuggling" under section 117 of the *Immigration and Refugee Protection Act*.[116] The respondents sought a declaration that section 117 was overbroad, as it would criminalize the actions of humanitarian workers or family members who assist refugee claimants in entering Canada illegally for altruistic reasons.

In analyzing the overbreadth argument, Neilson JA held that neither Canada's obligations under the *Refugee Convention*,[117] nor its obligations under the *Protocol Relating to the Status of Refugees*,[118] imposed an international obligation on state parties to exempt humanitarians or family members from the ambit of anti-human smuggling legislation.[119] Moreover, the trial judge had erred in giving decisive weight to the *travaux préparatoires* behind the convention and the protocol,[120] as the *travaux* were only to be used as an interpretive aid in the event of an ambiguity or manifestly unreasonable result per Article 32 of the *VCLT*.[121]

On 9 October 2014, the Supreme Court of Canada granted leave to appeal in this matter (SCC Docket no. 35958). The case will be briefed in full in a later edition of the *Yearbook*.

[115] *Ibid* at para 116 (emphasis in original).

[116] SC 2001, c 27.

[117] *Refugee Convention*, *supra* note 102.

[118] 31 January 1967, 606 UNTS 267.

[119] *R v Appulonappa*, 2014 BCCA 163 at paras 129, 137–40.

[120] *Ibid* at para 122.

[121] *VCLT*, *supra* note 92.