Public International Law at the Supreme Court of Canada

A Selection of Cases

Stéphane Beaulac

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PREFACE

For 150 years, the Supreme Court of Canada has achieved a careful and enduring balance between respecting our legal traditions and being open to universal values. Across generations, the Court has remained steadfast in administering justice according to Canadian law, while recognizing that the law exists within a broader set of principles and ideas that extend beyond our borders. This book explores that meeting point between the particular and the universal, tracing the ways in which international law has progressively shaped contemporary Canadian jurisprudence.

The story that unfolds here is not linear. It is marked by caution and dialogue, by a spirit of openness and discernment. The Canadian legal tradition reflects an evolution from an early tentativeness to draw on international sources toward a more confident, methodical, and structured approach. Over the decades, the Supreme Court of Canada has come to look to international law not for ready-made answers, but for insight to help illuminate the interpretation of domestic law.

In *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, and *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, international law was invoked to protect human dignity against torture and persecution. These decisions opened an important space for dialogue between Canada's international obligations and the *Canadian Charter of Rights and Freedoms*. They marked an early turning point, one in which Canadian law became more mindful of its commitments to the international community, while retaining its own interpretive sovereignty.

Each of the decisions in *R.* v. *Bissonnette*, [2022] 1 S.C.R. 597, *United States* v. *Burns*,

[2001] 1 S.C.R. 283, *Canadian Foundation for Children, Youth and the Law* c. *Canada (Attorney General)*, [2004] 1 S.C.R. 76 and *Kazemi Estate* v. *Islamic Republic of Iran*, [2014] 3 S.C.R. 176, demonstrate how this approach could be applied to issues as varied as human dignity, the death penalty, children's rights, and state immunity. Through these decisions, the Court showed that turning to international law does not diminish Canadian legal sovereignty. Rather, it constitutes a principled expression of the values that define us. Dignity, justice, and universal responsibility emerge not as abstract ideals, but as principles that enrich our understanding of Canadian law.

This openness to public international law finds particularly eloquent expression in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5. There, the Court articulated a vision of law in which different legal traditions do not compete, but instead converge.

Indigenous legal traditions, Canadian law, and international norms meet in a concert centred on reconciliation.

Professor Beaulac's work brings to light a simple yet fundamental truth: Canadian law, in all its richness and complexity, has always been a place of encounter. It occurs between civil and common law, between the national and international, and between written rules and the values that animate them. By tracing the Supreme Court's journey through these decisions, this book reveals that the interplay of these systems is not a doctrinal abstraction but a lived expression of Canada's legal pluralism.

As the Court commemorates its 150th anniversary, Professor Beaulac's work invites us to reflect on the role of dialogue in shaping our law: a dialogue with our history, our values, our international commitments, and the lived realities of Indigenous peoples.

Canadian law is not closed onto itself. It moves with the world, as a living system in constant evolution. Far from being impermeable to international law, it remains receptive to ideas and challenges from elsewhere while preserving its distinctly Canadian character. It draws strength from its roots without turning inward. As the Court reminded us in *Bissonnette*, openness to international legal principles supports and confirms the validity of our own norms. Grounded in this openness to the world, Canadian law avoids the perils of insularity. It is in this same spirit of openness and steadiness that the Court continues its commitment to delivering justice with independence, humanity, and a profound sense of duty to all.

"Canadian law is not closed onto itself. It moves with the world, as a living system in constant evolution. Far from being impermeable to international law, it remains open to ideas and challenges from elsewhere while retaining its distinctly Canadian character. It draws strength from its roots without turning inward. As the Court reminded us in *Bissonnette*, our openness to principles of international law supports and confirms the validity of our own legal norms. By grounding our law in this openness to the world, we avoid the pitfalls of ignorance."

The Right Honourable Richard Wagner, C.P.
Chief Justice of Canada

A. CONVENTIONAL INTERNATIONAL LAW (TREATIES)

1. *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

This is considered a landmark decision, a game-changer with respect to the use of international law domestically in Canada. By opening the door to the influence of norms based on treaties, even though they are not incorporated into domestic law, the message conveyed by the SCC majority is broad and forceful. Canadian courts are to resort to such normativity, insofar as possible and with the relevant nuances, so that domestic law may be in tune with international law.

An immigration case, it concerned a deportation order issued by the Canadian authorities against Ms. Baker, a woman who had children born in the country but whose visa had long since expired. Judicial review of the decision was sought, primarily on grounds of procedural fairness, but also on humanitarian grounds under section 114(2) of the *Immigration Act*, [R.S.C. 1985, c. I-2, now the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27]. In essence, it was argued that Ms. Baker's deportation would negatively affect her dependent children, thereby triggering the notion of the best interests of the child, which became one of the main components of the SCC's analysis. More specifically, the question was whether this norm, provided for in article 3 of the *Convention on the Rights of the Child* [[1992] Can. T.S. 1992 No. 3], could be used to assist in interpreting the federal statutory provision at stake, even though the treaty had not been formally implemented domestically.

As per the traditional approach to interlegality that Canada inherited from England, based on the landmark decision

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in the *Labour Conventions Case* [*A.G. Canada* v. *A.G. Ontario*, [1937] A.C. 326], the theory known as "dualism" applies to conventional international law. For these norms to have legal effect domestically, the treaty must be incorporated into domestic law through the enactment of a piece of legislation, a process which also takes into account the constitutional division of powers. This is no less than an orthodoxy, as noted by L'Heureux-Dubé J., writing for the majority in this case: "International treaties and conventions are not part of Canadian law unless they have been implemented by statute [...]". Thus she holds: "I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law." [*Baker*, at para. 69].

Justice L'Heureux-Dubé, however, did not stop at such a formalistic understanding of dualism; instead, she went beyond

the binary reasoning based strictly on whether or not domestic transformation took place through implementing legislation. For, she writes, even in the absence of such legislation, "[…] the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review" [*Baker*, at para. 70]. Unimplemented treaty norms can, accordingly, be regarded as part of the legal context, as a relevant and persuasive source that may help in ascertaining legislative intent. Soft law instruments, such as the *Universal Declaration of Human Rights* [U.N. Doc. A/810 (1948) 71] and the *Declaration of the Rights of the Child* [U.N. Doc. A/4354 (1959) 19], were given similar treatment. In the case at hand, the normative elements based on international law's notion of the best interests of the child further supported the broad scope the SCC gave to the humanitarian grounds pursuant to the *Act*.

Indirectly, does this make possible what dualism does not allow to do directly, namely to resort to treaty norms even in the absence of legislative implementation? This is the reproach voiced by the dissenting judges in *Baker*, "namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament" [*Baker*, at para. 80]. Although valid, this criticism is arguably overstated. Indeed, all things considered, reliance on a norm based on an unincorporated treaty does not carry the same persuasive force as it would had the international instrument been implemented domestically. Furthermore, the "contextual" argument – one way to operationalize international law [as examined in Section F] – which was indeed favoured by the majority in *Baker* – allows for the assessment of the proper weight to be given to international law in such situations.

In the end, the message associated with this decision, loud and clear, is that Canadian courts shall be more open to resorting to international law in interpretating domestic law.

2. *Society of Composers, Authors and Music Publishers of Canada* v. *Entertainment Software Association*, [2022] 2 S.C.R. 303

As in *Baker* [[1999] 2 S.C.R. 817], this decision was in administrative law, although it concerned substantive judicial review, applying the new guidelines set out in *Vavilov* [[2019] 4 S.C.R. 653], rather than procedural fairness. The reference to international law in this case was made in relation to the interpretation of the statute implementing a convention, clearly following the logic of dualism. Writing the reasons for the seven-judge majority – the minority opinion focused on other points – Justice Rowe seized the opportunity "for a reiteration of the role international treaties play in statutory interpretation" [*Entertainment Software*, at para. 43].

In this case, the Copyright Board had allowed for distinct remuneration rights for making works available online and on demand, which were based on the new rules introduced in 2012 by way of amendment of the *Copyright Act* [R.S.C. 1985, c. C-42]. Indeed, the *Copyright Modernization Act* [S.C. 2012, c. 20] had amended section 3(1)(*f*) by adding section 2.4(1.1) to reflect, in substance, article 8 of the *WIPO Copyright Treaty* [[2014] Can. T.S. No. 20]. This treaty norm, thus formally transformed into domestic law, was at the core of the trial judge's decision, erroneously according to the Federal Court of Appeal, which instead placed the emphasis on the provision of the *Act*.

The SCC was of the same view, holding that it was necessary that the *Act* be interpreted "so as to fulfill Canada's obligations under art. 8 [of the *Treaty*]", but only "to the extent possible, given the *Copyright Act*'s text" [*Entertainment Software*, at para. 49].

On the specific issue relating to the dualist theory applicable to international treaties, Rowe J. recalls that "[o]nce ratified, treaties do not automatically become part of domestic law; rather, they are given effect through domestic legislation [...]" [*Entertainment Software*, at para. 47]. Invoking the principle of the separation of powers, the reasons emphasized on the distinction between, on the one hand, the implementation of a treaty by the legislative authority and, on the other hand, the negotiation, signature and ratification, which are acts of the executive; note that the same concern was raised by the dissenting judges in *Baker* [at para. 69]. Accordingly, the role of the presumption of conformity with international law – an "interpretative tool for legislation", which will be examined in detail below [Section F] – may have to be toned down [*Entertainment Software*, at para. 47]. Indeed, giving effect to the domestic legislative intent remains the gist of the task involved in statutory interpretation. Case law is consistent that, in the event of a conflict with treaty obligations, Canada's domestic legislation will always prevail [*R.* v. *Hape*, [2007] 2 S.C.R. 292, at para. 53].

This clarification is most opportune, as it serves to reframe the international law argument. Though it may indeed be highly relevant in the context of statutory interpretation, in no way may it supplant what lies at the core of that exercise, namely the intention of Parliament. As Rowe J. wrote, "[t]he court's task is to interpret what the legislature (federally and provincially) has enacted and not subordinate this to what the federal executive has agreed to internationally" [*Entertainment Software*, at para. 48]. Reference is then made to an unerring statement by Justice LeBel in *Kazemi* [[2014] 3 S.C.R. 176, at para. 60], to the effect that international law cannot be used to support an interpretative conclusion that would do violence to the text of the legislation.

Three other elements addressed by Justice Rowe are worth mentioning: (1) "A treaty should be considered when interpreting statutes that purport to implement the treaty, in whole or in part", these norms being "relevant at the context stage of the statutory interpretation exercise" [*Entertainment Software*, at para. 44]. (2) "There is no need to find textual ambiguity in a statute before considering the treaty", rather one must be "interpreting the statute's text in its 'entire context'", which "includes any relevant international legal obligations" [*ibid.*, at para. 45]. (3) "If a statute implements a treaty without qualification, the interpretation of the statute needs to be wholly consistent with Canada's obligations under the treaty"; however, if the statute is not explicit in this regard, "the weight given to obligations under the treaty will depend on the circumstances of the case, such as the treaty's specificity and the statute's text", with a view to complying with Canada's treaty obligations, "in accordance with the presumption of conformity" [*ibid.*, at para. 46]. These means of operationalizing international law – statute's entire context and presumed legislative intent – will be examined further below [Section F].

B. CUSTOMARY INTERNATIONAL LAW (CUSTOM)

3. *R.* v. *Hape*, [2007] 2 S.C.R. 292

In terms of the use of international custom in domestic law, it was noted a while ago that the SCC did not have many opportunities to articulate the applicable rules. It was simply taken for granted that, pursuant to the British tradition, "monism" was the theory to be followed. This other heuristic tool regarding interlegality diametrically differs from "dualism" in that no explicit implementing measure is required; customs, instead, automatically produces their legal effects domestically. The "doctrine of adoption" is another expression found in case law to explain the same idea. The judgment in *Hape* saw the SCC set the record straight, once and for all, as far as the Canadian position is concerned.

In substance, the case raised issues about the protection against unreasonable search and seizure guaranteed by section 8 of the *Canadian Charter of Rights and Freedoms*, in the context of an investigation abroad in which the RCMP had participated. The heart of the debate, in effect, was the initial question of whether section 32 of the *Charter* allowed for Canada's supra-legislative instrument to be applicable extraterritorially.

Known as the application clause of the *Canadian Charter*, section 32 contains no explicit indication in that regard, which means that the question will have to involve the rules relating to state jurisdiction and other principles and norms of public international law, such as sovereignty and non-intervention. These norms are based *inter alia* on customary international law and have been recognized in well-known international adjudicative decisions, such

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as the *"Lotus" case* [P.C.I.J. Reports (series A), No. 10 (September 7, 1927), p. 4], the *Island of Palmas case* [[1928] 2 R.I.A.A. 829], and the *Nicaragua case* [I.C.J. Reports 1986, p. 14]. Accordingly, the jurisdiction of a state relies on territoriality, although there are other bases, called extraterritorial, which may alternatively be invoked, notably nationality; also coming into play in the latter situations are sovereignty (and its derivate, comity) and non-intervention. Moreover, the rules governing state jurisdiction will vary depending on whether the matter relates to prescriptive, enforcement or adjudicative authority.

Specifically on the use of customary international law as a relevant and persuasive source to assist in interpreting section 32 of the *Charter*, the majority opinion written by LeBel J. provides a useful summary of the reception of custom domestically. After recalling the British tradition regarding interlegality and customary law, including the English *Trendtex* [[1977] 1 Q.B. 529 (C.A.)] and the Canadian instances

referring to this decision, it was noted that on several occasions, "this Court has implicitly or explicitly applied the doctrine of adoption in several cases" [*Hape*, at para. 37]. As it were, LeBel J. acknowledges, "[i]n other decisions, however, the Court has not applied or discussed the doctrine of adoption of customary international law" [*Hape*, at para 38]. This time, the majority of the SCC wants to clarify the situation, affirming that "[d]espite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada" [*Hape*, at para. 39]; indeed, it has been consistently recognized or *de facto* applied in Canadian case law. In the end, LeBel J. writes, "following the common law tradition, it appears that the doctrine of adoption operates in Canada" [*ibid.*].

As for the way in which customary international law shall be operationalized domestically, a subject examined below [Section F], Justice LeBel provides useful clarifications, though in doing so introduces an element that will create a degree of confusion. He writes that "prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation". [*ibid.*, emphasis added]. This incorporation is automatic, since custom, "as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, [Parliament] declares that its law is to the contrary" [*ibid.*]. The mention that this would be the situation only for "prohibitive rules" of customary law led to some debate, but this unnecessary distinction was later abandoned in subsequent case law [see *Nevsun*, [2020] 1 S.C.R. 166, at para. 93, discussed hereinbelow].

With respect to the means of operationalizing these customary norms (state jurisdiction, sovereignty, non-intervention) in the course of interpreting section 32 of the *Charter*, LeBel J. resorted to the presumption of conformity with international law, which will be examined below [Section F]. The relevant passages explain that, whenever possible, interpretations that would result in a violation of Canada's obligations should be avoided, it being understood that the "presumption is rebuttable, however" [*Hape*, at para. 53]. In conclusion, falling in line with consistent case law on extraterritoriality, the *Charter* was deemed inapplicable in the context of this case.

4. *Nevsun Resources Ltd.* v. *Araya*, [2020] 1 S.C.R. 166

Together with *Québec inc.* [[2020] 3 S.C.R. 426], the present decision in *Nevsun* has helped clarify the domestic use of international normativity in Canada. More particularly in this case, it was done with regard to customary international law. This 5-4 decision saw Justice Abella, writing for the majority, describe customary law as "the common law of the international legal system" [*Nevsun*, at para. 74]. The guidelines given to domestic courts for resorting to the other main formal source, under article 38(1) of the *Statute of the International Court of Justice* [[1945] Can. T.S. No. 7] cover several important aspects that go beyond the doctrine of adoption; for example, they include a feature on proof of international law [an issue examined later in Section G].

Arising from a preliminary objection seeking dismissal of the proceedings, the case was not decided on its merits, but rather pursuant to the (less demanding) criterion of whether it was "plain and obvious" that the claims against Nevsun had no reasonable prospect of success. The majority concluded that the arguments of the three plaintiffs, former mine workers in Eritrea, could ground a cause of action for damages

under Canadian common law, based on customary international law norms. The alleged working conditions would be in violation of prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, as well as crimes against humanity. The case would therefore have been allowed to proceed to trial; however, an out-of-court settlement brought the proceedings to an end, which means that a final judicial ruling was never made on the substantive issue of tort liability.

With regard to custom, Abella J. explains that there are "two requirements for a norm of customary international law to be recognized as such: general but not necessarily universal practice, and *opinio juris*, namely the belief that such practice amounts to a legal obligation" [*Nevsun*, at para. 77]. These teachings come from the *North Sea Continental Shelf case* [Judgment, I.C.J. Report 1969, p. 3]. The constituent elements of custom, she adds, may be demonstrated through the jurisprudence of domestic courts, among other things. This international source also includes "a subset of norms known as *jus cogens*, or peremptory norms" [*Nevsun*, at para.83]. Codified in article 53 of the *Vienna Convention on the Law of Treaties* [[1980] Can. T.S. No. 37], the SCC has already recognized *jus cogens* as "a fundamental tenet of international law that is non-derogable" [*Kazemi*, [2014] 3 S.C.R. 176, at para. 47]. This concept will be examined in greater detail below [Section D].

With regard to interlegality, Justice Abella for the majority contrasts conventional law, which requires legislative incorporation in order to have legal effects domestically, with customary law, which "is automatically adopted into domestic law without any need for legislative action" [*Nevsun*, at para. 86]. The "doctrine of adoption" is the expression used in Canada to refer to this automatic judicial incorporation of custom into domestic law, unless otherwise provided for by legislation. The use of the permissive "may" in case law [see *Hape*, [2007] 2 S.C.R. 292, at para. 39], in relation to custom, does not represent a departure from "the traditional approach of directly incorporating customary norms into Canadian common law" [*Nevsun*, at para. 91]. In short, customary law is automatically available to domestic judges exercising their judicial authority to interpret and apply national law. Of course, legislators have the prerogative to modify or even to override custom, "but like all common law, no legislative action is required to give them effect" domestically [*Nevsun*, at para. 94]. Being *ipso facto* an integral part of Canadian common law, customary law "must be treated with the same respect as any other law" [*Nevsun*, at para. 95].

As for Justices Brown and Rowe, dissenting in part – but authoring the majority opinion in the other leading case, later in 2020 [*Québec inc.*, discussed in Section E] – one of their points is, in a way, advance notice: "The conventional [...] approach to the supremacy of legal systems", they rightly explained, means "that Canadian courts will apply the law of Canada, including the supreme law of our Constitution" [*Nevsun*, at para. 151-152]. From this perspective, they reminded us that "[t]he primacy given to contrary legislation preserves the legislature's ability to control the effect of international laws on the domestic legal system" [*Nevsun*, at para. 167].

As for the issue of "proof", which will later be examined separately [Section G], Abella J. explains, on behalf of the majority, that it is important to distinguish foreign law from international law. Unlike the former, which is treated as a question of fact requiring proof, customary international norms "are law, to be judicially noticed" [*Nevsun*, at para. 97]. She further opines that judicial notice is, in fact, "an inevitable implication" of the doctrine of adoption,

since international custom becomes *ipso facto* part of domestic law [*Nevsun*, at para. 98]. The question of proof specific to the recognition of "new" customary norms has not been resolved; in any event, the view is that judicial notice of custom is all the more appropriate when such norms, as in the case at hand, are also *jus cogens* [*Nevsun*, at para. 99 ss.].

To be complete, let us mention briefly that the argument (raised in the motion to dismiss) that a multinational corporation such as Nevsun was not submitted to international law was rejected. Although in *obiter dictum*, certain statements made by the majority are worth noting: "While states were classically the main subjects of international law since the Peace of Westphalia in 1648, international law has long-since evolved from this state-centric template" [*Nevsun*, at para. 106]; "there is no longer any tenable basis for restricting the application of customary international law to relations between states" [*Nevsun*, at para. 107]; and finally "non-state actors like corporations can be held responsible", including in civil liability suits, for violations of rules of international law [*Nevsun*, at para. 112].

Although these ontological elements remain debatable, Abella J. uses them to back up the idea that the claims against Nevsun, based on customary law, were not without legal basis *as per* the "plain and obvious" criterion [*Nevsun*, at para. 113]. By bringing the common law to evolve in this direction, international norms in this case could in theory allow for a judicial remedy (*ubi jus ibi remedium*) for the Eritrean workers.

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C. OTHER SOURCES OF INTERNATIONAL NORMATIVITY

5. *Saskatchewan Federation of Labour* v. *Saskatchewan*, [2015] 1 S.C.R. 245

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This SCC case is a landmark decision in the country's recent jurisprudence, as it profoundly modified the state of public law by constitutionally recognizing the right to strike, on the basis of freedom of association guaranteed by section 2(*d*) of the *Charter*. As for interlegality, guided by Chief Justice Dickson's dissent in the *Reference Re Public Service Employee Relations Act (Alta.)* [[1987] 1 S.C.R. 313, "*Alberta Reference*"]), here it is the majority of the Court (5-2) that relied on international norms to justify a generous and expansive interpretation of this provision guaranteeing human rights in a labour context. In her reasons for the majority, Abella J. opened the valves fully in this regard, not only with respect to instruments and legal norms that are binding, but also for other sources of international normativity – which are not binding for Canada, strictly speaking - that may nevertheless play a role in the interpretation and application of domestic law.

Although in 1987 the majority of the SCC had given freedom of association under section 2(*d*) of the *Charter* a limited scope in the *Alberta Reference*, it had already been broadened to include the right to collective bargaining in *Health Services and Support* [[2007] 2 S.C.R. 391], *Ontario* v. *Fraser* [[2011] 2 S.C.R. 3], and *Mounted Police Association of Ontario* [[2015] 1 S.C.R. 3]. The present decision followed the same trend, extending constitutional protection to the right to strike by invalidating legislative provisions that limited the ability of public sector employees providing essential services to engage in work stoppages. The majority of the Court concluded that this infringement of the right to a meaningful

collective bargaining process guaranteed under section 2(*d*) was unjustified under section 1 of the *Charter*.

After examining the historical and comparative context, and situating it within the Court's recent jurisprudence, Justice Abella invoked the purposive approach advocated in *Big M Drug Mart* [[1985] 1 S.C.R. 145] to support a broad interpretation of section 2(*d*) of the *Canadian Charter*. This fundamental freedom was held to include the right to strike, deemed an essential element of the meaningful collective bargaining process [*Saskatchewan*, at para. 75]. In the course of what amounted to reviving Dickson C.J.'s opinion in the *Alberta Reference*, essentially agreeing with him and adopting his reasons [*ibid.*], Abella J. undertook a detailed analysis that included numerous references to foreign and international law. As for the latter, a basic instruction is recalled, that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified", as restated in *Divito* [[2013] 3 S.C.R. 157, at para. 23], which is cited in this case [*Saskatchewan*, at para. 64].

The majority opines that, pursuant to this presumption of intent, Canada's international obligations "clearly argue for the recognition of a right to strike" under the *Charter* [*Saskatchewan*, at para. 65]. In support, references are made to article 8(1)(*d*) of the *International Covenant on Economic, Social and Cultural Rights* [[1976] Can. T.S. No. 46] and to section 45(*c*) of the *Charter of the Organization of American States* [[1990] Can. T.S. No. 23], both of which have been ratified by Canada. In addition to these binding instruments, "other sources tend to confirm the protection of the right to strike recognized in international law" [*Saskatchewan*, at para. 67, emphasis added]. Accordingly, Abella J. relies on the *Convention (No. 87) concerning freedom of association and protection*

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of the right to organize [(1948) 68 U.N.T.S. 17] – concluded within the International Labour Organization (ILO) – also ratified by Canada, and more importantly, the position of the ILO's Committee of Experts and Committee on Freedom of Association, to the effect that the right to strike is inseparable from the right to organize. Although it is true that they are "not strictly binding", Abella J. writes that the decisions of these committees should be seen as enjoying a "considerable persuasive weight", as they have been cited and referenced worldwide, including in Canada [*Saskatchewan*, at para. 69].

The normativity of *Convention No. 87* would also be found in article 22(3) of the *International Covenant on Civil and Political Rights* [[1976] Can. T.S. No. 47]. Moreover, Abella J. refers to the regime – which is not binding in Canada – of the *European Convention on Human Rights* [(1950) 213 U.N.T.S. 221]. On the basis of article 11, guaranteeing freedom of association, the European Court of Human Rights held that the right to strike is an indissociable corollary to the right to collective bargaining [*Saskatchewan*, at para. 71]. Finally, the exercise is rounded off with several references to foreign law, including German and Israeli case law, as well as to the *European Social Charter*, an instrument of soft law [*Saskatchewan*, at para. 72-74].

D. *JUS COGENS* NORMS AND INTERNATIONAL CRIME

6. *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3

Long before the SCC described it as "a subset of norms" of customary law [*Nevsun*, [2020] 1 S.C.R. 166, at para. 83], involving a "fundamental tenet of international law that is non-derogable" [*Kazemi*, [2014] 3 S.C.R. 176, at para. 47], *jus cogens* had already been invoked in *Suresh*, in 2002. Codified in the *Vienna Convention on the Law of Treaties* [[1980] Can. T.S. No. 37], what is also termed a "peremptory norm" of general international law is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" [*ibid.*, art. 53]. Although case law has made reference thereto on occasion, this cardinal concept in contemporary international law does not appear to be determinative when it comes to issues of interlegality, as this decision illustrates.

The case concerned the judicial review of a decision made under the *Immigration Act* [R.S.C. 1985, c. I-2, s. 53(1)(*b*), now the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27], ordering the deportation of Mr. Suresh to a country where he risked being tortured. The SCC was thus required to address several issues of constitutional and administrative law, one of which related to section 7 of the *Charter*. Namely, whether the removal of a person, even if there is a risk of torture – in cases of "terrorism" and "danger to the security of Canada" – can nevertheless be in accordance with the "principles of fundamental justice". To be precise, at stake was the right of *non-refoulement* in these circumstances and whether Canadian constitutional law protects it in absolute terms or not. Rendered by "the Court", and after an analysis based primarily on section 7 of the *Charter* (but invoking section 1 also), the door was left open: there may be "exceptional circumstances" justifying the exercise of the Minister's discretion to proceed with such deportation [*Suresh*, at para. 78-79]. In the end, the file was referred back to the Minister, for reconsideration in accordance with the Court's directives.

With regard to the issue of interlegality, an entire subsection was devoted to it – entitled "The International Perspective" – which followed a detailed analysis of the situation under Canadian constitutional law, based on the interpretation of section 7 of the *Charter* and the related case law [*Suresh*, at para. 49-58], including the key decision in *United States v. Burns* [[2001] 1 S.C.R. 283]. The provisional conclusion in this regard was that "this balance [under section 7 of the *Charter*] will usually come down against expelling a person to face torture elsewhere" [*Suresh*, at para. 58]. Internationally, this protection would even be absolute, according to the Court's interpretation of the norms in question, including their peremptory nature (i.e. *jus cogens*).

At the outset of the discussion of the international context, the Court recalls the essential parameters of the analytical

framework [*Suresh*, at para. 60]. First, the dualist theory: "International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment". Be it as it may, more broadly in terms of contextual interpretation, "in seeking the meaning of the Canadian Constitution, the courts may be informed by international law" [*ibid.*], as a relevant and persuasive source. Specifically as regards the principles of fundamental justice under section 7 of the *Charter*, the Court "look[s] to international law as evidence of these principles and not as controlling in itself" [*ibid.*]. As such, the international law arguments were articulated in two stages: a) first, by examining how the prohibition of torture, in general, constitutes a *jus cogens* norm; and b) second, by specifically considering the international issue of *non-refoulement* to a country where there is a risk of torture.

Accepting the premise that the absolute prohibition of torture may qualify as a peremptory norm – described as developing "over time and by general consensus of the international community" [*Suresh*, at para. 61] – the Court identified three persuasive indicators to that effect: (1) the large number of multilateral instruments that explicitly prohibit torture; (2) the recognition that no state has ever legalized torture or admitted practicing it deliberately; and (3) the fact that doctrine and case law appear to agree that the said norm would be *jus cogens* [*Suresh*, at para. 62-64]. Showing caution on the matter, the Court concluded this first stage with somewhat of an understatement, holding that the prohibition of torture in international law "suggests that it cannot be easily derogated from" [*Suresh*, at para. 65].

Proof that little importance was given to the peremptory character of the prohibition of torture also emerges from the second stage, which examines the specific issue of expulsion to a country where there is a risk of torture. This exercise leads the Court to consider and balance the international norms found in the *International Covenant on Civil and Political Rights* [[1976] Can. T.S. No. 47, art. 4 and 7], the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* [[1987] Can. T.S. No. 36, art. 5] and the *Convention Relating to the Status of Refugees* [[1969] Can. T.S. No. 6, art. 33], including in light of *soft law* from the Human Rights Committee [General Comment 20, UN Doc. HRI/GEN/1/Rev. 1, at p. 31 (1994)]. In the end, paying lip service to the peremptory nature of the prohibition of torture in international law, the Court's reasoning simply followed the usual prioritizing process involved when there is a conflict among legal norms. It meant that precedence was given to the absolute prohibition on expulsion, without exception, in situations where there is a risk of torture.

Most interestingly, however, this "prevailing international norm" [*Suresh*, at para. 72], which would indeed be absolute, did not change the conclusion provisionally reached *as per* section 7 of the *Charter*, that is to say, in Canadian constitutional law. Recall that the principles of fundamental justice did not completely preclude *refoulements* in such a scenario, leaving it possible instead to plead "exceptional circumstances" and thus justify these expulsions. This illustrates that international law, considered as context (as a relevant and persuasive source), is in fact never determinative domestically, even when the norm invoked is also peremptory (*jus cogens*).

7. *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100

As far as international crimes in Canadian domestic law are concerned, strictly speaking, the case of *Ezokola* v. *Canada* [[2013] 2 S.C.R. 678] was the first occasion for the SCC to discuss the *Rome Statute of the International Criminal Court* [(2002) 2187 U.N.T.S. 3], as implemented nationally through the *Crimes Against Humanity and War Crimes Act* [S.C. 2000, c. 24]. In a unanimous decision, Justices LeBel and Fish stated that "Canada's acceptance of the *Rome Statute* as authority on international criminal principles is beyond dispute" [*Ezokola*, at para. 49]; this normative reality was again invoked in *Bissonnette* [[2022] 1 S.C.R. 597, at para. 101]. At any rate, it was in the *Mugesera* decision, in 2005, that the initial milestones in the field were established in case law. Although the provisions of the *Criminal Code* [R.S.C. 1985, c. C-46] on crimes against humanity *inter alia* have since been replaced, the lessons pertaining to the interlegality dimension of international crimes remain essential for understanding the normative dynamic at play.

This case concerned the judicial review of a decision ordering the removal of an individual, Mr. Mugesera, after obtaining permanent residency in Canada. In terms of interpretation, the debate focused on offences committed abroad, in Rwanda in 1992, namely incitement to murder, genocide and hatred, as well as crimes against humanity. A secondary dimension related to evidentiary standards applicable to the grounds for deportation, being an administrative procedure under the *Immigration Act* [R.S.C. 1985, c. I-2, s. 27(1)(*a*.1)(*ii*) and (*a*.3)(*ii*), s. 19(1)(*j*) and 27(1)(*g*), now the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27]. The case then turned primarily on the various constituent elements for each of the offences alleged against Mugesera. The bases for this exercise were the provisions of the *Criminal Code* in force at the relevant time (if the elements were established under Canadian law, they were deemed to be established in Rwandan law as well). In particular, international law proved to be relevant for two of the offences, namely (a) incitement to genocide, and (b) crimes against humanity.

a) In connection with a speech made by Mugesera, it was alleged that the facts demonstrated, on a balance of probabilities, the advocating or promoting of genocide, and therefore a crime under section 318(1) of the *Criminal Code*. More assertive than usual as regards such normativity, the Court explained that, due to the fact that "[g]enocide is a crime originating in international law", it would be "called upon to play a crucial role as an aid in interpreting domestic law", in this case the crime of incitement to genocide [*Mugesera*, at para. 82]. In terms of international conventional law, it was noted that both Canada and Rwanda are state parties to the *Convention on the Prevention and Punishment of the Crime of Genocide* [(1949) 78 U.N.T.S. 277], [1949] Can. T.S. No. 27], the International Court of Justice having ruled that the legal principles underlying this treaty constitute customary international law as well. Relying on *Baker* [[1999] 2 S.C.R. 817, at para. 69-71], the directives given are clear: "The importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada's treaty obligations was emphasized [by this Court]" [*Mugesera*, at para. 82]. In this context, and especially since there is no case law under section 318 of the *Criminal Code*, the decisions of international criminal courts "are highly relevant to the analysis" [*ibid.*]. Accordingly, references were made to the International

Criminal Tribunal for Rwanda ("ICTR"), citing passages from two leading judgments [*Prosecutor* v. *Akayesu*, No. ICTR-96-4-T, September 2, 1998, and the *Nahimana, Barayagwiza and Ngeze case*, No. ICTR-99-52-T, December 3, 2003].

b) As for the crimes against humanity alleged against Mugesera, assessed under the lower *Immigration Act* evidentiary standard of "reasonable grounds to believe", sections 7(3.76) and (3.77) of the *Criminal Code* – since repealed, but not significantly different from the current provisions of the *Crimes Against Humanity and War Crimes Act* [*supra*] – were also interpreted with the assistance of international norms. Crimes against humanity require to meet four conditions: (i) the *actus reus* and *mens rea* of an enumerated prohibited act; (ii) the act was committed as part of a widespread or systematic attack; (iii) the act was directed against any civilian population or any identifiable group of persons; and (iv) the person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack [*Mugesera*, at para. 119].

Invoking the need to clarify the *Finta* decision [[1994] 1 S.C.R. 701], the SCC makes use of the "vast body of international jurisprudence [that] emerged from the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the ICTR, [as these] tribunals have generated a unique body of authority which cogently reviews the sources, evolution and application of customary international law" [*Mugesera*, at para. 126]. Of course, their judgments are "not binding upon this Court", but domestic courts "should not [disregard them] lightly", given their expertise and authority in the field, particularly since domestic provisions on crimes against humanity expressly incorporate customary law [*ibid.*]. This is how revisiting *Finta* is justified here, so as to bring Canadian law in "accord with the jurisprudence of the ICTY and the ICTR" [*ibid.*]. This exercise required a detailed and extensive reliance on more than a dozen international decisions, helping to articulate the analysis of the four elements discussed above, with an eye to demonstrating the commission of crimes against humanity.

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E. ROLE OF INTERNATIONAL LAW IN DOMESTIC LAW

8. *Quebec (Attorney General)* v. *9147-0732 Québec inc.*, [2020] 3 S.C.R. 426

Over the past twenty-five years at the Supreme Court of Canada, there is little doubt that this decision has been the most significant as regards issues of interlegality, and for two reasons. Firstly, because it clarified the role of non-national norms (international law, comparative law) in the interpretation of domestic law, with respect to the *Canadian Charter* primarily, but teachings that apply generally *mutatis mutandis* to constitutional and legislative interpretation. Indeed, there has been a significant reframing of the use of international law and comparative law. Secondly, because the majority *as per* Justices Brown and Rowe puts forward a detailed, though not exhaustive, analytical framework aimed at guiding how to weigh the relevant and persuasive elements found in international and foreign norms. Therefore, the process for resorting to such normativity was improved, with a rigorous and more refined scheme.

The case revolved around the interpretation of section 12 of the *Canadian Charter*, which protects against cruel and unusual treatments and punishments, the issue being whether corporations (juridical persons, compagnies) could be the beneficiary of this human right. The conclusion was unanimous, namely that the scope of this guarantee was limited to natural persons, but the Court split 5-3-1 on the legal reasoning involved in deciding the question at hand. The dividing line between the majority and the main minority opinion, written by Justice Abella, concerned primarily the use of international law and comparative law as part of the exercise of constitutional

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interpretation of the *Charter*. The other minority judge, Kasirer J., did not address this issue, instead endorsing in essence the opinion by the dissent at the Quebec Court of Appeal.

Interestingly, the *Québec inc.* decision is also highly significant in Canadian case law for another reason, namely because of the adjustments – amounting to a recalibration – made to the general methodology of constitutional interpretation. Here too, there was a sharp disagreement between Brown and Rowe JJ., writing for the majority, and the minority opinion of Abella J. There is no need to examine this dimension in detail here, except to say that the majority judges were mindful to properly situate matters of interlegality within the purposive approach of *Big M Drug Mart* [[1985] 1 S.C.R. 295]. This realignment had already started in *Grant* [[2009] 2 S.C.R. 353], *Caron* [[2015] 3 S.C.R. 511] and *Poulin* [[2019] 3 S.C.R. 566], and was later confirmed and further elaborated in *Toronto (City)* [[2021] 2 S.C.R. 845]. But the pivotal case is *Québec inc.*, where the majority recalls and reinstates the importance,

even the primacy, of the text: "constitutional interpretation, being the interpretation *of the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text" [*Québec inc.*, at para. 9, emphasis in original].

Focusing now on the clarifications of the majority relating to interlegality, it is interesting to note from the outset that the opinion of Justices Brown and Rowe appears to be reacting to a trend toward internationalization associated for a while with Justice Abella. Her staunch position in that regard, sometimes immoderate, is quite evident in her minority reasons in this case – whose main lines will be examined below – but also, and more significantly, in her judgment some eight months earlier in *Nevsun* [[2020] 1 S.C.R. 166, discussed above in Section B], and even five years earlier in *Saskatchewan* [[2015] 1 S.C.R. 245, discussed above in Section C]. This noticeable tangent led Brown and Rowe JJ. to set the record straight, in a sense, because as they see it, "the Court has never relied on such tools to define the scope of *Charter* rights". They did not mince words in their criticism, stating that "our colleague Abella J.'s approach represents a marked and worrisome departure from this prudent practice", as it were at the Court [*Québec inc.*, at para. 28].

This cautious practice, explain Justices Brown and Rowe, is in fact limited to "providing *support or confirmation* for the result reached by way of purposive interpretation", in this case with respect to the *Canadian Charter*. It is thus certainly in a "limited role" that the Court "has generally accepted that international norms *can* be considered when interpreting domestic norms," [*Québec inc.*, at para. 22, emphasis in original]. The majority judges opine that "[t]his makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms" [*ibid.*, emphasis added]. In this regard, they endorse the position expressed in legal writings that even though international normativity has no binding force domestically *per se*, it may at the decision-maker's discretion end up influencing the interpretation and application of domestic law.

As a consequence of *Québec inc.*, there is a "reframing" of the whole topic of interlegality, boldly and definitely, one that actually goes beyond the proper role of conventional law, which was the main source invoked in this case. Indeed, more broadly it would seem, the clarifications provided by Brown and Rowe JJ. have all the reasons to apply to any type of international norms – such as custom, which was used in *Nevsun* v. *Araya* [*supra*], perhaps excessively – and even to what is known as *soft law*, as shall be seen shortly.

With this reframing accomplished, the other major contribution of the majority's reasons concerns the analytical framework aimed at guiding the use of non-national norms. "Furthermore", write Brown and Rowe JJ., "even within that limited supporting or confirming role, the weight and persuasiveness of each of these international norms in the analysis depend on the nature of the source and its relationship to our Constitution" [*Québec inc.*, at para. 23]. Here, two parameters are introduced to help in weighing arguments drawn from international law and comparative law: (a) First, (a) whether the instruments invoked are binding or not; and second, (b) the sequential order, or timing – i.e. whether the international instrument predates or postdates the domestic law to be interpreted – the relevant date here being 1982, when the *Charter* was adopted. Acknowledging that the Court "has not always explained how or why different international sources are being discussed or relied on, while others are not" – Abella J. is reproached for exactly this flaw – Brown and Rowe JJ. seek to articulate a "principled

framework" in order to "provide consistent and clear" directives, so that matters of interlegality have "guidance and clarity" [*Québec inc.*, at para 24 and 27]. These non-national elements shall fall within and supplement the *Big M Drug Mart* [*supra*] approach to *Charter* interpretation, which was recalibrated to emphasize the text, as seen above.

a) Regarding the first clarification, concerning the nature of the normative source, the majority in *Québec inc.* begins with the statement of Chief Justice Dickson in the *Alberta Reference* [[1987] 1 S.C.R. 313, 348], to the effect that international law may be considered a "relevant and persuasive source" in the interpretation of the *Charter*. Justices Brown and Rowe note that Dickson C.J. had already, in 1987, "clarified that *not all* of these sources carry identical weight in *Charter* interpretation" [*Québec inc.*, at para. 31, emphasis in original]. Essentially, the distinction is based, where a written legal instrument is involved, on whether or not the normative source is an instrument that is ratified by Canada. If so, as the Chief Justice explained at the time, Canada has "obliged itself internationally" to comply with international human rights norms; thus the "content of Canada's international human rights obligations" then becomes "an important indicia" of the interpretation of *Charter* provisions [*Alberta Reference*, *supra*, 349].

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In terms of the means for operationalizing international normativity – which will be examined further below [Section F] – Brown and Rowe JJ. note that Dickson C.J. was of the view that the presumption of conformity with international law was applicable precisely where it concerned "Canada's international *obligations* or *commitments*", a point consistently observed in jurisprudence [*Québec inc.*, at para. 32-33, emphasis in original]. In contrast, with respect to so-called non-binding normative sources – for example "international instruments to which Canada is not a party" [*Québec inc.*, at para. 35] – Dickson C.J.'s opinion in 1987 is again cited, to the effect that they may be deemed relevant and persuasive as aids for interpretation, but obviously without being determinative. Moreover, the presumption of conformity would not apply in such circumstances, as these non-binding instruments "have only persuasive value in *Charter* interpretation" [*ibid.*], or the interpretation of any domestic legislation, for that matter. It seems clear that, in addition to international conventions not ratified by Canada, non-binding sources within the analytical framework proposed by the majority in *Québec inc.* include soft-law instruments, which by definition do not entail binding normativity, unlike real legal sources under article 38(1) of the *Statute of the International Court of Justice* [[1945] Can. T.S. No. 7].

With a view to ensuring the core message is not lost about the proper methodology for constitutional interpretation, Brown and Rowe JJ. conclude this part of their reasons by reiterating the following: "In addition to properly characterizing their use, courts must not allow consideration of such instruments to displace the methodology for *Charter* interpretation set out in *Big M Drug Mart*" [*Québec inc.*, at para. 37]. In sum,

with respect to the nature of the source, and relating to the presumption of conformity, "binding instruments necessarily carry more weight in the analysis than non-binding instruments". In practical terms, when the latter ones are invoked, it will be necessary to "be careful to explain *why* [and] *how*" they are useful, the presumption of intent being inapplicable to them [*Québec inc.*, at para. 38, emphasis in original]. The majority judges are confident that, as it pertains to the nature of the sources relied upon, this "methodology is firmly rooted in this Court's jurisprudence" [*ibid.*].

b) The other parameter put forward in this case, within the analytical framework on interlegality, may be described as the timing of the instruments relied upon for interpreting domestic law, in this case the *Canadian Charter*. Justices Brown and Rowe write that "[a]nother important distinction is between instruments that pre- and post-date the *Charter*" [*Québec inc.*, at para. 41]. The first category relates to the historical origins – also known as the context of adoption – of Canada's supra-legislative instrument enshrined in 1982. As for the second category, "[i]t 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*" [*Québec inc.*, at para. 42].

c) Let us suggest a final parameter, in a sense, implied in the majority's reasons in *Québec inc.* as regards the analytical framework for interlegality, this one concerning comparative law as much as international law. These elements are the judicial decisions of foreign courts and of international tribunals which are, as Dickson C.J. explained in the *Alberta Reference*, non-binding sources warranting lesser interpretative weight. In this regard, Brown and Rowe JJ. criticized Abella J. for the excessive and confusing references she makes to foreign and international case law. "[S]he considers various sources of international and comparative law, and gives them unstated, but seemingly equal, interpretive weight" [*Québec inc.*, at para. 44]. The majority judges' general call for a rigorous scheme means that, beyond its limited role, any international normativity invoked must be integrated into an analysis based on "traditional factors"; moreover, with respect to non-binding sources (including foreign and international jurisprudence) their use should, in fact, be "accompanied by an explanation" of the manner in which they are relied upon and of the "persuasive weight" they are intended to carry [*Québec inc.*, at para. 47].

In her minority opinion, representing three members of the Court in *Québec inc.*, Justice Abella is not gentle with her colleagues Brown and Rowe, whom she accuses of fabricating this analytical framework. In her view, it is "a confusing multi-category chart", which has the effect of "[n]arrowing our approach by putting unnecessary barriers in the way of access to international and comparative sources" [*Québec inc.*, at para. 104 and 106]. In response, the majority judges reiterated the idea that "the normative value and weight of international and comparative sources have been tailored to reflect the nature of the source and its relationship to our Constitution". Above all, they categorically reject Abella J.'s characterization of their approach as "novel" [*Québec inc.*, at para. 46].

In the end, two features should be remembered from the reframing carried out by the majority of the SCC in *Québec inc.*: (a) the limited role of international normativity, which can be a relevant and persuasive source, but only to support or confirm an interpretative conclusion; and (b) the differentiated analytical framework for interlegality based principally on two parameters, namely the nature of

the source and the timing of international instruments in relation to the domestic law at stake (whether predating or postdating). To summarize, here are the different scenarios, in decreasing order of persuasive force:

- binding international instruments predating the domestic law;
- binding international instruments postdating the domestic law;
- non-binding international instruments predating the domestic law;
- non-binding international instruments postdating the domestic law;
- the case law of international tribunals, from binding regimes or, logically with lesser weight, from non-binding regimes; and
- the case law of foreign courts, as a comparative law argument.

Although rigorous and more refined, this framework must remain flexible; otherwise, excessive rigidity would give credence to Justice Abella's comment that, in matters of interlegality, "[t]his is not quantum physics" [*Québec inc.*, at para. 102].

For completeness sake, the instruments supporting the interpretative conclusion that the scope of section 12 of the *Charter* does not include corporations were numerous, both in the majority opinion and in Abella J.'s. For example, Brown and Rowe JJ. referred to the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* [[1987] Can. T.S. No. 36] and to the *International Covenant on Civil and Political Rights* [[1976] Can. T.S. No. 47], both binding, one postdating and the other predating the *Canadian Charter*. In addition, non-binding instruments were invoked, including treaties not ratified by Canada – the *American Convention on Human Rights* [(1969) 1144 U.N.T.S. 123] and the *European Convention on Human Rights* [(1950) 213 U.N.T.S. 221] – and even the *Universal Declaration of Human Rights* [U.N. Doc. A/810, p. 71 (1948)]; however, unlike Abella J., the majority judges did not consider foreign and international case law.

9. *R.* v. *Bissonnette*, [2022] 1 S.C.R. 597

This unanimous judgment of the SCC is significant in matters of interlegality, not for dwelling further upon the scheme for the domestic use of international law, but rather for having endorsed and strengthen the authority of the analytical framework set out in *Québec inc.* [[2020] 3 S.C.R. 426], whose five-judge majority was seen by some as fragile. Specifically, Chief Justice Wagner in *Bissonnette* focused on the second dimension involved in *Québec inc.*, this time writing on behalf of the whole Court. The first dimension of *Québec inc.* pertaining to the methodology of interpretation has also been taken up in Canadian jurisprudence, regularly in fact, a recent example being *DPJ CISSS A* [2024 SCC 43, at para. 24], a case involving the construction of a regular statute. For our purposes, *Bissonnette* confirmed the modern approach to interlegality, both in terms of the limited role for international normativity and with respect to the framework developed for the use such non-national norms. Thus one can say, with authority (at least in principle), that the *Québec inc.* majority opinion, examined in detail above [Decision 8], represents now the official position of the country's apex court.

This case arises from the shooting at the Great Mosque of Quebec City in 2017, for which Alexandre Bissonnette was charged and pleaded guilty to all twelve counts against him, including six counts of

first-degree murder. Only the sentence was at issue in this appeal before the SCC, more specifically in relation to section 745.51 of the *Criminal Code* [R.S.C. 1985, c. C-46] and the possibility of imposing consecutive 25-year parole ineligibility periods. The question was whether this provision relating to multiple murders – which in this case could have meant six consecutive periods, for a total of 150 years – violates the right guaranteed by section 12 of the *Canadian Charter*, which protects against cruel and unusual treatments or punishments.

The trial judge concluded that this provision of the *Criminal Code* was contrary to sections 7 and 12 of the *Charter*, but refused to declare it unconstitutional; instead, he proceeded to "read in" section 745.51 an interpretation allowing the stacking of periods, but for a term that could be less than 25 additional years for the other murders. For Mr. Bissonnette, his sentence was thus set at a fixed period of 40 years. The Quebec Court of Appeal, for its part, simply declared the provision unconstitutional on the basis of sections 7 and 12 of the *Charter*. At the Supreme Court of Canada, all judges also agreed that section 745.51 was invalid, as it violated section 12 protection against cruel and unusual treatments or punishments; the other ground under section 7 was not considered [*Bissonnette*, at para.26].

At the Court of Appeal, arguments based on international law were presented, essentially drawing on human rights legal instruments, but without the benefit of the teachings of *Québec inc.*, the SCC decision not yet been rendered. A parallel was also drawn, which proved problematic, with the sentence review regime under the *Rome Statute of the International Criminal Court* [(2002) 2187 U.N.T.S. 3, [2002] Can. T.S. No. 13], a somewhat technical aspect that was corrected by the SCC [*Bissonnette*, at para. 101-102], and on which it is not necessary to dwell here.

The most significant aspect of Chief Justice Wagner's reasons relating to interlegality is his endorsement, on behalf of the Court, of Justice Brown and Rowe's opinion in *Québec inc.* First, on the limited role of non-national law in constitutional and statutory interpretation:

> Support for the conclusion that this sentence is unconstitutional can also be found in international and comparative law, under which a sentence of imprisonment for life without the possibility of parole is generally considered to be incompatible with human dignity. As Brown and Rowe JJ. noted recently in [*Québec inc.*], there is a role for international and comparative law in the interpretation of *Charter* rights (at para. 28). However, "this role has properly been to *support* or *confirm* an interpretation arrived at through the [purposive] approach established in *R. v. Big M Drug Mart Ltd.*, [[1985] 1 S.C.R. 295]; the Court has never relied on such tools to define the scope of *Charter* rights" ([*Québec inc.*], at para. 28 (emphasis in original)).
>
> [*Bissonnette*, at para. 98]

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This message is reiterated, forcefully, at the end of the reasons relating to international law and comparative law, when Wagner C.J. writes that section 12 of the *Charter* must, in fact, "be interpreted primarily by reference to Canadian law and history" [*Bissonnette*, at para. 108].

As for the differentiated analytical framework, based mainly on two parameters – the nature of the international source (binding or not) and the timing of the international instruments in relation to the domestic law at stake – one notices in *Bissonnette* that Wagner C.J. is not as explicit on this feature in his endorsement of the majority's instructions in *Québec inc.* Be that as it may, it is readily apparent that a descending order of persuasive force was followed in his reasons when completing the interpretive exercise with the use of international law and comparative law.

Accordingly, in a methodical and rigorous manner, Chief Justice Wagner's interpretation refers to human dignity which, he notes, "has been the central focus in the development of the international system for the protection of human rights since the end of the Second World War" [*Bissonnette*, at para. 99]. Then the references to international instruments, in sequence, include first the *Charter of the United Nations* [[1945] T.S. Can. No. 7] and the *International Covenant on Civil and Political Rights* [[1976] Can. T.S. No. 47], two instruments that have been ratified and are therefore binding in Canada; these represent, *as per* the dictates in *Québec inc.*, "a relevant source for the interpretation of the *Charter*'s provisions" [*Bissonnette*, at para. 100]. It is followed by a reference to the *Rome Statute* [*supra*], another ratified treaty, but of very limited relevance in this case (as noted above), being useful "only insofar as, like Canadian law, it recognizes the need to give offenders, including those who have committed the most serious crimes, an opportunity for rehabilitation" [*Bissonnette*, at para. 102].

Clearly enjoying far less persuasive force, instruments non-binding on Canada, beginning with the *European Convention on Human Rights* [(1950) 213 U.N.T.S. 221], are included in the Chief Justice's interpretative exercise. Also invoked, albeit as a non-binding source, is the jurisprudence of the European Court of Human Rights – *a fortiori* since it is under a regime that is itself non-binding – indeed about half a dozen of cases were used, though with caution, i.e. with little weight given to them. As for the comparative analysis, references were made to the foreign law of France, Italy, and Germany, as well as that of the United States, Great Britain, Wales, Australia, and New Zealand (some of these jurisdictions being linked to the *European Convention*'s regime). It is obvious here that these complementary arguments are at the bottom of the scale of persuasive force, a reasoning perfectly in line with *Québec inc.*'s framework, herein endorsed *de facto* by the Supreme Court of Canada, unanimously.

F. OPERATIONALIZATION OF INTERNATIONAL LAW IN DOMESTIC LAW

10. *United States* v. *Burns*, [2001] 1 S.C.R. 283

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Mentioned on a few occasions, the facet of interlegality that concerns the operationalization of international law in domestic law – which examines how, in practice, a court in the country can resort to these norms domestically – requires a return to older case law. A few years after the landmark decision in *Baker* [[1999] 2 S.C.R. 817], in a judgment signed by the Court, several relevant and persuasive sources of international law and comparative law were used as contextual elements in the interpretation of the principles of fundamental justice under section 7 of the *Canadian Charter*. Essentially, this contributed to the conclusion that it was appropriate to revisit the SCC's decisions in *Kindler* [[1991] 2 S.R.C. 779] and in *Ng* [[1991] 2 S.R.C. 858], about extradition cases involving the death penalty in the United States.

In this case, Mr. Burns and Mr. Rafay, 18-year old Canadian citizens at the time of the murder of three members of the latter's family, were wanted in the State of Washington. Despite their age and nationality, Canada's Minister of Justice ordered their extraditions under the *Extradition Act*, [S.C. 1999, c. 18, s. 25], and without obtaining assurances from the U.S. authorities that the death penalty would not be imposed, as permitted under the *Extradition Treaty between Canada and the United States of America* [[1976] Can. T.S. No. 3, art. 6]. Although other provisions of the

Charter were invoked – namely, the right to mobility under section 6(1) and the right not to be subjected to any cruel and unusual treatment and punishment under section 12 – the unanimous judgment of the SCC was based solely on section 7 of the *Charter*. The debate was around the right to liberty and security, focusing on whether to revisit the principles of fundamental justice in cases where there is a risk that the death penalty would be imposed following extradition.

The Court recalls that, although it is generally up to the government (i.e. the Minister), and not the courts, to exercise discretion in relation to extradition, cases involving the possible imposition of the death penalty engage fundamental constitutional values. Exceptionally, in such situations, the courts must act as guardians of the Constitution. By deciding that the extradition without assurances deprived the individuals of their section 7 of the *Charter* rights and that it could not, generally, be consistent with the principles of fundamental justice, the Court overruled *Kindler* and *Ng*, which had left the door open to extradition without the required assurances in limited circumstances. Although the fundamental precepts of our legal system [*Motor Vehicle Act (C.-B.)*, [1985] 2 S.C.R. 486] did not change in the ten years following these decisions, at the time of the *Burns* decision, the Court finds that new facts domestically, abroad, and internationally justify revisiting the jurisprudence. Accordingly, it would no longer be possible under constitutional law to ever extradite without the required assurances.

The Court first notes that there are certain principles of fundamental justice supporting the possibility of extradition without assurances [*Burns*, at para. 72]. But it is rather those in favour of allowing extradition only if it is accompanied by the required assurances that ultimately lead to a reinterpretation of section 7 of the *Charter* [*Burns*, at para. 75 ss.]. Among these factors, several are considered in light of comparative law and international law, examined under separate headings, thereby giving each of them particular importance. In support of this expanded interpretive exercise of the *Charter*, the Court relies on some precedents to that effect, including *Motor Vehicle Act (C.-B.)* [*supra*, p. 512], *Slaight Communications* [[1989] 1 S.C.R. 1038, 1056-1057], the *Alberta Reference* [[1987] 1 S.C.R. 313, 348], and *Keegstra* [[1990] 3 S.C.R. 697, 750-791].

It is therefore appropriate to examine the matter "in the broader context of international relations generally" [*Burns*, at para. 81, emphasis added], in particular initiatives denouncing extradition without the required assurances and those aimed at the abolition of the death penalty *per se*, initiatives which Canada itself had advocated for. A host of international instruments, as well as resolutions and reports by the United Nations, the Council of Europe, and the European Parliament, are invoked in the analysis of the Court. References are also made to the position of the UN Security Council regarding the International Criminal Tribunals for the former Yugoslavia and for Rwanda, as well as to the *Rome Statute of the International Criminal Court* [(2002) 2187 U.N.T.S. 3, [2002] Can. T.S. No. 13].

This "context", although not formally establishing the existence of an international norm aimed at prohibiting the death penalty (or extradition without assurances in these circumstances), shows a "significant movement toward acceptance internationally of a principle of fundamental justice" to that effect in Canada [*Burns*, at para. 89]. Furthermore, following a brief examination of comparative law, the Court opines that "[t]he existence of an international trend against the death penalty is useful in testing our values against those

of comparable jurisdictions" [*Burns*, at para. 92]. This abolitionist trend "supports" a conclusion already identified, which "mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada" [*ibid.*, emphasis added]. The interpretation of section 7 of the *Charter* with the help of international law and comparative law is clearly contextual.

Furthermore, in the part of the reasons concerning state practice showing that the personal characteristics of fugitives should be mitigating factors in cases involving the death penalty, the Court refers to the *International Covenant on Civil and Political Rights* [[1976] Can. T.S. No. 47, art. 6(5)] as well as to the *Convention on the Rights of the Child* [[1992] Can. T.S. No. 3, art. 37(*a*)]. According to the Court, "Canada's ratification of these international instruments, and the language of the new *Extradition Act* [*supra*], support the conclusion" that some leniency in the administration of cases involving young accused persons is justified.

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Finally, as to the other factors – namely, the risk of wrongful convictions and the "death row syndrome" – reference is made, among others, to a case decided by the British Privy Council [*Pratt* v. *A.G. Jamaica*, [1993] U.K.P.C. 37, [1993] 4 All E.R. 769, 783]. This reference is added to other uses of foreign law, such as the judgment's earlier consideration of the relevance of accounting for public opinion regarding the death penalty, endorsing the remarks of the President of the Constitutional Court of South Africa [*S.* v. *Makwanyane*, 1995 (3) SA 391, at para. 88]. The comparative exercise is quite detailed with respect to the experience in the United States and the United Kingdom, also based on information from legal literature (e.g. American bar associations).

In conclusion, with respect to interlegality, the Court is of the view that "[i]nternational experience, particularly in the past decade, has shown the death penalty to raise many complex problems"; this experience, it adds, "confirms the validity of concerns expressed in the Canadian Parliament about capital punishment" [*Burns*, at para. 127-128]. In the end, a general rule requiring that assurances be obtained prior to extradition involving the death penalty aligns both with the principled position taken by Canada internationally and with the practice observed in many other countries around the world, with the exception of the United States. This is considered the relevant and persuasive context as regards the interpretation of the principles of fundamental justice under section 7 of the *Charter*. The Court thus operationalizes international law using the contextual argument, in the same way it would also do, one year later, in *Suresh* [[2002] 1 S.C.R. 3], which was examined in detail above [Decision 6].

11. *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, [2004] 1 S.C.R. 76

Along with the contextual argument of international law, the other means by which such normativity may, in practice, be operationalized by domestic courts lies in the pragmatic method of interpretation, that is to say, through a presumption of intent. The presumption of conformity with international law, mentioned already several times when discussing other decisions – *Entertainment Software Association* [[2022] 2 S.C.R. 303, *supra*, Decision 2], *Hape* [[2007] 2 S.C.R. 292, *supra*, Decision 3], and *Québec inc.* [[2020] 3 S.C.R. 426, *supra*, Decision 8] – comes from the Anglo-Saxon public law tradition. It forms an integral part of Canada's interpretive methodology, having been endorsed in landmark decisions, notably *Daniels* v. *White* [[1968] S.C.R. 517, 541], and in the last 25 years, *Schreiber* [[2002] 3 S.C.R. 269, at para. 50]. The majority judgment (6-3) in the present case illustrates the modern way in which international law may be invoked through this presumption of intent.

At issue in *Canadian Foundation* was the constitutional validity of section 43 of the *Criminal Code*, which provides an exemption from criminal liability in cases of corporal punishment, where reasonable force is used by parents to discipline their children, or by teachers against their students. By way of an application for declaratory judgment, it was argued that this provision violates section 7 of the *Charter*, as it would be inconsistent with the principles of fundamental justice, as well as section 12 (cruel and unusual treatment and punishment) and section 15(1) (right to equality without discrimination).

Like the lower courts, the majority at the SCC rejected all three arguments, while making sure however to set out precise guidelines as to the circumstances in which reasonable physical correction may be administered to children [*Canadian Foundation*, at para. 36-38]. Acknowledging

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an infringement of children's right to the security of their person under section 7 of the *Charter*, the analysis then moved to the principles of fundamental justice, such as the children's independent procedural rights and the notion of the best interests of the child, and eventually focused on the doctrines of vagueness and of overbreadth. It was in relation to these doctrines that interlegality became an issue, in connection with the relevant norms of international law.

Among other things, it was alleged that the expression "reasonable under the circumstances" in section 43 of the *Criminal Code*, which allows the use of force against children to be justified, was too vague for a criminal law provision. According to the leading case on vagueness, *R.* v. *Nova Scotia Pharmaceutical Society* [[1992] 2 S.C.R. 606, 639-640], it was necessary that the provision be intelligible, that is to say, to sufficiently delimit a sphere of risks, an examination carried out in the light international normativity. Chief Justice McLachlin, writing for the majority, stated that the expression was not unconstitutionally vague due to the implicit limitations that serve to clarify its meaning. In this regard, "further precision on what is reasonable under the circumstances may be derived from international treaty obligations" [*Canadian Foundation*, at para. 31].

Relying on a case where the means of operationalizing international law was the presumption of conformity - *Ordon Estate* v. *Grail* [[1998] 3 S.C.R. 437, at para. 137] - she explained that "[s]tatutes should be construed to comply with Canada's international obligations" [*Canadian Foundation*, at para. 31]. These international norms confirmed the limits inherent in section 43 of the *Criminal Code*, namely "that physical correction that either harms or degrades a child is unreasonable" [*ibid.*].

Through reasoning based on the presumption of conformity with international law, the majority of the Court, in its interpretive exercise regarding the provision at issue, relied on several international instruments. Although the instructions in *Québec inc.* [[2020] 3 S.C.R. 426] would arrive years later, one may note that McLachlin C.J. prioritized binding norms for Canada, including those found in the *Convention on the Rights of the Child* [1992] Can. T.S. 1992 No. 3, art. 5, 19(1) and 37(*a*)] and the *International Covenant on Civil and Political Rights* [[1976] Can. T.S. No. 47, art. 7]; furthermore, confirming their interpretative conclusion, the majority noted that it is not required "to ban all corporal punishment of children" [*Canadian Foundation*, at para 33]. Interestingly, an element of soft law was also invoked, drawing from three reports of the United Nations Human Rights Committee: while it considered that the prohibition of degrading treatment and punishment applies to corporal punishment of children in schools, the body responsible for implementing the *Covenant* "has not expressed a similar opinion regarding parental use of mild corporal punishment" [*ibid.*].

Furthermore, the factors determining the circumstances in which reasonable force may be used under section 43 derive not only from Canadian case law but also from international decisions. The majority thus referred to the judgment of the European Court of Human Rights in *A.* v. *The United Kingdom* [Reports of Judgments and Decisions 1998-VI, p. 2699], rendered under section 3 of the *European Convention on Human Rights* [(1950) 213 U.N.T.S. 221], which prohibits inhuman and degrading treatments, notably in the context of corporal punishment of children [*Canadian Foundation*, at para. 34]. The social consensus that corporal punishment by teachers is unacceptable was also invoked, which was found to be "consistent with Canada's international obligations", *as per* the findings of the Human Rights Committee of the United Nations [*Canadian Foundation*, at para. 38]. Certainly, regarding these elements of non-binding normativity, the 2020 case of *Québec inc.* has set aside the possibility of using them by means of the presumption of conformity; but this jurisprudential directive did not exist, of course, at the time of the present decision.

In dissent as well, Justice Arbour made reference to many elements of international law in her reasons, when addressing the doctrine of vagueness. Concluding that the "area of risk" is not adequately delineated by section 43 of the *Criminal Code*, she undertook a more extensive analysis of international norms, including numerous non-binding sources, adding observations and reports from the Committee on the Rights of the Child [*Canadian Foundation*, at para. 186-188]. Note that these uses are not framed through the lens of a presumption of intent, but this is precisely because Arbour J. disagrees with McLachlin C.J. that international law confirms implicit limits on permissible physical correction.

12. *Kazemi Estate* v. *Islamic Republic of Iran*, [2014] 3 S.C.R. 176

As with all presumptions of intent available within the methodology of legal interpretation, there is a sort of preliminary condition to fulfil before using the presumption of conformity with international law. The requirement is to have an ambiguity (or other shortcomings) in the text of the statute, that is to say, the legislator's intent must be unclear after an initial attempt at ascertaining it (this preliminary element, however, appears not to be present in constitutional interpretation, *as per* the instructions found in *Québec inc.* [[2020] 3 S.C.R. 426]).

In *National Corn Growers* [[1990] 2 S.C.R. 1324, 1371], Justice Gonthier tried to set aside the preliminary requirement of ambiguity before resorting to international law through this means of operationalization. A dozen years later, it became obvious in *Schreiber* [[2002] 3 S.C.R. 269, at para. 50] – LeBel J. endorsed the position on this matter expressed by Pigeon J. in *Daniels* v. *White* [[1968] S.C.R. 517, 541] – that an ambiguity must be present for a court to resort to the international presumptive argument. It was reiterated in *Németh* [[2010] 3 S.C.R. 281, at para. 35], a unanimous decision, in which Justice Cromwell identified two different features, though overlapping, characterizing the presumption of conformity: (i) "[t]he presumption that legislation implements Canada's international obligations is rebuttable"; and (ii) "[i]f the provisions are unambiguous, they must be given effect" [*ibid.*].

The decision in *Kazemi* (split 6-1), specifically in the reasons for the majority written by LeBel J., reaffirms, strengthen and clarifies these facets of the presumption of intent, thereby putting in relative terms the possible impact of international law on legal interpretation. This case concerned the federal legislative regime codifying (and crystallizing) the rules of customary international law at play, *as per* the *State Immunity Act* [R.S.C. 1985, c. S-18], examining more specifically possible exceptions to jurisdictional immunity. The main argument put forward, presented by way of international normativity – indeed even *jus cogens* – was that a new exception to state immunity should be recognized in cases of torture committed outside of the country.

Relying on the text of section 3(1) of the *Act*, LeBel J. for the majority opines that both common law and international law had been set aside by Parliament and, consequently, could not be the basis for new exceptions to jurisdictional immunity. With respect to the latter, the argument is based on the presumption of conformity with international law, which is rejected in the end:

> The current state of international law regarding redress for victims of torture does not alter the SIA, or make it ambiguous. International law cannot be used to support an interpretation that is not permitted by the words of the statute. Likewise, the presumption of conformity does not overthrow clear legislative intent [...]. Indeed, the presumption that legislation will conform to international law remains just that — merely a presumption.
>
> [*Kazemi*, at para. 60, emphasis added]

Recalling his reasons in *Hape* [[2007] 2 S.C.R. 292, at para. 53-54], examined above [Decision 3], Justice LeBel is adamant that the clear wording used in the *Act* – that is to say, the unambiguous legislative text – refutes in this case any possible application of the presumption of intent. On this point, the conclusion is definitive: "Canada's domestic legal order, as Parliament has framed it, prevails" [*Kazemi*, at para. 60]. Thus the *Act* constitutes a "complete code", and its list of exceptions is exhaustive [*Kazemi*, at para. 63].

To avoid any misunderstanding, the majority judges add that it does not mean, of course, that international law "may never be used to *interpret*" the *Act* at stake [*ibid.*, emphasis in original]. On the contrary, recalling classic case law on the fundamentals of this presumption of intent – *Schreiber* [*supra*, at para. 50], *Daniels* v. *White* [*supra*, p. 541] – the position remains that, if the scenario presents itself and the provisions of the *Act* "were genuinely ambiguous or required clarification, it would be appropriate for courts to look to [...] international law for guidance" [*Kazemi*, at para. 63, emphasis added].

Finally, it should be noted that in dissent, Justice Abella would have allowed international law to support the recognition of a new exception to state immunity in cases of torture committed outside of the country. In fact, her review of international normativity extends well beyond the specific issue of jurisdictional immunity, to include the right to a remedy in accordance with "the protection for and treatment of individuals as legal subjects" [*Kazemi*, at para. 188 ss.]. A very large number of sources in both international law and comparative law – from treaties to custom, universal and regional, binding and non-binding instruments, as well as international and foreign judicial decisions, and elements of soft law (e.g. reports from UN bodies) – were referenced and examined in substance and in detail by Abella J. In the end, however, we are left in the dark as to how such norms would be operationalized in domestic law, that is to say, in relation to the interpretation and application of the *Act* in the case at hand.

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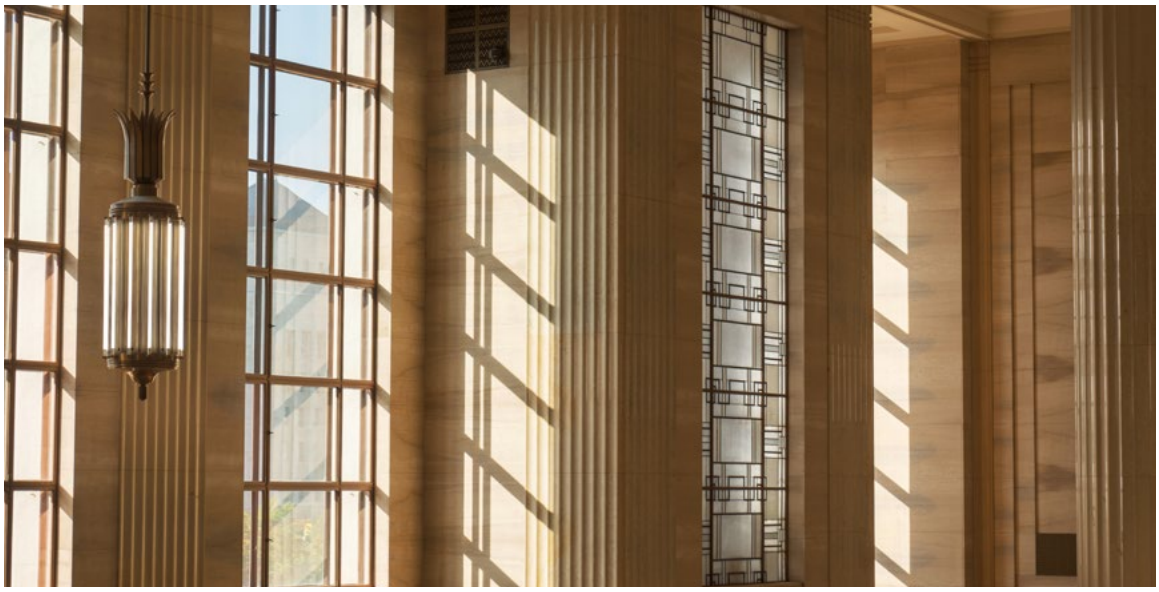
G. INTERPRETATION AND PROOF OF INTERNATIONAL LAW

13. *International Air Transport Association* v. *Canada (Transportation Agency)*, 2024 SCC 30



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While the trend of resorting to the methods of treaty interpretation has already been clearly observed in case law, the issue of proof or demonstration of the elements specific to conventional and customary sources of international law has been the subject of very little discussion at the Supreme Court of Canada.

With regard to treaty interpretation, articles 31 and 32 of the *Vienna Convention on the Law of Treaties* [[1980] Can. T.S. No. 37] codify the applicable rules, with an expanded understanding of the context, which includes elements that are subsequent to treaties. In two cases, for example – *Igloo Vikski inc.*, [[2016] 2 S.C.R. 80, at para. 72 (dissent)] and *Wallace* [[2016] 1 S.C.R. 207, at para. 47 (unanimous)] – the interpretive exercise concerning implementing legislation is presented as calling upon international rules in that regard. In the latter decision, Moldaver and Côté JJ. even added that "[t]hese general rules, set out in Articles 31 and 32 of the *Vienna Convention*, are similar to the modern approach to statutory interpretation" [*ibid.*]. This idea was subsequently taken up in *Balev* [[2018] 1 S.C.R. 398, at para. 32-34 (majority), at para. 117 (dissent)], where the majority even introduced the "principle of harmonization", so as to promote the coordination of international-domestic interpretive methodologies.

With respect to proof of international law, this issue was addressed, though peripherally, in *Nevsun* [[2020] 1 S.C.R. 166], discussed in detail above [Decision 4]. Justice Abella, writing for the majority, explained that a distinction must be drawn between the use of foreign law and the

reliance on international law. That case involved custom which, under the adoption theory (i.e. monism), constitutes domestic "law" and should therefore "be judicially noticed" by domestic courts [*Nevsun*, para. 97]; the scenario of proving new customs was not addressed. The present decision in *International Air Transport Association* (or "*IATA*") provided an opportunity for the country's apex court to go back to these issues in more depth.

At issue in this case is a new regulation adopted by a federal agency, known as the "*Passenger Bill of Rights*", which provides for minimum compensation to passengers in the event of problems on flights to or from Canada. The challenge to the validity of the regulation was based on the principle of exclusivity governing the liability of international air carriers, provided for by the *Convention for the Unification of Certain Rules for International Carriage by Air* [(2004) 2242 U.N.T.S. 309], known as the "*Montreal Convention*". A state party to this treaty, Canada then transformed it into domestic law through the enactment of an implementing statute, which simply reproduced the conventional text in Schedule VI of the *Carriage by Air Act* [R.S.C. 1985, c. C-26]. In a unanimous decision *per* Rowe J., it was held that the new regulatory regime may be reconciled with Canada's international obligations, meaning that the *Passenger Bill of Rights* is not invalid.

As regards the interpretive exercise, the issue revolved around article 29 of the *Montreal Convention*, the scope of application of the principle of exclusivity having been left unresolved in *Thibodeau* [[2014] 3 S.C.R. 340]. More specifically, it must be determined whether the said scope included the kind of standardized compensation offered under the regulatory regime at stake. To this end, the Court refers to the international methodology to ascertain the meaning and the reach of this conventional norm, it being indeed implemented into domestic law through Schedule VI of the *Act*. Referring to classic decisions in case law, such as *Pushpanathan* [[1998] 1 S.C.R. 982, at para. 51-52] and *Thomson* [[1994] 3 S.C.R. 551, 577-578], Rowe J. summarizes the approach as follows: "The *Vienna Convention* is the starting point for determining the scope of the *Montreal Convention*" [*IATA*, at para. 39].

First, the ordinary meaning of the expression "action for damages", read in context, as well as the object and purpose of the *Montreal Convention*, were considered by the Court, all of which being directives of article 31 of the *Vienna Convention*. With regard to this purpose-based analysis, Rowe J. included the normative history of the evolution of the regime in the field of air transportation (the previous one being the *Warsaw Convention*) and, importantly, an examination of state practice, as permitted by article 31(3) of the *Vienna Convention*. This provision provides that "[t]here shall be taken into account together with the context [...] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Following this interpretative exercise – which did not need to call upon the supplementary means of interpretation under article 32 – the Court concluded that the exclusivity principle has limited scope and, essentially, is not in conflict with the *Passenger Bill of Rights*.

Moreover, in accordance with the rule of interpretation allowing to take into account subsequent state practice, Rowe J. deemed it appropriate to address the applicable standard for expert evidence on questions of international law, the second important feature relating to interlegality in his reasons. Citing Abella J. in *Nevsun* [*supra*, at para. 97], with respect to proof, Rowe J. draws a distinction between, on the one hand, foreign law, which is regarded as

a question of fact that must be pleaded and proved (generally through expert evidence), and on the other hand, international law, which is considered as a question of law. Accepting the invitation to provide clarification in this regard, the Court explained that "the admissibility of expert evidence concerning international law depends on the same legal criteria as the admissibility of expert evidence in any other area of Canadian law" [*IATA*, at para. 65].

This is, in essence, the framework established in *Mohan* [[1994] 2 S.C.R. 9] which, in the situation where expert evidence is sought, will allow it insofar as it is "necessary in the sense that it provides information 'which is likely to be outside the experience and knowledge of a judge or jury'" [*ibid.*, at 23]. The *Mohan* test consists of four minimum conditions: "(1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert" [*IATA*, para. 72, citing *Mohan*]. As in this case, where the *Montreal Convention* was interpreted in light of subsequent state practice, it can therefore happen that "[q]uestions of conventional international law may require judges to have regard to questions of fact that are susceptible to expert evidence" [*IATA*, at para. 73].

Furthermore, citing legal writings on this point, Justice Rowe opines that in the context of customary international law, expert evidence admissible under the *Mohan* test may be required to demonstrate its constituent elements, namely state practice and *opinio juris*. "Otherwise", it is by means of judicial notice that "judges should proceed as they would for any other question of law - that is, on the basis of the submissions of the parties before the court and authorities on which they rely" [*IATA*, at para. 74]. An example would be the case of *Suresh* [[2002] 1 S.C.R. 3], discussed in detail above [Decision 6], where in addressing *jus cogens* in regards torture, the Court had to examine several international sources; it was done without resorting to expert evidence, instead relying on legal writings, foreign case law, and the observations of parties and interveners. [*IATA*, at para. 74]. In the present case as well, the matter was addressed by means of judicial notice.

To conclude on the question of proof, the message may be summarized as follows: "Given the variety of contexts in which expert evidence is sought to be adduced on questions of international law", there is no fixed and final rule concerning judicial notice. In accordance with *Mohan*, "the admissibility of such evidence is best left as a matter of judicial discretion", to determine whether or not the expertise is required [*IATA*, at para. 79].

The last point, although secondary, concerns the presumption of conformity with international law – a means of operationalization discussed above [Section F] – invoked to help decide whether there was a conflict between the *Passenger Bill of Rights* and the *Montreal Convention*. Endorsing the decision in *Daniels* v. *White* [[1968] S.C.R. 517, 526], but distinguishing the decision in *Hape* [[2007] 2 S.C.R. 292, at para. 53], the Court rejected the argument on conforming interpretation. Indeed, since the matter involved implementing legislation (i.e. Schedule VI of the *Carriage by Air Act* [*supra*]), the reasoning should not rely on a presumed intent, but rather on the applicable test to know if there is a normative conflict between a federal statute and a regulation [*IATA*, at para. 93]. In this case, there was no such conflict.

H. INDIGENOUS LAW AND INTERNATIONAL LAW

14. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5

Issues of interlegality have already arisen in cases involving Indigenous rights and section 35 of the *Constitution Act, 1982* – for example, in *Ktunaxa Nations* [[2017] 2 S.C.R. 386, at para. 64-65] – but in reality, it was in relation with arguments concerning the human rights at stake, guaranteed under the *Canadian Charter*. More recently, the dynamics of the relational link between international normativity and Canadian domestic law in the Indigenous context have taken on an entirely new importance with the creation of a soft law regime at the international level, the *United Nations Declaration on the Rights of Indigenous Peoples* [U.N. Doc. A/RES/61/295, "*UNDRIP*"], the result of a resolution of the United Nations General Assembly [AG Res. 61/295]. As a reminder, on must not confuse this type of non-binding instruments with sources of international law, codified in article 38(1) of the *Statute of the International Court of Justice* [[1945] Can. T.S. No. 7], the two principal ones being treaties and custom.

The present case arises from a reference by the Attorney General of Quebec, who challenged the constitutional validity of the *Act respecting First Nations, Inuit and Métis children, youth and families* [S.C. 2019, c. 24, the "*AFNIMCYF*"], enacted by Parliament. Under the division of powers, essentially, the question was whether the *AFNIMCYF* was *ultra vires*, the head of authority invoked being section 92(24) of the *Constitution Act*, 1867, relating to Indigenous peoples. The unanimous judgment of the Court confirms the validity of the legislation, which establishes national norms for the protection of

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Indigenous children and affirms the inherent right of Indigenous peoples to self-government in relation to child and family services.

Noting at the outset that the *AFNIMCYF* "is part of a broader legislative program introduced by Parliament to achieve reconciliation with First Nations, the Inuit and the Métis", the Court sets out the issues in this case in light of the *UNDRIP* [*Reference re An Act respecting First Nations*, at para. 3]. It is underscored that the *UNDRIP*, in fact, serves "as the foundation for this reconciliation initiative by Parliament" [*ibid.*], which followed Canada's formal commitment, since 2016, to support the *UNDRIP* "without qualification" [*Reference re An Act respecting First Nations*, at para. 14].

Moreover, this international instrument of soft law has been transposed in domestic positive law at a federal level through the *United Nations Declaration on the Rights of Indigenous Peoples Act* [S.C. 2021, c. 14, the "*UNDRIP Act*"]. Although it is not, strictly

speaking, your typical implementing statute, as the *UNDRIP* is not a treaty, this federal legislation confirms, *as per* section 4(*a*), that it is "a universal international human rights instrument with application in Canadian law" [*Reference re An Act respecting First Nations,* at para. 15]. The precise wording used by the Court suggests that the *UNDRIP* "is incorporated [in French, "*intégré*", which should be translated as "integrated"] into the country's domestic positive law" [*ibid.*, emphasis added].

In substance, the Court takes note of several directives set out by Parliament in the *UNDRIP Act* [*Reference re An Act respecting First Nations,* at para. 4 and 15], notably:

- Preamble – The *UNDRIP* "provides a framework for reconciliation";
- Preamble – Canada must take "effective measures — including legislative, policy and administrative measures — at the national and international level, in consultation and cooperation with Indigenous peoples, to achieve the objectives of the Declaration";
- Preamble – The implementation of *UNDRIP* "must include concrete measures to address injustices" faced, among others, by Indigenous children and youth;
- Section 5– The government of Canada has the obligation, in consultation with Indigenous peoples, to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration";
- Section 6(2)(*b*)– The responsible Minister shall take "measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration".

Furthermore, the need to enact legislation affirming the right to self-government of Indigenous peoples, by facilitating the exercise of their rights, is echoed in other contexts [*Reference re An Act respecting First Nations,* at para. 16]. Internationally, in addition to the *UNDRIP* (at article 38), it is acknowledged by the United Nations General Assembly (see the *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* [U.N. Doc. A/HRC/9/9]) and by the Office of the United Nations High Commissioner for Human Rights (see the *Statement upon conclusion of the visit to Canada by the United Nations Special Rapporteur on the rights of indigenous peoples*).

Therefore, in this case, the impugned legislation, challenged on constitutional grounds, must be understood "directly in keeping with Canada's commitment" to implement the *UNDRIP*, as set forth in the preamble to the *AFNIMCYF* [*Reference re An Act respecting First Nations,* at para. 15]. This preamble also refers to the calls to action by the Truth and Reconciliation Commission of Canada – itself calling for the implementation of the *UNDRIP* – elements echoed also in the calls for justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls.

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As well, the importance of the international dimension is affirmed by Parliament's approach in placing the *AFNIMCYF* at the core of the reconciliation process. Indeed its object declaration at section 8 provides for three components, one of which, explicitly in paragraph (c), is to "contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples". The two other components, found in section 8, are to "affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services" (para. (a)), and to "set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children" (para. (b)).

The Court views section 8 of the *AFNIMCYF* as reflecting the need for an approach which resorts to using "three different types of legal norms that will be interwoven in this framework for reconciliation to ensure the well-being of Indigenous children" [*Reference re An Act respecting First Nations,* at para. 7]. The metaphor, proposed in legal writings, about the "braiding" of these three types of norms – thus including international normativity – is accepted by the Court as a way of giving effect to Parliament's true intent in adopting the *AFNIMCYF* [*Reference re An Act respecting First Nations*, at para. 8].

In terms of division powers, the Court introduces a new concept, namely "constitutional affirmation". The idea is to allow Parliament to declare, in the *AFNIMCYF*, that "the inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes 'legislative authority' in relation to Indigenous child and family services" [*Reference re An Act respecting First Nations,* at para. 9]. To be sure, this does not amount to amending the Constitution, whether as regards section 35 or in terms of division of powers.

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But here with respect to the *AFNIMCYF*, "Parliament's jurisdiction under s. 91(24) of the *Constitution Act, 1867* is a sound basis for enacting federal legislation that contains such affirmations and imposes such obligations on His Majesty" [ibid.].

In sum, in the *Reference re An Act respecting First Nations*, by invoking the *UNDRIP Act* and based on the concept of constitutional affirmation, the Court recognizes Parliament's jurisdiction to impose national norms for child and family services with respect to Indigenous children. Accordingly, the *AFNIMCYF* "falls squarely within s. 91(24) of the *Constitution Act, 1867*", because *as per* the statement in its section 18(1), "establishing national standards and facilitating the implementation of the laws of Indigenous groups, communities or peoples are all measures that are within Parliament's powers" [*Reference re An Act respecting First Nations,* at para. 93]. In the end, the impugned legislation which, it is noted in passing, would have no effect on the architecture of the Canadian Constitution, is *intra vires* the federal legislative authority.

To put it in terms of interlegality, and following the metaphor about the "braiding" of the three components of the purpose set out in section 8 of the *AFNIMCYF*, the soft-law instrument that is *UNDRIP* is indeed implemented

legislatively, playing an important role in the interpretation and application of the normative framework in Canada's domestic law. In the Court's view, "[t]here is little doubt that an anticipated practical effect of the Act is to make Canadian law more consistent with the *UNDRIP*" [*Reference re An Act respecting First Nations,* at para. 86]. The *UNDRIP Act* by setting out "concrete measures to implement the aspects of the *UNDRIP* related to Indigenous children will advance reconciliation with Indigenous peoples", which is also consistent with the calls to action of the Truth and Reconciliation Commission of Canada [*Reference re An Act respecting First Nations,* at para. 89]. Endorsing legal writings on that point, the Court adds that reconciliation is a long-term project that "will not be accomplished in a single sacred moment, but rather through a continuous transformation of relationships and a braiding together of distinct legal traditions and sources of power that exist" [*Reference re An Act respecting First Nations,* at para. 90, emphasis added].

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In closing, it should be noted that in a subsequent case, *Vuntut Gwitchin First Nation* [2024 SSC 10], the SCC once again invoked the *UNDRIP*, noting first that the inherent right to Indigenous self-government is affirmed therein, something that case law under section 35 of the *Constitution Act, 1982* has yet to recognized in Canada. In a split decision (4-3), the majority revisited what it referred to this time as the "adoption" (and formal "implementation") of the *UNDRIP*, terminology generally associated with international treaty law [*Vuntut Gwitchin*, at para. 47]. Article 4 of the *UNDRIP Act* is cited, which states that the Declaration is "a universal international human rights instrument with application in Canadian law".

According to a purposive interpretation of section 25 of the *Canadian Charter*, the goal pursued would be to promote the balancing of the individual rights and freedoms guaranteed to all Canadians with the distinctive collective rights of Indigenous peoples. The protection of collective rights, the majority opines, "is also consonant with the *United Nations Declaration on the Rights of Indigenous Peoples*, as brought into Canadian law by the *UNDRIP Act*" [*Vuntut Gwitchin*, at para. 117, emphasis added]. Here too, the terminology used may be misleading, as it resembles that typically associated with the incorporating legislation of a treaty under international law, which the *UNDRIP* is obviously not.

Moreover, in the joint opinion of Martin and O'Bonsawin JJ., dissenting in part, one can see a sort of shift in the reasoning relating to interlegality that proves even more problematic. Although they rightly refer to the leading decisions in that regard, *Québec inc.* [[2020] 3 S.C.R. 426] and *Alberta Reference* [[1987] 1 S.C.R. 313], it is their characterization of the *UNDRIP* that raises concerns. Citing case law stating that "[b]inding international instruments carry weight in the *Charter* interpretation exercise", Martin and O'Bonsawin JJ. express the view that, as a consequence, "*UNDRIP* is binding on Canada

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and therefore triggers the presumption of conformity" [*Vuntut Gwitchin*, at para. 317, emphasis added].

While it is true that Canada has undertaken commitments with respect to the *UNDRIP*, it would not be appropriate to confound this instrument with a "binding" treaty in international law. In reality, the *UNDRIP* is soft law, that is to say, a normative instrument which, by definition, was conceived and came into being as non-binding. Later in domestic law, logically, it should remain non-binding. Furthermore, according to the instructions in *Québec inc.*, discussed in detail above [Decision 8], it would not be appropriate in these situations to resort to the presumption of conformity as a means of operationalizing this normativity.

This recent case provides a blatant example that, in matters of interlegality, the teachings of the SCC in 2020 in *Québec inc.* should be better presented and explained by prosecutors and interveners before the apex court in the country.

CAIJ