

Canada in International Law at 150 and Beyond | Paper No. 2 – January 2018

The Reception of International Law in Canada

Three Ways We Might Go Wrong

Gib van Ert



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About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. *Canada in International Law at 150 and Beyond/ Canada en droit international : 150 ans d'histoire et perspectives d'avenir* is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

Canada in International Law at 150 and Beyond/ Canada en droit international : 150 ans d'histoire et perspectives d'avenir demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/ Réflexions sur le passé, le présent et l'avenir du Canada en droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Author

Gib van Ert is the executive legal officer to the Chief Justice of Canada. The executive legal officer is the Chief Justice's principal adviser in matters concerning the administration of the Supreme Court of Canada, the Canadian Judicial Council and the National Judicial Institute. He is on leave of absence from Hunter Litigation Chambers, Vancouver, where he has a broad civil litigation practice. He is the author of *Using International Law in Canadian Courts* and other works on the reception of international law in Canada. He is an annual contributor to the *Canadian Yearbook of International Law*. He was a law clerk to Justices Charles Gonthier and Morris Fish of the Supreme Court of Canada and Madam Justice Joanne Prowse of the Court of Appeal for British Columbia. He has a B.A. (Hons) from McGill University, an M.A. in law from the University of Cambridge and an LL.M. from the University of Toronto.

Introduction

The reception of public international legal norms in Canadian domestic law has received a great deal of academic consideration in the last 20 years,¹ prompted no doubt by increasing judicial interest in the question. Assisted by notable early contributions,² these more recent commentators have painted a clear picture of the Canadian reception scheme as set out in the case law. Despite its common law nature and lack of codification in the written Constitution, Canadian reception law is not only fairly clear but remarkably stable. The rules by which international law comes into, or stays out of, Canadian domestic law are mostly the same today as they were when Lord Atkin decided the all-important *Labour Conventions Case* in 1937.³ Lack of development in the common law is not necessarily a good thing. Adaptability is generally regarded as the common law's hallmark and strength. But change should not be for change's sake, and the long-settled doctrines that make up today's reception scheme reveal an internally coherent system that well balances two competing

judicial impulses: a proper respect for international law and due regard for Canadian self-government.⁴

This paper considers three ways this admirably steady and balanced reception system might go wrong. Each of the potential deviations described are real risks, given certain tendencies in the case law.

Overview of the Canadian Reception Scheme

Before considering how the reception scheme might go wrong, let us recall its main attributes. The starting point is judicial notice of public international law. Canadian courts, like English,⁵ American⁶ and Australian⁷ courts, generally take judicial notice of conventional and customary international law. Direct Canadian judicial authority for this proposition is oddly lacking,⁸ but Canadian commentators have made the point.⁹ Three federal statutes specifically require courts to take judicial notice of certain treaties. Section 8(3) of the Extradition Act provides that “[a]greements and provisions published in the Canada Gazette or the Canada Treaty Series are to be

1 See e.g. W Schabas, “Twenty-Five Years of Public International Law at the Supreme Court of Canada” (2000), 79 Can Bar Rev 174; S Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada” (2001), 80 Can Bar Rev 534; J Brunnée and S Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002), Can YB Intl Law 3; E Eid and H Hamboyan, “Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical” in O Fitzgerald, ed, *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto: Irwin Law, 2006) [Fitzgerald, *Globalized Rule of Law*] 449 [see also, in the same volume, A de Mestral and E Fox-Decent, “Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law” at 31; G van Ert, “What is Reception Law?” at 85]; J Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) c 6; G van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008) [Van Ert, *Using International Law*]; G van Ert, “Canada” in D Sloss, ed, *The Rule of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge, UK: Cambridge University Press, 2009) 166; C-E Côté, “La réception du droit international en droit canadien” (2010), 52 SCLR (2nd) 483.

2 See e.g. DC Vanek, “Is International Law Part of the Law of Canada?” (1949-50), 8 UTJ 251; AE Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968); A Jacomy-Millette, *L’introduction et l’application des traités internationaux au Canada* (Paris: LGDJ, 1971); R St J Macdonald, “The Relationship between Domestic Law and International Law in Canada” in R St J Macdonald, Gerald L Morris & Douglas M Johnston, eds, *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 88 [Macdonald, Morris & Johnston, *Canadian Perspectives*]; A Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992); M Copithorne, “Canadian Treaty Law and Practice”, *Advocate* 54 (1996) 35; W Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed (Scarborough: Carswell, 1996).

3 *Attorney General for Canada v Attorney General for Ontario*, [1937] AC 326 (PC) (also known as the *Labour Conventions Reference*) [Attorney General].

4 This argument is also made in Van Ert, *Using International Law*, *supra* note 1 at 5–11.

5 See e.g. *Post Office v Estuary Radio Ltd*, [1968] 2 QB 740 at 756–57 (Eng CA); *Trendtex Trading Corp v Central Bank of Nigeria*, [1977] 1 QB 529 (Eng CA) [Trendtex] at 569; H Lauterpacht, “Is International Law a Part of the Law of England” (1939), 25 *Transactions of the Grotius Society* 51 at 59, n (i); *Halsbury’s Laws of England*, vol 17, 4th ed (London: Butterworths, 1987) at para 100 and vol 18 at para 1403; F Bennion, *Statutory Interpretation: A Code*, 4th ed (London: Butterworths, 2002), s 270.

6 See e.g. *The Scotia* (1871), 14 Wall 170 (81 US Sup Ct) at 188; *Restatement (Third) of the Foreign Relations Law of the United States* (St Paul, MN: The Institute, 1987) at §113, comment b.

7 See Justice Perram’s careful consideration of the matter in *Australian Competition and Consumer Commission v P.T. Garuda Indonesia* (No 9), [2013] FCA 323 (Fed Ct Australia) [Garuda] at paras 29–48.

8 But see *The Ship “North” v The King* (1906), 37 SCR 385 at 394; *R v Appulonappa*, 2014 BCCA 163 at para 62; *Boily c Sa Majesté la Reine*, 2017 FC 396 (Fed Ct Canada).

9 See e.g. J-G Castel, *International Law Chiefly as Interpreted and Applied in Canada* (Toronto: University of Toronto Press, 1965) at 44; Macdonald, Morris & Johnston, *Canadian Perspectives*, *supra* note 2 at 113; G van Ert, “The Admissibility of International Legal Evidence” (2005), 84 Can Bar Rev 31; M Rankin, “The Admissibility of International Legal Opinion Evidence after *R v Appulonappa*” (2015), 93 Can Bar Rev 327.

judicially noticed.”¹⁰ Similarly, the Competition Act, in part III (Mutual Legal Assistance), provides that agreements providing for mutual legal assistance in competition matters and published in the *Canada Gazette* or the Canada Treaty Series “are to be judicially noticed.”¹¹ Parallel provisions are found in the Mutual Legal Assistance in Criminal Matters Act.¹² But the clearest proof that Canadian courts take judicial notice of international law is the vast jurisprudence in which courts look to and rely upon international law norms without first requiring that they be proved in evidence.¹³

The second attribute of Canada’s reception scheme is the incorporation of customary international law by the common law. Canadian courts, following English precedent, give direct legal effect in domestic law to pertinent rules of customary international law — without the need for legislative implementation or other approval by the legislative or executive branches. As the Privy Council explained in 1939, “The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.”¹⁴ The incorporation doctrine was modified by the English Court of Appeal in 1977 to allow for incorporation of newly developed customs even where judicial precedent incorporating the previous

custom stands in the way.¹⁵ Otherwise it appears to operate today much as it has done since the eighteenth century. This was Justice Rand’s point in *Saint John (Municipality of) v Fraser-Brace Overseas Corporation* when he famously declared, “If in 1767 Lord Mansfield, as in *Heathfield v Chilton*¹⁶ could say, ‘The law of nations will be carried as far in England, as any where’, in this country, in the 20th century, in the presence of the United Nations and the multiplicity of impacts with which technical developments have entwined the entire globe, we cannot say any thing less.”¹⁷ As Justice LeBel more recently explained, “The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary.”¹⁸ This is not to suggest, however, that customary international law is frequently incorporated in domestic law. To the contrary, incorporation cases are very rare, seemingly because customs usually concern state-to-state relations and lack application to domestic legal issues.

The third key attribute of Canada’s reception system is nearly the opposite of the second: treaties need legislative implementation to take direct effect in domestic law. As Lord Atkin explained, “the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.”¹⁹ Canadian courts recognize the Crown’s prerogative to conduct foreign affairs,²⁰ including by making internationally binding agreements with other states. But such agreements are international law, not domestic, and cannot themselves alter domestic law. Implementation by statute or regulation is therefore needed to give a treaty direct domestic legal effect. Even after implementation, it is strictly speaking the enactment and not the treaty behind it that alters domestic law. Legislative jurisdiction to implement Canadian treaty obligations is subject to the

10 SC 1999, c. 18. This provision appears to be directed specifically at extradition agreements (*accords*) as defined in section 2, despite section 8(3)’s use of the term “agreements” rather than “extradition agreements.” This is suggested by the French version of section 8, where *accord* is employed throughout. On section 8(3) generally, see *Republic of France v Peugeot* (1912), 1 DLR 204 (SKQB) and *Attorney General of Canada on behalf of the Czech Republic v Ganis*, 2006 BCCA 542 at para 22.

11 RSC 1985, C-34, s 30.02(3).

12 RSC 1985, c 30, (4th Supp) s 5(3).

13 Examples from recent Supreme Court cases include: *World Bank Group v Wallace*, 2016 SCC 15; *R v Appulonappa*, 2015 SCC 59 [*Appulonappa*]; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 [B010]; *Thibodeau v Air Canada*, 2014 SCC 67 [*Thibodeau*]; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 [*Kazemi*]; *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40; *Ontario (Attorney General) v Fraser*, 2011 SCC 20; *Németh v Canada (Justice)*, 2010 SCC 56 [*Németh*]; *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 [*Health Services*]; *R v Hape*, 2007 SCC 26 [*Hape*]; *GreCon Dimter Inc v J.R. Normand Inc*, 2005 SCC 46 [*GreCon*].

14 *Chung Chi Cheung v The King*, [1939] AC 160 (PC) at 167–68, cited in *Reference as to whether members of the Military or Naval Forces of the United States of America are exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] SCR 483 at 517.

15 *Trendtex*, *supra* note 5.

16 (1767), 4 Burr 2015, 98 ER 50.

17 [1958] SCR 263 at 268–69.

18 *Hape*, *supra* note 13 at para 39. See also *Kazemi*, *supra* note 13 at para 149.

19 *Attorney General*, *supra* note 3 at 347.

20 See generally *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 34–37 [*Khadr*].

ordinary division of powers.²¹ While it is clear that treaties are not, in Canada, self-executing, it must also be acknowledged that even unimplemented agreements can, as the High Court for England and Wales recently observed, “have certain indirect interpretive effects in relation to domestic law,”²² and that, as the Federal Court of Australia recently noted, “when...a court construes a statute to comply with a treaty obligation...international law then exerts a discernable influence on the content of local law.”²³

The final feature of Canadian reception law to bear in mind in the discussion that follows is the interpretive presumption of conformity with international law. The Supreme Court of Canada (SCC) has explained that the values and principles of customary and conventional international law form part of the context in which Canadian laws are enacted,²⁴ and thus courts interpret domestic law according to the presumption that it is in keeping with the state’s international obligations.²⁵ Courts construing domestic enactments are “direct[ed]...to relevant international instruments at the context stage of statutory interpretation.”²⁶ The presumption applies to both conventional

and customary international law²⁷ and is based “on a rule of judicial policy” rather than on proof of historic legislative intent.²⁸ The presumption is rebuttable, but not easily; one must show “an unequivocal legislative intent to default on an international obligation,”²⁹ legislative wording that “clearly compels” a non-conforming result³⁰ or “unambiguous” legislative provisions.³¹

A related doctrine exists for Charter interpretation. The SCC has affirmed that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in Canada’s international human rights agreements.³² The court’s enunciation and application of this presumption has been less consistent than its endorsement and application of the general presumption of conformity, but recent decisions suggest that the Charter version of the presumption is approaching a settled interpretive rule.³³

How to Go Wrong (1): Revival of the Ambiguity Requirement

As explained elsewhere,³⁴ for the first hundred years or more of its existence in English law the presumption of conformity with international law had no strict ambiguity requirement, i.e., no rule that a court may not have recourse to an

21 *Attorney General*, *supra* note 3; *Health Services*, *supra* note 13 at para 69.

22 *R (Miller) v Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin) at para 33. See also Justice Duff (as he then was) in *In re Employment of Aliens* (1922), 63 SCR 293 (“the Crown... possesses authority to enter into obligations towards foreign states diplomatically binding and, indirectly, such treaties may obviously very greatly affect the rights of individuals. But it is no part of the prerogative of the Crown by treaty in time of peace to effect directly a change in the law governing the rights of private individuals...” at 329).

23 *Garuda*, *supra* note 7 at para 43.

24 *Hape*, *supra* note 13 at para 53; *B010*, *supra* note 13 at para 47. See also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at para 70.

25 See e.g. *Zingre v R*, [1981] 2 SCR 392 at 409–10; *Ordon Estate v Grail*, [1998] 3 SCR 437 at para 137; *Pushpanathan v Canada (MCI)*, [1998] 1 SCR 982 at para 51; *Baker*, *supra* note 24 at para 70; 114957 *Canada Liée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 [*Spraytech*] at para 30; *Schreiber v Canada (Attorney General)*, 2002 SCC 62 at para 50; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 [*Canadian Foundation*] at para 31; *GreCon*, *supra* note 13 at para 39; *Hape*, *supra* note 13 at paras 53–54; *Health Services*, *supra* note 13 at para 70; *United States of America v Anekwu*, 2009 SCC 41 at para 25; *Németh*, *supra* note 13 at para 34; *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 117; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 [*Divito*] at para 23; *Thibodeau*, *supra* note 13 at para 113; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [*Saskatchewan*] at para 64; *B010*, *supra* note 13 at para 48; *Appulonappa*, *supra* note 13 at para 40.

26 *B010*, *supra* note 13 at para 49.

27 *Hape*, *supra* note 13 at para 53; for a case endorsing the presumption in respect of custom, see *Spraytech*, *supra* note 25 at para 30.

28 *Hape*, *supra* note 13 at para 53. For an application of the rule where historic legislative intent clearly could not have supported the presumption (because the international norm post-dated the enactment), see *Canadian Foundation*, *supra* note 25.

29 *Hape*, *supra* note 13 at para 53.

30 *Ibid.*

31 *Németh*, *supra* note 13 at para 35.

32 *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 349; *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391 at 70; *Divito*, *supra* note 25 at paras 22–23.

33 See *India v Badesha*, 2017 SCC 44 at para 38; *Saskatchewan*, *supra* note 25 at para 64; *Health Services*, *supra* note 13 at para 70; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 65.

34 *Van Ert*, *Using International Law*, *supra* note 1 at 135–139.

underlying international agreement for interpretive purposes unless first identifying an ambiguity in the legislative text. Such an ambiguity requirement arose in English law in the mid-twentieth century.

The SCC effectively dropped ambiguity as a prerequisite for considering relevant international sources in two decisions in the 1990s. In *National Corn Growers* (1990), Justice Gonthier for the majority explained that there was “no need to find a patent ambiguity *before* consultation of [a treaty] is possible” and that “an international agreement may be used...at the preliminary stage of determining if an ambiguity exists.”³⁵ Under this approach, ambiguity remained a consideration in principle, but there was no need to find ambiguity on the face of the enactment to be construed before considering relevant international sources; both were to be reviewed together to determine whether they jointly revealed an ambiguity in the domestic law to be resolved by interpreting it in conformity with Canada’s international obligations.

Then in *Crown Forest* (1995), Justice Iacobucci for the court made clear that “a court may refer to extrinsic materials [here, international agreements] which form part of the legal context...without the need first to find an ambiguity before turning to such materials.”³⁶ This decision went further than *National Corn Growers* by replacing the concept of ambiguity with the concept of context. International sources can be referred to by courts construing domestic provisions not because there is any ambiguity to resolve, but simply because these sources form part of the enactment’s context.

SCC jurisprudence has since expanded on this contextual approach. While *Crown Forest* might suggest that international materials may be referred to for interpretive purposes only where they can be shown to “form part of the legal context,” decisions from *Baker* (1999) onwards depict international law as the context in which all Canadian laws are enacted.³⁷ In *B010* (2015), the court expressly situated consideration of international law within the context stage of the prevailing

“modern approach” to statutory interpretation³⁸ and explained that the international context of domestic law making “follows from the fact that to interpret a Canadian law in a way that conflicts with Canada’s international obligations risks incursion by the courts in the executive’s conduct of foreign affairs and censure under international law.”³⁹ The court added that the presumption of conformity with international law is “[i]n keeping with the international context in which Canadian legislation is enacted.”⁴⁰ No mention of ambiguity is found anywhere in *B010*’s extensive consideration of the place of international law in statutory interpretation, and indeed not one of the SCC’s many invocations of the presumption of conformity since *Crown Forest* has treated ambiguity on the face of the enactment as a prerequisite to considering its international context or applying the presumption of conformity.

The Federal Court of Appeal quickly appreciated the significance of these developments. In *Seaboard Lumber* (1995), Justice Linden for that court concluded that, “It is now established that courts will look to relevant international documents to aid interpretation of implementing legislation from the outset of the investigation, and even absent ambiguity on the face of that legislation. Ambiguity may arise out of the consideration of any manner or variety of contextual factors; it should not be taken as a necessary precondition to looking to those factors.”⁴¹ Later, in *De Guzman* (2005), Justice Evans depicted *National Corn Growers* as part of a greater “evolution of the common law” to give an expanding role to international law.⁴² In *Najafi* (2014), Justice Gauthier observed that “relevant international law...should ideally be taken into account before concluding whether or not a text is clear or ambiguous,” but added that “many courts still consider ambiguity a prerequisite.”⁴³ Most recently, in *Pembina County* (2017), Justice Nadon noted that *National Corn Growers* “specified that recourse can be had to international treaties even where the legislative provision is not ambiguous (overturning

35 *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371 [emphasis in original].

36 *Crown Forest Industries Ltd v Canada*, [1995] 2 SCR 802 at para 44.

37 *Baker*, *supra* note 24 at para 70, citing R Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths Law, 1994) at 330; *R v Sharpe*, 2001 SCC 2 at para 175; *Spraytech*, *supra* note 25 at para 30; *Hape*, *supra* note 13 at para 53; *Németh*, *supra* note 13 at para 34; *B010*, *supra* note 13 at para 47; *Appulonappa*, *supra* note 13 at para 40.

38 *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26.

39 *B010*, *supra* note 13 at para 47.

40 *Ibid* at para 48.

41 *Canada v Seaboard Lumber Sales Co*, [1995] 3 FCR 113 at 120. See also *De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 [De Guzman] at paras 63–64.

42 *De Guzman*, *supra* note 41 at paras 61–64.

43 *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262 at para 61.

this Court on this point).⁴⁴ Several Federal Court trial decisions have also noted the change in the law wrought by *National Corn Growers* and *Crown Forest*.⁴⁵

Despite all this, some courts continue to apply the ambiguity requirement. Examples can be found in provincial trial court decisions,⁴⁶ in federal trial courts,⁴⁷ in provincial appeal courts⁴⁸ and even (most unfortunately) in the Federal Court of Appeal.⁴⁹ Most of these decisions are under-reasoned on the point and are likely due to failures by counsel to bring *National Corn Growers*, *Crown Forest* and later authorities to courts' attention rather than any overt resistance to international legal sources or SCC precedents. But the number of lower court decisions endorsing and applying the ambiguity requirement risks reintroducing it into Canadian law *per incuriam*.

A passage in the SCC's 2014 decision in *Kazemi Estate*⁵⁰ might also be taken as reviving the ambiguity requirement. The question in that case was whether Iran and its officials enjoyed immunity from civil suits in Canada. Section 3(1) of the State Immunity Act (SIA)⁵¹ provides that, "Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada." Justice LeBel held that the act was a complete codification of the Canadian law of state immunity, leaving no room for exceptions derived from customary international law. He then noted, "A number of interveners argue that s. 3(1) of the Act is ambiguous and should therefore be interpreted in accordance with the

common law, the *Charter* and international law. The intervener the Canadian Civil Liberties Association (CCLA) submits that the SIA is ambiguous because it does not clearly extend to cases involving alleged breaches of *jus cogens* norms (factum, at paras 8-10). The British Columbia Civil Liberties Association ("BCCLA") similarly asserts that s. 3 of the Act is ambiguous (factum, at para 8).⁵²

A review of these interveners' factums⁵³ confirms that both asserted section 3(1) was ambiguous without considering whether ambiguity was a prerequisite for their argument that section 3(1) should be interpreted in conformity with (what they contended to be) customary international law. The CCLA followed the Quebec Court of Appeal's erroneous insistence on ambiguity in the decision under appeal.⁵⁴ BCCLA relied on no relevant authority on the point. Thus, *Kazemi* is, at best, another example of the ambiguity requirement creeping in through inattention.

Justice LeBel responded to these arguments by explaining that the "current state of international law regarding redress for victims of torture does not alter the SIA, or make it ambiguous" because "[i]nternational law cannot be used to support an interpretation that is not permitted by the words of the statute" for "the presumption does not overthrow clear legislative intent."⁵⁵ Furthermore, even if the exception asserted by the interveners existed in international law (which it did not), "such an exception could not be adopted as a common law exception to s. 3(1) of the SIA as it would be in clear conflict with the SIA."⁵⁶ Both these observations are well grounded in reception law jurisprudence and do not in any way turn on the existence of the ambiguity requirement, which Justice LeBel had no need to consider. The learned judge concluded his observations on this point as follows: "The above is not to suggest that international law and the common law may never be used to interpret the SIA. On the contrary, to borrow Lord Diplock's words, the provisions of the *State Immunity Act* fall to be construed against the background of those principles of public international law that

44 *Pembina County Water Resource District v Manitoba (Government)*, 2017 FCA 92 at para 46.

45 See e.g. *Bayer Inc v Canada (Attorney General)*, [1999] 1 FCR 553 at para 47 (FCTD); *Animal Alliance of Canada v Canada (Attorney General)*, [1999] 4 FCR 72 at para 34 (FCTD); *Celgene Inc v Canada (Health)*, 2012 FC 154 at para 28 (reversed on other grounds 2013 FCA 43).

46 See e.g. *Ferrell v Ontario (Attorney General)*, 1997 CanLII 12351 at para 10 (Ont SC); *Gosselin v Québec (Procureur général)*, 2000 CanLII 18504 at para 250 (CS Que).

47 See e.g. *Hitti v Canada (Citizenship and Immigration)*, 2007 FC 294 at para 38; *Canadian Security Intelligence Service Act (Canada) (Re)*, 2008 FC 301 at para 38.

48 See e.g. *Québec (Ministre de la Justice) v Canada (Ministre de la Justice)*, 2003 CanLII 52182 at paras 93-95 (Que CA); *Islamic Republic of Iran v Hashemi*, 2012 QCCA 1449 [Hashemi] at para 41; *Lum v Alberta Dental Association and College (Review Panel)*, 2016 ABCA 154 at paras 51-54; *Tracy v Iran (Information and Security)*, 2017 ONCA 549 at para 58.

49 See e.g. *Gitxaala Nation v Canada*, 2015 FCA 73 at para 17; *Prophet River First Nation v Canada (Attorney General)*, 2016 FCA 120 at para 12.

50 *Kazemi*, *supra* note 13.

51 RSC 1985, c S-18.

52 *Kazemi*, *supra* note 13 at para 59.

53 Available through the SCC, online: <www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=35034>.

54 *Hashemi*, *supra* note 48 at para 41.

55 *Kazemi*, *supra* note 13 at para 60.

56 *Ibid* at para 61.

are generally recognized by the family of nations... Thus, if certain provisions of the SIA were genuinely ambiguous or required clarification, it would be appropriate for courts to look to the common law and international law for guidance.”⁵⁷

This passage, read in isolation and without consideration of *National Corn Growers, Crown Forest* and the many “international law as context” decisions of the SCC since, might be taken as endorsing the old law requiring a judicial finding of ambiguity on the face of an enactment before having recourse to international law and the presumption of conformity. But that cannot have been Justice LeBel’s meaning. The point of this passage was not to limit recourse to international law in statutory interpretation; rather, Justice LeBel’s purpose was to affirm the continuing importance of international law in statutory interpretation, despite his finding that, in the case before him, section 3(1) unambiguously rebutted the presumption of conformity that would have applied had Justice LeBel been persuaded that international law was inconsistent with that provision. To interpret this passage as reviving the ambiguity requirement would entirely miss Justice LeBel’s point.

Clearly the ambiguity requirement should not be revived by accident through inattention to controlling SCC authorities. But should the SCC itself revive the prerequisite? The answer is surely no. To do so would constrain judicial consideration of international law. This would, in turn, increase the likelihood of judicial decisions that contradict Canada’s international obligations, thus “risk[ing] incursion by the courts in the executive’s conduct of foreign affairs and censure under international law.”⁵⁸ That is the downside. The upside is hard to see.

How to Go Wrong (2): Treating International Law as Fact, Not Law

Canadian courts, like courts all over the world,⁵⁹ are supposed to treat public international law as law, not fact, and for the most part that is what they do. Unlike foreign law, which is treated as a question of fact and therefore requires proof, in conflicts of laws cases, international laws derived from treaties and custom are (as noted above) to be judicially noticed rather than proved.⁶⁰

But Canadian practice in recent years has been uneven in its evidentiary approach to international legal issues. Litigants seeking to rely on a treaty or custom frequently do so by resorting to the opinion evidence of international legal experts, usually professors.⁶¹ Opposing parties predictably respond by tendering competing opinion evidence from their own experts and leaving the judge to decide which opinion she prefers. This approach treats international law as a question of fact to be decided at trial, after evidence under oath and testing by cross-examination. Furthermore, the logical conclusion of this approach on appeal is to cloak the resulting “finding” about international law with the protection from appellate interference enjoyed by ordinary determinations of fact.⁶²

The attractions of treating international legal questions as matters of fact to be proved through expert evidence are easy to see. For counsel, tendering an expert report on a question of

⁵⁷ *Ibid* at para 63.

⁵⁸ B010, *supra* note 13 at para 47.

⁵⁹ In the words of the former president of the International Court of Justice, “There is not a legal system in the world where international law is treated as ‘foreign law.’ It is everywhere part of the law of the land; as much as contracts, labour law or administrative law.” R Higgins, “The Relationship Between International and Regional Human Rights Norms and Domestic Law” in *Developing Human Rights Jurisprudence*, vol 5 (London: Commonwealth Secretariat, 1993) at 16.

⁶⁰ A minor qualification of this statement is that a claimant contending for the existence of a new rule of customary international law may be required to prove in evidence the state practice element of that claim. See *van Ert, Using International Law, supra* note 1 at 62–69.

⁶¹ See e.g. *Bouzari v Iran*, [2002] OTC 297 (Ont SCJ); *Northwest Atlantic Fisheries Organization v Amaratunga*, 2011 NSCA 73; *R v Appulonappa*, 2013 BCSC 31.

⁶² *Housen v Nikolaisen*, 2002 SCC 33 (“The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a ‘palpable and overriding error’” at para 10).

international law saves the trouble of researching the point himself. Furthermore, the expert is, by definition, more knowledgeable in the field and therefore more likely to be right — or at least persuasive. Lawyers may also like how expert reports, like affidavits from lay witnesses, give them the opportunity to shape the evidence.⁶³ Lastly, the engagement of a particularly notable expert may be hoped to impress the judge and the opposition. Proceeding by way of expert report is also attractive to experts themselves. They can charge a fee, of course. They can also have their say in a contested point of international law, one which may be of personal interest to them. They may feel they are assisting the court by putting before it international legal considerations that would otherwise be disregarded or misunderstood. Now a law professor could achieve all these goals by appearing as co-counsel. But lead counsel may not want that sort of help. And a law professor may prefer to avoid exposure to the law society fees that come with appearing as counsel.⁶⁴

Against these advantages are two practical disadvantages.

First there is the awkwardness of subjecting international lawyers to credibility determinations about the nature of their legal opinions. Upon entering the witness box, an international lawyer serving as expert witness at trial is asked to swear to or affirm the truth of her evidence. When her “evidence” is nothing more than her opinion about the present state of international law, what does that affirmation mean? Soon after, the expert will be subjected to cross-examination, a crucial purpose of which is to impeach the witness’s credibility. So the cross-examiner will endeavour to make the expert’s legal opinions look implausible, and the expert herself unreliable. If the cross-examination succeeds, the judge will find that the expert’s views about international law’s content and application on the facts before her are not credible, or at least not as credible as those of the opposing party’s international legal expert. Shot through this procedure is an abandonment

of the notion that legal questions have right answers; instead, they are treated as having, at best, more or less probable answers depending on the credibility of the experts advancing them.

A second disadvantage of the expert opinion approach is revealed on appeal. How is an appeal court to treat the trier of fact’s determination of the international legal question — as a finding of fact, a question of law, or something in between? The Court of Appeal for Ontario faced this problem in *Bouzari v Iran*.⁶⁵ The trial judge heard evidence from competing international legal experts, preferring the testimony of Christopher Greenwood (professor of international law at the London School of Economics) over that of Ed Morgan (professor of international law at the University of Toronto). On appeal, Justice Goudge called the motion judge’s acceptance of one opinion over the other “not a finding of fact by the trial judge...[but] a finding based on the evidence she heard,” which was “therefore owed a certain deference in this court.” The learned judge explained that he “would depart from [the motion judge’s finding] only if there were good reason to do so.”⁶⁶ If it were wrong in law, would that be a good reason? It is hard to tell. Later, Justice Goudge observed that the trial judge concluded, based on Greenwood’s evidence, that state practice reflected a certain understanding of article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984,⁶⁷ and added “there was ample evidence to sustain this conclusion. Indeed, I agree with it.”⁶⁸ Again on the interpretation of article 14, Justice Goudge noted that the motion judge accepted Greenwood’s evidence on its interpretation by states, saying, “This finding of the motion judge is due deference in this court. Indeed, in my view, it is the right conclusion.”⁶⁹ Each of these statements is, with respect, confusing. Is the appeal court upholding the motion judge because she got the international legal question right or because her finding on the point — right or wrong — attracts appellate deference? Justice Goudge ought not to have been put in this predicament in the first

63 This despite the SCC’s admonition that “Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.” *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 at para 27, citing *National Justice Compania Naviera S.A. v Prudential Assurance Co.*, [1993] 2 Lloyd’s Rep 68 (Eng QB).

64 I am grateful to Craig Forcese, University of Ottawa Faculty of Law, for this practical insight.

65 (2004), 71 OR (3d) 675, 2004 CanLII 871 (Ont CA), Goudge, MacPherson and Cronk JJA [*Bouzari*].

66 *Ibid* at para 68.

67 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36 (entered into force 26 June 1987).

68 *Bouzari*, *supra* note 65 at para 79.

69 *Ibid* at para 83.

place. International law is not appropriately treated as a question of fact in trial courts or on appeal.⁷⁰

A similar uncertainty about how to characterize international legal questions — as facts to be decided and deferred to, or legal questions to be answered correctly — has now arisen in administrative law. Some recent Federal Court⁷¹ and Federal Court of Appeal⁷² judicial review decisions have treated international legal questions decided by administrative decision makers as matters upon which reviewing courts must defer under the now-prevailing SCC approach to administrative standards of review.⁷³ According to one understanding of the reasonableness standard, an administrative decision maker who decides a question of international law incorrectly may nevertheless be upheld if the decision, while wrong in law, nevertheless “falls within a range of possible, acceptable outcomes.”⁷⁴ Under this approach, a court sitting in judicial review of or appeal from an administrative decision maker who errs on a point of international law may nevertheless be bound to uphold the decision.

The standard of review applicable to an international legal question divided the Federal Court of Appeal in *Febles*.⁷⁵ Justice Evans found that the presumption of reasonableness review (applicable when administrative decision makers interpret their “home” or enabling statutes) was rebutted because the provision at issue, namely article 1F(b) of the United Nations Convention relating to the Status of Refugees 1951,⁷⁶ “is a provision of an international Convention that should be interpreted

as uniformly as possible” and “[c]orrectness review is more likely than reasonableness review to achieve this goal, and is therefore the standard to be applied.”⁷⁷ Justice Sharlow concurred.

Justice Stratas, in concurring reasons, argued for a reasonableness standard despite the heightened risk of inconsistent results:

World-wide uniform interpretations of the provisions in international conventions may be desirable. However, that depends on the nature of the provision being interpreted and the quality and acceptability of the interpretations adopted by foreign jurisdictions. For example, foreign interpretations may not always embody values and principles to which we subscribe....

In particular cases, our courts are well-placed to assess whether their decisions should conform to foreign decisions. But some of our tribunals are equally well-placed to assess that—sometimes even better-placed—armed as they are with specialized understandings, policy appreciation, and expertise. In some cases, reasonableness review, not correctness review, may be warranted.⁷⁸

This reasoning is inimical to the purpose of multilateral international law making, namely to harmonize domestic legal systems around agreed-upon norms and standards. States do not spend vast amounts of time and money negotiating international agreements in order that their respective judges should be free to undo those painstaking efforts on the strength of subjective judicial assessments of local “values and principles.” Canadian courts have recognized the need, when interpreting multilateral conventions, to avoid frustrating states’ purposes through the adoption of parochial interpretations of what are intended to be shared multilateral norms. In *Connaught Laboratories*, Justice Molloy observed that an international convention’s “objective of having uniform regulations..would be seriously weakened if the courts of every country interpreted the Convention without any regard to how it was being interpreted and applied elsewhere. This

70 See *Garuda*, *supra* note 7 at paras 42–44 and 48.

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

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

73 “[O]n judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness.... In such situations, deference should normally be shown, although this presumption can sometimes be rebutted.” *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46; see also *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 at para 39.

74 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

75 *Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324 [*Febles*].

76 See [1969] Can TS no 6 Section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection”).

77 *Febles*, *supra* note 75 at para 24; see also para 58.

78 *Ibid* at paras 76–77.

potential problem supports an approach favouring consistency of interpretation among nations, rather than one in which each country applies its own domestic principles.⁷⁷⁹ Similar observations have been made by other Canadian courts,⁸⁰ including the Federal Court of Appeal⁸¹ and the SCC.⁸²

What the resort to expert opinion evidence and the reasonableness standard of review have in common, in cases featuring an international legal issue, is the potential tolerance for internationally non-conforming results. The objection to such tolerance may not be immediately obvious. After all, Canadian reception law accepts — indeed, insists upon — non-conformity to international legal requirements when they arise from “an unequivocal legislative intent to default on an international obligation.”⁸³ It is central to the balance the reception system strikes between respect for international law and recognition of Canadians’ self-government that laws of Parliament and the provincial legislatures “must be followed even if they are contrary to the established rules of international law.”⁸⁴

But the judicial branch has not, historically at least, enjoyed the legislative branch’s privilege to act in ways that risk bringing responsibility upon Canada at international law. It is for democratically elected legislatures — preferably in rare cases only — to depart from rules recognized internationally as having the force of law. The courts’ role in the reception system, by contrast, has been to achieve

and promote compliance with international law through the incorporation of custom and the presumption of conformity. By treating legal obligations binding on the state as matters of opinion (for evidentiary purposes) or deference (in administrative law), courts risk increasing the possibility that the state’s judicial or executive organs bring responsibility upon Canada at international law by tolerating internationally non-compliant legal determinations. This stance is at odds with the courts’ historic place in the reception system. Of course, innovation in the common law is not objectionable per se. But here, as in the case of the ambiguity requirement, it is hard to see what Canadian law would gain from such an innovation.

How to Go Wrong (3): Justiciability

Canadian courts have shown a healthy suspicion of claims that they may not review Canadian government actions in the fields of foreign relations and international law. The conduct of foreign affairs remains a prerogative power,⁸⁵ but is no longer considered immune from judicial oversight on common law grounds.⁸⁶ Constitutional review of government actions in the foreign sphere has been available since nearly the outset of the Charter era, and is also available in respect of the rest of the written constitution.⁸⁷ The simple fact that a government act takes place in the foreign sphere, or involves matters of international law, does not necessarily make that act non-justiciable.

This is not to say that all Canadian government acts in exercise of the foreign affairs power or touching international affairs are now reviewable by the courts. Justiciability can be an issue. As Justice

79 *Connaught Laboratories Ltd v British Airways* (2002), 61 OR (3d) 204 (On SCJ) at para 46.

80 See e.g. *Canadian Pacific Ltd v Canada*, [1976] 2 FC 563 at 596–97 (FCTD); *N.V. Bocimar S.A. v Century Insurance Co. of Canada*, [1981] FCTD no 1033 (QL) (FCTD), citing with approval *Stag Line Ltd v Foscolo, Mango & Co. Ltd*, [1932] AC 328 and *Scruttons v Midland* (1962), AC 446 on this point; *Recchia v KLM lignes aériennes royale néerlandaises*, [1999] RJQ 2024 (Que SC); *Plourde v Service aérien FBO Inc (Skyservice)*, 2007 QCCA 739 (Que CA) at para 55; *Strugarova v Air France*, 2009 CanLII 40552 at paras 14–15 (Ont SC); *Gontcharov v Canjet*, 2012 ONSC 2279 at paras 19–20.

81 *Air Canada v Thibodeau*, 2012 FCA 246 at para 45 (“It is important that these provisions be construed and interpreted in a uniform and consistent manner by the signatory States who have endorsed collective measures harmonizing certain rules governing international air carriage....Even the slightest ‘bending’ of Article 29 of the *Montreal Convention* will impair the objectives of the Convention”).

82 *Thibodeau*, *supra* note 13 at para 50 (“In light of the *Montreal Convention*’s objective of achieving international uniformity, we should pay close attention to the international jurisprudence and be especially reluctant to depart from any strong international consensus that has developed in relation to its interpretation”).

83 *Hape*, *supra* note 13 at para 53.

84 *Daniels v White and the Queen*, [1968] SCR 517 at 539.

85 *Khadr*, *supra* note 20 at para 35.

86 *Black v Chrétien* (2001), 54 OR (3d) 215 (Ont CA) at para 47.

87 *Khadr*, *supra* note 20 (“In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms (*Air Canada v. British Columbia (Attorney General)*, [1986] 2 SCR 539)” at para 36).

Stratas recently explained, “In rare cases...exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts’ ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to conceive of a court reviewing in wartime a general’s strategic decision to deploy military forces in a particular way.”⁸⁸

Precisely which exercises of executive power will be found to be “suffused with” the sorts of off-limits concerns Justice Stratas refers to here is impossible to say in the abstract, but Justice Stratas is surely right to describe these as rare cases.

Another justiciability issue is whether Canadian courts may review or impugn the acts of foreign states. This question recently divided the Court of Appeal for British Columbia in *India v Badesha*.⁸⁹ The applicants were Canadian citizens sought for extradition by India for conspiracy to murder. The Minister of Justice ordered their surrender. On judicial review, the applicants strongly impugned India’s judicial system by evidence seeking to prove (among other things) that they could not get a fair trial there and that its prisons are rampant with torture and neglect. The majority accepted this evidence and overturned the minister’s surrender order until she obtained diplomatic assurances.

In dissent, Justice Goepel relied on BC authorities doubting the propriety of Canadian courts sitting in judgment of the human rights practices of Canada’s extradition partners.⁹⁰ He observed:

The cases at bar raise questions about the extent to which one country can, or should, judge the laws and systems in place in another country. As framed in their written submissions to the Minister, the applicants’ positions amount to a general indictment of India’s criminal justice system and the conditions in its prisons....Without diminishing the gravity

of the applicants’ submissions, I am of the view that, as suggested in *Gwynne* and *Reumayr*, such general sweeping indictments of another country’s criminal justice system and prisons are an unsatisfactory underpinning for finding that an individual’s s. 7 *Charter* rights will be violated if surrendered. Such sweeping indictments may also have profound implications for our country’s relationship with its extradition partners, such as India. As this Court suggested in *Reumayr*, these implications cannot be ignored.⁹¹

While Justice Goepel’s reasoning here is supported by the authorities he cites, it is nevertheless profoundly unattractive. Why, in the human rights era, should a domestic court reviewing the lawfulness of an extradition be expected to close its eyes to human rights abuses in the requesting state? Comity is a poor answer to that question, and none other recommends itself.

Happily, Justice Moldaver rejected Justice Goepel’s observations on this point and affirmed that “when evaluating whether there is a substantial risk of torture or mistreatment in the requesting state... the Minister can consider evidence of the general human rights situation” in the receiving state.⁹² His conclusion is consistent with *Suresh v Canada (Minister of Citizenship and Immigration)*, where the Court cautioned against “relying too heavily on [diplomatic] assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past,” and added, “[i]n evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances.”⁹³

In the United Kingdom, the extent to which English and Welsh courts must avoid ruling upon the lawfulness of foreign state actions was recently considered in *Belhaj v Straw*.⁹⁴ The judgment considers a rarely invoked English common law

88 *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 66.

89 *India v Badesha*, 2016 BCCA 88 [Badesha].

90 See e.g. *Gwynne v Canada (Minister of Justice)* (1998), 103 BCAC 1 (BCCA) at paras 41–2 and *USA v Reumayr*, 2003 BCCA 375 at para 29.

91 *Badesha*, *supra* note 89 at para 125.

92 *India v Badesha*, 2017 SCC 44 at para 44.

93 2002 SCC 1 at paras 124–5. See also *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779 at 849–50, where Justice McLachlin (as she then was) expressly included judicial consideration of “the nature of the justice system in the requesting jurisdiction and the safeguards and guarantees it affords the fugitive” as part of the reviewing judge’s *Charter* scrutiny.

94 *Belhaj v Straw*, [2017] UKSC 3 [Belhaj].

doctrine known as foreign act of state. To date Canadian law has been largely uninfected by this doctrine,⁹⁵ about which a noted British commentator once observed that it “displays in every respect such uncertainty and confusion and rests on so slippery a basis that its application becomes a matter of speculation.”⁹⁶ Nevertheless, *Belhaj* is notable for its rejection of justiciability and comity concerns, similar to those that preoccupied Justice Goepel in *Badesha*, and for its affirmation that no rule of law prevents English and Welsh courts from forming views about the lawfulness of foreign state conduct.⁹⁷

In *Re Secession*, the SCC answered an objection to the Court’s consideration of whether Quebec enjoyed a right to secede under international law by distinguishing questions of pure international law from questions of international law which seek “to determine the rights or obligations of some actor within the Canadian legal system.” The latter were not “beyond the competence of this Court, as a domestic court” simply because they required it to look at international law.⁹⁸ Similar reasoning should govern the question of whether a Canadian court can assess the lawfulness of a foreign state’s actions, whether under that state’s own law or international law. Where such a question genuinely arises for consideration in Canadian proceedings, the reviewing court should not hesitate to admit evidence, hear argument and make determinations on the point in the course of deciding the issues before it. In doing so, the court does not sit in judgment of the foreign state or decide a point of pure international law. It only determines the legal rights and obligations of actors within the Canadian legal order.

At present, the argument that a matter of foreign affairs or international law is non-justiciable is rarely advanced in, and even more rarely accepted by, Canadian courts. This is not to say that such an argument ought never to be entertained.

95 But see *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 at paras 373–75, where Justice Abrioux felt constrained, due to a brief reference to an act of state in *United Mexican States v British Columbia (Labour Relations Board)*, 2015 BCCA 32, to conclude that the doctrine exists in Canadian common law. As this article went to press, the Court of Appeal for British Columbia’s decision in *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 was released. Justice Newbury for the court considers the foreign act-of-state doctrine in great detail but rejects its application in the case before her.

96 *Belhaj*, *supra* note 94 at para 33, citing F Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986) at 15.

97 See e.g. *Belhaj*, *supra* note 94 at paras 73 (citing *Allimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*, [2011] UKPC 7 at para 101), 82 (citing *Moti v The Queen*, [2011] HCA 50 at paras 50, 52), 99, 140.

98 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 22–23.

Justice Stratas’s acknowledgment of the potential, in rare cases, for a justiciability objection to judicial review in certain areas of foreign affairs is measured and fair. But the usefulness of the British foreign act-of-state doctrine in contemporary Canadian law is doubtful. Canadian reception law has got along well so far without giving justiciability considerations undue weight.

How Not to Go Wrong

The potential errors reviewed above all proceed from the same source: insufficient familiarity with the Canadian reception system. We are probably ahead of where we were 20 years ago. In particular, the significance of the presumption of conformity with international law is likely better understood today than in the late twentieth century. But even today, too few courts and counsel have a good grasp of Canadian reception law as a whole. They may be generally familiar with some of its aspects, such as the requirement that treaties need implementation or the constitutional principle that legislatures are sovereign to enact laws inconsistent with international law. But they often lack knowledge of admittedly more arcane, but nonetheless important, points such as the SCC’s rejection of the ambiguity requirement or the marked absence of the act-of-state doctrine from our law.

Beyond these particulars, what is still missing is an appreciation of how Canada’s various reception rules come together to form an internally consistent system of reception law. Once courts and counsel come to recognize reception law as a system, they will be less likely to fall into certain kinds of error. A judge will hesitate to treat international law as fact if she reflects on the operation of the presumption of conformity. To apply an ambiguity requirement will seem at odds with the SCC’s depiction of international law as the context in which domestic law is enacted. Blanket assertions of non-justiciability (whether in respect of the acts of Canada or foreign states) will seem in tension with the judiciary’s usual functions in the reception system, namely to take judicial notice of international law, to construe domestic laws according to the presumption of conformity and to incorporate (however rarely) rules of custom into the common law. The reception scheme’s internal logic will illuminate the obscurity of particular cases.

ON CANADA'S PAST, PRESENT AND FUTURE
IN INTERNATIONAL LAW

REFLECTIONS

RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA
EN DROIT INTERNATIONAL

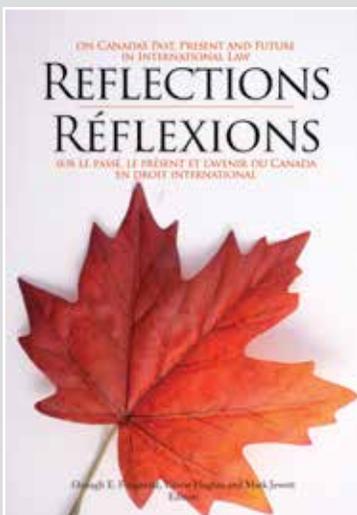
Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett,
Editors



Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's rich history in international law and governance, where we find ourselves today in the community of nations, and how we might help shape a future in which Canada's rules-based and progressive approach to international law gains ascendancy. These essays, each written in the official language chosen by the authors, provide a critical perspective on Canada's past and present in international law, survey the challenges that lie before us and offer renewed focus for Canada's pursuit of global justice and the rule of law.

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