International Law Gateway to Domestic Law: Hart's "Open Texture", Legal Language and the Canadian Charter

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Résumé

L'hypothèse au cœur du présent article est que le genre de langage juridique favorisé dans une législation a un impact direct sur la méthodologie d'interprétation. On fait référence à l'expérience récente au Canada, pays à la fois de droit civil et de common law, pour montrer qu'ouvrir la texture (*dixit* Herbert Hart) du langage législatif mène à une plus grande participation judiciaire dans la réalisation et l'actualisation du droit. Cette problématique est ensuite examinée en relation avec les questions d'interaction entre le droit international et le processus décisionnel des juges nationaux, eu égard particulièrement à la *Charte canadienne des droits et libertés*. L'argument défendu veut que l'opérationnalisation de la normativité interna-

Abstract

The hypothesis at the centre of the paper is that the type of legal language favored in legislation has a direct impact on the methodology of interpretation. The contemporary experience in Canada, with both civil law and common law traditions, is used to show that opening up the texture (*dixit* Herbert Hart) of legislative language leads to greater judicial participation in the realization and actualization of the law. This issue is then examined in relation to the interaction between international law and domestic judicial decision-making, in particular as regards the interpretation of the *Canadian Charter of Rights and Freedoms*. The argument is that the operationalisation of international normativity is done through the methodology of interpreta-

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tionale s'accomplisse par l'entremise de la méthodologie d'interprétation – l'argument d'interprétation contextuelle ou la présomption de conformité au droit international (« Charming Betsy rule ») – et que son influence, pour sa part, soit tributaire en bonne partie du genre de langage utilisé dans l'instrument législatif de droit écrit, ce que la *Charte canadienne* illustre notamment.

tion – with the argument of contextual interpretation or by means of the presumption of conformity with international law (i.e. Charming Betsy rule) – and that its impact, in turn, depends to a large extent on the type of language used in the written legislative instrument, as the *Canadian Charter* illustrates *inter alia*.

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It was once rather popular within the circle of philosophers of language to resort to Lewis Carroll's *Alice in Wonderland* in order to illustrate the intrinsic indeterminacy of language[1]. In chapter 6 of the book, when the young girl engages with this strange egg-head character, the following statement is uttered: "'When *I* use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean – neither more nor less'."[2] Of course, the indeterminacy of language has been at the centre of intense debates in law and, indeed, was referred to as the key issue in legal scholarship today[3]. Similar to legal scholars in this country[4], the Supreme Court of Canada thought it appropriate to invoke Humpty Dumpty's remarks, with a view to conveying the need to develop a well articulated methodology of interpretation[5].

In dwelling on the possible ways that law-makers may control and monitor the process of judicial legal interpretation, especially in an Anglo-Saxon common law system such as in Canada, the indeterminacy debate falls squarely within the narrative around the methodology of statutory interpretation that is the interpretative approach in regard to the written law ("*droit écrit*") found in legislation[6]. In a nutshell, can the traditional

1 For example, see: Donald Davidson, "A Nice Derangement of Epitaphs", in Ernest LePore (ed.), *Truth and Interpretation – Perspective on the Philosophy of Donald Davidson*, Oxford, Basil Blackwell, 1986, p. 433; Keith S. Donellan, "Putting Humpty Dumpty Together Again", (1968) 77 *Philosophical Review* 203.

2 Lewis Carroll (Charles Lutwidge Dodgson), *Through the Looking-Glass, and What Alice Found There*, London, Macmillan, 1872, p. 124 [emphasis in original].

3 See: Steven L. Winter, "Bull Durham and the Use of Theory", (1990) 42 *Stanford L. Rev.* 639; Anthony D'Amato, "Pragmatic Indeterminacy", (1990) 85 *Northw. L. Rev.* 148; Lawrence B. Solum, "Indeterminacy", in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Oxford, Blackwell, 1996, p. 488.

4 See: A. Wayne Mackay, "Interpreting the Charter of Rights: Law, Politics and Poetry", in Gérald-Armand Beaudoin (ed.), *Causes invoquant la Charte, 1986-87 – Actes de la Conférence de l'Association du Barreau canadien tenue à Montréal en octobre 1986*, Cowansville, Éditions Yvon Blais, 1987, p. 347; Luc B. Tremblay, « L'interprétation téléologique des droits constitutionnels », (1995) 29 *R.J.T.* 460, 508.

5 *2747-3174 Québec Inc.* v. *Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, para. 171 (L'Heureux-Dubé J.): "*A Humpty-Dumpty-like interpretation exercise* is actually nothing more than an interpretation based on random or vague rules or solely on intuition or unrationalized impressions, or one that fails to consider the underlying premises of legal reasoning. It goes without saying that the courts must avoid this type of interpretation exercise" [emphasis in original].

6 See: Timothy A. O. Endicott, "Linguistic Indeterminacy", (1996) 16 *Oxford J. Legal Stud.* 667.

specific and detailed legislative drafting typical to common law statutes lead to anything other than a literal and strict construction of written normativity, or may a slightly more vague and general expression of legislative intent lead to an interpretative process that favors a more purposive and expansive reading of the law. Put another way, the interrogations on the interaction between law-makers and decision-makers in the Anglo-Saxon world are not so much about how to close up the tap of judicial activism[7], but rather about the ways to allow and rationalize a greater participation of the judiciary in the realization and the actualization of written law.

Without falling into *clichés*, it is interesting to examine this problematic in regard to the contemporary realities of globalization and inter/supra/transnational governance. In short, pursuant to the hypothesis that the type of legal language favored in legislation has a direct impact on the methodology of interpretation, the inquiry then focuses on the recent trend in Canada allowing courts to rely much more on international law in their decision-making. After examining our recent experience in legislative drafting (section 1), the argument is thus that the operationalisation of international normativity is accomplished through the methodology of interpretation which, in turn, largely depends on the type of language used in legislation (section 2). In order to make my case, Herbert Hart's theory and, in particular, his idea of "open texture" legal language is central to the discussion that follows.

I. Canada's legislation: from specific and detailed to more "open texture"

In my work on statutory interpretation[8], I have agreed with the view expressed by my comparative law teacher at the University of Cambridge[9]

7 I tend to agree with Anthony D'Amato that this task, in its absolute form, appears to be impossible; see Anthony D'Amato, "Can Legislatures Constrain Judicial Interpretation of Statutes?", (1989) 75 *Va. L. Rev.* 561, 587: "We never should have expected that a legislature could force a single interpretation of its commands upon any addressee."

8 See: Stéphane Beaulac, « Le *Code civil* commande-t-il une interprétation distincte ? », (1999) 22 *Dalhousie L.J.* 236; and see generally: Stéphane Beaulac, *Handbook on Statutory Interpretation – General Methodology, Canadian Charter and International Law*, Markham, LexisNexis Canada, 2008.

9 Namely, Roderick Munday, fellow at Peterhouse: see: Roderick Munday, "The Common Lawyer's Philosophy of Legislation", (1983) 14 *Rechtstheorie* 191.

that the most fundamental distinctive feature of the common law's "*mentalité*"[10] is the attitude toward legislation. As a legal system based on judge-made-law – a.k.a. precedents, caselaw, "*droit non écrit*" – legislation is considered an "alien intruder in the house of the common law"[11] suggested Harland Stone. For his part, Sir Frederick Pollock expressed the blunt opinion that "Parliament generally changes the law for the worse"[12]. As Roderick Munday wrote, "In short, whilst the English lawyer is forced to acknowledge the necessity of legislation, for him the common law – that cautious, organic, accretion of slow-won judicial wisdom – remains the true bedrock of English law."[13] Similarly, Frederick Lawson opined: "In England [as in most other common law countries], it is unwritten law that is regarded as normal and written law as exceptional."[14]

This restrictive attitude vis-à-vis legislation (a.k.a. statutory law) is responsible for the traditional take on the drafting of statutes in common law jurisdictions, leaving very little leeway to the judiciary. It is well accepted, both in the common law and the civil law traditions[15], that "forms of draftsmanship are often the consequences of the methods and rules of judicial interpretation"[16]. As far as statutory interpretation and legislative drafting are concerned[17], one should bear in mind that Canada

10 This idea of "*mentalité*" is borrowed from Pierre Legrand Jr.'s work; see: Pierre Legrand, "Legal Traditions in Western Europe: The Limits of Commonality", in Robert Jagtenberg, Esin Örücü and Annie J. de Roo (eds.), *Transfrontier Mobility of Law*, The Hague, Boston, Kluwer Law International, 1995, p. 63; Pierre Legrand, "European Legal Systems are not Converging", (1996) 45 *Int'l & Comp. L.Q.* 52.

11 Harlan Fiske Stone, "The Common Law in the United States", (1936) 50 *Har. L. Rev.* 4, 15.

12 Frederick Pollock, *Essays in Jurisprudence and Ethics*, London, Macmillan, 1882, at p. 85.

13 R. Munday, *supra*, note 9, 193.

14 Frederick Henry Lawson, *The Rational Strength of English Law*, London, Stevens & Sons, 1951, at p. 17.

15 For example, in a civil law system, see: Jean Beetz, « Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867 », in Paul-André Crépeau and Crawford B. MacPherson (eds.), *L'avenir du fédéralisme canadien*, Montréal, Presses de l'Université de Montréal, 1965, p. 113, at p. 116; Alain-François Bisson, « L'interaction des techniques de rédaction et des techniques d'interprétation des lois », (1980) 21 *C. de D.* 551.

16 John David Bawden Mitchell, "Reflections on Law and Orders", (1958) 3 *Judicial Reports* 19, 24.

17 In the jurisdiction of the province of Quebec, even if most of the field of private law is civil law-based, the methodology favoured by the judiciary to interpret and apply writ-

is deemed to follow the common law methodology[18]. Be it as it may, both in the civil law system of Quebec or in the common law jurisdictions of the other Canadian provinces, the way in which legislation is drafted by Parliament will have a direct nexus with the way in which they will be interpreted and applied by the judiciary. In the most recent edition of a popular treatise on statutory interpretation in Canada, the authors summed up the situations thus: "En somme, le style de composition législative influera sur le dosage entre les diverses techniques heuristiques."[19]

In common law jurisdictions like Canada, the non-collaborative and somewhat predatory approach adopted by the judiciary towards the will of Parliament expressed in enactments has meant that, for the longest of time, specific and detailed provisions had to be employed in legislation[20]. From the English traditional position, Roderick Munday explicated the connection as follows:

> "One result of the literal approach English courts adopt to the interpretation of statutes has been that the Parliamentary draftsmen, well aware of the way in which their handiwork is likely to be construed, deliberately draw up the most detailed, long-winded and complex enactments, which seek to provide against every contingency and to make absolutely plain the legislation's intent."[21]

Justice Steven, of the Queen's Bench in United Kingdom, captured well the essence of the task of legislative drafters in common law systems when he suggested that statutes must not only be intelligible to people reading them in good faith, "but it is necessary to attain, if possible, a degree of precision which a person reading in bad faith cannot misunderstand"[22]. This understanding of legislative drafting is hard to reconcile with the notion of "open texture".

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ten law – including the civil code – is akin to that applicable in the rest of the country and in Quebec public law. See: Pierre-André Côté, « L'interprétation en droit civil et en droit statutaire: communauté de langue et différences d'accents », (1997) 31 *R.J.T.* 45.

18 Goef R. Hall, "Statutory Interpretation in the Supreme Court of Canada: The Triumph of a Common Law Methodology", (1998) 21 *Advoc. Q.* 38.

19 Pierre-André Côté, Stéphane Beaulac and Mathieu Devinat, *Interprétation des lois*, 4e éd., Montréal, Éditions Thémis, 2009, at p. 36.

20 See: J. A. Clarence Smith, "Legislative Drafting: English and Continental", (1980) 1 *Statute Law Rev* 14.

21 R. Munday, *supra*, note 9, 198.

22 *In re Castioni*, [1891] 1 Q.B. 149, 167.

A. Notion of "open texture" legal language

Although he borrowed it from Friedrich Waismann[23], the expression "open texture"[24] is very much associated with British author Herbert Hart, who introduced it into legal philosophy with his masterpiece *The Concept of Law*[25], first published in 1961[26]. In a chapter entitled "Formalism and Rule-Scepticism", he spoke of the inherent vagueness of language that expresses normativity, be it in a statute enacted by a legislature or in the *ratio decidendi* of a judgment. In some cases, the application of legal language is relatively clear, what Hart referred to as the core situations, while in other cases, the meaning of the term employed is not clearly applicable, what Hart calls the penumbra situations. As the legal theorist explained:

> "The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case."[27]

Except for such determinate rules applicable to core situations, normativity consists of variable legal standards; in turn, the level of variation depends on the language found, vague or precise, on a sliding scale-type

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23 Friedrich Waismann, "Verifiability", (1945) 19 *Proceedings of the Aristotelian Society, Supplementary* 119, 121; republished as Friedrich Waismann, "Verifiability", in Antony Flew (ed.), *Logic and Language*, First Series, Oxford, Basil Blackwell, 1952, p. 117. Waismann himself is said to have been highly influenced by Ludwig Wittgenstein's philosophy of language, in material published posthumously as Ludwig Wittgenstein, *Philosophical Investigations*, New York, Macmillan, 1958, para. 80 and 142. See: Gordon P. Baker and Peter Michael Stephan Hacker, *Wittgenstein: Rules, Grammar & Necessity*, Oxford, Basil Blackwell, 1985, p. 229 to 232.

24 What Hart also referred to as the "fringe of vagueness" in legal rules, similar to Waismann who used the expression "possibility of vagueness" in language. See: Brian Bix, "H.L.A. Hart and the 'Open Texture' of Language", (1991) 10 *Law & Philosophy* 51, 56.

25 Herbert Lionel Adolphus Hart, *The Concept of Law*, Oxford, Clarendon Press, 1961.

26 On Hart's theory and the use of language in law, see: Timothy A. O. Endicott, "Law and Language", in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford, Oxford University Press, 2002, p. 935.

27 H. L. A. Hart, *supra*, note 25, p. 132 [italics in original; underlines added].

of reasoning[28]. These rules are deemed more or less "open texture" and, accordingly, as allowing a different degree of involvement by the decision-maker in the realization and actualization of the law in specific cases.

Hart's "open texture" of law, we believe, can be assimilated *mutatis mutandis* to another idea, known in the French-speaking world as "*notions à contenu variable*", translated as "notions of variable content" or "notions of variable standard"[29]. In the civil law tradition, of course, it is normal and accepted that the law-maker chooses to express itself, to set out normativity, in terms that are vague, general or indeterminate, with the result that there is a greater need for courts to engage in interpretation[30]. This being so, the general understanding of "variable content notions" in civil law appears to be very similar indeed to "open texture" in the common law. Witness how Chaïm Perelman, following a series of meetings organized by the Centre National Belge de Recherches de Logique, summed up the prevailing concept:

> « Tenant compte de la variété infinie des circonstances, du fait qu'il n'est pas capable de tout prévoir et de tout régler avec précision, admettant que des règles rigides s'appliquent malaisément à des situations changeantes, le législateur peut délibérément introduire dans le texte de la loi des notions à contenu variable, flou, indéterminé, telles que l'*équité*, le *raisonnable*, l'*ordre public*, la *faute grave*, en laissant au juge le soin de les préciser dans chaque cas d'espèce. »[31]

He then explained the direct link between the type of legal language and the degree of participation of the decision-makers: the more vague

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28 As my colleague Luc B. Tremblay pointed out to me, this image of sliding scale could also be linked to Dworkin's work in jurisprudence. However, I use it here to refer to Hart's open texture with, at one end of the spectrum, cases that are akin to core situations and, at the other end, cases that tend to be part of the penumbra situations, at variable degrees of indeterminacy.

29 See: Neil MacCormick, "On Reasonableness", in Chaïm Perelman and Raymond Vander Elst (eds.), *Les notions à contenu variable en droit*, Brussels, Bruylant, 1984, p. 131.

30 See: Stéphane Beaulac, « L'interprétation de la Charte: reconsidération de l'approche téléologique et réévaluation du rôle du droit international », (2005) 27 *Supreme Court L.R. (2d)* 1, 19 and 20.

31 Chaïm Perelman, « Les notions à contenu variable en droit, essai de synthèse », in C. Perelman and R. Vander Elst (eds.), *supra*, note 29, p. 363, at p. 365 [emphasis in original].

and indeterminate the notion is expressed, the more power of appreciation is given to judges in interpreting the law[32].

B. Canada's recent experience in opening up legislative language

Especially in relation to the jurisdiction of the province of Quebec, which is civil law-based in regard to its private law, Canada has always had a hybrid style of legislative drafting and approach to statutory interpretation, one that is certainly not full-fledged common law (specific and detailed formulation)[33]. One must recall that, far from foreign to Canadian jurists, the civil law typical mode of legislative drafting is prominent in one of the main provincial jurisdictions and, in effect, has come to have an influence on other legislative levels. This is particularly true at the federal Parliament, which must take into account the bi-jural nature of the law in Canada, as regards private law matters at least[34].

To be clear, although not "purist" in its form, the *Civil Code of Quebec*[35] – and before 1994, the *Civil Code of Lower Canada*[36] – is a normative instrument that is expressed in abstract, general and vague terms, what would be referred to as "open texture" legal language or "notions of variable content". The preliminary provision of the *Civil Code of Quebec* makes it explicit why such vague language is used, namely because it provides for

32 *Id.*: « En effet, plus les notions juridiques applicables sont vagues et indéterminées, plus grand est le pouvoir d'appréciation laissé aux juges. »

33 See: Lionel A. Levert, "Bilingual and Bijural Legislative Drafting: To Be or Not to Be?", (2004) 25 *Statute Law Rev.* 151.

34 See: Michel Bastarache, « Le bijuridisme au Canada », in *L'harmonisation de la législation fédérale avec le droit civil de la province de Québec et le bijuridisme canadien*, 2e édition, Ottawa, Department of Justice Canada, 2001, p. 1; Charles D. Gonthier, « Quelques réflexions sur le bijuridisme – Convergence et valeurs », (2003) 33 *R.G.D.* 305; Ruth Sullivan, "The Challenges of Interpreting Multilingual, Multijural Legislation", (2004) 29 *Brooklyn J.I.L.* 985.

35 On the interpretation of the *Civil Code of Quebec*, see: Pierre-André Côté (ed.), *Le nouveau Code civil – Interprétation et application*, Montreal, Éditions Thémis, 1992; Alain-François Bisson, « Nouveau Code civil et jalons pour l'interprétation – traditions et transitions », (1992) 23 *R.D.U.S.* 1.

36 On the interpretation of the *Civil Code of Lower Canada*, see: Pierre-Basile Mignault, « Le Code civil de la province de Québec et son interprétation », (1935-36) *R.D.U.T.* 104.

"*le droit commun*", that is the generally applicable law in the jurisdiction[37]: "The Civil Code comprises a body of rules which, in all matters within the letter, the spirit or object of its provisions lays down the *jus commune*, expressly or by implication."[38] In establishing the generally applicable law, the Civil Code's provisions employ language that is, by and large, rather broad and vague[39]. Witness, for instance, the notion of "good faith" found in section 6, section 932, section 1375 and section 2805 of the *Civil Code of Quebec*, as well as the drafting style of section 10, which refers to the standard of "free and enlightened consent", or of section 1457, which generally speaks of "a duty to abide by the rules of conduct […] according to the circumstances, usage or law".

1. Nature of the law, style of legislative drafting, interpretative approach

In Canada, it is generally accepted that the style of legislative drafting is very much intertwined with the nature of the law provided for in legislation[40]. One ought to distinguish, with respect to the latter element, between generally applicable law ("*le droit commun*")[41] and what is called the "law of exception" which, in contrast with the first, provides for the rules of specific application that is rules that either complement or derogate from general law. Bearing in mind this dichotomy between the two types of law, it can be argued that, to a large extent, the nature of the law provided for in a piece of legislation explains the style of draftsmanship favored when the legal rules are put down into writing (broad and vague, or specific and detailed) which, in turn, influences whether the decision-maker resorts to a more literal and strict interpretative approach or, conversely, to a more purposive and expansive methodology. To put it another way, in Canada, we now know that it is not so much the legal tra-

37 See: John E. C. Brierley, « La notion de droit commun dans un système de droit mixte: le cas de la province de Québec », in *La formation du droit national dans les pays de droit mixte*, Aix-en-Provence, Presses universitaires d'Aix-Marseille, 1989, p. 103.

38 See: Alain-François Bisson, « La Disposition préliminaire du *Code civil du Québec* », (1999) 44 *McGill L.R.* 539.

39 See: Patrick H. Glenn, « La Disposition préliminaire du *Code civil du Québec*, le droit commun et les principes généraux du droit », (2005) 46 *C. de D.* 339.

40 See, generally: Nicholas Kasirer (ed.), *Le droit civil, avant tout un style?*, Montréal, Éditions Thémis, 2003.

41 On the notion of "*droit commun*", see: Adjutor Rivard, « La notion du 'droit commun' », (1924-25) 3 *R. du D.* 257.

dition (civil law or common law) that leads to an *a priori* bias in the interpretation of legislation; it is rather the style of drafting typically found in one legal tradition, as opposed to that typically found in the other legal tradition, that determines whether interpretation will tend to be more large and liberal or strict and restrictive. Although not exhaustive, the following formula may be useful to visualize the contention. On the one side:

(A) Civil law system = written law as generally applicable law = open texture drafting = purposive and generous interpretation;

while, on the other side:

(B) Common law system = written law as law of exception (specific application) = non open texture drafting = literal and strict interpretation.

The main point here is that, what explains at the end of the process one interpretative bias or another is not, directly, the legal tradition (civil law; common law). In reality, the direct causal link with the interpretative approach (liberal; restrictive) is the style of legislative drafting (more open texture; less open texture) which, in turn, is dictated by the nature of the law provided for by means of legislation.

These separations and distinctions in the reasoning are not merely rhetorical; they are necessary to understand the contemporary situation in this country as regards its statute books. The view expressed by the Supreme Court of Canada in *Épiciers Unis Métro-Richelieu Inc.*[42], is most apposite to help understand the point. Justice LeBel wrote:

> "In the common law provinces, statutes were considered exceptions whose nature often justified a narrow and at times quite formalistic interpretation. In contrast, the *Civil Code of Québec*, which sets out the *jus commune* of that civil law province, must be interpreted liberally. In *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, Gonthier J. addressed this point, stating that "unlike statute law in the common law, the *Civil Code* is not a law of exception, and this must be taken into account in interpreting it. It must be interpreted broadly so as to favour its spirit over its letter and enable the purpose of its provisions to be achieved" (para. 15); […]."[43]

[42] *Épiciers Unis Métro-Richelieu Inc., division "Éconogros"* v. *Collin*, [2004] 3 S.C.R. 257.
[43] *Id.*, para. 20 [emphasis added] (N.B. the past tense of the verb "to be").

To make a long story short, it is deemed not accurate anymore to consider that statutes in Canada's common law jurisdictions all provide for rules of specific application (law of exception), while civil law-based private law in Quebec is all made of normativity of general application (*le droit commun*). While it is true that much of the legislation in Quebec expresses generally applicable law, many of the province's acts provide for specific law. Conversely, in the common law jurisdictions of this country, most of the statutes provide for law of exception – their *jus commune* is judge-made-law, that is caselaw – but the contemporary reality in Canada (as in other common law countries) is that there exist more and more instances where legislation "codifies" rules of judge-made-law, in an open texture-style of drafting, thus providing for legal norms akin to generally applicable law (*le droit commun*).

By acknowledging that it is the nature of the law provided for in an act, and not so much the legal tradition, that influences its legislative drafting and, in turn, the interpretative approach, one can more clearly appreciate that a civil law jurisdiction like Quebec may have both open texture language and less open texture language in its corpus of legislation and, accordingly, both purposive / extensive and literal / strict interpretation adopted by decision-makers[44]. Similarly (though, of course, the bias is on the other side), one ought to see now that Canada's common law jurisdictions may have both specific / detailed and general / vague legislative drafting, and thus both instance of liberal approach and of restrictive approach to statutes[45]. In an article he wrote extra-judicially (with P.-L. Le Saunier), Justice LeBel agreed that statutes in a common law jurisdiction need not be automatically interpreted restrictively[46], no more than legisla-

[44] An example of a less open texture piece of legislation providing for legal rules of exception, from the civil law jurisdiction of the province of Quebec, is the *Consumer Protection Act*, R.S.Q., c. P-40.1.

[45] An example of an open texture statute that constitutes the *jus commune* in an area of the law, from the common law jurisdiction of the province of Ontario, is the *Labour Relations Act*, S.O. 1995, c. 1.

[46] Louis LeBel and Pierre-Louis Le Saunier, « L'interaction du droit civil et de la common law à la Cour suprême du Canada », (2006) 47 *C. de D.* 179, 230 and 231: « La différence entre les méthodes d'interprétation du Code civil et du droit statutaire en common law s'est toutefois estompée avec l'évolution des méthodes d'interprétation des lois à un point tel que nous pouvons désormais affirmer que le droit statutaire ne s'interprète plus automatiquement d'une manière restrictive, bien qu'il conserve sa nature d'exception relativement à la common law [i.e. judge-made-law]. »

tion in a civil law jurisdiction needs absolutely receive a large and liberal interpretation. All shall depend on the style of legislative drafting used in the piece of legislation (influenced by whether or not the law amounts to *jus commune*): (i) open texture brings an interpretation that tends to be purposive and generous, while (ii) less open texture leads to an interpretation giving a literal and strict reading of the law.

2. Canada's endorsement of open texture legislation

There is no more serious resistance, in Canada, to the idea that legislation may be expressed in vague and general language. In 1992, the Supreme Court of Canada had the occasion to endorse the contemporary reality of open texture draftsmanship in a case considering the validity of a legislative norm in view of the so-called void for vagueness doctrine. In *R.* v. *Nova Scotia Pharmaceutical Society*[47], the legislative provision challenged was section 32(1) of the *Combines Investigation Act*[48], a federal statute, which prohibited to conspire or combine, etc., in order "to prevent, or lessen, unduly, competition in the production, manufacture, [etc.,] of a product"[49]. One of the questions at issue was whether this legal rule was unconstitutionally vague, which the Court answered in the negative.

It is in this context that Gonthier J., writing the reasons for the Supreme Court, dwelled upon what normativity can accomplish in a legal system. He was unusually candid[50] in explaining that the law always involves a degree of approximation that, in the end, must be determined specifically by decision-makers. Here is an excerpt:

> "Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

47 *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

48 *Combines Investigation Act*, R.S.C. 1970, c. C-23.

49 [Emphasis added.]

50 On candour in interpretation, see: Nicholas S. Zeppos, "Judicial Candor and Statutory Interpretation", (1989-90) 78 *Geo. L.J.* 353.

> By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens."[51]

The void for vagueness doctrine would get involved in the very rare situations where the law-maker used excessively open texture language in providing for normativity, so much so that the decision-makers have no intelligible basis for a legal debate as to how to actualize the law in a particular case[52].

In accomplishing this institutional function entrusted by the constituting power ("*pouvoir constituant*"), to determine the precise normative content of the legislative norm in order to settle the legal issue and thus resolve a dispute, the decision-makers do not remain passive[53]. It must be openly admitted that, always, the judiciary will participate in the actualization of normavity provided for in a statute, and thus in the realization of legal rules found therein. The extent of this participation, however, will vary depending on the type of language used, as Gonthier J. also noted in *Nova Scotia Pharmaceutical Society*:

> "This arbitration must be done according to law, but often it reaches such a level of complexity that the corresponding enactment will be framed in relatively general terms. In my opinion the generality of these terms may entail a greater role for the judiciary, but unlike some authors (see F. Neumann, *The Rule of Law* (1986), at pp. 238-39), I fail to see a difference in kind between general provisions where the judiciary would assume part of the legislative role and "mechanical" provisions where the judiciary would simply apply the law. The judiciary always has a mediating role in the actualization of law, although the extent of this role may vary."[54]

Put another way, the decision-makers always, in all situations of interpretation of the law[55], play a part in the realization of the will of the legis-

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51 *R.* v. *Nova Scotia Pharmaceutical Society*, *supra*, note 47, 638-639.

52 See: Stéphane Beaulac, « Les bases constitutionnelles de la théorie de l'imprécision: partie d'une précaire dynamique globale de la Charte », (1995) 55 *R. du B.* 257.

53 See: P.-A. Côté, S. Beaulac and M. Devinat, *supra*, note 19, at para. 22 *ff.*

54 *R.* v. *Nova Scotia Pharmaceutical Society*, *supra*, note 47, 641.

55 See: Glanville Llewelyn Williams, "Language and the Law", (1945) 61 *L.Q.R.* 71, 181: "Some words, though not equivocal in the sense of having two or more distinct defi-

lature as provided for in the statute. The extent of such a participation of the judiciary, in the process by which he or she will interpret and apply the legal rule, will be directly linked to the legislative style of draftsmanship. As suggested above, the more open texture the provision is, the more input the decision-maker should have – legitimately, because the permission is implicitly given by the law-maker – in the actualization of the law; these situations would fall within Hart's penumbra. Conversely, the legislative provisions drafted in specific and detailed language, in less (or little, no) open texture terms, should see the judiciary have less (or, virtually, no) power of appreciation in fulfilling its function to interpret and apply the law; the latter would fall towards the core cases of application, pursuant to Hart's conceptualization of legal rules.

3. Example of open texture law: *Canadian Charter of Rights and Freedoms*

A relatively recent example of open texture legal language found in Canada's written law is the *Canadian Charter of Rights and Freedoms*[56] – this country's bill of rights – adopted in 1982[57]. Indeed, a good number of provisions in this constitutional instrument employ general and vague language, what are said to amount to standards more than legal rules[58]. Instances of open texture legislative draftsmanship are found in sections 1 and 11 ("reasonable"), in section 8 ("abusive"), in section 9 ("arbitrary"), in the several paragraphs of section 11 ("unreasonable", "independent and impartial", "just cause"), in section 12 ("cruel and unusual") and of course in the limitation clause of section 1 ("free and democratic society")[59].

nitions, are yet obviously vague in their meaning […] What I am concerned to demonstrate in this section is that not merely some but all words are capable of occasioning difficulty in their application."

56 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B. to the *Canada Act 1982* (U.K.), 1982, c. 11.

57 See: Dale Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations", in Walter S. Tarnopolsky and Gérald-Armand Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms – Commentary*, Toronto, Carswell, 1982, p. 25.

58 See: Danielle Pinard, « Le droit et le fait dans l'application des standards et la clause limitative de la *Charte canadienne des droits et libertés* », (1989) 30 *C. de D.* 137.

59 See: Peter W. Hogg, *Constitutional Law of Canada*, student ed., Scarborough, Carswell, 2003, at p. 705 and 706.

Although some have condemned the use of such general and vague language in the *Canadian Charter*[60], it is not at all uncommon for a constitutional instrument to favor open texture language. In the context of the American Bill of Rights, Laurence Tribe made this observation: "The Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices."[61] For his part, Canadian author Sidney Peck noted that the actual formulation of a normative text like the *Canadian Charter* invites for a full participation of decision-makers: "Judges do not discover meaning from the words; they assign meaning to the words."[62] Such heavy involvement of the judiciary in the determination of normativity, he added, is tributary of the type of language employed to express the intention of the creating authority. The need to assign meaning to the words, Peck wrote, "is particularly true of a document such as the *Charter*, which contains very general language relating to abstract concepts used to articulate the nature of the social order and the relationship between the individual and the state"[63].

This being said, one important point must be made: It is the nature of the legal rules found in the *Canadian Charter* which explains that the language employed in its provisions is open texture and, consequently, that the interpretation given to them has always been purposive and expansive. As I have argued elsewhere[64], the fact that the *Canadian Charter* is a constitutional instrument – like the fact that one is a civil law system – is not directly linked to the interpretative bias in favor of a large and liberal approach. It is rather the fact that the *Canadian Charter* uses open texture language in its provisions, itself due to the nature of the law (generally

60 Henri Brun, « La Charte canadienne des droits et libertés comme instrument de développement social », in Clare F. Beckton and A. Wayne Mackay (eds.), *Les tribunaux et la Charte*, Toronto, University of Toronto Press, 1985, p. 1, at p. 4: « Certains reprochent à la Charte canadienne d'être rédigée en des termes trop généraux. Cette critique, à notre avis, est mal fondée. »

61 Laurence H. Tribe, *American Constitutional Law*, 2nd ed., Mineola, Foundation Press, 1988, at p. iii. See also: Peter W. Hogg, "The Charter of Rights and American Theories of Interpretation", (1987) *Osgoode Hall L.J.* 87.

62 Sidney R. Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms", (1987) 25 *Osgoode Hall L.J.* 1, 12.

63 *Id.* See also: Christian Brunelle, « L'interprétation des droits constitutionnels par le recours aux philosophes », (1990) 50 *R. du B.* 353.

64 See: S. Beaulac, *supra*, note 30, 44 and 45.

applicable) provided for in this constitutional instrument, that justifies the methodology usually favored in interpreting and applying the *Canadian Charter*. As Pierre Carignan wrote, in regard to the interpretation of constitutional instruments like our bill of rights: « Ainsi donc, selon qu'elle est rédigée sous forme de principes généraux ou de critères concrets, une loi laisse planer plus ou moins d'incertitude et, partant, donne jeu, dans une mesure variable, à la créativité des juges. »[65] In sum, the open texture of the language used in the *Canadian Charter* is the basis upon which the decision-makers participate fully[66], in the realization and actualization of the supra-legislative legal rules provided for in this constitutional document.

In the latest edition of the Canadian treatise on statutory interpretation, entitled *Interprétation des lois*, the authors made the point as follows:

> « L'interprétation d'une charte des droits fait appel de façon plus importante au rôle créateur de l'interprète, et les contraintes fonctionnelles, liées aux finalités et aux valeurs, prennent le pas sur les contraintes linguistiques qui, ans être totalement absentes, sont reléguées au second plan. »[67]

Similarly, another French Canadian legal scholar, Christian Brunelle, wrote: « [L]a Charte étant rédigée en termes très généraux, l'interprète doit nécessairement faire preuve de créativité pour donner un contenu réel aux droits et libertés qu'elle énonce. »[68] It is indeed the general and vague terminological style used in the *Canadian Charter* – what clearly constitutes open texture legal language – that commands an interpretative approach that calls on decision-makers to breathe life into normativity, what François Gény called "*la libre recherche scientifique*" in legal interpretation[69].

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65 Pierre Carignan, « De l'exégèse et de la création dans l'interprétation judiciaire des lois constitutionnelles », (1986) 20 *R.J.T.* 27, 40.

66 On the participatory role of decision-makers in the realisation and actualisation of the law, see: Rosalie Silberman Abella, "Public Policy and the Judicial Role", (1989) 34 *McGill L.J.* 1021; Louis-Philippe Pigeon, "The Human Element in the Judicial Process", (1970) 8 *Alta L. Rev.* 301.

67 P.-A. Côté, S. Beaulac and M. Devinat, *supra*, note 19, at. p. 26 [footnotes omitted].

68 C. Brunelle, supra, note 63, 365.

69 See: François Gény, *Méthode d'interprétation et sources en droit privé positif*, 2e éd., vol. 2, Paris, Librairie générale de droit et de jurisprudence, 1954, at p. 74 to 78. See also: Gérard Cornu, *Droit civil*, Paris, Montchrestien, 1988, at p. 131 to 134.

II. The national use of international law through legal interpretation

Building upon the hypothesis, set out above, that the type of legislative language has a direct impact on the interpretative approach and indeed the level of participation by the decision-makers in the realization of the law, the paper continues empirically to see how this dynamic may work in practice. The focus of the inquiry is the *Canadian Charter of Rights and Freedoms* which, it was shown, largely resorts to open texture in its provisions. The object of verification is international law and the role it plays in the interpretation and application of this constitutional instrument. The argument is that the domestic operationalisation of international normativity is done through the methodology of interpretation and, with the *Canadian Charter* as a forceful example, the discussion examines recent cases at the Supreme Court of Canada to demonstrate the direct link between the vague drafting style found therein and the willingness to rely on treaty or customary law as relevant and persuasive elements of interpretation, thus in this way participating extensively in the realization of the constitutional norms. A refresher on the parameters of normative interaction, first, shall prove useful.

A. The paradigm of international / national normative interaction[70]

As far as the decision-makers in common law jurisdictions like Canada are concerned, the matrix within which states operate and international affairs are conducted are still very much based on the Westphalian model of international relations[71], at the centre of which is the idea of sover-

[70] This part draws from Stéphane Beaulac, "Westphalia, Dualism and Contextual Interpretation: How to Better Engage International Law in Domestic Judicial Decisions", (2007) *European University Institute Working Papers*, MWP 2007/3, 1.

[71] Of course, Westphalia is an *aetiological myth* (i.e. a myth of origin), created by international society to explain the whens, wheres and hows of its becoming and its being. This acknowledgement, however, does not diminish in any way the most extraordinary semiotic effects of Westphalia on the consciousness of international society. See: Stéphane Beaulac, "The Westphalian Model in Defining International Law: Challenging the Myth", (2004) 8 *Australian Journal of Legal History* 181; Stéphane Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?", (2000) 2 *Journal of the History of International Law* 148.

eignty[72]. As Neil Walker noted, the legal by-products of this social construct are twofold: constitutional law and international law[73], which in turn correspond to the exercise of internal sovereignty (Jean Bodin's[74]) and external sovereignty (Emer de Vattel's[75]). Thus the traditional stance continues to hold that the Westphalian model of international relations, which is regulated by the Vattelian legal structure, involves an international realm that is distinct and separate from the internal realms[76]. Geoffrey Palmer, while arguing that the situation is changing, provides the following interesting image: "International law and municipal law have been seen as two separate circles that never intersect"[77].

In terms of judicial activities, the international / domestic dichotomy means that domestic courts and tribunals of sovereign states apply their domestic law, while the International Court of Justice and other international courts and tribunals apply international law. Put another way, the constitutional mandate of domestic courts is to interpret and apply domestic law, not international law. But this normative division does not mean that international judicial bodies cannot take into account domestic law, which is in fact an explicit source of international law under article 38(1) of the *Statute of the International Court of Justice*[78], or that domestic caselaw may not influence their decisions as a secondary source of

72 See: Stephen D. Krasner, "The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law", (2004) 25 *Michigan Journal of International Law* 1075, 1077, who wrote: "Sovereignty is now the only game in town."

73 See: Neil Walker, "Late Sovereignty in the European Union", in Neil Walker (ed.), *Sovereignty in Transition*, London, Hart Publishing, 2003, p. 3.

74 See: Stéphane Beaulac, "The Social Power of Bodin's 'Sovereignty' and International Law", (2003) 4 *Melbourne Journal of International Law* 1.

75 See: Stéphane Beaulac, "Emer de Vattel and the Externalization of Sovereignty", (2003) 5 *Journal of the History of International Law* 237.

76 See, generally: Stéphane Beaulac, *The Power of Language in the Making of International Law – The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia*, Leiden, Martinus Nijhoff, 2004.

77 Geoffrey Palmer, "Human Rights and the New Zealand Government's Treaty Obligations", (1999) 29 *Victoria University in Wellington Law Review* 27, 59.

78 *Statute of the International Court of Justice,* 26 June 1945, U.N.T.S. 961, [1945] Can. T.S. 7, art. 38(1), enunciates the sources of international law, including in sub-paragraph (c) the so-called "general principles of law recognized by civilized nations", which are drawn from the legal traditions of domestic jurisdictions.

international law or as evidence of international customs[79]. Conversely, no authority needs to be cited for the proposition that domestic judges may resort to international law when it has also become part of the law of the land[80].

Such a mutual influence, however, does not modify the basic situation that the international judiciary applies the legal norms of its realm and that national judiciaries apply the legal norms of their realms. The international reality is distinct and separate from the internal reality and, therefore, the actualization of international law through judicial decision-making is distinct and separate from the actualization of domestic law through judicial decision-making. Thus, it is still assumed in North America that it is if, and only to the extent that, national legal rules of reception allow international law to be part of domestic law – and that it has in effect become part of that domestic law, such as through implementing legislation[81] – that international norms may have an impact on the interpretation and application of domestic law by domestic courts[82]. Strictly speaking, therefore, international law *qua* international law cannot be binding on national judges[83], whose judicial authority is constitutionally entrusted by and for a sovereign state. Put another way, international

79 Sub-paragraph (d) of article 38(1) of the *Statute of the International Court of Justice* provides that judicial decisions – which was interpreted to include those of domestic courts – are a subsidiary source of international law.

80 If an authority was needed, the clearest judicial pronouncement in Canadian jurisprudence may be found in the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 22, where, in rejecting the argument that it had no jurisdiction to look at international law, the Supreme Court of Canada wrote this: "In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system". See also: Stéphane Beaulac, "On the Saying that International Law Binds Canadian Courts", (2003) 29(3) *Canadian Council on International Law Bulletin* 1.

81 On domestic legislation incorporating international law domestically, see: John Mark Keyes and Ruth Sullivan, "A Legislative Perspective on the Interaction of International and Domestic Law", in Oonagh E. Fitzgerald and al. (eds.), *The Globalized Rule of Law: Relationships Between International and Domestic Law*, Toronto, Irwin Law, 2006, p. 277.

82 See: Stéphane Beaulac, "National Application of International Law: The Statutory Interpretation Perspective", (2003) 41 *Can. Y.B. Int. L.* 225.

83 See: Louis LeBel and Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law", (2002) 16 *Supreme Court L.R. (2nd)* 23, 62.

normativity cannot apply *per se* within domestic systems because courts are concerned with and competent over national, not international law[84].

What norms from the international legal order can do, and indeed ought to do whenever appropriate, is to influence the interpretation and application of the law of the land[85]. International law should act as persuasive authority, that is as material and information that is "regarded as relevant to the decision which has to be made by the judge, but […] not binding on the judge under the hierarchical rules of the national system determining authoritative sources"[86]. Resorting in this way to international normativity falls within the hypothesis explicated above as the level of its influence on the interpretation and application of domestic law may be linked to the style of draftsmanship in the legislative rule at issue. Before illustrating this argument on the basis of recent caselaw in Canada, it is useful to briefly recall how the methodology of interpretation allows the domestic operationalisation of international normativity.

B. The Supreme Court of Canada and the use of international normativity

The structural conception of the relation between international law and domestic law in Canada is essentially dualist; indeed, the two systems are not, in any real sense, part of an integrated legal order, one that would fall within a monist logic[87]. According to the still dominant understanding of the legal world, at least in the mind of common lawyers, "different legal systems on the national and international levels interact with one another on the basis of standards internal to each legal system"[88].

84 See: Gerald Fitzmaurice, "The General Principles of International Law: Considered from the Standpoint of the Rule of Law", (1957) 92 *Hague Recueil* 1, at 70 to 80.

85 See: Stéphane Beaulac, « Arrêtons de dire que les tribunaux au Canada sont 'liés' par le droit international », (2004) 38 *R.J.T.* 359.

86 Christopher McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights", (2000) 20 *Oxford J. Legal Stud.* 499, 502 and 503.

87 See: Joseph Gabriel Starke, "Monism and Dualism in the Theory of International Law", (1936) 17 *Brit. Y.B. Int. L.* 66.

88 Mattias Kumm, "Democratic Constitutionalism Encounters International Law: Terms of Engagement", in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge, Cambridge University Press, 2007, p. 256, at p. 257.

1. International law as relevant and persuasive interpretative elements

It follows that to determine the legal status of international normativity within the domestic legal systems of a sovereign state, one must look inward at the constitutional rules of reception. In the United States, for instance, unimplemented treaties have no direct effect generally, in spite of the so-called "supremacy clause" in the American constitution[89], because of a presumption against self-executing treaties developed by caselaw[90]. In Canada, recent caselaw allows more flexibility in using international law domestically[91], but the orthodoxy remains: "International treaties and conventions are not part of Canadian law unless they have been implemented by statute."[92] With regard to customary law, legal publicists opine that no implementation is required[93]. In the latter situation, the dualist rules of reception call for direct application[94].

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89 Article VI, clause 2, of the *Constitution of the United States of America* provides that "all Treaties made, or which shall be made, under the authority of the United States" shall be part of the supreme law of the land.

90 The authority for distinguishing between self-executing and non-self-executing treaties is the case of *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). On the presumption against self-executing treaties, see: *Goldstar, S.A.* v. *United States*, 967 F.2d 965 (4th Cir. 1992); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Sei Fuji* v. *State*, 242 P.2d 617 (Cal. 1952). See also: *Restatement (Third) of the Foreign Relations Law of the United States*, § 111 (1987).

91 See: Stéphane Beaulac, "Recent Developments on the Role of International Law in Canadian Statutory Interpretation", (2004) 25 *Statute Law Rev* 19; Anne Warner La Forest, "Domestic Application of International Law in *Charter* Cases: Are We There Yet?", (2004) 37 *U.B.C. L. Rev.* 157.

92 *Baker* v. *Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, 861 [hereinafter "*Baker*"]. See also the classic statement by the Judicial Committee of the Privy Council in the *Labour Conventions* case: *Attorney General for Canada* v. *Attorney General for Ontario*, [1937] A.C. 326, 347 (*per* Lord Atkin): "Within the British Empire there is a well-established rule that 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."

93 In Canada, this issue if now finally settled, with the decision of the Supreme Court in *R.* v. *Hape*, [2007] 2 S.C.R. 292. See also, in other common law jurisdictions: Treaser Dunworth, "The Rising Tide of Customary International Law: Will New Zealand Sink or Swim?", (2004) 15 *Public Law Review* 36; Gerald L. Neuman, "Sense and Nonsense About Customary International Law: A Response to Bradley and Goldsmith", (1997) 66 *Fordham L. Rev.* 371; Louis Henkin, "International Law as Law in the United States", (1984) 82 *Mich. L. Rev.* 1555.

94 See: Stéphane Beaulac, "Customary International Law in Domestic Courts: Imbroglio, Lord Denning, *Stare Decisis*", in Christopher P. M. Waters (ed.), *British and Canadian Perspectives on International Law*, Leiden, Martinus Nijhoff, 2006, p. 379.

Concerning the role of international law in relation to the *Canadian Charter*, the 1987 decision of the Supreme Court of Canada in *Reference Re Public Service Employee Relations Act*[95] must be the starting point of any discussion[96]. In this case, Dickson C.J. declared that international obligations to which Canada is bound provide an "important indicia" to identify the objective of the provisions of the *Charter*[97]. He held that the *Charter* "should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified"[98]. Having said that, even norms that bind Canada as a question of international law do not bind this country's judiciary, Dickson C.J. noted pointedly: "I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*."[99] Both types of norm, in the words of the Chief Justice, are "a relevant and persuasive source" in the process of interpretation and application of the *Canadian Charter*[100].

2. Tempering with the dualist logic: The *Baker* decision

Clearly, in the last 25 years, the most significant development on these issues in this country is the decision of the Supreme Court of Canada in *Baker* v. *Canada (Minister of Citizenship and Immigration)*[101]. At stake was whether the order to deport a woman with Canadian-born dependent children should be judicially reviewed. She had asked for an exemption

95 *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313.

96 On both the purposive interpretation and the role of international law in regard to the *Canadian Charter*, see: Stéphane Beaulac,, *supra*, note 30.

97 *Reference Re Public Service Employee Relations Act*, *supra*, note 93, para. 59.

98 *Id.*

99 *Id.*, para. 60.

100 *Id.* On how Dickson C.J.'s opinion in this case, although not expressed on behalf of the majority of the Supreme Court, has become current practice in Canada, see: Gerard V. La Forest, "The Use of International and Foreign Material in the Supreme Court of Canada", (1988) 17 *Canadian Council on International Law – Proceedings* 230, 232; Michel Bastarache, "The Honourable G.V. La Forest's Use of Foreign Materials in the Supreme Court of Canada and His Influence on Foreign Courts", in Rebecca Johnson and John P. McEvoy (eds.), *Gérard V. La Forest at the Supreme Court of Canada 1985-1997*, Winnipeg, Canadian Legal History Project, 2000, p. 433, at p. 434. *Contra*, see: Jutta Brunnée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts", (2002) 40 *Can. Y.B. Int. L.* 3.

101 *Supra*, note 92. See also: Karen Knop, "Here and There: International Law in Domestic Courts", (2000) 32 *N.Y.U. J. Int'l L. & Pol.* 501.

based on humanitarian and compassionate considerations, under section 114(2) of the *Immigration Act*[102], which read:

> **"114.** (2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations."

In order to determine the scope of this legal norm expressed in open texture language, namely "compassionate or humanitarian considerations", the majority *per* L'Heureux-Dubé J. considered Canada's international obligations. Central to her analysis was the 1989 *Convention on the Rights of the Child*[103], and its notion of the "best interests of the child"[104], because the interests of the applicant's children to have her continue providing for them would be a humanitarian and compassionate reason for exemption.

The problem is that Canada has ratified this international treaty, but has yet to implement it within its domestic legal system. According to the dualist logic, there is no direct effect possible and courts should not resort to the international norms therein to help interpret and apply domestic legal rules like that found in section 113(2) of the *Immigration Act*. This is where L'Heureux-Dubé J. made a groundbreaking statement in the *Baker* case, as regards the international / national normative interaction:

> "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.
>
> Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[105]

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102 *Immigration Act*, R.S.C. 1985, c. I-2, now replaced by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

103 *Convention on the Rights of the Child*, 20 November 1989, entered into force 2 September 1990, 1577 U.N.T.S. 3.

104 *Id.*, art. 3.

105 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 92, para. 69-70.

Then followed a reference to *doctrine* in statutory interpretation[106], which says that international law (treaties, customs) is part of the legal context relevant to ascertain the normative content of a legislative provision. It was also mentioned that the role of international human rights in interpreting domestic legislation has been recognized in other common law countries[107].

As a result, Justice L'Heureux-Dubé for the majority of the Supreme Court of Canada did consider the values and principles underlying the international legal norm of the best interests of the child, pursuant to the *Convention of the Rights of the Child*, even though this treaty remains unimplemented in the country's domestic system. It contributed, along with other soft-law instruments – *Universal Declaration of Human Rights*[108], *Declaration of the Rights of the Child*[109] – to giving quite a large and liberal interpretation to the legal norm expressed in terms of "compassionate or humanitarian considerations", a very much open texture style of legislative language.

The reason why the *Baker* decision has been considered so important on these issues is straightforward: Justice L'Heureux-Dubé, by saying that both implemented and non implemented treaties may be utilized in interpreting domestic statutes, quite clearly opened the door wide to the use of international normativity. Be it in regard to ordinary legislation or, as we will see, constitutional documents such as the *Canadian Charter*, the position in this country is to allow international legal norms a great deal of influence on the interpretation and application of domestic law. What must now be verified is whether there is a direct connection – as I intuitively suspect – between the type of language found in a piece of legislation and the degree of persuasive authority international law (implemented treaties; unimplemented treaties; customary law) is given by the decision-maker in a case.

106 Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., Toronto, Butterworths, 1994, p. 330.

107 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 92, para. 70; caselaw was referred to, from New Zealand and from India.

108 *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. G.A.O.R., 3rd sess., suppl. nº 13, U.N. Doc. A/810 at 71 (1948).

109 *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV), U.N. G.A.O.R., 14th sess., suppl. nº 16, U.N. Doc. A/4354 at 19-20 (1959).

C. Open texture legislative language as a means to internationalisation

Recourse to international law in the interpretation of Canada's domestic law predates the *Baker* decision, of course, and it has been done by the Supreme Court of Canada in relation to different types of legislation. An early example is the 1943 case of *Re Foreign Legations*[110], where customary international law of sovereign immunity was invoked in interpreting municipal taxation legislation. Chief Justice Duff noted that, although Parliament was not bound by international law, the statutory provision was in line with it, because the "general language of the enactments imposing the taxation in question must be construed as saving to privileges of foreign states"[111]. There is a clear reference to the style of draftsmanship – what may be called open texture – in allowing the international law argument of interpretation.

More recently, the 2005 case of *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*[112] concerned the interpretation of the provisions of the Canadian *Criminal Code* on the crimes of incitement to murder, genocide and hatred, and crimes against humanity. The latter was defined as follows:

> "'crime against humanity' means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations."[113]

We must note that this provision, explicitly, incorporates domestically the applicable international legal norm. It is therefore logical that, despite the less open texture legal language used therein, the Supreme Court of

110 *Re Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 209.

111 *Id.*, 231 [emphasis added].

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

113 *Criminal Code*, R.S.C. 1985, s. 7(3.76), since repealed and replaced by Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.

Canada opined that "international law is thus called upon to play a crucial role as an aid in interpreting domestic law"[114]. The caselaw of the *ad hoc* international tribunals for Rwanda and the former Yugoslavia was even utilized to help interpret and apply the domestic criminal law provision[115].

Another recent example in criminal law may be given, where much more open language was employed in the legislative text, namely the 2004 decision in *Canadian Foundation for Children*[116]. At issue was the validity of a *Criminal Code* provision which justifies the use of reasonable force by parents and teachers for the purpose of disciplining children or pupils; specifically, the expression found in section 43 was "reasonable under the circumstances", a very open texture type of language. For the majority of the Supreme Court of Canada, McLachlin C.J. made an extensive use of international law in deciding that the said provision was not unconstitutionally vague – namely, the *Convention on the Rights of the Child*[117], the *International Covenant on Civil and Political Rights*[118], the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[119], documents by the Human Rights Committee[120] and caselaw by the European Court of Human Rights[121].

1. *Canadian Charter*, open texture and international law

Early in the short history of the *Canadian Charter* (adopted in 1982), there is a trilogy of cases that clearly illustrate the connection between the international law argument of interpretation and the legislative drafting

114 *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 112, para. 82.

115 *Id.*, para. 126.

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

117 *Supra*, note 103.

118 *International Covenant on Civil and Political Rights*, 16 December 1966, entered into force 23 March 1976 999 U.N.T.S. 171.

119 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, entered into force 3 September 1953, 213 U.N.T.S. 221.

120 *Report of the Human Rights Committee*, U.N. G.A.O.R., 50th sess., suppl. nº 40, U.N. Doc. A/50/40, vol. 1 (1995), para. 426 and 434; *Report of the Human Rights Committee*, U.N. G.A.O.R., 54th sess., suppl. nº 40, U.N. Doc. A/54/40, vol. 1 (1999), para. 358; *Report of the Human Rights Committee*, U.N. G.A.O.R., 55th sess., suppl. nº 40, U.N. Doc. A/55/40, vol. 1 (2000), para. 306 and 429.

121 *A.* v. *United Kingdom*, nº 25599/94, ECHR 1998-VI, nº 90.

style favored in its provisions. They are the Supreme Court decisions in *Re Public Service Employee Relations Act*[122] (already alluded to), *Slaight Communications Inc.* v. *Davidson*[123] and *R.* c. *Keegstra*[124]. In the latter case, Dickson C.J. for the majority, citing the other two decisions, wrote:

> "Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself […]. Moreover, international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective under s. 1."[125]

Indeed, it was in the process of interpreting the limitation clause in section 1 of the *Canadian Charter* that the Chief Justice resorted to international human rights law instruments – namely, the *International Convention on the Elimination of All Forms of Racial Discrimination*[126], the *International Covenant on Civil and Political Rights*[127] and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[128]. Although we may sometimes overlook the formulation of the *Canadian Charter* limitation clause, for the present purposes, it is very material to recall the wording of section 1:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In terms of open texture legal language, it is difficult to imagine better instances, with expressions like "reasonable limits", "prescribed by law" and "free and democratic society", all of which was indeed scrutinized, dwelled on and expended upon by the judiciary (decision-makers),

122 *Reference re Public Service Employee Relations Act*, *supra*, note 93.
123 *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038.
124 *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.
125 *Id.*, 750.
126 *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, entered into force 4 January 1969 660 U.N.T.S. 195.
127 *Supra*, note 118.
128 *Supra*, note 119.

including in light of international normativity[129], in order to interpret and apply section 1 of the *Canadian Charter*.

From this brief review of some of the Supreme Court of Canada case-law using international law, including in regard to the *Canadian Charter*, one may also notice that there exists more than one way, through the methodology of legal interpretation, to put into operation domestically international normativity. To put it simply, it may be done by means of the international law argument of contextual interpretation or it may be accomplished using the presumption of conformity with international law. Each is examined in turn, with a focus on the impact that the style of draftsmanship has on the method of interpretation through which international law is resorted to by decision-makers.

2. Open texture and the contextual international law argument[130]

In Canada, another leading expert in statutory interpretation is Ruth Sullivan[131], who took up Elmer Driedger's treatise, *Construction of Statutes*[132], and has also dwelled on what has become the unanimously accepted approach in the field[133], namely the so-called "modern principle"[134]. One of the main ideas of this contemporary approach to legislation

129 See: William A. Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law – Legal Commitment, Implementation and the Charter*, 3rd ed., Toronto, Thomson Carswell, 2007, p. 255 291, especially under the heading "International Origins of the [Section 1] Test".

130 This part draws from Stéphane Beaulac, "International Law and Statutory Interpretation: Up with Context, Down with Presumption", in O.E. Fitzgerald et al. (eds.), *supra*, note 81, p. 331.

131 See, *inter alia*: Ruth Sullivan, "The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation", in Ejan Mackaay (ed.), *Les certitudes du droit – Certainty and the Law*, Montreal, Éditions Thémis, 2004, p. 151; Ruth Sullivan, "Statutory Interpretation in a New Nutshell", (2003) 82 *Can. Bar Rev.* 51; Ruth Sullivan, "Some Implications of Plain Language Drafting", (2001) 22 *Statute Law Rev* 145; and Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada", (1998-99) 30 *Ottawa L. Rev.* 175.

132 First published in 1974: Elmer A. Driedger, *Construction of Statutes*, Toronto, Butterworths, 1974.

133 See: Stéphane Beaulac and Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization", (2006) 40 *R.J.T.* 131.

134 Generally taken from the second edition of Elmer A. Driedger, *The Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983), p. 87; the short excerpt reads as follows:

is the centrality and the breath of the concept of context; in fact, another way to call Driedger's modern principle is the "word-in-total-context" approach. In a recent edition of *The Construction of Statutes*, Sullivan explained the essential point as follows: "The meaning of a word depends on the context in which it is used. This basic principle of communication applies to all texts, including legislation."[135] With respect to international normativity, she considers it most appropriate to treat it as an element of context:

> "Under Driedger's modern principle, the words to be interpreted must be looked at in their total context. This includes not only the Act as a whole and the statute book as a whole but also the legal context, consisting of case law, common law, and *international law*."[136]

Hugh Kindred, a prominent international legal scholar in Canada, agrees: "[W]here the context of the legislation includes a treaty of another international obligation, the statute should be interpreted in light of it."[137]

The majority decision of the Supreme Court of Canada *per* L'Heureux-Dubé J. in *Baker* v. *Canada (Minister of Citizenship and Immigration)*[138] is an instance where international law was used through the contextual argument of statutory interpretation. After holding that the values underlying unimplemented treaty norms are nevertheless relevant, L'Heureux-Dubé J. quoted from Ruth Sullivan's writings, in particular on the contextual international law argument:

> "Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial

"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."

135 Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., Markham and Vancouver, Butterworths, 2002, p. 161. See also: Shalin M. Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability", (1999) 22 *Dalhousie L.J.* 126.

136 *Id.*, 262 [emphasis added].

137 Hugh M. Kindred, "Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts", in Stephen G. Coughlan and Dawn Russell (eds.), *Citizenship and Citizen Participation in the Administration of Justice*, Montreal, Éditions Thémis, 2002, p. 263, at p. 271.

138 *Supra*, note 92.

> review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 33:
>
> > The legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added (by L'Heureux-Dubé J.).]
>
> The important role of international human rights law as an aid in interpreting domestic law as also been emphasized in other common law countries."[139]

Thus the majority of the Supreme Court of Canada in *Baker* reproduced and endorsed what Ruth Sullivan wrote about international legal norms being part of the context of adoption and of application of domestic legislation and how these contextual elements should be considered relevant and persuasive by courts when appropriate.

Of course, the legal language at issue in *Baker* was very open texture indeed – "compassionate or humanitarian considerations" in section 114(2) of the *Immigration Act*[140] – making it most justifiable to resort to international normativity in a material fashion. A few years later, in 2001, there was another case at the Supreme Court of Canada where international law had a domestic impact through the methodological file of contextual interpretation, namely the case of *114957 Canada Ltée (Spraytech, Société d'arrosage)* v. *Hudson (Town)*[141]. At issue was section 410(1) of Quebec's *Cities and Towns Act*[142], an enabling statutory provision giving local governments (municipalities) the authority to adopt regulations (so-called "by-laws"), which reads:

> "**410.** The council may make by-laws:
>
> (1) to secure peace, order, good government, health and general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of Canada, or of Quebec, nor inconsistent with any special provision of this Act or of the charter."

139 *Id.*, para. 70.

140 *Immigration Act*, *supra*, note 102.

141 *114957 Canada Ltée (Spraytech, Société d'arrosage)* v. *Hudson (Town)*, [2001] 2 S.C.R. 241.

142 *Cities and Towns Act*, R.S.Q., c. C-19.

Based on this very broad and indeterminate legislative language, the respondent Town of Hudson enacted a by-law that prohibited the general use of certain pesticides on its territory. The appellant contested the validity of this by-law because, it argued, there was a conflict with federal or provincial legislation.

In the process of interpretation that concluded in favor of the legality of the delegated legislation, the Supreme Court of Canada *per* L'Heureux-Dubé J. seized the opportunity to confirm the view, expressed in *Baker*, that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review"[143], and quoted again Ruth Sullivan on the use of international law as a basic contextual argument of statutory interpretation. In fact, the statement in the *Hudson* case on relying on international normativity as context is broader than in *Baker*, as it is not limited to unimplemented treaty norms, but extends to international law in general. In *Hudson*, it was the international environment norm of the "precautionary principle" – deemed customary international law by L'Heureux-Dubé J. – which was utilized to confirm the interpretation of the statutory provision at hand. Again, it must be emphasized that the open texture of the legislative language was undoubtedly responsible for the willingness of the Court to refer to international normativity in interpreting domestic law.

Going back to the instrument of verification for my hypothesis on open texture language and internationalization, thus making the link with the *Canadian Charter of Rights and Freedoms*, the next interesting case came in 2002, with the decision in *Suresh* v. *Canada (Minister of Citizenship and Immigration)*[144]. There, the Supreme Court of Canada, in a unanimous judgment, made extensive use of international law as an element of context, the same strategy developed in *Baker*. At stake in *Suresh*[145] was a ministerial decision pursuant to section 53(1)(b) of the *Immigration Act*[146] that allowed, in exceptional situations of national security, *refoulement* to a country where the refugee faces serious risk of torture. The issue of legal

143 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 92, 70.

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

145 See also: Stéphane Beaulac, "The *Suresh* case and Unimplemented Treaty Norms", (2002) 15 *Quebec Journal of International Law* 221.

146 *Supra*, note 102.

interpretation, however, concerned the *Canadian Charter*, particularly section 7, and whether it applied here to declare constitutionally invalid the ministerial decision. It is useful to recall that the provision is expressed in highly open texture language:

> **"7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[147]

Specifically, it was in regard to the phrase "principles of fundamental justice" that the provision needed to be construed, including in light of what the Court itself referred to (under a heading) as "the international perspective"[148].

After examining whether the deportation of refugees to torture was, from the perspective of Canadian law, a violation of the principles of fundamental justice, the Court wrote:

> "However, that does not end the inquiry. The provisions of the *Immigration Act* dealing with deportation must be considered in their international context: [*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982]. Similarly, the principles of fundamental justice expressed in s. 7 of the *Charter* and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect. A complete understanding of the Act and the *Charter* requires consideration of the international perspective."[149]

Such an "international perspective" involved invoking (without deciding) the fact that the international prohibition on torture was a peremptory norm of customary law (*jus cogens*)[150], as well as considering three international conventions: the *International Covenant on Civil and Political Right*[151], the *Convention Against Torture and Other Cruel, Inhuman or*

147 [Emphasis added.]

148 *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 145, heading (ii), para. 59.

149 *Id.*, para. 59.

150 This notion is defined in article 53 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, entered into force 27 January 1980, 1155 U.N.T.S. 331, Doc. A/CONF. 39/26; reprinted in 8 I.L.M. 679 (1969). See also: Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, Helsinki, Lakimiedliiten Kustannus, 1988.

151 *Supra*, note 118.

Degrading Treatment or Punishment[152], the *Convention Relating to the Status of Refugees*[153].

Concluding this part of its reasons, the Supreme Court held that international law prohibited any deportation to torture, even if national security is involved. When interpreting in its entire context the general and vague legal language in section 7 of the *Canadian Charter*, therefore, this was viewed as the international legal norm that "best informs the content of the principles of fundamental justice"[154]. There are other statements in the decision which show that international law was indeed utilized as a contextual argument of construction[155]:

- "The Canadian and international perspectives in turn inform our constitutional norms;"[156]
- "Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests."[157]

One final feature in the *Suresh* decision indicates that international law was utilized through the file of contextual interpretation, namely the very conclusion reached in the end by the Supreme Court. It held that, under Canadian law, "in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1"[158]. Therefore, the legal norm against torture in this country was held to be different than that in the

152 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, entered into force 26 June 1987, 1465 U.N.T.S. 85, UN Doc. A/39/51, at 197 (1984), reprinted in 23 I.L.M. 1027 (1984); minor changes reprinted in 24 I.L.M. 535 (1985).

153 *Convention Relating to the Status of Refugees*, 28 July 1951, entered into force 22 April 1954, 189 U.N.T.S. 150.

154 *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 144, para. 75.

155 Ruth Sullivan also believes that the *Suresh* case considered international law as a basic contextual argument of statutory interpretation; see R. SULLIVAN, *supra*, note 135, p. 426.

156 *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 144, para. 76.

157 *Id.*

158 *Id.*, para. 78.

international legal order – less stringent, in effect[159]. It bears witness to the fact that the international law argument was given some weight (not at all determinative), as an element of contextual interpretation, and was used to help ascertain the meaning of the "principles of fundamental justice", a legal norm expressed in very open texture language, which is the kind of language typically found in the *Canadian Charter*.

3. Open texture and the presumption of conformity with international law

As an alternative to resorting to international normativity through the methodological file of contextual interpretation, courts in the common law tradition have developed a so-called "presumption of legislative intent" in favor of interpreting domestic law, in particular legislation, in conformity with the country's international obligations. This is known in the United States as the "Charming Betsy"[160] rule of interpretation, to the effect that judges ought to construe national law to be in line with international law[161]. Canada inherited this canon of interpretation from Great Britain, about which Peter Maxwell wrote the following: "[E]very statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law."[162] Lord Diplock once explicated thus:

> "There is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred."[163]

159 See: Stéphane Beaulac, « Le droit international comme élément contextuel en interprétation des lois », (2004) 6 *Can. Int. Lawyer* 1.

160 From the case *Murray* v. *The Charming Betsy*, 6 U.S. 64 (1804).

161 See, generally: Gerald L. Neuman, "International Law as a Resource in Constitutional Interpretation", (2006) 30 *Harv. J.L. & Pub. Pol'y.* 177; Curtis A. Bradley, "The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretative Role of International Law", (1998) 86 *Geo. L.J.* 479.

162 Peter Benson Maxwell, *On the Interpretation of Statutes*, London, Sweet & Maxwell, 1896, p. 173. See also: Hersch Lauterpacht, "Is International Law a Part of the Law of England?", (1930) *Transactions Grotius Society* 51.

163 *Salomon* v. *Commissioners of Customs and Excise*, [1967] 2 Q.B. 116 (C.A.).

In Canada, the presumption of conformity with international law is not limited to domestic written law and thus applies to both statutory law and to judge-made-law, in regard to both conventional international law and customary international law[164]. The interpretative rule was recently reiterated by the Supreme Court of Canada in the 1998 case of *Ordon Estate* v. *Grail*:

> "Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations."[165]

One of the main difficulties with this means by which international law may be employed in legal interpretation relates to the requirement of ambiguity. Essentially, in the process of statutory interpretation, there exists a sort of preliminary condition to the use of international law through the file of the presumption of intent. There must be a prior finding that the legislative provision at issue is ambiguous, or is otherwise problematic to construe by reason of vagueness, generality or redundancy[166], short of which the presumption of conformity with international law cannot be invoked as an argument of interpretation. Here is how Pigeon J., at the Supreme Court of Canada, highlighted this aspect of the international interpretative presumption:

> "I wish to add that, in my view, this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. It is a rule that is not often applied, because if a

164 See: Gib VAN ERT, *Using International Law in Canadian Courts*, 2nd ed., Toronto, Irwin Law, 2008, at 130 *ff.*; François LAROCQUE and Martin KREUSER, « L'incorporation de la coutume internationale en common law canadienne », (2007) 45 *Can. Y.B. Int. L.* 173.

165 *Ordon Estate* v. *Grail*, [1998] 3 S.C.R. 437. See also: *Chan* v. *Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593; *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689, as well as William A. SCHABAS, "Twenty-Five Years of Public International Law at the Supreme Court of Canada", (2000) 79 *Can. Bar Rev.* 174.

166 On the different problems found in statutes, see: Reed DICKERSON, "The Diseases of Legislative Language", (1964) 1 *Harv. J. on Legis.* 5. See also: Randal GRAHAM, *Statutory Interpretation – Theory and Practice*, Toronto, Emond Montgomery, 2001, at 119 *ff.*

> statute is unambiguous, its provisions must be followed even if they are contrary to international law."[167]

More recently, in the 2002 decision of the Supreme Court of Canada in *Schreiber* v. *Canada (Attorney General)*[168], LeBel J. referred to *Daniels* v. *White* and (literally) underlined the last sentence of this passage, on how the presumption of conformity with international law "is not often applied, because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law"[169].

In interpreting the open texture legal language typically found in provisions of the *Canadian Charter of Rights and Freedoms*, the 2007 judgement in *R.* v. *Hape*[170] saw the Supreme Court of Canada rely heavily on international law by means of the presumption of conformity. At issue in this case was whether or not an investigation conducted abroad with the involvement of Canadian police was subject to Canadian law or, more broadly, in what circumstances the *Canadian Charter* could have an extra-territorial application and guarantee procedural rights to a person accused of a criminal offence. In terms of interpretation, the debate revolved around the meta-provision of this constitutional instrument, namely section 32, which provides for the application of the *Charter*:

> "32. (1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect or all matters within the authority of Parliament, including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

Writing the majority opinion of the Court, LeBel J. considered the vocabulary used in the provision – not particularly open texture, given the explicit references to different public bodies – and then noted the

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167 *Daniels* v. *White and The Queen*, [1968] S.C.R. 517, 541.

168 *Schreiber* v. *Canada (Attorney General)*, [2002] 3 S.C.R. 269 [hereinafter "*Schreiber*"].

169 Quote from *Daniels* v. *White and The Queen*, *supra*, note 168, found in *Schreiber*, *supra*, 167, para. 50; sentence underlined by LeBel J.

170 *R.* v. *Hape*, *supra*, note 93. See also: France Houle and Noura Karazivan, « Les rapports de relevance juridique entre les ordres législatifs canadien et international », (2008) 1 *Revue québécoise de droit comparé* 1.

following: "Section 32 does not expressly impose any territorial limits on the application of the *Charter*."[171]

The fact that this meta-provision said nothing explicit about the jurisdictional scope of the *Charter* (and the non exhaustive nature given to its express text) called for an extensive participation of the decision-maker in the realization and actualization of the legal rules of *Charter* application, one that takes into account what international law says about issues of state jurisdiction. Justice LeBel explained the situation as follows:

> "By virtue of state sovereignty, it was open to the framers to establish the jurisdictional scope of the *Charter*. Had they done so, the courts of this country would have had to give effect to a clear expression of that scope. However, the framers chose to make no such statement. Consequently, as with the substantive provisions of the *Charter*, it falls upon the courts to interpret the jurisdictional reach and limits of the *Charter*. Where the question of application involves issues of extraterritoriality, and thereby necessarily implicates interstate relations, the tools that assist in the interpretation exercise include Canada's obligations under international law and the principle of the comity of nations."[172]

Accordingly, there was considerable reliance on the international law rules of state jurisdiction in the judgment[173], endorsing the distinction between the different types of jurisdiction (prescriptive, executive, adjudicative) and how consent by the foreign country is at the centre of the possible extra-territorial application of Canadian law.

In order to justify such substantive recourse to international normativity, LeBel J. spent a good part of his reasons for judgment to dwell upon the logics of interaction between legal spheres. For one, he finally confirmed that international customary law has direct effect domestically, an issue left lingering for some time in Canada[174]. For our purposes, most interesting are LeBel J.'s remarks under the heading "Conformity with international law as an interpretive principle of domestic law." He concluded the section thus: "In interpreting the scope of application of the

171 *Id.*, para. 33.

172 *Id.*

173 See, generally: John H. Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law", (2007) 45 *Can. Y.B. Int. L.* 55.

174 *R.* v. *Hape*, *supra*, note 93, para. 35-39. See also: Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law", (2001) 50 *U.N.B. L.J.* 11.

Charter, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction."[175] Therefore, in the interpretation of the meta-provision of section 32, to determine the exceptional circumstances where the *Canadian Charter* applies extra-territorially – while keeping it within the language found in the text – recourse should be had to international law, in particular the customary legal rules of territorial sovereignty and non-intervention, as well as the derivative concept known as the comity of nations[176].

These normative elements from the international legal order were utilized by LeBel J. for the majority of the Supreme Court of Canada in order to shed light onto the debate about the extra-territorial application of the *Charter*. The way in which international law was operationalised in *Hape* was not by means of the contextual argument of interpretation, but rather through the presumption of legislative intent. The majority of the Court held:

> "Simply put, Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent. This conclusion, which is consistent with the principles of international law, is also dictated by the words of the *Charter* itself. The *Charter*'s territorial limitations are provided for in s. 32, which states that the *Charter* applies only to matters that are within the authority of Parliament or the provincial legislatures. In the absence of consent, Canada cannot exercise its enforcement jurisdiction over a matter situated outside Canadian territory."[177]

In the end, therefore, we see that LeBel J. did indeed link the use of international law with the legal language found in section 32 of the *Charter* which, even though the vocabulary therein is not most open texture, allowed the decision-maker latitude to participate in the realization and actualization of this meta-provision, including an extensive recourse to international normativity through the presumption of legislative intent. It is noteworthy that, again, the nature of the language found in the written

175 *Id.*, para. 56 [emphasis added].

176 See, generally: Stephen G. Coughlan, Robert J. Currie, Hugh M. Kindred and Teresa Scassa, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization", (2007) 6 *Canadian Journal of Law and Technology* 29.

177 *R.* v. *Hape*, *supra*, note 93, para. 69 [emphasis added].

law was directly connected to the degree of involvement of international law.

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Be it through the international law argument of contextual interpretation or by means of the presumption of conformity with international law, the Canadian experience in recent years is resolutely in favor of the internationalization of judicial interpretation. The hypothesis set out at the beginning of the discussion was that the type of the legal language found in written law – itself dictated by the nature of the law provided for in the text – is responsible for the extent to which decision-makers participate (greater or lesser) in the realization and actualization of legal norms. The *Canadian Charter of Rights and Freedoms*, though not the only instance of open texture legal language in Canada, was utilized as a forceful illustration of the direct connection between the judicial involvement in breathing life into legal norms, in particular through recourse to international law, and the vague and general vocabulary employed in a normative document.

In an Anglo-Saxon common law system such as in Canada, the debate is not so much about the measures by which judicial activism may be tamed or controlled. As regards written law, traditionally approached restrictively, the issue has rather been how to prompt decision-makers to appreciate their role more in terms of collaborative participant in the pursuit of societal goals. The area of human rights protection was no doubt most apposite to a methodological paradigm shift, in favor of a substantive engagement to the realization and actualization of the law. In an era of globalization, as well as inter/supra/transnational governance, favoring open texture legal language to encourage and facilitate recourse to international normativity in the process of legal interpretation at the domestic level certainly constitutes a most effective strategy in promoting (not thwarting) rule of law values, both in the national and the international legal sphere[178].

178 On these theoretical issues, see: Stéphane Beaulac, "The Rule of Law in International Law Today", in Gianluigi Palombella and Neil Walker (eds.), *Relocating the Rule of Law*, Oxford, Hart Publishing, 2009, p. 197.