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CHAPTER 41

# CONSTITUTIONAL INTERPRETATION

## *On Issues of Ontology and of Interlegality*

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FROM a theoretical viewpoint, two contemporary dimensions of constitutional interpretation are of particular interest in Canada. First is a purely ontological issue: whether or not, by its nature, the interpretation of a constitution is fundamentally different than legal interpretation or, more specifically, statutory interpretation. The second is the problematics of interlegality, or the domestic use of international law, which has caused much ink to flow as of late, here and elsewhere in liberal democracies.

## 1. ONTOLOGY: NO EXCEPTIONALISM IN CANADA'S CONSTITUTIONAL INTERPRETATION

The specificity of constitutional interpretation, compared to the methodology of legal interpretation in general, has long been stated and affirmed in legal circles, although few scholars have actually conducted a demonstration to show that the claim is actually accurate.[1] For instance in *Re Residential Tenancies*,[2] Justice Dickson (as he then was) wrote:

> A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose

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[1] See: Alain-François Bisson, "La Charte québécoise des droits et libertés de la personne et le dogme de l'interprétation spécifique des textes constitutionnels" (1986) 17 *RD U Sherbrooke* 19.

[2] *Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714.

> of the Constitution, viewed as a "living tree", in the expressive words of Lord Sankey in *Edwards and Others v Attorney-General for Canada and Others*, [1930] A.C. 124.[3]

A few years later, the Supreme Court reiterated in *Re Upper Churchill*[4]—in the same context involving the use of parliamentary debates—that constitutional interpretation is fundamentally different from statutory interpretation. Incidentally, it is noteworthy that, since the yearly 1980s, the "exclusionary rule"[5] regarding parliamentary debates has been set aside across the board, that is to say, not only in constitutional interpretation, but also for the construction of ordinary statutes. This suggests that insisting on the specific context of constitutional interpretation to relax the exclusionary rule for parliamentary debates in *Re Residential Tenancies* and in *Re Upper Churchill* was perhaps unnecessary. But the damage was done, in a sense: the splitting of interpretative methodology became the dominant narrative.

With respect to the construction of the *Canadian Charter of Rights and Freedoms*, there seems to be another underlying reason that the Supreme Court of Canada spoke in terms of exceptionalism in constitutional interpretation, namely the disappointing experience with the 1960 *Canadian Bill of Rights*,[6] which the judiciary reduced to an instrument of little impact. There were indeed some authors in legal writings who predicted the same inglorious fate for the *Charter*.[7] Surely it was in the back of the justices' mind, if not at the forefront, when they considered the first few cases of *Charter* interpretation. For instance, in the 1985 case of *Singh*,[8] Justice Wilson wrote:

> It seems to me rather that the recent adoption of the *Charter* by Parliament and nine of the ten provinces as part of the Canadian Constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be re-examined.[9]

The same year in *Therens*,[10] Justice Le Dain emphasised that, when interpreting the *Charter*, unlike the *Canadian Bill of Rights*, there is a "clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament".[11]

[3] *Ibid*, 723.

[4] *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297, 318.

[5] An ancient and firmly established interpretative tool in the common law tradition, the exclusionary rule prohibited the use of parliamentary debates and other *travaux préparatoires* in ascertaining legislative intent. See Stéphane Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998) 43 *McGill LJ* 287.

[6] SC 1960, c 60, reprinted in RSC 1985, App III.

[7] See, for example, Berend Hovius and Robert Martin, "The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada," 61 *Canadian Bar Rev* 354.

[8] *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177.

[9] *Ibid*, 209.

[10] *R v Therens*, [1985] 1 SCR 613.

[11] *Ibid*, 639.

But this begs the question: Does the constitutional nature of the instruments to be interpreted, such as the *Canadian Charter*, warrant a completely different and novel methodology when it comes to ascertaining the normative content of a provision? The first authoritative judicial statement to support this proposition came in the 1984 case of *Skapinker*.[12] At the outset, Justice Estey described the interpretation and application of the *Charter* as a "new task";[13] he later highlighted that, in deciding the role of headings in interpretation, neither the federal nor the provincial interpretation Acts applies to the *Charter*.[14] In the following, Estey J explained why a different methodology is needed for constitutional instruments:

> The *Charter* comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it "is the supreme law of Canada": *Constitution Act, 1982*, s. 52. It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The *Charter* is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves.[15]

Later that year, while emphasising the need to interpret the constitution in a dynamic and evolving fashion, Chief Justice Dickson was quite categorical in *Hunter v Southam*[16] regarding exceptionalism in constitutional interpretation: "The task of expounding a constitution is crucially different from that of construing a statute".[17] The same reasons are identified by Dickson CJ: namely (1) a constitution is drafted to be perennial; (2) its functions relate to government powers and, with a *Charter*, to protections of human rights; (3) such an entrenched document is complicated to change; and (4) consequently, it must, in the Chief Justice's words, "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers".[18]

Just as he had done three years earlier in *Re Residential Tenancies*, then for the *Constitutional Act, 1867*, Dickson CJ invoked in *Hunter v Southam* the metaphor of the "living tree", from the classic speech of Viscount Sankey in the 1930 Judicial Council case of *Edwards v Canada*.[19] The reason is clear: to historically root the need to have a broad perspective in approaching constitutional instruments, which translates into

[12] *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357.
[13] *Ibid*, 365.
[14] *Ibid*, 370.
[15] *Ibid*, 366–367.
[16] *Hunter v Southam Inc*, [1984] 2 SCR 145.
[17] *Ibid*, 155.
[18] *Ibid*.
[19] *Edwards v Attorney-General for Canada*, [1930] AC 124, 136.

exceptionalism in the constitutional interpretation of the *Charter*.[20] What is this methodology of a particular kind? Not only is this methodology not new, dating back to the 1930s, not only does it exist also in Great Britain and the United States,[21] but even the name given to it has nothing original: *purposive interpretation* or "*interpretation téléologique*" in French.[22] Déjà vu, all over again (perhaps?).

It was a year later, in *Big M Drug Mart*,[23] that Chief Justice Dickson fleshed out what "purposive interpretation" means in constitutional interpretation. Referring to both *Hunter v Southam* and *Skapinker*, the following became solemn instructions for the construction of the *Charter*:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.* [. . .] this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific rights or freedoms, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker* [. . .] illustrates, be placed in its proper linguistic, philosophic and historical contexts.[24]

I shall come back to these two paragraphs, specifically, to bring to light each of the points made in regard to *constitutional* interpretation, with a view to comparing these elements with the methodology of *statutory* interpretation.

[20] See Dale Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations", in WS Tarnopolsky and G-A Beaudoin (eds), *The Canadian Charter of Rights and Freedoms—Commentary* (Carswell, 1982), 25, 39.

[21] In *Hunter v Southam*, above (n 16), 156, indeed Dickson J refers to the British case of *Minister of Home Affairs v Fisher*, [1980] AC 319 (HL) and to the American old case of *M'Culloch v Maryland*, 17 U.S. (4 Wheat) 316 (1819).

[22] See, in general, Luc B Tremblay, "L'interprétation téléologique des droits constitutionnels" (1995) 29 *Revue juridique Thémis* 460, 462.

[23] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295.

[24] *Ibid*, 344 [emphasis in original].

It needs to be emphasized that these interpretative directives, with no interruption or exception, have been followed in *Canadian Charter* case law, just as the general idea of exceptionalism in constitutional interpretation, as well as the metaphor of the "living tree", continue as an unchallenged mantra (even an incantation) every time the Supreme Court of Canada addresses issues of construction in constitutional law. Along with some important cases from the 1980s and 1990s—*Motor Vehicle Act*,[25] *Saskatchewan Electoral Boundaries*[26]—recent judgments such as *Doucet-Boudreau*[27] (2003) and *Reference re Same-Sex Marriage*[28] (2004), as well as the *Nadon case*[29] (2014) and the *Caron case*[30] (2015), confirm a sort of *orthodoxy* in constitutional interpretation concerning the purposive construction of the *Charter*.

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The hypothesis at the centre of this section of the chapter is that, in spite of the claims of ontological exceptionalism, there is nothing inherently and fundamentally different about constitutional interpretation in Canada—not anymore, in any event—when compared with the general methodology of statutory interpretation. Previous work I conducted—including with Professor Emeritus Pierre-André-Côté[31]—shows that the "modern principle" in statutory interpretation has created a convergence of approaches, where the construction of regular legislation and of constitutional instruments such as the *Canadian Charter* follows one and the same logical reasoning or analytical scheme. Put another way, empirically, one cannot observe any real or essential distinctions in the methodology applicable to constitutional interpretation and statutory interpretation; the difference that remains is one of weighting (*pondération*) of the different interpretative elements.

The first element to support this argument is the timing of the Supreme Court of Canada's call for purposive interpretation for the *Charter*—in 1984–1985 as noted above—and the implementation of Professor Elmer Driedger's "modern principle" in regard to statutory interpretation. Let us recall the famous quote from the second edition of Driedger's *Construction of Statutes*:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.[32]

[25] *Re British Columbia Motor Vehicle Act*, [1985] 2 SCR 486.
[26] *Re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158.
[27] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3, [24].
[28] *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, [23].
[29] *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 SCR 433, [19].
[30] *Caron v Albert*, [2015] 3 SCR 511, [35] and [218].
[31] See Stéphane Beaulac and Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 *Revue juridique Thémis* 131.
[32] Elmer A Driedger, *The Construction of Statutes*, 2nd ed. (Butterworths, 1983), 87.

The official endorsement of the "modern principle" in Canadian case law has a date: 1984, in *Stubart v The Queen*,[33] a case in tax law. Since then, it has become the most popular legal commentator's citation in the Supreme Court of Canada's history,[34] with major reiterations of the principle in *Rizzo Shoes*[35] and *Bell ExpressVu*.[36] As we also highlighted: "Driedger's quote is used in all areas of the law and, in fact, in all facets of legal interpretation: from tax law to human rights law, from criminal law to family law, as well as to qualify legislation in constitutional challenges [. . .]".[37]

The Supreme Court of Canada, be it by means of a direct quote, a reference to the passage, or an indirect endorsement via previous cases, has referred to Driedger's modern principle as the "prevailing and preferred" or the "traditional and correct" approach, and as a "definitive formulation", which "best captures or encapsulates" their interpretative approach, even the "starting point" for addressing issues of interpretation.[38] The latter point was again made, very recently, in the 2014 case of *Conception*,[39] involving the interpretation of the Canadian *Criminal Code*. In fact, Driedger's quote, often in tandem with the cases of *Rizzo Shoes* and/or *Bell ExpressVu*, was, in 2015 alone, again used numerous times, five times to be precise: *Loyola High School*[40] (education law), *ATCO Gas and Pipelines*[41] (regulatory law), *Wilson v British Columbia*[42] (administrative law), *Canadian Broadcasting*[43] (copyright law), and *CIBC v Green*[44] (securities law). It is also worth noting that in the very recent case of *World Bank Group v. Wallace*,[45] handed down 20 April 2016, the Supreme Court of Canada associated the "modern approach to statutory interpretation", along with the *Rizzo Shoes* decision, with the methodology of treaty interpretation under sections 31 and 32 of the *Vienna Convention on the Law of Treaties*, for the purpose of interpreting implementing legislation.[46]

In sum, since 1984, the consistent message from the Supreme Court of Canada, which has been heard loud and clear by lower courts, is that the methodology involved in the construction of statutes has changed substantially.[47] The old Anglo-Saxon approach of

[33] *Stubart Investments Ltd v The Queen*, [1984] 1 SCR 417.
[34] Stéphane Beaulac and Pierre-André Côté, above (n 31), 135.
[35] *Rizzo & Rizzo Shoes Ltds. (Re)*, [1998] 1 SCR 27.
[36] *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559.
[37] Stéphane Beaulac and Pierre-André Côté, above (n 31), 137 [footnotes omitted].
[38] *Ibid*, 139 [footnotes omitted].
[39] *R v Conception*, [2014] 3 R.C.S. 82.
[40] *Loyola High School v Quebec (Attorney General)*, [2015] 1 SCR 613.
[41] *ATCO Gas and Pipelines Ltds v Alberta (Utilities Commission)*, [2015] 3 SCR 219.
[42] *Wilson v British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 SCR 300.
[43] *Canadian Broadcasting Corp. v SODRAC 2003 Inc*, [2015] 3 SCR 615.
[44] *Canadian Imperial Bank of Commerce v Green*, [2015] 3 SCR 801.
[45] *World Bank Group v. Wallace*, 2016 SCC 15.
[46] *Ibid*, [47].
[47] See Louis LeBel, "La méthode d'interprétation moderne: le juge devant lui-même et en lui-même," in S Beaulac and M Devinat (eds), *Interpretatio non cessat—Essays in honour of Pierre-André Côté* (Éditions Yvons Blais, 2011), 103.

strict and restrictive interpretation of legislation,[48] articulated around the so-called literal rule (or plain meaning rule)—often put in terms of interpretation only if the statute is ambiguous or obscure—is no longer acceptable in Canada and beyond.[49] The negative prejudice vis-à-vis statutory law, when it was considered that "Parliament changes the law for the worse",[50] as suggested by Sir Frederick Pollock in the nineteenth century, or that legislation is "an alien intruder in the house of the common law",[51] as once quipped by Harland Stone in the early twentieth century, is now a thing of the past in the common law world. To give but one example from abroad, witness the position expressed by Lord Griffiths in the famous British case *Pepper v Hart*: "The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation [. . .]".[52]

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The main point here is that the general methodology of statutory interpretation, infused with Driedger's modern principle, corresponds with the approach favoured for constitutional interpretation, including for the *Canadian Charter*. The convergence between the two can be observed both in terms of the spirit of the method and the very language used to describe the interpretative directives.

First, as regards the spirit behind the methodology of construction, the underlying message is the same for ordinary statutes and for constitutional instruments: the judge in a case must ascertain the intention of the legislative authority based on the language used in the provisions, but always considered in context and in harmony with other relevant statutes, and most importantly in light of the purpose that the provision and the statute as a whole want to accomplish The strategy behind such an approach is twofold: (1) out goes the preliminary condition of ambiguity or obscurity; (2) in comes, always, the full arsenal of interpretative tools for the judge to work with, in order to realise the actual legislative intent. This is encapsulated in section 12 of the federal *Interpretation Act*:[53] "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". It took a long while, but the full strength of this commandment from the *Interpretation Act*—with equivalents in provincial interpretation acts[54]—was embraced by courts, along with Driedger's modern principle.

[48] See, in general, Roderick Munday, "The Common Lawyer's Philosophy of Legislation" (1983) 14 *Rechtstheorie* 191.

[49] See, in general, Stéphane Beaulac and Frédéric Bérard, *Précis d'interprétation legislative*, 2nd ed. (LexisNexis, 2014), 1.

[50] Frederick Pollock, *Essays in Jurisprudence and Ethics* (Macmillan, 1882), 85.

[51] Harlan F Stone, "The Common Law in the United States" (1936) 50 *Harvard L Rev* 4, 15.

[52] *Pepper v Hart*, [1993] AC 593 (HL), 617. See also Francis AR Bennion, *Statutory Interpretation—A Code*, 4th ed (Butterworths, 2002), 500.

[53] RSC 1985, c I-21.

[54] See, for instance, s 41 of the Quebec's *Interpretation Act*, RSQ, c I-16, and s 10 of the Ontario's *Interpretation Act*, RSO 1990, c I.11.

A forceful example comes from the 1993 case of *Hasselwander*[55] at the Supreme Court of Canada, where the majority resorted to section 12 of the *Interpretation Act* to assist in interpreting a provision of the *Criminal Code*, legislation which was traditionally seen as requiring a strict and restrictive construction. However, Justice Cory explained: "The apparent conflict between a strict construction of a penal statute and the remedial interpretation required by section 12 of the *Interpretation Act* was resolved by according the rule of strict construction of penal statutes a subsidiary role."[56] As a consequence, the pragmatic argument involving a presumption of legislative intention favoring a strict and restrictive construction of criminal law provisions comes into play "only when attempts at the neutral interpretation suggested by section 12 of the *Interpretation Act* still leave reasonable doubt as to the meaning or scope of the text of the statute."[57] Similarly in 1984, while endorsing in general terms Driedger's modern principle, the *Stubart case*[58] had rejected a priori strict interpretation in tax law, an area of statutory law that used to epitomise strict and restrictive construction.

These decisions, as I have argued elsewhere,[59] explicitly confirm how the literal rule (or plain meaning rule) is no longer a valid approach in Canada. With regard to the *Canadian Charter*, one can sense the same spirit behind these interpretative directives—informed by both Driedger's modern principle and section 12 of the *Interpretation Act*—namely the rationale which similarly animates the purposive approach in constitutional interpretation, favouring a large and liberal, as well as dynamic, interpretation.[60]

In fact, this common interpretive approach to ordinary statutes and constitutional instruments was highlighted by the Supreme Court of Canada in a few cases. In *Blais*,[61] for example, at issue was a provision of the Manitoba *Natural Resources Transfer Agreement*, incorporated as Schedule 1 to the *Constitution Act, 1930*[62] and thus a constitutional document; specifically, whether the word "Indians" in paragraph 13 of the Agreement included Métis. Interestingly, the Court wrote: "The starting point in this endeavour is that a statute—and this includes statutes of constitutional force—must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve: see E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87".[63] Similarly, in *Lavigne v Canada*,[64] Justice Gonthier for the Court had to consider so-called "quasi-constitutional" legislation—namely the

[55] *R v Hasselwander*, [1993] 2 SCR 398.

[56] *Ibid*, [29].

[57] *Ibid*, [30].

[58] Above (n 33).

[59] See Stéphane Beaulac, "Les dommages collatéraux de la Charte canadienne en interprétation législative" (2007) 48 *Cahiers de droit* 751.

[60] See A Wayne Mackay, "Interpreting the Charter of Rights: Law, Politics and Poetry", in G-A 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), 347.

[61] *R v Blais*, [2003] 2 SCR 236.

[62] Reprinted in RSC 1985, App II, No. 26.

[63] *R v Blais*, above, (n 61), [16].

[64] *Lavigne v Canada (Commissioner of Official Languages)*, [2002] 2 SCR 773.

*Official Languages Act*[65] and the *Privacy Act*.[66] According to Gonthier J, "that status does not operate to alter the traditional approach to the interpretation of legislation, defined by E.A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87". Recently, in the 2015 *Caron case*,[67] under the heading "Guiding Principles of Interpretation" and after referring to the relevant case law, including the *Blais case*,[68] the majority *per* Justices Cromwell and Karakatsanis summed up the methodology of constitutional construction by referring to "the ordinary meaning of the language used in each document, the historical context, and the philosophy or objectives lying behind the words and guarantees,"[69] essentially paraphrasing Driedger's modern principle. This was followed by a qualification, also applicable across the board in the methodology of legal interpretation: "The Court must generously interpret constitutional linguistic rights, not create them."[70]

In terms of the spirit, but also in the very wording used by the judiciary, we can see an obvious parallel between the directives in constitutional interpretation, especially with regard to the *Charter*, and the general approach in the construction of regular statutes. For this demonstration, let us go back to the (long) excerpt from *Big M Drug Mart*,[71] reproduced above, summarizing the method of constitutional interpretation of the *Charter*, and compare it with the formulation found in Driedger's modern principle with respect to legislative interpretation. The first thing to note is that the idea of *purpose* is central, hence the name given to the method in *Charter* interpretation. Chief Justice Dickson even underlined the word "purpose" in the first paragraph of the quote: "The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; [. . .]".[72] The same general idea of purpose is also at the heart of Driedger's modern principle, endorsed by courts, and embodied in section 12 of the Federal *Interpretation Act*,[73] and its provincial equivalents.

But there is much more to say about purpose. In *Big M Drug Mart*, Chief Justice Dickson distinguished two types of purpose, one specific to the *Charter* provision at issue, and the other general to the entire *Charter*: "The purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself".[74] This dual use of purpose is very common in statutory interpretation. Pierre-André Côté (with S Beaulac and M Devinat) summarizes the two forms of what is called teleological interpretation as follows: "[S]ometimes, the objectives of the specific provision being considered are invoked, and sometimes those of the statute as a

[65] RSC 1985, c 31 (4th Supp).
[66] RSC 1985, c P-21.
[67] Above (n 30).
[68] Above (n 61).
[69] *Caron v Alberta*, above (n 30), [38].
[70] *Ibid*
[71] Above (n 23).
[72] *Ibid*, 344 [emphasis in original].
[73] Above (n 53).
[74] *Big M Drug Mart*, above (n 23), 344.

whole."[75] The case of *Abrahams v Canada*[76] is a classic illustration of how legislative purpose can be considered in relation to the specific provision at issue and/or in relation with the act as a whole. In *Abrahams*, Justice Wilson for the Court was not only interested in the purpose of fraud prevention in the provision of the employment insurance legislation, but also in the overall purpose of the Act, namely, to provide benefits to entitled workers. It is thus apparent that Dickson CJ's instructions in *Big M Drug Mart* concerning the dual role of purpose in *Charter* interpretation, far from unique, are found on a regular basis in cases involving the interpretation or ordinary statutes.[77]

Similarly, Chief Justice Dickson's discussion of the role of the wording employed by the constituting authority in *Charter* provisions, as accurate as it may be, says nothing new in terms of interpretative methodology. The relevant passage in *Big M Drug Mart* speaks of "the language chosen to articulate the specific rights or freedoms" and, later in the same paragraph, after referring to the *Skapinker case*,[78] of the "proper linguistic context".[79] In general statutory interpretation, of course, the letter of the law (the text) is the crucial element with which any process of ascertaining legislative intent begins. With the rejection of the plain meaning (or literal) rule and the acceptance of the Driedger's modern principle in statutory interpretation, the textual interpretative moment is not the "whole story"—that is, one that ends the process of interpretation because the provision is allegedly clear and unambiguous. Instead, it is the "beginning of the story", namely, the first element that the judge considers to identify the intention of Parliament.[80] A recent illustration comes from the constitutional case of *Caron case*,[81] where the majority of six justices started off interpretation with the wording employed by the constituting authority and gave it high importance in determining the meaning of the provision.

Recalling the interpretative text-context-object trilogy,[82] as captured in Driedger's modern principle, there remains contextual interpretation, or what is also referred to as the systematic and logical method of construction.[83] Here again, the directive is echoed by Chief Justice Dickson in *Big M Drug Mart*, when, after referring to the historical origins of the concepts enshrined in the *Charter*, he emphasizes the "meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the

[75] Pierre-André Côté (coll Stéphane Beaulac and Mathieu Devinat), *The Interpretation of Legislation in Canada*, 4th ed (Carswell, 2011), 415.

[76] *Abrahams v Attorney General of Canada*, [1983] 1 SCR 2.

[77] See Stéphane Beaulac, "L'interprétation de la Charte: reconsidération de l'approche téléologique et réévaluation du rôle du droit international", in G.-A. Beaudoin and E. Mendes, (eds), *Canadian Charter of Rights and Freedoms*, 4th ed (LexisNexis Butterworths, 2005), 27.

[78] Above (n 12).

[79] *Big M Drug Mart*, above (n 23), 344.

[80] See Stéphane Beaulac, *Handbook on Statutory Interpretation: General Methodology, Canadian Charter and International Law* (LexisNexis, 2008), 51.

[81] *Caron v Alberta*, above (n 30).

[82] This is another expression of my own making in statutory interpretation: see Stéphane Beaulac, above (n 80), 49.

[83] See Pierre-André Côté (coll Stéphane Beaulac and Mathieu Devinat), above (n 77), 325 *ff*.

*Charter*".[84] Put another way, a right or freedom at issue must not be construed in isolation, but rather in the normative context of the other provisions, and the *Charter* as a whole. Pierre-André Côté (with S Beaulac and M Devinat)[85] and Ruth Sullivan[86] (who took up Driedger's work) divide up context into several categories: immediate context, comprised of all the words in the actual provision; the wider context of the whole Act (other provisions, the components such as headings and preambles, as well as empowered regulations); related legislation or statutes *in pari materia* and other external context such as judge-made-law (or common law), historical and philosophical context, and international law.

In sum, Dickson CJ in *Big M Drug Mart*, just like the Supreme Court of Canada in all cases of constitutional interpretation, resorts to the three pillars of construction: text, context, and object. There is nothing novel here, just as Driedger did not re-invent the wheel with the modern principle of interpretation, which in fact was based on the traditional Liberal Rule,[87] Golden Rule,[88] and Mischief Rule.[89] Though the restrictive flavor of these rules has disappeared, their essence remains.[90] Driedger's famous principle, found in chapter 4 of his book,[91] was in fact a recapitulation of the three traditional English "rules" of statutory interpretation.[92] Recall his instructions that a judge should resort to the "grammatical and ordinary sense" of the words in an Act (text), "read in their entire context" (context) and considering them "harmoniously with the scheme of the Act" (context), and in light of the "object of the Act and the intention of Parliament" (object or purpose).

Thus the novelty with Driedger's modern principle is not with regard to the use of text-context-object in legal interpretation. It lies instead in the fact that all three facets are always relevant and ought to be, at a minimum, considered by the decision-maker. In turn, this implies that there is no such thing as a preliminary condition of ambiguity or obscurity, as the literal rule (or plain meaning rule) used to suggest, before resorting to these interpretative tools in ascertaining legislative intent. Then it becomes a matter of weighting the different elements of construction in the particular case at hand. The same novelty was said to flow from Justice Dickson's directives for *Charter* interpretation in *Big M Drug Mart*, also with a view to avoiding strict and restrictive construction in human rights law, an approach set aside in constitutional interpretation since

[84] *Big M Drug Mart*, above (n 23), 344.

[85] Pierre-André Côté (coll Stéphane Beaulac and Mathieu Devinat), above (n 77).

[86] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Butterworths, 2002), as well as the following editions.

[87] See the classic British cases: *Vacher and Sons Ltd v London Society of Compositors*, [1913] AC 107; *Hill v East and West India Dock Co.* (1844), 9 AC 448, and *Sussex Peerage* (1844), 8 ER 1034.

[88] See the classic British cases: *River Wear Commissioners v Adamson*, [1877] 2 AC 743, and *Grey v Pearson* (1857), 10 ER 1216.

[89] See the famous British decision in the *Heydon's case* (1584), 76 ER 637.

[90] See John M Kernochan, "Statutory Interpretation: An Outline of Methods" (1976) *Dalhousie LJ* 333.

[91] Elmer A Driedger, above (n 32), 81 *ff.*

[92] Stéphane Beaulac and Pierre-André Côté, above (n 31), 141–142.

the "living tree" in the 1930 *Edwards case*,[93] though it had been highly problematic in the 1960s and 1970s with regard to the *Canadian Bill of Rights*.[94]

In any event, the main point in this section of the chapter is that, because of the general endorsement of Driedger's modern principle by the Court, what has happened in the last 30 years is a convergence of methodology. The same elements of text-context-object are to be considered in all instances, be it to interpret a constitutional instrument such as the *Canadian Charter* or to ascertain legislative intent in an ordinary statute. Interestingly, Sidney Peck highlighted this commonality as early as 1987: "These factors [in *Charter* construction]—purpose, language, history, and context—are central to the well-established 'rules' of statutory construction".[95] To be sure, the relevant interpretative elements may be weighted differently in constitutional and statutory interpretation, but the nature of both methodologies is one and the same. "*Blanc bonnet, bonnet blanc*".

## 2. Interlegality: The Enduring Normative Divide of the Westphalian Paradigm

In addition to the convergence of interpretative methodology, interlegality, or the domestic use of international law by Canadian courts, has also become a distinctive trait of contemporary constitutional construction. Here again, recent developments in judicial practice have taken place simultaneously in regard to the interpretation of the Constitution and of ordinary statutes. The following discussion revisits the international theory behind the problematics of interlegality.

Although there were times, within international circles, when it was fashionable to speak of national sovereignty as a dying metaphor,[96] recent scholarship acknowledges the enduring role of this *idée-force* which, in its international dimensions,[97] was codified in Article 2, paragraph 1 of the *Charter of the United Nation* as the principle of "sovereign equality" of states. Thus in Canada, as in most common law jurisdictions, the matrix within which state affairs take place and according to which international law is indeed understood continues to be based on the so-called *Westphalian model* of international

[93] Above (n 19).

[94] Above (n 6).

[95] Sidney R Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms" (1987) 25 *Osgoode Hall LJ* 1, 13.

[96] See Stephen J Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 *Canadian Bar Rev* 534, 540. This was, of course, reminiscent of the empty claims of the "end of history", associated to Francis Fukuyama, *The End of History and the Last Man* (Free Press, 1992).

[97] See, for instance, Stephen D Krasner, "The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law" (2004) 25 *Michigan J Int'l L* 1075, 1077.

relations.[98] The traditional stance has constantly held that, following the paradigm of Westphalia, governed by the Vattelian legal structure—from Emer de Vattel's work *Droit des Gens*[99]—the international legal plane is distinct and separate from the internal legal realms. Janne Nijman and André Nollkaemper, although attempting to justify a different perspective, address the problematics of interlegality in terms of a "divide" between national law and international law.[100] Similarly, though suggesting the situation was perhaps changing, Geoffrey Palmer used this image: "[I]nternational law and municipal law have been seen as two separate circles that never intersect".[101] In Canada, John Currie writes: "Public International law is not so much an area or topic of the law as it is an entire legal system that is conceptually distinct from the national legal systems".[102] Karen Knop puts it schematically as follows: "domestic law is 'here' and international law is 'there' ".[103]

The continuing distinct and separate legal realities of our modern state system of international relations explain two fundamental principles.[104] First, on the international plane, a state cannot invoke its internal law—including constitutional law[105]—to justify a breach of its international obligations.[106] At the Supreme Court of Canada, in *Zingre v The Queen*,[107] Justice Dickson adopted the statement by the (then) Canadian Department of External Affairs stating that "it is a recognized principle of international customary law that a state may not invoke the provisions of its internal law as justification for its failure to perform its international obligations".[108] Indeed, within the paradigm of Westphalia, a state cannot rely on its domestic law to justify a breach of *pacta sunt servanda*—as per section 26 of the *Vienna Convention*[109]—because these norms and duties are part of two distinct and separate legal spheres.

[98] See Stéphane Beaulac, "The Westphalian Legal Orthodoxy—Myth or Reality" (2000) 2 *J History Int'l L* 148.

[99] Emer de Vattel, *Le droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains*, 2 vols (n.b., 1758). See also Stéphane Beaulac, "Emer de Vattel and the Externalization of Sovereignty" (2003) *J History Int'l L* 237.

[100] Janne Nijman and André Nollkaemper, *New Perspectives on the Divide between National and International Law* (Oxford University Press, 2007).

[101] Geoffrey Palmer, "Human Rights and the New Zealand Government's Treaty Obligations" (1999) 29 *Victoria U Wellington L Rev* 27, 59.

[102] John H Currie, *Public International Law*, 2nd ed (Irwin Law, 2008), 1.

[103] Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *New York U J Int'l L & Pol* 501, 504.

[104] This part borrows from Stéphane Beaulac, "National Application of International Law: The Statutory Interpretation Perspective" (2003) 41 *Canadian YB Int'l L* 225, 234–236.

[105] See Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9th ed, vol 1 (Longman, 1992), 254.

[106] This rule was codified in section 27 *Vienna Convention on the Law of Treaties*; it was first articulated in the arbitration decision in the *Alabama Claims case* (US/UK) (1872), Moore, Arbitrations, i. 653.

[107] *Zingre v The Queen*, [1981] 2 SCR 392.

[108] *Ibid*, 410.

[109] Above (n 106).

The other core principle flowing from the international-internal divide is the need to manage the relationship between these two legal realities. John Currie refers to this scheme as the "international-national law interface",[110] whereas I prefer the expression "interlegality",[111] to refer to the national use of international law. As in other common law countries, the rules on the status of international law in Canada are domestics ones, deemed fundamental enough to form part of its constitutional law. As Francis Jacobs explained: "Indeed international law is generally uninformative in this area since it simply requires the application of treaties in all circumstances. It does not modify the fundamental principle that the application of treaties by domestic courts is governed by domestic law".[112] In that regard, Mattias Kumm is right that: "The very idea that the national constitution is decisive for generating the doctrines that structure the relationship between national and international law is dualist [in a meta-structuring way]".[113] In fact, the continuing apprehension of interlegality based on national constitutions—in spite of or even beyond the binary logics of dualism and monism—brings us back, inexorably, to the Westphalian paradigm and the international/national divide.

This traditional stance is being challenged by what is dubbed the internationalist conception of the relation between international law and domestic law, advocated by an increasing number of commentators, according to which "the incorporation and status of international law in the [domestic] legal system should be determined, at least to some extent, by international law itself".[114] Anne-Marie Slaughter took the lead in the 1990s,[115] suggesting that there ought to be global normative integration and noting the increasing use of international law domestically. However, her caveat, to the effect that there is a continuing divide between the two (at least conceptually), was lost by too many of her followers.[116] International commentators in constitutional legal theory, such as Neil Walker, have also considered what Anne-Marie Slaughter presented as "a new world order",[117] attempting to make sense of a "disorder of orders",[118] as regards interlegality. Drawing from the terminology developed by Jürgen Habermas,[119] in 2010, Nico

[110] *Above* (n 115), 220.

[111] Stéphane Beaulac, "La problématique de l'interlégalité et la méthodologie juridique," in JY Chérot *et al.* (eds), *Le droit entre autonomie et ouverture—Mélanges en l'honneur de Jean-Louis Bergel* (Bruylant, 2013), 5.

[112] Francis G Jacobs, "Introduction", in FG Jacobs and S Roberts (eds), *The Effect of Treaties in Domestic Law* (Sweet and Maxwell, 1987), xxiii, xxiv.

[113] Mattias Kumm, "Democratic Constitutionalism Encounters International Law: Terms of Engagement", in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2007), 256, 258.

[114] Curtis A Bradley, "Breard, Our Dualist Constitution and the Internationalist Conception" (1999) 51 *Stanford L Rev* 529, 531.

[115] See Anne-Marie Slaughter, "A Typology of Transjudicial Communication" (1994) 29 *U Richmond L Rev* 99.

[116] See Anne-Marie Slaughter and William Burke-White, "The Future of International Law Is Domestic (or, The European Way of Law)" (2006) 47 *Harvard Int'l LJ* 327, 349–350.

[117] See Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).

[118] Neil Walker, "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders" (2008) 6 *Int'l J Constitutional L* 373.

[119] Jürgen Habermas, *Die postnationale Konstellation* (Suhrkamp Verlag, 1998).

Krisch coined a new expression: "postnational law", that is, normativity where the line between domestic and international legal spheres is blurred, "with a multitude of formal and informal connections taking the place of what once were relatively clear rules and categories".[120] Similarly, in light of recent case law especially on freedom of association, Patrick Macklem examined what he called, "the nature of Canadian constitutionalism in an age of post-dualism".[121]

The question to address here is this: Is the paradigm of Westphalia really outdated and obsolete? Can we seriously suggest that the concept of national sovereignty is dead and buried? In this country, can we observe in the practice of the Supreme Court of Canada a fundamental change in the use of international law? In that regard, the most significant development in the last 30 years is the decision of the Supreme Court of Canada in the 1999 case of *Baker*.[122]

*Baker* considered whether the order to deport a woman with Canadian-born dependent children should be judicially reviewed. She had asked for an exemption from the requirement to leave the country to apply for Canadian citizenship, based on humanitarian and compassionate considerations under section 114(2) of the *Immigration Act*.[123] In order to determine the scope of this legal norm, namely "compassionate or humanitarian considerations", the majority *per* L'Heureux-Dubé J considered Canada's international treaty obligations. Central to her analysis was the 1989 *Convention on the Rights of the Child*, and its notion of the "best interests of the child",[124] because the interests of the applicant's children to have her continue providing for them would be a humanitarian and compassionate reason for an exemption.

Canada had ratified the *Convention on the Rights of the Child*, but has yet to implement it within its domestic legal system. Pursuant 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 the domestic legal rules regarding an exemption to the immigration requirement in section 113(2) of the *Immigration Act*. This is where L'Heureux-Dubé J made what is generally deemed a groundbreaking statement in *Baker* on the normative interaction between the national and international:

> 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.

[120] Nico Krisch, *Beyond Constitutionalism—The Pluralist Structure of Postnational Law* (Oxford University Press, 2010), 4.

[121] Patrick Macklem, "The International Constitution", in F Faraday, J Fudge and E Tucker (eds), *Constitutional Labour Rights in Canada—Farm Workers and the* Fraser *Case* (Irwin Law, 2012), 261, 263.

[122] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. This part borrows from Stéphane Beaulac, "International Law Gateway to Domestic Law: Hart's 'Open Texture', Legal Language and the Canadian Charter" (2012) 46 *Revue juridique Thémis* 443.

[123] *Immigration Act*, RSC 1985, c I-2; now replaced by the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[124] *Ibid*, article 3.

> Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.[125]

She then referred to legal scholarship on statutory interpretation[126] for the proposition that international law (treaties, customs) is part of the legal context relevant to ascertain the normative content of a legislative provision. As well, it was acknowledged that the role of international human rights in interpreting domestic legislation had been recognised in other common law countries.[127]

Accordingly, Justice L'Heureux-Dubé considered 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 Canadian legal order. The convention contributed greatly, along with other soft-law instruments—the *Universal Declaration of Human Rights* and the *Declaration of the Rights of the Child*—to a large and liberal interpretation of the legal norm expressed by the phrase "compassionate or humanitarian considerations".

The reason the *Baker* decision has been considered so important on these issues is straightforward: Justice L'Heureux-Dubé, by saying that both implemented and unimplemented treaties may be utilised 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 instruments 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. Having said that, is permitting the use of unimplemented treaty norms revolutionary, as far as interlegality is concerned? Is it at least a meaningful change, a sort of "creeping monism"[128]—as an author once put it to describe a definite trend in common law countries with regard to the domestic use of international human rights law? Conversely, is *Baker* vulnerable to criticism for enabling "to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament"?[129] This was the main point made in the minority opinion by Iacobucci and Cory JJ.

In terms of the operationalization of international normativity by means of legal interpretation, I have demonstrated elsewhere that Justices Iacobucci and Cory's point is exaggerated, if not plain wrong, for two reasons.[130] First, L'Heureux-Dubé J maintains

[125] *Baker*, above (n 122) [69–70].

[126] Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Butterworths, 1994), 330.

[127] *Baker*, above (n 122), [70].

[128] Melissa A Waters, "Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties" (2007) 107 *Columbia L Rev* 628.

[129] *Baker*, above (n 122), [70].

[130] See Stéphane Beaulac, "Interlégalité et réception du droit international en droit interne canadien et québécois," in S Beaulac and J-F Gaudreault-DesBiens (eds), *JurisClasseur—Droit constitutionnel* (LexisNexis, 2011), 23/1, 23/102.

the theoretical status quo by reaffirming the applicability of the dualist logic with regard to the incorporation of international treaty norms. Second, and more important, the majority in *Baker* resorts to international law via the contextual method of interpretation which, as the reference to legal scholarship demonstrates,[131] falls within Driedger's modern principle of interpretation: International law, indeed, "constitute[s] a part of the legal context in which legislation is enacted and read".[132] Resorting to these norms as an argument of context allows courts to exercise their interpretative discretion and give appropriate persuasive force to international law, that is to say to evaluate its weight based, inter alia, on its domestic status within Canadian law.

Put another way, since *Baker* the operationalization of international conventional law has been refined (not revolutionized): it is no longer a simple all-or-nothing-type of reasoning, on/off based on a dualist logic only, treaty norms being implemented or not, black or white, as it once was.[133] Instead, the analysis now involves a sliding scale of persuasive force which, by means of the contextual argument of interpretation, can be assessed on a case-by-case basis by the court, depending on many discretionary factors—as in any process of legal construction—including whether the treaty norm has been implemented.[134] The dualist logic as regards treaty norms remains highly material to the analysis, but it is not determinative by itself anymore. This being so, does *Baker* short-circuit the need for treaty implementation? More generally, does *Baker* contribute to the "'normalization' of international law and global standards in regional and national law, quite in contrast with—or at least circumventing—the classical picture of separate spheres,"[135] as suggested by one author recently? I believe not. By reiterating dualism, *Baker* refuses to throw the baby out with the bathwater, maintaining the Westphalian paradigm and the international/national divide.[136]

Many other cases involving international law have been at the Supreme Court of Canada since *Baker* was decided in 1999. They confirm not only the more sophisticated analysis of the issue based on the circumstantial evaluation of the persuasive force of international law (not simply an on/off switch), but also that the epistemological matrix founded on the divide between international and national law is still highly relevant. A few years later in the 2001 case of *Spraytech v Hudson*,[137] a generous interpretation was

[131] *Baker*, above (n 122), [70].

[132] Ruth Sullivan, above (n 126), 33.

[133] See Hugh M Kindred, "Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts," in SG Coughlan and D Russell (eds), *Citizenship and Citizen Participation in the Administration of Justice* (Éditions Thémis, 2002) 263.

[134] See Stéphane Beaulac, "International Law and Statutory Interpretation: Up with Context, Down with Presumption," in OE Fitzgerald *et al.* (eds), *The Globalized Rule of Law—Relationships between International and Domestic Law* (Irwin Law, 2006), 331.

[135] Nico Krisch, above (n 12), 10.

[136] Accordingly, I have a very different reading than Patrick Macklem, above (n 121), 264, when he suggests that: "In recent years, [. . .] the Supreme Court of Canada has effectively rendered obsolete Canada's dualist engagement with international law".

[137] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241.

given to the enabling statutory provision under which a municipal by-law (prohibiting certain pesticides) was adopted on the basis of international law, among other factors. Referring to her reasons in *Baker*, L'Heureux-Dubé J relied again on values reflected in international normativity, this time not for unimplemented treaty norms, but for a rule of customary international law; the so-called "precautionary principle", which was resorted to as an element of context deemed relevant to the interpretation of the relevant statutory provision.[138] A similar argument of contextual interpretation was employed in 2002 in *Suresh*,[139] dealing with torture under the *Canadian Charter*; in 2005 in *Mugesera*,[140] dealing with Canadian criminal law and international crimes; and again in the 2013 case of *Ezokola*,[141] regarding immigration and refugee law.

Of course, international law can also be utilized by means of another argument of statutory interpretation, namely the presumption of conformity with international law[142] (the "Charming Betsy" rule,[143] as it is known in the United States). Articulated in Canada by Justice Pigeon in the 1968 case of *Daniels v White*,[144] it continues to be a favored way, even after *Baker* in 1999, by which to operationalize international normativity through interpretation, whether for regular statutes or for constitutional instruments.[145] Witness, for instance, *Schreiber v Canada*[146] in 2002 on state immunity law, *Canadian Foundation for Children*[147] in 2004 on corporal punishment in criminal law, and *Hape*[148] in 2007 on the application of the *Canadian Charter*, as well as *Health Services and Support*[149] in 2007 on freedom of association under the *Charter*.

Again recently in the 2014 case of *Kazemi v Iran*,[150] the Supreme Court of Canada was faced with a problem of interlegality, as customary international law was invoked to create a new statutory exception for state immunity under the applicable Canadian federal

[138] *Ibid*, [31–32].

[139] *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3.

[140] *Mugesera v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100.

[141] *Ezokola v Canada (Citizenship and Immigration)*, [2013] 2 SCR 678.

[142] See the classic formulation, from British author Peter Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 1876), 173: "every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law".

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

[144] *Daniels v White and the Queen*, [1968] SCR 517.

[145] See Stéphane Beaulac and John H. Currie, "Canada", D Sherton (ed), *International Law and Domestic Legal Systems—Incorporation, Transformation, and Persuasion* (Oxford University Press, 2011), 116, 145 *ff*.

[146] *Schreiber v Canada (Attorney General)*, [2002] 3 SCR 269.

[147] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] 1 SCR 76.

[148] *R v Hape*, [2007] 2 SCR 292.

[149] *Health Services and Support—Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391.

[150] *Kazemi Estate v Islamic Republic of Iran*, [2014] 3 SCR 176.

legislation.[151] Writing for the majority, Justice LeBel rejected the interpretative argument based on the presumption of conformity, pointing out the following:

> The current state of international law regarding redress for victims of torture does not alter the [legislation], or make it ambiguous. International law cannot be used to support an interpretation that is not permitted by the words of the statute. Likewise, the presumption of conformity does not overthrow clear legislative intent (see S. Beaulac, "*'Texture ouverte', droit international et interprétation de la Charte canadienne*", in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), at pp. 231–35). Indeed, the presumption that legislation will conform to international law remains just that—merely a presumption.[152]

This latest case shows how clearly the divide between the international and the national legal realms is maintained when courts consider such norms by means of the presumption of conformity with international law. Of course, this separating line is even more blatant when the argument of legal interpretation is rejected in the end, as in the *Kazemi case*.

The same margin of appreciation, with a sort of sliding scale-type of reasoning, is favoured by the Supreme Court of Canada when it comes to resorting to international law in constitutional interpretation, to construe and apply the *Canadian Charter*. In *Re Public Service Employee Relations Act*,[153] Chief Justice Dickson expressed a point of view that set the tone for resorting to international law in *Charter* interpretation:

> The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions. [. . .] I believe 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. [. . .] In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions.[154]

Chief Justice Dickson draws a distinction between two categories of international legal instruments: (1) those that, although not necessarily binding upon Canada as a

[151] Indeed, the law of state immunity in Canada, with specific exceptions (such as for commercial activities), is codified by federal legislation: *State Immunity Act*, RSC 1985, c S-18.

[152] *Kazemi Estate*, above (n 150), [60].

[153] *Re Public Service Employee Relations Act* [1987] 1 SCR 313.

[154] *Ibid*, 348–350.

question of law, fit generally into the category of contemporary international human rights law; and (2) those that actually bind Canada as a matter of international law. The first category includes treaties such as *the European Convention on Human Rights* and *the American Convention on Human Rights*; declarations and other inherently non-binding norms, such as the *Universal Declaration of Human Rights*, and the *Helsinki Final Act*, and documents such as the *Organization for Security and Cooperation in Europe*, the *Standard Minimum Rules for the Treatment of Prisoners*, the *Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities*, and the *Declaration on the Rights of Indigenous Peoples*. Such non-binding or soft law norms are said to be relevant and persuasive to the interpretation of the *Charter*, probably because they are sources of comparative law, more than international law proper.[155]

The second category identified by the Chief Justice—instruments that are legally binding upon Canada—includes documents such as the *International Covenant on Civil and Political Rights*; the *International Convention on the Elimination of All Forms of Racial Discrimination*; the *Convention on the Elimination of Discrimination Against Women*; the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*; the *Convention on the Rights of the Child*; and the *Rome Statute of the International Criminal Court*. The provisions of these instruments are similar to those of the *Charter*, and they have been ratified or acceded to by Canada. According to Dickson CJ, Canada is bound by international law to protect such rights within its borders. Interestingly, he did not specifically base his conclusion on the classic rule of interpretation by which domestic legislation is presumed to be consistent with international obligations. Rather, he wrote that "general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation".[156]

Although initially in dissent, Chief Justice Dickson's views on international law has been very influential. In a 1988 speech, former justice of the Supreme Court of Canada Gérard La Forest said the following about the Chief Justice's position in *Re Public Service Employee Relations Act*: "Though speaking in dissent, his comments on the use of international law generally reflect what we all do".[157] In 2000, another former justice of Canada's highest court, Michel Bastarache, opined similarly: "While Chief Justice Dickson rejected the implicit incorporation of international law doctrine in a dissenting judgment, his opinion reflects the present state of the law".[158] Although the "relevant and

[155] See Karen Knop, above (n 103).

[156] *Re Public Service Employee Relations Act*, above (n 153), 350 [emphasis added].

[157] Gérard V La Forest, "The Use of International and Foreign Material in the Supreme Court of Canada" in *Proceedings, XVIIth Annual Conference* (Ottawa: Canadian Council on International Law, 1988) 230, 232.

[158] Michel Bastarache, "The Honourable GV La Forest's Use of Foreign Materials in the Supreme Court of Canada and His Influence on Foreign Courts," in R Johnson & JP McEvoy (eds), *Gérard V La Forest at the Supreme Court of Canada, 1985–1997* (Canadian Legal History Project, 2000) 433, 434.

persuasive" passage has been cited on numerous occasions in subsequent cases, the distinction suggested by the Chief Justice between binding and non-binding instruments has generally been ignored. As a matter of fact, judges in Canada rarely, if ever, consider international law sources by taking into account whether they have a legally binding effect. Instead, they tend to consider *all sources* of international human rights law as "relevant and persuasive".[159]

Recent examples at the Supreme Court of Canada include the 2007 case of *Health Services and Support*[160] on freedom of association under section 2(d) of the *Charter*, which affirmed Dickson CJ's approach to international law. Writing for the majority in this case, Chief Justice McLachlin and Justice LeBel referred to the *International Covenant on Economic, Social and Cultural Rights*; and the *International Covenant on Civil and Political Rights*, as well as the *Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize*, adopted at the International Labour Organization. The status of these instruments—binding or not, implemented or not—was not specified, only that "Canada has endorsed all three of these documents".[161] It is worth noting that a few years before, in the 2001 case of *Dunmore*,[162] the majority per Justice Bastarache had gone more broadly because, in addition to the above instruments used to interpret freedom of association, reference was also made to two treaties that Canada has in fact not even ratified: ILO *Convention (No. 11) concerning the Rights of Association and Combination of Agricultural Workers*, and ILO *Convention (No. 141) concerning Organizations of Rural Workers and Their Role in Economic and Social Development*. Be they binding or not, implemented or not, ratified or not, all that mattered was that these international instruments represented "international human rights law",[163] norms deemed relevant and persuasive to the construction of section 2(d) of the *Charter*.

This generality of terms in the use of international law in *Charter* interpretation goes in line not only with Dickson CJ's call for resorting to such normativity in *Public Service Employee Relations Act*—although dispensing with the two categories of binding and not binding norms—but also with L'Heureux-Dubé J's message of flexibility and openness in *Baker*. More importantly for the central point of this second section of the chapter, both these decisions confirm that the paradigm of Westphalia is alive and strong in Canada and that the international/national divide remains highly relevant for constitutional and statutory interpretation. The new era of postnational law or post-dualism is aspirational at best, probably just a "*vue de l'esprit*".

[159] See William A Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law—Legal Commitment, Implementation and the Charter*, 3rd ed (Thomson Carswell, 2007), 84–90.

[160] Above (n 149), [70].

[161] *Ibid*, [71].

[162] *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016.

[163] *Ibid*, [27].

## 3. Conclusion

By way of concluding remarks, it is appropriate to tie up these two issues and to insist on how they represent contemporary challenges not only in Canada, but also in a lot of liberal democracies, whatever their legal traditions. Talks of convergence in interpretative methodology have been going on for some time now, not merely within the common law world in regard to constitutional and statutory interpretation. Indeed, although Brexit may signal a reorientation of the debates, the European Union has provided a most interesting legal ground where, as legal commentators have highlighted,[164] there are mighty forces for the convergence, not only in legal methodology among the different member states, but also more generally in regard to the two legal systems, civil law and common law.[165]

With respect to the problematics of interlegality, we saw that the same feature distinguishes our Canadian experience, as recent developments on the domestic use of international law do not differentiate whether courts are involved in constitutional or statutory interpretation. Furthermore, when the focus is put on the operationalization of international normativity by means of legal interpretation, it becomes clear that both the contextual argument and the presumption of conformity with international law now allow the judiciary greater flexibility and, at the end of the day, additional opportunities for interlegality, meanwhile keeping intact, indeed reaffirming the paradigm of Westphalia. Numerous jurisdictions around the globe are having similar debates; witness the *Oxford Reports on International Law in Domestic Courts*,[166] a web-based resource led by André Nollkaemper at the Amsterdam Centre for International Law,[167] which have compiled and analyzed the domestic cases resorting to international law from nearly a hundred countries. Unlike the trendy argument in the field, however, this chapter shows how the empirical data—at least those from Canada—do not support the proposition suggesting the end of the international/national divide, when it comes to interlegality.[168]

[164] See Xavier Lewis, "L'Européanisation du *common law*," in P Legrand (ed), *Common law d'un siècle à l'autre* (Éditions Yvon Blais, 1992), 275; H Patrick Glenn, "La civilisation de la common law," in E Capparo (ed), *Mélanges Germain Brière* (Wilson & Lalfeur, 1993), 595; and also the different contributions in Baris S Markesinis (ed), *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (Clarendon Press, 1993). *Contra*, see Pierre Legrand, "European Legal Systems Are Not Converging" (1996) 45 *Int'l & Comp LQ* 52.

[165] On the methodological convergence in the Canadian bijural context, see: 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 *Cahiers de droit* 179, 230–231.

[166] See: http://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts.

[167] For the sake of disclosure, I am myself involved with *Oxford Reports on International Law in Domestic Courts*, as well as with research projects at the Amsterdam Centre for International Law, between 2004 and 2010.

[168] See the recent diagnostic, to the similar effect, by Machiko Kanetake and André Nollkaemper, "The International Rule of Law in the Cycle of Contestations and Deference", in M Kanetake and A Nollkaemper (eds.), *The Rule of Law at the National and International Levels—Contestations and Deference* (Hart Publishing, 2016), 445.

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