

## THE USES OF METAPHOR: INTERNATIONAL LAW AND THE SUPREME COURT OF CANADA

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In his provocative book, *Contingency, Irony and Solidarity*, the American pragmatist philosopher, Richard Rorty, makes the following claim:

Old metaphors are constantly dying off into literalness, and then serving as a platform and foil for new metaphors.<sup>1</sup>

Today I detail a process in which the Supreme Court of Canada is an active, if uncertain, participant; a process through which the old metaphors of "national sovereignty" and the "state legal system" are dying off, being replaced by new metaphors of "transnationalism" and "interpenetration of normative traditions"

Lest I be accused of flighty, professorial thought, let me situate the discussion by quoting from the judgment of the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, from 1999. Justice l'Heureux-Dubé, writing for the majority, asserted that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."<sup>2</sup> This argument adopts and extends the suggestion made by then-Chief Justice Dickson some twelve years earlier that the norms of international law "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".<sup>3</sup> In *Baker*, the Court held that the values contained in an international human rights treaty could shape not only a process of statutory interpretation, but the exercise of Ministerial discretion as well.

Former Justice La Forest has made the point most forcefully: human rights principles "are applied consistently, with an international vision and on the basis of international experience. Thus our courts - and many other national courts - are truly becoming international courts in many areas involving the rule of law".<sup>4</sup>

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<sup>1</sup> R. Rorty, *Contingency, Irony and Solidarity* (New York: Cambridge University Press, 1989) at 16.

<sup>2</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70.

<sup>3</sup> *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313 at 349-50. See also *R v. Keegstra*, [1990] 3 S.C.R. 697 (*per* Dickson C.J.C., for the majority).

<sup>4</sup> G.V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y.B.I.L. 89 at 100. Justice La Forest treated international legal values as persuasive in the non-*Charter* case *Re Canada Labour Code*, [1992] 2 S.C.R. 50.

Former Justice La Forest is undoubtedly correct to point to a global judicial development: a growing interest in international law both as a formal instrument of interpretation for national law and as a broader underlying metaphor for our desire to transcend the parochial and to open our minds to legal influences that may not be binding, but are appropriately influential. One can point to important recent judgements of courts in the United Kingdom, the United States, South Africa, Israel, and Australia, that participate in what one commentator has called transgovernmentalism. Anne-Marie Slaughter describes how networks of state institutions, including courts, are increasingly knowledgeable about each other's work, and increasingly open to the influence of non-national law, including international law.<sup>5</sup>

Thirteen years ago, my colleague H. Patrick Glenn argued that our legal traditions should be influenced by what he called "persuasive authority," rather than relying solely upon binding sources of law to guide decision making.<sup>6</sup> The invocation of international legal values in *Baker* is a prime example of just such a development.

Recently, another Canadian colleague, Karen Knop, has borrowed Glenn's theme to suggest that it is a mistake to emphasize the role of national courts in "enforcing" international law, that the very idea of compliance is outdated, and that international law is best viewed as "foreign" law to be employed as persuasive authority when domestic courts see fit.<sup>7</sup>

In her excellent article, Knop relies heavily on *Baker* to demonstrate the new, more open, attitude of the Supreme Court of Canada to the influence, if not authority, of international law. She contrasts this open attitude to the accusations of "traditional" international lawyers who have criticised the Court for its unprincipled use of international law. Now here is the rub: amongst those "traditional" lawyers, Knop lists me. She quotes me, quite accurately, as writing that: "Although the Court often involves international treaties as an aid to interpretation, particularly of the *Charter*, it does so in a fluid, not to say unprincipled, manner... Treaty obligations are not so much 'relevant and persuasive' as instrumentally useful or merely interesting".<sup>8</sup>

There is no epithet more hurtful to a North American law teacher than to be called "traditional"! You will therefore not be surprised to hear that I want to argue that my past criticism of the Supreme Court of Canada's engagement with international law is in no way "traditional", if we interpret that word to mean

<sup>5</sup> A.-M. Slaughter, "A Typology of Transjudicial Communication" (1994) 29 U.Rich.L.Rev. 99; and A.-M. Slaughter, "Governing the Global Economy Through Government Networks" in M. Byers, ed., *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000) 177.

<sup>6</sup> H.P. Glenn, "Persuasive Authority" (1987) 32 McGill L.J. 261.

<sup>7</sup> K. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 N.Y.U.J.Int'l Law & Pol. 501.

<sup>8</sup> S.J. Toope, "Canada and International Law" (1998) 27 Can.Coun.Int'l.L.Proc. 33 at 36.

outdated and fusty! To do so, I will recall Rorty's understanding of the life cycle of metaphors: old metaphors do not simply die, they are part of the process of regeneration. They serve "as a platform and foil for new metaphors".<sup>9</sup>

The old metaphors of "national sovereignty" and "state legal system" are not yet dead. They are the very platform from which the metaphor of "transnationalism" is being launched. So we are living in an "in-between time" where, as T.S. Eliot suggests in his magical poem "Burnt Norton", we suffer the disaffection of experiencing neither the illucidation of daylight nor the purification of darkness.<sup>10</sup> Hence, the dichotomy that Knop sets up between a traditional focus on international law as "binding" on domestic courts, and international law as "persuasive authority" is, I think, a false dichotomy. In our world, international law can be both, but is often neither, and *that* is the struggle with which international lawyers must engage.

To make the argument more concrete, let me canvass briefly various ways in which the Supreme Court of Canada has employed, been influenced by and ignored international law. It is important to set the context. Canada is one of the minority of states where the relationship between international law and domestic law remains a constitutional conundrum. Our written constitutional texts do not address the issue, and the Supreme Court has not seen fit (or perhaps has not been given a good opportunity) to pronounce upon the matter. We know for certain that we *do not* know whether customary international law forms part of the law of Canada. This position is in contrast to that of the United Kingdom where Lord Denning in *Trendtex*<sup>11</sup> and Lord Wilberforce in *I Congreso del Partido*<sup>12</sup> held that the United Kingdom courts could directly apply emerging customary law to establish a controlling norm within the United Kingdom legal system, in those cases, the norm of restrictive state immunity. Similarly, in the famous *Mabo* case, the High Court of Australia held that the development of the common law could be influenced by both customary and treaty-based international law.<sup>13</sup> The Supreme Court of the United States established a century ago in the *Paquete Habana*<sup>14</sup> that "customary international law informs the construction of domestic law, and, at least in the absence of any superseding positive law, is controlling" to adopt the description of that famous case offered by Justice Blackmun.<sup>15</sup>

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<sup>9</sup> Rorty, *supra* note 1.

<sup>10</sup> T.S. Eliot, "Burnt Norton" in T.S. Eliot, *Four Quartets* (London: Faber and Faber, 1944).

<sup>11</sup> *Trendtex Trading Corp. v. The Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.).

<sup>12</sup> *I Congreso del Partido*, [1983] 1 A.C. 244 (H.L.).

<sup>13</sup> *Mabo v. Queensland [No 2]* (1992), 175 C.L.R. 1.

<sup>14</sup> *Paquete Habana* (1900), 175 U.S. 677.

<sup>15</sup> H.A. Blackmun, "The Supreme Court and the Law of Nations" (1994) 104 Yale L.J. 39 at 40.

Meanwhile, the Canadian Supreme Court has vacillated between an approach seeming to accept the direct application of customary international law and one requiring some form of explicit transformation of custom into domestic law.<sup>16</sup> In the recent *Québec Secession Reference*, the Court offered an at best enigmatic aside that it could not apply "pure" international law directly.<sup>17</sup> If the Court believed that customary international law could condition domestic law, then such an application would be in no way precluded. One can conclude either that the Court currently favours a requirement of transformation of customary law or that the aside was not meant to signal any particular attitude and may not have been fully thought through.

The situation for obligations that Canada has voluntarily assumed under international treaty law is even more complex, despite a seemingly bright line rule. The "rule" is that treaties must be incorporated into Canadian domestic law before they can be controlling upon domestic legal actors, including courts. This well-established proposition was re-affirmed in *Baker*,<sup>18</sup> following a consistent line of cases.<sup>19</sup>

Yet on this subject the Supreme Court is confronted with two significant problems. The first is well known, that a central underlying reason for the requirement of explicit transformation of treaty obligations into domestic law is the need to uphold the division of legislative power within the Canadian federation. This rationale was promoted in the *Labour Conventions* case,<sup>20</sup> and it may have influenced the dissenting opinion of our learned chair in *Baker*,<sup>21</sup> although his reasons focus purely upon the need to carefully balance the powers of the legislature and the executive. So, the potential influence of "persuasive authority" could be limited by legitimate concerns, rooted in domestic constitutional law, that are unrelated to the compelling logic or the moral imperatives of the untransformed treaty norms.

<sup>16</sup> See e.g. *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208 (arguably adopting an attitude favouring direct application, but certainly not doing so clearly); *Municipality of Saint John v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263 (with a clearer attitude favouring direct incorporation of customary international law); *La République Démocratique du Congo v. Venne*, [1971] S.C.R. 997 (where changes in customary law did not operate to affect Canadian domestic law); and *Reference Re Mineral and Other Natural Resources of the Continental Shelf* (1983), 145 D.L.R. (3d) 9 (Nfld. C.A.) (implicitly requiring transformation of customary law into domestic law).

<sup>17</sup> *Reference re: Secession of Québec* (1998), 161 D.L.R. (4th) 385 at 433. See also S.J. Toope, Case Comment, (1999) 93 A.J.I.L. 519 at 523-25.

<sup>18</sup> *Supra* note 2 at 230 (per L'Heureux-Dubé J.) and at 234 (per Iacobucci J., dissenting in part).

<sup>19</sup> See e.g. *Francis v. The Queen*, [1956] S.C.R. 618; and *Capital Cities Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141.

<sup>20</sup> *Labour Conventions Case*, [1937] A.C. 326 (P.C.).

<sup>21</sup> *Supra* note 2 (per Iacobucci J., dissenting in part).

The second problem is less obvious, but it is fast becoming a central issue for those concerned about the relationship between international and domestic law in Canada. As a country whose self-definition is arguably influenced by perceptions of international influence and responsibility,<sup>22</sup> Canada is a great ratifier of international treaties, especially those related to human rights and the rule of law. Yet the Canadian executive often takes the position that Canada can ratify these treaties on the basis of existing conformity with the newly articulated conventional obligations. Canadian courts are then placed in an uncomfortable position: they are asked to assess Canada's compliance with international obligations, but are not given any explicit implementing legislation to analyse. So the traditional focus upon the "bindingness" of an international norm proves deeply problematic. The Canadian Government asserts, and reports to international treaty bodies, that we are bound by norms that are already implemented, but courts have to find the mechanism of implementation in the interpretation of legislative texts or of the common law created before the ratification of the supposedly implemented treaty. In part to address this problem, the Supreme Court has adopted two interpretative presumptions that have a long history in the common law: first, that unless there are unmistakable signals pointing to the non-conformity of Canadian law with an international obligation, domestic law, including statutes and the *Charter*, should be interpreted to uphold Canada's treaty commitments.<sup>23</sup> Second, that in interpreting ambiguous domestic legislation, recourse should be had to underlying international treaty commitments.<sup>24</sup>

But these presumptions have not been adequate to the task, and the Court has confronted diverse situations in which international law could be binding within Canada's legal system, or where it would be at least "persuasive," but where the Court's attachment to international law has wavered and vacillated. In most cases where the Supreme Court has examined international law sources, the citations have been superficial and instrumental. For example, in looking at Canadian obligations under international human rights treaties, the Court has typically gone no further than the parsing of treaty texts, eschewing recourse to authoritative pronouncements of treaty-based monitoring bodies. The majority judgment in *Keegstra*<sup>25</sup> is an exception. Similarly, the Court has usually refused to look at the *travaux préparatoires* of relevant treaties as a guide to interpretation. Once again, I can point to a notable exception, and one that I hope will be emulated in the future: *Pushpanathan v. Canada (Minister*

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<sup>22</sup> See e.g. Toohey, *supra* note 8.

<sup>23</sup> See *R. v. Keegstra*, *supra* note 3; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1371-72 (*per* Gonthier J.); and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at 1019-22 (*per* Bastarache J.).

<sup>24</sup> See *Capital Cities Comm. Inc. v. C.R.T.C.*, *supra* note 19; and the opinion of Iacobucci J. in *Baker*, *supra* note 2 (dissenting in part).

<sup>25</sup> *Supra* note 3.

of Citizenship and Immigration).<sup>26</sup> In *Reference Re Public Service Employee Relations Act*,<sup>27</sup> where Chief Justice Dickson and Justice Wilson marshalled a compelling case that Canada was bound by international commitments to protect the right to strike as an aspect of the freedom of association, the majority simply chose to ignore the relevant international law.

Even when international law is favourably invoked, the Court often neglects to state the basis upon which the international norms are alluded to. This is particularly true for treaty commitments that have not been expressly incorporated into domestic law. So it is common in the Court to cite the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights* in one breath, failing to distinguish between a treaty commitment of Canada, arguably transformed into Canadian law through the vehicle of the *Charter*, and a treaty to which Canada could never be a party.<sup>28</sup> In the *Québec Secession Reference*, the Court discussed international treaty law in detail, looking only at the words of texts, and completely neglected the influential and fast-changing parallel customary law on the issue of secession.<sup>29</sup> International law remains a seemingly mysterious set of norms referred to haphazardly by the Court.

In a time of changing metaphors, from “national sovereignty” to “transnationalism”, the Court’s reliance on interpretative presumptions has proven to be unsatisfying and inadequate. So, the Supreme Court has begun to invoke the general values of international society, as stated in formal treaties, to shape its readings of domestic law. I have already pointed to *Baker*, but another excellent recent example can be found in *Pushpanathan*,<sup>30</sup> where Justice Bastarache argued that “until such time that the international community declares drug trafficking to be a major violation of human rights amounting to persecution” it would not be possible to invoke trafficking as a grounds for exclusion under the Canadian legislation implementing the United Nations *Refugee Convention*.<sup>31</sup> So collective international values expressed in a range of treaties and declarations serve now to guide the interpretation of Canadian law. International law can be invoked generally, and without doctrinal mechanisms of restraint, as influential or persuasive.

Following the critical legal scholar David Kennedy, Karen Knop employs another revealing metaphor, stating that international law can now be treated in Canada simply as “foreign” law. She suggests that just like “foreign” law, international law is a “translation of norms from elsewhere”

<sup>26</sup> *Supra* note 23 at 1035.

<sup>27</sup> *Supra* note 3.

<sup>28</sup> See e.g. the majority opinion in *Keegstra*, *supra* note 3; and *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (dissenting opinion of Cory J.).

<sup>29</sup> See Toope, *supra* note 17, at 524-25.

<sup>30</sup> *Supra* note 23.

<sup>31</sup> *Ibid.* at 1035.

and that international law should find its new inspiration in the insights of comparative law.<sup>32</sup>

Just to prove that I am no more a traditionalist than Knop, I will state directly that as far as it goes, I find the “foreign” metaphor instructive. I delight in the greater openness to the influence of international legal values represented by *Baker* and *Pushpanathan*. My own recent work on conceptions of legal normativity in international society fully supports both a discursive and an interactional model of law.<sup>33</sup> I agree with Justice Iacobucci’s suggestion in *Vriend* that various institutions develop law by engaging in a democratic dialogue.<sup>34</sup> That is just as true of the institutions of international and domestic law as it is of courts and legislatures within the framework of the *Charter*.

But the “foreign” metaphor is not the whole story and, ironically, it points us to the very opposite of the model of persuasive authority that Knop would uphold. To construct the “foreign”, one must accept the continuing influence of the dying metaphor of national sovereignty. I think that Knop is right to do that, for I have suggested that we are living in-between metaphors of sovereignty and transnationalism. But if that is true, then it seems to me that for the foreseeable future, the Supreme Court of Canada will have two distinct roles to play when engaging with international law.

The first is the role it adopted in *Baker* and *Pushpanathan*, opening itself to the persuasion of international legal values in shaping Canadian domestic law. Here the Court has taken on a significant role of global leadership, in stark contrast to the Supreme Court of our neighbours to the South, despite the valiant efforts of Justices Blackmun, O’Connor, Ginsberg and Breyer. But the Supreme Court of Canada must also play a second role, that of articulating clearly how the dying metaphors of “national sovereignty” and “state legal system” continue to play themselves out. The Court can undertake this role more effectively than it has done in the past. I therefore harbour three hopes. I hope that the Court will soon be given another opportunity to consider whether or not customary international law forms part of the law of Canada, or at least whether the common law should be developed in the light of customary obligations. I hope that the Court will soon be asked to address the increasingly thorny question of how Canadians can benefit from treaty commitments undertaken by Canada on the basis of prior conformity with treaty rules. I hope that the Court will take greater care to distinguish amongst international obligations that should shape Canadian law and international legal values that can shape Canadian law. For, to adopt a final set of interrelated metaphors, in this in-between time, international law is both “foreign” and “part of us”. The Supreme Court of

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<sup>32</sup> Knop, *supra* note 7 at 535.

<sup>33</sup> See Jutta Brunnée and Stephen J. Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” Col.J.Trans.L. [forthcoming].

<sup>34</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 138-42 (*per* Cory and Iacobucci JJ.).

Canada translates external norms, but it does so by participating in the creation and re-creation of norms that shape our emerging transnational society.

As Lon Fuller helped us to understand decades ago, the judge "ought to be proud that his [or her] contribution is such that it cannot be said with certainty whether it is something new or only the better telling of an old story".<sup>35</sup> The Supreme Court's telling of the story of international law in Canada will depend upon old and new metaphors, the old metaphor of binding law and the new metaphor of persuasive authority. Both metaphors must be employed, but not usually at the same time or in the same way. Articulating the differences will be a challenge for the Court in the years immediately ahead. Thank you.

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<sup>35</sup> L.L. Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, inc., 1940) 140.