

## THE ADMISSIBILITY OF INTERNATIONAL LEGAL OPINION EVIDENCE AFTER *R V APPULONAPPA*

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### *I. Introduction*

The British Columbia Court of Appeal's recent decision in *R v Appulonappa*<sup>1</sup> will be of interest to lawyers wishing to rely on international law in Canadian courts. At issue in the case was the constitutionality of the human smuggling offence in section 117 of the *Immigration and Refugee Protection Act (IRPA)*.<sup>2</sup> The Court of Appeal was asked to decide whether the offence was inconsistent with Canada's obligations under the 1951 *Convention Relating to the Status of Refugees*<sup>3</sup> (*Refugee Convention*) and the *Protocol Against the Smuggling of Migrants by Land, Sea and Air (Migrant Protocol)*.<sup>4</sup> In resolving this issue, the parties invited the Court to place reliance upon two international law experts who had given opinions on various aspects of Canada's obligations under those treaties. Although the Court ultimately allowed the appeal, it held that the parties' experts had impermissibly offered opinions on the content of international law, a question of law that fell squarely within the purview of judges.<sup>5</sup>

Much could be written about the broader international and constitutional law issues that were in play in *Appulonappa*. This case comment focuses, however, on the Court of Appeal's conclusions on the admissibility of expert legal opinions on international law. The Court of

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<sup>1</sup> *R v Appulonappa et al*, 2014 BCCA 163, (2014), 11 CR (7th) 154.

<sup>2</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

<sup>3</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, CTS 1969 No 6, [Refugee Convention].

<sup>4</sup> *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime*, 15 November 2000, 2241 UNTS 507 [Migrant Protocol].

<sup>5</sup> *Appulonappa*, *supra* note 1 at para 62.

Appeal's conclusion is significant because it sheds light on how international law should be "proven" in court. The effect of the decision is to hold that experts should not be permitted to offer legal opinions on Canada's international obligations, and thus responds to at least some of the criticisms levelled against courts in the past.<sup>6</sup> Although the Court's conclusion in *Appulonappa* appears unassailable, the decision will likely pose some practical challenges for lawyers and judges who have previously relied upon expert opinion evidence as an expedient means of resolving disputes over the content of Canada's international legal obligations.

## 2. The Facts and Judgements

The facts underlying the *Appulonappa* decision are uncomplicated. On October 17, 2009, Canadian authorities intercepted a freight ship, the *MV Ocean Lady*, off of the coast of Vancouver Island, British Columbia. The vessel was carrying 76 Sri Lankan Tamil asylum-seekers, all of whom went on to initiate refugee claims upon arrival in Canada. Four of the 76 migrants were alleged to have been the vessel's crew and to be involved in organizing the voyage. These individuals were charged with organizing the illegal entry into Canada of a group of ten or more individuals contrary to section 117 of the *IRPA*. The offence, as then set out in section 117(1) of the *IRPA*,<sup>7</sup> was as follows:

No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

The trial proceeded by way of direct indictment. However, before any evidence was called, the four co-accused (the Respondents in the Court of Appeal) filed a constitutional challenge seeking a declaration that section 117 of the *IRPA* was inconsistent with section 7 of the *Charter*<sup>8</sup> relying on the doctrines of vagueness and overbreadth.<sup>9</sup> More specifically, the accused argued that Parliament, in enacting the human smuggling offence,

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<sup>6</sup> See in particular: Gib Van Ert, "The Admissibility of International Legal Evidence" (2005) 84 Can Bar Rev 31 [Van Ert, "Admissibility"]; and see Gib van Ert, *Using International Law in Canadian Courts* (Toronto: Irwin Law, 2008) at 69 [Van Ert, *Using International Law*].

<sup>7</sup> *Supra* note 2. The offence has subsequently been amended in direct response to the arrival of the *MV Ocean Lady*; see *Protecting Canada's Immigration System Act*, SC 2012, c 17, s 41. The amendment modestly changes the *mens rea* for the offence and imposes harsher penalties.

<sup>8</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*].

<sup>9</sup> *R v Appulonappa*, 2013 BCSC 31, (2013), 13 Imm LR (4th) 207.

failed to comply with the definition of the human smuggling offence under the *Migrant Protocol*, which, among other things, requires proof that a smuggler has obtained a material benefit from smuggling. The accused also argued that Canada had a duty under the *Refugee Convention* to refrain from prosecuting legitimate refugees who had aided and abetted each other's illegal entry into Canada. Although compliance with international law is not a requirement under section 7 of the *Charter*, Canada's international obligations were relevant to Parliament's intent in enacting the human smuggling offence itself. The accused argued that if Parliament intended to comply with its international obligations in enacting the offence, then the law was overbroad to the extent that it violated Canada's international obligations.

The constitutional and international law arguments in *Appulonappa* are interesting in their own right, but what is more important for the purpose of this comment is how the constitutional *voir dire* unfolded at trial. The accused's *Charter* application proceeded as a pre-trial application, with the Crown electing to call no evidence. The parties instead relied upon a general summary of the alleged circumstances of the offence. The parties also adduced extensive documentary evidence relevant to the immigration and refugee context, and to Canadian and international responses to human smuggling. In addition, the parties tendered written opinions from two experts who were called to give *viva voce* evidence. The accused called Catherine Dauvergne, one of Canada's foremost experts on international refugee law, who offered an opinion on Canada's international obligations under the *Refugee Convention*. The Crown tendered evidence from Yvon Dandurand, an expert on human smuggling, who, though not a lawyer, had been present as an observer when the *Migrant Protocol* was negotiated. The experts were qualified, examined in chief, and then cross-examined by the respective parties. Both of the experts offered opinions about the scope of Canada's international law obligations, and to some extent about the consistency between Canada's refugee regime and the human smuggling offence under international law. No objection was taken by either party to this procedure, or to the admissibility of those aspects of the experts' evidence that amount to opinions on international law.

The trial judge held that section 117 of the *IRPA* was overbroad, violating section 7 of the *Charter*, and that the offence could not be saved under section 1. Based on the evidence, he concluded that Parliament's purpose in enacting section 117 of the *IRPA* was "to combat human smuggling in accordance with Canada's international obligations."<sup>10</sup> While the trial judge found that the human smuggling offence was broader

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<sup>10</sup> *Ibid* at para 20.

“than the minimum standard” set by the *Migrant Protocol*, he concluded that Parliament “never intended that it be so broad as to stop and prosecute legitimate family members and humanitarian workers.”<sup>11</sup> In reaching this conclusion, the trial judge referred extensively to the expert evidence noting that both “expert witnesses expressed the view that humanitarian aid workers and family members were not intended, under the international regime by the international community (including Canada) to be prosecuted as human smugglers.”<sup>12</sup>

The Crown appealed to the British Columbia Court of Appeal, arguing the trial judge had erred in identifying the purpose of section 117 of the *IRPA*. The Crown continued to rely upon its human smuggling expert, arguing that neither the 1951 *Refugee Convention* nor the *Migrant Protocol* precluded Canada from prosecuting those who smuggle for humanitarian or benevolent reasons. The Respondents, by contrast, argued these two international instruments, individually or together, provided an interlocking framework, protecting asylum-seekers and humanitarian workers from prosecution as human smugglers. The Respondents further argued that the Crown expert’s opinion was inadmissible in so far as it purported to pronounce on Canada’s international obligations under the *Migrant Protocol* and the consistency of these obligations with Canada’s domestic human smuggling offence.

In the result, the Court of Appeal agreed with the Crown that the trial judge had misapprehended the legislative objective of section 117 of the *IRPA*. In the Court’s view, Parliament had not considered the impact of the human smuggling offence on close family members or humanitarian workers. Consequently, section 117 of the *IRPA* was properly aligned with Parliament’s intent. Although the Court rejected the Respondents’ argument that the human smuggling offence contravened Canada’s international obligations, it accepted their argument that the Crown’s expert had impermissibly pronounced upon questions of law. The Court stated:

... with respect to expert evidence, the respondents called Professor Dauvergne, who testified to issues of refugee law and policy. Mr. Dandurand, who was called by the Crown, gave evidence as an expert in human smuggling as a transnational crime. *I agree with the respondents that, to the extent that both experts strayed into providing opinions on the interpretation and application of international law and s 117 of the IRPA, their testimony was not properly admissible as these were questions of*

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<sup>11</sup> *Ibid* at para 146.

<sup>12</sup> *Ibid* at para 88; see also references to the expert evidence at paras 45, 69, 70, 75, 116, 125, 126, 161.

law for the court. I accordingly limit my consideration of their evidence to factual matters.<sup>13</sup>

The Court of Appeal allowed the appeal and remitted the matter back for trial. The Respondents (accused) have since been granted leave to appeal to the Supreme Court of Canada on the substantive *Charter* issues.<sup>14</sup>

### 3. Discussion and Analysis

Most lawyers involved in litigation are conversant with the rules of evidence and how these apply to the introduction of expert opinion. According to the Supreme Court of Canada's leading decision in *R v Mohan*,<sup>15</sup> expert evidence will only be admitted where it is (a) relevant; (b) necessary; (c) not subject to any exclusionary rule; and (d) given by a properly-qualified expert. It is also well established that "[q]uestions of domestic law as opposed to foreign law are not matters upon which a court will receive opinion evidence."<sup>16</sup> Yet while the prohibition of expert opinion on questions of domestic law is well-known, it is less certain whether the same rules apply to international law. Should one call an expert who opines on the point of law in issue, or does one simply make submissions in the form of legal argument? In a time when there is an expanding use of international law in domestic courts, it is crucial that courts find some satisfactory, or at least consistent, response to these questions.

Before touching on the relevant jurisprudence, it is useful to identify two significant tensions in the law. The first relates to the status of international law in Canadian courts. Unlike foreign law, which is considered by courts to be a question of fact,<sup>17</sup> the content of Canada's international legal obligations has usually been held to be a question of law.<sup>18</sup> In the normal course, something that is categorized as a question of law will fall within the exclusive domain of the judiciary and cannot be the

<sup>13</sup> *Appulonappa*, *supra* note 1 at para 62 [emphasis added].

<sup>14</sup> *Francis Anthonimuthu Appulonappa, et al v Her Majesty the Queen, et al*, 2014 CanLII 60080 (SCC).

<sup>15</sup> *R v Mohan*, [1994] 2 SCR 9.

<sup>16</sup> A W Bryant *et al*, *The Law of Evidence in Canada*, 3d ed (Markham: LexisNexis Canada Inc., 2009) at 832; *R v Century 21 Ramos Realty Inc and Ramos* (1987), 58 OR (2d) 737 (CA).

<sup>17</sup> *Hunt v T&N PLC*, [1993] 4 SCR 289 at 306; J G Castel, *Canadian Conflict of Laws*, 4th ed (Toronto: Butterworths, 1997) at 155.

<sup>18</sup> See *Jose Pereira E Hijos, SA v Canada (Attorney General)* (1996), 126 FTR 167; *Ielovski v Canada (Minister of Citizenship and Immigration)*, [2008] FC 739 at para 7, 169 ACWS (3d) 620. However, as Van Ert has observed, courts have not internalized this into their practice. Often courts treat international law as though it were a question

subject of expert opinion. In principle, therefore, expert opinion evidence on Canada's international obligations should not be admissible merely by dint of the fact it involves having an expert pronounce upon a question of law.

The second (and related) tension results from the way international obligations are proven. While courts "cannot take judicial notice of foreign law,"<sup>19</sup> they can and should take judicial notice of international treaties or custom.<sup>20</sup> Indeed, in some instances, courts are bound by legislation to take judicial notice of treaties.<sup>21</sup> Once again, if judicial notice can (and in some instances *must*) be taken of public international law, then expert evidence is unnecessary. This is so because the ostensible purpose of judicial notice is to dispense with unnecessary proof.<sup>22</sup>

As the above suggests, the introduction of international law in Canadian courts should not, at least in principle, involve the use of expert opinion evidence.<sup>23</sup> But even a cursory survey of the jurisprudence reveals that it is common for courts to rely on the opinions of international legal experts. For instance, in the *Reference re Secession of Quebec*,<sup>24</sup> the Supreme Court of Canada noted the expert opinions tendered by the "*amicus curiae* and the Attorney General of Canada" made it "clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state."<sup>25</sup> Yet in many other cases the Supreme Court has quite properly cited and relied upon international law without explicitly referring to, or apparently requiring, expert opinion evidence.<sup>26</sup>

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of fact; see Van Ert, "Admissibility," *supra* note 6 at 40; Van Ert, *Using International Law*, *supra* note 6 at 44.

<sup>19</sup> Castel, *supra* note 17 at 7-1.

<sup>20</sup> *North v Canada* (1906), 37 SCR 385; Van Ert, *Using International Law*, *supra* note 6 at 42-62.

<sup>21</sup> For example, the *Mutual Legal Assistance in Criminal Matters Act*, RSC, 1985, c 30, s 5(3), stipulates that "Agreements and provisions published in the Canada Gazette or the Canada Treaty Series are to be judicially noticed."

<sup>22</sup> *R v Find*, 2001 SCC 32 at para 48, [2001] 1 SCR 863.

<sup>23</sup> Van Ert, "Admissibility," *supra* note 6; Van Ert, *Using International Law*, *supra* note 6 at 69. See also *R v Finta*, [1994] 1 SCR 701 (*per* La Forest J dissenting).

<sup>24</sup> [1998] 2 SCR 214.

<sup>25</sup> *Ibid* at para 111.

<sup>26</sup> See e.g. *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313; *Thomson v Thomson*, [1994] 3 SCR 551; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 ; *Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281.

While at least one court has obliquely suggested that “expert evidence on international law may at times be required,”<sup>27</sup> the majority of judges have admitted expert evidence with no comment as to its necessity, its admissibility, or the form in which it should be tendered. By way of example, in *Bouzari v Iran*,<sup>28</sup> the Ontario Court of Appeal considered an appeal from a successful motion to strike a lawsuit against Iran brought by an individual who was imprisoned and tortured by the Iranian regime. The parties each tendered expert opinions from professors of international law. On appeal, Bouzari challenged the motion judge’s conclusions about Iran’s immunity under international law. In rejecting this line of argument, the Court of Appeal made no comment about the admissibility of expert opinion, *per se*. The Court did, however, state that while the motion judge’s conclusions on international law were “not a finding of fact by a trial judge,” they were “a finding based on the evidence she heard and is therefore owed a certain deference in this court.”<sup>29</sup>

Expert opinion evidence was also tendered in *Amaratunga v Northwest Atlantic Fisheries Organization*,<sup>30</sup> a case that reached the Supreme Court of Canada in 2013.<sup>31</sup> At issue was whether a plaintiff was barred from suing the North Atlantic Fisheries Organization, an international organization headquartered in Nova Scotia, for wrongful dismissal. The motions judge, in receiving expert evidence from two “renowned legal experts”<sup>32</sup> appears to have applied the *Mohan* criteria to their evidence, stating that both experts “were qualified as experts in international law” and “able to express opinion evidence with respect to international law and, in particular, the law respecting immunity of sovereign states and international organizations.”<sup>33</sup> In considering their evidence, the motions judge commented that one of the experts had “resiled” from a “sweeping statement in his cross-examination.”<sup>34</sup> The Supreme Court of Canada made no explicit reference to the motion judge’s treatment of the expert evidence.

*Saskatchewan v Saskatchewan Federation of Labour* is a recent example of a case involving *Charter* litigation where, as in *Appulonappa*,

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<sup>27</sup> *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2010 FC 1328 at para 11, [2010] FCJ No 1650.

<sup>28</sup> *Bouzari v Iran* (2004), 71 OR (3d) 675 (CA) [*Bouzari*].

<sup>29</sup> *Ibid* at para 68.

<sup>30</sup> 2010 NSSC 346, (2010), 295 NSR (2d) 331 [*Amaratunga*].

<sup>31</sup> *Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 SCR 866.

<sup>32</sup> *Amaratunga*, *supra* note 30 at para 15.

<sup>33</sup> *Ibid* at para 16.

<sup>34</sup> *Ibid* at para 20.

the parties tendered expert opinions on international law.<sup>35</sup> The case concerned the constitutionality of legislation enacted by the province of Saskatchewan which, among other things, limited the ability of union members to strike if they were designated “essential services.” The trial judge found that the impugned legislation violated the applicants’ right to freedom of association under section 2(d) of the *Charter*. In reaching this conclusion, the trial judge observed that the parties had “filed opinions prepared by international law experts along with detailed submissions relating to Canada’s international law obligations.”<sup>36</sup> The trial judge commented that the government’s arguments “were not supported by the expert opinion given in this action, which is that Canada’s responsibilities arising from its [International Labour Organization] membership and UN covenants include a commitment to respect the body of international law that has developed on collective bargaining.”<sup>37</sup> Once again, there appears to have been no question as to whether experts could pronounce upon Canada’s compliance with international law.<sup>38</sup>

Another feature of cases involving expert opinion on international law is that the evidence itself is not tendered in a consistent format.<sup>39</sup> In some cases the parties follow the approach taken in *Appulonappa*, with experts giving *viva voce* evidence. In other cases, experts simply file written reports or swear affidavits.<sup>40</sup> In one recent case,<sup>41</sup> the parties tendered expert opinions in the form of unsworn letters from two legal experts. Remarkably, the trial judge was prepared on the letters alone to find that the applicant’s expert was biased, unlike the respondent’s expert who was “more neutral, factually rigorous and persuasive.”<sup>42</sup>

Although expert evidence on international law is frequently admitted in trial courts, it is also common for courts to rely upon international law

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<sup>35</sup> *Saskatchewan v Saskatchewan Federation of Labour*, 2012 SKQB 62, (2012), 390 Sask R 743.

<sup>36</sup> *Ibid* at para 100.

<sup>37</sup> *Ibid* at para 107.

<sup>38</sup> The same was true on appeal. The Saskatchewan Court of Appeal referenced the fact that the “record contains expert reports speaking to the place of the right to strike in international law;” see *Saskatchewan v Saskatchewan Federation of Labour*, 2013 SKCA 43 at para 70, (2013), 414 Sask R 70.

<sup>39</sup> Also see Van Ert, “Admissibility,” *supra* note 6 at 32-36 (discussing a number of cases in which expert evidence on international law was tendered in varying forms).

<sup>40</sup> *Amnesty International Canada v Canadian Forces*, 2007 FC 1147, (2007), 320 FTR 236; *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 876, (2013), 19 Imm LR (4th) 122.

<sup>41</sup> *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900, [2014] 1 CNLR 106.

<sup>42</sup> *Ibid* at para 42.



without relying upon expert evidence. Numerous cases could be cited, but a few leading examples will suffice. In *Baker v Canada (Minister of Citizenship and Immigration)*,<sup>43</sup> the Supreme Court relied on the “bests interests of the child” standard in the United Nations *Convention on the Rights of the Child (CRC)*<sup>44</sup> when interpreting the *Immigration Act* (as it was then called), without reference to expert evidence.<sup>45</sup>

*Suresh v Canada (Minister of Citizenship and Immigration)*<sup>46</sup> provides a further example of a recent case where the Supreme Court relied upon international law in the apparent absence of expert evidence.<sup>47</sup> There the Court considered, among other things, Canada’s obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>48</sup> The same approach was taken in *R v Hape*<sup>49</sup> where the Court considered the principles of international law governing the extraterritorial application of domestic law in a foreign state. Once again, the Court did not refer to any expert opinion evidence and none appears to have been relied on in the lower courts.<sup>50</sup>

This brings us back to the *Appulonappa* decision and its consequences for the admissibility of expert evidence on international law. The discussion above is certainly not intended to be an exhaustive account of the jurisprudence on the reception of expert opinion evidence, but it does serve to illustrate why *Appulonappa* is an important decision. The Court in *Appulonappa* did not suggest it should defer to the trial judge’s conclusions on international law, or to the need for expert opinion evidence. Instead, the Court was clear and unequivocal in holding the expert evidence was inadmissible to the extent that the experts had opined on “the interpretation and application of international law.”<sup>51</sup>

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<sup>43</sup> [1999] 2 SCR 817 [*Baker*].

<sup>44</sup> 28 May 1990, 1577 UNTS 3, CTS 1992 No 3 [*CRC*].

<sup>45</sup> The Supreme Court has recently relied upon the *CRC* without the need for expert evidence in *R v DB*, 2008 SCC 25 at para 60, [2008] 2 SCR 3. However, two expert reports on the meaning of the *CRC* and other questions of international law were tendered in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76; see Van Ert, “Admissibility,” *supra* note 6 at 33.

<sup>46</sup> 2002 SCC 1, [2002] 1 SCR 3.

<sup>47</sup> There is nothing in the lower court decision suggesting that expert evidence was placed before the court; see *Suresh v Canada (Minister of Citizenship and Immigration)* (1999), 65 CRR (2d) 344.

<sup>48</sup> 23 August 1985, 1465 UNTS 85, CTS 1987 No 36.

<sup>49</sup> 2007 SCC 26, [2007] 2 SCR 292.

<sup>50</sup> *R v Hape* (2005), 201 OAC 126.

<sup>51</sup> *Appulonappa*, *supra* note 1 at para 62.

If the Court's holding in *Appulonappa* is correct, then what are the consequences for trial courts and for lawyers? The answer is that expert opinion evidence on international law, in the sense of a witnesses giving *viva voce* evidence, is inadmissible. This conclusion is entirely defensible in principle. It also recognizes the fact that the common law's adversarial mode of fact-finding is ill-suited to the resolution of questions of international law. Inevitably, the process of examination and cross-examination of witnesses tends to raise issues of credibility that are (or should be) alien to the proper determination of Canada's international legal obligations.<sup>52</sup> This is to say nothing of the spectacle of requiring a lawyer to swear an oath on the validity of his or her legal opinion.<sup>53</sup>

The proper approach, as one learned scholar has persuasively argued,<sup>54</sup> is for counsel to make submissions in the form of legal argument. This is, in effect, what the Court's holding in *Appulonappa* appears to demand. Although many lawyers and judges do not have the expertise to navigate the international law issues arising in litigation, this does not mean the admission of international law should become an unprincipled free for all. In cases where international obligations are unclear, yet central to the disposition of the case, the better procedure is to have legal experts (who will in any case usually be lawyers or law professors) make oral or written submissions. The international legal expert can simply file a written brief and appear as counsel for those discrete aspects of the case touching upon international law.

One of the practical problems posed by having experts make submissions is that many international law experts may not be qualified to practice law in Canada. Where such an issue arises, the Court should be able exercise its inherent jurisdiction over the "right of audience"<sup>55</sup> and permit the legal expert to make submissions. Alternatively, the court could appoint the expert as *amicus curiae*. Although lexically synonymous with a neutral "friend of the court," the original function of the *amicus curiae* was to inform judges of areas of law beyond their expertise or knowledge,

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<sup>52</sup> An example of this is found in *Canadian Council for Refugees v Canada*, 2007 FC 1262 at para 108, [2008] 3 FCR 606, where the trial judge stated: "I find the [respondents'] experts to be more credible, both in terms of their expertise and the sufficiency, directness and logic of their reports and their cross-examination thereon..."

<sup>53</sup> Van Ert, *Using International Law*, *supra* note 6 at 69 noting that "lawyers in the guise of experts should not be asked to swear to the truth of the legal views they hold or submit to cross-examination on those views by other lawyers."

<sup>54</sup> Van Ert, "Admissibility," *supra* note 6 at 46.

<sup>55</sup> See e.g. *Lameman v Alberta*, 2011 ABQB 396, (2011), 521 AR 99, where the Court draws a distinction between the "right of audience" and the right to practice law.

either in the form of impromptu oral or non-binding written submissions.<sup>56</sup> Appointing an international law expert as *amicus curiae* would be entirely in keeping with its traditional function.<sup>57</sup> The court could engage in an evaluation of the *amicus*' qualifications before making such an appointment. Where there is a dispute involving strongly conflicting opinions, the court could appoint more than one *amicus*, perhaps on the recommendations of the parties. Again, these international law *amici* would not give evidence or be examined, but would file written briefs and make oral submissions.

#### 4. Conclusion

The Court of Appeal's decision in *Appulonappa* is unlikely to resolve every question about how international legal obligations should be pleaded in Canadian courts. The case is important, however, because it reaffirms that the content of Canada's international obligations is a question of law, and that international law experts should not therefore be permitted to pronounce upon it. The practical consequence of this holding is that Canadian lawyers will not be able to rely upon experts, and may have to roll up their sleeves and make submissions on international law themselves, or hire outside counsel to do it for them. Perhaps more than anything, the *Appulonappa* decision provides a useful foil for further discussion about the procedures used to plead and rely upon international law in Canadian courts. As economic and social interdependency between states increases, it is all but certain that Canadian courts will be regularly confronted with prickly international law problems. As this occurs, courts will have to adapt their domestic procedures and evidentiary rules to recognize our evolving juridical environment.

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<sup>56</sup> Samuel Krislov, "The *Amicus Curiae* Brief: From Friendship to Advocacy" (1963) 72 Yale L J 694 at 720.

<sup>57</sup> Certainly *amici* are permitted to make submissions in diverse international *fora*. See Duncan B Hollis, "Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty" (2002) 25 BC Int'l & Comp L Rev 235; Eugenia Levine, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation" (2011) 29 Berkeley J Int'l L 200; Luigi Crema, "Testing Amici Curiae in International Law: Rules and Practice" (2012) 22 The Italian Yearbook of International Law 91.