Canadian Yearbook of International Law
Annuaire canadien de droit international
(2022), **60**, 387–410 doi:10.1017/cyl.2023.14

CAMBRIDGE UNIVERSITY PRESS

CASES / JURISPRUDENCE

Canadian Cases in Public International Law in 2022

Jurisprudence canadienne en matière de droit international public en 2022

compiled by / préparé par

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Châtiments cruels — emprisonnement à vie — rôle du droit international dans l'interprétations de la Charte canadienne des droits et libertés

R. c Bissonnette, 2022 CSC 23 (27 mai 2022). Cour suprême du Canada.

Bissonnette a tué six personnes et en a blessé cinq autres dans une mosquée à Québec. Il a plaidé coupable à six chefs de meurtre au premier degré. Le *Code criminel* du Canada prévoit une peine minimale dans les cas de meurtre au premier degré d'emprisonnement à perpétuité sans possibilité de libération conditionnelle avant vingt-cinq ans.[1] Le ministère public a demandé l'application d'une disposition du *Code criminel* selon laquelle les périodes sans admissibilité à la libération conditionnelle pour chaque condamnation pour meurtre doivent être purgées consécutivement plutôt que concurremment. En effet, Bissonnette serait inéligible à la libération conditionnelle avant 150 ans, c'est-à-dire qu'il mourrait en prison.

Le juge en chef Wagner pour la Cour suprême du Canada a statué que la disposition du *Code criminel* qui permettait un telle résultat était contraire à l'article 12 de la *Charte canadienne des droits et libertés*.[2] Cet article confère une protection contre tous ou traitements ou peines cruels et inusités. Le juge en chef est arrivé à cette conclusion à la suite d'une analyse de la portée de la disposition contestée, la jurisprudence canadienne relative à l'article 12 de la *Charte* et la nature de la peine imposée par la disposition. Fondamentalement, le juge en chef Wagner a conclu qu'une peine d'emprisonnement à perpétuité sans possibilité réaliste de libération

[1]*Code criminel*, LRC 1985, c C-46.
[2]*Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11 [*Charte*].

conditionnelle prive le délinquant de toute perspective de réforme et de réintégration dans la société.[3] L'effet est de priver les contrevenants de toute incitation à se réformer.[4]

Le juge en chef Wagner a trouvé de l'appui pour cette conclusion dans le droit international et comparé, "la peine d'emprisonnement à perpétuité sans possibilité de libération conditionnelle y étant généralement considérée comme étant contraire à la dignité humaine."[5] Le juge en chef a confirmé la décision de la Cour dans *9147-0732 Québec inc.*[6] que bien que le droit international et comparé ait un rôle à jouer dans l'interprétation des droits garantis par la *Charte*, "ce rôle a comme il se doit consisté à *appuyer* ou à *confirmer* une interprétation dégagée en appliquant la démarche [téléologique]" de l'interprétation de la *Charte* établie dans *R. c Big M Drug Mart Ltd.* et que "la Cour n'a jamais eu recours à de tels outils pour définir la portée des droits garantis par la Charte."[7]

Procédant ainsi, le juge en chef Wagner a observé que la "dignité humaine est au cœur du développement du régime international de protection des droits de la personne depuis la fin de la Seconde Guerre mondiale,"[8] citant les préambules de la *Charte des Nations Unies* de 1945[9] et la *Pacte international relatif aux droits civils et politiques* de 1966 (*PIDCP*).[10] Il a également fait référence aux articles 10(1) (traitement des détenus) et 10(3) (réinsertion des détenus) du *PIDCP*. Il a noté que le *PIDCP* étant un traité ratifié par le Canada, "le droit canadien est présumé conforme aux engagements qu'il prévoit," ajoutant qu'il "représente donc une source pertinente pour l'interprétation des dispositions de la *Charte*."[11]

Le juge en chef a ensuite examiné l'approche de révision des peines prononcées par la Cour pénale internationale en vertu du *Statut de Rome de la Cour pénale internationale* 1998,[12] soulignant que "le Canada a joué un rôle important dans la création de cette cour" et que le Canada a été le premier pays à mettre en œuvre le *Statut de Rome* en droit interne. Le juge en chef a noté que le *Statut de Rome* comprend un mécanisme de révision des peines où des peines d'emprisonnement à perpétuité sont imposées.[13] Le juge en chef a également examiné certaines décisions de la Grande Chambre de la Cour européenne des droits de l'homme dans lesquelles le principe de la réhabilitation dans la détermination de la peine a été reconnu, notant l'acceptation par cette cour que les peines à perpétuité ne sont pas contraires à l'article 3 de la *Convention européenne des droits de l'homme* 1950 (*CEDH*),[14] mais aussi la

[3] *R c Bissonnette*, 2022 CSC 23, Motifs au para 82 [*Bissonnette*].

[4] *Ibid* au para 96.

[5] *Ibid* au para 98.

[6] 2020 CSC 32 [*9147-0732 Québec*].

[7] *Bissonnette*, *supra* note 3 au para 98; *R c Big M Drug Mart Ltd*, [1985] 1 RCS 295.

[8] *Bissonnette*, *supra* note 3 au para 99.

[9] *Charte des Nations Unies*, 26 juin 1945, RT Can 1945 n° 7 (entrée en vigueur: 24 octobre 1945).

[10] *Pacte international relatif aux droits civils et politiques*, 16 December 1966, 999 RTNU 171, Can TS 1976 n° 47 (entrée en vigueur: 23 March 1976).

[11] *Bissonnette*, *supra* note 3 au para 100.

[12] *Statut de Rome de la Cour pénale internationale*, 17 juillet 1998, 2187 RTNU 3 (entrée en vigueur: 1er juillet 2002).

[13] *Bissonnette*, *supra* note 3 au paras 101–02.

[14] *Convention européenne des droits de l'homme*, 4 November 1950, 213 RTNU 221 (entrée en vigueur: 3 September 1953).

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conclusion de cette cour selon laquelle de telles peines doivent être compressibles après révision de sorte que tout détenu ait la possibilité d'être libéré.[15]

Passant au droit comparé, le juge en chef a brièvement noté, "à titre illustratif," la situation en Allemagne, aux États-Unis, en Nouvelle-Zélande, en Australie et en Angleterre et au Pays de Galles.[16] Il a conclu cette partie de ses motifs en faisant observer que

> bien que, comme toute autre disposition de la Charte, l'art. 12 doive d'abord et avant tout être interprété au regard du droit et de l'histoire du Canada … un parallèle peut être établi entre l'approche du droit pénal canadien et celles du droit international et du droit de différents pays similaires au Canada en ce qui concerne les peines d'emprisonnement à perpétuité sans possibilité de libération conditionnelle, qui sont généralement considérées comme étant incompatibles avec à la dignité humaine.[17]

L'approche du juge en chef aux sources juridiques internationales et comparées dans *Bissonnette* met en pratique l'approche novatrice de la majorité quant à l'interprétation de la *Charte* à la lumière du droit international dans *9147-0732 Québec*. Le juge en chef est parvenu à une conclusion (pouvons-nous la qualifier de préliminaire?) au sujet de l'article 12 dans le contexte de l'affaire avant de se tourner vers le droit international et comparé. Il a ensuite utilisé ces sources pour étayer sa conclusion, semblant donner plus de poids aux sources internationales contraignantes (la *Charte des Nations Unies* et le *PIDCP*) qu'aux sources non contraignantes (la *CEDH*, les décisions des tribunaux internationaux et les décisions des tribunaux étrangers). Les sources internationales et comparatives ne sont (à juste titre) pas traitées sur un pied d'égalité, mais toutes les deux sont reléguées à un rôle d'appui ou de confirmation.

Ce qui, méthodologiquement, se passe réellement ici reste quelque peu flou. Le juge en chef affirme la présomption de conformité avec le droit international, mais décrit ensuite cette présomption comme expliquant pourquoi le *PIDCP* est une source pertinente pour l'interprétation de la *Charte*. Cela semble en contradiction avec la distinction, établie pour la première fois par la Cour suprême en 1987,[18] entre la présomption de conformité (applicable aux sources internationales contraignantes) et la plus faible "approche pertinente et persuasive" (applicable aux sources non contraignantes). Le principal exemple de sources non contraignantes auxquelles l'approche pertinente et persuasive s'appliquait auparavant, à savoir les décisions de tribunaux étrangers, est pris en compte par le juge en chef Wagner, mais uniquement "à titre illustratif." Cette expression signale-t-elle un poids encore moindre que "pertinent et persuasif"?

En faisant ces observations, je suis peut-être coupable de l'erreur contre laquelle le juge Abella a mis en garde dans *Nevsun Resources*, à savoir la lecture des décisions

[15] *Bissonnette*, *supra* note 3 au para 104.

[16] *Ibid* au paras 105–07.

[17] *Ibid* au para 108.

[18] Voir *Renvoi relatif à la Public Service Employee Relations Act (Alberta)* [1987] 1 RCS 313 à la pp 348–49 (une cause longuement étudiée dans *9147-0732 Québec*, *supra* note 6, mais pas cité dans *Bissonnette*, *supra* note 3).

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judiciaires comme des textes talmudiques où chaque mot attire sa propre interprétation exégétique.[19] Il reste à voir exactement où la nouvelle approche de la Cour suprême quant au droit international et l'interprétation de la *Charte*, adoptée dans *9147-0732 Québec*, nous mènera. Ce que *Bissonnette* nous dit jusqu'ici, selon moi, c'est premièrement que le droit international doit jouer un rôle de soutien ou de confirmation, plutôt que déterminant, dans l'interprétation de la *Charte*, et deuxièmement, que la Cour suprême du Canada continue de s'intéresser aux normes internationales en tant que facteurs à considérer dans le cadre de l'interprétation de la *Charte*.

Le véritable test de la nouvelle approche viendra lorsqu'une interprétation téléologique de la *Charte* selon *Big M* produira un résultat incompatible avec les obligations internationales du Canada. Un tribunal, dans de telles circonstances, appliquera-t-il la présomption de conformité telle qu'approuvée dans *Renvoi relatif à la Public Service Employee Relations Act (Alberta)*, ou trouvera-t-il la présomption réfutée? Il existe une possibilité réelle que ce scénario ne se produise jamais; il est extrêmement rare que le droit international des droits de la personne devance le droit constitutionnel canadien en matière de protection des droits de la personne. Si ce scénario se produit, cependant, la réfutation de la présomption de conformité dépendra essentiellement du contexte factuel et juridique de la question. Il est impossible de dire dans l'abstrait s'il convient d'adopter une interprétation conforme ou non conforme. Les deux voies restent ouvertes. (GvE)

Treaty interpretation — tax treaties — requests for information

Levett v Canada (Attorney General), 2022 FCA 117 (17 June 2022). Federal Court of Appeal.

The appellants, several Canadian taxpayers, challenged the validity of three requests for information (RFIs) submitted by the Canada Revenue Agency (CRA) to the Swiss Federal Tax Administration pursuant to Article 25 of the *Canada-Switzerland Income Tax Convention*.[20] The convention has the force of law in Canada.[21] Article 25 of the convention sets out rules for Canadian and Swiss tax authorities to share information where necessary to carry out the provisions of the convention or to administer or enforce domestic taxation laws. The *Interpretative Protocol* to the convention specifies that a state can resort to RFIs only "once [it] has pursued all

[19]2020 CSC 5 au para 90.

[20]*Convention between the Government of Canada and the Swiss Federal Council for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital*, 5 May 1997, CanTS 1998 No 15 (entered into force 21 April 1998), as amended by the *Protocol Amending the Convention between Canada and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital*, 22 October 2010, CanTS 2011 No 31 (entered into force 31 October 2013) [*Canada-Switzerland Income Tax Convention*].

[21]*Act to Implement Conventions Between Canada and Morocco, Canada and Pakistan, Canada and Singapore, Canada and the Philippines, Canada and the Dominican Republic and Canada and Switzerland for the Avoidance of Double taxation with respect to Income Tax*, SC 1977, c 29, s 19; *Tax Conventions Implementation Act*, SC 2013, c 27, s 12.

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reasonable means available under its internal taxation procedure to obtain the information."[22]

At issue was whether the CRA had pursued "all reasonable means" under Canadian domestic law prior to issuing the RFIs. The Federal Court of Appeal held that the CRA had done so. It gave a broad interpretation to the word "reasonable," noting that its use in the *Interpretative Protocol* suggested that the tax authorities must have some measure of discretion in determining whether all reasonable means under domestic tax law had been pursued.[23] The court emphasized that tax treaties "must be given a liberal interpretation with a view to implementing the true intentions of the parties" and that a "literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated."[24] Those "true intentions" could be determined by referring to "extrinsic materials which form part of the legal context," including model conventions and official commentaries.[25]

Here, reading Article 25 of the convention in light of various extrinsic materials (including model conventions and commentaries of the Organisation for Economic Co-Operation and Development and the *Interpretative Protocol*) revealed that the "true intentions of the parties to that agreement was [*sic*] to promote the exchange of information to the maximum extent possible, not to limit it."[26] The court proceeded to review various complaints by the appellants. While it appeared to have some questions about how the CRA proceeded in some instances, on the whole, it found that the CRA had acted reasonably in issuing the RFIs. Interestingly, the court noted that the Swiss Tribunal administrative fédéral had been satisfied, in the proceedings in Switzerland, that the CRA had exhausted all reasonable domestic means to exhaust the information. While this was not binding in Canada, it bolstered the court's conclusion that the CRA had acted reasonably.[27] (DS)

Copyright — "Making available" right — treaties and the interpretation of statutes

Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association, 2022 SCC 30 (15 July 2022). Supreme Court of Canada.

The Federal Court of Appeal's decision in this case was noted in the 2020 edition of the *Canadian Yearbook of International Law*. The question was how to interpret section 2.4(1.1) of the *Copyright Act*,[28] as introduced by the *Copyright Modernization Act*[29] in November 2012. The provision reads:

[22]*Canada-Switzerland Income Tax Convention*, Interpretative Protocol, para 2(b).
[23]*Levett v Canada (Attorney General)*, 2022 FCA 117 at paras 14–15 [*Levett*].
[24]*Ibid* at para 24, quoting *Crown Forest Industries Ltd v Canada*, [1995] 2 SCR 802 at para 43.
[25]*Levett*, *supra* note 23 at para 25.
[26]*Ibid* at paras 26–28.
[27]*Ibid* at paras 33–34.
[28]RSC 1985, c C-42.
[29]SC 2012, c 20.

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For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.	Pour l'application de la présente loi, constitue notamment une communication au public par télécommunication le fait de mettre à la disposition du public par télécommunication une œuvre ou un autre objet du droit d'auteur de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement.

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) took the view that this provision had overtaken the decision of the Supreme Court of Canada in *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* (*Entertainment Software 2012*) where the court held that transmission over the Internet of a musical work resulting in a download of the work was not, for the purposes of the *Copyright Act*, a communication by telecommunication attracting the payment of royalties.[30] Now, in SOCAN's submission, royalties were due when musical works were made available to the public online, whether those works were transmitted by downloading or streaming. This result was said to be required by the treaty underlying the amendment of section 2.4(1.1) — namely, the *World Intellectual Property Organization Copyright Treaty* (*WIPO Copyright Treaty*).[31]

The Copyright Board had largely agreed with SOCAN that Article 8 of the *WIPO Copyright Treaty* required new royalty payments and interpreted section 2.4(1.1) accordingly. The Federal Court of Appeal reversed this decision in reasons that blasted the board for misusing the treaty in its decision-making. At the Supreme Court of Canada, Justice Malcolm Rowe for the majority of the court upheld the Federal Court of Appeal's result but painted a very different (and more orthodox) picture of the treaty's relevance in statutory interpretation. After determining the applicable standard of review (correctness), Rowe J considered at length the role of the *WIPO Copyright Treaty* in the interpretation of section 2.4(1.1). The treaty is relevant at the context stage of the statutory interpretation exercise.[32] There is no need to find textual ambiguity in the statute before resorting to the treaty. Rather, the statute must be interpreted in its entire context, including relevant international legal obligations.[33] If the statute implements a treaty "without qualification," the interpretation of the statute needs to be wholly consistent with Canada's obligations under the treaty. If the statute is "less explicit as to the extent to which it gives effect to a treaty, the weight given to obligations under the treaty will depend on the circumstances of the case, such as the treaty's specificity and the statute's text."[34]

[30] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34.

[31] *World Intellectual Property Organization Copyright Treaty*, 20 December 1996, Can TS 2014 No 20 (entered into force 6 March 2002).

[32] *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at para 44.

[33] *Ibid* at para 45.

[34] *Ibid* at para 46.

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Where the text permits, legislation should be interpreted so as to comply with Canada's treaty obligations.[35] That said, "[t]he task remains to give effect to legislative intent," and the separation of powers requires courts to give effect to a statute that demonstrates legislative intent not to comply with treaty obligations.[36] Thus, a treaty "cannot overwhelm clear legislative intent." "The court's task is to interpret what the legislature (federally and provincially) has enacted and not subordinate this to what the federal executive has agreed to internationally."[37] Applying these principles to Article 8 of the *WIPO Copyright Treaty* and section 2.4 (1.1) of the *Copyright Act*, Rowe J concluded that Parliament intended to fulfill its Article 8 obligation by means of the amendment. He notes the textual similarity of the two provisions. He noted as well that an explanatory memorandum (tabled in the House of Commons pursuant to the Tabling of Treaties Policy) advised that the *Copyright Modernization Act* was "developed with a view to implementing the rights and protections of the *WIPO Copyright Treaty*, thereby putting Canada in a position to ratify."[38]

This conclusion does not mean the Copyright Board's interpretation of section 2.4 (1.1) was sound, however. While its interpretation "is one means to fulfill Canada's obligations under art. 8, it is inconsistent with the text, structure and purpose of the *Copyright Act*" and is not required by Article 8.[39] In the lengthy discussion that follows, Rowe J concludes that another interpretation of the disputed provision is available — one that lives up to Canada's international obligations while also respecting the scheme of the *Copyright Act.* In particular, Rowe J concludes that the *WIPO Copyright Treaty* "does not demand that member countries create a new compensable 'making available right' to satisfy art. 8" but need only "ensure that authors can control the physical act of making their works available … through any combination of rights."[40]

The learned judge identifies Article 8's "first goal" as "to clarify that the right to communicate works to the public (a performative activity) applied to on-demand technology," resolving "an ambiguity as to whether the old communication to the public rights accommodated or excluded 'pull technologies'."[41] The article's "second goal" is "to ensure that authors could control when their works were made available online."[42] But ensuring such control does not require reading section 2.4(1.1) of the *Copyright Act* as creating a compensable making available right.[43] Rather, the so-called umbrella solution adopted by states parties to the treaty leaves it to the states themselves to determine how to achieve Article 8's two goals. So long as Canadian law does so, Canada will be in compliance with its Article 8 obligation.[44] Rowe J notes in this connection that the United States has opted to rely on its existing reproduction, performance, and distribution rights to discharge its Article

[35] *Ibid.*
[36] *Ibid* at para 47.
[37] *Ibid* at para 48.
[38] *Ibid* at para 49.
[39] *Ibid* at para 50.
[40] *Ibid* at para 75.
[41] *Ibid* at para 82.
[42] *Ibid* at para 83.
[43] *Ibid* at para 87.
[44] *Ibid* at para 90.

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8 obligations, while other states (not specified) have adopted wording similar to that in Article 8.[45]

Rowe J proceeds to adopt an interpretation of section 2.4(1.1) that (1) clarifies that an author's right to "communicate the work to the public by telecommunication" (section 3(1)(f) of the *Copyright Act*) applies to on-demand streams and (2) a work is performed as soon as it is made available for on-demand streaming.[46] In his view, this interpretation gives effect to Canada's Article 8 obligation while also being consistent with the text, context, and purpose of the *Copyright Act.* A royalty is payable as soon as the work is made available for on-demand streaming.[47] If works are streamed or made available for streaming, the author's performance right is engaged. Downloads, by contrast, do not engage performance rights. Downloads are protected by reproduction and authorization rights.[48]

Notably absent from Rowe J's reasons is any engagement with the elaborate and, at points, unconventional approach to international law in domestic courts adopted by Justice David Stratas for the Federal Court of Appeal. The tenor of Rowe J's approach resembles that of Stratas JA in its insistence on the primacy of the legislative text as the starting point for interpretation and its affirmation of the legislative power to adopt laws that fail to conform to the state's international obligations. But Rowe J implicitly rejects Stratas JA's attempt to downplay the presumption of conformity with international law (which, Stratas JA had warned, "can lead some dangerously off track").[49] Instead, Rowe J affirms that international law is part of the context in which statutes are enacted and interpreted and that enactments are presumed to comply with international law. Of particular note is Rowe J's rejection of the so-called ambiguity requirement — a heresy still found in some Canadian appeal court decisions whereby consideration of international instruments is said to be permissible only where the legislative text reveals an ambiguity. That notion has now been rejected by the Supreme Court of Canada three times.[50] Instead of the excessive scepticism that Stratas JA's reasons evinced about the propriety of the Copyright Board's consideration of the treaty at all, Rowe J's reasons engage with the treaty, as Parliament itself sought to do in the *Copyright Modernization Act.* (GvE)

Motion to strike — presumption of conformity — actions based on breach of customary international law

Toussaint v Canada (Attorney General), 2022 ONSC 4747 (17 August 2022). Ontario Superior Court of Justice.

Toussaint was an irregular migrant in Canada who required urgent medical care. The Minister of Immigration, Refugees, and Citizenship refused to grant her an

[45]*Ibid* at paras 89, 109.

[46]*Ibid* at para 91.

[47]*Ibid* at para 100.

[48]*Ibid* at para 103.

[49]*Entertainment Software Association and another v Society of Composers, Authors and Music Publishers of Canada and Others*, 2020 FCA 100 at para 89.

[50]The two prior cases are *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371–72 and *Crown Forest Industries Ltd v Canada*, [1995] 2 SCR 802 at para 44.

https://doi.org/10.1017/cyl.2023.14 Published online by Cambridge University Press

exemption that would allow her to receive the medical care. After unsuccessfully challenging that decision before the federal courts, Toussaint made a complaint to the United Nations Human Rights Committee (HRC), which concluded that Canada had violated her rights to life and liberty and directed Canada to provide compensation to Toussaint and take positive steps to fix its health-care legislation to accommodate individuals like her. Canada disagreed with the HRC's decision and refused to implement it. Toussaint then sued Canada in the Ontario Superior Court of Justice, alleging that the federal government had violated her rights under the *Canadian Charter of Rights and Freedoms* and her international human rights by refusing to provide health care essential to prevent a reasonably foreseeable risk of loss of life or irreversible negative health consequences.[51] Canada brought a motion to strike the claim on several bases, including that the conclusions of a HRC decision did not give rise to a cause of action in Canada.

Justice Paul Perell dismissed Canada's motion. As the decision is only preliminary (that is, its focus is only on whether the cause of action has no hope of success and should not succeed), it does not rule on any of the issues definitively.[52] However, aspects of the decision are worthy of note. Perell J emphasized that Canada's obligations under the *Vienna Convention on the Law of Treaties* include an obligation to perform its obligations in good faith and not to invoke any provisions of its domestic law as justification for its failure to perform its obligations.[53] He observed that Canada had acceded to the 1966 *International Covenant on Civil and Political Rights* (*ICCPR*)[54] and its *Optional Protocol*[55] but had not enacted legislation to incorporate either into domestic law.[56] Perell J rejected Canada's submission that Toussaint's international law arguments had no chance of success as being "a dog whistle argument that reeks of the prejudicial stereotype that immigrants come to Canada to milk the welfare system."[57] In his view, Canada had mischaracterized Toussaint's argument as being that customary international law includes a right to free health care regardless of immigration status. However, Toussaint was not asserting such a right; rather, her argument was that there is a claim for public health care where a claimant's right to life is "demonstrably and not just theoretically at risk of being seriously impaired or extinguished."[58]

[51] *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 [*Charter*].

[52] The decision has since been overturned in part, but not on the aspects of interest in this comment. See *Toussaint v Canada*, 2023 ONCA 117. Unfortunately, Toussaint passed away between the Superior Court's decision and the appeal decision, but it appears that her family intends to pursue the litigation in the public interest (at para 24). If it proceeds, a decision on the merits would likely analyze these issues further.

[53] *Toussaint v Canada (Attorney General)*, 2022 ONSC 4747 at para 28 [*Toussaint*]; *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980) [*VCLT*].

[54] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976).

[55] *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976).

[56] *Toussaint*, *supra* note 53 at para 30.

[57] *Ibid* at para 134.

[58] *Ibid* at paras 135–38.

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The learned judge concluded that the Supreme Court of Canada's decision in *Nevsun Resources Ltd v Araya*,[59] which had allowed novel causes of action based on customary international law to proceed to trial, was a complete answer to Canada's motion.[60] He went on, however, to consider Canada's arguments based on a 2002 decision of the Ontario Court of Appeal, *Ahani v Canada*.[61] In this case, the HRC had asked Canada to stay its deportation of Ahani until it considered his complaint, but Canada refused. A majority of the Court of Appeal refused to grant the stay. A key part of its reasoning was that Canada had not implemented the *ICCPR* or the *Optional Protocol* into Canadian law and that the "views" of the HRC were non-binding.[62] Perell J concluded that *Ahani* did not foreclose Toussaint's arguments. He took the view that *Ahani* was largely concerned with procedural aspects of the *ICCPR* (that is, whether Canada was required to stay deportation while the HRC considered Ahani's complaint), whereas Toussaint was invoking the *ICCPR* in a substantive sense.[63] Further, "[i]t is also arguable that [*Ahani*] was wrongly decided in the first instance" or that it had been overtaken by subsequent law on the *Charter*, the relationship between the *Charter* and customary international law, and the law on the role of the HRC.[64]

Perell J may prove to be right that *Ahani* was wrongly decided or, at least, that the law has evolved since that 2002 decision. The Court of Appeal's conclusion that Canada has not implemented the *ICCPR* or the *Optional Protocol* into Canadian law is, with respect, questionable. The question of whether a treaty has been implemented can be more complex than it seems. Some treaties contain rights or obligations that are already part of Canadian law and, for that reason, need not be expressly implemented. Where changes to Canadian law are necessary, the federal executive ensures that laws are amended or introduced at the federal level (or works with provinces and territories where changes to provincial or territorial laws are needed) prior to ratifying new treaties.[65] The result is that Canada will typically not incur an international obligation until the Canadian executive is satisfied that it is able to perform it.[66] The result is that Canadian law may suffice to perform a treaty before it has been ratified, and no further implementing legislation will be required.

Assuming it followed its usual practice, the federal executive would have made a determination before ratifying the *ICCPR* that Canada's laws complied with it. Indeed, in *Reference re Public Service Employee Relations Act (Alberta)*,[67] Chief Justice Brian Dickson, dissenting but not on this point, noted that prior to acceding to the *ICCPR*, the federal government "obtained the agreement of the provinces, all of whom undertook to take measures for implementation of the Covenants in their

[59] *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun Resources*].

[60] *Toussaint*, *supra* note 53 at para 189.

[61] *Ahani v Canada (Attorney General)*, 2002 CanLII 23589 (Ont CA).

[62] *Ibid* at paras 2, 16, 31–35.

[63] *Toussaint*, *supra* note 53 at para 199.

[64] *Ibid* at para 200.

[65] Elisabeth Eid & Hoori Hamboyan, "Implementation by Canada of Its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical" in O Fitzgerald, ed, *The Globalized Rule of Law: Relationship between International and Domestic Law* (Toronto: Irwin Law, 2006) 339 at 456.

[66] Gib van Ert, "The Domestic Application of International Law in Canada" in Curtis A Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019) 501 at 508.

[67] [1987] 1 SCR 313.

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respective jurisdictions."[68] Moreover, the Supreme Court of Canada has repeatedly emphasized that the *ICCPR* is a binding international instrument, such that our laws are presumed to comply with it.[69]

The Court of Appeal's conclusion in *Ahani*, relying largely on its assertion that neither instrument was implemented in Canadian law, may therefore be ripe for reconsideration. With the green light now being given for Toussaint's litigation to proceed, it may provide an opportunity for that reconsideration. (DS)

Extradition — risk of torture — relevance of decision of Committee against Torture

Boily v Her Majesty the Queen, 2022 FC 1243 (31 August 2022). Federal Court.

Boily sued the Government of Canada for extraditing him to Mexico despite having information that he faced a substantial risk of torture there. This risk stemmed from the fact that Boily would be placed in the same prison from which he had escaped some years earlier, in the course of which a prison guard was killed. In a meticulous judgment, Justice Sébastien Grammond concluded that the government had breached Boily's right to life, liberty, and security of the person under section 7 of the *Charter*. He awarded Boily $500,000 in damages.

Much of the decision focuses on purely Canadian legal issues: the requirements of section 7 of the *Charter* and the principles of *Charter* damages. Of interest for our purposes is Grammond J's brief treatment of the international legal principles at issue and a decision that Boily obtained from the Committee against Torture in 2011.[70] The committee concluded that, prior to extraditing Boily, Canada had failed to take into account all the circumstances indicating that he faced a foreseeable, real, and personal risk of torture. These circumstances included the fact that Boily would be sent to the same prison where the guard had died and deficiencies in the agreed-upon diplomatic assurances.[71] The committee held that Canada was in breach of Article 3 of the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*Convention against Torture*),[72] which prohibits states parties from expelling, returning, or extraditing a person to another state where "there are substantial grounds for believing that he would be in danger of being subjected to torture," and ordered Canada to provide redress to Boily.[73]

Grammond J began by noting that, "although the case raises issues of constitutional law and even international law, the parties agree that the applicable suppletive law is Quebec law … since Mr. Boily resided in Quebec at the time of his extradition and continues to do so today."[74] As for the Committee against Torture's decision,

[68]*Ibid* at 350.

[69]See e.g. *9147-0732 Québec*, *supra* note 6 at para 39; *Bissonnette*, *supra* note 3 at para 100.

[70]Committee against Torture, Communication No 327/2007, UN Doc CAT/C/47/D/327/2007 (2007) [Committee Decision].

[71]*Ibid* at para 14.5.

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

[73]Committee Decision, *supra* note 70 at paras 14.6, 15.

[74]*Boily v Her Majesty the Queen*, 2022 FC 1243 at para 42 [*Boily*].

https://doi.org/10.1017/cyl.2023.14 Published online by Cambridge University Press

Grammond J determined that he should undertake an independent review of Boily's claim without reference to it, in part because

> this Court is a Canadian court that applies first and foremost Canadian law. In contrast, the Committee makes decisions according to international law. The application of international law by Canadian courts raises complex, sensitive and sometimes controversial issues, as evidenced by the recent cases of *Nevsun Resources Ltd v Araya*, 2020 SCC 5, and *Quebec (Attorney General) v 9147-0732 Quebec Inc*, 2020 SCC 32. In some cases, Canadian law may provide a complete solution to a dispute. As will be seen below, that is the case here. In such cases, it is not necessary to address issues of international law.[75]

A second reason for undertaking an independent review of the claim was that the evidence before Grammond J was much more extensive than that before the committee, which based its decision on a written record and did not hear from witnesses.[76] This reasoning is persuasive and will not be analyzed further here. Of interest for our purposes is the first part of the reasoning: that the committee was applying international law while Grammond J was tasked with applying Canadian law.

It is undoubtedly true that Canadian courts apply Canadian law, and Grammond J did indeed resolve the issues in the case by applying principles of Canadian constitutional and criminal law. However, those principles were inextricably linked to international law. The *Convention against Torture*, to which Canada is a party, requires states parties to criminalize torture and prohibits them from expelling, returning, or extraditing a person to another state where "there are substantial grounds for believing that he would be in danger of being subjected to torture."[77] As Grammond J explained, Canada has prohibited torture in section 269.1 of the *Criminal Code*, and case law has confirmed that torture is inconsistent with the *Charter*.[78] Even beyond the convention, the prohibition against torture is a norm of *jus cogens* that is automatically incorporated into Canadian law.[79]

The Committee against Torture's task was to determine whether Canada had contravened Article 3 of the *Convention against Torture* — that is, whether Canada had done enough to ensure it was not extraditing Boily in circumstances where there was a substantial risk of torture. Its decision was largely a fact-finding exercise: it reviewed the record and submissions before it to determine whether there was a substantial risk of torture and whether Canada had enough to prevent Boily from being subjected to torture. Grammond J conducted a very similar exercise. While he did so by looking primarily to the requirements of section 7 of the *Charter* with respect to avoiding torture, Canada's obligations stem from both domestic constitutional law and international law (that is, the *jus cogens* norm and Canada's adherence to the convention).[80] In short, both the Committee against Torture and

[75] *Ibid* at para 45.

[76] *Ibid* at para 46.

[77] *Convention against Torture*, *supra* note 72, arts 4 and 3, respectively.

[78] *Boily*, *supra* note 74 at para 2, citing *Suresh v Canada (Minister of Citizenship and Immigration)*, 2022 SCC 1, and *Bissonnette*, *supra* note 3.

[79] John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 175.

[80] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 49–75.

https://doi.org/10.1017/cyl.2023.14 Published online by Cambridge University Press

Grammond J were called on to determine whether Boily faced a substantial risk of torture in Mexico and whether Canada had done enough to prevent the torture from occurring. Grammond J was not bound by the decision of the committee, and he was right to observe that he had more detailed evidence before him than the committee did. However, the committee's decision was undoubtedly relevant and should have at least been considered.

In this case, it appears that there was no legal question of international law at play — for example, there was no dispute about the legal standard that ought to apply. Both the Committee against Torture and Grammond J applied the same standards: whether there was a substantial risk of torture and whether Canada had taken sufficient steps to avoid extraditing Boily to torture. However, had a substantive legal question arisen about the meaning or content of Canada's international obligations, one would hope that Grammond J would have considered it, despite his comment that the "application of international law by Canadian courts raises complex, sensitive and sometimes controversial issues."[81] Failing to consider a binding international legal obligation of Canada would risk putting Canada in breach and subject to censure under international law, contrary to the presumption that Canada intends to comply with those very obligations.[82] (DS)

Espionage — right to privacy — extraterritorial powers of the Canadian Security Intelligence Service

Re Canadian Security Intelligence Service Act, 2022 FC 1444 (21 October 2022). Federal Court.

The Canadian Security Intelligence Service (CSIS) sought a ruling from the Federal Court that it no longer needed to obtain a warrant under the *Canadian Security Intelligence Service Act* (*CSIS Act*) to deploy a particular type of technology to collect geolocation data about targets of a security threat investigation.[83] CSIS sought approval to deploy the technology pursuant to section 12 of the *CSIS Act* in five different scenarios. Section 12 of the *CSIS Act* authorizes CSIS, within or outside Canada, to collect, analyze, and retain information and intelligence on activities that may be suspected of constituting threats to the security of Canada.

The court appointed an *amicus curiae* to assist in addressing the legal issues raised in the *in camera* application. For national security reasons, the type of technology, how CSIS proposes to deploy it, and the targets of investigation are entirely redacted. The first four scenarios presented by CSIS arose in Canada. Three proposed use cases would occur solely within Canada, while the fourth would occur within and outside Canada. CSIS conceded that the proposed collection would qualify as a search under section 8 of the *Canadian Charter of Rights and Freedoms* (the right to be free from unreasonable search and seizure) in all cases. However, the Attorney General of Canada (AGC) argued that these searches complied with section 12 of the *CSIS Act* and were constitutionally compliant. To determine whether CSIS required a warrant

[81] *Boily*, *supra* note 74 at para 45.
[82] *B010 v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58 at para 47.
[83] *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*].

https://doi.org/10.1017/cyl.2023.14 Published online by Cambridge University Press

for the proposed collection, Chief Justice Paul Crampton relied heavily on his previous decision in *X (Re)*, which concluded that CSIS was authorized under section 12 of the *CSIS Act* to conduct minimally intrusive searches.[84] He assessed each proposed use of the technology and concluded that they were all similarly authorized by section 12.[85] He then considered and set out a series of conditions to ensure the resulting searches would be conducted reasonably.

The fifth scenario before the court was whether CSIS requires a warrant to employ the same technology in a manner that is "more-than-minimally intrusive" outside of Canada or whether such activity is authorized by section 12 of the *CSIS Act*.[86] Once again, Crampton CJ found that section 12 provides sufficient lawful authority for the proposed use of the technology in two ways outside Canada against non-Canadians. To reach this conclusion, Crampton CJ first considered whether CSIS's proposed activities would trigger the *Charter*'s protections. As CSIS conceded that the fifth proposed use of the technology would be more than minimally intrusive, CSIS could not rely on section 12 of the *CSIS Act*.[87] Interestingly, the AGC did not invoke the Supreme Court of Canada's holding in *R. v Hape*[88] that, except in exceptional cases, the *Charter* cannot apply overseas.[89] Rather, the AGC conceded "that the *Charter* applies to CSIS's investigative activities, wherever they occur" but argued that foreigners outside Canada do not benefit from the *Charter*'s protections.[90] Crampton CJ agreed with this position.

Relying on *Slahi v Canada (Justice)*,[91] Crampton CJ found that the term "Everyone" in section 8 of the *Charter* only encompasses persons with one of the three recognized nexuses to Canada: (1) Canadian citizenship; (2) physical presence in Canada; and (3) being subject to criminal proceedings in Canada.[92] He makes this finding by concluding that the term "everyone" used in section 7 of the *Charter*, which was considered by the court in *Slahi*, must mean the same when used in section 8. There is, however, a weakness in this reasoning. None of the jurisprudence relied on in *Slahi* actually grappled with the question of whether a non-Canadian outside Canada who is subsequently prosecuted in Canada has a sufficient nexus to benefit from the *Charter*'s protections and, if so, when those protections are triggered and why.[93] Rather, in *Slahi*, Justice Edmund Blanchard cited the "concerns"

[84]*In the Matter of an Application by […] for Warrants pursuant to Sections 12 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23 and In the Matters of […] Threat-Related Activities*, 2022 FC 1444 at paras 42–43; *X (Re)*, 2017 FC 1047.

[85]*Re Canadian Security Intelligence Service Act*, 2022 FC 1444 at paras 49–59 [*Re CSIS Act*].

[86]*Ibid* at paras 149ff.

[87]*Ibid* at paras 176–77.

[88]2007 SCC 26 [*Hape*].

[89]*Ibid* at paras 52, 113.

[90]*Re CSIS Act*, *supra* note 85 at para 147.

[91]2009 FC 160 at para 40–48 [*Slahi*], affirmed in *Slahi v Canada (Justice)*, 2009 FCA 259, leave to appeal refused, 33409 (18 February 2010).

[92]*Re CSIS Act*, *supra* note 85 at para 170.

[93]Concerns have also been raised about Blanchard J's application of the Supreme Court of Canada's decision in *R v Khadr*, 2008 SCC 28, particularly his conclusion that the "human rights exception" that triggers the *Charter*'s extraterritorial application does not apply to non-citizens. See Robert J Currie, "A Tale of Two Brothers: The Impact of the *Khadr* Cases on Canadian Anti-terrorism Law" in C Forcese & F Crépeau, eds, *Terrorism, Law and Democracy: Ten Years after 9/11* (Montreal: Canadian Institute for the Administration of Justice, 2012) 307.

https://doi.org/10.1017/cyl.2023.14 Published online by Cambridge University Press

presented by Justice Claire L'Heureux-Dubé in her dissent in *R v Cook*.[94] The issue in *Cook* was whether Canadian police violated the accused's right to counsel under section 10(b) of the *Charter* when they interviewed him prior to his extradition from the United States. While the majority focused on the extraterritorial application of the *Charter*, L'Heureux-Dubé J questioned whether the accused has section 10(b) rights at all. She noted that

> [t]he term "everyone" seems quite broad. Nevertheless, interpreting it must take into account the purposes of the *Charter*. I am not convinced that passage of the *Charter* necessarily gave rights to everyone in the world, of every nationality, wherever they may be, even if certain rights contain the word "everyone." Rather, I think that it is arguable that "everyone" was used to distinguish the rights granted to everyone on the territory of Canada from those granted only to citizens of Canada and those granted to persons charged with an offence.[95]

Based on this statement, Blanchard J concluded in *Slahi* that *Charter* protections are available to non-Canadians abroad who are subject to a criminal trial in Canada. This is in spite of the fact that, in the very next paragraph, L'Heureux-Dubé J wrote: "It is not necessary for the purposes of this appeal to decide exactly who is included by 'everyone' and other similar general statements of *Charter* rights."[96]

Blanchard J's finding was later reinterpreted by Justice Donald Rennie in *Tabingo v Canada*.[97] Rennie J observed in *obiter* that, in immigration matters, the Federal Court had thrice applied "Justice Blanchard's determination that a *Charter* claim may only be advanced by an individual who is present in Canada, subject to criminal proceedings in Canada or possessing Canadian citizenship."[98] It is from here that Crampton CJ concluded, in this case, that "foreign nationals who do not have one of three recognized grounds of nexus to Canada … do not come within the scope of the term 'everyone' in section 8 of the *Charter*."[99] In short, relying almost exclusively on *obiter* statements, the Federal Court has gone from finding that criminal prosecution is a sufficient nexus to connect a claimant with Canada to finding it is the only basis to extend the *Charter* to non-Canadians outside of Canada.

Moreover, Crampton CJ did not explain how this finding applies in the context of section 8 of the *Charter*. This is regrettable given that section 8 rights are typically triggered at the investigatory stage before charges are laid. He did note that CSIS acknowledged that it would be required to apply for a warrant as soon as it confirmed that a target did have a recognized nexus to Canada. This seems to endorse the idea that a search of a foreigner outside Canada only needs to comply with section 8 after they are charged with an offence. Does this mean all intrusive investigative activities prior to laying charges are fair game? What is the constitutional basis for such a

[94] *Slahi*, *supra* note 91 at para 43, citing *R v Cook*, [1998] 2 SCR 597 [*Cook*].

[95] *Cook*, *supra* note 94 at para 86. The Supreme Court of Canada in *Hape*, *supra* note 88, summarizes L'Heureux-Dubé J's dissenting opinion when canvasing prior jurisprudence on the *Charter*'s extraterritorial application but does not rely on it in its reasons.

[96] *Cook*, *supra* note 94 at para 87.

[97] 2013 FC 377.

[98] *Ibid* at para 75.

[99] *Re CSIS Act*, *supra* note 85 at para 170.

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distinction? Could investigators not delay laying charges to take advantage of this freedom? Alternatively, would the *Charter* somehow retroactively protect the accused once they are charged with an offence? In that case, how should we differentiate between the section 8 obligations of CSIS and those of law enforcement?

Crampton CJ's decision leaves us without answers to these questions. We can only hope that a future court will address them and consider whether being the subject of a Canadian investigation is a sufficient nexus to benefit from the protections afforded to "everyone" under the *Charter*. Having found that the *Charter* was not engaged, Crampton CJ turned next to the question of whether carrying out the proposed activities against foreign nationals outside of Canada fell within the scope of what section 12 of the *CSIS Act* authorizes. As section 12 explicitly permits CSIS to perform its duties and functions "within or outside Canada," Crampton CJ had little trouble answering this question in the affirmative.

The final and most important question from the perspective of international law was whether any international legal principle prevented CSIS from using the technology abroad against foreign nationals with no nexus to Canada in an intrusive manner. This question arose because the presumption of conformity requires the court to interpret section 12 of the *CSIS Act* consistently with international law. In other words, investigative action undertaken under section 12 must not violate Canada's international legal obligations. This is different from warranted activities conducted pursuant to section 21 of the *CSIS Act*, which Parliament has made clear may be judicially authorized "notwithstanding any other law." Crampton CJ began his analysis of this question by noting that the *amicus* had not produced anything to suggest that the warrantless use of the proposed technology would offend international law.[100] Next, he endorsed the *amicus*'s admission "that espionage, *per se*, is not contrary to international law."[101] Moreover, he affirmed that "the issue of whether such [espionage] activity contravenes international law ought to be determined on the specific facts of each case."[102] Despite this instruction, in the very next sentence, Crampton CJ held that "[o]n the specific facts of this case, and in the absence of any evidence to the contrary, I conclude that there is no principle of international law that would prevent CSIS from using the Technology abroad."[103]

These findings are notable for two reasons. First, Crampton CJ's affirmation that spying is not "*per se*" illegal diverges from previous decisions of the Federal Court regarding the international legal status of espionage. Second, he did not actually undertake any international legal analysis of the proposed technique. Regarding the issue of whether spying is legal, there are four approaches to resolving this question: (1) the realist approach; (2) the formalist approach; (3) the functional approach; and (4) the relativist approach.[104] Formalists assert that peacetime intelligence operations violate the international legal principles of sovereignty and non-intervention. Consequently, intelligence operations, regardless of whether they are carried out by spies,

[100] *Ibid* at para 185.

[101] *Ibid* at para 186, citing Michael Schmitt, ed, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge: Cambridge University Press, 2017) at 169 [*Tallinn Manual*]; Craig Forcese, "Pragmatism and Principle: Intelligence Agencies and International Law" (2016) 102 Va L Rev 67 at 71–72.

[102] *Re CSIS Act*, *supra* note 85.

[103] *Ibid* at para 187.

[104] Leah West "'Within or Outside Canada': The Charter's Application to the Extraterritorial Activities of the Canadian Security Intelligence Service" (2023) 73 UTLJ 1 at 36.

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the military, or diplomats, are governed by all relevant international laws unless a treaty specifies otherwise.

Until the present decision, the Federal Court had consistently adopted the formalist approach.[105] On this basis, the court previously held that CSIS's investigative activities outside of Canada would violate international law and that the court could not issue a warrant for those activities under section 21 of the *CSIS Act* due to the presumption of conformity.[106] This decision led to amendments to the *CSIS Act*, which now authorize Federal Court judges to issue warrants for activities abroad "without regard to any other law."[107] In this case, Crampton CJ rejected the formalist position. Instead, he gave credence to the functional approach by recognizing intelligence operations as neither legal nor illegal under international law. That is to say, no specific treaty or customary rule prohibits peacetime espionage, and yet the practice is not formally tolerated except during an armed conflict.

Crampton CJ then affirmed the need to take a relativist approach to the question of legality, although he did not use this language explicitly. Relativists argue that, although the practice of espionage does not violate international law, certain methods of intelligence collection and covert activities may be illegal. This approach is reflected in the work of Craig Forcese and the International Group of Experts responsible for the *Tallinn Manual on the International Law Applicable to Cyber Operations*, both cited by the court.[108] Rule 32 of the *Tallinn Manual* stipulates: "Although peacetime cyber espionage by States does not *per se* violate international law, the method by which it is carried out might do so." Crampton CJ also took "comfort" in adopting the relativist stance (without using the term) because the Federal Court of Appeal previously refused to endorse the formalist approach.[109]

Unfortunately, Crampton CJ never explored the principles of sovereignty, non-intervention, or Canada's international human rights obligations and how CSIS's proposed extraterritorial activities may implicate them in this case. Unlike other sections of the judgment, this part of the decision is not redacted for national security reasons; there simply is no analysis. What is more, he seemed to justify this gap by suggesting that it falls to the *amicus* to present evidence and argument that CSIS's conduct would violate international law rather than the responsibility of the AGC to prove that it would not. This approach is especially unsettling given that it falls wholly on the AGC to establish that CSIS's proposed activities are authorized under section 12 of the *CSIS Act* and, consequently, consistent with international law.

Crampton CJ's conclusion is also startling because the issue of whether and how the use of modern technology to access, search, manipulate, and seize data in a foreign state engages the principle of sovereignty is a notoriously contentious question of

[105] *Canadian Security Intelligence Service Act (Re)*, 2008 FC 301 at paras 42–53; *X (Re)*, 2018 FC 738 at para 140; *Canadian Security Intelligence Services Act (CA) (Re)*, 2020 FC 757. In *X (Re)*, 2009 FC 1058 at para 74, Mosley J advanced the realist approach, explicitly disagreeing with Blanchard J's 2008 decision. Citing Jack Goldsmith, a leading realist scholar, Mosley J concluded that the "norms of territorial sovereignty do not preclude the collection of information by one nation in the territory of another country, in contrast to the exercise of its enforcement jurisdiction." Mosley J subsequently changed his position and adopted a formalist approach in *X (Re)*, 2013 FC 1275. On appeal, the Federal Court of Appeal rejected the formalist approach.

[106] *X (Re)*, 2013 FC 1275, affirmed *X (Re)*, 2014 FCA 249.

[107] *CSIS Act*, *supra* note 83, s 21(3.1).

[108] Forcese, supra note 101 at 69; *Tallinn Manual*, *supra* note 101, r 32.

[109] *Re CSIS Act*, *supra* note 85 at para 193, citing *X (Re)*, 2014 FA 249 at para 80.

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international law. Had he sought to apply the facts of this case to the law, we can presume that the AGC would have advanced the official position of the Government of Canada. In 2022, the government issued a statement that only activities that "rise above a level of negligible or *de minimis* effects, causing significant harmful effects within the territory of another State without that State's consent, could amount to a violation of the rule of territorial sovereignty with respect to the affected State."[110] However, this position is at odds with the findings of the group of experts responsible for the *Tallinn Manual*.[111] On this issue, the majority of experts agreed that "if organs of one State are present in another State's territory and conduct cyber espionage against it without its consent or other legal justification, the latter's sovereignty has been violated."[112] Based on the little we know of the facts in this application, resolving this matter is likely crucial to determining whether CSIS's proposed conduct is lawful under section 12 of the *CSIS Act*.

What is more, equally contentious debates exist around the extraterritorial reach of a state's privacy obligations. Does Canada have international human rights obligations with respect to the targets of its investigations, and, if so, does using this technology as proposed violate those obligations? Crampton CJ's reasons do not raise this question, let alone answer it. Perhaps, the Federal Court is reluctant to adjudicate such complex and novel questions of international law in closed, *ex parte* proceedings. The court does not have expertise in international law, nor does it benefit from full adversarial hearings (even with the assistance of *amici*) or the possibility of additional expert witnesses. Nevertheless, the bold assertion that there are no principles of international law that would prevent CSIS from using a new espionage technique in a foreign state displays a lack of familiarity with the relevant law on the part of the AGC, the court, or both.

Unfortunately, the implication is that CSIS will now get to decide these matters for itself. Under the formalist approach, the Federal Court considered any peacetime espionage carried out by CSIS without the host state's consent a violation of Canada's international obligations. By consequence, because investigative activities carried out under section 12 of the *CSIS Act* must comply with international law, the vast majority of CSIS's overseas conduct would require judicial authorization under section 21 of the Act. Under Crampton CJ's relativist approach, there is no longer a presumption that CSIS's security investigations abroad violate international law. Instead, the court instructs CSIS to assess its activities on a case-by-case basis. Where CSIS and its lawyers believe that an extraterritorial intrusive activity is lawful under international law, they may proceed under section 12 of the *CSIS Act* and forgo not only the judicial authorization and oversight of the Federal Court but also the requirement to obtain Ministerial approval.[113]

What is more, this reasoning may also extend to the need to obtain warrants to engage in extraterritorial threat disruption activities under sections 12.1 and 21.1 of

[110]"International Law Applicable in Cyberspace" (22 April 2022) online: *Government of Canada*, <www.international.gc.ca/world-monde/issues_development-enjeux_developpement/peace_security-paix_securite/cyberspace_law-cyberespace_droit.aspx?lang=eng>.

[111]*Re CSIS Act*, *supra* note 85 at para 186.

[112]*Tallinn Manual*, *supra* note 101, r 4.7.

[113]Section 21(1) of the *CSIS Act*, *supra* note 83, stipulates that "the Director or employee may, after having obtained the Minister's approval, make an application in accordance with subsection (2) to a judge for a warrant under this section."

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the *CSIS Act*. Arguably, where a target of investigation does not have a recognized nexus to Canada, and CSIS believes a proposed threat reduction measure is consistent with Canadian and international law, CSIS no longer requires ministerial approval or judicial authorization to deploy that measure against a target outside of Canada. (LW)

Expert evidence — judicial notice of international law — Montreal Convention

International Air Transport Association et al v Canadian Transportation Agency and the Attorney General of Canada, 2022 FCA 211 (6 December 2022). Federal Court of Appeal.

The International Air Transport Association (IATA) and various air carriers challenged regulations adopted by the Canadian Transportation Agency relating to delays, losses, and inconveniences in the course of air travel, including requirements on airlines to provide fixed sums of compensation and provide alternative travel arrangements. The appellants alleged that the regulations contravened Canada's obligations under the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (*Montreal Convention*).[114] Writing for a unanimous panel, Justice Yves de Montigny upheld all the regulations except one (on a basis not of interest for the purposes of this comment). In doing so, he provided a welcome clarification of the law surrounding expert evidence on international legal issues. While this comment will focus on this evidentiary point, the decision is also notable for its strong endorsement of the presumption of conformity, pursuant to which "courts will strive to avoid constructions of domestic law that would result in violation of those obligations, unless it is unavoidable,"[115] and for its interpretation of the *Montreal Convention* following the principles in the *Vienna Convention on the Law of Treaties*.[116]

These commentaries have long criticized the practice of admitting expert evidence on the content of international law, particularly treaties.[117] De Montigny J's clear rejection of such a practice is therefore welcome. He began by affirming that foreign law (that is, the domestic law of other nations) is characterized as fact for the purpose of evidence and therefore must be pleaded and proved at trial, usually by expert evidence.[118] However, the treatment of international law (that is, treaties and customary international law) was a "vexed question" in Canadian law that courts had treated inconsistently. In a detailed analysis, de Montigny J concluded that customary international law and treaties that have been implemented into Canada

[114]*Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 28 May 1999, 2242 UNTS 309 (entered into force 4 November 2003) [*Montreal Convention*].

[115]*International Air Transport Association et al v Canadian Transportation Agency and the Attorney General of Canada*, 2022 FCA 211 at para 83 [*International Air Transport Association*].

[116]*Ibid* at paras 118–21, 135–42, 156–57; *VCLT*, *supra* note 53.

[117]See e.g. Gib van Ert & Dahlia Shuhaibar, "Canadian Cases in Public International Law in 2020" (2020) 58 Can YB Intl L 580 at 596, n 91; Gib van Ert, Greg Allen & Eileen Patel, "Canadian Cases in Public International Law in 2010–11" (2011) 48 Can YB Intl L 519 at 549; Gib van Ert, "Canadian Cases in Public International Law in 2003–4" (2004) 41 Can YB Intl L 583 at 612–13.

[118]*International Air Transport Association*, *supra* note 115 at para 45.

https://doi.org/10.1017/cyl.2023.14 Published online by Cambridge University Press

law should be judicially noticed.[119] Consequently, "[e]xpert evidence on international law, just like expert evidence on any issue of domestic law, should therefore not be countenanced. Counsel should make submissions on international law themselves, without resorting to the added credibility of an expert," and international law must not be pleaded. That said, articles canvassing legal issues in an expert opinion could be put before the court along with case law and other types of legal sources.[120]

De Montigny J gave several compelling reasons for his conclusion. He explained that, in many respects, international law is domestic law — specifically, treaties that have been implemented into Canadian law, and "prohibitive rules of customary international law" are part of our law.[121] He also noted that the well-established presumption of conformity means that domestic law will be interpreted to conform to Canada's international obligations unless there is clear and unequivocal language to the contrary.[122] Further, applying the general criteria for the admission of expert evidence, de Montigny J noted that expert evidence on the content of international law is not necessary given that questions of law "clearly fall within the purview of the court's expertise and opinion evidence on these issues would usurp the court's role as expert in matters of law."[123] And, while there were "admittedly … few cases where Canadian courts have explicitly stated that they can take judicial notice of international law," the Supreme Court of Canada and other courts had done so on various occasions.[124]

Having set out these principles, de Montigny J struck portions of expert affidavits put before the court that opined on the proper interpretation of the *Montreal Convention*. He repeated that the "normative content of international law falls within the bailiwick of the court's exclusive jurisdiction."[125] Further, while the expert affidavits properly adduced evidence on foreign legislation and decisions, they went too far in opining on the consistency of the foreign laws with the *Montreal Convention*: this indirectly interpreted the scope of the convention and the meaning of the "exclusivity principle" contained in that treaty, which were questions for the court to resolve.[126] De Montigny J further clarified that, although state practice (that is, how states parties to the treaty had applied it) was a question of fact, it was up to the parties to make legal argument about whether that state practice is consistent with, and "in the application of," the treaty within the meaning of the *Vienna Convention on the Law of Treaties*.[127]

While de Montigny J's treatment of the expert evidence issue was largely very persuasive, a couple of points are worthy of mention. First, he explicitly left for another day the treatment of treaties that have been signed by Canada but not yet implemented into Canadian law, noting they are "not part of Canadian law."[128] It is

[119] *Ibid* at paras 46–47, 64.
[120] *Ibid* at para 65.
[121] *Ibid* at para 48.
[122] *Ibid* at paras 49, 87.
[123] *Ibid* at para 52, citing *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 18.
[124] *International Air Transport Association*, *supra* note 115 at paras 59–60.
[125] *Ibid* at para 66.
[126] *Ibid* at para 67.
[127] *Ibid* at para 68; *VCLT*, *supra* note 53.
[128] *International Air Transport Association*, *supra* note 115 at para 47.

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true, of course, that a treaty that has not been expressly implemented by statute or regulation is not part of Canadian law.[129] But whether implemented or not, such treaties are binding on Canada internationally, attract the interpretive presumption that domestic law conforms to them,[130] and inform whether decision-making by Canadian officials is reasonable.[131] Further, it is important not to jump too quickly to the conclusion that a treaty has not been implemented: it can often be the case that a treaty obligation does not require a change in the law because Canadian law is already consistent with it,[132] meaning that a search for an "implementing law" will be fruitless. In any event, whether a treaty obligation has been implemented or not, it remains a question of law — the content of the treaty does not become a matter of foreign law to be proved by evidence simply because it has not been formally implemented. Such treaties can, and should, be judicially noticed in the same way as an implemented treaty. De Montigny J was overly cautious in leaving this issue for another day.

Second, it is notable that de Montigny J rejected an argument that "expert evidence can be adduced when the principles of international law are contested, controversial or emerging." He noted that a "disagreement between parties on the proper interpretation of the law (be it constitutional law, civil law, criminal law or international law) cannot be the test to determine the admissibility of expert opinion evidence" because it would usurp the role of the trial judge.[133] While this is in most respects true, de Montigny J appears to overlook commentary from the Supreme Court of Canada that it may be permissible to introduce expert evidence on new or emerging norms of customary international law, specifically on the issue of state practice.[134] In this case, however, it appears that the appellants were not focusing on novel norms of customary international law but, instead, on the requirements of the *Montreal Convention*; de Montigny J was therefore correct to reject this submission. (DS)

Briefly Noted / Sommaire En Bref

Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis, 2022 QCCA 185 (10 février 2022). Cour d'appel du Québec.

Il s'agissait d'un renvoi du gouvernement du Québec à la Cour d'appel du Québec contestant la constitutionnalité de la *Loi concernant les enfants, les jeunes et les*

[129]*Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at para 47.

[130]See e.g. *Hape*, *supra* note 88 at para 53 (which describes the presumption as applying to all Canadian international obligations, not limited to those that are expressly implemented in statutes).

[131]*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69–71; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 114.

[132]Elisabeth Eid & Hoori Hamboyan, "Implementation by Canada of Its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical" in O Fitzgerald, ed, *The Globalized Rule of Law: Relationship between International and Domestic Law* (Toronto: Irwin Law, 2006) 339 at 456; Gib van Ert, "The Domestic Application of International Law in Canada" in Curtis A Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019) 501 at 508.

[133]*International Air Transport Association*, *supra* note 115 at para 53.

[134]*Nevsun Resources*, *supra* note 59 at para 99.

https://doi.org/10.1017/cyl.2023.14 Published online by Cambridge University Press

familles des Premières Nations, des Inuits et des Métis.[135] Cette loi fédérale vise à régler le problème de la surreprésentation des enfants autochtones dans les systèmes de services à l'enfance et à la famille de deux façons : premièrement, en établissant des normes nationales pour la prestation de services à l'enfance et à la famille relativement aux enfants autochtones, et deuxièmement, par un régime législatif qui reconnaît que les lois autochtones sur les services à l'enfance et à la famille ont la même force de loi que les lois fédérales et qu'elles prévalent sur toute disposition contradictoire ou incohérente des lois provinciales concernant les services à l'enfance et à la famille.

Le Québec soutient que la Loi est inconstitutionnelle parce qu'elle outrepasse la compétence du Parlement et représente une tentative inadmissible de modifier unilatéralement l'article 35 de la *Loi constitutionnelle de 1982*.[136] Dans une décision unanime attribuée à l'ensemble de la cour, la Cour d'appel du Québec a déterminé que l'imposition par la Loi de normes nationales pour les services à l'enfance et à la famille autochtones relevait du pouvoir du Parlement en vertu de l'article 91(24) de la *Loi constitutionnelle de 1867*.[137] Cependant, la Cour d'appel a conclu que la tentative de la Loi d'accorder la doctrine de la prépondérance fédérale aux lois autochtones sur le bien-être de l'enfance et de la famille (article 21) et sa stipulation que les lois autochtones l'emportent sur toute disposition contraire ou incohérente de la législation provinciale (para. 22(3)) sont *ultra vires*. La cour a jugé ces dispositions contraires à l'architecture fondamentale de la Constitution.

L'affaire est remarquable pour les lecteurs de l'*Annuaire canadien de droit international* en raison de son examen du poids juridique à accorder à la *Déclaration des Nations Unies sur les droits des peuples autochtones* dans le droit interne.[138] Nous ne mentionnons l'affaire ici que brièvement, car un appel de la décision de la Cour d'appel a maintenant été entendu par la Cour suprême du Canada. La décision de ce tribunal sera traitée dans une prochaine édition de l'*Annuaire canadien de droit international*. La Cour d'appel a noté que si la déclaration "n'impose pas des obligations qui lient le Canada sur le plan du droit international," elle a néanmoins été reconnue par le Parlement comme "un instrument international universel en matière de droits de la personne dont les valeurs, principes et droits sont une source d'interprétation du droit canadien."[139] De même, la Cour a noté que la déclaration, bien que non contraignante sur le plan international, a été "mise en œuvre dans l'ordre normatif fédéral grâce à la Loi concernant la *Déclaration des Nations Unies sur les droits des peuples autochtones*."[140] Constatant la règle d'interprétation bien établie selon laquelle une loi est présumée conforme au droit international, la Cour d'appel a estimé qu'"Il n'y a rien qui justifie de ne pas étendre cette présomption à l'art. 35 de la *Loi constitutionnelle de 1982*, vu qu'il se rattache principalement à la protection des droits fondamentaux des peuples autochtones."[141] La Cour a observé que les

[135]*Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, LC 2019, c 24

[136]*Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982.

[137]*Loi constitutionnelle de 1867* (UK), 30–31 Vict, c 3.

[138]UN GA Res 61/295 (13 September 2007).

[139]*Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 au para 507.

[140]*Ibid* au para 512.

[141]*Ibid* au para 509.

https://doi.org/10.1017/cyl.2023.14 Published online by Cambridge University Press

dispositions de la déclaration relatives à l'autodétermination (articles 3 à 5) renforçaient et confirmaient son interprétation de l'article 35 de la *Loi constitutionnelle de 1982* comme incluant, dans les droits ancestraux existants reconnus et confirmés par cet article, le droit des peuples autochtones de réglementer les services à l'enfance et à la famille.[142]

Un dernier point à noter est l'observation en passant de la Cour selon laquelle le règlement des droits ancestraux par l'article 35 de la *Loi constitutionnelle de 1982*, selon la décision de la Cour suprême du Canada dans *R. c Sparrow*, "paraît tout à fait conforme aux principes qu'énonce la Déclaration des Nations Unies."[143] Cette observation est clairement un obiter dictum et semble, au mieux, prématurée à ce stade très précoce de la vie de la déclaration en tant que source de normes juridiques canadiennes. (GvE)

Government procurement — Canada-European Union Comprehensive Economic Trade Agreement — Ontario implementation of the treaty

Thales DIS Canada Inc. v Ontario, 2022 ONSC 3166 (1 June 2022). Ontario Divisional Court.

An appeal from this decision is currently on reserve at the Court of Appeal for Ontario. That decision will be considered in a future edition of the *Canadian Yearbook of International Law*. This was a judicial review of two decisions by the Ontario Ministry of Transportation arising from a contract for tender for the production of government identity cards. The applicant, Thales, was a company that produces such cards from a facility in Poland. It challenged the ministry's decision not to award it the contract relying on the non-discrimination provisions of the 2016 *Canada-European Union Comprehensive Economic Trade Agreement* (*CETA*).[144] The majority of the Divisional Court found both the decision and the tender process to be contrary to *CETA*.

Justice Sandra Nishikawa for the majority of the court reviewed *CETA*'s non-discrimination provisions, including the security exception, in Chapter 19. She relied, as the parties had done, on the test adopted by the Appellate Body of the World Trade Organization in *Brazil – Measures Affecting Imports of Retreaded Tyres (Complaint by the European Communities)*.[145] She concluded that the Ontario decision was reviewable by the court on a reasonableness standard and that the decision unreasonably disregarded the applicable international legal principles as expressed in Chapter 19 of *CETA* and the *Brazil – Tyres* case. The learned judge also found that the request for bids process itself (distinct from the decision resulting from that process) was reviewable for reasonableness and was unreasonable for contraventions of *CETA*.

[142] *Ibid* au para 513.

[143] *Ibid* aux paras 60–61; *R c Sparrow*, [1990] 1 RCS 1075.

[144] *Canada-European Union Comprehensive Economic and Trade Agreement*, 30 October 2016, online: <trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> (provisionally applied 21 September 2017).

[145] *Brazil – Measures Affecting Imports of Retreaded Tyres (Complaint by the European Communities)*, WTO Doc WT/DS332/AB/R (2007).

https://doi.org/10.1017/cyl.2023.14 Published online by Cambridge University Press

In concurring reasons, Justice David Corbett agreed that both the decision and the request for bids must be quashed but held that the Divisional Court ought not to engage in a substantive review of the decision. In his view, Ontario had failed to implement a *CETA*-compliant dispute resolution process. Instead, it relied on an internal bid dispute process contrary to *CETA*. Judicial review of the decision by the Divisional Court would, in Corbett J's view, constitute a further breach of *CETA*. Instead, the decision was a nullity for lack of jurisdiction and should be quashed for this reason, whether substantively reasonable or not. (GvE)

Cite this article: van Ert, Gib, Dahlia Shuhaibar, and Leah West. 2022. "Canadian Cases in Public International Law in 2022." *Canadian Yearbook of International Law/Annuaire canadien de droit international*, 60: 387–410, doi:10.1017/cyl.2023.14