

The Application of International Human Rights Law by Administrative Decision-Makers

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A casual survey of Canadian jurisprudence about the application of international human rights norms in domestic law will quickly reveal two tendencies: First, most of the case law emerges from the administrative realm and second, most of those administrative cases concern some aspect of immigration or refugee law. This is true not only of Canada but also of New Zealand and Australia. Significantly, all three jurisdictions are known as “countries of immigration”, and all partake broadly in the British common law tradition in respect of administrative law and the domestic incorporation of international law.¹ In my remarks today, I wish to pose and reflect upon several questions:

What have the Canadian courts said thus far about the application of international human rights law in the administrative context?

- Why does migration law figure so prominently in this branch of the case law?
- What do immigration decision-makers actually do with international law?
- What does the application of international human rights law by administrative tribunals signify about the relationship between international and domestic law,

¹ The United States’ approach to both spheres of law is distinct: Though a land of immigration, its “plenary powers” doctrine has a peculiarly insulating effect on judicial scrutiny of immigration law. The constitutional structure of Government in the US also differentiates that country’s doctrine regarding domestic application of international law. For its part, the U.K. conceives of itself less as a country of immigration, which perhaps account for the relative under-representation of immigration cases in its jurisprudence.

and between the various institutional actors who participate in this conversation?

I. JUDICIAL PRONOUNCEMENTS ON THE DOMESTIC APPLICATION OF INTERNATIONAL LAW

I leave the full ventilation of this topic to the speakers on another panel devoted specifically to this subject, and confine myself to a few brief comments. Common law orthodoxy dictates that international law does not “enter” domestic law unless the law in question forms part of customary law, or is expressly incorporated into the domestic legal system through an act of the legislator. In Canada (unlike England), the force of the former proposition is still contested. In any event, the status of an international norm as “customary law” depends on general practice and *opinio juris*, (the acceptance of the norm as law). Once Canada signs and ratifies a treaty or international convention, Canada becomes bound under international law by the obligations contained therein. The international community’s ability and willingness to enforce compliance is famously compromised, but international obligations are enforceable before domestic courts only if incorporated through an Act of Parliament.

These formal requirements generate thick barriers impeding the direct injection of international legal obligations into the corpus of Canadian law. Over the years, however, Canadian courts have opted to enfold international law into the domestic sphere on a more tentative, selective basis. The effect is to preserve enough judicial space to invoke international law when it is instrumentally useful, while leaving enough “wiggle room” to avoid being bound by it when it is not. This is particularly true in relation to Charter interpretation, as typified by the remarks of the late Chief Justice Dickson: “[T]hough I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada’s international obligations under human rights conventions.”² In virtually the same breath, Dickson C.J. expressed the view that “the *Charter* should generally be presumed to provide

² *In the Matter of a Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 349-350 [hereinafter *PSERA*].

protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”³

I suggest that the subtext of this presumption is that the Charter was partly inspired by, and drafted in the shadow of, Canada’s extant human rights obligations. Perhaps more contentiously, I also suspect that Dickson C.J.’s presumption reflects a certain confidence that Canada’s status as a Western democratic state puts it at the vanguard of human rights protection, such that it has nothing to fear [and perhaps little to gain] from the application of [less sophisticated] international standards. Given the paucity of jurisprudence at the international level that interprets the provisions of various conventions, the abstract expression of the norms provides relatively little guidance to their application in specific cases anyway.

In *Baker*,⁴ L’Heureux-Dubé appears to extend the role of international law in Charter interpretation to cover the exercise of statutory discretion, specifically the power to grant “humanitarian and compassionate” relief to an undocumented migrant living in Canada.⁵ At issue was the impact upon the exercise of discretion by the *Convention on the Rights of the Child* (CRC), and particularly the provision making the best interests of the child “a primary consideration” in decisions by the state that affect children. While conceding that the CRC, which Canada had signed and ratified, was not binding unless and until incorporated, “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”⁶

³ *Ibid.*, See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 38 [hereinafter *Slaight*]. While Dickson C.J. was writing in dissent in *PSERA*, his dicta regarding international law were incorporated into the majority judgment in *Slaight*.

⁴ *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817 [hereinafter *Baker*]. The facts of the case are well known: Mavis Baker was a Jamaican citizen who lived in Canada for 12 years (1981-1992) as undocumented live-in domestic worker. During that time, she bore four children. After the birth of her last child, she developed post-partum psychosis, applied for welfare and was ordered deported. In 1993, she applied for permanent residence under the humanitarian and compassionate (H&C) provision of the *Immigration Act*, and was rejected in 1994. The evidence submitted on her behalf indicated that she was making progress in terms of her mental health, and further that both she and her Canadian-born children would suffer if she was separated from them.

⁵ *Immigration Act*, R.S.C. 1985, c. I-2, s. 114(2).

⁶ *Baker*, *supra* at para. 70.

In reference to the CRC and the cast at bar, L'Heureux-Dubé concludes that:

“The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H&C power.”⁷

Of course, it has not escaped notice that L'Heureux-Dubé deliberately stops short of adopting the “primary consideration” standard imposed by the CRC, and uses the phrase “important factor” instead, thereby emphasizing that the CRC was merely influential, not binding.

If I have correctly described the relationship between *Baker* and preceding Charter cases, one may well wonder why the concurring judges in *Baker* objected to using international law to interpret the grant of discretionary power administrative law when they had no difficulty using it to interpret the Charter. David Dyzenhaus suggests that Iacobucci and Cory JJ.'s dissent on this point may have been driven by a desire to contain the Charter's realignment of the doctrine of parliamentary supremacy and separation of powers between the executive, the legislature and the judiciary.⁸

I am persuaded by this explanation, and wish to supplement it with a minor point: Not long after *Slaight*, the Supreme Court of Canada has developed a jurisdictional mechanism to control administrative decision-makers' ability consider and apply the Charter. On my reading of the test laid out in *Cuddy Chicks*, I doubt that the Immigration officers involved in the *Baker* case would possess the requisite jurisdiction to apply the Charter. Yet L'Heureux-Dubé's injunction that the exercise of discretion must be exercised “in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter [emphasis added]”, implies a blurring of those jurisdictional boundaries; the insertion of international human rights law into the exercise of discretion by administrative decision-makers effectively

⁷ *Ibid.*, para. 71.

⁸ D. Dyzenhaus, *Baker and the Unwritten Constitution* (forthcoming).

leapfrogs over the jurisdictional hurdle. By emphasizing that *Baker* was not a Charter case, and that unincorporated international human rights law can only aid Charter (as opposed to statutory) interpretation, the concurring judges preserve the courts' near-monopoly over the meaning and scope of human rights norms. Obviously, the courts must contend with the reality of federal and provincial human rights statutes, but I would argue that the very strict standard of review applied to human rights tribunals by the courts evinces the profound judicial discomfort with ceding interpretive authority over human rights to administrative actors.

II. CANADIAN MIGRATION LAW AND INTERNATIONAL HUMAN RIGHTS

Why do so many of the cases raising international human rights law before the courts arise in the field of immigration and refugee law? One reason may be that immigration and refugee lawyers are more likely than other lawyers to raise the arguments. I do not mean this flippantly: The very nature of immigration and refugee law enlarges one's field of vision to the international realm. Over the years, a small but dedicated group of immigration and refugee lawyers have educated themselves about Canada's international human rights undertakings. Where Canadian courts have rendered adverse decisions, these lawyers have not hesitated to approach the UN Human Rights Committee, the Organization of American States human rights tribunal, and other transnational bodies, to lodge complaints against Canada. Some of these lawyers have also established links with advocates in other jurisdictions, and are able to access jurisprudence from other supra-national jurisdictions, such as the European Court of Human Rights.

There is another reason why international human rights law figures prominently in the litigation strategy of immigration advocates, and it is this: *Chiarelli*.⁹ Critics of the Charter, and opponents of immigration, are fond of citing *Singh* as evidence of the broad and (in their view illegitimate) protection afforded to non-citizens under the Charter. Indeed, the current hysterical demands from some quarters to invoke section 33 to override the Charter in its application to non-citizens emerges from this understanding. *Singh* allows that the Charter applies to

⁹ *Chiarelli v. Canada (Minister of Justice)*, [1992] 1 S.C.R. 711 [hereinafter *Chiarelli*].

all those present on Canadian soil, and that exposing a refugee to the risk of persecution by the country of nationality violates security of the person. In *Chiarelli*, however, the Court eviscerated much of *Singh's* potential by ruling that non-citizens (except refugees) possessed virtually no cognizable life, liberty, or security of the person interest that would be violated by their removal from Canada. As Sopinka J. baldly stated, “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country”. From this re-inscription of the right/privilege distinction (derived from common law and Bill of Rights jurisprudence), it is a short step to concluding that the principles of fundamental justice require very little of state actors when deciding to remove non-citizens, unless the person in question is at risk of death or [perhaps] torture.¹⁰

To appreciate the sweep of *Chiarelli*, it is useful to compare Mr. Chiarelli to Ms. Baker: Mr. Chiarelli immigrated with his family to Canada as an adolescent, and held the legal status of permanent resident. Ms. Baker was an undocumented migrant who had no legal status in Canada. If taking away Mr. Chiarelli’s permanent resident status and deporting him on account of criminality did not deprive him of life, liberty and security of the person under section 7 of the Charter (because he had no unqualified right to enter and remain), it is difficult to see how Ms. Baker would have fared any better under the Charter. After all, she had *no* right (qualified or otherwise) to be in Canada. No wonder Ms. Baker’s counsel relied so heavily on international human rights law, and no wonder the Supreme Court of Canada was anxious to avoid deciding the case on Charter grounds.

Despite media rhetoric to the contrary, the Charter is a national constitutional document, rooted in a historical liberal tradition where membership in that nation-state (as expressed in the juridical status of citizenship) is the pre-requisite to the enjoyment of rights and liberties. Of course, the Charter is also the product of post-War human rights consciousness, where entitlement to fundamental rights is predicated on the moral equality and dignity of all human beings. Cases such as *Singh*, *Andrews*, *Chiarelli*, *Dehghani*, etc. express the tension between these two visions. At the moment, the vision of *Chiarelli* dominates within Charter jurisprudence. The fact that Ms. Baker’s interests as an undocumented migrant attracted more recognition under administrative law than did Mr.

¹⁰ This latter exception remains to be resolved in *Suresh*.

Chiarelli's interests as a permanent resident under the Charter reveals a lurking paradox which the courts will not be able to avoid indefinitely. It also underscores why one might prefer direct recourse to international human rights law domestic cases involving the rights of non-citizens, or relationships between citizens and non-citizens. In important ways, non-citizens remain foreigners to the Charter, whether by virtue of *de jure* or *de facto* exclusion from the ambit of protection; conversely, non-citizens are full members of the human community defined under international human rights law, and entitled to the equal protection of those norms.

III. INTERNATIONAL LAW BEFORE THE TRIBUNAL

Members of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board regularly and unselfconsciously rely upon the provisions of international human rights conventions. The fact that the refugee definition and exclusion provisions (Articles E & F) from the *UN Convention Relating to the Status of Refugees* have been integrated virtually *verbatim* into the text of Canada's *Immigration Act* provides a rare and unambiguous fusion of the "here" of domestic law with the "there" of international law.¹¹ I believe this phenomenon generates an openness on the part of the IRB to considering international sources of law, a practice which is encouraged in various training manuals and guidelines issued by the IRB, such as the *Guidelines on Child Refugee Claimants: Procedural and Evidentiary Issues*, and the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*.

With few exceptions, however, decision-makers invoke human rights instruments in an *ad hoc* manner, and without grounding their reliance on any theory explaining the relevance of international law. Having said that, it should be noted that in the overwhelming majority of cases, decision-makers cite human rights contained in international conventions in order to determine whether what the claimant fears in the country of origin constitutes persecution. The underlying principle is that persecution subsists, at a minimum, in violations of the fundamental

¹¹ See K. Knop, "Here and There: International Law in Domestic Courts" (2000) 35 *N.Y.U. J. Int'l. Rev.* 501.

rights contained in the International Bill of Rights¹² and other prominent human rights instruments, such as the *Convention on the Rights of the Child*, *Convention Against Torture*, *Convention on the Elimination of All Forms of Discrimination Against Women*, *Convention on the Elimination of All Forms of Racial Discrimination*, etc.

The singular feature of this use of international law is that the human rights norms are deployed by a domestic tribunal of one state in the service of judging the practices of another state. Details regarding whether the state of nationality has signed and ratified the instrument tend not to attract discussion, and the binding nature of the instruments is taken for granted. This is perhaps explicable if one presumes that the various norms have attained the status of customary international law, but I have located only one case¹³ where the tribunal explicitly predicated their application of the International Bill of Rights to Ghana upon the claim that the instruments “are generally considered to be part of customary International Law, and thus binding upon both Canada and Ghana.” Apart from this, CRDD panels simply cite international human rights treaties without asking whether and to what extent the countries of nationality are bound by them. Alternatively, in circumstances where the country of nationality is a party to the relevant convention, one could conceive of refugee determination as the closest that individual states party come to adjudicating and providing a remedy for other states’ breaches of international human rights obligations.

Tribunals occasionally rely upon international law to exclude certain refugee claimants from the ambit of protection. The exclusion provisions under Article 1F of the *Refugee Convention*, reproduced in an Appendix to the *Immigration Act*, deny refugee protection to those who, *inter alia*, have committed a crime against peace, war crimes, crimes against humanity, or acts “contrary to the purposes and principles of the United Nations.” In *Pushpanathan v. Canada (MEI)*,¹⁴ the Supreme Court of Canada overruled a determination by a CRDD tribunal that drug trafficking within Canada constituted an act contrary to the purposes and principles of the United Nations.

¹² The *Universal Declaration of Human Rights*, *The International Covenant on Civil and Political Rights*, *the International Covenant on Social Economic and Cultural Rights*.

¹³ *RSF (Re)* [1997] CRDD No. 78, No M95-13161 (Didier, Prevost).

¹⁴ [1998] 1 S.C.R. 982 [hereinafter *Pushpanathan*].

A reading of the judgment most favourable to the domestic application of international human rights would acknowledge the Supreme Court of Canada's reluctance¹⁵ to let a tribunal curtail Canada's international human rights obligation (not to *refouler* a refugee) by adopting a broad and self-serving interpretation of the purposes and principles of the United Nations. In delivering the majority judgment, Bastarache J. concluded that:

“in the absence of clear indications that the international community recognizes drug trafficking as a sufficiently serious and sustained violation of fundamental human rights as to amount to persecution, either through specific designation as an act contrary to the purposes and principles of the United Nations, [...] or through international instruments which otherwise indicate that trafficking is a serious violation of fundamental human rights [...], individuals should not be deprived of the essential protections of contained in the [Refugee] Convention for having committed those acts.”¹⁶

If the traditional theory of incorporation imposes a heavy burden on those arguing that international law binds domestic tribunals, at least the approach in *Pushpanathan* imposes an analogous burden on domestic tribunals seeking to invoke international law in aid of limiting extant human rights obligations: the international community must clearly and unambiguously adopt the alleged policy or principle before a domestic tribunal can rely upon it.

Refugee law is unique insofar as the international refugee definition is adopted and applied in Canadian law, with the effect of compromising the putative right of states to admit or exclude whomever they please. Perhaps still smarting from this concession, most states (including Canada) resist any further incursion by international law across legal borders. Thus, Immigration officers (such as those in *Baker*), and the Immigration Appeal Division (which hears appeals concerning family sponsorship, loss of permanent resident status and deportation), do not

¹⁵ This reluctance is manifested both substantively in terms of the result reached by the Supreme Court of Canada, but also methodologically through the Court's adoption of a strict standard of review (correctness) against which the CRDD's interpretation of article 1F(c) would be assessed.

¹⁶ *Pushpanathan*, *supra* note 14.

routinely consider international law. Their respective institutional cultures (unlike the refugee division) neither facilitate nor particularly encourage the internalization of international law; I understand (anecdotally), that *Baker* has had little effect on how Immigration officers actually think about the best interests of children, though it may have affected how they phrase their decisions.

CONCLUSION: LOCALIZATION AND LAW

The picture I've sketched here takes as a given the unidirectional flow of law from the global to the local level. What strikes me in attempting to address this topic is the juxtaposition of the esoteric quality ascribed to international law, with the prosaic—dare I say parochial—character of domestic administrative bodies, also known by the unflattering label “inferior tribunals”. Yet this picture conveys a misleading and simplistic set of relationships by failing to acknowledge the concurrent processes of transmission from the domestic to the international and the web of emerging relationships shaping the which are constantly evolving and shaping both the international and the domestic legal discourse. I wish to provide two examples that give meaning to Stephen Toope's assertion that “in this in-between time, international law is both ‘foreign’ and ‘part of us’”¹⁷. While Toope focuses on how the Supreme Court of Canada “translates external norms [...] by participating in the creation and re-creation of norms that shape our emerging society,”¹⁸ my examples are drawn from refugee law.

In the late 1980s, the Executive Committee of the United Nations High Commissioner for Refugees [hereinafter *UNHCR*] endorsed an interpretation of the refugee definition that recognized women's refusal to abide by certain socially enforced norms of sex-role behaviour as persecution on account of membership in a particular social group. In 1993, the Canada's Immigration and Refugee Board enacted the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, which have since been revised. These guidelines have served as a template and a catalyst for other national jurisdictions to adopt locally viable guidelines or at least to take more seriously gender-related refugee

¹⁷ S. Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada” (2001) 80 *Can. Bar Rev.* 534 at 540.

¹⁸ *Ibid.*, at 540-541.

claims. Indeed, the phenomenon provides a concrete example of how, in Karen Knop's words, "we might value the hybridity of domestic decisions as a source of alternatives that helps other domestic courts to particularize international law in a way that makes sense to them."¹⁹ Refugee law is ideally suited to this transnational translation of norms because all States Party to the *Refugee Convention* submit the identical refugee definition to local interpreters.

Meanwhile, the UNHCR has responded to gender persecution initiatives at the domestic level by elaborating upon its own work in this area, and other UN bodies (including the Special Rapporteur on Violence Against Women) have provided both empirical and political support for the recognition of gender-based persecution within and beyond the refugee domain. The linkages between these developments in the refugee field and in the international prosecution of war crimes, in combating trafficking, and in other domains has contributed to the overall development of transnational and domestic initiatives around gender related persecution, some of them legal. These conversations occur within and between national jurisdictions, and between national and transnational jurisdictions, and manifest in a concrete way the interactive process which Toope and others describe.

The creation of an International Association of Refugee Law Judges [hereinafter *IARLJ*] has furnished an institutional framework within which many of the conversations can take place. The ensuing training, debate, and exchange of ideas seems to actualize Anne-Marie Slaughter's model of transgovernmentalism. Slaughter speaks of the emergence of "a distinctive mode of global governance: horizontal rather than vertical, composed of national government officials rather than international bureaucrats, decentralized and informal rather than organized and rigid."²⁰ In a field such as immigration and refugee law, where border-policing in the "national interest" constantly threatens to overwhelm the international obligation to admit refugees, forging interpretive communities across borders is all the more crucial.

¹⁹ Knop, *supra* note 11 at 533.

²⁰ Quoted from Knop, *supra* note 11 at 519.