A return to international law in constitutional adjudication

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This paper arose from a conference at Laval University in Quebec entitled the *Evolution of constitutional law in Canada and Quebec: a return to sources*. The organizers of the conference identified public international law as a source of constitutional law to which we ought to return. But the claim that international law is a source of constitutional law is unorthodox. And the claim that we may "return" to it implies that it has been a source of constitutional law for some time and not, as it may seem, only a recent fashion. I think both these claims are correct, but they are not self-evident and are worth probing further.

The idea of using international law in constitutional law and other public law litigation has been somewhat in vogue since the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*.[1] When I gave the speech that is the basis of this paper, I suggested that international law might be a fashion that is now declining, as it seemed that the academic frenzy that followed *Baker* was beginning to cool off and that the practical consequences of *Baker* appeared to have been rather slight. Since then, however, the Supreme Court of Canada has reinvigorated this area of law with two very important decisions, *R. v. Hape*[2] and *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*.[3] These decisions make clear that international law is indisputably a feature of contemporary Canadian constitutional law. This is not, I suggest, a new development. International law and constitutional law have been linked in Canada and Quebec for some time, though the juridical significance of the linkages has been unclear.

Canada's adoption of the *Canadian Charter of Rights and Freedoms*[4] in 1982 is an example of how international law has fertilized the constitutional law of Canada. A textual analysis of the *Charter*'s provisions, as compared to the provisions of the *Universal Declaration of Human Rights, 1948*[5] and the *International Covenant on Civil and Political Rights, 1966*[6] reveals just how influential those international instruments were on the development of the *Charter*.[7] Some of the *Charter*'s most celebrated and recognizable provisions are lifted almost word for word from these instruments. The language of section 7 and section 1 are two examples. Others can be

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[1] [1999] 1 S.C.R. 817.

[2] 2007 SCC 26.
[3] 2007 SCC 27 [*Health Services*]
[4] Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [the *Charter*].
[5] GA Res. 217A (III), UN Doc. A/810, 1948.
[6] [1976] Can. T.S. no. 47.
[7] See Mark Freeman and Gib van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) at chapter 10.

cited. Dickson CJ noted the *Charter*'s dependence on international human rights law in *Re Public Service Employee Relations Act* when he said, "The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights."[8] The *Charter*'s international origins are clear. Yet the legal consequences of the *Charter*'s international heritage remain uncertain.

The contemporary international human rights movement of which Dickson CJ spoke influenced Quebec constitutional law even before the *Charter*'s adoption in 1982. Quebec adopted its own *Charter of Human Rights and Freedoms*[9] in 1975, inspired in important part by international human rights law. While not all of the *Quebec Charter*'s provisions are as closely identifiable to those found in international human rights instruments as is the case with the *Charter*, it is nevertheless remarkable that the *Quebec Charter* includes a measure of protection for economic and social rights reminiscent of certain provisions of the *International Covenant on Economic, Social and Cultural Rights, 1966*.[10] Another remarkable feature of Quebec's constitutional involvement in international human rights law is that the *Quebec Charter*'s adoption preceded Canada's adherence to the two international covenants by a year. To the extent that the *Quebec Charter* can be viewed as implementing legislation for these international treaties, Quebec beat Canada to the punch. Furthermore the government of Quebec declared itself bound by the covenants on 21 April 1976—about four months before Canada ratified those treaties.[11]

The connections between Quebec and Canadian law, on the one hand, and international law, on the other, predate even the two Charters. Canadian courts and courts operating in the Commonwealth tradition more generally have looked to international law as a source for the interpretation of domestic law for a long time.[12] The role of international law as an interpretive tool has always been regarded, and rightly so, as a constitutional question. This is because law-making in the British tradition is the responsibility of parliament yet treaty-making (the most prevalent form of international law making today) is regarded as a prerogative of the executive. The extent to which an executive act may be looked to in order to interpret a legislative act inevitably raises constitutional questions.

For the most part Canadian courts have not hesitated to have regard to international legal sources for guidance in the interpretation of domestic laws. In the very important *National Corn Growers* case,[13] Gonthier J held that courts may make reference to international treaties at the outset of the interpretative exercise in order to determine if there is any ambiguity, whether latent or patent, in the domestic legislation. By so holding, Gonthier J put an end to a doctrine that had arisen in English law in the mid-twentieth century which sought to confine the use of international law in domestic adjudication by permitting resort to it only in cases where the domestic statute could be said to be ambiguous on its face. Against this view, Gonthier J held that the proper approach was

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[8] *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 [*Re PSERA*] at 348.
[9] R.S.Q. c. C-12 [the *Quebec Charter*].
[10] [1976] Can. T.S. no. 46.
[11] "Conventions multilatérales, traités et accords internationaux pour lesquels le Québec s'est declaré lié" (Government of Quebec document on file with the author).
[12] See generally Gib van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002) at chapter 4.
[13] *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.

to determine from the outset of the inquiry whether the domestic provisions, when read in light of the relevant international agreements, gave rise to any ambiguity, and from there to interpret the domestic provisions, to the extent possible, in conformity with international law.

Another important instance of judicial resort to international law as an interpretative aid is the dissenting judgment of Pigeon J in *Capital Cities Communications v. CRTC*.[14] It is notable that in that case Pigeon J spoke in dissent but with the support of two other Quebec judges, namely Beetz and Grandpré JJ. The majority of the court had found that an administrative decision-maker operating under statutory authority was free to make determinations that conflicted with Canada's treaty obligations under international law. By contrast, Pigeon J held that the *Canadian Radio-Television Commission* [the CRTC] could not properly issue decisions in violation of Canada's treaty obligations. He explained that it was the CRTC's "duty" to "implement the policy established by Parliament" and that "while this policy makes no reference to Canada's treaty obligations, it is an integral part of the national structure that external affairs are the responsibility of the federal government. It is an oversimplification to say that treaties are of no legal effect unless implemented by legislation".[15] I suggest that this is by far the better view and that it is now, as a result of *Baker*, the correct position.

It is therefore quite correct to call for a "return" to international law sources in the context of constitutional adjudication. And a return does appear to be under way. The question now is whether we are returning well. That is to say, do Canadian and Quebec judges and lawyers make good use of international law? I propose to break this question into two parts. First, do our judges and lawyers understand international legal sources? Second, are our theories on the application of international law in constitutional disputes satisfactory?

1. Understanding international legal sources

The enthusiasm for international law that flared up following the *Baker* decision has had at least one beneficial effect, namely to raise the awareness of judges and lawyers about international law and international human rights law in particular. I fear, however, that there remains a good deal of uncertainty as to how international legal sources work.

One uncertainty that continues, it seems, to plague judges and lawyers concerns the juridical nature of international legal norms. Are they binding or not? The answer depends in part on what we mean by "binding". International law does not purport to bind anyone but its subjects which are, for the most part, states. It is therefore mistaken, or at least exaggerated, in most cases to say that a government or a court or an individual is bound by a certain rule of international law. To the extent that a government or court or an individual may be assimilated to a state, there may be some truth to the statement. But it is nevertheless a rather inexact expression. An example of this uncertainty arose in the recent decision of *GreCon Dimter Inc. v. J. R. Normand Inc*.[16] In that case LeBel J of the Supreme Court of Canada made several references to the obligations of Canada and Quebec under an international treaty, namely the *New York Convention, 1958*.[17] LeBel J treated the Convention, to which Canada is a party, as a legal obligation binding both on

[14] [1978] 2 S.C.R.141.
[15] *Ibid.* at 188.
[16] 2005 SCC 46 [*Grecon*].
[17] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [1986] Can T.S. no. 43.

Canada and Quebec. Strictly speaking, that is inaccurate. Quebec is not a state as a matter of international law and is therefore not capable of entering into international agreements in the ordinary case. Quebec is not a party to the New York Convention. Strictly speaking, then, Quebec is not bound by the New York Convention. And yet there is truth in what LeBel J said, for Quebec is a constituent part of the Canadian state and the Canadian state is bound by the New York Convention as a matter of international law. Were Quebec, whether through its executive or its legislative branches, to do something contrary to the Convention, that default would be imputed to Canada and would be treated by the international community as a breach by Canada of its international legal obligations. While Quebec is not directly bound by international law, it can, by its acts, bring a certain vicarious liability upon Canada.

There is a second issue surrounding the term "binding". Some judges, lawyers and academics appear to take the view that international law is inherently non-binding. It is not always clear what these people mean. Sometimes they mean it as a criticism of the international geopolitical order—a way of complaining that international law is not properly enforced. But obligation and enforcement are distinct concepts. In other cases people proclaim the non-binding nature of international law as an affirmation of state sovereignty and a denial of the possibility that states can ever be restrained by law. Yet it is clear that international law does exist and that certain international laws are binding on certain states. States themselves believe this to be true, and that is probably all the proof one needs. In most cases, there is no great difficulty in determining whether a given international norm is a law binding on the state or not. Yet the distinction between binding and non-binding international legal norms continues to give rise to difficulty in some cases. It need not do so.

Related to this occasional uncertainty about the binding or non-binding nature of an international norm is a lack of appreciation of the formal character of international legal sources. The distinctions between treaties, customs, *jus cogens*, declarations, and other descriptions of international legal sources are sometimes not given the attention they deserve. An example of this may be the decision of the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*[18] where the court relied heavily (and commendably) on the judicial decisions of the International Criminal Tribunals for Rwanda and the former Yugoslavia. The court apparently regarded these decisions as representing customary international law.[19] That may or may not be true. What concerns me is that the court seemed to take it for granted that judicial decisions of international tribunals represent the customary international legal position. Customary international law is created by state practice, not by the decisions of judicial bodies. The court in *Mugesera* seems to have treated custom as analogous to common law, that is to say a judge-made form of law. That analogy is not apt.

Another instance of a Canadian court paying too little attention to the differences between international legal sources is the increasingly derided decision of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*.[20] The international legal question that exercised the court in that case was whether or not the prohibition against torture was a *jus cogens* rule of international law. The court concluded that the prohibition against

[18] [2005] 2 S.C.R. 100.
[19] *Ibid.* at paras. 126, 137.
[20] [2002] 1 S.C.R. 3.

torture was not yet a rule of *jus cogens* but that such a norm was emerging. One may certainly dispute this conclusion. Leaving that aside, however, the court asked itself the wrong question. Canada has an express legal obligation under the *Convention Against Torture, 1984*[21] to prohibit torture, including refoulement to torture. Given the existence of this treaty obligation, whether or not the prohibition of torture was contrary to *jus cogens* was quite irrelevant. All the court needed to know was that Canada had an obligation under the treaty to prohibit torture and refoulement. The *jus cogens* issue was a red herring. The court's error, in my respectful opinion, was to misunderstand, or at least fail to appreciate, the interaction of these two sources of law: absent any suggestion that a conflicting *jus cogens* norm had arisen, express treaty requirements prevail.

A third type of international legal misunderstanding that plagues our lawyers and judges concerns the character of international law itself: is it law or is it fact? The answer to this question has very practical consequences. If international law is properly regarded by our lawyers and judges as law, lawyers ought to argue international legal points in their submissions (where relevant) and judges ought to take judicial notice of international norms (where applicable). By contrast, if international law is properly characterized as fact, then lawyers ought to bring evidence to prove the international legal position and judges ought to weigh this evidence based on such considerations as the balance of probabilities and the credibility of expert witnesses. My view is that international law is just what it says it is, namely law. It therefore ought not to be the subject of expert evidence.[22] Courts ought to decide international legal questions, where necessary, on the strength of the submissions of counsel and their own sense of what the law is. There is, however, a trend in Canada for lawyers to lead evidence of what international law requires by resort to professors and other so-called experts. Instead of excluding such evidence as inadmissible, courts in recent cases have admitted it and treated it not as evidence but as legal argument in another form.[23] The judicial decisions that follow from this procedure tend to decide the international legal questions in dispute based not on the balance of probabilities and the credibility of the competing witnesses but on the substantive merit of the positions staked out by the witnesses. In short, judges are treating international law as a question of fact for procedural purposes but a question of law for the purposes of decision-making. This practice is intellectually unsatisfying and procedurally confusing.

Greater rigour is needed when Canadian lawyers and judges consider international legal sources, whether in constitutional contexts or more generally. Counsel and courts alike must take greater care in determining, in respect of each international legal source they consider, the legal character of the source (i.e., whether it is binding or non-binding on the state as a matter of international law), its formal character (i.e., treaty, custom, judicial declaration, non-binding declaration, etc.) and the proper evidentiary and procedural approaches to it (i.e., judicial notice or proof of fact). Greater rigour will make for better judgments.

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[21] [1987] Can T.S. no. 36.

[22] See Frederic Bachand, "The 'Proof' of Foreign Normative Facts Which Influence Domestic Rules" (2005) 43 Osgoode Hall LJ 269 and Gib van Ert, "The Admissibility of International Legal Evidence" (2004) 84 Canadian Bar Review 31. Note that a possible exception to the rule against expert evidence on questions of international law may be necessary in respect of customary international law, where proof of state practice may be required.

[23] See e.g. *Romania v. Cheng* (1997) 158 NSR (2d) 13 (NSSC), affirmed 162 NSR (2d) 395; *Ivanov v. USA* (2003) 223 Nfld & PEIR 33 (NLSCTD); *Bouzari v. Iran* (2004) 71 OR (3d) 675 (Ont. CA).

2. Reception theories

The second question we must ask in considering whether we have made a successful return to international legal sources is whether our theories for the application of those sources in domestic law are satisfactory. Until the *Hape* and *Health Services* cases, there existed a remarkable gap between the approach to international law in constitutional adjudication and the approach employed in the rest of Canadian law. The far-reaching declarations of the Supreme Court of Canada in *Hape* and *Health Services* may serve to close that gap, though it is much too soon to say.

The general theoretical approach to international law in Canada is founded on the interpretive presumption of conformity with international law. This was illustrated by the Supreme Court of Canada in *GreCon*. Difficulties arose from conflicting provisions of the *Civil Code of Quebec*[24]. Article 3148(2) provided that the Quebec court lost jurisdiction where the parties had agreed to either a choice of forum clause or an arbitration clause. Yet article 3139 conferred jurisdiction on the Quebec court to hear actions in warranty so long as the court had jurisdiction over the principal action. In the case at bar, the Quebec court had jurisdiction over the principal action yet the parties to the incidental action in warranty had agreed upon a German court as their forum of choice. The court therefore had to decide which of the two *Civil Code* provisions took precedence. LeBel J, for the unanimous Supreme Court of Canada, held that the "interpretation of the provisions in issue, and the resolution of the conflict between them, must necessarily be harmonized with the international commitments of Canada and Quebec".[25] LeBel J. interpreted the *Civil Code* as presumptively consistent with Canada's obligations under the previously-mentioned *New York Convention*[26]. That treaty requires the courts of contracting states to refer disputing parties to arbitration where they have previously so agreed. While the facts of the case before the court concerned a choice of forum clause rather than arbitration clause, article 3148(2) treats both such clauses alike and LeBel J held that, for the sake of consistency, the internationally compliant approach should be adopted in respect of both types of clauses.[27]

Numerous other cases may be cited in which the Supreme Court of Canada and other courts have applied the presumption of conformity with international law to resolve interpretative problems and thus determine the meaning and effect of domestic laws. The leading judgment on point today must be that of LeBel J in *Hape*. The central question in that case was whether the *Charter* applies to searches and seizures conducted by RCMP officers outside Canada. The majority held that it generally does not. Much of LeBel J's reasoning was devoted to the international law of extraterritoriality. He began, however, with several observations about the relationship between international and domestic law. On the presumption of conformity, he observed:

> It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly

[24] L.Q., 1991, c. 64 [the *Civil Code*].
[25] *GreCon, supra* note 16 at para. 39.
[26] See *supra*, note 17.
[27] *Ibid.* at paras. 39-46.

> compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation. See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at pp. 367-68.
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> The presumption of conformity has been accepted and applied by this Court on numerous occasions….The presumption applies equally to customary international law and treaty obligations.[28]

While the Supreme Court of Canada and other Canadian courts have frequently applied the presumption of conformity to ordinary statutes, its application to constitutional laws has long been uncertain. In *Charter* jurisprudence, a different and weaker theoretical approach has dominated. This is the so-called relevant and persuasive approach set out by Dickson CJ in *Re Public Service Employee Relations Act*. In that decision Dickson CJ described the various sources of international human rights law as "relevant and persuasive" for interpretation of the *Charter*'s provisions. He elaborated:

> In particular, the similarity between the policies and provisions of the Charter and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicate of bodies, in much the same way that decisions of the United States courts under the Bill of Rights, were decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in Charter interpretation extends beyond the standards developed by adjudicate of bodies under the documents to the documents themselves.[29]

This approach is fundamentally different than the presumption of conformity which applies to the rest of Canadian law. Rather than presuming from the outset of the interpretive exercise that the constitutional provision in question conforms to Canada's international obligations and then requiring the disputing party to rebut that presumption, this approach merely acknowledges the relevance and the potential persuasiveness of international law in interpreting the constitutional provisions at issue. What is lacking is the injunction to courts to reach, if possible, an internationally compliant interpretation of the constitutional provision at issue. Instead, the

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[28] *R. v. Hape*, *supra* note 2 at paras. 53-54.
[29] *Re PSERA*, *supra* note 8 at 348.

courts are merely permitted to have regard to international law, just as they may have regard to foreign laws and decisions, such as those under the U.S. Bill of Rights.

On its face, the relevant and persuasive approach may seem admirably cosmopolitan. In practice, however, this approach relegates international legal sources to the status of curiosities in constitutional adjudication. Courts and litigants both may take them or leave them. It should therefore come as no surprise that, in the 20 years since *Re Public Service Employee Relations Act* was decided, international human rights law has had little effect on *Charter* interpretation. The case that represents the nadir of constitutional interpretation in disregard of the requirements of international human rights law is *Suresh*, in which the court paid lip service to Canada's obligations under the *Convention Against Torture* while failing to reach an interpretation of section 7 of the *Charter* that meets that treaty's requirements.

Curiously, Dickson CJ's judgment in *Re Public Service Employee Relations Act* also contains the most important enunciation of the presumption of conformity in the *Charter* context. Though the thrust of his comments was in favour of the relevant and persuasive approach, Dickson CJ also expressed the view that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified".[30] Until *Hape* and *Health Services*, this observation had been largely neglected.

Turning to the Quebec constitution, the Court of Appeal for Quebec has endorsed the relevant and persuasive approach for the interpretation of the *Quebec Charter*. In *Québec (Commission des droits de la personne et droits de la jeunesse) v. Montreal (Ville)*, the court described the adoption of both federal and provincial human rights laws as having occurred "in an international context of affirmation of human rights and freedoms"[31]. The court went on to say that, "in the case of the *Quebec Charter*, the importance attached to different international human rights text during the work preparatory to its adoption and the similarity of the language used in Quebec and international standards illustrate the usefulness of recourse to the latter".[32] Note the emphasis on utility over obligation. Courts and litigants need not inform themselves of the state's international human rights obligations, but it may be useful for them to do so. By contrast, international law was a deciding factor in the *GreCon* case as it has been in other cases in which the presumption of conformity was applied.

The theoretical gap between the use of international law in constitutional adjudication and in other contexts appears now to be closing. In *Hape* and *Health Services*, the Supreme Court of Canada seems to have rejected the relevant and persuasive approach and to have embraced the presumption of conformity. In *Hape*, LeBel J declared that "in interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction".[33] That case, however, concerned the *Charter*'s scope of application (section 32) and not its substantive human rights provisions. More significant is *Health Services*, in which the

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[30] *Ibid.* at 349.
[31] *Québec (Commission des droits de la personne et droits de la jeunesse) v. Montreal (Ville)* (1998) 36 CCEL (2d) 196 at para. 65.
[32] [1998] RJ.Q. 688 at para. 65; affirmed [2000] 1 S.C.R. 665.
[33] *R.v. Hape*, *supra* note 2 at para. 56; see also para. 55.

court unanimously overruled the so-called Labour Trilogy of cases[34] which held that section 2(d)'s right to freedom of association did not confer constitutional protection to collective bargaining. In overruling these decisions, McLachlin CJ and LeBel J for the court relied in part on Canada's obligations to protect trade unions under international human rights and labour law. On the interpretation of the *Charter* in the light of international law, they observed:

> Under Canada's federal system of government, the incorporation of international agreements into domestic law is properly the role of the federal Parliament or the provincial legislatures. However, Canada's international obligations can assist courts charged with interpreting the Charter's guarantees…. Applying this interpretive tool here supports recognizing a process of collective bargaining as part of the Charter's guarantee of freedom of association.
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> Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(d) of the Charter. As Dickson C.J. observed in the *Alberta Reference*, at p. 349, the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.
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> The sources most important to the understanding of s. 2(d) of the Charter are the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 ("ICESCR"), the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 ("ICCPR"), and the International Labour Organization's (ILO's) Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, 68 U.N.T.S. 17 ("Convention No. 87"). Canada has endorsed all three of these documents, acceding to both the ICESCR and the ICCPR, and ratifying Convention No. 87 in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.
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> The ICESCR, the ICCPR and Convention No. 87 extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association. The interpretation of these conventions, in Canada and internationally, not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(d).
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> Article 8, para. (1)(c) of the ICESCR guarantees the "right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others." This Article allows the "free functioning" of trade unions to be regulated, but not legislatively abrogated (per Dickson C.J., *Alberta Reference*, at p. 351). Since

[34] I.e. *Re PSERA*, *supra* note 8; *PSAC v. Canada* [1987] 1 S.C.R. 424 and *RWDSU v. Saskatchewan* [1987] 1 S.C.R. 460.

collective bargaining is a primary function of a trade union, it follows that Article 8 protects a union's freedom to pursue this function freely.

Similarly, Article 22, para. 1 of the ICCPR states that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." Paragraph 2 goes on to say that no restriction may be placed on the exercise of this right, other than those necessary in a free and democratic society for reasons of national security, public safety, public order, public health or the protection of the rights of others. This Article has been interpreted to suggest that it encompasses both the right to form a union and the right to collective bargaining: *Concluding Observations of the Human Rights Committee Canada*, U.N. Doc. CCPR/C/79/Add.105 (1999).

Convention No. 87 has also been understood to protect collective bargaining as part of freedom of association. Part I of the Convention, entitled "Freedom of Association", sets out the rights of workers to freely form organizations which operate under constitutions and rules set by the workers and which have the ability to affiliate internationally. Dickson C.J., dissenting in the *Alberta Reference*, at p. 355, relied on Convention No. 87 for the principle that the ability "to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits".

Convention No. 87 has been the subject of numerous interpretations by the ILO's Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry. These interpretations have been described as the "cornerstone of the international law on trade union freedom and collective bargaining"…. While not binding, they shed light on the scope of s. 2(d) of the Charter as it was intended to apply to collective bargaining: Dunmore, at paras. 16 and 27, per Bastarache J., applying the jurisprudence of the ILO's Committee of Experts and Committee on Freedom of Association

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The fact that a global consensus on the meaning of freedom of association did not crystallize in the *Declaration on Fundamental Principles and Rights at Work*, 6 IHRR 285 (1999), until 1998 does not detract from its usefulness in interpreting s. 2(d) of the Charter. For one thing, the Declaration was made on the basis of interpretations of international instruments, such as Convention No. 87, many of which were adopted by the ILO prior to the advent of the Charter and were within the contemplation of the framers of the Charter. For another, the Charter, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the Charter.

> In summary, international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(d) of the Charter should be interpreted as recognizing at least the same level of protection: *Alberta Reference*.[35]

Conclusion

For the most part in Canadian law, a return to international legal sources is not necessary. We never left them. The exception is Canadian constitutional adjudication. Here what is needed is a theoretical approach to international law that gives it its proper weight. To treat international human rights obligations of the state as merely relevant and persuasive in constitutional matters is unsatisfactory. Instead, constitutional interpretation should strive to the extent possible to conform to international law. If that interpretative approach is appropriate for the *Civil Code* it is appropriate for the *Quebec Charter*. If it is appropriate for ordinary statutes, it is appropriate for the constitutional foundations of the state. It is too early to say whether the *Hape* and *Health Services* cases finally bring *Charter* adjudication in line with the rest of domestic law in this regard, subjecting all legal norms to the presumption of conformity with international law. That may, however, be the result of these two decisions. If so, it is a welcome development.

[35] *Ibid.* at paras. 69-76 and 78-79.