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Application of Non-Implemented International Law by the Federal Court of Appeal: Towards a Symbolic Effect of s. 3(3)(f) of the IRPA?

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France Houle* Application of Non-Implemented International
Noura Karazivan** Law by the Federal Court of Appeal: Towards
a Symbolic Effect of s. 3(3)(f) of the IRPA?

Since 1999, the Supreme Court has explored the linkages between domestic statutes and international norms and values and has slowly developed the basic principles underlying a new mechanism of relevancy that the authors call harmonization of domestic law with international law. The authors analyze this development in Part I of the present article. In Part II, they study the application of this harmonization mechanism in the field of Canadian immigration law. Of particular importance in the Immigration and Refugee Protection Act is s. 3(3)(f), for it directs judges to construe and apply the IRPA in a manner that "complies with international human rights instruments to which Canada is signatory." They found that instead of harmonizing the interpretation of all relevant IRPA provisions with international law, courts are harmonizing the application of the legislation as a whole with international law. They conclude that s. 3(3)(f) has been reduced to a merely symbolic value.

Depuis 1999, la Cour suprême explore les liens entre les lois publiques et les normes et valeurs du droit international et élabore patiemment les principes de base qui sous-tendent un nouveau mécanisme de relevance juridique que les auteures nomment harmonisation du droit interne avec le droit international. Les auteures analysent ces développements dans la Partie I du présent texte. Dans la Partie II, elles étudient l'application de ce mécanisme d'harmonisation dans le domaine du droit de l'immigration. En particulier, elles examinent le par. 3(3)(f) de la Loi sur l'immigration et la protection des réfugiés qui exige du juge qu'il « se conforme aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire. » Les auteures ont constaté que plutôt d'harmoniser l'interprétation de toutes les dispositions pertinentes de la LIPR avec le droit international dans le cadre d'un litige en particulier, les cours harmonisent l'application de la totalité de la loi avec le droit international. Elles concluent que cette manière de procéder a pour conséquence de réduire la portée du par. 3(3)(f) à un effet simplement symbolique.

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Introduction

The reception of international law into domestic law is known for its uncertainties but one can safely say, without being controversial, that the traditional, dualist model which found its roots in the distinction between implemented and unimplemented international law *is* evolving. One of the great challenges faced by academic scholars today is to find new ways of theorizing this evolving reality while at the same time remaining sufficiently pragmatic to be of use to judges in their day-to-day tasks. In recent years, scholars have suggested many ways of conceptualizing the new role of international law in domestic law, including an approach based on the persuasive authority of international law, a second based on the role of international law as part of the context of adoption of domestic law, a third focused on the discretionary power of the judge, a fourth based on a comparative law analogy, a fifth which attributes weight according to the pedigree of the international instruments, and so on.¹

One of the greatest areas of confusion is the question of the reception of non-implemented international law in domestic law. These instruments include all treaties signed by Canada, and those signed and ratified by Canada. Throughout this article, we refer to non-implemented international

1. See, generally, Jutta Brunnée & Stephen Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l. Law 3; Gibran Van Ert, "Using Treaties in Canadian Courts" (2000) 38 Can. Y.B. Int'l. Law 3; France Houle, "La légitimité constitutionnelle de la réception directe du droit international en droit canadien" (2004) 45 C. de D. 295; Irit Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System" (2004) 37 U.B.C. L. Rev. 113; Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 N.Y.U. J. Int'l L. & Pol. 501; Anne Warner LaForest, "Domestic Application of International Law in Charter Cases : Are We There Yet ?" (2004) 37 U.B.C. L. Rev. 157; William A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3d ed. (Toronto: Thomson Carswell, 2007) at 84 and ff; France Houle & Noura Karazivan, "Les rapports de relevance juridique entre les ordres législatifs canadien et international" (2008) 1 R.Q.D.C., <<http://www.aqdc.org/volumes/pdf/houle-les-rapports-de-relevance-juridique.pdf>>.

law as a body of treaty law which binds Canada on the international scene, but which has not been implemented into Canadian law.

Under the dualist theory to which Canada adheres, only treaties that have been implemented into domestic law are actually binding on Canadian judges in a domestic setting. Consequently, as the orthodoxy of the doctrine puts it, all other treaties or conventional instruments are legally irrelevant. That is why the use of this category of international instruments by domestic judges, notwithstanding the dualist orthodoxy, triggers questions of constitutional and democratic legitimacy as it involves the consideration, by courts, of instruments that have not been transformed into law by the legislative branch.

In order to give greater certainty to this area of the law, and also perhaps to provide a justification for the use of these materials, some authors have suggested that the presumption of conformity—which already exists with relation to domestic legislation aimed at fulfilling Canada's international obligations—should be extended to include any unimplemented ratified treaty.² In other words, that absent a contrary legislative intention, judges must *presume* compliance with these treaties whenever an issue of interpretation of domestic law arises.

We have elsewhere shown a reticence with regard to the use of the term *presumption* when it comes to explaining the new role of ratified but unimplemented treaties in Canadian law.³ We agree that if it is plain that domestic legislation aims at fulfilling Canada's international obligations; even though the intention was not made explicit, international norms must be determinative of either the meaning of a domestic statute or regulation or the validity of administrative action taken under its authority. However, when it is not plain that domestic legislation aims at fulfilling Canada's international obligations (either explicitly or implicitly), the question remains to which extent judges are nonetheless authorized to take into consideration international norms in order to interpret the scope and limits of a Canadian legal norm.

The Supreme Court decision in *Baker*⁴ addressed this important issue, but also raised two problems which are not yet resolved in Canadian case law. The first is with respect to the criteria to be applied by judges to determine if it is open to them to take non-implemented international law into consideration when interpreting Canadian legal norms. The second

2. See discussion below at ns. 47 to 51.

3. Houle & Karazivan, *supra* note 1.

4. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, S.C.J. No. 39 [Baker].

occurs when judges have decided that they can take into consideration international legal norms to interpret Canadian legal norms even though they have not been implemented into domestic law: what weight should be given to these international norms?

To fully appreciate the problems raised by the *Baker* case, it is important to distinguish between the use of international law to interpret domestic ordinary legislation, and the use of international law to interpret constitutional norms, in particular the rights and freedoms guaranteed in the *Charter*.

With respect to interpreting the scope of constitutional norms, it will be open to judges to take international law norms into consideration when the concepts used in Canadian constitutional law and international law are *similar*.⁵ When such is the case, judges are entitled to give *persuasive* value to these international norms to interpret Canadian constitutional law.⁶

When it comes to ordinary legislation, the question of *when* to resort to non-implemented international law in interpreting Canadian legal norms is less clear. Justice L'Heureux-Dubé stated in *Baker* that international law norms "constitute a part of the legal context in which legislation is enacted and read". Therefore, interpretations that reflect these values and principles are to be preferred "[in] so far as possible."⁷

With respect to weight, Justice L'Heureux-Dubé appeared to lean toward giving persuasive value to international norms that do not aim at fulfilling Canada's international obligations when interpreting a domestic statute or regulation. We say "appeared" because her reasons are not crystal clear on this issue. This lack of clarity resulted in the development of a fuzzy caselaw. Indeed, as we have shown previously, courts that are presented with international law arguments sometimes refer to international instruments as persuasive, relevant, useful, or quite often determinative. As a consequence, the question of weight is still debated.⁸ Nonetheless, the weight issue will not be the focal point of this text. Rather, we will focus our attention on the first difficulty raised in *Baker*: when are judges entitled to consider non-implemented international law norms to interpret Canadian legal norms, and how do they proceed to do so?

5. *Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, S.C.J. No. 10, Dickson C.J.C., dissenting [*Re Public Service Employee Relations Act*]. These reasons were later endorsed in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, S.C.J. No. 45.

6. *Ibid.*

7. *Baker*, *supra* note 4 at para. 70 [emphasis added].

8. Houle & Karazivan, *supra* note 1.

In our opinion, *Baker* both discards the traditional dualist reception theory, and applies a new mechanism of relevancy that we call harmonization of domestic law with international law.⁹ In Part I of this article, we will analyze both the foundations of the dualist theory (section 1), and how this theory created the need to develop new ways of theorizing the role of non-implemented international law. We will then highlight how harmonization best describes the current interpretative process going on in *Baker* and in the subsequent caselaw (section 2).

In Part II of the article, we will focus on how harmonization can illustrate the relationship between international law and domestic law in the field of Canadian immigration law. Immigration law offers a clear example of the difficulties faced by judges when they are conferred the explicit task of considering international law while interpreting a statute—in this case, the *Immigration and Refugee Protection Act*¹⁰ (*IRPA*). Of particular importance in this statute is s. 3(3)(f), for it directs judges to construe *and* apply the *IRPA* in a manner that “complies with international human rights instruments to which Canada is signatory.” Parliament is using a wording that is quite strong and does not give discretion to judges: “*This Act is to be construed and applied in a manner that complies with international human rights instruments.*” However, as our analysis will show, even if the language of Parliament is explicit, judges have nonetheless started an interpretative process to limit the scope of Parliament’s injunction. In other words, even if s. 3(3)(f) of the *IRPA* does not contain the words “in so far as possible,” judges are *reading in* this principle of interpretation stated in *Baker*. This is not so surprising: after all, one can argue, *any* interpretative rule contained in an enactment is to be read subject to a contrary legislative intention.¹¹ But instead of harmonizing the *interpretation* of the *IRPA* with international law, courts are harmonizing the *application* of the legislation as a *whole* with international law. As we will show, this unexpected turn raises new questions that transcend the traditional debate on the post-*Baker* use of international law by courts and identifies a new technique, devised by judges, to limit the impact of international law in the interpretation of domestic law. Consequently, it may be argued that s. 3(3)(f) has been reduced to a merely symbolic value.

9. *Ibid.*

10. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*Act or IRPA*].

11. *Interpretation Act*, R.S.C. 1985, c. 1-21, s. 15(2)(a) [*Interpretation Act*].

Judges of both Federal Courts paid some attention to s. 3(3)(f) of the *IRPA* since its coming into force in 2002. However, it is in the *De Guzman*¹² decision, rendered by Justice Evans of the Federal Court of Appeal, that an analytical framework was explicitly laid down to guide judges in the application of s. 3(3)(f) of the *IRPA*. For this reason, we start our study of relevant case law from the *De Guzman* decision (section 1), but we limit our follow-up sample to the Federal Court of Appeal decisions (section 2). Our decision to limit the scope of our inquiry was mainly driven by the exploratory nature of this article. There is no doubt that the Federal Court of Appeal decisions post-*De Guzman* raise novel questions which will justify a full-fledged investigation of all relevant cases but such an investigation is beyond the scope of the present contribution.¹³

I. Reception doctrines in Canadian law

Canada follows a monist approach with regard to the reception of customary law, and a dualist approach with regard to the reception of conventional (treaty) law. It is the latter that concerns this article; the reception of customary law will not be addressed.¹⁴

Under the dualist approach, a treaty must be transformed or implemented into domestic legislation in order to become legally binding in Canada.¹⁵ This model takes into account the separation of powers as well as the federal division of powers in Canada: the federal executive holds the power to enact treaties, but the federal and provincial legislatures—depending on the jurisdiction over the matter covered by the treaty—hold the power to make that treaty into law.¹⁶ The belief is that separation of powers as well as the principle of federalism would be jeopardized if the federal executive were able to do indirectly what it may not do directly, i.e., enact a law and trespass on provincial jurisdiction.¹⁷

12. *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 70 (June 22, 2006) [*De Guzman*].

13. A *Quickcite* of this decision on the Quicklaw database reveals that this case was cited 43 times (mentioned in 40 cases, explained in 6 and followed in 2). Most cases involve either the Minister of Citizenship and Immigration or the Minister of Public Safety and Emergency Preparedness. However, a preliminary observation which can be made is that the *De Guzman* decision was also cited in cases in which statutes other than the *IRPA* were pleaded. This may be an indication, which will need to be verified, that the *De Guzman* analytical framework is perhaps being extended to other areas of interpretation of domestic legal norms in light of non-implemented international law.

14. The monist approach to the reception of customary international law in Canada was clarified in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 [*Hape*].

15. *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 [*Capital Cities*].

16. *Attorney General of Canada v. Attorney General of Ontario*, [1937] 1 D.L.R. 673 [*Labour Conventions Case*].

17. J.-M. Arbour, *Droit international public*, 4th ed. (Cowansville, QC: Yvon Blais, 2002) at 146.

As a result of these beliefs, judges for a long time shared the view that they had to determine if an international treaty was implemented in Canadian domestic law before considering its weight in a given case. It is only with the advent of the *Canadian Charter of Rights and Freedoms* that this traditional reception doctrine went through significant changes and, as a consequence, opened the door to major developments leading to the formulation of a contemporary reception doctrine of international law norms in Canada. In this section, we start with a brief review of the evolution of the traditional reception doctrine to differentiate the clearer from the more obscure zones of this doctrine.

1. *Evolution of the traditional reception doctrine*

An implemented treaty is part of Canadian law. Yet questions of interpretation may arise, and if they do, there is a presumption of conformity that binds the courts. The courts *must* presume that the legislator had the intention to conform in all points to the treaty unless the legislature explicitly intended otherwise. To find clear formulation for this presumption, we turn to English law, from which we inherited the dualist model of reception. In *Salomon v. Commissioners of Customs and Excise*, Lord Diplock defines the presumption as follows:

[T]he treaty, since English law is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. *Once the Government has legislated ...*, the court must in the first instance construe the legislation If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations But if the terms of the legislation are not clear ..., the treaty itself becomes relevant, for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law¹⁸

Lord Diplock adds that it is not necessary that the legislation refer explicitly to the treaty: it is sufficient that extrinsic evidence make it "*plain that the enactment was intended to fulfil Her Majesty's obligations under a particular convention ...*".¹⁹

The presumption of conformity thus stands for the proposition that reference to international law is *mandatory* when analyzing implementing legislation or legislation that is meant to fulfill the government's

18. *Salomon v. Commissioners of Customs and Excise*, [1967] 2 Q.B. 116 (C.A.) at 143-144 [Salomon] [emphasis added].

19. *Ibid.* at 144 [emphasis added].

international obligations. Such a position is summarized by the House of Lords as follows:

Further cases in which the court may not only be empowered but *required* to adjudicate upon the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation.²⁰

Once an explicit or implicit implementation was shown to the satisfaction of a Court, a judge still had to determine whether Canadian domestic norms needed to be interpreted. For a long time, the criterion to determine if interpretation was required was to show that the norm at stake was ambiguous. If so, international norms explicitly or implicitly implemented could be used to clarify the ambiguity. This was the state of the law until the advent of the *Charter*.

Very early in the new days of the *Charter*, the Supreme Court decided that international human rights law norms, principles and jurisprudence broadly speaking (thus, including regional norms such as those developed in Europe) were relevant to interpret the scope of the rights and freedoms guaranteed in it. This move was significant because the Court did not argue that the framers explicitly or implicitly implemented international norms into Canadian law. Therefore, the first point to be made here is that in the context of the interpretation the *Charter*, the Supreme Court moved away from the obligation to demonstrate implementation of an international treaty before using the norms contained in it to interpret the meaning of the *Charter*.

Second, instead of justifying the recourse to international law norms on the basis of implementation, the Court reasoned on the basis of the similarities between the concepts used in both sets of norms.²¹ This point was particularly evident when judges were referring to European human rights norms. Because of these similarities, the Court argued that it was open for judges to use international law norms as an extrinsic aid to interpretation. What is also noteworthy is that the Court pushed aside the ambiguity criterion. Indeed, the nature of norms such as rights and freedoms, that is to say being intrinsically ambiguous, vague and

20. *J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade & Indus.*, [1990] 2 A.C. 418, [1989] 3 W.L.R. 969 at 1002 (H.L.) [emphasis added].

21. See *Re Public Service Employee Relations Act*, *supra* note 5. Schabas and Beaulac report some comments made by former Justices La Forest and Bastarache on the lasting impact of the words of Justice Dickson in *Re Public Service Employee Relations Act*: see Schabas & Beaulac, *supra* note 1 at 87.

obscure, was also viewed as crucial factor to make such a move. The Court felt the need to resort to international human rights instruments to help it in construing the scope and limits of our constitutional rights and freedoms. It is worth recalling that the Court's departure from both criteria—implementation and ambiguity—was viewed as quite radical at that time.²²

In the context of the interpretation of domestic legal norms, however, the Court still held the view, until *Baker*, that the criterion of implementation (whether explicit or implicit) was a necessary one to fulfill. One example of the application of the principle of "implicit implementation" can be found in *National Corn Growers Association v. Canada*.²³ In that case, the Supreme Court clearly specified that it was handling the interpretation of legislation aimed at fulfilling Canada's obligations under the *General Agreement on Tariffs and Trade (GATT)*. In such cases, recourse to the GATT, i.e., to the underlying international agreement, was justified in order to interpret a provision of the Canadian legislation.

However, the Court moved away from a rigid application of the criteria of ambiguity. Indeed, in *National Corn Growers*, Gonthier J. alleviated the requirements to be met before international law could be resorted to: writing for the majority of the Court, he declared that international law could be helpful to interpret domestic legislation even where the underlying legislation shows no apparent ambiguity. In his opinion, the relevant treaty could be helpful *in order to ascertain* whether the implementing legislation was ambiguous. The findings are summarized as follows:

In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.

Second, and more specifically, it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation.²⁴

As a result of *National Corn Growers*, the scope of the traditional reception doctrine was changed with respect to the use of international

22. D. Turp, "Le recours au droit international aux fins de l'interprétation de la Charte canadienne des droits et libertés : un bilan jurisprudentiel" (1984) 18 R.J.T. 353.

23. *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, S.C.J. No. 110 [*National Corn Growers*].

24. *Ibid.*

legal norms to interpret domestic legal norms. Although implementation was still viewed as a necessary criterion to meet, the proof of ambiguity was greatly relaxed. When international law was deemed implemented, Courts were entitled to presume that Parliament's intention was to conform to norms contained in the international instrument.

However, this decision still left unanswered the question as to whether domestic legal norms could be interpreted in light of non-implemented international instruments just like constitutional norms. It appeared that the rule stated in *Francis v. The Queen*²⁵ and more famously in *Capital Cities*,²⁶ a case involving the interpretation of the *Broadcasting Act*, was still applicable. Recall that in *Capital Cities*, the appellant pleaded that Canadian law had to be interpreted in light of the *Inter-American Radio Communication Convention of 1937*, or, at least, in a way that complies with Canada's international obligations under this Convention. Applying the English case of *Salomon*, the Supreme Court of Canada rejected that plea, holding that because the *Broadcasting Act* neither implemented nor referred to the international Convention, the Convention could have no domestic consequences in Canada.²⁷ In other words, the Court said that non-implemented international instruments had no impact whatsoever on the Canadian legislation. The Court clearly meant the presumption of conformity did not apply to non-implemented treaties.

This is precisely where the *Baker* decision fits in, for it opened the possibility of using non-implemented international law norms to interpret the meaning of Canadian legal norms. In so doing, the Supreme Court aligned the *Charter* case law and domestic case law with respect to the first criterion: the lack of implementation of international norms is not an excluding factor any more. The Court also arguably aligned *Charter* and domestic case law with respect to the ambiguity criteria: *Baker* did not refer to the existence of an explicit or latent ambiguity as in *National Corn Growers*. Rather, the Court in *Baker* referred to similarities of values between domestic and international law to justify recourse to the latter to interpret the former.

2. Contemporary reception doctrine

Perhaps one may wonder *why* Canada has adopted the English reception theory in the first place, a theory which reflects the fundamental importance of the principle of parliamentary sovereignty in the United Kingdom.

25. *Francis v. The Queen*, [1956] 1 S.C.R. 618.

26. *Capital Cities*, *supra* note 15.

27. *Ibid.* at 173.

In fact, contrary to the situation prevailing in the U.K.,²⁸ parliamentary sovereignty has never been an absolute feature in Canadian constitutional law. This is due to many factors: our history of colonization and the *Colonial Laws Validity Act*, which made British laws supreme over colonial laws; federalism and the division of powers which split parliamentary sovereignty between federal and provincial parliaments; the written constitution which includes an amending formula that goes beyond mere parliamentary majority; and, lastly, the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, which authorized a judicial review of legislation based on *Charter* grounds. Notwithstanding these limitations on parliamentary sovereignty in Canada, the dualist theory of reception has been imported into Canadian law, and it is undeniably part of our legal environment. Its survival in the Canadian legal order may be due to the role it performs in ensuring that the division of powers within the federation is protected. Indeed, requiring the implementation by provincial legislatures of a treaty which falls within their jurisdiction helps maintain that balance.²⁹

Yet it would be an understatement to say that this theory has not been applied faithfully and consistently by Canadian courts.³⁰ Clearly, the case in *Baker* marked the formal shift from this dualist approach to a new, more modern approach. Yet *Baker* is itself torn between a majority and a minority ruling. On the one hand, the dissenting judges, Iacobucci and Cory JJ., followed the dualist approach and held that it was "well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation."³¹ On the other hand, the majority of the Court, led by L'Heureux-Dubé J., opined otherwise. For the seven judges, although unimplemented treaties are not binding in Canada, the courts may nonetheless refer to the values and principles enshrined

28. In England, Parliament has "the right to make or unmake any law whatever; and, (...) no person or body is recognized in England as having a right to override or set aside the legislation of Parliament": see Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982) at 3-4; Dicey refers to the idea that the British Parliament has all powers, including the power to legislate so that all blue-eyed babies should be murdered: *Ibid.* at 33.

29. See *Labour Conventions Case*, *supra* note 16.

30. We must point out that the dualist theory is also undergoing transformations in England, notably since the adoption of the *Human Rights Act*. Section 3(1) of the *Human Rights Act* provides that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." *Human Rights Act 1998* (U.K.), 1998, c. 42, s. 3(1). See e.g. Yuval Shany, "How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts" (2006) 31 *Brook. J. Int'l L.* 341.

31. *Baker*, *supra* note 4 at para. 81 (footnotes omitted).

in these international human rights instruments when undertaking the contextual analysis of the domestic legislation. This does not mean that the presumption of conformity with underlying treaties has been extended to all sorts of instruments, whether signed or ratified. Rather, it means that those instruments that were previously totally discarded because non-implemented, were suddenly admissible. The question then becomes how best to theorize this new relationship of *legal relevance*.³²

In an earlier contribution we suggested that harmonization of domestic and international norms offers the potential to explain this new relationship of legal relevance. We analyzed all Supreme Court cases that both cite *Baker* and discuss the reception of treaty law in domestic law between 1999 and 2007.³³ This survey allowed us to identify a free-style, *à la carte* type of reasoning that cannot support the conclusion that courts are *presuming compliance*. Rather, the cases led us to observe a variety of mechanisms, from presumption to harmonization to mere consideration of international law in the interpretative process:

- In *R. v. Sharpe*,³⁴ three concurring judges spoke of international norms as not binding, but nonetheless “relevant sources” for interpreting domestic legislation on the prohibition of possession of child pornography, while the six judges writing the majority opinion failed to mention international law.³⁵
- In *Canadian Foundation for Children, Youth and the Law v. Canada*,³⁶ the Court interpreted the Criminal Code provision on the reasonable force that can be used on children. The Court held that what is reasonable “may be derived from international treaty obligations”³⁷ and that statutes “should be construed”³⁸ in a manner so as to conform to Canada’s international obligations.
- In *Society of Composers*,³⁹ the Court wrote that non-implemented

32. We borrow this expression from Santi Romano, *L'ordre juridique* (Paris: Dalloz, 1975). Romano believes there are as many legal orders as there are institutions, and that the State is only one institution among others that can create law. In Romano’s view, when the existence or efficacy of one legal order is contingent upon the conditions set out by another legal order, we may speak of legal relevance among these two orders.

33. Houle & Karazivan, *supra* note 1. That research focused on ordinary legislation and did not include cases which analyzed the interpretation of the *Canadian Charter of Rights and Freedoms*.

34. *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45.

35. *Ibid.* at para. 175.

36. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76.

37. *Ibid.* at para. 31.

38. *Ibid.*

39. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427.

international norms are “relevant” in interpreting national law,⁴⁰ while adding that Parliament is “presumed” not to legislate against international law generally.⁴¹

- In *GreCon Dimter inc. v. J.R. Normand inc.*,⁴² the Court interpreted sections of the Civil Code of Québec which implemented private international law. Instead of applying the presumption of conformity, as the implementation would entail, it spoke of harmonizing the Civil Code with Canada and Québec’s international obligations.⁴³
- And finally, in *Mugesera v. Canada (Minister of Citizenship and Immigration)*,⁴⁴ the Court was interpreting the Criminal Code provision on the crime of genocide. The Court noted that this provision “incorporates, almost word for word, the definition of genocide found in art. II of the *Genocide Convention*”⁴⁵—a treaty ratified by Canada. The Court held that it is important that domestic law be interpreted in accordance with the principles of international customary law as well as Canada’s treaty obligations, and added that in this context, “international sources ... are highly relevant to the analysis.”⁴⁶ The Court was silent on the existence or application of any presumption of conformity.

Many authors have attempted to make sense of this gap between traditional theory and emerging practice, trying to elaborate a theory that better describes the role of international law in domestic courts. Some believe that all ratified treaties, whether implemented or not, trigger a “presumption of conformity”⁴⁷ which means that reference to these treaties by courts is mandatory; others acknowledge that such a presumption does not currently exist, or note the ambiguity of the situation, but would encourage the extension of the presumption of conformity to ratified but unimplemented treaties⁴⁸; some do not distinguish between ratified or signed treaties and seem to apply the presumption to all of these instruments,⁴⁹ while others believe that Courts should be free to grant any meaning to a non-

40. *Ibid.* at para. 150.

41. *Ibid.*

42. *GreCon Dimter Inc. v. J.R. Normand Inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401.

43. *Ibid.* at para. 39, 41.

44. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100.

45. *Ibid.* at para. 82.

46. *Ibid.*

47. See Brunnée & Toope, *supra* note 1 at 32.

48. See Weiser, *supra* note 1 at para. 44 and Van Ert, *supra* note 1 at 36, n. 112.

49. Ruth Sullivan’s famous formulation of the rule of reception holds that “the legislature is presumed to comply with the obligations owed by Canada as a signatory of international instruments” (emphasis added). See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 422.

implemented treaty based on its persuasive authority in the case at bar.⁵⁰ Finally, some authors argue that the contextual approach to statutory interpretation makes sufficient room for international law, treating it as part of the general context of adoption.⁵¹ All in all, the number of theories put forward seems proportional to the variety of judicial approaches to that question.

In our view, the use of the term “presumption” incorrectly describes the way non-implemented international law makes its way into Canadian law. The term *presumption* should be reserved for implementing legislation, or for legislation that aims at fulfilling Canada’s obligations under international law. A presumption is not optional. It is not a synonym for “useful,” “helpful,” or “relevant.” It is a rule of law that refers to a mandatory exercise, one that requires the judge to draw a particular inference from a particular set of facts.⁵² It is neither conditional, nor discretionary. It is unable to correctly account for what courts actually do because international law creates no obligation on States to *conform* to ratified treaties through their domestic legislation.⁵³ With non-implemented international law, States cannot invoke provisions of their domestic law to justify non-compliance with international law, but they need not make their domestic law conform to international law.

In our opinion, neither *Baker* nor the caselaw following *Baker* shows that non-implemented international instruments trigger a mandatory *presumption*. It is clear that a meaning in accordance with international law ought to be preferred, in order to avoid placing Canada in violation of its international obligations, but it is not a mandatory exercise. Therefore, it is both more useful and more accurate to reserve the use of the term “presumption” to implemented treaties. In this regard, we agree with Mayo Moran’s views that the presumption of conformity is “too indebted

50. Knop, *supra* note 1 at 525 and LaForest, *supra* note 1 at para. 51-52.

51. Schabas & Beaulac, *supra* note 1.

52. L. Ducharme, *Précis de la preuve* (Montreal: Wilson & Lafleur, 2005) at 221. A rebuttable presumption of law “compels the trier of fact to assume the existence or non-existence of the presumed fact in the absence of evidence to the contrary”: see Alan W. Bryant et al., *Sopinka, Lederman & Bryant - The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis, 2009) at §4.25 (e-book). At para. 4.28, the authors, citing Wigmore, add that “a rebuttable presumption is a ‘rule of law compelling the trier of fact to reach the conclusion *in the absence of evidence to the contrary*’” (emphasis in text).

53. Houle & Karazivan, *supra* note 1 at n. 71: “Il s’agit donc ici pour l’État canadien de s’assurer que son droit interne n’est pas en conflit avec les normes contenues dans le traité. Il s’agit donc en quelque sorte d’une obligation négative. Il n’a pas à rendre son droit interne positivement conforme au droit international, à moins que la loi ne le prévoit expressément.” See also Mayo Moran, “Shifting Boundaries: The Authority of International Law” cited in Janne Nijman & André Nollkaemper, *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007) at 163, 184.

to the traditional picture and the unique salience of binding rules to be adequate as an account of what courts are doing when they have recourse to non-domestically binding international law”⁵⁴ and that a new rôle for these non-implemented norms must be developed outside the positivist box which polarizes binding and non-binding law.

As to which mechanism better describes the new rôle of non-implemented international law, Moran suggests that the use of ratified treaties be better characterized as “*attentiveness to the overall scheme of values and principles embodied in the Convention.*”⁵⁵ Inspired by Australian jurisprudence, Moran argues that the conceptual tool used by courts is the doctrine of legitimate expectations, a doctrine which allows for both a mandatory reference to these instruments, and a values-based approach.⁵⁶

Contrary to Moran, we do not consider that judges perceive the reference to such instruments as mandatory, nor do we believe that the theory of legitimate expectations best explains what they do.⁵⁷ Rather, we suspect that courts attempt to harmonize domestic legislation with non-implemented international law, and that they are currently in the process of constructing the legal criteria that better determine cases under which judges may consider harmonization possible. Recall that in *Baker*, Justice L’Heureux-Dubé referred to the similarity of values and of principles between international law and domestic law, and stressed that “in so far as possible,” it is preferable to adopt interpretations that correspond to these values and principles.

Harmonization is the expression of this realm of possibility within which two texts can be read together: outside of this realm, it is impossible to harmonize, and the “in so far as possible” *caveat* applies. Martin Boodman defines harmonization as a “flexible concept composed of an array of measures that may vary depending on the context within which each question is dealt with. It may mean that the relevant legislation is very similar in terms of basic principles but different as to the specific provisions of the other body of law.”⁵⁸ Thus harmonization may depend on a finding of certain proximity between the legislation and the treaty. It also

54. Moran, *ibid.* at 163, 184.

55. *Ibid.* at 169.

56. *Ibid.* at 187.

57. The doctrine of legitimate expectations has not been recognized as creating substantive rights; the Federal Court of Appeal dismissed the application of that presumption in *Baker*; but the point was not discussed in the Supreme Court’s judgment.

58. M. Boodman, “The Myth of Harmonization of Laws”, cited in *Droit Contemporain*, Association canadienne de droit comparé et Association québécoise de droit comparé (Dir.) (Cowansville, QC: Yvon Blais, 1992) at 129.

allows each instrument to retain its specificity: according to Goldstein, harmonization is “a process through which several elements are combined or adapted to one another in order to create a coherent whole, while allowing each provision to retain its singleness.”⁵⁹ This is why harmonization is highly contextual.

All in all, whether one chooses the mechanism of a presumption or that of harmonization, it now appears clear that general statements such as that “the legislature is presumed to comply with instruments to which Canada is a signatory” are of very little help when one tries to make sense of the evolution of the dualist theory.⁶⁰ Nor do general references to the “well-established principle” that “Canadian law is presumed to comply with international law”⁶¹ provide useful guidance as they do not specify whether one talks about implementing legislation or not, about ratified treaties or not.

In our view, harmonization describes accurately the process through which non-implemented international law makes its way into our domestic law—but the question of *how* such harmonization is to be conducted remains open. In the next part, we will consider s. 3(3)(f) of the *IRPA*, a provision which does not seem to leave open the “in so far as possible” *caveat*. Nonetheless, as we shall see, these words have been construed in the Act. What is more, the interpretation of domestic law with regard to international law took an unexpected turn: instead of *interpreting* the impugned provision, the Federal Court, in several cases, embarked upon an evaluation of the conformity of the *application* of the whole *Act* with international law. In other words, instead of harmonizing the *interpretation* of the *IRPA* with international law, the Court is harmonizing the *application* of the legislation with international law. This surprising—and potentially hazardous—development is the focus of the next part.

II. Case study on s. 3(3)(f) of the *IRPA*

A major law reform followed *Baker*; and, in 2002 the new *IRPA* was adopted. Section 3(3) f) provides that the *Act* is to be “construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory.” We can recognize *Sullivan and Driedger*’s wording⁶² and, more precisely, the use of the term “signatory”—which

59. G. Goldstein, “L’expérience canadienne en matière d’uniformisation, d’harmonisation et de coordination des droits” (1998) 32 R.J.T. 235 [translated by author].

60. See Sullivan, *supra* note 49 at 422. This is especially true considering the fact that some of the authorities cited in support of this formulation of the presumption of conformity are *Salomon* and *Francis*, two cases that stand for the formal dualist approach.

61. *Hape*, *supra* note 14 at para. 53, LeBel J.

62. See above, n. 49.

includes instruments that are not binding on Canada in international law, as well as instruments which are binding on Canada in international law. This wording creates a potential source of ambiguity that did not go unnoticed by some judges.⁶³

Section 3(3)(f) of the *IRPA* does not incorporate or implement international treaties in immigration law,⁶⁴ nor does it refer to any specific convention. Yet it is a reminder of the importance of international law in interpreting and applying immigration legislation. The precise nature of the role of non-implemented international law in the interpretation of domestic law in light of s. 3(3)(f) was recently defined by the Federal Court of Appeal.

In *De Guzman*,⁶⁵ the Court, with Evans J.A. writing, addressed the question of the reception of international law in domestic courts and acknowledged the evolution of the traditional dualist theory. The Court considered the “burgeoning” common law and openly rejected the *Capital Cities* dualist approach which made no room for ratified, unimplemented treaties. That approach was qualified as “older.”⁶⁶ According to the Court, the interpretation of s. 3(3)(f) of the *IRPA* must take into account the evolution of this burgeoning common law. As to the proper interpretation to be given to s. 3(3)(f), the Court went on to hold that consideration of international instruments to which Canada is a party was *mandatory*, and that some instruments were *determinant* of the meaning of Canadian legislation unless the legislator specifically intended otherwise. How or to what extent it effectively proceeded to apply these interpretative statements will be discussed below.

1. *The Federal Court of Appeal's decision in De Guzman*

The facts of the case are simple. The appellant is a Canadian citizen who was denied application to sponsor the admission to Canada of her two sons living in the Philippines. Despite the fact that her sons were obviously family members, the officer held that they were not part of the family class because their mother had not disclosed their existence when she initially applied for permanent resident status. Thus, her application was rejected under s. 117(9)(d) of the *Immigration and Refugee Protection Regulations*.⁶⁷ The appellant pleaded that s. 117(9)(d), to the extent that it denies family

63. *De Guzman*, *supra* note 12 at para. 76, Evans J.A.

64. *Munar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, [2005] F.C.J. No. 1448.

65. *De Guzman*, *supra* note 12.

66. *Ibid.* at para. 63.

67. *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

reunion, is invalid because it is contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*. She also argued that this provision is inconsistent with Canada's international obligations under human rights treaties, which protect the right of families to live together as well as the best interests of the child.

More specifically, the appellant alleged that s. 117(9) is invalid *because* it renders the IRPA non-compliant with international human rights instruments to which Canada is a signatory, contrary to s. 3(3)(f) of the IRPA. Ms. De Guzman argued that because of s. 3(3)(f), instruments such as the *Convention on the Rights of the Child* must prevail over conflicting IRPA provisions. The trial judge dismissed her claim, holding that "paragraph 3(3)(f) merely requires the Court to consider the international human rights instruments relevant in this case as context when interpreting ambiguous provisions of the immigration act."⁶⁸ Since, in that case, s. 117(9) was found "plain, clear and unambiguous," there was no need to refer to international law, even as an interpretative aid.

On appeal, the Court overturned the trial judge's finding that non-implemented international treaties are "merely context" or that an ambiguity must be found in the text prior to referring to international law. Evans J.A. concluded that s. 3(3)(f) attaches more than "ambiguity-resolving, contextual significance to international human rights instruments to which Canada is signatory."⁶⁹ In other words, s. 3(3)(f) applies, of course, when an ambiguity needs to be resolved and in such case international norms and values can be used to clarify the meaning of the IRPA and IRPR. However, finding an ambiguity is no longer necessary as a prerequisite to the interpretation of the international norms encompassed by s. 3(3)(f). All in all, Evans J.A. found that the trial judge's view "does not take proper account of the expanding role that the common law has given to international law in the interpretation of domestic law" in recent years.⁷⁰

In order to outline what would be a proper account of this expanding role, the Court examined the scope of s. 3(3)(f) in two steps. The first step was quickly dealt with: Ms. De Guzman was asking for a declaration of *invalidity* of s. 117(9)(d) on account of it causing the IRPA to be incompatible with international law. The Court said that no such declaration would be given, lest international law would have precedence over domestic law.

68. *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1276, [2005] 2 F.C.R. 162 at para. 53.

69. *Ibid.* at para 83.

70. *De Guzman*, *supra* note 12 at para. 62.

So the first point was that non-implemented international human rights instruments *do not prevail over* conflicting *IRPA* provisions.

But that non-implemented international law does not prevail over Canadian law does not mean that it plays no interpretative role. In the second step, Evans J.A. went on to develop the analytical framework that will help establish the role of non-implemented international law *as interpretative norms* in the context of the *IRPA*.

He made several findings in this regard. First of all, s. 3(3)(f) *IRPA* directs courts to take mandatory action. There is no discretion involved. Evans J.A. even stresses the words "is to be." Evans J.A. goes on to say that "[If] interpreted literally," s. 3(3)(f) makes international instruments "determinative of the meaning of the *IPRA*, in the absence of a clear legislative intent to the contrary."⁷¹ However, Evans J.A.'s *ratio decidendi* with respect to the determinative weight of international instruments applies only to treaties to which Canada is a signatory *and* that are binding on Canada in international law.⁷² These instruments are binding either "because they do not require ratification or because Canada has signed *and* ratified them."⁷³ Evans J.A. did not make a finding with respect to instruments that are not binding Canada in international law,⁷⁴ only a comment which has therefore the value of an *obiter dictum*. He wrote that he was inclined to think that Parliament "intended them to be used as persuasive and contextual factors in the interpretation and application of the *IPRA*."⁷⁵

Second, instruments that are binding on Canada in international law will be determinant only "in the absence of a clear legislative intent to the contrary."⁷⁶ This means that if the legislator specifically wished to have a certain provision be given meaning *not* according to international law, he should say so explicitly. Here, Evans J.A. seems to be applying the rule of interpretation found in s. 15(2)(a) in the *Interpretation Act*, according to which "Where an enactment contains an interpretation section or provision, it shall be read and construed (...) as being applicable only if a contrary intention does not appear."⁷⁷

Third, Evans J.A. holds that the question that must be answered is that of the *compliance* of the *whole* Act with international law. When

71. *Ibid.* at para. 75 (emphasis added).

72. *Ibid.* at para. 87.

73. *Ibid.*

74. *Ibid.* at para. 88.

75. *Ibid.* at para. 89.

76. *Ibid.* at para. 75.

77. *Interpretation Act*, *supra* note 11, s. 15(2)(a).

it comes to making such determination, the Court points out that s. 3(3)(f) does not require “that each and every provision of the IRPA and Regulations, considered in isolation,” comply with these norms.⁷⁸ The Court thus announces that it is going to attempt to harmonize both: “Rather, the question is whether an impugned statutory provision, when considered together with others, renders the IPRA non-compliant” with these norms.⁷⁹

Why is the compliance of the Act’s application with international law surfacing at that point of the judgment? Recall that the Court was in the process of establishing the role of human rights instruments “as interpretative norms.”⁸⁰ Yet the text of the provision is sufficiently clear, it appears, so that no interpretative effort is effectively undertaken by the Court of Appeal to ascertain its *meaning*. Rather, the Court attempts to ascertain whether the whole act *applies* in a way that is complying with international law. So in the prescription of 3(3)(f), which holds that “this Act is to be construed and applied,” the *application* of the law seems to gain precedence over the *interpretation* of the Act. This is an important point because it has an impact on how the analytical framework devised by Justice Evans should be conceived and applied.

To sum up, the steps which now should be followed to analyze an issue falling under the scope of s. 3(3)(f) are the following:

- First, a judge must determine if the *non-implemented* international law instrument is *binding on Canada in international law* or not.
- Second, if binding on Canada, the norms and values contained in this instrument are determinative of how the *IRPA* and *IRPR* must be interpreted and applied. However, this will be so only in the absence of a contrary legislative intention. Therefore, a judge must check if there is a contrary legislative intention clearly expressed in the *IRPA* and its regulations directing a judge to determine that the norms and values contained in the instrument *are not determinative*.
- Third, if no such legislative intention exists, then a judge must check if the impugned statutory or regulatory provision, when considered together with others, renders the *IRPA* non-compliant with these international law norms. To conduct this inquiry, a judge must distinguish between arguments based on the non-compliance of *statutory or regulatory* provisions.

78. *Idid.* at para. 81.

79. *Ibid.*

80. This section starts at para. 61 of the judgment and runs until para. 89.

- In the case of a statutory provision, judges must consider “whether other provisions in the *IRPA* mitigate its impact on a right guaranteed by an international human rights instrument to which Canada is signatory.”⁸¹ It is clear that the mitigating factor introduced by Evans J.A. is to be understood as referring to the *application* of the *IRPA*, not the *interpretation* of the impugned provisions. Indeed, it is simply odd to speak of “mitigating the interpretation” of any rule of law.
 - If the *IRPA* is found compliant, the inquiry ends there.⁸²
 - If the *IRPA* is found non-compliant, Evans J.A. does not specify what happens, but it is clear that international instruments cannot be used to declare legislative provisions invalid as they do not prevail over legislation⁸³ nor have a supra-legislative value.
- In the case of a regulatory provision, the Court must proceed to the same examination. But if it determines that the impugned regulatory provision renders the *IRPA* non-compliant, it must undertake a second inquiry.⁸⁴ The Court must look at the enabling section in the *IRPA* and determine whether it authorizes the enactment of a regulation that puts the *IRPA* in breach of a binding instrument to which Canada is signatory.⁸⁵ It will be open for a Court to conclude that the regulation-making power could lawfully be exercised in a manner which renders the *IRPA* non-compliant only when there is a clear legislative intention warranting such a conclusion.⁸⁶ Otherwise, the regulation will be found invalid in light of its enabling legislation.

In applying the framework to the case at bar, the Court made it clear that it was dealing with ratified instruments, binding on Canada in international law, and not instruments that were merely signed by Canada.⁸⁷ Therefore, the norms and values contained in this instrument are determinative of how the *IRPA* and *IRPR* must be interpreted and applied. In other words, if several meanings can be attributed to a single provision, the meaning which corresponds to Canada’s treaty obligations must be preferred. The Court

81. *Ibid.* at para. 91 (emphasis added).

82. *Ibid.* at para 92.

83. *Ibid.* at para. 56.

84. *Ibid.* at para. 92

85. *Ibid.*

86. *Ibid.*

87. *Ibid.* at para. 94.

implicitly concluded that there was no “contrary legislative intention” that international law should not be determinative of the meaning of the Act, as it proceeded directly to assess whether s. 117(9)(d) of the Regulations renders the *IRPA* generally inconsistent with international human rights instruments. In order to do so, the Court considered two rights recognized by international instruments to which Canada is a party: the right to family life, provided under s. 17 of the *International Covenant on Civil and Political Rights* (ICCPR), and the principle of the best interests of the child, codified in Article 3 of the *Convention on the Rights of the Child*.

The Court held that the right to family life was not infringed by s. 117(9)(d) since the separation between Ms. De Guzman and her sons was not attributable to Canada but to her leaving her sons in Philippines, and coming to Canada without disclosing their presence.⁸⁸ Even if the impugned provision actually prevents Ms. De Guzman from sponsoring her sons, such limiting effect is alleviated by the presence of other ways, under the *Act*, to achieve unification, for example through a s. 25 application on humanitarian and compassionate grounds.⁸⁹

The Court then moved on to consider whether the impugned provision violates the principle of the best interests of the child, codified in Article 3 of the *Convention on the Rights of the Child*. Again, the Court felt that there were other provisions in the *IRPA* such as s. 25 which allowed for the consideration of the best interests of the child throughout the immigration process. Given the finding that “not every statutory provision must be able to pass the “best interests of the child” test, if another provision requires their careful consideration,”⁹⁰ the Court found the *IRPA* and its regulations to be generally compliant with international law.

Upon finding that s. 117(9)(d), if read with other provisions of the *Act*, did not make the *IRPA* non-compliant with international law, the Court felt it was not necessary to move to the inquiry as to whether the enabling provision in the *IRPA* can be interpreted as “not authorizing the making of a regulation that renders the *IRPA* non-compliant.”⁹¹

As noted above, what the Court effectively did in the third step of the analysis was to move away from the question of the *interpretation* of the impugned provision, to that of the *application* of the *Act*. In other words, the Court was at no point trying to ascertain the meaning of s.

88. *Ibid.* at para. 96.

89. This provision allows the Minister to grant an exemption from the strict application of permanent residence requirements based on humanitarian and compassionate grounds. Hereinafter, we refer to s. 25 as H&C application.

90. *Ibid.* at para. 105.

91. *Ibid.* at para. 109.

117(9)(d) by choosing among several meanings one which corresponds to Canada's international obligations—even though the Court had announced earlier that it had no discretion in this regard. Indeed, the meaning of this provision seems clear for the Court, just as it was for the application judge. But contrary to the application judge, the Appeal Court did not wish to rest its conclusions on a finding of clear legislative drafting. What the Appeal Court effectively did was to consider the application of the *IRPA*, from the beginning until the end, to evaluate whether at some point or another in the immigration process, some provisions allowed for the consideration of the rights guaranteed by the international instruments at stake. It is clear that s. 25 of the *IRPA* fulfills this role at least when it comes to considering the best interests of the child. Therefore, it is hard to imagine how the *Act* can be said to be generally *non-compliant* with international law in its application as long as s. 25 is standing and the best interests of the child are alleged. And since a finding of compliance is sufficient to dismiss the claim based on s. 3(3)(f), one may conclude that the Court actually eviscerated the interpretation dimension of s. 3(3)(f), and transformed an inquiry regarding the interpretation of a certain provision, into a inquiry as to the general application of the law.

2. *Developments after De Guzman*

The Court in *De Guzman* adopted a model that sought to harmonize domestic legislation with international law by considering the relationship between the *Act* as a whole and international law and the possibility of reconciling the former with the latter in the absence of a contrary legislative intention. But when it came to applying this model, what the Court actually did was to engage in an evaluation of whether the *IRPA* and its regulations, in their application, complied with international law. As the analysis of the Federal Court of Appeal cases discussing *De Guzman* will show, this strategy has been followed by the appeal justices with puzzling results. Five Appeal court decisions discussed *De Guzman*, and these cases constitute our sample.

In *Varga v. Canada (Minister of Citizenship and Immigration)*,⁹² the Court of Appeal was interpreting s. 112(1) of the *IRPA* which provides that only those persons subject to removal can apply for protection. Accordingly, Canadian-born children of persons subject to removal, being ineligible for removal, can neither apply for protection nor have their best interests considered. The Court, Evans J. writing, cited *De*

92. *Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2006] F.C.J. No. 1828 [*Varga*].

Guzman for the proposition that not each and every provision of the *IRPA* must be analyzed in light of international obligations; rather, the *Act as a whole* must be considered compliant. According to the Court, the *Act* did provide, through s. 25, for an effective opportunity to consider the best interests of affected children, including the Canadian-born ones. It was thus unnecessary that s. 112(1) be judicially expanded in order to include Canadian-born children in the category of persons admissible to request a Pre-Removal Risk Assessment (PRRA).

In *Idahosa v. Canada (Public Service and Emergency Preparedness)*,⁹³ the Federal Court of Appeal was handling the interpretation of s. 50(a) of the *IRPA*, a provision allowing that a "removal order is stayed ... if a decision that was made in a judicial proceeding ... would be directly contravened by the enforcement of the removal order." A week before her removal from Canada, the appellant obtained a court order of temporary custody of her children and a prohibition of their removal from Ontario. She then proceeded to argue that this court order would be directly contravened if she were removed from Canada. The appellant relied on *De Guzman* to argue that s. 3(3)(f) of the *IRPA* requires that "only the plainest statutory language will warrant an interpretation that would violate Canada's international legal obligations."⁹⁴ Since s. 50(a) does not contain such specific language, the appellant argued that it "must be interpreted consistently with international human rights instruments,"⁹⁵ for example, instruments protecting the best interests of the child and family relationships, and that it should be read as imposing a stay on her removal in order to protect the best interest of her children.

The Federal Court of Appeal disagreed. After reviewing the text, context and purpose of the impugned provision, for the "only issue to be decided in this appeal was the interpretation of *IRPA*, s. 50(a), which is a question of law",⁹⁶ the Court examined the impact of s. 3(3)(f). According to Evans J.A., the assessment of whether a statutory provision violates international human rights law must be made "on the basis of the statute as a whole" and not by considering the specific provision. As the *IRPA* provides "other opportunities for the consideration of the best interests of the children of those subject to deportation," including a s. 25 application, it was not necessary to interpret s. 50(a) in a manner to give effect to these international obligations. The interpretation that was chosen is a narrow

93. *Idahosa v. Canada (Public Service and Emergency Preparedness)*, 2008 FCA 418, [2008] F.C.J. No. 1800 [*Idahosa*].

94. *Ibid.* at para. 51.

95. *Ibid.* at para. 52.

96. *Ibid.* at para. 16.

one: s. 50(a) ought to be interpreted as *not* enabling non-nationals to defer their removal by invoking custody orders which they obtained to avoid being removed.

In these two cases, the rulings were drafted by Evans, J.A., and both applied the analysis set forth in *De Guzman*, placing the impugned provision in the overall legislative scheme and finding that general compliance of the *Act* with international law was sufficient to meet the para. 3(3)(f) prescription. In both cases, s. 25 of the *IRPA* (H&C) was invoked as a provision giving sufficient opportunity to consider these rights. Now what exactly is required by an immigration officer handling a s. 25 application? The answer is provided in *Canada (Citizenship and Immigration) v. Okoloubu*.⁹⁷ This case concerned the determination of an immigration officer's jurisdiction to consider international law instruments in an application under s. 25 (1) of the *IRPA*. At stake was the jurisdiction of the officer to consider the *ICCPR*,⁹⁸ a treaty ratified by Canada, in a s. 25 application. The respondent pleaded that s. 3(3)(f) mandated an examination of these provisions—a task which was allegedly not performed by the officer—and a conclusion that family-related interests must prevail absent countervailing considerations.

The Federal Court granted the motion for judicial review and held that the officer failed to properly examine international instruments. The Federal Court of Appeal overruled the decision and applied *De Guzman*. The Court cited Evans J.A.'s finding that s. 3(3)(f) "directs that the *Act* must be construed and applied in a manner that complies with" international treaties,⁹⁹ but ultimately read it as "meaning that [the values enshrined in the *ICCPR*] must *inform* the decision of the officer."¹⁰⁰ The Court also found that s. 3(3)(f) does not require that specific reference to the international human rights instruments be made. It is sufficient that the H&C officer "have those interests in mind" when dealing with a s. 25 application. As the officer did have these interests in mind, there was no reason to displace her judgment.

In *Thiara v. Canada (Citizenship and Immigration)*,¹⁰¹ the Federal Court of Appeal also cited *De Guzman* in the context of a s. 25 application. In that case, the Court rejected the appellant's argument that if the officer

97. *Okoloubu v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 326, [2008] F.C.J. No. 1495 [*Okoloubu*].

98. At issue was the right to family life codified in articles 17, 23 and 24 of the *ICCPR*.

99. *Ibid.* at para. 37.

100. *Ibid.* at para. 50 (emphasis added).

101. *Thiara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 151, [2008] F.C.J. No. 668 [*Thiara*].

had construed the best interests of the child in a manner compliant with human rights instruments, she would have concluded that the exemption should be given. The Court of Appeal endorsed the trial judge's opinion that the best interests of the child are an important factor, but not the only relevant factor in the determination of a s. 25 application. Moreover, the Court of Appeal found that s. 3(3)(f) does not require that an immigration officer specifically refer to international human rights instruments when considering a s. 25 application. Rather, it is sufficient that "the Officer addresses the substance of the issues raised."¹⁰²

The first two cases show that s. 3(3)(f) merely requires that the *Act*, when its application is considered as a whole, complies with international instruments to which Canada is a party. They also show that s. 25 *IRPA* (H&C) is conveniently used in order to satisfy this requirement. In our view, this route is problematic from an interpretation point of view. Indeed, it is important to recall that s. 3(3)(f) requires that "[t]his Act is to be construed and applied [and not construed or applied] in a manner that complies with international human rights instruments." The French version of the *IRPA* is to the same effect.¹⁰³ Therefore, a court cannot avoid interpreting a provision of the *Act* and merely focus on ascertaining whether the *Act* as a whole complies with international law.

What is more, the narrow interpretation given to s. 25 in the above-mentioned caselaw sheds doubts as to the ability of that section to fulfill the role of ensuring that the application of the *IRPA* as a whole complies with international human rights law. As the cases that we examined point out, and rightly so, the best interests of the child form *one* consideration and not necessarily one that prevails over other considerations. *Baker* is clear on this point: "That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration."¹⁰⁴ However, Justice L'Heureux-Dubé also stressed in her reasons that "[t]he principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as *an important factor, give them substantial weight, and be alert, alive and sensitive to them.*"¹⁰⁵

102. *Ibid.* at para. 9.

103. *Loi sur l'Immigration et la Protection des Réfugiés*, L.C. 2001, c. 27, art. 3 : L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet : f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

104. *Baker*, *supra* note 4 at para. 75.

105. *Ibid.* (emphasis added).

This statement goes farther than merely requesting that the officer “keep in mind” the international rights at stake.

In sum, it appears that the analysis set forth in *De Guzman* is problematic for two reasons: on the one hand, the *Act* requires that it be “construed and applied”, and not merely applied in conformity with international law. It is thus insufficient for the Court to limit the analysis to one of compliance of the *Act* with international law. On the other hand, the compliance analysis promises more than it delivers as it rests upon a diluted version of s. 25. Instead of requesting that children’s best interests be given *substantial weight* and that an officer should be *alert alive and sensitive* to them, the Court now merely requires that these interests be “kept in mind.” In other words, the interpretation of s. 25, with respect to the best interests of children, is drifting progressively away from Justice L’Heureux-Dubé’s reasons in *Baker*. In this light, it is not all that obvious that the compliance analysis, to the extent it rests on the diluted interpretation of the H&C provision, possess this “magic effect” that the Federal Court of Appeal believes it has.

The last decision that we examine is even more puzzling in its interpretation of the case law and raises serious concerns about the protection afforded to individuals in Canada who are deemed to represent a threat to our national security.

In *Charkaoui v. Canada (Citizenship and Immigration)*,¹⁰⁶ Mr. Charkaoui alleged that the Pre-Removal Risk Assessment provisions breach the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights* and Canada’s international obligations, including the *Convention against Torture* which prohibits return to torture. Mr. Charkaoui applied initially for a PRRA which was denied by the Minister of Citizenship and Immigration on account of a lack of substantive risk of torture. The Minister’s delegate added however that if she were underestimating the risk of torture, the exceptional circumstances test provided in the *IRPA* would justify the appellant’s removal to Morocco “despite the danger of torture.”¹⁰⁷ It is the validity of these “exceptional circumstances” that Mr. Charkaoui challenged before the Federal Court of Appeal. Mr. Charkaoui was well aware that in *Suresh v. Canada*,¹⁰⁸ the Supreme Court of Canada had not excluded “the possibility that in exceptional circumstances, deportation to face torture might be justified.” Yet he argued before the

106. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 FCA 80, [2007] F.C.J. No. 269 leave to appeal to S.C.C. refused, 65205 (February 22, 2007) [*Charkaoui*].

107. *Ibid.* at para. 2.

108. *Suresh v. Canada*, 2002 SCC 1, [2002] 1 S.C.R. 3.

Federal Court of Appeal that this ruling had to be revisited in light of s. 3(3)(f) *IRPA* which was in-existent at the time of *Suresh*.

The Federal Court of Appeal rejected this argument. Referring to *De Guzman*, it agreed that international conventions to which Canada is a signatory are *determinative* of the interpretation of the *Act*, but only “in the absence of a clear legislative intent to the contrary.”¹⁰⁹ The Court of Appeal endorsed the trial judge’s conclusion that in that case, the impugned provisions expressly stipulate a balancing process¹¹⁰ in accordance with the *Suresh* decision. Therefore, since the *IRPA* and its regulation regarding PRRA are constitutionally valid, s. 3(3)(f) cannot have the effect of overturning this finding. The case was dismissed on these grounds, too hastily perhaps. Recall that *De Guzman*’s analytical framework required that a court checks if the impugned statutory or regulatory provision, when considered together with others, renders the *IPRA* non-compliant with these international law norms (the third step). Justice Desjardins did not consider this part of the analytical framework and one may question whether she did not do so because the Court of Appeal decision “had not yet been rendered when the designated judge made his decision.”¹¹¹ This argument would be puzzling for three reasons.

First, at common law, cases that are qualified “jurisprudence” have a declaratory character. Appeal courts are required to apply them whether or not they have been pleaded before the trial or application court (for example, because the new jurisprudence did not exist at that time as in the case at bar).¹¹² Second, this is a formalistic argument and one that should be avoided in a case such as *Charkaoui* when the decision could result in the possible torture of a Canadian permanent resident. Third, recall that a security certificate was issued by the Minister against Mr. Charkaoui, but that a decision as to its reasonableness had not yet been rendered at the time Justice Desjardins made her decision. Therefore, there was no clear decision stating that Mr. Charkaoui was indeed posing a threat to the security of Canada. In addition, the validity of the whole security certificate process was under scrutiny by the Supreme Court of Canada at the time of Mr. Charkaoui’s hearing before the Federal Court of Appeal. At the time that Justice Desjardins rendered her decision, the Supreme Court was about to hold that the procedure under the *IRPA* for determining

109. *Charkaoui*, *supra* note 106 at para. 14.

110. *Ibid.* at para. 15.

111. *Ibid.* at para. 12.

112. On the declaratory theory of judicial decisions, see *Kleinwort Benson Ltd v Lincoln City Council*, [1998] UKHL 38, [2004] 2 AC 349 at 377. See also *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd. and others*, [2005] UKHL 41, [2005] 2 AC 680 at 690-693.

the reasonableness of the security certificate and the detention review procedures infringed s. 7 of the *Charter*.¹¹³

As a consequence, it would appear that Mr. Charkaoui's right not to be sent to a country where he would potentially face torture should have prevailed over security issues. This should have led the Court to suggest that if the Minister were to make a negative decision on the PRRA against Mr. Charkaoui, this would not be viewed as a proper application of the Act, that is to say in compliance with s. 3(3)(f) of the *IRPA* but also in compliance with *Suresh*.¹¹⁴ In our opinion, had the Court gone through this exercise, it would have addressed the very substance of Mr. Charkaoui's argument.

But the Court missed the opportunity to undertake this analysis. It is a missed opportunity because contrary to the first four cases, which dealt with the best interests of the child, this case dealt with the fundamental right not to be subjected to torture. Contrary to the first four cases, which presented section 25 as providing an opportunity for compliance with the internationally protected right to the best interests of the child, the right not to be subjected to torture cannot be subsumed into a section 25 analysis. This leads us to conclude that *De Guzman's* analytical framework has yet to be tested on—and may prove unable to cope with—cases involving the possibility of torture.

Conclusion

To date, scholars (including ourselves) have been debating which tools best describe or ought to prescribe Canadian courts' treatment of international law before and after *Baker* (presumption, harmonization, contextual approach, etc.), which instruments (ratified, signed, soft law, etc.) can be used by them, and what is the weight to be given to each of these instruments (persuasive value, determinative value, etc.). We have contributed an answer to some of these questions in the first part of this article. We have thus suggested that the use of the term *harmonization* better describes the courts' treatment of non-implemented international law, and that it is unrealistic to suggest that courts "presume" compliance of domestic law with international law. Harmonization depends on the context of each case; it offers the flexibility required but imposes no mandatory task on courts; it allows for a consideration of the act as a whole, in search of similarities between national law and international law, while preserving the interpreted instrument's own specificity.

113. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

114. *Charkaoui*, *supra* note 106 at para. 10, Desjardins J.A.

While these debates are rightfully catching scholarly attention, going largely unnoticed is the judicial development of sophisticated techniques that raise new issues about the distinction between the *interpretation* and *application* of legislation when international law is invoked. The second part of this contribution sought to address these concerns. If harmonization can be understood as a convenient tool for courts handling the difficult question of the role of international law in immigration law, one must acknowledge that harmonization can become a slippery slope, especially if courts are substituting an interpretative exercise by one focusing on the application of the Act and its conformity with international law. As our analysis demonstrated, this is one of *De Guzman's* legacies. The analytical framework proposed by the Court of Appeal in that case is fraught with many difficulties when it comes to applying it to different immigration processes set by the *IRPA* and its regulations—and when it comes to handling issues that do not necessarily involve the best interests of the child.

The above-mentioned trend that consists of harmonizing legislation instead of using the presumption mechanism is not unrelated to the other tendency we have indicated, namely, the courts' focus on the *application* of the impugned legislation instead of an interpretative search for its *meaning*. Both are linked to the endorsement of a pragmatic approach to law.

On the one hand, harmonization clearly allows a court to detach itself from the search of the legislative intention underlying a provision and attempt to reconcile two bodies of rules in a flexible and contextual manner. In a similar fashion, the pragmatic approach to statutory interpretation allows a Court to dissociate itself from the search for the intention of the legislator and focus on reaching the most appropriate solution for each case.¹¹⁵ It is presented as an alternative to the modern approach to statutory interpretation in Canada.¹¹⁶

On the other hand, pragmatism is also easily reconcilable with the Court of Appeal's preference for the consideration of the *application* of the impugned legislation rather than a search for its *meaning*. By focusing on the practical impact of the legislation, the Court is sending the message

115. It does not mean that the judge is authorized to rule outside of the "framework traced by the legal system, but that he reaches the solution that best suits the case at bar (...). The common goal is to find the just solution, the one that fits, the right one, and that goal transcends the method used," see Françoise Michaut, "Le rôle créateur du juge selon l'école de la 'Sociological Jurisprudence' et le mouvement réaliste américain" (1987) 39 R.I.D.C. 343 at 349 [translated by author].

116. R. Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998-1999) 30 Ottawa L. Rev. 175.

that applying a statute in conformity with international law is perhaps more important than ascertaining its meaning.

Whether we agree or not with the substantive analysis of the *IRPA*'s compliance with international law, we may foresee that this approach is going to be more popular in the future. Of course, what this means is that the caselaw regarding the relationship between international and domestic law might grow in an unpredictable fashion—in an area which was hardly known for its certainties.

