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ARTICLE

INTERPRETING THE *CHARTER* WITH INTERNATIONAL LAW: PITFALLS & PRINCIPLES

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INTRODUCTION

While the use of international human rights law in Canadian courts is not an entirely novel phenomenon,[1] there is little doubt that it has become more prevalent in the Supreme Court of Canada's jurisprudence.[2] Far from being treated "as some exotic branch of the law, to be avoided if at all possible,"[3] the courts have come to embrace international law and human rights norms, notably in the course of defining the guarantees found in the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[4] Indeed, more than simply being considered among various aids to interpretation, it is often said that the *Charter* must be *presumed* to provide at least as much protection as international human rights law and norms, particularly those binding treaties that served as its inspiration.[5] However, as I aim to show below, the Court has so far used international human rights law inconsistently and imprecisely in the process of *Charter* interpretation, exhibiting

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1 See e.g. *R v Shindler*, [1944] AJ No 11, 82 CCC 206; *R v Brosig*, [1944] 2 DLR 232, 83 CCC 199; and *R v Kaehler and Stolski*, [1945] 3 DLR 272, 83 CCC 353. For an overview of the evolving use of international law in the pre-*Charter* period, see William A Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed (Scarborough: Carswell, 1996) at 1-13 [Schabas, *International*].

2 Anne Warner La Forest, "Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004) 37 UBC Law Rev 157 at 157-159 [La Forest]. This increased use has generated a wealth of scholarship. See generally Schabas, *International*, *ibid*; Stephen J Toope, "Canada and International Law" (1998) 27 Can Council Int'l L Proc 33; AF Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) [Bayefsky, *Human Rights*]; Louise Arbour & Fannie Lafontaine, "Beyond Self-Congratulation: The *Charter* at 25 in an International Perspective" (2007) 45 Osgoode Hall LJ 239 at 250 [Arbour & Lafontaine]; and the materials discussed below.

3 Jutta Brunnee & Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Int'l L 3 at 3 [Brunnee & Toope], citing Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (New York: Oxford University Press, 1994) at 206.

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

5 See the survey in Schabas, *International*, *supra* note 1 at 10-13, 26-28.

little in the way of a meaningful presumption of compliance with international human rights obligations. The purpose of this paper is to provide a review of this development in constitutional interpretation, and propose tentative guidelines that may lead to more principled and predictable use of international human rights law in the future.

In Part I, a brief survey of the Court's relevant *Charter* jurisprudence will highlight those circumstances in which international human rights law has been used (or ignored) in *Charter* cases. In the next Part, it will be argued that while international human rights norms may be relevant and persuasive, there should be no automatic 'presumption' that the *Charter* effectively encapsulates all international laws and agreements to which Canada is a signatory. Such a proposition, if adhered to with any rigour, conflicts with the principles of federalism and the separation of powers by giving the federal executive the power to unilaterally affect the meaning of the Constitution. Part III proposes a number of factors that may be helpful in constructing a consistent and principled framework for the use of international human rights norms in *Charter* interpretation. In particular, I will argue that certain factors that are frequently cited—such as whether Canada is strictly bound by the international law or norms—are not particularly salient considerations once we accept that the court should look only to those laws, norms and interpretations in so far as they are considered both relevant and persuasive. Ultimately, while international human rights law may be useful in the context of *Charter* interpretation, greater attention should be paid to its compatibility in the context of Canada's own constitutional order, and to the reasons underlying and offered in support of the international laws and norms.

I. THE SUPREME COURT'S USE OF INTERNATIONAL LAW

Before surveying the Court's use of international human rights law in *Charter* interpretation, it is important to delineate the scope of inquiry, as the justification of the use of international law in domestic courts depends heavily on the legal context in which it is deployed.[6] The analysis here will be confined to those cases where the Court has used international law or human rights documents to reveal the content of a given *Charter* provision. Cases in which the Court has applied international law in the process of statutory interpretation,[7] defining administrative law duties,[8] developing the common law,[9] interpreting treaty-implementing legislation,[10] deciding the international

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6 The Honourable Justice Claire L'Heureux-Dubé, "From Many Different Stones: A House of Justice" (2003) 41 Alta L Rev 659 at 668.

7 There is a general presumption of statutory interpretation that requires a statute to be construed in accordance with international law to the extent possible (Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths, 1994) at 330). See e.g. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241; *Schreiber v Canada (AG)*, 2002 SCC 62, [2002] 3 SCR 269; *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371, 74 DLR (4th) 449 [*National Corn*]; *Ordon Estate v Grail*, [1998] 3 SCR 437 at para 137, 166 DLR (4th) 193. See also Stephane Beaulac, "Recent Developments on the Role of International Law in Canadian Statutory Interpretation" (2004) 25 Stat L Rev 19 [Beaulac].

8 See e.g. *Baker v Canada (Ministry of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69-71, 174 DLR (4th) 193 [*Baker*].

9 Canadian courts adhere to the doctrine of adoption, such that customary international norms may be adopted into the common law provided that there is no legislation that clearly conflicts with the international rule. See the discussion in *R v Hape*, 2007 SCC 26 at paras 35-39, [2007] 2 SCR 292 [*Hape*], and the cases cited therein.

10 See e.g. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at 1019-1020, 160 DLR (4th) 193.

application of the *Charter*,[11] or the section 1 context[12] will not make up part of this analysis, important as they are. Each one of these contexts presents its own challenges and potential for greater theoretical and doctrinal development.[13] However, I expect that confining the analysis to the use of international human rights law in the interpretation of discrete provisions of the *Charter* will focus the impact of the analysis.

A. The Court's Use of International Human Rights Law in *Charter* Cases

With the bounds of the inquiry established, we can turn to how the Supreme Court has used international human rights laws in the course of interpreting the breadth and content of *Charter* rights and freedoms. The practice appears to have its genesis in Chief Justice Dickson's dissenting opinion in *Reference re Public Service Employee Relations Act (Alta)* ("*Alberta Reference*"),[14] one of a trilogy of cases[15] dealing with the extent to which labour rights are protected under the section 2(d) guarantee of freedom of association. In his reasons, the Chief Justice asserted 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."[16] The legal basis of this presumption was not articulated in detail,[17] although the Chief Justice appeared to ground it in the conceptual and historical nexus between international human rights documents and the *Charter*,[18] thus making the former an 'important indicia' of the latter.[19]

The plausibility of such a presumption will be addressed in the next part. For now, it is important to note a somewhat different and potentially more attractive formulation, in which Chief Justice Dickson suggests that international laws and norms may constitute

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11 See e.g. *Hape*, *supra* note 9 at para 56.

12 Examples include *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight Communications*]; *Canada (Human Rights Commission) v Taylor,* [1990] 3 SCR 892, 75 DLR (4th) 577; *Ross v New Brunswick School District No 15,* [1996] 1 SCR 825, 133 DLR (4th) 1; *Edmonton Journal v Alberta (AG),* [1989] 2 SCR 1326, 64 DLR (4th) 577, La Forest J; *R v Lucas,* [1998] 1 SCR 439 at para 50, 157 DLR (4th) 423; *R v Zundel,* [1992] 2 SCR 731, 95 DLR (4th) 202; *R v Sharpe,* 2001 SCC 2 at paras 171, 175-79, [2001] 1 SCR 45; *R v Keegstra,* [1990] 3 SCR 697 at 749-755, [1990] SCJ No 131, Dickson CJC [*Keegstra*]; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 67, [2013] 1 SCR 467.

13 For instance, some have observed that the use of international and comparative sources would appear to be required under section 1, which has been called a "broad invitation to examine the law in effect in other 'free and democratic societies'." Schabas, *International*, *supra* note 1 at 131. See also John Claydon, "The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms" (1986) 2 Conn J Int'l L 349 at 351; Bayefsky, *Human Rights*, *supra* note 2 at 111; The Honourable Mr Justice Michel Bastarache, "The Honourable G.V. La Forest's Use of Foreign Materials in the Supreme Court of Canada and His Influence on Foreign Courts" in Rebecca Johnson et al, eds, *Gérard V. La Forest at The Supreme Court of Canada 1985-1997* (Winnipeg: Canadian Legal History Project, University of Manitoba, 2000) at 436 [Bastarache, "Use of Foreign Materials"].

14 *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161, Dickson CJC, dissenting [*Alberta Reference*].

15 *Ibid*; *PSAC v Canada*, [1987] 1 SCR 424, [1987] SCJ No 9; *RWDSU v Saskatchewan*, [1987] 1 SCR 460, [1987] SCJ No 8 (collectively the "*Labour Trilogy*").

16 *Alberta Reference*, *ibid* at 349. This approach has been referred to as a 'universalist' method of *Charter* interpretation, insofar as it considers the existence of human rights norms to be, in a sense, universally ascertainable. See Steven Barrett & Benjamin Oliphant, "The Trilogy Strikes Back: Reconsidering Constitutional Protection for the Freedom to Strike" (2014) Ottawa L Rev (forthcoming).

17 Bayefsky, *Human Rights*, *supra* note 2 at 21, 76.

18 See Schabas, *International*, *supra* note 1 at 44 (the "common heritage" of the *Charter* and post-war international human rights documents is a "powerful argument for the relevance of the international instruments in interpreting the Canadian *Charter*").

19 *Alberta Reference*, *supra* note 14 at 349.

'relevant and persuasive sources' for the interpretation of the *Charter*, not unlike comparative law sources generally.[20] In his words:

> 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. The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter's* provisions.[21]

Chief Justice Dickson's 'presumption' seems confined to those treaties and laws by which Canada is bound. His overall focus, however, is broader and would appear to extend to both 'soft' international law and non-binding law, as well as the judicial and quasi-judicial decisions of international tribunals or oversight bodies. As such, Chief Justice Dickson went on to rely on the *International Covenant on Economic Social Cultural Rights* (*ICESCR*)[22] as well as a non-binding interpretation[23] of International Labour Organization (ILO) *Convention No. 87*[24] in finding that freedom of association included an implicit right to strike.[25]

Following Chief Justice Dickson's influential dissent, the use of international law in the context of *Charter* interpretation has blossomed.[26] Space does not permit a complete survey but a few representative examples will demonstrate the way in which the Court has used international laws, norms and interpretations in the course of defining the scope of *Charter* rights and freedoms.

A natural starting point, given the origins of the presumption, is with respect to freedom of association, where the Court has been keen to take inspiration from international norms in developing that section's jurisprudence.[27] In *Health Services and Support – Facilities*

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20 *Ibid* at 348.

21 *Ibid*.

22 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976) [*ICESCR*]. Dickson CJC noted that the *ICESCR*, along with the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [*ICCPR*], were adopted in an effort to make more specific the broad principles articulated in the *Universal Declaration of Human Rights*, GA Res. 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71 [*UNDHR*].

23 *Alberta Reference, supra* note 14 at 355, citing *ILO Official Bulletin*, vol LXVIII, Series B, No 3, 1985, at 34-35.

24 *Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organize*, 9 July 1948, 68 UNTS 17, ILO No 87 (entry into force 4 July 1950) [*Convention No 87*].

25 The difference between an automatic presumption of incorporation and deeming international sources 'relevant and persuasive' will be taken up more fully in Parts II & III below.

26 See e.g. *Slaight Communications*, *supra* note 12 at 1056-1057, and the decisions cited in this section. See generally Patrick Macklem, "The International Constitution" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) [Macklem, "International Constitution"] 261.

27 See *Dunmore v Ontario (AG),* 2001 SCC 94 at para 16, [2001] 3 SCR 1016 [*Dunmore*]; *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 69-79, [2007] 2 SCR 391 [*B.C. Health*]; *Ontario (AG) v Fraser*, 2011 SCC 20 at paras 91-95, [2011] 2 SCR 3 [*Fraser*]. Members of the court have also occasionally turned to human rights documents in delineating the scope of other fundamental freedoms. For instance, in *Harper v Canada (AG)*, a case involving the constitutional permissibility of campaign spending limits, McLachlin CJC and Major J (dissenting), appeared to rely on international human rights covenants in finding that the scope of 2(b) should be influenced by the fact that the "right to receive information is enshrined in both" the *UNDHR* and the *ICCPR*. See *Harper v Canada (AG)*, 2004 SCC 33 at para 18, [2004] 1 SCR 827.

Subsector Bargaining Association v British Columbia ("*B.C. Health*")[28] for instance, the Court addressed a challenge to government legislation nullifying portions of collective agreements in the B.C. health care sector and effectively precluding collective bargaining on a number of terms in the future. While generally the legislature is constitutionally competent to limit the scope of or derogate from negotiated contracts,[29] the Court found that by doing so in the case of collective bargaining agreements, the government had impermissibly violated the union members' freedom of association. In coming to this conclusion, the Court overruled the *Labour Trilogy*'s finding that section 2(d) did not afford protection to collective bargaining, partially on the basis that "collective bargaining is an integral component of freedom of association in international law."[30] Although endorsing Chief Justice Dickson's presumption, the inquiry in *B.C. Health* was not limited to "the international human rights documents that Canada has ratified."[31] The Court went on to rely on ILO *Convention No. 98*,[32] which Canada has not ratified,[33] as well as non-binding interpretations of that law.[34]

Occasionally, the Court will look to more detailed articulations of a right or freedom in international human rights documents in the course of interpreting the 'open textured' *Charter* provisions, a use explicitly recommended by the Chief Justice in the *Trilogy*.[35] Such was the case in *R v Brydges* ("*Brydges*"),[36] a case involving section 10(b) of the *Charter*, which provides the right to "retain and instruct counsel without delay and to be informed of that right." Justice Lamer (as he then was) discussed Article 14 of the *International Covenant on Civil and Political Rights* (*ICCPR*), which goes some ways further than the *Charter*'s text in providing for a right to duty counsel.[37] Justice Lamer found that this provision in the *ICCPR* reinforced his view that "the right to retain and instruct counsel, in modern Canadian society, has come to mean more than the right to retain a lawyer privately," and includes the right to have access to available legal aid and duty counsel, and the right to be informed of that opportunity.[38] As with the Chief

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28 *B.C. Health*, *ibid*.

29 Peter Hogg, *Constitutional Law of Canada,* 5d ed loose-leaf (consulted on 15 January 2014), (Toronto: Carswell), ch 44 at 6-13 [Hogg]; Robert Charney, "The Contract Clause Comes to Canada: The British Columbia Health Services Case and the Sanctity of Collective Agreements" (2008) 23 NJCL 65 at 71.

30 *B.C. Health*, *supra* note 27 at paras 20, 69-79.

31 *Ibid* at para 70.

32 *Convention (No 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951). See Brian Langille, "Can We Rely on the ILO?" (2006-2007) 13 CLELJ 273 at 279-281 [Langille, "Can We Rely"].

33 See generally Brian Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54 McGill LJ 177 at 194-198 [Langille, "Freedom of Association Mess"]. On the problematic interpretation and use of ILO law in *B.C. Health*, see Brian Langille and Benjamin Oliphant, "From the Frying Pan into the Fire: *Fraser* and the Shift from International Law to International 'Thought' in *Charter* Cases" (2011) 16 CLELJ 181 [Langille & Oliphant]. See also the discussion in Part III, below.

34 *B.C. Health*, *supra* note 27 at para 74, citing United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant — Concluding Observations of the Human Rights Committee — Canada*, UNOHCHR, 1999, UN Doc CCPR/C/79/Add 105.

35 See *Alberta Reference*, *supra* note 14 at 349, citing John Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 Sup Ct L Rev 287 at 293.

36 *R v Brydges*, [1990] 1 SCR 190, 74 CR (3d) 129 [*Brydges*].

37 It provides the right of an accused to be "tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." *ICCPR*, *supra* note 22, art 14(3)(d).

38 *Brydges, supra* note 36 at 215.

Justice's decision in the *Alberta Reference*, Justice Lamer did not attempt to clearly justify his reliance on international law, or ground it in theory or principle.[39]

The Court has also turned to international human rights norms in interpreting the section 7 rights to life, liberty and security of the person.[40] In *United States v Burns* ("*Burns*"),[41] for instance, the Court clarified its previous decisions in *Kindler v Canada (Minister of Justice)* ("*Kindler*") and *Reference Re Ng Extradition (Can)* ("*Ng*"),[42] and found that extraditing an individual who may potentially be sentenced to death upon conviction violates section 7. While the Court admitted that "evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty,"[43] the emerging international consensus that imposition of the death penalty as such violates human rights norms was found compelling by the Court.[44] In particular, the Court found that the arguments against extradition without assurances that the accused would not face the death penalty have "grown stronger" since *Kindler* and *Ng*.[45] In supporting this conclusion, it cited "important initiatives within the international community denouncing the death penalty, with the government of Canada often in the forefront,"[46] including a range of international protocols, reports, resolutions, and treaties, of varying degrees of legal weight and authoritativeness.[47]

It should also be noted that the use of international human rights law does not always lead the Court to a more expansive definition of a *Charter* right or freedom in question. Beyond those cases in which the Court may use international legal norms in support of reasonable limits on a right or freedom under section 1[48]—which are beyond the scope of this survey—the Court may also find that international law undercuts the more expansive definition of a right or freedom urged by a claimant. For instance, in *USA v Cotroni* ("*Cotroni*"), the Court considered the interpretation of section 6(1) of the *Charter* in the context of extradition proceedings.[49] Justice La Forest, for the majority, found that section 6(1) was indeed infringed by deportation. He cited a number of international

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39 Bayefsky, *Human Rights*, *supra* note 2 at 78.

40 In a number of cases, members of the court have mentioned international law in passing, without it forming any meaningful aspect of the judgment. See e.g. *Re BC Motor Vehicle Act,* [1985] 2 SCR 486 at 503, 24 DLR (4th) 536 [*Motor Vehicle Reference*]; *R v Oakes,* [1986] 1 SCR 103 at paras 54-55, 26 DLR (4th) 200; *Mills v The Queen,* [1986] 1 SCR 863, 29 DLR (4th) 161, Lamer J, dissenting; *Canadian Egg Marketing Agency v Richardson,* [1998] 3 SCR 157 at paras 57-58, 1997 CanLII 295; *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man),* [1990] 1 SCR 1123, 56 CCC (3d) 65, Lamer CJC, concurring [*Reference re ss 193*]; *Beauregard v Canada,* [1986] 2 SCR 56 at paras 33-34, 30 DLR (4th) 481; *R v Milne,* [1987] 2 SCR 512 at para 24, 46 DLR (4th) 487 [*Milne*]; *R v L(DO),* [1993] 4 SCR 419, 85 CCC (3d) 289, L'Heureux-Dubé, concurring; *R v O'Connor,* [1995] 4 SCR 411 at para 114, 130 DLR (4th) 235; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 69, 152 DLR (4th) 577, La Forest J, concurring.

41 *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*Burns*].

42 *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438 [*Kindler*]; and *Reference Re Ng Extradition (Can)*, [1991] 2 SCR 858, 84 DLR (4th) 498 [*Ng*].

43 *Burns*, *supra* note 41 at para 89.

44 *Ibid* at paras 83-92.

45 *Ibid* at para 131.

46 *Ibid* at paras 85-88.

47 *Ibid* at paras 79-92. See also the similar reasoning process in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].

48 See the cases cited *supra* note 12.

49 *USA v Cotroni*, [1989] 1 SCR 1469, 48 CCC (3d) 193 [*Cotroni*].

instruments that limited protection to situations of exile or banishment,[50] and found that if the objective was to so limit section 6, "one would have thought these more specific words would have been used rather than according a general right to remain in Canada."[51] However, these international materials also led Justice La Forest to conclude that "the infringement to s. 6(1) that results from extradition lies at the outer edges of the core values sought to be protected by that provision."[52]

Similar reasoning was adopted in the recent case of *Divito v Canada* ("*Divito*"),[53] again in the context of mobility rights. *Divito* involved provisions of the *International Transfer of Offenders Act* ('*ITOA*')[54] that permitted the Minister to refuse the transfer of a Canadian citizen incarcerated abroad seeking to serve his sentence in Canada. The claimant asserted that these provisions, taken together, violated the section 6(1) right to 'enter' Canada. Justice Abella for the majority endorsed Chief Justice Dickson's presumption of compliance,[55] and relied on both binding and non-binding international norms in interpreting the scope of section 6(1).[56] However, Justice Abella also noted that, as a matter of international law, "requiring the return of an offender to his or her home state infringes the doctrine of state sovereignty," and therefore Canada has no free standing authority to *require* the return of a citizen lawfully imprisoned abroad.[57] The ability to serve one's sentence in Canada depended entirely on a bilateral Canada-US treaty,[58] which had been implemented through the *ITOA*. That this ability was merely a "creation of legislation" supported the conclusion that the law itself did not offend the *Charter* by permitting the government to refuse such a transfer.[59]

B. Relevant International Law Not Considered

In the cases discussed above, the Court has taken seriously Chief Justice Dickson's presumption, and found that international human rights law and norms can be a critical factor in identifying the meaning and scope of *Charter* provisions. Despite the significance of this trend,[60] however, there have also been a number of high profile *Charter* cases in which clearly relevant international human rights norms and documents did not find their way into the Court's reasoning. A useful starting point is, again, in the labour relations context. In *R v Advance Cutting & Coring Ltd* ("*Advance Cutting*"),[61] the various judgements making up the majority found that a statutory 'union shop' provision

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50 *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46, art 3(1), (entered into force 2 May 1968); The *Explanatory Reports on the Second to Fifth Protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (1971); *ICCPR*, *supra* note 22, art 12.

51 *Cotroni*, *supra* note 49 at 1481.

52 *Ibid*.

53 *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, 364 DLR (4th) 391 [*Divito*].

54 *International Transfer of Offenders Act*, SC 2004, c 21, ss 8, 10(1), 10(2).

55 *Divito, supra* note 53 at para 22.

56 *Ibid* at paras 21-28. For instance, at para 27, the majority relied on a General Comment to the relevant article of the *ICCPR* for the proposition that there will be "'few, if any' limitations on the right to enter that would be considered reasonable" (Report of the Human Rights Committee, CCPR, 55th session, Supp No 40, UN Doc A/55/40 at 128-133).

57 *Divito*, *ibid* at para 40.

58 *Treaty Between Canada and the United States of America on the Execution of Penal Sentences*, 2 March 1977, Can TS 1978 No 12, arts II, III, IV (entered into force 19 July 1978).

59 *Divito, supra* note 53 at para 45.

60 These cases and others have led Patrick Macklem to conclude that the Supreme Court has effected a "fundamental shift in Canada's constitutional relationship to the international legal order." Macklem, "International Constitution", *supra* note 26 at 265.

61 *R v Advance Cutting & Coring Ltd,* 2001 SCC 70, [2001] 3 SCR 209 [*Advance Cutting*].

requiring all employees to be members of a union as a condition of employment was not unconstitutional. This conclusion appears to run contrary to ILO interpretations of the relevant international law,[62] which provide that people should be free to *not* join a union, and to join a union of their choosing.[63] Indeed, Justice Bastarache, in dissent, cited a variety of sources in finding that the freedom to not associate was well entrenched in international human rights law.[64] Nevertheless, the other members of the Court did not meaningfully address the international law angle at all.[65] For instance, Justice LeBel (Arbour and Gonthier JJ., concurring) simply noted that the interpretation of the freedom of association provision of the *European Convention* by the European Court of Human Rights (ECHR),[66] "interesting as it may be," should not be followed because labour laws of a country represent a political compromise that should not easily be displaced by the courts.[67]

Even where the Court does directly address the relevant international law or norms, it has not always been eager to rely on the *interpretations* of those laws or norms offered by oversight bodies. The case of *Canadian Foundation for Children, Youth and the Law v Canada (AG)* ("*Canadian Foundation*")[68] provides a helpful counter-example. In *Canadian Foundation*, the Court was tasked with determining the constitutional permissibility of including a defence to assault under the *Criminal Code* relating to the corporal punishment of children.[69] The majority noted that the relevant international treaties[70] do not *explicitly* prohibit corporal punishment under all circumstances in support of its finding that the law did not offend section 7.[71] However, as noted by Justice Arbour in dissent, the Committee on the Rights of the Child—the body tasked with reviewing State progress under the *Convention on the Rights of the Child*—concluded in its report on Canada that "physical punishment of children in families [should] be prohibited."[72] Unlike in *Burns* and *B.C. Health*, the opinion of an international monitoring body in *Canadian Foundation* was evidently not considered compelling by the majority.

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62 Committee on Freedom of Association, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th ed, (Geneva: International Labour Organization, 2006) at para 975 [*Digest*]. Roy Adams has noted that union shop clauses "clearly [offend] the basic principles of freedom of association." Roy J Adams, "From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining" (2008) 12 Just Labour 48 at 61 [Adams, "Human Right"]. See also Bob Hepple, "The Right to Strike in an International Context" (2009) 15 CLELJ 131 at 144 [Hepple, "Right to Strike"].

63 This interpretation has been followed by the European Court of Human Rights (ECHR). See *Young, James and Webster v UK* (1982), 4 EHRR 38 (individual cannot be fired for refusing to join a trade union); *Sigudur A Sigurjonssen v Iceland* (1993), 16 EHRR 462 (issuance of a cab drivers' license contingent on joining a union violates article 11); *Sørensen and Rasmussen v Denmark*, No 52562/99, (11 January 2006) (closed shop provisions violate article 11).

64 *Advance Cutting*, *supra* note 61 at paras 11-15.

65 See also *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 319, 81 DLR (4th) 545, where the reasons of La Forest J, dissenting on this point, relied on the 'bilateral' nature of freedom of association as indicated in the *UNDHR*. The other opinions of the Court did not address this point.

66 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, art 11(1), (entry into force 3 September 1953) [*European Convention*].

67 *Advance Cutting*, *supra* note 61 at para 193.

68 *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4, [2004] 1 SCR 76 [*Canadian Foundation*].

69 *Criminal Code*, RSC 1985, c C-46, s 43.

70 *ICCPR*, *supra* note 22, arts 7, 24; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, arts 3(1), 5, 19(1), 37(*a*), 43(1), (entered into force 2 September 1990) [*CRC*].

71 *Canadian Foundation*, *supra* note 68 at para 33.

72 *Ibid* at paras 187-188, citing Committee on the Rights of the Child, *Report adopted by the Committee at its 233rd meeting on 9 June 1995*, Ninth Session, CRC/C/43, at para 93.

Similarly, in *Gosselin v Quebec (AG)*,[73] the majority found, *inter alia*, that providing social assistance benefits that fell substantially below a level necessary to meet basic needs did not violate section 7. The majority acknowledged that a number of sources of international law provide basic social provisions as a human right to be exercised against the government,[74] but nevertheless declined, in its interpretation of "security of person" within section 7, to recognize such a positive right to social assistance. Indeed, the majority of the Court did not even consider international law as a relevant factor in the interpretation of section 7.[75] Had any sort of presumption of compliance applied, one would have expected the Court to either apply or rebut the presumption in this instance, particularly as Justice Arbour in dissent recommended an interpretation of section 7 which would include a positive right to social assistance.[76]

Finally, the Court has occasionally overlooked international human rights documents even where previously found useful. For instance, while the *ICCPR* expressly guarantees the right to legal assistance to be provided without payment to an accused "if he does not have sufficient means to pay for it,"[77] the Court in *R v Prosper* ("*Prosper*") found that section 10(b) of the *Charter* includes no such obligation.[78] It came to this conclusion on the basis that such a right is not found expressly in the *Charter* and was indeed

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73 *Gosselin v Quebec (AG)*, 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*].

74 See *ICESCR*, *supra* note 22, art 11(1) ("the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"); *UNDHR*, *supra* note 22, arts 22, 25.

75 The *ICESCR* and *UNDHR* were only considered by the majority in the context of interpreting Quebec's statutory human rights legislation (the *Charter of human rights and freedoms*, CQLR c C-12), and not in its *Charter* analysis. *Gosselin*, *supra* note 73 at para 93.

76 *Gosselin*, *ibid* at para 385. As another example, the Court has rejected an interpretation of section 7 that would include some protection for property rights. See e.g. *Irwin Toy v Quebec*, [1989] 1 SCR 927 at 1003, 58 DLR (4th) 577 [*Irwin Toy*]; *Reference re ss 193, supra* note 40. It came to this conclusion despite the fact that property rights are protected in the *UNDHR* (*supra* note 22, art 17) and the absence of property rights in the *Charter* represents a "shocking and deliberate departure from the constitutional texts that provided the models for s. 7," see Hogg, *supra* note 29 at ch 47, 17-19; see also Gregory Alexander, *The Global Debate over Constitutional Property* (Chicago: University of Chicago Press, 2006) at 41. While this may be a sound interpretation of the constitution, it certainly does not reflect a presumption of compliance with international human rights norms. For proponents of an interpretation of s 7 that would include protection for property, see John Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983) 13 Manitoba Law Review 455; Phillip W Augustine, "Protection of the Right to Property in the Canadian Charter of Rights and Freedoms" (1986) 18 Ottawa L Rev 55. Other scholars are less sympathetic: see Janet McBean, "Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 Alta L Rev 548; Richard Bauman, "Property Rights in the Canadian Constitutional Context" (1992) 8 SAJHR 344; Jennifer Nedelsky, "Reconceiving Rights as Relationships" (1993-1994) 1 Rev Const Stud 1. On the deliberate exclusion of property rights from the *Charter*, see Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 Canadian Journal of Political Science 309.

77 *ICCPR*, *supra* note 22, art 14(3)(d).

78 *R v Prosper*, [1994] 3 SCR 236, 118 DLR (4th) 154 [*Prosper*]. The majority decided, at 278, that section 10(b) does not impose a substantive constitutional obligation on governments "to ensure that duty counsel is available, or likewise, provide detainees with a guaranteed right to free and immediate preliminary legal advice upon request."

considered and rejected by the framers.[79] Somewhat surprisingly, given the logic and holding of *Brydges*, the majority did not address the relevant international law on this point at all.[80] While Professor Peter Hogg has suggested that more detailed international human rights treaties may be useful in the context of *Charter* interpretation, and cites the right to duty counsel as a specific example,[81] the Court has thus far resisted this implication in the context of 10(d).[82]

C. Conclusion

The above survey suggests that the Court's track record in addressing international law in the context of *Charter* interpretation is somewhat mixed. In the labour relations context, great attention has occasionally been paid to the use of international human rights norms and the interpretations of various ILO bodies in defining the scope of section 2(d), at least in those cases following the *Labour Trilogy*. Indeed, in response to challenges to the Court's interpretation of international law in *B.C. Health*,[83] the majority of the Court unequivocally affirmed its position in *Fraser v Ontario (AG)*.[84] There, the majority not only emphasized that the *Charter* "*must* be interpreted in light of Canadian values and Canada's international and human rights commitments,"[85] but asserted that it must also be interpreted in light of "the current state of *international thought* on human rights."[86] Against this backdrop, cases like *Advance Cutting*, in which the majority judges were apparently unconcerned with the relevant international human rights norms, illustrate the inconsistency of the Court's use of international law.[87]

Similarly, while the Court has often been anxious to rely on non-binding interpretations of international human rights laws in cases like *Burns* and *B.C. Health*, it has also been content to downplay them in cases like *Canadian Foundation*. It was not made clear why the Court found the opinions of oversight bodies useful in the former context and not the latter. Finally, as alluded to above, the interpretation of section 10(b) in *Prosper* seems to run directly contrary to the Court's logic in *Brydges*, rendered a few years prior. If the

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79 *Ibid* at 265-268. Similar reasoning can be found in *Milne*, *supra* note 40, although in that case with specific reference to the relevant international law. In *Milne*, the Court refused to give an interpretation to ss 9 and 12 that would provide a right to lesser punishment where the punishment for the offence had been changed after conviction and sentencing. Such an interpretation was, as counsel in *Milne* pointed out, in line with the *ICCPR*, article 15 of which provides that where the law has been changed to impose a lighter penalty after the commission of the offence, "the offender shall benefit thereby." The majority of the Court rejected such an interpretation of the *Charter*, noting at 527 that "(i)t is difficult to see how such an approach could be taken in light of the fact that specific attention was given to this matter in s. 11(i) of the *Charter*, which limits the rights of an accused in this regard to the benefit of a reduction in sentence made between the time of the commission of the offence and the time of sentencing."

80 The only reference to the *ICCPR* was in Justice L'Heureux-Dubé's dissenting reasons. She quoted from *R v Robinson* (1989), 73 CR (3d) 81 at 113, which had observed that the framers had considered the relevant provisions of the *ICCPR* and other human rights documents before rejecting a right to duty counsel. However, Justice L'Heureux-Dubé also rejected an interpretation that would impose a positive obligation on the government to provide duty counsel, for reasons similar to the majority. See *Prosper*, *ibid* at 286-288.

81 Hogg, *supra* note 29, ch 36, 39-43.

82 It should be noted, however, that while the courts have not found an affirmative right to counsel under s 10(b), they have found that court appointed counsel may be required in certain situations where section 7 interests are implicated. See *R v Rowbotham* (1988), 41 CCC (3d) 1, 1988 CanLII 147 (Ont CA); *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 124.

83 Most notably by Rothstein J, dissenting, in *Fraser, supra* note 27 at paras 247-250.

84 *Ibid*.

85 *Ibid* at para 92 (emphasis in original).

86 *Ibid* (emphasis added).

87 Irit Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System" (2004) 37 UBC L Rev 113 at 142-143 [Weiser, "Undressing"].

reasoning the Court employed in *Prosper* was extended to *Brydges*, it would have led to the contrary conclusion: the framers were aware of the more generous articulation of the right to counsel in the *ICCPR*, and their decision to not extend the more expansive articulation should be dispositive. Evidently, the fact that a given international human rights document contains a more precise articulation of a given right or freedom found in the *Charter* can cut both ways, and it is not clear in advance which way it will cut.

II. PRESUMPTIONS OF COMPLIANCE AND CREEPING MONISM

A number of critics have suggested that the Court's use of international human rights law is often confined to those provisions and interpretations that appear to support a conclusion at which the Court has already arrived.[88] The Court's framework for the use of international law has been called "imperfect at best, and improvised at worst,"[89] "inconsistent and even unintelligible,"[90] "troublesome and confused," and "unpredictable."[91] In fairness, it should be noted that the Court's reasoning might have reflected the various emphases on the importance of international human rights law and norms by counsel, the different approaches of different judges, or principled distinctions lurking in the background that have not been systematically revealed in the written reasons. Whatever its source, the apparent inconsistency identified in the case law cannot help but sow confusion; it is not clear from the outset whether the Court will consider such laws and norms to be irrelevant, conclusive, or somewhere in between. It seems clear that this inconsistency is sustained by the confusion surrounding the theoretical basis for the use of international law in the context of *Charter* interpretation.[92] The remainder of this paper will attempt to identify the potential fault lines in the debate over the use of international law in the context of *Charter* interpretation, and propose some principles and guidelines that may lead to the more consistent use of such materials in the future.

A. Abandoning Presumptions of Compliance

From the outset, it should be emphasized that there is a potentially large conceptual gap between suggesting that the courts *must* apply a 'presumption' that relevant international human rights norms are effectively incorporated into the *Charter*, and considering international laws and interpretations relevant and persuasive as the context warrants. In the former case, it would be incumbent on courts to identify any germane international human rights documents, apply that meaning to the relevant *Charter* provision, and then either accept that definition or seek to rebut it by meeting an unknown standard. By contrast, where international human rights norms are considered 'relevant and persuasive,' they may simply be among the matrix of factors that the court might consider helpful in the course of resolving issues involving the content of specific *Charter* rights and freedoms. The survey above suggests that the Court has tended towards the latter in practice, but has at least rhetorically adopted the former.

Stephen Toope has argued that this tendency is unfortunate, and suggests that the distinction between the two standards—a presumption on the one hand and persuasive sources on the other—was quite deliberately made. According to Professor Toope:

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88 Bayefsky argues in the context of her discussion of the labour relations cases that "the Court considers international law where it is supportive of a predetermined conclusion but ignores it when it is not." Bayefsky, *Human Rights*, *supra* note 2 at 89.

89 Arbour & Lafontaine, *supra* note 2 at 252.

90 Gib van Ert, *Using International Law in Canadian Courts*, 2d ed, (Toronto: Irwin Law, 2008) at 326 [van Ert, *Using*] (summarizing critics of the Court's approach).

91 Bayefsky, *Human Rights*, *supra* note 2 at 93.

92 See van Ert, *Using*, *supra* note 90 at 325-326.

> In the 1987 Labour trilogy, Dickson attempted to introduce a distinction between general international human rights law which served as the context for the *Charter's* adoption and was therefore "relevant and persuasive" in *Charter* interpretation, and human rights treaties to which Canada is a party, which would serve as the benchmark for all *Charter* rights. The *Charter* should be presumed to guarantee protection "at least as great" as that afforded under Canada's treaty obligations. The Court subsequently ignored this distinction. This is a loss, not only in *Charter* cases, but also in all cases where international law is invoked. That part of international law that is "inside" Canada is not only persuasive, it is obligatory. When we fail to uphold our obligations, we tell a story that undermines respect for law internationally.[93]

In line with this observation, various commenters have endorsed some sort of presumption of compliance in the context of *Charter* interpretation. For instance, Professors A.F. Bayefsky and M. Cohen have suggested that some of Canada's international commitments should be seen as effectively implemented through the *Charter*, while other laws or norms should be seen as presumptively incorporated.[94] Chief Justice Lamer has stated extra-judicially that "[t]he *Charter* can be understood to give effect to Canada's international legal obligations, and should therefore be interpreted in a way that conforms to those obligations."[95] Consistent with these positions, Patrick Macklem has recently identified what is effectively a form of 'creeping monism,'[96] whereby various international obligations have been imported into the domestic legal order through judicial interpretation of the *Charter*.[97]

While the notion that international human rights norms have been implemented or otherwise incorporated into Canadian law through the *Charter* was "enthusiastically advanced" by scholars in the early years of the *Charter*,[98] such an approach has been largely resisted by the courts.[99] At first blush, any doctrine of incorporation or compliance would appear to run headlong into the reality that the *Charter* could only with great difficulty be read to include every international human rights document assented to by the Canadian government. It would indeed be a remarkable single page document that

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93 Stephen J Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) UNBLJ 11 at 17. See also Schabas, *International*, *supra* note 1 at 231-232.

94 M Cohen & AF Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 Can Bar Rev 265 at 301-308. See also Daniela Bassan, "The Canadian *Charter* and Public International Law: Redefining the State's Power to Deport Aliens" (1996) 34 Osgoode Hall LJ 583 at 590-593 [Bassan].

95 Karen Knop, "Here and There: International Law in Domestic Court" (1999-2000) 32 NYUJ Int'l L & Pol 501 at 518 [Knop], citing Antonio Lamer, "*The Treaty System in the 21st Century*", (International Conference on Enforcing International Human Rights Law, delivered at York University, 22 June 1997) [unpublished].

96 For a comparative survey of this phenomenon, see Melissa A Waters, "Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties" (2007) 107 Colum L Rev 628. On the monist-dualist distinction, see generally John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 220-224 [Currie, *PIL*].

97 See Macklem, "International Constitution", *supra* note 26. See also Langille & Oliphant, *supra* note 33 at 220-232.

98 For the sake of brevity, I do not here distinguish between the various methods for asserting that international commitments are, in some sense, effectively incorporated into the domestic legal order through the *Charter*. I think the criticisms offered here apply whether based on a meaningful presumption of compliance, the notion that the *Charter* is 'implementing legislation' for international human rights documents, or other related rationales. See the various approaches discussed in MA Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications" (1984) 23 UWO L Rev 9 [Hayward].

99 Schabas, *International*, *supra* note 1 at 15.

would, by necessary implication, incorporate the commitments found in the nearly forty international human rights treaties and declarations to which Canada is a party,[100] much less the full spectrum of international law, norms, protocols, and decisions available. However, even if we were to accept that a presumption of compliance is plausible,[101] there are good reasons to not adopt it. In particular, the meaningful application of such a presumption would undermine two important pillars of the Canadian constitutional order: federalism and the separation of powers.[102]

From the outset, it should be noted that such a presumption runs contrary to the rules that treaties are not self-enforcing in Canada,[103] and that customary international law can be displaced by legislation.[104] It also undermines the clear direction from the Court that Canada's international law obligations are not incorporated into the *Charter*.[105] Although some countries have adopted a monist system,[106] or have explicitly incorporated international law into the domestic law through a constitution[107] or quasi-constitutional legislation,[108] Canada has not done so. It therefore remains for all intents and purposes a dualist jurisdiction[109] in which those international treaties requiring domestic implementation must be adopted by the relevant legislature before becoming binding in Canada.[110]

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100 La Forest, *supra* note 2 at 194. See also the up-to-date list on the Canadian Heritage website. Department of Canadian Heritage, "Multilateral human rights treaties to which Canada is a party", online: Government of Canada <http://www.pch.gc.ca>.

101 Dickson CJC, at least, appeared to only be referring to those international human rights laws *similar* to those found in the *Charter*. See *Alberta Reference*, *supra* note 14.

102 Professor Weinrib has called these the 'two constitutional complications': Lorraine Weinrib, "A Primer on International Law and the Canadian Charter" (2006) 21 NJCL 313 at 318-322 [Weinrib, "Primer"]. This issue has been addressed in detail elsewhere, so only a brief summary will be attempted here. See generally Langille & Oliphant, *supra* note 33 at 220-232.

103 *Francis v The Queen*, [1956] SCR 618 at 621; *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141 at 172-73 [*Capital Cities*]; *Baker*, *supra* note 8 at para 69. See also Weiser, "Undressing", *supra* note 87 at 125; La Forest, *supra* note 2 at 186; Gibran van Ert, "Using Treaties in Canadian Courts" (2000) 38 Can YB Int'l L 3 at 16-17 [van Ert, "Treaties"]. The exception to this rule are those treaties and agreements that can be implemented through powers already possessed by the executive branch of government, and therefore need no further legislative authority for their implementation. See Hogg, *supra* note 29, ch 11, 6-10.

104 La Forest, *supra* note 2 at 164-165.

105 *Suresh*, *supra* note 47 at para 60.

106 See generally the discussions in Thomas Buergenthal, "Modern Constitutions and Human Rights Treaties" (1997) 36 Colum J Transnat'l L 211; Jorg Polakiewicz, "The Application of the European Convention on Human Rights in Domestic Law" (1996) 17 HRLJ 405.

107 Some national constitutions give international law a status superior to the constitution itself. See generally Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, "Commitment and Diffusion: How and Why National Constitutions Incorporate International Law" (2008) 2008 U Ill L Rev 201.

108 See *Human Rights Act* 1998 (UK), c 42 (implementing the *European Convention* and its interpretations by the ECHR. *European Convention*, *supra* note 66, s 2(1)(a)).

109 I note that monism and dualism can often be best seen as points on a "continuum," as opposed to strictly categorical (see Currie, *PIL*, *supra* note 96 at 220-224). Indeed, some have described Canada as a 'hybrid' system: monist with respect to customary international law and dualist with respect to conventional law. See e.g. van Ert, "Treaties", *supra* note 103 at 4; Gibran van Ert, "Dubious Dualism: The Reception of International Law in Canada" (2010) 44 Val U L Rev 927 [van Ert, "Dubious Dualism"]. However, as any reception of customary law or application of a statutory presumption with respect to conventional law can be displaced by clear legislation, I consider the dualist nature of the constitutional order to be predominant. See also the discussion in The Honourable Justice Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional litigation: Fugue or Fiction? Recent Developments and Challenges in Internalizing International Law" (2002) 16 Sup Ct L Rev (2d) 24 at 33-36 [LeBel & Chao].

110 At least as a formal matter, this requirement appears to be accepted by many scholars who envision a greater role for international law in the context of *Charter* interpretation. See e.g. Bayefsky, *Human Rights*, *supra* note 2 at 30 and William A Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79 Can Bar Rev 174 at 177. But see the argument of Macklem, "International Constitution", *supra* note 26 at 272, who argues that "dualism is alive in Canada in name only."

This dualist approach to international treaties is required by the logic of the Canadian constitutional structure with regards to both the division of powers and separation of powers. In brief, the Governor General, acting on the advice of the Prime Minister and Cabinet, possesses the constitutional authority to enter treaties binding Canada internationally.[111] However, in order for such treaties to have the force of law in Canada, they must be adopted by the relevant legislature.[112] As it is the federal executive that is endowed with treaty making power, a monist structure would allow the executive to unilaterally make domestic law without parliamentary oversight, and to give effect to treaties encroaching upon provincial jurisdiction without provincial consent or participation.[113] This logic applies *a fortiori* to the argument that international obligations assented to by the federal executive are incorporated into *constitutional* law, which limits the content of legislation passed by either level of government. Allowing past, present or future federal executives to effectively modify the meaning of the *Charter* is untenable given the onerous steps required to change the language of the constitution explicitly.[114] That the Crown has affixed Canada's name to a given treaty affects the recourse that may be had at the international level; it does not for that reason have the force of law within Canadian courts.[115] To put the matter bluntly: "[i]f treaties are made by the executive, and the executive cannot make law, treaties must not be law."[116]

This observation brings us back to the important distinction between applying international law as a statutory presumption or as a matter of common law development on the one hand, and presumptively applying it in construing the *Charter* on the other. The relevance of this distinction is left unaddressed by many commenters,[117] and some

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111 This power is derived from the royal prerogative. See generally Hogg, *supra* note 29, ch 11, 1-11; van Ert, "Treaties", *supra* note 103 at 10-13.

112 See generally Schabas, *International*, *supra* note 1 at 21-22; Currie, *PIL*, *supra* note 96 at 235, 245.

113 See *AG Canada v AG Ontario et al*, [1937] 1 DLR 673, [1937] AC 326, (UK PC) at 682-683 [*Labour Conventions*]; Langille & Oliphant, *supra* note 33. While there is some dispute over the ongoing vitality of the *Labour Conventions* case on this point (see Hogg, *supra* note 29, ch 11, 11-18; Bayefsky, *Human Rights*, *supra* note 2 at 27-30), it is difficult to fathom a power in the Canadian constitutional framework that would provide the federal executive with the unilateral ability to so entirely undermine the division of powers. See van Ert, "Treaties", *supra* note 103 at 67-76; Hogg, *supra* note 29, ch 11, 14-18. Such a transcending doctrine would seem to be particularly problematic in light of the Supreme Court's recent emphasis on the principle of 'cooperative federalism.' See e.g. *Reference re Securities Act*, 2011 SCC 66 at 58-62, [2011] 3 SCR 837.

114 See *Procedure For Amending Constitution of Canada*, Part V of the *Constitution Act*, 1982, being Schedule B of the Canada Act 1982 (UK), 1982, c 11, s 38. It might also be argued that such a position upends the separation of powers in another way, by impinging on the *judiciary's* role over the interpretation of the constitution, a power often jealously guarded. See *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 745, 19 DLR (4th) 1; *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 111, [2007] 1 SCR 429 [*Hislop*]; Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: University of British Columbia Press, 2013) at 168-172. But see Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal-Kingston: McGill-Queen's University Press, 2010).

115 See e.g. *Henry v Canada*, [1987] 3 FC 429, 10 FTR 176 at para 10, Strayer J; Currie, *PIL*, *supra* note 96 at 235, 245.

116 van Ert, "Dubious Dualism", *supra* note 109 at 928. Gib van Ert notes the simplicity of the formulation, but considers the syllogism "largely accurate" with respect to the legal status of treaties in Canada. See also Weinrib, "Primer", *supra* note 102 at 319.

117 See e.g. Stephen J Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) Can Bar Rev 534 at 538; Beaulac, *supra* note 7; Errol P Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights" (1982) 20 Alta L Rev 383 at 390; Martha Jackman and Bruce Porter, "Justiciability of Social and Economic Rights in Canada" in Malcolm Langford, ed, *Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge: Cambridge University Press, 2008); Hayward, *supra* note 98 at 10; van Ert, *Using*, *supra* note 90 at 323-360.

courts,[118] who seem to operate under the belief that the presumption should naturally apply in the context of constitutional interpretation, just as it applies in the course of statutory interpretation. In my view, this approach does not adequately reflect the substantial difference in interpreting legislative acts in light of textual ambiguity and permanently rendering those acts of no force and effect.[119] In the former event, where the court 'gets it wrong' in imputing to the democratic branches an intention that is not present, or by developing the common law in a way contrary to the will of elected bodies, the legislatures can correct such an interpretation through the passage of legislation. No such recourse is available where the Court is interpreting the meaning of a constitutional document.

This leads to difficulties for the 'presumption of compliance' school of thought with respect to *Charter* interpretation. For instance, Professor Bayefsky relies on the "time-worn presumption and resulting admonition to bring Canadian law into conformity with international legal obligations where possible."[120] However, she also notes that when the courts apply this time worn presumption in the normal course, there is "no doubt" that unambiguous[121] domestic legislation will prevail where it conflicts with international law.[122] Put differently, the corollary of the presumption of compliance is that "courts will apply the law laid down by statute or common law, *even if it is inconsistent with a treaty which is binding upon Canada*."[123] I would suggest that the reason that the presumption is relatively uncontroversial[124] with respect to statutory interpretation and common law development is because it can be ousted by clear legislative action that derogates from the international law or agreement. In stark contrast, the *Charter* is applied to *abridge* legislative authority, however clearly it is expressed. In the context of the *Charter*, the logic of the presumption is turned on its head: it does not operate in this context to ensure the relevant legislative body remains vested with its constitutional authority, but rather to divest it of authority.

Other difficulties arise if the presumption is applied to constitutional interpretation. For instance, it might be noted that the Supreme Court has consistently stated that *all* decisions of the executive—including those stemming from the royal prerogative—are subject to *Charter* scrutiny.[125] Thus, the effects of treaties must be consistent with the *Charter*, and executive efforts to generate legal results through treaties "are as much

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118 See e.g. *Re Warren*, [1983] OJ No 113 at para 7, 35 CR (3d) 173 (Ont HC) ("Since the meaning of s. 11(a) is not completely clear on its face, resort should be had to the [*ICCPR*] as a tool of statutory interpretation"); *R v Videoflicks*, [1984] OJ No 3379, 14 DLR (4th) 10 (CA); Bayefsky, *Human Rights*, *supra* note 2 at 100-105.

119 Irit Weiser, "Effect in Domestic Law of International Human Rights Treaties Ratified Without Implementing Legislation" (1998) Can Council Int'l L Proc 132 at 133; Weiser, "Undressing", *supra* note 87 at 148. Even strong proponents of using international law as an interpretive aid in constitutional interpretation note this "serious objection". See e.g. The Honorable Justice Michael Kirby, "International Law – The Impact on National Constitutions" (7th Annual Grotius Lecture delivered at the Annual Meeting of the American Society of International Law, Washington DC, 29 March 2005), [unpublished].

120 Bayefsky, *Human Rights*, *supra* note 2 at 95.

121 See *Capital Cities*, *supra* note 103 at 173 ("I do not find any ambiguity that would require resort" to the relevant international Convention); *Schavernoch v Foreign Claims Commission*, [1982] 1 SCR 1092 at 1098, 1982 CanLII 191; *National Corn, supra* note 7, at 1371-1372.

122 Bayefsky, *Human Rights*, *supra* note 2 at 67-68; *Daniels v R*, [1968] SCR 517 at 541, [1968] RCS 517.

123 Hogg, *supra* note 29, ch 11, 6-9 (emphasis added).

124 But see the opinion of Justice Iacobucci in *Baker*, *supra* note 8 at paras 79-81 ("one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch").

125 See e.g. *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 455, 18 DLR (4th) 481 and *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 36, [2010] 1 SCR 44.

subject to the required conformity with the *Charter* as are legislative efforts."[126] If this is true, how can it also be that the proper *interpretation* of the *Charter* can be discerned with reference to an exercise of that same executive power? The analytical approach is entirely circular: the executive must act in accordance with the *Charter*, which must in turn be interpreted in accordance with a product of that executive action, that is, international treaties.

None of which is intended to suggest that it is illegitimate for the courts to abridge legislative authority, which is the very purpose of the *Charter*. Rather, it is simply to note the inaptness of applying statutory presumptions to constitutional interpretation without considering the important distinctions between the two exercises. As Chief Justice Dickson once observed, "[t]he task of expounding a constitution is crucially different from that of construing a statute."[127] I think that distinction requires careful attention in this context.[128]

As a result, I prefer the position adopted by Chief Justice McLachlin, dissenting in *R v Keegstra*.[129] The Chief Justice argued that while international human rights law may be helpful when interpreting the *Charter*, it would be wrong "to consider these obligations as determinative of or limiting the scope of those guarantees"; the *Charter* is a uniquely Canadian legal instrument, whose protections may depart from international covenants.[130] The Court's role here is, in a sense, to 'translate' relevant international norms "in a way that forwards a unique Canadian vision of law."[131] In my view, a meaningful presumption resulting in a form of 'creeping monism' is only slightly less troubling than a *de jure* monist system in the Canadian context, and for the same reasons: it would effectively permit the federal executive, in executing its power to adhere Canada to international legal obligations, to unilaterally modify, expand or contract the meaning of *Charter* guarantees. Along with the other difficulties raised above, I think any notion of a presumption of compliance should be avoided. Fortunately, there is an alternative approach that would avert these problems without losing the benefit of international human rights norms entirely.

B. The Relevant and Persuasive Approach

On the analysis above, the more rigorously any constitutional presumption of compliance or doctrine of incorporation is applied, the more constitutionally objectionable it becomes. However, there seems to be no compelling justification for excluding international sources from the matrix of factors that elucidate the purpose, meaning and scope of *Charter* rights and freedoms. In my opinion, the justification for the use of international legal sources in the context of *Charter* interpretation is rather straightforward, and indeed is well accepted in our legal culture. It is simply that "the search for wisdom is not to be circumscribed by national boundaries."[132] To the extent that international human rights laws and norms are helpful in construing the meaning of *Charter* provisions, it should only be to the extent

126 Bayefsky, *Human Rights*, *supra* note 2 at 27.

127 *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155, 11 DLR (4th) 641.

128 See also Weinrib, "Primer", *supra* note 102 at 329: "It must be a fundamental error to claim that international law has the same role to play in *Charter* interpretation as it does in the interpretation of an ordinary domestic statute."

129 *Keegstra*, *supra* note 12. In *Keegstra*, the majority of the Court cited the obligations to prohibit hate speech expressed in the *ICCPR* and other conventions in support of its finding that prohibition of hate speech was justifiable under section 1.

130 *Ibid* at 837-838.

131 La Forest, *supra* note 2 at 184, discussing the approach of members of the Court in *Keegstra*, *supra* note 12.

132 Hogg, *supra* note 29, ch 36, 39-43. See also Langille & Oliphant, *supra* note 33 at 229.

that they are considered relevant and persuasive on a given point of interpretation.[133] As others have observed, this 'relevant and persuasive' approach was indeed the principal thrust of the Chief Justice's reasons in the *Alberta Reference*, his invocation of a 'presumption' notwithstanding.[134] The approach envisioned here would, generally speaking, resemble the Court's use of comparative law sources: for elucidation where considered persuasive, as opposed to commanding statements of constitutional meaning.[135]

Amongst others, Gib van Ert has criticized the relevant and persuasive approach as evincing an "ultimately weak approach to international law," and one that departs from the common law system of reception, discussed above.[136] He suggests that the relevant and persuasive approach upsets the balance between self-governance and respect for international law "by empowering Canadian courts to ignore or depart from international conceptions of human rights with relative ease."[137] However, as noted above, courts are already permitted, and indeed required, to do so, if by "with relative ease" we mean upon clear direction from the relevant legislature. Respectfully, the argument that this approach is "too much self-government and too little respect for international law" appears to be based on the idea that the *Charter* operates like any other domestic legal document. To the contrary, unlike a common law or statutory presumption "reserving to our laws the power to depart from international norms by explicit action,"[138] such an approach may serve to prohibit explicit legislative action, and invalidate laws that are not in conformity with international obligations.

I do not mean to suggest that advocates of a presumption of compliance are without strong reasons for their position. Undoubtedly, ensuring adherence to international commitments is an objective to be lauded, and our elected representatives should take such obligations seriously. The more a considered opinion of the Court dovetails with Canada's international obligations, the better. In my view, however, the difficulties with the presumption raised above weigh heavier in the balance, and the fact that the relevant and persuasive approach is "unobjectionable"[139] seems to recommend it. The courts' responsibility in this context is to interpret the constitution, not to bend it to ensure compliance with international agreements entered into by the Crown. The hard task will be in constructing a framework for a principled approach to the use of relevant and persuasive international legal materials, a point to which I now turn.

III. RELEVANCE AND PERSUASIVENESS OF INTERNATIONAL LAWS & NORMS

If the above argument is accepted, we might be content to know that courts have not consistently applied anything approaching a meaningful presumption of compliance

133 Of course, one could conceivably put in place a 'weak' presumption, which would permit the presumption to be rebutted by, for instance, the factors identified here, or any other reason seen to be controlling. Such an approach might not differ markedly from the approach endorsed here. However, it is not clear to me in that case what is gained by terming it a 'presumption,' if that presumption is as likely to come to pass as not, given all of the many factors that might displace it.

134 van Ert, *Using*, *supra* note 90 at 339.

135 I think the approach defended here at least roughly parallels what Professor Weinrib calls the "comparative approach." See Weinrib, "Primer", *supra* note 102 at 326-328. See also La Forest, *supra* note 2 at 183, 187-189.

136 van Ert, *Using*, *supra* note 90 at 341.

137 *Ibid* at 342.

138 *Ibid*.

139 *Ibid*.

with international human rights obligations.[140] In effect, the Supreme Court has largely limited itself to discretionary use of international human rights law, which use has been "entirely permissive."[141] In so doing, however, the Court has opened itself up to the charge of inconsistency and 'cherry picking'—that is, only considering the relevant international law, norms or interpretations to the extent it supports a pre-determined conclusion.[142] While a staunch proponent of the use of international law in *Charter* interpretation, Professor Bayefsky suggests that the justification for its use has not been clearly articulated,[143] and the use is often selective, evidencing a "results oriented" approach.[144] Needless to say, if the use of international human rights laws and norms are considered relevant and potentially persuasive in the context of *Charter* interpretation, their use and consideration should not be limited to those circumstances where those law and norms support a conclusion at which the interpreter has already arrived. The following proposals are relatively unstructured, but raise for consideration issues that may lead to a more principled and consistent application of a relevant and persuasive approach.[145]

A. Relevance

First, the Court should take care to identify exactly what is to be considered 'relevant' in the context of *Charter* interpretation. Some judges[146] and scholars[147] have suggested that binding international law should be given more weight in *Charter* interpretation than international law to which Canada is not a party.[148] Indeed, if the rationale for the use of international law in *Charter* interpretation is a presumption of compliance with Canada's international *obligations*, it might be said that only those laws binding on Canada should be considered relevant to the exercise.

As the survey above reveals, however, the Court has not strictly adhered to any such distinction,[149] notwithstanding the belief that Chief Justice Dickson "clearly placed such

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140 See Bassan, *supra* note 94 at 593; Weiser, "Undressing", *supra* note 87 at 133; Schabas, *International*, *supra* note 1 at 232-233. See also Stephane Beaulac & JH Currie, "Canada" in Dinah Shelton, ed, *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (Oxford: Oxford University Press, 2011) at 125; Currie, *PIL*, *supra* note 96 at 259-261; van Ert, *Using*, *supra* note 90 at 323-351.

141 Weiser, "Undressing", *supra* note 87 at 133.

142 See Justice Scalia's comments in Norman Dorsen, "A conversation between U.S. Supreme Court justices" (2005) 3 Int J Con Law 519 at 522 [Dorsen] ("Well if you don't want (foreign sources) to be authoritative, then what is the criterion for citing it? That it agrees with you? I don't know any other criterion to bring forward.")

143 Bayefsky, *Human Rights*, *supra* note 2 at 93.

144 *Ibid* at 3, 93. Bayefsky makes a similar point with respect to the Court's use of international law that is not binding on Canada at 126-127.

145 From a slightly different perspective, see also the helpful discussion in Weiser, "Undressing", *supra* note 87 at 143-155.

146 *Alberta Reference*, *supra* note 14 at 349 (presumption applies to "international human rights documents which Canada has ratified"); *B.C. Health*, *supra* note 27 (presumption applies to "international conventions to which Canada is a party"). See also Rothstein J's dissent in *Fraser, supra* note 27 at para 248, where he notes that because Canada is not bound by *Convention No 98*, it is "therefore inappropriate to interpret the scope of Canada's obligations on the basis of that Convention." See also *Burns*, *supra* note 41 at para 93 and *Suresh*, *supra* note 47 at para 76.

147 Bassan, *supra* note 94 at 590; Brunnee & Toope, *supra* note 3 at 18-20.

148 In one description, Justice Bastarache has said that the Court will consider non-binding instruments as "a guide to interpretation, while (binding international laws) are a 'relevant and persuasive factor' in *Charter* interpretation." Bastarache, "Use of Foreign Materials", *supra* note 13 at 434. It is not immediately clear to me what the difference is between a 'guide' and a 'factor' in interpretation, but the distinction does not appear to be helpful on the approach suggested here.

149 Macklem, "International Constitution", *supra* note 26 at 272.

binding norms in a paramount category."[150] Indeed, if it is accepted that international human rights norms can be useful to the courts only where relevant and persuasive to an issue before it, the binding status of the law *on Canada* specifically does not seem to be a salient consideration.[151] This conclusion flows from the same logic employed above: the federal executive—present, past or future—should not be able to unilaterally modify the meaning of the *Charter* by refusing to assent to a treaty or convention any more than by executing or adhering to one. If international laws, norms and interpretations thereof can help the courts better ascertain the meaning of the *Charter*, this would seem to be so independent of decisions made by the federal executive at any given moment.[152]

Nor does it seem particularly relevant when those international laws, norms, or interpretations came to be recognized. William Schabas applauds Chief Justice Dickson's approach on this point, arguing that "it is significant that he does not at all insist upon the role the international instruments played in the drafting of the *Charter*," as such an approach "may tend to focus the attention of judges on the state of international human rights law" on the date of the *Charter*'s adoption.[153] While the contemplation of the framers has been relied on as a justification for the use of international law,[154] undue emphasis on this justification would presumably imperil the only untouchable precept of Canadian constitutional interpretation: the document is not frozen in any period of time but is a 'living tree'.[155]

Nevertheless, such 'intentionalist' justifications can and have appeared on both sides of the equation, as noted above. In *B.C. Health*, the majority considered it important that the international agreements to which it made reference "were adopted by the ILO prior to the advent of the *Charter* and were within the contemplation of the framers of the *Charter*."[156] Conversely, the framers' decision to deliberately leave out specific rights contained in international documents appeared to support the opposite conclusion in cases like *Prosper*. Leaving aside the analytical inconsistency between these approaches, both positions are difficult to maintain in light of the Court's apparent rejection of the framer's intent in clarifying the scope of *Charter* rights and freedoms.[157] Until the Court's disinterest in the framer's intent wavers, it would seem anomalous to rely on what was

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150 Schabas, *International*, *supra* note 1 at 38.

151 On this point, see La Forest, *supra* note 2 at 185.

152 It should be noted that whether or not the law in question is binding on Canada certainly would be of central importance in other contexts. See *supra*, notes 7-11 and surrounding text.

153 Schabas, *International*, *supra* note 1 at 46.

154 See Bayefsky, *Human Rights*, *supra* note 2 at 33-66, 100-105.

155 See e.g. *Hislop*, *supra* note 114 at para 94.

156 *B.C. Health*, *supra* note 27 at para 78. The implication that the contemplation of the framers should be considered a relevant factor in *Charter* interpretation proved temporary, and was duly qualified in the very next sentence: "For another, the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians."

157 See e.g. *Motor Vehicle Reference*, *supra* note 40 at 504-507; *Reference re Employment Insurance Act (Can), ss 22 and 23*, 2005 SCC 56 at para 9, [2005] 2 SCR 669; Hogg, *supra* note 29, ch 60, 7-8 ("Indeed, as has been narrated, while Americans have debated whether the 'original understanding' should be binding, Canadians have debated whether evidence of the 'original understanding' should even be disclosed to the Court!"); Justice Ian Binnie, "Constitutional Interpretation and Original Intent" in Grant Huscroft and Ian Brodie, eds, *Constitutionalism in the Charter Era* (Markham, Ontario: LexisNexis, 2004) 345 at 370 (the doctrine of 'original intent' "has never really taken hold in Canada and is… unlikely to do so"); Adam Dodek, "The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits" (2008) 41 Sup Ct L Rev 331 at 333-334 ("Originalism is a dirty word in Canadian constitutional law... [it] is either ignored or denigrated in Canada."). But see Bradley W Miller, "Beguiled by Metaphors: The "Living Tree" and Originalist Constitutional Interpretation in Canada" (2009) 22 Can JL & Jur 331.

presumed to be in their assumed 'contemplation' in this context while not typically giving any effect to their intent in drafting the specific *Charter* provisions themselves.

It should also be noted that while the Court has usefully cautioned against using international human rights norms as a means of limiting the protections afforded by the *Charter*,[158] the same cautionary logic would appear to extend to impermissibly expanding protections well beyond the language of the *Charter*, which may unduly limit the operation of the democratic branches of government. If international human rights law can be a lodestar, there seems to be no principle by which it should not be meaningfully addressed (although not necessarily followed) whether it leads to an expansive or narrow interpretation of the *Charter*. As Professor Hogg has pointed out, a purposive interpretation of the *Charter* is not necessarily generous or expansive: it is purposive.[159] Legislatures and courts will often face intractable trade-offs where the expansion of one important interest leads to at least some contraction of the other. There would appear to be no sound basis for an automatic presumption in favour of either outcome. The 'presumption' should simply be that the courts will uniformly address relevant international law and interpretations thereof, and will at least make some effort to explain why it is deemed relevant or persuasive (or not) beyond simply noting that it happens to support a given conclusion.[160]

By contrast, one factor that may be important in assessing the relevance of a given international norm seems obvious: a court should seek to identify a specific provision in the *Charter* that can support the interpretation offered. Where the text, history or purpose of the *Charter* provision can only with great difficulty shoulder the international law or norm sought to be applied, courts may legitimately question whether the latter is particularly relevant to the proper interpretation of the former.[161] This consideration may explain the Court's reluctance to read property protections or positive social and economic rights into the *Charter* given the conspicuous absence of such provisions in the text.[162]

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158 See *R v Cook*, [1998] 2 SCR 597 at para 148, 164 DLR (4th) 1. See also Weiser, "Undressing", *supra* note 87 at 140.

159 Hogg, *supra* note 29, ch 36, 30-31.

160 Moreover, it is not immediately obvious why dictates of human rights treaties signed in the 1960s, for instance, are or should be dispositive of obligations under the *Charter* half a century later. See on this point La Forest, *supra* note 2 at 216, who discusses the "danger of crystallization" where international human rights law is not "tested and translated" into the contemporary Canadian context.

161 See the discussion of *Gosselin* and *Irwin Toy* in Part I, above. See also Schabas, *International*, *supra* note 1 at 27 ("If the role and influence of the *Covenant* in the drafting of the *Charter* is inescapable, there are also significant and substantial differences that militate against the implication approach. Several rights found in the *Covenant* do not appear at all in the *Charter*, among them the right to property as well as the full range of economic, social and cultural rights. In some cases, the wording of texts is inspired by common law provisions rather than the international model.") By contrast, international human rights norms may be more clearly relevant in cases involving discrete interactions with the justice system, or where an individual's life or security of person are undoubtedly in jeopardy, as was the case in *Burns*. There is little doubt that *Charter* protected interests are potentially implicated in such cases, and the international norms developed in this area would be directly relevant to a specific *Charter* provision. Similarly, there is little doubt that the Conventions relating to freedom of association may be relevant to cases involving section 2(d) in the workplace. In such cases, what remains to be demonstrated is the *persuasiveness* of a given law, norm or interpretation in the context of the specific case.

162 I do not mean to suggest such interpretations would be necessarily illegitimate, but only that the absence of clear textual authority in the *Charter* may be one factor that the Court might consider in assessing the relevance of a given international treaty, law or norm to a given case. On the *Charter* as a vehicle for property rights, see the sources cited in *supra* note 76. With respect to social and economic rights, see e.g. Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 J L & Soc Pol'y 117; and Arbour & Lafontaine, *supra* note 2 at 266-273.

This discussion of relevance might alert us to another difficulty with basing the use of international legal sources on the importance of Canada adhering to its international obligations; there is no obvious reason why this rationale would be limited to foundational human rights treaties. The case of *Canada (Attorney General) v PHS Community Services Society* (the "*Insite* case")[163] may illustrate the problem, as it has been suggested that the tolerance of safe injection sites might place Canada in violation of its international obligations with respect to narcotics control.[164] I make no comment on the cogency of the argument as it would have applied in that case, and the issue was not addressed by the Court. However, if the presumption is based on the importance of adherence to Canada's international commitments, *as such*, there seems to be no obvious reason why this type of commitment should not come into play in the Court's reasoning, even if the international law or agreement in question is not in the nature of a human rights treaty. By contrast, whatever Canada's international law enforcement commitments, such an international obligation would plainly not be *relevant* to developing the content of the right to life, liberty or security of person on the theory presented here.

As such, it is proposed that relevance of a given international law, norm or interpretation would be established not by the date of its enactment, the contemplation of the framers, or the 'bindingness' of the law or norm on Canada specifically. Nor would it be particularly relevant that Canada had entered into a treaty or agreement unrelated to the right or freedom in question, but obliquely pulling toward a restrictive (or expansive) interpretation thereof. Rather, the question of relevance as envisioned here would be a relatively low bar, focusing largely on whether or not the international law or norm is genuinely related to a provision found in the Canadian *Charter*, and in a meaningful sense enlightening on the points at issue in a given case. Unencumbered by any presumption of compliance, the Court can focus on identifying those documents and interpretations that are most clearly pertinent to the *Charter* provision and dispute in question. It can then proceed to decide if the existence of an international norm, or the arguments put forward in its support, is particularly persuasive in the context of a given case. This decision will often require close attention to the *reasons* provided—by drafters, courts, administrators, quasi-judicial bodies, committees, and others—for placing such interests above the democratic fray, which is the subject of the next section.

B. Persuasiveness

i. Looking at the 'Reasons'

One way to assess the persuasiveness of a given law or norm would be to identify the reasoning and deliberations that went into the drafting of the document, and to determine whether those reasons would be considered persuasive at this point in time and in our constitutional order. However, given the reluctance of the Court to ascribe much weight to the intentions of the *Charter*'s own framers, it is not clear that it would find the intention of the drafters of international agreements to be of greater utility, even if they were readily available. Instead, the Court may wish to turn to authoritative interpretations of those laws or norms for guidance as to their scope and the purposes behind those guarantees, and to ascertain the degree to which they shed light on the purposes behind the *Charter* provisions in question. Professor Hogg has noted that decisions of the UN Human Rights Committee, for instance, might be considered particularly persuasive "because they are considered interpretations by distinguished jurists of language and ideas that are similar to the language and ideas of the Charter."[165]

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163 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*Insite*].

164 See International Narcotics Control Board, *Report of the International Narcotics Control Board for 2011*, INCB, 2011, UN Doc E/2011/1, at paras 281-290.

165 Hogg, *supra* note 29, ch 36, 39-43.

The converse of this observation is, I think, that the interpretations of international law by international bodies should not be given greater force in elucidating the nature and scope of the *Canadian* constitution than their authoritativeness and arguments merit.

Thus, in determining the authoritativeness of the source, it will be important for the courts to thoughtfully address the mandate and function of the interpretive agent, and the context in which those decisions were taken. The Court's treatment of ILO law in *B.C. Health* provides a useful cautionary tale with respect to both understanding the relevant international law, and recognizing the authoritativeness or mandate of the interpretive bodies. In that case, the Court relied on decisions of the Committee of Freedom of Association (CFA)[166] in determining that "international law" supports a human right to collective bargaining that includes a duty to bargain in good faith. This conclusion was problematic for two reasons. Firstly, the entire structure of the ILO is based on the principle of *voluntary* collective bargaining,[167] which places no legal obligation on employers to bargain.[168] In other words, the premises did not support the Court's ultimate conclusion. In light of this point, the Court in *Fraser* noted that the ILO does not *prohibit* compulsory bargaining,[169] however this is a far less compelling justification for modifying the meaning of a *Charter* freedom than the original claim that the right to compulsory bargaining "is an integral component of freedom of association in international law."[170] Secondly, the CFA is a representative,[171] non-judicial body,[172] staffed by non-lawyers;[173] indeed, according to the ILO constitution, the CFA is incapable of 'making law.'[174] The body is tasked with finding *ad hoc* and politically acceptable compromises between labour, employers, and government's interests.[175] Although some may be perfectly comfortable with the Canadian courts directly delegating the interpretation of the *Charter*'s fundamental freedoms to political actors in Geneva,[176] this delegation is probably an outcome to be avoided, in the absence of the courts identifying and assessing the relevance and cogency of the reasons behind a particular conclusion.

For this reason, a court might justifiably place greater stock in the decisions of rigorous judicial bodies interpreting similar constitutional documents than it would to various quasi-judicial international bodies more beholden to the need for political and practical compromise. The fact that the latter may be operating under the auspices of international law does not, in itself, make its reasoning more persuasive. For example, although of course Canada is not a party to the *European Convention*, the ECHR is a scrupulous judicial body interpreting often-similar human rights protections, and the courts may be inclined to treat the relevant jurisprudence of these bodies as more authoritative and compelling than more administrative and political bodies, such as the CFA. However, again, the arguments provided—and their fit with the Canadian constitutional order and purposes behind the *Charter* provisions in question—should be paramount.

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166 *B.C. Health*, *supra* note 27 at paras 76-78.

167 Langille, "Freedom of Association Mess", *supra* note 33 at 197.

168 *Digest*, *supra* note 62 at para 926; Langille, "Can We Rely", *supra* note 32 at 291-293.

169 *Fraser*, *supra* note 27 at para 95.

170 *B.C. Health*, *supra* note 27 at para 20.

171 Hepple, "Right to Strike", *supra* note 62 at 137.

172 See Langille & Oliphant, *supra* note 33 at 201-205.

173 Langille, "Can We Rely", *supra* note 32.

174 *Ibid* at 287-288.

175 *Ibid* at 286-287.

176 According to Roy Adams, "[f]reedom of association is a general concept, the detailed meaning of which in the context of work has been delegated by the world community to the ILO to work out" (Adams, "Human Right", *supra* note 62 at 56). See also James Gray Pope, "The Right to Strike Under the United States Constitution" (2009) 15 CLELJ 209 at 223.

To put the matter bluntly, once we have shed the notion that the *Charter* presumptively reflects international human rights law or norms, it is typically the reasons underlying a law or norm that should be considered compelling. As such, the Court might quite reasonably find the opinion of a Canadian expert on the area of law in question, or the reasons of another domestic court interpreting similar provisions in its own constitution, to be more persuasive than an interpretation of international human rights documents by judicial or quasi-judicial bodies, international law experts, administrators, or monitoring bodies. As Chief Justice Dickson himself noted, international human rights norms and interpretations can be useful "in much the same way" as comparative law sources generally.[177] What matters most are the reasons offered, the context in which they are provided, and their persuasiveness in the context of the Canadian constitutional order, not the bare conclusions at which these bodies have arrived.

ii. The Existence of a Law or Norm as 'Persuasive'

It is often assumed that the mere existence of a particular norm or law would carry weight in the interpretation of a related *Charter* guarantee, perhaps in the nature of a 'six billion people can't be wrong' type argument. Such an approach is generally more compatible with a presumption of compliance with international obligations, as it is otherwise difficult to characterize the mere *existence* of a law, norm or interpretation as 'persuasive'. As noted above, the existence of a long-standing norm or law, and the deliberate decision *not* to include it expressly in the *Charter*, may just as easily lead the Court to avoid such an interpretation.

To the extent that the Court intends to rely on the very existence of a particular norm or law as a useful indicium of the meaning of the *Charter*, some effort should be made to determine its authoritativeness in the global legal order. The mere existence of a given norm might be a particularly compelling justification in the case of peremptory norms of customary international law, which are specifically derived from widespread international acceptance.[178] Admittedly, discerning such norms can be difficult; as the Court has noted, "it is often impossible to pinpoint when a norm is generally accepted and to identify who makes up the international community."[179] Moreover, where a certain norm has such widespread acceptance to have become a peremptory norm, it is difficult to imagine that it is not already protected by the *Charter*. Nevertheless, the existence of a meaningful international consensus on a given point may typically be considered more revelatory than an isolated normative argument stemming from but not required by an international treaty, even if advanced by an international oversight body.

By contrast, a norm that is not authoritative in international law and subject to significant controversy and disagreement would likely be less persuasive in any *Charter* interpretation.[180] Otherwise the Court would be merely citing one side of a debate.[181] Thus, courts may wish to be alert to whether they are relying on tangible and established

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177 *Alberta Reference*, *supra* note 14 at 348-349.

178 Peremptory norms are such that any violation of the norm would "shock the conscious of mankind" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep 15 at 23). The generally accepted list prohibits, for instance, genocide, slavery, apartheid and torture. See *Steen v Islamic Republic of Iran*, 2013 ONCA 30, 114 OR (3d) 206 at para 30, citing JH Currie, C Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* (Toronto: Irwin Law, 2007) at 159.

179 *Suresh*, *supra* note 47 at para 61.

180 John Claydon, "The Application of International Human Rights Law by Canadian Courts" (1981) 30 Buff L Rev 727 at 742.

181 On the ultimately contentious nature of rights claims at the international level, see Michael Ignatieff, "Human Rights as Politics", in Amy Gutmann, ed, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2003) 3 [Ignatieff].

international human rights laws and norms,[182] or non-authoritative interpretations of laws, treaties, conventions, and declarations. While the latter may be found persuasive, the courts would have to more clearly engage with the reasoning employed to determine its pertinence to the dispute in question.

For similar reasons, and while international human rights law cannot be easily categorized into permanent, watertight compartments of 'hard' and 'soft' law,[183] courts may consider it wise to generally attach lesser weight the 'softer' the law. This is simply because the softer and more 'symbolic' the law, the easier it is to attract universal assent,[184] and the further actual practice may be removed from commitment without a mechanism for effective international implementation or enforcement.[185] As Justice LeBel and Gloria Chao have written:

> many of these documents include aspirational declarations, programmes of action, guidelines and protocols, also known as 'soft law'. Although such general statements or declarations are useful as they allow obligations to be formed 'in a precise and restrictive form that would not be acceptable in a binding treaty,' by its very nature, 'soft law' does not set out how these principles may be applied in domestic legal orders.[186]

Thus, if the Court is relying on the very existence of a given law or norm as persuasive in the context of *Charter* interpretation, it might want to attend to the actual significance, permanence, and authoritativeness of that norm in the international arena. This is not to suggest that only binding or 'hard' international law could ever be considered useful. It is to suggest that where a court is relying solely on the collective wisdom of the international community in identifying the meaning of the *Charter*, it should take care to ensure a meaningful consensus or some demonstrable wisdom is in play.

Indeed, it could be argued that the 'six billion people can't be wrong' justification invites something of a paradox, in that the justification tends to dissipate the more useful the norm becomes. As alluded to above, fundamental human rights described at a high enough level of abstraction to achieve universal (or near universal) assent[187] are likely to be little help in interpreting the *Charter*.[188] Conversely, the further one particularizes a norm—for instance, by looking to specific decisions of an international tribunal, interpretations of oversight bodies, or non-binding instruments further specifying the content of a given right or freedom—the less likely the universal assent or obedience to the norm in question. In such situations, the mere presence of the norm becomes less compelling on the basis of collective assent, and the more important it becomes

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182 The difficulty in identifying these norms was noted in *Suresh*, *supra* note 47.

183 Ryan Goodman & Derek Jinks, "How to Influence States: Socialization and International Human Rights Law" (2004) 54 Duke LJ 621 at 687-698.

184 *Ibid* at 676-678; Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (Toronto: Oxford University Press, 2005) at 120.

185 Jack Donnelly, "The Social Construction of International Human Rights", in Tim Dunne & Nicholas J Wheeler, eds, *Human Rights in Global Politics* (Cambridge, UK: Cambridge University Press, 1999) 71 at 75.

186 LeBel & Chao, *supra* note 109 at 28.

187 van Ert, *Using*, *supra* note 90 at 331-332 ("The more general the language, and the more attainable the goals, the more likely the draft instrument is to become law and gain broad adherence.")

188 For instance, one suspects that torture, slavery and genocide—while clearly prohibited at international law—are incompatible with any plausible reading of the *Charter*. Similarly, there is little doubt that section 2(d) of the *Charter* contains at least the freedom to join and belong to a trade union without state molestation, in general terms, as is included in the *ICCPR* and *Convention No. 87*. However, as none of these general propositions are much in dispute, they may not be very helpful in understanding the meaning of our own constitution.

to look at the reasoning of the body offering its interpretation of the (more abstract) document that *actually* received widespread endorsement. There is much in between abstract universal commands that undoubtedly have the stamp of international law, and singular non-binding decisions of an international body pertaining to very different parties in very different circumstances from our own; but that is the point. On the relevant and persuasive approach, it will be rarely useful to a court to simply point in the general direction of a norm at international law, because if it were that easy to establish a proposition in a *Charter* case, it probably does not need establishing.

CONCLUSION

The above observations and suggestions are tentative only, and have been developed in light of the specific cases that have come before the Court to date. This paper barely scratches the surface of the issue, and there is no doubt that other factors may prove to be useful to a court in addressing the relevance and persuasiveness of international law in a given case.[189] Indeed, the subject matter in question—constitutional interpretation and human rights norms in international law—is indelibly political and nebulous on a number of intersecting planes, and does not lend itself to anything approaching hard and fast rules. As such, the recommendations here are relatively modest. Respectfully, I would submit that courts should resist the temptation to purportedly rely on a presumption of compliance, especially where that presumption is applied selectively. They should instead continue to rely on international legal norms to the extent that they are found relevant and persuasive in the context at hand, and in light of the specific *Charter* provision in question. Abandoning the pretence of a presumption of compliance would, in my view, lead to greater consistency and transparency in the courts' reasoning. If it is agreed that the mere existence of a law, norm, document, or interpretation will not often be considered an argument in itself, the courts may spend greater time addressing the relevance and persuasiveness of the material to the case at hand. If the courts purport to rely on the very existence of a given law or norm in coming to a conclusion about the meaning of the *Charter*, it should be clear that they are appealing to the presumed collective wisdom of the international community directly, and as much as possible identify the reasons why it is considered helpful in resolving the dispute in question.

At the same time, there is no good reason for the Court to entirely ignore international human rights norms, laws, or interpretations thereof in the process of interpreting the constitution, a position that has some purchase in the United States.[190] Just as with comparative law and academic authorities, the Court should draw on the strongest legal and normative arguments available in coming to its conclusions about the *Charter*'s meaning. That judges may do so inconsistently is not a point in favour of the Court artificially blinding itself to international legal materials entirely, so much as revealing an opportunity for greater doctrinal development. Greater consistency in this context can be best accomplished with a clear view towards why those international laws and norms are important, and how they further a purposive interpretation of the *Charter* in context of our unique constitutional order.

189 See especially Weiser, "Undressing", *supra* note 87.

190 See Justice Scalia's comments in Dorsen, *supra* note 142; Roger P Alford, "Misusing International Sources to Interpret the Constitution" (2004) 98 Am J Int'l L 57.