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THE RECEPTION OF INTERNATIONAL HUMAN RIGHTS LAW IN *CHARTER* LITIGATION: "NOT A BOX OF CHOCOLATES" BUT YOU STILL "NEVER KNOW WHAT YOU'RE GONNA GET"

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ABSTRACT

This article explores the reception of international human rights law (IHRL) in Canada. Focusing on the *Charter* context, it demonstrates that how IHRL applies in Canada continues to lack clarity despite repeated (and recent) efforts by the Supreme Court of Canada to provide it. This article argues that this lack of clarity is an important matter for the Court to address, particularly as IHRL is increasingly being invoked before courts and other tribunals around the world. It argues that the Court should adopt a methodology that: (i) endorses the "Dickson Doctrine," according to which the "minimum protection approach" is robustly applied for international human rights that are binding upon Canada, while relevant, non-binding international human rights are considered for their persuasive value when interpreting relevant *Charter* rights; and (ii) uses international legal principles to interpret IHRL and to determine the interpretive weight to afford to international legal materials. In doing so, it

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is crucial for the Supreme Court to finally heed long-standing calls to dispel uncertainty by clearly explaining its methodology and reconciling its jurisprudence. In addition to being consistent with existing jurisprudence, this approach would assist with narrowing the gap between Canada's international and domestic human rights obligations; acknowledge the binding nature of Canada's IHRL obligations; respect concerns for separation and divisions of powers; and, ultimately, contribute to maintaining the rule of law while providing additional clarity regarding the scope of fundamental rights and freedoms in Canada.

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RÉSUMÉ

Cet article explore la réception du droit international des droits de la personne (DIDP) au Canada. En se concentrant sur le contexte de la *Charte*, il démontre que l'application du DIDP au Canada manque encore de clarté malgré les efforts répétés (et récents) de la Cour suprême du Canada pour y remédier. Cet article soutient que ce manque de clarté est une question importante que la Cour doit aborder, d'autant plus que le DIDP est de plus en plus invoqué devant les cours et autres tribunaux à travers le monde. Il soutient que la Cour devrait adopter une méthodologie qui : (i) approuve la « Dickson Doctrine », selon laquelle l'« approche de protection minimale » est appliquée de manière rigoureuse pour les droits internationaux de la personne qui lient le Canada, tandis que les droits internationaux de la personne pertinents mais non contraignants sont pris en compte pour leur valeur persuasive lors de l'interprétation des droits pertinents de la *Charte*; et (ii) utilise les principes juridiques internationaux pour interpréter le DIDP et déterminer le poids interprétatif à accorder aux documents juridiques internationaux. Ce faisant, il est crucial que la Cour suprême tienne enfin compte des demandes de longue date visant à dissiper l'incertitude en expliquant clairement sa méthodologie et en harmonisant sa jurisprudence. En plus d'être conforme à la jurisprudence existante, cette approche contribuerait à réduire l'écart entre les obligations internationales et internes du Canada en matière de droits de la personne, reconnaîtrait le caractère contraignant des obligations du Canada en vertu du DIDP, respecterait les préoccupations relatives à la séparation et à la répartition des pouvoirs et, en fin de compte,

contribuerait à maintenir l'état de droit tout en clarifiant davantage la portée des droits et libertés fondamentaux au Canada.

INTRODUCTION

COMMENTING on the then-new *Canadian Charter of Rights and Freedoms* (*Charter*),[1] John P. Humphrey—a Canadian who authored the precursor for the "International Bill of Rights"[2]—lamented that it did not mention nor mirror more closely the International Bill of Rights.[3] In his view, this was "[c]ontrary to what might have been expected in a country which prides itself on its support of the United Nations."[4] Recognizing the value of a common interpretation of rights across jurisdictions, he noted that the "rich jurisprudence" from the European and Inter-American human rights systems—based on treaties that explicitly reference the *Universal Declaration of Human Rights* (*UDHR*)[5]—"would have been of great help to Canadian judges" when interpreting the scope of *Charter* rights.[6] A review of how international human rights law (IHRL) is received in Canada demonstrates that Humphrey's concerns were well-founded. Canadian courts have struggled to provide a clear methodology

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 The International Bill of Rights is comprised of the *Universal Declaration of Human Rights* (UNGA, 3rd Sess, UN Doc A/RES/217(III)[A] (1948) GA Res 217 (III) A) and the two primary universal human rights treaties: the *International Covenant on Civil and Political Rights* (16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]) and the *International Covenant on Economic, Social and Cultural Rights* (16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976) [*ICESCR*]).

3 John P Humphrey, "The New Charter of Rights and Freedoms and Canada's Obligations Under the International Bill of Rights", Montreal, McGill University Archives (files of the John Peters Humphrey Fonds, MG4127-C0007-1995-0032-101, container 7, file 101) at 1.

4 *Ibid* at 2.

5 See *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, Preamble (entered into force 3 September 1953) [*ECHR*]; *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123, Preamble (entered into force 18 July 1978) [*ACHR*].

6 Humphrey, *supra* note 3 at 2–3.

for how the evolving body of IHRL applies in Canada, which the Supreme Court of Canada ought to (finally)[7] address.

Focusing on the *Charter* context, this article explores the reception of IHRL in Canada—that is, how IHRL applies in the Canadian legal system. It demonstrates that the general practice of legislation not being passed that expressly implements the treaty-based human rights obligations that Canada has voluntarily incurred internationally[8] may make it unclear how IHRL applies domestically. Commenting on how Canadian courts ought to treat international law, Justice Stratas of the Federal Court of Appeal recently noted that "[i]nternational law is not a box of chocolates from which one can take what one wants, leaving the rest in the box."[9] While this is true—at least in terms of what international law obligations apply to Canada *internationally*—the absence of a clear methodology for the reception of IHRL endorsed by the Supreme Court means, to borrow the iconic words of Forrest Gump, that "you never know what you're gonna get"[10] *domestically* when IHRL is invoked in Canada.

This uncertainty should be intolerable to those who value the rule of law and/or the promise of IHRL. As John H. Currie noted over a decade ago, the lack of certainty with how IHRL applies in *Charter* cases is insupportable because it can have a profound effect on litigants, particularly those facing "life or death" situations.[11] In addition, Canada's global credibility is undermined when its voluntarily-assumed international obligations remain legally ineffective domestically.[12] To this, I add that the

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7 See e.g. John H Currie, "International Human Rights Law in the Supreme Court's Charter Jurisprudence: Commitment, Retrenchment *and* Retreat—In No Particular Order" (2010) 50 SCLR (2nd) 423 [Currie, "Charter Jurisprudence"].

8 But see *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIPA*]; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*DRIPA*]; *National Housing Strategy Act*, SC 2019, c 29, s 313 [*NHSA*]; Bill 29, *Interpretation Amendment Act, 2021*, 2nd Sess, 42nd Parl, British Columbia, 2021 (assented to 25 November 2021), SBC 2021, c 36.

9 *Canada v Boloh 1(A)*, 2023 FCA 120 at para 50 [*BOLOH* FCA], rev'g *Boloh 1(A) v Canada*, 2023 FC 98 [*BOLOH* FC], leave to appeal to SCC refused, 2023 CanLII 106674 (SCC).

10 *Forrest Gump*, dir by Robert Zemeckis (US: Paramount, 1994) at 00h:03m:37s.

11 "Charter Jurisprudence", *supra* note 7 at 454.

12 Louise Arbour & Fannie Lafontaine, "Beyond Self-Congratulations: The *Charter* at 25 in an International Perspective" (2007) 45:2 Osgoode Hall LJ 239 at 262.

growing recognition by courts and other tribunals around the world that IHRL imposes specific obligations capable of judicial enforcement[13] underscores that this matter needs to be addressed. With the potential for an international *jus commune* to emerge as IHRL evolves through legal proceedings worldwide—according to which a common understanding of obligations may develop by courts in one jurisdiction having recourse to decisions from other jurisdictions[14]—it is highly likely that litigants will increasingly invoke IHRL in Canada. For such claims to be adjudicated

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13 See, for example, *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, in which the European Court of Human Rights recognized that Switzerland's greenhouse gas emissions reduction target violated the right to private and family life of elderly Swiss women under the *ECHR*—while leaving open the question of whether it violated their right to life—because it was not sufficient to combat the threat of climate change (see [GC], No 53600/20 (9 April 2024), ECLI:CE:ECHR:2024:0409JUD005360020 at paras 538, 544, 573); *Urgenda Foundation v The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)*, in which the Dutch Supreme Court found that the Netherlands' greenhouse gas emissions target was insufficient to address the threat posed by climate change to the right to private and family life of Dutch residents and imposed a minimum greenhouse gas emissions reduction target for the Netherlands to achieve (see Hoge Raad der Nederlanden [Supreme Court of the Netherlands], The Hague, 20 December 2019, [2020] JBPr 2020/20 at para 7.5.1 (annotated by HW Wiersma), ECLI:NL:HR:2019:2007 (Netherlands) [*Urgenda*]); *Milieudefensie et al v Royal Dutch Shell PLC*, in which the Hague Court of Appeal upheld the finding that Shell owes a duty of care to residents of the Netherlands to reduce its greenhouse gas emissions and a responsibility to respect human rights in the context of climate change (see Gerechtshof Den Haag [The Hague Court of Appeal], The Hague, 12 November 2024, ECLI:NL:GHDHA:2024:2100 at paras 7.24–27, 7.57 (Netherlands)); *Obligations of States in Respect of Climate Change*, in which the International Court of Justice determined, among other things, that States have an obligation under IHRL to respect and ensure the enjoyment of human rights by taking necessary measures to protect the climate system and that they incur international responsibility if they fail to meet their obligations (see Advisory Opinion of 23 July 2025, ICJ General List No 187, online (pdf): <icj-cij.org> [perma.cc/BGQ5-Y384]); and *Views adopted by the Committee under article 5(4) of the Optional Protocol concerning communication No. 2348/2014*, in which the UN Human Rights Committee found that the rights to life under the *ICCPR* imposed positive obligations upon Canada, including to provide federal health insurance coverage to an irregular/illegal migrant without distinction based on migrant status (see UNHRC, 123rd Sess, UN Doc CCPR/C/123/D/2348/2014 (2018) at paras 11.3, 11.7 [*Toussaint* UNHRC]).

14 See Olivier De Schutter, "The Formation of a Common Law of Human Rights" in Emmanuelle Bribosia & Isabelle Rorive in collaboration with Ana Maria Corrêa, eds, *Human Rights Tectonics: Global Dynamics of Integration and Fragmentation* (Cambridge, UK: Intersentia, 2018) 3 at 18.

appropriately, counsel and the judiciary need a clearer understanding of how IHRL is received.

Finally, if this matter remains unaddressed, there is a risk that Canadian courts could interpret domestic human rights obligations so that they fall below their international equivalents. Although some may consider it unlikely for rights in Canada to be interpreted less expansively than their international equivalents,[15] the potential for this to occur exists and could be increasing in some contexts. An example of the domestic interpretation of rights potentially falling below IHRL equivalents may be emerging in the context of the right to life. In recent years, tribunals around the world have been finding that the right to life (and related rights) may impose positive obligations on States (and possibly even corporations) in the context of climate change.[16] While Canadian courts have, to date, resisted finding that the right to life under section 7 of the *Charter* imposes positive obligations,[17] the issue is directly relevant to current Canadian climate change litigation.[18] In addition, with respect to access to essential healthcare insurance for irregular/illegal migrants,

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15 See Gib van Ert, *Using International Law in Canadian Courts*, 3rd ed (Toronto: University of Toronto Press, 2024) at 483 [van Ert, *Using International Law*, 3rd ed].

16 See e.g. *Urgenda*, *supra* note 13 at para 5.6.2; *Toussaint* UNHRC, *supra* note 13 at para 11.3.

17 See e.g. *Mathur v Ontario*, 2024 ONCA 762 at para 49 [*Mathur*], leave for appeal to SCC refused, 2025 CanLII 38373 (SCC); *La Rose v Canada*, 2023 FCA 241 at paras 22, 92–93.

18 For example, see Chief Justice McLachlin's majority opinion in *Gosselin v Québec (Attorney General)*:

> Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.
>
> One day s. 7 may be interpreted to include positive obligations. ... It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases (see 2002 SCC 84 at paras 81–82 [emphasis omitted]).

Canada has also argued that section 7 "do[es] not impose positive obligations to legislate or mobilize public resources in any particular way" (see *La Rose v Canada*, 2020 FC 1008 (Statement of Defence at para 110)).

there is currently an unresolved gap in the interpretation of Canada's obligations. The Federal Court of Appeal has found that the rights to life and equality under sections 7 and 15 of the *Charter* do not impose an obligation on Canada to provide essential healthcare insurance; in contrast, the UN Human Rights Committee has found that such an obligation exists pursuant to the rights to life and non-discrimination under the *International Covenant on Civil and Political Rights* (*ICCPR*) and the *International Convention on the Elimination of All Forms of Racial Discrimination*.[19]

There appears to be insufficient attention (and possibly insufficient understanding) in Canada on how international law is received,[20] which could be attributed to the fact that most lawyers in Canada could consider international law to be "foreign" and not relevant to their work. In addition, the matter does not fit squarely within the silo of the mandatory courses taught in most Canadian law schools[21] because how international law is received domestically sits at the intersection of international law, constitutional law, administrative law, and general statutory interpretation. And since the reception of international law is a matter for each State's domestic law to determine, the topic is often not even taught in international law courses. A review of pleadings for recent claims in which IHRL could be invoked, for example, demonstrates litigants not invoking IHRL when it could bolster the strength of their arguments.[22]

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19 See Karinne Lantz, "Mind the Gap: *Toussaint* and the Reception of International Human Rights Law in Canada" (2024) 3 McGill GLSA Research Series 228; *Toussaint v Canada (Attorney General)*, 2011 FCA 213 [*Toussaint* FCA], aff'g 2010 FC 810 [*Toussaint* FC], leave to appeal to SCC refused, 2012 CanLII 17813 (SCC); *Toussaint* UNHRC, *supra* note 13.

20 Elisabeth Eid and Hoori Hamboyan suggest that the difficulty Canadian courts have had dealing with IHRL may be due to "the quality of the pleadings [the Supreme Court] receives" and, as a result, they "call upon those knowledgeable about international human rights law to better inform the legal community, which can in turn enlighten the judiciary" (see "Implementation by Canada of Its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical" in Oonagh E Fitzgerald, ed, *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto: Irwin Law, 2006) 449 at 459 [Fitzgerald, *Globalized*]).

21 At Dalhousie University's Schulich School of Law, the topic has been recently taught as part of a mandatory intensive course in first year, Law in its National and International Context.

22 For example, interveners in *Amnistie internationale Canada c Environnement Jeunesse* and *Mathur* were granted leave to appeal in order to make submissions regarding international law because arguments based on international law were not made by

Additionally, even when IHRL is invoked, the arguments are sometimes not as robust as they could be.

Through this article, I aspire to bring attention to this gap in understanding—which I (and others before me)[23] attribute, in part, to consistently unclear jurisprudence—and propose a clarified methodology to be applied in the *Charter* context. While the reception of IHRL needs to be addressed in all contexts (including statutory interpretation and judicial review), I focus here on *Charter* claims. I place particular attention on the recent *Bring Our Loved Ones Home* (*BOLOH*) litigation,[24] which demonstrates a persistent lack of methodological clarity. This is despite the fact that, in *Quebec (Attorney General) v. 9147-0732 Québec inc*. (*Québec inc.*),[25] the Supreme Court explicitly attempted to clarify the matter, with the majority (i) recognizing that "[a] principled framework" for how international (and foreign) sources are to be treated is "necessary and desirable, both to properly recognize Canada's international obligations and to provide consistent and clear guidance to courts and litigants";[26] and (ii) purporting to set out "a methodology for considering international and comparative sources" that "provides guidance and clarity."[27] In addition to illustrating that the Court's attempt to "provide consistent and clear guidance to courts and litigants"[28] for how international materials are to be treated in *Charter* applications fell short of its goal, *BOLOH* FCA may also demonstrate judicial skepticism—or, with respect, even hostility—toward IHRL playing a key role in generously and purposively interpreting the *Charter*. I argue that this skepticism may be attributed to (or made more possible by) the lack of a clear methodology. With the request for reconsideration of the Supreme Court's dismissal of leave to appeal in

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the parties (see *Amnistie internationale Canada c Environnement Jeunesse*, 2020 QCCA 223 at paras 22–27 [*Amnistie internationale*]; *Mathur*, *supra* note 17 at paras 6, 78).

23 See e.g. Currie, "Charter Jurisprudence", *supra* note 7.

24 *BOLOH* FCA, *supra* note 9; *BOLOH* FC, *supra* note 9.

25 2020 SCC 32 [*Québec inc*].

26 *Ibid* at para 27.

27 *Ibid*.

28 *Ibid*.

BOLOH not accepted for filing,[29] the litigation became another missed opportunity for this matter to be resolved.

This article begins in Part I with a summary of how international law is received in Canada, with a focus on treaty-based (i.e., "conventional") international law.[30] Part II examines the reception of IHRL in the *Charter* context. With particular attention on the *BOLOH* litigation, it demonstrates that the jurisprudence continues to lack clarity despite recent efforts to provide it. In Part III, I argue that, in *Charter* cases, the Supreme Court should adopt a methodology that: (i) endorses the "Dickson Doctrine,"[31] according to which the "minimum protection approach" is robustly applied for binding international human rights, while relevant, non-binding international human rights are considered for their persuasive value when interpreting *Charter* rights; and (ii) uses international legal principles to interpret IHRL and to determine the interpretive weight to afford to international legal materials. In doing so, it is crucial for the Supreme Court to finally heed long-standing calls to dispel uncertainty by clearly explaining its approach and reconciling existing jurisprudence.[32] This article concludes that, in addition to being consistent with existing jurisprudence, the proposed approach would narrow the instances in which Canada's IHRL obligations could be found to have no domestic effect while respecting concerns for separation and division of powers. Ultimately, the endorsement and consistent application of a clear methodology would address concerns regarding the selective treatment of IHRL, which contributes to maintaining the rule of law while providing overdue clarity for how our courts will determine the scope of fundamental rights in Canada.

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29 *Boloh 1(a), et al v His Majesty the King, et al*, SCC 40851 (Letter by the Registrar, reconsideration not accepted for filing).

30 See generally van Ert, *Using International Law*, 3rd ed, *supra* note 15 at 284–379; Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008) at 272–78 [van Ert, *Using International Law*, 2nd ed].

31 See Currie, "Charter Jurisprudence", *supra* note 7 at 432.

32 See Currie, "Charter Jurisprudence", *supra* note 7.

I. THE RECEPTION OF INTERNATIONAL LAW IN CANADA

A. General Reception Law Principles

Since Canada's constitution does not address how international law is received (i.e., has domestic legal effect)[33] and the matter is not addressed through other legislation,[34] Canadian reception law has developed judicially.[35] Canada has a "hybrid" system with international law either applying directly or requiring implementation (i.e., incorporation into the legal system) depending on whether it derives from customary international law or treaties (which are the two primary sources of international law, discussed more fully below in Part III).[36] Canada is monist for customary international law, which means that customary international law automatically forms part of Canadian law absent contrary legislation.[37] In contrast, Canada is dualist for conventional international law,[38] with the general starting point being that, to have domestic effect,

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33 See van Ert, *Using International Law*, 3rd ed, *supra* note 15 at 109–11; Armand de Mestral & Evan Fox-Decent, "Implementation and Reception: The Congeniality of Canada's Legal Order to International Law" in Fitzgerald, *Globalized*, *supra* note 20, 31 at 33.

34 See de Mestral & Fox-Decent, *supra* note 33 at 82.

35 See van Ert, *Using International Law*, 3rd ed, *supra* note 15 at 109–11.

36 *Ibid* at 5.

37 But see John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 227–34 [Currie, *International Law*]. Any such doubt has likely since been dispelled; as Justice Abella wrote in *Nevsun Resources Ltd v Araya*:

> [C]ustomary international law is automatically adopted into domestic law without any need for legislative action. ...
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> ... Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation. ...
>
> There is no doubt then, that customary international law is also the law of Canada (see 2020 SCC 5 at paras 86, 90, 95 [*Nevsun Resources*] [references omitted]).

38 See e.g. van Ert, *Using International Law*, 3rd ed, *supra* note 15 at 4–5.

treaties Canada has ratified must be implemented, which is—usually[39]—achieved legislatively.[40]

An important interpretive principle outside of the *Charter* context is the "presumption of conformity," through which Canadian law is to be interpreted so that Canada meets its international obligations.[41] As a rebuttable presumption, domestic legislation evidencing the legislature's intention to not abide by Canada's international obligations will prevail even if it results in Canada violating its international obligations.[42] Explored below, a similar but different (or "varied")[43] interpretive principle applies in the *Charter* context, according to which *Charter* rights are supposed to be presumptively interpreted so that they—*at a minimum*—meet Canada's IHRL obligations (which I refer to in this article as the "minimum protection approach" to avoid unnecessary confusion with the presumption of conformity). Through the minimum protection approach, Canada's IHRL obligations set a conceptual floor for the interpretation of corresponding *Charter* rights.[44]

B. The Reception of Conventional International Law

Under dualism for conventional international law, the general starting point is that, to have domestic effect, treaties that Canada has ratified must be (legislatively) implemented. As the Supreme Court held in

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39 But some identify at least thirteen different methods of implementation (see e.g. de Mestral & Fox-Decent, *supra* note 33 at 45; John Mark Keyes & Ruth Sullivan, "A Legislative Perspective on the Interaction of International and Domestic Law" in Fitzgerald, *Globalized*, *supra* note 20, 277 at 310; Gib van Ert, "Domestic Reception of International Law" in Phillip M Saunders & Robert J Currie, eds, *Kindred's International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Edmond Montgomery, 2019) 153 at 246 [van Ert, "Domestic Reception"]).

40 See e.g. *Capital Cities Comm v CRTC*, 1977 CanLII 12 at 173 (SCC). See also van Ert, *Using International Law*, 2nd ed, *supra* note 30 at 236; *Nevsun Resources*, *supra* note 37 at para 85.

41 See e.g. van Ert, *Using International Law*, 3rd ed, *supra* note 15 at 166. See also *R v Hape*, 2007 SCC 26 at paras 53–54 [*Hape*].

42 See e.g. Currie, *International Law*, *supra* note 37 at 234; van Ert, *Using International Law*, 3rd ed, *supra* note 15 at 153–65. See also *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 60 [*Kazemi*].

43 See van Ert, *Using International Law*, 3rd ed, *supra* note 15 at 482.

44 See Currie, "Charter Jurisprudence", *supra* note 7.

Capital Cities Communications v. C.R.T.C., "[t]here would be no domestic ... consequences [of the *Inter-American Radio-communications Convention*] unless they arose from implementing legislation giving the Convention a legal effect within Canada."[45] However, this simple rule may obscure complications that arise in practice. Complexity arises, in part, because implementation may take a variety of forms, which can make it unclear whether a treaty is implemented.[46] And, as will be explored more fully below, while appearing rigid, the dualist approach has softened, in some instances, due to judicial interpretive methods.

Dualism for Canada's treaty-based international obligations helps to avoid issues that could otherwise arise on account of the separation of powers between the executive and legislative branches of government, and Canada's federalist structure. First, with respect to separation of powers, dualism avoids the federal executive exercising an unconstitutional law-making function when the executive exercises its prerogative to ratify treaties independent of Parliament.[47] Under the dualist approach, although the Crown can exercise its sole authority to enter into a treaty (and thereby incur obligations for Canada internationally), the treaty does not affect domestic law unless it has been implemented—usually legislatively. This subjects Canada's treaty obligations to the usual domestic legislative process before they can affect domestic law.

With respect to division of powers, dualism avoids the federal executive infringing upon areas of provincial or territorial jurisdiction when it ratifies treaties regarding matters under provincial or territorial jurisdiction. Although the federal executive has the sole authority to ratify treaties, the authority to pass legislation making treaties domestically

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45 *Supra* note 40 at 173. See also van Ert, *Using International Law*, 2nd ed, *supra* note 30 at 236; *Nevsun Resources*, *supra* note 37 at para 85.

46 See e.g. de Mestral & Fox-Decent, *supra* note 33 at 45; van Ert, "Domestic Reception", *supra* note 39 ("[l]egislative implementation of Canadian treaty obligations can take a confusing variety of forms. No particular form of words is required, and no standard practice has yet emerged. Academics have at times tried to identify and categorize the ways in which implementation can occur, but the results are a bit like cataloguing snowflakes" at 212).

47 See van Ert, *Using International Law*, 2nd ed, *supra* note 30 at 92–98.

effective falls on Parliament and provincial or territorial legislatures in accordance with the constitutional division of powers.[48]

While separation and division of powers concerns provide seemingly compelling arguments against interpretive methods that would narrow the gap between Canada's international and domestic human rights obligations, from a practical perspective the strength of these arguments may be overstated.[49] With respect to separation of powers, unlike in some other countries,[50] the federal executive in Canada has no formal obligation to consult Parliament prior to ratifying treaties; however, a policy has been in place since 2008 for treaties being considered for ratification to be tabled in Parliament for comment.[51] To ameliorate division of powers concerns, as a matter of practice, Canada does not ratify a treaty with implications for matters under provincial or territorial jurisdiction until the federal government has: (i) obtained provincial and territorial support for ratification, and (ii) ensured that federal and provincial or territorial laws and policies are consistent with the treaty's obligations (or could be addressed by a reservation or declaration upon ratification).[52] It should be noted that this latter practice may contribute to legislation not generally being passed specifically implementing human rights treaties;[53] if laws and policies in Canada are already consistent with treaty obligations (at least in the opinion of the executive and legislative branches of

48 See *ibid* at 99.

49 See e.g. Keyes & Sullivan, *supra* note 39 at 279–81.

50 See Joanna Harrington, "The Role for Parliament in Treaty-Making" in Fitzgerald, *Globalized*, *supra* note 20, 159 at 162.

51 Global Affairs Canada, "Policy on Tabling of Treaties in Parliament" (last visited 13 July 2023), online: <treaty-accord.gc.ca> [perma.cc/R328-M264].

52 Laura Barnett, *Canada's Approach to the Treaty-Making Process*, Publication No 2008-45-E (Ottawa: Library of Parliament, 1 April 2021) at 5, online (pdf): <lop.parl.ca> [perma.cc/XPV7-544Y] [Barnett, *Treaty-Making Process*]. See also Oonagh Fitzgerald, "Understanding the Question of Legitimacy in the Interplay Between Domestic and International Law" in Fitzgerald, *Globalized*, *supra* note 20, 125 at 148–49; Department of Justice Canada, "International Human Rights Treaty Adherence Process in Canada" (last visited 16 January 2026), online: <justice.gc.ca> [perma.cc/AW9M-VTJJ].

53 See e.g. *List of issues in relation to the sixth periodic report of Canada: Replies of Canada to the list of issues*, UNCESCR, 57th Sess, UN Doc E/C.12/CAN/Q/6/Add.1 (2016) at para 2; *Implementation of the International Covenant on Economic, Social and Cultural Rights: Fourth Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant*, UNESC, UN Doc E/C.12/4/Add.15 (2004) at para 17.

government), express legislative implementation is, arguably, superfluous.[54]

C. *The Reception of International Human Rights Law*

There is potential for a gap to arise in the reception of IHRL because, although some international human rights form part of customary international law (which would mean these rights are automatically adopted into Canadian law absent legislation to the contrary), IHRL is primarily treaty-based (at least for now).[55] As such, rights to which Canada has internationally committed by ratifying a treaty may be considered legally ineffective domestically because the treaty has not been legislatively implemented. The potential for such a gap is exacerbated by the general practice of not passing legislation that expressly implements human rights treaties, discussed above.[56]

As noted above, in some instances, judicial interpretive methods have opened the door for Canada's IHRL obligations to have the potential for domestic effect even where human rights treaties have not been expressly legislatively implemented. The most potent of these methods is the minimum protection approach—discussed in the next part—whereby the *Charter* is taken as implementing a relevant international right and binding IHRL is presumed to provide a minimum standard for interpreting the corresponding *Charter* right.[57]

A gap may also be avoided or narrowed in non-*Charter* contexts when ratified but unimplemented human rights treaties are considered relevant sources when taking a contextual approach to interpreting

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54 See e.g. Barnett, *Treaty-Making Process*, *supra* note 52.

55 It should be noted that, through the process of "crystallization," widespread State practice adhering to treaty-based obligations may result in the obligations forming part of customary international law.

56 But see *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, SNWT 2023, c 36; *UNDRIPA*, *supra* note 8; *DRIPA*, *supra* note 8, s 1(1). There has also been legislation passed that references human rights treaties or specific rights without expressly implementing them (see e.g. *NHSA*, *supra* note 8; *Poverty Reduction Act*, SC 2019, c 29, s 315).

57 See e.g. *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 64–65 [*SFL*].

legislation and reviewing administrative decision-making.[58] However, in both the non-*Charter* and *Charter* contexts, Canadian courts have not clearly endorsed nor explained the methodology to follow when IHRL is invoked before them. The lack of a clear methodology is problematic because it increases uncertainty regarding how Canadian courts will handle arguments invoking IHRL and what international human rights obligations, if any, will be considered relevant to the claim. It may also fuel concerns about the rule of law and exacerbate a possible perception that litigants and the judiciary are picking and choosing what IHRL applies to a given circumstance—which, as discussed below, was a concern expressed in *BOLOH* FCA.[59]

Although this article focuses on the *Charter* context, it should be noted that there is also a strong need for clarity on how IHRL is received in other instances. The uncertainty regarding how IHRL applies in the non-*Charter* context could be a contributing factor to some courts being less willing to engage substantively with arguments invoking IHRL in the *Charter* context. This uncertainty may be traced to *Baker v. Canada (Minister of Citizenship and Immigration)* (*Baker*), in which the majority of the Supreme Court opened the door to ratified-but-legislatively-unimplemented human rights treaties to affect judicial review of administrative decisions.[60] In *Baker*, the majority held that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review";[61] however, the Court did not explain how to identify and define the "values" of IHRL and did not provide guidance on how this works in practice. As a result, while *Baker* signalled the adoption of a more relaxed approach to dualism for human rights treaties, [62] it has been criticized for fuelling considerable

58 See e.g. *Baker v Canada (Citizenship and Immigration)*, 1999 CanLII 699 (SCC) [*Baker*]; *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 114 [*Vavilov*].

59 *Supra* note 9 at para 50.

60 *Supra* note 58.

61 *Ibid* at paras 69–70.

62 See e.g. Currie, *International Law*, *supra* note 37 at 258; John H Currie et al, *International Law: Doctrine, Theory, and Practice*, 3rd ed (Toronto: Irwin Law, 2022) at 170–71. See also Hugh W Kindred, "The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach" in Fitzgerald, *Globalized*, *supra* note 20, 5 at 28.

confusion.[63] Allowing—but not requiring—the "values" of IHRL drawn from legislatively-unimplemented treaties to affect statutory interpretation and judicial review may allow for IHRL obligations to have more domestic effect. But with no real guidance on how this works in practice, there is a risk of inconsistency, with some courts being more receptive to IHRL-based arguments than others.

Baker's influence can be seen in cases that followed,[64] including *R. v. Hape* (*Hape*), where the Supreme Court asserted that the "values and principles" of international law "form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them."[65] However, the uncertainty that persists regarding what the "values" and "principles" of international (human rights) law really mean and how they are to be identified and applied underscores the need for the Court to address the reception of IHRL in all contexts. In the face of methodological uncertainty regarding the reception of IHRL, courts may (inconsistently) avoid the matter and default to the enticingly simple rule that treaties must be implemented to have domestic effect and simply disregard IHRL[66]—even in *Charter* cases[67] where, as will be discussed below,

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63 See e.g. Amissi M Manirabona & François Crépeau, "Enhancing the Implementation of Human Rights Treaties in Canadian Law: The Need for a National Monitoring Body" (2012) 1:1 Can J Human Rights 25 at 37, 41.

64 See e.g. *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 72; *Vavilov*, *supra* note 58 at para 114; *Thales DIS Canada Inc v Ontario (Transportation)*, 2023 ONCA 866 at para 95, leave to appeal to SCC refused, 2024 CanLII 101526 (SCC); *N v F*, 2021 ONCA 614 at para 179, Brown JA, concurring, aff'd *F v N*, 2022 SCC 51.

65 *Supra* note 41 at para 53.

66 Despite finding that *Baker* had established that "values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review" (see *Nova Scotia (Community Services) v VAH*, 2019 NSCA 72 at para 18 [*VAH*], citing *Baker*, *supra* note 58 at para 70), the unanimous Nova Scotia Court of Appeal concluded that the *Convention on the Rights of the Child*—the same treaty that was applied by the majority in *Baker*—and the *Convention on the Rights of Persons with Disabilities* were unimplemented and, therefore, their values and principles were not relevant to interpreting the Nova Scotia *Child and Family Services Act* (see *VAH*, *supra* note 66 at paras 13–23).

67 See e.g. *Toussaint* FC, *supra* note 19 at para 70.

the *Charter* can be seen as implementing corresponding international rights.[68]

II. INTERNATIONAL HUMAN RIGHTS LAW AND THE *CHARTER*

A. *The* Charter *as Implementing International Human Rights Law*

As William Schabas has noted, "[t]he most frequent resort to international law by the Supreme Court of Canada has been in the interpretation of the [*Charter*]."[69] While, on its face, it may appear to run counter to dualism for conventional international law, taking Canada's international human rights obligations into account in *Charter* cases is consistent with dualism if the *Charter* is seen as implementing Canada's relevant international obligations.[70] It is also supported by the fact that, although not expressly mentioned in the *Charter*, IHRL—particularly the *ICCPR*—provided "inspiration and guidance" for the drafting of the *Charter*.[71] Further, as Gérard La Forest has explained extrajudicially, "[t]he protection of human rights is not a uniquely Canadian concept and just as the drafters of the *Charter* drew on the experience and successes of the international human rights movement, so too would it be necessary for the Canadian courts to look abroad" when interpreting the *Charter*.[72]

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68 It should be noted that there was a strong dissent in *Baker* reflecting concerns for separation of powers in the administrative law context; however, the dissent suggested that it would not find it controversial to have recourse to IHRL in *Charter* cases (see *Baker*, *supra* note 58 at paras 80–81, Cory & Iacobucci JJ, dissenting).

69 William A Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79:2 Can Bar Rev 174 at 185.

70 *R v Ewanchuk*, 1999 CanLII 711 (SCC) ("[o]ur *Charter* is the primary vehicle through which international human rights achieve a domestic effect" at para 73 [references omitted]).

71 Van Ert, *Using International Law*, 2nd ed, *supra* note 30 at 333. See also Canadian Human Rights Commission, "About Human Rights" (last modified 8 October 2025), online: <chrc-ccdp.gc.ca> [perma.cc/TZC5-2EEP].

72 Mr Justice GV La Forest, "The Use of International and Foreign Material in the Supreme Court of Canada" in Brian Etherington et al, eds, *Canada and Europe: An Evolving Relationship: Proceedings of the Seventeenth Annual Conference Canadian Council on International Law, Ottawa, 1988* (Ottawa: Canadian Council on International Law, 1988) 230 at 230, cited in The Honourable Louis LeBel & Gloria Chao, "The Rise of

Despite the familiarity the Supreme Court ought to have with how IHRL affects *Charter* interpretation, there has been dissatisfaction expressed—particularly from international lawyers—with its jurisprudence.[73] The lack of clarity is reflected in the difficulty commentators have had explaining the jurisprudence. Writing in 2008, Gib van Ert identified three interpretive approaches: (i) the "relevant and persuasive approach," (ii) "the presumption of minimum protection," and (iii) "the context and values approach."[74] Currie, writing in 2010, would "possibly" have added a fourth approach, according to which IHRL would be considered "(as part of Canada's overall international legal obligations) a body of law with which the courts 'should seek to ensure compliance.'"[75] In Currie's view, "[t]hese are all plainly different rules" that he argued needed to be reconciled to avoid perpetuating interpretive difficulties.[76] Returning to the matter in 2024, van Ert notes that "for much of the Charter's history the Supreme Court of Canada's jurisprudence failed to provide predictable rules for the reception of international human rights law ... through the Charter's provisions."[77] In his view, however, the Court

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International Law in Canadian Constitutional Litigation: Fugue or Fusion?: Recent Developments and Challenges in Internalizing International Law" (2002) 16 SCLR (2nd) 23 at 43.

73 For example, van Ert notes that "Charter jurisprudence has raised more questions about the proper role of international norms in Charter adjudication than it has answered" and finds "most remarkable ... the hesitance of the Supreme Court of Canada to apply the presumption of conformity with international law to the Charter" (see *Using International Law*, 2nd ed, *supra* note 30 at 332). Currie argues that the jurisprudence has "fluctuated quite dramatically" and that "it would be no exaggeration to describe the current state of the law on this issue as chaotic" (see "Charter Jurisprudence", *supra* note 7 at 451).

74 Van Ert, *Using International Law*, 2nd ed, *supra* note 30 at 333.

75 Currie, "Charter Jurisprudence", *supra* note 7 at 451, citing *Hape*, *supra* note 41 at para 56. See also *Canada (Justice) v Khadr*, 2008 SCC 28 at para 18.

76 "Charter Jurisprudence", *supra* note 7 at 451. Currie also writes:

> As the Court has never explicitly disavowed any of these various approaches or doctrines, but rather appears to apply them all periodically and selectively in particular cases, all must be presumed to remain operative at some level in the law governing Charter interpretation. Yet no guidance has been provided by the Court as to the particular circumstances that justify resort to one or another of them, or indeed whether it is possible to reconcile them all (see *ibid* at 452).

77 *Using International Law*, 3rd ed, *supra* note 15 at 464 [footnotes omitted].

has come to "embrace ... the presumption of conformity with international law,"[78] albeit "properly varied in the Charter context to be a floor for human rights protection but not a ceiling"[79]—and with the caveat that "[w]hether recent ... decisions have finally settled on Charter-specific reception rules remains to be seen."[80]

A review of caselaw suggests that interpretive difficulties have persisted, which may be attributed to the Supreme Court neither reconciling its jurisprudence nor identifying a clear and fully-reasoned methodology. Although the Court has implicitly endorsed the Dickson Doctrine, which includes the minimum protection approach for Canada's binding IHRL obligations,[81] the jurisprudence has still not been sufficiently clarified. And, as discussed below, while it has been implicitly endorsed, the minimum protection approach is often not mentioned or, when it is, it is not robustly applied. There has also been a potential conflation of the minimum protection approach with the presumption of conformity.

B. The Dickson Doctrine

Chief Justice Dickson's dissent in *Reference Re* Public Service Employee Relations Act *(Alta.)* (*PSERA*)[82] is considered the genesis of the Dickson Doctrine[83] that underlies (or ought to underlie) the reception of IHRL in *Charter* cases and from which the minimum protection approach is drawn. In *PSERA*, the Court was determining whether the right to strike is protected as part of freedom of association under section 2(d) of the *Charter*. When considering the scope of freedom of association, Chief Justice Dickson examined jurisprudence from Canada, the Judicial Committee of the Privy Council, and the United States before turning to an array of international materials.[84] With respect to the latter, although he

78 *Ibid* at 471.

79 *Ibid* at 482.

80 *Ibid* at 464.

81 See e.g. van Ert, "Domestic Reception", *supra* note 39 at 242, 246.

82 1987 CanLII 88 at paras 1–144 (SCC) [*PSERA*].

83 See Currie, "Charter Jurisprudence", *supra* note 7 at 432.

84 *PSERA*, *supra* note 82 at paras 25–72.

considered the judiciary to not be "bound by the norms of international law in interpreting the *Charter*,"[85] he stated:

> The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—*must ... be relevant and persuasive sources for interpretation of the* Charter*'s provisions*. ...
>
> Furthermore, Canada is a party to ... international human rights Conventions which contain provisions similar or identical to those in the *Charter*. *Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the* Charter. The general principles of constitutional interpretation *require that these international obligations be a relevant and persuasive factor in* Charter *interpretation*. ... The content of Canada's international human right obligations is ... an important indicia of the meaning of "the full benefit of the *Charter*'s protection." *I believe 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*.[86]

This description of the role(s) for IHRL in *Charter* litigation has been subject to competing interpretations;[87] however, the better view may be that IHRL is "a source of guidance in interpreting the *Charter* which is to be given more or less weight depending on whether Canada has or has

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85 *Ibid* at para 60.

86 *Ibid* at paras 57, 59 [emphasis added].

87 Van Ert had argued that Chief Justice Dickson "enunciated two contradictory theories": the "relevant and persuasive" and "presumption of minimum protection" (see *Using International Law*, 2nd ed, *supra* note 30 at 344). However, in Schabas's view, "Chief Justice Dickson proposed a rather sophisticated doctrine distinguishing between two categories of international sources" with all "international human rights instruments [being] part of the *Charter*'s context of adoption ... and 'provid[ing] a relevant and persuasive source for interpretation of the provisions of the *Charter*,'" and ratified (i.e., binding) international human rights treaties informing the minimum scope of relevant *Charter* rights (see *supra* note 69 at 186, citing *PSERA*, *supra* note 82 at para 60). Currie argues against the view that Chief Justice Dickson endorsed two conflicting approaches (see "Charter Jurisprudence", *supra* note 7 at 428–29).

not formally bound itself to it"[88] (i.e., by ratifying a treaty). This is supported by Chief Justice Dickson describing both primary and subsidiary sources of international law when he stated that "[t]he various sources of international human rights law ... *must ... be relevant and persuasive sources* for interpretation of the *Charter*'s provisions"[89] and, further, that "these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, *especially when they arise out of Canada's international obligations under human rights conventions*."[90] Although Chief Justice Dickson did not explicitly apply the minimum protection approach, his opinion in *PSERA* suggests that relevant IHRL, as a whole, ought to be persuasive in *Charter* interpretation, but with Canada's IHRL obligations setting a minimum interpretive standard for corresponding *Charter* rights.[91]

Chief Justice Dickson returned to this reasoning for the majority two years later in *Slaight Communications Inc. v. Davidson* (*Slaight*):

> In [*PSERA*], I had the occasion to say ... :
>
> > The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter*'s protection". I believe 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.[92]

There is, again, room for disagreement on the implications of *Slaight*, with scholars debating whether the Court abandoned the relevant and persuasive approach.[93] And, by employing arguably qualified (e.g., "should

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88 Currie, "Charter Jurisprudence", *supra* note 7 at 429.

89 *PSERA*, *supra* note 82 at para 57 [emphasis added].

90 *Ibid* at para 60 [emphasis added].

91 *Ibid* at para 59.

92 [1989] 1 SCR 1038 at 1056, 1989 CanLII 92 (SCC), citing *PSERA*, *supra* note 82 at para 59.

93 For example, van Ert considers *Slaight* as an "affirmation of the presumption of minimum protection and an abandonment of the relevant and persuasive approach" (see *Using International Law*, 2nd ed, *supra* note 30 at 344). Currie, however, considers *Slaight* to have "unambiguously endorsed" the minimum protection approach while allowing the "relevant and persuasive" approach to remain of significance; and yet,

generally be presumed") and imprecise language,[94] Chief Justice Dickson was, perhaps, not unambiguously endorsing a presumption of minimum protection.

After *Slaight*, judicial commitment to the minimum protection approach fluctuated,[95] with some courts appearing to favour a "context and values" approach (perhaps mirroring—or possibly confusing it with—the "values and principles" approach from *Baker* in the non-*Charter* context).[96] However, subsequent cases support concluding that Canadian courts have, at least implicitly, endorsed the minimum protection approach for *Charter* cases—while risking conflating or confusing it with the presumption of conformity.[97]

Notably, the Supreme Court invoked the minimum protection approach in *Health Services and Support — Facilities Subsector Bargaining Assn v. British Columbia* (*Health Services*), which concerned whether freedom of association protects the right to collective bargaining.[98] There—at risk of introducing additional interpretive confusion—the majority

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reading *PSERA* with *Slaight*, he concludes that the "relevant and persuasive" approach remained significant despite the fact that it was not mentioned by Chief Justice Dickson in *Slaight* (see Currie, "Charter Jurisprudence", *supra* note 7 at 430–31). According to this reading, the "Dickson approach" could be summarized as:

> [A]ll IHRL (whether or not binding on Canada) was to be considered at least 'relevant and persuasive' in Charter interpretation. However, those elements ... that were binding on Canada were to be considered particularly relevant and persuasive in that they would establish a presumptive floor of human rights protection below which interpretation of Charter protections should not generally dip (see *ibid* at 432).

94 Consider, for example, references to "*documents* which Canada has ratified"; since ratification is the specific legal method by which States become a party to a treaty, did Chief Justice Dickson intend to restrict this presumption to ratified treaties or was this statement implying that other, non-treaty international instruments that Canada has otherwise positively endorsed (but not technically "ratified") could be subject to the presumption?

95 See e.g. *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 121, 126.

96 See e.g. *ibid* at paras 114–15; *United States v Burns*, 2001 SCC 7 at paras 64–69. See also Currie, *International Law*, *supra* note 37 at 260; Currie, "Charter Jurisprudence", *supra* note 7 at 434–38.

97 See Currie, "Charter Jurisprudence", *supra* note 7 at 443.

98 2007 SCC 27 at para 19 [*Health Services*].

characterized "international obligations" as an "interpretive tool" in *Charter* cases but then provided some clarity by holding that

> Canada's adherence to [i.e., ratification of] international documents [i.e., treaties] recognizing a right to collective bargaining supports recognition of the right in s. 2(d) of the *Charter* [because] [t]he *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.[99]

The majority considered three treaties that Canada had ratified to support expanding the scope of freedom of assembly to include the right to collective bargaining[100] and supported its interpretation with recourse to international materials interpreting these treaties,[101] noting that "[w]hile not binding, they shed light on the scope of s. 2(*d*) of the *Charter*."[102]

Although the majority recognized that "a global consensus on the meaning of freedom of association did not crystallize" until after the *Charter* came into force,[103] it determined that chronology was not an issue. The majority noted that a more recent international instrument—namely, an International Labour Organization (ILO) declaration[104]—was rooted in pre-existing international human rights treaties[105] that Canada had ratified "prior to the advent of the *Charter* and were within the

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99 *Ibid* at paras 69–70.

100 See *ibid* at para 71, citing *ICESCR*, *supra* note 2; *ICCPR*, *supra* note 2; *Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organize*, 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950, accession by Canada 23 March 1972) [*Convention No 87*].

101 In their reasons, Chief Justice McLachlin and Justice LeBel cited interpretations of these treaties by the UN Human Rights Commission, the ILO's Committee on Freedom of Association, the ILO's Committee of Experts, and the ILO's Commissions of Inquiry, as well as academic commentary and a review by ILO staff (see *Health Services*, *supra* note 98 at paras 74–77).

102 *Ibid* at para 76.

103 *Ibid* at para 78.

104 *Ibid*, citing *ILO Declaration on Fundamental Principles and Rights at Work*, 18 June 1998, reprinted in *International Labour Organization, ILO 1998 Declaration on Fundamental Principles and Rights at Work and Its Follow-Up* (Geneva: International Labour Organization, 2022) 8, online (pdf): <ilo.org> [perma.cc/RSP9-9EHE].

105 *Health Services*, *supra* note 98 at para 78, citing *Convention No 87*, *supra* note 100.

contemplation of the framers of the *Charter*."[106] In addition, the majority reasoned that rights may evolve: "[T]he *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*."[107]

Although *Health Services* can be read as endorsing the minimum protection approach—and the analysis largely focused on obligations arising from treaties that Canada had ratified—the Court did not endorse the minimum protection approach explicitly and continued a pattern of using imprecise terms,[108] which could provoke methodological instability. In Currie's view, the majority in *Health Services* laid out a "multiplicity of rules" in what could have been "an [implicit] attempt at reconciliation of the Court's prior jurisprudence."[109] Combined with *Hape*,[110] which was released one day before *Health Services*, Currie was critical of the continued confusion in the Supreme Court's jurisprudence and was particularly concerned about a potential conflation of the presumption of conformity and the minimum protection approach.[111]

Commenting on *Hape* (which addressed whether the *Charter* applies to Canadian officials outside of Canada and in which the majority opinion turned on its view of general rules of international law instead of IHRL), Currie criticized the majority for "transplant[ing] the presumption of conformity with international law, which clearly applies in the

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106 *Health Services*, *supra* note 98 at para 78.

107 *Ibid* [emphasis in original].

108 In their reasons, Chief Justice McLachlin and Justice LeBel stated that Canada's international IHRL "commitments"—which suggest binding obligations—"provide a [merely] *persuasive* source for interpreting the scope of the *Charter*" rather than providing a minimum interpretive standard for the application of the presumption of minimum protection to which the majority had just referred in its analysis (see *ibid* at paras 70, 78).

109 "Charter Jurisprudence", *supra* note 7 at 446.

110 *Supra* note 41.

111 See e.g. Currie, "Charter Jurisprudence", *supra* note 7 at 460; John H Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007) 45 Can YB Intl Law 55 at 74–76 [Currie, "*Hape*"]. But see van Ert, *Using International Law*, 2nd ed, *supra* note 30 at 350; van Ert, "Domestic Reception", *supra* note 39 at 246.

statutory interpretation context, to the wholly different Charter interpretation context."[112] He warned that conflating the *Charter*-specific minimum protection approach with the general presumption of conformity could have a stifling effect on *Charter* rights: "Charter protections would not simply benefit from an interpretive floor based on a minimum content presumption; they would also be subject to any 'ceiling' or 'walls' implied by any of Canada's international legal obligations."[113] He further cautioned that this could "place the Charter in an interpretive box, the limits of which would be dictated by the sum total of Canada's international legal obligations—not merely those of a human rights character."[114] Finally, Currie was critical that *Health Services* (and *Hape*) did not reconcile past jurisprudence nor explicitly clarify how IHRL applies in *Charter* cases.[115] Although *Health Services* can be read as implicitly endorsing the

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112 "Charter Jurisprudence", *supra* note 7 at 442 [emphasis and footnotes omitted]. However, van Ert argues that *Hape* and *Health Services* could "finally establish that the Charter is presumed to comply with Canada's international human rights obligations" (see *Using International Law*, 2nd ed, *supra* note 30 at 351).

113 Currie, "Charter Jurisprudence", *supra* note 7 at 443.

114 *Ibid*.

115 Currie saw the majority in *Hape* presenting a "wholly novel approach as though it were business as usual, grounded in a long, uncontroversial and essentially coherent jurisprudential pedigree" but with "no explanation ... given ... for ... very significant departures from the Court's earlier approaches to the role of international law, including IHRL, in interpreting the Charter" (*ibid* at 444). Similarly, Currie took issue with the fact that the presumption of conformity laid out in *Hape* does not appear in *Health Services*—despite the fact that *Hape*, like *Health Services*, considered the role for international law in interpreting the *Charter* and was released only one day before *Health Services*. He went on to say that

> what is profoundly puzzling is that nowhere in *Health Services* was *Hape*'s novel presumption of conformity mentioned at all. Recalling that *Hape* had been decided only the day before *Health Services* and that the majority judgments in each case were penned and concurred in by many of the same members of the Court, this seems virtually incomprehensible (*ibid* at 446 [footnotes omitted]).

Since the matter is not addressed in *Health Services*, one may only speculate on why the Court did not refer to its reasoning in *Hape*. It may be that the Court in *Hape*, having framed its analysis around general international law principles of non-interference, territorial sovereignty, and jurisdiction, considered IHRL to not be relevant—even though it was a *Charter* claim.

minimum protection approach,[116] the Court did not do so explicitly, leaving room for continued jurisprudential uncertainty.

To assist with the discussion below where I maintain that more precise language should be used to endorse the minimum protection approach instead of a (modified) presumption of conformity, there are two threads to be aware of in Currie's warning summarized above. First is a concern that conflating the "presumption of conformity" (which developed in the context of general statutory interpretation) and the "minimum content presumption" (which is *Charter*-specific) could result in IHRL placing a conceptual ceiling on the interpretation of *Charter* rights. Under the minimum protection approach, the underlying focus is on ensuring that corresponding domestic rights in Canada are interpreted in a way so that they *at a minimum* meet Canada's IHRL obligations, which leaves room for a domestic interpretation of rights *exceeding* Canada's international obligations. However, by conflating the two presumptions and applying the presumption of conformity to the *Charter* context, there is a risk that "conformity" may be read as *being equal to* Canada's international obligations and result in courts failing to consider if the domestic right ought to be interpreted more expansively than its international equivalent. Conflating the two interpretive principles also risks obscuring the fact that the presumption of minimum protection applies in a rights-granting context, which supports a more generous and purposive interpretation than that which applies to general statutory interpretation.

Second, while beyond the scope of this article to address in detail, *Hape* has been subjected to sustained and pointed criticism (particularly by international lawyers) because, among other things, the Supreme Court based its decision on general international law without recourse to IHRL despite *Hape* being a *Charter* case and the *ICCPR* addressing when its obligations apply extraterritorially.[117] Currie was concerned that applying the presumption of conformity based on Canada's non-IHRL international obligations could result in a conceptual cage around the

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116 See e.g. van Ert, *Using International Law*, 2nd ed, *supra* note 30 at 346.

117 See e.g. Currie, "*Hape*", *supra* note 111; Amir Attaran, "Have Charter, Will Travel?: Extraterritoriality in Constitutional Law and Canadian Exceptionalism", Case Comment on *R v Hape* (2009) 87:2 Can Bar Rev 515; Leah West, "Canada Stands Alone: A Comparative Analysis of the Extraterritorial Reach of State Human Rights Obligations" (2002) 55:3 UBC L Rev 845.

interpretation of *Charter* rights. This is a particular concern because Canada's international law obligations outside of the IHRL context are often prohibitive in nature (i.e., they constrain a State's freedom of action internationally out of respect for the rights of other States). As such, there may be a greater risk that applying an interpretive presumption using Canada's general international law obligations could result in insufficient weight being given to Canada's IHRL obligations while also impairing the development of Canadian-specific rights that exceed Canada's international obligations.

As a review of recent caselaw below demonstrates, post-*Health Services*, the Supreme Court has repeatedly invoked the minimum protection approach[118] while suggesting that it is synonymous with the presumption of conformity. In addition, despite an effort to provide clear guidance and an interpretive framework for how courts should treat international law in *Québec inc.*,[119] as the *BOLOH* litigation demonstrates, the need for a clearer methodology persists. This is a pressing matter for the Court to not avoid[120] when the opportunity arises—particularly after missing the chance in *BOLOH*.

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118 For example, Justice Moldaver wrote in *India v Badesha*:

> In extradition cases, s. 7 of the *Charter* should be presumed to provide at least as great a level of protection as found in Canada's international commitments regarding non-refoulement to torture or other gross human rights violations. ... Extraditing a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is prohibited under art. 3(1) of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ... It follows that in the extradition context, surrendering a person to face a substantial risk of torture or mistreatment in the requesting state will violate the principles of fundamental justice (see 2017 SCC 444 at para 38).

See also *Divito v Canada*, 2013 SCC 47 at paras 23, 25 [*Divito*].

119 *Supra* note 25.

120 See, for example, *R v McGregor*, in which the majority purposefully declined to address the uncertainty that *Hape* created regarding the extraterritorial application of the *Charter* (see 2023 SCC 4 at para 23 [*McGregor*]). But see *ibid* at paras 46–95, Karakatsanis & Martin JJ, concurring.

1. *SFL* and the "Magnetic Guide" of the Dickson Doctrine

In 2015, section 2(d) of the *Charter* was again before the Supreme Court in *Saskatchewan Federation of Labour v. Saskatchewan* (*SFL*).[121] In *SFL*, the majority invoked the minimum protection approach and used IHRL to support overturning prior jurisprudence to find that section 2(d) protects the right to strike because it is essential to collective bargaining.[122] This case is notable as an example of the potential for IHRL to influence the interpretation of *Charter* rights because IHRL supported reading the right to strike into the *Charter* through a "nesting dolls" approach (which may not sit well with those who prefer a more textual interpretation of the *Charter*). First, in *Health Services*, the majority interpreted freedom of association—which protects the right to form unions[123]—as protecting the right to collective bargaining.[124] Then, in turn, the Court recognized in *SFL* that, for the right to collective bargaining to be meaningful, section 2(d) must also protect the right to strike.[125]

Writing for the majority in *SFL*, Justice Abella traced a more generous interpretive approach toward section 2(d) that had emerged in *Charter* jurisprudence since the Supreme Court had previously held that there was no constitutional protection for the right to strike.[126] She then examined "the history of strike activity [including its statutory regulation and protection] in Canada and globally,"[127] which she considered supported recognizing a right to strike. After turning to IHRL, she concluded that "Canada's international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining."[128]

When considering IHRL, Justice Abella characterized Chief Justice Dickson's approach in *PSERA* as "prov[ing] to be a magnetic guide" and reasoned that "[g]iven this presumption [of minimum protection], Canada's international obligations clearly argue for the recognition of a right

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121 *Supra* note 57.

122 *Ibid* at para 24.

123 See *PSERA*, *supra* note 82 at para 22.

124 *Health Services*, *supra* note 98 at para 2.

125 *Supra* note 57 at para 24.

126 *Ibid* at paras 28–33.

127 *Ibid* at paras 28–61.

128 *Ibid* at para 62.

to strike within s. 2(*d*)."[129] She put particular emphasis on the fact that "Canada is a party to two [binding] instruments [i.e., the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*) and the *Charter of the Organization of American States* (*Charter of the OAS*)] which explicitly protect the right to strike."[130] She then turned to an array of subsidiary and other "non-binding" international and foreign materials—namely, academic commentary regarding treaty obligations, interpretive guidance issued by treaty-monitoring bodies, decisions of treaty-monitoring bodies subsequently endorsed by courts, decisions of the European Court of Human Rights (ECtHR), and decisions of foreign courts—which she found "tend to confirm the protection of the right to strike recognized in international law."[131] Together, she reasoned, the "historical, international, and jurisprudential landscape suggest compellingly" that "a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement."[132]

Notably, although dissenting on whether the right to strike is protected under section 2(d), in its consideration of the right to strike under IHRL, the minority opinion of Justices Rothstein and Wagner also endorsed the minimum protection approach. However, they refused to recognize that the right to strike is protected under section 2(d) because they found "the current state of international law on the right to strike [to be] unclear."[133] After exploring a number of international authorities that they interpreted as providing conflicting views on whether the right to strike is protected internationally,[134] Justices Rothstein and Wagner turned to the *ICESCR*. They noted that its formulation of the right "is

129 *Ibid* at paras 63, 65.

130 *Ibid* at paras 65–66.

131 *Ibid* at paras 67–74.

132 *Ibid* at para 75.

133 *Ibid* at para 150, Rothstein & Wagner JJ, dissenting in part.

134 In their reasons, Justices Rothstein and Wagner placed less weight on interpretations that had endorsed a right to strike as part of freedom of assembly by ILO bodies that "do not perform judicial functions and do not enforce obligations under ILO conventions." They further noted that the *ICCPR* does not expressly contain the right to strike and has been interpreted by the UN Human Rights Committee as not protecting this right (see *ibid* at paras 152–54).

subject to explicit restrictions as it applies to public sector workers"[135] and concluded that it "demonstrates that the measures at issue [in *SFL*] are not precluded."[136] Without considering the *Charter of the OAS*—despite it specifically recognizing the right to strike as part of freedom of association[137] and being a treaty that Canada has ratified—they found that "[t]here is ... no clear consensus under international law that the right to strike is an essential element of freedom of association."[138] Underscoring that "this Court has indicated that obligations under international law that are *binding* on Canada are of primary relevance to this Court's interpretation of the *Charter*,"[139] they suggested that the majority placed too much weight on select non-binding international materials in its interpretation of the scope of freedom of assembly and expressed a concern—which, as discussed below, would be echoed in *BOLOH* FCA—that "[w]here this Court opts to rely on non-binding interpretations of international conventions, it should not cherry pick interpretations to support its conclusions."[140]

Employing ambiguous language, the minority in *SFL* also highlighted separation of powers as a rationale for having Canada's binding IHRL obligations carry more weight when interpreting the *Charter*:

> There is good reason to accord little weight to international instruments [i.e., treaties?] to which Canada is not a party. It is the role of the government to accept international obligations on behalf of Canada, not the courts. Judicial review and the use of international law as an interpretive aid should not become a euphemism for this Court interfering in the government's prerogative over foreign affairs.[141]

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135 *Ibid* at para 155.

136 *Ibid* at para 156.

137 *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3 (entered into force 13 December 1951, accession by Canada 8 January 1990) ("[e]mployers and workers ... have the right to associate themselves freely ... including ... the workers' right to strike", art 45(c)).

138 *SFL*, *supra* note 57 at para 156.

139 *Ibid* at para 157 [emphasis in original].

140 *Ibid* at paras 151.

141 *Ibid* at para 159 [references omitted].

The minority was highly critical of the majority overruling precedent[142] and opined that the absence of an explicit reference to the right to strike in the *Charter* suggests an intention to exclude it.[143] Nonetheless, the minority's potential openness to the minimum protection approach indicates that had Justices Rothstein and Wagner concluded that there was an "international consensus" that freedom of assembly protects the right to strike, their view on the scope of section 2(d) may have been different.

Relevant to the discussion that follows, overall, *SFL* is a useful example because both the majority and minority opinions did not consider the minimum protection approach controversial; however, from a methodological perspective, both opinions demonstrated a continued lack of a clear methodology. Leaving aside potential concerns about "cherry-picking" interpretations of treaty obligations, although the majority opinion followed a sound approach by focusing on treaties that Canada has ratified with reference to (arguably) authoritative interpretations of what these treaty obligations mean in practice, neither opinion clearly laid out the analytical approach to be taken to identify Canada's IHRL obligations. Both opinions could also have been clearer regarding what interpretive weight was being afforded to various international materials and why such weight was warranted. Finally, the minority's suggestion that there needs to be an "international consensus" on the right to strike is questionable,[144] especially when paired with the fact that the *Charter of the OAS* and Canada's obligations under the *ICESCR* were glossed over. While such a consensus could have been helpful if the Court had been assessing whether the right to strike forms part of freedom of association as part of customary international law or the "values and principles of international law" per *Hape*,[145] the Court should have focused on Canada's IHRL obligations arising from the treaties Canada has ratified.

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142 *Ibid* at paras 106, 137–49.

143 *Ibid* at para 158.

144 See e.g. van Ert, "Domestic Reception", *supra* note 39 at 241.

145 Or perhaps the Court could have assessed whether the right to strike forming part of freedom of association was part of customary international law, although this would have been methodologically incorrect since the focus ought to be on what States do in practice and why they do it. Customary international law binds all States equally—with the possible exceptions of persistent objectors and States located outside of a region where a regional customary rule exists—and arises when there is "evidence of a general practice accepted as law" established through consistent State

2. *Ktunaxa Nation* and the Ceiling of IHRL?

In 2017, the majority of the Supreme Court again invoked the minimum protection approach in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* (*Ktunaxa Nation*), while also, at least on its face, conflating it with the presumption of conformity.[146] In that case, the Ktunaxa Nation argued that its freedom of religion under section 2(a) of the *Charter* was infringed by the federal government approving the construction of a ski resort because it would drive from its spiritual territory its revered Grizzly Bear Spirit. In the majority's view, the Nation was asking the Court to enlarge the scope of freedom of religion beyond what had been previously recognized under the *Charter*—which it declined to do.[147]

Chief Justice McLachlin and Justice Rowe, writing for the majority, determined that freedom of religion under IHRL protects the freedom to have and to manifest religious beliefs, but not to have the manifestation—or "spiritual focal point of worship"—of those beliefs (in this case, the Grizzly Bear Spirit) protected.[148] When exploring freedom of religion under the *ICCPR* and the *UDHR*,[149] the majority noted that the Court had previously "adopted [the] interpretive presumption" of Chief Justice Dickson according to which the *Charter* would "provide at least as great a level of protection as is found in Canada's international human rights obligations."[150] In the passage that follows, they consider treaties that Canada has not ratified, noting that since they are non-binding, they "do not attract the *presumption of conformity*, [but] they are nevertheless important illustrations of how freedom of religion is conceived around the world."[151]

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practice, coupled with *opinio juris sive necessitatis*, namely, the belief that the law requires the practice (see *North Sea Continental Shelf (Germany v Denmark)*, [1969] ICJ Rep 3 at para 77).

146 2017 SCC 54 at paras 66–67 [*Ktunaxa Nation*].

147 *Ibid* at para 70–71.

148 *Ibid* at paras 64–67, 71.

149 Because the *UDHR* is technically a non-binding declaration of the UN General Assembly, it is not a primary source of international law; however, it may be considered reflective of customary international law in parts.

150 *Ktunaxa Nation*, *supra* note 146 at para 65.

151 *Ibid* at para 66 [emphasis added], citing *ECHR*, *supra* note 5; *ACHR*, *supra* note 5.

Although it may not have clearly supported the Nation's claim in light of how it was framed by the majority as seeking to protect the "spiritual focal point of worship," the *United Nations Declaration on the Rights of Indigenous Peoples*[152] (which Canada endorsed seven months before the appeal was heard) was notably absent from the analysis despite its clear relevance and it being one of the focuses of Amnesty International Canada's arguments as an intervener.[153] Similarly, the Court did not assess relevant foreign court decisions raised in the appeal (again, potentially due to the majority's narrow framing of the Nation's claim) before summarily concluding that "[w]e have been directed to no authority that supports the proposition that s. 2(*a*) protects the [spiritual focal point of worship], rather than individuals' liberty to hold a belief and to manifest that belief."[154] While the majority invoked the minimum protection approach (tracing it back further than *PSERA* in the context of section 2(a)),[155] the reference to the presumption of *conformity* (rather than a presumption of *minimum protection*) could perpetuate confusion and risk conflating what are—and ought to remain—two distinct interpretive principles.[156]

Demonstrating continued methodological uncertainty, the minority opinion of Justices Moldaver and Côté did not even comment on IHRL despite its prominence in the majority opinion (which may perhaps be attributed to the fact that IHRL was invoked by an intervener and not the parties).[157] However, they would have recognized a more expansive freedom of religion under the *Charter* on account of a fundamental distinction between Indigenous and Judeo-Christian spiritual beliefs; namely, "the connection to the physical world, specifically to land, [being] a central

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152 UNGA, 61st Sess, UN Doc A/RES/61/295 (2007) GA Res 61/295.

153 *Ktunaxa Nation*, *supra* note 146 (Factum, Intervener Amnesty International Canada at paras 9–11, 13) [*Ktunaxa Nation* Amnesty International Factum].

154 *Ktunaxa Nation*, *supra* note 146 at para 71.

155 See *ibid* at para 65, citing *R v Videoflicks Ltd*, 1984 CanLII 44 (ONCA).

156 For example, van Ert notes that the majority came "close to equating the Charter presumption of minimum protection with the more general statutory presumption of conformity with international law" (see "Domestic Reception", *supra* note 39 at 250).

157 See *Ktunaxa Nation* Amnesty International Factum, *supra* note 153. The extent to which the Court ought to engage in arguments raised by interveners and not the parties was recently addressed by the Court in *McGregor* (see *supra* note 120 at paras 21–24; *ibid* at paras 81–82, Karakatsanis & Martin JJ, concurring).

feature of Indigenous religions."[158] While the Nation's claim would have still failed due to the minority concluding that approval of the resort was reasonable, Justices Moldaver and Côté reasoned that section 2(a) protects the manifestation of religious beliefs when state action destroying the manifestation would render religious beliefs and practices "devoid of spiritual significance."[159] Given the "inextricable link between spirituality and land in Indigenous religious traditions," they concluded that "state action that impacts land can sever the spiritual connection [of Indigenous Peoples] to the divine, rendering Indigenous beliefs and practices devoid of their spiritual significance."[160] Additionally, they cautioned that the majority's approach "risks excluding Indigenous religious freedom claims involving land from the scope of s. 2(*a*)'s protection."[161]

Although this point should not be overstated, *Ktunaxa Nation* could be an example of IHRL being used to support imposing a conceptual ceiling on freedom of religion—potentially due to a conflation of the minimum protection approach with the presumption of conformity. Faced with a claim advancing a more expansive interpretation of freedom of religion than previously recognized under the *Charter*, the majority considered the right's scope under various international materials, found that the expanded interpretation was not supported by these materials, and declined to recognize an expanded *Charter* freedom.[162] In contrast, the minority—unbound by any consideration of IHRL—adopted an interpretation exceeding Canada's IHRL obligations (or at least as they were interpreted by the majority) based on what they considered to be an important distinguishing feature of how religion and spirituality are conceptualized by Indigenous Peoples in Canada compared to the dominant Judeo-Christian tradition.

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158 *Ktunaxa Nation*, *supra* note 146 at para 127, Moldaver J, concurring in part.

159 *Ibid* at para 130.

160 *Ibid*.

161 *Ibid* at para 131.

162 *Ibid* at paras 66–67, 71.

3. *Québec inc.*: Guidance with Insufficient Clarity

Québec inc. underscores the continuing need for the Supreme Court to clarify the role of IHRL in *Charter* claims.[163] Decided in 2020, this case is significant because the majority of the Court specifically set out to identify a methodology for treating international (and foreign) legal materials in the *Charter* context;[164] however, it did not clearly reconcile past jurisprudence[165] and, I argue, it provided an insufficiently clear methodology. As noted above, this was despite the majority recognizing that "[a] principled framework is ... *necessary* and desirable" both "*to properly recognize Canada's international obligations* and to *provide consistent and clear guidance* to courts and litigants."[166]

In *Québec inc.*, the Court was considering whether the Federal Court of Appeal had erred in determining that corporations are protected from cruel and unusual punishment under section 12 of the *Charter*. While unanimous that the protection is only available to individuals, in a 5-3 decision, the majority and minority strongly disagreed on the proper approach to *Charter* interpretation generally and, specifically, how to treat international (and foreign) law. The confused nature of existing jurisprudence was underscored by how each opinion characterized the other as a marked departure from precedent.[167]

Writing for the majority, Justices Brown and Rowe stressed the need to start with the text of the *Charter* when undertaking a purposive interpretation and recognized that jurisprudence on the reception of IHRL lacked clarity.[168] They invoked an echo of the Dickson Doctrine; conflating it with the presumption of conformity, they explained that the minimum protection approach applies with respect to binding IHRL and that non-binding IHRL may be relevant and persuasive to *Charter* interpretation: "This proposition [of minimum protection] has since become a

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163 *Supra* note 25.

164 *Ibid* at para 27.

165 Currie has long maintained that it is important for the Supreme Court to do so (see "Charter Jurisprudence", *supra* note 7).

166 *Québec inc*, *supra* note 25 at para 27 [emphasis added].

167 For examples of this characterization in the majority opinion, see *ibid* at paras 19, 28–29, 38, 40, 46. For an example in Justice Abella's concurring opinion, see *ibid* at paras 102–04.

168 *Ibid* at paras 8, 24.

firmly established interpretive principle in *Charter* interpretation, the presumption of conformity."[169] With respect to non-binding international (*and* foreign law, which ideally would have been addressed separately since these are distinct bodies of law that should not be conflated) they stressed that courts should justify having recourse to these sources: "[Where] these instruments are merely persuasive [i.e., non-binding] ... a court relying upon them should explain why it is [using the sources], and how they are being used (that is, what weight is being assigned to them)."[170]

Introducing a novel source of confusion into the jurisprudence, the majority was also of the view that international (and foreign) sources "have typically played a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation."[171] Although this role for international law was reiterated in a subsequent decision (in which the minimum protection approach was again conflated with the presumption of conformity),[172] it should be noted that this does *not* reflect the role that international law has historically played,[173] with van Ert characterizing this portion of the judgment as a "striking innovation."[174] It is also difficult to understand how a minimum protection approach could even operate effectively if Canada's IHRL obligations only play a role *confirming* an interpretation arrived at without them, as it suggests that an interpretation based on IHRL exceeding an interpretation arrived at without it would not be adopted. It remains to be seen whether this

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169 *Ibid* at para 31 [references omitted].

170 *Ibid* at para 40 [emphasis omitted].

171 *Ibid* at para 22 [emphasis in original].

172 As Chief Justice Wagner wrote in *R v Bissonnette*:

> As Brown and Rowe JJ. noted recently in *9147-0732 Québec inc*., there is a role for international and comparative law in the interpretation of *Charter* rights. However, "this role has properly been to *support* or *confirm* an interpretation arrived at through the [purposive] approach." ...
>
> ... Because the ICCPR is an international treaty ratified by Canada, Canadian law is presumed to be in conformity with the commitments set out in it (see 2022 SCC 23 at paras 98, 100 [emphasis in original, references omitted]).

173 See e.g. *PSERA*, *supra* note 82 at para 58, Dickson CJC, dissenting; *Health Services*, *supra* note 98 at para 69; *SFL*, *supra* note 57 at paras 62–65.

174 *Using International Law*, 3rd ed, *supra* note 15 at 478.

"confirmatory" role will be sustained or if the majority's intention was to set out an order of operations according to which courts should adopt a purposive approach to *Charter* interpretation and first consider binding domestic precedents in their analysis before turning to international (and/or foreign) sources.

Writing for the minority and strongly dissenting on the approach outlined by the majority in *Québec inc.*, Justice Abella cautioned against being too textual with *Charter* interpretation. She foresaw risks arising from giving primacy to the *Charter*'s text, including that it would erase "the difference between constitutional and statutory interpretation."[175] She also argued against too rigid of an approach to non-binding international (and foreign) sources, finding that the majority's decision was inconsistent with prior jurisprudence[176] and a "worrying setback" for "constitutional, comparative and international law."[177] Justice Abella underscored the value she saw in purposively interpreting the *Charter*, which she traced through the Supreme Court's jurisprudence,[178] and disagreed that non-binding international sources should be explicitly weighed:

> This is not quantum physics. Non-binding international sources are "relevant and persuasive", not obligatory. Simply put, such sources attract adherence rather than command it. Presumptively narrowing the significance of international and comparative sources, as the majority suggests, does a disservice to our Court's ability to continue to consider them with selective discernment.[179]

While potentially suggesting that the majority had confined the confirmatory role of international law to non-binding sources (which it did not), she also argued forcefully against international law playing only a confirmatory role in *Charter* interpretation: "The majority acknowledges that this Court has always been willing to treat non-binding international sources as 'relevant and persuasive' in *Charter* interpretation. ... However, it inexplicably retreats from this long line of jurisprudence and concludes

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175 *Québec inc*, *supra* note 25 at para 61.

176 *Ibid* at paras 68, 96–107.

177 *Ibid* at para 61.

178 *Ibid* at paras 68–74.

179 *Ibid* at para 102 [emphasis and references omitted].

that non-binding sources should only be used to confirm a pre-established interpretation."[180]

Overall, for a decision expressly purporting to provide clarity, *Québec inc*. fell short of its goal, as it did not reconcile past jurisprudence nor establish a sufficiently clear analytical framework for *Charter* claims invoking IHRL. In addition, the majority continued the unnecessarily confusing conflation of the minimum protection approach with the presumption of conformity; risked downgrading IHRL—with the rest of international law—to an unclear confirmatory role that could render the minimum protection approach inoperative when Canada's IHRL obligations exceed a previously-established domestic interpretation of a *Charter* right; and did not explain clearly why different international legal materials ought to be weighed differently.

Although a measure of clarity was achieved through *Québec inc.*, ideally, when faced with another opportunity to revisit the matter, the majority's approach would be overruled in favour of one that reflects a blend of the majority and minority reasoning. There is ample support for a generous and purposive, living tree approach to *Charter* interpretation within the confines of its textual provisions, under which the Dickson Doctrine is applied and IHRL is not used merely to confirm an interpretation arrived at without it. However, there is also significant value in the majority's holding that careful consideration should be given to the nature of international legal materials and what weight to afford them because, as will be discussed in Part III, the persuasive value of these materials should rightly depend on their nature.

C. BOLOH *and the Need for a Robust Methodology*

The continuing need for clarity following *Québec inc.* is underscored by the *BOLOH* litigation. It should be noted that the focus in this article is on the approach the courts take in *BOLOH* with respect to how IHRL applies in a *Charter* application; it is not whether either court got it "right" or "wrong" on the merits of the application. For present purposes, the *BOLOH* litigation is instructive because it is a timely demonstration that *Québec inc.* failed to provide the guidance it should have and, with the Supreme Court denying leave to appeal, it was a missed opportunity to

180 *Ibid* at para 103.

clarify its jurisprudence. Notably, in the *BOLOH* litigation, neither court expressly applied *Québec inc.*: the Federal Court did not even cite it despite touching upon the minimum protection approach, while the Federal Court of Appeal cited it—primarily for its discussion of the role of the text of the *Charter*—but then did not mention the minimum protection approach. Notably, both courts also failed to follow one of the clearest holdings of *Québec inc.*, as they did not expressly examine in sufficient detail the nature and content of the international materials under consideration nor fully explain the weight being afforded to them in their analyses.

At issue in *BOLOH* was "the right to enter ... Canada" under section 6(1) of the *Charter* and whether it could support an obligation on Canada to assist with repatriating Canadians who are suspected to have joined or otherwise supported the terrorist group Daesh/ISIS and who have been detained without charge for several years (some for over five)[181] in north-eastern Syria by a non-State actor, the Autonomous Administration of North and East Syria (AANES).[182] The detainees were being held in extremely difficult conditions characterized as "abysmal" and "deplorable" by the Federal Court of Appeal.[183] The AANES controls the area, has received indirect Canadian financial and other support through an international coalition, and has requested that States—including Canada—repatriate their nationals whom they are detaining.[184] By the time oral arguments were heard, with the cooperation of AANES, twenty-seven countries—including Canada—had successfully repatriated some of their nationals.[185]

1. *BOLOH* FC

In an eighty-seven-page decision, Justice Brown of the Federal Court concluded that section 6(1) of the *Charter* required Canada to facilitate the repatriation of the applicants—who, at the time the decision was rendered, were only men because Canada had repatriated the women and

181 See *BOLOH* FCA, *supra* note 9 at para 4; *BOLOH* FC, *supra* note 9 at para 139.

182 *BOLOH* FCA, *supra* note 9 at paras 3–4, 11–12; *BOLOH* FC, *supra* note 9 at paras 13, 17–18.

183 *BOLOH* FCA, *supra* note 9 at paras 1, 11. See also *BOLOH* FC, *supra* note 9 at paras 13–17.

184 See *BOLOH* FC, *supra* note 9 at paras 8–10, 25–26, 139, 142.

185 *Ibid* at para 168.

children applicants after arguments were heard but before Justice Brown's decision was released.[186] However, following the Supreme Court's approach in *Canada (Prime Minister) v. Khadr*, he declined to make an order to this effect.[187] Justice Brown declared that the applicants have a right under section 6(1) to have Canada: (i) issue emergency travel documents to them, (ii) formally request AANES to allow for their repatriation, and (iii) appoint a delegate or representative to accept them from AANES.[188]

In his decision—which, as noted earlier, did not cite *Québec inc.*—Justice Brown explained that the Supreme Court had previously held that the right to enter Canada is to be "generously interpreted" so it is not "illusory" and adopted a purposive approach to interpreting the scope of section 6(1), finding its purpose to be prohibiting the exile of Canadians.[189] He concluded that, in the circumstances before the court, Canada had a duty to assist with repatriation.[190] While he did not specifically explain how IHRL affects *Charter* interpretation nor analyze Canada's treaty obligations specifically, Justice Brown touched on the minimum protection approach, noting that the Supreme Court has recognized that "the right to return to Canada is generally 'presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents' ratified by Canada"[191] and that "[t]he right to enter protected by subsection 6(1) ... must be interpreted in a way that is consistent with or greater than Canada's international treaty obligations."[192]

After reviewing prior decisions where section 6(1) was interpreted as obliging Canada to not arbitrarily deny issuing passports to Canadians abroad,[193] Justice Brown turned to IHRL. In doing so, he explored a letter

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186 *Ibid* at paras 1, 90.

187 *Ibid* at paras 99–102, citing *Canada (Prime Minister) v Khadr*, 2010 SCC 3.

188 *BOLOH* FC, *supra* note 9 at paras 100–01, 145, 156, 161.

189 See *ibid* at paras 105–11, citing *United States of America v Cotroni*, 1989 CanLII 106 (SCC); *Divito*, *supra* note 118.

190 *BOLOH* FC, *supra* note 9 at paras 104, 119, 134.

191 *Ibid* at paras 112, 136, citing *Divito*, *supra* note 118.

192 *BOLOH* FC, *supra* note 9 at para 114.

193 *Ibid* at paras 129–35, citing *Kamel v Canada (Attorney General)*, 2009 FCA 21 [*Kamel* FCA]; *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580 [*Abdelrazik*].

that a UN special rapporteur had submitted to Canada summarizing her findings on the situation of Jack Letts, one of the applicants in *BOLOH* who had been detained by AANES since 2019[194] (and, at the time of writing, is still being detained and may be subject to transfer to Iraq).[195] Without assessing each of these bases in detail (or making an effort to determine whether IHRL supports a duty to assist with repatriation), Justice Brown found that the special rapporteur's conclusion—that "the only international law-compliant response open to Canada is the *urgent* voluntary repatriation of its citizens"—advanced the applicants' claims.[196] Laying out the entire letter—but without exploring any of Canada's IHRL obligations explicitly—he found that it supported the claim that Letts was being detained in "conditions that may constitute violations of international treaties entered into by Canada."[197] Although he thought that Canada's human rights obligations would be violated if the applicants were being held in Canada under similar conditions,[198] Justice Brown did not assess the potential scope of repatriation obligations under the *ICCPR*, the *ICESCR*, the *UDHR*, or any other international human rights materials cited by the special rapporteur, nor did he explore the legal nature of the special rapporteur's letter.

Relevant to the discussion of *BOLOH* FCA that follows, Justice Brown addressed a decision of the Grand Chamber of the ECtHR, *H.F. and Others v. France* (*H.F.*),[199] upon which Canada had relied.[200] While it is unclear whether he was summarizing Canada's submissions or his own reading of the case, Justice Brown described the findings of the Grand Chamber as: (i) there is no general right to repatriation under the *Fourth Protocol to the ECHR*,[201] (ii) the *Fourth Protocol to the ECHR* "will impose

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194 *BOLOH* FC, *supra* note 9 at paras 137–39.

195 See "Parents of Canadian Held in Syria Urge Ottawa to Act as Prisoners Are Sent to Iraq", *Canadian Press* (22 January 2026), online: <ctvnews.ca> [perma.cc/J5GJ-J9Q9].

196 *BOLOH* FC, *supra* note 9 at para 138 [emphasis in original].

197 *Ibid* at para 140.

198 *Ibid* at para 141.

199 [GC], No 24384/19 (14 September 2022), ECLI:CE:ECHR:2022:0914JUD002438419 [*HF*].

200 *BOLOH* FC, *supra* note 9 at para 178.

201 *Protocol No 4 to the Convention of 4 November 1950 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, 1496 UNTS 263 (entered into force 2 May 1968) [*Fourth Protocol to the ECHR*] ("[n]o one

positive obligations on states in exceptional circumstances only, which have been confined to the issuance of travel documents"[202] (which, as discussed below, does not necessarily reflect the more nuanced holding of the ECtHR in *H.F.*), and (iii) "the right to enter would be violated when the ... legal system did not have sufficient protections against arbitrary or unfair decision-making."[203]

Potentially reflecting confusion on the nature of *H.F.*—it is not a "binding" source of IHRL for Canada because it is a regional human rights court's interpretation of a treaty to which Canada is not a party—Justice Brown attributed the non-binding nature of the case, in part, to it conflicting with his purposive interpretation of the *Charter* as supported by domestic precedents of the Supreme Court and Federal Court of Appeal that he was bound to follow and which he had interpreted as supporting the applicants' position.[204]

2. *BOLOH* FCA

Writing for the unanimous Federal Court of Appeal, Justice Stratas allowed Canada's appeal, holding that "Subsection 6(1) of the Charter, the right to enter, remain in and leave Canada, is not a golden ticket for Canadian citizens abroad to force their government to take steps—even risky, dangerous steps—so they can escape the consequences of their actions."[205] Reflecting the divide between the majority and minority in *Québec inc.* on the proper approach to *Charter* interpretation generally, a

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shall be deprived of the right to enter the territory of the state of which he is a national", art 3(2)).

202 *BOLOH* FC, *supra* note 9 at para 178.

203 *Ibid*.

204 Discussing the non-binding nature of *H.F.*, Justice Brown stated, "[w]ith respect, the decision [*H.F.*] ... does not bind this Court because it cannot be reconciled with the Supreme Court of Canada's determination of the scope and applicability of subsection 6(1) rights in *Divito*," before noting that "[i]n any event, while foreign judgments are informative and useful as interpretative guides, this Court is obliged to follow the Supreme Court of Canada and Federal Court of Appeal in this regard" (see *ibid* at paras 178–79, citing *Divito*, *supra* note 118; *Kamel* FCA, *supra* note 193; *Kamel v Canada (Attorney General)*, 2008 FC 338; *Abdelrazik*, *supra* note 193).

205 *BOLOH* FCA, *supra* note 9 at para 44.

considerable portion of *BOLOH* FCA focuses on how much primacy to give the text of the *Charter*.[206]

Unlike Justice Brown, Justice Stratas cited *Québec inc*. He (questionably) characterized *Québec inc.* as endorsing a more textual approach to *Charter* interpretation following a "showdown" in *Québec inc.* with what he termed a prior "looser" approach to *Charter* interpretation.[207] Perhaps taking implicit aim at Justice Abella's contribution to Supreme Court jurisprudence[208] and reflecting his long-held concern for doctrinal stability and various iterations of the Court being willing to overturn

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206 While this matter could be considered tangentially related to this article's focus on the reception of IHRL, it is worthwhile to note because, as Justice Stratas's reasoning makes clear, a more textual and less generous and purposive approach to *Charter* interpretation may leave courts less receptive to arguments in favour of an expanded scope of *Charter* rights based on IHRL.

207 *BOLOH* FCA, *supra* note 9 at paras 20–21.

208 Recently, this criticism became explicit. In the context of praising the Supreme Court's decision in *Vavilov* (*supra* note 58) as not being "some figment of some judge's worldview of what ought to be, the product of some judge's bestowal of personal benediction," Justice Stratas noted that "[f]or an explicit example of a judge basing a decision on a personal benediction, see *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 3" (see Justice David Stratas, "*Vavilov*: A Success Story, with Lessons Worth Learning" (Keynote Address delivered at the *Vavilov* at 5 Conference, University of Alberta, 19 June 2025) (2025) 63:1 Alta L Rev at 2, n 6). This paragraph that he cited of *SFL*, which was written by Justice Abella, states:

> The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations. As Otto Kahn-Freund and Bob Hepple recognized:
>
> > The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses the freedom to strike puts the workers at the mercy of their employers. This—in all its simplicity—is the essence of the matter.
>
> The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction (see *SFL*, *supra* note 57 at para 3, citing Otto Kahn-Freund & Bob Hepple, *Laws Against Strikes*, Fabian Research Series, vol 305 (London, UK: Fabian Society, 1972) at 8 [references omitted]).

precedents,[209] Justice Stratas was sharply critical of the "looser" approach followed in other Supreme Court decisions. He cited *SFL* as one of several examples of the "looser" approach, in which (although not discussed by Justice Stratas) IHRL was used to support an expansion of *Charter* rights.[210] In his view, after *Québec inc.*,

> [g]one is inspiration from some vague feel, spirit or vibe, things that are in the eye of the beholder. In its place is a rigorous, objective and disciplined judicial task guided by the words of the Constitution itself viewed in light of their historical context, the larger objects of the Constitution, and, where applicable, the meaning and purpose of associated provisions in the Constitution.[211]

Commenting on international (and foreign) law, Justice Stratas noted that it "can play a role in *Charter* interpretation ... by supporting or confirming the result reached by purposive interpretation" and that for *Charter* provisions that "were modelled after provisions in international law instruments," such as section 6(1), "international jurisprudence ... can often play an important role in the interpretive process."[212] However, he cautioned that "international law and foreign law do not displace or supplement the *Big M* [i.e., non-'looser'] approach. They have a defined, limited role, not the sprawling, undisciplined role they had under the looser approach."[213] He further argued against courts picking selectively from relevant international and foreign law: "When we interpret the *Charter*, international law and foreign law are not 'a series of tasty plates on a buffet table from which we can take whatever we like and eat whatever we

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209 See e.g. Canadian Constitutional Foundation, "CCF Law & Freedom 2016 Justice David Stratas' Keynote Presentation" (8 January 2016), online (video): <youtube .com> [perma.cc/727T-25TG].

210 In his reasons, Justice Stratas questions *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59; *Canada (Attorney General) v Bedford*, 2013 SCC 72; *SFL*, *supra* note 57; and *Schmidt v Canada (Attorney General)*, 2018 FCA 55 (see *BOLOH* FCA, *supra* note 9 at para 20).

211 *BOLOH* FCA, *supra* note 9 at para 23.

212 *Ibid* at para 28.

213 *Ibid* at para 29 [references omitted].

please.'"[214] He also noted that "different sources of international law have different value in the interpretive process."[215]

Justice Stratas underscored—in perhaps remarkably strong terms—the importance of "doctrinal stability" (which he clearly considered to be at risk under the "looser" approach to *Charter* interpretation), tying it to concerns about the rule of law and the proper role of the judiciary:

> Stability furthers the separation of powers between the judiciary and other branches of government: it keeps the judiciary in a predictable, appropriate lane. Stability brings us certainty, predictability, and freedom: it gives us consistent jurisprudence about what governments can and cannot do and about what they can be required to do. Stability bolsters the rule of law and increases confidence in the legal system. The people we serve deserve to be governed by lasting legal doctrine carefully shaped and sculpted over the years by many—not by the personal diktat of whoever happens to sit in a particular judicial chair at a particular moment of time.[216]

Overall, the decision's tone—including its strong caution against non-incremental change to protect the rule of law and its view that judges decide cases based on their personal opinions—highlights one of the primary arguments of this article: the uncertainty generated by unclear jurisprudence on how IHRL is received may provoke skepticism (and, potentially, even hostility) toward IHRL supporting expanded interpretations of *Charter* rights. In turn, the lack of a clear methodology may ultimately provide room for courts to avoid undertaking a robust effort at identifying Canada's IHRL obligations in the name of doctrinal stability and a stronger adherence to textualism.

Applying the "proper [i.e., primarily textual] interpretive approach,"[217] Justice Stratas held that the interpretation advanced by the respondent applicants would transform "the right 'to enter ... Canada' into a right to be returned to Canada."[218] As he saw it, "[t]his smacks of

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214 *Ibid*, citing *Canada (Attorney General) v Kattenberg*, 2020 FCA 164 at para 26.

215 *BOLOH* FCA, *supra* note 9 at para 29 [references omitted].

216 *Ibid* at para 24.

217 *Ibid* at heading B(1)(b).

218 *Ibid* at para 30.

the looser approach of interpreting *Charter* provisions" by "pluck[ing] broad words about [section 6(1)'s] underlying purposes from certain isolated paragraphs in certain Supreme Court cases."[219] With these "broad words ripped from their context and presented in the abstract," he concluded that section 6(1) was "given a meaning that overshoots its proper scope."[220]

Although this article is not focused on the proper interpretation of section 6(1), it should be noted that the difference of opinion between the Federal Court and the Federal Court of Appeal in *BOLOH* primarily turns on how the courts interpreted existing domestic caselaw. Justice Brown adopted a more purposive approach, finding the provision's purpose to be prohibiting state action (and, by extension, inaction) that results in Canadians being in de facto exile. This purpose previously supported Canada being under an obligation to not arbitrarily deny issuing passports and, in Justice Brown's view, could be extended to support the repatriation obligations at issue in *BOLOH* in order to avoid the applicants being left in de facto exile. In contrast, Justice Stratas took a predominantly textual approach, concluding that the right "to enter" cannot support a right "to be returned."[221]

Particularly relevant for the present discussion, despite the majority in *Québec inc*. having referred to the Dickson Doctrine—and Justice Stratas expressly extolling the importance of doctrinal stability and applying a consistent methodology to *Charter* interpretation—the Federal Court of Appeal's decision did not mention the Dickson Doctrine. Before exploring this omission in more detail below, it should be noted that there are some other surprising aspects of—and potential glaring errors in—the court of appeal's decision that are particularly noteworthy given the decision's tone regarding the need to be methodical and careful with international legal materials. One is where Justice Stratas stated that Justice Brown "did not cite ... *H.F.*"[222] As discussed above, Justice Brown clearly took note of *H.F*. as a non-binding, relevant decision of the ECtHR. He not only cited it, but he summarized his (or Canada's) view of the principles for which the case stands and concluded that *H.F.* was irreconcilable

219 *Ibid* at para 31.

220 *Ibid*.

221 *Ibid* at para 33.

222 *Ibid* at para 51.

with his interpretation of existing section 6(1) caselaw and that he was not bound to follow it.[223]

Justice Stratas also mischaracterized the nature of *H.F.* and its holding. First, *H.F.* was mischaracterized as "concern[ing] article 12(4) of the [*ICCPR*]," which Justice Stratas noted "was very much the inspiration behind subsection 6(1) of the Charter."[224] In fact, *H.F.* concerns article 3§2 of the *Fourth Protocol to the ECHR*. Although article 3§2 of the *Fourth Protocol to the ECHR* is substantially similar to article 12(4) of the *ICCPR* (and the ECtHR considered article 12(4) as part of its analysis in *H.F.*),[225] the *Fourth Protocol to the ECHR* is *not* a treaty that binds Canada and was *not* the inspiration for section 6(1) of the *Charter*.

Second, and of potentially greater consequence, Justice Stratas oversimplified the holding in *H.F.* As he characterized it, "*H.F.* tells us that article 12(4) [of the *ICCPR*] prohibits state actions that arbitrarily prevent citizens from entering their country of citizenship and does not extend to a right to be returned to their country of citizenship,"[226] and that *H.F.* "*rejects the existence of a right to be returned from abroad to one's country of citizenship*."[227] However, as discussed below, *H.F.* is more nuanced. Although the majority of the ECtHR found that there is no general right to be returned under the *Fourth Protocol to the ECHR* and held the ECtHR's review will be limited to ensuring that decisions taken on repatriation requests are not arbitrary and are reviewable, it found that there may be a positive obligation to facilitate repatriation in "exceptional circumstances"; namely (and echoing the reasoning of Justice Brown), where the State party's national faces what would amount to de facto exile. And, which may be surprising to a reader of *BOLOH* FCA alone, the ECtHR concluded that France had violated the rights of the *H.F.* applicants.[228]

Finally, although Justice Stratas stated that "[t]he parties have not placed before this Court any international authorities that conflict with

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223 *BOLOH* FC, *supra* note 9 at para 179.

224 *BOLOH* FCA, *supra* note 9 at para 51.

225 *Ibid* at paras 96–101, 248.

226 *Ibid* at para 48.

227 *Ibid* at para 51 [emphasis added].

228 *HF*, *supra* note 199 at para 284.

H.F., nor has this Court found any,"[229] it should be noted that, in *H.F.*, the Grand Chamber discussed a decision that could potentially conflict with Justice Stratas's reading of *H.F.* (and his dismissal of the special rapporteur's letter). First, there was a concurring minority opinion in *H.F.* that was highly critical of the majority not going further and clearly specifying that the obligation under article 3§2 is not merely procedural in nature and could support an order specifying action to be taken to assist with repatriation.[230] In addition, in its effort to identify the scope of the

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229 *BOLOH* FCA, *supra* note 9 at para 48.

230 As Justices Pavli and Schembri Orland wrote:

> The Grand Chamber has held that no general right to repatriation can be derived from Article 3 of the Fourth Protocol for nationals who happen to find themselves outside their country of citizenship and are unable to return freely to its territory. That notwithstanding, in certain exceptional circumstances, including a serious risk to the life and limb of nationals, the State of nationality's "refusal ... to take any action" to facilitate a national's right to return may amount, in effect, to *de facto* exile prohibited by the said Convention provision. In such a scenario, positive obligations are triggered for the State of nationality to guarantee the effective exercise of its nationals' right to enter its territory—in essence, a right to return.
>
> What do such positive obligations consist of? The majority are rather circumspect in spelling out these "other obligations." ...
>
> It is perhaps unprecedented for the Court to establish positive State obligations in order to give effect to a *substantive* Convention right without seeking at least to delineate in broad terms the nature of those positive obligations. ... In our view, giving effect to the right to return—however exceptional the circumstances under which such a right might arise in the first place—necessarily implies positive obligations of a procedural as well as a substantive nature. If "a refusal ... to take any action" to facilitate a national's repatriation is found to have been arbitrary or otherwise unjustified, compliance with the relevant Convention provision would require that the State take reasonable steps to facilitate his or her return. Otherwise, a duty to ensure the effectiveness of the substantive Convention right not to be exiled would itself be severely undermined. ...
>
> One obvious question that is not answered in the judgment is the following: can European States of the twenty-first century choose to effectively exile their own nationals suspected of involvement in terrorism—or more pertinently, their family members, including very young children? That question is left to be decided another day. ...
>
> The Court should have gone further, in our view, by calling a spade a spade (see *HF*, *supra* note 199 at paras 2, 5, Pavli & Orland JJ, concurring [emphasis in original, references omitted]).

potential right to be repatriated under the *Fourth Protocol to the ECHR*, the majority reviewed numerous international decisions and other international legal materials relevant to whether there is a right to repatriation under various human rights treaties (and, by extension, IHRL generally). These materials included a determination by the Committee on the Rights of the Child that France had violated its obligations under the *Convention on the Rights of the Child* by refusing to repatriate French children detained by AANES in northeastern Syria.[231]

In reasoning that echoes that of the special rapporteur's letter considered in *BOLOH* because it focuses on an (arguable) due diligence obligation on States to ensure that a third-party does not violate the rights of a State's citizens, the committee determined that, because France was "aware of the prolonged detention of [the] French children in a life-threatening situation and is capable of taking action," it had "a positive obligation to protect these children from an imminent risk of violation of their right to life and an actual violation of their right not to be subjected to cruel, inhuman or degrading treatment."[232] The committee found that France was obliged to go beyond simply assisting with repatriation, by needing to, among other things, "take positive and urgent measures, acting in good faith, to repatriate [the] child victims; ... support the rehabilitation and reintegration of each repatriated child; and ... take any additional measures in order to mitigate the risks to the life, survival and development of child victims while they remain in north-eastern Syria."[233]

3. The Minimum Protection Approach's Notable Absence

In *BOLOH* FCA, when discussing the role of international law in *Charter* interpretation, Justice Stratas did not mention the minimum protection approach (or the presumption of conformity), which could be surprising since the decision (i) relied on *Québec inc.*, (ii) stressed the importance of taking a methodical approach to *Charter* interpretation, and

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231 *Ibid* at paras 84–124.

232 *Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communications Nos 77/2019, 79/2019 and 109/2019*, UNCRC, 89th Sess, UN Doc CRC/C/89/D/77/2019-CRC/C/89/D/79/2019-CRC/C/89/D/109/2019 (2022) at para 6.9 [*UNCRC Views on FB*].

233 *HF*, *supra* note 199 at para 107, citing *UNCRC Views on FB*, *supra* note 232 at para 8.

(iii) underscored the need for "doctrinal stability."[234] While not reiterating relevant interpretive rules does not render a decision incorrect, the omission is problematic because it obscures the reasoning. And—particularly in a context where courts have struggled to find and provide clarity—doing so was a less desirable approach for several other reasons.

First, not referring to the minimum protection approach returns to implicit reasoning, which occurred in some Supreme Court cases in which IHRL was invoked—particularly before *Health Services*—and had engendered sharp criticism.[235] Second, when the minimum protection approach is *not* mentioned in a judgment that strongly endorses starting with the *Charter*'s text, it could result in a court failing to undertake a generous and purposive interpretation that is sufficiently mindful of and informed by Canada's IHRL obligations (and, potentially, other relevant IHRL). Instead of engaging in a serious effort to identify Canada's IHRL obligations and applying them as an interpretive floor to ensure that Canada is—at a minimum—meeting its IHRL obligations, not mentioning the minimum protection approach could pave the way for a more cursory analysis according to which a potentially emaciated understanding of Canada's obligations is used to confirm the Court's interpretation of the *Charter*. Although Justice Stratas was correct that with respect to Canada's IHRL obligations that have a domestic equivalent in the *Charter*, "[i]nternational law is not a box of chocolates from which one can take what one wants, leaving the rest in the box,"[236] there is an increased risk of selective treatment when there is a less robust effort made to identify applicable minimum IHRL standards.

While the Federal Court of Appeal may have implicitly followed the majority's approach in *Québec inc.* by (i) identifying its interpretation of the scope of section 6(1), (ii) considering (albeit in an arguably cursory manner) two international materials relevant to the arguable right to repatriation under IHRL, and (iii) preferring the material that the court considered more authoritative, the reasoning could have followed a much clearer methodology. It could have, for example, adhered more closely to the majority opinion in *Québec inc.* by identifying the previously established interpretation of section 6(1) and the scope of positive obligations

234 See *BOLOH* FCA, *supra* note 9 at para 24.

235 See e.g. Currie, "Charter Jurisprudence", *supra* note 7 at 439.

236 *BOLOH* FCA, *supra* note 9 at para 50.

it could impose on Canada before determining if this, at a minimum, meets Canada's obligations under the *ICCPR*. And, as will be examined in more detail below, if it were following *Québec inc*., the court could have more accurately assessed the nature of the international materials it was considering and the extent to which they assist with interpreting Canada's relevant binding international human rights obligations.

Finally, at the risk of reading too deeply between the lines, not mentioning the minimum protection approach—or even "international human rights law" at all—could be significant because the decision may be read as implicitly questioning the role of IHRL in *Charter* claims. Notably, Justice Stratas was specifically critical of *SFL*, which he cited as an example of the "looser" approach leading the Supreme Court "to strike down or circumvent some decades-old binding precedents, with doctrinal inconsistency the result."[237] Although Justice Stratas did not mention it, as explored above, IHRL played an important role in supporting the expansion of the scope of freedom of assembly under the *Charter* in *SFL* to include the right to strike.[238] Moreover, it should be noted that there is no doctrinal inconsistency generated by the decision if one considers the outcome in *SFL* to be the result of correctly applying the minimum protection approach on account of the fact that Canada has ratified a treaty codifying the right to strike under freedom of association. Given its overall tone, the omission of the minimum protection approach, and the lack of any reference to "international human rights law," *BOLOH* FCA could be read as the unanimous court being skeptical of—and perhaps even hostile to—IHRL playing a key role in the interpretation of *Charter* rights.

4. Weighing International Legal Materials

Both courts in *BOLOH* could—and, I argue, should—have undertaken a more detailed and robust consideration of the nature and content of the international legal materials being relied upon by the parties and what weight to afford them in the analyses. Aside from noting that he was not bound to follow *H.F.* because it was non-binding, Justice Brown did not directly address this matter in *BOLOH* FC. In *BOLOH* FCA, when considering the weight to give international materials that he considered

237 *Ibid* at para 20 [references omitted].

238 *SFL*, *supra* note 57 at paras 62–75.

to stand for conflicting propositions on whether there is the right to be repatriated, Justice Stratas noted that "[d]ifferent international authorities are of different value" and asserted that "international court decisions in adjudicative contexts, such as *H.F.*, deserve far more weight than the non-adjudicative individual opinions of other international actors" (i.e., the special rapporteur's letter).[239] However, without delving into the substance of either authority (and potentially mischaracterizing *H.F.* as directly conflicting with the letter even though it might not), he essentially dismissed the special rapporteur's letter in favour of his reading of *H.F.*:

> The Federal Court relied on a letter from the UN Special Rapporteur as support for its imposition of positive obligations upon the Government of Canada under subsection 6(1) of the *Charter*. The letter does support the Federal Court's view. But, as we have seen, *H.F.*, a decision of the European Court of Human Rights, says the opposite, in highly detailed, persuasive reasoning.[240]

On its face, such weighing may be justified; despite being authored by an expert in IHRL who specifically investigated the situation of one of the applicants, the letter is not a primary source of international law. However, as a regional human rights court decision considering the provision of a treaty to which Canada is not a party, *H.F.* is not a primary source of IHRL for Canada either. Both are likely best considered subsidiary sources of international law that may assist with interpreting Canada's relevant IHRL obligations.[241] Although an argument may be made that the letter could be considered less authoritative (and therefore less persuasive) than a relevant decision of a highly respected regional human rights court regarding a provision of a regional human rights treaty that is substantially similar to the provision of a treaty Canada has ratified, following the holding of the majority in *Québec inc.*, it was incumbent

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239 *Supra* note 9 at para 50 [references omitted].

240 *Ibid* at para 49.

241 Sources of international law are identified in the *Statute of the International Court of Justice*, which provides that "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law" (see 26 June 1945, 33 UNTS 993, art 38(1)(d) (entered into force 24 October 1945) [*ICJ Statute*]).

upon both federal courts to more directly assess the nature of these materials to determine what interpretive weight—if any—to give them.

While Justice Stratas's "weighing" (which amounted to essentially disregarding the letter in favour of his interpretation of *H.F.*) may be particularly sound *if* the materials stood for clearly conflicting propositions, as explored below, a more detailed consideration of the letter and *H.F.* calls into question whether they directly conflict. The cursory treatment of these materials in *BOLOH*—which, I argue, was facilitated by overlooking the minimum protection approach—raises questions about whether the reasoning in both *H.F.* and the letter were given due consideration by both courts. As will be explored below—contrary to Justice Stratas's cursory conclusion discussed above—a closer look suggests that *H.F.* and the letter may not directly conflict and that their contribution to answering the question of whether there is a right to repatriation under IHRL that is internationally binding upon Canada is more nuanced than *BOLOH* FCA suggests.

Finally, since the Federal Court of Appeal was determining what weight to afford the international materials before it, the nature of the letter should have been explored more closely. As a document conveying an IHRL expert's opinion on Canada's IHRL obligations in a specific context, the letter is likely best characterized as a subsidiary source. Despite not being a primary source of international law, the letter could, however, still be potentially persuasive commentary on Canada's obligations in the context before the court that, in turn, may arise from binding IHRL. As will be discussed below, had the letter been more carefully scrutinized, the judgments could have (with the assistance of counsel) distilled the special rapporteur's arguments and assessed if they accurately reflect Canada's IHRL obligations.

5. *H.F.* and Repatriation Obligations

As noted above, although the majority in *H.F.* held that there is no general right to repatriation under article 3§2 of the *Fourth Protocol to the ECHR*,[242] the decision did not stop there. Notably, the Grand Chamber held that "in exceptional circumstances," there may be "a positive obligation on the State where, in view of the specificities of a given case, a

242 *Supra* note 201.

refusal by that State to take any action would leave the national concerned in a situation comparable, *de facto*, to that of exile."[243] However, the practical effect of this obligation could be limited because the majority determined that, where such exceptional circumstances exist, "the requisite review [by the ECtHR] will be confined to ensuring effective protection against arbitrariness in the State's discharge of its positive obligation."[244] Although unspoken by the majority of the court but noted by the concurring minority, this holding necessarily implies that, in some circumstances, a State could be obliged to take reasonable steps to assist with repatriation.

Applying this test to the circumstances before the court, the majority found that exceptional circumstances existed in *H.F.* and that France had violated its obligation because its "examination of the [repatriation] requests ... was not surrounded by appropriate safeguards against arbitrariness."[245] The concurring minority was strongly critical of the majority not going further and holding that the obligation is not merely procedural in nature and could support an order by the ECtHR specifying the steps to be taken to assist with repatriation.[246] If the minimum protection approach were applied robustly in *BOLOH*, I argue that the minority opinion would deserve attention because its reasoning could assist with assessing how persuasive to consider the majority's reasoning that procedural declaratory relief was a sufficient remedy.

Therefore, rather than outright "reject[ing] the existence of a right to be returned from abroad to one's country of citizenship," as Justice Stratas had characterized it, *H.F.* stands for the principle that, despite there being no general right to repatriation under the *Fourth Protocol to the ECHR*, in exceptional circumstances where a citizen would be left in de facto exile, the right to enter one's country of nationality could impose a positive obligation on States Parties to the *Fourth Protocol* to take reasonable steps to facilitate repatriation, and they must (at a minimum) have appropriate processes in place to ensure that decisions taken on repatriation requests are not arbitrary and are reviewable. If the courts in *BOLOH* had robustly applied the minimum protection approach to identify the

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243 *HF*, *supra* note 199 at paras 260–61.

244 *Ibid* at para 261.

245 *Ibid* at para 283.

246 *Ibid* at paras 2, 5, Pavli & Schembri Orland JJ, concurring.

scope of right to enter under the *ICCPR* (and, perhaps, IHRL generally), the analysis would not end with *H.F.* Also relevant could be the numerous authorities explored within *H.F.* that could help to inform the scope of a State's potential obligations, including the determination by the Committee on the Rights of the Child, discussed above, that France was required to take "positive and urgent measures ... to repatriate child victims" from northeastern Syria.[247]

Ideally, both courts in *BOLOH* would have explicitly applied the Dickson Doctrine, which would have led to an application of the minimum protection approach since section 6(1) of the *Charter* has an international equivalent—article 12(4) of the *ICCPR*—that is binding upon Canada. In doing so, the courts would have considered *H.F.* (among other authorities) as a relevant subsidiary interpretive source that could assist with identifying the scope of the right to enter one's country of nationality under the *ICCPR*.

As part of this analysis, the more nuanced perspective on the right arising from *H.F.* could have been applied in *BOLOH*. This would have required the courts to consider, for example, whether exceptional circumstances meeting the threshold of *H.F.* exist and whether an appropriate procedure was in place in Canada for handling and reviewing repatriation requests. While not as inherently vulnerable as women and children, an argument could be made that the *BOLOH* male applicants are in a situation comparable to exile. They are being held in indefinite and arbitrary detention outside Canada due to being suspected of engaging in or supporting terrorist activities in circumstances where their lives and health are at risk, and they are being subjected to inhuman and degrading treatment. Meanwhile, there are possibly insufficient grounds to charge them with criminal offences in Canada and their repatriation and potential reintegration into Canadian society could be difficult—from practical, legal, and public safety perspectives—in addition to being problematic politically. Further, AANES has requested repatriation and cooperated with the repatriation of other detainees (including Canadians), while non-governmental human rights organizations have offered to act as Canada's delegate to facilitate repatriation to avoid Canadian officials being put at risk. Ideally, the courts in *BOLOH* would have asked whether, considering the totality of the circumstances, Canada's refusal to request

247 *UNCRC Views on FB*, *supra* note 232 at para 8.

repatriation from AANES leaves the applicants in circumstances comparable to de facto exile. And if so, whether there were sufficient procedural safeguards against arbitrariness, and whether the denial of the repatriation requests was reasonable. If the Dickson Doctrine had been robustly applied and the "highly detailed, persuasive reasoning" of the Grand Chamber in *H.F.* given interpretive weight, both federal courts ought to have directly considered these questions.

6. The Special Rapporteur's Letter

A more detailed effort at identifying the scope of repatriation obligations under IHRL would also have been useful when considering what weight to afford the arguments advanced by the special rapporteur. While Justice Brown's opinion implied that he may have taken at face value that the letter evidenced that Canada was failing to meet its IHRL obligations and Justice Stratas appeared to characterize the letter as a (highly questionable) source of international law conflicting with *H.F.*, neither court explored the substance of the letter nor considered to what extent the arguments made in the letter could be reflective of Canada's IHRL obligations. Applying a more robust methodical approach would have drawn from the letter the arguments made in it, assessed to what extent these arguments reflect Canada's IHRL obligations arising from the treaties and other sources cited in the letter, and then applied the court's understanding of this binding or relevant IHRL to determine whether the scope of section 6(1) should be expanded.

Notably, the letter does not even focus on whether there is a right to repatriation per se under anything similar to section 6(1) of the *Charter*.[248] Rather, the letter lays out—in a conclusory manner that likely did not help the applicants—the special rapporteur's view that a refusal to repatriate could violate Canada's obligations to protect specific human rights arising from a variety of sources—including treaties that Canada has ratified and customary international law. Overall, it expressed concern that Canada could be failing to meet its (arguable) obligation under IHRL to ensure that a non-State actor it supports does not violate the human rights of a Canadian abroad, as the letter focuses on the indefinite and arbitrary

248 *BOLOH* FC, *supra* note 9 at para 139, citing Letter from Fionnuala Ní Aoláin et al to Canada (8 June 2022), Reference No UA CAN 3/2022, online (pdf): <spcommreports.ohchr.org> [perma.cc/X7VA-Y2ZN].

detention of a Canadian being "enabled and supported" by Canada's support of AANES.[249] The letter noted that Canada has an obligation under IHRL to ensure that its support of non-State actors does not contribute to human rights violations. It also suggested that some of Canada's other international human rights obligations could be implicated by its refusal to assist with repatriation—including the rights to life, health, non-discrimination, and access to an effective remedy arising from the *UDHR*, the *ICCPR*, the *ICESCR*, and customary international law—particularly since AANES had asked Canada to repatriate its nationals and many other countries had already done so.[250]

If a more methodical approach had been taken to the legal arguments raised in the letter, both courts in *BOLOH* would have assessed (i) whether and to what extent Canada has a due diligence obligation pursuant to binding sources of IHRL (i.e., the *ICCPR*, the *ICESCR*, and customary international law) to ensure that a non-State actor whose activities it is capable of influencing does not violate the human rights of Canadians it is detaining in circumstances where it is known—and not simply reasonably foreseeable—that rights violations are occurring; (ii) whether such a due diligence obligation, if one is found to exist, gives rise to an obligation under IHRL to take reasonable steps to assist with repatriation in order to put an end to the rights violations; and (iii) whether this, in turn, could inform a duty to take reasonable steps to facilitate repatriation under section 6(1) of the *Charter* (or by some other means, particularly if the underlying obligation flows from customary international law).

Overall, the *BOLOH* litigation is instructive as another missed opportunity for Canadian courts to apply a sound methodological approach to a *Charter* claim invoking IHRL. It may also illustrate what happens when jurisprudential uncertainty combines with a perception that litigants—and courts—are picking and choosing what international materials to invoke and consider analytically persuasive. With respect, the tone of *BOLOH* FCA suggests that it was delivered by a bench exasperated with litigants arguing in favour of expanded *Charter* rights and relying upon what it considered to be select international materials to support their positions—particularly when the litigants are arguing for positive

249 *BOLOH* FC, *supra* note 9 at para 139, citing Ní Aoláin et al, *supra* note 248.

250 *BOLOH* FC, *supra* note 9 at para 139, citing Ní Aoláin et al, *supra* note 248.

obligations to be recognized and are unsympathetic due to being at fault for their predicament.[251]

III. ENDORSING THE DICKSON DOCTRINE AND APPLYING INTERNATIONAL LAW TO INTERNATIONAL LAW

A. Recognizing Canada's IHRL Obligations and the Value of Consistency

There has long been academic debate on the role that international law should play within Canada's domestic legal system, with some scholars arguing that a simplified approach should be adopted under which any relevant international law is treated as potentially persuasive—regardless of its binding or non-binding status—similar to comparative foreign law because this would provide "great flexibility" and enhance its "usefulness."[252] While this more flexible approach could be appealing for those who think it would be beneficial to have international law *potentially* play a greater role influencing Canadian law, I argue that it risks exacerbating uncertainty regarding the reception of IHRL and is not ideal for several other reasons.

First, adopting a "relevant and persuasive" approach for all international law is problematic because it risks disregarding the nature of IHRL

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251 In *BOLOH* FCA, Justice Stratas noted that it was inappropriate to require Canada to take positive measures to assist the applicants "*so they can escape the consequences of their actions*" (see *supra* note 9 at para 44 [emphasis added]). In *Toussaint* FCA, Justice Stratas similarly highlighted an applicant's personal actions as being the cause of the alleged violations of her *Charter* rights, stating:

> Further, and most fundamentally, the appellant by her own conduct—not the federal government by its Order in Council—has endangered her life and health. The appellant entered Canada as a visitor. She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the Ontario Health Insurance Plan (see *supra* note 19 at para 72 [references omitted]).

252 See e.g. Stéphane Beaulac, "International Law and Statutory Interpretation: Up with Context, Down with Presumption" in Fitzgerald, *Globalized*, *supra* note 20, 331 at 335–63; William A Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3rd ed (Toronto: Thomson Carswell, 2006) at 51; Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32:2 NYUJ Intl L & Pol 501 at 506, 520, 525, 535.

as a rights-granting regime, which could support setting it conceptually apart from other areas of international law[253]—similar to how the *Charter* is interpreted in a different (e.g., large, liberal, generous and purposive, living tree) manner than other, non-rights-granting areas of Canadian law.[254] In addition, although it would potentially increase the ability for IHRL to affect the interpretation of domestic law—the value of which is clearly in the eye of the beholder—too much flexibility would risk courts simply disregarding IHRL even when it is binding on Canada, which diminishes the potential for Canada's IHRL obligations to have domestic effect.[255] I argue that the potential for courts to disregard arguments invoking IHRL would be greater where the scope of obligations is difficult to identify, which (as will be discussed below) may often be the case with IHRL. Further, adopting a "relevant and persuasive" interpretive framework for all international law overlooks that the rule of law is maintained through consistency and certainty regarding what rules apply; being too flexible may bolster the perception that IHRL is being used selectively to support a desired result.[256] This, in turn, could fuel concerns regarding judicial activism, which may have contributed to the skepticism potentially present in *BOLOH* FCA to a generous and purposive approach to *Charter* interpretation informed by Canada's IHRL obligations.

Finally, adopting a "relevant and persuasive" framework for all international law would overlook that there is a principled reason for binding IHRL to carry more weight: IHRL imposes obligations that Canada

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253 See Scott Sheeran, "The Relationship of International Human Rights Law and General International Law: A Hermeneutic Constraint, or Pushing the Boundaries?" in Scott Sheeran & Nigel Rodley, eds, *Routledge Handbook of International Human Rights Law*, Routledge Handbooks (Abingdon: Routledge, 2013) 79 at 102. See also Paul Hunt, "Interpreting the International Right to Health in a Human Rights-Based Approach to Health" (2016) 18:2 Health & Hum Rts 109 at 120–23; Matthew Craven, "Legal Differentiation and the Concept of the Human Rights Treaty in International Law" (2000) 11:3 Eur J Intl L 489.

254 For a discussion on the different interpretive approaches that ought to be taken to legislation compared to the *Charter* in the context of the risk of applying the presumption of conformity to the *Charter*, see Currie, "*Hape*", *supra* note 111 at 81.

255 See e.g. *VAH*, *supra* note 66 at para 18–19; *Toussaint* FC, *supra* note 19 at para 70.

256 See e.g. Graham Hudson, "Neither Here nor There: The (Non-)Impact of International Law on Judicial Reasoning in Canada and South Africa" (2008) 21:2 Can JL & Jur 321 at 329. See also *Québec inc*, *supra* note 25 at para 3.

has voluntarily accepted internationally[257] *and* the State vis-à-vis individual plane is precisely where these obligations are supposed to exist. The importance of Canada's international obligations meaning something domestically has long been recognized by the Court.[258] To properly recognize Canada's IHRL obligations, these obligations ought to be something more than a potentially persuasive interpretive aid.

B. Explicitly Endorsing the Dickson Doctrine

The most compelling arguments on how IHRL should be received are those that reconcile, explain, and draw from existing jurisprudence.[259] Both Anne Warner La Forest and Currie have made such arguments in favour of endorsing the Dickson Doctrine for *Charter* cases.[260] Doing so would recognize an enhanced role for binding IHRL, while having recourse to relevant non-binding IHRL would allow for a full consideration of the context and purpose of the *Charter* in light of binding and relevant IHRL while maintaining room for a domestic interpretation of rights that could exceed IHRL.

Warner La Forest, for example, argues that "in the case of [IHRL] and the interpretation of the *Charter*, the Court should act as a translator, and not an enforcer, of international law so as to forward a Canadian vision of human rights."[261] In her view, binding international law should not be equated to foreign law because its binding nature provides a principled reason to distinguish it.[262] In addition, she notes that treaty-based international law represents a consensus among States, unlike foreign law, such that treaties may be more likely to reflect common ideals.[263] As she

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257 See e.g. Jutta Brunnée & Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Intl Law 3 at 41; Stephen J Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 UNBLJ 11 at 19–20.

258 See e.g. *PSERA*, *supra* note 82 at paras 59–60. See also *Québec inc*, *supra* note 25 at para 27.

259 See e.g. Currie, "Charter Jurisprudence", *supra* note 7 at 460–63.

260 *Ibid*; Anne Warner La Forest, "Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004) 37:1 UBC L Rev 157 at 218.

261 A La Forest, *supra* note 260 at 185.

262 *Ibid*.

263 *Ibid*.

cautions, "there is often an unacknowledged preconception that [IHRL] is usually more progressive than domestic human rights law" which (as the discussion of *Ktunaxa Nation* above may show) might not always be so.[264] Since IHRL may not always "keep pace" with domestic jurisprudence, she argues that "the binding character of [IHRL] and its transformation into the domestic law is a matter to be carefully assessed by the Court."[265] In her view, Canadian courts ought to act as an "'informed translator'" and "examine both domestic and international law and develop ... a solution that is persuasive to both communities."[266] Ultimately, she endorses the Dickson Doctrine:

> Dickson C.J.C. was right in stating that international law should be relevant and persuasive but really demonstrated the measure of his greatness as a judge by concluding 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 [i.e., treaties] which Canada has ratified."[267]

Highly critical of the Supreme Court's confused jurisprudence, Currie has argued for a "model" based on the Dickson Doctrine under which "an unqualified minimum content presumption [would be] applied to all of Canada's binding IHRL obligations" while a "relevant and persuasive interpretive status" would be afforded to non-binding international human rights obligations.[268] He argues that this approach "would constitute an appropriate starting point for rehabilitation of the Court's jurisprudence" and supports his position by the fact that it is drawn from existing jurisprudence—the Court simply needs to explain and endorse it.[269]

To this, I add that Currie's proposal is further supported by the fact that, unlike most international law, the entire purpose of IHRL is to create

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264 *Ibid* at 208. See also Schabas & Beaulac, *supra* note 252 ("[m]uch of international human rights law ... constitutes a low common denominator of the world community. This is not always appropriate for Canadian society, where aspects of human rights law and practice are more advanced and are, in several areas, often on the cutting edge" at 50–51).

265 A La Forest, *supra* note 260 at 209.

266 *Ibid* at 218.

267 *Ibid*, citing *PSERA*, *supra* note 82 at para 59.

268 Currie, "Charter Jurisprudence", *supra* note 7 at 463.

269 *Ibid*.

obligations on a State toward individuals rather than obligations among States. Therefore, although arguments have been made that domestic systems should not be used to enforce international law where international enforcement mechanisms are lacking,[270] with respect to IHRL, this argument is weaker because domestic systems are the most appropriate forum for international human rights to be made effective. The domestic plane is where human rights are designed to exist and the importance of IHRL being effective domestically is heightened because IHRL is one of the most—if not *the* most—internally-focused area of international law for which an incentive on dualist States to internalize their international obligations may be lacking because they do not have the same international (i.e., State-to-State) implications as other areas of international law that encourage States to work toward legal harmonization *and* domestic legal implementation of their international obligations.[271] International human rights—particularly those not tied to labour standards or environmental protection—are often more insulated from State-to-State interests because they create obligations on the State with respect to individuals instead of obligations among States. As a result, unlike other areas of international law touching upon matters of an internal nature, there may be less State-to-State pressure to motivate dualist States to explicitly incorporate their IHRL obligations into the domestic legal system.

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270 For example, Karen Knop criticizes "international lawyers" who seek to use domestic courts as "enforcers" of international law, which she attributes to the fact that enforcement mechanisms are "weak or absent in the international system." She sees this approach as "reduc[ing] these courts to a simple compliance mechanism for international law" which renders the courts "in effect, not judges, but police." She argues, in essence, against the harmonization of international and domestic law because this may not allow for the modification (or "translation") of international law to better fit domestic circumstances (see *supra* note 252 at 502–03, 530–34).

271 See e.g. *Draft General Comment No 9: The domestic application of the Covenant*, UNCESCR, 19th Sess, UN Doc E/C.12/1998/24 (1998) at paras 4, 7, 9–10. The UN Committee on Economic, Social and Cultural Rights has long been critical of Canada's resistance to implementing *ICESCR* rights into Canadian law. For example, in its concluding observations on Canada's sixth periodic report, the committee was critical of the fact that "economic, social and cultural rights remain generally non-justiciable in [Canadian] courts" and recommended that Canada "take the legislative measures necessary to give full effect to the Covenant rights in its legal order and ensure that victims have access to effective remedies" (see *Concluding observations on the sixth periodic report of Canada*, UNCESCR, 57th Sess, UN Doc E/C.12/CAN/CO/6 (2016) at paras 5–6).

Further, unlike many other areas of international law, domestic courts are the most relevant forum for having international human rights be legally effective because the domestic plane is precisely where these rights are supposed to exist. The role for domestic courts is also heightened due to the general requirement for individuals to exhaust local remedies before having recourse to international mechanisms, while international oversight bodies for treaties to which Canada is a party—including the *ICCPR*—often lack robust enforcement mechanisms, which can leave individuals without an effective remedy where a treaty-monitoring body (e.g., the UN Human Rights Committee) has found that their rights have been violated. As the situation of the late Nell Toussaint demonstrates, this was not a concern in the abstract as Canada simply refused to abide by the views of the committee that it had violated her rights to life and non-discrimination under the *ICCPR*.[272]

Finally, an additional benefit of the explicit adoption of a fully-reasoned Dickson Doctrine—which maintains a clear distinction between the minimum protection approach and the general presumption of conformity—is that it could allay concerns that international law could impair the development of rights in Canada that exceed those existing internationally.[273] The confusing and unnecessary potential conflation of the *Charter*-specific minimum protection approach with the general presumption of conformity that has crept into the Supreme Court's jurisprudence needs to be acknowledged and disavowed to avoid international law becoming an interpretive cage around rights in Canada;[274] there is simply no need for the two interpretive principles to be used synonymously but with one varied in a potentially confusing manner in the *Charter* context. A thoroughly reasoned endorsement of the Dickson Doctrine that reconciles past jurisprudence therefore offers the best path forward[275]—particularly when (as will be discussed below), it focuses on the nature of the right in question and is combined with a methodical approach that uses international legal methods to: (i) identify the scope and content of IHRL and (ii) determine the nature of—and therefore what interpretive weight to afford—international legal materials.

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272 See Lantz, *supra* note 19.

273 See Currie, "Charter Jurisprudence", *supra* note 7.

274 See Currie, "*Hape*", *supra* note 111 at 76.

275 See Currie, "Charter Jurisprudence", *supra* note 7 at 460–63.

C. Using International Law to Interpret International Law

As Justices Brown and Rowe in *Québec inc.* and Justice Stratas in *BOLOH* FCA noted, there are compelling reasons for certain international legal materials to be afforded more weight than others. Weighing international materials appropriately not only assists Canada in meeting its international obligations, but reflects the fact that some materials are, by their nature, more authoritative than others. Understanding the nature of international materials and what interpretive weight to give them requires an understanding of international law and its rules of interpretation.

International law is derived from a variety of sources, with primary sources being customary international law and treaties (and general principles of law).[276] Except for States that are a party to a specific case or otherwise bound by the outcome, judicial decisions are technically only "subsidiary" sources of international law, together with commentary by leading international law scholars.[277] As subsidiary or secondary sources, such caselaw and scholarly commentary may assist with identifying rules of international law and understanding the scope and content of international law; however, they do not create it.

In addition to these traditional "hard" sources of primary international law and subsidiary interpretive aids, there is an increasing amount of other international legal materials and so-called "soft" law available to assist with identifying the rules of international law and interpreting its scope in specific contexts. This is where it is particularly important for the nature of international legal materials to be understood. These materials include (among many others) declarations, resolutions, and other materials produced by intergovernmental organizations and bodies, such as the UN General Assembly (UNGA), the UN Security Council (which, in some cases, may perform something akin to a law-making function by making decisions that UN Member States must "accept and carry out"),[278] the ILO, the World Trade Organization, the World Health Organization, and a variety of UN agencies, among others; expert—and potentially highly authoritative—commentary and guidance on specific topics

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276 See *ICJ Statute*, *supra* note 241, art 38(1)(a)–(c).

277 *Ibid*, art 38(1)(d).

278 See *UN Charter*, 26 June 1945, Can TS 1945 No 7, arts 25, 39.

published by subject matter expert bodies such as the International Law Commission, regional and international human rights treaty monitoring bodies, and UN special rapporteurs;[279] principles and guidelines (potentially endorsed by States) under the auspices of regional or international organizations; and commentary published by nongovernmental organizations, such as the International Commission of Jurists, the International Committee of the Red Cross, and the International Law Association. This list could go on. The fundamental point is that, even beyond the binary "binding" (i.e., ratified treaties, customary international law, general principles of law, and international court decisions to which Canada is a party) versus "non-binding" (i.e., almost everything else) distinction appearing in *Charter* jurisprudence, not all international legal materials are created equal.

For example, while on their face a "non-binding" source because they are not a primary source of international law, not all UNGA resolutions should carry the same interpretive weight. A UNGA resolution passed unanimously by UN Member States that expressly lays out an interpretation of a foundational article of the *UN Charter*[280] and that has been cited with approval by the International Court of Justice as being reflective of customary international law[281] should—despite being technically "non-binding"—carry far more interpretive weight (quite rightly to the point of being considered reflective of customary international law) than a contested resolution of the UNGA where States voted along bloc lines for potentially political purposes. It is, therefore, entirely appropriate—and necessary—for due consideration to be given to the specifics of a UNGA resolution before deciding how persuasive it should be in a given context, because the weight it ought to be afforded is dependent upon how reflective it is of *lex lata* compared to *lex ferenda* (i.e., the law as it is compared to the law as it should be). In other words, when it has an international

279 UN special rapporteurs are highly respected subject matter experts whose reports, in some instances and depending on the context, could be considered on par with academic commentary as a subsidiary source that can assist with interpreting the content of international law.

280 See e.g. *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UNGA, 25th Sess, UN Doc A/RES/2625(XXV) (1970) GA Res 2625 (XXV).

281 See e.g. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14 at paras 188, 191–93.

material before it, a court should be asking how reflective the material is of the actual state of international law, which will, in turn, help the court determine how persuasive it ought to be in the court's interpretive analysis.

For Canadian courts to undertake this task and appropriately adjudicate claims invoking IHRL, the nature of international materials, their significance, and the distinctions that may be drawn among them need to be understood, considered, and addressed—by counsel who are arguing cases and by judges who are deciding them, potentially with the assistance of interveners.[282] This need is underscored by the fact that courts take judicial notice of international law, such that expert opinions are not required (and in some instances may not even be permitted).[283] And the need may now be even more pressing given that the Supreme Court has recently signalled its potential lack of openness to entertaining interventions that diverge significantly from the arguments advanced by the parties—despite having granted leave for such interventions[284]—which may presumably be more likely to occur when interveners invoke international law when the parties have not. Given that, as noted above, litigants often do not make international law-based arguments directly, this ought to be a concerning development that underscores the clear need for lawyers in Canada to have a basic understanding of international law and reception law so that they may advance these arguments directly.

D. Clarifying the Dickson Doctrine and Using International Law to Interpret International Law

A possible source of the persistent confusion regarding the role for IHRL could be due to the suggestion in *PSERA* (and subsequent decisions) that courts should consider whether specific international legal *materials* being relied upon are "binding" or "non-binding," rather than focusing on the nature of the *obligation* (i.e., whether the specific international human right being invoked is binding or non-binding upon

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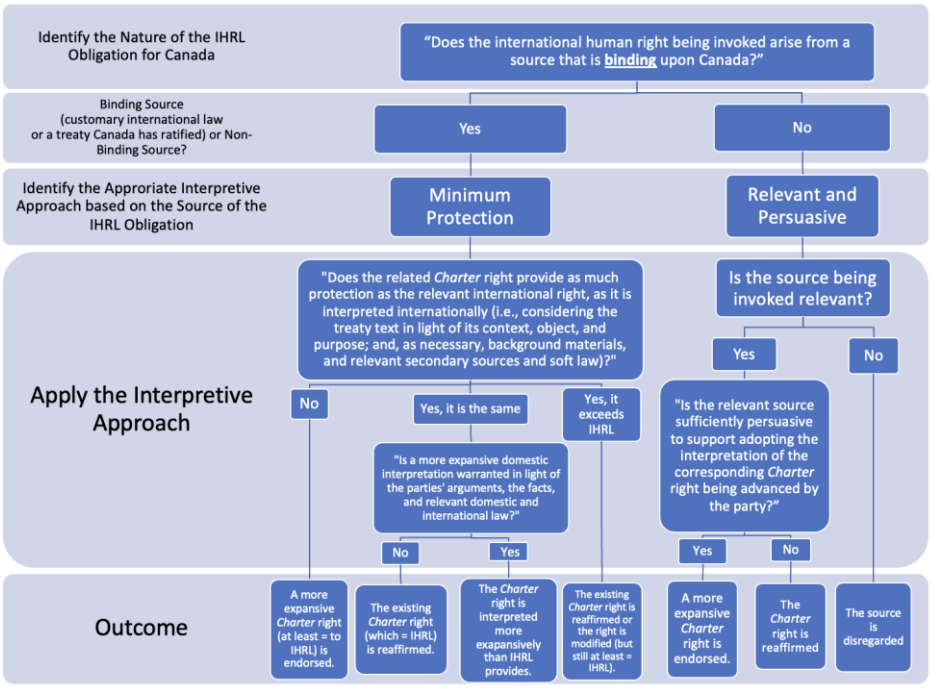
282 See e.g. *Amnistie internationale*, *supra* note 22.

283 See e.g. Micah B Rankin, "The Admissibility of International Legal Opinion Evidence after *R v Appulonappa*", Case Comment (2015) 93 Can Bar Rev 327 at 328, 330–32; van Ert, *Using International Law*, 2nd ed, *supra* note 30 at 44–45.

284 *McGregor*, *supra* note 120 at paras 21–24. But see *ibid* at paras 81–82, Karakatsanis & Martin JJ, concurring.

Canada). While the binding/non-binding distinction remains important when determining what weight to afford international materials under consideration, I argue that clarity could be achieved if the analysis followed the approach summarized in the chart below, according to which the first question to be asked is whether the specific international human right being invoked is binding upon Canada, with the source of the right clearly identified. The analysis then proceeds by applying the minimum protection approach or the relevant and persuasive approach to assist with identifying the scope of the right in the context of its source. In both lines of analysis, international legal methods would be used, as necessary, to assist with interpreting the scope of the (purported) international right at issue and to assign analytical weight to the international legal materials under consideration.

Figure 1. Clarifying the Dickson Doctrine Analysis



1. Identify the Nature of the (Purported) Right as Binding or Non-binding

To elaborate, when faced with a claim invoking IHRL to support a more expansive or different interpretation of a *Charter* right than has previously been recognized, the first step would be to identify the source of the (purported) right, keeping in mind that it will be binding on Canada if it is codified in a treaty that Canada has ratified or derives from customary international law (and has not been displaced by contrary legislation). Tracing the source to identify if the international right is binding upon Canada is critically important because it determines which interpretive approach will be applied. (And, as discussed below, the source is also important because it sets the analytical framework for interpreting the right—if, for example, the court is trying to determine the scope of the right to enter one's country of nationality under the *ICCPR*, the formulation of this right under the *ICCPR* should be the focus of the analysis.) Where the international right being invoked is binding on Canada, the second step is for the court to robustly apply the minimum protection approach to identify the scope and content of the international right at issue under IHRL in order to set the interpretive floor for the corresponding *Charter* right. Where the international right being invoked is not binding, the relevant and persuasive approach would be applied.

i. Binding Rights: Robustly Apply the Minimum Protection Approach

When applying the minimum protection approach, the overriding question the court needs to address is whether a previously established interpretation of the *Charter* right provides at least as much protection as the relevant binding international right. In many instances, determining the scope and content of the right under international law will be a necessary—and potentially difficult—aspect of the court's analysis.

A "robust" application of the minimum protection approach requires courts (with the assistance of counsel) to make a sustained effort to identify the scope and content of Canada's IHRL obligations and to not shy away from the matter under the guise of IHRL being unsettled or difficult to discern. While it may be tempting to conclude that it is unrealistic to expect Canadian courts to undertake such an analysis, the task would be made easier with the assistance of counsel who are familiar with international law (and, in appropriate cases, interveners). It should also be noted

that many domestic courts around the world engage meaningfully in similar analyses, and it does a disservice to summarily conclude that Canadian courts and counsel would not be up to the task.

Perhaps contributing to the confusion in prior jurisprudence, identifying the scope of Canada's IHRL obligations would require, in almost all instances, going beyond the text of a treaty and considering a variety of technically "non-binding" materials (i.e., subsidiary sources, including soft law) to help interpret the substantive obligations flowing from a treaty. Just like the text of the *Charter* is brief and requires interpretation—often with recourse to interpretive aids such as relevant academic literature and comparative foreign law—to determine the full scope and effect of *Charter* rights in different contexts, human rights treaties are often brief and require interpretation to determine what duties they impose on States and what rights they provide in specific contexts. During this step of the analysis, courts ought to follow the rules that international law provides for its interpretation: Justice Stratas was correct that "international law is a specialized field calling for discipline, intellectual rigour and careful judgment when applying it."[285] As such, Canadian courts should use international methods to interpret IHRL—which is consistent with Supreme Court jurisprudence on how to interpret treaties.[286]

Since most international human rights that are binding upon Canada are codified in a treaty that Canada has ratified, the analysis at this stage would usually be guided by the rules laid out in the *Vienna Convention on the Law of Treaties* (*VCLT*).[287] In doing so, because IHRL is a specialized and rights-granting legal regime, a teleological or purposive approach to interpretation within the confines of the *VCLT* is appropriate[288]—again, not dissimilar to how the *Charter* is to be read generously and purposively as a "living tree" in light of its purpose within the confines of its text—

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285 *BOLOH* FCA, *supra* note 9 at para 50 [references omitted].

286 See e.g. *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68; *Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19 at paras 19–21; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 at paras 51–52 (SCC); *Thomson v Thomson*, [1994] 3 SCR 551 at 577–78, 1994 CanLII 26 (SCC); *R v Parisien*, 1988 CanLII 85 at 958 (SCC).

287 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980, accession by Canada 14 October 1970) [*VCLT*].

288 See Sheeran, *supra* note 253 at 102; Hunt, *supra* note 253 at 120–23; Craven, *supra* note 253.

while interpretive principles drawn from human rights jurisprudence could also help with guiding Canadian courts when interpreting Canada's obligations.[289]

Pursuant to article 31(1) of the *VCLT*, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[290] Article 32 provides a role for "supplementary" sources of international law—including (but not limited to) the *travaux préparatoires* (i.e., the official drafting history) where applying article 31 "[l]eaves the meaning ambiguous or obscure" or "[l]eads to a result which is manifestly absurd or unreasonable."[291] Article 32 is particularly relevant because State obligations may be "ambiguous" or "obscure" due to cursory, vague, and/or open-ended language in a human rights treaty. As such, when interpreting the scope of a right codified in a treaty in a specific context, recourse should be had to supplementary means of interpretation, which opens the door for relevant subsidiary sources and "soft law" to be of assistance. To return to a point made above, it is critical at this stage of the analysis for the nature of these materials to be carefully considered so that they may be afforded appropriate analytical weight—international legal materials that are more firmly tied to primary sources of international law or reflect an authoritative interpretation of the right at issue ought to be afforded more interpretative weight than other materials.

When applying the minimum protection approach, since Canada's IHRL obligations are to set the interpretive floor, where an established interpretation of a *Charter* right is found not to provide as much protection as Canada's IHRL obligations, the more expansive international interpretation ought to be adopted—unless there are compelling reasons to conclude this is not appropriate in the Canadian context. Finally, when applying the minimum protection approach, care should be taken not to impair the development of a domestic right that exceeds the corresponding international right. As such, even if the interpretation of a *Charter* right is found to meet Canada's IHRL obligations, the court should still

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289 See e.g. James Crawford & Amelia Keene, "Interpretation of the Human Rights Treaties by the International Court of Justice" (2020) 24:7 Intl JHR 935. See generally Magnus Killander, "Interpreting Regional Human Rights Treaties" (2010) 7:13 Sur 145.

290 *Supra* note 287, art 31(1).

291 *Ibid*, art 32.

consider whether a more expansive domestic interpretation should be endorsed in light of the parties' arguments; the facts and context before the court; and relevant law and legal materials (whether domestic, foreign, or other international law) invoked by the parties.

An obvious counterargument to this approach is that it may risk straying too far from the text of the *Charter*. Does, for example, the "nesting dolls" approach to freedom of association, where freedom of association was interpreted to include the right to collective bargaining[292] and then the right to collective bargaining was subsequently interpreted to include the right to strike[293] exceed the limits imposed by the text of section 2(d) of the *Charter*, as Justice Stratas implicitly suggested in *BOLOH* FCA? In my view, this is a matter best addressed in the specific context in which it arises—it is not something that should prevent the adoption of this proposed methodological framework.

Another counterargument could be that the minimum protection approach is a rebuttable presumption and, as such, a *Charter* provision that, on its face, does not provide as much protection could evidence an intention to depart from Canada's international obligations and therefore rebut the presumption—similar to how, outside of the *Charter* context, the presumption of conformity may be rebutted by conflicting legislation.[294] While such an argument could be appealing in light of the deference afforded to legislatures,[295] it would, in practice, render the minimum protection approach devoid of practical effect while also sidelining the judicial branch's role in ensuring the constitutionality of the actions of the other branches of government. Additionally, since the minimum protection approach applies to the *Charter* context and provides a mechanism for ensuring that Canada's (*voluntarily assumed*) IHRL obligations are effective domestically, the minimum protection approach can be distinguished from the presumption of conformity and require a clearer, manifest, and unequivocal intention for Canada to depart from its IHRL obligations than what courts may otherwise accept for rebutting the presumption of conformity. This approach is supported by the recognition in *Hape* that the presumption of conformity itself "requires courts to give

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292 *Health Services*, *supra* note 98 at para 2.

293 *SFL*, *supra* note 57 at para 24.

294 See e.g. *Kazemi*, *supra* note 42 at para 60.

295 *Ibid*.

effect to a statute that demonstrates an *unequivocal legislative intent to default on an international obligation*."[296] Applying an "*unequivocal ... intent* to default" to the minimum protection context, I argue that a court should only decline to apply the minimum protection approach for binding IHRL when satisfied that the legislative branch (i) is aware of Canada's IHRL obligations; and (ii) has unequivocally stated its intention not to meet its IHRL obligations—not dissimilar to how the *Charter*'s notwithstanding clause requires legislatures to be clear about what sections of the *Charter* will be suspended.[297]

Finally, to counter any potential unease about the minimum protection approach having too great an effect on the interpretation of the *Charter*, it should be recalled that it remains open for legislation to address the reception of specific treaties—or even IHRL as a whole—by expressing this unequivocal legislative intent. British Columbia presents a recent example of legislation supporting the general implementation of the international human rights of Indigenous Peoples: pursuant to an amendment to the BC *Interpretation Act*, "[e]very Act and regulation [in British Columbia] must be construed as being consistent with the [*United Nations Declaration on the Rights of Indigenous Peoples*]."[298]

Although it could be politically fraught, legislatures could do the opposite and express their unequivocal intent *not* to have Canada's IHRL obligations be legally effective domestically by passing legislation specifying that a human rights treaty is inoperative or identifying how it applies or is to be interpreted in a specific context. While such an action would likely be challenged and it may be an open question of whether legislative supremacy would prevail in the *Charter* context,[299] if a court

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296 *Supra* note 41 at para 53 [emphasis added].

297 *Charter*, *supra* note 1, art 33.

298 *Interpretation Act*, RSBC 1996, c 238, s 8.1(3), as amended by *Interpretation Amendment Act, 2021*, SBC 2021, c 36. See also *UNDRIPA*, *supra* note 8, s 5; *DRIPA*, *supra* note 8, s 3.

299 Irit Weiser has argued in favour of applying a modified version of the presumption of conformity to ratified treaties in general, with the exception of constitutional—including *Charter*—litigation. In her view, applying the presumption in such cases would render the government unable to legislate contrary to a court decision because it would require a constitutional amendment. She wrote the following on this point:

were to find that Canadian legislatures cannot "legislate out" of Canada's IHRL obligations, this could—and, perhaps, should—have a chilling effect on Canada's willingness to enter into human rights treaties if Canadian legislatures do not want conventional IHRL obligations to have domestic legal effect. In such circumstances, one may ask what is more desirable: Canada entering into human rights treaties and then arguing before Canadian courts that these treaties have no domestic legal effect because the treaty has not been legislatively implemented,[300] or Canada declining to enter into such treaties (or withdrawing from them) because it

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> In respect of constitutional laws, it is recommended that binding international obligations should be of extremely high persuasion, but that an automatic presumption of conformity should not operate. A rule requiring that the *Charter* be interpreted consistently whenever possible with an international treaty obligation would effectively result in "constitutionalizing" or entrenching that obligation. As the treaty provision would be incorporated into the interpretation of the *Charter*, Parliament could not (without using s. 33) legislate in a contrary manner (see "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System" (2004) 37:1 UBC L Rev 113 at 148).

Van Ert has argued that Weiser's concern is overstated:

> [I]ndividual applications of the presumption of conformity ... would not suffice to entrench a given international obligation through the Charter. While applications of the presumption would have precedential value in other cases, it overstates the effect of the presumption to suggest that its application in a particular instance must necessarily turn the treaty provision in question into an unyielding constitutional law (see *Using International Law*, 2nd ed, *supra* note 30 at 350).

300 For example, the UN Committee on Economic, Social and Cultural Rights has been specifically critical of Canada taking the position before Canadian courts that its obligations under the *ICESCR* cannot be invoked in litigation because they have not been legislatively implemented (see *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNESC, 36th Sess, UN Doc E/C.12/CAN/CO/4-E/C.12/CAN/CO/5 (2006) at para 11; Bruce Porter, "The Domestic Implementation of the *ICESCR*: The Right to Effective Remedies, the Role of Courts and the Place of the Claimants of ESC Rights" (Lecture delivered at the Workshop for Judges and Lawyers in North East Asia on the Justiciability of Economic, Social and Cultural Rights, Ulaanbaatar, Mongolia, 26 January 2004) [unpublished] at 10, online (pdf): <socialrights.ca> [perma.cc/GVH5-TGYN]). See also Toope, *supra* note 257 at 17–18.

cannot (or will not) in good faith commit to incorporating the treaties into the domestic legal system?[301]

ii. Non-binding Rights: Applying the Relevant and Persuasive Approach

Returning to the second stage of the analysis, where an international right being invoked is not binding upon Canada (which would generally arise because the right does not form part of customary international law or the right is codified in a treaty to which Canada is not a party), the court would apply the relevant and persuasive approach.

An (arguable) example is the international human right to a clean, healthy and sustainable environment. This right was recently recognized by the UNGA in a resolution that passed with a high level of support—with 161 States voting in favour, including Canada, albeit with the Canadian representative to the UNGA noting that the content of the right was unsettled.[302] The right has also been recognized by at least 156 States at national and regional levels (including within constitutions);[303] however, it has not (yet) been codified in a treaty and (likely) does not (yet) reflect customary international law. Despite the arguably uncertain legal status of the right internationally, in June 2023, "the right to a healthy environment" was added to the preamble of the *Canadian Environmental Protection Act, 1999*, along with the requirement for the Canadian government to "protect the right of every individual in Canada to a healthy environment ... subject to any reasonable limits."[304] Furthermore, a public

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301 Toope has expressed a measure of sympathy for the Canadian judiciary and clear dissatisfaction with the Canadian government's practice of not legislatively implementing human rights treaties, arguing that it is difficult for the judiciary to "deal cogently with [the] utterly inconsistent practice and even open hypocrisy" of the Canadian government (see *supra* note 257 at 17).

302 *The human right to a clean, healthy and sustainable environment*, UNGA, 76th Sess, UN Doc A/RES/76/300 (2022) GA Res 76/300; United Nations, Press Release, GA/12437, "With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right" (28 July 2022), online: <press.un.org> [perma.cc/E499-7DT4].

303 See OHCHR, UNEP & UNDP, "What Is the Right to a Healthy Environment?: Information Note" (25 January 2023) at 7–8, online (pdf): <undp.org> [perma.cc/PYH2-CYEF].

304 *Environmental Protection Act, 1999*, SC 1999, c 33, Preamble, s 2(1)(a.2), as amended by *Strengthening Environmental Protection for a Healthier Canada Act*, SC 2023, c 12.

consultation process to develop an implementation framework for the right under the act recently concluded[305] which may open a door to future litigants invoking the international right to a clean, healthy and sustainable environment before Canadian courts based on its arguable incorporation through the act. The international right is also clearly relevant to existing *Charter* rights—such as the rights to life, liberty and security of the person under section 7—in the climate change context and other contexts where environmental rights intersect with section 7 rights, as well as section 15 rights where negative environmental effects affect certain individuals disproportionately or where environmental racism is alleged. In such claims, what weight, if any, should the international right to a clean, healthy and sustainable environment be afforded, if it is invoked? It is likely only a matter of time until a court faces this issue.

When applying the relevant and persuasive approach, the court should seek to first answer whether the non-binding international right is relevant to the *Charter* right at issue. Then, being satisfied that it is, the court would determine whether it is persuaded to adopt the interpretation of the *Charter* right being advanced on account of the relevant non-binding international right. A critical part of the analysis will involve interpreting the scope of the non-binding international right in accordance with international legal methods in the same manner as discussed above.

2. Identifying the Persuasive Value of International Materials

Under both the minimum protection, and relevant and persuasive approaches, courts would need to keep in mind both established principles for *Charter* interpretation and interpretive approaches for IHRL. Since not all international legal materials are created equal in terms of the analytical weight they should be afforded—and IHRL, like many areas of international law, is rife with commentary reflecting *lex ferenda*—courts should consider carefully the nature of the materials invoked to determine the interpretive weight they ought to be afforded on account of their nature. And, to provide clarity, increase the persuasiveness of their own reasoning, and avoid potential allegations of "cherry-picking" that engenders doctrinal instability threatening the rule of law, courts should

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305 See Canada, "A Right to a Healthy Environment under the Canadian Environmental Protection Act, 1999" (last modified 13 August 2025), online: <canada.ca> [perma.cc/XSB4-2MK9].

explain what weight is being afforded to the legal propositions for which these materials stand in light of their nature and persuasive value.

Although Justice Abella was critical of the majority holding in *Québec inc*. that international (and foreign) materials be weighed in accordance with their nature, doing so does not have to equate to imposing a "rigid hierarchy" or a "confusing multi-category chart."[306] Rather, it can be seen as a judicial commitment to robust and explicit reasoning with an eye to ensuring clarity in the resulting jurisprudence—which, ultimately, benefits the rule of law. While it may be tempting under a rights-oriented or "progressive" perspective to be in favour of a "looser" approach to the reception of IHRL due to a perceived benefit of increasing its relevance, there is a risk that a "looser" approach untethered from a clear methodology could mischaracterize IHRL—and, in some cases, lead to courts simply disregarding even binding IHRL. This, in turn, could constrain a purposive interpretation of the *Charter* out of concern for judicial activism—a concern that I have argued is reflected by the majority's reasoning in *Québec inc*. and, to an even greater extent, *BOLOH* FCA.

Ultimately, judges decide cases based on the facts, law, and arguments before them. The lack of clarity in how IHRL is received in Canada may, to some extent, reflect the need for counsel and judges to become more familiar and comfortable working with international law; it is difficult to assign weight to international materials if the nature of the materials and the distinctions that should be drawn between them are not well understood.[307]

CONCLUSION

Despite seemingly simple rules for Canadian reception law, there is a persistent uncertainty regarding how Canadian courts will treat IHRL in the *Charter* context. As has long been argued, uncertainty can be attributed to the Supreme Court identifying different interpretive approaches without a full explanation of its jurisprudence and without endorsing a sufficiently clear methodology.

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306 *Supra* note 25 at paras 80, 104.

307 See e.g. Eid & Hamboyan, *supra* note 20 at 463; Kindred, *supra* note 62 at 16.

Recent caselaw—particularly the *BOLOH* litigation—demonstrates that uncertainty persists despite recent attempts by the Supreme Court to address the matter. It is incumbent on—and long overdue for—the Court to dispel this uncertainty. And, as I have argued, the need to do so is only intensifying: As IHRL evolves through litigation around the world, litigants in Canada will increasingly be relying upon arguments invoking IHRL and international legal materials. For these claims to be adjudicated appropriately, counsel and the judiciary need a clearer understanding of how Canada's IHRL obligations apply (or do not) in Canada. That the need for such clarity is overdue is demonstrated by the fact that I have written this article over ten years after Currie advanced a compelling argument for the Court to clarify this area of the law based on the Dickson Doctrine, which was cited—but, I argue, not sufficiently heeded—by the majority in *Québec inc.*[308]

While the reception of IHRL ought to be addressed in all contexts, this article has focused on the *Charter* context, where—as Currie argued—a jurisprudential foundation for a clear path forward is present[309] which the Court finally ought to follow. In doing so, the Court could be guided by a methodology focused on: (i) the Dickson Doctrine—with a firm commitment to the robust application of the minimum protection approach for international human rights that are binding upon Canada—and (ii) using international legal methods for interpreting IHRL and affording analytical weight to international legal materials. In addition to being consistent with existing jurisprudence, this approach would assist with narrowing the gap between Canada's international and domestic human

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308 *Québec inc*, *supra* note 25 at paras 26, 32, citing Currie, *International Law*, *supra* note 37 at 153–54, 262.

309 As Currie wrote:

> No great doctrinal innovation would be required as the essential elements of this model already exist, albeit scattered here and there, in the Court's prior work. All that would be needed is a candid recognition by the Court of the need for clarification of the law in this area, followed by a clear and unequivocal endorsement (and application) of the proposed model in its future jurisprudence. On that solid foundation, the Court could then proceed, in future cases, to address the many other questions that arise with respect to the relevance of international law, including IHRL, in Charter interpretation and Canadian law more generally (see "Charter Jurisprudence", *supra* note 7 at 463).

rights commitments;[310] acknowledge and give meaning to the binding nature of Canada's IHRL obligations; respect concerns for separation and division of powers; and, ultimately, contribute to maintaining the rule of law while providing clarity regarding how fundamental rights and freedoms in Canada will be interpreted.

310 It should be noted that if an approach like the one presented in this article is endorsed, a gap would persist for international rights that lack a clear equivalent in Canadian law—including many socio-economic human rights that do not appear within the *Charter* and have not been legislatively implemented.