Session 4: The Courts and International and Foreign Law

Remarks of the Right Honourable Beverley McLachlin, P.C.

Former Chief Justice of Canada

At the Centre for International Law's first International Law Year in Review Conference

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Introduction

Thank you, it's great to be here in Singapore, and great to talk to you about Canadian courts' experience with international and foreign law. I've been asked to touch on two rather different subjects – first, the Supreme Court of Canada's experience with international law, and second – a much more specific topic – Canadian courts' experience in reviewing NAFTA arbitration awards. Without further ado, let me jump right in.

The Supreme Court of Canada's Experience with International Law

The two main types of international law I am going to discuss are treaty law and customary international law. These are treated differently by Canadian courts.[1]

Treaty Law

[1] Hugh M. Kindred, Phillip M. Saunders, and Robert J. Currie (eds.), National Application of International Law, in International Law, Chiefly as Interpreted and Applied in Canada (8th ed.), Toronto: Emond Montgomery, 2014 at p. 150.

Let me first give you a brief overview of how treaties are entered into in Canada. Constitutional powers are divided between the federal and provincial levels of government. Provinces and the federal government function independently in their separate spheres of operation, although in reality there is overlap on some matters. It is generally although not universally[2] accepted that only the federal government can enter into treaties with foreign states. Today, however, treaties increasingly deal with private matters that fall under provincial jurisdiction, such as family matters, property issues, and civil rights, rather than intergovernmental issues for which the federal government would normally be responsible.[3] This could be problematic, where the federal government would negotiate something a province would have to implement. However, the federal and provincial levels of government have gotten into the habit of cooperating on treaty negotiations, discussing their positions before formal negotiations with the other state take place.[4] Often, treaty delegations will be led by federal officials but include provincial officials.[5] This ensures both levels of government understands what their rights and obligations will be, and has the added benefit of making it easier to identify and apply them in court.

In Canada, the executive branch government has the power to enter into treaties, but only legislatures can create laws that are binding within the country. Therefore, if a treaty requires a change in domestic law, federal or provincial legislatures must pass laws to enact signed treaties within Canada so that citizens can rely on them and Canadian courts can apply them.[6] The actual text of the treaty can be incorporated into domestic law by enacting a short section that gives the

[2] *Ibid.* at p. 160, 164, 166.
[3] *Ibid.* at p. 167.
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.* at p. 172.

force of law to the treaty, which may be reproduced in whole or in part in a schedule at the end of the act.[7] The provisions of the treaty become part of Canadian law not because Canada signed the treaty, but because it passed this domestic legislation, which is the source of law that courts will rely on. For example, Canada became the first country to pass domestic legislation implementing its obligations under the *Rome Statute of the International Criminal Court*. The relevant provisions defining the crime of genocide, crimes against humanity, and war crimes, are reproduced in a schedule to Canada's *Crimes Against Humanity and War Crimes Act*.[8] The text of the Act itself provides specific details on how offences listed in the treaty would be dealt with, for example specifying the role of the Attorney General in these proceedings and how provisions of the Canadian *Criminal Code* apply.

Earlier I said "if" a treaty requires domestic law to be changed, because not all treaties do require that. For example, many treaties may have effects on foreign relations or the economy (such as peace treaties and defence pacts), but not the law.[9] Others can be given effect through administrative action (such as regulations made by a minister).[10] Still others may be able to be implemented under the framework of existing law, perhaps with a slightly different interpretation of existing provisions. This can be the case for international human rights treaties,[11] particularly since Canada has a robust *Charter of Rights and Freedoms* that sets out fundamental civil and political rights. When treaties are not implemented through specific legislation, however, there can be ambiguities about whether an existing law fulfills the treaty's requirements,[12] or whether a

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[7] *Ibid.* at p. 180.
[8] Canada, *Crimes Against Humanity and War Crimes Act*, SC 2000, c. 24, 23 October 2000, Schedule, available at http://laws-lois.justice.gc.ca/eng/acts/C-45.9/page-6.html#h-13.
[9] Kindred, supra note 1, at p. 174.
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*

treaty is in force domestically at all.[13] This is a question courts, like the Supreme Court of Canada, can be called upon to decide through careful examination and analysis of the situation.

Nonetheless, the Supreme Court has frequently looked to international sources in determining the scope of Canadian *Charter* guarantees. A former Chief Justice (Dickson) once said (in dissent in a case dealing with freedom of association) that "[t]he various sources of international human rights law-declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms-must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions."[14] In a later case, the Supreme Court endorsed the former Chief Justice's dissent, but went even further than he did, in part relying on ILO Convention 98 – which Canada had not ratified – and non-binding interpretations of that convention, to find that collective bargaining was integral to freedom of association.[15] Another Justice (Lamer, who later went on to become Chief Justice) looked to the International Covenant on Civil and Political Rights to support his view that the *Charter* right to retain and instruct counsel meant more than the right to privately hire a lawyer, but also extended to the right to have access to legal aid and duty counsel, and to be informed of that right.[16] The Court has also looked to international human rights norms to find that extraditing an individual who may face the death penalty violated the Charter right to life, liberty, and security of the person.[17] However, just

[13] *Ibid.* at p. 176.
[14] Reference re Public Service Employee Relations Act (Alta), [1987] 1 SCR 313, at 348, Dickson CJC, dissenting.
[15] Health Services and Support- Facilities Subsector Bargaining Assn v British Columbia, 2007 SCC 27, cited in Benjamin Oliphant, Interpreting the Charter with International Law: Pitfalls & Principles, 19 Appeal: Rev. Current L. & L. Reform 105 (2014) at 109.
[16] R v Brydges, [1990] 1 SCR 190, 74 CR (3d) 129, cited in Benjamin Oliphant, Interpreting the Charter with International Law: Pitfalls & Principles, 19 Appeal: Rev. Current L. & L. Reform 105 (2014) at 109.
[17] United States v Burns, 2001 SCC 7, [2001] 1 SCR 283, cited in Benjamin Oliphant, Interpreting the Charter with International Law: Pitfalls & Principles, 19 Appeal: Rev. Current L. & L. Reform 105 (2014) at 110.

because the Court has looked to human rights treaties or norms, however, does not mean it will rely on interpretations of those laws or norms.[18]

Customary International Law

Unlike treaty law which is written down and explicitly agreed to, notwithstanding any potential differences in interpretation, customary law is harder to pin down. It exists and is no less binding than treaty law, but its automatic incorporation into Canadian domestic law was not explicitly recognized until 2007, when the Supreme Court decided *R. v. Hape*.[19] According to *Hape*, customary international law is adopted automatically in Canada, but only "in the absence of conflicting legislation."[20] This is because of the principle that the federal Parliament and provincial legislatures are sovereign, and courts must apply their laws even if they conflict with international law, and even if they may place Canada in breach of international law.[21]

There are certain provisions of customary international law, however, that nations are not allowed to deviate or derogate from. These are called "peremptory norms" or, in Latin, "jus cogens." These rules are considered so basic and so important that there can be no excuse for violating them.[22] These are things like prohibitions against genocide, torture, slavery, and

[18] Benjamin Oliphant, Interpreting the Charter with International Law: Pitfalls & Principles, 19 Appeal: Rev. Current L. & L. Reform 105 (2014) at 112.
[19] *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2364/index.do.
[20] *Ibid.*, at para. 39, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2364/index.do, cited in Hugh M. Kindred, Phillip M. Saunders, and Robert J. Currie (eds.), National Application of International Law, in International Law, Chiefly as Interpreted and Applied in Canada (8th ed.), Toronto: Emond Montgomery, 2014 at p. 153.
[21] Hugh M. Kindred, Phillip M. Saunders, and Robert J. Currie (eds.), National Application of International Law, in International Law, Chiefly as Interpreted and Applied in Canada (8th ed.), Toronto: Emond Montgomery, 2014 at p. 153.
[22] *Ibid.* at p. 154.

maritime piracy. How these types of customary rules are to be treated by Canadian courts has not yet been fully resolved.[23]

Even where a court accepts the existence of a peremptory norm, it will still need to determine the scope and possibly even a remedy. A 2004 Ontario Court of Appeal case, *Bouzari v. Islamic Republic of Iran*,[24] dealt with a lawsuit brought in Canada against Iran seeking damages for the plaintiff's torture by Iranian agents. While the court did not doubt the status of the prohibition of torture as a peremptory norm, it found that this did not necessarily mean that state immunity provisions could be overridden in order to give the plaintiff a civil remedy.[25] "The Court determined that though there is a *jus cogens* right to be free from torture, there is not necessarily a civil remedy for breach of it."[26]

Canadian courts are open to taking guidance from international law, including customary international law, in order to help identify principles of fundamental justice. Before *Hape,* however, courts made clear that they were only looking for guidance, not to identify potential obligations. In 2002, the Supreme Court decided *Suresh v. Canada*, a deportation case involving a member of the Tamil Tigers who argued he would be subject to torture in Sri Lanka if he were deported there. The Supreme Court explicitly stated that "in seeking the meaning of the Canadian Constitution, the courts may be informed by international law," although courts will "look to international law as evidence of these principles [of fundamental justice] and not as controlling in itself."[27] In the end, the Court held that Canada could not deport a person where there were

[23] *Ibid.* at p. 151.
[24] Bouzari v. Iran, 2004 CanLII 871 (ON CA), available at https://www.canlii.org/en/on/onca/doc/2004/2004canlii871/2004canlii871.html.
[25] *Ibid.* at para. 101.
[26] Kindred, supra note 1, at p. 158-159.
[27] Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 60, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do.

substantial grounds to believe he might be tortured, not because the *Convention Against Torture*, which Canada had signed, said so – but because the fundamental justice balance under *Canadian Charter of Rights and Freedoms*, a constitutional document, will generally preclude it.[28]

The way that Canadian courts determine the content of customary international law can vary. Some may listen to legal arguments about the existence and scope of international law, but decide the contents for themselves. Some may accept expert evidence about the existence and scope of customary law but decide contents for themselves; others may accept expert evidence or expect it to be proved through evidence like foreign law and facts, even though international law can be judicially noticed and applied without such proof.[29]

Canadian Courts' Experience in Judicial Review of NAFTA Awards

I turn now to Canadian courts' experience with judicial review of arbitration awards under the North American Free Trade Agreement, or NAFTA. Let me say at the outset that the Supreme Court of Canada has not yet had the occasion to decide on a matter involving a NAFTA award, so in my comments I will be discussing what lower courts have done in Canada so far.

NAFTA is, of course, the free trade agreement negotiated by Canada, the United States, and Mexico. It created one of the world's largest free trade areas, and was the first time two developed nations signed a trade agreement with an emerging economy. Under Chapter 11, which deals with investment, disputes are resolved through arbitration by expert panels (unless the investor wants to seek recourse in the host nation's domestic courts).[30] These decisions can be judicially reviewed by the courts. Arbitrations can occur following rules of the United Nations

[28] *Ibid.* at para. 78.
[29] Kindred, supra note 1, at p. 159.
[30] NAFTA Secretariat, "Overview of the Dispute Settlement Provisions," 2014, available at https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions.

Commission for International Trade Law or UNCITRAL, or the rules of the World Bank's International Centre for the Settlement of Investment Disputes.

In the first case where a NAFTA award was reviewed by a domestic court, *Mexico v. Metalclad Corp*.,[31] the court controversially substituted its own findings and partially overturned the tribunal's decision – meaning it was not very deferential. Later reviews by Canadian courts have shown courts to be inclined to defer to arbitration tribunal decisions. Let me give you a quick overview.

Metalclad, an American company, had purchased a hazardous waste landfill in Mexico. The investment was first encouraged by Mexican authorities, but later they denied a construction permit and issued a last-minute ecological decree protecting the landfill site. Metalclad brought an action under NAFTA alleging violations of the minimum standard of treatment and expropriation.[32] The tribunal agreed, saying that there was a requirement of transparency that had been violated.[33] Mexico sought annulment of the decision in the British Columbia Supreme Court.[34] As they do when looking at any other type of international agreement, Canadian courts will normally look to domestic legislation to determine how to approach judicial review of NAFTA awards. British Columbia's *International Commercial Arbitration Act* provided only limited review of international arbitral awards, and allowed intervention only on specified grounds, such as deciding matters beyond the scope of the submission or making an award that conflicts with public policy.[35] While what we call the "pragmatic and functional" approach was normally used to determine the appropriate standard of review of domestic decisions, the judge felt it would be

[31] Barnali Choudhury, Determining the Appropriate Level of Deference for Domestic Court Reviews of Investor-State Arbitral Awards (2007), 32 Queen's L.J. 602-640 at para. 7.
[32] *Ibid.*
[33] *Ibid.* at para. 8.
[34] *Ibid.* at para. 9.
[35] *Ibid.*

wrong to import an approach developed for domestic tribunals created by statute into international arbitration.[36] The court concluded that the arbitral tribunal had made several errors, including deciding matters beyond the scope of the investor's submission.[37] Specifically, it disagreed that Chapter 11 contained transparency obligations, since these obligations are not found in Chapter 11 but in Chapter 1.[38] It therefore held that the transparency findings went beyond the scope of the submission and set them aside.[39] It did find, however, that the ecological decree constituted a breach.[40] The court also set aside a significant part of the interest component of the award.[41] As one writer put it, "The review had transformed itself into a full-fledged appeal, with the court substituting its own opinion for that of the Tribunal. The decision became highly criticized for its invasive approach to investor-state awards, and made Canada a questionable forum for the place of an arbitration."[42]

The second case to be judicially reviewed in Canada, *Marvin Roy Feldman Karpa v United States of Mexico*, concerned the application of certain Mexican tax laws to tobacco exports by a Mexican company owned and controlled by an American citizen.[43] The company was requested to repay certain tax rebates after the government passed a 1997 law eradicating them, and it was subject to audits that were not imposed on its competitors.[44] Feldman initiated an action under Chapter 11, alleging violations of national treatment, violations of the minimum standard of treatment, and expropriation.[45] The Tribunal rejected the claim for expropriation but found

[36] *Ibid.*
[37] *Ibid.* at para. 10.
[38] *Ibid.*
[39] *Ibid.* at para. 11.
[40] *Ibid.* at para. 11-12.
[41] *Ibid.* at para. 12.
[42] *Ibid.*
[43] *Ibid.* at para. 13.
[44] *Ibid.*
[45] *Ibid.*

violations of national treatment.[46] Mexico sought review at the Ontario Superior Court of Justice, which dismissed its claims.[47] Like the BC court, it relied on provincial legislation governing international commercial arbitration to determine that courts had limited opportunity to give recourse against an arbitral award.[48] Unlike the BC court, however, the Ontario Court of Justice also relied on the pragmatic and functional approach.[49] Mexico appealed to the Ontario Court of Appeal, which dismissed the appeal and took an even more deferential approach to tribunal decisions.[50]

The more deferential approach was followed in the third case, *SD Meyers Inc. v. Canada*, which involved the Canadian subsidiary of an American company that treated PCB chemicals.[51] The Canadian government banned the export of PCBs from Canada in 1995, lifted it in 1997 for a few months, and then reinstated it. Meyers filed a claim alleging expropriation and claiming violations of national treatment, the minimum standard of treatment, and performance requirements.[52] The tribunal found a number of violations.[53] Canada sought judicial review at the Federal Court of Canada, where it argued that US-based SD Meyers International and its subsidiary Meyers Canada did not meet the criteria for investor and investment, and was therefore outside the jurisdiction of a NAFTA dispute.[54] The Court relied on the Commercial Arbitration Code for determining the standard of review, noting that an award could be set aside only if it dealt with a dispute not contemplated by the submission or decided matters beyond the scope of the

[46] *Ibid.* at para. 14.
[47] *Ibid.* at para. 15.
[48] *Ibid.* at para. 16.
[49] *Ibid.*
[50] *Ibid.* at paras. 17-18.
[51] *Ibid.* at para. 19.
[52] *Ibid.* at para. 20.
[53] *Ibid.* at para. 21.
[54] *Ibid.* at para. 22.

submission.[55] The court dismissed Canada's claims, and noted that jurisdiction issues should be raised at the outset of arbitration rather than at the review stage.[56] Nonetheless, the judge provided an analysis in the alternative in case his finding on jurisdiction was incorrect.[57] Using the pragmatic and functional approach, he concluded that the legal meanings of definitions in NAFTA and the application of Chapter 11 to cross-border trade in services were questions of law that would normally be considered by a court and did not require the special expertise of the tribunal, and should be given little deference.[58] However, he concluded that the tribunal's interpretation of "investor" and "investment" had been correct and that it had correctly applied Chapter 11 obligations to cross-border trade in services.[59] It dismissed the application without altering the tribunal's conclusions.[60]

In the fourth case reviewed in Canada, *Bayview Irrigation District No. 11 v. United States of Mexico*, the Bayview (and a number of other irrigation districts) claimed they had acquired rights to use a portion of the waters of the Rio Grande River and its tributaries.[61] They claimed Mexico deprived them of these rights by capturing and diverting the water for use by Mexican farmers.[62] At arbitration, Mexico asserted the irrigation districts were not "investors" under NAFTA, and the arbitral tribunal agreed, finding it had no jurisdiction.[63] The tribunal did say that the irrigation district's water rights could be considered an "investment" but that it was not "in the territory of Mexico" because they could not own water flowing in Mexican territory.[64] At the

[55] *Ibid.* at para. 23.
[56] *Ibid.* at para. 24.
[57] *Ibid.* at para. 25.
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.* at para. 26.
[61] Elizabeth Whitsitt, Forum Topic: The Impact of International Law on Canadian Law - The Role of Canadian Courts in the Legitimization of NAFTA Chapter Eleven Tribunal Decisions, (2014) 65 UNBLJ. 126-156, at para. 36.
[62] *Ibid.*.
[63] *Ibid.*, at para. 37.
[64] *Ibid.*

Ontario Court of Appeal, the claimants argued that the tribunal should not have addressed the question of whether the water rights constituted an investment at the jurisdiction stage, and that this error deprived them of the opportunity to present their case.[65] This would have violated the UNCITRAL Model Law, which Ontario had adopted as part of its *International Commercial Arbitration Act*.[66] The court confirmed the tribunal's decision, holding that the grounds for review under the Model Law should be narrowly construed and that applicants would need to meet a high threshold to set decisions aside.[67] It further held that arbitral decisions would not be set aside due to errors of law or fact.[68]

The last case, *United Mexican States v Cargill, Inc.*, involved a producer and distributor of high-fructose corn syrup who claimed that a 20% tax imposed by Mexico on sweetened drinks – except those made with sugar cane – was discriminatory and destroyed the value of its investments.[69] The arbitral tribunal agreed, awarding damages for losses suffered by Cargill's Mexican subsidiary and losses suffered by the company in the US as a result of lost sales to the Mexican subsidiary.[70] Mexico challenged the jurisdiction of the tribunal to award damages for the latter, called "upstream" losses, and applied to the Ontario Superior Court to have the ruling set aside as falling outside the scope of the submission.[71] The court found that Mexico's objections were substantive, not jurisdictional, and so were outside the court's scope of review under the Model Law.[72] The court reiterated that international arbitral tribunals should be given a high level of deference and that courts should interfere only exceptionally.[73] The Ontario Court of Appeal

[65] *Ibid.*, at para. 38.
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*, at para. 39.
[70] *Ibid.*
[71] *Ibid.*, at para. 40.
[72] *Ibid.*
[73] *Ibid.*

found that the proper standard of review on the particular provision of the Model Law at issue was correctness, the less deferential standard.[74] However, it did not set the decision aside.[75] Despite articulating a less deferential standard, the Court of Appeal characterized the facts and legal issues narrowly, so that tribunals are still accorded deference in the result.[76]

As we see, Canadian courts tend to give a high degree of deference to NAFTA arbitral tribunal decisions, even though they may not always seem to characterize it that way. Given that one of the main advantages of arbitration is that it is faster, cheaper, and more efficient than the courts, it would make sense for courts be quite deferential to arbitral awards. Sometimes the only link between Canada and the dispute is that Canada is the place of arbitration; therefore it may not make sense to apply rules and standards developed purely in Canada.[77] Unlike for domestic tribunals, courts are not "supervisors" of international tribunals.[78] In any case, as some writers have noted, adopting a more deferential standard has advantages. It inspires confidence in Canada as a forum for international arbitration, which can encourage economic activity with Canada.[79] It can also help harmonize laws on arbitration by treating awards similarly no matter where they are rendered.[80]

As I mentioned, while the Supreme Court of Canada has not yet dealt with a NAFTA arbitral award, and therefore has not had the opportunity to pronounce on the appropriate standard of review, the Court has concluded that autonomy is fundamental to arbitration in the copyright

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[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] Choudhury, supra note 31, at para. 41.
[78] *Ibid.* at para. 81.
[79] *Ibid.* at para. 82.
[80] *Ibid.*

context.[81] This might provide some hint of the approach the Court might take to a NAFTA arbitral decision.

With that I conclude my remarks, and I look forward to taking any questions later.

[81] Desputeaux v. Éditions Chouette (1987) Inc., [2003] 1 S.C.R. 178 at paras. 68-69, cited in Barnali Choudhury, Determining the Appropriate Level of Deference for Domestic Court Reviews of Investor-State Arbitral Awards (2007), 32 Queen's L.J. 602-640 at para. 32.