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Article abstract

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Intervention in the Supreme Court of Canada's *Bissonnette* case: assessing the relationship between international and Canadian criminal law

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ABSTRACT

This article, which follows the authors' intervention in the *Bissonnette* case before the Supreme Court of Canada, highlights the jurisprudential context surrounding the analytical framework upon which judges are called to base their interpretation and application of Canadian domestic law - in this case, the sentencing regime under sections 7 and 12 of the Canadian Charter - when resorting to the normativity of international law. In addition to clarifying the persuasive value of international criminal law norms in the interpretation of the Canadian Charter, this paper seeks to nuance the principles of sentencing review under international criminal law, which differ from those under Canadian domestic law. Essentially, this consolidation of existing interlegal principles serves to correct the ambiguity left by the Quebec Court of Appeal, which, had it not been for the Supreme Court decision, could have led to the instability and unpredictability of the case law on the application of international law in Canadian law.

Keywords: Interlegality, Supreme Court of Canada, International law, Canadian criminal law, Bissonnette case

INTRODUCTION

[1] Although counter-intuitive, there were still some, following the landmark *Québec inc.* decision[89] in 2020, who seriously thought, or perhaps secretly hoped, that the Supreme Court of Canada's clarification of inter-legality – the strong signal putting an end to the recreation of the use of international law in domestic law in Canada and Quebec – was not necessarily final or definitive, not least because the decision enjoyed only a slim majority of five judges. That said, to use a proverbial image, the unanimous decision of the highest court in the land in the *Bissonnette* case[90] "hammered the last nails into the coffin" of the exorbitant use of international law at every turn, without a rigorous analytical grid, based on an intuitive approach, or worse still, an exercise in "cherry picking" (an expression rendered in French by the metaphor of the "Chinese buffet"). Bearing in mind that other recent jurisprudential developments exist[91], this 2022 case is the focus of the present text, and more specifically the questions of inter-legality it addresses, i.e., the relationship between Canadian criminal law and international criminal law.

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89 *Quebec (Attorney General) v. 9147-0732 Québec inc., 2020 SCC 32* ["*Québec inc.*"].

90 *R. v. Bissonnette, 2022 SCC 23* [*"Supreme Court of* Canada *decision"*].

91 In a particularly interesting application, in the very recent case of *Constitutionnalité de la Loi sur laïcité de l'État*, handed down on February 29, 2024, the Quebec Court of Appeal invoked international human rights law (essentially the two *International Covenants*), referring by name to *Québec inc.* and its teachings on inter-legality, in its analysis of the appropriateness (under the test of *Canada (A.G.) v. Bedford*, 2013 SCC 72, regarding vertical *stare decisis*) of reviewing *Ford v. Québec (A.G.)*, [1988] 2 S.C.R. 712, regarding the absence of substantive conditions for invoking the notwithstanding clauses in section 33 of the *Canadian Charter* and section 52 of the *Québec Charter*. See, in particular, the discussion on this subject by Savard, Morissette and Bich JJ. at par. 286 et seq. of their unanimous reasons.

[2] The interest in the Bissonnette case does not stem from the substantive issue raised, i.e. the unconstitutionality of section 745.51 of the Criminal Code[92], but rather from the international dimension in the unanimous 2020 Quebec Court of Appeal judgment[93], inadequately considered in light of subsequent developments arising from the Quebec Inc. decision. It is precisely this consideration that motivated the authors to intervene in this case in 2021-2022, as counsel for the Observatoire des mesures visant la sécurité nationale, to reaffirm before the Supreme Court of Canada the proper application of the rules and principles of inter-legality.

[3] Following on from the authors' intervention brief in the *Bissonnette* case at the Supreme Court of Canada[94], this article aims to shed light on the jurisprudential context surrounding the analytical grid to which judges are invited to subscribe when resorting to the normativity of international law to interpret and apply Canadian domestic law, in this case the sentencing regime under sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*[95]. In addition to clarifying the fair and persuasive value of international criminal law norms in the interpretation of the *Canadian Charter*, it is also a question of nuancing and contextualizing the principles surrounding the review of sentences in international criminal law, as this is a regime distinct from that provided for in Canadian domestic law.

[4] To this end, the authors begin with an overview of the judicial history of the *Bissonnette* case, to better contextualize the issues of inter-legality involved (2). This is followed by an analysis of the principles surrounding the appropriate use of international criminal law in Canadian domestic law, in the light of the lessons to be drawn from the case law of the country's highest court on the subject of inter-legality (3). Once the analytical grid has been duly identified, the reasons for the authors' intervention in this case emerge, with a view of ensuring the proper application of the rules governing the use and operationalization of international law norms in domestic law, and thus consolidating jurisprudential law in the field of inter-legality (4). Finally, some links are drawn between the *Bissonnette* case and the future of the relationship between international law and Canadian domestic law (5).

[5] Essentially, the exercise in consolidating inter-legal gains proposed in this article contributes to correcting the ambiguity left behind by the Quebec Court of Appeal, which was likely to lead to instability and unpredictability in our country's case law, were it not for the corrective action taken by the Supreme Court of Canada. At the same time, this reframing of the scheme of analysis in matters of inter-legality critically rejects Justice Abella's earlier approach of drawing on international normativity, turning away from the

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92 *Criminal Code,* R.S.C. 1985, c. C-46 ["*Cr. C*"].

93 *Bissonnette v. R.*, 2020 QCCA 1585, par. 105-106 ["*Court of Appeal judgment*"].

94 *Brief of the intervener l'Observatoire des mesures visant la sécurité nationale,* by attorneys Stéphane Beaulac, Miriam Cohen and Sarah-Michèle Vincent-Wright, in the *Bissonnette* case before the Supreme Court of Canada, 2021 ["*Intervention Brief*"].

95 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, [Schedule B of the Canada Act 1982, 1982, c. 11 (U.K.)] ["*Canadian Charter*"].

framework of analysis developed in the leading cases on the subject. In this way, the present article contributes to the continuity of the fundamental precepts of Canadian and Quebec public law, including two constitutional ones as a basis for support, namely the supremacy of Parliament and the rule of law, as well as the dualist theory (or legal dualism), with regard to the role of international treaties in the exercise of judicial interpretation in domestic law.

1. BACKGROUND TO THE BISSONNETTE CASE: AN OVERVIEW OF THE JUDICIAL HISTORY

[6] The *Bissonnette* affair stems from the attack committed by Alexandre Bissonnette on January 29, 2017, at the Grande Mosquée de Québec. Bissonnette shot into a crowd of forty-six people gathered for evening prayer, killing six and seriously injuring five, not to mention the psychological impact on the victims and their families[96]. This tragedy gave rise to a series of judicial decisions[97] concerning the constitutionality of article 745.51 of the *Criminal Code*, which provides that a person guilty of multiple murders may be sentenced to life imprisonment with cumulative parole ineligibility periods. To set the context for the inter-legal issues involved, the judicial history of this case is reviewed as follows: first, the decision of the Quebec Superior Court (2.1); followed by the judgment of the Quebec Court of Appeal (2.2); then the appeal to the Supreme Court of Canada (2.3).

1.1 QUEBEC SUPERIOR COURT DECISION

[7] After the Grande Mosquée de Québec tragedy, Bissonnette was charged with six counts of first-degree murder and six counts of attempted murder. He pleaded guilty to all twelve counts. With Bissonnette's guilt uncontested, it was sentencing that was the focus of the trial judge's decision. By pleading guilty to these counts of first-degree murder and attempted murder, Bissonnette received the (automatic) sentence associated with these crimes, namely life imprisonment.

[8] At the sentencing stage, a parole ineligibility period of 150 years was considered, i.e. six consecutive six-year periods. Such a sentence is possible under section 745.51 of the *Criminal Code* because, in the case of multiple murders, the application of this provision allows judges to "order that the parole ineligibility periods for each murder conviction be served consecutively". However, Bissonnette's lawyers challenged the constitutionality of this provision, arguing that its application as such would violate sections 7 and 12 of the *Canadian Charter*[98]. Justice Huot of the Quebec Superior Court was asked to rule on both the parole ineligibility period and the constitutionality of the contested provision.

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96 *Supreme Court of Canada decision, par. 11.*

97 *R. v. Bissonnette, 2019 QCCS 354* [*"Trial decision"*]*; Court of Appeal judgment; Supreme Court of Canada decision.*

98 As a brief reminder, Article 7 protects the right to life, liberty and security of the person, while Article 12 provides protection against cruel and unusual treatment and punishment.

[9] In his February 8, 2019, judgment, Judge Huot declared that article 745.51 of the *Cr. C* is contrary to articles 7 and 12 of the *Canadian Charter*. However, he gave a broad interpretation to preserve the constitutionality of the said provision, leaving the court with the discretionary power to determine the duration of the second period, which could be less than 25 years. As a result, Bissonnette was sentenced to a parole ineligibility period of 40 years, longer than the 25-year period for a single murder, but shorter than the accumulation of two consecutive periods equivalent to 50 years.

1.2 QUEBEC COURT OF APPEAL RULING

[10] After being sentenced to life imprisonment without the possibility of parole for 40 years, Bissonnette challenged the trial court's decision, arguing that this sentence would violate sections 7 and 12 of the *Canadian Charter*. The judges of the Court of Appeal were asked to rule on the constitutionality of article 745.51 of the *Criminal Code* and to determine whether Judge Huot had erred in law by interpreting the provision broadly, thereby granting himself the discretionary power to impose a sentence that included a cumulative number of parole ineligibility periods. Justices Doyon, Gagnon and Bélanger of the Court of Appeal unanimously allowed the appeal and concluded that article 745.51 of the *Criminal Code* was unconstitutional[99].

[11] Indeed, the Court of Appeal concluded that the provision was contrary to section 12 of the *Canadian Charter* since the accumulation of parole ineligibility periods could lead to absurd sentences exceeding the convict's life expectancy or disproportionate sentences[100]. It also ruled that the said provision was contrary to section 7 of the *Canadian Charter*, due to its excessive scope and disproportionate effects[101]. At the same time, the Court of Appeal set aside the broad interpretation of the provision endorsed by the Superior Court, being more of the opinion that the unconstitutionality of the provision was too intrinsically linked to its content[102] and therefore that a broad interpretation would represent an encroachment on the role of the legislator[103].

[12] For the purposes of this article, it is above all the Quebec Court of Appeal's analysis of section 12 of the *Canadian Charter* that is the focus of our attention, considering the reference to various international instruments to support the interpretation of the protected right, in the following paragraphs:

> [105] Several international instruments and other documents produced by international organizations emphasize that the prison system should include a component aimed at the transformation and social reclassification of individuals: *International Covenant on Civil and Political Rights*, December 16, 1966, (1976) 999 U.N.T.S. 187, entered into force March 23, 1976, art. 10 and ratified by Canada in 1976; *American Convention on Human Rights*, November 22, 1969,

99 *Court of Appeal judgment,* par. 187.

100 *Ibid,* par. 103.

101 *Ibid*, par. 148.

102 *Ibid*, par. 170.

103 *Ibid,* par. 171.

O.A.S.T.S. nº 36, entered into force July 18, 1978, art. 5; *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT), *25th General Report on the CPT's Activities (including a chapter on the situation of prisoners serving life sentences)*, April 2016, p. 39-40, para. 73.

[106] It should also be noted that the Rome Statute, which governs the prosecution of the most serious crimes (war crimes, crimes against humanity, genocide) and in which Canada has played a key role, notably in the establishment of the International Criminal Court, provides for a review of the sentence after 25 years when the individual is sentenced to life imprisonment: Rome Statute of the International Criminal Court, July 17, 1998, 2187 R.U.N.T. 38544, entered into force on July 1er 2002, art. 110(3), ratified by Canada on July 7, 2000. In Quebec (Attorney General) v. 9147-0732 Québec inc., 2020 SCC 32, Brown and Rowe JJ. write in this regard:

[31] Dickson C.J. went on to clarify that these sources do not all carry the same weight in interpreting the *Charter*, stating that "in general, it must be presumed that the *Charter* affords protection at least as great as that afforded by similar provisions in the international human rights instruments ratified by Canada": p. 349 (emphasis added). This proposition has since become a firmly established principle of *Charter* interpretation, namely the presumption of conformity: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, para. 65; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, para. 38; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, par. 64; Kazemi, par. 150; *Divito v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 47, [2013] 3 S.C.R. 157, par. 23; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, par. 70.

[32] It is important to note that Dickson C.J. was referring to instruments that Canada had *ratified*. [...]

[13] These two paragraphs show how (inappropriate) recourse to international normativity has played an (inappropriate) role in the interpretation and application of Canadian domestic law, in this case in the analysis of rehabilitation as an essential part of determining what constitutes "a just sentence". Referring to several instruments of international law[104], the judges of the Court of Appeal reiterated the importance of social reintegration as a fundamental concept in the sentencing process in Canadian criminal

104 *Ibid,* par. 105; *International Covenant on Civil and Political Rights*, December 16, 1966, (1976) 999 U.N.T.S. 187, entered into force March 23, 1976, art. 10 and ratified by Canada in 1976; *American Convention on Human Rights*, November 22, 1969, O.A.S.T.S. no 36, entered into force July 18, 1978, art. 5; *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT), *25th General Report on the CPT's Activities (including a chapter on the situation of prisoners serving life sentences)*, April 2016, p. 39-40, par. 73.

law[105]. However, the Court of Appeal also referred to the normativity of international criminal law, mentioning the *Rome Statute*[106] of the International Criminal Court, which nevertheless provides for a review of a convicted person's sentence after 25 years of life imprisonment, even in the case of the commission of the most serious crimes, including war crimes, crimes against humanity and genocide[107]. However, the Court of Appeal does not go any further in its exercise of inter-legality. To integrate the content of these instruments, it merely briefly recalls a few rules of inter-legality in Canada, essentially the principle of presumption of conformity, according to which the *Canadian Charter* is presumed to grant at least the protection provided for in the international instruments ratified by Canada. Otherwise, a sentence consisting of consecutive periods of parole ineligibility would deny the possibility of rehabilitation.

1.3 APPEAL TO THE SUPREME COURT OF CANADA: INTERVENTION ON THE USE OF INTERNATIONAL INSTRUMENTS IN THE BISSONNETTE CASE

[14] Following the Quebec Court of Appeal's ruling that section 745.51 of the *Criminal Code* was unconstitutional, and that Bissonnette was to serve a concurrent sentence without eligibility for parole for 25 years, the Crown appealed to the Supreme Court of Canada. The country's highest court was thus called upon to rule on the constitutionality of the said provision, i.e., whether it contravened sections 7 and/or 12 of the *Canadian Charter*, and if so, whether it could be saved by the application of section 1 of the *Canadian Charter* and, if not, to determine the appropriate remedy.

[15] On May 27, 2022, the Supreme Court rendered its decision. In a unanimous decision, the appeal was dismissed and the substance of the Court of Appeal's decision was upheld. As we shall see in detail in Part IV, in its analysis of section 12 of the *Canadian Charter*, the Supreme Court has shown greater rigour in its use of international criminal law.

[16] The authors were of the opinion that the Quebec Court of Appeal had made a questionable use of international normativity to interpret the sentencing regime in Canadian domestic law. Thus, it seemed appropriate to intervene before the Supreme Court of Canada so that the country's highest court could rectify the situation in the context of this appeal. To be clear, the intervention was not intended to dwell on the Court of Appeal's judgment *per se*, nor on the constitutionality of the provision at issue. Rather, it aimed to rectify the errors that had crept into the Court of Appeal's reasoning on international law and to crystallize the principles governing the use of international criminal law in Canadian domestic law[108], in light of the summary of case law presented below.

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105 *Ibid*, par. 104.

106 *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 38544 (entry into force: July 1, 2002) ["*Rome Statute*"].

107 *Ibid,* art. 110.

108 *Intervention brief,* par. 2.

2. SUMMARY OF LESSONS TO BE LEARNED FROM THE SUPREME COURT OF CANADA'S JURISPRUDENCE ON INTER-LEGALITY

2.1 THE 1987 REFERENCE: CANADIAN MILESTONES IN INTER-LEGAL REASONING

[17] In line with the worldwide trend (NOLLKAEMPER & REINISCH, 2018; NOLLKAEMPER, 2011), courts in Canada and Quebec have long been open to recourse to international law in interpreting and applying domestic law (BEAULAC, 2023, Fasc. 23; SCHABAS & BEAULAC, 2007). Fairly early on in *Canadian Charter* jurisprudence, Dickson C.J. laid the groundwork for inter-legality reasoning when he explained, in the *1987 Reference*, that without being in any way binding, international normativity provides "relevant and persuasive" elements to be considered in helping to resolve questions of interpretation in domestic law[109]. This reference criterion, namely the "persuasive authority" of international law (BEAULAC, 2004; KNOP, 2000), although at one time the subject of criticism in doctrine[110], is now the subject of consensus in domestic jurisprudence[111].

2.2 THE BAKER CASE: A LANDMARK RULING ON INTER-LEGALITY

[18] Shortly before the 2000s, the Supreme Court of Canada's decision in Baker v. Canada[112] was a landmark ruling on inter-legality (BEAULAC, 2004). Relaxing the rigidity of the dualist approach to recourse to international treaty law, Madam Justice L'Heureux-Dubé, for a majority of seven judges, allowed a treaty that had not been transformed into domestic law to be used as an element of factual context. While this is obviously not a direct application of treaty provisions in domestic law, explains the judge, "[t]he values expressed in international human rights law" – in this case, essentially, the criterion of the best interests of the child, taken from the Convention on the Rights of the Child[113] – are relevant and persuasive elements, all things considered, to help interpret the statutory standard (humanitarian and compassionate exception)

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109 *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, pp. 349-350 ["*1987 Reference*"]. Strictly speaking, this passage is taken from a dissenting opinion by Chief Justice Dickson. But as his colleagues have expressed in out-of-court writings, these explanations summarize well the approach taken by the Supreme Court in this matter (LA FOREST, 1988, p. 232; BASTARACHE, 2000, p. 434).

110 Some zealous authors of the internationalist cause have in fact suggested that international law should be seen as binding on domestic courts, a thesis that has never been followed in jurisprudence (BRUNNÉE & TOOPE, 2002; VAN ERT, 2008).

111 Two examples to illustrate that, when it comes to international normativity, this "relevant and persuasive" test of interpretation applies generally, not just in *Canadian Charter* matters; see: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, par. 70; and *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, par. 22-23.

112 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ["*Baker*"].

113 *Convention on the Rights of the Child*, adopted Nov. 20, 1989, entered into force Sept. 2, 1990, 1577 U.N.T.S. 3, art. 3, ratified by Canada, but not implemented.

under subsection 114(2) of the Immigration Act[114]. In terms of interpretive methodology, by opening the door to untransformed treaties[115]. Baker sends a strong signal in favour of greater use of international law in domestic law.

2.3 FROM SASKATCHEWAN TO *NEVSUN*: JUSTICE ABELLA'S APPROACH TO INTER-LEGALITY

[19] The internationalist torch passed from the hands of Justice L'Heureux-Dubé[116] to those of Justice Rosalie Abella in the 2000s. That said, the latter was often forced to defend the idea of ever greater openness to the international in domestic law, sometimes bordering on unconditional abdication, albeit in dissenting opinions. This was the case in the famous *Kazemi* decision[117], involving the *State Immunity Act*[118], where Judge Abella was prepared to create from scratch, on the basis of customary international law, a new exception outside the text of the law, to justify setting aside the presumption of jurisdictional immunity in the case of torture. Writing the reasons for the majority of six, Justice LeBel rejected such use of international normativity, opting instead to reason the issue in terms of domestic law, pointing out in passing that "the presumption that the law respects international law remains just that – a mere presumption"[119]. Finally, he opined, the Act "contains a complete code of exceptions to immunity"[120].

114 *Immigration Act*, R.S.C. (1985), c. I-2, which has since been replaced by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

115 In this regard, it will be recalled that the minority justices Cory and Iacobucci in *Baker* (para. 80) rightly suggested that it was possible to do indirectly what is not permitted to be done directly, "that is, to give effect in the domestic legal system to international obligations assumed by the executive alone and which have not yet been submitted to the democratic will of Parliament." That said, this criticism is highly exaggerated, if not inaccurate, since the approach suggested by l'Heureux-Dubé J., in addition to being consistent with the dualist thesis of treaty law, ensures that recourse to international normativity in these exceptional situations of treaties not transformed into domestic law is weighted down; In short, when it comes to treaties, it's no longer all-or-nothing, white-or-black, but rather nuanced, on a spectrum, with more or less persuasive force given to the argument one draws from it, on the basis of whether or not the treaty has been implemented in domestic law, all according to the contextual interpretation argument (BEAULAC, 2004).

116 It's worth pointing out here, as the contrast between the two female Supreme Court justices is highlighted, that Claire L'Heureux-Dubé always insisted on being called "Madame LE juge", not LA juge. Although the explanations, often anecdotal, may vary from author to author, the most plausible reason is that in the French language, at the time of pioneering jurists like L'Heureux-Dubé, Madame la juge was the accepted formula for referring to the wife or spouse of Monsieur le juge; thus, for herself, she always favored the traditionalist Franco-French way of referring to the institution of the judge, in the masculine form.

117 *Kazemi (Estate) v. Islamic Republic of Iran*, 2014 SCC 62 ["*Kazemi*"], Abella J.'s dissent, alone, is from par. 172.

118 *State Immunity Act*, R.S.C. (1985), c. S-18.

119 *Kazemi*, par. 60.

120 *Kazemi*, par. 63.

[20] But be that as it may, Justice Abella's approach to inter-legality – which some might be tempted to call internationalization through and through – has been a resounding success. Certainly, one of the most notable is the *Saskatchewan* case[121] where, somewhat against the odds (MACKLEM, 2012), international law made it possible, in concert with other factors, to overturn the restrictive interpretation of paragraph 2(d) of the *Canadian Charter*, with regard to freedom of association in the workplace, and to recognize constitutional protection for the right to strike in Canada (TRUDEAU & DROUIN, 2022, Fasc. 1, par. 29). In fact, the five-judge majority, led by Justice Abella, endorsed the approach taken by Dickson C.J. in the *1987 Reference* and, using the presumption of intention in the matter as reiterated in *Hape*[122], emphasized in broad strokes that "Canada's international obligations clearly militate in favour of recognizing a right to strike protected by s. 2(d)"[123]. This is followed by a host of references to instruments of international law, both universal (e.g., the *International Covenant on Civil and Political Rights*) and regional (e.g., the *European Social Charter*) – and whether or not they are binding on Canada, formally normative or of a "soft law" nature – as well as the decisions of implementing bodies (e.g. the ILO Committee) and national courts, including those in Israel, not forgetting those countries that "have expressly incorporated the right to strike into their constitutions" (e.g. France, Italy, Portugal, Spain, South Africa)[124].

[21] Then comes 2020, which will prove to be a pivotal year for these issues of inter-legality and the use of international law in domestic law. First of all, the Supreme Court's 5-4 split decision in *Nevsun v. Araya*[125], set the record straight on customary international law, and in so doing, it was thought at the time, would have marked the triumph of Justice Abella's unabashedly internationalist thesis. In this case, the Supreme Court had to rule on the existence of a cause of action, under British Columbia private law jurisprudence (i.e. common law, i.e. "judge-made-law"), for mining workers in Eritrea, against a Canadian-based company, alleging that they had suffered violent, cruel, inhuman and degrading treatment. The majority rejected the preliminary objection to striking out the proceedings - in short, that there was not a complete absence of a reasonable cause of action in this case - essentially because there could be a remedy based on customary international human rights law, including standards concerning crimes against humanity, slavery, forced labour and cruel, inhuman or degrading treatment. On the substance, however, let's be clear: the question of whether or not such a remedy exists has not been cleared up, only that it is not impossible to envisage it, reasonably, in legal proceedings for damages, in any event[126].

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121 *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245 ["*Saskatchewan*"].

122 *R. v. Hape*, 2007 SCC 26. See also, with regard to the presumption of conformity with international law, the Supreme Court's decision, a few years later, in *Németh v. Canada (Justice)*, 2010 SCC 56, in particular par. 35.

123 *Saskatchewan*, par. 65. See also, in the same vein, *Henry v. British Columbia (A.G.)*, 2015 SCC 24 at para. 136.

124 *Saskatchewan* par. 67-74.

125 *Nevsun Resources Ltd. v. Araya, 1 S.C.R. 166* ["*Nevsun v. Araya*"].

126 The case was eventually settled out of court (CAROLINO, 2020).

[22] It was against this backdrop, which is hardly conducive to the expression of a position of principle (but hey), that Judge Abella set out to take stock of inter-legality and custom, even waxing lyrical[127], if not hyperbolic[128], when it comes to general public international law. But be that as it may, *Nevsun v. Araya* is undeniably useful in confirming once and for all that, according to the monist thesis (i.e., the adoption theory), courts can have recourse to customary norms automatically, i.e., without the need for any legislative implementing measure (as is the case, according to the dualist thesis, for treaties). Is it fair to suggest, as Abella J. does, that customary international law "[i]s like the common law of the international legal system"[129], those norms that automatically become "integrated into, and part of, Canadian domestic common law, unless otherwise provided by statute"?[130]

[23] Nothing is less certain, that said with consideration, especially if it justifies the following unqualified assertion: "There is therefore no doubt that customary international law also constitutes the law of Canada"[131].

[24] What's wrong with this statement? Essentially, it suggests that, when we say that custom is automatically applicable in domestic law, we mean that it is applicable *ipso facto*, without the intervention of any national actor. However, this is not the case, since the applicability of a customary norm, even in common law ("judge-made-law"), will always depend on its finding and judicial implementation by the judge, who will exercise the discretionary power inherent in his or her functions to decide whether or not, and if so how, this international normative source, like all others, may intervene and influence the interpretation and application of Canadian or Quebec domestic law.

[25] In short, when we say that custom applies in domestic law "automatically", it's a kind of linguistic shorthand, since what we should really be saying is that custom is available, automatically available, to national judges, who can choose to have recourse to it in domestic law. This is certainly a very important nuance which, unfortunately, Justice Abella missed in *Nevsun v. Araya*.

127 The following statement is proof of this: "Although States have historically been the main subjects of international law since the Peace of Westphalia in 1648 [...], international law has long since evolved from this State-centred model." As Professor Beaulac has already expressed in doctrine, with respect, we may wonder what normative reality Judge Abella is evolving in, for if there has been a strong trend over the last decade at the international level, it is indeed that of a return in force of States, by whom and for whom international law exists, an understanding that is still otherwise centered on the idea-structure of sovereignty and the voluntarist thesis (BEAULAC, 2019).

128 For example, Abella J. states, peremptorily, as follows: "There is no longer any valid reason to restrict the application of customary international law to relations between States"; *Nevsun v. Araya*, par. 107.

129 *Ibid*, par. 74.

130 *Ibid*, par. 94.

131 *Ibid*, par. 95. For a clear example of this type of error in reasoning, see: LAROCQUE & KREUSER, 2007.

2.4 THE QUEBEC INC. DECISION: AN ANALYTICAL GRID FOR INTER-LEGALITY

[26] Fortunately, 2020 ended on a much more positive note, in terms of the rigorous use of international law in domestic law, with the Supreme Court's magisterial decision in *Québec inc*. To put it bluntly, there would probably have been no majority opinion from Justices Brown and Rowe in this case regarding the role of treaties in domestic law, had it not been for the elastic band of internationalization stretched to the limit by Justice Abella. Building on her boundless enthusiasm for customary law in *Nevsun v. Araya*, she added another layer by suggesting, in general terms, that sources of international law (presumably custom as well as treaties), and even comparative law, "have proved indispensable in virtually every area of the law"[132], and indeed that they "are certainly invaluable to the Court's work in all areas of the law"[133].

[27] That was all it took – although some would say it was a natural and necessary reaction to such extreme language – for Justices Brown and Rowe to feel the need, in *Québec inc.* to set the record straight on the role of international law in domestic law, especially about treaties, in this case. It should be noted that this issue arose in connection with a question of interpretation of section 12 of the *Canadian Charter*, concerning cruel and unusual treatment and punishment, whose scope of application was at stake in determining whether constitutional protection could be extended beyond natural persons to include legal persons or corporations, such as the respondent Québec inc. in this case. All nine justices of the country's highest court agreed that this question could not be answered – and that the protection of section 12 was therefore limited to natural persons – but the one who had obviously taken the lead in drafting the Court's opinion, Justice Abella, failed to convince the majority of her colleagues to follow her this time. The reframing of the inter-legal analysis carried out by Justices Brown and Rowe on behalf of the majority in *Québec inc.* will undoubtedly prove salutary for the durability of Canadian and Quebec public law.

[28] The analytical grid for these questions, in particular as regards convention-type normativity such as treaties, has been considered in detail in order to restore order and make the way in which international law is used in domestic law fairer and more rigorous.

[29] First of all, Justices Brown and Rowe recall the basic elements at the heart of the inter-legality issue: While the Court generally accepts that international norms *may* be taken into account in interpreting domestic norms, these international norms usually play a limited role in *supporting* or *confirming* the result reached by the court through a purposive interpretation. This is logical, as Canadian courts called upon to interpret the *Charter* are not bound by the content of international norms[134].

132 *Québec inc.* par. 100.

133 *Ibid*, par. 101.

134 *Ibid*, par. 22 [italics in original; emphasis added].

[30] Clearly to correct the misguidedness of Abella J. – who spoke, as we have seen, of an "indispensable" and "invaluable" role for international law in domestic law – the majority sets the record straight and reiterates, in connection with the interpretation of section 12 of the *Canadian Charter*, what the use of these complementary tools for interpreting Canadian law must be limited to:

> The Court has recognized that international and comparative law play a role in interpreting *Charter* rights. However, this role has appropriately consisted of *supporting* or *confirming* an interpretation arrived at by applying the approach established in *Big M Drug Mart*; the Court has never resorted to such tools to define the scope of *Charter* rights[135].

[31] To give some perspective, this was not the first time that Justice Abella's almost blind militant promotion had been rebuked by her colleagues. Justice LeBel, for the majority in *Kazemi*, had made the following overriding reminders, clearly also to put the methodology applicable to these issues in order: "The interaction between domestic and international law must be carefully managed, in light of the principles governing what remains a dualist system of application of international law, and a constitutional and parliamentary democracy"[136]. This passage was taken up and endorsed by the majority in *Québec inc*[137].

[32] As Professor Beaulac has already explained in detail (BEAULAC, 2018), this tendency to open valves unconditionally to international law – which has won the support of the majority of the Supreme Court on occasion, as we have seen, as in *Saskatchewan* – does not seem to be concerned with the fundamental precepts of domestic public law, including two of a constitutional nature, such as the supremacy of Parliament, the rule of law, and the dualist theory of inter-legality, as regards the role of international treaties. As has already been pointed out elsewhere (BEAULAC, 2019), Abella J.'s haphazard approach allowed her to draw on international normativity, all too often ignoring the analytical framework skilfully developed in the leading cases on the subject, notably the teachings of Dickson C.J. in the *1987 Reference*.

[33] These cries from the heart expressed in doctrine, it seems, were heard at the Supreme Court, at least by the majority justices in *Québec inc.* Their efforts to articulate a rigorous analytical framework for the use of international law in domestic law deserve recognition and applause. This certainly contributes to building an interpretive methodology in Canada and Quebec that promotes legal certainty and predictability in

135 *Ibid*, par. 28 [italics in original; emphasis added].

136 *Kazemi*, par. 150 [emphasis added].

137 *Québec inc.* par. 23.

the law, values dear to the cardinal principle of the rule of law[138]. In the words of Justices Brown and Rowe:

> A reasoned framework for analysis is therefore both necessary and desirable, both to adequately recognize Canada's international obligations and to provide clear and consistent guidance to courts and litigants. Establishing a methodology for considering sources of international and comparative law helps to indicate how this Court has dealt with these sources in practice, as well as providing direction and clarity[139].

[34] What is this rigorous grid, both reframed and clarified, that was put forward by Justices Brown and Rowe on behalf of the majority of the Supreme Court in *Québec inc.* with regard to inter-legality in this country? To put it simply, we could say that the analysis hinges on two parameters: (1) the one specific to the nature of the instrument, and (2) the one considering the time of the instrument's adoption.

[35] Thus, the majority judges in *Québec inc.* teach us that since not all sources of international normativity carry the same weight – as already emphasized by Dickson C.J. in the *1987 Reference*[140] - international instruments must be distinguished on the basis of whether or not they are binding on Canada. This was a thinly veiled reproach directed at their colleague Justice Abella, who in her reasons lumped everything together: binding or non-binding instruments, hard law or soft law, international judicial decisions or those based on comparative law, *and so on*. For Justices Brown and Rowe, "*binding* international instruments should be seen as having more persuasive force, since ratification is the procedure by which such instruments become internationally binding"[141].

[36] In short, and logically, a reference to the *European Convention on Human Rights*, to which Canada is not (and, in fact, cannot be) a State Party, should not carry the same weight as a relevant and persuasive element in an interpretive exercise as, for example, recourse to the *International Covenant on Civil and Political Rights*, which has been ratified by Canada (even Quebec has acceded to it, albeit symbolically, because the provinces do not have *jus tractatus*, as we know) (BEAULAC, 2012). In *Québec inc.* the majority connects this idea with what lies at the heart of the issue of interpretation and application of domestic law, using excerpts from Dickson C.J.'s reasons in the *1987*

138 In *Québec inc.* justices Brown and Rowe refer to the work of Professor Beaulac in support of this idea of methodological rigour, with regard to the interpretation of law in general and the use of international law in domestic law in particular: "If such sources are to be given persuasive value, this must be done by following a coherent and uniform methodology. It is important for a court to be consistent and uniform in the reasons it gives, because reasons are an essential means of accounting to the public for the way in which it exercises its powers. This is particularly true for a subject as fundamental as constitutional interpretation. As Professor Stéphane Beaulac points out (BEAULAC, 2013, p. 192-193), a well-defined and consistent interpretation methodology is necessary, as it is a means of promoting the rule of law, particularly through legal predictability.

139 *Ibid*, par. 27.

140 *1987 Reference*, pp. 348-349.

141 *Québec inc.* par. 32 [emphasis in original; references omitted].

Reference: "Canada has therefore undertaken an international obligation to ensure within its borders the protection of certain fundamental rights and freedoms which are also set out in the Charter"[142], repeating (with emphasis, incidentally) that these are international obligations[143].

[37] Non-binding instruments, such as treaties to which Canada is not a state party (e.g. the *European Convention*), explained the minority judges in *Québec inc.*, have diminished value, less persuasive force, in interpreting domestic legislation, including the *Canadian Charter*. Although this was not considered by the judges in this case, there is reason to believe that this reasoning, which distinguishes between binding and non-binding instruments, could be applied to weight hard law sources (such as treaties and customs, for example) differently from soft law sources. This being the case, after its explanations, the majority reiterates the following fundamental idea: "the courts must not allow the consideration of such instruments to replace the methodology of Charter interpretation"[144], and one might safely add, in fact, any law in domestic law, not just the *Charter*.

[38] The second parameter for articulating a rigorous inter-legal grid concerns the timing of the international instrument (binding or not), in relation to the law we wish to have interpreted in the light of this normativity of international or comparative law. In other words, is the treaty, for example, anterior or posterior to the *Canadian Charter,* the latter dating from 1982? If it predates and is therefore part of the context in which the Charter was adopted (e.g., the *International Covenant on Civil and Political Rights*, ratified by Canada in 1976), it should be given greater weight as a relevant and persuasive element; if it predates 1982 (e.g., the Convention against Torture, ratified by Canada in 1982), it should be given greater weight as a relevant and persuasive element. If it is post-1982 (e.g., the *Convention Against Torture*, ratified by Canada in 1987), the treaty would instead be part of what is known as the *Charter*'s application context, which "has much less interpretative value than an instrument that is binding on Canada, that contributed to the development of the *Charter*, or both"[145], explains the majority in *Québec inc.*

[39] Once again, this approach, with its differentiated weighting of the various types of instruments and their time of adoption (concerning domestic law), compares favourably with the artistic vagueness characterizing Abella J.'s approach. In her dissenting reasons, not only did she omit these important nuances – binding or non-binding instruments, prior or subsequent to domestic law – but she even took the liberty of

142 *1987 Reference*, p. 349 [emphasis added by Justices Brown and Rowe].

143 *Québec inc.* par. 32.

144 *Ibid*, par. 37.

145 *Ibid.*, par. 42.

describing it as “a confusing multi-category chart”146&147. Not only is this approach unjustified in any case, but it would also be incompatible with legal certainty and the predictability of the law, values that are inherent in the fundamental constitutional principle of the rule of law.

[40] To complete this summary of the lessons to be learned from *Québec inc.*, let’s add a word on comparative law and, indeed, on what the majority explains about the role of foreign and international court decisions. While it is permissible to refer to them, as Justices Brown and Rowe explain, “particular caution is called for when referring to what other countries do in their domestic law, as foreign measures tell us little (if anything) about the scope of the rights enshrined in the Canadian Charter”[148]. No one will be surprised to learn that this clarification is addressed to Justice Abella, who is criticized as follows: “The jurisprudence of foreign and international courts seems to permeate her analysis at various points, without her explaining the role of this jurisprudence in the interpretation process”[149]. In other words, not only is there a certain artistic vagueness that characterizes Justice Abella’s internationalist approach[150], but there is also a kind of arbitrary selection of international and comparative elements that is highly problematic, which is well captured by the English expression “cherry-picking”. There can be no

146 *Ibid*, par. 104.

147 Indeed, Justices Brown and Rowe are merciless in their rejoinder: “As the Court's jurisprudence abundantly demonstrates, the normative value and weight accorded to sources of international and comparative law were designed to reflect the nature of the source in question and its relationship to our Constitution. Reaffirming this requirement cannot reasonably be characterized as ‘novel’, no matter how vigorously or emphatically our colleague Justice Abella denounces it”; see *Québec inc.*, par. 46.

148 *Ibid*, par. 43.

149 *Ibid*, par. 44.

150 *Ibid*, par. 47. See the following passage from the majority reasons: "With respect, the reasons of our colleague Justice Abella do not respect this approach. It follows that case law and international and foreign instruments dominate her analysis, contrary to the Court's teachings on constitutional interpretation", *Québec inc.*, par. 47; this is what Justices Brown and Rowe refer to as the traditional factors set out in the classic case on the subject, *R. v. Big M Drug Mart*, [1985] 1 S.C.C. 295, which should govern and, above all, "not be indiscriminately amalgamated [...] with international and comparative law".

doubt that this is a major shortcoming, not least given the values cherished by the rule of law (certainty, predictability) that underlie the interpretive methodology[151].

3. INTERVENTION IN THE *BISSONNETTE* CASE AT THE SUPREME COURT OF CANADA TO PROPOSE A REFRAMING OF THE APPLICATION OF INTERNATIONAL LAW IN CANADIAN DOMESTIC LAW

[41] The clarifications provided during the intervention concern the rules of inter-legality in Canada and the content of international criminal law in the interpretation of the *Canadian Charter.* Recalling the rules governing the use and operationalization of international law norms (4.1), the authors then return to the reference to the *Rome Statute* by the Court of Appeal judges in the *Bissonnette* case, whose implementation regime in Canadian legislation seems to have been omitted. However, this exercise was necessary to assess the persuasive value of the *Rome Statute*, and even to understand its nuances and contrasts with the regime provided for in Canadian criminal law (4.2). Finally, there is the erroneous reference to the presumption of conformity with international law, which is irrelevant in the present case, given the analytical grid developed by the Supreme Court of Canada's jurisprudence on inter-legality (4.3).

3.1 REMINDER OF THE RULES GOVERNING THE USE AND OPERATIONALIZATION OF INTERNATIONAL LAW STANDARDS IN DOMESTIC LAW

[42] The relevance of international law as a persuasive element in the interpretation of the *Canadian Charter* is well-established in Canadian jurisprudence and doctrine. In this respect, it is quite clear to Canadian jurists that international law is not binding on domestic courts, but that it can play a role as persuasive authority by bringing elements relevant to the interpretation of the law[152]. On the other hand, the rules surrounding the use of international law in Canadian domestic law sometimes seem to be omitted by the

151 In this regard, the words of Madame Justice L'Heureux-Dubé, in the minority in *2747-3174 Québec inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, par. 170-171, speak of an interpretative exercise *à la* Humpty-Dumpty, i.e., one that is not carried out according to a rigorous and predictable methodological grid, but rather randomly and without clear direction. Lewis Carroll's (real name Charles Lutwidge Dodgson) famous line from his timeless work Through the Looking-Glass, and What Alice Found There (London: Macmillan, 1872) comes to mind: "When *I* use a word", Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less." Such a Humpty-Dumpty interpretation, Madam Justice teaches us (in the minority in this 1996 decision, *ibid*, par. 171), "is in fact nothing more than an interpretation based on random or vague rules, or one that is accomplished solely intuitively or on the basis of non-rationalized impressions, or by failing to consider the underlying premises of legal reasoning." Ironically, in a way, these words are almost premonitory of the criticism of inter-legality formulated by Justices Brown and Rowe in *Québec inc.* with regard to Justice Abella, who was nevertheless the runner-up to Justice L'Heureux-Dubé on these issues, as seen above.

152 *Reference re Public Service Employee Relations Act* (Alta.), [1987] 1 S.C.R. 313 ["1987 Reference"], pp. 349-350); I*ntervention Brief*, par. 10.

courts, as was the case in the Quebec Court of Appeal's judgment in the *Bissonnette* case.

[43] Norms of international law can be included in the judges' reasoning by an argument of context, or by a presumption of conformity with international law. This presumption of conformity, however, can only be used when the law to be interpreted is ambiguous. Since the provisions at issue in this case are not ambiguous, there is no reason to use this presumption, contrary to what the Court of Appeal did.

3.2 DISTINCTION BETWEEN THE SENTENCING REGIME PROVIDED FOR IN THE ROME STATUTE IN INTERNATIONAL CRIMINAL LAW AND THAT OF ITS IMPLEMENTING LEGISLATION IN CANADIAN DOMESTIC LAW

[44] In terms of international criminal law, it was important to clarify certain aspects of the *Rome Statute* regime and its implementation in Canadian law that had escaped the Court of Appeal. These elements are essential to the use of international criminal law in Canadian law.

[45] In the Court of Appeal's decision, the judges referred to the *Rome Statute*, but omitted its implementation regime, in this case that arising from the *Crimes Against Humanity and War Crimes Act*[153] ("*Canadian Act*"), adopted the same year as Canada's ratification in 2000**.**

[46] By adopting this legislation to implement the *Rome Statute*, Canada not only complied with its international obligations but also became the first country in the world to incorporate the obligations set out in the *Rome Statute* directly into its national law. At the same time, Canada adopted legislation specifically designed to criminalize the international crimes set out in the *Rome Statute* – that is, war crimes, crimes against humanity and genocide – by enacting the penalties applicable under Canadian domestic law, i.e., life imprisonment, while referring to the *Cr. C* for sentencing purposes[154]. The parole regime also applies to these crimes, i.e., 25 years of parole ineligibility for first-degree murder, and in the third paragraph of section 745.51, the *Cr. C* specifies that the accumulation of parole ineligibility periods remains possible for crimes under the *Canadian Act*.

[47] What is important to emphasize here is that, by transforming the obligations arising from the *Rome Statute* through this implementing legislation, the legislator has established a sentencing regime in Canadian law that differs from that provided for in the *Rome Statute*. In fact, although this Act represents the implementation of the *Rome Statute* in domestic law, the Statute conceives of a different regime. The *Rome Statute* includes its own sentencing regime in Article 77. In paragraph 110(3), the *Rome Statute* also states that offenders may apply for a *review of their sentence* after 25 years when sentenced to life imprisonment. As the authors point out in their intervention:

153 *Crimes Against Humanity and War Crimes Act* (S.C. 2000, c. 24.)

154 *Ibid*, art. 15.

> "[...] it is important to nuance and contextualize the principles concerning the review of sentence length in IPR. IPR standards for sentencing and release are specific to the context of international crimes tried before an international tribunal, such as the International Criminal Court. They should not, in any case, be simply applied to the Canadian context, for the purposes of interpreting sections 7 and 12 of *the Canadian Charter*, especially as the *Canadian Act*, with all its nuances, takes care to establish (in fact, to maintain) a distinct sentencing regime in domestic law"[155].

[48] The two regimes therefore differ on a point that is crucial in this case. The *Rome Statute* regime provides for a *review of* the sentence, i.e., the possibility of reducing the sentence, and not for *parole*, as does the Canadian *Cr. C* does. Sentence review and parole are two different concepts that cannot be presented as equivalent. That said, by incorporating the *Rome Statute* into domestic law through the adoption of a regime that differs from that provided for in international criminal law, it is clear that the Canadian legislator wished to depart from it. It is therefore not possible to abbreviate the methodology of integrating international norms by referring to the *Rome Statute* while ignoring any mention of the domestic implementation regime. Yet this is what the judges of the Court of Appeal did in their analysis. For the purposes of interpretation, it is clear that if the Statute has been implemented in Canadian law, the treaty's persuasive force is diminished. It can no longer be used on its own to fill a gap in the clarity of domestic law.

3.3 APPROPRIATE USE OF THE INTER-LEGAL ANALYSIS GRID

[49] First, to establish the basis for its use of international law in its reasoning, the Supreme Court recalls the landmark *Quebec Inc.* decision of 2020. According to this decision, international law can be used to support an interpretation of the *Canadian Charter*[156].Then, unlike the Court of Appeal, it starts from a premise that establishes the relevance of international criminal law:

> In addition, although criminal law is generally a matter of domestic law, it is appropriate in this case to consider the approach to sentence review adopted by the International Criminal Court ("ICC"), enshrined in the *Rome Statute of the International Criminal Court*, R.T. Can. Can. 2002 no 13[157].

[50] The Supreme Court thus distinguished Canadian criminal law (the subject of the case) and international criminal law. Indeed, these two regimes should not be drawn too closely together, given that the crime of which Bissonnette is guilty does not even fall within the scope of the *Rome Statute*.

[51] What's more, unlike the Court of Appeal, the Supreme Court includes in its analysis of section 12 with the *Rome Statute* its implementing regime in Canadian law, the

155 *Intervention brief,* par. 27.

156 *Supreme Court of Canada decision*, par. 98.

157 *Ibid,* par. 101.

Canadian Act. In paragraph 102, the Court also explains the distinction between these two regimes and assesses their persuasive force.

[52] Moreover, unlike the Court of Appeal, the Supreme Court makes appropriate use of the inter-legal analysis grid. It does not make use of the presumption of conformity with international law, which is not applicable here.

[53] The Court therefore concludes that the *Rome Statute* is useful in this case only as a *relevant* element to demonstrate that in international criminal law, as in Canadian law, there is a desire to offer the possibility of rehabilitation to guilty parties[158]:

> In this context, the *Rome Statute* is only relevant insofar as, like Canadian law, it recognizes the need to offer rehabilitation to offenders, including those who have committed the most serious crimes[159].

[54] This approach is consistent with the rules of inter-legality in Canada. Indeed, the Court uses international criminal law, by way of comparison, to demonstrate the importance attached to rehabilitation, while noting the highly relevant distinctions with Canadian criminal law and clarifying the fair persuasive value of the *Rome Statute*.

[55] To sum up, the following considerations should be borne in mind in order to carry out a rigorous and adequate inter-legal exercise regarding the normativity of international criminal law. The *Rome Statute*, as an instrument of international law, can be used as a persuasive authority in the interpretation of the *Canadian Charter*, at the free discretion of the court. Since the *Rome Statute* is subsequent to the *Canadian Charter*, however, its persuasive force is diminished. The *Rome Statute*, if requested, must be applied in accordance with its implementation regime, parallel to that provided for in Canadian criminal law, to avoid any shortcut between the two regimes. In this case, while the *Canadian Act* establishes a regime specific to Canadian law, demonstrating the legislator's intention to depart from the Statute's regime, the content of the *Rome Statute* has diminished persuasive value. Given that article 745.51 of the *Criminal Code* is clear and unambiguous, it is inappropriate to use the presumption of conformity with international law. It should be noted that these clarifications were eventually incorporated into the Supreme Court's decision.

4. THE FUTURE OF THE RELATIONSHIP BETWEEN INTERNATIONAL CRIMINAL LAW AND CANADIAN DOMESTIC LAW

[56] For many reasons, even if it was not intended to change the essence of the Court of Appeal's decision, the Supreme Court's intervention was of significant importance for Canadian law and its relationship with international law.

158 *Ibid,* par. 102.

159 *Ibid,*.

[57] Firstly, not to rectify the ambiguity left by the Court of Appeal would have contributed to the instability and unpredictability of the law. In its 2020 decision in *Québec inc.*, the Supreme Court criticized the practice of "cherry-picking" in Canadian law, whereby international law is used as an interpretative tool by judges on a sporadic and random basis. In the same vein, this case highlights the need to structure the use and operationalization of international law in domestic law.

[58] Secondly, while the Supreme Court proceeded with the said structuring in *Québec inc.*, the Court of Appeal subsequently failed to follow the teachings laid down in the landmark decision. Reiterating the principles set out in the judgment was therefore an appropriate way to consolidate the gains and ensure clarity. In this sense, the intervention brief and the rectification by the Supreme Court in its appeal contributed to the crystallization of these principles and the clarification of the use of international criminal law in Canadian law.

[59] Finally, the ambiguity left by the Court of Appeal has had a real impact on the clarity and understanding of the principles of inter-legality and international criminal law in Canada. Confusion has also spread to the academic community, where some authors have adopted the Court's reasoning without adequate analysis of the use of international law. Indeed, the comments of some authors on the Court of Appeal's decision in *Bissonnette* are often limited to mentioning international law as a factor relevant to the interpretation of section 12 of the *Canadian Charter*. Inter-legality rules, on the other hand, are often ignored. Here are a few examples of the commentary in the literature: international jurisprudence is relevant in recalling the importance of rehabilitation (IFTENE, 2021, p. 339); the sentences that may result from the application of section 745.51 of the *Cr. C* are contrary to Canada's international obligations (GRANT, CHOI & PARKES, 2020, p. 173); sentences of imprisonment or imprisonment for a criminal offence are contrary to Canada's international obligations (GRANT, CHOI & PARKES, 2020, p. 173); life sentences without reasonable possibility of parole distance Canada from European jurisprudence and the international trend (DESROSIERS & BERNARD, 2021, p. 303); international instruments are relevant in assessing a reasonable length of parole ineligibility period (SPENCER, 2019); and the Supreme Court's discourse on the place of human dignity in sentencing is consistent with international law (STUART, 2022). In short, there is little comment on the Court of Appeal's use of international criminal law, let alone a critical analysis of its use.

[60] Moreover, the relationship between international criminal law and domestic law raises important issues. Indeed, an interesting duality exists in the relationship between international criminal law and Canadian domestic law. On the one hand, state sovereignty always plays a decisive role in international law. Particularly in criminal law, sentencing is a prerogative of the State that is difficult to reconcile with international commitments. As mentioned by the Supreme Court judges in this case, criminal law is a matter of domestic law. On the other hand, there may be advantages for the state concerned in following international sentencing standards. This idea is supported in particular by Derek Spencer (SPENCER, 2019). Knowing that international criminal law is the result of a certain consensus on international crimes, referring to it in domestic law must be done with precision and nuance. In this case, as discussed, the sentencing

regimes provided for in Canadian law and the International Criminal Court are distinct and should not be treated as equivalent.

[61] All in all, given that international criminal law can make an interesting contribution to Canadian domestic law, its use must be properly framed. In other words, when its use makes it possible to draw relevant parallels with the Canadian system, the exercise of inter-legality must be properly integrated. This is why reiterating the principles of inter-legality at the Supreme Court is relevant to domestic law. With rigorous use of international law, cherry-picking can be avoided. Acknowledging the gaps that have crept into Canadian jurisprudence and doctrine alike, greater rigour in the use of international law before Canadian courts remains a crucial endeavour.

CONCLUSION

[62] The *Bissonnette* case represents an important case in terms of international (criminal) law and Canadian law. For the authors, the aim was to contribute to the consolidation of jurisprudential achievements in the field of inter-legality. This contribution aimed to reaffirm before the Supreme Court of Canada the proper application of the rules and principles relating to inter-legality when interpreting and applying Canadian domestic law – in this case, the sentencing regime, under sections 7 and 12 of the *Canadian Charter.* The purpose of this analysis of the principles surrounding the use of inter-legality was to highlight the lessons to be drawn from the jurisprudence of Canada's highest court in this area, in the form of an analytical grid. It was precisely to ensure the consolidation of this analytical grid that the authors felt it was important to intervene in this case, essentially to ensure the proper application of the rules governing the use and operationalization of international law norms in domestic law, and thus consolidate the case law on inter-legality.

[63] In addition to *Canadian Charter* issues, the Supreme Court's decision in this case demonstrates just how distinct the sentencing regimes in Canadian criminal law and international criminal law are. Contrary to the Quebec Court of Appeal's problematic use of international law normativity – i.e., laconic references to international instruments without recourse to the analytical grid of inter-legality articulated and clarified by recent Supreme Court of Canada jurisprudence – it was rather a matter of first turning to Canadian legislation implementing the *Rome Statute*, and then examining the content of the relevant sentencing norms. This approach was necessary to assess the persuasive value of the *Rome Statute*, and to understand the nuances and contrasts with the Canadian criminal law regime. What's more, the authors' analysis highlights the contrast between the sentence review system introduced under the *Rome Statute* of the International Criminal Court and the parole system provided for under Canadian criminal law. Thus, to equate the two regimes without nuance denotes a misunderstanding of international criminal law, all the more so as the *Canadian Act* (omitted in the Quebec Court of Appeal's analysis) attested to the legislator's desire to establish a distinct regime with regard to the penalties provided for in domestic law.

[64] The Court of Appeal's judgment shows just how important it is to understand the methodology for applying international law in Canadian law since a "blanket" application

of the rules of international normativity to the Canadian context runs counter to the analytical grid developed by the Supreme Court of Canada in the field of inter-legality. This judicial saga was thus an opportunity to crystallize the analytical framework for inter-legality. In this respect, the present article contributes to correcting the ambiguity left behind by the Quebec Court of Appeal[160], otherwise likely to lead to instability and unpredictability of the law in our country, were it not for the analysis provided by the Supreme Court of Canada. In this sense, the authors' intervention and the Supreme Court of Canada's rectification in its ruling have contributed to the crystallization of principles – discussed in this article – aimed at clarifying the proper use of international criminal law in Canadian law.

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