[Charter: A Course - S2E6 - International Law in Constitutional Litigation]

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Cheryl M.: Hello, and welcome back to Charter: A Course. A podcast created by the David Asper Centre for constitutional rights, at the University of Toronto, faculty of law. My name is Cheryl Milne, and I'm the executive director of the Asper Centre.

Our podcast focuses on leading constitutional cases and issues, highlighting strategic aspects of constitutional litigation and some of the accomplishments of U of T law's faculty and alumni involved in those cases.

It is our hope that over the course of this episode, whether you are a law student, a lawyer or someone looking for an interesting topic to chat about at the water cooler, that you learn about an aspect of constitutional law and litigation that interests you.

I wish to first acknowledge this land from which our podcast emanates. For thousands of years, it has been the traditional land of the Huron Wendat, the Seneca and the Mississauga's of the credit. Today, this meeting place is still the home to many indigenous peoples from across Turtle Island, and we are grateful to have the opportunity to work here.

In our previous episode, we referenced the importance of Canada's International obligations, in the context of socio-economic rights in the Charter. In this episode, we discuss the role of international law in constitutional litigation more generally. In our practice corner, I'll be speaking with Cory Wanless, a lawyer who uses international law in his practice.

But to begin, I'm speaking with lawyer Gib van Ert, on the role of international law in constitutional litigation. Gib van Ert is a partner at Olthuis van Ert, and current president of the Canadian Council on international law. He completed a BA from McGill University and M.A in law from the University of Cambridge, and an LLM from the University of Toronto. Gib then served as a law clerk at the British Columbia Court of Appeal, and Supreme Court of Canada.

After practicing litigation for over a decade, Gib returned to the Supreme Court of Canada serving as the Chief Justice's executive legal officer. Gib is recognized as an expert

on the application of international law in Canadian courts, and his extensive writing on the subject has been cited in multiple cases by the Supreme Court of Canada. Welcome, Gib.

Gib van E.: Thank you very much. It's a pleasure to be with you.

Cheryl M.: For our listeners who may have limited experience with international law, could you explain what a dualist approach to international law means? And how this impacts Canada's implementation of its international human rights obligations.

Gib van E.: Sure. So judges often say, and commentators often say that Canada takes a dualist approach to international law. That's not quite right. A dualist approach is an approach where international law does not directly apply in Canadian courts or in domestic courts, but instead, there needs to be some step taken by the legislature or some internal authority before the international law takes effect.

That's what is generally known as dualism. As opposed to monism, which is a scheme where international law does take direct effect. And various constitutional structures in states around the world do things on monist lines or on dualist lines. Canada is a hybrid, and in this, we are the same as the United Kingdom and other similarly constituted states. Where we are dualist in respect of conventional international law, meaning treaty obligations. But we are monist in respect of customary international law. And even our treaty dualism, it's an important feature, absolutely. It's actually a central constitutional principle in ways that we can describe. But even our dualism is somewhat qualified by the interpretive presumption of conformity with international law.

So to summarize it, you can say more accurately that Canada is dualist in the sense that treaties do not take direct effect in domestic law without legislative implementation. That customary international law does take direct effect in the common law, that's the doctrine of incorporation or adoption and we can come back to that later. There are some instances where that doctrine doesn't apply, but generally that is the rule.

As regards treaties, the dualism is, as I say, qualified by the idea that even though treaties don't take direct effect without implementing legislation, courts still follow an interpretive presumption that existing legislation complies with our treaty obligations. And so, I think it's too simple to say oh well, you ignore the treaty unless there's express implementing legislation. Courts don't do that, and they shouldn't do that, because the Supreme Court of Canada has said they shouldn't do it.

A treaty like the rest of international law, but for human rights purposes, treaties are where most of the action is. A treaty is part of the legal context in which a domestic law is enacted. The Supreme Court of Canada has been very clear about that, when you're following the modern approach to statutory interpretation.

One of the considerations is the legal context generally, which can be the context that a particular provision occurs in a section or in a part of a law, or its context in the rest of the statute book, or its context in the common law or its context in international law.

So international law is an interpretive consideration, whether the treaty is expressly implemented by legislation or not. And so you can't say too categorically the way judges sometimes still do, that treaties don't matter unless they're implemented.

Cheryl M.: For the sake of our listeners who may not be that familiar with what international law is, could you give an example of what is a customary international law that applies in Canada, and secondly, a treaty that people might be familiar with.

Gib van E.: Right. Well, starting with the treaty, I was thinking earlier about which treaties come up in Canadian courts the most, maybe it's the Refugee Convention, certainly in the federal courts, that's probably the treaty they contend with most frequently. But there are all sorts of treaties that are frequently looked to by Canadian courts.

The Vienna Convention on the law of treaties, which is where some of these doctrines that I've already mentioned or that we're going to be coming to derive from, is frequently cited by the Supreme Court of Canada.

But look, there are so many treaties, I mean Canada is making 80 to 100 treaties a year. Most of those are state to state agreements and they're not going to have any particular relevance to domestic litigation. But the general practice in human affairs as we all know, is that the world is becoming more interconnected, and the result is that legal problems that in the past might have been dealt with on a regional basis, or a country-to-country basis or even just within a country just can't be tackled that way anymore.

So International norms are necessitated by the nature of the problem, right? As for some examples of customary international law, in the human rights context, an instrument that is not a treaty, so it's not conventional, international law, but which is frequently cited as representing customary international law is the Universal Declaration on Human Rights, 1948.

So it's a resolution of the United Nations General Assembly, in that sense it's not a treaty, you couldn't call it conventional international law, states aren't parties to it. But it's just an expression of the General Assembly. And yet, it is regarded as being largely restatement of, or having developed since 1948 as being recognized as binding on states by virtue of customary international law.

So even though it isn't a treaty, and even though some states may not have signed on to treaties that have similar provisions, the states of the world generally regard that as a customary law definition of the minimum requirements of human rights in the international legal system.

Cheryl M.: So while you mentioned that the treaty-based international law does not necessarily take direct effect without implementing legislation. It still plays an important role in constitutional litigation.

So can you just further discuss the intersection of that kind of international law and constitutional law? And in particular, how international law can be used by lawyers to bolster constitutional arguments.

Gib van E.: We're talking about constitutional law, but we're probably talking more specifically about the Charter rather than the rest of the Constitution. In principle, I think you could run an argument saying that some other provision of our constitution, whether it's the 1867 Constitution, or maybe more pertinently these days, section 35 of the 1982 Constitution, is consistent with international law or should be interpreted in some way that's informed by international law.

But by far, the most common meeting point between our constitutional provisions and public international law is the Charter. And that's maybe principally because of the Charter's origins, right? It's a domestic human rights instrument, but its forebears are international, and that's very clear on the legislative history of the Charter.

If you look at its predecessors like the Canadian Bill of Rights, that was very clearly an attempt by the Diefenbaker government to give effects to the human rights ideas in the Universal declaration that we were talking about a moment ago.

It's quite interesting actually, when you read the House of Commons debates, when Mr. Diefenbaker was introducing the Bill of Rights, the leader of the opposition at the time was Lester Pearson, and he rises and says well this is a lot of nonsense. The way to protect human rights is the tried and true British way of leaving it to the judges to work out, not pious declarations of abstractions, the way Mr. Diefenbaker is proposing here, right?

But in that same House of Commons, was a fellow named Pierre Trudeau, who was sitting there watching this. And you've got to think that he was looking across the aisle and thinking no, Dief's got it right here actually, I like this. Because before long, he's prime minister as we know. And before the Charter comes, Canada ratifies the International Covenant and civil and political rights, and the International Covenant on economic social and cultural rights in 1976.

So that's ten years after those treaties actually came into force, so Canada took some time to do it, but then the government decided to do it. And unusually, for Canadian practice, the ordinary thing is for treaties generally, not just human rights treaties, is we won't sign up to a treaty, we won't conclude a new international legal obligation until we are first satisfied that our domestic law internally suffices to perform the obligation. I don't

know for sure whether there was some legal opinion at DOJ in 1975 saying okay, we're good, we can sign on to this now. My sense is that there wasn't, but I don't know.

But in any case, before long, it becomes clear that we're going to need to renovate our statute books to live up to these new obligations, and the Charter is very much a part of that. And the early drafts of the Charter, you can see that the drafters are looking to the ICCPR in particular, because the Charter is more of a civil and political rights instrument, than an economic social cultural rights instrument, right?

I mean, that's kind of clear on its face. Which isn't to say that it can't grow over time, and maybe it already has to some extent. But that's the inspiration. So my point here is that the Charter is effectively implementing legislation for some of our key international human rights obligations.

And in fact, the government of Canada has said that to United Nations treaty bodies more than once. It doesn't implement the entirety of our international human rights obligations, it doesn't implement even all of the obligations in the two covenants. But it is doing a lot of work there. So that's the background.

Now the actual methodological approach to the Charter and international human rights law, has been uncertain for some time, but I think it's become more certain in recent years, and then maybe it got a little uncertain again in 2020. So let me explain briefly what I mean by that. In the late 1980s was it 89 I think, there was a decision, actually a dissent of Chief Justice Dickson in a case called Re Public Service Employee Relations Act, Alberta.

Where he elaborated a pretty complex theory about how the Charter and international human rights law should interact. It was perhaps a little unclear on its face, but I think what he was saying and what the Supreme Court of Canada has since interpreted him to be saying, is that for international human rights obligations that are binding on Canada, meaning treaties we've actually ratified, principally, right? Legal obligations of the country. The Charter should be interpreted as protecting human rights at least as well as those international human rights obligations require us to protect.

And then for human rights instruments that are not binding on Canada, or human rights principles that are sort of floating out there in the international legal system, but that

Canada hasn't subscribed to necessarily. So take for instance, jurisprudence under the European Convention on human rights, we're not a part of that treaty, right?

The decisions of Courts under that instrument are clearly not binding on Canada, or even jurisprudence from the United States Supreme Court on the U.S Bill of Rights for instance. Well, obviously, we're not bound by that at all. But for those sorts of things, Chief justice Dickson said well, they should be treated as relevant and persuasive.

Meaning relevant because they're talking about human rights, which is the same topic as the charter, and persuasive because they come from high authorities.

So we don't necessarily presume that the Charter complies with some determination of the European Court of Human Rights or some provision of the U.S Bill of Rights, that wouldn't be the right approach. But we are interested, and we'll learn what we can from them as we interpret the Charter. So two different methodological approaches. One for binding instruments, and one for non-binding sources of international human rights law.

That was, as I say, spoken in dissent, very shortly thereafter it seems to have become a majority position in Slaight Communications and Davidson. Even then, as time marches on, you see the Supreme Court sort of sometimes looking at international human rights law and taking it seriously the way Dickson seems to be saying we should, and then sometimes just ignoring it all together.

And this caused a lot of anxiety and frustration amongst Canadian International legal commentators, and no doubt, practitioners and maybe even judges from time to time who couldn't figure out what the rules are.

But in the 2010’s I'd say, the Supreme Court of Canada really sort of started to settle on what the rules are. In fact, it really started with Hape in 2007 and Health Services, which was the decision they released the very next day. And in both those two decisions, they seem to embrace the Dickson doctrine here.

Cheryl M.: Well I think that the Slaight Communications it's almost boilerplate in most factums that are filed, by those who are asserting sort of the international human rights obligations. Again, I know I've quoted it many times in things that I've filed.

Gib van E.: And the Supreme Court has affirmed that several times, especially in the mid-2010s in a few different cases. So that seemed right up until the day before the Quebec numbered case decision came out in late 2020, it seemed as though we were now finally settled on this.

In fact, what was interesting as well is that the court in those more recent decisions in the late 2010s was describing the Dickson approach as the perception of conformity with international law, which they hadn't previously said. I think what the court was saying there is largely right, it does look a lot like the general presumption of conformity that we apply outside of the Charter, right? I mean, you're interpreting a limitations act, and you'll do it in conformity with a convention on the law of the sea, right? That was Ordon Estate and Grail, right?

So that interpretive approach is uncontroversial, well-established, reaffirmed by the Supreme Court of Canada almost yearly for the last 25 years, in non-constitutional contexts. And the question was well, what's the rule in the Constitutional context? The only difference between the ways the Charter was approached in the Dickson Doctrine, and the general statutory presumption of conformity, I think is this.

The tenor of what chief justice Dickson was saying I think was that international human rights law was a floor, but it wasn't a ceiling. Meaning we would protect through the Charter, we would interpret the Charter as protecting human rights at least as well as international law requires, but we wouldn't be obliged to withhold better protection just because international human rights law doesn't require it, right?

So it was a floor not a ceiling. Slightly different than the presumption of conformity in statutory context, but close enough, right? So the Supreme Court in recent cases has been treating this all as basically a presumption of conformity that applies to the Charter.

Cheryl M.: So that kind of brings us up to 2020. You mentioned the Quebec numbered case, which is Quebec the 91470732 Quebec Inc. And then Nevsun Resources limited, which is another case.

So both of which took a different, slightly different approach or clarified the approach. Could you explain the relevance of these two decisions? And bring us up to date on what the Court's saying.

Gib van E.: Sure. So let's start with the numbered company case, because that's the one that's actually a Charter case. And you're absolutely right, we should talk about Nevsun as well. But that's outside the Charter, or at least, it's relevant to constitutional litigation for sure, but it's not directly a Charter case.

So in the Quebec case, the issue was the interpretation of section 12 of the Charter, but actually, not so much as interpretation as its application to a corporate claimant. So the Quebec Court of Appeal had decided by a two to one majority, that a corporation could assert rights under section 12 of the Charter, the right to be free from cruel and unusual treatment or punishment.

And section 12 as the court explains in the Quebec case, is essentially related to, and similar to, the international human right to be free from torture, or other cruel and inhuman or degrading treatment and punishment, right? So the question was whether or not a corporation could assert such a right, does a corporation have a section 12 right? Can a corporation be treated inhumanely or degradingly or could a corporation be tortured?

As I say, the Quebec court of appeal it said two to one, yes, with the dissent saying that can't be right, this is a human right that only applies to humans. And of course, we're familiar in other Charter contexts, there are Charter rights that corporations can lawfully assert. And the question was is section 12 one of those? So the Supreme Court of Canada said no, and overturned the Quebec Court of Appeal on that, and said a couple important things about Charter interpretation, that were, some of it was new and some of it was old.

One thing that the majority insisted upon, and by the way, it's a fascinating decision if you haven't read it and you're interested in the Charter, you should, because it ends up being a debate that really isn't just about international law anymore, international law becomes the sort of jumping off point for a bigger discussion about the role of judges in developing Charter jurisprudence.

And there's quite a vigorous debate between the majority and Justice Abella writing a concurring opinion. There are three sets of opinions and everyone agrees with each other on the outcome, and yet, Abella and the majority disagree very importantly about how to be a judge in constitutional cases.

Cheryl M.: Yes, I agree. I think everyone should read this case, especially if you're appearing before the court, to know exactly where the different judges are coming from when you're trying to pitch an argument.

Gib van E.: Absolutely. So the way the international law ends up as sort of sparking this debate, I think, is that the Justice Abella says well look, and when we're deciding whether or not a corporation can have section 12 rights, we should look internationally and see what other courts and tribunals around the world have decided.

And they have decided very clearly that corporations don't have rights to be free from torture, because there's no such thing as torture in corporation. Corporations don't have feelings, they don't have corporal existence, they don't have a body that you can harm. So it's just irrelevant to corporations. The majority doesn't disagree with that at all. But what Justice Abella goes on to do is to elaborate a rule for international law considerations, international human rights considerations and charter jurisprudence that is quite open-ended.

And the majority says no that goes too far, we've got to draw clear distinction between international human rights instruments that Canada has subscribed to, that we are parties to, and that therefore bind us as a matter of international law. For those we apply the presumption of conformity.

But for those that are non-binding, so instruments that Canada has decided not to ratify for whatever reason or other international human rights law notions that are in the international ether, but haven't necessarily been recognized as legal.

We have to approach those differently, and we have to be rigorous when we're considering international law submissions in Charter jurisprudence, to distinguish between what binds Canada and what doesn't. So that's one big difference between the majority

and the concurrence by Justice Abella. And that then sparks this longer conversation about constitutional adjudication, which really isn't limited to questions of international law.

But there's a second element about the Quebec case that we need to talk about, I think, and that is that the majority says something new that certainly is not found in Chief Justice Dickson's dictum that we talked about from Slaight and Re PSERA earlier. And that is, the majority says that International and comparative sources play a limited role of providing support or confirmation for an interpretive result reached through the ordinary Charter purposive interpretation methodology.

That is not something that the Court had ever said before, and it'll be very interesting to see how that develops and where that goes. Because what it seems to be saying is that you cannot go to a court and say interpret section 7 or section 15 or a section, whatever section maybe. This way, because we are required by international human rights law or to achieve this result, and interpreting the Charter in this compliant way will get us there.

That argument is not permissible, because you've injected the international human rights consideration too soon. Instead, what you're meant to do, if I've understood the majority correctly, is interpret the Carter provision at issue without consideration of international law. And then once you've reached a tentative conclusion, you sort of check your homework by comparing it with our International obligations.

And also, we can compare it with comparative sources, which would be on the relevant basis. They wouldn't be binding on us, right? So international human rights law seems to be cast in this sort of minor supporting role, supporting or confirming a result that we reach some other way. I don't think that's what chief justice Dickson was saying at all, and it's hard to see why that should be the rule.

It's very inconsistent by the way, with everything else the Supreme Court of Canada says about International laws being the context in which domestic laws are made. And the whole rationale for the perception of conformity. The reason why courts interpret our laws as presumptively conforming to international law, I think there are sort of two related reasons. One is, they are courts of law, they're not there to break laws, they're there to uphold laws. So if you detect a potential violation of international law as a judge, your natural judicial instinct is to steer clear of that and to reach a conforming result.

Secondly, as I say a related point, but a subtly different one, there is the concern about separation of powers. That is to say, foreign affairs is conducted not by the judges, it's conducted by the federal government. And so the decision whether or not to enter into a new treaty, whether it's a human rights treaty or any other kind, that is a political decision made by the executive.

And then, of course, if the implementing legislation is needed, that decision is brought to parliament, and parliament is asked to enact the necessary laws to perform the new obligation. And assuming that they say yes, then that becomes a decision of the legislature, to comply with this new obligation that the executive has undertaken.

So you've got two parts of our separation of powers who are unanimous about a particular outcome. They want a conforming outcome. For the judges to then ignore that would frustrate our conduct of foreign affairs, and be inconsistent with parliamentary intent. Now everything I've just said, it seems to me you can say something very similar for the Charter as well.

The Charter is not an ordinary statute, of course. But it's a curious proposition that we as the judiciary, would close its eyes to the possibility of an interpretation of the Charter that puts us offside our International obligations. But we wouldn't close our eyes when we're interpreting the limitations act as I was saying earlier, in a case like Ordon Estate and Grail.

I mean, limitations acts are important and marine liability is important, and the law of the state is important. But you'd think that international human rights law and the Charter is in some ways even more fundamental, right? So why would you stop up your ears and pretend that international law isn't part of the interpretive context, when you're dealing with Charter cases, but not do so when you're dealing with more day-to-day matters?

So I find that a bit puzzling, and I'm curious to see where it goes. Because even within the Quebec decision itself, it's not clear to me that that's the only thing the court is saying. I think this doctrine of international human rights law supporting or confirming other interpretations is actually at odds with some other passages in the Quebec majority itself.

Cheryl M.: Yes, I agree. I think that partly, we've got sort of a group on the Supreme Court of Canada that take this more textual, kind of less I think of a purposive approach to the Charter. And so that's what we're seeing coming through, and they saw this as an opportunity to put forward their more restrictive I think review of the charter, generally.

So I mentioned the Nevsun case, and so briefly, can you just explain its relevance? And then I really want to talk about the sort of arguments that you've made on behalf of the British Columbia civil liberties association, in a couple of cases, both those the Quebec numbered case, as well as a McGregor case, a case the Asper Centre is also involved in.

Gib van E.: Sure. So Nevsun is a fascinating and important case, your listeners may be familiar with it already. But it was a claim brought by a group of Eritrean nationals against a BC Mining Corporation that was mining in Eritrea. They were claiming that the operation of the mine involved the corporation in all sorts of complicity in human rights abuses that the state of Eritrea had perpetuated.

And they were trying to bring a civil action in British Columbia for recourse against the corporation. And the question was whether that claim, which was based in significant part on what were alleged to be human rights norms that were incorporated into the common law. So customary in nature, and incorporated into the common law. Whether those norms created a cause of action against a private company. And the company brought a motion to strike the pleading saying that it was plain and obvious, that the case was bound to fail, because there was just no basis for liability in the way that the plaintiffs were claiming.

The Supreme Court of Canada upheld the lower courts, which had all said that no, it's not plain and obvious this case is going to fail. And in the course of that, justice Abella for the majority explains I would say two key things. First, the incorporation of customary international law by the common law, which the Supreme Court of Canada and other courts in the Westminster model have talked about a lot.

I mean, the incorporation doctrine goes back to the 18th century, maybe even the late 17th. It's not new law, it's not novel. But a good restatement of those principles by the

majority in Nevsun. Then the majority of Nevsun also rejects a doctrine called the act of state doctrine.

This is a feature of British law and Australian law and U.S law, still, as far as I know, certainly was until very recently at least, and it was a common law doctrine that sort of married the international law notion of state immunity that is to say that states are immune from being pursued in the domestic courts of other states. And it married that with other concerns about the propriety of judges making judicial comments about the lawfulness of foreign states conduct or laws, all right.

The problem with the act of state doctrine even in English law, and lots of English courts have commented on this. Is that it's a rule that has so many exceptions to it, that you can hardly see the rule anymore. And it's very incoherent as a result. But the court in Nevsun, Justice Abella quoted Lord Millet, describing it in English law and he said the act of state doctrine is a rule of domestic law, rule of domestic law, not international law, rule of domestic law which holds that the national court is incompetent to adjudicate upon the lawfulness of the Sovereign acts of a foreign state.

And as I say, the problem with that is it sounds good in theory, but there are so many exceptions. And what Justice Abella concluded is that that may be the law of England that may be the law of Australia, it's not the law of Canada. It's a common law doctrine, yes, and the Nevsun was arguing well, being part of the common law, it came to Canada, it crossed the Atlantic with the rest of the common law and it's part of our law now too.

And Justice Abella said well, I can't find it here. We look at our case law, and that's just not how we deal with these problems. We deal with the question of whether or not to make judicial commentary, or to make decisions about foreign laws, and their lawfulness or appropriateness. We do it through private law, private international law principles, and through the doctrine of judicial restraint.

And basically, the rule here is that courts are not going to gratuitously comment on the constitutions of foreign States or the lawfulness of foreign acts. But, in a proper case, if it actually falls to be decided, then we will look into the thing if we have to. And you can think of all sorts of cases in the immigration context, for instance, cases solving deportation or refoulement, where the Canadian courts have said yes, the judicial and

criminal justice system of State X isn't great. And if we send someone back there, they may be tortured, right? We haven't hesitated to say those kinds of things from time to time. And so the majority in Nevsun just said well, let's just dump it, it was never part of our law anyways, we don't need it. So I was very encouraged to see that, and I was also encouraged to see the majority reaffirm the role of customary international law potentially in our law.

I've got to say if you're an international human rights lawyer, or a constitutional lawyer, the action is almost entirely with treaties. It's not going to be often that there's going to be anything from customary international law that's likely to help you.

But you never know, there was a Justice Perell decision just last week, where customary international law arguments around the treaty doctrine of practice and surround treaties must be kept were advanced, and Justice Perell accepted them and gave some effect to them. So there's room for creativity as well.

Cheryl M.: So on to the McGregor case, this is a case the Asper Centre intervened in as well, it's been argued, we're awaiting a decision. So we can't really predict what's going to happen. But you mentioned earlier the case of Hape, and McGregor is a case that calls upon the court to look at Hape, and whether interpret it or overturn it or re-evaluate the principles that came out in Hape.

And that is really about the international sort of application of the Charter, so to Canadians outside of Canada. So tell us a little bit about McGregor, and what you argued on behalf of the BCCLA in that case.

Gib van E.: Sure. Yes, when the Hape decision came out in 2007, it caught those of us who take an interest in international law and Canadian courts completely by surprise. It's very clear, you can look at the factums. None of the parties in Hape actually argued International legal considerations at all. But what the court in Hape decided in short, is that Mr. Hape could not lawfully raise a Section 8 defense to the charges that he was facing in an Ontario

Court, because, and he was trying to exclude some evidence that had been collected in Turks and Caicos.

And the majority said that to exclude that evidence would somehow be contrary to international law or International comity, because it would be offensive to the sovereignty of Turks and Caicos. By the way, Turks and Caicos isn't a sovereign country. So a bit of a mistake by the court there, it's a British dependency. But in any event, the notion was that there was somehow a sovereignty problem here.

And that we had to be careful about applying the Charter to our own officials, in this case the RCMP that had gone abroad to do the investigation, for fear that applying it would somehow involve an extra territorial application of Canadian law. And as you say, McGregor was heard just recently, and I can't imagine why the Supreme Court of Canada granted leave in that case, unless it was to reconsider Hape.

Because the court martial appeal court, which was the appeal court that the appeal was taken from applied Hape, and Hape is a strange decision it's hard for those of us who are interested in international law and particularly jurisdiction points, we just don't get it, it drives us crazy. But the court martial appeal court applied it correctly.

Cheryl M.: So they followed the law.

Gib van E.: They followed the law, why would you take the, so I'm hoping that it's because they want to rethink it, because it leads to some very strange results. Suddenly, Canadian officials can go abroad and do things that would otherwise be inconsistent with the Charter, and are told you get a free pass, why should that be, right? It's very hard to understand.

And the only reason why the court gave for that is because international law requires it. But actually, what BCCLA argued was no, it doesn't. And actually, it wasn't just BCCLA that argued that, I was up on my feet arguing that. But thankfully, I had friends from CCLA and other organizations as well.

BCCLA in particular talked about the international law point, and sort of confirmed and expanded upon the fact that this is just a misunderstanding of international law. Foreign states are generally not concerned with what domestic courts say about the lawfulness of the conduct of their own State officials.

That was an interesting exercise in bringing international law to the Supreme Court of Canada, and seeing how they would respond. I had an immediate question from Justice Rowe, which I thought was completely fair, to the effect of oh, well you're just telling us that we got it wrong. And I had to say to him, well yes, actually, but what you got wrong was the international law.

And that's a bit different, isn't it? Then you could go to the Supreme Court of Canada and say well, I want you to overturn some precedent that you decided 20 years ago on the interpretation of the Charter, or the interpretation of some Canadian law. And we know that there are rules about that, right? You can't just go attacking precedence willy-nilly.

You've got to explain to the court why, and the Court's actually created jurisprudence to explain how you do that. Here, we weren't telling them that they got Canadian law wrong, we were telling them they got international law wrong, and of course, they weren't trying to get international law wrong, by all accounts, they were trying to get it right. So it'll be interesting to see what they do.

I very much hope that they correct it, because there shouldn't be in my view some Charter no-go zone, where Canadian officials are just free from Charter scrutiny. I mean, where else in the constitution is that true, I can't think of a place.

Cheryl M.: And that would be consistent with the Asper Centre’s intervention and arguments as well in that case. So we'll await the decision in that case and see, and we expect it'll come out relatively soon.

So as a final question, do you have any advice for current and future constitutional litigators on incorporating international law to strengthen their constitutional challenges?

Gib van E.: I would say to any litigation counsel that's proposing to make an international law argument, you've got to expect skepticism, and you've got to be prepared to meet it.

You've got to bear in mind that most judges in our country, it's not just that they probably didn't take international law in law school, which is an important consideration in itself.

But it's not just that, most of our judge's experience with public international law submissions are probably coming from self reps that are doing what they can, but maybe not very reliable on the point. Or sometimes, even from freedom of the land types, and people who are really not likely to be advancing something that a judge is going to feel confident in.

So a lot of judges are going to come to submissions like this with skepticism or apprehension, which I think is fair, given the experience that a lot of them have, which will be very limited and sometimes negative, right? So you've got to be mindful of that, I think. And you've got to be prepared to show the judge that not just here's what international law has to say, that's kind of the easy part, honestly.

But here's the relevance of that. And here's why you're actually allowed as a judge to consider that, that's what their concern is going to be principally. I think in most cases, as well, you tell me that that's the international law, and maybe your learned friend isn't even disagreeing with you about the substantive international law point.

But the question is I'm a superior court judge, is this the right forum? How am I supposed to use this information? Is it proper for me to be considering it at all? And you're telling me to strike down some law or reverse some administrative decision? How do I do that? Am I even allowed to do that, right? I hear that we're dualists, and you haven't told me that this treaty is implemented, and so is that an objection, what do I do with that?

You've got to be prepared to do all that. I had an experience like that about a year and a half ago now, when I was on the Meng Wanzhou legal defense team that was resisting her extradition to the United States. And one of our arguments was that the extradition request that the Americans had made to Canada, was itself contrary to customary international law, and should be refused for that reason.

I was on my feet for about two and a half days making this submission, and I knew that there was going to be skepticism. I was convinced that it was right by the way, it was very sound. The Americans had absolutely no business trying to apply their criminal law to a Chinese National over a conversation that she had with a British Banking official in a Hong

Kong Tea Room, like it was nuts, right? As a matter of international law, it was an absurd overreach by the Americans. But how do you explain to a BC judge, that she should consider all of that in making the determination.

So I spent a lot of time just preparing the way, by trying to show the court how the Supreme Court of Canada in authority after authority has said these are proper considerations, you are allowed to consider the customary international law of State jurisdiction and exercises of extra territorial jurisdiction. And you are allowed to scrutinize an executive decision like this on an international law basis, right?

So you've got to be prepared for that. And it's like all litigation work where you can't just come to court with a problem, you have to bring a solution as well. But be ready to meet those anxieties, and be really prepared for it. Because I feel a lot of, some of the skepticism that judges feel comes from litigants who jump straight to the substantive international law, and they don't prepare the way to explain how it's actually a permissible consideration.

Cheryl M.: And on that front, I would suggest to people that they take a look at some of the case law around the use of the UN Convention on the rights of the child. For really good examples of where there's been really great advocacy from a lot of organizations, Justice for Children and Youth in Toronto is one that comes to mind.

Where the courts have really now started to adopt that particular convention in a lot, in a range of circumstances such as youth criminal justice, as well as family law, Child Protection Law. Because it, I mean, it is one of the, it's sort of one of my areas of expertise and sort of interest, which is it is the most ratified International treaty, and people like to trot that out as an example, and that's true.

I think the U.S is the only member of the UN who's not ratified it, and it's really become much more acceptable by Canadian courts. So judges are no longer as wary of that particular convention, because they see the terms are similar to what we have in our domestic legislation, the federal government touts it as, and touts their own legislation as examples of where they've Incorporated it, so the divorce act and that sort of thing.

They've said we've redefined best interests of the child based on the recommendations of the committee, for example, under this treaty. So there's some really good examples of arguments that have been put forward that really explain why that's an important treaty, when you're dealing with the rights of children. So I would commend that line of cases as a good example of where judges are becoming less skeptical about the international law, in the case of a treaty.

Gib van E.: I agree with that. I would also say that for any litigant who's looking to advance international human rights and treaties, whether it's the convention on the rights of the child or another one. It's always good to look to see what Canada has told the U.N. because Canada reports to the U.N every five years on its big U.N treaties.

So ICCPR, IEC, ESCR, convention against torture, CEDAW the discrimination against women convention and the others, right? And Canada has a standing document that you can find online through the office, the U.N office of human rights that explains to U.N. officials how we work constitutionally, and what the place of international law on international human rights treaties in particular is. And in that document, and also, in their annual or not annual reports, their reports every five years.

Cheryl M.: Periodic, their periodic reports.

Gib van E.: Thank you, their periodic reports. They will report, and they will say things like the Convention on the rights of the child has been given effect in the following laws, and this is what we're doing to give effect to it. Or they'll say our obligations under this treaty provision are discharged in our law in the following ways.

And so you have what are sort of admissions, I mean, sometimes admissions against interest depending on maybe you're up against the government on the other side, right? Where they're telling the international community we're living up to our treaty obligations. This gets briefly, I don't want to take us into this too much, but there is an interesting state responsibility angle here, right?

As the international law of State responsibility is perfectly clear, that every organ of the state is a potential source for a violation by the state of its International obligations, including judges, right?

The courts are an organ of the state. If courts make decisions that are inconsistent with our treaty obligations, that may suffice to put us in breach of those obligations, right? So there's another reason to apply the presumption of conformity with international law, is to make sure that a judge doesn't actually put, accidentally put the country in breach.

Cheryl M.: So before we end our discussion, I want to extend the opportunity for you to share with our audience what you think is the most important international human rights issue facing Canada at the moment.

Gib van E.: Well, I am especially interested in the U.N Declaration on the rights of indigenous peoples, which is not formally speaking a treaty, it's not legally binding the way a Convention is. It's like the universal declaration of Human Rights we were talking about earlier, it's a resolution of the U.N general assembly, and it is coming, it seems, to be regarded, at least in part, as declaratory of customary international law.

But for Canadian purposes, honestly, it's legal status and international law, maybe it doesn't matter terribly much anymore. And I say that because both in British Columbia and now at the federal level, we have statutes in place that require the governments of BC and the federal government to ensure consistency between their statute books and the UN declaration. And that is a remarkable thing, I think it's the most important thing that has happened to Canadian public law since 1982.

There's been this promise made by the crown in May 2016 at the U.N, that Canada was now an unqualified supporter of the UN Declaration on the rights of indigenous peoples, and that was followed up by legislation in BC and now federally, promising indigenous peoples that we are going to rewrite our statute books to conform with the declaration.

That process is at its very early stages, and of course, it could get blown off course. A change in government or a lack of political will in the existing government or who knows

what, but it is a remarkable new commitment that the crown and two governments have made to indigenous peoples. And if it's followed through, I think it will change our law in unpredictable ways, but ways that will, I very much hope and think, will improve the lives of indigenous peoples in this country.

If we do break that commitment and fail to carry it through, then I fully expect that courts will be asked to do what legislatures had said that they were going to do, and what governments had said that they would do. How the courts will respond to that remains to be seen, but to me, that is a very intriguing, new area of internationally informed litigation that's on the horizon here for us.

Cheryl M.: Well, that's a great note to end our discussion today. Thank you, Gib, for being with us here today. I've been speaking with Gib van Ert of Olthuis van Ert, an international law expert on the role that international law plays in our Charter litigation, thank you.

Gib van E.: Thanks, Cheryl.

Cheryl M.: Welcome back to the podcast, and to this episode's Practice Corner. Following our in-depth discussion with Gib van Ert on the role of international law in constitutional litigation, we are delighted to speak with Cory Wanless, about his experience advocating for his clients rights in cases with aspects of international law. Cory Wanless is a partner and litigation lawyer at Waddell Phillips in Toronto, and a U of T law alumnus.

He has experience litigating complex cases, related to corporate accountability, human rights, indigenous rights, police and state accountability, anti-racism and defending human rights defenders at all levels of court in Ontario and Alberta, including the Supreme Court of Canada.

Cory is currently co-counsel in groundbreaking corporate accountability lawsuits against a Canadian mining company regarding human rights abuses in Guatemala. Additionally, Cory was lead counsel for the University of Toronto, faculty of law international human

rights program, in an intervention at the Supreme Court, in a case regarding the use of forced labor at a Canadian owned mine in Eritrea. Welcome, Cory.

Cory W.: Thanks very much for having me.

Cheryl M.: Can you start us off by telling us more about your practice? What proportion of your cases involve these kinds of issues, and how did you get involved in doing this specialized work?

Cory W.: Well, my interest in corporate accountability and international human rights started in law school, through my work with the international human rights program and an internship that I did in Zambia. Where I sort of came face to face with the impacts of a Canadian mining company, and I was pretty shocked by that. It was a pretty informative and eye-opening experience.

And when I came back, wherever I could in my third year, I focused as much as I could on corporate accountability and from all sorts of different angles. Then I was just very fortunate, when I started to work for a small firm that did a lot of social justice cases. We took on the Hudbay case, which is regarding human rights abuse in Guatemala and that's been going on for 12 years now, and has allowed me to work on this issue.

In addition to that, I do a lot of Charter damages cases, lawsuits against police, and transit enforcement officers and that sort of thing, and increasingly, Aboriginal law. So I feel quite lucky, quite fortunate to get to do the work that I do, and currently, corporate accountability and international human rights stuff takes up, I don't know, maybe 10 to 15% of my practice.

Cheryl M.: Through this episode, we are trying to better understand how Charter rights and constitutional litigation intersect with international law. Can you walk us through why a

case with an international law component might be brought to a Canadian court, and the unique challenges that might arise throughout the course of litigation?

Cory W.: Yes. It's an interesting question, and whenever I sort of think about international human rights or human rights, I sort of think about them in two different ways. On the one hand, we often use international human rights or human rights as a normative concept, of a way of understanding, when I talk about the Hudbay case, I often talk about it as an international human rights case.

And when I do, I'm talking about it sort of using the normative power of international human rights and human rights. But then there's also the legal aspect. And it's interesting in, at least in our Canadian legal system, there's not a lot of opportunities other than the new opportunities from Nevsun to have international human rights, or even human rights have direct implication or application in Canadian law.

There are, of course, the Human Rights code, but that's just one human right that's talking about discrimination, and then there's Charter rights. But we don't often talk about sort of International human rights.

So for the most part, when I'm when I'm talking about cases like the Hudbay case, and like the new case that we've just started against Barrick, there are actually claims that are brought in Tort law, using the Tort of negligence, but nonetheless, rely on the normative power of international human rights.

Cheryl M.: In our main interview, Gib van Ert talked about the Nevsun case and you've mentioned that, so we heard a bit about it already. To give a quick recap, we discussed that the case was a class action brought by Eritrean miners against Nevsun resources limited, the Canadian company that owned the mine.

The workers were alleging that they were conscripted through their military service into forced labor, where they were required to work at the Bisha mine in Eritrea, and subjected to violent, cruel, inhuman and degrading treatment.

The action was brought through Canadian courts, so Nevsun resources brought a motion to strike on the basis of the principle of state doctrine, arguing that domestic courts should not be involved in assessing the Sovereign acts of a foreign government.

In this case, that meant Canadian courts should not assess Eritrean law. The Supreme Court ultimately upheld the lower Court's decision, and dismissed Nevsun's motion to strike. You were involved in this case as lead counsel for the intervener, the IHRP, the international human rights program here at the faculty of law. Can you tell us why the IHRP was interested in intervening in this case, and what arguments they brought forward.

Cory W.: Well, I think the IHRP is interested in intervening whenever there's a case before the Supreme Court that involves the application of international law, or international human rights, and there's a long history of that. When I was in law school, there was an intervention in the Khadr case. I was also counsel many years ago in the Chevron case when it went up to the Supreme Court, and then now, Nevsun.

Interventions are interesting, you don't have a lot of time, you don't have a lot of space in terms of factums you have five minutes of oral argument, in the short 10-page factum. So you have to kind of be strategic about what you want your contribution to be, and in this case, we decided to focus, there were the two main issues about whether you could bring a claim in Tort based on breach of international customary law, was one argument.

And then the other one was the Act of State doctrine, and we decided to focus on the act of state doctrine. And the act of State doctrine is sort of, it's interesting, it's an interesting doctrine. It comes from British law, it has a long history in the United States, but hasn't really ever been applied in Canada. And what it says basically, is that courts should not sit in judgment of the actions of another country.

So if a lawsuit comes up that requires a court to make a determination about what that foreign sovereign did, it shouldn't. It should essentially refrain from passing judgment. And that was key in this case, because Nevsun was accused of using slave labor or forced labor to construct its mine, but the slave labor came through a national service program that was a program of the Eritrean government.

So Nevsun was arguing that the Canadian courts can't determine the lawsuit as against them, because that would require them to pass judgment on the national service program.

So that's obviously quite important, and we decided to focus on that mainly because of its importance. If that argument carried today, then whenever a Canadian company teamed up with a bad international actor, they would essentially get like a free pass. They could hide behind the actions of the foreign Sovereign, the nation, to say you can't bring a claim and accuse us of breaching International human rights law.

So we were worried about that as a precedent, and I decided to focus specifically on that doctrine. I like being an intervener, it's fun to be an intervener in part because parties, strange in what they can do. They have to act strategically, they have to focus on the arguments that they think are most likely to win, and that are most likely to benefit their clients. Which tends to, it forces you to be a bit more conservative in your arguments. You're not going to make this sort of big oh, I think actually we should do things differently type arguments, because it's too risky for your client.

You got to focus on the sort of more conservative argument that's more likely to carry the day. And interveners aren't constrained, like interviewers can focus on the bigger issues. And so in this case, I think we were alone in, I don't think any other parties made this argument, and I don't think any of the other interveners did. We say that this doctrine shouldn't exist in Canadian law, it's never been applied in Canadian law before, maybe it was incorporated as part of Canadian law way back when, when Canadian law started to be interpreted separate from British law.

But other than that, it's never been applied and it's not necessary. All of the issues of comedy or respects for foreign countries is already dealt with through International private law. Concepts such as form non-convenience or choice of law. And because of that, there's no need to invent a new doctrine or to apply this, a new doctrine. And that was a more radical position than the other parties.

Most of them were sort of tweaking around with yes, it probably exists, but let's make sure that it doesn't exist in a way that prevents claims regarding peremptory international law norms, or maybe it should be interpreted sort of narrowly, and we said it just didn't

exist as a concept of Canadian law at all. Ultimately, that's the position that the Supreme Court took as well.

Cheryl M.: Now the Asper Centre has taken similar types of positions in relation to Charter damages, for example. So we see ourselves as kind of pushing the boundaries a little bit, and seeing what the court will actually come up with.

In an article in the Canadian lawyer magazine, you were quoted saying the Supreme Court showed a willingness to take seriously international human rights law. Can you describe the outcome of the Nevsun case, and its implications for other corporate accountability cases?

Cory W.: Yes. So as I mentioned before, there's the two aspects of Nevsun that are important. There's act of state, that was important for us to make sure that wasn't established as a new doctrine, because that could really undermine a number of Human Rights claims that would be brought forward.

But the real headline grabbing aspect of the Nevsun case is the possibility of a new Tort that might be described as a breach of international customary law. Or at least, what's known as the jus cogens or the peremptory norms. Basically saying if there's a violation of those kinds of international law norms, it is possible to bring an action in Canadian courts regarding those breaches, essentially it creates new Torts.

And that's exciting because it doesn't happen very often, and also because it's the first time in Canadian law that international law would have sort of a direct application, it can be directly applicable in in Canadian courts. And it's also further than any other court in the world has gone. Canada was the first nation to say that it's possible for private plaintiffs to sue for breaches of certain kinds of international law.

Cheryl M.: In 2020, as part of holding in the case of Quebec and 91470732 Quebec Inc, we call it the Quebec Inc case. The Supreme Court commented on sort of the issue of, the application of international law in Canadian cases, in the Canadian circumstances.

It said a court is meant to interpret the provision of the Charter for example first, or the law that was being applied. And then as a second step, the court could in a sense, the quotation is, check its homework by comparing that interpretation with non-binding sources of international human rights law.

What are your thoughts on this approach? And is this method new? Or has it changed the way you argue cases?

Cory W.: Well, I think it's very consistent with how Canadian courts have approached international law historically. As our legal traditions have never sort of had a full embrace of international law, we've always sort of held it as a bit of an arm's length.

This might be the result of the fact that we're a dualist nation, which means that the international law doesn't have any direct application in Canadian courts, and so when we sign on to a treaty, that treaty doesn't have direct application. Instead, a parliament has to pass legislation implementing that treaty. And then it's the implementing statute that has the effect of the force of law, not the treaty.

I mean, I think that's created some distance. I think in general, there's been a lack of education amongst the judiciary about international human rights norms, and their relevance frankly for Canadian law and interpreting. So when I look at what the court did here, it's pretty consistent.

The idea that you focus on, you just use your normal rules of interpretation, you focus on the domestic law first, and then you sort of do a double check to make sure that it's consistent with international law. I mean, I don't think that's all that new, and not all that surprising.

I guess a bit of a confession on my part, I don't actually often argue International human rights or International in court. And that's usually for strategic reasons. I mean, you don't

have a lot of time, you don't have a lot of space in your factum. And you really have to focus on the arguments that you think are going to be most likely to carry the day.

And for a variety of reasons, these tend not to be international law arguments. Mainly because the courts at the lower level are unsure what to do with international law, not particularly comfortable with it, and I tend to avoid it unless they can't. And it's only when you get to the higher levels, and especially the Supreme Court, where you start to see the international law play a larger role.

And then the Supreme Court telling other courts that you should also be using it as an interpretative tool, but it just doesn't seem to happen all that often.

Cheryl M.: Well, it's interesting this week, the UK Supreme Court rendered the decision with respect to the Scottish referendum, quoting the succession reference in Canada, in terms of their reasoning. So there is this sort of interplay sometimes back and forth.

I also know that within the work that I do, that the one piece of international law, the U.N Convention on the rights of the child, is the one piece that seems to get probably quoted more often than many others in Canadian cases. And we have done a bit of judicial training, in conjunction with the national judicial Institute about how the UN Convention works.

Cory W.: Sorry, just a quick amendment to my previous answer. I am involved in a Charter, a claim for Charter damages regarding the practice of detaining immigration detainees in prisons.

And it's a Charter claim, we are actually in that case relying a lot on international law, in part because of the way the Immigration and Refugee Protection Act works. It cites a lot of international law, and because of that, international law in that case is going to be front and center.

Cheryl M.: Exactly. That is one area where you can't avoid the implications of international law. I'd like to move to a more open-ended question for you. Our world has been becoming

increasingly more connected over the past century, but COVID certainly accelerated the process, by emphasizing virtual connections more than ever.

Through your corporate accountability work, what trends are you beginning to see in response to these rapid changes? And what legal issues do you expect we will see in the courts in the coming years?

Cory W.: So I started doing corporate accountability transnational lawsuits I guess over a decade ago, and there have been a ton of changes, which make it easier to bring these kinds of claims. I mean, the biggest one is technology. That because of prevalence of smartphones and cell phones, and because of the emergence of video conferencing technology, it becomes way easier to speak to people who are far away, including our clients.

And our clients, they live in remote places, a lot of them didn't have any benefit of formal education, some of them don't read and write, but they all have cell phones. And it's actually pretty easy to get them on a WhatsApp video chat, and that's made a huge difference. But more so than even the technology, is the court system's attitude towards technology. Before COVID, there was real resistance in terms of any sort of virtual participation in any form of legal proceeding.

We had a couple cases where we tried to do cross-examinations or examinations for discovery, and you had to bring a formal motion and then it was hard. You had to lead evidence about why it was necessary, and there was a real prejudice against doing things that way. And likewise, everything was in person in terms of court. And then COVID happened, and everyone just got a lot more comfortable with technology.

And now we've switched in Ontario where all motions are presumptively done virtually, and all counsel are very comfortable we're doing cross-examinations and examinations for discovery virtually, which just makes a huge difference. I mean, it allows clients to participate in and attend court hearings through their computers.

Whereas before, when we wanted our clients to attend, it was a big deal, we had to fly them up. And same thing with experts and other witnesses and cross-examinations on

affidavits, and commissioning affidavits remotely all of those are, it's new, and it's a total sea change in terms of making transnational litigation more possible.

Cheryl M.: It also makes it less expensive.

Cory W.: Yes. Well yes, and when I say more possible, I mean, that's a huge part of it. Access to justice is mainly about affordability, and anything that you can do to reduce the cost of litigation, it's huge.

Cheryl M.: I opened up the newspaper this morning to read about a new and potentially very significant corporate accountability case that you filed this week, you made reference to it at the beginning. Can you please tell us more about it?

Cory W.: Yes. So I'm working with a law firm in Vancouver, at Camp Fiorante Matthews Mogerman, and Joe Fiorante of that firm, who's also an alumnus of U of T. I mean, it's a lawsuit brought on behalf of a group of Tanzanians who have suffered very severe violence at one of Barrick's mines in Tanzania, the North Mara Mine.

And in many ways, it picks up where Nevsun and Hudbay left off, the causes of action in it are primarily negligence, but there's also a pleading of a breach of customary international law in the form of extrajudicial killings and torture. So basically, it is the natural next step after Nevsun and after Hudbay.

Cheryl M.: Well, thank you very much for joining us. It's been inspiring to listen to you talk about the kind of practice that you have.

Cory W.: Well, thank you so much for having me. It was great fun.

Cheryl M.: I've been speaking with Cory Wanless, partner and litigation lawyer with Waddell Phillips in Toronto. A link to all the cases we discussed throughout the episode, as well as links to the bios of our guests will be in the show notes, thanks for listening.

Cory W.: Well, thank you so much.

Cheryl M.: Thank you to our listeners for tuning in to this episode on international law and the Charter. Thanks again to our guests, Gib van Ert, who joined us in our main segment, and Cory Wanless in our practice corner. Join us next time for a conversation about the right to vote in the Charter, including a special conversation about an upcoming Supreme Court challenge concerning the age at which Canadians gain the right to vote.

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