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**THE APPLICATION OF THE *CONVENTION ON THE RIGHTS OF***  
***THE CHILD* BY CANADIAN COURTS SINCE *BAKER*:**  
**COASTING OR SPEEDING UP?**

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**Justice of the Court of Appeal of Québec**

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Some judicial decisions represent distinct turning points in the evolution of the law. *Baker v. Canada (Minister of Citizenship and Immigration)*<sup>1</sup> is one of those cases. For public law jurists, the judgment sparked off a revival of interest in the challenging issue of the relationship between international law and Canadian domestic law.<sup>2</sup> More particularly, it renewed the interest of Canadian jurists in the *Convention on the Rights of the Child*.<sup>3</sup> This is illustrated by the regular application of this Convention over the past five years, not only in immigration cases but also in a number of other matters either directly or indirectly touching on child protection.

### **The Baker Case**

Ms. Baker, a Jamaican woman, entered Canada as a visitor in August 1981 and remained here without obtaining permanent resident status. In December 1992, she was issued a deportation order after authorities became aware of the situation.

Ms. Baker applied for an exemption from the requirement to apply for permanent residence from outside Canada on the basis of “compassionate or humanitarian considerations” pursuant to s. 114(2) of the *Immigration Act*<sup>4</sup> and s. 2.1 of the *Immigration Regulations*.<sup>5</sup> In her application, she indicated that she was the sole caregiver for two of her Canadian-born children and that her other two children depended on her for emotional support.

Her application was refused.

The notes taken by the immigration officer in charge of the inquiry indicated that the interests of the children may not have been considered in the assessment of her application. This was a sufficient ground for Ms. Baker to apply to the Federal Court for a review of the

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<sup>1</sup> [1999] 2 S.C.R. 817.

<sup>2</sup> France Houle, “La légitimité constitutionnelle de la réception directe des normes du droit international des droits de la personne en droit interne canadien,” (2004) 45 *Les Cahier de Droit*, at 295.

<sup>3</sup> Adopted November 20, 1989, it entered into force on September 2, 1990, the thirtieth day following the date of deposit of the twentieth instrument of ratification or accession, according to Article 49 of the Convention. All the member states of the United Nations (191), with the exception of the United States of America and Somalia, have signed and ratified the *Convention on the Rights of the Child*.

<sup>4</sup> S.R.C. 1985, c. I-2, now repealed and replaced by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

<sup>5</sup> SOR/78, amended by SOR/93-44; this was also repealed and replaced by the *Immigration and Refugee Protection Regulations*, SOR/2002-227, June 11, 2002.

decision of the immigration authorities. She argued that it contravened several articles of the *Convention on the Rights of the Child*, which Canada had ratified on December 13, 1991 but never incorporated into domestic law.

Both the Federal Court Trial Division and the Federal Court of Appeal dismissed the application for judicial review, refusing to apply the international convention because it did not form part of domestic law. The Federal Court of Appeal added that while the law should be interpreted, to the extent possible, so as to avoid conflicts with Canada's international obligations, requiring ministerial discretion to be exercised in accordance with an international convention that has not been implemented by a domestic law would interfere with the democratic principle of the separation of executive and legislative powers.

In a split decision rendered on July 9, 1999, the Supreme Court of Canada overturned the ruling of the Federal Court of Appeal on the effect of international law on the exercise of the Minister of Immigration's discretionary power. Madam Justice L'Heureux-Dubé, writing for the majority of the Court, found that the immigration officer's decision was inconsistent with the values underlying the grant of discretion. Invoking the objectives of the Act, international law and Ministerial guidelines, she concluded in her reasons that the words "compassionate and humanitarian considerations" require particular consideration of the interests and needs of children.

Madam Justice L'Heureux-Dubé stated the following:

- 69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: ... the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.
- 70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. ...

71 The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. ... The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

(Emphasis added.)

Justice Iacobucci, with whom Justice Cory concurred, did not favour the adoption of a legal principle permitting reference during the process of statutory interpretation to a convention that has not been incorporated into Canadian law, for fear that it may “adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch” (para. 80). He added that “the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament” (para. 80).

The *Baker* decision thus establishes the principle that, in the process of statutory interpretation and in matters of judicial review, it is entirely appropriate to rely on provisions of international conventions which have not been incorporated into legislation but with which the State is presumed to have a will to be in compliance.

Many have observed that the judgment marked a major turning point in the relationship between international law and Canadian domestic law.<sup>6</sup>

Certainly, there is no doubt that *Baker* inspired a renewed interest on the part of Canadian jurists in the *Convention on the Rights of the Child*. This is confirmed in the case law of the last five years, in

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<sup>6</sup> For example, in an article entitled “Les droits de l’enfant, la Convention des Nations Unies et l’arrêt *Baker* : une trilogie porteuse d’espoir,” in *Mélanges Jean Pineau* (Montréal : Les Éditions Thémis, 2003), 151-181, Madam Justice Anne-Marie Trahan writes that this judgment marks [*translation*] “a turning point in Canadian judicial history” (at 158); a little further on, the author reports that Chief Justice McLachlin has declared on several occasions that [*translation*] “Canadian law has changed since the *Baker* decision” (at 161).

matters of immigration,<sup>7</sup> not surprisingly, as well as in a number of other cases that were either directly or indirectly related to the protection and welfare of children. Indeed, Canadian judges have drawn inspiration from the Convention when called on to define the social context of legislative and administrative measures challenged under the *Canadian Charter of Rights and Freedoms*, to uncover the meaning or define the scope of legislative provisions, and, in criminal matters, to justify the imposition of more severe sentences for crimes affecting children.

### **Canadian Case Law Since *Baker*<sup>8</sup>**

In *Winnipeg Child and Family Services v. K.L.W.*,<sup>9</sup> the Supreme Court of Canada was asked to determine the constitutionality of s. 21(1) of the (*Manitoba*) *Child and Family Services Act*, which conferred upon provincial child protection authorities the power to apprehend a child in need of protection without prior judicial authorization.

The appellant, K.L.W., whose newborn son had been apprehended at the hospital pursuant to this provision, challenged its constitutionality on the ground that it infringed her right to security of the person under section 7 of the *Canadian Charter of Rights and Freedoms* which guarantees all persons the right not to be deprived of liberty and security of the person except in accordance with the principles of fundamental justice.

It was not disputed that the decision to remove the child from K.L.W.'s custody violated her right to security of the person. It remained to be determined whether the apprehension of the child took place in accordance with the principles of fundamental justice.

Madam Justice L'Heureux-Dubé, writing for the majority of the Court, found that the Act does respect these principles because it complies with the requirements of procedural fairness by providing for a prompt post-apprehension judicial review process.

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<sup>7</sup> For cases since the Baker decision, see *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358, *Chieu v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 84 and *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C. 555.

<sup>8</sup> This survey includes case law until November 19, 2004 and, due to time and space constraints, is limited to decisions of the Supreme Court of Canada and Canadian courts of appeal. The decisions are presented in chronological order. Finally, the author would like to thank Mtre. Violette Leblanc, Clerk at the Court of Appeal of Québec, whose research and case summaries significantly contributed to the writing of this text.

<sup>9</sup> [2000] 2 S.C.R. 519.

Madam Justice Arbour, Chief Justice McLachlin concurring, disagreed. In her opinion, judicial authorization prior to the apprehension of a child in need of protection in a non-emergency situation is constitutionally necessary in order to protect both parents and children from unreasonable State interference.

The *Convention on the Rights of the Child* was used to support the reasoning of both opinions, with each judge relying on it in her own way.

In terms of the social context of the dispute, Madam Justice L'Heureux-Dubé affirmed that "protecting children from harm has become a universally accepted goal" (para. 73), relying on the Convention and on the fact that, at the time, it had been ratified by 191 States, including Canada.

In her discussion of the substantive law of fundamental justice (as opposed to its procedural aspects), Madam Justice Arbour noted that section 2(1) of the impugned Act<sup>10</sup> "would seem to run contrary to" article 3(1) of the *Convention on the Rights of the Child* (para.7). On the same subject, Madam Justice L'Heureux-Dubé stated that, on the contrary, section 2(1) is understandable in light of the wording of the Convention because it provides that, in the context of protection proceedings, the best interests of the child is no longer the paramount consideration but merely one of the primary considerations (para. 81).

In *United States v. Burns*,<sup>11</sup> the Supreme Court considered a claim for extradition to the United States of two young Canadian men accused of murdering three family members of one of them. The particular issue in dispute was whether the extradition could be ordered without seeking assurances from the United States under Article 6 of the extradition treaty between the two countries that the death penalty would not be imposed, or, if imposed, would not be carried out. In a unanimous ruling, the Supreme Court upheld the decision of the British Columbia Court of Appeal which set aside the Minister of Justice's decision and ordered the Minister to seek assurances from the United States as a condition of surrender.

In its analysis of the fundamental rights protected by section 7 of the Charter, the Court listed the values in our society which favour unconditional extradition and those which militate against it. Among

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<sup>10</sup> Section 2(1) provides that the paramount consideration is the best interests of the child in all proceedings affecting a child, "other than proceedings to determine whether a child is in need of protection."

<sup>11</sup> [2001] 1 S.C.R. 283.

the latter, the Court noted Canada's international commitments supporting clemency toward youths who were under 18 years of age at the time of the offence of which they have been accused (Article 37(a) of the *Convention on the Rights of the Child*). Because the young men accused were 18 years old at the time of the offence, the Court recognized that here, as in the United States, they would be held fully responsible for their acts. However, it concluded that the importance that Canada places on the rights of the child justifies considering their relative youth to be a mitigating circumstance, although, as the court pointed out, one of limited weight (para. 93).

In *Droit de la famille – 3403*,<sup>12</sup> the Court of Appeal of Québec ruled on various questions relating to the Québec adoption of four Moroccan-born children who had been placed in the appellants' care by Moroccan authorities but who were now living in Canada. The Montérégie Director of Youth Protection opposed the applications for orders of placement of the children with a view to their adoption, arguing essentially that the appellants could not institute proceedings on their own. In a unanimous judgment, the Court of Appeal disagreed.

Justice Forget supported his reasoning with standards adopted by the international community regarding child protection and international adoption and set out in the *Convention on the Rights of the Child* and the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* of May 29, 1993. Citing developments in the law which have enshrined the Québec legislator's intention to act within the boundaries set by the international community, he also relies on the Government of Québec's order in council 1676-91 of December 9, 1991,<sup>13</sup> by which it declared itself bound by the *Convention on the Rights of the Child*. He also refers to the fact that the objectives of the Québec government and the conditions it imposes are similar to those set out in the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, even though it does not yet formally adhere to it.

In *T. v. Alberta (Director of Child Welfare)*,<sup>14</sup> the Court of Appeal of Alberta was called on to decide whether an *ex parte* application for the apprehension of a child by the Director of Child Welfare could be brought without notice to the child's guardian and without giving the

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<sup>12</sup> [2000] R.J.Q. 2252.

<sup>13</sup> 1992 124 G.O. II, 51.

<sup>14</sup> [2000] 188 D.L.R. (4th) 603; 82 Alta L.R. (3d) 39.

guardian an opportunity to be heard. The Court of Appeal concluded that it could, invoking arguments based on the text of the *Child Welfare Act*, its objective of protecting children from harm and the reasonable accommodation of the interests of the guardian provided for in the Act. The Court then stated that the *ex parte* application procedure is consistent with the *Convention on the Rights of the Child*, which obliges States to take all appropriate measures and provide whatever investigation is necessary to ensure that children are protected (article 19).

In *Louie v. Lastman*,<sup>15</sup> the Court of Appeal for Ontario granted the Canadian Foundation for Children, Youth and the Law leave to intervene in an action in which two children were suing a man they alleged to be their biological father for the failure to provide support when they were minors. The intervener succeeded in proving that it would be able to add to the debate by arguing that the obligations set out in the laws of Ontario should be supplemented by Canada's international obligations, notably by those flowing from the ratification of the *Convention on the Rights of the Child*.<sup>16</sup>

In *Trinity Western University v. British Columbia College of Teachers*,<sup>17</sup> Madam Justice L'Heureux-Dubé made use of the *Convention on the Rights of the Child* to support her dissenting opinion. The University applied to the British Columbia College of Teachers (B.C.C.T.) to have its teacher training program recognized. The College refused, stating that to do so would be contrary to public interest since the university engaged in discriminatory practices by requiring its students to sign a commitment to "refrain from practices that are biblically condemned," which of course included homosexual practices. The majority of the Supreme Court found no relationship between the academic instruction offered by the university and discrimination in the classrooms. For her part, Madam Justice L'Heureux-Dubé emphasized that the immaturity of children makes them vulnerable and justifies providing them with protection. She relied on the *Convention of the Rights of the Child* to highlight the universal nature of this concern. The B.C.C.T.'s decision violated the freedom of expression of the students, but this was justified under section 1 of the Charter, as the protection of the classroom environment is a pressing and substantial objective and the

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<sup>15</sup> [2001] 208 D.L.R. (4th) 380.

<sup>16</sup> The suit was finally resolved without appealing to international law and the intervener's contribution was never noted; *Louie v. Lastman* (No.1) [2002] 61 O.R. (3d) 449.

<sup>17</sup> [2001] 1 S.C.R. 772.

decision was acceptable according to the criteria of proportionality and minimal impairment.

In *A.P. v. L.D.*,<sup>18</sup> the Court of Appeal of Québec was asked to decide whether a court seized with an action for a declaration of paternity could order the defendant to submit to a DNA test. In a split decision, the Court responded in the affirmative.

In support of his reasons, Justice Forget, with whom Justice Robert (puisne judge as he then was) concurred, relied heavily on the *Convention on the Rights of the Child* which recognizes, "as far as possible, the [child's] right to know and be cared for by his or her parents" (article 7). My colleague justified the application of this document by emphasizing, much as he had done in the above-cited case, the fact that Québec had formally declared itself bound by the Convention. In his view, the right of the child to know his or her parents [*translation*] "fits perfectly" with the legal rule set out in article 33 C.C.Q. (par 62):

[*translation*]

... Indeed, while it is true that this convention does not bind us because it has not been incorporated into our domestic law, it remains that the values reflected therein may help inform the contextual approach to statutory interpretation, as was noted by Madam Justice L'Heureux-Dubé for the majority in *Baker v. Canada (Minister of Citizenship Immigration)*. If this international convention can be relied on in the context of a procedure surrounding the deportation of the mother and caregiver to Canadian-born children, it can certainly be relied on in cases where the issue directly relates to the interests of the child.

Less than two months later, the Supreme Court of Canada rendered a decision in *R. v. Sharpe*<sup>19</sup> concerning the constitutional validity of section 163.1 (4) of the *Criminal Code*, which prohibits the possession of child pornography.

Sharpe maintained that this provision unjustifiably violated his freedom of expression. In a split decision, the Court confirmed the validity of the provision, while modifying the definition of "child

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<sup>18</sup> [2001] R.J.Q. 16.

<sup>19</sup> [2001] 1 S.C.R. 45.

pornography” to include exceptions for two categories of material which, in the Court’s opinion, present little or no risk of harm to children.

According to the three minority judges (Justices L’Heureux-Dubé, Gonthier and Bastarache), s. 163.1(4) C.C. was justified in its entirety under section 1 of the Charter, and it would be an error to include the two exceptions accepted by the majority judges within the definition of child pornography. In their section 1 analysis, the justices emphasized the need to pay close attention to the factual legislative and social context of the impugned provision and the nature of the infringed right.

One of the contextual factors they examined was the vulnerability of the group—in this case children—that the legislator was seeking to protect. On this point, the three judges noted that Canada’s support for the *Convention on the Rights of the Child* testifies to its strong commitment to protect the rights of children (para. 171). They also recalled that these international standards, “[w]hile...generally...not binding without legislative implementation,...are relevant sources for interpreting rights domestically” (para. 175). Finally, in the opinion of the three judges, section 163.1(4) C.C. “addresses [Canada’s] responsibilities under art. 34 of the *Convention on the Rights of the Child*”<sup>20</sup> (para. 196).

In *V.L. v. D.L.*,<sup>21</sup> the Court of Appeal of Alberta found that family law in Alberta does not contain a presumption that the mother should be awarded sole guardianship of a young child. On the contrary, the law contains a presumption of joint guardianship, even after the separation or divorce of the parents, and this conforms with the *Convention on the Rights of the Child*, which guarantees children the right to maintain personal relations and direct contact with both parents, and affirms that both parents have common responsibilities for the upbringing and development of their children, unless the exercise of these rights is contrary to the children’s interests (articles 9 and 18).

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<sup>20</sup> Article 34 :

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

<sup>21</sup> [2002] 1 W.W.R. 651; (2001) 206 D.L.R. (4<sup>th</sup>) 325.

In *Gosselin v. Québec (Attorney General)*,<sup>22</sup> the Court of Appeal of Québec was seized with a motion for a ruling that certain articles of the *Charter of the French language*<sup>23</sup> were invalid in that they had the effect of excluding certain children—that is, francophone and allophone children—from an English language education in subsidized public schools. The applicants argued that these articles were discriminatory, relying on the Québec *Charter of human rights and liberties*<sup>24</sup> (article 10) and the *Convention on the Rights of the Child* (article 2).<sup>25</sup>

On the topic of the Convention, the Court noted that [*translation*] “...in some cases, [international treaties] can be useful for the interpretation of provisions of the Québec Charter” (para. 46.), but that, in the present case, the treaties invoked by the appellants were not helpful to their arguments.

In *R. v. North*,<sup>26</sup> the Court of Appeal of Alberta heard the Crown’s appeal from a sentence imposed on North—a fine of \$750 and two years of probation—after he had pleaded guilty to a number of charges of possession of child pornography. The Court allowed the appeal, increasing the sentence to include a 12-month suspended sentence, 14 months of probation, and an obligation to provide a DNA sample. In its analysis of the fitness of the sentence, the Court repeated the statements of the Supreme Court on the relationship between section 163.1 (4) C.C. and Canada’s commitment to the terms of the *Convention on the Rights of the Child*.<sup>27</sup>

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<sup>22</sup> [2002] R.J.Q. 1298; leave to appeal to the Supreme Court of Canada granted April 24, 2003, [2002] S.C.C.A. No. 3000.

<sup>23</sup> R.S.Q. c.C-11.

<sup>24</sup> R.S.Q. c.C-12.

<sup>25</sup> Article 2 :

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinion, or beliefs of the child’s parents, legal guardians, or family members.

<sup>26</sup> [2002] W.W.R. 277; (2002) 3 Alta L.R. (4th) 290.

<sup>27</sup> For a decision along the same lines, see *R. v. Hewlett*, [2002] 312 A.R. 321; 167 C.C.C. (3d) 425 (C.A. Alberta).

In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*,<sup>28</sup> the British Columbia Court of Appeal rendered a decision on the rights of autistic children to receive publicly-funded health care. The Court concluded that the authorities' refusal to provide treatment for these children was discriminatory under section 15 of the *Canadian Charter of Rights and Freedoms*. Madam Justice Saunders then analyzed the government's decision under section 1 of the Charter and stated that the modern emphasis on the development of children is illustrated by the *Convention on the Rights of the Child*, and in particular by article 23 regarding mentally or physically handicapped children. She concluded that the Convention "has moral force relevant on an assessment of the application of s. 1 of the Charter,"<sup>29</sup> even though it represents Canada's international commitments while the impugned governmental measure falls under provincial constitutional jurisdiction.<sup>30</sup>

In *D.W. v. A.G.*,<sup>31</sup> the Court of Appeal of Québec was seized with an appeal from the trial judge's decision to award sole custody of the children to the mother because of the degree of conflict between the parents. The father also argued that one of the findings of the impugned decision deprived him of parental authority which he had, until then, exercised jointly with the mother, pursuant to article 600 of the C.C.Q. In answering this question, the Court noted that the Québec legislator had been inspired by the *Convention on the Rights of the Child* when drafting this provision.

In *Québec (Minister of Justice) v. Canada (Minister of Justice)*,<sup>32</sup> the Court was seized with an appeal by the Government of Québec regarding the validity of certain provisions in Bill C-7 on the youth criminal justice system. The second question formulated in the appeal expressly asked the Court to rule on whether the impugned provisions were consistent with international conventions ratified by Canada, including the *Convention on the Rights of the Child*.

Before beginning its analysis of this issue, the Court discussed the

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<sup>28</sup> [2003] W.W.R. 42; (2002) 220 D.L.R. (4th) 411.

<sup>29</sup> However, she relied on *Slaight Communications Inc. v. Davidson* [1989] 1 S.C.R. 1038 at 1056-57, rather than on *Baker*.

<sup>30</sup> In a unanimous decision rendered on November 19, 2004, [2004] A.C.S. No. 71, the Supreme Court of Canada overturned the judgment of the British Columbia Court of Appeal. However, the reasons of Chief Justice McLachlin, writing for the Court, did not refer to the *Convention on the Rights of the Child*.

<sup>31</sup> [2003] R.J.Q. 1411.

<sup>32</sup> [2003] R.J.Q. 1118.

legal effects of the simple ratification of an international convention. On this issue, it accepted the position of the parties to the dispute that [translation] "simple ratification...by the executive branch...does not give the treaty force of law or any coercive effect in domestic law, unless it is subsequently incorporated into domestic law..." (para. 89) On the issue of incorporation, the Court stated that [translation] "[a] simple reference in a statute is not sufficient" (para. 90). This was the situation in the case at bar since the preamble to the impugned Act referred to the *Convention on the Rights of the Child*. The Court concluded that, in the case at bar, international conventions could "merely serve as tools for interpreting the provisions of the [impugned Act] whose scope would otherwise be ambiguous" (para. 95).

Going deeper into the analysis, the Court reflected on whether it was useful or appropriate to answer the questions raised by the appeal. The Court found that the question was "justiciable and legal in nature" since it had been asked to assess the validity of the impugned provisions in the light of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. To the extent that the *Convention on the Rights of the Child* may serve as an interpretive tool when determining what constitutes, in criminal matters, the fundamental rights of children under section 7 of the Charter, a declaration of incompatibility may then have [a legal] impact in terms of the applicability of section 1 of the Charter (para. 115).

The Court concluded its analysis by unanimously finding that the impugned provisions were not inconsistent with the international instruments ratified by Canada.

In *C.U. v. McGonigle*,<sup>33</sup> the Court of Appeal of Alberta once again relied on the *Convention on the Rights of the Child*, this time in support of its position that a minor's clear refusal to undergo medical treatment because of religious beliefs does not override the provisions of the *Child Welfare Act* which permit a tribunal to authorize treatment. The appellant argued that under the exception allowing a mature minor to give consent to certain acts, her wishes to not be treated should have been respected. The Act provides that, if the minor is of the age where he or she is capable of forming an opinion, the court must hear that opinion and take the child's wishes into account. The Court concluded that the Act provided sufficient recognition of the child's opinion and his or her right to express it (article 12), while maintaining the best interests of the child as the primary consideration (article 3). In its view, the child's wishes are not dispositive of the issue, but rather

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<sup>33</sup> [2003] 6 W.W.R. 629; (2003) 223 D.L.R. (4th) 662.

represent merely one factor among others to consider when determining the best interests of the child (paras. 37 to 39).

In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*,<sup>34</sup> the Supreme Court of Canada was seized with a dispute on the constitutional validity of section 43 of the *Criminal Code*, which provides that every father, mother or schoolteacher is justified in using reasonable force by way of correction toward a child under his or her care.

In a split decision, the Court found this section to be valid.

The Foundation argued that the exemption of the use of reasonable force by way of correction from criminal sanctions that section 43 provides is not in the best interests of the child, and that this contravenes a principle of fundamental justice which requires legislation affecting children to be in their best interests.

Madam Justice McLachlin, writing for a majority of five judges, referred to the *Convention on the Rights of the Child* to determine the meaning and scope of the term “best interests of the child” (paras. 9 and 10). She returned to it when dealing with the argument that section 43 C.C. is unconstitutionally vague, in particular because of its use of the phrase “reasonable [force] under the circumstances.” The Chief Justice again noted that “[s]tatutes should be construed to comply with Canada’s international obligations” (para 31), particularly those flowing from the *Convention on the Rights of the Child* (para. 32 and 33).

In dissent, Madam Justice Deschamps also referred to the *Convention on the Rights of the Child* to illustrate the principle that “children, as individuals, have rights, including the right to have their security and safety protected by their parents, families and society at large” (para. 225).

## **Conclusion**

The impact of *Baker* on the Canadian legal landscape is undeniable.

Standards set out in international conventional law—and in particular, those established in the *Convention on the Rights of the Child*—are now benefiting from greater illumination and analysis.

However, certain public law scholars, such as Professor Jutta Brunnée

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<sup>34</sup> [2004] 1 S.C.R. 76.

and Professor Stephen J. Toope,<sup>35</sup> have expressed some concern over the long-term impact of the *Baker* decision.

They note that the judgment emphasizes the **persuasive** rather than **obligatory** force of international conventional law. They fear that a strictly persuasive application of international rules that have not been incorporated into domestic law could erode the presumption of conformity of domestic law with international law.<sup>36</sup> They therefore propose an interpretive tool based on the distinction between ratified international instruments and those that have not been ratified. Once Canada has ratified a treaty, it has engaged its international responsibility. According to Professors Brunnée and Toope, it therefore follows that judges should give effect to ratified international conventional law, regardless of whether it has been legislatively incorporated into domestic law, and interpret Canadian law in a manner that is consistent with the standards contained in the treaties. As for international law that is not binding on Canada, judges should maintain their discretion to refer to it when they see fit; it would then have a persuasive function in the interpretation of Canadian law.

While this approach is innovative, it raises a number of problems, including, of course, that of the constitutional legitimacy of such a manner of incorporating international law into domestic law. It remains to be seen whether Canadian courts will accept the invitation to go beyond *Baker* and move further along the road toward the recognition of international conventional law. One thing is certain, however: we have not yet heard the last word on the relationship between international law and Canadian domestic law.

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<sup>35</sup> J. Brunnée and S. Toope, "A Hesitant Embrace: Baker and the Application of International Law by Canadian Courts," *The Canadian Yearbook of International Law-Annuaire canadien de Droit international*, Volume XL, Vancouver, UBC Press, 2002, 3-60.

<sup>36</sup> Canada has adopted a dualist approach to the incorporation of international conventional law, whereby the legislature must explicitly indicate its intention to give effect to these rules in Canadian law. There are multiple techniques by which international law may be implemented. In the absence of explicit indication, a judge may, if certain conditions have been met, nevertheless presume that the Canadian legislature has a will to comply with international conventional law and indirectly give it effect. This "presumption of compliance" of domestic law with international law applies 1) when the text of the domestic law is ambiguous and 2) when the legislator's intention to give effect to the rules of international law can be detected in the domestic law. Professor Houle believes that the conditions of application of this presumption [*translation*] "have become rather confused" over the last few years (France Houle, *op. cit.*, p. 298).