Entertainment Software Association: is the presumption of conformity progressive or conservative?

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Summary: In *Entertainment Software Association*, the Federal Court of Appeal rejected an interpretation of the Copyright Modernization Act that would have conformed with a treaty that the Act was seemingly intended to implement. The court's skepticism of international law as an interpretive consideration verged on hostility. I argue here that rejecting the presumption of conformity in the interpretation of statutes neglects the separation of powers and risks judicial incursion into the executive's conduct of foreign affairs.

I have often noticed a tendency in some law students, lawyers and even judges to regard public international law, and internationally informed interpretations of Canadian law, as progressive in the partisan political sense of that word. We can readily think of cases where internationally informed interpretation drove what may be regarded as progressive results (e.g., *Baker v Canada (MCI)* [1999] 2 SCR 817, *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* 2004 SCC 4). Likewise, cases come to mind where neglect of Canada's international legal obligations produced regressive results (e.g., *Co-operative Committee on Japanese Canadians v Attorney General for Canada* [1947] AC 87 (PC), *Suresh v Canada (MCI)* 2002 SCC 1, *Canada (Prime Minister) v Khadr* 2010 SCC 3).

It is nevertheless erroneous to treat the entire international legal system as having a generally progressive or conservative character in the political senses of those words. The error lies in under-sampling. If one equates international law with say, international human rights or international labour law, one may erroneously conclude that there is something

inherently progressive about international law generally. But international agreements and norms are found in countless areas of law. Some of these might be regarded skeptically by political progressives (e.g., international trade law, international investment law). Many others simply cannot be meaningfully characterized as having a political bent at all (e.g., maritime delimitation and the law of the sea, the law of treaties, diplomatic and consular relations, international space cooperation, Hague private law conventions on such matters as taking evidence and serving legal process—and on and on). For lawyers (and especially judges) to regard international as having some inherently partisan aspect is an error. Like domestic law, international law has pockets that are amenable to partisan characterization (whether defensible or facile) and vast swathes that resist such characterization.

Treating international law as inherently political is a threat to the common law rules governing the reception of public international law in domestic law. Judges, of course, must be impartial. Impartiality includes being above the political fray. The Canadian Judicial Council's *Ethical Principles for Judges* observes, uncontroversially, that "Judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity". If judges come to regard international law as politically charged, they may feel duty-bound to avoid it. Their sense of judicial integrity may lead them to reject international legal considerations as improper—contrary to Anglo-Canadian reception rules that permit, and indeed require, judicial consideration of international legal norms in proper cases.

The Federal Court of Appeal's decision in *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* 2020 FCA 100 appears at points to flirt with this error. I have commented on the case in the *Canadian Yearbook of International Law*. The case is now headed to the Supreme Court of Canada. Its key aspects for my present purpose are these.

ESA was an appeal from a decision of the Copyright Board[1] about the interpretation of s. 2.4(1.1) of the Copyright Modernization Act SC 2012 c 20. The Act could no doubt have been clearer about the ill it sought to remedy. Its preamble, however, expressly referred to two international treaties (the World Intellectual Property Organization Copyright Treaty [2014] Can TS no 20 and the World Intellectual Property Organization Performances and Phonograms Treaty [2014] Can TS no 21), describing them as reflecting "internationally recognized norms" that "are not wholly reflected in the Copyright Act". The Board also considered a government statement of its intent in introducing the bill that become the Act, in the form of a publication entitled "What the Copyright Modernization Act Means for Copyright Owners, Artists and Creators".[2] This document was explicit that the "proposed Bill will implement the associated rights and protections to pave the way for a future decision on ratification" on the two treaties, which Canada had signed in 1997 but had not yet ratified. Canada proceeded to ratify both treaties in 2014—tellingly after the Copyright Modernization Act came into force. Finally, the Board admitted expert evidence on the meaning of the underlying treaties and what they required of Canada and other states parties.[3] The Board concluded that s. 2.4(1.1) could and should be interpreted consistently with Canada's obligations, in particular art. 8 of the Copyright Treaty.

The Federal Court of Appeal overturned the Board. Stratas JA for the court was scathing. The Board "skewed its analysis in favour of one particular result" (para. 49), acting "contrary to binding jurisprudence that limits the ways in which international law can influence the interpretation of domestic law" (para. 50), and providing "no meaningful reasons to support" its interpretation of s. 2.4(1.1) (para. 52). Justice Stratas conceded that the Act's preamble "suggests that the

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[1] *Scope of section 2.4(1.1) of the Copyright Act – Making Available (25 August 2017)*, CB-CDA 2017-085 (online: https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366772/index.do).

[2] Government of Canada, *What the Copyright Modernization Act Means for Copyright Owners, Artists and Creators*, online: <web.archive.org/web/20130123093243/http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/rp01189.html>.

[3] I have often argued that opinion evidence on the meaning of a treaty is inadmissible in a court of law. Whether that is so before an administrative tribunal is an unsettled, and perhaps more difficult, question.

Copyright Modernization Act is aimed at implementing certain norms in international law" but found the Act "vague as to the extent to which it does so" and criticized the Board for ignoring the specific terms of the Act and "just interpret[ing] and apply[ing] international law wholesale" (para. 53).

As for international law itself, Justice Stratas declared, "Under our Constitution, the power to make laws is not vested in anyone else" than Parliament and the provincial legislatures, "and certainly not the unelected functionaries abroad who draft and settle upon international instruments" (para. 79). In this passage, Justice Stratas for the court insists upon Parliament's constitutional supremacy, including supremacy over international legal considerations which he appears to regard as irredeemably foreign and lacking legitimacy.

Some might applaud this approach as appropriately deferential to Parliament. That would be a mistake. What the court in *ESA* depicts as respect for parliamentary sovereignty is in fact a troubling disregard for the executive's prerogative to conduct foreign affairs. While the *ESA* court appears to champion the separation of powers, in truth its rejection of the presumption of conformity badly neglects that doctrine—without advancing parliamentary supremacy in any meaningful way.

Federal governments of every political stripe spend vast amounts of resources (energy, time, personpower and money) in the conduct of foreign affairs. These efforts include: the elaboration of a general foreign policy, and of particular policy goals within it; the advancement of that foreign policy on dozens of fronts; the negotiation and drafting of international instruments, from simple bilateral arrangements with neighbouring states to regime-defining multilateral legal agreements such as the WIPO treaties at issue in *ESA*; the careful scrutiny of domestic law (federal, provincial or both) prior to entering new international obligations to ensure Canada can perform them; where necessary, the introduction of new laws, or amending laws, to enable Canadian performance prior to treaty ratification; and the avoidance and resolution of international disputes arising from any failure by Canada to perform its obligations.

Every case in which a statute may be interpreted either consistently with the state's international obligations or contrary to them risks judicial frustration of the vast amount of

executive effort that goes into the conduct of foreign affairs. The judicially conservative approach, by which I mean the approach that most respects the immense resources and effort involved in foreign affairs decision-making, and that least risks "incursion by the courts in the executive's conduct of foreign affairs" (*B010 v Canada (MCI)* 2015 SCC 58 at para. 47), is to apply the presumption of conformity with international law.

To avoid misunderstanding, let me add what should go without saying. Conforming interpretation has its limits. Treaty obligations are not a trump card litigants can use to foist unsupportable interpretations of statutory provisions upon courts. If the wording of a particular provision simply cannot bear a treaty-conforming interpretation, judges are not obliged, out of deference for the executive's foreign affairs prerogative, to pretend otherwise. And as Justice Cromwell rightly noted in *Németh v. Canada (Justice)* 2010 SCC 56, the fact that one particular legislative provision cannot be read consistently with an international obligation of the state does not necessarily mean that Canada is in breach; as was the case in *Németh*, we may discharge our obligation elsewhere in our law.

Whether the *ESA* case was one in which a conforming interpretation was impossible is a matter I leave to scholars and practitioners of copyright law. Clearly the Board did not think so, but just as clearly the Federal Court of Appeal disagreed. I have argued elsewhere[4] that Parliament could and should have made its treaty-implementing intent clearer. But whatever the proper outcome of the *ESA* case on its facts, the Federal Court of Appeal's exceedingly narrow approach to the presumption of conformity in this case is wrong. While Parliament could have been clearer, its intent was not utterly opaque. The Act's preamble notes the gap between the as-yet-unratified treaties and existing law. The Board's conclusions that the preamble "makes it clear that Parliament intended to implement new copyright protections…based on internationally recognized norms" and that "one of the main purposes of the [Copyright Modernization Act] was to establish copyright protection that is

[4] See my note on *ESA* in the 2020 *Canadian Yearbook of International Law*.

based on internationally recognized norms, as reflected in" the two treaties were hardly unreasonable.[5]

There was, moreover, evidence outside of Parliament, in the government press releases, of what the federal executive understood the bill to do: it enabled Canada to ratify the WIPO treaties by making the copyright reforms required for performance by Canada of the international obligations it would assume upon ratification. Using government press releases to interpret statutes is no doubt a dangerous and suspect exercise in most contexts. But the objection to doing so ought to be less where foreign affairs is concerned, for the simple reason that foreign affairs is an executive and not a legislative function. It is hard to see why judges must necessarily ignore executive statements about its decisions to incur new treaty obligations given that courts take judicial notice of the treaties themselves: *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529 at 554 (Eng CA) at 569; *Pan American World Airways Inc. v The Queen* (1979) 96 DLR (3d) 267 (FCTD) at 274–5; *Turp v Canada (Foreign Affairs)* 2018 FCA 133 at paras. 82–8.

The *ESA* case illustrates how a failure to apply the presumption of conformity with international law may inappropriately insert the courts into Canadian foreign policy. If the legislative amendments at issue in *ESA* do not conform to Canada's WIPO obligations, Canada will find itself in breach. This is precisely the result the federal government sought to avoid by delaying ratification of the treaties until the Copyright Modernization Act became law. If the Supreme Court of Canada upholds the Federal Court of Appeal, Canada will seemingly find itself in breach and will be forced to expend further foreign affairs resources (plus parliamentary time) in responding to, managing, and remedying that breach.

A key purpose of the presumption of conformity with international law is to avoid judicial interference with the executive's conduct of foreign affairs by adopting internationally compliant interpretations of domestic law where such interpretations are reasonably available. This is not to deny that Parliament and the provincial legislatures retain the power to enact laws contrary to the state's international obligations. That power remains. The question for judges is

[5] *Scope of section 2.4(1.1) of the Copyright Act – Making Available (25 August 2017)*, CB-CDA 2017-085 at paras. 98–9.

when to attribute an internationally unlawful intent to the legislature—knowing that doing so risks creating the foreign affairs difficulties described here. Judicial deference to the executive's conduct of foreign relations supports the Supreme Court of Canada's previous statements that the presumption is rebutted only in unequivocal, unambiguous cases: *R v Hape* 2007 SCC 26 at para. 53; *Németh* at para. 35. While our legislatures have the power to cause Canada to break its promises, the judicious approach is to presume legislative compliance wherever possible.

This is not a matter of progressive politics, or of privileging cosmopolitanism over Canadian values. To the contrary, one might argue there is something conservative—or at least old-fashioned—in the presumption of conformity. It is about judges respecting the separation of powers. It is also about Canada keeping its promises. Are we, as a country and a people, as good as our word? The presumption of conformity says yes.