International law evidence after *Nevsun*

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One of the many important reception law issues addressed in the Supreme Court of Canada's decision in *Nevsun Resources Ltd v Araya* 2020 SCC 5 was the judicial notice of international law by Canadian courts. *Nevsun* takes us some way further towards settling a long-neglected point of evidence and procedure: how, as a matter of evidence and procedure, should parties bring international legal issues before the court? While *Nevsun* does not give a complete answer, it points the way. Read together with other Canadian and Commonwealth authorities, we may finally be coming to a resolution of the question. An upcoming appeal before the Federal Court of Appeal presents a further opportunity to clarify this point.

The issue: fact or law?

The issue is the same from either end of the telescope. The question for judges is: How can a Canadian court inform itself of applicable international legal norms when doing so is necessary to the determination of the case before it? The question for counsel is: How do lawyers present international legal issues where required to advance their clients' interests?

The answer to both questions turns ultimately on how international law is characterized. If international law is law, courts take judicial notice of it as they do statutes, regulations and judicial decisions. For their part, counsel put the law before the court in books of authorities and make submissions on its meaning and implications for their case. If, however, international law is fact, the laws of evidence and procedure dictate different approaches. Courts require proof, whether through lay or expert evidence. Counsel martial that proof through witnesses and test it through cross-examination.

All this seems straightforward. But there are two related difficulties. The first is that international law cannot always be straightforwardly characterized as either law or fact. Mostly it is law, but sometimes it will be appropriate to characterize it (at least for procedural and evidentiary purposes) as fact. The second problem is that counsel are sometimes tempted to characterize international law as fact not because they have come to that conclusion after careful consideration of the issue in light of principle and precedent, but because they prefer to retain an expert witness on an international legal point rather than to learn the law and make submissions on it as they would a point of domestic law.

What *Nevsun* tells us

The *Nevsun* case comes down strongly in favour of international law being, for most purposes, law rather than fact. It also recognizes, however, that this characterization cannot be applied inflexibly.

It is crucial to recall that *Nevsun* was concerned with customary international law, not treaties. While art. 38(1) of the Statute of the International Court of Justice 1945 [1945] CanTS no. 7 famously recognizes four or five sources of international law (treaties, custom, general principles and, as subsidiary means for the determination of these, judicial decisions and eminent commentators), in practice the key distinction—in international law and in Canadian reception law—is between treaties and custom.

Treaties can be seen as contracts that international legal persons (mostly states) make between themselves. They are the predominant form of international law-making today. In Canada, treaty-making is an aspect of the Crown prerogative over foreign affairs. In practice this means the federal government can conclude treaties without the approbation, or even the involvement, of Parliament or the provincial legislatures. Doing so may be politically risky. It may even create legal risk for the government if the treaty in question cannot be performed domestically without legislation. But none of that detracts from the fact that treaty-making is a Crown prerogative. The crucial consequence of this for Canadian reception law is that treaties cannot take direct legal

effect here without implementation by legislation. The federal Crown cannot make federal law outside of Parliament, and it cannot make provincial law at all. This has not stopped, and should not stop, courts from interpreting federal and provincial laws as presumptively consistent with the state's treaty obligations. But conforming interpretation can only do so much. The federal government's lawyers understand this very well. This is why Canadian practice is, and has long been,[1] to secure the necessary implementing legislation before assuming the treaty's legal obligations. (This, in turn, is a powerful argument for applying the presumption of conformity. If the government has incurred a treaty obligation without securing amendments to domestic law, it is because it felt confident domestic law sufficed already to perform the obligation.)

While treaties are the leading source of new international laws today, it remains true that not all international law is captured by positive instruments. Customary international law is the law recognized by states as governing their relations in the absence of codification in written agreements. Much state practice in the international legal system is explained by states' recognition that such practice is required by law, and that to depart from that practice would be unlawful. The majority in *Nevsun* at para 80 quoted Brierly:

> Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if

[1] A remarkable early instance of delaying a treaty's entry into force in international law to ensure domestic compliance by fresh legislation was the Anglo-Japanese Treaty of Commerce and Navigation 1894 [1894] UKTS No 23. Article I of the treaty granted each state's subjects freedom of movement within the territories of the other. The British imperial authorities could ensure domestic performance of this promise in the United Kingdom by legislation in the UK Parliament. For Canada and the other dominions, however, the imperial authorities were dependent on local legislation. Opposition to Japanese immigration in British Columbia delayed the treaty's entry into force for Canada until 1905. See G. van Ert, "A Suitable Population: British Columbia's Japanese Treaty Act Litigation, 1920-1923" (2017) 3(1) *Canadian Journal of Comparative and Contemporary Law* 133.

> the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor.

In marked contrast to the reception of treaties, the historic Anglo-Canadian approach to custom is for courts to treat it as the law of the land unless some statute, or perhaps a conflicting common law precedent, prevents this conclusion. This incorporation doctrine, i.e., the adoption of custom by the common law, occupied much of the Court's reasons in *Nevsun*, but we need not consider it further for present purposes.

The issue in *Nevsun* was whether the claimants' allegations, based in part on rules of customary international law, were bound to fail and should be struck from their pleadings. Most of the majority's reasons was therefore directed at the place of customary international law in Canadian law. There were, however, some broader statements about the place of public international law (i.e., treaties and custom) generally in our law. The majority (at para 80) quoted approvingly a law review article by La Forest J. calling on national courts, "in dealing with interstate issues", to "fully perceive their role in the international order and…adopt an international perspective". Rather more prosaically, the majority (at para 96) quoted approvingly a statement of mine that "Canadian courts, like courts all over the world, are supposed to treat public international law as law, not fact".

Turning specifically to custom, the majority affirmed (at para 97) that established norms of customary international law are to be characterized as law and thus judicially noticed by courts. The judicial notice rule—"in the sense of not requiring formal proof by evidence"—was said to be the "inevitable implication" of the doctrine of adoption (*Nevsun* at para 98). Importantly, judicial notice without proof by evidence was said to be the rule for *established* customary norms. The majority proceeded immediately (at para 99) to acknowledge a possible exception for novel customary law claims:

> Some academics suggest that when recognising new norms of customary international law, allowing evidence of state practice may be appropriate. While these scholars acknowledge that permitting such proof departs from the

> conventional approach of judicially noticing customary international law, they maintain that this in no way derogates from the nature of international law as law....The questions of whether and what evidence may be used to demonstrate the existence of a new norm are not, however, live issues in this appeal. Here the inquiry is less complicated and taking judicial notice is appropriate since the workers claim breaches not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms.

What, then, does *Nevsun* tell us about how courts and counsel should approach public international law in judicial proceedings? I suggest *Nevsun* tells us at least three things.

First, public international law (including treaties and custom) is generally to be characterized as law and not as fact. Unlike foreign law, which is treated as a question of fact to be proved (*Nevsun* at para 97), international law is law and should be treated as such for most purposes.

Second, *Nevsun* makes clear that established rules of customary international law are judicially noticed in largely the same way as courts take judicial notice of domestic legal norms. In particular, there is no need to prove established customary norms through evidence. It follows from this, I suggest, that counsel seeking to rely on an established rule of customary international law should proceed much as she would if relying on a binding precedent or an enactment: she brings it to the court's attention as a relevant legal authority and makes submissions on its significance for the case before the court. Determining which rules of customary international law are properly regarded as "established" will be easy in many cases. International law textbooks are full of uncontroversial rules of customary international law. But as always in law, and particularly in litigation, there will be edge cases. Where to draw the line between customs that need not be the subject of evidence and claims that may need evidence be will be a judgment call that counsel and courts will be called upon to make in future cases.

This brings us to the third point. *Nevsun* acknowledges (without expressly deciding) that there may be need for parties to lead, and courts to admit, evidence on "new norms of customary international law" (para 99). I suggest that the notion of new customary norms here should be read to mean two things: new in the sense that state practice and *opinio juris* have developed to create a customary norm that did not previously exist, and new in the sense that the custom contended for by a party before the court cannot confidently be regarded as "established" in the sense that word is used by the majority at para 98. In other words, "new" here should include controversial or contested customary claims that cannot safely be treated as established based only on reference to publicly available evidence of state practice and *opinio juris* (e.g., published state papers, communiqués, policy declarations, internal orders and decrees, etc.) and authoritative international law commentary. Where a party invites the court to push the boundaries of custom, or resolve some controversy in customary international law, both the opposing party and the court will be entitled to ask whether the elements of the alleged custom can be established without evidence. If not, that evidence must be led. The usual (but not the only) way of leading that evidence will be the opinion of an expert. Such opinion evidence is not without its hazards, and there is nothing in *Nevsun* to suggest that the *R v Mohan* [1994] 2 SCR 9 criteria for the admissibility of expert evidence (particularly necessity and relevance) are suspended when advancing controversial customary claims.[2] Still, there is room for expertise in such cases. The approach I am describing here appears to me to accord both with the majority's observations at para 99 and with the partly dissenting reasons of Brown and Rowe JJ at paras 179-82.

What *Nevsun* does not tell us

Nevsun does not consider the role, if any, for expert opinion evidence in determining the status or meaning of Canadian treaty obligations. There is no reason why *Nevsun* should have tackled this point, as it did not arise on the facts and pleadings of the case.

[2] See generally *White Burgess Langille Inman v Abbott and Haliburton Co.* 2015 SCC 23 at paras 23-4; see also the discussion in *Boily v HMTQ* 2017 FC 1021 at para 32.

Nevertheless, *Nevsun*'s starting point is clear: international law is law and courts generally take judicial notice of it. That is a strong signal from the Supreme Court of Canada that opinion evidence on treaties is unlikely to be admissible.

Even without Supreme Court of Canada authority directly on the point, there is ample reason to believe that expert opinion evidence on the meaning of Canadian treaty obligations is inadmissible. Justice Nadon reached this result in *Turp v Canada (Foreign Affairs)* 2018 FCA 133, observing at para 82 that, in his opinion, "parties do not need to file experts' reports to prove international law, because the Court can take judicial notice of said law". He supported this claim with the observations about judicial notice made by Davies J. in *R v The Ship "North"* (1906) 37 SCR 385 (also cited by the majority in *Nevsun*), the decision of Mackay J. in *Jose Pereira E Hijos SA v Canada (Attorney General)* [1997] 2 FC 84, and a leading Scottish decision on the point, *Lord Advocate's Reference No. 1 of 2000* [2001] ScotHC 15. While Nadon J.A. was careful to note that the court had not heard submissions on the issue, and it therefore remained open for future determination in the Federal Court and the Federal Court of Appeal, his conclusion (at para 88) is wholly consistent with both *Nevsun* and *Mohan*:

> I think that in a case like the one before us, the parties do not need to rely on expertise in international law. International law, being a question of law, is the prerogative of courts, which can take judicial notice of this law with the help of attorneys arguing the case.

Two appellate authorities from British Columbia are also of note. In *Ganis v Canada (Minister of Justice)* 2006 BCCA 543 the central issue was not the meaning of a treaty, but its legal status for Canada. Chief Justice Finch for the court held that that question was to be determined by resort to the executive. I return to that point below. Importantly, Finch C.J. distinguished that question from the question of a treaty's content, saying (at para 24), "Our courts are sometimes asked to interpret a treaty's provisions and determine its domestic effect; that task, involving legal questions, is within the judiciary's expertise." This is, with respect, exactly right. Where a treaty falls to be interpreted for some domestic legal

purpose, Canadian courts (like other Commonwealth courts) take that task on themselves. The law reports are full of examples, not only in the Supreme Court of Canada but also in first instance and appeal courts.

Consistently with *Ganis*, the Court of Appeal for British Columbia in *R v Appulonappa* 2014 BCCA 163 had occasion to observe (at para 62) that,

> To the extent that both experts strayed into providing opinions on the interpretation and application of international law and s. 117 of the [Immigration and Refugee Protection Act], their testimony was not properly admissible as these were questions of law for the court.

One might have expected this observation to curtail, at least in British Columbia, the practice of filing expert reports on the interpretation of treaties. So far it has not done so. In *Li v British Columbia* 2019 BCSC 1819, both parties submitted expert reports addressing a variety of public international legal questions arising from Canada's obligations under 36 different international investment treaties. Neither party challenged the admissibility of these opinions, both being guilty of the same offence. The trial judge admitted one report but kept out the other (for reasons other than its opining on the meaning of treaties), while also stating (at para 67) he preferred the opinion of the expert whose report he admitted over the opinion of the expert whose report he did not.

The decision of Mahoney J. in *Pan American World Airways Inc v The Queen* (1979) 96 DLR (3d) 267 (FC) is one of the few in Canadian law that expressly rules on the admissibility of expert evidence on the meaning of a Canadian treaty obligation. The plaintiff airline challenged the legality of federal fees charged to it. International civil aviation is governed by a multilateral treaty regime under the Chicago Convention on International Civil Aviation 1944 [1944] CanTS no. 36. The plaintiff claimed the fees were contrary to the Chicago Convention and unlawful. Having considered the Convention's provisions at some length, the learned judge found no conflict. The fees not being contrary to the Convention, Mahoney J. had no need to determine "the places, if

any, of arts. 15 and 70 of the Chicago Convention in Canadian domestic law" (at 274).

It was at this point that the learned judge turned to the expert evidence of Mr. Seagrave. The expert's statement explained that his testimony was "directed to the question whether, under International Law, Canada has the right to levy on the United States' airlines charges for air navigation and services provided by Canada over the High Seas". "[O]n reflection," Mahoney J. felt this evidence to be "wholly inadmissible notwithstanding that counsel for the defendants did not press his objection". He continued (at 274-5):

> While expert evidence as to foreign law is, of course, admissible, expert evidence as to domestic law is not. It is well established that international law has no force in Canada unless it has been adopted as domestic law. Opinion evidence as to the proper construction to be placed on the Chicago Convention was not admissible and I have not, therefore, considered Mr. Seagrave's statement as evidence but, on the assumption that plaintiff's counsel would willingly adopt it as argument, I have considered it such.

These observations, read in the context of the case before the judge, are unimpeachable. The statement that "international law has no force in Canada unless it has been adopted as domestic law" is consistent with both the treaty implementation requirement and the incorporation of custom by the common law, though Mahoney J. likely had treaties specifically in mind. The statement that opinion evidence on the proper construction of the Chicago Convention was inadmissible is consistent with the learned judge's preliminary observation that expert evidence as to domestic law is inadmissible. While, as noted, Mahoney J. did not need to determine whether the treaty was implemented (having found no conflict between the Convention and the federal fees),[3] the plaintiff airline was arguing the Convention was Canadian law, while at the same time advancing Mr. Seagrave's evidence as to its meaning.

[3] On further appeal to the Supreme Court of Canada, the unanimous court took the same approach and dismissed the appeal: *Pan American World Airways v The Queen* [1981] 2 SCR 565.

Accepting, at least for the sake of argument, that the treaty was indeed domestic law, Mahoney J. rightly rejected opinion evidence on it.

I would add, however, that evidence on the meaning of Canadian treaty obligation is inadmissible whether that treaty is implemented domestically or not. If the treaty is implemented, evidence on its meaning offends the rule against opinion evidence on domestic law, as Mahoney J. held. If unimplemented, however, the evidence is still unnecessary. The observations of Nadon J.A. and Finch C.J., quoted above, apply: the interpretation of positive legal instruments is a judicial function and cannot be regarded as beyond our courts' competence. This is particularly so given the fact that Canada's treaties are authenticated in both of Canada's official languages (see s. 10(1) of the Official Languages Act RSC 1985 c 31 (4th Supp)), and when one considers the numerous occasions in which the Supreme Court of Canada has explained to Canadian courts and counsel that treaties fall to be interpreted according to the interpretive rules set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 [1980] CanTS no 37.[4] Moreover, while treaty interpretation is not an everyday occurrence in Canadian superior courts, it certainly goes on there. And it is a fairly regular feature of adjudication in the national courts, namely the Tax Court, the Federal Court and the Federal Court of Appeal.

A recent Australian decision on expert evidence on treaty interpretation deserves careful attention. In *Australian Competition and Consumer Commission v P.T. Garuda Indonesia (No. 9)* [2013] FCA 323 (Fed Ct Aust), the Commission raised several objections to the admissibility of a report by an expert on international transportation law. The central objection was that evidence could not be received as to the content or operation of public international law. Such matters were to be determined in the same way as ordinary legal argument. According to the Commission, the expert report was, in effect, legal argument. In careful reasons in

[4] E.g., *Thomson v Thomson* [1994] 3 SCR 551 at pp. 577-78; *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 at para 51; *Febles v Canada (Minister of Citizenship and Immigration)* 2014 SCC 68 at para 11; *Office of the Children's Lawyer v Balev* 2018 SCC 16 at paras 32, 85.

which the reception of treaties in Australian law was thoroughly canvassed, Justice Perram agreed. The case turned, in Perram J.'s view, on art. 6(2) of air services treaty between Australia and Indonesia.[5] Among Perram J.'s conclusions of note for Canadian courts are these:

- "What little authority there is suggests that under Australian law a question of public international law is not one which involves the taking of evidence": para 29;

- "There is no doubt that domestic law cannot be proved law by evidence….Does a similar principle apply to international law? Despite authority to this effect being scarce, it seems that the answer is that it does": paras 31-2;

- "The proliferation of international law concepts throughout modern legal systems, including Australia's, would make it inconvenient to require evidentiary proof each time one arose for consideration. In this Court, for example, double taxation treaties are frequently considered as is the Convention Relating to the Status of Refugees…. It would add a layer of expense and complexity if that discourse were required to be approached factually": para 42;

- "…domestic public law (by which I mean areas such as statutory interpretation, constitutional and administrative law) and international law are intertwined….When…a court construes a statute to comply with a treaty obligation…international law then exerts a discernable influence on the content of local law": para 43;

- "…it is not inaccurate to view international law as perhaps one of the sources of domestic law. That is not to say that it is paramount or that the Australian legal order is somehow to be seen as a corollary of international law. It is rather to accept that local rules of interpretation and public law have the effect of picking up, or invoking, international

[5] Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia for Air Services Between and Beyond their Respective Territory 1969, [1969] ATS 4.

law at various points in the decision-making process and that when they do this it has the effect of making international law one of the sources, among a number, of local law. If one accepts that international law can be a source of local law—in that very precise and limited sense—it is natural to expect that it will be approached as a legal question when it comes to questions of proof": para 44;

- "It is natural...to treat international law as if it were domestic law for the purposes of its proof....it is to accept its inherent legal nature, its domestic legal consequences, the practicality of it being dealt with as legal material and the qualification of domestic courts to engage in such an exercise. These matters mark it out as qualitatively different to foreign law": para 47;

- "...before an Australian court a question as to the interpretation of a treaty which arises in the course of ascertaining the operation of Australian law is to be approached as a question of law rather than as one of fact": para 48;

- "I do not think that the Professor's views are likely to add anything more in the form of evidence than they will add in the form of Mr Leeming's eventual submissions based upon them. Indeed, given the more active role of the Court during submissions it is unlikely that cross-examination of the Professor by counsel is likely to add anything which will not otherwise be obtained by cross-examination of counsel by the Court": para 54.

Each of these statements, I suggest, is as true in Canada as it is in Australia.

The chief difficulty, at present, with the claim that expert evidence on the meaning of a Canadian treaty obligation is inadmissible lies not in its logic, or even in the precedents supporting it. Rather, it is the profusion of cases in the last twenty-five years or so in which expert evidence was admitted despite logic and precedent. There is no shortage of examples, and indeed no shortage of appeals from such examples, where no issue is

taken with how the parties chose to proceed at trial or with the court's acquiescence in their doing so.[6] In my view, such cases cannot be regarded as judicial precedents unless one takes an impoverished view of that concept. For a judicial decision to be precedential on a point, the point must have been considered and decided. That is precisely what has not happened in such cases. Clearly the fact that one party introduced an expert report, and the other party either declined to object to it or countered it with a report of its own, establishes no precedent. The court's failure to object where no party has done so cannot, I suggest, create a precedent, either. All this would be true even without the Supreme Court of Canada's guidance in *Mohan* and now *White Burgess Langille Inman v Abbott and Haliburton Co*. 2015 SCC 23. It is all the more so given those authorities' insistence that the admissibility of expert opinion turns, as a threshold matter, on (among other things) relevance to prove a fact and necessity in assisting the trier of fact.

Assuming, therefore, that expert evidence on the meaning of Canadian treaty obligations is *prima facie* inadmissible in evidence, are there exceptions to the rule? We saw in *Nevsun* that the starting point is judicial notice, but there may yet be room for expertise in novel cases. Might there be exceptions to the bar on expert opinions on what our treaty obligations mean?

The case law suggests the answer is yes, but that the exceptions are narrower than those allowed in respect of custom in *Nevsun*. Recognized exceptions in the case law to date concern the status of a treaty for Canada, the meaning of a foreign-language version of a treaty, and recondite or specialist terms used in a treaty. There may also be what one might call a quasi-exception for foreign judicial decisions about a treaty.

Status of a treaty for Canada

I have noted the *Ganis* case already. The question was the treaty's status for Canada, meaning whether it remained in force as against Canada as a matter of international law. Chief Justice Finch rightly held that the existence of a treaty between Canada and another

[6] For examples, see the discussion in G. van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008) at 44-56.

state was not a justiciable question but fell to be determined by the federal government. As he put it (at para 23), "the question of a treaty's validity is purely political, and … there is no legal component in these circumstances that would warrant the court's interference" with the minister's determination that a valid extradition treaty existed between Canada and the Czech Republic. In reaching this result, Finch C.J. relied on Pigeon J.'s observation, in *Institut National des Appellations d'Origine des Vins et Eaux-de-Vie v Chateau-Gai Wines Ltd.* [1975] 1 SCR 190 at 199, that "whether a treaty is in force, as opposed to what its effect should be, [is] wholly within the province of the public authority".

Thus, while a treaty's meaning is a matter for judicial determination, its status for Canada is not. But that is not to be determined by expert evidence, either. Rather, it is determined by rarely used but long-established form of evidence in Anglo-Canadian law: the executive certificate. Rather than determine the status of a treaty for itself, the court accepts (and in some cases, actively seeks) a certificate from the government on the point, then gives effect to it.[7]

Foreign language texts

In *Fothergill v Monarch Airlines Ltd*. [1981] AC 251, a partial exception to the prohibition of expert evidence on the meaning of a treaty was recognized for foreign language treaties. The House of Lords was faced with English and French versions of a treaty. The French text was authentic. The English text was a translation adopted by Parliament in implementing the treaty. Lord Scarman observed (at 293-4) that the court "may receive expert evidence directed not to the questions of law which arise in interpreting the convention, but to the meaning, or possible meanings (for there will often be more than one), of the French. It will be for the court, not the expert, to choose the meaning which it considers should be given to the words in issue".

[7] The leading case is *Re Château-Gai Wines Ltd. and Attorney General of Canada* (1970) 14 DLR (3d) 411 (Exchequer Court of Canada). See also *Institut National des Appellations d'Origine des Vins et Eaux-de-Vie v. Chateau-Gai Wines Ltd*. [1975] 1 SCR 190; *Parent v. Singapore Airlines* 2003 CanLII 7285 (Que Sup Ct); *Canadian Planning v Libya* 2015 ONSC 2188.

As noted above, the Official Languages Act requires Canadian treaties to be in both French and English. It seems unlikely that expert evidence on the meaning of the French text of a Canadian treaty would be admissible in evidence, but I know of no authority on the point. If, however, a Canadian court were asked to consider the meaning of a treaty authenticated in a language other than English or French, *Fothergill* would seemingly permit this. One might wonder, however, whether a certified translation would not serve instead of expert evidence.

Recondite or specialist terms

The English Court of Appeal permitted expert evidence on the meaning of certain treaty provisions in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 (CA). In doing so, however, it affirmed that treaties are a matter for judicial notice and that the ultimate question of the treaty's meaning remained a matter for the court.

The question was whether a radio tower in the Thames estuary was within United Kingdom internal or territorial waters or was instead on the high seas. The availability of injunctive relief turned on this point. The parties disagreed on the meaning of the expression "the natural entrance points" of a coastal indentation. The expression was used both in the treaty at issue and in the order in council implementing it. There was expert evidence on the meaning of the phrase from both parties. Lord Diplock explained:

> Although the ultimate decision upon the meaning of the expressions used in the Order in Council must be one for the court, the subject-matter is sufficiently recondite to render admissible evidence as to what the words used would be understood to mean by persons qualified in this specialised field of claims by states to exercise jurisdiction over the coastal sea. The judge preferred on this matter the evidence of the Post Office experts, whose qualifications on this particular aspect of hydrography he considered, with justification, lent greater weight to their opinions as compared with those of the experts called for Estuary Radio Ltd. The Post Office experts were naval officers whose duty it was to advise the Crown not only upon its own claims to internal waters and the territorial sea, but

> upon the recognition of claims by other states. This court would be chary of differing from the view of the trial judge on a matter of assessing the weight to be given to conflicting evidence of expert witnesses whom he has seen and heard. But in addition, the Post Office experts gave convincing reasons for applying the purely cartographical test, which, according to their evidence, is that adopted by the United Kingdom and other countries in applying the Convention.

Clearly the Court of Appeal regarded this evidence as exceptional. As noted, it affirmed (at 756) that the court must take judicial notice of the Convention. Furthermore, while it accepted expert evidence here, it did so in a qualified way. The evidence was directed only (it seems) at the meaning of the disputed expression, and not at the treaty as a whole. Proceeding by expert opinion was justified on the ground that the subject matter was "sufficiently recondite" (i.e., beyond ordinary knowledge or understanding) to permit evidence on the point. To put this in the language of *R v Mohan*, the evidence was necessary despite the court's general competence to construe international agreements.

Foreign judicial decisions on the treaty in question

I am not aware of a Canadian case in which expert evidence was led to explain what the courts of other states parties to a multilateral treaty have said about the treaty's meaning. In principle, however, such evidence strikes me as potentially admissible—not to prove the treaty's meaning *per se*, but to demonstrate what other states understand the treaty to mean. There are, however, potential difficulties, too.

The Supreme Court of Canada has affirmed that "domestic courts should give serious consideration to decisions by the courts of other contracting states on [a treaty's] meaning and application": *Office of the Children's Lawyer v Balev* 2018 SCC 16 at para 33; see also *Thibodeau v Air Canada* 2014 SCC 67 at para 50. Notably, the majority in *Balev* cited art. 31(3)(b) of the Vienna Convention on the Law of Treaties 1969 [1980] CanTS no 37 in support of this conclusion:

> There shall be taken into account, together with the context: …
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

Consistently with this, McLachlin C.J. for the majority observed (at para 33) that a "clear purpose of multilateral treaties is to harmonize parties' domestic law around agreed-upon rules, practices and principles".

Clearly, expert evidence will not always be needed for our courts to consider how other courts have interpreted a shared treaty obligation. If the foreign court operates in English (or, in some of our courts, French), our courts can read the foreign decisions for themselves to see how the shared treaty is being interpreted. Our courts may also be able to rely on authoritative academic commentaries explaining how a given treaty has been construed in foreign states, again without the need for expertise. Many multilateral agreements are the subject of exhaustive academic commentaries that survey the convention's treatment in domestic jurisdictions.

Yet there may be instances where an expert report explaining how the courts of a foreign state have interpreted a shared treaty would be helpful, particularly where the foreign state's jurisprudence is inaccessible to Canadian judges due to language barriers or other reasons. In such cases, admitting an expert report might not be regarded not as an exception to the rule against expert evidence on treaties but as an application of the rule that foreign law can be proved by expert evidence. Admittedly, an expert report on how a shared treaty obligation has been interpreted in a foreign jurisdiction risks crossing the line and becoming an opinion on the meaning of the treaty itself. How courts police that line in particular cases remains to be seen. The key, it seems to me, is for parties, trial courts and courts of appeal always to bear in mind that the interpretation of a treaty is ultimately a judicial function.

Law not "soft law"

A caution is in order. This discussion of international legal evidence after *Nevsun* is strictly limited to international legal norms binding on Canada, as found in treaties and custom. Our concern here is with *lex lata*, meaning international law as it is, and not *lex ferenda*, or international law as it may become. The international arena generates an endless stream of non-binding instruments, some of which are drafted very much like binding instruments. Where *Nevsun* speaks of judicial notice of international law, it clearly does not mean judicial notice of so-called "soft law". The Canadian reception system has specific rules concerning the role of treaties and customs in domestic law. These rules are matters of public law, profoundly informed by our written and unwritten constitutional arrangements and common law precedents dating back to the eighteenth century. For the most part, Canadian law has not fashioned rules to receive non-binding international instruments and materials into our law. The reason is simple. The reception scheme is committed, within constitutional limits, to promoting domestic compliance with the state's international obligations. Soft law materials do not express international obligations, and therefore do not require reception rules.

Given that the presumption of conformity and other reception rules do not apply to non-binding international materials, a party seeking to rely on them before a Canadian court must clearly explain the basis for doing so. Perhaps the material is demonstrative of state practice, or *opinio juris*, or both, in advancing an argument founded on customary international law. Perhaps the material, while formally non-binding, has been recognized by Canadian jurisprudence or by foreign states as authoritative on the meaning of a treaty obligation.[8] In the context of Charter litigation, the material, while not binding on Canada and therefore not attracting the presumption of conformity,[9] may

[8] The best example of this may be the UNHCR Handbook. See, e.g., *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 713–14; *Chan v. Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593; *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982; *Hinzman v Canada (Citizenship and Immigration)* 2007 FCA 17 at para 23, etc.

[9] See *Quebec (Attorney General) v. 9147-0732 Québec inc*., 2020 SCC 32 at paras. 31–38.

nevertheless be relevant and persuasive to the interpretation of a particular right.[10] In such cases, courts cannot be expected to take judicial notice of non-binding materials. Rather, they must be advanced in evidence, which may include expert evidence. The very fact that they are not international law binding on Canada is what makes expert evidence on them unobjectionable.

Are we there yet?

The proper approach to expert evidence on questions of international law has been ignored in Canada for a generation or more, despite the immense growth of international law reasoning in Canadian decision-making, particularly at the Supreme Court of Canada, in this same period. *Nevsun* is a big step in the right direction. But it does not address treaties, and treaties are where the action is. It may seem pedantic to insist on the need for an express judicial affirmation that Canadian courts take judicial notice of the state's treaty obligations without the need for evidence. After all, there is no shortage of Supreme Court of Canada decisions considering our treaties without any indication that they were proved in evidence or even raised by the parties. But more is needed. Despite *Turp*, *Appulonappa* and *Ganis*, practitioners continue leading dueling expert reports on the legal significance of treaties for domestic litigation, and courts continue to let it happen. International law is still routinely treated as equivalent to foreign law as a matter of evidence and procedure.

There is reason for hope, however. In *International Air Transport Association v Canadian Transportation Agency* 2020 FCA 172, Mactavish J.A. (sitting alone) considered a motion by the Attorney General of Canada to strike portions of two affidavits filed by the appellants in support of a challenge to the validity of certain

[10] Many examples might be given. Of note is *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4, in which the majority relied in part on opinions from supervisory bodies of the International Labour Organization as having "considerable weight" though "not strictly binding" (at para 69). Meanwhile Rothstein and Wagner JJ (dissenting) observed (at para 157) that "obligations under international law that are binding on Canada are of primary relevance to this Court's interpretation of the Charter" and "other sources of international law can have some persuasive value in appropriate circumstances" but "should be granted much less weight than sources under which Canada is bound."

regulations, which they alleged to be contrary to the Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999 (2004) 2242 UNTS 309. The learned judge deferred to the panel of the court hearing the appeal. In doing so, however, she noted the issue, including the important comments of Nadon J.A. in *Turp*, the decision of Mackay J. in *Pan American*, and the Federal Court's more recent consideration of the issue in *Boily v Canada* 2017 FC 1021.

It is immensely encouraging to see the Attorney General of Canada take the position that expert evidence on treaties is inadmissible. It is equally encouraging to see the Federal Court of Appeal cite (if only in chambers) the long-neglected decision of the Federal Court in *Pan American*. Maybe we are about to get an authoritative ruling on the point. If so, maybe we will also see counsel amend their practice accordingly. I continue, perhaps stubbornly, to be of the view I expressed 15 years ago in (2005) 84 *Canadian Bar Review* 31 at 41:

> While it is no doubt true that a scholar who has long studied a particular question of law may be more knowledgeable about it than a trial judge at the outset of a hearing, our adversarial legal system is predicated upon the conviction that a qualified judge, assisted by learned counsel presenting competing views and acting for parties with a real interest in the outcome, and protected (if all else fails) by the possibility of reversal on appeal, is capable of correctly resolving any legal controversy. If we begin to doubt this proposition for international law, on the ground that it may be unfamiliar to many judges, why should we not also doubt it for other lesser-known areas of law?