

THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT (EDS. SLOSS AND JINKS)
CHAPTER SIX: CANADA
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If asked whether Canadian courts enforce treaties binding on the state at international law, most Canadian judges and lawyers would say no. Some might hesitate a little, or qualify their answers. Many would not. They would explain that treaties are not part of Canadian law unless given domestic effect by legislation, and even then a court interpreting or applying such legislation is not, in fact, enforcing the treaty, but simply giving effect to domestic law. There is much truth in this depiction of the Canadian approach. But there is also some generalization, even some simplification. While the orthodox account of the place of treaties in Canadian law retains much of its force today, it was elaborated at a time when Canada's engagement with international law, and international law's engagement with the domestic laws of Canada and other states, were more narrowly circumscribed. An accurate account of treaty enforcement in Canadian courts today must pay due regard to received doctrines while also considering the contemporary practices of Canada's judicial, legislative and executive branches of government. Seen in this light, Canadian courts play an increasingly important role in enforcing the state's treaty obligations, though largely through such indirect means as interpretive presumptions and implementing legislation.

I The status of treaties in Canadian law

The status of international treaties¹ in Canadian law is complicated by Canada's constitutional structure, which blends written constitutional provisions with unwritten doctrines and interpretive practices. Canada's constitution is partially codified in a series of statutes enacted by the British

¹ The phrase "international treaties" will appear redundant to most readers but is necessary, in the Canadian context, to distinguish treaties governed by international law from those legal agreements, also known as treaties, which govern relations between Canadian governments (both federal and provincial) and Canada's aboriginal peoples. Aboriginal treaties enjoy a measure of constitutional protection in Canadian law under section 35(1) of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982 c. 11.

imperial parliament, most notably the Constitution Act 1867² (which established Canada as a federation of British North American colonies) and the Constitution Act 1982³ (which entrenched judicially enforceable human rights protections in Canadian law and removed the need for British involvement in constitutional amendments). Together, these enactments form the written constitution of Canada. But they do not comprehensively codify Canadian public law. In particular, the Canadian constitution includes unwritten elements derived from the British constitution, upon which Canada's constitution is based.⁴

A. Treaty-making is an executive act

One such unwritten element is the royal prerogative. In British constitutional tradition, certain functions are recognized as belonging entirely to the Crown, i.e., the executive branch of government. Such royal prerogatives may be exercised without the need for parliamentary approval or even parliamentary involvement.⁵ Among these prerogatives is the conduct of foreign affairs, including the negotiation and conclusion of treaties. In the absence of any express written provisions concerning treaty-making (or foreign affairs generally) in the Canadian constitution, treaty-making in Canada is recognized by the courts as an exclusively executive function. This is consistent with British constitutional tradition.

The fact that treaty-making is characterized as a royal prerogative is very significant. In Canada, as in other British-derived constitutional democracies, domestic laws cannot be made by executive action alone. They must be made by legislatures.⁶ This rule is rightly seen as a fundamental constitutional doctrine on which the structure of Canadian representative government rests. By contrast, the royal prerogative over foreign affairs means that treaties in

² 30 & 31 Vict. c. 3 (UK), reprinted in RSC 1985 App. II No. 5.

³ Schedule B to the Canada Act 1982 (UK) 1982 c. 11.

⁴ The preamble to the Constitution Act 1867 records the desire of the founding provinces "to be federally united into One Dominion...with a Constitution similar in Principle to that of the United Kingdom."

⁵ See G. van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002) at 66-74; J. Harrington, "Scrutiny and Approval: the Role for Westminster-Style Parliaments in Treaty-Making" 55 ICLQ 121, 136-41 (2006).

⁶ *Case of Proclamations* (1611) 12 Co. Rep. 75, 77 ER 1352; *Archbishop of York and Sedgwick's case* (1612) Godbolt 201, 78 ER 122; Bill of Rights 1689 (UK) 1 Will. & Mary sess. 1 c. 6 art. 1. Delegated forms of legislation, such as regulations, are no exception. Delegated legislative power is created by statute and is invalid if it exceeds its authority.

Canada can be made by unilateral executive action. For this reason, Canadian courts have repeatedly declared that a treaty is not, in itself, a source of law on which litigants may directly rely. The most well-known statement of this principle occurred in the judgment of the Privy Council in a Canadian appeal known as the *Labour Conventions* case.⁷ Lord Atkin for the board observed:

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.⁸

This doctrine is the basis for Canada's so-called dualist approach to international law: for a treaty to take direct effect in domestic law without legislative action would violate the fundamental constitutional principle that laws are made by legislatures and not by the Crown. Canadian dualism is qualified, however. It does not extend to rules of customary international law.⁹ And as we will see, it does not prevent judicial notice of treaties or judicial interpretive practices to ensure conformity with treaty requirements.

The location of treaty-making in the executive is unproblematic in a unitary state such as the United Kingdom. Canada, however, is a federation of ten provinces, all of which have their own executives. The instrument that created Canada's federal structure, the Constitution Act 1867, was drafted at a time when the foreign affairs of Britain's colonies were conducted by the imperial government in London. The Constitution Act 1867 is therefore silent on whether, or how, the treaty-making power is distributed among Canada's federal and provincial executives. This

⁷ *Attorney-General for Canada v. Attorney-General for Ontario* [1937] AC 326 (PC) (*Labour Conventions*).

⁸ *Labour Conventions*, at 347. See also *Francis v. The Queen* [1956] SCR 618 at 621.

⁹ Customary international law is incorporated directly into Canadian common law. See *R v. Hape*, 2007 SCC 26, at paras. 36-39.

lacuna has not been remedied in subsequent constitutional amendments. In practice, however, treaty-making authority in Canada is vested in the federal executive, partly through the acquiescence of the majority of the provinces and partly (perhaps more importantly) through the *de facto* recognition by other states that Canada's federal government is the proper treaty partner. Nevertheless, the province of Quebec has long maintained that the treaty-making power is in fact distributed between the federal and provincial governments according to their legislative jurisdictions under the Constitution Act 1867.¹⁰

B. Treaties lack direct effect without legislation

The constitutional prohibition on executive law-making means that treaties concluded by Canada cannot in themselves be regarded as sources of domestic law. In most cases this rule presents no difficulty, for even today most treaties concluded by Canada (and other states) do not address themselves to the domestic laws of the parties. For those treaties that operate purely on the international plane, without requiring any domestic legal effect from the parties, the Canadian implementation requirement is a non-issue. But treaty practice underwent a remarkable change in the twentieth century. The frequency with which states committed themselves, at international law, to observing treaty-based standards in their own internal legal systems increased dramatically. The state practice of concluding such inward-looking treaties, which address not only the international legal order but also the domestic legal systems of the parties, shows no signs of abating in the present century. In Canada, treaties of this nature must be implemented by legislative action in order to take direct effect in Canadian law.

There is no set rule governing what kind of legislative action constitutes treaty implementation. Canadian legislative practice reveals a variety—some would say a bewildering variety—of ways in which legislatures choose to give direct effect to the state's treaty obligations in domestic law. The most obvious way, of course, is for the legislature to declare that the treaty has the force of law and perhaps, for convenience, to include the treaty's text as a schedule to

¹⁰ See G. van Ert, "The Legal Character of Provincial Agreements with Foreign Governments," 42 *Les Cahiers de Droit* 1093 (2001).

the enactment. There are many examples of this type of legislation.¹¹ Another way to implement a treaty in Canada is to amend domestic law to bring it into conformity with the treaty's requirements, without expressly mentioning the treaty in the amending legislation. The international effect of this approach is to achieve Canadian compliance with the treaty. The treaty is therefore implemented in domestic law, even if it is not expressly mentioned in the enactment. This is a very common legislative method of implementing treaties in Canada.¹² Another way of ensuring domestic conformity with treaty obligations, in many cases, is simply to retain laws which predate the treaty but which, as it happens, suffice to discharge the state's responsibilities under the supervening treaty. Under this approach, which is frequently relied on in Canada in respect of human rights treaties, the pre-existing legislation effectively becomes implementing legislation, even though it began life with no connection to the treaty.¹³ Treaties can also be implemented in Canada by means of delegated legislation (such as regulations), provided that the parent legislation confers on the delegate the power to make whatever changes are necessary to meet the treaty's requirements.¹⁴

In short, Canadian legislatures (led by their executives) take a functional, not a formal, approach to treaty implementation. If a given legislative action (or inaction) suffices to achieve Canada's compliance with the treaty's requirements, that action will be taken (or not taken),

¹¹ See, e.g., United Nations Foreign Arbitral Awards Convention Act RSC 1985 c. 16 (2nd Supp.) (approving the New York Convention, declaring it to have the force of law in Canada, and scheduling it); Family Relations Act, RSBC 1996 c. 128 s. 55 (granting the Hague Convention on the Civil Aspects of International Child Abduction force of law and requiring its publication in the BC Gazette); Trusts Convention Implementation Act, S.S. 1994 c. T-23.1 (providing that the Convention on the Law Applicable to Trusts and on Their Recognition applies in Saskatchewan and scheduling it); Intercountry Adoption (Hague Convention) Act RSPEI 1988 c. I-4.1 (giving force to the Convention On Protection Of Children And Co-Operation In Respect Of Intercountry Adoption in Prince Edward Island and scheduling it).

¹² See, e.g., references to the "best interests of the child" principle of art. 3(1) of the Convention on the Rights of the Child 1989 [1992] CanTS no. 3 in the following statutes (cited by McLachlin CJ in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* 2004 SCC 4): Immigration and Refugee Protection Act SC 2001 c. 27 ss 25, 28, 60, 67, 68 and 69; Youth Criminal Justice Act SC 2002 c 1 ss 25(8), 27(1), 30(3) and 30(4); Divorce Act RSC 1985 c 3 (2nd supp) ss 16(8), 16(10), 17(5) and 17(9); Family Relations Act RSBC 1996 c 128 s 24(1); Child and Family Services Act RSO 1990 c C.11 s. 1(a); Children's Law Reform Act RSO 1990 c C.12 s 19(a). See also Criminal Code RSC 1985 c. 10 (3rd Supp.) s. 2, enacting s. 269.1 (torture offences) in implementation of Canadian obligations under the Convention Against Torture 1984 [1987] CanTS no 36.

¹³ See E. Eid and H. Hamboyan, "Implementation by Canada of Its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical" in O. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* 449, 450 (Toronto: Irwin Law, 2006).

¹⁴ See, e.g., *Pan American World Airways v. The Queen* [1981] 2 SCR 565, *Schavernoich v. Foreign Claims Commission* [1982] 1 SCR 1092 and *Benin v. Whimster* [1976] 1 QB 297 (Eng. CA).

without any legal requirement of annexing the treaty as a schedule to an enactment, or referring to it by name, or doing anything else that makes explicit the legislature's intent to give the treaty domestic effect. In theory, this approach is entirely satisfactory. On the international plane, it secures Canadian compliance with the treaty. On the domestic plane, in the absence of any constitutional or other legal requirement that legislatures follow a set pattern or procedure for implementing treaties, this somewhat haphazard approach to treaty implementation is legally unobjectionable. In practice, however, the functional approach to treaty implementation in Canada risks confusion about the status of a given treaty in domestic law. In recent years, Canadian courts have declared certain treaties to be unimplemented simply, it seems, because these treaties were not mentioned expressly in any statute.¹⁵ One might say, with some truth, that these judgments reflect a lack of sophistication by courts and counsel. The realities of Canadian treaty implementation are now well documented in the literature.¹⁶ Furthermore, for a court to conclude that an inward-looking treaty (i.e., one that requires its parties to adhere to stated international norms in its domestic law) is unimplemented is tantamount to finding the state in breach of the treaty, a conclusion Canadian courts presumptively avoid. It must be acknowledged, however, that the absence of formal rules on how treaties are implemented can create uncertainty about whether treaties have been implemented at all.¹⁷

As noted above, the implementation requirement is an inheritance from British law. Britain is a unitary state, or at least it was in 1867. Transposing the implementation requirement into Canada's federal context has generated controversy. Section 132 of the Constitution Act

¹⁵ See, e.g., *Ahani v. Canada (Minister of Citizenship and Immigration)* (2002) 58 OR (3d) 107 (Ont. CA).

¹⁶ See J. Keyes and R. Sullivan, "A Legislative Perspective on the Interaction of International and Domestic Law," in O. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* 277 (Toronto: Irwin Law, 2006); E. Eid and H. Hamboyan, "Implementation by Canada of Its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical," in O. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* 449 (Toronto: Irwin Law, 2006); G. van Ert, "What is treaty implementation?" in *Legitimacy and Accountability in International Law: Proceedings of the Canadian Council of International Law 2004* 165-74 (Ottawa: Canadian Council on International Law, 2005); G. van Ert, *Using International Law in Canadian Courts*, at 175-89 (The Hague: Kluwer Law International, 2002). See also *Pfizer Inc. v. Canada* [1999] 4 FC 441 (FCTD) per Lemieux J. at paras. 29-31 (affirmed (1999) 250 NR 66 (Fed. CA)), in which the learned judge describes the variety of ways in which the WTO and TRIPS Agreements were implemented in Canadian law.

¹⁷ This uncertainty is exacerbated by the federal government's inexplicable refusal, in spite of years of campaigning by members of Parliament and academics, to adopt the practice (now well established in other Commonwealth jurisdictions) of accompanying Canadian treaty action with an explanatory memorandum setting out what legislative changes, if any, are necessitated by new treaty obligations.

1867 expressly provides that the federal Parliament has “all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.” Otherwise, the written constitution is silent on treaty implementation. Since empire treaties are a thing of the past, section 132 no longer has any practical effect. The modern rule, decided by the Privy Council in the *Labour Conventions* case,¹⁸ is that treaty implementation is subject to the ordinary division of legislative powers under sections 91 and 92 of the Constitution Act 1867. Thus, if the subject matter of a treaty falls within federal legislative jurisdiction, Parliament may implement it alone. If, however, the treaty falls partly or entirely within provincial legislative jurisdiction, it must be implemented by each provincial legislature. The effect of this rule has sometimes been to frustrate Canadian participation in treaties due to provincial objections.¹⁹

C. Indirect effects of treaties

Some observers contend that the Canadian implementation requirement prevents unimplemented treaties from having any effect at all in Canadian law. However, decided cases make clear that treaties do influence Canadian law indirectly, even in cases where they are not implemented, or at least are not implemented by the statutory provisions at issue in a given dispute. Canadian courts generally take judicial notice of the state’s treaty obligations.²⁰ Having done so, they usually seek to harmonize domestic law with the state’s international obligations by means of an interpretive presumption of conformity between domestic and international law. This presumption is discussed at length below. The undeniable effect of the presumption of conformity is to grant

¹⁸ See *supra* note 7.

¹⁹ One of the most notorious examples is the International Convention on the Settlement of Investment Disputes, 575 UNTS 159. Canadian participation in this treaty has been delayed for over forty years due to resistance from certain Canadian provinces. All provinces are now supporting the treaty and Canada signed it on 15 December 2006. Ratification is expected shortly, following the passage of implementing legislation in all Canadian jurisdictions.

²⁰ The scope of this doctrine remains uncertain. See G. van Ert, “The Admissibility of International Legal Evidence,” 84 CBR 31 (2005); and F. Bachand, “The ‘Proof’ Of Foreign Normative Facts Which Influence Domestic Rules,” 43 Osgoode Hall LJ 269 (2005).

some measure of legal significance to the purely executive act of concluding a treaty with another state.

No Canadian judgment has ever attempted (explicitly at least) to reconcile the tension between the indirect effect given to treaties by the presumption of conformity and the constitutional fundamentals informing the implementation requirement. It seems that at least two factors prevent the presumption of conformity from being regarded as wholly inconsistent with the implementation requirement. First, there is only so much an interpretive presumption can do. If the treaty requires Canada to achieve certain results in its domestic law, construing a given legislative provision to conform with that treaty may avoid a breach in that single instance but will not, in most cases, wholly relieve the government of the need to seek implementation of the treaty by legislation. Second, the presumption of conformity is rebuttable. If the provision under consideration is simply not amenable to a conforming interpretation, the court may find the presumption rebutted and leave it to the legislature to rectify any resulting treaty breach. Likewise, if the court finds that to apply the presumption in a given case comes too close to granting the treaty direct legal effect without implementation, it may seemingly refuse to do so.²¹

While the presumption of conformity is well-established in Canadian law, another type of indirect means by which treaties might take effect in domestic law has so far gained no traction. Courts in other Commonwealth jurisdictions have occasionally held that the state's ratification of a treaty may give rise to a legitimate expectation that the government will conform to it, particularly in the exercise of discretionary powers.²² The majority of the Supreme Court of Canada rejected this approach in *Baker v. Canada*,²³ finding on the facts that the treaty at issue (the Convention on the Rights of the Child 1989²⁴) did not give rise to a legitimate expectation of specific

²¹ This is one possible interpretation of the position taken by Iacobucci and Cory JJ, dissenting, in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, discussed below. There is, however, no Canadian case in which the court expressly found the presumption rebutted for this reason.

²² See, e.g., *Minister for Immigration and Ethnic Affairs v. Teoh* (1994-5) 183 CLR 273 (High Court of Australia); *Tavita v. Minister of Immigration* [1994] 2 NZLR 257 (NZ CA); *R. v. Secretary of State for the Home Department, Ex parte Ahmed* [1999] Imm LR 22 (Eng. CA); *Thomas v. Baptiste* [1999] 3 WLR 249 (PC). But see also *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] QB 811 (Eng CA), *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 195 CLR 502 (HCA).

²³ [1999] 2 SCR 817, at para. 29.

²⁴ [1992] CanTS no. 3.

procedural rights. The decision purported to leave open the question whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation, but commentators tend to regard *Baker* as implicitly rejecting the doctrine. Even if a Canadian court were one day to recognize a treaty as the basis of a legitimate expectation to certain rights, those rights would likely be procedural only, not substantive. This is because in Canada, unlike other jurisdictions, the doctrine of legitimate expectations can give rise only to procedural rights.²⁵ Regardless, the absence of an internationally-informed doctrine of legitimate expectations in Canadian law is little barrier to the reception of international legal norms in domestic law. While the legitimate expectations doctrine differs in theory from the presumption of conformity, in practice the two approaches achieve similar results.

II Treaty interpretation in Canadian courts

The international law of treaty interpretation is codified in articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (VCLT).²⁶ These articles are well known, but it is helpful to restate them before considering the extent to which they are given effect by Canadian courts.

Article 31(1) states the “General rule of interpretation” that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31(2) elaborates on this rule by providing that the context of a treaty comprises, in addition to its text, any related agreement or instrument accepted by the parties as related to the treaty. Article 31(3) requires to be “taken into account, together with the context” subsequent agreements between the parties, subsequent practice establishing the parties’ agreement regarding its interpretation, and any relevant rules of international law applicable in the relations between the parties. Article 31(4) allows for special meanings to be given to treaty terms where the parties so intend.

²⁵ *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)* [2001] 2 S.C.R. 281, at paras. 22-38.

²⁶ While the VCLT has not been universally ratified, it tends to be treated as largely a codification of customary international law. See A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000).

Article 32 states that the interpreter of a treaty may have recourse to “supplementary means of interpretation”, including the preparatory work of the treaty (the *travaux préparatoires*) and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of art. 31, or to determine the meaning where the interpretation according to art. 31 is ambiguous or obscure, or leads to a manifestly absurd or unreasonable result.

Article 33 governs the interpretation of treaties authenticated in more than one language, establishing that each language text is equally authoritative and that conflicts between texts which cannot be resolved by applying arts. 31 and 32 are to be resolved in favour of the meaning which best reconciles the texts, having regard to the object and purpose of the treaty.

A. *The VCLT in Canada*

Canada is a party to the VCLT.²⁷ As discussed below, the interpretive rules set out in articles 31 and 32 of that convention have been recognized and applied by the Supreme Court of Canada and other Canadian courts. By contrast, VCLT art. 33 (on the interpretation of treaties authenticated in two or more languages) has received very little attention from Canadian courts.²⁸ This is surprising given Canada’s bilingual and bijuridical legal culture, in which the problem of applying equally authentic English and French texts of domestic statutes and regulations arises with some frequency.²⁹

The leading case on the application of VCLT treaty interpretation rules by Canadian courts is *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*.³⁰ In that case, the Supreme Court of Canada sought to interpret the term “refugee” in light of art. 1F(c) of the 1951 United Nations Convention Relating to the Status of Refugees,³¹ as implemented in Canadian law

²⁷ [1980] CanTS no. 37.

²⁸ *But see R. v. Vincent* (1993) 12 OR (3d) 427 (Ont. CA) (noting, in the course of interpreting art. III of the 1794 Jay Treaty, that VCLT art. 33(2) requires that only authentic versions of treaties be used when interpreting them, unless the parties agree otherwise).

²⁹ One commentator has noted the similarity between VCLT art. 33 and Canadian practice in resolving disparities between equally authentic legal texts. See J.P. McEvoy, “The Charter as a Bilingual Instrument,” 64 Can. Bar Rev. 155, 169-70 (1986).

³⁰ [1998] 1 SCR 982 (*Pushpanathan*).

³¹ [1969] CanTS no. 6.

by the Immigration Act.³² The appellant was a permanent resident of Canada who had been convicted of conspiring to traffic in narcotics. He sought refugee status while on parole. The federal government subsequently issued a conditional deportation order against him, the condition being that he could not be deported if he was found to be a Convention refugee. The claim was heard by the Convention Refugee Determination Division of the Immigration and Refugee Board, which decided that the appellant was excluded from refugee status by Convention art. 1F(c): "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that...[h]e has been guilty of acts contrary to the purposes and principles of the United Nations." This finding was upheld on judicial review in the Federal Court, Trial Division and the Federal Court of Appeal.

In the latter court, Strayer JA began by considering the rules of interpretation applicable to determining the scope of article 1F(c) as implemented in Canadian law. His comments merit lengthy quotation:

...while Canadian courts must respect domestic law where it is clearly inconsistent with a treaty to which this country is a party, where there is no clear conflict a court should try to give domestic law a meaning which is consistent with Canada's international obligations. This may lead the court into using interpretative aids as to the meaning of the treaty being implemented even where such aids might not be available for the simple interpretation of a domestic statute. Where a statute incorporates a treaty, it is treaty interpretation rules which should apply.

...It is also appropriate if necessary, in interpreting [art. 1F(c)] to look at other provisions of the Convention which, though not incorporated in the *Immigration Act*, may assist in the interpretation of section F of Article 1.

It is also accepted that in interpreting a treaty-implementing statute one may have regard to the treaty and the means for its interpretation even if the implementing

³² RSC 1985 c. I-2 (since repealed). For the current statute, see Immigration and Refugee Protection Act SC 2001 c. 27.

statute is not on its face ambiguous. But none of the rules of interpretation of statutes or treaties authorize a court to ignore completely the express terms of the language finally adopted in the treaty or the statute, in favour of vague expressions of intention derived from extrinsic sources which fail to demonstrate ambiguity in the text of the treaty or adopting statute. This has particular relevance to the lengthy invocation, by counsel on both sides of this case, of the *travaux préparatoires* of the Convention. Counsel for the appellant himself recognized that *travaux préparatoires* are normally far from determinative and he suggested this should be even more so [in] the situation where the interpretation of a human rights treaty is involved. In the present case I have read the *travaux préparatoires* referred to and I find them completely unhelpful. It is difficult to understand fully the committee discussions of the earlier drafts of section F of Article 1 because in the excerpts provided it is not clear what was the exact text under discussion. Further, much of the discussion appears to relate to the contents of what became Article 1F(b) without specific reference to Article 1F(c). Also it is hazardous to assume that the meaning attributed to a text by one or two delegations in a multilateral international negotiation necessarily reflects the collective intention, if indeed there was a common intention. I believe it would be wrong to conclude that paragraph (c) was thought to be of little consequence: it embraces some of the specific language of section 2 of Article 14 of the *Universal Declaration of Human Rights* [GA Res. 217 A (III), UN GAOR, December 10, 1948], which delegates were attempting to implement.

In such circumstances it is far safer to place the most emphasis on the final text as approved. That is conspicuously true in this case.

It must also be kept in mind, when one seeks to infer the meaning of one provision of a treaty by reference to other provisions in that same treaty, that the drafting of multilateral conventions by the United Nations often lacks the discipline and cohesion imposed on the drafters of domestic Canadian laws. Thus, for example, it is not surprising to find in such conventions overlapping provisions without internal guidance as

to which, if either, is to have paramountcy. It must be assumed, however, that every provision was intended to have some distinct purpose and meaning unless it is impossible to ascribe one.³³

Applying this approach to the interpretation of article 1F(c), Strayer JA for the court held that the appellant was not a Convention refugee.

The Supreme Court of Canada allowed the appeal, finding that conspiring to traffic in a narcotic is not a violation of article 1F(c). Bastarache J for the majority held that, in the absence of clear indications that the international community recognizes drug trafficking as a sufficiently serious and sustained violation of fundamental human rights as to amount to persecution, individuals should not be deprived of the essential protections contained in the Convention for having committed those acts.³⁴ On the interpretation of the Convention, Bastarache J began by observing: “Since the purpose of the [Immigration] Act incorporating Article 1F(c) is to implement the underlying Convention, the Court must adopt an interpretation consistent with Canada’s obligations under the Convention. The wording of the Convention and the rules of treaty interpretation will therefore be applied to determine the meaning of Article 1F(c) in domestic law...”³⁵ Bastarache J then quoted VCLT arts. 31 and 32 in full, noting that they had been applied by the court in two recent cases.³⁶ He added that the court had made use of such interpretive devices as the drafting history and preparatory work of the Refugee Convention, the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, and previous judicial comments on the object and purpose of the treaty.³⁷ Bastarache J then reviewed and rejected Strayer JA’s interpretive approach to the Convention, finding that he “erred in dismissing the objects and purposes of the treaty, and in according virtually no weight to the indications provided in the *travaux préparatoires*,” adding that the “extremely general words in Article 1F(c) are not so

³³ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1996] 2 FC 49 (Fed. CA) at paras. 10-14.

³⁴ *Pushpanathan*, above note 30, at para. 75.

³⁵ *Pushpanathan*, *supra* note 30, at para. 51.

³⁶ *Thomson v. Thomson* [1994] 3 SCR 551, and *Canada (Attorney General) v. Ward* [1993] 2 SCR 689.

³⁷ *Pushpanathan*, *supra* note 30, at para. 53.

unambiguous as to foreclose examination of other indications of the proper scope of the provision.”³⁸

Bastarache J described the “starting point of the interpretive exercise” as “to define the purpose of the Convention as a whole and, second, the purpose and place of Article 1F(c) within that scheme.”³⁹ Relying on previous jurisprudence, Bastarache J found that the background against which interpretation of the Convention’s individual provisions must take place is its “human rights character.”⁴⁰ The learned judge then turned to the definition of “refugee” in art. 1, relying at length on the debates surrounding that article during the treaty’s negotiation in the Social Committee of the UN Economic and Social Council. From these *travaux*, Bastarache J concluded that art. 1F(c) was intended by the delegates who negotiated it to identify “non-war-related crimes against humanity...even if the acts falling into this category could not be clearly enumerated at that time.”⁴¹ Bastarache J therefore held that the purpose of art. 1F(c) was to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting.⁴²

Having established the purpose of art. 1F(c), Bastarache J turned to the meaning of the phrase “contrary to the purposes and principles of the United Nations.” He described the “guiding principle” as “where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes of and principles of the United Nations, then Article 1F(c) will be applicable”.⁴³ Bastarache J looked to UN resolutions and ICJ jurisprudence for the purposes and principles of the UN,⁴⁴ finding there to be “no indication in international law that drug trafficking on any scale is to be considered contrary to the purposes

³⁸ *Id.*, at para. 55.

³⁹ *Id.*, at para. 56.

⁴⁰ *Id.*, at para. 57.

⁴¹ *Id.*, at paras. 58-60.

⁴² *Id.*, at para. 64.

⁴³ *Id.*, at para. 65.

⁴⁴ *Id.*, at paras. 66-8.

and principles of the United Nations,” in spite of evidence of UN activity to stop such trafficking.⁴⁵ Likewise, Bastarache J found no indication that drug trafficking “comes close to the core, or even forms a part of the corpus of fundamental human rights.”⁴⁶ Finally, Bastarache J relied on the possible overlap between arts. 1F(b) and (c) with regard to drug trafficking as a basis for excluding that activity from the latter.⁴⁷

The *Pushpanathan* case establishes the centrality of the VCLT to the interpretation of treaties by Canadian courts and tribunals. One may question, however, whether the interpretive model *Pushpanathan* provides truly conforms to the VCLT’s requirements. Bastarache J’s judgment is arguably too quick to turn to the *travaux* which, it must be remembered, are described in art. 32 as “supplementary means of interpretation” to be resorted to in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 31 is ambiguous or absurd. One can sympathize with Strayer JA’s hesitation to rely on the *travaux* in the court below, although even his judgment appears to put the cart before the horse by ruling out reference to the *travaux* based not on the clarity of the treaty’s terms, as interpreted according to art. 31, but on the lack of clarity in the *travaux* themselves.

Another leading Canadian case on treaty interpretation arguably conforms more closely to the VCLT method of starting with the treaty’s ordinary meaning, then confirming that meaning, as necessary, through extrinsic materials. In *Crown Forest Industries Ltd. v. Canada*,⁴⁸ the respondent company withheld 10% tax on certain rental payments to another company, N, pursuant to art. XII of the 1980 Canada-United States Income Tax Convention,⁴⁹ claiming that N was a “resident of a Contracting State” (the US) within the meaning of art. IV of the treaty. The appellant argued that N was not a US resident, in spite of the fact that N’s sole office and place of

⁴⁵ *Id.*, at para. 69.

⁴⁶ *Id.*, at para. 72.

⁴⁷ *Id.*, at para. 73.

⁴⁸ [1995] 2 SCR 802 (*Crown Forest*).

⁴⁹ [1984] CanTS no. 15.

business was located in the US, because it was a Bahamas corporation. The amount of withholding tax under the treaty was therefore 25% not 10%.

Iacobucci J for the Supreme Court of Canada allowed the appeal, finding that N was not a US resident and therefore the 25% withholding tax applied. He stated: “In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intentions of the parties. Both upon the plain language reading of Article IV and through an interpretation of the goals and purposes of the [treaty], I reach the same destination: to allow the appeal.”⁵⁰ Immediately following this passage is a lengthy consideration of the “plain language” of the treaty, in which the court affirms that a trial judge’s interpretation of a treaty is a question of law, not a finding of fact, and therefore subject to appellate review.⁵¹ Having established the plain language meaning of art. IV of the treaty, Iacobucci J went on to find his conclusion confirmed by “the intention of the drafters of the Convention” and the “goals of international taxation treaties.”⁵² The learned judge quoted approvingly a well-known Canadian statement on the interpretation of tax treaties by Addy J in *J.N. Gladden Estate v. The Queen*: “Contrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated in so far as the particular item under consideration is concerned.”⁵³

Next, Iacobucci J considered the object and purpose of the treaty, noting in passing that “a court may refer to extrinsic materials which form part of the legal context...without the need first to find an ambiguity before turning to such materials.”⁵⁴ Among the extrinsic materials considered by Iacobucci J was the OECD *Model Double Taxation Convention on Income and on Capital*, which “served as the basis for the [Canada-US treaty] and also has world-wide recognition as a basic document of reference in the negotiation, application and interpretation of

⁵⁰ *Crown Forest*, *supra* note 48, at para. 22.

⁵¹ *Id.*, at paras. 23-41, especially para. 38 (stating that treaty interpretation is a finding of law).

⁵² *Id.*, at para. 42.

⁵³ [1985] 1 CTC 163 (FCTD) at 166-7.

⁵⁴ *Id.*, at paras. 43-67. On extrinsic materials, *see especially* para. 44.

multilateral or bilateral tax conventions.”⁵⁵ To ascertain the object and purpose of the treaty, Iacobucci J also considered a report of the US Senate Foreign Relations Committee on the proposed Canada-US treaty.⁵⁶ Iacobucci J cited VCLT articles 31 and 32 as authority for referring to extrinsic materials, but without specifying which article or sub-article he relied on in specific cases.⁵⁷ Having reviewed these materials, Iacobucci J concluded that N was not a “US resident” as that term is used in the Convention.

While *Crown Forest* makes fewer express references than *Pushpanathan* to the VCLT’s interpretation provisions, the methodology actually applied by the court in the former case seems to follow more closely the VCLT scheme, starting with the treaty’s express terms, viewed in their context and in the light of the treaty’s object and purpose, then resorting to supplementary means of interpretation to confirm the textual meaning or to resolve textual ambiguity.

A number of other Canadian decisions might be cited illustrating judicial resort to the VCLT to interpret Canadian treaty obligations. Many of these cases arise from the interpretation of statutes implementing international tax treaties.⁵⁸ Extradition,⁵⁹ human rights⁶⁰ and investment treaties⁶¹ are other areas in which the V2CLT has been cited. In many of these cases, references to the VCLT rules are brief and consist largely of affirming the need to interpret the treaty’s provisions in their entire context or in light of the treaty’s object and purpose. More specific applications of the VCLT rules are found in some cases, however. In *Coblentz v. Canada*,⁶² the Federal Court of Appeal considered the interpretive weight to be given to a technical explanation accompanying art. XVIII of the 1980 Canada-US Income Tax Convention. The explanation was prepared by the US Treasury Department four years after the convention was signed; and was

⁵⁵ *Id.*, at para. 55.

⁵⁶ *Id.*, at para. 46.

⁵⁷ *Id.*, at para. 54.

⁵⁸ See, e.g., *MIL (Investments) S.A. v. Canada* 2006 TCC 460 (TCC); *Beame v. Canada* 2004 FCA 51 (Fed. CA); *Edwards v. The Queen* [2002] 4 CTC 2202 (TCC) (in which the court mistakenly states that Canada is not a party to the VCLT but applies it anyway, following *Crown Forest*); *CUDD Pressure Control Inc. v. Canada* [1999] 1 CTC 1 (Fed. CA).

⁵⁹ See, e.g., *R. v. Parisien* [1988] 1 SCR 950.

⁶⁰ See, e.g., *Bouzari v. Iran* [2002] OJ no. 1624 (Ont. SCJ), *affirmed* (2004) 71 O.R. (3d) 675 (Ont. CA); *Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003) 228 DLR (4th) 63 (Que. CA).

⁶¹ See, e.g., *Canada (Attorney General) v. S.D. Myers, Inc.* 2004 FC 38 (FCTD).

⁶² [1997] 1 FC 368 (Fed. CA).

endorsed by the Canadian Department of Finance. The court was satisfied that the explanation did not fall within VCLT art. 32, but debated whether it fell within art. 31(2) or 31(3). In *Bouzari v. Iran*, the judge admitted expert evidence on state practice in the interpretation of art. 14 of the 1984 Convention Against Torture⁶³ in order to determine whether states parties to that treaty recognized it as creating an enforceable obligation on them to provide a civil right of redress for torture - whether committed at home or abroad.⁶⁴

In sum, Canadian courts take judicial notice of the VCLT and purport to give effect to its interpretive rules in construing treaties. The authority for doing so is well established and uncontroversial. In particular, the practice of resorting to *travaux préparatoires* is accepted—possibly more so than the VCLT itself envisions. Especially outside the specialized area of international taxation, Canadian judicial resort to the VCLT might be criticized as somewhat superficial. This seems likely to change, however, as Canadian courts become increasingly accustomed to hearing submissions based on the state's treaty obligations.

B. VCLT and domestic interpretive rules

The *Pushpanathan* case does not expressly state that the VCLT treaty interpretation rules take precedence over domestic interpretive practices, but one can readily infer that conclusion from the strong reliance on VCLT arts. 31 and 32 in that decision. Furthermore, at least two leading Canadian decisions expressly prefer the international law of treaty interpretation over domestic interpretive rules. The first is *Gladden v. The Queen*,⁶⁵ from which Iacobucci J quoted approvingly in *Crown Forest*, reproduced above. That case approved a previous decision, *Cruikshank v. The Queen*,⁶⁶ in which the court noted the usual domestic rule of strict construction of taxing statutes, but held that the rule did not apply where a tax treaty was involved.

⁶³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 [1987] CanTS no. 36.

⁶⁴ *Bouzari* (Ont. SCJ), supra note 60, at paras. 44-56. See also (2004) 71 O.R. (3d) 675 (Ont. CA), at paras. 72-79 (the appeal in the same case).

⁶⁵ [1985] 1 CTC 163 (FCTD).

⁶⁶ [1978] 1 F.C. 256 (FCTD).

The second case preferring international over domestic law in treaty interpretation is *Re Regina and Palacios*,⁶⁷ a decision of the Court of Appeal for Ontario in which Blair JA for the court adopted the following statement from O'Connell's *International Law*:

The rules of municipal law for interpretation are not to be utilised unless they can be regarded as “general principles of law recognised by civilised nations.” Hence, the restrictive rule of common law relating to literal interpretation has no place in international law. The dictionary meaning of words, and the rules of syntax, may be departed from to produce an “effective” result, but only when this is necessary.⁶⁸

After reviewing the international law of treaty interpretation as set out by O'Connell, Blair JA concluded that the “rules of treaty interpretation make it clear that the court is not bound by the common law canon of literal construction of statutes upon which it appears [the trial judge] may have relied”. Thus liberated from common law interpretive principles, Blair JA went on to give a more liberal meaning to art. 39(2) of the 1961 Vienna Convention on Diplomatic Relations⁶⁹ than the usual Canadian common law interpretive rules might otherwise have permitted.

There is therefore authority in Canada for the claim that international treaty interpretation rules supplant domestic interpretive rules where the two approaches differ. Notably, however, the Supreme Court of Canada observed in *Thomson v. Thomson* that, “By and large, international treaties are interpreted in a manner similar to statutes. This is evident from a perusal of Article 31 of the [VCLT]”.⁷⁰ It is certainly true that the contextual and purposive approach adopted in VCLT art. 31 resembles accepted Canadian interpretive practice.⁷¹ The court in *Thomson* noted one “significant difference” between international and domestic interpretive practices, namely “the use that may be made of legislative history and other preparatory material” in international practice.⁷²

⁶⁷ (1984) 45 OR (2d) 269 (Ont. CA).

⁶⁸ D.P. O'Connell, *International Law*, 2nd ed. (1970) vol. 1, at 257.

⁶⁹ [1966] CanTS no. 29.

⁷⁰ *Thomson v. Thomson* [1994] 3 SCR 551 at 577.

⁷¹ Compare, e.g., Interpretation Act RSC 1985 c. I-21 s. 12: “12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”

⁷² *Thomson*, *supra* note 70, at 577.

Yet even that does not seem to be an important difference, given the increasing reliance by Canadian courts on records of legislative proceedings and other extrinsic material in the interpretation of domestic statutes and regulations.

C. Interpretation of treaties in the light of international and foreign judicial decisions

Canadian courts have, on occasion, considered the state's treaty obligations in light of pronouncements by international and/or foreign judicial or quasi-judicial bodies. Certainly there is no rule against doing so, and the potential relevance of such decisions is obvious. Furthermore, Canadian judges and lawyers are very familiar with comparative legal materials, given the long history of reliance on English and, to a lesser extent, Commonwealth and US authority in common law matters. At the risk of generalizing, it seems that Canadian judges and lawyers do not—consciously at least—take a parochial view of legal problems. The controversy that has developed in the United States in recent years concerning the propriety of American courts having regard to the judgments of international and foreign courts, has no parallel—and seemingly no resonance—in Canada. Having said this, there is little authority on the extent to which Canadian courts may or must pay heed to the decisions of international or foreign tribunals in the interpretation of Canadian treaty obligations. While Canadian courts have occasionally cited foreign and international interpretations of treaties to which Canada is a party, they have offered little guidance on when or how to use such sources.

Perhaps the most remarkable example of a Canadian court relying on the decisions of international tribunals is *Mugesera v. Canada (Minister of Citizenship and Immigration)*.⁷³ In that case, the Supreme Court of Canada overruled in part its own prior decision in *R v. Finta*⁷⁴ in order to conform with later decisions by the International Criminal Tribunals for Rwanda and the Former Yugoslavia involving the international law of incitement to genocide and crimes against humanity. In the words of the court:

⁷³ [2005] 2 SCR 91 (*Mugesera*).

⁷⁴ [1994] 1 SCR 701.

In the face of certain unspeakable tragedies, the community of nations must provide a unified response. Crimes against humanity fall within this category. The interpretation and application of Canadian provisions regarding crimes against humanity must therefore accord with international law. Our nation's deeply held commitment to individual human dignity, freedom and fundamental rights requires nothing less.⁷⁵

But *Mugesera* concerned customary international law, not treaty. It is therefore not strictly on point, although it certainly suggests that the Supreme Court of Canada is interested in the judicial decisions of international courts concerning Canada's international legal obligations.

The Supreme Court has also paid heed, at times, to the views of quasi-judicial international bodies. In the *Canadian Foundation* case,⁷⁶ both the majority and the dissent relied on the reports of UN treaty-monitoring bodies established under the 1966 International Covenant on Civil and Political Rights⁷⁷ and the 1989 Convention on the Rights of the Child.⁷⁸ Other recent Supreme Court judgments have likewise referred to the reports and comments of UN treaty bodies.⁷⁹ Similarly, in the recent *Health Services* case,⁸⁰ the court referred to the work of the International Labour Organization's Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry, noting the court's reliance on the "jurisprudence" of the first two bodies in a previous decision, *Dunmore v. Ontario (Attorney General)*.⁸¹ In this respect, the court appears to have been following the trail blazed twenty years earlier by Dickson CJ (dissenting) in *Re Public Service Employee Relations Act (Alta.)*,⁸² where the chief justice relied on ILO committee interpretations of the ILO Convention (No. 87) on the Freedom of Association and

⁷⁵ *Mugesera*, *supra* note 73, at para. 178.

⁷⁶ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76.

⁷⁷ [1976] CanTS no. 47.

⁷⁸ [1992] CanTS no. 3.

⁷⁹ See *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia* 2007 SCC 27, at para. 74 (citing the Human Rights Committee's concluding observations on Canada (1999) in respect of ICCPR art. 22); *Sauvé v. Canada (Chief Electoral Officer)* [2003] 3 SCR 519, at para. 133 (Gonthier J, dissenting, relies on certain General Comments of the Human Rights Committee concerning prisoner voting rights); *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, at paras. 66-7 (considering General Comment 20 of the Human Rights Committee).

⁸⁰ *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia* 2007 SCC 27, at paras. 69-79.

⁸¹ [2001] 3 SCR 1016.

⁸² [1987] 1 SCR 313, at paras. 66-71.

Protection of the Right to Organize.⁸³ It is notable, however, that these occasional references to the decisions of international bodies proceed from no legal requirement that such decisions be considered and have given rise to no such rule or practice. No Canadian decision sets out, in a general or authoritative way, the interpretive weight to be given to treaty interpretations advanced by such international tribunals as UN treaty bodies, WTO panels or even international courts.

In the case of multilateral treaties, the views of courts from foreign states parties ought to be of especial interest. Yet Canadian precedent for having regard to foreign interpretations of the state's treaty obligations is scarce. In *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*,⁸⁴ Addy J held that a maritime law principle enunciated by the United States Court of Appeals for the 5th Circuit should be applied in Canadian courts; he quoted with approval two English authorities⁸⁵ to the effect that courts applying rules elaborated by international agreement should strive for uniformity in interpretation. Similarly, in *Canadian Pacific Ltd. v. Canada*,⁸⁶ Walsh J observed:

While it is true that this Court has the right to interpret the Canada-U.S. Tax Convention and Protocol itself and is in no way bound by the interpretation given to it by the United States Treasury, the result would be unfortunate if it were interpreted differently in the two countries when this would lead to double taxation. Unless therefore it can be concluded that the interpretation given in the United States was manifestly erroneous it is not desirable to reach a different conclusion, and I find no compelling reason for doing so.

Walsh J referred here to the US Treasury rather than a US court, but the principle is the same.

Both these decisions are somewhat dated. More recently, decisions from Ontario and Quebec concerning international air carriage have had resort to foreign decisions interpreting the

⁸³ [1973] CanTS no. 14.

⁸⁴ [1981] FCJ no. 1033 (QL) (FCTD).

⁸⁵ *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd. et al.* [1932] AC 328; *Scruttons v. Midland* (1962) AC 446.

⁸⁶ [1976] 2 FC 563, at 596-7 (FCTD).

treaties that underlie Canadian legislation in this area.⁸⁷ Particularly notable is the *Connaught* case, in which Molloy J reviewed several Canadian and foreign authorities on the question of whether a subjective or objective test should be applied in determining whether damage to Connaught's cargo had been inflicted recklessly within the meaning of art. 25 of the International Convention for the Unification of Certain Rules relating to International Carriage by Air (the Warsaw Convention).⁸⁸ Upon concluding that no binding Canadian decision decided the point, she turned to foreign authorities. She observed that the treaty's

objective of having uniform regulations limiting the liability of carriers would be seriously weakened if the courts of every country interpreted the Convention without any regard to how it was being interpreted and applied elsewhere. This potential problem supports an approach favouring consistency of interpretation among nations, rather than one in which each country applies its own domestic principles.⁸⁹

Molloy J therefore reviewed a number of foreign decisions on point, together with the text of the convention, its drafting history and its protocols, from which she concluded that a subjective test must be applied.

There is much to be said for cooperation between the judicial and other authorities of states in the interpretation of international agreements. Yet despite the cases cited above, the practice of having regard for foreign interpretations of common treaty obligations is regrettably infrequent in Canada.

D. Deference to the executive in treaty matters

Canadian constitutional and administrative law contain a variety of doctrines setting out when, and to what extent, the courts will defer to the federal and provincial executives on questions of policy or even, on occasion, questions of law. There is, however, no doctrine in

⁸⁷ See: *Recchia v. K.L.M. lignes aériennes royale néerlandaises* [1999] R.J.Q. 2024 (Que SC); *Connaught Laboratories Ltd. v. British Airways* (2002) 61 OR (3d) 2004 (Ont. SCJ); *Plourde v. Service aérien FBO inc. (Skyservice)* 2007 QCCA 739 (Que CA).

⁸⁸ [1947] Can TS no. 15 (as amended by subsequent protocols).

⁸⁹ *Connaught*, above note 87, at para. 46.

Canadian law requiring courts to defer to the executive in questions of treaty interpretation. To the contrary, the interpretation of treaties is regarded as a legal question within the scope of the judicial function.⁹⁰

The courts will, however, defer to the executive on the question of whether a treaty exists at all or is in effect as against Canada. In *Ganis v. Canada (Minister of Justice)*,⁹¹ the appellant, appealing his extradition, argued that the existence of a valid extradition treaty between Canada and the Czech Republic had not been established. He sought to exploit a typo in certain agreements between the two countries which erroneously referred to a previous extradition treaty between the UK and Czechoslovakia. In making the extradition order, the minister of justice had relied on advice from the Canadian Ministry of Foreign Affairs that a treaty existed. Finch CJ for the Court of Appeal for British Columbia rejected the appellant's argument. He explained:

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. A treaty's existence, however, is not an ordinary question of law but a highly political matter as between the executive of two contracting states. The Supreme Court of Canada has recognized this distinction, holding that "whether a treaty is in force, as opposed to what its effect should be, [is] wholly within the province of the public authority."⁹²

Similarly, in *Château-Gai Wines Ltd. v. Attorney General of Canada*,⁹³ Jackett P considered whether a 1933 trade agreement between Canada and France had ever come into force. To prove that it had, the Attorney General relied on certificates from the secretary of state for external affairs. Jackett P found these certificates to be "conclusive that the agreement did come into force as a binding international agreement at that time" and explained that, where

⁹⁰ See, e.g., *Pushpanathan v. Canada* [1998] 1 SCR 982 (judicial review of immigration board's decision subject to a correctness standard, i.e. no deference to the executive's decision on the meaning of the treaty and its implementing legislation); *Crown Forest Industries Ltd. v. Canada* [1995] 2 SCR 802, at para. 38 (treaty interpretation a finding of law and therefore subject to appellate review).

⁹¹ 2006 BCCA 543 (*Ganis*).

⁹² *Id.* at para. 24 (quoting *Institut National des Appellations d'Origine des Vins et Eaux-de-Vie v. Chateau-Gai Wines Ltd.*, [1975] 1 S.C.R. 190, per Pigeon J. at 199).

⁹³ [1970] Ex CR 366.

doubt existed on the point, it should be resolved by resort to certificates from the executive in the same manner as courts determine other disputed questions of foreign affairs (such as whether a person is a foreign sovereign, whether persons must be regarded as constituting the effective government of a foreign territory, whether a particular place must be regarded as being in Canada or as being under the authority of a foreign sovereign authority, whether Canada is at peace or at war with a foreign power, or whether a person in Canada is entitled to diplomatic privileges).

E. Interpretive significance of treaties in Canadian law

As noted above, when construing domestic laws Canadian courts apply an interpretive presumption that those laws conform to the state's obligations under treaties and other sources of international law. This presumption of conformity with international law has long been present in Canadian law but appears to be growing stronger following a series of important Supreme Court of Canada decisions invoking the presumption to resolve interpretive problems in a variety of domestic laws including ordinary statutes,⁹⁴ the Criminal Code,⁹⁵ the Civil Code of Quebec⁹⁶ and even the constitutionally-entrenched Charter of Rights and Freedoms.⁹⁷ In the past, resort to international treaties and the presumption of conformity has tended to be the preserve of appellate courts and lawyers. But the Supreme Court of Canada's increasing reliance on the presumption to dispose of appeals seems likely eventually to filter down to the lower courts. If so, the importance of treaties for judicial decision-making in Canada will likewise increase, further eroding support for the proposition that treaties always require legislative implementation before taking effect in domestic law.

⁹⁴ See, e.g., *Ordon Estate v. Grail* [1998] 3 SCR 437 (presumption applied to determine the applicable limitation period).

⁹⁵ See, e.g., *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76 (presumption applied in construing the so-called "spanking defence" to child assault).

⁹⁶ See, e.g., *GreCon Dimter v. J.R. Normand Inc.* [2005] 2 SCR 401 (presumption applied to determine whether the Quebec court had jurisdiction in light of a choice of forum clause).

⁹⁷ See, e.g., *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia* 2007 SCC 27 (presumption invoked as one of four reasons for overturning previous decisions excluding collective bargaining as a right constitutionally protected by the freedom of association guarantee in Charter section 2(d)).

There is no clearer statement of the presumption of conformity with international law as understood and applied in Canada than the following passage from LeBel J's majority judgment in *R. v. Hape*:

It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation. See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at pp. 367-68.⁹⁸

This far-reaching description of the presumption of conformity makes at least three significant points.

First, the presumption is described as a rule of judicial policy—as opposed to an interpretive rule founded in the actual or presumed intent of the lawmaker whose law is in question. Thus, the presumption does not depend on finding that the legislature actually possessed any historical intent to conform to or not to conform to the international norm at issue.

⁹⁸ 2007 SCC 26, at para. 53.

The legislature need not be shown to have had international law in its contemplation at the time of the enactment for the presumption to apply. Rather, it applies because Canadian courts choose to interpret domestic laws in conformity with international law. This policy-based approach to the presumption explains its occasional application by Canadian courts to legislation that predates the treaty with which the law is presumed to conform.⁹⁹ The policy-based approach is consistent with earlier Canadian and English cases,¹⁰⁰ and also with the well-known Bangalore Principles.¹⁰¹

Second, the values and principles of international law (including treaties) are said to form part of the context in which statutes are enacted. The significance of this lies in its consistency with the general Canadian law of statutory interpretation. There is perhaps no more well-established Canadian legal doctrine than the so-called modern approach to statutory interpretation, according to which the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹⁰² In *Hape*, LeBel J indicates that international treaties and custom form part of the “entire context” in which legislation is to be interpreted.

Third, the presumption of conformity with international law is rebuttable. As previously noted, the constitutional doctrine of parliamentary sovereignty makes this conclusion inescapable. Nothing in the written constitution of Canada prevents Canadian legislatures from enacting laws contrary to the state’s obligations under treaties or rules of customary international law. While the Supreme Court of Canada has at times suggested that legislation may be judicially reviewed for inconsistency with certain unwritten constitutional principles,¹⁰³ the orthodoxy is that Canadian legislatures may do anything not expressly prohibited by the written constitution. While *Hape* and

⁹⁹ See, e.g., *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76 (presumption applied to interpret a Criminal Code provision in conformity with treaties that postdated it). See also *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia* 2007 SCC 27 at para. 78 (Canada’s current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the Charter, i.e. it may be interpreted in the light of treaties, etc., that postdate it).

¹⁰⁰ See *Zingre v. The Queen* [1981] 2 SCR 392 and *Corocraft v. Pan American Airways* [1968] 3 WLR 1273 (Eng. CA), both describing it as the court’s “duty” to interpret domestic law consistently with international law.

¹⁰¹ See “The Challenge of Bangalore: Making Human Rights a Practical Reality” in *Developing Human Rights Jurisprudence*, vol. 8 (London: INTERIGHTS & Commonwealth Secretariat, 2001) at 267–70.

¹⁰² *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 SCR 27, at para. 21.

¹⁰³ See, e.g., *Re Secession of Quebec* [1998] 2 SCR 217.

other cases affirm the sovereignty of Canadian legislatures to violate international law, they also insist on applying the presumption of conformity to avoid such interpretations where possible. The inevitable question is, “How far will the courts go in asserting the presumption?” In *Hape* the answer (in *obiter*, at least) is, “Very far.” LeBel J says the presumption applies “unless the wording of the statute clearly compels” an internationally-unlawful result, and that the legislature must demonstrate “an unequivocal legislative intent to default on an international obligation.” It is notable that few Canadian decisions have ever found the presumption of conformity with international law to be rebutted.¹⁰⁴

F. Ambit of the presumption

LeBel J’s description of the presumption of conformity in *Hape* suggests its broad application in a variety of instances. The presumption’s wide ambit in Canadian law is confirmed by decided cases. There are a number of ways in which the presumption might theoretically be constrained. In almost every case, these theoretical restraints have been rejected, either implicitly or explicitly, in favour of a far-reaching application of the doctrine.

The presumption seemingly applies with respect to all treaties to which the state is bound. While this point has never been expressly made in a Canadian case, it surely goes without saying. All treaties to which the state is a party are equally binding as a matter of international law, and should therefore equally benefit from the presumption of conformity in domestic law. No Canadian case has ever declined to apply the presumption of conformity in respect of a binding Canadian treaty obligation on the ground that the presumption does not or ought not apply to that particular treaty.

The presumption applies with respect to a wide variety of domestic laws. It applies not only to statutes enacted by legislatures but also to regulations promulgated by statutory

¹⁰⁴ *But see Co-operative Committee on Japanese Canadians v. Attorney General for Canada* [1947] AC 87 (PC) (Privy Council found that war-time conditions rebutted the presumption of conformity with principles of international law prohibiting the forcible removal of British subjects of Japanese descent to Japan).

authority.¹⁰⁵ In England, the presumption has also been applied to instruments made under the royal prerogative,¹⁰⁶ and there is no reason to think that it would not also do so in Canada. Whether the presumption applies to Canadian common law is less certain. To presume that the common law conforms to the state's treaty obligations may, in some cases, come perilously close to dispensing with the constitutional requirement that treaties be implemented before taking direct effect in domestic law. English courts have seemingly accepted that the presumption may apply both to statutes and to the common law.¹⁰⁷ Canadian courts have not yet gone that far. English and Canadian courts are agreed, however, that the presumption applies not only to legislation purporting to implement a treaty, but also to other legislation, whether expressly stated as implementing a given treaty or not.¹⁰⁸ Finally, the presumption appears to apply equally to federal and provincial statutes, in spite of the fact that the treaty-making power is *de facto* federal.¹⁰⁹ No Canadian court has ever declined to apply the presumption of conformity on the ground that provincial legislation is not to be presumed to conform to federally-made treaties. That is not to say, however, that no court will ever do so. The possibility of a treaty-compliant interpretation of a provincial statute being found objectionable on federalism grounds is remote but may nevertheless be real.

Perhaps the most important example of a Canadian court rejecting a supposed limitation on the ambit of the presumption of conformity is the *National Corn Growers* case.¹¹⁰ The question before the court was whether an administrative tribunal had erred by having regard to a treaty, the General Agreement on Tariffs and Trade 1947,¹¹¹ in interpreting a federal statute. Decided cases in Canada and England had, at times, held that courts could not invoke a treaty for interpretive purposes unless the statute under consideration was first determined to be

¹⁰⁵ See *supra* note 14.

¹⁰⁶ *Post Office v. Estuary Radio* [1968] 2 QB 740 (CA).

¹⁰⁷ See *R v Lyons* [2002] UKHL 44, at para. 27.

¹⁰⁸ See, e.g., *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76 (presumption applied to a Criminal Code provision adopted decades before the treaties in question were negotiated).

¹⁰⁹ Examples of the presumption applied to provincial laws include *Re Foreign Legations* [1943] SCR 209; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* [2001] 2 SCR 241; and *GreCon Dimter Inc. v. J.R. Normand Inc.* [2005] 2 SCR 401.

¹¹⁰ *National Corn Growers Association v Canada (Import Tribunal)* [1990] 2 SCR 1324 (*National Corn Growers*).

¹¹¹ [1948] CanTS no. 31.

ambiguous on its face.¹¹² Absent such ambiguity, the statute had to be interpreted literally, without resort to the treaty and without regard to the international consequences of the resulting interpretation. The majority of the court of appeal in *National Corn Growers* applied this supposed rule. Gonthier J, for the majority of the Supreme Court of Canada, rejected this approach, holding instead that a court or tribunal may make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, patent or latent, in the domestic legislation. Gonthier J wrote:

...I share the appellants' view that in circumstances where the domestic legislation is unclear it is reasonable to examine any underlying international agreement. In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.

...more specifically, it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation. The Court of Appeal's suggestion that recourse to an international treaty is only available where the provision of the domestic legislation is ambiguous on its face is to be rejected.¹¹³

The court then quoted at length from Ian Brownlie's treatise on international law to support this point:

If the convention may be used on the correct principle that the statute is intended to implement the convention then, it follows, the latter becomes a proper aid to interpretation, and, more especially, may reveal a latent ambiguity in the text of the

¹¹² See, e.g., *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 SCR 141 (*Capital Cities*).

¹¹³ *National Corn Growers*, *supra* note 110, at 1372-3.

statute even if this was 'clear in itself'. Moreover, the principle or presumption that the Crown does not intend to break an international treaty must have the corollary that the text of the international instrument is a primary source of meaning or 'interpretation'. The courts have lately accepted the need to refer to the relevant treaty even in the absence of ambiguity in the legislative text when taken in isolation.¹¹⁴

Since *National Corn Growers*, the so-called ambiguity requirement has largely disappeared from Canadian law. Courts need not justify their resort to relevant treaties binding on the state by purporting to find some patent ambiguity on the face of the legislation, but may instead (as *R v Hape* confirms) regard international instruments as part of the legal context in which statutes are enacted.

G. The presumption and discretionary decision-making

The foregoing discussion indicates the extent to which interpretive resort to treaties has become an accepted part of Canadian judicial practice. There remain, however, at least two areas of Canadian law in which the presumption of conformity remains uncertain, if not controversial. The first area is administrative law, and more particularly the application of the presumption in cases where an administrative decision-maker exercises statutory discretion.

In principle, a statute that grants an administrative decision-maker the power to make discretionary decisions ought to be construed, like other Canadian statutes, according to the presumption that it conforms to Canadian treaty obligations and other rules of international law binding on the state. There is a problem, however, in applying the presumption to such statutes: to do so introduces an additional ground for judicial review of discretionary decisions, one based on the conformity or lack of conformity of the decision with the state's treaty obligations. The effect, potentially at least, is to curtail the statutorily-granted discretion in a significant way. Furthermore, where the treaty relied on by the litigant challenging the discretionary decision is not expressly implemented by statute in Canadian law, the constitutional objection may arise that to

¹¹⁴*Id.*, at 1372-3 (quoting I. Brownlie, *Principles of Public International Law*, at 51 (3rd ed. 1979)).

supervise the decision-maker's discretion by resort to that treaty is to give direct effect to the treaty without legislative action, contrary to the constitutional requirement that treaties be implemented in domestic law before changing the law or affecting private rights.

Two decisions of the Supreme Court of Canada have considered this problem, though in both cases somewhat obliquely. In *Capital Cities*,¹¹⁵ petitioners sought judicial review of the decision of a licensing body to alter the licence of a cable TV provider. The altered licence permitted the provider to replace advertisements on US-based television channels with public service announcements. The regulator's power to alter the licence in this way was based on a federal statute.¹¹⁶ The treaty in question allegedly required states parties not to interfere with other states' broadcasts.¹¹⁷ Whether the treaty was implemented in federal law was disputed. The majority of the court found that the treaty was not implemented in Canadian law and could not prevail against the express stipulations of the Act. Against this conclusion, Pigeon J, for himself and two other dissenting judges, argued that the licensing body could not grant licences contrary to Canadian treaty commitments. Even if the treaty were not implemented, said the dissent, "It is an oversimplification to say that treaties are of no legal effect unless implemented by legislation."¹¹⁸ The dissent would have accepted the appellants' argument that the presumption of conformity restrained the licensing body from acting inconsistently with Canada's treaty obligations.

Over twenty years later, the application of the presumption of conformity to discretionary decision-making powers arose again in *Baker v. Canada*.¹¹⁹ The case concerned a Jamaican woman whom the federal government sought to deport for overstaying her visitor's visa by several years. She sought to apply for permanent residence in Canada, but could not do so from within the country without an exemption from the minister, pursuant to a discretionary power exercisable on "humanitarian and compassionate grounds". The minister declined to make the

¹¹⁵ *Capital Cities*, *supra* note 112.

¹¹⁶ Broadcasting Act SC 1967-68 c. 25 s. 17(1).

¹¹⁷ Inter-American Radiocommunications Convention 1937 [1938] CanTS no. 18.

¹¹⁸ *Capital Cities*, *supra* note 112, at 188.

¹¹⁹ [1999] 2 SCR 817 (*Baker*).

exemption. Baker challenged this decision arguing, among other things, that it unreasonably failed to give sufficient weight to the interests of her Canadian-born children, contrary to Canada's obligations under the 1989 Convention on the Rights of the Child.¹²⁰ The federal government argued (implausibly, given the legislative record)¹²¹ that that treaty was not implemented in Canadian law. The majority of the Supreme Court of Canada accepted that conclusion, but held nevertheless that the minister's decision was an unlawful exercise of discretion because, among other reasons, it unreasonably neglected certain considerations, including Canada's obligations under the Convention. While the majority did not depict this aspect of its decision as an application of the presumption of conformity with international law, that was its effect.¹²²

In separate reasons, Iacobucci J (Cory J concurring) agreed with the majority's disposition of the case but sounded the alarm about its resort to international law to control the minister's decision, saying in part:

It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141. I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.

¹²⁰ [1992] CanTS no. 3.

¹²¹ Numerous amendments were made to federal and provincial statutes as a result of Canada's accession to the Convention. In its *First Report on the Convention on the Rights of the Child* (1994) CRC/C/11/Add.3 at para 27, the Government of Canada reported to the Committee on the Rights of the Child (under the heading "Implementation by states: Article 4") that Canada had "taken measures of a constitutional, legislative, administrative and other nature to implement the rights set forth in the Convention... ."

¹²² Subsequent Supreme Court of Canada decisions have depicted *Baker* as a presumption case. See *R. v. Sharpe* [2001] 1 SCR 45, at para. 175; and *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* [2001] 2 SCR 241, at para. 30.

In my view, one should proceed with caution in deciding matters of this nature, lest we 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. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, 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.

The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament...¹²³

The basis of Iacobucci J's objection to the use of international law is not immediately clear. There was nothing new in "the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation." That is simply the presumption of conformity as it has been applied many times, including by Iacobucci J himself in *Ordon Estate v. Grail*.¹²⁴ There is a difference, however, between *Baker* and other cases: in *Baker*, as in *Capital Cities*, the application of the presumption introduces international law as a basis for judicial review of administrative decision-making even in the absence of any statute permitting international law to control discretionary decisions in this way.¹²⁵ That appears to be Iacobucci J's real concern in *Baker*. Seen in this light, it is hard to disagree with him that the precedent in *Capital Cities* is undone by the majority's decision in *Baker*.

¹²³ *Baker*, *supra* note 119, at paras. 79-81.

¹²⁴ [1998] 3 SCR 437.

¹²⁵ The problem has arisen in other Commonwealth jurisdictions. See, e.g., *R. v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696 (HL); and *Ashby v. Minister of Immigration* [1981] 1 NZLR 222 (NZ CA).

That may not be a bad thing. Subjecting administrative decisions to the requirement that they conform to the state's treaty obligations is consistent with the judicial policy in favour of conforming interpretations of domestic law and serves to prevent treaty breaches by administrative action. There may be some cases where to apply the presumption of conformity in this way takes Canadian law too far away from its traditional constitutional position of requiring legislative implementation of treaties before giving them direct effect in domestic law. But instead of adopting an absolute rule on the point, Canadian law may be better served by considering the matter on a case-by-case basis. *Baker* dealt with the issue too abstractly to be considered the last word (or perhaps even binding authority) on the point. One must conclude that the application of the presumption of conformity to Canadian administrative decision-making remains uncertain. Given the Supreme Court of Canada's resounding endorsement of the presumption in *R v Hape*, however, it seems likely that it applies in the interpretation of the powers granted by statute to administrative decision-makers. Unless that presumption is rebutted in a given case, conformity with treaties and other sources of Canadian international legal obligations must be regarded as an implicit limit on the powers of administrative decision-makers in this country.¹²⁶

H. The presumption and the Charter

The second area of Canadian law in which the presumption of conformity with treaties and other forms of international law is controversial (or perhaps was until very recently) is the Canadian Charter of Rights and Freedoms,¹²⁷ the country's leading human rights instrument. Ever since its adoption as part of the written constitution of Canada in 1982, academics and commentators have debated the extent to which the Charter can properly be regarded as implementing legislation for Canadian human rights treaties, chiefly the International Covenant on Civil and Political Rights (ICCPR).¹²⁸ As neither the Charter nor any other Canadian law expressly

¹²⁶ For a recent case in which the presumption of conformity was applied to a statutory discretion to control its exercise consistently with the Convention on the Rights of the Child, see *Munar v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1180 (FCTD).

¹²⁷ Constitution Act 1982 part I (Canadian charter of rights and freedoms), being Schedule B to the Canada Act 1982 (UK) 1982 c. 11.

¹²⁸ [1976] CanTS no. 47.

implements the ICCPR or Canada's other human rights treaties,¹²⁹ the question of how Canadian law discharges the state's international human rights commitments has often arisen.¹³⁰

Until recently, it was uncertain whether the presumption of conformity applied to the Charter in the same way as it does to ordinary (i.e. non-constitutional) statutes. No majority judgment of the Supreme Court of Canada had clearly applied the presumption to the Charter. The reasons for not doing so have been speculated upon, and in some cases shored up by, academics and other commentators.¹³¹ They included the textual disparities between some Charter provisions and their treaty counterparts, the fact that some human rights treaties postdate the Charter, and the concern that to presume that the Charter conforms to international human rights treaties may effectively entrench those treaties in the constitution without formal constitutional amendment.

Opposition to presuming the Charter to be consistent with international human rights law was not uniform, however. The most important proponent of an internationally-compliant Charter was Dickson CJ, Canada's first chief justice of the Charter era. In his dissenting reasons in *Re Public Service Employee Relations Act (Alta.)*, Dickson CJ wrote: "The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the Charter's protection." I believe the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights

¹²⁹ Canada is a party to most UN human rights treaties, including the ICCPR, the International Covenant on Economic, Social and Cultural Rights 1966 [1976] CanTS no. 46, the International Covenant on the Elimination of All Forms of Racial Discrimination 1965 [1970] CanTS no. 28, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 [1982] CanTS no. 31, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 [1987] CanTS no. 36 and the Convention on the Rights of the Child 1989 [1992] CanTS no. 3.

¹³⁰ See M. Freeman and G. van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004), especially at chapters 9-10; W. Schabas and S. Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter* (Toronto: Thompson Carswell, 2007); E. Eid and H. Hamboyan, "Implementation by Canada of Its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical," in O. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* 449 (Toronto: Irwin Law, 2006); I. Weiser, "Effect in Domestic Law of International Human Rights Treaties Ratified Without Implementing Legislation," in *The Impact of International Law on the Practice of Law in Canada. Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa October 15-17, 1998* 132 (The Hague: Kluwer Law International, 1999).

¹³¹ See, e.g., A. Warner La Forest, "Domestic Application of International Law in Charter Cases: Are We There Yet?" 37 UBC LR 157 (2004); and I. Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System," 37 UBC LR 113 (2004).

documents which Canada has ratified.”¹³² Read in isolation from the rest of his judgment, this passage seems like an unqualified endorsement of the application of the presumption of conformity to the Charter. In the context of Dickson CJ’s entire judgment, however, the passage is less clear. The chief justice invoked presumption-like language at some points. But in other passages he seemed to equate Canadian human rights treaties with foreign law and to regard all such sources as “relevant and persuasive” rather than presumptively-conformed-with by Canadian law. In a later decision, *Slaight Communications Inc. v. Davidson*,¹³³ Dickson CJ carefully lifted the presumption-friendly passages out from the earlier case, quoting them only. This time he spoke for the majority of the court, yet even this restatement of the presumption did not suffice to establish it as an accepted interpretive tool in Charter interpretation.¹³⁴

Though it may be too early to say, two recent decisions of the Supreme Court of Canada, released one day apart, appear to establish the court’s determination to subject the Charter to the same presumption of conformity that is applicable to the rest of Canadian law. In *R. v. Hape*, the majority of the court stated, under the heading “Conformity with International Law as an Interpretive Principle of Domestic Law,” that

Wherever possible, [this court] has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other....

In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada’s binding obligations under international law where the express words are capable of supporting such a construction.¹³⁵

The first part of this statement strains credulity. The case law since *Slaight Communications* tends to show that the Supreme Court of Canada did not, with some exceptions, concern itself

¹³² [1987] 1 SCR 313 at 349.

¹³³ [1989] 1 SCR 1038 at 1056.

¹³⁴ See M. Freeman and G. van Ert, *International Human Rights Law* 189-96 (Toronto: Irwin Law, 2004).

¹³⁵ 2007 SCC 26, at paras. 55-56.

very much with reaching internationally-compliant interpretations of the Charter.¹³⁶ That being said, the *Hape* decision appears to show the court turning over a new interpretive leaf as regards the Charter and international law. But perhaps one cannot give too much weight to these comments, given the facts of *Hape*. The case concerned an RCMP money-laundering investigation in the Turks and Caicos Islands. The accused sought to have documentary evidence produced by the investigation excluded from his trial on the basis that it was obtained in violation of his Charter right to be secure against unreasonable search and seizure.¹³⁷ The majority held that the Charter does not generally apply to searches and seizures that take place in other countries. To find otherwise (the majority held) would be to apply the Charter extraterritorially contrary to both international law¹³⁸ and the terms of Charter section 32 (which sets out the extent of the Charter's application). Thus the internationally-conforming interpretation of the Charter advanced by the majority concerned the Charter's geographic scope of application—not a substantive Charter right.

A clearer signal of the Supreme Court of Canada's newfound determination to apply the presumption of conformity to the Charter's human rights protections came in *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia*,¹³⁹ released one day after *Hape*. In the *Health Services* case, the appellant unions and union members challenged the constitutionality of provincial labour legislation that effectively precluded collective bargaining in some areas. Previous Supreme Court decisions (including *Re Public Service Employee Relations Act (Alta.)*,¹⁴⁰ in which Dickson CJ, dissenting, first advocated the application of the presumption of conformity to the Charter) had held that collective bargaining was not protected by the Charter's freedom of association guarantee. In *Health Services*, the court overruled those decisions and held that the Charter includes a procedural right to collective bargaining. In

¹³⁶ The most egregious example is *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, in which the court contemplated (in obiter) the possibility that deporting a person to a place where he or she might be tortured, contrary to the 1984 Convention Against Torture, might be possible without violation of the Charter's guarantee of life, liberty and security of the person.

¹³⁷ Charter section 8.

¹³⁸ One may question whether an extra-territorial application of Canadian human rights law in such circumstances would truly be contrary to international law. That question, however, is beyond the scope of this chapter.

¹³⁹ 2007 SCC 27 (*Health Services*).

¹⁴⁰ *Supra* note 132.

overruling its previous decisions, the court relied significantly on international human rights and labour law, including treaties to which Canada is a party. McLachlin CJ and LeBel J, for the majority, wrote:

Under Canada's federal system of government, the incorporation of international agreements into domestic law is properly the role of the federal Parliament or the provincial legislatures. However, Canada's international obligations can assist courts charged with interpreting the Charter's guarantees.... Applying this interpretive tool here supports recognizing a process of collective bargaining as part of the Charter's guarantee of freedom of association.

Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in section 2(d) of the Charter. As Dickson C.J. observed in the *Alberta Reference*, at p. 349, the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.

The sources most important to the understanding of section 2(d) of the *Charter* are the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 ("ICESCR"), the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 ("ICCPR"), and the International Labour Organization's (ILO's) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17 ("Convention No. 87"). Canada has endorsed all three of these documents, acceding to both the ICESCR and the ICCPR, and ratifying Convention No. 87 in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold....

In summary, international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that section 2(d) of the

Charter should be interpreted as recognizing at least the same level of protection: *Alberta Reference*.¹⁴¹

Unlike *Hape*, the *Health Services* decision is a clear case of the Supreme Court of Canada invoking and applying the presumption of conformity to a Charter right—with momentous results. Judging by *Health Services*, it appears that the presumption of conformity with international law has now been admitted into the one area of Canadian law in which it was previously prohibited.

III Judicial remedies for breaches of treaty rights

The maxim, “No right without a remedy”, is well established in Canadian law. When it comes to rights guaranteed by international law, however, the maxim is in tension with the constitutional principles set out at the beginning of this chapter, namely that treaty-making is a prerogative of the Crown and therefore rights established by treaty require legislative implementation before taking direct effect in domestic law.

The implementation requirement is not necessarily rights-denying. It can also preserve rights. In *Miller v. Canada*,¹⁴² an employee of the International Civil Aviation Organization in Montreal sued Canada for damage to his health allegedly caused by poor air quality in the Organization’s building. Canada was the lessor of the premises to the Organization under a treaty. Canada contended that the effect of the treaty was to immunize it from the claim, even though the treaty was unimplemented in Quebec law. The Court of Appeal for Quebec rejected this argument, affirming that if the Crown had committed a fault in Quebec which caused a person damage, the courts had jurisdiction unless removed by domestic law. An unimplemented treaty could not, without more, restrict the claimant’s right to sue.¹⁴³ The Supreme Court of Canada agreed and dismissed the appeal.

¹⁴¹ *Health Services*, *supra* note 139, at paras. 69-71, 79.

¹⁴² [2001] 1 SCR 407.

¹⁴³ See also *The Parlement Belge* [1878-9] 4 PD 129 (Eng.).

While the implementation requirement can preserve rights, it also has the potential to frustrate attempts by individuals to vindicate rights promised to them by a treaty. The right may be insufficiently implemented, or not implemented at all in domestic law. In such cases, the presumption of conformity may fill the legislative gap,¹⁴⁴ but interpretation can only reach so far. Other possible remedies, such as declaratory relief or arguments founded on legitimate expectations, are undeveloped in Canada. In short, the most certain way of vindicating treaty-based rights in Canadian law is to rely on domestic laws which implement them or can be said to implement them. In the absence of implementation, there may be little a claimant can do, within Canadian law at least, to vindicate a treaty-based right.

A. Remedies for breaches of implemented treaty rights

Where the treaty right upon which a claimant seeks to rely is implemented in Canadian law, there may be no need to refer to the international aspect of the right at all. The right has descended from the lofty heights of international law to the solid ground of domestic law and will be applied in the same way as any other domestic provision. An example of this in Canada is the human right of equality before the law, as guaranteed internationally in art. 26 of the ICCPR and other provisions. That right is implemented in Canada by a number of constitutional, quasi-constitutional and ordinary laws, chief among them being section 15 of the Charter. For the most part, Canadian equality jurisprudence has been found to meet international standards.¹⁴⁵ It seems clear that the international right to equality before the law is fully, or at least very satisfactorily, implemented in Canadian law. Yet Canadian equality jurisprudence rarely relies on, or even refers to, the international aspect of the right. Rightly or wrongly, the feeling seems to be that Canada has nothing to learn about equality from the international experience. The result is that a person seeking to vindicate her right to equality before the law in Canada may readily do so by means of a Charter challenge under section 15, or reliance on other equality guarantees, without

¹⁴⁴ Speaking in a different context, Bouck J in *Neonex Int'l Ltd v Kolasa et al* (1978) 84 DLR (3d) 446, 452-53 (BCSC) memorably observed: "If Parliament intends to deprive the minority of these common law rights then the law demands the statute say so in the most clear and unequivocal language. Otherwise, the common law will blossom through the cracks and crevices of the legislation and try to ensure that justice is done."

¹⁴⁵ Indeed, Canadian equality law clearly exceeds international standards in some areas, such as the protection of equality rights for gays, lesbians and other sexual minorities.

resorting (or even referring) to ICCPR art. 26. The same can be said about many of the less controversial civil and political rights that Canada is required to protect under international law. In short, the international right is implemented in Canadian law, yet the implementing nature of the provisions that serve that purpose often goes unnoticed.

Not every treaty right is as well protected in Canadian law as equality, of course. Where a treaty right is implemented domestically, but the right's full meaning, or the sufficiency of its implementation, is in question, resort to the treaty basis of the right is clearly permissible and may be helpful. As we have seen, the interpretative presumption of conformity with international law is well established in Canada, and may assist rights claimants to ensure they obtain the full benefit of the right as provided for by international law. In the *Canadian Foundation* case,¹⁴⁶ a children's rights foundation challenged the constitutionality of section 43 of the Criminal Code,¹⁴⁷ which justifies the use of force against children when done by parents or teachers by way of correction "if the force does not exceed what is reasonable under the circumstances." The foundation's constitutional challenge was unsuccessful before the Supreme Court of Canada, yet the majority of the court effectively read down the impugned provision by interpreting the phrase "reasonable under the circumstances" as implicitly limited by (among other things) Canadian treaty obligations under the 1989 Convention on the Rights of the Child and the 1966 International Covenant on Civil and Political Rights. Those obligations were found to prohibit violence against children and cruel, inhuman or degrading treatment or punishment of children. Applying the presumption of conformity with international law, McLachlin CJ interpreted section 43 to exempt from criminal sanction only minor corrective force of a transitory and trifling nature. The chief justice observed, "From these international obligations, it follows that what is 'reasonable under the circumstances' will seek to avoid harm to the child and will never include cruel, inhuman or degrading treatment."¹⁴⁸

¹⁴⁶ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76.

¹⁴⁷ RSC 1985 c. C-46.

¹⁴⁸ *Canadian Foundation*, *supra* note 147, at paras. 32 and 40.

Of course, argument by reference to the underlying international law can go both ways. If the opposing party (normally a government) can show that the domestic legislation on which the claimant relies was intended to implement a treaty, and that the right as established in the treaty is more circumscribed than the claimant suggests, this may be an argument for reading the implementing legislation more narrowly.

There is a great deal of federal and provincial legislation in Canada that gives domestic legal effect to rights established under Canadian treaty obligations. Human rights laws are the most obvious example. They may be found in all jurisdictions and in a variety of forms, from constitutional provisions to so-called quasi-constitutional laws to ordinary statutes. But rights-creating treaties exist in many other areas of international law, including family law, taxation, labour, international humanitarian law, commercial law and beyond. It would be a huge task to attempt to identify all those federal and provincial laws which serve to implement rights established under Canadian treaty obligations in these and all other fields of law into which treaty-making has expanded in the modern era.

B. Remedies for breaches of unimplemented treaty rights

In principle, all rights benefiting individuals and founded in Canadian treaty obligations ought to be implemented in domestic law. The usual Canadian practice is not to allow treaties requiring domestic implementation to enter into force for Canada until the federal government has ensured the treaty's implementation.¹⁴⁹ The reason for this is simply that, where a treaty requires domestic legal action by states parties, failure to take that action may breach the treaty. Usually, then, if a right-creating treaty is in force against Canada, there exists some legislative implementation of that right. If the right is one that falls to be implemented federally, the federal government will have ensured its implementation by Parliament. If the right falls within provincial

¹⁴⁹ "Governments have come to take the position that they will normally only ratify a treaty after any necessary enabling legislation has been passed....Today, on only rare occasions does Canada ratify a treaty prior to the enactment of enabling legislation": M. Copithorne, "National Treaty Law and Practice: Canada" in M. Leigh and others, eds., *National Treaty Law and Practice* (Washington DC: American Society of International Law, 2003) at 5.

jurisdiction, the federal government will normally hold off on ratifying or acceding to the treaty until it has persuaded all the provinces to ensure implementation of the right in their jurisdictions.

However, theory is not always matched by practice. Where a treaty right is not, for whatever reason, implemented in Canadian law, the orthodox rule is that judicial remedies will not be available. Failure to implement a treaty is not a cause of action against the government, and Canadian judges can only apply Canadian laws. Failure to implement a treaty right in domestic law may be a legal problem from the perspective of a foreign state party to the treaty in question (which may regard the failure as a breach of the treaty) but from the perspective of a Canadian judge the failure is not legal but political: the legislature has declined to make the law the claimant wants it to make.

This orthodox account is largely sound but is subject to some caveats, the most important of which is the presumption of conformity. As we have seen, Canadian courts are hesitant to conclude that Canada has failed to give legal effect in domestic law to those treaties which require it. To the contrary, the courts endeavour, as a matter of judicial policy, to interpret Canadian laws harmoniously with international requirements. In the recent *Health Services* case,¹⁵⁰ the Supreme Court of Canada revised its interpretation of the freedom of association right established by section 2(d) of the Canadian Charter of Rights and Freedoms to conform to Canada's obligations under the 1966 International Covenant on Economic, Social and Cultural Rights,¹⁵¹ the 1966 International Covenant on Civil and Political Rights,¹⁵² and ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize.¹⁵³ While the court observed that international law was only one of four considerations informing its decision,¹⁵⁴ it also made clear that it was applying the presumption of conformity with international law to the Charter.¹⁵⁵ The result was to establish collective bargaining as a constitutionally protected right in

¹⁵⁰ *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia* 2007 SCC 27.

¹⁵¹ [1976] CanTS no. 46.

¹⁵² [1976] CanTS no. 47.

¹⁵³ [1973] CanTS no. 14.

¹⁵⁴ *Health Services*, *supra* note 150, at para. 20.

¹⁵⁵ *Id.*, at paras. 70-9.

Canadian law. That right had clearly not existed, at least in constitutional form, prior to the court's decision. Indeed, the court had to overrule four of its own decisions¹⁵⁶ to reach this result. *Health Services* is a dramatic example of a court applying the presumption of conformity to vindicate an unimplemented treaty right in domestic law.

While *Health Services* serves as an example of a court applying the presumption of conformity to give effect to a treaty right unimplemented (or at least previously unimplemented) in Canadian law, the case is exceptional. The treaty right in question (collective bargaining) was one that lent itself to judicial vindication by means of constitutional interpretation. Furthermore, the court presented with the problem was the only one in the country that could have reached an internationally-conforming result, being the only Canadian court with the power to depart from Supreme Court of Canada precedent. In most cases where a treaty right remains unimplemented in Canadian law, judicial interpretation will likely not suffice to provide the missing right. The right to compensation for wrongful conviction of a criminal offence provides an example. That right is established by art. 14(6) of the ICCPR. Yet compensation for wrongful conviction in Canada is made purely on an *ex gratia* basis, without any domestic legal entitlement to such payments.¹⁵⁷ In short, the treaty right is unimplemented in domestic law. A court faced with this stark example of non-implementation might very well be forced to conclude that it can provide no remedy.

There may, however, be another remedial option available to Canadian courts faced with unimplemented treaty rights: declaratory relief. Historically, declaratory relief has seemingly not been available against governments for legislative failures to implement treaties in domestic law.¹⁵⁸ Such relief was sought, however, by the Quebec government against the government of Canada in *Quebec (Minister of Justice) v. Canada (Minister of Justice)*.¹⁵⁹ Quebec brought a

¹⁵⁶ *Reference re Public Service Employee Relations Act (Alta.)* [1987] 1 SCR 313; *PSAC v. Canada* [1987] 1 SCR 424; *RWDSU v. Saskatchewan* [1987] 1 SCR 460; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)* [1990] 2 SCR 367.

¹⁵⁷ M. Freeman and G. van Ert, *International Human Rights Law* 373-75 (Toronto: Irwin Law, 2004).

¹⁵⁸ I am forced to say "seemingly" because I am not aware of any Canadian case in which the question has been put to the court. Declaratory relief is not, to my knowledge, a remedy that has ever been sought for failure to implement a treaty, except in the cases discussed above.

¹⁵⁹ (2003) 228 DLR (4th) 63 (Que CA).

number of challenges to a federal law, the Youth Criminal Justice Act.¹⁶⁰ Most of the challenges were constitutional in nature, but Quebec also sought two declarations that the Act was incompatible with Canadian obligations under the 1966 International Covenant on Civil and Political Rights¹⁶¹ and the 1989 Convention on the Rights of the Child.¹⁶² The Court of Appeal for Quebec held that these declarations were available and that the compatibility of the Act with Canadian treaty obligations was a question properly before it. Whether this case constitutes a precedent for granting declaratory relief against governments for failure to implement treaty rights is by no means clear. The case arose as a reference by the Quebec government directly to the Court of Appeal and may not be authority for granting declaratory relief in litigation involving private parties.¹⁶³ Declaratory relief for non-implementation of treaty rights, or other legislative treaty breaches, would offer litigants a powerful new means of ensuring that treaty obligations freely undertaken by the state are respected by the state's own domestic law. There is much to recommend such relief in theory, but only modest authority for its existence in practice.

In the absence of any other remedy for non-implementation of a treaty right, Canadian claimants are left to assert the right, if possible, in international fora. Canadians have often had resort to mechanisms established under UN human rights treaties, ILO conventions and other international agreements. Favourable decisions at the international level do not always prompt governmental or legislative action, however. For example, a number of decisions by the UN Human Rights Committee have found Canada in breach of its ICCPR obligations, yet without executive or legislative response.¹⁶⁴

Conclusion

¹⁶⁰ SC 2002 c. 1.

¹⁶¹ [1976] CanTS no. 47.

¹⁶² [1992] CanTS no. 3.

¹⁶³ *But see Montana Band of Indians v. Canada* [1991] 2 FC 30 (Fed. CA).

¹⁶⁴ *See, e.g., Waldman v. Canada* (1999) Comm. no. 694/1996, in which the UN Human Rights Committee found a violation of Waldman's right to equal and effective protection against discrimination (ICCPR art. 26) resulting from Ontario legislation granting public funding to Roman Catholic schools but not to Jewish schools. The legislation gives effect to constitutional education guarantees under section 93 of the Constitution Act 1867. To remedy the breach found by the Committee would seemingly require constitutional amendment. No such amendment has been made.

Any consideration of judicial interpretation and enforcement of treaties, in Canada at least, must bear in mind certain essential, if indistinct, limits to judicial action in respect of treaties. As Canadian law currently stands, treaties can only be subject to judicial interpretation and enforcement in certain circumstances. These circumstances can be difficult to describe, and one hesitates to generalize at the risk of suggesting artificial or unnecessary exclusions. It is clear, however, that Canadian courts are not international courts and will not determine legal disputes between states occurring purely on the international plane. A treaty question put before a Canadian court must have some purchase in Canadian law. The observations of the Supreme Court of Canada in *Re Secession of Quebec*¹⁶⁵ are helpful. Faced with the objection that it did not have jurisdiction to answer an international legal question referred to it by the government of Canada,¹⁶⁶ the court replied,

This concern is groundless. In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system....

More importantly, Question 2 of this Reference does not ask an abstract question of “pure” international law but seeks to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec, institutions that clearly exist as part of the Canadian legal order. As will be seen, the amicus curiae himself submitted that the success of any initiative on the part of Quebec to secede from the Canadian federation would be governed by international law. In these circumstances, a consideration of international law in the context of this Reference about the legal aspects of the unilateral secession of Quebec is not only permissible but unavoidable.¹⁶⁷

¹⁶⁵ [1998] 2 SCR 217.

¹⁶⁶ The question was, “Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?”

¹⁶⁷ *Re Secession of Quebec*, *supra* note 165, at paras. 22-3.

Related to this point is the constitutional doctrine, described at the beginning of this chapter, that foreign affairs is a prerogative of the Crown. That prerogative is, generally speaking, beyond judicial review.¹⁶⁸ The orthodoxy is that Canadian courts will not sit in judgment of government acts in the area of foreign affairs. An actual or potential treaty breach by Canada will seemingly not entitle a claimant to any relief from a Canadian court where to grant such relief would interfere with the government's conduct of foreign relations without some substantial connection to domestic law. These statements are generalizations, and made with some hesitation. As the cases reviewed in this chapter demonstrate, Canadian judicial engagement with treaties is increasing and expanding. The boundaries of judicial action in these areas have never been entirely clear, and may grow more uncertain as the linkages between Canadian and international law continue to multiply.

¹⁶⁸ *Black v. Chrétien* (2001) 54 OR (3d) 215 (Ont CA). *But see Operation Dismantle v. R.* [1985] 1 SCR 441 re review of foreign affairs prerogative for compliance with the Charter.