

INTERACTION BETWEEN INTERNATIONAL AND
DOMESTIC HUMAN RIGHTS LAW:
A CANADIAN PERSPECTIVE

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Introduction

This paper describes the Canadian approach to the implementation of international human rights treaties. I will commence with a discussion of the Canadian legal and constitutional framework relevant to the ratification and implementation of international human rights treaties. Then, outline the steps that are taken domestically prior to ratifying a treaty. Finally, I will discuss how Canadian courts have interpreted the relationship between international human rights treaties and domestic law.

The Canadian Legal and Constitutional Framework

At the outset, I would like to identify three aspects of the Canadian legal and constitutional framework relevant to the implementation of human rights treaties.

1. Treaty Adherence is an Executive Act

In Canada, treaty-making is an Executive act, derived from the Royal Prerogative. Parliamentary approval is not required for Canada to enter into international treaties. The Senate Standing Committee on Human Rights is currently examining the way that the government deals with international human rights obligations, including whether Parliament should have a role to play in the process. The Committee is presently scheduled to report to the Senate on October 31, 2001.

2. Canadian Federalism

Secondly and perhaps most importantly, according to a 1937 case – often referred to as the Labour Conventions case¹, although only the federal executive is empowered to enter into international treaties, the federal government cannot legislate to implement treaties in areas that would otherwise fall within provincial jurisdiction. This stands in contrast to other federations, such as Australia, where the federal government retains a residual power to legislate in furtherance of a treaty, even if the subject matter typically falls outside of federal jurisdiction.

As human rights is a matter of shared federal-provincial jurisdiction, the general practise is to only ratify a human rights treaty after obtaining the support of Canadian provinces and territories.

3. Dualist System

Thirdly, Canada follows a dualist approach with respect to the domestic effect of international treaties.² This is similar in approach to other Commonwealth countries such as the United Kingdom, Australia and New Zealand. The dualist system means that international treaties in Canada are not self-executing. In other words, an international treaty alone cannot form the basis of an action in domestic courts, nor can Canadian courts grant specific performance of a

¹ *A.G. Can. V. A.G. Ont. et al. (Labour Conventions Case)*, [1937] 1 D.L.R. 673

² With respect to customary international law, Canada's approach is monist in the sense that customary international law automatically forms part of domestic law. However, domestic legislation would prevail in the event of any inconsistency.

treaty.³ In order for the treaty obligations to be given the force of law domestically, they must be incorporated into domestic legislation.

As a general rule, human rights treaties are not incorporated into domestic legislation. This is often due to the fact that the same obligation appears in other international and domestic human rights instruments. For example, the ICCPR and the CRC contain some form of guarantee of freedom of expression. To legislate different freedom of expression guarantees - which are worded in different ways - could result in inconsistent legislative statements and it is at a minimum, a confusing legislative policy approach. Remember too, that all these legislative statements of freedom of expression would then be subject to the same guarantee contained in the Canadian Charter of Rights and Freedoms. Where the same guarantee appears at the domestic level, there does not seem to be a need to expressly incorporate the international guarantee.

These three features of the Canada system render it unique and from a structural perspective, one of the most difficult places in the world for the purposes of implementing international human rights treaties.

³ *J.H. Rayner Ltd. v. Department of Trade*, [1990] 2 A.C. 518 (at p. 476). See also: *A.G. Canada v. A.G. Ontario (The Labour Conventions Case)*, [1937] A.C. 355 (P.C.); *Bancroft v. The University of Toronto* (1986), 24 D.L.R. (4th) 620 (Ont.H.C.); *Re Vincent and Min. Employment and Immigration* (1983), 148 D.L.R. (3rd) 385 (F.C.A.).

Domestic Review for Purposes of Ratification

In light of this legal and constitutional framework, what is done domestically so that Canada can ratify human rights treaties?

Typically, as a prelude to ratification, Department of Justice officials consult with colleagues in other affected federal departments and agencies, as well as with the provinces, territories, aboriginal groups and other non-governmental groups, to determine:

- whether existing domestic laws and policies already conform with the treaty obligations;
- if there are inconsistencies, whether new legislation/policies should be adopted or whether existing legislation/policies should be amended;
- alternatively, whether it is appropriate to maintain the domestic position even though it is inconsistent with a treaty provision, and enter a reservation. Reservations are employed where the domestic position appears to be inconsistent and can not be changed for various reasons. Statements of understanding may also be used to assert how Canada views the interpretation of the treaty provision to ensure that domestic legislation is consistent.

As was mentioned previously, often-existing legislation and policies are seen to conform with human rights treaty obligations, such that no new legislation is required. Where there is uncertainty as to whether a domestic measure is consistent with a treaty obligation, a legal opinion may be sought. In giving such advice, regard may be had to the text of the provision, the

Travaux Préparatoires and if they exist at the time, General Comments or views on cases of the treaty body respecting provisions of the treaty. At times inconsistencies or gaps in domestic legislation are found.

For example, prior to ratification of the *Convention Against Torture and Other Forms of Cruel, Unusual or Inhuman Treatment*, an internal review determined that there was no specific *Criminal Code* provision prohibiting torture. A new offence of torture was added to the *Criminal Code* to which was attached universal jurisdiction.

Another example occurred when a comparison of the terms of the *Convention on the Rights of the Child* with domestic law and practice found two areas of possible conflict: one pertaining to detention of youth with adults, and the other concerning aboriginal customary adoption⁴. For various reasons, a decision was made to enter two reservations to the Convention, rather than to amend domestic law.

Judicial Treatment of Canada's Human Rights Treaty Obligations

As I indicated earlier, Canada has a dualist system with respect to the relationship between international human rights treaties and domestic law and so unincorporated treaties cannot form the basis of a cause of action in domestic courts. However, treaty obligations clearly have an impact on the interpretation of domestic legislation, although the extent of that impact varies.

⁴ Article 21 of the *Convention on the Rights of the Child* requires that an adoption be authorized by competent authorities in accordance with applicable laws and procedures. As it was unclear at the time of ratification whether the article would apply to aboriginal customary adoption, a reservation was entered.

To look at how Canadian courts have applied international human rights treaties, I would like to divide the jurisprudence into two categories: 1) jurisprudence considering ordinary legislation; and 2) jurisprudence concerning the Canadian Constitution and in particular, the Canadian Charter of Rights and Freedoms.

1. Ordinary Legislation

With respect to ordinary legislation, the courts have said that judges should strive to interpret such laws in accordance with relevant international obligations. In a recent decision of the Supreme Court of Canada, the court stated that the “values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”.⁵ However, if the express provisions of a domestic statute are contrary to or inconsistent with Canada’s international obligations, the former prevails.⁶

I am of the view that it is appropriate to read ordinary or non-constitutional legislation consistently with treaty obligations, wherever possible. It would respect the presumption that Parliament does not intend to act in violation of Canada's international obligations. At the same time it respects the democratic process, because contrary domestic legislation prevails over a treaty obligation and unlike the Constitution, Parliament can pass new laws if they are unhappy with a court decision.

2. Constitutional Provisions

The situation with respect to constitutional provisions is somewhat more nuanced. The most often cited statement of the law is that of former Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alta.)*.⁷ In summation, he said:

... though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions."
(pages 349-50)

Hence, the judiciary is not bound to apply Canada's international human rights treaty obligations, although they will be a relevant and influential factor in the courts' interpretation of the Charter.

I think such an analysis is appropriate in respect of the Canadian Charter because otherwise the courts would effectively be "making constitutional" international norms agreed to by the Executive. The treaty provision would be incorporated - through judicial interpretation - into the supreme law of our land and Parliament could not legislate in a contrary manner. In my view, this would be an inappropriate result in light of the fact that ratification is an Executive act, not subject to the debates and examinations typically inherent in a democratic, transparent, law-making process.

⁵ *Baker v. Canada*, [1999] 2 S.C.R. 817.

⁶ See *National Corn Growers*.

⁷ [1987] 1 S.C.R. 313.

I think it is fair to say that until recently, the Court often examined the content of international provisions in a somewhat superficial manner, failing to give significance to the Government's act of ratification⁸, or to the commentaries and interpretations of the various treaty-monitoring committees. However, there has been a notable recent trend towards a more serious and informed consideration of international norms in Supreme Court jurisprudence.

For example, the recent decision of *United States v. Burns*,⁹ showed a marked departure from that approach. That case concerned whether the Minister of Justice, in extraditing two individuals to face murder charges in the United States, was obliged to seek assurances from the US that the death penalty would not be imposed. The Supreme Court examined in a comprehensive manner the international community's position on the death penalty, as well as Canada's stance on the world stage, including not only ratification, but as well our voting position on UN resolutions. The Court held that assurances that the death penalty will not be applied upon extradition must be sought in all but exceptional cases.

Despite my criticisms of the court, one needs to recognize that they are not faced with an easy task. Canada's method of implementing its treaty obligations means that they are often scattered

⁸ *Slaight Communications Inc. v. Davidson*, *supra*; *Reference Re Public Service Employee Relations Act (Alta.)*, *supra*; *Canada (Human Rights Commission) v. Taylor*, *supra*; *Chan v. Canada*, *supra*; *R. v. L. (D.O.)*, *supra*, are exceptions to this general statement in which ratification was at least noted by the judges.

⁹ 2001 SCC 7.

throughout several statutes, at both federal and provincial levels, and that there is frequently no signal as to when a law implements a treaty obligation. The problem is particularly acute when existing law is relied upon for ratification purposes.

In addition, there is a myriad of treaty obligations Canada has undertaken and the interpretation of international human rights obligations is often skeletal in comparison to the rich and considered jurisprudence we have in Canada. For example, there is little doubt that the Supreme Court has examined the underlying values, purpose and application of such fundamental rights as equality, freedom of expression, right to counsel and so on in greater depth than any international body.

Also, in some areas, Canadian human rights legislation and thinking is way out ahead of the international movement. Same sex issues are a clear example of this. The international community is yet far from a consensus on whether sexual orientation is even an unacceptable ground of discrimination.

I should also say that the legal community at large has varying levels of knowledge of basic international human rights law (although over the last few years this situation also seems to have improved). Education on international human rights law could certainly be improved in law schools, and in the continuing education of judges, government lawyers and the private bar.

Conclusion

Due to the dualist system under which Canada operates and the practise of not incorporating international human rights treaties, the latter do not form part of domestic law but serve as an important interpretive tool for domestic legislation and the Canadian constitution. Recent cases suggest that there is a trend in judicial circles to give greater weight to international instruments. A similar trend is apparent in the United Kingdom, Australia and New Zealand.

Canada takes ratification of human rights treaties seriously as demonstrated by the in-depth review process that occurs prior to ratification. Improvements could still be made however, such as ensuring that on-going reviews of legislation and policies occurs post-ratification as well.

There are significant challenges in implementing international human rights treaties, but the values enshrined in such treaties make it well worth the effort.