

Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts*

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* This paper draws heavily on my presentation, entitled “The Use of Unimplemented Treaties in Canada: Practice and Prospects in the Supreme Court”, to the Third Trilateral Conference of Japanese, American and Canadian International Lawyers, held at Ottawa in October 2000.

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Though we seldom stop to think about it, it is common knowledge that Canadians, as citizens of the world, carry both international criminal responsibilities and international human rights protections. But far too few lawyers, let alone members of the public, realize that international crimes are fully implemented by legislation within Canada but international human rights are not.

Sections have been progressively added to the *Criminal Code* to give effect to numerous conventions, to which Canada is a party, that outlaw serious international criminal offences, such as torture, hostage taking, hijacking of aircraft and ships, and other terrorist activities.¹ In addition, the *Crimes against Humanity and War Crimes Act*² confirms that genocide, crimes against humanity and war crimes, as defined internationally, are punishable offences in Canada.

Yet nowhere to date is there legislation explicitly implementing within Canada such fundamental international human rights conventions as the *International Covenant on Civil and Political Rights*,³ the *International Covenant on Economic, Social and Cultural Rights*⁴ and the *Convention on the Rights of the Child*,⁵ as well as many other like treaties. This is a surprising fact in a country that is generally known for its efforts to protect human rights. It also has important implications because of well-established Canadian constitutional principles about the domestic legal effects of

¹ *Criminal Code*, R.S.C. 1985, c. C-46 as amended, ss. 7(1), (2), (2.1), (2.2), (3.1), (3.2), 76, 77, 78, 78.1, 269.1 and 279.1.

² S.C. 2000, c. 24.

³ December 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁴ December 19, 1966, 993 U.N.T.S. 3.

⁵ GA Res. 44/25, UN GAOR, 44th Sess., UN Doc. A/RES/44/25 (1989).

international agreements. As Lord Atkin observed in 1937 in the famous *Labour Conventions Case*:

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.⁶

On the face of this statement, Canadians would appear to have no international treaty rights or obligations until they are legislated into domestic law.

It is no answer to the lack of legislative implementation of the international human rights conventions to say that the *Canadian Charter of Rights and Freedoms*⁷ is sufficient. As citizens of the world, we are entitled to all our rights. It is also an inadequate justification to assert that the *Canadian Charter* and other domestic human rights acts overlap the human rights recognised by international treaties and therefore legislative implementation is unnecessary. In the first place, the international crimes created by treaty undoubtedly overlap existing offences within the *Criminal Code*, yet Parliament still enacted them.

Secondly, the suggestion that Canadian human rights laws already encompass the extant international human rights protections,⁸ as the Canadian government is wont to do in its mandatory periodic reports to the United Nations Human Rights Committee,⁹ is an inadequate answer to a Canadian who claims to be the victim of abuse. He or she is surely entitled to expect a definitive judgment of his or her rights in a Canadian court. At present, there is no way within Canada to determine whether in a particular

⁶ *Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 326 at 347 [hereinafter *Labour Conventions Case*].

⁷ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Canadian Charter*].

⁸ Limited, of course, to those found in treaties to which Canada is a party.

⁹ See A.F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 53-60, and S.J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 *Can. Bar Rev.* 534 at 538.

instance a Canadian may have greater rights by international standards than by Canadian laws.¹⁰

The inability of Canadians to vindicate their international treaty rights because they have not been legislatively implemented within Canadian law is not limited to the field of human rights. It simply yet sharply illustrates a growing constitutional problem. The requirement of domestic implementation by legislative action of the contents of international treaties was not such an impediment to Canadian citizens when it was implicitly adopted with the *Constitution Act, 1867*¹¹ or even when confirmed by Lord Atkin as “well-established” in 1937. In those times, the bulk of treaties compared to today was small and dealt principally with inter-state affairs. Treaties on peace and friendship, defense arrangements and diplomatic relations are typical examples.

By contrast, contemporary treaties are far greater in number and increasingly concern intra-state affairs. In addition to criminal responsibility and human rights, already mentioned, international conventions now also govern such matters as identity and citizenship, health, food, education, property, resources, pollutants, the environment and the movement of people and goods, as well as all forms of transportation and communications. By and large, most aspects of the daily lives of Canadians are now the subject of international treaties. We are truly international citizens. But, given the rapidly increasing flow of treaties which require legislative action, either federally or provincially or both,¹² the number that may linger unimplemented in Canada is likely to grow substantially. Thus the predicament of unimplemented treaties, though not new, is now a significant concern.

¹⁰ As a result, Canadian claimants are forced to pursue the inadequate international avenues for redress of their international rights, such as petitioning the UN Human Rights Committee under the ICCPR.

¹¹ (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No 5.

¹² In the *Labour Conventions case*, *supra* note 6 at 351, Lord Atkin also famously said:
“For the purposes of ... the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.

Since the legislatures have not satisfactorily fulfilled their role as scrutineers and implementers of Canada's treaty obligations, the judiciary has been called upon to protect Canadians' international treaty rights. That task has proved none too straightforward. The cases display a great array of views and a high degree of confusion¹³ about the impact of international treaties binding on Canada but not implemented domestically by legislation. The object of this paper is to cast some light on this confusion and uncertainty. In particular, it will seek to induce a principled approach to the use of unimplemented treaties from the more recent judgments of the Supreme Court of Canada that have involved international law.

Since the Canadian Constitution barely mentions international law, the courts have looked to British constitutional practice for guidance. Very frequently the starting point for their judgments has been the famous statement of Lord Atkin on behalf of the Judicial Committee of the Privy Council in *Chung Chi Cheung v. The Queen*:¹⁴

The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes or finally determined by their tribunals.¹⁵

The simplicity of this statement belies its uncertainty in practical application. It does not adequately explain when applicable international law will be overridden by conflicting cases and statutes. Since legislation takes precedence over caselaw in the event of conflict or contradiction, the issue of

¹³ See the case comment of S.J. Toope, "Re Reference by Governor on Council Concerning Certain Questions Relating to Secession of Quebec from Canada" 161 D.L.R. (4th) 385. (1999) 93 *A.J.I.L.* 519 at 523, note 25; his keynote address, "Canada and International Law" (1998) 27 *Proc. Can. Council Int. L.* 33; and "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 *U.N.B.L.J.* 11 at 14. Even so the Supreme Court has acknowledged in a line of cases at least since *Watkins v. Olufson*, [1989] 2 S.C.R. 750, that the courts have a responsibility, secondary to the legislatures, to adapt Canadian law to reflect changing social, moral and economic conditions. This responsibility includes, in maritime law at least, consideration, *inter alia*, of the effects of proposed changes upon Canada's treaty obligations: see *Ordon v. Grail*, [1998] 3 S.C.R. 437 at 494-495.

¹⁴ [1939] A.C. 160 [hereinafter *Chung*].

¹⁵ *Ibid.*, at 168.

greatest tension over the application of international law arises in the face of a contrary statute. That is also the aspect on which this paper will concentrate, first by discussing the principles of statutory interpretation that are relevant when international law is involved in a case, and then by addressing the more particular issues arising from the interaction of statutes and unimplemented treaties.

I. PRINCIPLES OF STATUTORY INTERPRETATION WITH REFERENCE TO INTERNATIONAL LAW

Canadian courts have long recognized it is their duty to seek to interpret statutes in conformity with international law. This principle obtains whether the source of international obligation is customary international law or treaty, and whether the treaty has been implemented or not. In 1968 Pigeon J. spoke in the Supreme Court of a “rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law.”¹⁶ In *National Corn Growers Assn. v. Canada (Import Tribunal)*¹⁷ Gonthier J. observed that “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.”

In 1998, in *Ordon Estate v. Grail*,¹⁸ Iacobucci and Major JJ., writing for the Court, stated:

Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada’s obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations [...].¹⁹

¹⁶ *Daniels v. White and The Queen*, [1968] S.C.R. 517 at 541. See also *C.A.P.A.C. v. CTV Television Network*, [1968] S.C.R. 676.

¹⁷ [1990] 2 S.C.R. 1324 at 1326 [hereinafter *National Corn Growers*].

¹⁸ *Supra* note 10.

¹⁹ *Ibid.*, at 526.

The following year Justice L'Heureux-Dubé made the same point in her judgment for the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*²⁰ by quoting approvingly from *Driedger on the Construction of Statutes*:

[T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred.*²¹

This firmly rooted principle of statutory interpretation may also be derived from Lord Atkin's statement in the *Chung case*²² about the status of international law domestically. Courts will "treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes...." International law and domestic legislation coexist harmoniously so far as possible, and only if they are too inconsistent to do so does the latter overreach the former.

The rationale for this principle is not hard to appreciate. Its solidity lies in the presumption that every legislature intends to act in compliance with international law and in every judge's purpose to uphold the law, whether national or international. States are bound to fulfill their treaty obligations and may not invoke domestic law as justification for their failure to do so.²³ Courts will not purposefully place the state in breach of international law by their decisions if such a consequence can be avoided.

The courts' respect for international law is bolstered by at least two other principles of statutory interpretation. Statutes, the Supreme Court has said, are to be interpreted in context. This is the "modern" method of interpretation advocated by Justice L'Heureux-Dubé in *Hills v. Canada*

²⁰ [1999] 2 S.C.R. 817 [hereinafter *Baker*].

²¹ *Ibid.*, at 861, quoting E.A. Driedger, *Driedger on the Construction of Statutes*, 3d ed. by R. Sullivan (Markham: Butterworths, 1994) at 330 [emphasis added by L'Heureux-Dubé J.]. This principle was reiterated once more in the Supreme Court by L'Heureux-Dubé J. in the recent case of *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at para. 30. See also P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1991) at 308.

²² *Supra* note 14.

²³ *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331, arts. 26, 27.

(*Attorney General*)²⁴ in 1988 and discussed with great care and length in 2747-3174 *Québec Inc. v. Quebec (Régie des permis d'alcool)*²⁵ in 1996. In the latter case, she adopted the reformulation offered in *Driedger on the Construction of Statutes*:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids.²⁶

Since 1996, a line of Supreme Court cases²⁷ has approved this contextual approach to statutory interpretation. In addition, as pointed out in *Gladue*, the *Interpretation Act*²⁸ importantly provides: “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.”²⁹

From these propositions it follows that where the context of the legislation includes a treaty of other international obligation, the statute should be interpreted in light of it. For example, in *Re Canada Labour Code*³⁰ the Supreme Court was invited to apply the *State Immunity Act*³¹ which, consistent with current customary international law, grants only restrictive immunity to states for their activities. Mr. Justice La Forest stated for the majority: “the proper approach to characterizing state activity is to view it in its entire context.”³²

²⁴ [1988] 1 S.C.R. 513.

²⁵ [1996] 3 S.C.R. 919.

²⁶ *Ibid.*, at 1005-1006.

²⁷ See *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 and *R. v. Gladue*, [1999] 1 S.C.R. 688 [hereinafter *Gladue*].

²⁸ R.S.C. 1985, c. I-21.

²⁹ *Ibid.*, s. 12. Provincial Interpretation Acts read to the same effect. See the reference to the Ontario Act s. 10 in *Re Rizzo & Rizzo Shoes Ltd.*, *supra* note 27 at 41.

³⁰ [1992] 2 S.C.R. 50.

³¹ R.S.C. 1985, c. S-18.

³² *Re Canada Labour Code*, *supra* note 30 at 76.

In addition to employing international law sources where the context demands it, the Supreme Court has now firmly determined they shall also be interpreted according to international principles. It would seem obviously sensible that where a statute implements a treaty, the intent of the legislature is to give effect to the terms of the treaty and hence their meaning should be determined according to international law's principles of interpretation. Those principles are readily accessible, having been codified in the *Vienna Convention on the Law of Treaties*.³³

In the past, courts were likely to interpret statutes involving treaties according to the domestic rules of statutory interpretation. *Schavernoch v. Foreign Claims Commission*³⁴ exemplified this approach. The appellant sought payment of a claim under regulations made pursuant to an act that implemented a treaty for the lump sum settlement of Canadian claimants. Absent some ambiguity in the regulations which might have permitted recourse to the underlying treaty, the Supreme Court refused to consider it. Estey J. said: "Here the regulations fall to be interpreted according to the maxims of interpretation applicable to Canadian domestic law generally."³⁵

A more enlightened approach has recently suffused Supreme Court practice. As Bastarache J. stated straightforwardly in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*:³⁶

Since the purpose of the [Immigration] Act incorporating Article IF(c) [of the Convention Relating to the Status of Refugees] 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 IF(c) in domestic law...³⁷

³³ *Supra* note 23, arts. 31-32.

³⁴ [1982] 1 S.C.R. 1092.

³⁵ *Ibid.*, at 1100.

³⁶ [1998] 1 S.C.R. 982.

³⁷ *Ibid.*, at 1019-1020.

In confirming the duty of the Court to give effect to the treaty and not simply the statute, Justice Bastarache declared that both the treaty provisions themselves and the international rules for their interpretation should be employed. He went on to enumerate those rules by reproducing them as codified in the *Vienna Convention on the Law of Treaties*,³⁸ notwithstanding that, unsurprisingly, the treaty itself has not been implemented in Canada.

Even before these clear directions from Bastarache J., the Supreme Court had become used to referring to relevant treaties and other international legal sources to interpret domestic statutes. In *National Corn Growers*,³⁹ Gonthier J. reached beyond Estey J.'s very restrictive approach in *Schavernoeh v. Foreign Claims Commission*.⁴⁰ He admitted the particular treaty to the Court's scrutiny in all circumstances, not just when the text of the statute displayed an ambiguity. As he logically pointed out: "[a]s a latent ambiguity must arise out of matters external to the text to be interpreted, such an international agreement may be used ... at the preliminary stage of determining if an ambiguity exists."⁴¹

Pressing beyond reference simply to the treaty itself, La Forest J., in a trio of cases, employed a wide variety of international resources to help him interpret related statutes. In *R. v. Parisien*,⁴² he observed: "[i]n interpreting this undertaking, it must, as in the case of other terms in international agreements, be read in context and in light of its object and purpose as well as in light of the general principles of international law."⁴³ In *Canada (Attorney General) v. Ward*,⁴⁴ the Supreme Court had to determine a refugee's claim under the *Immigration Act*⁴⁵ which, *inter alia*, gives effect in Canada to the Refugee Convention.⁴⁶ To do so, Mr. Justice La Forest made very extensive use of the drafting history of the Convention and commentaries upon it. He drew heavily upon the *travaux préparatoires*, even

³⁸ *Supra* note 23.

³⁹ *Supra* note 17.

⁴⁰ *Supra* note 34.

⁴¹ *Supra* note 17 at 1372.

⁴² [1988] 1 S.C.R. 950.

⁴³ *Ibid.*, at 958. La Forest J. cited as authority for this approach art. 31 of the Vienna Convention on the Law of Treaties, *supra* note 25.

⁴⁴ [1993] 2 S.C.R. 689 [hereinafter *Ward*].

⁴⁵ R.S.C. 1985, c. I-2.

⁴⁶ *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 150.

citing individual state's positions, and upon the practice under the Convention as endorsed by states in the U.N. High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status. He also made wide reference to scholarly writings, both Canadian and international, on the Convention, as well as analysing numerous other cases, mostly Canadian but some foreign, about the status of refugees. His judgment, for the Court, made a rich use international legal sources to nourish the interpretation of the statute. It stands out as the example for all courts to follow in the future.

In the third case, *Thomson v. Thomson*,⁴⁷ La Forest J. noted the approach he had established in the *Ward* case and added:

It would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended. Not surprisingly, then, the parties [to the case] made frequent reference to this supplementary means of interpreting the Convention [on Child Abduction], and I shall also do so.⁴⁸

Indeed, it seems odd that the courts should ever have thought otherwise. Having now admitted as much, it is only reasonable that all the supplementary sources and extrinsic aids permitted by international law to interpret a treaty should be admitted and used in a national court seized with the task of interpreting a statute that applies the treaty.

⁴⁷ [1994] 3 S.C.R. 551. See also *Re Canada Labour Code*, *supra* note 30.

⁴⁸ *Thomson v. Thomson*, *ibid.*, at 578.

II. THE USE OF UNIMPLEMENTED TREATIES IN THE INTERPRETATION OF STATUTES

Much has been written about the influence of international human rights covenants and treaties in Canadian law.⁴⁹ Certainly since *Slaight Communications Inc. v. Davidson*,⁵⁰ and probably before, the Supreme Court has explicitly accepted that the *Canadian Charter* should be interpreted in light of Canada's international human rights obligations. In that case, Dickson C.J., in his majority judgment, reiterated what he has said in dissent in *Ref. Re Public Service Employee Relations Act*.⁵¹

The content of Canada's international human rights obligations is [...] an important indicia of the meaning of the "full benefit of the Charter's protection." I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.⁵²

Using this general statement, he enlarged on the particular relationship between international law and the *Canadian Charter*:

[...] Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or

⁴⁹ See, for example, Bayefsky, *supra* note 9; W.A. Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed., (Toronto: Carswell, 1996); J.E. Claydon, "International Human Rights and the Interpretation of the Canadian Charter of Rights and Freedoms", (1982) 4 *Sup. Ct. L. Rev.* 287; D. Turp, "Le recours au droit international aux fins de l'interprétation de la Charte canadienne des droits et libertés: un bilan jurisprudentiel", (1984) 18 *R.J.T.* 353; A.M. Haywood, "International law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications", (1985) 23 *U.W.O. L. Rev.* 9; M. LeBel, "L'interprétation de la Charte canadienne des droits et libertés au regard du droit international des droits de la personne", (1988) 48 *R. du B.* 743.

⁵⁰ [1989] 1 S.C.R. 1038 [hereinafter *Slaight Communications*].

⁵¹ [1987] 1 S.C.R. 313.

⁵² *Slaight Communications Inc. v. Davidson*, *supra* note 50 at 1056.

under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.⁵³

The principle is thus established that Canada's international human rights obligations, whether of customary or treaty law origin, should inform and nourish the interpretation of the *Canadian Charter of Rights and Freedoms*. This has been achieved even though the *Canadian Charter* makes no reference to international human rights treaties⁵⁴ and Canadian courts have not been much concerned to discuss whether it does or does not implicitly implement them.⁵⁵ The question that remains is how far this accepted principle may be generalised to other fields of international treaty law and other areas of domestic legislation? Is the judicial approach peculiar to the protection of human rights, particularly because the *Canadian Charter* is not just an ordinary statute but is one of the constitutional documents of the country? Or is the use of international legal resources in *Canadian Charter* jurisprudence the leading edge of a more general approach to the curial admission and employment of unimplemented treaty obligations?⁵⁶

The practice of the Supreme Court outside of *Canadian Charter* cases has been limited. Cases before the adoption of the *Canadian Charter* in 1982 were mostly antagonistic towards unimplemented treaties. The early case of *Re Arrow River and Tributaries Slide and Boom Co.*⁵⁷ was one of the more supportive ones. Faced with a provincial act allowing for tolls on the use of the Arrow river and its tributaries in apparent contradiction to the unimplemented Webster-Ashburton Treaty, all three Supreme Court justices who wrote opinions seriously considered the treaty and attempted to construe away the conflict with the statute. In the end, two justices did so by interpreting the treaty, in different ways, as not affecting the statute.⁵⁸ Only

⁵³ *Ibid.*, at 1056-1057. See also *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 749-755.

⁵⁴ See the discussion in Bayefsky, *supra* note 9 at 63. She also makes a strong argument from legislative history and official representations that much of the *Canadian Charter* does implement many of Canada's treaty obligations respecting international human rights: *ibid.*, at 33-63.

⁵⁵ See Schabas, *supra* note 49 at 47.

⁵⁶ See W.A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada", (2000) 74 *Can. Bar Rev.* 174 at 183.

⁵⁷ [1932] S.C.R. 495 [hereinafter *Re Arrow River*].

⁵⁸ Compare with the judgment of Riddell J.A. in the Ontario Court of Appeal, (1931) 66 O.L.R. 577, in which he used the same interpretive approach to reach a different result, reading down the statute in face of the treaty.

Lamont J. saw an insurmountable conflict in which the treaty had to give way to the statute for lack of legislative implementation.

However, in 1956, in *Francis v. The Queen*,⁵⁹ the Supreme Court stepped back from its constructive approach in *Re Arrow River*. Contenting itself that the Jay Treaty had not been implemented by legislation and was not a Peace Treaty, which, it was supposed, might not need legislative implementation, the Court refused to consider the treaty further. Thus the legislation respecting customs duties was applied without any reference to the particular rights of the Native applicant under the Jay Treaty.

The “Laskin Court” of the 1970s was of the same mindset. In *MacDonald and Railquip Enterprises Ltd. v. Vapor Canada Ltd.*,⁶⁰ Chief Justice Laskin discussed the constitutional process and need for certainty of implementation of a treaty, without any comment on the relevance of the unimplemented treaty before him. In *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*⁶¹ the Supreme Court was invited, *inter alia*, to interpret the *Broadcasting Act*⁶² in light of the Inter-American Radio Communications Convention of 1937. Laskin C.J. refused, saying: “I do not find any ambiguity that would require resort to the Convention, which is, in any event, nowhere mentioned in the *Broadcasting Act*, and certainly the convention *per se* cannot prevail against the express stipulations of the Act.”⁶³

Chief Justice Laskin’s attitude was shared by Estey J. in *Schavernoch v. Foreign Claims Commission*⁶⁴ in which the interpretation of regulations to disperse funds from a foreign claims settlement, made under the *Appropriation Act No. 9, 1966*,⁶⁵ was in issue. Even though the Act and

⁵⁹ [1956] S.C.R. 618.

⁶⁰ [1977] 2 S.C.R. 134.

⁶¹ [1978] 2 S.C.R. 141 [hereinafter *Capital Cities Communications*].

⁶² R.S.C. 1970, c. B-11, as rep. by S.C. 1991, c. 11.

⁶³ *Capital Cities Communications*, *supra* note 61 at 173. Laskin C.J. also held that the Convention was not impliedly implemented by the *Radio Act*, R.S.C. 1970, c. R-1, as rep. by *Radiocommunications Act*, R.S.C. 1985, c. R-2.

⁶⁴ *Supra* note 34.

⁶⁵ S.C. 1966, c. 55.

regulations very probably implemented the treaty settling the foreign claims,⁶⁶ Estey J. had no time for them at all. He stated:

If one could assert an ambiguity, either patent or latent, in the Regulations it might be that a court could find support for making reference to matters external to the Regulations in order to interpret its terms. Because, however, there is in my view no ambiguity arising from [...] these Regulations, there is no authority and none was drawn to our attention in argument entitling a court to take recourse either to an underlying international agreement or to textbooks on international law with reference to the negotiation of agreements or to take recourse to reports made to the Government of Canada by persons engaged in the negotiation referred to in the Regulations.⁶⁷

The need to discover an ambiguity in the legislative text as a prerequisite to considering the relevance of a treaty was often asserted by the courts, in apparent disregard of their own principle that statutes should be interpreted to conform with international law so far as possible. But there was some resistance to the prevalence of this attitude. Pigeon J., contrary to Laskin C.J.'s majority judgment in *Capital Cities Communications*, expressed a strong dissent:

I cannot agree that [Canadian Radio-Television] Commission may properly issue authorizations in violation of Canada's treaty obligations. Its duty is to implement the policy established by Parliament. While this policy makes no reference to Canada's treaty obligations, it is an integral part of the national structure that external affairs are the responsibility of the federal Government. It is an oversimplification to say that treaties are of no legal effect unless implemented by legislation.⁶⁸

Indeed it is an oversimplification to say treaties binding on Canada are of no legal effect unless implemented by legislation when they concern matters within domestic Canadian law. Pigeon J. considered "judicial notice ought to be taken that, by virtue of the Convention the appellants had a legal interest

⁶⁶ Estey J. recognised that the lower court thought so but did not comment himself: *Schaveroch v. Foreign Claims Commission*, *supra* note 34 at 1095.

⁶⁷ *Ibid.*, at 1098.

⁶⁸ *Capital Cities Communications*, *supra* note 61 at 188.

entitled to protection.” He held “the Commission could not validly authorize an interference with this interest in violation of the Convention signed by Canada.”⁶⁹ This would have been a far-reaching application of an unimplemented treaty had it commanded the respect of the majority. Fortunately the Supreme Court’s decisions of the 1980s and 1990s moved away from its opinions, represented by Laskin C.J., in the 1970s. Later cases have begun, hesitantly, to dispel the “over-simplification” of the Court’s treatment of unimplemented treaties, with which Pigeon J. charged it.

No doubt changes in the membership of the Supreme Court from the 1970s to the 1980s made a difference in judicial attitudes. Even so, there can be no escaping the ferment created in the courts by the introduction of the *Canadian Charter of Rights and Freedoms* in 1982. It forced courts, and the Supreme Court in particular, into the midst of Canadian social policy. Given the breadth of the human rights principles contained in the *Canadian Charter* and the necessity of balancing their application with the needs of a free and democratic society, the Supreme Court has come close to creating Canadian social policy. Inevitably its decision-making authority had to be exercised over a much wider range of subject matter and materials, and, in its role of interpreter of the *Canadian Charter*, it has had to seek, review and utilize a greatly expanded range of legal sources. The Court’s readiness to use what in previous times would have been regarded as inadmissible extrinsic evidence of a statute’s purpose and of the legislature’s intent has clearly spilled over from its decisions about the *Canadian Charter* into other cases on its docket, including some involving international law.

Early in the 1980s the Supreme Court heard the unusual case of *Zingre v. The Queen*.⁷⁰ It involved a request by Switzerland pursuant to an extradition treaty to a Manitoba court to issue a commission authorizing two Swiss investigating judges to take testimony in Canada for the possible prosecution of three Swiss nationals for crimes committed in Manitoba. In a judgment for the whole of the Supreme Court,⁷¹ Dickson J. noted that the argument in favour of granting the order rested on the treaty:

⁶⁹ *Ibid.*, at 189.

⁷⁰ [1981] 2 S.C.R. 392.

⁷¹ The case was decided the year before the *Canadian Charter* was adopted while the Supreme Court was still led by Laskin C.J. Yet it is interesting to note that Laskin C.J. concurred in the judgment of Dickson J. who went on to be the Chief Justice in the formative years of the Court’s views of the *Canadian Charter* in the 1980s.

In responding affirmatively to the request which has been made the Court will be recognizing and giving effect to a duty to which Canada is subject, by treaty, under international law. It is common ground that the treaty applies. [...] It is the duty of the Court, in interpreting the 1880 Treaty and s. 43 of the Canada Evidence Act to give them a fair and liberal interpretation with a view to fulfilling Canada's international obligations. [...] The Treaty of 1880 places Canada under a specific obligation to comply with the Swiss request. If Canada denies the Swiss request it will be in breach of its international obligations.⁷²

Notably, Justice Dickson did not enquire about the unimplemented status of the treaty; he simply applied it. Indeed, as apparent authority, he reported:

As the Canadian Department of External Affairs stated in a note to the Swiss Federal Policy Department [...] "it is a recognized principle of international customary law that a state may not invoke the provisions of its internal law as justification for its failure to perform its international obligations."⁷³

Perhaps in future more Canadian courts, and the Supreme Court in more cases, will recognize this verity. Then the role of unimplemented treaties might be better articulated than it has been so far.

Two other cases in which the Supreme Court made reference to international law to interpret statutes are *Bell Canada v. Quebec (CSST)*⁷⁴ and *Re Canada Labour Code*.⁷⁵ Writing for the whole Court in the *Bell Canada* case, Beetz J. observed:

What is perhaps the best argument [...] comes from the very wording of the international documents which are the basis of contemporary legislation on occupational health and safety.⁷⁶

⁷² *Zingre v. The Queen*, *supra* note 70 at 409-410.

⁷³ *Ibid.*, at 410.

⁷⁴ [1988] 1 S.C.R. 749 [hereinafter *Bell Canada*].

⁷⁵ *Supra* note 30.

⁷⁶ *Bell Canada*, *supra* note 74 at 806.

He cited as evidence for this observation the Preamble to the *Constitution of the International Labour Organization*⁷⁷ and Article 7 of the *International Covenant on Economic, Social and Cultural Rights*,⁷⁸ both of which are binding on Canada.

Re Canada Labour Code concerned the proper interpretation of the *State Immunity Act*.⁷⁹ La Forest J. based his opinion on the view that the Act was “a codification that is intended to clarify and continue the theory of restrictive immunity, rather than to alter its substance.”⁸⁰ Thus he read the Act as giving effect to the customary international law of restrictive immunity. In neither case did the justices choose to explain the reasons why they relied on international law. They were both, no doubt, correct in their observations but it would have been helpful if they had articulated the basis for them, even if that were only to reaffirm the principle that, so far as possible, statutes should be interpreted to conform with international law. The cases stand, however, as examples fulfilling that expectation.

The fullest deliberation to date on the use of international law, and unimplemented treaties in particular, is to be found in the 1999 case of *Baker v. Canada (Minister of Citizenship and Immigration)*.⁸¹ Ms. Baker, a Jamaican citizen, entered Canada in 1981 and had four Canadian-born children before she was ordered to be deported in 1992. She applied for permanent residency based on humanitarian and compassionate grounds (H&C), pursuant to the *Immigration Act*,⁸² section 114(2). Her application having been denied, she appealed on several grounds, including the argument that the immigration officer’s discretion under section 114(2) had been improperly exercised because it did not take appropriate account of the interests of her Canadian children.

⁷⁷ 15 U.N.T.S. 40.

⁷⁸ *Supra* note 4.

⁷⁹ *Supra* note 31.

⁸⁰ *Supra* note 30 at 73.

⁸¹ *Supra* note 20. See also K. Knop, “Here and There: International Law in Domestic Courts”, (2000) 32 *N.Y.U.J. Int’l. L. & Pol.* 501.

⁸² *Supra* note 45.

In allowing the appeal, the majority opinion of Justice L’Heureux-Dubé argued to an important conclusion. She started from the premise that the *Immigration Act* required the immigration officer to exercise the discretionary power based upon compassionate and humanitarian considerations in a reasonable manner. She continued: “Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally.”⁸³ As a result, a reasonable exercise of the statutory power in her opinion required close attention to the interests of the appellant’s children because children’s rights “are central humanitarian and compassionate values in Canadian society.”⁸⁴ Evidence for these contextual values were to be found, she stated, in the purposes of the Act, in international instruments and in departmental guidelines on making H&C decisions.

When Justice L’Heureux-Dubé examined the evidence of international instruments, she cited the *Convention on the Rights of the Child*⁸⁵ as a treaty ratified by Canada. Noting that it has not been implemented by legislation and therefore has no direct application within Canadian law, she continued: “Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”⁸⁶ Finding that “[t]he values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future,”⁸⁷ she determined that the immigration officer’s decision, because it had minimized the interests of the children, was in conflict with the H&C values of the Act. It was therefore unreasonable and could not stand.

The sum of Justice L’Heureux-Dubé’s reasoning constitutes a full-scale demonstration of reference, even deference, to unimplemented but binding treaties as a positive aid to statutory interpretation. This goes beyond the principle that courts should take care to interpret statutes in accordance

⁸³ *Baker, supra* note 20 at 860.

⁸⁴ *Ibid.*

⁸⁵ *Supra* note 5.

⁸⁶ *Baker, supra* note 20 at 861.

⁸⁷ *Ibid.*

with international law where possible. Justice L'Heureux-Dubé's judgment demands that courts make affirmative use of international law, and ratified treaties in particular, in the interpretation of domestic statutes.

Her opinion cannot be sidelined on the grounds that it only affects judicial review of the discretionary exercise of administrative powers. Justice L'Heureux-Dubé was careful to discuss whether the approach of the immigration officer was "within the boundaries set by the words of the statute."⁸⁸ She was not second-guessing his decision; she was interpreting the statute that gave him the power to decide. In addition, it appears to make no difference whether the legislation being interpreted is federal or provincial. Justice L'Heureux-Dubé made no reference to the fact that the *Immigration Act* happens to be a federal statute. There is, it seems, no more encroachment on the legislative authority of the Provinces than there is on the powers of the federal Parliament.

Yet Justice L'Heureux-Dubé's reasoning did not meet the approval of the whole Court.⁸⁹ Iacobucci J. wrote:

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. [...] 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.⁹⁰

As this article has shown, Iacobucci J. is largely correct that L'Heureux-Dubé's "approach is not in accordance with the Court's jurisprudence"⁹¹ on the use of international law. She has definitely pushed the Court beyond the resistance to the use of unimplemented treaties that it showed in the 1970s

⁸⁸ *Ibid.*, at 860.

⁸⁹ The Court was unanimous in the decision but divided 5-2 over L'Heureux-Dubé J.'s opinion about the role of international law.

⁹⁰ *Supra* note 20 at 865-866.

⁹¹ *Ibid.*, at 865.

and the tentative references for interpretive assistance made in the 1980s and early 1990s. Viewed from this perspective, Justice Iacobucci's minority view is a rearguard defence of an attitude that Justice L'Heureux-Dubé has carried the majority of the Court beyond.

Whether L'Heureux-Dubé J.'s approach will lead to the achievement indirectly of what cannot be achieved directly, as charged by Iacobucci J., remains to be seen. Certainly, that was not her intent. She recognised that treaties "are not part of Canadian law unless they have been implemented by statute,"⁹² citing *Francis v. The Queen*⁹³ and *Capital Cities Communications Inc.*⁹⁴ She was careful to confine her references to the *Convention on the Rights of the Child*⁹⁵ to its values and principles, not its specific provisions. Quoting Driedger on the Construction of Statutes, she emphasized with italics the sentence that reads: "In so far as possible, therefore, interpretations that reflect these values and principles are preferred."⁹⁶

CONCLUSION: PROSPECTS FOR THE USE OF UNIMPLEMENTED TREATIES

The judgment in *Baker* has carried Canadian courts into new territory. The role of unimplemented treaties is better defined. They have an affirmative function in statutory interpretation⁹⁷ and may no longer be ignored as of no effect. Yet all this should cause no surprise. What is surprising is that the Supreme Court has taken so long to reach this position. It is more than twenty years since Pigeon J. charged: "[i]t is an oversimplification to say that treaties are of no legal effect unless implemented by statute."⁹⁸ Although many refinements about the impacts of unimplemented treaties will have to be made in subsequent cases, the

⁹² *Ibid.*, at 861. L'Heureux-Dubé J. also left open the issue whether an unimplemented treaty can give rise to a legitimate expectation that rights expressed in the treaty must be taken in account in the execution of a discretionary power: *ibid.*, at 841.

⁹³ *Supra* note 59.

⁹⁴ *Supra* note 61.

⁹⁵ *Supra* note 5.

⁹⁶ See the whole passage *supra* at note 21.

⁹⁷ And probably also in determining the contents and meaning of the common law and the *Civil Code of Quebec*, S.Q. 1991, c. 64, though they have not been addressed here.

⁹⁸ *Capital Cities Communications*, *supra* note 61 at 188.

prospects may be projected from the same principles of statutory interpretation that foreshadowed these developments so far.

The three principles of statutory interpretation with reference to international law, discussed previously, add up to an obligation on the courts to pay much more attention to international norms, whether customary or treaty, and whether the treaty has been implemented or not. The first principle constrains a court to interpret a statute in conformity with international law, so far as possible. It does not require the court to pay heed to an international obligation, such as an unimplemented treaty, that conflicts with the statute, but it does demand that the court gives due consideration to the treaty to determine that an interpretation of the statute consistent with the treaty cannot be achieved.

Principle number two requires that every statute be construed in its context. When the context involves international elements and sources, they must be consulted. It does not matter whether the international legal sources are binding norms or not for Canada. It may be that those that are binding, like unimplemented treaties, have greater weight depending on their relevance to the statute and the contextual purpose for consulting them. As Dickson C.J. said in *Slaight Communications*,⁹⁹ in interpreting the *Canadian Charter*, “the fact that a value has the status of an international human right, either in customary law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.”¹⁰⁰ But, in addition, as Dickson C.J. indicated in his reasons¹⁰¹ in the earlier case of *Ref. Re Public Service Employee Relations Act*,¹⁰² all norms of international law provide a relevant and persuasive source for interpretive purposes.¹⁰³

The third interpretive principle explains the range of international sources that may be consulted in order to determine the meaning and effect to be ascribed to relevant international norms. The former conservative approach towards extrinsic evidence has been abandoned in favour of reference to a very broad range of sources. For instance, the Supreme Court

⁹⁹ *Supra* note 50.

¹⁰⁰ *Ibid.*, at 1057.

¹⁰¹ Which he relied on in *Slaight Communications*.

¹⁰² *Supra* note 51.

¹⁰³ See the comments of Schabas, *supra* note 49 at 37.

has referred, where relevant, to binding and non-binding treaties and their *travaux préparatoires*, to United Nations resolutions and other documents, such as guidelines for practice under a treaty, to other states' and foreign courts' application of a treaty, and to scholarly commentaries about related international law. Reference to all of these sources is consistent with, indeed necessary for, a contextual approach to statutory interpretation. In addition, it is mandated by the international rules of treaty interpretation, as codified in the *Vienna Convention on the Law of Treaties*,¹⁰⁴ and now adopted in Canadian courts as the appropriate rules of interpretation in a case involving international treaty law.

The combined application of these three principles places a heavy duty on a court to find an interpretation of a statute that conforms with Canada's obligations under an unimplemented treaty after a thorough consideration of all international, as well as domestic, legal sources relevant to the context of the statute. Prior to *Baker*, the practice of the Supreme Court did not appear to recognize the principles of statutory interpretation with reference to international law that it itself has wrought. Justice L'Heureux-Dubé's judgment in *Baker* is a much fuller construction of the relevance of unimplemented treaties than any of the tentative references to them in previous cases. Her judgment is significant in several aspects. It espoused a contextual approach to statutory interpretation and thus drew upon a relevant but unimplemented treaty along with references to other international instruments. It justified this approach on the principle that an interpretation of a statute consistent with international law is to be preferred. Indeed, the judgment went further than verifying that the interpretation of the statute was not inconsistent with the treaty. It made affirmative use of the principles and values of the treaty to inform the statute's interpretation in context.

In conclusion, unimplemented treaty rights and obligations are attaining progressively more significance in Canadian courts. Formerly the courts typically treated unimplemented treaties as if they hardly existed and certainly as irrelevant to Canadian law. But, as has been shown, the Supreme Court has firmly moved from that position. Now the courts will use all available international law to inform the contextual interpretation of a Canadian law and will favour an interpretation consistent with a relevant binding, though unimplemented, treaty.

¹⁰⁴ *Supra* note 23.

The jurisprudence of the Supreme Court also hints that prospectively Canadian courts may adopt an even stronger role for unimplemented treaties, namely that Canadian law must be interpreted so as to be consistent with Canada's international legal obligations whenever possible. Such a position would endow binding treaties, whether implemented or not, with legal authority in Canadian law, unless overridden by directly conflicting legislation. This result would be completely appropriate to the needs of Canadians as citizens of the increasingly interdependent international community.