

The Global Picture – The Acknowledged Influence: Treaties and Conventions

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PROVISIONAL VERSION

Introduction

There is no doubt that Canadian law is being increasingly influenced by the international legal environment. In recent years, the globalization of international trade, environmental issues, defense, intellectual property, telecommunications, criminal law and human rights have all had an impact on Canadian law.

Canada is a party to approximately 4,000 international treaties and conventions in these areas and more.¹ For example, Canada has signed 11

* Dean, Faculty of Law, McGill University. I wish to acknowledge the assistance of received for the preparation of this paper from my research assistant Nicole Hogg.

¹ Discussion with representative of DFAIT Treaties Section, 6 November, 2000. NB: usually the terms ‘treaties’ and ‘conventions’ are synonymous and can be used interchangeably to mean instruments binding at international law concluded between international entities, regardless of their formal designation. At the specific level, ‘conventions’ usually involve multilateral treaties with a broad number of parties. They are frequently negotiated under the auspices of an international organization. The term ‘treaties’ usually refers to instruments made between states which are of a serious character – eg. Peace Treaties, Border Treaties, Extradition Treaties. ‘Agreements’ is generally used for less serious instruments, which are signed by representatives of government departments, but not subject to ratification. United Nations ‘Definition of key terms used in the UN Treaty Collection’, United Nations Treaty Collection: www.untreaty.un.org/English/guide.asp.

international conventions in relation to terrorism alone², and 48 agreements on the environment and sustainable development.³ Canada has also entered into 40 international instruments on human rights.⁴

Canadian legislators and courts are looking more and more to international law in creating and interpreting Canadian law.⁵ Canadian law is also influencing the progression of international law as other jurisdictions look to Canada in developing their own legal principles and procedures. Thus, The Honourable Mr Justice Gerard La Forest has said:

‘...our courts – and many other national courts – are truly becoming international courts in many areas involving the rule of law... Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.’⁶

I suggest that Canadian legislators should adopt an equally international perspective in drafting Canadian law. This is important, not

² Department of Foreign Affairs and International Trade, ‘Canada and the Fight Against International Terrorism’, online: www.dfait-maeci.gc.ca/english/foreignp/terrorism/anti-tle.htm.

³ This is the figure given as at 29 July 1998 by the Commissioner of the Environment and Sustainable Development (Minister of Public Works and Government Services Canada), *Database of Canada’s International Environmental Commitments* online: www.oag-bvg.gc.ca/domino/env_commitments.nsf.

⁴ This figure is accurate at least as at 1991. See Schabas, W. *International Human Rights Law and The Canadian Charter: A Manual for the Practitioner*, Ontario, Carswell, 1991, Appendix I. This figure is much higher if one adopts a broader definition of ‘human rights’ to include issues such as prohibition of land mines, which has traditionally come under the banner of disarmament.

⁵ For a discussion of the rather ‘unprincipled’ manner in which Canadian courts refer to international law, see Toope, S. ‘Canada and International Law: The Impact of International law on the Practice of Law in Canada’ in Canadian Council on International Law, *Proceedings of the 27th annual conference of the Canadian Council on International Law, Oct 15-17, 1998*, 33.

⁶ La Forest, G.V, ‘The Expanding Role of the Supreme Court of Canada in International Law’ (1996) 34 Can. Y.B. Int’l L. 89, at 100-101.

only so that Canada is seen as at the cutting edge of progressing international law, but also so as to ensure that Canadian legislation complies with the country's international legal obligations.

In this paper, I would like to discuss the recognized influence of international treaties and conventions on legislative drafting in Canada in the field of human rights, and some aspects of international human rights law which have not received such wide recognition in Canada's domestic legislation. I will also make some proposals for ways in which international human rights instruments could be better acknowledged and implemented in Canadian law, stemming in particular from the Australian approach to treaty-making. This approach is relevant to Canada, given that Australia also has a federal system of government and operates under the same legal principles in respect to incorporation of treaties and conventions into domestic law.

Part 1

The influence of international human rights treaties and conventions on legislative drafting in Canada

1.1 Introduction to the main international human rights instruments

As already mentioned, Canada has ratified a significant number of international human rights instruments. I think it is useful to briefly describe the most important of these instruments before looking at their implementation in Canadian legislation.

The four principal human rights documents are called, collectively, the International Bill of Rights. These documents are:

1. The centerpiece of international human rights law, the 1948 *Universal Declaration of Human Rights*⁷

⁷ G.A.Res. 217 (III), UN GAOR, 3rd Sess, Supp No 13, UN Doc A/810 at 71 (1948) [hereinafter *The Universal Declaration*].

(It should be noted that the Universal Declaration is a resolution of the United Nations General Assembly, and not a treaty between states, although it is now largely considered as customary international law.)

2. *The International Covenant on Civil and Political Rights*,⁸ which was adopted by the United Nations General Assembly in 1966 and came into force in 1976, usually referred to as the ICCPR.

The ICCPR, which deals with rights such as freedom of expression, religion and association, equality between men and women, the right to a fair trial, and minorities' rights, also created the Human Rights Committee to which States Parties are required to report regarding the execution of their obligations under the Covenant.

3. *The First Optional Protocol to the ICCPR*,⁹ which entered into force for Canada in August 1976, and which provides for complaints or communications by individuals directly to the Human Rights Committee in respect of alleged violations of ICCPR rights.
4. *The International Covenant on Economic, Social and Cultural Rights*,¹⁰ which was also adopted in 1966 and entered into force in 1976. The ICESCR deals with matters such as the right to work, the right to education and to an adequate standard of living, the right to form trade unions, and the right to take part in cultural life. Countries are required to report to the Committee on Economic, Social and Cultural Rights regarding their compliance with the Covenant.

A few other significant international instruments to which Canada is a party are:

⁸ (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47 [hereinafter the ICCPR].

⁹ Ibid

¹⁰ (1976) 993 U.N.T.S. 3, [1976] C.T.S. 46 [hereinafter, *The ICESCR*].

- The International Convention on the Elimination of All Forms of Racial Discrimination 1969 (CERD);¹¹
- The Convention on the Elimination of All Forms of Discrimination Against Women 1982 (CEDAW);¹²
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT);¹³ and
- The Convention on the Rights of the Child 1989 (CRC).¹⁴

1.2 Incorporation of international law into Canadian domestic law

In Canada, the ratification of international instruments by the executive (that is, the Governor-General in Council) does not, of itself, ensure that international law becomes part of Canadian law.¹⁵ Usually, legislation is required to specifically implement or ‘transform’ international law into Canadian law.¹⁶

In almost all cases, when Canada signs an international treaty it undertakes a positive obligation to ensure that its legislation gives effect to those treaties.¹⁷ However, the federal Parliament cannot go about

¹¹ (1969) 660 U.N.T.S. 195, [1970] C.T.S. 28

¹² G.A. Res A/34/46, UN GAOR, 34th Sess, Supp 46, p193.

¹³ G.A. Res A/39/51, UN GAOR, 39th Sess, Supp 51.

¹⁴ G.A. Res A/44/25, UN GAOR, 44th Sess, Supp 25.

¹⁵ This approach is different to that of the USA, France, the Netherlands and Germany, for example, whereby international law is automatically incorporated into the law of the land upon ratification of an international treaty.

¹⁶ It is also possible for the legislature to endorse the incorporation of international law into domestic law by implication, although this process is inherently problematic. See Schabas, *supra*, at 19.

¹⁷ For example, Article 2.2 of the ICCPR states that ‘each State party ... undertakes to take the necessary steps ... to adopt such legislative or other measures as may be

legislating on any area it likes, due to the operation of the federal system of government in Canada. While provincial governments are always consulted to some extent before entry into major human rights treaties (all ten provinces supported Canada's entry into the two International Covenants)¹⁸, if the Provinces do not wish to legislate to incorporate treaty obligations falling under provincial, rather than federal, jurisdiction, the federal Parliament cannot adopt legislation without risking a constitutional challenge.¹⁹ It is therefore important that Federal *and* provincial governments and Parliaments are equally committed to incorporating international instruments into Canadian law, and that adequate consultation takes place before entry into those treaties to ensure that Canada can fulfill its international commitments.

1.3 Some specific examples of the influence of international treaties and conventions on Canadian law

It is not a novel idea that Canadian laws should reflect international human rights standards. For example, Canada's abolition of slavery in 1793 should be viewed in accordance with the development in international standards at the time.²⁰

Nevertheless, unlike in other areas such as trade law, one has to search reasonably hard to find express examples of implementation of

necessary to give effect to the rights recognized in the present Covenant.' Article 2.1 of the ICESCR contains a similar provision.

¹⁸ Bayefsky, A. *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation*, Canada, Butterworths, 1992, at 50-53.

¹⁹ Federal legislation purporting to incorporate Canada's obligations under International Labor Organization Conventions was held to be unconstitutional by the Canadian Courts in 1935: *Canada (A.G.) v Ontario (A.G.) et al (Labour Conventions Case)*, [1937] 1 W.W.R. 299, [1937] A.C. 326 (P.C.)

²⁰ *An Act to Prevent the Further Introduction of Slaves and to Limit the Term of Contracts for Servitude within this Province* 1793 S.U.C. (2nd Sess) c7.

international human rights law in Canada. References to Canada's international obligations in the field of human rights have been much more indirect and cautious than in other areas.

(a) The Canadian Charter of Fundamental Rights and Freedoms

Probably the most obvious modern reflection of international human rights law can be found in the Canadian Charter of Fundamental Rights and Freedoms.²¹ As Justice Belzil has said, 'The Canadian Charter was not conceived and born in isolation. It is part of the universal human rights movement.'²²

Sections of the Canadian Charter that draw from international human rights law include:

- *Section 1* (the limitation clause). This section was directly inspired by similar provisions found in the Universal Declaration and the ICCPR.²³
- *Section 6(1)* (every citizen's right to enter, remain in and leave Canada). This was based on provisions in the Universal Declaration of Human Rights and the ICCPR which protect against arbitrary deprivation of nationality and the arbitrary denial of the right to enter one's own country.²⁴

²¹ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), c.11 [hereinafter the Charter].

²² *R v Big M Drug Mart* 5 D.L.R. (4th) 121, 9 C.C.C. (3d) 310. Justice La Forest (supra, at 91) has also commented that 'The Charter has become the instrument of choice in fostering compliance with international human rights law in Canada'.

²³ Bayefsky, supra, at 39-40.

²⁴ In 1983 the Ontario Court of Appeal interpreted this section of the Charter in light of Canada's international obligations, and specifically Art 9 of the ICCPR, and said that section 6(1) did not give a Nazi war criminal a right not to be extradited (*Queen v Rauca* (1983, 41 DLR (2nd) 22 5; (1984) 4 CCR 42, as cited in Schabas, supra, at 92.)

- *Section 8* (the right to protection against unreasonable searches and seizure). The Explanatory Notes to the Proposed Resolution on this provision specifically say it is derived in part from the ICCPR. Similar provisions are also found in the Universal Declaration.²⁵
- *Sections 11(a), (b), (g) (h) and (i)* (legal rights), which were new rights drawn from the ICCPR.²⁶
- *Sections 15(1)* (equality rights - protection of the Charter to unenumerated grounds of discrimination) *and 24(1)* (remedies for Charter violations). These rights were added by the Hays Joint Committee (which prepared the final version of the Charter) after a review of Canada's international obligations under the ICCPR and ICESCR.²⁷
- *Section 28* (equality between men and women), which was also directly influenced by the Universal Declaration, the CEDAW and the ICCPR.²⁸

International law has had a significant impact, not only on the specific wording of the Charter, but on interpretation of it by the Canadian Courts. Although the Charter does not expressly incorporate Canada's international treaty obligations (for example, by referring to them in the text or preamble of the document), it is uncontested that the Charter was intended to reflect those obligations. Accordingly, the Courts have not been shy in looking to international instruments and jurisprudence as an aid in interpreting the Charter.²⁹ As at 1990 Canadian Courts had cited

²⁵ Bayefsky, *supra*, at 41.

²⁶ *Ibid*, at 42.

²⁷ See *Ibid* at 44-46 and Schabas, *supra*, at 115-122.

²⁸ See *Ibid* at 46-47.

²⁹ Courts work generally from a presumption that Parliament and the legislatures do not intend to act in breach of Canada's international treaty obligations. Therefore, where there is no direct conflict between domestic legislation and international law, the courts will look to international instruments and the way those international

international human rights instruments and jurisprudence in nearly 150 cases involving interpretation of the Charter³⁰, and this number has grown over the last ten years.

(b) Other Canadian legislation that incorporates international human rights law

In addition to the Charter, Federal and provincial human rights legislation has drawn inspiration from international human rights instruments. For example, the *Canadian Human Rights Act*,³¹ Quebec's *Charter of Human Rights and Freedoms*³² and the Saskatchewan *Human Rights Code*³³ all implement international law, at least to some extent.³⁴ Ontario's *Human Rights Code*³⁵ explicitly refers to the Universal Declaration in its preamble.³⁶

obligations have been applied in other jurisdictions as a guide to interpretation of domestic legislation. See Schabas, *supra*, at 29.

³⁰ Schabas, *supra*, Appendix III

³¹ R.S.C. 1985 c. H – 6.

³² R.S.Q. 1977, c. C-12.

³³ S.S. 1979 c. S-24.1

³⁴ See representations made by the Canadian government to various UN Convention Committees, as cited in Bayefsky, *supra*, at 58-59.

³⁵ RSO 1980 c340

³⁶ 'Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the *Universal Declaration of Human Rights* as proclaimed by the United Nations ...' *ibid*, preamble.

Other examples of Canadian legislation that incorporates international human rights obligations include:

*Criminal Code 1985*³⁷ - The hate propaganda provisions (sections 318-320) were enacted to respect aspects of the International Convention on the Elimination of All Forms of Racial Discrimination. The offence of torture was also included to ensure compliance with the Torture Convention.³⁸

*Geneva Conventions Act 1985*³⁹ - This Act expressly incorporated the Four Geneva Conventions relating to the rights of the wounded and sick members of the armed forces, and the treatment of prisoners of war and civilians in times of war.

*Unemployment Insurance Act*⁴⁰ - The provisions regarding maternity benefits were amended in 1986 in order to ensure conformity with the Convention on the Elimination of Discrimination Against Women.⁴¹

*Immigration Act 1976*⁴² - This Act (sections 1(2) and 3(g)) refers to the Refugee Convention and to Canada's international obligations.

The drafters of the proposed *Youth Criminal Justice Act* (which was designed to replace the *Young Offenders Act* but has been put on hold

³⁷ R.S.C. 1985, c. 46

³⁸ See statements made by the Canadian government to the UN Committee on Torture in 1989, as cited in Bayefsky, *supra*, at 56.

³⁹ R.S.C. 1985, c. G-3.

⁴⁰ R.S.C. 1985, c. U-1.

⁴¹ This connection was specifically made in Canada's second report on the CEDAW Convention in 1988. See Bayefsky, *supra*, at 56.

⁴² R.S.C. 1985, c. 28 (4th Supp).

pending the forthcoming election) paid close attention to the Convention on the Rights of the Child.

So, it is certainly possible to detect real efforts by Canadian legislators to implement Canada's international human rights obligations, particularly where they relate to the area of civil and political rights and relatively uncontroversial issues such as torture and racial discrimination.⁴³ Canada has had less success though in implementing its obligations in relation to economic, social and cultural rights.

Part 2

Non-acknowledgement of international law in Canadian law

2.1 The importance of economic, cultural and social rights

Canadian society's attitude to the relevance of international human rights treaties to Canada, particularly in the field of economic, cultural and social rights, has been described as 'a combination of ignorance and apathy'.⁴⁴ Indeed, some people here today might ask 'What all the fuss is about? Canada doesn't have a problem with human rights. We should be looking at countries with *real* human rights problems.'

⁴³ Canada does not, however, have a perfect record in respect to civil and political rights. In particular, Canada has received criticism from the Human Rights Committee in respect to failures in ensuring the right to self-determination of Aboriginal Peoples, violation of privacy rights of social assistance recipients and deportation of aliens in potential breach of family rights and rights of children. See United Nations Human Rights Committee, 65th Sess, *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, UN Doc CCPR/C79/Add 105 (1999) [hereinafter *HRC C.O.*] at paras 7-8, 13-15, and 16 respectively.

⁴⁴ Scott, C. 'Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?' in (1999) 10:4 Constitutional Forum 98 at 105. Canada's approach is unfortunately consistent with a widespread resistance to the equal recognition of these rights to civil and political rights. See generally, Foster, J.W. 'Meeting the Challenges: Renewing the Progress of Economic and Social Rights' (1988) 47 UNBLJ 197.

This proposition appears to be supported by the fact that Canada continually appears at, or near, top ranking of the UNDP's Human Development Index. Nevertheless, the picture is not as bright as it first seems, as recently pointed out by the Committee on Economic, Social and Cultural Rights:

‘The HDI indicates that, on average, Canadians enjoy a singularly high standard of living and that Canada has the capacity to achieve a high level of respect for all Covenant rights. That this has not yet been achieved is reflected in the fact that UNDP's Poverty Index ranks Canada tenth on the list for industrialized countries.’⁴⁵

Parliament has also had difficulty understanding the obligatory nature of social and cultural rights, which are often viewed more as ‘goals than rights’.⁴⁶ However, under the Universal Declaration, and many other international documents such as the Vienna Declaration of 1993⁴⁷, economic, social and cultural rights are accorded equal importance to civil and political rights concerning issues such as equality and non-discrimination. In addition, under Article 2.1 of the ICESCR Canada has committed itself to undertake steps, including legislation, to implement Convention obligations ‘to the maximum of available resources’.

⁴⁵ United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)*, Geneva, 4 December 1998, E/C 12/1/Add 3.1, [hereinafter, CESCR C.O.], at para 3. At para 13, CESCR also criticized Canada for the absence of an official poverty line, which ‘makes it difficult to hold the federal, provincial and territorial governments accountable to their obligations under the Covenant.’

⁴⁶ Report of the Special Joint Committee on a Renewed Canada, *Comprehensive, universal, portable, publicly administered and accessible health care; adequate social services and social benefits; high quality education; the right of workers to organize and bargain collectively; and the integrity of the environment* (Ottawa, Queen's Printer, 1992) at 87-88, as quoted in Kinsella, N. ‘Some Dimensions of Human Rights Standards and the Legislative Process’, (1998) 47 UNB LJ 147.

⁴⁷ *Vienna Declaration and Programme of Action*, adopted at the World Conference on Human Rights, Vienna, 1993.

2.2 Criticism by international Committees of Canada's performance on economic, social and cultural rights

Considering its relative wealth, Canada has received quite a lot of criticism from both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights (CESCR) for its lack of performance in this area. On cultural rights, for example, the UN Human Rights Committee declared (before the time of the Charter) that section 12(1)(b) of the Indian Act 1970⁴⁸ – which provided for loss of Indian status upon marriage - was in contravention of Article 27 of the ICCPR.⁴⁹ Parliament responded by amending the Act⁵⁰ and reporting back to the HRC.⁵¹ However, I suggest that if Canadian legislators were more familiar with the potential implications of international law on the area of cultural rights it could have considered more fully the effect of the *Indian Act* at the time of drafting the Act, rather than wait to be criticized by an international committee to respond.⁵²

⁴⁸ RSC 1970, c. I-6

⁴⁹ *Lovelace v Canada* (No. 24/1977), [1981-1982] 2 YHRC 320 [1985] 1 SD 83 [1983] CHRY 306, (1985) 68 ILR 17, as cited in Schabas, *supra*, at 27.

⁵⁰ *An Act to amend the Indian Act*, SC 1985, c.27, s4.

⁵¹ Despite this amendment, the Human Rights Committee remains unsatisfied with Canada's approach, as the amendment only affects the Indian woman and her children, not subsequent generations. See HRC C.O., *supra*, at para 19.

⁵² The debate over various provisions of the *Indian Act* greatly influenced the development of section 15 of the *Charter* – See Schabas, *supra*, 27-28 (fn 51). Attempts have been made to implement cultural rights in the *Canadian Multiculturalism Act 1988* S.C. 1988, c. 31. That Act incorporates ICCPR provisions on the rights of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion and to use their own language, as well as the requirement under CERD that all human beings are equal before the law and entitled to equal protection of the law against any discrimination.

In the most recent reports of CESCR in December 1998 and the Human Rights Committee in April 1999⁵³, Canada was also criticized widely for its failures in respect to indigenous rights and homelessness.⁵⁴ Ontario's 1998 Act to prevent unionization⁵⁵ also received particular attention for breach of Covenant guarantees regarding the right to join a trade union and bargain collectively.⁵⁶

In its latest report CESCR also took Canada to task for its termination of the Canada Assistance Plan, or CAP,⁵⁷ which was introduced in 1966 as the statutory framework for federal and provincial compliance with the basic terms of the ICESCR and repealed in 1995 as part of general federal government budgetary cutbacks. Briefly, as I understand it, the CAP authorized federal contributions towards provincial welfare programs, including the social assistance plan, and provided that social assistance, taking into account basic requirements, was to be provided to any person in need. Grants were conditional upon provincial compliance with the CAP conditions, ensuring equal access across Canada to a minimum level of income support and services, and claimants had a right of appeal against decisions to deny them assistance.⁵⁸

When CAP was repealed and replaced with a non-conditional system of provincial transfers under the Canada Health and Social

⁵³ Supra. See, for example, HRC C.O. paras 8, 11 and 12.

⁵⁴ HRC C.O., paras 8 and 12; CESCR C.O., paras 17, 18, 24, 28, 34, 43 and 46.

⁵⁵ *Prevention of Unionization Act*, S.O. 1998, c.17.

⁵⁶ HRC C.O. para 17; CESCR C.O. paras 31, 55.

⁵⁷ R.S.C. 1985, c.C-1 as amended

⁵⁸ Jackmann, M. 'From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees through Charter of Rights Review' in (1999) 14 *Journal of Law and Social Policy*, 69 at 74

Transfer (CHST) ⁵⁹, general funding levels to the provinces were reduced, affecting among other things unemployment insurance coverage, resources for medicare and funding for women's centers. The federal government also stopped matching spending by provincial governments and removed the conditionality previously accorded to federal grants. Appeal procedures were also terminated.

In its *Concluding Observations* in 1998 the ICESCR was highly critical of Canada's repeal of the CAP. ⁶⁰ The Committee recommended the re-establishment of a:

‘national programme with designated cash transfers for social assistance and social services which include universal entitlements and national standards, specifying a legally enforceable right to adequate assistance for all persons in need, a right to freely chosen work, a right to appeal and a right to move freely from one job to another.’⁶¹

To date, as far as I am aware, no such national programme has been re-established, and this is unfortunate, although I am told that federal

⁵⁹ *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act*, RSC 198 c.F-8, as amended, as cited in Jackmann, *ibid* at 74.

⁶⁰ The Committee said: ‘The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada ...the CHST has eliminated each of these features [previously lauded by the Canadian government] and significantly reduced the amount of cash transfer payments provided to the provinces to cover social assistance... The Committee regrets that, by according virtually unfettered discretion in relation to social rights to provincial Governments, the Government of Canada has created a situation in which Covenant standards can be undermined and effective accountability has been radically reduced.’ CESCR C.O., para 19. Queen's University Professor Elwell has also suggested that we are on a trend toward the further balkanization of Canadian social and environmental policy which creates a ‘vacuum of state responsibility’: see Elwell, C ‘World Social Policy Conferences as Rule-Making and a Decentralized Canadian Federation’(Winter 1997) 4:3 *Canadian Foreign Policy*, as referred to in Foster, J, *supra*, at 205.

⁶¹ CESCR C.O. para 40

transfers to the provinces have increased with increased government spending.⁶²

2.3 Possible relief under the Canadian Charter

It is likely that in future people will try to advance economic, social and cultural rights through litigation under the Charter. Provisions of the Charter that could be relevant in this area are sections 7 (the right to life, liberty and security of the person) and 15 (the right to equality). For example, it has been argued that section 7 entitles people to material assistance and support, or even to a standard of living adequate for health and well-being as set out in the Universal Declaration, although the Courts have not yet gone this far in interpretation of this provision.⁶³ The right to equality, on the other hand, has been interpreted broadly to mean *substantive* equality. In one case, the Court ordered that ensuring equal access to government services by disadvantaged groups requires the provision of interpreters for the deaf under Medicare.⁶⁴

Provincial Courts have been much more hesitant to interpret the Charter so as to impose on governments obligations in the economic, social and cultural field. In any event, it should be the role of the legislators, rather than the Courts developing the law on a case-by-case

⁶² Personal discussion with representative of the Ministry of Justice on 25 October 2000.

⁶³ Scott, C 'Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?' (1999) 10:4 *Constitutional Forum* 97. Justice Bastarache, in his dissenting opinion in the New Brunswick Court of Appeal decision in *J.G. v Minister of Health and Community Services 2/96/CA* (NBCA) at 12, came close to the broad interpretation of section 7 when he said 'In modern societies, rights cannot be fully protected by preventing government intrusions in the lives of citizens. Some rights in effect require governmental action for their integration into the concept of fundamental justice.'

⁶⁴ *Eldrige v British Columbia (Attorney General)* [1997] 3 SCR 624, 151 DLR (4th) 577, 218 NR 161, as cited in Jackmann, *supra*, p84.

basis, to ensure full and equal realization of these rights in accordance with Canada's international obligations. As stated by the CESCR:

'The Committee, as in its previous review of Canada's report, reiterates that economic and social rights should not be downgraded to 'principles and objectives' in the ongoing discussions between the federal government and the provinces and territories regarding social programmes.'⁶⁵

In recognition of the fact that many economic and social rights fall within provincial jurisdiction under the Canadian Constitution (e.g. in areas of health, education, welfare and employment), the Committee said:

The Committee consequently urges the Federal Government to take concrete steps to ensure that the provinces and territories are made aware of their legal obligations under the Covenant and that the Covenant rights are enforceable within the provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.'

Part 3

Inadequacies in the Canadian system of implementation of human rights instruments and suggestions for a better way forward

As I have already mentioned, there is no formal requirement for Parliamentary approval prior to entry into international treaties by the Federal executive. However, in the field of human rights an informal mechanism exists which is designed to ensure that Canada does not enter into treaties unless its domestic legislation is consistent with proposed treaty obligations. This occurs via the Federal-Provincial Territorial Continuing Committee of Officials Responsible for Human Rights, which meets twice yearly to discuss pending treaties and proposed reports to the international monitoring bodies. This Committee is comprised of the Federal and Provincial ministers for human rights. In order to encourage

⁶⁵ CESCR, C.O., supra, para 52.

compliance with Canada's international obligations, where 'glaring inconsistencies' are perceived between the proposed treaty and existing legislation, the Committee ensures that the treaty is not entered into until appropriate legislation is adopted.⁶⁶

The amendments to the *Criminal Code* that I discussed earlier were made as a direct result of consultation with the Committee regarding the *Convention Against Torture*. However, in many cases Canada considers that it already complies with international human rights obligations and that specific implementing legislation is not necessary. This approach is understandable, but problematic. The process is not public, and if legislation does not refer to the treaty in question it will be difficult to know further down the track if domestic law was meant to implement a particular treaty obligation or not. This will impact both on Courts' interpretations of domestic law and Canada's standing before the international monitoring bodies.

Canada could improve its practices in this area by a more *systematic* review of proposed treaties which involves Parliament (rather than just the ministers for human rights) and more widespread public consultation.

Canadian legislators could learn from the approach taken to ensure that legislation is consistent with the Charter, as required under section 52 of the *Constitution Act 1982*.⁶⁷ According to this approach, the Federal Minister of Justice, in conjunction with the Clerk of the Privy Council, set up a Cabinet Support System and a Certification process for government bills. The Cabinet Support System requires all memoranda to cabinet to include an analysis of the Charter and other constitutional implications of

⁶⁶ Personal discussion with representative of the Ministry of Justice on 25 October 2000.

⁶⁷ As the *Charter* is a component of the Constitution, any laws that limit a *Charter* right may be struck down as unconstitutional. Section 52(1) of the *Constitution Act 1982* reads: 'The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency of no force or effect.'

any policy or program proposal'.⁶⁸ Through the certification process, the Minister confirms that all bills presented to the House of Commons have been examined both by the legislative editing, publishing and data base management section of the Ministry of Justice and the chief legislative counsel to ensure that the bill does not contravene the Charter.⁶⁹

Moreover, as lawyers across government departments are quite familiar with the terms of the Charter, potential inconsistencies are often dealt with at the drafting stage, even before Cabinet approval is sought.

There is no reason why a similar procedure could not be introduced to ensure that all proposed legislation is consistent with Canada's international treaty obligations. In this respect, Canada could also learn a lot from the Australian system of treaty making, which is viewed as a model by the Department of Foreign Affairs and International Trade.⁷⁰

Australia, which also has a Federal system of government, has a much more transparent, participatory approach to treaty making, even though, as in Canada, Parliament has no formal role in this process under the Constitution. Since 1996 in Australia:

- All treaties are tabled in both houses of the Commonwealth Parliament for at least fifteen sitting days (between 30 and 100 calendar days) after signature, but prior to ratification.
- Treaties are tabled with a National Interest Analysis which notes the reasons why Australia should become a party to the treaty, and includes a discussion of:
 - the foreseeable economic, environmental, social and cultural effects of the treaty;
 - the obligations imposed by it;
 - its direct financial costs to Australia;
 - how the treaty will be implemented domestically; and

⁶⁸ *A Guide to the Making of Federal Acts and Regulations* (Ottawa: Department of Justice 1996) at 26, as quoted in Kinsella, N, *supra*, at 160.

⁶⁹ Kinsella, *ibid*, at 161

⁷⁰ Personal discussion with representative of DFAIT, 6 November, 2000

- what consultation has occurred in relation to it.⁷¹

NIAs are also made available on the internet, together with the proposed treaty.

- A Parliamentary Joint Standing Committee on Treaties (JSCOT), comprising of members from both houses of Parliament,⁷² scrutinizes tabled treaties and National Interest Analyses, plus considers any other questions relating to a treaty that is referred to it by either house of parliament or a Minister. In the course of this process JSCOT holds extensive hearings and seeks submissions from a wide range of parliamentary, government, industry and community groups, through direct contact with them and newspaper advertising.⁷³ JSCOT has not limited its scrutiny to tabled treaties, but will also consider all treaties entered into prior to creation of the Standing Committee.⁷⁴ JSCOT may also inquire into treaties during negotiations, before the text of the treaty has been finalized.
- A list of multilateral treaties under negotiation or review is tabled twice a year in both houses of Federal Parliament and published on the Internet in the Australian Treaties Library. The list includes the name of the contact officer in the responsible Department to whom comments or questions can be directed for each treaty under negotiation.

⁷¹ Department of Foreign Affairs and Trade, Australia, 'Australia and International Treaty Making Questions and Answers' in *Australia and International Treaty Making Information Kit*, July 2000, online, www.austlii.edu.au/au/other/dfat/reports/infokit.html.

⁷² JSCOT comprises of 16 members: 9 from the House of Representatives (the lower house), and 7 from the Senate: JSCOT homepage: online: aph.gov.au/house/committee/jsct

⁷³ Department of Foreign Affairs and Trade, Australia, 'Review of the Treaty-Making Process Commonwealth of Australia' in *Australia and International Treaty Making Information Kit*, *ibid*, at 7.

⁷⁴ For example, JSCOT has recently undertaken an inquiry into the implementation of the *Convention on the Rights of the Child*, *Ibid*, at 6.

- Parliament ensures that implementing legislation is introduced prior to ratification.⁷⁵ Parliamentary discussion also often takes place during the negotiation process for major multilateral treaties.
- Other key ‘stakeholders’ such as business or NGOs are often consulted during the treaty negotiation process, or even sometimes directly involved in delegations attending treaty negotiations. There is also wide consultation with the Australian community at all stages through the negotiations, and the Australian Department of Foreign Affairs and Trade consults human rights NGOs twice a year when international human rights instruments are on the agenda.
- A Treaties Council, made up of the Prime Minister, State Premiers and Chief Ministers, meets at least once a year to consider treaties and other international instruments with particular importance to the States and Territories.⁷⁶ The Treaties Council may also refer treaties to Ministerial Councils for consideration.
- The Commonwealth-State-Territory Standing Committee on Treaties, which consists of representatives from every State and Territory, meets twice a year to:
 - identify treaties and other international instruments of sensitivity and importance to the States and Territories;
 - decide whether there is a need for further consideration by the Treaties Council, a Ministerial Council, intergovernmental body or other consultative arrangements;

⁷⁵ For example the *Montreal Protocol on Substances that Deplete the Ozone Layer* was not ratified by Australia until Australian legislation was enacted to ensure the requisite ban of the manufacture and trade in products containing ozone depleting substances, Ibid, at 11.

⁷⁶ The consultation process between the Federal and provincial governments on treaties is set out in ‘Principles and Procedures for Commonwealth-State-Territory Consultation on Treaties’ in *Australia and International Treaty Making Information Kit*, ibid. These principles provide, *inter alia*, that the Commonwealth will inform States and Territories in all cases and at an early stage of any treaty discussions in which Australia is considering participation; information about treaty discussions is to be forwarded to the States and Territories on a regular basis; and the Commonwealth will provide the States and Territories every six months with a list of current and forthcoming negotiations (casting 12 months ahead).

- monitor and report on the implementation of particular treaties where the treaty has strategic implementations for States and Territories;
- ensure appropriate information is provided to the States and Territories; and
- co-ordinate State and Territory representation on delegations in international conferences where appropriate.

Admittedly, the situation in Australia is slightly different to that in Canada in that despite the breakdown of powers between the States (Provincial) and Federal governments in the Australian Constitution, at the end of the day the Federal government may draft legislation to implement treaties on any subject matter under its 'external affairs' power⁷⁷ even though that subject matter may otherwise fall under the provincial powers. Nevertheless, in most cases, recourse to the external affairs power is not necessary as provincial legislatures agree to enact appropriate legislation.

The obvious benefit of the Australian approach to treaty making is that there should be more certainty in fulfilling international obligations - in the field of human rights as in others - than currently exists under the Canadian system. The number of treaties ratified by Australia to date also suggests that ratification of treaties and conventions is not necessarily stalled by parliamentary scrutiny and a more consultative process to treaty making, a concern which has been expressed on occasions by DFAIT in Canada.

Nevertheless, even the Australian system requires the necessary political will to ensure that international treaties are implemented. Recent comments by the Australian government in reaction to criticism by the Human Rights Committee and other UN monitoring bodies have unfortunately undermined that commitment. Similar reactions have been known in Canada, particularly in the media. Such comments do little for Canada's international reputation, and hinder the development of a just society based on support for human rights.

⁷⁷ Section 51(xxix) of the Australian Constitution.

Conclusion

1. I have suggested throughout the course of this paper that international law has had a growing impact on Canadian domestic law. However, there appears to be a continued resistance to implementing international law in Canada by the legislature, including in the field of human rights.
2. International human rights law is wide-reaching, and its subject matter relates to areas as diverse as family law, discrimination law, employment law, immigration, and criminal law, as well as social policy, taxation and budgetary matters. In particular, economic, social and cultural rights have not received the attention they should have in Canadian law and it is time that Canada gave this issue serious consideration, both to protect its international reputation as a leader in the field of human rights, and to ensure that Canadians enjoy the same rights that Canada insists on for others at the international level.
3. In order to start this process, priority needs to be given to better informing Federal and Provincial governments about human rights treaties to which Canada is a party, and provincial governments should also take a more active role in participation in delegations before the international committees.⁷⁸ Further, Canada should give serious consideration to adopting the Australian model of treaty making, which provides for involvement of both Federal and Provincial parliaments and the general community at all levels of treaty negotiation and implementation.
4. In today's global village, international law – both international customary law and international treaties to which Canada is a party – must be fully taken into account by those involved in legislative drafting at the domestic level. Without an improvement to the current approach to implementing human rights treaties in Canada,

⁷⁸ The CESCR has directly referred to this lack of involvement by the Provinces, stating: 'in light of the federal structure of Canada and the extensive provincial jurisdiction, the absence of any expert representing particularly the largest provinces, other than Quebec, significantly limited the potential depth of the dialogue on key issues.' (CESCR, C.O., supra, at para 2).

some of the country's international commitments appear to have little substance.