

The Global Picture – The Acknowledged Influence: Treaties and Conventions – A Review of the Acknowledged Sources of International Law that Influence the Drafting of Statute Law in Canada (Speaking Notes)

Philippe LORTIE*

Introduction

The title of this first panel “*The acknowledged influence: Treaties and Conventions*” suggests that what we have here is a postulate that cannot be contested. This provokes me to open with a general comment: namely, that I believe that this statement is open to debate. Does international law really influence the drafting of Canadian legislation? As any good lawyer would say: “It depends!” In fact, the answer would depend on the area of law involved. The answer will be different in the case of Human Rights, Criminal Law, Environmental Law, International Trade Law or Private International Law. Thus, different lessons will be learned in light of Dean Leuprecht’s presentation focussing mainly on Human Rights and the comments of the Honourable Raynell Andreychuk.

I, in turn, will give you some insights based on my practice, which is in the area of private international law. I am a member of the “Private International Law Team” of the Department of Justice of Canada. In short, the Team deals primarily with the development of private international law instruments in connection with international organisations such as The Hague Conference on Private International Law, the United Nations Commission on International Trade Law (UNCITRAL), Unidroit and the OAS. Secondly, the Team plays an important role in the implementation of these instruments in Canada. Thus, we begin by working in close cooperation with the Provinces and Territories in order to develop these international instruments while respecting the civil law tradition and the common law tradition, both of

* Counsel, Private International Law Team, Department of Justice of Canada (Ottawa). The opinions expressed in this presentation are mine and should not in any way be attributed to the Department of Justice of Canada.

which find expression in French and in English.¹ Secondly, we depend on the provinces and territories for the implementation within their borders of those instruments that fall under their jurisdiction.

Generally, the objective of the instruments being developed is to harmonise substantive private law worldwide or, when this is impossible, to develop either rules governing the recognition and enforcement, between different States, of judicial decisions rendered under different systems of law or rules to determine the law that applies to a situation where the laws of different jurisdictions are applicable. You are probably familiar with the famous exam question that asks: “*A mother of French nationality gives birth to a girl on an Air Canada flight over the Atlantic between Casablanca and Montreal. The father is an American citizen. Air Canada leases the aircraft from a bank in Ireland, which is the owner of the aircraft. The aircraft is registered in Ireland. Which law will apply in determining the nationality of the daughter?*”

In light of my area of expertise, the proposition that I will try to demonstrate is as follows: it appears that the influence of private international law instruments on the drafting of legislation in Canada is inversely proportionate to the level of development of domestic law. Then, conversely, the more developed the domestic law framework is, the more likely it is to influence the development of private international law instruments. This proposition is based on the following observation: international instruments in the area of private international law rarely initiate new rules of positive law. Let me explain: more often than not, private international law instruments transpose to the international level rules of positive law that already exist in the most highly developed legal frameworks.

In order to demonstrate this, I will begin by analysing the influence on Canadian law of private international law instruments. I shall do this in light of three focal points: (1) I will examine the sources that create obligations in international law, such as treaties and conventions to which

¹ To this effect, provinces and territories are consulted and one representative of a Province or Territory with a Common Law tradition and one representative with a Civil Law background from Quebec are included in the Canadian Delegations to such negotiations.

Canada is a contracting party; (2) We will look at non-binding instruments such as model laws and legislative and contractual guides that are also developed by States within international organisations; (3) I will analyse the influence of international treaties and conventions to which Canada is not a contracting party. Throughout this demonstration, we will look at individual instances of influence on drafting conventions, terminology and the impact on positive law.

The demonstration would not be complete without examining the influence of Canadian positive law on the development of international instruments. In this analysis, I will limit myself to specific examples.

Part I – Influence of International Law Sources on the Drafting of Legislation in Canada – the Private International Law Perspective

Conventions and Treaties to which Canada is a Contracting Party

Private international law norms will most likely have an influence on Canadian law when that law is implemented. As you know, in order for a norm of international law to be applicable by a judge in Canada, the norm has to be part of Canadian law.² Generally speaking, in Canada, we give the force of law to conventions and treaties dealing with private international law through uniform implementing legislation. These laws are generally drafted by the Uniform Law Conference of Canada. However, there is an exception to this rule in the area of judicial co-operation in civil matters (*i.e.*, the taking of evidence and the service of documents and legalisation). In this case, force of law is given to certain conventions through amendments to the Rules of Court, in the Provinces and Territories with a common law tradition, and by way of amendments to the Code of Civil Procedure in Quebec. Two types of legislation are used to implement private international law conventions and treaties.³

² Customary international law is part of domestic unless there is unambiguous legislation or settled common law to the contrary.

³ Verdon, Christiane, “Le Canada et l’unification internationale du droit privé” (1994) 32 Can. Y.B. Int’l L. at 30; and Brownlie, Ian, *Principles of Public International Law*, 2nd ed. (Oxford: Clarendon Press, 1973) at 50.

First, in most cases the treaty can be incorporated in a short act, which expressly gives the force of law to the treaty or some of its provisions. The treaty or the provisions in question may be set out as a schedule to the act.⁴ In this case, since the treaty or some its provisions will be reproduced as such in Canadian law, they will have an influence on substantive law, but no influence whatsoever on the drafting of legislation in general. In this regard, we note that there is little effect on terminology because the treaty will use neutral terms that have legal effect whatever the legal system into which they are transposed. Then, since the effect of the treaty is limited to a law of exception and not of general application, the treaty will have little influence on the positive law as a whole.

Second, in other exceptional cases, the treaty may be implemented by an act that sets out its own substantive provisions equivalent to those contained the treaty but without directly enacting or referring to the treaty.⁵ Again, the influence of the treaty on the drafting of Canadian law will be minimal. The equivalent provisions will be drafted in accordance with domestic legislative drafting conventions and the provisions will not generally be part of the law of general application but rather specific laws or laws of exception.

Lately, however, we have noted that uniform acts prepared by the Uniform Law Conference of Canada to implement treaties tend to include provisions allowing for the interpretation of the treaty in Canadian law according to international law standards set out in the *Vienna Convention*

⁴ Verdon, *ibid.* For example the *Uniform Act on International Child Abduction* of the ULCC, 23B-2 or the *Settlement of International Investment Disputes Act*, ULCC (1997).

⁵ Verdon, *ibid.* This possibility occurs when force of law is given to conventions in relation to judicial co-operation in civil matters by way of amendments to the Rules of Court or the Quebec Code of Civil Procedure. This situation also occurs in the area of criminal law as, for example, in the case of article 7(2.2) of the *Criminal Code* that implements the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature at Rome on March 10 1988.

on the Law of Treaties.⁶ As a result, this Convention has an important influence on the general principles governing the interpretation of treaties in Canadian Law.

Non-binding Private International Law Instruments – Model Laws, Legislative and Contractual Guides

On occasion, in Canada we adopt or give effect in our law to international instruments that do not create international obligations, despite the fact that they have been developed within international organisations.

The first example that comes to mind is that of model laws such as the *UNCITRAL Model Law on International Commercial Arbitration*. Again, the influence on drafting is tenuous because the model law has been reproduced unchanged in all Canadian jurisdictions except for Quebec where it has been implemented differently. However, in terms of positive law, the model law has opened the door to commercial arbitration all across Canada since 1986. Today, in light of the successes achieved with ADR, we can say that the adoption of the Model Law on Arbitration brought about a revolution. Our current experience with the adoption of the *UNCITRAL Model Law on Electronic Commerce* is very similar. It provides another contribution to positive law in Canada.

Among other non-binding international instruments are legislative guides and guides for the drafting of contracts or the *Unidroit Principles of International Commercial Contracts*, which can be used as a legislative guide or a guide to draft contracts.⁷ Apart from the legislative guide, these other instruments do not have a direct influence on the drafting of legislation as such. The legislative guide will propose wording or principles for the drafters but do not offer specific provisions such as those

⁶ The *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, cf. Article 31 in relation to the general rule of interpretation and Article 32 in relation to Supplementary means of interpretation.

⁷ The Unidroit Principles can also be used as an interpretation tool for arbitrators in interpreting a contract.

found in a model law. When drafting norms based on the guide, the drafter will use the drafting principles specific to his or her own system.

Conventions and Treaties to which Canada is not a contracting party

Let us now come back to our first sources of international law: treaties and conventions. We shall examine the influence of treaties to which Canada is not a contracting party. Indeed, there is no need to wait for a State to become a contracting party to a treaty in order to incorporate the treaty into domestic law. The only difficulty in doing so is a lack of transparency and publicity vis-à-vis our international partners. Indeed, how will our partners know that a treaty has been incorporated in Canada without Canada being a contracting party to it? Quebec has taken this approach. More than 30 provisions out of 92 in Book X of the Civil Code of Quebec dealing with private international law are inspired by treaties to which Canada is not a party. This is a very important influence on positive law.⁸ However, we do not find any influence on drafting as such. I have not encountered such an approach in common law jurisdictions. The reason for this absence of influence is probably the fact that common law drafters are more influenced by case law than treaties in developing their policies.

Further to this analysis, apart from the example of the Civil Code of Quebec and the example of model laws, it seems that private international law instruments have little influence on the drafting of laws in Canada in terms of the drafting conventions and terminology used. Equally, the impact on positive law will be limited except once again in the case of the Civil Code of Quebec and the model laws. After this first analysis, let us take a quick look at the opposite situation.

Part II – Influence of Canadian Positive Law on the Development of International Instruments

⁸ Cf. the 1980 Rome Convention on the Law Applicable to Contractual Obligations and a good number of conventions from The Hague Conference on Private International Law.

Does Canadian domestic positive law influence the development of private international law instruments? It appears that it does. Does it influence this development to any great extent and does it influence it as much as it could? That remains to be seen. It has only been 30 years since Canada became involved in this area. Our experience is still relatively new. However, it is certain that Canada has all the tools it needs to influence the development of private international law instruments.

Firstly, we note that Canada has a modern framework of private law that is even at the cutting edge in many areas such as personal property security. Secondly, Canada is one of the few States where the civil law tradition and the common law tradition coexist in a single country. Furthermore, those traditions are practised in both English and French, which are the two languages used in most of the organisations where such norms are developed. Thus, we use the same legal language as 90% of countries. In addition, we are the only country with a capacity to interpret these two legal traditions simultaneously and we are in an ideal position to compare them in either French or English. This is what we commonly refer to as bilingual and bijural legal drafting. Finally, we are fortunate to have in Quebec a modern Civil Code that has benefited from the common law environment in which it developed. When necessary, the Civil Code has adapted itself to this common law environment.

The Influence on Positive Law

In recent years on the international scene, Canada has taken advantage of the common law principles that have counterparts in the civil law. Let us examine a couple of examples. Because it is familiar with the concepts of both “la fiducie” and the trust, Canada played a key role in the development of the *1985 Hague Convention on the Law Applicable to Trusts and on their Recognition*. Indeed, because this Convention was aimed at civil law States that were not familiar with the concept, the country that was best placed to interpret it to the civil law States was Canada. Because of its knowledge of both movable hypothecs and personal property securities, Canada is playing a similar role in the development of a *Convention on International Interests in Mobile Equipment* and a *Protocol on matters specific to Aircraft Equipment* both being prepared in co-operation by Unidroit and ICAO. In the last-mentioned case, Canada is a pioneer in this area, especially with regard to the civil law aspect. Canada is also a pioneer in the development of the

legal frameworks required to set up electronic registries necessary for these security systems. On a more specific point, Canada went so far as to incorporate into the *1999 Hague Convention on the International Protection of Adults* the concept of mandate in anticipation of incapacity in the civil law and the counterpart common law concept of powers of attorney. In a similar way, Canada has greatly influenced the *UNCITRAL Model Law on Cross-Border Insolvency* and the *UNCITRAL Model Law on Procurement of Goods, Construction and Services*.

Influence on Drafting and on Terminology

We also have an influence with regard to drafting and terminology. During the last few years, there has been an increasing tendency to appoint Canada to the drafting committees of international organisations. The reason for this is that there is a *de facto* recognition of Canada's bilingual and bijural capacity. In the work of these committees, when the rules of the committees allow, we push for parallel drafting. When the rules of the committees do not allow for parallel drafting, Canada promotes the alternate use of French and English. Another way to influence would consist in including legislative drafters in Canadian delegations.

Canada has also a definite influence on the terminology used in the drafting of international instruments. This influence originates from our capacity to develop legal glossaries and vocabularies and bilingual private law dictionaries in both common law and civil law. In order to have a stronger influence, we should disseminate all these tools and distribute them to all the international organisations dealing with the development of international legal norms.

Conclusion

I hope I have convinced you, or at least got you thinking that the influence of international law on domestic legislative drafting is inversely proportionate to the level of development of domestic law and, inversely, that the more developed the domestic law framework is, the more likely it is to influence the development of private international law instruments.