

A Legislative Perspective on the Interaction of International and Domestic Law*

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Part 1 – Introduction

In Canada, whose form of government is based on the English model, domestic and international law are generally considered distinct legal systems. International agreements are negotiated and ratified by the federal executive to manage the nation's relationships with other nations in the international community. The legislative and judicial branches have no role to play in the development or ratification of such agreements. However, to operate within the domestic legal system, an international agreement must either be recognized by the courts as reflecting customary international law or else it must be implemented through domestic legal action, typically taken by the legislative or executive branches.

This dualist position has been recognized repeatedly by Canadian courts. The following pronouncement by Iacobucci J. in *Baker v. Canada* is typical:

It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation.¹

The arguments advanced to justify this position focus on the structure of domestic government, most notably the separation of powers among the three branches of government and the division of powers between federal and provincial legislatures.

Separation of Powers

In Canada, like other modern democratic states, governmental powers are divided among the legislative, executive and judicial branches. Law is supposed to be made by the legislature, consisting of the elected representatives of the people. The executive's power to legislate was

¹ *Baker v. Canada* [1999] 2 SCR 817 at para. 79, citing *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 SCR 141. Note also the recent decision of the Australian High Court in *Re Minister for Immigration and Multicultural Affairs; Ex p. Lam* [2003] HCA 6 at para. 99ff.

abolished by the *Bill of Rights* of 1689, which established the law-making supremacy of Parliament.² Because the executive has no power to make law by itself, its ratification of an international agreement cannot in itself effect any change in domestic law.³ If change is indeed required, then some form of implementation action must occur.

Although in principle the implementation requirement protects democratic values, the sharp distinction between the executive and legislative branches of government implicit in the separation of powers described above bears little relation to current realities. In Canada, the executive generally exercises significant control over the legislative branch through political parties. Not only does it control both the content and form of most legislation enacted by legislatures, but it also frequently arranges the delegation to itself of broad regulation-making authority, which may include the authority to implement international conventions. This state of affairs has long been criticized, most recently as the cause of the so-called “democratic deficit”.⁴

It is argued, with some justification, that the assumption of international obligations is a significant act of government that requires greater accountability to parliamentary bodies. International law is no longer confined to matters of interest only to national governments. Nowadays it is often designed to influence the rights and obligations of state subjects and regulate their activities. This expansion of international law’s focus arguably justifies a greater role for legislatures in its formulation. However, efforts to reform current practice have enjoyed limited success. Although legislative approval of the negotiation or

² 1 Will. & Mary, 2nd session, c. 2. Prerogative law-making powers in Canada have been whittled into relative insignificance through the enactment of legislation that displaces them: see J.M. Keyes, *Executive Legislation* (Butterworths, Toronto: 1992) at 10. However, the Consolidated Index of Statutory Instruments published under the *Statutory Instruments Act* lists about 70 instruments issued under “Other than Statutory Authority”, including the *Canadian Passport Order*, SI/81-86 and the *Reproduction of Federal Law Order*, SI/97-5.

³ The same also holds true of federal-provincial agreements: the executive has no inherent power to make laws to implement them: see *Reference re Anti-inflation Act* (1976), 68 DLR (3d) 452 (SCC).

⁴ See, for example, P. Aucoin and L. Turnbull, “The democratic deficit: Paul Martin and parliamentary reform” (2003), 46 *Public Administration* 427.

ratification of international obligations sometimes take place,⁵ proposals to require such review and approval⁶ or otherwise involve parliamentarians⁷ in the negotiation and ratification process have not yet been adopted at the federal level in Canada.⁸

While criticism of the expansive role of the executive branch is warranted in some respects, it may also be overstated. The executive is no longer comprised of aristocrats with their own set of class interests who are beholden to the monarch. First Ministers and their Cabinets have a democratic mandate and are accountable to the electorate not only through the legislature, but also through the media and through their own consultations with subjects in the course of developing new legislation or making new regulations. In our view, a more persuasive basis for criticizing executive powers relating to international obligations is the high degree of confidentiality that the executive enjoys about its affairs through its traditional common law privileges and, more recently, under statute.⁹ Arguably it is the lack of transparency and the resulting dissatisfaction with accountability that makes executive treaty-making problematic.

Finally, it is worth noting the role of the courts. Although their basic function is to apply and enforce *domestic* law, their power to decide what counts as domestic law and to interpret it potentially gives them a significant role in the domestic implementation of international law. This

⁵ For example, the House of Commons passed a resolution approving the ratification of the Kyoto Protocol on December 12, 2003.

⁶ A number of bills have been introduced in the House of Commons to provide procedures for the ratification of international agreements. The most recent, Bill C-260 (First Reading in the 1st Session, 38th Parliament on November 3, 2004), would have required an “important treaty” to be approved by a resolution of the House of Commons before it is ratified and would also have required publication of ratified treaties. It would also require the Federal Government to consult provincial governments before negotiating or concluding a treaty in an area of provincial legislative authority.

⁷ See, for example, Michel Bissonet, “The Participation of Parliamentarians in Trade Negotiations” (2004), 27 *Canadian Parliamentary Review* 10.

⁸ Note, however, *An Act respecting the Ministère des relations internationales*, LRQ c. M-25.1.1. Sections 22.2 to 22.6 (LQ 2002, c. 8, a. 6) provide for the tabling and approval of international agreements in the National Assembly of Québec.

⁹ See the *Access to Information Act*, RSC 1985, c. A-1, ss. 13-23 and 69 and the *Canada Evidence Act*, RSC 1985, c. C-5, ss. 37-39.

raises a number of questions. Are Canadian courts obliged to promote the application and enforcement of international law and, if so, on what basis? How should courts respond to agreements that have been ratified by Canada but never formally implemented? Should all agreements, regardless of subject matter, receive the same weight?

Federal-Provincial Division of Powers

Another perhaps more compelling justification for the dualist position lies in the division of powers between the federal and provincial levels of government. Under the constitution, the provinces lack the capacity to bind Canada at international law. This limitation is reflected in their lack of extra-territorial capacity. In practice, provinces are able to participate in international relations only to the extent that the federal government allows them to participate. Although they have the capacity to enter into agreements with foreign governmental bodies, the predominant view is that the power to create international law obligations belongs exclusively to the federal executive.¹⁰

In Canada, there is no federal power to implement international agreements entered into on behalf of Canada by the federal government. Since 1937 when the *Labour Conventions Case*¹¹ was decided, jurisdiction to implement international agreements has been understood to follow the division of powers established in the *Constitution Act, 1867*. Thus, Parliament may implement obligations relating to matters that fall within federal competency, including the peace order and good government clause, but obligations relating to matters that fall exclusively within provincial jurisdiction can be addressed legislatively only by the provincial legislatures. The rationale for this approach is obvious: the

¹⁰ See G. van Ert, "The Legal Character of Provincial Agreements with Foreign Governments" (2001), 42 *Les Cahiers de Droit* 1093 at 1103-1109. Some scholars take a contrary view. See van Ert at 1109ff and S.Scherrer. "La Pratique québécoise en matière de traités, accords et autres instruments internationaux » (1992), Actes de la XIe Conférence des juristes de l'État (Les Éditions Yvon Blais, Cowansville: 1992) at 123.

¹¹ [1937] 1 DLR 673 (PC). See also T. Strom, and P. Finkle, "Treaty Implementation: the Canadian Game needs Australian Rules" (1993), 25 *Ottawa Law Review* 39.

many important values protected by the federal distribution of powers, not least the integrity of civil law in Quebec, would be threatened if the federal executive could change the domestic law of Canada simply by ratifying an international convention. With the increasing expansion of international law into private law areas, the need to maintain a sharp division of powers between the federal executive and the provincial legislatures is all the more compelling.

Basic Principles

The constitutional framework set out above rests on three basic principles. First, ratification of an international agreement does not in itself change Canadian domestic law; if a change in domestic law is necessary, it must be effected by the institutions that have domestic law-making power. Second, ratification of an international agreement does not displace the allocation of jurisdiction between federal and provincial levels grounded in the *Constitution Act 1867*. Third, the courts have no role to play in the implementation of international agreements: they interpret and apply domestic law and have regard to international law only in so far as it sheds light on the meaning and purpose of domestic law.

However well established these principles may be, their application and implications deserve close analysis, particularly in terms of the evolving roles of the legislative, executive and judicial branches of government. In this article, we propose to examine them in light the following fundamental values of Canadian law:

- transparency and accountability in law-making and governmental functions, including the opportunity for participation in decisions by affected, interested parties (democracy);
- the separation of powers among the legislative, executive and judicial branches, particularly the encroachment of the latter two on the role of the legislative branch (parliamentary sovereignty);
- the need to preserve provincial jurisdiction from being undermined by federal treaty-making (federalism);
- accessibility of law and coherence of the statute book (rule of law).

Part 2 of this article looks at the role international law plays in the interpretation of domestic legislation. Part 3 focuses on the range of strategies available to governments to implement international agreements,

whether through statutes, regulations or other legal action. Part 4 concludes with some general comments on the role of the three branches of government in the implementation of international agreements and offers suggestions on how they might more effectively interact.

Part 2 – The Role of International Law in Interpreting Domestic Legislation

In this part we describe a theory of domestic interpretation that allows for reliance on international law in a variety of circumstances, justified on several grounds. Our basic assumption is that under Canadian constitutional law none of the branches of government when acting domestically is obliged to implement or comply with international law. The duty of legislatures is to serve the interests of their electorates. The duty of courts is to declare and apply domestic, not international law. While courts may adopt customary international law and legislatures may codify that law or implement international conventions in whole or in part, neither is obliged to do so. Even the executive branch, which at the federal level negotiates, signs and ratifies international treaties, is not obliged to implement them by introducing appropriate legislation or exercising executive powers. Of course, it is open to legislatures to impose a duty on courts or on the executive branch to implement international law. But in such cases, the duty is grounded in the particular statute and not in general constitutional law.

Because the rules governing the impact of international law within Canada are made in Canada, they can be changed by Canadian courts and legislatures. That is what some international law scholars are advocating. For example, Van Ert has urged courts to enhance the role of international law within Canada by declaring the internal institutions of Canada to be subject to international law.¹² This would not limit the current power of legislatures to violate that law, but it would elevate the presumption of compliance with international law to a judicial duty. What is missing is a good reason to make this change. In our view, compliance with

¹² G. van Ert, *Using international law in Canadian courts* (New York : Kluwer Law International, 2002) at 4.

international law is a good to be weighed against other, potentially competing goods. There is no reason why it should automatically trump other considerations.

Under the approach to interpretation adopted by the Supreme Court of Canada, “the words of an Act are to be read in their entire context”.¹³ This is sound advice, but the challenge is to identify, first, what constitutes context for purposes of interpreting legislation and, second, how that context may be relied on in interpretation. By definition, the context of a legislative provision anything other than the provision and in particular:

- the rest of the Act and the rest of the statute book (the *literary* context),¹⁴
- the common law, the Civil Code, Aboriginal law, international law and the law of other jurisdictions (the *legal* context),
- everything about the world existing at the time the legislation was enacted (the *external* context),
- the circumstances in which the legislation operates from time to time (the *operating* context).

Of course, how much context can be brought to bear in interpreting legislation depends partly on how much of it is known to the interpreter (this is a practical limitation) and how much of it is relevant (this limitation is legal). Assuming a given context is relevant, it must also be assigned an appropriate weight.

Finally, there is the problem of time. In all interpretation, the context in which a text was made is potentially at odds with the context in which the text is interpreted over time. In statutory interpretation, this potential is realized in the tension between static interpretation, which

¹³ According to Driedger’s modern principle, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” As Iacobucci J. noted in *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559 at para 26, “Driedger’s modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of settings.”

¹⁴ This is called the literary context because it is the context within which the conventions of legislative drafting operate, much like the conventions of poetry or the various genres of fiction. The literary context of an article in an international convention would be the rest of the convention and the body of international conventions.

insists on the original intent of the law-maker, and dynamic interpretation, which supports the adaptation of legal rules to changing circumstances. Implementing an international convention may be part of a law-maker's original intent or it may be part of the evolving context in which legislation is interpreted.

While many different types of context are relied in statutory interpretation, in the end every use of context must be justified on one of the following grounds:

- it is a basis for inferring legislative intent;
- it is a source of domestic legal norms;
- it contains persuasive opinion on the issue before the court.

These are not mutually exclusive categories, of course. A given contextual factor may be relevant, for example, because it both justifies adherence to a norm and offers persuasive evidence of the legislature's intention to adhere to that norm. But in our view it is important to distinguish among

- establishing legislative intent as a matter of fact on the basis of evidence,
- presuming legislative intent as a matter of law based on common law norms,
- seeking a desirable solution based on diverse legal and academic materials.

These distinctions are important because the kind of justification offered to establish actual intent differs from that offered in support of presumed intent, as does the justification for relying on and assigning weight to comparative law materials. These issues are explored in this Part initially under the headings legislative intent and judge-made norms. The distinction between actual and presumed intent is also highlighted in the section on the role of international law in the dynamic interpretation of statute-based discretion. In the final two sections, on executive intent and comparative law, we focus on the use of international law as a persuasive resource.

Legislative Intent

Our analysis of statutory interpretation takes the idea of legislative intent seriously. While it is not the only thing that matters, it is a key consideration in statutory interpretation. Under current interpretive approaches, there are two circumstances in which international law might assist in determining intent. The first is when there is reason to believe that the legislation to be interpreted was intended to codify an international law doctrine, implement an international law obligation or impose a power or a duty on a decision-maker to consider international law.¹⁵ The second is when there is reason to believe that international law materials formed part of the historical context in which legislation was enacted and may therefore shed light on the meaning of particular words or expressions or help infer the purpose of a particular provision.¹⁶

Intention to Implement

Ideally, the legislature's intention to implement international law or to impose a duty to consider it in exercising discretion should be signaled in the legislation itself. An intention to implement can be stated in a preamble or purpose statement.¹⁷ A duty to consider international law when exercising discretion can be imposed expressly in an interpretative or enabling provision.¹⁸ However, this sort of express reference is not required.¹⁹ The relevant intention can also be established through legislative history, for example a statement by a Minister declaring that the purpose of legislation to implement a particular convention or a similar

¹⁵ See, for example, *National Corn Growers Association v. Canadian Import Tribunal* [1990] 2 SCR 1029 and *Canada v. Ward* [1993] 2 SCR 689.

¹⁶ *R. v. Sharpe* [2001] 1 SCR 45.

¹⁷ See, for example, the preamble to the *North American Free Trade Agreement Implementation Act*, SC 1993, c. 44.

¹⁸ See, for example, ss. 7(4) of the *Postal Services Act*, 1975 (Cth):

The commissioners shall exercise their powers in compliance with the Convention to the extent that it imposes obligations on Australia in relation to matters within their powers.

¹⁹ See *National Corn Growers*, above note 15 at para 73..

statement in a Regulatory Impact Analysis Statement.²⁰ Such materials are legitimate evidence of legislative intent because they precede the enactment of the legislation and form part of the understanding on which it was made. Finally, an intention to implement can be inferred by comparing the wording of the legislative text to international law materials. Where the language of legislation tracks the language of a convention, for example, the court may legitimately infer an intention to implement.²¹

The role that international law can play in the interpretation of implementing legislation is well illustrated by the *Ward* case.²² At the relevant time, Canada's *Immigration Act*²³ defined "Convention refugee" as a person who "by reason of a well-founded fear of persecution ... is outside the country of the person's nationality and is unable or ... unwilling to avail himself of the protection of that country...." One of the issues in *Ward* was whether, to qualify for refugee status, a person with dual citizenship had to be unable or unwilling to return to both countries in which he or she had citizenship. The Act was silent on this point, but the underlying Convention expressly provided in Art. 1(A)(2) that "in the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national." La Forest J. did not hesitate to adopt the Convention solution. He wrote:

Although never incorporated into the *Immigration Act* and thus not strictly binding, paragraph 2 of Art. 1(A)(2) of the 1951 Convention infuses suitable content into the meaning of "Convention refugee" on the point....

...

The fact that this Convention provision was not specifically copied into the Act does not render it irrelevant. The assessment of Convention

²⁰ See, for example, *Animal Alliance of Canada v. Canada* [1999] 4 FC 72 (TD) at para. 2.

²¹ See, for example, *Gosselin v. Quebec (Attorney General)*, [1999] J.Q. no 1365 (C.A.) at para 365-367.

²² Above, n.15.

²³ RSC 1985, c. I-2.

refugee status most consistent with this theme requires consideration of the availability of protection in all countries of citizenship.

This conclusion is bolstered by general rules of statutory interpretation. Section 33(2) of the *Interpretation Act*, R.S.C., 1985, c. I-21, stipulates that words in the singular include the plural. Consequently, references to “country of nationality” in the definition of “Convention refugee” in s. 2(1) of the *Immigration Act* should be read as including “countries of nationality”.²⁴

In his analysis, La Forest J. relies on the underlying convention to gloss the meaning of the Act and he supports this interpretation by referring to the purpose of the international refugee protection regime. But he also, quite rightly, appeals to domestic conventions of legislative drafting and interpretation.

When a court concludes that the legislation to be interpreted was intended to give effect to an international law convention or doctrine, the court is obliged to look at the relevant international law materials, interpret them and rely on them in interpreting Canadian law. But the following points should be noted. First, the content of the judicial duty here is not to apply international law but to give effect to the intention of the legislature. The international law materials are relevant only in so far as they cast light on domestic intentions. Second, the legislature may well intend to qualify or partly reject Canada’s international obligations, as it is legally entitled to do. Given cogent evidence of such an intent, the presumption of compliance with international law is rebutted. The constitutional competence to decide whether the full and unqualified implementation of international law is in the best interest of the jurisdiction it serves belongs to the legislature, not the courts.

The legislation considered by the Supreme Court of Canada in *Thomson v Thomson*²⁵ illustrates the need for courts to pay close attention to the indicators of legislative intent and resist the temptation to take an all or nothing approach to implementation. The issue here was the validity of an order made under Manitoba’s *Child Custody Enforcement Act*,²⁶ which

²⁴ Above, n. 15 at pp. 751-52.

²⁵ [1994] 3 SCR 551.

²⁶ RSM 1987, c. 360.

implemented the international *Convention on the Civil Aspects of International Child Abduction*. Article 12 of Convention provided as follows:

12. Where a child has been wrongfully removed or retained ... and a period of less than one year has elapsed from the date of the wrongful removal or retention, the [judicial or administrative authority of the Contracting State where the child is] shall order the return of the child forthwith.

This obligation was qualified by art.13 which, provided that:

the judicial or administrative authority of the requested State is not bound to order the return of the child if ... there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Section 17 of the *Child Custody Enforcement Act* provided that “from and after December 1, 1983, the [Convention on the Civil Aspects of International Child Abduction] is in force in Manitoba and the provisions thereof are law in Manitoba.” However, that is not all the Act provided. Sections 5 and 6 of the Act said:

5. Notwithstanding any other provision of this Act, where a court is satisfied that a child would suffer serious harm if the child remained in or was restored to the custody of the person named in a custody order made by an extra-provincial tribunal, the court may make a custody order in respect of the child that differs from the custody order made by the extra-provincial tribunal.

6. Upon application, a court

(a) that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Manitoba ...

may do any one or more of the following:

- (c) make such interim custody order as the court considers is in the best interests of the child;
- (d) stay the application ...;
- (e) order a party to return the child to such place as the court considers appropriate

In *Thomson* a Scottish court granted interim custody of a seven month old child to the mother and interim access rights to the father and ordered that the child remain in Scotland. When shortly thereafter the mother removed the child to Manitoba, the Scottish court granted permanent custody to the father. The father then applied to Manitoba's Court of Queen's Bench for the return of the child in accordance with article 12 of the Convention. The motions judge, Davidson J., found no evidence to suggest that returning the child to Scotland would create a "grave risk [of] physical or psychological harm or otherwise place the child in an intolerable situation" (article 13) nor was there evidence that the child would "suffer serious harm" (s. 5). However, she thought it would be in the best interests of the child to give interim custody to the mother for a period of four months, by way of order under s. 6(c). This order would prevent the child from being abruptly removed from his mother's care while at the same time ensuring that she would have the custody matter dealt with before the Scottish courts in an expeditious fashion.

A majority of the Supreme Court of Canada held that there was no jurisdiction under s. 6 of the Manitoba Act for an interim custody order of this sort. In considering whether an order to return the child could be refused on grounds of harm, it relied on the language of Article 13 (b) of the Convention, as interpreted by courts around the world, rather than the language of s. 5 of the Act, as interpreted by domestic courts. What is disturbing about the majority's analysis is its disregard for the actual intentions of the Manitoba legislature respecting these issues. Speaking for the majority, La Forest J. wrote:

As I see it, those provisions [the provisions of the Act other than s. 17] and the Convention operate independently of one another. This result appears obvious when an application is made solely under the Convention or solely under the Act. One procedure may provide advantages that the other does not. When a particular procedure is chosen, however, it

should operate independently of the other, though where the provisions of the Act are selected it may not be improper to look at the Convention in determining the attitude that should be taken by the courts, since the legislature's adoption of the Convention is indicative of the legislature's judgment that international child custody disputes are best resolved by returning the child to its habitual place of residence....

It is difficult to understand the distinction drawn here between the Convention and the Act and, more particularly, how an application could be made under the Convention as opposed to the Act. The Convention does not and could not confer jurisdiction on Manitoba courts to make orders. The Convention is without legal significance in Manitoba except in so far as it is incorporated into the Act and thereby made part of Manitoba law. It follows that applications which invoke provisions of the Convention are made under the Act and in fact rely on the law of Manitoba as declared in the Act.

It is also difficult to understand why the various provisions of the Act, including those incorporated from the Convention, should operate independently of one another. Perhaps the most fundamental principle of statutory interpretation is that statutes are meant to embody coherent and internally consistent schemes to which each provision contributes in a useful way. Had the Manitoba legislature intended the Convention, once implemented, to operate independently of the Act it would have implemented the Convention in a separate Act.

Finally, it is not clear why, if the Act creates two independent schemes, the Manitoba based scheme should be read in light of the Convention, but the latter need not be read in light of the former. La Forest, J. writes that the legislature's adoption of the Convention is evidence of its judgment that international child custody disputes are best resolved in accordance with the Convention. However, this analysis ignores the other evidence of legislative intent, notably, sections 1-16 of the Act, the context in which the Convention was implemented, and the legislative history of the enactment. Of particular concern are sections 5 and 6. The notwithstanding clause in section 5 makes it clear that, to the extent there is a conflict between the standard of child protection set out in the section and the standard set out in the Convention, the former prevails. Section 6 confers a right on interested parties to apply to the court for a

variety of orders not provided for under the Convention. It is far from self-evident that the Manitoba legislature intended the discretion conferred on the court by section 6 to be displaced by the provisions of the Convention.

It would be helpful if section 6, like section 5, began with a notwithstanding clause. In the absence of such a clause, the interpreter is thrown back on other indicators of legislative intent. One such indicator is Manitoba's decision not to enact the Uniform Act prepared by the Uniform Law Conference of Canada to implement the Convention. The Uniform Act was adopted by four provinces. It includes a provision that gives paramountcy to the Convention in the event of a conflict between the Convention and other legislation. A similar clause is found in the implementing legislation of three other provinces. As La Forest J. observes, speaking of the common law provinces, only the British Columbia and Manitoba Acts do not contain such a paramountcy clause. A fair inference from these facts is that Manitoba did not intend the Convention to prevail over all other domestic legislation; rather it intended sections 1- 16 of the Act to supplement the provisions of the Convention.

This inference is confirmed by the explanations offered by Manitoba's Attorney General to the Standing Committee on Law Amendments which considered the legislation in bill form. In response to questions from a Committee member, the Attorney General said:

With respect to the point made about conflict between the Act and the Convention, it is my impression ... that in fact the bill that we're proposing gives greater protections [to the best interests of the child] and that the Convention is a minimum. What we're doing is going beyond the Convention....

I don't think that there is that potential for conflict. It is always possible of course that there is some conflict that may be perceived between one section of an Act and another, but then that falls to be decided by the ordinary rules of statutory interpretation. ... *It was the intention of this bill not to*

*restrict, but to enlarge the protective mechanisms of the Convention....*²⁷

This indicates quite clearly that the provisions of the Convention were not intended to operate independently of the other provisions in the Act. It further indicates that the legislature was not content to simply incorporate the Convention, but wished to supplement it. As explained by the Attorney General, the intention was “to enlarge the protective mechanisms of the Convention”.

L’Heureux-Dubé, J, who wrote a dissenting judgment in the case, drew attention to another indicator of legislative intent, namely the way in which section 6 tracks the wording of the Convention. She wrote:

Both the wording of the Convention and the CCEA provide support for the complementary interpretation of the two. First the precise wording of s. 6 CCEA adopts the same terminology as that of the Convention by making reference to the wrongful removal and retention of the child, thus stressing the fact that the court’s jurisdiction to make transitory orders pursuant to s. 6 is to be available regardless of whether the Convention is applicable.²⁸

Finally, she drew attention to the potential conflict between giving paramount importance to the interests of children in custody matters and securing their prompt return. The Convention struck a particular balance between these interests, one that did not seem satisfactory to the Manitoba legislature, which adjusted the balance by providing additional protections for the child in sections 5 and 6. L’Heureux-Dubé J. wrote:

The emphasis placed upon prompt return in the Convention must be interpreted in light of the paramount objective of the best interests of children and in light of the express wording of the CCEA through which the Convention was enacted in

²⁷ Legislative Assembly of Manitoba, Standing Committee on Law Amendments, vol. XXX No. 6, June 28, 1982, at p. 101.

²⁸ Ibid. at para 129.

Manitoba, and should not mean return without regard for the immediate needs or circumstances of the child.²⁹

In our view, the reasoning in the minority judgment is to be preferred over that of the majority because it gives appropriate weight to legislative intent.

External Context

In cases like *Ward*, a particular international convention is relied on in interpreting domestic legislation because the court has reason to believe that the purpose of the legislation, in part at least, was to implement the international obligations assumed by Canada upon ratifying the convention. In other cases, international law materials may form part of the external context that (arguably) was present to the mind of the legislature when it enacted the legislation in question. This is certainly true of the international human rights instruments that influenced the framing of the Charter. It is also possible for foreign codifying or implementing legislation to influence the interpretation of similar domestic legislation, as illustrated in *Re Canada Labour Code*.³⁰

Judge-made Norms

In Elmer Driedger's approach to statutory interpretation, as set out in his second edition, the common law presumptions of legislative intent are treated as a subcategory of legislative intent. He wrote:

It may be convenient to regard "intention of Parliament" as composed of four elements, [including] ... the presumed intention – the intention that the courts will in the absence of an indication to the contrary impute to Parliament...³¹

Driedger here explains what is not apparent from simply reading the modern principle itself, namely that the reference to legislative intention includes

²⁹ Ibid. at para 131.

³⁰ [1992] 2 S.C.R. 50.

³¹ E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 106.

presumed intent and presumed intent in fact consists of judge made norms. These norms are applied to resolve interpretation disputes despite the absence of evidence that the legislature intended them to apply. The justification is that, in the opinion of the courts, they are important enough to warrant judicial protection against incursions by the legislative branch of government.

Of course, once a norm is established and relied on in statutory interpretation, it behooves a legislature to sit up and take notice. If the legislature knows that its silence will be interpreted in a particular way, and yet remains silent, the courts may legitimately infer that the legislature intended its legislation to be interpreted that way. In this sense, presumed intent may be considered an expression of actual legislative intent. But this analysis obscures what is most important about judge made norms, namely their origin. Judges make them up, and it is therefore up to judges to justify them, that is, to explain where they came from and why they should be imputed to the legislature.

Many presumptions of legislative intent are rooted in British constitutional law. As La Forest J.A. pointed out in *Estabrooks*, these are rooted in the liberal philosophy of the 17th century:

Those who struggled to wrest power from the Stuart Kings and placed it in the hands of the elected representatives of the people were not of a mind to replace one despot by another. Rather they were guided by a philosophy that placed a high premium on individual liberty and private property and that philosophy continues to inform our fundamental political arrangements – our Constitution....

With the complete realization of the implications of Parliamentary supremacy, this type of judicial approach, of course, disappeared. But the original foundations of our governmental organization remained as a legacy in a number of presumptions designed ... “as protection against

interference by the state with the liberty or property of the subject”....³²

Other presumptions are rooted more specifically in Canada’s constitutional experience, for example, the presumption that legislation affecting Aboriginal peoples must be interpreted in their favour and the liberal construction of language rights.³³

A number of well-established presumptions derive from the incorporation of customary international law into common law that took place during the 18th century. This category includes the presumption against the extra-territorial application of domestic law, based on the doctrine of territorial sovereignty, and presumed respect for the principle of comity, which was the basis for both common law and civil law systems of private international law.³⁴ A good example of the incorporation process is found in the 18th century case *Scrimshire v. Scrimshire*,³⁵ in which for the first time the question of the validity of a foreign marriage between two British subjects came before British courts. Under English law the marriage between the parties was valid, but under the law of France where the marriage took place it was null. To determine the applicable law, the court consulted some half dozen authorities on international law. It reached the following conclusion:

From the doctrine laid down in our books — the practice of nations — and the mischief and confusions that would arise

³² (1982), 144 DLR (3d) 21 (NBCA) at 210-11.

³³ See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 378ff and 409ff.

³⁴ The private international law of Britain was initially derived largely from the work of the Dutch scholar Huberus as published in *De Conflictu Legum*, trans. by E.G. Lorenzen “Huber’s *De Conflictu Legum* (1919), 13 Ill. L. Rev. 375 at pp. 401 et seq. Huberus explained that his system of private international law was founded on three maxims:

- (1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.
- (2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
- (3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.

³⁵ (1752) 2 Hag. Cons. 395, 161 E.R. 782.

to the subjects of every country, from a contrary doctrine, I may infer that it is the consent of all nations that it is the jus gentium that the solemnities of the different nations with respect to marriages should be observed, and that contracts of this kind are to be determined by the law of country where they are made.... The jus gentium is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it: and the Court observing that law, in determining upon this case, cannot be said to determine English rights by the laws of France, but by the law of England of which the jus gentium is part.³⁶

This strong statement of the principle of automatic adoption of international law is typical of the 18th century.³⁷ International law is adopted because it is universally observed by every country and the courts fear that failure to observe it would bring mischief and confusion to the subjects of a non-observing country.

Another category of presumptions derives from the judicial duty to harmonize potentially conflicting sources of law. The courts have developed a set of rules to deal with conflicts between different sources of legislation (federal/provincial, statute/ regulation) and between legislation on the one hand and the entrenched constitution, the common law and international law on the other. These rules reflect a hierarchy among the sources of law in which the entrenched constitution prevails over legislation and legislation prevails over common law as well as international law. However, before applying these rules the courts rely on a number of harmonizing presumptions: that the legislature intends to comply with constitutional limits on its jurisdiction, that it does not intend to change the common law or derogate from the Civil Code, and that it does intend to comply with international law.

The first presumption, that the legislature intends to comply with constitutional limits, reflects the accepted relationship between entrenched

³⁶ Ibid. at 790.

³⁷ See, for example, *Buvert v. Barbuitt* (1737), Cas. T. Talb 281, 25 E.R. 777; *Roach v. Jarvan* (1748), 1 Ves. Sen. 157, 27 E.R. 954; *Tringquet v. Bath* (1764), 3 Burr. 1478, 97 E.R. 936.

legal norms and mere legislation and it makes good sense. Since legislatures have no capacity to exceed the limits on their jurisdiction, it would be both improper and futile for them to attempt to do so. The presumption of non-derogation from the Civil Code is also readily justified with reference to the role of the Civil Code in a civil law system.³⁸

The presumption against changing the common law is more contentious. As a matter of constitutional law, validly enacted legislation prevails over the common law to the extent of any inconsistency. Given this rule, why would courts resolve legislative ambiguity in favour of the common law? Given that the legislature does not legislate in vain, why would the courts presume an intention not to change? In responding to these questions, a distinction should be drawn between common law constitutional principles, such as the rule of law or the presumption that property will not be expropriated without compensation, and ordinary private law rules such as those governing the formation of contracts or the administration of trusts. Legislatures might be expected to defer to well established constitutional principles, but not to common law private law. Perhaps the best justification for the presumption against changing the common law is that it creates an incentive for explicit legislative drafting so as to avoid ambiguity and ensure that change is not made surreptitiously in the case of fundamental principles or inadvertently in the case of ordinary common law.

Finally, there is the presumption of compliance with international law. Given the standard formulations of this presumption, it must be taken to apply to all obligations imposed on Canada by international law, regardless of source — whether customary law or convention — and in the case of convention-based obligations, regardless of whether the convention has been implemented. Conventions that have not been ratified obviously impose no obligations, but once ratified they are binding on Canada, whether or not they have been implemented. However, the

³⁸ For discussion, see Jean-Maurice Brisson & André Morel, *Federal Law and Civil Law: Complementarity and Dissociation*, in CAN. DEPT. OF JUSTICE, THE HARMONIZATION OF FEDERAL LEGISLATION WITH QUEBEC CIVIL LAW AND CANADIAN BIJURALISM, COLLECTION OF STUDIES 2, 217 (1995)

failure to implement a convention might, in some circumstances,³⁹ be taken to indicate an intention not to implement.

In justifying the presumption of compliance with international law, Van Ert writes:

The normative justification for the presumption [of compliance with international law] is the principle of respect for international law. To interpret the acts of our legislatures and courts in a way that failed to respect international law or comity would impute to these bodies an unlawful or belligerent intent. Such an imputation is certainly uncharitable and usually wrong. There is also an important prescriptive justification for the presumption. Violations of international law or comity may bring international responsibility upon the state. The judiciary should therefore avoid internationally unlawful constructions of domestic law wherever possible.⁴⁰

In our view, interpreting legislative or judicial acts in a way that violates international law or comity can be said to impute an unlawful or belligerent intent to those institutions only if one assumes that international law is binding within Canada, an assumption we reject. The second argument, that interpreting legislative or judicial acts in a way that violates international law or comity is usually wrong, is an argument about actual legislative or judicial intent, which must be based on evidence rather than presumed.

Van Ert's third argument is that violations of international law may have repercussions for the state, or possibly for its subjects. However, it is not the court's duty to avoid such repercussions. The extent to which the state or its subjects are to be put at risk through violation of international

³⁹ This inference would not arise if there was reason to believe that the convention's obligations were already implemented by existing law. This is the case with many human rights conventions: see I. Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System" (2004), 37 *UBCLRev* 113 at 127 and 132ff. Arguably it is the case with the Convention on the Rights of the Child considered in *Baker v. Canada*, above n. 1 discussed below at 30ff.

⁴⁰ Van Ert, above n. 12 at pp. 99-100.

law is for the legislature to decide. Just as it is open to Canadian legislatures to derogate from Charter values within the limits prescribed by section 1, so it is open to Canadian legislatures to derogate from international law to whatever extent seems appropriate to secure the best interest of their electorates. And just as courts must not apply the presumption of compliance with Charter values so as to preclude application of section 1,⁴¹ so too they must take care not to apply the presumption of compliance with international law to undermine the legislature's constitutional right and duty to consider whether compliance is in the best interest of Canada or the relevant province.

We conclude that the primary justification for presuming interpretations that comply with international law is to avoid giving effect to legislative violations of international law that are surreptitious or inadvertent. In other words, the justification for presuming compliance with international law rests on much the same ground as the justification for presuming that the legislature does not intend to change the common law.

As noted above, in applying the presumption of compliance with common law, the courts distinguish between constitutional law principles and ordinary private law. A similar distinction is appropriately made between international human rights law and other areas of international law.⁴² The justification for this distinction is not that international human rights law is binding on the courts, but rather that protecting human rights is an area in which courts claim inherent jurisdiction and special expertise. As asserted by Commonwealth judges in the *Bangalore Declaration*:

1. Fundamental human rights and freedoms are universal....
2. The universality of human rights derives from the moral principle of each individual's personal and equal autonomy and human dignity. That principle transcends national political systems and *is in the keeping of the judiciary*.⁴³

⁴¹ *Bell ExpressVu Limited Partnership v. R.* (2002), 212 DLR 4th 1 (SCC) – quote relevant passage

⁴² For an excellent recent analysis of this distinction, see Van Ert chapter 7, above n.12.

⁴³ As quoted by van Ert, above n. 12, at p. 238.

In so far as international human rights law sets out fundamental human rights and freedoms, the Canadian judiciary is obliged to give effect to it – not because international law is binding on Canadian judges, but because the judiciary is obliged to give effect to fundamental human rights within Canada.

The last category of judicial norms to be examined here includes newly emerging norms. In *Willick v. Willick*, the Supreme Court of Canada asserted that interpretations that would tend to defeat the “feminization of poverty” are to be preferred over ones that do not.⁴⁴ In *Rizzo & Rizzo Shoes*, it asserted that interpretations that recognize the fundamental role that employment has assumed in the life of the individuals should be preferred.⁴⁵ The presumptions relied on in these cases are grounded in evolving social, cultural and political norms, as evidenced by government reports, academic writing and policies embodied in domestic legislation.

Another source of newly emerging legal norms is international law. This use of international law is illustrated by the reasoning of L’Heureux-Dubé J. in the *Spraytech* case.⁴⁶ The issue was whether the Town of Hudson had authority under Quebec’s *Cities and Towns Act*⁴⁷ to make a by-law restricting the use of pesticides to certain locations and activities. Under s. 410(1) of the Act, a municipal council could make by-laws to “secure peace, order, good government, health and general welfare in the territory of the municipality”. The Court held that this omnibus enabling power was broad enough to authorize the pesticide by-law. In the majority reasons L’Heureux-Dubé J. wrote:

To conclude this section on statutory authority, I note that reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy.

...

⁴⁴ [1994] 3 SCR 670.

⁴⁵ [1998] 1 SCR 27.

⁴⁶ *114957 Canada Ltd (Spraytech) v. Hudson* [2001] 2 SCR 241.

⁴⁷ RSQ, c. C-19, ss. 410 [am. 1982, c. 64, s. 5; am. 1996, c. 2, s. 150].

The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the Bergen Ministerial Declaration on Sustainable Development (1990):

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations

Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment".... The Supreme Court of India considers the precautionary principle to be "part of the Customary International Law".... In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under this rubric of preventive action.⁴⁸

This analysis illustrates how international law can be a source of domestic legal norms. The justification lies in evidence of (1) Canada's commitment to the norm, (2) the widespread acceptance of the norm in the international community, and (3) its coincidence with domestic concerns about the dangers of environmental pollution.⁴⁹

The *Spraytech* case also illustrates a timing problem that can arise in relying on international law as a source of legal norms. Section 410 of the *Cities and Towns Act* was first enacted well before the formulation of

⁴⁸ Ibid. at 266-267.

⁴⁹ Another emerging norm, grounded in international law, is harmonization — see, for example, the dissenting judgment of Binnie J. in *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, at para. 12ff.

the precautionary principle in international law. The question, then, is the extent to which it is legitimate for courts to rely on international legal norms that were not in existence when the legislation was enacted.

Dynamic Interpretation

The question posed above is not unique to international law norms and is best addressed in the context of Canadian law concerning the interpretation of legislative texts over time. While this is a complex subject, two basic principles offer a helpful starting point. The first is that in interpreting all legal texts, whether entrenched constitutions or ordinary statutes, courts must mediate between the original context in which the law was made and the operating context in which the law is applied from time to time. The original context includes the law in existence when the constitution or statute was conceived — whether domestic, foreign or international and whether hard or soft law. The operating context includes the law in existence when the constitution or statute is applied, including evolving international law, both hard and soft, and including conventions ratified after the law was enacted. Mediating between these two contexts lies at the heart of the judicial function in statutory interpretation, which is the application of more or less abstract rules conceived at one time to concrete facts occurring at another.

The second basic principle is that entrenched constitutional instruments should receive an “organic” or dynamic interpretation. This principle was most famously expressed by Lord Sankey in *Edwards* where he introduced the living tree metaphor.⁵⁰ Because a dynamic interpretation is called for, international law materials as they exist from time to time are an appropriate source of legal norms to be relied on in interpreting the Charter, both the rights and freedoms it declares⁵¹ and the limitations it accepts under s. 1.⁵² Even though some of these materials would not have been contemplated by the Charter’s framers as formal

⁵⁰ [1930] AC 124 (PC).

⁵¹ See Van Ert, chapter 7, above n. 12.

⁵² See, for example, L’Heureux-Dubé, J in *R. v. Sharpe* [2001] 1 SCR 45 at para . 175ff. See also discussion by Van Ert, *ibid.* at 240ff.

sources of the law set out in the Charter, they form part of the operating context.

The primary justification for the living tree doctrine is the fundamental importance of an entrenched constitution in ensuring the stability of a state and the security of its subjects, coupled with the difficulty of amending it. This justification does not apply to ordinary legislation, which (in principle) can easily be amended. However, there are other grounds on which courts appropriately adopt an “organic” or dynamic approach. These grounds are sometimes formulated in terms of framers’ or legislative intent. For example, when the legislature enacts a statute that is to operate for an indefinite time, particularly one that establishes institutions of governance or regulatory frameworks, it intends for those who will apply the statute to adapt it to evolving circumstance so that the statute continues to meet the legislature’s original goals.

However, the most common basis for adopting a dynamic approach is the existence of discretion. When the legislature confers discretion on those who are to apply a statute, either directly through enabling provisions or indirectly through the use of general terms, it intends that discretion to be exercised taking into account evolving circumstance. Otherwise there would be no point in conferring the discretion. This point is explained by McLachlin J. (as she then was) in *Tataryn v. Tataryn Estate*,⁵³ where the Supreme Court of Canada had to determine what provision for the testator’s dependents would be “adequate, just and equitable” within the meaning of British Columbia’s *Wills Variation Act*. McLachlin J. wrote:

The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking ..., means that the Act must be read in light of modern values and expectations.... The search is for contemporary justice.⁵⁴

⁵³ [1994] 2 SCR 807.

⁵⁴ Ibid. at 814-5.

An important source of modern values and expectations (although not the only source) is international law.

The role international law can play in dynamic interpretation is nicely illustrated by the judgment of McLachlin C.J. in *Canadian Foundation for Children Youth and the Law v. Canada*.⁵⁵ The issue there was whether s. 43 of the *Criminal Code* was consistent with sections 7, 12 and 15 of the Charter. Section 43 provides:

43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Before reaching the Charter issues, it was necessary to determine the meaning of the rule set out in s. 43 and in particular the import of the expression “reasonable under the circumstances”. McLachlin C.J. wrote:

....precision on what is reasonable under the circumstances may be derived from international treaty obligations. Statutes should be construed to comply with Canada’s international obligations.... Canada’s international commitments confirm that physical correction that either harms or degrades a child is unreasonable.⁵⁶

She also emphasized the fact that “neither the Convention on the Rights of the Child nor the International Covenant on Civil and Political Rights explicitly require state parties to ban all corporal punishment of children.”⁵⁷ The Conventions referred to in her judgment came into existence and were ratified long after s. 43 was first enacted, yet they were legitimate indicators of the norms domestic courts could rely on in deciding what is “reasonable under the circumstances.”⁵⁸

⁵⁵ [2004] 1 SCR 76.

⁵⁶ Ibid., para 31.

⁵⁷ Ibid., para 33.

⁵⁸ While the majority relied on international law to support their understanding of s. 43 of the Code, they did so selectively. As pointed out in the dissenting judgment of

The *Canadian Foundation* case illustrates the interaction between international law and the discretion conferred on interpreters by general or abstract language in a statute. In this context, it does not matter whether the court justifies its reliance on international law by appealing to the presumption of compliance or by appealing to norms whose validity and importance in domestic law is established in part by their recognition in international law. Things are somewhat more complicated, however, when it comes to the rule-making and decision-making discretions that are often conferred on the executive branch.

Generally speaking, the presumptions of legislative intent apply to enabling provisions that confer discretion so that, in the absence of evidence to the contrary, the powers conferred by the legislature (whether legislative or administrative) do not include the jurisdiction to violate those presumptions.⁵⁹ On this basis, regulations and decisions may be struck down as *ultra vires* because they fail to comply with international law. This approach is troubling because it does not allow for a nuanced analysis of the purpose and scope of the enabling provision. The relevance and weight of international law norms in the exercise of rule-making or decision-making discretion should be governed not by a rule — presume compliance — but rather by a pragmatic approach in which international law norms are but one of many considerations affecting the court’s assessment of the purpose and scope of the delegated authority.

The reasoning of the majority in *Baker v. Canada (Minister of Citizenship and Immigration)*⁶⁰ offers an illustration of this approach. By regulations made under subsection 114(2) of the *Immigration Act*,⁶¹ the Minister of Immigration was authorized

Arbour J., the Convention on the Rights of the Child establishes a Committee on the Rights of the Child. This Committee has been highly critical of s. 43 of Canada’s Criminal Code. In its 2003 report, Arbour J. notes, “the Committee expressed ‘deep concern’ that Canada had taken ‘no action to remove section 43 of the Criminal Code’ and recommended the adoption of legislation to remove the existing authorization of the use of ‘reasonable force’ in disciplining children.” *Ibid.* at para 188.

⁵⁹ See Keyes, above n. 2 at 165ff.

⁶⁰ Above, n.1.

⁶¹ RSC 1985, c. I-2.

...to exempt any person from any regulation made under subsection 114(1) ... where the Minister is satisfied that the person should be exempted from that regulation ... owing to the existence of compassionate or humanitarian considerations.⁶²

Long after subsection 114(2) was originally enacted in 1976,⁶³ Canada ratified the *Convention on the Rights of the Child*, which provided (among other things) that “in all actions concerning children, the best interests of the child shall be a primary consideration.”⁶⁴

The appellant Baker asked the Minister to exempt her on humanitarian and compassionate grounds from a regulation that required her application for permanent residence to be made from outside Canada. If she were forced to leave Canada, she would be separated from her four Canadian born children, to their detriment as well as hers. The Minister rejected her request and the Federal Court dismissed her application for judicial review. However, it certified the following question as a basis for appeal:

Given that the *Immigration Act* does not expressly incorporate the language of Canada’s international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?

The appellant argued that the Minister was obliged to exercise her discretion in accordance with the Convention. The Minister argued that to require her discretion to be exercised in accordance with an unimplemented Convention would effectively implement the Convention, thereby undermining both the separation of powers between the executive

⁶² *Immigration Regulations*, 1978, SOR/ 78-172, as amended by SOR/ 93-94.

⁶³ SC 1976-77, c. 52. Note, that the critical date here in terms of legislative intent is when the statutory enabling provision was enacted, not when the regulations were made.

⁶⁴ Convention on the Rights of the Child, Can. T.S. 1992 No. 3, art. 1.

and legislative branches of government and the division of powers between federal and provincial governments.

The majority judgment in *Baker* does not really answer the certified question nor does it directly address the issues raised by the submissions of the parties. However, some conclusions can be drawn. The majority held that the decision neglected the interests of Ms. Baker's children and this neglect was unreasonable because serving the interests of children is an important norm in Canadian law, as evidenced in several ways. L'Heureux-Dubé, J wrote:

In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H& C decisions published by the Minister herself.⁶⁵

Later she elaborates on the significance of international instruments in constraining ministerial discretion:

Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute....

Nonetheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review....

⁶⁵ Above n. 1 at para 67.

... The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.⁶⁶

As this analysis shows, the majority in *Baker* does not suggest that the Minister is obliged by the Convention to give primary consideration to the best interests of the applicant's children. Nor does it rely on the presumption of compliance with international law. The Convention on the Rights of the Child is invoked, along with other Conventions ratified by Canada, as a justification for emphasizing the importance the Minister must attach to the interests of children if the exercise of her discretion is to be reasonable. The Conventions are significant in so far as they illuminate the content and add to the weight of a norm which the court has judged to be relevant, along with other considerations, in the exercise of that discretion.

Executive Intent

It is axiomatic that courts must give effect to legislative intent in so far as that intent can be established. But when the legislature's intent is doubtful, the courts necessarily resort to relevant legal norms to help resolve the interpretation problem. The question to be examined in this section is what notice courts may take of executive intent and what role, if any, such intent might properly play in statutory interpretation.

The issue of executive intent arises when the executive ratifies an international convention, but does not take any overt steps to implement it by introducing legislation or exercising a delegated or prerogative power. There is a range of explanations for this:

- (1) the executive considers that it is not in the best interest of the jurisdiction to implement the convention for the time being (this may particularly occur if there has been a change in government);

⁶⁶ Ibid. at para 69-71.

- (2) the executive is preoccupied with other matters, and implementation, while desirable, is not a priority;
- (3) in the view of the executive, the legislature lacks jurisdiction to implement the convention and must seek implementation by provincial authorities;
- (4) in the view of the executive, there is no need for additional implementation measures because domestic law already provides for everything undertaken by ratifying the convention.

Supposing reliable evidence of executive intent could be brought before the court,⁶⁷ should such evidence be admissible and would it be relevant? In our view, evidence of executive intent should be admissible to the same extent as evidence of legislative intent. There is no reason for courts to cling to the fiction that legislatures control the legislative agenda and the content and form of legislation. Courts should be able to take judicial notice of the real relations of power and accountability between the executive branch and the legislature.

Once those relations are acknowledged, the relevance of executive intent becomes obvious, particularly in cases where the issue is the significance of non-implementation of a ratified convention. If the executive has judged it better to avoid implementation in whole or in part or has judged it expedient to postpone implementation, the court has no business second guessing that judgment. The consequences of failure to implement is a matter for international, not domestic, law.

Access to executive opinion is particularly important when the executive branch decides that implementation is not required because the terms of the ratified convention are already contained in domestic law. This opinion cannot be relied on as evidence of actual legislative intent, since it postdates the enactment of the legislation. However, the newly ratified convention is part of the operating context in which existing legislation should be interpreted. And in so far as the opinion of the executive is accessible, it can be relied on as persuasive authority in fixing

⁶⁷ A major problem that arises in any attempt to rely on executive intent is that most reliable sources evidencing such intent are subject to a variety of restrictions on disclosure: see above, n. 9.

the meaning or scope of legislation or assessing the weight to be assigned to a legal norm.

In a number of cases involving actions against the ratifying government in Commonwealth nations, litigants have attempted to rely on conventions that have been ratified, but not expressly implemented, by invoking the doctrine of legitimate expectations. In the *Teoh* case, the High Court of Australia held that ratification by Australia of the international Convention on the Rights of the Child effectively evidenced the intention of the executive branch of the Australian government to be bound by the terms of the convention.⁶⁸ This approach has since been doubted by the Australian High Court⁶⁹ and was firmly rejected in *Baker*, quite rightly in our view, although not necessarily for the right reasons. Speaking for the entire court on this point, L'Heureux-Dube emphasized that the doctrine of legitimate expectations does not create substantive rights. She wrote:

...the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the “circumstances” affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.⁷⁰

She went on to say that ratification of the Convention did not give rise to a legitimate expectation that special procedures would be followed, in addition to those normally followed in applications to the Minister under s.114(2) of the *Immigration Act*. Nor did it give rise to an expectation that the Minister would apply particular criteria or reach a positive result. She wrote:

⁶⁸ (1995), 183 CLR 273.

⁶⁹ See *Lam*, above n. 1 at 97ff.

⁷⁰ Above n. 1 at para 26.

This Convention is not, in my view, the equivalent of a government representation about how H & C applications [applications to the Minister to facilitate admission to Canada on humanitarian and compassionate grounds] will be decided, nor does it suggest that any rights beyond the [usual] participatory rights ... will be accorded.... It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.⁷¹

In our view, there are *no* circumstances in which the mere ratification of an international instrument, in the absence of implementation action, could fairly give rise to a legitimate expectation on the part of a citizen that the state will act in accordance with the terms of the convention. In the first place, an expectation of compliance is far from being the sole or even the most reasonable response to the act of ratification. Under Canadian constitutional law, international conventions cannot change domestic law until they are implemented, and the executive and legislative branches have unfettered discretion whether to implement a ratified convention. As noted above, the failure to implement a ratified convention may have several different causes, including unwillingness to implement the convention. In these circumstances, there is no legitimate basis to expect that ratification of a convention will have any impact on domestic law.

International Law as Comparative Law

In recent years, there has been considerable discussion of resort to international law for comparative law purposes. This treats international law as an inspirational resource, comparable to the foreign law of other jurisdictions, to which courts may resort in an effort to find the best solution to a given legal problem.⁷² On this approach, international law is relied on as a source of good ideas and as such merits little weight.

⁷¹ Ibid. at para. 29.

⁷² See, for example, Karen Knop, "Here and There: International Law in Domestic Courts" (2000), 32 *New York U. J. International Law and Policy* 501 and Anne LaForest, "Domestic Application of International Law in Charter Cases: Are We There Yet?" (2004), 37 *UBC Law Rev* 157.

Stephen Toope and Gibran Van Ert object to this approach.⁷³ But arguably their objections target the claim that this is the primary or only use of international law in the interpretation of domestic legislation. On the analysis proposed here, reliance on international law as a source of comparison is but one approach among several.

The comparative law approach to international law is nicely illustrated in *Suresh v. Canada*,⁷⁴ in which one of the questions was whether the reference to terrorism in section 19 of the *Immigration Act* was void for vagueness. It provided that no person may be admitted to Canada as a permanent resident if there are reasonable grounds to believe that the person has engaged in terrorism or is a member of an organization that has engaged in or might engage in terrorism. The court acknowledged that “terrorism” is a vague term, susceptible to a range of interpretations based on political or ideological considerations. In an effort to delimit the term, the court looked to a variety of international law materials, including the International Convention for the Suppression of the Financing of Terrorism, the Convention on the Physical Protection of Nuclear Material and the International Convention for the Suppression of Terrorist Bombings. The Court reached the following conclusion:

In our view, it may safely be concluded, following the International Convention for the Suppression of the Financing of Terrorism, that “terrorism” in s. 19 of the Act includes any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”. This definition catches the essence of what the world understands by “terrorism”.⁷⁵

⁷³ See, for example, Stephen J. Toope, “The Use of Metaphor: International Law and the Supreme Court” (2001) *Can. Bar Rev.* 534 at 540; van Ert above n.12 at pp. 256 & ff.

⁷⁴ [2002] SCC 1.

⁷⁵ *Ibid.* at para 98.

The Convention relied on to interpret the term “terrorism” in s. 19 postdates the enactment of the provision. In such a case, it is impossible to argue that the legislature intended to adopt the definition of “terrorism” accepted by the signatories to the Convention. Nonetheless, there could be a legal norm that would justify the court in adopting the Convention’s understanding of terrorism — here, possibly, the need to harmonize Canadian legislation with the legislation of other jurisdictions in the international effort to defeat terrorism. But even in the absence of such a norm, the Convention is useful because it offers a contained and plausible understanding of a vague term.

Part 3 – Legislative and Administrative Implementation Action

In Part 2, we explored the ways in which international law can affect the interpretation of domestic legislation. In this part, we consider the types of action, both legislative and administrative, that can be taken to implement Canada’s international obligations.

The threshold requirement for taking such action is to have the jurisdiction to do so. As noted above, jurisdiction to implement international agreements ratified by Canada depends on their subject-matter and follows the division of powers established by the *Constitution Act, 1867*.⁷⁶

Many types of state action can be taken to give an international agreement domestic legal effect. Their legal effect varies considerably, as does their transparency. The following is a list of the various types, beginning with the most explicit and concluding with the most subtle:

- domestic laws (whether in the form of primary or delegated legislation) can provide that the agreement has effect as law (direct implementation),
- domestic laws can restate the provisions of the agreement (rights, prohibitions, requirements) that the agreement says are to be part of domestic law (restatement),
- new powers (legislative or administrative) can be enacted to give effect to the agreement,

⁷⁶ Above at p.6.

- existing administrative powers can be used to give effect to the agreement.

These techniques can be used separately or in combination with one another. This part reviews them and comments on their advantages and disadvantages. It also looks at some aspects of reversing implementation measures (de-implementation) when a state decides to withdraw from an agreement. Finally, a checklist for considering these techniques is provided in the appendix to this article.

Direct Implementation by Providing that an Agreement has Effect as Law

The most direct way to give domestic legal effect to an agreement is simply to enact that the Agreement “has the force of law”. For example, section 142 of the *Canada Shipping Act, 2001*⁷⁷ says:

142. (1) Subject to the reservations that Canada made and that are set out in Part 2 of Schedule 3, the International Convention on Salvage, 1989, signed at London on April 28, 1989 and set out in Part 1 of Schedule 3, is approved and *declared to have the force of law in Canada.*

This language incorporates the text of the agreement into domestic law, instructing those who are bound by the domestic law to treat it as they would any other text enacted as law. This is not, however, the only language capable of conferring the force of domestic law on the text of a treaty. *Canada v. Nakane*⁷⁸ suggests that “sanctioned” will suffice. In this case, section 2 of the *Japanese Treaty Act, 1906*⁷⁹ said simply:

2. The convention of the 31st day of January, 1906, which is set forth in the schedule to this Act is hereby sanctioned.

Irving, J of the Full Court of British Columbia concluded:

⁷⁷ SC 2001, c. 26.

⁷⁸ [1908] BCJ No. 15; 13 BCR 370 (FC).

⁷⁹ SC 1906-07, c. 50.

That seems to be a very apt and proper way of giving effect in Canada to all the terms of the Treaty. Without an Act giving effect to the Treaty there would be no binding law governing the officials of this country. The word “sanction” signifies to ratify a decree or ordinance — in an extended sense to make anything binding. In itself, it conveys the idea of authority by the person sanctioning. It is the lending of a name, an authority or an influence in order to strengthen and confirm a thing.⁸⁰

If “sanctioned” will directly incorporate a treaty into domestic law, it appears that “approved” will not. In some countries, including Canada, there is a legislative practice in implementing legislation of providing that an agreement is “approved”. The example quoted above from the *Canada Shipping Act, 2001* illustrates this. The purpose of this practice in jurisdictions based on the British model is not entirely clear.⁸¹ It may be intended simply to signal legislative acceptance of the actions of the Executive in concluding and ratifying the agreement. Such “approval” has no effect on the status of the agreement as a matter of international law since the power to conclude international agreements falls exclusively within the prerogatives of the Executive. But it equally has no effect in terms of making the agreement part of domestic law, other than perhaps to explain why, as in the *Canada Shipping Act* example, Parliament is taking the further step of giving the treaty binding force as a matter of domestic law. The presence additional language in this example (“declared to have the force of law”) explicitly conferring this effect reinforces the conclusion that mere “approval” will not suffice.

This conclusion is also confirmed in *Pfizer v. Canada*,⁸² where the Federal Court of Appeal considered provisions “approving” the *WTO Agreement Implementation Act* and expressing the purpose of implementing it. The Court rejected the argument that these had the effect of making the entire agreement part of Canadian law:

⁸⁰ Above n. 78 at 374-5.

⁸¹ J. Crawford, “The International Law Standard in the Statutes of Australia and the United Kingdom” (1979), 73 Am. J. of Int. Law 628 at 629.

⁸² [1999] FCJ No. 1122 (TD).

[48]In short, Pfizer fails in its arguments. When Parliament said, in section 3 of the *WTO Agreement Implementation Act*, that the purpose of that Act was to implement the Agreement, Parliament was merely saying the obvious; it was providing for the implementation of the WTO Agreement as contained in the statute as a whole including Part II dealing with specific statutory changes. When Parliament said in section 8 of the *WTO Agreement Implementation Act* that it was approving the WTO Agreement, Parliament did not incorporate the WTO Agreement into federal law. Indeed, it could not, because some aspects of the WTO Agreement could only be implemented by the provinces under their constitutional legislative authority pursuant to section 92 of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]]. What Parliament did in approving the Agreement is to anchor the Agreement as the basis for its participation in the World Trade Organization, Canada's adherence to WTO mechanisms such as dispute settlement and the basis for implementation where adaptation through regulation or adjudication was required.⁸³

Another, often complementary, way to give direct legal effect to an international agreement is to provide that it prevails over any inconsistent laws⁸⁴ or that other laws are amended so as to give effect to the agreement.⁸⁵ These sorts of provisions attempt to resolve conflicts that might arise between the existing law and the agreement. However, they

⁸³ Ibid. at para. 48.

⁸⁴ See, *Canada Shipping Act, 2001*, *ibid.*, ss. 142(2), which reads:

(2) In the event of an inconsistency between the Convention and this Act or the regulations, the Convention prevails to the extent of the inconsistency.

⁸⁵ *International Boundary Waters Treaty Act*, RSC 1985, c. I-17, s. 3:

3. The laws of Canada and of the provinces are hereby amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the treaty, and so as to sanction, confer and impose the various rights, duties and disabilities intended by the treaty to be conferred or imposed or to exist within Canada.

do not provide any indication of where these conflicts arise. This highlights a major difficulty with giving direct legal force to an agreement: those affected by the law must identify the inconsistencies. This requires readers of the existing law to have the agreement in mind in order to verify whether there are any inconsistencies, which may itself not be an easy task given that there can be considerable debate about what constitutes an inconsistency.⁸⁶

This question has been considered in the context of the Canadian constitutional paramountcy rule about overlapping federal and provincial legislation: in this circumstance, conflict occurs when it is impossible to comply with both the legislation of both jurisdictions.⁸⁷ A similar approach obtains when determining whether there is a conflict between primary and subordinate legislation.⁸⁸ In addition, the Supreme Court of Canada has recently revived another branch of the conflict rule, recognizing that a conflict can also arise if one piece of legislation will “frustrate the legislative purpose” of the other.⁸⁹ This standard is far more open-ended than the first branch of the test, depending on a determination of purposes that often have to be gleaned from the terms of the legislation or the context of its enactment. The task of establishing what these purposes are and how particular provisions affect their attainment often leads to indeterminate, if not subjective, results, particularly in the absence of clear statements of purpose.⁹⁰ A provision that simply says that a particular law or agreement prevails over other conflicting laws invites confusion and litigation.

Direct implementation may be limited to particular provisions of an agreement. An implementing legislature need not give the force of law to all of the provisions of an agreement. As discussed below, there may be other mechanisms for implementation besides the enactment of new law.⁹¹

Another important facet of direct implementation has to do with which languages of an agreement are authentic, a matter that is generally

⁸⁶ Above n. 33 at 265-266.

⁸⁷ Above, n. 46.

⁸⁸ *Friends of Oldman River v. Canada* [1992] 1 SCR 13.

⁸⁹ *Saskatchewan v. Rothmans, Benson & Hedges Inc.* [2005] SCC 13.

⁹⁰ See R. Sullivan, above n. 33 at 230-234.

⁹¹ See below at 7.

specified in one of its terms.⁹² If these are different from the national language of the implementing jurisdiction, then many of those subject to it may have difficulty understanding it or be at a disadvantage when interpreting it. Although a translation may be available, it will not have the same status as the original, which will prevail over the translation if it does not accurately capture the original.

Legislation providing for direct implementation typically contains a preamble or purpose clause, and sometimes both, which set out contextual detail that may have a significant effect on how it is interpreted. In addition, the text of the agreement may be annexed to the implementing legislation. This is particularly useful in that it makes the text as readily available as the legislation itself. Given that the text of the agreement forms part of the law of the implementing jurisdiction, it is only reasonable that it be published in the same manner as other law. Although the texts of treaties are in some cases available on-line,⁹³ and can generally be found in official publications, such as the *Canada Treaty Series*⁹⁴ or the *United Nations Treaty Collection*,⁹⁵ general access is by no means assured since these publications are not widely available or entail substantial subscription costs.⁹⁶

One consequence of direct implementation is that the agreement will be interpreted in accordance with international law principles, unless the implementing legislation provides otherwise.⁹⁷ The *Vienna Convention on the Law of Treaties* codifies these principles. Article 31 says:

⁹² For example, the *International Space Station Agreement* specifies 6 authentic languages: see SC 1999, c. 35.

⁹³ See, for example the UN Framework Agreement on Climate Change: http://unfccc.int/not_assigned/b/items/1417.php.

⁹⁴ See http://www.treaty-accord.gc.ca/Treaties_CLF/Section.asp?Page=TS.

⁹⁵ <http://untreaty.un.org/>.

⁹⁶ For example, the on-line subscription rate for the UN Treaty Series is \$60US per month for non-profit entities, including universities and individuals: <http://untreaty.un.org/English/howtoreg.asp>. However, many university law libraries offer free access to their collections, for example the Nathan Gelber Law Library at McGill University: <http://www.law.library.mcgill.ca/treaties.html>.

⁹⁷ *R. v. Palacios* (1984), 7 DLR (4th) 112 (Ont.CA).

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose.

It also provides that subsequent agreements among the parties and “special meanings” that they intend will influence interpretation.⁹⁸ Article 32 goes on to say:

32. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning ... when the interpretation according to article 31:
 - (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.

Canadian interpretation law has developed in a similar direction in recent years and reliance on the Vienna Convention as opposed to domestic interpretation law is less likely to make much difference in practice. However, Canadian courts still arguably accord greater weight to the wording of the legislation, notably through the “plain meaning” rule.⁹⁹

A further potentially important consequence of direct implementation is greater judicial reliance on foreign case law in interpreting the incorporated treaty. Arguably, the choice of direct implementation signals an intention to harmonize Canadian law as much as possible with other jurisdictions that have ratified and implemented the

⁹⁸ Vienna Convention, Article 32, subarticles 3 and 4:

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

⁹⁹ See, most recently, *Will-Kare Paving & Contracting Ltd. v. Canada* [2000] 1 SCR 915 and *R. v. Daoust* [2004] 1 SCC 217.

convention. This seems to have been a factor in the majority judgment in the *Thomson* case, which considered and relied on judgments interpreting the relevant Convention from Australia and the U.K.¹⁰⁰

As noted above, implementing legislation may attempt to control the interpretation of directly implemented agreements through preambles and purpose clauses. Another way is through interpretation clauses such as section 5 of the *Income Tax Conventions Interpretation Act*.¹⁰¹ It provides a series of definitions that apply “[n]otwithstanding the provisions of a convention or the Act giving the convention the force of law in Canada”. These clauses effectively modulate the scope of the direct implementation with what amounts to a form of restatement, which is discussed next.

Direct implementation is a simple and expeditious way of implementing an international agreement, but it can pose difficulties in terms of its efficacy. Just saying that a text has the force of law does not guarantee that those subject to it will comply. Most legislation is backed up with administrative and enforcement provisions, notably penal sanctions, directed toward ensuring compliance. These provisions generally have to be tailored to domestic enforcement agencies or courts and related laws. It is unlikely that an agreement can be written so as to achieve a detailed fit with the agencies, courts and laws of all the parties to the agreement. At the very least, these have to be examined to determine whether adequate administrative and enforcement measures can be taken under existing law to ensure that the agreement is implemented in substance and not just formally. If not, then additional adjustments will be needed to domestic law and institutions. This largely explains the use of the alternative technique of restatement.

Restating the Agreement in Domestic Law

This approach involves restating the terms of the agreement or by enacting provisions that will accomplish what the agreement requires.

¹⁰⁰ Above, n. 25 at 585-8, 596-7 and 599

¹⁰¹ RSC 1985, c. I-4.

Restatement can be accomplished by either enacting a new law or amending existing laws. These laws may be either primary legislation (statutes) or delegated legislation (regulations, by-law, rules, orders).

Restatement is not merely an exercise in copying the terms of an agreement into a piece of legislation. Words that may have a particular meaning in one context, do not necessarily have the same meaning in another. The context for domestic legislation is a complex system of laws that operate together and have a bearing on each other's meaning. When an agreement is implemented through restatement, the legislation is subject to the interpretive rules of the domestic jurisdiction, as opposed to those of the Vienna Convention. Domestic legal systems are not only different from the international legal context in which an agreement is drafted, they also vary from one jurisdiction to another. Given these contextual differences, different words may be needed to achieve a meaning that will effectively implement an agreement in domestic law.

Of course, the purpose of implementing an international agreement heavily influences the meaning of domestic legislation. This purpose is sometimes expressly stated, as for example in section 3 of the *North American Free Trade Agreement Implementation Act*:

3. For greater certainty, this Act, any provision of an Act of Parliament enacted by Part II and any other federal law that implements a provision of the Agreement or fulfils an obligation of the Government of Canada under the Agreement shall be interpreted in a manner consistent with the Agreement.¹⁰²

As with direct implementation, there may also be provisions to say that the implementing legislation prevails over other legislation to the extent of any inconsistency.¹⁰³

One important difference between direct implementation and restatement is that the latter makes it easier to be selective about which provisions of an agreement are being implemented. If nothing is said about a particular provision in the implementing legislation, then it is not

¹⁰² SC 1993, c. 44.

¹⁰³ See for example the *Income Tax Conventions Implementation Act, 1996*, SC 1997, c.27, s. 5.

implemented. By contrast, the direct method requires an express exclusion to accomplish this. This is not to say that such a provision will remain unimplemented: it may be implemented in some other way besides through the enactment of new legislation. It is important to consider whether existing legislation already implements, or goes some distance towards implementing, new international agreements. If it does, there is little point in enacting duplicate provisions that will only engender confusion.

Another advantage of the restatement technique is that it allows new obligations to be fitted into existing legislation so that those who already use that legislation will be able to appreciate how the new obligations alter their rights and obligations. This will not only avoid conflicts, it may also make the new obligations easier to understand, particularly if improvements can be made in the way they are drafted. A good example of this is the *Anti-personnel Mines Convention Implementation Act*.¹⁰⁴ Article 4 of the Convention states the main obligation to destroy anti-personnel mines, but the exception to this rule is found in the preceding Article 3. When the Convention was restated in the Act, the main rule was stated first in section 9 and was followed by the exception in section 10 to accord with general legislative drafting practices in Canada.¹⁰⁵

Using Primary or Delegated Legislation

In the preceding discussion, we have noted that either primary or delegated legislation can be used to give agreements effect in law. The choice between these two turns on the significant differences between the processes for making them. Primary legislation is generally enacted by elected legislative bodies in accordance with procedures that allow considerable scope for public scrutiny and input. It is generally used to deal with legislative matters of some significance, as demonstrated by the guidelines that some jurisdictions have for determining what matters

¹⁰⁴ SC 1997, c. 33.

¹⁰⁵ See the Drafting Conventions of the Uniform Law Conference of Canada, s. 1 (logical organization) at <http://www.ulcc.ca/>.

should be dealt with in primary legislation. For example, the Canadian Government's *Cabinet Directive on Law-making* says:

Matters of fundamental importance should be dealt with in a bill so that Parliamentarians have a chance to consider and debate them. The bill should establish a framework that limits the scope of regulation-making powers to matters that are best left to subordinate law-making delegates and processes.¹⁰⁶

Matters of a more technical nature, in the sense of filling in the details of a legislative scheme established by an Act, are properly left to delegated legislation.

Although it may be tempting to say that the implementation of an international agreement is a substantial matter deserving of treatment in primary legislation, this presupposes the nature of the agreement. The test for using primary legislation to implement an agreement should surely depend on whether it requires legislative measures that, in their own right, ought to be dealt with in primary legislation. The fact that this is often the case with international agreements does not mean that it is always the case. There are many examples of regulation-making powers to implement international agreements that deal with largely technical matters. For example, section 35(1) of the *Canada Shipping Act, 2001*¹⁰⁷ provides general regulation-making authority to implement a variety of international shipping conventions:

¹⁰⁶ Available at http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=legislation/directive_e.htm.

¹⁰⁷ SC 2001, c. 26.

35. (1) The Governor in Council may, on the recommendation of the Minister of Transport, make regulations

...

(d) implementing, in whole or in part, an international convention, protocol or resolution that is listed in Schedule 1, as amended from time to time, including regulations

(i) implementing it in respect of persons, vessels or oil handling facilities to which it does not apply,

(ii) establishing stricter standards than it sets out, or

(iii) establishing additional or complementary standards to those it sets out if the Governor in Council is satisfied that the additional or complementary standards meet the objectives of the convention, protocol or resolution;

The Act also gives the Governor in Council power to amend the list of conventions in Schedule 1, but it requires that additions to the list be tabled in Parliament for referral to the appropriate committee:

30.(1) The Governor in Council may, by order, add international conventions, protocols and resolutions described in subsection 29(1) to Schedule 1 or described in subsection 29(2) to Schedule 2.

(2) The Minister of Transport is to cause a copy of each order related to Schedule 1 and the Minister of Fisheries and Oceans is to cause a copy of each order related to Schedule 2, together with a description of the objectives of the convention, protocol or resolution, to be laid before each House of Parliament on any of the first 10 days on which that House is sitting after the order is made. The order stands referred to the appropriate standing committee of each House.

31. The Governor in Council may, by order, delete an international convention, protocol or resolution from Schedule 1 or 2 or amend Schedule 1 or 2 if the amendment would not, in the opinion of the Governor in Council, result in a material substantive change.

In this provision, one sees an attempt to balance parliamentary accountability against the need for flexibility in implementing these conventions.

Enacting Non-legislative Powers

Often, international obligations cannot be met simply by enacting new rules: they require judicial or administrative action instead. For example, the *Mutual Legal Assistance in Criminal Matters Act*¹⁰⁸ implements agreements dealing with law enforcement. It recognizes that requests for enforcement must be carefully considered before they are acted upon. It makes the Minister of Justice responsible for the administration of the Act and confers power on the Minister to examine requests for enforcement before they are placed before Canadian courts.¹⁰⁹

It is also possible to shape general powers to ensure that they are exercised in a way that takes new international obligations into account. For example, subsection 35(3) of the *Citizenship Act* says:

¹⁰⁸ RSC 1985, c. 30 (4th Supp.).

¹⁰⁹ *Ibid.*, ss. 7 to 9.

35 (3) Subsections (1) and (2) [*restrictions on acquisition of property by non-Canadians*] do not operate so as to authorize or permit the Lieutenant Governor in Council of a province, or such other person or authority as is designated by the Lieutenant Governor in Council thereof, to make any decision or take any action that ...

(b) conflicts with any legal obligation of Canada under any international law, custom or agreement;¹¹⁰

Anticipatory Implementation

Legislation can be enacted in contemplation of agreements being entered into. This is particularly useful when a series of similar bilateral agreements with other countries is planned. For example, the *Mutual Legal Assistance in Criminal Matters Act*¹¹¹ is intended to facilitate the enforcement of criminal law against persons who are outside the prosecuting jurisdiction. It contains a general definition of the type of treaty it is meant to implement:

2. (1) In this Act,

“treaty” means a treaty, convention or other international agreement that is in force, to which Canada is a party and of which the primary purpose or an important part is to provide for mutual legal assistance in criminal matters.

(2) For the purposes of the definition “treaty” in subsection (1), an important part of a treaty provides for mutual legal assistance in criminal matters if the treaty contains provisions respecting all of the following matters:

(a) the right of Canada, for reasons of security, sovereignty or public interest, to refuse to give effect to a request;

¹¹⁰ RSC 1985, c. C-29.

¹¹¹ Above, n. 108.

- (b) the restriction of mutual legal assistance to acts that, if committed in Canada, would be indictable offences;
- (c) the confidentiality of information sent by Canada to a foreign state pursuant to a request for legal assistance;

Provision can also be made to take account of possible amendments to a treaty. For example, the *Migratory Birds Convention Act, 1994*¹¹² provides for changes to the list of protected birds. These changes are to be incorporated textually into the Act through a ministerial order tabled in Parliament:

12 (2) The Minister shall, by order, amend the schedule to incorporate any amendment to the Convention as soon as is practicable after the amendment takes effect, and table any amendment in both Houses of Parliament within fifteen sitting days after the order is made.

This provision attempts to accommodate the need for flexibility in implementing the convention with the need for legislative scrutiny. However, this provision does little more than notify members of Parliament. It does not ensure debate or offer any substantive check on the implementation of changes to the Convention.

Using Existing Powers

A number of cases discussed above in Part 2¹¹³ clearly suggest that powers granted or recognized under existing legislation (without reference to the implementation of any international agreement) might also serve to implement obligations or international law principles when they are exercised in accordance with those obligations or principles. Whether they can do so depends on the nature and breadth of the existing powers: does the implementation action fit within the scope of the power? This question has two main dimensions:

¹¹² SC 1994, c. 2; <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

¹¹³ *Baker*, above n. 1, *Spraytech*, above n. 46 and *Canadian Foundation for Children Youth and the Law* above n. 55.

- does the power permit a form of action that will advance the implementation of the agreement?
- are the purposes for which the power may be used broad enough to embrace the purposes of the agreement and its implementation?

These questions are seldom expressly articulated in the case law, but they are clearly in play. For example, *Baker* involved the exercise of an exemption power delegated to the Minister by section 2.1 of the *Immigration Regulations, 1978*¹¹⁴ under subsection 114(2) of the *Immigration Act*.¹¹⁵ Although the exemption power was not framed in terms of the implementation of any international agreement, the Supreme Court recognized, not only that it could be used to advance the objects of the *Convention on the Rights of the Child*, but that the Convention had a bearing on whether the power was exercised reasonably.¹¹⁶ Thus a general power originally enacted in 1976¹¹⁷ without reference to the Convention (which entered into force on September 2, 1990) was capable of being used to advance the objects of the Convention.

There is no shortage of examples of the use of existing powers to implement international agreements. In the field of human rights, Irit Weiser has pointed out that international obligations “are typically adhered to on the basis that *existing law already conform to the treaty obligations* and therefore, no new implementing legislation is required.”¹¹⁸ The same often occurs in relation to general regulatory matters such as those addressed by the *Canada Shipping Act*.¹¹⁹ Although many of the enabling provisions of this Act are expressed in terms of implementing international agreements or instruments, there are many others that contain no such references. However, there is no obstacle to using them to implement international obligations as long as the implementation action otherwise fits within the terms of the enabling provisions.

¹¹⁴ SOR/78-172, as amended by SOR/93-44.

¹¹⁵ Above n. 23.

¹¹⁶ Above n. 1 at para. 71.

¹¹⁷ SC 1976-77, c. 52.

¹¹⁸ I. Weiser, above n. 39.

¹¹⁹ RSC 1985, c. S-9. This Act has now been replaced by the *Canada Shipping Act, 2001*, above n. 107.

For example, subsection 79(1) of the *Crewing Regulations*¹²⁰ was made under enabling provisions in four sections of the *Canada Shipping Act* that dealt with the certification of masters and seamen (110 and 112), safety precautions (338) and safe navigation. Although none of these provisions refers to international agreements, together they confer authority to require compliance with the safety standards of the International Maritime Organization. Indeed, Canadian courts have generally recognized the propriety of regulations that incorporate by reference international requirements in order to achieve harmonization with the legal regimes of other countries.¹²¹

When an agreement requires a government (as opposed to a member of the public) to accomplish some task, there is [may be?]no need to enact a law to implement the requirement. For example, article 5, section 2 of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* provides that

2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed.

This obligation was not included in the *Anti-Personnel Mines Convention Implementation Act*¹²² since it entails activities that the Canadian Government can accomplish without any additional legislative authority.

The anti-personnel mines example provides an important reminder that under the Canadian constitution many Executive powers are inherent in the executive branch of government. In parliamentary states, the

¹²⁰ SOR/97-390.

¹²¹ See *Reference re Manitoba Language Rights, No. 3* [1992] 1 S.C.R. 212 and J. Keyes, "Incorporation by Reference in Legislation" (2003), 25 *Statute Law Review* 180.

¹²² SC 1997, c. 33.

Government has the capacity to perform the legal acts that all legal persons generally have, and it has prerogative powers as well. These span a range that encompasses the command of military forces, the issuance of passports and the capacity to conclude contracts or deal with property.

Although the use of existing powers to implement international agreements simplifies the task of implementation in so far as no legislative action is required by Parliament, it is also a source of criticism that such implementation leaves too much to be determined by the Executive, and is therefore undemocratic. However, if there is a problem with using these powers to implement an international agreement in the absence of implementing legislation, then the problem is with the scope of the powers themselves, not with their use to implement the agreement. Would using them to advance other policy purposes not raise the same objections? If not, then what is it about the implementation of international agreements that makes their use objectionable? There may be an answer to this question, namely it is much harder to reverse implementing legislation than other legislation.

However, we would suggest that a more compelling objection is to the lesser degree of transparency that often accompanies the use of existing powers, as opposed to the enactment of implementing legislation. Rather than discouraging the use of existing powers, consideration should be given to finding ways to increase the transparency of implementation when existing powers alone are used. Existing reporting mechanisms, such as the Departmental Reports on Plans and Priorities and the Departmental Performance Reports of the Government of Canada could serve as a means for doing this.¹²³ It should also be borne in mind that

¹²³ These reports are required as part of the annual Parliamentary Estimates process. The Foreword to the *Guide for the Preparation of Departmental 2004-2005 Performance Reports* says:

Reports on plans and priorities (RPPs) and departmental performance reports (DPRs) are departments' primary instruments of accountability to Parliament and, by extension, to Canadians. It is important that they provide clear, concise, balanced, and reliable information about each department's plans to be achieved with the resources entrusted to it and how it performed against those plans. These reports also present an opportunity to engage parliamentarians and Canadians more effectively in a constructive dialogue about the future directions of the government (http://www.tbs-sct.gc.ca/rma/dpr1/04-05/guidelines/guide_e.asp).

implementation through legislative measures is hardly a panacea in terms of transparency. The enactment of legislation does not ensure that it will be administered and enforced. Additional measures are generally needed to monitor these dimensions as well. The United Nations Framework Convention on Climate Change and the Kyoto Protocol are a striking example of this. The obligations they impose on states are quite straightforward: reductions in the amount of greenhouse gases by reference to emissions in 1990.¹²⁴ Much of their detail and that of subsequent protocols has to do with measuring and reporting on emissions levels.

A further issue relating to the use of existing powers is whether the executive is ever *required* to use them to implement international obligations. When powers are conferred by legislation enacted for the purpose of implementing an international agreement, the requirement to exercise them for the purpose of implementing the agreement is clear. However, it is far less clear that general powers, not created for the implementation of an agreement, must be used to implement it. This is particularly true of delegated legislative powers since the courts are quite reluctant to require the executive to exercise them because such powers generally import a high degree of discretion, if not policy-making.¹²⁵

Combining Techniques

There is no requirement to use only one technique to implement a particular agreement. In fact, most of the examples of implementation legislation discussed above rely on a combination of techniques. Direct implementation may be accompanied by legislated provisions, such as definitions, that restate some features of an agreement¹²⁶ or by regulation-making powers that add supplementary the terms to the agreement.¹²⁷

¹²⁴ http://unfccc.int/essential_background/convention/items/2627.php.

¹²⁵ See J.M. Keyes, "Required Rule-making: When Do You Have to Make Delegated Legislation" (2002), 15 *Canadian Journal of Admin Law and Practice* 293.

¹²⁶ See above, n. **Error! Bookmark not defined.**

¹²⁷ This is done in most Canadian legislation for the implementation of tax treaties, for example, the *Income Tax Conventions Implementation Act, 2001*, SC 2001, c.30.

And restatement legislation sometimes directly incorporates definitions from the implemented agreements.¹²⁸

A good example of combination occurs when a domestic law is enacted to create penalties for doing things that contravene an agreement. In such a case, the text of the agreement defines the scope of the prohibited conduct, while the domestic law defines the regime used to penalize it. Section 3 of the *Geneva Conventions Act*¹²⁹ illustrates this:

3. (1) Every person who, whether within or outside Canada, commits a grave breach referred to in Article 50 of Schedule I, Article 51 of Schedule II, Article 130 of Schedule III, Article 147 of Schedule IV or Article 11 or 85 of Schedule V *is guilty of an indictable offence*, and
 - (a) if the grave breach causes the death of any person, is liable to imprisonment for life; and
 - (b) in any other case, is liable to imprisonment for a term not exceeding fourteen years.

By making a person “guilty of an indictable offence”, this provision engages the provisions of the *Criminal Code* for the investigation and prosecution of such offences.¹³⁰ Thus, the law in this case is an amalgam of the Geneva Conventions (direct implementation) and the *Criminal Code* (statement in domestic law).

De-implementation

If there is some prospect that Canada may terminate or withdraw from an agreement in whole or in part, some thought should be given to

¹²⁸ For example, the *Chemical Weapons Convention Implementation Act*, SC 1995, c. 25 restates the terms of the Convention, but subsection 2(2) gives direct legal effect to its definitions.

¹²⁹ RSC 1985, c. G-3.

¹³⁰ The *Interpretation Act*, RSC 1985, c. I-21, ss. 34(2) says “All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment”.

how the implementing legislation will be repealed or modified. This can of course be done with another piece of legislation. However, if a more expeditious route is needed, it can be built into the implementing provisions. In addition, previous provisions can be suspended, rather than repealed, so that it is easier to reinstate them.

For example, many provisions enacted to implement the North American Free Trade Agreement (NAFTA) superseded but did not repeal comparable provisions enacted to implement the US Free Trade Agreement. For example, implementing amendments to the *Customs Tariff*¹³¹ did not repeal the US Free Trade provisions; instead, they suspended their operation for as long as the new provisions were in force. The US Free Trade provisions could, accordingly, be revived by repealing the NAFTA implementing provisions.

De-implementation provisions must obviously be used with a great deal of caution. They may signal to other parties a lack of commitment to the agreement and perhaps lead to questions about the good faith of a party that uses them.

Part 4 – Conclusions

In Part 1, we posed some questions about the roles of the legislative, executive and judicial branches and, more particularly, whether the latter two are improperly encroaching on the legislative sphere. The legislative branch clearly has the capacity to decide whether and to what extent international obligations are implemented by or under Canadian law. However, that capacity is tempered by two realities. First, the Constitution and existing legislation, along with the interpretive principles that govern their application, provide many avenues for giving effect to international obligations. Second, legislative bodies are no more capable of dealing with all aspects of international law than they are of dealing with all aspects of the domestic laws they enact. Legislatures must rely on the executive and the courts, not only to administer laws, but

¹³¹ RSC 1985, c. 41 (3rd Supp.), as amended by SC 1993, c. 44, subsection 117(1).

also to fill in or elaborate many of the details of the law needed to allow it to operate effectively.

Courts should be praised, not criticized, for relying on international law not only to give effect to the implementing or codifying intentions of the legislature, but also in mediating between the expressed intentions of the legislature and the contexts in which legislation must be interpreted. At the same time, it must be remembered that compliance with international law is but one of many concerns that animate judicial interpretation. Finally, courts must be responsive to indications that the legislature intends a partial or nuanced implementation or codification of its international obligations.

As for the executive branch, its capacity to implement international law that does not require legislative change is troubling because of the lack of debate and transparency. When international law is implemented through executive action, it is often far from apparent how or to what extent implementation is taking place. More fundamentally, the executive branch controls both the statutory and most regulatory implementation mechanisms. However, this control is constrained by increasingly significant checks and balances. Executive action is subject to judicial review, particularly of the interpretation of domestic legislation. In addition, the Executive hold on the legislative function is loosening in Canada with democratic reform of parliamentary institutions proceeding apace.¹³² Finally, executive functions are subject to increasing transparency, notably through consultative processes on their domestic actions;¹³³ this transparency should, however, logically be extended into its international law functions as well.

Concerns about power and transparency in the implementation of international obligations should not be limited to the executive and judicial

¹³² Note “Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform,” Government of Canada, Privy Council Office, February 4, 2004 (http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=Publications&doc=dr-rd/dr-rd_doc_e.htm) and the Canadian Government’s Democratic Reform website at <http://www.pco-bcp.gc.ca/dr-rd/>.

¹³³ See “Consultation Guidelines for Managers in the Federal Public Service,” Government of Canada, Privy Council Office, December 21, 1992 (<http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications&Sub=Current>).

branches. The increasing interest of legislators in international law and its implications for domestic law signals the development of an increasingly significant role for legislators.¹³⁴ We should not assume that existing parliamentary institutions and procedures are well enough equipped to take on this role and to discharge it with the transparency that is coming to be expected of the executive. This deserves to be an area of careful study over the coming years.

¹³⁴ See above nn. 6 to 8.

Appendix – Checklist for Deciding How to Implement International Obligations

The following questions should be considered when determining how to implement international obligations:

- What result does the agreement require to be implemented?
- Does it say how the result is to be implemented?
- Does implementation require legal action?
- What existing powers are there to take this action?
- Are any new laws are needed and, if so, what kind
 - statutes
 - delegated legislation
- Are any administrative powers needed?

The following criteria should be use for assessing implementation decisions:

- democracy: do those affected by implementation have enough input into decisions about implementation?
- transparency: are the implementation measures made clear to those affected?
- harmony with domestic law: are changes needed to domestic law to avoid conflicting provisions?
- ease of implementation: how quickly can the implementation measures be taken?
- workability and effectiveness: will the implementation measures operate effectively?
- harmony with law of other countries: will the implementation measures operate effectively with measures taken by other countries?
- flexibility: how easy will it be to respond to changing circumstances (amendment or rescission of agreement)?

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