Lawyers' Rights Watch Canada

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Implementation of international human rights treaties in Canada

Briefing note

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This briefing note explains Canada's legal responsibility to implement and enforce international human rights treaties at every level of the country. It summarizes Canada's process as a federal state for entering into treaties and receiving them into domestic law. This note also explains why Canadian courts and tribunals cannot enforce treaties directly but should interpret Canadian domestic law in light of Canada's international human rights obligations. It concludes with a brief summary of some recommendations for change.

1. Canada's responsibility to implement international human rights treaties

Once a State ratifies a treaty, its provisions are legally binding on the State as a matter of international law. This means the State has a binding international law obligation to ensure that the treaty is implemented throughout the State at every level. As Canadian legal scholar Gib van Ert states, "failure to give domestic legal effect to a binding treaty obligation that requires it is itself a breach of the treaty."[1]

The executive branch of the federal government of Canada has the power to enter into international treaties.[2] However, as part of Canada's system of democracy, only Parliament and provincial legislatures have the power to make laws binding within Canada. As matter of policy, the federal government tables treaties in parliament after adoption "and prior to Canada formally notifying that it is bound by the Instrument."[3]

In Canada, the power to make laws is divided between the federal government and the provinces pursuant to Sections 91 and 92 of the *Constitution Act*, 1867.[4] The federal Parliament has no authority to make legislation to implement treaties in areas outside the federal powers listed in Section 91. The provinces have exclusive jurisdiction to make laws within the powers set out in Section 92.[5] The provisions of treaties ratified by Canada become part of Canadian law through passage or amendment of laws by the federal Parliament or provincial legislatures to incorporate the protected rights and ensure remedies for violation.[6]

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[1] Gib van Ert, *Using International Law in Canadian Courts* (Toronto: Irwin Law, 2008) [van Ert, 2008] at 234.
[2] For more detail, see Laura Barnett, "Canada's Approach to the Treaty-making Process", *Legal and Legislative Affairs Division, Parliament of Canada* (24 November 2008) at 1-2, online: Parliament of Canada <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0845-e.htm> [Barnett].
[3] *Policy on Tabling of Treaties in Parliament* (January 2008), s. 6.3, online: Government of Canada <http://www.treaty-accord.gc.ca/procedures.aspx>.
[4] The Constitution Act, 1867, 30 & 31 Vict, c 3, online: Government of Canada <http://laws-lois.justice.gc.ca/eng/const/page-4.html#docCont>
[5] *Attorney General of Canada v Attorney General of Ontario (Labour Conventions)*, [1937] AC 326 [*Labour Conventions Case*]. In the *Labour Conventions Case* the court said Parliament may not legislate in an area of provincial jurisdiction, not even for the purpose of implementing Canada's international treaty obligations. For explanation and a list of federal and provincial powers, see Canadian Human Rights Commission, "A Three-Minute Guide to the BNA Act, 1867," online: CHRC <http://www.chrc-ccdp.ca/en/browseSubjects/bnaguide.asp>
[6] For more detail see Amissi M. Manirabona, and François Crépeau, "Enhancing the Implementation of Human Rights Treaties in Canadian Law: The Need for a National Monitoring Body." *Canadian Journal of Human Rights* 1(1)(2012): 25-59, online: CJHR <http://cjhr.ca/wp-content/uploads/2012/05/Manirabona-and-Crepeau-Enhancing-Implementation-with-Human-Rights-Treaties.pdf> [Manirabona and Crépeau]. Also see Barnett, supra note 2; Raynell Andreychuk, and Sheila Finestone, *Promises to Keep: Implementing Canada's Human*

The *Vienna Convention on Treaties* makes it clear, however, that a federal structure may not be used as a reason to avoid treaty obligations. Article 27 states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[7] To ensure that Canada can live up to its international legal obligations, it is Canada's practice to ratify treaties only after securing the support of the provinces.[8] This ensures that provincial governments agree to take on the international legal obligation to implement treaties within their areas of exclusive jurisdiction.

Despite these international obligations and Canada's policies for ensuring federal-provincial cooperation on ratification of treaties, Canadian governments may not always enact specific legislation to implement treaties. Canada has no legislation that mandates parliaments or provinces to incorporate treaties into federal or provincial laws.[9] Canada also has no effective mechanism to ensure federal, provincial and territorial cooperation to implement international human rights obligations.[10]

2. Canadian Courts: Domestic law should be interpreted through the lens of international law binding on Canada

The Supreme Court of Canada (SCC) has confirmed that international treaties are not part of Canadian law unless they have been incorporated into Canadian law by statute.[11] This leads many Canadian jurists to an incorrect perception that international treaties are rarely relevant in Canadian courts.[12] This part of the briefing note demonstrates, using Supreme Court of Canada case law, that international human rights law, including both incorporated and unincorporated treaties are frequently important for legal argument in Canada's courts and tribunals. Readers can obtain a deeper understanding by examining the cases and literature suggested in the footnotes.

The SCC has ruled that Canada's *Charter of Rights and Freedoms* (*Charter*) "should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[13] In the 1999 case of *Baker v. Canada*, the SCC affirmed this principle, ruling that international human rights law is "a critical influence on the interpretation of the scope of the rights

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Rights Obligations. Report of the Standing Senate Committee on Human Rights (Ottawa: Government of Canada, 2001), online Parliament of Canada:. <http://www.parl.gc.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm> [Andreychuk and Finestone]. Regarding justiciability of economic, social and cultural rights in Canada, see Martha Jackman & Bruce Porter,"Justiciability of Social and Economic Rights in Canada" in Malcolm Langford ed., *Social Rights Jurisprudence: Emerging Trends in Comparative International Law* (Cambridge: Cambridge University Press, 2008), pre-publication draft online Social Rights Accountability Project (SRAP): <http://www.srap.ca/publications/porter_justiciability_of_social_and_economic_rights_in_canada.pdf> [Jackman & Porter]; Bruce Porter, "Homelessness, Human rights, Litigation and Law Reform: A View from Canada" (2004) 10 *Australian Journal of Human Rights* 133, online: SRAP <http://www.srap.ca/publications/porter_homelessness_human_rights.pdf> [Porter].

[7] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, online: Refworld <http://www.refworld.org/docid/3ae6b3a10.html>

[8] See Annex A to the *Policy on Tabling of Treaties in Parliament* (January 2008), online: Government of Canada <http://www.treaty-accord.gc.ca/procedures.aspx>

[9] Manirabona and Crépeau, *supra* note 6, at 30.

[10] Canada has a federal-provincial Continuing Committee of Officials on Human Rights (CCOHR) that meets in person twice a year and engages in monthly telephone conference calls to consult and share information on international human rights instruments. Online: CCOHR <http://www.pch.gc.ca/pgm/pdp-hrp/canada/cmtt-eng.cfm>. The CCOHR is not an implementation body: The mid-level officials participating in the CCOHR have no decision making power, and the CCOHR has limited financial resources and no accountability to elected legislative assemblies or Parliament. No political level meeting of federal, provincial and territorial ministers responsible for human rights has occurred since 1988. Human rights treaty bodies and non-governmental organizations have criticized Canada for its failure to have an effective implementation mechanism and for ignoring key recommendations that have been made repeatedly to Canada. See, e,g, Amnesty International et al., *Promise and Reality: Canada's International Human Rights Implementation Gap. Joint NGO Submission to the United Nations Human Rights Council in relation to the February 2009 Universal Periodic Review of Canada* (Canada: Amnesty International, 2008) at 2-3, online OHCHR: <http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/JS1_CAN_UPR_S4_2009_SocialRightsAdvocacyCentre_Etal_JOINT.pdf>; Lawyers' Rights Watch Canada, "Implementation of CERD and CAT recommendations on violence against Aboriginal Women and Girls," Submission to Continuing Committee of Officials on Human Rights 4 November 2012, available at http://www.lrwc.org/implementation-of-cerd-and-cat-recommendations-regarding-murders-and-disappearances-of-aboriginal-women-and-girls/lrwcbccedaw-on-cerd-implementation-to-ccohr-1-11-12/

[11] *Baker v Canada,* [1999] 2 SCR 817, online: SCC http://scc.lexum.org/en/1999/1999scr2-817/1999scr2-817.html [*Baker*].

[12] See, for example, Catherine Morris, and Gail Davidson. *The Right to Know Our Rights: International Law Obligations to Ensure International Human Rights Education and Training*. Vancouver: Lawyers' Rights Watch Canada, 2012, 75-83, online LRWC: http://www.lrwc.org/?p=2930.

[13] *Slaight Communications Inc. v Davidson,* [1989] 1 SCR 1038, at 1056-7 [*Slaight*]

included in the *Charter.*"[14] The Court also stated that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review"[15] and cited with approval the well-established principle of statutory interpretation that:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred* [emphasis added by the SCC in *Baker*].[16]

Where *Charter* decisions are concerned, the case of *R. v. Hape*[17] seems to strengthen this principle. The Court said (para 56): "In interpreting the scope of application of the *Charter,* the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a conclusion."

Hape also refers, albeit in *obiter dicta*, to Canada's general approach to customary international law:[18]

> [F]ollowing the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law [per Lebel J].[19]

International instruments that do not have treaty status may also be legally relevant in Canadian tribunals and courts. In *Canada (Human Rights Commission) v. Canada (Attorney General)*[20] the Federal Court said:

> "…where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional."

The court also extended the interpretive presumption to non-treaty instruments, saying that the UN *Declaration on the Rights of Indigenous Peoples*[21] "may also inform the contextual approach to statutory interpretation.

Despite the importance of international human rights law to Canadian law, to date Canada's courts have not

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[14] *Baker, supra note 11,* para 70. It should be noted that Baker considered the application of the presumption of conformity to administrative decision making. Thus, it applies to tribunals as well as courts. See Gib Van Ert, "Canada," Chapter 6 in *The Role of Domestic Courts in Treaty Enforcement*, edited by David Sloss, 166-208 (Cambridge, UK: Cambridge University Press, forthcoming March 2014), see draft Chapter at http://www.litigationchambers.com/pdf/vanErt-domestic-courts.pdf.

[15] *Ibid.* For more detail see Anne F. Bayefsky, "International Human Rights in Canadian Courts," in Benedetto Conforti; Francesco Francioni eds., *Enforcing International Human Rights in Domestic Courts* (Leiden, Netherlands: Martinus Nijhoff Publishers, 1997) 295.

[16] Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330, cited with approval by the SCC in *Baker, supra note 11.*

[17] *R. v. Hape* [2007] 2 SCR 292 [*Hape*], available http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2364/index.do

[18] Customary international law "arises when consistent state practice is joined with the belief that such practice is required by law *(opinio juris)."* See *Gib van Ert, "Using treaties in Canadian courts" (2000) Canadian Yearbook of International Law 3 [van Ert, 2000]* at 5, which has a brief explanation, or read "The Incorporation of Custom, Chapter 7," in Gib van Ert, *Using International Law in Canadian Courts*. 2d ed. (Toronto: Irwin, 2008).

[19] *Hape*, at para 39. For a brief discussion of ambiguities in the law regarding Canada's. reception of customary international law, see Craig Forcese, "Supreme Court of Canada Clouds Rules Governing Role of Customary International Law in Domestic Law and of International Law in Interpreting Canadian Charter." Blog post at *International Law: Doctrine Practice and Theory*, 1 February 2009, available at http://craigforcese.squarespace.com/public-international-law-blog/2009/2/1/supreme-court-of-canada-clouds-rules-governing-role-of-custo.html

[20] *Canada (Human Rights Commission) v. Canada (Attorney General)* (2012 FC 445) T-578-11, April 18, 2012, paras 155, 351, 353, online: Federal Court <http://decisions.fct-cf.gc.ca/en/2012/2012fc445/2012fc445.html>.

[21] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: http://www.refworld.org/docid/471355a82.html

provided clear guidance as to the nature and scope of the interpretive presumption of unincorporated treaties of customary international law, nor have Courts always interpreted Canadian domestic law in accordance with the plain meaning of international human rights treaties binding on Canada.[22]

3. Conclusion: The need for change

Canada's incorporation of international human rights law has been inconsistent. However, it is not the job of Canadian courts to fill all the gaps between Canada's international human rights obligations and its domestic law.[23] That is the job of Parliament and provincial and territorial legislatures. Proposals for reform include:

- A standing Parliamentary Human Rights Committee to take leadership in identifying and remedying inconsistencies between international human rights obligations and Canadian law and policy.;[24]
- A "process of law reform to establish a formal mechanism for transparent, effective and accountable implementation of Canada's international human rights obligations," including an "*International Human Rights Implementation Act" developed "*in extensive consultation with provincial and territorial governments, Indigenous peoples and organizations and civil society grou*ps*."[25] Such legislation would establish clear duties for domestic implementation of treaty obligations plus effective federal-provincial-territorial coordination mechanisms to ensure that all people in Canada are able to seek enforcement in Canada of their international human rights.

[22] An example is the Supreme Court of Canada's decision in Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3, online: SCC <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do>. The UN Committee Against Torture in 2005 criticized "the failure of the Supreme Court of Canada, in *Suresh* v. *Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever." *Consideration of Reports Submitted by States Parties Under Article 19 Of The Convention. Conclusions and recommendations of the Committee against Torture: Canada*, Thirty-Fourth Session, 2-20 May 2005, CAT/C/CR/34/CAN, 7 July 2005, online: UNHCR Refworld <http://www.unhcr.org/refworld/publisher,CAT,CONCOBSERVATIONS,CAN,43f2fe460,0.html>

[23] Andreychuk and Finestone, supra note 6.

[24] Ibid, Manirabona and Crépeau, *supra* note 6.

[25] Amnesty International et al. Empty Words and Double Standards: Canada's Failure to Respect and Uphold International Human Rights. Joint Submission to the United Nations Human Rights Council in relation to the May 2013 Universal Periodic Review of Canada, October, 2012 [NGO Coalition of 62 organizations]. Online: Amnesty International: <http://www.amnesty.ca/sites/default/files/upr16_ngo_coalition_submission_for_the_upr_of_canada_october_2012_eng.pdf>