Implementation of human rights treaties in Canada

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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.

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.”

The executive branch of the federal government of Canada has the power to enter into international treaties. 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.”

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. 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. 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.

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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 enact specific legislation to implement treaties despite Canada’s international legal obligations to do so. 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

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9 Manirabona and Crépeau, supra note 6, at 30.


13 Slaight Communications Inc. v Davidson, [1989] 1 SCR 1038, at 1056-7 [Slaight].
affirmed this principle, ruling that international human rights law is “a critical influence on the interpretation of the scope of the rights 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

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\(^{18}\) 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).


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 “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 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. 21

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 the gaps between Canada’s international human rights obligations and its domestic law. 22 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; 23
• 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 groups.” 24 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 Andreychuk and Finestone, supra note 6.
23 Ibid, Manirabona and Crépeau, supra note 6.