
Rethinking the Relationship Between International and Domestic Law

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Despite considerable judicial consideration in recent years, the relationship between international law and domestic law in Canada remains uncertain. While Canadian courts frequently invoke the presumption of conformity to claim that domestic law must be read in light of international law, their interpretations of domestic law often fail to respect the full extent of Canada's international legal obligations. Moreover, Canadian courts rely on an overly restrictive understanding of what it means to implement a treaty in Canada's domestic law, and as a result they tend to give short shrift to the role international treaties can and should play in Canada's legal order.

The authors argue in favour of a number of measures that seek to portray international and domestic law as a unity, held together by an overarching commitment to the rule of law. They argue for a more generous understanding of treaty implementation according to which a ratified treaty would be considered "implemented" if, at the time of ratification, there exists sufficient legislative and regulatory authority capable of enabling Canadian officials to comply with Canada's treaty obligations. They also suggest a variety of means through which federal and provincial legislators could play a more constructive role in the treaty-making process. One option is the development of a *Canada Treaties Act* that would provide guidance with respect to the specific requirements of treaty negotiation, authorization, and implementation. A less ambitious alternative is the recognition of international law as equal in status to common law. Finally, the authors contend that even in the absence of such steps, Canadian judges and administrative decision makers ought to combine a generous understanding of implementation with a thoroughgoing commitment to the presumption of conformity.

Malgré beaucoup d'attention de la part des juristes au cours des dernières années, au Canada, la relation entre le droit international et le droit domestique demeure incertaine. Tandis que les tribunaux canadiens invoquent fréquemment la présomption de conformité pour avancer que le droit domestique se doit d'être analysé à la lumière du droit international, leurs interprétations du droit domestique ne parviennent pourtant pas à tenir compte dans leur entièreté des obligations juridiques internationales du Canada. Qui plus est, les tribunaux canadiens s'appuient sur une compréhension trop restrictive de ce que constitue la mise en œuvre d'un traité en droit canadien, ce qui a pour effet de mettre de côté sans ménagement le rôle que les traités internationaux peuvent et devraient jouer dans l'ordre juridique canadien.

Les auteurs argumentent en faveur d'une série de mesures qui cherchent à présenter le droit international et le droit domestique comme un ensemble, maintenu par un engagement commun envers la suprématie du droit. Ils militent pour une compréhension plus généreuse de la mise en œuvre des traités, en vertu de laquelle un traité ratifié serait considéré «mis en œuvre» si, au moment de la ratification, il existe une autorité législative et réglementaire suffisante, en mesure de permettre aux officiels canadiens d'observer les obligations du Canada issues de traités. Ils suggèrent aussi plusieurs moyens à travers lesquels les législateurs fédéral et provinciaux pourraient jouer un rôle plus constructif dans le processus d'élaboration des traités. Une des options présentées est le développement d'une *Loi canadienne sur les traités*, qui donnerait certaines directives quant aux exigences spécifiques de la négociation, de l'autorisation et de la mise en œuvre des traités. La reconnaissance du droit international comme ayant le même statut que le droit commun représente quant à elle une alternative moins ambitieuse. Enfin, les auteurs soutiennent que même en l'absence de telles mesures, les magistrats canadiens et les décideurs administratifs se doivent de combiner une compréhension généreuse de la mise en œuvre des traités avec un engagement approfondi envers la présomption de conformité.

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Introduction

In light of the increased significance of public international law since 1945, the proliferation of international treaties, and the basic obligation of all states to perform their international legal obligations in good faith, states have good reason to seek a measure of congruence between their domestic legal orders and international law. This article argues that Canada has not yet struck the appropriate balance between domestic and international law. Canadian law views the two legal orders as fundamentally distinct and separate from one another. The result is that Canadian domestic law and its institutions have failed to articulate a persuasive account of the relationship between domestic and international law.

In this article we take stock of how this relationship is currently understood in Canada. We also make a series of recommendations that aim to recast the relationship between the two legal orders as a unity. The relationship between domestic and international law, properly understood, enables the two legal orders to complement one another as a unified and coherent set of legal rules and principles. This unity, we suggest, flows from the idea that all law, domestic and international alike, establishes norms and standards to which public bodies and private parties can be held publicly accountable. The unity of domestic and international law, in other words, follows from a shared and overarching commitment to public accountability.¹

In Part I we provide background to the article's recommendations and outline several considerations relevant to the relationship between domestic and international law in Canada. We consider the impact of international law on Canadian domestic law and the worry that a democratic deficit attends international law-making. Part II analyzes those elements of the relationship between domestic and international law in Canada that pose concerns. In particular, we survey the approaches Canada has adopted to the domestic reception of customary and treaty law. Part III prescribes measures intended to contribute to the unity of domestic and international law. These measures relate to (1) parliamentary participation in treaty making, (2) implementation of international law in Canada, (3) the role of judges and administrative decision makers (e.g., tribunals, agencies, frontline decision makers, ministers), and (4) the role of provinces.

One of our main recommendations is that Canada should adopt a *Canada Treaties Act* in order to support the participation of legislators in the treaty-making process and to formalize the modes through which treaties may be implemented and received into Canada's domestic law. At the core of our argument is a new and

¹ We borrow the idea of a unity of international and domestic law from a collection of essays with a similar title (David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart, 2004) [Dyzenhaus, *Unity*]). As the text below makes clear, however, the unity of international and domestic law may in some cases (e.g., in international customary law) bear on private actors, and thus its compass is wider than the conventional understanding of public law.

generous approach to treaty implementation. Contrary to prevailing judicial opinion in Canada, we argue that treaties should be viewed as “implemented”—and therefore as capable of producing domestic legal effects—if Canadian law at the time of ratification provides sufficient discretionary or rule-making power to enable public decision makers to comply with Canada’s international obligations.

I. Background: Canada and the Challenge of International Law

Which institutions in Canada determine the relationship of domestic and international law? In the broadest sense all three branches of government—the executive, the judiciary, and the legislatures—are responsible for the current legal situation. Both the executive, charged with international relations, and the judiciary, charged with the interpretation of law, have been increasingly active throughout the twentieth century. For various reasons, the legislative branch has been largely absent from the making and interpretation of international law. This absence may be the source of much of the uncertainty that currently exists concerning the relationship between domestic and international law in Canada. Parliament and provincial legislatures have passed a host of laws giving effect to international rules, but they have seldom sought to be part of the making of the rules themselves. Instead, presumably with the willing concurrence of their respective governments, they prefer to leave it to the executive branch to negotiate treaties and conduct international affairs, on the assumption that the conduct of international relations is an executive function. But as we shall see below, the constitution of Canada is silent on the matter, the few laws dealing with foreign affairs provide little guidance, and domestic interpretation acts contain only a few provisions on the role of customary international law and treaty law. There is no general legislation governing interpretation of treaties or the place of international law in the domestic legal order.

The result of legislative inaction is that the courts have been left to deal with the relationship between international and domestic law without legislative guidance or even much assistance from the executive branch. This problem has been compounded by the often puzzling positions taken by officers of the various attorneys general at the federal and provincial levels in litigation before the courts. Winning the case by using any argument at hand sometimes seems to be more important than ensuring Canada’s compliance with its international legal obligations. This tendency is especially unfortunate since Canada has clearly entered a period of history in which the courts are faced with an ever-increasing number of cases that raise issues of international law.

A. *The Impact of International Law on Domestic Law-Making*

Customary international law is a direct source of domestic legal rules unless a state takes explicit measures to ensure that a particular customary rule does not have

the force of domestic law.² Failing any such step, the customary rule can be applied by courts in litigation between citizens. International customary law can also limit the exercise of public authority and may equally define the parameters within which a state may legitimately legislate. For example, it can define the limits of the jurisdiction of states over persons and territory.

Turning now to treaty law, international agreements frequently lead to the enactment of domestic legislation. International law may give rise to domestic law, for example, when UN specialized agencies, such as the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), and the World Health Organization (WHO) adopt rules that bind their member states in accordance with their respective constitutional structures.³ The same organizations sometimes adopt rules in the form of treaties that are negotiated in regular or special sessions.⁴ They may range from the most general and comprehensive “law-making” treaties, such as the third *United Nations Convention on the Law of the Sea*,⁵ or human rights treaties establishing rules for the protection of different categories of persons, such as the *Convention on the Rights of the Child*,⁶ to much more specific treaties dealing, for example, with the regulation of the construction of ships, such as the *International Convention for the Safety of Life at Sea, 1979*,⁷ or commercial matters, such as the *Convention on International Interests in Mobile Equipment*.⁸ Moreover, virtually every type of intellectual property is now the object of an international convention that has given rise to implementing legislation.⁹ International trade treaties—bilateral,

² *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, 280 D.L.R. (4th) 385 [*Hape*].

³ For example, the *Constitution of the World Health Organization* allows the WHO to adopt recommendations and conventions, as well as regulations on, among other things, pharmaceutical standards and quarantine procedures (22 July 1946, 14 U.N.T.S. 185, arts. 18-23, 69 U.S. Stat. 2679 (entered into force 7 April 1948)). The ICAO can create international standards and recommended practices in the form of annexes to the *Convention on International Civil Aviation* (7 December 1944, 15 U.N.T.S. 295, art. 54(1), 61 U.S. Stat. 1180 (entered into force 4 April 1947)). Under the *Convention on the International Maritime Organization*, the IMO can make recommendations to member states (6 March 1948, 289 U.N.T.S. 48, arts. 3, 4, 16, 22, 9 U.S.T. 621 (entered into force 17 March 1958)). For an overview of law-making powers of specialized UN organizations, see José E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005) at 111-18. The effect of this law-making is both ambiguous and multifaceted. The range of instruments for standard setting lie at different points between binding and non-binding (*ibid.* at 217).

⁴ See Alvarez, *ibid.* at 273-337.

⁵ 10 December 1982, 1833 U.N.T.S. 396, 21 I.L.M. 1261 (entered into force 16 November 1994).

⁶ 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3, 28 I.L.M. 1456 (entered into force 2 September 1990).

⁷ 1 November 1974, 1184 U.N.T.S. 278, Can. T.S. 1980 No. 45, 14 I.L.M. 959 (entered into force 25 May 1980).

⁸ 16 November 2001, 2307 U.N.T.S. 285 (entered into force 1 April 2004), online: UNIDROIT <<http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>>.

⁹ See e.g. *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 1161 U.N.T.S. 31, Can. T.S. 1998 No. 18, online: World Intellectual Property Organization <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> (URL referring to

regional or multilateral—have also required extensive legislative implementation in Canada.¹⁰

The domestic effects of treaty law-making do not end with implementation. An increasing number of treaties include provisions for compulsory dispute settlement. These proceedings can lead to rulings that require the losing state to change its legislation or reverse administrative decisions already taken.¹¹

We estimate that roughly 40 per cent of federal statutes implement international rules in whole or in part. Examples include the *Canada Shipping Act, 2001*,¹² the *Aeronautics Act*,¹³ the *Broadcasting Act*,¹⁴ the *Special Import Measures Act*,¹⁵ the *Special Economic Measures Act*,¹⁶ the *Export and Import Permits Act*,¹⁷ the *Customs Tariff*,¹⁸ the *Customs Act*,¹⁹ the *North American Free Trade Agreement Implementation Act*,²⁰ the *World Trade Organization Agreement Implementation Act*,²¹ the *Oceans Act*,²² and the *Remote Sensing Act*.²³ Other examples include the many double taxation acts,²⁴ as well as legislation concerning among other things Canada's

latest version, revised on 24 July 1971, as amended on 28 September 1979); *Paris Convention for the Protection of Industrial Property*, 20 March 1883, 828 U.N.T.S. 305, 6 I.L.M. 806, online: World Intellectual Property Organization <http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html> (URL referring to latest version, revised on 14 July 1967, as amended on 28 September 1979).

¹⁰ See e.g. *Free Trade Agreement Between the Government of Canada and the Government of Chile*, 5 December 1996, Can. T.S. 1997 No. 50, 36 I.L.M. 1067 (entered into force 2 June 1997); *Canada–Chile Free Trade Agreement Implementation Act*, S.C. 1997, c. 14.

¹¹ To cite one example, Canada was required to change various aspects of its patent legislation that were found not to be in conformity with the *Agreement on Trade Related Aspects of Intellectual Property Rights* by dispute settlement panels of the World Trade Organization (WTO) (1869 U.N.T.S. 300, being Annex 1C to *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154, 3 I.L.M. 1144 (entered into force 1 January 1995)). See WTO, *Canada–Term of Patent Protection: Report of the Appellate Body*, WTO Doc. WT/DS170/AB/R (2000), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds170_e.htm>; *Patent Act*, R.S.C. 1985, c. P-4.

¹² S.C. 2001, c. 26, s. 4 [*Shipping Act*].

¹³ R.S.C. 1985, c. A-2, ss. 4.4(1)-(2).

¹⁴ S.C. 1991, c. 11.

¹⁵ R.S.C. 1985, c. S-15 [*SIMA*].

¹⁶ S.C. 1992, c. 17.

¹⁷ R.S.C. 1985, c. E-19.

¹⁸ S.C. 1997, c. 36.

¹⁹ R.S.C. 1985 (2d Supp.), c. 1.

²⁰ S.C. 1993, c. 44, s. 4 [*NAFTA Act*].

²¹ S.C. 1994, c. 47, s. 3 [*WTO Act*].

²² S.C. 1996, c. 31.

²³ *Remote Sensing Space Systems Act*, S.C. 2005, c. 45.

²⁴ See e.g. *Income Tax Conventions Implementation Act, 1999*, S.C. 2000, c. 11 [*ITCIA 1999*] (preventing double taxation and fiscal evasion between Canada and Kyrgyzstan, Lebanon, Algeria, Bulgaria, Portugal, Uzbekistan, Jordan, Japan, and Luxembourg); *Income Tax Conventions Implementation Act, 1997*, S.C. 1997, c. 38 [*ITCIA 1997*] (preventing double

membership in various international organizations,²⁵ international environmental protection,²⁶ the international protection of migratory species,²⁷ endangered species and wildlife,²⁸ heritage protection,²⁹ enforcement of chemical and biological weapons conventions,³⁰ enforcement of international humanitarian law,³¹ enforcement of international human rights law,³² and international arbitral procedure.³³

This list represents an impressive body of law. The federal government, provincial governments, and even municipalities must enforce such legislation. Most of these statutes deal with both domestic and international issues, and it is frequently difficult to determine where one field stops and the other begins.

Given that international treaties play such an important role in the Canadian legislative process, it is important to understand where these treaties come from and the forces that have shaped them. If they condition the content of Canadian laws, it is important that Canada plays an appropriate part in their negotiation and drafting to ensure that they reflect Canadian values and protect Canadian interests.

B. The Democratic Principle

To be free and democratic, Canada must remain in control of its legislative processes at every level of government. No sovereign democracy can be subject to foreign control over the kind of laws it must adopt. Yet many issues have to be dealt with at the international level.

Canada is not alone in facing this dilemma: in different ways, all states must face it. The member states of the European Union must, in many respects, cope with an even greater dilemma than Canada. The majority of laws regulating business transactions in the twenty-seven member states are now made in Brussels. Some of these laws are automatically applicable in each member state, while others must be transposed into domestic law and applied by member states. Short of exiting the

taxation and fiscal evasion between Canada and Sweden, Lithuania, Kazakhstan, Iceland, and Denmark, and amending similar acts between Canada and the Netherlands and the United States).

²⁵ See e.g. *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 [FMIOA]; *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47 [CITTA].

²⁶ See e.g. *Ocean Dumping Control Act*, R.S.C. 1985, c. O-2 [ODCA].

²⁷ See e.g. *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22.

²⁸ See e.g. *Canada Wildlife Act*, R.S.C. 1985, c. W-9.

²⁹ See e.g. *Department of Canadian Heritage Act*, S.C. 1995, c. 11.

³⁰ See e.g. *Chemical Weapons Convention Implementation Act*, S.C. 1995, c. 25.

³¹ See e.g. *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 [CHWCA].

³² See e.g. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

³³ See e.g. *Commercial Arbitration Act*, R.S.C. 1985 (2d Supp.), c. 17.

European Union, no choice is offered once these E.U. regulations and directives are adopted.³⁴

This phenomenon is not limited to legislation in the economic sphere; it is now a daily fact of life for E.U.-member legislatures, governments, and courts.³⁵ The issues of ensuring respect for domestic democracy and constitutional integrity vis-à-vis the E.U. legislative process have arisen in every member state. Problems have been most acute in those member states that possess a written constitution and a formal constitutional charter of rights. In Germany, a federal state governed by a complex constitutional document that includes a charter of rights, challenges have been made to E.U. laws or governing treaty amendments on the ground that they threaten constitutional protections of fundamental freedoms or central principles, such as democracy, in the *Basic Law* of Germany, the state's constitutional document.³⁶ The Federal Constitutional Court of Germany has on every occasion determined that legitimate bounds were not crossed by the ratification of the law or treaty in question.³⁷ However, the court has categorically affirmed its right to review E.U. treaty commitments in light of German constitutional principles and, if necessary, to declare that an E.U. measure must give way before the *Basic Law*.³⁸

The E.U. example is perhaps unique, yet it contains lessons for all states. Interestingly, these lessons even apply to the European Union itself, the European Court of Justice having recently ruled that E.U. regulations pursuant to mandatory sanctions of the UN Security Council under chapter VII of the *Charter of the United Nations*³⁹ cannot violate fundamental human rights guaranteed by E.U. law.⁴⁰ The dilemmas of E.U. member states with respect to E.U. law can be resolved by political action and common policy making within the E.U. framework of supranational

³⁴ See Paul Craig & Grainne de Burca, *EU Law: Text, Cases and Materials*, 4th ed. (Oxford: Oxford University Press, 2008) at 83-87.

³⁵ Many directives and regulations are now released by the European Union on matters as varied as the environment, health, and security. See e.g. EC, *Regulation (EC) 141/2000 of the European Parliament and of the Council of 16 December 1999 on Orphan Medical Products*, [2000] O.J. L 18/1; EC, *Regulation (EC) 1781/2006 of the European Parliament and of the Council of 15 November 2006 on Information on the Payer Accompanying Transfers of Funds*, [2006] O.J. L 345/1.

³⁶ *Grundgesetz für die Bundesrepublik Deutschland* (federal constitution), trans. in Christian Tomuschat & David P. Currie, trans., *Basic Law for the Federal Republic of Germany* (Berlin: German Bundestag, Public Relations Division, 2008), online: German Bundestag <http://www.bundestag.de/interakt/informal/fremdsprachiges_material/downloads/ggEn_download.pdf> [*Basic Law*].

³⁷ See e.g. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 29 May 1974, 2 BvL 52/71, 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 271; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 12 October 1993, 2 BvR 2134, 2159/92, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155 [BVerfGE 1993].

³⁸ *BVerfGE 1993, ibid.*

³⁹ 26 June 1945, Can. T.S. 1945 No. 7, [1976] Yrbk. U.N. 1043, 59 U.S. Stat. 1031 (entered into force 9 November 1945).

⁴⁰ *Kadi v. Council; Al Barakat International Foundation v. Council*, C-402/05 P, C-415/05 P, [2008] O.J. C 285/2, [2008] 3 C.M.L.R. 41.

legislative processes. This type of resolution is virtually impossible at the international level: the international community does not possess the institutions necessary to reconcile the immense political differences that exist between the almost two hundred member states of the international community. Nonetheless, the degree of cooperation and interaction between states is increasing year by year. The result is an ever-growing body of treaty law that affects the domestic decisions of states.

Canada, like all other states, faces the dilemma of preserving its democracy and democratic legislative practices while accommodating the legitimate demands of international cooperation. In *Reference Re Secession of Quebec*,⁴¹ the Supreme Court of Canada affirmed that “democracy expresses the sovereign will of the people” and that democratic institutions must allow for participation and accountability.⁴² Nevertheless, the Court was quick to add that the significance of democracy is not exhausted by majority rule. Democratic institutions must rest on a legal foundation, and that foundation is supplied by one of the other organizing principles identified by the Court: the rule of law.⁴³ The domestic reception of international law must respect all these principles.

Our contention is that a concern for democracy and the rule of law supports a much more generous approach to the domestic effect of international law than the one currently taken by Canada’s judiciary. A key aspect of the separation of international and domestic legal orders often stressed by Canadian courts is that treaties are made by the executive arm of government without parliamentary direction or participation. It is then argued that international law has scant legitimacy in the Canadian legal order unless it is formally implemented by a legislative act. We have argued elsewhere that this objection is unconvincing because domestic courts routinely impose duties, such as procedural fairness, on administrative decision makers without the prompt of statute.⁴⁴ That being said, a changed view of the place of treaties in the domestic legal order would be all the more appropriate if Parliament and the provincial legislatures were to signal their desire to enhance legislative involvement in the treaty-making process. But Canadian courts have been strongly influenced by the fact that treaties are made exclusively by the executive branch. It will thus not be a simple task to displace the view that treaties cannot have the force of law in the Canadian legal order without express legislative intervention.

This “dualist” approach to international law—one that conceives of international and domestic law as operating in separate domains, can be seen to be motivated by a desire to protect Canadians from the unlicensed intrusion of international law. The

⁴¹ [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [*Secession Reference* cited to S.C.R.].

⁴² *Ibid.* at para. 66.

⁴³ See e.g. *ibid.* at para. 67.

⁴⁴ Armand de Mestral & Evan Fox-Decent, “Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law” in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto: Irwin Law, 2006) 31 at 57.

dualist approach allows the Canadian legal system to pick and choose the bits of international law it wishes to receive into its domestic law through legislative implementation. Dualism thus appeals to the populist democratic ideal of contemporary liberal democracies according to which law is to be made by popularly elected legislators.

Many other countries adopt a dualist position with respect to treaties. Few countries adopt an entirely “monist” approach, which affirms that treaties always have direct domestic effect merely upon ratification. Nonetheless, as we shall discuss below, there may be no developed country that continues to maintain as thoroughgoing a dualism as Canada.

How should Canada balance dualist and monist principles? We suggest that the approach to be followed is one that facilitates harmony between Canadian and international law by taking international law seriously when Canadian statutes are interpreted and applied. First of all, we argue that because customary international law is now clearly part of Canadian law, the rules of customary law should be enforceable by courts at the behest of individuals, unless the relevant legislature has expressly stated in its legislation that a particular customary rule is of no effect. Secondly, we propose that treaties, duly ratified and implemented by Canada, should be recognized as part of a common normative order that treats international law and domestic law as a unity. In other words, ratified and implemented treaties should be regarded as fully legitimate sources of law in Canada, and they should be treated as capable of producing legal effects in the Canadian legal system.

While the dualist approach admits that implemented treaties can produce domestic effects, we shall see that the dominant judicial understanding of implementation is deeply impoverished. Far more treaties deserve to be recognized as “implemented” than the courts currently acknowledge. We claim that all branches of government—Parliament, the provincial legislatures, the courts, and the different elements of the executive—can take a variety of steps to accomplish this objective. As outlined below, such steps relate to treaty adoption and legislative participation in the treaty process. But they also call for a more generous understanding of implementation by courts and administrative agencies. It should be acknowledged that Canadian domestic law is in most cases already consistent with international treaties at the time they are ratified. As a consequence, the search for explicit *ex post* implementing legislation as a threshold test for whether international law can have domestic effects is misguided.

II. The Current Relationship Between Domestic and International Law in Canada

International law requires each state to respect and fulfill its international obligations, but leaves to states a large degree of latitude as to how they will achieve this goal. Some countries, such as the Netherlands, are on the monist side of the

spectrum: international law is assumed to have direct force of law in the domestic legal order.⁴⁵ Other states, such as the United States, have a hybrid system that makes considerable room for international law, while retaining several techniques requiring its positive implementation before it can have the force of law in the domestic system.⁴⁶ As noted above, Canada is at the dualist end of the spectrum. The Canadian position is somewhat surprising given Canada's historic commitment to the United Nations and to an international legal system based on law rather than power.⁴⁷ One might reasonably expect to find Canada at the other end of the spectrum or at least in the middle. The fact that Canada continues to maintain an increasingly outmoded approach to the matter is the principal reason for this article.

A. Customary International Law in Canada

International customary law, unlike treaties, does not emanate from intergovernmental negotiations, although it is heavily influenced by the practice of states. Rather, it develops through the cumulative practice of states in accordance with what is perceived as a governing legal obligation (*opinio juris*). Historically, there has been considerable authority for the proposition that rules of customary international law have the force of law in Canada and that they may be invoked before the courts. As discussed at the end of this section, this view has been recently reaffirmed by the Supreme Court of Canada in *R. v. Hape*.⁴⁸

Two theories exist with regard to how international law can be incorporated into domestic law. Adoption theory holds that international law is automatically part of domestic law, except in cases where it conflicts with domestic statutory laws or the

⁴⁵ See e.g. Andre Nollkaemper, "The Application of Treaties in the Netherlands" in Derek Jinks & David Sloss, eds., *The Role of Domestic Courts in Treaty Enforcement* (Cambridge: Cambridge University Press) [forthcoming in 2009].

⁴⁶ It is generally recognized that there exist two parallel tracks for treaty making in the United States. The first track functions according to art. II, § 2, cl. 2 of the *Constitution of the United States* (often referred to as the "treaty clause"), which states that the president of the United States may make treaties with the approval of two-thirds of the United States Senate (U.S. Const. art. II, § 2, cl. 2 [*U.S. Constitution*]). See text accompanying notes 161-62. But another important and increasingly common track is the one relating to "congressional-executive agreements", for which the executive requires only a simple majority from both houses of the United States Congress (Oona A. Hathaway, "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States" (2008) 117 *Yale L.J.* 1236). Oona Hathaway argues that in the wide majority of cases it would be preferable to make use of the congressional-executive-agreements process (*ibid.*). Nonetheless, both treaties and congressional-executive agreements are considered to be part of U.S. law where they are "self-executing". See *infra* note 163 and accompanying text.

⁴⁷ Several Canadians, such as John Humphrey, former Prime Minister Lester B. Pearson, and Louise Arbour, have played important roles in the development of UN institutions. Cory J.'s dissenting opinion in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* also displays a reverence for UN institutions ([1998] 1 S.C.R. 982 at paras. 78-158, 160 D.L.R. (4th) 193, Cory J. [*Pushpanathan* cited to S.C.R.]).

⁴⁸ *Supra* note 2.

common law. Transformation theory holds that international law can only become incorporated into domestic law when it has been integrated into domestic law by way of a legislative enactment.⁴⁹ Customary international law enters a legal system automatically by way of adoption.

The adoption approach means that customary international law is deemed to form part of the common law. As Gibran van Ert notes, “[t]he common law looks on customary international law as a facet of itself.”⁵⁰ Thus, when a court is satisfied that a given proposition amounts to a rule of customary international law, it will apply it as a rule of common law. The adoption theory thus invites courts not only to render decisions that are consistent with international law, “but to adopt international custom as the rules upon which their adjudication is based.”⁵¹ As Ronald St. J. Macdonald observes in this regard, “customary rules of international law are adopted automatically into our law, amid a few caveats about sovereignty, and then directly applied unless they conflict with statute or some fundamental constitutional principle in which case legislation is required to enforce them.”⁵²

A conflict between customary international law and domestic legislation may arise if an international custom changes. A conflict may also be triggered by the “expansion of international custom beyond its former bounds and into spheres of law formerly reserved to domestic adjudication.”⁵³ Nevertheless, incorporating international customary law into the common law does not depart from the principle of self-government because this process leaves the legislature with the authority to change or modify the common law through statutory action.⁵⁴ Similarly, a state that persistently objects to the emergence of an international custom cannot be bound by it.

Customary international law does pose special difficulties for those arguing for its adoption into the domestic legal framework.⁵⁵ The difficulty results from the fact that the use of customary international norms requires the party seeking their application to demonstrate the existence of “wide-sweeping objective and subjective evidence of

⁴⁹ Anne Bayefsky, “International Human Rights in Canadian Courts” in Benedetto Conforti & Francesco Francioni, eds., *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff, 1997) 295 at 297 [Bayefsky, “Human Rights”].

⁵⁰ *Using International Law in Canadian Courts*, 2d ed. (Toronto: Irwin Law, 2008) at 182 [Van Ert, *International Law*].

⁵¹ *Ibid.* at 184.

⁵² “The Relationship Between International Law and Domestic Law in Canada” in Ronald St. J. Macdonald *et al.*, eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 88 at 111.

⁵³ Van Ert, *International Law*, *supra* note 50 at 209.

⁵⁴ *Ibid.* at 184.

⁵⁵ For an illustration of the difficulty of proving custom in a domestic court, see *Mack v. Canada (A.G.)* (2002), 60 O.R. (3d) 737, 217 D.L.R. (4th) 583 (C.A.).

the establishment of a custom.”⁵⁶ This burden is often hard to discharge, as it can be daunting to determine what states believe as opposed to what they say.⁵⁷ Notwithstanding this difficulty, the rule holding that customary international law is genuinely part of domestic law appears to be firmly entrenched in Canada as well as in other democracies.

The rule was affirmed by eminent English jurists as early as the eighteenth century. In *Buvot v. Barbut*, Lord Talbot stated that the law of nations to “its fullest extent was and formed Part of the law of England.”⁵⁸ This dictum was reiterated in a case by Lord Mansfield.⁵⁹ Similarly, in *Heathfield v. Chilton*, Lord Mansfield affirmed that “the law of nations ... is part of the common law of England.”⁶⁰ The unity of customary international law with the common law was also affirmed by Lord Langdale in *Charles Duke of Brunswick v. The King of Hanover*.⁶¹

Canadian jurisprudence suggests that customary international law is applicable in Canada so long as it does not conflict with existing Canadian law. The adoption doctrine was confirmed in early decisions such as *The Ship “North” v. R.*,⁶² in which Justice Davies sanctioned the adoption approach taken by early English authorities. He declared that “[t]he right of hot pursuit ... being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge ...”⁶³ A relatively recent example of this approach is provided by *Reference Re Newfoundland Continental Shelf*.⁶⁴ The Supreme Court of Canada unanimously identified a relevant rule of customary international law in determining whether Canada or Newfoundland had the right to seek and exploit natural resources of the continental shelf at the moment of Newfoundland’s entry into Confederation. Unfortunately, as noted by Van Ert, “[t]he [C]ourt’s consideration of customary international law, while not inconsistent with [adoption], did not clearly invoke it.”⁶⁵ Similarly, in the *Secession Reference*, while the Court took into account some aspects of international law with regard to state secession, “nowhere did it make clear that those parts of the law which

⁵⁶ Louis LeBel & Gloria Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law” (Paper presented to the 5th Annual Analysis of the Constitutional Decisions of the Supreme Court of Canada, Osgoode Hall Law School, York University, 12 April 2002), (2002) 16 Sup. Ct. L. Rev. 23 at 30.

⁵⁷ See generally Van Ert, *International Law*, *supra* note 50 at 62-69.

⁵⁸ *Barbut’s Case* (1737), Cas. t. Talb. 281 at 283, 25 E.R. 777 (Ch.).

⁵⁹ *Triquet v. Bath* (1764), 3 Burr. 1478 at 1480-81, 97 E.R. 936 (K.B.).

⁶⁰ (1767), 4 Burr. 2015 at 2016, 98 E.R. 50 (K.B.).

⁶¹ (1844), 6 Beav. 1 at 45, 49 E.R. 724 (Rolls Court).

⁶² (1906), 37 S.C.R. 385, 26 C.L.T. 380.

⁶³ *Ibid.* at 394.

⁶⁴ [1984] 1 S.C.R. 86, 5 D.L.R. (4th) 385.

⁶⁵ *International Law*, *supra* note 50 at 202.

were customary in nature enjoyed direct effect in Canadian law via the doctrine of [adoption].”⁶⁶

Canadian courts could well rely on the interpretative authority of international customary law to address a wide range of human rights questions.⁶⁷ But in the context of customary law, it is difficult to fully agree with Justice La Forest’s observation that human rights norms “are applied consistently, with an international vision and on the basis of international experience. Thus our courts—and many other national courts—are truly becoming international courts in many areas involving the rule of law.”⁶⁸ Applications of international customary law by Canadian courts have been inconsistent and at times half-hearted. A recent Supreme Court of Canada decision failed to acknowledge the peremptory status of a *jus cogens* norm of customary international law—the kind of norm from which no derogation is possible.⁶⁹ In *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Court considered the peremptory norm of security against torture, but would recognize only that the norm “cannot be easily derogated from.”⁷⁰ In *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town of)*, the majority hastily affirmed the precautionary principle’s status as a rule of customary international law without even examining the requirements of state practice and *opinio juris*.⁷¹

This situation has led Stephen Toope to go as far as stating that “[w]e know for certain that we *do not* know whether customary international law forms part of the law of Canada.”⁷² As Van Ert has accurately remarked, “[t]he cases do not deny [adoption], but neither do they engage with customary international law as the doctrine—and the related doctrine of judicial notice—require.”⁷³ As we shall see now,

⁶⁶ *Ibid.* See also *Secession Reference*, *supra* note 41.

⁶⁷ See Donald J. Fleming & John P. McEvoy, “Domestic Implementation of Canada’s International Human Rights Obligations” in Fitzgerald, *supra* note 44, 521 at 546-47.

⁶⁸ Gérard V. La Forest, “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) 34 Can. Y.B. Int’l Law 89 at 100 [La Forest, “Expanding Role”]. La Forest J. treated international legal values as persuasive norms in *Re Canada Labour Code* ([1992] 2 S.C.R. 50, 91 D.L.R. (4th) 449).

⁶⁹ For the application of *jus cogens* norms, see e.g. *Prosecutor v. Furundžija*, IT-95-17/1, Judgment (10 December 2003) at paras. 153-57 (International Criminal Tribunal for the Former Yugoslavia); *Al-Adsani v. United Kingdom* [GC], no. 35763/97, [2001] XI E.C.H.R. 79 at para. 61, 34 E.H.R.R. 11; *Case of Maritza Urrutia (Guatemala)* (2003), Inter-Am. Ct. H.R. (Ser. C) No. 103, at para. 92, *Annual Report of the Inter-American Court of Human Rights: 2003*, OEA/Ser. L./V/III.61/doc.1 (2004) 891; *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)* (1999), [2000] 1 A.C. 147, [1999] 2 W.L.R. 827 (H.L.).

⁷⁰ 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 65, 208 D.L.R. (4th) 1 [Suresh].

⁷¹ 2001 SCC 40, [2001] 2 S.C.R. 241, 200 D.L.R. (4th) 419.

⁷² Stephen J. Toope, “The Use of Metaphor: International Law and the Supreme Court of Canada” (2001) 80 Can. Bar Rev. 534 at 536 [Toope, “Use of Metaphor”].

⁷³ *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002) at 150.

the *Hape* decision—the Court’s most recent pronouncement on the issue at the time of writing—provides some salutary clarification.⁷⁴

In *Hape*, Justice LeBel for the Court reaffirmed the rule that international customary law is part of the common law. It may thus be pleaded before the courts unless it is in direct conflict with the constitution or with a legislative act. Justice LeBel stated:

In my view, following 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.⁷⁵

Although the rules regarding the adoption of customary international law have been clarified by this decision, a number of questions still remain as to how the Supreme Court of Canada and lower courts will apply this holding. The dictum quoted above refers to prohibitive rules of customary international law. Many customary rules, however, empower states or confer rights to be exercised by their nationals, such as the rules governing navigation on the high seas.

Moreover, proof of custom is a thorny issue. How will the courts approach the issue of proof of a rule or custom? In particular, will the courts seek guidance from the minister of foreign affairs? Will the courts continue to be more comfortable with evidence from expert witnesses on matters that arguably should simply be pleaded as law? Many courts in recent years, when faced with pleadings based on customary international law, have allowed the parties to furnish expert evidence in writing and in testimony, which allows for cross-examination.⁷⁶ This approach to customary law is scarcely consonant with the idea that Canadian courts are dealing with part of the law of Canada. Justice LeBel has removed many ambiguities but only the future will tell where *Hape* will take the law.⁷⁷

The approach in *Hape* is consistent with the approaches to customary international law adopted by courts in other jurisdictions, including the United

⁷⁴ In light of *Hape*, Van Ert has been able to take a more positive stance when he states that “[o]n balance, the better view is that Canadian law continues to incorporate rules of customary international law” (*International Law*, *supra* note 50 at 208).

⁷⁵ *Hape*, *supra* note 2 at para. 39.

⁷⁶ In the case of *Romania v. Cheng* for example, it was alleged that the crew of a Taiwanese-registered ship had murdered Romanian stowaways while the ship was berthed in Halifax ([1997] 158 N.S.R. (2d) 13, 114 C.C.C. (3d) 289 (S.C.)). The case involved questions of jurisdiction of a Canadian court over the ship and its crew. The presiding judge allowed the parties to bring expert witnesses to give testimony as to the state of international law (*ibid.*).

⁷⁷ See Glen Linder, “*R v. Hape*—The International Law Aspects”, Case Comment, online: Canadian Council on International Law <<http://www.ccil-ccdi.ca/images/stories/ccil-hape-comment-070917.pdf>>.

Kingdom.⁷⁸ Also, the constitutions of a number of countries, notably South Africa,⁷⁹ Germany,⁸⁰ and the United States,⁸¹ explicitly establish that customary international law is part of domestic law.

B. Treaty Law and Treaty Making in Canada

Contemporary international rule making is done largely by means of treaties to which states can commit themselves. Once the drafting stage has been completed and the text is formally adopted the treaty is subject to ratification, a process of formal acceptance by each state that takes place according to the state's domestic procedures and the ratification requirements established in the treaty. Through ratification the state indicates that it is both willing and able to fulfill its obligations under the treaty.

Having taken the decision to ratify, each state must consider how the provisions of the treaty will be respected. This process is generally called implementation. Implementation refers to a range of steps that a state can take to ensure its compliance

⁷⁸ See e.g. *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] Q.B. 529, [1977] 2 W.L.R. 356 (C.A.) [*Trendtex* cited to Q.B.]. For further discussion of this case, see Part III.A, below.

⁷⁹ The proposition that customary international law forms part the common law of South Africa is well entrenched. See *Constitution of the Republic of South Africa 1996*, No. 108 of 1996, s. 232 [*Constitution of South Africa*] (“[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”).

⁸⁰ In Germany international law rules are incorporated into the German legal system through the *Basic Law*, which provides that “[t]he general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory” (*supra* note 36, art. 25). The “general rules of international law” refer to “rules of *general customary law* as well as *general principles* of international law in the sense of Art. 38(1)(c) of the Statute of the ICJ” (Meinhard Hilf, “General Problems of Relations Between Constitutional Law and International Law” in Christian Starck, ed., *Rights, Institutions and Impact of International Law According to the German Basic Law* (Baden: Nomos, 1987) 177 at 185 [emphasis in original]).

⁸¹ The only reference to customary international law in the *U.S. Constitution* is in art. I (U.S. Const. art. I). § 8 of art. I gives the United States Congress the power “to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations” (U.S. Const. art. I, § 8, cl. 10). It was established in an early decision that

where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is (*The Paquete Habana*, 175 U.S. 677 at 700 (1900)).

This reasoning accords with the view of the *Restatement (Third) of the Foreign Relations Law of the United States*, which notes that “the modern view is that customary international law in the United States is federal law ...” and is determined by federal courts (§ 111 at 50 (1987)).

with the treaty. Many states, such as Canada, have adopted a wide variety of implementation methods, each tailored to the treaty in question and to the shape of domestic law. Some states must adopt new legislation when implementation requires a change in domestic law, while others give direct effect in their domestic law to the very words of the treaty and thus require no legislative intervention.

Since there is no international executive power, virtually all decisions concerning implementation depend upon the willingness of states to take appropriate measures, separately and in concert with others, to ensure that a treaty is put into operation. States must provide the means of administering a treaty and must ensure that their laws and public institutions are in a position to give full effect to the policies enshrined in the treaty. International organizations play an important coordinating role with respect to the implementation of a number of treaties, and a growing number of international organizations are empowered to inquire into the adequacy of domestic implementation.⁸² But the state remains the primary vehicle through which treaty obligations are (or are not) fulfilled.

Some see state implementation as a source of weakness in the international legal system. But given the nature of the contemporary international order, it cannot, and arguably should not, be otherwise. States are closer to their populations than any international organization could be in the foreseeable future. Unless governments turn to tyranny and authoritarianism, states enjoy a far greater degree of legitimacy with their populations than international organizations. In the modern international order, enforcement of treaties by states ensures a vital degree of both efficacy and legitimacy.

1. How Does Canada Enter into Treaties?

Much scholarship has been devoted to the subject of Canadian treaty making and related diplomatic practice.⁸³ Internationally, treaty making is governed by the *Vienna*

⁸² For example, review of the adequacy of domestic implementation is critical to the operation of the WTO. Not only is review of domestic implementation central to effective dispute settlement, but the domestic-reporting element required as part of the *Trade Policy Review Mechanism* also gives the WTO a role in reviewing domestic measures (1869 U.N.T.S. 480, art. D, being Annex 3 to *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (entered into force 1 January 1995)). The UN Human Rights Committee issues views on the domestic implementation of international human rights norms as evidenced in countries' domestic policies. See *Rules of the Procedure of the Human Rights Committee*, UN CCPROR, 71st Sess., UN Doc. CCPR/C/3/Rev.8 (2005) [mimeo.]. The operations of other international agencies, such as the International Monetary Fund, similarly involve surveillance of states' domestic measures. See e.g. *Articles of Agreement of the International Monetary Fund*, 22 July 1944, 2 U.N.T.S. 39, Can. T.S. 1944 No. 37 (entered into force 27 December 1945), art. IV.

⁸³ See e.g. Allan E. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968); Hugh M. Kindred *et al.*, eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery, 2006); Armand L.C. de Mestral, "L'évolution des rapports entre le droit canadien et le droit international un demi-siècle après l'affaire des conventions

Convention on the Law of Treaties, adopted in 1969 and ratified by Canada in 1994.⁸⁴ Treaty making relating to the creation of new international organizations or under the aegis of the United Nations or other leading international organizations demands the most formal procedures.⁸⁵ Many major treaties are negotiated at international conferences specially convened for the purpose.⁸⁶ Some treaty negotiations are led by one or more like-minded states, which seek to promote a policy and then convene an international conference when the time is ripe for the conclusion of a treaty.⁸⁷

In almost all cases, the individuals principally charged with treaty negotiation are diplomats or officials of government departments specially accredited for the purpose of negotiating a treaty. But governments recognize that the inclusion of a broad-based group of individuals in a negotiation is often of assistance in ensuring that negotiations yield positive results.⁸⁸ For example, in recent years, it has become common for major treaty-making conferences to be attended by large numbers of representatives of non-governmental organizations (NGOs).⁸⁹

internationales du travail" (1987) 25 Can. Y.B. Int'l Law 301 [De Mestral, "Évolution"]; Anne Marie Jacomy-Millette, *Treaty Law in Canada* (Ottawa: University of Ottawa Press, 1975); Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough, Ont.: Thomson Carswell, 2007) c. 11.1-11.18.

⁸⁴ 23 May 1969, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 (entered into force 27 January 1980) [*Vienna Convention*].

⁸⁵ Many international organizations actively take part in the development of international law: the International Labour Organization (ILO), the WTO, the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD), and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) are among the major international organizations that have law-making power. For an overview, see Alvarez, *supra* note 3 at 111-22, 227-31 (ILO), 232-34 (WTO).

⁸⁶ In various UN organizations, the Conference of the Parties is the supreme body of the conventions that are negotiated under the aegis of the United Nations. These conferences are the decision-making entities and are usually attended by representatives from states that are signatory to these conventions. See e.g. *United Nations Framework Convention on Climate Change*, 19 June 1993, Can. T.S. 1994 No. 7, art. 7, 31 I.L.M. 849 (entered into force 21 March 1994) (establishing the Conference of the Parties, "the supreme body of this Convention"); *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79, art. 23, Can. T.S. 1993 No. 24, 31 I.L.M. 818 (entered into force 29 December 1993); UN, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, "Meetings of States Parties to the 1982 United Nations Convention on the Law of the Sea", online: United Nations <http://www.un.org/Depts/los/meeting_states_parties/meeting_states_parties.htm>.

⁸⁷ See especially *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 3 December 1997, 2056 U.N.T.S. 211, Can. T.S. 1999 No. 4, 36 I.L.M. 1507 (entered into force 1 March 1999) (being one of the most rapidly ratified multilateral conventions of its kind).

⁸⁸ See e.g. A.L.C. de Mestral & L.H.J. Legault, "Multilateral Negotiation: Canada and the Law of the Sea Conference" (1979-80) 35 Int'l J. 47 at 53-55 (describing the formation of the delegation to the Third UN Law of the Sea Conference and the perceived interest in a broad-based delegation).

⁸⁹ Government departments such as Environment Canada and the DFAIT frequently call on the Canadian Environment Network to select qualified NGO representatives to be part of Canadian

Until only last year there was no general official description of Canadian treaty-making practice, although a statement of treaty practice, prepared by the legal adviser of the Department of Foreign Affairs and International Trade (DFAIT), is published annually in the Canadian Yearbook of International Law.⁹⁰ But in 2008, the Treaty Section of the DFAIT published on its website a *Policy on Tabling of Treaties in Parliament*,⁹¹ which closely follows the Ponsonby Rule, a U.K. procedure whereby treaties are laid before Parliament for at least twenty-one sitting days before ratification.⁹² The policy puts flesh on the government of Canada's announcement on 25 January 2008 that it henceforth intends to table treaties in the House of Commons prior to ratification.⁹³ Nonetheless, the federal government still takes the position that it alone is authorized to negotiate and ratify international treaties. This principle is enshrined in the *Department of Foreign Affairs and International Trade Act*, which vests the conduct of foreign affairs, including the negotiation and ratification of treaties, in the minister and deputy minister of foreign affairs and international trade.⁹⁴

Various departmental and interdepartmental committees consider and discuss the need for a treaty. The actual decision to initiate or participate in a treaty negotiation may be incremental or very formal. When officials determine that a formal decision is required, a policy on the matter is usually worked out by several federal interdepartmental committees, though it is possible that the policy can be developed by only one department. Regardless of how the underlying policy is developed, it must be approved by the federal cabinet. In most cases, the policy will be put to the appropriate committees of cabinet for approval. Some major decisions, involving significant treaties, are referred to the full cabinet for approval.

government delegations to treaty negotiations and meetings such as those of the UN Convention on Biological Diversity. In addition, many NGOs, from Canada and a host of other countries, attended negotiations surrounding the *Rome Statute of the International Criminal Court*, which established the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90, Can. T.S. 2002 No. 13 (entered into force 1 July 2002) [*Rome Statute*]). See Marlies Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court" in Marlies Glasius, Mary Kaldor & Helmut Anheier, eds., *Global Civil Society, 2002* (Oxford: Oxford University Press, 2002) 137.

⁹⁰ See e.g. Alan Kessel, "Canadian Practice in International Law: At the Department of Foreign Affairs and International Trade in 2005–06" (2006) 44 Can. Y.B. Intl'l Law 565. The Canadian Yearbook of International Law is issued annually under the auspices of the Canadian Branch of the International Law Association.

⁹¹ (2008), online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/Tabling.asp>> [*Treaty-Tabling Policy*].

⁹² See U.K., Foreign & Commonwealth Office, "The Ponsonby Rule", online: Foreign & Commonwealth Office <http://www.fco.gov.uk/resources/en/pdf/pdf2/fco_nopdf_ponsonbyrule>.

⁹³ Canada, Department of Foreign Affairs and International Trade, News Release, "Canada Announces Policy to Table International Treaties in House of Commons" (25 January 2008), online: Canada News Centre <<http://news.gc.ca/web/view/en/index.jsp?articleid=374729>> [DFAIT, "Tabling Announcement"].

⁹⁴ R.S.C. 1985, c. E-22, s. 10 [DFAITA].

In short, the policy-formation process relating to treaty negotiation is entirely in the hands of the federal public service, subject to political direction from the federal cabinet and other elected members of the federal government. In formal terms, provincial, territorial, and First Nations governments are not part of this process. They can be invited to participate, but the invitation is entirely subject to the discretion of the federal government and public service.

Once a formal decision has been taken to initiate or participate in treaty negotiations, the method of negotiation must be established. Negotiations may be as simple as a summit-meeting decision signed by heads of state. Similarly, expeditious negotiations may take the form of a telephone call between officials in Ottawa and their counterparts elsewhere, followed by correspondence and ultimately the exchange of letters duly signed by the responsible ministers. At the opposite end of the spectrum might be a very complex negotiation on a matter of high political significance and public interest, as in the case of the 1988 *Free Trade Agreement Between the Government of Canada and the Government of the United States*.⁹⁵

The typical negotiation is conducted by federal officials. In the event of a strong provincial interest, particularly if the subject matter falls within provincial jurisdiction, there is in almost all cases intergovernmental discussion between officials and possibly ministers. Yet, there is little uniformity of approach, nor is there

⁹⁵ 12 October 1988, Can. T.S. 1989 No. 3, 27 I.L.M. 293 (entered into force 1 January 1989) [*FTA*]. Years of study and planning preceded the decision to open negotiations with the United States. The decision was the object of complex discussions within the federal public service, but these discussions were accompanied by intense private consultation with all provincial governments to determine the degree to which these governments supported the idea and would be willing to see commitments made on their behalf. Federal-provincial consultations, which continued throughout the negotiations, were accompanied by broad-based public consultations. The general public was consulted at open meetings across the country. Concerned industry and commercial leaders and academic experts were consulted on a frequent basis in a highly structured manner through standing sectoral committees that were called upon to comment on actual negotiation proposals. The treaty was negotiated from 1984 to 1987 by federal officials who had sole carriage of the negotiations, which covered 10 negotiating groups over the three years of the negotiations. The 10 negotiating groups were market access, agriculture, investment, services, government procurement, intellectual property rights, competition policy, subsidies, antidumping and countervailing duties, and dispute settlement committee on institutional issues. The decision to conclude the negotiations and to sign the *FTA* was taken by the federal government in the face of opposition from several provincial governments and the Official Opposition in the House of Commons and the Senate. The ratification of the *FTA* itself was not debated in Parliament, although the treaty was tabled in the House of Commons and was the object of a heated debate. However, in the face of the refusal of the Senate to pass the implementing legislation in 1988, the government took the virtually unprecedented step of calling a general election in which the approval of the *FTA* was a central issue. Upon winning the election, the Mulroney government proceeded with a rapid adoption of the legislation implementing the *FTA* in the House of Commons. The *Canada-United States Free Trade Agreement Implementation Act* was thus adopted in 1989 after a series of heated debates in the House of Commons and a general election (S.C. 1988, c. 65 [*FTA Act*]).

a general framework, for federal–provincial consultations.⁹⁶ Public participation in treaty negotiation (or prior policy formation) is even more driven by political choice and ad hoc decision making. In some sectors, particularly those involving environmental issues and human rights issues, many NGOs clamour for attention and inclusion in the planning and negotiation of treaties.⁹⁷ Whether they succeed is left to the discretion of federal officials and those elected members of the federal government who direct them.

In other sectors, particularly those involving economic matters, commercial and industrial associations have developed a pattern of consultations with federal officials before and during negotiations.⁹⁸ But these situations seldom involve requests to participate in negotiations as such. These same groups are often consulted on the question of implementation. A similar pattern exists where the focus of treaty negotiations concerns health care, a profession, or a mode of transportation. Interested professional groups often have a fairly close relationship to the federal officials responsible for such treaty negotiations. There is little or no tradition of consultation with outside groups on issues that are predominately of international intergovernmental interest.

Many practitioners of international treaty making are skeptical of wide public participation in the treaty-making process. Their case, however, is much harder to make when it comes to the ratification of a treaty. Ratification is the decision by which Canada declares itself bound by international law and assumes the obligation to do everything necessary to ensure respect for its obligations under the treaty. Notwithstanding the new and laudable *Treaty-Tabling Policy*, the position of the Canadian government at the present time is that ratification is strictly an executive matter, regardless of how many Canadians might be affected and no matter what the division of legislative jurisdiction might be.⁹⁹ As a result, the federal government can commit Canada internationally, without any form of legislative consent, to treaty obligations requiring changes to both federal and provincial laws. Very serious consequences for Canadian federalism would ensue were it not for the fact that the federal government, out of prudence, does not actually ratify treaties requiring legislative changes until these changes have been adopted by Parliament or the provincial legislatures, or until it is confident that such changes as are necessary will be forthcoming.

⁹⁶ For a description of provincial involvement in treaty negotiations, see Armand de Mestral, “The Provinces and International Relations in Canada” in Jean-François Gaudreault-DesBiens & Fabien Gélinas, eds., *The States and Moods of Federalism: Governance, Identity and Methodology* (Cowansville, Qc.: Yvon Blais, 2005) 309 at 319-21.

⁹⁷ See *supra* note 89 and accompanying text.

⁹⁸ The DFAIT actively seeks the opinions of corporations and individuals to assess Canada’s international interests or to determine how negotiations of a given treaty should proceed. The “Consultations” page of the DFAIT website presents a list of specific requests for the views and opinions of Canadians (<<http://www.international.gc.ca.consultations/>>).

⁹⁹ Hogg, *supra* note 83, c. 11-5. See also *Treaty-Tabling Policy*, *supra* note 91, Annex A.

It is important to emphasize that as a general rule, at both levels of government, law officers of the Crown have been careful to ensure that legislation is in place before authorizing ratification. And now, under the *Treaty-Tabling Policy*, the cabinet document seeking authorization to ratify a treaty must state the legislation or regulatory power under which Canada can perform its international obligations with respect to the treaty in question.¹⁰⁰ This responsibility is shared by both the DFAIT, which is ultimately charged with ratification, and the Department of Justice, which is charged with ensuring that adequate legislation and regulatory authority is in place.¹⁰¹

Such a careful consideration of domestic law can have the effect of delaying ratification for a considerable period. A particularly striking example of this delay was the ratification process surrounding the *International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*.¹⁰² Signed in 1965 and quickly ratified by many states, the *ICSID* presented problems in Canada, as provincial governments insisted that arbitration, even over international investment, fell within the provincial powers over administration of justice. Rather than face both legal and political challenges, and despite considerable pressure from Canadian foreign investors, the federal government delayed signature until after 2006. Also, in the face of continued opposition from two provincial governments, it postponed ratification yet again, despite the fact that by that time, federal jurisdiction over international trade and investment had been considerably strengthened, legislation had been adopted at the federal and provincial levels, and provincial governments supported the practice of international arbitration.¹⁰³ Despite the obvious frustrations that these delays may cause, the speed at which ratification occurs does ensure that only a very small number of treaties are ratified without adequate implementing legislation or regulatory authority, though some ratifications are delayed for strictly political reasons.¹⁰⁴

¹⁰⁰ *Treaty-Tabling Policy*, *ibid.*

¹⁰¹ *Ibid.*

¹⁰² 18 March 1965, 575 U.N.T.S. 158, 17 U.S.T. 1270 (entered into force 14 October 1966) [*ICSID*]. Canada signed the *ICSID* on 15 December 2006 but has not yet ratified it (“Details”, online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/details.asp?id=05087>>).

¹⁰³ Only Quebec has not yet agreed to ratification. Negotiations on the matter are ongoing.

¹⁰⁴ Some have argued that the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (11 December 1997, UN Doc. FCU/CP/1997/L.7/Add.1, 37 I.L.M. 22 (entered into force 16 February 2005) [*Kyoto Protocol*]) was ratified without the existence of an adequate legislative basis. There may be some truth in this assertion, but this argument fails to consider the extent of federal authority to regulate interprovincial and international sales of carbon credits under existing legislation. The *Softwood Lumber Agreement Between the Government of Canada and the Government of the United States* (12 September 2006) (entered into force 12 October 2006), online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/text-texte.asp?id=105072>>) was ratified on 12 October 2006, some weeks before the third and final reading of the implementing legislation, the *Softwood Lumber Products Export Charge Act* (S.C. 2006, c. 13). The legislation was pending in Parliament at the time of ratification, which was urgently required to give effect to the promised transfer of money from the U.S. government to Canadian lumber

2. Where Did the Canadian Approach Come From and What Is Currently Driving It?

a. Sources of the Dualist Approach

The body of public law received from the United Kingdom as a result of British colonization of North America has been an influential factor in Canada's approach to treaties. This body of law vested the conduct of international relations and treaty making in the Crown.¹⁰⁵ It also established the principle that a treaty could not amend the positive law of the land unless the change received positive legislative endorsement.¹⁰⁶ As we have seen, however, U.K. public law did admit the principle that customary international law was part of the law of the land and could be enforced by the courts as domestic law.¹⁰⁷

A further contributing factor has been the constitution of Canada and the division of powers between the provincial legislatures and Parliament. In *Canada (A.G.) v. Ontario (A.G.)*, which was decided in 1937 and remains the leading decision on treaty implementation in Canada, the Judicial Committee of the Privy Council, although asked to rule on both executive and legislative powers in respect of certain conventions, ruled only that legislative jurisdiction necessary to implement a treaty followed the normal division of powers and was not vested exclusively in Parliament.¹⁰⁸

The result of *Labour Conventions* has been to establish a rule that the federal division of legislative powers requires treaties to be implemented in accordance with the federal principle. In so doing, the Privy Council refused to accept the proposition

producers. These are rare cases of ratification before adequate implementing legislation is in place.

¹⁰⁵ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan & Co., 1965) at 119; Arthur Berriedale Keith, *An Introduction to British Constitutional Law* (Oxford: Clarendon Press, 1931) at 76.

¹⁰⁶ William R. Anson, *The Law and Custom of the Constitution*, vol. 1, 4th ed. (Oxford: Clarendon Press, 1935) at 65-66; Keith, *ibid.* at 77; O. Hood Phillips, *Chalmers and Hood Phillips' Constitutional Laws of Great Britain* (London: Sweet & Maxwell, 1946) at 173.

¹⁰⁷ See text accompanying notes 58-61.

¹⁰⁸ [1937] A.C. 326, (*sub. nom. Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act*) [1937] 1 D.L.R. 673 (P.C.) [*Labour Conventions*]. Two earlier references had also dealt with the treaty power. See *Reference Re Regulation and Control of Aeronautics in Canada* (1931), [1932] A.C. 54, [1932] 1 D.L.R. 58 [*Aeronautics Reference*]; *Reference Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, [1932] 2 D.L.R. 81 (P.C.) [*Radio Reference*]. The *Aeronautics Reference* in 1932 posed a question in respect of both executive and legislative powers to implement an "Empire" treaty in respect of aeronautics, but the Privy Council only answered those regarding legislative issues (*ibid.*). The *Radio Reference*, also delivered in 1932, was only addressed to the power of Parliament in respect of an international treaty dealing with the international division of the radio frequency spectrum (*ibid.*).

that there existed a “treaty power” beyond that created by section 132 of the *Constitution Act, 1867* concerning “Empire” treaties made for Canada by the United Kingdom.¹⁰⁹ Since no Empire treaties have been made since the time of these decisions, that power serves only to renew federal legislation in respect of such treaties as still remain.¹¹⁰

Canadian federalism raises the question of the role of the provincial crowns in international relations. An equally important issue is the capacity of the provincial legislatures to legislate in respect of treaty implementation covering matters within provincial jurisdiction. We discuss a number of the issues that complicate provincial participation in international affairs in Part III.E, below.

Also relevant in determining the role of the federal and provincial crowns in foreign affairs and treaty making is the unwritten law of the Royal Prerogative.¹¹¹ Apart from section 132 of the *Constitution Act, 1867*, and more recently section 11(g) of the *Canadian Charter of Rights and Freedoms*,¹¹² the constitution of Canada is silent on treaty making and the place of international law in the Canadian legal order.¹¹³ Given the relative silence of the constitution on the matter, it is largely the exercise of the Royal Prerogative that sustains the federal government’s claim to the exclusive exercise of the foreign-affairs power. Various federal and provincial laws governing interpretation of statutes or particular treaties, some of which we discuss below, apply to the exercise of the foreign-affairs and treaty powers.¹¹⁴ But the origin of these powers traces back to the Royal Prerogative.

The Canadian approach to treaties and treaty making is thus an amalgam of history, principles of public law, case law, administrative practice, and legislative

¹⁰⁹ (U.K.), 30 & 31 Vict., c. 3, s. 132, reprinted in R.S.C. 1985, App. II, No. 5.

¹¹⁰ See *International Boundary Waters Treaty Act*, R.S.C. 1985, c. I-17; *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22.

¹¹¹ The Royal (or Crown) Prerogative refers to the historical powers of the Crown—the monarch acting in a public capacity—over which Parliament has no authority. In the 17th century these included the power to imprison and impose taxation at the Crown’s discretion. Today the domestic prerogative powers of the Crown are very limited (e.g., the bestowal of honours), but the federal government’s basic claim to a near-monopoly on foreign affairs continues to rest on its claim to prerogative power in this field. See H.W.R. Wade & C.F. Forsythe, *Administrative Law*, 9th ed. (Oxford: Oxford University Press, 2004) at 215-17; Hogg, *supra* note 83, c. 1.9.

¹¹² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 11(g) [*Charter*].

¹¹³ Section 11(g) is the *Charter’s* sole reference to international law through the expression “the general principles of law recognized by the community of nations” (*ibid.*). The closest provision in the constitution on the subject of treaty making is s. 132 of the *Constitution Act, 1867*, which refers to the federal power to perform what is designated as “empire treaties” (*supra* note 109, s. 132).

¹¹⁴ *Interpretation Act*, R.S.B.C. 1996, c. 238 [*Interpretation Act (B.C.)*]; *Legislation Act, 2006*, being Schedule F to the *Access to Justice Act*, S.O. 2006, c. 21; *Interpretation Act*, R.S.Q. c. I-16 [*Interpretation Act (Quebec)*]; *Interpretation Act*, R.S.C. 1985, c. I-21 [*Interpretation Act (Federal)*]. See also *DFAITA*, *supra* note 94.

direction. Not surprisingly, it has generated significant scholarship in recent years.¹¹⁵ The division of powers provides an answer to the question of whether the federal or provincial legislatures (or both) have jurisdiction to implement treaties. The issue of the relationship between treaties and Canada's domestic legal order, however, has largely been left to administrative practice, political debate at the occasional federal–provincial conference, and numerous judicial decisions that, in the main, affirm a strong commitment to dualism.¹¹⁶ These decisions, and the dualist approach that underlies them, have played a leading role in determining the principles of public law

¹¹⁵ For recent scholarship that addresses the relationship between international and domestic law in Canada, see Bayefsky, “Human Rights”, *supra* note 49; Stéphane Beaulac, “Recent Developments on the Role of International Law in Canadian Statutory Interpretation” (2004) 25 Stat. L. Rev. 19; Jutta Brunnée & Stephen Toope, “A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts” in Dyzenhaus, *Unity*, *supra* note 1, 357; Joanna Harrington, “Redressing the Democratic Deficit in Treaty Law-Making: (Re-)Establishing a Role for Parliament” (2005) 50 McGill L.J. 465 [Harrington, “(Re-)Establishing”]; Hugh M. Kindred, “Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts” in Stephen G. Coughlan & Dawn Russell, eds., *Citizenship and Citizen Participation in the Administration of Justice* (Montreal: Thémis, 2002) 263; Karen Knop, “Here and There: International Law in Domestic Courts” (2000) 32 N.Y.U.J. Int'l. L. & Pol. 501; Ed Morgan, “In the Penal Colony: Internationalism and the Canadian Constitution” (1999) 49 U.T.L.J. 447; René Provost, “Le juge mondialisé — fonction judiciaire et droit international au Canada” in Marie Claire Belleau & François Lacasse, eds., *Mélanges Claire L'Heureux-Dubé* (Montreal: Wilson & Lafleur, 2004) 569; René Provost, “Judging in Splendid Isolation” (2008) 56 Am. J. Comp. L. 125; Anne Warner La Forest, “Domestic Application of International Law in Charter Cases: Are We There Yet?” (2004) 37 U.B.C. L. Rev. 157; La Forest, “Expanding Role”, *supra* note 68; LeBel & Chao, *supra* note 56; William A. Schabas, “Twenty-Five Years of Public International Law at the Supreme Court of Canada” (2000) 79 Can. Bar Rev. 174; Stephen J. Toope, “Inside and Out: The Stories of International Law and Domestic Law” (2001) 50 U.N.B.L.J. 11; Toope, “Use of Metaphor”, *supra* note 72; Van Ert, *International Law*, *supra* note 50; Robert Wai, “Justice Gérard La Forest and the Internationalist Turn in Canadian Jurisprudence” in Rebecca Johnson *et al.*, eds., *Gérard V. La Forest at the Supreme Court of Canada, 1985–1997* (Winnipeg: Canadian Legal History Project, Faculty of Law, University of Manitoba, 2000) 471; Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Brussels: Peter Lang, 2008); Kindred *et al.*, *supra* note 83, c. 4; De Mestral, “Évolution”, *supra* note 83; Hogg, *supra* note 83, c. 11; Fitzgerald, *supra* note 44.

¹¹⁶ See e.g. *Ahani v. Canada (A.G.)* (2002), 58 O.R. (3d) 107, 208 D.L.R. (4th) 66 (C.A.) [*Ahani* cited to O.R.]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker* cited to S.C.R.]; *Bouzari v. Iran*, [2002] O.T.C. 297, 114 A.C.W.S. (3d) 57 (Ont. Sup. Ct.), *aff'd* 71 O.R. (3d) 675, 243 D.L.R. (4th) 406 (C.A.), leave to appeal to S.C.C. refused, [2005] 1 S.C.R. vi [*Bouzari*]; *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, 2004 SCC 4, [2004] 1 S.C.R. 76, 234 D.L.R. (4th) 257 [*Foundation for Children*]; *GreCon Dimter v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, 255 D.L.R. (4th) 257; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449 [*National Corn Growers* cited to S.C.R.]; *Pushpanathan*, *supra* note 47; *Schreiber v. Canada (A.G.)*, 2002 SCC 62, [2002] 3 S.C.R. 269, 216 D.L.R. (4th) 513; *Suresh*, *supra* note 70.

applicable to treaty implementation, the status of treaties, and the interpretation of treaties.

b. Legislative Interpretation and the Principle of Conformity

To some extent the commitment to dualism is tempered by the interpretive presumption of conformity that calls on administrative officials and courts to interpret domestic law in a manner that respects Canada's international legal obligations.¹¹⁷ In *Baker v. Canada (Minister of Immigration)*, the Supreme Court of Canada reviewed a minister's refusal to exercise his discretionary authority to stay a deportation on humanitarian and compassionate grounds in the case of a woman with Canadian-born dependent children.¹¹⁸ In its analysis, the Court considered whether the *Convention on the Rights of the Child* could be used as an interpretative instrument in reviewing the exercise of the minister's discretion.¹¹⁹ At issue was article 3 of the convention, which states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."¹²⁰ The convention had been ratified by Canada but, in the view of Justice L'Heureux-Dubé, had not yet been implemented and given effect under Canadian domestic law because no specific statute had been adopted whose purpose was implementation.¹²¹ Nonetheless, the majority held that "the [concern for children's best interests] reflected in *international* human rights law may help inform the contextual approach to statutory interpretation and judicial review."¹²²

In his remarkable book *Using International Law in Canadian Courts*, Gibran van Ert makes a powerful implicit case that many of the problems regarding the proper relationship of domestic and international law in Canada can be resolved by reference to the presumption of conformity.¹²³ In an earlier article, we have also noted the potential of the presumption of conformity to promote a more harmonious relationship between the two legal orders.¹²⁴ The presumption is further discussed at various points in this article. Nonetheless, we will argue below that legislative intervention and major policy changes to parliamentary practice are also desirable.

Since the adoption of the *Charter* the courts have been asked many times to determine the relevance of international human rights law to *Charter* interpretation,

¹¹⁷ *Foundation for Children, ibid.* at 100.

¹¹⁸ *Supra* note 116; *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 114(2) [IRPA].

¹¹⁹ *Supra* note 6; *Kindred et al.*, *supra* note 83 at 238.

¹²⁰ *Ibid.*, art. 3.

¹²¹ *Baker, supra* note 116. For further discussion on this topic, see Part III.A, below.

¹²² *Ibid.* at para. 70.

¹²³ *Supra* note 50, c. 5, 11.2(d). See also Gibran van Ert, "Using Treaties in Canadian Courts" (2000) 38 Can. Y.B. Int'l Law 3 at 28.

¹²⁴ De Mestral & Fox-Decent, *supra* note 44 at 31.

with the case law increasing almost exponentially.¹²⁵ In some decisions, however, the courts have put Canada in conflict with important ratified treaties or fundamental principles of public international law.¹²⁶

The courts are thus dealing with arguments based on international treaty law on a routine basis. But they still lack clear guidance as to the approach they should adopt in different circumstances. Even the various interpretation acts have little to say to judges who are called upon to apply either treaties or laws based on treaties. The federal *Interpretation Act* states the following:

15(1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(a) as being applicable only if a contrary intention does not appear; and

(b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.¹²⁷

This section has been judicially considered on a number of occasions¹²⁸ but does not appear to have had a major influence on the interpretation of treaties. Its greatest influence may be to suggest, by its very brevity, that treaties play a very small role in statutory interpretation and that they must give way to statutes. Even less guidance is provided with respect to the place of customary international law.¹²⁹ Similarly, many provincial interpretation acts contain limited guidance on the place of treaty law.¹³⁰

¹²⁵ LeBel J. indicated in a speech in April 2002 that between 1984 and 1996 there were about 50 decisions in which the Supreme Court of Canada turned to international law in its deliberations and that in the four years preceding the speech, that number had doubled (LeBel & Chao, *supra* note 56 at 23).

¹²⁶ Suresh, *supra* note 70; Bouzari, *supra* note 116.

¹²⁷ *Supra* note 114, s. 15.

¹²⁸ See e.g. *National Corn Growers*, *supra* note 116.

¹²⁹ *Interpretation Act (Federal)*, *supra* note 114, s. 8(3). The act states:

Every Act now in force enacted prior to December 11, 1931 that expressly or by necessary or reasonable implication was intended, as to the whole or any part thereof, to have extra-territorial operation shall be construed as if, at the date of its enactment, the Parliament of Canada had full power to make laws having extra-territorial operation as provided by the *Statute of Westminster, 1931* ... (*ibid.*).

See also *DFAITA*, *supra* note 94, s. 10.

¹³⁰ See e.g. *Interpretation Act (B.C.)*, *supra* note 114, s. 12; *Interpretation Act (Quebec)*, *supra* note 114, s. 41.1.

c. *Treaty Approval*

No Canadian statute contains specific provisions on the approval of treaties except the *Loi sur le ministère des Relations internationales*.¹³¹ This act, which was first adopted by the National Assembly of Quebec in 1988 and amended in 2002, gives the National Assembly an important role, along with the *ministre des relations internationales*, in the process of approval and implementation of treaties by the province of Quebec.¹³² The law was adopted to regulate the process followed by Quebec in implementing treaties whose subject matter falls within provincial jurisdiction, and to clarify the role of the government of Quebec in the approval of all such treaties. While the government of Quebec has shown considerable interest in treaty approval, it has made less effort to clarify the status of rules of customary international law that fall within provincial jurisdiction. With the exception of possible implicit references in articles 2807 and 3155 to 3165 C.C.Q.,¹³³ the Civil Code of Quebec does not clarify the place of customary international law in the law of Quebec.

Some federal statutes contain indications of their relationship to treaties, as we discuss in Part III.C.1. But what is missing from federal implementing legislation is any sense of order or any governing principle. Each law appears to have been developed separately with very little regard to the development of a common approach to implementation.

One very striking absence from Canadian statutory texts is any reference to the *Vienna Convention*, although it is an important part of the *Treaty-Tabling Policy*.¹³⁴ The *Vienna Convention* is so widely adopted that many authorities have suggested that the convention is largely, if not entirely, declaratory of customary international law. The convention sets out two fundamental rules. Article 26 lays down the principle that states are obligated to fulfill their treaty commitments in good faith.¹³⁵ Article 27 stipulates that states, having made a treaty commitment, cannot plead internal legal or constitutional difficulties in mitigation of their treaty obligations.¹³⁶ In other words, the *Vienna Convention* requires states to fulfill their obligations and brooks few excuses by states for the failure to do so. It reinforces the legal duty incumbent upon Canada when a treaty commitment is made and should be a powerful message to Canadian judges called upon to rule, directly or indirectly, on a matter involving a treaty ratified by Canada. Sadly, no Canadian law deals with these principles and this important source has seldom been cited by the courts. At best, it can be argued that the rules of the *Vienna Convention* reflect customary international

¹³¹ R.S.Q. c. M-25.1.1.

¹³² *Ibid.*, ss. 22.1-22.7.

¹³³ See e.g. art. 3155 C.C.Q. (“[a] Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec ...”).

¹³⁴ *Supra* note 91, s. 5.

¹³⁵ *Vienna Convention*, *supra* note 84, art. 26.

¹³⁶ *Ibid.*, art. 27.

law and are thus part of the domestic law of Canada. Legislative affirmation of this fact would be a powerful message to the judiciary and might well embolden the courts to give treaties greater weight when deciding cases.¹³⁷

It is encouraging that the government recently announced that it intends to bring Parliament back into the treaty-approval process. On 25 January 2008, the federal government announced that henceforth all treaties between Canada and other states or entities would be tabled in the House of Commons.¹³⁸ As noted above, this policy has been further developed in the *Treaty-Tabling Policy*.¹³⁹ Under this new procedure the government is required to table “all instruments governed by public international law, between Canada and other states or international organizations ... ” in the House of Commons.¹⁴⁰ It must also observe a waiting period of twenty-one sitting days from the date of the tabling before taking any action to make the treaty binding upon Canada. When treaties require legislative amendment, the government will be bound to delay consideration of any implementing legislation until this twenty-one sitting-day period has passed.¹⁴¹

This initiative is welcome and long overdue. It will give parliamentarians an opportunity to debate the content of treaties that they consider worthy of scrutiny. But such a debate will only take place in time allotted to the opposition parties and at their behest. A further restriction is that, when Parliament reconvenes, parliamentarians may have to choose to debate many treaties within the twenty-one sitting days that have accumulated over the period of the parliamentary recess. As well, the minister of foreign affairs and international trade and lead ministers may request from the prime minister an exemption from the necessity of tabling.¹⁴²

Nonetheless, other features further strengthen the policy’s value. The policy requires that each treaty be accompanied on tabling in the House of Commons by an Explanatory Memorandum setting out considerable information on the objectives and impact of the treaty, including a statement on the chosen means of implementation.¹⁴³ In addition, the policy is also accompanied by instructions to departments of government on the process of seeking authorization from cabinet to negotiate a treaty, and it sets out the various stages of the participation of departments in the treaty-negotiation and approval process. It is in many respects a codification and clarification of federal governmental practice in respect of treaty making, and as such

¹³⁷ See e.g. *Pushpanathan*, *supra* note 47 at 1019-29, Bastarache J. (discussing treaty interpretation).

¹³⁸ DFAIT, “Tabling Announcement”, *supra* note 93.

¹³⁹ *Supra* note 91.

¹⁴⁰ *Ibid.*, s. 2.

¹⁴¹ *Ibid.*, s. 6.2.

¹⁴² *Ibid.*, s. 6.3.

¹⁴³ *Ibid.*, s. 6.4.

will be of great utility to government departments and to the public in following the process.¹⁴⁴

Yet, however well the new policy works, we suggest in Part III.B.3 that this initiative essentially reverts to the prevailing practice up to 1968, leaves unanswered many questions regarding the legal significance of parliamentary approval or disapproval, and comes much too late in the treaty-making process.

III. The Way Forward

The remainder of this article seeks to promote debate on Canada's approach to international law. It sets out options that would move Canada toward a unified understanding of the relationship between international and domestic law. The courts are an obvious source of possible change. Given the relative absence of constitutional and legislative provisions governing the domestic reception of international law in Canada, the courts appear to enjoy considerable latitude to fashion new rules and principles through the common law. As we shall now see, this is just what some of them have been doing in recent years.

A. The U.K. Example

The courts of the United Kingdom have shown greater willingness than Canadian courts to adopt more generous approaches to international law. Although the fundamental principles of dualism are very similar in the United Kingdom and Canada, U.K. courts have issued a series of groundbreaking decisions respecting sovereign immunity of property and the immunity of heads of state charged with crimes against humanity. These cases suggest that the U.K. courts are increasingly attentive to arguments based on rules of customary law.

The openness of U.K. courts to customary international law was evidenced in 1977 in *Trendtex Trading Corporation v. Central Bank of Nigeria*.¹⁴⁵ The Court of Appeal of England and Wales stated that restrictive immunity was now firmly established as a rule of customary international law and could therefore be incorporated into the common law without need for an act of Parliament.¹⁴⁶ With

¹⁴⁴ At the time of writing implementation of this policy was still a work in progress. The problems posed by the long hiatus of parliamentary recesses have not yet been resolved and too few Explanatory Memoranda have been issued to determine whether they will provide satisfactory information regarding implementation. It would not appear that any official record of implementation is planned as of yet.

¹⁴⁵ *Supra* note 78.

¹⁴⁶ *Ibid.* at 554. The court stated that “[i]nternational law does change: and the Courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English Courts were justified in applying the modern rules of international law ...” (*ibid.*). The applicability of customary international law in the domestic legal order has been affirmed in

respect to customary international law, Lords Denning and Shaw followed the doctrine of “incorporation” (or adoption) rather than “transformation”, and in so doing affirmed that “the rules of international law are incorporated into English law automatically ...”¹⁴⁷

The openness of U.K. courts to international law was again put to a test in a recent House of Lords decision, *R v. Jones*.¹⁴⁸ The central question posed to the House of Lords was “whether the crime of aggression, if established in customary international law, is a crime recognised by or forming part of the domestic criminal law of England and Wales.”¹⁴⁹ The facts arose from a protest against U.K. participation (or intended participation) in the U.S.-led invasion of Iraq in 2003. A group of demonstrators entered a military facility in order to obstruct military operations and to show their opposition to the war. Some demonstrators chained themselves to tanks and other military equipment in order to halt the loading of equipment destined for the Middle East. The appellants argued that their conduct was legally justified because they acted in order to “impede, obstruct or disrupt the commission” of the crime of aggression, which they believed the United Kingdom to be committing (or conspiring to commit) by virtue of its preparations to participate in the invasion of Iraq in March 2003.¹⁵⁰

The appellants relied on section 3 of the *Criminal Law Act 1967*:

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

(2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.¹⁵¹

The appellants therefore submitted that customary international law is part of the domestic law of England and Wales and that crimes in customary international law do not require any domestic statute or legislative enactment. They further contended that the law of nations in its full extent is part of the law of England and Wales.

The House of Lords accepted the broad principle that customary law forms part of the law of England and Wales. It also accepted that a crime of aggression now exists under customary international law. It held, however, that accepting a crime could be created by customary international law would violate the constitutional and

other relatively more recent U.K. cases. See e.g. *Playa Larga v. I congreso del partido* (1981), [1983] 1 A.C. 244, [1981] 2 All E.R. 1064 (H.L.); *J.H. Rayner (Mincing Lane) Ltd. v. United Kingdom (Department of Trade and Industry)*, [1988] 3 All E.R. 257, [1988] 3 W.L.R. 1033 (C.A.), aff'd (1989), [1990] 2 A.C. 418, [1989] 3 All E.R. 523, [1989] 3 W.L.R. 969 (H.L.).

¹⁴⁷ *Trendtex, ibid.* at 553.

¹⁴⁸ [2006] UKHL 16, [2007] 1 A.C. 136, [2006] 2 All E.R. 741 [cited to A.C.].

¹⁴⁹ *Ibid.* at 152.

¹⁵⁰ *Ibid.*

¹⁵¹ (U.K.), 1967, c. 58, s. 3.

democratic principle that common law crimes no longer exist in England and Wales. All crimes must be defined by Parliament to be triable before a court. This finding is similar in spirit to that of the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*.¹⁵²

As a result of legislative intervention, the courts of the United Kingdom have also accepted a remarkable transformation of the principle of parliamentary supremacy (or sovereignty). This transformation arises from the *European Communities Act 1972*, which provides for the enforcement and supremacy of E.U. law, both existing and future, over the domestic law of the United Kingdom in the following terms:

2(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time *provided* for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable Community right” and similar expressions shall be read as referring to one to which this subsection applies.¹⁵³

In *R. v. United Kingdom (Secretary of State for Transport), Ex parte Factortame Ltd. (No. 2)*,¹⁵⁴ the House of Lords gave direct effect in the United Kingdom to a rule of E.U. treaty law guaranteeing the “right of establishment” of companies and persons existing by virtue of articles 43-48 (formerly articles 52-58) of the *Treaty Establishing the European Economic Community*.¹⁵⁵ This right can be exercised by any E.U. citizen or company incorporated in an E.U. member state and can be invoked against a government before national courts.¹⁵⁶ The House of Lords decided that it was required by the *EC Treaty*, which had the force of law in the United Kingdom by virtue of the *ECA 1972*, to enjoin through injunction the proclamation of a statute duly adopted by Parliament in order to enforce the community law rights of the company.¹⁵⁷

This form of judicial review of parliamentary law-making was clearly otherwise unconstitutional on the basis of longstanding precedent. Under the traditional view of parliamentary supremacy, Parliament is free to enact, modify or repeal any kind of legislation whatsoever, without interference from the judiciary.¹⁵⁸ In *Factortame*, however, the principle of parliamentary supremacy was in effect informed and

¹⁵² *Supra* note 69.

¹⁵³ (U.K.), 1972, c. 68, s. 2(1) [*ECA 1972*].

¹⁵⁴ (1990), [1991] 1 A.C. 603, [1991] 1 All E.R. 70 [*Factortame* cited to A.C.].

¹⁵⁵ 25 March 1957, 298 U.N.T.S. 11, arts. 52-58, U.K.T.S. 1979 No. 15 (entered into force 1 January 1958) [*EEC Treaty*]; *Consolidated Version of the Treaty Establishing the European Community*, 24 December 2002, [2002] O.J. C/325/33, arts. 43-48.

¹⁵⁶ *EEC Treaty, ibid.*, arts. 7, 52, 58 (reference being made to the version in force when the *Factortame* case was decided).

¹⁵⁷ *Factortame, supra* note 154.

¹⁵⁸ See Dicey, *supra* note 105 at 39-40.

constrained by a prior legislative commitment to treat international law—the law of the European Union—as domestic law. Explaining the decision, Lord Bridge stated:

Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty (Cmnd. 5179-II) it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.

Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.¹⁵⁹

If such a change to the approach taken to the domestic effect of international law can be adopted in the United Kingdom, similar changes may be possible in Canada. The strictly dualist stance adopted by the courts in Canada is not immutable. Nor does it reflect the increasingly close relationship between Canadian and international law or the demands being made upon the Canadian legal system from outside. Canada can do better. We now suggest how.

B. Parliamentary Authorization, Review, Participation, and Oversight

As mentioned above, on 25 January 2008 the government of Canada served notice that henceforth all treaties would be tabled in the House of Commons, and it subsequently presented the *Treaty-Tabling Policy*. This is a valuable first step, but before turning to a discussion of where we go from here, it is helpful to have in mind the role played by legislatures of other liberal democracies in the treaty-making process, as well as the role of Parliament in treaty making prior to 1968.

1. The Processes and Structures of Other States

In the United States, the Senate has the power to give its advice on and consent to major international treaties to give them the force of law. This provision, often referred to as the “treaty clause”, has been part of the *Constitution of the United States* for over two centuries.¹⁶⁰ In the field of trade, both Houses of the United States Congress play a significant role in setting the direction of trade negotiations and in

¹⁵⁹ *Supra* note 154 at 658-59.

¹⁶⁰ U.S. Const. art. II, § 2, cl. 2.

approving or rejecting the results of those negotiations. In the last twenty-five years Congress has typically given the executive “fast-track” negotiating authority.¹⁶¹ The *prenegotiation* role of Congress is a means of constraining the legislature *after* the treaty negotiations in respect of how it may play with the implementation act. Unlike in Canada, Congress gives up its authority to amend implementing legislation in return for some say in advance on how the negotiations may proceed. Congress’s role in approving or rejecting the results through the implementation process is, in this sense, significantly circumscribed compared to that of the Parliament of Canada.

Moreover, self-executing treaties approved by the Senate have the direct force of law. The place of treaties in U.S. domestic law is determined by article VI of the *U.S. Constitution*. Article VI states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.¹⁶²

Provisions in treaties are given effect in the domestic law of the United States if they are “self-executing”, or if they are “non-self-executing” but have been implemented by an act of Congress.¹⁶³ Congress, either the Senate or both the House of Representatives and the Senate, plays a vital role in each case.¹⁶⁴

In France, the ratification of treaties is constitutionally vested in the president of the republic, but the French constitution also requires that all categories of important

¹⁶¹ The “fast-track” negotiating authority (now called Trade Promotion Authority), where provided by Congress, allows the executive to negotiate trade agreements that Congress must then approve or disapprove within mandatory deadlines, and cannot amend or filibuster (19 U.S.C. § 2191-94 (2000), 3803-05 (2006 Supp.)). For a list of recent uses of the authority, see U.S., Congressional Research Service, *Trade Promotion Authority and Fast Track Negotiating Authority for Trade Agreements: Major Votes*, Report for Congress by Carolyn C. Smith (3 January 2007) at 5-6, online: United States Department of State <<http://fpc.state.gov/documents/organization/78548.pdf>>.

¹⁶² U.S. Const. art. VI.

¹⁶³ The distinction between self-executing and non-self-executing treaties, initially introduced in *Foster v. Neilson* (27 U.S. 253 at 254 (1829) [*Foster*]), has been the cause of some confusion for courts and scholars. A self-executing treaty is one that is suitable to being directly accepted into domestic law. Treaties that are non-self-executing supposedly are not directly enforceable in domestic law because they are addressed to the political branches (*ibid.*). But it remains unclear when to designate a treaty as self-executing or not. Carlos Manuel Vázquez argues that the concept of a non-self-executing treaty is not easily reconciled with art. 6 of the *U.S. Constitution* and should be subject to a default rule that treaties are domestically enforceable unless clearly stated otherwise (“Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties” (2008) 122 Harv. L. Rev. 599). The Supreme Court of the United States has recently reaffirmed the non-self-executing exception (*Medellin v. Texas*, 128 S. Ct. 1346 (2008)), and several commentators still argue for its relevance. See e.g. Curtis A. Bradley, “Self-Execution and Treaty Duality” [2008] Sup. Ct. Rev. [forthcoming in 2009].

¹⁶⁴ See *supra* note 46 and accompanying text.

treaties must receive the prior assent of the National Assembly.¹⁶⁵ It is also noteworthy that article 55 of the French constitution provides that “[l]es traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l’autre partie.”¹⁶⁶ The French constitution thus gives treaties a status superior to national legislation.

In Mexico too the ratification of treaties is constitutionally vested in the legislature.¹⁶⁷ Article 133 of the *Constitution of Mexico* affirms that all Senate-approved treaties become the law of the union, irrespective of their content.¹⁶⁸ What is interesting for present purposes is that Senate approval alone is sufficient to “implement” treaties into domestic law. The *Constitution of Mexico* does not require that treaties be transformed by way of legislation in order to have effect in the Mexican legal order. Rather, treaties undertaken by the executive and approved by the Senate are directly applicable within Mexican municipal law as soon as they are duly published.¹⁶⁹

Australian treaty practice accords Parliament a review role, introduced through reforms made in 1996. Under the reformed treaty procedure, treaties must be tabled in both Houses of Parliament for at least fifteen sitting days before a definitive action is taken by government.¹⁷⁰

¹⁶⁵ 1958 Const., art. 52, online: Legifrance <<http://www.legifrance.gouv.fr/html/constitution/constitution.htm>>.

¹⁶⁶ *Ibid.*, art. 55.

¹⁶⁷ *Constitución Política de los Estados Unidos Mexicanos* [Const.], as am., Diario Oficial de la Federación [D.O.], art. 89, 5 February 1917 (Mex.), trans. in Marc Becker, *1917 Constitution of Mexico*, online: Illinois State University <<http://www.ilstu.edu/class/hist263/docs/1917const.html>> [*Constitution of Mexico*].

¹⁶⁸ *Ibid.*, art. 133.

¹⁶⁹ *Ibid.*

¹⁷⁰ This proposal allowed for a certain degree of flexibility in cases where specific circumstances warranted the consideration of either shorter or longer timelines. During that period, a Parliamentary Joint Standing Committee on Treaties was to hold hearings and prepare a report about the treaty (i.e., 30-100 calendar days). The reform proposal also changed the practice governing the signing and implementation of bilateral treaties. A two-step process was recommended for dealing with bilateral treaties. The first step involved the actual signing of the treaty (followed by tabling of the treaty in Parliament) and the second step involved the exchange of notes signalling that the constitutional processes of parties were complete. See Harrington, “(Re-)Establishing”, *supra* note 115 at 494. In addition, the 1996 reform requires the completion of a National Interest Analysis (NIA) by the department or agency sponsoring the treaty as well as the Department of Foreign Affairs and Trade. An NIA must be attached to every treaty tabled in Parliament. The NIA, which aims to highlight the advantages and disadvantages of a given treaty, is made available to state and territory governments as well as the public. It considers the foreseeable economic, environmental, social, and cultural effects of a treaty action, the obligations such action will impose, the direct financial costs to Australia, domestic implementation implications, and the nature of consultation that has occurred. See Australia,

In South Africa, the country's constitution stipulates that international agreements of a technical, administrative or executive nature, or agreements that do not require ratification or accession by the executive branch, are binding without the need for parliamentary approval.¹⁷¹ As Joanna Harrington notes, "[t]reaty-making in South Africa is thus a shared responsibility between the national executive and both houses of Parliament, with all bilateral treaties of significance and virtually all multilateral treaties subject to an 'approval by both houses' rule of constitutional status."¹⁷² Both houses of Parliament have the opportunity to give their input as to the approval or rejection of a treaty at "a stage that matters in terms of that treaty's binding nature vis-à-vis South Africa," and retain the power for the enactment of legislation in giving domestic effect to international treaties.¹⁷³ Harrington observes that the greater role accorded to Parliament in treaty making by the new constitution has not hampered the country's treaty-making efforts.¹⁷⁴

2. Canada in Historical Perspective

In Canada, from 1968 until January 2008, the federal and provincial legislatures engaged in very little that is comparable to the treaty-making practices of legislatures of the liberal democracies cited above. From the signature of the *Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean including Bering Sea*¹⁷⁵ in 1923 until 1968, at a time when Canada's international legal personality was still forming, it was customary for the minister of external affairs to table a copy of all treaties, whether multilateral or bilateral, in the House of Commons.¹⁷⁶ It was also the

Department of Foreign Affairs and Trade, *Australia International Treaty Making Information Kit*, online: Australasian Legal Information Institute <<http://www.austlii.edu.au/au/other/dfat/reports/infokit.html#Heading53>>.

¹⁷¹ These agreements must be laid on the table of Parliament within a reasonable period of time. The Rules of Procedure stipulate that a copy of the agreement, with the addition of an explanatory note, shall be presented to the speaker of the National Assembly. The speaker must lay the agreement and explanatory note on the Assembly's table, and refer them to one of the Assembly's committees that is responsible for the issue, or any other committee that the assembly might decide upon, for the purpose of examination and reporting. The committee must examine the agreement in order to recommend approval or rejection. The committee is entitled to—and with the instruction of the Speaker must—consult the Foreign Affairs Committee and any other committee of the Assembly that is directly concerned with the subject of the agreement. Finally, the committee must present a report to the Assembly, with a recommendation about whether to approve the agreement or reject it. This report is then enclosed to a motion for the agenda, for the adoption of a resolution by the Assembly (*Constitution of South Africa, supra* note 79, s. 231(3)).

¹⁷² "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making" (2006) 55 I.C.L.Q. 121 at 146.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.* at 148.

¹⁷⁵ United States and Canada, 2 March 1923, 43 U.S. Stat. 1841 (entered into force 22 October 1924).

¹⁷⁶ Gotlieb, *supra* note 83 at 15-17.

practice of the federal government to seek a resolution of support from the House of Commons for treaties falling within a limited set of the most important treaty categories. A.E. Gotlieb, a leading practitioner and commentator, reports that four categories of major treaties were always debated in Parliament:

- (1) treaties involving military or economic sanctions;
- (2) treaties involving large expenditures of public funds or having important financial or economic implications;
- (3) treaties having political considerations of a far-reaching character;
- (4) treaties involving obligations the performance of which will affect private rights in Canada.¹⁷⁷

Harrington quotes Prime Minister Mackenzie King as stating before Parliament that

Parliament should feel assured in regard to all these great obligations of an international character which involve military and economic sanctions that a government should not have the opportunity of binding parliament in advance of its own knowledge of the obligations incurred thereby.¹⁷⁸

King made the link between the significance and impact of the obligations assumed and the fact that the executive assumed the obligations on behalf of Canada. Support of elected representatives for such treaties was understood by King to reflect the democratic principle. Yet the practice of seeking a resolution of support was limited and affected only the most major and politically sensitive treaties. The remaining treaties were simply tabled.

After 1968 even the practice of tabling treaties in the House of Commons was gradually abandoned for reasons that remain unclear.¹⁷⁹ Possibly the federal executive wished to stress its constitutional view that it alone was responsible for treaty making. Or maybe the federal government wished to stress the strictly federal nature of the treaty-making function vis-à-vis certain provincial governments that sought to expand their role in international affairs. During this period, only one major treaty, the 1988 *FTA*, was debated in the House of Commons.¹⁸⁰ The government of the day sought support for the treaty, as well as for implementing legislation, in the face of the refusal of the Senate to allow passage of the legislation. That refusal eventually forced a general election.¹⁸¹

¹⁷⁷ *Ibid.* at 16-17 [footnotes removed]. Gotlieb believes that there was a parliamentary convention that such major treaties should be tabled (*ibid.*).

¹⁷⁸ *House of Commons Debates* (21 June 1926) at 4762, cited in Harrington, “(Re-)Establishing”, *supra* note 115 at 476.

¹⁷⁹ Gotlieb, *supra* note 83 at 16.

¹⁸⁰ *Supra* note 95.

¹⁸¹ For a discussion of the wide-ranging consultation and debate surrounding the *FTA*, see *supra* note 95.

The most recent example of parliamentary scrutiny of a treaty was the debate on 17 December 2002 over ratification of the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.¹⁸² In this case, the federal government sought to garner authority to ratify a controversial treaty in the face of opposition from provincial governments. The *Kyoto Protocol* was debated and a vote of approval taken at the behest of the government of Prime Minister Jean Chrétien. Adoption of the motion was seen as moral authority for the ratification of the treaty, the subject matter of which falls within both federal and provincial jurisdiction. The federal government then proceeded to ratify in the face of continued opposition from Alberta.¹⁸³

Another example of parliamentary action in relation to treaties after 1968 was the gradual emergence of the House of Commons Standing Committee on Foreign Affairs and International Trade (SCFAIT) as a focal point for limited parliamentary debate of treaties. Maurice Copithorne, a former legal advisor to the Department of External Affairs, has written that “[c]onsultations on Canada’s most important treaties now take place regularly prior to the Government taking binding action.”¹⁸⁴ He cites in particular the work of the SCFAIT on the *Multilateral Agreement on Investment*, then under negotiation at the Organisation for Economic Co-operation and Development, and on the *Agreement on Air Transport Preclearance Between the Government of Canada and the Government of the United States* in 1999.¹⁸⁵ A second committee, the Senate Committee on Human Rights, studied the *American Convention on Human Rights: “Pact of San José, Costa Rica”*¹⁸⁶ in 2003, though Canada has yet to ratify this convention.¹⁸⁷ The work of various committees is of considerable interest, but it is difficult to see whether this work reflects a determined

¹⁸² *Supra* note 104. The *Kyoto Protocol* was ratified by Canada after a motion calling on the government to ratify the protocol was passed by a vote of 196 to 77. See *House of Commons Debates*, No. 042 (10 December 2002) at 1525-45. As Harrington notes, “Parliament did not, however, examine the text of the *Kyoto Protocol* prior to adopting the call to ratify” (“(Re-)Establishing”, *supra* note 115 at 468).

¹⁸³ Alberta opposed ratification of the *Kyoto Protocol* and attempted to elaborate its own “Made in Alberta” plan to fight global warming. See Alberta, *Albertans and Climate Change: A Strategy for Managing Environmental and Economic Risks* (Edmonton: Government of Alberta, 2002); Alberta, Legislative Assembly, *Alberta Hansard*, No. 38 (11 November 2002) at 1373-74 (Ralph Klein).

¹⁸⁴ “Canada” in Monroe Leigh, Merritt R. Blakeslee & L. Benjamin Ederington, eds., *National Treaty Law and Practice: Canada, Egypt, Israel, Mexico, Russia, South Africa* (Washington, D.C.: American Society of International Law, 2003) 1 at 13, cited in Harrington, “(Re-)Establishing”, *supra* note 115 at 478.

¹⁸⁵ *Ibid.*

¹⁸⁶ 22 November 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (entered into force 18 July 1978).

¹⁸⁷ Canada, Parliament, “Report of the Standing Senate Committee on Human Rights: Enhancing Canada’s Role in the OAS: Canadian Adherence to the American Convention on Human Rights” in *Sessional Papers*, No. 25 (2003), online: Parliament of Canada <<http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep04may03-e.htm>>.

commitment to bring parliamentarians into the treaty-making process in light of the “hit-or-miss record” of these committees.¹⁸⁸

What does seem clear is that the older policy of tabling treaties in Parliament was set aside for forty years and that parliamentary action during that time was neither systematic nor fully satisfactory when judged in light of either the democratic principle or the federal principle. There are examples of failure to table extradition treaties that should have been tabled under the governing legislation.¹⁸⁹

A related concern is that the publication of treaty documents in the Canada Treaty Series, a common practice since 1928, has been on the decline.¹⁹⁰ For the last ten years, apparently for reasons of economy, neither individual treaties nor the annual volume of the Canada Treaty Series have been regularly issued. This matter was partially remedied in 2005, but only online.¹⁹¹ The printed volumes of the Canada Treaty Series are still not properly published nor made available in public libraries across Canada in both official languages.¹⁹² As with the Statutes of Canada and statute volumes of the legislation of several provinces and territories, one may quite reasonably believe that adequate publication of laws is one of the first rule-of-law duties of any democratic government, but apparently this has not been the view prevailing in successive governments with respect to treaties.

Equally disturbing has been the Department of External Affairs’ abandonment of the practice, first begun in 1909, of filing a statutory Annual Report that includes, *inter alia*, detailed information on all treaty actions taken by Canada during the year.¹⁹³ Since becoming the DFAIT in 1994, the department is no longer under a statutory obligation to publish the Annual Report.

Some statutes empower the House of Commons to intervene after the fact to challenge governmental decisions pursuant to a treaty. A long-standing example is the authority of the House to pass resolutions objecting to tariff reductions, previously required under the *Marrakesh Agreement Establishing the World Trade*

¹⁸⁸ Harrington, “(Re-)Establishing”, *supra* note 115 at 479. See also France Morrisette, “Les processus canadien et communautaire de négociation des traités, la société civile et le principe démocratique : leçons à tirer de la Communauté européenne” (2007) 45 Can. Y.B. Int’l Law 3.

¹⁸⁹ Harrington, “(Re-)Establishing”, *ibid.* at 481. Harrington notes that “[s]ection 7 of the *Extradition Act*, R.S.C. 1985, c. E-23, used to require all extradition arrangements to be laid as soon as possible before both Houses of Parliament” (*ibid.*).

¹⁹⁰ *Ibid.*

¹⁹¹ See “Treaty List”, online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/search-recherche.asp?type=&page=TLA>>.

¹⁹² Harrington, “(Re-)Establishing”, *supra* note 115 at 481.

¹⁹³ The last annual report appeared in 1992 (Canada, Department of External Affairs and International Trade, *Annual Report, 1991–92* (Ottawa: External Affairs and International Trade Canada, 1992)).

*Organization*¹⁹⁴ and taken under the *Customs Tariff* by the minister of finance.¹⁹⁵ The House can pass such resolutions on motion within thirty days of receiving notice of such reductions, which the minister is required to provide to the House.¹⁹⁶ These are interesting examples but, in the final analysis, they remain fairly marginal and are essentially negative powers, allowing the House of Commons to prevent the adoption of a proposed change. They do not represent a significant shift of authority over foreign affairs from the executive to the legislative branch.¹⁹⁷

When one takes stock of contemporary practice, it is clear that there is relatively little parliamentary oversight of the negotiation, adoption, and ratification of treaties. Parliament exercises little or no prior or *ex post facto* control over the negotiation or status of a treaty. Parliament virtually never provides guidance to negotiators, nor is such guidance sought. Regular parliamentarians are seldom included in international delegations or in the negotiation process. Perhaps the only major exception in recent times is the inclusion of parliamentarians in the Canadian delegation to the Third United Nations Conference on the Law of the Sea.¹⁹⁸ And, with the exception of recent committee proceedings, there are virtually no formal occasions where parliamentarians are given the opportunity to learn of developments in treaty negotiations.

3. Canada's New Policy

What will be the impact of the decision of 25 January 2008 to table treaties in the House of Commons? As noted, tabling will be subject to a twenty-one-day period during which the House can debate issues raised by the treaty. Debate on a particular treaty by the House may confer a new degree of legitimacy on these treaties, but it must be noted that under the *Treaty-Tabling Policy* there is no approval process. Provision has only been made for debate and comment,¹⁹⁹ so that it is difficult to expect this process to send a legally significant message to the courts. If the House were to approve a treaty (notwithstanding the lack of an envisioned approval process), such approval may well confer a degree of legitimacy on these treaties that they may not have had before. Possibly the courts will take this change as a sign of

¹⁹⁴ 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (entered into force 1 January 1995) [*Marrakesh Agreement*].

¹⁹⁵ *Supra* note 18, s. 14.

¹⁹⁶ *Ibid.*

¹⁹⁷ See e.g. *Old Age Security Act*, R.S.C. 1985, c. O-9, s. 42. The act deals with social-security treaties that are entered into force by regulations. It is stipulated that these regulations must be laid before Parliament, a requirement that confers on Parliament the power to use a negative resolution procedure to obstruct the treaty from coming into force (*ibid.*).

¹⁹⁸ See e.g. *Delegations to the Third United Nations Conference on the Law of the Sea*, UN CLOS III OR, 5th Sess., UN Doc. A/Conf.62/Inf.6 (1976).

¹⁹⁹ *Supra* note 91, s. 6.2.

the increased significance of treaties and accordingly allot them greater weight when called upon to interpret domestic legislation in conformity with them.

However, the legitimacy that might flow from the proposed tabling procedure is undermined by its own limitations. The procedure only sets out parameters that will supply an opportunity for debate. Such debate can only be carried out on opposition time and is not designed to lead to the adoption of a resolution of the House, let alone a legally binding decision. The procedure is essentially designed to allow parliamentary debate prior to the stage in the treaty-making process at which the responsible government departments seek authorization from cabinet to proceed with implementation and ratification.

Under the new initiative, the definition of a treaty is very wide. A treaty is defined as a written instrument governed by public international law.²⁰⁰ Certainly it will cover law-making multilateral treaties, trade treaties, and most exchanges of diplomatic notes, but will exclude “Memorand[a] of Understanding” and “arrangements” that are deemed to reflect non-binding “moral or political commitments” between governments.²⁰¹ Is a treaty in some sense “approved” if the House of Commons adopts a resolution to that effect, bearing in mind that resolutions of the House have no formal legal significance? There is no provision for a resolution in the policy. At best the House may pass a resolution, but there is no expectation or requirement that it do so. And there is no provision or expectation that the government will be bound by any resolution the House happens to pass. The most serious defect of the new policy is that the clerk of the House of Commons is under no obligation to publish the text of the treaty when it is tabled. Currently, the clerk merely sends a copy to the Library of Parliament.

The initiative raises but does not answer several major questions: Will the federal government consider itself bound to ratify a treaty that meets with House approval? What would be the legal or policy consequences of a negative vote, a real possibility in a minority-government situation? In such a case, must the government abstain from ratification when the policy itself provides only for a twenty-one-day waiting period? Must the government seek changes? The last avenue may be very difficult to pursue: treaties always involve other parties, and the initiative only proposes the tabling of finalized treaties before the House. But this possibility cannot be ruled out if the government senses great opposition to the treaty.

Furthermore, as ratification remains a prerogative decision not subject to parliamentary approval, the government will retain considerable discretion as to the timing of ratification and even as to whether it ratifies at all. The act of tabling is also a prerogative decision of a legislative nature, and thus is also unlikely to attract judicial review should the government decline to table a given treaty. Lastly, we

²⁰⁰ *Ibid.*, s. 5 (considering the definition of treaty provided in the *Vienna Convention*).

²⁰¹ *Ibid.*, s. 8.

might ask, will the Senate be consulted or is this simply a matter for the House of Commons? The policy makes no reference to the Senate.

In conclusion, the *Treaty-Tabling Policy*, while representing a valuable codification and clarification of procedure and policy designed to promote a degree of transparency, is a political gesture without much legal importance. Certainly it does not appear to be designed to change the legal significance of treaties in Canadian law. No change is intended with respect to the capacity of Parliament to influence treaty negotiations or to ratify treaties, and all the hard questions concerning the status of treaties in Canadian law and the legal significance of implementation remain unanswered. The initiative is a move in the right direction, but there is a long road ahead. The one very positive effect of this clarification is that it suggests that the *Baker* vision of the “unimplemented treaty” is mistaken. The policy clearly states that *ex post* legislation is only one of many approaches to implementation and that pre-existing legislation is fully capable of being relied on for the purposes of implementation.

4. On Democratic Legitimacy

Because treaties can and do give rise to such a wide range of domestic law, the democratic principle supports involving the people’s elected representatives in the treaty-making process. Concern has been voiced in Canada and in other democratic countries over the existence of a growing democratic deficit as between governments and the governed.²⁰² One dimension of this perception may be the growing sense of loss of control by citizens over an ever-expanding body of international treaty law that is made largely by governments rather than parliamentarians and with little public input. Leaving the treaty-making process mainly in the hands of the executive disregards the contribution civil society might make to the treaty-making process and raises suspicions that international law serves elites rather than the people. The result was seen, in an admittedly extreme form, in the streets of Seattle and Quebec City.²⁰³

One specific response to concerns over the democratic deficit that afflicts treaty making would be to open up to public scrutiny the negotiation and decision-making

²⁰² See e.g. Harrington, “(Re-)Establishing”, *supra* note 115.

²⁰³ The Third WTO Ministerial Conference took place in Seattle in December 1999 against the backdrop of street demonstrations against the WTO. These demonstrations were carried out by NGOs and various groups representing civil society in general. See Sam Howe Verhovek & Steven Greenhouse, “Seattle is under a Curfew after Disruptions” *The New York Times* (1 December 1999) 1. Similarly, the Summit of the Americas that took place in Quebec City in April 2001, and which focused on discussion of a Free Trade Area of the Americas, drew significant protests from civil society. See David Schepp, “The Americas Summit’s Legacy” *BBC News* (23 April 2001), online: BBC News <<http://news.bbc.co.uk/2/hi/business/1293093.stm>>.

process within international organizations charged with treaty making.²⁰⁴ An equally important response, we suggest, would involve taking steps to ensure a much closer alignment of domestic and international law-making processes within the law-making structures of states such as Canada. While draft policies at the international level, like draft legislation in Canada, would be worked out in confidence by the relevant state actors, there is no reason to think that such policies could not be subject to far wider public consultation than they are today. In sum, were the public more informed, were interest groups more closely involved, and were elected representatives in Parliament more involved in the treaty-making process, there would be greater public confidence in the treaties that emerge from international negotiations.

Is there a reason in principle to resist the idea that Parliament should take on the task of actually approving treaties by authorizing (or refusing to authorize) their ratification? Some may suggest that treaty making is inherently an executive act. But the treaty-making procedures in countries such as the United States, Mexico, and France suggest that greater involvement of the legislative branch is possible. Such involvement is also desirable for the democracy-strengthening reasons given above. Moreover, were Parliament to be responsible for the decision to ratify treaties, this would send a powerful message to judges and administrative decision makers that treaties constitute an integral and important part of the Canadian legal system.

To have elected representatives indicate their approval or rejection of treaties in the House of Commons would go some way toward meeting the concern that treaty making is too much in the hands of the executive, but it may not be enough. Ideally, the people's representatives should have a say in shaping treaty law as well as in approving or rejecting the final product. To wait until the treaty has been finalized, sometimes in negotiation with over 150 states, is to wait too long to influence the content of the treaty.

For parliamentarians to influence treaty negotiations their views must be sought at the early stages of negotiation. Some parliamentary committees already follow certain treaty negotiations. These practices could be formalized and generalized so that elected representatives play a role in the determination of the mandate given to negotiators. Wherever possible, some members of Parliament should follow the negotiations so that they will be well informed of the issues under negotiation and of the constraints that inevitably exist in any negotiation. Associating legislators with the treaty-making process could transform treaty making into a collaborative endeavour in which the people's representatives play an important role.

²⁰⁴ Quite plausibly the government of Canada should be doing more to make international organizations more transparent in their work. The decision-making processes of these organizations should also be further democratized to allow for a greater participation of civil society. See e.g. Alvarez, *supra* note 3; D.W. Bowett, *The Law of International Institutions*, 4th ed. (Agincourt, Ont.: Carswell, 1982) at 306.

5. On a *Canada Treaties Act*

While treaty making and the legal effect of treaties may be matters worthy of inclusion in the constitution of Canada, the many difficulties that stand in the way of such a solution suggest that federal and provincial legislation is a good place to start. An important first step would be the enactment of a *Canada Treaties Act* that regulates the process of treaty making, implementation, and ratification at the federal level. Such an act could set out a much greater role for Parliament and its members. For example, the act could:

- require Parliament to pass motions outlining the general terms to be sought during negotiation,
- require the executive to report to Parliament on the current state of treaty negotiations,
- provide for parliamentary approval of the treaty before ratification,
- provide for public consultations with civil society,
- provide guidance about the mode of implementation to be used, including an official record of the mode chosen,
- implement Canada's obligations under the *Vienna Convention*, and
- clarify the effect of treaties in the Canadian legal order.

At the limit, the act could be to Canada what the *ECA 1972* is to the United Kingdom: omnibus legislation that declares the supremacy of some international treaty obligations in the absence of express statutory reservations to the contrary.²⁰⁵

The courts will always have an important role to play in determining the legal significance of treaties in the Canadian domestic legal order. Even with the passage of a *Canada Treaties Act*, it would still be necessary for the courts to determine, for example, how the terms of a treaty and the terms of an implementing statute are to be read in light of one another. Nonetheless, statutory guidance on these matters would play a constructive role in dissipating the uncertainty that surrounds the force of treaty law today.

Should this approach be adopted, comparable legislation could be enacted by provincial legislatures, enabling provincial participation in treaty making and subsequent implementation of treaty commitments.²⁰⁶

²⁰⁵ *Supra* note 153.

²⁰⁶ Ideally, such legislation should be prepared by the Uniform Law Conference of Canada, a body made up of delegates from the federal, provincial, and territorial governments, and which considers areas where law would benefit from harmonization. See Uniform Law Conference of Canada, "About", online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/about>>. For a discussion of provincial participation in treaty making, see Part III.E, below.

C. Rethinking Implementation

Canada currently uses a variety of means to implement treaties.²⁰⁷ Different treaties may require different modes of implementation. The very existence of different modes of implementation, however, appears to have left judges uncertain about the legal significance of treaties. More serious still, some judges believe that many, perhaps most, modes of implementation in use today, and set out below, are not complete acts of implementation.²⁰⁸ The result is a large category of so-called “unimplemented” treaties. The existence of such a category further increases uncertainty as to the precise legal effect of treaties in Canadian law.

1. Canadian Implementation Practice

A number of modes of implementation are identifiable in Canadian practice. Thirteen such modes are profiled below:

1. *Incorporation textually of the whole or part of a treaty, giving the text of the treaty the force of law.* This method has been adopted for a succession of treaties whose purpose is the avoidance of double taxation. The actual texts of the treaties are given the force of law and are applied and interpreted directly by Canadian courts.²⁰⁹
2. *Scheduling the text and referring to all or part of the text.* This method is used with respect to legislation governing diplomatic and consular privileges and immunities.²¹⁰ It makes designated sections, but not entire treaties, part of Canadian law and hence applicable to all persons. In particular, these sections serve as a defence to claims of jurisdiction in civil and penal matters over foreign diplomatic and consular personnel in Canada.²¹¹

²⁰⁷ For a more detailed discussion on the different possible modes of implementation, see De Mestral & Fox-Decent, *supra* note 44 at 42-56.

²⁰⁸ See e.g. *Baker*, *supra* note 116; *Ahani*, *supra* note 116.

²⁰⁹ For example, double-taxation treaties eliminate duplicate taxation of individuals and companies from one country doing business or earning income in the other. Canada has double-taxation agreements with more than 60 countries. See e.g. *ITCIA 1999*, *supra* note 24; *ITCIA 1997*, *supra* note 24.

²¹⁰ *FMIOA*, *supra* note 25, s. 3(1). The act states:

Articles 1, 22 to 24 and 27 to 40 of the Vienna Convention on Diplomatic Relations, and Articles 1, 5, 15, 17, 31 to 33, 35, 39 and 40, paragraphs 1 and 2 of Article 41, Articles 43 to 45 and 48 to 54, paragraphs 2 and 3 of Article 55, paragraph 2 of Article 57, paragraphs 1 to 3 of Article 58, Articles 59 to 62, 64, 66 and 67, paragraphs 1, 2 and 4 of Article 70 and Article 71 of the Vienna Convention on Consular Relations, have the force of law in Canada in respect of all foreign states, regardless of whether those states are parties to those Conventions (*ibid.*).

²¹¹ See e.g. *Miller v. Canada*, 2001 SCC 12, [2001] 1 S.C.R. 407, 196 D.L.R. (4th) 385.

3. *Specific incorporation by reference of particular treaty provisions.* This method has been used with respect to various treaty provisions granting jurisdiction to Canada over offshore territory. The legislation incorporates definitions of the nature and extent of Canadian jurisdiction over territorial waters, the exclusive economic zone, and the continental shelf.²¹² This method gives force and effect to the actual language of the treaty. What is less clear is whether the courts see this method as validating the legal status of the treaty or simply as one more technique of legislative drafting that still places all legal effect in the statute.²¹³
4. *Translating the treaty into Canadian statutory language.* This method is one of the most commonly adopted techniques, particularly in the area of trade legislation.²¹⁴ Rather than formally incorporating all or parts of trade agreements as law, legislation is adopted amending various federal statutes to ensure that officials and quasi-judicial tribunals charged with the administration of trade remedies are empowered to give effect to Canada's rights and duties under the agreements.²¹⁵ In doing this, it can be argued that Canada is going the extra mile to ensure the fullest incorporation of the treaty into domestic law. Yet the courts have traditionally seen this technique as an indication that the statute prevails over the treaty in case of divergence.²¹⁶
5. *Adding a statement in the text of intention to implement.* In a number of statutes, one finds a statement to the effect that an act is adopted in order to implement an international agreement.²¹⁷ Such a statement should be a clear signal to the courts that, at the very least, the treaty is highly relevant to the meaning of the statute and that it should play a part in its interpretation. Unfortunately most courts prefer to rely simply on the wording of the

²¹² *Oceans Act*, *supra* note 22. See also *Interpretation Act (Federal)*, *supra* note 114, s. 8. Another notable example is the definition of a refugee under the *IRPA*, which incorporates the language of the treaty into the statute (*supra* note 118, ss. 95-96). See also *Pushpanathan*, *supra* note 47.

²¹³ This viewpoint was revealed in *Suresh* (*supra* note 70). See also *CHWCA*, *supra* note 31; *Elements of Crime*, Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., Annex, ICC-ASP/1/3, U.N. Doc. PCNICC/2000/1/Add.2 (2002) [mimeo.]. The *Elements of Crimes* document was developed pursuant to the *Rome Statute* (*supra* note 89, art. 9).

²¹⁴ See e.g. *SIMA*, *supra* note 15, s. 1; *NAFTA Act*, *supra* note 20; *WTO Act*, *supra* note 21; *ODCA*, *supra* note 26; *State Immunity Act*, R.S.C. 1985, c. S-18; *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52; *Commercial Arbitration Act*, *supra* note 33.

²¹⁵ Other examples include the extensive amendments and additions to the *Criminal Code*. See e.g. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 7(3), 76 (offences against internationally protected persons and hijacking, respectively). Other examples include giving effect to the substantive and procedural aspects of the *Rome Statute*. See *CHWCA*, *supra* note 31.

²¹⁶ *National Corn Growers*, *supra* note 116.

²¹⁷ See *WTO Act*, *supra* note 21, s. 3; *NAFTA Act*, *supra* note 20, s. 4.

statute.²¹⁸ Courts continue to place the text of the statute on a much higher plane than the text of the underlying treaty.

6. *Adding a statement in the statute of the intention to approve a treaty.* Such a statement has occasionally been made in Canadian statutes.²¹⁹ It is not clear that these statements have any significant consequence for the status of the treaty before the courts, for the reasons set out above. One interpretation is that it expresses the intention of Parliament to incorporate by reference. Nonetheless, this method may at least serve as evidence that Parliament can take notice of treaties and approve them as part of the process of their implementation and ratification.
7. *Adding instructions for interpretation of a treaty.* The legislation incorporating double-taxation treaties into Canadian law contains instructions on treaty interpretation of a positive nature, as does the *Immigration and Refugee Protection Act*.²²⁰ However, most examples of this type of legislative disposition are of a negative character, such as those statements in the *FTA*, the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*,²²¹ and World Trade Organization (WTO) implementation legislation precluding the granting of direct effect to any of these treaties.²²² For example, the *Canada–United States Free Trade Agreement Implementation Act* states that “[f]or greater certainty, nothing in this Act or the Agreement, except Article 401 of the Agreement, applies to water.”²²³ The act links the nonapplication language with a more specific statutory definition of Canadian waters for the purposes of customs

²¹⁸ See *Suresh*, *supra* note 70; *Capital Cities Communications v. Canadian Radio-Television Commission* (1977), [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609 [*Capital Cities*]; *National Corn Growers*, *supra* note 116.

²¹⁹ *FTA Act*, *supra* note 95, s. 8; *Geneva Conventions Act*, R.S.C. 1985, c. G-3, s. 2.

²²⁰ *Supra* note 118, s. 3(3)(f). For a discussion of the provision, see text accompanying notes 270-72. For a sample of the double-taxation acts, see e.g. *ITCIA 1999*, *supra* note 24; *ITCIA 1997*, *supra* note 24.

²²¹ 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

²²² Art. 5 of the *FTA Act* provides that “[n]o person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of Part I, or any regulation made under Part I” (*supra* note 95, art. 5). See also *WTO Act*, *supra* note 21. Art. 5 of this act states:

No person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of Part I or any order made under Part I, or the Agreement (*ibid.*, art. 5).

²²³ *Ibid.*, s. 7(1).

legislation, thus leaving some doubt as to the legal significance of the interpretation.

8. *Including provisions that provide for the adoption of implementing regulations or decisions by cabinet, a minister or an independent tribunal.* Many statutes, including those concerning trade, customs, maritime law, and air law provide for the making of regulations whose purpose is to give effect to a treaty or a category of treaties.²²⁴ This method allows the government to take the steps necessary to implement a treaty and also to give effect to developing treaty regimes such as those existing in respect of air or maritime law. It also allows the executive to make changes needed to uphold Canada's obligations in respect of an ongoing treaty regime without the necessity of formal legislative intervention.

In all probability, this form of implementation, although not open to the general public, constitutes the most active form of implementation followed by the federal government.²²⁵ Statutes can also contain instructions governing the implementation of treaties by quasi-judicial tribunals, ministers, and other public officials.²²⁶ What remains unclear is the degree to which these provisions are interpreted by the courts as involving an obligation to act according to the treaty or whether the statute is deemed to be merely a source of authority that permits (but does not obligate) compliance with the treaty.

9. *Adopting regulations for the purpose of implementation.* Regulatory power can be used to implement a treaty even if there is no express intention in the statute designating this goal as the objective of the regulation in question. Similarly, at the level of administration rather than legislation, reductions in customs duties, for example, may result from a unilateral decision of the

²²⁴ *Customs Act*, *supra* note 19, s. 43(2). The *Customs Act* states:

The Governor in Council may make regulations respecting advance rulings, including regulations respecting (a) the application of an advance ruling; (b) the modification or revocation of an advance ruling, including whether the modification or revocation applies retroactively; (c) the authority to request supplementary information in respect of an application for an advance ruling; and (d) the circumstances in which the issuance of advance rulings may be declined or postponed (*ibid.*).

See also *Oceans Act*, *supra* note 22 (providing for the making of regulations in relation to maritime law treaties); Bill C-32, *The Canadian Environmental Protection Act, 1999*, 1st Sess., 36th Parl., 1998, s. 115(1) (establishing that subject to s. 115(2), the Governor in Council may, on the recommendation of the ministers, make regulations for the purposes of implementing an international agreement). See also *Aeronautics Act*, *supra* note 13; *Shipping Act*, *supra* note 12.

²²⁵ An index of the Consolidated Regulations of Canada is available in alphabetical order on CanLII (online: CanLII <<http://www.canlii.org/ca/regu/toca.html>>).

²²⁶ *CITTA*, *supra* note 25; *SIMA*, *supra* note 15.

minister of finance taken for local reasons, but the decision may also satisfy an obligation under an international agreement.²²⁷

10. *Reliance upon a rule or provision of the constitution.* In so far as the Canadian constitution entails a range of duties upon the federal and provincial legislative and executive branches, enforceable before the courts at the behest of a person, the constitution acts, particularly the *Charter* can be relied upon to assist in ensuring the implementation of a treaty dealing with the rights and freedoms set out in the *Charter*. A case in point would be the prohibition against torture. The Supreme Court of Canada in *Suresh* held that “[w]hen Canada adopted the *Charter* in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12 ... As such, torture is seen in Canada as fundamentally unjust.”²²⁸
11. *Reliance upon pre-existing federal and provincial legislation.* Existing law often provides a sufficient basis to allow the legal advisers of the federal government to proceed with ratification of a treaty without the necessity of any new enactment. Examples of this method can be found in the provisions of the *Radiocommunications Act*,²²⁹ the *Department of Industry Act*,²³⁰ or the *Aeronautics Act*.²³¹ In these cases, frequent treaty changes, or the negotiation of new specialized treaties, give rise to ongoing treaty implementation.

Reliance upon pre-existing domestic legislation can lead however to conflicts between a domestic law and an international agreement. For example, in *Capital Cities Communications v. Canada (Radio-Television Commission)* the Supreme Court of Canada had to decide between upholding a decision of the Canadian Radio-Television and Telecommunications Commission (CRTC) allowing a licensee to replace U.S. advertisements in accordance with section 3 of the *Broadcasting Act*, or enforcing a contrary obligation enshrined in article 11 of the *Inter-American Radiocommunications Convention*.²³² The majority upheld the CRTC’s decision.²³³

12. *Reliance on the common law, including the Royal Prerogative.* The Royal Prerogative includes the power to make war or peace. A peace treaty may be concluded pursuant to the prerogative power. Action validly taken pursuant

²²⁷ *Customs Act*, *supra* note 19.

²²⁸ *Suresh*, *supra* note 70 at para. 51.

²²⁹ R.S.C. 1985, c. R-2, s. 5(k).

²³⁰ S.C. 1995, c. 1, s. 6(e).

²³¹ *Supra* note 13, s. 4.2(h).

²³² *Capital Cities*, *supra* note 218; *Inter-American Radiocommunications Convention*, 3 December 1937, Can. T.S. 1938 No. 18, art. 11, 53 U.S. Stat. 1576 (entered into force 1 July 1938) (providing guarantees against acts that may alter or disrupt services provided from another country).

²³³ *Capital Cities*, *ibid.*

to the Royal Prerogative can thus be a sufficient legal basis for the implementation of Canada's obligations under a treaty.²³⁴

13. *Reliance on the intention of the treaty to determine the effect of the treaty in the legal system.* Frequently, the language of the treaty will indicate whether some form of legislative or regulatory amendment is required. A treaty addressed to the government and explicitly requiring action by agencies of governments, such as the armed forces, will normally not require any form of legislative action. Rather, in such circumstances, the executive power has full authority to execute the obligations assumed under the treaty.

This list of thirteen forms of implementation is not exhaustive. Others exist. For example, agreements relating to old age security have become law through a process of negative resolution under the *Old Age Security Act*.²³⁵ Simply put, the government is permitted to enter into an agreement and ratify it. The Order in Council authorizing ratification is then placed before Parliament, which has sixty days to vote the agreement down. Where it fails to do so, the agreement becomes the law of the land.²³⁶ It should also be noted that some acts of implementation display several of the features outlined above. Of special interest is the *Geneva Conventions Act*, which not only schedules the four *Geneva Conventions for the Protection of War Victims*²³⁷ and the three protocols,²³⁸ but also contains a specific statement that the conventions are "approved".²³⁹ The Act contains language making it a criminal offence to violate the conventions, grants Canadian courts jurisdiction to try offences under the conventions, and creates a regulatory power to give them further effect.

²³⁴ This power was at the heart of the legal issues discussed in *Operation Dismantle v. Canada* ([1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481).

²³⁵ *Supra* note 197, ss. 40-43.

²³⁶ *Ibid.*

²³⁷ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 (entered into force 21 October 1950).

²³⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, Can. T.S. 1991 No. 2 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 U.N.T.S. 609, Can. T.S. 1991 No. 2 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem*, 8 December 2005, 2404 U.N.T.S. [forthcoming] (entered into force 14 January 2007).

²³⁹ *Supra* note 219, s. 2.

There is little uniformity in the use of these different approaches in Canada. Doubtless, arguments can be made that some forms of implementation are more appropriate in certain cases than in others. A situation requiring legislation cannot be dealt with under the Royal Prerogative; a commitment to include the very words of the treaty in domestic legislation can only be met by doing exactly that. But specific requirements aside, the judiciary has shown considerable reluctance to rely on the words of the treaty when a mode of implementation is used that falls short of *ex post* implementation with direct incorporation of the very words of the treaty into a statute.²⁴⁰

One concern is the uncertainty that may arise about the extent to which a treaty has been implemented, or even about whether it has been implemented at all. In light of *Baker*, it would seem that for some courts a treaty may count as “implemented” only if legislation enacted after ratification expressly states that its purpose is to implement the ratified treaty and if it incorporates the exact words of the treaty. In our view, the Court in *Baker* mischaracterized the *Convention on the Rights of the Child* as “unimplemented”. Prior to ratification, federal and provincial legal advisers had determined that no specific implementing statute was necessary because Canadian law provided ample authority—such as discretionary and rule-making authority—to allow public officials to comply with the obligations arising from the Convention.

A similar mischaracterization of a human rights treaty infects Justice Laskin’s majority judgment for the Court of Appeal for Ontario in *Ahani v. Canada (A.G.)*.²⁴¹

²⁴⁰ See e.g. *Reference Re Exemption of United States Forces from Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483 at 517, 4 D.L.R. 11. Taschereau J. states that “[i]f not accepted in this country, international law would not be binding, but would merely be a code of unenforceable abstract rules of international morals” (*ibid.*). See also *Baker*, *supra* note 116 at para. 80. Iacobucci J., dissenting in part, states:

I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court’s jurisprudence concerning the status of international law within the domestic legal system (*ibid.*).

²⁴¹ *Supra* note 116 at paras. 31-33. In *Ahani*, the Court of Appeal for Ontario denied Mr. Ahani’s request to remain in Canada, primarily on the basis that neither the *International Covenant on Civil and Political Rights* (19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976) [*ICCPR*]) nor its Optional Protocol (a side agreement specifically providing for the right of individual petition) was incorporated into Canadian law. As stated by Laskin J.A., “Canada has never incorporated either the Covenant or the Protocol into Canadian law by implementing legislation. Absent implementing legislation, neither has any legal effect in Canada” (*ibid.* at para. 31). Laskin J.A. also noted that “neither the [Human Rights] Committee’s views nor its interim measures requests are binding on Canada as a matter of international law, much less as a matter of domestic law” (*ibid.* at para. 32) He came to the conclusion that it would be an untenable result to “convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a

Justice Laskin found that the *International Covenant on Civil and Political Rights*,²⁴² signed in 1966 and ratified by Canada in 1976, was unimplemented.²⁴³ As with the *Convention on the Rights of the Child*, the *ICCPR* was ratified after many years of federal-provincial consultation and negotiation, a process geared toward ensuring that Canadian law supplied adequate public power to Canadian officials on whom the burden of compliance would ultimately fall. This process took almost a decade and included extensive review of existing federal and provincial legislation.²⁴⁴ Moreover, the subsequent *Canadian Human Rights Act*²⁴⁵ and the *Charter* draw some of their language directly from the *ICCPR*. For example, in the *Charter* the limitation clause in section 1, the legal rights in sections 7-14, and the right to equality in section 15 were all derived from similar provisions in the *ICCPR*.²⁴⁶ Yet in *Ahani*, none of this informed the majority's analysis of whether the *ICCPR* should count as "implemented".

It would appear either that federal and provincial legal advisers have systematically given bad advice on the capacity of existing legislation to serve as a basis for Canada's compliance with international law, or that the judiciary has adopted an overly restrictive view of implementation. As we have seen, in practice Canadian legislatures and executives use a wide range of methods to ensure that they have legal authority to comply with Canada's international obligations. Generally, the federal government will not ratify a treaty until it is confident that Canada's domestic law is consistent with the treaty and that there are sufficient legal powers in place to comply with its obligations. If legislation is necessary, it is usually passed before the treaty is ratified. The same considerations apply when a treaty relates to matters falling within both federal and provincial jurisdiction, and a fortiori when the treaty relates to matters exclusively within provincial jurisdiction.

Our suggestion is that the various modes of implementation, all of which have at their root a concern in grounding the domestic action of the Crown in domestic law, should be put on an equal footing. Perhaps few will dispute that there is much in principle to distinguish complex legislation that includes original provisions and a statement that the law's purpose is to give effect to a treaty, and a statute that incorporates textually or by reference the very words of a treaty. In *MacDonald v.*

Canadian court, and more, into a constitutional principle of fundamental justice" (*ibid.* at para. 33).

²⁴² *Ibid.*

²⁴³ *Supra* note 116 at paras. 31-33.

²⁴⁴ Fleming & McEvoy, *supra* note 67 at 527. See generally Hugo Fischer, "The Human Rights Covenants and Canadian Law" (1977) 15 Can. Y.B. Int'l Law 42; Daniel Turp, "La préparation et la présentation des rapports périodiques du Canada en application des traités relatifs aux droits et libertés" (1986) 24 Can. Y.B. Int'l Law 161.

²⁴⁵ *Supra* note 32.

²⁴⁶ Anne Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 49.

Vapor Canada Ltd.,²⁴⁷ Chief Justice Laskin suggested in *obiter dictum* that if Parliament passed a law explicitly stating that its purpose was to implement a treaty, then that law would count as a valid form of implementation under the “peace, order and good government” clause of the *Constitution Act, 1867*.²⁴⁸ While he also affirmed elsewhere the dualist thesis that for a treaty to have domestic effect there must be an implementing act,²⁴⁹ Chief Justice Laskin’s *obiter dictum* remarks would have had profound repercussions upon Canadian federalism had they actually been followed by the Supreme Court of Canada in subsequent cases. Instead, Canadian judges have opted for the path of caution. However, while subsequent cases have focused on Justice Laskin’s affirmation of dualism, the point we wish to underscore is that he was clearly open to implementation through means other than direct incorporation of a treaty’s text in the implementing statute.

The main legal controversy over implementation is driven by two considerations. Underlying both is the worry that a democratic deficit attends international law-making. The first is the timing of implementation. If implementation is alleged to have occurred prior to ratification it may appear that Parliament could not have considered and approved the treaty. It may seem, in other words, that the treaty sets out “international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.”²⁵⁰ Secondly, even if the Crown’s advisers were right to insist that pre-existing legislation supplies sufficient legal power to *allow* officials to fulfill Canada’s international obligations, the defender of strong dualism might contend that it is still an open question as to whether those officials are legally obligated by Canadian domestic law to fulfill them.

As indicated above, a *Canada Treaties Act*, governing all aspects of treaty adoption and implementation, could do much to relieve the uncertainty in Canada surrounding the meaning of treaty implementation and its legal consequences. Below we argue that the concern over the timing of implementation is overstated. We also argue that if pre-existing Canadian domestic law allows for compliance with international law, then Canadian officials and judges are legally obligated to exercise their administrative and interpretive authority to ensure respect for Canada’s international obligations.

2. Implementation Options and Canadian Constitutional Principles

We have reviewed above the different approaches to treaty implementation and the legal status of international law in the United Kingdom, Australia, South Africa, the United States, France, Mexico, and Germany. After setting out some of the salient

²⁴⁷ *Vapor Canada Ltd. v. MacDonald* (1976), [1977] 2 S.C.R. 134 at 168-72, 66 D.L.R. (3d) 1. See also *Schneider v. R.*, [1982] 2 S.C.R. 112, 139 D.L.R. (3d) 417, Dickson C.J.

²⁴⁸ *Supra* note 109, s. 91.

²⁴⁹ See e.g. *Capital Cities*, *supra* note 218 at 173.

²⁵⁰ *Baker*, *supra* note 116 at para. 80, Iacobucci J.

and often common elements from these alternative approaches, we test them against the unwritten constitutional principles from the *Secession Reference*. While the written constitution of Canada is virtually silent on the issue of the domestic effect of treaties, unwritten principles present a set of robust norms against which the legality and desirability of different approaches to treaty implementation may be assessed. The salient elements of the approaches to international law found in the jurisdictions surveyed above are the following:

1. Customary law is automatically adopted into the domestic legal order and can be invoked by litigants before the courts. This element appears to be virtually universal.
2. Treaties in almost all jurisdictions reviewed are subordinate to the constitution and cannot be adopted in violation of the constitution.
3. In some but not all jurisdictions, properly ratified treaties have a status equivalent to a domestic statute. They can be amended or overridden by law but, unless this happens, they can be invoked before the courts and applied by them.
4. Treaties are normally approved by the legislature, a fact that contributes to their normative status in the domestic legal order. The more formally the legislature approves a treaty the greater its normative weight.
5. In many but not all jurisdictions and for some but not all categories of treaties, ratification and implementation are part of the same process of legislative approval, and the role of the executive is simply to forward the act of ratification to the appropriate international authority.
6. In some but not all jurisdictions, the legislature plays a role in respect of foreign affairs beyond treaty approval.
7. Some but not all jurisdictions have constitutional provisions on the status of international law in general, as well as provisions on the status of treaties.

With the exception of the first two points regarding customary law and constitutional supremacy, Canada's treatment of international law is largely out of synch with the practices of the liberal democracies reviewed above. We argue now that if Canada were to adopt some or all of the approaches to international law listed above, these changes would be fully compatible with the unwritten constitutional principles discussed in the *Secession Reference*: the federal principle, the democratic principle, constitutionalism and the rule of law, and the protection of minorities.²⁵¹

Canadian federalism grants the provinces wide legislative powers over the implementation of treaties whose subject matter falls within their jurisdiction. Provincial governments are jealous of their authority in this area and suspicious that

²⁵¹ *Supra* note 41 at para. 49.

federal initiatives might be designed to curtail their authority. So, proposals to alter the status of treaties in the Canadian legal order must accommodate the legitimate concerns of provincial governments under the federal principle. But there is no reason to suppose that such accommodation is not possible since it has long been a central part of the practice of federal–provincial relations.

The Canadian constitutional principle that requires protection of minorities resonates with a host of international treaties that Canada has ratified, including the *ICCPR*, the *International Convention on the Elimination of All Forms of Racial Discrimination*,²⁵² and the *Convention on the Elimination of All Forms of Discrimination Against Women*.²⁵³ There would not appear to be any requirements of international law that would force Canada to lower its standards. On the contrary, international law encourages Canada to maintain its existing high standards. Moreover, non-binding declarations and open-textured treaty principles can signal aspirational goals relevant to future policies intended to protect minorities.²⁵⁴ Of immediate advantage to minorities in Canada would be the right to invoke ratified conventions protective of their interests more freely before the courts, a right squarely supported by the constitutional principle at issue. It would also be to minorities' advantage to dispel the suggestion that conventions such as the *ICCPR* are unimplemented.²⁵⁵

Constitutionalism and the rule of law are implicit in and presupposed by the institutions and practices of international law-making. The most successful efforts at international law-making—from the foundation of the United Nations²⁵⁶ to the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*²⁵⁷ and the *Rome Statute of the*

²⁵² 7 March 1966, 660 U.N.T.S. 195, Can. T.S. 1970 No. 28 (entered into force 12 March 1969).

²⁵³ 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force 3 September 1981).

²⁵⁴ Canadian proponents of the *Declaration on the Rights of Indigenous Peoples* might well worry that Canada is not meeting international standards (GA Res. 61/295, UN GAOR, 61st Sess., UN Doc. A/RES/61/295 (2007) [mimeo.] [*Indigenous Rights Declaration*]). Of course, until the prescriptions contained within the declaration are found to be declaratory of customary international law, which they may well be, this text remains a Resolution of the UN General Assembly and is not formally binding on Canada. The Canadian government refused to support the resolution in 2007, despite the support of previous Canadian governments for earlier drafts. In our view, the constitutional principle weighs in favour of Canada signing the *Indigenous Rights Declaration*, and so the failure of the government to do so thus far places the government's inaction, not international law, in tension with the principle.

²⁵⁵ *ICCPR*, *supra* note 241.

²⁵⁶ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, 59 U.S. Stat. 1031 (entered into force 24 October 1945).

²⁵⁷ *Supra* note 87. See also *Anti-Personnel Mines Convention Implementation Act*, S.C. 1997, c. 33.

*International Criminal Court*²⁵⁸—have relied on fundamental principles of law, both substantive and procedural. The most successful effort of economic integration, the European Union, has always been a construction of the law based on fundamental principles including the law of human rights.

The rule of law is a hotly contested concept that has spawned an enormous literature.²⁵⁹ Many writers take the rule of law to impose formal constraints on legislation (e.g., laws must be clear, public, possible to follow, etc.),²⁶⁰ while others suggest that it may impose substantive limits on administrative action and even legislation.²⁶¹ The basic idea is that governance through law shields individuals from arbitrary exercises of power. The presence of legal institutions through which law must flow, such as the legislature and the judiciary, protects individuals against abuses of public power. And law itself, in the form of general rules and principles, creates space in which persons can live their lives with a measure of independence from others. Law thus provides a bulwark against some abuses of private power.²⁶²

International law establishes a wide range of legal regimes, several of which we noted above in relation to their implementing legislation in Canada. These regimes provide important public goods that benefit Canadians, such as regulatory frameworks for commerce and human rights protection. More important still from the point of view of the rule of law, international legal regimes establish transnational legal standards to which public and private actors may be held accountable through democratic processes. Thus, those standards establish an international rule of law and enrich the democratic legal order. Because the rule of law and democracy are unwritten and intertwined constitutional principles, it is not a stretch to suggest that

²⁵⁸ *Supra* note 89.

²⁵⁹ For an excellent review of both the rule of law and the Supreme Court of Canada's understanding of it, see Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in C. Flood & L. Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 77. See also David Dyzenhaus, "The Rule of (Administrative) Law in International Law" (2005) 86 *Law & Contemp. Probs.* 127; Dyzenhaus, *Unity*, *supra* note 1; Warren J. Newman, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005) 16 *N.J.C.L.* 175; Michael Taggart, Murray Hunt & David Dyzenhaus, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 *O.U.C.L.J.* 5.

²⁶⁰ See e.g. Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1969); Joseph Raz, "The Rule of Law and Its Virtue" in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 210; Paul Craig, "Formal and Substantive Conceptions of the Rule of Law" (1997) *P.L.* 467; Andrei Marmor, "The Rule of Law and its Limits" (2004) 23 *Law & Phil.* 1.

²⁶¹ See e.g. T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2003); David Dyzenhaus, "Hobbes and the Legitimacy of Law" (2001) 20 *Law & Phil.* 461; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); Jennifer Nadler, "Hart, Fuller and the Connection Between Law and Justice" (2007) 27 *Law & Phil.* 1; Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

²⁶² Simmonds, *ibid.* at 141-43, 182-89.

Canadian legislators, judges, and officials are duty-bound to respect and promote the international legal order.

At the present time, however, it does not appear that most Canadian judges believe that they have a duty to the international legal order. Yet, if the rule of law is present in international as well as domestic law, and if the international rule of law has positive consequences for Canada's democratic legal order, arguably judicial responsibility extends to safeguarding the international incidents of the rule of law. In an increasingly globalized world, the rule of law does not stop at the border.

The contribution of the (international) rule of law to democracy brings us to the democratic principle and the issue of how international law-making can best be squared with it. We have suggested already that a much more expansive role should be given to federal and provincial legislators in the treaty-making process in order to enhance the legitimacy of the process and its final product. Similarly we have argued that public officials and judges should acknowledge that the various modes of implementation are sufficient to give treaties domestic effect. Nonetheless, we have suggested that a *Canada Treaties Act* would make Canada's approach to implementation more uniform and transparent and thereby bolster the democratic credentials of treaties.

We next explain and defend the provisions of a *Canada Treaties Act* that could bring greater unity to the relationship of international and domestic law in Canada. We look at the broader separation-of-powers concerns frequently associated with the democratic principle, arguing that they do not supply a reason to deny that treaties can produce domestic legal effects once they are ratified and implemented through any of the modes discussed above. In the absence of a *Canada Treaties Act*, ratified treaties (the overwhelming majority of which will be implemented through one or more of the modes set out above) give rise to common law obligations that bind officials and judges. This argument shows that the role of the *Canada Treaties Act* is just to make explicit and clear, and raise to the level of statutory law, the underlying relationship between domestic and international law that already exists within Canada's legal order as a matter of common law.

3. Enhanced Legal Status for Treaties under a *Canada Treaties Act*

If Parliament (and eventually, *mutatis mutandis*, the provinces) were to adopt a *Canada Treaties Act* along the lines we have suggested, what might be included within the act with respect to the legal status of ratified treaties? One option would be to proclaim that if pre-existing law gives officials sufficient power to comply with Canada's international obligations, then officials must so exercise their power. More generally, the idea is that duly ratified and implemented treaties would be treated on a par with domestic statutes, even if the method of implementation does not involve an explicit *ex post* implementing statute that incorporates text from the treaty into its provisions.

The democratic credentials of the treaty would be supported by the *ex ante* participation of legislators in the treaty-making and approval process. The legislature

could of course also recant and disavow a treaty or some of its provisions. France and Mexico have long used roughly this approach to treaty making.

One may object, on the grounds mentioned above, that, notwithstanding greater participation by legislators in the treaty-making process, as a matter of law and policy it remains important to distinguish domestic law that requires compliance with a treaty from domestic law that simply empowers the government to comply. Discretionary powers were intended by the legislature to be just that—discretionary—and therefore were intended to be available for the administration to exercise as it sees fit. Thus, one may argue that relying on discretionary powers as the basis for domestic legal obligations does too much violence to legislative intent and the discretionary aspect of the conferred powers. We have six replies.

First, from the international law perspective, whether the law relied on to implement the treaty is power-conferring or imperative makes no difference: Canada's international legal obligations remain the same. As indicated above, the *Vienna Convention* requires state parties to comply with their treaty obligations in good faith, and it prohibits states from pleading inconsistent domestic law as an excuse for noncompliance.²⁶³

Second, as a matter of public law, not even broad grants of discretion supply truly unfettered power. In *Baker*, Justice L'Heureux-Dubé established that discretionary grants of power “must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.”²⁶⁴ There is much to commend this view of discretion, despite apparent backsliding away from it in *Suresh*, in which the Supreme Court of Canada insisted that exercises of discretion would generally receive great deference.²⁶⁵

Third, recall that the interpretive presumption of conformity cited by Justice L'Heureux-Dubé in *Baker* instructs officials and judges, wherever possible, to interpret domestic law consistently with Canada's international obligations. Van Ert claims that the presumption of conformity “requires our courts to interpret domestic law consistently with Canadian treaty obligations—whatever the subject-matter of the treaty may be.”²⁶⁶ But even if the presumption is merely persuasive in the sense that it simply “informs” interpretations of domestic law, *Baker* makes clear that this presumption is now a principle of Canadian administrative law that governs

²⁶³ *Supra* note 84, art. 26.

²⁶⁴ *Supra* note 116 at para. 56.

²⁶⁵ In *Suresh* the Court held that reviewing courts were not to “reweigh” the relevant factors that discretionary decision makers must take into consideration (*supra* note 70 at paras. 29, 39, 41). However, the Court did not recant the list of principles from *Baker* relevant to the exercise of discretionary power, and thus these principles remain as the legal framework within which discretionary power must be exercised, even if it is a framework the Court has little appetite to enforce.

²⁶⁶ *International Law*, *supra* note 50 at 121 [emphasis added].

discretionary grants of power. Like all common law presumptions, it can be rebutted by legislation, but clear and express statutory language is required to accomplish this.

Fourth, if the presumption of conformity is indeed a principle of Canadian administrative law, and if such principles sound in the rule of law, then compliance with the presumption is a requirement of the rule of law. It follows that if Canadian officials and judges fail to apply the presumption when they interpret discretionary powers, they infringe the rule of law. Moreover, if public authorities decline to apply the presumption in favour of international law, then they also undermine the rule of law by failing to uphold the legal standards of international law that promote public accountability.

Fifth, *Baker* tells us that discretion must be exercised in accordance with “the fundamental values of Canadian society.”²⁶⁷ Plausibly, the honour of the Crown is one such fundamental value. It has been relied on extensively when courts have sought to interpret treaties concluded between the Crown and Aboriginal peoples.²⁶⁸ There is reason to think that the honour of the Crown is also at stake when officials and judges are called on to interpret domestic law in light of international obligations. In these cases, public authorities are being asked to live up domestically to commitments the Crown has made internationally. If the honour of the Crown is a fundamental value of Canadian society, then like the catalogue of constraints on discretionary power articulated in *Baker*, it too compels public authorities to interpret and exercise discretionary grants of power subject to the presumption of conformity.

Finally, recent case law from the Federal Court of Appeal supports the idea that the presence of discretionary power can be relied on to conclude that legislation not purporting to implement any particular treaty may nonetheless do so. The Federal Court of Appeal in *De Guzman v. Canada (Minister of Citizenship and Immigration)*²⁶⁹ had to determine the effect of paragraph 3(3)(f) of the *IRPA*, which provides that the act “is to be construed and applied in a manner that ... complies with international instruments or treaties to which Canada is a signatory.”²⁷⁰ Justice Evans, writing for the court, held that in the case of ratified and binding treaties, paragraph 3(3)(f) did not require that every provision of the *IRPA*, considered separately, had to

²⁶⁷ *Supra* note 116 at para. 56.

²⁶⁸ See e.g. *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.), aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.); *R. v. Taylor* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114 (C.A.); *Simon v. R.*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390; *R. v. Sioui*, [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427; Leonard Rotman, “Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence” (1997) 46 U.N.B.L.J. 11.

²⁶⁹ 2005 FCA 436, [2006] 3 F.C. 655, 262 D.L.R. (4th) 13 [*De Guzman*]. Ms. De Guzman had received permanent-resident status on the basis of a misrepresentation and as a consequence was later statutorily barred from sponsoring her children. She argued that the statutory bar violated the *ICCPR* and the *Convention on the Rights of the Child*, and that the bar should be read down given the requirement under s. 3(3)(f) to read the *ICCPR* consistently with Canada’s international obligations (*ibid.*).

²⁷⁰ *Supra* note 118, s. 3(3)(f).

satisfy the requirements of Canada's international obligations. Rather, the *IRPA* as a whole had to be construed and applied so as to fulfill them—barring express statutory language to the contrary. He concluded that the *IRPA* could be so construed and applied mainly on the basis of the discretionary power granted to the minister under section 25.²⁷¹ That section gives the minister discretionary authority to permit individuals to enter and remain in Canada on the basis of humanitarian and compassionate considerations, and it instructs decision makers to take account of children's best interests.²⁷²

The effect of *De Guzman* is that if Canada has an international legal obligation to provide for family reunification or other results that cannot be accommodated through the ordinary operation of the *IRPA*, then the minister or her delegate *must* exercise the discretionary power conferred under the *IRPA* to bring the *IRPA* into compliance with international law. International law, in other words, is fully capable of controlling discretion on the basis of the presumption of conformity written into the *IRPA* in paragraph 3(3)(f).

Justice Evans's reading of paragraph 3(3)(f) also strengthens the common law presumption of conformity—or at least reinforces a stronger reading of it than Justice L'Heureux-Dubé offers in *Baker*—because where ratified and binding treaties are at issue, the *IRPA* as a whole must be read to conform with them. In these cases the treaty does not so much “inform” as dictate statutory construction. In practice this means that discretion will sometimes have to be exercised so as to bring the *IRPA* into compliance with the treaty. *De Guzman* thus reveals that discretionary power can be relied on as a valid mode of implementation. It also shows that discretion, properly understood, makes the unity of domestic and international law possible. A *Canada Treaties Act* might apply in omnibus fashion the presumption of conformity found in paragraph 3(3)(f) to all federal statutes, as either a complement or an alternative to proclaiming that ratified and implemented treaties themselves have the same legal status as federal legislation.

Let us consider now the “timing” objection mentioned above, which stems from a concern that ratified treaties are not subject to legislative will prior to their implementation.²⁷³ Involving legislators in the treaty-making process addresses this concern directly. But it is important to see that even without increased participation by legislators the objection is unconvincing. Some treaties, as a matter of fact, are ratified only after implementing legislation has been passed, anticipating their ratification.²⁷⁴ But these cases aside, the objection trades on a dubious understanding of legislative intent according to which the legislature must actually turn its mind to a treaty through explicit and *ex post* legislation for the treaty to have domestic effect.

²⁷¹ *De Guzman*, *supra* note 269.

²⁷² *IRPA*, *supra* note 118, s. 25.

²⁷³ See text accompanying note 250.

²⁷⁴ Examples of this approach to ratification are found within recent legislation implementing international trade treaties. See e.g. *FTA Act*, *supra* note 95.

Under the “modern principle” of statutory interpretation frequently endorsed by the Supreme Court of Canada, “the words of an Act are to be read in their entire context.”²⁷⁵ In *Baker*, this meant that the complainant could rely on the *Convention on the Rights of the Child* to inform interpretation of the scope of the minister’s discretionary power because the convention informed the context in which the *Immigration Act* had to be read.²⁷⁶ It made no difference to the Court that the *Immigration Act* in force at the time was passed in 1976,²⁷⁷ whereas Canada ratified the convention in 1991, some fifteen years later. Similarly, in constitutional law, judges presume that ambiguous pre-*Charter* legislation should be read to comply with the *Charter*, even though the legislature could not have literally intended such a reading.²⁷⁸ In other words, if the “timing” objection were taken seriously, it would in many cases subvert the common law presumption of conformity as well as the dominant view of the relationship between the *Charter* and pre-*Charter* legislation. The better view of legislative intent, one consistent with the “modern principle” of statutory interpretation, the principle of conformity, and the relationship between the *Charter* and pre-*Charter* statutes, is that Parliament “intends” on an ongoing basis that its legislation be read in conformity with Canada’s international obligations, including treaty obligations that arise *after* legislation has been enacted. Only this construction of legislative intent—the idea that the legislature is always speaking—allows us to explain the courts’ systematic reliance on the presumption of conformity.

4. An Alternative Approach: The Common Law Status of Treaties²⁷⁹

We have argued for a generous approach to implementation, greater legislative and public participation in treaty making, and a *Canada Treaties Act* that declares duly ratified and implemented treaties to have the same legal status as federal legislation. These changes will require significant political will and quite dramatic reform of current practices. We consider now the extent to which the common law could unite domestic and international law should these calls for reform go unanswered. The first issue we must revisit is the democratic deficit alleged to attend international law-making, since our hypothesis now is that, the policy initiative of 25 January 2008 notwithstanding, treaty making and approval will continue to be dominated by the federal executive.

²⁷⁵ E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87. See e.g. *Opechesah Indian Band v. Canada*, [1997] 2 S.C.R. 119 at para. 75, 147 D.L.R. (4th) 1.

²⁷⁶ *Supra* note 116.

²⁷⁷ *Immigration Act*, R.S.C. 1985, c. I-2.

²⁷⁸ See e.g. *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 at 1079, 59 D.L.R. (4th) 416, Lamer J. (finding that “legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* ...”).

²⁷⁹ Some of the arguments in this section are taken from a previous work (De Mestral & Fox-Decent, *supra* note 44).

We assume the cogency of the arguments regarding implementation, and thus assume that implementation is possible through pre-existing and power-conferring law that does not state that its purpose is to implement a specific treaty. Under these assumptions, the substantive question is whether democratic accountability is undermined if a ratified treaty is given domestic effect without Parliament having enacted specific implementing legislation. The more formal and constitutional question is whether courts and public actors are barred, as a matter of law, from being bound by the terms of treaties that do not enjoy explicit legislative implementation, notwithstanding the presence of pre-existing law that makes implementation possible. We contend that neither the formal nor the substantive argument is compelling.

With respect to the formal separation of powers itself, the main constitutional worry that preoccupies courts is that neither they nor the executive have authority to impose legal obligations independently of the legislature. But, as Roderick Macdonald and others have shown, there are many sources of legal normativity apart from formally adopted statutes.²⁸⁰ Common law courts, for example, have a long history of enforcing public law obligations against the executive in the absence of express statutory language. The duty of procedural fairness, as already mentioned, is one such obligation.²⁸¹ This duty requires administrative agencies to use fair procedures to permit individuals to know and reply to the case against them. It can apply independently of whether the legislature has provided for such procedures in the agency's enabling statute. Thus, the separation of powers does not require that *all* legal obligations to which the executive is subject have some basis in legislation.

Furthermore, there is considerable tension between the presumption of conformity and the idea that ratified treaties cannot give rise to legal obligations without *ex post* implementation. If Parliament is the sole legitimate source of law, then what is the reason for interpreting domestic legislation in a manner that it is consistent with the dictates of ratified treaties? International comity cannot be the reason because the issue is the domestic rather than international effect of treaty obligations. Moreover, in many cases the relevant domestic effect engages matters in

²⁸⁰ See e.g. Roderick Macdonald, "Normativité, pluralisme et sociétés démocratiques avancées : l'hypothèse du pluralisme pour penser le droit" in C. Younès & E. Le Roy, eds., *Médiation et diversité culturelle : pour quelle société?* (Paris: Karthala, 2002) 21; Roderick Macdonald, "Introduction: Law as a Normative Enterprise" in R.A. Macdonald, ed., *Perspectives on Legislation: Essays from the 1999 Legal Dimensions Initiative* (Ottawa: Law Commission of Canada, 2000) 1; Roderick Macdonald, "Pour la reconnaissance d'une normativité juridique implicite et «inférentielle»" (1986) 18 *Sociologie et sociétés* 47.

²⁸¹ See e.g. *Nicholson v. Haldimand-Norfolk (Region of) Commissioners of Police* (1978), [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671; *Knight v. Saskatchewan Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489; *Baker, supra* note 116. Although *New Brunswick (Board of Management) v. Dumsmuir* reduces the scope of procedural fairness, it continues to exist as a common law duty (2008 SCC 9, [2008] 1 S.C.R. 190, 291 D.L.R. (4th) 577).

which other nations and their citizens have no material interest (e.g., the calculation of property taxes).

Presumably, the rationale for the presumption of conformity rests on the idea that international law has some legitimacy and legal authority independently of any act of Parliament. If this were not the case, there would be no reason to use international law as an interpretive lens. The authority of international law is partially explained by the fact that such law reflects the international community's consensus on the constitutive and substantive contents of the rule of law—the best legal principles and institutional modes through which public authority may legitimately interact with the people subject to it. For example, as Michael Taggart, Murray Hunt, and David Dyzenhaus note, increased judicial reliance on human rights instruments signals “the judicial updating of the catalogue of values to which the common law subjects the administrative state” from “pre-democratic, property-based values, to a more modern set of democratic values, including fundamental human rights.”²⁸²

This updating of common law values suggests that obligations arising from ratified and implemented treaties ought to enjoy common law status, even if the implementation of these treaties relies exclusively on pre-existing law. Because international obligations are also domestic common law obligations, judges ought to enforce them in the absence of clearly preclusive statutory language.

The substantive concern over democratic accountability also misses the mark. Given the particularities of Canada's first-past-the-post electoral system and a parliamentary tradition of voting along party lines, governments at the federal level, and to a lesser extent at the provincial level, usually rule as a majority. In the normal course of law-making, then, legislation almost invariably passes in the House of Commons. Ministers are not required to submit proposed legislation to public scrutiny and debate before tabling it in the House,²⁸³ although an opportunity to review proposed legislation does arise once it is tabled, particularly during the course of debate on second reading. Thus, in Canada's present legal and political system, the executive—through its ministers—has had a virtually free hand to determine the content of its citizens' legal rights and obligations.

The characteristics and practices of Canada's parliamentary tradition may well disclose a lamentable disregard for public input and consultation in the law-making process. Yet, these deficiencies do not impugn the legality of legislation that is

²⁸² *Supra* note 259 at 7, 34.

²⁸³ The First Nations case is a notable exception, but one grounded in the entrenchment of treaty and Aboriginal rights in s. 35 of the *Charter* (*supra* note 112). Recent jurisprudence suggests that the Crown does have a constitutional duty to consult with First Nations if “the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it ... ” (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 35, 245 D.L.R. (4th) 33).

enacted by Parliament at the behest of the executive. Furthermore, once proposed legislation is enacted into law, members of the opposition remain free to monitor and comment on the ongoing effect of legislation.

Similarly, when the executive ratifies a treaty—and under the initiative announced on 25 January 2008, prior to ratification—members of the opposition have the opportunity to scrutinize the treaty's measures, ask questions, and criticize the obligations that the government intends to assume. If the government's ratification proves unpopular, it can withdraw from the treaty. Further, if the government falls in an election, a subsequent government can withdraw from the treaty or enact legislation that limits the treaty's domestic effect. All of these possibilities remain available and together they ensure that, substantively, the democratic deficit alleged to attend recognition of the binding nature of ratified treaties, when compared with domestic law-making, is not as significant as it may first appear.

In the absence of a *Canada Treaties Act* that declares ratified and implemented treaties to be of equal status to federal legislation, our proposal is that the status of such treaties should be equivalent to common law obligations that only explicit legislation or the constitution can supersede and restrict. For example, Parliament can pass legislation that has the effect of expropriation, but the common law requires compensation for expropriation unless the statute explicitly bars such claims.²⁸⁴ Our suggestion is that the common law should protect the legal rights conferred by treaties in much the same way as it shields rights to property through the doctrine that controls expropriation.²⁸⁵ A person in Ms. Baker's position would then be entitled, for example, to have the decision maker treat her children's best interests as a "primary consideration", pursuant to article 3 of the *Convention on the Rights of the Child*, unless domestic legislation explicitly states that the decision maker is free to exercise her discretion without treating children's best interests as a primary consideration, or without regard to the convention.²⁸⁶

²⁸⁴ See e.g. *Authorson (Litigation Guardian of) v. Canada (A.G.)* (2002), 58 O.R. (3d) 417, 215 D.L.R. (4th) 496 (C.A.), rev'd 2003 SCC 39, [2003] 2 S.C.R. 40, 227 D.L.R. (4th) 385.

²⁸⁵ Our proposal may appear to be a radical departure from current doctrine. However, it is interesting to note that a similar suggestion was made more than 30 years ago by Canada's eminent international jurist Ronald St. J. Macdonald:

As to the separation of powers between the crown [the executive] and parliament, it is submitted that this could be preserved while still enabling (and forcing) Canada to fulfill her international obligations by according ratified but unimplemented treaties a status superior to common law but inferior to statute (*supra* note 52 at 127).

For clarity, we do not think that it is helpful to suggest to judges that they need to invent a space between the common law and statute law within which international law is supposed to operate domestically. It is enough that international law be received into the common law for it to bind the executive while still being subordinate to clear and express legislation that seeks to limit its scope.

²⁸⁶ *Convention on the Rights of the Child*, *supra* note 6; *Baker*, *supra* note 116.

The substantive concern over a democratic deficit proceeds from the assumption that democratic legitimacy rests almost entirely on respect for legislative procedures that enable the will of the majority to operate. We have already suggested that the Canadian electoral system and Parliament's ability to monitor ratification and its consequences provide significant procedural and political safeguards against an executive that ratifies an unpopular treaty without Parliament's prior assent. The will of the majority is not left to the caprice of a politically unaccountable executive: ministers need to get re-elected too. But there is a deeper issue at play.

The deeper issue has to do with the assumption that democratic legitimacy is reducible to giving effect to the will of the majority. As many others have argued, majoritarianism alone supplies an impoverished conception of democratic legitimacy.²⁸⁷ Majorities, like dictators, can engage in ruthless domination—the so-called tyranny of the majority. It is this latent feature of unrestrained populism to which the liberal, republican, and rationalist strands of contemporary democratic theory respond.²⁸⁸ The liberal strand speaks to the protection of fundamental rights and interests, such as those protected in the *Charter*.²⁸⁹ Republicanism emphasizes checks and balances so that no particular branch of the state accumulates unconstrained power that lends itself to abuse. From the republican perspective, judicial review is less about protecting cherished liberal rights than it is about limiting the threat of domination posed by concentrations of power.²⁹⁰ The rationalist view of democracy states that democratic rule is accomplished by people reasoning together about the proper ends of policy and not through resorts to force or naked assertions of individual self-interest.²⁹¹ We mention these theories simply to illustrate the poverty of a conception of democracy that relies heavily on majoritarianism.

To sum up, giving domestic effect to a ratified treaty that is implemented through any of the modes we have discussed is consistent with democracy so long as Parliament retains authority to restrict the scope of the treaty's terms once it is ratified. Further, if the treaty touches on human rights, then giving it domestic effect contributes to the liberal ideal of protecting such rights and to that extent contributes

²⁸⁷ See e.g. David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 *Queen's L.J.* 445 at 501-02; Henry S. Richardson, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (Oxford: Oxford University Press, 2002).

²⁸⁸ Such categories are adopted from Richardson's "republican-liberal-populist-rationalist" conception of democracy, or "democracy as democratic autonomy", the point of which he summarizes as "collectively reasoned self-rule ... collective reasoning about public ends, the ends of policy" (*ibid.* at 17-19).

²⁸⁹ See e.g. Ronald Dworkin, "Liberalism" in Julian Nida-Rümelin & Wilhelm Vossenkuhl, eds., *Ethische und politische Freiheit* (Berlin: Walter de Gruyter, 1997) 180; Robert Nozick, *Anarchy, State and Utopia* (London: George Allen & Unwin, 1983) at ix.

²⁹⁰ See e.g. David Leslie Miller *et al.*, *The Blackwell Encyclopedia of Political Thought* (Oxford: Blackwell, 1991) at 433-34.

²⁹¹ See e.g. *ibid.* at 98-99; Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Press, 1991).

to Canada's democratic legitimacy. Similarly, the republican strand of democracy is strengthened by requiring the executive to respect domestically the obligations it assumes on the world stage. Republicanism is strengthened because these treaty obligations place constraints on executive power and therefore make its abuse more difficult, and because deviation from international norms requires Parliament to justify such deviations publicly through the legislative process. This public-justification requirement dovetails with rationalist theory. By requiring Parliament to be explicit about its intent to contravene international law, the government would be required to expose its intent to the public scrutiny that attends the legislative process. Thus international law contributes to the rule of law by setting standards to which Parliament and the executive can be held accountable.

Notwithstanding the arguments advanced in this and the preceding subsection, the idea of recognizing ratified and implemented treaties to have the same status as either domestic legislation (pursuant to a future *Canada Treaties Act*) or the common law may appear to be too great a step to take at one time. If so, there exist less thoroughgoing approaches that would still constitute a significant improvement over the status quo. The Supreme Court of the United States long ago dealt with the issue of treaty law's applicability by distinguishing between self-executing and non-self-executing treaties.²⁹² In more recent times, the European Court of Justice has dealt with the issue through the doctrine of the potential but not necessary "direct effect" of E.U. treaties and E.U. legislation in the domestic legal orders of E.U. member states.²⁹³ Such an approach would allow Canadian courts to examine on its merits every claim that relies on the text of an implemented treaty. Courts would decide whether giving direct effect to the words of the treaty is necessary to ensure that the treaty's object and purpose require that those words be applied like any rule of domestic law. Canadian courts could thus choose which parts of a treaty require direct effect, rather than granting direct effect automatically to the whole treaty text.

A further question concerns whether a party may assert the domestic effect of a treaty's terms merely against the executive (including its tribunals, agencies, and frontline decision makers) or also against private citizens. We contend that ratified and implemented treaties contain real rights and obligations on which individuals should be able to rely in their interactions with both public and private parties. Intermediate positions are also possible, however, and would also be an improvement on the status quo. Parliament might set general limits in either a *Canada Treaties Act* or through a case-by-case basis in implementing legislation. Finally, as suggested above, the courts might be empowered to decide which treaty provisions should be granted direct effect, possibly limiting the direct effect of treaty provisions along the lines followed by the European Court of Justice—applying only those provisions that contain clear negative or positive commands or that require very specific results.

²⁹² *Foster*, *supra* note 163 at 254. See also *supra* note 164 and accompanying text.

²⁹³ See Craig & de Burca, *supra* note 34 at 268.

If the courts of the common law provinces were prepared to grant common law status to certain principles or parts of ratified and implemented treaties, could the courts of civil law Quebec follow suit? We believe that this could happen without doing violence to the civil law system. First, it is important to note that public law in Quebec is largely similar in structure to public law of other provinces, for both are constitutionally required to share a system of public law “similar in principle” to that of the United Kingdom.²⁹⁴ Moreover, a number of civil law jurisdictions, discussed above, give direct effect to treaties and make them legally equivalent to statutes. Civil law jurisdictions have to make room for the rules of interpretation derived from international law, they have to give effect to the presumption of conformity, and above all, they recognize general principles of law as much as common law systems. Thus, it would seem that the barriers to entry of international treaty law into the civil law are no more insuperable, and are possibly lower than those raised by the common law.

D. The Role of Judges and Administrative Decision Makers

Throughout this article we have stressed the importance of the role played by the judiciary as well as quasi-judicial tribunals and public officials in mediating the relationship between domestic and international law. In this section we try to bring these common themes together.

We have argued that Canadian judges and administrative decision makers should view the rule of law as embracing international as well as domestic law, and thus that these actors are under a rule-of-law duty to take international law seriously. We have also shown that judges use, to varying degrees, techniques such as judicial notice of customary law and the principle of conformity to allow international law into the domestic sphere. Customary law also binds administrative decision makers. So too does the presumption of conformity, for it applies to all public actors charged with interpreting domestic law that relates to Canada’s international legal obligations. In this section we argue that public actors can and should do more to recognize the domestic legal status of customary and treaty law. This recognition could occur through the proper application of the principle of adoption or through a more vigorous application of the principle of conformity. We also point to another doctrine capable of binding judges and decision makers when they interrogate the domestic effect of international law: legitimate expectations.

Courts historically have been willing to look to a treaty if provisions of a statute that purported to implement it were ambiguous. In *National Corn Growers* a majority of the Supreme Court of Canada held that this approach was too restrictive. The Court found that in such cases recourse may be had to the treaty to resolve the ambiguity or

²⁹⁴ *Constitution Act, 1867*, *supra* note 109, preamble. But see Robert Leckey, “Prescribed by Law / une règle de droit” (2007) 45 *Osgoode Hall L.J.* 571 (discussing many differences that emanate from Quebec’s civil law culture and tradition).

show that there is in fact an ambiguity, subject to the implicit caveat that an unambiguous statute requires no additional aids to interpretation.²⁹⁵ This willingness to look to a clearly implemented treaty for interpretive guidance mirrors the presumption of conformity that has traditionally been used to read domestic law, as in *Baker*, in light of ratified but so-called unimplemented treaties.²⁹⁶

Yet, as in *Baker*, Canadian courts have used the presumption of conformity as merely one element—a permissive or at most mandatory relevant consideration—to inform the interpretation of domestic law. This approach falls well short of the analogous Charming Betsy doctrine used by U.S. courts. Under that doctrine, American courts will not apply an American statute in a manner that violates a ratified treaty unless they are under a clear legislative command to do so.²⁹⁷ Once Canadian judges and decision makers accept that the presumption of conformity presupposes the legitimacy of international law, and once they see that treaties should count as implemented if pre-existing law makes implementation possible, they should feel no discomfort conferring on international law the same respect and status they accord the common law. Treating international treaty obligations as common law obligations would do no more than bring Charming Betsy to Canada.

What might some of the specific consequences of this approach be with respect to administrative and regulatory agencies? These agencies are charged with authority over a host of governmental activities, many of which reflect Canadian treaty obligations as described above. Pursuant to their legislative mandates, boards and tribunals make decisions that require them to interpret their constitutive statutes and act pursuant to the various powers with which they are entrusted. The following are but a few examples.

The Canadian International Trade Tribunal (CITT) is charged with administering various pieces of legislation that give effect to Canada's international obligations under the WTO's *Agreement on Subsidies and Countervailing Measures*,²⁹⁸ the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (anti-dumping agreement),²⁹⁹ the *Agreement on Safeguards*,³⁰⁰ and other WTO agreements on customs valuation and classification. The Anti-dumping and

²⁹⁵ *National Corn Growers*, *supra* note 116 at 1371. The majority of the Federal Court of Appeal in this case was even more explicit on this point. See *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1989] 2 F.C. 517 at 533, 58 D.L.R. (4th) 642 (F.C.A.) [*National Corn Growers (F.C.A.)*].

²⁹⁶ For a recent affirmation of the presumption, see *Foundation for Children*, *supra* note 116.

²⁹⁷ *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804). The Supreme Court of the United States stated that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains ...” (*ibid.* at 118). Since then, this canon of construction has become an important component of the legal regime defining the relationship between domestic and international law in the United States.

²⁹⁸ 1869 U.N.T.S. 14, being Annex 1A to *Marrakesh Agreement*, *supra* note 194.

²⁹⁹ (12 April 1979), 1186 U.N.T.S. 2, 31 U.S.T. 4919 (entered into force 1 January 1980).

³⁰⁰ 1869 U.N.T.S. 154, being Annex 1A to *Marrakesh Agreement*, *supra* note 194.

Countervailing Directorate of the Canada Border Services Agency provides assistance to Canadian producers who face unfair foreign competition in the Canadian marketplace. The Directorate also oversees the administration of the Special Import Measures Act,³⁰¹ which helps to protect Canadian industry from injury caused by the dumping and subsidizing of imported goods.³⁰²

Traditionally, administrative agencies and tribunals have considered themselves to be strictly bound by the words of their enabling statute. They are generally very reluctant to base a decision on the wording of the treaty that they are in effect called upon to implement.³⁰³ This caution exists even when the statute declares that its purpose is to implement a specific treaty.

A case in point is the *SIMA* considered by the Supreme Court of Canada in *National Corn Growers*.³⁰⁴ In that case, the CITT's predecessor, the Canadian Import Tribunal, was invited to consider the argument that there was ambiguity in the statute that should be elucidated according to the terms of the *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*.³⁰⁵ The majority of the tribunal refused to do so, arguing that the statute and the treaty permitted a broad interpretation of the concept of "subsidized imports".³⁰⁶ The majority of the Federal Court of Appeal held that the tribunal had acted within its discretion and had adopted a reasonable if broad definition of the concept of subsidized imports. Justice McGuigan dissented, holding that the treaty did not admit of a broad definition of subsidized imports, and that the tribunal was required to interpret the statute in light of the narrower conception of subsidized imports contained within the treaty.³⁰⁷ Justice Gonthier, writing for a majority of the Supreme Court of Canada, upheld the tribunal's decision. He found that contrary to the approach taken by the tribunal, the treaty should be used to inform the proper construction of the statute, but that the meaning suggested by the treaty would not necessarily be determinative of the legality of the interpretation the tribunal gave to the statute. In this case the interpretation given to the statute was not patently unreasonable and thus was legal.³⁰⁸

Setting to one side concerns regarding the deference owed to the tribunal on review, there is much to commend the approach to statutory interpretation advocated by Justice McGuigan. At first instance, the tribunal ought to interpret the statute in a

³⁰¹ *Supra* note 15.

³⁰² See *National Corn Growers*, *supra* note 116 (discussing the role of the Canadian Import Tribunal vis-à-vis Canada's corresponding international obligations).

³⁰³ In *National Corn Growers* for example, the majority opinion of the Canadian Import Tribunal that is considered by the Supreme Court of Canada displays this reluctance (*ibid.* at 1360-62).

³⁰⁴ *Ibid.*

³⁰⁵ 12 April 1979, 1186 U.N.T.S. 204, 18 I.L.M. 579 (entered into force 1 January 1980).

³⁰⁶ *National Corn Growers (F.C.A.)*, *supra* note 295.

³⁰⁷ *Ibid.*

³⁰⁸ *Supra* note 115.

way that respects the obligations contained within the treaty. If, as we have suggested, the courts must treat ratified and implemented treaties as capable of producing legal effects, then so must administrative boards and tribunals.

Like agencies and tribunals, officials at the federal and provincial levels appear to act on the assumption that they are strictly bound by the words of the statute under which they operate but not bound by a treaty that their department may be responsible for implementing. They seldom seem prepared to base a decision on the wording of the treaty that they are in effect called upon to implement, even when it is duly ratified by Canada and fully embedded in statutory law. An illustrative case is the refugee legislation and the international prohibition against torture, where the role of the minister of immigration has been the object of much litigation.³⁰⁹ If the treaty language is clear, as with the uncompromising condemnation of torture in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,³¹⁰ why should such language be subject to qualification in Canada? Recall that this type of qualification was made in *Suresh*. The Supreme Court of Canada expressed a willingness to permit deportation to torture under exceptional circumstances, notwithstanding the Court's recognition that the condemnation of torture reflected a rule of *jus cogens*.³¹¹ As with boards and tribunals, officials such as ministers and their delegates should be required to treat the requirements of ratified and implemented treaties as equivalent to common law rules.

The approach of Canadian judges and decision makers to international customary law has also failed to treat this body of law as law in its own right. We have seen already that the Supreme Court of Canada affirmed in *Hape* that customary law is adopted directly into the common law.³¹² Thus, Canadian courts can and should take judicial notice of it without even requiring proof or evidence, which is necessary in the case of foreign law.

Legitimate expectations provide a further avenue through which judges can fruitfully bring international law into the domestic legal order and through which administrative decision makers can uphold the honour of the Crown. Much has been written on the doctrine of legitimate expectations and the idea that such expectations are created by the ratification of a treaty.³¹³ The High Court of Australia in 1995 made

³⁰⁹ See *Suresh*, *supra* note 70; *Ahani*, *supra* note 116.

³¹⁰ 10 December 1984, 1465 U.N.T.S. 113, U.K.T.S. 1991 No. 117 (entered into force 26 June 1987).

³¹¹ *Ibid.*

³¹² The presumption of compatibility was also affirmed by the Court on the following day in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia* (2007 SCC 27, [2007] 2 S.C.R. 391, 283 D.L.R. (4th) 40).

³¹³ See Mark Jennings, *The Relationship Between Treaties and Domestic Law*, online: Australian Government Department of Foreign Affairs and Trade <http://www.dfat.gov.au/treaties/workshops/treaties_global/jennings.html>. See also Hilary Charlesworth *et al.*, "Deep Anxieties: Australia and the International legal Order" (2003) 25 Sydney L. Rev. 423 at 431-38.

reference to legitimate expectations in *Minister of State for Immigration and Ethnic Affairs v Teoh*.³¹⁴ Nevertheless, it restricted its application of the doctrine to children's legitimate expectation that fathers be present for their children, an expectation that was said to arise from Australia's ratification of the *Convention on the Rights of the Child*.³¹⁵

It is plausible to suggest that ratification signals the intention of the government to be bound by the treaties it ratifies³¹⁶ and that this public display of intention is sufficient to give rise to a legitimate expectation that the state intends to respect the obligations of the treaty in the domestic sphere. This argument remains underdeveloped in Canadian jurisprudence. The Supreme Court of Canada in *Baker* made no mention of *Teoh*, and it held that Canada's ratification of the *Convention on the Rights of the Child* did not give rise to a legitimate expectation on the part of Ms. Baker that specific procedural rights would be afforded above what was already available at common law.³¹⁷ The Court nonetheless left dangling the possibility that legitimate expectations might do some work in a different context involving a ratified treaty, concluding that "[i]t is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation."³¹⁸

In light of the various suggestions made above, it would seem that Canadian judges and administrative decision makers could go much further than they have to give legal effect to ratified and implemented treaties. Were Parliament to adopt a *Canada Treaties Act* giving treaties the status of statutes, judges and decision makers would have to perform the important interpretive role of reading treaties and statutes in light of each other. This would be equally true were Parliament (via statute) or the courts (via the common law) to adopt the intermediate position that treaties in principle, but not in all cases, have direct effect in domestic law.

E. The Role of Provinces

The relationship between domestic and international law is not simply a federal problem. While the contacts between international law and domestic law are more intense at the federal than at the provincial level, the provinces nonetheless are faced with comparable problems. Though on a smaller scale, the provincial governments must ensure respect for customary international law and must deal with the implementation of treaties when implementation requires new legislation or positive

³¹⁴ *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995), 183 C.L.R. 273, 128 A.L.R. 353 (H.C.A.).

³¹⁵ *Ibid.*

³¹⁶ *Re Arrow River and Tributaries Slide and Boom Co. Ltd. v. Pigeon Timber Co. Ltd.* (1931), 66 O.L.R. 577 at 579, [1931] 2 D.L.R. 216 (Ont. S.C. A.D.).

³¹⁷ *Supra* note 116 at para. 29.

³¹⁸ *Ibid.*

or negative administrative action. For this reason it is important to keep in mind the difficulties faced by the provinces of Canada as they cope with the incorporation and reception of international law into the provincial legal orders.

As we have seen, in *Labour Conventions* the Privy Council held that the legislative power to implement international law obligations, particularly treaties, is vested in both Parliament and the provincial legislatures according to the ordinary division of powers.³¹⁹ However, the executive power in respect of international relations is generally accepted to be vested in the federal crown. Furthermore, the Parliament of Canada is deemed to have powers to legislate extraterritorially, while it has been held by the courts that the legislative powers of the provinces are limited to their territory.³²⁰

The net result is to severely limit the capacity of provincial governments to deal with foreign governments. The federal government must act for the provinces, who have sovereign legislative powers to implement treaties but no way of being directly involved in treaty making, even in areas of provincial jurisdiction such as health, welfare, culture, and education. Provinces cannot sign treaties, engage in direct relations with foreign governments, or join international organizations, even if such organizations deal with matters within provincial jurisdiction.

From the federal perspective there are many frustrations and pitfalls. The federal government can commit Canada to a treaty, but it cannot guarantee that the treaty will be properly implemented if the subject matter falls within provincial jurisdiction. This fact can be a serious impediment to the rapid consolidation of a treaty relationship with other states. For example, despite Canada's signing the *NAFTA* side agreements on environmental cooperation³²¹ and labour cooperation³²² subject to a type of "federal-state" clause,³²³ not all provincial governments have yet agreed to bring those side agreements into force within their territory.

Beyond the practical difficulties created for the treaty-making process also lies a much more fundamental concern: the unity of the country. The maintenance of international relations is an essential attribute of sovereignty. Should the provincial governments have unrestrained authority to make treaties, entertain diplomatic relations with other sovereign states, and occupy a separate seat in intergovernmental organizations, then they would be acting essentially as sovereign states. Such activities would put the unity of Canada (or at least the international perception of a

³¹⁹ *Supra* note 108.

³²⁰ Hogg, *supra* note 83, c. 13.2(a).

³²¹ *North American Agreement on Environmental Cooperation Between the Government of the United States, the Government of Canada and the Government of Mexico*, 14 September 1993, 32 I.L.M. 1480 (entered into force 1 January 1994) [NAAEC].

³²² *North American Agreement on Labor Cooperation Between the Government of the United States, the Government of Canada and the Government of Mexico*, 14 September 1993, Can T.S. 1994 No. 4, 32 I.L.M. 1499 (entered into force 1 January 1994).

³²³ *Ibid.*, Annex 46; NAAEC, *supra* note 321, Annex 41.

unified Canada) in serious doubt. This concern has been expressed on a number of occasions by scholars, politicians, and practitioners of international law.³²⁴

For the purpose of analysis, the issues are best divided into a number of separate headings. The most important are (1) maintaining formal relations with foreign governments, (2) contacts with foreign governments at home and abroad, (3) the making of formal agreements, which may or may not be treaties with foreign governments or international organizations, (4) assuming obligations under international treaties, (5) participating in international negotiations, and (6) participating in the work of international organizations. With respect to each of these issues there is both a formal legal position and a *modus vivendi* that have been worked out between the federal and provincial governments over the last thirty years.

The current state of relations between the federal government and the provincial governments most interested in this question has been documented in legal and political-science literature³²⁵ and is the object of a *Guide de la pratique des relations internationales du Québec*.³²⁶ The original proposals for an accommodation set out in white papers from 1968 have been realized and considerable elaborations upon the theme have been made since that time.³²⁷

In essence, no relations are permitted between a provincial government and a foreign state not recognized by Canada. Furthermore, provinces cannot entertain state-to-state relations at the diplomatic level (with the exception of the special case of Québécois representation in Paris).³²⁸ Still, provincial governments can maintain relations at the departmental and administrative level that are necessary to ensure the fulfillment of provincial governmental functions in support of provincial residents. Contacts of provincial and foreign ministers are possible at home or abroad, subject to the right of federal officials to be informed of such contact and to be present at meetings. Thus, provincial-government departments can maintain a close working relationship with foreign-government departments in areas as diverse as social-security payments, education, student exchanges and funding of students abroad,

³²⁴ See Gibran van Ert, “The Legal Character of Provincial Agreements with Foreign Governments” (2001) 42 C. de D. 1093; Gotlieb, *supra* note 83.

³²⁵ Armand de Mestral, “The Provinces and International Relations in Canada” in Jean Francois Gaudreault DesBiens & Fabien Gélinas, *The States and Moods of Federalism: Governance, Identity and Methodology* (Québec: Yvon Blais, 2005). See also Armand de Mestral, “Le rôle de la pratique dans la formation du droit international” (1984) 14 R.D.U.S. 441.

³²⁶ Québec, Ministère des relations internationales, *Guide de la pratique des relations internationales* by F. Leduc (Québec City: Ministère des relations internationales, 2000) [*Guide des relations internationales*].

³²⁷ Canada, Parliament, “Federalism and International Relations” by Paul Joseph James Martin in *Sessional Papers*, No. 265 (1968) [*1968 White Paper*]; Canada, Parliament, “Federalism and International Conferences on Education: A Supplement to Federalism and International Relations” by Mitchell William Sharp in *Sessional Papers*, No. 265 Supp. (1968).

³²⁸ *Guide des relations internationales*, *supra* note 326, c. 2; Armand de Mestral, “Le rôle de la pratique dans la formation du droit international public” (1984) R. de D. 441 at 446.

forestry, and fire prevention. Provincial governments may establish offices to represent themselves and to provide information and services to foreigners and their own residents. With the exception of Québécois representation in Paris, such offices do not have formal diplomatic or consular status.

Provinces may not sign documents that purport to be treaties or that are binding under international law. Nevertheless, subject to federal approval, they may make administrative arrangements (whose legal status is deliberately vague) with foreign governments or government departments. Provinces may agree to assume obligations pursuant to treaties and often do so at the urging of the federal government as a condition precedent to ratification of a treaty. The manner in which provincial implementation is accomplished may be the result of careful negotiation between the province and the federal government, as the federal government may be held internationally responsible if the treaty is not appropriately implemented by a province. There appears to be nothing stopping a province from adopting a procedure for legislative ratification that signifies the province's willingness to perform the obligations of the treaty, as is done in Quebec under the *Loi sur le ministère des Relations internationales*.³²⁹ Such ratification creates a legislative duty within the province under provincial law but it does not appear to impose a duty on Canada under international law.³³⁰

Provinces have no right to participate in international negotiations or to be present in discussions between federal officials and foreign diplomatic officials. This restriction can be the source of considerable frustration for provinces. But the absence of provincial participation can equally be a source of concern and frustration for federal officials when provincial consent and active support is required to implement a negotiated settlement. The response to these frustrations has been the development of a range of ad hoc solutions, some of which are very complex and highly pragmatic. Provincial officials can be made full members of Canadian negotiating teams, as was the case in the Third United Nations Conference on the Law of the Sea.³³¹ Where this approach is not practical due to the need to limit the number of negotiators in an international negotiation—as is the case at the WTO—elaborate procedures of consultation and almost instantaneous information feedback have been established. In one area that is almost entirely within provincial jurisdiction—private international law—experts named by provincial governments act as full members and sometimes even head the Canadian delegation.³³² Thus, pragmatism and good sense can provide acceptable results, but the current situation leaves provincial governments with a permanent fear of exclusion.

³²⁹ *Supra* note 131.

³³⁰ *Ibid.*, s. 22.2. See also Hogg, *supra* note 83, c. 11-5.

³³¹ See De Mestral & Legault, *supra* note 88.

³³² See generally Christiane Verdon, "Le Canada et l'unification du droit international privé" (1994) 32 *Can. Y.B. Int'l Law* 3. See also 1968 *White Paper*, *supra* note 327.

Arguably, in light of the very large number of negotiations involving matters under provincial jurisdiction, more effective and stable procedures should be created. The same can be said of provincial participation in the many international organizations that are charged with negotiations, rule making, and decision making on matters within provincial jurisdiction. There is a serious case to be made for ensuring effective provincial participation in such organizations. Quebec in particular has long sought a greater international role, arguing that its interests—especially cultural—are distinct from those of other regions of Canada. On 5 May 2006, Prime Minister Stephen Harper and Premier Jean Charest established a formal role for Quebec in the Permanent Canadian Delegation to UNESCO.³³³ This agreement can be seen as an encouraging development toward giving provinces a greater role in Canada's foreign affairs.

Is this an area where, by the nature of constitutional arrangements in Canada, conflict and frustration will never be far from the surface? Arguably not. One need only look to the very pragmatic set of arrangements worked out over the last forty years to deal with the phenomenon. Despite many latent pitfalls and conflicts, much has been done to ensure meaningful participation and consultation. Furthermore, the international community leaves considerable latitude to federal states as to how they empower constituent units to participate in the international arena. It is quite possible that a new balance of interests could be struck that both empowers provincial governments while guaranteeing the essential integrity of Canada as a single federal state. We suggest that a concern for the functional need of provincial governments to effectively exercise their powers at home and abroad should be a basic guiding principle.

With greater involvement in foreign affairs, it is not overly optimistic to imagine provinces adopting provincial equivalents of a *Canada Treaties Act*. As at the federal level, this legislation could provide greater opportunity for provincial legislators to scrutinize and discuss the merits of treaties. Such acts might also acknowledge the legal status of treaties that must be implemented at the provincial level. Provinces could hold this status out as a useful bargaining chip as they discuss with their federal counterparts the concerns they may have with respect to a treaty or its particular provisions.

³³³ Quebec, National Assembly, Press Conference, "Signature d'un Accord entre le gouvernement du Canada et le gouvernement du Québec relatif à l'Organisation des Nations unies pour l'éducation, la science et la culture" (5 May 2006), online: National Assembly of Quebec <<http://www.assnat.qc.ca/fra/conf-presse/2006/060505JC.HTM>>.

Conclusion

We have argued for a major realignment and reassessment of the relationship of domestic and international law in Canada.³³⁴ First of all, the rule of law does not stop at the border: it extends to every source from which public legal standards may be adopted so as to hold those with power to account. Secondly, international and domestic legal principles are so tightly intertwined today that it is a mistake to view them as residing in separate universes. Thirdly, it is not in the interests of Canadians to maintain the strict separation of treaties and domestic law. This distinction no longer reflects the reality of today's many cosmopolitan legal relationships. The strict dualist principle is no longer the appropriate standard for Canada.

The federal government has taken a valuable step forward by deciding to table treaties in the House of Commons. Parliament can do more by showing that it takes the treaty-making process seriously as a source of law. Legislation would provide a valuable impetus to bringing unity to international and domestic law. Taking their lead from Parliament, the courts and administrative decision makers can affirm the legitimacy of international law by adopting generous approaches to implementation and the presumption of conformity. By treating international law as law, legislators, judges, and officials can demonstrate their commitment at home to the principles and values they celebrate abroad.

³³⁴ The capacity of a state to legislate and to act with effect outside its borders raises many complex issues of domestic and international law. It is submitted that no discussion of the relationship of domestic and international law is complete without a discussion of the problems posed by extraterritoriality. The function of international law as a bar to the extraterritorial reach of domestic law is in many ways a litmus test of the power of international law and the existence of an international legal order. Considerations of space precluded treatment of extraterritoriality in this article.