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Gib van Ert

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Valparaiso University

DUBIOUS DUALISM: THE RECEPTION OF INTERNATIONAL LAW IN CANADA

Gib van Ert*

I. INTRODUCTION

The question of how norms of public international law are received into domestic legal systems is largely a matter of constitutional law. The Canadian constitution—like so many things Canadian—resembles in part both the American and the British models. Like the American tradition, the Canadian constitution is based in large part on judicial review of legislative and executive action against written constitutional norms. Like the British tradition, however, the Canadian constitution also includes an important unwritten element. Those wishing to understand how public international law is received into Canadian law will not find an answer in the written portion of the Canadian constitution, which hardly refers to international law at all. One must instead look to unwritten, English-derived constitutional practices and principles.

The starting point, at least as far as treaties are concerned—treaties being the preeminent source of contemporary international law—is the royal prerogative over foreign affairs. In the Anglo-Canadian tradition, foreign affairs, including treaty-making, is a purely executive function.[1] There is no legal requirement that the legislative branch be consulted, or involved in any way, in the executive's decision to negotiate and conclude a treaty.[2]

The second essential Anglo-Canadian legal principle informing the Canadian approach to conventional international law is the English rule, established through civil war and revolution, that the Crown is not a source of law. Just as treaty-making is an exclusively executive act, law-making is an exclusively legislative act. In contrast to the American recognition of some law-making power residing in the president (which

* BA (McGill), MA (Cantab.), LLM (Toronto). Of the British Columbia Bar.

1 *Reference re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753, 877 (Can.).

2 There are, however, non-legal government policies in place governing the tabling of treaties in Parliament, the publication of treaties, and other matters arising after the executive's decision to conclude a treaty. *See* Canada Treaty Information, Policy on Tabling of Treaties in Parliament, http://www.treaty-accord.gc.ca/procedure.asp (last visited Feb. 8, 2010).

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one participant in the conference described as "presiprudence"),[3] in the Anglo-Canadian tradition the king's act is not law.[4]

These two propositions drive towards a syllogistic conclusion about the status of treaties in Canadian law. If treaties are made by the executive, and the executive cannot make law, treaties must not be law. That is largely accurate: Canadian courts, like those of England and other Commonwealth countries, have repeatedly affirmed that a treaty is not itself a source of domestic law. To state the proposition in American parlance, no Canadian treaty is self-executing. All require legislative implementation if they are to enjoy direct legal effect in Canadian law.[5]

This approach to the domestic reception of treaty norms, commonly called dualism, does not wholly describe the Canadian reception system. In Canada, rules of customary international law are directly incorporated into the common law without legislative action. Furthermore, the dualist approach to treaties is importantly qualified by judicial interpretive practices. I have suggested elsewhere that Canada is neither dualist nor monist, but a hybrid of the two models.[6]

II. IMPLEMENTATION OF TREATIES

Treaties must be implemented, but what does implementation mean? Canadian law offers no fixed answer. Canadian legislative practice reveals a variety, a bewildering variety even, of implementation forms. These range from express implementation of entire treaties by primary legislation,[7] to statutes or regulations that make no mention of the treaty motivating them but effectively discharge the state's treaty-derived obligations,[8] to reliance upon existing constitutional or

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3 Robert Blomquist, *The Jurisprudence of American National Security Presiprudence*, 44 VAL. U. L. REV. _____ (2010).

4 *Archbishop of York and Sedgwick's Case*, (1612) 78 Eng. Rep. 122 (K.B.); *Case of Proclamations*, (1611) 77 Eng. Rep. 1352 (K.B.).

5 This statement oversimplifies the matter. Strictly speaking, no treaty can ever have direct legal effect in Canadian law. The implementing statute, rather than the treaty behind it, has legal effect. And yet, reference to and consideration of any treaty underlying an implementing provision is not only permissible but positively desirable. As suggested below, the real simplification here lies in the contention, strongly supported in Canadian case law, that treaties are legal non-entities.

6 *See* G. VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS 3–5 (2d ed. 2008).

7 *E.g.*, Geneva Conventions Act, R.S.C., ch. G-3 (1985) (as amended).

8 *E.g.*, Criminal Code, R.S.C., ch. C-46, s. 269.1 (1985) (as amended) (giving effect to certain Canadian obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 [1987] Can. T.S. No. 36 but makes no reference to that instrument).

legislative provisions to meet the treaty's requirements.[9] In the absence of legal requirements as to how treaties must be implemented, Canadian legislatures are free to take a purely functional approach. The only rule (if one can call it that) is the practical requirement that the implementation method chosen must suffice to discharge the state's obligations.[10] The constitutional principle that no treaty may be self-executing is, of course, a major difference between the Canadian and American reception schemes. Two more differences are worthy of mention.

First, a controversy has arisen in the United States in recent years that has no parallel in Canada; it involves the desirability, and even the propriety, of United States courts having regard to international and foreign law in the course of their deliberations. Canadian lawyers are in the habit of referring to and, where warranted, relying upon legal precedents from other countries, perhaps due to their country's mixed legal heritage of English common law and French civil law, and to the fact that until 1949 the Judicial Committee of the Privy Council was the final court of appeal for Canada. Resort to international norms or jurisprudence has not raised objections in principle, though the relevance, proper use, and weight of such authority are issues that inevitably must be considered. *Mugesera v. Canada (Minister of Citizenship and Immigration)* presents a striking recent example.[11] The Supreme Court of Canada overruled in part its own prior decision in *R. v. Finta,*[12] basing its new decision on the desirability of conforming with decisions of the International Criminal Tribunals for Rwanda and the Former Yugoslavia:

> In the face of certain unspeakable tragedies, the community of nations must provide a unified response. Crimes against humanity fall within this category. The interpretation and application of Canadian provisions regarding crimes against humanity must therefore accord with international law. Our nation's deeply held

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9 *E.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982, ch. 11 (UK) (The federal government frequently relies upon this for partial implementation of Canadian obligations under human rights treaties.); GAOR, Human Rights Comm., *Core Document Forming Part of the Reports of States Parties: Canada*, ¶ 137, U.N. Doc. HRI/CORE/1/Add.91 (1998) .

10 *See* G. VAN ERT, *supra* note 6, at 238–52 .

11 [2005] 2 S.C.R. 100, 2005 SCC 40 (Can.).

12 [1994] 1 S.C.R. 701 (Can.).

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> commitment to individual human dignity, freedom and fundamental rights requires nothing less.[13]

Mugesera is no doubt the high-water mark, but it serves to illustrate the openness of Canadian courts to not only considering, but relying upon, international law in proper cases.

A second notable difference between Canadian and U.S. approaches to international legal questions arises because Canadian law recognizes no doctrine by which courts defer to governmental interpretations of international legal questions, including the meaning of treaties. Rather, Canadian courts appear to regard international legal questions as just that—legal questions for determination by courts.[14] I am not aware of any case in which a Canadian court expressly states that the submissions of the federal government on a question of international law ought to be deferred to. To the contrary, Canadian courts have repeatedly considered and decided upon such questions themselves—to be sure, with assistance of government counsel—but without any suggestion that they give greater weight to the government's position compared to opposing views simply because the arguments came from the government.

In contrast to the orthodox view that treaties take no direct effect in Canadian law, the Canadian approach to customary international law follows the English example. Customary international law is said to be directly incorporated by the common law, without the need for legislative intervention but subject to conflicting domestic litigation. Thus, if a litigant can establish before a Canadian court that a given proposition represents a rule of customary international law, and is not ousted by express statutory provision, she may proceed to rely on that rule as if it were a common law rule. The similarity between the English and Canadian positions on this point was expressly invoked by Mr. Justice Rand, who wrote in *Municipality of Saint John v. Fraser-Bruce Overseas Corp.*:

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13 *Mugesera*, 2 S.C.R. at 178.

14 At least that is the substantive approach shown by Canadian courts. Despite this, many courts in recent years have tolerated evidentiary procedures that permit parties effectively to make legal submissions by means of expert opinions on international legal controversies. There is judicial authority against this approach, which is out of keeping with the general Canadian treatment of international law as law, not fact. See the discussions in Frédéric Bachand, *The "Proof" of Foreign Normative Facts Which Influence Domestic Rules*, 43 OSGOODE HALL L.J. 269 (2005); G. van Ert, *The Admissibility of International Legal Evidence*, 84 CANADIAN B. REV. 31 (2005).

> If in 1767 Lord Mansfield, as in *Heathfield v. Chilton* [(1767), 4 Burr. 2015, 98 E.R. 50], could say, "The law of nations will be carried as far in England, as any where", in this country, in the 20th century, in the presence of the United Nations and the multiplicity of impacts with which technical developments have entwined the entire globe, we cannot say any thing less.[15]

The incorporation doctrine may be more remarkable in theory than in practice. Only a handful of Canadian cases have recognized rules of customary international law as decisive in the outcome of disputes, possibly for several simple reasons. First, not many rules of customary international law have relevance to domestic legal disputes. Customary rules tend to define the rights and powers of states against other states. Second, proving support for a supposed custom by the required degree of state practice and *opinio juris* is particularly difficult in an Ontario or Saskatchewan trial court. Third, rules of custom enter Canadian law through the common law and are therefore susceptible to legislative curtailment. Where an alleged custom is contrary to an existing Canadian statute, its incorporation by the common law is preempted (or at least made purely academic) by that legislative fact.

III. JUDICIAL INTERPRETATION OF TREATIES

While no description of Canadian reception law can ignore custom, by far the more significant legal questions arise from the interaction between Canada's treaty obligations and its domestic laws, whether constitutional, statutory, or common. Partly due to the incorporation of custom, Canada's reception scheme is not as dualist as the orthodox approach to treaties may suggest. But the more important qualification of Canada's dualist stance, in my view, arises from Canadian judicial interpretive practices. For every Canadian decision affirming that treaties are not a source of law, often in the same decision, there is another argument that supports the counter proposition that Canadian courts strive to interpret domestic laws in conformity with the state's international legal obligations.

The interpretive rule for conformity with international legal obligations is most usually described as a rebuttable presumption—an obstacle that a party who seeks to advance an internationally non-compliant interpretation of a given Canadian legal norm must overcome. The most remarkable Canadian description of this presumption is that of

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15 [1958] S.C.R. 263, 268–69 (Can.).

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Mr. Justice Lebel for the majority of the Supreme Court of Canada in the recent decision of *R. v. Hape*:

> It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation.[16]

This passage makes a number of important points about the Canadian interpretive approach with respect to international law. To begin, the presumption of conformity is characterized as a "judicial policy," or as an earlier Supreme Court decision described it, the "duty of the Court" to construe a statute "with a view to fulfilling Canada's international obligations."[17] This language suggests that an absence of positive legislative intent to conform to international law is not decisive, nor even relevant. A second notable aspect of this passage is its description of international legal values and principles as part of the context in which statutes are enacted. Canadian courts take a contextual

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16 [2007] 2 S.C.R. 292, 2007 SCC 26 at 53 (Can.) (citation omitted).

17 *R. v. Zingre*, [1981] 2 S.C.R. 392 at 409–10 (Can.).

approach to statutory interpretation whereby the words of an enactment are "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[18] Under such an approach, treaties or other sources of international law might be regarded as external interpretive aids of questionable legitimacy. Against this view, the passage quoted above characterizes international law as a contextual factor to be considered together with the enactment's express terms, scheme, and object. International law is part of the interpretive exercise.

Finally, the passage from *Hape* quoted above affirms that the presumption of conformity is rebuttable. This must be so, for it is an unwritten constitutional principle (again inherited from English law) that Canadian legislatures are sovereign, empowered to legislate on any matter and not to be gainsaid by any other body.[19] In Canada this sovereignty is massively qualified by the written constitution, which imposes a variety of jurisdictional limits on Parliament and the provincial legislatures, limits enforced by the judiciary. However, Canadian legislatures remain omnipotent and omnicompetent in those areas not subject to constitutional review, such as international law. As a practical result a litigant may not seek judicial review of a Canadian statute solely on the basis that it is contrary to international law; there being no power in a Canadian court to control an internationally unlawful legislative act. It follows that the presumption of conformity with international law is a rebuttable one. But what must a litigant, or a legislature, do to rebut the presumption? The quoted passage states that parliamentary sovereignty requires courts to give effect to statutes that demonstrate "unequivocal legislative intent to default" on the state's international obligations.[20] That appears to be a very high standard. Certainly there are very few decided cases in which Canadian courts have held that the presumption of conformity with international law was rebutted by express legislative action.[21]

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18 *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, ¶ 21 (Can.) (citing ELMER DRIEDGER, CONSTRUCTION OF STATUTES 87 (2d ed. 1983)).

19 ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39–40 (10th ed., Macmillan 1959).

20 *Hape*, 2 S.C.R. at 53.

21 A notorious instance is *Coop. Comm. on Japanese Canadians v. Attorney Gen. for Canada*, [1947] A.C. 87 (P.C.) (Can.), in which the Privy Council upheld the forcible removal of "persons of the Japanese race" from Canada to Japan, rejecting the appellants' argument that the legislation enabling the removals must be construed as authorizing only orders consistent with accepted principles of international law, and that the removals were contrary to international law. The Privy Council found the presumption to be rebutted by war-time conditions.

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IV. CONCLUSION

The vigour accorded to the presumption of conformity in *R. v. Hape* (and other cases) puts into question the orthodox account of treaties in Canadian law. While it is accurate in many respects to say that the Crown is not a source of law, and thus Canadian treaty obligations are not law, the presumption of conformity clearly accords some legal weight to treaties by the interpretive influence they enjoy. Where two interpretations of a given statutory provision are available, and the court opts for the interpretation that best conforms to a treaty to which Canada is a party, the treaty (and the executive action by which it was concluded) is surely being accorded some legal significance. The inevitable conclusion, in my view, is that description of Canada as a dualist jurisdiction is a convenient shorthand, but also an over-simplification.[22]

[22] I respectfully agree with the observation of Mr. Justice Pigeon, dissenting, in *Capital Cities Commc'ns, Inc. v. Canadian Radio-Television Comm'n*, [1978] 2 S.C.R. 141, 188 (Can): "It is an oversimplification to say that treaties are of no legal effect unless implemented by legislation."