

Enhancing the Implementation of Human Rights Treaties in Canadian Law: The Need for a National Monitoring Body¹

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In Canada, many international treaties have been ratified by the government. Nevertheless, similar to other countries with Westminster-style democratic systems, those treaties have no direct effect on domestic law. Accordingly, their explicit incorporation into national law is an essential requirement. This prerequisite may lead to many unrecognized human rights treaties in Canada. As a result, at a domestic level, private actors cannot base any claim on the grounds of human rights treaties that have been ratified but not implemented through legislation. Therefore, the incorporation of international human rights treaties in Canadian domestic law is essential to provide Canadians with easy and adequate access to justice. The continuing absence of their incorporation in Canadian law may hamper Canadian efforts to fulfill international obligations. A monitoring body may stimulate compliance with international obligations, and ensure that Canadian citizen rights are not compromised. In this article, the authors argue that Canada cannot afford to adopt such principles as the presumption of conformity and the legitimate expectations doctrine that are characterized by unpredictable outcomes. The aim of this article is to propose the creation of a domestic body that would monitor the implementation of human rights treaties ratified by Canada. The proposed public body would take the form of an ombudsperson, a commissioner or a parliamentary committee.

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Au Canada, tout comme dans d'autres États suivant le modèle constitutionnel britannique, les traités internationaux, même ratifiés, n'ont pas d'effet direct en droit interne. Par conséquent, les traités doivent être incorporés avant de devenir une composante du droit national. Ainsi, de nombreux traités ratifiés par le Canada, notamment ceux portant sur les droits de la personne, demeurent sans effet, et de nombreux Canadiens se retrouvent privés de recours en vertu des traités. Dans ces conditions, l'incorporation en droit interne de ces traités ratifiés par le Canada constitue un besoin pressant afin d'assurer à ses citoyens un accès facile et effectif aux droits qu'ils prévoient. Une institution indépendante pourrait stimuler la mise en œuvre de ces accords, afin de permettre au Canada de respecter ses engagements et maintenir sa réputation internationale. Les auteurs suggèrent que le Canada ne peut pas se permettre d'adopter le principe de la présomption de conformité ou celle de l'expectative légitime dont l'application mène à des résultats imprévisibles. Cet article propose la création d'une institution nationale pour superviser la mise en œuvre des traités ratifiés par le Canada en matière des droits de la personne qui pourrait prendre la forme d'un ombudsman, d'un commissaire au sein du bureau du Vérificateur Général du Canada, ou encore d'un comité parlementaire.

I. Introduction

As a sovereign State endowed with an international legal personality, Canada is free to enter into treaties with one or more states or with international organizations. Like many other Commonwealth states, the treaty-making decision power remains with the executive branch of the government in its capacity as the unique holder of authority to represent the State in the international sphere.⁴ According to a long-standing constitutional tradition in Canada, there is “no legal obligation on the executive [branch of government] to secure the consent or approval of Parliament prior to treaty ratification.”⁵ In contrast, on a domestic level, “Parliament is the ultimate law-making authority in a Westminster-style democracy.”⁶

In France, like other monist states, treaties are automatically granted the force of law without the requirement of any further domestic formal recognition. Generally, in these states, there is a constitutional provision that declares a ratified treaty to become part of national law. However, Canada’s legal system refuses to recognize treaties as being a direct source of domestic law unless they are incorporated⁷ by an act of Parliament.⁸ In other words, unincorporated treaties are not binding on Canadian national institutions, though at the international level they bind Canada as a state party. The treaties

⁴ However, some exceptions exist. For example, in the United States, the executive branch of the government shares the treaty-making power with the Senate.

⁵ Joanna Harrington, “Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament” (2005) 50 McGill LJ 465 at 468 [Harrington, “Democratic Deficit”].

⁶ *Ibid.* Nevertheless, it is noteworthy that since 2008, the government has adopted a policy of tabling signed treaties in Parliament. The purpose of that policy is “to ensure that all instruments governed by public international law, between Canada and other states or international organizations, are tabled in the House of Commons following their signature or adoption by other procedure and prior to Canada formally notifying that it is bound by the Instrument.” (Canada, Department of Foreign Affairs and International Trade, *Policy on Tabling of Treaties in Parliament* (January 2008), s 2, online: Canada Treaty Information <<http://www.treaty-accord.gc.ca>>.) According to Professor Harrington, this policy of treaty tabling is by no means an innovation in Canada. She mentions that it existed from 1926 to 1966 when, on the initiative of former Prime Minister William Mackenzie King, “it was the practice in Canada for all important treaties to be submitted to Parliament for approval prior to ratification.” (Harrington, “Democratic Deficit”, *supra* note 5 at 476.) See also Peter W Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 14 November 2011), 5th ed (Toronto: Carswell, 2007) vol 1 at 11-5. However, the executive branch of the government still has preeminent powers over the treaty-making process. Thus, section 6.3 of the *Policy on Tabling of Treaties in Parliament*, *supra* provides for many exceptions, especially where the treaty’s ratification is deemed to be urgently required.

⁷ In this article, we use the word “incorporation” to mean the inclusion of a treaty in an Act of Parliament in order to make the content of the treaty part of the domestic legal order.

⁸ *Capital Cities Communications Inc v Canadian Radio-Television Commn*, [1978] 2 SCR 141, 81 DLR (3d) 609. See also Hogg, *supra* note 6 at 11-5-6; Gib van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin Law, 2008) at 229.

which necessitate change to Canadian law must be followed by the enactment of a statute in order to produce effects in domestic legal order.⁹

The reasons underlying this legislative requirement to confer legal effects of treaties on domestic law have long-standing historical roots. While the Crown has the power to make treaties with foreign states, the Royal legislative prerogative was abolished a long time ago.¹⁰ Therefore, insofar as it is only Parliament which has domestic law-making authority, it would be considered an usurpation of power if the simple action of the ratification of treaties by the Executive were to be considered as sufficient to create legislation at the domestic level.¹¹

The term 'unincorporated treaties' refers to all treaties that Canada has previously signed or ratified, but that have not yet been incorporated into domestic law through incorporating legislation adopted by Parliament. The incorporation of treaties provides Parliament with domestic authority ensuring that all actions and decisions of domestic institutions and officials are in compliance.¹²

The method of incorporation of international treaty obligations into domestic law is not always consistent. Kindred explains that the incorporation of treaties within domestic law is carried out according to two methods:

The most direct way is a simple clause in the body of the implementing act stating that a certain treaty, or parts of it, shall have the force of law in Canada.... Sometimes the terms of the relevant treaty are incorporated simply by reference. More often, as in all these instances, the relevant treaty provisions are annexed in a schedule to the act. ... The second way that treaties are statutorily implemented in Canada is by incorporating the substance of an international convention directly into the sections of a statute. This objective may be achieved either by using the exact provisions of the relevant articles of the treaty in question, or by using similar language which has the same intent as the treaty.¹³

⁹ Hogg, *ibid* at 11-5.

¹⁰ Van Ert, *supra* note 8 at 231.

¹¹ David Dyzenhaus, Murray Hunt & Michael Taggart, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1:1 OJLJ 5 at 5: "[w]hen the source of the international obligations constraining executive discretion is a convention ratified by the executive, but not incorporated by parliament into legislation, traditional alarm bells ring. Such 'backdoor' incorporation seems to amount to executive usurpation of the legislature's monopoly of law-making authority, or to judicial usurpation of the same, or to a combination of both". See also 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 31 [De Mestral & Fox-Decent, "Implementation and Reception"].

¹² Denis Galligan & Deborah Sandler, "Implementing Human Rights" in Simon Halliday & Patrick Schmidt, eds, *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Portland, OR: Hart, 2004) 23 at 29.

¹³ Hugh M Kindred, "The Use of Unimplemented Treaties in Canada: Practice and Prospects in the Supreme Court" in Chi Carmody, Yuji Iwasawa & Sylvia Rhodes, eds, *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Baltimore: American Society of International Law, 2003) 3 at 8-9. For more details about treaty incorporating means, see Armand de Mestral & Evan Fox-Decent, "Rethinking the

Despite the fact that Canada is supposed to ratify international treaties, after taking necessary measures to ensure the enforcement of its obligations in domestic law, this has not always been the case.¹⁴ Furthermore, not all treaties need to be incorporated via the legislative branch. For example, as Kindred points out, “a whole class of treaties concerning inter-state relations can simply be executed by the government of Canada pursuant to its powers under the Constitution to conduct foreign affairs. These kinds of treaties ... are of no concern to internal Canadian law.”¹⁵

Given the structure of the Canadian federal system, the process of incorporating treaties is somewhat complicated. While it may appear straightforward for the executive branch of the government to initiate the enactment of a statute incorporating treaties, the process is more complicated in cases in which international treaties encroach on a subject matter that falls, in part or in whole, within provincial jurisdiction. It was held in the *Labour Conventions Case* that, where the subject matter of a treaty is outside the federal government’s jurisdiction, legislative assent of provincial legislatures is required.¹⁶ Hence, if a ratified treaty requires the involvement of the provinces in order to be implemented, provincial political reasons may impede the enactment of any new legislation. This is the case particularly where provinces are not involved in the ratification process.¹⁷

The provinces are not, however, the only source of impediment to incorporating legislation. It may well be the case that the federal government considers Canadian legislation to be in compliance with a given treaty and that further enactment of a new incorporating statute would be, practically speaking, unnecessary.¹⁸ Experience has shown that Canada’s international human rights treaty obligations can be considered as already implemented

Relationship between International and Domestic Law” (2008) 53:4 McGill LJ 573 at 617-22 [De Mestral & Fox-Decent, “Rethinking the Relationship”]. See also France Houle, “La légitimité constitutionnelle de la réception directe des normes du droit international des droits de la personne en droit interne canadien” (2004) 45:2 C de D 295 at 297-98.

¹⁴ For example, the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 148, 37 ILM 22, was ratified without necessary measures to ensure its full enforcement in domestic law.

¹⁵ Kindred, *supra* note 13 at 7.

¹⁶ *Attorney-General for Canada v Attorney-General for Ontario et al*, [1937] AC 326, [1937] 1 DLR 673 (PC) [*Labour Conventions Case*].

¹⁷ Although it is argued that the federal government usually consults the provincial governments to ensure that they are willing to pass the required legislation (See Elisabeth Eid & Hoori Hamboyan, “Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical” in Fitzgerald, *supra* note 10, 449), there is no assurance that this promise will be systematically kept, especially when prior to the enactment of a required legislation, a provincial government loses elections.

¹⁸ Van Ert, *supra* note 8 at 247-48.

through the *Canadian Charter of Rights and Freedoms*¹⁹ as well as through the publicity and educational activities of government agencies. Yet, as noted, in the absence of a specific treaty incorporating legislation, the general trend is that treaties are not legally enforced on a national level. Effectively, this means that no domestic human rights claims may be based on treaties before domestic courts. Only the incorporation of a treaty into domestic law enables private persons to have access to domestic remedies in cases of violation of legal rights which have been created by that treaty.

Although the domestic incorporation of treaties is a requirement, the Supreme Court of Canada has referred to some locally unincorporated human rights treaties from time to time. This has been done by virtue of the Doctrine of Legitimate Expectation,²⁰ or by considering the values enshrined in them during the process of statutory interpretation.²¹ Nevertheless, without an incorporating statute to give legal effect to international treaties within the domestic legal sphere, there is no evidence that Canadian courts are compelled to make their decisions correspond with Canada's international obligations.²² Notwithstanding some criticisms,²³ a considerable trend in Canadian legal practice takes the position that, although some provisions of a treaty may be encompassed by domestic legislation, that treaty remains unincorporated in the absence of an explicit incorporating statute.

Canada has ratified or acceded to all of the six core international human rights treaties, namely the *International Covenant on Civil and Political Rights*,²⁴ the *International Covenant on Economic, Social and Cultural Rights*,²⁵ the *International Convention on the Elimination of All Forms of Racial Discrimination*,²⁶

¹⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [Charter].

²⁰ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 119, [2002] 1 SCR 3 [Suresh].

²¹ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [Baker cited to SCR]. In this case, the Supreme Court highlighted the fact that the ratification by Canada of the *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990), testified to its commitment towards children's protection values enshrined in that convention. See also *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45.

²² See *Ahani v Canada (Attorney General)* (2002), 58 OR (3d) 107, 208 DLR (4th) 66 (CA) [Ahani (CA)]; *Ahani v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 SCR 72 [Ahani]; *Bouzari v Islamic Republic of Iran* (2004), 71 OR (3d) 675, 243 DLR (4th) 406 (CA). See also Stéphane Beaulac, "National Application of International Law: The Statutory Interpretation Perspective" (2003) 41 Can YB Int'l L 225 at 259.

²³ Joanna Harrington, "Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection" (2003) 48:1 McGill LJ 55 [Harrington, "Punting Terrorists"]; Hugh M Kindred & Phillip M Saunders, eds, *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed (Toronto: Emond Montgomery, 2006) at 206, 234-36; De Mestral & Fox-Decent, "Rethinking the Relationship", *supra* note 13 at 623-25.

²⁴ 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976).

²⁵ 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976).

²⁶ 7 March 1966, 660 UNTS 195, Can TS 1970 No 28 (entered into force 4 January 1969).

the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*,²⁷ the *Convention on the Rights of the Child*,²⁸ and the *Convention on the Elimination of All Forms of Discrimination against Women*.²⁹ None of them have been specifically incorporated into Canadian law.³⁰ As human rights treaties are designed to grant legal rights to citizens and residents, the absence of domestic legislation giving legal effect to them may result in the denial of justice because no legal claims may be made in reference to them. Furthermore, the lack of local incorporation of human rights treaties may undermine the general status of the rule of law in Canada.

We propose the establishment of a monitoring body which would have as its principle duty the task of overseeing Canada's compliance with all international human rights treaties, including the incorporation of these treaties in Canadian law. At the international level, many human rights treaties and conventions generally create institutional mechanisms to oversee compliance by state parties.³¹ For example, Canada may face complaints lodged before international human right bodies where there is a failure to perform its treaty obligations at the domestic level. Canada is subject also to the United Nations Human Rights Council Universal Periodic Review which provides a mechanism for every country to have its human rights record reviewed and critiqued by its peers. However, there is no international process that dictates to sovereign states how to perform their human rights treaty obligations effectively. In addition, the federal government is suspected of proceeding in a hidden manner that leaves civil society organizations unable to contribute adequately to the United Nations review process.³² As such, this international monitoring mechanism cannot ensure effective compliance with human rights obligations by Canada on a domestic level. Moreover, the Universal Periodic Review is considered to take place in a climate of dissent and division within the Human Rights Council, a body perceived as politically directed and controlled by states with distinct ideological goals and socio-political objectives.³³

²⁷ 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36 (entered into force 26 June 1987).

²⁸ *Supra* note 21.

²⁹ 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31 (entered into force 3 September 1981).

³⁰ Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, (The Hague: Kluwer Law International, 2002) at 124-25.

³¹ See Andreas Zimmermann, "Dispute Resolution, Compliance Control and Enforcement in Human Rights Law" in Geir Ulfstein, ed, *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge, UK: Cambridge University Press, 2007) 15 at 22-37.

³² See Foreign Affairs, *Periodic Review*, *infra* note 116.

³³ Joanna Harrington, "Canada and the United Nations Human Rights Council: Dissent and Division" (2010) 60 UNBLJ 78.

Assuming that complaints that are made by Canadian citizens and residents are reviewable by those international human rights treaty-monitoring bodies, the cost associated with such an international litigation system may discourage many individuals from resorting to those mechanisms. It is still the case that any decision made by an international human rights treaty-monitoring body may not be enforced on a domestic level.³⁴ Consequently, there is a pressing need for the creation of such a mechanism at a national level in Canada.

There remains a great deal of uncertainty surrounding the question as to whether or not a given treaty has been incorporated by the Canadian legal system.³⁵ The purpose of this article is not to examine whether a specific international treaty has or should be incorporated into Canadian domestic law. Instead, this article surveys the issue broadly and advocates for the creation of a monitoring mechanism. This mechanism would be designed to oversee the enforcement process of Canada's obligations under human rights treaties, starting from the stage of ratification and continuing until the enactment of domestic incorporating legislation. The proposed monitoring body would have the necessary power to engage in requisite discussions with the provinces and territories in order to obtain full implementation of human rights treaties where the subject matter of those treaties would have a direct effect on their jurisdiction.

Part I of this article deals with the consequences of unincorporated human rights treaties on Canadian citizens. We argue that Canada's failure to incorporate human rights treaties in domestic law may result in a great cost for its citizens. The absence of incorporating legislation of human rights treaties could deprive Canadian citizens of the right to a remedy. We argue further that no interpretive principle functions to mitigate the possible detrimental effects of leaving a human rights treaty unincorporated. Part II proposes the establishment of a monitoring body to expedite the implementation process of the treaty into domestic law. Specifically, the public body monitoring the implementation of international human rights treaties would include a form of ombudsperson, commissioner for treaty affairs or House of Commons committee.

Given the growing number of current and anticipated unincorporated human rights treaties in Canada, it is clear that Parliament, on its own, cannot adequately handle the domestic incorporation of all aspects of Canada's human rights treaty obligations. We argue that a monitoring mechanism would aid Parliament in fostering effective incorporation of human rights treaties, as

³⁴ *Ahani (CA)*, *supra* note 22 at paras 31-41.

³⁵ See e.g. Van Ert, *supra* note 8 at 238-50; De Mestral & Fox-Decent, "Rethinking the Relationship", *supra* note 13 at 623; Stephen J Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 UNBLJ 11 at 14-17 [Toope, "Inside and Out"].

well as ensuring that Canadians are aware of their ability to enforce their rights as granted by the ratification of human rights treaties by the Executive.

II. Consequences of Unincorporated Human Rights Treaties on Canadian Citizens

In 1928, the Permanent Court of International Justice (PCIJ) held that even when international agreements do not create direct rights and obligations toward private persons in the domestic sphere, their very object may create some rules providing for individual rights and obligations enforceable by national courts.³⁶ While the Court of International Justice system that succeeded the PCIJ does not adhere to the doctrine of *stare decisis*, this finding has never been challenged. If the parties to human rights treaties are states bearing an obligation to respect and ensure the fulfilment of various commitments, the objective of many human rights treaties is ultimately to grant rights to individuals. States that are parties to human rights treaties assume obligations to take action domestically so that individuals can benefit from the rights the treaties provide – including the possibility of lodging a claim for a state’s failure to fulfil its commitments. International human rights treaties that impose obligations on states to take domestic action can enable individuals to pursue their claims under domestic law.

International treaties cannot, by themselves, have a direct effect on the Canadian legal system unless they are domestically implemented. In the absence of incorporating legislation, those treaties cannot benefit private actors since domestic remedies are unavailable when treaties remain unincorporated. However, in some circumstances, courts have recognized that even though unincorporated treaties may serve as guidance for tribunals tasked with interpreting domestic provisions, in practice this is a highly unpredictable process. The following sections survey these issues in greater detail.

A. Unavailability of Domestic Remedies in Cases of Unincorporated Human Rights Treaties

In the past, international law was applied only to states or international organizations created by states. Since private actors did not have the attributes necessary to participate in the creation of treaties, they would not have been directly affected by the rights and obligations created by them. Private persons were regarded as mere objects of international law.³⁷ The rationale was that,

³⁶ *Jurisdiction of the Courts of Danzig* (1928), PCIJ (Ser B) No 15 at 17-18.

³⁷ Paul Sieghart, *The International Law of Human Rights* (Oxford, UK: Oxford University Press, 1983) at 16-17; Krzysztof Drzewicki, “The Status of International Human Rights Instruments in Domestic Law”

insofar as international responsibility is mainly held by states, the individual was not affected by international law, except indirectly through the state.³⁸

This view of international law has evolved considerably. Since the end of the 19th century, states have realized that maintaining international peace and security requires that, in certain circumstances, private actors be directly subject to international law. By way of example, in order to combat international piracy, states decided to impose international legal duties directly on individual pirates. Pirates were no longer considered 'objects' of international law, and states were authorized to capture them and hold them legally responsible for the crimes they committed.³⁹

In addition, the international community recognized that private actors' rights also were worthy of strong protection under international law. In order to avoid the repetition of heinous crimes, such as those that occurred before and during the Second World War, international instruments were drafted to acknowledge that individuals were subjects of internationally protected rights.⁴⁰ By way of example, the *Charter of the United Nations* states that:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

...

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.⁴¹

While international law had, at first, been concerned only with the violation of foreigners' rights, international protection has been extended subsequently to nationals suffering from domestic mistreatments.⁴² Many international treaties are comprised of chapters aimed at directly providing certain rights to private persons with a particular emphasis on human rights.⁴³ As Slaughter

in Allan Rosas, ed, *International Human Rights Norms in Domestic Law: Finnish and Polish Perspectives* (Helsinki: Finnish Lawyers', 1990) 1 at 4.

³⁸ Julie Cassidy, "Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights" (2004) 9:9 *Deakin L Rev* 533 at 539.

³⁹ *Ibid* at 551.

⁴⁰ *Ibid* at 554.

⁴¹ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 55(c).

⁴² Louis B Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States" (1982) 32:1 *Am U L Rev* 1 at 4-5.

⁴³ Many treaties recognize the right of private persons to access international or national tribunals in order to hold a state or its agents liable for violations of international obligations. See e.g. *International Covenant on Civil and Political Rights*, *supra* note 24, art 2(3); Anne-Marie Slaughter & William Burke-White, "An International Constitutional Moment" (2002) 43:1 *Harv Int'l LJ* 1 at 14; Sangeeta Shah, "Seeking Remedies for Violations of International Humanitarian Law: *Markovic v Italy*" (2007) 7:2 *Hum Rts L Rev* 412; Sital Kalantry, "The Intent-to-Benefit: Individually Enforceable Rights Under International Treaties" (2008)

and Burke-White rightly point out, international law is now replacing the principle of “territorial boundaries inviolability” with the principle of “civilian inviolability”.⁴⁴

To enforce human rights at the international level, many states have created tribunals that function to provide aggrieved individuals an opportunity to obtain redress for injuries suffered following a breach of international obligations by a state.⁴⁵ This is true for states in Europe, America, Africa, and Asia. In addition to the tribunals created by individual states, the monitoring of core UN international human rights treaties is performed by special committees. The committees are comprised of independent experts and created in accordance with the provisions of the treaty that they monitor.⁴⁶

Insofar as private actors’ remedies are provided for either at the international level or at the domestic level,⁴⁷ many claims for violations of international treaties are likely to be brought before domestic tribunals. A great number of persons should be benefiting from access to domestic courts as granted to them pursuant to the rights enshrined in international human rights treaties. Domestic courts are the most competent bodies at enforcing an individual’s rights under international treaties. However, as already discussed, without the intervention of the legislative branch of government, which is regarded as the sole legitimate lawmaker at the domestic level, international treaties cannot have direct legal effect in Canada. Unfortunately, the enactment process of new legislation designed to incorporate international treaties into domestic law often has been unsatisfactory when it comes to human rights matters. The official justification for this is that Canadian law provides at least as much protection as international human rights treaties.⁴⁸ The *Charter*, as well as federal and provincial human rights statutes, are deemed to implement fully Canada’s international human rights obligations. Nevertheless, according to Almeida and Porret, this is not exactly true, especially in the case of economic, social, and cultural rights, as well as in matters relating to discrimination.⁴⁹

44:1 Stan J Int’l L 63; Sangeeta Shah, “From Westminster to Strasbourg: *A and Others v United Kingdom*” (2009) 9:3 Hum Rts L Rev 473.

⁴⁴ Slaughter & Burke-White, *ibid* at 13-14.

⁴⁵ Oscar Schachter, *International Law in Theory and Practice* (Boston: Kluwer Law International, 1995) at 239.

⁴⁶ For a list of the committees, see Office of the United Nations High Commissioner for Human Rights, “Human Rights Treaty Bodies: Monitoring the Core International Human Rights Treaties”, online: OHCHR <<http://www2.ohchr.org>>.

⁴⁷ See e.g. Rebecca J Cook, “State Responsibility for Violations of Women’s Human Rights” (1994) 7 Harv Hum Rts J 125 at 169; M Cherif Bassiouni, “International Recognition of Victims’ Rights” (2006) 6:2 Hum Rts L Rev 203.

⁴⁸ See e.g. *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416.

⁴⁹ Iris Almeida & Marc Porret, *Renewing Canada’s Commitment to Human Rights: Strategic Actions for at Home and Abroad* (Montreal: Rights & Democracy, 2004), online: Rights & Democracy, <<http://www.dd-rd.ca/>>

While one may argue that the economic, social and cultural rights found in the *International Covenant on Economic, Social and Cultural Rights*⁵⁰ are subject, by the very terms of the treaty, to the availability of resources, the precarious living conditions of some Canadians demonstrate bad faith on the part of the government.⁵¹

When legal practitioners try to ground claims on unimplemented human rights treaties, the courts are unwilling to give credence to these claims, citing the non-incorporation of those treaties on a domestic level.⁵² As a result, without an explicit act of a legislature designed to implement international treaties, Canadians cannot benefit from the remedies that they provide.⁵³ This appears to be contrary to the requirements of the principle of the rule of law as it implies, among other things, subjection to known legal rules as well as executive accountability to legal authority.⁵⁴

Some international treaties may yet grant protections or benefits to private actors in Canada, notwithstanding their lack of incorporation into domestic law. Whether or not this occurs depends on certain considerations, perhaps the most important of which is the process of statutory interpretation conducted

site/_PDF/publications/intHRadvocacy/canadaCommitment.pdf> (“[w]hile Canadian human right law exceeds international standards for some rights, this is not always the case. ... The Government of Canada has not consistently translated its international obligations into domestic law. ... [D]iscrepancies exist in terms of the scope and substance of actual human rights and in the remedies that are made available in instances of violations of these rights. This is especially true for economic, social and cultural rights, but also for civil rights such as the prohibition of discrimination based on social origin and the right to privacy” at 40-41).

⁵⁰ *Supra* note 25.

⁵¹ David R Boyd, “No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada” (2011) 57:1 McGill LJ 81.

⁵² *Baker*, *supra* note 21 at paras 69, 79; *Suresh*, *supra* note 20 at para 60. However, it is important to note that some authors rightly suggested the opposite approach arguing that even though there is no specific legislative transformation, if “Canadian law is in conformity with a treaty due to prior statutory, common law, or even administrative policy,” the treaty should be considered as “implemented for the purposes of domestic law”: Jutta Brunnée & Stephen J Toope, “A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts” in David Dyzenhaus, ed, *The Unity of Public Law* (Portland, OR: Hart, 2004) 357 at 363. See also Elizabeth Brandon, “Does International Law Mean Anything in Canadian Courts?” (2001) 11 JELP 399 at 401-07. For the contrary argument, see Beaulac, *supra* note 22 at 245-48.

⁵³ Almeida & Porret, *supra* note 49 (“[a] significant objective of international human rights is the genuine and practical implementation of the commitments of States to all human beings. Canadians tend to benefit on paper from a relatively high degree of protection of human rights due to ratification of international human rights instruments and the Canadian Charter of Rights and Freedom and the federal and provincials human rights laws. What is lacking, however, is the requisite domestic framework that would allow Canadians to realize their rights and give them effective and accessible remedies if and when their rights are violated.... [M]any international human rights treaties ratified by Canada do not benefit from implementing legislation. As a consequence, Canadians cannot request their courts to compel the Canadian governments (federal, provincial and territorial) to comply with their international obligations” at 39-40).

⁵⁴ *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 749-50, 19 DLR (4th) 1. See also *Re Resolution to amend the Constitution*, [1981] 1 SCR 753 at 805-06, 125 DLR (3d) 1.

by Canadian courts. Many recent cases however, have demonstrated that this process yields inconsistent and unpredictable results.

B. The Lack of Predictable Significance of Unincorporated Treaties During the Process of Statutory Interpretation

The dualist idea that a treaty must be incorporated by an act of Parliament in order to be introduced into Canadian law is largely accepted in the Canadian legal community.⁵⁵ However, there is no consensus, either in judicial practice or among scholars, about the real role and effect of unincorporated treaties during the process of statutory interpretation. Many recognize the relevance of the long-standing judicial rule of the Doctrine of the Presumption of Conformity. Simply put, the rule holds that Canadian domestic law should be construed to conform to Canada's international obligations. Those obligations may stem from either incorporated or unincorporated treaties. The real significance of this judicial rule in Canadian courts has been subject to various levels of appreciation and interpretation.⁵⁶

The evolution of the Doctrine of the Presumption of Conformity in the Canadian judicial process can be divided into three stages. The first stage encompasses the time before the Supreme Court's decision in *Baker*.⁵⁷ During this period, the principle requiring that Canadian law be interpreted in conformity with Canada's international obligations was not largely contested, even though it was not uniformly applied.⁵⁸ The second stage began with *Baker*. Rather than elaborating and explaining the real scope of the Presumption of Conformity rule, *Baker* created confusion. The third stage developed in the post-*Baker* period as further case law developed. Even now, there is uncertainty surrounding the exact importance and function of the Doctrine of the Presumption of Conformity in Canadian law.

i. The Doctrine of the Presumption of Conformity in the Pre-Baker Era

The Canadian roots of the Doctrine of Presumption of Conformity can be traced back to the *Arrow River* case of 1931.⁵⁹ Although the Ontario Court of Appeal was dealing with an international treaty that was not domestically incorporated in this case, the court construed a provision of domestic legislation

⁵⁵ See *Baker*, *supra* note 21 at paras 69, 79; *Suresh*, *supra* note 20 at para 60.

⁵⁶ Toope, "Inside and Out", *supra* note 35.

⁵⁷ *Baker*, *supra* note 21 at paras 69, 79.

⁵⁸ See John H Currie, *Public International Law*, 2d ed (Toronto: Irwin Law, 2008) at 254-55 [Currie, *International Law*].

⁵⁹ *Re Arrow River & Tributaries Slide & Boom Co*, [1931] 2 DLR 216, 66 OLR 577 (CA) [*Arrow River* cited to DLR].

in a narrow manner, holding that domestic legislation must be interpreted so as to avoid conflicts with international treaty obligations that are binding on Canada.⁶⁰ Even though the ruling was reversed by the Supreme Court of Canada,⁶¹ the decision left a significant mark on the Canadian approach to statutory interpretation. By way of example, in *Daniels v White*,⁶² the Supreme Court stated that Parliament is presumed not to legislate in breach of a treaty, or in any manner inconsistent with the comity of nations unless by a clear, unambiguous, and unmistakable intent.⁶³

Subsequent cases have inconsistently applied the Doctrine of Presumption of Conformity to instances of domestically incorporated and unincorporated international treaties.⁶⁴ In *Zingre*,⁶⁵ in accordance with the *Anglo-Swiss Treaty* of 1880,⁶⁶ Switzerland asked Canada to allow the investigating judges' commission to take testimony in Canada where crimes were allegedly committed by three Swiss nationals. The appeal before the Supreme Court of Canada sought to challenge the validity of the request. Although the *Anglo-Swiss Treaty* was unincorporated in domestic law, the Court ruled that,

in responding affirmatively to the request which has been made the Court will be recognizing and giving effect to a duty to which Canada is subject, by treaty, under international law. It is common ground that the treaty applies.... The Treaty of 1880 places Canada under a specific obligation to comply with the Swiss request. If Canada denies the Swiss request it will be in breach of its international obligations. By the terms of the Treaty, orders for commission evidence, as requested by the Swiss, are part and parcel of the surrogate criminal proceedings in Switzerland.⁶⁷

In *Ordon Estate v Grail*,⁶⁸ the issue concerned a statute which provided for two different limitation periods with respect to claims arising over fatal accidents involving boat collisions. In accordance with an international treaty, the Court dismissed the appeal seeking the application of a shorter limitation period:

In the absence of any valid reason to justify applying a shorter limitation period which would have the effect of barring the plaintiffs' claims, the plaintiffs should have the benefit of the more favourable limitation period.... [A]pplying the one-year limitation period in s. 649 to all fatal accident claims stemming from boating collisions would place Canada in breach of its international treaty obligations. Although

⁶⁰ *Ibid* at 217.

⁶¹ *Arrow River & Tributaries Slide & Boom Co Ltd v Pigeon Timber Co Ltd*, [1932] SCR 495, [1932] 2 DLR 250.

⁶² *Daniels v White and The Queen*, [1968] SCR 517, 2 DLR (3d) 1 [*Daniels v White* cited to SCR].

⁶³ *Ibid* at 541, Pigeon J, concurring.

⁶⁴ Currie, *International Law*, *supra* note 58 at 255.

⁶⁵ *Zingre v The Queen et al*, [1981] 2 SCR 392, 127 DLR (3d) 223 [*Zingre* cited to SCR].

⁶⁶ *Treaty of Extradition, Switzerland and United Kingdom*, 26 November 1880, 71 BFSP 54, cited in *Zingre*, *ibid* at 409 [*Anglo-Swiss Treaty*].

⁶⁷ *Zingre*, *ibid* at 409-10.

⁶⁸ *Ordon Estate v Grail*, [1998] 3 SCR 437, 166 DLR (4th) 193 [cited to SCR].

international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations....⁶⁹

As already noted, the Doctrine of Presumption of Conformity requires that any interpretation of national law be made in conformity with Canada's international obligations – except in the event of an unequivocal legislative intention to the contrary.⁷⁰ The rationale underlying this approach is 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.”⁷¹ In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of its obligations both as a signatory of international treaties, and as a member of the international community.⁷²

It has been argued that the rule stemming from the Doctrine of Presumption of Conformity should apply only in cases of incorporated treaties; any other approach would undermine the Canadian dualist system by giving “force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.”⁷³ The proponents of this view base their argument on the Court of Appeal ruling in *Salomon*;⁷⁴ however, this is a very conservative approach. Another approach is to recognize that since both incorporated and unincorporated treaties are internationally binding on Canada, they both require equal consideration. The reasonable approach would be to treat an incorporated treaty as a source of mandatory domestic legal norms and to apply the Doctrine of Presumption of Conformity to unincorporated treaties;

⁶⁹ *Ibid* at paras 136-37 [citations omitted].

⁷⁰ *R v Hape*, 2007 SCC 26 at para 53, [2007] 2 SCR 292 [*Hape*]; Brunnée & Toope, *supra* note 52 at 363; René Provost, “Judging in Splendid Isolation” (2008) 56:1 Am J Comp L 125 at 153.

⁷¹ *Hape*, *ibid*.

⁷² *Ibid*; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis Canada, 2008) at 539.

⁷³ *Baker*, *supra* note 21 at para 80, Cory & Iacobucci JJ; See also Currie, *International Law*, *supra* note 58 at 255.

⁷⁴ *Salomon v Commissioners of Customs and Excise* (1966), [1967] 2 QB 116 at 143, [1966] 3 All ER 871 (CA) [*Salomon*] (“the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty’s Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated..., the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty’s treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties.... But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law...” [citations omitted]).

the same would apply to other international norms which do not explicitly contradict Canadian domestic law. A legislatively incorporated treaty should even prevail over contrary domestic law because a treaty is usually designed to bring a necessary correction to domestic law.

Some commentators have noted that the Doctrine of Presumption of Conformity is likely to resolve many of the problems related to the relationship between national and international law.⁷⁵ Unfortunately, this doctrine has not been uniformly applied by Canadian courts.⁷⁶ Moreover, this rule was weakened by *Baker*.

ii. *Baker Undermines the Presumption of Conformity Rule*

Although it has been more than ten years since the Supreme Court of Canada's decision in *Baker*, it remains one of the most discussed decisions by Canadian scholars. *Baker* was an opportunity for the Supreme Court to discuss explicitly the real significance of a human rights treaty which is not incorporated in Canadian law. The Court examined an appeal seeking to overturn an immigration officer's decision relating to a deportation order. The appellant, who had Canadian-born dependent children, grounded her argument on the premise that the best interests of the children should be of prime importance, a principle enshrined in the *Convention on the Rights of the Child*.⁷⁷ Ultimately, because the *Convention on the Rights of the Child* had not been incorporated specifically through Canadian domestic legislation, even though it was ratified and mostly implemented in federal and provincial law, the Federal Court of Appeal refused to give effect to the appellant's argument. The Court held that doing so would interfere with the separation of powers between the executive branch and the legislative branch of government. At the outset, the Court acknowledged the long-existing principle that unincorporated treaties have no direct application in Canadian law; however, it added that

the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.... The legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.... The values and principles of the Convention recognize the importance of being attentive to the rights and best

⁷⁵ See e.g. Gibran van Ert, "Using Treaties in Canadian Courts" (2000) 38 Can YB Int'l L 3 at 28; De Mestral & Fox-Decent, "Implementation and Reception", *supra* note 11; De Mestral & Fox-Decent, "Rethinking the Relationship", *supra* note 13 at 598.

⁷⁶ See e.g. Stephen J Toope, "Re Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada" (1999) 93 Am J Int'l L 519 at 523, n 25.

⁷⁷ *Supra* note 21, art 3(1) ("[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").

interests of children when decisions are made that relate to and affect their future.⁷⁸

Rather than discussing the conformity of domestic law with international law, the majority in *Baker* referred to respect for “the values and principles” enshrined in international law during the interpretation process of domestic law. Although some scholars interpreted this approach as the equivalent to the application of the Doctrine of Presumption of Conformity,⁷⁹ others consider the reasoning as a regrettable underestimation of it. In reality, the Court unnecessarily distinguished between provisions of the law versus values of the law instead of having recognized and allowed recourse to both. By drawing that distinction, the Court “implied that Canada’s international obligations, as expressed in the provisions of the [unincorporated] *Convention*, are not covered by the presumption of statutory conformity.”⁸⁰ Rather than holding that, to the extent possible, statutes should be construed in conformity with Canada’s international legal obligations, the Court ruled that international law “may help inform” – which is something less than what is required by the Doctrine of the Presumption of Conformity. In short, the Court treated the *Convention on the Rights of the Child* like a non-binding international norm.⁸¹

Although it has been said that *Baker* has altered the dualist approach of the Canadian legal system with respect to treaty matters;⁸² in practice, the Supreme Court may have been dealing less with treaty law than with customary international law, despite the fact that customary international law was not invoked.⁸³ To the extent that customary norms are automatically incorporated into domestic law, had the Supreme Court treated the expression “best interests of the child” as one of the components of customary international law, there would have been no need to refer to the Doctrine of Presumption of Conformity.⁸⁴ Even if this approach appears convincing, it does not resolve the problem of determining the precise scope of the Doctrine of the Presumption of Conformity that remains surrounded by uncertainty even today.

⁷⁸ *Baker*, *supra* note 21 at paras 70-71, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths Canada, 1994) at 330.

⁷⁹ De Mestral & Fox-Decent, “Rethinking the Relationship”, *supra* note 13 at 598.

⁸⁰ Brunnée & Toope, *supra* note 52 at 371.

⁸¹ *Ibid* at 371-73.

⁸² John H Currie, Craig Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* (Toronto: Irwin Law, 2007) at 115.

⁸³ Provost, *supra* note 70 at 137.

⁸⁴ Toope, “Inside and Out”, *supra* note 35 at 20; Provost, *ibid*.

iii. *The Continuing Uncertainty Around the Doctrine of the Presumption of Conformity After Baker*

The *Baker* approach regarding the Doctrine of the Presumption of Conformity has been adopted in a large number of cases handled by the Supreme Court.⁸⁵ Accordingly, international norms may merely “help inform the contextual approach to statutory interpretation and judicial review.”⁸⁶ While the Doctrine of the Presumption of Conformity appears to compel an interpretation consistent with international law, the phrase “may help inform” treats the conformity with international norms simply as an option. *Baker* stands “as an authority for the proposition that the appropriate way to consider international law is now as an element of context and not through a presumption of conformity.”⁸⁷

The influence of the Doctrine of Presumption of Conformity was weakened further by subsequent decisions. In *Suresh*, the Supreme Court held that reference to international unincorporated treaties is made as evidence of the principles of fundamental justice “and not as controlling in itself.”⁸⁸ Although some researchers suggest that recent decisions indicate a return to the pre-*Baker* approach,⁸⁹ it seems that “the presumption of conformity with international law does not any longer correspond to the statutory interpretation approach favoured in Canada.”⁹⁰ Far from returning to the pre-*Baker* approach, the Supreme Court is approaching and analyzing the relationship between domestic and international law without a common and well-defined reasoning methodology. The judiciary has been criticized for approaching the interaction of domestic and international law without a clear and consistent methodology – even though it deals with the issue frequently.⁹¹ For example, in *Hape*, the Supreme Court reiterated that “the legislature is presumed to comply with the values and principles of customary and conventional international law”, and that “[t]hose values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them.”⁹² In *Health Services and Support*, the

⁸⁵ See e.g. 114957 *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 30, [2001] 2 SCR 241 [*Spraytech v Hudson*].

⁸⁶ *Baker*, *supra* note 21 at para 70, cited in *Spraytech v Hudson*, *ibid* at para 30.

⁸⁷ Beaulac, *supra* note 22 at 259 [citations omitted].

⁸⁸ *Supra* note 20 at para 60.

⁸⁹ Currie, *International Law*, *supra* note 58 at 258.

⁹⁰ Beaulac, *supra* note 22 at 256.

⁹¹ De Menstral & Fox-Decent, “Rethinking the Relationship”, *supra* note 13.

⁹² *Supra* note 70 at para 53. See also at para 39: “[a]bsent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.”

Supreme Court held that “Canada’s current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.”⁹³

However, the Supreme Court replaced “obligations under international law”, which had been utilized to that point, with “values and principles enshrined in international law”. The effect of the change is to suggest that there is no longer an *obligation* to construe domestic law in conformity with Canadian obligations under international law. Any construction that reflects the values and principles of international law seems sufficient. In referring to “reflect”, as opposed to “conform”, the Court has undoubtedly diminished the significance of the Doctrine of the Presumption of Conformity.

By suggesting that treaty obligations and customary international law constitute a simple guide to the interpretation of Canadian legislation, as in *Hape*, the Court has contradicted its earlier holding in the very same case; the Court has deviated from the concept that customary norms are directly applicable in Canadian law.⁹⁴ As Currie stressed, *Hape* generates further uncertainty on the use of international law in Canadian law.⁹⁵ Rather than merely guiding the interpretation of domestic law, customary international law ought to be binding in the absence of clear, contrary legislation.

In short, it is clear that the Doctrine of the Presumption of Conformity is applied inconsistently when it comes to determining which unincorporated human rights treaties could be enforced on the domestic level. Even if the Supreme Court had adopted the doctrine without confusion, it still has no direct effect on domestic law.⁹⁶ As such, it cannot be said that the Doctrine of the Presumption of Conformity mitigates the principle that unincorporated treaties have no direct application in domestic legal system. Even if ratified international human rights treaties remain domestically unincorporated, they are still binding on Canada on the international stage. Canada’s international obligations should be meaningfully and substantially considered at the

⁹³ *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 78, [2007] 2 SCR 391 [*Health Services and Support*].

⁹⁴ See *Hape*, *supra* note 70 at para 39: “[i]n 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. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly.”

⁹⁵ John H Currie, “Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law ” (2007) 45 Can YB Int’l Law 55.

⁹⁶ Currie, *International Law*, *supra* note 58 at 258.

domestic level, and not be used simply in a persuasive role as a rule of statutory interpretation.⁹⁷

We now turn to examine whether the Doctrine of Legitimate Expectations can improve the condition and applicability of unincorporated human rights treaties in Canadian law.

C. The Limits of Applying the Doctrine of Legitimate Expectations

The Doctrine of Legitimate Expectation arose from a decision of the High Court of Australia in the *Teoh* case.⁹⁸ According to this doctrine, the ratification of a treaty by the executive branch of government creates a legitimate expectation on the part of citizens that executive agencies will honour the international obligations to which it has committed. Being a public and official act, the ratification of a treaty by the executive ought to serve legitimately as legal grounds for citizens wishing to invoke the doctrine, at least at the procedural level.⁹⁹ Had the executive branch wished to exempt the domestic law from the obligations which it had undertaken as a result of ratifying an international treaty, it would have informed the concerned citizens about its intention to do so.¹⁰⁰ According to some commentators,

[R]atification signals the intention of the government to be bound by the treaties it ratifies, and ... this public display of the government's intention is sufficient to give rise to a legitimate expectation and (therefore) to a presumption that the state intends to respect the obligations of the treaty in its domestic as well as in its international dealings.¹⁰¹

In Canada, the Doctrine of Legitimate Expectations has been pleaded by litigants on several occasions. In *Baker*, the Supreme Court made reference to the doctrine, but the majority found that it was not applicable to the case. The Court refused, however, to settle the question of whether or not the doctrine could be applied in other circumstances concerning treaties ratified by Canada.¹⁰² The majority agreed with the Court of Appeal that "the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments"¹⁰³ In general, while this legal doctrine is

⁹⁷ See Brunnée & Toope, *supra* note 52 at 374.

⁹⁸ *Minister for Immigration and Ethnic Affairs v Teoh* (1995), 183 CLR 273, 128 ALR 353 (HCA) [*Teoh* cited to CLR].

⁹⁹ *Baker*, *supra* note 21 at para 26.

¹⁰⁰ *Teoh*, *supra* note 98 at 291.

¹⁰¹ De Mestral & Fox-Decent, "Implementation and Reception", *supra* note 11 at 41.

¹⁰² *Baker*, *supra* note 21 at para 29.

¹⁰³ *Ibid* at para 74.

substantive in Australia and the United Kingdom, it is only of a procedural nature in Canada.

The Doctrine of Legitimate Expectations has also been indirectly referred to by the Supreme Court in *Suresh*. The Court stressed that

[i]t is only reasonable that the same executive that bound itself to the [Convention Against Torture] intends to act in accordance with the CAT's plain meaning. Given Canada's commitment to the CAT, we find that the appellant had the right to procedural safeguards, at the s. 53(1)(b) stage of the proceedings. More particularly, the phrase "substantial grounds" raises a duty to afford an opportunity to demonstrate and defend those grounds.¹⁰⁴

According to one commentator, this ruling constituted a clear application of the Doctrine of Legitimate Expectations.¹⁰⁵ Whether or not that reading is correct is irrelevant for the purposes of this article. What is important is the doctrine's impact on the judicial process in Canada. The cases following *Suresh* do not support the argument that the Doctrine of Legitimate Expectations may change the effect of unincorporated human rights treaties in Canadian judicial practice. In *Ahani*(CA),¹⁰⁶ for example, while the appellant could have expected to benefit from a suspension of the deportation process until the Human Rights Committee had rendered a decision regarding his request challenging the deportation order issued against him, the Ontario Court of Appeal dismissed the appeal in sharp contradiction to Canada's international obligations under the *International Covenant on Civil and Political Rights*¹⁰⁷ and its *Protocol*.¹⁰⁸ After having held that Canada had never incorporated either the *Covenant on Civil and Political Rights* nor the *Protocol* into domestic law, the Court went on to emphasize that giving effect to Ahani's argument would lead to an "untenable result" by converting a non-binding request "into a binding obligation enforceable in Canada by a Canadian court ..."¹⁰⁹

Arguably, the decision in *Ahani* (CA) constitutes a narrow view of the implementation process of treaty obligations in domestic law. This led one commentator to argue that Canada was acting in bad faith.¹¹⁰ This decision completely ignored the fact that the *Charter* was based on international human rights instruments, albeit not expressly purporting to implement these international authorities. As the Court of Appeal has rightly held in other circumstances, one must not presume that Parliament did not implement a

¹⁰⁴ *Supra* note 20 at para 119.

¹⁰⁵ Provost, *supra* note 70 at 160.

¹⁰⁶ *Supra* note 22.

¹⁰⁷ *Supra* note 24.

¹⁰⁸ *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1976, 999 UNTS 171 (entered into force 23 March 1976) [*Protocol*].

¹⁰⁹ *Supra* note 22 at para 33.

¹¹⁰ See Harrington, "Punting Terrorists", *supra* note 23.

given international instrument “merely because it does not say expressly that it is intending to observe it.”¹¹¹

Despite the fact that, in his dissenting opinion, Rosenberg JA indirectly referred to the Doctrine of Legitimate Expectations,¹¹² nothing seems to indicate that this doctrine will improve the situation of unincorporated treaties in Canada in the future. At best, it is held by some researchers that the current approach of employing the Doctrine of Legitimate Expectations in analyzing the domestic legal effects of ratified and unincorporated treaties produces results that should be of “influential authority” – a position somewhere between “persuasive authority” and “binding authority”.¹¹³ Consideration of the significance of unincorporated treaties in domestic law remains an option rather than an obligation.

On the one hand, this situation may lead to the breach of Canada’s international obligations when those human rights treaties urge signatory states to adopt legislative measures in order to fully implement their terms. On the other hand, at the domestic level, the treaty-based human rights of Canadians citizens and residents may be frustrated as they cannot be enforced in Canadian courts.

To summarize, the current situation of unincorporated treaties in Canada remains fraught with many uncertainties. When rules carry with them such uncertainty, they are also unpredictable, which is inconsistent with the rule of law. As the Supreme Court noted, the rule of law consists of “subjection to known legal rules.”¹¹⁴ It provides a shield for individuals from arbitrary state action since it “vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.”¹¹⁵ Canadian citizens and residents need to better organize their lives and plan for their future (including the planning for resolutions of possible disputes with administrative agencies) in a way that is more secure and predictable.

¹¹¹ *Salomon*, *supra* note 74 at 144.

¹¹² See *Ahani (CA)*, *supra* note 22 at para 93 (“[t]he appellant does not claim that the views of the Committee about our process for removing him would create legal rights that could be enforced in a domestic court. He claims only the limited procedural right to reasonable access to the Committee, upon which the federal government has conferred jurisdiction. *He submits that the government, having held out this right of review, however limited and non-binding, should not be entitled to render it practically illusory by returning him to Iran before he has had a reasonable opportunity to access it.* I agree with that submission and that it is a principle of fundamental justice that individuals in Canada have fair access to the process in the Protocol. By deporting the appellant to Iran, the government will deprive the appellant of this opportunity” [emphasis added]).

¹¹³ Mayo Moran, “Authority, Influence and Persuasion: *Baker*, Charter Values and the Puzzle of Method” in Dyzenhaus, *supra* note 52, 389 at 409-12.

¹¹⁴ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70, 161 DLR (4th) 385.

¹¹⁵ *Ibid.*

Since the end of the Cold War, an increasing number of international human rights agreements have been ratified by states. Consequently, a considerable number of private actors are deemed to benefit directly from human rights treaties to which their home states are parties. Still, on a domestic level, private actors cannot base their claims on human rights treaties which are unincorporated in Canadian law, despite their ratification. Yet, individuals are often expected to bring their potential claims before domestic courts due to the costs of international adjudication. This justifies our proposal to create a national body that would monitor the genuine incorporation of international human rights treaties ratified by Canada into domestic laws and to provide adequate access to justice for Canadians citizens and residents at home. The incorporation of human rights treaties into domestic laws would also reduce the detrimental effects caused by the unpredictability of the various judicial interpretations of unimplemented treaties.

III. A Case for Establishing a Monitoring Body to Enhance the Human Rights Treaty Incorporation Process in Domestic Law

To date, there is no official body designed to monitor the national implementation of Canada's international treaty commitments. The only existing mechanism is the 1975 Federal-Provincial-Territorial Continuing Committee of Officials with respect to the ratification and the implementation of human rights treaties. However, as that body's main role consists of maintaining consultation and collaboration among governments in Canada,¹¹⁶ the Continuing Committee does not have the requisite power to influence federal government policy with respect to the domestic implementation of international human rights instruments. In addition, to the extent that human rights issues are often coloured ideologically, the work of the Continuing Committee may be perceived as partial and biased as this Committee is made up of government officials. In 2001, the Senate Standing Committee on Human Rights summarized some significant limitations of the Continuing Committee:

The Continuing Committee of Officials meets behind closed doors and does not have any policy or decision-making authority. The responsible ministers have not met in some thirteen years. None of the governments is held accountable for its human rights performance, and there is no public scrutiny or input. As the situation with regard to the recent *Waldman* decision against Canada by the United Nations Human

¹¹⁶ House of Commons, *Government Response to the Report of the House of Commons Standing Committee on Foreign Affairs and International Development: Canada's Universal Periodic Review and Beyond: Upholding Canada's International Reputation as a Global Leader in the Field of Human Rights* (28 February 2011), online: Parliament of Canada <<http://www.parl.gc.ca>>.

Rights Committee has demonstrated, there is certainly no mechanism for pressuring either level of government to live up to its commitments. While non-governmental organizations have, in recent years, been consulted during the preparation of Canada's reports to the treaty bodies, this is not a transparent process to which the general public has access. The Continuing Committee offers no opportunity for any public debate or follow-up to the observations, findings, and recommendations of the treaty bodies – nor was such a role ever intended for it.¹¹⁷

In a recent report, the Subcommittee of the House of Commons Standing Committee on Foreign Affairs and International Development also mentioned that “the Continuing Committee is comprised of ‘mid-level officials who generally have no decision-making authority with respect to human rights issues which are often complex and politically charged.’”¹¹⁸ It added that “the Continuing Committee carries out all its work in absolute and total secrecy, declining and refusing to even release its agenda to the public.”¹¹⁹

Enhancing the implementation of international human rights treaties in Canadian law requires a comprehensive, independent and credible national body that is specifically designed to ensure genuine and impartial fulfilment of Canada's international human rights obligations. An independent monitoring body also would ensure the participation of the provinces and territories as well as Canadian public and civil society groups in the process of implementing Canada's human rights treaties. For example, this body may propose financial compensation schemes flowing from the federal government to the provinces when human rights treaty obligations require provincial action for performance.

The following section proposes the creation of a domestic body for monitoring the implementation of human rights treaties in Canada; the proposal will suggest various models of bodies. There are certainly many forms of monitoring bodies; however, this article will focus on only three of them: an ombudsperson, a Commissioner in the Office of the Auditor General and a Parliamentary Standing Committee.

A. An Ombudsperson for International Human Rights Treaties

The ombudsperson is classically considered as “a public sector office established by the legislative branch of government to monitor and regulate

¹¹⁷ Senate, Standing Committee on Human Rights, *Promises to Keep: Implementing Canada's Human Rights Obligations* (December 2001) (Chair: Raynell Andreychuk), online: Parliament of Canada <<http://www.parl.gc.ca>>.

¹¹⁸ House of Commons, Standing Committee on Foreign Affairs and International Development, *Canada's Universal Periodic Review and Beyond: Upholding Canada's International Reputation as a Global Leader in the Field of Human Rights* (November 2010) (Chair: Dean Allison), online: Parliament of Canada <<http://www.parl.gc.ca>> [citations omitted] [Foreign Affairs, *Periodic Review*].

¹¹⁹ *Ibid* [citations omitted].

the administrative activities of the executive branch".¹²⁰ More precisely, the ombudsperson's role is to remedy citizens' grievances against administrative agencies by receiving complaints and making non-binding recommendations.¹²¹

Since its origin in Sweden, the institution of ombudsperson has undergone many changes in order to contend with the specific problems encountered by members of the national community of a given state. Today, many varieties of ombudsperson exist and the variety created for a given state depends upon the political, legal, socio-economic and cultural aspects of the state in question.¹²² Nevertheless, it is still possible to recognize some common elements of the ombudsperson institution that have persisted since its inception in Sweden, through a multitude of state apparatuses today.

Generally speaking, the ombudsperson was originally placed to be Parliament's overseer of the administration. To that end, the ombudsperson functioned by investigating complaints of maladministration on behalf of aggrieved citizens and then making a recommendation as to corrective steps to be taken by the competent government officials and/or department.¹²³ The rationale is that bureaucratic power must have some oversight in order to avoid becoming a source of the self-destruction of democracy and its values.¹²⁴ Given the exponential increase in both quantity and quality of government intrusion into the lives of its citizens, the legislative and executive branches of government, as well as the courts, are neither completely suited nor entirely capable of providing the required supervision over the entire system.¹²⁵ Due to the fact that the litigation process before the courts can be costly and slow, the ombudsperson is the best mechanism for acting as a check for administrative abuse.¹²⁶ According to Rowat, "[i]n this age of the welfare state, thousands of administrative decisions are made each year by governments or their agencies,

¹²⁰ Linda C Reif, "Introduction" in Linda C Reif, ed, *The International Ombudsman Anthology* (The Hague: Kluwer Law International, 1999) xxiii at xxiii.

¹²¹ Donald C Rowat, "The Dilution and Distortion of the Ombudsman Concept" in Dimitrios Argyriades, OP Dwivedi & Joseph G Jabbra, eds, *Public Administration in Transition; A Fifty-Year Trajectory Worldwide: Essays in Honor of Gerald E Caiden* (Portland, OR: Vallentine Mitchell, 2007) 238 at 239.

¹²² See Mary A Marshall and Linda C Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995) 34:1 *Alta L Rev* 215 at 225-26.

¹²³ *British Columbia Development Corporation v Friedmann (Ombudsman)*, [1984] 2 SCR 447 at 458, 14 DLR (4th) 129 [Friedmann]. In this way, s 2 of the *Ombudsman Act*, RSO 1990, c O.6 [Ontario Ombudsman Act], provides that "[t]here shall be appointed, as an officer of the Legislature, an Ombudsman to exercise the powers and perform the duties prescribed by this Act."

¹²⁴ *Friedmann*, *ibid* at 459.

¹²⁵ *Ibid* at 459-60.

¹²⁶ *Ibid* at 460.

many of them by lowly officials; and if some of these decisions are arbitrary or unjustified, there is no easy way for the ordinary citizen to gain redress."¹²⁷

The general function of an ombudsperson has been summarized by the Supreme Court of Canada as follows:

The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman "can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds" ... [H]e may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned. In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.¹²⁸

The impartiality of the ombudsperson stems mainly from his or her status as an appointee of the legislative branch of government. For instance, the *Public Protector Act* of Québec provides that "[o]n motion by the Prime Minister, the National Assembly shall appoint a person called the 'Public Protector' and fix his [or her] salary."¹²⁹ In some countries, the ombudsperson is appointed pursuant to a constitutional provision. This ensures the ombudsperson's permanency, neutrality and independence from the executive and administrative branches.¹³⁰ As such, the ombudsperson is prohibited from holding paid public office positions¹³¹ and cannot attend Legislative Assembly nor hold any other employment position.¹³² Until the end of his or her mandate (5 years in Québec, 10 years in New Brunswick), the ombudsperson cannot be removed from the position by the executive branch except, in some rare cases, under a stringent procedure.¹³³ It is also provided that the ombudsperson appoints all of his servants and employees

¹²⁷ Donald C Rowat, "An Ombudsman Scheme for Canada" (1962) 28:4 Can J Econ Polit Sci 543 at 543 [citations omitted].

¹²⁸ Friedmann, *supra* note 123 at 461 [citations omitted].

¹²⁹ *Public Protector Act*, RSQ c P-32, s 1. In some Canadian provinces, the ombudsperson is paid like judges. See e.g. *Ombudsman Act*, RSNB 1973, c O-5, s 2(4).

¹³⁰ Judge Anand Satyanand, "The Ombudsman Concept and Human Rights Protection" (1999) 29:1 VUWLR 19 at 21 [citations omitted].

¹³¹ Marshall & Reif, *supra* note 122 at 218.

¹³² *Ontario Ombudsman Act*, *supra* note 123, s 5(1) ("[t]he Ombudsman shall devote himself or herself exclusively to the duties of the Ombudsman's office and shall not hold any other office under the Crown or engage in any other employment"). See also Marshall & Reif, *ibid*.

¹³³ *Public Protector Act*, *supra* note 129, s 3. The dismissal requires a resolution of the National Assembly approved by two-thirds of its members.

and defines their duties.¹³⁴ Members of the ombudsperson's staff cannot be dismissed without the recommendation of the ombudsperson to whom they are answerable.¹³⁵ The ombudsperson's work, including investigations of nearly all government agencies, is conducted in a private manner.¹³⁶ During their appointment, all members of the staff of the ombudsperson's office are vested with "the powers and immunity of commissioners appointed under the Act respecting public inquiry commissions... except the power to impose imprisonment."¹³⁷

There is no doubt that Canadian citizens may suffer as a result of the human rights treaties which remain unincorporated in domestic laws. The ombudsperson for human rights treaty affairs could aptly foster the implementation of such international treaties. This could be done on his or her own initiative, at the request of any person, group of persons acting on their own behalf or on behalf of another person.¹³⁸ Where no satisfactory corrective measures have been taken and provided within a reasonable timeframe, the ombudsperson may refer the case to the legislative branch.¹³⁹ Ultimately, as the Supreme Court noted, usually it is the case that the ombudsperson cannot enforce resolutions – rather, he or she is vested only with powers of investigation and persuasion for the purposes of encouraging effective change.¹⁴⁰ Although the ombudsperson's decisions do not have legally-binding effect,¹⁴¹ the ombudsperson can be influential in significant ways. For instance, he or she may participate in legislative draft proposals or report to the media on the progress and pitfalls of a case.

Where Parliament is responsible for the failure to implement a human rights treaty on a domestic level, one might suggest that the ombudsperson's work would be of little importance insofar as that office's jurisdiction does not generally comprise the activities of the legislative branch.¹⁴² Still, it must be remembered that the institution of the ombudsperson has outgrown its traditional role. The ombudsperson institution nowadays may match the

¹³⁴ *Ibid.*, ss 11-12.

¹³⁵ *Ibid.*, s 11.

¹³⁶ *Ibid.*, s 24.

¹³⁷ *Ibid.*, s 25.

¹³⁸ *Ibid.*, s 13.

¹³⁹ *Ibid.*, s 27.

¹⁴⁰ See *Friedmann*, *supra* note 123 at 462.

¹⁴¹ Ann Abraham, "The Ombudsman and Individual Rights" (2008) 61:2 *Parliam Aff* 370 at 375.

¹⁴² *Friedmann*, *supra* note 123 at 474. However, it is not unlikely that such a government agency could provide the necessary information relating to a complaint even if it is out of the jurisdiction of the ombudsperson. See Eugene Biganovsky, "The Experiences of the South Australian Ombudsman: Policy – Administration – Jurisdiction of the Ombudsman" in Reif, *supra* note 120, 455 at 458.

particular political and cultural needs of each state.¹⁴³ One salient example is that, in several countries, ombudspersons are vested with the powers to ensure that legislation concerning the protection of human rights is enforced.¹⁴⁴ In Norway, the Children's Ombudsperson can alert a Cabinet member, Parliament members or top-level officials of any case or problem if allowing an issue to reach the uppermost level of consideration may be effective.¹⁴⁵ Moreover, in the same country, "[o]pinions and statements may also be distributed widely to the mass media, irrespective of political consent, informing the public and creating difficulties for politicians and decision-makers wishing to disregard the interest of children."¹⁴⁶ The Norwegian Children's Ombudsperson can participate in drafting regulations concerning the well-being of children.¹⁴⁷ In Poland, the ombudsperson has the power to submit his or her own proposals for legislative change in order to ensure that the rights and freedom of citizens are better protected.¹⁴⁸ He or she can also go directly to an appropriate tribunal to look for the implementation of the recommendation.¹⁴⁹ In Sweden, the Equality Ombudsman shall, among other things, "propose legislative amendments or other anti-discrimination measures to the Government and initiate other appropriate measures."¹⁵⁰ In New South Wales, Australia, the ombudsperson can seek interim injunctions before the Supreme Court in order to restrain administrative action.¹⁵¹ In several African jurisdictions, human rights ombudspersons can go to court to enforce their recommendations.¹⁵² In Spain and Portugal, human rights ombudspersons can request a judicial examination of the constitutionality of a given piece of legislation, regardless of whether or not it stems from a filed

¹⁴³ See Gary B Melton, "Lessons from Norway: The Children's Ombudsman as a Voice for Children" (1991) 23:2 Case W Res J Int'l L 197 at 222-33; Ann Abraham, "The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy" (2008) 61:4 Parliam Aff 681 at 682-686 [Abraham, "Ombudsman as Agent"].

¹⁴⁴ Marshall & Reif, *supra* note 122 at 231.

¹⁴⁵ Målfrid Grude Flekkøy, "The Norwegian Ombudsman Experience" (Paper delivered at the meeting of the International Catholic Child Bureau, September 1989) at 5-6, cited in Melton, *supra* note 143 at 213.

¹⁴⁶ *Ibid.*

¹⁴⁷ See Melton, *supra* note 143 at 216.

¹⁴⁸ Colin T Reid, "The Polish Ombudsman" (1988) 14:3 Rev Socialist L 255 at 256.

¹⁴⁹ Ewa Letowska, "The Polish Ombudsman (The Commissioner for the Protection of Civil Rights)" (1990) 39:1 ICLQ 206 at 207-08; Ewa Letowska, "The Ombudsman and Basic Rights" (1995) 4:1 E Eur Const Rev 63 at 63-64.

¹⁵⁰ Sweden, *Act concerning the Equality Ombudsman* (SFS 2008:568), s 3, online: Government Offices of Sweden <<http://www.sweden.gov.se/content/1/c6/11/81/97/236bdd76.pdf>>.

¹⁵¹ Biganovsky, *supra* note 142 at 469.

¹⁵² Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden: Martinus Nijhoff, 2004) at 88.

complaint.¹⁵³ In Finland and Sweden, the ombudsperson can even prosecute state officials.¹⁵⁴ In short, the ombudsperson's power largely stems from the legislation creating the ombudsperson institution. In many countries, it is characterized by "its adaptability and diversity, its ability to evolve to suit its changing environment."¹⁵⁵

Although there is no nationally available ombudsperson institution at the federal level in Canada, some "single-purpose" federal institutions are closer to the traditional ombudsperson model. The Commissioner of Official Languages, the Privacy Commissioner, the Information Commissioner, the Federal Correctional Investigator, the Royal Canadian Mounted Police (R.C.M.P.) External Review Committee, as well as the Police Complaints Commissioner, can all be considered examples of ombudsperson-like institutions.¹⁵⁶ One can therefore conclude that there is no reason why Canada cannot create an Ombudsperson for Human Rights Treaty Affairs. The ombudsperson may be appointed with a broad mandate to conduct investigations in relation to Canada's international treaty obligations and to take necessary measures to ensure that those human rights treaties are properly incorporated into domestic law. Alternatively, if an ombudsperson for human rights treaty affairs is not the preferred option, we suggest the creation of the post of Commissioner for Human Rights Treaty Affairs within the office of the Auditor General.

B. A Commissioner for Human Rights Treaties Under the Supervision of the Auditor General

The Auditor General of Canada's primary duty is to conduct independent audits of federal government activities for the purpose of providing "fact-based information that Parliament needs [in order] to fulfill one of its most important roles: holding the federal government accountable for its stewardship of public funds."¹⁵⁷ More precisely, the Office of the Auditor General audits departments and agencies, Crown corporations and many other federal organizations, as well as the territorial governments of Nunavut, the Yukon and the Northwest Territories.¹⁵⁸ Following a request from the Governor-in-Council, the Auditor General may also "inquire into and report on any person or organization that

¹⁵³ *Ibid* at 88.

¹⁵⁴ *Ibid* at 61, n 26.

¹⁵⁵ Abraham, "Ombudsman as Agent", *supra* note 143 at 688-89.

¹⁵⁶ See Marshall & Reif, *supra* note 123 at 231, n 81.

¹⁵⁷ Office of the Auditor General of Canada, "Welcome to the Office of the Auditor General of Canada" (13 December 2011), online: Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca>>.

¹⁵⁸ *Ibid*.

has received financial aid from the Government of Canada or in respect of which financial aid from the Government of Canada is sought.”¹⁵⁹ The Auditor General is vested with free access to all information and has the power to demand and receive from members of the federal public administration any information and reports that are necessary for the fulfilment of his or her responsibilities, except as provided by any other Act of Parliament.¹⁶⁰ Furthermore, the Auditor General may examine any person under oath in respect of any matter pertaining to an audit undertaken by the Office, all the while carrying powers similar to those of a public inquiry commissioner.¹⁶¹ Although the office of Auditor General was originally created to control public funds expenditures, its scope of responsibilities is not confined solely to financial matters. The Auditor General also has a duty to appraise the effectiveness and the necessity of federal programs. Broadly speaking, the Auditor General’s role consists in establishing confidence between the tax payers and the Executive branch.

The Auditor General’s independence is presently unquestioned in Canada. This independence stems mainly from the legal environment in which he or she operates as provided by the *Auditor General Act*.¹⁶² Beginning with the Auditor General’s appointment and extending through reports made regarding his or her own employment conditions, as well as decisions regarding work organization, the Auditor General is immune from the influence of the government and its agencies.¹⁶³ Furthermore, the Auditor General is “paid a salary equal to the salary of a puisne judge of the Supreme Court of Canada.”¹⁶⁴ More importantly, the Auditor General is tasked with preparing “an estimate of the sums that will be required to be provided by Parliament for the payment of the salaries, allowances and expenses of his office during the next ensuing fiscal year”¹⁶⁵ on an annual basis. He or she may also draft and submit a special report to the House of Commons in the event that the financial amounts provided for his office in the estimates submitted to Parliament are, in his or her opinion, inadequate for the fulfillment of his or her responsibilities.¹⁶⁶

¹⁵⁹ *Auditor General Act*, RSC 1985, c A-17, s 11.

¹⁶⁰ *Ibid*, s 13(1).

¹⁶¹ *Ibid*, s 13(4).

¹⁶² *Ibid*.

¹⁶³ *Ibid*, ss 3(1), 7, 13, 15-16, 18-19.

¹⁶⁴ *Ibid*, s 4(1).

¹⁶⁵ *Ibid*, s 19(1).

¹⁶⁶ *Ibid*, s 19(2).

In order to guarantee independence, the Auditor General is provided with a workforce of officers and employees that are essential to enabling the proper performance of his or her duties.¹⁶⁷ He or she may station any person employed by the office within any federal department.¹⁶⁸ Furthermore, the Auditor General is authorized to determine the terms and conditions of employment for his or her employees and is responsible for employer-employee relations.¹⁶⁹ The Auditor General's annual or casual reports are submitted directly to the House of Commons through the Speaker.¹⁷⁰ Each report calls attention to any matter that the Auditor General considers to be of significance.¹⁷¹ The report generally provides members of Parliament and the media with information enabling them to scrutinize and criticize the activities of the government so that it might be held accountable.

In terms of legal immunities, the Auditor General has all of the necessary immunities against any judicial proceedings resulting from any action taken, reported, or said in good faith, in the course of the performance of his or her function.¹⁷²

It is evident that such a legal environment protects the Auditor General against any apparent bias in favour of the executive branch of the government. It has been said that the contemporary position of the Auditor General is "alongside and sometimes apparently above government".¹⁷³

Thus, if a monitoring body similar to the Auditor General were created with an evaluative focus on human rights treaties ratified by Canada, it could significantly enhance the domestic implementation process of Canada's international obligations. Perhaps a more realistic option would be to amend the *Auditor General Act* so as to enable the appointment of a senior officer who might be called the "Commissioner for Human Rights Treaties." The same post already exists for the purposes of handling environmental matters, namely the Commissioner of the Environment and Sustainable Development.¹⁷⁴ Similar to the latter, the Commissioner for Human Rights Treaty Affairs would report directly to the Auditor General. The amendment of the *Auditor General Act* would enumerate the new duties of the Auditor

¹⁶⁷ *Ibid.*, s 15(1).

¹⁶⁸ *Ibid.*, s 13(2).

¹⁶⁹ *Ibid.*, s 16.

¹⁷⁰ *Ibid.*, s 7(1).

¹⁷¹ *Ibid.*, s 7(2).

¹⁷² *Ibid.*, s 18.1.

¹⁷³ SL Sutherland, *The Office of the Auditor General of Canada: Government in Exile?*, School of Policy Studies, Working Paper 31 (September 2002) [unpublished] at 2, online: Queen's University <http://www.queensu.ca/sps/publications/working_papers/31.pdf>.

¹⁷⁴ *Auditor General Act*, *supra* note 159, s 15.1(1).

General, as they pertain to the Commissioner and his or her function. The main role of the Commissioner could be to ensure that legislation properly complies with the international human rights commitments of Canada. More precisely, the Commissioner's role would consist, among other things, in preparing legislative proposals designed to foster the adoption of implementing legislation by Parliament. Besides the elaboration of those bills to be studied by Parliament, a Commissioner for Human Rights Treaties would receive petitions concerning international human rights treaty matters and forward them to the government. As well, the Commissioner could raise public awareness of issues relating to unincorporated human rights treaties, by way of annual or casual reports submitted to Parliament.

Nevertheless, despite the fact that reports from the Auditor General are generally unbiased and that some of his or her recommendations are in fact addressed,¹⁷⁵ one might prefer the oversight of a political body in order to ensure a politically driven follow-up of recommendations concerning unincorporated treaties.

C. A Parliamentary Committee for International Human Rights Treaties

In Canada, like in other Westminster-style democracies, Parliament is regarded as the real "democratic nucleus," as it happens to be the only branch of government which is "chosen by and responsible to the people."¹⁷⁶ Alongside the traditional role of legislation making, Parliament's main function is to scrutinize the government's actions in order to ensure that public affairs are managed pursuant to the will of the people.

Since Confederation, the House of Commons has been divided into standing committees.¹⁷⁷ Presently, the House of Commons is comprised of more than twenty standing or special Committees, generally with a dozen members within each,¹⁷⁸ as well as two Joint Committees: the Standing Joint Committee on the Library of Parliament and the Standing Joint Committee on the Scrutiny of Regulations.¹⁷⁹

¹⁷⁵ See Auditor General of Canada, "Citizenship and Immigration Canada: The Economic Component of the Canadian Immigration Program" in *A Status Report of the Auditor General of Canada: May 2003* (Ottawa: Minister of Public Works and Government Services Canada, 2003), online: Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca>>.

¹⁷⁶ JR Mallory, "The Uses of Legislative Committees" (1963) 6:1 Can Pub Adm 1 at 1.

¹⁷⁷ CES Franks, "The Dilemma of the Standing Committees of the Canadian House of Commons" (1971) 4:4 CJS 461 at 462.

¹⁷⁸ See House of Commons, *Standing Orders of the House of Commons Including the Conflict of Interest Code for Members* (June 2011), s 104(2), online: Parliament of Canada <<http://www.parl.gc.ca>>.

¹⁷⁹ *Ibid*, s 104(3).

With regard to their mandate, the Committees are “empowered to study and report on all matters relating to the mandate, management and operation of the department or departments of government which are assigned to them...”¹⁸⁰ Specifically, the Committees are empowered, *inter alia*, to review and report on the programs and policy objectives of a given department, as well as on its effectiveness. The Committees are also empowered to conduct an analysis of the relative success of the department compared with the stated objectives.¹⁸¹ Furthermore, the government may be required to table a comprehensive response to the report of the Committees within 120 days of its presentation.¹⁸² The ability of the Committees to “publicly examine issues and place information before the public and media”, as well as the ability to influence government policy, constitutes their main contributions towards real government accountability.¹⁸³

A House of Commons committee on international human rights treaty affairs could significantly change the Canadian practice in this area. In their capacity as politicians, the members of a proposed Committee on Human Rights Treaty Affairs could foster the implementation of Canada’s international obligations through inquiries and recommendations. Of course, there is a Subcommittee of the House of Commons in charge of International Human Rights within the Standing Committee on Foreign Affairs and International Development. But this subcommittee deals with human rights issues in a broader sense without focusing exclusively on requisite mechanisms for the effective incorporation of human rights treaties in Canadian law. Finally, the realistic option would be to create a House of Commons Committee on Human Rights Affairs which is made of subcommittees including an exclusive subcommittee on Human Rights Treaty Affairs. The establishment of a such Committee would be of great importance, especially with regard to the legitimacy of potential proposals for financial compensation schemes that would ensure the full implementation of human rights treaties when the subject matter of a treaty falls, in whole or in part, under provincial or territorial jurisdiction.

¹⁸⁰ *Ibid*, s 108(2).

¹⁸¹ *Ibid*, ss 108(2)(b), 108(2)(d).

¹⁸² *Ibid*, s 109.

¹⁸³ Jonathan Malloy, “An Auditor’s Best Friend?: Standing Committees on Public Accounts” (2004) 47:2 *Can Pub Adm* 165 at 181; See also Bonnie Brown, Nancy Miller Chenier & Sonya Norris, “Les comités en tant qu’agents de la politique publique: le Comité permanent de la santé” (2003) 26:3 *Rev Parlem Can* 4; Manon Tremblay & Stephanie Mullen, “Le Comité permanent de la condition féminine de la Chambre des communes du Canada: un outil au service de la représentation politique des femmes?” (2007) 40:3 *CJPS* 615; Shawn Murphy, “The Appearance of Accounting Officers Before the Public Accounts Committee” (2007) 30:2 *Can Parliam Rev* 4.

IV. Conclusion

This article has presented arguments for the creation of a monitoring body designed to ensure the domestic incorporation into Canadian law of international human rights treaty obligations. There are several forms that such a monitoring body could take, including: the form of an Ombudsperson for human rights treaty affairs, or that of a Commissioner for Human Rights Treaty Affairs under the supervision of the Auditor General, or that of a House of Commons' Standing Committee on Human Rights Treaty Affairs.

Unincorporated human rights treaties cannot confer rights on Canadians and do not impose duties upon the state nor private persons on a domestic level. As human rights treaties are generally intended to protect individuals' rights, their implementation into domestic law constitutes a pressing need that is necessary to ensure the consistent application of the rule of law. This would provide citizens with a convenient and meaningful method of access to justice in cases of infringement of human rights, as they are set out by the ratified treaties. The lack of such access to justice is quite opposite to the liberal approach and democratic governance of Canada.¹⁸⁴

In contrast with ideas put forth by some commentators,¹⁸⁵ it is clear that Canada cannot afford to be content with unpredictable outcomes when it comes to human rights adjudications. Unpredictable results arise when the courts employ uncertain legal principles, including the Presumption of Conformity and the Doctrine of Legitimate Expectations, in an effort to assess the scope of international human rights obligations at a domestic level. Accordingly, the establishment of a body dedicated to monitoring human rights treaty implementation in domestic law is essential in order to ensure that all individuals in Canada have meaningful access to the full complement of human rights as they are set out in human rights treaties. An independent body has more strategies to foster the incorporation of human rights treaties in Canadian law than any other national mechanism concerned with the issue.

An argument can be made that if Canada consents to be bound to a treaty whose obligations reflect existing Canadian law, no new incorporation legislation is needed. For example, one may hold that Canada does not need to pass a law to implement a new treaty that calls for an end to discrimination on a particular ground since Canadian law already prohibits such discrimination (through the *Charter* and for the private sector, through the federal, provincial and territorial anti-discrimination acts). Yet, *Ahani* and *Suresh* have shown that such incorporating legislation is needed in order to give Canadian citizens

¹⁸⁴ Makau wa Mutua, "The Ideology of Human Rights" (1996) 36:3 Va J Int'l L 589.

¹⁸⁵ See Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32:2 NYUJ Int'l L & Pol 501.

all available remedies at the national and international level. It would be unrealistic to think that the rulings in these two cases were isolated incidents.