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INTERNATIONAL TREATY NORMS AND DRIEDGER'S "MODERN" PRINCIPAL OF STATUTORY INTERPRETATION

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Introduction

The year 1999, when the Supreme Court of Canada handed down its decision in *Baker v. Canada (Minister of Citizenship and Immigration)*,[3] signalled the beginning of a new era with respect to the national use of international law. So we are told. And we would not be alone, with many common law jurisdictions also doing some soul searching on this issue.[4]. I have myself

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3 [1999] 2 S.C.R. 817. [hereinafter "Baker"]

4 See, on the situations in New Zealand, Australia, Great Britain and the United States, the following literature: F.G. Jacobs & S. Roberts, The Effect of Treaties in Domestic Law (London: Sweet & Maxwell, 1987); R. Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992), 18 Commonwealth L. Bulletin 1268; S.A. Riesenfeld & F.M. Abbott (eds.), Parliamentary Participation in the Making and Operation of Treaties — A Comparative Study (Dordrecht: Martinus Nijhoff, 1994); S. Donaghue, "Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia" (1995), 17 Adelaide L. Rev. 213; A. Mason, "The Influence of International and Transnational Law on Australian Municipal Law" (1996), 7 Public L. Rev. 20; B. Conforti & F. Francioni (eds.), Enforcing International Human Rights in Domestic Courts (The Hague: Martinus Nijhoff, 1997); K. Keith, "The Application of International Human Rights Law in New Zealand" (1997), 32 Texas Int'l L.J. 401; M. Hunt, Using Human Rights Law in English Courts (Oxford: Hart,

participated in the debate,[5] along with other international law scholars like Hugh Kindred,[6] Karen Knop,[7] and Stephen Toope.[8] Sure, my position has been portrayed as somewhat traditional, because I suggest qualifications on the wild enthusiasm for the "international" that a few authors have shown.[9] But make no mistake - I am in favour of a strengthened role for international law when appropriate. I am advocating, however, an evolutionary (as opposed to revolutionary) approach, one that is more likely to be endorsed by non-internationalist lawyers and judges, who are at the end of the day the most important audience that we need to convince. I like to think that I might thus steer the focus back to the "real" and away from the "ideal".[10]

In this short essay, I want to examine one particular aspect of the issue, namely the proper way to resort to international law (especially conventional

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5 See S. Beaulac, "National Application of International Law: The Statutory Interpretation Perspective" (2003), 41 Canadian Y.B. Int'l L. 225; S. Beaulac, "On the Saying that 'International Law Binds Canadian Courts'" (2003), 29 C.C.I.L. Bulletin 1; S. Beaulac, "Arr□tons de dire que les tribunaux au Canada sont 'liés' par le droit international" (2004), 38 Rev. jur. Thémis 359; and, S. Beaulac, "Le droit international comme élément contextuel en interprétation des lois" (2004), 6 Canadian Int'l Lawyer 1. See also the following case comments, which include discussions on the broader issue of the domestic use of international law, S. Beaulac, "The Suresh Case and Unimplemented Treaty Norms" (2002), 15 Rev. québécoise d. int'l 221; S. Beaulac, "Recent Developments on the Role of International Law in Canadian Statutory Interpretation" (2004), 25 Statute L. Rev. 19.

6 See H.M. Kindred, "Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts," in S.G. Coughlan & D Russell (eds.), Citizenship and Citizen Participation in the Administration of Justice (Montreal: Thémis, 2002), 263.

7 See K. Knop, "Here and There: International Law in Domestic Courts" (2000), 32 New York U. J. Int'l L. & Pol. 501.

8 See S.J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001), 80 Canadian Bar Rev. 534; S.J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U. New Brunswick L.J. 11; and, J. Brunnée & S.J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 Canadian Y.B. Int'l L. 1.

9 See, in particular, G. van Ert, Using International Law in Canadian Courts (The Hague: Kluwer Law International, 2002).

10 On these ideas of the "real" and the "ideal", and how law (including international law) contributes to the dynamic between the two, see P. Allott, Eunomia - New Order for a New World (Oxford: Oxford University Press, 1990). For an example of this process, see S. Beaulac, The Power of Language in the Making of International Law - The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia (Leiden & Boston: Martinus Nijhoff, 2004).

international law[11]) as seen through the eye of a domestic actor that is the Canadian judge. The hypothesis is that the so-called "modern" principle of statutory interpretation, credited to Elmer Driedger, requires that international law be considered an element of context in the process of ascertaining the intention of parliament when construing legislative provisions, whether in the area of human rights law or elsewhere. In order to develop this thesis, it is necessary to briefly discuss the theoretical basis of my approach and the implementation requirement.

1. Bridging the international and the national

The position I defend is based on the premise that the Westphalian model of international relations,[12] which is governed by the Vattelian legal structure,[13] involves an international realm that is distinct and separate from the internal realm.[14] Even without endorsing the comparative law argument, one can therefore accurately describe the situation as follows: "domestic law is 'here' and international law is 'there.'"[15] Further, there is nothing inherent in the international and the national systems which bridge them, hence the need to administer their relationships. John Currie referred to this feature as the "international-national law interface"[16] and wrote that the relationship "will depend on legal rules that determine, as a matter of law, how one legal system treats another."[17]

As I have written elsewhere,[18] it follows that domestic courts (such as Canadian courts) interpret and apply domestic law (Canadian law), and it is

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11 The present essay does not examine the situation with regard to international customary law, which have increasingly been considered by international commentators as not requiring transformation to have legal effect in the Canadian domestic legal system, a position I tend to resist by intuition.

12 See, generally, S. Beaulac, "The Westphalian Legal Orthodoxy - Myth or Reality?" (2000), 2 J. History Int'l L. 148.

13 See, generally, S. Beaulac, "Emer de Vattel and the Externalization of Sovereignty" (2003), 5 J. History Int'l L. 237.

14 See J. Currie, Public International Law (Toronto: Irwin Law, 2001), at 1, who writes: "Public international law is not so much an area or topic of the law as it is an entire legal system, quite distinct from the national legal systems that regulate daily life within states." [emphasis added] And later, ibid., the author further explains that, "public international law exists outside and independent of national legal systems."

15 K. Knop, *supra*, note 7, at 504.

16 J. Currie, *supra*, note 14, at 193.

17 Ibid.

18 See, in particular, S. Beaulac, "On the Saying that 'International Law Binds Canadian Courts'" (2003), 29 C.C.I.L. Bulletin 1.

if, and to the extent that, legal rules allow international law to be part of domestic law - and that it has in effect become part of that domestic law - that international treaty norms may have an impact on the interpretation and application of domestic law by domestic courts. In that sense, international law can never "bind" a sovereign state like Canada, or more accurately, international law can never be "binding" in or within the domestic legal system because domestic courts are concerned with national law, not international law. What international law can do, and indeed should do whenever appropriate, is to "influence" the interpretation and application of domestic law, the degree to which in all cases will depend, in the words of Bill Schabas, on the extent that international law "is also part of the 'Laws of Canada.'"[19]

2. *The implementation of international treaty norms by legislation*

As in many other Commonwealth jurisdictions,[20] in Canada, the reception rules on how international law is applicable domestically are a matter of constitutional law. Francis Jacobs explained:

> First, the effect of international law generally, and of treaties in particular, within the legal order of a State will always depend on a rule of domestic law. The fundamental principle is that the application of treaties is governed by domestic constitutional law. It is true that domestic law may, under certain conditions, require or permit the application of treaties which are binding [sic] on the State, even if they have not been specifically incorporated into domestic law. But this application of treaties 'as such' is prescribed by a rule of domestic constitutional law. It is not a situation reached by the application of a rule of international law, since such a rule, to have effect, itself depends upon recognition by domestic law. Indeed international law is generally uninformative in this area since it simply requires the application of treaties in all circumstances. It does not

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19 W.A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000), 79 Canadian Bar Rev. 174, at 176.

20 See, for instance, the Australian situation with the Commonwealth of Australia Constitutional Act, 63 & 64 Victoria, c. 12 (U.K.), and the decision of the Australian High Court in Minister for Immigration and Ethnic Affairs v. Teoh (1995), 183 C.L.R. 273, at 286-287.

> modify the fundamental principle that the application of treaties by domestic courts is governed by domestic law.[21]

These constitutional rules are unwritten in Canada[22] - certainly amounting to constitutional conventions[23] - and come from the British tradition through the preamble to the *Constitution Act, 1867*,[24] which provides that Canada shall have "a Constitution similar in principle to that of the United Kingdom." As Peter Hogg put it, "Canada's constitutional law, derived in this respect from the United Kingdom, does not recognize a treaty as part of the internal (or 'municipal') law of Canada."[25]

Indeed, it has become an orthodoxy that an international treaty is not part of the law of the land until it has been incorporated domestically, which must be accomplished "by the enactment of a statute which makes the required change in the law."[26] The basic authority for this proposition undoubtedly remains the decision of the Judicial Committee of the Privy Council in the notorious *Labour Conventions* case,[27] where Lord Atkin famously wrote:

> Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified

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21 F.G. Jacobs, "Introduction," in F.G. Jacobs & S Roberts, The Effect of Treaties in Domestic Law (London: Sweet & Maxwell, 1987), xxiii, at xxiv.

22 As Chief Justice Lamer confirmed in Re Provincial Court Judges [1997] 3 S.C.R. 3, at 68, "the general principle [is] that the Constitution embraces unwritten, as well as written rules."

23 Constitutional conventions were considered by the Supreme Court of Canada in Re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753. See also A. Heard, Canadian Constitution Conventions: The Marriage of Law and Politics (Toronto: Oxford University Press, 1991).

24 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, Appendix II, No. 5.

25 P.W. Hogg, Constitutional Law of Canada, 3rd (student) ed. (Scarborough, Ontario: Carswell, 1992), at 285.

26 Ibid. The suggestion recently made that international treaty norms could be implemented through non-legislative means such as government policy measures, albeit virtuous (perhaps), is unsupported by authority - see E. Brandon, "Does International Law Mean Anything in Canadian Courts?" (2001), 11 J. Environmental L. & Prac. 399, at 407: "Thus a treaty that has been brought into Canadian law through other measures - such as policy - should be of equal status to treaties implemented by specific legislation."

27 Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326. [usually referred to as the "Labour Conventions case"]

> do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decides to incur the obligations of a treaty which involves alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.[28]

The implementation requirement for treaties has been reiterated and applied by the Supreme Court of Canada,[29] as well as by the Federal Court of Canada[30] and in other courts.[31] Justice L'Heureux-Dubé reaffirmed the rule in the important 1999 *Baker* case: "International treaties and conventions are not part of Canadian law unless they have been implemented by statute."[32] The terminology used to describe this reception process depends on one's point of view - from that of the international sphere, one speaks of the "dualist" model of reception (as opposed to "monism"); while at the domestic level, one speaks of the "transformationist" model of reception (as opposed to "adoptionism").[33]

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28 Id., at 347. See also the comments by Justice Lamont of the Supreme Court of Canada in Re Arrow River & Tributaries Slide & Boom Co. Limited, [1932] S.C.R. 495, at 510, to the effect that "the Crown cannot alter the existing law by entering into a contract with a foreign power."

29 See, for instance, Francis v. The Queen, [1956] 618, at 621; Capital Cities Communications Inc. v. Canada (C.R.T.C.), [1978] 2 S.C.R. 141, at 172-173; Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, at 484.

30 See, for instance, Bitter v. Secretary of State of Canada, [1944] Ex. C.R. 61, at 76-77; Mastini v. Bell Telephone of Canada (1971), 18 D.L.R. (3d) 215, at 217 (Exchequer Ct.); National Corn Growers Association v. Canada (Import Tribunal) (1989), 58 D.L.R. (4th) 642, at 649-650 (Federal C.A.); and Rahaman v. Canada (Minister of Citizenship and Immigration) (2002), 211 D.L.R. (4th) 455, at 469 (Federal C.A.).

31 See, for instance, R. v. Vincent (1993), 12 O.R. (3d) 427, at 437-438 (Ontario C.A.); Entreprises de rebuts Sanipan v. Procureur général du Québec, [1995] R.J.Q. 821, at 844 (Quebec S.C.), and, R. v. Rebmann (1995), 122 Nfld. & P.E.I. R. 111, at 121-126 (Newfoundland S.C.T.D.).

32 Baker, *supra* note 3 at 861.

33 See J. Currie, *supra*, note 14 at 195 ff.; and H.M. Kindred et al. (eds.), International Law - Chiefly as interpreted and applied in Canada, 6th ed. (Toronto: Emond Montgomery, 2000), at 165-166. Examples of countries that apply a version of "monism" or "adoptionism" for treaties include France (see article 55 of their constitution) and Germany (see article 25 of their basic law) - see A. Aust, Modern Treaty Law and Practice (Cambridge: Cambridge University Press, 2000), at 145-160.

3. *Rationales underlying implementation requirement*

There are three *raisons d'etre* behind the rule that conventional international law requires legislative implementation to have legal effect domestically.[34] The first of them concerns the separation of powers, that is, the Montesquian idea[35] that in the British parliamentary tradition the executive branch of government is theoretically separate from the legislative branch.[36] It was a pivotal reason behind the ruling in the *Labour Convention* case.[37] In his minority reasons in *Baker*, Iacobucci J. considered this aspect, which led him to opine that "one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch."[38] In Canada, it is the executive branch of the federal government that has competence to negotiate, conclude and ratify international treaties,[39] and requiring the actual

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34 In this section, I rely on S. Beaulac, "Arr□tons de dire que les tribunaux au Canada sont 'liés' par le droit international" (2004), 38 Rev. jur. Thémis 359.

35 See his major work, C.-L. de S. Montesquieu, De l'esprit des loix (London: n.b., 1757), first published in 1748.

36 See S. Donaghue, *supra* note 4, at 224-226; and, F.G. Jacobs, *supra*, note 4 at xxv. See also, generally, J. Goldsworthy, The Sovereignty of Parliament - History and Philosophy (Oxford: Clarendon Press, 1999).

37 See Labour Conventions case, *supra* note 27 at 347.

38 Baker, *supra* note 3 at 866-867. See also, to the same effect, Arrow River & Tributaries Slide & Boom Co. Limited, *supra*, note 28 at 510, and, Capital Cities Communications Inc. v. Canada (C.R.T.C.), *supra*, note 29 at 173. Interestingly, the separation of powers rationale was central to the decision of the New Zealand Court of Appeal, per Richardson J., in Ashby v. Minister of Immigration, [1981] 1 N.Z.L.R. 222, at 229.

39 Under British constitutional and imperial law, the power to conclude and ratify treaties was a Crown prerogative: see Lord Templeman, "Treaty-Making and the British Parliament," in S.A. Riesenfeld & F.M. Abbott (eds.), Parliamentary Participation in the Making and Operation of Treaties - A Comparative Study (Dordrecht: Martinus Nijhoff, 1994), 153; A.E. Gotlieb, Canadian Treaty-Making (Toronto: Butterworths, 1968), at 4-5; and, also, P.N. Baker, "Les Dominions sont-ils vraiment des personnes du droit des gens?" (1927), 19 Rec. C. Acad. d. int'l 247. Similar to Great Britain, in Canada, the evolution towards a constitutional monarchy meant that a practice developed whereby Crown prerogatives were exercised at the request and under the advice of the Canadian government, which did not require the participation of Parliament however - see J.-Y. Grenon, "De la conclusion des traités et de leur mise en oeuvre au Canada" (1962), 40 Canadian Bar Rev. 151, at 152-153: "En vertu de notre droit constitutionnel coutumier, l'autorité nécessaire à la conclusion des traités rel□ve de la prérogative royale laquelle, d'ordinaire, est exercée au nom du Canada par le gouverneur général en conseil agissant habituellement, dans ce domaine, sur

implementation of these agreements through the adoption of legislation is an essential ingredient of maintaining the relevance of Parliament in the creation of legal norms within our parliamentary system.

The second rationale underlying the implementation requirement of international treaties is linked to the federal nature of the Canadian constitution.[40] Essentially, in a federation where both orders of government are supreme within their respective legislative authorities, there must be incorporation of treaty norms through the adoption of legislation following such a division of competences because, otherwise, the government which has treaty-making power (in Canada, Ottawa) could in effect indirectly assume *ultra vires* responsibilities if the subject-matter of a treaty falls within the responsibilities of the other order of government (the provinces). This element was central to the decision of the Privy Council in the *Labour Conventions* case, where Lord Atkin wrote: "In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth."[41] Later, he further wrote, metaphorically: "While the ship of state now sails on

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la recommandation du secrétaire d'Etat aux Affaires extérieures. En d'autres termes, c'est l'organe exécutif central qui, chez-nous, est habilité à autoriser la conclusion d'accords valides selon le droit international public." The 1947 Letters Patent constituting the office of Governor General of Canada, R.S.C. 1985, Appendix II, no. 31, confirmed that the executive branch of the federal government is now entrusted with the Crown prerogatives for Canada, including the power to negotiate, conclude and ratify treaties. It is noteworthy that the province of Quebec has on occasion argued that the federal government does not have exclusive authority in that regard.

40 See S. Donaghue, *supra*, note 4 at 226-228.

41 Labour Conventions case, *supra* note 27 at 352. See, on this aspect of the case: N.A.M. Mackenzie, "Canada: The Treaty-Making Power" (1937), 18 British Y.B. Int'l L. 172; N.A.M. Mackenzie, "Canada and the Treaty-Making Power" (1937), 15 Canadian Bar Rev. 436; F.R. Scott, "The Consequences of the Privy Council Decisions" (1937), 15 Canadian Bar Rev. 485; A.B. Elkin, "De la compétence du Canada pour conclure les traités internationaux - Étude sur le statut juridique des Dominions britanniques" (1938), 45 Rev. gén. d. int'l pub. 658; F.R. Scott, "Labour Conventions Case: Lord Wright's Undisclosed Dissent" (1956), 34 Canadian Bar Rev. 114; G.J. Szablowski, "Creation and Implementation of Treaties in Canada" (1956), 34 Canadian Bar Rev. 28; E. McWhinney, "Federal Constitutional Law and the Treaty-Making Power" (1957), 35 Canadian Bar Rev. 842; E. McWhinney, "The Constitutional Competence within Federal Systems as to International Agreements" (1964-68) 1 ng4105 Canadian Leg. St. 145; and, G.L. Morris, "The Treaty-Making Power: A Canadian Dilemma" (1967), 45 Canadian Bar Rev. 478.

larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure."[42]

The third *raison d'etre*, which is likely the most compelling one in modern time, is the democratic argument.[43] Simply put, the incorporation of international treaty norms through the adoption of legislation involves the main democratic institution within the Canadian system of parliamentary government. Justice Iacobucci's minority opinion in *Baker* linked the democratic rationale with the separation of powers; he wrote that the result of the majority's approach was to "give 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*."[44] Jutta Brunnée and Stephen Toope discussed this aspect of the issue and endorsed David Dyzenhaus's view,[45] expressed in administrative law, that to equate democracy with majoritarian legislative action is "often rooted in impoverished conceptions of democratic governance."[46] Although it is accurate that democratic legitimacy is a larger concept than parliamentary participation, the argument remains strong as such involvement of the elected

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42 Labour Conventions case, *supra* note 27 at 354. It is noteworthy that the "Laskin Court" hinted at reconsidering this aspect of the case but that it was never acted upon - see MacDonald v. Vapor Canada Ltd., [1977] 2 S.C.R. 134, at 169, where Chief Justice Laskin wrote that one can "support a reconsideration of the Labour Conventions case" which could hold that the central Parliament can "pass legislation in implementation of an international obligation by Canada under a treaty or Convention (being legislation which it would be otherwise beyond its competence)." See also Justice Dickson's (as he then was) comments in Schneider v. The Queen, [1982] 2 S.C.R. 112, at 134. However, the ruling in the Labour Conventions case on this point was subsequently affirmed implicitly, but also explicitly, in the concurring set of reasons of Justice L'Heureux-Dubé in Thomson v. Thomson, [1994] 3 S.C.R. 551, at 611.

43 See B.R. Openkin, *supra*, note 4 at 617; and F.G. Jacobs, *supra*, at xxv. Also, see the following excerpt from L. LeBel & G. Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 Supreme Court L. Rev. (2nd) 23, at 24: "At the heart of the debate is the tension between the democratic principle underlying the internal legal order and the search for conformity or consistency with a developing and uncertain external legal order." [emphasis added]

44 Baker, *supra* note 3 at 866. [emphasis added] See also D. Dyzenhaus & E. Fox-Decent, "Rethinking the Process / Substance Distinction: Baker v. Canada" (2001), 51 U. Toronto L.J. 193.

45 See D. Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002), 27 Queen's L.J. 445.

46 J. Brunnée & S.J. Toope, *supra*, note 8 at 34. The endorsement comes out of footnote 164 of the paper.

assemblies of our governments still constitutes a large, if not the primary, portion of what democratic legitimacy is and can be when it comes to legal norms governing the Canadian peoples.[47]

It is most important to keep in mind these three rationales underlying the implementation requirement of treaties within the Canadian domestic legal system when considering the proper way to determine the persuasive force of international law as an element of contextual statutory interpretation.

3.1 "Passive incorporation"

Ruth Sullivan identifies two techniques used by legislative authorities to give legal effect to international treaty law in Canada — incorporation by reference and harmonisation.[48] The first implements the treaty directly in one of two ways: either by reproducing its provisions in the statute itself or by including the text as a schedule and somehow indicating that it is thus part of the statute.[49] On the other hand, "[w]hen a legislature implements an international convention through harmonization, it redrafts the law to be

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47 In another paper, however, David Dyzenhaus (with Murray Hunt and Michael Taggart) actually seems to support the democratic rationale underlying the implementation requirement of international treaties. See D. Dyzenhaus, M. Hunt & M. Taggart, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001), 1 Oxford U. Commonwealth L.J. 5, at 5: "Courts throughout the common law world have, for some time, given effect to international legal obligations (especially human rights norms) by way of administrative law doctrines and techniques. When 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 legislative's monopoly of law-making authority, or to judicial usurpation of the same, or to a combination of both." [emphasis added]

48 See R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ontario & Vancouver: Butterworths, 2002), at 430.

49 The majority reasons of Justice Iacobucci in Re Act Respecting the Vancouver Island Railway, [1994] 2 S.C.R. 41, have made it clear that scheduling an international treaty is not sufficient in itself to incorporate it domestically. Using two opinions expressed in Ottawa Electric Raiway Co. v. Corporation of the City of Ottawa, [1945] S.C.R. 105, Iacobucci J. opined thus, id., at 109: "Although divided in the result, I discern a common thread in the judgments of Rinfret C.J. and Kerwin J., namely, that statutory ratification and confirmation of a scheduled agreement, standing alone, is generally insufficient reason to conclude that such an agreement constitutes a part of the statute itself." See also Winnipeg v. Winnipeg Electric Railway Co., [1921] 2 W.W.R. 282 (Manitoba C.A.), at 306.

implemented in its own terms so as to adapt it to domestic law."[50] Given the formal requirement to transform international treaty norms through legislation, however, what has been referred to as "passive incorporation" of treaties is impossible.[51]

This would be the situation where the federal government concludes and / or ratifies an international agreement on the basis of existing domestic law that already conforms with Canada's new international obligations. In the context of international human rights law, Irit Weiser considered the issue and attempted to elucidate the effect of such passive incorporation on statutory interpretation.[52] In the context of international environmental law, Elizabeth Brandon wrote that: "Given the common government practice of assessing Canada's legislative framework prior to signing a treaty, significance can be attached to legislative inaction by the government following signature."[53] She opined that "such inaction signals that the existing legislative or policy framework has been deemed adequate to fulfil the treaty obligations."[54] Similarly, Jutta Brunnée and Stephen Toope argued that: "In cases where there was no specific legislative transformation but Canadian law is in conformity with a treaty due to prior statutory, common law, or even administrative policy, we suggest that the treaty is also implemented for the purposes of domestic law."[55]

The contention that passive incorporation actually constitutes domestic transformation of international treaty norms can be attractive given the claim the federal government has made in its reports to international treaty bodies that Canada's human rights commitments, for instance, have been met on the basis of prior conformity.[56] This would be an error, however, especially in

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50 R. Sullivan, *supra*, note 48 at 434.

51 In this section, I rely on S. Beaulac, "National Application of International Law: The Statutory Interpretation Perspective" (2003), 41 Canadian Y.B. Int'l L. 225.

52 See I. Weiser, "Effect in Domestic Law of International Human Rights Treaties Ratified without Implementing Legislation," in Canadian Council on International Law, The Impact of International Law on the Practice of Law in Canada — Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa, October 15-17, 1998 (The Hague: Kluwer Law International, 1999), 132, at 137-139.

53 E. Brandon, *supra*, note 26 at 418.

54 Ibid.

55 J. Brunnée & S.J. Toope, *supra*, note 8 at 26-27.

56 See, for instance, Canada's report to the United Nations Human Rights Committee, sitting under the first Optional Protocol to the International Covenant on Civil and Political Rights, concluded on 19 December 1966, U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force on 23 March 1976) — Human Rights Committee, Consideration of Reports Submitted by States under

view of the three rationales underlying the implementation requirement of international treaties. First, it would allow the executive branch of government to, in effect, determine the legal effect of international treaty law within the domestic legal system of Canada, in blatant violation of the separation of powers in our parliament system of government. Second, it would be the federal government, which has treaty-making power and international personality, that could indirectly transform treaties in Canada through such passive incorporation, with no apparent restriction in regard to the constitutional division of legislative authorities. Thirdly, allowing incorporation of treaty norms without the participation of the elected assembly of the competent government would create a real democratic deficit which, in a way, would see the international legal realm, in which citizens have no participation, dictate the democratically legitimate national legal realm.[57]

These are no doubt some of the considerations that the Ontario Court of Appeal had in mind when considering the argument based on the *International Covenant on Civil and Political Rights*[58] in *Ahani v. Canada (Attorney General)*.[59] The question at issue was whether or not the *Optional Protocol*[60] to this international convention was part of the laws of the land. The fact that there is no legislation transforming these human rights commitments undertaken by Canada, be it directly or through harmonisation,

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Article 40 of the Covenant: Fourth Periodic Report of States Parties due in 1995: Canada, U.N. C.C.P.R.O.R., 1995, U.N. doc. CCPR/C/103/Add.5.

57 Compare these arguments with the following ones by Brunnée and Toope — "Two considerations suggest that the [passive incorporation] approach is both correct and compatible with legitimate concerns over the proper roles of the executive, legislators, and the judiciary. First, where a treaty does not actually affect domestic law, the concern that the authority of Parliament or the provincial legislature could be usurped by federal executive action seems misplaced. In any event, it remains open to Parliament or provincial legislatures to deviate from treaty provisions through explicit statutory action. Second, where no legislative action is required to bring domestic law in line with Canada's treaty commitments, it seems absurd to insist on explicit statutory implementation. This applies with even greater force when Canada, in international forums, reports its implementation of treaty commitments, as it does regularly, for example, in the human rights context;" J. Brunnée & S.J. Toope, *supra*, note 8 at 27-28.

58 ICCPR at www.unhcr.ch/html/menu3/b/a_ccpr.htm

59 (2002), 58 O.R. (3d) 107.

60 *Supra*, note 56. See, on petitions under the Optional Protocol in general, W.A. Schabas, *supra*, note 19 at 193-195.

is well documented in legal literature.[61] Both the majority and the dissent reached the unescapable conclusion that these international norms had no legal effect within the Canadian domestic legal system — "Canada has never incorporated either the Covenant or the Protocol into Canadian law by implementing legislation. Absent implementing legislation, neither has any legal effect in Canada."[62] It would lead to an "untenable result," the majority further wrote, to "convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court."[63] Justice Rosenberg, in dissent, agreed with the federal government, and thus the majority of the Court, on this point.[64]

Along with the rationales behind the implementation requirement of treaties, this clear judicial pronouncement from the authoritative Ontario Court of Appeal (short by one from the Supreme Court of Canada) will hopefully put to rest the argument that the passive incorporation of a treaty constitutes transformation of international norms.

4. The use of international law through contextual statutory interpretation

The basic premise of the proposed scheme is that international law must be considered in terms of persuasive force - as opposed to being "binding" - within the Canadian domestic legal system. International treaty norms are authoritative or persuasive on the interpretation and application of legislation. Therefore, the most appropriate discourse to address, rationalise

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61 See, for instance, H.M. Kindred, *supra*, note 6 at 265: "Yet nowhere to date is there legislation explicitly implementing within Canada such fundamental international human rights conventions as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child." [footnotes omitted] This is the generally accepted view in Canada, which contrasts with that expressed by G. van Ert, *supra*, note 9 at 186: "It is true that there is no such thing as the ICCPR Implementation Act. To conclude from this, however, that Canadian law does not implement the ICCPR is, at best, an oversimplification and, at worst, simply wrong."

62 Ahani v. Canada (Attorney General), *supra*, note 59 at para. 31, per Justice Laskin.

63 Ibid., at para. 33

64 See Justice Rosenberg's reasons, id., at para. 73, which read as follows: "On the legal side, they [the federal government et al.] invoke the established principle that international conventions are not binding in Canada unless they have been specifically incorporated into Canadian law. The Covenant, while ratified, has never been incorporated into Canadian domestic law and therefore does not create legal obligations enforceable in Canada."

and understand the national application of international law is that of the construction of statutes, and specifically the contextual approach. This last section of the essay first examines what is known as the "modern" principle of statutory interpretation and then argues that the proper way to resort to international law is through this contextual method.

4.1. Driedger's "modern" approach to statutory interpretation

When it comes to statutory interpretation, there seems to be a consensus at the Supreme Court of Canada (as well as in lower courts) that the proper approach is that expressed by Elmer Driedger in his second edition of *Construction of Statutes*:

> Today there is only one principle or approach, namely, the words of an act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.[65]

It has now become known as the "modern" principle of legislative interpretation in Canada and, as Justice Iacobucci wrote in *Bell ExpressVu Limited Partnership v. Rex*, it "has been repeatedly cited by this Court as the *preferred approach* to statutory interpretation across a wide range of interpretive settings."[66] Even in the context of taxation, the principle applies, as Justice Major pointed out in *Will-Kare Paving & Contracting Ltd. v. Canada* - "The modern approach to statutory interpretation has been applied by this Court to the interpretation of tax legislation."[67]

In *R. v. Ulybel Enterprises Ltd.*, Justice Iacobucci further opined that the "famous passage from Driedger 'best encapsulates' our court's preferred approach to statutory interpretation."[68] Likewise, according to Justice Gonthier in *Barrie Public Utilities v. Canadian Cable Television Assn.*: "The starting point for statutory interpretation in Canada is Driedger's definitive formulation."[69] The modern principle has recently been reformulated in *R. v. Jarvis*,[70] where Justices Iacobucci and Major paraphrased Driedger and wrote:

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65 E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at 87.

66 [2002] 2 S.C.R. 559, at 580. [emphasis added]

67 [2000] 1 S.C.R. 915, at 934.

68 [2001] 2 S.C.R. 867, at 883.

69 [2003] 1 S.C.R. 476, at para. 20.

70 [2002] 3 S.C.R. 759.

> The approach to statutory interpretation can be easily stated: one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.[71]

Of course this modern approach to the construction of legislation contrasts with the old restrictive "plain meaning rule,"[72] which was adopted at a time when it was seriously believed that "Parliament changes the law for the worse"[73] and that a statute was an "alien intruder in the house of the common law."[74] The plain meaning rule is now generally considered obsolete in common law jurisdictions because courts realised that legislative language cannot be read in isolation[75] — "The most fundamental objection to the rule is that it is based on a false premise, namely that words have plain, ordinary meanings apart from their context."[76] In England,[77] the House of Lords acknowledged this shift in favour of a purposive and contextual construction of legislation in *Pepper v. Hart*,[78] where Lord Griffiths said:

> The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.[79]

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71 Ibid., at 799.

72 On the "plain meaning rule" (or "literal rule") in general, see P.-A. Côté, Interprétation des lois, 3rd ed. (Montreal: Thémis, 1999), at 357-386.

73 F. Pollock, Essays in Jurisprudence and Ethics (London: Macmillan, 1882), at 85.

74 H. Stone, "The Common Law in the United States" (1936), 50 Harvard L. Rev. 4, at 15.

75 See, on this point, S. Beaulac, "Le Code civil commande-t-il une interprétation distincte?" (1999), 22 Dalhousie L.J. 236, at 251-252; and, S. Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998), 43 McGill L.J. 287, at 310-312.

76 M. Zander, The Law-Making Process, 4th ed. (London: Butterworths, 1994), at 121.

77 See A. Lester, "English Judges as Law Makers," [1993] Public L. 269, at 272, who explained the old English approach thus: "Yet they [courts] decided that, to avoid 'making laws,' they were compelled to give effect to the 'plain and unambiguous' language of a statute, no matter that words are rarely plain or unambiguous in real life, and no matter how absurd might be the result of such a literal interpretation."

78 [1993] A.C. 593.

79 Ibid., at 617.

British author Francis Bennion very recently reiterated the danger of the plain meaning rule, what he called the "first glance approach."[80] "The informed [i.e. modern] interpretation rule is to be applied no matter how plain the statutory words may seem at first glance,"[81]. Bennion continued by arguing that: "Without exception, statutory words require careful assessment of themselves and their context if they are to be construed correctly."[82]

In Canada, Justice L'Heureux-Dubé at the Supreme Court of Canada was one of the main proponents of a liberal approach to the interpretation of statutes. As early as *Hills v. Canada (Attorney General)*,[83] for which she wrote the majority decision in 1988, her views on the matter were well settled. Later in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*,[84] she wrote an impressive dissenting opinion in which she made an exhaustive historical and doctrinal review of the methodology of statutory interpretation. Her conclusion captured the essence of the modern approach:

> What Bennion calls the "informed interpretation" approach is called the "modern interpretation rule" by Sullivan and "pragmatic dynamism" by Eskridge. All these approaches reject the former "plain meaning" approach. In view of the many terms now being used to refer to these approaches, I will here use the term "modern approach" to designate a synthesis of the contextual approaches that reject the "plain meaning" approach. According to this "modern approach," consideration must be given at the outset not only to the words themselves but also, *inter alia*, to the context, the statute's other provisions, provisions of other statutes *in pari materia* and the legislative history in order to correctly identify the legislature's objective.[85]

She is obviously not alone anymore in openly holding that a proper interpretation and application of a statute must consider the context and purpose as well as the language of the enactment. One of the latest examples is found in *Harvard College v. Canada (Commissioner of Patents)*,[86] where Justice Bastarache, for the majority, wrote: "This Court has on many

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80 F.A.R. Bennion, Statutory Interpretation - A Code, 4th ed. (London: Butterworths, 2002), at 500.

81 Ibid.

82 Ibid

83 [1988] 1 S.C.R. 513.

84 [1996] 3 S.C.R. 919.

85 Ibid., at 1002.

86 [2002] 4 S.C.R. 45.

occasions expressed the view that statutory interpretation cannot be based on the wording of the legislation alone."[87]

At the outset of that second edition of *Construction of Statutes*, Elmer Driedger forcefully expressed the view that,[88] "Words, when read *by themselves* in the abstract can hardly be said to have meanings."[89] In the latest edition of *Construction of Statutes*, Ruth Sullivan pointed out that: "Driedger's modern principle is sometimes referred to as the *words-in-total-context approach*, a characterization that is apt."[90] Developing the idea that words need to be read in context to be given a meaning, she wrote:

> The meaning of a word depends on the context in which it is used. This basic principle of communication applies to all texts, including legislation. It has been repeatedly confirmed by linguists, linguistic philosophers, cognitive psychologists and others - by virtually anyone who studies communication through language. And it has long been recognized in law.[91]

A similar position, albeit more qualified, was taken by Pierre-André Côté in *Interpretation des lois*.[92] Randal Graham, referring to Derrida's deconstruction, opined thus: "By far the most important of these [interpretative] tools is often referred to as 'the context.' In ascertaining the meaning of a word or a written passage, we appeal to the context to guide our interpretation."[93]

In order to address, rationalise and understand the national application of international law within the framework of statutory interpretation, treaties ought to be considered within this modern approach, that is, within the words-in-total-context approach. Ruth Sullivan provided a list of contextual elements that includes, significantly, international legal norms:

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87 Id., at para. 154. Justice Bastarache refered to the opinion of Justice Iacobucci in Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at 41.

88 In this section, I rely on S. Beaulac, "Le droit international comme élément contextuel en interprétation des lois" (2004), 6 Canadian Int'l Lawyer 1.

89 E.A. Driedger, *supra*, note 65 at 3. [emphasis in original]

90 R. Sullivan, *supra*, note 48 at 259. [emphasis added]

91 Ibid.

92 See P.-A. Côté, *supra*, note 72 at 355, where the author wrote: "Sans aller jusqu'à prétendre que les mots n'ont pas de sens en eux-mêmes, on doit admettre cependant que leur sens véritable dépend partiellement du context dans lequel ils sont employés." [footnotes omitted]

93 R.N. Graham, Statutory Interpretation - Theory and Practice (Toronto: Emond Montgomery, 2001), at 62-63.

> Under Driedger's modern principle, the words to be interpreted must be looked at in their *total context*. This includes not only the Act as a whole and the statute book as a whole but also the legal context, consisting of case law, common law and *international law*. The primary significance of legal context is that it supplies a set of norms that affect interpretation at every stage. These norms influence the intuitive process by which ordinary meaning is established; they are also relied on in textual, purposive and consequential analysis. Whether or not they are acknowledged, these norms are part of the mindset that lawyers and judges unavoidably bring to interpretation.[94]

This is confirmed in the international legal literature where, for instance, Hugh Kindred wrote that "where the context of the legislation includes a treaty of other international obligation, the statute should be interpreted in light of it."[95]

4.2. Contextual interpretation rather than presumption of conformity

Given the recent developments with respect to the methodology of statutory interpretation in Canada, especially with the modern principle that recognises the proper role of context, and remembering that it is more appropriate to consider international law as persuasive than all-or-nothing "binding," the old way in which courts were resorting to norms from the international legal order should be reformulated.

There is a rule of statutory interpretation, referred to as a "presumption of conformity," according to which legislation ought to be read, when possible, consistently with international law.[96] British author Peter Maxwell gave an early formulation of it when he wrote that "every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international

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94 R. Sullivan, *supra*, note 48 at 262. [emphasis added]

95 H.M. Kindred, *supra*, note 6 at 271.

96 See R. Sullivan, *supra*, note 48 at 421: "Although international law is not binding on Canadian legislatures, it is presumed that the legislation enacted both federally and provincially is meant to comply with international law generally and with Canada's international law obligations in particular." In international legal literature, see also D.C. Vanek, "Is International Law Part of the Law of Canada?" (1960), 8 U. Toronto L.J. 251, at 259-260; and, H.M. Kindred, *supra*, note 6 at 269-270.

law."[97] This rule was enunciated clearly in Canada by Justice Pigeon in *Daniels v. White and The Queen*:

> I wish to add that, in my view, this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. It is a rule that is not often applied, *because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law.*[98]

Very recently, the Supreme Court of Canada again referred to the presumption and relied on this excerpt in *Schreiber v. Canada (Attorney General)*.[99]

When examined closely, this passage from Pigeon's reasons contains the reason why the presumption of conformity with international law no longer corresponds to the statutory interpretation approach favoured in Canada.[100] Namely, the preliminary requirement to the utilisation of international law through such a presumption, is a finding that the statutory provision is *ambiguous*.[101] This precondition was considered by Justice Estey in *Schavernoch v. Foreign Claims Commission*,[102] where he explained:

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97 P.B. Maxwell, On the Interpretation of Statutes (London: Sweet & Maxwell, 1896), at 122. See also, in England, Corocraft v. Pan American Airways, [1968] 3 W.L.R. 1273, at 1281 (C.A.), where Lord Denning wrote that it is a "duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it." In international legal literature, see also H. Lauterpacht, "Is International Law a Part of the Law of England?," [1939] Transactions Grotius Society 51.

98 Daniels v. White and The Queen, [1968] S.C.R. 517, at 541. [emphasis added]

99 [2002] 3 R.C.S. 269, pp. 293-294. See also, on this case, S. Beaulac, "Recent Developments on the Role of International Law in Canadian Statutory Interpretation" (2004), 25 Statute L. Rev. 19.

100 In this section, I rely also on S. Beaulac, "L'interprétation de la Charte : reconsidération de l'approche téléologique et réévaluation du rôle du droit international", in G.-A. Beaudoin & E.P. Mendes (eds.), Canadian Charter of Rights and Freedoms , 4th ed. (Toronto: Carswell, 2005), forthcoming.

101 See also the decision of the Judicial Committee of the Privy Council in Collco Dealings v. Inland Revenue Commissioners, [1962] A.C. 1, at 19, where Viscount Simonds said: "My Lords, the language that I have used is taken from a passage of p. 148 of the 10th edition of 'Maxwell on the Interpretation of Statutes' which ends with the sentence: 'But if the statute is unambiguous, its provisions must be followed even if they are contrary to international law.'"

102 [1982] 1 S.C.R. 1092.

> If one could assert an ambiguity, either patent or latent, in the Regulations it might be that a court could find support for making reference to matters external to the Regulations in order to interpret its terms. Because, however, there is in my view no ambiguity arising from the above-quote excerpt from these Regulations, there is no authority and none was drawn to our attention in argument entitling a court to take recourse either to an underlying international agreement or to textbooks on international law with reference to the negotiation of agreements or to take recourse to reports made to the Government of Canada by persons engaged in the negotiation referred to in the Regulations.[103]

The main problem with such an ambiguity requirement is that it perpetuates the empty rhetoric of the plain meaning rule.[104] Another concern is how difficult it is to determine whether or not the legislation is ambiguous or unambiguous.[105] As Lord Oliver of Aylmerton pointed out in *Pepper v. Hart*: "Ingenuity can sometimes suggest ambiguity or obscurity where none exists in fact."[106]

The truth of the matter is that, when judges hold that a statutory provision is clear or that it is ambiguous, they have in fact already construed the legislation.[107] Justice L'Heureux-Dubé, dissenting in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, considered this point and appositely observed that: "In reality, the 'plain meaning' can be nothing but the result of an implicit process of legal interpretation."[108] Indeed, rather than being

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103 Id., at 1098. See also, to the same effect, the reasons by Chief Justice Laskin in Capital Cities Communications Inc. v. Canada (C.R.T.C.), *supra*, note 29 at 173.

104 On this point, see S. Beaulac, "Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates" (2000), 63 Saskatchewan L. Rev. 581, at 602.

105 See, generally, C.B. Nutting, "The Ambiguity of Unambiguous Statutes" (1940), 24 Minnesota L. Rev. 509.

106 Pepper v. Hart, *supra*, note 78 at 620.

107 See, on this general issue, M. Zander, *supra*, note 76 at 121-127; W.N. Eskridge, Dynamic Statutory Interpretation (Cambridge, U.S.A.: Harvard University Press, 1994), at 38-41; N.J. Singer, Statutes and Statutory Construction, vol. 2A, 5th ed. (New York: Clak Boardman Callaghan, 1992), at 5-6; V. van de Kerchove, L'interprétation en droit — Approche pluridisciplinaire (Brussels: Facultés universitaires St-Louis, 1978); F.E. Horack Jr., "In the Name of Legislative Intention" (1932), 38 West Virginia L.Q. 119, at 121; and, M. Radin, "Statutory Interpretation" (1930), 43 Harvard L. Rev. 863, at 869.

108 2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool), *supra*, note 82 at 997. [emphasis in original]

something *a priori*, legislative ambiguity is a conclusion reached at the end of the interpretation process. Ambiguity is in effect a determination that can be made only after a full assessment of the intention of Parliament, using canons and tools of statutory interpretation, including international law, as a contextual element.

It is illogical to require that legislation be ambiguous as a preliminary threshold test to the interpretation of legislation in general or, particularly, to the use of international law as an aid to the construction of statutes. This was the conclusion reached by Justice Gonthier in *National Corn Growers Assn. v. Canada (Import Tribunal)*,[109] where he effectively narrowed down Justice Estey's statement in *Schavernoch v. Foreign Claims Commission*[110] and wrote that "it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation."[111] Ruth Sullivan also noted the problems with the reasoning behind the ambiguity requirement and agreed that no such preliminary condition was necessary before resorting to international law.[112]

5. *Conclusion*

The new position that domestic courts in Canada do not have to find an ambiguity or an obscurity in the statutory provision before construing it having regard to international law falls squarely within Driedger's "modern" principle of legislative interpretation. This words-in-total-context approach also commands that the old way to resort to international law, by invoking the presumption of conformity, be reformulated in terms of the purposive and contextual method of statutory interpretation. Indeed, international treaty law ought to be considered as an element of context which, as Justice Dickson wrote in *R. v. Zingre*, allows "a fair and liberal interpretation with a view to fulfilling Canada's international obligations."[113] Ruth Sullivan accurately noticed that the recent trend at the Supreme Court - in cases such as *Baker*,

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109 [1990] 2 S.C.R. 1324.

110 *Supra*, note 102 at 1098.

111 National Corn Growers Assn. v. Canada (Import Tribunal), *supra*, note 30 at 1371. Similarly, see M Hunt, Using Human Rights Law in English Courts (Oxford: Hart, 1997), at 40, where the author wrote: "So instead of asking if there is ambiguity which can be resolved with the 'assistance' of international law, on this approach the court should ask, having automatically considered the international law alongside the national law, whether the domestic law is unambiguously (in the sense of irreconcilably) in conflict with the international norms."

112 See R. Sullivan, *supra*, note 48 at 437-438.

113 R. v. Zingre, [1981] 2 S.C.R. 392, at 409-410.

but also *Suresh v. Canada (Minister of Citizenship and Immigration)*,[114] *R. v. Sharpe*,[115] *114957 Canada Ltée (Spraytech) v. Hudson (Town)*[116] - is an increased open "reliance on international law as legal context."[117]

In that regard, it is important to point out in closing that, in the *Baker* decision,[118] Justice L'Heureux-Dubé relied on an excerpt of the third edition of the *Construction of Statutes* where Sullivan explains that international law is an element of context in statutory interpretation:

> Second, 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.[119]

Justice L'Heureux-Dubé thus endorsed Sullivan's view on the relevance of international law as a *contextual element of interpretation*. On the other hand, her ladyship did not refer to - and thus did not endorse - what Sullivan wrote about the presumption of compliance with international law, which was in the preceding two sentences.[120] Accordingly, one can make the argument that *Baker* stands as an authority for the proposition that the proper way to resort to international law is as an element of context within Driedger's "modern" approach to statutory interpretation, not through the use of a presumption of conformity.[121]

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114 [2002] 1 S.C.R. 3. See also, on this case, S. Beaulac, "The Suresh Case and Unimplemented Treaty Norms" (2002), 15 Rev. québécoise d. int'l 221.

115 [2001] 1 S.C.R. 45.

116 [2001] 2 S.C.R. 241.

117 R. Sullivan, *supra*, note 48 at 426.

118 Baker, *supra* note 3 at 861.

119 R. Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto & Vancouver: Butterworths, 1994), at 330. [emphasis added]

120 This passage, at ibid., reads: "First, the legislature is presumed to comply with the obligations owed by Canada as a signatory of international instruments and more generally as a member of the international community. In choosing among possible interpretations, therefore, the court should avoid interpretations that would put Canada in breach of any of its international obligations."

121 This is an aspect of the Baker case that Jutta Brunnée and Stephen Toope also noticed, but which they used to argue that the majority should have resorted to the old approach of the presumption of conformity with international law. See J. Brunnée & S.J. Toope, *supra*, note 8 at 37-38.

This would also make sense, given the identified inclination at the Supreme Court to see all interpretative arguments (contextual or else) available to the Canadian judge in all cases, like tools in a toolbox awaiting use by the one doing the construction. By considering international treaty norms as context, there is no way to brush the argument aside at the outset. International law is thus always there for the judge to utilise and weight, as much as any other method of interpretation, like the textual argument, the coherence argument, the purposive argument, the historical argument, and the pragmatic argument. Also, by emphasising that the issue is not "bindingness" but is really one of persuasive force attributed to the international law argument based on the extent to which such norms are implemented by legislation, the judge retains his or her margin of appreciation in the interpretation of Canadian statutes.

It is absolutely unrealistic to think that we, international legal scholars, will be able to do for international treaty norms what nobody - case law, doctrine - has been able to do with any other canon of interpretation, that is, to transform a method available to courts into a full-fledged rule that decision-makers are obliged to follow in ascertaining the intention of Parliament. This will never happen. By the very nature of the constitutional mandate entrusted to them, judges must have latitude in choosing and weighing the methods they use in interpreting and applying legislation.[122] In fact, I believe that being overly enthusiastic about the "international" is doing a disservice to the cause of strengthen the role of international law in Canada. Indeed, diminishing the value of the implementation requirement of treaties, suggesting that "passive incorporation" is possible, extending the means of legal transformation to non-legislative ones like government policy measures, all these back-door changes have the potential to backlash.

In order to get lawyers and judges in this country on board when it comes to the relevance of international law domestically, caution is in order. A gradual evolution of mentalities in an open and honest discourse, as opposed to revolutionary and insidious challenges to fundamental principles, will more likely win the day and be accepted in Canada's legal community. One such evolutionary step I have been proposing here and elsewhere is to consider the international law argument as a contextual element within Driedger's "modern" approach to the interpretation of statutes, which has already drawn a consensus in our courts. This is a case where international legal scholarship can, and should, build on important developments in the discipline of statutory interpretation and thus further promote the domestic use of international law.

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[122] On this point, see the decision of the Supreme Court of Canada, per Justice Gonthier, in R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606.