

# No More International Treaty Interpretation in Canada's Statutory Interpretation: A Question of Access to Domestic *Travaux Préparatoires*

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"By and large", wrote Justice La Forest for the majority of the Supreme Court of Canada in the 1994 case of *Thomson v. Thomson*, "international treaties are interpreted in a manner similar to statutes".<sup>1</sup> This qualification from a more complete commonality of methods between treaty interpretation and statutory interpretation in Canada was due in large part to one specific (and now displaced) rule peculiar to the latter field, namely the exclusionary rule on parliamentary debates, or in general, the prohibition to resort to so-called "extrinsic evidence"<sup>2</sup> – parliamentary / legislative history,<sup>3</sup> also

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1. *Thomson v. Thomson*, [1994] 3 S.C.R. 551 at 577.

2. This terminology bears witness to the Anglo-Saxon common law general approach to written law – i.e. legislation, also known as "statutes" – which was highly restrictive, favouring a strict construction of normativity similar to contracts in private law. See R. Munday, "The Common Lawyer's Philosophy of Legislation" (1983) 14 *Rechtstheorie* 191. Hence the procedural reflexes of approaching elements to ascertain legislative intent in terms of "evidence" and, in particular, treating material not within the four corners of an act as inadmissible in the truth-seeking interpretative process. See F. Frankfurter, "Some Reflections on the Reading of Statutes" (1947) 47 *Columbia Law Review* 527.

3. Noteworthy is the distinction between parliamentary history (sometimes called legislative history, in English) and the historical argument of interpretation interested in the previous versions of an act. The rules traditionally applicable to the two categories were very different, the latter being fully acceptable to determine legislative intent. See, on that point, S. Beaulac, *Handbook on Statutory Interpretation* –

known as preparatory work (or French *travaux préparatoires*)<sup>4</sup> in international law particularly<sup>5</sup> – to help ascertain the intention of Parliament in a piece of legislation.<sup>6</sup> Justice La Forest noted this feature in the *Thomson* decision: “There is a significant difference, however, in the use that may be made of the legislative history and other preparatory material”.<sup>7</sup>

The situation in the last fifteen years has changed considerably in Canada as far as the methodology of statutory interpretation is concerned, and particularly with regard to preparatory work. In the most recent edition of Côté’s treatise, the authors opined that setting aside the exclusionary rule is part of a clear trend in this country toward a less restrictive approach to statutory interpretation, *inter alia*, by favouring a large concept of contextual interpretation, one that now includes parliamentary material.<sup>8</sup> The hypothesis at the centre of this short paper is that the main reason why there was once a need to use the methodology of treaty interpretation – that is, to resort to *travaux préparatoires* in the domestic construction of statutes – does not exist any longer, given that such material is now

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*General Methodology, Canadian Charter and International Law* (Markham: LexisNexis, 2008) at 263ff.

4. Even old classics on the topic did not provide a precise meaning, or list of material that form part of this interpretative argument: F.A.R. Bennion, *Statutory Interpretation: A Code*, 5<sup>th</sup> ed. (London: Butterworths, 2008) at 609; J. Bell & G. Engle, eds., *Cross on Statutory Interpretation*, 3<sup>rd</sup> ed. (London: Butterworths, 1995) at 152; and R. Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown, 1975) at 137. Here, the expression favoured, given the common terminology in international law, is preparatory work, or *travaux préparatoires*, which includes all the documented information relating to events that occurred at the conception, preparation and adoption of a piece of written law, being domestic legislation or international convention. In the domestic law lexicon, it includes not only parliamentary debates, but also commission or administrative reports and so-called explanatory memoranda about a bill. To be precise, unless otherwise indicated, the expression preparatory work or *travaux préparatoires* used in this chapter concerns *domestic* parliamentary material, such as that in relation to implementing legislation, not the material pertaining to the international treaty *per se* that would have been domestically transformed by the said statute.
5. See M.N. Shaw, *International Law*, 6<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2008) at 935; R.K. Gardiner, *International Law* (Harlow: Pearson Longman, 2003) at 82-84; and I. Brownlie, *Principles of Public International Law*, 5<sup>th</sup> ed. (Oxford: Oxford University Press, 1998) at 635-636.
6. See, generally, S. Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?” (1998) 43 McGill Law Journal 287.
7. *Thomson v. Thomson*, *supra* note 1 at 577.
8. P.-A. Côté, *Interprétation des lois*, 4<sup>th</sup> ed., with the collaboration of S. Beaulac & M. Devinat (Montreal: Thémis, 2009) at 53: “S’inscrivant dans le mouvement favorable à l’interprétation contextuelle, l’abandon progressif de la règle qui interdisait le recours aux travaux préparatoires a révolutionné le travail des juristes en matière d’interprétation.”

utilised without much restriction by domestic courts.<sup>9</sup> What ensues is a complete overlap in interpretative approaches which, in turn, would explain why there is no more reference to international treaty interpretative methods in Canadian cases of statutory interpretation, even in relation to enactments that have an obvious link to conventional international law, like domestic implementing legislation.

The chapter is structured thus: Preliminarily, it is useful to have some refreshers on the background issues of treaty interpretation (section I) and of interlegality (section II). Next, the discussion shows the evolution in the practice at the Supreme Court of Canada, which no longer refers to the international methodology of treaty interpretation (section III). Then the last part of the demonstration contends that the reason for this change is found in recent developments about the role of preparatory work in this country (section IV).

## I – METHODOLOGY OF TREATY INTERPRETATION

All over the world, and especially in Europe, a large number of domestic courts have endorsed (without hesitation or qualifications) the methodology of interpretation applicable to international treaties when it comes to interpreting national legislation that is linked to international normativity, that is to say, in the construction of what is known as implementing statutes in a “dualist”<sup>10</sup> country like Canada. This is even more so in jurisdictions that follow a “monist”<sup>11</sup> logic as regards treaties where, as Richard Gardiner accurately noted, “courts and tribunals more readily accept that they are inter-

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9. *Ibid.* at 504.

10. On the *dualist* theory of normative interaction between international and domestic law, see the classic work by H. Triepel, *Völkerrecht und Landesrecht* (Leipzig: Hirschfeld, 1899). See also G. Gaja, “Dualism – A Review” in J. Nijman & A. Nollkaemper, eds., *New Perspectives on the Divide Between National and International Law* (Oxford & New York: Oxford University Press, 2007) at 52.

11. On the *monist* theory, see the classic work by H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: Mohr, 1920). On the difference between dualism and monism, see also the following pieces: J.G. Starke, “Monism and Dualism in the Theory of International Law” (1936) 17 *British Yearbook of International Law* 66; I. Seidl-Hohenfeldern, “Transformation or Adoption of International Law into Municipal Law” (1963) 12 *International & Comparative Law Quarterly* 88; and L. Ferrari-Bravo, “International and Municipal Law: The Complementarity of Legal Systems” in R. St.J. Macdonald & D.M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Martinus Nijhoff, 1986) at 715.

preting the treaty itself rather than implementing legislation".<sup>12</sup> In most instances, the domestic use of the international methodology of interpretation boils down to invoking the relevant provisions of the *Vienna Convention on the Law of Treaty*.<sup>13</sup> Articles 31 and 32, in their essential parts, read as follows:

#### ARTICLE 31

##### *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

[...]

#### ARTICLE 32

##### *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

A detailed comparison of the interpretative methodology in international law, based on articles 31 and 32 of the *Vienna Convention*, and the approach favoured in domestic courts, like in Canada with Driedger's "modern principle"<sup>14</sup> of statutory construction (quite

12. R.K. Gardiner, *Treaty Interpretation* (Oxford & New York: Oxford University Press, 2008) at 128.

13. *Vienna Convention on the Law of Treaties*, (1969) 1155 UNTS 331, Can. T.S. 1980 No. 37 [hereinafter *Vienna Convention*].

14. The *modern principle* of statutory interpretation comes from Elmer Driedger's work, *Construction of Statutes*, 2<sup>nd</sup> ed. (Toronto: Butterworths, 1983) at 87, where the author wrote: "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". On the absolutely gigantic impact of the modern principle on the Canadian methodology of statutory interpretation, see S. Beaulac &

familiar to most readers), goes beyond the scope of this paper.<sup>15</sup> Suffice it to say, in agreement with La Forest J.'s *dictum* referred to above,<sup>16</sup> that it appears that the fundamental elements of interpretation are the same for international treaties and domestic legislation, namely, to ascertain the intention of the constituting authority (legislature or state parties) based on the text of the written law, on the context in which it is expressed and on the object it seeks to achieve.<sup>17</sup> Put another way: TEXT, CONTEXT, OBJECT, the three cornerstones of any process pertaining to the interpretation of written normativity, be it at the national or at the international level.

Before examining how there used to be an exception to a more total commonality of methods between international treaty interpretation and the Canadian interpretation of statutes, the problematics of interlegality must be briefly addressed. These general points are germane to a full appreciation of how the normative interface comes into play in the discussion that follows.

## II – PARAMETERS OF INTERLEGALITY

To provide some theoretical background, the parameters of what is referred to as "interlegality"<sup>18</sup> must be highlighted.<sup>19</sup> Simply put, as far as Canadian courts are concerned, the matrix within which states operate and international affairs operate is still based

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P.-A. Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 *Revue juridique Thémis* 131.

15. For more detail, beside Gardiner's work (*supra* note 12), see the recent book by U. Linderfalk, *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer, 2007).
16. See *supra* notes 1 and 7.
17. On the application of the text-context-object methodological trio, see 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*, 4<sup>th</sup> ed. (Markham: LexisNexis Butterworths, 2005) at 27; reprinted in (2005) 27 *Supreme Court Law Review* (2d) 1.
18. I use the term *interlegality* to refer to the phenomenon of normative migration among legal orders, in particular the national application of international law by domestic courts. I owe this terminology to Neil Walker, University of Edinburgh School of Law.
19. This part of the paper draws from S. Beaulac, "Westphalia, Dualism and Contextual Interpretation: How to Better Engage International Law in Domestic Judicial Decisions" (2007) European University Institute Working Paper, MWP 2007/3.

on the so-called Westphalian model of international relations,<sup>20</sup> at the centre of which is the *idée-force* of sovereignty.<sup>21</sup> The legal by-products of this social construct<sup>22</sup> are constitutional law and international law,<sup>23</sup> which correspond to the exercise of internal sovereignty (Jean Bodin's<sup>24</sup>) and external sovereignty (Emer de Vattel's<sup>25</sup>). Therefore,<sup>26</sup> the traditional stance holds that the Westphalian model of international relations, which is governed by the Vattelien legal structure, involves an international realm that is distinct and separate from the internal realms.<sup>27</sup> While he argued that the paradigm is changing, Geoffrey Palmer provided the following useful image: "[I]nternational law and municipal law have been seen as two separate circles that never intersect".<sup>28</sup>

The distinctiveness and separateness of the international / national realities – what was recently called the *divide*<sup>29</sup> – explain

20. See S. Beaulac, "The Westphalian Model in Defining International Law: Challenging the Myth" (2004) 8 *Australian Journal of Legal History* 181; S. Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?" (2000) 2 *Journal of the History of International Law* 148.
21. See S.D. Krasner, "The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law" (2004) 25 *Michigan Journal of International Law* 1075 at 1077, who accurately summarises the modern situation with respect to sovereignty, in spite of the numerous revisionist claims over the years, with the following catchy phrase: "Sovereignty is now the only game in town".
22. T.J. Biersteker & C. Weber, "The Social Construction of State Sovereignty" in T.J. Biersteker & C. Weber, eds., *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996) at 1.
23. See N. Walker, "Late Sovereignty in the European Union" in N. Walker, ed., *Sovereignty in Transition* (London: Hart Publishing, 2003) at 3.
24. See S. Beaulac, "The Social Power of Bodin's 'Sovereignty' and International Law" (2003) 4 *Melbourne Journal of International Law* 1; S. Beaulac, "Le pouvoir sémiologique du mot « souveraineté » dans l'œuvre de Bodin" (2003) 16 *International Journal for the Semiotics of Law* 45.
25. See S. Beaulac, "Emer de Vattel and the Externalization of Sovereignty" (2003) 5 *Journal of the History of International Law* 237.
26. *Contra*, see P. Allott, "The Emerging Universal Legal System" in J. Nijman & A. Nollkaemper, eds., *New Perspectives on the Divide Between National and International Law* (Oxford & New York: Oxford University Press, 2007) at 63.
27. See, generally, 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).
28. G. Palmer, "Human Rights and the New Zealand Government's Treaty Obligations" (1999) 29 *Victoria University in Wellington Law Review* 27 at 59. Another image is given by P. Weil, "Towards Relative Normativity in International Law?" (1983) 77 *American Journal of International Law* 413 at 441: "Regret it as one may, the international scene today is still made up of the juxtaposition of equally sovereign states seeking, irrespective of their differences, to ensure their peaceful coexistence and cooperation".
29. See J. Nijman & A. Nollkaemper, "Beyond the Divide" in J. Nijman & A. Nollkaemper, eds., *New Perspectives on the Divide Between National and International Law* (Oxford & New York: Oxford University Press, 2007) at 341.

two fundamental legal principles, one from international law and one from constitutional law. The first is that a sovereign state is not entitled to invoke its internal law, including its constitutional legal structure,<sup>30</sup> in order to justify a breach of its international obligations.<sup>31</sup> The essential reason why domestic law cannot justify a failure to honour obligations *vis-à-vis* the international community is that these norms and duties belong to two distinct and separate legal systems. The second core legal principle springing from the international-national divide, in fact a set of rules, concerns the administration of the relationship between the two systems.<sup>32</sup>

These rules determine, as a matter of law, how one legal system interacts, how it treats the other legal system, including the way in which the normativity emanating from one may be taken into account or utilised in the other.<sup>33</sup> Accordingly, the rules on the status of international law in the jurisdiction of a sovereign state are domestic rules, usually deemed important enough to be part of constitutional law.<sup>34</sup> As Francis Jacobs once explained, “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”. “Indeed international law is generally uninformative in this area since it simply requires the application of treaties in all circumstances”, he further noted.<sup>35</sup> This is, fundamentally, the dualist logic at play here, applicable at the *meta-level* of the interlegality interface.<sup>36</sup> Mattias Kumm is right that: “The very idea that the national

30. See R. Jennings & A. Watts, eds., *Oppenheim's International Law*, 9th ed., vol. 1 (London: Longman, 1992) at 254.

31. The basic authority for this proposition is the arbitration decision in the *Alabama Claims* case (United States/United Kingdom) (1872), Moore, *Arbitrations*, i. 653. This rule was codified in section 27 of the *Vienna Convention*.

32. See, generally, J.H. Currie, *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008) at 220-224.

33. See R. Provost, “Judging in Splendid Isolation” (2008) 56 *American Journal of Comparative Law* 125.

34. See C. Greenwood, “International Law in National Courts: Discussion” in J. Crawford & M. Young, eds., *The Function of Law in the International Community: An Anniversary Symposium – Proceedings of the 25th Anniversary Conference of the Lauterpacht Centre for International Law* (Cambridge: 2008) available at <[http://www.lcil.cam.ac.uk?25th\\_anniversary?book.php](http://www.lcil.cam.ac.uk?25th_anniversary?book.php)>.

35. F.G. Jacobs, “Introduction” in F.G. Jacobs & S. Roberts, eds., *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987) xxiii at xxiv.

36. See S. Beaulac, “What Rule of Law Model for Domestic Courts Using International Law in States in Transition: Thin, Thick or ‘À la Carte’” (2010) *Transitional Justice Institute Research Paper*, No. 10-13.

constitution is decisive for generating the doctrines that structure the relationship between national and international law is dualist",<sup>37</sup>

In terms of judicial activities, the international-domestic dichotomy means that domestic courts of sovereign states apply their national law, while the International Court of Justice and other international adjudicative bodies apply international law.<sup>38</sup> Put another way, the constitutional mandate of domestic courts is to interpret and apply domestic law, not international law.<sup>39</sup> This normative divide, however, does not entail that international judicial bodies cannot take into account domestic law, which is in fact a source of international law under article 38(1) of the *Statute of the International Court of Justice*,<sup>40</sup> or that domestic caselaw does not influence their decisions as secondary sources of international law or as evidence of international customs. Conversely, no authority needs to be cited for the proposition that domestic judges in Canada may resort to international law when it has become part of the laws of the land through reception rules.<sup>41</sup>

Be that as it may, such a mutual influence does not modify the basic situation that the international judiciary applies the legal norms of its realm and that national judiciaries apply the legal norms of their realms. The international reality is distinct and separate from the internal reality and, therefore, the actualization of international law through judicial decision-making is distinct and separate

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37. M. Kumm, "Democratic Constitutionalism Encounters International Law: Terms of Engagement" in S. Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 256 at 258.
  38. See A. von Bogdandy, "Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law" (2008) 6 *International Journal of Constitutional Law* 397.
  39. See K. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *New York University Journal of International Law & Policy* 501.
  40. *Statute of the International Court of Justice*, annexed to the *Charter of the United Nations*, (1945) 1 UNTS 16, Can. T.S. 1945 No. 7.
  41. If an authority was needed, the clearest judicial pronouncement in Canadian caselaw may be found in the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 235, where, in rejecting the argument that it had no jurisdiction to look at international law, the Supreme Court of Canada wrote this: "In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system". The Court cited the following cases in support: *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208; *Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; and *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86. See also S. Beaulac, "On the Saying that International Law Binds Canadian Courts" (2003) 29(3) *Canadian Council on International Law Bulletin* 1.

from the actualization of domestic law through judicial decision-making.<sup>42</sup> Thus, it is still assumed in Canada that it is if, and only to the extent that, national legal rules of reception allow international law to be part of national law – and that it has, in effect, become part of national law, such as through treaty implementing legislation – that international norms may have an impact on the interpretation and application of domestic law by domestic courts. Strictly speaking, therefore, international law *qua* international law cannot be binding on national judges,<sup>43</sup> whose judicial authority is constitutionally entrusted by and for a sovereign state. Put another way, international normativity cannot apply *per se* within a domestic system like in Canada because our national courts are concerned with and competent over national, not international law.<sup>44</sup>

Now, what normativity from the international legal order can do – and no doubt ought to do, whenever appropriate – is to influence the interpretation and application of domestic law.<sup>45</sup> It should act as *persuasive authority*, that is, as material and information that is “regarded as relevant to the decision which has to be made by the judge, but [...] not binding on the judge under the hierarchical rules of the national system determining authoritative sources”.<sup>46</sup> Likewise, the international approach to written law, that is, the interpretative methodology regarding treaties, is a concern for international adjudications, through their courts and tribunals. Therefore, without any kind of connection to domestic legal orders, the international methodology is not relevant to Canada’s domestic courts for their decision-making process. However, in a scenario where national implementing legislation is at issue and to be interpreted by a domestic court,

42. See S. Beaulac, “International Law and Statutory Interpretation: Up with Context, Down with Presumption” in O.E. Fitzgerald *et al.*, eds., *The Globalized Rule of Law – Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006) at 331.

43. See 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 Law Review (2nd) 23 at 62.

44. See also S. Beaulac, “Thinking Outside the ‘Westphalian Box’: Dualism, Legal Interpretation and the Contextual Argument” in C.C. Eriksen & M. Emberland, eds., *The New International Law – An Anthology* (Leiden: Brill Publishers, 2010) at 17.

45. See G.L. Neuman, “International Law as a Resource in Constitutional Interpretation” (2006) 30 Harvard Journal of Law and Public Policy 177 at 185.

46. C. McCrudden, “A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights” (2000) 20 Oxford Journal of Legal Studies 499 at 502-503.

the methods of statutory interpretation may be influenced by the methods applicable on the international plane, the latter acting as *methodological persuasive authority*.

It is worth saying again that this conception of the relation between international law and domestic law, involving the judicial application of legal norms as well as the methodology courts adopt to accomplish it, is essentially dualist at the micro-level and, more importantly, dualist at the fundamental meta-level. The two systems are not – in any significant way, shape or form – part of an integrated legal order, one that could be associated to monism. Rather, according to the still dominant understanding of the world legal reality, “different legal systems on the national and international levels interact with one another on the basis of standards internal to each legal system”.<sup>47</sup> Thus in order to determine the legal status of international normativity within the domestic legal systems of sovereign states, one must be looking inwardly at the constitutional rules of reception. In the United States, for instance, unimplemented treaties have no direct effect generally, in spite of the “supremacy clause” in the US Constitution;<sup>48</sup> this is due to a presumption against self-executing treaties developed by caselaw.<sup>49</sup> In Canada, even though recent decisions – especially in *Baker*<sup>50</sup> – provide for more flexibility in utilising conventional international law domestically,<sup>51</sup> the orthodoxy remains strong: “International treaties and conventions are not part of Canadian law unless they have been implemented by statute”, as Justice L’Heureux-Dubé confirmed in that case.<sup>52</sup>

47. M. Kumm, *supra* note 37 at 257.

48. Article VI, clause 2, of the United States Constitution provides that “all Treaties made, or which shall be made, under the authority of the United States” shall be part of the supreme law of the land. Generally, see also J.F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press).

49. On the presumption against self-executing treaties, see American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, § 111.

50. *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817. The case concerned the application of the “best interests of the child” principle, based on the *Convention on the Rights of the Child*, to guide the discretionary power of immigration officials making decisions on the basis of compassionate and humanitarian grounds.

51. See S. Beaulac, “Recent Developments on the Role of International Law in Canadian Statutory Interpretation” (2004) 25 Statute Law Review 19; and A.W. La Forest, “Domestic Application of International Law in *Charter* Cases: Are We There Yet?” (2004) 37 University of British Columbia Law Review 157.

52. *Baker v. Canada*, *supra* note 50 at 861.

### III – INTERNATIONAL METHODOLOGY IN CANADIAN COURTS

To the question of whether or not the interpretative approach on the international plane has had any influence on the methodology of interpretation of domestic legislation implementing treaties, there used to be a modest affirmative answer. Indeed, a certain number of cases in the 80s and 90s, including at the Supreme Court of Canada, make a connection between the two methodologies, not so much generally, but more particularly in relation to preparatory work. This paper argues that there is no need anymore for these references to international interpretative methods because of a convergence of rules, that came from domestic law and saw an opening toward *travaux préparatoires*. The review of caselaw below is conducted to show that, although once common judicial practice in Canada, invoking the interpretative provisions of the *Vienna Convention* has not occurred for a long time. To help the discussion, let us first recall the legislative drafting techniques of treaty incorporation applicable in this country.

#### A. Domestic Implementation of Treaties

Although one author has suggested that implementation of treaties by legislation could take different forms (some ten of them<sup>53</sup>), it is generally agreed that there are really two techniques of statutory drafting to accomplish domestic transformation, namely (i) direct reference and (ii) harmonization. The first type, quite simply, directly implements the convention, either by reproducing its provisions in the statute itself or by including the conventional text as a schedule and somehow indicating that it is thus part of the statute.<sup>54</sup> As John Mark Keyes and Ruth Sullivan noted: “Legislation providing for direct implementation typically contains a preamble or purpose clause, and sometimes both, which set out contextual detail that may have a significant effect on how it is interpreted”. “In addition”, they wrote, “the text of the agreement may be annexed to the implement-

53. See G. van Ert, “What is Treaty Implementation?” in C.C.I.L., ed., *Legitimacy and Accountability in International Law – Proceedings of the 33<sup>rd</sup> Annual Conference of the Canadian Council on International Law* (Ottawa: Canadian Council of International Law, 2005) 165 at 168-169. This claim, however, is not substantiated by judicial practice in Canada.

54. For example, the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 directly incorporates the applicable provisions of the *Vienna Convention on Diplomatic Relations*, (1961) 500 UNTS 95 (1961), Can. T.S. 1966 No. 29, and the *Vienna Convention on Consular Relations*, (1963) 596 UNTS 261; Can. T.S. 1977 No. 25.

ing legislation".<sup>55</sup> In the latter scenario, however, it is noteworthy that the mere scheduling of an international treaty, in itself, was held to be insufficient to give domestic effect to the norms therein. In *Re Act Respecting the Vancouver Island Railway*,<sup>56</sup> Iacobucci J. of the Supreme Court of Canada relied on two opinions in the 1945 case of *Ottawa Electric Railway Co. v. Corporation of the City of Ottawa*<sup>57</sup> and concluded: "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".<sup>58</sup>

As regards the second technique, Ruth Sullivan observed: "When a legislature implements an international convention through harmonization, it redrafts the law to be implemented in its own terms so as to adapt it to domestic law".<sup>59</sup> This is no doubt the mode of treaty incorporation that is most commonly favoured, in many areas of the law, including criminal law.<sup>60</sup> As John Mark Keyes and Ruth Sullivan put it: "This approach involves restating the terms of the agreement or enacting provisions that will otherwise accomplish what the agreement requires", which may be done by amending an existing statute or by enacting a brand new one. In such cases: "The purpose of implementing an international agreement heavily influences the meaning of domestic legislation".<sup>61</sup>

Given the requirement of having legislation to transform international conventions within the Canadian domestic legal system, the deciding factor in knowing whether such incorporation has occurred is, unsurprisingly, the intention of the legislature.<sup>62</sup> Relying on Jus-

55. J.M. Keyes & R. Sullivan, "A Legislative Perspective on the Interaction of International and Domestic Law" in O.E. Fitzgerald *et al.*, eds., *The Globalized Rule of Law – Relationships Between International and Domestic Law* (Toronto: Irwin Law, 2006) 277 at 314.

56. *Re Act Respecting the Vancouver Island Railway*, [1994] 2 S.C.R. 41.

57. *Ottawa Electric Railway Co. v. Corporation of the City of Ottawa*, [1945] S.C.R. 105.

58. *Re Act Respecting the Vancouver Island Railway*, *supra* note 56 at 109.

59. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed. (Markham & Vancouver: Butterworths, 2002) at 434.

60. For example, see the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, which implements through harmonization the *Rome Statute of the International Criminal Court*, (1998) 2187 UNTS 90, Can. T.S. 2002 No. 13.

61. J.M. Keyes & R. Sullivan, *supra* note 55 at 317.

62. See C.-E. Côté, "La réception du droit international en droit canadien" (2010) 52 Supreme Court Law Review (2d) 483 at 524.

tice Iacobucci's reasons in *Re Act Respecting the Vancouver Island Railway*,<sup>63</sup> Justice Lemieux at the Federal Court of Canada in the *Pfizer* decision<sup>64</sup> explained that "whether an agreement is legislated so as to become endowed with statutory force is a matter of discovering Parliament's intention". Accordingly, when the statute explicitly declares that a certain international convention has "force of law in Canada",<sup>65</sup> the implementing requirement is likely fulfilled.<sup>66</sup> Although the language that is used in the enactment is important, "all of the tools of statutory interpretation can be called in aid to determine whether incorporation is intended".<sup>67</sup> A similar opinion is found in the Quebec Court of Appeal decision in *UL Canada Inc.*,<sup>68</sup> holding that to determine whether an international treaty has been implemented by legislation: "One must, using all the rules of statutory interpretation, determine the intention of the legislature. Did it intend to incorporate the Agreement into internal law?"<sup>69</sup> As a result, the old view that, "courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation",<sup>70</sup> suggesting it can be done considering the letter of the law exclusively, is not an accurate description of Canada's judicial practice any longer. Rather, the recipe is, as usual: text, context, object.

Now, what is our interest in recalling these drafting techniques? It is in regard to the former technique – namely, direct incorporation – that the courts in this country have resorted to the methodology of treaty interpretation, to help ascertain legislative intent in relation to implementing legislation. As a matter of fact, such references are indeed most appropriate where domestic legislation embodies the very words of the treaties and gives them legal effect domestically, be it by reproducing the text in the statute or by putting it as a schedule (with an indication of the will to implement).

63. *Supra* note 56 at 110.

64. *Pfizer Inc. v. Canada*, [1999] 4 F.C. 441 (F.C.T.D.).

65. For instance, see s. 3 of the *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c. 16 (2<sup>nd</sup> supp.); and s. 3(1) of the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41.

66. Such clear intention to implement, however, is not necessarily conclusive as to the actual transformation of treaty norms domestically – see *Antonsen v. Canada (Attorney General)*, [1995] 2 F.C. 272 (F.C.T.D.) at 305-306.

67. See *Re Act Respecting the Vancouver Island Railway*, *supra* note 56 at 110.

68. *UL Canada Inc. v. Quebec (Attorney General)*, [2003] R.J.Q. 2729, 234 D.L.R. (4th) 398, affirmed [2005] 1 S.C.R. 10.

69. *Ibid.* at par. 78.

70. *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134 at 171, *per* Laskin C.J.

## B. Canadian Caselaw Resorting to International Interpretative Methodology

As I have argued elsewhere,<sup>71</sup> when a domestic court resorts to international law to interpret an implementing statute that directly incorporates a treaty, the latter constitutes an element of immediate context, with very high *a priori* interpretative weight, given that the language of the treaty and that of the domestic legislation are no less than intrinsically intertwined.<sup>72</sup> To construe one instrument (national statute) amounts to construing the other one (international treaty).<sup>73</sup> “Hence, the exercise is one of treaty interpretation and not statutory interpretation”,<sup>74</sup> as William Schabas put it. Clearly then, the situation where there is direct treaty incorporation by legislation makes it possible for a domestic court to use the methods of interpretation found in the *Vienna Convention*.<sup>75</sup> This is true even though, as I insisted above, Canadian judges apply Canadian law according to Canadian methodology. Here, given the intrinsically intertwined nature of treaty and legislation, it is warranted for domestic courts to rely on the international rules of interpretation, as they act as methodological persuasive authority.

It is at the Ontario Court of Appeal, in the 80s, that the first explicit reference to international interpretative methodology occurred, in relation to legal norms incorporated by a domestic piece of legislation. At issue in *R. v. Palacios*<sup>76</sup> was Canada’s *Diplomatic and Consular Privileges and Immunities Act*,<sup>77</sup> implementing the *Vienna Convention on Diplomatic Relations*<sup>78</sup> – giving it “the force of

71. S. Beaulac, “National Application of International Law: The Statutory Interpretation Perspective” (2003) 41 *Canadian Yearbook of International Law* 225 at 261. See also S. Beaulac, “Le droit international comme élément contextuel en interprétation des lois” (2004) 6 *Canadian International Lawyer* 1.

72. See also, generally, W.A. Schabas & S. Beaulac, *International Human Rights and Canadian Law – Legal Commitment, Implementation and the Charter*, 3<sup>rd</sup> ed. (Toronto: Thomson Carswell, 2007).

73. See R.K. Gardiner, *supra* note 12 at 128.

74. W.A. Schabas, “Twenty-Five Years of Public International Law at the Supreme Court of Canada” (2000) 79 *Canadian Bar Review* 174 at 178.

75. See R. Sullivan, *supra* note 59 at 430-431. See also, former Justice at the Supreme Court of Canada, G.V. La Forest, “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) 34 *Canadian Yearbook of International Law* 89.

76. *R. v. Palacios* (1984), 7 D.L.R. (4th) 112.

77. *Diplomatic and Consular Privileges and Immunities Act*, S.C. 1976-1977, c. 31; now replaced by the *Foreign Missions and International Organizations Act*, *supra* note 54.

78. *Vienna Convention on Consular Relations*, *supra* note 54.

law"<sup>79</sup> in this country – notably the grounds on which diplomatic immunity may be lost, *inter alia* when a diplomat goes abroad. In interpreting the expression "leave the country" found in section 39(2) of the convention, Blair J.A. made interesting comments (although resonating less nowadays, given that the literal rule is *passé* with the advent of Driedger's modern principle). He wrote:

The principles of public international law and not domestic law govern the interpretation of treaties. [...] These rules of interpretation apply even where, as in this case, a treaty has been incorporated in a statute [...].

The basic rule of interpretation law governing the interpretation is stated by O'Connell, *International Law* [...] sometimes called the effectiveness principle which requires courts to read a treaty as a whole to ascertain its purpose and intent and to give effect thereto rather than to rely on a literal interpretation of some articles [...].

The rules of treaty interpretation make it clear that the court is not bound by the common law canon of literal construction of statutes [...]. Equally, the court is not bound by the common law rule that every word in a statute should be given a meaning and that a "construction would leave without effect any part of the language of a statute will normally be rejected": *Maxwell on the Interpretation of Statutes* [...].<sup>80</sup>

At the Supreme Court of Canada, the first time international rules of interpretation were invoked was in *R. v. Parisien*,<sup>81</sup> which involved the construction of Canada's *Extradition Act*.<sup>82</sup> In his reasons, Justice La Forest did not make a point to explicitly distinguish the international methodology of treaty interpretation and that applicable to domestic statutes. However, he did refer to the interpretative provisions of the *Vienna Convention*, by name:

In interpreting this undertaking [i.e. an extradition treaty with Brazil], it must, as in the case of other terms in international agreements, be read in context and in light of its object and purpose as well as in light of the general principles of international law; see Art. 31 of the *Vienna Convention on the Law of Treaties*.<sup>83</sup>

79. *R. v. Palacios*, *supra* note 76 at 116.

80. *Ibid.* at 120-121.

81. *R. v. Parisien*, [1988] 1 S.C.R. 950.

82. *Extradition Act*, R.S.C. 1970, c. E-21.

83. *R. v. Parisien*, *supra* note 81 at 958.

Since then, at the Supreme Court of Canada, there were a few more instances, in the 90s, where the *Vienna Convention* was referred to in relation to domestic implementing legislation.<sup>84</sup> Unlike the first two precedents, in all four Supreme Court of Canada cases, international rules of interpretation were invoked for a particular purpose, namely to open the door to the use of the domestic legislation *travaux préparatoires*. The last time it happened is in the 1998 decision in *Pushpanathan*,<sup>85</sup> where Bastarache J. for the majority summed up the situation as follows:

Although some non-governmental organizations advocated the determination of exclusion under Article 1F(c) of the Convention by the United Nations High Commissioner for Refugees, it was ultimately decided that each contracting state would decide for itself when a refugee claimant is within the scope of the exclusion clause [...]. Since the purpose of the Act incorporating Article 1F(c) is to implement the underlying Convention, the Court must adopt an interpretation consistent with Canada's obligations under the Convention. The wording of the Convention and the rules of treaty interpretation will therefore be applied to determine the meaning of Article 1F(c) in domestic law (*Ward, supra*, at pp. 713-16).

Those rules are succinctly articulated in the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 ("Vienna Convention"), which states: [...]

[FOR THE WORDING OF ARTICLES 31 AND 32, SEE ABOVE]

These rules have been applied by this Court in two recent cases, one involving direct incorporation of treaty provisions (*Thomson v. Thomson*, [1994] 3 S.C.R. 551) and another involving a section of the *Immigration Act* intended to implement Canada's obligations under the Convention (*Ward, supra*). In the latter case, La Forest J. makes use of several interpretative devices: the drafting history of, and preparatory work on the provision in question; the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* ("UNHCR Handbook"), and previous judicial comment on the purpose and object of the treaty. Indeed, at p. 713,

84. The four cases are: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; *Thomson v. Thomson*, *supra* note 1; *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802; and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. Note that in the *Ward* case, although rules of treaty interpretation were obviously utilised, there was no explicit reference to the *Vienna Convention*.

85. *Ibid.*

La Forest J. was willing to consider submissions of individual delegations in the *travaux préparatoires*, although he recognized that, depending on their content and on the context, such statements “may not go far” in supporting one interpretation over another.<sup>86</sup>

It has been over fifteen years since, at Canada’s highest court, there was a reference to the provisions of the *Vienna Convention* or, generally, the interpretative methodology in international law. There was no shortage of occasions to do so though, with several cases involving implementing legislation that directly incorporates treaty obligations in domestic law, either by reproducing the convention or by scheduling it in a statute. The *Mugesera* decision<sup>87</sup> is a prime example where, although it was appropriate to do so, the Supreme Court of Canada made no mention of the *Vienna Convention*. Indeed, at issue were the sections of the Canadian *Criminal Code*<sup>88</sup> that implement, *inter alia*, the treaty definition of “genocide” from the *Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>89</sup> First, the Court pointed out that: “Genocide is a crime originating in international law. International law is thus called upon to play a crucial role as an aid in interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide”.<sup>90</sup> Yet, in spite of the fact that the treaty language was reproduced *verbatim* in the *Criminal Code*, there was not any reference to the *Vienna Convention* interpretative provisions. The same thing happened later in the judgement, where the definition of “crimes against humanity” found in the *Criminal Code* was interpreted;<sup>91</sup> the court went as far as resorting to the caselaw of the *ad hoc* tribunals for Rwanda and for the former Yugoslavia,<sup>92</sup> but there was no reference whatsoever to the international methodology of interpretation.

86. *Ibid.* at par. 51-53 [emphasis added].

87. *Mugesera v. Canada (Minister of Citizenship & Immigration)*, [2005] 2 S.C.R. 100.

88. *Criminal Code*, R.S.C. 1985, c. C-45, s. 27(1)(a.1)(ii), (a.3)(ii) (on incitement to murder, genocide and hatred) and s. 7(3.76), (3.77) (on crimes against humanity).

89. *Convention for the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277, Can. T.S. 1949 No. 27.

90. *Mugesera*, *supra* note 87 at par. 82.

91. Section 7(3.76) of the Canadian *Criminal Code*, *supra* note 88, reads: “For the purposes of this section, [...] ‘crime against humanity’ means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations” [emphasis added].

92. *Mugesera*, *supra* note 87 at par. 126.

Two other recent illustrations can be given where the Supreme Court of Canada, when asked to interpret domestic statutes that directly incorporate international treaties, did not resort to the interpretative provisions of the *Vienna Convention*, namely the 2005 case of *GreCon Dimter*<sup>93</sup> and the 2007 case of *Dell Computer*.<sup>94</sup> In both decisions, our highest court invoked (i) the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,<sup>95</sup> as well as (ii) the *UNCITRAL Model Law on International Commercial Arbitration*,<sup>96</sup> to help resolve issues concerning arbitration agreements and arbitration clauses. The former international instrument is a binding treaty and, more importantly, the provincial "legislature has incorporated the principles of the *New York Convention* relating to arbitration agreements into Quebec law by enacting the substance of the Convention"<sup>97</sup> in 1986.<sup>98</sup> Nevertheless, the Court did not resort, in either case, to articles 31 and 32 of the *Vienna Convention*, which would have been most appropriate to do given that the legislation at hand was the type that directly implements international obligations.

The question then becomes: Why is it that the Supreme Court of Canada does not deem it necessary or relevant any longer to resort to the interpretative methodology from the international plane when it needs to construe implementing legislation?

#### IV – COMMONALITY IN METHODS, EVEN FOR *TRAVAUX PRÉPARATOIRES*

What this paper suggests is that the situation described in 1988 by Blair J. of the Ontario Court of Appeal in *Palacios*,<sup>99</sup> and which later has most certainly motivated the Supreme Court of Canada to resort to the international rules of treaty interpretation – as methodological persuasive authority – in this country's construction of

93. *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401.

94. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801.

95. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (1958) 330 UNTS 38, Can. T.S. 1986 No. 43.

96. *UNCITRAL Model Law on International Commercial Arbitration*, (1985) UN Doc. A/40/17 Annex I.

97. *GreCon Dimter inc. v. J.R. Normand inc.*, *supra* note 93 at par. 41. This passage was quoted by the majority of the Supreme Court of Canada, *per* Deschamps J., in *Dell Computer*, *supra* note 94 at par. 45.

98. *Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration*, S.Q. 1986, c. 73.

99. *Supra* note 76.

domestic statutes, does not exist anymore.<sup>100</sup> In other words, the distinction in interpretative methodology between international law and Canada, which used to be pretty minor anyway, has now completely vanished. The reason is straightforward: the latter has evolved considerably in the last few decades to converge,<sup>101</sup> in a sense, towards the way treaties are interpreted on the international plane, specifically in regard to *travaux préparatoires*.

As mentioned above,<sup>102</sup> the one particular rule of statutory interpretation which was in sharp contrast with the methodology of treaty interpretation is the exclusionary rule prohibiting recourse to preparatory work. At international law, article 32 of the *Vienna Convention* is clear that, as a supplementary interpretative means, *travaux préparatoires* may be used – and indeed are frequently used<sup>103</sup> – in the interpretation of international treaties. This important methodological difference explains, to a large extent, why the Supreme Court of Canada insisted to put the debate in terms of treaty interpretation in cases like *Ward*<sup>104</sup> and *Crown Forest*.<sup>105</sup> In *Ward*, Iacobucci J. wrote:

I now turn to another set of extrinsic materials, other international taxation conventions and general models thereof, in order to help illustrate and illuminate the intentions of the parties to the *Canada-United States Income Tax Convention* (1980). Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (Can. T.S. 1980 No. 37) indicate that reference may be made to these types of extrinsic materials when interpreting international documents such as taxation conventions.<sup>106</sup>

As per Canada's statutory interpretation at the time, including the lingering exclusionary rule, such recourse to preparatory work would not have been authorised, or at least it was not clear then whether it would be possible. The alternative for the Court was to open the door

100. On the fading distinction between strict and literal construction and liberal and purposive interpretation in Canada, see S. Beaulac, "Legal Interpretation in Canada: Opening Up Legislative Language as a Means to Internationalisation" (2010) University of Edinburgh School of Law Working Paper, No. 2010/05.

101. Such convergence of interpretative approaches is also happening on the European continent; see X. Lewis, "L'Européanisation du *common law*" in P. Legrand, ed., *Common law d'un siècle à l'autre* (Cowansville: Éditions Yvon Blais, 1992) at 275.

102. See *supra* notes 1-9 and accompanying text.

103. See R.K. Gardiner, *supra* note 12 at 331ff.

104. *Canada (Attorney General) v. Ward*, *supra* note 84.

105. *Crown Forest Industries Ltd. v. Canada*, *supra* note 84.

106. *Canada (Attorney General) v. Ward*, *supra* note 84 at 827 [emphasis added].

to this method of historic construction by referring to the rules of international treaty interpretation. Since 1995, however, the exclusionary rule has gone out of the window in Canada,<sup>107</sup> a methodological change also witnessed in other common law jurisdictions around the world.<sup>108</sup>

Put another way, there is no blanket prohibition anymore in this country, indeed there is not much restriction at all on using domestic legislation *travaux préparatoires*.<sup>109</sup> The lack of obstacles to resort to such material in interpreting and applying Canadian statutes pursuant to the domestic methodology makes the courts' compensating strategy of relying on the interpretative provisions of the *Vienna Convention* less compelling, to say the least. In fact, it quite simply means that references to the methodology of treaty interpretation, in general, and to article 32 of the *Vienna Convention* on preparatory work, in particular, have now become completely unnecessary, some would say redundant or even moot. In the recent caselaw at the Supreme Court of Canada, the absence of any such references in over a decade and a half, even if there were blatant opportunities to do so, it is argued, bears witness to the consequences of ridding the domestic interpretative methodology of the exclusionary rule.

A last case, straight on point, is the 2006 judgment in *Canada 3000*,<sup>110</sup> where the Supreme Court of Canada had to interpret the word "owner" found in section 55 of the *Civil Air Navigation Services Commercialization Act*,<sup>111</sup> to decide whether or not legal titleholders

107. See S. Beaulac, "Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates" (2000) 63 Saskatchewan Law Review 581.

108. Nowhere has it been more paradigmatic than in Great Britain, with the groundbreaking decision of the House of Lords in *Pepper v. Hart*, [1993] 3 W.L.R. 1032. On the repercussions of the case, see D. Miers, "Taxing Perks and Interpreting Statutes: *Pepper v Hart*" (1993) Modern Law Review 695; S.C. Styles, "The Rule of Parliament: Statutory Interpretation after *Pepper v. Hart*" (1994) 14 Oxford Journal of Legal Studies 151; J. Steyn, "*Pepper v. Hart*: A Re-examination" (2001) 21 Oxford Journal of Legal Studies 59; A. Kavanagh, "*Pepper v. Hart* and Matters of Constitutional Principle" (2005) 121 Law Quarterly Review; and S. Vogenauer, "A Retreat from *Pepper v. Hart*? – A Reply to Lord Steyn" (2005) 25 Oxford Journal of Legal Studies 629.

109. P.-A. Côté, *supra* note 8 at 504: "Dans l'interprétation des lois, l'historique parlementaire pertinent peut être consulté par le juge, sans restriction ni quant aux circonstances où cette consultation est permise, ni quant aux fins pour lesquelles elle peut être faite".

110. *Canada 3000 Inc. Re; Inter-Canadien (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865.

111. *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20.

are jointly and severally liable for outstanding civil air navigation charges. Justice Binnie examined in detail the wording of the provision, in light of the immediate context of the act, noting the two linguistic versions of the text and considering *in pari materia* legislation. Under the heading "Broader Legislative Framework", reference was made, *inter alia*, to the *Convention on the International Civil Aviation*<sup>112</sup> (a.k.a *Chicago Convention*), which is an international instrument to which Canada is a party and which was duly implemented domestically. In the following part of his reasons for judgment,<sup>113</sup> under the heading "Legislative History", Justice Binnie went on to consider at length the domestic *travaux préparatoires* of the statute, at the time it was adopted by the House of Commons at the federal Parliament. There was no suggestion of any impediment to the use of parliamentary debates in interpreting the provision at hand. Hence, there was no need whatsoever to put the interpretative issue in terms of treaty interpretation and to call upon the *Vienna Convention* provisions, something that would have certainly happened in the 80s and 90s given the exclusionary rule.

Metaphorically, the key that the *Vienna Convention* used to provide to Canadian judges is now useless because the door to preparatory work is wide open in this country. Commonality of methods between international conventional law and domestic statutory law seems, as a result, plenary.

\* \* \*

To conclude, the core argument in this chapter was that it is a change in domestic legislative interpretation that explains, at the Supreme Court of Canada, the contemporary trend ignoring, so to speak, the *Vienna Convention*. Hence what now appears to be a complete overlap of interpretative approaches between the international legal sphere and Canada's legal order, with quasi-unrestricted access to *travaux préparatoires*. Justice La Forest's qualification voiced in the 1994 *Thomson* decision<sup>114</sup> – that is, the "by and large" bit – can certainly be deleted which, going full circle in the present discussion, leaves us with the rest of the statement we started off with, namely,

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112. *Convention on International Civil Aviation*, Can. T.S. 1944 No. 36.

113. *Canada 3000 Inc. Re; Inter-Canadien (1991) Inc. (Trustee of)*, *supra* note 110 at par. 57.

114. *Supra* note 1.

that "international treaties are interpreted in a manner similar to statutes".<sup>115</sup> Indeed.

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115. *Ibid.* at 577.