Canadian Treaty Practice and the Disabilities Convention

Joanna Harrington♣

On 13 December 2006, the United Nations General Assembly adopted the final text of a new multilateral human rights treaty, the *Convention on the Rights of Persons with Disabilities* (CRPD),[1] bringing to an end approximately five years of international negotiations and an even longer campaign for such an instrument.[2] The CRPD consists of 50 articles, which set out the purpose and general principles of the convention, the general obligations on states parties, and the specific rights of persons with disabilities. The CRPD is accompanied by an "Optional Protocol", which establishes a complaints procedure for violations of the convention using arrangements similar to those found in the optional protocols to the 1966 *International Covenant on Civil and Political Rights*,[3] and the 1979 *Convention on the Elimination of Discrimination against Women*.[4] While representing a strong affirmation at the international level of the rights

♣ Professor, Faculty of Law, University of Alberta, Canada

1 Adopted 13 December 2006, in force 3 May 2008, UN Doc. A/61/611 (2006) [CRPD].

2 See, for example, *Declaration on the Rights of Disabled Persons*, GA Res. 3447 (XXX) (9 December 1975).

3 Adopted 16 December 1966, in force 23 March 1976, 999 UNTS 171, (1967) 6 ILM 368, Can. TS 1976 No. 47; *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted 16 December 1966, in force 23 March 1976, 999 UNTS 302, Can. TS 1976 No. 47.

4 Adopted 18 December 1979, in force 3 September 1981, 1249 UNTS 13, (1980) 19 ILM 33, Can. TS 1982 No. 31; *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, adopted 10 December 1999, in force 20 December 2000, 2131 UNTS 83.

of persons with disabilities, the main purpose of the CRPD is not to create new human rights, but rather to promote, protect and ensure the full and equal enjoyment of all existing human rights for all people with disabilities and to promote respect for their inherent human dignity. The CRPD entered into force on 3 May 2008. As of October 2009, it had attracted 71 states parties and its optional protocol had attracted 45 states parties. The newly-created "Committee for the Rights of Persons with Disabilities" of independent experts has also begun operations to monitor state compliance with the convention.[5]

Canada signed the CRPD at the official signing ceremony held in New York in March 2007. By signing the convention, and thus becoming a "signatory", Canada signaled its intention to become bound to the convention in future as a "party" ; however, Canada has yet to ratify the CRPD. During its recent review as part of the new "universal periodic review" mechanism before the new United Nations Human Rights Council,[6] Canada indicated that ratification of the CRPD was being considered for future action.[7] At the time of writing, a public

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5 On the establishment and functions of the international disability rights committee, see CRPD, ***supra*** note 1, art. 34. See also: http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx

6 The universal periodic review mechanism allows for the human rights record of all 192 member states of the United Nations to be reviewed and assessed on a periodic basis（currently every four years）through a process of written reports and interstate dialogue within a working group consisting of the member states of the Human Rights Council and observer states. See further, ***Human Rights Council***, General Assembly resolution 60/251 of 15 March 2006, UN Doc. A/RES/60/251（2006）at para. 5（e）; ***Institution-building of the United Nations Human Rights Council***, Human Rights Council resolution 5/1 of 18 June 2007, Annex, Part I, reprinted in ***Report of the Human Rights Council***, UN Doc. A/62/53（2007）at 48-73; and ***Modalities and practices for the universal periodic review process***, Human Rights Council President's Statement 8/1of 9 April 2008, reprinted in ***Report of the Human Rights Council,*** UN Doc. A/63/53（2008）at 237-9. See also: http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx

consultation process concerning the CRPD's ratification has just been completed in Canada, under the leadership of the national Minister of Human Resources and Skills Development and her Department's Office of Disability Issues. This web-based consultation[8] sought input from Canadian organizations, individuals residing in Canada, and any Canadian citizens residing abroad who were interested in sharing their views on the ratification, implementation and reporting of the CRPD. An intensive inter-governmental consultation process is also taking place between the national, provincial and territorial governments, facilitated at the officials' level by a body known as the Continuing Committee of Officials on Human Rights (CCOHR), and discussions are also underway with self-governing Aboriginal communities in Canada.

While Canada is a party to almost all the core international human rights treaties adopted under the auspices of the United Nations,[9] Canadian constitutional law and Canada's federal structure adds a complication to the making of treaty obligations for the Government of Canada. As in other parliamentary democracies modelled on the United Kingdom, treaties on the international legal plane can be concluded by the state's national executive without involving either Parliament or the provinces. However, the legal obligations found within an international treaty do not automatically have domestic legal effect within Canada simply as a result of ratification. Treaty obligations that require changes to the domestic law must be implemented by the passage of legislation, thus ensuring that the Parliament of Canada, and for matters of provincial jurisdiction, the Legislative Assemblies of the provinces, retain their constitutional

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8 Unfortunately, at the conclusion of the consultation in August 2009, the Government of Canada removed the website, thus providing no historical record of how the consultation took place. See further: http://www.hrsdc.gc.ca/eng/public_consultations/index.shtml

9 The exception, in addition to the CRPD, is the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted 18 December 1990, in force 1 July 2003, 2220 UNTS 3, (1991) 30 ILM 1521, which Canada, among others, does not consider a "core" convention and which has attracted a relatively low level of ratification.

role as the bodies with the primary responsibility for law-making for Canada. Because of this, as well as the general importance placed on being in compliance with the obligations of a treaty before ratification, there is a need for the federal, provincial and territorial governments within Canada to undertake an extensive legislative and policy review before making a decision to ratify a new treaty.

At present, this extensive law and policy analysis is taking place with respect to the CRPD to ensure that its implications for subject matters as diverse as family law, housing, healthcare delivery, education, building codes, and access to services can be met. Many of these matters fall within provincial jurisdiction under Canada's constitutional division of powers between the national Parliament in Ottawa and the provinces. While it is true that Canada already has in place a foundation of equality and non-discrimination protection for persons with disabilities, which is entrenched constitutionally in section 15 of the Canadian Charter of Rights and Freedoms,[10] and bolstered by the enactment of comprehensive human rights legislation in all of Canada's eleven jurisdictions,[11] a review of all current laws, policies and programs is needed to ensure that the approach taken in all Canadian jurisdictions

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

11 See, for example, the ***Human Rights, Citizenship and Multiculturalism Act***, R.S.A. 2000, c. H-14, prohibiting discrimination on the basis of physical and mental disability within the province of Alberta. Canadian jurisdictions do not have separate legislative enactments for each ground of prohibited discrimination, such as a Race Discrimination Act and a Persons with Disability Act, and instead favour a more comprehensive "Human Rights Act" approach covering all grounds of discrimination in one Act. This "multiple ground" approach dates back to the 1950s in Canada, and the enactment of "fair practices" legislation prohibiting discrimination in employment and accommodation on grounds of race and religion, and later sex. These "fair practices" acts were modelled on legislation enacted by the state of New York in 1945. For further detail, see W. S. Tarnopolsky, 'The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada' (1968) 46 ***Canadian Bar Review*** 565.

go far enough to meet the requirements of the convention. Admittedly, the time taken to accomplish this review is of concern, not least to those within Canada's disability community, but it is hoped that the following discussion of the treaty-making process and the specific rules applicable to Canada will help explain the need, and democratic justifications, for a fully consultative process. Given that matters of human rights fall within areas of both national and provincial jurisdiction, extensive inter-governmental consultation is needed to ensure respect for the principles of federalism. In a federation, each level of government is sovereign within its own sphere of jurisdiction.

Treaty Making in Commonwealth States

Treaties take various forms, go by various names, and can be made with respect to various subject matters, but as express agreements between states that create legally binding rights and obligations, treaties are "a form of substitute legislation"[12] similar to contracts, but of a nature of their own that reflects the character of the international system.[13] By binding states to each other, treaties constitute a significant component of the international legal order and their faithful observance has been described as "perhaps the most important principle of international law."[14] As expressed by the Latin maxim ***pacta sunt servanda***, now codified in Article 26 of the ***Vienna Convention on the Law of Treaties***,[15] every treaty in force is binding upon its parties and must be performed by them in good faith. Article 18 of the ***Treaties Convention*** further obliges a signatory to a treaty that is subject to ratification to refrain from acts that would defeat the object and purpose of the treaty.

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12 Malcolm N. Shaw, ***International Law***, 6th ed. (Cambridge: Cambridge University Press, 2008) at 94.

13 ***Ibid.***

14 ***Restatement of the Law (Third): The Foreign Relations Law of the United States*** (St. Paul, Minn.: American Law Institute, 1987) vol. 1 at § 321.

15 Adopted 23 May 1969, in force 27 January 1980, 1155 UNTS 331, (1969) 8 ILM 679, Can. TS 1980 No. 37 [***Treaties Convention***].

As for the treaty making process, the most important stage at the international level is when the state parties express their consent to be bound. This can be done by a variety of means so long as the method chosen clearly signifies a state's intention to assume the legal obligations in the treaty. With multilateral treaties, a state often expresses its consent to be bound through a process known as ratification[16] or accession,[17] typically accomplished by the deposit of a formal instrument containing the state's declaration of its consent some time after the treaty's adoption. The passage of time between the treaty's initial adoption and state ratification enables a state to take whatever steps are necessary, if any, to secure domestic approval for the treaty and to enact any legislative changes needed to ensure compliance.[18] This process also gives a state time if it so desires to gauge public opinion about the new treaty commitments, with the possibility existing that a strong negative reaction might persuade a state to withhold ratification.

As for where the power to make treaties resides within a state, this is determined by every state's own system of constitutional law. Constitutional law determines where the power to make treaties resides within a state, and thus the location of this power, and its associated requirements, may vary from state to state. For states that follow the British constitutional tradition, such as Canada, the power to conduct

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16 *Treaties Convention*, (*ibid.*), arts. 2 (1) (b), 14 and 16. I refer here to "ratification" in the international law sense and not in the sense of a domestic procedure required by the national law in some states.

17 Accession has the same legal effect as ratification, but is the term typically used when a state becomes bound to a treaty already negotiated and signed by other states: Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge: Cambridge University Press, 2007) at 95-96 and 110-113; *Treaties Convention, supra* note 15, arts. 2 (1) (b) and 15.

18 Since a state cannot invoke the provisions of its domestic law as justification for its failure to perform a treaty obligation (*Treaties Convention, supra* note 15, art. 27), it is common practice for Commonwealth states to insist that any necessary legislative changes be in place before a treaty is ratified.

foreign relations, including the power to make treaties, is one of the royal prerogatives[19] retained by the Crown and carried out by the executive branch, usually through the member of Cabinet responsible for foreign affairs.[20] Professor Dicey described the royal prerogatives as a set of common law powers comprising "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown" [21] and "it is under the prerogative and the common law that the Crown appoints and receives ambassadors, declares war, concludes treaties and it is in the name of the Queen that passports are issued." [22] Since prerogative powers, by definition, provide the executive with the power to act without Parliament's consent,[23] treaty making, or the conclusion of treaty obligations on the international legal plane, including treaty ratification, is legally a wholly executive act within most Commonwealth states, and this is the situation in Canada.

Treaty implementation, however, is a different matter. Because Commonwealth states embrace a dualist approach with respect to the relationship between treaty law and domestic law, the two legal systems are said to coexist, but function separately.[24] States that are monist in their orientation to international law view international law and domestic law as parts of one legal system, while states that are dualist view international law and domestic law as existing on two separate legal

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19 The royal prerogative has been defined as "comprising those attributes peculiar to the Crown which are derived from common law, not statute, and which still survive" : Colin R. Munro, ***Studies in Constitutional Law*** (London: Butterworths, 1987) at 159.

20 See further, F.A. Mann, ***Foreign Affairs in English Courts*** (Oxford: Clarendon Press, 1986) at 1-22.

21 A.V. Dicey, ***Introduction to the Study of the Law of the Constitution***, 10th ed. (London: MacMillan, 1959) at 424.

22 ***Reference re Resolution to Amend the Constitution***, [1981] 1 ***Supreme Court Reports*** 753 at 877 (Canada).

23 Dicey, ***supra*** note 21 at 425. See also A.W. Bradley and K.D. Ewing, ***Constitutional and Administrative Law***, 13th ed. (London: Longman, 2003) at 309.

24 See further, Sir Robert Jennings & Sir Arthur Watts, eds., ***Oppenheim's International Law***, 9th ed. (NY: Longman, 1992) at 53.

planes – a conception that requires action to be taken by the organs of the state to transform a rule from the international legal plane into a rule of the domestic legal plane. As a result, it is generally the position in common law countries that a treaty that purports to change an existing domestic law has no domestic legal effect unless and until the treaty obligations are "incorporated" [25] or "transformed" [26] into domestic law by the passage of domestic legislation.[27] The underlying purpose of this rule is to preserve a role for the legislative branch, although some argue that the distinction between treaty making and treaty implementation is lost in practice given the degree of executive control over Parliament. The existence of minority governments tests the strength of this argument, but in any event, the distinction between treaty making and treaty implementation and the roles for the executive and legislative branches of government remain part of the British constitutional tradition that has been replicated throughout the Commonwealth, including Canada.[28]

The Role of the National Executive Branch

As in other Commonwealth states, the power to make treaties resides in Canada with the executive branch of the government that represents

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25 This is the term used in the United Kingdom: Aust, ***supra*** note 17 at 188.

26 This is the term used in Canada, with incorporation being one of the means of transformation: John H. Currie, ***Public International Law***, 2nd ed.（Toronto: Irwin Law, 2008）at 225. But see, Ian Brownlie, ***Principles of Public International Law***, 7th ed.（Oxford: Oxford University Press, 2008）at 41-44 for the somewhat interchangeable use of both terms.

27 ***Canada***（***Attorney General***）***v. Ontario***（***Attorney General***）, [1937] ***Appeal Cases*** 326 at 347（Judicial Committee of the Privy Council）[***Labour Conventions Case***]. Until 1949, the Judicial Committee of the Privy Council based in London, England was the final court of appeal for Canada. For recent Canadian confirmation of the rule embraced in the ***Labour Conventions Case***, see ***Baker v. Canada***（***Minister of Citizenship and Immigration***）, [1999] 2 ***Supreme Court Reports*** 817 at paras. 69 and 79（Canada）.

28 See generally J.E.S. Fawcett, ***The British Commonwealth in International Law***（London: Stevens & Son, 1963）at 16-32.

Canada as a whole, namely the national government based in the capital city of Ottawa.[29] While claims have been made that Canada's provinces also possess a treaty making capacity,[30] and certainly one province in particular has entered into many treaty-like arrangements,[31] such claims have never been accepted by the federal government in Ottawa[32] and are not borne out by Canadian practice.[33] Moreover, with the possible exception of France,[34] no other state in the international system recognizes any competence on the part of Canada's provinces to conclude treaties.

Reflecting Canada's constitutional development, Canadian responsibility for treaty making emerged gradually, much like full independence. While Confederation marked the beginning of Canada's domestic self-

29 A.E. Gotlieb, ***Canadian Treaty-Making*** (Toronto: Butterworths, 1968) at 27 and Maurice Copithorne, "Canada" in Monroe Leigh ***et al***, eds., ***National Treaty Law and Practice***, vol. 3 (Washington DC: American Society of International Law, 2003) at 1. See also Peter W. Hogg, ***Constitutional Law of Canada***, 5th ed. (Toronto: Thomson Canada, 2007) at §11.2.

30 Such claims were particularly prevalent in the 1960s, bolstering claims then made by the Québec government that led to the creation of a Québec department of intergovernmental affairs in 1967. Québec, however, is not the only province with a department dedicated to international affairs, nor the only province with missions abroad. Ontario, Alberta and British Columbia are also active "internationalists", although all Canadian provinces have made agreements with foreign states at one time or another. See further, Gibran van Ert, "The Legal Character of Provincial Agreements with Foreign Governments" (2001) 42 ***Les Cahiers de Droit*** 1093.

31 The province of Québec has entered into over 500 such arrangements since 1964, with 300 agreements remaining in force. See further: http://www.mri.gouv.qc.ca/en/informer/ententes/engagements.asp

32 In 1968, the then Secretary of State for External Affairs, the Hon. Paul Martin Sr., issued a background paper on ***Federalism and International Relations*** (Ottawa: Queen's Printer, 1968), disputing and opposing all claims to a provincial treaty making capacity.

33 Hogg, ***supra*** note 29 at §11.2 and §11.6; Currie, ***supra*** note 26 at 239-240.

34 See Gibran van Ert, ***Using International Law in Canadian Courts*** (The Hague: Kluwer Law International, 2002) at 87, fn 163.

governance, it was not envisaged at that time that Canada would make treaties independently from Britain. Thus, Canada's 1867 constitution contained no explicit treaty making provision[35] since the British executive retained the prerogative power to make treaties for the Empire as a whole.[36] But as the countries within the Empire gradually acquired their full independence, so did they acquire their portion of the treaty making power once held by the British executive. In Canada's case, the delegation can be found in the 1947 ***Letters Patent Constituting the Office of the Governor General of Canada***,[37] clause two of which authorizes the Governor General "to exercise all powers and authorities lawfully belonging to [the King] in respect of Canada" ; language which according to Professor Peter Hogg, "undoubtedly delegates to the federal government of Canada the power to enter into treaties binding Canada." [38]

At law, prerogative powers rest with the Governor General of Canada to be exercised on the advice of the Prime Minister or Cabinet. In daily practice, the foreign affairs prerogative is exercised by ministers and the departments they lead, with the Minister of Foreign Affairs assuming the lead role.[39] According to statute law, the Minister of Foreign Affairs is responsible for: the conduct of Canada's diplomatic and consular relations, as well as Canada's official communications with other states and any international organization; the conduct and management of international negotiations as they relate to Canada; the coordination of Canada's

35 The closest provision on point is s. 132 of the Canadian ***Constitution Act, 1867*** which concerns a federal power to perform what are termed "Empire treaties" ; however, this provision does not extend to treaties entered into by an independent Canada（***Labour Conventions Case***, ***supra*** note 27 at 350）and is now viewed as obsolete.

36 See further, Hogg, ***supra*** note 29 at §11.2. See also Gotlieb, ***supra*** note 29 at 6-10.

37 Reproduced in R.S.C. 1985, App. II, No. 31.

38 Hogg, ***supra*** note 29 at §11.2.

39 ***Department of Foreign Affairs and International Trade Act***, R.S.C. 1985, c. E-22, s. 2. This department was previously styled the Department of External Affairs and headed by a Secretary of State for External Affairs.

international economic relations; the fostering of Canada's international trade and commerce; and the management of Canada's diplomatic and consular missions abroad.[40] The Minister of Foreign Affairs is also required by statute to "foster the development of international law and its application in Canada's external relations." [41] As a result, Canada's Minister of Foreign Affairs and his officials play a key role in treaty-making.

Treaty Making and the Parliament of Canada

The national executive branch within Canada guards its treaty making power, allowing no formal role for the Parliament of Canada. This, however, was not always the case. From 1926 to 1966, it was the practice in Canada for all important treaties to be submitted to Parliament for approval prior to ratification; a practice initiated by Prime Minister William Lyon Mackenzie King by way of a two-part motion, the second part of which read: "This House ... considers further that before His Majesty's Canadian ministers advise ratification of a treaty or convention affecting Canada, or signify acceptance of any treaty, convention or agreement involving military or economic sanctions, the approval of the Parliament of Canada should be secured." [42] While Mackenzie King acknowledged that treaty ratification was an executive act, he also stated that "Parliament should feel assured in regard to all these great obligations of an international character which involve military and economic sanctions that a government should not have the opportunity of binding parliament in advance of its own knowledge to the obligations incurred thereby." [43] The House adopted the motion, and for the next

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40 *Department of Foreign Affairs and International Trade Act*, (*ibid.*), s. 10.

41 *Department of Foreign Affairs and International Trade Act*, (*ibid.*), s. 10 (2) (f).

42 Canada, *House of Commons Debates* (21 June 1926) at 4758-4759. The debate on the motion is found at 4758-4800. See further, Gotlieb, *supra* note 29 at 15-16.

43 Canada, *House of Commons Debates* (21 June 1926) at 4762.

forty years, according to Allan Gotlieb's authoritative[44] but now dated account in *Canadian Treaty-Making*, a practice developed of submitting to Parliament all treaties involving:

1）military or economic sanctions,
2）large expenditures of public funds or important financial or economic implications,
3）political considerations of a far-reaching character, and
4）obligations the performance of which will affect private rights in Canada.[45]

Since the initiation of this practice took place in the same year that Canada achieved its autonomy from Britain with respect to the exercise of the treaty making power, the practice can be rightly described as being part of the Canadian treaty making process since the beginning. The Balfour Declaration issued at the Imperial Conference of 1926 confirmed that no autonomous dominion within the British Empire could be bound by commitments incurred by the Imperial government without its consent. The question of treaty making was specifically addressed, with the conference confirming that each dominion government had the power to negotiate, sign and ratify treaties on its own behalf.[46]

Studies show, however, that the practice of submitting treaties to Parliament applied in practice to only a small proportion of all the treaties entered into by Canada for 1926-1966 since many of Canada's treaties were concluded by way of an exchange of notes or letters and as such, were not subject to ratification.[47] Nevertheless, for those treaties

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44 Gotlieb was, at the time of authorship, the Assistant Under-Secretary of State for External Affairs and Legal Adviser to the Department. He would later serve as Under-Secretary of State for External Affairs（1977-1981）and Ambassador of Canada to the United States（1981-1989）.

45 Gotlieb, *supra* note 29 at 16-17.

46 See further, Maurice Ollivier, *The Colonial and Imperial Conferences from 1887 to 1937*（Ottawa: Queen's Printer, 1954）, vol. 3 at 150-155.

47 Gotlieb, supra note 29 at 18. See also A. Jacomy-Millette, *Treaty Law in*

that were submitted, the practice did give Parliament a voice in relation to some treaties of significance, such as the ***Canada-US Automotive Products Agreement*** of 1966, and the pre-ratification timing was crucial because it meant that Parliament had a say before Canada became bound. The practice, however, waned in the 1970s, such that by 1974, it was the view of the then Department of External Affairs (now Department of Foreign Affairs and International Trade) that it was up to the government of the day as to whether parliamentary approval would be sought for a proposed treaty action.[48] This continues to be the Department's view[49] and as time has passed, the practice of submitting treaties to Parliament for approval has been either forgotten or abandoned,[50] prompting the introduction of a series of Private Member's Bills in 1999-2001 to encourage, among other things, its reinstatement.[51]

Canada (Ottawa: University of Ottawa Press, 1975) at paras. 32 and 44.

48 See the excerpt from a memorandum of 11 June 1974 by the Department's Bureau of Legal Affairs reprinted in (1975) 13 ***Canadian Yearbook of International Law*** 366-367.

49 See the excerpts from Department memoranda reprinted in (1982) 20 ***Canadian Yearbook of International Law*** 289-292, (1986) 24 ***Canadian Yearbook of International Law*** 397-402 and (2002) 40 ***Canadian Yearbook of International Law*** 490-492.

50 According to research undertaken by University of Montreal Professor Daniel Turp, then serving as a Bloc Québécois Member of Parliament, the practice stopped in the late 1960s: Turp, "Un nouveau défi démocratique: l'accentuation du rôle du parlement dans la conclusion et la mise en oeuvre des traités internationaux" [1999] CCIL Proc. 118. As noted by both Turp (at 119) and van Ert, ***supra*** note 34 at 68-69, commentary suggesting that the practice continues is suspect because of a reliance on the out-dated texts of Gotlieb (***supra*** note 29) and Jacomy-Millette (***supra***, note 47).

51 Five Bills were introduced by Professor Turp in October: Canada, ***House of Commons Debates*** (14 October 1999) at 113. An earlier Bill requiring the tabling of treaties was introduced by Turp that Spring: Canada, ***House of Commons Debates*** (3 May 1999) at 14601. Of the five October Bills, only one proceeded to second reading, garnering support from all but the governing Liberal Party: Canada, ***House of Commons Debates*** (1 December 1999) at 2018-2026, Canada, ***House of Commons Debates*** (13 April 2000) at 6127-6131, and Canada, ***House of Commons Debates*** (8 June 2000) at 7725-7731. It was

Nevertheless, according to Professor Maurice Copithorne, a former Legal Adviser to the Department of Foreign Affairs, "the role of Parliament as a body with which the executive consults is evolving," [52] noting that "consultations on Canada's most important treaties now take place regularly prior to the Government taking binding action." [53] Copithorne points to the work of the House of Commons Standing Committee on Foreign Affairs and International Trade (SCFAIT), and in particular its examination of the proposed *Multilateral Agreement on Investment* in 1997[54] and the *Canada-US Preclearance Agreement* in 1999,[55] as well as the practice of passing enabling legislation prior to ratifying a treaty.[56] But while there are instances where SCFAIT has examined a treaty that is in the process of being negotiated,[57] albeit treaties already in the public eye, a review of the record from the mid-1990s to the

later defeated by a vote of 110-151: Canada, *House of Commons Debates* (13 June 2000) at 7956-7. Similar Bills were later reintroduced in the following session by Francine Lalonde MP, the Bloc Québécois critic for foreign affairs: Canada, *House of Commons Debates* (28 March 2001) at 2440-2441. A more recent version was introduced as Bill C-260 by Jean-Yves Roy MP of the Bloc Québécois on 3 November 2004.

52 Copithorne, *supra* note 29 at 5.

53 *Ibid.*

54 *Canada and the Multilateral Agreement on Investment: Third Report of the Standing Committee on Foreign Affairs and International Trade: First Report of the Sub-Committee on International Trade, Trade Disputes and Investment* (December 1997).

55 *Bill S-22, An Act authorizing the United States to preclear travellers and goods in Canada for entry into the United States for the purposes of customs, immigration, public health, food inspection and plant and animal health: Eighth Report of the Standing Committee on Foreign Affairs and International Trade* (May 1999).

56 Copithorne, *supra* note 29 at 5.

57 The only example found, apart from the Multilateral Agreement on Investment, concerns the proposed Free Trade Area of the Americas (FTAA) : *The Free Trade Area of the Americas: Towards a Hemispheric Agreement in the Canadian Interest: First Report of the Standing Committee on Foreign Affairs and International Trade: First Report of the Sub-Committee on International Trade, Trade Disputes and Investment* (October 1999).

early 2000s indicated that when it came to treaty scrutiny, the usual role for SCFAIT was to review the legislation implementing a treaty, rather than a future treaty action. Moreover, the broad mandates of SCFAIT and other standing committees prompt a hit-and-miss record with respect to treaty scrutiny given the many other matters on the agenda. As for the passage of enabling legislation prior to ratification, Copithorne admits that there are "rare occasions" when this is not done, with the central point being that such occasions can occur, and have occurred. The principled rebuttal, however, to Copithorne's arguments is that Parliament is more than a body for "consultation" and as the ultimate lawmaker in a parliamentary system of democratic governance, Parliament should have the opportunity to review all treaties before their ratification, whether or not enabling legislation will be required.

Parliament did have such an opportunity in the past, since it was "the invariable practice in Canada", at least as of 1968 when Gotlieb wrote these words, "to table in Parliament all agreements, including exchanges of notes." [58] Through tabling, Parliament was kept informed of treaty obligations assumed on Canada's behalf by the national executive, albeit after these obligations became binding under international law. But as with the practice of submitting treaties for parliamentary approval, the practice of tabling treaties for parliamentary reading also suffered from decline and had all but disappeared until criticism prompted then Foreign Minister Lloyd Axworthy to table dozens of ratified treaties in 1999,[59] including treaties which were required by law to be deposited in Parliament.[60] Perhaps in recognition of the "democratic deficit" critique

58 Gotlieb, ***supra*** note 29 at 18 and 66. However, according to Jacomy-Millette, ***supra*** note 47 at para. 44, tabling was "not an invariable rule".

59 Turp, supra note 50 at 128; van Ert, ***supra*** note 34 at 70. Treaties that entered into force for the years 1993-1997 were tabled on four occasions in 1999: Canada, ***House of Commons Debates*** (13 April 1994) at 13715, (12 May 1999) at 15072, (9 June 1999) at 16098 and (10 June 1999) at 16149.

60 Section 7 of the ***Extradition Act***, R.S.C. 1985, c. E-23, used to require all extradition arrangements to be laid as soon as possible before both Houses of the Canadian Parliament. On 8 January 1999, Foreign Minister Axworthy

of a treaty-making process that lacks any requirement to involve those elected to make laws, the Government of Canada in January 2008 announced new measures to require all new treaties to be tabled in the House of Commons prior to Canada's expression of its consent to be bound by ratification, acceptance, approval or accession.[61] This new measure was introduced as a matter of policy and administrative practice and not law,[62] but the Canadian Government has announced that it will apply to the future ratification of the CRPD. In doing so, the Canadian government has provided parliamentarians of all political stripes with an opportunity to express their views, should they desire, while potentially delaying further the time period between the convention's signature and future ratification.

Treaties and the Role of the Provinces

As for the provinces, their Legislative Assemblies, like Canada's Parliament, may still have a role to play, given the common law rule that a treaty that entails the alteration of domestic law requires the passage of legislation to gain domestic legal effect. Treaties are not self-executing and as such, require parliamentary action to take effect（unless there is existing legislation that is sufficient to give effect to the obligations in the new treaty）. Canada, however, is a federal state, and its federal character complicates treaty implementation, while adding a further dimension to the debate about the democratic credentials of treaty making.

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belatedly deposited seven extradition treaties. Such a breach will not occur again since the statutory requirement has now been removed, as evident by comparing the former section 7 to the new section 8 of the Extradition Act, S.C. 1999, c. 18.

61 Foreign Affairs and International Trade Canada, "Canada Announces Policy to Table International Treaties in the House of Commons", News Release No. 20（25 January 2008）. The new practice bears resemblance to the practices of other comparable states: see further, Joanna Harrington, "Scrutiny and Approval: The Role for Westminster-style Parliaments in Treaty-Making"（2006）55 *International and Comparative Law Quarterly* 121.

62 See further: http://www.treaty-accord.gc.ca/procedure.asp

In Canada, the responsibility for treaty implementation is divided according to the constitutional division of powers between the two levels of government: the national government and the provincial governments, with the territorial governments falling under the national government's jurisdiction as a matter of law, but treated in practice as akin to provincial governments. As a result, treaties that fall within a federal area of responsibility in terms of their subject matter must be implemented by the passage of federal legislation, while treaties within a provincial area of responsibility must be implemented by provincial legislation,[63] notwithstanding the lack of accountability between the federal treaty maker and the provincial implementer and the potential problems this poses for treaty compliance, absent the use of federal state clauses and reservations to alleviate the federal responsibility for provincial non-compliance. This rule can be either criticised for holding the federal government hostage to provincial demands, or praised for protecting provincial autonomy and encouraging a degree of federal-provincial collaboration in the treaty making process.

In any event, the rule is of long-standing, having been first espoused in 1937, and it remains the law in Canada. As a result, federal-provincial consultations, and cooperation, is required to secure success for the CRPD post-ratification, if ratification does indeed take place, with the provinces being involved given the CRPD's provisions concerning education, health, employment, social security, transportation, and family matters. Provincial governments will also need to work with city councils and other forms of municipal government to ensure that building codes and accessible signage rules, as well as the collection of appropriate statistical and research data, comply with the obligations of the CRPD.

Further action will also be required in the province of Québec, which has enacted legislation to require the prior approval of that province's Legislative Assembly, known as the National Assembly, for all important international commitments (“*des engagements internationaux*

63 *Labour Conventions Case, supra* note 27.

importants"）intended to be made by either the Québec or Canadian executive branch, provided in the latter case, the subject matter of the commitment falls within an area of Québec responsibility.[64] The primary object of the 2002 legislation, according to the then Minister of International Relations, Louise Beaudoin, was to democratise the process of treaty making by giving a voice to the elected representatives of the citizens of Québec.[65] She also suggested that the new law would allow for greater transparency in the treaty making process, suggesting that in some cases, a parliamentary commission could be established to study a proposed treaty action and invite submissions from the public.[66] The new law was also intended to address the concern in Québec that the language, culture and future interests of the province may be threatened if the federal government acts on the international stage without provincial agreement in areas of provincial competence.[67]

In essence, the Québec legislation requires three actions to occur, and occur sequentially, for an important international commitment to be valid. The three actions are the signature by the responsible Minister, the approval by the legislature（the National Assembly）, and the ratification by the provincial government. The legislation also requires the Minister to table all future treaty actions in the National Assembly, with an explanatory note on the content and effects of the commitment; a procedure that was expressly acknowledged during the legislative debates to be similar to that followed in the United Kingdom, Australia and New Zealand.[68] Once tabled, the treaty can be the subject of a motion to either approve or reject, but not amend, provided at least ten

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64 *An Act Respecting the Ministère des Relations Internationales*, R.S.Q. 2002, c. M-25.1.1, s. 22.4.

65 Québec, *Débats de l'Assemblée nationale*（20 March 2002）at 5247.

66 *Ibid*. at 5248.

67 See the speech of then Premier Bernard Landry in *Débats de l'Assemblée nationale*（22 March 2001）at 7-8.

68 See the debates within the Committee on Institutions, *Journal des débats: Commission permanente des institutions*（1 May 2002）, available at: http://www.assnat.qc.ca/fra/Publications/debats/journal/ci/020501.htm

days have passed since tabling to ensure time for access and reflection.[69] Provision is also made for cases of urgency, allowing the Québec government to ratify an important international agreement before it is tabled or approved by the National Assembly.[70]

As for what constitutes an "important international commitment", the Québec law suggests that all treaties requiring the passage of implementation legislation, the imposition of a tax, or the acceptance of an important financial obligation, as well as treaties concerned with human rights and freedoms or international trade, will require Assembly approval.[71] However, treaties addressing technical issues and treaties signed by Canada affecting only matters within federal jurisdiction will not need National Assembly approval under the 2002 legislation. Provision is also made to apply the procedure to the denunciation and termination of an agreement in the same way that the process applies to the adoption and conclusion of a new agreement.[72] Clearly, this provincial process will apply to the CRPD, but I should note that the Québec legislation concerning new treaty commitments was adopted by a unanimous vote in an assembly comprised of federalists and separatists, presumably because the democratic credentials of a greater role for the provincial legislature in Canadian treaty making cuts across the political spectrum.

Conclusions

The adoption and coming into force of the CRPD has been welcomed by disability advocates as heralding a change in social policy concerning persons with disabilities by marking a shift in attitude from a charity-based model to a rights-based approach. The convention is intended to build on existing national and international human rights rules and

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69 *An Act Respecting the Ministère des Relations Internationales, supra* note 64, s. 22.3.

70 *Ibid.*, s. 22.5.

71 *Ibid.*, s. 22.2.

72 *Ibid.*, s. 22.6.

standards by articulating what is specifically needed to ensure that persons with disabilities actually enjoy those rights. In addition to a basis in law, these rights will need to be made effective and practical through government programs and policies designed to address the problems which face persons with disabilities in fully enjoying their rights.

As a result, Canada's pre-ratification process of review and consultation both within and outside government is a welcome step in the law and practice concerning the making of treaty obligations for Canada, albeit a time-consuming one given Canada's federal structure and fourteen different jurisdictions. In future, one would hope that lessons can be learned from this process so as to ensure a speedier review of existing laws and programs. Nevertheless, such a full process of consultation is more likely to ensure a robust and cooperative future implementation of the CRPD, than a quickly concluded treaty ratified by the federal executive without provincial and territorial support and cooperation. The consultation process also serves an educational purpose and publicizes the existence of the CRPD and its obligations. It is also required by the CRPD, with article 4（1）（b）requiring states parties to the convention to ensure that laws, policies, practices and customs which constitute discrimination against persons with disabilities are modified or abolished.

As discussed above, developments over time with respect to Canada's treaty making process have responded to complaints about its executive domination and behind-the-scenes nature, with the Government of Canada implementing a new tabling policy in January 2008 to ensure all national parliamentarians receive advance notice of any Canadian intention to ratify a new treaty, such as the CRPD, as well as the results of the intergovernmental and public consultation processes. Parliament may then decide to review the matter further, or to let the matter proceed to ratification without further delay, perhaps upon receiving assurances that the governments in Canada's provinces, territories, municipalities and Aboriginal communities are in a position to ensure that the CRPD's provisions will not become empty promises for Canada's disabled persons. It must be noted, however, that Canada has stated that it is not considering signing or ratifying the optional protocol at this time,

preferring to focus its efforts on the CRPD, and the consultation process, albeit long and drawn-out, does provide an opportunity for the public and parliamentarians to also comment on this aspect of Canada's plans. To this end, it is worth noting that Australia originally prioritized the ratification of the CRPD, but bolstered by the recommendations made following a review conducted by an Australian parliamentary committee, [73] Australia subsequently acceded to the optional protocol in August 2009.

Postscript: Canada became a party to the ***Convention on the Rights of Persons with Disabilities*** in April 2010.

73 See Joint Standing Committee on Treaties, ***Report 99: Treaties Tabled on 3 December 2008 and 3 February 2009*** (Canberra: Parliament of the Commonwealth of Australia, 2009) at ch. 2, available at: http://www.aph.gov.au/house/committee/jsct/3december2008/report.htm