CANADA AND INTERNATIONAL HUMAN RIGHTS LAW AT 150: A JOURNEY IN THREE PARTS

Anne Warner La Forest*

"Canada is back my friends" Prime Minister Justin Trudeau declared at the Paris climate summit in November 2015 just weeks after defeating Stephen Harper in the federal election.[1] This specific statement was intended to signal Canada's support for the United Nations in relation to its work on climate change. However, there is no doubt that a commitment to international human rights was understood to fall within this declaration. From the beginning of his mandate to the present date, the current Prime Minister has made diversity and human rights a centerpiece of his mandate. For example, on Canada day this year, our Prime Minister made this statement:

> "In the 150 years since [Confederation], we have continued to grow and define ourselves as a country. We fought valiantly in two world wars, built the infrastructure that would connect us, and enshrined our dearest values – equality, diversity, freedom of the individual, and two official languages – in the *Charter of Rights and Freedoms*. These moments, and many others, shaped Canada into the extraordinary country it is today – prosperous, generous, and proud."[2]

Our 150th anniversary offers an appropriate occasion to reclaim the past and focus on our long relationship with international human rights law. And it is of interest to consider where the future may lead. The phrase "Canada is back" implies that Canada had been away. Looking at the matter from the point of view of someone who came of age in the 35 years that has followed the coming into force of the *Canadian Charter of Rights and Freedoms*,[3] it might appear that there had been some stepping back from Canada's focus on human rights and international human rights. But taking the long view, the reality is that whatever party has been in power, international human rights and their acceptance and integration nationally has consistently taken a path of quick progression followed by a period of challenge and then reshaping. To use a metaphor that is particularly apt in Prince Edward Island, a province surrounded by ocean, the evolution of international human rights and Canada's embrace thereof has proceeded like the waves reaching our shores; quick movement forward and then the water recedes somewhat before moving forward again, never in quite the same direction.

---

* Anne Warner La Forest is a Professor at the Faculty of Law at the University of New Brunswick. The following reflects Professor La Forest's Chief Justice Thane Campbell Lecture in Law delivered in Charlottetown, Prince Edward Island in October 2017 – Eds.

[1] "James Fitz-Morris, "Justin Trudeau tells Paris climate summit Canada ready to do more" *CBC News* (30 November 2015), online: <www.cbc.ca/news/politics/trudeau-address-climate-change-paris-1.3343394>.

[2] *Statement by the Prime Minister on Canada Day* (1 July 2017), online: Prime Minister of Canada <https://pm.gc.ca/eng/news/2017/07/01/statement-prime-minister-canada-day> [emphasis added].

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

In my remarks, my hope is to show in broad strokes that since Confederation, there have been three such progressive movements and that each in turn has been followed by a period where advancement has slowed or been hampered by internal constitutional barriers only to be renewed and reshaped in a manner that seeks to resolve those limits and to more fully embrace the current needs of Canadian society. I also hope to show that these movements have been integrally connected to Canada's independence and the development of its unique vision in the world. It is that in the end that will define us as a nation. What becomes evident on review is that international human rights law has not only deeply influenced us; we have contributed to its evolution.

This lecture then is largely a reflective one but in my final remarks, I will comment on where the future may lead us building upon the discussion in the earlier parts of this lecture.

Before turning to these progressive movements in relation to international human rights law, I want to take a few moments to set the table. Specifically, I will make a few comments about international law in general, international human rights law in particular, and where, in 1867, Canada fit into that story.

I. The Background: International Law, International Human Rights Law and Canada in 1867.

Like many other aspects of Canadian law, our understanding of international law derives from our relationship with and the reception of the law of England. The years before and after the Treaty of Westphalia in 1648 saw the emergence of independent European nation states who sought to have exclusive jurisdiction – apart from the Roman church – in relation to persons and things within their defined borders. By 1789, Jeremy Bentham, the great utilitarian philosopher, had coined the phrase "international law" and asserted that it had evolved to mean the body of rules, norms, and standards that apply between sovereign states.[4]

There are two important points here to emphasize for our purposes. The first is that international law refers to the law between states and not to the law applicable within a state. Critical to understanding international law is that within the recognized borders of each state, the state is sovereign over its territory and importantly in this context, its citizens. In 1789, international law was focused upon regulating matters beyond the reach of individual states such as diplomatic and commercial relations, laws relating to war, and the law of the sea.

The second point is that the body of rules were in the form of custom and treaties. Putting these two points together, custom and treaties were understood to be obligations between states and did not have application directly within a state unless

[4] James Crawford and Martti Koskenniemi, eds, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) at 7.

adopted within the state. Under English law, because custom, representing practices accepted between states, operated much like the common law, it was brought into effect within England through the courts.[5] Treaties however, involved the prerogative of the Crown and under British constitutional law, while the executive could ratify treaties that would then be binding between states, they would only become the law within England through the enactment of legislation by Parliament.[6] This process of adoption within the state is referred to as implementation. As we shall see directly, almost all international human rights law is in treaty form.

Given the foregoing remarks, it should not come as a surprise that international human rights law was not initially treated as a subject of international law for the simple reason that the treatment of persons was considered to be a matter within the purview of states. Human rights as we understand them now, were addressed, if at all, within nation states. If we return to 1789 for a moment, we would find that to be the year in which two critical documents in terms of human rights were drafted: The American Bill of Rights and the French Declaration on the Rights of Man. To the extent that early international law focused on the treatment of persons, it was addressed as a consequence of matters directly affecting international relations between states. There were thus, for example, protections offered to individuals who were acting in a diplomatic capacity and to those engaged in war.

It was not until the 20th century and the end of World War I that human rights began to be of international concern such that their protection became the subject matter of treaties. Over the course of the next 100 years, we have come to loosely classify international human rights as falling within three categories, sometimes referred to as generations of rights in recognition of the timing of their emergence.[7] To connect them to the French Declaration, liberté or first generation rights are described as negative rights and protect civil and political rights such as freedom of expression and life, liberty, and security of the person; egalité or second generation rights are described as positive rights and protect economic and social rights such as health, education, and working conditions; and fraternité or third generation rights protect collective rights belonging to groups on the such bases as language and culture.

At the time of Confederation, the idea of what would become Canada developed within the international context I have just described. At an international level, what was central during this period was colonization. This focus resulted in an interesting paradox. While international law had originally evolved as a means of allowing the emergence of independent nation states in Europe, it had, by the 19th century, evolved to include understandings that ensured that colonial states had the authority to provide oversight of the law within their colonies.

---

[5] See e.g., *Heathfield v Chilton* (1767), 4 Burr 2015, 98 ER 50 (KB).

[6] John H. Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law Inc., 2008) at 235–238.

[7] Karel Vasek & Philip Alston, eds, *The International Dimensions of Human Rights* (Westport, Conn.: Greenwood Press; Paris: Unesco, 1982).

While Canada of course was conceived of as a Dominion and thus had greater independence than other colonies, the practical reality in international terms was a division between international relations (over which the mother country was to continue to have jurisdiction) and matters within Canada. Further, in terms of the latter, there was, as we know, a further proposed division of powers between matters of national importance, and those of more local concern.

Transposing this discussion to the language of the *British North America Act, 1867*,[8] what one sees is that s. 132 in effect reserved the power to ratify international treaties to the executive in England while implementation was left, for the whole of Canada, to Parliament:

> "The Parliament … shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries".

Sections 91 and 92 addressed matters internal to Canada. And recalling our discussion to this point, matters of human rights were not generally perceived yet to be international in character and thus legislation affecting the civil rights of individuals were treated as a local matter encompassed within s. 92(13). That then is the background. We turn now to the three projects. The first covers the period from 1919 through 1937 and focuses on the creation of the International Labour Organization and the *Labour Conventions Case*.[9] The second period runs from 1945 to 1976 and focuses on the development of the *United Nations Declaration on Human Rights*[10] and Canada's response thereto. The third focuses on the period from 1976 to the present with particular focus on the *Canadian Charter of Rights and Freedoms*, 1982. I will spend the largest amount of time on the first project because that history is not as well-known and has deeply influenced what has followed.

II. The Projects

A. The First Project – The International Labour Organization and the Labour Convention Case – 1919 –1937

In very recent years there has been renewed focus on the first World War. The cost in human life of that war was very high.[11] By the time the war ended, more than 16 million people, soldiers, and civilians were dead. At that time, Canada's population

---

[8] *The Constitution Act, 1867,* 30 & 31 Vict., c. 3.

[9] *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 326, [1937] 1 DLR 673 (JCPC) rev'g *Reference re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, and the Limitation of Hours of Work Act*, [1936] SCR 461, [1936] 3 DLR 673.

[10] UNGA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

[11] Margaret MacMillan, *Paris 1919: Six Months that Changed the World* (New York: Random House, 2001) at xxvi.

was approximately 8 million. More than 60,000 Canadians were killed and more than 170 000 were wounded.[12] What occurred immediately after the war marked the beginning of Canada's independence. Within Canada, there was a growing sense that if Canada could suffer such losses, it could also stand on its own. Thus, by the time of the peace talks that followed the war, the then Prime Minister, Robert Borden, sought and obtained an independent voice for Canada.[13] The Treaty of Versailles,[14] concluded on June 28, 1919, created the League of Nations and Canada was to have its own membership on that international body.

The independence story is well known. What is not as well known or remembered is that the period following World War I also set the stage for Canada's engagement with international human rights law. At this time, there was considerable unrest in relation to labour.[15] 1917 had seen the Bolshevik Revolution in Russia. Furthermore, for almost 100 years preceding the end of World War I, there had been a movement in Europe aimed towards developing international labour standards including standards in relation to child labour, limiting hours of work, and establishing minimum wages.[16] The argument in favour of international standards was that given competition between industrialists in different states, no single country could impose such standards without loss of economic position.[17] The importance of developing international labour standards by 1919 was such that it was believed that the creation of the League of Nations alone could not provide a lasting peace unless it also: "provided a remedy for the industrial evils and injustices which mar the present state of society."[18] In this manner, the idea of sustainable peace was tied to ensuring labour rights.

At almost the first meeting of the Paris Peace Conference on January 31, 1919, that Conference established a Commission on International Labour Legislation.[19] In less than a year, this Commission and its successor established the International Labour Organization (the I.L.O.), an organization supported by governments that would develop labour standards and a Labour Bill of Rights that

---

[12] For statistics in relation to Canada, see online: Historica Canada <https://www.thecanadianencyclopedia.ca/en/article/first-world-war-wwi/>.

[13] MacMillan, *supra* note 11 at 45, 93.

[14] The Versailles Treaty June 28, 1919, online: Yale Law School <www.avalon.law.yale.edu/subject_menus/versailles_menu.asp> [Treaty of Versailles].

[15] David A. Morse, *The Origin and Evolution of the ILO and Its Role in the World Community* (Ithaca: New York State School of Industrial and Labor Relations, Cornell University, 1969) at 4.

[16] G.A. Johnston, *The International Labour Organization: It's Work for Social and Economic Progress* (London: Europa Publications, 1970) at 5.

[17] *Ibid* at 5–6.

[18] Report Presented to the Preliminary Peace Conference by the Commission on International Labour Legislation in ILO Official Bulletin, Volume 1, 1919 (April 1919- August 1920), at 260, online: International Labour Office <www.ilo.org/public/libdoc/ilo/P/09604/09604(1919-1920-1).pdf> [Official Bulletin, Vol 1].

[19] *Ibid* at 1–2.

outlined the principles that had been championed for so long by labour organizations. Both were included as Chapter XIII of the Treaty of Versailles.[20] Furthermore, the perceived urgency around these matters was such that by the end of the same year, the nascent I.L.O. had held a conference in Washington that gave direct representation to workers and employers and led to the adoption of several draft conventions on labour standards.[21] In this manner, labour standards became a matter for international law. In terms of international human rights, these standards in relation to employment would fall within the category of second-generation rights. It was fully intended that this international labour legislation would have a direct impact within states and thereby limit the sovereignty of states.

Both Britain – who led the drafting process of the Commission on International Labour – and France had wanted a strict provision that would make the conventions immediately binding within states unless the national legislatures disapproved of the conventions. But the United States, concerned about the jurisdiction of its individual states over labour matters, sought to water down the obligation provision to provide that nation states would have a duty to submit draft conventions to authorities "within whose competence the matter lies for the enactment of legislation" and obtain their consent before ratification. Other states represented at the Commission were not in favour of this clause but wanted to ensure the participation of the United States. They thus accepted this approach but made it clear that any federal exception should apply only to the extent that there were in fact limitations and no further.[22] Ironically the United States did not in the end join the I.L.O. until 1934.[23] The question for Canada however would become who were the competent authorities: the provinces or the federal government? That question arose quickly because at the first Conference in October 1919, Canada began its participation in the I.L.O.

As already noted, at the Peace Conference in 1919, Canada had begun to act independently of Britain. The record however, clearly discloses that concerns raised by Canada in relation to the I.L.O. did not relate to its status as a federation. Indeed, the Minister of Justice of the day, Charles Doherty who was at the Peace Conference assumed that implementation of the I.L.O. Conventions would be a matter for the federal government under s. 132 of the *BNA Act*.[24]

However, by the time of the I.L.O. Conference in October 1919, the seed of what was to come was already beginning to germinate. Of the 40 states represented at the conference, Canada had the largest delegation. This is because the federal

---

[20] Treaty of Versailles, at Part XIII, online: Yale Law School <avalon.law.yale.edu/imt/partxiii.asp>.

[21] Official Bulletin, Vol 1, *supra* note 18 at 408.

[22] *Ibid* at 262–265, 274.

[23] "Brief History and Timeline", online: International Labour Organization <www.ilo.org/washington/ilo-and-the-united-states/brief-history-and-timeline/lang--en/index.htm>.

[24] John Mainwaring, *The International Labour Organization: A Canadian View* (Ottawa: Minister of Labour, Government of Canada, 1986) at 15.

Department of Labour thought it wise to invite "advisors" from the provinces.[25] While labour standards were now perceived to be a matter of international law and perhaps a matter outside the scope of the provinces, labour issues had up to this point been understood to be within s. 92(13). Curiously, Prince Edward Island named William Lyon McKenzie King, the leader of the opposition, as its representative. Given what was to eventually transpire, this was a prophetic choice.

Canada was not content to sit on the sidelines at the Conference. From the outset, it was very active in debates and supportive of the mission of the I.L.O. The draft convention that caused the most difficulty was the Hours of Work Convention and it was in that context that Newton K. Rowell, Acting Secretary for External Affairs, made clear Canada's support for the I.L.O. He stated as follows:

> For what we desire here is not so much the expression of certain ideals or certain hopes…but what we desire to secure here is an actual convention, an actual agreement, which will be ratified by the necessary vote of the conference, and which will be adopted by the industrial nations of the world, members of the conference, when remitted to them for action.[26]
> […]
> The Parliament of Canada has already approved the treaty containing the labour clauses and the covenant of the League of Nations. We believe the covenant of the League of Nations and the labour clauses constitute two of the most important and vital features of the whole treaty. The Parliament of Canada having approved the League of Nations and the labour clauses, the Government of Canada will carry out, in spirit as well as in letter, the obligations it has assumed under the treaty.[27]

In spite of this ambitious beginning, the reality is that the Hours of Work Convention and most other conventions that were later adopted by the I.L.O. were not ratified by Canada or implemented into legislation until 1935 when in the midst of the Depression, the Conservative Prime Minister R.B. Bennett made the decision to ratify and then implement the Hours of Work Conventions and two other labour conventions. He made this decision, just prior to an election that saw him go down to defeat against William Lyon McKenzie King. What were the reasons for this failure to act and why the change in 1935?

The main reason for the failure to ratify I.L.O. treaties and to then implement them was uncertainty about the constitutional framework of Canada. By November 1920, the Minister of Justice Charles Doherty had changed his view in terms of who were the competent authorities to implement these human rights conventions given Canada's newfound independence internationally.[28] Section 132 which reserved the

---

[25] *Ibid* at 42–43.

[26] International Labor Conference, First Annual Meeting (October 29, 1919–November 29, 1919) at 74, online: League of Nations <www.ilo.org/public/libdoc/ilo/P/09616/09616(1919-1).pdf>.

[27] International Labor Conference, First Annual Meeting (October 29, 1919–November 29, 1919) at 117, online: League of Nations <www.ilo.org/public/libdoc/ilo/P/09616/09616(1919-1).pdf>.

[28] His opinion to this effect was contained in a report of the Committee of the Privy Council approved by the Governor General on the 6th of November: See the I.L.O. Official Bulletin of December 22, 1920, No.

power of ratification to the British Crown and implementation to the federal government was now felt to be of doubtful application. That left sections 91 and 92, and the jurisprudence in 1920, especially as developed by then Justice Duff of the Supreme Court of Canada and Lord Haldane of the Judicial Committee of the Privy Council, leaned heavily in favour of preserving provincial autonomy and limited the ability of the federal government in terms of relying upon the broader language in relation to peace, order, and good government in section 91.[29] In these circumstances, while the federal government may have inherited the prerogative to ratify treaties, labour legislation was a matter that would normally fall within section 92(13) and not section 91. The approach then was to bring the draft conventions before the Lieutenant General in Council of each province. Uncertainty remained however and a narrowly framed reference was submitted to the Supreme Court of Canada by the William Lyon McKenzie King government in 1925 relating to the Hours of Work Convention. The decision, written by Justice Duff, supported the revised opinion of the Minister of Justice at least within the narrow confines of the reference.[30]

The result on the ground was that by 1935, Canada had fallen well behind other industrialized states including Britain and France in terms of ratifying and implementing the draft conventions of the I.L.O. By 1935, Canada had ratified only four of the draft conventions of the I.L.O.[31] All of these were conventions within the jurisdiction of the federal government because they involved working conditions at sea. Canadian working conditions otherwise were below the standard of other countries including the United States who was not even, at this time a member of the I.L.O. In short, while Canada had largely gained its independence by this time, it was in fact, unable to exercise it.

But why then the change of heart by the federal government? The answer is a complex one but there were two principal reasons. First, the circumstances of the Great Depression were such that the labour situation might be reasonably be described as an emergency within the meaning of the opening words of section 91 and from a political point of view, Bennett felt the need to do something. It is also of note that by this time, the United States had joined the I.L.O. and passed New Deal legislation seeking to ameliorate the labour situation in that country.[32] Second, by this time, the Judicial Committee of the Privy Council had rendered a number of decisions such as

---

15–16 at 11–4, online: International Labour Organization <www.ilo.org/public/libdoc/ilo/P/09604/09604(1920-2).pdf>.

[29] See for example James G. Snell and Frederick Vaughan, *The History of the Supreme Court of Canada: History of the Institution Federalism* (Toronto: The Osgoode by University of Toronto Press, 1985), Chapters 5 and 6. See also John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: Osgoode Society for Canadian Legal History by University of Toronto Press, 2002).

[30] *Re Legislative Jurisdiction over Hours of Labour*, [1925] SCR 505, [1925] 3 DLR 1114.

[31] "Ratifications for Canada", online: International Labour Organization <www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102582>.

[32] Conrad Black, *Franklin Delano Roosevelt: Champion of Freedom* (New York: PublicAffairs, 2003) at Part II.

the *Person's Case*,[33] the *Aeronautics Reference*,[34] and the *Radio Reference* which signaled a more purposive reading of the *British North America Act, 1867* and which strongly suggested, though in *obiter*, that in the international arena, the federal government was the natural successor to the British Executive in terms of ratification of treaties and that the federal Parliament was the appropriate body to implement such treaties.

Bennett ran his election campaign of 1935 on his "New Deal" and lost. His successor, William Lyon McKenzie King had run arguing that the legislation was unconstitutional and shortly after the election referred the *Labour Conventions Case* to the Supreme Court of Canada which was heard over six days in January 1936.[35] Newton Rowell, who had been Canada's representative at the 1919 Washington Conference of the I.L.O., acted as counsel for the federal government before the Supreme Court of Canada. In his argument, Rowell focused on the emergence of Canada as a nation state and the need to interpret our Constitution in a way that would facilitate that growth. He correctly stated that it was entirely open to the Court to rely on more recent Judicial Committee jurisprudence to uphold the legislation and allow for a unitary approach to international legal matters.[36] Three of the judges[37] concluded that the matter of labour standards was more properly within the purview of the provinces and relied upon earlier jurisprudence limiting the federal government's ability to rely upon its general power to override provincial authority. Their focus was on the "Charter of the Legislatures" rather than the "Labour Bill of Rights" and the concern raised was that if the position of the federal government were adopted, that government would use the power to implement treaties as a means of limiting provincial power and altering the structure of Confederation. Chief Justice Duff and two other judges[38] however adopted the position advanced by Rowell. It is important to state that the Chief Justice had by this time been on the Supreme Court of Canada for 30 years and had consistently been a stalwart protector of provincial rights. Indeed, he was the Canadian architect of the approach relied upon by the other three judges and the author of the 1925 Reference. But he simply did not see that the 1925 Reference affected the matter before the court and more generally concluded that international capacity had never been part of the division of powers. He also determined that there was significant check and balance on any abuse of this capacity by the federal government. Specifically, there could be no treaty between states unless the subject matter of the treaty was of international concern to states, a question that could be tested on judicial review. By definition, such matters were no longer of merely local concern. Here there was no doubt that labour standards had reached that

---

[33] *Edwards v Canada (Attorney General)*, [1930] AC 124, [1930] 1 DLR 98 (JCPC).

[34] *Canada (Attorney General) v Ontario (Attorney General)*, [1932] AC 54, [1932] 1 DLR 58 (JCPC).

[35] It is interesting to note that during the same month, Chief Justice Thane Campbell became Premier of Prince Edward Island.

[36] "Record of Proceedings" (1936) at 5–54, online: <http://www.bailii.org/uk/cases/UKPC/1937/1937_6(image6).pdf>.

[37] Rinfret, Cannon, and Crocket, JJ.

[38] Davis and Kerwin, JJ.

level. His approach is entirely consistent with the history of international law and the *BNA Act* reviewed earlier in my comments.

But at the Judicial Committee of the Privy Council, Lord Atkin decided to read the more recent decisions of the Judicial Committee narrowly and adopted the view that the treaties in question addressed labour, a matter within provincial jurisdiction. His now famous words are as follows: "While the ship of state now sails on larger ventures and into foreign waters, she still retains the water-tight compartments of her original structure".[39] He echoed the concern raised by some of the judges on the Supreme Court of Canada and stated that placing the power of implementation in the hands of the federal government might result in undermining the safeguards of provincial autonomy.

Lord Atkin's metaphor is appealing on first reading. But what is not often stated directly is that the consequence of these words is that the actual kinds of treaties to which the ruling applies are those which directly affect individuals within the state; i.e. human rights conventions. I have already spoken of the results on the ground in terms of the I.L.O. under an approach that required the provinces to consent in advance of ratification. Because failure to fulfill a treaty would leave Canada in breach of its international obligations, the practical consequence of this case – as Lord Atkin himself acknowledged – is that the executive would need to have the consent of the provinces in advance of ratifying any treaty on human rights. The ruling put Canada in a different position than other states internationally, one that required on-going cooperation to ensure that obligations would be met. So, while there was great movement in terms of Canada's independence and the desire to move forward with labour standards, our constitutional framework resulted in a limited outcome in the short run and the need to fully develop cooperative federalism in relation to treaties affecting human rights if we were, as a country, to move forward in undertaking and implementing international human rights obligations.

Indirectly, and as an aside in this context, it is this case which led to Canada's final act of independence from England. The outcome of this case caused so much fury within Canada that the Conservatives (then in opposition) submitted a private members bill to end appeals to the Judicial Committee of the Privy Council with the support of the then Liberal Minister of Justice Eric LaPointe.[40] The matter was referred to the Supreme Court of Canada. While the war intervened and slowed that process, it was a matter of time. Chief Justice Duff wrote the decision ending such appeals.[41]

---

[39] *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 326 at 354, [1937] 1 DLR 673 (JCPC).

[40] W H McConnell, "The Judicial Review of Prime Minister Bennett's 'New Deal" (1968) 6 Osgoode Hall LJ 39 at 78–82.

[41] *Ontario (Attorney General) v Canada (Attorney General)*, [1940] SCR 49, [1940] 1 DLR 289. And see *Attorney-General for Ontario v Attorney-General for Canada*, [1947] AC 153, 1 DLR 801 upholding the decision.

B. The Second Project – The UN Bill of Rights & the Canadian Bill of Rights

During the period in which the *Labour Conventions Case* was being decided before the Supreme Court of Canada and the Judicial Committee of the Privy Council, human rights atrocities were being committed by Germany within its own state and elsewhere. When the world became fully aware of this in 1945, the result was a very strong international lobbying effort for the protection of human rights and a focus on ensuring limits on sovereignty. What has followed over the next 70 years is an exponential growth in the subject matter. I pause to state here that it is reasonable to wonder whether the decision in the *Labour Conventions Case* would have been the same had it been decided in 1945 rather than in 1937.

As was the case in the development of the League of Nations, the first words of the preamble to the United Nations Charter of 1945[42] connected the achievement and maintenance of peace to the fulfillment of fundamental rights and the dignity and worth of the human person. However, the Charter did not specifically outline the relevant rights that required protection. It left the development of these principles to a Human Rights Commission that was created in 1946. While there was considerable support for the development of human rights, there were, by this time, changes on the international horizon: the beginning of the Cold War and the push for decolonization. To return to our generations of human rights, this meant that different rights were prioritized by different states. Western states were more focused on civil liberties, Eastern states were more focused on economic rights and those states seeking decolonization were more focused on collective rights. In these circumstances, a pragmatic decision was made to begin with a non-binding declaration and to use that foundation to then develop binding treaties.

A Commission chaired by Eleanor Roosevelt completed the Declaration of Human Rights in 1948 and it was then submitted to the United Nations General Assembly.[43] One of the principal drafters of this declaration was a Canadian, John Humphrey, who was then a law professor at McGill University. [44] The declaration included first generation rights that would be very familiar to us such as equality in Article 1, life, liberty, and security of the person in Article 3, and the right to mobility in Article 13. But it also provided for such second generation rights as just and favourable conditions of work and the right to rest and leisure in Articles 23 and 24, and a standard of living adequate for health in Article 25. The Declaration was adopted in December 1948 with 48 states in favour and 0 opposed with 8 abstentions.

---

[42] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

[43] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

[44] For an excellent overview of this time period and the work of Eleanor Roosevelt and John Humphrey, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001). John Humphrey later had a significant connection to Prince Edward Island; he ran a summer programme every year on human rights. Close to Brackley Beach, you'll find a lane called Humphrey lane where his family stayed for many years.

Ultimately, the first generation rights were embodied in one treaty – the *International Civil and Political Rights Convention* (*ICCPR*)[45] – and the second generation rights were embodied in a second treaty – the *International Economic and Cultural Rights Convention* (*ICESCR*).[46] Both treaties included a common first article acknowledging the third generation collective right of self-determination. Together, these three documents constitute the United Nations Bill of Rights. Canada signed the *ICCPR* and the *ICESCR* in 1966 but they were not ratified by Canada until 1976. We will return to them in our discussion of the third project.

Domestically, Canada's focus on international human rights began in earnest almost immediately after the Second World War. The United Nations Charter was extensively referred to in the case of in *Re Drummond Wren*[47] in 1945 as a justification for removing a restrictive covenant that was anti-Semitic. In 1947, the Province of Saskatchewan passed the first general human rights act in North America which proclaimed such rights as freedom of expression, association, and religion, and equality before the law.[48]

Canadians did press for a Universal Declaration of Human Rights within Canada and many called for a bill of rights to be added to the *British North America Act, 1867* but this predictably resulted in failure because of concerns in relation to the division of powers. The *Canadian Bill of Rights* was then adopted unilaterally by Parliament under the leadership of Prime Minister Diefenbaker who had been campaigning for the protection of human rights since he became a Member of Parliament in 1945. It was enacted on August 10, 1960.[49] The *Bill of Rights* focused upon first generation rights/civil liberties such as the right to life, liberty, and security of the person, the right to equality before the law, and freedom of religion. The provinces then, over the course of the next decade enacted similar legislation.[50]

There were positive decisions under the *Canadian Bill of Rights* and otherwise that were consistent with Canada's support of international human rights. We might in this regard mention the 1970 case of *The Queen v Drybones*[51] in which the Supreme Court of Canada held that the *Bill of Rights* could have the effect of rendering other federal statutes inoperative in the face of inconsistency with the rights laid out therein and the very important decision of *Calder v British Columbia (Attorney*

---

[45] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

[46] *International Covenant on Economic, Social and Cultural Rights*, 19 December 1976, 993 UNTS 3 Can TS 1976 No. 46 (entered into force 23 March 1976, accession by Canada 19 May 1976).

[47] [1945] OR 778, [1945] 4 DLR 674 (Ont HC).

[48] Saskatchewan *Bill of Rights Act*, SS 1947, c 35.

[49] SC 1960, c 44.

[50] For example, Prince Edward Island enacted an *Act Respecting Human Rights* in 1968 during the period in which Alex B. Campbell was premier: SPEI 1968, c 24.

[51] [1970] SCR 282, 9 DLR (3d) 473.

General)[52] decided in 1973 where the Supreme Court of Canada for the first time acknowledged that aboriginal title to land had existed prior to colonization.

However, as in the case of the I.L.O. project, there were significant constitutional limitations on the effectiveness of the *Canadian Bill of Rights*. First, it was, for reasons that we have discussed, inapplicable to the provinces. Second, because the Canadian Bill of Rights was only a statute, the courts adopted a limiting interpretation of the rights outlined therein so as to avoid striking down federal legislation that might appear to be inconsistent. Examples included the *Lavell v Canada (Attorney General)*[53] and *Bliss v Canada (Attorney General)*[54] cases. In the former, it was held that the inequality provision of the *Bill* was not violated by the *Indian Act* which provided that aboriginal women would lose their status as aboriginals upon marriage to a white man when the same consequences did not apply to aboriginal men who married a white woman. In the latter case, it was held that it was not discrimination to deny federal unemployment benefits to a pregnant woman. Again, the internal constitutional law of our country limited a progressive movement.

C. The Third Project – 1982 to the Present

As noted earlier, the *ICCPR* protecting political and civil rights and the *ICESCR* protecting economic rights were adopted in 1966 and signed by Canada in that year though neither was ratified until 1976. There is no question that in the years immediately following the signing of these treaties, there was a marked difference between the types of states who were parties to the *ICCPR* and those who were parties to the *ICESCR*. Apart from the United States, which has never ratified the *ICESCR*, that distinction is now not as evident. Of the 195 countries in the world today, 169 are state parties to the *ICCPR* and 165 are state parties to the *ICESCR*.[55] Both of these treaties have Optional Protocols[56] allowing individuals to appeal directly to International Committees when they allege that their rights under the treaties have been breached.

There are also many more specialized treaties in the area of international human rights law that have been adopted or ratified by Canada before and after the coming into force of the *Canadian Charter of Rights and Freedoms*. These include: the *Convention on the Elimination of All Forms of Racial Discrimination* 1965, the

---

[52] [1973] SCR 313, 34 DLR (3d) 145.

[53] [1974] SCR 1349, 38 DLR (3d) 481.

[54] [1979] 1 SCR 183, 92 DLR (3d) 417.

[55] "Status of Ratification Interactive Dashboard", online: United Nations Human Rights Office of the High Commissioner: <www.indicators.ohchr.org>.

[56] *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 TS 171 (entered into force 23 March 1976; ratified 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989, A/Res/44/128 (entered into force 11 July 1991; ratified 2005); *Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights*, 5 March 2009, A/Res/63/117.

Convention on the Elimination of Discrimination Against Women 1979, the *Convention Against Torture* 1984, the *Convention on the Rights of the Child* 1989, the *Convention on the Rights of Persons with Disabilities*, 2006, and the *United Nations Declaration on the Rights of Indigenous Peoples* 2007.[57]

Unlike the *Canadian Bill of Rights*, the *Constitution Act, 1982* is constitutional rather than merely legislative in character. In its own words, it is the "supreme law of Canada". The *Charter* has in many respects enabled Canada to avoid the constitutional concerns outlined in relation to the first two projects. Specifically, in entering new international rights treaties, Canada is able to ratify such treaties to the extent that the treaty is consistent with the rights as outlined in the *Charter*. But again, there have been two issues in terms of the acceptance and integration of international human rights law. The first is one of implementation and the other one of scope.

In terms of implementation, there is no question that the timing of the *Charter* was intended to fulfill Canada's obligations under the *ICCPR* and *ICESCR* and the Supreme Court of Canada has consistently referred in its decisions to international human rights law. Between 1984 and 1996, reference was made by the Supreme Court of Canada to international human rights law in 50 cases and in the next four years, that number doubled.[58] There is thus a deep connection between the *Charter* and international human rights law that is sometimes forgotten. At the same time, however, the *Charter* was inspired by reference to other material such as the American Bill of Rights and the *European Convention on Human Rights*.

I think that it is fair to say that international lawyers had expected or at least hoped that in interpreting the *Charter*, Canadian courts would directly implement Canada's international human rights obligations and draw a clear distinction between international obligations binding upon Canada and other comparative of international instruments outlining human rights but not binding upon Canada. In the early jurisprudence of the Supreme Court of Canada, it is fair to say that the Court considered such an approach. In the 1987 case of *Reference Re Public Service*

[57] Canada is a party to all of these and the accession dates for Canada are as follows: *International Conventionon the Elimination of All forms of Racial Discrimination,* 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969; accession in 1969); *Convention on the Elimination of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981; accession 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,*10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987; accession 1987); *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990; accession1991); *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/106 (2006) at Annex I (accession 2010); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess Supp No 49, UN Doc A/61/295 (2007) at Annex (accession 2016).

[58] Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" in *Fifth Annual Analysis of the Constitutional Decisions of the Supreme Court of Canada* (Toronto: Osgoode Hall Law School, 2002), (2002) 16 SCLR (2d) 23.

Employee Relations Act (Alta.),[59] Chief Justice Dickson stated that: "…the Charter should ***generally*** be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified". If such an approach had been consistently followed, it would have amounted to the courts directly implementing Canada's international obligations.

The Supreme Court, however, has not really followed this approach. The sources that have been used to inform *Charter* interpretation have included international and regional treaties which are not binding upon Canada, comparative constitutions, declarations, covenants, and decisions of the Human Rights Committee established under the *ICCPR*.[60]

In other contexts, I have written that I agree with the approach of the Court.[61] One reason is that it allows for a living tree approach to the rights outlined in the *Charter*; many of the treaties that have been ratified by Canada were not even in existence at the time the *Charter* came into effect. But more importantly, the evolution of human rights is not merely a top down process and the evolution of human rights can also be horizontal. After all, human rights began nationally. The constitutional nature of the *Charter* allows the Court to develop human rights in a manner that is consistent with our own unique vision. And we have in this regard had considerable influence internationally. Courts in many other jurisdictions cite Supreme Court of Canada decisions.[62] It is fair to say that this is an era of judicial globalization and on the 35th anniversary of the *Constitution Act, 1982*, it can be stated that our own efforts have contributed to the advancement of international human rights. A few examples over the course of the last 35 years include: *Brooks v Canada Safeway Ltd*;[63] *R v Big M Drug Mart*;[64] *R v Oakes*;[65] *Andrews v Law Society (British Columbia)*;[66] *Irwin Toy v Quebec (Attorney General)*;[67] *R v Keegstra*;[68] *Eldridge v British Columbia (Attorney*

---

[59] [1987] 1 SCR 313 at 349, 38 DLR (4th) 161. Chief Justice Dickson again cited this reference in *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 at 1056, 59 DLR (4th) 416.

[60] "Domestic Application of International Law: Are We There Yet" (2004) 37 UBC L Rev 157 at 157–218; "Evidence and International and Comparative Law" in Oonagh Fitzgerald et al, eds, *The Globalized Rule of Law: Relationships between International and Domestic Law*, (Toronto: Irwin Law, 2006) at 367–392.

[61] *Ibid.*

[62] See for example *State v Makwanyane*, [1995] 1 LRC 269, S Afr Const Ct.

[63] [1989] 1 SCR 1219, 59 DLR (4th) 321 rev'g *Bliss v. Attorney General of Canada*, [1979] 1 SCR 183, 92 DLR (3d) 417.

[64] [1985] 1 SCR 295, 18 DLR (4th) 321 addressing the right to religious freedom in a democratic state.

[65] [1986] 1 SCR 103, 26 DLR (4th) 200 addressing the right to be presumed innocent until proven guilty.

[66] [1989] 1 SCR 143, 56 DLR (4th) 1 addressing equality rights.

[67] [1989] 1 SCR 927, 58 DLR (4th) 577 addressing freedom of speech.

[68] [1990] 3 SCR 697, [1991] 2 WWR 1 addressing hate speech.

General);[69] *Delgamuukw v British Columbia*;[70] *Reference Re Same-Sex Marriage*;[71] and, *Carter v Canada (Attorney General)*.[72]

While there have been many successes through the interpretation of the *Constitution Act, 1982* in terms of civil and political rights and in terms of language and aboriginal rights, there continues to be a significant issue in terms of scope. In 2007, former Supreme Court of Canada Justice Louise Arbour who was then the UN High Commissioner for Human Rights commented on the many ways in which the *Charter* has changed the legal landscape in Canada but she focused as well on the limits of the interpretation of that document in terms of second generation rights. In her estimation, social and economic rights had been inadequately protected under the *Charter*:

> "While we are quick to explain how the *Charter* has made our society evolve…, we are hesitant to identify how and why the *Charter* has failed to prompt social change where it arguably should have. We can celebrate the social achievements of the *Charter* and still acknowledge that it has not yet brought Canada where it committed itself to be, in critical areas such as the protection of economic and social rights."[73]

Specifically, the Supreme Court of Canada has been reticent to interpret the *Charter* in a manner that would impose a positive obligation on the government to remedy socio-economic disadvantage. In cases such as *Gosselin v Quebec (Attorney General)*[74] in 2002 and *Chaolli v Quebec*[75] in 2005, the Court made it clear that it would review government schemes that were under-inclusive or discriminatory, but would not confer freestanding positive rights.

The *ICESCR* committee established to monitor our compliance with this human rights treaty has been consistently critical of Canada for failing to implement the rights set out in the treaty. In its most recent report of March 6, 2016, it has stated as follows.

> "The Committee recommends that [Canada] take the *legislative* measures necessary to give full effect to the Covenant rights…and ensure that victims have access to effective remedies…[Canada] should engage civil society…in that revision, with a view to broadening the interpretation of the *Canadian Charter of Rights and Freedoms*…to include economic and

[69] [1997] 3 SCR 624, 151 DLR (4th) 577 addressing equality for people with disabilities.

[70] [1997] 3 SCR 1010, 153 DLR (4th) 193 addressing indigenous rights in relation to land.

[71] [2004] 3 SCR 698, 246 DLR (4th) 193 addressing legal recognition of same-sex marriage.

[72] 2015 SCC 5, [2015] 1 SCR 331 addressing medical assistance in dying.

[73] Louise Arbour and Fannie Lafontaine, "Beyond Self-Congratulations: The Charter at 25 in an International Perspective" (2007) 45 *Osgoode Hall LJ* 239 at 265 [emphasis added].

[74] 2002 SCC 84, [2002] 4 SCR 429.

[75] 2005 SCC 35, [2005] 1 SCR 791.

social rights."[76]

III. Conclusion

> "We come together as Canadians to celebrate the achievements of our great country, reflect on our past and present, and ***boldly look towards our future***."
> […]
> "Great promise and responsibility await Canada. As we look ahead to the next 150 years, ***we will continue to rise to the most pressing challenges we face***..."[77]

The future of Canada's relationship with indigenous peoples is of course ongoing and finds its roots in the beginnings of international law and represents part of the movement towards decolonization that began more than 50 years ago and that led to the *UN Declaration on the Rights of Indigenous Peoples*. There is considerable national work to be done on this front and is ongoing. The tension between security and human rights is one that has been particularly acute since September 11, 2001. We continue to struggle with this as the recent settlement in the case of Omar Khadr discloses. And this summer has seen the potential for another issue on the horizon and that is climate change. For example, should individuals suffering from the consequences of climate change be entitled to seek refugee status? All of these questions are difficult ones. But given the substance of this lecture, one question is whether, in the face of rising income inequality nationally and internationally, labour standards should return to the forefront.

Recent years have seen the rise of nationalism in countries such as Britain and France and most particularly, the United States. There is an increasing sense that while globalization has given rise to many gains, there have been losers. Labour markets have been profoundly altered as has income division within established economies. We are in a new Gilded Age.[78] Internationally, just eight men own the same wealth as the 3.6 billion people who make up the poorest half of the world. Seven out of ten people live in a country that has seen a rise of inequality in the last 30 years. On current trends, it will take 170 years for women to be paid the same as men.[79] Canada is not immune from these matters. In 2012, Statistics Canada noted that in

---

[76] "Concluding Observations on the Sixth Periodic Report of Canada" (23 March 2016), E/c.12/CAN/CO/6 at para 6, online: <docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW4yzVsFh%2Fjl1u%2Ft0KVExfQT6EfAENdSjJTaz3raPv3QWT3Y59q3zadXvBYMpLNW5%2FsveoBdxLZoVN%2Fzz31c7YEgqRm0DpoVivqHo2yN5iIam>

[77] "Statement by the Prime Minister on Canada Day" (1 July 2017), online: Prime Minister of Canada <https://pm.gc.ca/eng/news/2017/07/01/statement-prime-minister-canada-day> [emphasis added].

[78] "World's Witnessing a new Gilded Age as billionaires' wealth swells to $6tn", *The Guardian* (10 October 2017), online: <https://www.theguardian.com/business/2017/oct/26/worlds-witnessing-a-new-gilded-age-as-billionaires-wealth-swells-to-6tn>.

[79] These facts were taken from the Oxfam International website on July 25, 2017. To see more current facts, see online: Oxfam International <https://www.oxfam.org/en/even-it/5-shocking-facts-about-extreme-global-inequality-and-how-even-it-davos>.

terms of Household Wealth Distribution, the bottom quintile in Canadian society is at 3.9% while the top quintile is at 46.9%.[80]

As we have seen, international human rights law provides for the right to an adequate wage, social security, and fair working conditions. But as this lecture has demonstrated, while the rights are outlined and represent international obligations undertaken by Canada, our success in achieving them has been at times limited. The rights outlined in the *ICESCR* require active measures by the states and their enforcement is not in many cases within the purview of the *Canadian Charter of Rights and Freedoms*. In such circumstances, there would seem to be three possibilities in a constitutional sense. The first possibility, as many academics have suggested, is that the Supreme Court of Canada take a broader interpretation of the *Charter*.[81] The second is, as the *ICESCR* committee suggests, legislative measures and in this regard, some provinces have sought to expand social and economic rights. But in terms of uniformity, we are constrained by the *Labour Conventions Case* to an approach of cooperative federalism.

The third is executive action and there are signs of this approach being taken in Canada's recent position in relation to NAFTA and the TPP. On August 15, 2017, the Minister of Foreign Affairs, Chrystia Freeland, stated as follows: "Canada is really committed to working hard to make [NAFTA] more progressive and we see some real opportunities to do that, particularly in the labour chapter".[82] If such an approach is taken, there is a good argument to the effect that the matter would fall within the trade and commerce power under section 91(2). If successful, it would finally fulfill the promise of those who championed a Labour Bill of Rights a century ago.

In this lecture, we have seen constitutional impediments at each stage of evolution in terms of the relationship between Canada and international human rights law. But the message of this lecture is also an optimistic one. The suggestion I have been making is that the relationship between Canada and international human rights law has been one where there is always movement forward towards a society that brings the greatest happiness to its citizens. That, as Jeremy Bentham would agree, is the purpose of government. My own belief is that the next chapter in the development of Canada's relationship with international human rights law will be to find ways and means to address matters that continue to give rise to inequity. In so doing, we will act, I am sure, in a way that is uniquely Canadian.

---

[80] See online: Statistics Canada <www.statcan.gc.ca/pub/75-006-x/2015001/article/14194-eng.htm>. For statistics on the United States, see online: Pew Research Center <www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928/>.

[81] See for example, Martha Jackman and Bruce Porter, "Canada" in M Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) at 209. And see Doug Beazley, "The Court after McLachlin", *CBA National* (Fall 2017) online: <www.nationalmagazine.ca/Articles/Fall-Issue-2017/The-Court-after-McLachlin.aspx>.

[82] "Labour groups press Freeland to raise work standards in NAFTA talks", *The Toronto Star* (August 15, 2017) online: <https://www.thestar.com/news/canada/2017/08/15/labour-groups-press-freeland-to-raise-work-standards-in-nafta-talks.html>.