Contents

Table of international instruments xv
Table of statutes xx
Table of cases xxiv
Abbreviations xxxvi
Glossary xli

1. International law and Canada: an introduction 1
   1.1 The duties of statehood 1
   1.2 The nature of international obligation 3
   1.3 Principles of the reception system 5
     (a) Respect for international law 7
     (b) Self-government 9
     (c) The balancing act 10
   1.4 The purpose of this book 11

2. Definitions, sources and forums 13
   2.1 Introduction 13
   2.2 International law defined and distinguished 13
   2.3 Sources of international law 15
     (a) Treaties 16
     (b) Custom 19
     (c) General principles of law 22
     (d) Subsidiary sources: judicial decisions and publicists 24
     (e) International organizations 26
     (f) Jus cogens and obligations erga omnes 28
     (g) Soft law 29
   2.4 Judicial notice of international law 30
     (a) The rule 30
     (b) International law and foreign law distinguished 34
     (c) Pleading international law 36
     (d) Judicial notice of international law by tribunals 37
     (e) Errors of judicial notice 39
   2.5 Forums in which international law is applied 40
     (a) Courts of general jurisdiction 40
     (b) Specialist and regional courts and tribunals 41
     (c) International arbitral tribunals 42
     (d) Treaty-monitoring bodies 43
     (e) Domestic courts and tribunals 45
3. Foundations of the reception system 47
   3.1 A matter of constitutional law 47
   3.2 Monism and dualism: Canada as a hybrid jurisdiction 49
   3.3 Constitutional features of the reception system 52
   3.4 The residual sovereignty of Canadian parliaments 52
      (a) Legislative competence to violate international law 55
          (i) In English law 56
          (ii) In Canadian law 58
      (b) The argument against 61
          (i) Croft v. Dunphy 61
          (ii) Vanek 62
          (iii) La Forest 63
          (iv) Criticism of these arguments 64
      (c) The presumption of international legality 65
   3.5 The treaty power 66
      (a) The royal prerogative over foreign affairs 66
      (b) Parliament’s role 68
      (c) The role of the provinces 71
      (d) Who may exercise the treaty power? 74
          (i) The federal case for an undivided treaty power 75
          (ii) The provincial case for a shared treaty power 79
          (iii) Canadian case-law on the treaty power 83
          (iv) Crystallization and consent in the unwritten constitution 86
      (e) Judicial review of the treaty power 93
      (f) Future of the treaty power 97
   3.6 Federalism and human rights 98

4. The presumption of international legality 99
   4.1 The presumption 99
      (a) The presumption is rebuttable 100
      (b) Legislative intent or judicial obligation? 101
   4.2 Case-law on the presumption 102
      (a) English authorities 102
      (b) Canadian authorities 106
      (c) Other common law authorities 118
   4.3 The customary presumption 119
      (a) The customary presumption and the common law 120
      (b) The customary presumption and statute 120
   4.4 The treaty presumption 121
      (a) Ambiguity 122
      (b) Nature of the legislation 127
      (c) The relevance of chronology 130
   4.5 The presumption and judicial review 134
   4.6 The presumption in Charter jurisprudence 136
5. The incorporation of custom 137
   5.1 Incorporation and respect for international law 137
   5.2 Case-law on incorporation 138
      (a) English authorities 138
      (b) Canadian authorities 142
      (c) Conclusion 150
   5.3 Custom and stare decisis 150
      (a) Conflicts between custom and common law 151
      (b) Strong and weak incorporation 152
      (c) Weak incorporation in Canada 153
      (d) The English landmark: Trendtex 155
      (e) Trendtex in Canada 158
   5.4 Permissive and mandatory customs 160
      (a) R. v. Keyn (The Franconia) 160
      (b) Canadian authorities 161
   5.5 Incorporation and judicial review 163
   5.6 Incorporation of jus cogens 165
      (a) Suresh at the Federal Court of Appeal 166
      (b) Suresh at the Supreme Court of Canada 169

6. Implemented and unimplemented treaties 171
   6.1 Implementation and self-government 171
   6.2 The constitutional objection to self-executing treaties 172
   6.3 The implementation requirement 175
      (a) Case-law on the requirement 175
      (b) Forms of implementation 178
         (i) Legislation is needed 179
         (ii) No formal requirements 180
         (iii) Approval is not implementation 184
         (iv) Implementation without reference 184
         (v) Effect of non-enforcement provisions 188
      (c) Supposed exceptions to the implementation requirement 189
   6.4 Federalism and treaty implementation 192
      (a) Case-law prior to Labour Conventions 193
      (b) The decision in Labour Conventions 194
      (c) Academic criticism of the decision 196
      (d) Judicial consideration of the decision 199
      (e) The current position of the law 204
      (f) In defence of Labour Conventions 205
   6.5 Unimplemented treaties 207
   6.6 Unimplemented treaties, the treaty presumption and judicial review 207
      (a) The revelations of Baker 209
## Contents

(b) *Baker* and the separation of powers 214  
(c) *Baker* and the division of powers 219  
(d) The significance of a treaty’s content: *Baker* and *Capital Cities* 222  
(e) How international law can bolster a decision-maker: *Spraytech* 226  
6.7 Unimplemented treaties and legitimate expectations 228

7. Using international human rights law 230  
7.1 Introduction 230  
7.2 Why rights are different 233  
(a) The universality of human rights 233  
(b) Entrenched human rights: the Charter 236  
(c) The perceived priority of human rights 237  
7.3 Entrenched human rights: the Charter 238  
(a) International law in Charter interpretation 239  
   (i) Section 1 239  
   (ii) Section 2 242  
   (iii) Section 7 244  
   (iv) Section 15 249  
   (v) Other sections 250  
(b) In need of a theory 252  
(c) The relevant and persuasive approach 255  
   (i) Sources 258  
   (ii) Application 260  
   (iii) Respect for international law 260  
   (iv) Self-government and balance 263  
(d) The presumption of minimum protection 264  
   (i) Sources 267  
   (ii) Application 269  
   (iii) Respect for international law 269  
   (iv) Self-government and balance 269  
(e) The universal presumption of international legality 270  
   (i) Sources 272  
   (ii) Application 274  
   (iii) Respect for international law 274  
   (iv) Self-government and balance 274  
   (v) Making the universal presumption a reality 275  
7.4 Unentrenched human rights 276  
7.5 International human rights law as public policy 277

Index 281