Act of state and treaty implementation in *Jim Shot Both Sides*

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Summary: In *Jim Shot Both Sides* 2022 FCA 20, the Federal Court of Appeal criticized the trial judge for applying the act of state doctrine, which it called a principle of international law, in concluding that treaties between the Crown and Indigenous peoples were not actionable before the advent of s. 35 of the Constitution Act, 1982. But act of state is not a principle of international law, and the trial judge did not apply it. The real issue is not act of state but the treaty implementation requirement. The Supreme Court of Canada should avoid falling into these same misapprehensions when it hears the case this month.

In *Jim Shot Both Sides*, a case to be heard soon by the Supreme Court of Canada, the court must decide whether claims by the Blood Tribe against Canada for breaches of Treaty 7 are time-barred. In doing so, the court will be confronted with some rather difficult statements by the Federal Court of Appeal about what it described as the "act of state doctrine". The purpose of this piece is to call attention to the Federal Court of Appeal's confusion on this score, in the hope that the Supreme Court of Canada does not fall into confusion itself.

In his reasons (2019 FC 789), Zinn J. found a breach of Treaty 7 (the reserve created under it being significantly smaller than promised) and held that an action for breach of that treaty was not available until the adoption of s. 35 of the Constitution Act, 1982.

The Federal Court of Appeal (2022 FCA 20) allowed the appeal on the basis that a breach of Treaty 7 was actionable prior to the coming into force of s. 35, with the result that the plaintiffs were out of time, Treaty 7 having been made in 1877.

Rennie JA for the court found three reversible errors in the Federal Court's reasons. I am concerned only with the first alleged error, which Rennie JA summarized as follows (at para. 13):

> First, the reasons are not consistent with the guidance of the Supreme Court of Canada. The Supreme Court has rejected the characterization of [Indigenous] treaties as international agreements, as well as the application of international law principles to Canadian law. The Federal Court erred in characterizing Treaty 7 as if it were an international treaty and applying the act of state doctrine to conclude that its terms were unenforceable in a Canadian court. It was only by ignoring the governing jurisprudence that holds that [Indigenous] treaties are enforceable agreements under Canadian law that the judge was able to open the door to the act of state doctrine, a principle of public international law.

Similarly, at para. 8, Rennie JA observed:

> After reviewing decisions of the Judicial Committee of the Privy Council [JCPC] in 1899 (*Secretary of State for India v. Sahaba*, [1859] U.K.P.C. 18) and 1941 (*Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, 1941 A.C. 308), the judge adopted the act of state doctrine, a principle of international law that provides that unless incorporated into a domestic law which confers a right of action, treaties are not enforceable in national courts. The judge reasoned that "[t]here is nothing in the *Indian Act* permitting a First Nation to bring an action to enforce the [treaty land entitlement] under a Treaty" (*Reasons* at para. 500). As Treaty 7 was not incorporated into Canadian law, it was not enforceable in Canadian courts.

The first thing to be said about these passages is that the act of state doctrine is emphatically not a principle of international law. If it is a principle at all, it is one of English law—and maybe of Canadian law, but probably not. This will become clearer below.

The second point is that act of state is not, as Rennie JA depicts it, a single principle. Instead, act of state comes in two varieties: foreign act of state and Crown (or British) act of

state. Both concern the justiciability of certain governmental acts—but neither quite accords with the rule Rennie JA described in *Jim Shot Both Sides*.

The Supreme Court of Canada recently considered foreign act of state at length in *Nevsun Resources Ltd v Araya* 2020 SCC 5. Justice Abella for the majority of the court quoted Lord Millet as follows (my emphasis): "the act of state doctrine is *a rule of domestic law* which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state": *Nevsun* at para. 29, quoting *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147 (HL) at 269. Justice Abella went on to hold that foreign act of state is not a doctrine that exists in Canadian law. Justices Brown and Rowe concurred with the majority on this point.

The other kind of act of state is known as Crown or British act of state. In *Rahmatullah (No 2) v Ministry of Defence and another* [2017] UKSC 1, Lady Hale (at paras. 36–7) hesitated to "attempt a definitive statement" of this doctrine but depicted it as a defence or objection to justiciability that the Crown can make in respect of

> a very narrow class of acts: in their nature sovereign acts—the sorts of thing that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which are themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law).

In *Calder*, Hall J more narrowly described this version of act of state as a doctrine which "denies a remedy to the citizens of an acquired territory for invasion of their rights which may occur during the change of sovereignty" on the basis that English courts have "no jurisdiction to review the manner in which the Sovereign acquires new territory": *Calder v Attorney General of British Columbia* [1973] SCR 313 at 404.

Again, we are speaking of English legal doctrines, not international law doctrines and possibly not even Canadian doctrines. *Nevsun* was clear that foreign act of state is not part

of Canadian law. As for Crown act of state, it might be assumed to have crossed the Atlantic with the rest of the common law. But Abella J rejected that assumption in respect of foreign act of state in *Nevsun*, and Hall J's observations about the doctrine in *Calder* treat it as a rule of English law with no application to the case before him. I have not conducted a thorough review of lower court authorities for signs of Crown act of state in our law. Those few Supreme Court of Canada decisions that consider the doctrine strike me as inconclusive about whether it forms part of Canadian law. The explanation for this may be that Canada has never been an imperial power with a history of warring with foreign sovereigns and capturing their territories. Instead, Canada is a product of such an imperial power, namely Britain.

What, then, was Rennie JA aiming at with his critique of the trial judge's supposed reliance on the act of state doctrine? Notably, Zinn J. did not use the expression "act of state" even once in his reasons. The phrase does occur there, in a quotation (at para. 495) from a passage of the Privy Council's decision in *Nayak Vajesingji Joravarsingji and others v. Secretary of State for India in Council* [1924] UKPC 51, where the Board held that rights accorded to the inhabitants of a territory ceded by one sovereign to another in a treaty of cession are not directly enforceable in domestic courts.

The principle described in that quotation is neither foreign nor Crown act of state. Rather, it is the implementation requirement, i.e., the foundational constitutional principle that treaties do not take direct effect in domestic law but require implementation by legislation. Older English cases (particularly ones concerning British colonies and conquests) sometimes describe treaties between Britain and foreign powers as acts of state unreviewable by domestic courts. But we ought not confuse the jurisdictional notion that municipal courts are not a forum for enforcing promises made between sovereigns in treaties with the constitutional principle that the Crown is not a source of law.

Indeed, the Privy Council famously rejected an attempt by the Crown to invoke Crown act of state as an excuse for relieving it of the implementation requirement in *Walker v Baird* [1892] AC 491. The UK and France had concluded a treaty concerning the north Atlantic lobster fishery. One of its provisions was that no new lobster factories should be

permitted on the Newfoundland coast after 1 July 1889 without consent of British and French officials. In purported enforcement of British obligations under this treaty, Captain Baird of the HMS Emerald entered Mr. Walker's lobster factory and seized his equipment. When Walker sued, Baird tried to plead act of state, i.e., that he was acting in performance of his duties under the treaty with France and, as such, the litigation "involved the construction of treaties…and other acts of State and were matters which could not be inquired into by the Court". Lord Herschell for an eight-judge panel of the Privy Council called this argument "wholly untenable" and upheld the Supreme Court of Newfoundland's determination that Walker's right to run a lobster fishery could not be affected by a treaty with France that had not been enacted in Newfoundland law. The Attorney General, on behalf of Captain Baird, tried to get around the implementation requirement by an argument that the Crown has a power to make treaties of peace, and "there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a [peace] treaty", and even of a treaty aimed at "the preservation of peace". Their Lordships did not find it necessary to consider these issues in Walker's case, there being (it seems) no serious prospect of the French and British empires going to war with each other over Newfoundland lobsters.

In short, Rennie J.A.'s equation of act of state with the implementation requirement is wrong but not completely incomprehensible—if you read enough nineteenth century Privy Council decisions. What is rather hard to understand, however, is how act of state becomes such a punching bag in Rennie J.A.'s reasons. At para. 63, he states that Zinn J. supported his conclusion that Treaty 7 was not enforceable in Canadian law before s. 35's introduction into the Constitution "by noting that the Supreme Court of Canada adopted the act of state doctrine in *Francis v. The Queen*, [1956] S.C.R. 618". But Zinn J. did not call *Francis* an adoption of the act of state doctrine. Justice Zinn did indeed note that in *Francis* an Indigenous man tried to rely on the right of Indians, recognized in art. 3 the Jay Treaty 1794, to pass and repass between US and British territories without paying duties on their goods and effects, and that the Supreme Court of Canada held that Francis could not rely on art. 3 of the treaty unless implemented in Canadian law, which it was not. But it was not Zinn J who called *Francis* an application of the act of state doctrine— it was Rennie JA.

At para. 65 of his reasons, Rennie JA complains that Zinn J:

> …did much more than look to international law by analogy, he adopted substantive principles of international law. To be precise, the judge applied the act of state doctrine, a substantive component of international law to Treaty 7. The doctrine holds that unless domestic legislation provides a right of recourse, municipal or domestic courts do not have the competence to consider treaties between two foreign and sovereign countries. This conclusion comes as a surprise, given the extent to which Canadian courts recognized the enforceability of [Indigenous] treaties since Confederation and the consistent and unequivocal jurisprudence of the Supreme Court that [Indigenous] treaties are not international agreements.

Respectfully, this is off course in two ways. First, as noted, act of state is not a substantive principle of international law. It is a feature of English law, one that does not exist in Canadian law in its foreign variety (*Nevsun*) and may not have much currency here in its Crown variety, either. Second, the act of state doctrine is not quite what Rennie JA says it is. What he is describing is not the act of state doctrine but the requirement that treaties be implemented by legislation to take direct effect in domestic law. That latter rule is not an international one either, by the way. It is a basic principle of Anglo-Canadian constitutional law.

At para. 77 of his reasons, Rennie JA observes that "the policy rationale that underlies the act of state doctrine as a principle of public international law is incompatible with the fundamental constructs of Canadian constitutional framework which establishes, through sections 96 and 101 of the Constitution Act, 1867, the role of the judiciary in the Canadian federation". If by this Rennie JA means that the notion that government action in foreign affairs is necessarily subject to judicial oversight, without the imposition of internationally informed justiciability concerns, this seems at odds with Stratas JA's recognition, in *Hupacasath First Nation v Minister of Foreign Affairs* 2015 FCA 4 at para. 67, that while "the category of non-justiciable cases is very small" it includes such foreign affairs matters as the deployment of military forces in a particular way in wartime and the decision, without more, to

sign a treaty. But that probably is not what Rennie JA was saying, for when he says act of state he in fact means the implementation requirement. How the implementation requirement is in any way at odds with the Judicature provisions of the Constitution Act, 1867 is, with respect, hard to see.

The true issue that concerns Rennie JA in this part of his reasons is not act of state. It is whether treaties between the Crown and Indigenous peoples are enforceable by Canadian courts even in the absence of implementing legislation. That is an important question, one which Rennie JA goes on to consider in an extensive and admirable review of the difficult case law on the similarities and differences between treaties between the Crown and Indigenous peoples and treaties between Canada (or Britain before it) and foreign states. That question—do Crown/Indigenous treaties require legislative implementation just as international treaties do?—is one the Supreme Court of Canada must tackle in *Jim Shot Both Sides*. But it has nothing to do with act of state.

I will not venture far into the question of whether treaties with Indigenous peoples are self-executing, but I will make two points. First, as Rennie JA noted, Blair JA for the Court of Appeal for Ontario *R. v. Agawa* (1988) 65 O.R. (2d) 505 regarded the issue as settled. He held that while "Canadian Indian treaties" were called *sui generis* by Dickson CJ in *Simon v The Queen* [1985] 2 SCR 387 at 404, and not the same as treaties between independent countries, yet the two kinds of treaty resemble each other in one respect: "They are not self-executing and can acquire the force of law in Canada only to the extent that they are protected by the Constitution or by statute" (*Agawa* at 509). This conclusion would seem consistent with the result and reasoning in *Francis*.

Second, it seems that the federal government, provincial governments, territorial governments, and Indigenous governments and peoples all consider that agreements between them do indeed require legislative implementation, at least in some cases. Several modern treaties have been implemented in federal, provincial, and territorial law using the same implementation mechanism that our legislatures routinely use for implementing international agreements, namely force of law clauses. An example is the Maa-nulth First Nations Final Agreement, which is given force

of law federally by s. 4(1) of the Maanulth First Nations Final Agreement Act SC 2009 c 18 (“The Agreement is approved, given effect and declared valid and has the force of law”) and in BC by s. 3(1) of the Maa-nulth First Nations Final Agreement Act SBC 2007 c 43 (“The Maa-nulth First Nations Final Agreement is approved, given effect and declared valid and has the force of law”). Other enactments expressly giving the force of law to Crown/Indigenous agreements include the following:

- Nisga'a Final Agreement Act, SC 2000, c 7 s. 4(1) and Nisga'a Final Agreement Act, RSBC 1999, c 2 s. 3(1)
- Tlicho Land Claims and Self-Government Act, SC 2005, c 1 s. 3(1) and Tåîchô Land Claims and Self-government Agreement Act, SNWT 2003, c 28 s. 4(1)
- Labrador Inuit Land Claims Agreement Act, SC 2005, c 27 s. 5(1) and Labrador Inuit Land Claims Agreement Act, SNL 2004, c L-3.1 s. 3(2)
- Nunavik Inuit Land Claims Agreement Act, SC 2008, c 2 s. 5(1)
- Tsawwassen First Nation Final Agreement Act, SC 2008, c 32 s. 4(1) and Tsawwassen First Nation Final Agreement Act, SBC 2007, c 39 s. 3(1)
- Eeyou Marine Region Land Claims Agreement Act, SC 2011, c 20 s. 5(1)
- Yale First Nation Final Agreement Act, SC 2013, c 25 s. 4(1)
- Tla'amin Final Agreement Act, SC 2014, c 11 s. 4(1) and Tla'amin Final Agreement Act, SBC 2013, c 2 s. 3(1)
- Déline Final Self-Government Agreement Act, SC 2015, c 24 s. 4(1) and Délîne Final Self-Government Agreement Act, SNWT 2015, c 3 s. 4(1)
- Anishinabek Nation Governance Agreement Act, SC 2022, c 9, s 1 at s. 4(1)
- Self-Government Treaty Recognizing the Whitecap Dakota Nation / Wapaha Ska Dakota Oyate Act, SC 2023, c 22 s. 4(1)

This is not a complete list, but it suffices to indicate current practice. In all these instances, the Crown/Indigenous agreement has been implemented through federal, provincial, and/or territorial legislation in the very same way that Parliament routinely enacts tax conventions and various other international agreements: by expressly declaring them to have the force of law. This practice tends to support Blair JA's view in *Agawa* that Indigenous treaties, like international treaties, need legislative implementation, at least for some purposes.