

## NOTES AND CASE COMMENTS

THE PROBLEM OF TREATY-MAKING AND  
TREATY IMPLEMENTATION IN CANADA

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The federal state contemplates a political equilibrium in which governmental functions are "exhaustively" distributed between autonomous central and regional authorities. Ideally, a constitution based on the concept of federalism would provide for several coordinate and independent bodies, each confined to its own jurisdiction. In practice, however, conflicts of policy between the central and regional governments are the inevitable result of such a system.

In recent years Canada has witnessed increasing federal/provincial tension in the field of domestic policy. Claims put forward by the province of Quebec for special status within confederation and by the province of Alberta for the exclusive control, management and export of its natural resources have been dominant factors in the federalist struggle. Not surprisingly, this conflict of policy has extended to the international sphere with the development of a possible federal/provincial division of treaty-making power. In emphasizing the implications of such a division, Morris states:<sup>1</sup>

The claim that a Canadian province should play an external role enabling it to undertake international obligations in provincial fields of legislative jurisdiction, without the necessity of any consent or supervision by Ottawa, has the most profound significance for Canadian federalism.

In order to maintain the Canadian federation, as well as the status of Canada in the international community, Canadian foreign policy must accommodate provincial interests and provincial international initiatives. To what extent is a division of international powers between the federal and provincial governments a viable solution?

Despite the concept of exhaustive distribution of powers between the central and regional authorities, nowhere in the BNA Act is provision made for the allocation of treaty-making powers. Similarly, the Act makes no reference to foreign or external affairs. It was simply not contemplated in 1867 that the Dominion would eventually possess international status and the concurrent power to negotiate and conclude international treaties; such matters were left to the control of Great Britain. This is illustrated by s. 132 of the BNA Act which provides:<sup>2</sup>

The Parliament and government of Canada shall have all powers necessary or proper for performing [i.e. implementing] 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.

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1. G. L. Morris, "The Treaty-Making Power: A Canadian Dilemma" (1967) 45 *Can. Bar Rev.* 478.
2. *British North America Act, 1867*, 30 & 31 *Vict.*, c-3.

In effect, the Dominion Parliament was given exclusive jurisdiction to perform the obligations of Canada or the provinces under Empire treaties through implementing legislation. However, Canada's gradual elevation to independent international status has rendered s. 132 obsolete. Great Britain no longer concludes treaties or international agreements on behalf of Canada or any province.

The effect of s. 132 was further laid to rest by the *Labour Conventions* case.<sup>3</sup> The question was one of implementation: could s. 132, with its reference to empire treaties, be interpreted as conferring exclusive jurisdiction upon the Canadian Parliament to implement Canadian treaties? In rejecting the applicability of s. 132, Lord Atkin stated:<sup>4</sup>

... the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations, they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the Ship of State now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.

The decision affirmed that the federal government, although competent to conclude treaties, could not adopt legislation implementing those treaties whose subject matter fell within the exclusive jurisdiction of the provinces. In effect, the power of implementation was governed by the ordinary rules of federal distribution.

The concession made by the Privy Council to provincial constitutional autonomy naturally raises the question of provincial treaty-making powers. Advocates of such power claim that because the BNA Act does not give exclusive treaty-making jurisdiction to the federal government, it can be implied that the provinces have a legal right to negotiate and conclude treaties affecting provincial subject matters. This argument draws support from the *Labour Conventions* decision; because the provinces have the exclusive legal right to implement such treaties, it logically and necessarily follows that they also have the right to negotiate and conclude these treaties. This contention is dependent on the premise that the processes of treaty-making and internal treaty-implementation cannot be realistically separated.

However the argument for provincial treaty-making powers based on the obsolescence of s. 132 is weak, particularly in light of the overwhelming criticisms of the *Labour Conventions* case. As F.R. Scott has stated:<sup>5</sup>

So long as Canada clung to the Imperial apron strings, her Parliament was all powerful in legislating on Empire treaties, and no doctrine of "watertight compartments" existed; once she became a nation in her own right, impotence descended.

While provincial autonomy would indeed be seriously threatened if the federal government was given the authority to bring provincial matters into the federal field of competence through the treaty-making power, there is no reason to believe that the federal Parliament would be allowed to enter into colourable treaties in order to extend its legislative power.

3. *A.G. for Canada v. A.G. for Ontario (Labour Conventions)* [1937] A.C. 326.

4. *Id.* at 352-54.

5. F. R. Scott, "Labour Conventions Case: Lord Wright's Undisclosed Dissent?" (1956) 34 *Can. Bar Rev.* 114 at 115.

In the federations of Australia<sup>6</sup> and the United States<sup>7</sup> for example, the central government has exclusive power to implement treaties whether the subject matter of the agreement be within federal or regional competence. However, Laskin suggests that the central governments of these countries are effectively restrained from pushing this authority too far by virtue of the very concept of federalism.<sup>8</sup>

Section 132 may, by its very existence, indicate that treaty-making is a distinct constitutional matter under the BNA Act.<sup>9</sup> This interpretation would conform to the generally accepted theory of exhaustive distribution of legislative powers. If such a construction of s. 132 is accepted, it follows that although the section itself may be inapplicable, the law relating to treaty-making and treaty-implementation must fall within the federal residuary power "to make laws for the peace, order, and good government of Canada".<sup>10</sup> In fact, this argument was accepted by the Privy Council in both the *Aeronautics* case<sup>11</sup> and the *Radio Reference* case,<sup>12</sup> where it was held that the federal government could enact implementing legislation pursuant to the exercise of its treaty-making authority, notwithstanding the fact that the subject matter of the treaties was otherwise within the exclusive jurisdiction of the provincial legislatures. In recent years, there have been several dicta in the Supreme Court of Canada suggesting a willingness to reconsider the issues raised in the *Labour Conventions* case.<sup>13</sup> It is therefore possible that the peace, order and good government argument will ultimately prevail.<sup>14</sup>

The proposition that treaty negotiation and implementation are realistically inseparable raises the question of the relationship between provincial executive and legislative functions. Section 92 of the BNA Act gives the provinces power to *legislate* in relation to those matters within provincial competence, and further imposes a territorial limit on the exercise of this legislative function. Does the prohibition against provincial extraterritorial legislative power infer a corresponding prohibition against provincial extraterritorial *executive* power? The authorities would seem to agree that the s. 92 limitation does have this effect. Statutory support for this interpretation is found in s. 3 of the Statute of Westminster (1931), which gives express authority to the Canadian Parliament to enact extraterritorial legislation.<sup>15</sup> Historical support is found in Canada's British

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6. Section 51(9) of the Australia Constitution. *R. v. Burgess; ex parte Henry* (1936) 55 CLR 608 — High Court of Australia held that the "external affairs" power under s. 51(9) included the power to enact implementing legislation even if the subject matter of the treaty was within the competence of the state legislatures.
  7. U.S. Const. Art. 6.
  8. B. Laskin, "The Provinces and International Agreements" (1967) *Ontario Advisory Committee on Confederation* 101.
  9. P. W. Hogg, *Constitutional Law of Canada* (1977).
  10. *Supra* n. 2 at s. 91.
  11. *Re Regulation and Control of Aeronautics* [1932] A.C. 304.
  12. *Re Regulation and Control of Radio Communications in Canada* [1933] A.C. 157.
  13. *Francis v. The Queen* [1956] S.C.R. 618 at 621 *Offshore Mineral Rights Reference* [1967] S.C.R. 792 at 815-17.
  14. Hogg, *supra* n. 9 at 191.
  15. Statute of Westminster (U.K.), 22 Geo. V., c. 4

inheritance, whereby the conduct of external affairs and the negotiation and conclusion of international obligations have always been regarded as matters for the *executive* branch of the government. This contention would effectively preclude any provincial treaty-making power by virtue of the s. 92 limitation.

The counter-arguments to this line of reasoning focus on the inherent threat to provincial autonomy. E. McWhinney proposes that virtually all matters falling within provincial competence contain some trans-national aspects. If such matters were to be automatically characterized as "foreign affairs" within the exclusive competence of the federal Parliament, a strongly centralized federal system would result.<sup>16</sup> Whether or not this is preferable is a matter of opinion. However, by employing constitutional doctrine, the courts will permit provincial legislation having extra-territorial effect to stand provided that the extra-territorial aspect is a "mere incident" of the valid local authority. Similarly, federal legislation which purports to encroach on provincial jurisdiction has been held to be "colourable" and therefore *ultra vires* the federal government.

A most convincing argument in favour of exclusive federal jurisdiction over treaty-making powers is to be found in the Letters Patent of 1947.<sup>17</sup> By virtue of this instrument, the British Crown effectively delegated the prerogative powers over foreign affairs to the Governor General of Canada to be exercised upon the advice of Parliament:

And We do hereby authorize and empower our Governor-General, with the advice of Our Privy Council for Canada or any member thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada . . .

This express delegation would seem to conclude the matter. However, advocates of provincial treaty-making powers cite the case of *Maritime Bank v. Receiver General of New Brunswick*<sup>18</sup> as authority for the proposition that the provincial Lieutenant Governors, as representatives of the Crown, are also delegates of the prerogative treaty-making powers. It is doubtful that such an inference can be validly drawn from the case. A somewhat more literal reading of the Privy Council's decision would seem to suggest that the powers of the provincial Lieutenant Governors can be exercised only for local purposes within provincial jurisdiction, and that the Lieutenant Governors do not in any way represent the Crown in external affairs.<sup>19</sup> Indeed, the very position of the Lieutenant Governor precludes such a possibility. By virtue of s. 58 of the BNA Act, the Lieutenant Governor is appointed not by the Sovereign but by the Governor General in Council. Since there is no direct contact with the Sovereign, it is doubtful that the royal prerogatives of treaty-making can be sub-delegated to the Lieutenant Governors under the 1947 Letters Patent.

Even without the express delegation of treaty-making powers to the Governor General in Council, the achievement by Canada of full international status would necessarily carry with it the power to negotiate and conclude treaties. And historically, this power would vest in the ex-

16. E. McWhinney, "Canadian Federalism and the Foreign Affairs and Treaty Power" (1969) VII *The Canadian Yearbook of International Law* 3.

17. Reproduced in R.S.C. 1970, Appendix II, no. 35.

18. [1892] A.C. 437.

19. Morris, *supra* n. 1 at 484.

ecutive branch of the government which represents Canada as a whole — the federal executive.<sup>20</sup>

The general rule under international law is that only "states" are recognized as having an independent international personality and capacity. An inevitable corollary of this rule is that only the central government of a federal state is recognized as having the power to enter into binding international obligations. Political practicality alone would justify the exclusive federal jurisdiction over treaty-making and treaty-implementation; a foreign state must be able to look conclusively to one governmental body for the performance of international obligations. A substantial degree of consistency in foreign policy is thus essential if a nation is to assert an effective influence in international affairs. Indeed, a federal division of treaty-making powers would severely impair international responsibility for treaty obligations and international recognition in general.

Under international law, the central government is responsible for all breaches of international obligations occasioned by the component units, even if these units possess independent treaty-making powers. The international community would therefore look to Ottawa to remedy an international breach occasioned by a provincial government. This approach is only logical, for the provinces have no means to back up their international actions. Having no recognized international status, they are unable to become parties to an action in the International Court of Justice; having no armed forces, they are unable to settle disputes by resort to force.

Administrative and practical problems aside, conferring exclusive treaty-making jurisdiction on the provinces in respect of s. 92 subject matters would tend to undermine the very concept of federalism. Laskin asserts that a province purporting to enter into a binding international agreement would in effect be declaring its independence and denying the exclusive competence of the federal government in the field of external affairs. Such action would therefore have no international validity.<sup>21</sup> Former External Affairs Minister Martin expressed the view that should the provinces adopt an independent stance in relation to international issues, the Canadian federal state would cease to exist:<sup>22</sup>

... If individual constituent members of a federal state had the right to conclude treaties independently of the central power, it would no longer be a federation but an association of sovereign powers.

International law authorizes a federal state to determine, through its constitution, the division of treaty-making powers between its political subdivisions. Normally, all treaty-making power is vested in the central government, although regional co-operation may be required for purposes of implementation. Where the constitution is silent with respect to treaty-making authority, as in the Canadian situation, international law presumes that the federal government has exclusive powers. The Report of the International Law Commission on the Law of Treaties (1953) out-

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20. See above.

21. Laskin, *supra* n. 8 at 111.

22. Address at the University of New Brunswick, reported in *The Globe and Mail* (Toronto) May 17, 1967.

lined the international opinion as to the division of treaty-making power in a federal state:<sup>23</sup>

... On the other hand, in the absence of such authority conferred by the federal law, member states of a federation cannot be regarded as endowed with the power to conclude treaties. For according to International Law, it is the federation which, in the absence of provisions of constitutional law to the contrary, is the subject of International Law and international intercourse. It follows that a treaty concluded by a member state in disregard of the constitution of the federation must also be considered as having been concluded in disregard of the limitations imposed by International Law upon its treaty-making power. As such it is not a treaty in the contemplation of International Law. As a treaty, it is void.

In response to the so-called federal problem inherent in a division of treaty-making powers, provincial adherents point to other federal states in which the component units have the authority to conclude treaties independently of the central government. The countries of Switzerland, Germany, the Soviet Union, and, to some degree, the United States, have constitutionally empowered their member states to enter into binding international agreements. However, attempts by the member states to assert their independent treaty-making powers have not proved successful because, in reality, all are subject to strict federal control.<sup>24</sup> For example, the Swiss cantons are subject to full veto power by the federal authorities in the field of external affairs. Similarly, agreements entered into by the member states of the United States are subject to approval by the U.S. Congress.

In light of the relatively few federal states in which the component units are empowered to make treaties, and the extensive federal supervision to which their international agreements are subject, it would seem somewhat tenuous to conclude that there is a general acceptance in international law of subordinate treaty-making power. In practice, the trend is undoubtedly toward centralized international capacity and responsibility, and political realities must be considered. Morris is of the view that "international affairs are too crucial and complex to permit nations speaking with more than one voice in matters of international significance".<sup>25</sup>

In light of this federalist trend toward the centralization of treaty-making powers, it is interesting to note that the draft codification of the law of treaties by the International Law Commission of the United Nations provided for the express recognition of subordinate treaty-making authority. Article 3 originally provided as follows:<sup>26</sup>

- (1) Every State possesses capacity to conclude treaties;
- (2) State members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

However, this draft was rejected by a majority vote at the UN Conference on the Law of Treaties, 1969. The amended article, which became part of the Vienna Convention on the Law of Treaties, contained only the first subsection. Atkey submits that the Canadian delegation, consisting

23. In R. J. Delisle, "Treaty-Making Power in Canada" (1967) *Ontario Advisory Committee on Confederation* 115.

24. J. Y. Morin, "International Law — Treaty-Making Power" (1967) 45 *Can. Bar Rev.* 160 at 168.

25. Morris, *supra* n. 1 at 497.

26. *Yearbook of the International Law Commission* 1966, II, 114-15.

primarily of representatives from the Department of External Affairs, was instrumental in ousting subsection 2.<sup>27</sup>

Despite the rather strong arguments for exclusive federal jurisdiction in international affairs, recent years have witnessed an evolution of *de facto* provincial competence in the international sphere. The knowledge and resources required in various fields of international activity, such as tourism, are found only within the provincial governments. It would therefore seem more practical for a province to enter into direct agreements with a foreign state rather than interpose an additional level of government involvement.<sup>28</sup> Furthermore, it may be misleading to assume that the consistency of foreign policy resulting from exclusive federal jurisdiction in international affairs is beneficial to the federation. Atkey suggests that because social and economic priorities differ substantially throughout the provinces, this uniformity in foreign policy would have the effect of thwarting provincial goals and initiatives.<sup>29</sup>

There is no doubt that a nationally co-ordinated policy is necessary in some areas; indeed areas such as defence and diplomacy are already within the exclusive jurisdiction of the federal government. However, in those areas where the national interest is not directly at stake, provincial authority to conclude international agreements may be the only practical solution to the federal problem.

A convincing example of the developing provincial competence in international affairs can be found in the provincial educational jurisdiction. The importance of keeping abreast of educational advances in foreign states has necessitated a certain degree of provincial international involvement. Foreign exchange programmes have proliferated in recent years, particularly in the provinces of Ontario and Quebec. The educational and cultural agreements signed between Quebec and France in 1964 are but one example. In addition, the province of Quebec has been active as an independent participant in international educational conferences since 1968.<sup>30</sup>

However, to what extent can such provincial agreements be considered as binding under international law? A strongly federalist line of reasoning suggests that where constituent states appear to have concluded agreements with foreign states, they have, in actuality, simply acted as agents to bind the federal state as a whole in respect of a particular territorial area.<sup>31</sup> This proposition is based on the principle that a unified foreign policy is essential to the characterization of a federalist state.<sup>32</sup>

But it is usual today to distinguish a federal state, that is to say, a union of states in which the control of the external relations of all the member states has been permanently surrendered to a central government so that the only state which exists for international purposes is the state formed by the union, from a confederation of states in which, though a central government exists and exercises certain powers, it does not control all the external relations of the member states, and therefore for international purposes there exists not one but a number of states.

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27. R. G. Atkey, "The Role of the Provinces in International Affairs" (1970-71) XXVI *International Journal* 249 at 257.

28. Atkey, *supra* n. 27 at 258.

29. *Id.* at 251.

30. *Id.* at 254.

31. Morin, *supra* n. 24 at 167.

32. Brierly, *The Law of Nations* (6th ed. 1963) 128.

This reasoning, however, must strain considerably to bring internationally active member states into conformity with a rather inflexible concept of federalism. Political reality is ignored for member states *do* conclude binding international agreements within the federation.

The better view is that such agreements may, if invalid under public international law, be valid and binding contracts governed by the rules of private international law. This interpretation applies particularly when agreements between corresponding government departments are not authorized or approved by the federal government as head of the state. Delisle states this proposition succinctly:<sup>33</sup>

Agreements between departments of the provincial government and departments of foreign governments are not international agreements governed by International Law but rather, like agreements between provincial governments and private individuals and corporations, within the province or in other jurisdictions, are contracts whose interpretation and enforcement are governed by private International Law.

Similarly, it has always been recognized that the provinces are competent, in respect of their specific constitutional powers as defined in the BNA Act, to conclude trans-national agreements having no international consequences. These "informal administrative arrangements"<sup>34</sup> cannot be classified as either treaties or contracts, for they create merely understandings rather than legal obligations. A common example of such an agreement between two jurisdictions is the reciprocal recognition of legislative or administrative action. The validity of such arrangements was judicially upheld by the Supreme Court of Canada in *A.-G. for Ontario v. Scott*<sup>35</sup>, a case involving the co-operative enforcement of maintenance orders between Ontario and Great Britain.

These informal administrative arrangements or "gentlemen's agreements" are also frequently evidenced by the co-ordinated governmental action between the Canadian provinces and their bordering states necessary to meet joint problems. The Departments of Transport for Alberta, Manitoba and Nova Scotia have independently concluded arrangements with various American states for the reciprocal recognition of drivers' licences and commercial vehicle licences and registration.<sup>36</sup> Similarly, the province of Alberta has an informal arrangement with the bordering states for mutual assistance in respect of forest fires occurring adjacent to the national boundary.<sup>37</sup> International relationships of a regional character have thus been established, and it would seem to be impractical to demand federal intervention in these situations in the absence of over-riding national interests.

While it is generally accepted that informal administrative agreements independently concluded by the provinces are valid under domestic or private international law, the legal enforceability of these arrangements is another matter.<sup>38</sup> Agreements concluded by the provinces seldom make

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33. Delisle, *supra* n. 23 at 132.

34. McWhinney, *supra* n. 16 at 14.

35. (1956) 1 D.L.R. (2d) 433.

36. Atkey, *supra* n. 27 at 258-259.

37. *Id.* at 259.

38. L. Di Marzo, "The Legal Status of Agreements Concluded by Component Units of Federal States with Foreign Entities" (1978) XVI *The Canadian Yearbook of International Law* 197.



reference to legal obligations or dispute settlement. Those that do make such reference virtually always state that the agreement is not legally binding or enforceable. In *A.-G. for Ontario v. Scott*<sup>39</sup> the Supreme Court of Canada recognized the distinction between international agreements and mere administrative arrangements which do not involve international obligations in the strict sense. Although such arrangements may be valid, they cannot be legally binding, for each party can change its internal legislation without the prior approval of the other. However, the fact that an agreement is concluded by a provincial government and is governed by the rules of domestic or private international law does not in itself render such an agreement unenforceable and of no legal effect. Di Marzo submits that the binding nature of these agreements must be determined by the intention of the concluding parties, independently of federal government participation.<sup>40</sup>

In conclusion, it is submitted that the solution to the federal problem of treaty-making and treaty-implementation is not capable of a purely legal analysis which focuses on form rather than substance. Rather, a more functional and realistic approach is required in light of the *de facto* evolution of provincial competence in the field.

It is clear that the decision of the Privy Council in the *Labour Conventions* case has impaired Canada's capacity to play a full role in international affairs — realistically, the general responsibility for international obligations cannot be divided into "watertight" federal and provincial compartments. Administrative practicality alone would justify exclusive federal jurisdiction of treaty negotiation and implementation, even though this would extend federal legislative competence into provincial fields. Current political pressure tending towards full federal/provincial consultation, and the constitutional doctrine of colourability, would be effective safeguards of provincial legislative autonomy. The power to negotiate and undertake international obligations must surely carry with it the power to ensure this performance through domestic implementation.

However, the current trend is unmistakably toward greater provincial competence in international affairs, and as this trend is not likely to abate it must be dealt with as practically and realistically as is possible within the federal system. The exclusive implementation powers of the provinces with respect to matters falling within their legislative field does not necessarily result in federal impotence in international affairs. The general practice of consulting with the provinces and obtaining a prior agreement for the implementation of such matters allows the federal government to enter international obligations without reservation. Where no prior provincial consent has been obtained, the federal government may employ the use of a "federal state clause" which stipulates that the federal government is required to take action under the treaty only in respect of those obligations which are within federal legislative competence. The federal government further undertakes to bring to the notice of the provinces those obligations which are within regional competence. This device allows the federal authorities to retain ultimate

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39. *supra* n. 35.

40. Di Marzo, *supra* n. 38 at 215.

responsibility under a treaty while allowing the provinces the maximum amount of discretion and involvement possible within the federal system.

The concept of co-operative federalism is perhaps the only viable solution for satisfying the interests of both the federal and provincial governments. The inclusion of provincial representatives in delegations to international organizations and conferences, and full federal/provincial consultation in international activity, would no doubt be effective in alleviating the federal problem. With such consultation and co-operation, the provinces may, in the future, be free to enter into international agreements with the reasonable expectation that the federal government would provide the sanctioning umbrella, as it did in the Quebec/France cultural exchanges of 1964.<sup>41</sup>

In order to meet the needs of Canadian federalism, a flexible and imaginative international policy must be adopted. *De facto* changes in the international competence of the provinces must be recognized and realistically accommodated within the federal state.

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41. Atkey, *supra* n. 27 at 264.