THE "NEW FEDERALISM" IN CANADA: SOME THOUGHTS ON THE INTERNATIONAL LEGAL CONSEQUENCES

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Had the suggestion been put to Grotius, Vattel or Gentili that the law of nations should be of universal application, those scholars would have been gravely startled. To them, international law was a set of rules devised to make regular the relations of the Christian nations of Western Europe. Universality was of no interest to any European in the seventeenth century. The rest of the world was either beyond the influence of these Christian princes, or subject to them as colonial possessions. In no sense were the non-European countries participants in an international legal order. (Indeed, this social order of friends, neighbors and relatives dies slowly. Many heads of State still address one another on formal occasions in such terms as "our good friend" or "our dear cousin".)

The twentieth century brought with it a changed atmosphere and the Western European community accepted the change. The era of The League of Nations saw the introduction of the inevitable concept that nation-States not members of the European family were nonetheless entitled to a legal status as full participants in the international community. The community widened perceptibly with the entry of Japan.

This concept of nation-States remains today as one of the primary definitive doctrines of international law. But there is no rigidity to the doctrine. No longer may it be said that States are subjects of the law, whereas human beings and other entities are objects. There are now many new forms of international legal entities which enjoy full subject-status. The United Nations itself has international legal capacity. So have the special agencies such as ICAO WHO, ILO, and FAO. So, in a sense, has the International Bank for Reconstruction and Development, the European Coal and Steel Community, and other organizations. Some writers argue persuasively that a status approaching that of an international legal person is enjoyed by the giant industrial firms such as Royal Dutch Shell, General Motors and Unilever. In 1948 Professor Philip C. Jessup, now a judge of the International Court of Justice, wrote in "A Modern Law of Nations" that international law would never achieve its potential of effectiveness until it recognized individuals as subjects of the law.

These developments have proceeded rapidly in some regions. In the European communities for example, the European Court of Justice recognizes private companies and governments as possessing an equal status as litigants. This is not to say, however, that subject-status will confer upon either companies or individuals rights and obligations equal to those of States. Equality before the law is a matter of status, not of capacity or power. There is a long step separating a giant corporation

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or powerful State from an individual human being. Perhaps it is a natural consequence of this difference that the law has done more to attach responsibility to persons than to confer any rights upon them. Efforts since 1945 to develop individual legal responsibility for such acts as war crimes have made more headway than have similar efforts to define areas of State responsibility for the far-more widespread, and perhaps more significant, incidents which injure individuals. But headway is being made.

These illustrations serve as evidence that international legal jurisprudence is exhibiting a remarkable vitality as it seeks to include and accommodate a variety of fundamental principles. In few other fields of law can there be found an equal freshness of approach. Now this jurisprudence is asked to recognize as having legal status for certain purposes the individual provinces of Canada. Such is the international consequence of the "new federalism." If a province is competent to contract in its sovereign capacity with a foreign sovereign, it must first possess a degree of international legal status. Is this possible?

May Provinces be "International Persons"?

Would such a recognition be an advance, that is, an advance from the point of view of international law? The question can, it is submitted, be answered readily, though roughly. If the result of the recognition by law of a Canadian province as an international person is to permit that province to exercise, to the advantage of its residents, rights which have been hitherto held in check, *and* such exercise does not derogate from the rights of others, either Canadian or foreign, then the step will likely be characterized as a forward one. Given these two assurances, classical traditions should not be permitted to interfere with the evolution of new legal forms or characterizations.

It is much easier to pose the question, however, than to receive assurances in this controversial area. Unfortunately, of the ten provinces only Quebec has to this date endeavoured to explain and justify provincial claims to international status. It is known that some of the other provinces support at least some of Quebec's proposals. The balance, comprising probably the majority in number, have made no public statements, preferring to sit on the sidelines and then, presumably, to act expediently at the opportune moment. If this is indeed the attitude, then the Canadian Constitution has been turned into a game, played by the provinces according to the rules of political pragmatism.

Is there precedent for the provincial claim?

Are there any precedents or analogies to these claims by the provinces? Some spokesmen for Quebec contend that, from the view of international law, the international status of constituent parts of a federal State is not an innovation. West Germany and Switzerland are cited as examples. In each of these countries the "parts" exercise certain international rights. Therefore, the argument proceeds, so can the provinces of Canada.

This analogy, it is submitted, is not wholly accurate. To see why, it is necessary to look briefly into the constitutional history of these several

nations. Both West Germany and Switzerland are unions of previously sovereign States which at the time of union had legal status as international persons. The member-States of Germany preserved in the pre-World War I federal constitution their right, for example, to send and receive envoys to and from foreign governments. Similarly the present constitution of the German Federal Republic preserves for the Laender (in Article 32) the right to conclude treaties with foreign nations concerning those subjects over which the Laender have retained legislative competence. The constitutional history of Switzerland follows a like pattern. With the exception of the period of the short-lived Helvetic Republic, the central government never did acquire from the cantons all measures of sovereignty. The reconstitution of 1815 restored to the twenty-two cantons their long-held right to conduct certain aspects of foreign relations on an individual basis.

In neither Switzerland nor Germany was international law called upon to recognize the emergence from a single nation-State of several new legal persons. In each of these cases the law simply recognized the continued exercise of certain pre-existing sovereign rights now clothed in a new federal constitution.

The Canadian experience is quite different. There is no historic example of the exercise of a treaty power by any of the ten provinces on the eve of their entry into Confederation. Newfoundland enjoyed for a brief period the status of an independent dominion within the Commonwealth, but in 1947 it was again a colony. None of the other provinces could claim a superior position. Certainly in 1867 there was no suggestion that any colony was possessed of any power to conduct its relations with any foreign power or even with a neighboring colony. The Quebec resolutions of 1864 advanced no claim on the part of the would-be provinces in this respect. In short the colonies of Nova Scotia, New Brunswick and Canada were not in 1867 in any sense sovereign States. In 1849 Prussia, Bavaria and Würtemberg were, and so in 1815, were the cantons of Switzerland.

The Canadian position is thus distinct, containing neither the individualistic powers permitted in the constitutions of West Germany and Switzerland, nor the strong central authority in all matters of foreign relations which is present in the constitution of the United States. We are different because the British North America Act provides for a totality of legislative competence which is divided between the federal government and the provinces. This means, of course, that a consensus is required where categories of Section 92 and other provincial matters are the subject of international negotiation.

Upon a clumsy, dualistic concept of international law which we have inherited from the common law, the Judicial Committee of the Privy Council has overlaid this pluralistic interpretation of a federal State. It is of little wonder that some of the provinces now cry the need for a way out of the labyrinth. Most lawyers probably concur in the belief that there must be a better system. At the same time, however, it is perhaps not unfair to recall that it was the strong position taken by the provinces 3 decades ago that led to the present impasse.

Provincial activities in the international arena.

The aspect of the "new federalism" which has highlighted dramatically the provinces' claim for international status is, of course, the demand by Quebec that it be permitted to negotiate and conclude certain types of treaties. It has been suggested in some quarters that a treaty is simply a form of agreement which makes manifest other substantive activities already engaged in. If this is so, we are involved in a discussion of semantics. But is it so?

Certainly provinces have been active internationally in one way or another for years. They have established offices abroad to lure tourists and immigrants; they have entered the New York money market; they have exported their natural resources; they have sent abroad good-will missions intent on attracting industry and causing it to migrate in their direction. These activities show no signs of diminishing. On the contrary, Quebec is becoming increasingly expressive in the cultural and educational fields; several provinces are asserting their competence in such areas of potential international significance as the recovery of off-shore mineral resources.

All these activities have one thing in common, they are geographically international in scope. Beyond that they are readily capable of placement in one of two categories. For example, when Alberta opens a travel bureau in London, or Nova Scotia sends to Europe an industrial promotion team, the provinces are acting in the same sense as does a chamber of commerce. The office and the mission are intended to distribute information and create good will. The consequence of either will be the arrival in the appropriate province of tourists or industrialists who will conduct themselves according to Canadian law. When the debentures of a province are sold in New York they will conform to the law either of New York or of the issuing province. If disputes arise, conflicts principles will settle the choice of law problems. In a sense, if the offering is of great magnitude, default and subsequent seizure of the security will create some sort of international crisis but it will really be little different to the problems precipitated when the bonds are held domestically.

In short, many of the seemingly external activities of Canadian provinces are of a private law nature. They do not assume the character of relations between sovereigns except through the normal channels of escalation into an international claim: local denial of justice, espousal of national's complaint by the protective State, advancement of claim and commencement of international legal proceedings. This is the area of State responsibility from which there is no escape short of a State turning its back on the world and prohibiting all forms of intercourse with the outside world. (Indeed, the very act of turning around attracts responsibility.) These activities are no cause for alarm.

Activities which are a manifestation of sovereignty, or which attach international responsibility to the whole Canadian nation, however, are another matter. One such is the export of natural resources. Another involves international waterways. These activities result in the disposition of the national wealth, and so affect Canada. When Canada is affected, there are international legal consequences of a public law nature.

In the past, the federal government and the provinces have all recognized the dual nature of these transactions and the sharing of the totality of legislative competence which is entailed.

Of critical importance, then, is the dividing line between these two areas of activities. No matter how anxious a province may be to deal with the outside world, and no matter how willing a federal government might be to permit this to happen, the international community will be affected. A unilateral expression of competence is by itself insufficient. There must as well be conformity with the law.

The Judicial Committee of the Privy Council ruled in 1921 that a fisheries claim by Quebec involving property rights in territorial waters, and which challenged the breadth of those waters, was more than an argument between two levels of government in a single country; it was "really a question of public international law."[1]

The Supreme Court of the United States declared in 1950 that a single state of the union, occupying territory which forms part of the sea-coast, must recognize that its state boundary is also an international frontier. Said the court, speaking of Louisiana's claim to offshore competence, "National interests, national responsibilities, national concerns are involved. The problems of commerce, national defence, relations with other powers, war and peace focus there."[2]

And as recently ago as the summer of 1965 the Supreme Court spoke again in similar vein. The opinion of the court was delivered by Justice Harlan, who said: "The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the states in the territory over which they are sovereign. Thus a contraction of a state's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. But an extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent states from so enlarging themselves."[3]

These criteria, it is submitted, are applicable to all attempted extensions of provincial sovereignty whether of territory or of subject-matter. If a Canadian province ventures outside its own territorial bounds and attempts to exercise there its powers in the guise of a sovereign government, then by so doing it affects the external relations of Canada as a whole, and international legal consequences will follow.

Effect of a "provincial treaty-power"

A treaty leads to the same result, whatever its subject-matter. The conclusion of a treaty is more than the simple act of reducing to writing an agreement. When made between nation-States, it is an undertaking given by one sovereign to another. This type of agreement a Canadian province cannot make without involving the national interest. The involvement occurs in one of two ways: either Canada becomes committed

1 A.G. Can. v. A.G. Que., [1921] 1 A.C. 413, 431.
2 U.S. v. Louisana, 339 U.S. 699, 704.
3 U.S. v. California, 381 U.S. 139.

to the performance of the obligation, or to a part performance; or the totality of competence which the Canadian government now enjoys in the field of external relations is diminished to the extent of the subject-matter of the treaty. In either event international legal consequences flow from the act.

Conclusion.

In summation, the foreign examples cited by advocates of provincial rights in the international field are not analogous. They do offer, however, an example of a legal device not inconsistent with the general development of the international jurisprudence.

Secondly, the international activities in which provinces have hitherto been engaging do not have public law consequences and so provide no adequate experience for the formulation of new rules or principles.

Thirdly, the engagement by a province in foreign activities of a sovereign nature has a national effect and therefore leads to international legal consequences. More is involved than a simple re-shuffle of constitutional responsibilities.

In answer to the question posed earlier about the desirability of extending provincial sovereignty, it is suggested that the onus rests on the provinces to prove that the net result will be advantageous. Arguments to this end have not yet, in the opinion of the writer, discharged this onus.

There remains but a single further observation. It pertains to the area chosen by the government of Quebec for the province's debut as an international power: the *causa proxima* of the whole exercise. The area is that of consular representation. Quebec regards itself, according to the province's former Minister of Education, as the "State of residence" of the Montreal Consular Corps by virtue of the description of consular activities listed in the 1963 Vienna Convention on Consular Relations.[4] Quebec is easy to identify, said the Minister in a speech in April, 1965. The Convention does not restrict itself to defining the activities of a consul, however; it deals with the consular State as well. And these provisions, it is submitted, do not support the Minister's conclusion that Quebec is either the State of residence or a State capable of sending consuls abroad. The Convention deals with States; States which are "Members of the United Nations" or "invited by the General Assembly of the United Nations." Quebec qualifies in neither category. Perhaps it is the intention of the province in its initial international appearance to act in the face of the Convention; to defy the United Nations as it seemingly attempts to defy the Canadian government. If so, the entire claim to an international personality risks becoming colourable, and this is most regrettable.

4 U.N. Doc. A/Conf. 25/12, April 23, 1963.