THE NEGOTIATIONS, RATIFICATIONS, AND IMPLEMENTATION OF TREATIES IN CANADA AND AUSTRALIA

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PART II**

By far the most controversial and troublesome aspect of the treaty problem in Canada and Australia is that of implementation. It is a well established principle of British constitutional law that international agreements, signed and ratified, do not automatically become the law of the land. To have the force of law in the national forum an international agreement must be implemented by legislation.[52] The same rule applies in the case of Australia and Canada and was explicitly spelled out by Lord Atkin in the famous *Labour Conventions* Case.

> Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.[53]

This rule provides no constitutional difficulty for the United Kingdom. British constitutional usage provides for the supremacy of Parliament. The Executive almost invariably has majority support in the legislature. Thus, if the Executive negotiates and ratifies an international agreement, it is only under the most extraordinary and unusual circumstances that Parliament will not pass the legislation necessary to give the agreement domestic effect.

In Canada and Australia, however, the problem of implementation is of course complicated by the fact that both these countries have a federal system. As has already been demonstrated, the power to enter into treaty relations lies solely with the Federal Executive in both Australia and Canada. Federalism has created the situation in which the Executive has ratified an international agreement but, due to the division of legislative powers, has been unable to give domestic effect to the treaty. The Executive has then been in the embarassing position of being internationally in default. The governments of both Canada and Australia, however, have usually been very cautious about entering into international agreements because of their limited power of implementation and the resultant possibility of their being unable to carry out their part of an agreement. This can often lead to the highly undesirable situation of a federal state choosing "to adopt a foreign policy sufficiently negative to prevent conflict

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[52] *Walker v. Baird*, [1892] A.C. 491.

[53] *Attorney-General of Canada v. Attorney-General of Ontario* [1937] A.C. 326.

between the internal division of sovereignty and the demands of international obligations".[54]

The Australian Constitution [55] provides that the Commonwealth Parliament has only those powers specifically assigned to it under section 51. Residual power, accordingly, is vested in the states (section 107). As mentioned earlier, one of the powers given to the Commonwealth by section 51 (xxix) is that of external affairs. The debate has revolved around the question whether, under this grant of power, the Commonwealth Parliament has authority to implement treaties dealing with subjects belonging to the states. The first Attorney-General of Australia, Alfred Deakin, answered this question in 1903 in the affirmative, stating that "legislation with respect to the enforcement of treaty obligations is closely within the scope of section 51 (xxix)".[56] This view, however, was not generally shared in the earlier days of the Commonwealth either by learned authorities like Sir Harrison Moore or by the government. Moore, writing in 1910, took the position that:

> The power to give effect to international arrangements must, it would seem, be limited to matters which, *in se*, concern external relations, a matter in itself purely domestic, and therefore within the exclusive power of the states, cannot be drawn within the range of federal power merely because some arrangement has been made for uniform national action. Thus, there is at the present time an international movement for the amelioration of labour conditions and the International Union has arrived at some agreement for uniformity of legislation. It is submitted that the Commonwealth could not, by adhering to an international agreement for the regulation of factories and workshops, proceed to legislate upon that subject in supercession of the states.[57]

With respect to the government Bailey points out that Moore's viewpoint was generally accepted; despite Deakin's earlier remarks, "there followed some thirty years in which successive Commonwealth governments acted in general on the narrower opinion that legislative power to implement treaties went by subject matter."[58]

This outlook on the part of the Commonwealth government was most clearly reflected in their actions with respect to the Conventions of the International Labour Organization. The Australian government acted upon the assumption that the "federal clause" (Article 19, paragragh 9) of the Constitution of the International Labour Organization was specifically applicable in the case of Australia. These special provisions for federal states were applicable, according to the I.L.O. Charter, to any "federal state, the power of which to enter into conventions on labour matters is subject to limitations." They allowed the government of the federal state "to treat a draft convention to which such limitations apply as a recommendation only."[59]

Protected by the "federal clause," the Australian government originally refused to ratify any I.L.O. convention dealing with a subject not exclusively

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[54] J. P. Nettl, "The Treaty Enforcement Power in Federal Constitution" (1950) Can. Bar. Rev. 1069.

[55] *The Commonwealth of Australia Act*, 1900, 63 and 64 Victoria, c. 12.

[56] K. H. Bailey, "Australia and the International Labour Conventions", (1946) 54 *International Labour Review* 300.

[57] H. Moore, *The Constitution of the Commonwealth of Australia*, 2d ed., 1910, pp. 461-462.

[58] K. H. Bailey, "Fifty Years of the Australian Constitution", (1951) 25 *Australian Law Journal* 322.

[59] Quoted in Hendry, *Treaties and Federal Constitutions*, p. 172. Professor Hendry examines briefly the problems of the federal state and participation in the I.L.O., pp. 171-176.

assigned by the Constitution to the Commonwealth. Since, as Professor Bailey points out, "the Commonwealth Parliament possesses virtually no direct power to make laws regarding industrial matter,"[60] the number of I.L.O. conventions ratified by Australia were very few.

An effort was made in 1929 to increase Australian participation in the Organization. The Commonwealth agreed to enter into conventions dealing with matters that were within the legislative sphere of the states, provided that "the states gave an assurance not only that they had already taken the legislative action necessary to give the effect to the convention but also that, during the currency of the convention they would not, without consulting the Commonwealth, modify the law in any manner inconsistent with the convention."[61]

The 1929 recommendation, as might be expected, brought little in the way of results and, as the consequences of mounting dissatisfaction with Australia's role in the I.L.O., the problem was reviewed again in 1936 by the Commonwealth government. At the 1936 Premiers' Conference the government submitted two lists of conventions. The first list covered I.L.O. conventions which either in whole or in substantial part were covered by existing legislation. The states were asked to agree to Australia's ratification of these conventions. The second list dealt with conventions that were in part covered by state statutes. These laws required only moderate revision by the state legislatures in order that the Commonwealth could ratify the appropriate conventions.[62] Through this cautious approach to the problem, Australia has sought to avoid assuming any obligations that cannot be performed through domestic legislation.

As a result, Australia's record of convention ratifications has been very low. Professor Hendry points out that, up to the year 1954, Australia had ratified only twenty out of 103 conventions.[63] What is disturbing to this writer is that, according to Bailey, twelve out of the 60 I.L.O. conventions had been ratified by the Commonwealth prior to 1946.[64] This means that since 1946, Australia has ratified only four out of 43 conventions. The disturbing feature demonstrated by these statistics is that her post-war participation in the Organization has not been marked by any substantial improvement. It appears that Stewart's gloomy prediction of 1939 holds just as good today as it did then. He prognosticated that it did not "appear likely that the High Court will have any opportunity in the immediate future to pass upon the validity of Commonwealth legislation giving effect to international labour conventions of this character. So long as the Commonwealth government maintains its present attitude—that 'from a practical point of view' legislation fixing the hours of work, for example, 'is a matter mainly for the state Parliaments'—no opportunity will arise for challenging its authority or for determining the extent of the Commonwealth legislative authority to implement international labour conventions."[65] It is my opinion that the Commonwealth

[60]Bailey, "Australia and the International Labour Conventions", *op. cit.*, p. 294.
[61]Bailey, *ibid.*, pp. 288-9.
[62]Hendry, *op. cit.*, p. 120. Also see Stewart, *Treaty Relations of the British Commonwealth*, pp. 306-307.
[63]Hendry, *op. cit.*, p. 173.
[64]Bailey, "Australia and the International Labour Conventions", *op. cit.*, p. 290.
[65]Stewart, *op. cit.*, p. 315.

position with respect to the implementation of I.L.O. convention and other international agreements has been unnecessarily timid.

There has been only one case in Australia[66] in which the High Court has thoroughly examined the meaning of "external affairs." Prior to the *Burgess* case several judges, however, had made passing reference to this term in the course of their judgments. Mr. Justice Barton stated with respect to "external affairs" that "it is probable that that power includes power to legislate as to the observance of treaties between Great Britain and foreign nations."[67] Another judge stated that "It is difficult to say what limits if any can be placed on the power to legislate as to external affairs. There are none expressed."[68] The reason why the full extent of this important power was not examined until 1936 can no doubt be explained by the unwillingness of the Commonwealth government to tread on the toes of the states. The Commonwealth was quite content to proceed upon the hypothesis that they could only give effect to treaties that came exclusively within their own legislative competence, thereby negativing any suggestion that they were attempting to extend their legislative jurisdiction through giving effect to treaties dealing with subjects that were ordinarily within the exclusive competence of the states. This state of affairs was, however, interrupted in a manner, as will be shown, not contemplated by the Commonwealth.

In October, 1919, Australia signed the Convention for the Regulation of Aerial Navigation. The following year the Commonwealth Parliament passed the Air Navigation Act. This legislation delegated to the Cabinet the power to make such regulations as were necessary to fulfill Australia's commitments under the aforementioned convention. Section 4 of the Act also authorized the making of regulations "for the purposes of providing for the control of air navigation in the Commonwealth and the territories." In theory the Commonwealth relied on the "external affairs" power for carrying out the first purpose, namely, giving effect to the Convention, and they relied on the "trade and commerce" power to give them authority to control air navigation. Professor Bailey, however, makes the interesting point that in practice the Commonwealth did not expect to rely strictly on either of these powers. He takes the position that when the Commonwealth passed the Act and regulations the government was still acting on the already outlined restrictive view of their power to implement treaties. Bailey states:

> The Act and the original regulations were passed in 1920, in anticipation of the fulfilment of an undertaking given by the Premiers of all six States to secure the passage of State laws "referring" to the Commonwealth Parliament the subject of civil aviation in its entirety. A special provision in the Constitution [section 51 (xxxvii)] gives to the Commonwealth the power to make laws with respect to any matters so "referred" by the States. The undertaking was in fact not fulfilled; but if carried out it would certainly have supported the second part of section 4 of the Air Navigation Act. The Act is therefore not contradictory, but illustrative of the restricted official view upon which, despite the breadth of Mr. Deakin's contentions in 1903, the Commonwealth was at that time proceeding.[69]

The constitutional validity of the Act and regulations was finally determined

[66] *The King v. Burgess, ex parte Henry*, 55 C.L.R. 668.

[67] (1906) 4 C.L.R. 286.

[68] (1921) 29 C.L.R. 338-339, per Higgens J.

[69] Bailey, "Australia and the International Labour Conventions", *op. cit.*, pp. 302-303.

by the High Court in 1936.[70] Mr. Goya Henry was convicted of violating the Air Navigation Regulations by flying an airplane without a license as required by the regulations. There was no question but that the flight took place solely within the confines of a single state. The regulations, however, purported to apply to all aerial navigation in Australia, including flying operations carried on solely within one state.

Chief Justice Latham stated that the appeal raised the question "whether the Commonwealth Parliament has power to legislate with respect to flying operations carried on within the limits of a single state.[71] All five judges quickly rejected the Commonwealth's argument that the federal trade and commerce power gave them authority to regulate aviation within a single state. Chief Justice Latham stated, "The Constitution gives to the Commonwealth Parliament power over inter-state and foreign trade and commerce and does not give it power over intra-state trade and commerce."[72] He concluded, "I find myself compelled to reject the contention that if the Commonwealth Parliament has power to legislate with respect to inter-state and foreign aviation, it must therefore also have power to regulate intra-state aviation."[73]

The Court was then squarely faced with the issue whether the external affairs power bestowed on the Commonwealth the power to control matters normally within the legislative competence of the States. The Court held unanimously that the external affairs power would allow certain legislation implementing treaties to be held valid which, under ordinary circumstances, would be declared *ultra vires*. It took the position that the legislation before it came within this rule. It was therefore held that the Act and any proper regulations made under its terms were a valid exercise of the power bestowed on the Commonwealth by section 51 (xxix).

The majority of the Court, however, held that the regulations which had been made under the Act were invalid because the discrepancy between the provisions of the treaty and the regulations made under the implementing legislation was too wide. In this respect Chief Justice Latham stated:

> The examples which I have given illustrate the governing principle that the regulations, in order to be justified under the Air Navigation Act, must in substance be regulations for carrying out and giving effect to the convention.
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> It is at this point that the respondent's case breaks down. The regulations follow the convention—most of them being taken *verbatim* from the convention. These regulations have been drafted mainly to carry the convention into effect, but variations have been introduced upon the wrong assumption that the Commonwealth Parliament has full power to legislate with respect to air navigation.[74]

Evatt and McTiernan, JJ., in a joint judgment, came to a similar conclusion, stating that:

> It is impossible to regard the Commonwealth regulations as being regulations made "for the purpose of carrying out and giving effect" to the convention. The present regulations constitute a scheme and carry out a purpose which is different and distinct from

[70]*The King* v. *Burgess*, p. 608.

[71]*Ibid.*, p. 625.

[72]*Ibid.*, p. 628.

[73]*Ibid.*, p. 629.

[74]*Ibid.*, p. 646-7.

the only purpose lawfully committed to the Executive—that of carrying out a convention. The departures from the purposes and scheme permitted of carrying out the convention are so numerous that they evidence a different purpose.[75]

Thus the court would have upheld the conviction of Henry if the regulations had not departed from the convention. It supported the position that the Commonwealth's power over external affairs allowed the implementation of the Convention. Particularly interesting, however, are some of the other conclusions reached by the Court. It unanimously agreed on at least two limitations on the Commonwealth's power to give effect to international agreements.

The first limitation is that the external affairs power cannot be used to override express prohibitions and guarantees that are found in the Constitution. Chief Justice Latham said in this regard:

> The Executive government of the Commonwealth and the Parliament are alike bound by the Constitution and the Constitution cannot be indirectly amended by means of an international agreement made by the Government and subsequently adopted by the Parliament. Examples can be readily given. Section 116 of the Constitution provides that the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance or for prohibiting the free exercise of any religion. Section 113 provides that all fermented, distilled, or other intoxicating liquids passing into any State or remaining therein, for use, consumption, sale or storage, shall be subject to the laws of the State as if such liquids had been produced in the State. If the Commonwealth Parliament were to pass a law in pursuance of a treaty establishing a form of religion such a law would be simply invalid. Similarly if the Commonwealth Parliament were in pursuance of a treaty to prohibit the use, consumption, sale or storage of intoxicating liquor within a State, that law would be simply invalid.[76]

Evatt and McTiernan, JJ., expressed a similar outlook, stating that "The legislative power in section 51 is granted 'subject to this Constitution' so that such treaties and conventions could not be used to enable the Parliament to set at nought constitutional guarantees elsewhere contained, such for instance, as Sections 6, 28, 41, 80, 92, 99, 100, 116 or 117."[77] In the similar opinion of Mr. Justice Starke,

> The power conferred by the Constitution upon the Commonwealth to make laws with respect to external affairs must be exercised with regard to the various constitutional limitations expressed or implied in the Constitution, which restrain generally the exercise of federal powers. But otherwise the power is comprehensive in terms and must be commensurate with other Powers or States. It is impossible, I think, to define more accurately, at the present time, the precise limits of the power.[78]

The other strict limitation on the Commonwealth's power to make and implement international agreements is in cases where the agreement is made solely for the purpose of expanding Commonwealth power. With respect to the present Convention, the circumstances surrounding its creation negatived any suggestion that the motives of the Commonwealth were anything but *bona fide*. The view of Chief Justice Latham is as follows: "The suggestion that a Commonwealth Government might make an international agreement in bad faith simply with the object of extending Federal powers cannot be applied in this case . . . If such a case should ever arise it can then be considered."[79]

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[75] *Ibid.*, p. 695.
[76] *Ibid.*, p. 642.
[77] *Ibid.*, p. 687.
[78] *Ibid.*, p. 658.
[79] *Ibid.*, p. 642.

Evatt and McTiernan JJ. come to similar conclusions on this point: "No suggestion has been made that the entry into the Convention was merely a device to procure for the Commonwealth an additional domestic jurisdiction, and that could easily be refuted by referring to the setting up, under Chapter VIII of the Convention, of the Permanent International Commission for Air Navigation".[80] There seems little room to doubt that any subterraneous attempt, by means of the external affairs power, to extend Commonwealth power would be rejected by the Courts. They would merely have to examine the substance, rather than the form, of what was taking place.

Canadian and Australian Courts, not to mention the Privy Council, have been very aware of any attempts by the central governments of their countries to extend their powers. It is extremely unlikely, however, that the Commonwealth government would be so cynical or politically foolish as to attempt this method of achieving extra legislative power. It would be faced, not only with the ferocious political opposition of the States, but also by the legal opposition of the High Court. Professor Bailey suggests that "in fact a Commonwealth law implementing a merely colourable treaty would not be a law 'with respect to external affairs' at all, but would correctly by described as a law 'with respect to' the domestic matter concerned."[81]

A problem, however, which perplexed and divided the Court was whether the Commonwealth's power to implement treaties was limited only to such matters which, *in se*, concern external affairs. Starke and Dixon JJ. come forth with what amount to affirmative, if somewhat ambiguous, answers to this question. Starke J. states, "It may be as Willoughby suggests in connection with the treaty-making power in the Constitution of the United States, that the laws will be within power only if the matter is 'of sufficient international significance to make it a legitimate subject for international co-operation and agreement'."[82] Mr. Justice Dixon, a well known judicial spokesman for States' rights, comes to somewhat similar conclusions:

> If a treaty were made which bound the Commonwealth in reference to some matter *indisputably international in character* [italics mine], a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs.[83].

With respect to this particular convention, however, both Starke and Dixon find that aviation is a matter clearly international in character and one suitable for international agreement.

Evatt and McTiernan JJ., however, go to the other extreme and specifically reject any suggestion that the Commonwealth's power to implement treaties is limited to subjects which, *in se*, concern external relations. They maintain that, bcause of the increasing complexity of life and the need for ever-increasing international co-operation, it is wrong to assume in advance that certain matters

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[80] *Ibid.*, p. 685.
[81] Bailey, "Australia and the International Labour Conventions", *op. cit.*, p. 305.
[82] *The King v.Burgess*, p. 658.
[83] *Ibid.*, p. 669.

are excluded from being the subject of international agreements. As an example they point to the provisions of the Treaty of Versailles which set up the I.L.O., because, as they point out, it was explicitly recognised in the Treaty that labour unrest is a threat to peace of the world. They maintain that "it must now be recognised that the maintenance or improvement of conditions of labour can (as it does) form a proper subject of international agreement".[84] It is their conclusion that

> The fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such a subject is dealt with by the agreement. Accordingly (to pursue the illustration) Australia is not "a federal state, the power of which to enter into convention on labour matters is subject to limitations." A contrary view has apparently governed the practice of the Commonwealth authorities in relation to the ratification of the draft conventions of the International Labour Office. In our opinion such view is wrong.[85]

Thus in the foregoing statement the two judges go out of their way to criticize the Commonwealth's extraordinary reluctance to assume the full responsibilities of a member of the I.L.O. For one reason or another, it has refused to accept the challenge of Evatt and McTiernan JJ. because, as was pointed out previously, Australian action with respect to I.L.O. conventions continues to be extremely unsatisfactory.

Chief Justice Latham, without unequivocally saying so, definitely tends to reject the idea that the Commonwealth's power to legislate with respect to external affairs is restricted to subjects which, *in se,* involve external relations. He thinks it is impossible to lay down an absolute rule because "it is very difficult to say that any matter is incapable of affecting international relations so as properly to become the subject matter of an international agreement."[86] He sums up his position on this question by his remark, "It is, in my opinion, impossible to say *a priori* that any subject is necessarily such that it could never be properly dealt with by international agreement."[87]

It is indeed unfortunate that the High Court has not had further opportunities to examine the external affairs power. This is no doubt due to the Commonwealth's unwillingness to precipitate any conflict with the States by attempting to implement treaties dealing with subjects normally within state jurisdiction. Of the five judges who decided the *Burgess* Case, only Dixon and McTiernan JJ. are still sitting on the High Court. It is accordingly difficult to determine which way the Court would now go on the question of treaty implementation. K. H. Bailey, writing in 1937 just after the *Burgess* case, confidently stated that "for ordinary purposes of international intercourse it may now be assumed that the Commonwealth of Australia has full power to execute in Australia, by its own legislative action, any treaty entered into with other countries".[88] Whether this same proposition still holds true twenty-three years later, is with any degree of certainty, difficult if not impossible to say.

To appreciate fully the various judicial pronouncements on treaty imple-

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[84]*Ibid.*, p. 681.
[85]*Ibid.*, p. 681-682.
[86]*Ibid.*, p. 640.
[87]*Ibid.*, p. 641.
[88]K. H. Bailey, "Australia: Federal States in External Relations", (1937) 18 *British Yearbook of International Law* 176.

mentation in Canada, it is necessary to examine sections 91, 92, and 132 of the British North America Act.[89] Until 1950 the Judicial Committee of the Privy Council was the final court of appeal with respect to Canadian constitutional problems. The vast majority of these problems which faced the Privy Council revolved around the meaning of sections 91 and 92. It is these two sections which divide legislative power between the Federal Parliament and the Provincial legislatures. Section 91 bestows on Parliament the right to "make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces". The preamble to the section goes on to state "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated". There then follows an enumeration of 29 (now 31) subjects, illustrative of the power bestowed on the Dominion. Section 92 lists 16 classes of subjects which are stated to be within the exclusive jurisdiction of the provinces. This list includes "13. Property and civil rights in the Provinces" and "16. Generally all matters of merely local or private nature in the Province". There is little or no doubt that the Act was intended to provide for a powerful central government.[90]

Unlike the Australian and the American constitutions which bestow residual power on the states, the preamble to section 91 of the B.N.A. Act gives residual power to the Dominion. The effect, however, of Privy Council decisions has been a continual diminution of the powers of the Dominion. In practice, the residual clause has provided the central government with very little legislative competence. A brief examination of the general approach of the Privy Council to sections 91 and 92 is necessary in order that the decisions on the question of treaty implementation can be better understood and appreciated.

The first important constitutional decision by the Privy Council concerned the validity of certain Dominion legislation which provided that the municipalities had a "local option" on the question of the sale of alcoholic beverages. The Privy Council upheld the legislation on the ground that it was within the Dominion's power "to make laws for the peace, order and good government of Canada."[91] The Court appeared to accept the proposition that if the Dominion genuinely felt that its legislation was necessary "for the peace, order and good government of Canada", the courts should not interfere.

The Privy Council, however, soon "reversed its field" in a long line of decisions starting with the *Local Prohibition* Case.[92] In that case the Board was faced with Ontario legislation regulating liquor in terms similar to those

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[89](1867), 30-31 Victoria c. 3, hereinafter referred to as the B.N.A. Act.

[90]Hendry, *op. cit.*, p. 18: "Sir John A. Macdonald's concept of the federation was that of provincial subordination to a central authority. Canada's first Prime Minister, and leading luminary of the period, visualized a powerful central government, a powerful legislature and a powerful decentralized scheme of minor legislatures for local purposes."

[91]*Russell* v. *The Queen* (1882) 7 App. Cas. 829.

[92]*Attorney-General of Ontario* v. *Attorney-General of Canada* (1896) A.C. 340.

contained in the above mentioned Dominion Act. The Board upheld the Ontario Act. Lord Watson stated, "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in Section 92 upon which it might not legislate, to the exclusion of the provincial legislatures."[93] The Board found that the Dominion's power to legislate under the residual clause at the beginning of section 91 was supplementary to the enumerated classes of subjects in that section. The line of reasoning adopted in this case might still have given the Dominion ample legislative elbow room if the 29 classes of power had been given a liberal interpretation. The results, however, have been overwhelmingly in the opposite direction. The Dominion power over "the regulation of trade and commerce" has come to mean virtually nothing, whereas section 92 (13) giving the provinces control over "property and civil rights" has been given a very wide meaning. The practical effect of the Privy Council's decisions have been to make 92 (13) the source of residual power in Canada.

The general power at the beginning of section 91 is now confined, with one exception,[94] to times of great national crisis. In one case[95] the Board, in order to distinguish the decision in the *Russell* Case, was forced to conclude that, "*Russell* v. *The Queen* can only be supported today . . . on the assumption of the Board, apparently made at the time of deciding the case of *Russell* v. *The Queen,* that the evil intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster".[96]

Since the Privy Council was willing to go to such absurd lengths to restrict Dominion power it is hardly surprising that, in the thirties, they found that Prime Minister Bennett's "New Deal" legislation, designed to cope with the economic depression, could not be supported under the residual power in section 91. Part of this legislation consisted of the Weekly Day of Rest in Industrial Undertakings Act, the Minimum Wages Act and the Limitation of Hours of Work Act. The Dominion advanced two grounds to support the validity of this legislation, first that the acts were intended to deal with a great emergency and second, that this was legislation to put into effect conventions which Canada had made through the I.L.O. The Privy Council rejected both these arguments and declared all three acts *ultra vires* the Dominion.[97] A Royal Commission, appointed in the late Thirties to study the problem of Dominion-Provincial relations, summed up the situation as follows:

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[93] *Ibid.,* pp. 360-361.

[94] The *Radio Communications* case [1932] A.C. 304.

[95] *Toronto Electric Commissioners* v. *Snider,* [1925] A.C. 396.

[96] *Ibid.,* p. 412.

[97] *Attorney-General of Canada* v. *Attorney-General of Ontario* [1937] A.C. 326, hereinafter referred to as the *Labour Conventions* case. Since this case is the most important one on the problem of treaty implementation, it will be dealt with later in considerable detail.

"Temporary evils of great magnitude may be grappled with by Dominion legislation under the general clause of Section 91, but an enduring and deep-rooted social malaise, which requires the mobilizing of efforts on a nation-wide scale to deal with it, is beyond the power of the Dominion unless it is comprised in the enumerated heads of Section 91."[98]

During the period from 1930 to 1935 two decisions,[99] giving the Dominion the power to implement two treaties, and one decision,[100] giving priority to Dominion claims in the field of taxation, raised hopes that the Privy Council might be ready to give a broader interpretation of the Dominion's powers. These hopes, however, were soon dashed to the ground by certain decisions in 1937.[101] The Board, reflecting its customary preoccupation with the protection of provincial autonomy at the expense of virtually all other considerations, accordingly reasserted its usual view of the limited nature of Dominion power.

The only other section of the B.N.A. Act which concerns us is section 132. In it, the Dominion was given "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." This is the only part of the B.N.A. Act which touches upon the question of foreign relations. There is no grant of power to deal with "external affairs" as was found to be the case with the Australian Constitution. In practice, however, control of foreign affairs has been assumed by the Dominion, except that the provinces have denied that the Dominion has power under section 132 to implement treaties encroaching on their legislative sphere. Historically it seems quite clear that section 132 was not intended to bestow on the Dominion power to enter into treaties. As Professor Stewart points out: "The self-governing colonies were ordinarily included automatically in all British treaties, commercial and otherwise, or a treaty in relation to a particular colony was made by the Imperial authorities in London. It was for the purpose of giving the necessary legislative effect to such treaties in Canada that Section 132 was adopted."[102] Canada has now, of course, assumed complete control over her own treaty making. Should the section subsequently be interpreted, in the light of these changed circumstances, as bestowing on the Dominion the same power to implement its own treaties as it had to implement treaties entered into by the British Government? The answer must be sought through an examination and analysis of the most important judicial decisions dealing with this problem.

In 1911, Britain and Japan entered into a treaty of commerce and navigation. It included a provision that the subjects of each country living in the territory of the other would have opportunities equal with respect to professions

[98]Canada. Royal Commission on Dominion-Provincial Relations. *Report,* Ottawa, 1939, Bk. 1, p. 249. (The Rowell-Sirois Report).

[99]*In re Regulation of Radio Communication* [1932] A.C. 124. *In re Regulation of Aeronautics* [1932] A.C. 54.

[100]*In re Silver Brothers* [1932] A.C. 514.

[101]One of the most important of these being that in the *Labour Conventions case* (see footnote 97).

[102]R. B. Stewart, "Canada and the International Labour Conventions", (1938 22 *American Journal of International Law.*

and educational studies to those of citizens of the most favoured nation. In 1913 the Dominion Parliament passed the Japanese Treaty Act, thereby sanctioning the Treaty and giving it the force of law. British Columbia, a few years later, passed an act which provided that Japanese and Chinese could not be employed in connection with any contract, lease, or concession on Crown property. The validity of the provincial statute was challenged and accordingly came before the Privy Council.

The first case involved some Chinese labourers.[103] It was an action by lumber companies asking for a renewal of their licenses to cut lumber on Crown lands, despite the fact that they employed Chinese labourers. The Court held that, respecting the Chinese, it was a valid exercise of the Province's power to manage its property. In a second case,[104] however, the rights of Japanese residents of British Columbia were involved. The Court was clearly faced with the conflict between the British Columbia statute and the Dominion treaty act. The judgment of the Privy Council was handed down by Viscount Haldane who stated," As regards the question arising as to the application of the Treaty Act itself, they (the members of the Privy Council) entertain no doubt that the Provincial statute violated the principle laid down in the Dominion Act of 1913".[105]

The Court, without considering the problem whether this was an "empire treaty" or not, applied section 132. They merely assumed that a treaty made by the British Government in the name of His Majesty was an "empire treaty" within the meaning of section 132. Having made this assumption the Privy Council had little difficulty in finding that a provincial statute which normally would be valid under section 92 becomes *ultra vires* if it conflicts with Dominion legislation passed under section 132.

The next important case[106] arose as the result of the Dominion Government being challenged as to its power to give legislative effect to the Convention dealing with the Regulation of Aerial Navigation. The Government accordingly referred to the Supreme Court of Canada the question whether the Air Board Act was constitutional. The Aeronautics Convention had been signed in 1919, during the sittings of the Peace Conference. As far as the British Empire was concerned, it was signed in the same form as the Peace Treaty. As outlined earlier, this meant that the British Empire, *eo nomine,* was the contracting party with each of the Dominions signing on indented lines after the United Kingdom had signed for the British Empire. The treaty, accordingly, had been ratified by the King on behalf of the British Empire in 1922, and the Air Board Act was passed by the Dominion in order to fulfill Canada's obligations under the treaty.

In its reference to the Supreme Court, the Dominion directed the following question to the Court: "Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of

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[103]*Brooks, Bidlake and Whittall v. Attorney-General of British Columbia* [1923] A.C. 450.
[104]*Attorney-General of British Columbia v. Attorney-General of Canada* [1924] A.C. 203.
[105]*Ibid.*, p. 212.
[106]*In re Regulation of Aeronautics*, p. 54.

Canada, or of any province thereof under the convention entitled "Convention relating to the Regulation of Aerial Navigation?"[107] The Court agreed that the treaty was one between the Empire and foreign countries. It refused, however, to say that under section 132 the power of the Dominion was paramount and exclusive, and the conclusion reached was that the provinces were not to be denied all power with respect to a particular subject just because of the existence of a treaty. Thus, if the Dominion had not implemented the Treaty, the provinces still would have had the power to control the subject as they ordinarily would have under section 92. In the event, however, that the Dominion wished to implement an Empire treaty, its legislation would take precedence.

The Privy Council, though, answered the question somewhat differently.[108] They held that the Dominion's authority under section 132 was exclusive, although they thought that the subject fell partly within the power of the Dominion and partly within that of the provinces. Since the Board found the Convention to come within section 132 they did not, however, have to pursue this type of thinking any further. Lord Sankey dealt with the problem as follows:

> There may also be cases where the Dominion is entitled to speak for the whole, and this is not because of any judicial interpretation of ss. 91 and 92, but by reason of the plain terms of s. 132,where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation.
>
> Their Lordships are of the opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piece-meal analysis. They consider the governing section to be s. 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. As far as s. 132 is concerned, their Lordships are not aware of any decided case which is of assistance on the present occasion. It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for the performing of the obligations of Canada, or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out.

Unfortunately the Court merely assumed that the Convention was an "empire treaty" without directing their attention to what these words really meant. As one legal commentator points out, various parts of the judgment "imply that Section 132 applies only to obligations actively assumed by Canada by a treaty to which she is a signatory as part of the Empire."[109]

The next decision to merit consideration is that handed down in the *Radio* case.[110] The treaty in question in this case was an international agreement on the subject of radio communications, signed by the Canadian delegates to the 1927 International Radiotelegraph Convention. The delegates had been ap-

[107] [1930] S.C.R. 663.

[108] [1932] A.C. 54.

[109] Vincent C. MacDonald, "Canada's Power to Perform Treaty Obligations", (1933) 11 Can. Bar. Rev. 665.

It it interesting to note "that the Convention of 1919, relied on in this case, was denounced by Canada and a new Convention, so far as Canada was concerned. came into force on April 4, 1947. Section 132 therefore ceased to have any efficacy to enable Parliament to legislate upon the subject of aeronautics. In the case of *Johannesson v. West. St. Paul,* [1952] 1 S.C.R. 292, the Supreme Court held, nevertheless, that Parliament had exclusive jurisdiction in relation to aeronautics". F. P. Varcoe, *The Distribution of Legislative Power in Canada,* 1954, p. 61.

[110] *In re Regulation and Control of Radio Communication in Canada,* [1932] A.C. 304; [1931] 5. S.C.R. 541.

pointed by a Canadian Order-in-Council. Similarly, ratification was effected by an Order-in-Council and an instrument signed by Canada's Minister of External Affairs. In other words, this was an intergovernmental agreement and not a "Heads-of-State" treaty. Then again, Canada signed in her alphabetical place and not as part of the British Empire as she had done at the Aeronautics Convention. The subject was given domestic effect by the Radiotelegraph Act.

The Dominion's authority to deal with this subject was subsequently questioned and the matter referred to the courts. Here the provinces contended that section 132 did not give the Federal government the power to legislate on this subject, since Canada had signed the treaty on her own and not as part of the British Empire. The provincial counsels accordingly distinguished the *Aeronautics* case on the grounds that Canada, in that instance, could implement under section 132 because it had signed the Convention as a member of the British Empire. They contended that the present subject was within the jurisdiction of the provinces under section 92 (13): "property and civil rights."

The Dominion's lawyers argued that the Court should follow the decision in the *Aeronautics* case. They contended, first, that the change in method of treaty making from that employed in the Aeronautics Case did not affect the scope of section 132. In the alternative, they maintained that even if section 132 was not, in this case, applicable, the Dominion, because of the national importance of the subject, had the power to pass the legislation under its authority in section 91 "to make laws for the peace, order and good government of Canada."

The Privy Council held that the Dominion was within its power in controlling radio communication in Canada. Viscount Dunedin, speaking for the Board, was quick to distinguish the case at bar from that concerning aeronautics. With respect to the latter, he stated in the course of his judgment:

> For this must at once be admitted; the leading consideration in the judgment of the Board was that the subject fell within the provisions of Section 132 of the British North America Act . . . . . And it is said with truth that, while as regards aviation there was a treaty, the convention here is not a treaty between the Empire as such and foreign countries, for Great Britain does not sign as representing the Colonies and Dominions. She only confirms the assent which had been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the convention. But while this is so, the aviation case, in their Lordship's judgment, cannot be set to one side.[111]

Thus the Court chose to give section 132 and the term "Empire treaty" a narrow meaning instead of recognizing Canada's changing international status and the corresponding need for a wider interpretation of the section. The Board, however, did not completely turn its back on the Dominion, but found, instead, that the legislation was a legitimate exercise of Parliament's powers under the introductory words of section 91. Viscount Dunedin summed up the Board's view as follows:

> Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a wholq but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only

[111] [1932] A.C. 304 at 311.

legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada *vis-à-vis* the mother country, Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either section 91 or 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by Section 132. Being therefore not mentioned explicitly in either section 91 or section 92, such legislation falls within the general words at the opening of section 91 which assign to the Government of Canada the power to make laws "for the Peace, Order and Good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exlusively to the Legislatures of the Provinces". In fact, though agreeing that the Convention was not such a treaty as is defined in section 132, their Lordships think that it comes to the same thing.[112]

Two authors [113] have advanced what seem to this writer to be sound arguments against the Board's reliance on the residuary clause of section 91. They argue, first, that the clause is indefinite and variable, second, that the extent of its application to treaty enforcement is dependent upon judicial interpretation of general terms, as distinguished from the relatively express terms of section 132, and third, "to hold that legislation in aid of a treaty, by virtue of its residuary clause merely, may override provincial legislation under Section 92 is to do violence to the whole philosophy of the Act."[114]

Undoubtedly the most important case on the question of implementation is the *Labour Conventions* case.[115] The I.L.O. adopted three draft conventions dealing with "The Hours of Work in Industrial Undertakings", "The Application of the Weekly Rest in Industrial Undertakings", and "The Creation of Minimum Wage Fixing Machinery". In the spring of 1935, the Dominion Parliament approved all three conventions. The Cabinet then passed Orders-in-Council that the conventions be approved and that the Secretary-General of the League of Nations be notified accordingly. The proper instruments of ratification were then sent to him.[116]

Approximately a month after ratifying the conventions the Dominion government proceeded to carry out its convention commitments by passing three Acts, The Weekly Rest in Industrial Undertaking Act, The Limitation of Hours of Work Act and The Minimum Wages Act. It is interesting to note that the preambles to the Acts attempted to demonstrate that the Dominion was vested with the power to pass the legislation under section 132. Each one of the acts was preceded by these words:

> Whereas, the Dominion of Canada is a signatory, as Part of the British Empire, to the Treaty of Peace made between the Allied and Associate Powers and Germany . . . , and whereas by Article 23 of the said Treaty the signatories thereto each agreed that they would endeavor to secure and maintain fair and humane conditions of labour . . ., and whereas a Draft Convention . . . was agreed upon at a General Conference of the League of Nations, in accordance with the relevant articles of the said Treaty . . ., and whereas it is advisable to enact the necessary legislation to enable Canada to discharge the duties assumed under the provisions of the said Treaty and the said Convention . . . .[117]

[112] *Ibid.*, p. 312.

[113] MacDonald, *op. cit.*, p. 678, and R. J. Matas, "Treaty Making in Canada", (1947) 25 Can. Bar Rev., p. 467.

[114] MacDonald, *op. cit.*, p. 678.

[115] See footnote [97], re Weekly Rest in Industrial Undertaking Act. See also [1936] S.C.R. 461.

[116] For a very detailed account of the procedure of ratification followed here, see: Stewart, "Canada and the International Labour Conventions", pp. 39-42.

[117] *Statutes of Canada*, (1935) 25-56 Geo. 5, c. 14.

The legislation was hotly debated in Parliament. The opposition maintained that Parliament was going outside its constitutional limits in passing these acts. Within a few months of the enactment of the legislation, the Bennett Government was defeated and the opposition Liberals took power. They quickly referred to the Supreme Court the question "Are the Weekly Rest in Industrial Undertakings Act, the Minimum Wages Act and the Limitation of Hours of Work Act, or any of the provisions thereof, and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?"[118]

Counsel for the Dominion argued that, under the circumstances, the legislation was valid on at least one of two grounds, though they admitted that the matters dealt with ordinarily would be within the legislative sphere of the provinces under section 92 (13). They contended, first, that they were fulfilling an obligation under Article 405 of the Treaty of Versailles, which treaty was an Empire Treaty within the meaning of section 132, therefore giving the Dominion the power to give internal effect to their obligations. Alternatively, they argued that even if they were acting outside the terms of section 132, that they had power under the residuary clause in section 91 because these were treaties affecting Canada as a whole.

The Supreme Court of Canada split three to three. Chief Justice Duff wrote the opinion of those upholding the legislation. He held that Canada was carrying out her obligations incurred under the Treaty of Versailles. Since this was an Empire treaty the Dominion had the power under section 132 to give effect to her obligations. He went on to argue that "as a result of the constitutional development of the last thirty years (and more particularly of the last twenty years) Canada has acquired the status of an international unit . . . enabling her to enter into, on her own behalf, international arrangements, and to incur obligations under such arrangements."[119]

He then examined the decisions handed down in the *Aeronautics* and *Radio* cases and proceeded to step a long way out on a judicial limb by arguing that, "by the combined effect of the judgments in the *Aeronautics* case and the *Radio* case, the jurisdiction of the Dominion Parliament in relation to international obligations is exclusive, and moreover, as such matters are embraced within the authority of Parliament in relation to peace, order and good government, its power is plenary . . . The jurisdiction of Parliament to enforce international obligations under agreements which are not strictly "treaties" within Section 132 is co-ordinate with the jurisdiction under this last named section."[120]

Of the three judges who held the legislation to be *ultra vires,* two of them[121] disposed of the case on the narrow ground that, since the consent of the provinces had not been obtained, the ratification was improper. Mr. Justice Crockett took a different approach and stated:

> While I agree with the learned Chief Justice that the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect the Dominion as a whole or any of the provinces separately, I do not

[118] [1936] S.C.R. 461.

[119] *Ibid.,* p. 496.

[120] *Ibid.,* pp. 487, 499.

[121] Rinfret and Cannon JJ.

think that this fact can be relied on as altering in any way the provisions of the B.N.A. Act as regards the distribution of legislative power as between the Dominion Parliament and the provincial legislatures or as necessarily giving to any matter, which may be made the subject of legislation in Canada any other meaning or aspect than that which it bears in our original constitution.[122]

Thus, since the subject matter dealt with in the conventions was normally within the legislative sphere of the provinces, he held that the Dominion legislation was *ultra vires.*

Upon appeal to the Privy Council the arguments of the Dominion were systematically rejected and the legislation declared *ultra vires.* Lord Atkin, delivering the opinion of the Board, first distinguished between the formation and performance of the obligations in an international agreement. He stated that the Board would not bother considering the arguments with respect to the question of ratification because "their Lordships have come to the conclusion that the reference can be decided upon the question of legislative competence alone."[123]

Lord Atkin then proceeded to reject the Dominion's argument that the legislation was valid under section 132. He replied that "so far as it is sought to apply this section to the conventions when ratified the answer is plain. The obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision in the *Radio* case, and their Lordships do not think that the proposition admits of any doubt."[124]

The Dominion tried to argue that even if section 132 did not apply to the conventions, it did apply to the Treaty of Versailles which Canada signed as a member of the British Empire. They contended that the treaty imposed an obligation to perform the labour conventions. Lord Atkin, however, took the view that "no obligation to legislate in respect of any of the matters in question arose until the Canadian executive, left with an unfettered discretion, of their own volition acceded to the conventions, a *novus actus* not determined by the treaty. For the purpose of this legislation the obligation arose under the conventions alone."[125] The Court thus turned aside any suggestion whatsoever that the acts were supported by section 132.

Before turning to examine in detail the question whether section 91 supported the legislation, Lord Atkin discussed and distinguished the decisions in the *Aeronautics* and *Radio* cases.

The Aeronautics case concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Section 132, therefore, clearly applied, and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly *obiter*, the case could not be said to be an authority in the matter now under discussion. The judgment in the Radio case appears to present more difficulty. But when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in s. 92, or even within the enumerated classes in s. 91.[126]

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[122] [1936] S.C.R. 461 at 535.

[123] [1937] A.C. 326 at 349.

[124] *Loc. cit.*

[125] *Ibid.*, p. 350.

The Privy Council also rejected the idea that there was any such thing as "treaty legislation as such." They immediately went on to say: "The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects, so will the legislative power of performing it be ascertained . . . It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions . . . There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with the enlarged functions of the Dominion executive."[127]

The argument of the Dominion that this was legislation passed to deal with a grave emergency was quickly dismissed. The fact that, in 1935, Canada was in the midst of the worst economic depression in her history was not even mentioned by the Board. The fact that the majority of families in the Province of Saskatchewan were on government relief along with many thousands in other parts of the country was evidently not sufficient to constitute a "matter of national concern". Lord Atkin says, "It is only necessary to call attention to the phrases in the various cases, 'abnormal circumstances', 'exceptional conditions', 'standards of necessity', 'highly exceptional', 'epidemic of pestilence', to show how far the present case is from the conditions which may overide the normal distribution of powers in ss. 91 and 92."[128] Of course, if the people of Canada had sought to escape their economic woes by resorting to alcohol, on the basis of Viscount Haldane's remarks in the *Snider* case[129] the Dominion could have legislated under the general power in section 91.

His Lordship, however, still had one more judicial observation. "It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But 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."[130] His Lordship ended with a proclamation which is still haunting Canadians: "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."[131]

The result of this line of decisions has been a serious hampering of Canada's ability to assume and preform international obligations. Section 132 has been made a virtual dead letter. Prior to 1919, if Britain signed a treaty, the Dominions were usually automatically bound by it and Canada could thus

[126][1937) A.C. 326 at 351. *Ibid.*, p. 351.

[127]*Ibid.*, pp. 351-2.

[128]*Ibid.*, p. 353.

[129]See footnote 95 *supra.*

[130][1937] A.C. 326 at 353-354.

[131]*Ibid.*, p. 354.

implement under section 132. These treaties, however, were British Empire treaties, not *eo nomine,* but only in the sense that Britain, by her signature, committed the whole Empire.

It is only for the short period from 1919 to 1926 that a good argument can be made for the supposition that there really were treaties of the British Empire. In that period, when the Empire entered into an international commitment, the Dominions signed the documents, along with Britain, as parts of the Empire. This method, however, was abandoned in 1926 so that, from that time to the present, each dominion has signed in its own individual capacity. The Privy Council, however, refused to give section 132 a more flexible interpretation, despite Canada's new independence in treaty matters. As a consequence, unless Canada steps back into her treaty-making past and adopts one of the old forms, section 132 is dead. There is no doubt, however, that if the Board had been willing to find that an "empire treaty" had been signed the Dominion would then have had absolute power to give it domestic effect even if it dealt with subjects normally within section 92.

The judicial murder of section 132 now leaves Canada with the "rule that (apart from the 'Empire' treaties performable under Section 132) treaty-performing power follows the divisions of ordinary power."[132] This means that "the source of treaty-performing power in Canada now turns first upon the type of treaty, i.e., upon how and by whom it was brought about, etc. If it is of one type (Empire), the power resides in Section 132; or if of another (Canadian), the power resides (a) in Section 92 or (b) in Section 91, and in the latter case it may reside either in (i) the enumerated heads or (ii) (in case of emergency) in the 'Peace, Order and Good Government' clause."[133]

As if the Board in the *Labour Conventions* case were not satisfied with destroying the Dominion's power under section 132, it also seemed intent upon keeping its power under section 91 as limited as possible. The obliteration of section 132 could have been accepted more easily if the Board had then been willing to interpret broadly the Dominion's authority under 91. Instead, they interpreted the introductory words to section 91 as narrowly as possible. One famous Canadian constitutional authority wrote despairingly, just after the Labour Conventions decision, that "the federal 'general power' is gone with the winds. It can be relied on the best when the nation is intoxicated with alcohol, at worst when the nation is intoxicated with war; but in times of sober poverty, sober financial chaos, sober unemployment, sober exploitation, it cannot be used, for these, though in fact national in the totality of their incidence, must not be allowed to leave their legal water-tight provincial compartments."[134]

A variety of reasons can be, and have been, offered to explain why the Privy Council placed Canada in such an uncomfortable constitutional position. It

[132]Vincent C. MacDonald, "The Canadian Constitution Seventy Years After," (1937) 15 Can. Bar Rev. 418.

[133]*Loc. cit.*

[134]W. P. M. Kennedy, "The British North America Act: Past and Future", (1937) 15 Can. Bar Rev. 398.

has been suggested that the Court was influenced by its predilection for provincial rights, *laissez-faire*, and nineteenth century imperialism. These suggestions all have some merit. One writer[135] maintains that the rapidly changing personnel of the Privy Council militated against the Board's effectiveness. He points out that none of the members who sat in the *Labour Conventions* case sat to hear the appeal in the *Radio* case. This, in my opinion, is an important observation, because it suggests that the members of the Privy Council tended to reach their decisions without sufficient knowledge of the Canadian scene and of Canadian constitutional law.

Various writers have offered a variety of solutions to the problems created by the Privy Council decisions. One suggests that Canada could return to the position where British ministers would act for her in treaty matters, thereby restoring section 132 to effectiveness.[136] Another suggests amendment of the B.N.A. Act to give the Dominion power to implement all international agreements whether or not they deal with subjects normally coming within section 92.[137] Professor Kennedy, however, demonstrates considerably less timidity in his approach to the problem:

> We must seek machinery to do in Canada certain things: (i) to repeal the B.N.A. Act *in toto;* (ii) to rewrite completely the constitution; to provide reasonable and sane and workable constitutent machinery; (iii) to abolish all appeals to the Judicial Committee. I submit that every one of these things is necessary; and above all we must get rid of all the past decisions of the Judicial Committee, for they will hang around the necks of the judiciary if appeals are abolished, in that uncanny stranglehold with which *stare decisis* seems doomed to rob the law of creative vitality.

At least one of Kennedy's hopes has been realized because, in 1949, Canada abolished appeals to the Privy Council. This action, however, has not changed matters since the Government has not provided the Supreme Court of Canada with an opportunity to review the question of treaty implementation. Such a state of affairs is perfectly understandable, considering that any Canadian government must derive much of its support from the provincial rights stronghold of Quebec. They are therefore loath to take any steps that would suggest an attempt to encroach upon the legislative sphere of the provinces.

The fact that the Canadian Government accepts the decision in the *Labour Conventions* case was reflected in a statement by the former Canadian Foreign Minister, Lester B. Pearson, during the course of a debate at the United Nations. Speaking on the question of implementation and ratification of a proposed human rights convention he stated, "The delegation of this country abstained from voting in the IIIrd Commission, . . . whenever questions arose which, under the terms of the Canadian Federal Constitution, were within the competence of the provincial Governments . . . However, the Canadian delegation, having clearly defined the constitutional problems raised for this

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[135] John D. Holmes, "An Australian View of the Hours of Labour Case", (1937) 15 Can. Bar Rev. 506.

[136] N. A. M. MacKenzie, "Canada and the Treaty Making Power", (1937) 15 Can. Bar Rev. 453.

[137] MacDonald, "The Canadian Constitution Seventy Years After", *op. cit.*, p. 421.

[138] Kennedy, "The British North America Act: Past and Future", *op. cit.*, p. 399.

country by the adoption of this instrument, will vote for the declaration."[139]

It is interesting to note that the representatives of federal states have requested that the proposed Human Rights Convention include a clause which allows them to ratify it even though they would not be able to promise that they would implement the Convention.[140] Canada, for example, would be unable to give effect to such a convention unless legislative action were to be taken by all ten provinces, a most unlikely event. She finds herself similarly handicapped with respect to many of the conventions adopted at international conferences.[141] In fact, Canada's difficulties are enhanced by the circumstance of having her regional units probably stronger than those of any other federation, thanks largely to the judicial interpretations of the B.N.A. Act by the Privy Council. Appeals to the Privy Council have been abolished, but the words of Lord Atkin are still with us: "While the Ship of State now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure." The title of a popular song perhaps best summarizes the situation—"The Song is Ended but the Melody Lingers On"—and an unpleasant melody it is.

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[139]U.N. General Assembly, IIIrd Session, 1st Part, *Plenary Meetings*, pp. 899-900, cited in G. Piotrowski, "Canada and International Labour Conventions; Canadian Court Decisions as Regards Public International Law", (1953) 83 *Journal de Droit International* 871.

[140]Max Sorenson, "Federal States and the International Protection of Human Rights", (1952) 46 *American Journal of International Law* 214.

[141]For example, Canada cannot make effective tax agreements. As one writer points out, "In the broad field of social legislation the Dominion is effectively prevented from active international collaboration . . . If they deal with such matters as labour laws, access to raw materials, basic health standards, and basic educational standards, it is extremely unlikely that the Dominion could validly participate in them to the extent of implementing any international commitment." R. J. Matas, "Treaty Making in Canada," pp. 476-77.