TREATY MAKING IN CANADA*

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There are two aspects of treaty making — the formation of the treaty, and the implementation of the treaty once it has been formed. It is proposed to discuss each of these aspects of the subject in turn.

I

A treaty is primarily a compact between independent nations; a solemn engagement entered into between independent nations for the common advancement of their interests and the interests of civilization.[1] It may, more properly perhaps, be described as "a compact between sovereign powers or states, for treaty making is a competence attaching to sovereignty".[2]

The subject of treaties is governed partly by international, and partly by municipal law. International law regulates the relations of the sovereign or part sovereign states *inter se* and so, according to the view of English law, determines the validity, the interpretation and the enforcement of treaties as between the parties. Municipal law determines the attribution of the treaty-making power within the state and the effects of treaties upon persons within its allegiance. The negotiations leading up to and concluding a treaty are matters of diplomatic practice.[3]

According to international law, States which are fully sovereign possess unlimited power to conclude treaties. States which are only partly sovereign may make treaties only in so far as they are within their competence.[4]

Various states may have classifications as to the forms which they prefer to use in respect of defined subject matters in concluding international contracts, but such distinctions have "nothing to do with international law".[5] Satow,[6] after enumerating fifteen forms which international compacts may take, says, "of these, the terms Treaty and Convention appear for-

* This article, in somewhat different form, was originally presented as a thesis for the LL.B. degree at the Manitoba Law School.

[1] 63 Corpus Juris, p. 826.

[2] Vincent C. MacDonald: Canada's Power to Perform Treaty Obligations (1933), 11 Can. Bar Rev. 581, 664.

[3] 6 Hals. (2nd ed.), pp. 519-520.

[4] *Ibid.*, p. 520. In this connection Halsbury points out that it is difficult to lay down rules as to the treaty making power of partly sovereign states, but that the various States of the American Union, or the Provinces of the Canadian Dominion, have no treaty making power.

[5] *Ibid.*, p. 520.

[6] Guide to Diplomatic Practice (3rd ed., 1932), p. 318; section quoted by Vincent C. MacDonald *op. cit.*, at p. 674.

merly to have been mainly employed for compacts concluded between Heads of States; now the latter term is often used for compacts between governments. Which of the above [fifteen] forms shall be used in a particular case is partly a matter of usage, partly of convenience, partly of choice. At the present day it cannot be said that any precise rule of nomenclature exists. Treaties are sometimes concluded between governments and conventions are often now so concluded. Not even the relative importance of their contents determines whether compacts shall take the form of treaties between Heads of States, or between States, or whether they shall take the form of Government Agreements."[7]

Commercial treaties are sometimes known as conventions. The term, convention, has also been applied to arrangements preliminary to a formal treaty, or intended to serve as its basis, and also to international agreements for the regulation of matters of common interest but not coming within the spheres of politics or commercial intercourse.[8]

Often the commercial type of international compact is concluded in the form of an agreement. These agreements are made between Governments, not States. It was formerly considered that they were subject to discontinuance on a change of government, whereas a treaty was unaffected by such a change.[9] At the present time the position would seem to be that an intergovernmental agreement is binding according to its terms regardless of any change in government.

It is suggested by some authors that the distinction between Treaties and Agreements is purely formal, that the latter differ "in nothing but form from the traditional type of treaty". It is stated in Halsbury that: "International law provides no rule prescribing a necessary form of treaties, and in fact the differences between the various forms, such as conventions, declarations, protocols, and acts are of little importance".[10]

The British North America Act makes no specific reference to the power to enter into treaties. The reason for this is that the treaty making power is a Royal Prerogative vested in His Majesty. For external purposes the Crown represents the

[7] Dean MacDonald in the article cited in footnote 2 *ante* mentions the important agreement between Great Britain and Japan as to the maintenance of peace, etc., in China, an agreement which was in Governmental form.

[8] 13 C. J., p. 847.

[9] The informal trade agreements made with the United States by Sir Wilfred Laurier, to be made effectual by local legislation, proved abortive since Laurier was defeated at the general election of 1911 fought on this issue (11 Hals., 2nd ed., p. 31).

[10] 6 Hals. (2nd ed.), p. 520.

community. No person or body, save the King, by his ministers or accredited representatives, can deal with a foreign state so as to acquire rights or incur liabilities on behalf of the community at large. In acting for the people he does not act as a trustee or agent for any individual. It is the King, acting on the advice of his ministers, who makes war and peace.[11]

This statement of the constitutional position is misleading, since one might gather from a reading of it that it is actually the King who acts for the state. It must be borne in mind that the prerogative of the Crown, in this respect, is subject always to the collective responsibility of the cabinet. The true position in Canada is that the Governor-General in Council, *i.e.* the Cabinet, is responsible for treaty making. That responsibility is limited only in a political sense. The Government must carry the House or, failing that, the electorate with it on any issue of major policy. Should the Government incur liability by treaty contrary to the wishes of the majority of the House or, ultimately, contrary to the wishes of the majority of the electorate, it would face certain defeat. We may say, then, that the control over treaty making is political rather than legal.

Treaties may be conveniently divided into two groups — political, and non-political or commercial. The course of development of the federal power to enter into treaties was different for each of these groups. The history of that development is an interesting one, but is beyond the scope of this paper.[12] At the present time complete control over tariffs and commercial treaties is exercised by the Federal Government. The Federal Government can negotiate, enter into and perform commercial or trade treaties.

The development of the Dominion power, as regards the negotiation of the political treaties, has followed a somewhat different course than in the case of commercial treaties.

Canada did not attain political autonomy regarding the negotiation of political treaties until quite recently. The sovereign status of the Dominion in this regard was expressed in the system of rules as to treaties adopted at the Imperial Conference of 1926 and by The Statute of Westminster, 1931 (22 Geo. V., c. 4). In this connection a passage might be quoted from the report of the Inter-Imperial Relations Com-

[11] Anson: Law and Custom of the Constitution (4th ed.), vol. II, pp. 131,136.

[12] Corbett and Smith: Canada and World Politics, p. 53, and see Vincent C. MacDonald, *op. cit.*, p. 590, for references to authorities on the historical development. See also 11 Hals. (2nd ed.), p. 31.

mittee of the Imperial Conference, usually called the Balfour Declaration:

> They [the Dominions] are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or internal affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations.[13]

Some restraints on the treaty making power are embodied in the resolutions of the Imperial Conferences, *e.g.* the treaty making power of a Dominion could not operate directly to impose any obligation of an active character on any other part of the Empire.

The process of achieving independent status was completed during the World War of 1939–45. In 1939 an end was put to the popular debate of the 'thirties as to whether the Crown was divisible and therefore whether one part of the British Commonwealth could remain neutral while Britain was at war. A formal declaration of war was issued separately for Canada, by the Governor-General, after telegraphic approval had been given by the King in London, and a state of war was declared with Germany as of September 10th, not as from September 3rd, the date of Britain's declaration.[14] It thus appears correct to say that this war has brought to completion the evolution, well under way before September 1939, of independent national status for the Dominions. As a necessary corollary of that sovereign status, Canada must now have independent power to negotiate and enter into all types of treaties.

II

Some treaties may require that Canada should change its domestic law. In this event the treaty is not performed until the appropriate legislation is enacted. A treaty in itself is not equivalent to an Imperial Act and without the sanction of Parliament the Crown cannot alter the existing law by entering into a contract with a foreign power.[15] In this respect our law would seem to differ from that prevailing in the United States, where, by an express provision in the constitution, treaties duly made are the supreme law of the land "equally with Acts of

[13] Imperial Conference of 1926, Summary of Proceedings, p. 12; quoted in "B.N.A. Act and Selected Statutes" (1943), p. 131, Ottawa, King's Printer.

[14] F. R. Scott: The End of Dominion Status (1945), 23 Can. Bar Rev. 725, at p. 736.

[15] *Arrow River and Tributaries Slide and Boom Co.* v. *Pigeon Timber Company Limited*, [1932] S.C.R. 495.

Congress duly passed. They are thus cognizable by both Federal and State Courts."[16]

It may be said that treaties binding on Canada require legislation in the following cases:

(1) when they affect private rights or require taxation;

(2) when they involve a change in the law of the land;

(3) when they involve action which is not within the ordinary scope of the discretionary powers of the Executive.[17]

Thus, one reason for the legislative effect given to the treaties of peace, in 1919, was the interference with private rights under the clearing-house system of debt liquidation between nationals of the powers parties to the treaties. Similarly, treaties of commerce which might require a change in the character or the amount of duties charged on exported or imported goods,[17A] or extradition treaties which confer on the executive a power to seize, take up and hand over to a foreign state persons who have committed crimes there and taken refuge here, cannot be made operative without legislation.[18]

The present constitutional position regarding the implementation of treaties is in many ways one of great difficulty. Before a decision can be made as to whether the Dominion can legislate in performance of a particular treaty obligation it is necessary to study the effect of sections 91, 92 and 132 of the British North America Act, together with the pertinent judgments of the Judicial Committee of the Privy Council. Even then, it may be doubted whether a final answer could safely be given without further appeal to the Privy Council. This unhappy state of affairs has resulted from three major decisions handed down by the Board in the 1930's. It is proposed to discuss the relevant provisions of the B.N.A. Act, as interpreted by those decisions.

Section 132 provides as follows: "The Parliament and Government of Canada shall have 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".

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[16] 63 Corpus Juris, p. 827.

[17] F. A. Vallat: Treaties (1933), 11 Can. Bar Rev. 385, at. p. 391.

[17A] The Customs Tariff Act, R.S.C., 1927, c. 44, gives the Governor in Council a considerable power to carry out tariff agreements with other countries. The necessary action is frequently taken by Order in Council.

[18] Anson, *op. cit.*, p. 142.

> Sect. 91 tabulates the subjects to be dealt with by the Dominion, and s. 92 the subjects to be dealt with exclusively by the Provincial legislatures, but it will not be forgotten that s. 91, in addition, authorizes the King by and with the advice and consent of the Senate and House of Commons of Canada 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, and further provides that any matter coming within any of the classes of subjects enumerated in the section shall not be deemed to come within the classes of matters of a local and private nature comprised in the enumeration of classes of subjects assigned by s. 92 exclusively to the legislatures of the Provinces.[19]

The first case which requires detailed consideration is *In re the Regulation and Control of Aeronautics in Canada.*[20] This case came to the Privy Council on appeal from a reference to the Supreme Court of Canada. The Governor-General in Council had referred four questions to the Supreme Court relating to the constitutionality of the Aeronautics Act (R.S.C., 1927, c. 3) and the Air Regulations (1920).

A convention had been drawn up and signed at the Peace Conference in Paris, in 1919, which made elaborate provision for the regulation of aerial navigation. The convention was signed by the representatives of the allied and associated powers, including Canada, and was ratified by His Majesty on behalf of the British Empire on June 1st, 1922. With a view to performing her obligations as part of the British Empire, under this convention, the Parliament of Canada enacted the Act and Regulations in question. By this Act and these Regulations provision is made for the regulation and control, in a general and comprehensive way, of aerial navigation in Canada and over the territorial waters thereof.

The provinces' contention before the Privy Council was in part that section 132 gives only such power as is necessary or proper for fulfilling the obligations referred to; if provincial legislation adequately covers the matter there is nothing for the Dominion to do, under section 132; the section does not prevent the provinces from legislating as to a provincial matter.

The judges of the Supreme Court of Canada had adopted the view that, as regards matters normally falling within section 92 of the British North America Act, the provinces might legislate for the purpose of giving effect to an international obligation and they were, accordingly, unanimously of the opinion that,

[19] *In re the Regulation and Control of Aeronautics in Canada,* [1932] A. C. 54, at p. 64.

[20] [1932] A.C 54, [1931] S.C.R. 663.

as regards such matters, the jurisdiction of the Parliament of Canada was not exclusive but only paramount. The Judicial Committee, rejecting this view, held that the jurisdiction, legislative and executive, conferred by section 132, was exclusive.

Lord Sankey in the course of the judgment said at page 74:

> Their Lordships are of opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piecemeal 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. . . 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 performing 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.

In dealing with the subject matter of the Convention, in relation to the specific heads of section 91 and section 92, the Board said at page 77:

> . . . . it is not necessary for the Dominion to piece together its powers under s. 91 in an endeavour to render them co-extensive with its duty under the Convention when s. 132 confers upon it full power to do all that is legislatively necessary for the purpose.

It is necessary to keep in mind that the Convention was concluded in the same form as the Versailles Peace Treaty itself, which is said to have been the first treaty in the annals of British diplomacy to have been concluded in the name of the British Empire *eo nomine* as one of the contracting parties. The Convention, after negotiation, had been ratified by His Majesty on behalf of the British Empire. Since the Convention was signed by the representatives of the Allied and Associated Powers, including Canada, and was ratified by His Majesty on behalf of the British Empire, the Convention was literally, in form as in fact, a treaty between the British Empire, as such, and the foreign countries parties to it. It, therefore, plainly fell within the scope of section 132 of the British North America Act, 1867, and the Board, accordingly, treated the provisions of the Aeronautics Act and of the Air Regulations as being referable, for the most part, to the performance of the obligations of Canada under the Convention.[21]

[21] The remaining ground of the decision of the Board was based on the peace, order and good government clause of s. 91.

The second important Privy Council decision is *In re Regulation and Control of Radio Communication in Canada.*[22] This case arose out of a reference to the Supreme Court by the Governor-General in Council regarding the jurisdiction of the Parliament of Canada to regulate and control radio communication.

The Dominion of Canada concluded an agreement with seventy-nine other countries by the International Radiotelegraph Convention, 1927. The representatives of Canada were appointed by the Governor-General in Council and, with the other signatories, were described in the preamble as "the plenipotentiaries of the countries named". The convention and regulations were ratified and confirmed on behalf of His Majesty's Government in Canada by an instrument dated July 12th, 1927, and signed by the Secretary of State for External Affairs, Canada, which stated that the convention had been "signed by the representatives of His Majesty's Government in Canada and of the other Governments specified therein". They were ratified and confirmed on behalf of His Majesty's Government in Great Britain by an instrument in the same form signed by the Secretary of State for Foreign Affairs. The Parliament of Canada dealt with the subject by the Radiotelegraph Act (R.S.C., 1927, c. 195) and regulations made under it.

Counsel for the provinces in their argument distinguished the *Aeronautics* case by contending that it was decided mainly upon the ground that upon that subject there was a treaty between the British Empire and foreign countries and that by the terms of section 132 of the British North America Act, 1867, the Parliament of Canada had authority to perform the obligations under a treaty of that kind. In the present case there was no treaty entered into by the British Empire as an entity and binding upon Canada as a constituent member. Canada was separately represented and its Government contracted with the other signatories, including Great Britain, as a principal. If the Parliament of Canada had legislative authority to perform the obligations of the convention, although it was not a treaty by the British Empire, section 132 was superfluous. Further, they argued that apart from section 91 the Dominion had no jurisdiction over property and section 132 could not give that jurisdiction.

Counsel for the Dominion and the Canada Radio League maintained that the matter was in substance covered by the *Aeronautics* case; that the change of method in making treaties binding upon the Dominion does not affect the scope of section

[22] [1932] A. C. 304; [1931] S.C.R. 541.

132 or take away the authority thereby conferred upon the Parliament of Canada to perform the obligations arising under it. But even if section 132 does not in terms apply to the international convention here in question, the Parliament of Canada has similar authority under the power conferred upon it by section 91 to make laws for the peace, order and good government of Canada, since the matter was one of national importance and therefore not within section 92.

The Board (affirming the majority judgment of the Supreme Court of Canada) held that the Parliament of Canada had exclusive legislative power to regulate and control radio communication in Canada. In the course of the judgment Viscount Duneden had this to say about the *Aeronautics* case (at page 311):

> 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 s. 132 of the British North America Act, 1867.

The Board went on to distinguish the treaty in the earlier case (at page 311):

> 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 Lordships' judgment cannot be put on one side.

Although section 132 was held not to cover the convention under review, the Board found that the Parliament of Canada, in virtue of its general or residuary power under the introductory words of section 91 of the B.N.A. Act, to make laws for the peace, order and good government of Canada, had, nevertheless, in relation to the obligations under the convention, powers similar to those which it would have had under section 132, if the convention had been a treaty between the British Empire, as an entity, and foreign countries.

In so deciding, the Board said, at page 312:

> Canada as a Dominion is one of the signatories to the convention. . . 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 to 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 s. 91 or s. 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 s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91. . . In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing.[23]

Note that the convention in this case was really an agreement between Governments and was distinguished from the convention in the *Aeronautics* case on the ground that it was not concluded as in the former case in the name of the British Empire as a contracting party; nor was it concluded in the Heads-of-State form of treaty.

This decision, based on the residuary power under section 91 (since section 132 was held not to apply to an international agreement of the type in question), has been criticized as an unnecessary bifurcation of the Dominion power to legislate for the implementation of treaties. To place the authority for the Dominion legislation in performance of treaty obligations on the tenuous support of the peace, order and good government clause was a course that immediately opened up difficulties. The undesirability of referring treaty making power to the introductory words of section 91 may be summarized in the following way: firstly, the residuary clause is variable and uncertain; secondly, the extent to which it can be made to apply to the enforcement of treaties depends upon judicial interpretation of very general terms and not upon express language, as in section 132; and, thirdly, 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.

On the other hand, the competency of such legislation under section 132 to override provincial legislation has already been established. In the *Reference re Waters and Water Powers*[24] the Supreme Court held, per Duff J., at page 225 that:

> Broadly speaking, the Dominion has under s. 132 full authority to legislate for the execution of obligations imposed upon Canada, or upon a province, in virtue of an Imperial Treaty.

The overriding effect of section 132 was dealt with by the Privy Council in *Attorney-General for Canada* v. *Attorney-General for British Columbia*.[25] The Dominion, by chapter 27 of Statutes of Canada, 1913, had enacted its Japanese Treaty Act. That

[23] The other ground of the Privy Council decision was based on an interpretation of s. 92 (10 (a)) and s. 91 (29).

[24] [1929] S.C.R. 200.

[25] [1924] A.C. 203.

act sanctioned a treaty made between His Majesty and Japan, and placed subjects of each contracting party on the same footing as the subjects of the most favoured nation. The Province of British Columbia enacted legislation in 1921 (chapter 49 of the statutes for that year) which restricted the rights of the Japanese in British Columbia. The Board held that the statute was in contravention of the legislation passed by the Dominion in performance of the treaty and was therefore *ultra vires*.

In another case the subject matter of the litigation was a convention respecting the protection of certain migratory birds.[26] To carry out the obligations of Canada under the international agreement, Parliament passed in 1917 the Migratory Birds Convention Act (S.C., 1917, c. 18). The head note of the report reads:

> The object of the Migratory Birds Convention Act, 1917 (Can.), c. 18, being to implement a treaty in accordance with s. 132 of the B.N.A. Act, the Act is *intra vires* of the Dominion although it incidentally trenches on the provincial jurisdiction over property and civil rights. Therefore in so far as it conflicts with the Game Protection Act, 1916 (Man.) c. 44, the Dominion Act is paramount.

An American case arose out of this same convention.[27] In giving judgment to the effect that treaties may override state legislation, Holmes J. said:

> It is obvious that there may be matters of the sharpest exigency for the national well being that an Act of Congress could not deal with but a treaty followed by such an Act could and it is not to be lightly assumed that in matters requiring national action a power which must belong to, and reside somewhere in every civilized government, is not to be found.

It has been suggested that section 132 was an effort to give the Dominion Parliament similar power.[28]

It goes without saying that legislation on matters falling within the headings of section 91, pursuant to treaty obligation, is within the competence of the Dominion Parliament. An example of this type of legislation is the Canadian Copyright Act, which gives effect to the Berne Convention, Berlin Convention and Rome Convention, for international protection of copyright.[29]

It might be well to consider at this stage the type of treaties that may bind Canada. Dean MacDonald submits there are

[26] *The King* v. *Stuart*, [1925] 1 D.L.R. 12, 34 M.R. 509 (Man.) (C.A.), [1924] 3 W.W.R. 648.

[27] *Missouri* v. *Holland*, 252 U.S. 416.

[28] N. A. M. MacKenzie: Canada and the Treaty-Making Power (1937), 15 Can. Bar Rev. 436.

[29] R.S.C., 1927, c. 32 as amended by 21-22 Geo. V., c. 8, 25-26 Geo. V, c. 18 and 1 Edw. VIII, c. 28; B.N.A. Act, s. 91 (23).

three types to which Canada may be a party and which will give rise to the obligation of legislation:

1. Treaties made in the name of the British Empire but to which other parties are signatories. This form was used between 1919 and 1926. Of this type were "Treaties of Peace" (1919) and "Aerial Navigation Convention" (1919). This was the only period in which the "British Empire" contracted *eo nomine.*
2. Treaties negotiated by Canadian plenipotentiaries under full powers issued by His Majesty "in respect of the Dominion of Canada", *e.g.* Halibut Treaty. In 1923 Canada had successfully established the doctrine that a treaty affecting one Dominion only should be signed by a Dominion representative alone. The Halibut Treaty was negotiated with the United States by Hon. Mr. Lapointe acting for Canada. Canada performed its obligations under the treaty by a Dominion statute.[30]
3. Treaties made in the name of His Majesty but to which Canada is a signatory by a British plenipotentiary authorized to sign "for" Canada, *e.g.* Treaty for the Renunciation of War, Paris, 1928.[31]

In all these cases it is "His Majesty" who makes the treaty. The decisions of the Board in the *Radio* case and the *Labour Conventions* case indicate that it is necessary, for the purpose of determining whether a treaty or convention to which Canada is a party is one which comes within the purview of section 132, to have regard not only to the form of the particular treaty but to the consideration (it would seem) whether the treaty is one which has been entered into on the advice of His Majesty's Imperial Executive or on the advice of His Majesty's Ministers at Ottawa.

An interpretation of section 132 that would limit its operation to treaties described as British Empire treaties is a particularly restrictive one. Such an interpretation does not take into account that the term "British Empire", as used in the B.N.A. Act, is merely a descriptive term. All treaties concluded by His Majesty in 1867 automatically bound the Empire, but the Empire did not

[30] 13-14 Geo. V, c. 61, as amended.

[31] Dean MacDonald contends that Canada may be bound by a treaty made on the advice of Imperial Ministers and to which Canada is not a consenting party. But present opinion seems to be opposed to this view especially in the light of recent developments.

contract *eo nomine*. The first time that was done was in 1919. A treaty concluded today is also concluded in the name of His Majesty. The advice is given by His Ministers in Ottawa instead of Westminster, but this is a convention or practice which should not change the legal position.

It has been said that the modern treaty is, in actuality, different from the type envisaged in 1867. Even if this were so, if the words of the Constitution can be interpreted to include the unthought of event, that interpretation should be made.

> When, however, exigencies arise which were not in the contemplation of the framers of the Constitution, the fact that they had no affirmative intention that it should cover such a case will not prevent such a case being brought within it. Since it was intended not only for the period in which it was adopted, but for the future also, it should in such cases be interpreted according to the view which reasonable men would take of it in the light of existing circumstances.[32]

The restrictive interpretation by the Privy Council of section 132 is in direct conflict with the broad interpretation applicable to a constitution. As the Board said in *Henrietta Muir Edwards and others* v. *Attorney-General for Canada and others:*

> Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.[33]

These sentiments were approved by the Board in a later case, where we find the following statement:

> Indeed in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted.[34]

Further, to say that, because a given treaty was unthought of in 1867, it does not come within section 132 is to echo the type of argument repudiated in the *Combines* case.[35] In that case it was contended that the term "Criminal Law" means only what it meant in 1867, but the Privy Council held that that term was not confined to what was considered "criminal" in 1867. On a broad constitutional interpretation section 132 should therefore

[32] Burdick: The Law of the American Constitution, p. 148; quoted by Vincent C. MacDonald, *op. cit.*, p. 582.

[33] [1930] A. C. 124, at p. 136.

[34] *British Coal Corporation and others* v. *The King*, [1935] A.C. 500, at p. 518.

[35] [1931] A.C. 310.

be considered as applicable to a treaty made today as it was to a treaty made in 1867.

One hopeful sign is that the Privy Council did not go the whole way with the provincial argument. A. W. Roebuck, K.C., went so far as to say that a province has the right to advise the Crown in matters where its legislative powers apply; and that there is nothing in the B.N.A. Act which suggests that foreign affairs as affecting provincial jurisdiction have been committed to the Dominion Government. The Privy Council said that since the case was being decided on the question of legislative competence there was no necessity to deal with the executive power of the Dominion to make such treaties. The majority in the Supreme Court ruled that the executive power lay in the Dominion.[36]

The final case of the now famous trilogy is the *Labour Conventions* case.[37] This appeal came to the Privy Council from a judgment of the Supreme Court of Canada answering questions referred to the Court by the Governor-General in Council. The questions referred asked whether the Weekly Rest in Industrial Undertakings Act, 1935, the Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, were *ultra vires* of the Parliament of Canada. The statutes in question, which dealt with the matters denoted by their titles, were passed by the Dominion Parliament in implementation of conventions adopted by the International Labour Organization. These conventions had been ratified by the Dominion.

It was sought on behalf of the Dominion to justify the legislation on two grounds. Firstly, it was contended that, the consent of the two Houses of Parliament of Canada to ratification of the conventions having been obtained, paragraph 7 of Article 405 of the Treaty of Versailles placed the Government of Canada under an obligation to ratify the conventions and to take appropriate action "to make effective the provisions of such conventions" and, therefore, the legislation was legislation for performing the obligations of Canada arising under a treaty between the Empire and foreign countries within the purview of section 132 of the B.N.A. Act, 1867.

Secondly, it was contended that, even if the conventions did not involve treaty obligations within the purview of section 132, they were nevertheless treaties internationally binding upon

[36] The aspect of the Board's decision dealing with radio as a matter of national concern need not be considered here.

[37] [1937] A.C. 326; [1936] S.C.R. 461.

Canada as a whole and the Dominion Parliament was, accordingly, competent to enact the legislation under the conventions in virtue of its residuary power under section 91 of the B.N.A. Act to make laws for the peace, order and good government of Canada.

In brief, the decision of the Board rejecting the Dominion contention proceeded on the ground that the legislation could not be upheld:—

1. Under section 132 of the British North America Act, as being legislation "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":

> Firstly, because the obligations under the ratified conventions were not obligations of Canada "as part of the British Empire", but of Canada, by virtue of her new status as an international juristic person, and did not arise under a treaty between the British Empire and foreign countries; and,
>
> Secondly, because the obligation to perform the conventions did not arise under the Treaty of Versailles, nor at all, 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.

2. Under the general residuary power given by section 91 to the Dominion Parliament:

> Firstly, because that power did not give the Dominion Parliament exclusive authority to legislate for performing the obligations of Canada arising out of international engagements not in terms within section 132 nor within any of the enumerated classes of subjects in section 91; and
>
> Secondly, because the legislation was not concerned with matters of such general importance as to have attained "such dimensions as to affect the body politic", to have "ceased to be merely local or provincial" and to have "become matter of national concern."[38]

Lord Atkin at page 351 of the *Labour Conventions* case declined to take the view (which had been adopted by Duff C. J. and Davis and Kerwin JJ. in the Supreme Court of Canada) that the judgments of the Board in the *Aeronautics* case and the

[38] C. P. Plaxton: Canadian Constitutional Decisions of the Privy Council, 1930-39.

Radio case constrained them to hold that jurisdiction to legislate for the purpose of performing the obligations of a treaty resides exclusively in the Parliament of Canada. Lord Atkin said:

> Their Lordships cannot take this view of those decisions. The *Aeronautics* case concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Sect. 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 on 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. Part of the subject-matter of the convention, namely — broadcasting, might come under an enumerated class, but if so it was under a heading 'Interprovincial Telegraphs', expressly excluded from s. 92. Their Lordships are satisfied that neither case affords a warrant for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.

Lord Atkin laid down the principle that no further legislative competence is attained by the Dominion's accession to international status and the consequent increase in the scope of its executive function. As a treaty deals with a particular class of subject, so will the legislative power of performing it be ascertained.

"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." [39]

Canada's treaty-making power is further affected by the other aspect of the Board's decision. In expressing the view that the conventions were not treaties, Lord Atkin said:

> It is unnecessary, therefore, to dwell upon the distinction between legislative powers given to the Dominion to perform obligations imposed upon Canada as part of the Empire by an Imperial executive responsible to and controlled by the Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament.[40]

It may, therefore, be taken that section 132 includes only treaties entered into by His Majesty on the advice of his Imperial Ministers. We have already seen that there is no necessity for so holding. Treaties are made by His Majesty today as they were made in 1867, with the one exception that the convention regarding the source of advice has changed.

[39] [1937] A.C. 326, at. p 354.
[40] *Ibid*, at p. 349.

The decision of the Privy Council has this peculiar result: If Canada enters a treaty, the subject matter of which falls entirely within section 92, the nine provincial legislatures must pass the implementing legislation; if, however, the Dominion were to ask the British Government to enter into that treaty, section 132 would apply and the Dominion could enact the appropriate legislation.

The point has been raised that perhaps the *Labour Conventions* case applies only to conventions of the type considered there and not to treaties made between Heads of States. However, the language of the Privy Council is quite general in its terms and would seem to include all international agreements.[41]

The present constitutional position may be summed up in the following way: The power to perform treaties by way of changing Canada's domestic law is to be found, according to the decisions of the Privy Council, sometimes in the Dominion Parliament alone, sometimes in the Dominion Parliament and provincial legislatures and sometimes in the provincial legislatures alone.

There has been a strong reaction among students of the Canadian Constitution against the reasoning of the Board in these treaty cases. This adverse criticism has not been confined to the treaty cases but has extended to the whole series of decisions handed down by the Privy Council during the 1930's. The Federal Government power had already been cut down in many ways by restrictive judicial interpretation. But to carry that restrictive interpretation into the field of external relations can only result in a stultification of Canada's newly won sovereign status. As one author put it: "To carry into the field of external contractual relations the divisions of powers set out in sections 91 and 92 as to domestic matters seems to be of doubtful validity in point of law, suicidal in point of governmental efficiency, and to involve the frustration of Canada's achievements in political autonomy and international status."[42]

It should be remembered that in international law the State is bound, once the obligation is entered into. A foreign state is not bound to take cognizance of the internal checks and balances of the domestic law of the contracting parties regarding the performance of treaties. Canada, once it ratified a treaty, would be bound to take steps to implement it. The

[41] N. A. M. MacKenzie: Canada and the Treaty-Making Power (1937), 15 Can. Bar Rev. 436.

[42] Vincent C. MacDonald: The Canadian Constitution Seventy Years After (1937), 15 Can. Bar Rev. 401, at p. 419.

result is that Canada would be compelled to default on its treaty obligations if the subject matter of the international agreement happened to fall within section 92, and thus, according to the Privy Council, was beyond Dominion legislative competence. The Privy Council did make some reference to cooperation between the provinces and the Dominion. In the *Labour Conventions* case (pages 353–354) appears the following:

> 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.

As we have seen, this would necessitate the Dominion bringing the subject matter in question (if within section 92) to the attention of each of the nine provincial legislatures. Aside from the difficulty of obtaining agreement among ten legislative bodies, there is still the hurdle of constitutionality, *e.g.* the *Natural Products Marketing Act* reference where the Dominion's cornerstone act was held to be *ultra vires* although nine provinces had passed enabling legislation ([1937] A.C. 377).

Conclusion

The nations of the world are at present concerned with the ways and means of preventing future wars. It is now accepted that cooperation in the economic and social sphere is a prerequisite of peace. If there are to be any effective measures taken in international cooperation in the military and political fields, those measures must be based on a firm foundation of international collaboration in the economic and social fields. One of the principal organs of the United Nations, the Economic and Social Council, has been making the effort to achieve such cooperation.

Canada is expected to take her place in the organization with the leading nations of the world. Our position as the third largest exporting nation of the United Nations, our place in the British Commonwealth, our intimate knowledge of the use of atomic energy, our place in the United Nations as one of the leading Middle Powers and our large agricultural and industrial resources make it necessary for Canada to exert her influence on the side of international cooperation.

But Canada's internal law is not in keeping with her influence in the external world. At present we cannot feel certain that it would be constitutionally possible to carry out many of the commitments that may be made at international conferences.

It is clear that the Dominion has the power under specific heads of section 91 to deal with certain matters, *e.g.* currency, foreign exchange control and tariff adjustments. Further it has been held that the Dominion has jurisdiction over a subject that has lately received a great deal of attention from the Canadian and American Governments, namely the question of control of international cartels and combines.[43] It is fortunate that this power of regulation and control has been found to lie in the Dominion. There is little doubt that international co-operation of the most intimate kind will be necessary to destroy the invidious influence on freedom of trade of international combines. It is now clear that the Dominion has all necessary executive and legislative power to implement any international agreements seeking to destroy that influence.

In matters of taxation, however, the Dominion cannot make effective international agreements to avoid the effects of double taxation. In discussing the question of inheritance taxes the Sirois Report[44] points out that double taxation tends to impede the free flow of investment capital between other countries and Canada and that it can only be avoided by agreement between taxing authorities. The negotiation of such agreements by Canada cannot be completely effective since the agreements could not in all cases be implemented by Dominion legislation. Regarding the question of income tax, the Report has this to say (at page 112) :

> We should note in addition the extent to which the present divided jurisdiction, coupled with the inability of the Dominion to compel the Provinces to comply with treaties on subjects within provincial jurisdiction, weaken Canada's ability to enter into effective international agreements respecting income taxes, which have recently become of importance. One result of this may be inability of the Dominion to secure fair treatment for Canadians investing abroad, and another may be the discouragement of investment in Canada by foreigners.

In the broad field of social legislation the Dominion is effectively prevented from active international collaboration. The Federal Government cannot, for example, take any steps to attack unemployment internationally, since it has no power to implement agreements with other nations relating to minimum wages, maximum hours and weekly days of rest. It may be that the very peace treaties will be beyond Dominion competence. In so far as they relate to purely military matters,

[43] *Proprietary Articles Trade Association* v. *A.-G. for Canada*, [1931] A.C. 310, affirming [1929] S.C.R. 409.

[44] Report of the Royal Commission on Dominion-Provincial Relations (1939), Book II, p. 118.

there is no doubt that they will be within Dominion jurisdiction. But 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.

There has been a great deal of speculation over the reasons behind the Privy Council decisions. Critics, refusing to believe that the judgments have been determined on strict legal reasoning, have ascribed various motives to the Board. The learned law lords have been accused of deliberately strengthening the hands of the provinces in order to keep the central government weak; they have been accused of striving to maintain the prevalence of the doctrine of "laissez-faire" and of trying to maintain the imperialist notions of the nineteenth century. Other critics have pointed to the varying composition of the Board and have asked how such a fluctuating body could possibly give consistent decisions.[45] Expediency, rather than law, has been the basis of the judgments of the Privy Council, according to another author.[46]

In fairness to the Board it should be stated that some authors, holding that it is not the function of a court but of legislatures to adapt the constitution to changed circumstances, have maintained that all in all the decisions have been legally justifiable.[47] In any case, it seems clear that there is strong opinion in Canada in favour of amending the constitution so as to give the Dominion Government the power effectively to implement international obligations.[48]

[45] For a criticism of the varying composition of the Board see John D. Holmes: An Australian View of the Hours of Labour Case (1937), 15 Can. Bar Rev. 495.

[46] Symposium on Constitutional Cases (1937), 15 Can. Bar Rev. 393.

[47] A. Berriedale Keith: The Privy Council Decisions: A Comment From Great Britain (1937), 15 Can. Bar Rev. 428.

[48] Vincent C. MacDonald: The Canadian Constitution Seventy Years After (1937), 15 Can. Bar Rev. 401.