CREATION AND IMPLEMENTATION OF TREATIES IN CANADA*

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I. Introduction

The treatment of the topic of this article is based on the assumption that a modern state, unitary or federal, cannot effectively function in the international forum without possessing full capacity, in law and in fact, to create and to perform binding obligations. When performance necessitates implementation, as it does in Canada, the practical extent of a state’s capacity to contract will be determined, in large measure, by the internal constitutional rules relating to legislative jurisdiction. In a constitution that vests sovereignty not in one but in several legislative bodies, implementation of international agreements may become hardly feasible unless there is a provision specifically exempting created treaties from being subject to the general rules distributing legislative power. The Canadian Constitution possessed such a provision in the form of section 132 of the British North America Act, 1867, until judicial decisions divested it of all meaning and effect. With the exception of the introductory part, which deals mainly with the procedure of making treaties, this article serves a threefold purpose: (a) to discover the textual meaning of the terms used in section 132; (b) to describe the judicial interpretation of the section that led to the present state of the law; and, finally, (c) to analyze the proposition, which seems to flow from the decision of our Supreme Court in the Johannesson case,1 that the “Peace, Order and good Government” clause may be taken to replace section 132 as a basis for treaty implementation.

*This article is an abbreviated version of an essay that won the Law Faculty Prize at McGill University in 1955. Professor Hendry’s work entitled Treaties and Federal Constitutions (1955) was published after the completion of the article, which consequently contains no reference to it.

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From one aspect the problem tackled is so typically Canadian that it cannot be properly appreciated without an understanding of the basic conflicts and struggles permeating this country since the capitulation of the French regime. Even historical truth, however, may be out of place as a valid argument in a legal analysis. The writer believes that an important test of the efficacy of a national constitution is its degree of conformity to the contemporaneous international law and practice. A truly satisfactory solution, therefore, cannot be attained until a deliberate choice is made between the "right" to sectional self-assertion and the "duty" to partake consciously and completely in the creation of a world community.

It is suggested that this Canadian constitutional issue should be viewed in a large context and delimited by following rules of international law governing the creation and performance of treaties:

1. The validity of international instruments is determined by the rules of the law of nations; however, because the states are able to conclude agreements exclusively through the medium of their internal organs, these organs must be constitutionally competent when acting in the international forum on behalf of the states, and to that extent only can municipal laws affect the validity of treaties.2

2. The form of the conclusion of treaties has been evolved through the practice of states; but, again, the organs competent to negotiate, sign and ratify international compacts are designated by national constitutions.3

3. Power to make treaties is said to belong inherently to every state that is sovereign.4 Sovereignty, in this sense, means full capacity to contract with other states5 and is an incident of legal personality.

4. Through political development Canada has achieved full international personality and thus legal power to make treaties; internally, that power is vested in the Crown, which uses it as an organ of the Canadian state in accordance with the Constitution. It is the state, not the Crown, that is internationally bound by

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4 Cf. Oppenheim, op. cit., p. 882.
5 "External independence". See Oppenheim, op. cit., p. 286.
II. Creation of Treaties

In international law the distinction between creation and performance of an obligation is merely a convenient way of looking at two stages of the same event. But in national constitutions that require formal participation of the legislature when a treaty aims at the modification of the law of the land, this distinction becomes of fundamental importance. Power to make belongs to the executive, while power to perform internally (implement) rests with the legislature. In Canada all executive authority is exercised in the name of the Crown where, in law, it remains vested.\(^7\) The totality of power embraced by section 9 of the British North America Act may be divided into two main categories: first, rights exercised in the name of the Crown by the Queen’s constitutional advisers, whether of prerogative origin or given by statute; secondly, rights exercised by the Queen in person, whether alone or on the advice of her constitutional advisers. Most prerogative powers relating to the federal sphere of government may now be assumed by Parliament and given by way of a statute to the Governor General-in-Council; some of them, however, are transferred by the Crown by a specific delegation. Traditionally the ratification of treaties, as well as conferring honours, declaring war, peace or neutrality, belonged to the rights of the second category, that is, rights used by the Queen personally. Thus, strictly speaking, it would seem that, in the absence of either statutory delegation or specific delegation from the Crown, the government has no authority to act. In fact, this is not so. A considerable amount of national business is conducted on the basis of (what the courts call) executive power implied in the existence of correlative legislative power and necessary for effective governing.

By a dictum in *Musgrove v. Chun Teeong Toy*,\(^8\) Kerferd J. advanced a doctrine that “all prerogatives necessary for the safety and protection of the people, the administration of the law, and


\(^7\) Section 9 of the British North America Act, 1867, reads as follows: “The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen”. The “Canada” referred to in this section is the former provinces as united by and under the act.

\(^8\) (1897), 5 Cartwright Cases 556, at p. 606; reversed by the Privy Council, [1891] A.C. 272, on other grounds.
the conduct of public affairs under our system of responsible government, have passed as an incident to the grant of self-government (without which the grant would be of no effect). *A fortiori*, one may argue that with the grant of equal status the so-called "external prerogatives" should also be regarded as transferred to Canada. But Keith⁹ insisted that the Statute of Westminster had no such effect. O'Connor,¹⁰ on the other hand, strongly favoured the extension of the doctrine of *Musgrove v. Chun Teeong Toy*, stating that its partial rejection by Lord Haldane in the *Bonanza Creek* case¹¹ cannot be presently accepted as this case was decided before 1931. In fact, the exercise of important external prerogatives requires the use of the great seal or signets. Thus, so long as Canada possessed neither of these, the issue of full powers and instruments of ratification had to be sought from London. In 1939 the Seals Act¹² made a provision for Canadian royal seals to be used in Canadian matters. The Governor General was empowered, "subject to the approval of His Majesty the King", to "make orders and regulations relating to the royal seals". But the traditional procedure was retained and was to be followed in all cases, except in emergencies when royal consent could only be obtained *post factum*. It was merely a partial and conditional transfer of the royal prerogative, effective in extraordinary situations only. The Letters Patent of 1947, constituting the office of Governor General, present an entirely different matter. The wording of paragraph two is in part as follows: "And We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada . . .". The extent of this sweeping grant is still difficult to ascertain. It appears that the word "Canada" has been used in the same sense as in section 9 of the British North America Act,¹³ which would imply that this provision makes no distinction between the prerogatives necessary for the conduct of provincial affairs and those necessary for the conduct of national affairs. Furthermore, the emphasis on "all powers" seems to exclude any limitation on the Governor General's authority to ratify treaties. Probably Lord Atkin's hesitation in the *Labour Conven-


¹⁰ Report to the Honourable Speaker of the Senate by the Parliamentary Counsel (1939) p. 160.

¹¹ *Bonanza Creek Gold Mining Co. v. The King*, [1916] A.C. 566.


¹³ See supra footnote 7.
tions case\(^\text{14}\) to express an opinion on this subject can be already forgotten. If there still existed doubt as to the federal government's exclusive authority to make treaties irrespective of subject matter, this delegation of royal prerogative to the Governor General seems to have been intended to extinguish it once and for all. Consequently, the Governor General-in-Council possesses now exactly the same power, in scope and extent, to issue full powers and to ratify treaties as does the Queen; hence, the Canadian government is legally free to make international agreements involving matters that come within the legislative jurisdiction of the provinces. The Prime Minister, Mr. St. Laurent, described the effect of this delegation in the following words: "...This does not limit the King's prerogatives. Nor does it necessitate any change in the present practice under which certain matters are submitted by the Canadian Government to the King personally. However, when the letters patent come into force, it will be legally possible for the Governor General, on the advice of the Canadian ministers, to exercise any of these powers and authorities of the Crown in respect of Canada, without the necessity of a submission being made to His Majesty. The new powers and authorities conferred by this general clause include among others royal full powers for the signing of treaties, ratifications of treaties, and the issuance of letters of credence for ambassadors...."\(^{15}\)

Before Canada's acquisition of international personality, which in part resulted from its gradual emancipation in the conduct of external affairs, the executive action in relation to negotiation, signature and ratification of treaties was fundamentally in the hands of the British Foreign Office. Since the grant of self-government in 1847 until the First World War there have been several instances of direct Canadian participation in treaty making; but, in each case, a British diplomat alone had the ultimate right of signature, even when acting together with a Canadian representative.\(^{16}\) Canadian statesmen pressing for more independence were faced not only with the firm attitude of the Colonial Office but, also, with serious difficulties in foreign states that refused to recognize their position.\(^{17}\) Moreover, all these external activities\(^{18}\)

\(^{15}\) House of Commons Debates (1948) p. 1126.  
\(^{16}\) Keith, Responsible Government in the Dominions (1928), vol. 1, p. 7.  
\(^{17}\) E.g. Galt's attempt to make a treaty of reciprocity with Spain. See Noel Baker, \textit{supra} footnote 6.  
\(^{18}\) E.g. Macdonald's in 1871, Brown's in 1874, Tupper's in 1883 and 1893.
were in the realm of commercial interests; the British Foreign Office alone was qualified to make decisions in political matters affecting the whole of the Empire. In a reply to the proposals of colonial governments made at the Ottawa Conference in 1894, Lord Ripon, then Colonial Secretary, laid down the principles that were to govern relations until World War I: "(1) The colonies neither desired nor would it be possible to give them the treaty power, since that would result in the destruction of the Imperial unity; (2) separate treaties could properly be made with colonial cooperation for colonies which desired them; (3) in such treaties, colonies should not accept concessions from foreign powers which would be detrimental for other parts of the Empire". These principles gain proper perspective in the light of the statements made by Sir John A. Macdonald in London in 1897 asserting "the absolute necessity of direct negotiation with foreign powers for the proper protection of Canadian interests, a diplomatic position at the Court of St. James, and a recognized position among the corps diplomatique".

It is, thus, clear that treaties affecting Canada concluded before World War I were made by the Crown on the advice of the Imperial Ministry and were binding on Canada whether its government consented to them or not. The Crown acted, not as an internal organ of Canada, but as the legal executive authority of Great Britain, including her colonies and territories, which as a single unit was the person of international law. The obligations incurred by the Crown were, therefore, binding on Canada only as a part of the British Empire. As a result of its participation in World War I Canada was separately represented within the delegation of the British Empire at the Peace Conference of 1919 and separately signed the peace treaties. The period from 1919 to 1926 is interesting because during it for the first and only time in history the British Empire eo nomine was a party to several treaties. British and Canadian plenipotentiaries held full powers from the King and he ratified the agreements on behalf of the Empire. This novel procedure did not become a precedent and it is now obvious that it was merely an intermediate stage in the

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19 Keith, supra footnote 16, at p. 8.
20 Noel Baker, supra footnote 6, at p. 62.
23 The meaning of this term is discussed infra at p. 40.
24 For a full discussion of Sir Robert Borden's demands as to the form of signature and its results, see Noel Baker, supra footnote 6, pp. 69-82.
development. Much more significant was an independent act of Mr. Lapointe who in 1923 negotiated the Halibut Fisheries Treaty with the United States holding full powers from the Crown, and alone signed the agreement on behalf of Canada. This procedure was approved by the Imperial Conference of 1923 in the words: “Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the government of that part”. The same resolution stated also that during negotiation the “effect” on and the “interests” of the other parts of the Empire should be considered and, if necessary, the interested government should be kept informed. It was further resolved that inter-governmental agreements “usually of a technical or administrative character” are to be made in the names of the signatory governments without issue of full powers from the head of the state. The 1926 conference added the following rules: (a) all treaties should be made in the name of the King “as the symbol of the special relationship between the different parts of the Empire”; (b) full powers to sign the treaty are to be issued on the advice of the Dominion government concerned and not upon the advice of the Imperial government. There was no change in the procedure of ratification. It is clear that by the conventions adopted at the Imperial Conferences the central governments of the self-governing colonies were granted free and full exercise of the treaty power. When the principle of equality of status was legally consolidated in the enactment of the Statute of Westminster the governments “beyond the Seas” already possessed the practical means to use the authority still ultimately vested in the Crown. Consequently, the growth of Canadian external relations followed rapidly: from a “position without exact definition” Canada developed into a full international personality recognized by the existing states.

26 McNair, supra footnote 2, p. 69.
27 Ibid.
28 In A.-G. for Can. v. A.-G. for Ont., [1936] S.C.R. 461, Rinfret J. expressed the view that an international “obligation should not be created or entered into before provinces have given their consent thereto”. This statement is certainly a constitutional novelty, as none of the existing conventions contemplate the participation of the provincial organs in making treaties. The practice of consulting provincial authorities before the conclusion of an agreement when local or private interest is involved cannot be regarded as an established convention. Keith, Responsible Government in the Dominions (1928) Vol. 1, p. 579, deals with the constitutional usage adopted by the Dominion government “not to take advantage of section 132 to interfere with provincial matters”, but without the abandonment of the right to legislate under this power. Obviously, the convention, if in fact existing, refers solely to the performance of already created obligations.
Treaty power, in the legal sense, remains vested in the Queen. Constitutionally, she cannot use that power without "advice" from her British or Canadian ministers, as the case may be. Under the Letters Patent of 1947 the exercise of treaty power in respect of Canada has been delegated from the Queen to the Governor General-in-Council, although it appears that she still may use it personally; and the choice between these two sources of authority is left entirely to the Canadian government. The modern procedure of treaty making may be summarized in the following steps:

1. Appointment of plenipotentiaries. The nomination is contained in an order in council advising the Governor General to issue full powers to the named plenipotentiaries. The Governor General issues full powers under the Great Seal of Canada;
2. Negotiation of the treaty by the plenipotentiaries;
3. Signature of the treaty by the plenipotentiaries on behalf of Canada;
4. Ratification of the treaty. An order in council advises the Governor General to ratify the treaty on behalf of Canada by an instrument under the Great Seal of Canada. Ratification is deposited or exchanged in accordance with the stipulation.

In the case of an inter-governmental agreement, full powers and the instrument of ratification may be issued by the Secretary of State for External Affairs, when the matter is of minor importance, or by the Governor General. Hence, the only real distinction between treaties in the formal sense and inter-governmental agreements is that the former are made in the name of the Crown, while the latter mention the Canadian government only. It should be added that both treaties and inter-governmental agreements may be presented to Parliament for approval before ratification. This practice is always followed when the government contemplates the implementation of the instrument and also when the instrument contains stipulations concerning matters of policy important enough to warrant Parliament's consent. It may be useful to bear in mind that modern practice involves considerations which make the conclusion of treaties, in the narrow sense, a rather rare activity. Inter-governmental agreements, no longer merely "of a technical or administrative character", have taken the place of formal treaties between the heads of states. The creation of international obligations has been greatly simplified, but there are still serious difficulties over the problem of internal performance.
III. Performance of Treaty Obligations

1. Structure of section 132 of the British North America Act, 1867

A number of international agreements do not require legislative action towards municipal execution; they consist of matters which can properly be dealt with by the designated executive organ within its statutory powers. When, however, a treaty specifically commits the parties to domestic performance that cannot be effected otherwise than by a change in the existing national law, then it is the duty of the government concerned to take the appropriate action. Very much depends on the nature of the obligation itself; sometimes it amounts to no more than to "bring the convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action".\(^{29}\)

However, it is presumed that, once an agreement is ratified, the government is in a position to effectuate implementation of its terms. This is why governments frequently ask national legislatures to approve the treaty in question before it is ratified, thus avoiding the possibility of unnecessary embarrassment. National constitutions provide the means by which an international obligation is performed internally; two methods are most frequently used, treaties as law of the land and specific reception.\(^{30}\) The former method is adopted, for example, by the Constitution of the United States\(^{31}\) and, in part, by the French Constitution of 1946;\(^{32}\) the latter is a traditional doctrine of the British constitution laid down in *Walker v. Baird*\(^{33}\) and followed by the Supreme Court of Canada in *Arrow River & Tributaries Slide & Boom Co. v. Pigeon Timber Co.*\(^{34}\) It may be summarized as follows: international agreements signed and ratified do not become self-executory; they have no force of law in the national forum until their provisions are implemented by legislation.\(^{35}\)

The British North America Act, implying the principle just enunciated, assigned the power to perform treaty obligations to the government and Parliament of Canada. Section 132 is worded as follows: "The Parliament and Government of Canada shall

\(^{29}\) Constitution of International Labour Organization, art. 19, para. 5b.  
\(^{31}\) Article VI, s. 2.  
\(^{32}\) Article VI, s. 2.  
\(^{33}\) [1892] A.C. 491.  
\(^{34}\) [1932] S.C.R. 475. See also Lord Atkin in the *Labour Conventions* case, and McNair, *supra* footnote 2, pp. 7-8.  
\(^{35}\) But if a treaty is internationally binding on Canada and a Canadian court refuses to give effect to it because of the lack of municipal legislation, a duty to make reparation for any resulting breach of international obligation would obviously arise: *Chorzow Factory* (1934), 1 Hudson World Court Reports 589, at p. 602.
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". In the Quebec Resolutions, the term “Federated Provinces” is used in place of the words “Canada or of any Province thereof”; also, instead of the second “Empire”, the term “Great Britain” appears. In the London Resolutions, the text is the same as in the Quebec Resolutions, except that “Federated Provinces” is replaced by the word “Confederation”. The Confederation Debates provide no explanation for these changes, the existence of which, however, signifies that the matter had been discussed. Although the Parliamentary Debates, as a guide to the interpretation of the British North America Act, have been sufficiently discredited by the Privy Council, it seems proper to illustrate the purpose of section 132 by an excerpt from a speech made by Mr. Cardwell when the House of Commons debated the British North America bill:

... look at the disadvantage we incurred when we endeavored at Washington to negotiate a renewal of the reciprocity treaty. Every part of that treaty, if we had succeeded, must have been submitted to five parliaments before it could have received royal assent. In negotiating with the foreign powers, is it desirable that treaties should be ratified by one parliament or is it better that they should be subject to the accidents which they are liable in passing through the parliaments of five small countries? ... These considerations go far to prove the enormous advantage which such a scheme of consolidation as that proposed by the bill before the House is likely to confer on both the colonies and the Mother Country.

The object of section 132 is merely a specific embodiment of the more general object of the British North America Act itself: to create a central authority competent in law and in fact to deal effectively with all matters of general or national scope. The obvious consequence of such a purpose is the endowment of the central authority with powers which previously belonged or might have belonged to the local units, that is, provinces. It is logical to assume that the Fathers of Confederation regarded “obligations of Canada or of any Province thereof” as necessarily including matters of general or of national character, otherwise they

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36 Resolution 30.
37 Resolution 29.
38 House of Commons (Great Britain), Thursday, Feb. 28, 1867, pp. 20-21 (quoted in the brief presented to the Royal Commission on Dominion Provincial Relations by the League of Nations Society, Appendix 1, at p. 5).
would not have given authority to legislate in relation to them to the Parliament of Canada. "Obligations of Canada", as a class of subjects, was specifically exempted from the general scheme of the distribution of legislative authority and placed under the heading "Miscellaneous Provisions, General". This fact may be interpreted as indicating that matters coming within this class of subjects (that is, incorporated in a treaty) are of general or national interest, even if in another aspect their character is local or private. In other words, section 132 seems to have established a permanent "aspect" for all matters which become the subject of an international agreement. Thus, by implication, the government of Canada was given authority to decide conclusively whether a particular matter should be raised to the national scope; and the existence of a valid treaty would make it impossible for the courts to change its decision. O'Connor righty stated that the British North America Act does not distribute fields of law or matters but areas of legislative jurisdiction. A matter falling within a class of subjects enumerated in section 92 remains there only so long as its "aspect" is purely local, and authority to legislate in relation to that matter is exclusively provincial because the matter imports no other but a local interest and significance. Thus, a matter prima facie within provincial jurisdiction does not give rise to exclusive provincial legislative authority once it has become a subject of a treaty. The operation of section 132 is not comprehensive unless that section is given a construction overriding the limitation of federal authority by powers exclusively assigned to the provinces. Note the emphasis on "all Powers", which suggests a contrast with the opening words of section 91, where a portion of jurisdiction is carved out of the otherwise unlimited grant to make laws for "Peace, Order and good Government".

To name "Obligations of Canada" a "class of subjects" may seem inconsistent with the sense in which this term is used in sections 91 and 92. This is only an apparent and misleading inconsistency. Mundell suggests that a "matter" may be understood

40 Report to the Honourable Speaker of the Senate by the Parliamentary Counsel (1939) p. 25.
41 Holmes J. expressed the same idea in the words: "The subject matter is only transitorily within the state, and has no permanent habitat therein" (Missouri v. Holland (1920), 252 U.S. 416, at p. 435).
42 Tests for Validity of Legislation under the British North America Act, 1867 (1954), 32 Can. Bar Rev. 813. This article has been severely criticized (1955), 11 U. of Toronto L.J. 114, by Professor Bora Laskin. However, it is submitted that the useful description of a "matter" quoted from Mr. Mundell's article can be successfully isolated from the controversy between Professor Laskin and Mr. Mundell. See also Mundell (1955), 33 Can. Bar Rev. 915.
as "a field of practical human relations arising from or connected with some practical thing or activity or concept or idea". He uses the word "practical" in the sense of "real relations between physical persons engaged in physical activities". For example, "Property and Civil Rights" or "The Borrowing of Money on Public Credit" are termed "classes of subjects" because certain fields of "practical human relations" fall logically within them. Under "Property and Civil Rights" come all matters logically falling within that class, except those which, although logically belonging to that class, are specifically enumerated elsewhere (as all "heads" in sections 91 and 92 must be interpreted disjunctively and not conjunctively). Under "Obligations of Canada" come all matters logically falling within the scope of an existing treaty except those which have not attained national character. "Class of subjects" is merely a convenient heading for grouping various "matters", which however do not become "frozen" within it. Matters can and do overlap between the federal authority and the provinces: thus, it is impossible to delimit the scope of each jurisdiction in abstracto. In the final analysis, it is the specific nature or "aspect" of a matter that places a field of law either within federal or provincial jurisdiction. "Legislative jurisdiction", an abstract concept, is the capacity to make laws in relation to matters. Exclusivity, provided by the British North America Act, attaches to jurisdiction and not to matters: hence, in practice, neither the federal authority nor the provinces are a priori forbidden to legislate in relation to any particular matter until the courts assign the matter under a specific class of subjects or under the "Peace, Order and good Government" clause. The nature of each "class of subjects" provides merely a prima facie answer, and the validity of each unchallenged law is, so to speak, provisional. It is submitted that the resulting uncertainty, unavoidable in a strictly federal constitution, was intended to be permanently eliminated by placing the power to implement treaties outside sections 91 and 92.

The jurisdiction under section 132 must be regarded as exclusive in the sense that only Parliament can legislate in relation to matters of national character and importance; but, in the absence of a treaty, the provinces are free to regulate matters which prima facie fall within any of the enumerated heads in section 92. It should be noted that the aspect rule does not operate like an amendment; it does not take away from the provinces an area of legislative authority exclusively assigned to them under section
92. When a matter prima facie within the provincial jurisdiction is declared to be of national character, Parliament does not gain additional jurisdiction other than that which it possessed \textit{ab origine} to make laws for "Peace, Order and good Government".

The words used in section 132 present some difficulty—it is basically a difficulty of time. Though semantics is outside the scope of this article, one observation, commonly accepted, is worth enunciating: the meanings of words are not static, they change; moreover, some meanings become obsolete while the words to which they were attached remain and confuse. "Meaning" can be described as a conventional relationship between the facts and the term which purports to depict them. So long as the factual situation remains more or less the same, the conventional relationship is not disturbed and the meaning is rather easy to discover. When, however, a drastic change in facts occurs, the meaning of terms becomes blurred and an involved interpretation is required, which often compels one to "torture" the language. It is not suggested that this is exactly the case with the provisions of section 132, although the courts have clearly stated that "it is impossible to strain the section so as to cover the unanticipated events".\footnote{Lord Atkin in the \textit{Labour Conventions} case, \textit{supra} footnote 14, at p. 350.}

The crucial phrases in section 132 are: "as Part of the British Empire" and "Treaties between the Empire and such Foreign Countries". The most probable meaning of these words as of 1867 may be explained as follows. The term "treaty" is, undoubtedly, used in the narrow sense designating (in accordance with the British practice) an international agreement made between the heads of states. Thus, the terms "Empire" and "Foreign Countries" are merely descriptive as, in law, the parties to the type of treaty in question are the formal head of a foreign power and the Crown.\footnote{But it must be remembered that the treaty is binding on the states only and not on the parties which are merely acting on behalf of the states.} In this descriptive sense the term "British Empire" means Great Britain, embracing all her possessions, which alone was the person of international law; the Crown, becoming party to a treaty, acted as the constitutional organ of that entire disjoined state of which Canada was a part. Nettl\footnote{The Treaty Enforcement Power in Federal Constitutions (1950), 28 \textit{Can. Bar Rev.} 1051, at p. 1054.} conveys the same idea when he suggests that "agreements made under the authority of the Governor General and the Dominion Government" are not "Empire" treaties. Such "authority" was inexistant until Canada
achieved a measure of international capacity. It goes without saying that the term "Foreign Countries" does not include Great Britain. The phrase "obligations of Canada or any Province thereof" must be understood in the light of the existing limitations on the conduct of foreign relations. Since a form of responsible government was established the North American colonies began to exercise some measure of responsibility in foreign commitments mainly of a commercial nature. Treaties affecting a colony by way of statutory implementation, but dealing with matters which were under the exclusive control of the Imperial government, involved obligations of Great Britain and not of the colony. "Canadian" or "provincial" obligations could only arise under a treaty made by the Imperial government but relating to matters which were at a given time within the responsibility of the colonial government. The provisions of section 132 were to serve the implementation of such obligations, while the Imperial Parliament alone was empowered to legislate freely for Canada in relation to "British" or "Imperial" obligations until the Statute of Westminster.

It is clear from this evaluation that section 132, as it was intended and understood in 1867, would have today a very restricted scope of operation, which however was perfectly consistent (in 1867) with the political facts and Canada's status as a colony. By the provisions of this section the aim to give the central government power to implement treaties was carried out so far as human foresight permitted. Law is only good so long as it remedies real factual situations; once they change the need for new interpretation or amendment arises. It is very difficult to draw a conclusive line between "broad interpretation", which the courts are sometimes willing to apply, and "strained interpretation", which the courts will refuse to apply, stating that only the legislature can modify the law. Was it merely a broad interpretation when the word "Senator" in section 23 of the British North America Act was held to include a woman? Was it a clear danger of "strained interpretation" which prevented their lordships from holding that "treaty" includes an intergovernmental agreement?

In their attempt to reconcile new facts with a letter of the law slowly becoming meaningless, the courts, depending on the definition of a given agreement either as a "British Empire Treaty" or not as a "British Empire Treaty", adopted an entirely different standard.

2. Operation of section 132 of the British North America Act

Section 132 provides in express words that the performance of treaty obligations belongs to the "Parliament and Government of Canada". The quoted words suggest that reference is made here to legislative as well as executive action; obviously some treaties may not require implementation. So long as foreign affairs in respect of Canada were effectively conducted by the Imperial government, the language of section 132 presented little doubt. Courts in dealing with cases of conflict between provincial laws and federal statutes implementing provisions of Imperial treaties saved themselves the trouble of intricate interpretation. The issue before them was not whether an international agreement is such as to fall within the meaning of a treaty as this term is used in section 132; nor was it whether Parliament possesses the power to legislate in relation to the obligation created by the agreement. In most cases the sole question was the existence of conflict: Is the provincial law contrary to the federal statute? Once the conflict was established, the provincial law was automatically invalid. Existence of federal law based on a treaty in a field falling within the jurisdiction of the provinces was not understood as a bar to valid provincial legislation in relation to that field, so long as the latter did not conflict with the former.48

The decision of the Judicial Committee in the Aeronautics case49 offers an exception. In his closing remarks Lord Sankey stated: "Their Lordships are influenced by the fact that the subject of aerial navigation and the fulfilment of Canadian obligations under section 132 are matters of national interest and importance...".50 It is worth noting that for the first time the legislative authority of the Parliament, under section 132, was held to be exclusive. The effect of Lord Sankey's ruling would seem to be that, even in the absence of Dominion regulation, the provinces have no right to occupy the field. The fact that their lordships regarded the implementation of treaties as involving ipso facto

48 Regina v. Wing Chong (1893-94), 1 B.C.R. 150; In re Nakane and Ozaka (1908), 13 B.C.R. 370; A.-G. of B.C. v. A.-G. of Can., [1924] A.C. 203. Said Lord Haldane: "the provincial statute violated the principle laid down in the Dominion Act of 1913 implementing the Japanese Treaty"; thus its provisions, in so far as they interfered with the enjoyment of the personal freedoms of the Japanese subjects, were ultra vires. This decision is a clear example of the overriding operation of section 132: a law in relation to a matter falling squarely under section 92 was contrary to another law passed exclusively under the authority of section 132, and thus was invalid.

50 Ibid., at p. 77.
legislation in relation to matters of national character is, it is submitted, perfectly consistent with the structure of section 132 and its meaning in conjunction with other parts of the British North America Act. All provisions of the act ought to be viewed in the context of its real object, which is "to give the central authority those high functions by which uniformity might be secured on all questions which are of common concern to all the Provinces as members of a constituent whole".\textsuperscript{51}

So far as is known no federal law was ever held ultra vires once the court was satisfied that it implemented an "Empire" treaty. Often, as is evident from early cases, the "satisfaction" was reached without close examination of the facts; the courts simply assumed that the treaty involved was an "Empire" treaty. Although doubts have been expressed\textsuperscript{52} as to the scope of the federal power under section 132, it cannot be seriously disputed that the provisions of that section override the general scheme of the distribution of legislative authority and, in effect, endow Parliament with authority which, in the absence of a treaty, it does not possess. The cases clearly establish that there is no limitation on the subject matter of Parliament's jurisdiction to implement "obligations of Canada".\textsuperscript{53}

Since the Treaty of Versailles the procedure of treaty making has altered. This was mainly due to the inadequacy of the existing practices, which were clearly inconsistent with the new independent status of Canada. Membership in the League of Nations and participation in the activities of international bodies created under the Versailles peace treaty presented the government of this country with the problem of reconciling the principles of federalism with the effective fulfilment of international engagements. The shadow of the Imperial Parliament's supremacy and the firmness of the Imperial government's control over foreign affairs prevented this question, or rather its political aspect, from arising before, although, if it existed at all, it must have been inherent in the constitution since 1867. But the effect of section 132.

\textsuperscript{51} Ibid., at pp. 70-71.

\textsuperscript{52} Duff J. in \textit{In re Employment of Aliens} (1922), 63 S.C.R. 293, at p. 330, leaned towards the view that section 132 is limited to "subjects of imperial or national concern as distinguished from matters of strictly Dominion concern only". However, treaties designated to operate solely within the Canadian boundaries and made exclusively for Canada were held to be Imperial. Furthermore, "obligations of Canada" necessarily involve matters of Canadian concern and responsibility and the concern is even accentuated by the decision to transform an international undertaking into domestic law.

\textsuperscript{53} For a careful review of early cases on the subject, see Daggett, \textit{Treaty Legislation in Canada} (1938), 16 Can. Bar Rev. 159.
was not questioned and its necessity not doubted in any large measure until the responsibility of the Canadian government extended over its external acts. As the "Canadian ship of State" entered new waters, serious defects were suddenly discovered in her basic structure, which prevented smooth sailing.

In 1934 out of forty-four draft conventions adopted by the International Labour Organization, of which Canada was a member, only four were implemented in Canada. This was primarily due to the complete ineffectiveness of the internal procedure chosen by the Canadian government. A signed agreement was referred to the Minister of Justice for his opinion as to the competence of Parliament or of the legislatures; then, the minister's opinion was approved by the Privy Council and, in accordance with it, the draft proposals were presented (in the usual official manner) before the designated legislative bodies. Finally, the secretariat of the International Labour Organization was notified that the obligation had been fulfilled. Since the agreement in question remained unratified, it was not binding, and the legislatures could freely ignore it without breaching any international commitment. Jenks attempted to prove that this internal procedure was not available to Canada under Part XIII of the Versailles Treaty and that Canada's obligation to consider ratification was not fulfilled by following it. Whether this be true or not depends largely on the interpretation of the charter of the International Labour Organization. For present purposes, however, a more significant fact is that the government did not depend on the provisions of section 132. Ratification might have given Parliament full authority to legislate in relation to the draft conventions, while, in the absence of ratification, the subject matter of the conventions fell within the property and civil rights clause.

The Supreme Court of Canada was unanimous in its opinion on the reference, but, as Jenks pointed out, it was not asked the only proper and direct question: Is the Parliament competent under section 132, or any other provision in the British North America Act, to give internal effect to the draft conventions? As a result, therefore, this decision throws little light on the operation of section 132 and on the power to implement international obligations in general.

64 The Constitutional Capacity of Canada to Give Effect to International Labour Conventions (1934), 16 J. Comp. Leg. & Int'l L. 201, and (1935), 17 ibid. 12.
66 Jenks (1934), 16 J. Comp. Leg. & Int'l L. at p. 212.
In 1927 Canada participated in the negotiation of the International Radiotelegraph Convention, which was signed in the same year and later ratified by the Secretary of State for External Affairs. Plenipotentiaries were appointed by a Canadian order in council. It was a “Canadian treaty” *par excellence* and its implementation—the Radiotelegraph Act—came under scrutiny of the Judicial Committee in 1932. Viscount Dunedin, delivering the decision, started out with an observation that the *Aeronautics* case was decided primarily on section 132; in other words, that the convention then in question was such as to fall within the meaning of the words of that section. Turning to the Radiotelegraph Convention, he noticed that the manner in which it was concluded was entirely different, and, therefore, it could hardly be regarded as an Empire treaty. It could not be expected, he continued, that the British North America Act should have express words to describe such a convention. But this fact could not conclusively eliminate the power of Parliament to legislate in relation to matters contained in the convention. Since the control and regulation of radio communication is mentioned neither in section 91 nor 92, it must necessarily fall under the “Peace, Order and good Government” clause; thus, the convention, although not an Empire treaty, “comes to the same thing”. The reasoning of Viscount Dunedin did not, however, end there. “Their Lordships draw special attention to the provisions of section 92: ‘Undertakings and works connecting one province with another or extending beyond the limits of one province such as railways, canals, telegraphs etc’.” Broadcasting can be properly regarded as falling within the meaning of the term “telegraphs”.

It is interesting to note that this decision, before the *Labour Conventions* case, which overruled the part relating to the residualy clause, was looked on very favourably by those who wanted to see the opening words of section 91 restored to their textual value. The effect of this ruling on section 132 seems to have been somewhat neglected. Whatever meaning we ascribe to the words “it comes to the same thing”, one thing is certain: the Radiotelegraph Convention was held to be not an “Empire” treaty, and conversely the operation of section 132 was drastically diminished. It is one thing to give proper construction to the “Peace, Order and good Government” clause and another to take away a power originally distinct from the main scheme of

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distribution and intended to override the provisions of sections 91 and 92.

In fact, the *Labour Conventions* case introduced nothing new in so far as the interpretation of section 132 is concerned. It merely confirmed its obsolescence with regard to Canadian treaties. Ratification of an agreement will not endow Parliament with authority when the agreement is clearly not an Empire treaty. To that extent, states Jackett, "there can be no quarrel with that decision" once we accept the holding in the *Radio* case as to the limited scope of section 132. Jenks submitted that the labour conventions were not, in strict law, concluded independently by Canada, and that the obligation to apply them arises out of a treaty between the Empire and foreign countries. Clearly, the obligation under part XIII of the Versailles peace treaty to attempt ratification in good faith was not in issue and should be distinguished from the obligations imposed by the labour conventions themselves. Furthermore, the treaty was ratified by the Crown on behalf of the Empire and the conventions were concluded independently of it and ratified by the appropriate ministers of the governments concerned. Said Lord Atkin: "No obligation to legislate in respect of any of the matters in question arose until the Canadian executive, left with unfettered discretion, of their own volition acceded to the conventions, a 'novus actus' not determined by the treaty".

That a "convention is not a treaty was clearly established by the decision in the *Radio* case, and their Lordships do not think that the proposition admits any doubt". The word "convention"
was clearly used here to designate an intergovernmental agreement. Would a formal "Canadian treaty" still fall within the provisions of section 132? The cases supply no definition of an "Empire" treaty. Before the Radio case, all agreements which came up before the courts were of the formal type, ratified by the Crown personally. The procedure along which they were concluded varied considerably; and it does not seem sufficient to base a description of a treaty, within the meaning of section 132, merely on the method of conclusion. In the Radio case and in the Labour Conventions case, their lordships were faced with typical intergovernmental agreements; thus, one might argue that section 132 may still serve its purpose provided that the implemented agreement is a treaty *sensu stricto* with the Crown as a named party. It seems, however, that such a contention cannot be maintained. Lord Atkin's emphasis on words like "discretion", "volition" and "responsibility" of the Canadian government leads to the following evaluation.

In the matter of treaties, the independence and the new international status of Canada manifested themselves internally by the fact that the Crown accepted the advice of the Canadian ministers and chose to act upon it. This was the beginning of what Professor Scott calls the "nationalization of the Crown". In those formal functions leading to the conclusion of an international agreement, the responsibility for the advice to the Crown (to become a party and to ratify) rested exclusively on the ministry which gave the advice. This responsibility was not internationally unimportant, because, according to international law, it is the state and not the Crown which will be bound by the concluded treaty; hence, depending on whose advice the Crown took, we can determine the person obligated by the agreement—either Canada or the United Kingdom. Moreover, the responsibility for each advice to the Crown carries with it the intention to proceed to the conclusion of the proposed agreement. Thus, the existence and the nature of this responsibility (coupled with intention) are facts fully relevant to the international forum and productive of legal effects. Their lordships, recognizing these considerations, must have presumed that, no matter what procedure is adopted, a treaty cannot be Imperial when the entire responsibility for its conclusion is in fact vested in a government which had never been and is not presently competent to advise the Crown.

more logical to hold obiter the entire reasoning of Viscount Denedin before his mention of section 92-10.
in matters pertaining to the Empire. The interpretation of section 132 broke down not on the word “treaty” but on “Empire”. The Privy Council was unable to accept the proposition that a former colonial government could assume responsibility which in the international forum is regarded as belonging exclusively to the government of the United Kingdom. Hence, it held that the word “treaty” does not include an intergovernmental agreement or a treaty (in the narrow sense) which was concluded by the Crown on the advice of ministers other than those of the United Kingdom government. The distinction was made in accordance with international rather than constitutional law. An Empire treaty is, therefore, an international agreement between the heads of states ratified by the Crown on the advice of its United Kingdom ministers and intended to apply to one or more of the states formerly or presently under the authority of the United Kingdom Parliament and government.

If this definition is correct, then section 132 of the British North America Act is for all practical purposes obsolete. Some writers, however, seem to be supporting the view that the authority of the Labour Conventions case is limited to intergovernmental agreements and that formal treaties, ratified by the Crown on the advice of its Canadian ministers, and containing matters inherently of national character, may still be implemented under section 132. This opinion, even if it could be accepted, affords little consolation. Modern treaties tend to take the form of multilateral intergovernmental agreements, which today fulfil the same legal function as did old-fashioned treaties between the heads of states. The power to implement these new instruments is inseparable from the power to perform formal treaties. This fact was fully realized by the United States Supreme Court, but unfortunately it escaped the notice of their lordships. As a result of the obsolete character of section 132, the validity of federal legislation implementing international agreements can only depend upon sections 91 and 92 of the British North America Act.

IV. “Peace, Order and good Government” as the Basis of Treaty Implementation

Already in 1932 and in 1937 counsel pleading on behalf of the

Attorney General of Canada attempted to support their arguments by the “Peace, Order and good Government” clause. After the Labour Conventions case, the residuary power stands out as the sole basis for federal treaty legislation in relation to matters which do not fall within any of the enumerated classes of subjects in section 91 and, at the same time, seem to belong prima facie to provincial jurisdiction under section 92. Depending on the construction given to the opening words of section 91, the federal government enjoys either greater or lesser freedom to engage Canada in foreign commitments. The operation of the “Peace, Order and good Government” clause, as it appears from the text of the British North America Act, may be summarized in the following main points:

1. The distribution of legislative authority as between the Dominion and the provinces is exhaustive. Provincial jurisdiction is produced by a subtraction from the totality. Hence, federal jurisdiction is wholly residuary, the enumeration in section 91 being merely declaratory of the instances of the residuum.

2. The exclusiveness of provincial power to make laws “of local or private Nature in the Province” is expressly enacted in section 92; it inevitably follows that the federal residue of power is exclusive as well. This fact is implied in the use of the word “extends” in section 91.

3. The purpose of the enumeration in section 91 is to name specific classes of subjects embracing not merely matters of national importance but also subjects of local or provincial character which logically fall within these classes. The remaining unspecified part of the residuary power must necessarily contain matters in their national or general aspects.

4. The “paramountcy” of section 91 over section 92 is established by the enacting words and the non obstante clause in section 91. Thus, a law in relation to a matter falling within any of the enumerated heads in section 91, and a law in relation to a matter of national scope or character within the “Peace, Order and good Government” clause can “incidentally” and “necessarily” affect any matter within section 92 and will exclude a conflicting provincial law.

67 “It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, 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....”

68 Cf. Report to the Honourable Speaker of the Senate, by the Parliamentary Counsel (1939) pp. 52-63 (Annex I).
The important practical distinction between the specified heads and the remaining part of the residuum is that, when a matter falls within any of the enumerated classes of subjects, the ascertainedment of its "aspect" is unnecessary; whereas, to fall under the "Peace, Order and good Government" clause, a matter must be of national interest, or else it will be embraced by the local residuum (section 92-16). Therefore, depending on the standard used in classifying a matter either as national or as local, the operation of the unspecified residuum will increase or diminish.

The interpretation of the opening words of section 91 by the Judicial Committee of the Privy Council is well known. In Tennant v. Union Bank,69 Lord Watson restricted the paramountcy of the unspecified residuum; and later, in the Local Prohibition case,70 he declared that the "Peace, Order and good Government" clause is merely a supplement to the enumeration and that the federal jurisdiction in virtue of that power is not exclusive and thus cannot trench or affect matters coming within the classes of subjects in section 92. These holdings as to the construction of the residuary power paved the way for Lord Haldane to develop the "emergency doctrine". By it, all other tests which might be applied to determine the "aspect" of a given matter were eliminated in favour of "special circumstances such as war or national disasters equal to war".71 The dictum of Viscount Sankey in the Aeronautics case as to the portion of the federal act not found in the treaty and not vested in the Parliament by the specific words of section 91, and Viscount Dunedin's famous words, "it comes to the same thing", uttered in the Radio case, indicated a temporary deviation of the Board from the "emergency doctrine", which however was quickly revived by Lord Atkin in the Labour Conventions case. It was not until 1946 that the Privy Council delivered a judgment fully consistent with the text of the British North America Act and with its own decision in the Russell case.72 Said Viscount Simon in the Canada Temperance Federation case:73

... the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the

72 (1881-2), 7 App. Cas. 829.
Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. . . . An emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.

But, even if we accept Viscount Simon's "true test", the difficulties are not eliminated. The choice of the measure as to when a "matter is such as to go beyond local or provincial concern" remains entirely within the judicial discretion. Hence, the resultant uncertainty of the validity of legislation based solely on the unspecified residuary power is inevitable.

Assuming the construction of the residuary power is as given by Lord Simon in the Canada Temperance Federation case, there are two circumstances in which the "Peace, Order and good Government" clause may be a source of legislative authority for the Parliament implementing a treaty: first, when the subject matter of the enabling legislation falls within none of the enumerated heads in sections 91 and 92; secondly, when the subject matter of the legislation falls prima facie within section 92, but in another aspect is of national importance. The Aeronautics case and the Radio case may be cited as examples of the first circumstances. But the Labour Conventions case overruled the words of Lord Sankey on residuary power and the clear reasoning of Viscount Dunedin met a similar fate. Viscount Dunedin (delivering the decision in the Radio case) attempted to say that because the control of radio communication does not fall either under section 91 or 92 (and it is a matter of national importance), it must fall under the "Peace, Order and good Government" clause. Hence, although a convention is not a treaty, it comes to the same thing, as Parliament possesses power to legislate anyway. But he was interpreted to say that, because the pith and substance of the Radiotelegraph Act comes within the term "telegraphs", Parliament enjoys undoubted authority to legislate and thus, although a convention is not a treaty, it comes to the same thing.

The Labour Conventions case might have become an example of the second circumstances had Lord Atkin been willing to apply the aspect rule. Instead he chose to return to the previously established interpretation, saying that: "The Dominion could not initiate legislation, however desirable, which affected civil rights in

74 This does not eliminate the necessity to determine the aspect of the matter, because, if it is clearly local or provincial, it will fall under section 92-16.
the Provinces". But the British North America Act does not forbid any “trenching” or “affecting”; on the contrary, it contemplates this possibility, which in practice is often unavoidable. The ascertainment of the pith and substance of a given piece of legislation, which places it “in relation” to a class of subjects, does not finally determine whether the jurisdiction is federal or provincial. The ascertained matter must be classified in accordance with the aspect rule either as “local or provincial” or as “national”. Jackett writes that “this problem must be solved by the judicial sense”, and he continues, “a matter extending over more than one province (geographically) is definitely of national character. The problem arises when the court has to decide whether Parliament is making law in relation to one matter of national character or in relation to several matters each local or private in one of the provinces.” Prima facie, the objects of the Weekly Rest Act, Minimum Wage Act and Limitation of Hours of Work Act were clearly within the “Property and Civil Rights” clause. Lord Atkin quickly arrived at this conclusion and stopped his reasoning there, without asking himself the final question whether or not, in another aspect, the objects of these acts are of national character and, if so, if the authority to enact them should not belong to Parliament under the opening words of section 91.

Since the Labour Conventions case the construction and function given to the residuary clause by the Judicial Committee have been seriously modified by two decisions, which permitted Jackett to write that: “this statement [that is, Lord Atkin’s to the effect that the “matter” of the legislation implementing a treaty cannot become national once it falls prima facie within one of the enumerated subjects of section 92] is ‘obiter’ and, if not erroneous, is at least misleading”. Lord Simon’s ruling in the Canada Temperance Federation case arrived at an opportune moment and considerably encouraged the Supreme Court to pass a unanimous judgment in the Johannesson case. Here, the issue arose out of the conflict between the Municipal Act of Manitoba, prohibiting the establishment of aerodromes within municipali-

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75 Labour Conventions case, supra footnote 14, at p. 352.
77 See, supra, p. 50.
78 Canada Temperance Federation case, supra, p. 50, and the Johannesson case, infra.
79 Supra footnote 76, at p. 175, fn. 71.
ties, and the federal Aeronautics Act, which alone was to control aerial navigation in Canada. The Municipality of West St. Paul argued that the validity of the federal act depended solely on the existence of an Empire treaty, that is, the Aeronautics Convention, and once the convention had been denounced (in 1947) and its place taken by a typically Canadian treaty, the Chicago Convention, aerial navigation ceased to be a matter exclusively within Parliament's jurisdiction under section 132. The Supreme Court, however, maintained the exclusive nature of federal jurisdiction on the ground that "aeronautics is a class of subjects which attained such dimensions as to affect the body politic of the Dominion". Thus, authority over it is vested in Parliament by the opening words of section 91. Rinfret C. J. repeated the words, "it comes to the same thing", in a context which would suggest the confirmation of those reasons given in the Radio case which were specifically set aside as obiter by Lord Atkin. All the judges gave various examples to suggest that the subject matter of federal legislation was truly of national character and stressed the fact that aeronautics did not fall within any of the enumerated heads in section 92. All the judges, also, relying exclusively on the "Peace, Order and good Government" clause, accepted by implication the limited construction of section 132, and there was no attempt to reconsider the meaning of the term "Empire" treaty. In one respect, one can notice a rather striking parallel: the court presumed without scrupulous examination of the facts that the agreement in question was a Canadian treaty, just as some forty years ago it would have taken for granted that it was an Empire treaty. The Johannesson case may be called an improved replica of the Radio case: reference to any of the enumerated heads in section 91 was wisely omitted. But it must be remembered that the court was considering here an act which had already been held valid and that the authority of the case does not necessarily extend beyond the narrow rule of law enunciated by the judges.

As the law stands today, in all instances of Canadian treaties, the decision of the federal government to implement must be made in the light of the general scheme of distribution of legislative power. If the subject matter of a treaty falls clearly within one of the enumerated heads of section 91, Parliament has undoubted authority to legislate in relation to it. If the matter falls neither under section 91 nor 92, and is of national importance, Parliament can legislate under the "Peace, Order and good Government"

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81 Ibid., per Kerwin J. at p. 308.
82 See, supra, p. 45.
clause. If it falls prima facie within one of the enumerated classes of subjects in section 92, Parliament may still have authority to legislate either by reason of the “deeming clause” in section 91 or because the given matter has “attained such dimensions as to affect the body politic” of Canada as a whole. If, however, the matter has been expressly assigned by the courts to a class of subjects enumerated in section 92, or if it is clearly “local or private in the Province”, then jurisdiction is vested in the legislatures of the provinces and Ottawa can merely ask them to consider implementation.

The undesirability of the present constitutional position, from the international point of view, needs no elaboration. Canadian participation in international engagements cannot be determined on the merits alone, since a politically unwise step might provoke serious embarrassment. To undertake an obligation knowing that its performance is either impossible or at least highly uncertain may be properly regarded in the international forum as an act of bad faith. Prior consultations with the provinces and joint concurrent legislative action by all legislatures are no easier now than they were in 1867, when it was realized that “a scheme of consolidation [would be] of enormous advantage”. As a result, the capacity of the Canadian government to bind Canada towards other states, although unlimited in law, is in fact considerably impeded.

From the constitutional point of view the present state of the law is just as unsatisfactory. Legal difficulties involved in the interpretation of sections 91 and 92 are a practical obstruction to the effective handling of current business in the Department of External Affairs. The uncertainty, which perhaps cannot be totally eliminated in a federal system with judicial review, is presently unnaturally increased by the impossibility of ascertaining

83 The truth of the last contention seems to be still uncertain. The authority of the Labour Conventions case speaks against it; the decision in the Canada Temperance Federation case would appear to support it; the Johannesson case lacks authority, as all judges insisted that the control of aeronautics does not even prima facie fall under section 92.

84 The closing paragraph of a memorandum issued by the government of Canada on July 21st, 1952, upon request of the Secretary-General of the United Nations reads as follows: “To avoid the difficulty which might arise if provincial legislation, required for the fulfilment of an international obligation, were refused, prior consultations are had and agreements reached with the Provinces before Canada enters into international agreements. This makes it difficult for Canada to enter into some international conventions such as the proposed Covenants on Human Rights and Fundamental Freedoms without the inclusion of a federal state clause.”

85 As a protection against the inability to perform, so called “federal state” clauses are inserted in many treaties: see Liang, Federal Clauses in United Nations Multilateral Instruments (1951), 45 Am. J. Int’l L. 108.
the real extent of the limitation on federal legislative power to implement international agreements. In the final analysis, the problem turns on the standards used by the courts in distinguishing national or general concern from provincial or local concern. Between war and disaster equal to war, on one side, and pure convenience and expediency, on the other, there exists a range of measures to choose from. Both Jackett and Varcoe indicate the present significance of national security and contend that Parliament would have to have power to implement a treaty essential to the security of Canada requiring, for example, "a special treatment of state X's citizens in Canada in relation to the holding of property or the capacity to enter into contracts." Defence has established itself as a more or less permanent feature of modern government. Under the guise of it many federal activities have been extended over areas constitutionally reserved to local or private regulation. The importance of security measures, however, and hence their justification, depend on the international political climate. It is difficult to see, therefore, how a degree of military and economic preparedness which may vary from time to time can become a reliable test for the validity of national legislation; unless, of course, the objective of national security is understood in its wide and liberal sense and pursued through social, economic and scientific progress.

But, even in such a case, the courts will not be able to give to the residuary clause a permanent construction which would allow Parliament to affect provincial fields of jurisdiction seriously while legislating for the "Peace, Order and good Government" of the whole of Canada. The unspecified residue cannot properly serve as the basis for the implementation of treaties. It is too wide a provision and will, consequently, always be interpreted restrictively. Moreover, it can hardly be expected that a standard permitting a conclusive distinction to be drawn between a national and a local aspect will ever be developed. The Temperance Federation and the Johannesson cases do not constitute a general authority on this point, but merely state that the specific issues there involved should be decided by the application of a wide and lib-

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88 Jackett, supra footnote 86, at p. 175, fn 71.
eral construction of the "Peace, Order and good Government" clause. Even if such an interpretation finally prevailed, the courts would retain the right to review it in each new case before them and, if they saw fit, to substitute a different standard. Uncertainty would continue and uncertainty, it is submitted, cannot be afforded when decisions and actions of the executive affecting the international forum are involved. Furthermore, many of the subjects which now fall within the exclusive jurisdiction of the provinces may in the near future become of such international concern that the necessity to regulate them on a supra-national basis will be inevitable. This possibility was fully realized by the Sirois Commission, which recommended that "the Dominion and the provinces together should decide how International Labour Conventions should be implemented". The commission stated further: "It seems that the best method would be for the provinces to give to the Parliament of Canada power to implement such international labour conventions as the Government of Canada has ratified or may ratify in the future". The report did not deal with "the more general issue of legislative competence to implement Canadian treaties, which we consider outside our terms of reference".

The need for an amendment of the constitution, so far as treaty power is concerned, is today more evident than ever. The British North America Act (No. 2) 1949, which endowed Parliament with a general power to amend the constitution, "except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces . . .", has been interpreted to confer no authority to alter section 132. If this analysis is correct, the only method left is co-operation between the central government and all provincial governments. However politically inexpedient, it is not out of place to suggest a provision most advantageous for Canada as a rising partner in the international community. "A choice must be made between the two values, one of local sovereignty, the other of world peace." Exclusive power to legislate in relation to matters coming within a ratified treaty should be vested in Parliament. (A

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90 The Report of the Royal Commission on Dominion-Provincial Relations (1940), Book II, p. 48.
93 "Treaty", within the meaning of this provision, should be understood as an international instrument concluded in any form accepted by and valid under international law.
matter coming within a ratified treaty must be regarded as inherently and necessarily of national concern.) This jurisdiction should extend only over the terms agreed on in the treaty and the enabling statute must not contain additional regulations.94 Finally Parliament’s authority to implement must be independent of the general scheme of distribution of legislative power provided in sections 91 and 92, and not limited to any particular matter.95

Such a revival of section 132 seems to be perfectly consistent with the object of the British North America Act and with Canada’s type of federalism. It would merely return to Parliament the authority which it possessed before the present section 132 lost its original meaning and effect. It would not have the result of violating any principle upon which rests so-called provincial autonomy: in the absence of a treaty, areas of legislative authority assigned exclusively to the provinces would remain unaffected, while the presence of a treaty would indicate that the subject matter of it is of national concern, in which case Parliament possesses power to legislate anyway. It would, also, enable the courts to apply methods already familiar to them in determining the validity of federal statutes: first, the ascertainment of the pith and substance of the federal act; secondly, the ascertainment of the pith and substance of the treaty; and, thirdly, the comparison of the two, producing finally the validation, or invalidation, or partial invalidation, of the implementation. To ensure that the power given to Parliament will not be abused, the courts may find it necessary to scrutinize carefully and in detail the legislation and the treaty before arriving at the conclusion.96 As guardians of the constitution, the courts will still be free to declare the invalidity of a statute giving effect to a treaty. They might set it aside on the ground that it is clearly “colourable”, that is, while it pretends to regulate a matter contained in the treaty, in fact it regulates another matter. They might hold a statute invalid on the ground that it violates individual rights expressly exempted from Parliament’s jurisdiction to implement, or because it alters the nature of the Canadian constitution. But they will not be able to invoke defences of provincial autonomy and rule a federal

94 Except when the “addition” is clearly valid under some other provision of the British North America Act or when it is “necessarily incidental” to the operation of the statute.
95 However, in the absence of a Canadian Bill of Rights, a provision protecting individual freedoms should also be inserted.
statute, implementing an international agreement, ultra vires on the ground that it "trenches on" or "affects" a matter falling within a class of subjects exclusively assigned to the provinces.

There are also important guarantees against the abuse of treaty-making power outside judicial review. They can be found in the relationship between the policy-making Cabinet and the policy-controlling Parliament. A treaty may never come into being when the policy upon which it is based is discredited in Parliament; and, even when an agreement is concluded, formal ratification of it does not normally take place until Parliament gives its approval or consent. These conventional checks form an essential feature of our system of government, and should further dispel any substantial fear of an arbitrary or unwarranted invasion by the central authority into the provincial sphere of government.

V. Summary

The following are the principal contentions which form the skeleton of this article and depict the trend of the writer's thought:

(1) By the political emancipation of the Canadian state and the accompanying process of "nationalization" of the Crown, the exercise of treaty-making power passed to Canada. Legal authority to make treaties, still ultimately vested in the Queen, has been expressly delegated to the Governor General-in-Council by the Letters Patent of 1947.

(2) The negotiation and conclusion of treaties by the Canadian executive follow international practice. The present procedures available within the constitutional framework do not differ basically from those of other states; both formal treaties and intergovernmental agreements may be concluded and ratified in Canada without the necessity of recourse to the United Kingdom.

(3) As a result of a restrictive interpretation by the courts, the operation of section 132 of the British North America Act, which gave full authority to implement "obligations of Canada" to Parliament, has been limited to embrace the so-called Empire treaties only. Hence, in all instances of Canadian treaties, legislative jurisdiction to perform is divided between Parliament and the provincial legislatures, according to the distribution embodied in sections 91 and 92 of the British North America Act.

(4) To overcome the difficulties created by the assignment to one government of the power to make and to several other governments of the power to perform internally, all within the same state, an attempt was made to rely, for the purpose of implementation,
on the authority remaining in the unspecified residuum vested in Parliament by the opening words of section 91 of the British North America Act.

(5) The recent trend in the judicial interpretation of the "Peace, Order and good Government" clause seems to suggest that Parliament might be allowed to implement international obligations when the subject matter of the legislation is clearly of national concern. But absence of a permanent standard which would permit clear classification of all matters as either national or provincial leaves the law in a state of uncertainty which cannot be afforded when actions of the Canadian government in the international forum are involved.

(6) Although the principle of section 132 has not been abrogated, and the unspecified residuum might be regarded as the logical "heir" to section 132, important considerations dictate that power to implement treaties be independent of the general scheme of the distribution of legislative authority, and that it be conferred in toto on Parliament.

(7) So long as the implementation of treaties is subjected to sections 91 and 92, Canada's capacity to participate in the life of the international community of states remains grossly impeded.

Two Mighty Voices

The real task of those employed in the administration of justice is to be the realization of every word of Party and Government resolutions, but particularly the consolidation of the Socialist legal structure and the modelling of our courts on the shining example of the courts of the Soviet Union. Their first duty will be to carry out, in the field of justice, every principle and every word of Party and Government resolutions laid before the National Assembly on 15 September by Prime Minister Viliam Siroky. It is necessary to put a definite end to our people's courts deviating from, or evading, the policy of Party and Government. (From a speech of the Czechoslovak Minister of Justice, Vaclav Skoda, on October 9th, 1953; quoted in Justice Enslaved: A Collection of Documents on the Abuse of Justice for Political Ends (1955), prepared by the International Commission of Jurists)

Obviously, a rough equality between the two great political parties should be maintained on the bench. Thus we help assure that the judiciary will realistically appraise and apply precedent and principles in the light of current American thinking, and will never become a repository of unbalanced partisan attitudes. (Dwight D. Eisenhower, The Spirit of John Marshall: Crusader for Ordered Liberty and Justice (1955), 41 A.B.A.J. 1005, at p. 1006).