THE TREATY-MAKING POWER: A CANADIAN DILEMMA

GERALD L. MORRIS*
Toronto

Introduction

A development which should be of the utmost concern to Canadian lawyers has become apparent during the past several years. It is the determined campaign by a small number of prominent commentators to win acceptance of the theory that the provinces of Canada are entitled to a wide measure of direct participation in foreign affairs which would enable them not only to implement certain treaties but to negotiate, sign and ratify them on their own behalf. The proposition has been most frequently linked with the claims put forward on behalf of Quebec for a "special status" within Confederation but it seems clear that Quebec is not the only province that would be attracted by the possibilities inherent in a division of the treaty-making power. The claim that a Canadian province should play an external role enabling it to undertake international obligations in provincial fields of legislative jurisdiction, without the necessity of any consent or supervision by Ottawa, has the most profound significance for Canadian federalism.

Not all of the advocates of special status for Quebec have articulated such far-reaching proposals[1] but several of the leading spokesmen have made clear their view that nothing less than complete freedom to negotiate treaties within fields assigned to provincial legislative competence by the British North America

*Gerald L. Morris, of the Faculty of Law, University of Toronto.

[1] Quebec's Associate Education Minister, Marcel Massé, qualified his call for recognition of Quebec's treaty-making rights by saying that Quebec should exercise the right "taking Canadian foreign policy into account". Beyond a call for machinery for federal-provincial consultation, Mr. Massé did not clarify how this would work out if Quebec's aims appeared to conflict with Ottawa's foreign policy. While recognizing a basic problem, he does not seem to have overcome it. See the report of his address to the St. Jean Baptiste Society in the Globe and Mail (Toronto), July 23rd, 1967. The question is discussed at length in this article, *infra*.

Act would suffice. Professor J.-Y. Morin of the University of Montreal has outlined in detail his arguments in support of this view,[2] while Mr. Gérin-Lajoie[3] of the former Liberal Government in Quebec and Premier Johnson[4] of the present Union Nationale Government have been quoted in terms which forthrightly confirm their agreement that Quebec is entitled to international status of this sort.

Unfortunately those who have no enthusiasm for such a developement in the area of treaty-making have written surprisingly little on the topic. Even with respect to the broader questions of special status, those who do not favour the concept have tended either to be non-committal in their comments or to phrase their rebuttal in terms so negative or emotional as largely to vitiate the validity of the points which they make. An example of the intensity of feeling that can be generated by special status can be seen in the report carried by the Toronto Daily Star of June 9th, 1967, of an exchange of remarks between Dr. Eugene Forsey and Professor Morin at the annual conference of the Canadian Political Science Association in Ottawa.

When pressed, Prime Minister Pearson and External Affairs Minister Martin have made firm statements of the Federal Government's viewpoint. During an address at Fredericton in May, 1967, Mr. Martin expressed the view that assumption by the provinces of independent stands on international issues would involve the dissolution of Canada as a single state. He said "if individual constituent members of a federal state had the right to conclude treaties independently of the central power, it would no longer be a federation but an association of sovereign powers".[5] Despite occasional

[2] See J.-Y. Morin, La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé (1965), 3 Can. Yearbook of Int. L. 126. And see Professor Morin's comment in (1967), 45 Can. Bar Rev. 160.

[3] Address to the Consular Corps of Montreal on April 12th, 1965. See Le Devoir (Montreal), April 14th and 15th, 1965.

[4] See the report of his statement in the Legislative Assembly and remarks outside the chamber in The Globe and Mail (Toronto), May 11th, 1967. And see the report of his address to the St. Jean Baptiste Society in the Toronto Daily Star, June 26th, 1967.

[5] Address at the University of New Brunswick reported in The Globe and Mail (Toronto), May 17th, 1967. And see the report of a return tabled by Prime Minister Pearson in the House of Commons on April 26th, 1967, in The Globe and Mail (Toronto), May 17th, 1967. A press release from Mr. Martin on "The Provinces and Treaty-Making Powers" is reproduced at (1965), 17 External Affairs 306 and several statements explaining the Government's position were made in the Commons during the same period; see, for example, (1965), 109 House of Commons Debates 11818. The Minister of Justice, Mr. Trudeau, has upheld the Federal Government's constitutional policies, but has, for the most part, con-

statements such as this, it is clear that most federal politicians, and particularly those holding Cabinet portfolios, have little desire to involve themselves in more than an absolute minimum of discussion of a topic which is politically so controversial.

For their part, senior federal civil servants are largely inhibited from public comment by the normal custom barring statements by officials that might be considered partisan. There are infrequent exceptions such as the carefully worded, middle-of-the-road, personal statement[6] on special status by A. W. Johnson, Assistant Deputy Minister of Finance responsible for federal-provincial relations, at the June meeting of the Canadian Political Science Association, but a major share of the responsibility for intelligent and reasoned discussion of this crucial topic seems to be devolving upon the legal profession and the political scientists.

Those members of the profession who, like this writer, are concerned at the prospect of undue diffusion of the treaty-making power (and of responsibility for foreign affairs generally) have cause for apprehension over the marked imbalance between the attention given in both the scholarly journals and the popular media to arguments in support of a broad provincial treaty-making power as a central element of special status and, on the other hand, the relatively infrequent appearance of reasoned expositions of moderate centralist views. There is a danger that the extreme claims of special status will become increasingly accepted by virtual default, if their questionable basis is not repeatedly and persuasively pointed out.[7]

centrated on issues other than the treaty power. See reports of his statements in The Globe and Mail (Toronto), May 31st, June 28th, and September 6th, 1967.

[6] Reported in The Toronto Daily Star, June 9th, 1967.

[7] A recent constructive attempt to delineate a meeting ground acceptable in the Canadian constitutional context may be seen in an article by Professor J.-G. Castel on possible Canadian involvement in the Hague Conference on Private International Law. See Castel, Canada and the Hague Conference on Private International Law: 1893-1967 (1967), 45 Can. Bar Rev. 1. Although his comments on the negotiation and signature of conventions and on representation at international conferences are directed primarily to the very special circumstances of the Hague Conference, his proposals, nonetheless, provide a starting point for discussion in the wider context (see this article, *infra*). Unfortunately there are all too few contributions from the profession directed to the formulation of reasonable proposals. For a noteworthy survey by a law student which casts doubt on the strength of provincial claims, see Michael C. Rand, International Agreements Between Canadian Provinces and Foreign States (1967), 25 U. of Toronto Faculty of L. Rev. 75. Among recent encouraging signs are the attention given to current constitutional problems at the recent meeting of the Canadian Bar Association in Quebec City, and the naming in May of one of Canada's ablest international lawyers, Professor Ivan Head, as associate counsel to the Federal Government on the constitution. See I. L.

I. *The Argument for Provincial Treaty-Making Power.*

It appears possible to isolate four main lines of argument frequently utilized by those supporting an extended provincial treaty power. There is, first of all, what may be termed the domestic constitutional argument based on the fact that an exclusive federal treaty power is not spelled out in Canadian constitutional documents and, furthermore, that the absence of a provincial treaty-making power is nowhere stated. An integral part of this argument is the claim that the exclusive right currently conceded to the provinces to implement certain treaties must logically and necessarily carry with it the right to negotiate and sign those treaties, since the process of negotiation cannot realistically be separated from internal implementation.

The second approach may be called the comparative constitutional argument and proceeds from the assertion that constituent member states of certain federal states other than Canada are constitutionally empowered to enter into treaty relationships (on a limited basis, at least), and do in fact contract such international obligations. These precedents are offered as evidence of acceptability and feasibility relevant to the Canadian situation. An extension of this line is seen in the third basic argument, which looks to the practice of the international community as exemplified in the United Nations and its agencies and organs. Reference is made to the draft codification of treaty law prepared by the International Law Commission and to the fact that among the active participants in the work of the specialized agencies are some who are not fully independent sovereign states.

Finally there is a fourth argument which is perhaps more political than legal in its nature. According to this view, what must be done to meet the needs of Canadian federalism can be done, if only we utilize imagination and flexibility. Necessity mothers invention and it is essential that we bring our constitutional arrangements into line with the changed demands of the second half of the twentieth century. This "catch-all" argument carries a warning, either express or clearly implied, that a failure to adopt radical changes in constitutional practice with respect to external relations must inevitably result in the early departure of Quebec from Confederation.

It may be helpful to consider each of these basic arguments briefly before examining the prospects for a workable solution in this area of federal-provincial controversy.

Head, The "New Federalism" in Canada: Some Thoughts on the International Legal Consequences (1966), 4 Alta L. Rev. 389.

II. The Domestic Constitutional Argument.

The complex history of the development of full sovereignty in Canada and the even more tortuous story of judicial interpretation of the Canadian constitution over the last century are familiar to all Canadian lawyers. This short article, which is more concerned with the future outlook than with a retrospective study, can hardly do more than touch on some of the milestones which appear relevant to the question of treaty-making.

The British North America Act of 1867 contained no express grant of competence in international affairs beyond section 132, which gave the Federal Government exclusive power to perform the obligations of Canada or of the provinces arising under treaties between the British Empire and foreign countries. This gave Ottawa clear jurisdiction to implement Empire treaties by legislation and, in the context of 1867, there appeared no further need to spell out external competence, since Britain retained exclusive responsibility for the foreign relations and defence of the new Confederation.

Before the end of the nineteenth century there were signs of an increasing Canadian desire to be involved where direct Canadian interests were at issue. The first quarter of the present century saw a gradual increase in the Federal Government's control of Canada's external relations and a progressive shaking off of subordinate international status. Early in the century the Department of External Affairs was established to centralize Ottawa's dealings with London on matters of external concern. Canada's significant involvement in World War I provided an opportunity to press the Canadian claim to a separate role in international affairs, which was substantially recognized at Versailles and in the League of Nations. The transfer of full sovereignty was largely completed by the Imperial Conference of 1926 and the subsequent Statute of Westminster in 1931. Any question of international competence which remained was removed after World War II by the Letters Patent of 1947. Despite such hangovers as the problem of constitutional amendment there has been no serious doubt in the past twenty years as to Canada's status as a fully independent, sovereign member of the international community.

It is interesting to note that during the past forty years the question of the domestic legislative consequences of the federal treaty-making power has been far more significant and contentious than the question of whether the Federal Government in fact had the exclusive power to make treaties and, if so, where the source

of that power was to be found. There are several possible explanations of the source of treaty-making power and not all the authorities make it completely clear on which ground they rely. For some purposes it might suffice to pass over the problem with a rather unenlightening reference to the treaty-making power as part of the royal prerogative exercised through the executive branch. In view of the claims recently advanced on behalf of the provinces, however, it may be worthwhile to examine a little more carefully the question of how the Federal Government can claim the right to exercise this function exclusvely.

In the first place it seems clear that even a strained construction of section 132 of the British North America Act could offer no help as a possible source of the treaty-making power. As Justice Laskin has pointed out,[8] it is too much to expect the Canadian courts to torture the words of the section sufficiently to give it modern relevance even with respect to the question of implementation to which it was directly related. Accordingly, section 132 must be deemed obsolete in all practical respects.

A possibily more fruitful line of inquiry involves examination of the federal residuary or general power to make laws for the peace, order and good government of Canada under section 91 of the British North America Act. The report of the Judicial Committee in the *Bonanza Creek* case[9] held that the distribution of executive powers in Canada was substantially the same as the distribution of legislative powers under the British North America Act. By that line of reasoning, if a wide view of the residuary power under section 91 were to be taken, an exclusive federal executive power to conclude treaties might be supported on the ground that no parallel legislative power was expressly assigned to the provinces by section 92. This, however, is a course fraught with difficulty, since it raises the entire question of construing the residuary power which has given the courts such great difficulty in relation to legislative jurisdiction.[10]

The more widely accepted view is that, apart from the terms of the British North America Act, the royal prerogative to conclude treaties was progressively transferred by Britain to Canada (to be exercised by the Governor in Council) following World War I. Major steps in the confirmation of this process can be traced through the Imperial Conference of 1926, the Statute of

[8] Hon. Bora Laskin, Canadian Constitutional Law (3rd ed., 1966), p. 290.

[9] *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566.

[10] The question is further discussed in this article, *infra*.

Westminster in 1931, the Seals Act of 1939 and the Letters Patent of 1947. The remaining explanation does not rely on locating an express provision in any document but simply finds the source of the treaty-making power in the assumption of independent status by Canada. This taking of full sovereignty carried with it all the competence of international personality, which was recognized by the international community. An essential and inseparable element of this sovereignty is the power to conclude treaties, which need not find its source in any grant or transfer.

Whichever of the foregoing possibilities it may seem preferable to emphasize, it probably comes down to much the same result. Consequently it is perhaps appropriate to attach less importance to any debate over the precise source of the federal treaty-making power than to the fact that the exclusive federal power to sign and ratify treaties has gone virtually without serious challenge, either domestically or internationally, from the time Canada assumed substantial treaty-making power until the past several years. Indeed, the striking feature is the scarcity of authority over the years for the suggestion that the province has treaty-making power.

In 1892 the case of *Maritime Bank* v. *Receiver General of New Brunswick*[11] indicated that the provinces were independent and autonomous, with the Lieutenant-Governors having all the powers of the Crown necessary for provincial purposes (*In re Initiative and Referendum Act*[12] in 1919 echoed the "independent and autonomous" phrase). The accuracy and appropriateness of this wording can be questioned, insofar as its applicability for purposes of claiming international status is concerned, when numerous other statements by the Privy Council on the scope and significance of provincial autonomy are kept in mind.[13] Although the *Maritime Bank* case has been cited by authors as relevant to treaty-making, this may be a classic example of the generally recognized danger in lifting brief passages from a constitutional decision on one point and attempting to apply them to quite different problems. It is fair to say that constitutional authority has in general held the royal powers of the Lieutenant-Governors to be exercisable only for local purposes within the province.[14]

[11] [1892] A.C. 437. [12] [1919] A.C. 935.

[13] And note that in *Attorney General for Ontario* v. *Scott*, [1956] S.C.R. 137. Rand J. mentions the frequent references to the provinces as having *quasi*-sovereign legislative power.

[14] In the *Labour Conventions* case, Duff C.J. was prepared to summarize the situation by stating that "the Lieutenent-Governors of the provinces do not in any manner represent His Majesty in external affairs". See *Attorney*

While analogies are not always satisfactory, it may be noted that on the question of legislative jurisdiction, the courts have drawn rather narrow limits on the extent to which provincial action will be permitted to have extra-provincial effect, holding that it must be no more than a "mere incident" [15] of the valid, essentially local activity. Certainly, where the substance of the provincial action was intended to have significant extra-provincial consequences, it could not be upheld under this approach. Reference may also be made to section 3 of the Statute of Westminster which confirms in the Federal Government, but not in the provinces, the right to enact laws having extra-territorial effect.

If it is accepted that the executive power is substantially the same under the constitution as the legislative power, then one may ask whether constitutional validity could attach to any unsupervised provincial involvement in the conclusion of treaties, or in other aspects of foreign affairs. It will, of course, be interesting to see whether the forthcoming decision of the Supreme Court of Canada in the offshore mineral reference contains statements which will necessitate a re-examination of the traditional view of the limitation on provincial competence to matters of intra-provincial concern.

Reference has already been made to the major controversy in past years over the question of jurisdiction under the British North America Act to enact legislation for the domestic implementation of treaties dealing with matters within the normal legislative competence assigned to the provinces. So much has been written about the issue that a detailed review of its development and contemporary resolution need not be attempted here. In 1932 the judgment of Lord Sankey in the *Aeronautics* case[16] and, even more, that of Lord Dunedin in the *Radio* case[17] appeared to contain language indicating that the Privy Council was prepared to recognize the right of the Federal Government to enact implementing legislation pursuant to the exercise of its treaty-making power even in fields otherwise reserved to the provinces. On a different (but analogous) problem, the decision in *Croft* v. *Dunphy*[18] in 1933 seemed to take

General for Canada v. *Attorney General for Ontario*, [1936] S.C.R. 461, and, in the Privy Council, [1937] A.C. 326.

[15] The phrase was used by Duff J. in *Lawson* v. *Interior Tree Fruit and Vegetable Committee*, [1931] S.C.R. 357.

[16] *Re Regulation and Control of Aeronautics*, [1932] A.C. 54.

[17] *Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304.

[18] [1933] A.C. 156.

a view of federal powers consonant with that of the two decisions in the previous year.

When the *Labour Conventions* case[19] arose, Chief Justice Duff pursued this general approach in the Supreme Court of Canada but it was rejected on appeal to the Privy Council in 1937. In delivering the Board's opinion Lord Atkin reverted to views on the division of legislative powers under the British North America Act expressed by the Privy Council prior to the *Aeronautics* and *Radio* cases. He distinguished the *Aeronautics* and *Radio* cases primarily on the ground that the true basis for those decisions was to be found in the subject matter of the specific conventions in question and thereby enabled himself to pass over the more sweeping terminology used by Lords Sankey and Dunedin. Culminating in his oft-quoted remark about the ship of state sailing with watertight legislative compartments, Lord Atkin affirmed that the Federal Government could not, on the basis of a treaty-making power, move into provincial legislative fields when the same legislative privilege was otherwise denied it.

Although Lord Atkin's views continue to provide the major foundation for current Canadian practice, there have been subsequent signs of a possible judicial retreat from his philosophy. In the *Canada Temperance Federation* case[20] in 1946 Lord Simon appeared to give a strong endorsement to the wide view of federal powers set forth in the *Aeronautics* and *Radio* cases. The "extra-judicial dissent" to the *Labour Conventions* case by Lord Wright, writing in the *Canadian Bar Review* in 1955, attracted considerable attention.[21] Lord Wright, who had been a member of the Board hearing the *Labour Conventions* appeal, was outspoken in his support of the constitutional approach enunciated in the *Aeronautics, Radio* and *Canada Temperance* cases, as well as in his criticism of Lord Atkin's opinion. The next year, in *Francis* v. *The Queen*,[22] Chief Justice Kerwin inserted a comment which seemed to indicate his readiness to reconsider the basic approach taken by Lord Atkin.

Since the *Labour Conventions* case did not place limits on the Federal Government's executive authority to conclude treaties,[23] the present Canadian constitutional situation in the treaty field

[19] *Supra*, footnote 14.

[20] *Attorney General for Ontario* v. *Canada Temperance Federation*, [1946] A.C. 193. But there were also indications, in some of the last cases to go to the Privy Council from Canada, of a continuing willingness to take the more limited view of federal jurisdiction.

[21] See (1955), 33 Can. Bar Rev. 1123. [22] [1956] S.C.R. 618.

[23] Lord Atkin expressly refrained from considering the point.

seems in conflict with the Privy Council's own general rule, enunciated in the *Bonanza Creek* case, concerning the similar division of the executive and legislative powers under the British North America Act.[24] Partly for obvious political reasons, however, the Federal Government has not taken an opportunity to challenge the philosophy of the *Labour Conventions* case but has followed the general practice of consulting with the provincial governments concerning treaties on matters within the normal provincial fields of legislative competence.[25] Nevertheless, it is safe to say that federal officials have not always embraced this complicated practice with enthusiasm. It can hardly be doubted that there have been occasions on which harrassed officials have been deterred from pressing for desirable treaty action by the requirement of pursuing consultations with ten provincial governments as well as the foreign government involved. That this requirement compounds the normal difficulty in overcoming inevitable bureaucratic inertia is obvious.

If domestic political realities could be left aside, it would be possible, from the standpoint of administrative practicality and accepted international practice, to justify a Canadian approach which would permit the Federal Government to exercise not only an exclusive power to conclude treaties but also an overriding jurisdiction to enact necessary implementing legislation even though this would extend federal legislative competence into provincial fields. Certainly it would hardly be necessary to strain logic in support of a totally centralist doctrine as much as appears unavoidable in attempting to construct a logical basis for a provincial treaty-making power. Common sense would indicate that there is little reason why Canada could not adopt a view comparable to

---

[24] On the surface the argument may seem double-edged and it might be argued that the *Labour Conventions* case read together with the *Bonanza Creek* rule necessarily implied that the provinces should have a treaty-making power co-extensive with their right to implement. The great weight of the constitutional and international law pronouncements, however, support the thesis that the Federal Government must have exclusive control of treaty-making. This is largely brought out in the following sections of this article. Should not the federal authorities then have the legislative powers necessary to carry out the international obligations validly undertaken? The strongest attack on Lord Atkin's approach can probably be mounted from the international law standpoint.

[25] But note the recent cultural agreement with Belgium, discussed towards the end of this article. The Federal Government is reported merely to have informed the Quebec Government that a treaty was being negotiated. Quebec was not consulted, however, on the grounds that Quebec was not obligated to legislate or otherwise take action under the agreement. See footnote 44, *infra*.

that outlined in the United States in *Missouri* v. *Holland*,[26] which recognized an extensive federal right to encroach on state fields of legislative jurisdiction through the *bona fide* exercise of the federal treaty power.

There are, of course, obvious differences between the Canadian and American constitutional fabrics. For one thing, the basic federal treaty power and a corresponding limitation on state action are spelled out in the United States constitution.[27] This must be balanced against the intention of the framers of the United States constitution to create a relatively weak federal apparatus, which they underscored by reserving the residual powers to the component states. It is well known that the fathers of Confederation were greatly influenced by the difficulties experienced by the federal union south of the border and were determined to avoid those difficulties by creating a very strong federal government in Canada. Even having regard for the differing constitutional histories of Canada and the United States, it can be persuasively argued that there is much in the language of the leading United States cases on the Federal Government's responsibility for the carrying out of international obligations that seems equally applicable to the Canadian situation.

Although the *Curtiss-Wright* case[28] in the United States did not involve a state-federal dispute over jurisdiction like that in *Missouri* v. *Holland*, Justice Sutherland found it necessary to consider the nature of the foreign affairs power vested in the Federal Government. He stated that ". . . the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the constitution, would have vested in the federal government as necessary concomitants of nationality . . . . Otherwise, the United States is not completely sovereign". He went on to point out that, in discerning this basis for various aspects of the foreign affairs power, the court "found the warrant for its conclusion not in the provisions of the Constitution, but in the law of nations".

---

[26] (1920), 252 U.S. 416.

[27] The federal power is in section 2 of article 2 and the limitation on state action is in section 10 of article 1. The latter reads in part: "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power . . . ."

[28] *United States* v. *Curtiss-Wright Export Corp.* (1936), 299 U.S. 304.

The stress in *Curtiss-Wright* on a wide-ranging foreign affairs power (including the treaty-making power) as an essential element of national sovereignty inhering in the Federal Government, regardless of constitutional language, was an extension of the centralist view taken by *Missouri* v. *Holland* in the specific area of jurisdictional conflict between the federal and state governments. The argument put to the court in the latter case was that a United States treaty and federal legislation enacted pursuant to it were unconstitutional as infringing the reservation to the individual states by the Tenth Amendment of powers not delegated to the Federal Government. Further, it was argued that "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do". Both of these arguments, so familiar to Canadians, were rejected by Justice Holmes. While his conclusions were mainly brought within the framework of specific constitutional provisions, some of his statements, even when the references to constitutional authority are deleted, have an ability to stand on their own logic.

After discussing the domestic legal significance of a valid treaty in the United States, Justice Holmes went on to say "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. 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 that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found". Earlier in his judgment Justice Holmes had noted: "If the treaty is valid there can be no dispute about the validity of the statute under Article 1, section 8, as a necessary and proper means to execute the powers of the Government." He concluded that the matter in question (protection of migratory birds) involved a national interest of sufficient magnitude that both the treaty and the consequent statute must be upheld.

Surely it is arguable that there is some persuasive value for Canadians in the willingness of the United States courts to permit substantial intrusion into fields reserved to state jurisdiction, if a genuine and important national need exists, on the basis of a federal treaty power which can be founded in international law principles quite aside from any constitutional provisions. If the power of implementation logically involves the power to negotiate

treaties, as Mr. Gérin-Lajoie claims, then the reverse proposition seems at least equally true. The power to negotiate and undertake international obligations must carry the power to ensure their performance through domestic implementation.[29] Both aspects appear to be part of a continuing and indivisible process of policy development.

If the concept of essential indivisibility is valid, the federal claim to what might be called "total treaty power", comprising both conclusion and implementation, must be rated stronger than any competing claim by the provinces to total treaty power within limited provincial fields. As subsequent sections of this article should make clear, the stronger claim of the Federal Government can be supported on grounds of both customary international law and practical policy. It should be kept in mind that the treaty-making power is an integral part of the broader foreign affairs power and in actual practice cannot be artificially separated from it. Nor can general responsibility for foreign affairs be divided up into watertight federal and provincial compartments on any sensible basis.

To the extent that Canadian constitutional provisions are helpful in this connection, the balance also favours the federal authorities. If section 132 of the British North America Act has any continuing relevance, it may be as an indication of the intention of the framers of the Act concerning the respective roles of the federal and provincial governments in connection with treaty matters. The role was to be played entirely by the Federal Government without regard for the division of legislative powers. Despite present political limitations on its application, section 90 of the British North America Act should possibly be kept in mind. The power given to the federal authorities by section 90 to disallow provincial legislation would seem to run counter to the suggestion that a province could constitutionally conclude treaties and then implement them by provincial legislation without the concurrence of Ottawa. If driven to it by an ambitious provincial government, Ottawa could disallow any implementing enactments and there is no reason to doubt that Canadian courts would agree that the Federal Government had successfully blocked any meaningful internal legal significance of attempted provincial treaty action.

---

[29] Note the view of Justice Rand to this effect in I. Rand, Some Aspects of Canadian Constitutionalism (1960), 38 Can. Bar Rev. 135. And see Laskin, Some International Legal Aspects of Federalism; The Experience of Canada in Currie (ed.), Federalism and the New Nations of Africa (1964), p. 389 *et seq.*

It must be recognized that, if the Supreme Court of Canada suddenly ruled that Ottawa had the power both to negotiate and to implement treaties on all subjects, Quebec and other provinces would, in light of political realities, have little to fear. Quebec, in particular, could apply irresistible political pressure in Ottawa to protect what it considered its essential interests. Recent political history demonstrates that, in almost any conceivable circumstances, no government in Ottawa would wish to attempt radical interference with vital provincial interests. As Professor Friedmann has pointed out,[30] *Missouri* v. *Holland* has become little more than a ghost in the United States, since Washington has little desire to raise unnecessarily the spectre of federal intervention in local state affairs.

But a Canadian version of the *Missouri* v. *Holland* doctrine would provide the Federal Government with a clearer power to take necessary action, which could be held in reserve for possible use in situations of obvious national urgency where even limited delay (in order to obtain provincial concurrence) in taking action at the international level would not be in the national interest. A more important consequence would be the possibility of encouraging Canadian involvement in international treaty action where there was in fact very general acceptance in the provinces of the desirability of accepting proposed treaty commitments (perhaps because only trivial changes in existing provincial law would be necessary) and the conclusion of the treaty was being held up by little more than official apathy or by the occasional reluctance of provincial politicians to appear to be co-operating with the Federal Government (especially with a Federal Government drawn from another political party) even though the provincial leaders might have no specific objection to the substance of the treaty obligations in question. Federal officials could relax in the knowledge that the irritation of minor technical breaches of treaty obligations could be avoided, one way or the other, without providing grounds for a violent provincial reaction, while provincial spokesmen could reluctantly accept the commitment after a nice show of grumbling over "a federal power play".

It must be conceded, of course, that discussion of a centralist solution to the problem of the treaty power in Canada represents little more than an interesting intellectual exercise. With virtually all of the current domestic political pressures tending in the op-

[30] See W. Friedmann, Canadian Approaches to International Law (1963-64), 19 Int. J. 77.

posite direction, it is hardly realistic to see any prospect of increased federal capacity with respect to treaties. The choice must therefore be made between some version of the present system, involving federal-provincial consultation where appropriate, and acceptance of a provincial treaty-making power.

III. *The Comparative Constitutional Approach.*

Among recent comparative constitutional studies, the work of Professor Morin merits particular attention as it epitomizes the approach of proponents of special status. In a detailed study written in 1965 and again in condensed form in a recent issue of the *Canadian Bar Review*,[m] Professor Morin has undertaken the task of ascertaining the extent to which the practice of federal states has permitted component members to participate in the treaty-making process. His conclusion is that there is sufficient precedent to justify the view that a Canadian province such as Quebec could exercise a treaty-making power in its fields of legislative competence without effecting an unacceptable breach of current international practice.

For the purpose of his study, Professor Morin has been able to reduce the twenty or more federal states into three general classes: (a) federal states in which the conclusion of treaties and the power to implement them is the sole responsibility of the federal authorities; (b) states in which the central government has the power to conclude treaties, whereas the member states retain the power to approve or implement treaties whose subject falls within their legislative field; (c) federations whose members possess, to some extent, the power to conclude treaties.

In the first class Professor Morin places the majority of federal unions including most of those that are newly independent. In addition to such nations as India, Malaysia, Austria, Mexico and Brazil, he readily concedes that the Soviet Union, the United States and Argentina should in fact be categorized as falling into this group, although for technical reasons they can be placed in the third type. All states in this class are virtually unitary states so far as the foreign affairs and treaty powers are concerned.

In the second category Professor Morin includes Canada, Nigeria and, with some hesitation, Australia. In view of the current chaos in Nigeria, the Nigerian precedent may be of value primarily as an extreme reminder of the crucial importance of working out acceptable constitutional arrangements before it is

[m] *Loc. cit., supra*, footnote 2.

too late. While the precise constitutional position in Australia with respect to the treaty-making power provides ample material for debate, the Commonwealth Government has clearly obtained broader powers of implementation than its Canadian counterpart and hestitation seems justified before placing Australia in the second group of federal states. For that matter, as indicated above, there appear to be legal grounds, even if they are somewhat unrealistic from the standpoint of internal politics, for arguing that in Canada the question is still open to review. Depending, therefore, on what the future may bring in Nigeria, it may perhaps be contended that the second class of federal states hardly exists. The classification is useful, however, and, on the basis of current practice, Professor Morin's allocation of states to it is quite reasonable.

The most interesting group are those in the third class. Here Professor Morin places the Soviet Union, Argentina, the United States, Switzerland and the Federal Republic of Germany, although (as noted above) he agrees that the Soviet Union, Argentina, and the United States could be placed in the first group.

Since most North American and West European students of international law, including Professor Morin, are prepared to dismiss the grant to the federated republics of the Union of Soviet Socialist Republics, by constitutional amendment in 1944, of the right "to enter into direct relations with foreign states, to conclude agreements with them, and to engage in exchange of diplomatic and consular representatives" as a transparent device to facilitate the admission of the Ukraine and Byelorussia as charter members of the United Nations (a view which was accepted by other founding members only as a desperate expedient to help ensure Soviet participation in the new organization), it is highly disconcerting to find Premier Johnson of Quebec treating the Soviet "precedent" seriously as a valuable source of ideas for Canadian constitutional reform. On August 15th, 1967, he was quoted[32] as saying that the Soviet Union's constitutional experience could be "very useful and stimulating for Canadians" and as referring to the "very large international competence" granted to the member republics of the Soviet Union. Some weeks earlier a report[33] of a speech made by the Premier on St. Jean Baptiste Day stated that "he re-iterated Quebec's demand for power to

[32] Address at a state dinner in Montreal for D. Polyansky, First Deputy Premier of the Soviet Union. See The Globe and Mail (Toronto), August 15th, 1967.

[33] See the Toronto Daily Star, June 26th, 1967.

sign foreign pacts and asked why Quebec shouldn't be at the United Nations when Ukraine and Byelorussia were there".

One wonders whether Premier Johnson can really believe that the Byelorussian delegate at United Nations gatherings expresses views adopted by the Byelorussian Government without benefit of direction from Moscow. For that matter, how long does he think an official in Kiev would survive in his position if he took any foreign initiative at variance with the policies of the Party's all-union central committee? As one Canadian journalist wryly pointed out[34] when recently considering the fiction of the decentralized control of foreign relations in the Soviet Union: "Article 17 also gives each republic the right to freely secede from the federation. Neither of these rights has figured prominently in the internal politics of the Soviet Union . . . . There is not an equivalent to an autonomous Quebec Liberal Federation which has objectives and policies that are often contrary to those of the national party. Doubtless those who use the example of Ukrainian and Byelorussian autonomy in international affairs do not intend that the emulation be carried all along the line." Since one is reluctant to question the good faith of provincial leaders, it may be preferable merely to suggest that more firmly based arguments should be expected from those whose position requires that they play a prominent role in official deliberations on constitutional reform.

When attention is focussed on Argentina, its status can be discerned without undue difficulty as essentially that of a unitary state in foreign affairs. Although there is a constitutional basis for suggesting that the component member states are entitled to participate in the treaty process, the central government has consolidated its absolute control over foreign relations and isolated attempts by member states to negotiate formal international agreements have not been pursued successfully.

The position in the United States is more complex. There the constitution allocates the treaty power to the federal authorities but a constitutional clause authorizes individual states to conclude "compacts" with foreign powers so long as the consent of Congress is obtained. The relative insignificance of this right can be seen in the fact that there seems to be no example of a state having concluded a compact with a sovereign foreign power. The congressional authorization for a civil defence compact[35] left it open to

---

[34] See Frank Howard, For an Apologist, Precedents Are Where You Find Them, The Globe and Mail (Toronto), May 13th, 1967.

[35] (1951), 64 Stat. 1251.

Mexico and Canada to decide whether the federal governments or political sub-divisions of those countries would sign the proposed agreement. It was, after all, only a speculative invitation by Congress and a rather naïve one at that. The right of close congressional scrutiny has been maintained whenever consent has been sought for a compact involving states and neighbouring provinces of Canada. Accordingly there is little evident reason to expect that state governments will acquire any role in treaty-making that is not subject to strict federal control and limited to matters of local co-operation which are best left to regional authorities.

Professor Morin places considerable emphasis on the importance of the precedents to be found in the constitutional arrangements of the two remaining federations, Switzerland and (even more important in his view) the Federal German Republic. In all honesty it is difficult to understand the importance attached to these precedents since Professor Morin himself carefully notes the major limitations on any independent power of the cantons and *Länder* to conclude international agreements.

Article 9 of the Swiss constitution gives the cantons the right to conclude treaties on certain subjects provided they do not contain "anything prejudicial to the confederation". In the latter part of the nineteenth century and the early decades of the present century some of the cantons made use of their power to conclude treaties with neighbouring governments, subject always to the agreement of federal officials that the proposed treaty contained nothing prejudicial to the interests of the confederation. But even before the end of the last century the common practice developed of having Swiss federal authorities conclude the agreement with the foreign power on behalf of the canton. Since World War II the practice of signing treaties by the cantons themselves appears virtually to have disappeared save for one or two minor agreements involving such adjacent jurisdictions as Liechtenstein, which has special administrative links with Switzerland in any case. The increasing central control of foreign affairs has made article 9 practically obsolete. It is mandatory that formal external relations of the cantons be conducted through federal channels and only junior officials of the cantons are permitted working contact with foreign officials. In fact the Swiss federal authorities have a reputation of imposing unusually strict control on contacts between foreign representatives and cantonal officials. Federal officials seem to exercise what amounts to a full veto power over the cantons' limited efforts in the external arena.

To a considerable extent the same comments are applicable to Germany. Constitutional changes since 1871 have seen a progressive diminution of the treaty-making powers brought into the original unification by the previously sovereign component states. The fundamental law of the German Federal Republic permits the *Länder* to do no more than conclude treaties on subjects which fall within their exclusive or concurrent jurisdiction so long as the subject is not already dealt with in a conflicting federal treaty or law. Furthermore, all such agreements are expressly subject to the approval of the federal authorities. This extremely limited treaty power has been exercised occasionally in the post-war years, particularly by the south German states, but agreements have frequently been concluded by the Federal Government on behalf of the *Land* in question. It is noteworthy that a special agreement was necessary in 1957 in order to commit federal officials thereafter (a) to inform the state governments when the central government was negotiating treaties within state fields of jurisdiction and (b) to seek the approval of the states to any resultant treaty before its ratification. Clearly the treaty-making power in Germany today is considerably centralized, with the state governments being permitted to deal mainly with friendly neighbouring governments on matters lacking major policy significance in the particular circumstances.

Having completed the comparative survey, how much can be made of it? Is it not straining somewhat to conclude that there is a general international acceptance of many different degrees of treaty-making by subordinate states? The member states of only two federations can be validly said to have exercised what might properly be called a treaty-making power and in those cases it is now subject to such a close degree of federal control that it is difficult to perceive any more liberal measure of unsupervised discretion remaining to the subordinate states than is permitted by the "umbrella agreement" procedure adopted in Canada (and which clearly does not satisfy the supporters of special status for Quebec, despite the cautious optimism expressed by one eminent commentator).[36]

The British North America Act is not the only example of a constitutional document which would provide a frequently misleading picture to a foreign visitor who relied heavily upon it for

[36] See G. Fitzgerald, Educational and Cultural Agreements and Ententes: France, Canada, and Quebec—Birth of a New Treaty-Making Technique for Federal States (1966), 60 Am. J. of Int. L. 529. And see further discussion, *infra*.

enlightenment. Constitutional provisions can rapidly become obsolete because of changed conditions, particularly if the provision was originally inserted for the primary purpose of facilitating an initial acceptance of the constitution. It is, therefore, equally important to have regard to the developing patterns of actual constitutional practice throughout the world. The overwhelming trend in practice is to a centralized treaty-making power and there is no evidence of willingness to allow subordinate states to conclude treaties in a range of subject matters comparable to those claimed by some on behalf of Canadian provinces. In view of this, too much weight should not be attached to the fact that, in rare instances, federal authorities have apparently overlooked (or perhaps it is more accurate to say they have glossed over) breaches of the strict constitutional requirements by component states with respect to international agreements of minor or local concern. The most likely explanation for such instances of apparent unconcern is that the political repercussions involved in making major issues of the incidents were not justified by any foreseeable international difficulties in the specific cases.

There is near universal recognition that the broad field of international affairs today is too crucial, complex and all-pervasive to permit the possibility of the nation speaking formally with more than one voice in any international matters of significance. As Professor McWhinney has suggested, it may not be particularly helpful to look to other federal precedents in seeking a suitable constitutional arrangement for Canada.[37]

IV. *The United Nations and International Practice.*

There is little evident help for the more extreme advocates of a provincial treaty power, when one carries the investigation into the wider field of practice generally accepted by the international community, as evidenced in United Nations organs and elsewhere. It is true that article 5, section 2, of the draft articles on the law of treaties prepared by the International Law Commission states that "states members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down". But as the commentary to the draft article indicates, there was considerable feeling within the Commission that the clause was not particularly meaningful as drafted and that the section should be balanced by

[37] See E. McWhinney, Federalism, Biculturalism and International Law (1965), 3 Can. Yearbook of Int. L. 100.

a reference to the role of international law in determining the extent to which subordinate states could have a capacity to conclude treaties.

As it stands, the draft section appears to leave to unilateral constitutional decision alone the determination of the extent to which component states may exercise a treaty-making power. Few legal scholars would support such a conclusion and it is obvious that the essential requirements of international law must also be met. Veteran observers of United Nations ritual will possibly recognize the broad wording of the draft section as a polite bow to the constitutional forms of United Nations members. United Nations protocol requires that the Soviet constitutional fiction, once accepted, be rigidly upheld in United Nations practice. As is so often the case in diplomacy, substance can be more easily ignored than form.

There is no reason to think that the International Law Commission was seriously inviting an unlimited extension of the treaty power to subordinate states through constitutional revision. The views and practice of United Nations members tend overwhelmingly in the opposite direction. Most federal unions and many unitary nations, comprising the bulk of the international community, have no desire to encourage centrifugal tendencies in their own territories by accepting extensive claims to international competence by the political sub-divisions of other federal unions.

The problem cannot be divorced from the related question of membership in international organizations such as the United Nations and its specialized agencies.[38] Membership in such organizations inevitably requires a capacity to undertake formal treaty obligations. Would it be possible for Canada to announce that its provinces had extensive international status, including a treaty-making power in at least some fields, and thereupon claim eleven seats in each international organization? The answer must obviously be in the negative. We must either continue to accept our present status which affords Canada one seat or else establish satisfactory evidence that we have become ten separate and independent nations. There is no better prospect that even one extra seat for Quebec could be obtained. Too many other countries

[38] The major part of the report of the International Law Commission on the work of the second part of its seventeenth session and on its eighteenth session (including the draft articles and commentary on treaty law) can be found in (1967), 61 Am. J. of Int. L. 248. As to membership in international bodies, see the thoughtful study in L. Sabourin, La participation des provinces canadiennes aux organizations internationales (1965) 3 Can. Yearbook of Int. L. 73.

could claim similar "special situations" and the result would be chaos. International acceptance of possible degrees of federation is limited in range. Whatever may have been their diversity in internal form, the limited number of federations which have successfully established their international status in the modern era have shown relatively little variety in their actual external functioning.

For a number of years the increasing tendency at the United Nations, especially on the part of the numerous new members, has been to recognize only two types of status: (1) fully independent or sovereign in the accepted international sense; (2) dependent colonial territories. Unlike a generation ago, it is not very meaningful today to write scholarly descriptions of a half dozen or more levels of sovereignty. Were they faced by new applications, it is doubtful whether a majority of United Nations members today would support the involvement in the specialized agencies of as wide a range as in the past of states who are less than fully sovereign in some respect. The possible exception would be endorsement of participation by non-sovereign territories as an interim move prior to full independence at an early date. But even if an overseas territory might be found acceptable on this basis, there is no basis whatever for suggesting that a province forming part of the metropolitan federal territory would be accepted. The circumstances which permitted the admission of the Ukraine and Byelorussia to United Nations membership are most unlikely to repeat themselves. China is the only nation which might have a remote possibility of enjoying bargaining power comparable to that enjoyed by the Soviet Union at the end of World War II, and only extraordinary leverage of that sort might cause the United Nations membership to accept once more such a fundamental breach of established international norms.

Various solutions to the problem of the so-called "mini-states" are being broached, usually involving some form of not-quite-sovereign "associate state". Attempts to implement such solutions (as in the small islands of the British West Indies) have yet to prove themselves a lasting success. To date they have not encountered universal acceptance, largely because of suspicion that the associate states would actually amount to little more than a sophisticated form of neo-colonialism whose votes would be controlled by the imperial powers. While there is widespread understanding that the unique problems posed by the miniature states may require some bending of the established rules, there is no

discernible sympathy for compounding the voting problem even more by admitting integral parts of the territory of present members.

V. *The Argument of Political Necessity.*

Those who stress this line of approach tend to dwell on the internal needs of the nation and on the domestic constitutional possibilities, while glossing over external problems of international acceptance. But facile talk of the need for imagination and flexibility to meet modern requirements does not alter the fact that international recognition of a new constitutional arrangement would be needed before a treaty power could be meaningful. When the stress in the *Curtiss-Wright* case on the law of nations, rather than the United States constitution, as the basis for defining the foreign affairs power is recalled, it might be seen as a helpful step forward if Canadians gave comparable recognition to the basic principles of international law as compelling factors with importance equal to internal constitutional complexities in the working out of a national approach to the treaty power.

One of the obstacles in the way of international acceptance of a substantially divided treaty power is the problem of international responsibility for treaty obligations. It is typical of the widespread Canadian preoccupation with internal constitutional reform that the question of international responsibility is rarely mentioned by those calling for an extensive provincial competence to conclude treaties. Nevertheless, if formal international agreements are to be regarded seriously, the party who will stand responsible for any default in meeting the obligations incurred must be readily identifiable. Nor will it suffice if a provincial government volunteers to accept responsibility. The concept of international responsibility is one of the foundation stones of public international law and its modern development has been marked by a dominant insistence that only national states and a few international organizations can accept responsibility in this international sense. Under present principles the members of the world community would look to Ottawa to remedy any international breach, though that breach had been occasioned by a provincial government or anyone else. Most nations are little interested in Canada's domestic political problems and could not be expected to change a fundamental rule of international law simply to satisfy the internal preference of one middle power. On the contrary, an aversion to unsettling major changes in the international rules,

especially when such changes are potentially damaging to their own best interests, would certainly produce a solid phalanx of foreign governments opposed to the recognition of a Canadian province as an international person capable of accepting international responsibility.

Premier Johnson and other spokesmen in Quebec have asserted that the series of formal visits to the province by a succession of world statesmen during the current international exposition in Montreal has provided important evidence that Quebec's international status is generally accepted.[39] Despite this rather blithe assumption there is at present little reason to think (with the exception of the debatable attitude of the present French Government and the political opportunism revealed in a few statements by members of the socialist bloc) that a large segment of the international community would recognize a "federal state" in which one or more political sub-divisions were alleged to have broad control over their external relations, including a wide treaty power subject to no central control of its substance. Assuming that Ottawa continued to maintain that Quebec was not independent, the vast majority of foreign governments could be counted on to insist that the Federal Government accept ultimate international responsibility. The more important the treaty to the foreign government, and the more substantial the pecuniary interests involved, the more resolute would be the demand that Ottawa be the guarantor of the undertaking.

When the content of the agreement did not touch the major interests of the foreign state involved, it might occasionally be possible to gloss over the problem of responsibility, since no prospect of an international claim resulting from the agreement would be reasonably foreseeable. Certain types of arrangements for cultural exchanges and information programmes might fit within this category. But just as Quebec has often attached great symbolic significance to minor steps in the direction of international status, many foreign governments might equally attach importance to ensuring respect for elementary principles of international law, even where the particular agreement was expected to raise no serious problems. Established members of a club usually take a deliberate interest in protecting their privileged status against attempts to gain access by applicants with doubtful qualifications.

[39] An example is seen in the report of an address by Premier Johnson to a Union Nationale meeting in Trois-Rivières, The Globe and Mail (Toronto), June 5th, 1967.

The development of circumstances in which Ottawa was fixed with international responsibility, while the provinces were empowered to contract important international obligations in their unfettered discretion, would lead rapidly to an impossible situation. The alternative suggestion that a province is entitled to assume the rights and obligations of a party to a treaty immediately raises the question of the province's capacity to become a party, either as plaintiff or defendant, to an action in the International Court of Justice. The provision in the statute of the court limiting parties to "states" obviously contemplated only those states having full international status. If a province can become a party to an action in the court, what then becomes of the claim that a recognizable federal union still exists in Canada? Here again the decisive answer is likely to be given outside Canada, as there is no sign of significant potential support for a claim by any Canadian province to participate independently in the work of the court.

In passing it should be noted that questions of public international law relating to treaties (or to other formal international agreements, by whatever name they are described) should not be blurred by references to the fact that provinces can enter into private contracts with foreign entities or can work out informal co-operative working arrangements with foreign authorities or can unilaterally offer formal assistance and co-operation to foreign jurisdictions on a reciprocal basis. These activities, which provide the practical means by which the provinces can carry out most of their operations with necessary extra-provincial elements, normally find their basis in municipal law or private international law and in general have little to do with public international law.[40] They are no more objectionable than similar actions by large corporations that do not jeopardize the basic international requirement of ultimate central control in foreign affairs and the need for the nation to speak formally with one voice at the international level.

Consideration must be given to other principles affecting the practical operation of a coherent foreign policy. For one thing, we can no longer attempt in advance to divide foreign relations or treaties into rigid political and non-political categories. We can do little more than note that there are certain topics which may frequently be largely non-political in respect of certain nations for indefinite periods. This is the era of complete foreign policy in

[40] See the valiant attempt by Premier Robarts to make the distinction clear to the Ontario Legislature, as reported in The Globe and Mail (Toronto), June 16th, 1967. And see the discussion in the *Scott* case, *supra*, footnote 13.

which no possible factor is overlooked in the sophisticated process of calculating the most effective formula for achieving national aims. Such things as technical and cultural agreements are routinely used in international affairs as political inducements or weapons.

Even a unitary state today has extreme difficulty in co-ordinating all aspects of its international relations, but some measure of consistency is essential if a nation's influence is to be used with any effectiveness in the pursuit of its objectives. In a federal state that still laid claim to national integrity, the difficulties could be compounded to the point of lunacy if central control over international commitments were substantially diluted. One can easily imagine the conflicts that could arise. Would special status permit Quebec to "recognize" Communist China and have formal treaty relations with that power when Canada did not? In the hope of encouraging greater capital investment from the United States, could Quebec establish a hostile attitude towards Cuba and restrict aspects of commercial relations between Quebec and Cuba more stringently than Ottawa would wish? Would special status in 1940 have permitted Quebec to conclude and implement agreements relating to scientific and industrial co-operation with Nazi Germany? Although such possibilities may seem almost comical, they appear permissible under the constitutional formula solemnly advocated on behalf of Quebec.

In this light it is understandable that some federal representatives wonder soberly if calls for a provincial treaty power subject to no policy control from Ottawa are not in fact veiled calls (whether subconscious or deliberate) for total independence or for a loose form of associate state relationship that would effectively amount to the same thing.[41]

VI. *The Prospects for Compromise.*

If the provinces can have no unsupervised treaty-making power within a continuing federal union, we are left with a choice between dissolution into independent states and some improved version of the present policy of "co-operative federalism". In other words, the question is whether improved arrangements for consultation and provincial involvement can be worked out that will meet the valid needs of Quebec and other provinces sufficiently to permit the continuation of the Canadian federation.

[41] The underlying significance of the extreme positions is bluntly summed up by L. L. LaPierre, Quebec and Treaty-Making (1965), 20 Int. J. 362.

Although co-operative federalism has sometimes been dismissed as a meaningless phrase useful only for political slogans, the practical philosophy which it encompasses deserves a more sympathetic examination. For some domestic problems more radical constitutional solutions may well be necessary, but in the treaty-making field co-operative federalism may offer the only viable solution that holds out any realistic promise of satisfying the essential interests of both the Federal Government and the provinces.

While the record of treaty action in fields requiring federal-provincial co-operation is not inspiring, neither is it as negligible as the ponderous machinery involved might lead one to expect. In the post-war years there are a handful of examples of conventions and treaties which the federal authorities were able to ratify after consultations with provincial governments had led to sufficient assurances of provincial co-operation. This degree of achievement becomes a little more impressive when it is remembered that Canada's emergence as a significant participant in international affairs really began only during the Second World War. Our management of foreign policy has been in a fluid, developing state until very recently and this has hardly been conducive to the smooth development of federal-provincial co-operation in foreign affairs.

The period in question saw the growth of Canada's Department of External Affairs from a nucleus of officials running a very limited operation to one of the larger diplomatic networks in the world today. The rapid increase in Canadian commitments abroad led to chronic shortages of personnel and frequent procedural improvisations aimed at keeping the conduct of our burgeoning external relations from coming apart at the seams. The system of rotational assignments, while essential to the development of a first class diplomatic service, created particular strains in a severely undermanned department. Supervisory responsibilities allocated to senior officials were usually far too heavy and were too frequently changed. Junior officers with extremely limited experience often found themselves coping with important duties which should have been handled, according to the department's establishment tables, by officers several grades higher in seniority. Frequently the only escape was a transfer, well before the time specified in the normal rotational scheme, to fill another serious gap elsewhere in the staff. In these circumstances, External Affairs' participation in consultation with the provinces on matters of mutual federal-

provincial concern was bound to be a sometimes uncertain matter. Obviously errors in judgment, breaches of protocol and ruffled feelings resulted. The remarkable thing is that Canada's foreign service somehow managed to perform very well in carrying out most of its responsibilities during a trying period in its growth.

Although the administrative problems of External Affairs have continued in some degree to the present time, there are signs that the Department is reaching a level of administrative maturity which may better permit it to play its key role in improving federal-provincial co-operation in international affairs. Federal authorities give the impression that they see no great room for major concessions to the provinces on the substance of the treaty-making power, but there is considerable readiness to admit that the existing procedures for consultations with provincial officials could be markedly improved. As the staff available to External Affairs approaches its requirements, the increased ability to assign experienced officials to all responsible positions and to reduce dislocation through unplanned and premature transfers should help ensure more consistent adherence to satisfactory procedures for consultation.

The Federal Government will have to decide whether it would be more desirable to establish a new division with specific responsibility for co-ordinating negotiations between the provinces and Ottawa on treaty matters and related external affairs questions, or to continue having officials (from External Affairs and other federal departments) whose duties directly involve them in the matters under discussion take charge on an *ad hoc* basis. Convincing arguments can be made for both approaches but, whichever procedure is chosen, it will be essential to inculcate in the federal service a clear appreciation of the fact that consultations with provincial governments are as important as those with other federal agencies and with foreign governments. New Cabinet directives should spell out guiding principles for the entire process of consultation, including the mandatory requirement of close liaison with the Provincial Relations Secretariat in the Privy Council Office.

Where the federal-provincial discussions with respect to a particular treaty promised to be protracted and complex, both levels of government might, as a tactical measure, consider making more frequent use on their negotiating teams of the services of members of business, academic and professional groups who may have demonstrated the requisite practical abilities. Certainly there

have been recent signs of increased awareness in External Affairs of the value of enlisting the temporary assistance of carefully selected specialists from outside the government service in appropriate circumstances. The addition of relatively neutral experts to federal and provincial negotiating teams might ease the sense of federal-provincial rivalry which is sometimes apparent when career officials from the two levels of government face each other over a negotiating table. In many cases, of course, the exchanges of views can be conducted by correspondence because the matters in question are comparatively straightforward.

While it seems probable that advance consultation would continue to be deemed necessary before undertaking international obligations arising under multilateral conventions, or under bilateral treaties in which the Federal Government has such a substantial interest that it feels the need of detailed understandings in advance, the need to involve federal officials in full-scale consultations about the details of treaty implementation could be obviated with increasing frequency in future by resort to an umbrella agreement (or framework agreement). Umbrella agreements such as that on cultural relations signed with France[42] in November, 1965, provide a useful means by which the Federal Government can specify its own immediate commitments to a foreign government and at the same time outline the broad terms within which the foreign government and a provincial government can work out detailed arrangements in provincial fields (or fields of concurrent federal and provincial jurisdiction) that are not of vital interest to the federal authorities. The Federal Government retains ultimate responsibility and general control of the nation's international commitments, while allowing provincial officials the maximum discretion possible within which to develop provincial programmes involving formal contact with foreign governments. The accord, or *entente*, between the province and the foreign government need only cite the umbrella agreement as its authority or else be supplemented by a note from the foreign government to Ottawa seeking the latter's *pro forma* assent.

---

[42] See Department of External Affairs press release No. 72 of November 17th, 1965, Franco-Canadian Cultural Agreement. The text of the agreement and the accompanying important exchange of notes are also in (1965), 17 External Affairs 513. On November 24th, 1965, Canada assented by an exchange of notes to a cultural *entente* signed that day between France and Quebec. See (1965), 17 External Affairs 520. On February 27th, 1965, an exchange of notes had been similarly used to give Canadian concurrence in an *entente* between France and Quebec on educational matters.

While it is yet too early for anything but conjecture as to the range within which the technique of the umbella agreement will be applied, it has been greeted by some observers[43] as a most promising means of bridging the conflicting demands in a federal state such as Canada. In view of the political pressure in Canada, it seems reasonable to surmise that federal officials would be prepared to use it quite widely where essential federal interests were not concerned and where no need for uniformity in provincial practice was discerned. The method could be used to regularize arrangements already largely negotiated between a province or provinces and a foreign government, as appeared to be the case with the 1965 cultural agreement with France. Alternatively, the agreement could simply provide long-term authorization for subsequent negotiations between the foreign government and a Canadian province or provinces, even where no clear plans for such action had been developed.

The use of umbrella agreements has not aroused enthusiasm in Quebec among supporters of provincial treaty power. Official spokesmen for Quebec, both in 1965 and thereafter, have studiously avoided any indication that an umbrella agreement is necessary or proper when subjects within provincial jurisdiction are involved. Indeed, the outraged cries by some Quebec politicians over the cultural agreement signed by Canada and Belgium[44] in May, 1967, show the vigorous rejection of the idea that the Federal Government can involve itself by treaty in areas such as culture and education, which Quebec believes to be within exclusive provincial competence.

The reported preference of the Belgian authorities for a treaty with Ottawa in place of initial negotiations with Quebec may provide some confirmation that few foreign governments are prepared to negotiate with a province until the international proprieties have been satisfied. While Quebec officials were merely informed in general terms by Ottawa that an agreement with Belgium was

[43] See Fitzgerald, *loc. cit., supra*, footnote 36. The suggestion that a variant of the umbrella technique might be used to allow provinces the option of becoming "associate contracting parties" to multilateral conventions raises more difficult questions. Aside from the matter of the general theoretical acceptability of such a development to the international community, there is a nice practical question of whether the advantage gained would be outweighed by the additional burdens faced by depositaries and the possible confusion engendered in other contracting parties.

[44] See reports in The Globe and Mail (Toronto) of the response of Premier Johnson and of Quebec's Cultural Affairs Minister, Mr. Tremblay (May 11th and May 17th, 1967) and of the official Belgian comment (May 26th, 1967). See also the editorial comment in The Globe and Mail (Toronto), May 11th, 1967.

being negotiated, they were apparently aware of the situation through their own channels. To Ottawa's explanation that consultation with Quebec was unnecessary because the province was not required by the treaty to participate in the programme agreed upon, was added a Belgian comment that budgetary factors had prevented Belgium from signing a separate agreement with Quebec. Obviously a major gap still exists between Ottawa's outlook and much of the thinking in Quebec. It remains true, nevertheless, that the umbrella device concedes to the provinces as much discretion and involvement in foreign affairs as prevailing international practice would find acceptable.

A related area in which the federal authorities could take steps to reduce provincial dissatisfaction is the naming of delegations to international organizations and conferences dealing with matters of provincial concern. It has long been the Government's practice to name one or more provincial officials to such delegations but at times a penny-pinching attitude has been the main cause of failure to name a delegation with increased provincial representation that would have reflected more closely the respective degrees of federal and provincial interest. The same attitude sometimes results in a failure to name any Canadian delegation at all to international meetings in which the Federal Government has little or no direct interest because the subject falls largely or entirely within provincial fields of authority. This outlook has been engendered partly by the chronic difficulty encountered by External Affairs in obtaining adequate budgetary allocations. The acute staff shortage at External has frequently necessitated an almost desperate search for one or two officers or supporting staff who could be temporarily assigned to assist important delegations. Although the resulting somewhat negative attitude to proposals for enlarged delegations, or additional delegations, is understandable, it does not meet present Canadian requirements. By leaning over backwards to accommodate provincial aspirations in this regard, the Federal Government would render itself much less open to criticism.

Obviously there can be administrative difficulties, potential policy disputes and occasional personal friction when one authority does not have complete control over the selection (and the sympathies) of delegation members. But it is precisely this type of problem which should not be permitted to stand in the way of a general improvement in federal-provincial co-operation. At most conferences it would not be necessary to include a delegate from

each province. For one thing, not all provinces would normally wish to propose a delegate. Very often, as now happens, one delegate could act as spokesman within the delegation for the viewpoint of all the provinces. Sometimes two provincial spokesmen, representing the two main legal and cultural systems in Canada, would appear desirable. The exact composition of the delegation can be determined according to the circumstances, including the degree of interest exhibited by the provincial governments.

The key point is to avoid limiting the size of delegations simply for the sake of economy even though conference practices permit a larger delegation. This approach is penny wise and pound foolish in light of our constitutional strains. Improvement, of course, will require educating Treasury Board away from its consistent wish to finance an impressive foreign affairs operation on a penny-ante basis. Since conferences result in international obligations, the burden of which actually falls very often on provincial shoulders, the validity of the provinces' desire to have their voice heard (if only within the confines of the Canadian delegation's own working sessions) at all stages of the negotiations can hardly be denied. For the same reason it would commonly be appropriate to include provincial officials on delegations negotiating bilateral treaties in fields requiring provincial co-operation in their implementation.

At the same time it is only fair to note the limitations faced by the Federal Government in naming delegations. The thoughtful survey by Professor Castel has been noted earlier in this article. In the rather unique context of the Hague Conference on Private International Law his suggestions concerning the appointment of delegates would in large measure seem appropriate. Furthermore, his suggestions show the direction in which future efforts must proceed to meet the broader need of providing satisfactory involvement in the negotiation of many types of international undertaking. Professor Castel recommends that delegates to the Hague Conference could be named as Canadian delegates but representing only a particular province and with freedom to speak in conference sessions from the particular viewpoint of the province represented.

The general application of this formula would undoubtedly have to be limited at conferences where controversial political topics could be expected to be introduced in debate and in corridor discussions, even if they were not on the formal agenda. In recent years, of course, there has been a depressing tendency to import political controversies into conferences which should be

concerned only with technical deliberations by experts. A few years ago this writer served on the Canadian delegation to a session of the World Health Assembly at which the greater part of the Assembly's time was taken up by heated discussion of such matters as the admission of Communist China to the Assembly, the banning of nuclear tests and the need to achieve immediate liberation of all territories still under colonial control. The provincial deputy minister who was a member of the delegation was alternately amused and irritated by the remarkable course of the debates. The entire delegation had to exercise utmost care in order to ensure that Canada was not placed in an embarrassing situation at any point in the intricate manoeuvres.

So long as political and non-political matters continue to be inextricably mixed in the deliberations of most conferences, there will be a continuing need for strong federal control over the participation of the Canadian delegation. In past years there have been instances of Canadian delegates resisting the authority of the head of delegation and attempting to deviate from agreed Canadian policy. Human nature makes occurrences of that sort inevitable from time to time but awkward situations presumably would be substantially increased if certain delegates thought of themselves as primarily provincial delegates and only nominally Canadian representatives. Accordingly, whatever the precise formula used in making the appointment, it would be essential that all delegates understood that they were primarily spokesmen for Canadian policy and must wholeheartedly support the agreed Canadian position in any utterances outside the Canadian delegation's closed meetings. Whenever broad questions of foreign policy did not enter the picture, the delegates named from a provincial government could intervene where appropriate to point out special problems or needs of his province but he would have to speak as a Canadian delegate and without coming into conflict with general Canadian policy.

At most conferences (unlike the Hague Conference on Private International Law) foreign delegations must be clear as to the policy of the Federal Government of Canada and have relatively little interest in the detailed views of the provincial authorities. It is usually possible to work out a basic Canadian policy that can be accepted by both the federal and provincial authorities in their respective spheres. Where this proves impossible the Canadian delegation can normally play only a passive role in the deliberations. So long as Canada remains a federal union, foreign govern-

ments will not tolerate the simultaneous expression of conflicting views by members of a Canadian delegation. Even brief signs of a sharp division of opinion within a Canadan delegation could greatly weaken the Canadian effectiveness in negotiations.

For the most part, past experience with "mixed" delegations has been remarkably good but it is understandable that federal officials would keep a cautious eye on the performance of provincial officials on Canadian delegations, as efforts were made to increase the role of provincial spokesmen in appropriate Canadian delegations to meet the legitimate demands of the provinces. In some cases it might be possible for the Federal Government to ease the tension by arranging to appoint from private business or the professions a certain proportion of delegates who would be acceptable to the provincial authorities as their expert spokesmen but who might not appear to federal officials to be emotionally committed to opposition to federal control of general foreign policy.

As the foregoing suggestions make clear, desirable improvements in constitutional arrangements relating to treaty-making will come about more through changes in procedure and attitude than by any basic legal reforms. The changes should, however, be more substantial in their cumulative effect than might at first be apparent. Their immediate objective would be to effect a thaw in the federal-provincial cold war and begin the replacement of suspicion by a greater measure of mutual confidence. This, after all, is the essence of any co-operative federalism.

Basically the obvious need is for enlightened political leadership supported by capable, discreet officials on both the federal and provincial sides. Put more simply, we need people in charge who have common sense and low blood pressure. Is it too much to expect? In the federal and provincial public services there are a surprising number of such men but, just as bad money is supposed to drive out good, the extreme and emotional spokesmen all too often dominate discussion and discourage more rational individuals from participating fully in public affairs. At crucial stages an extremist minority can grasp control of events and precipitate a crisis despite the passive inclinations of the moderate majority. There are disturbing signs of this process today, with many comments on federal-provincial relations by leading political figures being clearly designed to serve personal or partisan objectives more than the interests of Canada. Evasions, half truths and careless statements are common and it is too near the eleventh

hour to condone such behaviour. If we permit suspicion, emotion and illusion to continue building up, there is a very real danger that the Canadian nation could break up within a few years.

The situation is hardly conducive to optimism. Many Canadians evince little concern at the prospect of national dissolution. We can still hope, however, that the approach of disaster will bring a sombre realization of the need to resolve constitutional difficulties through compromise by all parties. By the very nature of the problem, the legal profession in Canada bears a heavy responsibility to help avoid a tragic outcome. No opportunity for calm, objective discussion aimed at reasonable compromise should be missed.