International Treaty Law and the Domestic Law of Canada

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In this paper I propose to explore the relationship between treaty law and domestic law in Canada. I will start with the familiar theory of the relationship between treaties and domestic law in England and in Canada and then move to less familiar areas of Canadian practice. An attempt will be made to investigate the rather murky area surrounding interdepartmental arrangements between Canada and sovereign states which are less than treaties but which do affect domestic law. I will attempt to raise, if not to answer, preliminary questions about the effectiveness of these procedures, the safeguards inherent in them, and their acceptability to the enlightened electorate of twentieth century Canada. These questions will lead to a few conclusions and, if necessary, some recommendations.

I. Conventional Law and Municipal Law: The Theory

1. In England

The law in England is and has been for some time very clear that the power to make and ratify treaties lies with the Crown exclusively.\(^1\) However, treaties so made and ratified cannot impose rights and duties on anyone in England except the Crown itself. If the ability to enjoy those rights and fulfill those duties lies within the royal prerogative that is the end of the matter; nothing further is required to implement the treaty. If, on the other hand, the fulfillment of the treaty requires actions outside the royal prerogative, then Parliamentary action is necessary to implement the treaty. To permit the Crown to exceed its powers in order to fulfill an obligation it has itself contracted would be to alter the basic constitutional law of England; that is an action indisputably beyond the power of the Crown acting alone.

It is in this light that Lord Atkin’s dictum in the Labour Conventions Case should be read: “Within the British Empire there

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is a well-established rule that the making of a Treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action". 2 If it lies within the crown prerogative to make the requisite alterations in domestic law, no legislation is required; but if, as is generally the case, the required alterations in domestic law are beyond the crown prerogative, then legislation will be necessary.

Viewed in this way, the rule admits of no exceptions; there are simply situations where the royal prerogative suffices and situations where it does not; and McNair’s famous exceptions to the rule that legislation is required become simple examples of the former situation. Thus, the Crown is acting within its prerogative when it seeks to enforce treaties it has ratified on rules for the conduct of war. This explains Porter v. Freudenberg, where it was held that the Hague Convention of 1907, which had not been implemented by legislation, could alter the common law rule that an enemy alien has no right to sue in English courts during hostilities. 3 Obviously, if Parliament has legislated on matters relating to the conduct of war, the Crown will be unable to modify the legislation. 4 Thus those parts of the Geneva Convention relating to prisoners of war which are implemented in the Geneva Conventions Act of 1957 are inviolable. By the same theory, F. A. Mann argues that the other provisions of the 1949 convention may also be in force in England. 5

It would seem that the Crown has the power to cede its territory and that, although parliamentary approval has invariably been obtained, the Crown could have granted independence to its former colonies on its own. This power does not extend to territory within England nor does it extend to the property of English nationals. In a number of treaties, the Crown has purported to cede property rights located in a foreign country. These treaties were made after the Second World War with Yugoslavia, Czechoslovakia, Poland, Bulgaria and Hungary; and the British Government declared “on their own behalf and on behalf of British nationals” that certain sums would be accepted “in full satisfactions and final discharge of
all liability to British nationals”. It is submitted that if these provisions were sought to be enforced in English courts, they would fail. This area of the Crown Prerogative has given rise to what can only be described as a misinterpretation by Lord Summer in *The Blonde*, where he said: “There can be no doubt that Germany was competent, on behalf of those nationals who were German subjects within the operation of the Treaty, to make cessions which would bind them and effect a transfer of their rights of property as if the cession had been made personally by the owner concerned”. This view, which has been suggested in other Prize Court decisions, must be restricted to questions arising between nations and not between individuals. The Crown may also implement treaties of peace designed to end a war so long as these treaties impose no financial burden on the country. This power has created little controversy in England, although, as we shall see, there have been difficulties in Canada.

The common law rules on diplomatic and sovereign immunities provide an excellent opportunity to observe what the Crown can and cannot do. The Crown cannot create new immunities nor can it create new classes of persons entitled to these immunities; these actions require legislation. The Crown can, however, restrict the immunities given and it can determine who is and who is not a member of existing classes of persons who are entitled to those immunities; these actions are within its prerogative.

The apparently opposing cases of *The Parlement Belge* and *Engelke v. Musmann* are illustrative of the Crown’s power to determine membership in classes but not to create new classes. In the former case, the Crown opposed a motion for the arrest of a Belgian mailship on the ground that the Crown had signed a postal convention (not implemented by legislation) to the effect that Belgian mailboats should be “...treated (in British ports) as vessels of war and be there entitled to all honours and privileges which the interests and importance of the service...demand”. Sir

6. Art. 2 of the Agreement with Yugoslavia (Dec. 3, 1948) CMD. 7600; Art. III of the Agreement with Czechoslovakia (Sept. 28, 1949) CMD. 7797; Art. 5 of the Agreement with Hungary (June 27, 1956) CMD. 9820; Art. 5 of the Agreement with Bulgaria (Sept. 23, 1955) CMD. 9625; and Art. 5 of the Agreement with Poland (Nov. 11, 1954) CMD. 9343.
Robert Phillimore held that the Crown did not have the power to, in effect, create immunities where none had heretofore existed. "If the Crown without the authority of Parliament, may by process of diplomacy, shelter a foreigner from one of Her Majesty's subjects who has suffered injury at his hands, I do not see why it might not also give a like privilege of immunity to a number of foreign merchant vessels or to a number of foreign individuals. The law of this country has indeed incorporated those portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors; but I do not think that it has therefore given the crown authority to clothe with this immunity foreign vessels, which are really not vessels of war, or foreign persons, who are not really ambassadors". The Crown will not "clothe" non-members of the class with immunities belonging to that class.

In Engelke, the question was the status of a German cipher clerk, not the immunities to which he was entitled. The House of Lords accepted the Crown's statement, that it considered Engelke to be a member of a class to which immunities normally attach, as conclusive of that aspect of the case. Their lordships then dealt with the common law question of whether the immunities would attach in this case and what effect they might have. The Crown was thus permitted to define the membership of the class. That the Crown may restrict the immunities granted is clear from Fenton Textile v. Krassin, where the official agents of the as-yet-unrecognized government of Soviet Russia were put in the class of diplomats for purposes of exemption from taxation, arrest and search. The courts upheld this restriction of immunity on the principle that it represented a waiver of a foreign state's rights which the Crown could accept within its prerogative.

Finally, the Crown may, by certain actions, such as a declaration of war, bring into operation a different set of common law rules. Although this action has the effect of changing the law under which the country is governed, it is not an excess of the Crown's powers because the common law itself has provided for alternate sets of rules to govern in any event.

9. Ibid., 154.
A treaty may be implemented by legislation in one of three ways: first, Parliament may translate the treaty into a number of statutes or amendments to existing statutes; second, it may enact a general law which uses the key terms of the treaty and is clearly designed to implement the treaty; finally, it may directly enact the treaty, with an appropriate preamble, into English law.

The latter two methods may give cause to the courts to go to the treaty itself and interpret it as an aid in the enforcement of the statute. In *Parke-Davis & Co. v. Comptroller-General of Patents, Designs & Trade Marks and Another*, the government was defending its decisions on the ground that by the Patents Act, 1949 it could make "no order...at variance with any treaty". To determine the question, the court felt obliged to interpret the International Convention for Protection of Industrial Property, 1934. And, in *Philippson et al v. Imperial Airways Ltd.*, the question arose in the interpretation of a contract as to whether the carriage in question was international. The conditions of carriage were based on the Warsaw Convention and the court looked to that convention to make its decision. Of course, this case concerned a private contract and it was not suggested that the Warsaw Convention was the law of the land. Perhaps the classic example of the English courts' willingness to go to the treaty itself is to be found in *Stoeck v. Public Trustee*, where the question was whether or not Stoeck was an alien within the meaning of the Treaty of Paris Order, 1919. The order simply stated that certain parts of the Treaty of Paris were to have full force and effect. In examining the entire treaty with a view to determining the meaning of the relevant provisions, Russell J. said: "I apprehend it is the right of a litigant to assert before the courts of this country, and the duty of those courts to adjudicate upon, claims founded upon a consideration of the municipal law of this country, and not the less so because the law involved has been derived from and has been enacted for the purpose of giving effect to, certain provisions of a document of an international character".

The rule in English law, then, is clear that, apart from certain situations involving interpretation, a treaty which requires action outside the Crown's prerogative cannot be enforced without

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legislation. The constitutional theory behind this rule appears to be soundly based on the division of powers between the Crown and Parliament, but the rule itself leaves unanswered some questions as to the status of a ratified treaty requiring but not having implementing legislation. It might well be argued that, being solemn declarations of the Crown's policy and being binding upon England in the international community, these treaties ought to have some effect. This argument will be explored more fully after we have examined the Canadian cases.

2. In Canada

Canadian courts have adopted substantially the same approach to conventional internation law as have the English courts. Indeed, the principle quoted from the Labour Conventions Case as defining English law arose from an appeal to the Privy Council from a Supreme Court of Canada decision and is, to a certain extent, binding on Canadian courts. The principle had, in any case, been affirmed by the Supreme Court some five years earlier in the Arrow River case where the court held that "the Crown cannot alter the existing law by entering into a contract with a foreign power".15

The Arrow River case is illustrative of another aspect of the attitude of Canadian courts to treaties. The case arose when Ontario passed a statute which imposed to toll on lumber passing along certain rivers including the Pigeon River. Since the Pigeon River was an international boundary river, this toll would have violated the unimplemented Ashburton Treaty of 1842. The Court of Appeal of Ontario and the Supreme Court of Canada (3 — 2), while recognizing that the treaty, having no implementing legislation, could be overridden by a statute, were able to interpret the statute in such a way as to avoid conflict with the treaty. Riddell J. put the matter this way: "The real argument is that the treaty was made with Her Majesty and is binding in honour upon Her Majesty's successor, His present Majesty, as it was upon His predecessor. Consequently, the Sovereign will not consider enacting anything that will conflict with His plain duty, unless the language employed in the statute is perfectly clear and explicit, admitting of no other interpretation. . . .the King cannot be thought of as violating His agreement with the other contracting power; and if the Ontario

legislation can fairly be read in such a way as to reject any imputation of breaking faith, it must be so read." Thus the Ontario statute was read in such a way as to avoid violating the Ashburton Treaty. We shall return to this point presently.

Although there have been few cases on the point in Canada, it is submitted that the English rule that the Crown can enforce a treaty without legislation so long as the actions required lie within its prerogative applies in Canada as well. In *Francis v. The Queen*, Rand J. of the Supreme Court of Canada gave support to this branch of the rule when he said that: "Speaking generally, provisions that give recognition to incidents of sovereignty or deal with matters in exclusively sovereign aspects, do not require legislative confirmation. For example, the recognition of independence, the establishment of boundaries and, in a treaty of peace, the transfer of sovereignty over property, are deemed executed and the treaty becomes the muniment or evidence of the political or proprietary title. Except as to diplomatic status and certain immunities and to belligerent rights, treaty provisions affecting matters within the scope of municipal law, that is, which purport to change existing law or restrict the future action of the legislature, including, under our Constitution, the participation of the Crown, and in the absence of a constitutional provision declaring the treaty itself to be the law of the state, as in the United States, must be supplemented by statutory action." It is submitted that this statement accurately reflects the rule in Canada with the caveat that one must read "the transfer of sovereignty over property" as restricted to the transfer of property to which Canada itself has title. A peace treaty could not transfer private property without legislation.

As a result of three *obiter dicta*, there has been some confusion about the status of treaties of peace in Canada. In *Secretary of State of Canada v. Alien Property Custodian of the United States*, Duff J. of the Supreme Court of Canada was dealing with the validity of the Treaty of Peace (Germany) Order of 1920. The Order, passed pursuant to the Treaties of Peace Act, was, of course, valid, but Duff J. added that "the treaty, it is to be observed, being a Treaty of

Peace, had the effect of law quite independently of legislation”.19 In a subsequent case on the same point, *Ritcher v. The King*, Angers J. said that “in passing I will note that an Act was not necessary to bring into force the Treaty of Peace between the Allied and the Associated Powers and Germany in question in this case; a treaty of peace is law in itself, independently of any legislation on the subject”.20 He then cited the Alien Property case, supra, as authority. One year later, Thorson J. of the Exchequer Court was seized with the same question and, after quoting Duff J.’s dictum said: “With the utmost respect, I venture the opinion that there is no authority for this statement and that it cannot be accepted without important qualifications. While a Treaty of Peace can be made only by the Crown, it still remains an Act of the Crown. While it is binding on the subjects of the Crown without legislation in the sense that it terminates the war, it has never, so far as I have been able to ascertain, been decided or admitted that the Crown could by its own act in agreeing to the terms of a treaty alter the law of the land or affect the private rights of individuals.”21 It is respectfully submitted that this last *dictum* is the correct statement of the law and that the two previous comments must be read subject to its qualifications.

The situation in Canada on the enforcement of treaties, while similar to that in England, is complicated by the federal nature of the Canadian constitution. The difficulties created by the *Labour Conventions Case*22 and other decisions have been discussed elsewhere.23 It is sufficient to quote Lord Atkin in the *Labour Conventions Case*: “But in a state where the Legislature does not possess absolute authority, in a federal state where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the Executive have the task of

obtaining the legislative assent not of one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive, but how it is to be performed, and that depends upon the authority of the competent Legislature or Legislatures.'

The theory behind this proposition is that when Canada was created as a federal state within the British Empire, certain powers were conferred exclusively on the provincial authorities. As time passed and Canada acceded to the status of an independent and fully sovereign nation, the federal executive acquired new powers to discharge this new role. But, according to the theory, nothing in this transition affected the distribution of legislative powers between the dominion and the provinces. Hence, although the federal executive might bind Canada internationally, it might or might not be able to fulfill that commitment depending upon the nature of the subject matter of the international agreement. The concern underlying this theory is that provincial autonomy is threatened whenever the central government is permitted to legislate in areas that are exclusively provincial even if the purpose is to fulfill an international obligation. Thus, after the Labour Conventions Case, Canada was unable to live up to the agreement it signed and the federal authorities were forced to begin negotiations which, as we shall see, are still continuing with the provinces in an effort to induce them to implement the terms of the agreement.

This approach is consistent with strict federal theory but it fails to take into account the sweeping changes that have occurred in regard to Canada's status as an international person. When the British North America Act was drafted in 1867, it was thought that Canada's international obligations would arise only through membership in the British Empire. Section 132 of the Act provided the federal authorities with ample power to implement any treaty obligations so acquired; in other words, the Fathers of Confederation intended the central government to be able to discharge all of Canada's foreseeable international responsibilities.

As Canada began to make treaties in her own right and not as part of the Empire, section 132 became less and less relevant, until now it is obsolete. Canada is left in the difficult position of being a full international person, with the responsibilities that that entails, and

yet there is no one government that has the power to ensure compliance with international law, customary or conventional. Provincial autonomy, which would, in my opinion, have been protected by the doctrine of "colourable legislation", could have survived a re-interpretation of either section 132 or the federal general power under section 91 of the B.N.A. Act permitting the federal authorities to legislate in provincial areas of competence in fulfillment of an international commitment.

In the *Offshore Minerals Reference*, the Supreme Court of Canada hinted that it might accept such an argument when it said, in support of its opinion that the Dominion owned the mineral rights in the continental shelf, that "it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention". The Supreme Court has here demonstrated an awareness of the inadequacy of the present situation regarding the implementation of treaties, but it may take many more years before a proper case comes before it and, even then, the court may not overrule the previous decisions. The faster and surer way to change this situation is to take advantage of current efforts to revise the constitution and to introduce a modernized version of section 132. The federal government might have to pay for such a revision but in the long run the price would be cheap.

We have seen thus far that the rule in Canada and in England is similar: most treaties require implementing legislation in order to change domestic law. When we examined this rule in the English context, we found that it was justified by the theory of the separation of powers between Crown and Parliament. The same theory applies in Canada: it is an important principle of Canadian constitutional law that the executive not be permitted to escape parliamentary control by doing by treaty what it could not otherwise do alone. Thus, in Canada, a treaty may be signed and ratified and yet have no effect internally as a result of either or both of two obstacles: either Parliament does not implement it or Parliament can not implement it. The treaty, to the extent that it was intended to operate internally, and many significant treaties of modern times are so intended, is rendered meaningless.

With due respect to the fundamental principles of separation and distribution of powers, may we not ask if such an approach to international citizenship is permissible? For example, after playing a role in the drafting of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, Canada waited until October 14th, 1970 before ratifying this treaty. There has been no implementing legislation.

The Canadian Bill of Rights which was assented to on August 10th, 1960 guarantees many of the freedoms called for in the convention, but it has two basic weaknesses. First, it is a federal statute and applies only in areas of federal competence. While this does include criminal matters, for the most part it fails to cover the provincial areas of civil and property rights. Second, until rather recently, the Bill of Rights was not being accorded much weight in Canadian courts. In a number of apparently relevant situations, it was found inapplicable. The recent case of Regina v. Drybones presents a notable exception to this trend and may signal a change in judicial thinking.

The federal government, when questioned about the implementation of the civil and property rights portion of the convention, indicated that it thought the provinces now provide a standard of civil rights sufficiently high to meet those of the convention. Several comments might be made at this point. Even if it is so now, will the provinces maintain those standards? If an individual is subjected to some form of discrimination and goes before a court, will it help his case to cite this convention to the court, or to point out that Canada has ratified the treaty? Will it help him to inform the court that the federal government believes that civil rights in the provinces are protected at least to the extent required by the convention? Surely, as the law is to-day, the answer is no.


28. It is interesting to note the brief history of such attempts in our judicial annuals. In a series of prisoner-of-war cases, notably R. v. Brosig, [1945] 2 D.L.R. 232 (Ont. C.A.), the courts appeared to hold that the Geneva Convention of 1929, although not implemented by legislation, was part of our law. There are, however, other explanations of these cases. There were two restrictive covenant cases which went both ways on the question of the force of the unimplemented San Francisco Charter and the Atlantic Charter: Re Drummond Wren, [1945] O.R. 778 (Ont. H.C.) and Re Noble and Wolf, [1948] O.R. 579 (Ont. H.C.). In reversing the
If we are to give some special status to the convention, what might this status be? It is clear that we cannot simply permit the executive to bypass Parliament; nor does there appear to be a simple solution to the federal-provincial difficulty. In regard to the separation of powers, these could be adequately protected and, at the same time, recognition could be given to a solemn binding commitment of the federal executive, as an expression of official public policy, by granting ratified treaties a status higher than the common law but lower than statute law. In other words, a ratified treaty would be the law of Canada until and unless it conflicted with a statute passed by Parliament. Since, subject to some important exceptions to be discussed presently, treaties are submitted to Parliament for approval, the federal Parliament would be most certainly aware of these new laws and could, if it disapproved, pass a statute to overrule it. The check on the Executive would be maintained. But, unless there existed or was enacted such a statute, the treaty would be law. This might also provide a solution to the separation of powers difficulty since the provincial Parliaments would have an opportunity to scrutinize the treaty and pass corrective legislation if they saw fit.

Another approach might be to provide that all treaties must be ratified by Parliament and then give them the force of law. This procedure might produce practical difficulties in that there is, as we shall see, some question about what is and what is not a treaty. The federal government has been, in recent years, signing agreements which it considers to be less than the type of treaty that customarily goes before Parliament for approval. Of course, this difficulty is overcome by the provision that, unless the treaty is ratified by Parliament, it has no legal effect except that which is already within the power of the executive. This approach also would avoid the separation of powers difficulty in that, if the subject matter of the treaty were provincial, the provincial legislatures would have to ratify it also. One can see immediately that there would be difficulties in this latter respect since one province might refuse to ratify. A better solution would probably be to allow the federal Parliament's ratification to implement the treaty and deal with the federal-provincial aspect in some other way.

Ontario courts the Supreme Court of Canada (Noble and Wolf v. Alley et al. [1951] 1 D.L.R. 321) did not mention either of the international instruments despite the fact that they were discussed at length by the lower courts.
The simplest solution, at least on the surface, to the division of powers question would be a reference to the Supreme Court on the treaty question. It has been suggested, here and elsewhere, that the Supreme Court might well be ready to overrule or refuse to follow the Labour Conventions Case. There are two difficulties here. First, the Supreme Court might decide against the federal government; and, second, even if the federal government was successful, it might not be politically feasible to take advantage of the victory. Such was the case with the Offshore Minerals Reference. A better approach must be, as suggested earlier, to negotiate a modernization of section 132 with appropriate safeguards. Since the separation of powers problem will require a constitutional change in any case, it would be appropriate to consider all aspects of this issue at once.

We have seen that, in a sense, Canada is restricted as an international person in regard to treaties. The possible solutions to this problem, and only a few have been discussed, will probably be long in coming and, in the meantime, the federal and to a lesser extent the provincial governments have been working out methods of dealing internationally which avoid some of the more serious repercussions. These methods are best examined by studying Canadian practice, as opposed to theory, in dealing with international obligations.

II. Conventional Law And Municipal Law: The Practice

The word treaty, as is well-known, is frequently used to describe a variety of binding international arrangements of differing degrees of formality and importance of subject matter, all of which come within the category of conventional international law. These include treaties themselves, conventions, protocols, agreements, declarations, final acts, and exchanges of notes. There arrangements may be contracted between heads of states, foreign ministers, and heads of administrative departments. Ratification and evidence that the contractor has full powers may or may not be required. Parliament may implement, ratify or approve them; or, they may not be put before Parliament at all. It is only in the light of these various possibilities that one can properly appreciate the difficulties and dangers of attempting to state anything like a rule, custom or even trend in the area of Canadian practice.

29. This is not to deny that a favourable judgment allows Ottawa to bargain from strength, an important consideration in the federal government's overall strategy.
A. E. Gotlieb has examined discrete periods of Canada’s treaty-making history since the Second World War, including the period 1965-1970, and concluded that, except for bilateral treaties with the United States, Canada has shown a tendency towards greater formality in its treaty-making in recent years. As he says, "it may be observed in the declining use of exchanges-of-notes in the bilateral field; in the emergence of a higher percentage of bilateral treaties subject to ratification than in late pre-World War II years, and in an upswing in formal multilateral treaty-making." He goes on to note that, although multilateral treaties are increasing in frequency, bilateral treaties with the United States, by far our most common treaty, have been for some time and continue to be informal. The exact nature of these informalities will be discussed later. It is difficult to draw any conclusions from Gotlieb’s observations except to note that Canada appears to treat commitments with partners other than the United States with more caution.

There are few statutory provisions relating to the exercise of the treaty-making power in Canada, it being, for the most part governed by constitutional custom. The power itself is part of the royal prerogative which is, in Canada, exercised by the Governor General in Council. There is no obligation at law, therefore, to submit treaties, either before or after their signature to Parliament for its approval or otherwise. Ratification, in its strict international sense, refers to the competent constitutional organ of a state giving its definitive consent to be bound by the treaty. It is part of the treaty-making power and in Canada it too is exercised under the prerogative by the executive. There is, however, tradition in Canada, dating back at least to the 1920’s, of submitting treaties for Parliamentary approval before ratification. Of course, this policy relates only to those treaties which do no require Parliamentary action to implement them. Those treaties requiring implementing legislation are approved when such legislation is passed or they have no effect.

On June 21, 1926, Mr. Mackenzie King, then Prime Minister, introduced a resolution approving the recommendations of the 1923 Imperial Conference regarding treaty making. This resolution said in part that "This House... considers... that before His Majesty’s
Canadian Minister advises ratification of a treaty or convention affecting Canada, or signifies acceptance of any treaty, convention or agreement involving military or economic sanctions, the approval of the Parliament of Canada should be secured. Mr. King had, in earlier speeches, indicated that this policy would apply to "Important treaties" and "obligations involving any considerable financial outlays or active undertakings" as well as those involving "political considerations of a far-reaching character." This approach was extended in 1941 when Mr. King said: "The practice is that, except in the case of very unimportant agreements or in the case of great urgency, the Senate and House of Commons are asked to approve formal treaties, conventions and agreements, before they are ratified. . ." In recent years, however, there has been a backing off from this position and it may now be said that only in cases of very important treaties is Parliamentary approval sought. The renewal of the NORAD agreement, the ratification of the Treaty on the Non-Proliferation of Nuclear Weapons, and the ratification of the extradition treaties with Austria and Israel are all instances where no approval was sought and yet they would appear to come within even the early guidelines set down by Mr. King.

In addition, distinctions are being drawn between "treaties" and "agreements", Mr. King's guidelines being considered as referring to the former only. On September 30, 1963, after it had become apparent that the agreement between Canada and the United States to permit the deployment of nuclear warheads on Canadian territory would not be placed before Parliament, Mr. T. C. Douglas asked Prime Minister Pearson if and when Parliament would be permitted to scrutinize the agreement. Mr. Pearson replied that it would not ever be presented with that opportunity, justifying his position by saying that "the agreement to which my friend refers is not a treaty or a heads of state agreement which would require ratification and customary prior approval of the House of Commons. It is an executive agreement, an exchange of notes between governments." A motion to table the agreement was defeated by a vote of 105-91.

32. Ibid.
33. Ibid.
35. Ibid., 3118-19.
In 1966, the Minister of Industry, Mr. Drury, moved a resolution to approve the agreement on automotive products signed in Johnson City, Texas, on January 16, 1965 and implemented by Orders-in-Council on that day. When questioned by the Opposition about the fifteen-month delay and the implementation before approval, Mr. Drury replied that, if this were a treaty, it would clearly come within Mr. King's guidelines: "But in this case this is not a treaty. It is an agreement between the administrations of two countries governing the exercise of their normal administrative functions." Other examples include the voluntary restraints on trade negotiated with Japan in 1964, the memorandum of the understanding reached between the governments of Canada and Hong Kong on restrictions of certain cotton textile exports to Canada in 1965, and the limits agreed to with the Government of Communist China regarding certain sensitive items as part of a wheat sale contract.

It can be seen then that as Canada's treaty-making becomes more sophisticated, there is a tendency away from Parliamentary scrutiny. Even where Parliament is called upon to approve a treaty, the terms of the treaty are not open for debate, only whether or not it should be ratified. In 1964, the Columbia River Treaty was before Parliament for approval and the New Democratic Party wished to amend the approving resolution to make it subject to Canada's negotiating a new protocol to the treaty clarifying certain clauses. The Speaker ruled this amendment out of order on the ground that, in putting the treaty before Parliament for approval, the government was not ipso facto relinquishing its prerogative in the realm of treaty-making. His ruling was upheld by a vote of the House.

It is, however, the practice of the Secretary of State for External Affairs to table, in both the House and the Senate, the texts of almost all international agreements which would not otherwise come to the attention of Parliament. There is also a list, deposited periodically in Parliament by the Prime Minister, of all Orders-in-Council, including those authorizing the conclusion of international agreements. Finally, there are the annual reports of the Department of External Affairs, the Department's bi-monthly bulletin, International Perspectives, and the Canada Treaty Series.

It is significant that even those treaties which are given the severest scrutiny — those for the ratification of which approval is

37. H. C. Deb (Can.), 1964, 3954.
sought — are not exposed to the possibility of amendment. And the others, that ever-growing category of "unimportant treaty" and "other than treaty", are simply published after the fact in a manner in which only those Members of Parliament with the greatest interest or time would have a chance to read let alone study them. Of course, even if they did study them, there would be no opportunity to discuss the matter in Parliament without the use of skillful tactics.

Reviewing momentarily what we have seen thus far in Canadian treaty practice, we find that the signing and ratifying of a treaty is within the power of the Executive. It is the Executive which decides upon the form and content of the treaty. If the treaty requires implementing legislation according to the Arrow River doctrine, the Executive will normally, before signing or, at least before ratifying, the treaty, place the implementing legislation before Parliament and a full opportunity to debate the treaty will be afforded. If, however, implementing legislation is unnecessary, there is no legal requirement for the Executive even to inform Parliament of what it is doing. The individual Members might, some time after the fact, glean from records and long lists of Orders-in-Council that something had happened — if their constituents had not notified them already — but even then there would be no simple way to bring the matter before the House, save by using the intricate medium of the question period or by attaching it to other bills such as Motions for Supply.

Recognizing the limitations of this system, Prime Minister King said in 1923 that "the day has passed when any government or executive should feel that they should take it upon themselves without the approval of Parliament to commit a country to obligations. . .".38 Were this the start of a binding custom, there could be no cause for concern at the lack of formal constitutional requirements. But, as we have seen, the custom, if it ever was one, is falling into disuse. In addition, it has been decided that Parliament has only a minimal role in these resolutions of approval, although full debate is allowed.

Surely the day Mr. King was speaking of has passed. Can it be acceptable in Canada today to have a treaty as important as the Automotive Products Agreement, with its important tariff changes, its far reaching economic impact, and its significant political

38. Supra, note 31, above.
implications, put into effect almost secretly? It is true that this was done legally, for these changes were made under powers that had been delegated to the Executive by Parliament; at a time when such an Agreement was not even contemplated. And, of course, it is true that the agreement received a certain amount of publicity when it was signed. But these considerations cannot make up for the fact that the tariff changes were in effect for fifteen months before Parliament was given an opportunity to approve or disapprove them, there never being an opportunity to change them. Can this be justified by saying that the changes in Canadian law were made pursuant to an "agreement" and not a "treaty"?

If there were a constitutional requirement, either in written or unwritten form, that all treaties, using the word in its broadest meaning, of any significance, be it economic, military or political, be placed before parliament for its approval before ratification; or, if no ratification were required, before signing it into force, most of the dangers, real and apparent, in the present system would be eliminated. Parliament would see the terms of the treaty as a body before Canada was bound to it and, since the terms of the treaty would themselves be up for approval, amendments could be proposed. The prospect of Parliament sending back approvals conditioned upon the negotiation of certain new terms may appear horrifying to the professional in foreign affairs, but we must have faith in Parliament's ability to grasp the difficulties which such a procedure would create. Obviously, in the case of multi-lateral agreements, it would have to be a take it or leave it approach.

Such a custom would also make more acceptable my earlier proposal about the status of a signed and ratified treaty. The suggestion was that such treaties, though lacking implementing legislation, should be considered as the law of the land until and unless contradicted by statutes of Parliament which would, of course, take precedence. There was a danger implicit in this suggestion that Parliament would not even know about these new "laws" until they were in force and, even then, would not hear of them as a body, but rather as individuals. It might be too difficult for opponents of the new treaty to organize a bill to change it.

Under my proposed approval system, any treaty which would affect our domestic law or make any economic, military or political commitments for Canada, whether or not implementing legislation was required, would be placed before Parliament in the form of a resolution approving its terms before Canada bound herself to it.
Once the approving resolution was passed and Canada had bound herself internationally, the terms of the treaty would be Canadian law, having a status above the common law but below statute law. If implementing legislation were thought necessary, either for the sake of clarity or to override existing statutes, parliament could then pass it. If none were required, the executive could issue the requisite Orders-in-Council, if they were necessary, with the assurance that Parliament had already approved their actions.

At the same time, it would be helpful, to say the least, if the meaning of the term "treaty" could be cleared up. At present, there are many international commitments created between Canada and other countries, the United States in particular, which take the form of exchanges of notes between the heads of administrative departments or even simple exchanges of letters. These come to the attention of Parliament, if at all, only in the most indirect and off-hand manner. The theory behind these forms of agreements is that nothing is being agreed to that is not within the power of the administrator to do on his own already. That is, he is acquiring no new powers by virtue of the treaty and any changes he makes are pursuant to powers already delegated to him by some act of Parliament. Since he is acting for the Executive, he is in the same position as the Executive vis-a-vis not having to account to Parliament for its actions within its prerogative.

Several points come to mind. First, administrators not have any prerogatives; they have, if Parliament has granted them, certain powers to make regulations through Orders-in-Council within pre-determined guidelines. Second, when Parliament delegates this authority, it has, generally speaking, few expectations that this authority is going to be used to commit Canada as a nation to international obligations. Third, the terms of these arrangements become obligations and those in Canada who are charged with administering various Acts of Parliament have their discretion fettered to the extent these obligations impinge upon their subject area. Finally, these are international commitments with invariably widespread political consequences; consequences which may exceed the apparently minor nature of the subject matter; consequences which Parliament should have an opportunity to consider beforehand.

The procedures for obtaining Parliamentary approval suggested above, then, should be applied to all treaties including any type of arrangement by which Canada becomes bound, whether legally or
morally, to do certain things. This will assure that the people in Canada who will be affected by these obligations will through their representatives be given an opportunity to scrutinize them in advance.

The Canadian practice with regard to the distribution of legislative powers problem is interesting as well. A. E. Gotlieb in his *Canadian Treaty-Making* argues that the federal government has, through an informal and pragmatic approach, developed effective and simplified means for making treaties despite the apparent restrictions of the *Labour Conventions* doctrine.\(^{39}\) In support of this argument he notes that many of the treaties Canada enters into require no implementing legislation. Of those treaties which do require implementing legislation, many lie within the federal sphere of competence. Treaties which have as their subject matter defence, trade, fishing, high seas and taxation make up some 85% of the formal treaties entered into by Canada and these all lie within federal competence.

Some treaties do require provincial legislation to implement them however and for these Canada has two choices. It can insist on the inclusion within the treaty of a so-called ‘‘federal state’’ clause by which Canada ratifies only such parts of the treaty as lie within the federal power and ratifies the other parts when and if the provinces pass the necessary legislation. This method has several obvious drawbacks, the most obvious being that Canada’s treaty partners may be, and frequently are, unwilling to permit Canada to enjoy this special position. In addition, Canada’s actual fulfillment of her international obligations becomes a rather amorphous quantity.

A more practical solution and one which Canada adopted after the legislation implementing the three I.L.O. Conventions was disallowed, is to have consultations between the various levels of government respecting the legislation or administrative changes required to implement a given treaty. The substantial success achieved by Canada in implementing these labour treaties is chronicled by E. A. Laundry.\(^{40}\) There have been, since that time, a number of I.L.O. conventions and the constitution of the I.L.O. requires that a member state brings a convention “before the authority or authorities within whose competence the matter lies for

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the enactment of legislation or other action". In 1964, the Minister of Labour, speaking of a convention respecting discrimination in employment said: The Prime Minister (Mr. Pearson) wrote to each provincial premier to ask for confirmation that the province is pursuing...a policy or promotion of equality of opportunity...within the spirit of the convention...The response...was positive. Canada did not employ the "federal state" clause method when it signed the International Convention on the Elimination of all Forms of Racial Discrimination. Instead a series of communications and consultations were commenced which were reported in a communication from the Department of External Affairs relying to an inquiry about the status of the convention. "In this connection the Government is now entering a process of consultation with the provinces concerning those provisions of the convention which fall within provincial jurisdiction. The federal government, at the present time, is actively engaged in consulting the provinces about the possibility of Canada's ratifying several conventions which touch upon human rights.

As we saw earlier, this convention was ratified on October 14, 1970 and, since no legislation was passed in pursuance of the convention by most of the provinces, we are left to infer that these consultations yielded the response that the provinces were already meeting that standard. This is, in fact, the position of the Department of External Affairs and the difficulties inherent in this approach have been discussed earlier. These observations, which are applicable to the consultation approach generally, reduce to the following question: so long as implementing legislation is necessary to supplant the common law by a treaty provision, are letters written to provincial premiers eliciting general replies fully satisfactory?

There are, of course, several substantial responses to the foregoing observations. It might well be suggested that even if Canada has no adequate method of fulfilling its obligations, it is still worthwhile signing these documents if only to lend what moral support we can to the principles contained in them. The argument would run that few countries do, initially, fulfil these conventions, which are designed to protect individuals within their own country, but that if we can at least get them to sign a document purporting to

41. H. C. Deb (Can.) 1964, 8993-94.
set these protections as goals, the reality might gradually move towards the form.

The second response might be that while yes it probably is unsatisfactory to be committing oneself to obligations one cannot property fulfil, nevertheless if we did not do it this way, we could not sign any treaties at all. In the absence of substantial constitutional change (and it would have to be substantial since the types of treaties we are talking about concern basic civil rights and property rights issues) the only alternative would be massive prior consultations, provincial representation at the negotiations, and provincial legislation passed and waiting to go into force before Canada could sign an agreement. This alternative appears so difficult that to articulate it is to reject it. We are, therefore, better off muddling through as we are than doing nothing.

In response to the first answer, that these treaties are useful even if only as ideals, I would have to agree. If it became clear that Canada's abilities to fulfil its obligations could in no way be strengthened, then it probably is better to sign anyway for moral support and in the hopes of gradual improvement. But, our moral support must be backed up by our ability to "deliver" within our own territory. As to the second argument, that muddling through is better than not moving, I can only partially agree. While this approach is, admittedly, in our Anglo-Canadian tradition and is even a source of pride among one school of political scientists, it does tend to avoid for a scandalous length of time fundamental questions and difficulties. It is not an answer to say that by a very pragmatic approach we are managing to get some things done. The true question ought to be: what could we do if the system were more finely tuned? It is by the standards set by the answer to that question that we must measure our present system.

Sooner or later we will have to face the reality that Canada, as a member, and more so, as one of the leaders, of the world community must have the power to change domestic law even in the sacred provincial rights areas popularly referred to as the sociological issues. Sooner rather than later. These changes can be wrought by a re-interpretation of our present constitution or, better, by a modernization of section 132 of the B.N.A. Act with appropriate safeguards against "colourable" interference.
III. Conclusion

In the area of international treaty law Canada has serious problems which affect us both domestically and internationally. There is the question of the status of a treaty duly signed and ratified but not implemented, the treaty which is not brought before Parliament, and the treaty which the federal government cannot implement even if it wanted to. None of these problems admits of any easy solution. The tentative suggestions put forward — the special status for an unimplemented but signed treaty, the requirement for Parliamentary approval, and the amending of our constitution — are all of them major changes. They may well carry with them the seeds of even greater difficulties. But they, along with other even more sweeping possibilities, such as a role for a provincially oriented Senate of Canada in treaty-ratifying or provincial treaty-making outside of the present "Umbrella Treaty" method now employed, must be considered if we are to begin to resolve these difficult questions.  

43. For a consideration of the related problem on customary international law, see R. St. J. Macdonald, The Relationship between International Law and Domestic Law in Canada in Macdonald, Morris and Johnston, Canadian Perspectives and International Law and Organization, 1974, pp. 88-137.