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Provincial International Status Revisited

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I. Introduction

The question as to whether the Canadian provinces possess international status caused much ink to flow in Canadian legal discourse from 1965 to 1968¹. Although the practical problems incident to an alleged provincial international personality remain with us in the mid 1970's, the lawyers have maintained a low profile from 1968 to 1971. In 1971 Anne-Marie Jacomy-Millette's doctoral dissertation was published as *L'introduction et l'application des traités internationaux au Canada*.² In 1973 Ivan Bernier's magisterial doctoral thesis was published under the title *International Legal Aspects of Federalism*.³ Although no new ground was broken, Professor Bernier stated the existing comparative and international law on federalism and international relations clearly and thoroughly. In 1974 the publication of *Canadian Perspectives on International Law and Organization*⁴ kept the Canadian controversy going in that two articles dealt explicitly with the issue of provincial international status, while a number of other studies mentioned the problem in passing. In that Gerald L. Morris' "Canadian Federalism and International Law" and André Dufour's

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This article is based largely on Chapter II of a doctoral dissertation entitled "Some Aspects of the Role of the Canadian Provinces in External Affairs: A Study in Canadian Federalism" (Duke University, 1974). I wish to express my deep gratitude to Professors F.R. Scott, Louis Sabourin and Robert R. Wilson respectively of McGill, Ottawa and Duke Universities for their helpful comments on earlier drafts.

1. The literature is summarized in Chapter IV of my M.A. thesis entitled *The International Status of Provinces* (McGill University, 1970).

2. (Paris: Pichon et Durand — Auzias, 1971). See C. Lloyd Brown-John's review of the volume in (1974, 5 *Etudes Internationales* at 730-31.

3. (London: Longman Group Limited, 1973). See my review in this journal, (1974), 1 *Dal. L.J.* 634.

4. R. St. J. Macdonald, G. Morris and D. Johnston, eds., (Toronto: University of Toronto Press, 1974).

“Fédéralisme canadien et droit internationale”⁵ presented respectively the federal and the Quebec viewpoints, it is perhaps time that the question of provincial international personality be reviewed from a reasonably objective standpoint.

I do not claim to be without views on the past, present and future of the Canadian federation. I merely wish to make clear that I view the Labour Conventions Case neither as a constitutional disaster nor as the bedrock of Canadian constitutional development. If I may state my own preferences, I wish for the continuance of the Canadian federation on terms acceptable to its major constituents. However, it is clear that the assertion of international rights and prerogatives by provincial governments for whatever purpose might occasion the balkanization of Canada in much the same way that Norway seceded from the Swedish crown in 1905, or indeed in the manner that Canada itself acquired “dominion status” within the Empire-Commonwealth. This possibility makes all the more necessary a fresh look at the issue of provincial international status.

The following study will examine whether the Canadian provinces enjoy international status and exercise its attributes, particularly the *jus legationis* and the *jus tractatum*. The examination will consider both international law and Canadian constitutional law and practice. The legal status of provincial agreements with foreign jurisdictions and of provincial representation abroad will also be considered.

II. International Law

1. Writers on International Law

There is general agreement that only fully independent sovereign states (and international public organizations) may be full international persons. This principle is as true of federal as of unitary states. That is, although the federation as a whole possesses international personality, the central government normally exercises its attributes.⁶

5. *Id.* at 55-71 and 72-87 respectively.

6. See 1 Hackworth, *Digest of International Law* (Washington: United States Government Printing Office, 1940-44) at 60; 1 L. Oppenheim, *International Law — A Treatise*, ed. Sir Hersch Lauterpacht, *Peace* (7th ed. London: Longmans, Green and Company, 1948) at 113 [hereinafter Oppenheim]; Hans Kelsen, *Principles of International Law* (New York: Rinehart and Company, 1952) at 170; Louis Delbez, *Les Principes Généraux du Droit International Public* (3 ième éd. Paris, Librairie Générale de Droit et de Jurisprudence, 1964) at 89; J. G. Starke, *An*

However, it is not unknown for the member-units of certain federations to exercise limited rights of legation and of treaty-making, thereby enjoying partial international personality.⁷ However, all the extant examples (the Swiss *cantons*, the German *Länder* and some Soviet republics) have been states which possessed full international status before entering their respective federations.⁸

Professor Kelsen held that a federal member-unit exercising external powers may be viewed as the indirect agent of the federal state. However, if the member-unit concludes an international agreement in its own name and is answerable internationally for its delinquencies, then that entity may be more than the federation's indirect agent.⁹ Whether federal member-units are internationally responsible for their own delicts is not firmly established due to a paucity of jurisprudence on the subject. However, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States opens the possibility that a member-unit of a federal contracting state may be a party to a legal dispute provided that the subdivision first obtains the consent of its central government.¹⁰

The source of authority for federal member-units to exercise limited rights of legation and of treaty-making is not fully settled

Introduction to International Law (6th ed. London: Butterworths, 1967) at 108 [hereinafter Starke].

7. See 1 Hackworth, *Digest of International Law* at 60; 1 Oppenheim at 168; Kelsen, *Principles of International Law* at 171; Starke at 108; and 1 D.P. O'Connell, *International Law* (London: Stevens and Sons Limited, 1965) at 318. Professor O'Connell in his *State Succession and the Effect upon Treaties of Entry into a Composite Relationship* (1963), 39 B.Y.I.L. 54 at 57 clarified the meaning of partial international status: "all that can be meant is that it [the member-unit] is capable of international transactions within the areas of power in which it is competent."

8. See 1 Oppenheim at 165; 1 O'Connell, *International Law* at 318; and André Patry, "La Capacité Internationale des Etats Fédérés", in Jacques Brossard et al eds., *Les Pouvoirs Extérieures du Québec* (Montréal: Les Presses de l'Université de Montréal, 1967) at 86 [hereinafter Brossard].

9. See Starke at 64n; Herbert Briggs, ed., *The Law of Nations: Cases, Documents, and Notes* (New York: F.S. Crofts and Co., 1938) at 63; and Wolfgang Friedmann, Oliver Lissitzyn and Richard Pugh, *Cases and Materials on International Law* (St. Paul, Minn.: West Publishing Co., 1969) at 202.

10. *United Nations Treaty Series: international agreements registered or filed and recorded with the Secretariat of the United Nations*, Vol. 575, 1966, No. 8359, Article 25. In Professor Lissitzyn's view, the American States and the German *Länder* are responsible for their own delicts. See his "Territorial Entities other than Independent States in the Law of Treaties", in Hague Academy of International Law, Collected Courses, Tome 125, 1968, III at 31 and 43 [hereinafter Lissitzyn (1968)].

among students of international law. The prevailing view is that these entities may exercise such rights if their federal constitutions permit them to do so.¹¹ The constitutions of Switzerland, the United States, the Soviet Union and the Federal Republic of Germany grant their member-units limited rights to treat with foreign jurisdictions. However, these "treaty rights" are subject to central government consent in all cases. The Ukrainian and Byelorussian republics have to their credit one bilateral "treaty" each, and these were made with the phantom Polish "Lublin Committee". The bilateral agreements of member-units of the other federations have been largely confined to the local problems of border areas.¹²

The writers who point to federal constitutions as the locus of authority for member-units to exercise limited external powers seem to assume a written document. Thus, it is difficult to apply the principle to a polity such as Canada where the constitutional norms governing foreign affairs are largely unwritten. Moreover, these writers are challenged by others who assert that the operative conditions for the possession of partial international status are the willingness of the central government to sanction it and the readiness of foreign states to treat with such subordinate entities.¹³ A variant of the latter position is the view that the experience of Commonwealth states and the Phillippines illustrates the principle that recognized international status was gained after the polities had successfully established precedents meriting such international recognition.¹⁴

11. See Delbez, *Principes Généraux* at 90; 1 Oppenheim at 692 and 796; and 1 O'Connell, *International Law* at 349. There are no extant examples of members of federations other than Canada exercising a limited right of legation. The two Soviet republics may be exceptions to this statement if their membership of the United Nations family of organizations is considered. However, the late J.L. Brierly viewed such membership as analogous to "being or becoming a party to a treaty." See his *The Law of Nations: An Introduction to the International Law of Peace*, revised by C. H. M. Waldock (6th ed. Oxford: The Clarendon Press, 1963) at 154.

12. See M. Rand, *Compacts Between States of the United States and Canadian Governments* (M.A. thesis, Columbia University, 1967) [hereinafter Rand]; E. His, *De la Compétence des Cantons Suisses de Conclure des Traités Internationaux Spécialement Concernant la Double Imposition* (1929), 10 *Revue de droit internationale et de législation comparée* at 454-79. See also W. Leisner, *The Foreign Relations of Member States of the Federal Republic of Germany* (1965-66), 16 *U.T.L.J.* at 346-60 [hereinafter Leisner].

13. Lissitzyn (1968) at 84.

14. Lissitzyn, *Efforts to Codify or Restate the Law of Treaties* (1962), 62 *Col. L. Rev.* 1166 at 1166-84.

2. Codification of International Law

a. Harvard Draft

Some of these contrasting views have found expression in the various attempts to codify international law, the most recent and fruitful effort being that of the International Law Commission of the United Nations. The Harvard Law School's Draft Convention on the Law of Treaties was the most influential of some earlier efforts and constituted the starting-point for the work of the International Law Commission. The article on treaty-making capacity made no mention of federal states, but the Commentary expressly excluded the member-units of federations from consideration:

Thus if under Article I, Section 10 of the Constitution of the United States, the State of New York may, with the consent of Congress, enter into an agreement with the Dominion of Canada, the agreement may have all the characteristics of a treaty, as the term is generally used, but it will not be a "treaty" as the term is used in this Convention, and the provisions of this Convention are not designed to apply to it.

An instrument to which . . . a Swiss Canton and one of the States of the German Reich are parties, may be called a "treaty" *eo nomine*, but this Convention will not apply to it.¹⁵

This quotation implies that some designation other than "treaty" must be found for the transborder agreements of federal member-units.

b. International Law Commission

After labouring for more than a decade on codifying the law of treaties, the International Law Commission completed its draft convention in 1966. The draft served as the working document of the United Nations Conference on the Law of Treaties, held at Vienna in 1968 and 1969. The article on treaty capacity had generated considerable controversy, and hence, its evolution should be traced in some detail.

The Commission's 1953 draft included the following comment: "It is believed that treaties thus concluded by State members of

15. (1935), 29 A.J.I.L. (Special Supplement) at 704. A more recent private effort is that by the American Law Institute, *Restatement of the Law: The Foreign Relations of the United States, Proposed Official Draft*, May 3, 1962. This work has been criticized by Professor Lissitzyn for failure to deal with the question of treaty capacity for federal member-units. See his *The Law of International Agreements in the Restatement* (1966), 49 N.Y.U.L. Rev. 100.

Federal States are treaties in the meaning of international law.”¹⁶ This statement marked a radical departure from the position taken by the Harvard Draft Convention. The Comment indicated that the authority for the exercise of treaty powers by federal member-units is the permission of the central government as expressed in constitutional law. However, in the absence of such provisions, the member-unit may not exercise external powers because it is not *prima facie* an international person.

The 1958 draft was less permissive than its predecessor. It denied federal member-units an international personality distinct from that of their federations. To the extent that the subordinate entities are authorized to treat with foreign countries, they do so as agents of the federation, which alone “becomes bound by the treaty and responsible for carrying it out.”¹⁷

The 1962 draft returned to the greater permissiveness of the 1953 version, but it added additional conditions for the exercise of treaty capacity by federal member-units:

- (i) If it is a member of the United Nations, or
- (ii) If it is recognized by the federal State or Union and by the other contracting State or States to possess an international personality of its own.¹⁸

The Rapporteur commented that the examples (the Ukrainian and Byelorussian republics) “if not numerous, are important and difficult to overlook.”¹⁹ Thus he acknowledged the Soviet Union’s special political interests. However, there are as yet no extant examples of federal member-units fulfilling the second condition.

During the Commission’s 1965 meetings, the dispute between the Canadian central and Quebec governments on treaty-making figured prominently. Some members evidenced an appreciation of the consequences of an article referring to the treaty capacity of federal member-units. Nigeria mentioned the Canadian controversy as an argument in favor of retention. The Soviet Union favored retention as well, despite earlier disinterest in the matter. However, Poland

16. United Nations, *Yearbook of the International Law Commission, 1953*, Vol. II, Doc. A/CN. 4/63 at 139.

17. United Nations, *Yearbook of the International Law Commission, 1958*, Vol. II, Doc. A/CN. 4/115 at 24.

18. United Nations, *Yearbook of the International Law Commission, 1962*, Vol. II, Doc. A/CN. 4/144 at 35-36.

19. *Id.* at 37. A noteworthy feature of the 1962 debates was the stout opposition by the American and Austrian members to any reference to federal states, while the Canadian member, Mr. Cadieux, favoured the reference.

dissented from the Soviet view, indicating that there was not as yet a firm Communist bloc policy on the matter. Moreover, Yugoslavia suggested that French behaviour toward Quebec might be construed as interference in Canadian internal affairs. Israel doubted that the "so-called cultural 'agreement' " between France and Quebec would be registered, and hence dismissed the problem as academic.²⁰ Given France's growing attention to Quebec, the French member's opposition to special prominence for federal states²¹ might have occasioned some surprise. The United States and Austria maintained their strenuous opposition to the offending paragraph.

Given the lack of consensus among the members, the Rapporteur admitted that a provision respecting the treaty capacity of federal member-units

involved some very serious dangers. There were Federal States in which the problem of the possible treaty-making capacity of component units had given rise to controversy. Any pronouncement by the Commission on that question could involve the risk of such a component unit involving a right under article 3, with risks to the continuation of the federation.²²

Consequently, the article was sent back to the drafting committee, and the following replacement was presented to the 816th meeting:

Article 3 (2): 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.²³

This paragraph was adopted by seven votes to three with four abstentions.

The only change made by the 1966 meeting was the renumbering of the controversial article. The Commentary, however, left some legal issues unresolved. According to it,

20. United Nations, *Yearbook of the International Law Commission, 1965*, Vol. I, 810th meeting at 248.

21. *Id.* at 46.

22. *Id.*, 811th meeting at 252.

23. *Id.*, 816th meeting at 280. See also the 777th and 779th meetings, In Helmut Steinberger's view, the paragraph did not mean that federal member-units could be states under international law. It simply "recognized the competence of States under general international law to endow political subdivisions with a limited international capacity." See his *Capacity of Constitutional Subdivisions to Conclude Treaties: Comments on the ILC's Draft Articles* (1967), 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 418.

the treaty-making capacity is [usually] vested exclusively in the federal government, but there is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third States. Questions may arise in some cases as to whether the component State concludes the treaty as an organ of the federal State or in its own right. But on this point also the solution must be sought in the provisions of the federal constitution.²⁴

c. Vienna Conference on the Law of Treaties

The renumbered 1965 text served as the working document at the Vienna Conference which met in 1968 and 1969 respectively in committee and in plenary session. The article on treaty capacity for federal member-units again proved to be very controversial.

The arguments in favour of the article included these: the Soviets asserted that it conformed to international practice; the Czechs thought that it would provide for present and future federal arrangements; the Byelorussians and the Ukrainians drew attention to their "sovereignty", "diplomatic practice" and "constitutional norms"; while the Nigerians were impressed by the possibilities opened by the Convention on the Settlement of Investment Disputes.²⁵

Of those opposed to the article, Austria held that its excision would spare third states the delicate task of interpreting a federation's constitution; New Zealand felt that the use of the term "State" to refer to both the federation and a component unit was misleading; Mexico asserted that international law is not concerned with domestic constitutional arrangements; Canada feared that the article would serve as an invitation to outside states to interpret its constitution,²⁶ and suggested the difficulty of applying the provisions to federal states with unwritten or partly written

24. United Nations, *Yearbook of the International Law Commission*, 1966, Vol. II, Doc.A/6309/Rev. 1, Part II at 192.

25. See *United Nations Conference on the Law of Treaties, First Session*, Vienna 26 March - 24 May 1968, 11th meeting. See also *id.*, *Analytical Compilation of Comments and Observations Made in 1966 and 1967 with Respect to the Final Draft Articles on the Law of Treaties: Working Paper Prepared by the Secretariat*, Vol. I, A/CONF. 39/5, 10 February 1968.

26. The Canadian fears were not without foundation in fact; for, in January 1968, the African state of Gabon invited Quebec, not Canada, to send delegates to an international conference on education. In effect, Gabon interpreted Canada's constitution in a manner unacceptable to the central government. Ottawa subsequently suspended diplomatic relations with the African state.

constitutions; the United States thought that the article would create more problems than it would resolve; and Uruguay insisted on the primacy of international law over domestic constitutional law, and warned against a proliferation of states at international conferences.

The vote on an amendment to delete the controversial paragraph revealed a bloc pattern: For:—Western and affiliated (30), Latin American (8), Federations (11), Total (38); Against:—Western and affiliated (9), Latin American (2), Communist (9), Arab (6), Francophone (15), Federations (4), Total (45).²⁷ There were ten abstentions.

The vote was sufficiently close to cause the word "State" in the sense of a federal member-unit to be deleted from the article. The revised text was subsequently adopted 46 to 39 with 8 abstentions and with substantially the same bloc voting pattern.²⁸ Jamaica's suggestion that the article should have had the unanimous support of the federations since they were most directly concerned apparently went unheeded.

The 1969 Plenary Session deleted the controversial paragraph on treaty capacity for federal member-units. The leader of the Canadian delegation, Mr. Max Wershof, made an impassioned appeal for excision. He argued that the paragraph was "dangerously incomplete" because it failed to specify "conferred by the federal State and must have been recognized by other sovereign States."²⁹ The paragraph also failed to refer to judicial decisions as modifying a constitutional text and it did not deal with the problem of international responsibility. It also neglected to say that only the federal state was competent to interpret its own constitution. To quote Mr. Wershof:

In federations where the constitution was entirely written and dealt expressly with treaty-making, the danger might be relatively small, but it would be real and very serious in situations like that of Canada where the constitution was largely unwritten and where constitutional practice was as important as written documents.³⁰

The Canadian position apparently carried considerable weight, for the controversial paragraph was eliminated by the decisive

27. There is some unavoidable overlap in these categories. The totals were summed separately.

28. *United Nations Conference on the Law of Treaties, First Session*, 28th Meeting, at 149.

29. *United Nations Conference on the Law of Treaties, Second Session* at 6.

30. *Id.* at 6-7.

margin of 66 to 28 with 13 abstentions.³¹ Those in favor of retention were limited to the Communists and Arab blocs, a rump of the Franchophone group (including France and Gabon) and some miscellaneous states. Thus, a paragraph referring to the treaty-making capacity of federal member-units failed to find a place in an international Convention of the Law of Treaties which is presently open for signature.

3. Membership of International Organizations

a. United Nations Family

A related issue concerns membership of international organizations. Those United Nations bodies which made provision for the associate membership of entities lacking control over their own foreign relations include the Food and Agriculture Organization, the International Telecommunications Convention, the World Health Organization and the World Meteorological Organization. The constitutional provisions of each are basically similar. The "parent" state must act as sponsor and guarantee the fulfillment of any obligations undertaken by the non-sovereign, and two-thirds of the members of the organization must agree to accept the application. Upon admission as an associate member, the non-sovereign may not vote, elect or be elected to any position within the organization.³²

It is generally agreed that these provisions for associate membership were intended to apply to dependent entities in various stages of colonial development. There are apparently no federal member-units which enjoy associate membership in any of these organizations.

b. L'Agence de Coopération Culturelle et Technique (Agency for Cultural and Technical Cooperation)

A somewhat different picture is presented by an international

31. *Id.* at 15. Professors McWhinney and Atkey credit the "vigorous lobbying" by the Canadian federal government in helping to secure this result. See their articles in 2 *The Confederation Challenge* (Toronto: Queen's Printer, 1970) at 117 and 161n. See also C. Brown-John, "The Constitution and Treaty-Making Capacities" in Appendix V of Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, Thursday, December 10, at 86. On the other hand it is believed that France consulted with Quebec.

32. See A. Peaslee, ed., *International Governmental Organizations: Constitutional Documents* (2d rev. ed. 2 vols. The Hague: Martinus Nijhoff, 1961).

organization of *Francophonie*, l'Agence de Coopération Culturelle et Technique, which was founded at Niamey, Niger on March 20, 1970. The constitutional provision respecting membership for non-sovereigns is basically similar to those of the United Nations organizations. It reads as follows:

Within the framework of the full respect for the sovereignty and the international competence of member-States, any government may be admitted as a participating government [gouvernement participant] in the institutions, the activities and the programs of the Agency, provided that it receives the support of the member-State which is sovereign over the territory on which the participating government concerned exercises its authority and according to the agreed modalities between this [participating] government and that of the member-State.³³

However, this formula was clearly drafted with the Canadian province of Quebec in mind. That is, this particular instance may possibly become the definitive precedent for a species of official status for federal member-units in international organizations.³⁴

4. Summary

It is evident that the question of international status for federal member-units is not yet settled in international law. However, there are a few common themes which may serve as useful indicators of partial international personality for certain members of federal unions. First, although there is no explicit mention of the question in the Vienna Convention, there is no rule of international law which denies partial international status to federal member-units. For the entity to enjoy such status, however, other criteria must be satisfactorily met. The most important of these criteria for the exercise of limited rights of legation and of treaty-making is constitutional authorization. Normally, this authority should stem from a written constitutional document. Although it is not impossible to find ways to derive the requisite authority from unwritten constitutional practices and "understandings", this alternative is beset with too many pitfalls and potential embarrassments to be considered viable. Secondly, if partial international

33. *Convention Relative à l'Agence de Coopération Culturelle et Technique*, Annexe: Charte de l'Agence de Coopération Culturelle et Technique at 3 (author's translation). There is no possibility of multiple voting, because each member-state, whether federal or unitary, has only one vote.

34. The same point is made by L. Sabourin in his *Canadian Federalism and International Organizations: A Focus on Quebec* (Ph.D. dissertation, Columbia University, 1971) at 168 [hereinafter Sabourin].

status is not to be an empty façade, there must be a number of other states willing and able to deal with the partial sovereign in the areas of its competence. A third element, found in the practices of some federations, is the possibility of ultimate central control and surveillance of the member-units' foreign relations.

As to breaches of obligations contracted by federal member-units, there appear to be at least two possibilities. Usually, the federation will be held internationally responsible and may itself attempt to collect damages from its member-unit. Alternatively, the federation may permit its component to be a party to an internationally justiciable proceeding as is contemplated by the Convention on the Settlement of Investment Disputes.

Since the answer to the question of partial international status must be sought in a particular concrete case, the next steps are to examine Canadian constitutional law and practice, and to ascertain whether any foreign states or groups of states have recognized the right of a Canadian province to enjoy partial international personality.

III. Canadian Constitutional Law and Practice

1. Personality

No province of Canada enjoyed international personality immediately prior to joining the federation.³⁵ The four original provinces were all British colonies at the time of union. British Columbia and Prince Edward Island, admitted in 1871 and 1873 respectively, were likewise British colonies prior to entry. The provinces of Manitoba, Saskatchewan and Alberta were created by the central government out of previously unorganized territory. Only Newfoundland possessed full "dominion status" prior to federation. Like Canada, Newfoundland acquired external sovereignty between 1926 and 1931.³⁶ However, Newfoundland's international personality was short-lived, for she suffered insolvency in the early 1930's and reverted to crown colony status in

35. Each colony possessed the legislative power to implement treaty obligations contracted by Great Britain, but some felt that their interests in foreign affairs were sometimes being overlooked. See N. Rogers, *Notes on the Treaty-Making Power* (1926), 7 Can. Hist. Rev. 29 at 29 and 32 and R. Delisle, "Treaty-Making Power in Canada" in Ontario Advisory Committee on Confederation, 1 *Background Papers and Reports* (Toronto: Queen's Printer, 1967) at 125-26.

36. The legal division of the Canadian Department of External Affairs cannot itself be more precise. See (1968), C.Y.B.I.L 255.

1933. Thus, at the time of union with Canada in 1949, Newfoundland had no international status to surrender, in whole or in part. On entering the federation, therefore, her position became precisely that of the other provinces with respect to external affairs.³⁷

In short, no province, whether original or subsequently admitted, had any international status to surrender. Hence, for purposes of international law, the Canadian provinces cannot be compared with the Swiss *cantons* and German *Länder*,³⁸ for the vestigial external powers of both these entities stem from an earlier period of full international personality. This is not to say that one or more Canadian provinces may not have subsequently acquired a species of international standing. However, to assess this possibility, any acts of recognition by foreign states and any likely provincial precedents in terms of legation and treaty-making powers must be scrutinized.

2. Recognition

There are a number of areas in which it would be appropriate for foreign states to deal at some point, or in some way, with Canadian provinces. These provincial international contacts may be classified into at least three basic types: transborder, economic and cultural. However, for the time being, evidence of a foreign state's disposition to recognize an international status for the provinces should be looked for mainly in the context of cultural relations with French-speaking countries.

For example, while the United States sometimes permits its states to enter into contractual relationships with Canadian provinces, the American enabling legislation often refers to the corresponding Canadian authorization. On the other hand, the United States government refused to answer a letter sent in 1966 by the Quebec Minister of Revenue protesting newly-announced guidelines for the conduct of American corporate subsidiaries in Canada.³⁹ Moreover,

37. S.C. 1949, c.1 R.S.C. 1970, App. No. 30. For the problems of treaty of succession consequent on Newfoundland's federation with Canada, see D. O'Connell, *State Succession*, *supra*, note 7 at 91-93.

38. Although it is recognized that, except for Bavaria and the Hanseatic cities, the present-day *Länder* were created by the Allied occupying powers, historically, the *Länder* have enjoyed partial international personality under both the Imperial and Weimar constitutions.

39. John Saywell, ed., [1966] Canadian Annual Review at 50 [hereinafter CAR]

in permitting Louisiana to conclude a cultural accord with Quebec, the State Department demonstrated a keen awareness of Canadian sensitivities.

Although, for the most part, France has acted “correctly” toward Canada in its relations with Quebec, it became increasingly evident after 1965 that it was official French policy to recognize Quebec’s “international capacity”.⁴⁰ Moreover, French officials who visited Quebec between 1967 and 1969 have refused to visit Ottawa. However, in a desire to improve its relations with Canada, France has recently moderated its policy of encouraging Quebec’s claims of external sovereignty.

Switzerland, Luxembourg, Belgium, Laos, Cambodia and South Vietnam prefer good relations with Canada and eschew bilateral dealings with Quebec.⁴¹ Gabon was the only French-speaking African state to have acted in a manner which may be construed as recognition of Quebec’s “international status”, but Gabon, too, has subsequently abandoned this position in favor of improved relations with Canada. While Senegal, Tunisia, Niger and the Ivory Coast have in the past engaged in bilateral dealings with Quebec, they apparently did so unaware of the domestic repercussions in Canada. Better informed, their present practice is to carry on relations with French Canada through the medium of the federal government.⁴² Thus, although for a brief period, Quebec found a number of foreign states willing to recognize its alleged international status,⁴³ not one of these states presently maintains this attitude.

3. *Legation*

Consistent with the experience of most other federal states, the Canadian federal government has gained exclusively the right of

40. It is believed that France consulted with Quebec prior to both the Vienna Conference on the Law of Treaties and the Founding Conference of l’Agence de Coopération Culturelle et Technique. For an analysis of French motives, see my “French Attitudes and Policies Respecting Canada and Quebec” (forthcoming for the Dalhousie Centre for Foreign Policy Studies). Although there is little of record on Quebec’s relations with Communist and Arab states, the attitudes of these states toward Quebec’s international aspirations may perhaps be inferred from their pro-Quebec votes at the Vienna Conference.

41. Sabourin at 372.

42. *Id.* at 373-76.

43. Following the precedent of El Salvador’s accidental recognition of Manchukuo in the 1930’s, exchanges of greetings between the Premier of Quebec and a number of foreign leaders were arranged for January 1, 1968. For a description of the

legation on behalf of the federation. Ottawa achieved this position by a cumulation of symbolic and political precedents rather than by a constitutional text.

By 1880 the Canadian High Commissioner in London became the highest-ranking quasi-diplomatic official in the Empire, eclipsing in status the provincial agents-general. In 1907 Prime Minister Wilfrid Laurier effectively blocked provincial representation at the Colonial and Imperial Conferences.⁴⁴ In 1919 the central government gained for Canada separate membership in the League of Nations and International Labor Organization. In 1926 Canada and the United States established diplomatic relations, followed in 1927 by similar links with France and Japan. At present, Canada's representatives abroad enjoy full diplomatic privileges and immunities as of right under international law and practice.⁴⁵

However, the federal government's position has not gone unchallenged by the provinces. There are areas of joint or indeterminate jurisdiction which have made it possible for most provinces to establish relatively permanent representation abroad at various times. Indeed, some provinces maintained a presence in London before entering Confederation.⁴⁶

In 1868, a federal-provincial conference on immigration endorsed a Quebec proposal that each province send its own emigration officer abroad, although the official would be "accredited by the general government". However, it was not until early 1870's that Ontario and Quebec sent emigration agents to several British cities and to Europe. A certain amount of federal-provincial rivalry was evident in the British Isles, and a subsequent federal-provincial conference in 1874 approved an Ontario proposal for centralization, that is, the abolition of separate provincial agencies. However, the provinces retained the option of appointing sub-agents to work under the supervision of the

Manchukuo incident, see J. Gunther, *Inside Latin America* (New York: Harper and Brothers, 1941) at 130.

44. M. Ollivier, ed., *Colonial and Imperial Conferences from 1887-1937*, I: *Colonial Conferences* (Ottawa: Queen's Printer, 1954) at 241.

45. See the *Vienna Convention on Diplomatic Relations*, U.N. Doc. A/CONF. 20/13, April, 1961; and the *Vienna Convention on Consular Relations*, U.N. Doc. A/CONF. 25/12, April 23, 1963.

46. H. Gordon Skilling, *Canadian Representation Abroad: From Agency to Embassy* (Toronto: The Ryerson Press, 1945) at 107 [hereinafter Skilling]. See also H. Leeson and W. Vanderelst, *External Affairs and Canadian Federalism: The History of a Dilemma* (Toronto: Holt, Rinehart and Winston of Canada Limited, 1973) at 48.

Canadian Agent-General. This cooperative scheme was abandoned in 1880 with the institution of the High Commissionership. Subsequently, the following provinces authorized the establishment of Agencies-General in London: Nova Scotia (1885), New Brunswick (1887), British Columbia (1901), Prince Edward Island (1902) and Quebec and Ontario (1908). Manitoba, Saskatchewan and Alberta joined their sister provinces later in this century.⁴⁷

In March 1882, Quebec appointed Hector Fabre, a federal senator, as General Agent in Paris. Almost immediately, Ottawa began to make use of his services, and Mr. Fabre served both levels of government simultaneously.⁴⁸ Professor Skilling has suggested that Mr. Fabre's main purpose in Paris was to provide the same link between France and French Canada that the High Commissioner in London provided between Britain and British Canada.⁴⁹ Mr. Fabre's successor served Ottawa exclusively, and it was not until the 1960's that Quebec again appeared in Paris in its own right.

In 1915 Quebec opened a commercial agency in Belgium and a 1940 statute authorized the government to appoint Agents-General all over the world. However, the only immediate result of the 1940 legislation was the establishment of a travel agency in New York.⁵⁰ In 1961, the New York agency was raised to the status of a General Delegation, and similar ones were created in Paris and London respectively in 1961 and 1962. In 1965, Quebec opened an economic and immigration office in Milan, Italy.⁵¹

In the 1960's an impressive expansion of provincial commercial representation abroad took place, with Ontario and Quebec accounting for most of the growth. Ontario established offices in New York, Los Angeles, Chicago, Atlanta, Cleveland,

47. Skilling at 12-13 and 107. The texts of the agreements emanating from the 1868 and 1874 federal-provincial conferences are reproduced in Jean Hamelin, *Quebec and the Outside World 1867-1967*, [1968-69] Quebec Yearbook at 40-41 and 43-44. Although British Columbia did not formally provide for the office of Agent-General until 1901, the first individual to oversee the province's interests in London appears to have assumed the title on his own responsibility. See British Columbia, Legislative Library, "The History of the Position of Agent-General and British Columbia House, London, 1872-1916" (unpublished, n.d.) at 1 and 7.

48. Quebec, Legislative Assembly, *Sessional Papers*, Vol. XV-2, 1881-82, No. 27; and Canada, Department of External Affairs, *Documents on Canadian External Relations, I: 1909-1918* (Ottawa: Queen's Printer, 1967) at 9. [hereinafter DEA, Documents].

49. Skilling at 239-40.

50. The relevant Quebec statutes are reproduced in J. Hamelin, *Quebec and the Outside World*, *supra*, note 47 at 49 and 51.

51. *Id.* at 54.

Minneapolis-St. Paul, Brussels, Düsseldorf, Vienna, Milan, Stockholm, Jamaica, Osaka and Tokyo. Quebec increased its foreign representation by opening offices in Chicago, Boston, Dallas, Los Angeles and Düsseldorf. The smaller provinces followed suit on a more modest scale. Nova Scotia secured premises in New York and Boston, British Columbia appeared in Los Angeles, San Francisco and Osaka while Alberta established itself in Los Angeles and Tokyo.⁵²

Impressive as this proliferation of provincial representation abroad may be, it was in London that the controversies over the legal status of these provincial agencies took place. Prior to the Confederation of 1867, the provincial colonies enjoyed the right to confer directly with the British government through the Colonial Secretary. Neither Confederation nor the establishment of the High Commissionership in 1880 was thought to have constituted an automatic abridgement of this provincial right.⁵³ However, Ontario's Special Commissioner for Immigration recommended in 1869 the strengthening of the Canadian Agent's office in London because "His is the only recognized Canadian agency in the British metropolis and to him, therefore, public men, members of Parliament and members of the Press naturally go for information."⁵⁴

The appointment in 1896 of Lord Strathcona as Canadian High Commissioner to Britain augured a change in Ottawa's attitude toward the provincial Agents-General. Strathcona assumed the role of representative of all Canada, including the provinces, and strenuously opposed the granting of an official status to the provincial representatives. British Columbia, later supported by Nova Scotia, Ontario and Quebec, insisted on official status to no avail. Strathcona obtained the support of Joseph Chamberlain, the Colonial Secretary, and Mr. Laurier, the Canadian Prime Minister. When faced with a joint memorandum submitted by the Agents-General in 1914 requesting official status, Prime Minister Robert Borden's government substantially reaffirmed Mr. Laurier's position.

52. N. Fodor, *The provincial salesmen who undersell Canada*, Financial Times of Canada, September 28, 1970 at 9.

53. Skilling at 108.

54. Ontario, Legislative Assembly, *Sessional Papers*, 1869, No. 45, Appendix A. at 14.

The controversy was revived in 1922 with a remarkable letter from Mr. F. C. Wade, British Columbia's Agent-General in London, to Mr. Arthur Meighen, the Canadian Prime Minister. Mr. Meighen's reply is not yet available; but his successor, Mr. W. L. MacKenzie King, assured Mr. Wade that the Agents-General would be assisted in receiving the recognition to which they were properly entitled. However, the High Commissioner, Mr. Peter C. Larkin, had no such intention, and resented Mr. Wade's efforts to represent the interests of his province without the intervention of the High Commissioner's office. Larkin's position was sustained by the Prime Minister on December 12, 1922.⁵⁵

During the depression of the 1930's, the provinces were obliged to close their London offices for reasons of economy; but these provincial operations began to reappear during and after the war years. Professor Skilling expressed the fear that the reappearance of provincial agencies abroad "at the worst might constitute a challenge of the exclusive right to the federal government to send and receive diplomatic representatives."⁵⁶ However, there is little evidence of any such provincial intention at the time.

Finally, by 1953, the British Diplomatic Immunities Act (Commonwealth Countries and Republic of Ireland)⁵⁷ provided for the conferring by Order-in-Council

on the Chief representatives in London of the States or Provinces of a Commonwealth country and on the members of their staff performing consular functions, an immunity from suit and legal process and an inviolability of premises and archives similar to that possessed by foreign consuls in the United Kingdom.⁵⁸

In addition, the Agents-General themselves were to be exempt from taxes, licenses and duties.⁵⁹

The Quebec General Delegation in Paris was granted a similar official status by the French government at the end of 1964, and the Delegate-General received privileges similar to those enjoyed by his colleague in London. Although he has been provided with an ordinary

55. Skilling at 108-10; DEA Documents, III: 1919-25, at 33-37; and Public Archives of Canada, *Mackenzie King Papers* (M.6.26, J1, vol. 79), 10 pp.

56. Skilling at 337.

57. 15 and 16 Geo. VI and 1 Eliz. II, c. 18 (U.K.).

58. Quebec, Department of Intergovernmental Affairs, "Outline of Privileges Granted by British Government to Agents General of the Provinces in the U.K.," Annex II-B (n.d.) at 1.

59. *Id.*, Annex II-A.

diplomatic passport, his name has not appeared on the French diplomatic list.⁶⁰

The staff of the Quebec General Delegation in New York travel on ordinary Canadian passports while the Delegate-General himself possesses a special, but non-diplomatic passport. All personnel are registered with the Department of State, and the Department of Justice is kept informed of the Delegation's activities. The staff of the Delegation and its property are exempt from federal taxes, while the Delegate-General himself is exempt from city and state taxes. However, as a previous incumbent indicated, "It is largely due to courtesy that Canadian representatives benefit from the privileges which they have."⁶¹ In order to be on a footing of equality with his colleagues in London and Paris, he urged that the Quebec Premier induce the Prime Minister of Canada to obtain consular privileges for the Delegate-General since he is called upon to perform many duties of a consular nature.

Although the Quebec Delegates-General in London and Paris enjoy officially sanctioned consular privileges and immunities, it is generally agreed that these have been extended as a matter of courtesy, and that neither Quebec nor any other province may claim them as of right.⁶² Moreover, Ottawa's intervention was required in both cases to obtain these particular privileges for the provincial representatives.⁶³

Quebec's representative in Milan has neither privilege, immunity nor special concession.⁶⁴ The representatives of the other provinces in the United States, Europe and Japan are in precisely the same position. Former Ontario Premier John Robarts has described the formal status of his province's "diplomats" as follows:

Generally, it appears that Ontario acts abroad without formal diplomatic privileges and rights. Its officers act as private Canadian

60. Quebec, Department of Intergovernmental Affairs, "Aide-Mémoire en Réponse aux Questions Soulevées par Monsieur Marcel Laliberté dans sa Lettre du 18 Septembre à Monsieur Claude Morin" (October 29, 1970) at 1-2 [hereinafter Quebec, Intergovernmental Affairs, "Aide-Mémoire"].

61. Letter from Charles Chartier, Delegate-General of Quebec in New York to Claude Morin, Deputy Minister of Intergovernmental Affairs of Quebec, December 11, 1967 (author's translation).

62. B. Laskin, "The Provinces and International Agreements" in Ontario Advisory Committee on Confederation, 1 *The Confederation Challenge* at 111-12; Brossard at 69, 89, 229, 237 and 439-40; and A. Trudeau, *La Capacité Internationale de l'Etat Fédéré et sa Participation au sein des Organizations et Conférences Internationales* (1968), 3 *Thémis* 247 [hereinafter Trudeau].

63. Quebec, Intergovernmental Affairs, "Aide-Mémoire" at 2.

64. *Id.*

citizens, with their formal dealings with foreign governments being subject to the supervision of the Department of External Affairs of the federal government.⁶⁵

In short, the provincial representatives abroad enjoy neither consular nor diplomatic *status*, nor are they accredited to the governments of the countries in which they serve, nor may they deal *officially* with those governments. That is, the provinces do not at present enjoy the right of legation.⁶⁶ A former Canadian Minister of External Affairs expressed the constitutional position as follows:

Although provincial governments are not empowered to appoint diplomatic or consular representatives, ... , they can, of course, maintain offices in other countries and appoint officials to deal with matters of provincial concern that relate essentially to the private sector.⁶⁷

Or, as Ivan L. Head put it, the purposes of these provincial offices are to bring to the provinces tourists or industrialists who will conduct themselves according to Canadian law.⁶⁸ In a practical sense, however, the complex web of provincial representation abroad is apparently unique among contemporary federations.

65. Ontario, Legislative Assembly, *Debates*, No. 133, June 15, 1967 at 4795.

66. The right of legation includes, of course, the right to receive diplomatic and consular envoys. The constitutional position respecting consuls is quite clear. Only the federal government delivers the *exequatur* to consuls resident in provincial cities, and Ottawa is under no legal obligation to consult the provinces as to the acceptability of individuals as consuls. On the other hand, the French government has conferred on its Consulate-General in Quebec City certain attributes which go beyond what is necessary for the operation of a consular post. Moreover, France, as a matter of courtesy, consulted the Quebec government before appointing Monsieur Pierre de Menthon Consul General. See Quebec, Intergovernmental Affairs, "Aide-Mémoire" at 3. Also, the French consular staff of fourteen in Quebec City is more numerous than those in Montreal (ten) and Toronto (five); and, for that matter, larger than any other consular staff anywhere in Canada. (The French embassy staff in Ottawa numbers eighteen). See Canada, Department of External Affairs, *Diplomatic Corps and Consular and Other Representatives in Canada*, June, 1970.

67. Hon. Paul Martin, *Federalism and International Relations* (Ottawa: Queen's Printer, 1968) at 39 [hereinafter Martin]. André Patry suggested s.92(4) of the BNA Act in supporting the provincial right to establish offices abroad: "The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers" in Québec, Assemblée Législative, Comité Parlementaire sur la Constitution, *Compte-rendu de la séance du 5 juin 1964*, at R/3-p. 4 [hereinafter Quebec, Comité Parlementaire]. Patry observed, however, that to the extent that Quebec appears on the world scene for commercial purposes, it appears as a subject of private law. *Id.* at R/3-p. 6.

68. *The 'New Federalism' in Canada: Some Thoughts on the International Legal Consequences* (1966), 4 Alta.L. Rev. 392.

4. *Treaty-Making Powers*

The federal government gained the right to exercise plenary treaty-making powers in much the same way as it acquired the right of legation. According to a former legal adviser of the Department of External Affairs, Ottawa secured its treaty-making powers by a combination of express delegation by Britain, by the achievement of "dominion status" and by judicial sanction in Canada.⁶⁹

Although there is no explicit constitutional provision conferring treaty-making powers on the federal executive,⁷⁰ the following processes have been distinguished in explaining Ottawa's acquisition of these powers: first, the process by which the central executive, rather than the British executive, advised the Crown; and, secondly, the process by which Canada "nationalized" the Crown. The first process involved these steps: Canadian membership on British negotiating teams, separate Canadian negotiations but British signature of treaties and, finally, the entire process effectively under Canadian control although symbolically "imperial". The "nationalization" of the Crown was accomplished by Canadian nomination of the Governor General who exercises all the Crown's prerogatives including those relating to treaties, and the use of Canadian seals and symbols in the exercise of these powers.

The above discussion refers specifically to treaties made in the Heads of State form. However, from an early date, Canadian treaty-makers have preferred less formal intergovernmental agreements which do not necessarily require ratification.⁷¹

An analysis of the subject-matter of Canadian treaties from 1946 to 1964 indicates that almost half are concerned with matters that are conceivably under provincial or joint jurisdiction, and that the United

69. A. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968) at 28-29 and 41 [hereinafter Gotlieb]. "Dominion Status" was ultimately recognized in the Statute of Westminster, 1931. With respect to external affairs, however, the Statute is an imperfect guide. Section 3 recognizes the Dominion Parliament as having the exclusive power to legislate extraterritorially; yet section 7(3) restricts Parliament to the enactment of laws within its competence. The latter clause was inserted at the insistence of the provinces.

70. The only reference to treaties in the BNA Act is the virtually inoperative s.132 which reads as follows: "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries." The origin, purpose and judicial fate of s.132 have been dealt with in the author's "The International Status of Provinces," Chapter III.

71. Gotlieb at 43-46.

States is the treaty partner in approximately 33 per cent of the cases. This rather large percentage of treaties with the United States is explained in part by the problems occasioned by a frontier more than 5,000 miles in length.⁷² Since seven provinces share the frontier, the provincial interest in treaty-making is evident in terms of both subject matter and geography.

Moreover, the provinces are the ultimate legal owners of natural resources that may be desired by foreign states;⁷³ and Quebec, sharing with other provinces the exclusive right to legislate with respect to education,⁷⁴ is interested in educational and cultural agreements with French-speaking countries.

In view of the problems incident to the frontier, most provinces have made hundreds, if not thousands,⁷⁵ of agreements with American jurisdictions. Many of these agreements have been made without explicit legal authority and few have been challenged by the federal government.

Saskatchewan has negotiated with New Mexico and Poland for the curtailment of potash production, and Alberta has held similar talks on sulphur with Mexico. In 1965, the Premier of British Columbia arranged a multi-million dollar reciprocal trade agreement with Japan.⁷⁶ In these cases the legal question raised is the extent of central control over external trade.⁷⁷

Quebec has to her credit an agreement with a paragovernmental body in France (Association for the Organization of Study Periods in France), three agreements with the French Republic (dealing with education, culture, youth and sports) and an agreement of uncertain status with Rwanda.

Given the significant provincial interest in international agreements, it is not surprising that some provinces have, from time to time,

72. *Id.* at 61-64. Although the provinces are often consulted on treaties affecting their interests, a notable exception is the Boundary Waters Treaty of 1909. *Id.* at 77n.

73. BNA Act, s.92(5) "The Management and Sale of Public Lands belonging to the Provinces and the Timber and Wood Thereon." See also G. Laforest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) and appendices.

74. BNA Act, s.93.

75. See E. McWhinney, *The New Pluralistic Federalism in Canada* (1967), 2 *Thémis* 145.

76. Sabourin at 363; and J. Morrison, "Canada's Role in a French Commonwealth" in C.I.I.A., *Behind the Headlines*, October, 1967 at 21.

77. BNA Act, s.91(2): "The Regulation of Trade and Commerce."

claimed treaty-making powers in their own right. Thus, it is in order to examine the provincial claims and the legal nature of accords already made.

a. Provincial claims

The first provincial claim for treaty-making powers was made by counsel for Ontario in the 1937 Labour Conventions Case. Based on the alleged coequality in status of the Governor General and of the provincial Lieutenant Governors, counsel declared that "Ontario has a right to enter into an agreement with another part of the British Empire or with a foreign state."⁷⁸ However, Ontario has not subsequently maintained this view. British Columbia has claimed treaty powers on occasion, but not consistently. In 1965, for instance, Premier Bennett declared with respect to the export of natural resources: "all the resources of Canada belong to the provinces, not to the Federal Government; it is therefore their [the provinces'] exclusive right and prerogative to negotiate agreements or to seek new markets for the development of their resources."⁷⁹ However, at meetings of the Canadian Constitutional Conference in 1968 and 1969, Mr. Bennett affirmed his support for plenary central treaty-making powers.⁸⁰

Only Quebec has consistently maintained that it already has treaty powers and that these should be explicitly recognized in a new constitution. Members of the Quebec Parliamentary Committee on the Constitution first manifested an interest in provincial treaty powers in June 1964. Two distinguished professors of international law, Jacques-Yvan Morin and André Patry, attended a committee session and made a favourable impression on the thinking of the members. Professor Patry observed that only constitutional practice prevents the provinces from negotiating officially with foreign states without central control. His reference to Ontario's 1937 claim for treaty powers elicited "C'est bon ça" from Georges Lapalme, Minister of Cultural Affairs; while René Lévesque, then Minister of Natural Resources and currently President of the Parti Québécois, found Ontario's claim illuminating. Daniel Johnson, then Leader of

78. [1937] A.C. 326 at 333.

79. Quoted in *Le Devoir* (Montreal), July 7, 1965 (author's translation).

80. Canada, Constitutional Conference, *Proceedings*, First Meeting, February, 1968 (Ottawa: Queen's Printer, 1968) at 23; and Third Meeting, December, 1969 (Ottawa: Queen's Printer, 1970) at 78.

the Opposition, and destined later as Premier to realize Quebec's greatest victories in international diplomacy, was clearly unaware of the provincial power recognized by the Labour Conventions decision to refuse to perform the obligations of treaties made in areas of provincial jurisdiction.⁸¹

Although Professor Patry concluded that the provinces lacked international competence, he urged in his final remarks at the committee hearing that Quebec acquire the prerogatives that would permit it to be represented in foreign countries and in international organizations and to conclude international agreements in all fields of its legislative competence. Part of Professor Patry's remarks merit quotation because subsequent Quebec leaders have invoked similar justifications and motivations:

There is no reason to dissociate two operations of the same act, making and applying the accord. I do not see why the one who concludes [the accord] does not have the right to put it into effect or why the one who puts it into effect does not have the right to conclude [it]. This is in the logic of things, again they are two aspects of the same operation which is the concluding of an agreement with another party. Moreover, if Quebec has the exclusive right to legislate in the educational, cultural and private law fields, why should not this same Quebec have the right to agree with other states and draw many benefits from the resulting exchanges, to do it with full authority and without restriction? Also I consider that we are a unique phenomenon among the world's federations, in the sense that we are concentrated, that we are a minority in Canada, but that we are a majority in a given province and that this province is manifesting signs of recovery and increased vitality. There is no reason, I repeat, that this same province should not have the right to deal on the basis of equality with foreign states, [and] with international institutions in the fields of its constitutional competence.⁸²

Professor Patry's remarks were apparently well-received by a government which had already experienced difficulties with Ottawa

81. Quebec, *Comite Parlementaire*, R/3 pp. 6-7. Professor Morn referred to the 1937 decision as "la castration mutuelle." *Id.* at 7.

82. *Id.* at R/5-p. 5 (author's translation). Professor Patry's views are developed in greater detail in Brossard. He has subsequently served four Quebec governments in different capacities, all somehow related to international relations: Lesage government (1964-66), on contract to interdepartmental committee on inter-governmental affairs; Johnson government (1966-68), chief of protocol and adviser to the Premier on international relations; Bertrand government (1968-70), deputy minister of immigration; Bourassa government (1970-), special adviser to executive council (cabinet).

in negotiating an agreement with the French National School of Administration.⁸³

Almost a year later, in April 1965, Paul Gérin-Lajoie, the Quebec Minister of Education, chose the occasion of an address to the Montreal Consular Corps to claim limited treaty-making powers for Quebec.⁸⁴ Subsequently this view was maintained by the Union Nationale governments of Daniel Johnson and Jean-Jacques Bertrand.

The former Union Nationale government presented the following proposition in a formal submission to the Canadian Constitutional Conference in 1968:

Within the limits of Canadian foreign policy, member-states should have a recognized capacity to negotiate and sign their own agreements with foreign governments on matters subject to their internal jurisdiction.⁸⁵

A companion document entitled *Working Paper on Foreign Relations* was issued in February 1969 in support of the earlier proposition. The document noted that the BNA Act contains no reference to treaty-making powers and that neither judicial rulings nor constitutional practice has yet succeeded in removing difficulties. Moreover, new dimensions in international relations are coinciding with Quebec's need to assume its powers to the full.⁸⁶ In justification for a claimed provincial [Quebec] treaty power, the document cited various agreements already made by Quebec with foreign jurisdictions, the need for Quebec to be a direct party to them without central government mediation, Ontario's 1937 claim of treaty powers, the International Law Commission's 1966 paragraph on treaty powers for federal member-units, the fact that the 1937 Labour Conventions decision was not concerned with treaty-making, the primacy of the constitution over the 1947 Letters-Patent which authorized the Governor General to exercise

83. Québec, Comité Parlementaire at R/3p. 8. See also Trudeau at 243n.

84. Text in *Le Devoir* (Montreal), April 14 and 15, 1965. The text of Ottawa's rejoinder may be found in (1966), 4C.Y.B.I.L. 265-66. Despite his new role as President of C.I.D.A., Gérin-Lajoie has not altered his previous viewpoint as much as one might expect. See B. Morrissette, "Le French Power à Ottawa: Paul Gérin-Lajoie" in *Le MacLean*, June 1971 at 44.

85. Quebec, Department of Intergovernmental Affairs, *Working Documents: Propositions for Constitutional Review* (Quebec: July 17, 1968) at 37.

86. Quebec, Department of Intergovernmental Affairs, *Working Paper on Foreign Relations: Notes Prepared by the Québec Delegation* (Quebec: February 5th, 1969) at 3 [hereinafter cited as Quebec, *Working Paper on Foreign Relations*].

the royal prerogatives in external affairs and two Privy Council decisions⁸⁷ which suggest that the royal prerogatives may be exercised by Lieutenant Governors for provincial purposes.⁸⁸

To digress for a critical examination of certain arguments raised by the *Working Paper*, Ontario's contention had not been taken seriously by the Privy Council, nor, for that matter, by Ontario itself. Article 5(2) of the International Law Commission's draft is of historical value only. Although the Privy Council was indeed not concerned with treaty-making in the Labour Conventions case, the portion quoted by the *Working Paper* itself made unmistakable reference to Canada's newly-acquired external sovereignty. In the context of 1937, the implication was clear that the federal government exercised the attributes of sovereignty on behalf of Canada. Thus, there was an implied judicial recognition of the central government's power to make treaties on behalf of the federation. The limitation was that Ottawa lacked the power itself to implement those requiring changes in provincial legislation.

The contention that the 1947 letters-patent are inferior to the constitution is specious because the former is a constitutional document. The two Privy Council decisions cited were decided before the crown's external prerogatives were considered to have devolved to Canada, and, moreover, the cases had no external affairs aspects.⁸⁹ Thus, the legal arguments adduced by Quebec in support of an already-existing provincial treaty-making power are not very convincing.

On the other hand, Quebec's strongest argument is that it has already made a number of international agreements, notably with France, and that these should be viewed as precedents. The legal nature of these accords will be examined shortly.

87. The two cases are *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*, [1892] A.C. 437, and *Bonanza Creek Gold Mining Co. v. The King*, [1916] A.C. 566.

88. Quebec, *Working Paper on Foreign Relations* at 7, 9, 4, 13, 16, 17 and 18-19. The present Liberal Bourassa government is not comfortable with these documents, but it has yet to produce its own policy on the subject. See Government of Quebec, *Statement by Mr. Robert Bourassa, Prime Minister and Minister of Finance, to the Constitutional Conference*, Ottawa, September 14 and 15, 1970.

89. B. Laskin, "Some International Legal Aspects of Federalism: the Experience of Canada", in D. Currie, ed., *Federalism and the New Nations of Africa* (Chicago: University of Chicago Press, 1964) at 396, interpreted the *Liquidator's* case in support of plenary treaty-implementing powers for Ottawa. See also J. Saywell, *The Office of Lieutenant Governor: A Study in Canadian Government and Politics* (Toronto: University of Toronto Press, 1957).

Ottawa's rejection of the Quebec position is contained in the White Paper on *Federalism and International Relations* issued in 1968 and in a declaration of policy entitled "Foreign Policy and the Provinces" made in October 1969 by the Parliamentary Secretary to the Secretary of State for External Affairs. The White Paper's arguments include the necessary indivisibility of the conduct of foreign policy, the devolution of the prerogative powers to the Governor General, certain statements by Canadian Supreme Court judges prior to 1937 and subsequent to 1947 and the denial of international legal validity to provincial international agreements.⁹⁰

On examination, Ottawa's arguments in favor of central plenary treaty-making powers are hardly more convincing than Quebec's claims for its part. True, the devolution of the prerogatives to the Governor General is considered to be part of the constitution, but the 1947 letters-patent have basically served to legitimize powers the federal government had already acquired extra-constitutionally. Moreover, as Mr. Gotlieb has shown, the prerogatives have largely been irrelevant in actual Canadian treaty-making. The statements by Canadian Supreme Court judges prior to 1937 in support of central plenary treaty-making powers were *obiter*; while the views of some judges after 1949, when appeals to the Privy Council were abolished, added nothing to what Lord Watson said in 1937.

Moreover, despite what federal government spokesmen say publicly, they know very well that they exercise plenary treaty powers largely on the basis of domestic political practice and international consent, and that in strict law, they operate in a constitutional vacuum. Otherwise, they would not devote so much effort to refuting Quebec's claims in legal theory, and to undermining the force of the provincial precedents in political practice.⁹¹ Consequently, the constitutional issue remains to be settled.⁹²

90. Martin, at 9, 13, 14, 25, 26-28. Not unnaturally, Gotlieb's arguments against provincial treaty-making powers parallel those of the White Paper. See his *Canadian Treaty-Making* at 27-32.

91. The 1969 policy declaration is basically a restatement of the White Paper. See Canada, Department of External Affairs, *Statements and Speeches*, No. 69/18, "Foreign Policy and the Provinces." See also the Right Honourable L.B. Pearson, *Federalism for the Future: A Statement of Policy by the Government of Canada to the Constitutional Conference*, 1968 at 30.

92. Of the Canadian writers concerned with the question of provincial treaty powers, not one fully supports the position advanced by the Quebec Working Paper. However, Professors LaPierre, Morin, Patry and Brossard desire

It is beyond dispute that the federal government has hitherto exercised the *jus tractatum* on behalf of Canada. But may the provincial "precedents" entitle the provinces to claim that they are in the process of acquiring a limited, *de facto* treaty-making power of their own? The answer depends in part on an assessment of the legal nature of international agreements made by the provinces in three different settings of administrative and political behavior.

b. Provincial international agreements

(i) Transborder and transnational⁹³ agreements

For the purpose of administrative convenience respecting matters of relatively minor importance, most Canadian provinces make agreements with neighbouring American states and with some foreign countries. Some of these undertakings are authorized by the federal government, others take the form of reciprocal legislation and "gentlemen's agreements". Canadian legal opinion is virtually unanimous in regarding these accords as something other than treaties.⁹⁴ Those who have studied the transborder agreements of American states and German *Länder* have reached similar conclusions.⁹⁵

The centrally-sanctioned accords and the provincial "gentlemen's agreements" are viewed as contracts lacking any

treaty-making powers for Quebec. See also M. Faribault, "The Provincial Constitutional Interest in Foreign Affairs" in *Canada Month*, May, 1968 at 24-27. When he wrote the article, Mr Faribault was serving the late Premier Johnson as special adviser on economic and constitutional matters. Professors McWhinney, Atkey and Sabourin, while not necessarily favouring constitutional change, support greater provincial participation in external relations. Professors Head, Morris and Delisle support Ottawa's position unreservedly.

93. "Transnational" refers to similar types of agreements made with countries other than the United States.

94. J.-Y. Morin, *La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparée* (1965), 3 C.Y.B.I.L. 178; Grenon, "De la conclusion des traites" at 153n; Trudeau 243n and 245; Brossard at 440; R. Delisle, "Treaty-Making Power in Canada," in Ontario Advisory Committee on Confederation, 1 *The Confederation Challenge* at 132; E. McWhinney, "The Constitutional Competence Within Federal Systems for International Agreements", *id* at 153-54; G. Morris, *The Treaty-Making Power: A Canadian Dilemma* (1967), 45 Can. Bar. Rev. 502; Rand at 93 and 106; Martin at 26; Gotlieb at 24; and Robarts, in Ontario Legislative Assembly Debates (1967) at 4794.

95. See the Harvard Draft Comment, *supra*, note 15 at 20; Lissitzn (1968) at 30; F. Zimmerman and M. Wendel, *The Interstate Compact Since 1925* (Chicago: The Council of State Governments, 1951) at 42, 75 and 78n; Leisner at 347 and 356-57; and H. Naujocks, *Compacts and Agreements Between States and a Foreign Power* (1952-53), 36 Marq. L. Rev. 232.

international validity and enforceability of their own. Any legal difficulties that may ensue would be settled by conflicts of laws principles; that is, the wronged party may attempt to recover damages in a mutually agreed municipal court. However, these agreements depend, for the most part, on the good faith and mutual interest of the parties, and there have been few, if any, resorts to litigation.

Although the provinces are not constitutionally empowered to enter into transborder agreements, the practice is well-established and occasions little controversy. Moreover, the provincial right to enact reciprocal legislation in concert with foreign jurisdictions has been judicially sanctioned.⁹⁶

Former Premier Robarts of Ontario has observed that the gentlemen's agreement is sometimes employed to "effectively by-pass the treaty-making problem." For example, the memorandum of understanding between Ontario Hydro and the New York Power Authority "was explicitly developed ... to avoid the problems they might each face were they, as governments to enter into more formal arrangements with foreign government agencies."⁹⁷

The former Liberal government of New Brunswick in 1968 supported plenary treaty powers for Ottawa. However, it expressed the concern that provincial rights to deal "informally" with American jurisdictions be protected in any constitutional revision.⁹⁸

(ii) International economic agreements

The legal status of provincial economic agreements with foreign states has received little critical attention. Although these

96. *Attorney-General for Ontario v. Scott*, [1956] J.S.C.R. 618; [1956] 1 D.L.R. 433. Brown-John has suggested that provincial legislation enforcing maintenance orders paralleling that in foreign jurisdictions ought not to be viewed as an international agreement, because this reciprocity extends only to Commonwealth countries and is thus governed by the *inter se* doctrine. However, as he himself admits, this doctrine is difficult to apply to Commonwealth republics. See his "The Constitution and Treaty-Making Capacities", Appendix V of Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, Thursday December 10, 1970, 86 at 89n and 93. Moreover, Ontario and Michigan have recognized each other's legislation providing for the enforcement of maintenance orders. See Robarts, in Ontario Legislative Assembly Debates (1967) at 4795.

97 *Id.*

98. Government of New Brunswick, Propositions for Constitutional Review (July, 1968), Proposition 52 and Comment.

agreements have not yet occasioned public constitutional controversies in Canada, both levels of government are in the process of examining their respective powers over trade and commerce.

The BNA Act, 1867 granted the central government exclusive authority over "The Regulation of Trade and Commerce." However, judicial interpretation has rendered the clause virtually inoperable in intra-provincial trade, and its applicability to interprovincial and external trade has been qualified as well. The only areas of external trade in which Ottawa's control has been judicially upheld have been the import of liquor and margarine, and the marketing of agricultural products, including grain.⁹⁹

Federal control over external trade has never been challenged; however, the occasions when appropriate legislation was upheld have been few.¹⁰⁰ One reference to provincial control over exports occurred in a 1952 Supreme Court case which authorized central delegation of authority to provincial marketing boards.¹⁰¹

(iii) Quebec-France educational and cultural agreements

In February 1964 the Quebec Department of Youth entered into a contract with ASTEF (Association for the Organization of Study Periods in France) to initiate a program of exchanges and cooperation. In the Quebec view, the agreement "evidently saved face for Canada and France in the context of diplomatic relations, but ... nevertheless permitted us to negotiate directly with France for all practical purposes, although technically the French entity has the same jural status as a crown corporation here."¹⁰² Ottawa gave its consent to the agreement in December 1963 in an exchange of letters between the Secretary of State for External Affairs and the French Ambassador to Canada.¹⁰³

In February 1965, Paul Gérin-Lajoie and Claude Morin, respectively Minister of Education and Deputy-Minister of Federal-Provincial Affairs, signed with their French counterparts an entente on a programme of educational exchanges and cooperation. Mr. Gérin-Lajoie subsequently described the accord as an

99. A. Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963) at 175.

100. *Id* at 121.

101. *P.E.I. Potato Marketing Board v. H. B. Willis, Inc.*, [1952] 2 S.C.R. 392.

102. Québec, Comité Parlementaire, R/3-p. 9 (author's translation).

103. Martin at 26.

international agreement "negotiated and signed in otherwise traditional forms."¹⁰⁴ In Ottawa's view, the agreement drew its international validity from an exchange of letters between the Secretary of State for External Affairs and the French Chargé d'Affaires in Ottawa.¹⁰⁵

In an effort to dispense with these exchanges of letters each time that Quebec negotiated an entente with France, Canada and France signed a cultural agreement in November 17, 1965. Included as an integral part of the treaty was an exchange of letters between the Secretary of State for External Affairs and the French Ambassador permitting the provinces to enter into ententes with France within the framework of the Canada-France agreement. The province's capacity would stem either from its reference to the authority of the cultural agreement and exchange of letters or from Ottawa's subsequent assent.

On November 24, 1965, Pierre Laporte, the Quebec Minister of Cultural Affairs, signed on behalf of the Quebec government a cultural entente with France. The French Ambassador to Canada signed on behalf of the French Republic. Since Quebec chose not to refer to the Canada-France agreement and exchange of letters, a further exchange of letters was arranged on the same day.¹⁰⁶

In February 1968, Jean-Marie Morin signed on behalf of the Quebec government a protocol with France on physical education, sports and popular education. The agreement was made in the form of a protocol to the February 1965 education entente.¹⁰⁷ Quebec's evident purpose in adopting this procedure was to sign an international agreement independently of any assent given by Ottawa. Of course, the central government could take comfort from

104. *The Montreal Star*, March 19, 1968.

105. The texts may be found in (1966), 4 C.Y.B.I.L. at 263-64.

106. The complete texts may be found in Canada, Department of External Affairs, (1965), 17 *External Affairs* (December) at 514 ff. Charles Rousseau viewed the November accord as eliminating the irregularities and uncertainties of the earlier February entente. See his *Chronique des Faits Internationaux* (1965), 69 *Revue Générale de Droit International Public* 776, and (1966), 70 *Revue Générale* 458. Professor McWhinney described the elaborate Quebec-France signing ceremony in "The Constitutional Competence Within Federal Systems", *supra*, note 94 at 155-56.

107. Protocol concerning exchanges between Québec and France in matters of physical education, sports and popular education made pursuant to the Franco Québec agreement of the 27 February 1965 on a program of exchange and cooperation in the field of education. Reproduced as a Schedule to an Act respecting the Office Franco Québécois pour la Jeunesse. (S.Q. 1968 c.7).

the fact that the agreement was cast in the form of a protocol to an earlier agreement which had already received Ottawa's consent.

There is a consensus among Canadian legal scholars that these Quebec-France agreements possess no international validity of their own, create no mutually binding obligations under international law and are unenforceable in the event of default.¹⁰⁸ However, there are other considerations which merit attention. Professor McWhinney has written that since the agreements entail no binding obligations in international law, Ottawa's covering letters were *legally* unnecessary.¹⁰⁹ On the other hand, it is recognized that the ententes were intended by Quebec to serve, to some degree, as precedents for *de jure* international status. As André Dufour observed, the 1965 ententes do not have the same importance as the Halibut Treaty of 1923, "but we cannot deny the analogy."¹¹⁰

Moreover, it would be helpful to place the ententes in the context of France's general experience with cultural and educational agreements with her former African colonies since 1960. In virtually all cases, the preamble of the treaty underlines the absolute equality and independence of France's treaty partner. However, the rest of the agreement reserves for France "certain prerogatives to protect French interests and to assure the efficacious use of personnel, materials and funds."¹¹¹ The Quebec-France accords, in contrast, are based on the absolute equality of the rights and obligations of both parties. Thus, the international sovereignty of the African states was negated in practice by the treaties; while the Quebec accords, having no international legal standing, were, in effect, agreements between real equals.

IV. Conclusion

International law remains unclear as to whether subdivisions of federations may possess international status. While there is nothing in the law of treaties which expressly confers international juridical

108. McWhinney, "The Constitutional Competence Within Federal Systems" *supra*, note 94 at 154-55; Atkey, "Provincial Transnational Activity" at 169; and Brossard at 74, 95-96, 228 and 440.

109. McWhinney, "Canadian Federalism: Foreign Affairs and the Treaty Power" *supra*, note 94 at 131.

110. "France-Quebec Relations" in *Canada and Europe: A New Look* (Toronto: C.I.I.A., 1967) at 153.

111. G. Feuer, *Les Accords Culturels passés par la France avec les Nouveaux Etats d'Afrique et Madagascar* in [1963] *Annuaire Francais de Droit Internationale* 890 at 902-3 (author's translation).

personality on federal subunits, neither is there any rule of international law which denies them such status. There does, however, appear to be a consensus that for member-units of federations to enjoy international status, they must have the formal approval of their central governments and they must find other states willing to deal with them in the areas of their constitutional competence. A number of Canadian provinces have received formal federal consent for their international dealings and they have been able to find external "treaty partners". However, the circumstances under which federal "consent" was given and those surrounding the provincial transnational agreements themselves raise questions as to how long these two criteria for provincial international status — federal authorization and international consent — will remain in effect.

As far as Canadian law and practice are concerned, no province entered the federation with any degree of international personality and no province has received sustained acts of recognition from any quarter. No provincial government has achieved a formal right to legation although the provincial presence abroad is substantial by any standard. The question of provincial representation abroad was discussed by the first Ministers in May 1973, but no conclusions were apparently reached.

Although neither Ottawa nor the provinces have put forth fool-proof cases for plenary treaty powers, the federal government's strongest argument is one that it has been reluctant to press publicly — the inherent right of the central government of a sovereign state to deal with external sovereigns. The strongest provincial argument is that the international agreements they have already made constitute precedents which should be constitutionally recognized.

On examination, provincial transborder administrative agreements with American states are similar in character to those habitually concluded by Swiss *cantons* and German *Länder*. The international agreements entered into by these European entities have occasioned much of the nineteenth century writing on federalism and foreign affairs. On the other hand, Canadian legal scholars are reluctant to consider province-state agreements as international "treaties". The Franco-Quebec educational and cultural accords are not commonly viewed as "treaties" either, but their political significance cannot be denied.

It would be premature to draw any "final" conclusions about a situation which is still evolving. Since at least 1965, the federal

government has been willing, admittedly under duress, to allow various provincial governments access to international society. Three examples may be mentioned — umbrella agreements with foreign states, plural representation at international conferences and practical assistance to provincial agents abroad. For their part, various provinces have increased the scope of their external dealings and their methods have become more sophisticated and subtle.

While both levels of government have worked out pragmatic “arrangements” concerning provincial external interests, no questions of principle have as yet been fully resolved. How long the Canadian federation can survive in its present form without an operative constitutional provision relating to foreign affairs remains an open question. At the Victoria Constitutional Conference in 1971 Ottawa attempted to gain provincial consent for a replacement for s.132 of the BNA Act, but Quebec, Alberta and Saskatchewan refused to go along.¹¹² A detailed empirical study of provincial international interests and actions might someday suggest a viable alternative.

112. See *Le Devoir* (Montreal), June 11, 1971 at 4. A similar proposal may be found in Canada, Parliament, The Special Joint Committee of Senate and of the House of Commons on the Constitution of Canada, *Final Report*, 4th session, 28th Parliament, 1972 at 68-69.