Federal State Clauses and the Conventions of the Hague Conference on Private International Law

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Dean Read would have been pleased, I believe, with this year’s events since Canada has ratified The Hague Convention on the Civil Aspects of International Child Abduction.1 This is a first for Canada in its participation in The Hague Conference on Private International Law. Dean Read worked hard and effectively to promote Canada’s participation in that Conference and he was the Atlantic regional representative on the Canadian delegation to the first plenary session attended by Canadian delegates in 1968. I had the honour to work with him at that time and to be closely associated with him for many years in the field of legal education and the work of the Uniform Law Conference of Canada, as it is now called. For these reasons, and others, it is a privilege to be here on yet another occasion devoted to the greening of his memory. We share still with Mrs. Read a real sense of loss but rejoice that his work lives on. Si monumentum requiris, circumspice — if it is a monument you seek, look about you.

I have chosen as the subject for this year’s discourse, “Federal State Clauses and the Conventions of The Hague Conference on Private International Law.” Much of the discussion will be relevant, however, to treaties and conventions emanating from other international agencies such as UNCITRAL and UNIDROIT. Our discussions will focus on the place where public international law,

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1. This Convention concluded at The Hague on October 25, 1980 has not yet come into force. It was ratified by Canada on June 2, 1983.

*This article contains the text of the Horace E. Read Memorial Lecture delivered at Dalhousie Law School, September 19, 1983. The author is the Vice Chairman of the Ontario Law Reform Commission and was a member of the Canadian delegation at the plenary sessions of The Hague Conference on Private International Law in 1968, 1972 and 1976 and Chief of the Canadian delegation at the plenary session in 1980. The author wishes to acknowledge the valuable research assistance in the preparation of this article received from R.S.G. Chester of the Ontario Bar, and John Wilson, 1983 summer research assistant at the Ontario Law Reform Commission.
private international law, and constitutional law meet. I trust that they will be no less acceptable for that reason in this forum devoted primarily to private international law matters. The issues are more acute with respect to The Hague Conference since its conventions deal essentially with the resolution of conflicts in private law matters.

The crux of the matter is that due to the particular, some would say peculiar, nature of the Canadian Constitution the treaty-making and treaty-implementing power in Canada is divided, as a jurisdictional matter, amongst the federal and provincial executive and legislative bodies.² A substantial number of international conventions deal with subject matters which, from the treaty-implementation point of view, fall domestically within the legislative competence of the provincial legislatures. Consequently in the formulation stage the provincial governments ought to, and in the implementation stage the provincial governments must, be involved in the process. Without an acceptable federal state clause, Canada, in these circumstances, is powerless to enter into international conventions without the approval of all ten provinces. At best this may result in inordinate delay and, at worst, impossibility. A properly formulated federal state clause, on the other hand, allows Canada to ratify international conventions with respect to one or more of the provinces and to alter the declaration from time to time as more provinces desire to be brought within the ambit of the convention. In illustration of this, Canada, on June 2, 1983 ratified The Hague Convention on the Civil Aspects of International Child Abduction with respect to the provinces of Ontario, New Brunswick, British Columbia and Manitoba. When it comes into force the Convention will apply only between those provinces and the contracting states. Needless to say, implementing legislation has already been enacted in all four provinces, adopting a draft act formulated by the Uniform Law Conference of Canada.

In Canada, as in the United States, the treaty-making power reposes in the federal government. This, however, appears to be the end of the similarity between the two countries.

Treaty-Making Power in the United States

The framers of the American Constitution sought to establish a federal government with specific and limited enumerated powers. On the other hand, in Canada, the Fathers of Confederation sought a strong federal government with limited legislative competence in the provinces. With the treaty-making power the opposites of these objectives have evolved through the cases. In the United States the federal power to make treaties has evolved with great strength and can override state law and congressional acts. On the other hand, in Canada, the treaty power is limited with no ability in itself to affect the distribution of legislative power.

The American Constitution grants to the President the power to make treaties subject to Senate approval. This treaty-making power is contained in Article II, section 2, of the Constitution which provides:

The President . . . shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur . . .

Under this provision, treaties are generally negotiated by the representatives of the executive who will return the proposed treaty to the President when fully negotiated. The President then submits the treaty to the Senate for approval. Normally after review by the Senate Committee on Foreign Relations, the Senate can approve or reject the treaty as negotiated by the executive. That is, the Senate has no constitutional power to approve a treaty subject to reservations. In effect, however, such a power is exercised by the Senate through withholding approval subject to changes in the treaty being made. When this occurs further negotiation by the executive will normally be required. Even after Senate approval, however, the President is free not to conclude the treaty and at this stage the Senate is functus.

3. This is what occurred during the negotiations between Canada and The United States regarding the east coast fishery. An agreement was reached by the negotiators of each country but the Senate refused approval unless certain changes were made to favour American fishermen. Upon return to the negotiating table the Canadian delegates could not agree to the amendments and therefore Senate approval was not obtained and no treaty resulted. See, generally, L. Henkin, Foreign Affairs and the Constitution (Mineola, N.Y., Foundation Press, 1972), 133; and M. J. Glennon, Senate Role in Treaty Ratification (1983), 77 Am. J. Int. L. 257; M. J. Glennon, Treaty Process Reform: saving constitutionalism without destroying diplomacy (1983), 52 U. Cinn. L.R. 84.
It is important to point out that the Senate in the United States can be an important champion of states' rights against federal powers for the reason that the Senate is composed of Senators from each state, directly chosen by the people of the state, voting as one electorate. The Australian elected Senate is similarly constituted. There are lessons to be learned here in any changes proposed for a Canadian upper house.

The legal status of treaties in the United States is determined by Article VI, clause 2, of the Constitution which provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The leading case on the capacity of the federal government to trench upon state legislative competence by exercise of the treaty-making power is Missouri v. Holland\(^5\) decided in 1920. That case involved the treaty between the United States and the United Kingdom concerning migratory birds in Canada and the United States. There was no question that the regulation of hunting within a state was outside federal competence and previous attempts by Congress to legislate in this area without the benefit of a treaty had been held unconstitutional. The State of Missouri attacked the federal legislation implementing the treaty on the ground that the treaty-making power was limited to areas within federal legislative competence and since the regulation of intra state hunting was not delegated to the federal government in the Constitution, federal legislative action was precluded by the Tenth Amendment. You will recall that the Tenth Amendment is the opposite of the Canadian residual power clause in that it provides that everything which is not expressly delegated to the federal government in the Constitution remains within state competence.

The Court held that regardless of whether a matter was otherwise within state competence the entry into an international agreement removed the matter into the competence of the federal government. Thus, while a treaty must accord with the Constitution of the United States, it need not respect the division of legislative competence.

\(^5\) (1920), 252 U.S. 416.
To round out the picture a word must be said about international executive agreements. By the use of these agreements the President has largely been able to avoid Senate approval. Under such a device the executive merely enters into an agreement with a foreign power which in international law becomes binding regardless of Senate approval. In \textit{U.S. v. Belmont}\(^6\) in 1937 and \textit{U.S. v. Pink}\(^7\) in 1942, these agreements were held to override state law. In \textit{U.S. v. Capps}\(^8\) in 1953, however, these internal executive agreements were held not to override laws passed by Congress. The rule is that treaties can intrude on congressional powers unless a congressional act is specifically required or Congress has already acted in a manner inconsistent with the treaty. In this latter case, however, the result can be avoided if Senate approval is obtained.

To summarize the American position, treaties which are made by and with the consent of the Senate are undoubtedly supreme law and may override state law and previous acts of Congress. Executive agreements may override state law, but have only limited capacity to override the powers of Congress. Self-executing agreements can affect congressional competence while those requiring legislation cannot.

\textit{Treaty-Making Power in Canada}

The Canadian position is markedly different from the United States. At the time of the original Confederation conferences, Canada did not possess international personality and therefore the British North America Act, 1867 did not contemplate the time when Canada would possess such capacity on attaining the status of an independent sovereign state. As a result, the extent of the power of the federal government to enter into treaties affecting provincial competence has been left to the courts for delineation. The resulting judicial analysis, at least to this date, has left the treaty-making power subject to the distribution of legislative power contained in sections 91 and 92 of the Constitution Act, 1867, as the B.N.A. Act, 1867 is now called.

\(^6\) (1937), 301 U.S. 324.
\(^8\) (1953), 204 F. 2d 655 (C.A. 4 Circ.).
This limitation precludes the federal government from concluding treaties which trench upon provincial competence and at the same time, as the provinces do not possess international personality, they are unable to conclude international treaties concerned with such areas. Canada’s ability to participate fully in the international arena is impaired to the extent that, in the absence of federal-provincial accord, there is an inability to conclude treaties dealing with significant portions of the economic, social, political and legal spectrum.

In 1867 the power to effect international agreements for all the Dominions under the Crown resided in Westminster and the Confederation conferences did not presume to suggest that any such power should be given to Canada. Thus the Constitution Act, 1867 dealt only with British Empire treaties, that is, agreements entered into by the United Kingdom on behalf of the Dominions. With respect to such treaties a supremacy clause was included in the Constitution Act, 1867. Section 132 of that Act provides:

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.

This clause conferred on the federal government the power to trench upon provincial areas of competence so long as the treaty could be characterized as an “Empire treaty”. This was made clear in R. v. Stuart\(^9\) in 1924 where the defendant had been charged under the federal Migratory Birds Convention Act, 1917 which implemented the treaty of the same name entered into by the United Kingdom on behalf of Canada.

The defence was raised, as in Missouri v. Holland\(^10\) in the United States, that the regulation of hunting was a matter of provincial competence which could not be usurped by the federal government. This argument was rejected because of the precise wording of section 132 and since an Empire treaty was at issue the federal government had full competence to implement the treaty notwithstanding the fact that its contents were otherwise an area of provincial concern. Dennistoun J.A. stated:

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10. See, supra, fn. 5.
Section 132 must be construed as conferring powers which will enable the Dominion to keep full faith with the United States of America and to take all necessary measures to prevent the indiscriminate slaughter of migratory birds.\textsuperscript{11}

An identical result occurred in *Attorney-General for British Columbia v. Attorney-General for Canada*\textsuperscript{12} in 1924 involving legislation validating provincial Orders-in-Council which prohibited the employment of Japanese or Chinese in mines in British Columbia. These orders were in direct conflict with a treaty entered into by Great Britain on behalf of the Dominions with Japan and specifically with Canadian federal legislation, the Japanese Treaty Act, S.C. 1913, c. 27, which guaranteed the right of British subjects and Japanese nationals to pursue a living in the territory of the signatories. Notwithstanding the fact that the employment contracts were otherwise within the area of provincial competence, the Privy Council held that such competence must cede to the terms of the treaty, in accordance with the provisions of section 132.

In the period following World War I, from the independent signing of the Treaty of Versailles in 1919 to the Statute of Westminster in 1931, Canada developed its own international personality and with it the power to enter into international agreements without the intervention of Westminster. The question naturally arose concerning the status of such agreements when they purported to deal with matters within provincial competence.

The first two cases dealing with Canada's new sovereignty were inconclusive as to the extent of the treaty power. In *Re Regulation and Control of Aeronautics in Canada*\textsuperscript{13} in 1931 the treaty in question was signed by Canada in its own right but was also ratified by Westminster on behalf of the Empire. The Privy Council held that the treaty could affect provincial competence on two grounds. First, it was held that aeronautics were not within the class of subjects enumerated in sections 91 and 92 of the Constitution Act, 1867 and therefore within federal legislative competence under the residual power. Second, the Board expressed the view that section 132 governed this treaty and, therefore, the division of powers was largely irrelevant.

\textsuperscript{11} Supra, fn. 9 at 15.
\textsuperscript{12} [1924] A.C. 203 (P.C.).
\textsuperscript{13} [1932] A.C. 54 (P.C.).
A similar situation arose in *Re Regulation and Control of Radio Communication in Canada*\(^{14}\) in 1932, where the treaty was not signed by the United Kingdom but rather assent was given to the signing of the treaty by the Dominions individually. On these facts, the provinces submitted that the provisions of section 132 did not govern and provincial competence must be respected. The Privy Council did not respond directly to this argument, holding that radio communications, like aeronautics, were within federal competence under the residual clause and, therefore, a matter solely of federal legislative competence. It was suggested by Viscount Dunedin, however, that all matters of international agreement were within the residual clause and, therefore, within federal competence. Viscount Dunedin stated:

> It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which would apply to all the dwellers in Canada.\(^{15}\)

This reasoning, however, which would bring the federal competence with respect to treaty implementation of international agreement within the residual power of the Constitution Act, 1867 was rejected by the Privy Council in the *Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions)*\(^{16}\) in 1937. This case involved a reference to determine the capacity of the federal government to enter into three treaties relating to employment contracts.\(^{17}\) The federal government argued that the impugned implementing legislation was valid under the provisions of section 132 or alternatively under a treaty power within the residual clause. Both arguments were rejected. The Board summarily dismissed the submissions with respect to section 132 holding that this was not an Empire treaty but rather one entered into by Canada in its new status as an international person. The Board then implicitly rejected the argument that the power was within the residual clause. The Board reasoned that as a general treaty-making power was not expressly enumerated in the Act, the real question

\(^{15}\) Ibid., 313. Lord Sankey L.C. made a similar comment in *Re Aeronautics*, supra, fn. 13 at 77.  
\(^{17}\) The implementing legislation was the Weekly Rest in Industrial Undertakings Act, the Minimum Wages Act and the Limitation of Hours of Work Act.
was not who had the power to enter into treaties but rather who had the power to pass the implementing legislation. The Board held that if the enacting legislation, apart from the treaty, was within provincial competence then only the province could pass the requisite legislation. To hold otherwise, according to Lord Atkin, would be to grant the federal government greater power than specifically contemplated by the British North America Act.

The decision in the *Labour Conventions* case has been roundly criticized by constitutional lawyers like Frank Scott and Peter Hogg who have argued that the modern treaty power could justifiably be found in section 132. This was precisely the argument rejected by three members of the Supreme Court of Canada, with whom the Board agreed. It is difficult to accept the "living tree" principle advocated by Scott and Hogg in view of the clear wording of section 132. The genus of the sapling determines the essential nature of the mature tree.

In dealing with the second argument the Board having drawn the obvious distinction between treaty-making and treaty-implementing rested their reasons solely on the distribution of legislative power under sections 91 and 92. Lord Atkin stated it in this way:

If, therefore, s. 132 is out of the way, the validity of the legislation [i.e. treaty-implementation] can only depend upon ss. 91 and 92. Now it had to be admitted that normally this legislation came within the classes of subjects by s. 92 assigned exclusively to the Legislatures of the Provinces, namely — property and civil rights in the Province. This was in fact expressly decided in respect of these same conventions by the Supreme Court in 1925. How, then, can the legislation be within the legislative powers given by s. 91 to the Dominion Parliament? It is not within the enumerated classes of subjects in s. 91: and it appears to be expressly excluded from the general powers given by the first words of the section.

... 

For the purposes of ss. 91 and 92, i.e. the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this

distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the British North America Act gives effect. . . . It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. . . . There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in s. 92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s. 91 and existed ab origine. In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

. . . .

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.\footnote{20}{[1937] A.C. 326, 350 \emph{et seq.}}

Despite this clear language there remains support in some quarters for a revisitation of the \textit{Labour Conventions} case. This is based on the argument that the federal government is the only international person within Canada and to deny full treaty-making
and treaty-implementing power to the federal government compromises Canadian sovereignty, that the ship of state referred to by Lord Atkin is becalmed or dead in the water.

Some indication has been given by the Supreme Court of Canada of its willingness to reconsider the *Labour Conventions* case; though the matter is so charged politically that it was thought desirable to keep it off the agenda or not to include it in the twelve items which were the subject of the most recent round of constitutional negotiations. There is no evidence that it was ever considered for inclusion. The judges would thus be asked to intervene where politicians fear to tread in this volatile political arena.

In *Johannesson v. West St. Paul*\(^{21}\) in 1951 a conflict arose between a municipal by-law and Canada's obligation under the Convention on International Civil Aviation entered into by Canada in 1944. The court held the treaty to be paramount on the basis that aeronautics was within the residual clause and thus exclusively federal and therefore the *Labour Conventions* case did not impede the exercise of plenary federal legislative jurisdiction. The case arguably goes beyond this, however, and potentially could support a submission that the treaty-making power itself is within the residual clause. This argument arises due to the holding that matters of national interest and importance are federal and since treaties in general are concerned with matters of national interest they are within federal competence.

A more direct attack on the principle of the *Labour Conventions* case may be the result of the decision in *Re Offshore Minerals*\(^{22}\) in 1967. In that case the court partially based its holding that Canada had jurisdiction over the territorial sea on the west coast on the fact that it was Canada and not British Columbia which was answerable in international law for obligations entered into with respect to that sea. This would appear to give some support for the argument that whenever Canada is subject to international obligations that the content of these obligations become matters of federal competence. Again this is precisely what Lord Atkin said the federal government could not do, i.e., to change the distribution of legislative power simply by assuming responsibility for the discharge of international obligations. Obviously, however, there is a difference between

international obligations undertaken voluntarily, as in treaties, and those that result from international law without treaty.

In a more recent case the Supreme Court has reiterated the possibility that the *Labour Conventions* case will be reviewed. In *MacDonald v. Vapor Canada*23 in 1976 the federal government attempted to justify a section of the Trade Marks Act, inter alia, on the basis that it was required to fulfill Canada's obligations under international convention. The Court rejected this argument being unable to find that the convention in question required the enactment of the impugned provision. In the course of his reasons for judgment, concurred in by Spence, Pigeon, Dickson and Beetz, JJ., the Chief Justice referred to other cases and other judicial authority where the decision in the *Labour Conventions* case was doubted and then added:

> Although the foregoing references would support a reconsideration of the *Labour Conventions* case, I find it unnecessary to do that here because, assuming that it was open to Parliament to pass legislation in implementation of an international obligation by Canada under a treaty or Convention (being legislation which it [sic] would be otherwise beyond its competence), I am of the opinion that it cannot be said that... [the section in the instant case] was enacted on that basis.24

Even accepting the uncertain fact that the future may bring substantial change, we are required for the present to negotiate, formulate and implement treaties in accordance with the constitutional principles, some would say undue strictures, established by the *Labour Conventions* case. We are also required to adhere to the provisions of the Vienna Convention on the Law of Treaties to which Canada acceded in October 1970 and which came into force after ratification by the thirty-fifth state on January 27, 1980.

*The Vienna Convention on the Law of Treaties*

The Convention does not explicitly deal with the issue of federal state clauses. However, several articles do have some relevance to that issue. Article 6 deals with capacity to enter into treaties and enacts customary international law as follows:

> Every state possesses capacity to conclude treaties. The use of the word "state" relates to the international concept of a state meaning

a sovereign unit with defined territory, population and some semblance of independent internal political control. When applied to federal states, the concept of sovereignty will yield international recognition to the central government thus resulting in an incapacity in the component units to conclude treaties.

In earlier drafts of the Vienna Convention an attempt was made to give members of a federal state a limited capacity to conclude treaties. As originally drafted article 6 contained the following provisions:

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.

Even this would not have been helpful to Canada since it has not been admitted by the federal government that such capacity exists in the provinces under our federal constitution. That is not to say that the argument has not been made, particularly by the Province of Quebec, that such power does exist in matters falling within the areas of provincial legislative competence.

But the wording of the draft Vienna Convention caused difficulties since a technical interpretation of the clause would allow a member of a federal state to enter into treaties only when it was a state in its own right in terms of international law. This, however, appears not to have been the intention of the draftsmen, nor was it appreciated by the diplomatic conference convened to settle the terms of the treaty. Despite the confusion concerning the provision and the concern of some delegates that it represented a troublesome intrusion into the internal constitutional arrangements of federal states, the provision was adopted by the first session. This position was, however, reversed at the second session and the provision was deleted.

For our present purposes the remaining three relevant articles of the Vienna Convention are as follows:

Art. 27. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Art. 29. Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

26. Ibid., Second Session, A/Conf. 39/11, Add. 1, 6 et seq.
Art 46. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

By the Vienna Convention then a treaty entered into by the federal government is presumed to bind the entire country unless a different intention is expressed or can be implied. One assumes that the accession to the Vienna Convention itself was a matter of federal/provincial accord. Otherwise one gets trapped in the *circulus inextricabilis*. The division of powers would not provide a defence to an action on the treaty dealing with subject matter beyond the legislative competence of the federal government.

Article 29 is particularly relevant to the Canadian position in that it allows that the application of a treaty may be limited territorially if the treaty so provides. Conversely, in the absence of a permitted and declared territorial limitation the treaty applies to its entire territory. This points up the dire necessity of an acceptable federal state clause tailor-made for the Canadian situation. Such a clause was fashioned at the Twelfth Session of The Hague Conference in 1972 and has been used in The Hague conventions and other international treaties since that date.

*The Federal State Clause*

Although there exists a fairly large body of literature concerning the federal state clause most of it was written prior to 1972 and accordingly is not helpful on developments since that date. In this category is Ivan Bernier’s treatise, “International Legal Aspects of Federalism.” In his analysis of federal state clauses Bernier states that they must be distinguished from territorial application clauses. The latter, also called the colonial clause, stipulates that either a treaty will not apply to colonies and dependencies unless the signatory state notifies its intention to the contrary or that it will apply to such territories unless they are excluded by specific negotiation. Bernier then continues:

Federal state clauses, on the other hand, limit, or otherwise affect, the obligations of the signatory federal state with respect to subject matters falling within the jurisdiction of its member states. Thus, the territorial application clause is concerned with

the problem of the inclusion or exclusion of non-metropolitan areas in the sphere of application of the treaty; whereas the federal state clause takes into consideration the difficulty of applying to the component parts of a federation an international instrument that deals wholly or in part with subject matters within their exclusive field of jurisdiction. One clause is jurisdictional, the other territorial, and it is unsafe to lump the two together as though they were one. 28

This type of classification was defensible on the then state of the art but a lot has happened since Bernier wrote. Although up to now I have referred to the federal state clause as if there were only one, I think it preferable to say that present rationalization would indicate there are a number of substantially different federal state clauses which may be classified in two main categories. The first group comprises the federal state ratification or accession clause which really is involved with both territoriality and jurisdiction and the second group is the federal state interpretation clauses which vary with the subject matter of the treaty or convention and are, therefore, in the private law field infinitely various.

The Federal State Ratification Clause

The so-called colonial clause has been contained in The Hague conventions since time immemorial. Selecting one at random it appears in the following form in the most recent Hague Convention on International Access to Justice, formulated at the Fourteenth Session, October 25, 1980:

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State. 29

As Bernier points out such a provision has no application to a federal state which is made up of member states, without any external territories 30 and certainly not to a federal state such as Canada with division of legislative competence between the federal authority and the constituent provincial units depending on the

28. Ibid., 172.
subject matter of the convention. This lacuna led to a review of the situation at the Hague Conference since it was involved in multilateral conventions concerning federal states and unitary states alike. Indeed, as the development progressed there has been a realization that many more states are federal in nature for some important purposes of these conventions than was originally envisaged and there has been a proliferation of different types of the federal state clause to deal with the problem as changing subject matter dictates.

As indicated in my remarks at the outset of this address, Canada participated in the Hague Conference for the first time in 1968. The members of the delegation attending the Eleventh Session in October of that year were involved in the formulation of Conventions on the Recognition of Divorce and Legal Separation, the Law Applicable to Traffic Accidents, and on the Taking of Evidence Abroad in Civil or Commercial Matters. Although not entirely satisfactory from the Canadian point of view these Conventions did attempt to go beyond the classical colonial clause and deal with a federal state clause from the standpoint of jurisdiction. The Convention on the Law Applicable to Traffic Accidents provided in Article 14 as follows:

A State having a non-unified legal system may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its legal systems or to one or more of them, and may modify its declaration at any time thereafter by making a new declaration.

This was closer to Canadian aspirations but not ideal because of the possible interpretation that the reference was to the civil law and common law systems and not jurisdictional territorial units giving rise to ten legal systems. The Divorce Convention of the same year caused no major concern for Canada because, in divorce, Canada has a unified legal system since divorce is a federal head of jurisdiction and legal separation was not a construct known to the law in several provinces. The Divorce Convention, however, did contain a federal state clause identical in terms to that in the Traffic Accidents Convention. It was inserted at the request of Israel because in the matter of divorce Israel, though politically a unitary state, does have a separate system of laws with respect to divorce of Jewish nationals and that of Arab nationals.

At the Twelfth Session of the Hague Conference the matter of appropriate federal state clauses arose again in the context of three
new conventions on the International Administration of the Estates of Deceased Persons, on the Law Applicable to Products Liability, and on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. The amended version of the federal state clause approved by that Session was negotiated, drafted and presented by D. S. Maxwell, Q.C., Deputy Minister of Justice, Canada and Chief of the Canadian delegation, and Mr. P.W. Amram, a Washington international law attorney and acting chief of the American delegation, with the assistance of advisors from their respective delegations.\textsuperscript{31} As approved by the Conference, Article 14 of the Convention on Products Liability reads as follows:

If a Contracting State has two or more territorial units which have their own rules of law in respect of products liability, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

The proper solution was attained at last not only for Canada but other federal systems like the United States with similar political, if not entirely legal, problems of constitutional ordering. It will be noted that this clause identifies accurately the source of the differing legal systems to which the convention must give cognizance if the jurisdictional problem is to be resolved in a meaningful way. It enables Canada to ratify treaties involving provincial legislative jurisdiction without the unanimous consent of all provinces and to declare the convention non-applicable to those provinces who do not consent. It gives full force and effect to the treaty-making power in the federal government and the treaty-implementing power to the provincial governments in matters where the provincial legislatures have legislative competence.

It should be pointed out that these conventions also contain the classical colonial clause, i.e. the territorial application clause referred to by Bernier. The new clause can be said to be jurisdictional but it is jurisdictional in the sense that it is based on the existence of territorial units having legislative competence and

\textsuperscript{31} Conférence de La Haye de droit international privé, Actes et Documents de la Douzième session, Tome I Matières diverses, Document de travail No. 5 — Note of the Canadian delegation, I-91; Document de travail No. 9 — Joint Proposal of the United States and Canada for a standard model of 'Federal State' Clauses, I-107; Procès-verbal No. 4, I-108-110.
thus creating the fact of multiple legal systems in one state in the particular subject matter being dealt with in the convention.

What may be described as the 1972 version of the federal state clause has appeared in all subsequent Hague Conventions and has been adopted in its precise terms in the UNIDROIT Convention on the Uniform Law on the Form of an International Will at Washington in 1973, the United Nations Convention on the Limitation Period in the International Sale of Goods at New York in 1974, the United Nations Convention on Contracts for the International Sale of Goods at Vienna in 1980, and in the recent conventions of the Organization of American States resulting from its International Conferences on Private International Law (CIDIP/I and II) in 1975 and 1980, even though Canada is not yet a member of the O.A.S. Thus it can be said that the clause has gained widespread international recognition.

It is all the more distressing to record here that its acceptance has not been unanimous. Unhappily the chief opponent is one of our sister Commonwealth countries, Australia. The Australian concerns were expressed forcefully as early as 1972 at The Hague, reached the level of diplomatic exchanges at the time of the Washington Conference in 1973 and the New York Conference in 1974, and escalated to such proportions at The Hague in 1980 that the Australians insisted on the insertion of a federal state clause that would reserve their position on treaty-making power. This was not their preferred position. They would have been happier with the removal, or, at least, modification of the 1972 federal state clause. It appears as Article 40 of the 1980 Hague Convention on Child Abduction again in these terms:

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

The organic statute of the Australian constitution is not specific on the treaty-making power. Presumably the current powers derive from public international law principles applicable to a state having international personality as a sovereign country. This was not true of the colonies which united to form the Commonwealth in 1900. There is not even reference to Empire treaties as in section 132 of
the Constitution Act, 1867. Perhaps the winds of change which led to independent sovereign status for the Dominions after World War I were already causing reflection in 1900 and it was thought politically desirable not to make direct reference to the treaty power.

Whatever the reason, the only direct reference to treaties in the Act to constitute the Commonwealth of Australia is contained in section 75(i) which grants original jurisdiction to the High Court in all matters arising under any treaty. There is currently under consideration in Australia a constitutional amendment which would allow the High Court to give advisory opinions. A government standing committee on constitutional reform has recommended the insertion of a new section 77A of a somewhat elaborate nature enabling the High Court to give advisory opinions on a large range of matters including the Commonwealth and state acts, proposed enactments and "any question of law arising under or with respect to any treaty, including any question of law relating to the implementation of any treaty, being a question that, by reason of circumstances existing at the time of the reference, the Governor-General in Council is of opinion has arisen or is reasonably likely to arise." 32

The reasons for the Australian federal state confrontation may be found in the general provisions of the Commonwealth of Australia Constitution Act, 1900. Sections 5, 51, 107, 108 and 109 contain the seeds for differences and discord in the exercise of legislative power with respect to the implementation of treaties. Section 5 is the paramountcy or supremacy clause in favour of the federal Parliament and reads as follows:

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; . . .

Conversely the political leverage granted to the States under the Constitution flows from sections 107, 108 and 109 which read as follows:

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the

establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a Colony which has or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration or repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Under the Constitution the powers of the Commonwealth Parliament are contained in the provisions of section 51. The relevant provision for present purposes reads as follows:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

(XXIX.) External affairs: . . .

It will be noted that section 51 (XXIX) makes reference to "external affairs" and not to "treaties". The issue is whether the reach of this federal power is such as to enable the Commonwealth Parliament to legislate with a view to implementing a treaty and in doing so override state law.

These provisions cover such a welter of constitutionally justiciable facts that there is small wonder that neither the Commonwealth nor the State authorities should have been disposed to agree to any precise wording in international agreements which might have had profound significance in the resolution of these constitutional issues at a time when those issues were being brought before the Australian courts. No one would deny the reality of these concerns but what is being suggested is that their nature is such that they must be resolved at home. The Australian federal authorities appear to view the precise wording of the 1972 version of the federal state clause as having the potential of circumscribing the treaty-making power of the federal government. The state authorities, on the other hand, or some of them, view the same words as having the potential of permitting the federal authorities to trench on their legislative competence under the constitution in terms of the enactment of federal legislation for purposes of
treaty-implementation. The situation is similar but not the same as the Canadian constitutional problems. Until recently they did not have a *Labour Conventions* case to settle in a definitive manner the reach of the federal treaty-implementation power.

They now have one but in a sense it is inconclusive. I refer to *Koowarta v. Bjelke-Petersen* decided by the High Court in 1982. Australia had ratified the International Covenant on the Elimination of All Forms of Racial Discrimination on August 13, 1980. To implement this treaty the federal Parliament had passed the Racial Discrimination Act, 1975 (Cth). The plaintiff supported, and the State of Queensland attacked, the validity of this legislation on the ground that some of the provisions were beyond the reach of the federal power to enact laws with respect to external affairs under section 51 (XXIX) of the federal constitution.

The High Court, in a 4:3 decision, upheld the provisions of the Racial Discrimination Act, 1975 as a valid exercise of the power of the Commonwealth to make laws with respect to external affairs. This power had never been definitively settled by the High Court. Three of the majority judges, Mason, Murphy and Brennan JJ., held that the Commonwealth Parliament can give legislative effect to any international agreement entered into bona fide by the Commonwealth, whatever its content and in doing so may override state law.

In addressing this view Chief Justice Gibbs and Aickin J. said:

If the view... is correct, the executive could, by making an agreement, formal or informal, with another country, arrogate to the Parliament power to make laws on any subject whatsoever. It could, for example, by making an appropriate treaty, obtain for the Parliament powers to control education, to regulate the use of land, to fix the conditions of trading and employment, to censor the press, or to determine the basis of criminal responsibility — it is impossible to envisage any area of power which could not become the subject of Commonwealth legislation if the Commonwealth became a party to an appropriate international agreement. In other words, if s. 51 (XXIX) empowers the Parliament to legislate to give effect to every international agreement which the executive may choose to make, the Commonwealth would be able to acquire unlimited legislative power. The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field

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of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed.\textsuperscript{34}

Wilson, J., the third dissenting judge, put the matter equally forcefully:

\ldots if ss. 9 and 12 of the [Racial Discrimination] Act [(Cth.)] are a valid exercise of the power to enact laws with respect to external affairs, it would be difficult to deny a power to implement any international obligation. Certainly the entire field of human rights and fundamental freedoms would come within the reach of paramount Commonwealth legislative power. \ldots The effect \ldots would be to transfer to the Commonwealth virtually unlimited power in almost every conceivable aspect of life in Australia, including health and hospitals, the workplace, law and order, the economy, education, and recreational and cultural activity. \ldots So broad a power, if exercised, may leave the existence of the States as constitutional units intact but it would deny them any significant legislative role in the federation.\textsuperscript{35}

Stephen, J., the swing judge, voted to constitute a majority of the judges in upholding the impugned federal legislation. He pointed out, however, that the Commonwealth head of power under s. 51 (XXIX) is not "treaties" but "external affairs" and then made the following reservation:

But where the grant of power is with respect to "external affairs" an examination of subject-matter, circumstance and parties will be relevant whenever a purported exercise of such power is challenged. It will not be enough that the challenged law gives effect to treaty obligations. A treaty with another country, whether or not the result of a collusive arrangement, which is on a topic neither of especial concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive that scrutiny.\textsuperscript{36}

It would be impertinent to suggest that if \textit{Koowarta v. Bjelke-Petersen} had been decided early in 1980 instead of 1982 the Australian opposition to the 1972 version of the federal state clause would have been dissipated. There can be no doubt that the case profoundly affects the distribution of legislative power between the States and the Commonwealth of Australia. But it would appear that all doubts have not been dispelled.

\textsuperscript{34} \textit{Ibid.}, 637.
\textsuperscript{35} \textit{Ibid.}, 660-61.
\textsuperscript{36} \textit{Ibid.}, 645.
In commenting on the implications of the Koowarta case, Dr. J. M. Finnis has written:

At all events, the States can still argue that no positive interpretation of the external affairs power commanded a majority in Koowarta, and that the rulings or dicta on human rights in general are not definitive, and not to be acquiesced in.

Moreover, the States can still contend, at the political and administrative level, that since a majority of Justices have clearly ruled that not every treaty will attract the external affairs power, the arrangements (since 1976) for regular Commonwealth-State consultations on the negotiation of treaties are more important than ever. Koowarta provides no proper ground for the Commonwealth to try to scale those consultations down.

Nor does Koowarta provide any genuine ground for Australia to slacken its efforts to obtain 'federal state' clauses in international treaties.37

Because of the Australian concerns at the time, Article 41 was inserted in the 1980 Hague Convention on Child Abduction in the following terms:

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Canada abstained from voting for or against the motion to adopt but contented itself in explaining its vote to state that this clause appeared to be a matter to be sorted out internally in Australia and not one for insertion in an international convention. But I am under no illusions and though together we appear to have scotched the snake, we have, I suspect, not killed it. I hope that in the future better minds may find a solution which will allow Australia and ourselves to live comfortably in the international community. But whatever the solution proposed and unless and until the treaty-making power in Canada is changed, we must not allow ourselves to be driven off the formula that is a sine qua non for us in our ventures into the international field and which is acceptable to our colleagues in other contracting states. The matter is legally

critical for us. It is obviously important for the Australians as well. It is distressing that we should be so obviously at odds with them and unseemly that the debate should be so public and so protracted. I imagine it is small comfort to them that their chief support in these forums has been the U.S.S.R. who, curiously enough, express an abhorrence for all these so-called colonial clauses. Thus do technical terms acquire an opprobrious connotation.\textsuperscript{38}

There are other possible formulations for the federal state clause, such as that contained in Article 41 of the 1951 United Nations Convention on the Status of Refugees. The provisions read as follows:

Art. 41. In the case of a Federal or non-unitary State the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.\textsuperscript{39}

This type of clause is common in the I.L.O. Conventions and the United Nations Conventions. Clearly they attempt to deal with the problems of contracting states having an internal organization with divided legislative jurisdiction in the particular subject matter of the

\textsuperscript{38} Since the date of writing, word has come that the Tasmania Dam case has been disposed of by the High Court favourable to the Commonwealth and in a manner which now settles the reach of the federal treaty-making and treaty-implementing power under the Commonwealth Constitution. It has also been suggested that in view of this decision any special federal state clause for Australia will no longer be required.

\textsuperscript{39} See U.N. Treaty Series, vol. 189, 137 at 180.
They are generally unpopular with contracting states having a unitary system and have not been acceptable in the Conventions of The Hague Conference dealing essentially with private law subjects.\textsuperscript{40}

\textit{The Federal State Interpretation Clauses}

Earlier in this address I alluded to the fact that there is not one federal state ratification clause but a number of them. Three of them have been discussed at length. We now turn to a brief discussion of federal state interpretation clauses. In a sense that is a misnomer but it does classify those types of clauses that are necessary in any convention applying to a state which has a non-unified legal system. It may, of course, be a federal state properly so called but it is also necessary in those politically unitary states having more than one legal system. These clauses are interpretive or definitional in nature and are essential for a proper application of the convention. For example, The Hague Convention on Recognition of Divorce and Legal Separation in Article 23 contains a \textit{federal state ratification clause} which provides that if a contracting state has more than one legal system in matters of divorce or legal separation it may, at the time of signature, ratification or accession declare that the convention shall extend to all its legal systems or only to one or more of them, and may modify its declaration by submitting another declaration at any time thereafter.

The corresponding \textit{federal state interpretation clause} is found in Article 15 of the Convention and states that in relation to a contracting state having, in matters of divorce or legal separation, two or more legal systems applicable to different categories of persons, any reference to the law of that state shall be construed as referring to the legal system specified by the law of that state. This clearly applies in states such as Israel where the divorce laws differ in relation to religious groups within the state, i.e. one divorce law for those of the Jewish faith and a different divorce law for those of the Moslem persuasion.

These interpretation clauses are particularly relevant in the context of The Hague Conference conventions since the connecting factors in private international law, such as habitual residence, are

\textsuperscript{40} See Bernier, \textit{op. cit.}, 172 \textit{et seq.} for a full analysis of this type of federal state clause.
relevant not to the national state but to the territorial units of that state. We, in Canada, are entirely familiar with the fact that with respect to the formulation of rules designed to resolve conflict of laws the Canadian provinces are treated as separate countries or jurisdictions. The Hague Conventions reflect that fact. For example, the 1980 Hague Convention on Child Abduction in Article 31 provides that:

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units —

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Diversity of laws or legal systems may, as we have seen, result from territorial unit legislative competence in a true federal state or from differing legal treatment of peoples on religious grounds in a unitary state such as Israel. It may also result from different laws applicable to different groups within an otherwise unitary state based upon differences in ethnic origin. This is true of states such as Yugoslavia, a member of The Hague Conference on Private International Law. In that country different laws in relation to matrimonial property apply to the distinct ethnic groups, Croats, Slovenes, Serbs, etc., of which the nation is composed. Consequently the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes in Article 19 contains the provision that:

For the purposes of the Convention, where a State has two or more legal systems applicable to the matrimonial property regimes of different categories of persons, any reference to the law of such State shall be construed as referring to the system determined by the rules in force in that State.

It has always intrigued me that legal constructs which superficially appear so disarmingly simple turn out to be highly complex in application. This is a source for great challenge to the lawyer. A good illustration of this is found in the area of conflict of laws or private international law with its frequent reference to nationality as a connecting factor. The reference to nationality and national law in the Convention on Matrimonial Property Regimes
raised special problems for the United Kingdom. The status of British subject in their nationality law as it existed at that time would have caused special problems in the application of that Convention. It was common ground that large numbers of British subjects could not be said to be British nationals for the purposes of the applicability of the Convention. Consequently the United Kingdom was instrumental in having a special interpretive clause inserted as Article 26 which provides:

A Contracting State having at the date of entry into force of the Convention for that State a complex system of national allegiance may specify from time to time by declaration how a reference to its national law shall be construed for the purposes of the Convention.

This appears to be an acceptable solution to a very complicated problem and the stuff of which law and human relations is all about.

One must not assume that this is the ultimate end of the development of federal state clauses in the area of international conventions and treaties. But, at least, it is the end of a long beginning. What has been accomplished in the last decade reflects a rational approach and has laid a sound foundation for future development. In my view, Canadians can be justly proud of their contribution to this important area of international legal scholarship and cooperation.

Throughout his professional life, Dr. Read willingly and eagerly took up the challenges offered by some of the most conceptually complex areas of the law governing nations and the relations of human beings. He did this not for personal gain or recognition but to assist in the fashioning of a more just and enduring society for all. His life and his work have inspired others to do likewise. May I end, as I began, that it has been a great privilege to be with you on this occasion.