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Uniformity in International Trade Law: The Constitutional Obstacle

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I. Introduction

International trade is the life-blood of the Canadian economy. Exports have become the largest single source of jobs in Canada, providing employment for almost three million Canadians and accounting for approximately 30 per cent of the G.N.P.¹ It is imperative that everything possible should be done to encourage the growth of this vital sector of the economy and that any impediments to such growth should be removed.

One factor which can have an effect on the volume of trade done by a country is its legal system. Traders are more likely to deal with partners in countries where they are familiar with the legal system and can be ensured that their rights will be enforced with the least amount of difficulty.

[I]t does not seem to be advisable to have in force several conflicting systems of private international law. Regionalism is out of place in this area of the law. By remaining in jealous isolation, one encourages aimless and inevitable differentiations of legal rules. *This is not conducive to the development of international trade, a development that is so important to Canada's economic growth.*² [emphasis added]

The desire for familiar rules to govern international trade has led to numerous and continued efforts over the years to achieve uniformity of laws governing international trade. The importance of uniformity in international trade law was underlined by the creation of the United Nations Commission on International Trade Law (UNCITRAL) which was established pursuant to Resolution 2205(XXI) of the General Assembly of the United Nations on December 17, 1966.³ The basic mandate of UNCITRAL is "to further the progressive harmonization and unification of the law of international trade."⁴ To this end, UNCITRAL has drafted and opened for ratification three international conventions:

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1. "Exports: A Matter of Economic Survival," External Affairs Canada, Supplement to the *Globe and Mail*, October 1, 1984.

2. Castel, "Canada and the Hague Conference on Private International Law: 1893-1967" (1967), 55 Can. Bar. Rev. 1.

3. G.A. Res. 2205, 21 U.N. GAOR, Supp. (No. 16) 88, U.N. Doc. 6316 (1966), reprinted in 1 Y.B. UNCITRAL at 65, U.N. Doc. A/CN.9 Ser. A/1970 [hereinafter 1 UNCITRAL].

4. G.A. Res. 2102, 20 U.N. GAOR, Supp. (No. 14) 91, U.N. Doc. A/6014 (1965), reprinted in 1 UNCITRAL at 18.

the Convention on the Limitation Period in the International Sale of Goods,⁵ the Convention on the Carriage of Goods by Sea, 1978,⁶ and the Convention on Contracts for the International Sale of Goods.⁷ In addition, UNCITRAL has promulgated the UNCITRAL Arbitration Rules⁸ and the UNCITRAL Conciliation Rules,⁹ which are used extensively to settle disputes in international trade. UNCITRAL also adopted the UNCITRAL Model Law on International Commercial Arbitration in June, 1985 and invited the General Assembly to recommend to States that they should consider the Model Law when they enact or revise their laws to meet the current needs of international commercial arbitration.¹⁰ Work has also been done in the area of the law of negotiable instruments and two draft Conventions have been circulated: the Draft Convention on International Bills of Exchange and Promissory Notes¹¹ and the Draft Convention on International Cheques.¹² A number of other areas of the law related to international trade are also being studied by UNCITRAL.

Other international bodies have also been active in proposing conventions to achieve uniformity in various areas of the law affecting international trade, such as the United Nations Conference on Trade and Development (UNCTAD): Convention on International Multimodal Transport of Goods;¹³ and the International Institute for the Unification of Private Law (Unidroit): Convention on Agency in the International Sale of Goods.¹⁴ In addition the International Chamber of Commerce has been very active in developing uniform rules governing many areas of trade law which, while not binding on parties, have been widely used voluntarily in international trade: (*eg.*, INCOTERMS, Uniform Customs and Practice for Documentary Credits, Uniform Rules for Collections, Uniform Rules for Contract Guarantees).

Although Canada has participated in many of the deliberations leading to the promulgation of these Conventions and uniform rules there has been a marked reluctance on the part of the federal government to commit Canada to any of the Conventions. The main reason for this

5. New York 1974, U.N. Doc. A/Conf. 63/15, reprinted in 13 I.L.M. 952 (1974).

6. Hamburg 1978, U.N. Doc. A/Conf. 89/13, reprinted in 17 I.L.M. 603 (1978).

7. Vienna 1980, U.N. Doc. A/Conf. 97/18, reprinted in 19 I.L.M. 668 (1980).

8. Adopted by UNCITRAL at its 9th Session, April 1976, U.N. Doc. A/31/17, 1976, reprinted in 15 I.L.M. 701.

9. Adopted by the General Assembly in Dec. 1980, U.N. Doc. A/Res 35/52 (1980), reprinted in 20 I.L.M. 300.

10. U.N. Doc. A/CN.9/SR.333 (1985).

11. U.N. Doc. A/CN.9/211 (1981).

12. U.N. Doc. A/CN.9/212 (1981).

13. U.N. Doc. TD/MT/CONF/16 (1980), reprinted in 19 I.L.M. 938 (1980).

14. 22 I.L.M. 249 (1983).

hesitation is the fear that Canada would not be able to guarantee implementation of her treaty obligations thus entered into because of constitutional problems. That is, although it is clear that the federal government may enter into treaties regardless of the subject matter, it has been argued that the federal Parliament may only enact legislation to implement treaty obligations that fall squarely within an enumerated federal head of power and that the subject matter of many of these conventions may be outside the legislative competence of the federal Parliament and within the legislative competence of the provincial legislatures.¹⁵

Some attempts have been made to circumvent this problem by the insertion of a federal state clause.¹⁶ However, aside from the problems with arriving at an acceptable federal state clause¹⁷, it is submitted that the federal-state clause is not an entirely satisfactory approach to the problem as it is still possible to have territorial units within a State which do not implement the Convention and therefore uniformity across the country as a whole cannot be achieved. In addition, even if all the units

15. See, e.g.: Brierly, "International Trade Arbitration: The Canadian Viewpoint", in *Canadian Perspectives on International Law and Organization* (Toronto: U. of T. Press, 1974), 826 at 835:

The explanation for this inactivity (*i.e.* lack of participation in any multilateral conventions on arbitration) . . . lies in the realm of Canadian constitutional law. Thus while the federal government is the sovereign authority constitutionally empowered to participate in the creation of a treaty with another state, and the only Canadian authority able to assume international obligations thereunder, it does not thereupon acquire the constitutional competence to execute that obligation if its subject matter is a provincial matter. The subjects of commercial arbitration agreements, procedures and enforceability of awards are, primarily, matters within a class of subject matter with respect to which the Canadian Parliament lacks exclusive jurisdiction. And it is not because a particular subject may have attained a national or even international commercial importance that these distinctions as to legislative competence will dissolve away.

16. A federal state clause is a clause in a treaty which recognizes that the federal state may be unable to guarantee performance of the treaty obligations, as performance may require the cooperation of the component units. Such a clause may take one of several forms. For example, it may stipulate that the federal state, in acceding to the treaty, undertakes to perform only those obligations which are within the federal government's executive or legislative competence, and agrees to bring the treaty to the attention of the component units of the state with a favourable recommendation for taking action (*see, e.g.*, 1958 N.Y. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article XI); or, it may provide for the contracting federal state to declare to which component units the treaty extends and to change this declaration from time to time (*see, e.g.*, The United Nations Convention on Contracts for the International Sale of Goods, Article 93).

17. In this regard, see the discussion of the problem of the acceptability of the federal state clause in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in E.P. Mendes and E.S. Binavince, "Canada and the New York Convention on Foreign Arbitral Awards" (1984), 9 *Canadian Arbitration Journal*, No.1, 2.

do implement the Convention, there may be some differences from unit to unit in the implementing legislation.¹⁸

The time has come for more active Canadian participation in international efforts at achieving uniformity in laws regulating international trade. This paper is intended to engender discussion towards such an objective. It will be argued that the federal Parliament, acting by itself, has jurisdiction not only to enter into conventions dealing with areas of the law related to international trade matters, but also to implement them through federal legislation.¹⁹ This jurisdiction, it will be argued, may be founded on one of two heads of power: i) the federal treaty power;²⁰ ii) the power to regulate trade and commerce.²¹ In addition, it will be noted that under the latter head of power the federal parliament may have an even broader scope to participate in unification of international trade laws.

II. *The Problem*

Before looking at the constitutional issue, it is perhaps worthwhile, in order to illustrate the problem, to look at a few specific instances where it has been difficult for Canada to participate fully in attempts at achieving international uniformity in international trade law. Two such areas are those of dispute settlement by international commercial arbitration and the rules regarding international sales of goods.

In order for international business to function efficiently it is necessary to have a system whereby disputes that arise can be settled quickly and satisfactorily and whereby awards may be enforced against recalcitrant defendants. Arbitration is the preferred method of settling international commercial disputes.²² However, problems arise in that different

18. See discussion of legislation implementing N.Y. Convention in Canada, *infra*.

19. For a discussion regarding implementation of the New York Convention on the Recognition and Enforcement of Arbitral Awards, see E.P. Mendes and E.S. Binavince, *supra*, note 17 and J.-G. Castel, "Canada and International Arbitration" (1981), 36 *The Arbitration Journal* 6. Mendes and Binavince, although questioning the authority of the *Labour Conventions* case, seem to accept that the federal power to implement treaties is limited as held in that case and argue for a limited implementation of the treaty. Castel also seems to accept the limited federal power to implement treaties. This paper takes a much broader view of the federal power to implement treaties.

20. Section 132 of the *B.N.A. Act*, now the *Constitution Act*, 1867.

21. *Id.*, s. 91(2).

22. See e.g., Schmitthoff, "Universalism and Regionalism in International Commercial Arbitration", in *International Economic and Trade Law — Universal and Regional Integration*, Schmitthoff and Simmonds, eds. (Leyden: A.W. Sijthoff, 1976) at 179: "It has become increasingly obvious that disputes arising from or in connection with international commercial transactions are inherently unsuitable for cognizance by the national courts. The international business community has recognized this; hence, the growing trend to international arbitration."

jurisdictions have different rules governing the conduct of arbitrations and the enforcement of foreign arbitral awards. In order to improve the efficacy of the international commercial arbitration system it would be useful if a standard set of procedural rules could be agreed upon and if uniform rules were applied to the recognition and enforcement of arbitral awards. The United Nations has been active in both these areas.

The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed in New York in 1958. The purpose of the New York Convention is to facilitate the recognition and enforcement of foreign arbitral awards by providing a simple mechanism for that purpose in member states. After almost 30 years of debate, Canada has finally acceded to the New York Convention. Canada's instrument of accession was deposited with the Secretary-General of the United Nations on May 12, 1986 and the Convention entered into force in Canada on August 10, 1986. The reason for the delay in acceding to the New York Convention was the constitutional problem of the federal government's not wanting to undertake international obligations without being able to ensure that they were effectively implemented. The position is summarized in the following letter from the then Minister of Justice dated September 21, 1979:

From time to time over the last number of years, the federal government has considered carefully the advantages of and the prospects for ratification of the Convention by Canada. When the matter was last under active study by this Department, it was considered that full implementation of the Convention would require legislation at the provincial level. The enforcement of foreign arbitral awards in Canada by Canadian courts is largely a matter of (*sic*) falling within the competence of provincial legislatures. While the "federal state clause" in Article XI might go some way to allowing Canadian ratification and implementation without concurrent legislative action on the part of all of the provinces, provincial implementing measures would be necessary in order for the Convention to have any significant effect in Canada.²³

During the period that Canada was not a signatory to this Convention, Canadian business persons were at a disadvantage in negotiating arbitration clauses in their contracts. This difficulty arose from the fact that Canadian business persons were unable to guarantee the rapid recognition and enforcement of foreign arbitral awards in Canada. This may have hindered the ability of Canadian business persons to compete on an equal footing with foreign competitors as foreign parties preferred to deal with business partners in countries where they could be guaranteed that there would be no problem with enforcement of their contracts (*i.e.* those who are party to the New York Convention).

23. As quoted in, Castel, *supra*, note 19, at 9 and 10.

It was only the renewed emphasis on international trade in the 1980s, coupled with the interest in international commercial arbitration raised by UNCITRAL's work on the Model Law on International Commercial Arbitration, that finally resulted in the federal government and the provinces and territories being able to get together and to agree to co-operate in order to allow Canada to accede to the New York Convention. Although this federal-provincial cooperation is to be lauded its necessity illustrates how easily matters can be delayed and how Canada can be left out of important international conventions.

In addition to the difficulty in getting unanimous agreement to allow Canada to even accede to such a convention, there remains the difficulty that a foreign party is still faced with 13 separate jurisdictions when it comes to enforcing an award in Canada and the implementing legislation can vary slightly from jurisdiction to jurisdiction. For example, in the legislation implementing the New York Convention, the province of Saskatchewan has put in a reciprocity reservation limiting applicability of the Convention to parties from other contracting states while other jurisdictions have not.²⁴ In addition, while all jurisdictions have limited the applicability of the Convention as provided for in Article 1 Paragraph 3 of the Convention to "differences arising out of legal relationships . . . which are considered as commercial . . .", there may be some differences in the interpretation of this provision across Canada arising from the actual wording of the legislation. These differences will arise because what is considered by the courts in one jurisdiction to be commercial may be different from what is considered commercial by the courts of another jurisdiction.²⁵ This may be the case particularly between the courts of the common law jurisdictions and the civil law jurisdiction of Quebec.

The second aspect of achieving uniformity in international arbitration law, *i.e.*, the uniform procedural rules, was considered by the United Nations Commission on International Trade Law and in June, 1985 UNCITRAL adopted the UNCITRAL Model Law on International Commercial Arbitration and invited the General Assembly to

24. *The Enforcement of Foreign Arbitral Awards Act*, S.Sask. 1986, s. 5.

25. In this regard it should be noted that the implementing legislation of some of the jurisdictions specifically refers this matter to be determined by the law of that jurisdiction. For example: *Foreign Arbitral Awards Act*, S.B.C. 1986, s. 3, "... considered as commercial under the law of British Columbia"; *Foreign Arbitral Awards Act*, S.O. 1986, s. 1 (1), "... recognized as commercial by the law of Ontario" (note: *The Foreign Arbitral Awards Act* is being repealed by the *International Commercial Arbitration Act*, Bill 17 (Ont.), 1987 which was given First Reading on May 4, 1987, as this Act will serve itself to implement the N.Y. Convention. This new Act refers simply to "international commercial arbitration agreements and awards", s. 2(2)); *Foreign Arbitral Awards Act*, S.Y. 1986, c.4, s. 3, "considered as commercial under the law of the Yukon".

recommend to States that they should consider the Model Law when they enact or revise their laws to meet the current needs of international commercial arbitration.²⁶ The Model Law constitutes a modern practical code of arbitration procedure and it is hoped that its wide acceptance among member states of the U.N. will lead to its voluntary adoption in legislation in those states and others when they reconsider their laws which deal with international commercial arbitration.

Although it is not in the form of a Convention and therefore does not raise the constitutional issue of treaty implementation, it does illustrate the broader constitutional problem faced by Canada in achieving uniformity in international trade law. If international trade is considered to be within the competence of the provincial jurisdictions then in order to obtain uniformity in this regard across Canada it will be necessary for 13 jurisdictions to enact identical legislation based on the Model Law. If it is within the competence of the federal Parliament then only one piece of legislation would be necessary.

Canada, in fact, is the first country to enact legislation which is based on the Model Law. The federal government introduced Bill C-108, *The Commercial Arbitration Act*, on May 1, 1986, which is modelled after the Model Law and in fact incorporates it, with very minor modifications as a schedule, "The Commercial Arbitration Code". However, this statute is limited in that:

The Code applies only in relation to matters where at least one of the parties to the arbitration is a department or a Crown corporation or in relation to maritime or admiralty matters.²⁷

The provinces have also introduced or are considering introducing legislation based on the Model Law.²⁸ However, not all provinces have introduced such legislation and the legislation which has been introduced varies slightly from one jurisdiction to another.

The main problem remains that a foreign business person dealing with a Canadian partner from one province can never be certain that the law that will apply will be the same as that which applies when dealing with a Canadian partner from another province.

26. U.N. Doc. A/CN.9/SR.333 (1985).

27. *Commercial Arbitration Act*, S.C. 1986, c. 21, s. 5(2).

28. 1. Alberta: *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6.

2. British Columbia: *International Commercial Arbitration Act*, S.B.C. 1986, c. 14.

3. Manitoba: *The International Commercial Arbitration Act*, S.M. 1986, c. 32.

4. New Brunswick: *International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2.

5. Newfoundland: *The International Commercial Arbitration Act*, S.N. 1986, c. 45.

6. Nova Scotia: *International Commercial Arbitration Act*, S.N.S. 1986, c. 12.

7. Ontario: *International Commercial Arbitration Act*, Bill 17, 1987 (Ont.). First reading, May 4, 1987.

A second area in which attempts have been made to achieve international uniformity is the law governing the international sale of goods. It would seem only logical to have a transaction which is by definition international, governed by a uniform international law rather than by the domestic law of one of the parties or perhaps of some third country. To this end the United Nations Commission on International Trade Law has drafted the Convention on Contracts for the International Sale of Goods (CISG) which was adopted in Vienna on April 10, 1980.²⁹ This convention was the culmination of many years' work originating in the early '30s with the International Institute for the Unification of Private Law.³⁰

Canada participated as an observer at the UNCITRAL deliberations and a federal state clause³¹ was inserted in the convention at Canada's request because of the federal government's concern that it might not be able to guarantee implementation of the convention since the subject matter of the convention was thought to fall within provincial jurisdiction over property and civil rights. However, despite the existence of the federal state clause, the federal government did not become a signatory to the convention, nor has it acceded to it.

The convention and the problems of Canada's adopting it have been discussed elsewhere³². However, a couple of points bear mention here to indicate some of the problems raised because of Canada's constitutional structure.

First, it is a difficult task to achieve the necessary agreement of all the provinces and territories to co-ordinate their domestic laws to allow for uniform implementation of the convention. The federal government is reluctant to accede to the treaty and allow for piece-meal implementation, although this was the purpose of including the federal state clause in the convention.

8. Prince Edward Island: International Commercial Arbitration Act, S.P.E.I. 1986, c. 14.

9. Quebec: *An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration*, S.Q. 1986, c. 73.

10. Saskatchewan: Implementation of the UNCITRAL Model Law is being considered (Letter to author from Lorelle E. Schoenfeld, Crown Solicitor, Saskatchewan Justice, June 24, 1986.)

11. Yukon: International Commercial Arbitration Act, S.Y., 1987, c. 14.

12. Northwest Territories: *International Commercial Arbitration Act*, O.N.W.T. 1986.

29. U.N. Doc. A/Conf. 97/18 (1980) (*supra*, note 7).

30. For a further discussion of the history of this convention, see Ziegel, "Should Canada Adopt the International Sales Convention?", in Faculty of Law, McGill University, *Meredith Memorial Lectures — New Developments in Law of Export Sales*, (Toronto: DeBoo, 1983), 67 at 68 to 69.

31. Article 93. See also comments in note 16, *supra*.

32. See, e.g., Ziegel, *supra*, note 30.

Further, difficulties could arise if the provinces request different declarations under Article 94 of the Convention. Article 94(1) provides that:

Two or more contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or their formation where the parties have their places of business in those States.

Article 94(2) is of similar effect in allowing a contracting party to make a unilateral declaration of non-applicability with respect to contracts involving a party whose place of business is in a non-contracting state. As the article only permits *contracting States* to make such declarations, it would appear that such a declaration would have to apply equally to all territorial units within a contracting state and that separate declarations could not be made for each territorial unit. This might be a significant problem in Canada where there are two separate legal systems that must be taken into account. For example, although France's legal rules on sales may be the same or closely related to those of Quebec, they may differ substantially from the rules in the common law provinces.

III. *The Constitutional Issue*

From the above discussion, it can be seen why Professor Ziegel was led to comment:

What does seem clear to me is that Canada will not be able to play a full role in international law making until our self-imposed constitutional fetters are removed.³³

The following discussion will argue that these fetters can indeed be removed and that the federal government does have the constitutional competence to implement treaty obligations without the necessity of provincial legislation and that in the area of international trade law the constitutional power goes beyond mere treaty implementation to encompass legislation on all aspects affecting international trade and commerce. The latter power would enable Canada to achieve uniformity in international trade law not only through treaty obligations but also through the more informal route of implementing uniform legislation based on model laws agreed to by UNCITRAL or other international bodies.

1. *The Federal Treaty Power*

The only reference to treaties in the *Constitution Act, 1867* is section 132 which provides that:

33. *Id.*, at 85.

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.
[emphasis added]

The fact that this is the only reference to treaty power and that nowhere else is reference made to foreign or external affairs is not surprising if one looks at the historical context. Prior to 1867 the colonies had no control over external affairs, this being a task for the Imperial government. At the time of federation in 1867 it was considered that this treaty-making power would continue to reside with the British government and that all that was necessary was to provide the federal Parliament of Canada with the power to implement such Empire treaties. It was simply not contemplated that Canada would eventually possess international status and would enter into treaties in her own right. However, Canada gradually shed her colonial fetters and achieved independent international status with concurrent powers to negotiate and conclude treaties.³⁴ The problem which arose with this treaty-making power was the question of the ability to *implement* treaties thus entered into. As the question of implementation of other than Empire treaties was not specifically provided for in the *B.N.A. Act* of 1867, and as Canada's new status was not achieved through an amendment to the *B.N.A. Act* but through developing customs and conventions, it became a question of judicial interpretation as to the power to implement such treaty obligations. The development of this treaty implementation power has its roots in three decisions of the Privy Council.

In the *Aeronautics* case³⁵ the Privy Council considered the validity of federal legislation regulating aerial navigation. As this legislation had been enacted to implement provisions of the 1919 Aerial Navigation Convention which had been ratified by His Majesty the King on behalf of the British Empire, the Privy Council had little hesitation in upholding the legislation as a valid exercise of the power to implement Empire treaties provided for in section 132. It had been argued for the provinces that section 132 only gave such power as was necessary to fulfil the obligations referred to and that if provincial legislation passed pursuant to a head of s. 92 of the *B.N.A. Act* adequately covered the matter, there

34. This development of international status was recognized in the 1926 and 1930 Imperial Conferences and in the *Statute of Westminster, 1931*, which provided that the dominions "... are autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs." For a more detailed discussion of the treaty power and the achievement of Dominion status, see Gotlieb, "The Method of Canadian Treaty Making" (1967), 1 *Can. Leg. Studies* 181.

35. *Re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

was no need for federal legislation. However, Lord Sankey's judgement indicated that the Privy Council was of the opinion that s. 132 went further and gave the federal Parliament exclusive powers of implementation:

It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada, or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out.³⁶

His judgement also contains language which appears to indicate that the Privy Council was prepared to go even further and to give the federal parliament wide powers of implementation of treaty obligations outside s. 132:

Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.³⁷

This statement could be construed as an indication that the matter could be brought under the federal power "to make laws for the Peace, Order and Good Government of Canada."³⁸

The second case in the trilogy is the *Radio* case.³⁹ This time the challenged federal legislation had been enacted to implement the International Radiotelegraph Convention of 1927, which had been ratified by Canada after Canada had been involved in its negotiation. The Privy Council held that the Convention did not fall under section 132 but that the Parliament of Canada nevertheless had power to implement its treaty obligations under its general or residuary power to make laws for the peace, order and good government of Canada, similar to those which it would have had under section 132. Viscount Dunedin commented as follows:

This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either

36. *Id.*, at 74.

37. *Id.*, at 66.

38. *Constitution Act, 1867*, s. 91.

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

s. 91 or s. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 . . . In fine, though agreeing that the Convention was not such a treaty as defined in s. 132, their Lordships think that it comes to the same thing.⁴⁰

This expansive interpretation of the treaty power was brought to an end by the third case in the series: the *Labour Conventions* case⁴¹ and it is from this case that the current problem of treaty implementation stems. The federal legislation in question in that case had been passed to implement treaty obligations undertaken by Canada pursuant to its ratification of conventions adopted by the International Labour Organization. Again, it was held that as this was not an Empire treaty, section 132 could not be called on to give jurisdiction. But, more importantly, the Privy Council declined to accept the view adopted by the Supreme Court of Canada that the *Aeronautics* case and the *Radio* case constrained them to hold that jurisdiction to legislate with regard to implementing treaty obligations resided exclusively in the Parliament of Canada. As Lord Atkin said:

Their Lordships cannot take this view of those decisions. The *Aeronautics* case concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Section 132, therefore, clearly applied, and but for a remark at the end of the judgement, which in view of the stated ground of decision was clearly *obiter*, the case could not be said to be an authority on the matter now under discussion. The judgement in the *Radio* case appears to present more difficulty. But when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in s. 92, or even within the enumerated classes in s. 91. Part of the subject matter of the convention, namely, broadcasting, might come under an enumerated class, but if so it was under a heading "Interprovincial Telegraphs", expressly excluded from s. 92. Their Lordships are satisfied that neither case affords a warrant for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.⁴²

40. *Id.*, at 312.

41. *A.G. for Can. v. A.G. for Ont.*, [1937] A.C. 326.

42. *Id.*, at 351. Cf. Lederman, "Legislative Power to Implement Treaty Obligations in Canada" in Aitchison (ed.), *The Political Process in Canada* (Toronto: University of Toronto Press, 1963) at 171: "It is true that Lord Atkin (in the *Labour Conventions* case) purported to distinguish the *Radio* case. He dismissed the remarks of Viscount Dunedin on the treaty-performing power as *obiter dicta* and said that the one true reason of that decision was the finding that regulation of radio communication was within the federal legislative powers anyway even if there were no treaty. But this is simply not a legitimate interpretation of Viscount Dunedin's reasons for judgement. If one reads what Viscount Dunedin said, obviously he was resting his decision on both grounds. . . . So the *Radio* case cannot be

Lord Atkin went on to say:

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 the new international status Canada incurs obligations they must, so far as legislation is concerned, when they deal with Provincial classes of subjects, be dealt with 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.⁴³

Canada was thus left in the unenviable position of not being able to guarantee implementation of international obligations entered into if there was some question that the subject matter might come within provincial jurisdiction and thus require provincial legislation to implement. The effect of this was to impede Canada's ability to partake in many important international agreements. As F.R. Scott has put it, "So long as Canada clung to the Imperial apron strings, her Parliament was all powerful in legislating on Empire treaties, and no doctrine of 'watertight compartments' existed; once she became a nation in her own right, impotence descended."⁴⁴

The reasoning of Lord Atkin in the *Labour Conventions* case has received much adverse criticism. Lord Wright, a member of the Judicial Committee of the Privy Council at the time the case was decided, has implied that the Judicial Committee was far from unanimous in its decision and that the issue "was really settled . . . by the Privy Council in the *Aeronautics* and *Radio* cases,"⁴⁵ and Mr. Chief Justice Kerwin of the Supreme Court of Canada, indicated in 1956 that "it may be necessary . . . to consider in the future the judgement of the Judicial Committee in *The Labour Conventions case*."⁴⁶ However for years it was thought that the Privy Council decision in the *Labour Conventions* case had laid to rest any claim that the federal government might have to a general power to implement treaty obligations without regard to the division of legislative powers between the federal Parliament and the

dismissed as Lord Atkin purports to dismiss it. The *Radio* case speaks for itself as a precedent to the Supreme Court of Canada in the words of Viscount Dunedin." I would agree with Professor Lederman.

43. *Id.*, at 353-354.

44. Scott, F.R., "*Labour Conventions Case: Lord Wright's Undisclosed Dissent?*" (1956), 34. Can. Bar. Rev. 114 at 115.

45. Lord Wright of Durely *et al.*, "Rt. Hon. Sir Lyman Poore Duff, G.C.M.G., 1865-1955" (1955), 33 Can. Bar. Rev. 1113, at 1126.

46. *Francis v. The Queen*, [1956] S.C.R. 618 at 621.

provincial legislatures. Recent judicial statements have indicated that this is not necessarily so.

In 1968 the Supreme Court of Canada gave its opinion in the *Offshore Minerals Reference*⁴⁷, which contains statements⁴⁸ that could be construed as overruling the *Labour Conventions* case. Unfortunately, the Court did not give reasons for these statements and one commentator has been led to say "[I]t is submitted, with respect, that the Supreme Court has erred . . ."⁴⁹ and "the Court could surely not have intended this result,"⁵⁰ and another to state:

Since it strains credulity to believe that the Supreme Court of Canada intended . . . to overrule the *Labour Conventions* decision *sub silentio*, one's conclusion may have to be that the *Labour Conventions* case was not properly presented by counsel . . . and that this apparent *non sequitur* in the *Offshore Mineral Rights Reference* was therefore arrived at by the Court *per incuriam*.⁵¹

Thus, the position of the *Labour Conventions* case in Canada was still left in doubt. More recently, though, the Supreme Court of Canada has indicated a willingness to reconsider the *Labour Conventions* case; first in 1976 in *MacDonald v. Vapour Canada Ltd.*⁵², and more recently in *Schneider v. The Queen*.⁵³

In the *Vapour* case,⁵⁴ Laskin, C.J., in *obiter dicta*, referred to some of the criticism of the *Labour Convention* case and said that "the foregoing references would support a reconsideration of the *Labour Conventions* case"⁵⁵ and mentioned the possibility of Parliament's passing legislation "in implementation of an international obligation by Canada under a

47. [1967] S.C.R. 792.

48. "Legislative jurisdiction . . . must, therefore belong exclusively to Canada (because, *inter alia*) . . . the rights in the territorial sea arise by international law and depend upon recognition by other sovereign States. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign State recognized by international law and thus able to enter into arrangements with other States respecting the rights in the territorial sea." (*Id.*, at 817).

"British Columbia lacks. . . legislative jurisdiction (*inter alia*, because) Canada is the sovereign State which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention." (*Id.*, at 821).

49. Head, Ivan L., "The Canadian Offshore Minerals Reference: The Application of International Law to a Federal Constitution" (1968), U. of T. Law Journ. 131 at 155.

50. *Id.*, at 156.

51. E. McWhinney, "Canadian Federalism, and the Foreign Affairs and Treaty Power. The Impact of Quebec's 'Quiet Revolution'" (1969), 7 Can. Y.B.I.L. 19 at 20.

52. [1977] 2 S.C.R. 134.

53. (1983), 139 D.L.R. (3d) 417.

54. For a comment on this case, see P.W. Hogg (1976), 54 Can. Bar. Rev. 361.

55. [1977] 2 S.C.R. 134 at 169.

treaty or convention” which would otherwise be beyond its competence.⁵⁶

In *Schneider*, Mr. Justice Dickson, as he then was,⁵⁷ wrote the opinion for the majority of the court. It had been argued that “Parliament has jurisdiction to enact laws in relation to obligations assumed by Canada as a signatory to international treaties or conventions”⁵⁸ and further that “even if the exercise of federal implementation of treaty obligations touches upon a provincial subject matter, it is competent to Parliament so to do in relation to a treaty as a matter of national concern.”⁵⁹ In commenting on this argument Dickson, J. said:

Although the point was left open in this court in *MacDonald et al. v. Vapour Canada Ltd.* . . . the appellant’s proposition is questionable in the face of Lord Atkin’s judgement [in the *Labour Conventions* case].⁶⁰

However, he went on to say:

That aside, this court in the *MacDonald v. Vapour* case held that even assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone the exercise of that power must be manifested in the implementing legislation and not left to inference.

There is nothing in the *Narcotic Control Act* to indicate that the Act or any part of it was enacted in implementation of Canada’s treaty obligations . . .⁶¹

This statement would seem to indicate that if it were clearly set out in the legislation that it was enacted pursuant to a treaty obligation, the Court might be prepared to consider whether it would uphold the federal legislation though it dealt with subject matter otherwise within provincial competence. Although these comments on the treaty implementation power are clearly *obiter*, they were not dissented from by any other member of the Court and can be taken as an indication of a willingness on the part of the Court to consider argument for a broad power of treaty implementation by the federal government.⁶² Nowhere is this need for a

56. *Id.*

57. Now Chief Justice of the Supreme Court.

58. (1983) 139 D.L.R. (3d) 417 at 437.

59. *Id.*

60. *Id.*

61. *Id.*, at 437-438.

62. For a comment on the *Schneider* case arguing for a narrower interpretation, see A.L.C. De Mestral (1983), 61 Can. Bar. Rev. 856 where he concludes (at 865):

With the *obiter dicta* in *Vapour Canada* and *Schneider* concerning the treaty-implementing power, the Supreme Court of Canada has taken itself very far out on a limb. If the Court is not careful the branch will soon break and the Court and the country will be the worse for it. There is still time to climb down.

broad treaty implementation power more evident than in the area of those international agreements which can affect Canada's economic well-being and commercial livelihood.

Even though it may be impossible to bring broad treaty implementation power within section 132 of the *Constitution Act, 1867* "unless its words are tortured to meet the present international position, and this is too much to expect of the courts,"⁶³ an argument can clearly be made to bring such power within the residual power of the Parliament of Canada to make laws for the peace, order and good government of Canada. As the Honourable Ivan C. Rand, formerly of the Supreme Court of Canada, said in the Oliver Wendell Holmes Lecture delivered at the Harvard Law School on February 26, 1960:⁶⁴

That legislative power [to implement treaties] likewise has been transmitted or has arisen as an inherent faculty of an independent state. The legislative competence of the provinces is limited to specific subjects enumerated in section 92 of the Act of 1867 together with a general class embracing local and private matters. As treaties do not fall within this general clause, we can say that as a distinct legislative subject matter they find no place in any provincial category. But the relation of treaty to province arises from another question which is this: Is legislation which implements a treaty legislation "in relation to" the treaty or in relation to the specific matters with which the treaty deals? By the retention of treaty-making and implementation in the British Government and Parliament and its delegation of performance to the Dominion by section 132, the totality of treaty-making action was treated as being a discrete and entire subject matter. Can legislation of such a nature, then, be other than "in relation to" treaty-matter, that is, matter in a treaty aspect? I cannot agree that it is possible to eliminate treaty character from legislation accomplishing its terms. . . . Assuming treaty-making to be an entirety as legislative matter, the transmission or originated faculty finds its only place of reception in the residual power of the Dominion . . .⁶⁵

63. Laskin, *Canadian Constitutional Law*, (4th ed. 1975) at 218. For an argument that it could be brought within the wording of s. 132, see R.J. Matas, "Treaty Making in Canada" (1947), 25 Can. Bar. Rev. 458 where the author states at 470-471: "On a broad constitutional interpretation section 132 should therefore be considered as applicable to a treaty made today as it was to a treaty made in 1867."

64. Ivan C. Rand, "Some Aspects of Canadian Constitutionalism" (1960), 38 Can. Bar. Rev. 135 at 142-143.

65. This approach, which treats the power to implement treaties as a separate head of power coming within the general residual power, can be compared with the approach taken by Professor Lederman in his article "Legislative Power to Implement Treaty Obligations in Canada," *supra*, note 42. Professor Lederman suggests that this approach goes too far and that rather than having a separate head of power to implement treaties, the existence of a treaty should simply be a factor to consider in determining whether the "international obligations of Canada could be of such character as to confer on the matters with which they were concerned national dimensions and national importance within Canada sufficient to invoke the federal general power." He continues, "It is possible to maintain that some international obligations

While such a broad power to legislate to implement treaty obligations would appear to threaten provincial autonomy, there is no reason to believe that the federal government would use such a power as an untrammelled vehicle to enter into colourable treaties simply to extend its legislative power. Canada is, as are other nations, very jealous of the scope of its sovereign powers. As assumption of international obligations puts limits on these powers, Canada is unlikely to enter into international obligations merely to acquire competence over what would otherwise be provincial matters. As long as the exercise of the federal treaty power is *bona fide* and is not a mere colourable attempt to intrude on provincial powers, the fact that the subject matter might otherwise be within a provincial sphere of competence should not derogate from the paramount power of the federal Parliament to pass legislation to implement treaty obligations as part of the residual power to legislate for the peace, order and good government of Canada.

In the majority of federal states the power to enter into *and* implement treaties is the sole responsibility of the federal authorities.⁶⁶ The situation in Canada can be compared to the situation in Australia where it has been held that the Commonwealth Parliament has legislative power to implement any international convention even though it might impinge on the legislative sphere of the states, the only qualification being that the treaty must have been entered into in good faith and not merely as a device to attract the Commonwealth legislative power.⁶⁷

While the ship of state may still retain her "watertight compartments which are an essential part of her original structure,"⁶⁸ it must be remembered that there can only be one helmsman at the wheel to chart the course and steer the ship of state as it "sails on larger ventures and into foreign waters" lest she flounder on the rocks by being driven in *all* directions at once. This helmsman must have the power to make and

would have this effect without insisting with the *Radio* case that all international obligations must have this effect" (at 178). However I think that this approach, while a step in the right direction, does not go far enough in ensuring the capability to implement treaty obligations, which is necessary if Canada is to play a role in the development of international law. In taking the approach which he does Professor Lederman seems to be concerned that there be some limit on the federal power as the broader approach "could and quite possibly would eliminate the essential autonomy of the provinces and thus end the federal constitution" (at 178). While I agree that some control is necessary to ensure that the federal Parliament does not usurp the totality of the provincial powers under the guise of treaty implementation, I believe this can be accomplished within the broader approach.

66. See: Morris, "The Treaty-Making Power: A Canadian Dilemma" (1967), 55 Can. Bar. Rev. 478 at 492-497.

67. *The Commonwealth of Australia v. The State of Tasmania* (1983), 57 A.L.J.R., 450. (*The Franklin River Dam Case*).

68. *A.G. Can. v. A.G. Ont.*, [1937] A.C. 327 at 354, *per* Lord Atkin.

implement decisions for the better good of the entire ship; in the case of Canada this helmsman is the federal Parliament.

2. *The Regulation of Trade and Commerce*

Even if one were to disagree with a broad federal power to legislate to implement treaty obligations as suggested above, it is this author's opinion that the authority to legislate relating to international trade matters comes under the trade and commerce power of section 91(2) of the *Constitution Act, 1867*, in which case even the narrower test of the *Labour Conventions* case would be satisfied.⁶⁹ This approach would have the added advantage of affording an even broader scope to legislate for uniformity in matters affecting international trade where attempts at uniformity are made through other than international treaties (eg., by way of model laws)⁷⁰ in that it would not necessitate formal treaty obligation before uniform legislation could be passed.

A broad discussion of the trade and commerce power is beyond the scope of this paper and, in any event, has been undertaken in detail elsewhere.⁷¹ However, a few comments on the federal power in the area of international trade law are in order.

Although the trade and commerce power has in general received a restricted interpretation for fear that "unless the scope to which its literal meaning was susceptible was restricted it would materially curtail, if not extinguish, provincial powers in local matters intended to be conferred,"⁷² it has always been interpreted as encompassing the power to legislate with respect to the regulation of interprovincial and international trade. Kerwin, C.J. in *Re The Farm Products Marketing Act*⁷³ in discussing the ambit of the trade and commerce power stated:

Once a statute aims at "regulation of trade in matters of interprovincial concern" (*Citizen Ins. Co. v. Parsons* (1881), 7 App. Cas. 96 at 113), it is beyond the competence of a Provincial Legislature.

...

Once an article enters into the flow of interprovincial or external trade, the subject matter and all its attendant circumstances cease to be a mere matter of local concern.⁷⁴

69. That is, the federal Parliament in enacting legislation to implement international trade obligations would be acting within a federal class of subjects.

70. For example, the Draft Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/246 (1984).

71. See, e.g., Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963).

72. Ivan C. Rand, *supra*, note 64 at 157.

73. [1957] S.C.R. 198.

74. *Id.*, at 204-205. These statements have been quoted as stating the law in a number of subsequent cases dealing with the trade and commerce power. *Carnation Co. Ltd. v. Quebec*

However, although the federal jurisdiction to legislate in relation to the regulation of international trade and commerce is clear, the extent of what amounts to the "regulation of international trade and commerce" is not so clear. In commenting on the competition between "Trade and Commerce" (section 91(2)) and "Property and Civil Rights" (section 92(13)) Professor Lederman stated as follows:

The general line of distinction between section 91(2) and section 92(13) was drawn as follows: Given that the challenged law is both property or contract law and trading or commercial law, if the trade or commerce is internal to a single province, then the property and civil rights aspect is the more important and provincial power is exclusive. But, if the challenged law is property or contract law about interprovincial or international trade or commerce, then its trading or commercial aspect is the more important and the federal power is exclusive.⁷⁵

It is submitted that if a transaction in its inception envisages goods or services entering the flow of trade outside the province then all elements of that transaction including the regulation of the contracts governing that transaction, are matters for federal regulation. This would, *inter alia*, include the regulation of the international contract of sale, as the contract is not dealing solely with rights *within* the province but by its very nature deals with rights extending beyond provincial boundaries,⁷⁶ and laws providing for the arbitration of international trade and investment disputes, which also transcend provincial boundaries.

That the federal Parliament is to have the power to legislate with respect to international trade and commerce, even if in so doing it were to affect property and civil rights within the province, is clear if one looks at the *Constitution Act* in a historical context. It is clear that what was desired at the time of confederation was a strong central government.⁷⁷ The single most important factor in the United Kingdom's strength at the time (mid-19th century) was its position as a trading nation and among its most important laws were those dealing with matters regulating international trade and commerce. Thus, bearing in mind the importance of international trade and commerce to the development of England's economy and England's position as a trading nation in the 19th century,

Agricultural Marketing Board et al, [1968] S.C.R. 238; *A.G. Man. v. Man. Egg and Poultry Assn.*, [1971] S.C.R. 689; *Can. Indust. Gas & Oil Ltd. v. Sask.*, [1978] 2 S.C.R. 545.

75. W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada (1963), 9 McGill L.J. 185 at 187-188.

76. It is these types of sales contracts which are envisaged by the U.N. Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18 (1980), Article 1: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States. . . ."

77. See, e.g., Smith, *The Commerce Power in Canada and the United States* (Butterworths, Toronto, 1963) chap. 1.

it would be impossible to argue otherwise than that the term "trade and commerce" in a 19th century British statute encompassed international trade and commerce. If one is to look at the other topics specifically mentioned in section 91, the object of giving the federal Parliament exclusive control over matters affecting general trade and commerce becomes even clearer as the federal Parliament is given the power to legislate in regard to all other matters affecting trade and commerce: section 91(1) Navigation and Shipping; section 91(14) Currency and Coinage; section 91(15) Banking; section 91(17) Weights and Measures; section 91(18) Bills of Exchange and Promissory Notes; section 91(19) Interest; section 91(20) Legal Tender.⁷⁸

Although federal legislation regulating international trade and commerce could lead to a dual system of laws in a number of areas, it is submitted that this should not lead to any insurmountable problems. Federal laws would govern where the trade is international or interprovincial while provincial laws would regulate intraprovincial trade. Such a dual system of laws is not without precedent even in a unitary state. For example, the United Kingdom has enacted the Uniform Laws on International Sales Act 1967 which applies only to contracts for the international sale of goods and not to domestic transactions.⁷⁹ In addition, the United Kingdom has recently adopted an arbitration act which distinguishes between domestic and non-domestic arbitrations and provides different rules to govern each. France also has a recent arbitration law which provides different treatment for international as opposed to purely domestic arbitration.⁸⁰

IV. Conclusion

If Canada is to maintain her position as a world trader it is imperative that she keep abreast of and in tune with the progress which is being

78. It is not being argued here that the federal Parliament has an all-encompassing power to legislate with regards to every facet of trade and commerce which a literal meaning of those words might indicate. Sir Montague Smith in *Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96 at 112 indicated this was not so:

... a consideration of the Act shews that the words were not used in this unlimited sense. In the first place the collation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature. . . . If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in s. 91 would have been unnecessary. . . .

However, the mention of these other classes does, as argued, reinforce the claim that "trade and commerce" includes "general trade and commerce", including especially international trade.

79. See: Schmitthoff, *The Export Trade*, 7th ed. (London: Stevens & Sons, 1980), chap. 13.

80. Decree No. 81-500 dated May 12, 1981.

made towards uniformity in laws regulating international trade and participate actively in their formation. To achieve uniformity across Canada, any legislation in this regard must be at the federal level. This paper has argued that the federal Parliament does indeed have the legislative authority to ensure that such legislation is implemented either as part of a treaty obligation or pursuant to more informal steps at uniformity, such as model laws. It is hoped that in the future Canada will take an even more active role in the development of such uniform laws, confident that their implementation across Canada as a whole will be upheld.