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TREATY-MAKING POWER AND THE PROVINCES: FROM THE "QUIET REVOLUTION" TO ECONOMIC CLAIMS *

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In our divided contemporary world there are no compulsory legal rules binding the subjects of international law, which are in most cases sovereign States, in the absence of an agreement, whether it is a rule of customary law, a general principle of law or any other source of international law. The trend toward the emergence of a single world State is not yet set. On the contrary, the concept of State sovereignty is still very much alive as reflected in the statements and activities of both old and new States. In the light of this fact, it is easy to assess the significance of international treaties on the international plane, as a consequence of new political, economic, technical, social and cultural developments. [1]

Accordingly, at the level of every day life on the municipal plane, international agreements have an impact in areas that are constantly expanding. In a modern unitary State and therefore a more or less centralised entity, the treaty-making power is vested in a particular organ by the law of that State, that is either a provision of a written Constitution or a fundamental rule of customary law and practice. The situation is somewhat different in a few federations where in the absence of a specific provision to that effect conflicts may arise.

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* For a more exhaustive study of treaty matters in Canada, see *L'introduction et l'application des traités internationaux au Canada*, by this writer, Paris, L.G.D.J., 1971, which is a revised and amended version of a doctoral thesis submitted to the Sorbonne in 1966; forthcoming in 1974 at the University of Ottawa Press, *Treaty Law in Canada*, by the same; see also A. E. GOTLIEB, *Canadian Treaty-Making*. Toronto, Butterworths, 1968; the writer is grateful to Professor Donat Pharand who kindly took the time to read this article and made very useful suggestions.

[1] As of July 1973, Canada was a party to 905 bilateral treaties with 107 States and 10 international organisations, and to 375 multilateral treaties on 93 subjects, as compared, for example, with 6,500 bilateral treaties with 152 States and 370 multilateral treaties on 78 subjects for the United States; during the year 1972, Canada became a party to approximately 33 bilateral treaties, 11 multilateral treaties and 34 informal memoranda of understanding on external aid.

Such is the case for Canada where there is no written constitutional provision for the formation of treaties. The often-quoted section 132 of the British North America Act deals only with the domestic performance of the international obligations undertaken at that period by the Imperial government, in fact the British Cabinet. And this section is now obsolete in the view of most commentators. [2]

The question of how the treaty-making power is distributed between the federal Union and the provinces has thus in recent times led to a controversy with no ready answer as a result of political implications and their effect on the interpretation of the law. The crux of the matter lies essentially in the claim made by Quebec, during the sixties, especially between 1963 and 1970, to the right to enter directly into agreements with foreign governments on matters under provincial jurisdiction.

I. — THE TREATY-MAKING CLAIMS OF QUEBEC.

The various formulas proposed and applied by the federal government for the conclusion of treaties in the field of provincial jurisdiction have met with the opposition of the Quebec government at the time of the so-called "quiet revolution". A request for either greater autonomy based on a deconcentration of power or special status was then formulated.

Until the election of April 29, 1970, when the Liberals were returned to power in Quebec, these claims were put forward by the government and by a section of the French-speaking intellectual elite of the province. They were seeking — and they still are — recognition of the French fact in the life of Quebec, and of the province's special characteristics within the Canadian federation and more generally in North America. [3] However, since April 1970 the Quebec government's approach to the question is different, less aggressive and putting the emphasis much more on economic,

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[2] See B. LASKIN, *Canadian Constitutional Law, Cases, Text and Notes on Distribution of Legislative Power*, 3rd ed., Toronto, Carswell, 1969, see chapter VI, *Power to Implement Treaty Obligations* : "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" (s. 132, B.N.A.A., 1867).

[3] See, for example, the opening of a Quebec office in Lafayette, Louisiana, in November 1969, with a view to helping revive the French language and culture of Louisiana's one and a half million citizens of Acadian descent.

financial and social autonomy than on claims to the treaty-making power proper.

Quebec activities in international relations have been discussed by several commentators and spokesmen for the federal and provincial governments. We will only outline Quebec's position in the sixties as reflected by public statements and practice. [4] This position was vigorously asserted by the Liberal Government of Jean Lesage and the National Union governments of Daniel Johnson and Jean-Jacques Bertrand throughout the years 1964 to 1970. In 1964 Quebec and France concluded an agreement, between the *Association pour l'Organisation des Stages en France* and the Quebec Education Department, on a program of exchanges and co-operation in the industrial and technical field. The federal government gave its approval to the agreement by an exchange of letters of December 23 and 27, 1963, between the Secretary of State for External Affairs and the French Ambassador to Canada.

On February 27, 1965 a cultural agreement was signed in Paris by two members of the Quebec government, Paul Gérin-Lajoie and Claude Morin, and by the French Minister of National Education and a Senior French Foreign Service officer. It provided for a program of exchanges of students, teachers and researchers, which is a subject-matter, education, within provincial jurisdiction. As put by Professor Jacques-Yvan Morin, now the Leader of the Opposition at the Quebec legislature, it was the first "official agreement" between a Canadian province and a foreign country. [5] On

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[4] See in particular, GOVERNMENT OF QUEBEC, *Preliminary Statement presented to the Confederation of Tomorrow Conference*, Toronto, November 1967; *Brief on the Constitution submitted by the Honourable Daniel Johnson, Prime Minister of Quebec*, Canadian Intergovernmental Conference, Ottawa, February 5-7 1968; *Quebec Working Paper on Foreign Relations*, Notes Prepared by the Quebec Delegation, Constitutional Conference, February 6, 1969; C. MORIN, *Le pouvoir québecois en négociation*, Québec, Boréal Express, 1972; P. GÉRIN-LAJOIE, *Quebec in International Affairs : Federal Position Anachronistic*, in *Montreal Star*, March 19, 1968; for the federal position see in particular P. MARTIN, *Federalism and International Relations*, Ottawa, 1968; M. SHARP, *Federalism and International Conferences on Education*, Ottawa, 1968; L. B. PEARSON, *Federalism for the Future*, Ottawa, 1968 (see at p. 30-2); A. E. GOTLIEB, *Canadian Treaty-Making*.

[5] *La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé*, (1965) 3 *C.Y.I.L.* 127-186, at p. 174; for a summary of this article see (1967) 45 *C.B.R.* 160, Comments, *International Law, Treaty-Making Power, Constitutional Law, Position of the Government of Quebec;* see Quebec Order-in-Council No. 267 of February 16, 1965 authorizing P. Gérin-Lajoie and C. Morin to sign on behalf and in the name of the Government of Quebec.

the same day, however, the federal government gave its assent by an exchange of letters with the French government. [6]

On April 12, 1965, Paul Gérin-Lajoie stated the position of his government to the Consular Corps of Montreal. He asserted Quebec's rights to negotiate and sign international agreements in the fields of provincial jurisdiction. [7] This claim was reiterated by Premier Jean Lesage and Paul Gérin-Lajoie on April 23. [8] In their view the Canadian federation had a dual international (legal) personality. [9]

On May 14, 1965 the Quebec Minister of Cultural Affairs, Pierre Laporte, went to Paris to initiate new discussions with the French government for the conclusion of another cultural agreement. Seven months later a cultural entente was signed by the French Ambassador in Canada and Pierre Laporte, on November 24, 1965. A few days earlier, on November 17, an umbrella agreement had been concluded between France and Canada. It included an agreement on Franco-Canadian cultural co-operation and an exchange of letters relating to the conclusion of *ententes* by the provinces on cultural matters. There was also a Franco-Canadian exchange of letters on November 24, 1965 authorising the Quebec entente of the same date. [10]

From 1965 to 1970 the same assertion of autonomy in external relations prevailed. For example, the Quebec Department of Intergovernmental Affairs was set up in the spring of 1967, with responsibility for co-ordinating relations with governments at home and abroad. It was a source of concern for some Members of Parliament as reflected in the Debates of the House of Commons. [11] The same year the federal government negotiated a cultural agreement with

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[6] Text in 4 *C.Y.I.L.* 263-4; see Paul Martin's comment to the House of Commons, March 1, 1965: the Secretary of State for External Affairs stated that the provinces can not enter into international agreements without prior approval from the federal government (*Debates*, H.C., 1965, reply to question No. 2768).

[7] *Le Devoir*, Montreal, April 14 and 15, 1965.

[8] *Le Devoir*, April 24, 1965, *Globe and Mail*, Toronto, *ibid.*

[9] *Le Devoir*, May 1, 1965; see statement of Paul Martin of April 23; he said that "Canada had only one international personality in the community of sovereign States (and therefore that) only the government of Canada had the power or authority to enter into treaties with other countries" (Press Release No. 25, and 17 *External Affairs*, (1965) 306-7).

[10] See 17 *External Affairs*, (1965) 520-3; *ibid.* at p. 513 and *Canada Treaty Series*, 1965, No. 21.

[11] See in particular the statement of Prime Minister L. B. Pearson to the House of Commons on March 1, 1967.

Belgium. Premier Daniel Johnson, on May 2 and 7, asserted Quebec's right to represent French Canada abroad in cultural and education matters and concluded that the federal government should not conclude international agreements in this field. The agreement was nevertheless signed on May 8, which provoked a strong reaction and opposition from the Quebec Premier and his cultural affairs minister. [12] A year later, on February 9, 1968 Quebec signed a Protocol with France modifying the 1965 agreement on Education. Under its terms a Franco-Quebec Youth Bureau was set up. In the same vein, three *lettres d'entente* were signed in Paris between France and Quebec. One of these dealt with co-operation on a communication satellite project, a field in which provincial governments, and not only Quebec, have expressed their intentions of assuming domestic jurisdiction, in recent years. [13]

At the Constitutional Conferences of the late sixties between the provincial Premiers and the Prime Minister of Canada, the government of Quebec has reiterated its approach to the question. In particular, at the Conference held in Ottawa in February 1969, Premier Jean-Jacques Bertrand tabled a working paper on foreign relations. His arguments were based on law and facts at both the domestic and international level. [14] It should be noted however that the claims and proposals submitted by Quebec spokesmen somewhat differed throughout the years depending on their political affiliations, in particular as regards the role to be played in the various aspects of external relations. Though these different approaches have a common objective that of securing greater autonomy for the province.

On September 9, 1969, a Quebec-Louisiana agreement on cultural co-operation was concluded in the form of a Joint Communiqué of Premier Jean-Jacques Bertrand of Quebec and Governor

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[12] *Canada Treaty Series*, 1968, No. 3; agreement in force March 5, 1968; *Globe and Mail*, May 11 and 17, 1967.

[13] *Debates*, H. C. January 31 and March 5, 1969; *Le Devoir*, February 1, 1969; *Ottawa Citizen*, January 23 and 25, 1969; *ibid.*, January 25, 1973; in a January 23, 1969 statement The Secretary of State for External Affairs, Mitchell Sharp, pointed that "in any events, these documents in themselves would not constitute international agreements".

[14] *Quebec Working Paper on Foreign Relations*, Notes prepared by the Quebec Delegation, Constitutional Conference, February 6, 1969; see JACOMY-MILLETTE, *L'introduction et l'application des traités internationaux au Canada, op. cit.*, at ch. 2, Part II, for a study of the proposals, and list of further authorities.

John McKeithen of Louisiana when the latter paid a visit to Quebec City. [15] In November Quebec opened an office in Lafayette, Louisiana, in particular to help revive the French language and culture of Louisiana's one and a half million citizens of Acadian descent and coordinate an exchange of teachers and students. [16]

Early in 1970, Quebec Minister of Intergovernmental Affairs. Marcel Masse visited Paris to open the new headquarters of the France-Quebec Association and had talks with the French Minister for Foreign Affairs. He then went on to Brussels where he reiterated the position of Quebec with respect to cultural and education co-operation with French-speaking States, in connection with the Canadian-Belgian cultural agreement of 1967. [17]

Quebec official approach to external relations took a new turn in April 1970 when Premier Bourassa became the new head of government. As mentioned earlier, the emphasis is on cultural, economic and social objectives as well as decentralisation. [18] At the Constitutional Conference in June 1971, held in Victoria, for example, he held that Quebec "had always promoted the concept of decentralised federalism, since this is the only form really suited to the diversity of the economic, social and cultural needs of Canadians from every part of [the] country". He argued that" [t]he government of Quebec has always had a dual objective in the field of constitutional reform, decentralised federalism and the promotion of Quebec's distinctive personality". [19] The topic of international agreements concluded by the provinces is apparently no longer at issue, at least as indicated by public statements. However, we have to point out that in this area there are still unsolved problems such as the Belgium-Quebec cultural relations within the framework of the 1967 Agreement, or the distribution of power related to agreements on communication by satellite.

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15 Quebec Government, Department of Intergovernmental Affairs; see R. S. RODGERS, *The Capacity of States of the Union to Conclude International Agreements*, (1967) 61 *A.J.I.L.* 1021; *ibid., Conclusion of Quebec-Louisiana Agreement on Cultural Co-operation*, (1970) 64 *A.J.I.L.* 380.

16 *Ottawa Citizen*, September 7, 1973.

17 *International Canada*, January 1970, at p. 19.

18 See Communications Minister Gerard Pelletier's statement in Brussels on September 23, 1973, as reported in *The Gazette*, Montreal, September 25, 1973: [he] "indicated that the once turbulent issue of Quebec's status at international Francophone Conferences now [was] settled and that relations between Ottawa and the provinces on this point [were] currently smooth."

19 *Constitutional Conference Proceedings*, Victoria, B.C. June 14, 1971, pp. 15 and 17.

Furthermore, Quebec activities in the field of external relations continue, as evidenced by official visits abroad of members of the government or participation in international conferences and programmes. Thus, for example, Premier Bourassa visited Belgium, Great Britain, West Germany, Italy, France and the United States (New York) in April 1971, essentially to promote foreign investments in his province. He also went to London in November 1972 and had conversations with Prime Minister Heath, the Foreign Secretary, the Leader of the Opposition and British bankers and businessmen. [20]

II. — THE TREATY-MAKING CLAIMS OF THE OTHER PROVINCES.

Premier Bourassa's statements and activities must be viewed in relation to their counterparts in the other provinces. Since the establishment of the federation, specific problems and common interest have developed between the provinces and some foreign States in various fields. First, geographic and economic considerations dictated the necessity of consultations between the provinces and the neighbouring states in the United States. Examples of this are official or informal meetings held between representatives of both countries to reach an understanding and take the appropriate measures whether a similar sourse of action or enactment of similar legislation in areas of an essentially administrative or technical nature. Accordingly, Ontario, Manitoba and New Brunswick have held discussions with their American neighbours to work out a policy for preventing and controlling forest fires. [21] In this connection Manitoba enacted the Forest Act which authorises the Minister of Mines and Natural Resources to enter into agreements with other governments (at home and abroad) with respect to certain matters relating to forestry. [22]

The construction and maintenance of international bridges and highways have also been covered by agreements between vari-

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[20] *International Canada,* April 1971, p. 90; *Globe and Mail,* Toronto, November 29-30, 1972, *Le Devoir,* Montreal, December 1, 1972.

[21] R. J. DELISLE, *Treaty-Making in Canada,* in *Ontario Advisory Committee on Confederation, Background Papers and Reports,* Toronto, 1967; see Appendix III: Survey of Departmental Practice; L. HENKIN, *Foreign Affairs and the Constitution,* Mineola, N.Y., Foundation Press, 1972, at p. 230; O. J. LISSITZYN, *Territorial Entities other than Independent States in the Law of Treaties,* (1968) 125 *Recueil,* The Hague, A.D.I., 1-92; H. J. LAWFORD, *Canadian Practice in International Law,* (1966) 4 *C Y.I.L.* 220, at p. 221.

[22] S.M. 1964, c. 19, s. 9.

ous political or administrative entities on either side of the border. More or less official agreements exist in this respect between New Brunswick and Maine. Detailed regulations such as motor vehicle registration are provided by agreements concluded, for example, between Manitoba and certain American states, which sometimes result in the enactment of domestic legislation: In 1963 the Manitoba government was authorised by an amendment to the Highway Traffic Act to make agreements or arrangements with any State of the United States or the district of Columbia respecting the licensing of non-resident owners of motor vehicles. [23]

Similarly the use of boundary waters, or recently the problems of water pollution, has been regulated by international agreements between the two countries. The provinces have also entered into arrangements in this area with contiguous states or their administrative and political subdivisions. [24] This was done in the mid-sixties as well as in the seventies. An Agreement between Canada and the U.S.A. on Great Lakes Water Quality was signed and entered into force on April 15, 1972. A joint Communiqué was issued on July 14, 1972 by the Canadian Minister of the Environment and the Chairman of the United States Council on Environmental Quality. It reads partly as follows: "An agreement has been reached on a joint contingency plan for the Great Lakes, a proposed plan for the Atlantic coast has been drafted and a further round of discussions between officials of the responsible authorities in the two countries *including the provincial and state authorities*, is to be held . . . to complete the drafting of contingency plan arrangements for the Pacific coast." [25]

Subsequently, in January 1973 Premier Barrett of British Columbia and Governor Evans of Washington State negotiated an arrangement on co-ordination of pollution control. During the negotiations they also discussed other international topics of interest to both parties such as the control of salmon fishery and the Skagit River question. They acknowledged that these matters were within federal jurisdiction but maintained that they shared responsibility in such problems. [26]

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[23] LAWFORD, *op. cit.*, at p. 221.

[24] See LAWFORD, *Canadian Practice in International Law*, (1964) 2 C.Y.I.L. 271, at p. 272.

[25] *International Canada*, July-August 1972, p. 116 (emphasis added).

[26] *Vancouver Sun*, January 16, 1973.

This assertion of autonomy was equally at stake when Premier Barrett's government negotiated with Japan in March 1973 for an increase of the province's coal export. [27]

The provinces also had arrangements with the Commonwealth countries for the execution of judgments concerning alimony payments. With the exception of Quebec, they have concluded agreements in this area between themselves and with some Commonwealth countries and territories. Ontario, for example, has such arrangements with Malta, New Zealand and with the Australian States, Great Britain and Northern Ireland, the Isle of Man and Jersey. [28] These agreements are not really international agreements but rather undertakings to enact similar legislation in the jurisdictions concerned. They have been held valid by the Supreme Court of Canada though lacking the essentials for the existence of an international treaty. [29] It should be noted that recently these arrangements have been extended to remoter areas though still within the Commonwealth. For instance, Manitoba has an arrangement of that type with Ghana as of January 26, 1973. [30]

In the same vein, some provinces have in the past made arrangements with members of the Commonwealth and with American States to avoid double taxation concerning estate duties.

III. — NATURE OF THE ARRANGEMENTS ENTERED INTO BY PROVINCES WITH OTHER COUNTRIES.

These arrangements usually cover matters of limited scope and deal with administrative or technical matters but in recent years some of these involve economic and trade relationships. They cannot be considered as international treaties. However, when the conclusion of a true international agreement of a technical, administrative or economic nature involves primarily the provinces, a procedural pattern does emerge. First, consultations are held at the domestic level between federal representatives and the provinces concerned. In the meantime, negotiations take place between the representatives of the foreign state and the competent federal authority, sometimes with the participation of provincial represen-

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[27] *International Canada*, March 1973, p. 102.

[28] A. E. GOTLIEB, *Canadian Practice in International Law*, (1966) 4 C.Y.I.L. 260.

[29] *Attorney General for Ontario v. Scott*, (1956) S.C.R. 137.

[30] *International Canada*, January 1973, p. 27.

tatives. The federal government nevertheless asserts and retains full responsibility for the formal conclusion of the agreement.

This process was adopted in the case of the St-Lawrence Seaway and Power Development Project. The Provinces of Ontario and Quebec signed an agreement with the federal government on March 27, 1950, before the Exchanges of notes between Canada and the United States of June 30, 1952 and August 17, 1954. [31] Another formula has been used in the last two decades to reach an understanding at both the domestic and international levels. At the request of the minister concerned, generally the Secretary of State for External Affairs, Parliament enacts a statute authorising a named province to conclude an agreement with a foreign country, or a member state of a federation. [32]

Another field of interest to Canadian and American authorities, whether it involves the federations or their component units, is the use of hydro-electric power. In this connection, a *Memorandum of Understanding* was concluded between the Ontario Hydro-electric Power Commission and its counterpart in the State of New York, within the framework and in implementation of the Canada-United States Treaty of 1950 concerning the Diversion of the Niagara River. [33] Neighbouring countries or their administrative and political subdivisions were not the only contracting parties of such consultations and arrangements. It should be noted that these contracts were extended to remoter areas, such as Africa. An example of this is the arrangement between the Ontario Hydro-Electric Power Commission and the Ghanaian Volta River Authority. [34]

The stand taken by the provinces with respect to international relations is also reflected by official public statements and docu-

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[31] *Canada Treaty Series*, 1952, No. 30; *ibid.*, 1954, No. 38.

[32] *An Act to authorize the construction of a bridge across Lubec Channel between the province of New Brunswick and the State of Maine*, 7 Elizabeth II, 1958, c. 23; s. 3 provides that the agreement is subject to the approval of the Governor in Council. *An Act to authorize the construction of a bridge across the Pigeon River between the Province of Ontario and the State of Minnesota*, 7-8 Elizabeth II, 1959, c. 51; s. 3: same provision as above; the agreement was signed by the Ontario Minister of Highways and the Minnesota Commissioner of Highways; it was approved by federal Order-in-Council, February 23, 1961. *An Act to authorize the construction of a bridge across the St. Croix River between the Province of New Brunswick and the State of Maine*, 14-15-16 Elizabeth II, 1966-67, c. 9.

[33] See DELISLE, *op. cit.*, p. 143.

[34] *Ibid.*, p. 144.

ments. There is no formal proposal from the English-speaking provinces to assume exclusive responsibility in the conclusion of international treaties dealing with topics within the provincial legislative jurisdiction. However, these provinces do request — and with more emphasis in recent years — a participation in negotiation of agreements concerning not only subject matters within provincial jurisdiction but also those of concurrent or unsettled jurisdiction, mainly in economic areas. As stated by Premier Bennett of British Columbia in 1969, the conflicts and stresses within the nation "are primarily economic and financial in nature". [35] We have already observed that since 1970 Quebec is partly in agreement with this proposition.

Ontario's view in the matter is particularly meaningful. Premier Robarts sponsored and organised the Confederation of Tomorrow Conference held at Toronto in November 1967. [36] The conference dealt with the complex problem of constitutional review. In our field of interest, that is international relations, the province's approach at that time is suggested in the 1968 working papers prepared by the Ontario Advisory Committee. Out of the three papers dealing with this question, two endorse the view that the federal government has exclusive jurisdiction for the formal conclusion of treaties. These two commentators, Bora Laskin (now Chief Justice of the Supreme Court of Canada) and R. J. Delisle even argue that "if a province presently purported on its own initiative to make an enforceable agreement with a foreign State on a matter otherwise within provincial competence, it would either have no international validity, or, if the foreign State chose to recognize it, would amount to a declaration of independence", according to the former, and "the province would cease to be a member of the federation", as submitted by the latter. [37]

Official statements of the Ontario Government however do not endorse such a strong view. They merely recognize the chief responsibility of the federal government in this area, as evidenced by the propositions of that government submitted to the 1968 Constitutional Conference and tabled at the provincial Legislature

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[35] *Opening Statement of the Province of British Columbia to the Constitutional Conference*, Ottawa, February 10-11-12, 1969.

[36] See n. 21, above.

[37] B. LASKIN, *The Provinces and International Agreements, Ontario Advisory Committee on Confederation, Background Papers and Reports, op. cit.*, at p. 111; DELISLE, *op. cit.*, at p. 133.

on February 5, 1969.[38] Furthermore, the Ontario Government requests "a participation by the provinces in those decisions on external relations affecting matters under their jurisdiction." Accordingly the suggestion was made that there be regular and close consultation with the provinces, in the following terms:

"The written Constitution must make explicit provision for formal machinery by which the central government will regularly and closely consult the provinces, and by which the provinces will make their views known, particularly on those matters of external relations which come under, *or in any way affect*, their jurisdiction. The machinery would deal with such issues as *the adoption of treaties*, provincial representation at international conferences, and *external aid*".[39]

Thus these proposals emphasize the need for prior consultation *before* the "adoption" of treaties for matters coming under or even affecting provincial jurisdiction. A similar view is submitted by Ronald G. Atkey in his paper entitled "*Provincial Transnational Activity*", published in 1970 in the *Background Papers and Reports* of the *Ontario Advisory Committee on Confederation II.* In a summary of that paper, the author even asserts that "some means must be found for accommodating the desire of some provinces to project externally their legitimate domestic activities into the international community".[40]

In the last years and months the approach of the predominantly English-speaking provinces follows the same pattern. It is more vocal on the need for greater autonomy at the provincial level and participation in the formulation of a national economic policy as regards national and provincial needs and exchanges abroad.[41]

In this connection, it is interesting to note the request submitted by most provinces to participate in the establishment of a national policy, and even sometimes to have their own direct foreign relations, with respect to the exploration, development and export of energy resources. The sharing of offshore mineral rights, for

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[38] Revised *Propositions of the Government of Ontario submitted to the Continuing Committee of Officials as of December 1968;* tabled at the Ontario Legislative Assembly of Ontario, February 5, 1969 by Premier Robarts.

[39] *Ibid.*, Proposition 5.16.38: Subject External Relations (emphasis added).

[40] *The Role of the Provinces in International Affairs*, (1970-71) 26 *International Journal*, 249-273, p. 272.

[41] Let us point out that the subject matter *the regulation of trade and commerce* is within federal jurisdiction (see s. 91(2), B.N.A.A., 1867).

example, is still an open political issue though an advisory opinion of the Supreme Court of Canada in 1967 held that in the case of British Columbia these rights belonged to the federation. [42] Already in 1965 Premier Bennett of that province had argued that the province "had the exclusive right to deal with foreign countries in matters concerning natural resources". [43]

Similarly at the Victoria Constitutional Conference in 1971, Premier G. A. Regan stated that "the Atlantic provinces and certainly Nova Scotia (felt that they had) the legal right to the offshore mineral rights and certainly the moral right". [44] In November 1973, Newfoundland Energy Minister Leo Barry said that the province was awaiting a reply from Ottawa on proposals sent on September 22 for a joint management of offshore mineral resources and new regulations to govern exploration and development. [45]

The establishment of a common policy taking into account specific provincial interests with respect to export of energy resources to the United States has been widely discussed in 1972 and, in the fall and winter of 1973-74, in relation to the Middle East crisis and the resulting oil shortage. It was discussed in particular at the federal provincial energy Conference of January 1974. In 1972 the provincial Premiers, in particular those of Alberta and British Columbia, were asking to be kept informed of negotiations with the United States within the framework of a continental energy policy. [46] In 1973-74 all Premiers request more co-ordination between federal and provincial authorities in order to take appropriate measures concerning the energy crisis. As stated by Quebec Natural Resources Minister Gilles Masse, they warn Ottawa not to take over permanently matters under provincial jurisdiction. [47] In a

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[42] *Reference re Offshore Mineral Rights*, (1967) S.C.R. 792.

[43] H. J. LAWFORD, *Canadian Practice in International Law*, (1967) 5 C.Y.I.L. 294, at p. 304.

[44] *Constitutional Conference Proceedings*, see n. 19, above, at p. 22.

[45] *Globe and Mail*, Toronto, November 30, 1973; see Premier Moores' position as reported in *Globe and Mail*, January 21, 1974; see also Prime Minister Trudeau's statement to the House on November 26, 1973, that the federal government decided in 1969 to seek a settlement through political negotiations by setting aside the question of sovereignty in offshore areas and concentrating on administration and division or wealth, *Globe and Mail*, November 27, 1973.

[46] *Vancouver Sun*, November 25, 1972.

[47] *Globe and Mail*, December 5, 1973; see s. 109, B.N.A.A.: "All lands Mines, Minerals and Royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, shall belong to the [. . .] Provinces"; see also B.N.A.A., 1930, 21 George V, c. 26 (U K.).

similar vein, Manitoba Mines Minister Sidney Green expressed his concern on "whether the federal government considers the energy problem against one which continues to respect provincial jurisdiction over resources". Similar claims are pushed forward by Premier Lougheed of Alberta and Premier Blakeney of Saskatchewan. [48]

The federal-provincial controversy also covers permanent Canado-American joint ventures. The development of the Columbia River Basin, regulated by a Treaty between the two countries signed on January 17, 1961 has been in recent years the subject of discussions between Ottawa and Vancouver. Premier Barrett of British Columbia asked in December 1972 for a renegotiation of the agreement. [49] Similarly, though in another area, at a federal-provincial meeting of Trade Ministers, held in April 1973, Ontario Minister of Trade and Tourism Claude Bennett requested his province's participation in the negotiations with the United States over the 1965 Auto Trade Pact Agreement. [50] This view had already been expressed by the Ontario government in October and December 1971. [51]

As a result of this assertion of provincial participation in the field of external affairs, direct relationships with foreign powers are increasing. Ontario, for example, diversified its trade relations abroad. Early in 1970 officials of the Department of Trade and Development had conversations with businessmen in Japan with a view to promoting foreign investment and trade. [52] More recently in November 1972, a delegation led by the Minister of Industry and Tourism went to Japan and South Korea. [53] The same Department also promotes and sponsors visits abroad of Ontario businessmen, for example to the United States in January 1973; to Australia, New Zealand, Singapore, Hong Kong and Tokyo in February; and to Spain in March of the same year. [54] At home Ontario officials have conversations, for instance, with visiting trade missions from Cuba in November 1972. [55]

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[48] *Ottawa Citizen*, November 23, 1973; *Globe and Mail*, January 19, 1974; *ibid.*, January 22, 1974; *ibid.*, January 23, 1974.
[49] *Ottawa Citizen*, *Globe and Mail*, December 12 and 14, 1972.
[50] *Ottawa Citizen*, April 10, 1973.
[51] *Globe and Mail*, December 2, 1971.
[52] *International Canada*, February 1970, p. 68.
[53] *Ibid.*, November 1972, p. 217.
[54] *Ibid.*, January 1973, p. 17, February 1973, p. 61, March 1973. p. 103.
[55] *Ottawa Citizen*, November 30, 1972.

The same trend prevails for British Colombia. If Premier Bennett visited Europe in October 1970 to strengthen the economic links with the old continent, his successor Premier Barrett had also contacts abroad, for example with New York financiers and underwriters in May 1973.[56] For Alberta we note that trade missions were sent to Japan and South America in 1973.[57] Similarly Saskatchewan Cabinet Ministers discussed provincial matters abroad in 1972, with European officials and businessmen. The following year a government delegation headed by the Deputy Minister of Industry and Commerce went to Romania to continue the negotiations started during a visit of Romanian officials in the province on specific industry programmes.[58] Manitoba is also active in this field. In June 1971 a Japanese economic mission visited the province to study further investment in Manitoba's mining industry. Trade delegations also visit foreign countries. An example of this is the tour of duty in November 1971 of the Manitoba Minister of Industry and Commerce in Great Britain and Czechoslovakia.[59] Finally, it was reported that New Brunswick had in February 1970 conversations on foreign investment and trade in the United States.[60]

IV. — PROSPECTS FOR PERMANENT PROVINCIAL MISSIONS ABROAD.

We have so far dealt only with trends, as reflected by the several arrangements concluded by the provinces either through visits of provincial officials abroad or visits of foreign officials at home. It remains to consider whether these activities have led the way to more permanent missions abroad who might be entrusted in the future with the negotiation and ultimately the conclusion of agreements. Most active in this field has been the province of Ontario. In December 1973, Ontario had representatives in fourteen cities, six in Europe (London, Brussels, Frankfurt, Vienna, Milan and Stockholm), one in Asia (Tokyo), and seven in the United States (New York, Chicago, Los Angeles, Cleveland, Atlanta, Boston and Minneapolis). Furthermore, in October 1971 Ontario announced the opening of a provincial trade office in Washington,

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[56] *International Canada*, October 1970, p. 224, May 1973, p. 159.
[57] *Edmonton Journal*, May 16, 1973.
[58] *International Canada*, February 1973, p. 61. see also *Globe and Mail*, December 5, 1973, for a report of Cabinet ministers travels abroad.
[59] *Ibid.*, June 1971, p. 147; *Globe and Mail*, November 25, 1971.
[60] *Ibid.*, February 1970, p. 130.

though the final arrangement with Ottawa in May 1973 was to the effect that a member of the Canadian Embassy in that city would be specially assigned to represent Ontario's specific interest. [61]

Second on our list is Quebec with ten "Délégations générales" or offices abroad, four in Europe (Paris, London, Milan, and Dusseldorf), and six in the United States (New York, Chicago, Boston, Dallas, Los Angeles, and Lafayette). Then comes Nova Scotia with four representatives abroad respectively in Europe (London and Paris) and the United States (New York and Boston). Alberta and British Columbia have each three representatives abroad: the former in London, Los Angeles and Tokyo, the latter in London, San Francisco and Los Angeles. New Brunswick and Saskatchewan have each a representative in London. It seems that Manitoba, Newfoundland and Prince Edward Island have no office abroad. [62]

It should be pointed out, in addition to the above, that new offices are being planned. Such is the case of British Columbia which was considering in March 1973 the opening of a trade office in Central Europe near Frankfurt. Similarly Saskatchewan announced in February 1973 the establishment of a trade office in Tokyo. [63] Moreover some provincial officers are assigned specific tasks in Canadian displomatic missions. Accordingly Quebec's "orientation officers" are working in federal immigration offices abroad under an agreement with Ottawa of May 18, 1971. [64]

Looking at this list we find a sort of similarity with the steps which in the past led to the acquisition by Canada of the rights to diplomatic representation and to conclude its own agreements. [65]

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[61] *Ibid.*, October 1971, p. 206; *Globe and Mail*, May 25, 1973.

[62] Our list is not an authoritative one; it comes from a private source in the Department of External Affairs.

[63] *International Canada*, March 1973, p. 102, February 1973, p. 61; in December 1973, there were 37 such provincial offices; these offices are established after a formal request has been submitted to the country concerned by the federal government authorities (according to a statement made by an External Affairs official).

[64] *Ibid.*, May 1971, p. 134; these "orientation officers" are now working in Rome, Beyrouth and Athenes; they do not have a diplomatic status; worth mentioning is the fact that, after agreement between Quebec and Ottawa, a Quebec official was posted to Abidjan to act as a Counsellor in education matters with a diplomatic status and under the authority of the Canadian ambassador; this official also reports to the Quebec education Minister on matters of interest to the province.

[65] JACOMY-MILLETTE, *op. cit.*, n. 1, above, Part I, *Historical Background.*

In both cases at the outset these rights were asserted in trade matters, in its broad sense, and in areas of conflicts of interests between the federal and the provincial authorities, though Quebec's claims are partly different from those of other provinces as it has been indicated earlier. We say "partly different" only because the economic claims of that province are somewhat similar to those of the predominantly English-speaking provinces.

Secondly we note that Ontario has fourteen "missions" abroad when Quebec has only ten. In the view of this writer the strong opposition of the federal government to Quebec's approach and objectives in this field — when those of Ontario are met with no apparent reaction — is due mostly to the manner of submitting these claims, whether they come from "séparatiste", "indépendentiste" or "fédéraliste" quarters. The "différence" is mainly a psychological matter, whether it is a family quarrel between French Canadians or misunderstanding betwen English and French Canadians based on different approaches towards legal and political matters. The former are logical and argue in the abstract, the latter are pragmatic and empirical.

This sketchy summary of external provincial activities bears witness to the trend noted earlier in this paper of increasing awareness of specific provincial interests — as opposed to national interest — in the fields of economic and trade relations or cultural relations and communications.

It should be noted however that these activities do not involve questions of global national policy. The chief responsibility of the federal government in this area is not officially denied, as stated by the British Columbia Minister of Recreation and Conservation in March 1971 in the following terms: "[t]he province should not get involved in question of international politics."[66] It is not a major issue which arises in domestic-intergovernmental relations in the seventies.

However, the province's warning and approach to the matter is summarized in a statement of Saskatchewan Minister of Finance in February 1973 which reads as follows: "[t]he provincial government has found by experience that they could not sit back and wait for the federal Department of Industry, Trade and Commerce

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66 *International Canada*, March 1971, p. 66.

to promote Saskatchewan interest." Consequently, he concluded that "the province must assume an active role" in the matter. [67]

The author of this paper is thus somewhat perplexed as to how, in the future, the parties concerned will find a way to co-ordinate these various activities and informal agreements in a field which is so vital for the country as a whole, that is trade and economic matters, if the pattern set in recent years and months does not take a new turn.

V. — POSSIBLE SOLUTIONS TO THE PROBLEM OF TREATY-MAKING BY PROVINCES.

In the light of this observation it seems appropriate to submit our own view on the way to solve the question of the distribution of treaty-making power between the federal union and the provinces. The point of departure of our proposal is the Draft Articles on the Law of Treaties prepared by the International Law Commission from 1949 to 1966, submitted to the United Nations General Assembly in July 1966 and used as a basis for the drafting of the 1969 Convention on the Law of Treaties. [68] This Convention was adopted at the Vienna Conference on the Law of Treaties held in two sessions respectively in 1968 and 1969, [69] and lacks 16 ratifications for its coming into force. As for Canada, it has acceded to the Convention on October 14, 1969.

Article 5, paragraph 2 of the Draft Articles provided: "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."

This provision indicates clearly that the member States of a federation may possess capacity to conclude treaties though within certain limits. Since it is the result of lenghthy discussions between the members of the International Law Commission composed of eminent jurists from different continents and therefore various legal systems it proves, we submit, that an agreement had been

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[67] *Ibid.*, February 1973, p. 61.

[68] *General Assembly Official Records, 21st session*, Supp. No. 9 (A/6309/Rev. 1).

[69] *United Nations Conference on the Law of Treaties, Official Records* (A/CONF.39/27); the Convention was adopted on May 22, 1969, by an affirmative vote of 79 nations, 19 abstaining and 1 opposed. In February 1974, it has been ratified by 19 States and is not yet in force.

reached on this point. Furthermore this agreement was confirmed by a majority of government representatives attending the first session of the Vienna Conference when the provision in question was adopted by 54 votes to 17, with 22 abstentions. However at the second session it was deleted, due, it would seem, in particular to the active and influential opposition of the Canadian delegation and representations made by other States. [70]

The new form of Article 5, now Article 6 of the 1969 Convention, which simply states that "[e]very State possesses capacity to conclude treaties", does not modify the generally recognized principle of international law as formulated in the Draft Articles. On a strictly legal approach the problem is twofold; it involves two legal orders, domestic and international. The first proposition is that within a given federation both levels of government must agree as to the distribution of the treaty-making power, and this agreement must be part of the law of the country. Secondly, on the international plane the problem of recognition by foreign States of the treaty-making capacity of the member States does arise.

In the present state of international law and state practice such recognition as regards Canada, could only take place if the federal Constitution, the British North America Act, 1967, were amended. In this area, we submit, municipal developments in Courts' decisions and practice cannot create rules of law binding upon outside States, though these decisions and practice might be part of the domestic constitutional law in a slow process. It would then be an open invitation to interpretation of our Constitution by foreign powers, which is neither feasible nor in the mind of federal officials. The actors in the international community, which are mainly sovereign States, only recognize the capacity of member States to conclude their own international agreements when the federal Constitution permits and defines the limits of this capacity.

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[70] The leader of the Canadian delegation, M. H. Wershof, stated that "the Canadian delegation has grave reservations concerning paragraph 2 of Article 5 which, in our view, deals inadequately with the treaty-making capacity of members of a federal State, both from a political and from a strictly legal viewpoint" (April 28, 1969, 2nd session, Plenary session, reproduced in (1970) 8 C.Y.I.L. 364 5); see the commentary of the I.L.C. on the 1966 draft article 5 which reads in part: More frequently, the treaty-making capacity is vested exclusively in the federal government, but there is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third states. (1967) 61 *A.J.I.L.*, 296; see J. S. STANFORD, *United Nations Law of Treaties Conference: First session*, (1969) 19 *U.T.L.J.*, 59; IDEM, *The Vienna Convention on the Law of Treaties*, (1970) 20 *U.T.L.J.* 18.

In our view, on the Canadian plane, two solutions might be adopted. First a limited treaty-making capacity could be extended to the provinces by amending the British North America Act, after the required consultation between the federation and the provinces. International agreements concluded by the provinces would be restricted to matters within their constitutional jurisdiction, as stated in the British North America Act and its amendments. However, there would be no obligation to exercise this capacity and each province would have the choice to act on its own in each specific case, or to leave this responsibility, pursuant to an empirical approach to the matter, to the federal authorities though with no formal undertaking to do so.

However, since the foreign relations of a country must reflect as far as possible basic global national objectives, the new written constitutional provisions would also specify the chief responsibility of the federation in this area. It would also foresee a machinery for joint consultation and agreement before the conclusion of any agreement by the provinces and also before the conclusion of any treaty by the federal government affecting primarily provincial interests and legislative jurisdiction.

The second solution, which would only be a "second choice", would be to include in the Constitution a provision asserting the exclusive treaty-making power of the federal government. The situation would thus be clearly defined as regards foreign powers. In this case, prior consultation with the provinces on agreements affecting specific provincial interests or on matters within provincial and concurrent legisative jurisdiction would have to be organized on a compulsory and regular basis. Accordingly Article 132 of the 1867 Constitution would have to be formally deleted or amended.

In both of these solutions, the establishment of a permanent federal-provincial Secretariat or agency specialising in these matters might be one form of consultative machinery. The Secretariat of the Constitutional Conference established in February 1968 or the new agency which replaced it in May 1973, the Canadian Intergovernmental Conference Secretariat, functioning efficiently could serve the purpose. It could do so by creating a special unit or division specialised in these matters within the Secretariat or by setting up a new agency on the model of the Secretariat. Periodic and regular meetings of provincial and federal representatives to

examine draft treaties or suggest the conclusion of new agreements in answer to specific needs at both levels, would accordingly be held.

This need of prior consultation has already been pointed out by both provincial and federal authorities and implemented in some cases. For example, in the field of external aid the federal government sometimes has consultation and make arrangements with the provinces to implement external agreements concerning subject-matters within provincial jurisdiction such as education. This aid may be accorded through multilateral channels or on a bilateral basis. We will refer to the events associated with the Francophone International Conferences on Education held from February 1968 to the Niamey conference in March 1970 which set up the Francophone Agency for Cultural and Technical Co-operation. The controversy between Ottawa and Quebec as to the status of the latter is however an illustration of the many difficulties encountered in this field. [71]

Another instance of this need for concerted policy is given by the growth of Canadian external aid through the Canadian International Development Agency (CIDA), in particular in the field of education. A perusal of the Annual Reports of this agency, indicates that in 1972, 420 teachers were working in Francophone African countries as compared with 486 reported for the end of 1971. These international arrangements are made on a bilateral and generally informal basis between CIDA and the country concerned, though they also involve the passive or active co-operation of provincial public or private bodies. This observation is more evident in the case of foreign students and trainees from developing countries who come to Canadian Universities under CIDA's auspices. In 1972 there were 432 such students and trainees from Francophone Africa. [72]

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[71] See M. SHARP, *Federalism and International Conferences on Education, op. cit.*, p. 32; C. MORIN, *Le pouvoir québécois en négociation*, Québec, Boréal Express, 1972; L. SABOURIN, *L'Agence de coopération culturelle et technique de la Convention de Niamey aux modalités de participation du gouvernement québécois*, in *Perspectives internationales*, January 1972; *Modalities according to which the Government of Quebec is admitted as a Participating Government to the Institutions, Activities and Programs of the Agency for Cultural and Technical Co-operation*, as agreed on October 1, 1971 between the Government of Canada and the Government of Quebec, Press Release, Department of External Affairs, October 8, 1971.

[72] For example, 39 Canadian teachers were in Algeria and 75 students and trainees of that country were attending Canadian Universities in 1972 (the statistics cited above are extracted from CIDA Annual Report, 1972-73).

Canada has also been active in Commonwealth Africa for the year under survey. The links are older than in Francophone Africa. A shift should be noted toward concentration on assistance in energy, transportation, communication and agriculture, which do not directly involve Canadian provinces.[73] Aid in education remains nevertheless an important part of the programs. In 1972 there were 186 Canadian teachers as CIDA experts; conversely, 486 students of these countries were scholarship holders in Canadian Universities.[74] It should be pointed out that most arrangements of that sort are not considered as international treaties. They are usually concluded in the form of memoranda of understanding.

The federal-provincial work-team concept also extends to other areas. An illustration is the agreement signed on the domestic plane by Quebec Minister of Intergovernmental Affairs and the Secretary of State for External Affairs on March 3, 1971, concerning a joint project in Morocco, a $30 million aid program administered by CIDA involving Quebec experts.[75]

As regards the most important *rapports* with the United States, effective joint action is sometimes translated by Canada diplomatic intervention. Such was the case of the North Dakota irrigation project, which provoked a note of protest from the federal government forwarded to the United States. It was argued that the project would significantly and seriously degrade water quality in two Manitoba rivers.[76]

However, these are only a few examples of co-ordination at the two domestic levels. Consequently, there remains a list of unsolved problems as indicated in this paper. In practice, in our view, an accepted global and permanent approach to the question has not yet been devised, due mostly to Ottawa's reluctance to do so as well as the different approaches and claims of the parties concerned with respect to distribution of power in areas either not

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[73] Although they might affect indirectly the wealth of the provinces as in the examples of loan and credit agreements providing for the purchase of Canadian goods materials and equipment; see for example the agreement with the East African Community signed on 28 October, 1970, financing *inter alia* the purchase of locomotives.

[74] For example, 54 Canadian teachers were posted in Tanzania and 63 Tanzanian students and trainees were holding scholarships in Canadian universities in 1972.

[75] *Développement économique et rural du Rif occidental*, DERRO, see (1970) 22 *External Affairs* 101-2 and *International Canada*, January 1971, p. 18.

[76] *Globe and Mail*, November 21, 1973.

definitely settled or even governed by the federal constitution. In the specific field of our research, that is international agreements, a distinction is drawn between multilateral and bilateral treaties. As regards the former, which generally involve implementing legislation or action at both levels of government, the federal authorities do agree to consult the provinces before and even sometimes after the formation of the treaties, that is before ratification. Representatives from the provinces are invited to participate in international conferences convened to prepare conventions in fields within provincial jurisdiction. This participation is, nevertheless, within the Canadian delegation. Secondly, with respect to bilateral treaties which regulate various fields of specific interest to the provinces and thus might have a grave impact on a global provincial perpective, for instance, in trade and economic matters, no such co-operation is planned and organized on a regular or even semi-regular basis before the signature of any agreement affecting these interests. The pragmatic, empirical and, in a way, wavering approach seems to prevail.

In our view this approach is the crux of the matter and there will not be any real progress toward a solution agreed to by all parties concerned unless machinery for such permanent and periodic meetings be established.