

The Legal Character of Provincial Agreements with Foreign Governments

Gibran van Ert

Volume 42, Number 4, 2001

URI: <https://id.erudit.org/iderudit/043687ar>

DOI: <https://doi.org/10.7202/043687ar>

[See table of contents](#)

Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)

1918-8218 (digital)

[Explore this journal](#)

Cite this article

van Ert, G. (2001). The Legal Character of Provincial Agreements with Foreign Governments. *Les Cahiers de droit*, 42(4), 1093–1124.
<https://doi.org/10.7202/043687ar>

Article abstract

The object of this article is to consider the legal character of provincial agreements with foreign governments and the constitutional authority of provincial governments to make them. The matter is controversial ; Quebec has long maintained that provincial governments are competent to conclude treaties in areas of provincial jurisdiction, while the federal government asserts that it alone can conclude binding treaties. The argument of this essay is that the traditional arguments made for and against provincial competence to conclude treaties are equally unsatisfying. The best answer comes from a close analysis of the unwritten constitution from which the treaty power arises. Such analysis suggests that the otherwise credible argument, that the treaty-making power has devolved uniquely upon the federal government by a crystallization of constitutional usage into constitutional law, is blocked by Quebec's persistent objections over nearly forty years. Thus, the legal question of capacity to conclude treaties remains unresolved and indeed irresolvable without political dialogue. Finally, the article suggests that even if provinces do not have the power to make binding treaties, courts may nevertheless use provincial agreements with foreign governments, in the proper case, as a guide to the construction of legislation.

The Legal Character of Provincial Agreements with Foreign Governments

Gibran van ERT*

The object of this article is to consider the legal character of provincial agreements with foreign governments and the constitutional authority of provincial governments to make them. The matter is controversial; Quebec has long maintained that provincial governments are competent to conclude treaties in areas of provincial jurisdiction, while the federal government asserts that it alone can conclude binding treaties. The argument of this essay is that the traditional arguments made for and against provincial competence to conclude treaties are equally unsatisfying. The best answer comes from a close analysis of the unwritten constitution from which the treaty power arises. Such analysis suggests that the otherwise credible argument, that the treaty-making power has devolved uniquely upon the federal government by a crystallization of constitutional usage into constitutional law, is blocked by Quebec's persistent objections over nearly forty years. Thus, the legal question of capacity to conclude treaties remains unresolved and indeed irresolvable without political dialogue. Finally, the article suggests that even if provinces do not have the power to make binding treaties, courts may nevertheless use provincial agreements with foreign governments, in the proper case, as a guide to the construction of legislation.

* BA (McGill), BA (Cantab.), LL.M (Toronto). I am indebted to: Wayne Clifford, Assistant Deputy Minister, International Relations Section, Ministry of International and Intergovernmental Relations, Alberta; David Gamache Hutchison, Researcher for US/Latin America in the Ministry of International and Intergovernmental Affairs, Alberta; Lorraine Ratnik, Team Leader, Western Hemisphere in the Office of International Relations and Protocol, Ministry of Economic Development and Trade, Ontario; Jacques Hérivault and François Pouliot.

L'article explore le caractère légal des ententes entre les provinces et des gouvernements étrangers ainsi que le pouvoir éventuel des gouvernements provinciaux de conclure pareilles ententes en vertu de la Constitution. Le sujet est controversé. Le Québec soutient depuis longtemps que les gouvernements provinciaux peuvent conclure des traités dans des domaines de compétence provinciale. Par contre, le gouvernement fédéral affirme être le seul à pouvoir conclure des traités ayant force de loi. La thèse soutenue ici est la suivante : les traditionnels arguments pour ou contre la compétence des provinces en cette matière sont tous insatisfaisants. La meilleure solution consiste à analyser en profondeur la constitution non écrite, d'où émane le pouvoir relatif aux traités. Or, l'analyse montre que le Québec réfute inlassablement depuis plus de quarante ans l'argument — au demeurant crédible — d'un pouvoir dévolu exclusivement au gouvernement fédéral par la cristallisation de l'usage constitutionnel dans le droit constitutionnel. La question reste donc sans réponse sur le plan légal et sera impossible à résoudre sans dialogue politique. L'auteur suggère en conclusion que, même si les provinces n'ont pas le pouvoir de conclure des traités exécutoires, les tribunaux peuvent malgré tout utiliser les ententes conclues entre les provinces et les gouvernements étrangers, s'il y a lieu, pour élaborer les lois.

	<i>Pages</i>
1 Provincial practice : a case study	1096
2 Treaty-making at international law	1101
3 The federal case for an undivided treaty power	1103
4 The divided Crown : the provincial argument	1109
5 Canadian Case-Law	1112
6 The unwritten constitution : crystalization and consent	1116
7 Judicial use of provincial international agreements	1122
Conclusion	1124

Foreign affairs is ordinarily thought of as a power of the federal government. This is largely accurate. The vast majority of transactions between Canada and foreign states are conducted by federal ministries, principally the Department of Foreign Affairs and International Trade. Yet Canada's provincial governments also make occasional appearances on the international stage. A few have permanent departments dedicated to international affairs¹. Several have missions abroad². Most send ministers and civil servants to meetings with foreign leaders and international organizations. And all have concluded, and continue to conclude, agreements between their provinces and the governments of foreign states.

The object of this essay is to consider the legal character of these agreements and the constitutional authority of provincial governments to make them. The question is one of some controversy, for the power to conclude treaties is one which has fallen between the cracks of the Constitution Acts. The treaty power was not apportioned to either order of government in 1867, for it was anticipated that Canada's international relations would continue to be conducted by the Imperial authorities in London. Nor was the matter clarified upon Canada's assumption of international legal personality with the Statute of Westminster 1931. This is not to say that there is no law here. Constitutional law, like nature, abhors a void: here as in so many other places, the unwritten constitution has supplied the written constitution's deficiencies — though not, in this case, without controversy. The Government of Quebec has long maintained that provincial governments are constitutionally competent to conclude treaties in areas of provincial jurisdiction. Other provinces have not made the point as strongly, yet they have not hesitated to initiate, negotiate and conclude international agreements without federal involvement. The federal government recognizes the existence of such agreements, but denies that they constitute treaties at international law. How courts may use these agree-

-
1. Quebec has a Ministère de relations internationales dedicated to international relations, including federal-provincial relations. Likewise, Alberta has a Ministry of International and Intergovernmental Affairs. Other provinces — British Columbia, Saskatchewan, Manitoba, Nova Scotia (where the premier also serves as intergovernmental affairs minister), and New Brunswick — include international relations within their intergovernmental affairs department without acknowledging the international role in the department's name. Prince Edward Island and Newfoundland deal with international and intergovernmental matters at cabinet level. Ontario has an international relations office within its Ministry of Economic Development and Trade.
 2. See the discussion in Gordon Mace, «Canada's Provinces and Relations with Latin America: Quebec, Alberta, and Ontario» in J. HAAR and E.J. DOSMAN, eds., *A Dynamic Partnership: Canada's Changing Role in the Hemisphere* (Boulder: Lynne Rienner, 1993), p. 61, pp. 62-67.

ments, be they treaties or something less, has yet to be considered judicially or in the academic literature.

These are the issues to be considered here. I begin by reviewing provincial practice in concluding international agreements, focusing on some recent international activities by Alberta. I then introduce the treaty-making power from the vantage point of international law. Next I describe the legal arguments for and against provincial competence to conclude treaties. Concluding that these arguments are equally unsatisfying, I turn for answers to Canadian jurisprudence and finally to the unwritten constitution from which the treaty power arises. I conclude that there would be a credible argument that treaty-making authority has devolved uniquely upon the federal government by a crystallization of constitutional usage into constitutional law, were it not for Quebec's persistent objection. Given its objection, no such unwritten law can have developed and the legal question of capacity to conclude treaties remains unresolved and indeed irresolvable without political dialogue. But that is not the end of the matter, for I go on to consider what use domestic courts can make of provincial international agreements, even if they are not strictly treaties. I conclude that provincial agreements with foreign states are properly susceptible to an interpretive presumption that, while not granting them the bindingness of treaties, nonetheless accords them some legal weight.

1 Provincial practice : a case study

Canadian provinces have long made agreements with foreign governments on matters touching their interests, without federal involvement. The subject matters of these agreements have included economic cooperation³, cultural relations⁴, family maintenance orders⁵, succession duties⁶, the

3. See, for example, the Memorandum of Understanding on Economic Cooperation Between the Province of Alberta, Canada and the Province of Neuquén, Argentina, 14 November 2000. See also the Memorandum of Understanding on Maritime Commerce Between the Province of Ontario and the State of Michigan, 19 April 1988.

4. See, for example, the Memorandum of Agreement between the Maritime Provinces and the State of Louisiana, 1994, the text of which is reproduced at [on line] [<http://www.gov.nb.ca/0056/sommet/agr-1e.htm>], and the Entente entre la province du Nouveau-Brunswick et La Commission communautaire française de Belgique, the text of which is reproduced at [on line] [<http://www.gov.nb.ca/0056/sommet/agr-6e.htm>]. (Both web sites visited 27 April 2001.)

5. See A.E. GOTLIEB, « Canadian Practice in International Law, 1965 », (1965) 4 C.Y.I.L. pp. 260-262.

6. See « The reciprocal arrangements between Quebec, Great Britain, Northern Ireland, and Trinidad and Tobago (1932-1934) » reported in *Canadian Estate and Gift Tax Reports*, vol. I, sections 7810, 7825, 7835.

environment⁷, and more⁸. Tracking down these agreements is not easy ; what Edward McWhinney said to this effect in 1969 remains true to this day :

The examples [of interprovincial agreements] are, of course, legion ; one of the problems in obtaining detailed records of such trans-national agreements entered into by the Canadian provinces is that they have very often been highly informal in their modes of creation, and very often concluded, not by the Prime Minister of the province or his cabinet, but by intermediate-rank civil servants who have acted on a purely functional, utilitarian basis related to the province's needs, and dealt directly with their civil service counterparts in other countries without apparently being aware that, in doing what comes naturally, they may have created conceptualistic problems for latter-day commentators⁹.

In spite of this evidentiary problem, it is clear that some provinces are more active internationally than others. Historically, Quebec¹⁰ and Alberta have been in the forefront. But all Canadian provinces have concluded agreements with foreign governments at one time or another. Most of these agreements are framed in language that makes their non-binding nature plain. Some, however, are not so clear. It is helpful to situate the legal

-
7. A notable example of multilateral, sub-federal environmental cooperation is the Great Lakes Charter between Ontario, Quebec, and eight American states. The Charter, concluded 11 February 1985, includes a statement of « Findings », five « Principles for the Management of Great Lakes Water Resources », lengthy provisions on « implementation », a provision entitled « Reservation of Rights », and a definitions section. See also the Declaration of Partnership and Memorandum of Understanding on Cooperation Between the Province of Ontario and the State of New York, 20 September 1991 (the lengthiest provisions of which concern the environment), and the Ontario-Michigan Joint Notification Plan of Unanticipated or Accidental Discharges of Pollutants into Shared Waters of the Great Lakes and Interconnecting Channels, 19 April 1988.
 8. See, for instance, Morin's discussion of the 1955 Nova Scotia-Netherlands land settlement agreement, whereby Dutch immigrants could receive loans for farms in the province: J.-Y. MORIN, « La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé », (1965) 3 C.Y.I.L. 127, p. 178.
 9. E. MCWHINNEY, « Canadian Federalism and the Foreign Affairs and Treaty Power. The Impact of Quebec's « Quiet Revolution » », (1969) 7 C.Y.I.L. 3 at 14n18.
 10. Emanuelli states that Quebec has concluded over a hundred international agreements with a variety of states, « sans que le gouvernement fédéral puisse s'y opposer de façon efficace »: C. EMANUELLI, *Droit international public: contribution à l'étude du droit international selon une perspective canadienne*, Montreal, Wilson & Lafleur, 1998, p. 73. The web site of the Quebec international relations ministry puts the number even higher: « Le Québec privilégie le partenariat comme mode de promotion de ses intérêts. C'est ainsi que, depuis 1964, il a conclu plus de 400 ententes avec des organismes internationaux et différents pays étrangers dans des domaines aussi divers que l'agriculture, l'éducation, l'énergie, le transport, les télécommunications, la R-D et l'environnement »: [on line] [http://www.mri.gouv.qc.ca/le_quebec_un_profil/affaires/rel_inst_fr.html] (visited 27 April 2001).

problems considered here in actual provincial practice. To that end, I propose to consider a recent agreement concluded by the government of Alberta.

I concede from the outset that Alberta is not representative of provincial international activity. To the contrary, Alberta stands out as a province with a very strong international presence, particularly in the field of international agreements¹¹. Alberta added an international division to its Department of Intergovernmental Affairs in 1978¹². Its motive was largely economic self-interest, for the resource-driven Alberta economy is particularly sensitive to international market fluctuations in such sectors as oil and natural gas. But Alberta was also motivated by what might be called (perhaps too simplistically) Western alienation. As an Albertan government official explained in 1985, « We have...recognized that the federal government is unable to represent all of Alberta's interests on the international scene or, for that matter, all the interests of all the other provinces. They do not have the resources to acquire the expertise and the knowledge that one gets by being here and seeing what is happening in the provinces...¹³ » This sentiment remains, and continues to be invoked by the Alberta government to explain its international presence. A recent publication by the Alberta Ministry of International and Intergovernmental Relations declares, « [t]he direct approach works », and goes on to explain that :

[t]he federal government has an understandable inclination to focus on Central Canada, which has more than 60 per cent of Canada's population and physical proximity to Ottawa. Alberta's foreign offices and missions by the Alberta premier and ministers can tell the Alberta Advantage story better than the federal government. (In most cases, we carry out these activities in close partnership with Ottawa.)¹⁴.

Alberta's active role in international affairs is not typical of all Canadian provinces. It is precisely that fact which makes it a good study for our

-
11. This was not always so. Writing in 1965, Morin considered that while British Columbia and Ontario may have shared Quebec's desire for a greater international presence, Alberta was uninterested in and perhaps opposed to provincial competence in international affairs. MORIN, *op. cit.*, note 8, p. 180.
 12. A.-M. JACOMY-MILLETTE, « Les activités internationales des provinces canadiennes » in P. PAINCHAUD (ed.), *From Mackenzie King to Pierre Trudeau : Forty Years of Canadian Diplomacy 1945-1985*, Quebec, Les Presses de l'Université Laval, 1989, p. 86.
 13. James Dinning, speech at the University of Alberta reprinted in T. KEATING and D. MUNTUN (eds.), *The Provinces and Canadian Foreign Policy : Proceedings of a Conference, University of Alberta, Edmonton, Alberta, 28-30 March 1985*, Toronto, Canadian Institute of International Affairs, 1985, p. 12.
 14. Government of Alberta, *A Framework for Alberta's International Strategies* (February 2000), p. 3.

purposes. For Alberta's activities, while not in overt denial of the federal government's claim to an undivided treaty power (as in the case of Quebec), may implicitly question that claim in some instances.

While Alberta's foreign policy is looking increasingly far afield,¹⁵ the province's American neighbours continue to be of paramount importance¹⁶. In particular, Alberta has sought closer ties with the state of Montana, which shares Alberta's entire southern border. Governmental agreements between Alberta and Montana date back to the late 1960s and address such matters as civil planning, agricultural trade, border cooperation, vehicle weights and inspection stations, and cross-border schooling¹⁷. In 1985, the two governments established the Montana-Alberta Bilateral Advisory Council (MABAC) as a forum for resolving irritants in cross-border relations. In March 2000, Alberta and Montana formalized MABAC in a Memorandum of Understanding which included a commitment on the part of both parties to use MABAC to « promote, as a first step, informal consultations » on cross-border irritants, in the hope of averting resort to costlier and more acrimonious mechanisms such as the NAFTA, the WTO, or the courts¹⁸. The MABAC consists of several delegates from both parties. The Alberta delegation includes interested ministers, government and opposition MLAs from southern Alberta, senior government officials and private sector representatives. The Montana delegation consists of the Lieutenant Governor, two State Senators, two State Representatives and four government officials¹⁹. The agreement also provides that the MABAC may appoint informal dispute advisory committees to address matters that

-
15. On 14 November 2000, Alberta and the Argentinian province of Neuquén concluded a Memorandum of Understanding on Economic Cooperation committing each government to « facilitating closer commercial ties between the private sector of each jurisdiction » with particular attention to oil and gas, natural resources development, agricultural services, environmental technologies, education and public sector management. The two provinces also committed to »endeavour to exchange information in the identified sectors ».
 16. On 25 June 1999, Alberta and the Mexican state of Jalisco concluded a Protocol of Understanding and Friendship for a Sister Relationship. This superceded and broadened a 1998 Memorandum of Understanding on Economic Cooperation between the parties.
 17. GOVERNMENT OF ALBERTA, *Montana-Alberta Bilateral Advisory Council (MABAC)* (2000 ?), p. 3. Downloaded from the following web site on 27 April 2001 : [on line] [[http :/ /www.iir.gov.ab.ca/iir/inter_rel/media/mabac.pdf](http://www.iir.gov.ab.ca/iir/inter_rel/media/mabac.pdf)].
 18. Memorandum of Understanding and Cooperation Between the Government of the State of Montana, United States of America and the Government of the Province of Alberta, Canada, Respecting the Montana/Alberta Bilateral Advisory Council (MABAC), signed 8 March 2000 (hereafter MABAC Agreement).
 19. GOVERNMENT OF ALBERTA, *op. cit.*, note 17, p. 4.

cannot be resolved during MABAC's annual meetings or in the course of interim discussions by MABAC delegates.

The tenor of the MABAC agreement is informal and voluntary. The use of the designation « Memorandum of Understanding » indicates this in part, for a practice exists of entitling non-binding agreements this way²⁰. The language of the agreement is frequently declaratory rather than mandatory. Furthermore, the agreement's dispute resolution provisions explicitly provide as follows :

Nothing in the above would preclude either Party from seeking action through other dispute resolution mechanisms (under multilateral or bilateral trade agreements such as the World Trade Organization, North American Free Trade Agreement, International Joint Commission, States/Provinces Agricultural Accord, international or domestic courts or tribunals, etc.)²¹.

In spite of this proviso, and the document's consensual rather than mandatory language, the agreement imposes on the signatories a significant obligation. As the Alberta minister for international and intergovernmental relations explained in a letter to Messrs Axworthy and Pettigrew (the federal ministers of Foreign Affairs and International Trade, respectively), « [t]he MOU commits Alberta and Montana to use and promote MABAC as a forum to avoid, and if necessary, resolve cross-border disputes involving the two jurisdictions²². »

The minister's letter to the federal government is interesting not only for what it says about the MABAC agreement's effects between the parties, but also for what it reveals about federal involvement in the negotiation of the agreement. The letter is dated 20 April 2000, well over a month after the Alberta premier and Montana governor signed the MABAC agreement and the Government of Alberta published a press release on it²³. By all accounts, federal officials may have read about the agreement in the newspapers before learning of it from the Alberta government. Provincial independence from the federal government in the conclusion of interna-

20. This practice has only indirect support in international law. The *Vienna Convention on the Law of Treaties* 1969, *infra* note 26, provides in art. 2(1)(a) that a treaty is a treaty « whatever its particular designation ». But the same article also provides that a treaty is « governed by international law », and use of the designation « Memorandum of Understanding » may, in appropriate cases, signal a lack of intent to be bound by the agreement at international law.

21. MABAC Agreement, *supra* note 18.

22. Hon. SHIRLEY MCCLELLAN, Letter to the Hon. Lloyd Axworthy and the Hon. Pierre Pettigrew (20 April 2000).

23. GOVERNMENT OF ALBERTA, « Agreement creates closer ties with Montana » (8 March 2000).

tional agreements in areas of provincial jurisdiction may be the most important insight offered in this brief overview of provincial practice. We must now consider how far that independence may go as a matter of constitutional law.

2 Treaty-making at international law

As we will see, there are two sides to the treaty-making question : the federal position, held by Ottawa and supported or acquiesced to by most provinces, and the provincial position, advanced principally if not entirely by Quebec. Before considering these arguments, it is helpful to examine what the parties are fighting over, namely the power to conclude treaties. Treaties are creatures of public international law. They are agreements that establish rights and obligations of a legally binding nature. This aspect of treaties is emphasized in Article 38 (1) of the Statute of the International Court of Justice 1945²⁴ (which is viewed as declaratory of the sources of international law recognized by State practice). Paragraph (a) provides that the Court shall apply «international conventions, whether general or particular, *establishing rules expressly recognized by the contesting states*²⁵». Thus the power to conclude a treaty is the power to establish internationally enforceable legal rules.

Who may be a party to a treaty is, in the case of federations, a difficult question. Article 6 of the Vienna Convention on the Law of Treaties 1969²⁶ provides that «[e]very State possesses capacity to conclude treaties.» The term «State» is not defined, but need not necessarily exclude states with less than full international personality. *Oppenheim* considers there to be «no justification for the view that [member states of federations] are necessarily deprived of any status whatsoever within the international community : while they are not full subjects of international law, they may be international persons for some purposes²⁷.» Shaw is of the same view, adding that where member states of a federation have been granted some «restricted international competence», they may be regarded as having «a degree of international personality²⁸». But what «degree» of international personality is needed for the purpose of becoming party to a treaty ? In

24. [1945] Can. T.S. no. 7.

25. SIR R. JENNINGS and SIR A. WATTS (eds.), *Oppenheim's International Law*, 9th ed., vol. 1, Harlow, England, Longman, 1992, section 11 (hereafter *Oppenheim* vol. 1).

26. [1980] Can. T.S. no. 37.

27. *Oppenheim* vol. 1, *op. cit.*, note 25, section 75.

28. M. N. SHAW, *International Law*, 4th ed., Cambridge, Cambridge University Press, 1997, p. 156.

particular, does it suffice that the sub-federal unit enjoys internal competence within the federation to carry out the treaty's obligations? The answer appears to be no: what is also needed is some provision in the federation's constitutional law establishing the capacity of the sub-federal unit to conclude treaties. That this is so is suggested by art. 5 (2) of the International Law Commission's Draft Articles on the Law of Treaties, which provided that «[s]tates 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 down²⁹.» This provision was dropped from the Vienna Convention, but seems nevertheless to represent the current position.

If the Quebec argument (which we consider below) is correct, the unwritten element of the Canadian constitution provides provinces with the necessary capacity to conclude treaties on subject matters falling within their jurisdiction. But there is a further complication: while it is one thing for a federation's constitution to grant sub-federal units treaty-making capacity, it is another for that capacity to be recognized by other states³⁰. The problem of recognition is easily overcome where the federal and sub-federal authorities agree on the matter, and make their agreement known to would-be parties to sub-federal treaties. But if the federal level disputes the sub-federal level's claim, as is the case in Canada, third states may hesitate to recognize the sub-federal unit's competence³¹. The recognition problem may operate as a sort of *de facto* federal veto over provincial claims to treaty-making capacity.

A final point about treaties at international law is the requirement of intent to create legal relations. This requirement is not found explicitly in the Vienna Convention; the International Law Commission considered it

29. Quoted in SHAW, *id.*, p. 157.

30. GOTLIEB, *loc. cit.*, note 43, p. 32.

31. I do not say that this will always be the case. In the past, there has been some suggestion that France recognized Quebec's claim to treaty-making competence. See McWhinney's discussion of France-Quebec-Canada relations in the 1960s, *supra* note 9, at 10-7, and I. BERNIER, *International Legal Aspects of Federalism*, London, Longman, 1973, p. 60. In the past few years, however, France has been more sensitive to the federal government's concerns. In 1996, Canada and France concluded a Mutual Legal Assistance agreement (cited but not reproduced in [1996] Can. T.S., 10 June 1996), art. 26 of which purported to authorize the provinces and territories of Canada to conclude agreements with France on all matters within the treaty. This «umbrella agreement» allowed Ottawa to assert a supervisory role over Quebec's purported treaty-making with France. (For an account of the development of «umbrella agreements» in the 1950s and '60s, see M. RAND, «International Agreements Between Canadian Provinces and Foreign States», (1967) 25 *U.T. Fac. L.R.* 75. See also Bernier, *op. cit.*, pp. 58-60.)

to be embraced within the phrase 'governed by international law' in art. 2 (1) (a)'s definition of 'treaty'³². Thus, for an instrument to be a treaty, *i.e.*, an agreement governed by international law, it must have been intended to create legal relations between the parties. Lacking such intention, the instrument is a non-binding agreement that, while possibly not entirely without legal effect³³, does not create international legal obligations. The relevance of intent for our purposes is that a foreign state that enters into an agreement with a Canadian province might do so with the understanding that the province is not competent to conclude treaties. In such a case the necessary intent to create legal relations may be lacking, and the supposed treaty rendered unenforceable whatever the province's competence to conclude treaties may be.

3 The federal case for an undivided treaty power

The Constitution Act 1867 (the British North America Act) betrays its origins in the English traditions of unwritten constitutionalism. It does not

It is by no means clear that such an umbrella agreement was needed, given that most if not all of the sorts of agreements Quebec and France might make under it could have been accomplished through non-binding intergovernmental agreements such as those concluded by Canadian provinces on a regular basis. But Canada's insistence upon a treaty was motivated, it appears, by the federal government's post-referendum strategy of combating Quebec claims to autonomy or international stature. Thus, in late 1997, Ottawa raised objections to a Quebec-France entente on support payments on the grounds that (1) the entente referred to France and Quebec as « contracting parties », a phrase which the federal government contended was reserved to sovereign states ; and (2) the entente made no mention of the Canada-France « umbrella agreement ». In a letter to the Quebec international affairs minister, M Sylvain Simard, the federal foreign affairs minister, Mr Lloyd Axworthy, reportedly accused Quebec of trying to arrogate to itself a status reserved for sovereign states : « Accord France-Québec : Axworthy en remet », *La Presse*, 11 November 1997, B4. See also « Pensions alimentaires : Simard estime qu'Ottawa prive les Canadiens », *Le Soleil*, 22 October 1997, A10, and « Perception des pensions alimentaires en France : Entente impossible », *Le Soleil*, 7 November 1997, A10.

This rather embarrassing episode brings to mind McWhinney's comments on a similar Ottawa-Quebec controversy over Gabon in 1968 : « Looking back, it may be suggested that unedifying public quarrels...have been rather damaging to all of the parties involved, for they reveal a preoccupation with old-fashioned, abstract and theoretical, questions of where sovereignty lies and whether it is divisible in any sense—in short, an atavistic preoccupation with the « symbols » of government at the expense of the substance... » : McWHINNEY, *op. cit.*, note 9, pp. 13-14.

32. « Reports of the Commission to the General Assembly » (UN Doc. A/6309/Rev. 1) dans *Yearbook of the International Law Commission 1966*, vol. 2, New York, United Nations, 1967, pp. 189. (UNDOC. A/CN.4/SER.A/1966/Add.1)

33. SIR R. JENNINGS and SIR A. WATTS (eds.), *Oppenheim's International Law*, 9th ed., vol. 2, Harlow, England, Longman, 1992, p. 1210.

purport to exhaust or encapsulate Canadian constitutional arrangements. Rather, it overlays a federal structure upon a largely uncoded parliamentary foundation³⁴. That foundation is referred to in the Preamble, which provides that Canada shall have 'a Constitution similar in Principle to that of the United Kingdom'. Included in the unwritten foundation of the Canadian constitution are royal prerogatives, meaning powers vested in the executive and exercisable by it without the participation of the legislature. Dicey aptly described the royal prerogative as « nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown³⁵ ». Today, most prerogative acts are done on advice, meaning that they are discharged not by the governor general or lieutenant governor personally but by their ministers. As a matter of day-to-day politics, the most significant prerogative still vested in the Crown may be foreign affairs. This prerogative includes the powers to make war and peace, send and receive ambassadors, and conclude (but not implement) treaties.

When Canada was formed, the foreign affairs prerogative, and the treaty power more particularly, remained a prerogative exercised in practice by the British foreign affairs secretary and the Foreign Office. The only mention of international treaties in the Constitution Act 1867 was s. 132, by which the federal Parliament and government were granted competence to perform « 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 Countries³⁶. » When Canada gained full independence from the United Kingdom in 1931, Empire treaties became a thing of the past and s. 132 fell away as a spent, but not repealed, provision. No constitutional amendment was made to take its place, or to accommodate more generally Canada's new powers over foreign policy. The seeds of controversy were sown by this failure to clarify to which order of government the foreign affairs prerogative passed.

34. While many parliamentary practices are entrenched in the *Constitution Act 1867* (for instance, quorum, parliamentary privilege, and the requirement of royal consent to money bills), many others are not. For instance, the most basic rule of Anglo-Canadian constitutional arrangements, namely that whatever the Governor General assents to upon the advice of the Senate and Commons is law, finds no explicit statement in the Act, though it is implied in the Royal Assent provisions (ss. 55 to 57) and in the definitions of Parliament and the Legislatures (ss. 17, 69 and 71).

35. A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, 10th ed., London, Macmillan, 1960, p. 424.

36. *Constitution Act 1867*, s. 132.

The position of the federal government has always been that the power to conclude treaties with foreign states is a prerogative of the federal Crown exclusively, rather than a prerogative shared by all Canadian executive governments³⁷. There are four possible arguments. The first relies on the Letters Patent by which the king delegated his powers in respect of Canada to the governor general. The second rests on the fact of Canada's statehood at international law. The third focuses upon the legislative division of powers, particularly the confinement of provincial legislatures to matters of a local nature. The fourth argument relies on actual constitutional usage.

Hogg contends that the exclusive federal power to make treaties is based upon the Letters Patent Constituting the Office of Governor General of Canada 1947³⁸, the principal instrument by which the sovereign's powers in respect of Canada are delegated to the governor general³⁹. This was the contention of the prime minister of the day, Mr. St Laurent, who told the House of Commons that «when the letters patent come into force, it will be legally possible for the Governor General, on the advice of the Canadian ministers, to exercise any of these powers and authorities[:] ... royal full powers for the signing of treaties, ratification of treaties, and the issuance of letters of credence for ambassadors⁴⁰.» Yet the Letters Patent argument is open to challenge. Clause II of those Letters reads :

And We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada, and for greater certainty but not so as to restrict the generality of the foregoing to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust We have reposed in him according to the several powers and authorities granted or appointed him by virtue of the Constitution Acts, 1867 to 1940 and the powers and authorities hereinafter conferred in these Letters Patent and in such Commission as may be issued to him under Our Great Seal of Canada and under such laws as are or may hereinafter be in force in Canada⁴¹.

37. See for instance : the comments (1948) of the prime minister, Mr St-Laurent, *infra* ; P. MARTIN, *Federalism and International Relations*, Ottawa, Queen's Printer for Canada, 1968, pp. 11-16 ; M. MACGUIGAN, « Le fédéralisme et les relations internationales du Canada », (1981) 12 *Politique internationale*, 189, pp. 195-196 ; *letter of 1 February 1985 to the Council of Europe from the Legal Bureau of the Department of External Affairs*, réimprimés dans (1986) 24 *C.Y.I.L.* 397.

38. See R.S.C. 1985, Appendix II, No. 31.

39. P. HOGG, *Constitutional Law of Canada*, édition sur feuilles mobiles, Scarborough, Carswell, 1997, section 11.2.

40. DÉBATS DE LA CHAMBRE DES COMMUNES DU CANADA, 1948, p. 1126 (Mr St Laurent).

41. *Letters Patent Constituting the Office of Governor General of Canada*, 1947, réimprimées dans R.S.C. 1985, App. I, No. 31. (The original text referred to the British North America Acts, 1867 to 1946.)

The federal argument is that the treaty power, formerly exercised by the Crown on the advice of British ministers, was passed to the federal government by this clause. But the clause applies only to those powers and authorities lawfully belonging to the sovereign «in respect of Canada». This phrase must be read, it seems, to exclude those powers and authorities lawfully belonging to the sovereign in respect of the provinces, for it is nowhere contended that the Letters Patent 1947 affect the office of lieutenant governor. Thus, if the passage of the treaty power from the UK to Canada in 1931 tracked legislative jurisdiction under the Constitution Act 1867 (which, as we will see, is the provincial argument), nothing in the Letters Patent changed that. To read «in respect of Canada» as meaning «in respect of the federal and provincial governments» only begs the question. A further difficulty in relying on the Letters Patent is that the theory fails to explain where the treaty-making power lay between 1931 and 1947.

The second argument for an exclusively federal treaty power draws this conclusion from the fact of Canada's status as a sovereign state at international law. The argument here is that Canada, as a single state for the purpose of international law, must have only one international personality and therefore only one government competent to act on the international scene⁴². This argument often finds support in comparative analyses of the constitutional structures of other federal states, most of which assign treaty-making exclusively to the federal level⁴³. The international law of

42. A typical exposition of this approach is J.-Y. GRENON, «De la conclusion des traités et de leur mise en œuvre au Canada», (1962) 40 *Can. B.R.* 151. This approach is supported by an American case, *United States v. Curtiss-Wright Export Corp.*, (1936) 299 U.S. 304, in which Sutherland J declared:

...the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the constitution, would have vested in the federal government as necessary concomitants of nationality....Otherwise, the United States is not completely sovereign.

Similarly, the external affairs minister, Paul Martin Sr, argued that «if individual constituent members of a federal state had the right to conclude treaties independently of the central power, it would no longer be a federation but an association of sovereign powers» (quoted in MORRIS, *loc. cit.*, note 43).

43. For such a comparative approach, see A.E. GOTLIEB, *Canadian Treaty-Making*, Toronto, Butterworths, 1968, pp. 25-27, and G. L. MORRIS, «The Treaty-Making Power: a Canadian Dilemma», (1967) 45 *Can. B.R.* 478, pp. 492-497. For a comparison of the treaty-powers of Quebec and the Belgian communities, see A.L.C. DE MESTRAL, «Le Québec et les relations internationales», dans P. PATENAUD (ed.), *Québec-Communauté Française de Belgique: autonomie et spécificité dans le cadre d'un système fédéral*, Montreal, Wilson & Lafleur, 1992, p. 209.

statehood and legal personality has been considered above. There are two points. First, as we saw, the international position is not as straightforward as this argument makes out. International law appears to permit the constituent units of a federal state to enjoy some measure of international personality, including competence to conclude treaties. Second, the comparative approach is not, on its own, conclusive. To say that other federations do not divide the treaty power between the federal and sub-federal levels suggests certain policy arguments against such a division here in Canada, but sheds no light on the actual position of Canadian law.

The third argument in support of a federal treaty-making power relies on the constitution's division of legislative powers. The argument is as follows. Matters of provincial legislative jurisdiction can generally be characterized as «merely local or private⁴⁴». By contrast, Parliament's jurisdiction extends to matters of national interest or, in the language of s. 91, to matters concerning «the Peace, Order, and good Government of Canada⁴⁵». Executive powers and responsibilities track the legislative division of powers: *Maritime Bank*⁴⁶. The obligations of the Canadian state at international law are properly associated with the federal residual power and not with provincial heads of jurisdiction because treaty obligations are not «merely local or private» but national, and indeed international. There are at least two problems with this argument. First, to found the federal treaty power in Parliament's residual peace, order and good government power runs contrary to the decision of the Privy Council in *Labour Conventions*⁴⁷ that international treaties are not a discrete head of jurisdiction under the 1867 Act, but fall instead to be implemented by whichever order has jurisdiction over the treaty's subject-matter. Historically, *Labour Conventions* has been an unpopular decision among English-Canadian commentators⁴⁸, and has even been questioned by two Chief Justices of Canada⁴⁹. Nevertheless, it was cited with approval by the Supreme Court of Canada as recently as 1994⁵⁰, and remains the law⁵¹. A second problem

44. *Constitution Act 1867*, s. 92 (16).

45. *Constitution Act 1867*, preamble of s. 91.

46. [1892] A.C. 437 (P.C.).

47. *AG Canada v. AG Ontario*, [1937] A.C. 326 (P.C.), (hereafter *Labour Conventions*).

48. For a full discussion, see G. V. ERT, «Using treaties in Canadian courts», (2000) 38 C.Y.I.L. (à paraître).

49. *Francis v. The Queen*, [1956] S.C.R. 618, 621 per Kerwin CJ; *MacDonald v. Vapor Canada*, [1977] 2 S.C.R. 134, 168-169 per Laskin CJ. See also *Schneider v. The Queen*, [1982] 2 S.C.R. 112, 134-135 per Dickson CJ.

50. *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 611.

51. VAN ERT, *op. cit.*, note 48.

with this argument is its characterization of provincial power as « merely local or private » and thus inconsistent with treaty-making. Notice first that this is question begging: treaties are only necessarily national in scope if the provinces lack the power to bind themselves, and themselves alone, by concluding treaties. That objection aside, it is mistaken to assume that the content of treaty obligations cannot be local or private. States today conclude treaties that have as much to do with their own internal affairs as they do with international affairs. The Convention on the Rights of the Child 1989⁵², the North American Free Trade Agreement 1992⁵³, the Agreement Establishing the World Trade Organization 1994⁵⁴, and a great number of human rights instruments are treaties which put into question classical notions of state sovereignty by purporting to control the signatory states' regulation of their own nationals and economies.

The fourth argument for an undivided federal treaty power is founded on a theory of the development of the unwritten constitution. According to this approach, the treaty-making power has settled exclusively on the federal government by constitutional practice. As Duff CJ explained in *Re Weekly Rest* (the Supreme Court of Canada's judgment in *Labour Conventions*),

As a rule, the crystallization of constitutional usage into a rule of constitutional law to which the Courts will give effect is a slow process extending over a long period of time ; but the Great War accelerated the pace of development in the region with which we are concerned, and it would seem that the usages to which I have referred, the practice, that is to say, under which Great Britain and the Dominions enter into agreements with foreign countries in the form of agreements between governments and of a still more informal character, must be recognized by the Courts as having the force of law⁵⁵.

The argument here is that the unwritten constitution develops by political and judicial recognition of the legitimacy of adopted practices. In the case of the treaty power, these practices should include not only the assumption of the power by federal officials and the general (though not unanimous) consent of their provincial counterparts, but also the practice of other states in recognizing the federal government, rather than the provinces, as the authority competent to bind Canada at international law. I will

52. [1992] *Can. T.S.* no. 3. On the provincial nature of the Convention's provisions, see Strayer JA in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 127, 141 (F.C.A.).

53. [1994] *Can. T.S.* no. 2.

54. Ratified by Canada 31 December 1994.

55. *Re the Weekly Rest in Industrial Undertakings Act, the Minimum Wages Act, and the Limitation of Hours of Work Act*, [1936] S.C.R. 461, 477 per Duff CJ. Hereafter *Re Weekly Rest*.

return to this argument below, but for now we may note two problems with it. The first is the concept of crystallization itself, of which the Supreme Court of Canada was critical in *Re Resolution to Amend the Constitution*⁵⁶. The second difficulty with this argument is Quebec's persistent objection, which undermines the legitimacy of the practice and thus its suitability to be recognized as unwritten constitutional law. It is to the Quebec position that I now turn.

4 The divided Crown : the provincial argument

The argument for the existence of a provincial *jus tractatum* was first made by Ontario, not Quebec. The Attorney General for Ontario made the argument before the Supreme Court of Canada, and later the Privy Council, in *Labour Conventions*. Before the Board, counsel for the Attorney General submitted that

[t]here are no grounds whatever for saying that the parties to advise His Majesty in matters relating to the jurisdiction of the Provinces have in some way come to be the Dominion Ministers. The Province has the right to advise the Crown in matters where its legislative powers apply. Ontario has a right to enter into an agreement with another part of the British Empire or with a foreign State⁵⁷.

This argument had enjoyed limited success before the Supreme Court of Canada. It won some support from Rinfret J in dissent⁵⁸, but was not supported by Duff CJ (writing for himself and Davis and Kerwin JJ)⁵⁹ nor by Crocket J.⁶⁰ The remaining judge, Cannon J, dissented without specifically considering the argument. Before the Privy Council, the case was decided on other grounds. Their Lordships declined to rule on provincial competence to conclude treaties.

56. *Re Resolution to Amend the Constitution* (the *Patriation Reference*), [1981] 1 S.C.R. 753.

57. [1937] A.C. 326, 333 (P.C.).

58. *Re Weekly Rest*, précité note 55, 510-512. At 512, Rinfret J wrote, « In Canada, the practice has grown gradually to enter into international conventions through the medium of the Governor in Council. It does appear that it would be directly against the intentment of the *British North America Act* that the King or the Governor General should enter into an international agreement dealing with matters exclusively assigned to the jurisdiction of the provinces solely upon the advice of the federal Ministers who, either by themselves or even through the instrumentality of the Dominion Parliament are prohibited by the Constitution from assuming jurisdiction over these matters. »

59. *Id.*, 496. Duff CJ held that « in no respect does the Lieutenant-Governor of a province represent the Crown in respect of relations with foreign Governments. » This statement is clearly obiter, and on appeal was explicitly left undecided by the Privy Council. Yet proponents of the undivided treaty power, including the Government of Canada, have made disingenuous use of this dictum as though it were *ratio decidendi*. See E. McWHINNEY, *op. cit.*, note 9, pp. 6-7.

60. *Re Weekly Rest*, précité note 55, 535.

Without a ruling the argument persisted, though its champion changed. Ontario has long abandoned any claim to treaty-making power. As an Ontario government official explained in 1985, « Ontario has no interest whatsoever in a foreign policy which could be described as provincial. There is only one foreign policy and that is that of the federal government⁶¹. » Most other Canadian provinces agree with this position, though not all would put it so strongly. Today, the sole proponent of the argument that provincial governments are competent to conclude treaties binding their provinces at international law is Quebec⁶². Indeed, the argument has come to be known as the Gérin-Lajoie thesis, after the Quebec minister of education who revived the argument and forcefully asserted Quebec's power to negotiate and conclude, within its legislative jurisdiction, agreements with foreign states. The departure of M Gérin-Lajoie from Quebec's political scene has not dampened enthusiasm for his argument, particularly among sovereigntists. In 1999, the Bloc Québécois MP, Daniel Turp, introduced private member's legislation that purported to recognize « the royal prerogative of Her Majesty in right of a province with respect to the negotiation and conclusion of treaties⁶³ ». That bill died on the order paper, but a recent enactment of the Assemblée nationale contained an elaboration of the same claim. Section 7 of Quebec's so-called Bill 99 reads as follows :

The Québec State is free to consent to be bound by any treaty, convention or international agreement in matters under its constitutional jurisdiction.

No treaty, convention or agreement in the areas under its jurisdiction may be binding on the Québec State unless the consent of the Québec State to be bound has been formally expressed by the National Assembly or the Government, subject to the applicable legislative provisions.

The Québec State may, in the areas under its jurisdiction, establish and maintain relations with foreign States and international organizations and ensure its representation outside Québec⁶⁴.

61. John Carson, speech at the University of Alberta reprinted in T. KEATING and D. MUNTON, *The Provinces and Canadian Foreign Policy: Proceedings of a Conference, University of Alberta, Edmonton, Alberta, 28-30 March 1985*, Toronto, Canadian Institute of International Affairs, 1985, p. 6.
62. See A. JACOMY-MILLETTE, *Treaty Law in Canada*, Ottawa, University of Ottawa Press, 1975, pp. 78-94.
63. *Bill C-214*, An Act to provide for the participation of the House of Commons when treaties are concluded, 2d Sess., 36th Parliament, 1999, cl. 6.
64. An Act respecting the exercise of the *Fundamental Rights and Prerogatives of the Québec People and the Québec State*, S.Q. 2000, c. 46, s. 7. This is not the only Quebec law declaring the province's competence to conclude international agreements. Chapter 3 of the *Loi sur le ministère des Relations internationales*, R.S.Q., c. M-25.1 provides, in s. 19, that the minister of international relations shall oversee the negotiation and implementation of international agreements, and proceeds, in ss. 20 to 26, to elaborate upon and regulate those powers.

It is interesting to note that s. 7 asserts no more than Quebec's right to conclude treaties within its constitutional jurisdiction ; no claim is made to conclude treaties touching federal matters.

The legal argument that provinces enjoy a power to make treaties is founded on the decision of the Privy Council in *Liquidators of Maritime Bank v. Receiver General of New Brunswick*⁶⁵. The case had nothing to do with treaties. Rather, the question there was whether the government of New Brunswick was entitled to preference over other unsecured creditors of an insolvent bank. At common law, the Crown enjoyed preferred creditor status as a matter of prerogative. The liquidators argued that the government of New Brunswick was not entitled to preference because the prerogatives of the Crown could not be invoked by provincial governments. The governor general was the only representative of the Crown in Canada, and the lieutenant governors were mere federal appointees. The Privy Council forcefully rejected this argument, declaring that « a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government⁶⁶ ». Thus the prerogative powers of the Crown do not vest wholly in the governor general, but are distributed between the federal and provincial executives.

When *Maritime Bank* was decided, the Crown's prerogative to conclude treaties on behalf of Canada was exercised by the Queen on the advice of her British ministers. Clearly, their Lordships did not contemplate that their decision would be used to found the argument for a provincial treaty-making power. Nevertheless, that power follows from the logic of the judgment. If treaty-making is an aspect of the royal prerogative, and the lieutenant governor of a province is 'as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government', then the treaty power must vest in the lieutenant governor and governor general alike — assuming that treaty-making is one of the « purposes of provincial government ». Those purposes, it seems, are set out principally in s. 92 of the Constitution Act 1867. They do not exclude the making of treaties with foreign states. Rather, the phrase « provincial purposes » serves only to restrict the subject matters of provincially-concluded treaties to those falling within provincial legislative jurisdiction. In short, this argument

65. *Maritime Bank*, précité note 46.

66. *Id.*, 443. See also *Hodge v. The Queen*, [1883] 9 App. Cas. 117 (P.C.), upon which the Board relied, and the later Privy Council decision in *Bonanza Creek Gold Mining v. The King*, [1916] 1 A.C. 556.

proposes that there is no legal bar to the conclusion by provincial ministers, in the name of the lieutenant governor, of legally binding treaties within provincial jurisdiction.

We have already considered the federal arguments for an undivided treaty power, all of which strive (with doubtful success) to rebut the provincial claim. A further argument against the Gérin-Lajoie thesis might be that it artificially divides the Crown's power to conclude treaties from the general prerogative over foreign affairs of which it forms a part. The foreign affairs prerogative includes not only treaty-making but also diplomatic relations, the waging of war, and the conclusion of peace. These functions are not divisible from each other, but interconnected. Thus, the Crown may declare war pursuant to the terms of an alliance founded upon a treaty and administered in part by the diplomatic corps, and later cease hostilities with the enemy under the terms of a peace treaty negotiated by the Crown's ambassadors. The Quebec position has yet to go so far as to assert a power in the lieutenant governor in council to declare war, or to decline to go to wars declared by the federal government. How, one might object, can the Crown's power to conclude treaties be so neatly distinguished from its other, seemingly federal, foreign affairs powers?

The Quebec thesis has a strong answer to this challenge. As regards the prerogative power of diplomatic relations, such relations are already engaged in by the provinces. Several provinces have permanent offices abroad, only some of which operate under the aegis of Canadian delegations. While the federal government has occasionally grumbled, no serious constitutional challenge has ever been mounted against the power of the provinces to establish foreign missions. Nor could such challenge be made, for there is nothing in the Constitution Act 1867 placing diplomacy within exclusive federal jurisdiction. Turning now to the prerogatives of war and peace, *Maritime Bank* supplies the answer: national defence is clearly a matter of federal jurisdiction under s. 91 (7) of the Constitution Act 1867. The Quebec position claims no powers of war and peace, nor any other power within federal jurisdiction, as part of the provincial Crown's prerogatives. In sum, the foreign affairs prerogative is indeed susceptible to division: the diplomatic and treaty powers are exercisable by the Crown in the right of Canada and the provinces, while the powers of war and peace are assigned to the federal Crown by s. 91 (7) and the rule in *Maritime Bank*.

5 Canadian Case-Law

No Canadian court has yet answered the question of the capacity of provincial governments to bind their provinces by treaty at international law. Yet there is some case-law of relevance. First, there is the Supreme

Court of Canada's consideration of Canadian legal personality at international law in *Re Offshore Mineral Rights of British Columbia*⁶⁷. Second, there are two judgments in which the capacity of the provinces to conclude treaties was at issue, but not decided: *Attorney General for Ontario v. Scott*⁶⁸ and *Bazylow v. Collins*⁶⁹.

Re Offshore Mineral Rights held that Canada and not British Columbia enjoyed property rights and legislative jurisdiction over the territorial sea and continental shelf adjacent to British Columbia. In determining the territorial sea question, the Court placed great emphasis on Canada's achievement of sovereignty at international law. « There can be no doubt now », wrote the Court in an unsigned judgment,

that Canada has become a sovereign state....It is Canada which is recognized by international law as having rights in the territorial sea adjacent to the Province of British Columbia....Canada has now full constitutional capacity to acquire new areas of territory and new jurisdictional rights which may be available under international law....Canada is recognized in international law as having sovereignty over a territorial sea three nautical miles wide. It is part of the territory of Canada⁷⁰.

These observations do not say explicitly that Canada alone has international legal personality. Whether the provinces also have some degree of international personality was not considered by the Court. But the thrust of these comments is clear: the achievement of independence from the United Kingdom benefited Canada as a whole more than, or perhaps rather than, its constituent provinces. If the provinces have no legal personality at international law, their governments may not bind them through treaties, for they have no authority to bind Canada as a whole, and the territory for which they do have authority is not a subject of international law, and is therefore incapable of being bound.

The Court in *Re Offshore Mineral Rights* also noted the role of international recognition in deciding the dispute. They observed that the rights in the territorial sea depend upon recognition by other sovereign states, and that Canada is recognized as a sovereign state internationally. The implied contrast here is to the unrecognized « state » of British Columbia. The Court went on to explain that Canada « is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea⁷¹ ». The significance of this decla-

67. [1967] S.C.R. 793 (hereafter *Re Offshore Mineral Rights*).

68. [1956] S.C.R. 137 (hereafter *Scott*).

69. [1984] C.A. 268 (hereafter *Bazylow*).

70. *Re Offshore Mineral Rights*, précité note 67, 816.

71. *Id.*, 817.

ration is perhaps not obvious, but if « treaties » is substituted for « arrangements » »- and such arrangements do ordinarily take the form of treaties — the Court's meaning is plain: whatever the merits of the Gérin-Lajoie thesis as a matter of Canadian constitutional law, the recognition requirement in international law makes the federal government Canada's only effective treaty-making power.

I have attempted to demonstrate how the judgment in *Re Offshore Mineral Rights* may be interpreted as relevant to the question of whether provinces enjoy capacity to conclude treaties. Yet I would suggest that, on balance, the Court's statements about Canada's acquisition of international legal personality ultimately do not address the question at issue here, namely, the question of how Canada's newly-acquired sovereignty is distributed between the different levels of government.

The only Supreme Court judgment specifically to consider the capacity of provinces to conclude internationally binding agreements is the 1955 case of *A-G Ontario v. Scott*⁷². In point of fact there was no written agreement before the court in this case. But some sort of agreement clearly existed between Ontario and the United Kingdom, for Ontario's Reciprocal Enforcement of Maintenance Orders Act⁷³ gave effect to maintenance orders made by English courts, and English law accorded Ontario orders the same recognition. Such an order had been made against Scott in England and was about to be given effect in Ontario, where he now resided, when he challenged the Act as ultra vires the Legislature. Scott argued, *inter alia*, that the arrangement between Ontario and the UK was effectively a treaty to which the province had no authority to become a party, because treaty-making power resided exclusively in the federal government. How this argument could be used to invalidate legislation is hard to see: even if the Legislature were motivated by intent to implement a constitutionally improper treaty, the Act would surely remain valid so long as it could be brought under s. 92 of the British North America Act 1867. For, as Lord Atkin held in *Labour Conventions*, « there is no such thing as treaty legislation as such⁷⁴ ». The judgments in *Scott* did not make this point, however. Rand J (for himself and three others) held that the underlying agreement behind the Act was not a treaty but a non-binding agreement between the two jurisdictions: « The enactments of the two legislatures [Queen's Park and Westminster] are complementary but voluntary; the application of each is dependent on that of the other: each is the condition

72. *Scott*, précité note 68.

73. R.S.O. 1950, c. 334.

74. *Labour Conventions*, précité note 47, 351.

of the other ; but that condition possesses nothing binding to its continuance. The essentials of a treaty are absent...⁷⁵ » Similarly, Abbott J (for himself and two others) affirmed the view of the court below that there was no « valid legal reason why the Province of Ontario cannot, in relation to a subject-matter within its legislative jurisdiction, make a reciprocal arrangement with another Province or a foreign State in relation to such subject-matter⁷⁶. » Ultimately, *Scott* says nothing about provincial capacity to conclude treaties, for it describes the agreement in issue as mere non-binding. *Scott* is notable, however, as an instance of Supreme Court recognition of the power of provinces to enter into non-binding international agreements.

To my knowledge, the only other case to have considered provincial treaty-making is the judgment of the Quebec Court of Appeal in *Bazylo v. Collins*⁷⁷. Like *Scott*, this case concerned the validity of a provincial law giving effect to family law orders from outside the jurisdiction. Unlike *Scott*, however, the Act in question⁷⁸ explicitly implemented an 'entente' between the governments of France and Quebec on mutual aid in judicial matters. The appellant admitted that the subject-matter of the Act was within provincial jurisdiction, but contended that Quebec had no power to sign the entente. Rothman J for the court noted that the agreement between the two governments « appears to be clothed in the formal dress of something more than a simple administrative arrangement⁷⁹ ». This treaty-like form is in keeping with Quebec's claim that it is competent to conclude binding treaties at international law. Rather than decide that matter, Rothman J preferred to « read down » the would-be treaty. He found that « whatever the *form* of the Entente, one must look beyond it to its substance⁸⁰ », and went on to say that « [i]n spite of its formal appearance, I agree with the trial judge that the Entente was simply an administrative arrangement between the two jurisdictions and not a binding agreement, much less an international treaty⁸¹ ».

Here as in *Scott*, the court avoided the question of provincial competence to conclude treaties by holding that the agreements in question were

75. *Scott*, précité note 68, 142.

76. *Id.*, 147. The remaining judge, Locke J, mentioned Scott's treaty argument only briefly : see *id.*, pp. 153-154.

77. *Bazylo*, précité note 69.

78. *Loi assurant l'application de l'entente sur l'entraide judiciaire entre la France et le Québec*, L.Q. 1978, c. 20.

79. *Bazylo*, précité note 69, 270.

80. *Ibid.*

81. *Id.*, 271.

not treaties. It is tempting in both cases to read into their reasons the rule that, had the agreements been treaties, they would have been *ultra vires* the provincial government. But neither case in fact stands for that proposition, and indeed that proposition would not have helped resolve the cases for, as I have argued, an otherwise *intra vires* Act of the Legislature could not be made *ultra vires* that Legislature due simply to the provincial government's unconstitutional attempt to conclude a treaty. In my view, the court in *Bazylo* need not have entertained the appellant's treaty argument. For even if the agreement were intended by the parties to be a binding treaty at international law, that fact alone could not have impugned the Legislature's Act. The separation of powers doctrine requires that the validity of legislative Acts not turn on government intentions in introducing and supporting them. Nor may an Act be *ultra vires* simply because it aims to implement a treaty, for treaty implementation is not a distinct head of power under the Constitution Act 1867: *Labour Conventions*.

The three cases considered here appear in some respects to lean towards recognizing an undivided federal treaty-making power. But they do not decide the issue. For all the theories advocated by politicians and academics from both sides, the treaty power question remains unanswered as a matter of law.

6 The unwritten constitution : crystalization and consent

Having now considered the arguments for and against provincial competence to conclude treaties, and the positions at international and Canadian law, one would hope to be in a position to take a side. But to my mind, the debate comes out a draw. The federal arguments from the Letters Patent, Canadian statehood, and the division of powers fail, I suggest, to rebut Quebec's position, founded as it is on the strong authority of *Maritime Bank*. As a matter of pure constitutional law, the Quebec argument seems a winner. Yet the question of provincial treaty-making is not one of pure constitutional law, for it also involves constitutional practice and international recognition. It is here that the Quebec position breaks down. Canadian practice in treaty-making points clearly towards an undivided federal treaty power, in spite of Quebec's persistent objections. Likewise, international political reality suggests that, with the possible exception of France⁸², no other state recognizes Canadian provinces as competent to conclude treaties.

The question, then, is how to reconcile constitutional law with constitutional usage and international practice. The argument for provincial com-

82. See the discussion at *supra* note 31.

petence makes no attempt to do that. Nor do three of the four pro-federal arguments canvassed above. Only the «crystallization of constitutional usage» argument offers any means of reconciling Quebec's seemingly sound statement of the law, founded on *Maritime Bank*, with the blunt reality that the federal claim is accepted by most provinces and recognized by state practice at international law. If there is a solution to the treaty-power problem, it must lie somewhere here. But as I observed earlier, there are two serious objections to the argument that the treaty power has «crystallized» in the federal Crown.

The first objection is to the notion of crystallization itself. The concept was carefully scrutinized, and rejected, by the majority of the Supreme Court of Canada in the *Patriation Reference*⁸³. That case is a leading statement, not only in Canadian law but also in the UK and other Commonwealth jurisdictions, of the distinction between constitutional laws and constitutional conventions. A convention is an obligatory rule of constitutional practice, a sort of constitutional morality, whose enforcement lies not with courts of law but with the very political actors who are required to observe it. As the majority (on the convention question) explained in the *Patriation Reference*, «[t]he conventional rules of the Constitution present one striking peculiarity. In contradistinction to the laws of the Constitution, they are not enforced by the Courts⁸⁴.» «The judgment gave as an example the convention whereby the queen, the governor general or the lieutenant governor grants royal assent to every bill passed by both Houses of Parliament or a provincial Legislature.» «[I]f this particular convention were violated and assent were improperly withheld, the Courts would be bound to enforce the law, not the convention. They would refuse to recognize the validity of a vetoed bill⁸⁵.» The majority hastened to add, however, that the legal unenforceability of conventions does not mean their breach goes without a remedy. Rather, conventions are enforced by the sense of propriety shared by our political actors — from politicians to officials to the people themselves. Nor does the lack of legal enforcement render conventions any less «constitutional»: «it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence⁸⁶».

The distinction between law and convention was essential to Manitoba's argument in the case. Counsel for the Manitoban Attorney-

83. *Re Resolution to Amend the Constitution*, précité note 56. By 'majority' I mean the majority on the legal question, not the convention question.

84. *Id.*, 880.

85. *Id.*, 881.

86. *Id.*, 883.

General contended that there existed a convention of the Canadian constitution that the Houses of Parliament would not pass a resolution calling upon the queen to cause to be introduced in the British Parliament an amendment to the Constitution of Canada affecting the powers of the provinces without their consent. From here, the Attorney-General went further and argued that this convention had crystallized into a rule of law enforceable by the courts. The Supreme Court wholly rejected the theory that a constitutional convention might become enforceable before the courts of law. In doing so, their Lordships examined the reasons of Duff CJ on «crystallization», quoted above, and held that the Chief Justice's comments were directed toward «an evolution...of customary international law; the attainment by the Canadian federal executive of full and independent power to enter into international agreements⁸⁷.» Having distinguished (not very satisfactorily) Duff CJ's judgment, their Lordships rejected the Attorney-General's crystallization argument with the observation that, «[w]hat is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute⁸⁸.»

Does this judgment force us to abandon any argument that the treaty-power has crystallized in the federal government to the exclusion of the provinces? In my view, it does not. Manitoba's submission was that a constitutional convention had become constitutional law. The federal treaty-power argument, by contrast, does not rest on a convention. Clearly the *Patriation Reference* excludes the argument which runs, «It has been a convention of the Canadian constitution that the power to conclude treaties resides in the federal government alone, and that convention has now become enforceable as law.» But the «*Patriation Reference*» does not exclude a similar crystallization argument predicated not on convention but on constitutional usage. That argument may be sketched as follows: «Upon Canada's attainment of full independence, no law of the written constitution assigned the treaty-making power. From the very outset, however, the practice was that the federal government exercised that power. Likewise, the government of Canada was recognized by other states as competent to bind Canada at international law. This practice never achieved the status of a constitutional convention, for it lacked a convention's obligatory character; it was not a matter of political morality. It was simply a usage developed in the absence of a clear rule. That usage has now crystallized into an unwritten constitutional law enforceable by our courts.» This crystallization argument is fundamentally differ-

87. *Id.*, 778.

88. *Id.*, 784.

ent from the one rejected in the *Patriation Reference*, for it involves no suggestion that constitutional conventions can become enforceable laws. Rather, the argument is that constitutional usages may become unwritten laws.

What is the difference between a constitutional usage and a constitutional convention? The phrase «constitutional usage» is precisely that which Duff CJ used in *Re Weekly Rest*. That the Chief Justice used this phrase instead of the phrase «constitutional convention» suggests that he was well aware that conventions were unenforceable as laws⁸⁹. It was his view, however, that «constitutional law consists very largely of established constitutional usages recognized by the Courts as embodying a rule of law⁹⁰». The difference between constitutional usages and constitutional conventions is illustrated in a passage from Turpin:

The working of our system of government is conditioned by a mass of usages or practices which must be taken into account if the system is to be properly understood. Some of these usages affect the behaviour of the principal organs of the state or their mutual relations, while others operate at lower levels of the conduct of official business and may not be dignified as having a constitutional character: here again we approach the uncertain limits of «the constitution». Among higher level usages are some that are distinguished by their obligatory character as «conventions of the constitution⁹¹».

A constitutional usage, then, is one which is constitutional in nature (meaning that it concerns the operation of government) but which lacks the obligatoriness that renders its breach «unconstitutional in the conventional sense⁹²».

If we accept the distinction between constitutional usages and constitutional conventions, we must next consider the existence of unwritten constitutional laws. Here we withdraw somewhat from what Turpin calls the «uncertain limits» of the constitution. For the Supreme Court of Canada has unequivocally held that the constitution consists of both written and unwritten laws. In the *Patriation Reference*, the majority (on the convention question), declared:

A substantial part of the rules of the Canadian Constitution are [sic] written. They are contained not in a single document called a Constitution but in a great variety of statutes some of which have been enacted by the Parliament at Westminster,

89. The majority insisted that Duff CJ was aware of this point, and that his judgment was consistent with it: *id.*, 778-779.

90. *Re Weekly Rest*, précité note 55, 476.

91. C. TURPIN, *British Government and the Constitution: Text, Cases and Materials*, 3d ed., London, Butterworths, 1995, pp. 87-88.

92. *Re Resolution to Amend the Constitution*, précité note 83, 909.

such as the *British North America Act*, 1867..., or by the Parliament of Canada, such as the *Alberta Act*, 1905...; the *Saskatchewan Act*, 1905...; the *Senate and House of Commons Act*..., or by the provincial Legislatures, such as the provincial electoral Acts. They are also to be found in Orders in Council...

Another part of the Constitution of Canada consists of the rules of the common law. These are rules which the Courts have developed over the centuries in the discharge of their judicial duties⁹³.

Similarly, in *Re Provincial Court Judges* Lamer CJ confirmed that « the Constitution embraces unwritten, as well as written rules⁹⁴ ». Some examples of unwritten laws of the constitution include: the rule that the Crown is not a source of law⁹⁵; the doctrine of implied repeal⁹⁶; the rule that customary international law is incorporated by the common law of Canada⁹⁷; the requirement that treaties be implemented by legislation to have domestic effects (a version of the prohibition on Crown legislation)⁹⁸; and the law of parliamentary privilege⁹⁹.

93. *Id.*, 876.

94. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, 68. See also *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

95. That rule is unwritten in the sense that it is not entrenched in the Constitution of Canada as described in s. 52(2) of the *Constitution Act 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. Yet the rule that the Crown cannot unilaterally make law finds written expression in case-law and in the Bill of Rights 1689, an Act of the UK Parliament which passed into Canadian law by reception. That Act continues in force in all Canadian jurisdictions. As Brun and Tremblay observe, « on peut toujours plaider l'application au Canada de certains anciens statuts anglais qui consistent l'armature de base du droit constitutionnel britannique, tels la *Magna Carta* de 1215, la *Petition of Right* de 1627, le *Bill of Rights* de 1689 ou l'*Act of Settlement* de 1700 »; H. BRUN et G. TREMBLAY, *Droit constitutionnel*, 2nd ed., Cowansville, Québec, Les Éditions Yvon Blais, 1990, p. 19. The rule that the executive lacks legislative power is also implied by the definitions of the federal and provincial legislatures in the *Constitution Act 1867*.

96. That doctrine may, it seems, be subject to the operation of « primacy clauses » and other so-called manner and form requirements. See HOGG, *op. cit.*, note 39, at section 12.3(b).

97. For a lengthy discussion of the incorporation of customary international law in Canada, see VAN ERT, *International Law in Canada: Principles, Customs, Treaties and Rights*, mémoire de maîtrise, Toronto, Faculté des études supérieures, Université de Toronto, 2000, chapitre 3.

98. *Labour Conventions*, précité note 57; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Francis*, précité note 49; *Baker v. Canada*, [1999] 2 S.C.R. 817.

99. In respect of Parliament, those privileges are acknowledged but not set out in s. 18 the *Constitution Act 1867*. No mention of the parliamentary privileges of provincial Legislatures is made in the 1867 Act.

How, then, do unwritten constitutional laws arise? They have no single source. The many laws and customs of parliamentary privilege, for instance, arose from parliamentary practice recognized by the courts and, in some cases, declared in legislation (such as the art. 9 of the Bill of Rights 1689)¹⁰⁰. The implementation of customary international law is a judge-made rule of the common law. Implied repeal has its origins in the doctrine of parliamentary sovereignty, the origins of which are obscure but appear to derive from positivist political theory, common law adjudication, and constitutional usage¹⁰¹. In short, unwritten constitutional laws have no single author, no standard form, and no common pedigree. The most that can be said about them as a general proposition is that they arise from constitutional practice and are given the imprimatur of law by the judges. This is what I take Duff CJ to have meant when he spoke of « the crystallization of constitutional usage into a rule of constitutional law to which the Courts will give effect¹⁰² ».

The *Patriation Reference*, properly understood, does not exclude the argument that an undivided federal treaty-making power is established in Canadian constitutional usage and may have crystallized into an unwritten constitutional law cognizable by the courts. There remains, however, the second objection to the crystallization argument, namely that since 1965 if not earlier, successive Quebec governments have denied the existence and legitimacy of an undivided federal treaty power. What effect, if any, does Quebec's persistent objection have on the development of unwritten constitutional laws? Here we are catapulted far past Turpin's uncertain limits of the constitution. There is, quite simply, no legal answer to this question. Rather, there are only competing normative perspectives on the nature of Canadian constitutional society. I do not propose to address that fascinating and, in my view, increasingly urgent question here. I will say only that it is unfathomable to me that Quebec's long and continuing opposition to the existence of an undivided federal treaty power could have no effect whatever on the purported development of an unwritten constitutional law. As James Tully has brilliantly demonstrated, the principle of consent is not only a foundation of Canada's ancient constitutional arrangements but also a touchstone for future constitutional development in the post-imperial

100. Art. 9 reads, « That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. »

101. See J. GOLDSWORTHY, *The Sovereignty of Parliament: history and philosophy*, Oxford, Clarendon Press, 1999.

102. *Re Weekly Rest*, précité note 55, 477.

age¹⁰³. In my view, Quebec's persistent objection has the effect of precluding the development of any unwritten constitutional law in favour of an exclusively federal treaty-making power. Thus the question cannot be resolved by law, but only by political dialogue between the parties leading to a constitutional solution.

7 Judicial use of provincial international agreements

In the final part of this essay I consider how, if at all, courts may make use of provincial international agreements in deciding cases. Treaties, being part of public international law, are judicially noticed by Canadian courts¹⁰⁴. Furthermore, Canadian courts strive to construe domestic legislation according to the interpretive presumption that the legislature enacting the law did not intend to breach Canada's treaty obligations. I call this interpretive rule the treaty presumption¹⁰⁵. A particularly potent application of the treaty presumption was revealed in the Supreme Court of Canada's landmark judgment in *Baker v. Canada*, in which the treaty presumption was applied to a statutory grant of discretion in such a way as to control the exercise of administrative decision-making by reference to Canada's international obligations¹⁰⁶. If we accept that provincial international agreements are non-binding (as a matter of fact if not indisputably as

103. J. TULLY, *Strange multiplicity: constitutionalism in an age of diversity*, Cambridge, Cambridge University Press, 1995.

104. The leading Canadian case is the Supreme Court of Canada's decision in *The North v. R.*, [1906] 37 S.C.R. 385, 394. See also *R. v. Blanco and Rios*, [1992] 97 Nfld. & P.E.I.R. 86, 89 (Newf. S.C.T.D.). In English law, see *Post Office v. Estuary Radio Ltd.*, [1968] 2 Q.B. 740, 756-757, (Eng. C.A.), approved by Pigeon J (dissenting) in *Capital Cities Communications v. C.R.T.C.*, [1978] 2 S.C.R. 141, 189-190. See also *In re Queensland Mercantile and Agency Company*, [1892] 1 Ch. 219, 226 (Eng. C.A.). For secondary sources, see *Halsbury's Laws of England*, 4th ed., vol. 17, London, Butterworths, 1994, paragraph 100; F. A. BENNION, *Statutory Interpretation: a Code*, 3rd ed., London, Butterworths, 1997, p. 624; A. F. BAYESKY, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation*, Toronto, Butterworths, 1992, pp. 138-139. See also E. A. DRIEDGER, *The Construction of Statutes*, Toronto, Butterworths, 1974, pp. 129-131.

105. The leading cases are: *Bloxam v. Favre*, [1883] 8 P.D. 101 13 107 (Eng. C.A.); *Ahmad v. ILEA*, [1978] 1 Q.B. 36 (Eng. C.A.) per Scarman LJ at 48D-E; *R. v. Sharpe*, [2001] S.C.C. 2 (File No.: 27376), para 175, citing *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 349-350 and *Baker v. Canada*, [1999] 2 S.C.R. 817. The leading statement of the treaty presumption in the Canadian secondary literature is Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., Toronto, Butterworth, 1994, p. 330. For a discussion of the treaty presumption see VAN ERT, *op. cit.*, note 51. For a broader discussion of the principle of international legality, of which the treaty presumption is a facet, see VAN ERT, *op. cit.*, note 97, *passim*.

106. For a lengthy discussion, see VAN ERT, *op. cit.*, note 51.

a matter of law) and therefore are not treaties, the interpretive question which arises is, to what extent are non-binding provincial international agreements analogous to treaties for the purposes of the treaty presumption?

The rule according to which treaties are judicially noticed as law by Canadian courts does not extend to provincial international agreements, for the simple reason that they are non-binding and therefore cannot be sources of law. Thus, courts are not obliged to look to these non-binding agreements in the course of statutory interpretation. Yet such agreements might nevertheless be brought before the court by parties to litigation, for the purpose of arguing that a given provincial statute ought to be interpreted in the light of, and consistent with, the agreement. Such a proposition is not, of course, a denial of the competence of a provincial legislature to violate such international commitments by enacting inconsistent laws. Provincial legislatures are competent to legislate in violation of international law¹⁰⁷, and are *a fortiori* competent to breach non-binding international agreements. The argument here is simply that provincial legislation should be presumed not to violate non-binding international agreements until clear intent to do so is shown, just as the treaty presumption requires that legislatures be presumed not to violate international treaties unless their intent to do so is unambiguously made out.

The force of this argument, as regards both treaties and non-binding agreements, lies in its appeal to notions of legislative intent and international comity. First, the agreement at issue may be illustrative of legislative intent insofar as the law under consideration was enacted either for the purpose of giving domestic legal effect to an agreement made between the province and a foreign state, or (where intent to implement the agreement is lacking) without clear intent to violate the agreement. Second, where the disputed legislation might reasonably be read as either consistent with the province's international commitment under a non-binding agreement or in breach of such an agreement, international comity requires that the Act be read in the light of the agreement. The courts should hesitate to find legislation to be in violation of international agreements, even of a non-binding character, where a more favourable interpretation is available to them, for to do otherwise may bring the provincial government into conflict with the international party with whom it made the agreement.

This analysis requires there to be sufficient ambiguity in the statutory language to make an interpretation consistent with the international agree-

107. *Ibid.*

ment at issue possible. Cases may arise in which the plain words of the provincial enactment are so clearly in violation of a provincial international agreement that no other reading is possible, even though no clear legislative intent to violate the agreement is otherwise apparent. In the context of binding international agreements (*i.e.*, treaties), I have argued elsewhere that the treaty presumption should be forcefully applied in such cases to prevent negligent or unintentional violations of international law¹⁰⁸. In the case of non-binding agreements, however, the argument for such a strained construction cannot stand. While a court may be justified in applying a strained construction to legislation in the name of international law, its justification for doing so in the name of international comity alone is much weaker.

In sum, there is no constitutional or principled objection to a court using a non-binding international agreement to assist it in the interpretation of provincial legislation. To the contrary, considerations of legislative intent and international comity strongly recommend an interpretive approach informed by such agreements wherever an intent to depart from them is not unambiguously present in the statutory wording. The significance of this conclusion is that, in the proper case, the interpretation of a provincial statute (including the interpretation of statutory authority vested in a provincial administrative decision-maker) may be properly influenced by the existence of a non-binding agreement between the provincial government and a foreign government or state.

Conclusion

Provincial international activity shows no signs of abating. As I write, the front-page story in one Canadian daily newspaper explains that the premier of Alberta, Ralph Klein, will meet with US vice-president Dick Cheney to discuss Alberta's role in US energy policy¹⁰⁹. While high-level international meetings between provincial ministers and foreign representatives remain rare and newsworthy, mid- and low-level contact appears ever more frequent. It is probably only a matter of time before a Canadian court is forced to consider the significance of an international agreement arising from such an encounter. It is hoped that such a court will bring to this controversial question not only the international and constitutional considerations given here, but also a due sense of moderation, in keeping with Canada's federal character and international outlook.

108. *Ibid.*

109. T. OLSEN, « Klein Planning D.C. Power Play. Energy Talks With Cheney: We Are Gatekeepers of Our Resources, Not Ottawa », *National Post*, 28 May 2001.