

THE CANADIAN FEDERAL CONSTITUTIONAL  
FRAMEWORK AND THE IMPLEMENTATION OF  
THE KYOTO PROTOCOL

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***I INTRODUCTION***

The "elephant" was the general theme of a world conference organised for the 20<sup>th</sup> anniversary of the International Memorisation Competition.<sup>1</sup> The participating countries had to select a subject pertaining to this large mammal. The German delegation opened the event with a paper entitled: "The Elephant: Physical and Metaphysical Issues". The French followed and their communication was "The Elephant: The Most Exquisite Recipes". Later, it was the English delegation's turn and they spoke on "The Elephant: Financial and Banking Aspects". Many others took the stand and, to close the conference, the Canadian delegation presented a paper entitled: "The Elephant: Of Federal Jurisdiction or Provincial Jurisdiction?"<sup>2</sup>

Of course, this anecdote is meant to illustrate how important constitutional matters are in Canada; some even say that they are a

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1 The theme was of course linked to the adage "having an elephant's memory".

2 The author of this paper first heard this story in 1992 from Benoît Pelletier, then professor of law at the University of Ottawa and now member of Québec's provincial legislature. Roderick McDonald recently referred to a similar anecdote in "Three Centuries of Constitution Making in Canada: Will There be a Fourth?" (1996) 30 U British Columbia L Rev 211, 213.

collective obsession. It is not at all surprising, therefore, that the debate about the Kyoto Protocol<sup>3</sup> in Canada has largely revolved (similarly to the elephant) around the issue of whether its implementation falls within federal or provincial jurisdiction.

This paper examines fundamental questions concerning the implementation of the Kyoto Protocol in the Canadian federation. After a presentation of this international instrument and a general consideration of Canada's constitutional framework, the discussion focuses on the question of the division of legislative competences over foreign affairs. In the conclusion, some recommendations are formulated to overcome potential constitutional problems in implementing the Kyoto Protocol in Canada.

## ***II KYOTO PROTOCOL***

The expression global warming refers to the phenomenon whereby greenhouse gases in the earth's atmosphere prevent part of the sun's thermal radiations from being reflected back into space. Many human activities, especially those involving the combustion of fossil fuels like coal, oil and gas, have substantially increased concentrations of those gases. The rising temperatures thus caused have profound adverse effects not only on the environment but also on people's health and even on the world economy. It is in this general context that the Kyoto Protocol must be understood.

Marking 20 years since the Stockholm Conference on the Human Environment, the Conference on Environment and Development held in Rio de Janeiro in 1992 had an ambitious agenda and produced, along with the Rio Declaration on Environment and Development<sup>4</sup> and other soft law instruments, two global agreements: the Convention on Biological Diversity<sup>5</sup> and the Framework Convention on Climate

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3 Kyoto Protocol to the United Nations Framework Convention on Climate Change (11 December 1997) 37 ILM 22.

4 Rio Declaration on Environment and Development (Rio Declaration) (3-14 June 1992) UN Doc A/CONF.151/26 (Volume 1); 31 ILM 876.

5 Convention on Biological Diversity (5 June 1992) 1760 UNTS 79; 31 ILM 818.

Change.<sup>6</sup> The objective of the latter is to stabilize the atmospheric concentration of greenhouse gases in order to allow "economic development to proceed in a sustainable manner."<sup>7</sup> A new round of negotiations was launched in 1995 to give teeth to the general commitments, which led to a protocol adopted on 11 December 1997 in Kyoto, Japan.

The Kyoto Protocol establishes legally binding greenhouse gas emission targets for industrialised countries listed in its Annex I. The reductions are quite modest, about 5,2 per cent below the 1990 levels of emission, which must be attained within the period of 2008-2012. This international instrument was to come into force through a ratification threshold of 55 states responsible for 55 per cent of the 1990 total emission of greenhouse gases. When the United States, responsible for 36 per cent of the 1990 emissions, abandoned the Kyoto Protocol in 2001, President George W Bush calling it "fatally flawed",<sup>8</sup> it became clear that the Agreement could only materialize with the Russian Federation's ratification. After a somewhat long period of pleadings and horse-trading, President Vladimir Putin agreed in November 2004 to be part of this historic development in addressing global warming.<sup>9</sup>

### **III CANADIAN CONSTITUTIONAL CONTEXT**

Canada is a federation. What is perhaps less well-known is that a so-called "imperial statute", adopted by the British Parliament on 29 March 1867, created the Canadian federation.<sup>10</sup> By Royal Proclamation, the first

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6 Framework Convention on Climate Change (9 May 1992) 1771 UNTS 107; 31 ILM 849.

7 Framework Convention on Climate Change, above n 6, Art 2.

8 "Compromise Saves Climate Treaty" (21 July 2001) BBC News <<http://news.bbc.co.uk/1/hi/sci/tech/1452315.stm>> (last accessed 6 December 2004).

9 "Putin Clears Way for Kyoto Treaty" (5 November 2004) BBC News <<http://news.bbc.co.uk/1/hi/world/europe/3985669.stm>> (last accessed 14 December 2004).

10 British North America Act 1867 (UK) 30 & 31 Vict, c 6 which became after 1982 the Constitution Act 1867 (UK) 30 & 31 Vict, c 3. These changes were created by a

day of July 1867 was designated as the date for the entry into force of this statute, which became the core instrument of the Canadian Constitution.<sup>11</sup> For the present purposes, it is important to emphasise two elements of this first chapter of Canada's modern political and legal history. First, the Constitution Act 1867 (UK) did not create a sovereign and independent country;<sup>12</sup> Canada indeed remained a "Dominion" within the British Empire. As Peter Hogg explained:<sup>13</sup>

But the BNA Act did not mark any break with the colonial past. Independence from the United Kingdom was not desired or even contemplated for the future. The new Dominion, although enjoying a considerable degree of self-government, remained a British colony. In fact, of course, after 1867, there was an evolution to full independence, but it was a gradual process continuing well into the twentieth century.

One must also realise that there was no provision in the Constitution Act 1867 (UK) dealing with the competence over foreign affairs. These issues thus remained the exclusive responsibility of the British imperial power.<sup>14</sup>

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piece of legislation adopted in Westminster, namely, the Canada Act 1982 (UK), c 11, which includes in Schedule B the Constitution Act 1982 (UK), containing *inter alia* the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B) and the amending formula of the Constitution Part V.

11 Department of Justice Canada *A Consolidation of the Constitution Acts 1867 to 1982* (Minister of Supply and Services Canada, Ottawa, 1989) 2, note 4.

12 According to the Montevideo Convention on Rights and Duties of States (26 December 1933) 165 LNTS 19, art 1: "[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States." From the time of the creation of Canada up to the Statute of Westminster 1931 (UK), 22 Geo V, c 4, it was the fourth condition pertaining to international personality that was not formally present.

13 P W Hogg *Constitutional Law of Canada* (3 ed, Carswell, Toronto, 1992) 4-5.

14 See generally A B Keith *The Dominions as Sovereign States* (Macmillan, London, 1938).

The other element to underline is the distribution of legislative powers in the Canadian Constitution. Instead of a unitary authority, the British colonies in North America opted for a two-level structure of government: federal and provincial. One of the purposes of the Constitution Act 1867 (UK) was to enumerate, in sections 91 and 92, the different matters falling under federal or provincial jurisdiction respectively.<sup>15</sup> For example, the federal government has jurisdiction over trade and commerce, unemployment insurance, the postal service, military and naval defence, navigation and shipping, fisheries, currency and coinage, banking, weights and measures, bankruptcy and insolvency, copyrights, marriage and divorce, immigration and criminal law. On the other hand, the provincial governments have jurisdiction, *inter alia*, over public lands, the management of hospitals, municipal institutions, local works and undertakings, the celebration of marriage, property and civil rights, the administration of justice, penal offences and under section 92(16): "[g]enerally all matters of a merely local or private nature in the province."<sup>16</sup>

Neither section 91 nor section 92 of the Constitution Act 1867 (UK) provides for any legislative competence regarding the negotiation, conclusion and ratification of international conventions. Neither do they say anything about the conduct of foreign affairs and other international issues.<sup>17</sup>

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15 See G P Browne *The Judicial Committee and the British North America Act. An Analysis of the Interpretative Scheme for the Distribution of Legislative Powers* (University of Toronto Press, Toronto, 1967) 36, who opined that such an enumeration for both levels of government is unusual and that a common alternative is to give a list of competences for one level of government and to declare that the rest falls within the jurisdiction of the other.

16 Constitution Act 1867 (UK), above n 10.

17 See M H M Kidwai "International Personality and the British Dominions: Evolution and Accomplishment" (1976) 9 U QLJ 76, 114.

#### ***IV JURISDICTION OVER FOREIGN AFFAIRS***

The Constitution Act 1867 (UK) does not per se give jurisdiction to the federal Parliament or to the provincial legislatures over foreign affairs *stricto sensu*. In 1867, Canada was not sovereign and independent. It did not enjoy international personality to make its own representations among the members of the society of nations.<sup>18</sup> There existed, however, a constitutional provision that is very relevant here, dealing with the incorporation of international conventions, which must be understood in light of the dualistic approach Canada follows in regard to treaty norms. The situation prevailing in 1867 progressively changed, first with respect to the conclusion of international agreements and, later, as regards the implementation of international conventions.

##### ***A Section 132 of the Constitution Act 1867 (UK)***

A careful reading of the Constitution Act 1867 (UK) reveals that there is only one provision that explicitly deals with the foreign affairs of what was then the Dominion of Canada.<sup>19</sup> It is section 132, which reads as follows:

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign

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18 At the time, and to a large extent even today in spite of the developments in international law since World War II, the system of international relations was founded on the idea of a society of nations independent from one another and, by virtue of the notion of state sovereignty, free of any legal constraints from a superior order. This is the so-called "Vattellian" system of international relations, based on Emer de Vattel's work, *Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains* (2 ed, London, 1758); see also the translation by J Chitty *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns* (Johnson Law Booksellers, Philadelphia, 1863). On Vattel and his contribution to international law, see S Beaulac "Emer de Vattel and the Externalization of Sovereignty" (2003) 5 J History Int'l L 237.

19 See G A Beaudoin *La Constitution du Canada: institutions, partage des pouvoirs, droits et libertés* (Wilson & Lafleur, Montréal, 1991) 566.

Countries, arising under Treaties between the Empire and such Foreign Countries.

The federal Parliament was thus habilitated to implement norms arising from treaties concluded by the British imperial authority. More importantly, this power to adopt incorporating legislation was over international conventions covering subjects falling both under section 91 and section 92.<sup>20</sup>

It is appropriate at this point to refer to two passages in section 132 which, it will be seen, have justified in part the conclusion according to which this constitutional provision is now obsolete since Canada has become independent and thus empowered to negotiate and conclude its own international agreements. The first passage refers to the obligation of Canada and the provinces "as Part of the British Empire". Also, *in fine*, section 132 makes reference to "Treaties between the Empire and such Foreign Countries". Before seeing how these passages were interpreted, it is necessary to briefly discuss the issue of treaty incorporation into Canadian law in order to better understand the relevant constitutional context.

### ***B Dualistic Approach for Treaty Norms***

An important feature of Canadian constitutional law is the approach adopted in regard to the incorporation in domestic law of legal norms arising from international conventions. Being influenced by British practice,<sup>21</sup> Canadian courts have favoured the so-called "dualistic"

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20 See Hogg, above n 13, 290:

This provision rather clearly grants to the federal Parliament the power to enact legislation which is necessary to implement treaties but it refers only to treaties between the "British Empire" and foreign countries. The reason why s 132 is framed in these terms is that in 1867 the conduct of international affairs for the entire Empire was still firmly vested in the British (imperial) government, and it was the British government which negotiated, signed and ratified all treaties which applied to the Empire or to any part of the Empire.

21 See E D Dickinson "L'interprétation et l'application du droit international dans les pays anglo-américains" (1932) 40 *Recueil des Cours* 305; A D McNair

approach when it comes to implementing treaty norms,<sup>22</sup> as opposed to the "monist" view.<sup>23</sup> This principle<sup>24</sup> was set out by the Judicial Committee of the Privy Council in the *Labour Conventions* case,<sup>25</sup> where Lord Atkin famously wrote:<sup>26</sup>

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.

It follows that treaty norms must be formally transformed and incorporated through the adoption of domestic legislation in order for these international obligations to become part of the Canadian legal

"L'application et l'interprétation des traités d'après la jurisprudence britannique" (1933) 43 *Recueil des Cours* 247; I Brownlie *Principles of Public International Law* (5 ed, Clarendon Press, Oxford, 1998) 42-49.

22 According to the dualistic theory, international law is only applicable domestically if there has been some kind of incorporation into the domestic legal order, the two systems being considered as separate. See generally H Triepel *Droit international et droit interne* (Oxford University Press, Oxford, 1920).

23 Pursuant to the monist theory, international law forms part of the law of the land without the need for internal implementation, a position based on the view that both laws are fundamentally part of the same legal system. Monism can take two forms: international law has primacy over domestic law or municipal law trumps international law. Hans Kelsen is the most notorious defender of the monist theory. He favoured the former form of monism: see H Kelsen "La transformation du droit international en droit interne" (1936) 43 *RGDIP* 5. See also generally G Sperduti "Dualism and Monism: A Confrontation to be Overcome?" (1977) 3 *Italian Y B Int'l L* 31.

24 See R St J Macdonald "The Relationship Between International Law and Domestic Law in Canada" in R St J Macdonald and others (eds) *Canadian Perspectives on International Law and Organization* (University of Toronto Press, Toronto, 1974) 88.

25 *Attorney General for Canada v Attorney General for Ontario (Labour Conventions)* [1937] AC 326 (PC).

26 *Labour Conventions*, above n 25, 347. See also *Chung Chi Cheung v The Queen* [1939] AC 160, 168 (PC).



order.<sup>27</sup> In the Anglo-Saxon parliamentary tradition, this approach is mainly explained by the doctrine of the division of legislative and executive powers and that of supremacy of Parliament.<sup>28</sup>

It is interesting to note, however, that this dualistic approach seems to have progressively lost strength, at least implicitly, following a series of recent cases before the Supreme Court of Canada.<sup>29</sup> Especially since the decision in *Baker*,<sup>30</sup> it is now clear that treaty norms that are unimplemented in domestic law can nevertheless play an important role in interpreting the Canadian Charter of Rights and Freedoms 1982<sup>31</sup> and in construing ordinary legislation. In *Baker*, Justice L'Heureux-Dubé wrote the following for the majority:<sup>32</sup>

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27 See the following Canadian cases: *Arrow River and Tributaries Slide and Boom Co Ltd v Pigeon Timber Co Ltd* [1932] SCR 495, 510; *Francis v The Queen* [1956] SCR 618, 625-626; *Capital Cities Communications v Canadian Radio-Television Commission* [1978] 2 SCR 141, 173; *Reference Re Public Service Employee Relations Act (Alb)* [1987] 1 SCR 313, 348-349.

28 See Brownlie, above n 21, 46:

In England, and also it seems in most Commonwealth countries, the conclusion and ratification of treaties are within the prerogative of the Crown (or its equivalent), and if a transformation doctrine were not applied, the Crown could legislate for the subject without parliamentary consent. As a consequence treaties are only part of English law if an enabling Act of Parliament has been passed.

29 See on this issue S Beaulac "Arrêtons de dire que les tribunaux au Canada sont liés par le droit international" (2004) 38 Rev Jur Thémis 359; S Beaulac "National application of International Law: The Statutory Interpretation Perspective" (2004) 42 Canadian Y B Int'l L (forthcoming).

30 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

31 See for example *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038; *R v Keegstra* [1990] 3 SCR 697; *R v Burns* [2001] 1 SCR 283; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] SCC 4.

32 *Baker v Canada (Minister of Citizenship and Immigration)*, above n 30, paras 69-71 (emphasis added).

I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law. *Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.*

This new trend, albeit still at the experimentation stage, has been followed by the Supreme Court of Canada.<sup>33</sup> Because it remains formally necessary in Canada to implement international conventions in domestic law through legislation, the question is which level of government has the competence to do so. Pursuant to section 132 of the Constitution Act 1867 (UK),<sup>34</sup> when Canada was still a British Dominion, the central government had such legislative power, whether the treaty obligations were falling under federal or provincial jurisdiction. As will be examined below, this situation changed after Canada became an independent state.

### ***C Authority over the Conclusion of International Conventions***

In 1867, it was the executive branch of the British imperial government that had power to negotiate, conclude and ratify Canada's international conventions. Gradually, however, Canada obtained more autonomy over its own international relations with the members of the society of nations. Already in 1877, Canada was not considering itself bound by commercial treaties to which it had not consented.<sup>35</sup> At the end of World War I, Canada represented its own interests at the Paris Peace Conference and, albeit as a British Dominion, did sign the Versailles Treaty in 1919. Shortly afterwards, Canada began to fully exercise its authority to negotiate, conclude and ratify international agreements,

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33 See *114957 Canada Ltée (Spraytech Société d'arrosage) v Town of Hudson* [2001] 2 SCR 241; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3; *Schreiber v Canada (Attorney General)* [2002] 3 SCR 269. See also S Beaulac "The *Suresh* Case and Unimplemented Treaty Norms" (2002) 15 RQDI 221; S Beaulac "Recent Developments on the Role of International Law in Canadian Statutory Interpretation" (2004) 25 Statute L Rev 19.

34 Constitution Act 1867 (UK), above n 10.

35 See Beaudoin, above n 19, 567.

including the 1923 Halibut Fisheries Treaty. This feature of state sovereignty was consecrated in 1931 with the Statute of Westminster.<sup>36</sup>

Under British constitutional and imperial law, the power to conclude and ratify treaties was a Crown prerogative.<sup>37</sup> In Canada, it was thus the representative of the British monarchy, the Governor General, who came to exercise Crown prerogatives, including treaty-making powers. Similar to Great Britain, the evolution towards a constitutional monarchy in Canada meant that a practice developed whereby Crown prerogatives were exercised at the request and under the advice of the Canadian government,<sup>38</sup> which did not require the participation of Parliament however.<sup>39</sup> The 1947 Letters Patent constituting the office of Governor General of Canada<sup>40</sup> confirmed that the executive branch of the federal government was now entrusted with the Crown prerogatives for Canada, including the power to negotiate, conclude and ratify treaties. The Supreme Court of Canada decision in the *Labour Conventions* case<sup>41</sup> – the Privy Council did not address this point – also expressed the view that the central government was vested with such authority, whether the conventions dealt with matters falling under section 91 or section 92 of the Constitution Act 1867 (UK).<sup>42</sup>

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36 See A-M Jacomy-Millette *L'introduction et l'application des traités internationaux au Canada* (LGDJ, Paris, 1971) 5-21; P E Corbett and H A Smith *Canada and World Politics* (Faber & Gwyer, London, 1928) 42-69.

37 See A E Gottlieb *Canadian Treaty-Making* (Butterworths, Toronto, 1968) 4-5; P N Baker "Les Dominions sont-ils vraiment des personnes du droit des gens?" (1927) 19 *Recueil des Cours* 247.

38 See Hogg, above n 13, 229.

39 See J-Y Grenon "De la conclusion des traités et de leur mise en oeuvre au Canada" (1962) 40 *Canadian Bar Rev* 151, 152-153.

40 Letters Patent constituting the office of Governor General of Canada RSC 1985 Appendix II, no 31.

41 *Reference re The Weekly Rest in Industrial Undertaking Act, The Minimum Wages Act and The Limitation of Hours of Work Act* [1936] SCR 461, 462, 501.

42 Although, unlike Canada, Canadian provinces do not have legal personality in international law, they can nevertheless conclude agreements with foreign authorities

### ***D Shared Authority over the Implementation of International Conventions***

Given that the dualistic approach in Canada requires the transformation of international conventions into domestic law, there is another important constitutional question beside that of the competence to conclude such agreements; namely, which level of government has jurisdiction over the incorporation of treaty norms. Essentially, there are two possible answers. First, pursuant to section 132 of the Constitution Act 1867 (UK), the central Parliament would have such power, whether the treaties deal with federal or provincial matters. Secondly, based on the subject of the international conventions, their implementation through legislation would follow the division of legislative authority under sections 91 and 92 of the Constitution Act 1867 (UK).

The decision of the Judicial Committee of the Privy Council favoured the second position in the 1937 *Labour Conventions* case. This was not the first time, however, that the Privy Council considered this Canadian constitutional issue of treaty transformation. In three earlier cases,<sup>43</sup> the Lords appeared to lean towards a general jurisdiction for the federal government to implement treaties.<sup>44</sup> But it is really only in the *Labour Conventions* case that the issue was directly addressed, the decision

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on matters within their jurisdiction: see Grenon, above n 39. This is the type of administrative accords that the province of Quebec has reached with many states of the *Francophonie*, although secessionist governments have argued for a more official status in dealing with international relations: see Jacomy-Millette, above n 36, 75-87; J-Y Morin "La personnalité internationale du Québec" (1984) 1 RQDI 163.

43 *Attorney-General of British Columbia v. Attorney-General of Canada* (1924) AC 222 (PC); *In re The Regulation and Control of Aeronautics in Canada* (1932) AC 54 (PC); *In re Regulation and Control of Radio Communication in Canada* (1932) AC 304 (PC).

44 See J S Ewart "The Radio Case" (1932) 10 Canadian Bar Rev 298, 301-302.

which has since marked the constitutional consciousness of Canadian lawyers.<sup>45</sup>

The matter brought before the Privy Council in the *Labour Conventions* case was on appeal from a decision of the Supreme Court of Canada, which had been seized directly through a reference made by the Governor General in Council. The issue at the centre of the case was whether or not the federal Parliament had legislative authority to implement agreements concluded under the auspices of the International Labour Organization, namely, the Hours of Work (Industry) Convention,<sup>46</sup> the Weekly Rest (Industry) Convention<sup>47</sup> and the Minimum Wage-fixing Machinery Convention.<sup>48</sup> The federal Parliament incorporated them into Canadian law with the Weekly Rest in Industrial Undertakings Act 1935,<sup>49</sup> the Minimum Wages Act 1935<sup>50</sup> and the Limitation of Hours of Work Act 1935,<sup>51</sup> although it was admitted that such legislation would ordinarily fall under provincial legislative

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45 Among the many comments on the *Labour Conventions* case see N A M Mackenzie "Canada: The Treaty-Making Power" (1937) 18 British Y B Int'l L 172; F R Scott "The Consequences of the Privy Council Decisions" (1937) 15 Canadian Bar Rev 485; A B Elkin "De la compétence du Canada pour conclure les traités internationaux: Étude sur le statut juridique des Dominions britanniques" (1938) 45 RGDIP 658; F R Scott "Labour Conventions Case: Lord Wright's Undisclosed Dissent" (1956) 34 Canadian Bar Rev 114; G J Szablowski "Creation and Implementation of Treaties in Canada" (1956) 34 Canadian Bar Rev 28; E McWhinney "Federal Constitutional Law and the Treaty-Making Power" (1957) 35 Canadian Bar Rev 842; G L Morris "The Treaty Making Power: A Canadian Dilemma" (1967) 45 Canadian Bar Rev 478.

46 Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week (28 November 1919) 38 UNTS 17.

47 Convention Concerning the Application of the Weekly Rest in Industrial Undertakings (17 November 1921) 38 UNTS 187.

48 Convention Concerning the Creation of Minimum Wage-Fixing Machinery (16 June 1928) 39 UNTS 3.

49 Weekly Rest in Industrial Undertakings Act SC 1935, 25 & 26 Geo V, c 14.

50 Minimum Wages Act SC 1935, 25 & 26 Geo V, c 44.

51 Limitation of Hours of Work Act SC 1935, 25 & 26 Geo V, c 63.

authority pursuant to the competence over property and civil rights in section 92(13) of the Constitution Act 1867 (UK).

It was noted above that, unlike the Supreme Court, the Privy Council did not consider it necessary to decide the question of whether the central government had exclusive power for the conclusion of international conventions; its ruling was limited to the question of legislative authority to implement those agreements.<sup>52</sup> The first part of the reasons for judgment dealt with section 132 of the Constitution Act 1867 (UK), which gave jurisdiction to the federal government to transform into domestic law all treaties concluded by the British imperial authority. The Privy Council referred to the fact that Canada's international treaties – including the three in the present case – were now concluded by an independent country, not by a British Dominion. Section 132 had thus become obsolete and, accordingly, was of no utility to decide the question at issue. Lord Atkin explained thus:<sup>53</sup>

While it is true, as was pointed out in the Radio case, that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section so as to cover the unanticipated event.

This is how, in a somewhat summary fashion, the Privy Council dismissed the argument based on section 132 of the Constitution Act 1867 (UK). Indeed, the relevance of this provision could have certainly been saved, especially in view of the now notorious remarks of Lord Sankey in *Edwards v Attorney General for Canada*,<sup>54</sup> comparing the Canadian Constitution to a living tree capable of growth and expansion within its natural limits.<sup>55</sup>

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52 *Labour Conventions*, above n 25, 249.

53 *Labour Conventions*, above n 25, 250.

54 *Edwards v Attorney General for Canada* [1930] AC 124 (PC).

55 *Edwards v Attorney General for Canada*, above n 54, 136. See also V C MacDonald "The Privy Council and the Canadian Constitution" (1951) 29 Canadian Bar Rev 1021; W P M Kennedy "The Interpretation of the *BNA Act*" (1943) 8 CLJ 146.

Lord Atkin also dismissed the contention put forward by the Attorney General for Canada according to which the federal government had the legislative competence by virtue of its residual power to transform all international conventions into the domestic legal order. The federal nature of the Canadian Constitution was the main reason given in rejecting the claim:<sup>56</sup>

It would be remarkable that while the Dominion could not initiate legislation, however, desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy ... In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

Accordingly, the legislative authority to implement international treaties is not of the exclusive jurisdiction of the central government of Canada. It is the subject-matter of the agreement that determines which legislative authority has jurisdiction to incorporate its provisions into the domestic legal order, pursuant to sections 91 and 92 of the Constitution Act 1867 (UK).

It is noteworthy that the Attorney General for Canada had expressed concerns that such a shared power regarding treaty implementation would significantly reduce the flexibility and efficacy of the federal government as far as Canada's foreign policies are concerned. Lord Atkin replied as follows:<sup>57</sup>

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of

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<sup>56</sup> *Labour Conventions*, above n 25, 352.

<sup>57</sup> *Labour Conventions*, above n 25, 353-354.

legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.

The legislative authority to implement international treaty norms into domestic law is thus shared between the two levels of government in Canada, thus respecting the federal character of the Canadian Constitution.

One must underscore, however, that the federal nature of the country has no effect on the international plane and, in particular, on Canada's responsibility in cases of failure to fulfil its international obligations. In international law, the state is one and indivisible for the purposes of its responsibility.<sup>58</sup> Thus, the distribution of powers under the Canadian Constitution does not have any incidence on the fact that its constituting entities (the provinces) have no international legal personality, have no international representative capacity and cannot be internationally liable.<sup>59</sup> In international law, it is generally the central authorities of federal states which have these attributes.<sup>60</sup> With respect to international responsibility, a state cannot rely on its internal constitutional structure to justify a violation of an international obligation.<sup>61</sup> There is also a

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58 R Jennings and A Watts *Oppenheim's International Law* (vol 1, 9 ed, Longman, London, 1992) 540.

59 The most authoritative judicial ruling supporting this proposition was made by Chief Justice Duff in the Supreme Court decision in the *Labour Conventions* case: *Reference re The Weekly Rest in Industrial Undertaking Act, The Minimum Wages Act and The Limitation of Hours of Work Act*, above n 41, 496.

60 See Jennings and Watts, above n 58, 252.

61 See Jennings and Watts, above n 58, 254.



presumption, codified in Article 29 of the Vienna Convention on the Law of Treaties,<sup>62</sup> to the effect that all states, including federal states, must fulfil their obligations on the whole of their national territory, save of course express provision to the contrary such as in federal clauses.<sup>63</sup>

Consequently, even though the authority to implement international conventions is shared between the two levels of legislative authority in Canada, it is the federal government that would be held responsible, on the international plane, in cases of violation of treaty obligations, no matter whether such norms are to be implemented at the federal or provincial level. A state cannot use its internal law or even its constitution (including its federal nature) as a justification for failing to meet its international commitments.<sup>64</sup> As the Permanent Court of International Justice declared in the *Polish Nationals in Danzig*<sup>65</sup> case: "[a] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."<sup>66</sup> It follows that, if a province refuses to implement international obligations contracted by Canada, such as those in the Kyoto Protocol, the federal government on behalf of the country as a whole (not the actual province) would be held internationally responsible.

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62 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; 8 ILM 679.

63 On these clauses in general see B R Opeskin "Federal States in the International Legal Order" (1996) 43 *Netherland Int'l L Rev* 353; R B Looer "'Federal State' Clauses in Multilateral Instruments" (1955-56) 32 *British Y B Int'l L* 162.

64 The basic authority for this proposition is the arbitration decision in the *Alabama Claims* case between the United States and the United Kingdom in 1872, reproduced in J B Moore *History and Digest of the International Arbitrations to which the United States has been a Party* (vol 1, US Government Printing Office, Washington, 1898) 653. This rule was codified in the Vienna Convention on the Law of Treaties, above n 62, art 27.

65 *Treatment of Polish Nationals in Danzig (Poland v Danzig)* (Advisory Opinion) [1931] PCIJ (Series A/B, No 44).

66 *Treatment of Polish Nationals in Danzig*, above n 65, 24.

## V CONCLUSION: THE KYOTO OBLIGATIONS

After an autumn of federal-provincial debates and disputes, Canada officially ratified the Kyoto Protocol on 16 December 2002. Because of the dualistic approach adopted by Canada as regards international treaties, the ratification of the Protocol is far from putting an end to the quarrels between Ottawa and the provinces. Indeed, the transformation of this Protocol into domestic law will most likely raise constitutional questions of distribution of powers with respect to environmental matters. This is an area of shared jurisdiction between the federal and provincial governments, not least since the Constitution Act 1867 (UK) does not list the environment as a head of legislative competence.<sup>67</sup> Although the federal Parliament adopted the Canadian Environmental Protection Act,<sup>68</sup> the case law clearly states that the provinces are to play the principal role in the protection of the environment in Canada.<sup>69</sup>

Thus the *a priori* conclusion is that the implementation of the Kyoto Protocol in Canada will require some legislative or executive action from the provinces. Given that it potentially concerns all human activities contributing to greenhouse gas emissions, whether from industries, governments or even individuals, the Kyoto Protocol undoubtedly falls under provincial jurisdiction by virtue of several heads of legislative competence in section 92 of the Constitution Act 1867 (UK).<sup>70</sup> It is certainly possible, therefore, that the transformation in Canada of the international obligations set out in the Protocol will become problematic if provinces do not sufficiently collaborate with the federal government

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67 See on this issue F Chevette "Fédéralisme et protection de l'environnement" in N Duplé (ed) *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (Québec-Amérique, Montréal, 1988) 337; G A Beaudoin "La protection de l'environnement et ses implications en droit constitutionnel" (1977) 23 McGill LJ 207; D Gibson "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U Toronto LJ 54.

68 Canadian Environmental Protection Act RSC 1985 c 16 (4<sup>th</sup> Supp).

69 See *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401; *Friends of the Oldman River v Canada* [1992] 1 SCR 3; *R v Hydro-Québec* [1997] 3 SCR 213.

70 See Beaudoin, above n 19, 614; Hogg, above n 13, 733-734.

to introduce measures aimed at reducing the emission of greenhouse gases.

In this pessimistic, albeit plausible, scenario, Canada would run the risk of being unable to meet its international commitments by 2012. Such a violation would not go unsanctioned because Article 18 of the Kyoto Protocol not only prescribes precise environmental targets, but it further provides for the creation of effective control procedures and mechanisms:

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.

There is no doubt that these control procedures and mechanisms will be adopted now that the Kyoto Protocol has entered into force. The consequence is that the Kyoto Protocol *has* some real "bite" and could see Canada be held liable for failing to comply with its provisions, even if such a violation would emanate from provincial inaction.

A possible solution to this situation would be to recognise to the federal Parliament the necessary legislative authority on the environment in order to adopt the required measures to meet the Protocol's targets.<sup>71</sup>

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71 The question of federal legislative competence on the environment could be based on the national emergency doctrine (exceptional circumstances in order to meet Canada's international commitments) or certainly on the national dimension doctrine, which is still available according to *R v Hydro-Québec*, above n 69, 288-289. For the latter doctrine to be applied, the subject-matter "must be marked by a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" (*R v Crown Zellerbach Canada Ltd*, above n 69, 432) and must also comply with Canada's federalist tenets. It is most likely that the Kyoto Protocol's international commitments, which are very precise, indeed, as to the required reductions of greenhouse gas emissions, meet the national dimension

Another option to make sure that it is implemented across the country would be to revisit the *Labour Conventions* case. On a few occasions already, the Supreme Court of Canada has given signs that it might re-examine the issue of federal general authority to incorporate international conventions.<sup>72</sup> The best-known statement to that effect was made by Chief Justice Laskin in *MacDonald v Vapor Canada Ltd*,<sup>73</sup> who wrote that one can "support a reconsideration of the *Labour Conventions* case"<sup>74</sup> which could hold that the central Parliament can "pass legislation in implementation of an international obligation by Canada under a treaty or Convention (being legislation which it would be otherwise beyond its competence)."<sup>75</sup> This *obiter dictum* was endorsed by Justice Dickson in *Schneider v La Reine*.<sup>76</sup>

The situation in Australia, another federation belonging to the British constitutional tradition, may certainly be used as a precedent for the "centralist thesis". It is the Commonwealth of Australia Constitutional Act 1900 (UK),<sup>77</sup> also an "imperial" statute adopted by the British Parliament, which is the main Australian constitutional text.<sup>78</sup> Similar to section 91 of the Constitution Act 1867 (UK), section 51 of the Australian Constitution contains the list of legislative competences entrusted to the Commonwealth (that is, the federal) government.<sup>79</sup>

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doctrine strict conditions, especially in the context where the country would be held responsible on the international plane for non-compliance.

72 In 1956, Justice Kerwin raised the question of whether it might be appropriate to reconsider the *Labour Conventions* case. See *Francis v The Queen*, above n 27, 621.

73 *MacDonald v Vapor Canada Ltd* [1977] 2 SCR 134.

74 *MacDonald v Vapor Canada Ltd*, above n 73, 169.

75 *MacDonald v Vapor Canada Ltd*, above n 73, 169.

76 *Schneider v La Reine* [1982] 2 SCR 112, 134.

77 Commonwealth of Australia Constitutional Act 1900 (UK), 63 & 64 Vict, c 12.

78 See generally C Howard *Australian Federal Constitutional Law* (3 ed, Law Book, Sydney, 1985).

79 Commonwealth of Australia Constitutional Act 1900 (UK), above n 77, s 51 now enumerates forty heads of legislative power for the Commonwealth authority.

However, there is no equivalent to section 92 of the Canadian Constitution; rather, section 107 of the Australian Constitution provides that all the matters not specifically reserved for the Commonwealth fall under state (that is, provincial) jurisdiction.<sup>80</sup>

Like Canada, Australia favours a dualistic approach regarding the transformation of international conventional norms into domestic law.<sup>81</sup> Unlike Canada, however, the Australian Constitution expressly gives competence over foreign affairs to the Commonwealth.<sup>82</sup> Section 51 of the Australia Constitution Act 1900 (UK) is the basis upon which a general jurisdiction has been recognised to the central authority in Australia, not only to negotiate and conclude treaties,<sup>83</sup> but also to implement international conventional norms into domestic law, whether the subject falls within Commonwealth or state legislative competence.<sup>84</sup>

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80 Commonwealth of Australia Constitutional Act 1900 (UK), above n 77, s 107 reads as follows:

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

See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1928) 28 CLR 129, 154.

81 See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-287.

82 Commonwealth of Australia Constitutional Act 1900 (UK), above n 77, s 51(xxix) provides: "[t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth in relation to ... *external affairs*" (emphasis added).

83 See L Zines "The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth" in L Zines (ed) *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, Sydney, 1977) 1.

84 See *R v Burgess; ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 56 ALJR 625 (HCA); *The Commonwealth v Tasmania* (1983) 158 CLR 1. See also G Sawer "The External Affairs Power" (1984) 14 Federal L Rev 199.

Without going as far as to advocate the Australian example of general federal jurisdiction for the incorporation of treaty norms, the international obligations set out in the Kyoto Protocol command a broader authority for the Canadian federal government to implement international environmental agreements within domestic law. This would avoid the danger of constitutional disputes entailing the responsibility of Canada on the international plane for failure to comply with its obligations under the Kyoto Protocol.<sup>85</sup>

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85 Before he was appointed to the judiciary, Gérard La Forest wrote that a flexible and pragmatic approach to ss 91 and 92 of the Constitution Act 1867 (UK) should allow the federal government to exercise, in some rare cases, a general jurisdiction to implement international conventions. See G V La Forest "The Labour Conventions Case Revisited" (1974) 12 Canadian Y B Int'l L 137, 151-152 (emphasis added):

This may just possibly include a court's taking into account the fact that in regulating a matter on the international plane, the federal government must necessarily (especially in the case of multilateral treaties) accept an arrangement as a whole. *Following this approach, it could uphold legislation implementing a treaty largely falling within the ordinary bounds of federal competence but also touching on related matters that would in a purely internal setting be regarded as within provincial competence.*