"TREATY IMPLEMENTATION....AUSTRALIAN RULES": A REJOINDER

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This rejoinder challenges the claim that the High Court of Australia *has clarified, in a principled and realistic manner, the law in relation to treaty implementation. Challenged also is the soundness of the proposed purposive interpretation of the* Constitution *of Canada. In place of this purposive interpretation, and its mistaken reliance on the overturning of the* Labour Conventions Case *and on the restoration of the reasoning in the* Radio Reference, *this rejoinder argues for a flexible approach. The author relies on decisions by the Supreme Court of Canada where the introductory clause to section 91 and section 91(2) on "the regulation of trade and commerce" is applied.*

Dans cette réplique, l'auteur conteste l'affirmation selon laquelle la High Court of Australia *a clarifié, de manière réaliste et d'après des principes, le droit relatif à la mise en oeuvre des traités. Il conteste aussi le bien-fondé de l'interprétation téléologique de la* Constitution *du Canada qui a été proposée. Au lieu de cette interprétation téléologique, qui s'appuie erronément sur l'infirmation de l'Avis sur les conventions du travail et le rétablissement du raisonnement élaboré dans l'*Avis sur les radio-communications, *l'auteur de cette réplique soutient que l'on devrait adopter une approche flexible fondée sur les décisions de la Cour suprême du Canada qui appliquent la clause introductive de l'article 91 et le paragraphe 91(2) portant sur « la réglementation des échanges et du commerce ».*

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I. Introduction

Torsten Strom and Peter Finkle in their article "Treaty Implementation: The Canadian Game Needs Australian Rules",[1] seek "to broaden the exploration" of treaty implementation "through a comparative examination of the constitutions and case law of Canada and....Australia," and they claim to "add a note of realism....by giving some attention to the political consequences which flow from judicial interpretation in the two countries."[2]

This exploration leads them to conclude that "the Supreme Court of Canada should....overrule the *Labour Conventions Case* and restore the ruling of the Privy Council in the *Radio Reference*."[3] Absent this overruling and restoration, they conclude that this apparent impairment "will have increasingly serious consequences as....[nations forge] complex networks of mutual duties and obligations,"[4] and that "[i]t is difficult....to defend the Canadian approach to treaty implementation as being necessary to protect federalism, when Canada is the only federal state with its treaty implementation power rigidly divided on the basis of the respective federal and provincial legislative jurisdictions."[5]

For Strom and Finkle, the solution is to be found in the decisions of the High Court of Australia: "[t]he Australian experience provides the Supreme Court of Canada with an excellent example of the interpretive approach that is necessary to give effect to a poorly drafted constitutional provision,"[6] the implication being that, on the matter of treaty implementation, the Constitution of Canada is drafted poorly. The Australian experience is prescribed by them as Australian Rules.

This rejoinder contends that the conclusions drawn by them from the rhetoric of global trade overlook some of the reality of its intent; that the failure to explicitly examine and assess federal state clauses damages their argument; that section 132 is open to an interpretation other than that given to it by them; that the overruling of the *Labour Conventions Case* lacks primacy in relation to treaty implementation; that, as constructed by them, the reasoning to be restored from the *Radio Reference* is flawed; that divisiveness surrounds the unsettled law on which their Australian Rules rest; and that the solution can be found in the Canadian Constitution and the judgments of the Supreme Court of Canada in relation to matters coming within the introductory clause to section 91, the general power, and within section 91(2), the general trade power.

II. Reality: The Rhetoric Of Global Trade

The commonplace and now anachronistic rhetoric of global trade enters the arguments of Strom and Finkle as "a note of realism":

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[1] T.H. Strom & P. Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules" (1993) 25 Ottawa L. Rev. 39.

[2] *Ibid.* at 43.

[3] *Ibid.* at 44.

[4] *Ibid.* at 59.

[5] *Ibid.* at 60.

[6] *Ibid.* at 59.

> [t]he multilateral obligations arising out of the negotiation rounds [now complete and challenged by the US Congress] held under the *General Agreement on Tariffs and Trade (GATT)* are a good example of Canada's need to be able to control all aspects of....international trade and commerce, regardless of whether a facet....be a matter falling under....provincial legislative competence....This also holds true for the implementation of....the *North American Free Trade Agreement (NAFTA)*;[7]
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> [i]n view of the increasing globalization of many pressing social, economic and environmental issues, we argue that the balance....has tilted in favour of renewed federal [*i.e.*, central] powers to implement Canada's international....commitments. In particular, there is an ever greater need to respond effectively to trade matters within international regulatory structures....[8]

To support this last comment, they appeal to the authority of former Supreme Court Justice Willard Estey: "[m]aybe what we're talking about is an end to federal systems....Maybe a federal system can't compete with a unitary state on the international field...."[9] The debate on the Constitution suggests that there is no disposition to abandon federalism. Here, it is helpful to recall the statement in the *Final Text of the Consensus Report on the Constitution* that "[t]he consensus was not [to] pursue [the issues of the] implementation of international treaties",[10] which stands as a rejection of any amendment to establish treaty implementation as the exclusive competence of the Government of Canada.

Unexamined by Strom and Finkle in their arguments are the checks and balances inherent in federal constitutions that, in face of treaties and agreements tilted toward private advantage, local governments can defend the public interest of their jurisdictions against disabling international action by the central government. It is no rebuttal to say that "Canada is the only federal state with its treaty implementation power rigidly divided."[11] It is not intrinsically wrong to stand alone on any matter, and Canada may be avoiding the folly of other federal states.

Unheeded by Strom and Finkle and ignored in the global trade rhetoric is the reality that trade treaties and agreements are the means by which transnational and foreign-controlled corporations implement their conception of the global economy which is not necessarily in the public interest of independent sovereign states. This conception is based on the view, found at the Law and Economics School in Chicago, that "law consists and ought to consist of those rules which maximize a society's material wealth, and the efficient operation of markets designed to generate it,"[12] a conception opposed by other schools of legal thought.

Perhaps the Supreme Court of Canada will be guided by *Heydon's Case* "to suppress....*pro privato commodo* [for private advantage], and to add force and life to

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[7] *Ibid.* at 54-55.

[8] *Ibid.* at 58.

[9] *Ibid.* at 59 n.85.

[10] *Final Text of the Consensus Report on the Constitution* (Charlottetown, 26 August 1992) at 20.

[11] Strom & Finkle, *supra* note 1 at 60.

[12] R. West, Book Review of *Justice as Translation: An Essay in Cultural and Legal Criticism* by J.B. White, *The Times Literary Supplement* (8 February 1991) 23.

the....remedy....*pro bono publico* [for the public good]."[13] But the reality is to be found in the examination by then Professor Bora Laskin of the opinions in the various judgments of the justices of the Court (including that of James Estey, Willard's father) in the *Saumer*[14] case and his conclusion that "[h]ow the various members of the court faced [the issues]....is....a complete refutation of any notion that social or political considerations have no place in....litigation."[15] Those considerations can lead to the absorption into the value assumptions of members of courts of the global trade rhetoric as appears to have happened to some but not all members of the Australian High Court.

III. Federal State Clauses

Speaking about federal states, Strom and Finkle say the "[i]t....becomes a question of....what steps ["the treaty maker"] can take to ensure that it will be able to comply with its international legal obligations."[16] Overlooked by them, save for a footnote reference,[17] is the step of including in treaties federal state clauses, a step accepted and recognized in international law.

International trade arrangements are described, depending upon the "differing degrees of formality and importance of subject matter" as "treaties....conventions, protocols, agreements, declarations, final acts, and exchanges of notes."[18] Whatever form these arrangements take, international law recognizes that their implementation may vary as between unitary and federal states. Signatories to a treaty, convention or an agreement must, and will, take notice of this limitation on the extent to which federal states can comply with these instruments.

Federal state clauses have been used by governments in Canada. In *Northern Sales*, for example, the Federal Court of Canada, Trial Division, noted that the *United Nations Foreign Arbitral Awards Convention* contained a federal state clause and that "nine provincial legislatures....have enacted legislation to give effect to the *Convention*."[19] Strom and Finkle fail to provide any arguments against the use of these clauses which might be challenged.

IV. An Understanding of Section 132

Strom and Finkle refer to commentaries that section 132 could support an interpretation that Canada could implement treaties in her own right.[20] Reference is also made to contrasting commentaries. And they note that a "cryptic phrase" in the *Radio Reference* "has been interpreted by some commentators as indicating the possibility of

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[13] *Heydon's Case* (1584), [1907] 76 E.R. 637 at 638 (K.B.).

[14] *Saumer* v. *Quebec (City of)*, [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641.

[15] B. Laskin, "Tests for the Validity of Legislation: What's the 'Matter'?" (1955) 11 U.T.L.J. 114 at 123.

[16] Strom & Finkle, *supra* note 1 at 44-45.

[17] *Ibid.* at 46 n.28.

[18] R.St.J. Macdonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dalhousie L.J. 307 at 319.

[19] *Compania Maritima Villa Nova S.A.* v. *Northern Sales Co.* (1989), [1990] 29 F.T.R. 136 at 139, citing the *United Nations Foreign Arbitral Awards Convention*, art. XI.

[20] Strom & Finkle, *supra* note 1 at 46 n.28.

reading section 132 as if the words referring to Canada as part of the British Empire were not there."[21] It seems, apparently having weighed this reading and these commentaries, they are persuaded that "[i]t remains possible for the Supreme Court of Canada to reconsider Lord Atkin's view [in the *Labour Conventions Case*] of section 132."[22] Whether such a reconsideration of section 132 is warranted first requires an understanding of what section 132 really amounts to.

What meaning was given to section 132 by the Judicial Committee? In the *Aeronautics Reference*, the Committee, noting the lack of any precedent, held that section 132 gave to Parliament "all powers necessary....for performing the obligations towards foreign countries arising under [Empire] treaties,"[23] adding that "Parliament....has....the obligation, to provide by statute....that the terms of the Convention shall be duly carried out."[24] These are constrained and precise remarks that are to be read narrowly as the Committee gives section 132 its initial prescription. The Committee is not talking about treaty obligations of Canada. The Committee is saying nothing more than that Canada as a colony is obligated to the UK to do what the Imperial Parliament decides is necessary to meet its own treaty obligations. Section 132 is no more than a legal device within the Constitution of Canada to enable Canada *qua* colony to enact implementing legislation respecting Empire treaties entered into and ratified by the Imperial Parliament.

Bound as it was by the *London Tramways* rule, the Committee had to somehow make its decision in the *Radio Reference* without overruling or not following the decision in the *Aeronautics Reference*: "their Lordships' judgment [in the *Aeronautics Reference*] cannot be put on one side."[25] Hence its lame remark, described *supra* as a "cryptic phrase", that "though agreeing that the Convention was not such a treaty as is defined in s. 132,....it comes to the same thing."[26] The essence of the decision in the *Radio Reference* is the rejection of the colonialism of section 132 and the replacement of it with Canada's own treaty power as an independent sovereign state. For the Committee, the resting place for that power was the introductory clause to section 91. In brief, the Committee recognized a *de facto* repeal of section 132 resulting from the change in Canada's international status.

In sum, prior to independent statehood, the status of Canada internationally was that of a territorial extension of the land mass of the UK. For purposes of section 132, Canada held the status of a colony of the UK. That is, under section 132, Canada did not hold any treaty power. It had none. Obligations arising from Empire treaties rested with the Imperial Parliament. In short, section 132 had a narrow and precise object: it enabled the Imperial Parliament to meet its own obligations. That is all that can be drawn from the decisions in these two cases respecting section 132.

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[21] *Ibid.* at 56 n.74.

[22] *Ibid.* at 56.

[23] *Reference re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 at 74, [1932] 1 D.L.R. 58 at 67-68 [hereinafter *Aeronautics Reference* cited to A.C.].

[24] *Ibid.* at 77.

[25] *Reference re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 at 311, [1932] 2 D.L.R. 81 at 83 (P.C.) [hereinafter *Radio Reference* cited to A.C.].

[26] *Ibid.* at 312.

On this analysis, the claim by Strom and Finkle that section 132 "enabled the federal government to encroach on provincial areas of legislative competence"[27] is mistaken. For the purposes of Empire treaties, the distribution of legislative powers in the Constitution of Canada was irrelevant.

For domestic purposes, the Judicial Committee in the *Aeronautics Reference* characterized the subject matter as coming within a number of section 91 enumerated powers with a "small portion" located under the general power. Following the judicial process in the *Aeronautics Reference*, the Committee in the *Radio Reference*, recognizing that "the question does not end with the consideration of the convention",[28] placed, for domestic purposes, the matter of radio telegraphs within the competence of Parliament under section 92(10)(a). These decisions, albeit modified by subsequent case law, remain good law today.

However, for the purposes of section 132, whether these subject matters were placed within section 91 or section 92 was simply beside the point. Treaty obligations were imposed by the Imperial Parliament on colonies irrespective of whether they had, for domestic purposes, divided or undivided legislative powers. For understandable reasons, the Imperial Parliament turned to central governments to enact the laws.

V. Overruling the *Labour Conventions Case*

Strom and Finkle describe the decision in the *Labour Conventions Case* in this way: a "narrow, 'literalistic' approach";[29] and "wrong, both in theory and in practice".[30] They argue then that the decision was wrong because it "purported to eliminate section 132....and to dismiss arguments concerning the general power",[31] and it "rejected....by implication" the views of the Committee in the *Radio Reference* on "the power to implement treaties."[32]

The specific remarks of Lord Atkin on which they appear to rely for these arguments are:

> [t]here is no existing constitutional ground for stretching the competence of....Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive....[T]he Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution;[33]
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> [i]t must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed....[34]

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[27] Strom & Finkle, *supra* note 1 at 45.

[28] *Radio Reference*, *supra* note 25 at 314.

[29] Strom & Finkle, *supra* note 1 at 43.

[30] *Ibid.* at 44 n.19.

[31] *Ibid.* at 46.

[32] *Ibid.*

[33] *Ontario (A.G.)* v. *Canada (A.G.)*, [1937] A.C. 326 at 352, [1937] 1 D.L.R. 673 at 682-83 (P.C.) [hereinafter *Labour Conventions Case* cited to A.C.].

[34] *Ibid.* at 353-54.

In the second of these remarks, Lord Atkin is on sound theoretical ground: he is relying on the principle of exhaustive distribution of legislative power, a principle established in a number of earlier decisions by the Judicial Committee. Elsewhere, Lord Atkin held that "there is no such thing as treaty legislation....[A]s a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained,"[35] an explicit rejection of a separate treaty power.

Whether the Supreme Court "should....overrule....the *Labour Conventions Case*"[36] has to be measured by what is to be overruled. First, on the elimination of section 132, it scarcely matters. It was eliminated in the *Radio Reference* and replaced by the general power of Parliament. Furthermore, the previous section of this rejoinder contends that no grounds exist for a reconsideration of section 132. Second, on the rejection of the treaty power in the *Radio Reference*, the next section of this rejoinder, treaty power as constitutional doctrine, examines this subject and the myth that the treaty power was historically a complete and undivided authority. Third, on the actual grounds on which the impugned laws were found invalid, the Committee simply followed the arguments of Duff, C.J. in *Natural Products Marketing*,[37] who in turn had followed the prescription of the general power contained in the Haldane trilogy, the *Commerce*[38] – *Fort Frances*[39] – *Snider*[40] cases. There, Viscount Haldane conceded that, in circumstances out of the usual course, local matters could attain national dimensions. Such circumstances existed at the time of *Labour Conventions*; but they did not meet the apocalyptic test – "war, pestilence, famine" – of Viscount Haldane. The upshot was to place the impugned laws in the *Labour Conventions Case* beyond the competence of Parliament.

Within the ambient conditions of Canadian constitutional law in 1937 it is unlikely that the *Labour Conventions Case* was wrongly decided. Today, however, it would be decided differently. Given similar circumstances out of the usual course, in face of the opinion of the Chief Justice of Canada in the *Anti-Inflation Reference*,[41] these circumstances would be prescribed as "crisis conditions", and the same laws would likely be found within the competence of Parliament enabling it to implement the conventions. In fine, in this context, the decision in *Labour Conventions* can be readily distinguished.

VI. Treaty Power As Constitutional Doctrine

Relying on what they describe as the reversal by the Supreme Court of Canada of a "long-standing constitutional doctrine" in *De Savoye*[42] and on a comment about the

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[35] *Ibid.* at 351.

[36] Strom & Finkle, *supra* note 1 at 44.

[37] *Reference re Natural Products Marketing Act*, [1936] S.C.R. 398, [1936] 3 D.L.R. 622.

[38] *Reference re Board of Commerce Act, (Canada)* (1921), [1922] 1 A.C. 191, [1922] 60 D.L.R. 513 (P.C.).

[39] *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695, [1923] 3 D.L.R. 629 (P.C.).

[40] *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5 (P.C.).

[41] *Reference re Anti-Inflation Act, (Canada)* [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 [hereinafter *Anti-Inflation Reference* cited to S.C.R.].

[42] *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [hereinafter *De Savoye* cited to S.C.R.].

"living tree" doctrine in *Edwards*[43] that "principles of constitutional interpretation can and do allow for an organic approach to documentary deficiencies",[44] Strom and Finkle contend that "the federal government should have full power to implement all treaties".[45]

Two prefatory comments. First, one cannot quarrel with the organic approach to constitutional interpretation. It was given, subsequent to *Edwards*, additional prescription by Lord Jowitt in *Privy Council Appeals*: "[t]o such an organic statute [*i.e.* the *B.N.A. Act*] the flexible interpretation must be given that changing circumstances require",[46] which was cited with approval by the Supreme Court in *Blaikie*.[47] However, the organic approach to constitutional interpretation develops "'interstitially', that is by making small insertions here and there, from time to time, in the vast and intricate fabric of the legal system",[48] not by constitutional amendment which is inferred in the Strom and Finkle arguments.

Second, they fail to reconcile their conception of an implementation power with the principle of exhaustive distribution of legislative powers, inclusive of the general powers in the section 91 introductory clause and in section 92(16). To factor out implementation as a new matter may meet the distribution test; but it is a failed argument, *infra*. What they actually seek is a plenary treaty power inclusive of implementation, which is found in their acceptance, by indirection through F.R. Scott, of the plenary prescription of Lord Wright, *infra*, their attempt to restore *Radio Reference* reasoning and its conception of an undivided power, and in their construction of High Court case law.

In the *Labour Conventions Case*, the Committee relied on the distribution principle to find that the *Radio Reference* decision held no warrant that treaty performance is "exclusively within the Dominion legislative power".[49] Laskin C.J. used the same principle to reject a "supervening federal authority" in the *Anti-Inflation Reference*,[50] albeit accepting later in *Vapour Canada*[51] Lord Wright's contention that "[i]t was fundamental that Canada possessed as plenary every power necessary for fulfilling its....treaty obligations".[52] Yet in so far as a plenary treaty power overrides the distribution of legislative powers, it is incompatible with the principle. Strom and Finkle are silent on this incompatibility.

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[43] *Edwards* v. *Canada (A.G.)* (1929), [1930] A.C. 124, [1929] All E.R. 571 (P.C.).

[44] Strom & Finkle, *supra* note 1 at 57, citing H.S. Fairley, "Jurisdiction Over International Trade in Canada: The Constitutional Framework" in M. Irish & E.F. Carasco, eds., *The Legal Framework For Canada-United States Trade* (Toronto: Carswell, 1987) at 135.

[45] *Ibid.*

[46] *Reference re Privy Council Appeals Ontario (A.G.)* v. *Canada (A.G.)*, [1947] A.C. 127 at 154, [1947] 1 D.L.R. 801 at 814 (P.C.).

[47] *Quebec (A.G.)* v. *Blaikie et al.* (1978), [1979] 2 S.C.R. 1016 at 1029, [1980] 101 D.L.R. (3d) 394 at 403.

[48] D. Lloyd, Lord of Hampstead, *The Idea of Law* (Middlesex, England: Penguin Books, 1964) at 271.

[49] *Labour Conventions Case*, *supra* note 33 at 351.

[50] *Anti-Inflation Reference*, *supra* note 41 at 407-09.

[51] *MacDonald* v. *Vapour Canada Ltd.*, [1977] 2 S.C.R. 134 at 168, 66 D.L.R. (3d) 1 at 28.

[52] Lord Wright of Durley, P.C., G.C.M.G., sometime Lord of Appeal in Ordinary, "Rt. Hon. Sir Lyman Poore Duff, G.C.M.G. 1865-1955" (1955) 33 Can. Bar Rev. 1113 at 1126.

The central point here is that constitutional doctrine has never expressed the treaty power as an undivided authority. In English law, the prerogative power of the Crown to make treaties is located by definition in the executive. "[T]he executive cannot, however, simply by entering into an international agreement or convention, alter the law of the land so as to affect the private rights of individuals".[53] Only when the legislature acts do the terms and conditions of a treaty enter the law of the land. In the UK, a unitary state, these steps are straightforward: the Crown is undivided and the legislature is undivided. Treaty power – entering into, ratifying, implementing – may then be construed mistakenly as a seemingly complete, plenary and undivided power, a construction put on it by some commentators in their analyses of the *Aeronautics* and *Radio Reference* decisions. This, then, is the customary law in the UK.

In sum, the executive enters into and ratifies treaties. The legislature then enacts laws to implement them. Those laws carry no unique or extraordinary attributes. They are ordinary laws enacted in the ordinary way by Parliament. This UK customary law instructed the Committee in its decision in the *Labour Conventions Case.*

The Committee acted no differently with respect to an independent Canada: treaty implementation laws were seen as ordinary laws to be enacted in the ordinary way under the ordinary distribution of legislative powers. That is, the Committee "took the view that there is nothing special about legislation enacted to perform a treaty and that legislative jurisdiction for this purpose must therefore be determined in the ordinary way."[54] With distribution admitted as a principle separating the executive and the legislature, it is simply an extension of that principle to admit the distribution of legislative competence as it exists between the legislatures in Canada.

To contend that a treaty power is a plenary authority carries with it considerable constitutional cost. Judicial review on federal grounds would lose its meaning. The courts would be constrained to find that, in the characterization of laws enacted under such a power, the matters of these laws comprise all matters coming within the classes of subjects enumerated in section 91 and section 92. To render inoperative both the constitutional distribution of legislative powers and judicial review seems an inordinately high and unnecessary price to pay for a discretionary supervening treaty power.

VII. Restoring *Radio Reference* Reasoning

For Strom and Finkle, the "purposive" approach to treaty implementation, begun in *Radio Reference*, is expressed in the following remarks of Viscount Dunedin in that case:

> [t]he only class of treaty which would bind Canada was thought of as a treaty....that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91....In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing.[55]

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[53] D.C. Vanek, "Is International Law Part of the Law of Canada?" (1950) 8 U.T.L.J. 251 at 260.

[54] R.E. Sullivan, "Jurisdiction to Negotiate and Implement Free Trade Agreements in Canada: Calling the Provincial Bluff" (1987) 24:2 U.W.O. L. Rev. 63 at 68.

[55] *Radio Reference*, *supra* note 25 at 312.

They construe these remarks in this way:

> [h]is Lordship....stated that while the impugned legislation did not relate to an Empire treaty, but to a treaty signed by Canada in its own right, it remained validly enacted. Because Canada's founding fathers failed to contemplate the matter of treaties signed by Canada in its own right, treaty implementation fell under the rubric of new matters found under the POGG [peace, order and good government] clause.[56]

This then is the sum of the purposive reasoning on which they rely.

Treaty implementation is a peculiar new matter. Unlike other new matters – aerial aviation, radio telegraphs, narcotics control, marine pollution, the nuclear industry – that meet an inherent nature test of a unified subject matter, treaty implementation is inclusive of all matters, unlike in nature and qualities, which come within the classes of subjects enumerated in both section 91 and section 92. This seems hardly sustainable despite its support by Justice Ivan Cleveland Rand.[57]

The Supreme Court, in *Re Constitution of Canada*, placed the entering into and ratifying of treaties under the prerogative of the executive: "[i]t is also under the prerogative and the common law that the Crown....concludes treaties."[58] As Strom and Finkle contemplate a complete treaty power, they would be on firmer constitutional ground to place behind them the "purposive" reasoning of Viscount Dunedin and seek out constitutional language, if it exists, to support the extension of the prerogative to include implementation. The judicial reasoning to be found in the constitutional history of section 92(10)(c), the declaratory power, may also prove to be productive ground.

At bottom, for Strom and Finkle, the restoration of the *Radio Reference* reasoning is designed to overcome a seeming defect in the Constitution of Canada: "[t]he *Constitution Act, 1867*, contains no express provision [as exists in the Australian Constitution] addressing the competence of the federal government to legislate in the area of Canadian external affairs."[59] Without acceding to the argument that "no express provision" constitutes a defect, but accepting it for purposes of debate, the absence of a treaty clause can be responded to in these ways: amend the *Constitution Act, 1867*; rendering inoperative the distribution of legislative powers on the specious ground of a global trade imperative; adopting a "pragmatic" approach resting on Australian Rules; or adopting a "flexible" approach that stays within the confines of present Canadian constitutional law.

This rejoinder has attempted thus far to demonstrate that an amendment is unlikely to succeed in the short run and that a global trade imperative reduces itself to rhetoric that expresses private sector value assumptions. There remain the opposing views of a "pragmatic" approach based on alien case law and a "flexible" approach, as described by Lord Jowitt, based on domestic case law, which are examined in the last two sections of this rejoinder.

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[56] Strom & Finkle, *supra* note 1 at 56 n.74.

[57] I.C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 Can. Bar Rev. 135 at 143.

[58] *Reference Re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753 at 877, 125 D.L.R. (3d) 1 at 82.

[59] Strom & Finkle, *supra* note 1 at 45.

VIII. Australian Rules: A Pragmatic Approach

For Strom and Finkle, pragmatism is to be found in *Koowarta* and in *Tasmanian Dam*, where a purposive meaning is given to be "external affairs" clause.

In *Koowarta*,[60] three of the four judges belonging to the majority of a divided High Court (4-3) held that, "the Commonwealth Parliament can give legislative effect to any international agreement entered into...by the Commonwealth, *whatever its content* and in doing so may override State law."[61] In *Tasmanian Dam*,[62] another divided High Court (4-3) decision, the opinion of the deciding judge, Mr. Justice Dean, is given this construction by Strom and Finkle: his judgment "leaves us with a clear majority of the Court favouring a broad latitude for the Commonwealth government to implement international agreements domestically, regardless of whether the subject matter of the legislation had been assigned originally to the states."[63] They add that, "a majority of the Court considered a broad scope to implement treaties to be necessary in a world which is increasingly characterized as a 'global village' of closely interdependent 'neighbours'"[64] illustrated by "the myriad of multilateral treaties and conventions being negotiated".[65] Also, the majority of the Court "believed that the signature of the Commonwealth government on an international treaty was sufficient evidence that a given matter had attained the international dimension necessary to fall under the ambit of the [external affairs] power."[66] In sum, the "High Court was able to develop its doctrine of treaty implementation through a purposive interpretation of the 'external affairs' clause."[67]

On the attainment of an international dimension, *supra*, Strom and Finkle assert that Kerwin J. of the Supreme Court "used similar reasoning in *Francis*....where he stated that the terms of an international treaty could constitute evidence that a matter had attained national dimensions and was therefore within the federal competence pursuant to the POGG [peace, order and good government] clause in s. 91."[68]

These are not similar pieces of reasoning. The reasoning of the High Court is arbitrary: regardless of content, the act of signing a treaty validates it. The reasoning of Kerwin J. is a cautious and conditional expression of sound constitutional law: the interpretation of clauses in a treaty, done within the context of the national dimensions doctrine, *may* give evidence that local matters have attained national and international dimensions.

What then, in summary, are the Australian Rules? First, they are constitutional law by command and edict: the entering into and ratifying of a treaty decrees that its implementation falls within the competence of the central government. Second, "the

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60 *Koowarta* v. *Bjelke-Petersen* (1982), 153 C.L.R. 168, 56 A.J.L.R. 625 (H.C.).

61 Strom & Finkle, *supra* note 1 at 50, citing H.A. Leal, "Federal State Clauses and the Conventions of The Hague Convention on Private International Law" (1984) 8 Dalhousie L.J. 257 at 277.

62 *Commonwealth* v. *Tasmania (The Tasmanian Dam Case)* (1983), 158 C.L.R. 1, 57 A.J.L.R. 450 (H.C.) [hereinafter *The Tasmanian Dam Case* cited to C.L.R.].

63 Strom & Finkle, *supra* note 1 at 52.

64 *Ibid.* at 52-53.

65 *Ibid.* at 54.

66 *Ibid.*

67 *Ibid.* at 56.

68 *Ibid.* at 54 n.66.

preservation of provincial/state rights" is subordinate to the negotiation of "international agreements that include legal obligations".[69] What is the authority for these Rules?: a series of judgements by a divided High Court – the 4-3 judgements in *Koowarta* and *Tasmanian Dam, supra*, another divided judgement in *Poole*[70] and inconsistent reasoning in *Burgess*.[71]

How should these Rules be assessed? First, they are based on contestable "global village" claims beyond the competence of courts to judge without precise consideration of extrinsic materials, a step in judicial review not taken by the High Court. An awareness by the Court of a "myriad" of treaties and agreements does not translate into extrinsic materials put before the Court. Nor are they compelling, notorious facts. Second, the Rules are based on what can only be described as unsettled Australian law. Third, the arbitrary "purposive" interpretation of the High Court is overtaken by the principled, "flexible" interpretation by the Supreme Court of Canada, as the reasoning of Kerwin J., *supra*, testifies. Fourth, the Rules seem to assume a state/provincial incapacity to understand the benefits that international trade may hold for their local economies, and to ignore the willingness, at least in Canada, of the Provincial Legislatures to delegate administrative competence to the Government of Canada to facilitate implementation.

In the final analysis, the fatal flaw in the argument of Strom and Finkle is that, as they intended, the Australian "purposive" doctrine can have only one outcome: treaty implementation by Parliament by means of what can only be described as an unreviewable, discretionary, declaratory power or prerogative given to Parliament by the High Court. For the courts to apply this "purposive" doctrine is tantamount to their holding a power to amend the constitution. It is instructive here to turn to the incisive conception of John Maynard Keynes caught in the phrase "the character of the age": "[e]conomics as a guide to policy [and to the courts] was useless unless it grasped the 'nature of what is happening'."[72] If the nature of what is happening is such that global trade can so alter Canadian polity that the legislative competence of *both* governments is suspended then that is a matter of such gravity that those governments, not the courts, should make the fundamental constitutional change.

That which distinguishes a "flexible" doctrine, explained in the next section, from the "pragmatic" approach is that it enables the courts, in the process of judicial review, to examine arguments as to whether there exist circumstances out of the usual course, and to decide in light of these circumstances whether local matters have attained national and international dimensions, thereby placing implementation within the competence of Parliament. There is foreclosure neither on judicial review, nor on the distribution of legislative powers, which is the by-product of the "pragmatic" or "purposive" approach. On these grounds alone, it is not surprising that controversy still surrounds the decisions of the Australian High Court.

IX. Treaty Implementation: A Canadian Solution

In an attempt to find a Canadian treaty implementation solution that is not predicated on overruling the *Labour Conventions Case* or restoring the ruling in the *Radio*

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[69] *Ibid.* at 57.

[70] *R.* v. *Poole; Ex parte Henry* (1939), 61 C.L.R. 634 (H.C.).

[71] *R.* v. *Burgess; Ex parte Henry* (1936), 55 C.L.R. 608 (H.C.).

Reference (although judicial notice is likely to be taken of these cases), the application of the general power and the general trade power in a reference before the Supreme Court of Canada on the *NAFTA* is now examined.

A. *General Power*

The first question facing the Supreme Court should be whether there exist circumstances out of the usual course by which local matters have attained national dimensions. In its judicial notice of the opinion of the Chief Justice of Canada in the *Anti-Inflation Reference*, the Court may conclude that local matters contained in the *NAFTA* had attained national dimensions and would place implementation within the competence of Parliament. To recall, in the *Anti-Inflation Reference* the Court accepted that property and civil rights, including contracts and local trade, and local and private matters, had attained, because of the unusual circumstances of high and rising prices and high and rising unemployment, new national relations as matters of economic stringency which caused the Canadian economy to be unaccommodating to normal intra-provincial trade and commerce (Laskin C.J. had hinted that section 91(2) might apply, but he did not pursue it).

In the case of the *NAFTA*, the Court would have to move beyond the domestic economy to the international economy to consider whether dislocations in international trade existed – exaggerated oil pricing, recession – and whether such dislocations could be construed as circumstances out of the usual course. Here, the Court may take judicial notice of *Re Exported Natural Gas*, where the dissenting opinion of Laskin, C.J. concurred in by Lamer (as he then was) and McIntyre JJ., provides some instructive reasoning.

In *Re Exported Natural Gas*, the Court considered Bill C-57, which provided, *inter alia*, "for the imposition of a natural gas and gas liquids tax as an essential and integral element of the national oil and gas policy as expounded in the National Energy Program,"[73] which posited "a petroleum pricing and revenue-sharing regime that recognizes the requirement of *fairness* to all Canadians no matter where they live."[74] The circumstances leading to this action by Parliament were "external events...[by which] Canadian consumers are asked to pay ever-rising prices for both imported and domestic energy."[75] The impugned legislation was seen by the majority of the Court as simply a tax law. Laskin C.J. took a more flexible view: "[t]he proposed federal legislation....serves an important revenue purpose but it is equally true that it reflects economic objectives."[76] The view here is that, having taken account of unusual circumstances, the dissenting opinion stands as sounder constitutional reasoning. If Laskin C.J. had succeeded, authority could have been found under either the general power or the general trade power.

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[72] R. Skidelsky, *John Maynard Keynes: Volume 2: The Economist as Saviour: 1920-1937* (London: Macmillan London Limited, 1992) at 269.

[73] *Reference Re Exported Natural Gas*, [1982] 1 S.C.R. 1004 at 1011, 136 D.L.R. (3d) 385 at 394 [hereinafter *Re Exported Natural Gas* cited to S.C.R.].

[74] *Ibid.* at 1016.

[75] *Ibid.* at 1017.

[76] *Ibid.* at 1040.

The issue for the Court in a *NAFTA* reference would be whether similar reasoning, taking into account the external events of a recession, could be applied. The legislation is not helpful here, as it fails to make explicit these conditions and their temporary nature, leaving the Court to rely on an examination of extrinsic materials to find rational grounds for the competence of Parliament.

This reasoning would fall short of the objectives of Strom and Finkle to the extent that it is inapplicable in normal circumstances. Whether the reasoning of Le Dain J. in *Crown Zellerbach*, where he turned to the *Anti-Inflation Reference* and found there an "ascertainable and reasonable limits" test that circumscribed the impact of a law of Parliament on provincial jurisdiction,[77] could meet the shortfall seems problematical. A better course is to turn to the reasoning of Dickson C.J. and the encroachment doctrine he prescribed in *City National Leasing*.

B. *General Trade Power*

The following examination of the *City National Leasing* judgment seeks to replace the Australian Rules of Strom and Finkle, which are based on a markedly different socio-economic and political culture, with Canadian Rules based on the culture of Canada and section 91(2) of the *Constitution Act, 1867*, as it is construed by the Supreme Court of Canada.

City National Leasing is described as "a foundation case in Canadian constitutional law. It reinvigorates a central federal power and implicitly overrules a major relic [*i.e. Commerce*] from Privy Council days."[78] It seems necessary in consequence to give the encroachment doctrine it contains a detailed explication.

Dickson C.J. invokes the "indicia" set out in *Vapour Canada* and in *Canadian National Transportation*.[79] To these he attaches a complex doctrinal exposition on which the application of the general trade power of Parliament must rely.

The dominant elements in his exposition are an encroachment doctrine and integration tests. These elements require the courts to consider "the seriousness of the encroachment on provincial powers" which in turn determines the appropriate integration test to be applied to measure whether the provision is "sufficiently integrated" with the "scheme of regulation" to be valid under section 91(2). That is, "[a]s the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained."[80]

A criticism is entered that, under this doctrine, "[p]arliament [is permitted] to regulate purely intraprovincial economic activity to an unprecedented extent."[81] Any

[77] *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 at 437-38, [1988] 3 W.W.R. 385 at 412.

[78] N. Finkelstein, "Constitutional Law – Division of Powers – Constitution Act, 1867, Section 91(2) – Validity of Section 31.1, Combines Investigation Act: *General Motors of Canada Limited* v. *City National Leasing*; *Quebec Ready Mix Inc.* v. *Rocois Construction Inc.*" (1989) 68 Can. Bar Rev. 802 at 817.

[79] *Canada (A.G.)* v. *Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, 3 D.L.R. (4th) 16.

[80] *General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641 at 671, 58 D.L.R. (4th) 255 at 276 [hereinafter *City National Leasing* cited to S.C.R.].

[81] K.E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 298.

criticism of this kind must be read along with the array of constraints that Dickson C.J. places around the exercise of his doctrinal prescription.

First, some or all of the five indicia are to be met. Next, the law of Parliament must meet a test of being "qualitatively different". Then, one or more of a series of "requirements" (another term he uses to describe the integration tests) are to be met: a "rational and functional connection"; an "ancillary" or "necessarily incidental" or "truly necessary" test; an "intimate connection" or "integral part" test; or a "valid constitutional cast by the context and association in which it is fixed as a complementary provision".[82]

Then Dickson C.J. identifies a number of propositions that limit the scope of reach of the general trade power. The following "provisions" cannot be upheld as exercises of the general trade power: the regulation of a nationwide single trade; the regulation of a series of single trades; the control of production in a local area; and the regulation of contracts of a single trade.[83]

Finally, among the criteria identified to begin the task of distinguishing between matters of general trade and of local trade are those pertaining to the collective provincial constitutional incapacity to enact remedial laws and to the failure of one or more Provincial Legislatures to enact remedial laws despite their holding the constitutional capacity to do so.

How can this extensive constitutional doctrine be applied to treaty and international agreement implementation? The *NAFTA* provides a test case: it contains matters that fall within the classes of subjects enumerated in section 91 and section 92. Where the *NAFTA* seeks to regulate a "purely intraprovincial economic activity", the governments in Canada must consider the "seriousness of the encroachment on provincial powers". In this instance, the most constrictive of the integration tests would apply. In all likelihood, but with no certainty, implementation would rest with the Provincial Legislatures. As the degree of encroachment lessens in other economic activities, less constrictive integration tests would apply with a consequent shift to implementation by the Government of Canada. For other activities, the practical resolution may be through administrative inter-delegation. At the other end, where the *NAFTA* seeks to regulate purely extra-provincial economic activity, implementation would rest with the Government of Canada.

This reasoning still falls short of the objectives for Strom and Finkle. However, flexible reasoning by the Court, combined with administrative delegation by governments, comes very close to those objectives while remaining within the bounds of sound Canadian constitutional law. The alternative is without bounds, a discretionary treaty power of striking force that overrides judicial review on federal grounds, basic constitutional principles, and the distribution of legislative powers between Parliament and the Provincial Legislatures. Strom and Finkle cite the statement of Mr. Justice Deane in the *Tasmanian Dam Case* that tempered the broad scope he gave to the "external affairs" clause: a treaty law falls within that clause if, *inter alia*, "the law does not conflict with...constitutional prohibitions".[84] They apparently see no conflict between their purposive solution and the foregoing constitutional prohibitions in Canada.

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82 *City National Leasing*, *supra* note 80 at 670-71.

83 *Ibid.* at 689.

84 Strom & Finkle, *supra* note 1 at 52, citing *The Tasmanian Dam Case* at 255-56.