TREATY IMPLEMENTATION: THE CANADIAN GAME NEEDS AUSTRALIAN RULES

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The power to implement treaties to meet international obligations has remained a controversial issue in Canadian constitutional law for over half a century. Despite vigorous debate among distinguished academics and jurists over the merits of the Privy Council's reasoning in the Labour Conventions Case, the Supreme Court of Canada has, for all intents and purposes, remained silent on the matter.

In contrast to Canada, Australia's High Court, in a series of judgments spanning fifty years, has clarified the law in a manner that, the authors submit, is both principled and realistic. Relying on a purposive approach to constitutional interpretation, and being mindful of the rapid growth in global interdependence and the expanding need for international cooperation, the Australian High Court recognized that only a national government with complete control over all aspects of international legal relations could discharge its international obligations and remain an effective member of the international community.

The authors conclude that the time is ripe for the Supreme Court of Canada to take the first available opportunity to revisit the Labour Conventions Case. In reassessing

Le pouvoir de mettre en uvre des traités afin de respecter des obligations internationales est une question de droit constitutionnel canadien qui suscite des controverses depuis plus d'un demi siècle. Bien que d'éminents universitaires et d'éminents juristes discutent avec énergie du bien-fondé du raisonnement qui a été développé par le Conseil privé dans l'arrêt Conventions du travail, la Cour suprême du Canada est pratiquement demeurée silencieuse sur cette question.

Contrairement à ce qui s'est passé au Canada, la Haute Cour d'Australie, dans une série de décisions qui s'échelonnent sur une période de cinquante ans, a clarifié le droit d'une manière qui, selon les auteurs, est à la fois raisonnée et réaliste. En s'appuyant sur une méthode téléologique d'interprétation de la Constitution et en tenant compte de l'augmentation rapide de l'interdépendance à l'échelle mondiale et du besoin croissant de coopération sur le plan international, la Haute Cour d'Australie a reconnu que seul un gouvernement national maîtrisant complètement tous les aspects des relations juridiques internationales pourrait s'acquitter de ses obligations internationales et demeurer un véritable membre de la communauté internationale.

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the doctrine established by that case, the Supreme Court of Canada should rely on the approach of the Australian High Court to overturn a precedent that is theoretically questionable and, in practical terms, anachronistic.

Les auteurs concluent qu'il est temps que la Cour suprême du Canada réexamine l'arrêt Conventions du travail, dès que l'occasion se présentera. Lorsqu'elle réexaminera la doctrine développée dans cet arrêt, la Cour suprême du Canada devrait s'appuyer sur l'approche de la Haute Cour d'Australie afin de renverser un précédent qui est contestable sur le plan théorique et anachronique sur le plan pratique.

I. INTRODUCTION

The implementation of treaties through domestic legislation is a vexing problem faced by the Canadian federal government each time the subject matter of the treaty pertains, or might be interpreted to pertain, to one of the legislative powers assigned to the provinces in section 92 of the *Constitution Act, 1867*.[1] The growing complexity and economic and political interdependence which characterizes the international community has resulted in a steady increase in state interactions. Many of these interactions lead to the negotiating, drafting and signing of agreements that impose international legal duties and obligations on the signatories. Not surprisingly, Canada's federal structure can have a significant impact on the manner in which it enters into and implements treaties involving international legal obligations.

Some commentators have expressed the view that Canada suffers from a significant constitutional "handicap" in its ability to undertake and fulfil obligations in areas such as human rights, environmental protection and international trade.[2] Others have denied that this is a serious problem. As support for their argument, they point to Canada's record as a signatory to many important multilateral treaties in comparison with other federal states.[3]

This ongoing concern recently became more salient because of the *Free Trade Agreement*[4] (*FTA*) signed by the United States and Canada.[5] Some provisions of the *FTA* required implementation through legislation that, it was said, would encroach upon provincial legislative powers over property and civil rights[6] or matters of a local nature.[7] Questions were also raised whether, if a reference case on federal

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[1] (U.K.), 30 & 31 Vic., c. 3.

[2] *See, e.g.*, P.W. Hogg, CONSTITUTIONAL LAW OF CANADA, 2d ed. (Toronto: Carswell, 1985); 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) 131 [hereinafter *Jurisdiction Over International Trade*]; R.E. Johnston, THE EFFECT OF JUDICIAL REVIEW ON FEDERAL-STATE RELATIONS IN AUSTRALIA, CANADA, AND THE UNITED STATES (Baton Rouge: Louisiana State University Press, 1969); I.C. Rand, *Some Aspects of Canadian Constitutionalism* (1960) 38 CAN. BAR REV. 135; J.S. Ziegel, *Treaty Making and Implementing Powers in Canada: The Continuing Dilemma* in B. Cheng & E.D. Brown, eds., CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER ON HIS EIGHTIETH BIRTHDAY (London: Stevens & Sons, 1988) at 333; and F.R. Scott, *The Consequences of the Privy Council Decisions* (1937) 15 CAN. BAR REV. 485.

[3] *See, e.g.*, A.L.C. de Mestral, Comment on *Schneider* v. *The Queen* (1983) 61 CAN. BAR REV. 856; G.V. La Forest, *The Labour Conventions Case Revisited* (1974) 12 CAN. Y.B. INT'L L. 137; A. Jacomy-Millette, TREATY LAW IN CANADA (Ottawa: University of Ottawa Press, 1975); E. McWhinney, *The Constitutional Competence Within Federal Systems as to International Agreements* (1966) 3 CAN. LEG. STUD. 145.

[4] *See* the *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, Sch. A.

[5] *See Jurisdiction Over International Trade*, *supra* note 2; and H.S. Fairley, *Implementing the Canada-United States Free Trade Agreement* in D.M. McRae & D.P. Steger, eds., UNDERSTANDING THE FREE TRADE AGREEMENT (Halifax: Institute for Research on Public Policy, 1988) at 193 [hereinafter *Implementing FTA*].

[6] *Constitution Act, 1867*, *supra* note 1, s. 92(13).

[7] *Ibid.* at s. 92(16).

implementing legislation was filed, the Supreme Court of Canada would find that legislation unconstitutional.[8] On the other hand, it would also present an opportunity for the Court to overrule the *Labour Conventions Case*,[9] which has defined Canadian law on treaty implementation for over half a century. The controversy over the *FTA* remains unresolved judicially because neither the provinces nor the federal government chose to refer the matter to a court, and, so far, private litigants have not raised the issue in civil litigation. The legal questions remain.

The negotiations preceding the *FTA* also provided an illustration of the practical difficulties engendered by the current Canadian approach to treaty implementation. The federal government was clearly seen to be negotiating on two fronts at once. First, it had the formidable task of negotiating a trade agreement with a superpower with whom it has decidedly asymmetrical trade relations. The agreement was bound to have much more impact on Canada than on the United States because Canadian exports to the United States account for approximately 76 per cent of its total exports.[10] In contrast, exports from the United States to Canada constitute a mere 14 per cent of U.S. exports worldwide. Moreover, exports from the United States to Canada, though greater than to any other country, are still a small percentage of that nation's Gross Domestic Product.

Besides this negotiating problem, Canada also was burdened by a second handicap. It had to consult and negotiate with its own provinces while it negotiated with the United States. This second burden was a direct result of constitutional rules, which left the responsibility for the implementation of any aspect of an eventual treaty that was within provincial jurisdiction to the discretion of the provinces. Because it was uncertain, in advance, who had responsibility to implement different aspects of the treaty, the provinces had significant leverage to demand extensive involvement at nearly every step in the negotiations.

It is difficult to know with any certainty to what degree this constitutionally imposed burden affected the success of negotiations in this or any other, similar, situation. Canadian negotiators are unlikely to discuss (and may not be aware of) that which they failed to obtain because of this legally imposed handicap. Nevertheless, it is clear that, at a minimum, there would have been less of a paper burden on Canadian negotiators if they did not have to check with the provinces whenever some aspect of the negotiations might fall within provincial jurisdiction. Moreover, negotiators on the other side of the table were certainly aware of this Canadian legal peculiarity and could be expected to exploit it whenever the opportunity to do so profitably arose. Undoubtedly, this aspect of Canadian constitutional law has important and, in some situations, perhaps vital practical dimensions which should be an aspect of any legal consideration of this issue.

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[8] *See, e.g., Implementing FTA, supra* note 5 at 193-94. *See also*, a lively discussion of the matter among Professor Ivan Bernier, Scott Fairley, Professor Gerald Morris and Professor Andrew Petter, in hearings before the Standing Senate Committee on Foreign Affairs: Canada, Senate, Proceedings at the Standing Senate Committee on Foreign Affairs, No. 21 (4 May 1988).

[9] *Ontario (A.G.)* v. *Canada (A.G.)*, [1937] A.C. 326, [1937] 1 D.L.R. 673 (P.C.) [hereinafter *Labour Conventions Case* cited to A.C.]. *See* Part II, below, for a discussion of this case.

[10] This translates to almost 16 per cent of Canada's total Gross Domestic Product (GDP).

While others have examined treaty implementation from a perspective that has focused repeatedly on Canadian domestic case law, our purpose in this paper is to broaden the exploration of the subject. We aim to achieve this goal through a comparative examination of the constitutions and case law of Canada and fellow member of the Commonwealth, Australia.[11] Australia, with similar, British-derived political institutions and a decentralized federal system, provides a most useful comparative model for consideration. We also add a note of realism to this exercise in comparative constitutional law by giving some attention to the political consequences which flow from judicial interpretation in the two countries.

While the wording of the clauses which address the implementation of treaties in the Australian and Canadian constitutions is quite different, in both cases the drafters were attempting to address the same problem from the same perspective. Each nation became at its founding a federal, domestically self-governing member of the British Empire. Indeed, membership in the Empire seemed to both sets of founders to be so defining a condition that neither tried to see beyond it in their constitution-making. This similarity of circumstance, when combined with relatively vague constitutional sections, presented the courts of the respective countries with similar problems in interpretation. Do they engage in a literal, narrow, "strict constructionist" judicial analysis or should they employ a more daring, purposive, "living tree" approach to constitutional interpretation? In Canada, the courts[12] began with a purposive approach[13] that was almost immediately reversed,[14] and have since upheld the narrow, "literalistic" approach. The Australian courts,[15] on the other hand, took the first opportunity to favour a purposive perspective. It is our view that the evolution of Canada's political and economic situation dictates that Canada requires a new, more flexible approach to treaty implementation.

Moreover, recent decisions on *Charter*[16] issues suggest that the Supreme Court of Canada is both willing and able to take a purposive approach to constitutional interpretation.[17] Indeed, even in non-*Charter* areas, the Court has been willing to

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[11] *See infra* notes 47-50.

[12] The "courts" would, of course, include the Judicial Committee of the Privy Council because it sat as the final court of appeal for Canada at this time.

[13] *See* Viscount Dunedin's reasoning in *Reference re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, [1932] 2 D.L.R. 81 (P.C.) [hereinafter *Radio Reference* cited to A.C.].

[14] It was reversed by Lord Atkin, speaking for the Privy Council, in the *Labour Conventions Case*, *supra* note 9, through the interesting approach of distinguishing the *ratio* in the *Radio Reference* from the facts found in the *Labour Conventions Case*. *See* Part II, below, for a discussion of this issue.

[15] Here we should note what must be seen as a crucial difference between the two countries. Unlike the Supreme Court of Canada, an appeal to the Privy Council from a judgment of the High Court of Australia on matters of the division of powers under the *Australian Constitution* requires the leave of the High Court. The High Court, with one exception, has always denied leave to appeal on such matters: *see* Hogg, *supra* note 2 at 168 n. 23, for a brief discussion.

[16] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[17] *See, e.g.*, Dickson C.J.'s reasoning in *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, and its progeny.

take a deliberately purposive approach to constitutional interpretation, regardless of whether it means overturning a long line of decisions.[18] It is, therefore, our conclusion that the Supreme Court of Canada should take the first available opportunity to overrule the *Labour Conventions Case* and restore the ruling of the Privy Council in the *Radio Reference*.[19]

II. Treaty Implementation in Canada: Present Doctrine

When countries sign and ratify an international agreement such as a treaty, they create mutual international legal obligations.[20] A question arises, however, about the legal effect of the treaty domestically. Either the treaty is automatically incorporated as part of the domestic laws[21] or, alternatively, implementing legislation is required to give the treaty domestic effect and, thereby, meet the nation's international obligations.[22] In a unitary state such as Great Britain this is not usually a problem because a parliamentary system of government virtually assures that the international treaty entered into by the executive branch of the government will be translated into domestic legislation, provided that a majority government is in power. Federal states, with some exceptions, have problems, however, because the constitution divides the legislative powers between the central government and the sub-units of

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[18] *See, e.g.*, the recent judgment of the Court in *De Savoye* v. *Morguard Investments Ltd.*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [hereinafter *De Savoye* cited to S.C.R.], where the Court addressed longstanding principles pertaining to the enforcement of foreign judgments. For a discussion, *see* P. Finkle & S. Coakeley, *Morguard Investments Limited: Reforming Federalism from the Top* (1991) 14 Dalhousie L.J. 340.

[19] More specifically, it will be argued that the ruling in the *Labour Conventions Case* was wrong, both in theory and in practice, given Lord Sankey's *dictum* regarding the interpretation of constitutions, and that whatever the merits of the reasoning at the time, that reasoning can no longer be respected if the nature of the international system of today is considered. Lord Sankey stated that, "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.": *see Edwards* v. *Canada (A.G.)* (1929), [1930] A.C. 124 at 136, [1929] All E.R. 571 at 577 (P.C.) [hereinafter *Edwards* cited to A.C.].

[20] For example, in the United States any treaty signed by the president must be ratified by a 2/3 majority of the Senate before the obligation becomes legally binding on the United States: *see* U.S. Const. art. II, s. 2, cl. 2. This does not apply to those agreements signed by the president which are not classified as treaties and the result is that the president wields almost unlimited powers over U.S. foreign relations. As Richard E. Johnston writes: "[E]xecutive agreements do not require senatorial consent and the Constitution does not even mention executive agreements; the device has been developed by American presidents partially for the purpose of avoiding the required senatorial consent to formal treaties.": *see supra* note 2 at 167.

[21] *See, e.g.*, U.S. Const. art. VI, s. 1.

[22] *See, e.g.*, Canada and Great Britain. In Canada, the:

> treaty-making power being a prerogative power, the Crown can bind citizens only in areas that are still governed by the prerogative such as the recognition of a state, or the declaration or termination of war. But in any other area a treaty can only create rights enforceable by the courts or change the laws of Canada where appropriate legislation has been adopted.

See S.A. Williams & A.L.C. de Mestral, An Introduction to International Law: Chiefly as Interpreted and Applied in Canada, 2d ed. (Toronto: Butterworths, 1987) at 36.

the federation. It then becomes a question of whether the treaty maker — the central government — can legislate in an area covered by the powers that the constitution allots to the subordinate units of the state, and, if it cannot do so, what steps it can take to ensure that it will be able to comply with its international legal obligations.

The *Constitution Act, 1867*, contains no express provision addressing the competence of the federal government to legislate in the area of Canadian external affairs. The framers, however, included a clause which dealt with the implementation of empire treaties. Section 132 deals specifically with treaty implementation:

> The Parliament and Government of Canada shall have all Powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign Countries, arising under treaties between the Empire and such Foreign Countries.[23]

Put plainly, this clause enabled the federal government to encroach on provincial areas of legislative competence if it was "performing the obligations of Canada or of any province thereof....as part of the British Empire".[24] Apparently the framers did not foresee that Canada would eventually achieve independence from the British Empire. As a result, the courts were called upon to decide whether section 132 could be interpreted to encompass the implementation of treaties signed by Canada on its own behalf. If they decided that it could not be used that way, the courts then had to decide whether the federal government could implement treaties under the "Peace, Order, and Good Government" (POGG) clause found in section 91 of the *Constitution Act, 1867*, even if by so doing, it would encroach on provincial legislative powers.

The Privy Council first considered these questions in the *Radio Reference*.[25] In that case, the issue was whether parliament had the jurisdiction to make regulations for radio communications within the provinces as part of the international legal obligations created by the *International Radiotelegraph Convention, 1927*, to which Canada was a party in its own right. The Supreme Court of Canada had upheld the regulations,[26] and in affirming that judgment, the Privy Council, speaking through Viscount Dunedin, and possibly alluding to the frames of mind of the fathers of confederation, stated that:

> The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and 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 defined in s. 132, their Lordships think that it comes to the same thing.[27]

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[23] *Constitution Act, 1867*, *supra* note 1 at s. 132.

[24] *Ibid.*

[25] *See Radio Reference*, *supra* note 13.

[26] *Reference Re Regulation and Control of Radio Communication*, [1931] S.C.R. 541, [1931] 4 D.L.R. 865.

[27] *Radio Reference*, *supra* note 13 at 312.

It is noteworthy that the clause referring to Canada as "part of the British Empire" and to obligations "arising between the Empire and such foreign countries", was later ruled as having been rendered inoperative when Canada gained the status of a fully independent member of the international community in 1926.[28] In contrast to what Lord Atkin would later write on behalf of the Privy Council, it appears that Viscount Dunedin did not think that it mattered too much that Canada was no longer a member of the British Empire.

The issue arose again just five years later in the *Labour Conventions Case*. At the Supreme Court of Canada level,[29] Chief Justice Duff agreed with Viscount Dunedin's explanation of the power to implement treaties. Accordingly, he would have upheld federal legislation enacted to give effect to the international labour conventions signed and ratified by Canada in 1935.[30] The matter was then brought before the Privy Council for settlement.

Lord Atkin, writing for the Privy Council, soundly rejected Chief Justice Duff's — and by implication, Viscount Dunedin's — views on the matter. He struck down the legislation as an unacceptable federal foray into the provincial legislative competence over property and civil rights. Lord Atkin pointed out that the impugned legislation dealt with a treaty signed by Canada as an international person in its own right and therefore was not the implementation of an Empire treaty.[31] He went on to state:

> There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with the enlarged functions of the Dominion executive....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.[32]

Thus, in one short paragraph, Lord Atkin purported to eliminate section 132 as a possible head under which Parliament could implement treaties signed by itself as an independent state, and to dismiss arguments concerning the general power under the POGG clause. He rationalized the judgment by asserting the "watertight

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[28] This was the ruling of Lord Atkin speaking for the Privy Council in the *Labour Conventions Case*, *supra* note 9. There has been some disagreement among commentators about the accuracy of this holding. For views that s. 132 could support an interpretation that Canada could implement treaties in her own right *see Jurisdiction Over International Trade*, *supra* note 2; and R.St.J. Macdonald, *International Treaty Law and the Domestic Law of Canada* (1975) 2 DALHOUSIE L.J. 307. *But see, e.g.*, H.A. Leal, *Federal State Clauses and the Conventions of The Hague Conference on Private International Law* (1984) 8 DALHOUSIE L.J. 257; and B. Laskin, CANADIAN CONSTITUTIONAL LAW, 3d ed. (Toronto: Carswell, 1966).

[29] [1936] S.C.R. 461, [1936] 3 D.L.R. 673.

[30] The Court split evenly, however, (having only six judges at the time) on the issue of the constitutional validity of the legislation.

[31] *Labour Conventions Case*, *supra* note 9 at 349.

[32] *Ibid.* at 352.

compartments" theory[33] regarding the division of powers between the provinces and the federal government.

The effect of the judgment was to emasculate the federal power to implement international obligations in areas of provincial jurisdiction without provincial cooperation. Given the judicially mandated broad scope of the property and civil rights clause under section 92 and the historically narrow judicial interpretation of the federal trade and commerce clause,[34] it has become difficult for Parliament to implement treaties without provincial cooperation when the treaty involves provincial legislative powers. The practical result was, and remains, that the federal government must obtain the cooperation of all relevant provinces before assuming an international legal obligation that may fall within provincial jurisdiction.

The doctrine of the *Labour Conventions Case* has never been expressly overruled and remains in force. The Supreme Court of Canada has referred to the matter obliquely several times over the years,[35] and some commentators believe that the gathering *dicta* and scholarly criticism of the doctrine may soon reach the

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[33] Lord Atkin stated that:

> It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from 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.

Ibid. at 353-54.

[34] Several recent cases suggest that the Supreme Court may be gradually rehabilitating the trade and commerce clause from the land of marginal constitutional significance where it has dwelt for most of Canadian constitutional history. This development, if it were followed through in a determined and clear fashion, would do much to alleviate the problems of implementation discussed in this paper, at least in so far as they relate to international agreements which clearly relate to trade and commerce. While some do so relate, many do not, and these agreements would be untouched by these constitutional developments. *See, e.g., Canada (A.G.)* v. *Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, 3 D.L.R. (4th) 16; and *General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255.

[35] *See, e.g., Johannesson* v. *West St. Paul (Municipality of)*, [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609; *Francis* v. *Canada (A.G.)*, [1956] S.C.R. 618, 3 D.L.R. (2d) 641 [hereinafter *Francis* cited to S.C.R.]; *Reference Re Offshore Mineral Rights*, [1967] S.C.R. 792, 65 D.L.R. (2d) 353; *Macdonald* v. *Vapor Canada*, [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1; and *Schneider* v. *B.C. (A.G.)*, [1982] 2 S.C.R. 112, 68 C.C.C. (2d) 449. *See also Reference Re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86, 5 D.L.R. (4th) 385 [hereinafter *Continental Shelf Reference*]. 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, puts forward an argument for renewed federal powers to implement treaties in her discussion of the *Continental Shelf Reference.*

"critical mass" necessary for the Court to reconsider the Privy Council judgment openly and in light of present-day realities. It may, then, be useful to explore the experience in Australia to ascertain the types of legal arguments which may arise in the development of a new theory of treaty implementation and to refute the assertion that a strong federal treaty-implementation power would constitute a danger to Canadian federalism.

III. Treaty Implementation in Australia

In many ways Australia's constitutional position regarding treaties has a character similar to that of Canada. The *Commonwealth of Australia Constitution Act, 1900*,[36] does not expressly provide the Commonwealth government with the power to make treaties. Similar to the Canadian approach, this power derives from the devolution of the royal prerogative through the Governor General to the Governor-in-Council. Also, like the Canadian constitution, in the *Australian Constitution* there is no express mention of the power to implement treaties in its own right. Unlike in Canada, however, the framers of the *Australian Constitution* provided that, pursuant to section 51:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
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> (xxix.) External affairs.[37]

The "external affairs" clause has been the focus of judicial interpretation in case law dealing with the powers of the Commonwealth government to implement treaties. The *Australian Constitution* did not provide a definition of "external affairs" for the benefit of the Australian courts. The main issue considered in various Australian cases is whether the Commonwealth government can implement treaties dealing with matters assigned to the constituent states within the Commonwealth.[38]

The first case to address the interpretation of the clause was *R.* v. *Burgess; Ex parte Henry*.[39] *Burgess* addressed the power of the Governor-in-Council to enact regulations for intrastate aviation to implement the *Air Navigation Convention, 1919*, to which Australia was a signatory. The Australian High Court, in four separate judgments, held that while the Commonwealth government had no jurisdiction over intrastate aviation *per se*, it could legislate to regulate it as part of

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[36] (U.K.), 63 & 64 Vict., c. 12 [hereinafter *Australian Constitution*].

[37] *Ibid.* at s. 51.

[38] For general discussions of the treaty implementation powers in Australian constitutional law, *see, e.g.*, G. Doeker, The Treaty-Making Power in the Commonwealth of Australia (The Hague: Martinus Nijhoff, 1966); M.H.M. Kidwai, *External Affairs Power and the Constitutions of British Dominions* (1976) 9 U. Queensland L.J. 167; P.H. Lane, A Students' Manual of Australian Constitutional Law, 2d ed. (Sydney: Law Book, 1980); and N. Douglas, *'Federal' Implications in the Construction of Commonwealth Legislative Power: A Legal Analysis of Their Use* (1985) 16 U. West. Aust. L. Rev. 105.

[39] (1936), 55 C.L.R. 608 (Aust. H.C.) [hereinafter *Burgess*].

the implementation of a treaty. All five judges agreed "that the federal legislation to carry out the Air Navigation Convention was a constitutional and in no sense colorable exercise of the "external affairs power"....even though federal legislation as to the same subject matter would otherwise be unconstitutional."[40]

Despite this general interpretation of the "external affairs" clause, four of the five judges struck the legislation down as not adhering closely enough to the wording of the *Convention*. Starke J. dissented, holding that "[t]he Commonwealth cannot do what the Constitution forbids. But otherwise the power is comprehensive in terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other Powers or States."[41]

The Court tried to define the exact scope of the treaty implementation powers under the "external affairs" clause, but there was little consistency in the reasoning of the five judges, and it was unclear what matters had achieved a sufficiently international character for the purposes of the clause. In addition, it was unclear how closely the wording of the implementing legislation had to come to the language of the treaty in order for it to be upheld as implementing legislation.[42] The Australian Supreme Court, like the Privy Council in the *Labour Conventions Case*, was reluctant to permit the Commonwealth government to assume unlimited powers over implementation legislation merely because it had entered into an international agreement. Both Courts apparently feared that broad implementation powers might tempt a federal government to enter such agreements with a deliberate (or incidental) intent to expand federal powers.

The debate over the issue was renewed with vigour in *R.* v. *Poole; Ex parte Henry*.[43] This case also dealt with regulations enacted to implement the *Air Navigation Convention, 1919*. These regulations addressed air traffic above aerodromes in the States. A majority of the Court found that while the regulations went beyond the wording of the *Convention*, they were "incidental to the principle stated in the Convention."[44] We may contrast this reasoning with the finding in *Burgess* that the impugned regulations (in *Burgess*) were "in conflict with fundamental principles of the convention",[45] and disclosed a rather "wide departure from [its] purposes".[46]

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[40] L. Wildhaber, TREATY-MAKING POWER AND CONSTITUTION: AN INTERNATIONAL AND COMPARATIVE STUDY (Basel: Helbing & Lichtenhahn, 1971) at 299.

[41] *Burgess, supra* note 39 at 658.

[42] Evatt and McTiernan JJ. held that, "the particular laws or regulations which are passed by the Commonwealth should be in conformity with the convention which they profess to be executing.": *ibid.* at 688.

Mr Justice Dixon said that, "the nature of th[e] power [to implement treaties] necessitates a faithful pursuit of the purpose....": *ibid.* at 674.

Mr Justice Starke dissented on this point, asserting that, "[a]ll means which are appropriate, and are adopted to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power.": *ibid.* at 659-60.

[43] (1939), 61 C.L.R. 634 (Aust. H.C.).

[44] *Ibid.* at 656.

[45] *Burgess, supra* note 39 at 646.

[46] *Ibid.* at 674.

More recently, the Australian High Court has reconsidered the issue in four separate cases: *Koowarta* v. *Bjelke-Petersen*,[47] *Commonwealth* v. *Tasmania*,[48] *Richardson* v. *Forestry Commission*,[49] and *Queensland* v. *Commonwealth*.[50] The last two cases are applications of the principles that a majority of the Court reaffirmed and clarified in *Koowarta* and the *Tasmanian Dam Case*.

In *Koowarta*, one of the States attacked the federal *Racial Discrimination Act, 1975*, which the Commonwealth government had enacted to comply with Australia's obligations under the *International Covenant on the Elimination of All Forms of Racial Discrimination*. The High Court upheld the legislation in a 4-3 decision characterized by several differently reasoned judgments. Three of the Judges[51] upheld the legislation on the grounds that "the Commonwealth Parliament can give legislative effect to any international agreement entered into *bona fide* by the Commonwealth, *whatever its content* and in doing so may override State law".[52]

Chief Justice Gibbs and Aickin J. dissented, arguing that if such a view were correct:

> [I]t [would be] impossible to envisage any area of power which could not become the subject of Commonwealth legislation if the Commonwealth became party to an appropriate international agreement....The distribution of powers made by the Constitution could in time be completely obliterated....[53]

Mr Justice Stephen submitted the deciding judgment. He upheld the legislation but saw the treaty implementing power in somewhat narrower terms than Mason, Murphy and Brennan JJ. He stated:

> It [is] not....enough that the challenged law gives effect to treaty obligations. A treaty with another country, whether or not the result of a collusive arrangement, which is on a topic neither of especial concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive that scrutiny.[54]

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[47] (1982), 153 C.L.R. 168, 56 A.L.J.R. 625 (H.C.) [hereinafter *Koowarta* cited to C.L.R.].

[48] (1983), 158 C.L.R. 1, 57 A.L.J.R. 450 (H.C.) [hereinafter *Tasmanian Dam Case* cited to C.L.R.].

[49] (1987), 164 C.L.R. 261, 61 A.L.J.R. 528 (H.C.) [hereinafter *Richardson* cited to C.L.R.].

[50] (1989), 167 C.L.R. 232, 63 A.L.J.R. 473 (H.C.) [hereinafter *Queensland* cited to C.L.R.].

[51] Mason, Murphy and Brennan JJ.

[52] Leal, *supra* note 28 at 277 (emphasis added).

[53] *Koowarta*, *supra* note 47 at 198. To this dissent, Wilson J. added his own indictment of such a centralist view of the matter. He stated that:

> [I]t would be difficult to deny a power to implement any international obligation....So broad a power, if exercised, may leave the existence of the States as constitutional units intact but it would deny to them any significant legislative role in the federation.

See ibid. at 251-52.

[54] *Ibid.* at 216-17.

It is difficult to understand exactly what Stephen J. meant by "especial concern" and "general international concern". Clearly, as J.M. Finnis pointed out,[55] Stephen J. does not believe that it is sufficient that the Commonwealth has signed a treaty regarding the matter. It is hard to imagine, however, that a country would endure the difficult, expensive and often frustrating process of treaty negotiating unless the matter in question was of "especial concern" to it. Similarly, it is perhaps even more difficult to conceive of a number of countries going through that process unless the matter in question was of "general international concern", or at least of "especial concern" to each of them. It is possible that Stephen J.'s "especial concern" requirement was meant to function as an implicit check to prevent possible abuse of the treaty implementation power by the Commonwealth government, but this possibility is also doubtful for the same reasons indicated above.

In the *Tasmanian Dam Case*, the High Court had to deal with an attack on legislation enacted by the Commonwealth government to implement the *Convention for the Protection of World Cultural and Natural Heritage*, signed by Australia in 1983. The legislation prohibited the construction of a dam for hydroelectric purposes in the state of Tasmania without federal ministerial permission, and the State contended that it was *ultra vires* the legislative competence of the Commonwealth.

The High Court, in another 4-3 decision, held that the legislation, insofar as it implemented the *Convention*, was within the legislative competence of the Commonwealth by virtue of its powers under clause 51(xxix). The same three judges who had given the power a wide—perhaps even virtually unlimited—scope in the *Koowarta* case reiterated their views, but the deciding judge in this case was Mr Justice Deane. He declined to agree with the view expressed by Chief Justice Gibbs (who wrote another dissenting judgment in this case) and Aickin J. (no longer on the Court) in *Koowarta*. Mr Justice Deane stated that the "external affairs" power is:

> [N]ot to be limited by reference to notions of legislative powers being reserved to the States. Nor is it to be limited by the notion that to give the words conferring the power their full effect would imperil the balance between the Commonwealth and States which was achieved by the distribution of legislative powers contained in the Constitution.[56]

and:

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[55] J.M. Finnis tries to refute any notions that the *Koowarta* case represents a "centralization" of the power to enforce treaties in Australia. He argues that the view that any treaty implementing legislation can override State laws was rejected by a majority of the Judges (Gibbs C.J., Aickin, Wilson and Stephen JJ.), and that in this sense the States' rights won a victory in principle. He later tempers his view somewhat, however, by stating that:

> At all events, the States can still argue that no positive interpretation of the external affairs power commanded a majority in *Koowarta*, and that the rulings or dicta on human rights in general are not definitive, and not to be acquiesced in.

See Power to Enforce Treaties in Australia — the High Court Goes Centralist? (1983) 3 OXFORD J. LEGAL STUD. 126 at 128-29.

[56] *Tasmanina Dam Case, supra* note 48 at 254.

> Parliament's power to regulate with respect to external affairs is not limited by considerations of whether the law operates within or without Australia. If the law does not conflict with [other] constitutional prohibitions and can properly be characterized as a law with respect to external affairs, it is within power.[57]

As to the scope of the "external affairs" power, Deane J. writes that:

> *Burgess' Case* is authority for the proposition that the "substantial subject matter of external affairs" includes "the carrying out", within or outside Australia, of an agreement binding the Commonwealth in relation to other countries *whatever the subject-matter* of the agreement may be....It is, however, relevant for present purposes to note that the responsible conduct of external affairs in today's world will, on occasion, require observance of the spirit as well as the letter of international agreements, in compliance with recommendations of international agencies and pursuit of international objectives *which cannot be measured in terms of binding obligation.*[58]

Deane J. did, however, temper the broad scope that he gave to the "external affairs" power by adding that, "the law must be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs".[59] He also indicated that there must be "a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it."[60]

Thus, a fair reading of Mr Justice Deane's judgment leaves us with a clear majority[61] 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.[62] Deane J. would apparently go even further, recognizing the right of the Commonwealth government to legislate in areas of state concern even where there is no clear "binding obligation" on it. It also seems clear that a factor in the Court's interpretation of the "external affairs" power, at least in the *Tasmanian Dam Case*, is 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

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57 *Ibid.* at 255-56.

58 *Ibid.* at 258-59 (emphasis added).

59 *Ibid.* at 259.

60 *Ibid.* at 260.

61 Mason, Murphy, Brennan, and Deane JJ.

62 For a supporting argument, *see* P.H. Lane, *The Federal Parliament's External Affairs Power*: The Tasmanian Dam Case (1983) 57 AUST. L.J. 554. Professor Lane writes:

> The external affairs power was *the power* promoted by the High Court, to the benefit of the Commonwealth, but to the dismay of the States. Mason, Murphy, Brennan and Deane JJ. each conceded the proposition that the existence of an international Convention on any matter to which Australia is a party automatically validates the resultant external affairs law....

Ibid. at 556.

interdependent "neighbours".[63] Although Deane J. qualified his opinion somewhat, those qualifications did not go to the competence of the Commonwealth to legislate to implement *bona fide* international agreements, but rather to legislation which did not implement such an agreement or which was patently unreasonable, not because it trenched upon state powers, but because its effect in general was not commensurate with the object or purpose of the international agreement itself.[64]

IV. Treaty Implementation: A Pragmatic Approach

Mr Justice Mason of the Australian High Court, in formulating his opinion that the Commonwealth legislation in the *Tasmanian Dam Case* was a constitutionally legitimate means of implementing an international convention, referred to the elusive nature of any attempt to define in the abstract what matters would fall under the rubric of "external affairs". He stated:

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[63] *See, e.g.*, the judgment of Mason J. where he states:

> [W]hen we have regard to international affairs as they are conducted today, when the nations of the world are accustomed to discuss, negotiate, co-operate and agree on an ever-widening range of topics....there are virtually no limits to the topics which may hereafter become the subject of international co-operation and international treaties or conventions.

Tasmanian Dam Case, supra note 48 at 124. And the judgment of Murphy J. where he indicates that:

> It was recognized in *Burgess*, and is even clearer now, that along with other countries, Australia's domestic affairs are becoming more and more involved with those of humanity generally in its various political entities and groups. Increasingly, use of the external affairs power will not be exceptional or extraordinary but a regular way in which Australia will harmonize its internal order with the world order.

Ibid. at 170.

[64] In *Queensland, supra* note 50, the High Court had to address a challenge brought by the state of Queensland against Commonwealth legislation implementing the *Convention for Protection of World Cultural and Natural Heritage*. A proclamation had been issued by the Governor-General in accordance with the *World Heritage Properties Act 1983* (Cth), prohibiting certain activities from damaging certain lands in the state of Queensland. The validity of that proclamation was then challenged.

In *Richardson, supra* note 49, the Commonwealth had passed legislation making it unlawful to do any act which would damage a tree within a certain area of Tasmania until a commission of inquiry had established whether the area was appropriate for inclusion on the list of protected areas that had been set up under the convention indicated above. The claim in *Richardson* focused on an application by a Commonwealth senator for an interim injunction enjoining the Tasmania Forestry Commission and others from contravening the legislation.

In both cases the High Court ruled in favour of the validity of the Commonwealth legislation on the basis of the reasoning in the *Tasmanian Dam Case*. What also bears mentioning is that in both cases solid majorities accepted that reasoning, thus providing a judicial force that had, perhaps, been somewhat lacking in the 4-3 split in the *Tasmanian Dam Case*.

> [W]hen we have regard to international affairs as they are conducted today, when nations of the world are accustomed to discuss, negotiate, co-operate and agree on an ever-widening range of topics, it is impossible to enunciate a criterion by which potential for international action can be identified from topics which lack this quality.[65]

Mr Justice Mason, along with Murphy, Brennan and Deane JJ., viewed the implementation powers under the "external affairs" head as being wide in scope. Concomitantly, they also 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 power.[66] This view led them to the natural conclusion that the Commonwealth government had the power to legislate in derogation of the legislative competence of the States notwithstanding that the Commonwealth government lacked the power to do so in the absence of a treaty. In their view, given the global challenges facing states at that time, and the ever-growing interdependence evidenced by the myriad of multilateral treaties and conventions being negotiated, both bilaterally and multilaterally, it was necessary for the Commonwealth government to be able to act resolutely in meeting the international legal obligations created through these international agreements. This view remains true today.

The perspective of Mr Justice Mason is no less compelling when applied to the Canadian situation, and many commentators have remarked on the need for Parliament to have full control over the implementation of treaty obligations.[67] The multilateral obligations arising out of the negotiation rounds 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 the sphere of international trade and commerce, regardless of whether a facet may be judged, for Canadian constitutional purposes, to be a matter falling under one of the heads of provincial legislative competence in section 92.[68] This also holds true for the implementation of the *FTA* or the *North*

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[65] *Tasmanian Dam Case*, *supra* note 48 at 124. This cautious view of any attempt to define "external affairs" in a vacuum echoes the words of Chief Justice Latham in the *Burgess* case, where he stated that "[i]t is very difficult to say that any matter is incapable of affecting international relations....It seems to me that no absolute rule can be laid down on this subject.": *supra* note 39 at 640.

[66] Mr Justice Kerwin of the Supreme Court of Canada used similar reasoning in *Francis*, *supra* note 35, 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 clause in s. 91 of the *Constitution Act, 1867*.

[67] *See, e.g.*, Hogg, *supra* note 2; and Macdonald, *supra* note 28. *But see* McWhinney, *supra* note 3; A.E. Gotlieb, CANADIAN TREATY-MAKING (Toronto: Butterworths, 1968); and Williams & de Mestral, *supra* note 22.

[68] This view seems correct as it is the federal government that has to answer internationally for any infractions of those obligations. Canada has already experienced some difficulties in this area under the GATT structure. For some examples of the problems created by the GATT obligations and provincial legislation in violation of those obligations, *see* Ziegel, *supra* note 2 at 344-46, and P.J. Davidson, *Uniformity in International Trade Law: The Constitutional Obstacle* (1988) 11 DALHOUSIE L.J. 677.

American Free Trade Agreement (*NAFTA*) recently signed by Canada, Mexico and the United States.[69] H. Scott Fairley, in discussing the implementation of the *FTA*, has remarked that:

> What *Labour Conventions* lacks, and what continues to elude precise articulation in any Canadian Constitutional authority to date, lies in an appreciation of international legal personality and sovereignty as a constitutional foundation for national authority, *independent of specific constitutional language*. Under such a view, federal power over external affairs is inherent in the nature of the Canadian nation-state and serves as an *additional constitutional basis* for resolving federalism controversies where the international status and responsibilities of Canada to foreign governments are implicated.[70]

Even though the *Australian Constitution*, like that of Canada, does not contain a specific reference to the implementation of treaties entered into by the central government, the Australian High Court has recognized that the division of legislative competence should not interfere with the Commonwealth government's execution of Australia's international obligations. While some of the judges on the Australian High Court have expressed concern over the possible usurpation of the constituent States' powers,[71] their view was firmly rejected by a majority of the Court using a purposive constitutional interpretation. This interpretation hinges on a recognition of the negative consequences that would stem from allowing the constituent States to cripple the Commonwealth government in its role as the representative of the entire country in international relations.[72]

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[69] *See* Davidson, *ibid.*; R. Howse, *The* Labour Conventions *Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations* (1990) 16 CAN. BUS. L.J. 160; and Sullivan, *supra* note 35, for well-reasoned discussions of how changing global economic imperatives require a rethinking of Canada's approach to constitutional interpretation of treaty implementation.

[70] *Implementing FTA*, *supra* note 5 at 195 (emphasis added). In line with many others who have commented on this matter, he argues:

> Canada has been long in need of a constitutionally recognized, comprehensive and reviewable federal external affairs power. In my view, this new jurisdiction can be judicially derived within the confines of the federal general power in the existing Constitution....

Ibid. at 196.

[71] *See* the opinion of Gibbs C.J. in the *Tasmanian Dam Case* where he states:

> The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity.

Supra note 48 at 100.

[72] The idea that a federal power to implement treaties involves a danger to federalism is also rejected by Wildhaber, *supra* note 40; and La Forest, *supra* note 3.

Note, also, in the present context, that neither the Australian nor the Canadian decisions on treaty implementation have explored the full implications which flow from a doctrine that denies the federal government the capacity to implement treaties in areas of provincial competence. In particular, neither country's Court has explicitly examined the implications for the conduct of foreign affairs that flow from a need to consult the states or provinces while planning and negotiating international agreements. Both Courts have, however, examined in painstaking detail the implications for federalism that appear consequent from permitting a federal power to implement treaties in areas of provincial competence. Finally, the Courts in both countries have reviewed the implications of a nation that is unable to meet its international obligations.[73]

The Australian High Court was able to develop its doctrine of treaty implementation through a purposive interpretation of the "external affairs" clause. The decisive argument rested less on a textual analysis of the *Australian Constitution* or an examination of the cases on the subject than it did on the conviction of the majority that the nature of constitutional interpretation makes it necessary to interpret the clause in a certain way. Indeed, the High Court managed to arrive at its present doctrine without even (at least explicitly) canvassing the full range of practical arguments in favour of a broad federal treaty implementation power. In effect, the Court reduced (or raised, depending on one's perspective) the issue being addressed to the question of whether it was necessary or even very advisable to permit the Commonwealth to implement treaties, and whether this could be done without unbalancing the federal system. The answer to these questions determined how the Court would interpret the clause.

It remains possible for the Supreme Court of Canada to reconsider Lord Atkin's view of section 132, or, alternatively, the POGG clause in the *Constitution Act, 1867*, thereby restoring the reasoning of Viscount Dunedin in the *Radio Reference* case.[74] The Court has recently reviewed and reversed at least one long-standing constitutional doctrine in another area of the law, and it did so the basis of an explicitly purposive interpretation of the needs of a federal nation.[75] A similar purposive review of the treaty implementation cases should lead the Court to the

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[73] This is even more relevant today than it was in 1936. In writing the deciding judgment in *Koowarta*, Mr Justice Stephen formulated a cautious view of the scope of the legislative power of the Commonwealth under the external affairs clause, but he acknowledged that, "areas of what are of purely domestic concern are steadily contracting and those of international concern are ever expanding": *see Koowarta, supra* note 47 at 217.

[74] Viscount Dunedin's reasons for judgment in the *Radio Reference* are set out briefly earlier in this paper but may bear repeating here. His Lordship, on behalf of the Privy Council, 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 clause. He added the cryptic phrase, "[i]n 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.": *Radio Reference, supra* note 13 at 312. This has been interpreted by some commentators as indicating the possibility of reading s. 132 as if the words referring to Canada as part of the British Empire were not there.

[75] *See De Savoye, supra* note 18.

conclusion that the federal government should have the full power to implement all treaties, regardless of whether they are Empire treaties or treaties signed by Canada in its own right. This view flows from Lord Sankey's now famous "living tree" doctrine,[76] which H. Scott Fairley has characterized as the fact that "principles of constitutional interpretation can and do allow for an organic approach to documentary deficiencies."[77]

The Canadian constitutional scholar F.R. Scott has pointed out that it is anomalous and ironic that Parliament should have had a complete and unfettered power to legislate in derogation of provincial powers while implementing Empire treaties under section 132, but that it should suddenly lose that power in regard to its own treaties. He stated:

> So long as Canada clung to the Imperial apron strings, her Parliament was all powerful in legislating on Empire treaties, and no doctrine of "watertight compartments" existed; once she became a nation in her own right, impotence descended.[78]

Former Supreme Court Justice Ivan Rand, in evaluating the reasoning of Lord Atkin in the *Labour Conventions Case*, wrote in 1960 that, "[i]n such a view the power of veto vested in a province besides sterilizing national action would invert the underlying scheme of Dominion and provincial relations."[79] Professor Rand went on to reject the fear expressed by Lord Atkin that such a power held by parliament would emasculate completely the powers of the provinces, pointing out that Parliament, under the Canadian constitution, could already do that.[80] The Australian High Court also addressed this "emasculation" argument at considerable length in various cases, but eventually the arguments on emasculation were, in effect, laid aside. Mr Justice Deane suggested that whether or not the Commonwealth government can encroach upon the legislative powers of the States was not the issue when the "external affairs" clause is considered. The more pertinent question is whether the Commonwealth government can legislate to implement Australia's international obligations.[81] Both Professor Rand and Mr Justice Deane finally rejected the emasculation argument because they believed that the preservation of provincial/state rights is of less importance than the need to assure that the federal government can be as effective as possible in its role as an actor negotiating international agreements that include legal obligations.

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[76] *Edwards, supra* note 19.

[77] *Jurisdiction Over International Trade, supra* note 2 at 135. In bolstering his argument, Fairley also pointed out that:

> The still-governing view expressed by Lord Atkin in *Labour Conventions* was sustained by principles of constitutional interpretation established and developed for a country without any international personality, powers or responsibilities.

Ibid. at 134-35.

[78] F.R. Scott, Labour Conventions Case: *Lord Wright's Undisclosed Dissent?* (1956) 34 CAN. BAR REV. 114 at 115. This has also been pointed out by Johnston, *supra* note 2 at 193.

[79] *Supra* note 2 at 143.

[80] *Ibid.* at 144.

[81] *See* the judgment of Deane J. in the *Tasmanian Dam Case, supra* note 48 at 254-55.

Mr Justice La Forest, however, writing in 1974, emphasized that while legal arguments can be made for a reinterpretation of section 132 or a broadening of the POGG power:

> [a] case can equally well be made the other way: that there being no specific treaty power governing Canada's existing situation, legislative power to implement treaties falls within the ordinary division of legislative power; the Privy Council did so in the *Labour Conventions* case.
>
> Policy grounds, not technicalities, will, however, dictate the future of the *Labour Conventions* case, and these policy grounds are far more evenly balanced than most supporters and critics of the decision are willing to admit.[82]

In view of the increasing globalization of many pressing social, economic and environmental issues, we argue that the balance to which Mr Justice La Forest refers has tilted in favour of renewed federal powers to implement Canada's international legal commitments. In particular, there is an ever greater need to respond effectively to trade matters within international regulatory structures such as the *GATT*, the bilateral and multilateral trade zones created by the *FTA* and *NAFTA*, as well as the requirement to come to grips with multilateral global environmental concerns in various fora. Whenever the effectiveness of Canada's negotiating position is undermined, either by provincial refusals to implement the agreements or to cooperate in observing Canada's obligations, or by a weakening of the federal negotiating stance in the first place, the overall ability of the federal government to meet the needs of the nation as a whole is severely compromised.[83] There is more than ample reason to review this entire area of the law.

Recently, the Supreme Court of Canada made a number of statements that, while being only *obiter dicta*, appear to indicate that the Court is ready to reconsider the *Labour Conventions Case* in some manner.[84] Such a review is long overdue because, in the words of one of Canada's leading constitutional scholars:

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[82] *Supra* note 3 at 147. Mr Justice La Forest expressed faith that Canada's needs as a sovereign representative in the international arena would be met by an evolving doctrine fashioned by the Court as matters arose. He stated:

> [I]f Canada can effectively function in the international sphere without being possessed of legislative power to implement matters that under the constitution are regarded as local, it cannot do so unless it is clothed, both on the executive and legislative level, with all powers essential to a sovereign state to conduct international relations. Therefore, whatever else the Supreme Court may do by way of reversal or modification of the *Labour Conventions* case, it will likely continue, whenever the occasion arises, to develop doctrine ensuring Canada's sovereign status and, thus, its effective functioning in the international arena.

Ibid. at 152.

[83] *See Implementing FTA*, *supra* note 5 at 198.

[84] For a discussion of some recent Supreme Court references to the issue, *see* de Mestral, *supra* note 3.

> [W]hen all is said and done it is clear that the *Labour Conventions* decision has impaired Canada's capacity to play a full role in international affairs, and Canada has been unable to accept or in some cases to fulfil treaties in respect of labour, education, the status of refugees, women's rights and human rights generally.[85]

V. CONCLUSION

Canada's ability to implement treaties has suffered from "constitutional arthritis" for the last fifty years. Lord Atkin's "watertight compartments" doctrine has likely resulted in at least some impairment of Canada's ability to function as an effective actor in the international arena. The danger exists that this impairment will have increasingly serious consequences as the community of nations forges ever more complex networks of mutual duties and obligations among its members, particularly in areas such as environmental protection, trade relations, and human, civil and political rights. Certainly, the current approach to the implementation of treaties has caused some difficulties in the negotiation of treaties, and no one has argued that the current approach is of positive benefit in undertaking effective foreign relations.

Although many academic and judicial commentators have argued forcefully for a full review of the reasoning of Lord Atkin in the *Labour Conventions Case,* and for a renewal of federal treaty implementation powers, the Supreme Court of Canada has appeared hesitant to address the matter. It is possible that the Court has not yet been presented with what it believes to be an appropriate case which could serve as a vehicle for that review. The *dicta* in recent cases, however, may indicate that the Court is ready to reconsider the matter openly.[86]

The 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. The Australian High Court considers, not only the plain meaning of the words themselves, but also the purposes of the allocation of the powers, and a realistic assessment of how the respective needs of the national government and the units of the federation are best met. The Australian experience also demonstrates that the federal balance is not unduly affected when the federal government is provided with greater powers in the area of treaty implementation.

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[85] Hogg, *supra* note 2 at 253. Others take an even more drastic view. For example, former Supreme Court Justice Willard Estey said in a recent interview that the concept of federal systems may be on the way out entirely. In alluding to federalism in the Canadian context and the problems which could have arisen if the Meech Lake Accord had been ratified, he stated:

> Maybe what we're talking about is an end to federal systems after two or three hundred years of history.... Maybe a federal system can't compete with a unitary state on the international field.... There are a lot [sic] of things to be said about the fact that the split in authority between the federal government and the provinces becomes dangerous in this modern global village.

See J. Longair, *Profile of a Pragmatist: An Interview with the Honourable Willard Z. Estey* (1989) 16:3 CAN. BUS. REV. 8 at 12.

[86] *See, e.g., Continental Shelf Reference, supra* note 35.

The sole practical argument being put forward by those who favour the retention of the *Labour Conventions Case* doctrine is the putative threat to the effective maintenance of the division of powers as set out in sections 91 and 92 of the Canadian constitution. This argument was eventually and finally dismissed by the Australian High Court as specious and completely beside the point.

It is difficult, indeed, 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.[87] It is time that the Supreme Court of Canada reconsidered a constitutional doctrine which is theoretically questionable and, in practical terms, anachronistic.

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[87] Wildhaber, *supra* note 40 at 339.