

Introduction

On a brisk April 12th 1965, in Montréal, a man braved the rain.¹ He had something very important to do. He knew that a storm might ensue but he believed that it was necessary to face the rain for the future to be brighter. There had already been an important political storm a little more than a month earlier because of what he did in Paris and he needed to clear the air. With his conference notes under his arm – notes that he had prepared meticulously with the help of a visionary statesman² –, he walked confidently into a room filled with foreign dignitaries. He – and the People who were going to speak through his voice – was literally stepping on the world stage. After expressing his pleasure at hosting the Consular Corps, he told them something that is still not totally understood today. He spoke clearly but many who heard him could not make sense of what he said. Blinded by their own assumptions, many believed that his speech was, if not revolutionary in character, at least revolutionary in its intent. But interpreting intents is a risky business, particularly in moments of anxiety.

So what did Paul Gérin-Lajoie tell the Consular Corps? The constitutional law scholar turned Vice-President of the Québec Executive Council of the Liberal government of Jean Lesage told them, in short, that Québec, while still being a federated state of Canada, had both the capacity and the desire to engage herself³ on the world stage in order to

¹ Canada, Environment Canada, *Daily Data Report for April 1965*, online: Environment Canada <http://www.climat.meteo.ec.gc.ca/climateData/dailydata_f.html>.

I will often refer to Internet webpages in this document. We all know that such webpages have a variable lifespan. However, it is often possible to retrieve web pages that have been taken down by searching the Internet Archive, *Wayback Machine* found at <<http://www.archive.org/web/web.php>>. The Internet Archive apparently contains over 55 billion web pages archived since 1996.

² Robert Aird, *André Patry et la présence du Québec dans le monde* (Montréal: VLB, 2005) at 57-73.

³ The use of the feminine in relation to a “state” might seem dated to the contemporary reader. However, I have decided to revert to the older English usage of feminising states and countries to better highlight the fact that such collective entities are conceived as “persons” in our political culture. I will address in more depth the issue of the personification of states in section II.A.2.iv. However, I will use neuter words to refer to “governments”, “Parliament” and “legislatures” because those entities are not personalised in the same way as are states and countries. While “governments”, “Parliament” and “legislatures” are collective decision mechanisms, they are not necessarily considered *to be the collective* itself.

fulfil her governmental missions. That assertion explained the agreement that Québec had concluded with France, in the previous month, on education.⁴ Paul Gérin-Lajoie's speech was luminous in its pragmatism and far from being revolutionary; it was in the pure British tradition of constitutional evolution and continuity.

Unfortunately, many could not imagine that Québec's position on her capacity to conclude international agreements was anything but a demand for secession or, at least, a step in that direction. While they tried to understand Québec's position on her capacity to conclude international agreements, they were prisoners of their own conceptual prejudices. Too many listeners had forgotten that other forms of political institutions existed before we imagined the "sovereign nation-state". In effect, the long history of pluralistic arrangements between ecclesiastical, imperial and local governments that covered the European continent from the Middle Age on was a good source of examples as to the different ways one could distribute exclusive, concurrent or complementary jurisdictions between autonomous or semi-autonomous authorities.⁵ But

⁴ See Québec, Ministère des relations internationales, *Échange de lettres entre le ministère de la Jeunesse du Québec et l'Association pour l'organisation des stages en France (ASTEF) concernant un programme de coopération technique*, 1964-01, online: Ministère des relations internationales du Québec <<http://www.mri.gouv.qc.ca/fr/informer/ententes/pdf/1964-01.pdf>>. See also Jacques-Yvan Morin, "La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé" (1965) 3 Can. Y.B. Int'l Law 127 at 173-76 [J.-Y. Morin, "La conclusion d'accords internationaux par les provinces canadiennes"] for a discussion of the reactions to that agreement. Morin's article is also quite instructive on the way different federations dealt with treaty-making powers until the mid-1960s.

⁵ The German legal historian and theorist Otto Friederich von Gierke had done much to keep alive the memory of the pluralist structure of the Medieval political order in Europe with his four volumes *Das deutsche Genossenschaftsrecht* (Berlin: Weidmann, 1868-1913). At the turn of the 20th century, the famous Downing professor of the laws of England at Cambridge, Frederic William Maitland, introduced to the English-speaking world part of Gierke's opus. He translated a section of volume 3 of *Das deutsche Genossenschaftsrecht* and wrote an introductory note to the German scholar's work. See Otto Friederich von Gierke, *Political Theories of the Middle Age*, trans. and introd. by Frederic William Maitland (Cambridge: Cambridge University Press, 1900) [Gierke, *Political Theories of the Middle Age*]. Frederic William Maitland's work also dealt significantly with the issue of political pluralism and the multiplicity of superimposed forms of government that constitute the history of political order in England and Europe. In general, one can consult the essays collected in Herbert Albert Laurens Fisher, ed., *Collected Papers of Frederic William Maitland* (Cambridge: Cambridge University Press, 1911) Vol. 3. Political pluralism was also widely discussed in England in the first half of the 20th century thanks to the works of George Douglas Howard Cole, John Neville Figgis and Harold Joseph Laski. Laski taught at McGill from 1914 until 1916 when he left for Harvard. On the intellectual relations between Harold Laski and Viscount Haldane, see David Schneiderman's very instructive article, "Harold Laski, Viscount Haldane and the Law of the Canadian Constitution in the Early Twentieth Century" (1998) 48 U.T.L.J. 521 [D. Schneider-

these arrangements were somehow forgotten and replaced by the concept of the “sovereign nation-state”. Probably influenced by a decolonization movement that was in full swing, many listeners became somehow amnesiac. Their forgetfulness brought with it an incapacity to imagine that alternative institutional arrangements might better describe contemporary and future political arrangements. To put it differently: the revolution was not to be found in Gérin-Lajoie’s speech but in the fearful and forgetful minds of others. All this seems clear when one takes a sober look at the main lines of Paul Gérin-Lajoie’s speech.

Gérin-Lajoie proceeded by reminding his guests that the consular function consists in encouraging the development of relations between the represented state and the state of residence, i.e. the state of Québec. Because Québec’s status as a “state” might have been a point of contention, he elaborated on that point. First, he recognized that Québec, being a member of the Canadian federation, is not sovereign in all domains. But after reviewing the criteria of statehood, he concluded that Québec nonetheless met the characteristics of a state. Gérin-Lajoie went further and argued that, beyond simply meeting those criteria, Québec had a unique vocation in North America: she was the “political expression of a people distinguished, in a number of ways, from the English-language communities inhabiting North America”, “the political instrument of a cultural group, distinct and unique in all of North America.”⁶ Thus, the Québec statehood had to be viewed as one possible institutional embodiment of a particular People.

Once he had established that Québec was the institutional embodiment of a particular political community, he went on to describe the needs of that community. These needs were the ones of a political community which was coming of age. He described with excitement the *Québécois* of the “Quiet Revolution” as overflowing with a superabun-

man, “Harold Laski, Viscount Haldane and the Law of the Canadian Constitution in the Early Twentieth Century”].

⁶ The address by Paul Gérin-Lajoie, Vice-Président of the Executive Council and Québec’s Minister of Education was delivered, as I noted earlier, in Montréal to the Consular Corps on April 12, 1965. For a complete version of this address, see Québec, *Ministère des Relations internationales, Paul Gérin-Lajoie’s speech delivered at the Montreal to the Consular Corps on April 12, 1965*, trans. by *Ministère des Relations internationales*, online: *Ministère des Relations internationales* <http://www.mri.gouv.qc.ca/en/ministere/documentation/textes/discours_paul_gerin_lajoie.asp> [Paul Gérin-Lajoie, *Address to the Consular Corps*]. The original French version of this speech is available in Québec, *Ministère des relations internationales, Discours de Paul Gérin-Lajoie devant le corps consulaire de Montréal le 12 avril 1965*, online: *Ministère des relations internationales* http://www.mri.gouv.qc.ca/fr/ministere/documentation/textes/discours_paul_gerin_lajoie.asp [Paul Gérin-Lajoie, *Discours de Paul Gérin-Lajoie devant le corps consulaire de Montréal*].

dant energy and engaged in a wide range of productive activities.⁷ He described a Québec determined to take her “rightful place in the contemporary world” and eager “to provide, in external as well as internal affairs, all the means necessary for the realization of the aspirations of the society for which it stands.”⁸ And to optimise the results of those endeavours, to attain their destiny, the *Québécois* knew that they needed the appropriate “material and constitutional means”.⁹

It is important to note that Gérin-Lajoie was convinced that the fulfilment of those needs was within reach.¹⁰ While he thought that major constitutional revisions were needed in relation to, *inter alia*, the division of legislative powers and the institutional structures of the Canadian state,¹¹ he was, however, convinced that Québec *already* had the constitutional powers to engage in international affairs related to her own fields of legislative powers. Therefore, Gérin-Lajoie was not advocating for constitutional changes to allow Québec to take her place on the world stage. Rather, he claimed that Québec was simply awakening a latent power that already lay in the Constitution of Canada.¹² A power that was simply a logical consequence of a series of already accepted constitutional imperatives.

The legal grounds for Gérin-Lajoie’s argument were presented in a clear and succinct manner. First, Gérin-Lajoie stated that “the constitution which Canada was given in 1867 ... assigns to Canadian provinces the status of states fully and absolutely sovereign in certain definite

⁷ Gérin-Lajoie said, *ibid.*:

[t]he Quebecker has assumed his responsibilities and has taken his fate [in] his own hands. The economy, natural resources, education, community and social organization have been the main fields of action of the new Québec citizen. I shall note simply by way of landmarks the creation of the Departments of Education, of Natural Resources, and of Cultural Affairs, the setting up of the General Finance Corporation, the nationalization of electricity, the approaching creation of a siderurgical complex, of a universal pension plan and its investment fund which will soon be a reality, along with the introduction of hospitalization insurance as a forerunner to a complete system of sickness insurance ...

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ He was confident that the Québec society knew “that from now on the realization of its own ends and aspirations [lay] within its reach.” *Ibid.*

¹¹ See Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950).

¹² In the French version of Paul Gérin-Lajoie’s address, this point is made in unequivocal terms: “C’est dire que l’activité débordante que manifeste l’État du Québec depuis cinq ans dans les domaines qu’il n’avait pas jusqu’alors abordés ne doit apparaître en aucune façon comme révolutionnaire sur le plan constitutionnel.” (Paul Gérin-Lajoie, *Discours de Paul Gérin-Lajoie devant le corps consulaire de Montréal*, *supra* note 6).

domains.”¹³ He cited the famous judgment of the Privy Council in *Hodge v. R.* to support his claim:

[The provincial legislatures] are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances ...¹⁴

Second, he highlighted the fact that “[i]n the matter of international competence, the Canadian constitution is silent. With the exception of Article 132, which has become a dead letter since the *Statute of Westminster*, in 1931, there is nothing which says that international relations are solely under the jurisdiction of the federal state.”¹⁵ What he meant here by “the Canadian constitution” was the series of entrenched enacted constitutional texts. He wanted to remind the audience that the federal authorities did not enjoy plenary powers over international matters. “Therefore”, he added, “it is not by virtue of written law, but rather by repeated practice over the past forty years, that the Federal Government has assumed an exclusive role with regard to relations with foreign countries.”¹⁶ But those times were past and Québec wanted to step in and take her rightful place.

Having first established that Canadian provinces had “the status of states fully and absolutely sovereign in certain definite domains”¹⁷ and, second, that nothing conferred to the federal authorities exclusive jurisdiction over international affairs, Gérin-Lajoie argued that provinces already enjoyed such constitutional powers in relation to the subject-matters of their jurisdictional domains.

He reminded his audience that the implementation of treaties in Canada, when it required modifications to domestic law, had to be undertaken by the legislature that has power over the subject-matter involved

¹³ *Ibid.*

¹⁴ *Hodge v. R.*, [1883-84] 9 A.C. 117, 132. [*Hodge v. R.*]

¹⁵ Paul Gérin-Lajoie, *Address to the Consular Corps*, *supra* note 6.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

in the treaty obligation.¹⁸ This rule was the result of the very important decision of the Privy Council in what is known as the *Labour Conventions* case.¹⁹ From there, he moved on to three legal conclusions.

1) Gérin-Lajoie claimed that Québec possesses “a limited ‘jus tractatum’”,²⁰ that is, a limited treaty-making power, and that she had no intention to give away that power to the federal Parliament. In effect, Gérin-Lajoie commented on the absurdity that would characterise a system in which the authority charged with the execution of an obligation would not be able to sign and negotiate that obligation. He said: “Is an agreement not concluded with the essential purpose of putting it into application, and should those who will have to implement it not have the right to work out the conditions in advance?”²¹ While Gérin-Lajoie was speaking to a crowd of diplomats, he did not get into the details of the argument in favour of recognizing a *jus tractatum* for Québec apart from arguing that it would be absurd to attribute to separate authorities the power to make and the power to execute international obligations. The “absurdity” argument was obviously not sufficient since it could cut both ways: if treaty-making and treaty implementation ought to belong to the same authority, why shouldn’t they belong to the federal authority?²² If the federal executive has the power to conclude treaties on all and any subjects, why couldn’t the federal Parliament execute the obligations thus created? The answer to that objection lies in the fact that, in the Canadian federation, it is the legislative jurisdiction that determines the primordial scope of the executive powers and not the other way around. This argument would be fleshed out a few years later.²³

¹⁸ *Ibid.*

¹⁹ *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326, [1937] 1 W.W.R. 299, [1937] 1 D.L.R. 673 (P.C.) [*Labour Conventions* case with references to A.C.].

²⁰ Paul Gérin-Lajoie, *Address to the Consular Corps*, *supra* note 6.

²¹ *Ibid.*

²² Gerald R. Morris, “The Treaty-Making Power: A Canadian Dilemma” (1967) 45 Can. Bar Rev. 478 at 490 [G.R. Morris, “The Treaty-Making Power: A Canadian Dilemma”].

²³ See for example, Lorne Giroux, “La capacité internationale des provinces en droit constitutionnel canadien” (1967-1968) 9 C. de D. 241 [L. Giroux, “La capacité internationale des provinces en droit constitutionnel canadien”] who referred to the Privy Council decision in *Bonanza Creek Gold Mining Co. v. R.*, [1916] 1 A.C. 566 (P.C.) [*Bonanza Creek Gold Mining Co.*] where it was stated that “[i]t is to be observed that the British North America Act has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority. ... [T]he distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers” (at 479-80. Emphasis added). Jacques-Yvan Morin, in his article “La conclusion d’accords internationaux par les provinces canadiennes”, *supra* note 4 at p. 180, had hinted at the argument by refer-

2) Having affirmed Québec's limited *jus tractatum* and capacity to intervene on the world stage to achieve her objective, Gérin-Lajoie added that it was inadmissible "for the federal state to exert a kind of supervision and adventitious control over Québec's international relations."²⁴

3) In parallel to these conclusions, Gérin-Lajoie claimed a right for Québec to "participate in the activity of certain international organizations of a non-political character."²⁵ What he meant by "international organizations of a non-political character" was "interstate organizations ... founded for the sole purpose of bringing about a solution, by international cooperation" to "problems which up to now have been purely local in nature"²⁶

It is not because Québec or other provinces had not made great use of their powers that they had lost them. If there was a time when an almost exclusive participation of the federal authorities in international affairs was not detrimental to provinces because such affairs were fairly limited, Gérin-Lajoie's address was meant to say that those days were over²⁷: "Interstate relations now touch *every aspect of social life*."²⁸

In effect, international relations were no longer dominated by issues of war and peace but dealt increasingly with issues traditionally characterized as "domestic" such as labour conditions, education, family, etc. In many ways, being able to cooperate with other jurisdictions was becoming, for provinces, necessary if they were to fully accomplish their missions. This is why Gérin-Lajoie argued that the "*collectivités membres*" of the federation ought to be able "to participate actively and directly in the preparation of international agreements with which they are immediately concerned."²⁹ Gérin-Lajoie noted that a "large number of interstate organizations have been founded for the sole purpose of bringing about a solution, by international cooperation, [to] problems which up to now have been purely local in nature"³⁰ and it made good sense for those responsible for dealing with those issues to participate in those organizations.

ring to *Liquidators of the Maritime Bank v. New Brunswick (Receiver-General)*, [1892] A.C. 437 [*Liquidators of the Maritime Bank*] where the Privy Council stated that the Lieutenant-Governor is as much the representative of Her Majesty for provincial purposes as the Governor General is for the Dominion.

²⁴ Paul Gérin-Lajoie, *Address to the Consular Corps*, *supra* note 6.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.* (emphasis added).

²⁹ *Ibid.*

³⁰ *Ibid.*

The “Gérin-Lajoie doctrine” – or, as it is often called, the doctrine of “the external extension of internal competence”³¹ – has been accepted by all subsequent Québec governments.³² Recently, for example, Liberal Premier Jean Charest declared:

Il est d’ailleurs intéressant de constater que les gouvernements qui se sont succédé au Québec depuis ce temps ont agi, en matière internationale, avec une remarquable constance. Tant les gouvernements souverainistes que les gouvernements fédéralistes ont trouvé normal et nécessaire de pousser toujours plus loin l’engagement du Québec sur la scène internationale. Cette unanimité de la classe politique québécoise autour de l’engagement international du Québec trouve sa source dans ce qu’on a appelé la doctrine Gérin-Lajoie, dont le principe demeure toujours aussi actuel aujourd’hui que lorsqu’elle a été formulée pour la première fois en 1965 par Paul Gérin-Lajoie, alors ministre du gouvernement de Jean Lesage. Pour bien comprendre la portée de cette doctrine, il faut savoir que, contrairement à l’idée reçue, la compétence en matière de politique étrangère n’est pas attribuée à l’un ou l’autre des ordres de gouvernement dans les textes constitutionnels. Je n’ai pas l’intention de m’étendre sur ce sujet, déjà bien documenté, si ce n’est que pour préciser que nous croyons que lorsque le gouvernement du Québec est le seul gouvernement compétent pour appliquer un engagement international, il est normal qu’il soit celui qui prenne cet engagement. En somme, il revient au Québec d’assumer, sur le plan international, le prolongement de ses compétences internes. Par ailleurs, les divers gouvernements ont tou-

³¹ The Government of Québec, *Ministère des Relations internationales* website summarizes the Gérin-Lajoie doctrine in the following terms:

In areas in which the Government of Québec is the only government empowered to keep a commitment, it is normal that such commitment be made by the Government of Québec and that any foreign agreement in this area be made by the Government of Québec.

In short, Québec is responsible for the international extension of its domestic areas of jurisdiction.

See Québec, *Ministère des Relations internationales*, *Gérin-Lajoie’s doctrine presentation*, online: *Ministère des Relations internationales* <http://www.mri.gouv.qc.ca/en/politique_internationale/fondements/fondements.asp#doctrine>.

³² The Government of Québec states:

Following the change in government in the wake of the 1966 Québec general election, the new government solemnly confirmed the political legitimacy of the Gérin-Lajoie doctrine and the legal foundations of Québec’s international involvement. This position was further confirmed by a debate on April 13, 1967, in the Legislative Assembly (today’s National Assembly) leading up to the unanimous adoption of an act creating the Ministère des Affaires intergouvernementales.

Ibid. All subsequent Québec governments have adopted this line of thought and have worked to endow Québec with the appropriate institutional structures for her participation in international relations. See Daniel Turp, “La doctrine Gérin-Lajoie et l’émergence d’un droit québécois des relations internationales” in Stéphane Paquin, ed., *Les relations internationales du Québec depuis la Doctrine Gérin-Lajoie (1965-2005)* (Québec: Presses de l’Université Laval, 2006).

jours pris soin d'exercer cette compétence dans le respect de la politique étrangère canadienne. En d'autres mots, ce qui est de compétence québécoise chez nous, est de compétence québécoise partout.³³

Not only did subsequent Québec governments accept the three conclusions that Gérin-Lajoie teased out of his constitutional analysis, but they ultimately added a fourth: federal authorities cannot bind Québec to an international agreement without the latter's consent. This fourth conclusion would ultimately be arrived at by the Québec National Assembly when it formalised Québec's positions by adopting declaratory legislation stating that:

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

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

The Québec State may, in the areas under its jurisdiction, establish and maintain relations with foreign States and international organizations and ensure its representation outside Québec.³⁴

L'État du Québec est libre de consentir à être lié par tout traité, convention ou entente internationale qui touche à sa compétence constitutionnelle.

Dans ses domaines de compétence, aucun traité, convention ou entente ne peut l'engager à moins qu'il n'ait formellement signifié son consentement à être lié par la voix de l'Assemblée nationale ou du gouvernement selon les dispositions de la loi.

Il peut également, dans ses domaines de compétence, établir et poursuivre des relations avec des États étrangers et des organisations internationales et assurer sa représentation à l'extérieur du Québec.

³³ Québec, Cabinet du Premier ministre, "Address of the Premier of Québec to ÉNAP, February 25th, 2004", *Discours du mois de février 2004*, online: Premier ministre du Québec

<<http://www.premier.gouv.qc.ca/general/discours/2004/fevrier/dis20040225.htm>>.

The phrase "ce qui est de compétence québécoise chez nous, est de compétence québécoise partout" was also used by Premier Charest in his speech "Pour redécouvrir l'esprit fédéral" (Address pronounced at the occasion of the 40th anniversary of the Confederation Centre of the Arts in Charlottetown (P.E.I.), November 8, 2004), online: Premier ministre <<http://www.premier.gouv.qc.ca/general/discours/2004/novembre/dis20041108.htm>>.

³⁴ *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, R.S.Q. c. E-20.2, s. 7.

The legislature of Québec also adopted *An Act respecting the Ministère des Relations internationales*³⁵ in which it specified that the Government of Canada can negotiate international agreements with foreign governments or international organisations on matters within the constitutional jurisdiction of Québec if authorized by that province. In effect, following Québec's traditional claim that executive prerogatives parallel legislative jurisdiction, s. 22.1 provides that:

The [Québec] Minister [of International Relations] may agree to the signing of such an accord by Canada.

The Government must, in order to be bound by an international accord pertaining to any matter within the constitutional jurisdiction of Québec and to give its assent to Canada's expressing its consent to be bound by such an accord, make an order to that effect. The same applies in respect of the termination of such an accord.

Le ministre [des Relations internationales du Québec] peut donner son agrément à ce que le Canada signe un tel accord.

Le gouvernement doit, pour être lié par un accord international ressortissant à la compétence constitutionnelle du Québec et pour donner son assentiment à ce que le Canada exprime son consentement à être lié par un tel accord, prendre un décret à cet effet. Il en est de même à l'égard de la fin d'un tel accord.

However, most of these positions were not entirely new. Other provinces had made similar claims in the past. For example, Ontario had argued to the Privy Council that the only "authority competent to sign a treaty creating obligations is the King or some authority specially delegated to do so by the King ..."³⁶ and that "[t]here are no grounds whatever for saying that the parties to advise His Majesty in matters relating to the jurisdiction of the provinces have in some way come to be the Dominion Ministers."³⁷ Therefore, Ontario claimed that she had jurisdiction to conclude treaties on matters within her jurisdiction.³⁸ Whether or not this position was "new" it still caused a certain amount of fear. As mentioned above, it is probable that the decolonisation movement that was sweeping the World at the time had something to do with the anxiety of some of Gérin-Lajoie's listeners.

The most spectacular way in which colonized peoples exercised their newfound right to self-determination was secession from the old metropolises. Thus, secession might have appeared as the paradigmatic act of decolonisation. While in the 1960s, Canada was already autonomous

³⁵ *An Act respecting the Ministère des Relations internationales*, R.S.Q. c. M-25.1.1, s. 22.1 [*An Act respecting the Ministère des Relations internationales*].

³⁶ *Labour Conventions* case, *supra* note 19 at p. 333.

³⁷ *Ibid.*

³⁸ See I.C.1. below.

from the British Parliament, it still required the formal participation of the latter to amend certain parts of the *Constitution Act, 1867*.³⁹ The fact that the Canadian constitution had not been entirely given back to Canadians – and, in some Québec nationalist circles, the fact that the Head of State was still the same individual as the Head of State of the United Kingdom – was seen as evidence that the colonial ties had not been completely broken yet. And, according to many Québec nationalists, the decolonisation paradigm appeared to fit their situation. Thus, there were fears that Québec was not simply making claims about having rights to participate in international affairs but that she was rather taking steps towards fuller claims of independence from both the United Kingdom and the rest of Canada. In fact, thinking that possession of an “international legal personality” or of a power to make treaties were exclusive attributes of completely sovereign states, some thought that recognizing Québec’s claim was equivalent to recognizing Québec’s secession!⁴⁰

More generally, those opposed to the Gérin-Lajoie doctrine often shared a conception of an independent Canada that must speak with one voice and in which that voice came from the same place as where Canadian sovereignty lay: in the federal authorities. The absence of an express constitutional enactment explicitly distributing powers over international relations and diverging visions of the respective roles of Canada and the provinces on the world stage had been, early in the withdrawal process from the declining British Empire, an important cause of tensions between the federal and provincial governments. Accordingly, the question of the creation and implementation of treaty obligations in Canada has been the subject of a great number of debates that are still ongoing.⁴¹ In effect, the succeeding federal governments

³⁹ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*]. This statute was originally entitled *British North America Act*. The name of this statute was changed by the *Canada Act 1982* (U.K.), 1982, c. 11, Sch., item 1.

⁴⁰ See for example: Bora Laskin, “The Provinces and International Agreements” in Ontario, Ontario Advisory Committee on Confederation, *Background Papers and Reports*, Vol. 1 (Toronto: Queen’s Printer, 1967) at 108 [B. Laskin, “The Provinces and International Agreements”]; Jean-Yves Grenon, “De la conclusion des traités et de leur mise en oeuvre au Canada” (1962) 40 Can. Bar Rev. 151 [J.-Y. Grenon, “De la conclusion des traités et de leur mise en oeuvre au Canada”]; G.R. Morris, “The Treaty-Making Power: A Canadian Dilemma”, *supra* note 22.

⁴¹ See for example, the following classical articles on those issues: Clarence W. Jenks, “The Present Status of the Bennett Ratifications of International Labour Conventions” (1937) 15 Can. Bar Rev. 464 [C.W. Jenks, “The Present Status of the Bennett Ratifications of International Labour Conventions”]; W. Ivor Jennings, “Dominion Legislation and Treaties” (1937) 15 Can. Bar Rev. 455 [W.I. Jennings, “Dominion Legislation and Treaties”]; Norman A.M. Mackenzie, “Canada and the Treaty-Making

Power" (1937) 15 Can. Bar Rev. 436; Richard J. Matas, "Treaty Making in Canada" (1947) 25 Can. Bar Rev. 458; David C. Vanek, "Is International Law Part of the Law of Canada?" (1949-50) 8 U.T.L.J. 251 [D.C. Vanek, "Is International Law Part of the Law of Canada?"]; John Peter Nettl, "The Treaty Enforcement Power in Federal Constitutions" (1950) 28 Can. Bar Rev. 1051; Jean-Yves Grenon, "De la mise œuvre du futur Pacte international des droits de l'homme dans l'État fédératif canadien" (1951-52) 1-2 R.J.T. 195; George J. Szablowski, "Creation and Implementation of Treaties in Canada" (1956) 34 Can. Bar Rev. 28; Ivan C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 Can. Bar Rev. 135 [I.C. Rand, "Some Aspects of Canadian Constitutionalism"]; Gerald V. La Forest, "May the Provinces Legislate in Violation of International Law?" (1961) 39 Can. Bar Rev. 78 [G.V. La Forest, "May the Provinces Legislate in Violation of International Law?"]; J.-Y. Grenon, "De la conclusion des traités et de leur mise en œuvre au Canada", *ibid.*; J.-Y. Morin, "La conclusion d'accords internationaux par les provinces canadiennes", *supra* note 4; Edward McWhinney, "The Constitutional Competence within Federal Systems as to International Agreements" (1964-68) 1 Can. Legal Stud. 145 [Edward McWhinney, "The Constitutional Competence within Federal Systems as to International Agreements"]; G.R. Morris, "The Treaty-Making Power: A Canadian Dilemma", *ibid.*; B. Laskin, "The Provinces and International Agreements", *ibid.*; Edward McWhinney, "Canadian Federalism and the Foreign Affairs and Treaty Power: The Impact of Québec's Quiet Revolution" (1969) 7 Can. Y.B. Int'l. Law 3 [E. McWhinney, "Canadian Federalism and the Foreign Affairs and Treaty Power: The Impact of Québec's Quiet Revolution"]; Ronald G. Atkey, "The Role of the Provinces in International Affairs" (1970) 26 Int.J. 249; André Dufour, "Fédéralisme canadien et droit international" in Ronald St. John MacDonald, Gerald L. Morris and Douglas M. Johnston, eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 72; Ronald St. John MacDonald, "The Relationship between International Law and Domestic Law in Canada" in Ronald St. John MacDonald, Gerald L. Morris and Douglas M. Johnston, eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 88 [R. St. John MacDonald, "The Relationship between International Law and Domestic Law in Canada"]; Gerald L. Morris, "Canadian Federalism and International Law" in Ronald St. John MacDonald, Gerald L. Morris and Douglas M. Johnston, eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 55; Covey T. Oliver, "The Enforcement of Treaties by a Federal State" (1974) 14 Can.Y.B. Int'l. Law 331; Ronald St. John MacDonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dal. L.J. 307 [R. St. John MacDonald, "International Treaty Law and the Domestic Law of Canada"]; Anne-Marie Jacomy-Millette, "L'État fédéré dans les relations internationales contemporaines: le cas du Canada" (1976) 14 Can. Y.B. Int. L. 20; Thomas A. Levy, "Provincial International Status Revisited" (1976-77) 3 Dal. L.J. 70; Brian M. Mazer, "Sovereignty and Canada: An Examination of Canadian Sovereignty from a Legal Perspective" (1977-78) 42 Sask. L.R. 1; Claude C. Emmanuelli and Stanislas Slosar, "L'application et l'interprétation des traités internationaux par le juge canadien" (1978) 13 R.J.T. 69; Anne-Marie Jacomy-Millette, "Le rôle des provinces dans les relations internationales" (1979) 10 Études internationales 285; Francis Rigaldies and Jose Woehrling, "Le juge interne canadien et le droit international" (1980) 21 C. de D. 293 [F. Rigaldies and J. Woehrling, "Le juge interne canadien et le droit international"]; John Claydon, "The Application of International Human Rights Law by Canadian Courts" (1981) 30 Buff. L. R. 727 [J. Claydon, "The Application of International Human Rights Law by Canadian Courts"]; Alice Desjardins, "La mise en oeuvre au Canada des traités relatifs aux droits de la personne" (1981) 12 R.G.D. 359; Maxwell Cohen and Anne

Bayefsky, “The Canadian Charter of Rights and Freedoms and International Law” (1983) 61 Can. Bar Rev. 265 [M. Cohen and A. Bayefsky, “The Canadian Charter of Rights and Freedoms and International Law”]; Jacques-Yvan Morin, “La personnalité internationale du Québec” (1984) 1 R.Q.D.I. 163 [J.-Y. Morin, “La personnalité internationale du Québec”]; Daniel Turp, “Le recours en droit international aux fins de l’interprétation de la Charte canadienne des droits et libertés: un bilan jurisprudentiel” (1984) 18 R.J.T. 353; John Humphrey, “The Canadian Charter of Rights and Freedoms and International Law” (1985-86) 50 Sask. L. Rev. 13; Michel Lebel, “L’interprétation de la Charte canadienne des droits et libertés au regard du droit international des droits de la personne – Critique de la démarche suivie par la Cour suprême du Canada” (1988) 48 R. du B. 743; Armand L.C. De Mestral, “Le Québec et les relations internationales” in Pierre Patenaude, ed., *Québec – Communauté française de Belgique*, (Montréal: Wilson & Lafleur, 1991) 209 [A.L.C. de Mestral, “Le Québec et les relations internationales”]; Anne Bayefsky, “International Human Rights Law in Canadian Courts” in Irwin Cotler and Pearl Eliadis, eds., *International Human Rights Law – Theory and Practice* (Montréal: CHRF, 1992) 115 [A. Bayefsky, “International Human Rights Law in Canadian Courts”]; Douglas Sanders, “The Canadian Charter and the Protection of International Human Rights” (1993) 4 Crim. L.F. 413; Irit Weiser, “Effect in Domestic Law of International Human Rights Treaties Ratified without Implementing Legislation” (1998) 27 Can. Council Int’l L. Proc. 132; Karen Knop, “Here and There: International Law in Domestic Courts” (2000) 32 N.Y.U.J. Int’l Law & Pol. 501 [K. Knop, “Here and There: International Law in Domestic Courts”]; Hugh Kindred, “Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts” in Stephen G. Coughlan and Dawn Russell, eds., *Citoyenneté et participation à l’administration de la justice / Citizenship and Citizen Participation in the Administration of Justice* (Montréal: Thémis, 2001) 265 [H. Kindred, “Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts”]; Stephen J. Toope, “Inside and Out: The Stories of International Law and Domestic Law” (2001) 50 U.N.B.L.J. 11; Stephen J. Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada” (2001) 80 Can. Bar Rev. 534, reprinted in Stephen G. Coughlan and Dawn Russell, eds., *Citoyenneté et participation à l’administration de la justice / Citizenship and Citizen Participation in the Administration of Justice* (Montréal: Thémis, 2001) 289 (also available at <http://www.themis.umontreal.ca/pdf/icaj_citoyennete/full_icaj_citoyennete.pdf>) [S.J. “The Uses of Metaphor: International Law and the Supreme Court of Canada” with reference to the version published in Stephen G. Coughlan and Dawn Russell, eds., *Citoyenneté et participation à l’administration de la justice / Citizenship and Citizen Participation in the Administration of Justice* (Montréal: Thémis, 2001)]; France Houle, “L’arrêt Baker: Le rôle des règles administratives dans la réception du droit international des droits de la personne en droit interne” (2002) 27 Queen’s L.J. 511 [F. Houle, “L’arrêt Baker”]; Louis LeBel and Gloria Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law” (2002) 16 Sup. Ct. L. Rev. (2nd) 23 [L. LeBel and G. Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law”]; Stéphane Beaulac, “Recent Developments on the Role of International Law in Canadian Statutory Interpretation” (2004) 25 Stat. L. Rev. 19; Stéphane Beaulac, “National Application of International Law: The Statutory Interpretation Perspective” (2004) Can. Y.B. of Int’l L. 225; France Houle, “La légitimité constitutionnelle de la réception directe des normes du droit international des droits de la personne en droit interne canadien” (2004) 45 C. de D. 295 [F. Houle, “La légitimité constitutionnelle de la réception

never accepted the “Gérin-Lajoie doctrine”. They all claimed that the federal authorities were the ones who could speak for Canada and that provinces may, with the consent of federal authorities, play certain limited roles in Canada’s foreign relations. But sovereignty was the prism through which political desires were read. And, according to this mindset, because a sovereign state ought not only to enjoy the powers to make treaties but should also enjoy the domestic powers to implement

directe des normes du droit international des droits de la personne en droit interne canadien”] (edited version of France Houle, “La réception du droit international des droits de la personne en droit interne canadien: de la théorie de la séparation des pouvoirs vers une approche fondée sur les droits fondamentaux” in Patricia Hughes and Patrick Molinari, eds., *Justice et participation dans un monde global: la nouvelle règle de droit? / Participatory Justice in a Global Economy: The New Rule of Law? Proceedings of the Canadian Institute for the Administration of Justice Conference, Banff, 2003* (Montréal: Thémis, 2004)) 173); Stéphane Beaulac, “The Canadian Federal Constitutional Framework and the Implementation of the Kyoto Protocol” (2005) 5 R.J.P. 125; Joanna Harrington, “Redressing the Democratic Deficit in Treaty Law Making” (2005) 50 McGill L.J. 465 [J. Harrington, “Redressing the Democratic Deficit in Treaty Law Making”]; Joanna Harrington, “Scrutiny and Approval: The Role for Westminster-style Parliaments in Treaty-Making” (2006) 55 I.C.L.Q. 121 [J. Harrington, “Scrutiny and Approval: The Role for Westminster-style Parliaments in Treaty-Making”]; Joanna Harrington, “The Role for Parliament in Treaty-Making” in Oonagh Fitzgerald *et al.*, eds., *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006) 159.

Books have also been written about the treaties and Canadian domestic law. See among others: James M. Hendry, *Treaties and Federal Constitutions* (Washington: Public Affairs Press, 1955); Jacques Brossard, André Patry and Elisabeth Weiser, eds., *Les pouvoirs extérieurs du Québec* (Montréal: Presses Universitaires de l’Université de Montréal, 1967); Allan E. Gotlieb, *Canadian Treaty Making* (Toronto: Butterworths, 1968); Canada, Department of Foreign Affairs, *Federalism and International Relations* by Paul Martin, Sr. (Ottawa: Queen’s Printer, 1968) [P. Martin, Sr., *Federalism and International Relations*]; Anne-Marie Jacomy-Millette, *Treaty Law in Canada*, trans. by Thomas V. Helwig (Ottawa: University of Ottawa Press, 1975) [Anne-Marie Jacomy-Millette, *Treaty Law in Canada*]; William Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Toronto: Carswell, 1996); Gibran van Ert, *Using International Law in Canadian Courts* (New York: Kluwer Law International, 2002) [G. van Ert, *Using International Law in Canadian Courts*]; Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationship Between Domestic and International Law* (Toronto: Irwin Law, 2006); William Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law — Legal Commitment, Implementation and the Charter* (Toronto: Thomson Carswell, 2007).

As for general constitutional doctrine, one can refer to the following classic references: Kenneth C. Wheare, *Federal Government*, 3rd ed. (London: Oxford University Press, 1953) at 178ff.; Frederick P. Varcoe, *The Constitution of Canada* (Toronto: Carswell, 1965) at 178ff.; Bora Laskin, *Canadian Constitutional Law*, 4th ed. by Albert S. Abel and John I. Laskin (Toronto: Carswell, Toronto, 1975) at 202ff.; François Chevrette and Herbert Marx, *Droit constitutionnel: notes et jurisprudence* (Montréal: Presses de l’Université de Montréal, 1982) at 1181ff. [F. Chevrette and H. Marx, *Droit constitutionnel*].

them, many authors favourable to Ottawa's position have, over the years, called for a reversal of the famous *Labour Conventions* decision.

The issue of provincial treaty powers was never entirely resolved. However, Québec did not wait for approval to engage more deeply in international affairs. In effect, the *Ministère des Relations internationales* claims that Québec is currently engaged in "prospecting and promotion" activities,⁴² "intergovernmental cooperation" and development of international norms.⁴³ These actions are made possible not only by an important bureaucratic apparatus in Québec city but also by six "general delegations" covering all sectors of provincial jurisdiction,⁴⁴ four delegations with a more limited mandate,⁴⁵ nine government bureaux offering limited service to a single sector,⁴⁶ six trade branches headed by a resident of the host country and offering services in limited sectors⁴⁷ and three business agents.⁴⁸

⁴² The *Ministère des Relations internationales* explains these two terms in the following way:

Prospecting consists in recruiting investors and immigrants, exploring export markets, targeting groups of potential tourists and encouraging organizers to hold their conventions and cultural events in Québec. The deployment of these functions is greatly facilitated by Québec's permanent presence abroad. In the case of recruiting and selecting immigration candidates, this foreign presence is essential.

Efforts by Québec to promote its attractions, socioeconomic characteristics and culture are distinct from but closely related to prospecting activities, as they contribute to enhancing international awareness of Québec. This objective is achieved through lectures, Web sites, articles, advertising, and participation in trade shows, symposiums and exhibitions.

See Québec, *Ministère des Relations internationales, Activités – Prospecting and Promotion*, online: *Ministère des Relations internationales* <http://www.mri.gouv.qc.ca/en/politique_internationale/activites/prospection_promotion.asp> [Québec, *Activités – Prospecting and Promotion*].

⁴³ See Québec, *Ministère des Relations internationales, Types of Activities*, online: *Ministère des Relations internationales* <http://www.mri.gouv.qc.ca/en/politique_internationale/activites/activites.asp>. The English version of the Ministère's text refers to "shared general standards" but the French version is more precise and uses the expression "normes internationales".

⁴⁴ They are in Brussels, London, Mexico City, New York City, Paris and Tokyo.

⁴⁵ They are in Boston, Buenos Aires, Chicago and Los Angeles.

⁴⁶ They are in Barcelona, Beijing, Damascus (Immigration Office), Hong Kong (Immigration Office), Miami, Munich, Shanghai, Vienna (Immigration Office) and Washington (Tourism Office).

⁴⁷ They are in Atlanta, Berlin, Rome, Santiago, Seoul and Taipei.

⁴⁸ They are in Lima, Hanoi and Milan. All this information is found at Québec, *Ministère des Relations internationales, Québec Offices Abroad*, online: *Ministère des Relations internationales* <http://www.mri.gouv.qc.ca/en/action_internationale/representations_etranger/representations_etranger.asp>.

It is of particular interest to us here what the government of Québec does in terms of “intergovernmental cooperation” and development of international norms. Of the first type of action, the Ministère writes:

For purposes of mutual support, economy and efficiency, governments often decide to pool their resources and expertise. The Government of Québec has thus developed official relations with a number of American states, particularly border states, over the years. It has also forged links with states and regions on other continents, based mainly on cultural affinities and economic complementarity. The framework for this type of cooperation is generally specified in an intergovernmental agreement.⁴⁹

As for the second type of actions, the one about the development of international norms, the Ministère explains that “[t]he Government of Québec is affected in a number of ways by international standards,⁵⁰ particularly in areas under its jurisdiction such as labour, health, civil law, education and justice administration.”⁵¹ The Ministère states that certain norms “are negotiated bilaterally by individual governments – e.g., standards negotiated by Québec with respect to recognition of driver’s licences, international adoption and judicial cooperation.” Since 1964, Québec has entered into at least 550 international agreements with international bodies and foreign governments on a wide range of issues (e.g. agriculture, education, energy, transportation, telecommunications, environment, etc.).⁵²

Regarding the complex issue of international norms that are elaborated by international organisations or adopted at international conferences, the Ministère writes:

In most cases, Québec is not a member of the international organization in question. It nevertheless contributes to the organization’s efforts by assigning experts to organizational task forces and cooperating with the federal government prior to input by the latter as a member of the organization. In some cases, Québec participates in organizational decision-making as part of the Canadian delegation. In the case of the Organisation internationale de la francophonie (“La Francophonie”) and its agencies, the Government of Québec participates directly as a full-fledged member.

⁴⁹ Québec, *Ministère des Relations internationales, Activités – Intergovernmental Cooperation*, online: *Ministère des Relations internationales* <http://www.mri.gouv.qc.ca/en/politique_internationale/activites/cooperation.asp>.

⁵⁰ Again, the French version uses the expression “norme”.

⁵¹ Québec, *Ministère des Relations internationales, Activités – Development of Shared General Standards*, online: *Ministère des Relations internationales* <http://www.mri.gouv.qc.ca/en/politique_internationale/activites/normes.asp> [Québec, *Activités – Development of Shared General Standards*].

⁵² Québec, *Ministère des Relations internationales, International Commitments*, online: *Ministère des Relations internationales* <http://www.mri.gouv.qc.ca/en/action_internationale/ententes/index.asp>.

The Government of Québec also participates directly in negotiations aimed at harmonizing certain legislation of federal component states in various countries.

In some cases, thanks to its experience and the expertise available in Québec, the Government of Québec plays a highly influential international role. In 1999, for instance, Québec was responsible for the original initiative aimed at promoting and developing an international legal instrument in the area of cultural diversity.⁵³

All the while Québec and other provinces are actively involved internationally, the federal government refuses to recognize that provinces possess a limited *jus tractatus*. However, in the last few years, probably as a result of the increasing impacts of globalisation and the creation of transnational legal regimes, the issue of managing treaty powers has resurfaced with vigour in Canada, as it has in other federations.⁵⁴ The

⁵³ See Québec, *Activities – Development of Shared General Standards*, *supra* note 51. The *Ministère* refers to the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* approved at the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 20 October, 2005 (UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October, 2005 online: UNESCO <<http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>>). On 10 November, 2005, the *Assemblée nationale* unanimously adopted the following resolution: “... conformément à l’article 22.3 de la *Loi sur le ministère des Relations internationales*, l’Assemblée nationale approuve l’entente internationale concernant la Convention sur la protection et la promotion de la diversité des expressions culturelles.” (Québec, National Assembly, *Journal of Debates*, 37th Leg. 1st sess., Vol. 38 No. 182 (10 November 2005).

⁵⁴ For example, the debates about federalism and international law in the United States have regained a lot of vigour in the last few years. See for example: Jack L. Goldsmith, “Federal Courts, Foreign Affairs, and Federalism” (1997) 83 Va. L. Rev. 1617; Gerald L. Neuman, “The Global Dimension of RFRA” (1997) 14 Const. Commentary 33; Gavin R. Villareal, “One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After *United States v. Lopez*”, Note, (1998) 76 Tex. L. Rev. 1125; James A. Deeken, “A New Miranda For Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of *Printz v. United States*”, Note, (1998) 31 Vand. J. Transnat’l L. 997; Thomas Healy, “Is *Missouri v. Holland* Still Good Law? Federalism and the Treaty Power”, Note, (1998) 98 Colum. L. Rev. 1726; G. Edward White, “The Transformation of the Constitutional Regime of Foreign Relations” (1999) 85 Va. L. Rev. 1; Michael D. Ramsey, “The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism” (1999) 75 Notre Dame L. Rev. 341; Curtis A. Bradley, “The Treaty Power and American Federalism” (1998) 97 Mich. L. Rev. 390; Curtis A. Bradley, “The Treaty Power and American Federalism II” (2000) 99 Mich. L. Rev. 98; David M. Golove, “Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power” (2000) 98 Mich. L. Rev. 1075; Omar N. White, “The Endangered Species Act’s Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power”, Comment, (2000) 27 Ecology L.Q. 215; Edward T. Swaine, “Negotiating Federalism: State Bargaining and the Dormant Treaty Power” (2000) 49 Duke L.J. 1127; Janet R.

tensions between centralism and provincial self-government as well as the need felt for an effective presence at the international level have fuelled intense political debates.⁵⁵ It is time to review the state of Cana-

Carter, "Commandeering Under the Treaty Power", Note, (2001) 76 N.Y.U.L. Rev. 598; Robert Anderson IV, "Ascertained in a Different Way": The Treaty Power at the Crossroads of Contract, Compact, and Constitution" (2001) 69 Geo. Wash. L. Rev. 189; Robert Knowles, "Starbucks and the New Federalism: The Court's Answer to Globalization", Note, (2001) 95 Nw. U.L. Rev. 735; James J. Pascoe, "Time for a New Approach? Federalism and Foreign Affairs after Crosby v. National Foreign Trade Council" (2002) 35 Vand. J. Transnat'l L. 291; Edward T. Swain, "Does Federalism Constrain the Treaty Power?" (2003) 103 Colum. L. Rev. 403; Ana Maria Merico-Stephens, "Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties" (2004) 25 Mich. J. Int'l L. 265; Katrina L. Fischer, "Harnessing the Treaty Power in Support of Environmental Regulation of Activities that Don't 'Substantially Affect Interstate Commerce': Recognizing the Realities of the New Federalism" (2004) 22 Va. Envtl. L.J. 167; Nicholas Quinn Rosenkrantz, "Executing the Treaty Powers" (2005) 118 Harv. L. Rev. 1867; Ryan Patton, "Federal Preemption in an Age of Globalization", Note, (2005) 37 Case W. Res. J. Int'l L. 111. See also the articles published in the three following Symposia: *Foreign Affairs Law at the End of the Century*, (1999) 70 U. Colo. L. Rev. 1089; *New Voices on the New Federalism*, (2001) 46 Vill. L. Rev. 907; *Federal Courts and Foreign Affairs*, (2002) 42 Va. J. Int'l L. 365.

⁵⁵ Here is a sample of the newspaper articles published on the issue between October 2004 and October 2005: Gilles Toupin, "Martin reçoit l'aval de Chirac pour son G20" *La Presse* (15 October 2004) A21; Serge Joyal, "La fin du Canada ? D'une asymétrie à l'autre, il risque de rester bien peu de la fédération" *La Presse* (22 October 2004) A19; Lysiane Gagnon, "Howard Dean à Montréal" *La Presse* (28 October 2004) A21; Mario Cloutier, "Rencontre Charest-Fox" *La Presse* (29 October 2004) A8; Louise Beaudouin, "Remettre le Québec à sa place" *La Presse* (19 November 2004) A14; Mario Cloutier, "Mission au Mexique" *La Presse* (20 November 2004) A19; Joël-Denis Bellavance, "Harper promet de laisser le Québec s'exprimer sur la scène internationale" *La Presse* (28 November 2005) A3; Benoît Pelletier, "Un rôle accru" *La Presse* (1 December 2004) A21; Gilles Normand, "Conseil de la fédération" *La Presse* (27 December 2004) A16; Éric Clément, "Le Québec et la France main dans la main" *La Presse* (8 January 2005) A6; Jocelyne Richer, "Québec veut contribuer au succès des élections en Haïti" *La Presse* (5 February 2005) A8; Isabelle Hachey, "Le début d'un temps nouveau" *La Presse* (6 February 2005) PLUS 5; Constant Brand, "Charest réclame un plus grand rôle international pour le Québec" *La Presse* (5 March 2005) A14; Jocelyne Richer, "Jean Charest souhaite rencontrer Hillary Clinton à Washington" *La Presse* (12 March 2005) A18; Tommy Chouinard and Joël-Denis Bellavance, "Conseil de la fédération" *La Presse* (10 August 2005) A9; Isabelle Rodrigue, "Pettigrew tient son bout face à Charest" *La Presse* (9 September 2005) A11; Isabelle Rodrigue, "Pettigrew et Pelletier bientôt face à face" *La Presse* (13 September 2005) A23; Tommy Chouinard, "Relations internationales" *La Presse* (15 September 2005) A10; Michel Gauthier, "Le parti libéral n'a pas de leçon à donner à personne" *La Presse* (16 September 2005) A21; Marie-Claude Lemieux, "Boisclair veut faire mieux que René Lévesque" *La Presse* (19 September 2005) A1; André Pratte, "Deux doctrines" *La Presse* (19 September 2005) A16; Gilles Toupet, "Rejet du projet de loi sur la consultation des provinces" *La Presse* (30 September 2005) A7; *Presse Canadienne*, "Line Beauchamp parlera pour le Canada" *La Presse* (4 October 2005) A7; Sylvain Larocque, "Désaccord sur le rôle du Québec sur la scène interna-

tionale” (5 October 2005) A5; Réginald Harvey, “Concertation et coopération” *Le Devoir* (9 octobre 2004) G3; Antoine Robitaille, “La goutte d’eau de trop dans le vase asymétrique” *Le Devoir* (16 October 2004) B4; Michel David, “La doctrine Charest” *Le Devoir* (23 November 2004) A3; Alec Castonguay, “Paul Martin envoie des renforts à Sgro et Frulla” *Le Devoir* (3 December 2004) A3; Jean-Guillaume Dumont, “Faute de leadership, le Québec stagne” *Le Devoir* (5 February 2005) G5; Christian Rioux, “Québec veut participer aux négociations avec l’Europe” *Le Devoir* (4 March 2005) A2; Normand Thériault, “Au cœur des nations” *Le Devoir* (9 March 2005) C1; Claude Morin, “L’obstacle oublié” *Le Devoir* (9 March 2005) C6; Mylène Tremblay, “Retour sur la doctrine Gérin-Lajoie” *Le Devoir* (9 March 2005) C7; Stéphane Paquin, “Une réforme indispensable” *Le Devoir* (9 March 2005) C6; Jean-Guillaume Dumont, “Le gouvernement doit agir pour préserver l’identité québécoise” *Le Devoir* (9 March 2005) C5; Robert Aird, “Signé André Patry” *Le Devoir* (9 March 2005) C4; Michel David, “Les slogans creux” *Le Devoir* (19 March 2005) B3; Éric Desrosiers, “Se mêler de ses affaires” *Le Devoir* (19 March 2005) C3; Michel David, “Le prix de la mollesse” *Le Devoir* (30 June 2005) A3; Robert Dutrisac, “Ottawa se crispe, Québec s’alarme” *Le Devoir* (2 July 2005) A1; Jocelyne Richer, “Québec veut s’avancer sur la scène internationale” *Le Devoir* (9 August 2005) A3; Louise Harel and Gilles Duceppe, “Le Québec n’est plus libre de ses choix” *Le Devoir* (18 August 2005) A7; Danic Parenteau and Ian Parenteau, “La question de l’identité québécoise à l’heure de l’altermondialisme” *Le Devoir* (22 August 2005) A6; Lucie Lamarche, “La place du Québec sur la scène internationale: qu’en est-il des droits de la personne?” *Le Devoir* (24 August 2005) A7; Daniel Turp, “Je ne suis pas candidat et j’appuie André Boisclair” *Le Devoir* (26 August 2005) A9; Monique Gagnon-Tremblay, “L’action internationale du Québec et les droits de la personne: des efforts réels” *Le Devoir* (31 August 2005) A7; Robert Dutrisac, “Le Canada doit parler d’une seule voix” *Le Devoir* (2 September 2005) A1; Robert Dutrisac, “Québec entend renforcer la doctrine Gérin-Lajoie” *Le Devoir* (3 September 2005) A5; Bernard Descôteaux, “Le corset de M. Pettigrew” *Le Devoir* (6 September 2005) A6; Stéphane Paquin, “La réforme proposée par le gouvernement du Québec est plus nécessaire que jamais” *Le Devoir* (9 September 2005) A9; Robert Aird, “La magie canadienne” *Le Devoir* (9 September 2005) A9; Louise Beaudouin, “Mensonges et reculs” *Le Devoir* (9 September 2005) A9; Isabelle Rodrigue, “Pettigrew craint une récupération par les ‘fanatiques de l’indépendance’” *Le Devoir* (9 September 2005) A1; Benoit Pelletier and Monique Gagnon-Tremblay, “La doctrine Gérin-Lajoie: un cadre de référence toujours d’actualité” *Le Devoir* (10 September 2005) B5; Bernard Descôteaux, “Les sophismes de Pettigrew” *Le Devoir* (10 September 2005) B4; Presse Canadienne and *Le Devoir*, “Québec hausse le ton” (10 September 2005) A1; Chantal Hébert, “Pettigrew Kamikaze” *Le Devoir* (12 September 2005) A3; Presse Canadienne, “Pettigrew et Pelletier se parleront” *Le Devoir* (13 September 2005) A3; Robert Dutrisac, “Québec fera sa place dans le monde après entente avec Ottawa” *Le Devoir* (15 September 2005) A3; Hélène Buzzetti, “La bonne vieille méthode” *Le Devoir* (21 September 2005) A3; Monique Gagnon-Tremblay, “C’est la meilleure entente qui soit” *Le Devoir* (23 September 2005) A8; Tomy Menninger, “Les États fédérés et la scène internationale” *Le Devoir* (28 September 2005) A6; Antoine Robitaille, “C’est à Ottawa de parler de droits de l’homme, dit l’entourage de Charest” *Le Devoir* (30 September 2005) A4; Sylvain Larocque, “Pettigrew fait baisser les attentes” *Le Devoir* (3 October 2005) A3; Alec Castonguay, “Diversité culturelle: dernière ligne droite à l’UNESCO” *Le Devoir* (3 October 2005) A1; Antoine Robitaille, “Le débat sur la place du Québec continue de faire rage” *Le Devoir* (5 October 2005) A2; The Gazette, “Ex-MNA Christos Sirros named as Quebec’s man in Brussels” *The Gazette* (7 October 2004) A16; Mike de Souza, “Harper tous Belgium as a Federal model” *The Gazette*

dian constitutional law in relation to treaty-making powers and to reas-

(16 October 2004) A13; Anne Dawson, "Harper backs ADQ program" *The Gazette* (19 October 2004) A12; *The Gazette*, "Who wants a more complicated Canada" *The Gazette* (20 October 2004) A30; Anne Dawson, "Belgium" plan might be tough sell in Ontario" *The Gazette* (22 October 2004) A14; Mike de Souza, "Charest as little to say on anti-missile shield" *The Gazette* (1 December 2004) A12; Kevin Dougherty, "Our man in London" *The Gazette* (5 December 2004) D.1.BRE; Mike de Souza, "Ex-ambassador challenges Quebec's international role" *The Gazette* (18 February 2005) A9; Mike de Souza, "Canada should play bigger international role: Pettigrew" *The Gazette* (19 February 2005) A11; Elizabeth Thompson, "Feds set to work with Quebec" *The Gazette* (6 March 2005) A6; Irwin Block and Mike de Souza, "Pelletier makes pitch for greater Quebec role" *The Gazette* (18 March 2005) A8; Kevin Dougherty, "Vietnam orphans caught in war of words: Accord scuttled Ottawa, Quebec in jurisdiction fight" *The Gazette* (2 July 2005) A12; Kevin Dougherty, "Feds, province end Vietnam adoption spat" *The Gazette* (13 September 2005) A17; Don Macdonald, "Charest outlines goals of trip to China" *The Gazette* (14 September 2005) B1; Kevin Dougherty, "Wider role sought on world stage: Provincial minister takes hard line with Pettigrew" *The Gazette* (15 September 2005) A11; Josée Legault, "Pettigrew makes me pine for the Stephane Dion days" *The Gazette* (16 September 2005) A21; Kevin Dougherty, "Deal signed in Quebec to resume Vietnamese adoptions" *The Gazette* (16 September 2005) A9; Don Macpherson, "Quebec, Ottawa spar over foreign affairs" *The Gazette* (17 September 2005) A31; *The Gazette* "Canada must speak in one united voice" *The Gazette* (19 September 2005) A22; Monique Gagnon-Tremblay, "Quebec needs place at table" *The Gazette* (3 September 2005) A21; Elizabeth Thompson, "Province, feds jockey over roles in world: Quebec minister to read part of UNESCO speech" *The Gazette* (4 October 2005) A10; Anne Dawson, "Harper's Canada: Belgium: Calls for devolved powers, backs Dumont's Quebec plan" *National Post* (19 October 2004) A1; *National Post*, "Firewall folly, take two" *National Post* (20 October 2004) A23; Robert Fife, "PM threatens 'one Canada', Liberal says: Asymmetrical federalism" *National Post* (21 October 2004) A4; Stephen Harper, "My plan for 'open' federalism" *National Post* (27 October 2004) A19; Graeme Hamilton, "'Country' of Quebec" *National Post* (15 November 2004) A6; Mike de Souza, "Quebec bids to improve international presence" *National Post* (18 February 2005) A8; Monique Gagnon-Tremblay, "Quebec and America" *National Post* (14 March 2005) A17; Robert Sauvé, "Americans' view of Quebecers" *National Post* (15 March 2005) A17; Jack Aubry, "Ottawa set to discuss Quebec's world role: Seeks increased profile" *National Post* (1 September 2005) A9; Lorne Gunter, "Who may speak for Canada?" *National Post* (12 September 2005) A11; *The Globe and Mail*, "France and Quebec plan joint mission" *The Globe and Mail* (14 October 2004) A1; Jeffrey Simpson, "Ottawa, please stop trying to please" *The Globe and Mail* (15 October 2004) A23; Jeffrey Brooke *et al.*, "With the Liberal Party holding a policy convention this weekend, the *Globe and Mail* asked a sampling of members for their views on three issues" *The Globe and Mail* (5 March 2005) A4; Alan Freeman, "Premiers raise fear over border plans. Charest, McGuinty talk to US official" *The Globe and Mail* (19 April 2005) A18; *The Globe and Mail*, "Martin chats with *Globe's* editorial board. Sweeping conversation covers successes, economy, NDP, Darfur and Gomery probe" *The Globe and Mail* (26 April 2005) A6; Shawn McCarthy, "Chretien defends handling of ad scandal" *The Globe and Mail* (30 April 2005) A19; Konrad Yakabuski, "Big dreams in Canada's city that never sleeps. The mayor is working overtime to help Montreal get its groove back" *The Globe and Mail* (16 July 2005) A3; Rhéal Séguin, "Quebec will work with Ottawa in representing Canada abroad" *The Globe and Mail* (15 September 2005) A4.

sess the assumptions that have lain behind the different positions in order to better imagine ways to go forward in the new world order that we are now facing.

The Canadian federation is deeply involved in the web of relations with other states and non-state actors that form our current world order. However, despite the fact that the federal and provincial governments are actively engaged in establishing and maintaining such relations, the exact operational boundaries of each player are the subject of disagreement among them. As we have seen, this is partly due to the fact that the written Constitution of Canada does not expressly attribute the powers to make and implement international agreements binding on Canada or the provinces. A second factor that helps explain the lack of express resolution of the operational boundaries between the federal government and the provinces in relation to international agreements flows from a mistaken association between two questions: the recognition of the international capacity to make treaties and the international recognition of an independent state. Again, as I have said, fearing that any recognition of provincial powers over treaties could feed the Québec sovereignist theses, the federal government has, over the second-half of the last century, tended systematically to downplay the federalist nature of the treaty powers in favour of a centralisation of such powers in Ottawa.

However, it appears that there is more than enough constitutional material to construct an appropriate and rather precise set of operational rules defining the respective roles of the federal and provincial authorities. Furthermore, it is entirely possible to solve the longstanding conflict between Ottawa and Québec on this issue without having any impact – positive or negative – on the strength of a potential provincial bid to obtain international recognition after having declared secession from the rest of Canada. In the next section, I will briefly flesh out the constitutional traditions that inform the way in which I will go about uncovering the set of constitutional imperatives that govern treaty powers in Canada.

The Voluntarist and the Organic Constitutional Perspectives

The reader might wonder why the *Constitution Act, 1867*⁵⁶ does not expressly allocate either to the federal or provincial authorities the powers to engage in international relations. Why is there such an obvious gap? While many states have clear constitutional provisions dealing with international relations and the incorporation of international law

⁵⁶ *Constitution Act, 1867*, *supra* note 39.

within their domestic sphere,⁵⁷ Canada did not have at the time of Gérin-Lajoie's address – and still, to this day, does not have – any active constitutional provision expressly referring to those subjects. Section 132 of the *Constitution Act, 1867* might seem relevant at first glance since it states that 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”.⁵⁸ However, as Gérin-Lajoie rightly pointed out, this provision has become obsolete since Canada gained her international autonomy from Great Britain. Canada can no longer be bound by Imperial treaties adopted since then⁵⁹ and s. 132 is simply not applicable to treaties that Canada ratifies.⁶⁰ It must be remembered that the *Constitu-*

⁵⁷ For example, Article VI, § 2 of the *Constitution of the United States of America* declares that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Constitution of the United States declares at art. II, § 2, cl. 2 that the President “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur ...” and at art. I, § 10, cls. 1 and 3 that “[n]o state shall enter into any treaty, alliance, or confederation” and “[n]o state shall, without the consent of Congress ... enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay”.

⁵⁸ *Constitution Act, 1867*, *supra* note 39.

⁵⁹ Of course, Imperial treaties formed prior to Canada's international autonomy can still bind Canada according to the regular rules of state succession. However, s. 132 can no longer be used to justify implementation measures by the federal Parliament or Government of those treaties since those treaties no longer impose obligations on “Canada or of any Province thereof, as Part of the British Empire” (*Constitution Act, 1867*, *ibid.*, s. 132 (emphasis added)). *Contra R. v. Sikeya*, [1964] 2 C.C.C. 325, 43 C.R. 83, aff'd. [1965] 2 C.C.C. 129, 44 C.R. 266.

⁶⁰ *Labour Conventions* case, *supra* note 19 at 350 (“While it is true, as was pointed out in the Radio case, [1932] A.C. 304, that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section [132] so as to cover the un contemplated event.”). This position is fully accepted by the federal government. In a letter dated February 1, 1985 (reproduced in Edward G. Lee, “Canadian Practice in International Law at the Department of External Affairs / La pratique canadienne en droit international en 1985 au ministère des Affaires extérieures” (1986) 24 Can. Y.B. Int. L. 386 at 397 in 1985 [Canada, Letter from the Legal Bureau of the Department of External Affairs to the Council of Europe (1 February 1985)]), the Legal Bureau of the Department of External Affairs replied to a Council of Europe questionnaire on treaty making practices that: “The Canadian Constitution contains no provisions regarding treaty-making apart from Section 132 of the

tion Act, 1867 was a colonial constitution and that the British Parliament did not expect, at the time of its enactment, that Canada and the provinces would engage in international relations on par with “sovereign states” and independently from London’s Foreign Office.⁶¹ This would not mean, however, that provincial governments, for example, could not engage in some activities abroad such as the recruitment of immigrants.⁶² It simply means that, when the *Constitution Act, 1867* was adopted, treaty powers were not attributed to the federal government nor to the provinces but remained an Imperial prerogative.

The issue concerning the division of powers between federal authorities and the provinces in relation to international affairs thus emerged only as Canada gained her autonomy from the British Empire. Canada’s autonomy from Great Britain was gained gradually. In the British tradition of flexible constitutionalism, changes were brought slowly and pragmatically through a series of statutes, administrative instruments, executive decisions and judicial opinions. Thus, in 1871, Canadian representatives participated in negotiations leading to an imperial treaty affecting Canada (*Treaty of Washington, 1871*⁶³). Canada then signed such international agreements as a member of the Empire (*Treaty of Versailles, 1919*⁶⁴) and finally signed such agreements on her own behalf (*Halibut Fisheries Treaty, 1923*⁶⁵). At the 1926 Imperial Conference, the general principle to the effect that no autonomous Dominion

Constitution Act, 1867 [*supra* note 39], which has fallen into disuse because it has no relevance to present day conditions.”

⁶¹ It is to be noted, however, that the Federal Parliament has power over “Militia, Military and Naval Service, and Defence.” See *Constitution Act, 1867, ibid.* s. 91 (7). However, this allocation of legislative jurisdiction did not mean that the Federal government was free to develop its own defence policies independently from London. S. 15 of the *Constitution Act, 1867, ibid.* clearly states that the Queen is the Commander-in-Chief of the militia, military and naval service and at the time, the Crown was still a pretty unified concept. For the gradual division of the Crown in the Empire, see section II.A.1.ii.

⁶² *Constitution Act, 1867, ibid.*, s. 95 provides for concurrent federal and provincial power over immigration. For a brief overview of official representations made abroad by the province of Québec (starting in 1871 with the dispatch of immigration agents to the European continent, the British islands and to New England and with the opening of permanent offices in 1872 in Ireland and Scotland), see Québec, *Ministère des Relations internationales, History*, online: *Ministère des Relations internationales* <www.mri.gouv.qc.ca/en/politique_internationale/historique/historique.asp>.

⁶³ *Treaty between the United Kingdom and the United States for the Amicable Settlement of All Causes of Differences Between the Two Countries*, 8 May 1871, 17 U.S. Stat. 863, 143 Consol. T.S. 145 [*Treaty of Washington*].

⁶⁴ *Treaty of Peace between the Allied and Associated Powers and Germany*, 28 June 1919, 225 Cons. T.S. 188, 2 Bevans 43 (entered into force 28 June 1919) [*Treaty of Versailles*].

⁶⁵ *Halibut Fisheries Convention 1923, 1923*, 32 L.N.T.S. No. 93.

could be bound by commitments incurred by the Imperial Government except with the consent of the Dominion concerned was confirmed. The *Balfour Declaration* stated that “They (Great Britain and the Dominions) are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British commonwealth of Nations”.⁶⁶ The *Statute of Westminster* gave, in large parts, legal effect to that declaration in 1931.⁶⁷ The process leading to independence seems to have been mainly achieved by the end of the 1930s, when Canada entered World War II with a formal declaration of war issued separately from the United Kingdom’s declaration of war. But the independence process was not completely over. Canada had gained her

⁶⁶ U.K., Inter-Imperial Relations Committee, *Proceedings and Memoranda (Balfour Declaration)*, E (I.R./26) Series, p. 2 [*Balfour Declaration*]. See also Maurice Olliver, ed., *The Colonial and Imperial Conferences from 1887 to 1937*, Vol. 3. (Ottawa: Queen’s Printer, 1954) at 146.

⁶⁷ S. 4 of the *Statute of Westminster, 1931*, (U.K.), 22 & 23 Geo. V, c. 4 [*Statute of Westminster*] proclaimed that “No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.” However, s. 7 provided that:

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

The Supreme Court of Canada claimed, in 1967 that:

[t]here can be no doubt now that Canada has become a sovereign state. Its sovereignty was acquired in the period between its separate signature of the *Treaty of Versailles* in 1919 and the *Statute of Westminster*. Section 3 of the *Statute of Westminster*, provides in an absolutely clear manner and without any restrictions that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

(*Re Ownership of Offshore Mineral Rights*, [1967] S.C.R. 792, 816 [*Re Ownership of Offshore Mineral Rights*]). S. 3 of the *Statute of Westminster* also provided that “the Parliament of a Dominion has full power to make laws having extra-territorial operation.” However, as I will show later in section II.A.1.iv., (a) gaining international status does not necessarily mean gaining full formal independence and (b) the reference *Re Ownership of Offshore Mineral Rights* does not stand for the proposition that the federal government has inherited of the entire international powers of the federation.

international status, her international autonomy, but she had not yet completely gained her formal independence from the United Kingdom. In 1947, the King issued new Letters Patent to the Governor General devolving his remaining executive powers in relation to “Canada” to him:

II. And We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada, and for greater certainty but not so as to restrict the generality of the foregoing to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust We have reposed in him according to the several powers and authorities granted or appointed him by virtue of the Constitution Acts, 1867 to 1940 and the powers and authorities hereinafter conferred in these Letters Patent and in such Commission as may be issued to him under Our Great Seal of Canada and under such laws as are or may hereinafter be in force in Canada.⁶⁸

In 1949, the possibility of appeal to the Privy Council was terminated. Canada had to wait until 1982 for the “patriation” of the Canadian constitution.⁶⁹ But the *Constitution Act, 1982*⁷⁰ was not the formal result of the Canadian Parliament and provincial legislatures but an annex to a British statute!

Because the independence of Canada from the United Kingdom was acquired over time through a continuous transformation of their mutual relationship, there is simply no clear demarcation line between the dependence and the independence periods. Thus, trying to identify the exact moment of their separation is akin to trying to identify the moment at which a man has lost enough hair to be considered bald...

Understanding that Canada’s independence was achieved over time and not at a specific moment helps us understand two important things for the purpose of making sense of the evolution of treaty powers in Canada. First, it helps understand *why* Canada’s “birth” as an independent country did not cause – nor was it the result of – an entirely new

⁶⁸ *Letters Patent Constituting the Office of the Governor General of Canada*, reproduced at R.S.C. 1985, Appendix II, No. 31 [*Letters Patent Constituting the Office of the Governor General of Canada*].

⁶⁹ The appeals to the judicial committee of the Privy Council were completely abolished by *An Act Amending the Supreme Court Act*, S.C. 1949, c.37, s. 3.

For various political reasons, including the fact that the federal government and the provinces could not agree on (1) a proper constitutional amending formula and on (2) an appropriate redistribution of powers between the center and the provinces, the core of the Canadian constitution could be amended only by London even after 1931.

⁷⁰ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*].

constitutional order but happened through a continuous process of constitutional transformations. Second, because Canadian constitutionalism is not exclusively the product of constitutional enactments at specific points in time, the ways in which constitutional changes are conceived in Canada differ in very important ways from the ways those changes are conceived in a constitutionalism primarily based on narratives of popular will. Canadian constitutional law relating to international relations is much more a product of immanent progressive growth than an instant act of will. Let me say more about this.

Constitutional regimes that portray themselves as products of popular revolutions (such as the United States or France) have clearer narratives about their founding moments. I will call “Voluntarists” those revolutionary traditions and the traditions of others who mainly emphasise Will as the source of constitutional legitimacy. The narratives of those traditions are often constructed around the idea that the constitution is the product of the will of “the People”,⁷¹ a will that expressed itself through a rejection of past authorities. These traditions imagine “Peoples” as constitution-makers that intervene intermittently to set up structures of government after having made *tabula rasa* of their previous settings. Thus, revolutionary constitutionalism advocates both the destruction of a past and the construction of new institutional arrangements.⁷² And because Peoples are conceived as capable of creating *ex nihilo* their new forms of government, they are constrained only by their own wills and desires. However, because the individuals who form Peoples would not be ready to submit themselves to arbitrary decisions (the alleged arbitrariness of authorities being often a motive invoked for revolutions), the constitutions that Peoples set up are imagined to be not only the result of their will, but also the expression of Reason. In fact, not being constrained by the remnants of the previous regimes, Peoples

⁷¹ The famous preamble of the *Constitution of the United States of America*, *supra* note 57, declares: “We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.” The “We the People” appeared as a collective agent earlier with the American Declaration of Independence. Jacques Derrida highlighted the *aporia* in the production of that Declaration: the People whose representatives signed the document was simultaneously constituted as a People by this Declaration. In other words, the Declaration was simultaneously a “declarative” and “performative” act. See Jacques Derrida, “*Déclarations d’indépendance*”, dans *Otobiographies: L’enseignement de Nietzsche et la politique du nom propre* (Paris: Galilée, 1984) at 13ff., translated in English at “*Declarations of Independence*” (1986) 15 *New Political Science* 7.

⁷² For an interesting discussion of the tensions between law and revolution, see Paul W. Kahn, *The Reign Of Law: Marbury v. Madison and the Construction of America* (New Haven: Yale University Press, 1997).

imagine themselves trying to put in place the most “rational” system. They imagine themselves starting from scratch and putting in place an overall plan. The new constitutional imperatives are taken to be the will of the People which, hopefully, corresponds to reason institutionally incarnated.⁷³ The work of those who then follow the “founders” is to implement the founders’ Will, to fill the gaps left in the masterwork of the founders and to protect the founders’ achievements – at least until “the People” wakes up again after discovering that it had made a mistake earlier on⁷⁴ or that its will has changed.⁷⁵ This leads the Voluntarist

⁷³ Paul W. Kahn has demonstrated how Will and Reason have been perceived as separate and often conflicting sources of legitimacy in the American constitutional tradition (Paul W. Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* (New Haven: Yale University Press, 1992) [P.W. Kahn, *Legitimacy and History*]). Legitimacy, in the dominant American constitutional narratives, depends on the idea that (1) self-government has been established by the will of the People and continues to be exercised as the expression of that continuous will and (2) the Constitution is the embodiment of Reason. By Reason, I mean here a theorized form of practical reason that presents itself either in an achieved form or as a work in progress. Thus, Reason embodied in the Constitution is perceived as a limit on the unreflective moments of the People and as the result of its finer instants. A democratic polity might hope that the Will of the People will coincide with what is perceived as the requirements of Reason but it might not always be the case. When the two do not coincide, the polity has the gut-wrenching task of privileging one over the other. There is no necessary conflict here but there is always a potential one.

⁷⁴ There are at least two possible senses of “mistake” from the point of view of the Voluntarist. The first one refers to mistakes in the implementation of the initial Will of the People. Such mistakes can be corrected by the agents responsible for the implementation of the constitution. For example, courts might come to the conclusion that this or that constitutional doctrine that they have applied for some time is in fact not in conformity with the People’s Will as expressed in the constitution. They will then go on to correct it without awakening the sleeping giant that is the People in order to do so. Such modification, at least in its rhetoric, is a restoration of the true meaning of the constitutional norm and does not require the intervention of the Constituent power. The second type of “mistake” is one that would require the intervention of the Constituent power to correct and that is a mistake in the constitutional imperative itself. In other words, that mistake would consist in the adoption of a wrong constitutional imperative or omission to adopt a proper constitutional imperative. Such mistake would require the intervention of the Constituent power since it means modifying the Will of the People.

Obviously, unless one has views as to how it is possible to determine with any precision the content of the Will of the collective agent that is “the People”, the frontier between those two types of mistakes is not always easy to identify in practice. Understanding this helps to explain why so much attention has been brought in American constitutional scholarship to the proper interpretative methods to be used by judges when they are engaged in judicial review of state action. In effect, from the Voluntarist perspective, if one cannot distinguish between the two types of mistakes, one has a hard time justifying judicial review unless one finds a way for unelected judges to be conceived as not merely repeating what the People has said, repeating the voice of the Constituent power, but directly speaking in its name. One can read two of the most influential American constitutional theories of the 20th century as attempts to do

to allow for both dramatic changes in constitutional setting and very conservative attitudes once he believes that the constitutional imperatives in place are the institutionalised eternal truths of theoretical reason.

A purely Voluntarist perspective does not adequately fit Canadian constitutionalism. Although constitutional enactments account for large parts of Canada's governmental skeleton, the Will that is behind them is not clearly the one of "the People". Rather, the main Canadian constitutional narratives describe those constitutional enactments as the products of the will of a series of collective agents. For example, the *Constitution Act, 1867* was described recently by the Supreme Court as being the result of (a) the "initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada", (b) the approval of the "local Parliaments" and (c) a formal enactment

just that. See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) who, when the exercise of "passive virtues" was not sufficient, imagined Courts as trying to anticipate the future will of the People (but see Bickel's important qualifications in *Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970) at 173-181) and John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) who imagined courts as guardians of the accessibility of the political process rather than enforcers of substantive views. However, for Ely, when the process has been deficient, courts have a representation-reinforcement role that entails that they may substitute for an actual result the putative outcome that would have resulted from the political process had it been kept sufficiently open. On the other hand, the difficulty of identifying judicial review with the "voice of the People" and the need to heed the Will of the latter has led Robert Bork to suggest a constitutional amendment so that the current People could be able to override through legislative means every decision of the Supreme Court. See Robert Bork, *Slouching Toward Gomorrah: Modern Liberalism And American Decline* (New York: Regan Books, 1996) at 117-19. For an exploration of some other difficulties associated with the idea of constitutionality as the "voice of the People", see Jed Rubenfeld, *Freedom And Time: A Theory Of Self-Government* (New Haven: Yale University Press, 2001).

⁷⁵ On how the succeeding generations of American constitutionalists imagined their roles in relation to the American Constitution from its adoption until the 1990s, see the enlightening account of P.W. Kahn, *Legitimacy and History*, *supra* note 73.

Because American constitutionalism relies heavily on the "We the People" both as a source of legitimacy for the Constitution and as a source of legitimacy for everyday political decisions made by legislatures and the executive, it has to offer an account as to why these latter decisions ought to be constrained by the Constitution. In other words, if "the People" modifies the Constitution and the same "People" speaks through its elected officials in the legislatures, why are legislatures bound by constitutional norms? Would not it be an implicit indication that the People have changed their mind over certain constitutional issues when they adopt laws incompatible with the Constitution? Many constitutionalists have tried to solve that problem by distinguishing between the People acting as the "Constituent power" and the People acting in the course of "normal politics". For a version of such a "democratic dualism" theory, see Bruce Ackerman, *We The People: Foundations* (Cambridge: Harvard University Press, 1991), esp. c. 1, 9, 10 and 11.

by the Imperial Parliament in London.⁷⁶ And because Canada gradually became independent from the United Kingdom, that independence did not result in a momentous reconstruction of the Canadian constitutional order. As we have seen, independence was not the product of, nor did it result in, a complete reformulation of Canadian constitutional texts that would mark clearly the transition from dependence. In other words, the bulk of the *Constitution Act, 1867* has remained intact and the *Constitution Act, 1867* still dictates the division of powers between the federal government and the provinces according to the same terms. Even when the *Constitution Act, 1982* was adopted, seventeen years after Gérin-Lajoie's speech, changes made to the division of powers established by the *Constitution Act, 1867* between the center and the provinces were limited to the adoption of new constitutional amending formulas,⁷⁷ express provisions dealing with "equalization payments" between provinces⁷⁸ and provincial jurisdiction in relation to natural resources.⁷⁹ In other words, the "People" of Canada seems to have acquired their independence *in absentia*. It was not the occasion of a new start trumpeted by the People but rather the gradual transformation of power structure within organic wholes.

Although the *Constitution Act, 1982* broke the last constitutional ties to the British Parliament by providing for an entirely Canadian amending formula,⁸⁰ formal constitutional changes did not deal with the attribution of the authorities to form and implement treaties nor did they deal with the issue of who can intervene in international forums and maintain external relations.⁸¹ From a Voluntarist perspective, it would

⁷⁶ See *Reference Re Secession of Québec*, [1998] 2 S.C.R. 217 at paras. 35-47 [*Reference Re Secession of Québec*].

⁷⁷ See *Constitution Act, 1982*, *supra* note 70, ss. 38-49.

⁷⁸ S. 36 (2) of the *Constitution Act, 1982*, *ibid.* provides that "Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

⁷⁹ *Constitution Act, 1867*, *supra* note 39, s. 92A.

⁸⁰ In light of the uncertainties about the effects of devolutions on the so-called sovereignty of Parliament, one could possibly argue that the British Parliament still has the legal capacity to repeal the *Canada Act* of 1982. However, even if that repeal were to be valid for the purposes of the British legal system, the Canadian legal system would simply ignore it. To borrow a phrase from autopoiesis, the independence of the Canadian legal system means that it is now "operatively closed" to the British system.

⁸¹ In fact, the *Constitution Act, 1982*, *supra* note 70, only mentions international law in the *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 [*Canadian Charter of Rights and Freedoms*] once, guaranteeing that:

11. Any person charged with an offence has the right
11. Tout inculpé a le droit:

appear utterly strange – if not a complete sign of weakness of will – that a state acquiring its independence does not have a comprehensive constitutional text that provides for at least all the essential aspects of its new autonomous life. And treaty powers seem quite important for a state that hopes to develop fruitful relations with other members of the international community. But the Canadian constitution is made of much more than simply Voluntarist constitutional enactments. The fact that the written constitutional texts are not taken to be exhaustive of the Constitution helps to understand why the Voluntarist perspective may sound partly foreign to Canadians. In fact, like its British counterpart, Canadian constitutionalism also relies greatly on an “Organic” constitutional narrative.⁸²

The British Organic tradition⁸³ is one of slow, careful, pragmatic and

...	...
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or	g) de ne pas être déclaré coupable en raison d’une action ou d’une omission qui, au moment où elle est survenue, ne constituait pas une infraction d’après le
tional law or was criminal according to the general principles of law recognized by the community of nations; ...	droit interne du Canada ou le droit international et n’avait pas de caractère criminel d’après les principes généraux de droit reconnus par l’ensemble des nations; ...

This section, at best, recognizes implicitly through the word “or” placed between “Canadian” and “international law” that international law is distinct from Canadian law and that the former is not automatically incorporated into the latter – otherwise the word “Canadian” would be redundant.

⁸² Lord Sankey famously wrote that the Canadian constitution was like a “living tree capable of growth and expansion within its natural limits” (*Edwards v. Canada (A.G.)*, [1930] A.C. 124 (P.C.) at 136 [*Edwards*]).

⁸³ The British Organic tradition is made up of many strands of thought that emphasize different purported similarities between law and biology. One of the major strands uses the organic metaphor to describe the nature of the polity by comparing it to an organic entity. A classic example of such use of the organic metaphor is to be found in John of Salisbury’s *Policraticus* (John of Salisbury, *Policraticus (1159)*, transl. and ed. by Cary J. Nederman (Cambridge: Cambridge University Press, 1990) at 66-69) where Salisbury analogized the polity to a person to highlight both the mutual dependency of each member of the polity and to justify a certain structure of authority where each “member” and “organ” has a specific function in the maintenance of the general body. For a stimulating history of the idea of the “body politic” and the “corpus mysticum” in the Middle Age, see Ernst Kantorowicz, *The Kings Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957) [Kantorowicz, *The Kings Two Bodies*]. See also: David George Hale, *The Body Politic: A Political Metaphor in Renaissance English Literature* (The Hague-Paris, Mouton, 1971).

It is important to note, however, that the organic perspective does *not* have to be committed to the “human body” metaphor. For example, in the context of understanding the place of Aboriginal rights in Canada, Brian Slattery argues that an organic

continuous jurisprudential developments through *analogical* reasoning from case to case.⁸⁴ But what characterises the Organic perspective is not only the fact of gradual growth but also the imperative that each decision be harmoniously integrated within an already dense web of earlier decisions. The Organic perspective is biased towards incremental changes that have to fit within an already well-developed structure. From an Organic perspective, order is conceived as the preservation of a dense fabric of assumptions and expectations.⁸⁵ Past decisions are

conception of the Constitution ought to be viewed as an appropriate alternative to what he conceived as the inappropriate “Imperial model” of constitutionalism that emphasises monism and sovereignty as the power to command obedience (see Brian Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada” (1996) 34 Osgoode Hall L.J. 101). Thus, Slattery argues that Canada is a “multinational federation” (*ibid.* at 107) with a Constitution that “is the product of slow and continuing growth” (*ibid.* at 108). And that Constitution is “not limited to such enactments as the Constitution Acts of 1867 and 1982” and “[t]hese enactments depend for their legitimacy on a more fundamental body of law, which may be called the common law of the Constitution” (*ibid.* at 109). Slattery’s organic model, “subscribes to a pluralist conception of the sources of law and authority, viewing the Crown as the constitutional trustee of coordinate spheres of jurisdiction rather than their exclusive source” and “it portrays the law as immanent in our collective practices and traditions” (*ibid.* at 111). Jean Leclair proposes a similar organic model as the foundation of his “federal constitutionalism” (see Jean Leclair, “Federal Constitutionalism and Aboriginal Difference” (2006) 31 Queen’s L. J. 521). Thus, according to this organic model, law is not mainly the product of the command expressed by the “Head” to the other “members” of the “body politic” but is rather the result of the immanent growth of the different parts within the body itself. This leads to another strand of the Organic tradition (legal development as organic growth) that will be presented in more detail in what follows.

⁸⁴ Earl of Halsbury L.C. wrote in *Quinn v. Leatham*, [1901] A.C. 495 (H.L.), at p. 506 [*Quinn*] that:

there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.

Albert V. Dicey also agreed with these two principles. See Albert V. Dicey, *An Introduction to the Study of the Constitution*, 10th ed. with an introduction of Emyln C.S. Wade (London: MacMillan, 1967) [Dicey, *An Introduction to the Study of the Constitution*] at 291.

⁸⁵ The House of Lords, at a time when it did not claim the power to overrule itself, displayed an extreme cautiousness in treating very narrowly the rule of precedents (see *Quinn*, *ibid.*) Recently, the Supreme Court of Canada recognized that it was no longer necessary to hold on to such a narrow view of precedents (see *Henry v. R.*, [2005] 3 S.C.R. 609, 2005 SCC 76 [*Henry*] at para. 53 (Binnie J. for a unanimous panel of 9 judges)). This was particularly true in light of the fact that “much of the Court’s work (particularly under the *Charter*) required the development of a general

perceived as worthy for having withstood the test of time.⁸⁶ However, for that very reason, past wisdom is not venerated as eternal truth, it is rather taken to be right so long as it is adapted to its time.⁸⁷ From the Organic perspective, the rightness of institutional forms and legal imperatives is not determined by “theoretical reason” but rather by “practi-

analytical framework which necessarily went beyond what was essential for the disposition of the particular case” and that “the Court nevertheless intended that effect be given to the broader analysis” (*ibid.*): Nonetheless, the Court maintained that (*ibid.* at para. 57):

The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the ratio decidendi which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All obiter do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive ratio decidendi to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not “binding” in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

⁸⁶ For a fascinating study of the origins of the common law doctrine of the “Ancient Constitution”, see John G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957), chap. II, VII and IX and Pocock’s further developments on the issue at John G.A. Pocock, “Burke and the Ancient Constitution: A Problem in the History of Ideas” in John G.A. Pocock, *Politics, Language & Time: Essays on Political Thought and History* (Chicago: University of Chicago Press, 1989) at 202.

⁸⁷ There is, however, a strong presumption that past decisions are right. In *Henry*, *supra* note 85, for example, the Supreme Court of Canada stated that:

The Court’s practice, of course, is against departing from its precedents unless there are compelling reasons to do so: *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 777-83; and *R. v. Robinson*, [1996] 1 S.C.R. 683, at paras. 16-46. Nevertheless, while rare, departures do occur. In *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, it was said that “[t]his Court has made it clear that constitutional decisions are not immutable, even in the absence of constitutional amendment” (p. 704), and in the *Charter* context the Court in *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, effectively overturned the result (if not the reasoning) in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, and *Reference re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858. In the area of human rights, important reappraisals were made in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 (overturning the reasoning in *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561), and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (overturning *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183). The Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection.

cal reason” (*phronesis*).⁸⁸ This means that institutional forms and legal imperatives are not cast in stone, but that changes ought to be brought smoothly and incrementally through gradual adaptation to particular circumstances. As Daniel J. Boorstin once noted, in Great Britain, “constitutional theory has taken for granted the *gradual* formulation of a theory of society.”⁸⁹ He therefore added: “No sensible Briton would say that his history is the unfolding of the truths implicit in Magna Carta and the Bill of Rights. Such documents are seen as only single steps in a continuing process of definition.”⁹⁰ Moreover, changes are brought piecemeal because jurists are aware that a small change in one part of the web of constitutional law might require many constitutional adaptations elsewhere.

While the Organic perspective is open to constant reforms or, to be more precise, “development,”⁹¹ it is generally biased, for pragmatic reasons, against massive systemic modifications. In effect, wiping out significant parts of a web of imperatives would leave agents with little guidance as to how to resolve particular issues until a new experience pool has been developed. The need for heuristic devices might help to explain why, despite self-proclaimed revolutionary changes, people often continue to rely on older categories and habits. Thus, while the

⁸⁸ Practical reason is always situated and, at common law, this means practical reason takes into consideration a web of past decisions. The fact that the exercise of practical reason at common law requires a deep knowledge of past practices can be illustrated by the very important opinion given by Sir Edward Coke to King James I as to why the latter did not enjoy the privilege of personally deciding cases at law. Coke reports the exchange between him and King James I in the following terms:

Then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, true it was, that God had endowed his Majesty with excellent Science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognizance of it ...

(Emphasis added. *Prohibitions del Roy*, [1607] 12 Co. Rep. 63, 64-65, 77 Eng. Rep. 1342, 1342-43).

⁸⁹ Daniel J. Boorstin, *The Genius of American Politics* (Chicago: University of Chicago Press, 1953) at 15 [*The Genius of American Politics*].

⁹⁰ *Ibid.*

⁹¹ An organic conception of constitutionalism does not have to distinguish between “mistakes of constitutional implementation” and “mistakes in constitutional norms” since constitutional imperatives are not conceived as determinate pre-existing rules to which situations must “conform”. Rather, constitutional imperatives are indicators of the elements that must necessarily be integrated in our practical reasoning process on particular issues. In other words, the constitutional imperative is not necessarily the solution to a particular problem but the way to arrive at it.

Organic perspective might at first sight appear more conservative than the Voluntary perspective, it is not necessarily the case. In effect, because the actual is known to be simply an approximation of the good, it leaves plenty of space to the Organicist for the quest for a better arrangement. While contentment might be the attitude resulting from the Voluntary perspective,⁹² prudent hope might be what animates the Organic perspective.

To better highlight the differences between these two ways of looking at constitutionalism, let me use another metaphor. The Voluntarist imagines “the People” as an architect who attempts to design a perfect house. To succeed, the architect must have at least a general knowledge of the future dwellers and of their needs, she must be aware of the properties of the materials available and of the land upon which the house will be erected and she must have a sufficient understanding of building techniques to ensure that her plans will be able to be concretely put in place. According to the Organic perspective, the presumed architect necessary lacks the experience to design the perfect house on her first attempt. To the extent that it is ready to think of the “People” as a “person” that inhabits a constitutional house, the Organic perspective would rather imagine that the People has inherited her constitutional house from past times. The house might not be perfect, it might have parts that were suited for past needs and that no longer serve any useful or meaningful purposes, but the general structure has withstood the test of time. It then belongs to the current inhabitants to maintain and renovate the building to suit their needs while being aware that they are also holding it in trust for future generations. Having lived in that house, its current inhabitants have had time to acquire the skills and expertise to renovate the house and have been able to experience its concrete shortcomings. Renovations may require that an entire part of the house be demolished and rebuilt – or that the house be divided to be transformed into a condominium building – but the Organic view does not start from nothing. In effect, the new construction will not be possible until the old one is taken out of the way and the new building will necessarily be built in opposition to certain key features of the old one; otherwise, it would have been wiser to simply renovate it. While the Voluntarist perspective imagines the Constitution as the rational product of a bril-

⁹² Daniel Boorstin made a similar point about the American Voluntarist perspective when he wrote in *The Genius of American Politics*, *supra* note 89, that:

Our theory of society is thus conceived as a kind of exoskeleton, like the shell of a lobster. We think of ourselves as growing *into* our skeleton, filling it out with the experience and resources of recent ages. But we always suppose that the outlines were rigidly drawn in the beginning. Our mission, then, is simply to demonstrate the truth – or rather the workability – of the original theory.

liant architect, the Organic perspective sees it more as the well-maintained house of a particularly dextrous handyman.

Canadian constitutional law, despite being partly made of explicit constitutional enactments, remains shot through with this Organic perspective.⁹³ In effect, the Supreme Court of Canada recently stated that “our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order.”⁹⁴ These are not the words of a post-revolutionary court.

Therefore, Canada’s constitution, from both a Voluntarist and an Organic perspective, is a strange beast. It is partly made of Voluntarist elements in the form of constitutional enactments of the Imperial Parliament, the federal Parliament and provincial legislatures. However, these are not the works of a *single* collective author. Thus, the Will expressed in those enactments does not necessarily emerge from a single entity; Canada is a complex multinational state that is the result of a pact between different political communities, a pact sanctioned by an impe-

⁹³ While American Constitutionalism seems to be strongly animated by the Voluntarist perspective, the Organic perspective is not totally absent. For example, Woodrow Wilson, wrote that “government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton.” (Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908) at 56-57.). On the historic use of the organic metaphor in American constitutionalism, see P.W. Kahn, *Legitimacy and History*, *supra* note 73, chap. 2; Thomas H. Peebles, “A Call To High Debate: The Organic Constitution in its Formative Era, 1890-1920” (1980-1981) 52 U. Colo. L. Rev. 49 and Anonymous, “Organic and Mechanical Metaphors in Late Eighteenth-Century American Political Thought” (1996-1997) 110 Harv. L. Rev. 1832.

A contemporary return to a form of organic perspective has been heralded in the United States by David A. Strauss under the expression “common law constitutionalism”. See, in particular, David A. Strauss, “Common Law Constitutional Interpretation” (1996) 63 U. Chi. L. Rev. 877; David A. Strauss, “Tragedies Under the Common Law Constitution” in William Eskridge and Sanford Levinson, eds. *Constitutional Stupidities, Constitutional Tragedies* (New York: New York University Press, 1998); David A. Strauss, “Constitutions, Written and Otherwise” (2000) 19 *Law and Philosophy* 451; David A. Strauss, “The Irrelevance of Constitutional Amendments” (2001) 114 Harv. L. Rev. 1457; David A. Strauss, “Common Law, Common Ground, and Jefferson’s Principle” (2003) 112 Yale L.J. 1717.

This form of “common law constitutionalism” ought not to be confused with its British homonym criticised by Thomas Poole. See: Thomas Poole, “Dogmatic Liberalism? T.R.S. Allan and Common Law Constitutionalism” (2002) 65 *Modern L. Rev.* 463; Thomas Poole, “Back to the Future? Unearthing the Theory of Common Law Constitutionalism” (2003) 23 *O.J.L.S.* 435; Thomas Poole, “Questioning Common Law Constitutionalism” (2005) 25 *L.S.* 142.

⁹⁴ *Reference Re Secession of Québec*, *supra* note 76 at para. 33.

rial power.⁹⁵ Nonetheless, these are expressions of Will and the Organic perspective must try to make sense of the existence of such expressions.

⁹⁵ Although the majority of the Supreme Court of Canada declared in *Re Resolution to Amend the Constitution (Manitoba (Attorney General) v. Canada (Attorney General))*, [1981] 1 S.C.R. 753, 803 [*Patriation Reference*] that the Compact Theory was merely a political doctrine and does not “engage the law”, the majority nonetheless recognized that it “might have some peripheral relevance to actual provisions of the British North America Act and its interpretation and application”. Despite this modest role recognized by the Supreme Court, the Compact Theory nonetheless still plays an important role in Canadian foundational narratives. In effect, in an age when democracy and self-government are taken to lie at the heart of political legitimacy, there are immense pressures to find ways to justify constitutions on the basis of popular will. Because Canada was not the result of a revolutionary movement that united “the People”, the Compact theory plays a similar role. However, while this Voluntarist narrative provides legitimacy to constitutional enactments, it also logically imposes constraints. In effect, to the extent that a constitutional enactment is considered a pact, it means that it cannot be changed without the prior approval of the representatives of the collective agents that formed it or – depending on the interpretation given to the meaning of the pact – the new collective agents that they have agreed to form.

That being said, the Canadian Compact Theory comes in different versions. In effect, there are at least three important narratives concerning the identity of the relevant collective agents who took part in the pact to form a new political entity. These narratives are in tension with one another. The first one sees the *Constitution Act, 1867*, *supra* note 39, as a pact between the (French-) *Canadiens* and the British Crown (and Her English-speaking subjects). A similar narrative has taken hold among many Aboriginal Peoples who see the treaties signed with the British Crown and “recognized and affirmed” by the *Constitution Act, 1982*, *supra* note 70, s. 35, as a pact between themselves and the British Crown. The second narrative is one about a pact between self-governing *colonial legislatures* on the one hand, and the British Parliament, on the other, to form a local federation or confederation that would be a subpart of the larger Imperial system. Thus, the first type of narratives identify collective agents through “pre-political” attributes – that is, attributes not entirely produced by existing state institutions – while the second type starts from the perspective that existing state institutions already incarnate the relevant collective agents. See Paul Romney, “Provincial Equality, Special Status and the Compact Theory of Canadian Confederation” (1999) 32 *Canadian Journal of Political Science/Revue canadienne de science politique* 21. I wish to suggest that a third narrative, a complementary variant of the first two, also exists. That variant sees territorially defined “regions” (Ontario, Québec, the Maritime, Western provinces) as the relevant collective agents. Equal representation of regions in the Senate would be an outcome of that sensibility. At any rate, those narratives have often been seen by commentators as colliding with one another because they all assume the equality of incompletely overlapping collective identities. However, those narratives can be reconciled if one imagines that provinces deserve equal respect *among themselves* but a specific province might have the particular duty to protect and promote the existence of the Francophones in light of the fact that it is the only province in which the French-*Canadiens* are a majority. In light of that special duty, that province might need to enjoy particular powers to fulfil her mission without having a higher status than other provinces. An alternative way to overcome this tension would be to clearly create a third level of government that would incarnate the linguistic communities and that would be responsible for their protection and promotion – as it has been done in Belgium.

One way in which it tries to do so is simply to integrate such expressions into the larger web of constitutional imperatives; to make those rules examples of larger patterns or instantiations of more general principles.⁹⁶ That way, acts of will are presented as increments in the development of the whole.⁹⁷

However, fully harmonizing those two perspectives is not simple because one bases legitimacy on the *identity of the rule-maker* – and, incidentally, on the ultimate truth of the rules – while the other perspective bases legitimacy on the *virtues of practical reasons* and because both perspectives affirm that their claim to legitimacy must be paramount to the other. But that problem should not, in principle, arise in the current context since the constitutional imperatives relative to treaty powers in Canada are entirely the product of the Organic growth of the Canadian constitution.

⁹⁶ A similar strategy is at play in *Reference Re Secession of Québec*, *supra* note 76, when the Court declared that: “Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: *they are the vital unstated assumptions upon which the text is based*” (at para. 49, emphasis added). Thus, particular constitutional rules are taken to make sense only when viewed from the perspective of the whole system; they are not merely acts of Will, they are instantiations of a larger constitutional principle.

⁹⁷ One might be tempted to think that the Organic perspective will necessarily have a harder time competing against the Voluntarist narrative when formal constitutional enactments have been adopted precisely to repudiate past constitutional imperatives. In such cases, the image of natural growth might tend to lose to the image of the victorious Will, the image of horizontal or diagonal legal developments being displaced by one of vertical authority. However, when the organic narrative succeeds in dominating the general constitutional culture, constitutional amendments are not necessarily interpreted in a narrow originalist way but, rather, they may be taken as contextual indications about the directions towards which further progressive interpretations must be heading. The *Reference re Employment Insurance Act (Can.)*, *ss. 22 and 23*, [2005] 2 S.C.R. 669 [*Reference re Employment Insurance Act*] illustrates this quite well. Justice Deschamps writes (at para. 40):

While the views of the framers are not conclusive where constitutional interpretation is concerned, the context in which the amendment was made is nonetheless relevant. If the objectives of the framers are taken as a starting point, it will be easier to determine the scope of the jurisdiction that was transferred, and then to determine how it may be adapted to contemporary realities.

In light of the changes in the labour market, a 1940 constitutional amendment transferring from provinces to the federal Parliament legislative powers over “Unemployment insurance” (s. 91 (2A)) was interpreted as allowing the federal Parliament to legislate in order to establish “a public insurance program the purpose of which is to preserve workers’ economic security and ensure their re-entry into the labour market by paying income replacement benefits in the event of an interruption of employment” (at para. 68) in the form of maternity and parental benefits.

In effect, in Canada, the issue of treaty powers is entirely governed by the large web of rules, principles and other legal heuristics flowing from judicial decisions that have developed in harmony with other constitutional doctrines. Thus, while Canada and the provinces cut their colonial ties to the British Parliament, their connections with the external world were left to be defined by the natural growth of pre-existing constitutional sources rather than through an explicit new constitutional text.

At the center of the constitutional web is the *Labour Conventions* case. In that case, the Privy Council fleshed out the consequences of the Canadian federal structure and concluded, in short, that the implementation of treaty obligations was not an independent matter that belonged to the federal Parliament but, rather, that the authority to implement such obligations was divided according to the subject-matter of the obligations. Therefore, if a treaty dealt with matters belonging to the provincial jurisdiction, it was up to the provincial legislatures to adopt the proper laws to implement the obligations flowing from the treaty.

However, despite the fact that Organic growth has been in conformity with the expressed will of different provinces over time, there has been a counter will expressed mainly by the representatives of the federal government. The federal representatives and the scholars who support them have claimed that the division of responsibilities between the federal Parliament and the provincial legislatures is not appropriate. They usually claim that it would be more efficient if the powers to implement treaty obligations were centralised at the federal level. They claim that the current division of powers might weaken Canada's ability to negotiate with her international partners because Canada is not in a position to assure those partners that she will be capable of respecting her obligations. I have not seen any credible evidence yet that substantiates those claims. At any rate, one of the main problems for those who oppose the result of the natural growth of the Canadian doctrine is that they cannot rely on any solid constitutional foundations to make their point; their position is simply foreign to the actual web of constitutional doctrines. To reverse the current position would not simply mean adjusting a few constitutional strings here and there; it would mean a radical redrawing of the Canadian federation.

In effect, this is a great example of how a seemingly little change in the constitutional web of doctrines can actually mean the total unfolding of the web. While this might not be apparent at first sight, I will argue in this essay that rules dealing with treaty powers are now at the very heart of Canadian federalism. It is important to have this fact clearly in mind if we are going to think about reforming those rules. In the next section,

I will briefly outline the spirit in which I intend to propose organic reforms.

An Exercise in Conceptual Maintenance

In order to adapt the legal framework of the Canadian federation for the purpose of meeting the needs of international relations in the 21st century, we need to do some conceptual work. We have to sift through our current stocks of constitutional conceptions, keep the ones that continue to resonate with our reality, refurbish the ones that are dated but that can still be salvaged, parsimoniously delete the ones that have outlived their usefulness or that are just plain detrimental – and propose alternative conceptions when necessary.

This exercise in conceptual maintenance is always an important, but difficult part of law reform. It is an important task to accomplish lest we develop legal doctrines that assume the existence of a world that either no longer exists or that has never existed. For example, developing legal doctrines based on the conception that Canada is a *Dominion* in the British Empire⁹⁸ would be nonsensical since the status of “Dominion” no longer signifies anything in the current world order.

Conceptual maintenance is a difficult task for at least two reasons. First, it is difficult because we often grow so comfortable using age-old conceptions that we do not think about questioning their contemporary relevance. The conventional use of conceptions is often taken as sufficient proof of their appropriateness. A legitimate fear that we might lose an important knot in our web of meanings also reinforces this tendency: we are afraid that by discarding or transforming a conception in use we might adversely affect the other ideas that depend on it. However, when conceptions remain unquestioned despite significant changes in the cultural, material, and political conditions that made them possible, there is always the risk that such conceptions will prove ill-structured to grasp our current reality. Luckily, this is not the case here with the idea of “Dominion” or the idea that Canada is a member of the “British Empire”. We therefore do not have to disentangle this obsolete conceptual web to solve our problem since this has already been done in the last century by our predecessors.

Second, the exercise in conceptual maintenance is a difficult task because finding viable alternatives to legal conceptions that we have either trashed or that we want to reform is quite complex. Oftentimes, adapting

⁹⁸ *Constitution Act, 1867*, *supra* note 39, Preamble, where reference is made to the fact that the “Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion” and that “such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire”.

the meaning of existing legal vocabularies will do. The classic example here is the famous *Edwards* case in which the Privy Council decided that the term “person” in the *Constitution Act, 1867* had now to be read as applying both to men and women despite the fact that the term might have been originally taken to be applicable only to men.⁹⁹ The trick here is to come up with an interpretation that is different from the original and yet, is consistent with the developing narratives in which other parts of the Constitution are embedded.

Sometimes, however, no such vocabulary is available in the relevant constitutional texts because the older conceptions precluded the development of such a vocabulary in the first place. When this happens, we can either modify the Constitution through formal amendments or it can be adapted through changes in constitutional conventions or in the conceptual web that forms the background assumptions that render the constitutional texts intelligible. Either way, the challenge is to pick a conceptual apparatus fit for the job, an assemblage of conceptions that will easily be inscribed in political narratives and capable of future development and adjustments.

One of the risks that we have to avoid when selecting the proper conceptual apparatus is laziness: instead of coming up with an appropriate framework designed for our conditions, we might be tempted to simply borrow inadequate conceptual frameworks developed by other polities despite their structural differences and despite the fact that they may already be obsolete for the polities that had developed them. This risk reflects one of the ironies of decolonisation: too often, former colonies gained their independence simply to return to their colonial habit of mimicking the ways of the colonialist. Former colonies often brought in state structures as they were being abandoned by the colonial powers for being obsolete in a globalisation era. One of the conceptual frameworks that we should avoid buying from Europe’s flea-market of political thoughts is “sovereignty”.

That concept was constructed around the need to justify the autonomy of the Princes, the Emperor of the Holy Roman Empire and the Pope from each other’s claims of supremacy. At the same time it was used to justify the monopolisation of powers within each realm. Thus, the concept was meant to protect each realm from any *de jure* and *de facto* intrusion by external authorities (what has been called “external”¹⁰⁰

⁹⁹ *Edwards*, *supra* note 82.

¹⁰⁰ Daniel Philpot, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001) at 18 [Daniel Philpot, *Revolutions in Sovereignty*].

or “negative sovereignty”¹⁰¹) and to ensure that the monopoly of *de jure* authority would be concentrated within one institution within that realm (what has been called “internal sovereignty”¹⁰² or “positive sovereignty”¹⁰³). This system was believed to ensure the stability of the world order; if each state remains within its jurisdiction, peace would ensue.

Thus, according to this conception of sovereignty, international law – or to be more accurate, “inter-state” law – is mainly oriented towards protecting each state’s conditions of existence through the principle of non-intervention. Hurting another Monarch’s subject meant hurting his possession and his claim to exclusive power over his possessions, thus, it meant hurting that other Monarch’s dignity. Treaties were originally conceived as the personal obligations of the Monarch and, as states were abstracting themselves from the person of the King, they kept the older conceptual framework. According to this dated view of the world order, treaties are inter-state agreements that correspond roughly to the liberal conception of contracts between individuals. But this theory was developed with a view of the world order that no longer corresponds to today’s reality. In effect, while certain aspects of that theory remain valid today – for example, states enjoy a high degree of autonomy to make laws within their realm and external military intervention is only exceptionally permitted – we no longer live in that world.

There has been a paradigm shift in international relations.¹⁰⁴ As UN Secretary General Kofi Annan has pointed out: “States are now widely understood to be instruments at the service of their peoples, and not vice versa.”¹⁰⁵ This shift has two very important consequences. First, to the

¹⁰¹ Paul W. Kahn, “The Question of Sovereignty” (2004) 40 *Stan. J. Int’l L.* 259, 260 [Paul W. Kahn, “The Question of Sovereignty”].

¹⁰² Daniel Philpot, *Revolutions in Sovereignty*, *supra* note 100 at 18.

¹⁰³ Paul W. Kahn, *supra* note 101 at 260.

¹⁰⁴ For different perspectives on these changes, see for example: Louis Henkin, “International Law: Politics, Values, Functions” (1990) 216 *Rec. des Cours* 13, 24-25; John H. Jackson, “The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results” (1997) 36 *Colum. J. Transnat’l L.* 157; John O. McGinnis, “The Decline of the Western Nation State and the Rise of the Regime of International Federalism” (1996) 18 *Cardozo L. Rev.* 903; Oscar Schachter, “The Decline of the Nation-State and its Implications for International Law” (1997) 36 *Colum. J. Transnat’l L.* 7; Christoph Schreuer, “The Waning of the Sovereign State: Toward a New Paradigm of International Law?” (1993) 4 *E.J.I.L.* 447 [C. Schreuer, “The Waning of the Sovereign State: Toward a New Paradigm of International Law?”].

¹⁰⁵ Kofi A. Annan, “Two Concepts of Sovereignty” *The Economist* 352 (18 September 1999) 49, at 49. See also Kofi Annan, *Annual Report of the UN Secretary-General to the 54th General Assembly session*, UN Press Release, SG/SM 7136, GA/9596 (20 September 1999). Léon Duguit predicted this transformation much earlier. See: Léon

extent that states are to be understood as service providers, it means that we can evaluate them in instrumental terms. And if states are our instruments, they can be shaped to optimise the interests of those to whom they belong. Second, because states are no longer merely the embodiment of an “existential community”¹⁰⁶ but rather serve certain functions, states can serve more than one existential community at the same time. In other words, the state seen as an instrument may serve more than one nation. It does not mean that a state can no longer be the embodiment of an existential community, it simply means that this may or may not be the primary way in which every member of that state relates to it.

With the rise of the welfare and regulatory state and with the increasing worldwide mobility and economic integration made possible by technological advances, our models for securing peace, order and good governance have changed.¹⁰⁷ State powers are divided both functionally (between the different branches of the government and within those branches according to the specialized expertise of different departments) and territorially. States are no longer the only actors in our world order; our world’s ontology now includes international organisations, non-governmental organisations, transnational corporations, individuals, etc.¹⁰⁸ As domestic law is no longer dominated by the criminal law model of prohibitions and sanctions but by distributive, enabling and coordinating legal rules, the ordinary life of international law is no longer primarily occupied with boundary protection but with transnational cooperation, harmonization and integration. Thus, while international law was mainly preoccupied by inter-state affairs, it is now mainly occupied with what was previously seen as “domestic” affairs:

Duguit, *Les transformations du droit public* (Paris: Librairie Armand Colin, 1913) at 32-72.

¹⁰⁶ I will describe later in this essay “existential communities” as “communities through which individual selfhood is constituted by a deep sense of ‘love’, loyalty and identity to the other members of the group. In other words, an existential community is what makes it possible for the self to transcend the individual.” See II.A.2.iv..

¹⁰⁷ One of the things that is often eclipsed in the story about the shift from the old world of Monarchs to our world is the transformation of what was merely a technique to guarantee one State against another State’s intrusion into an organising principle of the new world order: mutual pledges. While Monarchs often sent their children to be married to the sons and daughters of other regents for the purpose of creating new alliances, they served as “guarantee deposits” to ensure the peace. To the extent that the parents had affection for the child that they had sent to a foreign land, they were cautious in their conduct with the receiving family. On the other hand, to the extent that the receiving family cared about their son’s or daughter’s well-being with his or her husband or wife, they had an interest in not hurting their in-laws. In the post-industrial age, corporations, non-governmental organisations and the mobile citizenry have replaced the sons and daughters of monarchs.

¹⁰⁸ See section II.A.1.iv.

“private” law (family law, law of persons, property law, contracts, etc.), education, individual and collective rights, economic development, etc. We have moved from an opaque inter-state model to a multi-layered transnational governance model where different governing institutions coordinate their actions or compete with one another in their many roles.

Also, we increasingly recognize that individuals are members of a multitude of often overlapping existential communities. Because we recognize that nation-states are not the only political model available, we can now imagine multinational states where individuals are members of more than one political community. If we can already imagine that individuals may be citizens of more than one state – dual citizenship is accepted in Canada –, we certainly can imagine that individuals might have different forms of attachment to the different parts of the state: one individual might see herself primarily as Canadian while another might see himself primarily as *Québécois*, while they both feel that they belong to the two communities. The state apparatus ought to be able to accommodate these different senses of belonging. Thus, our challenge is to imagine the state without using the centralising idea of sovereignty. We ought to imagine a state that will be both the incarnation of different existential communities and will provide us with the necessary apparatuses of functional regimes.

I hope to demonstrate in this essay that once actual Canadian constitutional rules are freed from the artificial cast of the “sovereignty” frame in which a plethora of scholars have decided to put them and once we start taking seriously Canadian constitutional law sources, we will discover that the Canadian constitution is far more adapted to that new global reality than what many might have thought. In effect, the federalism principle entrenched in the Canadian constitution¹⁰⁹ is far more adapted to today’s reality than the “sovereignty” model that certain scholars are trying to impose on the Constitution. As William Paul Maclure Kennedy had already written in 1922: the “evolution of Canadian government has constituted a decisive challenge to the absolute Austinian doctrine of sovereignty.”¹¹⁰

I will demonstrate that it is often the views of those centralist scholars who cry that the modern world requires treaty powers to be held exclusively in the hands of the federal authorities that are not attuned with the reality of our current world order. We will see that their com-

¹⁰⁹ *Reference Re Secession of Québec*, *supra* note 76 at paras. 32, 47, 49, 55-60, 66, 76, 88, 90-92, 148, 149, 151.

¹¹⁰ William P. M. Kennedy, *The Constitution of Canada: An Introduction to Its Development and Law* (London U.K.: Oxford University Press, 1922) at vii. I am indebted to David Schneiderman, “Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century”, *supra* note 5, for this quote.

plaints often stem from the fact that our actual constitutional rules do not sufficiently accord with their obsolete “sovereignist” views. Thus, I will propose here a very orthodox reading of the Constitution, one that takes seriously the traditional sources of constitutional law and examines them with all the diligence they deserve. The picture that will emerge from this analysis is a truly federalist one where federal and provincial authorities have the means to fulfil their respective constitutional missions, including making binding international agreements to ensure the cooperation of foreign jurisdictions.

To advance my argument, I will proceed in the following way: Since most of the terms of the modern debate between the federal government and the provinces about treaty powers can be found in the famous 1930s *Labour Conventions* case,¹¹¹ it is worth reviewing at length that case. Therefore, chapter I will be dedicated to that review. This thorough review is quite important because the case has been commented upon by so many scholars¹¹² over the years that one might legitimately be afraid that the comments have taken a life of their own, killing the original and substituting themselves for the wise words of the Privy Council! Therefore, I will try to stay clear from impersonation charges by letting the Privy Council speak for itself and by limiting myself to paraphrasing it, or by making it clear when I am adding my own comments. Also, to get a better understanding of the debate, I will reconstruct the federal and

¹¹¹ *Labour Conventions* case, *supra* note 19.

¹¹² See for example: C.W. Jenks, “The Present Status of the Bennett Ratifications of International Labour Conventions”, *supra* note 41; W.I. Jennings, “Dominion Legislation and Treaties”, *supra* note 41; Vincent C. MacDonald, “The Canadian Constitution Seventy Years Later” (1937) 15 Can. Bar Rev. 401 [V.C. MacDonald, “The Canadian Constitution Seventy Years Later”]; Arthur B. Keith, “The Privy Council Decisions: A Comment from Great Britain” (1937) 15 Can. Bar Rev. 428 [A.B. Keith, “The Privy Council Decisions: A Comment from Great Britain”]; Frederick C. Cronkite, “The Social Legislation References” (1937) Can. Bar Rev. 495; William P.M. Kennedy, “The British North America Act: Past and Future” (1937) 15 Can. Bar Rev. 393; Frank R. Scott, “The Consequences of the Privy Council Decisions” (1937) 15 Can. Bar Rev. 485 [F.R. Scott, “The Consequences of the Privy Council Decisions”]; Frank R. Scott, “Centralization and Decentralization in Canadian Federalism” (1951) 29 Can. Bar Rev. 1095; Lord Wright of Durley, *Commentaire*, (1955) 33 Can. Bar Rev. 1123; Frank R. Scott, “Labour Conventions Case: Lord Wright’s Undisclosed Dissent” (1956) 35 Can. Bar Rev. 114; Gerald V. La Forest, “The Labour Conventions Case Revisited” (1974) 12 Can. Y.B. Int’l L. 137 [G.V. La Forest, “Labour Conventions Case Revisited”]; Jean-Charles Bonenfant, “L’étanchéité de l’A.A.N.B. est-elle menacée ?” (1977) C. de D. 383; Pierre Patenaude, “L’érosion graduelle de la règle d’étanchéité: une nouvelle menace à l’autonomie du Québec” (1977) 20 C. de D. 229; Armand L.C. de Mestral, “L’évolution des rapports entre le droit canadien et le droit international un demi-siècle après l’affaire des conventions internationales de travail” (1987) 25 Can. Y.B. Int’l L. 301 [A.L.C. de Mestral, “L’évolution des rapports entre le droit canadien et le droit international un demi-siècle après l’affaire des conventions internationales de travail”].

provincial arguments from the notes taken by the court reporter in a way that highlights their respective vision of the post-independence Canadian polity. This reconstruction will be useful in re-discovering the initial claims of the participants in the debate but, mostly, it will help in presenting different institutional options and their likely constitutional consequences. Thus, I will focus on technical details of the arguments to the extent that they tell us something about political visions and constitutional arrangements. Finally, I will contextualise the varying claims made by the actors by giving some background information on the constitutional cases upon which they rely.

Chapter II will examine the state of the current constitutional law of treaty-making powers. When we carefully examine all the arguments invoked in favour of recognizing plenary treaty-making powers to the federal government – be it the Letters Patent of 1947, the prerogatives of the Crown, constitutional conventions, constitutional usage or international Law –, none of these is able to withstand a strict constitutional scrutiny; if federal authorities possess treaty-making powers in relation to provincial subject-matters, it is only as the result of a form of implied consent by provinces. I will also argue that there are very strong policy arguments in our current context in favour of not recognizing a federal exclusive plenary treaty-making power to federal authorities.

I will then examine the case for provincial treaty-making powers. I will first offer an overview of the extensive practices that the different Canadian provinces (and territories) are engaged in at the international level. I will then examine the legality of provincial treaty-making powers in light of both Canadian constitutional law and at international law. When considering international law, I will not limit myself to examining arguments based on orthodox international law. Rather, taking cues from game theory and from constructivism, I will show why the weak centralised sanction mechanisms of international law create incentives to recognize federated states at the international level.

The third chapter will be concerned with treaty *implementation* and, more precisely, with examining the arguments often invoked in favour of reversing the *Labour Conventions* case. I will review the basis upon which arguments often invoked in favour of reversing the *Labour Conventions* case are built (i.e. the possibility of reviving s. 132 of the *Constitution Act, 1867* (3.a), the possibility of using the “Peace, Order and Good Government” clause¹¹³ (3.b.) and the possibility of invoking the allegedly “extra-territorial” character of treaty implementation (3.c.)), and I will demonstrate that all those arguments are based on fundamentally flawed assumptions about Canadian constitutional law.

¹¹³ See *Constitution Act, 1867*, *supra* note 39, s. 91.

Those who want to reverse the *Labour Conventions* case do not seem to realize that reversing that fundamental case as they wish to do would ring the death knell of federalism: Canada would become akin to a unitary state. None of the powers invoked by those who would want the *Labour Conventions* case reversed are *exclusive* federal powers. Finally, I will show that the current amending procedures actually advocates *against* judicially overruling the *Labour Conventions* case.