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DOMINION-PROVINCIAL CONFERENCE

Opinions on Constitutional Law

No. 3. Legislative Power to Perform Treaty Obligations.

By Vincent C. MacDonald, K. C.

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LEGISLATIVE POWER TO PERFORM

TREATY OBLIGATIONS

132. "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."

1. Recommendation and Reasons of Sirois Commission.

"The Commission did not consider that it lay within its terms of reference to deal with the desirability, or undesirability, of the Dominion having power to implement its treaty obligations (otherwise than under Section 132 of the B.N.A. Act) if implementation would require legislation on topics within the exclusive jurisdiction of the Provinces. But the Commission did consider that it could recommend that the Dominion should have power to implement conventions of the International Labour Organization." (Book II p. 274)

On the subject of treaty-implementation generally the Commission made the following observations:

"It was contended that a recent decision of the Judicial Committee of the Privy Council had the effect of limiting the power of the Dominion Parliament to implement treaties under section 132 of the British North America Act to those treaties negotiated by the King on the advice of his United Kingdom ministers, and that for

treaties made by the King on the advice of his Canadian ministers, or conventions made by the Canadian Government, on any matter within the legislative jurisdiction of the provinces the Dominion Parliament had no power of implementation. It was contended that this made it extremely difficult, if not impossible, for Canada to perform its international obligations. It was further urged that the normal method of implementing treaties in a federal state was by the central rather than the state or provincial authorities.

But, except for conventions of the International Labour Organization (which are intimately related to jurisdiction in labour legislation), the Commission felt that the problem of implementing treaties, however important in Dominion-provincial relations or in relation to the status of Canada as a member of the family of nations, fell outside its terms of reference." (Book II, p. 225)

On the subject of the <u>implementation of International Labour Conventions</u> the Commission said:

"In one very important respect the situation with regard to labour legislation has changed completely since Confederation. For the last twenty years Canada has been a member of the League of Nations and of the International Labour Organization. Labour conventions of an international character are adopted from time to time and member-states of the International Labour Organization are invited to ratify them. Canada among other nations has ratified a number of these conventions. To give effect to their provisions, which are designed to establish uniform labour standards throughout the world, requires legislation which it is not within the competence of the Parliament of Canada to enact, and which the provinces are under no legal obligation to enact ..... This situation is entirely unsatisfactory and <u>we recommend</u> that the Dominion and the provinces together should decide how International Labour Conventions should be implemented. It seems that <u>the best method would be for the provinces to give to the Parliament of Canada power to implement such international labour conventions as the Government of Canada has ratified, or may ratify</u> in the future." (Book II p. 48)

As to this recommendation the Commission notes that this might be carried out in the form of a specific constitutional amendment or under a general amendment providing for delegation of legislative powers by the Dominion and Provinces. (cf. my Opinion on the "Delegation of Legislative Powers by and to the Dominion Parliament")

The Commission felt that power to implement International Labour Conventions could safely be entrusted to the Dominion; for, in possible distinction from ordinary treaties, there was little danger of them being used as a device for invading provincial rights. Thus the Commission said:

> "These labour conventions are the work of representatives of many countries, and it is inconceivable that an international convention could be formulated as part of a colourable attempt by the Dominion to encroach upon provincial jurisdiction. We do not feel, therefore, that (if the Dominion is given full power to implement these international labour conventions) there is any legitimate cause for fear that this method will be used for the purpose of invading provincial rights. It is true that existing provincial jurisdiction may be curtailed to some extent, but only in cases in which a large number of sovereign states have agreed to accept uniform labour standards, which they consider should prevail throughout the whole world." (Book II, p.48)

And again:

> "Conventions of the International Labour Organization .... partake of the character of international legislation. Many of the parties to them are countries with civil codes not dissimilar to that of Quebec; others are countries with English common law. Some are Catholic; others Protestant. In these circumstances it seemed that the rights of particular provinces were adequately protected against any encroachment of the federal power. And if international normative legislation of this character is desirable it is through the Dominion Government that Canada must become a party to it." (Book II p. 274)

Parenthetically it may be observed that this reference to the lack of reason to fear the colourable use of the power to make international labour conventions as a device to usurp provincial jurisdiction is in opposition to the view of the Privy Council as to the possibility of the ordinary treaty making power being used for this purpose. For, in the Labour Conventions Case((1937) A.C. 326) the Privy Council speaking of (non-British Empire) treaties said:

> "For the purposes of sections 91 and 92, i.e. the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such..... It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement."

This brings up the question as to whether any constitutional amendment giving the Dominion power to implement such international engagements as her international status enables her to make requires to be hedged about with express restrictions to safeguard the Provinces from possible invasion of their field of jurisdiction. Relevant answers would seem to be (a) that no such safeguards exist as to the plenary power to implement British Empire treaties under Section 132; and (b) that under the doctrine of "Colourable legislation" the Courts do not hesitate to invalidate legislation, whatever its form, when its true object as an intended encroachment on Pro-

vincial jurisdiction is detected; and (c) that it is settled doctrine that the existence of a power of legislation is not to be denied merely because of its capacity for abuse.

It may be, however, desirable to remove ~~for~~ from any such possibility of encroachment by way of the treaty-implementing power such ~~as~~ basic rights as those relating to education, language and religion, etc.

2. The Legal Situation

Three recent decisions of the Privy Council (The Aeronautics Case (1932) A.C. 54; The Radio Case (1932) A.C.304 and the Labour Conventions Case (1937) A.C. 326) have dealt with the treaty-implementing power.

The first case held that the Dominion was competent to implement the obligations of Canada as part of the British Empire under a Convention relating to Aerial Navigation made in terms by "the British Empire". This power was held to arise under Section 132 and to be exclusive and to justify legislation on provincial matters. The subject matter of the legislation so validated fell largely within the normal jurisdiction of the Dominion and partly within that of the Provinces.

The second decision upheld the validity of Dominion legislation implementing a Convention expressed to be made as between "the governments of the parties thereto" and to which Canada was a signatory. ~~of the parties thereto.~~ The decision confirmed the

application of Section 132 to the implementation of the obligations of Canada "as part of the British Empire ..... arising under treaties between the Empire and foreign countries". In holding that Section 132 was not applicable it was regarded as significant that "the Convention here is not a treaty between the Empire as such and foreign countries for Great Britain does not sign as representing the Colonies and Dominions", whereas Section 132 only envisaged "treaties by Great Britain". Accordingly, since the particular type of treaty did not fall within Section 132 that Section was inapplicable, but the legislation was competent to the Dominion under the residuary Clause of Section 91.

However, as explained in the Labour Conventions Case ((1937) A.C. at 351) we must now take it that "the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in Section 92 or even within the enumerated classes of Section 91". It therefore, fell within Dominion power under the residuary clause of Section 91. Thus, in the result, this decision upheld convention-implementing legislation which did not encroach on provincial jurisdiction.

The third case, that of 1937, dealt with the Weekly Rest in Industrial Undertakings, The Minimum Wages, and The Limitation of Hours of Work Acts of 1935, which sought to

implement certain draft conventions adopted by the International Labour Conference of which Canada was a member. Section 132 was held inapplicable because "the obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries" the legislative power to perform which are distinct from "the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament".

The rule was laid down that as to obligations under treaties outside Section 132 (i.e. "imposed upon Canada as a part of the Empire by an Imperial Executive responsible to and controlled by the Imperial Parliament") the power to perform same rests with the Dominion or the Provinces accordingly as the subject matter falls within a Dominion or provincial class of subject.

> "For the purposes of Section 91 and 92, i.e. the distribution of legislative powers between the Dominion and the Provinces there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained .... The legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation is concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers; in other words, by co-operation between the Dominion and

> the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure."

Accordingly as the subject matter of the Conventions fell within Provincial jurisdiction the Dominion legislation was ultra vires.

3. Comment on Legal Situation

(1) In general the legal situation is that as to treaties falling within Section 132, i.e., as to treaties which are made in terms by "the British Empire" (as was the Aerial Navigation Convention) or as to which Canada is bound in law as "part of the British Empire" by the act of the Imperial Executive, including (semble) one made in the name of the King simpliciter, and ratified under the Great Seal, the Dominion possesses exclusive and plenary powers of implementation regardless of the subject matter.

(2) As regards all other classes of treaty the power of implementation depends upon the classes of subjects to which the treaty relates. The consequence is that treaty performing capacity as to a given treaty reside wholly in the Dominion (as in the case of the Radio Convention) or wholly in the Provinces (as in the Labour Conventions), or partly in each (in which case they must be dealt with "by co-operation between the Dominion and the Provinces"). In short as to all treaties in this category the existence of a treaty is unimportant for

the Dominion and/or the Provinces have precisely the power of legislation they would have had without the treaty.

(3) The significance of this distinction lies in three facts; (a) that because of Canada's presnnt status in Empire and international affairs it is unlikely that any future treaties will become binding on her simply "as part of the British Empire" or by act of the Imperial Executive alone, and accordingly the Dominion's plenary power under Section 132 will rarely be invoked to justify legislation in aid of future treaties; (b) decisions whereby legislative power turns on the form of the document or its method of description of parties or the process of negotiation and ratification, are unrealistic in view of the fact that the essential jurisdic consideration is that a document is binding on Canada simply because made by the King in Council or derivatively by the Governmr General in Council; (c) decisions making implementing power depend upon subject matter makes it practically impossible to make many kinds of treaties requiring legislative implementation because either of doubt as to jurisdiction or because jurisdiction as to many types of treaty presently desirable is within Provincial jurisdiction in front of this subject matter as presently enlarged at the expense of the Dominion.

(4) The decisions are so confused in point of reasoning as to leave the Privy Council free to explain them away in any desired direction in some such manner as it re-based the Radio Case in the later Labour Conventions Case. Accordingly, even the present situation is capable of deterioration. Thus, for example, there is no clear ruling that the Dominion executive

may make treaties relating to provincial matters as this point was expressly left open in the Labour Conventions Case. There may be doubt as to whether "conventions" or "agreements between governments" are alway equivalent to "treaties" (cf. V. C. MacDonald in (1933) 11 Can. Bar Rev. at 674) and as to the essential nature of "labour conventions".

(5) Moreover, as indicated in the Labour Conventions Case and in the other "New Deal" cases of 1937 judicial concern for "provincial autonomy" seems likely to increase and result in further contraction of the normal heads of power of the Dominion with consequent contraction of its power to perform ~~all~~ treaties of the new type. Indeed it is this judicial concern which is largely responsible for the present consideration of the need of constitutional amendment.

4. Desiderata as to Amendment of the Treaty-performing Power

A. The amendment should deal with power to implement all types of treaty -- it should deal generically with power to perform Canada's international engagements regardless of the form of the document or of the process whereby it became binding, and should refer to "conventions" and to "inter-governmental agreements".

B. It should blot out the distinction between "Empire" treaties performable under Section 132 and other types performable under other heads of jurisdiction by referring simply to treaties

as made by His Majesty as the contracting party in law.

C. It should make special mention of International Labour Conventions (some of which may by constitutional amendment or by delegation of Provincial powers come under Dominion jurisdiction). Such special mention is necessary to obviate any decisions based on differences between such conventions and other international agreements which might be held to inhere in the special way in which they become binding.

D. The Amendment should clearly vest in the Dominion power to legislate in aid of the treaty whatever the subject matter of the treaty may be.

E. It should seek to safeguard matters relating to language, race, education, and religion, etc. by confining the over-riding power of implementation to matters covered by Section 92 thereby excluding the former matters which are covered by other sections.

F. It should provide some safeguard against hasty action or action intended to invade the provincial sphere unnecessarily or excessively and, to a certain extent, matters relating to language, race and religion, by requiring some approval or authority of the Dominion Parliament (wherein all interests are represented) as a prerequisite to implementing legislation.

Note: In the draft which follows no express reservation is made as to the inability of treaty implementing legislation to curtail such matters as rights relating to race, language,

religion, education, Quebec Civil law, etc., as it is assumed that the general amending procedure to be enacted will exclude such matters. If desired a similar reservation qua the treaty implementing power could be added to the present draft.

G. In a section primarily concerned with legislative power there seems no reason for referring to executive power inasmuch as "it cannot be doubted that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone" (Per Lord Atkins in the Labour Conventions Case). Nor can it be doubted that once created they bind the State though the legislative organ remains free -- notwithstanding its expressed approval of the creation of the obligation -- to refuse to pass legislation necessary to its performance "and so leave the State in default" -- an embarrassing situation most frequently occurring in a federal state. (cf. Lord Atkins in above case) Moreover there is the rule that correlative executive power is involved in a grant of legislative power. Accordingly, no reference to executive power is needed or appropriate in the draft section.

5. Draft Amending Section

The following is substituted for Section 132 of the B.N.A. Act, 1867:

132 (1) The Parliament of Canada may exclusively make

laws for performing the obligations of Canada or of any Province thereof towards foreign countries imposed by any treaty, convention or agreement made by His Majesty with a foreign state, regardless of the form or method whereby such obligations were contracted; and for this purpose such exclusive legislative authority shall extend to and include all matters coming within the classes of subjects assigned to the Legislature of a Province by Section 92 of this Act; provided that the making of the treaty, convention, or agreement has been approved or authorized by resolution of the Parliament of Canada.

(2) The foregoing sub-section shall apply mutatis mutandis to a draft labour convention adopted by an International Labour Conference of the International Labour Organization and which the Government of Canada, pursuant to Article 19 of the Constitution of the Organization and with the approval of the Parliament of Canada, has ratified and shall so apply whether or not the government or Legislature of a Province has approved the same.

V. C. MacDonald

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