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Pamela Anderson

AUTEUR DE LA THÈSE / AUTHOR OF THESIS

LL.M.

GRADE / DEGREE

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FACULTÉ, ÉCOLE, DÉPARTEMENT / FACULTY, SCHOOL, DEPARTMENT

Constitutions Over Convenience: Reaffirming the *Labour Conventios* Rule on the Application of the
Division of Powers to International Treaty Implementation

TITRE DE LA THÈSE / TITLE OF THESIS

C. Forcese

DIRECTEUR (DIRECTRICE) DE LA THÈSE / THESIS SUPERVISOR

CO-DIRECTEUR (CO-DIRECTRICE) DE LA THÈSE / THESIS CO-SUPERVISOR

EXAMINATEURS (EXAMINATRICES) DE LA THÈSE / THESIS EXAMINERS

J. Currie

F. Larocque

B. Pelletier

Gary W. Slater

Le Doyen de la Faculté des études supérieures et postdoctorales / Dean of the Faculty of Graduate and Postdoctoral Studies

**Constitution Over Convenience: Reaffirming the *Labour Conventions* Rule
on the Application of the Division of Powers to International
Treaty Implementation**

Pamela Louise Anderson

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in partial fulfillment of the requirements for the Master of Laws (LL.M.) degree

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Abstract

This thesis calls for the reaffirmation of the *Labour Conventions* rule, which holds that the authority to legislate in implementation of international treaties follows the division of powers as laid out in sections 91 and 92 of the *Constitution Act, 1867*. It argues that the criticism that has plagued the rule since its inception has neglected constitutional considerations in favour of an assertion that a federal treaty-implementation authority is necessary for reasons of international expedience. It contends that this assertion is irrelevant in the absence of evidence that such international considerations are themselves constitutionally mandated, as constitutionalism is not trumped by convenience. To this end, it maintains that neither established principles of constitutional interpretation nor the supposed intentions of the Fathers of Confederation provide grounds for ignoring one of the fundamental tenets of the division of powers, that one level of government cannot unilaterally usurp the other's authority.

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Introduction

It no doubt strikes some as odd to devote so much space to “reaffirming” a rule that is already recognized as valid law, even more so when one realizes that the *status quo* being defended has been the law for over seventy years; with such longevity, how controversial could such a rule be? In the case of the *Labour Conventions* rule, formulated by the Judicial Committee of the Privy Council in 1937,¹ the answer is “very”. The rule states that the authority to pass legislation implementing international treaty obligations is subject to the ordinary division of powers; that is, if a treaty concerns a matter over which the constitution grants the provinces legislative jurisdiction, only the provinces may implement its terms. Thirty odd years after its release, the decision had already earned a reputation as “perhaps the most bitterly-assailed and certainly the most often ridiculed judicial opinion in Canadian constitutional history”,² and the criticism continues to this day. Indeed, as Gerard La Forest once wrote, prior to his appointment to the Supreme Court of Canada, “[s]o much has been written about the *Labour Conventions* case that one hesitates to add to the flow of ink”.³

Yet despite the quantity of argumentation that already surrounds the decision, the analysis remains incomplete, reflecting a very limited perspective on the division of powers that this thesis aims to rectify. In so doing, it will demonstrate that the *Labour Conventions* rule is

¹*Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326, [1937] 1 D.L.R. 673 (P.C.) [*Labour Conventions* cited to D.L.R.].

²Edward McWhinney, “Canadian Federalism, and the Foreign Affairs and Treaty Power: The Impact of Quebec’s ‘Quiet Revolution’” (1969) 7 Can. Y.B. Int’l L. 3 at 4.

³Gerard V. La Forest, “The Labour Conventions Case Revisited” (1974) 12 Can. Y.B. Int’l L. 137 at 137.

one worthy of much more respect than it has received. While it has not been overturned, such doubt has been cast over its status as “good” law that it is questionable whether many judges continue to feel bound by its spirit, and this has led to an undermining of important constitutional principles. This thesis’s contribution will be to address the *Labour Conventions* question from a constitutionally principled perspective. Previous analyses have not only arrived at the wrong conclusion, they have asked the wrong question, placing too much emphasis on convenience over constitutionalism.

Part I of this thesis will begin by describing the *Labour Conventions* decision itself, and highlighting the source of apparent conflict identified by its critics. It will then identify the main schools of criticism directed at the decision, and illustrate how both subsequent jurisprudence and commentary have fed off of one another to create a self-sustaining consensus that the *Labour Conventions* rule ought to be revisited. It will conclude by reviewing one of the effects of that consensus, namely the unapologetic attempt to manipulate other constitutional provisions to avoid the strict application of *Labour Conventions*, and the lack of safeguards that exist to prevent this erosion of the rule.

Part II will examine the appropriate framework through which to assess the *Labour Conventions* rule anew, discussing the constitution’s status as supreme authority with which all other laws and government actions must comply.

Part III will apply the lessons of Part II, rejecting those who criticize *Labour Conventions* from the perspective of international expedience as basing their critiques on a misapplication

of constitutional principles. To this end, it will begin by examining the meaning and limits of the “living tree” doctrine that is so frequently cited in critique of *Labour Conventions* in opposition to that decision’s “watertight compartments” metaphor, and will argue that the two metaphors are in fact not diametrically opposed. It will go on to differentiate the purposive approach to interpretation of the division of powers, as opposed to the *Charter of Rights and Freedoms*, and argue that “purposive” has been wrongly understood by *Labour Conventions* critics as being equivalent to “pragmatic” or “convenient”, and has been used as an excuse to ignore all other interpretive factors. It will follow this by reviewing the history and objectives of Canada’s division of powers, rejecting the assertion that a reversal of *Labour Conventions* is required to fulfill the intent of the Fathers of Confederation. It will conclude with a discussion of various perspectives from which to evaluate federal systems, highlighting the importance of making such decisions on a principled basis, taking into account a myriad of factors that respect the complexity of the constitution.

Part IV will explore the many compromises to the *Labour Conventions* rule that have been proposed to supposedly achieve international efficiency while continuing to respect the provinces. It will reject them all as paying only lip service to provincial rights, instead assigning to the federal government an overarching supremacy that the constitution does not support.

It is important to note what this thesis does *not* aim to do. It does not engage in a hypothetical whereby the Canadian constitution is being rewritten from scratch, assigning powers to the level of government that can most efficiently achieve them. There *might* be

policy reasons supporting federal jurisdiction over treaty implementation (although as will be explored in Part III, the issue is nowhere near as clear cut as those arguing for a such a power generally assume); what this thesis argues, however, is that the constitution, as presently written and as interpreted using accepted principles of constitutional interpretation, does not recognize those supposed policy reasons as legitimate, and thus does not permit such a power. In other words, it takes issue not so much with the *concept* of a federal treaty implementation power, but with the present and past *justifications* for such a power, which ignore, manipulate, or oversimplify constitutional principles to reach a desired end. The criticisms discussed below are rejected not because they disagree with *Labour Conventions*, or because they are a departure from the *status quo*. Rather, they are rejected because in their concern about Canada's role on the international stage and its obligations to other nations, they fail to present a coherent *constitutional* argument for assigning to the *constitution* the meaning they do. Were the constitution to be amended, and include a federal treaty implementation power, the arguments against such a power would be entirely different from those found here, and that debate is left to another day. This thesis exists in the present, calling out those who fail to subject their criticisms of the *Labour Conventions* rule to the probing constitutional analysis required of any proposed alteration to the division of powers.

Part I: Present state of the law and the need for clarity

A) Conflict between the authority over treaty making and treaty implementation

i) Background on the *Labour Conventions* decision's finding of no treaty implementation power under the constitution

In the *Labour Conventions* decision, the Judicial Committee of the Privy Council, led by Lord Atkin, held that federal legislation purporting to implement a series of international obligations on labour standards entered into by the federal executive was *ultra vires*, as the legislation's subject matter fell within the provincial jurisdiction over property and civil rights in the province under section 92(13) of the *Constitution Act, 1867*.⁴ Lord Atkin held that section 132 of the constitution, which 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"⁵ was inapplicable, as the obligations Canada was purporting to meet arose not from treaties of the British Empire, but those entered into by Canada itself.⁶

Turning to other possible sources of a federal implementation power, Lord Atkin noted that the residual clause in section 91 further authorized Parliament "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". The regulation of labour standards *did* come within those powers assigned exclusively to the provinces by virtue of section 92(13); as such, the peace, order, and good government (p.o.g.g.) provision could not be applied to create a broad treaty-implementation power that

⁴*Labour Conventions*, *supra* note 1 at 681.

⁵*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 132 reprinted in R.S.C. 1985, App. II, No. 5.

⁶*Labour Conventions*, *supra* note 1 at 680.

would override provincial authority.⁷ To the argument that p.o.g.g. nonetheless applied to matters that had “ceased to be merely local or provincial” and had rather “become matters of national concern”, as per Lord Watson in the *Local Prohibition Reference*,⁸ Lord Atkin emphasized that such an eventuality was meant to arise only in exceptional circumstances, which did not exist here.⁹ The Privy Council explained its conclusion as follows:

For the purposes of ss. 91 and 92, i.e. the distribution of legislative powers between the Dominion and 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. . . . It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by provincial Parliaments need only agree with a foreign country to enact such legislation: and its Parliament would be forthwith clothed with authority to affect provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of provincial constitutional autonomy.¹⁰

No doubt cognizant of the fears that some might have regarding the decision’s impact on Canada’s ability to participate in international affairs, Lord Atkin added:

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and provincial together, she is fully equipped. But the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure.¹¹

⁷*Ibid.* at 681.

⁸*Ontario (A.G.) v. Canada (A.G.)*, [1896] A.C. 348 (P.C.).

⁹*Labour Conventions*, *supra* note 1 at 683.

¹⁰*Ibid.* at 681-82.

¹¹*Ibid.* at 683-84.

It must be emphasized that the purpose of this thesis is not to defend the Privy Council's decision *per se*, that is, to insist that it was arrived at for all the right reasons and with flawless logic. Rather, it is concerned simply with the outcome of the case, and thus defends the *Labour Conventions* "rule", without necessarily defending everything Lord Atkin wrote in his decision. For example, to reach his conclusion, Lord Atkin had to distinguish the *Radio Reference*, in which the Privy Council treated legislation in implementation of treaties as a distinct subject matter, not found explicitly in either section 91 or 92, and thus falling to the federal government.¹² Lord Atkin attempted to deal with this discrepancy by claiming that while the *Radio* decision "appears to present more difficulty . . . when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters [broadcasting] which did not fall within the enumerated classes of subjects in s. 92 or even within the enumerated classes in s. 91".¹³ While it is true that Viscount Dunedin in the *Radio Reference* did *also* find that radio communication fell to the federal government pursuant to section 92(10), that was simply an additional line of reasoning by which to reach the same result.¹⁴ His discussion of the significance of treaties leaves no doubt: "The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to

¹²*Quebec (A.G.) v. Canada (A.G.)*, [1932] A.C. 304, [1932] 2 D.L.R. 81 at 83-84 (P.C.) [*Radio Reference* cited to D.L.R.].

¹³*Labour Conventions*, *supra* note 1 at 681.

¹⁴*Radio Reference*, *supra* note 12 at 86. On this point, see e.g. W.R. Lederman, "Legislative Power to Implement Treaty Obligations in Canada" in *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 350 at 354 [Lederman, "Legislative Power"].

prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.”¹⁵ The fact that Lord Atkin had to ignore this part of the judgment makes his attempt to distinguish the *Radio Reference* undeniably strained; had he felt obliged to follow it as precedent, he *should* have decided *Labour Conventions* differently. That said, it must be recalled that the Privy Council was not bound by its own prior decisions.¹⁶ Moreover, Lord Atkin’s failure to follow precedent has no bearing on the argument that the Privy Council was correct in *Labour Conventions* to reject a federal treaty-implementation power, and thus incorrect in the *Radio Reference* to accept it. What this thesis emphasizes is that whatever its flaws, the *Labour Conventions* rule is a proper reflection of Canadian constitutional principles, and ought to be reaffirmed, free from the narrow or constitutionally irrelevant criticisms that have dogged it for seventy years.

ii) Explanation of the treaty making authority as resting with the federal executive

Were the opposition to *Labour Conventions* rooted only in an isolated allocation of power to one level of government over another, it is unlikely its criticism would have been so enduring. Rather, to comprehend the basis for the *Labour Conventions* controversy, one must appreciate the dichotomy that the decision created between treaty making and treaty implementation. International law does not determine whether constituent parts of federal

¹⁵*Radio Reference, ibid.* at 84.

¹⁶G.P. Browne, *The Judicial Committee and the British North America Act: An Analysis of the Interpretative Scheme for the Distribution of Legislative Powers* (Toronto: University of Toronto Press, 1967) at 14.

states are competent to enter into treaties; that is left to individual states' constitutions.¹⁷ An earlier draft of the *Vienna Convention on the Law of Treaties* explicitly stated that "States which are members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down". That clause was removed from the final draft amid controversy about states being called upon to interpret each other's constitutions,¹⁸ but it is apparent that the possibility of internal subdivisions having some degree of international status was not considered out of the question. This has been borne out by the fact that some federal states do provide their constituent parts with a limited capacity to enter treaties, and these are recognized internationally.¹⁹

Canada's constitution, however, is silent on treaty making, as in 1867, the British Crown held full power at common law over foreign affairs for the whole empire, so it was not a matter that needed to be assigned to either level of government. Despite this silence, the widely accepted interpretation of Canadian law is that the authority to enter into international treaties is part of the royal prerogative, which devolved to the federal executive when Canada gained its autonomy, an arrangement that was confirmed in 1947 when the British Crown delegated all of its prerogative powers in respect of Canada through Letters Patent to

¹⁷Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supplemented, looseleaf (Scarborough, ON: Carswell, 2005), vol. 1 at §11.6; Ivan Bernier, *International Legal Aspects of Federalism* (London: Longman, 1973) at 82.

¹⁸Bernier, *ibid.* at 15.

¹⁹AnneMarie Jacomy-Millette, Françoise Coulombe & James Lee, *Canadian Provinces and Foreign Relations*, Background Paper BP-97E (Ottawa: Library of Parliament Research Branch, 1986, rev. 1990) at 11.

the Governor General, who acts on the advice of the federal government.²⁰ As such, the power to enter into treaties rests exclusively with the federal executive, not the provinces. The contrary argument, that the provinces have the right to enter into treaties dealing with areas within their legislative jurisdiction, has not been accepted by the federal government, although it has allowed for greater provincial representation in international dealings, and permitted provinces to enter into less formal agreements with foreign states.²¹ This is not to suggest that the matter is closed; some commentators continue to argue for provincial treaty making powers, and it should be noted that their argument is frequently premised at least partially on the notion that executive and legislative powers should match; in other words, they cite the *status quo* of *Labour Conventions* as justification for extending provincial power beyond implementation to also cover treaty formation.²² This thesis, however, takes as its starting point the present reality that treaty making falls within the exclusive purview of the federal executive. It takes no position on the merits of the provincial treaty making argument except insofar as it rejects the notion that the powers of treaty making and treaty implementation may not be divided. On the contrary, it argues that the *Labour Conventions* rule is entirely consistent and compatible with a purely federal treaty making power, and the

²⁰Hogg, *supra* note 17 at §11.2; Joanna Harrington, “Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament” (2005) 50 McGill L.J. 465 at 474-75; Paul Martin, Secretary of State for External Affairs, *Federalism and International Relations* (Ottawa: Queen’s Printer, 1968) at 15.

²¹Hogg, *ibid.* at §11.6.

²²*Ibid.*; Gerald L. Morris, “The Treaty-Making Power: A Canadian Dilemma” (1967) 45 Can. Bar Rev. 478 at 483, 487; Mathieu Roy, *Treaty-Making Powers of Canadian Provinces: Revisiting the 1960s Debate in Light of Subsidiarity and Federal Loyalty* (LL.M. Thesis, University of Toronto, 2005) (Ann Arbor, MI: University Microfilms International, 2005); J.-Y. Morin, “International Law – Treaty-Making Power – Constitutional Law – Position of the Government of Quebec” (1967) 45 Can. Bar. Rev. 160.

existence of such a power thus has no bearing on the debate over implementation jurisdiction.

B) Criticism of *Labour Conventions* decision

It is best to first dispose of the most straightforward critique of *Labour Conventions*, that section 132 ought to apply by extension to treaties entered into by Canada on its own behalf.

Michael Milani argues that even if section 132 is not technically applicable, it is still evidence of an intention to treat treaty-making as a separate power:

Lord Atkin considered that the treaty power was not a distinct subject matter capable of being assigned to one or other level of government. This belief ignores that this is exactly the way the British government regarded the treaty power. The Empire treaty-implementing power was vested in Parliament alone. Surely there is nothing in an “Empire” treaty which makes it any more amenable to being treated as subject matter.²³

Yet there *is* something distinct about empire treaties: the fact that they implicate the empire, and thus entail British oversight in a way that “Canadian” treaties do not. Indeed, if one examines section 132’s legislative context, one notes that the provision is found in “Part IX: Miscellaneous Provisions”, not “Part VI: Distribution of Legislative Powers”. This suggests that section 132 was intended not to affect the division of powers as between the federal and provincial governments, but simply to meet the needs of the Imperial Parliament in ensuring the empire’s obligations were met.²⁴ That is, the provision allowed the empire to deal with only one level of government that would be accountable to it for all treaties. Once the

²³Michael Milani, “The Canadian Treaty Power: Decidedly Anachronistic; Potentially Antagonistic” (1980) 44 Sask. L. Rev. 195 at 199.

²⁴See Wallace W. Struthers, “‘Treaty Implementation . . . Australian Rules’: a Rejoinder” (1994) 26 Ottawa L. Rev. 305 at 310.

British empire no longer entered into treaties on Canada's behalf, its concern over treaty implementation disappeared, and the Privy Council was thus correct in concluding that the constitution contained no explicit "treaty legislation" power.²⁵

This interpretation gains force when one contrasts section 132 with other provisions outside of sections 91 and 92 that have been held to affect the division of powers. The prime example is section 101 of the *Constitution Act, 1867*, which states that, "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada." In *Ontario (A.G.) v. Canada (A.G.)*, the Privy Council determined that amendments to the *Supreme Court Act* making the Supreme Court the final court of appeal in Canada, and prohibiting appeals from any court, including a provincial court, to the Privy Council, were *intra vires* the federal government, based on section 101.²⁶ The Privy Council stressed that:

s. 101 confers a legislative power on the Dominion Parliament which by its terms overrides any power conferred by s. 92 on the provinces or preserved by s. 129. 'Notwithstanding anything in this Act' are words in s. 101 which cannot be ignored. They vest in the Dominion a plenary authority to legislate in regard to appellate jurisdiction, which is qualified only by that which lies outside the Act, namely, the sovereign power of the Imperial Parliament.²⁷

²⁵The argument that the constitution was intended to grant the federal government exhaustive power over foreign affairs is discussed in Part III, but is rejected as mischaracterizing treaty implementation as a power "incident to sovereignty".

²⁶ *Ontario (A.G.) v. Canada (A.G.)*, [1947] A.C. 127, [1947] 1 D.L.R. 801 (P.C.) [cited to D.L.R.].

²⁷ *Ibid.* at 813-14.

In other words, once the external constitutional limits imposed by the *Colonial Laws Validity Act, 1865* ceased to apply to Canadian statutes following the passage of the Statute of Westminster, the federal government was free to override the imperial statute that allowed provinces to appeal to the Privy Council. This was a “natural attribute of sovereign power . . . [that] stands unqualified and absolute”,²⁸ as the Privy Council held that it was “a prime element in the self-government of the Dominion, that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens”.²⁹

Why then should the fulfilment of treaty obligations not be treated in the same way, as an attribute of sovereign power? For one thing, the “notwithstanding anything in this Act” caveat that the Privy Council highlighted in section 101 has no counterpart in section 132. While section 101 granted a broad right to the federal government that was temporarily inoperable due to overarching empire legislation, section 132 is in a sense the opposite, granting a narrow right to the federal government to facilitate the execution of imperial responsibilities. The lessening of imperial involvement in Canadian affairs restored section 101 to its full application, but rendered section 132 unnecessary and thus, by its own terms, inapplicable. There is thus ample reason not to extend section 132 to provide the federal legislature with the power to implement all non-empire treaties, regardless of subject matter. Had the object of the section been to give the federal government exhaustive jurisdiction over any matter related to foreign affairs, rather than simply facilitate empire business, it would have been included among the other powers listed in section 91 or at least contained

²⁸*Ibid.* at 814.

²⁹*Ibid.* at 815.

some explicit reference to its intended effect on the division of powers. It does neither, meaning that Lord Atkin was correct to dismiss section 132 as determinative of the treaty-implementation issue.³⁰

In any event, the bulk of the criticism tabled against *Labour Conventions* has not been narrowly premised on a given interpretation of section 132. The remainder of this thesis is thus aimed at those who acknowledge that section 132 does not provide justification for a modern treaty implementation power, but rather claim to find this authority elsewhere. This latter form of criticism began almost immediately on *Labour Conventions*' release, with commentators seemingly jockeying for position to see who could paint a more dire picture of Canada's future in light of the Privy Council's finding. A common thread among these early critics was the notion that by preventing the federal legislature from implementing all of the treaties its executive entered into, Canada would be impossibly frustrated on the international stage. The critics who best exemplified that view were Norman MacKenzie and F.R. Scott, as MacKenzie lamented that "[t]he result of their Lordships' decision seems to be: that for international purposes Canada is no longer a nation, not even a league of nations, but a strange agglomeration in which the parties with power (the Provinces) have no status (internationally), and the party with status (the Dominion) has no power".³¹ In a similar vein, F.R. Scott predicted shortly after *Labour Conventions*' release that "[t]he decisions of the Judicial Committee on Mr. Bennett's "new deal" statutes will have grave

³⁰ See further discussion in Part III regarding the intention of the Fathers of Confederation.

³¹ Norman MacKenzie, "Canada: The Treaty-Making Power" (1937) 18 Brit. Y.B. Int'l L. 172 at 175.

and far-reaching consequences. It is probably not too much to say that they have created for Canadians a constitutional situation scarcely less critical than that which led to Confederation itself".³² He further alleged that they meant "Canada ceases to be a single nation in the conduct of her international affairs", and although it should be noted Scott was concerned not only with the implementation of treaties, but the prospect that the provinces also had authority to make them, he predicted that even if the Dominion retained exclusive authority to enter into treaties, with the provinces implementing those falling under section 92, "the conduct of Canada's foreign relations will henceforth be impossibly handicapped".³³ Time did not succeed in tempering Scott's view of the *Labour Conventions* rule, as he reiterated in 1956 that "[i]f world peace is to be maintained, nations must be able to carry out world decisions, and every constitution is an international as well as a national document".³⁴ He added that "[s]o long as Canada clung to the Imperial apron strings, her Parliament was all powerful in legislating on Empire treaties, and no doctrine of 'watertight compartments' existed; once she became a nation in her own right, impotence descended".³⁵

MacKenzie also held little trust in the provinces, referring to the Privy Council's assurance that Canada was still fully equipped, via the federal and provincial legislatures working together, to meet all of its international obligations as "cold comfort to a Canadian living in

³²F.R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485 at 485 [Scott, "Consequences"].

³³*Ibid.* at 485-87.

³⁴F.R. Scott, "Labour Conventions Case: Lord Wright's Undisclosed Dissent?" (1956) 34 Can. Bar Rev. 114 at 115 [Scott, "Undisclosed Dissent"].

³⁵*Ibid.*

Canada, who knows that the problem of getting agreement among all the Provinces of Canada is difficult if not impossible, and who knows, too, that such a handicap makes it practically impossible for Canada to enter into any treaty”.³⁶ Implicit in this criticism is hostility for the fact that the decision makers were British, not Canadian, and could thus not possibly understand the Canadian reality. This too was a refrain shared by Scott, who alleged that “[n]one but foreign judges ignorant of the Canadian environment and none too well versed in Canadian constitutional law could have caused this constitutional revolution”.³⁷ Years later, this criticism still apparently carries weight, with Garth Stevenson echoing the concern about the Privy Council’s position as “outsiders”, stating that “for almost a century the most influential concepts of Canadian federalism were mainly defined by men who had no practical knowledge of Canada or of federalism, and who were not even required to live in that country”.³⁸

That much of the criticism directed at the *Labour Conventions* decision rested on a profound mistrust of the provinces is best illustrated by a brief entitled *The Treaty Making Power in Canada*, presented in January 1938 by the League of Nations Society in Canada to the Royal Commission on Dominion-Provincial Relations. Despite its title, the brief was concerned more with the problem of treaty implementation arising from *Labour Conventions* than with treaty making. The authors disagreed with the meaning the Privy Council ascribed to “empire treaty” pursuant to section 132 of the *British North America Act*, but the brief is

³⁶MacKenzie, *supra* note 31 at 174.

³⁷Scott, “Consequences”, *supra* note 32 at 489.

³⁸Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, 4th ed. (Montreal & Kingston: McGill-Queen’s University Press, 2004) at 47.

most instructive as epitomizing the hyperbolic mistrust of the provinces that lies at the root of seventy years of *Labour Conventions* criticism. After reminding the Commission of Canada's obligations as a contracting party to the League of Nations Covenant and the Constitution of the International Labour Organization to "the promotion of international cooperation, the achievement of international peace and security, the maintenance of justice, a scrupulous respect for all treaty obligations, and the achievement of social justice",³⁹ the authors went on to complain that:

The Dominion Executive has no voice in or control over the legislatures which alone have this power [to legislate to implement treaties affecting section 92 matters]. This means that whereas the Dominion Government is bound internationally, the Provincial Legislatures are not bound and may refuse to permit these obligations to be carried out. Even if a Provincial Legislature passes legislation to give effect to international obligations, it may repeal such legislation at any time and thus place the Dominion in default internationally. Or several of the Provinces may implement the obligation while the others refuse, – all of which makes it difficult if not impossible for the Dominion Government to enter into treaties with other countries.⁴⁰

The brief then asserted that "no arrangements exist by which the Provinces and the Dominion can co-operate to satisfactorily enter into and carry out treaties and conventions".⁴¹ In other words, the authors invited the Commission to perceive the provinces as pesky hindrances who could only be expected to get in the way of the federal government's attempts to do good, and could not possibly be convinced that implementation of a given treaty was a good idea. The suggestions the authors made to deal with the problem reveal their anxiety, as in the alternative to advocating a constitutional amendment

³⁹League of Nations Society of Canada, *The Treaty Making Power in Canada*, Brief Presented to the Royal Commission on Dominion-Provincial Relations (1938) at 2.

⁴⁰*Ibid.* at 12.

⁴¹*Ibid.* at 14.

to “clarify” the meaning of section 132 to fit their interpretation, or at minimum a federal-provincial agreement allowing the federal government to enact implementing legislation, they suggested the admittedly “far-fetched possibility” of:

arrang[ing] with the government of the United Kingdom to undo the work of the Imperial Conferences of 1923-26 and 1930 in respect of treaties. If this were done the Dominion would then ask His Majesty’s Ministers in London to advise His Majesty to make a treaty on behalf of Canada, – and seemingly all would be well.

The Dominion Parliament could then legislate in regard to the treaty, to its heart’s content regardless of whether the subject matter of the treaty was in relation to or even “affected” section 92 of the B.N.A. Act and its various sub-sections.⁴²

In other words, they would have preferred to relinquish back to the United Kingdom Canada’s recently-obtained autonomy over treaty-making, rather than trust the provinces to share implementation duties.⁴³ Such was the perception of federal-provincial relations that has underpinned the consensus that *Labour Conventions* is unworkable to this day.

To illustrate, even after acknowledging that the problems of Canada’s international agreements being hindered by the need to cooperate with the provinces “have rarely been borne out in practice”,⁴⁴ Michael Milani nonetheless concludes that “[t]he *possibility* of Canada either being put in breach of international law, or being dissuaded from external

⁴²*Ibid.* at 46-48.

⁴³In its final report, the Commission determined that with the exception of International Labour Organization conventions, which it did recommend the Dominion be given authority to implement, treaty implementation did not fall within its terms of reference, and it was therefore “not here mak[ing] any recommendations with respect to treaties in general” (Royal Commission on Dominion-Provincial Relations, *Book II – Recommendations* (Ottawa: King’s Printer, 1940) at 48-49, 225).

⁴⁴Milani, *supra* note 23 at 209.

initiatives, is too great to justify a divided treaty power”.⁴⁵ He warns readers not to be lulled into complacency by the success thus far of cooperative federalism, as there is no assurance it will last.⁴⁶ In a similar vein, while Torsten H. Strom and Peter Finkle claim to be basing their analysis at least in part on a purposive constitutional analysis, a suggestion that will be critiqued in Part III, this does not negate the emphasis they put on the practical effects they perceive *Labour Conventions* as having on Canada’s international relations, referring to the need to consult the provinces as a “handicap” and “constitutionally imposed burden”.⁴⁷ They note that other commentators “have examined treaty implementation from a perspective that has focused repeatedly on Canadian domestic case law”, whereas their intent is to “broaden the exploration of the subject” and “add a note of realism . . . by giving some attention to the political consequences which flow from judicial interpretation . . .”⁴⁸ This quest for realism is somewhat ironic, given their subsequent acknowledgement that they cannot know the precise impact of the *Labour Conventions* “burden” on international relations, as “Canadian negotiators are unlikely to discuss (and may not be aware of) that which they failed to obtain because of this legally imposed handicap”. They nonetheless conclude that:

it is clear that, at a minimum, there would have been less of a paper burden on Canadian negotiators if they did not have to check with the provinces whenever some aspect of the negotiations might fall within provincial jurisdiction. Moreover, negotiators on the other side of the table were certainly aware of this Canadian legal peculiarity and could be expected to exploit it whenever the opportunity to do so

⁴⁵*Ibid.* at 215 [emphasis added].

⁴⁶*Ibid.* at 210, 216.

⁴⁷Torsten H. Strom & Peter Finkle, “Treaty Implementation: The Canadian Game Needs Australian Rules” (1993) 25 *Ottawa L. Rev.* 39 at 42.

⁴⁸*Ibid.* at 43.

profitably arose. Undoubtedly, this aspect of Canadian constitutional law has important and, in some situations, perhaps vital practical dimensions which should be an aspect of any legal consideration of this issue.⁴⁹

As will be explained in Part III, such potential practical burdens are *not* a key aspect of any legal consideration of *Labour Conventions*, and the authors incorrectly treat the purposive approach to constitutional interpretation as being synonymous with convenience, efficiency, and other pragmatic benefits.

Susan A. McDonald is another commentator whose dire warning about *Labour Conventions* hindering Canada internationally is purportedly based on what “must” be:

It is clear that the decision of the Privy Council in the *Labour Conventions* case has impaired Canada’s capacity to play a full role in international affairs – realistically, the general responsibility for international obligations cannot be divided into ‘watertight’ federal and provincial compartments. Administrative practicality alone would justify exclusive federal jurisdiction of treaty negotiation and implementation, even though this would extend federal legislative competence into provincial fields. . . . The power to negotiate and undertake international obligations must surely carry with it the power to ensure this performance through domestic implementation.⁵⁰

McDonald then acknowledges, however, the trend toward *greater* provincial authority internationally, and so allows that the exclusive provincial power to implement treaties relating to their areas of jurisdiction “does not necessarily result in federal impotence in international affairs” as a result of prior consultation and the availability of federal state clauses.⁵¹ Where McDonald draws the line between “impairment” and “impotence” is unclear, but it is apparent that she does not require a particularly high level of inefficiency

⁴⁹*Ibid.* at 42.

⁵⁰Susan A. McDonald, “The Problem of Treaty-Making and Treaty Implementation in Canada” (1981) 19 *Alta. L. Rev.* 293 at 301.

⁵¹*Ibid.*

before federal encroachment of areas of provincial jurisdiction is justified.

Paul J. Davidson plants himself squarely within the international relations camp from his opening paragraph:

International trade is the life-blood of the Canadian economy. Exports have become the largest single source of jobs in Canada, providing employment for almost three million Canadians and accounting for approximately 30 per cent of the G.N.P. It is imperative that everything possible should be done to encourage the growth of this vital sector of the economy and that any impediments to such growth should be removed.

One factor which can have an effect on the volume of trade done by a country is its legal system. Traders are more likely to deal with partners in countries where they are familiar with the legal system and can be ensured that their rights will be enforced with the least amount of difficulty.⁵²

Davidson notes Canada's reluctance to enter into various conventions on uniform rules because it could not guarantee implementation.⁵³ Even when provinces did adopt legislation based on Model Laws, "[t]he main problem remains that a foreign business person dealing with a Canadian partner from one province can never be certain that the law that will apply will be the same as that which applies when dealing with a Canadian partner from another province".⁵⁴

Even R.E. Sullivan, who recognizes that a blanket federal treaty implementation power would be "contrary to first principle", as "[n]either level of government can be permitted a

⁵²Paul J. Davidson, "Uniformity in International Trade Law: The Constitutional Obstacle" (1987-88) 11 Dal. L.J. 677 at 677.

⁵³*Ibid.* at 678-79.

⁵⁴*Ibid.* at 683.

unilateral power to amend the constitutional distribution of powers”, something the federal government would be able to do given the vast range of subjects that could be covered by treaties,⁵⁵ echoes the dire international predictions if the federal power cannot legitimately be found elsewhere. She states that:

if Canada is to be an effective player in the international arena, securing benefits for itself and contributing to the development of international peace and prosperity, it must be able not only to ratify those treaties it thinks appropriate but also to perform them in full. No one wants to do business with a party which cannot be relied on to keep its word. Moreover if Canada is to function domestically as a nation, the pan-Canadian interest at stake in the performance of Canadian treaties must not be made subject to the parochial interests of particular provinces. Part of what it means to be a nation is that the welfare of the whole must prevail over the welfare of the part.⁵⁶

DiGiacomo and Luz both attempt to add context to the challenges that the federal government faces when provinces fail to meet international obligations, citing three provincial breaches of the General Agreement on Tariffs and Trade (GATT) in which the panels found the federal government had not taken all reasonable measures to ensure provincial cooperation, although without specifying precisely what steps the federal government was required to take.⁵⁷ In one case, the European Community argued that “reasonable measures” entailed the enactment of paramount legislation, or the bringing of a constitutional challenge against the provincial regulations, yet Canada insisted it had no such

⁵⁵R.E. Sullivan, “Jurisdiction to Negotiate and Implement Free Trade Agreements in Canada: Calling the Provincial Bluff” (1986-1987) 24 U.W.O L. Rev. 63 at 69 [Sullivan, “Jurisdiction”].

⁵⁶*Ibid.* at 68.

⁵⁷Gordon DiGiacomo, “The Federal Treaty Implementation Power and International Labour Agreements” (2004) 11 C.L.E.L.J. 31 at 35; Mark Luz, “NAFTA, Investment and the Constitution of Canada: Will the Watertight Compartments Spring a Leak?” (2001) 32 Ottawa L. Rev. 35 at 56.

power.⁵⁸ The provinces in question ultimately changed their laws voluntarily, but Luz notes that they did so for policy reasons rather than out of a legal obligation imposed by the federal government.⁵⁹ Each of these criticisms from Sullivan, Davidson, Luz, and DiGiacomo will be assessed further in Part III; at present, they are raised merely as evidence of the continued popularity of critiquing *Labour Conventions* from an international relations perspective.

The “perhaps . . . most damaging” criticism of the *Labour Conventions* decision⁶⁰ came from one of the Law Lords who decided it. In celebrating the life’s work of Sir Lyman Duff, whose judgment in *Labour Conventions* at the Supreme Court of Canada level was rejected by the Privy Council, Lord Wright took the opportunity to express agreement with Sir Lyman’s analysis of the case over the judgment of Lord Atkin that prevailed in the Privy Council.⁶¹ As Lord Wright noted, the Privy Council never recorded dissents,⁶² and this gave rise to further speculation regarding the legitimacy of the decision. As if the fact that the Privy Council’s members were not Canadian were not bad enough, Lord Wright’s revelation led B.J. MacKinnon to raise the prospect in a 1956 letter to the editor that if Lord Macmillan had “dissented” along with Lord Wright, “we are left with the fascinating, but rather disturbing, possibility that one of the most important cases in Canadian constitutional law

⁵⁸Luz, *ibid.* at 55.

⁵⁹*Ibid.* at 56.

⁶⁰According to DiGiacomo, *supra* note 57 at 43; McWhinney, *supra* note 2, stated that it weakened *Labour Conventions* “in its psychological authority, at least” (at 4).

⁶¹Lord Wright, “Rt. Hon. Sir Lyman Poore Duff G.C.M.C.” (1955) 33 Can. Bar Rev. 1123.

⁶²*Ibid.* at 1124.

was decided by the vote of Sir Sidney Rowlatt, a ‘taxation judge’, who, I am told, sat through the 1937 hearings in his overcoat making neither note nor comment”.⁶³ Of course, this variety of criticism says nothing of the content of the *Labour Convention* rule that the Privy Council established. Although Lord Wright could not formally register his dissent, no doubt his colleagues on the Privy Council were aware of his views, and overruled him. As such, it is curious that Lord Wright’s opinion on *Labour Conventions* has been given such weight; the majority of other Law Lords were unpersuaded by the analysis that Lord Wright favoured. Similarly, the fact that Sir Sidney did not appear actively engaged in the proceedings, while a humorous anecdote, is irrelevant to whether he and the majority of his colleagues arrived at a constitutionally sound conclusion.

The same accusation of irrelevance can be levied against those who have emphasized the politics behind the Privy Council, such as Gordon DiGiacomo, who notes that as the presiding Lord of the Judicial Committee was also a member of the British Cabinet, the Committee “tended to base its decisions not only on legal principles, but also on political considerations facing the British government”.⁶⁴ He thus suggests that this “calls into question the legitimacy of all of the JCPC’s decisions, including the *Labour Conventions* decision”.⁶⁵ Other commentators have attributed the decision at least in part to the Privy Council’s dislike of the ideology behind Prime Minister Bennett’s “New Deal”, of which the

⁶³B.J. MacKinnon, “Labour Conventions Case: Lord Wright’s Undisclosed Dissent?” (1956) 34 Can. Bar Rev. 115 at 117.

⁶⁴DiGiacomo, *supra* note 57 at 48.

⁶⁵*Ibid.* at 49.

impugned legislation was part.⁶⁶ Whether or not the Privy Council acted impartially in reaching the *Labour Conventions* decision may be of great interest to those studying judicial influences, and would perhaps have been relevant shortly after the release of the decision in arguing why it ought not serve as a precedent. Yet for *Labour Conventions* to be justifiably ignored today, it must be established that it is not constitutionally sound; the possibility that a proper decision was arrived at for the wrong reasons is of academic concern only. Who the members of the Privy Council were and what motivated them are merely distractions from the essential question of what the constitution legitimately requires, a question that will be answered in Parts II through IV.

C) Jurisprudence undermining the *Labour Conventions* decision

While *Labour Conventions* has been most vociferously attacked by commentators, who wasted no time lambasting the Privy Council for its apparently disastrous decision, some judges have also indicated dissatisfaction with the decision, and this has arguably had an even greater impact on the rule's fortunes. While this judicial questioning has been relatively cautious, it has been significant and frequent enough to create doubt as to whether *Labour Conventions* merits strict adherence. Moreover, it should be noted that the jurisprudence and commentary feed off of one another, with judges frequently citing Lord

⁶⁶See e.g. Scott, "Consequences", *supra* note 32 at 492: "It would seem that even without special mention in the British North America Act, the doctrines of *laissez-faire* are in practice receiving ample protection from the courts"; Robert Howse, "The Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations" (1990) 16 Can. Bus. L.J. 160 at 166-68 [Howse, "Rethinking"]; Jeffrey L. Friesen, "The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models" (1994) 94 Colum. L. Rev. 1415 at 1432.

Wright’s “dissent” and other commentaries, and recent academic criticism unfailingly citing *Vapor* and other judgments discussed below as lending credence to the need for whatever reforms are being proposed. In other words, the two forms of criticism have together created a cycle of certainty that *Labour Conventions* is bad law, each citing the other as authority for that proposition.

The most significant case to cast doubt on the *Labour Conventions* decision directly is *Vapor Canada Ltd. v. MacDonald*, although like most others to be discussed, it did so as *obiter dicta*.⁶⁷ The case concerned a provision of the federal *Trade Marks Act* that broadly prohibited dishonest business practices and gave the federal courts jurisdiction to hear a cause of action based on a breach of that provision. The appellants and intervening provincial attorneys general alleged that the provision was *ultra vires* the federal government because it fell within the provincial heads of power of property and civil rights and/or matters of a local or private nature in the province. The respondent and intervening Attorney General of Canada defended the provision on numerous grounds, including that it constituted legislation in implementation of an international treaty, the *Convention for the Protection of Industrial Property*. The Supreme Court held that the treaty did not mandate a provision of the sort being challenged, and therefore rejected the federal government’s categorization of the provision as being implementing legislation.⁶⁸ While Laskin C.J.C. for the majority acknowledged it was thus “unnecessary” to reconsider the *Labour Conventions* decision,

⁶⁷ *Vapor Canada Ltd. v. MacDonald*, [1977] 2 S.C.R. 134.

⁶⁸ *Ibid.* at 171 (per majority), 176 (per minority).

since the impugned provision was not enacted on the basis of any treaty,⁶⁹ he delivered this concession only after highlighting the criticisms the case had received. He noted that Kerwin C.J.C. in *Francis v. The Queen*⁷⁰ suggested that *Labour Conventions* might need to be reconsidered, and was supported in that opinion by Fauteux and Taschereau JJ., whom Laskin C.J.C. pointed out would themselves later both become chief justice. He also highlighted the criticism of Lord Wright, discussed above, one of the law Lords who had decided *Labour Conventions*, but later expressed the opinion that the decision had been inconsistent with the wording of the constitution and earlier case law in the *Aeronautics Reference* and *Radio Reference*.⁷¹ Further criticism, in the form of a Bar Review article derived from a public lecture, came from former Supreme Court Justice Ivan Rand.⁷² Altogether, Laskin C.J.C. concluded that these comments “would support reconsideration of the *Labour Conventions* case”.⁷³

That this is the decision most often held up in support of claims of *Labour Conventions*' forthcoming demise in Canadian jurisprudence is telling. Laskin C.J.C.'s opinion on the case is not only *obiter dicta*, it is *obiter dicta* based on *obiter dicta* and out of court

⁶⁹*Ibid.* at 169.

⁷⁰*Francis v. The Queen*, [1956] S.C.R. 618.

⁷¹*Vapor*, *supra* note 67 at 168.

⁷²*Ibid.* at 169. Rand feared the rule would lead to provincial treaty-making, which he claimed, “besides sterilizing national action would invert the underlying scheme of Dominion and provincial relations” (Ivan C. Rand, “Some Aspects of Canadian Constitutionalism” (Oliver Wendell Holmes Lecture, delivered at Harvard Law School, 26 February 1960), (1960) 38 Can. Bar. Rev. 135 at 143).

⁷³*Vapor*, *ibid.* at 169.

commentary. Particularly questionable is the reliance on *Francis v. The Queen*, since that case cited *Labour Conventions* purely for the proposition that treaties must be implemented domestically to be law, with no consideration whatsoever of the division of powers between the provincial and federal governments. Moreover, Kerwin C.J.C. did not state in *Francis* what aspect of *Labour Conventions* might need to be reconsidered, only that it was not the aspect applicable to the case at hand, namely the requirement that treaties be implemented to have effect.⁷⁴ As such, any reliance on *Francis* for the proposition that one-time Chief Justices Kerwin, Taschereau and Fauteux all doubted the provincial power recognized in *Labour Conventions* is tenuous at best; in fact, the judgment expressly offered no opinion on that subject.

Lessening the legitimacy of *Vapor*'s criticism even further is *Schneider v. British Columbia*, in which the majority (Laskin C.J.C concurring) distanced itself from the doubt raised in *Vapor*, stating that although *Vapor* left open the point of federal jurisdiction to implement treaties otherwise within provincial competence as being matters of national concern, such an argument was "questionable in the face of Lord Atkins' judgment on behalf of the Judicial Committee of the Privy Council" in *Labour Conventions*.⁷⁵ The majority added that pursuant to *Vapor*, "even assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters . . . which would otherwise be for provincial legislation alone the exercise of that power must be manifested in the implementing

⁷⁴*Francis*, *supra* note 70 at 621.

⁷⁵*Schneider v. British Columbia*, [1982] 2 S.C.R. 112 at 134 [*Schneider*].

legislation and not left to inference”.⁷⁶ While some commentators have interpreted this addition as indicating a willingness to reconsider *Labour Conventions* and recognize a broad federal treaty implementation power,⁷⁷ it can just as easily be read as the Court “covering its bases”, not intending to lend support to any change in law.

McKeown J. of the Federal Court more recently raised the prospect of *Labour Conventions* being overturned in *Chua v. Canada (M.N.R.)*.⁷⁸ That decision rested on the characterization of the legislation in question as dealing more with taxation than with property and civil rights, and therefore falling within federal jurisdiction without any need to rely on the fact that it also served to implement a treaty.⁷⁹ Nonetheless, in response to the applicant’s submission that *Labour Conventions* governed, McKeown J. noted that “the Supreme Court of Canada has doubted that the Labour Conventions case . . . is still good law”, citing *Francis, Re Ownership of Offshore Mineral Rights*, and particularly *Vapor*.⁸⁰

It is not obvious what particular passages McKeown J. was relying on in citing *Offshore Mineral*, as *Labour Conventions* is not mentioned in that case.⁸¹ The pages cited do broadly discuss Canada’s position as a recognized sovereign state at international law, and conclude

⁷⁶*Ibid.* at 135.

⁷⁷See e.g. Davidson, *supra* note 52 at 691.

⁷⁸*Chua v. Canada (M.N.R.)*, [2001] 1 F.C. 608, 192 F.T.R. 300.

⁷⁹*Ibid.* at para. 36.

⁸⁰*Ibid.* at paras. 31-32.

⁸¹*Re Ownership of Offshore Mineral Rights (British Columbia)*, [1967] S.C.R. 792 [*Offshore Mineral*].

that since the right to exploit one's territorial sea arises by international law, the territorial sea off the coast of British Columbia belongs to Canada, not the province.⁸² How this finding casts doubt on *Labour Conventions*, however, is unclear, and the fact that the Court saw no need to cite the Privy Council decision itself suggests the two are unrelated. It is not the existence of a treaty that takes ownership of the territorial sea away from British Columbia and gives it to Canada; the decision is explicit that the disputed part of the sea never fell within the boundaries of the colony, or later province, of British Columbia. On the contrary, the concept of the territorial sea is an international law concept, and only ever applied to the benefit of sovereign states.

As such, while Michael Milani has claimed that the Supreme Court “tacitly (and possibly inadvertently) overruled the *Labour Conventions* case” in *Offshore Mineral*, quoting the Court as indicating that “[l]egislation [*sic*] jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by international law and thus able to enter into arrangements with other states”, and asking whether the Court was “suggesting that if Canada bound herself in matters relating to this land, she would acquire the power to legislate with respect to it”,⁸³ it was clearly doing no such thing. The full paragraph from which Milani quotes only a select portion states that: “Moreover, the *rights in the territorial sea arise by international law and depend upon recognition by other sovereign states*. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by international law and thus *able to enter into arrangements*

⁸²*Ibid.* at 815-17.

⁸³Milani, *supra* note 23 at 206.

with other states respecting the rights in the territorial sea.”⁸⁴ Had the Court held that the existence of an international treaty took what otherwise would have fallen within provincial jurisdiction and given it to the federal government, that would have cast doubt on *Labour Conventions*. That is not what happened, however; it held that something that was never within provincial jurisdiction was still not within provincial jurisdiction. Be that as it may, those who cite this case apparently fail to draw that distinction, thus cementing doubt in the *Labour Conventions* rule. While one could simply chip away at each of these misleading citations, pointing out their tenuous logic, that approach in itself is likely inadequate to restore respect for *Labour Conventions* after so many years of attack. This is especially true given that the rule has been undermined just as much by judicial decisions that do not even acknowledge the harm they do to *Labour Conventions* as those that explicitly question the rule’s validity.

D) Use of the “peace, order and good government” (“p.o.g.g.”) provision to place treaty implementation within federal jurisdiction notwithstanding the *Labour Conventions* decision

Not every attempt to undermine *Labour Conventions* has been overt. Many scholars have advocated its avoidance not by challenging its principles directly, but by finessing the federal heads of power to persuade courts to uphold implementing legislation. To be clear, there is nothing objectionable about a court finding that the subject matter of a treaty is better characterized as corresponding to a federal, rather than a provincial, head of power; there are of course many treaties that the federal parliament can unilaterally implement in this way. What is problematic is when such a determination is based on the existence of a

⁸⁴*Offshore Mineral, supra* note 81 at 817 [emphasis added].

treaty, for that is precisely what *Labour Conventions* prohibits: the creation of a “treaty implementation power” that gives the federal government jurisdiction over implementation regardless of the treaty’s subject matter.

The provision under which this suspect approach most commonly plays out is the “peace, order and good government” (“p.o.g.g”) residual power found in the preamble to section 91. It should be noted that the “trade and commerce” clause, enumerated at section 91(2), has also been the source of commentary on “avoiding” the application of *Labour Conventions*. This thesis is much more concerned with the p.o.g.g. power, however, which as will be seen, lacks the structure required to keep federal jurisdiction in check. There are evidently limits to the kinds of implementation legislation that the federal government can justify pursuant to trade and commerce, and the courts are experienced in determining which enumerated heads of power correspond best to a particular issue. As such, the use of trade and commerce presents a legitimate application of the division of powers, just as the implementation of treaties pertaining to defence, or copyright, for example, is undeniably warranted under sections 91(7) and 91(23), respectively. While it is regrettable that these commentators choose to frame their arguments in terms of “getting around” *Labour Conventions*, as this perpetuates a results-oriented approach to the constitution that suggests it is acceptable to manipulate the division of powers to achieve a desired end, there is every reason to believe the courts can correctly determine when a given piece of legislation is *ultra vires*.

Unfortunately, that confidence in the courts is less forthcoming with the application of p.o.g.g., because when that provision is relied upon to justify the implementation of an

international treaty, it is often the international dimension of the subject matter itself that is relevant, and that places *Labour Conventions* in great danger. This methodology had its genesis in *Johannesson v. West St. Paul (Rural Mun.)*, in which the Supreme Court of Canada had to determine whether aeronautics fell within federal jurisdiction.⁸⁵ The *Aeronautics* case⁸⁶ was not necessarily determinative, as the British treaty governing that decision had been subsequently denounced by Canada, and a new treaty entered into on Canada's own behalf. To the extent, therefore, that the earlier decision rested on section 132 of the *Constitution Act, 1867*, that rationale was no longer applicable. The Court in *Johannesson* determined that aeronautics remained under federal jurisdiction as a matter of national concern, with Kerwin J. explicitly relying on the terms of a treaty as evidence that the subject matter in question had attained a national dimension as a matter of national interest.

The decision most often cited in support of the use of p.o.g.g. in this manner, however, is *R. v. Crown Zellerbach Inc.*, a case which concerned a challenge to federal legislation prohibiting the dumping of substances into provincial marine waters, including those internal to a single province.⁸⁷ The majority of the Supreme Court held that the legislation was constitutional under the peace, order and good government provision as a matter of national concern. The federal government did not argue before the Supreme Court that the existence of a treaty in the area was what put the legislation within federal jurisdiction; that is, it did

⁸⁵ *Johannesson v. West St. Paul (Rural Mun.)*, [1952] 1 S.C.R. 292.

⁸⁶ *Re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, [1932] 1 D.L.R. 58.

⁸⁷ *R. v. Crown Zellerbach Inc.*, [1988] 1 S.C.R. 401.

not attempt to directly undermine *Labour Conventions*. However, the majority of the Court considered the treaty, the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, in any event, and held that “[m]arine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole”.⁸⁸ The majority acknowledged that the treaty did *not* require the regulation of dumping in internal marine waters, which was what the federal government had done, but cited a United Nations report that emphasized the link between internal pollution and pollution of the territorial sea. It also accepted the difficulty of visually discerning between the territorial sea and internal marine waters, which would create “an unacceptable degree of uncertainty for the application of regulatory and penal provisions”.⁸⁹ Even the dissent, which held that the legislation was *ultra vires*, did so partially on the basis that the provisions in question could not be said to be implementing the terms of the treaty, thus implicitly accepting that the treaty might have been relevant had the federal government been acting within its terms. No mention was made of *Labour Conventions*, only of *Vapor*.⁹⁰

It should be emphasized that the majority decision on its face is not necessarily fatal to *Labour Conventions*, as it could be said that the majority had reasons apart from the treaty to categorize the issue as a matter of national concern, and mentioned the convention only to bolster its opinion by showing that other countries had also found the matter to require a

⁸⁸*Ibid.* at 436.

⁸⁹*Ibid.* at 436-37.

⁹⁰*Ibid.* at 442-43.

large-scale response. Unfortunately, the more accepted interpretation is that the Court in *Crown Zellerbach* indicated that the existence of a treaty is a relevant consideration in determining whether an issue is a matter of national concern.⁹¹ The logic of this interpretation, whereby treaties are evidence of international character, international character is evidence of national concern, and matters of national concern fall within federal jurisdiction, means that *Labour Conventions* carries little weight, as the existence of a treaty can then be used to support federal jurisdiction over implementation. Indeed, it may support an even broader jurisdiction, according to the *Crown Zellerbach* majority, not only to implement the treaty's specific provisions, but to legislate with respect to its general subject matter.

While there are supposedly safeguards built into the p.o.g.g. national concern test to insulate provinces from any unnecessary federal incursion into their jurisdiction, namely the provincial inability requirement, Gerald Baier has demonstrated how that safeguard was significantly weakened in *Crown Zellerbach*. Baier traces the origins of the provincial inability test to a 1976 article by Dale Gibson,⁹² which advocated a system whereby “[j]urisdiction could be claimed under the [j] national concern doctrine only after all provincial capacities had been exhausted”.⁹³ Baier demonstrates, however, how Le Dain J. for the majority in *Crown Zellerbach* was “creative” in his application of the provincial inability

⁹¹Hogg, *supra* note 17 at §11.5(c).

⁹²Dale Gibson, “Measuring National Dimensions” (1976) Man. L.J. 7.

⁹³Gerald Baier, “Tempering Peace, Order and Good Government: Provincial Inability and Canadian Federalism” (1997-1998) 9 Nat’l J. Const. L. 277 at 282.

test,⁹⁴ relegating it to an afterthought, rather than treating it as a precondition for national concern. That is, as conceived by Gibson, and applied by the majority in *Labatt Breweries of Canada Ltd. v. Canada (A.G.)*,⁹⁵ the court in *Schneider*,⁹⁶ and Dickson J. in dissent in *R. v. Wetmore*,⁹⁷ absent evidence of provincial inability, there could be no discussion of whether the matter at hand was a matter of national concern; it was not.⁹⁸ Le Dain J. readily acknowledged those precedents in *Crown Zellerbach*, and described the provincial inability test as “one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine”.⁹⁹ When it came time to apply this limitation on federal jurisdiction, however, he *began* by stating that “[m]arine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole”, and *then* asked “whether the control of pollution by the dumping of substances in marine waters, including provincial marine waters, is a single, indivisible matter, distinct from the control of pollution by the dumping of substances in other provincial waters”.¹⁰⁰ To this end, he raised the treaty as evidence that marine pollution was a single, indivisible matter, distinct from intraprovincial *fresh* water pollution, which was excluded from both the treaty’s and the

⁹⁴*Ibid.* at 300.

⁹⁵[1980] 1 S.C.R. 914.

⁹⁶*Supra* note 75.

⁹⁷[1983] 2 S.C.R. 284.

⁹⁸Baier, *supra* note 93 at 285-90.

⁹⁹*Crown Zellerbach*, *supra* note 87 at 434.

¹⁰⁰*Ibid.* at 436.

legislation's reach.¹⁰¹

In other words, the question of provincial inability entered the analysis only as an opportunity to *disprove* national concern via the concepts of singleness and distinctiveness, after its existence has already been assumed on the basis of the more vague grounds of extra-provincial and international dimensions. As Baier notes, finding that the provinces cannot deal with an issue that one has already presupposed is beyond the provinces' scope is not a difficult hurdle to overcome, and does not serve to limit federal encroachment on provincial areas of jurisdiction to any meaningful degree.¹⁰² This is particularly true when the only evidence of provincial inability is that the international community has seen fit to categorize an issue in a particular way and enter into a treaty to address it. According to Baier, “[b]y applying provincial inability the way he did, Le Dain robbed it of its initial, necessity-based, narrowing effect and opens doors for national concern”.¹⁰³ While the author notes that the courts have become more reticent in relying on p.o.g.g. where they have another tool at their disposal, perhaps in recognition of the slippery slope that results once they find something to be of national concern,¹⁰⁴ the existing jurisprudence on provincial inability invites judges to place more legislation within federal jurisdiction than necessary, and legitimizes attempts to achieve a broad treaty implementation power. The revised provincial inability test may represent a means to a desired end, but as will be explained in Part III, such a results-

¹⁰¹*Ibid.* at 436-37.

¹⁰²Baier, *supra* note 93 at 290.

¹⁰³*Ibid.* at 291.

¹⁰⁴*Ibid.* at 305.

oriented approach is inappropriate in constitutional analysis, and has undermined the authority of *Labour Conventions*.¹⁰⁵

It should be noted at this point that this thesis is not advocating a return to Lord Atkin's conception of p.o.g.g. that discounted the national concern arm of that provision entirely, in favour of viewing it only as an emergency doctrine.¹⁰⁶ It simply points out that the national concern doctrine as espoused in *Crown Zellerbach* offers little protection for provinces faced with a federal government wishing to implement a treaty dealing with areas of provincial jurisdiction. Consider for a moment Dickson J.'s words in *Schneider*, where the Court held legislation addressing heroin dependency *intra vires* the province of British Columbia:

It is largely a local or provincial problem and not one which has become a matter of national concern, so as to bring it within the jurisdiction of the Parliament of Canada under the residuary power contained in the opening words of the *B.N.A. Act* (now, *Constitution Act, 1867*).

There is no material before the Court leading one to conclude that the problem of heroin dependency as distinguished from illegal trade in drugs is a matter of national interest and dimension transcending the power of each province to meet and solve its own way. It is not a problem which 'is beyond the power of the provinces to deal with' [citing Gibson]. Failure by one province to provide treatment facilities will not endanger the interests of another province. The subject is not one which 'has attained such dimensions as to affect the body politic of the Dominion' [citing *Aeronautics*]. It is not something that 'goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole' [citing *Temperance*].¹⁰⁷

¹⁰⁵ See also *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 where Lamer C.J. and Iacobucci J. in dissent cite *Crown Zellerbach* in defining the provincial inability test as "whether the failure of one province to enact effective regulation would have adverse effects on interests exterior to the province" (para. 76), a definition that bears little resemblance to the test's original meaning.

¹⁰⁶ *Labour Conventions*, *supra* note 1 at 683.

¹⁰⁷ *Schneider*, *supra* note 75 at 131.

What if Canada had entered into an international convention on the treatment of addiction? Would that have changed Dickson J.'s views? Would that suddenly render the provinces incapable of addressing a problem he so strenuously defended their ability to address? Under the common reading of *Crown Zellerbach* discussed above, it could. Yet if each province had a different way of dealing with the issue, is that really a sign of their "inability", or rather a sign that the federal government should not have signed onto one particular solution when there were in fact multiple ways for the provinces to meet the needs of their citizens? It should not suddenly be acceptable for the federal government to dictate what approach the provinces must follow where it previously had no such say, without first establishing that the provinces are genuinely incapable of solving the problem on their own.

The risk that this broad use of p.o.g.g. presents is not simply that future judges will allow questionable interpretations to permit federal treaty implementation legislation to stand, despite its encroachment on provincial jurisdiction. It is in fact much deeper than that, and relates to judges' and scholars' attitudes toward the constitution. What is troubling is the assumption that it is the end result that it is important, and the constitution is simply something to manipulate in arriving at that desired outcome. That is, so many operate on the assumption that the Privy Council was wrong in *Labour Conventions*, that the decision cannot possibly be followed to the letter and the spirit, and so it is entirely acceptable to avoid its application in any way possible. This reality is reflected in DiGiacomo's observation that "long-standing judicial dissatisfaction with the *Labour Conventions* decision has already eroded the authority of that decision, and could produce yet further

enlargement of the [federal treaty implementation] power”.¹⁰⁸

Such an enlargement has received much encouragement from the academic sphere, with several commentators praising the Court’s reasoning in *Crown Zellerbach*, endorsing the use of p.o.g.g. to achieve what *Labour Conventions* denies. Barring the possibility of senate reform and a constitutional amendment,¹⁰⁹ for example, H. Scott Fairley endorses judicial intervention by way of the “peace, order and good government” and “trade and commerce” powers to find that treaties fall within federal jurisdiction, arguing that the constitution must be interpreted flexibly to respond to the “needs of an evolving polity”.¹¹⁰ He argues that the *Labour Conventions* case need not be overruled, but merely freed of its “formalistic straightjacket” to take into account the issue of external affairs that was overlooked by the Privy Council.¹¹¹ Similarly, Robert Howse posits that an acceptable alternative to the *Labour Conventions* rule would have to adequately address Lord Atkin’s concerns by limiting federal jurisdiction over treaties “so that provincial power is not eventually gutted, and the federal balance destabilized”. He argues that the use of the p.o.g.g. power, as espoused in *Crown Zellerbach*, as well as the trade and commerce power, meet that requirement.¹¹² While a p.o.g.g. analysis does require some consideration of the national

¹⁰⁸DiGiacomo, *supra* note 57 at 33.

¹⁰⁹Discussed at Part IV.

¹¹⁰H. Scott Fairley, “External Affairs in the Constitution of Canada” (1987) 16 Can. Council Int’l L. Proc. 220 at 231. This “evolution” argument is examined in greater detail in Part III.

¹¹¹*Ibid.* at 232.

¹¹²Howse, *supra* note 66 at 172.

dimension of an issue – that is, it imposes *some* limits on one’s ability to shift jurisdiction from the provincial to the federal government – Baier’s analysis reveals that that is not an onerous requirement. The use of p.o.g.g. will not insulate against the federal balance being “destabilized” if it is being relied upon where inappropriate out of a misplaced assumption that any limits are sufficient limits.

While Lord Atkin raised the spectre of the federal government being able to strip the provinces of all of their powers simply by entering into treaties on a wide variety of subjects, his words should not be interpreted as meaning that any other redistribution of powers, as long as it does not lead to the complete “gutting” of provincial jurisdiction, is acceptable. Rather, any attempt to remove authority from the provinces and give it to the federal government must be fully justified. If the courts are to reign in the implications of *Crown Zellerbach*, all players must lose the preconception that the federal government *ought* to have a treaty implementation power, and that the only decision standing in the way of that power, while technically still valid, is not deserving of respect. To that end, it is necessary to reconsider the perspective from which the *Labour Conventions* rule has been criticized, and suggest alternative criteria for its evaluation.

Part II: Constitutional law as the appropriate framework through which to assess the *Labour Conventions* rule

The fate of the *Labour Conventions* rule is necessarily a constitutional question, as it deals with which level of government has authority to enact a given law. The subject matter of the law will always *prima facie* fall under a provincial head of power; were that not the case, the

law would already be *intra vires* the federal government, and *Labour Conventions* would in no way be implicated. This fact cannot be overemphasized: in any situation in which one is considering the effects of the *Labour Conventions* rule, one has already accepted that but for the existence of a treaty, the law in question would be within exclusive provincial jurisdiction. If that is not the case – for example, if one believes the subject is a matter of national concern even without considering the treaty – no reference to *Labour Conventions* is needed; the national concern doctrine on its own will serve one’s purposes. Moreover, those who criticize *Labour Conventions* for preventing the federal government from passing a law implementing a given treaty must ask themselves whether the existence of the treaty is really at the root of their disagreement. If they would want the federal government to be able to impose a uniform law on the country even if Canada were to withdraw from the treaty and thus have no international obligation, their quarrel is not with the *Labour Conventions* rule, but with the division of powers more broadly. In such a situation, the existence of the treaty and Canada’s professed need to live up to its international commitments is being used merely as a smokescreen to justify a desired outcome.

What, then, is the significance of the fate of the *Labour Conventions* rule being a constitutional question? It may seem unnecessary to explain the constitution’s supreme status above all other laws, yet the criticisms levelled against *Labour Conventions* suggest that a reminder is sometimes called for, as it is easy to get caught up in one’s view of what *ought* to be, and fail to recall that the options are very much limited by constitutional boundaries that cannot lightly be disregarded. That is, it is unacceptable to conclude that provincial powers may in some circumstances shift to the federal government without first

discussing the constitutional justifications for that shift. All the policy reasons in the world are insufficient if one does not bother to explain why those policy considerations are a legitimate factor in constitutional interpretation.

Section 52(1) of the *Constitution Act, 1982* states that “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.¹¹³ While no such explicit provision existed prior to 1982, it was implicit from the time of Confederation that the constitution was not simply any other law, and that the division of powers in sections 91 and 92 were not mere suggestions. As the Supreme Court of the United States has stated, “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void”.¹¹⁴

In other words, while it is often said that the *Constitution Act, 1982* marked a shift away from legislative supremacy towards constitutional supremacy, this should not be understood to mean that the constitution held no authority over other laws prior to 1982, or that older constitutional provisions, such as the division of powers, carry less weight than their newer counterparts. That statement merely reflects the fact that the advent of the *Charter of Rights and Freedoms* subjected *otherwise* validly enacted laws to constitutional scrutiny that could result in their nullification. It is without question, however, that “since the birth of Canada,

¹¹³*Constitution Act, 1982*, s. 52(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹¹⁴*Marbury v. Madison*, 5 U.S. 137 at 176 (1803).

legislative supremacy was . . . tempered by the principle of federalism, which ensured that Parliament and the provincial legislatures were supreme only when they were exercising powers conferred on them by the constitution”.¹¹⁵ As such, the addition of section 52(1) simply meant that “what was once a by-product of the Imperial system . . . became an explicit principle of the Canadian constitution While the section does not specifically provide for judicial review to determine if there is inconsistency, its adoption after 115 years of such judicial review under the constitution surely implies that the courts are to continue to exercise such a role”.¹¹⁶ The Supreme Court affirmed this unique status when it identified “constitutionalism”, which requires all government action to comply with the constitution, as one of Canada’s underlying constitutional principles in *Re Secession of Quebec*.¹¹⁷ It further stressed that the constitution is “entrenched beyond the reach of simple majority rule”, in part because “a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally”.¹¹⁸

¹¹⁵Joel Bakan et al., eds., *Canadian Constitutional Law*, 3rd ed. (Toronto: Emond Montgomery, 2003) at 5.

¹¹⁶Barry L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3rd ed. (Toronto: Butterworths, 1988) at 32.

¹¹⁷*Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 72 [*Secession*].

¹¹⁸*Ibid.* at para. 74; see also Stevenson, *supra* note 38 at 8, where he describes the inability of either level of government to abolish the other’s jurisdiction as one of the defining elements of federalism, distinguishing it from unitary states and other associations.

How, then, have critics of *Labour Conventions* addressed the constitutional considerations that must underpin any decision dealing with the division of powers? The answer is discouraging. These critics can be divided into two main camps: those who misapply the constitution, and those who demonstrate inadequate respect for the constitution. The former category consists of those who claim an exclusive federal treaty implementation power *is* constitutionally mandated, and may be further divided into those who base their argumentation on either the progressive or purposive approach to constitutional interpretation, or on claims about the centralizing intentions of the Fathers of Confederation. As will be seen in Part III, neither interpretive approach in fact justifies *Labour Conventions*' reversal. The latter category of showing inadequate respect for the constitution may be further subdivided into those who downplay the harm a reversal of *Labour Conventions* would impose on the provinces, and those who offer alternatives to the *Labour Conventions* rule that supposedly protect provincial interests, yet invariably fall short of what the division of powers guarantees. These variations are the focus of Part IV.

Part III: Error of *Labour Conventions* critics in failing to base arguments on valid constitutional considerations

While some critics of *Labour Conventions* have claimed that their positions are supported by constitutional principles, their interpretations have been overly simplistic, leaving the impression that they are using the constitution to attempt to bolster a predetermined outcome. Such is the case for the two main groups identified by Alan Cairns who criticize the Privy Council's pro-decentralization decisions, such as *Labour Conventions*, on an apparently constitutional basis: the fundamentalists and the constitutionalists. The

fundamentalists argue that the framers of the constitution intended it to create a strong centralized government and weaker provincial governments, as reflected in the wording of the document, and that the Privy Council thus interfered with Canada's "proper" federal supremacy.¹¹⁹ The constitutionalists, on the other hand, argue that the Privy Council erred in interpreting the constitution like any other act. They state that constitutions must rather be read flexibly, with policy consequences in mind,¹²⁰ and that if this were done, it would be apparent that Canada's foreign relations had to be entirely within the purview of the federal government.¹²¹ Section A will address and reject the constitutionalists' argument, establishing that while the constitution may not be an ordinary statute, the structure of the division of powers cannot be lightly interfered with on mere assertions of policy grounds, be it in the name of the progressive or the purposive approach to constitutional interpretation. Section B will do the same for the fundamentalists, arguing that centralization does not denote a complete absence of decentralization, and there is no reason to conclude treaty implementation must fall within the centralized powers.

A) Rejecting the constitutionalists' reliance on international expedience as a valid justification for exclusive federal jurisdiction over treaty implementation

i) Inability of the "progressive" approach to constitutional interpretation to justify rejection of the *Labour Conventions* rule

As mentioned above, Cairns' constitutionalists rely on notions of flexibility and policy to

¹¹⁹Alan C. Cairns, *Constitution, Government, and Society in Canada* (Toronto: McClelland and Stewart, 1988) at 44-46.

¹²⁰*Ibid.* at 48.

¹²¹*Ibid.* at 50-51.

justify a reversal of *Labour Conventions*. The most common tactic of those following this approach is to rely on *Edwards v. Canada (A.G.)*,¹²² and allege that Lord Atkin failed to heed that case's view of Canada's constitution as a "living tree", instead freezing the constitution in time and preventing Canada from evolving to meet the needs of an increasingly global society. Such commentators, however, take an overly simplistic view of the living tree doctrine, treating it as a catch-phrase, rather than carefully examining the context in which it initially arose, and thus its proper application.

Edwards concerned the interpretation of the word "person" in section 24 of the *British North America Act*, the provision authorizing the Governor General to summon "qualified [p]ersons" to the senate. Lord Sankey for the Privy Council concluded that the word "person" included women, employing a contextual analysis that noted the existence of other constitutional provisions that either specified a gender, used the term "persons" to evidently indicate both males and females, or explicitly listed other senatorial qualifications. Lord Sankey acknowledged that at the time the provision was drafted, custom would have excluded women from being considered eligible to sit as senators, but concluded that the constitution must not be frozen in time. Rather, the *BNA Act* was a "living tree capable of growth and expansion within its natural limits".¹²³ Those who use *Edwards* to critique *Labour Conventions* appear to stop their analysis at that statement, ignoring Lord Sankey's emphasis that the constitution be given "a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own

¹²²*Edwards v. Canada (A.G.)*, [1930] A.C. 123, [1930] 1 D.L.R. 98 (P.C.) [*Edwards* cited to D.L.R.].

¹²³*Ibid.* at 106-107.

house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.”¹²⁴ In other words, the Privy Council stressed that the living tree doctrine did not give *carte blanche* to expand the constitution to meet any and all perceived needs; such growth was subject to “fixed limits”. Lord Sankey further suggested the nature of these limits when he explicitly cautioned that “their Lordships are not here considering the question of the legislative competence either of the Dominion or its provinces which arise under secs. 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its provinces their respective spheres of government”.¹²⁵ As such, those who invoke the living tree doctrine as an automatic justification for all sorts of change in the name of progress are failing to apply the necessary restraints. Lord Sankey’s emphasis both on the provinces being mistresses in their own houses, and on sections 91 and 92 not being implicated in the case at bar (when evidently any number of sections were not implicated, yet he saw fit to single out the division of powers), combine to suggest that the Privy Council wanted the constitution to adapt to reflect the values of a changing Canadian society, but considered that the division of powers itself was not meant to be easily reinterpreted in light of changing attitudes. Rather, it was meant to provide the enduring structure *within* which evolution might occur.

This is not to say the living tree metaphor is inapplicable to division of powers cases. The metaphor is commonly associated with the “progressive” approach to constitutional interpretation, which “requires that the language used to describe the heads of power in the

¹²⁴*Ibid.* at 107 [emphasis added].

¹²⁵*Ibid.*

Constitution is not to be frozen as it would have been understood in 1867. Rather, the words of the *Constitution Act, 1867* are to be given a ‘progressive interpretation’ so that they are continuously adapting to new conditions and new ideas”.¹²⁶ The progressive interpretation has been most commonly applied to developments that could not have been contemplated in 1867, slotting such new technologies as the telephone, radio, television, or aviation into the division of powers.¹²⁷ As Hogg notes:

Much modern regulation of labour relations, the professions, marketing, and business generally, pursues purposes and employs means that could not have been anticipated in 1867; nor could the rise of the welfare state, with its elaborate systems for the public provision of education, health, and welfare have been anticipated. Yet all these developments have been litigated through the courts, and decisions have been given as to the legislative body with responsibility for each new measure. In every case the court has assumed that the language of the constitutional text is capable of application to laws that could not possibly have been within the contemplation of anyone in 1867.¹²⁸

Walton sounds a note of caution regarding the progressive interpretation, stating, that “the interpretation arrived at must fit within the purpose of the provision”, and it “cannot be relied upon to support broadening the interpretation of a provision beyond its natural limits.”¹²⁹ Indeed, she states that this doctrine “has not been relied upon to include a subject matter that was in existence at the time of enactment and was excluded, or vice versa”.¹³⁰ In other words, while the “living tree” metaphor allows for the interpretation of sections 91 and

¹²⁶Luanne A. Walton, “Making Sense of Canadian Constitutional Interpretation” (2000-2001) 12 Nat’l J. Const. L. 315 at 332-33.

¹²⁷*Ibid.* at 336; Peter W. Hogg, “The Charter of Rights and American Theories of Interpretation” (1987) 25 Osgoode Hall L.J. 87 at 98 [Hogg, “American Theories”].

¹²⁸Hogg, “American Theories”, *ibid.* at 98-99 [citations omitted].

¹²⁹Walton, *supra* note 126 at 350.

¹³⁰*Ibid.*

92 to cover new technological and societal developments, this must always be subject to the fixed limits identified by Lord Sankey, including the basic balance between the federal and provincial governments.

Given this limitation on the appropriate use of the “living tree” metaphor, one must question whether it is in fact diametrically opposed to Lord Atkin’s “watertight compartments” metaphor from *Labour Conventions*, as many commentators assert.¹³¹ While it may be the case that *originalism* and progressive interpretation are virtual opposites,¹³² that still leaves the question of whether it is fair to equate originalism with watertight compartments.

Walton claims that the *Labour Conventions* case is “[t]he closest the JCPC ever came to overt originalism”, quoting Lord Atkin’s “water-tight compartments” metaphor, but then adds the caveat that “even while stating that the terms of sections 91 and 92 of the *Constitution Act, 1867* were frozen in 1867, the Court did not concern itself with evidence of what those terms originally meant”.¹³³ Lord Atkin did consider what sections 91 and 92 meant, and found that “treaty implementation” was not contained within them, whereas

¹³¹See e.g. Milani, *supra* note 23 at 201, who contrasts Lord Atkin’s “watertight compartments” with Lord Sankey’s “living tree”, suggesting the two approaches are incompatible, and that the latter is the “more widely accepted description of the *B.N.A. Act.*” He claims that Lord Sankey “might well have given new life to section 132 . . . by extending it to apply to Canadian treaties”. See also Strom & Finkle, *supra* note 47 at 43, who, in contrasting the Canadian and Australian approaches to the treaty implementation issue, state that both countries’ courts were faced with the same choice: “Do they engage in a literal, narrow, ‘strict constructionist’ judicial analysis or should they employ a more daring, purposive, ‘living tree’ approach to constitutional interpretation?” The authors argue that Canada initially followed a purposive approach in the *Radio Reference*, but quickly reversed by *Labour Conventions*, and has “since upheld the narrow, ‘literalistic’ approach”.

¹³²Walton, *supra* note 126 at 332.

¹³³*Ibid.* at 317-18.

“property and civil rights” were. Be that as it may, in terms of Walton’s allegations of freezing the division of powers in time, Lord Atkin’s words bear repeating:

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and provincial together, she is fully equipped. But *the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces*. While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure.¹³⁴

This passage is not inconsistent with the progressive approach to constitutional interpretation; on the contrary, it explicitly contemplates the incorporation of new responsibilities into the legislative structure (“her new functions derived from her new international status”). All it requires is for the original *structure* of the constitution, namely its division of powers, to be maintained in a manner that does not allow powers shift back and forth, sloshing from one compartment to another. As noted above, the progressive approach has not been applied to alter the division of powers regarding matters already in existence at the time of Confederation; the courts have recognized that powers assigned to the provinces ought to remain with the provinces, with the same holding true for federal powers. As such, while “watertight compartments” is frequently interpreted as meaning nothing can be added or taken away, it more likely denies only the latter. That is, a head of power can encompass *more* than it did in 1867, but it should not encompass less. This is consistent with the jurisprudence on the national concern doctrine, which Beetz J. (dissenting, but in the majority on the applicability of the national concern doctrine)

¹³⁴*Labour Conventions*, *supra* note 1 at 683-84 [emphasis added].

described as having:

the effect of adding by judicial process new matters or new classes of matters to the federal list of powers. However, this was done only in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration before they were recognized as federal: if an enumerated federal power designated in broad terms such as the trade and commerce power had to be construed so as not to embrace and smother provincial powers . . . and destroy the equilibrium of the Constitution, the Courts must be all the more careful not to add hitherto unnamed powers of a diffuse nature to the list of federal powers.¹³⁵

This might initially strike some as illogical – either the heads of power are still up for debate or they are not – but it is in fact an entirely reasonable conclusion. What is frozen in time is the base structure of the division of powers; if health was a matter of provincial jurisdiction in 1867, the fact that it is subject to a treaty today does not suddenly stop it from being identical to the provincial interest that has always been protected. As such, Lord Atkin was concerned simply with the shifting of powers *between* the federal and provincial “compartments”. Treaty implementation could not be considered a new power, because the effect of such a power would be to strip old powers from the provinces; the real question the Privy Council was charged with answering was whether labour standards could be removed from provincial jurisdiction and assigned to the federal government. In short, when Walton notes that since becoming Canada’s final appellate court in 1949, the Supreme Court has generally “rejected the theory of ‘watertight compartments,’ preferring a progressive interpretation which allows the Constitution to evolve in response to technological and social change”,¹³⁶ she is using “watertight compartments” as shorthand for “originalism”, and that

¹³⁵ *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 458.

¹³⁶ Walton, *supra* note 126 at 318.

connection is misleading. The *Labour Conventions* rule does not stand in the way of progress; it stands in the way of taking from one level of government to give to another.

This misunderstanding of what a “progressive” approach to constitutional interpretation entails can be seen in the arguments of H. Scott Fairley, who criticizes *Labour Conventions* for failing to be progressive, justifying the use of p.o.g. or trade and commerce to provide the federal government with the power to implement treaties on the basis that “judicial duty extends to flexibility in constitutional interpretation in keeping with the needs of an evolving polity.”¹³⁷ He argues that the absence of any provision in the constitution dealing with international relations is a “glaring omission”, reflective of the fact that the constitution did not keep pace with Canada’s emergence as an independent nation.¹³⁸ To that end, Fairley acknowledges that *Labour Conventions* was concerned with “the eminently justifiable judicial priority of maintaining the federal balance set out in the [*Constitution Act, 1867*], the ‘federal principle’ so-called”, but then refers to this principle as something “which the Supreme Court of Canada was required to interpret and apply prior to the patriation of the Constitution in 1982”.¹³⁹ While the *Constitution Act, 1982* no doubt affected some provincial rights and altered the federal relationship, such as by subjecting provincial legislation to the restraints of the *Charter*, as well as inserting certain specific provisions on matters such as taxation and resource control,¹⁴⁰ the division of powers dating from 1867

¹³⁷Fairley, *supra* note 110 at 231.

¹³⁸*Ibid.* at 223.

¹³⁹*Ibid.* at 224.

¹⁴⁰See *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at 772-773.

persists as fundamental to Canada's constitution. As such, when Fairley laments that "there has been little if any acknowledgment within the confines of the federal principle of an equally prescriptive notion of the growth of Canada since 1867 from a colony to a nation, a single nation-state in the eyes of the rest of the world",¹⁴¹ one must ask on what basis he considers a strict adherence to the division of powers as being incompatible with nationhood. The author implies that those who do not factor Canada's external affairs obligations into their interpretation of the constitution are outdated originalists, but that is not the case. The constitution is capable of evolving, but only to the extent that this change is in keeping with its larger principles, not to the extent that it detracts from them. The preservation of provincial authority over its heads of power is a principle worth preserving, and need not be altered by relationships the federal government chooses to enter into on the international stage.

ii) Inability of the "purposive" approach to constitutional interpretation to justify rejection of the *Labour Conventions* rule

Many commentators argue that the purposive approach to constitutional interpretation requires a reversal of the *Labour Conventions* rule. This is the argument implicit in most international relations-based critiques: the constitution must be interpreted to the benefit of Canada, and that means it must enable Canada to fulfill its international obligations as efficiently as possible. Wallace W. Struthers encapsulates well the flaw in these commentators' reasoning, accusing them of spouting "global trade rhetoric" and of ascribing to the highly disputable view that "law consists and ought to consist of those rules which

¹⁴¹Fairley, *supra* note 110 at 224.

maximize a society's material wealth, and the efficient operation of markets designed to generate it".¹⁴² In fact, these critics are guilty of a gross misunderstanding of the interpretative approach, one that equates "purposive" with "pragmatic". The misunderstanding regarding the acceptable degree of flexibility when interpreting the constitution in accordance with the purposive approach is not surprising, given the breadth of constitutional provisions to which it applies, and the failure of courts and commentators to distinguish among them. For example, in Sullivan's words, when interpreting a statute according to the purposive approach, "the text is thought of as a map or a blueprint and the primary focus in interpretation is not so much the meaning of the text as the reasons for enacting it and the directions in which it points. Under a purposive approach, the court defers to the legislature not by decoding its language but by ensuring that its plans are carried out".¹⁴³ She adds that "with respect to the Charter and other constitutional documents, the courts adopt a dynamic approach. Under this approach, meaning is not tied to the framer's original understanding but is permitted to evolve in response to both linguistic and social change."¹⁴⁴ In support of this statement, she quotes Marceau J.A. in *Canada (A.G.) v. Mossop*, who explains the rationale as follows: "the main reason why the Charter [is] interpreted in a very special way, and particularly without the same deference to the historical intentions of the drafters and legislators, is that the difficulties of amending the Constitution could cause its provisions to fall behind changes in society's conception of basic societal values and thereby render them inadequate and unable to fulfill its very

¹⁴²Struthers, *supra* note 24 at 308.

¹⁴³Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., (Toronto: Butterworths, 1994) at 35 [Sullivan, *Driedger*].

¹⁴⁴*Ibid.* at 137.

role.”¹⁴⁵

A similar explanation is offered by Dickson J. in *Hunter v. Southam Inc.*: “Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country’s future as well as its present.”¹⁴⁶ Pierre-André Côté cites *Re B.C. Motor Vehicles Act*¹⁴⁷ for the proposition that “[c]onstitutional law must be dynamic rather than static, and its interpretation is analysed less as a quest for the thoughts of its framers, as one for the rule which, at the time the Constitution is applied, will provide the more adequate solution to the problem before the court”.¹⁴⁸ From each of these descriptions is thus planted the idea that the constitution should be interpreted in the way that allows it to best achieve its purposes.

There are a few problems with this approach. First, it conflates *Charter* interpretation with division of powers interpretation. Constitutional interpretation of the division of powers must differ from interpretation of the *Charter* because the latter is concerned with the rights of individuals and groups against the state. There is a presumption of statutory interpretation that in cases of ambiguity, one should side with the meaning that favours individual rights.¹⁴⁹

¹⁴⁵*Canada (A.G.) v. Mossop*, [1991] 1 F.C. 18 at 33 (C.A.), aff’d [1993] 1 S.C.R. 554, quoted *ibid.* at 138.

¹⁴⁶*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155.

¹⁴⁷[1985] 2 S.C.R. 486.

¹⁴⁸Pierre-André Côté, *The Interpretation of Legislation in Canada* (Scarborough, ON: Carswell, 2000) at 11.

¹⁴⁹*Ibid.* at 470.

Given that the *Charter*'s entire purpose is to bestow rights, it is in keeping with the purposive approach to give the *Charter* a flexible reading that will maximize the rights it affords. Sections 91 and 92 of the *Constitution Act, 1867*, however, are not rights-granting provisions of the same variety as the *Charter*. They assign legislative authority to the two levels of government, but these are rights as against one another, not against some all powerful "state". As such, there is no presumption that requires the rights bestowed in those sections to be interpreted broadly. Indeed, if they were all to be interpreted broadly, this would create intractable conflict between the jurisdictions. Passages from *Charter* cases that discuss the importance of flexible, policy-oriented interpretations must thus be applied with great caution to the division of powers context. Courts have done a great disservice in so frequently describing these principles as principles of *constitutional* interpretation when in fact the case before them implicates only the *Charter*, because the power dynamics are not comparable. Sections 91 and 92 can be interpreted flexibly in so far as this is necessary to categorize new matters, as discussed above. Shifting existing powers from one level of government to another, however, on the grounds that modern society calls for such a shift, ought to be resisted. Such behaviour assumes the purpose of the division of powers is to make life easy for the federal government, or to achieve pragmatic benefits, and that is unfounded.

What then is the purpose of the division of powers that is meant to be furthered through a purposive interpretation? Having established that the initial task of courts in deciding how to classify laws by jurisdiction is to determine which aspect is most important, W.R.

Lederman turned his attention to how one judges the relative importance of various aspects

of a law's meaning. He stated that:

If we assume that the purpose of the constitution is to promote the well-being of the people, then some of the necessary criteria will start to emerge. When a particular rule has features of meaning relevant to both federal and provincial classes of laws, then the question must be asked, Is it better for the people that this thing be done on a national level, or on a provincial level? In other words is the feature of the challenged law which falls within the federal class more important to the well-being of the country than that which falls within the provincial class of laws?¹⁵⁰

While this may also imply a focus on pragmatic benefits, one must not disregard Lederman's caution that "[s]uch considerations as the relative value of uniformity and regional diversity, the relative merits of local *versus* central administration, and the justice of minority claims, would have to be weighed".¹⁵¹ In other words, the question of whether it is "better" for a given thing to be accomplished by the federal government is about much more than efficiency or consistency; it implicates the very nature of federalism. To this end, Lederman's remark that "inevitably, widely prevailing beliefs in the country about these issues will be influential and presumably the judges should strive to implement such beliefs"¹⁵² must be treated with caution. While the people's conception of their country's federal structure is a relevant consideration, surely it is not Lederman's intention that the interpretation of the constitution become a matter of majority rule. Given that precedent will continue to inform constitutional analysis for years to come, it is apparent that a passing preference for federal or provincial supremacy, possibly inspired by the popularity or lack thereof of a particular government in power, should not dictate the division of powers.

¹⁵⁰W.R. Lederman, "Classification of Laws and the British North America Act", in *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 229 at 241 [Lederman, "Classification"].

¹⁵¹*Ibid.* at 241.

¹⁵²*Ibid.*

Rather, it is essential to review the rationale behind Canadian federalism, and the importance ascribed to it by all players. This is particularly true in the *Labour Conventions* context, where it must always be recalled that existing provincial powers are at stake. That is, even if one attempts to categorize the subject matter in question as the “new” matter of treaty implementation, rather than the base matter of property and civil rights, for example, the effect is still to tie the provinces’ hands in terms of their ability to choose for themselves how to legislate in a field over which they previously had free reign.

In other words, the “more adequate solution” endorsed by Côté is not necessarily the best or most convenient solution for the applicant; it is the solution that takes into account context, principle, and future implications in attempting to reach the most desirable outcome. In *Charter* cases, this restriction is apparent; even the most sympathetic litigants may not be entitled to the result many would want to give them, if to do so would not accord with the law. In the *Labour Conventions* scenario, however, many commentators seem willing to *make* convenience the law, to toss aside the division of powers when it stands in the way of progress, claiming that such is the constitution’s purpose. This is illustrated by Fairley, who states that in providing the federal government comprehensive jurisdiction over treaty implementation, “the trick will be for judicial imagination to live up to their potential. They will have to fashion new constitutional doctrine which both recognizes and constrains the comprehensive external affairs power Ottawa needs but does not have”.¹⁵³ While it is encouraging that Fairley is concerned with “constraint”, this approach to constitutional interpretation is nonetheless troubling (though not uncommon in the *Labour Conventions*

¹⁵³Fairley, *supra* note 110 at 231.

debate): what do we want to achieve and how can we use the constitution to justify it?

It is in this category that one can place the suggestion from Luz that foreign nations should be able to insist that the federal government enact paramount legislation contrary to both federal and provincial wishes.¹⁵⁴ The author argues that the fact that all of the “reasonable steps” Canada presently has the power to take are not enough to satisfy the desires of its international partners is itself a reason to expand its powers to allow it to take further steps. In other words, the federal legislature *ought* to have a universal treaty-implementation authority because otherwise, other countries do not have enough recourse against broken international promises. Any concern for being respectful of provincial interests is silenced in this approach; if it is better for the international community that the provinces not be able to frustrate implementation of a treaty, the Canadian constitution should be interpreted to their will. As will be argued further in this section, constitutional interpretation cannot be determined by a single desirable outcome, such as international reputation. The division of powers is meant to reflect the various, and sometimes conflicting, needs and interests of Canadians, and it is far too simplistic to pronounce that international considerations trump all else, lest Canada experience the wrath of other countries.

Strom and Finkle provide another example of this attitude, claiming that “the evolution of Canada’s political and economic situation dictates that Canada requires a new, more flexible approach to treaty implementation”, and that this is in keeping with the Supreme Court’s willingness to “take a deliberately purposive approach to constitutional interpretation,

¹⁵⁴See Luz, *supra* note 57 and discussion.

regardless of whether it means overturning a long line of decisions”.¹⁵⁵ For this latter proposition, they cite *Morguard Investments Ltd. v. De Savoye*, in which the Supreme Court of Canada examined the enforcement of extra-provincial judgments, and determined that the provinces ought not treat each other as foreign countries; rather, the judgment of any court exercised pursuant to proper jurisdiction (i.e. a real and substantial connection to the action) ought to be given full faith and credit by all other provinces.¹⁵⁶ That this case reflects the purposive approach to constitutional interpretation is not doubted; La Forest J.’s judgment is informed by his discussion of the constitution’s intent to establish a single country and reduce interprovincial barriers.¹⁵⁷ What Strom and Finkle fail to recognize, however, is that the Court departed from the “long line of decisions” not simply because the lack of interprovincial enforcement was inconvenient, but because it was not in keeping with the spirit of the constitution; the Court was *rectifying* a long-standing misapplication of the law. Strom and Finkle’s proposal attempts to rectify a situation that is already respectful of the constitution’s intention to create a nation in which responsibilities are shared, and both the federal and provincial governments can be trusted to work towards Canada’s best interests. Moreover, *Morguard* provides no grounds for arguing that Lord Atkin’s watertight compartments are a thing of the past, and thus for doubting that aspect of the *Labour Conventions* rule. If anything, it reaffirms through its real and substantial connection requirement the importance of respecting the boundaries of provincial jurisdiction. As La Forest J. notes, “[t]he private international law rule requiring substantial connection with the

¹⁵⁵Strom & Finkle, *supra* note 47 at 43-44.

¹⁵⁶*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.

¹⁵⁷*Ibid.* at 1099.

jurisdiction where the action took place is supported by the constitutional restriction of legislative power ‘in the province’”.¹⁵⁸

iii) Evidence that Canada functions internationally despite the *Labour Conventions* rule

Those critics who have suggested that the *Labour Conventions* rule be repealed because it interferes to an unacceptable degree with Canada’s ability to participate globally have thus been addressing the entirely wrong question; they have offered no more a coherent *constitutional* critique than those who might point to all the “trouble” the *Charter* has caused in forcing the government to go out of its way “accommodating” people, and thus conclude that the *Charter* should henceforth be disregarded. Federalism *is* more complicated than unitarism. It is no doubt inconvenient at times for both levels of government, as are bilingualism, aboriginal rights, and *Charter* rights, yet each of these things is constitutionally protected and deserving of the same degree of respect. That said, while it has just been argued that as a matter of correct constitutional doctrine, neither the purposive nor the progressive approach to constitutional interpretation justifies the repeal of the *Labour Conventions* rule, it is apparent that were there evidence that *Labour Conventions* had completely *crippled* Canada, as many suggested it would, such a hardened constitutional approach might have to give way to greater flexibility. It must be admitted that there is no point having a constitution if the nation it governs is on the verge of self-destructing through isolationism. What follows, therefore, albeit with the caution not to assign too much weight to the “pragmatic” argument in the first place, is evidence that Canada has the tools to at the

¹⁵⁸*Ibid.* at 1109.

very least muddle through its international obligations satisfactorily, despite the added complications that admittedly accompany the *Labour Conventions* rule. It thus establishes that there is no justification for departing to any degree from the normal constitutional principles that govern division of powers cases.

Edward McWhinney was blunt in debunking the myth of *Labour Conventions*' disastrous repercussions almost forty years ago, stating that:

At the concrete, empirical level, it has in fact proved easily possible for Canadians to live with the decision; and so the purely abstract, *a priori*, prophecies of constitutional doom and gloom, launched by the critics of the late 1930's, have been amply dispelled by the historical record of events since that time. This part of Canadian constitutional history, at least, is surely a warning to legal pundits in general, and to law professors in particular, against the temptations of trying too much to play Cassandra.¹⁵⁹

Similarly, Gerard La Forest described the argument that *Labour Conventions* had made Canada "an international cripple" as "difficult to take . . . too seriously", given Canada's important role internationally.¹⁶⁰ He added that "if Canada finds its international role deficient in certain areas, it is not clear . . . that it has made a concerted effort to achieve its objectives by close and continuous consultations with the provinces. Provincial co-operation would often be required, or at the least highly desirable, even if the *Labour Conventions* case were reversed".¹⁶¹

This is not to deny that there may have been some instances, whether at McWhinney or La

¹⁵⁹McWhinney, *supra* note 2 at 5.

¹⁶⁰La Forest, *supra* note 3 at 148.

¹⁶¹*Ibid.*

Forest's time or since, in which the federal government opted to forgo a commitment out of implementation concerns. A.E. Gotlieb's review of the various options available to Canada to work around the obstacles to international relations put in place by federalism, however, suggests that there are ways to minimize those occurrences.¹⁶² Chief among the tools identified by Gotlieb is prior consultation with the provinces, which frequently results in assurances that a treaty can be implemented without reservations.¹⁶³ Indeed, Gotlieb notes that such consultation occurred even prior to *Labour Conventions*, with the federal government frequently communicating with the provinces when a treaty dealt with areas of provincial jurisdiction.¹⁶⁴ As well, Gotlieb highlights the use of federal state clauses or other reservations indicating that the government is committing only to federal, not provincial action. He notes that other states may not look favourably upon federal state clauses, particularly in treaties dealing with human rights, but attributes this to a belief that states should not be able to excuse themselves from obligations that are essentially codifications of *jus cogens*, not to any broader distaste for such reservations as a general rule.¹⁶⁵

In terms of empirical evidence of Canada's ability to fulfill its international obligations, the words of Canada's then Attorney General, and later Prime Minister, Kim Campbell, are instructive. The Attorney General spoke positively of the shared responsibilities of the federal and provincial governments, observing that with treaties requiring provincial

¹⁶²A.E. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968).

¹⁶³*Ibid.* at 77-78.

¹⁶⁴*Ibid.* at 77.

¹⁶⁵*Ibid.* at 79-80.

implementation:

the federal government consults actively and extensively, formally and informally, with the provincial governments both before and after the negotiations. We consult with the provinces on negotiating positions; we invite their representatives as delegates or observers to the negotiations; we work with them to ensure consistency between provincial legislation and the international commitment; and we assist in the compliance review requirements of international obligations, such as those in human rights.

We consult widely, not just to follow a legal decision, but also to fulfill a basic purpose of our federal Constitution – to ensure that national and regional interests are respected.¹⁶⁶

Campbell went on to discuss Canada's use and promotion of federal state clauses, which allow the provinces to exercise their autonomy in determining which agreements are of interest to them.¹⁶⁷ The spirit of Campbell's description, focusing on cooperation, mutual assistance, and respect, is a far cry from the critiques of *Labour Conventions*, which tend to paint the rule as the bane of Ottawa's existence, preventing any productive international work from being accomplished.

This reality is in fact in keeping with a report released by the federal government in 1968, outlining its position on the treaty-making power, as well as its response to the *Labour Conventions* decision and the obstacles that decision had created.¹⁶⁸ It recognized the provincial desire to enter into international agreements, but recommended greater cooperation and provincial consultation, all the while maintaining federal authority. In other words, the federal government appreciated the need for provincial involvement in foreign

¹⁶⁶Kim Campbell, "Federalism and International Relations: The Canadian Experience" (1991) 85 Am. Soc'y Int'l L. Proc. 125 at 127-28.

¹⁶⁷*Ibid.* at 128.

¹⁶⁸Martin, *supra* note 20.

affairs. While the report suggested that the federal government would prefer to be able to implement all treaties itself, it nonetheless recognized the need for cooperation, and expressed a willingness to work with the provinces in good faith. This undermines many commentators' and courts' assumptions that *Labour Conventions* is unworkable for the federal government, and serves as an important reminder of how ingrained cooperative federalism is for those who deal with it on a regular basis. It is the two levels of government that are most affected by the *Labour Conventions* rule, and it is therefore their appreciation and understanding of federalism that is particularly relevant.

Another practical view of the *Labour Conventions* decision at work in Canada is the Standing Senate Committee on Human Rights' interim report on Canada's implementation of the UN Convention on the Rights of the Child.¹⁶⁹ This report examines Canada's obligations pursuant to the Convention, and assesses how those obligations have or have not been met, identifying obstacles to full implementation, and offering recommendations to facilitate the implementation of future human rights treaties. *Labour Conventions* is heavily implicated because, as noted in the report, some aspects of children's rights, such as immigration and criminal law, are within federal jurisdiction, but others, such as child protection and family law, are the legislative responsibility of the provinces. The report highlights many of the challenges that Canada's federal system poses for the implementation of treaties such as the Convention on the Rights of the Child, such as discrepancies in various provinces' youth-oriented laws and programmes, and concludes that Canada has not

¹⁶⁹Standing Senate Committee on Human Rights, *Who's in Charge Here? Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*, Interim Report (November 2005).

taken its international human rights obligations seriously enough.¹⁷⁰ It is nonetheless optimistic about steps that can be taken earlier in the ratification process to ensure provinces are onside and aware of their obligations.

This view is supported by the many provincial representatives from whom the Committee heard in preparing its report, who expressed frustration at the presently inadequate communication, but were supportive of both informal and more formal mechanisms to improve coordination and ensure treaties were implemented in everyone's best interests.¹⁷¹ In other words, while commentators rush to declare *Labour Conventions* unworkable, laying the blame largely at the provinces' feet, those on the front lines do work with it, and while doing so imperfectly at present, they recognize that with proper cooperation, important international objectives can be achieved.

A further sign that the *Labour Convention* doctrine is not nearly as unworkable as its critics would suggest is the fact that other countries have adapted it for their own use. McWhinney notes that the West German Federal Constitutional Court in 1957 opted to follow the Canadian rather than the American example in concluding that the balance between federal and provincial powers ought to continue through foreign affairs, and thus rejecting a separate federal foreign affairs power.¹⁷² Furthermore, Harrington notes that the United Kingdom, in devolving certain powers to Scotland, Wales, and Northern Ireland over the past decade,

¹⁷⁰*Ibid.* at 58-68.

¹⁷¹*Ibid.* at 71-82.

¹⁷²McWhinney, *supra* note 2 at 5.

retained for itself the power to enter into treaties, but “opted for a *Labour Conventions*-style approach with respect to treaty implementation in the post-devolution era, accepting that a dual or ‘parallel’ competence for implementation exists as a result of the division of powers between Westminster and the devolved legislatures”.¹⁷³ This arrangement has been accompanied by greater opportunities for the devolved administrations to be involved in the treaty-making process.¹⁷⁴ This is not to say the *Labour Conventions* rule is universally preferred; that is far from the truth, with Australia providing one example of a federal state whose courts have rejected the Canadian approach and instilled its federal government with a treaty implementation power notwithstanding the usual division of powers.¹⁷⁵ These examples of West Germany and the United Kingdom merely serve to debunk the theory that a divided treaty formation and implementation regime is a ridiculous idea that no one who gave any serious thought to its implications would choose, as it would be internationally crippling. The proof that *Labour Conventions*’ admitted inconveniences have been overstated is not only that Canada remains a functioning international actor, but that other states have willingly taken on those inconveniences themselves, in exchange for displaying a greater respect for their constituent parts. In other words, all of this is not to discount the legitimate complaints some critics have regarding the obstacles that the need for provincial cooperation presents to fulfilling international obligations. On the contrary, it accepts that those obstacles exist, but does not accept that they justify a “flexible” approach to the division of powers that has no basis in constitutional law.

¹⁷³Harrington, *supra* note 20 at 498.

¹⁷⁴*Ibid.*

¹⁷⁵ See Strom & Finkle, *supra* note 47.

B) Rejecting the fundamentalists' interpretation of the history and objectives of Canadian federalism

Several critics of *Labour Conventions* appeal to the intention of the Fathers of Confederation as supporting an exhaustive federal power over all aspects of foreign affairs. Scott, for example, stated that the Fathers of Confederation intended the federal government to receive all residual powers, and alleged that “[n]one but foreign judges ignorant of the Canadian environment and none too well versed in Canadian constitutional law could have caused this constitutional revolution”.¹⁷⁶ It should be recalled, however, that one of the reasons Canadian courts are reluctant to give much weight to legislative debates in statutory interpretation is that there is not necessarily one meaning or intent shared by all legislators. One must be cautious not to ascribe the views of particular individuals to the legislature as a whole.¹⁷⁷ The same is true regarding the Fathers of Confederation. Regardless of whether Sir John A. Macdonald “would be aghast” at the *Labour Conventions* decision, as Milani has claimed,¹⁷⁸ Sir John A. Macdonald was not unilaterally responsible for the constitution. As such, it is necessary to briefly examine the circumstances in which the division of powers was agreed upon, to get a fuller picture of the competing interests at play and the compromises that were made.

The word “confederation” historically referred to a very decentralized collection of states,

¹⁷⁶Scott, *supra* note 32 at 489.

¹⁷⁷Sullivan, *Driedger*, *supra* note 143 at 45.

¹⁷⁸Milani, *supra* note 23 at 200.

and Garth Stevenson posits that the term may have been deliberately misused in the Canadian context by those who favoured centralization to assuage the fears of those who disagreed. He refers to John A. Macdonald's statement that "'the true principle of a Confederation' meant a system in which all the powers not specifically assigned to the provinces were given to the central government" as "idiosyncratic", although it has come to be accepted as correct.¹⁷⁹ Stevenson refers to the division of powers as the "heart of any federal constitution", and notes that the division in the BNA Act enabled the federal government to "carry out the major objectives of Confederation", and "embodied a very centralist concept of federalism".¹⁸⁰ The fact that the constitution created a hierarchy with Great Britain superior to Canada, and Canada superior to the provinces, reflected in the power of each government to disallow the legislation of the government below it, makes this observation undeniable: the *BNA Act* prioritized centralization.¹⁸¹

Yet prioritizing centralization is not equivalent to eliminating all forms of decentralization. Those who point to the centralist intentions of the Fathers of Confederation as evidence that the treaty implementation power must belong to the federal government overlook all of the examples in the constitution where centralization did not win out. Indeed, Stevenson notes that while John A. Macdonald would have preferred a unitary state, as he had "serious reservations" about federalism, only a federation would ever receive the support of French

¹⁷⁹Stevenson, *supra* note 38 at 6.

¹⁸⁰*Ibid.* at 30-31, 33.

¹⁸¹*Ibid.* at 30.

Canada and the Maritime colonies.¹⁸² The greatest push for provincial powers came from French Canada, which was most concerned with social institutions, the family, education, and the legal system.¹⁸³ Although it might have been expected that the Maritimes would be vocal protectors of provincial legislative authority, since Confederation would require their existing governments to transfer much of their power to the federal government (this was not the case in Canada East and West, which had been unified as a single Province of Canada since 1841¹⁸⁴), Stevenson states that the Maritime representatives were in fact much more interested in provincial revenues and Senate representation than with the division of powers.¹⁸⁵ It is thus fair to conclude that the centralists had the upper hand, and would have offered the provinces only what was considered necessary to obtain their consent to Confederation. Indeed, it has been said that the *Labour Conventions* decision is “considered in Quebec to be one of the cornerstones of Canadian constitutional law”, as the Privy Council recognized the harm to provincial autonomy that would occur if section 132 were held to apply beyond Empire treaties, and sought to protect the provinces from this incursion.¹⁸⁶ Any argument that certain provincial heads of power are expendable must therefore fail; regardless of how Macdonald and other federalists envisioned their ideal Canada, they compromised on that vision, and that decentralizing compromise is now as important an element of the constitution as the centralizing core.

¹⁸²*Ibid.* at 26.

¹⁸³*Ibid.* at 29.

¹⁸⁴*Ibid.* at 21.

¹⁸⁵*Ibid.* at 29.

¹⁸⁶Morin, *supra* note 22 at 164.

To illustrate, had John A. Macdonald and his colleagues been asked in 1867 about the power to implement treaties should Canada some day enter into international agreements on its own behalf, no doubt they would have insisted such a power rested with the federal government, regardless of the subject matter of the treaty. Yet that supposition is irrelevant. Had a French Canadian delegate in 1867 been asked whether the federal government ought to have the power in that situation to encroach on Quebec's power over education or the family, simply by entering into a treaty on the subject, the answer may well have been no. That is, to assert the Canadian constitution is, as a general rule, highly centralized does nothing to explain why domestic legislation to implement the terms of an international treaty on labour standards should be treated like defence and copyright law, and not like health care or education. The constitution contains both centralized and decentralized elements, and the fundamentalists fail to establish why treaty implementation always belongs to the former.

Fairley makes an attempt at an explanation, as in support of his assessment of the external affairs power, he quotes James Madison's "principled argument" from the *Federalist* papers that "[i]f we are to be one nation in any respect, it clearly ought to be in respect of other nations".¹⁸⁷ He argues that the Fathers of Confederation had a similar intention, quoting the Attorney General from the 1865 parliamentary debates as stating that "all the powers which are incident to sovereignty" would rest with the federal government.¹⁸⁸ Fairley assumes that domestic implementation powers are properly characterized as "incident" to sovereignty, yet

¹⁸⁷Fairley, *supra* note 110 at 226.

¹⁸⁸*Ibid.* at 226-27.

this begs the question. For *a* to be incident to *b*, *a* must be a necessary accompaniment to *b*. No doubt this is what Fairley and other critics of the *Labour Conventions* believe, that without the authority to implement treaties, the federal power to enter into them in the first place is of little consequence. Yet surely the same could be said regarding the *separation* of powers over treaty formation and implementation; even where a treaty falls within federal jurisdiction, it is the federal executive that controls formation, but the federal *legislature* that is responsible for passing implementing legislation.¹⁸⁹ In the case of a majority government, the executive may be confident of the legislature's cooperation, but this is rarely assured with minority governments. If this separation of powers does not render the treaty formation power useless, neither can the division of powers, as both present a similar obstacle to the federal executive's desires. Moreover, the power to pass domestic legislation implementing a treaty's provisions is a power vis à vis other domestic governments, as are all the powers laid out in sections 91 and 92 of the *Constitution Act, 1867*; their purpose is to identify who, as between the federal and provincial governments, has the authority to enact a given piece of legislation. A power incident to sovereignty is a power one possesses *because* one is a sovereign nation. That is, it is a power vis à vis other sovereign nations, assigned by international law. As has already been discussed, international law is silent on domestic divisions of power, even in terms of treaty *making*, not to mention implementation. Quite simply, international law cannot bestow the authority to pass domestic legislation. For critics to rely on "sovereignty", therefore, as a justification for the abolition of the *Labour Conventions* rule, is simply misguided.

¹⁸⁹Harrington, *supra* note 20 at 468.

As such, when Sullivan laments that, “if Canada is to function domestically as a nation, the pan-Canadian interest at stake in the performance of Canadian treaties must not be made subject to the parochial interests of particular provinces. Part of what it means to be a nation is that the welfare of the whole must prevail over the welfare of the part”,¹⁹⁰ she overlooks the reality that another part of what it means to be the *Canadian* nation, is that the federal and provincial governments share legislative responsibilities, and the fact that provincial interests may in certain instances be “parochial” does not justify their casual dismissal. As explained earlier, to argue that the provinces frequently fail to appreciate benefits beyond their own narrow interests is beside the point; there is no caveat to section 92 that the provinces have jurisdiction unless the federal government thinks it could do better. Sometimes it probably *could* do better, but that is a critique of the division of powers, generally. To attack the *Labour Conventions* rule when one really believes the federal government ought to be able to legislate for the good of Canada regardless of whether it has entered into a treaty in that regard, is to muddy the legal waters, and allow ideology to overtake sound constitutional principle. The whole may not be quite as well off as a result of the part preserving its autonomy, but that comes with being a federal state with a constitutionally enshrined division of powers.

It is in that same light that one must read Davidson’s play off of Lord Atkin’s “watertight compartments” analogy:

While the ship of state may still retain her ‘watertight compartments which are an essential part of her original structure,’ it must be remembered that there can only be one helmsman at the wheel to chart the course and steer the ship of state as it ‘sails on larger ventures and into foreign water’ lest she flounder on the rocks by being

¹⁹⁰Sullivan, “Jurisdiction”, *supra* note 55 at 68.

driven in *all* directions at once. This helmsman must have the power to make and implement decisions for the better good of the entire ship; in the case of Canada this helmsman is the federal Parliament.¹⁹¹

The very premise of the constitution is that the provinces can be trusted *not* to cause Canada to “flounder on the rocks by being driven in *all* directions at once”; they were given powers over certain areas that, while largely confined to their own boundaries, would no doubt have some effect beyond them. The provinces know they benefit from the country’s overall well-being, and it is patronizing to assume they will not do their best to keep the ship of state sailing along adequately, even if not precisely in the direction Davidson’s chosen helmsman would take.

What then does the law consist of, or rather, what must one consider in distributing fields according to the division of powers? The best answer to that question is provided by Richard Simeon, who takes a more holistic view of federalism, laying out normative criteria against which to assess the functioning of federal systems, and to evaluate proposed changes. His approach was an attempt to move debates over federalism in Canada beyond “petty power mongering” to a more principled discussion of the values that federal systems are intended to promote.¹⁹² However, he emphasized that this was not a black and white exercise, as federalism is “not an end in itself, not something that can be inherently ‘balanced’ or ‘unbalanced’”.¹⁹³ How one assesses the pros and cons of federalism at large,

¹⁹¹Davidson, *supra* note 52 at 693-94.

¹⁹²Richard E. Simeon, “Criteria for Choice in Federal Systems” (1982-1983) 8 Queen’s L.J. 131 at 132.

¹⁹³*Ibid.* at 131.

or the assignment of a particular power to one level of government or the other, depends on the perspective one takes, and the values one favours as more important than others.¹⁹⁴

Simeon identifies three perspectives from which to evaluate federal systems. The first is the concept of community, and concerns the group with which we most identify ourselves.¹⁹⁵

The author divides Canadians into three categories, country-builders, province-builders, and (Quebec) nation-builders, while acknowledging that few people espouse a single viewpoint.¹⁹⁶ Everyone is a member of multiple communities, and whichever is in the fore at any given time will depend on the circumstance. As Simeon notes, “federalism is predicated on just this sort of division in the minds of citizens”.¹⁹⁷

The second perspective is the functional perspective, in which the division of powers should coincide with the level of government that can most efficiently and effectively meet the needs of citizens in a particular area. According to Simeon, this perspective does *not* focus on “rival national or provincial states. Rather, federal and provincial governments are seen to be different elements within a single system. Together – either through independent action, or through various forms of cooperation – they are responsible for governing the country and for satisfying the needs of citizens”.¹⁹⁸ In other words, both levels of

¹⁹⁴*Ibid.* at 131-32.

¹⁹⁵*Ibid.* at 136.

¹⁹⁶*Ibid.* at 136-41.

¹⁹⁷*Ibid.* at 136.

¹⁹⁸*Ibid.* at 141.

government should recognize when the other is more qualified to fulfill a given need.

However, Simeon notes that this is much easier said than done, as functionalists disagree as to the level of centralization and decentralization that leads to maximum efficiency.¹⁹⁹ Such arguments inevitably involve value judgments, as “[t]erms like ‘efficiency’ and ‘effectiveness’ or even ‘coordination’ always contain the implicit ‘for whom,’ ‘in whose eyes.’ A set of programs coordinated from one perspective may be quite uncoordinated from another”.²⁰⁰

Finally, the author considers the democratic perspective, which examines the effects of a particular federal system on “participation, responsiveness, liberty and equality”.²⁰¹ Again, however, greater or lesser centralization does not obviously lead to a particular effect on democratic rights. While decentralization may increase responsiveness, it may also decrease the power to achieve change. The existence of substantial overlap between government powers can be seen either as inhibiting accountability by allowing each government to shift responsibility to the other, or it can be seen as providing an extra layer of recourse if one level of government is unresponsive.²⁰²

The author acknowledges that none of these criteria provide easy or straightforward answers to questions of federalist change, but rather highlight the conflicting norms that inform

¹⁹⁹*Ibid.* at 143-44.

²⁰⁰*Ibid.* at 149.

²⁰¹*Ibid.* at 150.

²⁰²*Ibid.* at 151-55.

constitutional analysis. He argues, however, that they are helpful guides for assessing various systems and providing clarity to pre-existing beliefs. As Stevenson notes, while the concept of “federalism” may appear to be capable of concrete, value-neutral definition, “the effort to treat it thus never entirely succeeds”, as it shares a similar ideological quality as other terms such as “democracy” and “liberalism”.²⁰³ Simeon’s criteria thus encourage critics to question their ideology and consider factors they had previously overlooked. He notes that while “[i]t can never be certain what costs to, say, efficiency, might be imposed by a given decision about democracy . . . what is important is to realize that the trade-offs must be made”.²⁰⁴ Given these cautions, this thesis does not attempt a definitive application of Simeon’s criteria to the *Labour Conventions* rule. It is nonetheless important to highlight how few of Simeon’s considerations appear to have factored into most criticisms of the case, and how even those that have been considered have been applied very narrowly. In particular, it is important to reiterate that evaluating the *Labour Conventions* rule requires one to focus on the significance of treaties from each of these perspectives. That is, if a particular matter properly falls within provincial jurisdiction without a treaty, there must be something about the existence of the treaty itself that moves the matter into the federal jurisdiction in light of these perspectives. Does a citizen’s sense of community change on a federal official’s signing of a treaty? Does the federal government gain democratic clout on such an action? Does it change the functional considerations?

While the community perspective could support either side of the *Labour Conventions*

²⁰³Stevenson, *supra* note 38 at 3.

²⁰⁴Simeon, *supra* note 192 at 156.

debate, depending on whether one identified oneself more with one's federal or provincial government, critics ought to pay more attention to the kinds of issues that would be implicated by a reversal of the decision. That is, when one recalls that *Labour Conventions* is only ever relevant to treaties that pertain to otherwise provincial areas of jurisdiction, one can begin to ask whether citizens are more likely to define themselves as members of provincial communities with respect to some of those fields, and whether that conception shifts as soon as that field becomes subject to an international treaty. There is no indication that most commentators even considered the different communities that people might prefer to represent them in certain matters. Similar concerns arise in the democratic perspective, as the requirement that each province choose for itself what treaty terms ought to bind it allows more disparate views across Canada to be respected. This is not to suggest that preserving strong provincial powers is a perfect solution to representing the people's interests. As Simeon notes, there are many divisions within provinces, and thus minorities will not always be protected.²⁰⁵ In Stevenson's words, "[f]ederalism may protect those minorities which happen to make up a majority within one of the provinces or states, but it protects them precisely by allowing them to act as majorities, which means that they in turn can oppress the sub-minorities under their jurisdiction".²⁰⁶ Nonetheless, the tendency of *Labour Conventions'* critics to assume that the federal government's choices on what treaties to adopt are best for everyone shows a regrettable disregard for the democratic interests of the Canadian population.

²⁰⁵*Ibid.* at 152.

²⁰⁶Stevenson, *supra* note 38 at 16-17.

Even the perspective that has factored most heavily into the *Labour Conventions* analysis, the functional perspective, has been subject to a very shallow examination. Critics have assessed efficiency only from the perspective of the federal government dealing with international colleagues, not that of the provinces having to accommodate new federal laws into their existing provincial legislative structure on a given matter. These critics have failed to ask “for whom?” and “in whose eyes?” as Simeon suggested, instead simply assuming that international efficiency trumps all other interests. They have failed to question their view of federalism as a burden and inconvenience to the central government, and to consider instead whether the provinces can be trusted as partners in confederation. As such, while Richard Simeon expressed hope that debate about the “broad principles underlying federalism” would “remain a prominent feature of constitutional discussion”,²⁰⁷ that has not been the case in the *Labour Conventions* context. Indeed, one could read much criticism of *Labour Conventions* and be forgiven for failing to recognize that the principles at stake are of a fundamentally constitutional nature at all, such has been the focus on practicality and convenience, rather than the whole range of issues that are encapsulated in the division of powers.

Part IV: Misguided attempts to justify compromising on the *Labour Conventions* rule

Having established in Part III the lack of constitutional justification for modifying *Labour Conventions*, it remains to be determined if there is any room for doing so nonetheless, on the grounds that it would represent only a minor change of affairs, or an acceptable compromise. Several commentators have taken this tack, implicitly recognizing that their

²⁰⁷Simeon, *supra* note 192 at 157.

proposals to revisit *Labour Conventions* are not on firm constitutional ground, but suggesting that strict constitutional adherence is not warranted under the circumstances. Their first approach is to justify a modification by reassuring the provinces that their rights will be affected only slightly, and thus offset by the resulting efficiencies. This tactic takes two forms: first, critics suggest that the provinces will frequently be indifferent to their loss of jurisdiction; second, they assert that the incursion will be limited in scope due to restraints both self-imposed by the federal government, and imposed by the courts. In the alternative, many critics propose “compromise” positions that they claim protect provincial interests, while nonetheless improving international efficiency. This part will examine why all of these reassurances are empty. Once the federal government is authorized to disregard the provinces in an area of provincial jurisdiction, the damage is done: the division of powers has lost its authority.

A) Attempts to downplay the significance for provinces of reversing the *Labour Conventions* rule

i) Trivializing the loss of provincial jurisdiction

Gerald Morris has argued that the provinces may be uncooperative and fail to implement a treaty for a multitude of reasons other than actual disagreement with its terms, such as apathy, malice towards the federal government, and the fear of appearing too “pro-federal government” in the public’s eyes.²⁰⁸ He claims that a federal implementation power is necessary for situations where:

there was in fact very general acceptance in the provinces of the desirability of accepting proposed treaty commitments (perhaps because only trivial changes in

²⁰⁸Milani, *supra* note 23 at 208, 216.

existing provincial law would be necessary) and the conclusion of the treaty was being held up by little more than official apathy or by the occasional reluctance of provincial politicians to appear to be co-operating with the Federal Government (especially with a Federal Government drawn from another political party) even though the provincial leaders might have no specific objection to the substance of the treaty obligations in question.²⁰⁹

This perspective attempts to portray the power shift as being in both the federal government's and the provinces' best interests, as "[f]ederal officials could relax in the knowledge that the irritation of minor technical breaches of treaty obligations could be avoided, one way or the other, without providing grounds for a violent provincial reaction, while provincial spokesmen could reluctantly accept the commitment after a nice show of grumbling over 'a federal power play'".²¹⁰

In response to this approach, one must ask where in the constitution it is written that a government maintains its exclusive jurisdiction over a given area only if the other level of government is satisfied that its decisions on what to do with that jurisdiction are taken for the "right" reasons. The federal government does not get to take over because it does not like a province's reasons for not cooperating. If implementing a given treaty would be good for a province's citizens, the province should do so, and if it drags its feet, the federal government should be able to convince those citizens to demand that their provincial government cooperate. If it cannot do so, perhaps that is evidence that the province *does* speak for its citizens, after all. Similarly, for the federal government to be able to simply assume that a provincial government is apathetic, and thus take away its authority over a certain area, is in any case a gross infringement of the division of powers, no matter how much Morris

²⁰⁹Morris, *supra* note 22 at 491.

²¹⁰*Ibid.*

attempts to portray it as a minor, almost administrative, arrangement. Even if Morris is correct that provinces might sometimes prefer that a treaty be implemented for them, because while they do agree with it, they do not wish to be held accountable for it, as a general rule it is unfair to assume that the federal government is uniquely able to make difficult choices, whereas the provinces merely pander to popular opinion. In any event, one cannot clothe this proposal with the suggestion that it constitutes the federal government doing the provinces a favour. Ultimately, it is the federal government *unilaterally* deciding when it will deny the provinces their constitutional legislative rights. Just because one may occasionally approve of one's colleagues relieving one of a particular unpleasant responsibility, that does not mean one wants those colleagues to be able to take any responsibility they choose without one's approval, on their own assumption that one cannot handle it, or is not sufficiently interested. Recall the Supreme Court of Canada's caution in the *Secession Reference* regarding the unilateral usurpation of power by one level of government as being inconsistent with constitutionalism.²¹¹

ii) Offering empty reassurances about the extent of federal incursion

An even more common tactic is to downplay the risks of allowing the federal government a treaty-implementation power by asserting that the federal government can be trusted not to abuse it, and even if it attempted to do so, the courts would step in to preserve provincial autonomy. That line of argumentation is characteristic of Milani, who states that the federal government would be unlikely to “run roughshod over provincial powers”, as it has no desire to expand its own, and would rather remain “sensitive to the concerns of the [provinces]”,

²¹¹*Secession*, *supra* note 117 at para. 74; see also Stevenson, *supra* note 38 at 8.

and be “cautious” in international dealings.²¹² He claims that not only would the federal government face political repercussions if it attempted to expand its powers, the courts could overturn any abusive use of the treaty implementation power as colourable.

This opinion is shared by Susan A. McDonald, who argues that “[w]hile provincial autonomy would indeed be seriously threatened if the federal government was given the authority to bring provincial matters into the federal field of competence through the treaty-making power, there is no reason to believe that the federal Parliament would be allowed to enter into colourable treaties in order to extend its legislative power”, and indeed, “the very concept of federalism” serves as a restraint against the federal government abusing its authority.²¹³ She adds that “[c]urrent political pressure tending towards full federal/provincial consultation, and the constitutional doctrine of colourability, would be effective safeguards of provincial legislative autonomy”.²¹⁴

Fairley offers similar assurances that:

No Canadian court should or will give Ottawa a blank cheque for a unitary state. The test may seem somewhat problematic in view of the omniverous character of modern international agreements; but is such a colourable agenda likely for any federal government that wishes to be re-elected? Judicial review does not and need not necessarily scrap governing patterns of federal-provincial political checks and balances. At the same time, the courts can give Ottawa a legitimate trump card in the form of an external affairs power, yet still monitor the trust, as they already do throughout the balance of the Constitution demarcating the federal division of powers.²¹⁵

²¹²Milani, *supra* note 23 at 210.

²¹³McDonald, *supra* note 50 at 294-95.

²¹⁴*Ibid.* at 301.

²¹⁵Fairley, *supra* note 110 at 232.

Even La Forest, who does not take a firm position on the *Labour Conventions* rule one way or the other, expresses confidence in the provinces' ability to be heard, arguing that regardless of what political structure a state adopts, "local differences, if they are substantial enough, should and will find a voice and inhibit decision".²¹⁶ He thus challenges the risk raised by Lord Atkin that a treaty implementation power would allow the federal government to undermine provincial authority simply by committing itself to international agreements, stating that "such a view scarcely does justice to the effective power of the provinces, whether viewed politically, administratively, or otherwise. The general balance of our constitution is after all more strongly secured by historical, cultural, political, and geographical considerations than mere legalisms".²¹⁷

Milani supports his faith in the courts by stating that "[t]o believe that the courts would allow a federal power to envelop section 92 of the *B.N.A. Act* is to ignore that they could do so already. The courts could expand the federal peace, order and good government power to the point where almost everything would possess 'national dimensions.' They have not done so".²¹⁸ Of course, this article was written prior to *Crown Zellerbach*; as has been seen, the Supreme Court in that case gave p.o.g.g. a very broad application, and has not narrowed it since. More important, however, is the fact that a federal treaty power would leave very little to be objected to as being colourable in the first place; it would explicitly permit the

²¹⁶La Forest, *supra* note 3 at 148.

²¹⁷*Ibid.* at 149.

²¹⁸Milani, *supra* note 23 at 215-16.

federal government to pass legislation it would otherwise not have the authority to pass, on the basis of having made an international commitment. As such, the problem with relying on the courts to, in Fairley's words, "monitor the trust" placed in Ottawa in return for a foreign affairs power is that the limits on what that trust entails are poorly defined. What is "colourable" in these circumstances? While only implicit in most commentaries, Davidson makes it explicit in his own defence of a treaty implementation power:

As long as the exercise of the federal treaty power is *bona fide* and is not a mere colourable attempt to intrude on provincial powers, the fact that the subject matter might otherwise be within a provincial sphere of competence should not derogate from the paramount power of the federal Parliament to pass legislation to implement treaty obligations as part of the residual power to legislate for the peace, order and good government of Canada.²¹⁹

In other words, what would be unacceptable would be the federal executive entering into an international treaty for the sole purpose of giving it the authority to legislate domestically on a particular matter. While this was *one* of the fears expressed by Lord Atkin in the *Labour Conventions* decision, it cannot be said to be the provinces' primary worry. As Davidson himself notes:

there is no reason to believe that the federal government would use such a power as an untrammelled vehicle to enter into colourable treaties *simply to extend its legislative power*. Canada is, as are other nations, very jealous of the scope of its sovereign power. As assumption of international obligations puts limits on these powers, Canada is unlikely to enter into international obligations *merely to acquire competence over what would otherwise be provincial matters*.²²⁰

That is, the reassurance that colourable treaties and legislation will not be permitted is cold comfort; a federal treaty implementation power, even if used entirely legitimately, allows precisely what advocates of *Labour Conventions* want to avoid: the removal of provincial

²¹⁹Davidson, *supra* note 52 at 693.

²²⁰*Ibid.* [emphasis added].

authority over issues that are constitutionally guaranteed to them. That so many commentators would suggest that the provinces ought to be satisfied with the courts preventing incursions into their jurisdiction in circumstances where the federal government was not motivated by good intentions reveals their inattention to the supposed supreme nature of constitutional provisions. As mentioned earlier, these critics appear to be telling the provinces they should be happy they still have *some* powers. Yet they are entitled to a great deal more. Nowhere in the constitution does it state that governments may legislate outside their spheres as long as they do so with the best of intentions. Were that the case, the fact that the federal government genuinely believed Canada should have uniform education laws or rules of civil litigation, for example, would allow it to step in and legislate to that effect. Evidently that is not the case. The federal government is entitled to its opinions on what is in the citizens' best interests, and it is entitled to convince the provincial governments of that position. However, the ultimate determination of whether a particular set of provisions is in the citizens' best interests must fall to the government with the responsibility to legislate on the subject in question. On occasion, that will surely lead to federal frustration, but frustration is not grounds for disregarding the division of powers.

A similar response can be made to Milani's argument that it is better for the provinces to have to trust one federal government to act appropriately than for the federal government to have to trust ten provinces to be agreeable – otherwise, one province whose citizens supported its government could make the rest of Canada suffer, and the rest would have no recourse. If the federal government abused its power, however, “the electorate in *all* of

Canada could express its dissatisfaction”.²²¹ What Milani overlooks is that the federal government, if worried about the repercussions it might face, would likely attempt to implement only those treaties encroaching on an area of provincial jurisdiction that it believed would be supported by a majority (or more cynically, a majority of those whose votes mattered to the government in power); it would not risk angering too large a swath of its electoral base. Yet the division of powers does not give provinces jurisdiction to legislate only if a majority elsewhere wishes to do the same; the fact that the populations of even nine out ten provinces are willing to defer to the federal government on a particular issue does not mean the tenth loses its jurisdiction. Surely the constitutional rights of provinces who happen to be in the minority are just as worthy of protection as those who agree with the federal government’s stance.

As for the argument that a history of consultation and political pressure will ensure the provinces are heard even with a federal treaty implementation power, the status quo of consultation has arisen in an environment in which cooperation is necessary to ensure international obligations are met. Were the federal legislature given the power to implement all treaties itself, it is naïve to assert that the views of the provinces, particularly the less powerful or politically relevant ones, would carry the same significance as today. While consultation would not likely evaporate instantly, there is every reason to believe that over time it would become less of a priority, seen in some instances as an unnecessary inconvenience, and the provinces would gradually lose their voice in areas over which they had previously enjoyed exclusive jurisdiction. Seen in that light, La Forest’s confidence that

²²¹Milani, *supra* note 23 at 210.

provincial voices would find a way to be heard would become less sustainable as time passed and federal jurisdiction became legitimized. That is, dissenting voices are loudest when they can point to an injustice; were the courts to decide that treaty-implementation fell exclusively within the federal domain, there would be little basis for provincial protest.

B) Inadequacy of proposed alternatives that substitute concessions to the provinces in place of their constitutional rights

The same lack of appreciation for constitutional supremacy that plagues those who downplay the effect of *Labour Conventions*' reversal on the provinces can be seen in those who claim to want to protect the federal-provincial balance, and thus put forward propositions as "alternatives" to the *Labour Conventions* doctrine. While this attempt to soften the effects of a *Labour Conventions* reversal is an improvement over complete disinterest in provincial rights, it is wholly inadequate. Were one to propose to "substitute" some lesser right for a *Charter* right, one would surely be met with indignation; the idea of working around the constitutional division of powers to better meet federal needs ought to be no more acceptable. Moreover, even *Charter* rights can be subject to "reasonable limits", a caveat that does not exist on the division of powers.

For example, after contrasting the advantages and disadvantages of the Canadian and American approaches to treaty implementation, Jeffrey L. Friesen advocates a third alternative for "compact" federations such as Canada, which would allow the federal government to pass legislation to implement all treaties, but allow individual provinces to opt out of the federal legislation if it falls within their jurisdiction. As such, the default

position would be uniform implementation across the country, but if certain provinces were strongly opposed to the terms of the legislation (or strongly in favour of the preservation of their autonomy), they could withdraw.²²² Friesen suggests that the mere inclusion of the opt-out provision would reassure provinces that their autonomy was being respected, thus making them more comfortable of lending their support to a treaty, but in fact they might rarely use their opting out rights. In this way, Canada would still benefit from a normative regime, which would not be attained at all without the provinces knowing they had an opt-out safeguard.²²³ To be clear, however, Friesen is of the view that “[t]he federal government should have the power to enact the legislation necessary to implement a treaty, regardless of how intrusive the statute is on constitutionally allocated sub-unit subject matter competence”, and “such legislation should trump any contrary sub-unit law” unless the province opts out.²²⁴ The author notes that those provinces that do not opt out will then have uniform implementing laws, without the burden of having to create and pass their own legislation. He also claims that the opting out option “protects the legitimate interests of sub-unit autonomy that are so important in ‘compact’ federations”.²²⁵ The author suggests that ideally this opting out would be required before ratification, but he also entertains the possibility that allowing provinces to opt-out at any time might encourage them to accept the implementation from the start, without fear that if they did not object immediately, they

²²²Friesen, *supra* note 66 at 1444-48.

²²³*Ibid.* at 1447-48.

²²⁴*Ibid.* at 1448.

²²⁵*Ibid.*

would be forever relinquishing their power.²²⁶

While Friesen is apparently making efforts to preserve provincial control over their areas of jurisdiction, his solution fails to afford provincial rights the status they deserve as constitutionally enshrined provisions. That is, under the author's logic, Canada could presumably allow the federal government to legislate in *any* area of its choosing at any time, whether in implementation of a treaty or not, and as long as the provinces could opt out, their interests would be adequately protected. By extension, surely the provinces ought also to be able to legislate to their hearts' content, as long as the federal government has the opportunity to object if it so chooses. It is evident that this runs counter to the status of the division of powers as supreme law, whereby both federal and provincial jurisdiction are to be jealously guarded. The division of powers does not simply prevent the other level of government from passing laws one disagrees with, it prevents it from passing laws on subjects over which it is not supposed to have any say, regardless of how objectionable the content of those laws may or may not be. The essential question that Friesen fails to address is why the existence of a treaty is sufficient justification to even attempt to "balance[] the interests of federal implementation and sub-unit autonomy",²²⁷ when without the treaty, no such balancing is considered appropriate. While Friesen's concession to the provinces may as a practical matter save them from being forced to live with legislation they oppose, it does no more to protect their *constitutional* rights than those who would strip them of any involvement in treaty implementation whatsoever. The division of powers is about a great

²²⁶*Ibid.* at 1449.

²²⁷*Ibid.* at 1450.

deal more than the content of legislation and whether one agrees or disagrees with it; it is about treating the other level of government as a partner, with whom the country as a whole is governed, not as a lesser member who is permitted to raise objections, but not to decide for itself in the first place.

Similar problems befall Fairley's proposed alternative to the *Labour Conventions* rule.

Fairley claims that *ad hoc* negotiations between the provinces and federal government are inadequate, as they are impossible to enforce, and even if the federal government obtains the agreement of the provinces, subsequent provincial governments can easily withdraw their cooperation.²²⁸ The author suggests, however, that a constitutional amendment to put jurisdiction over international affairs in federal hands could follow effective senate reform, whereby the senate would become truly representative of provincial interests. Were this to be achieved, Canada could require senate ratification of treaties, and thereby reflect provincial interests.²²⁹ While it is difficult to offer a comprehensive critique of this proposal without knowing the terms of the mentioned senate reform, there is inevitably one major problem, which is that the senators, although representing the provinces, will never *be* the provinces. Under Fairley's plan, senators representing the minority view would be overruled, meaning the treaty could be ratified and all provinces would be bound to it, even those whose senators voted against it as being contrary to their interests. Recall that this will necessarily be in an area that, but for the existence of a treaty, would unquestionably fall within the provinces' exclusive jurisdiction. How, then, has even a reformed senate

²²⁸Fairley, *supra* note 110 at 225.

²²⁹*Ibid.* at 229.

preserved provincial interests? By making provincial concerns known, only to be outvoted? This solution makes sense only if one accepts that provinces professing a minority view on a treaty *ought* to be subject to majority will, that what is important is being heard, not being listened to.

That begs the question, however: why should the federal act of entering into a treaty be sufficient to strip a province of its right not to go along with the majority, a right it undoubtedly had up until the moment the federal government chose to sign onto an international agreement. By Fairley's logic, an effectively reformed senate ought to render the provincial governments redundant for all purposes; any legislation the federal government wished to pass on any subject should be acceptable, notwithstanding the division of powers, because the senate could be trusted to take care of provincial interests. It is evident that this is not what the constitution contemplates; the senate represents provincial interests only in areas of federal jurisdiction. If the representativeness of the senate is not a convincing argument for allowing the federal government to pass laws on property and civil rights in a given province, it does not suddenly become one because a treaty is involved. Like so many other critics, Fairley jumps straight to proposing a compromise between federal and provincial powers, without first establishing the constitutional basis for that compromise, that is, why a unilateral federal action justifies a reduction in provincial power in the first place.

Robert Howse does acknowledge the constitutional aspect of the issue, stating that although "[a]s a student of international trade law, I would have little hesitation in characterizing even

those provisions of NAFTA that deal with non-border measures as an integral part of the regulation of international trade and commerce in our times”, “[a]s a student of Canadian federalism . . . I cannot feel entirely comfortable with the notion that the scope of the federal trade and commerce power is infinitely expandable, depending on how broadly the trade negotiating agenda is cast at a given point in time”.²³⁰ He goes on to reject provincial cooperation as a prerequisite for federal incursion into their jurisdiction, as “this kind of rider on the exercise of legitimate federal powers forms no part of the existing constitutional architecture of the Canadian federation”.²³¹ Instead, he favours an approach whereby the federal government must satisfy a “minimal impairment” test, showing that it is encroaching on provincial legislative areas as little as necessary to achieve the relevant national objectives, whether through the p.o.g.g. or trade and commerce powers.²³²

The fundamental flaw in Howse’s “minimal impairment” test is that it inevitably resolves conflicts in favour of the federal government. That is, it accepts that provincial jurisdiction can as a rule be impeded, requiring only that the federal government to do so as little as possible. While Howse’s particular example of NAFTA is the kind of treaty that no doubt does have scope for significant federal implementation pursuant to the trade and commerce power, he phrases his proposal in too absolute terms. That is, one might argue that he is advocating a minimum impairment test to *limit* federal incursions where the courts have already found federal jurisdiction under p.o.g.g. or trade and commerce. This would be

²³⁰Robert Howse, “NAFTA and the Constitution: Does *Labour Conventions* Really Matter Anymore?” (1994) 5 *Constit. Forum* 54 at 54 [Howse, “NAFTA”].

²³¹*Ibid.* at 55.

²³²*Ibid.* at 57.

commendable, and indeed, in keeping with the strict provincial inability test, were it not for the fact that the mere existence of a minimal impairment test could in fact encourage courts to view provincial rights as thus adequately protected, and consequently grant the federal government some jurisdiction even in cases where its claim is more tenuous. As long as there is no constitutional provision giving the federal government the right to implement treaties, there is no reason its mere desire to do so should take precedence over the provinces' right to complicate that desire. What is being balanced is the provinces' explicit constitutional jurisdiction over a particular area, and the federal government's desire for efficiency, for which Howse fails to establish a similar constitutional mandate. The constitutionally protected right must surely take precedence, whereas Howse's proposed solution presupposes the opposite.

W.R. Lederman, influenced by Kerwin J.'s suggestion in *Johanneson* (since expressed more thoroughly in *Crown Zellerbach*) that the existence and terms of a treaty could be *evidence* of national dimensions, proposes a middle way between the *Radio Reference* doctrine that would have a treaty lead *automatically* to a federal implementation power, and the *Labour Conventions* doctrine that would make this never the case. He argues that entering into a treaty ought sometimes to allow for a federal implementation power, but should not be sufficient to displace the usual division of powers in "certain matters of fundamental significance for provincial autonomy".²³³ For example, he labels as unacceptable the prospect that by virtue of adopting a broad agreement, containing "very general standards and requirements that touch in one way or another every part of the total legal system of a

²³³Lederman, "Legislative Power", *supra* note 14 at 356.

modern country”, the federal government could assume jurisdiction over such issues as education, the regulation of local industries, and provincial electoral laws.²³⁴ He states that “[i]f national federalism is to continue, there must be certain fundamental matters in respect of which provincial autonomy is more important to Canada than is a national power to perform international obligations concerned with such matters.”²³⁵ Moreover, any federal power would be concurrent with provincial jurisdiction, with the doctrine of paramountcy leading to federal law overriding provincial law only when necessary to implement the treaty.²³⁶ However, Lederman expresses the view that the courts would likely uphold the federal implementation power most of the time, since Canada would not likely enter into treaties “unless under the pressure of very real social, economic, political or military necessity for limitations on national sovereignty, such limitations taking the form of uniform international rules in the matter concerned. These same real factors of pressure and necessity would usually establish the high degree of need for uniform action within Canada that would call for the operation of the federal general power”.²³⁷ In other words, we are back to the tactics employed by Milani, Davidson, Fairley and others of attempting to portray the reversal of *Labour Conventions* as representing very limited change for the

²³⁴*Ibid.* at 356-57. Lederman refers specifically in this regard to the Universal Declaration of Human Rights, presumably in reference to Canada’s initial abstention from voting in favour of a draft version the Declaration, which the federal government claimed at the time was owing to concerns about infringing provincial jurisdiction. Subsequent to Lederman’s writing, evidence has been presented that the jurisdictional question was merely a pretext: see William A. Schabas, “Canada and the Adoption of the *Universal Declaration of Human Rights*” (1997) 43 McGill L.J. 403.

²³⁵Lederman, “Legislative Power”, *ibid.* at 357.

²³⁶*Ibid.*

²³⁷*Ibid.* at 358.

provinces.

Lederman's approach has been criticized as being vague, and thus unpredictable.²³⁸ More fundamentally, however, it divides provincial powers into classes of important versus expendable, a distinction that the constitution evidently does not make.²³⁹ Lederman thus misunderstands the opposition to a federal treaty implementation power. The concern is not with the prospect that it will arise "automatically", but that it will arise at all. The author's reasoning that most cases will be decided in favour of the federal government because the "pressure and necessity" that come with treaties create a national concern is precisely the logic that defenders of the *Labour Conventions* rule fear. There is no need to take the fact that the government entered into a treaty as evidence of national concern; all it really establishes is a *perception* of national concern by the federal government. The courts must concern themselves with more objective assessments, and determine whether there was a national concern prior to and apart from the entrance into the treaty. Otherwise, they are deferring to the federal government to decide its own powers, rather than serving their proper function as impartial guardians of *both* federal and provincial rights.

In other words, there is a policy rationale for retaining the *Labour Conventions* rule, but it has nothing to do with convenience, or efficiency, or fulfilling international obligations. It lies in the inability of critics of the rule to establish why the federal government, acting unilaterally, ought to be permitted to reduce provincial powers. It is intuitive to argue that

²³⁸ See e.g. La Forest, *supra* note 3 at 150-51, Friesen, *supra* note 66 at 1443-44 and Sullivan, *supra* note 55 at 70.

²³⁹ See Sullivan, *ibid.*

Canada ought to be held to any international commitments it makes, and if that means shifting powers from the provinces to the federal government, so be it. But international commitments are a choice, so the need professed by the federal government is self-created. No doubt there are important treaties that Canada has not adequately implemented; some of those failures may be the result of provincial intransigence. There is also legislation unrelated to treaties that the provinces could enact that would be of benefit to Canadians, but it is widely understood that the federal government cannot step in and do it for them simply because it would be beneficial. It is imperative that critics of *Labour Conventions* step back and recognize how much significance they would ascribe to a treaty: if the federal government does not have the authority to enact a given piece of legislation, acting as though it does have that authority by representing to international partners that it can assure the implementation of a treaty should not be sufficient to bestow that authority. Such a situation would fail to respect the legitimate expectation of both the federal government and the provinces that the courts will not permit either level of government to unilaterally increase its own powers to the detriment of the other.

Conclusion

This thesis has argued that the apparent “consensus” that *Labour Conventions* ought to be overturned is incorrect for a simple reason: it has arisen from asking all the wrong questions. The relevant question is not whether the *Labour Conventions* rule is the most efficient model, or good for trade, or what Sir John A. Macdonald would have wanted. The question *must* be whether the *Labour Conventions* rule is constitutionally sound, taking into account principles of constitutional interpretation and federalism. When stripped to that core, the

criticism is revealed as shallow and largely irrelevant. Yes, the rule is inconvenient at times, but so is the *Charter of Rights and Freedoms*. Yes, other countries might prefer if the federal government could guarantee implementation, but other countries do not get to rewrite the Canadian constitution, and federal systems are accepted at international law. No, provincial cooperation cannot be assured under the current system, but assuming the worst in the provinces, namely that they will be petty troublemakers rather than rational partners who were constitutionally entrusted with the shared governance of Canada can only worsen federal-provincial tensions. It is time to put the controversy over *Labour Conventions* to rest, to encourage the cooperative work that is already underway, rather than fan the flames of federal-provincial discord by periodically renewing the call for the decision's rejection. Courts that might see fit to reconsider *Labour Conventions* would presently be faced with a very one-sided record, focusing on efficiency and incorrect assumptions about what is both possible and required. It is hoped that any court that does take the opportunity to review *Labour Conventions* will see past the rhetoric, treat the question as the constitutional issue it must necessarily be, and declare the rule to be of sound application going forward. After seventy years of criticism, tacit acceptance will not be sufficient to stem the hyperbole and restore respect for the constitutional principles that underlie the rule. A strong reaffirmation of cooperative federalism would be a welcome antidote to the mistrust and pessimism that critics of *Labour Conventions* have for far too long perpetuated.

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