MEMO ON INTERGOVERNMENTAL AGREEMENTS

INCLUDED IN THIS BINDER:

1. Memo on Intergovernmental Agreements
2. Photocopy of Magnet, J.E., *Constitutional Law of Canada: Cases, Notes and Materials* ("Interdelegation" and "Intergovernmental Agreements").
3. Photocopy of Hogg, P.W., *Constitutional Law of Canada* ("Cooperative Federalism" and "Treaties").
4. Photocopy of *Anaskan and The Queen.*
5. Photocopy of the Article Culat, D., "Coveting Thy Neighbour's Beer".
6. Point form of Kennett's Chapter Three "The Use of Intergovernmental Agreements in Water Resource Management" in *Interjurisdictional Water Resource Management in Canada: A Constitutional Analysis.*

Patty Robinet
July 02

MEMO ON INTERGOVERNMENTAL AGREEMENTS

INTRODUCTION

You asked me to research the legal issues of provinces entering into intergovernmental agreements in regards to a "state-provincial agreement to protect Great Lakes water". Moreover, you had asked that I look into whether or not the "provinces have the authority to do this and what the implications are". This includes an examination into the "constitutional authority" of the provinces, "treaty making" issues, and any "enforcement issues" of the parties themselves and third parties if a province fails to comply with the agreed terms.

In regards to this assignment, I have made several assumptions. These include: (1) that the state-provincial agreement to protect the Great Lakes water is concerned about keeping the lakes free from pollutants; (2) that there is currently no dispute resolution mechanism for any disputes between the provinces and states in regards to the Great Lakes water agreement, in the agreement itself; (3) that this agreement between the provincial governments is not characterized as a legal agreement, i.e. a binding contract, rather as a political agreement that is unenforceable; and (4) that this agreement is not, or will not be, constitutionalized.

CONCLUSION

Presently there is no comprehensive body of law on the topic of intergovernmental agreements; however, there are a small number of cases that deal with the subject, as well, as numerous academic articles. In regards to the legal status of intergovernmental agreements, I have come to the following conclusions.

First, a province is permitted to enter into intergovernmental agreements, with that of other Canadian governments. Although not necessary, this authority is derived from a statute. In the

present issue of conservation of the water quality of the Great Lakes, a province's authorization to enter into intergovernmental agreements comes from the federal statute, the *Canada Water Act*. Furthermore, Canadian courts recognize a government's ability, both provincial and federal, to enter into intergovernmental agreements.

Second, in regards to a province's ability to enter into international agreements, i.e. treaties, provinces are allowed to do so, however, these agreements are not binding on Canada. Only the federal government of Canada has an international legal personality that the international community will recognize. Consequently, only the federal government of Canada can bring any dispute, connected with the agreement, before an international court.

Third, concerning Constitutional jurisdiction over the pollution of interprovincial and international waters, there is some confusion as to what level of government has constitutional jurisdiction. Case law suggests that the federal government has ultimate jurisdiction, however, the federal government has the authority to delegate its jurisdictional control to the provincial governments, under the guise of administrative interdelegation. Therefore, the agreement will probably withstand any constitutional challenge by a third party that the agreement is *ultra vires* the constitutional authority of the provincial governments.

Fourth, the legal status, in regards to enforcement issues, is context specific to the agreement itself. For the most part, the legal status is dependent upon the language used and the constitutional status of the agreement. Accordingly, intergovernmental agreements are found to be within a spectrum of enforceability. On one end of the spectrum are those that are characterized as political agreements, which remain unenforceable, and on the other end are legal agreements by which the parties intended to be binding and, therefore, are enforceable. Another aspect to take into consideration is whether or not the agreement has been constitutionalized, i.e.

the agreement has been given special legal status and incorporated into the Constitution. If the agreement has been incorporated, then the agreement is enforceable against the participating parties.

With specific reference to intergovernmental agreements concerning water issues, those dealing with financing specific projects would generally be accorded legal status, however, those dealing with the direct management of the resource bear greater resemblances to political agreements, which are unenforceable. Therefore, if the present agreement concerning water quality issues of the Great Lakes contains no provisions or intentions for the agreement to be binding on the parties, and if there is no internal dispute resolution mechanism, such as arbitration, and if the language of the agreement is interpreted as not creating legal rights and obligations on the parties, then the agreement is unenforceable against an unwilling or recanting party.

Fifth, it is near impossible for a third party to bring a suit against the agreeing parties in order to enforce an intergovernmental agreement. This is due to contractual laws' "privity of contract" rule, as well as standing issues. Further, there is an assumption that an intergovernmental agreement will not and cannot be judicially enforced. However, if the agreement has been transformed into an independent legal statute, a third party, who is expecting to receive some form of benefit from the statute, may be able to enforce the statute against the parties.

Authority

"Most intergovernmental relationships depend upon informal arrangements which have no foundation in the Constitution, or in statutes, or in the conventions of parliamentary

government".[1] The authority to enter into intergovernmental agreements, may though, come from an Act, whereby a person, i.e. a Minister, is granted the authority to enter into agreements, concerning a specified subject matter, with the federal government of Canada or other provinces, as exemplified by *Re Anaskan and the Queen*.[2] However, "[i]t seems to be accepted by the courts in both Canada and Australia that, as a matter of common law, the Crown has a wide power to contract and does not need specific statutory authorization. There is no reason to think that the courts would take a different view of agreements (and especially arrangements) between two governments".[3]

The legal capacity for governments to enter into intergovernmental agreements, moreover, the capacity for governments to delegate this power to officials, is made clear by the courts in *Re Anaskan and the Queen*.[4] MacKinnon J. A concluded that the Province is authorized to enter into this provincial-federal agreement and that "there was no question of delegation of legislative jurisdiction; each [level of government] was operating properly within its own sphere dealing with situations authorized by s. 15 [of *Penitentiary Act*, R.S.C. 1970, c. P-6]".[5]

In relation to the present issue, an agreement to protect the water quality of the Great Lakes, the authority to enter into intergovernmental agreements, moreover, the authority for provinces to enter into these agreements is authorized by the *Canada Water Act*.[6] The preamble of this Act "authorizes the federal government to enter into agreements with the provinces for cooperative management and consultation with respect to 'Comprehensive Water Resource Management'

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[1] P.W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. 1 (Toronto: Carswell, 1997) at 5-43 [hereinafter Hogg].
[2] (1977), 15 O.R. (2d) 515 (Ont. C.A.) [hereinafter *Anaskan*]. Also, see J.E. Magnet, *Constitutional Law of Canada: Cases, Notes and Materials*, vol. 1, 8th ed. (Edmonton: Juriliber, 2001) at 163 [hereinafter Magnet].
[3] N. Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991) 29 Alta. L. Rev. 792 at 800. Also, see *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 [hereinafter *Re Anti-Inflation*].
[4] Magnet at 164.
[5] *Anaskan* at 520.
[6] R.S.C. 1985, c. C-11.

(Part I) and 'Water Quality Management' (Part II) and it includes guidelines regarding the content of these agreements".[7] The preamble states:

> WHEREAS the demands on the water resources of Canada are increasing rapidly and more knowledge is needed of the nature, extent and distribution of those resources, of the present and future demands thereon and of the means by which those demands may be met;
> AND WHEREAS pollution of the water resources of Canada is a significant and rapidly increasing threat to the health, well-being and prosperity of the people of Canada and to the quality of the Canadian environment at large and as a result it has become a matter or urgent national concern that measures be taken to provide for water quality management in those areas of Canada most critically affected;
> AND WHEREAS Parliament desires that, in addition, comprehensive programs be undertaken by the Government of Canada and by the Government of Canada in cooperation with provincial governments in relation to water resources, for research and planning with respect to those resources and for their conservation, development and utilization to ensure their optimum use for the benefit of all Canadians;
> NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows...

Provincial Treaty Making

The power to enter into treaties, that are meant to bind Canada in international law, remains within the exclusive domain of the federal government of Canada. The authority for Canada to enter into treaties is not found within the Constitution Act, 1867. Rather, Canada was not granted this power until 1947, when the King or Queen of Great Britain delegated this power in a document entitled Letters Patent constituting the office of Governor General of Canada (reproduced in R.S.C. 1985, Appendix II, No.131).[8]

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[7] S.A. Kennett, *Interjurisdictional Water Resource Management in Canada: A Constitutional Analysis* (L.L.M. Thesis, Queen's University 1989) (Kingston, Ontario: Queen's University, 1989) at 123 [hereinafter Kennett].
[8] Hogg at 11-2.

In order for an entity to enter into international treaties that are meant to be binding, that entity must have international legal personality.[9] This means that an entity's, i.e. the Canadian government, constitution must recognize that entity's power to enter into treaties:

> In the present condition of international law and State practice such recognition, as regards Canada, could only take place if the federal Constitution, the *British North America Act* were amended...The actors in the international community, which are mainly sovereign States, only recognize the capacity of member States to conclude their own international agreements when the federal Constitution permits and defines the limits of this capacity.[10]

Since the provinces of Canada do not have international legal personality, and the Constitution does not recognize provincial treaty making powers, ~~provincial~~ provinces cannot enter into treaties that are meant to bind Canada. Despite saying this, provincial governments do, and are permitted into contracts and/or agreements with foreign countries or American states. However, these treaties are not meant to be binding in international law.[11] Some examples are spousal maintenance orders, succession duties, motor vehicle registration, tourist information and drivers' licenses. "These various agreements or contracts are not intended to be binding in international law, and therefore they do not involve an assertion of treaty-making power".[12] Recently, according to Hogg, there have been claims by the provinces, especially that of Quebec, that they have treaty-making powers.[13]

Ultimately, though, "it [provincial treaty-making powers] has never commanded wide acceptance in Canada". Furthermore, the federal government has never accepted this provincial power. The federal position is set forth in two white papers: Martin, *Federalism and*

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[9] *Ibid.*
[10] A. Jacomy-Millette, *Treaty Law in Canada* (Ottawa: University of Ottawa Press, 1975) at 97 [hereinafter *Treaty Law in Canada*].
[11] Hogg at 11-17.
[12] *Ibid.*
[13] Hogg at 11-17 for some of the arguments for provincial treaty-making powers. See also, *Treaty Law in Canada* at 69.

International Relations (1968) and Sharp, *Federalism and International Conferences on Education* (1968). Essentially, "international affairs are an exclusive federal preserve".[14]

The implication of the province's lack of authority to enter into binding agreements with the U.S. is that in the event that one of the parties, i.e. a province or a state, does not fulfill its obligations, that complaining province or state cannot find recourse in an international court of law.

Constitutional Authority

Essentially, the authority to enter into intergovernmental agreements is not, per se derived from the Constitution itself.[15] The Canadian constitution does not recognize the ability of the federal or provincial government to enter into agreements. However, Canadian courts have upheld the legal capacity for them to do so, despite the lack of constitutional recognition.[16]

The Constitution, though, remains pertinent in the issue of a government's authority to enter into intergovernmental agreements in instances where the agreement is legislated and formed into a statute. A statute is only binding on individuals if it constitutionally authorized by the divided powers of government between the federal and provincial governments under the enumerated heads of s.91 and s.92 of the Constitution.[17] There seems to be confusion to which level of government actually has this ability. However, such cases as *Interprovincial Co-Operatives Ltd. v. Dryden Chemicals Ltd.*[18] stands for the proposition that the federal government has constitutional jurisdiction over international and interprovincial waters that is

[14] Hogg at 11-17.
[15] Magnet at 165. Also, see the discussion of provincial treaty making above.
[16] See *Anaskan*.
[17] See Kennett at 115 for a discussion of the various enumerated heads that may be used to make an argument for both federal and provincial government's abilities to legislate matters dealing with interprovincial and international waters.
[18] [1976] 1 S.C.R. 477 [hereinafter *Interprovincial*].

contaminated in one province and is carried over into another.[19] This is due to a couple of reasons. The federal government maintains control; first, because the matter is interprovincial in nature and, second, this subject matter is not explicitly enumerated within the Constitutional's heads of power (i.e. Section 91 and 92). Anything that is not explicitly granted constitutional authority to the provincial government remains in the residual legislative authority of the federal government.[20]

Implications

Due to a province's lack of constitutional control over legislative matters concerning the pollution of interprovincial and international waters, any legislative action, as a result of an agreement that a province may make in regards to such matters, may be struck down as *ultra vires* the Constitutional power of the province, and ultimately, will not be able to hold those in violation of the act, responsible.[21]

Even if the federal government grants provincial governments permission to act on its behalf in making laws concerning the pollution of interprovincial and international water, a court may find that, again, the law is *ultra vires* because the federal government cannot delegate its jurisdictional power to provincial governments. There is a rule against interdelegation.[22] However, this will not always be the case for there are ways in which the federal government can achieve flexibility with this prohibition against interdelegation. For instance the courts will recognize delegations that come in the form of a conditional legislation, incorporation by

[19] Hogg at 29-19.
[20] *Interprovincial* at 23.
[21] See *Interprovincial*. See, also, K. Wiltshire, "Working with Intergovernmental Agreements—The Canadian and Australian Experience" (Canberra, Australia: The Australian National University, Centre for Research on Federal Financial Relations, 1985) at 363 [hereinafter Wiltshire].
[22] See *Attorney General of Nova Scotia* v. *Attorney General of Canada*, [1951] S.C.R. 31. See, also, Magnet at 144.

reference (or adoption) and conjoint schemes with administrative cooperation.[23] According to Kennett, "this constraint [of interdelegation]...has been largely nullified by other cases permitting administrative interdelegation".[24] Furthermore, Hogg, argues that "it is doubtful whether even this rule can stand in light of the *Lord Day's Alliance*, a case upholding a federal statute which effectively allowed provincial legislation in the area of criminal law".[25]

Essentially, there is some confusion as to what level of government has jurisdictional control over water quality issues dealing with interprovincial and international waters. The Supreme Court of Canada has recognized that the federal government has jurisdiction over such matters in *Interprovincial*. However, this does not settle the matter of whether or not the provincial governments have jurisdiction, as well, through the means of administrative interdelegation. Therefore, in regards to any legislative action, as a result of an intergovernmental agreement, these forms of interdelegation will probably shield the statute from constitutional attack, allowing the provincial governments of Canada jurisdictional control over interprovincial and international waters as well.[26]

<u>Enforcement</u>

Essentially, the legal status of an intergovernmental agreement is a complex one, in which there is no definitive answer.[27] For the most part, though, it is safe to say that an intergovernmental agreement, at first instance, is not enforceable against the agreeing parties.

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[23] For a brief discussion of each, see summaries below: Magnet at 135.
[24] Kennett at 151. The first case to do this, *P.E.I. Potato Marketing Board v. Willis,* [1952] 2 S.C.R. 392. This case allowed the delegation of federal power over interprovincial and export trade to a marketing board created by the province. Also, *A.G. Ontario v. Scott,* [1956] S.C.R. 137 allowed the incorporation by reference of statutes from other jurisdictions; *Coughlin v. Ontario Highway Transport Board,* [1968] S.C.R. 569 "a statute delegating federal regulatory power over interprovincial transport to provincial regulatory boards and directing that they exercise it in accordance with provincial laws".
[25] Kennett at 152.
[26] Kennett at 153.

According to Culat, "the legal nature of an intergovernmental agreement is akin to that of a 'gentleman's agreement'. While the parties to the agreement agree to undertake certain obligations, there are no remedies in the event of a breach of the agreement by one of its signatories".[28]

Sopinka J., writing for the majority of the Supreme Court of Canada in *Reference Re Canada Assistance Plan*[29] differentiated intergovernmental agreements from contracts and essentially stated that contractual laws do not apply to intergovernmental agreements, and, therefore, are not binding on the parties:

> If this appears to deprive the Agreement of binding effect or mutuality, which are both features of ordinary contracts, it must be remembered that this is not an ordinary contract but an agreement between governments...In lieu of relying on mutually binding reciprocal undertakings which promote the observance of ordinary contractual obligations, these parties were content to rely on the perceived political price to be paid for non-performance.[30]

However, an intergovernmental agreement may create legally binding rights and obligations on the parties involved. The legal status of an intergovernmental agreement is context specific to the agreement itself and is dependent on the language used in the agreement and the constitutional status of the agreement.[31] Accordingly, intergovernmental agreements are found to be within a spectrum of enforceability. On one end of the spectrum are those that are characterized as political agreements, which remain unenforceable, and on the other end are legal agreements by which the parties intended to be binding and, therefore, are enforceable.[32] Another aspect to take into consideration is whether or not the agreement has been

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[27] Magnet at 164. Also, see Wiltshire at 368.
[28] D. Culat, "Coveting thy Neighbour's Beer: Intergovernmental Agreements Dispute Settlement and Interprovincial Trade Barriers" (1992) 33 C. de D. 617 at 620 [hereinafter Culat].
[29] [1991] 2 S.C.R. 525 [hereinafter *Re Canada Assistance Plan*], as cited in Magnet at 160.
[30] *Re Canada Assistance Plan*, as cited in Magnet at 161.
[31] Kennett at 160.
[32] J.D. Whyte, "Issues in Canadian Federal-

constitutionalized, i.e. the agreement has been given special legal status and incorporated incorporated into the Constitution. If the agreement has been attributed constitutional status, then the agreement is enforceable against the participating parties.[33] Otherwise, the Constitution does not afford protection to intergovernmental agreements.[34] However, since this is very rarely done, I have assumed for the purposes of this memo that the present agreement is not or will not be constitutionalized.

Another aspect of the agreement to take into consideration, is whether the parties incorporated into the agreement, itself, an internal dispute resolution mechanism. For instance, some agreements include provisions whereby if the parties were in a dispute then the parties will utilize a certain dispute resolution mechanism, such as arbitration, which is intended to bind the parties. Such examples are the *Beer Marketing Practices Agreement*[35] and the *Northern Flood Agreement*.[36] However, even in these instances, a party may not necessarily be bound to fulfill its obligations of an agreement because parties can always use the excuse of unilateral repudiation for non-performance.[37] "The Courts have made clear that federal and provincial parties to an agreement are free to unilaterally change the agreements"[38] or even abrogate them.[39]

Essentially, intergovernmental agreements are assumed to be unenforceable. However, if the agreement incorporates language to suggest otherwise, the agreement may be found to be enforceable. But again, this would be hard to ascertain because "few agreements have been litigated and the courts have not confronted the issue directly".[40]

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[33] *Ibid.*
[34] Magnet at 163.
[35] See Culat.
[36] Kennett at 124.
[37] Kennett at 149.
[38] *Re Canada Assistance Plan*, as cited in Magnet at 164.
[39] Magnet at 165.
[40] Kennett at 133 citing J.O. Saunders, *Interjurisdictional Issues in Canadian Water Management* (Calgary: Canadian Institute of Resources Law, 1988) at 91.

Concerning intergovernmental agreements that deal with water issues specifically, Kennett suggests that those dealing with financing specific projects would generally be accorded legal status, however, those dealing with the direct management of the resource bear greater resemblances to political agreements, which are unenforceable.[41] Therefore, if the present agreement concerning water quality issues of the Great Lakes contains no provisions or intentions for the agreement to bind the parties, and if there is no internal dispute resolution mechanism and if the language of the agreement is interpreted as not creating legal rights and obligations on the parties (only in the sense that they may be adjudicated), then the agreement is unenforceable against an unwilling recanting party.[42]

It should also be noted here that, additionally, "the constitution does not confer jurisdicition on the Supreme Court of Canada to resolve interjurisdictional disputes. These are judiciable...only by virtue of statute".[43] For instance, only when an agreement is transferred from the form of an agreement into the form of a statute, the statute itself takes on a separate and independent legal status from that of the agreement itself and it becomes a judiciable matter in the courts. Since the Constitution does not provide for this, the practice adopted by all governments, except Quebec, is to grant jurisdiction over intergovernmental disputes to the Federal Court of Canada by statute". However, the Federal Court's ability to judicially decide an interjurisdictional dispute is dependent on whether the governments' involved want to see the arrangement continue and all agree to submit to adjudication.[44] The statute that confers intergovernmental disputes on the Federal Court of Canada is the *Federal Court Act*, s. 19.[45]

[41] Kennett at 137.
[42] Kennett at 160.
[43] Kennett at 120.
[44] Kennett at 140.

Third Party Enforcement

In regards to third party enforcement issues, "[i]t is not clear whether third parties can sue the governments for non-performance of the agreements. Any lawsuit founded in the agreements must respect Crown immunities doctrines".[46]

This may be said in regards to those agreements that do not have independent legal status through that of a legislated statute. A third party faces difficulties due to "privity of contract" rules and standing tests.[47] However, the case seems to be different when the agreement has been embodies in a statute. Statute law provides independent legal status, from that of the agreement. Consequently, a determination of the third party's rights may arise, not from the agreement, rather from the statute, which incorporates the intergovernmental agreement.[48] One example is the Supreme Court of Canada's decision in *Finlay v. Canada (Minister of Finance).*[49] Here in issue was whether or not Mr. Finlay, as a third party beneficiary of a provincial social assistance plan, met the requirements for standing. Mr. Finlay was arguing that he was not receiving the full amount due to him because the provincial statute (*The Social Allowances Act)* was not in compliance with the *Canada Assistance Plan*, an Act, which embodied an agreement between the federal and provincial government. The Supreme Court found that Mr. Finlay did meet the requirements for standing and that he did have a genuine interest in the issue.[50]

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[45] *Ibid.*
[46] Magnet at 164.
[47] N. Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991) 29 Alta. L. Rev. 792.
[48] Kennett at 156.
[49] [1982] 2 S.C.R. 607.
[50] *Ibid.* at 633.

SUMMARIES OF SECONDARY RESOURCES AND CASES

Case Law:

•*Attorney General of Nova Scotia* v. *Attorney General of Canada*, [1951] S.C.R. 31. In regards to the rule against interdelegation:

The case of A.G.N.S. stands for the proposition that the interdelegation of powers between the federal and provincial governments is prohibited: "It is a well settled proposition of law that jurisdiction cannot be conferred by consent. None of these bodies [the provincial or federal government] can be vested directly or indirectly with powers which have been denied them by the B.N.A. Act, and which therefore are not within their constitutional jurisdiction".

•*Finlay* v. *Canada (Minister of Finance)*, [1982] 2 S.C.R. 607. In regards to third party enforcement and standing issues:

In this case, a third party, Mr. Finlay, declared that due to the province of Manitoba's non-compliance with an intergovernmental agreement, with that of the federal government of Canada in a cost-sharing arrangement for social assistance, he was denied the full amount due to him under the Plan (*Canada Assistance Plan*). Mr. Finlay sues for a declaration that the federal cost-sharing payments are illegal and an injunction to stop them as long as the provincial system of assistance to persons in need fail to comply with the condition and undertakings imposed by the Plan. At issue before the Supreme Court was whether or not Mr. Finlay had standing to seek this declarative and injunctive relief. The court found that he did.

•*Interprovincial Co-Operatvies Ltd.* v. *DrydenChemicals Ltd.*, [1976] 1 S.C.R. 477. In regards to constitutional jurisdiction issues over the pollution of interprovincial and international waters:

This case concerns an Act of Manitoba's, the *Fishermen's Assistance and Polluters' Liability Act*, 1970 (Man.), c. 32, which allows fisherman of Manitoba to recover damages against people who have polluted Manitoba water. This includes people who have polluted from within Manitoba and from without, whereby contaminates may flow from outside the province. The present case concerns a company located in Saskatchewan and Ontario that dumped mercury into waters that found its way into Manitoba and caused damage to the fish and the fisherman's livelihood. At issue in this case was whether this provision was *ultra vires* Manitoba's jurisdiction. Ulitmately, the majority of the court found that this was so. In writing for the majority, Pigeon J. stated:

> It has been determined in *Citizens Insurance Company of Canada v. Parsons* [(1881), 7 App. Cas. 96], that the power to regulate by legislation the contracts of a particular business or trade is within the scope of provincial legislative authority over property and civil rights. However, where business contracts affect

> interprovincial trade, it is no longer a question within provincial jurisdiction. The matter becomes one of federal jurisdiction...In my opinion, the same view ought to be taken in respect of pollution of interprovincial waters as with respect to interprovincial trade. Even if the enumerated power, 91.12 "Sea Coast and Inland Fisheries" is not quite as explicit as 91.2 "The Regulation of Trade and Commerce", the paramount consideration is that the specific powers are only "for greater certainty", the basic rule is that general legislative authority in respect of all that is not within the provincial field is federal.

•*Re Anaskan v. The Queen* (1977), 15 O.R. (2d) 515 (Ont. C.A.). In regards to the authority to enter into federal-provincial agreements:

This case involved the transfer of a female inmate from a provincial penitentiary, in Saskatchewan, to a federal penitentiary in Kingston, Ontario. One of the issues on appeal in this case, was the issue of whether or not s.15(1) of the *Penitentiary Act*, R.S.C. 1970, c. P-6, authorizes the Government of Saskatchewan to enter into an agreement with the Government of Canada for the transfer of inmates from provincial correctional institutions to a federal penitentiary outside the province (at 518). MacKinnon J.A. concluded that the province is authorized to enter into this agreement and that "there was no question of delegation of legislative jurisdiction; each was operating properly within its own sphere dealing with situations authorized by s.15 (at 520). Due to s.15 of the Act, which reads "The Minister, with the general or special approval of the Governor in Council, may on behalf of the Government of Canada enter into an agreement with the government of any province for the confinement in penitentiaries..." (at 518). And s.3 of the Saskatchewan *Federal-Provincial Agreements Act*, 1972 (Sask.), c.46, which authorizes the Government of Saskatchewan to enter into agreements with the Government of Canada "for any purpose of provincial interest", MacKinnon J.A. dismissed the appeal and upheld the transfer of the inmate.

•*Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525. In regards to the ability of a government to unilaterally terminate an abrogate an intergovernmental agreement:

This case concerns the *Canada Assistance Plan*, which authorizes the federal government to enter into agreements with the provincial governments of Canada in order to share in the expenditures of the province's social assistance and welfare programs. The federal government entered into an agreement with the provinces and then terminated it unilaterally a number of years later. One of the issues before the court was whether or not the federal government has the authority to unilaterally terminate the agreement. The Supreme Court found that they did.

Secondary Sources:

•Bankes, N., "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991) 29 Alta. L. Rev. 792:

Professor Bankes examines the effects of intergovernmental agreements on third parties in two states, Canada and Australia. In particular, he focuses on two issues: how third parties can challenge agreements, and in what circumstances third parties can receive rights or incur

obligations under them. His investigation raises questions about the impact of co-operative federalism on the interests of individual citizens.

This article, examines, in large part how third parties are affected in that the agreement binds them in some form of a duty. But my main interest in the article is where Bankes discusses how, if possible, third parties may claim rights in the agreement. For the most part, the greatest hurdle that a third party must pass in court is the idea that they were not privy to the contract between the governments and therefore have no interest in the implementation of the agreement.

•Culat, D., "Coveting Thy Neighbour's Beer: Intergovernmental Agreements Dispute Settlement and Interprovincial Trade Barriers" (1992) 33 C. de D. 617:

This article looks at an interprovincial agreement entitled the *Beer Marketing Practices Agreement*, (1991) 123 G.O. II, 2966. In this agreement, due to the current legal situation that intergovernmental agreements are unenforceable, a dispute settlement mechanism is incorporated into the agreement. Essentially, this dispute settlement mechanism is modeled after the international agreement *General Agreement on Tariffs and Trade (GATT)*. This article compares the two mechanisms and suggests that the *Beer Marketing Practices Agreement* refine its process in order to ensure an effective dispute resolution mechanism.

•Jacomy-Millette, A., *Treaty Law in Canada* (Ottawa: University of Ottawa Press, 1975):

-p.72, para. 8: there are federal acts, which grant authority to the provinces to enter into agreements on Canada's behalf. These agreements are of a technical or administrative nature (i.e. the prohibition against interdelegation does not apply).
-p.97, para.6: recognition of a province's ability to enter into treaties at an international level could only take place if the federal Constitution, i.e. the BNA Act, were amended.
-p.103, para.27: "it may thus be concluded that in Canada the power to conclude international treaties is possessed by the Crown as part of the rights and powers of the royal Prerogative".

•Magnet, J.E., *Constitutional Law of Canda: Cases, Notes and Materials,* 8th ed., vol. 1. (Edmonton: Juriliber, 2001) at 135:

"A conditional statute is one whose operation is determined by a condition, for example, the existence of a state of fact or the action of an individual body. Thus, the common provision that an Act shall come into force on proclamation is conditional legislation. The issue is the extent to which the federal Parliament or the provinces may employ one another to decide upon an action on which a statute is conditional. Here the courts have found no constitutional limitation...Parliament can limit the operation of its own Act to an event or condition, but it cannot extend the jurisdiction of the provincial legislatures by delegation" (at 135).

Incorporation by reference (or adoption) is a device, which incorporates the provisions of a statute from another legislature into the adopting legislature. Since the adopting legislature is adopting the provisions and their own authority does this, there is no ground for invalidating the statue just because the same provisions are found in another legislature (at 136).

"Finally, much can be done to avoid the restraints on interdelegation by administrative cooperation and conjoint schemes. The simplest form of this device is where an official is given power to enforce or administer both federal and provincial laws in relation to one subject

matter...Cooperation may similarly be effected by parallel legislation intended to secure a common end, though employing independent or combine administrative structures" (at 136).

These are devices employed by legislatures in order to avoid the interdelegation prohibition between the federal and provincial government(s).

•Wiltshire, K., "Working with Intergovernmental Agreements—The Canadian and Australian Experience" (Canberra, Australia: The Australian National University, Centre for Research on Federal Financial Relations, 1985):

"This paper examines the reasons why intergovernmental agreements come into being, their nature and purpose, and the problems they have caused in the two countries [Australia and Canada]. A number of solutions are suggested to overcome these problems" (at 353). Some of the problems identified are: accountability issues and constitutional ambiguities in relation to jurisdictional issues.

FURTHER REFERENCES

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