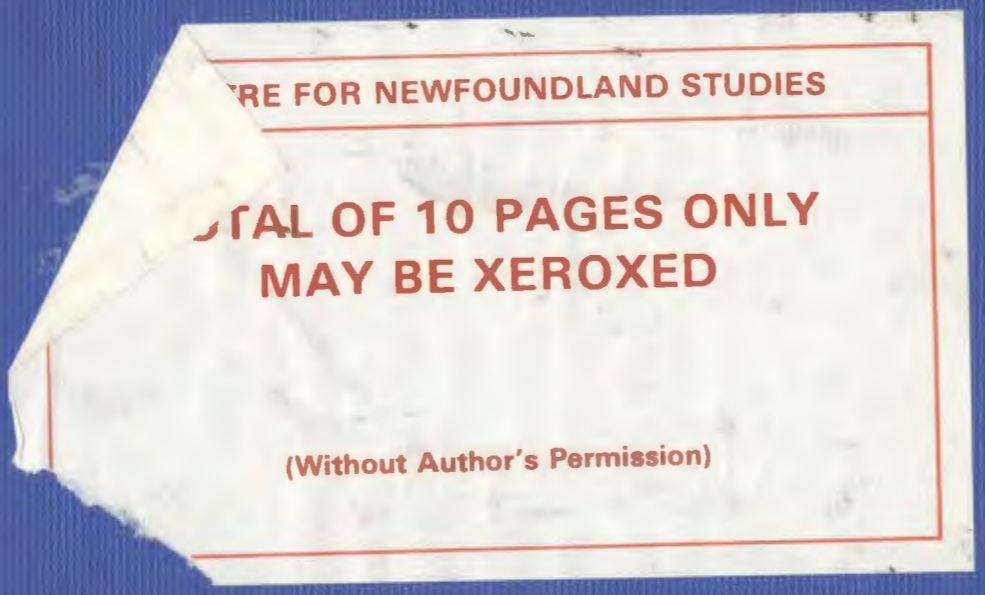
PROVINCIAL INTERNATIONAL ACTIVITY: THE CASE OF NEWFOUNDLAND



THOMAS ROBERT GRAHAM


CENTRE FOR NFLD. STUDIES
MAR 23 19
MEMORIAL UNIVERSITY
OF NEWFOUNDLAND

PROVINCIAL INTERNATIONAL ACTIVITY: THE CASE OF NEWFOUNDLAND

by

Thomas R. Graham, B.A.

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ABSTRACT

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Statement of the Problem

Although Canadian provinces have had international dealings since Confederation, these activities have apparently intensified since the 1960's and provoked renewed interest among both politicians and academics.

In an effort to understand the reasons for this renewed provincial activity and to evaluate its possible effects on federal and provincial spheres of jurisdiction, the emergent literature attempts to identify specific cases of transnational relations and develop typologies of interaction.

This study attempts to add to the data base of provincial international activity by examining Newfoundland's activity in this area between 1960 and 1978.

Materials and Methods

Oral materials consisted of interviews of the administrative heads of Newfoundland provincial government departments or their representatives as well as provincial politicians. The interviews were conducted in 1978-79. Written sources included government documents, legislative debates, books, scholarly articles, newspapers and miscellaneous unpublished materials.

The major assumptions to be tested are that the international activity of the province of Newfoundland is not atypical of the activity of other Canadian provinces, and that interest and involvement in international activity on the part of the province is a function of the perceived importance of specific issues and policy areas, rather than a desire to generally assert a provincial competence in external relations. Interviews were therefore conducted with governmental respondents with a view toward collecting data of recent provincial external activities and of eliciting attitudes toward the provincial role in Canada's foreign relations.

The procedure was inductive. Initially, all pertinent materials were gathered. Subsequently the data was classified into distinct categories for analysis and generalization.

Conclusions

The nature of provincial international activity largely relates to functional administrative matters, but even these may raise broader national and international legal issues.

Newfoundland, as a provincial actor in international relations, conducts itself on a level comparable with other provinces though on a much smaller scale. There is no indication that the province's international activity is anything other than a process pursued for the fulfillment of immediate and long term functional needs. There is no evidence to warrant the conclusion that the attainment of an international presence or status is a policy of the Newfoundland government. Indeed, in most cases, the activity is not even perceived as being international.

Research in this area has to date focused on relations between provinces and American states. The findings of this study indicate that Newfoundland is somewhat more active than other provinces in international contacts with states other than the United States. One possible explanation for this tendency may be found in Newfoundland's history but definitive conclusions must await further research.

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INTRODUCTION

The British North America Act (1867) is all but silent on the issue of external affairs. Section 132 of the Act, which provides for federal jurisdiction and control of "empire" treaties, is no longer applicable. Today, Canada interacts with foreign states in its own right. In 1937, the Labor Conventions Case[1] effectively bifurcated the treaty power by providing for plenary federal jurisdiction on issues under federal constitutional control but requiring provincial cooperation in the implementation of treaties whose subject matter falls under Section 92 of the B.N.A. Act. In other words, the federal government may conclude treaties and undertake international obligations in the same manner as a unitary state. However, where the subject matter of a treaty falls within provincial jurisdiction, implementation is a provincial concern. Thus, the federal government cannot guarantee to foreign states that it can honor treaties whose subject matter is in the provincial domain without provincial enabling legislation. In this context the question has arisen as to what executive role provinces may exercise in the treaty-making process. In other words, if provinces are empowered to implement the terms of treaties, does it follow that they have the executive power to enter into treaties where the subject matter falls under their jurisdiction as defined by the constitution?

This question forms part of what is in this paper referred to as the provincial argument for a treaty-making role in Canada. Couched primarily in legal and constitutional terms this argument relies heavily

on international law and the practice of other federal states. Generally it may be said that while there is precedent in international law and in the practice of federal states for the participation of subunits of states in international affairs, the state, as recognized under international law and practice, is the basic unit of competence. Its component units are permitted active involvement in foreign relations only to the degree stipulated in its constitution.

In the Canadian case this situation merely adds to the force of argument of those supporting the federal position which holds that only the federal government may make treaties with foreign states. The issue is not resolved, however, because the Canadian constitution is not definitive on this point.

Canadian literature on federalism and foreign affairs has emphasized the legal and constitutional aspects of the question,[2] which has remained, in essence, a hypothetical construct. Couched in terms of, "Do the provinces have a treaty-making capacity?" "Should provinces have such capacity?" "From what source would authority for such capacity emanate?" etc., the question has remained academic through several generations of scholarly journals, conferences and symposia.

The question is not unique to Canada. Comparative literature on federalism and foreign affairs[3] has focused on this issue in other federal states but with somewhat different results. While the question is not unique to this country, Canada may well be a unique case. In most other federal states, definitive constitutional provisions settle the issue or some combination of factors involving the previous independence of component units helps to provide an answer.

It is misleading to suggest that there is no answer in Canada's case. Perhaps the most obvious argument for a plenary federal treaty-making power is the most appropriate--that it is necessary. In a nation as diverse as Canada, eleven foreign policies would be impossible to coordinate and ultimately self-destructive. Generally, international law accepts international activity by subunits of federal states if such activity is sanctioned by the federal constitution. The ultimate test would lie in the action of a sovereign state agreeing to deal with the component unit of a federal state.

The necessity for Canada or any other federal state to act internationally with one voice is almost self-evident. Such a conclusion does not negate the possibility that Canadian provinces as well have a role to play beyond that of merely implementing the terms of treaties concluded by the federal government. It is this role which this paper addresses.

The study of international activity by Canadian provinces is a new area of inquiry.[4] The emerging literature examines the nature of this activity, its raison d'etre, its intent, and the motives of provinces. It is tentatively concluded that provincial international activity is essentially non-threatening to federal pre-eminence in foreign affairs. Basically administrative and functional in nature, it forms part of the day-to-day activities of provincial administrations and is not perceived as international activity in many cases. It has emerged on a de facto basis and reveals much about the economic, social, cultural and political diversity of the Canadian confederation.

As one would expect, students of this process have directed their attention to the larger and more populous provinces. This study is an examination of the international activity of the province of Newfoundland, with special emphasis on the nature and extent of such activity. Newfoundland has received little attention in this regard and this is at least partly because the extent of international involvement by Canadian provinces is a function of economic strength. However, wealth or lack thereof is not the only explanation for the degree of provincial international activity. Many factors are involved and some provinces undoubtedly have unique reasons for their actions. This study is undertaken in the interests of expanding our understanding of this process through an examination of the international activity of the Province of Newfoundland.

Footnotes - Introduction

[1]Attorney-General for Canada v. Attorney-General for Ontario and Others (1937), A.C. 326.

[2]See, for example, Edward McWhinney, Canadian Federation: Foreign Relations and the Treaty Power: The Impact of Quebec's Quiet Revolution"; and Ronald G. Atkey, "Provincial Transnational Activity: An Approach to a Current Issue in Canadian Federalism", in Ontario Advisory Committee on Confederation, The Confederation Challenge: Background Papers and Reports (Toronto: Queen's Printer for Ontario, 1970).

[3]See, for example, James McLeod Hendry, Treaties and Federal Constitutions (Washington: Public Affairs Press, 1955); Louis B. Sohn and Paul Shafer, "Foreign Affairs", in Studies in Federalism, ed. by Robert R. Bowie and Carl J. Friedrich (Boston: Little, Brown and Company, 1954), pp. 236-295; Kenneth W. Dam, "International Legal Aspects of Federalism", Robert R. Bowie, "The Treaty Power in the Federal System: The Experience of the United States", and Bora Laskin, "Some International Legal Aspects of Federalism": The Experience of Canada", all in Federalism and the New Nations of Africa, ed. by David P. Currie (Chicago: University of Chicago Press, 1964); William H. Riker, Federalism: Origin, Operation, Significance (Boston: Little, Brown and Company, 1964); and Ivo D. Duchacek, Comparative Federalism: The Territorial Dimension of Politics (New York: Holt, Rinehart and Winston, Ic., 1970).

[4]P. R. Johannson, "British Columbia's Relations with the U.S.," Conference Paper (1975); Richard H. Leach, Donald E. Walker and Thomas A. Levy, "Province-State Transborder Relations: A Preliminary Assessment", 16 CPA, 1973; Roger Frank Swanson, State/Provincial Interaction (Washington: The CANUS Research Institute, 1974).

CHAPTER I

THE EXTERNAL AFFAIRS POWER

A. The Constitutional Context

The only reference to external affairs in the British North America Act is found in Section 132:

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

Under this provision, the Canadian Parliament was empowered to replace the British Parliament as the appropriate agency to enact legislation to implement obligations incumbent upon Canada as a result of treaties negotiated by the Imperial government. Here, the supremacy of federal over provincial legislation was clear. However, neither Section 132, nor any other provision of the BNA Act answered the question of what would happen when Canada negotiated a treaty or convention applicable only to Canada and signed on behalf of the Canadian government. The answer to this question has evolved through judicial decision from the Judicial Committee of the Privy Council. Three cases in particular are relevant.

In 1919, Canada entered into the Convention Relating to the Regulation of Aerial Navigation, which resulted from the Peace Conference at Paris. The Convention was subsequently ratified by the King on behalf of the British Empire, and the Canadian representative signed

for Canada under the title of, and as a member of the British Empire. In accordance with the obligations undertaken by Canada, the Canadian Parliament enacted the Air Board Act of 1919, relating to the control and regulation of aeronautics in Canada. This legislation was challenged as being ultra vires of the federal government. On appeal from the Supreme Court of Canada,[1] the Judicial Committee relied on Section 132 as a basis for upholding the federal legislation. The decision, however, was read by some jurists as an indication that the Judicial Committee was prepared to recognize the right of the federal government to enact implementing legislation relevant to the exercise of its treaty-making power even in fields otherwise reserved to the province.[2]

In the "Regulation and Control of Radio Communication in Canada" case, the Judicial Committee found that the Convention was not an "Empire Treaty" and thus not covered by Section 132, but that "it comes to the same thing,"[3] or, in other words, is intra vires the federal government. In this case, Canada had concluded an agreement with seventy-nine other countries, known as the International Radio Telegraph Convention, in 1927. It was subsequently ratified on behalf of His Majesty's Government in Canada by an instrument signed by the Secretary of State for External Affairs. The implementing legislation, titled the Radio Telegraph Act,[4] was challenged as being ultra vires of the Canadian Parliament. Their lordships ruled that legislation adopted as a result of the Convention could be supported by the initial words of Section 91, authorizing the Canadian government to make laws for the peace, order and good government of Canada. In effect, the validity of this legislation was held to stem from the operation of the residuary clause, and not Section 132.

On this basis, legal opinion in Canada held that the federal parliament possessed all of the State's performing power,[5] and that the provinces were effectively excluded from the process. This position was repudiated, however, in the Labor Conventions Case in 1937. In this case, the courts were called upon to decide the validity of legislation which Parliament intended to enact, to fulfill the obligations of three labor conventions, namely, the Weekly Rest Convention, the Minimum Wage-Finding Machinery Convention and the Hours of Work Convention.[6] The Privy Council held that any Parliamentary implementing legislation would be invalid.[7] The essence of this decision was stated by Lord Atkin as follows:

> In totality of legislative powers, Dominion and Provinces together, she (Canada) 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 cooperation between the Dominion and the provinces.[8]

There have been indications of a judicial retreat from this philosophy. In the "Canada Temperance Federation Case," in 1946, the Judicial Committee "appeared to give a strong endorsement to the wide view of federal powers set forth in the Aeronautics and Radio cases."[9] In addition, a former member of the Committee, Lord Wright, has strongly supported the constitutional approach enunciated in the Aeronautics, Radio, and Canada Temperance cases. However, the federal government has not attempted to challenge the "Labor Conventions" decision, but has followed the general practice of consulting with the provincial governments concerning treaties on matters within the normal provincial fields of legislative competence.

Within this context, the province of Quebec has notably but not exclusively asserted a provincial role in Canadian treaty-making. The federal government has countered with arguments appealing to a number of sources.

B. Arguments Supporting Plenary Treaty-Making Powers of the Federal Government

Proponents of an exclusive federal role in treaty-making have looked to the intentions of the "founding fathers" of Confederation for support. Sir John A. MacDonald stated that "all the great questions which affect the general interests of the Confederacy as a whole, are confided to the Federal Parliament."[10] Similarly, Alexander Galt declared that among the subjects given to the general government would be found "all that could in any way be considered of a public and general character."[11] In describing the B.N.A. Act to the House of Lords, Lord Carnarvon, the colonial secretary, said that the House proposed to give to the central authority "those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces."[12]

Further underpinnings of this view involve an appeal to the fact that the Dominion was given the power to appoint provincial Lieutenant-Governors and that while the provinces may amend their own constitutions, they lack the power to alter in any way the office of Lieutenant-Governor. In addition, the Dominion was given the pre-eminent right to reserve and disallow provincial legislation.

In arguments supporting a broad view of Dominion powers, considerable importance is attached to the opening paragraph of Section 91 of the B.N.A. Act, where the Dominion is given power to make laws for the peace, order, and good government of Canada in relation to all matters not exclusively assigned to the provincial legislatures. This phrase and its variation, "peace, welfare and good government," were habitually used by British colonial authorities in vesting colonial legislatures with the full range of their legislative powers.

In general, the framers of the B.N.A. Act proposed a strong central government. In addition to the power to reserve and disallow provincial legislation, the financial settlement reached was indicative of their intent. The Dominion was given an unrestricted taxing power while receiving nearly four-fifths of former provincial revenues. These facts certainly indicate an intention to create a powerful central government in a federal state marked by the division of legislative power into provincial and federal spheres of competence. It remains a matter for speculation, however, as to the exact meanings intended to be given to the general words used in outlining these exclusive spheres of power.[13]

Edward McWhinney has stated, "the federal government exercises plenary treaty power largely on the basis of domestic political practice and international consent; in strict law, they operate in a constitutional vacuum."[14] This vacuum, according to supporters of the federal position, is at least partly filled in the instructions and commissions of the old colonial governors, the Letters Patent and Instructions to the present office of Governor-General, the statutory authority conferred on the executive by Parliament, and the prerogatives of the Crown. The

federal argument is that the prerogatives of the Crown were transferred to the federal executive through these means. Since it is the Crown to which foreign states look when consummating international agreements, and since the federal cabinet actually negotiates and concludes such agreements, the plenary treaty power resides exclusively in the federal government.

In other words, the federal executive acquired the treaty-making power through two processes: the process by which the central executive, rather than the British executive, advised the Crown--a process involving Canadian membership on British negotiating teams, separate Canadian negotiations but British signature of treaties, and finally the entire process under Canadian control although symbolically Imperial; and, the process by which Canada nationalized the Crown--signified by Canadian nomination of the Governor-General who exercises all the Crown's prerogatives including those relating to treaties, and the use of Canadian seals and symbols in the exercise of these powers.[15]

These processes point to the assumption of independent status by Canada and the focusing of power as regards treaties, diplomatic relations, and in general the conduct of international affairs, in the central executive. "This taking of full sovereignty carried with it all the competence of international personality, which was recognized by the international community. An essential and inseparable element of this sovereignty is the power to conclude treaties, which need not find its source in any grant or transfer."[16] Similarly, Ivan Rand has argued that the nature of foreign affairs as conducted by the British government, wherein treaty-making and implementation was treated as a

"discrete and entire subject-matter," was, in that nature, passed to the Dominion under Section 132. But assuming treaty-making to be an entirety as legislative matter, its transmission is received only in the residual power of the federal government.[17] The notion that authority in external relations is a concomitant of sovereignty finds support also in the American federal experience. In the Curtiss-Wright case, Justice Sutherland considered the source of federal competence in the foreign affairs area. He stated that,

> . . . the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . Otherwise, the United States is not completely sovereign.[18]

Against these positions, Canadian provinces, particularly Quebec, have advanced arguments for a provincial treaty-making role.

C. Arguments Supporting a Treaty-Making Role for Canadian Provinces

At the outset, it should be pointed out that the provincial argument for a treaty-making capacity has a number of limitations. Constitutionally, the provinces are limited to their enumerated powers. Provisions in the B.N.A. Act for agreements between provinces or agreements between a province and a foreign state, do not exist.

> If a province purported to make an enforceable agreement with a foreign state it has no domestic validity because any implementing legislation would fail as being action taken in pursuance of a non-existing power to accept international commitments.[19]

This point finds support as well in Section 3 of the Statute of Westminster which confirms in the federal government, but not in the provinces, the right to enact laws having extraterritorial effect. To this may be added the rather narrow limits which the courts have drawn on the extra-provincial effect of provincial action. In this area, the courts have held that it "must be no more than a mere incident of the valid, essentially local activity."[20]

The provincial argument has a number of facets. Firstly, limitations on a provincial treaty-making power are nowhere stated and an exclusive federal treaty power is not explicit in Canadian constitutional documents. The exclusive right conceded to the provinces to implement certain treaties must logically carry with it the right to negotiate and sign these treaties, or, as posed by Hendry, the question becomes, "If the provinces have the right to legislate on subject matter or international agreements within their legislative competence, does not the theory of the executive power following legislative power give them the right to enter into, or at least assist in, the negotiation of such agreements?"[21] One answer has come from Chief Justice Duff of the Canadian Supreme Court who argued in the Labor Conventions case that provincial executive authority is derived from the delegated power of the Governor-General. This authority extends to all matters necessarily implied in the grant of legislative powers contained in Section 92, and no further. Section 92 nowhere gives the provinces any authority to enter into agreements with foreign states.[22] In effect, this is the reverse of the federal argument that the right to negotiate and sign treaties should logically include powers of implementation. It is

submitted that the federal argument is better based, both in international law, as will be shown, and in constitutional documents, as indicated above. Certainly, for the provinces to argue the validity of this position because it is nowhere prohibited, is to base their argument on tenuous grounds indeed. In short, this argument allows for provincial claims but is not in itself an argument to support these claims.

Secondly, it is argued that constituent member units of certain federal states other than Canada are constitutionally empowered to enter into treaty relationships.[23] On this point Laskin has noted that the units of some federal states may and have been involved in foreign relations through reciprocal arrangements which are carried into effect by legislation on each side but without establishing agreement in the sense of mutual obligation. The sanction lies in the taking of reciprocal action.[24] These are usually concurrent measures on matters of mutual concern, as between certain northern American states and Canadian provinces in areas of fire prevention and flooding.[25]

Thirdly, in the draft codification of treaty law prepared by the International Law Commission, some of the active participants in the work of the specialized agencies were not fully independent sovereign states. In this regard, it may be noted that Byelorussia and Ukraine are charter members of the United Nations, but they are by no means sovereign states. However, this aspect of the provincial argument finds its answer in international practice where the section of the draft articles on the law of treaties in question[26] is recognized, in international experience, as a polite bow to the constitutional forms of United Nations members. It may also be argued that this situation stems

from political expediency and in no way reflects the true international legal status of the Ukraine and Byelorussia.

This brief examination of provincial arguments for an extended treaty-making role has raised a number of questions which may be further explored and evaluated by considering the practice of other federal states and in terms of international law.

D. The Practice of Selected Federal States as Regards the Role of their Constituent Members in International Relations

Proponents of an extended provincial role in Canadian treaty-making have sought support in the practice of other federal states where the member units engage in international relations. These states include the Federal Republic of Germany, Switzerland, the Union of Soviet Socialist Republics, and the United States.

1. Federal Republic of Germany

"There is no doubt in German theory or practice about the partial capacity of the member states under international law . . ."[28] This capacity was entrenched in the old Imperial Constitution, was extended through the Weimar Constitution, and under the Basic Law of the Federal Republic "the states have, with respect to foreign policy, greater rights under the Basic Law than under the Weimar Constitution. . . ."[29]

Perhaps the most important reason for the continuation of this constitutional theme is the fact that the German Empire, formed in 1871, was composed of sovereign and independent states which, prior to union, exercised all the attributes of states as defined by international law.

Thus, under Article 11 of the Imperial Constitution, the Kaiser as the presiding officer of the newly formed federation, was defined as the representative of the Reich in international and private law, while the member states retained the power to have relations with other member states and foreign countries in matters outside the exclusive competence of the federation.

The new federation established under the Imperial Constitution allowed considerable leeway within the framework of the constitution for the states composing it. Article 56, Section 2, for example, prohibited the states from establishing new consulates in districts administered by consuls of the federation, with a view toward the ultimate abolition of all state consulates.[30] On the other hand, there was no restriction on the member states with respect to the right to receive consuls from foreign nations; a state government could give an exequatur to consuls from foreign states.[31]

In the area of treaties, the Imperial Constitution, Article 11 (1), held that the Kaiser had the power to enter, in the name of the Reich, into alliances and other treaties with foreign states. The power of the member states remained extensive, however, as they were empowered to enter into treaties in specific areas such as extradition. In areas only facultatively within the competence of the Reich, the member states could conclude treaties as long as the Reich had not done so, as well as in matters that were neither exclusively nor optionally within the competence of the Reich. For example, in areas such as regulation of traffic on a common border, questions of improvement of land, and exploitation of water power which lay partly abroad, the member states

could conclude treaties with foreign states, the only restriction being that such treaties could contain nothing that was incompatible with the law of the federation.[32]

Under the Weimar Constitution, the rights of the member states to have relations with foreign countries were considerably restricted through Article 78 (1), which provided that the cultivation of relations with foreign states should be exclusively a matter for the Reich.[33] This is not to say that the Reich became, under the Weimar Constitution, a unitary state, although its federal nature was somewhat diluted.

In contrast to the Imperial Constitution, under which the states could send and receive ambassadors from foreign states, this right was denied under the Weimar Constitution. Similarly, the right to have consulates in foreign countries ceased to exist for the states.[34]

The rights of the Länder in treaty-making with foreign states remained essentially unchanged from the provisions of the Imperial Constitution to the Weimar Constitution with one important exception: treaties concerning matters within exclusive Länder jurisdiction could still be concluded but only with the approval of the Reich.[35]

This, then, is the constitutional situation in the Federal Republic of Germany. In practice, however, the situation is somewhat different; Walter Leisner observes that,

> German federalism is threatened by the increasing legal and financial power of the federation, but even more so by the political lethargy of the member states and their incapacity to organize an attractive political life of their own and to contribute efficiently to the shaping of federal policy: there are almost no particular political parties left in the Länder.[36]

Leisner argues that German federalism is underdeveloped in the sense that "its practical efficiency no longer corresponds to the important rights guaranteed by the constitution to the member states."[37] This view is echoed by Rand when he states that "the recent trend in the German Federal Republic has been, in fact, not towards a greater exercise by the Länder of their treaty power, but towards a delegation of it to the central government."[38] This practical devolution of constitutionally recognized powers has occurred through agreement[39] and through the attitude of third parties to treaties with the Länder. For example, in 1965, the Land of Niedersachsen completed a treaty (Konkordat) with the Vatican. Niedersachsen considered that it had plenary constitutional powers to conclude a treaty with the Vatican and deliberately limited itself to a courtesy, "for your information only," notification to the federal government of the signing of the Konkordat. However, the Vatican itself submitted the text of the Konkordat to the West German foreign minister for approval and endorsement; and the federal government, against the view of the Land, exercised "what it clearly considered to be its constitutional right to endorse the Land agreement with the Vatican."[40]

2. Switzerland

The Swiss Constitution, like the Basic Law of the German Federal Republic, is explicit in its provisions regarding foreign affairs. As in Germany a centralizing tendency has been historically evident, although the process began somewhat earlier in the constitutional life of Switzerland.

In 1848, the organic law which at present forms the basis of the fundamental law of the Confederation was adopted by a large majority of the Swiss people. Under this constitution, the cantons, although prevented from entering into foreign alliances, retained considerable power in the treaty-making process, particularly with regard to the use of Swiss troops serving under foreign flags.[41] This practice and other factors[42] brought Swiss political elites to the realization that a strong central authority with the power to control not only political but also commercial arrangements with foreign states was desirable.[43]

A revision of the Swiss constitution in 1874, reflected this concern. Although the wording of the articles concerned with treaty-making[44] remained essentially the same, the wording of Article 9, which reserves the right to the cantons to conclude exceptional alliances was changed. The opening word "toutefois" was replaced by the word "exceptionellement."[45]

The Swiss constitution of today is virtually unchanged from the revisions of 1874. Under Article 8, the Confederation is given the exclusive power to declare war and conclude peace and make alliances and treaties with foreign states. Article 9 provides that the cantons may conclude treaties with foreign states in matters of public economy, frontier relations and police, but that such treaties may contain nothing prejudicial to the Confederation or the rights of other cantons. Article 10 holds that relations between the cantons and foreign governments must take place through the Federal Council. Finally, Article 102 establishes the powers and duties of the Federal Council, including the power to examine treaties concluded by the cantons between themselves

or with foreign states and to give or withhold its approval, and to concern itself with the interests of the Confederation abroad, "paying particular notice to its international relations, and has general charge of foreign affairs."

The scope of the cantonal treaty power is rather broad with regard to the subject matter of treaties, but the cantonal power to negotiate with foreign states and to conclude treaties is very narrow due to the provisions of Article 10 of the constitution. Only with regard to the subject matters in Article 9, may the cantons correspond directly with "subordinate" authorities of foreign states. Thus, treaties concluded by the cantons with foreign states deal, for example, with the transmission of electric current through a part of foreign territory, protection of river sources, mutual admission of theatre groups, etc.[46]--matters not unlike those on which Canadian provinces and American states have concluded agreements.

Plenary control over foreign relations is vested in the Federal Assembly through Article 8 of the Constitution. This includes the power to enter into international agreements and equally to perform the obligations attendent upon such capacity. If there is any doubt as to the control exerted by the Federal Assembly in foreign relations, it is effectively dispelled by the mechanisms available to it in the implementation process. The central authority treads lightly when implementation of the terms of a treaty requires transgressing the legislative jurisdiction of the cantons. However, it has three constitutional mechanisms to aid it in the process. Firstly, it may, by constitutional practice, legislate on the subject within cantonal control under its power to

perform treaty obligations. Secondly, it may put the treaty to the test of a popular referendum and so acquire legislative jurisdiction by what would in effect be a constitutional amendment. Finally, the Federal Assembly may institute a constitutional amendment under the authority of Article 121 of the constitution.[47]

As in the case of the Federal Republic of Germany, the Swiss central government exercises its extensive powers in foreign affairs while the activity of the cantons in this area has become less important.[48]

3. Union of Soviet Socialist Republics

The role of Union Republics of the Soviet Union in international relations is small, despite the membership of two Republics[49] in the United Nations and constitutional provisions which are, perhaps, more permissive than those governing the Swiss cantons or the German Länder.

Aspaturian had identified four distinct phases of the role of the Union Republics in Soviet foreign affairs. The first phase extends from 1918 to the de facto formation of the union in mid-1923. It was characterized by the existence of the Republics as formally independent states with separate diplomatic establishments. During this period, the Ukraine, Byelorussia, Georgia, Armenia and Azerbaidzhan, as well as the two Central Asian Soviet People's Republics of Bukhara and Khorezm had their own Commissariats for foreign affairs. Each of these republics maintained modest diplomatic relations, contracted a number of treaties and agreements with bordering states and participated in a number of international conferences. However, despite the absence of a central

foreign affairs commissariat, their foreign policies were uniformly predetermined and shaped by the ruling communist party which operated in all republics and their diplomacy was closely supervised and coordinated by the paternalistic guidance of the Russian Socialist Federated Soviet Republic (R.S.F.S.R.).[50]

The diplomatic activities of the eight non-Russian republics were governed by a series of bilateral treaties signed between the R.S.F.S.R. and the individual republics. These treaties were held to be compacts concluded between sovereign states[51] and were signed by their respective Commissars of Foreign Affairs as international legal instruments. These treaties provided not only for the fusion of military, economic, financial, communications, and foreign trade activities, but also introduced a system of partially interlocking and overlapping internal political institutions. A common feature of all these arrangements was the deliberate institutional and functional diffusion of foreign affairs.[52]

The second phase in the role of the union republics in foreign affairs covered the approximate life of the 1924 Soviet constitution (1924-1938) and was marked by institutional centralization of foreign affairs in Moscow but within a framework which gave the republics limited though significant internal administrative responsibility and restricted representation abroad.[53] The U.S.S.R. agreed to assimilate all contractual obligations of the republics insofar as they affected the territories of the republics concerned:

> The People's Commissariat for Foreign Affairs of the USSR is charged with . . . the execution of all treaties and conventions entered into by the above mentioned republics with foreign states which shall remain in force in the territories of the respective republics.[54]

However, while the constitution[55] empowered Moscow to assume the international obligations incurred by the republics and explicitly gave it the power to represent the union in international relations, its provisions neither denied these powers to the republics nor defined them as exclusively within the jurisdiction of the Union government.[56] As Aspaturian notes in this regard, "the constitutional decentralization of foreign affairs in the Soviet system is ingeniously devised to preclude any legal or political conflict between formal devolution and de facto centralization of control. The enhanced diplomatic flexibility of the Soviet Union is thus ensured without at the same time disturbing the internal power equilibrium between Moscow and the border republics."[57]

The third phase covered the years of the purges[58] to the adoption of the 1944 amendments to the constitution. During this period, the republics were effectively deprived of all participation in the administration of Soviet foreign relations.

The 1944 amendments to the Soviet constitution mark the beginning of what Aspaturian has identified as the fourth phase in the role of the Union Republics in Soviet foreign relations. These amendments institute a permissive authority for the Union to delegate limited diplomatic functions to the republics, but it is free to grant or withhold these powers at its discretion.[59]

The revised constitution establishes a system of dual jurisdiction and shared sovereignty. The effect of the amendments is a partial recovery by the republics of powers which they voluntarily entrusted to the Union in 1923 and appears to be an expansion of their sovereign authority into the sphere of international relations.[60] The amendments

appear to indicate a return to the first phase in the external role of the Union republics, but in fact the Soviet treaty process indicates otherwise. Soviet constitutional law recognizes two general categories of international agreements, treaties requiring formal ratification by the supreme organs of state power (the Supreme Soviet or its Presidium, usually the latter), and international agreements requiring only confirmation by the Council of Ministers. Whereas Article 14 (a) of the constitution gives the Union the power of "conclusion, ratification, and denunciation of treaties" of the USSR, Article 18 (a) limits the republics to concluding agreements with foreign states and makes no mention of treaties or of the ratification and denunciation of international compacts.[61] A further indication of the plenary powers of the Union lies in the fact that all agreements signed by the republics with foreign states are subject to "nullification, disavowal or denunciation by the Union government."[62]

4. United States

The historical factors which gave rise to firm establishment of the central government as supreme in the foreign affairs of the United States form a classic argument against the diffusion of the foreign affairs power. Prior to federation violations of agreements by individual states were causing jealousy and disharmony among them. Furthermore, foreign nations were developing a practice of favoring one component state over another, particularly in the commercial field. It was felt, according to Hendry, that the central government must have control of the treaty performing power to prevent external forces from invading

national rights and disturbing the national tranquility. "This idea pervaded the making of the new Constitution and the setting up of the central government as supreme in both aspects of the treaty process."[63]

The constitutional convention in 1787 gave to the executive the right to enter into treaties on the advice and consent of two-thirds of the senators present.[64] As well, treaties were effectively defined as a part of the law of the land under Article 6, Section 2, which states, "this constitution, and the laws of the United States which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state notwithstanding."

The pre-eminence of the central government is further reinforced in Article 1, Section 1, where it states in part that "no state shall enter into any treaty or alliance or confederation." As well, Article 1, Section 3, holds that "no state shall, without the consent of congress . . . enter into any agreement or compact with another state or with a foreign power." There is little doubt that the realm of the formal treaty is firmly controlled by the central government; "the people of the United States by the Constitution of 1787, vested the whole treaty-making power in the national government. . . . The treaty-making power is not distributed; it is vested all in the national government; no part of it is vested in or reserved to the states."[65]

There is argument, according to Hendry, that other types of instruments, such as commercial agreements, are permissable with the consent of congress,[66] and that some scope exists for individual states to enter into agreements or compacts of a non-political nature. The

proceedings of the United States Congress are instructive here: "The terms 'compact and agreement' . . . do not apply to every possible compact or agreement . . . but the prohibition is directed to the formation of any combination tending to increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States. The terms cover all stipulations affecting the conduct or claims of states, whether verbal or written, formal or informal, positive or implied, with each other or with foreign powers."[67]

It would appear that while the states have some scope in foreign relations, its parameters are tightly defined.

E. International Law and the Participation of States Members of a Federal Union in International Relations

The position of international law on the question of the role of "dependent entities" in international relations is unclear. Lissitzyn has argued that the history of both private and official attempts to codify or restate the law of treaties lends little or no support to the view that territorial entities other than independent states cannot, in principle, have treaty-making capacity or be party to treaties, but "it reveals much uncertainty, much controversy, and some confusion as to the role of dependent entities in treaty relations and the modalities of this role."[68] Such a question necessarily involves the issues of 'personality' and 'capacity.' Without appearing to 'beg the question,' it is important to point out that Lissitzyn has argued elsewhere that "it may indeed be doubted that international law contains any objective criteria of international personality or treaty-making capacity."[69]

There are those who would disagree however. Some agreement exists that only fully independent, sovereign states, and certain international public organizations may truly be 'international persons.' These writers would argue that while the federation as a whole possesses international personality, the central government alone exercises its attributes.[70] A number of criteria must be satisfied for a state to be an international person. Oppenheim argues that "only external sovereignty must be taken into account for the determination of international personality."[71] But he admits that where a partial international competence is retained by (the member states of a federation), they enjoy a corresponding external sovereignty and are, to that extent, international subjects.[72] Bernier cites as an essential condition of the international personality of member states, the practice of individual recognition by states which are held to be sovereign.[73] He argues further that constitutional provisions alone are not enough to grant international status to member states of federations.

On the other hand, there is the view held by Sir Gerald Fitzmaurice, who, in his capacity as third special Rapporteur on the Law of Treaties, stated in 1958, that "there is no doubt that the component states of a federal union are not states in the international sense of the term and do not possess any international personality apart from that of the federal union to which they belong."[74] Even here, however, Fitzmaurice does not deny that the member units of a federation may possess some degree of international personality.

There appears to be general agreement that states members of federal unions may possess a limited international personality if the

constitution allows for the exercise of external sovereignty and if sovereign states are prepared to deal with them. Similarly, the capacity of member states in international relations derives from the federal constitution.[75] Sir Hersch Lauterpacht holds that an essential condition of the validity of agreements concluded by states members of a federation is the "conferment by the constitutional law of the federal states . . . of the treaty-making capacity upon their member states."[76] Where this is so, the member state exercises only a delegated power and is held to act as an agent of the federal government.

A similar view was presented in the First Report on the Law of Treaties in 1962 by Sir Humphrey Waldock. In a proposed article for the law of treaties, Waldock provided that members of federations may have the capacity to enter into treaties if the constitution so allows: "the constituent state normally exercises this power in the capacity only of an organ of the federal state or union . . ."[77] The proposed article further stated that:

> International capacity to be a party to treaties may however, be possessed by a constituent state of a federation or union, upon which the power to enter into agreements directly with foreign states has been conferred by the Constitution:
> 1. If it is a member of the United Nations or
> 2. If it is recognized by the federal state or union and by the other contracting state or states to possess an international personality of its own.[78]

Efforts to codify international law have attempted to place in the law of treaties some determination of the capacity of member units of federations to engage in the treaty process. At the First Session of the Vienna Conference on the Law of Treaties in 1968, no speaker denied that members of federal unions can possess treaty-making capacity, "but

there was controversy over the legal basis of such capacity and of the limitations upon it (constitutional law, international law, or both), over the formulation of the clause, and over the desirability of making express provision for members of federal unions in a convention otherwise limited in scope to agreements between 'states'."[79] Similarly, the Harvard Research in International Law and the Restatement of the Foreign Relations Law of the United States published by the American Law Institute in 1965 called into question the notion that independence was a prerequisite in the determination of "capacity."[80] The 1969 Plenary Session of the Vienna Conference on the Law of Treaties had before it for consideration a draft article on treaty capacity for federal member units which stated:

> States 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.[81]

This article was not retained by the Conference in the final draft of the Vienna Convention due to opposition from a number of states, including Canada, despite the fact that "general international law recognizes . . . the competence of states . . . to endow political subdivisions . . . with a limited capacity to enter into relations governed by international law."[82] In effect, lack of consensus led to the issue being shelved, but the possibility of its being resurrected remains.

Despite the failure of formal attempts to recognize the role of dependent entities in international law, practice and "general international law" indicates some consensus, however vaguely defined. States of the United States, Canadian provinces, German Länder, Swiss cantons,

and the Union Republics of the USSR have all shown at least a de facto international role. The legal status of the agreements concluded by these entities is as unclear as their capacity to conclude such agreements. Certain criteria have evolved, however. There is a general consensus that "states can enter into agreements with other states that are governed not by the rules of public international law but by the national law of one of the parties."[83] This notion finds support in the decision of the Permanent Court of International Justice in the Serbian Loans Case, where the majority decision held that "any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country."[84] Similarly, R. J. Delisle has argued that such agreements are in fact contracts "whose interpretation and enforcement are governed by private international law."[85]

Whether or not these agreements are binding and the source of responsibility for their conduct, is somewhat unclear. Lissitzyn argues that "an agreement between a state of the United States and a foreign entity, if it purports to create rights and obligations, is legally binding."[86] There is certainly a presumption that this is so, particularly since such agreements are governed, if not by public international law, then by the municipal law of one of the parties. Yet, many of the agreements between, for example, states of the United States and Canadian provinces are held to be "informal administrative arrangements because they create understandings rather than legal obligations."[87] Luigi di Marzo, in a study of the legal status of such agreements, concludes that:

> Unlike the Swiss canton and German Länder agreements which say they have the force of law and quite often have clear articles setting up machinery for the settlement of disputes, the agreements of the American states and Canadian provinces seldom speak of legal obligations and virtually none contain clauses for the settlement of disputes.[88]

Accordingly, the official Canadian view is that agreements or arrangements concluded by provinces with foreign entities fall into one of three categories: informal arrangements of a non-binding character; arrangements of a contractual nature governed by municipal law; and arrangements authorized by the Canadian government or Parliament, which are regarded as internationally binding on Canada as a whole, rather than on the particular provinces.[89] It follows from this position that the federal government alone has the power to terminate, with international effect, the agreements of the provinces with foreign entities. In this regard, the provinces are probably legally powerless without the implied or express consent of the federal government.[90]

It must be noted here that there appears to be some confusion in the literature in the use of the term 'treaty,' 'compact' and 'agreement.' In the constitutions of the Federal Republic of Germany, the USSR, Switzerland and the United States, both terms appear to apply to signed documents at the executive level which create rights and duties of an international nature. The Canadian government has attempted to create classes of agreements, only some of which fit the above definition and could properly be called "treaties." From the Canadian government's point of view an agreement between Newfoundland Hydro and the State of New York for the sale of hydroelectric power is a contract, despite the fact that Newfoundland Hydro is a Crown corporation of the Province of Newfoundland. On the other hand, a similar agreement involving an arm

of a German Länder and a Swiss canton may be termed a 'treaty' under the constitutions of Switzerland and the Federal Republic of Germany.

The question of responsibility remains. As accepted sovereign subjects of international law, federal states must answer for the acts or omissions of their component units in the same way as if they were unitary states. However, when the member states of federations are allowed to deal separately with foreign powers and undertake international obligations in their own name, they will normally be held responsible for the fulfillment of these obligations. If, by virtue of the constitution, the federal government retains a limited control over the international dealings of its component units, and this is the case in the majority of examples, then it must answer indirectly for their acts or omissions contrary to international law. In this instance, some variety of shared liability would apply. In the event that member states act in complete independence of federal authorities, and this fact is known to the other state or states concerned, responsibility rests entirely with the contracting member state. If, in concluding agreements with foreign states, member states exceed their competence, the federal government may denounce the agreement and it becomes null and void. On the other hand, if such an agreement is regarded by the federal government as valid, and the other contracting party has no objection, then the agreement may remain in force with the federal government and the member state or states involved, responsible for its execution.[91] This notion is in keeping with the idea that dominant states possess the power in international law to terminate or modify the treaty obligations of their subordinate entities by entering into overriding treaties with the other parties.[92]

The same reasoning applies in the question of immunity. From an international law point of view, only the federal state is sovereign; therefore the member states of a federation cannot claim immunity as sovereign entities before a foreign court. However, if a federal constitution grants limited international competence to its member states and they are allowed to deal on a basis of equality with foreign powers, and further, if such powers agree to deal with these member states, then they would appear to be entitled to immunity.[93]

From this discussion it is evident that the international law position on the question of the role of member units of federal states in treaty-making in particular, and in international relations in general, is unclear. In the case of Canadian provinces, the situation is perhaps even more obscure since a significant portion of the Canadian constitution is unwritten and we have seen that international law may recognize even a partial international personality only if such is admitted by the applicable constitution.[94] R. J. Delisle has argued that in the face of constitutional silence as to authority over foreign affairs, "there is a presumption in international law that the regional governments have no such power, i.e., the central government is to be deemed to have full and exclusive treaty-making power."[95] This is a valid point in the Canadian context, but it unfortunately ignores the fact that Canadian provinces have been parties to international agreements in a process very similar to that which eventually resulted in the attainment of full independence by a number of states, Canada included. Di Marzo, for example, has stated that the provinces could, through their conclusion of various transborder agreements, have acquired

a de facto agreement making power.[96] Similarly, Lissitzyn notes that the older British dominions, Southern Rhodesia, the Ukrainian and Byelorussian SSR's, the Phillippine Commonwealth and others, "all developed their treaty-making capacity through the very process of entering into international agreements."[97]

F. Conclusion

The evidence of international law and practice and state practice indicates that overall responsibility for the conduct of external affairs as regards treaties rests with the central government. As K. C. Wheare has stated:

> Although there are differences in detail . . . there is found everywhere a recognition of the principle that the exclusive control, actually or potentially, of relations with foreign states rests with the government of the whole country.[98]

Whatever the intentions of the fathers of Confederation, it is submitted that those intentions have little relevance to contemporary global politics. The fact remains, however, that a federal union's main purpose is to present itself on the international scene as possessing "the power and the will to speak on behalf of its component units with one single legitimate voice."[99] In light of this approach, it is probably anti-climatic to argue the respective merits of the federal and provincial positions on the question. However, some points may be made.

At present, on the basis of the Labor Conventions decision in 1937, the federal government may pursue the treaty process largely immune from provincial interference in areas of its exclusive legislative compe-

tence, while, in areas of provincial legislative competence, the implementation of treaties touching on such subject matter must await the pleasure of the provinces. This situation, however, has been adapted to allow the provinces somewhat more freedom than the Privy Council intended, while maintaining federal control. The methods employed have been designed to give international validity to agreements between provinces and foreign states. In a position paper released in 1968, titled "Federalism and International Relations," the federal government defined these methods as firstly, 'indemnity agreements.' Under such a scheme, the federal government enters into an agreement with the government of a foreign state on a matter of interest to a province. The province agrees to provide the necessary legislative authority to carry out the agreement and also agrees to indemnify the federal government in the event of provincial default. Secondly, 'ad hoc covering agreements' involve an exchange of notes between the federal government and a foreign state which gives assent to arrangements between a province and the foreign state. In the opinion of the federal government, the exchange of notes gives international legal effect to the arrangements between the province and the foreign entity but does not involve the province itself acquiring international rights or accepting international obligations. Thirdly, 'general framework agreements' are similar to the ad hoc variety except that their scope is much greater. Such agreements would allow for future arrangements between a province and a foreign state without further federal government involvement.[100] Such methods, either in use or contemplated, allow the provinces some scope in international affairs, but always under federal supervision. Indeed,

this concern with control by the federal government has been criticized as part of a general trend in federal-provincial relations. McWhinney, for example, has observed,

> . . . it may be suggested that the federal government has tended at times to be overly concerned with questions of symbols and abstract ideology and indeed of political 'face,' at the expense of concrete problem-solving; and that it has, on the whole, given too much stress to issues of constitutional power in the abstract, seeking to rest on the old fashioned notion of a federal-provincial constitutional dichotomy with watertight compartments of power, at the expense of a more pluralistic, co-operative approach to decision-making in the complex federal society of today.[101]

McWhinney's comments on this theme can be applied as well to provincial appeals to the practice of Switzerland and the Federal Republic of Germany, in seeking support for a provincial role in Canadian treaty-making. In his opinion, citation of these examples as support often rests on the 'law-in-books' of abstract constitutional texts, without regard to the 'law-in-action.'[102] This, in fact, is a telling criticism of that aspect of the provincial position since we have seen the extent of federal control of the international activity of these member units, even where such rights are entrenched in constitutional provisions.

Finally, arguments based in part on the practice of other federal states may be misleading for another reason, a reason which has broad implications in the Canadian context. Thomas Levy has suggested that Canada may be viewed as unique among the world's federations. Levy argues that Canada is characterized to a marked degree by territorially based ethnic, linguistic and religious cleavages, reinforced by regional divergences of economic interest, and by the lack of a deeply rooted political culture. "These cleavages suggest that the ways in which the

provinces are involved in external affairs may differ considerably from those found in other federations."[103] Added to this, is the fact that Canadian external relations have developed on an ad hoc, extra-constitutional, empirical basis. There is no operative constitutional provision specifying the role of either the federal or provincial governments in foreign affairs and the few formal principles that do apply have evolved largely by precedent and judicial determination.

The linguistic and cultural factors present primarily in the province of Quebec and the economic factors present in all provinces combine with other factors to make Canada a unique case. It is this uniqueness and its manifestations in provincial international activity, which we will now pursue.

Footnotes - Chapter 1

[1]"Regulation and Control of Aeronautics in Canada."

[2]Gerald L. Morris, "Treaty-Making Power: A Canadian Dilemma," 45 Canadian Bar Review (1967), p. 485. Hereinafter referred to as Morris, A Canadian Dilemma. ". . . their Lordships are influenced by the facts that the subjects of aerial navigation and the fulfillment of Canadian obligations under Section 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion."

[3]Howard A. Leeson and Wilfred Vanderelst, External Affairs and Canadian Federalism: The History of a Dilemma (Toronto: Holt, Rinehart and Winston of Canada, Ltd., 1973), p. 71. Hereinafter referred to as Leeson and Vanderelst, The History of a Dilemma.

[4]Revised Statutes of Canada, 1927, Chapter 195.

[5]See, for example, Debates of the House of Commons (Canada), February 1935, p. 90.

[6]These Conventions were ratified by Canada in 1935.

[7]The Supreme Court of Canada had evenly divided on the question. Supreme Court Reports (1936) (Canada) 461.

[8]Leeson and Vanderelst, The History of a Dilemma, p. 71.

[9]Morris, A Canadian Dilemma, p. 486.

[10]J. H. Stewart Reid, Kenneth McNaught and Harry S. Crave, A Source-book of Canadian History (Toronto: Longmans, Green and Co., 1959), p. 214.

[11]Ibid., p. 226.

[12]V. C. MacDonald, "Judicial Interpretations of the Canadian Constitution," (1936) University of Toronto Law Journal, p. 263.

[13]Report of the Royal Commission on Dominion-Provincial Relations. Book 1. Canada 1867-1939. J. A. Corry,"Difficulties of Divided Jurisdiction", pp. 254-259.

[14]Edward McWhinney, "The New Pluralistic Federalism in Canada," La Revue Juridique Themes, II (1967), p. 145. Hereinafter referred to as McWhinney, The New Pluralistic Federalism in Canada.

[15]Levy, A Study in Canadian Federalism, p. 44.

[16]Morris, A Canadian Dilemma, pp. 483-484.

[17]Ivan C. Rand, "Some Aspects of Canadian Constitutionalism," 38 Canadian Bar Review (1960), p. 143.

[18]Morris, A Canadian Dilemma, p. 488.

[19]Bora Laskin, in David P. Currie, ed., Federalism and the New Nations of Africa, "Some International Legal Aspects of Federalism: The Experience of Canada" (University of Chicago Press, Chicago and London, 1964), p. 401. Hereinafter referred to as Laskin, in Currie, ed., The Experience of Canada.

[20]Morris, A Canadian Dilemma, p. 485.

[21]James McLeod Hendry, Treaties and Federal Constitutions (Washington: Public Affairs Press, 1955), p. 48. Hereinafter referred to as Hendry, Treaties and Federal Constitutions.

[22]Ibid., p. 58.

[23]J. Y. Morin, "International Law--Treaty-Making Power--Constitutional Law--Position of the Government of Quebec," 45 Canadian Bar Review (1967), p. 161. Morin's survey of federal states indicates that only two, Switzerland and West Germany, can be validly said to have exercised what might properly be called a treaty-making power, and these only under a close degree of federal control.

[24]Laskin, in Currie, ed., The Experience of Canada, p. 401.

[25]Ibid., p. 402.

[26]Morris, A Canadian Dilemma, p. 497, Article 5, Section 2: "states 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."

[27]Ibid., p. 498.

[28]Walter Leisner, "The Foreign Relations of the Member States of the Federal Republic of Germany", 16 University of Toronto Law Journal, 1965-66, p. 348. Hereinafter referred to as Leisner, The Foreign Relations of the Member States of the Federal Republic of Germany.

[29]Robert R. Bowie and Carl J. Friedrich, eds., Studies in Federalism (Boston: Little, Brown and Co., 1954), p. 281. Hereinafter referred to as Bowie and Friedrich, Studies in Federalism.

[30]Ibid., p. 278.

[31]Ibid., p. 278.

[32]Ibid., p. 278.

[33]Ibid., p. 279.

[34]However, the member states could have relations with each other and with the Reich, under the title of "ambassador", "envoy", or "consul".

[35]Article 78, (1) Weimar Constitution.

[36]Leisner, The Foreign Relations of the Member States of the Federal Republic of Germany, p. 346.

[37]Ibid., p. 347

[38]Michael Carter Rand, "Compacts Between States of the United States and Canadian Governments", Unpublished M.A. Dissertation, Columbia University, 1967, pp. 13-14.

[39]Ibid., pp. 13-14. In October 1957, the Lendauer Abkommen specified that when the national government was negotiating treaties involving subjects under Land jurisdiction, the consent of the state would be sought prior to ratification, and that if their vital interests were affected a standing committee of state representatives would be kept fully informed and its wishes communicated to the negotiators.

[40]Edward McWhinney, "The Constitutional Competence Within Federal Systems for International Agreements", in Ontario Advisory Committee on Confederation, The Confederation Challenge: Background Papers and Reports (Toronto: Queens Printer for Ontario, 1967), p. 153.

[41]Hendry, Treaties and Federal Constitutions, p. 27.

[42]Particularly the rivalries between Catholics and Protestants in the frontier cantons, notably the Sonderbund.

[43]Hendry, Treaties and Federal Constitutions, p. 27.

[44]Articles 7, 8, 9 of the present Swiss Constitution.

[45]Hendry, Treaties and Federal Constitutions, p. 27.

[46]Bowie and Friedrich, Studies in Federalism, p. 286.

[47]Hendry, Treaties and Federal Constitutions, p. 127.

[48]Bowie and Friedrich, Studies in Federalism, p. 286.

[49]Byelorussia and Ukraine.

[50]Vernon V. Aspaturian, The Union Republics in Soviet Diplomacy (Publications De L'Institut Universitaire De Hautes Etudes Internationales - No. 36, 1960), p. 33. Hereinafter referred to as Aspaturian, The Union Republics in Soviet Diplomacy.

[51]Proponents of a greater role for Canadian provinces in foreign affairs have advanced a similar "compact theory."

[52]Aspaturian, The Union Republics in Soviet Diplomacy, p. 34.

[53]Ibid., p. 31.

[54]Ibid., p. 40.

[55]Article 1 of the 1924 Constitution.

[56]Aspaturian, The Union Republics in Soviet Diplomacy, p. 40.

[57]Ibid., p. 123.

[58]Approximately 1938.

[59]Aspaturian, The Union Republics in Soviet Diplomacy, p. 123.

[60]Ibid., p. 19.

[61]Ibid., pp. 174-175.

[62]Ibid., p. 174.

[63]Hendry, Treaties and Federal Constitutions, p. 88.

[64]Article 2, Section 2 of the U.S. Constitution.

[65]Elihu Root, "The Real Questions under the Japanese Treaty and San Francisco Board Resolution" (1907) 1 AJIL 273, pp. 278-279.

[66]See Chapter 2, Infra.

[67]The Constitution of the U.S.A. S. Doc. 232, 74th Congress, 2nd Session, pp. 366-368.

[68]Oliver J. Lissitzyn, "Territorial Entities Other Than Independent States in the Law of Treaties," 125 Recueil A.D.I. (1968), p. 23). Hereinafter referred to as Lissitzyn, Territorial Entities Other Than Independent States on the Law of Treaties.

[69]Oliver J. Lissitzyn, "Efforts to Codify or Restate the Law of Treaties," Columbia Law Review, Vol. 62, #7, November 1962, p. 1183. Hereinafter referred to as Lissitzyn, Efforts to Codify or Restate the Law of Treaties.

[70]Levy, A Study in Canadian Federalism, p. 16. See also, Green Hayward Hackworth, Digest of International Law, I (8 vols.: Washington: United States Government Printing Office, 1940-44), 60; L. Oppenheim, International Law--A Treatise, ed. Sir Hersch I. Lauterpacht, Peace (7th edition; London: Longman's, Green and Co., 1948), p. 113; Hans Kelsen, Principles of International Law (New York: Rinehart and Co., 1952), p. 170; and J.C. Starke, An Introduction to International Law (6th edition; London: Butterworths, 1967), p. 108.

[71]Quoted in Ivan Bernier, International Legal Aspects of Federalism (London: Longman Group Limited, 1973), pp. 18-19.

[72]Ibid., pp. 18-19.

[73]Ibid., pp. 81-82.

[74]A. Jacomy-Millette, Treaty Law in Canada (Ottawa: University of Ottawa Press, 1975), p. 58. Hereinafter referred to as Jacomy-Millette, Treaty Law in Canada.

[75]Ivan Bernier, International Legal Aspects of Federalism (London: Longman Group Limited, 1973), p. 30.

[76]Quoted in Jacomy-Millette, Treaty Law in Canada, p. 58.

[77]Lissitzyn, Territorial Entities Other Than Independent States in the Law of Treaties, p. 17, Article 3, Section 2 (a).

[78]Ibid., p. 17, Article 3, Section 2 (b).

[79]Ibid., p. 22.

[80]Ibid., p. 23. In a commentary on the Restatement, Lissitzyn concludes that "Independence . . . does not seem to be regarded . . . as an essential element of statehood or of treaty-making capacity."

[81]United Nations, Yearbook of the International Law Commission, 1965 (Vol. 1, 816th meeting), p. 280, Article 3, Section 2.

[82]Helmut Steinberger, "Capacity of Constitutional Subdivisions to Conclude Treaties: Comments on the ILC's Draft Articles," Zeitschrift fier Aurlandirches Offentliches Recht und Volherrecht, XXVII (1967), p. 418.

[83]A. E. Gotlieb, Canadian Treaty-Making (Toronto: Butterworths, 1968), p. 24. Hereinafter referred to as Gotlieb, Canadian Treaty-Making.

[84]Serbian Loans Case, PCIJ, Series A, No. 20/21, at 4 (1924).

[85]R. J. Delisle, "Treaty-Making Power in Canada," in Ontario Advisory Committee on Confederation. Background Papers and Reports. Queen's Printer of Ontario, 1967, p. 132. Hereinafter referred to as Delisle, Treaty-Making Power in Canada.

[86]Lissitzyn, Territorial Entities Other Than Independent States on the Law of Treaties, p. 29.

[87]Gotlieb, Canadian Treaty-Making, p. 24.

[88]Luigi Di Marzo, "The Legal Status of Agreements Concluded by Component Units of Federal States with Foreign Entities", 16 Canadian Yearbook of International Law, 1978, p. 206.

[89]Lissitzyn, Territorial Entities Other Than Independent States in the Law of Treaties, p. 32.

[90]Ibid., p. 33.

[91]Ivan Bernier, International Legal Aspects of Federalism(London: Longman Group Limited, 1973), p. 120. Hereinafter referred to as Bernier, International Legal Aspects of Federalism.

[92]Lissitzyn, Territorial Entities Other Than Independent States in the Law of Treaties, p. 86.

[93]Bernier, International Legal Aspects of Federalism, p. 146.

[94]See FN #7 (Bernier, p. 30).

[95]Delisle, Treaty-Making Power in Canada, p. 119.

[96]Luigi Di Marzo, "Legal Issues Connected with the Agreements Canadian Provinces Concluded with Foreign Entities". The Graduate Institute of International Studies, Geneva, 1975, p. 5.

[97]Lissitzyn, Efforts to Codify or Restate the Law of Treaties, p. 1183.

[98]K. C. Wheare, Federalism, p. 178.

[99]Ibid., 185.

[100]Hon. Paul Martin, Federalism and International Relations (Ottawa: Queen's Printer, 1968), pp. 30-33

[101]McWhinney, The New Pluralistic Federalism in Canada, p. 147.

[102]Edward McWhinney, "The Constitutional Competence Within Federal Systems for International Agreements", in Ontario Advisory Committee on Confederation. Background Papers and Reports, Queen's Printer of Ontario, 1967, p. 154.

[103]Levy, A Study in Canadian Federalism, p. 3.

CHAPTER II

PROVINCIAL INTERNATIONAL ACTIVITY

Introduction

Provincial international activity assumes a variety of forms and complexity which tends to belie the emphasis placed on the legal and constitutional aspects of the issue by contemporary and historical analysts. Relationships between Canadian provinces and foreign entities are a relatively new unit of analysis[1] and the literature is demonstrably biased in favor of those interactions between provinces and American states. Undoubtedly this shortcoming will be remedied as the attention of students of the subject becomes more focused.

From another perspective it may be premature to apply the adjective "biased" since the possibility exists that relationships between Canadian provinces and American states form the majority of provincial international activity.[2] Historical, cultural, social and economic linkages, plus the existence of a common border would lend support to this hypothesis.

Aside from these factors, which may be specific explanatory variables of province-state interaction, questions remain as to provincial motivation, method and intent. An examination of recent work in this field serves to provide some answers.

A. The Nature of Provincial International Involvement: Transborder Considerations

Perhaps the most comprehensive examination of provincial interaction with American states was commissioned by the United States State Department and conducted by Roger Swanson.[3] The emphasis in this study was on interactions between Canadian provinces and American states, as reported by American state officials. Swanson states that, "the Canadian Federal Government was informed of the project, and invited by the author to participate. Circumstances precluded the Canadian government from doing so."[4] On this basis, Swanson's data should be treated with some caution.

Despite this caveat, Swanson's findings are remarkable in revealing the nature and extent of province-state interaction. For this reason, we shall examine his study in some detail.

Swanson refers to province-state interaction as 'subnationalism,' the "interactions and roles of sublevel governmental units of nations."[5] He defines a state-provincial interaction as "those currently operative processes in which there is direct communication between state and provincial officials on an ongoing basis."[6] Thus, of a total of 1,057 interactions, 766 met these definitional parameters and form the basis of Swanson's analysis.

Swanson delineated the discovered interactions into a typology consisting of agreements, understandings and arrangements. An agreement is the most formal type of interaction defined as a jointly signed document setting forth regularized interactive procedures.[7] Such an interaction could occur between state governors and provincial premiers

as, for example, the June 1973 Curtis-Hatfield joint agreement between Maine and New Brunswick "to maintain and foster close cooperation in all relevant areas of concern."[8] Less formal is an understanding, consisting of correspondence, resolutions, communiques, or memoranda, not jointly signed, setting forth regularized interactive procedures. An example of correspondence is the August/December 1966 exchange of letters between an official of Louisiana's Department of Public Safety and Ontario's Department of Transport concerning reciprocity on exemption from registration of motor vehicles and trailers. An example of a resolution is the August 1973 Resolution of the New England Governors-Eastern Canadian Premiers[9] for the "development of joint energy policies" through the New England-Eastern Canadian Energy Advisory Committee. An example of a communique is the May 1972 Joint Communique of Maine's Governor and Quebec's Deputy premier setting forth an understanding between Maine and Quebec for cooperation in broadcasting and other areas. Finally, an example of memoranda is the January 1974 Illinois Administrative Order establishing an understanding between the Illinois Department of Conservation and Ontario for cooperative fishery management in accordance with the Great Lakes Fisheries Commission.[10] In cases where an interaction occurred, but there was no reported jointly signed document, nor any jointly signed correspondence, resolutions communiques or memoranda, it was entered in Swanson's typology as an arrangement, defined as "any other written or verbal articulation of a regularized interactive procedure." An example of such an interaction is the arrangement between New York's Department of Environmental Conservation and Ontario's Ministry of the Environment "to discuss mutual air pollution problems through the holding of periodic informal meetings."[11]

Of the 766 interactions considered by the Swanson study forty-four or 5.7 percent were agreements, the most formal and potentially the most highly politicized form of interaction. One hundred eighty-one or 23.6 percent were understandings and the majority, 541 or 70.6 percent were the least formal type of interaction, namely arrangements. On this basis, Swanson concludes that state-provincial interaction "is largely an informal affair."[12]

Swanson identified eleven functional categories or issue areas in which state-provincial interaction took place. The level of activity in each category is displayed in Table 1.

Table 1

Percentage of Total Interactions of Each Functional Category Identified by Swanson

Category	% of Total Interactions
Transportation	27.5%
Natural Resources	19.5%
Commerce & Industry	10.4%
Human Services	9.9%
Environmental Protection	8.5%
Educational & Cultural	5.7%
Energy	4.7%
Public Safety	4.7%
Agriculture	3.5%
Unclassified	3.4%
Military & Civil Defense	2.1%
Total*	99.9%

*Note: Figures do not total 100% due to rounding.

Source: Adapted from Swanson, Roger Frank, State/Provincial Interaction (Washington: The CANUS Research Institute, 1974)

Arrangements have been concluded in all functional categories, while understandings were not reported in the areas of agriculture, environmental protection, and public safety. Agreements, the most formal type of interaction, were absent in the categories of agriculture, educational and cultural, human services, natural resources and public safety. In terms of the total number of interactions, most, 27.5 percent, occurred in the functional category of transportation. An example is an understanding between Connecticut and Nova Scotia concerning "the operation of motor vehicles by non-resident students," concluded in an exchange of letters in July/August 1971.[13] Issues concerning natural resources accounted for 19.5 percent of all interactions. An example here is an arrangement between Maine and New Brunswick, Nova Scotia, and Quebec on shellfish purification and regulations where the three Canadian provinces consulted with the state of Maine in establishing quality control systems for shellfish.[14] Commerce and industry accounted for 10.4 percent of all interactions, as for example, an arrangement between Alaska and British Columbia involving correspondence on "matters of mutual interest concerning economic development projects."[15]

Howard Leeson, in a survey and analysis of the transborder contacts of Alberta and Saskatchewan,[16] used functional categories and a typology similar to that employed by Swanson. Interactions were classified as either agreements, that is, any interaction undertaken in writing and either jointly signed or agreed to by correspondence; or arrangements, defined as any interactive procedure not necessarily involving signed documents or correspondence which has the agreement of all parties.[17]

Leeson employed five functional categories: economic (including energy and natural resources); environmental, human services (including transportation and social welfare); political, defined as trips, visits, etc., and other executive or legislative contacts between state and provincial officials; and a general category, including all contacts not included under these specific headings.[18]

Where Swanson did not include in his analysis, interactions which were not ongoing,[19] Leeson does, in a treatment of the data for frequency of interaction. Thus, an interaction was defined as 'regular' if it occurred with regularity, such as annual conferences or regular committee meetings. Interactions were typed as 'occasional' if they happened more than once but had no fixed pattern of occurrence. Finally, an interaction was defined as 'unique' if it was necessitated by a particular event which did not carry with it the necessity for any future contact.[20] The final element in Leeson's typology was a classification of the data by actor role. Thus interactions which did not involve the Canadian federal government, but which may or may not have involved the American federal government, were classified as 'province-state.' Interactions involving the Canadian federal government and possibly the American federal government were classified as 'province-Canadian Government-state.'[21]

Leeson found a total of 113 interactions, of which 50 were agreements and 63 arrangements. This result is at variance with Swanson's findings that only 44 of a total of 776 interactions were the more formal agreement. Leeson notes, however, that most of the agreements are reciprocal motor vehicle licensing arrangements, heavily concentrated

in the transportation category. Thus the more formal type of interaction has not occurred in a wide range of activity.[22] In terms of frequency of interaction, over half (54 percent) of the contacts were regular in nature, while 31 percent were occasional and 11 percent unique. The most active functional category was human services with 51.3 percent of all interactions. Taken together with the economic category, these two issue areas accounted for over 90 percent of all interactions. Interestingly, when actor role was considered, only 15 or 13 percent of all interactions involved the Canadian federal government.

Another study of province-state transborder relations, from the Canadian perspective, was conducted by Richard H. Leach, Donald E. Walker and Thomas Allen Levy in 1973.[23] This study was, in effect, a combination of two research methods: a national mail survey by Leach and Walker, and a survey based on structured interviews by Levy. The classificatory system developed for this study examined the data for degree of formality and function. Formal interactions were defined as those embodied in some kind of written agreement, specifically calling for cooperation between Canadian provincial government departments and American state agencies. Informal relations were those interactions which consist of exchanges of information on an occasional basis.[24]

The functional classification consists of five categories. Firstly, regulatory relations are those examples of cooperation which, by mutual agreement, legally affect the conduct of some form of activity. An example is the practice of Canadian provinces and American states individually signing reciprocity agreements regarding the standards applic-

able to international common carriers licensed in their own jurisdictions. Secondly, third-party relations are interactions which involve the national government of either of the subnational actors participating. Quebec, for example, is a member of the Shore Party Subcommittee of the International Joint Commission on which both the Canadians and the American Federal Government sit. Thirdly, protective/environmental relations involve the preservation of some facet of ecology. In this regard, provinces and states have engaged in agreements which arrange protection against forest fires and sponsor anti-pollution programs. Fourthly, public works interactions focus on road and bridge design as well as maintenance of transportation facilities crossing the international boundary. For example, Maine and New Brunswick have collaborated in the building of a tourist information centre on the Maine-New Brunswick border. The fifth and final category is that of public services, involving interactions in such areas as welfare, consumer protection, municipal development, tax administration, adoption procedures, labor relations, education, civil defense and public health.[25]

Leach et al. reported a total of 170 interactions for all ten provinces with 95 or 55.9 percent being formal and 75 or 44.1 percent being informal.[26] In view of the number of interactions reported by Swanson and Leeson, this study is seriously incomplete. However, Leach and his colleagues raise an important issue in this regard, "In view of the highly compartmentalized nature of provincial bureaucracies and the scant attention given by them to collection of data regarding informal contacts with American states, it is certain that the number of informal links is greater than the number portrayed here."[27]

The most active areas of interaction as reported by Leach et al. were public service (40.2 percent) and protective/environmental (28 percent).[28]

Another study of significance to this discussion of the nature of provincial international activity is that conducted by Johannson.[29] On the basis of an elaborate typology, Johannson identified 649 interactions between British Columbia and American states. The typology employed identified interactions as occurring at three levels of authority, bureaucratic, ministerial and premier, within two fields, "provincial responsibility," or activities within the constitutional jurisdiction of the province, and "provincial responsibility extended," or activities which may go beyond a literal interpretation of constitutional authority. Finally, the nature of interactions was considered on the basis of five categories.

The lowest order of interaction, and the most extensive according to Johannson, were "informational interactions." These contacts involved information flows between individuals employed by governments, through membership in professional organizations, as well as data exchanges between governments at an informal level. "Joint activities" are the next order of interaction, representing low-level understandings which do not result from written agreements, in a range from regular exchanges of data to basic understandings calling for common responses to particular events. An interaction is typed as a "joint agreement" if it is characterized by a written agreement which calls for some kind of coordination of activity. Interactions defined as "joint memberships" result from actor membership on a task-oriented body which has been

established by governments. At this level of interaction, a formalized structure of some kind has been established, either by agreement between the two federal governments or in the form of committees established by local governments. Finally, the most significant provincial government involvement with foreign governments is the category of interaction labelled "treaty involvement." This level includes all operations of a formal nature in the international sector. Examples of this type of involvement are the operation of provincial offices abroad and membership on Canadian delegations which are charged with formulating an international agreement.[30]

To summarize Johannson's findings, the most active authority is the bureaucratic actor, accounting for 527 interactions of a total of 649. The bulk of these are accounted for by information, joint activities, and joint agreements. A total of 68 interactions for the bureaucratic actor involved treaties, and of these, 40 occurred in areas outside provincial jurisdiction. The ministerial level of authority had the bulk of interactions in the form of joint activities, but with a significant number, 41, again outside provincial jurisdiction. Activity at the level of premier occurred in joint activities with four interactions taking place outside provincial authority.[31] Overall, 13.1 percent of the interactions were classified as provincial responsibility extended, and according to Johannson, the incidence is most marked at the political levels of authority, "while the bureaucratic actor was involved in the most raw numbers, the political level accounted for 52.9 percent of the interactions considered "provincial responsibility extended."[32]

B. Informal vs. Formal Modes of Interaction

The typologies employed by these studies all incorporate some notion of the formality and informality of the interactions with which they deal. In each case, the most formal interactions are those characterized by the existence of a jointly signed document and with the exception of one study,[33] formed a minority of total interactions. Swanson, for example, found that of 766 interactions, only 44 were agreements, the most formal mode of interaction. Less formal understandings comprised 181 interactions, while the bulk of the reported interactions, 541, were arrangements, the least formal method of contact.

Why this is so is unclear. Swanson speculates that the distribution and prevalence of types of interaction appear to be consistent with a developmental sequence in which "a state begins with interactions in the form of arrangements and proceeds over time to formalize these arrangements or to conclude other understandings and agreements on this base."[34] Swanson also suggests that "the types of interaction could also be dependent upon those operative constitutional parameters which apply to given areas of interaction."[35]

This conclusion finds support in Leeson's study. Leeson found a preponderance of informal interactions, and agreements that did exist were not signed in a wide variety of activities. Less formal interactions were more evenly distributed however; "this would appear to indicate that Alberta/Saskatchewan and state governments are more willing to enter into informal arrangements on a wide variety of subjects than they are to formalize such arrangements. This is understandable given their position as subnational actors."[36]

Similarly, Johannson concludes that there is little use of formal written documents, but a strong tendency towards making "understandings" with other local governments. He states that "in part, this is because of constitutional prohibitions on this form of activity; in part, it is due to the level of authority involved. . . ."[37]

It is informative to examine "how" states and provinces interact, in other words, the mechanisms through which interaction takes place. Roger Swanson[38] has identified several of these mechanisms. Bureaucratic ad hoc meetings are one mode of contact. State and provincial officials are often involved in similar areas of concern. Where this is the case, it is not unusual that these officials should meet for an exchange of information, discussion of common problems and, if appropriate, the development of joint projects and programs. Another method of contact involves the direct representation of states in Canadian provinces, usually accomplished through the vehicle of public relations firms, rather than an official presence. The same is true of provincial representation in American states,[39] although provincial offices abroad tend to maintain a direct presence. In both cases, however, the mode of contact indicates a functional approach, designed to promote trade and tourism and the exchange of economic development. Another mechanism through which state-provincial contact is achieved is joint organizations, again designed to deal with functional issues, as, for example, the New England-Eastern Canadian Provinces Energy Advisory Committee. Similarly, Canadian provinces participate in American Interstate Compacts as the Uniform Vehicle Registration Proration. Contact may be facilitated as well through professional associations of which state

and provincial officials are members.[40] Finally, contact between states and provinces is achieved through the Canadian and American federal governments. In many of these cases, for example, the International Joint Commission, provinces and states have direct representation.[41]

The consensus of the literature in this area is that state-provincial interaction is primarily informal in nature. Moreover, the mechanisms by and through which states and provinces interact, indicate a functional orientation which poses no threat at this time, to the sovereign and pre-eminent powers of their respective federal governments.

C. Explanatory Variables of State-Provincial Interaction

At a general level, a number of factors have been suggested as reasons for transborder relations. Thomas Levy described the causes of state-provincial interaction as a "felt need to collaborate in policy areas in which they possess legislative authority, because jurisdictional parameters are not clear, or because their respective national governments choose either not to exercise their own authority or to delegate power to the regional governments."[42] Equally, Roger Swanson has suggested a number of variables including contiguity and geographical distance between states and provinces, the size of states and provinces in terms of population and economic base, the size of the state and provincial governments and their attendent capacity and resources for undertaking transborder interactions, and the cultural distribution of the population.[43] A more specific, regional perspective, according to Leeson, sees historical settlement and immigration patterns, economic development, and service needs generated from geographical proximity,

as operative factors.[44] In his study of British Columbia's relations with the United States, Johannson identified geography, constitutional authority, ceremonial good-will visits and specific issues as causal factors. More particularly, however, Johannson states that, "the degree of interaction undertaken by the provincial government on a given subject will be determined primarily by the perceived needs and interests of the province, rather than by the constitutional authority to become involved in the international ramifications of a particular subject."[45]

A factor common to the findings of all these authors is the role of geographical proximity as a causal factor in state-provincial interaction. Swanson found that 62 percent of all interactions between provinces and states were accounted for by states and provinces with contiguous borders.[46] Conversely, Leeson found that only 23 percent of Alberta/Saskatchewan interactions were with border states. More supportive of Swanson's figures were the findings of Johannson, who determined that almost 63 percent of British Columbia's interactions, for all levels of authority, were with bordering United States states.[47]

It would appear that the international boundary does not constitute a barrier to relations between Canadian provinces and American states and that the existence of common borders is an important factor in these relations. In the absence of comparative data to the contrary, there are grounds for viewing state-provincial interaction as unique. Canada and the United States are both federal states with many interests in common. The border between the two countries has been peaceful for over 150 years. Economic links abound. Canadian and American politicians still speak of a special relationship between the two countries. For

these reasons, provincial interaction with states or subunits of states other than the United States, must be considered before any definitive conclusions may be drawn.

While it appears that contiguity is an important factor in provincial international activity, the role of business and economics, and particularly the Canadian economic system is given less emphasis.

It is a well-established truism that the Canadian economy has historically been based on an image of Canadians as "hewers of wood and drawers of water." Canada exports its natural resources, in the main, in raw and semi-processed states, and, in turn, imports manufactured products. In general, Canada has a raw resource-based economy. Secondary manufacturing is concentrated in central Canada, Ontario and Quebec. Thus, in terms of interregional trade, Atlantic and Western Canada must pay the costs of high tariff-protected industrial goods produced in central Canada, while engaged in considerably less protected competition on world markets for the disposal of their natural products. In addition, the industrialized areas of central Canada have tended to siphon off labor from the peripheral parts of the country because of the latter's inability to foster secondary manufacturing. For these reasons, the peripheral provinces have been consistent advocates of free trade, primarily with the United States, while the central provinces have been equally staunch defenders of protectionism.[48]

On the Canadian periphery, the Maritimes, British Columbia, and to some extent the Prairies, feel that their regions gain only marginally as producers from being part of the Canadian economic structure because they possess many of the essential constitutional powers over the deter-

minants of their economic growth. Further, it should not be surprising that most provincial governments attempt to promote their own economic objectives in international economic life by endeavoring to create the economic climate most suitable for their own needs and by seeking foreign capital to strengthen their resource sectors as well as to diversify their economies.[49]

The statistics certainly support this idea. In terms of manufactured products, the Atlantic provinces, Newfoundland, Prince Edward Island, New Brunswick and Nova Scotia, have 54.4 percent of their trade within the region, 19.4 percent with other areas of Canada, and 26 percent with other countries. British Columbia consumes 48.6 percent of its own manufactures, trades 15.1 percent with the rest of Canada, and 36.4 percent with other countries.[50] Thus it would seem that, "a provincial government in whose territory a particularly valued resource is concentrated finds that it must concern itself with the international marketability of that resource much as an independent state in similar circumstances would do."[51] This economic concern of the provinces stems in part from the fact that they are legal owners of the public lands within their borders and the resources therein.

On this basis, we may well ask whether a national economic policy is even possible. The federal response to these economic cleavages has come in the form of equalization payments, conditional grants, and incentives offered by the Department of Regional Economic Expansion (DREE). Admirable as these measures are, they have created their own problems. All involve joint administration to some degree and the danger involved lies in the politicization of the issues under joint administration.

These dangers have been recognized for some time. J. A. Corry has stated that "success in Dominion-Provincial cooperation in administration depends entirely upon personalities,"[52] a dubious basis for success indeed. He states further that, "the experience with conditional grants leads us to doubt whether joint administration of activities by the Dominion and a province is ever a satisfactory way of surmounting constitutional difficulties."[53]

The gradual weaning away of some federal powers and the assumption of these powers by provincial governments, primarily in economic matters, has been seen by some as a failure of national economic policies. Donald Smiley has argued that "the breakdown of the Keynesian welfare state is in my view the most crucial element in the rise of provincialism in both domestic and international affairs."[54] Coupled with this notion, or flowing from it, is the emphasis on foreign policy as an extension of domestic social and economic policies. "Because jurisdiction over these social and economic matters is divided between the federal and provincial governments, the latter almost inevitably become more important in Canadian external affairs, than when Canadian foreign policies and foreign commitments were determined primarily by factors related to the security of the non-communist world."[55]

This rise in provincialism and its attendent concerns with the marketability of provincial products and resources has sparked a proliferation of provincial offices in foreign countries. One of the difficulties of federalism, from the provincial view, in terms of attracting investment from foreign sources, relates to the fact that the provinces are represented abroad by federal personnel, often non-natives of the

province for which they are responsible and charged with the responsibility of equally representing all provinces. The difficulties of this situation are obvious and some provinces, that is, those with the resources to do so, have decided that they may better represent themselves than depend on the federal government. Not surprisingly Quebec and Ontario maintain the largest number of offices abroad. Quebec is represented in London, Paris, Düsseldorf, Milan, Brussels, Tokyo, New York, Boston, Chicago, Los Angeles, Dallas, and New Orleans. Ontario has offices in London, Düsseldorf, Milan, Brussels, Vienna, Stockholm, Tokyo, New York, Boston, Atlanta, Chicago, Cleveland, Minneapolis-St. Paul, and Los Angeles. The remaining provinces do not approach this level of activity. Newfoundland,[56] Manitoba and Prince Edward Island have no offices abroad; Nova Scotia has offices in London, Paris, New York and Boston; New Brunswick is represented in London, as is Saskatchewan. Alberta has offices in London, Tokyo and Los Angeles, and British Columbia in London, Los Angeles and San Francisco.[57]

Cultural factors have given use to provincial international activity as well. The most visible province in terms of international activity has undoubtedly been Quebec. "French-Canadian disenchantment with Canadian foreign policy due to its alleged anglophone bias is a fundamental reason for the development of a parallel French-Canadian foreign policy carried out primarily by the government of Quebec."[58] Durham's comment that he found "two nations warring in the bosom of a single state" has retained its appropriateness to today. The existence of a significant cultural and linguistic minority confined in a single geographical area has had profound implications for Canadian federalism.

The expression of French-Canadian culture on the international scene in the face of a perceived English-Canadian bias, is in some respects, agitation for greater domestic recognition, in constitutional terms, of that culture. Officially, Canada is a bilingual country, yet federal participation and interest in the world-wide French-speaking community was minimal until Quebec's efforts seemingly began to undermine federal authority. As Levy argues, "in some respects, the concern of provincial governments with Francophonie filled a void in Canada's external relations because, in the early and mid 1960's, the federal government had not yet worked out a consistent set of domestic and foreign policies to deal with the crisis of Confederation stemming from French-Canadian society."[59] According to Levy, during the period marked by the "Quiet Revolution" in Quebec, coupled with a series of unstable minority governments in Ottawa, "Quebec politicians began to aggregate societal pressures and a policy of rapproachment with the French-speaking world became a prominent undertaking of successive provincial governments."[60] In addition, the difficulties that arose between Ottawa and Quebec over Quebec's participation in Francophonie were instrumental in mobilizing the interest of French-Canadian minorities in New Brunswick, Nova Scotia and Manitoba. Indeed, the participation of these provinces was in some respects an attempt by Ottawa to reduce the visibility and prominence of Quebec.[61]

D. Conclusions

In an overview of provincial participation in external affairs, Thomas Levy and Don Munton[62] have identified two sets of factors which

underlie the greater degree of provincial participation. Background factors include, the greater prominence of economic and social issues on the national and international agenda, the increasing prosperity and complexity of Canadian society, persisting regional social and economic differences, and increasing disparities in economic growth. The theme which pervades these factors is an economic one and its effects are profound. ". . . in the area of international economics there are clear signs of differing provincial assessments of Canada's 'national interests.'"[63] A similar conclusion, arrived at by the Task Force on the Structure of Canadian Industry led them to comment that, "the desire of each province to get as much job-creating investment, including foreign direct investment, as it can has created a tendency toward minimal constraints on, and maximum encouragement of, foreign ownership. It is clear that no policy toward foreign investment can be effective unless it is a national policy which, by its nature, transcends a strictly regional perspective."[64]

Here again, the problems of regionalism or provincialism are stated. Obviously, Canada's provinces seek to maximize economic benefits to themselves. Equally obvious is the fact that in doing so, they operate from a functional viewpoint. The same may be said of the political factors underlying provincial involvement in external affairs; the greater number and complexity of problems facing provincial governments, the expansion of provincial bureaucracies, and the relatively weakened position of successive minority federal governments during the mid 1960's.[65] As the capacity and perceived necessity of provincial action in areas previously monopolized by the federal government increased,

provincial activity increased as well in response. To these factors must be added the effect of physical closeness of provinces and American states. This situation has "made north-south international relationships between the Canadian provinces and bordering states of the United States of America appear to be a natural phenomenon in view of the coordinated governmental action required to meet joint problems."[66]

Footnotes - Chapter 2

[1]For example, the Johannson study (P. R. Johannson, British Columbia's Relations with the United States. Paper prepared for the Conference on the Federal Dimension in Canadian External Behavior, November 7, 8, 1975) focuses on the period 1952-1974. Leeson (Howard Leeson, Alberta/Saskatchewan Transborder Contacts with U.S. States--A Survey and Analysis. Paper prepared for the Conference on the Federal Dimension in Canadian External Behavior, November 7, 8, 1975) notes at p. 21 that "most interactions are of a recent nature (post 1960), indicating a growing propensity to interact." Swanson as well (Roger Frank Swanson, State/Provincial Interaction (Washington: The CANUS Research Institute, 1974) sought out state-provincial interactions that were operative at the time of his survey (July 1974).

[2]The present study indicates that at least in terms of raw numbers of interactions, Newfoundland has more interactions with foreign entities other than American states.

[3]Roger Frank Swanson, State/Provincial Interaction (Washington: The CANUS Research Institute, 1974). Hereinafter referred to as Swanson, State/Provincial Interaction.

[4]Ibid., p. 3.

[5]Ibid., p. 1.

[6]Ibid., p. 7.

[7]Ibid., p. 11.

[8]Ibid., p. 11.

[9]The Province of Newfoundland/Labrador was a party to this Resolution.

[10]Swanson, State/Provincial Interation, p. 11.

[11]Ibid., p. 12.

[12]Ibid., p. 19.

[13]Ibid., p. 89.

[14]Ibid., p. 128.

[15]Ibid., p. 69.

[16]Howard Leeson, Alberta/Saskatchewan Transborder Contacts with U.S. States--A Survey and Analysis, Conference Paper, 1975. Hereinafter referred to as Leeson, A Survey and Analysis.

[17]Ibid., p. 11.

[18]Ibid., p. 12.

[19]Swanson, State/Provincial Interaction, pp. 12-13. Such interactions were defined by Swanson as "contacts," defined as "single exchanges in which no regularized procedures are defined, nor any ongoing reciprocal procedural obligations incurred."

[20]Leeson, A Survey and Analysis, pp. 13-14.

[21]Ibid., p. 14.

[22]Leeson, A Survey and Analysis, p. 15.

[23]Richard H. Leach, Donald E. Walker and Thomas A. Levy, "Province-State Relations: A Preliminary Assessment," Canadian Public Administration, Vol. 16, #3 (Fall, 1973). Hereinafter referred to as Leach et al, A Preliminary Assessment.

[24]Ibid., p. 473.

[25]Ibid., pp. 473-474.

[26]Ibid., p. 476.

[27]Ibid., p. 475.

[28]Ibid., p. 477.

[29]P. R. Johannson, British Columbia's Relations with the United States, Conference Paper, 1975. Hereinafter referred to as Johannson, British Columbia's Relations with the United States.

[30]Ibid., p. 16.

[31]Ibid., p. 8.

[32]Ibid., p. 9. It is important that Johannson's definition of the term "provincial responsibility extended" be remembered. These are activities which go beyond a literal interpretation of the relevant constitutional provisions. Thus, British Columbia may establish a provincial office in an American state--this activity falls under the above definition. On the other hand there is no record of treaty involvement by British Columbia where the Canadian federal government is not a party or where such involvement is not sanctioned by an agreement to which the Canadian federal government is a party.

[33]Leach et al., A Preliminary Assessment.

[34]Swanson, State/Provincial Interaction, pp. 19-20. This conclusion may have significant implications for the future since Swanson, Leach et al., Leeson, and Johannson all found that international activity on the part of Canadian provinces and American states is a fairly recent (1960's) phenomenon.

[35]Ibid., p. 20.

[36]Leeson, A Survey and Analysis, p. 15.

[37]Johannson, British Columbia's Relations with the United States, p. 18.

[38]Roger F. Swanson, "The Range of Direct Relations Between States and Provinces," International Perspectives, March/April 1976. Hereinafter referred to as Swanson, The Range of Direct Relations Between States and Provinces.

[39]See note 55 Infra.

[40]For example, the International Association of Law Enforcement Officers.

[41]Swanson, The Range of Direct Relations Between States and Provinces, pp. 21-22.

[42]Kal J. Holsti and Thomas A. Levy, "Bilateral Institutions and Transgovernmental Relations Between Canada and the United States," International Organization, Vol. 28, #4 (Autumn, 1974), p. 887.

[43]Swanson, State/Provincial Interaction, p. 60.

[44]Leeson, A Survey and Analysis, pp. 3-5.

[45]Johannson, British Columbia's Relations with the United States, p. 20.

[46]Swanson, State/Provincial Interaction, p. 45.

[47]Johannson, British Columbia's Relations with the United States, pp. 10-12.

[48]Levy, A Study in Canadian Federalism, pp. 121-122.

[49]Ibid., p. 130.

[50]Dominion Bureau of Statistics, Destination of Shipments of Manufacturers, 1967. Table B, p. 9.

[51]McWhinney, The New Pluralistic Federalism in Canada, p. 121.

[52]J. A. Corry, "Difficulties of Divided Jurisdiction," in Report of the Royal Commission on Dominion-Provincial Relations, Book I, Canada 1867-1939, p. 256.

[53]Ibid., p. 259.

[54]Donald V. Smiley, "The Canadian Provinces and External Affairs: The Decline of the Centralized Federal Order." Paper prepared for a conference on 'The Provinces and International Relations,' Ottawa, 1975, p. 8.

[55]Ibid., p. 10.

[56]In 1978-79 the province of Newfoundland operated an office in London.

[57]Nicholas Fodor, "The Provincial Salesmen Who Undersell Canada," Financial Times of Canada, September 28, 1970.

[58]Levy, A Study in Canadian Federalism, p. 318.

[59]Ibid., p. 461.

[60]Ibid., pp. 460-461.

[61]It should be pointed out as well that neither France nor Quebec neglected the French-Canadian minorities in other provinces, and community leaders were found who in various ways, pressured their respective provincial governments into a more active international role. Ottawa's rather late "initiative" was apparently an attempt to appear to be promoting the interests of these minorities in Francophonie, after the fact.

[62]Thomas Levy and Don Munton, "Federal-Provincial Dimensions of State-Provincial Relations," International Perspectives, March/April 1976. Hereinafter referred to as Levy and Munton, Federal-Provincial Dimensions of State-Provincial Relations.

[63]Swanson, The Range of Direct Relations Between States and Provinces, p. 372.

[64]Canada, Privy Council Office, Foreign Ownership and the Structure of Canadian Industry: Report of the Task Force on the Structure of Canadian Industry (Ottawa: Information Canada, 1970), pp. 303-304.

[65]Levy and Munton, Federal-Provincial Dimensions of State-Provincial Relations, pp. 23-24.

[66]Ibid., p. 27.

CHAPTER III

INTERNATIONAL ACTIVITY OF THE PROVINCE OF NEWFOUNDLAND

Introduction

Newfoundland became a province of Canada in 1949. Its entry into the Canadian confederation was unique, as was its history, when compared to other provinces.

Newfoundland was a British colony which was granted representative institutions in 1832 and responsible government in 1855. Constitutionally, therefore, the province held the same Dominion status as did Canada. However, the Statute of Westminster (1931), though it applied to Newfoundland, was never adopted by the province's legislature. As well, though it was a Dominion, Newfoundland was not a separate member of the League of Nations.

In 1933, the Dominion of Newfoundland suffered bankruptcy and at its request, responsible government was suspended and replaced by Government by Commission in 1934. The Commission functioned as both legislature and executive, subject only to disallowance by the Imperial Government. In effect, the island had reverted to the status of a British colony.

The temporary prosperity of the war years led to expectations of a return to responsible government or the new alternative first explored seriously in 1946, of union with Canada. After a protracted debate and

two referenda, union with Canada was the choice of the Newfoundland people. In the negotiations leading to the Terms of Union, the province claims that by agreement between representatives of Newfoundland and Canada, Newfoundland's status reverted to that of a Dominion just prior to the finalization of the Terms of Union.[1] The implications of this claim for the subject under discussion are unclear and consideration of its ramifications, beyond the scope of this study. However, one tentative point may be made. International law recognizes as full international "persons," only those political entities which meet the usual criteria of a state. These criteria include a distinct people who inhabit a settled territory which possesses a government that has both internal and external sovereignty. Under the British North America Act, no Canadian province meets these criteria. However, international law recognizes the concept of "partial international personality" or "partial international competence" as emanating from political units which at some point in their histories have had original international personality and retained a degree of it on entering a federation.[2] There may be grounds, assuming the provincial claim is tenable, for the argument that Newfoundland has a better historical and constitutional claim to some degree of external sovereignty than any other Canadian province, and perhaps is comparable to the constitutional position of certain German Länder.

In the period 1855-1934, when Newfoundland unquestionably held Dominion status, it has been noted that the island remained free from "exalted ideas of sovereignty in the field of foreign affairs" and relied instead on the policy, and particularly the foreign trade nego-

tiations of the Imperial Government.[3] Any claim which Newfoundland may have to partial international personality is not compromised by the fact that the island did not exercise the rights accompanying Dominion status. Oliver Lissitzyn has noted, for example, that the lack of regular diplomatic relations of a dependent entity with foreign states is not of conclusive significance, "since in many types of treaty relations it is expressly provided or tacitly assumed that other channels of communication are open".[4]

The question of whether Newfoundland may have a claim to partial international competence is beyond the scope of this study and properly rests in the realm of legal and constitutional arguments pursued by others.[5] It is noted here in an attempt to highlight the fact that Newfoundland's history contains events and trends which influence the provinces' contemporary international activity.

Newfoundland, like Canada, has had and continues to have close ties with Great Britain. The severing of certain of those ties has, however, been more recent in Newfoundland's case. The population of the island is composed almost entirely of persons of English, Scottish and Irish descent and cultural links with these nations are common and strong.

Reinforcing these cultural ties is the geography of the province. The fact that Newfoundland is an island helps to foster a feeling of separateness and uniqueness which tends to maintain cultural traditions. As an island, Newfoundland is not contiguous with any other province, or, as in the case of some provinces, with a neighbouring American state.

Despite the decision to become part of Confederation in 1949, by the very small majority of four and one-half percent, one would

still expect Newfoundlanders to look more often to the east than to the west. Support for this contention may be found further, not only for Newfoundland but for the remainder of the Atlantic region in the economy and trade.

Writing in 1949, just after Newfoundland had become Canada's tenth province, H. B. Mayo concluded that "in many respects the economy of Newfoundland is like that of the other Maritime Provinces, the example of which surely confirms that Newfoundland cannot expect from union any great economic benefits."[6] At the time of Confederation, Atlantic area trade consisted mainly in the export of fish and timber to the New England states, Great Britain and the West Indies. The opening of Western Canada and the development of the wheat economy there resulted in a national economy, if indeed it could be termed "national," based on regional specializations. In itself, this is no obstacle to integration, but the north-south pattern of trade flows and the threat of a tariff to its traditional markets, left the Atlantic region unable to successfully penetrate the Central Canadian market. In response, Nova Scotia and New Brunswick began to develop their own immigration and trade promotion policies by establishing offices in London.[7]

At the same time in Newfoundland, the economy was based primarily on the export of fish, the export of minerals which could be used in the new technologies, the production of forest related products and on defense installations (primarily American), while manufactured commodities were brought from the outside. Thus the economy was dependent to a large degree on world market conditions.[8] After Confederation, Newfoundland, and in an earlier period, the Maritimes as well, had hoped

to turn from overseas markets to the North American and especially the national market as the basis for prosperity. It was hoped that this renewed vitality would be based particularly on coal, fish and manufactured goods. "However, prevailing conditions showed that the Maritimes were competitive with, rather than complementary to, central Canada."[9] This situation has had the natural result of causing Newfoundland and the Maritimes to look to markets other than the national one in the export of their products. The Atlantic Provinces Economic Council observes, for example, that the resource based and primary processing industries of the Atlantic region rely heavily on foreign export markets. Its estimate is that approximately one-quarter of the gross regional (Atlantic) income is generated in the export sector and that this trade is heavily concentrated in a few markets; fifty-one percent by value to the United States, nineteen percent to Great Britain, ten percent to Latin America, and nine percent to the Commonwealth Preference Area and Western Europe.[10]

Other factors of consequence to this analysis are the general service needs which arise in any administration and which may be expected to generate contact with other jurisdictions. Examples of such service needs include information exchanges of technical data, legislative requirements and reciprocal agreements in the field of transportation and communication.

A. Research Framework

The international activity of Canadian provinces has long been a concern of the federal government and of students of federalism. In

the context of the broad issue of federalism and international affairs, the legal and constitutional aspects of provincial international activity have been extensively examined. This study aims to participate in a new trend in the literature--an analysis of the tangible manifestations of provincial international activity.

In Canada, this new trend has focused on transborder relations between provinces and American states and generally the international activity of Quebec. The literature is as yet relatively incomplete in terms both of its scope and methodology. For example, the international activity of all provinces has not been examined, nor is there a consistent treatment of data by all investigators. Accordingly, the present study was undertaken to investigate the international activity of the Province of Newfoundland in an effort to determine its nature, scope and intent and to attempt to draw some tentative conclusions as to its similarity or lack thereof, with that of other provinces.

1. Methodology

Data was gathered through informal interviews with the administrative head of each department of the Newfoundland Provincial Government. In some cases, additional interviews were conducted with other administrative personnel or specialists.

It is important to note that a number of interactions are not included in this study. These are of two types: those not included through deliberate omission and labelled 'political' in Leeson's typology, and those not reported by the provincial government.

Leeson's typology included a functional category titled 'political' and defined as "trips, visits, junkets, and other legislative or executive contacts between officials of provincial and other governments." This category was not included in this study primarily because only two contacts of this nature were reported and they did not fall within the definition of 'political' as defined by Leeson. Recently, representatives of the Newfoundland provincial government travelled to London to lobby British parliamentarians concerning the issues surrounding the patriation of the British North America Act. This international contact would fall under the definition above and would have been included in this study were it within the time period studied. This is obviously an example of legislative and perhaps executive contact. However, the two reported contacts between 1960-1978 concerned trips by the provincial premier to the United States in an effort to influence opinion in that country concerning the Newfoundland seal hunt. Both trips were assisted and promoted by the federal department of External Affairs and involved neither executive nor legislative contact by the Premier with his counterparts in either state or federal levels of government in the United States. On this basis they were omitted from this study.

The second group of interactions not included consist of those interactions not reported by the provincial government. Here, the assumption is made that all international contact by the Newfoundland provincial government is not reported in this study. This assumption is based on two factors: the attitude of provincial officials and the manner in which data are maintained on provincial international activity.

In the initial stages of data collection the Newfoundland Intergovernmental Affairs Secretariat was contacted in the hope that it acted as a clearing house for the provinces international contacts. It was suggested by the Secretariat, however, that the provinces' involvement in international activity was minimal and that the only possible approach would be to canvas individual departments. Contact with individual departments resulted in referal to the Intergovernmental Affairs Secretariat and it was only during the course of personal interviews with representatives of each department (usually the deputy-minister), that international activity was discovered. On the basis of this process, a number of conclusions may be drawn. Firstly, the Intergovernmental Affairs Secretariat's primary purpose is to deal with relations between Newfoundland and Ottawa and other provinces of Canada, and no officer of the Secretariat has specific responsibility for international relations. Nor does the Secretariat have any mandate to deal with international relations since the official view is that any international activity undertaken by the province is conducted through the federal government. Secondly, it is highly probable that the volume of informal international activity is greater than reported, basically because it is not perceived as 'international' but as "purely functional, utilitarian . . . (and) related to the province's needs."[11] Thirdly, it is likely that the volume of formal relations reported is relatively complete. Though provincial officials are reluctant to label such activity 'international,' the method of its conduct, i.e., through a jointly signed document or a continuing committee, is such that the likelihood of some evidence of its existence being recorded is much greater than is the case with more informal relations.

2. Typology of Newfoundland's International Contacts

For the purpose of this study, international activity is defined as any contact between the Government of Newfoundland and Labrador or its agents and any foreign government, its component units or its agents. Relations coming within this definition are organized in a classificatory scheme which owes much to that employed by Howard Leeson in his study of Alberta/Saskatchewan transborder relations.[12] This method was chosen in an effort to maintain some consistency in treatment of data with other studies in the same field.

Leeson's typology is a synthesis of several others and like those others is intended to apply to "transborder" interactions, those between Canadian provinces and American states. In the case of Newfoundland, consideration was given to a wider range of contacts including those other than United States contacts. With few alterations Leeson's typology has been adapted to include non-transborder contacts as well. The definitive typology employed is as follows:

Type

Agreements - Any interaction undertaken in writing and either jointly signed or agreed to by correspondence.

Arrangements - Any interactive procedure not necessarily involving signed documents or correspondence which has the agreement of all parties. Essentially, this category involves all interactions not expressed as commitments made through signed correspondence.

Function

Economic - Any interaction that is essentially economic in nature, including those involving energy resources and other natural resources.

Environmental - Any interaction involving measures for the preservation of the environment.

Human Services - Interactions which facilitate private or public contacts in categories such as transportation and social welfare.

Frequency

Regular - Any interaction which occurs with regularity, such as annual conferences or regular committee meetings; or an agreement or arrangement which necessitates a continual high level of interaction.

Occasional - Interactions which happen more than once, but which have no fixed pattern of occurrence.

Unique - An interaction necessitated by a particular event which does not carry with it the necessity for any future transnational contact between the actors involved.

Method

Province-Other - Interactions which are undertaken by the province and other governments and exclude the Canadian federal government.

Province-Federal Government-Other - Interactions which include the province, the Canadian federal government and a foreign government.

With the exception of the Departments of Consumer Affairs and Environment,[13] Municipal Affairs and Housing, Rehabilitation and Recreation,[14] and Rural Development,[15] the remaining thirteen departments of the Newfoundland provincial government are involved in varying degrees of international activity. The extent of this activity on the basis of the typology outlined above is shown in Table 2.

The Government of Newfoundland and Labrador reports a total of 36 interactions with foreign states, or subunits thereof, over the period 1960-1978. Of this total, 11 interactions are agreements, or more formal contacts, while the remaining 25 interactions take the form of arrangements, or less formal contacts. On a percentage basis, 30.6 percent of interactions are the more formal agreements, while the majority, 69.4 percent are arrangements.

All of the agreements are of the regular variety with the majority, nine, being conducted directly, without the federal government as medium. Arrangements are more equally distributed by frequency, with direct and indirect interactions forming almost equal proportions. It is significant that both agreements and arrangements tend toward a fairly regular mode of interaction with no agreements falling in the 'unique' category and only three of 25 arrangements being so categorized.

Table 3 indicates the extent of Newfoundland's interactions with states of the United States. The total number of interactions with American states is slightly less than half, 16, of all interactions. The majority, 10, take the form of the more formal agreements, while the remainder are arrangements. Expressed as a percentage, 90.9 percent

Table 2

Newfoundland's International Activity - All Contacts

	Agreement						Arrangement					
	Regular		Occasional		Unique		Regular		Occasional		Unique	
	Prov.-Other	Prov. Fed.Gov. Other	Prov.-Other	Prov.-Fed.Gov. Other	Prov.-Other	Prov.-Fed.Gov. Other	Prov.-Other	Prov.-Fed.Gov. Other	Prov.-Other	Prov.-Fed.Gov. Other	Prov.-Other	Prov.-Fed.Gov. Other
Economic	1						2	1	2	3	1	
Environmental		2										
Human Services	8						5	3	3	3	2	
Column Totals	9	2	0	0	0	0	7	4	5	6	3	0

-- TOTAL --

11 Agreements

30.6%

25 Arrangements

69.4%

Table 3

Newfoundland's International Activity - American Contacts

	Agreement						Arrangement					
	Regular		Occasional		Unique		Regular		Occasional		Unique	
	Prov.-Other	Prov.-Fed.Gov.Other	Prov.-Other	Prov.-Fed.Gov.Other	Prov.-Other	Prov.-Fed.Gov.Other	Prov.-Other	Prov.-Fed.Gov.Other	Prov.-Other	Prov.-Fed.Gov.Other	Prov.-Other	Prov.-Fed.Gov.Other
Economic	1								1		1	
Environmental		2										
Human Services	7						1		2		1	
Column Totals	8	2	0	0	0	0	1	0	3	0	2	0

-- TOTAL --

10 Agreements

27.8%

6 Arrangements

16.7%

of all agreements are with American states, while 24 percent of all arrangements are with American states. In terms of the frequency of interaction, all 10 agreements that Newfoundland has with United States states are of the 'regular' variety, while the majority of arrangements are conducted at a lower level of frequency.

The method of interaction by the province with American states is primarily direct. Only two of 10 agreements were mediated through the Canadian federal government, and only one of seven arrangements are so conducted.

As indicated by Table 4, the picture for non-American contacts is somewhat different. Arrangements constitute 95 percent of all non-American interactions and 76 percent of all arrangements are with non-American sources. Only one agreement has been concluded with non-American contacts. The one agreement is a regularized, direct contact while the arrangements are divided almost evenly between regular and occasional interactions. The mode of interaction of non-American arrangements also reflect a dictotomy between direct and indirect contacts.

An analysis of Newfoundland's international activity by function (Table 5) indicates that the majority of interactions occur in matters dealing with human services (transportation, social services, health, etc.). The functional area which has the next highest proportion of interaction is economic, taking 27.8 percent of the total interactions. Environmental areas of interaction assume only 5.5 percent of the total.

As a proportion of total contacts, Newfoundland has a greater number of interactions with non-American areas in the economic and human

Table 4

Newfoundland's International Activity - Non-American Contacts

	Agreement						Arrangement					
	Regular		Occasional		Unique		Regular		Occasional		Unique	
	Prov.-Other	Prov.-Fed.Gov. Other	Prov.-Other	Prov.-Fed.Gov. Other	Prov.-Other	Prov.-Fed.Gov. Other	Prov.-Other	Prov.-Fed.Gov. Other	Prov.-Other	Prov.-Fed.Gov. Other	Prov.-Other	Prov.-Fed.Gov. Other
Economic							2	1	1	3		
Environmental												
Human Services	1						4	3	1	3	1	
Column Totals	1	0	0	0	0	0	6	4	2	6	1	0

-- TOTAL --

1 Agreement

2.8%

19 Arrangements

52.8%

Table 5

Distribution of Interactions by Function

	Agreements	Arrangements	Total	Percent
Economic	1	9	10	27.8
Environmental	2		2	5.5
Human Services	8	16	24	66.7
Column Totals	11	25	36	100

Table 6

American and Non-American Interaction by Function

	American	Non-American	Total
Economic	3	7	10
Environmental	2		2
Human Services	11	13	24
Column Totals	16	20	36
	44.4%	55.6%	

services categories, as reflected in Table 6. Non-American contacts in the economic sphere, however, appear to be the only significant divergence from international activity on the part of the province, which is generally equally divided between the states of the United States and other nations.

B. International Activity of the Province of Newfoundland/Labrador

An analysis of Newfoundland's international activity reveals that its generation is primarily a result of what are here termed "service needs." Service needs are defined simply as those aspects of the day-to-day operation of a government which require solution through administrative action. While the fulfillment of these needs generate much of Newfoundland's international dealings, other factors are evident as well. Table 7 displays the full range of reported international activity of the province.

The Department of Forestry and Agriculture through the Canadian federal government and in company with the Atlantic provinces and Quebec, participates in joint forestry research projects with the American federal government and Maine. The common concern is forest damage as a result of spruce budworm infestation. In addition, the department has had contact with the countries of Scandinavia concerning the marketing of Newfoundland newsprint and pulpwood, and with Scotland in areas involving exchanges of technical personnel, recruitment of personnel and exploration of certain logging techniques in Scotland which have been successfully adapted to Newfoundland conditions.[16]

Table 7

Newfoundland's International Activity by Provincial Government Department, Foreign Contact, Title and Purpose of Interaction, Type of Interaction, Function and Date

Department	Foreign Contact	Title and Purpose of Interaction	Type of Interaction	Function	Date	Method of Contact
Forestry and Agriculture	Scandinavia	Exploration of Markets for Nfld. newsprint & pulpwood	Arrangement	Economic	1976	Prov.-Fed. Other
	Scotland	Technical assistance from Scotland as well personnel exchanges in regard to cable logging operations	Arrangement	Economic	1974 Ongoing	Prov.-Fed. Other
	Maine, American Federal Government	Canadian-American forestry research project investigating control of the spruce budworm	Agreement	Environmental	1978 Ongoing	Prov.-Fed. Other
	American Federal Government	CANUSA--A bilateral agreement involving the exchange of technical information	Agreement	Environmental	Ongoing	Prov.-Fed. Other
Finance	Luxembourg	The province borrows, floats bond issues, etc. on the European market	Arrangement	Economic	Ongoing	Prov.-Other
	U.S. Securities & Exchange Commission (State of New York)	The province borrows, floats bond issues, etc. on the American market	Arrangement	Economic	Ongoing	Prov.-Other
Labor & Manpower	Various (through the International Labor Organization in Geneva	Information exchange	Arrangement	Human Services	Ongoing	Prov.-Fed.
	Great Britain	Department personnel have received technical training in Great Britain	Arrangement	Human Services	Ongoing	Prov.-Fed. Other
	Various American states	The Department holds active membership in the International Association of Government	Agreement	Human Services	1976	Prov.-Other

....continued

Table 7 (cont'd)

Department	Foreign Contact	Title and Purpose of Interaction	Type of Interaction	Function	Date	Method of Contact
	Various[1]	Reciprocal Enforcement of Judgments Act	Agreement	Human Services	1970	Prov.-Other
Justice	Various[2]	Maintenance Orders (Enforcement) Act	Agreement	Human Services	1974	Prov.-Other
	State of Maryland	Information exchange on adult corrections policy	Arrangement	Human Services	1976	Prov.-Other
	Various[3]	Market Research; promotional activity	Arrangement	Economic	Ongoing (3-4 times per yr)	Prov.-Fed. Other
Fisheries	Great Britain	The department maintains an office in London on a temporary basis for the purpose of promoting the fishery	Arrangement	Economic	1978	Prov.-Fec. Other
	Various[4]	Information exchange (Mines)	Arrangement	Economic	Ongoing	Prov.-Other
	Various[5]	Information interchange re: offshore oil and gas exploration and development	Arrangement	Economic	Ongoing	Prov.-Other
Mines and Energy	American Federal Government	The Mines Division of the department receiving assistance of a technical nature in the establishment of a Computerized Mineral Deposits Service	Arrangement	Economic	1977-1978	Prov.-Other
	Various[6]	The sailing schooner "Norma & Gladys," owned by the provincial government has been used for tourism and fisheries promotion	Arrangement	Human Services	1975-1976 Ongoing	Prov.-Fed. Other
Tourism						

....continued

Table 7 (cont'd)

Department	Foreign Contact	Title and Purpose of Interaction	Type of Interaction	Function	Date	Method of Contact
	Great Britain	Cultural Affairs interchanges	Arrangement	Human Services	Ongoing	Prov.-Other
	Federal Republic of Germany	Tourist Promotion	Arrangement	Human Services	1978	Prov.-Other
Tourism (cont'd)	State of Maine	Exchange of Newfoundland caribou for Maine grouse	Arrangement	Human Services	1962	Prov.-Other
	Colorado	Newfoundland otter sent to Colorado	Arrangement	Human Services	1978	Prov.-Other
	States of Maine & Massachusetts	Tourism Promotion	Agreement	Human Service	1976	Prov.-Other
	Various (through the United Nations)	Educational Conference for which the Adult and Continuing Education Division prepared a paper	Arrangement	Human Services	1977	Prov.-Fed. Other
Education	Various[7]	The department participates in OECD Regional Atlantic Committee	Arrangement	Human Services	Ongoing 1975-1976	Prov.-Fed. Other
	Great Britain	Frequent exchanges of administrative personnel; teacher training programs	Arrangement	Human Services	Ongoing	Prov.-Fed. Other
	St. Pierre & Miquelon	Extension of health care services to St. Pierre et Miquelon when such services are unavailable on the islands	Arrangement	Human Services	Ongoing 1977-1978	Prov.-Other
Health	Great Britain	Recruitment of health care personnel	Arrangement	Human Services	Ongoing	Prov.-Other
	States of Vermont, Connecticut, Maine, Massachusetts, New Hampshire & Rhode Island	Conference of Maritime Premiers and New England Governors	Agreement	Economic	1973	Prov.-Other
Industrial Development						

....continued

Table 7 (cont'd)

Department	Foreign Contact	Title and Purpose of Interaction	Type of Interaction	Function	Date	Method of Contact
Public Works and Services	State of Wisconsin	Membership in the National Association of State Purchasing Officials	Agreement	Economic	Ongoing 1972-1973	Prov.-Other
Social Services	States of New York, Maine & New Jersey	Adoption of Newfoundland children	Arrangement	Human Services	1971-1977	Prov.-Other
	States of Maine, New Hampshire & Delaware	Reciprocity agreements relating to the licensing of motor vehicles	Agreement	Human Services	1974	Prov.-Other
Transportation	States of Vermont, Connecticut, Maine, Massachusetts, New Hampshire & Rhode Island	Conference of Maritime Premiers and New England Governors	Agreement	Human Services	1973	Prov.-Other

Notes

[1]Includes, among others, the United Kingdom, Queensland, Australian Capital/Territory and the State of Victoria, Australia.

[2]Includes, among others, Malta, New Guinea, New Zealand, Republic of Singapore and Southern Rhodesia.

[3]Includes, among others, Poland, Portugal, Spain, the Netherlands, Ireland, Norway and Japan.

[4]Includes, among others, Australia, India, France and the U.S.S.R.

[5]Includes Scotland, England, Norway and Iceland.

[6]Includes, among others, Portugal, Spain, Great Britain.

[7]Includes, among others, France, Great Britain and the United States.

In the area of transportation, agreements involving the reciprocal recognition of vehicle registrations are in effect between the province and the states of Delaware, New Hampshire, and Maine. Interestingly, these agreements, contained in exchanges of letters between the province and the states indicated, came about through the lobbying of individuals and organizations involved in the transport of goods between Newfoundland and the United States.[17] As well, the Provincial Department of Transportation attended the Conference of Maritime Premiers and New England Governors in 1973. The departmental representative participated in discussions on transportation during the Conference although nothing substantive resulted.[18]

Through the Department of Justice, the province has agreements with several states[19] regarding the reciprocal enforcement of judgments and maintenance orders.[20] In 1976, the Division of Adult Corrections was requested by the Maryland Department of Fiscal Services through the Canadian Embassy in Washington to provide information on the criminal justice system in the province.[21]

In the area of health care, the province's Department of Health has finalized an "informal" arrangement with the islands of St. Pierre and Miquelon, to provide health services that are beyond the resources of the islands. The Deputy-Minister indicated that no formal agreement would result and that the arrangement was merely for the sake of convenience.[22] In addition to this activity, the province actively recruits health care personnel in Great Britain. Initially, the federal Department of External Affairs provided liason in the recruitment process but, as an ongoing process, personal contact by Department of Health personnel are relied upon.[23]

The role of other factors in the generation of international activity by the province is illustrated in the area of education. The provincial Department of Education is, in the opinion of the Deputy-Minister, more oriented toward Great Britain than the United States.[24] Primarily, there are two reasons for this view; firstly, the presence of strong traditional ties between the province and the 'mother' country, and secondly, the feeling that as part of the North American ethos, Newfoundland should seek alternatives to the American or Canadian approach to education. In addition to this general orientation, specific foreign contact has occurred in exchanges of administrative personnel with Great Britain. Such exchanges are intended for the exchange of information, administrative techniques in education and to provide personnel on both sides with new skills and ideas. As well, the Department participated in the preparation of a report for the United Nations on Adult Education in Canada through its Division of Adult and Continuing Education, and maintains active participation in the Organization for Economic Co-Operation and Development (OECD) through the Regional Atlantic Centre of that organization, of which the Deputy-Minister of Education is a member.[25]

Membership in professional associations has led to international activity on the part of the province. The province holds membership in the International Association of Government Labor Officials (IAGLO) through its Department of Labor and Manpower. The IAGLO is a Canada-United States organization comprised of state governors and provincial ministers of labor and its purpose is to provide a forum for the discussion of matters of mutual interest in the labor relations field. Con-

ferences are held on an annual basis and are attended by the provincial Minister of Labor and Manpower from Newfoundland.[26]

As well, the Department has a variety of international contacts through the International Labor Organization of the United Nations (ILO), located in Geneva. Current contacts through the ILO are mainly concerned with matters of occupational health and safety. In dealing with the ILO, the departments' contacts are often coordinated by the federal government through the Canadian Association of Labor Commissioners, but provincial Labor and Manpower officials have had direct contacts as well. In addition, the department periodically receives requests for information of a technical nature from many countries, although these usually, but not always, come through the ILO.[27]

Finally, Department of Labor and Manpower officials have received training of a technical nature in Great Britain. Similarly, the Department of Public Works and Services has had extensive contact with the state of Wisconsin, among other American states, through the National Association of State Purchasing Officials.[28]

The Department of Tourism has had extensive contact with American states primarily through its Wildlife Division. For example, in 1962, Newfoundland caribou were sent to the state of Maine in exchange for Maine grouse. As well, otter from Newfoundland waters have been shipped to Colorado. In the area of tourism promotion, the department attends Tourist Trade Shows in Europe on a regular basis. It is interesting to note in this area as well, that stemming from a meeting of the Conference of Maritime Premiers and New England Governors in 1976, the Province proposed a tourist package with the states of Maine and Massa-

chusetts. The package never came to fruition due to lack of funds on the part of Maine and Massachusetts.[29]

Additionally, a cultural exchange program is administered by the department, resulting in frequent interchanges of museum and art exhibitions with Great Britain.

In 1975-76, the province purchased a fishing schooner named the "Norma and Gladys" which serves the dual purpose of promoting the province's tourist attractions as well as the fishing industry.

The Department of Social Services has also had some international contacts. The influx of Vietnamese children to North America when the war in Vietnam ended saw a positive response from the people of Newfoundland. Through the International Children's Placement Agency and the Federal Department of Employment and Immigration, the Department of Social Services laid the groundwork for the adoption of Vietnamese children by Newfoundland families. While no actual adoptions took place, the department had prepared a program.

The main area of contact has been with the United States. In 1971, the province had a large number of children available for adoption and was finding placement difficult. According to the Director of Child Welfare for the province, three American states, New York, Maine and New Jersey were chosen for an adoption program, primarily due to their closeness to the province. The program was operative during the period 1971-77 and the department worked through the American Consul-General in the province. In the United States, the placement agencies utilized included the Adoption Resource Exchange of North America (ARENA), the Massachusetts Adoption Resource Exchange (MARE), the Sister Mary Eugene

Foundation and the New York Foundling Hospital. The Director of Child Welfare indicated that the program was a very positive one (it ended in 1977 due to a lack of Newfoundland children available for adoption) in which the greatest cooperation was extended by American authorities.[30]

Visits to the Departments of Fisheries and Mines and Energy revealed a very considerable difference in attitude in relation to other departments. As primary resource sectors, encompassing issues and policies which are often points of contention between the province and the federal government, there is a definite feeling of independence in the departments that administer these areas. The Department of Fisheries maintains extensive and frequent contact with foreign states. In fact, the department maintained a temporary office in London during 1978 for the purpose of promoting the Newfoundland fishery in Great Britain and Europe. Delegations at the Deputy-Ministerial level travel to foreign jurisdictions on the average of three to four times a year. These visits are primarily for the purpose of gathering information in areas such as fish-farming, vessel and gear technology and market technology. The Deputy-Minister of Fisheries pointed out that the position of Newfoundland is often contrary to that of the federal government in many marine resource areas and where this is the case, representatives of the province state their case without consideration as to the obvious conflict which may be perceived by foreign interests.[31] Similarly, the Energy Division of the Department of Mines and Energy is concerned with regulations governing the development of offshore oil and mineral resources. Consequently, the department's contacts with its counterpart organizations in Scandinavia, Scotland, England and Ireland are frequent.

The Mines Division of the department is involved in extensive information interchanges with many American states as well as Australia, India, France and the U.S.S.R. among others. In 1977-78, the Division received technical assistance from the United States on the establishment of a Computerized Mineral Deposits Service for the province.

The general practise of the provincial government is to utilize the services of the federal department of External Affairs and its representatives abroad where provincial officials are unsure of the territory or where External can facilitate contacts. Usually, however, after the province has developed relationships of its own, or through External Affairs, the role of the federal government ends and provincial representatives make their own way, at times, not bothering to inform federal officials of their activities. The overall impression, and indeed, the facts, support the notion that there is nothing covert about Newfoundland's relations with foreign states. Provincial officials simply go about doing their jobs concerned not with the constitutional implications of their activities, but rather the administration of the departments of which they are a part. As Edward McWhinney has stated,

> [Transnational agreements are] very often concluded, not by the Prime Minister of the province or his cabinet, but by intermediate rank civil servants who have acted on a purely functional, utilitarian basis related to the province's needs, and dealt directly with their civil service counterparts in other countries without apparently being aware that, in doing what comes naturally, they may have created conceptualistic problems for latter-day commentators.[32]

C. Newfoundland's International Activity and that of Other Canadian Provinces

When viewed in relation to the activity of other provinces, Newfoundland's international activity is not atypical. Obviously, when one talks in terms of the 'scale' or extent of international contact, Newfoundland does not compare with Ontario, Quebec, Alberta or British Columbia, but relative to its size, its interests, the attitudes of its leaders, and its resources for the conduct of such activity, Newfoundland's position exhibits some similarity to that of other provinces.

Since studies examining provincial international activity have employed different units of analysis, a variety of perspectives, and a tendency to emphasize 'transborder' contacts, only 'gross' comparisons are possible. These are illustrated in Table 8 for a number of variables.

A reasonable comparison is possible among all five studies on only one variable--the degree of formality of provincial international activity.[33] Four of the studies indicate that the majority of interactions are conducted at an informal level. At this level of interaction, signed documents creating legal duties and responsibilities are not utilized. Swanson, for example, concludes that for most states, "state/provincial interaction is largely an informal affair."[34] Similarly, Leeson found that formal agreements have not been signed in a wide range of activities despite the fact that formal and informal interactions in the Alberta/Saskatchewan case are of similar proportions. In this study, most of the formal interactions were confined to the transportation area. Leeson concludes that Alberta/Saskatchewan

Table 8

Comparison of Selected Studies of Provincial International Activity

	Present Study	Swanson	Leeson	Leach, Walker Levy	Johannson
Formal	28.9	29.3	44.2	55.9	21.1
Informal	71.1	70.6	55.8	44.1	78.9
Most Active Functional Category	Human Services	Human Services	Human Services	Human Services	
Frequency of Interaction	Regular (92%)		Regular (54%)		
Actor Role					Bureaucratic (81%)
Method of Contact					
Prov.-Other	73%		87%		
Prov.-Fed.Gov. Other	27%		13%		

and state governments "are more willing to enter into informal arrangements on a wide variety of subjects than they are to formalize such arrangements.[35]

The Leach, Walker and Levy study reported a higher proportion of formal interactions. Leach et al. suggest that this result may be a function of the fact that formal interactions involving substantiating documents are more likely to be retained as records than less formal activity and therefore are more likely to be reported.[36]

Comparisons for other variables are tenuous if not impossible in most cases, again because of the different methodologies employed. It may be stated generally, that where comparisons are possible, the data tends to support the findings of the present study. For example, human services is the most active functional category for four of five studies and there are similarities between the present study and Leeson's analysis of Alberta/Saskatchewan transborder contacts in terms of frequency of interaction and method of contact.

Although tested in most of the studies under discussion, incomplete reporting of when interactions occurred makes comparison difficult. As a general statement, the majority of interactions appear to be recent. Swanson notes that of 33 agreements concluded in the transportation category, 84.8 percent occurred in the period 1960-74.[37] Similarly, Leeson notes that "most interactions are of a recent nature (post 1960) indicating a growing propensity to interact."[38]

What emerges from an attempt to compare the existing studies of provincial international activity is the tentative conclusion that it is in the main, informal, functionally oriented toward human services,

regular in nature, does not usually involve the federal government of Canada and is a recent phenomenon. A significant research effort is required to verify these conclusions.

Footnotes - Chapter 3

[1]This point is one of the central tenets of the Newfoundland Provincial Government's argument for jurisdiction over offshore oil and mineral rights off Canada's east coast.

[2]Thomas Allen Levy, "The International Status of Provinces," unpublished M.A. Thesis, McGill University, 1970, p. 30. See also, Ivan Bernier, International Legal Aspects of Federalism (Longon: Longman Group Limited, 1973), pp. 18-19.

[3]H. B. Mayo, "Newfoundland's Entry into the Dominion," Canadian Journal of Economics and Political Science (1949), pp. 507-508.

[4]Lissitzyn, Territorial Entities Other Than Independent States in the Law of Treaties, p. 86.

[5]See Chapter I, supra.

[6]Mayo, Newfoundland's Entry into the Dominion, p. 521.

[7]H. Gordon Skilling, Canadian Representation Abroad: From Agency to Embassy (Toronto: The Ryerson Press, 1945), p. 107.

[8]Atlantic Provinces Economic Council. Atlantic Canada Today, 1969, p. 31.

[9]Ibid., p. 150.

[10]Nelson Mann, "Future Reciprocity," ed. John L. Hazard, Canadian-American Reciprocity and Regional Development at Mid-Continent (Michigan State University, 1968), p. 107.

[11]See Note 22, supra.

[12]Leeson, A Survey and Analysis.

[13]Now, the Department of the Environment.

[14]The Department of Rehabilitation and Recreation has recently been terminated, its former function being assumed by the Department of Social Services and the latter by the Department of Tourism.

[15]Now the Department of Rural, Agricultural and Northern Development.

[16]Interview with the Deputy-Minister of Forestry and Agriculture, March 30, 1978.

[17]Interview with the Deputy-Minister of Transportation, March 23, 1978.

[18]Ibid.

[19]These 'states' include the United Kingdom, Queensland, the Australian Capital Territory and the State of Victoria, Australia.

[20]Here, the range of contact is more extensive, but remains nonetheless within the commonwealth, including Australian Capital Territory, England and Northern Ireland, Isle of Man, Malta, New Guinea, New Zealand, New South Wales, Republic of Singapore, Southern Rhodesia and Tasmania, among others.

[21]Interview with Mrs. Mary Noonan, Solicitor, Department of Justice.

[22]Interview with the Deputy-Minister of Health, April 3, 1978.

[23]Ibid.

[24]Interview with the Deputy-Minister of Education, March 14, 1978.

[25]Ibid.

[26]Interview with the Deputy-Minister of Labor and Manpower, May 17, 1978.

[27]Ibid.

[28]Interview with the Director of Purchases, Department of Public Works and Services, May 8, 1978.

[29]Interview with the Deputy-Minister of Tourism, March 9, 1978.

[30]Interview with the Director of Child Welfare, Department of Social Services, May 2, 1978.

[31]Interview with the Deputy-Minister of Fisheries, May 4, 1978.

[32]McWhinney, The New Pluralistic Federalism in Canada, p. 145.

[33]A 'formal' interaction is one where a signed document is involved; 'informal' interactions are characterized by verbal commitments or so-called 'gentlemen's agreements.'

[34]Swanson, State/Provincial Interaction, p. 19.

[35]Leeson, A Survey and Analysis, p. 15.

[36]Leach et al., A Preliminary Assessment, p. 476.

[37]Swanson, State/Provincial Interaction, p. 42.

[38]Leeson, A Survey and Analysis, p. 21.

CHAPTER IV

SUMMARY AND CONCLUSIONS

For the purpose of this study and indeed for the whole issue of provincial international activity, it is important that a realistic perspective is maintained. Under the British North America Act (1867) there is no definitive determination of the respective powers of the federal government and the provinces in foreign affairs. Section 132 of the Act is inapplicable to contemporary events. The question of treaty implementation, however, has been settled since 1937, when the Judicial Committee of the Privy Council held that the implementation of any treaty made by Canada must follow the distribution of legislative powers as defined by Sections 91 and 92 of the B.N.A. Act.[1] In effect, the implementation of the terms of treaties dealing with matters under provincial jurisdiction is the legitimate concern of Canadian provinces. As a nation, Canada cannot undertake obligations under such treaties without provincial consent. For example, the Draft Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages was opened for signature at New York on December 10, 1962.[2] Since "solemnization of marriage" falls under provincial jurisdiction, the Secretary of State for External Affairs corresponded with all provincial premiers, inquiring whether, in the light of their provinces' legislation in the field of marriage, "it would be feasible for Canada to become a party to the United Nations Convention."[3] This process is

followed whenever the subject matter of a treaty falls under provincial jurisdiction. Where a treaty's subject matter falls clearly under provincial jurisdiction, the federal government is unencumbured by this process.

In the absence of a clear determination of treaty-making authority, Canadian provinces have claimed such power,[4] though little support can be found for this position. While it is true that the practice of certain federal states appears to lend support to the provincial argument, comparisons with the Canadian case are questionable. Some Länder of the federal Republic of Germany, and cantons of the Swiss federation exercised a treaty-making power prior to Confederation in their roles as sovereign states. The constitutions of both countries provide for a limited treaty-making power for their subunits in certain areas and always under central government control and supervision. Similarly, the constitution of the Union of Soviet Socialist Republics provides for a restricted treaty-making power on the part of the member union republics and the constitution of the United States implies that states may enter into compacts with the consent of Congress. Neither case is strictly comparable with Canada where no province possessed a treaty-making power prior to Confederation[5] and there are no applicable constitutional provisions.

Attempts to formulate an international law of treaties have seen efforts to include some provision governing the conduct of states members of federations in international law. All such attempts have failed. Proposed draft articles for such a law of treaties indicate that sovereign states may be prepared to recognize an international role

for states members of federations if constitutional authorization is present but on no other basis.[6]

Nevertheless, Canadian provinces are engaged in extensive international activity with no apparent international legal consequences, perhaps because the "treaty involvement" of Canadian provinces is minimal. With the exception of the province of Quebec, no province has purported to conclude a treaty with a foreign state or part thereof. Here, the term treaty is used in the sense of a "treaty proper," an agreement between sovereign states for some specific purpose as arms control or mutual defense. It is evident that provinces have concluded "lower level" or "administrative" agreements, but not with sovereign states. Rather, these agreements have been concluded with subunits of states or at the bureaucratic level. Such activity cannot be defined as political nor as threatening to Canada as a sovereign state. Nonetheless, the federal government, in an effort to provide supervision and control of provincial international activity, has, in its position paper on "Federalism and International Relations,"[7] provided a framework within which the provinces may act internationally. From an international law point of view, the Canadian approach legitimizes provincial international activity by effectively making provinces agents of the federal government, removing ultimate responsibility from the provinces and placing it in the federal government.

Research in the area of provincial international activity currently suffers from a number of deficiencies, the most important of which is probably lack of comparability due to divergent methodologies. In this context, only general conclusions are possible. Overall, provincial

international activity appears to be largely informal, rooted primarily in the administrative needs of provinces and dominated by a level of interaction best described as administrative agreements. At the same time, activity is regular, that is continuous, and possibly increasing, with a greater frequency of interactions since 1960.

In general, the international activity of the province of Newfoundland supports these conclusions. Insofar as comparisons are possible, Newfoundland's activity is not atypical of that of other provinces.

Newfoundland's primary export and staple is fish and in the 1920's, Sir Richard Squires, then premier, established trade offices for the promotion of this product in the United States, in New York and Boston, and in Spain, Portugal and Italy.[8] During Mr. Joseph R. Smallwood's tenure as premier, 1949-1972, again for the promotion of fish products, he appointed trade commissioners in Jamaica, Portugal and Spain.[9] These activities indicate only that the provincial administration has been concerned with the effective marketing of the province's resources and could not be construed as a conscious attempt to establish a role for Newfoundland in foreign affairs. Indeed, Mr. Smallwood is known as an ardent federalist, and his position is that the Newfoundland government and he, as premier, were very happy to have the federal government's department of external affairs working in Newfoundland's interests. In Mr. Smallwood's opinion, there was never any question of the fact that external affairs was indeed working in the province's interests.[10] Mr. Smallwood stated that during his years as premier, he was very active in the promotion of the island's interests, but always under the aegis or with the knowledge and consent of the federal government.[11]

The approach taken under Mr. Smallwood has not changed appreciably today. In a letter from the Intergovernmental Affairs Secretariat, the executive director set out Newfoundland's position on provincial international activity:

> Since the Government of Canada has the constitutional responsibility for negotiations with foreign countries the Government of Newfoundland and Labrador relies upon the Federal Department of External Affairs to represent our interests abroad.[12]

As if to reinforce this position, the letter further states,

> Notwithstanding the fact that certain provinces have recently established Provincial offices in various foreign capitals I am not aware of any plans on the part of the Government of Newfoundland and Labrador to move in this direction. Such duplication of facilities and services with those presently offered by the Federal Department of External Affairs does not appear to be justified given our Provincial involvement in international activity.[13]

Nonetheless, the province's involvement is fairly substantial.

Some authors have sought the underpinnings of provincial international activity in the fact that certain provinces have contiguous borders with American states. However, the problems arising from the existence of a common border between two distinct political entities and therefore a joint approach to the solution of these problems cannot be applied to Newfoundland. An approximation of this situation for Newfoundland would be proximity rather than contiguity. The question then becomes, is geographical closeness, in the absence of a common border, a necessary condition in the generation of interaction? The answer in Newfoundland's case is probably that mere proximity may be considered a sufficient condition but not a necessary one. Figure 1 shows American states which interact with the province. Of nine states which have agreements or arrangements with Newfoundland, all but two

Figure 1: American States Interacting with Newfoundland

are situated in the northeast United States. In other words, the majority of American states interacting with the province are those states which are closest to Newfoundland. While this situation supports the importance of proximity, other factors as well must be noted. The most important of these is probably the effect of historical trade patterns, particularly as that trade related to fisheries. Of less importance is the fact that the United States is Canada's major trading partner.

It is important to note as well, that over half of Newfoundland's international activity is transnational.[14] This fact may distinguish it from other provinces, but such a conclusion will have to await further research. In this regard, Newfoundland's historical connections and location in reference to Britain and Europe offer explanatory variables. Howard Leeson[15] offers a similar conclusion in regard to settlement patterns and historic contacts between Alberta/Saskatchewan and adjacent American states.

It would appear that for a variety of reasons, most of which are not threatening to the federal government's prerogatives in the conduct of foreign relations, provinces engage in international activity. The recognition of this activity by the federal government through the establishment of 'umbrella' agreements with other states is a positive approach which should resolve some of the conflicts involved. At the same time, however, this approach may give rise to problems in the future. For example, Oliver Lissitzyn has observed, "the older British Dominions, Southern Rhodesia, the Ukrainian and Byelorussian Soviet Socialist Republics and, shortly before attaining independence, the

Philippine Commonwealth, as well as some other entities, all developed their treaty-making capacity through the very process of entering into international agreements."[16] Similarly, Professor H. Gordon Skilling has argued that the sending abroad of Canadian representatives of a non-diplomatic character to fulfill Canadian needs which could not be satisfactorily promoted by British diplomatic machinery was prerequisite to gaining the right of legation.[17] In other words, the international activity of provinces today may have similarities to the international activity of Canada before it gained full independence from Great Britain in the conduct of foreign relations. De facto provincial international activity may have the potential to give rise to internationally legal and acceptable activity by the subunits of federal states.

This, and many other elements, are properly topics for future investigation. As stated previously, the literature in this area is relatively undeveloped but future research will encounter obstacles which must be overcome if answers are to be found. In the case of Newfoundland, the major problem is two-fold; firstly, an attitude is present that the province does not conduct international activity and secondly, there is no central store of information on the province's international dealings. In this case, the latter problem flows from the former. As obstacles to research, the significance of these problems should not be underestimated as they indicate much about the nature and intent of the province's international activity.

The status and extent of future provincial international activity will depend in large part on the successful resolution of problems in the Canadian confederation. The distribution of the rights and benefits

of Confederation in a manner of equality and fairness should ensure that provincial international activity is merely a legitimate expression of diverse interests and needs and not an occasion for conflict.

Footnotes - Chapter 4

[1]*Attorney General for Canada vs Attorney General for Ontario and Others* (1937), A.C. 326.

[2]Information provided by the Department of Justice, Government of Newfoundland and Labrador.

[3]*Ibid.*

[4]Counsel for Ontario in the 1937 Labor Conventions Case declared that "Ontario has a right to enter into an agreement with another part of the British Empire or with a foreign state" (1937), A.C. 326 at 333.

Also in 1965, Premier Bennett of British Columbia states that, "all the resources of Canada belong to the provinces, not to the federal government; it is therefore their exclusive right and prerogative to negotiate agreements or to seek new markets for the development of their resources," *Le Devoir* (Montreal, July 7, 1965).

[5]Again, Newfoundland is a possible exception.

[6]See pp. 26-34, *supra*.

[7]See pp. 35-36, *supra*, Chapter I.

[8]Interview with Mr. J. R. Smallwood, March 9, 1978.

[9]*Ibid.*

[10]*Ibid.*

[11]*Ibid.*

[12]Letter from the Executive Director of the Intergovernmental Affairs Secretary to the author, March 17, 1978.

[13]*Ibid.*

[14]See Table 3, p. 83, *supra*. Transnational refers to contacts with foreign states other than the U.S. Transborder refers to contacts with American states.

[15]Leeson, A Survey and Analysis, p. 2.

[16]Lissitzyn, Efforts to Codify or Restate the Law of Treaties, p. 1183.

[17]H. Gordon Skilling, Canadian Representation Abroad: From Agency to Embassy (Toronto: The Ryerson Press, 1945), p. 107.

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