

1954

## The Bricker Amendment in Canada . . . a Rose-coloured Optical Illusion

Thomas Franck

*University of Nebraska College of Law*

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

---

### Recommended Citation

Thomas Franck, *The Bricker Amendment in Canada . . . a Rose-coloured Optical Illusion*, 34 Neb. L. Rev. 59 (1954)

Available at: <https://digitalcommons.unl.edu/nlr/vol34/iss1/5>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

## THE BRICKER AMENDMENT IN CANADA

## ... a Rose-coloured Optical Illusion

Thomas Franck<sup>\*</sup>

It is not infrequently pointed out by the advocates of constitutional amendments restricting the treaty powers that just such restrictions as are envisioned by the Bricker Resolution<sup>1</sup> are, in fact, already the law in Canada, and that the Dominion has not only managed to "get along"—but has actually moved forward with great speed in terms of international importance.

The Canadian arrangement is frequently eulogized by the advocates of amendment as a model of constitutional horse-sense and practicality. Such damning praise is richly undeserved. The resemblances which appear to link the Canadian treaty powers and the Bricker Amendment are neither all substance nor all illusion. It can, however, be said that those which are shadow are irrelevant, and those which are substance are a source of regret to most Canadians. In neither instance is the analogy a very happy one.

There are, of course, important constitutional similarities between the two nations. Both Canada and the United States are products of a federation of colonies; both constitutions are the result of compromise; and both nations still face the problem of protecting "states' rights."<sup>2</sup> These constitutionally-constant factors make comparison logically feasible.

Comparisons, when they are made, are, of course, always directed at the famous section two of the Bricker Resolution.<sup>3</sup> This contains two entirely unconnected propositions which appear to have nothing more fundamental in common than the co-ownership of a verb. The first proposition requires that all treaties, before they may be considered to have altered the domestic law of the land, must first have been legislatively enacted.<sup>4</sup> The

<sup>\*</sup> Assistant Professor of Law, College of Law, University of Nebraska.  
<sup>1</sup> S.J. Res. 1, 83d Cong. 1st Sess. (1953).

<sup>2</sup> In the case of Canada, the courts have been so generous to the provinces that it is really federal rights which need protection. For the leading cases on this problem see, Laskin, *Canadian Constitutional Law* (1951).

<sup>3</sup> "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty."

<sup>4</sup> This would amend Art. VI of the Constitution which provides that "... all Treaties ... shall be the supreme Law of the Land ... " The amendment does not, however, make all treaties non-self-executing. Those dealing solely with international legal relations and requiring no domestic enforcement need not be legislatively enacted.

second proposition requires that such enacting legislation be passed by the legislature which, in the absence of a treaty, would have jurisdiction over the particular subject-matter.<sup>5</sup>

Let us examine these two propositions in the light of the Canadian analogy.

**PROPOSITION ONE: TREATIES MUST BE LEGISLATIVELY EXECUTED BEFORE THEY BECOME DOMESTIC LAW**

The senate committee reporting the Bricker Amendment stated categorically:<sup>6</sup>

In the British Commonwealth of Nations . . . a treaty does not become domestic law unless there is separate legislation by the legislative body.

This is generally correct, though subject to exceptions, as we shall see. Then, however, the committee lumbers to a conclusion:

This amendment would place the United States on a par with these other nations of the world by requiring legislative action before a treaty becomes effective.

It is quite true, of course, that in Canada (and the other nations of the Commonwealth) "... the Crown cannot alter the existing law by entering into a contract with a foreign power. Where . . . a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law, enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject."<sup>7</sup>

Is this not exactly what the Bricker Amendment would do? It is not. The right to enter into solemn treaties with other nations is in Canada the sole prerogative of the executive. The process calls for no legislative participation whatsoever *except* when the executive seeks to bind not merely the country as a whole in international law, but also the individual subject in domestic law. Only then is legislation required.

In the United States the right to enter into treaties is, however, *not* the exclusive right of the executive. The legislature participates in the process of ratification—and in a very important way, for whether or not a treaty is self-executing,<sup>8</sup> it cannot

<sup>5</sup> This would nullify the decision in *Missouri v. Holland*, 252 U.S. 416 (1920) which held that a migratory bird conservation law passed by Congress to enforce a treaty made with the United Kingdom was valid under Art., I, § 8 of the Constitution even though the subject matter of the legislation was normally within the jurisdiction of the states.

<sup>6</sup> Sen. Rep. No. 412, 83d Cong., 1st Sess. 10-11 (1953).

<sup>7</sup> Lamont, J. in *Re Arrow River and Tributaries Slide and Boom Co. Ltd.*, [1932] 2 D.L.R. 250, 260. See also Note, 29 Can. B. Rev. 969 (1951).

<sup>8</sup> For a discussion of this distinction see Whitton and Fowler, *Bricker Amendment—Fallacies and Dangers*, 48 Am. J. Int'l L. 23 (1954).

be ratified until after it has received the approval of two-thirds of the Senate.<sup>9</sup>

Thus in Canada, domestic law is protected against executive alteration by treaty through the device of requiring legislative enactment of any treaty provisions which are to have municipal effect. This requires a simple majority of both houses, as does any legislation. In the United States, the arbitrary executive alteration of domestic law by treaty is guarded against by requiring that no treaty becomes binding without the consent of two-thirds of the upper house. The Bricker Amendment does not substitute the Canadian system for the American, but *superimposes* the one on the other. In order to become domestic law all treaties would have to receive the support *first* of two-thirds of the Senate and then would still require Canadian-style legislative enactment.<sup>10</sup>

It ought also to be noted that in Canada there are exceptions to the rule that international agreements do not affect domestic law unless enacted into legislative form. In the cases of *Rex v. Brosig*<sup>11</sup> and *Rex v. Kaehler and Stolski*<sup>12</sup> the court was asked to entertain claims by Canadians against German prisoners of war in Canada. It was noted that "the Geneva Convention of 1929 is a part of the law of Canada."<sup>13</sup> An Ontario court in deciding *Re Drummond Wren*<sup>14</sup> electrified Canadian observers by holding a restrictive covenant on land to be against public policy, and by breaking that "unruly horse" with quotations from the United Nations Charter, the Atlantic Charter, various treaties, agreements, and covenants and even the constitution of the Soviet Union. This importation of treaty law into the domestic law "by the back door" has not, however, been repeated, and its standing

<sup>9</sup> U.S. Const. Art. II, § 2. This analogy reveals the *raison d'être* of the United States executive agreement, for just as there are in Canada instruments of international agreement which are of no legislative interest, so there are in the United States matters of external relation which ought not to require senatorial participation.

<sup>10</sup> The executive agreement must not, of course, be used to *make* law. That delegation will be construed narrowly by the courts is indicated in the recent decision of *United States v. Capps*, 204 F.2d 655 (4th Cir. 1953).

<sup>11</sup> [1945] 2 D.L.R. 232.

<sup>12</sup> [1945] 3 D.L.R. 272, 277.

<sup>13</sup> The court could, however, also have reached its decision through an interpretation and application of War-time Regulations P.C. 4121/193 No. 7, 53, 63.

<sup>14</sup> [1945] 4 D.L.R. 674.

as a method of determining public policy is now in doubt.<sup>15</sup> There is, however, no doubt whatsoever that private domestic rights in Canada may be affected by certain other executive acts, such as recognition,<sup>16</sup> or declarations of immunity.<sup>17</sup>

**PROPOSITION TWO: LEGISLATIVE ENACTMENT MUST BE UNDERTAKEN BY THE OTHERWISE APPROPRIATE LEGISLATURE.**

If the analogy between the first proposition set forth in the Bricker Resolution and the procedure actually followed in Canada is illusory, if not seriously misleading, the analogy to the second proposition is more accurate.

The Canadian Parliament is invested with no extraordinary treaty-enforcement powers, except perhaps in the event of an "emergency."<sup>18</sup> Canadian treaties, if they are to be enacted into domestic law, must be enacted by the legislature normally vested by the constitution with jurisdiction over the subject-matter of the treaty. The enacting legislation must be legislation which, in Senator Bricker's terms of reference, "would be valid in the absence of a treaty."

This has not always been the situation in Canada. Until 1937, the Canadian law respecting treaty enactment followed closely that of the United States.<sup>19</sup> The fundamental document of the Canadian confederation, the British North America Act of 1867,<sup>20</sup> states:

Sec. 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 Em-

<sup>15</sup> See *Re Nobel and Wolf*, [1948] 4 D.L.R. 123; [1949] 4 D.L.R. 375, and [1951] 1 D.L.R. 321. It is interesting to note how the U.S. Courts have disposed of the problem of the efficacy of the U.N. Charter on the municipal law. See *Sei Fujii v. California*, 217 P.2d 481 (Cal. 1950), *aff'd* on different grounds, 242 P.2d 617 (Cal. 1952).

<sup>16</sup> See *Luther v. Sagor*, [1921] 1 K.B. 456, and [1921] 3 K.B. 532, 556 where the court said, "... the Courts in questions whether a particular person or institution is a sovereign must be guided only by the statement of the sovereign on whose behalf they exercise jurisdiction."

<sup>17</sup> See *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149, 158 where the court argued, "When once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive."

<sup>18</sup> The "emergency doctrine" has undergone many phases of judicial popularity. Its most recent revival was briefly suggested in *Canadian Federation of Agriculture v. A.G. of Quebec*, [1950] 4 D.L.R. 689.

<sup>19</sup> *Supra* note 5.

<sup>20</sup> 30 & 31 Vict., c. 3, § 132, 1867.

pire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

The close relation this section bears to the "necessary and proper" clause<sup>21</sup> of United States Constitution is self-evident. Under it the Federal Parliament was fully competent to enact any treaty-implementing statutes even though their subject matter might otherwise be within the jurisdiction of the provinces.<sup>22</sup> Conflicting provincial statutes were held to be invalid.<sup>23</sup>

With the signing of the Treaty of Versaille and the separate entry into the United Nations of the various Dominions, the institution of the "Empire treaty," already long a virtual fiction, rapidly disappeared and Canada began to speak to other nations not as one part of a unitary Empire, but in its own sovereign right. Its treaties ceased to be "Empire" treaties and became purely "Canadian" treaties.<sup>24</sup>

If this development seems natural enough today, it could not possibly have been anticipated by the Fathers of Confederation who, in 1867, drew up the deed for the union of the British North American colonies. Consequently, there is no provision in their "constitution" for the enforcement by Parliament of anything but the "Empire Treaty."

In the *Aeronautics* case<sup>25</sup> the Imperial Privy Council, then Canada's highest court of appeal in civil matters, hinted that it might not extend Section 132 to treaties entered into by Canada in its own non-Imperial right. The debacle finally came in 1937 in the case *A.G. of Canada v. A.G. of Ontario*,<sup>26</sup> in which the court was faced with legislation<sup>27</sup> of the Federal Parliament enacting into domestic law the obligations assumed by Canada in adhering to the I.L.O. Conventions:

<sup>21</sup> Art. I, § 8.

<sup>22</sup> Federal powers are set out in § 91, and provincial powers in § 92 of the British North America Act.

<sup>23</sup> *Rex v. Stuart*, [1925] 1 D.L.R. 12. The court held that under § 132 the Dominion parliament had the power to enact the Migratory Birds Convention Act, 1917, even though the subject matter of the legislation would ordinarily have fallen within provincial jurisdiction. See also *A.G. of B.C. v. A.G. of Canada*, [1924] A.C. 203, and *Re Control of Aeronautics in Canada*, [1932] A.C. 54.

<sup>24</sup> The Treaty of Versaille was signed by five British plenipotentiaries and one from each of the Dominions and India. They all signed in the name of the Imperial Crown, but by virtue of Art. I, part I of the Treaty the Dominions were all seated separately in the League of Nations.

<sup>25</sup> *Re Control of Aeronautics in Canada*, supra note 23.

<sup>26</sup> [1937] A.C. 326.

<sup>27</sup> The Weekly Rest in Industrial Undertakings Act, 1935; the Minimum Wages Act, 1935; the Limitation of Hours of Work Act, 1935.

There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion Executive<sup>28</sup>

Thus, the court declared:<sup>29</sup>

If the new functions affect the classes of subjects enumerated in s. 92, legislation to support the new functions is in the competence of the Provincial Legislature only . . . While the ship of state now sails on larger ventures and into foreign waters, she still retains the watertight compartments which are an essential part of her original structure.

Imagination droops her pinions. With this decision, the Privy Council presented Canada with a reasonable facsimile of the famous "which" clause of the Bricker Amendment.

It is well to remember that this provision was written into the Canadian Constitution not by the will of the people as expressed by Parliament, but by the Judicial Committee of the Privy Council in London—an Imperial court to which, as a result of recent legislation, Canadian appeals may no longer be taken.<sup>30</sup> The strong reaction against just such decisions as this<sup>31</sup> had not a little to do with the decision to abolish the appeals. This, however, was a case of late barn-door closing. Once such a provision has been judicially inscribed into the British North America Act, it becomes far more difficult to erase than is any mere amendment to the United States' Constitution.<sup>32</sup>

If the analogy between the judicial amendment to British North America Act and the "which" clause of the Bricker Amendment were wholly valid, it would still not be a convincing argument in favor of either. It is currently difficult to explain to ourselves, let alone other nations, why Canada is forced to be

<sup>28</sup> Lord Atkin at 352.

<sup>29</sup> Lord Atkin at 352 and 354.

<sup>30</sup> Supreme Court Act, 1952, R.C.S. c. 259 §§ 54(1),(2),(3). It must in fairness be noted, however, that there is no indication that the Canadian courts would have resolved the problem of interpreting § 132 with any greater liberality.

<sup>31</sup> See articles collected in 15 Can. B. Rev. 393-507 (1937). Prof. Kennedy refers to it as a "judicial labyrinth" and adds at 418: "To carry into the field of external contractual relations the divisions of power set out in section 91 and 92 seems to be of doubtful validity in point of law, suicidal in point of government efficiency, and to involve the frustration of Canada's achievements in political autonomy and international status." The Sirois Report on Dominion-Provincial Relations goes so far as to suggest that it is "inconceivable that an international convention should be formulated as part of a colourable attempt by the Dominion to encroach upon provincial jurisdiction." *Supra* note 2, at 184.

<sup>32</sup> See Gerin-Lajoie, *Constitutional Amendment in Canada* (1950).

a mere spectator in the codification of human rights. It is frustrating to Canadians who have just graduated from a benevolent Empire to assert their international sovereignty to find that sovereignty now hog-tied by a benevolent constitution. However, the analogy is far from perfect.

There are, of course, only ten Canadian provinces, not forty-eight; and thus the possibility—though by no means the probability—of common legislative action for treaty enforcement does exist. It could hardly be said to exist in the United States. Moreover, as has already been pointed out, the Bricker Amendment requires legislative action not, as in Canada, by *either* the states *or* by the Federal legislature, but by *both* where state jurisdiction is involved.

It must also be noted that in Canada a serious minorities problem intertwines the issue of provincial rights. These rights, as set out in the British North America Act, are the constitutional guarantee of the sanctity of the French Canadian heritage and culture. The French Canadian will not entrust these rights to the sole protection of the Federal Parliament, for there he is a minority. He instead looks for his protection to the provincial autonomy of his native province of Quebec. In the United States, on the other hand, the states' rights champions represent an undisputed majority in both houses of Congress, as the passage of the Tidelands Bill and the support for the Bricker Resolution demonstrated. States rights is a universal rallying-cry in the United States, and not, as in Canada, the refuge of a regional racial and religious minority. Therefore the American Congress, unlike the Canadian Parliament, seems eminently suited to the task of protecting the vital division of functions between state and federation.<sup>33</sup>

Finally, though it is dangerous to generalize in this regard, it might be ventured that the British North America Act in some respects is more favourable to federal enactment of treaty obligations than is the American constitution. "Aliens," for example, perhaps the most frequent subject of international agreements, are by the British North America Act—but not by the American Constitution—assigned exclusively to the federal jurisdiction.<sup>34</sup>

In the final analysis, however, the ultimate distinction is the

<sup>33</sup> "If you can't trust the President, the Senate, the Congress, or the Courts, who, in Heaven's name can you trust?" Parker, *The American Constitution and the Treaty Making Power*, Wash. U.L.Q. 115, 124 (1954).

<sup>34</sup> Section 91(25). As for the court's interpretation of the scope of this section see: *A.G. of B.C. v. A.G. of Canada*, [1924] A.C. 203; *Brooks-Bidlake and Whittall v. A.G. of B.C.*, [1923] A.C. 455; *Cunningham v. Tomey Homma*, [1903] A.C. 151.

least subtle one: the United States is *not* Canada. It is not a nation of some fourteen million people. It does not have a powerful protecting neighbor to the south. Nor is the United States, like Canada, a nation less than ninety years old, exercising sovereignty in the field of foreign policy for only three decades, and still groping its way toward adulthood. Canadians do not like their drowsy, frowzy mechanism, but they can still afford it, or perhaps they can be excused for their youthful failing. But for the United States to seek to emulate this Canadian groping, or worse, is a Freudian delight: a craving, understandable but dangerous in these troubled times, to retreat to national pre-nativity.