



CONSTITUTIONAL AND LEGISLATIVE AUTHORITY FOR INTERGOVERNMENTAL AGREEMENTS BETWEEN U.S. STATES & CANADIAN PROVINCES

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SUMMARY:

Beyond the traditional treaties negotiated between the federal governments of the United States and Canada, hundreds of arrangements, agreements, or memorandums of understanding exist directly between American states and Canadian provinces, without federal participation, and outside of any formal diplomatic channels. These subnational arrangements – known as “microdiplomacy” – are becoming increasingly prevalent and important in the bilateral relationship. While the actual agreements that exist have been relatively well documented,¹ the legislative and constitutional authority which allow the agreements to exist is rather ambiguous and can differ greatly from state-to-state or province-to-province. This paper first discusses the legality of these agreements, in light of the constitutional limitations on state or provincial treaty making. Second, this paper analyzes what legislative authority authorizes the executive branches of state or provincial governments to enter into agreements with their cross-border counterparts, specifically those agreements related to border issues and transportation.

CONSTITUTIONALITY OF CROSS-BORDER AGREEMENTS:

For state/provincial agreements to be legitimate, they must occur within certain constitutional parameters of the U.S. or Canadian federal systems.

Agreements (using the term to encompass contracts, arrangements, compacts, and MOUs) are differentiated from treaties, which in both countries may only be created or entered in to by the federal government. Treaties, as defined by the *Vienna Convention on the Law of Treaties of 1969*, are “international agreement[s] concluded between States in written form and *governed by international law*, whether embodied in a single instrument, or in two or more related instruments and whatever its particular designation.”²

Agreements, made directly between subnational units (states, provinces, territories, cities) are *never governed by international law*; rather, they may be considered either as contracts, governed by the national law of one of the parties, or simply informal understandings or arrangements which create no legal obligations.³

The constitutions of both Canada and the United States explicitly limit the abilities of states or provinces to enter into treaties with foreign states without the approval of the federal government.

U.S. Constitutional Restraints on Treaty Making:

The United States Constitution contains two clauses which expressly deal with the matter of treaty power. In Article I, Section 10, when establishing the powers of the Congress, it is stated that,

No state shall enter into any treaty, alliance, or confederation . . . No state shall, without consent of Congress . . . enter into any agreement or compact with another state or with a foreign power. U.S. CONST. art. I, § 10.

And in Article II, Section 2, where the executive power is established, it is stated that,

[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur... U.S. CONST. art. II, §2.

Based upon these two clauses, the intent of the framers of the constitution was to keep treaty power within the federal realm. However, Congress' interpretation of the clauses has since allowed subnational cross-border arrangements, as described herein, to proliferate.

During their 74th and 88th sessions, Congress issued statements clarifying its stance on the issue of foreign agreements made by the states, holding that not all transborder interactions require their consent, and that they would generally allow states to enter into agreements so long as the states' actions did not threaten the centrality of the U.S. federal government. Congress interpreted the aforementioned constitutional clauses to imply that "the terms 'compact' and 'agreement' do not apply to every compact or agreement . . . but the prohibition is directed to the formation of any combination tending to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States."⁴

In instances where an agreement may be infringing on the "supremacy" of the federal government, state lawmakers may state in their bill that Congressional approval is required for the statute to be binding.⁵ The Senate may then allow the states to deal directly with foreign partners by passing a bill which consents to the agreement, as is stipulated in Art. I, § 10. An example of this process is the Great Lakes Basin Compact, between the Great Lake states and provinces.⁶ Congress can also "pre-authorize" states to enter into treaty-like agreements with Canadian provinces or other foreign powers. An example of this was the *International Bridge Act of 1972*, which gave states consent to "enter into agreements with the Government of Canada, a Canadian Province, or a subdivision or instrumentality of either, in the case of a bridge connecting the United States and Canada."⁷

Ultimately, and in the case of a disagreement, Congress holds the ability to determine whether or not a particular agreement constitutes a treaty under the Constitution.⁸

Canadian Constitutional Restraints on Treaty Making:

Canadian provinces are substantially more empowered than their American counterparts in when dealing with foreign powers. *The Constitution Act* of 1867, on the issue of treaty power, declared that,

The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries. Constitution Act, 1867, Ch. IX § 132.

Similar to the American Constitution, this clause seems to have exclusively designated treaty making as a federal power. However, the paramount difference lies in the structure of the Canadian federal system. While the federal government retains the authority to *make* treaties, the power to *implement* treaties is divided according to the division of powers as per the *Constitution Act*.⁹ *The Constitution Act* enumerates the specific powers and jurisdictions of the federal and provincial governments in sections 91 and 92, respectively. If a treaty affects an issue exclusively within the provincial realm, its ratification would require supporting laws to be passed within the provincial or territorial legislatures, and it could not be forced upon the Provinces by the federal government. This rule of law was affirmed by the British Privy Council in 1937 in the *Labour Conventions Case*, with Lord Atkin holding that the Canadian federal government “could not, merely by making promises to foreign governments, clothe itself with legislative authority inconsistent with the constitution.”¹⁰

Nevertheless, though provinces wield some power when it comes to treaty making, the majority of their international interactions are still conducted through the same informal agreements and arrangements that their American counterparts use. The Canadian government has not imposed any formal limitations of these arrangements, and in the 1970s, the Canadian Department of External Affairs (now DFAIT), acknowledged in a report prepared on this issue that “there are provincial interests in fields which involve dealings with foreign countries” but that these dealings are or must be either “arrangements subsumed under agreements between Canada and the foreign government concerned” or “administrative arrangement of an informal character . . . not subject to international law.”¹¹

The Canadian Supreme Court has also upheld the distinction between a treaty and an arrangement. In *Attorney General of Ontario v. Scott*,¹² the court examined the legality of a child support arrangement between Ontario and England. The court defined a treaty as

an agreement between states, political in nature, even though it may contain provisions of a legislative character which may, by themselves or their subsequent enactment, pass into law. But the essential element is that it produces binding effects between the parties to it.

In that case, the agreement at issue was upheld, with the court finding that it contained nothing binding, as “the enactments of the two legislatures are complementary but voluntary; the

application of each is dependent on that of the other: each is the condition of the other; but that condition possesses nothing binding to its continuance. The essentials of a treaty are absent.”

LEGISLATION AUTHORIZING CROSS-BORDER AGREEMENTS

American Authority

The authority given by state legislatures for the state executive or state agencies to enter into agreements with Canadian provinces varies greatly from state to state. Most states have passed statutes in an ad-hoc manner to authorize cross-border agreements in specific areas or for specific purposes, while several states have given broader, blanket authority.

Broad Granting of Authority

Through either their constitution or by statute, several states have given their political subdivisions broad authority to enter into agreements with Canadian provinces, so long as it is related to their primary role or function. The Michigan State Constitution, for example, states that,

This state or any political subdivision thereof, [or] any governmental authority . . . may enter into agreements for the performance, financing or execution of their respective functions, with . . . the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution.

MICH. CONST. art. III, § 5 (2008).

North Dakota has a similar law, though not part of its constitution, which allows for joint powers agreements to be made with Canadian provinces:

Any political subdivision of this state may enter into a joint powers agreement with . . . a political subdivision of a Canadian province if the power or function to be jointly administered is a power or function authorized by the laws of this state for a political subdivision of this state and is authorized by the laws of the other state or province.

N.D. CENT. CODE § 54-40.3-01 (2007).

Ad-hoc Granting of Authority:

The more common approach has been for states to enact individual statutes which authorize agreements to be made with Provincial Governments relevant to specific issues. The types of agreements authorized differ depending on region, geography, and local industry. The only common type of legislation, found in the statutes of all northern border states, is a variation of a statute which allows the governor, in the case of an emergency or disaster, to cooperate with neighboring provinces in relief efforts. See IDAHO CODE ANN. § 46-1010 (2008); N.H. REV. STATE. ANN. § 108:1 (2008).

A recent well publicized cross-border joint effort was the development of “enhanced driver’s licenses” by Washington State and British Columbia. The legislation passed by Washington mandating the licenses specifically stipulated that,

The department [of licensing] may enter into an agreement with the Canadian province of British Columbia for the purposes of implementing a border-crossing initiative.

WASH. REV. CODE § 46.20.202 (2007).

Agreements may also be authorized with neighboring provinces to share the cost of roads and other infrastructure leading to border crossings. In the case of the roads that connect mainland Minnesota to the Northwest Angle through Manitoba, the Minnesota legislature has enacted the following legislation:

The commissioner of transportation may enter into an agreement with the authorized authorities of the province of Manitoba, Canada providing for an equitable division of costs and responsibilities to be borne by the state of Minnesota and the province of Manitoba for the establishment, location, construction, maintenance, and operation of a highway through the province of Manitoba, thereby connecting the Northwest Angle with other parts of the state of Minnesota.

Minn. Stat. Ann. § 161.141(1) (West 2008).

Several states have also enacted statutes which concern the inspection of goods crossing the border, prior to them entering their state. An example of such legislation from Montana, dealing with the import of radioactive waste, states that,

The public service commission may enter into reciprocal agreements with adjacent states and bordering Canadian provinces that Montana's inspectors may inspect trains while they are stopped in those states or provinces before they cross the Montana border.

MONT. CODE ANN. § 10-3-1309(2) (2007).

Canadian Authority

Largely due to the nature of the parliamentary system, Canadian Provinces have fewer statutes specifically authorizing cross-border agreements than their American counterparts. The fused executive-legislative branch in the Canadian system gives provincial Premiers the ability to seek out and sign agreements without formal legislative authority, and allows for custom and tradition, rather than formal arrangements, to be the basis for agreements with foreign jurisdictions.¹³

When provinces do enact legislation authorizing Premier or his Ministers to enter into agreements, it typically is in situations where the legality of the agreement is likely to be challenged. For example, statutes exist in most provinces that authorize reciprocal enforcement

of traffic tickets and child support judgments from courts in bordering states. Ontario's Highway Traffic Act states that,

The Minister, with the approval of the Lieutenant Governor in Council, may enter into a reciprocal agreement with the government of any state of the United States of America providing for,
(a) the sanctioning by the licensing jurisdiction of drivers from that jurisdiction who commit offences in the other jurisdiction; and
(b) on a driver's change of residence, the issuance of a driver's licence by one jurisdiction in exchange for a driver's licence issued by the other jurisdiction.
Highway Traffic Act, 1990 R.S.O., ch. H.8, s. 40 (Can.).

Also, similar to all U.S. border states, all provinces have statutes authorizing regional, cross-border cooperation in the case of disaster.

CONCLUSION

Informal agreements are an indispensable component of the bilateral Canadian-American relationship, and they have become the most common method of cooperation between provinces and states.¹⁴ These agreements have allowed states and provinces to conduct cross-border interactions as though they are interacting with a domestic entity. The American and Canadian federal governments have recognized the importance these informal agreements, and have not interfered with their creation, accepting them as separate from and subordinate to traditional treaties. In the future, the number of informal agreements is likely only to increase, particularly as North American regional cooperation grows.

¹ See BUILDING CROSS BORDER-LINKS, CANADA SCHOOL OF PUBLIC SERVICE, http://www.ccmd-ccg.gc.ca/Research/publications/pdfs/p128_e.pdf.

² Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331.

³ A.E. GOTLIEB, CANADIAN TREATY-MAKING 24, (Butterworths 1968).

⁴ S. DOC. NO. 88-39, at 416-419 (1963).

⁵ See MINN. STAT. ANN. § 161.141(2) (West 2008) (Requiring Congressional approval of a bill allowing the state to share the costs of building roads through Manitoba to connect the Northwest Angle to mainland Minnesota).

⁶ See <http://www.glc.org/about/glbc.html>.

⁷ 33 U.S.C. § 535a (2008).

⁸ Richard H Leach, Thomas A. Levy & Donald E. Walker, *Province-State Trans-Border Relations: A Preliminary Assessment*, 16 CAN. PUB. ADMIN. 468 (1973).

⁹ Harrington, Joanna, *Accommodating a Provincial Role in Canadian Treaty-Making: Lessons from Britain*, CAN. COUNCIL ON INT'L LAW, http://www.cciil-ccdi.ca/index.php?option=com_content&task=view&id=81&Itemid=76.

¹⁰ A-G Canada v. A-G Ontario, (1937) A.C. 326 (Privy Council), 352.

¹¹ LEACH ET AL., *supra* note 4, at 471.

¹² A-G Ontario v. Scott, [1956] S.C.R. 137 (Can.)

¹³ Gerard F. Rutan, *Micro-Diplomatic Relations in the Pacific Northwest: Washington State-British Columbia Interactions*, in PERFORATED SOVEREIGNTIES AND INTERNATIONAL RELATIONS, 163, 184-86 (Ivo Duchacek, Daniel Latouche & Garth Stevenson, eds., 1988).

¹⁴ See Cross Border-Links, *supra* note 1.