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The Myth of *Jus Tractatus* in *La Belle Province*: Quebec's Gérin-Lajoie Statement

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*There is much debate in Quebec challenging the traditional stance on "jus tractatus," prevalent for nearly 100 years, to the effect that the federal government enjoys plenary power to enter into international treaties, whether the subject matter is federal or provincial. The paper argues that Quebec's Gérin-Lajoie "doctrine" has become a myth over the years, liable to have a huge semiotic effect, creating the perception that there is an incontestably true legal basis for provincial treaty-making power. After dwelling upon the ontological understanding of mythology, the author shows that the constitutional practice since the emancipation from Great Britain, as well as uninterrupted caselaw since both decisions in the Labour Conventions Case, inexorably support the exclusive federal power based on royal prerogatives, a position confirmed de jure with the 1947 Letters Patent. The Gérin-Lajoie statement is just that, a political statement, which is unsubstantiated by positive rules of constitutional law; the "two-Crown approach," based on Liquidators of Maritime Bank and Bonanza Creek, is of no avail in that regard.*

*Il y a bien du bruit, au Québec, contestant l'état du droit relatif au «jus tractatus,» pourtant fixé depuis près de cent ans, voulant que le gouvernement fédéral détienne la plénitude des pouvoirs pour conclure les traités internationaux, que la matière relève du fédéral ou du provincial. L'auteur est d'avis que la «doctrine» Gérin-Lajoie du Québec est devenue un mythe, dont l'effet sémiologique est énorme, créant une perception incontestable qu'un jus tractatus provincial jouit d'une base juridique véritable. Après avoir discuté de l'appréhension ontologique de la mythologie, il est vu que la pratique constitutionnelle depuis l'émancipation de la Grande Bretagne, ainsi que la jurisprudence ininterrompue depuis les deux décisions dans l'Affaire des Conventions du travail, vont inexorablement dans le sens d'un pouvoir exclusif fédéral fondé sur les prérogatives royales, une position confirmée de jure avec les Lettres patentes de 1947. L'énoncé Gérin-Lajoie n'est que ça en fait, un énoncé politique, qui ne s'appuie sur aucune règle de droit constitutionnel positif; la théorie des «deux Couronnes,» venant des arrêts Liquidateurs de la Banque maritime et Bonanza Creek, s'avère inutile à ce sujet.*

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*Introduction*

Ludwig Wittgenstein was certainly right, dare I say presumptuously, to recant his original position expressed in *Tractatus*<sup>1</sup>—to the effect that words represent reality, that language offers, as it were, a mere picture of the world—and (finally) realise that words and expressions do not only provide a representation of reality but, indeed, that language is an activity happening within reality, that in effect language is a participant in human consciousness.<sup>2</sup> Fellow University of Cambridge international law professor Philip Allott has also borrowed from Wittgenstein:

With Wittgenstein, we have been forced to face the possibility that human communication is not the transfer of something called Truth through a neutral medium called Language. Communication would then have to be regarded as simply another form of human activity, sharing in the intrinsic and irreducible ambiguity of all human activity.<sup>3</sup>

This fundamental theory of language, which in a way has proved revolutionary in modern philosophy, is at the centre of this short paper honouring Hugh Kindred. Along with his legacy of scholarship in this field of studies, in the steps of his predecessors at Dalhousie like Ronald St. John Macdonald, this great international legal commentator has allowed a whole generation of new authors like myself to feel confident enough and recognised enough by senior peers to say outrageous things like “Wittgenstein was certainly right”! No doubt, believing in one’s intellect

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1. L Wittgenstein, *Tractatus Logico-Philosophicus* (London: Routledge & Kegan Paul, 1961) at 15 *et seq* & 51 *et seq*.

2. See his posthumous work gathered from his former students, L Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, 1958) at 11 ff.

3. P Allott, “The Nation as Mind Politic” (1992) 24 J Int’l L & Pol 1361 at 1361-1362.

is essential to take stands that are, perhaps at times, unpopular and to play the role expected from academics, namely to provide a poised view on complex questions and thus shed a different perspective on debates in our societies, among other things.

Independent legal scholarship, true and bold, surely needs a dose of audacity, when going against the tide seems all but opportunistic—the darkness of dogmatism being never far in our profession—but I have taken comfort from acknowledgement and appreciation of some *éminences grises*, who not necessarily agree, but unconditionally accept different points of view, even on difficult (and politically charged) subjects. Professor Kindred is one of those quiet forces and wise men in Canada's international law, whose active leadership—*inter alia*, via his celebrated casebook—is only matched by his sense of collegiality and his effort to value other people's perspectives. I happened to be directly on the receiving end of such generosity on more than one occasion, be it in regard to a participation in a roundtable of experts in international law (only in my second year of teaching law at the University of Montreal)<sup>4</sup> or in relation to the non-internationalist sovereignty-oriented approach<sup>5</sup> I have been defending on issues of interlegality and the domestic reception of

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4. I am referring here to my participation, on the theme of the history and theory of international law, in the workshop entitled "Expert Roundtable on International Norms and Law," organised by the Department of Foreign Affairs and International Trade of Canada, in collaboration with the Munk Centre for International Studies at the University of Toronto, on 1 April 2003.

5. See, among my many papers on the subject, S Beaulac, "National Application of International Law: The Statutory Interpretation Perspective" (2003) 41 Can YB Int'l Law 225; S Beaulac, "Recent Developments on the Role of International Law in Canadian Statutory Interpretation" (2004) 25 Stat L Rev 19; S Beaulac, "Arrêtons de dire que les tribunaux au Canada sont 'liés' par le droit international" (2004) 38 RJT 359; S Beaulac, "L'interprétation de la Charte : reconsidération de l'approche téléologique et réévaluation du rôle du droit international" in G-A Beaudoin & E Mendes, eds, *Canadian Charter of Rights and Freedoms*, 4th ed (Markham: LexisNexis Butterworths, 2005) 27, reprinted in (2005) 27 SCLR (2d) 1; S Beaulac, "Customary International Law in Domestic Courts: Imbroglia, Lord Denning, *Stare Decisis*" in CPM Waters, ed, *British and Canadian Perspectives on International Law* (Leiden & Boston: Martinus Nijhof, 2006) 379; S Beaulac, "Thinking Outside the 'Westphalian Box': Dualism, Legal Interpretation and the Contextual Argument" in CC Eriksen & M Emberland, eds, *The New International Law—An Anthology* (Leiden & Boston: Martinus Nijhof, 2010) 17.

international normativity<sup>6</sup> (in spite of the efforts by some other colleagues to discredit my positions<sup>7</sup> or to simply ignore my contributions<sup>8</sup>).

This paper is likely to be another one that will not be well received by many of my contemporaries, especially in *la belle province*. I feel safe, however, taking this stand in a volume that is dedicated to Professor Kindred, as I assume his trademark open-mindedness to different ideas will be contagious with the readership. Unfortunately, *la pensée unique* is all too prominent in many circles—geographically, perhaps more so in Quebec—and, in an industry like academia, must be denounced for what it is: a form of intellectual bullying. It is in this context and against the provocative background of epistemological pluralism that I will address issues of *jus tractatus* (i.e., the capacity to enter into treaties) in international law, as regards the situation in the sovereign nation-state of Canada, as well as the recent claims in one of its federated sub-states, the province of Quebec, often put in terms of the Gérin-Lajoie statement. The latter is a political position expressed by then Quebec Minister of Education, Paul Gérin-Lajoie,<sup>9</sup> in the mid-1960s to the effect that Canadian provinces (and in particular Quebec) ought to have the power to conclude international treaties on subject-matters falling under their legislative authorities, pursuant to section 92 of the *Constitution Act, 1867*.<sup>10</sup>

The hypothesis of this paper, simply put, is that there is absolutely no foundation in law to such claims. Both public international law and, especially, Canadian public law clearly support the traditional position that the federal government in this country has the plenary powers when it comes to concluding binding conventions on the international plane. Legal actors in the province of Quebec know this and, indeed, know that the law

6. An unpopular stand, especially within Canada's international legal community, which did not stop Hugh from having me participate in a Department of Foreign Affairs and International Trade of Canada event, in collaboration with McGill Law School, on issues of interlegality and the national use of international law in Canada. The outcome of the two-day conference, held in Montreal on 15-16 June 2005, is the collective book OE Fitzgerald et al, eds, *The Globalized Rule of Law—Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006) in which I published a paper entitled "International Law and Statutory Interpretation: Up with Context, Down with Presumption" at 331, also available in French, S Beaulac, "Le droit international et l'interprétation législative: oui au contexte, non à la présomption" in OE Fitzgerald et al, eds, *Règle de droit et mondialisation: rapports entre le droit international et le droit interne* (Cowansville: Yvon Blais, 2006) 413.

7. See, for instance, C-E Côté, "La réception du droit international en droit canadien" (2010) 52 SCLR (2d) 483.

8. See, for instance, A de Mestral & E Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill LJ 573.

9. See also P Gérin-Lajoie, "Le Québec est vraiment un État même s'il n'a pas la souveraineté entière," *Le Devoir* (14 avril 1965) 5; and P Gérin-Lajoie, "Il nous faut une plus large autonomie et le droit de négocier avec l'étranger," *Le Devoir* (15 avril 1965) 5.

10. *Constitution Act, 1867* (UK), 30 & 31 Vict, C 3, reprinted in RSC 1985, App II, No 5.

has been settled for almost a century in that sense. But starting in the mid-1960s and with more intensity in the last fifteen years, there seem to have been increasing attempts at putting this well-entrenched legal principle into doubt. Indeed, there are different actors, including some in academia, that have participated in creating the impression that, in fact, the federal plenary power over *jus tractatus* may be put into question, that it would be contended and unsettled. What this paper seeks to show is that there is a constructed meaning around the Gérin-Lajoie statement and that it is tantamount to a myth in the public law of this province, one that is (by definition) unfounded in hard positive law. In the next section (Part I) I shall briefly dwell upon the learned ontological understanding of myth and mythology, and then (in Part II) I will return to the state of the law on *jus tractatus*.

I. *The power of mythology and socially constructed myths*<sup>11</sup>

Words and expressions are activities in themselves.<sup>12</sup> Words and expressions are mental-social phenomena separate and distinct from reality.<sup>13</sup> Words and expressions exist and act within human consciousness.<sup>14</sup> Like ordinary words, myths are also powerful social productions, often (though not necessarily) themselves expressed through language, which provide a shared explanatory structure for substantial areas of socially constructed reality. In the last century and a half, myths and mythology have been the subject of numerous scholarly works in different disciplines,<sup>15</sup> not only

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11. This section borrows from my book, S Beaulac, *The Power of Language in the Making of International Law—The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden & Boston: Martinus Nijhoff, 2004) ch 2.

12. For more on this, see JL Austin's "speech-act theory" in *How to do Things with Words* (Oxford: Clarendon Press, 1962).

13. Such a conceptualisation of words and expressions as separate and distinct from reality, is essentially *nominalist*—etymologically, belonging to a name. Nominalism is a medieval philosophy, most often associated with William of Ockham, which took the view that abstract concepts are merely words and do not refer to anything that exists in the way that particular things exist.

14. This idea of "consciousness of humanity" is borrowed from the moral philosophy of Georg Wilhelm Friedrich Hegel, in particular from *Phänomenologie des Geistes* (Hamburg: Meiner, 1952) 632-671; see also GWF Hegel, *Phenomenology of Spirit*, translated by AV Miller (Oxford: Clarendon, 1977) 383-409.

15. See MI Steblin-Kamenskij, *Myth* (Ann Arbor: Karoma, 1982) at 21; and J Waardenburg, "Symbolic Aspects of Myth" in AM Olson, ed, *Myth, Symbol, and Reality* (Notre Dame: University of Notre Dame Press, 1980) 41 at 60-61.

theology and philosophy, but also psychology, anthropology, semantics, literary criticism, sociology, and political science.<sup>16</sup>

The term “mythology” (from “*mūthologiā*”) combines the Greek “*mūthos*” and “*lógos*,” both of which originally referred to the ideas of “speech” and “story.”<sup>17</sup> In its earliest sense, *mūthos* was the thing spoken, uttered by the mouth.<sup>18</sup> Only later did it come to connote “speech” and, with Herodotus in the 5th century BCE, *mūthos* was relegated to fictitious narrative.<sup>19</sup> For its part, *lógos* (relating to “*légein*”) denotes demonstrable facts, formal conceptualisation, the rational explanation of things.<sup>20</sup> When *lógos* evolved to the sense of logical reasoning, however, *mūthos* became somewhat problematic—“*Mythos* came to be seen not as a relevant presentation of the world but as simply a story which has an emotional effect on listeners and thus not a decisive account (*logos*).”<sup>21</sup>

This dichotomy between *mūthos* as story-telling and fiction, on the one hand, and *lógos* as rational explanation, on the other, remains relevant today and explains that, in everyday usage, a myth is often taken to

16. See, for instance, FWJ von Schelling, *Philosophie der Mythologie* (Stuttgart & Augsburg: no publisher, 1857); FM Müller, “On the Philosophy of Mythology” in FM Müller, *Introduction to the Science of Religion* (London: Longmans, Green, 1873) 335; JG Frazer, *The Golden Bough—A Study in Comparative Religion*, 2 (London: Macmillan, 1890); S Freud, *Die Traumdeutung* (Leipzig & Vienna: Franz Deuticke, 1900); É Durkheim, *The Elementary Forms of the Religious Life—A Study in Religious Sociology* (London: Allen & Unwin, 1915); JE Harrison, *Mythology* (London: Harrap, 1925); B Malinowski, *Myth in Primitive Psychology* (London: Kegan Paul, 1926); E Cassirer, *Language and Myth* (New York: Harper, 1946); AW Watts, *Myth and Ritual in Christianity* (London & New York: Thames & Hudson, 1953); C Levi-Strauss, *Anthropologie structurale* (Paris: Plon, 1958) 227; CG Jung, *Man and His Symbols* (London: Aldus Books, 1964); P Ricoeur, *The Symbolism of Evil* (Boston: Beacon, 1969); J Campbell, *The Masks of God: Creative Mythology* (London: Souvenir Press, 1974); I Strenski, *Four Theories of Myth in Twentieth Century History—Cassirer, Eliade, Lévi-Strauss and Malinowski* (London: Macmillan, 1987); and P Hegy, *Myth as Foundation for Society and Values—A Sociological Analysis* (Lewiston, NY: Edwin Mellen Press, 1991).

17. See, generally, H Levin, “Some Meanings of Myth” in HA Murray, ed, *Myth and Mythmaking* (New York: Braziller, 1960) 103.

18. See P Stambovsky, *Myth and the Limits of Reason* (Amsterdam & Atlanta: Rodopi, 1996) at 32; and TF Hoad, ed, *The Concise Oxford Dictionary of English Etymology* (Oxford: Clarendon Press, 1986) at 307.

19. See J-P Vernant, *Myth and Society in Ancient Greece* (Brighton: Harvester, 1980) at 186 *et seq.*

20. See JAK Thomson, *The Art of the Logos* (London: Allen & Unwin, 1935) at 17-19; Stambovsky, *supra*, note 18 at 33-34; and Hoad, *supra*, note 18 at 270.

21. LJ Hatab, *Myth and Philosophy: A Contest of Truths* (La Salle, IL: Open Court, 1990) at 334, note 30. See also WG Doty, *Mythography—The Study of Myths and Rituals* (Tuscaloosa, AL: University of Alabama Press, 1986) at 3, who wrote that “*logos* gained the sense of referring to those words making up doctrine or theory, as opposed to *mythos* for those words having an ornamental or fictional, narrative function. The outcome of this development was that the mythological came to be contrasted with logic (the *logos*-ical) and later with ‘history’ in the sense of an overview or chronicle of events.”

involve an imagined, untrue account.<sup>22</sup> Works on myth, thus, invariably contain the *caveat* according to which one must not confuse the popular, pejorative sense of the term “myth” as a synonym for metaphor, falsehood, and distortion, with the scholarly and learned sense which considers myths as valid and true within the shared consciousness of a society.<sup>23</sup> Similarly, it is the allegorical value and the semiotic significance of myths that will prove useful, in the next section, to analyse the Gérin-Lajoie statement.<sup>24</sup>

Myths may be put into five categories, based on their narrative line, although any such attempt is somewhat challengeable as the classes are not mutually exclusive and the borders between them remain vague. They are: (i) aetiological myths, on the origin of things; (ii) eschatological myths, about the final end of things; (iii) soteriological myths, pertaining to momentous saving and salvation; (iv) ritual myths, combining rites with narratives; and, (v) heroic myths, on accounts of glorious deeds and accomplishments.<sup>25</sup> Preliminarily, let me suggest that the Gérin-Lajoie statement—which will be demonstrated as mythical in the next section—seems to have features of both soteriological myth and heroic myth, as this political stand by the province of Quebec has come to represent a necessary element for the preservation of its distinct character within the Canadian federation, as well as an event personified by one prominent MNA who bravely defended a basis for decentralised *jus tractatus*.

Questions of myth and mythology were explored by Roland Barthes in an essay entitled “Le mythe, aujourd’hui,”<sup>26</sup> a final piece in a collection

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22. See CG Flood, *Political Myth* (New York & London: Garland, 1996) at 6. See also Vernant, *supra* note 19 at 186, who wrote: “The concept of myth we have inherited from the Greeks belongs, by reason of its origins and history, to a tradition of thought peculiar to Western civilisation in which myth is defined in terms of what is not myth, being opposed first to reality (myth is fiction) and, secondly, to what is rational (myth is absurd).”

23. For instance, see E Leach, *Lévi-Strauss* (London: Fontana/Collins, 1970) at 54, who explained that “the special quality of myth is not that it is false but that it is divinely true for those who believe, but fairy-tale for those who do not.” See also, A Dundes, “Introduction” in A Dundes, ed, *Sacred Narrative—Readings in the Theory of Myth* (Berkeley: University of California Press, 1984) 1 at 1; and Doty, *supra* note 21 at 7-8.

24. See E Cassirer, *The Myth of the State* (New Haven: Yale University Press, 1946) at 45, who makes the point as follows: “Myth is not only far remote from this empirical reality; it is, in a sense, in flagrant contradiction to it. It seems to build up an entirely fantastic world. Nevertheless even myth has a certain ‘objective’ aspect and a definite objective function. *Linguistic symbolism leads to an objectification of sense-impressions; mythical symbolism leads to an objectification of feelings*” [emphasis added].

25. See MS Day, *The Many Meanings of Myth* (Lanham, MD: University Press of America, 1984) at 21-27.

26. R Barthes, “Le mythe, aujourd’hui” in R Barthes, *Mythologies* (Paris: Éditions du Seuil, 1957) 213; or see also the translation, R Barthes, “Myth Today” in R Barthes, *Mythologies* (London: Vintage, 1972) 109 [Barthes, “Myth”].

of mythical stories written for *Les lettres nouvelles*.<sup>27</sup> Following Swiss linguist Ferdinand de Saussure's semiotic approach to language and other sign-systems,<sup>28</sup> the French philosopher opined that, "myth is a type of speech."<sup>29</sup> Mythology would be a sign-system and would consist of the relation between a "signifier" (image or pattern) and a "signified" (concept or mental representation).<sup>30</sup> In essence, therefore, mythology constitutes a form of communication, similar to language and other systems of signs. However, unlike other sign-systems, myths would involve not a direct system of representation, but one of a second-order.<sup>31</sup> Indeed, Barthes wrote that "myth is a peculiar system, in that it is constructed from a semiological chain which existed before it: it is a second-order semiological system."<sup>32</sup> The original system of signs (linguistic or else) would thus metamorphose into a mythical sign-system. It is in that context that Lévi-Strauss noted that myth, "is both the same thing as language, and also something different from it."<sup>33</sup> Thus, the sign consisting of a signifier and a signified in the original representative order would become the signifier in the second order of representation, and then be combined with a signified to constitute a mythical sign. "[T]he materials of mythical speech," Barthes wrote, "are reduced to a pure signifying function as soon as they are caught by myth."<sup>34</sup>

Taking Barthes' example of the myth according to which "wrestling" is a spectacle not a sport,<sup>35</sup> semiotics will of course be interested in the relation between the image conveyed and the corresponding concept. However, the inquiry will not concern the actual mental process of combining the word "wrestling" as an image (i.e., signifier) with the mental representation of a physical activity involving bodily contact (i.e., signified). Rather, the analysis will focus on the second-order of representation attached to the image—which is the myth of "wrestling," not the word any longer—that

27. *Les lettres nouvelles* was a highly respected French literary periodical published in France (Paris) from 1953 to 1977, by Éditions Julliard and later Éditions Denoël.

28. See C Bally & A Sechehaye, eds, *Ferdinand de Saussure—Cours de linguistique générale* (Paris: Payot, 1916) [Saussure, *Cours*]; see also the translation by R Baskin, *Course in General Linguistics* (London: Peter Owen, 1960) [Saussure, *Course*]. The manuscript is entirely based on the lectures on general linguistics given between 1907 and 1911 at the University of Geneva, which were edited and published by de Saussure's students and colleagues after his death in 1913.

29. Barthes, "Myth," *supra* note 26 at 109 [emphasis in original].

30. Saussure, *Cours*, *supra* note 28 at 65 *et seq* and also Saussure, *Course*, *supra* note 28 at 99 *et seq*.

31. See J Culler, *Barthes* (London: Fontana, 1990) at 35.

32. Barthes, "Myth," *supra* note 26 at 114 [emphasis in original].

33. S Lévi-Strauss, *Structural Anthropology* (Middlesex: Penguin, 1972) at 209. See also the original, C Lévi-Strauss, *Anthropologie structurale*, *supra* note 16 at 230.

34. Barthes, "Myth," *supra* note 26 at 114.

35. *Ibid* at 15 *et seq*.



brings up the concept that “wrestling” is an entertaining show and not a real sport.

Considering Barthes, and also Lévi-Strauss, it is most illuminating to see what they reckon is the function of mythology in humanity. According to Barthes, “myth has the task of giving an historical intention a natural justification, and making contingency appear eternal.”<sup>36</sup> Later, he noted:

What the world supplies to myth is an historical reality, defined, even if this goes back quite a while, by the way in which men have produced or used it; and what myth gives in return is a *natural* image of this reality.<sup>37</sup>

Similarly, before illustrating his point using the French Revolution as a forceful example, Lévi-Strauss instructed thus:

On the one hand, a myth always refers to events alleged to have taken place long ago. But what gives the myth an operational value is that the specific pattern described is timeless; it explains the present and the past as well as the future.<sup>38</sup>

Indeed, in representing/creating mythical reality, a myth is generally viewed as being at least somewhat linked to material reality found in history, which the initial sign (linguistic or else) originally represented/created through the human mind. As both Barthes and Lévi-Strauss pointed out, however, the most important feature in myth is that a degree of certainty, eternity, and even orthodoxy, is invented and attributed to these historical events in the process whereby the initial sign is deemed a mythical sign and, consequently, whereby material reality changes into mythology through the cognitive process of the mind.<sup>39</sup>

The problem is that such historical facts may be unsettled and, in effect, can be the subject of great controversies, which a myth will hide and conceal.<sup>40</sup> As such, a myth may carry great power in society, one that is much more extraordinary than that of ordinary words and expressions.<sup>41</sup>

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36. *Ibid* at 142.

37. *Ibid* at 142 [emphasis in original].

38. Lévi-Strauss, *Structural Anthropology*, *supra* note 33 at 209. See also the original Lévi-Strauss, *Anthropologie structurale*, *supra* note 16 at 231.

39. It follows also that myths can be linked to the idea of *fallacies*, developed by Jeremy Bentham; see HA Larrabee, ed, *Bentham's Handbook of Political Fallacies* (New York: Harper Brothers, 1962) at 3, which reads: “By the name of fallacy it is common to designate any argument employed or topic suggested for the purpose, or with the probability of producing the effect of deception, or of causing some erroneous opinion to be entertained by any person to whose mind such an argument may have been presented.”

40. See Waardenburg, *supra* note 15 at 57, who wrote: “Myth then no longer gives access to reality but rather keeps us away from it.”

41. See Müller, *supra* note 16 at 355: “Mythology, in the highest sense, is the *power exercised by language on thought* in every possible sphere of mental activity” [emphasis added].

Indeed, when a myth transforms material reality into mythical reality through the human mind, or *vice versa*, when mythical reality causes a word to transform into a myth through this cognitive process, the equivocal character of the factual basis that may exist in material reality vanishes because such historical foundations in mythical reality are no longer considered relevant or are more or less viewed as incontestable.

In a way, a myth triggers reality to become larger than life. Material reality expressed in terms of *lógos* (logical reasoning) becomes mythical reality expressed in *múthos* terms (fictitious narrative), but it is nonetheless still considered by people in society in terms of *lógos*, as simply representing/creating *reality*, full stop. Put another way, the *lógos* that became a *múthos* reverted back to being viewed as *lógos*, that is, to being a rational explanation of the matter at hand based, this time, on a belief-system that unquestionably holds as valid and true the relevant historical accounts. Consciously or not, we thus cease to care about the material facts. As a result, the power that a word carries is increased tenfold when it becomes a myth which, in turn, may be strategically used to have considerable social impact upon human consciousness.

## II. *The myth of the Gérin-Lajoie statement*

The Gérin-Lajoie statement, as the soteriological/heroic myth it has become over the years, is liable to have a huge social effect, as a perceived incontestably true legal basis for *jus tractatus* in the province of Quebec. In examining this myth, the historical facts, as well as the political and legal context, which the linguistic sign originally represented/created before it became a mythical sign, must be scrutinised to show that the mythical reality for which it now stands is substantially remote from the initial material reality. For this demonstration, the existing rules in Canada's public law during the relevant time will be examined in some detail, before considering the actual tenets of Minister Paul Gérin-Lajoie's political statement in the mid-1960s.

### 1. *Plenary jus tractatus for the federal government*<sup>42</sup>

Possibly since the *Treaty of Versailles* in 1919<sup>43</sup> and, quite clearly, with the *Halibut Treaty* in 1923,<sup>44</sup> the emancipation of Canada vis-à-vis Great Britain was fully realised in regards to the capacity to conclude international

42. This section borrows from my paper, S Beaulac, "Interlégalité et réception du droit international en droit interne canadien et québécois" in S Beaulac & J-F Gaudreault-DesBiens, eds, *JurisClasseur—Droit constitutionnel* (Toronto: LexisNexis, 2011) 23/1, section IV.

43. *Treaty of Versailles*, 28 June 1919, 225 CTS 189.

44. *Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean*, Canada & USA, 2 March 1923, BTS 18 (1925), 32 LNTS 93 (entered into force 22 October 1924).

treaties, i.e. *jus tractatus*, which would be assumed by the Crown in right of Canada, i.e., by the federal government. This constitutional practice, *de facto*, was confirmed by binding constitutional rules, *de jure*, with the *Letters Patent* of 1947.<sup>45</sup> Quebec's claims associated with the Gérin-Lajoie statement, which will be examined later on, must therefore be contextualised right away, because the situation has been settled and accepted as such by the different stakeholders, both internationally and domestically (especially in Canada's judiciary) for almost a full century (over 90 years). It would be surprising, to say the least, that efforts from Quebecois political actors in the last couple of decades to create some sort of myth (as personified by a former MNA) would wipe out the significance of this long-standing position in Canada's and Quebec's public law.

Prior to examining domestic rules of constitutional law, a word on the relevance of public international law on issues of *jus tractatus* shall prove useful.

a. *International law not completely neutral on jus tractatus*

It is important to address a preliminary point before focussing on the basis for the Canadian federal government's plenary power regarding *jus tractatus*. The competence to conclude conventions and treaties, we are told, is a subject-matter that is governed by the domestic law of each sovereign state of the international community; it would be of no concern to international law. Indeed, the applicable law found in the *Vienna Convention on the Law of Treaties*<sup>46</sup> is deemed agnostic on the issue of the authority of federated sub-states such as Canada's provinces to create international obligations by means of agreements with other states. According to section 6 of the *Vienna Convention*, it is the states that enjoy the international capacity to conclude treaties; although propositions were made during the drafting of section 6, no details were adopted to address *jus tractatus* in regard to federal states. Thus we seem to have to agree with Jacques-Yvan Morin, when he suggests that:

Le droit international renvoie au droit public interne de chaque fédération lorsqu'il s'agit de déterminer [if required] le degré de capacité internationale dont peuvent se réclamer les collectivités composantes en matière de conclusion des traités.<sup>47</sup>

45. *Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada* (1947), RSC 1985, Appendix II, no 31.

46. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (1969), Can TS 1980 No 37 (entered into force 27 January 1980).

47. J-Y Morin, "La personnalité internationale du Québec" (1984) 1 RQDI 163, at 187.

This being so, it does not mean, necessarily, that international law is completely neutral with respect to *jus tractatus*. The main feature to take into account when considering this topic is that the continuing dominant epistemological understanding of international law is based on the fundamental structural idea of the sovereignty of states. On the international plane, the external dimension of state sovereignty—including treaty-making power and the responsibility in case of breach—is exercised by one authority,<sup>48</sup> i.e., the one government of the said state (which, incidentally, is a constituting element to be considered a state). In this regard, it is interesting to refer to section 27 of the *Vienna Convention on the Law of Treaties*, which provides that: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” The irrelevance of national law to issues of violations of international obligations extends to domestic constitutional law.<sup>49</sup> This was settled already in the *Polish Nationals in Danzig Case*, an advisory opinion by the Permanent Court of International Justice in 1931, where it was held that: “a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”<sup>50</sup>

As a consequence, it would be an exaggeration to suggest that international law is not at all informative as to the situation of federal states and treaty-making power. The rules on state responsibility assume and indeed are based on the premise that members of the international community, be they unitary or federal states, speak with one voice in their relations with others. One must not confuse, as an author seems to have done recently,<sup>51</sup> the general concept of international personality, which non-state actors may be deemed to enjoy in some circumstances, with the concept of legal or juristic capacity to participate in international relations. This is especially with regard to the creation of normativity, a capacity viewed as inherent to sovereign states and, as suggested here, considered exercised by them in a single voice (that of the central government in federal states). The direct correlation between treaty-making power and state responsibility in cases of breach, the latter being attributed to the state as a whole, constitutes a strong indication under international law

48. On the external dimension of state sovereignty, see S Beaulac, “Emer de Vattel and the Externalization of Sovereignty” (2003) 5 *J Hist Int’l L* 237.

49. R Jennings & A Watts, *Oppenheim’s International Law*, vol 1—Peace, 9th ed (Longman: London, 1992) at 254.

50. *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion), [1931] PCIJ, series A/B, no 44, p 24.

51. See H Cyr, “Les souverainistes canadiens et québécois et la conclusion des traités : ce qu’en dit le droit international public” (2010) 3 *RQDC* 1 at 13-16.

that federal states act and come into relation with other international community members as a single unit, including via the conclusion of conventions and treaties.

An illustration confirming this non-neutral stance of general public international law in regard to *jus tractatus* comes from the International Law Commission's *Draft Articles on State Responsibility*, endorsed by resolution at the United Nations General Assembly.<sup>52</sup> Article 4(1), in the chapter dealing with the attribution of conduct to a State, provides thus:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and *whatever its character as an organ of the central government or of a territorial unit of the State*. [Emphasis added]

Thus on the international plane, there is still nowadays no way around the basic position that states are the main legal subjects and are expected to act as single entities for the purpose of creating internationally binding normativity (be it conventional or customary)—in exercising their external sovereignty—because, in the end, it will be that one single central authority that will be held accountable in law for international wrongful acts such as breaching treaty obligations. This aspect, to say it again, is a strong indication, albeit indirect, that general public international law has a preference to have states speak with one voice with their *jus tractatus*. Such implicit positioning of international law is no doubt validated, explicitly, by a quick comparative consideration of state practice in other federal states, including the United States of America,<sup>53</sup> where the dominant approach is clearly to have the central authority enjoy the plenary of power to conclude international conventions and treaties.<sup>54</sup>

b. *The federal government plenary power over jus tractatus*

In Canada's public law—including that applicable in Quebec—the arguments in regard to treaty-making are clearly and inexorably in favour of the plenary power of the central authority, something that has been settled for almost a century. In the discussion that follows, caselaw and

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52. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, UNGAOR, 53rd Sess, UNDOC A56/10 (2001) at 44.

53. See, for instance, the decision in *United States v Curtiss-Wright Export Corp* (1936) 299 US 304 at 318.

54. See the classic studies by AE Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968) at 25-27; and GL Morris, "The Treaty Making Power: A Canadian Dilemma" (1967) 45 Can Bar Rev 478 at 492-497.

other legal sources of constitutional law are examined with a view to showing how, based on domestic positive law (to which international law defers on issues of *jus tractatus*), the material reality of the treaty-making power leaves no doubt as to the federal government's plenary power.

Of course, the first normative element to consider regarding this problematic is the landmark case known as the *Labour Conventions Case*,<sup>55</sup> which raised many issues of division of legislative authority in relation to international treaties. Everyone will recall the facts of the case, which involved three conventions concluded by the Canadian federal government, under the auspices of the International Labour Organisation, and in respect of which the federal Parliament had enacted three pieces of legislation to implement them domestically. In the end, the Privy Council held that these pieces of legislation were *ultra vires* because, essentially, the incorporation of international treaty (required under the so-called dualist theory) must follow the division of legislative authorities under sections 91 and 92 of the *Constitution Act, 1867*<sup>56</sup> (known then as the *British North America Act*). In this case, since the subject-matter of the conventions was labour law, which fell under provincial authority, the federal Parliament could not implement them by means of legislation. This feature is accurately seen as the *ratio decidendi* of the *Labour Conventions Case*, the one that was severely criticised by many legal writers (both Anglophones and Francophones)<sup>57</sup> and even put in doubt by some Supreme Court of Canada justices in a couple of *obiter dicta* in the 1950s and 1970s.<sup>58</sup>

The other highly important holding in the *Labour Conventions Case* concerns *jus tractatus*, i.e., the power in Canada to conclude international

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55. At the Supreme Court of Canada, *Reference re The Weekly Rest in Industrial Undertaking Act, The Minimum Wages Act and The Limitation of Hours of Work Act*, [1936] SCR 461; and at the Judicial Committee of the Privy Council, *Attorney General for Canada v Attorney General for Ontario*, [1937] AC 326.

56. *Supra* note 10.

57. See, for instance, NAM MacKenzie, "Canada and the Treaty-Making Power" (1937) 15 Can Bar Rev 436; NAM MacKenzie, "Canada: The Treaty-Making Power" (1937) 18 Brit YB Int'l L 172; VC MacDonald, "The Canadian Constitution Seventy Years After" (1937) 15 Can Bar Rev 419; FR Scott, "The Consequence of the Privy Council Decisions" (1937) 15 Can Bar Rev 485; AB Elkin, "De la compétence du Canada pour conclure les traités internationaux—Étude sur le statut juridique des Dominions britanniques" (1938) 45 RGDIP 658; GJ Szablowski, "Creation and Implementation of Treaties in Canada" (1956) 34 Can Bar Rev 28; FR Scott, "Labour Conventions Case: Lord Wright's Undisclosed Dissent" (1956) 34 Can Bar Rev 114; E McWhinney, "Federal Constitutional Law and the Treaty-Making Power" (1957) 35 Can Bar Rev 842; E McWhinney, "The Constitutional Competence within Federal Systems as to International Agreements" (1964) 1 Can Legal Stud 145; GV La Forest, "The Labour Conventions Case Revisited" (1974) 12 Can YB Int'l Law 137; and S Beaulac, "The Canadian Federal Constitutional Framework and the Implementation of the Kyoto Protocol" (2005) 5 *Revue juridique polynésienne* (hors série) 125.

58. See Justice Kerwin in *Francis v The Queen*, [1956] SCR at 621; and Chief Justice Laskin in *MacDonald v Vapor Canada Ltd*, [1977] 2 RCS 134 at 169-171.

treaties with other states. It is true that, strictly speaking, the *ratio decidendi* of the decision at the Privy Council was limited to the issue of treaty implementation, but it would be an error to stop the analysis there and then assume that there is a kind of vacuum in our public law with regard to treaty making.<sup>59</sup> Indeed, we will see that, short of explicitly ruling on the issue of *jus tractatus*, the Judicial Committee of the Privy Council nonetheless took the view that the federal government had plenary treaty-making power, and more importantly, the Supreme Court of Canada in the *Labour Conventions Case* did take an explicit position on the issue, which has been the governing law since.

It is unfounded to say that the Privy Council did not take a stand on *jus tractatus* in its 1937 judgment. The confusion comes from the following passage in Lord Atkin's speech, stating that his decision is taken on the basis of the lack of legislative competence to incorporate the treaties at hand:

Reverting again to the original analysis of the contentions of the parties, it will be seen that the Provincial contention I.(b) relates only to the formation of the treaty obligation, while I.(c) has reference to the alleged limitation of both executive and legislative action by the express terms of the treaty. If, however, the Dominion Parliament was never vested with legislative authority to perform the obligation, these questions do not arise. And, as their Lordships have come to the conclusion that the reference can be decided upon the question of legislative competence alone, in accordance with their usual practice in constitutional matters they refrain from expressing any opinion upon the question raised by the contentions I.(b) and (c), which in that event become immaterial.<sup>60</sup>

A proper reading of Lord Atkin's opinion, however, requires one to take into account other passages that, quite clearly, show where the Privy Council stands on Canada's *jus tractatus*. When dwelling upon treaty implementation and the necessary collaboration between the executive and legislative branch of government, all the more complex given the federal nature of the country, Lord Atkin takes for granted that the Crown in right of Canada (i.e., the federal government) enjoys full treaty-making power, independently of the subject-matter of the convention. Here is the excerpt:

The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the *[federal] executive have the task of obtaining the legislative assent not of the one Parliament to whom they*

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59. This is a common mistake by Quebec legal writers, which is what Hugo Cyr did in his PhD thesis, published as H Cyr, *Canadian Federalism and Treaty Powers—Organic Constitutionalism at Work* (Brussels: PIE Peter Lang (Diversitas), 2009).

60. *Attorney General for Canada v Attorney General for Ontario*, *supra* note 55 at 348-349.

*may be responsible*, but possibly of several Parliaments to whom they stand in no direct relation.<sup>61</sup>

Suggesting that this is a mere *obiter dictum* only begs the question. Albeit it is not necessary to decide the case at the Privy Council, this is a compelling (implicit) indication that Lord Atkin viewed the federal government as fully empowered to conclude every and any international treaty on behalf of Canada.

There is another even more probative passage in the judgment, which in fact not only endorsed the Supreme Court of Canada ruling in regard to *jus tractatus*—which is examined in a moment—but also expressed the view that the Crown in right of Canada enjoys full treaty-making power:

It is true, as pointed out in the judgment of the Chief Justice, that *as the [federal] executive is now clothed with the powers of making treaties* so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. 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>62</sup>

Clearly, when Lord Atkin says that, for the purpose of treaty implementation, he cannot extend the power of the federal legislative branch of government to correspond to that exercised by the federal executive branch of government for the purpose of treaty making, the premise is that Ottawa has the plenary authority in regard to the latter. Put another way, more than an *obiter* observation, we have here an element at the heart of ruling to the effect that the division of legislative authorities dictates who is competent to implement depending on the subject-matter of the convention or the treaty, namely that the *jus tractatus* is part of the “enlarged functions of the Dominion [federal] executive,” which was the *ratio decidendi* at the Supreme Court of Canada in the *Labour Convention Case*.

Indeed, unlike the Judicial Committee of the Privy Council, what became the highest court of the land shortly thereafter was of the view—not implicitly, but quite explicitly—in a split decision handed down in 1936, that the case must be ruled in favour of the federal government and, to be precise, should be decided first and foremost on the basis of Ottawa’s

61. *Ibid* at 348 [emphasis added].

62. *Ibid* at 352 [emphasis added].



plenary power over *jus tractatus*.<sup>63</sup> As a result, it is a simple matter of jurisprudence that, short of a ruling by the top judicial authority (Privy Council) in this case on the issue of treaty-making power—though there was an implicit opinion clearly expressed by Lord Atkin, as we saw—the highest court to rule on the issue was the Supreme Court of Canada and its conclusion in the *Labour Conventions Case* ought to be accepted as representing the applicable law. To be sure, the Privy Council says that it provides no (explicit) opinion as regards treaty-making power, deciding on the basis of treaty implementation, but Lord Atkin obviously does not overrule the Supreme Court of Canada on *jus tractatus*. Thus it is fair to say that, since the 1930s, the plenary power to conclude treaties was recognised to belong to the federal government, precisely since the *Labour Conventions Case*. As John H. Currie explained in his textbook,<sup>64</sup> this has been the law since the 1930s in Canada (and in Quebec too), because no Canadian court (or Quebec court) has put into doubt or reconsidered the validity of this unwritten constitutional rule; in fact, the only time the Supreme Court of Canada expressly addressed the issue again was in *Thomson v Thomson*, where Justice L'Heureux-Dubé (with McLachlin J.) wrote in a concurring set of reasons that the federal government had “exclusive” treaty-making jurisdiction.<sup>65</sup>

To recap, for nearly a century, the law concerning this country's *jus tractatus* has been settled: the Crown in right of Canada, that is to say, the federal government, enjoys plenary power when it comes to the conclusion of international conventions and treaties. To be clear, this entails that Ottawa can strike such agreements with other states, whether the subject matter is federal or provincial (ss 91 or 92, *Constitution Act, 1867*). This

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63. See the decision of the Supreme Court of Canada in *Reference re The Weekly Rest in Industrial Undertaking Act, The Minimum Wages Act and The Limitation of Hours of Work Act*, *supra* note 55, split 4-3, with the main opinion expressing the plurality view on the validity of the federal statutes (a conclusion overruled on appeal at the Privy Council) written by Chief Justice Duff (with Davis and Kerwin JJ); the plurality view was to the effect that Ottawa was competent to implement the treaties (the point overruled on appeal) and also, quite importantly here, to conclude the said international conventions (even if the subject-matter is provincial). Dissenting on treaty implementation, Crocket J agreed with the Chief Justice and his two colleagues on *jus tractatus* (*ibid* at 535): “While I agree with the learned Chief Justice that the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect the Dominion as a whole or any of the provinces separately [...]” In sum, on the plenary treaty-making power of the federal government, there is a clear majority at the Supreme Court of Canada in the *Labour Conventions Case*, which is the applicable law in this country.

64. JH Currie, *Public International Law*, 2d ed (Toronto: Irwin Law, 2008) at 240.

65. *Thomson v Thomson*, [1994] 3 SCR 551 at para 112-113. The fact that the Justices mistook on the continuing application of section 132 of the *Constitution Act, 1867*—a mere “judicial slip” as John Currie suggested, *ibid* note 64 at 239—should not affect the validity of the opinion that *jus tractatus* is fully federal.

is the uninterrupted practice, *de facto*, in this country since 1919 with the end of World War I—or at least since the 1923 *Halibut Treaty*—which was confirmed, *de jure*, by the decisions in the *Labour Conventions Case* by the Privy Council (implicitly) and by the Supreme Court of Canada (explicitly). This *de jure* situation was finalised, in a way, with the 1947 *Letters Patent* regarding the office of Government General, officialising the transfer of all powers from Westminster to Ottawa, especially royal prerogatives, the actual normative source of authority for *jus tractatus* (as we will see in a moment).

This understanding of applicable law has gone unchallenged in caselaw and was also accepted as such by all the other legal and political actors for a long time... up until the mid-1960s, in fact.<sup>66</sup> The rhetoric out of Quebec City prompted Ottawa to write down in a document the rules according to which international relations have been conducted in this country, which included the normative foundation for the federal government's plenary *jus tractatus*.<sup>67</sup> This is the material reality; let us examine now the mythical reality since Paul Gérin-Lajoie's political statement.

### c. *The Gérin-Lajoie political statement*

Although not expressed with the same zeal over the years, more recently the political position of the province of Quebec is, at least publicly, against the constitutional rules providing for plenary *jus tractatus* to the federal government. Many stakeholders—politicians and academics—have adopted the habit of associating their claims in favour of recognising a provincial treaty-making power that matches their legislative competences to a political statement made by then Education Minister Paul Gérin-Lajoie.<sup>68</sup> This is sometimes referred to, mainly by secessionist-leaning actors, as a “doctrine,” insinuating that it might have some normative value, suggesting that it is a position on par, as it were, to the legal situation prevailing in our constitutional law. The collective book published in 2006, entitled *Les relations internationales du Québec depuis la doctrine Gérin-Lajoie (1965-2005)*,<sup>69</sup> is a forceful example where some academics

66. See Currie, *supra* note 64 at 239; and Morris, *supra* note 54 at 484.

67. See Government of Canada, *Federalism and International Relations* (Ottawa: Queen's Printer, 1968).

68. Interestingly, one notes that the speech from which this political statement is taken was made, not inside the provincial legislature—called the National Assembly in Quebec—not even in front of a domestic or local audience; indeed, it was in a presentation before a group of foreign diplomats, in Montreal, that is deemed to be so influential. It was much much later, when the secessionist government of René Lévesque's Parti québécois was in power in the late 1970s and early 1980s, that the Gérin-Lajoie political statement was formally endorsed.

69. S Paquin, *Les relations internationales du Québec depuis la doctrine Gérin-Lajoie (1965–2005)* (Quebec: Presses de l'Université Laval, 2006).

in this province—including lawyers<sup>70</sup>—try hard to construct a mythical reality and, more importantly, a new rhetorical significance and semiotic effect associated with this political statement.

It is contagious, perhaps, as one can see the influence of nationalist academics—Benoît Pelletier, for one<sup>71</sup>—on the Quebec government. Nowadays, quite surprisingly, even the Quebec Liberal Party argues in favour of autonomous provincial *jus tractatus*, as the following statement by former Premier Jean Charest illustrates: “Ce qui est de compétence québécoise chez nous est de compétence québécoise partout.”<sup>72</sup> Although catchy, this is another mere political statement or slogan, a unilateral declaration in fact; to be clear, statements such as this have no influence whatsoever on the state of the law in this country, i.e., on our constitutional law. Nor does the legislation enacted under then-Premier Lucien Bouchard and his secessionist Parti québécois government, namely the *Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec*.<sup>73</sup> Leaving aside the obvious *ultra vires* nature of this statute, it is noteworthy that, for all purposes, section 7(1) would seem to give legal force to the Gérin-Lajoie statement: “The Quebec State is free to consent to be bound by any treaty, convention or international agreement in matters under its constitutional jurisdiction.” This being so, any respectable constitutional lawyer would agree that the Quebec legislature cannot unilaterally change the *jus tractatus* rules in such a (cavalier) way. This is “constitution-fiction law” or, as it shall be shown below, an attempt to build a mythical reality regarding provincial treaty-making power.

What is the constitutional legal basis for Quebec's claims expressed in terms of the Gérin-Lajoie statement? Is there, in effect, any foundation in positive public law to support the arguments put forward in favour of a provincial *jus tractatus*? Essentially, the argument is based on a

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70. See the recent attempt by UQAM law professor Hugo Cyr, *Canadian Federalism and Treaty Powers—Organic Constitutionalism at Work*, *supra* note 59. Even one (only one to my knowledge) Anglo-Canadian author, influenced by former BQ and PQ politician and international law professor Daniel Turp, has joined the group arguing in favour of provincial *jus tractatus*: see G van Ert, “The Legal Character of Provincial Agreements with Foreign Governments” (2001) 42 C de D 1093.

71. MNA Benoît Pelletier chaired a special committee on intergovernmental affairs that produced a final report, entitled *A Project for Quebec: Affirmation, Autonomy and Leadership* (Montreal: Quebec Liberal Party, 2001) which, for all purposes, endorses the Gérin-Lajoie statement.

72. Speech by the Premier Jean Charest at École nationale de l'administration publique, 25 February 2004, online: <[http://www.premier.gouv.qc.ca/general/discours/archives\\_discours/2004/fevrier/dis20040225.htm](http://www.premier.gouv.qc.ca/general/discours/archives_discours/2004/fevrier/dis20040225.htm)>. See also M David, “La doctrine Charest,” *Le Devoir* (23 November 2004) A-3.

73. *Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec*, LRQ, c E-20.2. In English, *An Act respecting the Exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State*.

tentious reading of the main decisions that developed the thesis or the theory known as the “two-Crown approach,” particularly relevant to the issue of royal prerogative. In fact, preliminarily, a word is in order to explain how the royal prerogative is the legal basis to *jus tractatus*; then follows the caselaw on the two-crown approach.

### III. *Jus tractatus based on royal prerogative*

Let us first recall that, with respect to treaties as a source of international law, we must highlight different steps in the process of treaty-making: negotiation, signature, ratification (or other means of state consent, such as adherence), registration, publication, and coming into force. All of these features are the concern of international law and, as the case may require, must be distinguished from the need for implementation, which is a domestic law operation that can be accomplished differently (things that fall outside the present study). Both groups of issues, however, share one domestic aspect, namely to know which state organ is entrusted with which function: of negotiating and concluding treaties, for instance, or of incorporating domestically international conventions. The latter, we mentioned earlier, is done in Canada by means of implementing legislation, meaning that it is Parliament (the legislative branch of government) that is competent to incorporate conventional international law; such implementing legislation must also, as we recalled, follow the division of legislative competence (federal, provincial) pursuant to the *Constitution Act, 1867*.<sup>74</sup>

What is called *jus tractatus* (i.e., treaty-making power) concerns first and foremost issues surrounding the state organ entrusted to conduct the negotiation and conclusion of treaties (and the different steps in the process). Put another way, within a Montesquieu analytical structure separating legislative, executive and judicial powers, who is competent to conclude international treaties and conventions with other states and, most importantly, what is the legal source for such authority? The first thing to say is that this question of domestic enablement is governed by domestic public law, not by public international law. Though this point may sound trite, it is nevertheless useful to recall that the *Vienna Convention on the Law of Treaties* only says that any state has the capacity to conclude treaties, leaving the issue of who within the state can conduct such activity to the internal organisation of the state. No matter who has the *jus tractatus* domestically, international law will hold a state to its word, *pacta sunt*

74. See comments in relation to the Privy Council decision in the *Labour Conventions Case*, *supra* notes 55-58 and accompanying text.

*servanda*, considering the state accountable if the international obligations are breached.

In Canada, the domestic source of law relevant to treaty-making power and, more generally, the jurisdiction over international relations and foreign affairs is the so-called royal prerogative. "When we speak in our day of a Prerogative of the Crown," it was once explained, "we mean a right that remains in the Sovereign as one of that bundle of discretionary common law rights which were, at and by the common law, exercisable by the Sovereign in person."<sup>75</sup> Similarly, Sir William Blackstone wrote: "By the word prerogative, we usually understand that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of common law, in right of his regal dignity."<sup>76</sup> The distinguishing feature, therefore, of a power or authority based on royal prerogative is that it need not be authorised by statute, i.e., by an enabling piece of legislation. This is, in a way, an exception to the general principle under the rule of law, known as legality, which generally means that the executive branch of government must base its action on enabling law. Of course, given that the source of royal prerogatives is the common law, i.e., judge-made-law, they are said to constitute "residue of power"<sup>77</sup> in relation to other legally authorised competence. In other words, Parliament can always modify, curtail or abolish a prerogative of the Crown by means of legislation<sup>78</sup>; this is how one must understand the old adage that "the King hath no prerogative, but that which the law of the land allows him."<sup>79</sup>

Traditionally, and still nowadays, based on its prerogatives, the British Crown has been the exclusive and plenary power-holder in regard to the conduct of foreign affairs and issues of international relations. This includes matters such as the declaration of war or neutrality, the establishment or severance of diplomatic relations, the negotiation and conclusion of conventions and treaties, the exercise of consular or diplomatic protection, and representation towards international claims and remedial measures. To be clear, for all these issues—according to the Anglo-Saxon parliamentary

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75. WF O'Connor, *Report to the Honourable Speaker of the Senate on the British North America Act, 1867* (Ottawa: Patenaude, 1939) Annex 1, 146.

76. W Blackstone, *Commentaries on the Laws of England, in Four Books*, 13th ed (London: Strahan, 1800) at 239.

77. AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1959) at 424, wrote that royal prerogatives are "nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." See also *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] RCS 269.

78. See the opinion of the House of Lords in *Attorney General v De Keyser's Royal Hotel*, [1920] AC 508 (HL).

79. *Case of Proclamation*, (1611) 12 Co Rep 74 at 76 (QB).

system of public law—the executive branch of government can exercise its power based on common law Crown prerogatives, that is to say, without any legislative type of authority. Specifically, with respect to *jus tractatus*, Justice Read once explicated thus:

The treaty-making is part of the Royal Prerogative. An international agreement is negotiated by representatives acting under the authority of the Crown, signed by them and, subsequently ratified by the Crown. When it has been thus signed and ratified, it creates an international obligation binding upon the State as an international person. Legally, the approval of Parliament is not necessary, at any stage, to create an international obligation.<sup>80</sup>

In Canada, it follows that the issue as to the constitutional *situs* of legislative power over treaty-making, i.e., to know whether it falls under s 91 or s 92 of the *Constitution Act, 1867*, seems to be highly hypothetical and without any real significance, given that it is a prerogative-based authority.<sup>81</sup>

Naturally, the judge-made-law nature of royal prerogatives means that, at the time *jus tractatus* started *de facto* in Canada in the 1920s and was confirmed *de jure* with the 1947 *Letters Patent*, the legislative branch could have intervened to modify, curtail or abolish the basis of such authority. But it did not: neither the federal Parliament in Ottawa nor, hypothetically, the different provincial legislatures manifested any intention whatsoever to interfere with the Crown prerogative over foreign affairs and international relations that Canada inherited from Great Britain. In fact, the whole story is that, since then, there has been no attempt by Parliament at the federal level (whose executive has discharged this country's *jus tractatus* uninterrupted) to modify, curtail or abolish the royal prerogative over foreign affairs and international relations. Undoubtedly, the legislative branch can, but it does not. To be precise, the legislative branches of governments in this country —both federal and provincial— did not manifest themselves in the 1920s or in 1947, which in federalism terms, has sealed the deal (so to speak) of *jus tractatus* in favour of the federal government. This is the bulk of the problem with the Gérin-Lajoie statement, as we will now see.

80. JE Read, "International Agreements" (1948) 26 Can Bar Rev 520 at 525.

81. See, generally, JM Roland, "Cancelling Charters of Canadian Companies: Division of Prerogative Powers" (1963) 21 UT Fac L Rev 75.

#### IV. *No legal basis for the Gérin-Lajoie statement*

The few serious legal academics who have attempted to flesh out a constitutional basis for a provincial treaty-making power,<sup>82</sup> that would correspond to the subject-matters under section 92 of the *Constitution Act, 1867*, have revisited two fundamental decisions by the Judicial Committee of the Privy Council, namely *Liquidators of Maritime Bank*<sup>83</sup> and *Bonanza Creek*.<sup>84</sup> These cases are the basis for the so-called “two-Crown approach” in Canadian constitutional law, which is of course most relevant to issues of Crown prerogative such as those pertaining to *jus tractatus*. According to the Quebec position, the combined effect of the two judicial pronouncements, read in a clearly result-oriented fashion, would be to justify (similarly to treaty implementation) a power to conclude international treaties and conventions to both the Crown in right of Canada and the Crown in right of a province.

But what was actually held in these cases? *Liquidators of Maritime Bank* was handed down in 1892 and the argument was to the effect that the Governor General of Canada was the only representative of the Crown in the country. In rejecting that view, the Privy Council wrote that, “a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.”<sup>85</sup> Lord Watson insisted on the importance of the division of authorities, both legislative and executive, between the federal and the provincial governments:

The object of the Act [*Constitution Act 1867*] was neither to weld the provinces into one, nor to subordinate provincial governments to central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its own independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion government should be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government.<sup>86</sup>

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82. The main proponent was no doubt former MNA under the secessionist *Parti québécois* government of René Lévesque, professor Jacques-Yvan Morin, University of Montreal: see J-Y Morin, “La personnalité internationale du Québec” (1984) 1 RQDI 163; and J-Y Morin, “Le Québec et le pouvoir de conclure des accords internationaux” (1966) 1 *Études juridiques canadienne* 136.

83. *Liquidators of Maritime Bank v Receiver General of New Brunswick*, [1892] AC 437 (PC).

84. *Bonanza Creek Gold Mining Company Ltd v Rex*, [1916] 1 AC 566 (PC).

85. *Liquidators of Maritime Bank*, *supra* note 83 at 443.

86. *Ibid* at 441.

The latter point, that both executive and legislative powers are distributed pursuant to s 91 and s 92 of the *Constitution Act, 1867*, was confirmed in *Bonanza Creek*, rendered in 1916. In an extensive judgment, Viscount Haldane opined that “the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers.”<sup>87</sup> In sum, the British Crown is divisible in Canada, upon the federalist lines, a basic constitutional principle that was held to apply *mutatis mutandis* to the prerogatives of the Crown, which are also divisible between the federal and provincial governments.<sup>88</sup>

The Quebec position refers to these two cases to support a provincial *ius tractatus*, for subject-matters under s 92 of the *Constitution Act, 1867*. The argument is that, given that treaty-making is a power of the Crown and that prerogatives follow the constitutional division of authorities, the executives of the provinces should be able to conclude treaties on provincial issues and, for its part, the federal executive treaty-making power should be limited to federal subject-matters. This reasoning, however, is no less than a syllogism, that is to say, it constitutes a truncated statement that gives the falsified impression that there is a foundation in Canada’s written constitutional law relating to foreign affairs and international relations. This suggestion is utterly wrong because, since at least the 1937 decision of the Privy Council in the *Labour Conventions Case*,<sup>89</sup> it has been crystal clear that this country’s positive law in the written constitutional documents says nothing about the domestic power in relation to international conventions; there is no “international” subject-matter under s 91 and s 92 of the *Constitution Act, 1867*, be it in regard to treaty making or treaty implementation.

Indeed, it is not written constitutional norms, but rather the common-law based prerogative of the Crown that is the legal source of authority, in our constitutional law, over foreign affairs and international relations, as we just explained. These judge-made-law unwritten rules are part of a distinct feature of Canada’s constitutional law, namely that the positive public law dealing with our constitution is formed of written legal rules and of unwritten legal rules, both normatively binding (not to be confused with the so-called political constitution, i.e., conventional

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87. *Bonanza Creek Gold Mining Company Ltd*, *supra* note 84 at 580.

88. See *British Columbia Power Corp v British Columbia Electric Co* [1962] SCR 642 at 644-645; and *Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539 at para 9.

89. *Attorney General for Canada v Attorney General for Ontario*, *supra* note 55 at 351.



rules).<sup>90</sup> To be precise, given that treaty-making power is purely a Crown prerogative-type of authority, there is no need to invoke s 91 and s 92 of the *Constitution Act, 1867* to establish the constitutional foundation for these activities conducted by the executive branch of government on the international plane. Put another way, it is a public power that the Crown is entrusted to exercise alone, without the participation of Parliament and, in the Canadian context, without bothering with the issues of legislative division of authorities under the *Constitution Act, 1867*. In sum, it is a common law-based unwritten rule that authorises the government in terms of *jus tractatus*.

This was the legal situation in Great Britain in the late 19th and early 20th centuries, where the British Crown exercised, with no involvement of the Westminster, the authority over foreign affairs and international relations, not only for its own sake, but also on behalf of Canada and other dominions. In fact, the domestic practice in Great Britain has remained the same to this day, that is to say, Parliament is not formally involved in the making of international conventions (in spite of the so-called “Ponsonby rule”).<sup>91</sup> To go back to the relevant time, which is the time *jus tractatus* migrated (was transferred), both *de facto* and *de jure*, from Great Britain to Canada around the turn of the 1920s—confirmed with the 1947 *Letters Patent*—the practice of all parties involved (in Great Britain, in Canada) was the same: namely that treaty-making was the sole responsibility of the Crown. Thus it was a migration and/or transfer of power from the Imperial Crown in Great Britain to Canada, precisely to the Crown in right of Canada, that occurred then and was confirmed in 1947 with the *Letters Patent*.

Peter Hogg is certainly right to say that: “The current instrument of delegation [of treaty-making] is a comprehensive document which was adopted in 1947 and which is entitled Letters Patent [in which] no prerogative power over Canada is withheld”<sup>92</sup> by the Imperial Crown. The following two clauses are particularly on point:

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90. See M St-Hilaire & L Bich-Carrière, “La constitution juridique et politique du Canada: notions, sources et principes,” in S Beaulac & J-F Gaudreault-DesBiens, eds, *JurisClasseur—Droit constitutionnel* (Toronto: LexisNexis, 2011) 23/1, para 7.

91. See SW Templeton, “Treaty-Making and the British Parliament” (1991) 67 *Chicago-Kent L Rev* 457 at 466. For a different interpretation of the British situation, which seems to exaggerate the impact of parliamentary courtesy on practice, see J Harrington, “Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament” (2005) 50 *McGill LJ* 465 at 485 *et seq.*

92. PW Hogg, *Constitutional Law of Canada*, 5th ed (loose-leaf) (Scarborough: Thomson Carswell, 2007) § 11.2.

(2) And We do hereby authorize and empower Our Governor-General with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada.

(3) And We do hereby authorize and empower Our Governor-General to keep and use Our Great Seal of Canada for sealing all things whatsoever that may be passed under Our Great Seal of Canada.

I share the view expressed by Hogg that: “This language undoubtedly delegates to the federal government of Canada the power to enter into treaties binding Canada.”<sup>93</sup> Indeed, this confirmed, not only the uninterrupted practice of the time, but also the legal situation based, as we saw, on both judgments in the *Labour Conventions Case*, of the Privy Council (implicitly recognising plenary power to the federal government) and the Supreme Court of Canada (the majority of justices explicitly holding such exclusive *jus tractatus* for Ottawa).

Hypothetically, there could have been an argument in favour of provincial treaty-making power, perhaps, at the time Canada started to exercise its independent authority over foreign affairs and international relations, that is to say, at the turn of the 1920s and in the following decades. Given the power’s foundation in the common law royal prerogative, one can surely imagine provincial legislatures intervening and, plausibly, exercising their sovereign authority to claim a delegation of *jus tractatus* in regard to their subject-matters under s 92 of the *Constitution Act, 1867*. But no such legal contention was put forward by any of the provinces (except, in a way, in the *Labour Conventions Case*), which renders such a hypothesis unverifiable. The truth of the matter is that, when the practice in this country concerning treaty-making power became crystallised in the 1920s and, more importantly, when the plenary authority of the Crown in right of Canada in that regard (established in the *Labour Conventions Case*) was confirmed in the 1947 *Letters Patent*, the provinces acquiesced and accepted that *de facto* and *de jure* situation. In our positive constitutional law, therefore, it became a done deal.

To a large extent, one needs to be a revisionist of historical developments and factual events surrounding our constitutional law to imply, as the proponents of the Gérin-Lajoie statement do, that the *Letters Patent* have no significance for issues of *jus tractatus*.<sup>94</sup> It participates, as

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93. *Ibid.*

94. For instance, see H Cyr, *Canadian Federalism and Treaty Powers—Organic Constitutionalism at Work*, *supra* note 59.

we will see shortly, in the construction of mythical reality, suggesting as factual things that are contested at best.

Specifically, what is the easy answer to the argument out of Quebec City that the two-Crown approach supports provincial treaty-making power? The real logic behind the *Liquidators of Maritime Bank* and *Bonanza Creek* cases is thus: executive powers do parallel legislative powers (provided for in s 91 and s 92 of the *Constitution Act, 1867*), given the plurality of Crowns in this country, but one needs to have a legislative *situs* for such an authority to invoke the principle. Put another way, if the subject-matter—in our case, *jus tractatus*—pertains solely to the executive branch, based on Crown prerogative, without any legislative foundation (other than hypothetically), then the suggested two-Crown-type of reasoning is of no avail. *Liquidators of Maritime Bank* and *Bonanza Creek* assume that the subject matter falls under the legislative authority of the federal government or the provincial government, and thus hold that the two levels of executive authorities share the power too. But here, as far as treaty-making power is concerned, no legislative basis exists; it is solely a matter under the authority of the executive branch. It would be to distort the *ratio decidendi* in those two judgments of the Judicial Committee of the Privy Council to suggest they apply to the issue of *jus tractatus*.

### *Conclusion*

There we have it: the historical facts and the legal constitutional context relevant to the issue surrounding *jus tractatus* in this country. To conclude, let us come back to the core of this paper's hypothesis, namely that the Gérin-Lajoie statement is a myth—a soteriological/heroic myth,<sup>95</sup> to be precise—that has been constructed for some time in this province, more intensively in the last 15 years it seems, with a view to providing a contended legal basis for a provincial treaty-making power, one that would correspond to its division of powers under s 92 of the *Constitution Act 1867* (and which, incidentally, is followed for treaty implementation). The Gérin-Lajoie myth, like any other myth, may be liable to have a gigantic semiotic effect on Quebec society, as representing a kind of incontestable truth to justify, in constitutional terms, a provincial power to conclude conventions and treaties on the international plane. Here is how, in semiotic terms, the linguistic sign originally representing and creating the material reality became a mythical sign that, indeed, is associated with a mythical reality pertaining to *jus tractatus*.

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95. See *supra* note 24 and accompanying text.

Although the Gérin-Lajoie statement was originally meant to be no more than a political stand by the province of Quebec, it has come to represent and create a different reality, one that portrays provincial *jus tractatus* as well founded in Canada's public law. As explained earlier, myth triggers reality to become large than life. Material reality expressed in terms of *lógos* (logical reasoning)—here the plenary federal treaty-making power—becomes contested and indeed replaced by mythical reality expressed in *mûthos* terms (fictitious narrative)—here the concurrent provincial *jus tractatus* for s 92 subject-matters—but it nevertheless remains considered by (Quebec) society in terms of *lógos*, as simply representing/participating in reality, full stop. Put another way, the actual *lógos* that became a *mûthos* reverted back to being viewed as *logos*, that is, to being a rational explanation of the issues at hand (treaty-making power) based, this time, on a belief-system that unquestionably holds as valid and true the relevant historical events and legal accounts. Consciously or not, people in the province of Quebec—too many of them, one could say—cease to care about the material reality, the practice of almost hundred years in this country and quite compelling caselaw and constitutional documents supporting the orthodoxy of plenary power over treaty-making for Ottawa. As a consequence, one can see that the semiotic power carried by the Gérin-Lajoie statement, clearly, is increased tenfold when it becomes a myth which, in turn, is strategically used to have considerable impact on the collective consciousness in Quebec.

Moreover, given that the hypothesis considered here must be apprehended within the positive legal epistemology of Canada's constitutional law, the following additional point is apposite. When language (words, myths) becomes law, its corresponding social effect increases all the more. Borrowing from Jean-Jacques Rousseau,<sup>96</sup> Philip

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96. See J-J Rousseau, *Discours sur L'Économie Politique* (Geneva: Emanuel Du Villand, 1758) at 15-16: "Par quel art inconcevable a-t-on pu trouver le moyen d'assujettir les hommes pour les rendre libres? D'employer au service de l'Etat les biens, les bras, & la vie même de tous ses membres, sans les contraindre & sans les consulter? D'enchaîner leur volonté de leur propre aveu? De faire valoir leur consentement contre leur refus, & de les forcer à se punir eux-mêmes quand ils font ce qu'ils n'ont pas voulu? Comment se peut-il faire qu'ils obéissent & que personne ne commande, qu'ils servent & n'ayent point de Maître; d'autant plus libres en effet, que, sous une apparente sujétion, nul ne perd de sa liberté que ce qui peut nuire à celle d'un autre? Ces prodiges sont l'ouvrage de la loi. C'est à la loi seule que les hommes doivent la justice & la liberté" [emphasis added] [spelling modernised].

Allot opined, as it were, that law is the continuing structure-system of human socialising.<sup>97</sup> In the context of international law, he writes:

Law, including international law, has a threefold social function. (1) Law carries the structures and systems of society through time. (2) Law inserts the common interest of society into the behaviour of society-members. (3) Law establishes possible futures for society, in accordance with society's theories, values and purposes.<sup>98</sup>

When language becomes mythical, when a linguistic sign becomes a myth within a second-order sign-system and, consequently, gets to be larger than life—like the Gérin-Lajoie statement—the semiotic effect is immense as it erases the contestable nature of material reality. Further, when a myth finds its way into the law, in our case Canada's and Quebec's constitutional law, then the semiotics are augmented exponentially. Although within a mythical sign-system, the Gérin-Lajoie political statement contributes greatly, in an organic fashion, to influence the shared consciousness of society, via a second-order mythical constitutional reality that is deemed to participate in the self-ordering of society, of Quebec society, as the true constitutional basis for provincial *jus tractatus*.

Quite surprisingly, this description is not a constructed fiction; it is deemed the incontestable reality for a large number of stakeholders in *la belle province*, including lawyers at the provincial Department of Justice, as well as legal advisers to the Premier of Quebec since Lucien Bouchard in the late 1990s. Witness, for instance, how the myth of a *jus tractatus* for the province of Quebec was certainly instrumental to the enactment, in 2000, of a blatantly and utterly *ultra vires* piece of legislation. As mentioned earlier,<sup>99</sup> the *Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec*—in English, *An Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State*—provides for and dwells upon the matter in which the provincial authority may exercise, *inter alia*,

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97. See P Allott, *Eunomia—New Order for a New World* (Oxford & New York: Oxford University Press, 1990) at 110: “Law is the self-directed becoming of society. Law is the purposive self-ordering of society. In the law-reality, the reconciliation of impulse and necessity, desire, and obligation, is actualized as possibilities which may then be actualized in willing and acting. In the law-reality, social identity is actualized as possibilities which may then be actualized in willing and acting. In the law-reality, structures of power are actualized as possibilities which may then be actualized in willing and acting. In the law-reality, values are actualized as possibilities which may then be actualized in willing and acting. In the law-reality, justice is actualized as possibilities which may then be actualized in willing act acting.”

98. P Allott, “The Concept of International Law” (1999) 10 EJIL 31 at 31.

99. See *supra* note 73 and accompanying text.

power in regard to international treaties. This is serious fiction, one would be tempted to say.

This being so, it might be the reality for many people in this province, but it must be clear that this is mythical reality. This soteriological/heroic myth might be all useful, in semiotic terms, for the nationalist project of Quebec, but it must be said loud and clear that the Gérin-Lajoie statement is not founded on material reality. Instead, in view of the relevant historical events, based on continuous practice in this country and even given our positive constitutional law, let us affirm it unequivocally: Ottawa holds plenary power over Canada's foreign affairs and international relations, which includes exclusive power for the negotiation and conclusion of all conventions or treaties on the international plane (be it a subject-matter under s 91 and/or s 92 of the *Constitution Act, 1867*). This is the applicable positive law, the constitutional law in this country and, unless it is changed by constitutional amendments, the mythical reality associated to Quebec former Minister of Education Paul Gérin-Lajoie will remain just that: *a myth*.

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