Contents

Preface ................................................................................................................................. 11

Introduction ......................................................................................................................... 13

The Voluntarist and the Organic Constitutional Perspectives ............................. 33
An Exercise in Conceptual Maintenance ................................................................. 51

PART I. STEPPING OUT OF THE FOOTSTEPS OF THE EMPIRE

CHAPTER I. The Labour Conventions Case ................................................................. 61

A. The Factual and Legal Context of the Labour Conventions Case ......................... 61

B. “There is Only One Heir to the Mother Country”: The Federal Government’s Sovereignist Arguments ................................................................. 67

C. “But We Are Equally Sisters”: The Provinces’ Federalist Arguments ................. 71
   1. Ontario ................................................................................................................. 72
   2. New Brunswick ............................................................................................... 76
   3. British Columbia ............................................................................................. 78

D. “Canada is a Federation”: The Judicial Committee of the Privy Council ............. 80
   1. Distinguishing Between Making and Implementing Treaties ............................. 82
   3. Executive Roles in Implementing Treaties ......................................................... 89
   4. Section 132 Constitution Act, 1867, Only Applies to Imperial Treaty Obligations...... 91
   5. No Treaty Powers in Section 91 of the Constitution Act, 1867 ....................... 91
   6. The Irrelevancy of the “National Concern” Doctrine .................................. 94
   7. Cooperative Federalism and “Watertight Compartments” ................................ 96
PART II. TRYING TO FIND OUR OWN PATH
BEYOND THE LABOUR CONVENTIONS CASE

CHAPTER II. Treaty-Making in the Canadian Federation ..........101

A. Rebutting the Case for Plenary Federal Treaty-Making Powers.........................................................104
   1. The Evanescent Legal Arguments in Favour of Federal Plenary Treaty-Making Powers.......................104
      i. The Letters Patent of 1947..................................................104
      ii. The Prerogatives of the Crown ..............................................108
      iii. Constitutional Conventions and Constitutional Usage.........................................................130
      iv. International Law and International Legal Personality.........136
      i. Many Ways to “One Voice” ..................................................159
      ii. The Need to Align Power with Expertise ..............................165
      iii. The Need to Align Power with Democratic Accountability ......................................................171
      iv. The Subsidiarity Principle, Existential Communities and Functional Regimes..................................172

B. Making the Case for Provincial Treaty-Making Powers ..........181
   1. The Self-Portraits of Provincial Involvement in International Relations .............................................186
   2. The Legality of Provincial International Involvements and Treaty-Making ........................................196
      i. At Canadian Constitutional Law ............................................196
      ii. At International Law .............................................................199
   3. A Plausible Legal Foundation for Federal Treaty Powers in Relation to Provincial Matters: Provincial Delegation....211

CHAPTER III. Treaty Implementation in the Canadian Federation .........................................................217

A. Section 132 Cannot Be Judicially Revived .......................218
B. Section 91 and the Federal Powers Over “Peace, Order and Good Government” ....................................228
C. Extra-Territoriality or the “Sufficient Connection” Doctrine .................................................................239
D. Constitutional Amendments .........................................................252

Conclusion .................................................................................259

Bibliography ............................................................................267