

that a security agreement may secure future advances: "The security agreement . . . provided for the creation of a security interest in future advances."<sup>16</sup> The agreement may have provided for a security interest in the collateral in respect of advances to be made in future, but certainly not for a security interest in future advances. Elsewhere it is stated that "[s]ection 40 deals with the position of an assignee from an account debtor . . ." and yet four lines later, reference is made to the "assigning creditor".<sup>17</sup> This section clearly deals with the position of an assignee from an account creditor and not an account debtor.<sup>18</sup>

The book will undoubtedly fill the need for a Canadian text on the new law of personal property security. It contains a wealth of material not available elsewhere and will facilitate the understanding of a difficult branch of law. This reviewer has been critical of a certain paucity of explanation and analysis and of the insufficient planning and care which appear to have gone into the preparation of the book, but he will be the first to admit that it is basically sound, containing hardly any substantive errors, and that it will be of considerable assistance to anybody confronted with the new Act.

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TREATY LAW IN CANADA. By A. Jacomy-Millette. Ottawa: University of Ottawa Press, 1975. pp. xviii, 431.

At a time when there is talk of the patriation of the Constitution and Quebec is claiming, and to some extent exercising, the right to enter into treaty relations on its own, without reference to the federal government, Dr. Jacomy-Millette's study of *Treaty Law in Canada*—an up-dated translation of her *L'Introduction et l'Application des traités internationaux au Canada* published in Paris in 1971—acquires added topicality and significance. The first fifty pages of this monograph, which deal with the historical background, constitute a useful introduction for anyone seeking a short account of Canada's development from colonial status to statehood. It is probably as well to be reminded of some of the difficulties that were experienced with regard, for example, to Canadian participation in the Peace conference and the Treaty of Versailles.<sup>1</sup> Of equal interest is the somewhat different position regarding the Treaty of Lausanne, in which Canada did not participate, thus "enabling the Canadian government to refuse to be bound by the commit-

<sup>16</sup> *Id.* at 78.

<sup>17</sup> *Id.* at 167.

<sup>18</sup> Another passage illustrative of the book's lack of clarity may be found at 139-40, dealing with section 29—security interests in returned or repossessed goods.

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<sup>1</sup> A. JACOMY-MILLETTE, *TREATY LAW IN CANADA* 14-15 (Helwig transl. 1975).

ments made by the United Kingdom. However, the government acknowledged that by virtue of this treaty, signed in the name of the Empire, the state of war between Canada and Turkey was at an end".<sup>2</sup> One must also not overlook the fact that as early as the end of 1918 Sir Robert Borden was indicating that foreign policy issues as seen by Canada might not coincide with those of the Imperial Government, and he emphasized that relations with the United States were more significant than relations with Europe.<sup>3</sup> Mme Jacomy-Millette draws attention to the special relationships then existing between Canada, the United States and the British Empire and compares them with "the contemporary triangle of Canada, Quebec and the French-speaking world".<sup>4</sup> Perhaps one of the most important cases dealt with in this section, and one which is likely to become increasingly important in the future, is the Privy Council opinion in the *Labour Conventions* case,<sup>5</sup> which "remains unquestionably the law of Canada"<sup>6</sup> concerning the distribution of powers in implementing international treaties. As early as 1951 Professor Laskin (as he then was) suggested that the Supreme Court need not follow the Privy Council unquestioningly,<sup>7</sup> and in 1976 in an obiter dictum in *MacDonald v. Vapour Canada Ltd.*,<sup>8</sup> Chief Justice Laskin suggested that it was probably time to "reconsider" the earlier case.

It is interesting to note that while the learned author states that her "guidelines are essentially in the work of the International Law Commission"<sup>9</sup> and while, adopting the phrase of the American delegates, she describes the Vienna Convention as "the Treaty on Treaties",<sup>10</sup> her definition of a treaty is not that of the Convention. She defines a treaty as "an international agreement whatever its particular designation, concluded between subjects of international law and governed by international law. This definition compares with that given by Duff J. . . . [in the *Employment of Aliens* case,<sup>11</sup>] at a time when States were almost the only subjects of international law: 'A treaty is an agreement between States . . . a compact between States and internationally or diplomatically binding upon States.'"<sup>12</sup> The Convention defines a treaty as "an international agreement concluded between States in written form and governed by international law",<sup>13</sup> and this, surely, is closer to Mr. Justice Duff's definition than Mme Jacomy-Millette's. Her definition, in so far as it envisages agreements made by a province or any organ

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<sup>2</sup> *Id.* at 19.

<sup>3</sup> *Id.* at 35.

<sup>4</sup> *Id.*

<sup>5</sup> *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.).

<sup>6</sup> *Supra* note 1, at 39.

<sup>7</sup> Laskin, *The Supreme Court of Canada: A Final Court of and For Canadians*, 29 CAN. BAR. REV. 1038, at 1075 (1951).

<sup>8</sup> 7 N.R. 477, at 509 (1976).

<sup>9</sup> *Supra* note 1, at 41.

<sup>10</sup> *Id.* at 42, n. 9.

<sup>11</sup> *In re Employment of Aliens*, [1922] S.C.R. 293.

<sup>12</sup> *Supra* note 1, at 45.

<sup>13</sup> Art. 2(1)(a), quoted *id.* at 43.

less than a state government, automatically confers international personality and subjectivity on the entity in question, a status that does not follow from the mere fact that, for example, Ontario and other English-speaking provinces "have held discussions with their American neighbours to work out a policy for preventing and controlling forest fires".<sup>14</sup> The same is true of agreements such as those providing for reciprocal recognition of judicial decrees signed with a Commonwealth country, for "these are not international agreements but merely a matter of enactment of similar legislative provisions by the parties".<sup>15</sup> When a true international agreement is involved, "[c]onsultations are first organised at the domestic level between federal representatives and the provinces involved. At the termination of the meetings, or concurrently, negotiations are undertaken with the foreign country by the competent federal authority, sometimes with the participation of provincial representatives. The federal government nevertheless retains full responsibility for conclusion of the agreement in question, from an external point of view".<sup>16</sup> Even when the "English" provinces have complained of their non-role on the international level, they have tended to restrict themselves to seeking greater participation on the consultation level. However, "direct relations with foreign powers are increasing",<sup>17</sup> at least in the economic and trade fields, accompanied by, in some cases, the establishment of provincial "missions" abroad.

As far as Quebec is concerned, there is a tendency "[i]n the field of external relations . . . to promote the expansion of relations with French-speaking countries, which are regarded as essential if the French fact is to survive in Canada and on the North American continent".<sup>18</sup> Much attention has been given in recent years to Quebec's endeavours to negotiate with France on the cultural level, but it must be borne in mind that this was already envisaged by the Franco-Canadian "umbrella" cultural agreement of 1965.<sup>19</sup> In discussing the legal basis of Quebec's claims to treaty competence, Mme Jacomy-Millette refers to the federal clause as it appeared in Article 5(2) of the International Law Commission draft Treaty Convention, and while she cites Professor Lissitzyn's statement that "[a]t the first session of the Vienna Conference in 1968 . . . no speaker denied that members of a federal union can possess treaty-making capacity", she does not mention in this context that at the plenary session, when Canada suggested a separate vote on this proposal, the paragraph was rejected by a vote of 66 to 28, with 13 abstentions. The Conference agreed by a vote of 88 to 5, with 10 abstentions, merely that "every State possesses capacity to conclude treaties". No reference remains regarding members of a federal union. It is only in the

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<sup>14</sup> *Supra* note 1, at 70.

<sup>15</sup> *Id.* at 71. See also *Attorney-General for Ontario v. Scott*, [1956] S.C.R. 137.

<sup>16</sup> *Id.* at 72.

<sup>17</sup> *Id.* at 76.

<sup>18</sup> *Id.* at 79.

<sup>19</sup> *Id.* at 82-83.

<sup>20</sup> Quoted *id.* at 89, n. 90.

next chapter that this fact appears, when the author points out that at Vienna some federal states, including the Soviet Union, supported the original draft, while the majority led by Canada opposed it.<sup>21</sup> In fact, even if the provision had remained, the problem would not have been settled. The consequence would have been that international law would have conceded the right of a constituent part of a federal union to enter into a treaty, but this would not in any way have altered the constitutional position. It would merely mean that if the constitution conferred such competence, then the unit in question enjoyed the power to make an internationally binding treaty. It should be remembered that the present membership of the United Nations is even more jealous of state sovereignty than was the group which drafted the Charter of the United Nations, and even that group envisaged ratification in accordance with constitutional processes. Despite the rejection of the former paragraph 2 of draft Article 5, the learned author still states that this paragraph formulates a "generally recognized principle of international law",<sup>22</sup> a difficult contention to support, it is submitted, in either customary or treaty law. It is further submitted that in her efforts to sustain this view, she exaggerates the relevance of domestic law on the external level. It would be interesting to know how many members of the United Nations would agree that "[t]he actors in the international community, which are mainly sovereign States, only recognize the capacity of member States to conclude their own international agreements when the federal Constitution permits and defines the limits of this capacity"?<sup>23</sup> How many states possess experts able to tell them accurately what a foreign constitution means? In the light of that query, can one really say that "the difficulty over interpretation by third countries would not arise if uncertainty did not exist at the domestic level"?<sup>24</sup> The principle that a country must accept the view of its contracting partner as to the meaning of the latter's constitution is too well established for statements of this character to carry much weight.

No one would argue with Dr. Jacomy-Millette when she reminds us that not only do states possess personality and subjectivity today, but that certain organizations have recognized that non-states possess a limited capacity for action on the international level.<sup>25</sup> It may well be that we are still excessively tied to archaic views of sovereignty and international personality. Her suggestions for the future therefore become important. She advocates an amendment of the B.N.A. Act to confer some external potential upon the provinces:

International agreements concluded by the provinces would be restricted to matters within their constitutional jurisdiction, as stated in the *British North America Act* and its amendments. However, there would be no obligation to make use of this power, merely authorisation giving each

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<sup>21</sup> *Id.* at 96.

<sup>22</sup> *Id.* at 97.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 98.

<sup>25</sup> *Id.* at 98-99.

province a choice of acting directly on the international level or leaving this responsibility to the federal government, pursuant to an empirical approach on the matter.

. . . [T]he new written constitutional provisions would also specify the chief responsibility of the federation in this area and foresee accordingly a machinery for joint consultation before international agreements are entered into by the provinces. A requirement of prior consultation would also be specified for treaties concluded by the federal government affecting primarily provincial interests and legislative jurisdiction.<sup>26</sup>

This might settle the constitutional confusion, but it would require acceptance by third states together with recognition by them that the provinces enjoying or exercising such capacity to enter into agreements would also be able to carry out any obligations arising therefrom, so that there would be no basis for holding the federal government liable in such circumstances. Not only would this require a new approach to international law in this field, it would also necessitate amendment of the Vienna Convention or a clear understanding that any agreements entered into by a province were not "treaties" in the sense defined by that Convention. As a second alternative, Dr. Jacomy-Millette suggests an amendment clearly giving sole treaty-making capacity to the federal government, again accompanied by a requirement of prior consultation. Even though she suggests that in both cases a permanent consultation body should be established, it is submitted that her second alternative would, given the present Canadian temper, merely serve to emphasize and aggravate the problems with which we are confronted.

Further sections of *Treaty Law in Canada* are concerned with the role of Parliament and the functions of the judiciary, but, in the light of current constitutional controversies, there is no need for this review to deal with these aspects of Dr. Jacomy-Millette's study. Enough has surely been said to indicate the amount of thought that has gone into the study, and the interesting and stimulating nature of the presentation. This monograph is a major contribution to Canadian aspects of international law, and the University of Ottawa Press is to be congratulated on making it generally available.

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MEDIEVAL LAW TEACHERS AND WRITERS, CIVILIAN AND CANONIST. By J. A. Clarence Smith. Ottawa: University of Ottawa Press. 1975. Pp. 129.

It is assumed in many quarters that the study of medieval canonists and civilians has been the private preserve of a few scholars. On the contrary. During the past forty years there has been a rapid growth in the study of these early expositors of Roman law and their contribution to the development of western legal systems.

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<sup>26</sup> *Id.* at 100.

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