

THE EEC AS A MODEL FOR CANADA

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The European Economic Community has been suggested as a model for Canada and as a solution to constitutional problems relating to Quebec.¹ A system like that of the EEC would allow for decentralization, with the power to make certain decisions being transferred from the centre to the regions. The EEC creates a well ordered interdependence amongst states which still retain their sovereignty. However, Member states of the Community do not now retain the sovereignty they had upon entering into the *Treaty of Rome* that created the Community. Members have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves. These restrictions on sovereignty are irreversible.²

One can debate endlessly the questions of whether the Community is a federation or a conglomeration of countries, or whether it is a supra-national system, or an international system. However, it is incontestable that the *Treaty of Rome* creates its own legal order, separate from the legal order of each of the Member States. This legal order, which takes the place of the Members' legal orders, was created by a transfer of power to common institutions, according to rules set out in the *Treaty*.³

Strength must not be confused with scope. The scope of Community institutions is more limited than the scope of the Canadian Parliament, and the matters in relation to which Community institutions have jurisdiction are fewer in number than the matters in relation to which Parliament has jurisdiction. But, structurally, Brussels is more powerful than Ottawa; within the scope allowed them, Community institutions are stronger than Parliament. If Canada were to become like the EEC, the Provinces would lose aspects of sovereignty they now have.

Legislative Institutions

The *Treaty of Rome* is a treaty unlike other treaties; it creates legislative institutions. The legislation of these institutions is directly applicable in Member States. *Treaty* provisions create individual rights and the treaty prevails over subsequent conflicting Member legislation. The Community is bicephalous, having, not one legislature, but two. The two lawmaking bodies are not subordinate one to the other, but are independent jurisdictions with distinct legislative powers.

The Council is one of these law making bodies. It consists of representatives of Member States, each Member having one representative.⁴ The Council votes by simple majority, qualified majority with weighted votes, or unanimously, depending on the subject matter of the vote. In general, if the subject matter is procedural, a simple majority is sufficient. If the subject matter involves implementing a policy, a qualified majority is required. If the subject matter involves establishing a policy, unanimity is required.

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1. (1977), House of Commons Debates, at 3245, per Claude Wagner; and see R. Levesque, *An Option for Quebec* (1968) 99.

2. See *Blackburn v. Attorney-General*, [1971] 2 All E.R. 1380, at 1381 (C.A.) (per Lord Denning, M.R.).

3. *Costa c. E.N.E.L.* (1964), 10 Recueil de la Jurisprudence de la Cour 1141, at 1174-75 (Eur. Com.) (per Adv.-Gen. Lagrange).

4. Art. 2, *Treaty Establishing a Single Council and a Single Commission of the European Communities* (Brussels, 8 April 1965) (hereinafter referred to as the *Merger Treaty*).

No one Member has enough weighted votes, on its own, to prevent a law being passed by a qualified majority.⁵

The other law making body is the Commission. The Commission consists of 13 people, appointed by common accord of the Members.⁶ Commissioners are required not to represent the states from which they came and are forbidden from taking instructions from Members.⁷ The Commission acts by a simple majority of Commissioners.⁸

The Commission and Council are given powers to realize or allow exceptions to the principles set out in the *Treaty*. The powers are given, depending on the subject matter, to the Council alone, to the Commission alone, or to the Council acting on a proposal from the Commission. The Council may delegate legislative powers to the Commission to implement the rules laid down by the Council.⁹ The legislative powers given to the Council are more general in nature than those given to the Commission. The Council is given the power to elaborate principles, the Commission the power to specify detail. If Council legislation and Commission legislation clash, Council legislation overrides Commission legislation.¹⁰

Both the Council and the Commission legislate by regulation, directive, and decision. Regulations are general in their application and specific in the manner of their execution. They are addressed to groups or classes of people, and contain both a result and the forms and methods by which the result is to be achieved. Directives set out results to be achieved, but the choice of forms and methods to achieve these results is left to Members. Decisions are addressed to specified individuals or Member States.¹¹

Self Execution

A treaty signed by Canada must be legislated to have domestic force. A treaty is entered into by the executive but must be performed by Parliament and the Legislatures. The executive cannot alter the domestic law of its country by entering into a contract with a foreign power. If the treaty is not legislated, Canada may be in breach of the treaty, but that is not something of which the domestic courts will take notice. Treaties signed by Canada give no rights to and impose no obligations on Canadian citizens. They are only binding, in honour, upon the Canadian executive to obtain legislative assent.

5. Art. 148(2), *Treaty Establishing the European Economic Community* (Rome, 25 March 1957) (hereinafter referred to as the *Treaty of Rome*).

6. Arts. 10(1), 11, *Merger Treaty*.

7. Art. 10(2), *Merger Treaty*.

8. Art. 17, *Merger Treaty*.

9. Art. 155(4), *Treaty of Rome*; *Contra*, Lasok and Bridge, *An Introduction to the Law and Institutions of the European Communities* (2nd ed. 1976) 83, 84.

10. *Gouvernement de la République Italienne c. Conseil et Commission de la C.E.E.*, 32-65, (1966), 12 *Recueil de la Jurisprudence de la Cour* 563, at 601 (Eur. Com.) (per Adv.-Gen. Roemer).

11. Art. 189, *Treaty of Rome*.

In *Arrow River & Tributaries Slide and Boom C. Ltd. v. Pigeon Timber Co. Ltd.*¹² the Pigeon Timber Co. Ltd. applied for an order prohibiting the approval of tolls on the Pigeon River, claiming that the levy of tolls violated the *Ashburton Treaty* between Great Britain and the United States. Lamont and Cannon J.J., in the Supreme Court of Canada, held that the *Treaty* could not be enforced in the courts. Although Ontario legislation authorizing the imposition of tolls was repugnant to the *Treaty*, the *Treaty* had not been legislated.

Similarly, a federal-provincial agreement must be legislated in order to confer rights and impose obligations on residents of the provinces. The provincial executives cannot change provincial law simply by entering into an agreement with the federal executive. Such an agreement is merely binding on the contracting parties. The agreement is not, without provincial legislation, part of the law of the province.

In *re Anti-Inflation Act*,¹³ the Supreme Court of Canada was asked if an Ontario-Canada agreement to apply the federal *Anti-Inflation Act* to the Ontario public sector was binding on the Ontario public sector. The Supreme Court of Canada advised that the agreement did not bind the Ontario public sector. The Ontario executive had no legislative authority to enter into the agreement; in the absence of such authority, the agreement was without force in the Province.¹⁴

Part of what makes the *Treaty of Rome* more than just a treaty is that Community legislation does not have to be legislated by Members in order to have the force of law within Member states. Community law is directly applicable.¹⁵ It does not merely impose an obligation on Members, to be performed by them individually, but is self-executing.

Members, by signing and implementing the *Treaty of Rome*, accepted Community legislative organs as sources of domestic law. The logic of the Community requires Community laws to have legal effect simultaneously throughout Europe. To insist that Community laws must be reproduced domestically in order to have domestic effect would fly in the face of this logic.

In *Frontini*,¹⁶ the Italian Constitutional Court was asked if the Italian law, that, by approving the *Treaty of Rome*, made Community law directly applicable in Italy, was constitutional. Italy, at least according to traditional Italian legal thought, requires, like Canada, that treaties be legislated before they become law. It was argued that Community law had to be legislated by Italy before it could have the force of law in Italy. The Constitutional Court rejected the argument. Community law did not have to be implemented domestically to have domestic force.

12. [1932] S.C.R. 495, [1932] 2 D.L.R. 250, 39 C.R.C. 161.

13. [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452.

14. *Id.*, at 433; 68 D.L.R. (3d), at 504.

15. Art. 189, *Treaty of Rome*.

16. *Frontini Franco Renato et le Ministère des Finances* (1974), 10 Revue Trimestrielle de Droit Européen 148, at 152 (Constitutional Ct.).

Third Party Rights

The Treaty of Rome

A treaty is like a contract, in that it confers rights and imposes obligations as between the parties, the signatory countries. Those not party to a treaty, like those not privy to a contract, gain no rights and incur no obligations. Citizens of a signatory country cannot invoke a treaty in litigation between themselves or in litigation with their government. As far as the courts are concerned, citizens of a signatory country are third parties, strangers to the treaty.

The signatories may, however, intend to confer third party rights. In such a case, if the treaty is legislated domestically, the courts will enforce those rights. Whether or not such rights exist is a matter of interpretation of the treaty and its implementing legislation. However, such rights are unusual.¹⁷ The normal treaty does not contain third party rights.

The *Treaty of Rome* does contain third party rights. The intention of the signatories was to create a new legal order. The subjects of this new legal order are not just the Member States, but also the individual citizens of the Member States.

The *Treaty* is directed to the people of Europe, its purpose to lay the foundations of an ever closer union amongst European peoples.¹⁸ The common market which the *Treaty* establishes is of direct concern to individuals within the Community; citizens of Member states are part of the functioning of the institutions of the Community.

The Assembly and the Economic and Social Committee, are composed of citizens of Member States. Both these institutions have an advisory role.¹⁹ The Assembly has, as well, a budgetary role.²⁰ The Assembly once consisted of delegates designated by the Parliaments of Member States from amongst their membership.²¹ Since June 1979, the Assembly has been directly elected by universal suffrage.²² The Economic and Social Committee consists of representatives of economic groups and representatives of the general public,²³ appointed by the Council.²⁴ The *Treaty* provision that national courts may, and, in some cases, must refer Community Law questions to the European Court of Justice²⁵ confirms that Members intended that their citizens could rely on Community Law in national courts.

17. See *Chateau-Gai Wines Ltd. v. Institut National des Appellations*, [1975] 1 S.C.R. 190, at 217; 51 D.L.R. (3d) 120, at 138 (per Laskin, C.J.C.).

18. Preamble, *Treaty of Rome*.

19. Art. 137, 193, *Treaty of Rome*.

20. Arts. 203, 206(b), *Treaty of Rome*.

21. Art. 138(1), *Treaty of Rome*.

22. *The Winnipeg Free Press*, Dec. 12, 1979.

23. Art. 193, *Treaty of Rome*.

24. Art. 194, *Treaty of Rome*.

25. Art. 177, *Treaty of Rome*.

In *van Gend & Loos*,²⁶ a Dutch importer claimed that a Dutch import duty was in violation of the *Treaty of Rome*. A Dutch Court asked the European Court of Justice if the *Treaty* had immediate effect on internal law, in the sense that nationals of member states could claim rights which a national judge must safeguard. Belgium, Netherlands, and Germany argued that the *Treaty* established obligations only between Member states and that it did not envisage any internal effects with respect to subjects. The Court held that the *Treaty* created rights which private parties can invoke on their own behalf.

Community Legislation

Community regulations give rights to individuals. The *Treaty* provides that regulations shall be "directly applicable" in all Member States, of "general application," and binding in their entirety on Member States.²⁷ In *Politi v. Italy*,²⁸ an Italian Court asked the European Court of Justice if a particular Council regulation created rights for individuals. The Court, rather than giving an answer restricted to the particular regulation questioned, said that, in general, regulations, because of their very nature and function in the Community, confer rights on individuals that national courts must protect.

Directives may also create individual rights. When a directive completes and perfects a *Treaty* provision that itself creates third party rights, the directive will have legal consequences for individuals. In *SACE v. Italy*,²⁹ the Commission, by directive, required Italy to abolish by July 1968, a duty Italy imposed on goods imported from Member States. Italy did not abolish the duty by the date set. SACE, an Italian firm, sued the Italian government in the Italian courts for a refund of the duty collected. The Italian Court asked the European Court of Justice if the directive created rights. The Court advised that it did. The *Treaty* required the abolition of duties between Members and gave the Commission power to determine the timetable for abolition. The directive perfected the *Treaty* requirement which had itself created individual rights.

Decisions addressed to Member States may also create rights in third parties. Decisions are binding in their entirety on those to whom they are addressed.³⁰ It would be incompatible with the binding effect of decisions to hold that the obligations they impose cannot be relied on by individuals concerned. When a decision is addressed to a Member, the useful effect of the decision would be weakened if citizens of the Member state were prevented from relying on it. Decisions can be referred by national courts to

26. *N. V. Algemene Transport-en Expeditie Onderneming van Gend & Loos c. Administration Fiscale Néerlandaise* (1963), 9 Recueil de la Jurisprudence de la Cour 1 (Eur. Com.).

27. Art. 189, *Treaty of Rome*.

28. *Politi c. Ministère des Finances de la République Italienne* (1971), 17 Recueil de la Jurisprudence de la Cour 1039 (Eur. Com.).

29. *Spa SPACE c. Ministère des Finances de la République Italienne* (1970), 16 Recueil de la Jurisprudence de la Cour 1213 (Eur. Com.).

30. Art. 189, *Treaty of Rome*.

the European Court of Justice.³¹ This reference power implies that decisions can be invoked by individuals in national courts.

In *Grad*,³² the Council addressed a decision to all Member States that a common value-added tax should replace national specific transport taxes on non-resident carriers. Germany imposed the value-added tax, but, in addition, imposed a specific transport tax. An Austrian transport contractor appealed, in the German Courts, against the levy of the specific tax. The German Court asked the European Court of Justice if the Council decision had a direct effect. The Court advised that it did.

Sequence

Canada

Inter-jurisdictional

It is untenable to suggest that when federal and provincial law are in conflict, the later in time should prevail. It is equally untenable to suggest that the earlier in time should prevail.³³ Any distinction based on sequence is unconvincing, yet arguments have been raised to support such distinctions.

It has been argued that federal law should be viewed as if it had been legislated provincially. Just as an earlier provincial law gives way to a later provincial law, so should an earlier federal law give way to a later provincial law. In *La Compagnie Hydraulique de St. Francois v. The Continental Heat and Light Co.*,³⁴ federal law gave one company power to manufacture and sell electricity. Later provincial law gave another company exclusive power to manufacture and sell electricity in a certain area. The federal company established a work within the area assigned by the province exclusively to the provincial company. The provincial company applied for an injunction restraining the federal company from establishing its work. Counsel for the provincial company argued that the federal incorporation must be viewed as if it had been legislated provincially. All the federal incorporation did was to remove the need for provincial incorporation. If the federal company had been incorporated provincially, the later provincial law would have prevailed. The argument was rejected. The federal law, though earlier in time than the provincial law, was paramount. The injunction was refused.

It has been argued that an earlier provincial law should prevail over a later conflicting federal law. The earlier statute vested rights and granted powers. The later statute could not take those rights and powers away. In *Re Silver Bros. Ltd.*,³⁵ a bankrupt company had only \$2353.51 to pay \$3707.07 of federal tax and \$527.42 of provincial tax. Provincial law said provincial taxes were a privileged debt of a debtor. Later federal law said

31. Art. 177, *Treaty of Rome*.

32. *Grad c. Finanzamt Traunstein* (1970), 16 *Recueil de la Jurisprudence de la Cour* 825 (Eur. Com.).

33. See F.R. Scott, "Case Comment" (1932), 10. *Can. B. Rev.* 658, at 659.

34. (1907), 16 B.R. 406 (Que. K.B. App. Div.); aff'd [1909] A.C. 194 (P.C.).

35. [1929] 1 D.L.R. 681 (Que. K.B. App. Div.); rev'd [1929] S.C.R. 557; rev'd. [1932] 1 W.W.R. 764 (P.C.).

federal taxes were a first charge on the assets of a taxpayer and ranked in priority to all other claims. The federal government claimed all the assets of the bankrupt, arguing that Quebec and federal law were in conflict and federal law prevailed. The Quebec Court of Appeal rejected the federal claim and distinguished the *Cie. Hydraulique* case. In that case the federal law was passed before the provincial law. The provincial law had attempted to remove powers granted and rights acquired by virtue of the federal law. However, in this case, it was provincial law that was passed first. On appeal, both the Supreme Court of Canada and the Privy Council disagreed with the Quebec Court of Appeal on this point. If the federal law was in conflict with provincial law, it prevailed, even though the provincial law was passed first.

Intra-jurisdictional

It may be untenable to maintain that inter-jurisdictional statutory conflicts should be resolved on the basis of chronology, but it is commonplace that intra-jurisdictional statutory conflicts are resolved in this way. Later conflicting federal law prevails over earlier federal law; later conflicting provincial law prevails over earlier provincial law.

The fact that the earlier law was legislated to perform an international treaty obligation does not change the rule. Legislated treaties have no higher status than any other legislation. The existence of a treaty cannot be invoked in the court to prevent sovereign legislators from taking what steps they see fit. The suggestion that the plain words of a later statute should be disregarded because of an earlier legislated treaty is an extravagance to which the courts will not give an ear.³⁶

In *Francis v. Reginam*,³⁷ the *Jay Treaty of 1794* between the United States and Britain provided that Indians did not have to pay duty on their own goods when going between the United States and British territories. The Legislature of Upper Canada implemented the treaty by statute in 1801, but repealed that legislation in 1824. A refrigerator, heater, and washing machine imported by an Indian from the United States during 1948 to 1951 were seized for the Indian's failure to pay duty. The Indian claimed he was entitled to the benefit of the Jay Treaty. The courts rejected the claim. The Legislature of Upper Canada had full authority to annul its earlier legislation.³⁸

Europe

The commonplace, that a jurisdiction's earlier statute is subject to the jurisdiction's later legislation, does not hold for Member legislation implementing the *Treaty of Rome*; it does not have the same status as other Member legislation. Member implementing legislation cannot be superseded-

36. *Collico Dealings Ltd. v. Inland Revenue Commissioners*, [1962] A.C. 1, at 19; (per Viscount Simonds). [1961] 1 All E.R. 762, at, 765 (H.L.).

37. [1954] Ex. C.R. 590; aff'd [1956] S.C.R. 618.

38. *Id.*, at 598-99 per Cameron, J. in the Exchequer Court.

ed by later Member legislation nor can it be repealed.³⁹ Adopting legislation has an authority superior to that of other domestic laws. By signing the *Treaty*, Members have limited their sovereign rights on the basis of reciprocity. A Member cannot pass later unilateral laws in opposition to the adopting legislation.

In *Costa v. E.N.E.L.*,⁴⁰ Mr. Costa refused to pay an Italian electricity bill on the ground that the Italian nationalisation of its electricity industry was contrary to the *Treaty of Rome*. The nationalization was subsequent to Italian legislation adopting the *Treaty*. The Constitutional Court of Italy on a reference, advised that it was not necessary to decide whether Italian law violated the *Treaty*.⁴¹ The later law, nationalizing the electricity industry, prevailed over the earlier law executing the *Treaty of Rome*. The European Court of Justice advised to the contrary that the *Treaty of Rome* prevailed over later conflicting domestic law. The trial Judge followed the European Court of Justice and granted Mr. Costa a declaration that the Italian nationalization law was ineffective because of the *Treaty*.⁴² In a later case, the Italian Constitutional Court changed its position and stated that Members cannot repeal the *Treaty*.⁴³

In *Vabre*,⁴⁴ France taxed coffee imported from Holland more than it taxed coffee processed in France. The *Treaty of Rome* requires that products imported from a Member not be more heavily taxed than national products. The French importer went to court in France to get back from the French government what he claimed to be the discriminatory tax. The French court upheld the claim of the importer. The fact that the French tax was legislated after the *Treaty of Rome* did not matter. The *Treaty* law was superior in legal authority to the law of Member states.

Because the adopting legislation, and therefore the *Treaty*, takes precedence over other Member domestic legislation, Community legislation takes precedence over Member legislation. The effect of Community law is to override any national law, even subsequent, incompatible with the Community law provision. Council and Commission regulations, directives, and decisions have a higher status than Member legislation. In *Politi*,⁴⁵ a Council regulation required the suppression by a certain date of national taxes equivalent to duties against listed products. Later Italian law abolished equivalent taxes with the abolition to take effect at a later date than that set out in the Council regulation. An Italian importer claimed in an Italian court restitution from the Italian government of the taxes paid after the date set out in the Community law. On a reference to the European Court of

39. For Luxembourg, see L. Brinkhorst and H. Schermers, *Judicial Remedies in the European Communities* (1969) 170. For Belgium, see *Etat Belge v. Fromagerie franco-suisse "le ski"* (1971), 7 *Revue Trimestrielle de Droit Européen* 494 (Cour de Cassation). For Germany, see C. Bail and H. Lichtenberg, "Recent Decisions of German Courts" (1972), 9 *Common Market L. Rev.* 234, at 363 and C. Berr, "Droit européen des assurances" (1974), 10 *Revue Trimestrielle de Droit Européen* 314, at 316.

40. *Supra* n. 3.

41. Brinkhorst, *Supra* n. 39, at 167.

42. *Id.*, at 168.

43. *Supra* n. 16.

44. *C. Soc. "Cafés Jacques Vabre" et S.A.R.L. J. Weigelet Cie*, [1975] *Recueil Dalloz Sirey* 497 (Cour de Cassation).

45. *Supra* n. 28.

Justice, the importer, in order to prevent the Italian Court from considering the later Italian law to have superseded the earlier Community law, asked the Court to affirm the primacy of Community law. The Court made this affirmation.

Principles and Powers

The *Treaty of Rome* transfers legislative power from Members to the Community, not simply by allocating powers between members and the Community, but by enunciating a number of principles. Neither Members nor the Community may violate these principles and the Community has the positive responsibility of realizing these principles. A Member cannot violate a principle set out in the *Treaty*, even if the Member is legislating in a domain that remains within the Member's legislative competence. Members cannot, under pretext of exercising their sovereign powers, violate *Treaty* obligations.

In *Commission v. France*,⁴⁶ the Commission asked the European Court of Justice to declare that France had violated the *Treaty* provision requiring Members not to give aid that distorts competition. France gave exporters a preferential rediscount rate better than that authorized by the Commission. France argued that the preferential rate was not a violation of the *Treaty* because it was a matter of monetary policy, left within the exclusive jurisdiction of Members. France had granted the preferential rate not to give a competitive advantage to its exports, but to help its balance of payments. The Court found France in violation of the *Treaty*. France could not use its power over monetary policy to violate the *Treaty*.

In determining whether or not a Member has violated a principle of the *Treaty*, what is relevant is not the purpose of the legislation of the Member, but its effect. It is not enough that Member legislation has an objective that is a Community objective. If the effect of the Member legislation is to frustrate the realization of a Community purpose, then the Member legislation violates the *Treaty*. A Member law will not be held valid simply on the basis that its intent is not at cross purposes with Community principles. If the Member law hinders, directly or indirectly, actually or potentially the realization of a Community principle, it cannot be valid.

In *Re Galli*,⁴⁷ an Italian distributor of agricultural products violated Italy's anti-inflation controls. The Italian Court asked the European Court of Justice if a national price control system violated the *Treaty* principle of free circulation of goods within the common market. Italy argued before the European Court of Justice that there was no violation, because its price control system had the objective of price stabilization which was itself a Community objective. The distributor and the Commission argued that the Italian law could hinder inter-Community commerce by not allowing importers to maintain their profit margins. The Court advised that, in areas covered by the organization of the common market, as was the distribution of agricultural products, Members could not unilaterally intervene in

46. *Commission de C.E. c. République Française* (1969), 15 Recueil de la Jurisprudence de la Cour 523 (Eur. Com.).

47. (1975), 21 Recueil de la Jurisprudence de la Cour 47 (Eur. Com.).

the price formation mechanism. Such intervention created price distortion within the Community. There was a potential impediment to commerce within the Community.

In determining whether or not a Canadian province is legislating within its own domain, or the federal domain, the test is not effect, but purpose. Effect is relevant in determining what the purpose of the provincial legislation is, but it is not conclusive. If the true aim of provincial legislation is to regulate a matter within provincial jurisdiction, the legislation is valid even though it affects a matter within the exclusive domain of Parliament.

In *Carnation Co. v. Quebec Agricultural Marketing Board*,⁴⁸ a provincial Board set prices which Quebec processors had to pay Quebec producers for milk. The appellant processor, who exported a major portion of its produce, argued that the price orders were in relation to inter-provincial trade, and therefore within exclusive federal jurisdiction. The Supreme Court of Canada held that the orders affected interprovincial trade, but were not in relation in interprovincial trade. The aim was not to regulate interprovincial trade. The orders were thus *intra vires* the province.

The *Treaty* does not provide for some legislative powers to be transferred to the Community and others to be retained by Members. The Community may, and indeed must, legislate in those domains retained by Members in order to realize the principles set out in the *Treaty*. By giving the Community power to realize these principles, Members are not renouncing their powers in favour of the Community. They are renouncing their powers in favour of a principle. The Community cannot substitute itself for Members in the domains retained by Members, all the Community can do is make more precise the obligations accepted by Members.⁴⁹ If the Community is doing that, Members cannot object that the Community is legislating in a domain belonging to Members.

In *Casagrande*,⁵⁰ the son of an Italian worker working in Germany asked the German authorities for a school grant. The Germans refused on the basis that the grants law allowed grants to be given only to Germans. The Community had legislated that children of foreign workers who were citizens of a Member state, were to have the same educational advantages as local children. The German Court asked the European Court of Justice if the German law was compatible with Community law. The German authorities argued⁵¹ that the Community could not legislate in relation to education, a domain retained by Members. The European Court of Justice advised that Community powers could not be so limited. Freedom of movement of workers was a *Treaty* principle. The Community could legislate to realize that principle, even if the legislation was education legislation.

The Canadian Parliament is given jurisdiction over listed classes of subjects, while Provincial Legislatures are given jurisdiction over other

48. [1968] S.C.R. 238.

49. See, V. Constantinesco, *Compétences et Pouvoirs dans les Communautés Européennes* (1974) 146.

50. *Casagrande c. Landeshauptstadt München* (1976), 10 *Revue Trimestrielle de Droit Européen* 378 (E.C.J.).

51. H. Cassan, "Le Principe de non-discrimination dans le domaine social" (1976), 12 *Revue Trimestrielle de Droit Européen* 259, at 261.

listed classes of subjects. If a matter comes within the provincial list, and does not come within the federal list, Parliament cannot pass a law in relation to the matter. Although Parliament has a general authority to make laws for the peace, order, and good government of Canada, this authority does not enable Parliament to legislate in relation to matters entrusted to the Provincial Legislatures. The fact that the matter is very important and has attained great dimensions in Canada does not affect the question in the least.⁵²

In *Re Insurance Act, (1910)*⁵³ federal legislation required everyone carrying on the business of insurance to acquire a federal licence. The federal government asked the Supreme Court of Canada if the legislation was within federal powers. Counsel for the Attorney-General for Canada claimed that the subject matter of the legislation was a matter of Canadian concern. On appeal, the Judicial Committee of the Privy Council said that this claim was no doubt true, but nonetheless advised that the federal law was *ultra vires*. "Insurance" was not in the federal list.

Subordination

The Canadian Provincial Legislatures are not subordinate to Parliament. The Legislatures and Parliament are co-ordinate jurisdictions. Parliament cannot tell the Provinces what to do or not to do. It cannot impose a duty on them. The provinces are not answerable to Ottawa for the execution of their authority. In *A.-G. for N.S. v. A.-G. for Can.*,⁵⁴ the government of Nova Scotia referred to the Supreme Court of Nova Scotia the question of whether a bill allowing Nova Scotia to accept delegation of legislative jurisdiction from Canada was *intra vires* the Province. The Supreme Court of Canada, on appeal, advised that the bill was not constitutionally acceptable. A province could not accept such a delegation. Delegation implies subordination, and the Provinces were not subordinated to Parliament.⁵⁵

European Member States are subordinate to the Community legislative institutions. The Council and the Commission can tell Member States what to do and not to do. The Community must ensure that the Treaty is observed, and can specify for Members what they must do so that the Treaty is observed. Regulations are binding in their entirety on Members; directives are binding as to the result to be achieved on all Member States to whom the directives are addressed; decisions are binding in their entirety on Member States to whom the decisions are addressed.⁵⁶ Members are obliged to take all appropriate measures to ensure fulfilment of the obligations resulting from regulations, directives, and decisions.⁵⁷

52. See, *In Re Insurance Act, 1910* (1913), 48 S.C.R. 260, at 304.

53. [1916] 1 A.C. 588 (P.C.).

54. [1951] S.C.R. 31.

55. *Id.*, at 49 (per Rand, J.).

56. Art. 189, *Treaty of Rome*.

57. Art. 5, *Treaty of Rome*.

In *Re the Payment of Export Rebates*,⁵⁸ a Commission regulation required Members to pay rebates to exporters of agricultural products. The Community would afterwards reimburse the payments. The Commission took Italy to the European Court of Justice for not paying the rebates. Italy argued that the Commission regulation had direct effect in Italy. Anyone who wanted the rebate had a remedy in the Italian Courts. Because this possibility existed, there was no need to bring Italy before the Court for breach of the regulation. The Court found that the existence of legal remedies in a Member State does not prevent the application of the procedure for breach of the duty to comply with Community law. If a government does not take action to comply with a Community law, it can be brought before the Court for breach.

Treaties entered into by the Community bind Members,⁵⁹ even those treaties which the Community alone signs. Treaties in the domains transferred to the Community, and which Members, jurisdictionally, cannot sign, are binding on Members. In *Opinion 1/75*,⁶⁰ the Commission asked the European Court of Justice if the Community had exclusive power to sign an international understanding on export financing. Members argued that they should be entitled, along with the Commission, to sign the understanding as they would incur international obligations from the signing of the understanding.⁶¹ The Court advised that the power in the Commission to sign the understanding was exclusive. The Commission could, by entering into a Treaty on its own, impose international obligations on Members.

A treaty entered into by Canada does not bind the Provinces, either internationally, or domestically. The Provinces are under no obligation to perform the treaty. If the Provinces do not perform the treaty, Canada will be in default, but the Provinces will not. Once a treaty in an area of provincial jurisdiction is signed by Canada, the federal executive has the obligation of obtaining provincial legislative assent. In *A.-G. for Can. v. A.-G. for Ont.*,⁶² Canada asked the Supreme Court if statutes it passed to implement treaties which it signed were valid. It was conceded that the statutes were in pith and substance within exclusive provincial jurisdiction. Lord Atkin, in giving the judgment of the Privy Council, said that a distinction must be made between formation and performance. An obligation formed by the federal executive may have to be performed, if at all, by the Provincial Legislatures. The federal executive has the task of obtaining the assent not of the federal Parliament to which it is responsible, but of the Provincial Legislatures to whom the federal executive stands in no direct relation.⁶³

58. *Commission de C.E. c. République Italienne* (1970), 16 Recueil de la Jurisprudence de la Cour 25 (Eur. Com.).

59. Art. 228, *Treaty of Rome*.

60. *Avis 1/75 rendu en vertu de l'article 228, Para. 1, Alinea 2 du Traite C.E.E.* (1975), 21 Recueil de la Jurisprudence de la Cour 1355 (Eur. Com.).

61. *Ibid.*, arguments not reported.

62. [1937] A.C. 326 (P.C.).

63. *Id.*, at 348.

Exclusivity and Concurrency

Whenever a matter is within one of the classes allocated to the Canadian Parliament, legislation in relation to that matter by a Provincial Legislature is invalid. The Provincial Legislature is incompetent even if Parliament has not legislated on the matter. Provinces may pass legislation that, if it had been legislated by Parliament, would have been suitably ancillary to a law in an area allocated to Parliament. The true ground of this principle is that the ancillary law does not itself fall within the class allocated to Parliament. In the *Fisheries Case*⁶⁴ Ontario law regulated fishing in provincial waters. The *British North America Act* gives exclusive jurisdiction over inland fisheries to Parliament. The Supreme Court of Canada was asked if the Provinces had power to regulate fisheries in so far as provincial law was consistent with federal law. The Privy Council, on appeal, held that the Provinces did not have the power. The federal power was exclusive.

Because Parliament may pass ancillary laws that, by themselves, would be laws in relation to matters allocated to the Provinces, and the provincial Legislatures may pass ancillary laws that, by themselves, would be in relation to matters allocated to Parliament; there exists a domain common to both Parliament and the Legislatures. Within this common domain, a Province may legislate in a field even though Parliament has already passed a law in the field. It does not matter that Parliament has occupied the field. As long as the provincial law is not repugnant to the federal law, the provincial law will stand. All that matters is that the federal and provincial laws can live together and operate concurrently. Only if there is direct conflict between federal and provincial law, will provincial law be rendered inoperative.

In *O'Grady v. Sparling*,⁶⁵ O'Grady was charged with the provincial offence of driving without due care and attention. The offence was held to be valid provincial legislation for highway traffic control. Parliament had enacted the offence of criminal negligence in the operation of a motor vehicle. In the Supreme Court of Canada, Cartwright and Locke, JJ. in dissent, found that Parliament had occupied the field of motor vehicle negligence by enacting this offence. The provincial law was inoperative. However, the majority held that because the provincial law and the federal law were not in direct conflict, the provincial law stood.

To the extent that Member states have given the Community law-making power in a domain in order for the community to realize a particular purpose, the Member states no longer have the power to pass laws in this domain. Member states cannot pass laws having for their object modifying the scope of Community laws. Nor can they pass laws for the purpose of adding to the provision of Community laws. In *Bollman*,⁶⁶ Germany classified turkey tails as poultry parts. Poultry parts were subject to the Community tariff, but Community law had not classified turkey tails. The

64. *A.-G. for Can. v. A.-G. for Ont.*, [1898] A.C. 700 (P.C.).

65. [1960] S.C.R. 804, 25 D.L.R. (2d) 145, 33 W.W.R. 360.

66. *Hauptzollamt Hamburg-Oberelbe c. Firma Paul G. Bollman* (1970), 16 Recueil de la Jurisprudence de la Cour 69 (Eur. Com.).

importer claimed that Germany could not make such a classification. The German Court asked the European Court of Justice if Germany could do so. The Court advised that it could not. Once the Community has legislated on tariffs for fowl, Members could not add to that legislation.

Members cannot legislate not only after the Community has legislated, but also they cannot legislate in parallel fashion with the Community. In *Opinion 1/75*,⁶⁷ Members argued that they had power parallel with that of the Community to sign an international understanding on export financing. The understanding, once signed, would become law in the Community.⁶⁸ The Court advised that the power of the Community was exclusive. To admit Members could legislate in a domain where the Community intends to legislate would be tantamount to recognizing that Members could pass laws different from those the Community intends to pass. That would be falsifying the Community system and preventing the Community from fulfilling its task in defence of the common interest.

The Community acquires exclusive jurisdiction over a field transferred to it by entering or intending to enter the field. This exclusivity exists for the purpose of uniformity. Nonetheless, Members cannot, even collectively, legislate in a field that the Community has occupied. When all the Member states act together, the aim of uniformity is realized. But it is only a temporary uniformity, depending on the agreement of each individual Member. Only the Community can pass legislation binding on all Member states. Community institutions cannot be bypassed and Community purposes realized in some other way. Member initiatives to pursue Community objectives outside of the framework of Community institutions are incompatible with the *Treaty of Rome*.

In the *Road Transport* case,⁶⁹ the Council agreed that negotiations to adapt the Community law a road transport treaty between Member states and foreign countries should be concluded by Member States. The Commission brought an action before the European Court of Justice to annul the deliberations of the Council. The Commission contended that negotiations should be carried out by itself alone and not by Member States. The annulment procedure gives the European Court of Justice jurisdiction to review the acts of Council. The Council contended that its agreement was not an act, on the ground that Member States already had the power to negotiate the transport treaty. The Court held that independently of the Council agreement the Members had no such power. The Community had legislated a common transport policy. Changes in the treaty would have repercussions on the Community transport law. Members could not, even collectively, change this law.

Duplication

A Canadian Provincial Legislature may pass legislation that is identical to legislation of Parliament. If duplication gives rise to incompatibility, the

67. *Supra* n. 60.

68. Art. 228(2), *Treaty of Rome*.

69. *Commission des C.E. c. Conseil des C.E., Accord Européen sur les transport routier* (1971), 17 *Recueil de la Jurisprudence de la Cour* 263 (Eur. Com.).

federal statute will suspend the operation of the provincial provision. But the fact that a federal provision and a provincial provision are identical does not in itself constitute a conflict. On the contrary, duplication is the ultimate in harmony.⁷⁰

Provinces cannot, of course, duplicate federal legislation *holus bolus*. The provincial legislation must, in pith and substance, be within the provincial domain. However, where the provincial domain overlaps the federal domain, duplication is permissible. In *Smith v. Reginam*,⁷¹ federal law made the fraudulent circulation of a share prospectus an offence. So did provincial law. Mr. Smith was prosecuted under the provincial law. He applied for an order prohibiting a magistrate from hearing the charge against him. His counsel argued that the existence of the federal offence rendered the provincial offence inoperative. The Supreme Court of Canada, on appeal, refused the order.

Reproduction of European Community law by Member States as a method of implementing Community law is contrary to the *Treaty*. By the *Treaty*, each Community regulation is applicable in Member states without reproduction.⁷² It enters into force by virtue of its publication in the official Journal of the Community, on the date fixed in the regulation, or, if no date is fixed, on the 20th day following its publication.⁷³ Reproduction as a method of implementation throws into doubt the legal nature of regulations as well as their time of entry into force. It compromises the simultaneous and uniform application of Community law throughout the Community. In *Commission v. Italy*,⁷⁴ Italy passed a law reproducing Community law and providing that the Community law was deemed to be received into Italian law. The Commission brought Italy before the European Court of Justice for violation of the *Treaty*. The Commission complained about the manner in which Italy gave effect to Community law. The Court found Italy's means of application of Community law, by reproducing the Community text in Italy's own law, was contrary to the *Treaty*.

The *Treaty* requires that all questions of interpretation of Community law raised in Member final appeal courts, other than a question the answer to which is quite clear, be decided by the European Court of Justice.⁷⁵ Member duplication of Community law removes the interpretation of Community law from the European Court of Justice. Member courts, in the guise of interpreting their own country's laws, would in reality be interpreting Community law. Thus, the possibility of different interpretations in different countries arises. Members final appeal courts, though they could not refuse to submit questions of interpretation of Community law to the European Court of Justice, could not accede to a request to refer the interpretation of their own country's laws to the European Court of Justice.

70. *Multiple Access v. McCutcheon* (1975), 11 O.R. (2d) 249, at 263, 65 D.L.R. (3d) 577, at 591 (H.C.) (per Henry J.), quoting W.R. Lederman "Concurrent Operation of Federal and Provincial Laws in Canada" (1963), 9 McGill L.J. 185, at 195. Rev'd. 16 O.R. (2d) 593, 78 D.L.R. (3d) 701 (Div. Ct.); aff'd 19 O.R. (2d) 516, 86 D.L.R. (3d) 160 (C.A.).

71. [1960] S.C.R. 776, 25 D.L.R. (2d) 225.

72. Art. 189, *Treaty of Rome*.

73. Art. 191, *Treaty of Rome*.

74. *Commission des C.E. c. République Italienne* (1973), 19 Recueil de la Jurisprudence de la Cour 101 (Eur. Com.).

75. Art. 177, *Treaty of Rome*.

In *ICIC*,⁷⁶ Community law required importers to pledge a deposit in order to obtain an import permit. If the goods were not imported, part of the deposit was forfeited. Forfeit amounts were fixed from month to month. Italian law had the same requirements. The Italian government claimed as a forfeit, from the holder of a permit who did not import, the forfeit amount for the last month of the permit. The importer claimed that it had forfeited only the amount for the month during which it intended to import. The Italian Judge before whom the dispute came refused to refer the matter to the European Court of Justice, holding that he was interpreting only Italian law. He found that the amount of the forfeit was the last month amount. Nine days earlier, the European Court of Justice, on references from Germany and Holland, had interpreted the Community law to mean that the correct forfeit amount was the amount for the month of intended importing.⁷⁷ The Constitutional Court of Italy advised that the Italian law was a violation of the *Treaty of Rome*, because it duplicated Community law, and was for that reason unconstitutional.

Taxation and Spending

The Community can impose a levy on individuals. Members have given the Community this power if the levy is imposed in pursuance of Community goals. They have limited their sovereign fiscal powers correspondingly. If the Community decides on a levy linked to a *Treaty* policy, that levy does not leave Members with the choice of the form or method of collecting the levy. The levy becomes immediately binding and directly applicable in Member States. In *Newmann*,⁷⁸ a German firm objected to paying a Community levy on imported chickens on the ground that only Germany could impose the levy. The German Court asked the European Court of Justice if the *Treaty of Rome* gave the Community power to impose levies directly applicable in Member States. The Court advised that the *Treaty* did give this power.

The Community can use the money it raises by levy to finance its own expenditures. Revenue from the common tariff and agricultural levies do not belong to Members but are the Community's own resources. The Community was to receive, from January 1, 1978, the proceeds of a Community value-added tax.⁷⁹ With the coming into effect of this tax, the Community budget was to be entirely financed from its own resources.⁸⁰

The Community can impose financial charges on Members. The Community is not limited to passing only those laws for which it can assume the financial charges. In those areas where it is given power to pass laws in order to substitute a common action based on uniform principles for the

76. *Société I.C.I.C. c. Ministère du Commerce Extérieur* (1975), 12 *Revue Trimestrielle de Droit Européen* 396 (Ital. Constitutional Ct.). See L. Plouvier, "L'Arret de la Cour Constitutionnelle d'Italie du 22 Octobre 1975 dans l'Affaire I.C.I.C." (1976), 12 *Revue Trimestrielle de Droit Européen* 271.

77. *Compagnie Continentale c. Hoofdprodukschap Voor akkerbouwprodukten* (1971), 17 *Recueil de la Jurisprudence de la Cour* 163 (Eur. Com.) and *Deutsche Tradax GmbH c. Einfuhr-und Vorratstelle fur Getreide und Futtermittel* (1971), 17 *Recueil de la Jurisprudence de la Cour* 145 (Eur. Com.).

78. *Newmann c. Hauptzollamt Hof/Saale* (1967), 13 *Recueil de la Jurisprudence de la Cour* 72 (Eur. Com.).

79. *The Economist*, March 26, 1977, at 62.

80. Council Decision (Apr. 21, 1970).

unilateral action of Members, it can pass laws for which Members must assume the financial charges. In *Opinion 1/75*,⁸¹ Members argued that they should have the power, along with the Commission, to sign an international understanding on export financing, on the ground that the financial charges for complying with the understanding were imposed on the Members. The Court, nonetheless, advised that the power in the Community to sign the understanding was exclusive. Members could not join in, even though they would be required to incur expenditures by virtue of the understanding.

In contrast, the Canadian Parliament cannot impose financial charges on the Provinces.⁸² Provincial revenue can be appropriated only by a Provincial Legislature on the recommendation of the Lieutenant-Governor.⁸³ If there is no recommendation or no appropriation, nothing Parliament does can bind the Provinces. In the *Reference re the Troops in Cape Breton*,⁸⁴ the federal militia, on the request of the Nova Scotia Attorney-General, aided the Nova Scotia police in suppressing a riot. No Nova Scotia legislation gave the Attorney-General the authority to make the request he had made. Federal law provided that any such request was binding upon the Province on behalf of which the request was made, and that the Province had to pay the federal costs incurred from responding to the request. On a reference, the Supreme Court of Canada was asked if the Province was liable for the federal costs. The Supreme Court advised that the Province was not liable.

A Member may not spend so as to frustrate the realization of a *Treaty* purpose. In particular, Members may not grant aid that is incompatible with the common market.⁸⁵ If the Community decides that aid granted by a Member is incompatible with the common market, the Community can require the Member to abolish the aid, and to order the repayment of the grants given. In *Commission v. Germany*,⁸⁶ Germany gave grants of 10% of their investments to businesses in German mining regions. The Commission decided that Germany should put an end to the grants but Germany continued to make them. The Commission asked the European Court of Justice to declare that Germany should require repayment of the grants given after the Commission decision had been made. Germany argued that, if the grants were a violation of the *Treaty*, it was up to Germany alone to decide what should be done to comply with the *Treaty*. The Court held that the Commission could require, and ask the Court to require, a Member to demand repayment.

The Canadian Provinces are not so limited as to how they can spend their money.⁸⁷ If a tax is within the power of a Province, then the proceeds

81. *Supra* n. 60.

82. *British North America Act*, 30 & 31 Vict. C. 3, S. 125 (U.K.).

83. *British North America Act*, 30 & 31 Vict. C. 3, S. 53, 54, 90.

84. [1930] S.C.R. 554, [1930] 1 D.L.R. 82.

85. Art 92, *Treaty of Rome*.

86. *Commission des C.E. c. République Fédéral d'Allemagne* (1973), 19 Recueil de la Jurisprudence de la Cour 813 (Eur. Com.).

87. See *Reference Re Employment and Social Insurance Act*, [1936] S.C.R. 427, at 431 (per Duff C.J.); see also *McMillan v. City of Winnipeg* (1919), 45 D.L.R. 351 (Man. Q.B.).

of the tax may be appropriated for the purposes of any expenditure. A Province may levy a tax for the specific purpose of providing funds to be spent on an object beyond the regulatory jurisdiction of the Province. The discretion of each Legislature as to the manner in which its assets are to be appropriated is unfettered. The appropriation can be subsequent to the collection of the tax funding the appropriation, or it can be antecedent, by a legislative direction that the proceeds of the tax should form a fund for a specific purpose.

In *Reference re Employment and Social Insurance Act, 1935*,⁸⁸ the Supreme Court of Canada was asked if the federal unemployment insurance scheme was *ultra vires* Parliament. The scheme imposed contributions on employers and employees. The funds provided from these contributions formed an insurance fund, to be paid out to the unemployed who had contributed. Insurance is within the exclusive regulatory jurisdiction of the provinces. The Supreme Court and the Privy Council, on appeal, advised that the fact that Parliament had legislated for the raising of money to be spent on a purpose beyond its regulatory jurisdiction did not render the scheme *ultra vires*. Only because the scheme affected civil rights as between employers and employees was it *ultra vires*.

A Member expenditure that is, by itself, compatible with *Treaty* purposes may, because of the manner in which it is financed, be incompatible with *Treaty* purposes. In order to determine whether or not a grant conforms to the *Treaty*, one must look to see not only who gets the grant, but also who pays for it. The effects of a grant are necessarily influenced by the way it is financed. To decide if the *Treaty* is observed, the spending and financing must be assessed together. In *France v. Commission*,⁸⁹ France gave grants for domestic textile research and modernization. The grants were, in themselves, in conformity with the *Treaty*. The grants were financed by a tax on both imported and local textiles. The tax was, in itself, not a violation of the *Treaty*. The Commission decided that those grants financed by that tax were incompatible with the common market. It ordered France either to stop the grants or change the method of financing. France asked the European Court of Justice to quash the Commission decision. It argued that if the tax was, by itself, legal, and the aid was, by itself legal, the two together could not be illegal. The Court held that the Commission was entitled to reach the decision it had reached.

The Courts

Where a question of interpretation of the *Treaty of Rome* or validity of interpretation of Community law, other than a question the answer to which is quite clear, arises in a court of last resort of a Member State, the question must be referred to the European Court of Justice. Where such questions arise in other courts, they may be referred to the ECJ.⁹⁰ A

88. [1936] S.C.R. 427, aff'd [1937] 1 W.W.R. 312 (P.C.).

89. *Gouvernement de la République Française c. Commission des C.E.* (1970), 16 Recueil de la Jurisprudence de la Cour 487 (Eur. Com.).

90. Art. 177, *Treaty of Rome*.

court of last resort is not just the final court of appeals of a Member, it is any Member court, where, in the particular case before that court, there is no appeal from its decision.⁹¹ In *Costa v. E.N.E.L.*,⁹² there was no appeal from the decision of the Italian Judge before whom the dispute came, if the amount in dispute was less than a certain figure. The amount in dispute in that case was so small that there was no possibility of appeal. The European Court of Justice, when answering the questions the Italian Judge put to the Court, advised that the Judge was obliged by the *Treaty of Rome* to make the reference he had made, because his court was the final court in that case.

In those cases where a Member court may, but does not have to, refer a question to the European Court of Justice, guidelines have been laid down by the courts indicating how the discretion given by the *Treaty* should be used. If the European Court of Justice has made no previous ruling on a point, if the point is difficult and important, or if the facts show that a decision on the point is necessary to decide the case, a reference should be made. In *Van Duyn v. The Home Office*,⁹³ Pennycuik, V.C. found that the interpretation of the *Treaty* and a Community directive raised necessary, important and open questions. He, accordingly, made a reference to the European Court of Justice.

Canadian provincial courts, on the other hand, have jurisdiction to interpret *The British North America Act* and to determine the validity of federal laws. These powers remain even where the Court is a Court whose decision cannot be appealed. In fact, provincial courts cannot, on their own volition, refer constitutional law questions, or questions about the interpretation of federal law, to the Supreme Court of Canada. The Federal Court of Canada has exclusive original jurisdiction where relief is claimed against the Federal Crown including a claim for a declaration that a federal law is *ultra vires*.⁹⁴ However, where a dispute over the constitutionality of a federal law arises in a case between private parties, the case does not have to be removed to the Federal Court. All that is required is that the Attorneys-General for Canada and the Province be notified.⁹⁵

Standing

Although the question of standing may not, at first glance, appear to have much bearing on the nature of a legal order, it can, in practice, be of decisive importance. A central authority, no matter how limited its powers, can extend its powers as it wishes, if all those who have an interest in challenging the exercise of those powers are barred from Court. A central authority which limited powers will be contained within those powers if all those who have an interest in challenging *ultra vires* acts have standing in Court.

91. But see *Bulmer v. Bollinger*, [1974] Ch. 401, at 420 [1974] 2 All E.R. 1226, at 1233 (C.A.) (per Denning M.R.), *cf.*, *Id.*, at 430, [1974] 2 All E.R., at 1241 (per Stephenson, L.J.).

92. *Supra* n. 3.

93. [1974] 3 All E.R. 178 (Ch.); see [1975] Ch. 358 (ECJ).

94. *Denison Mines Ltd. v. A.-G. of Can.*, [1973] 1 O.R. 797, 32 D.L.R. (3d) 419 (H.C.).

95. *The Queen's Bench Act*, R.S.M. 1970, c. C280, S. 73(1).

Locus standi in Europe to challenge the validity of Community laws is restricted. An individual can bring an action to annul a Community decision only if the decision is addressed to him or is of direct and individual concern to him.⁹⁶ This possibility exists only for decisions, and not for regulations. Regulations are general in nature and addressed to a class of people. Decisions are addressed to designate or identifiable individuals. Once a Community act is applicable to a category of people established in a general and abstract way, no individual can challenge the act in the European Court of Justice. In the *Fruits and Vegetables* case,⁹⁷ the Council required Members to renounce the right given to them by the *Treaty of Rome* to suspend imports from each other. A French fruit and vegetable growers association claimed that the Council act was an amendment to the *Treaty* and could be effected only by ratification of the act by Member Parliaments. The European Court of Justice, which was asked to annul the Council act, refused to hear the association. The Community act was not a decision. It was a regulation, as the act was general in nature, not specific. Individuals had no status to question the legality of the act.

For a decision to be of individual concern to a litigant, he must belong to a group of persons each of whom is determinable at the time the decision is made. An individual concerned must have those attributes that identify him in the same way that the person to whom the decision is addressed is identified. In practice, what this requirement means is that the situation to which the decision refers must already be in the past.⁹⁸ Since decisions are usually addressed to Member States, and not to individuals, it is only the rare decision that gives any right of action to individuals. In *Plaumann*,⁹⁹ Germany asked the Commission to suspend import duties on oranges entering Germany. The Commission, in a decision addressed to Germany, refused the suspension. A German orange importer claimed before the European Court of Justice that the Commission decision was a violation of the *Treaty of Rome*. The Court found the suit of the importer was inadmissible. The plaintiff was not individually concerned and thus had no standing. At the time the decision was made, the Members of the group to which the importer belonged, potential orange importers, could not be identified. Anyone can import oranges.

The procedure of reference from Member courts to the European Court of Justice does not allow individuals to raise questions before the European Court. The questions raised are the questions of the referring court. The individual parties will be heard on the questions referred, but the parties cannot add to or amend the questions raised. They cannot be heard to argue that a question raised is moot or not necessary. In *Hessische*¹⁰⁰, a

96. Art. 173(2), *Treaty of Rome*.

97. *Confédération Nationale des Producteurs de Fruits et Légumes c. Conseil de la C.E.E.* (1962), 8 *Recueil de la Jurisprudence de la Cour* 901 (Eur. Com.).

98. C.S.P. Harding, "Decisions addressed to member states and Article 173(2) of the Treaty of Rome" (1976), 25 *Int'l & Comp. L.Q.* 15, at 32.

99. *Plaumann & Co. c. Commission de la C.E.E.* (1963), 9 *Recueil de la Jurisprudence de la Cour* 197, at 222 (Eur. Com.).

100. *Hessische Knappschaft c. Maison Singer et Fils* (1965), 11 *Recueil de la Jurisprudence de la Cour* 1191, at 1198 (Eur. Com.).

French Court asked the European Court of Justice to interpret a Community regulation. One of the parties asked the Court to declare that the question of the French Court was without purpose, on the ground that the regulation was *ultra vires* the *Treaty*. The Court refused to consider the request. The parties cannot have a question asked by the Judge of a Member Court declared moot.

The Canadian law of *locus standi* is a good deal more generous. An individual may bring an action to question the validity of legislation, even though the legislation is general in character, and though he is not affected by the legislation any more than any other member of the public. Where all members of the public are affected alike by legislation, and there is a justiciable issue respecting the validity of the legislation, the Courts have a discretion to bear the case on its merits at the request of an individual member of the public. In *Thorson v. A.-G. for Can. (No. 2)*,¹⁰¹ the appellant asked for a declaration that a federal law was *ultra vires*. The Government of Canada claimed that the appellant had no status to maintain the action because he had not suffered any special damage. The Supreme Court of Canada held that the action should be allowed to proceed on its merits. The statute in question affected all members of the public alike and the issue was justiciable.

Conclusions

The Community was created in order to promote unity amongst its Members; its historical dynamic has been one of centralization. The construction of this legal order by the Community has progressed rapidly¹⁰² and Europe has seen a creeping federalism.¹⁰³ Although the details of the *Treaty of Rome* and Community laws deal with economic matters, the motivation of Members in developing the Community was political: to make the wars that ravaged Europe in the past impossible. The structures that have grown up are a reflection of this desire of Members to increase links amongst themselves.

In contrast, Canada was founded on a separation, the separation of Quebec from Ontario,¹⁰⁴ two provinces which were previously joined together¹⁰⁵. Thus, Canada's historical dynamic has been one of decentralization. Manitoba was created out of territory which Parliament could have brought within its exclusive jurisdiction,¹⁰⁶ and other new Provinces were created out of territories which were in fact governed exclusively by the federal government¹⁰⁷. Boundaries of Provinces were extended to include

101. *Thorson v. A.-G. of Can.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1.

102. G. Druesne, "La réserve d'ordre public de l'article 48 du traité de Rome" (1976), 12 *Revue Trimestrielle de Droit Européen* 229.

103. *The Economist*, June 18, 1977, at 65.

104. *The British North America Act*, 30 & 31 Vict., c. 3, s. 6 (U.K.).

105. *The Union Act*, 3 & 4 Vict., c. 35 (U.K.).

106. *The British North America Act*, 30 & 31 Vict., c. 3, s. 146 (U.K.); *Manitoba Act*, 33 Vict., c. 3, S.C. 1869.

107. *The Saskatchewan Act*, 4 & 5 Edw. 7, c. 42, S.C. 1905; *The Alberta Act*, 4 & 5 Edw. 7, c. 3, S.C. 1905.

areas previously within exclusive federal jurisdiction,¹⁰⁸ and federally owned land and resources were transferred to provinces.¹⁰⁹ For Canada to use the European Economic Community as a model would be falsifying its own historical reality; it would mean turning the country around and pointing it in a different direction. Imitating the European Economic Community would be embarking on a process of unification that those who suggest the Community as a model for constitutional reform would be unlikely to want.

108. Manitoba, 40 Vict., C. 6, S.C. 1877; 44 Vict. c. 14, S.C. 1881; 2 Geo. 5, c. 32, S.C. 1911-12; Quebec, 61 Vict., c. 3, S.C. 1898; 2 Geo. 5, c. 45, S.C. 1911-12; Ontario, 2 Geo. 5, c. 40, S.C. 1911-12.

109. *The British North America Act*, 20 & 21 Geo. 5, c. 26 (U.K.).