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ECONOMIC MOBILITY: SUPPLEMENTARY BRIEFING MATERIAL

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POUVOIRS D'IMPOSITION

Problématique

Dans quelle mesure le nouvel article 121 limiterait-il les pouvoirs fiscaux des provinces?

Réponse

Le nouvel article 121 interdirait toute mesure d'imposition discriminatoire, qu'elle soit fédérale ou provinciale, lorsqu'elle serait fondée, directement ou indirectement, sur un des trois critères énoncés au paragraphe 121(1) et qu'elle entraverait de manière abusive le fonctionnement de l'union économique canadienne. Toutefois, le nouvel article ne limiterait aucunement le pouvoir d'une législature de définir comme elle l'entend l'assiette ou la base d'un impôt provincial , même si cette définition devait être radicalement différente de celle prescrite par d'autres législatures, et d'en fixer les taux au niveau qu'elle juge approprié pour toute catégorie de contribuables, sans égard aux taux ayant cours dans d'autres provinces, pourvu que la même assiette, la même base et les mêmes taux s'appliquent sans égard à la province de résidence ou de résidence antérieure d'un contribuable, ou à la province d'origine ou de destination des biens, des services ou des capitaux visés. Cependant, pour qu'une mesure fiscale discriminatoire soit jugée invalide, il faudrait en outre établir qu'elle entrave abusivement le fonctionnement de l'union économique.

Signalons que des différences d'assiette ou de taux d'imposition peuvent constituer, en elles-mêmes, des entraves à la mobilité économique, mais être justifiées par d'autres objectifs gouvernementaux ou par les besoins particuliers des diverses provinces. Mais c'est par des aménagements politiques et administratifs entre gouvernements,

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plutôt que par une disposition générale de la Constitution, que les entraves fiscales non-discriminatoires pourraint être réduites avec le discernement qui s'impose.

Le Parlement fédéral serait assujetti aux mêmes contraintes que les provinces, mais pourrait y déroger conformément aux dispositions du paragraphe 121(3), sans toutefois pouvoir lever des douanes aux frontières provinciales, ce qui serait strictement interdit par 121(4).

Le nouvel article invaliderait donc les déductions, dégrèvements ou crédits d'impôt consentis par une province dont l'application serait assujettie à des conditions relatives à la province de résidence des propriétaires de l'entreprise en cause, et à l'origine ou la destination des biens, services ou capitaux visés, etc. Ainsi, toute taxe sur la place d'affaires, la prestation d'un service ou le transfert d'un avoir financier devrait s'appliquer de manière non-discriminatoire, selon la définition de 121(1). Tout dégrèvement visant à favoriser la transformation sur place des ressources devrait s'appliquer uniformément aux entreprises appartenant à des non-résidants et à des résidants, et sans égard à l'origine des matières à transformer ou à la destination des produits transformés.

Un cas d'espèce: L'épargne-actions au Québec

Objet

Le Québec adoptait en 1979 une loi accordant un dégrèvement fiscal aux contribuables québécois à l'égard d'investissements qu'ils feraient dans certaines entreprises.

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Investissements éligibles

Il s'agit d'achat d'actions votantes émises par l'une des catégories de corporations suivantes:

- une corporation dirigée au Québec;
- une corporation dont plus de 50% des salaires versés le sont à des résidents du Québec;
- une corporation du type S.O.D.E.Q.
- une corporation détenue à plus de 50% par un organisme régis par la Loi des caisses d'épargne et crédit.

L'investissement doit avoir été fait par un contribuable résidant au Québec.

Caractère du régime et sa validité

Ce régime est nettement discriminatoire au sens du nouvel article 121 proposé en regard des investissements éligibles. Il pourrait demeurer valide en regard du texte proposé si la province démontrait que sa mise en oeuvre n'entrave pas de manière abusive le fonctionnement de l'union économique canadienne.

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Subsidies

a) Situation

- There is extensive use by provincial governments of grants and other expenditure incentives, principally in support of industrial and area development.

b) Applicability of Proposed Section 121

- As proposed, section 121 would not limit the capacity of provincial governments or bodies to provide incentives designed to promote particular industries, groups or areas within the province. It would, however, prohibit discrimination in access to or treatment relating to such incentives on the basis of province of residence of the interested economic agents.

c) Specific Implications

- It would permit exclusive or differential access to provincial subsidies based on:
  - designated location within the province
  - disadvantaged or other selected groups within the province
  - specified economic sectors.
- It would prohibit exclusive or differential access to provincial subsidies based on:
  - residence in the province
  - ownership in the province
  - headquarters in the province.
- A 1979 IT&C review found very few provincial barriers of this kind affecting business mobility, other than for financial and agricultural businesses, which are described elsewhere.
- One example was a restriction for qualification for a loan guarantee under the Quebec Industrial Assistance Act to publishing companies with more than 50% of the shares owned in the province.
- Applicability to provincial student loan programs which discriminate against out-of-province residents would depend on the demonstration that these unduly impede the operation of the economic union.
- It is recognized that this coverage leaves considerable scope for sub-provincial differentiation, which will of course be governed by policy advisability and political accountability.

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Public Procurement

The notes below consider how several aspects of public procurement might be affected by the newly proposed section 121.

Provincial laws, regulations or practices which:

- barred the purchase of goods or services from sources in other provinces in Canada would seem to be counter to the new section 121.
- specified qualities or characteristics which happened to be available only in the province would not seem to be counter to the new section 121, but might be open to challenge.
- permitted, generally, the payment of higher prices or fees respecting good or services from a source in the province, or from a firm having a local office (as opposed to one which did not) would appear to be counter to the new section 121.
- permitted payments of higher prices for goods or services offered by those in, for example, particular parts of the province that were economically depressed, would not seem to be counter to the new section 121.
- permitted a policy of "reasonable area of search" in which invitations for local work would be made locally, or tenders advertised only locally, would not seem to be counter to the new section 121, provided "outsiders" were free to set up business in a local area and then compete.
- permitted local tenders only <u>with bids to be received from local firms only</u>, would probably not be counter to the new section 121 if such practices were restricted to smaller centres only (as they would not in that case "unduly impede" the economic union).

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- required that a provincial crown enterprise be the sole source of certain goods or services, would likely not be counter to the new section 121 provided that comparable private enterprises within the province were as much excluded from the business as private enterprises from outside the province.

In appreciating all of these situations, it seems reasonable to assume that the courts would pay close attention to the scale of the activity in question when they judge whether the activity is unduly impeding the economic union.

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Agricultural Marketing Boards

a) Situation

Most agricultural marketing boards operate under provincial authority, although many of these are organized under the federal Agricultural Products Marketing Act as well, which gives them power to regulate the sale of their product in interprovincial and international markets under delegation. Supply management marketing boards currently control the Canadian production of eggs, chickens, turkeys and industrial milk, allocating provincial quotas on an agreed sharing of the national market (determined principally on the basis of historical production levels).

b) Applicability of Proposed Section 121

Efforts by provincial marketing boards which seek to restrict the importation of agricultural commodities by other provinces would presumably be prohibited by section 121 if shown to unduly impede the operation of the economic union. However, as the national marketing agencies have been established to provide stability and efficiency where serious interprovincial rivalry has existed in the past, they would likely be judged to be consistent with the economic union.

c) Specific Implications

i) Section 121 would probably increase the trend for agricultural commodities to come under national supply management arrangements.

ii) Where these national arrangements could not be fully justified on the basis of sectoral efficiency (comparative advantage), the derogation for "compelling national interest" could probably be invoked on grounds of social and regional stability (perhaps necessary for the Dairy Commission).

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EDUCATION

Problématique

Dans quelle mesure le nouvel article 121 pourrait-il limiter l'exercice des compétences provinciales touchant l'éducation?

Réponse

Le nouvel article ne vise pas l'éducation, service public à caractère quasi universel, tout au moins aux niveaux élémentaire et secondaire, offrant peu d'occasions de traitement discriminatoire et n'affectant que très indirectement le fonctionnement de l'union économique. Le nouveau libellé de 121 ne limiterait pas, par exemple, la capacité d'une province de définir les programmes d'études s'appliquant dans un territoire, le choix des manuels scolaires, les conditions d'admissibilité à diverses institutions d'enseignement, les qualités requises pour exercer la profession d'enseignant, etc., pourvu que les lois ou règlements pertinents ne contiennent aucune clause discriminatoire fondée sur la province de résidence ou de résidence antérieure des personnes. Ainsi, une loi ou un règlement provincial, ou un contrat collectif de travail, ne pourrait proscrire l'embauche d'une personne d'une autre province satisfaisant aux exigences professionnelles pertinentes.

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Il va sans dire que le nouvel article n'interdirait pas les programmes spéciaux visant à favoriser la promotion sociale des groupes ethniques (i.e., les autochtones) ou socio-économiques défavorisés puisque, dans le premier cas, la distinction de traitement ne serait pas fondée sur la province de résidence et que, dans le deuxième cas, elle serait fondée sur le lieu de résidence à l'intérieur d'une province (quartier défavorisé d'une ville, collectivité pauvre ou isolée, etc.).

Qu'en serait-il des conditions d'accès à l'enseignement universitaire, en particulier les frais de scolarité et les prêts et bourses à la disposition des étudiants?

D'abord, il nous semble que les conditions d'admissibilité aux universités devraient être les mêmes pour tous, sans égard à la province de résidence, sujet à l'équivalence des diplômes et qualifications antérieures.

Ensuite, il nous semble que le nouvel article n'empêcherait pas une province d'exiger des frais de scolarité plus élevés d'étudiants non résidants, et de restreindre l'accès à ses programmes de prêts et bourses aux résidents car il serait fort douteux qu'on puisse faire la preuve que ces distinctions entravent abusivement le fonctionnement de l'union économique.

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A cet égard, la jurisprudence américaine n'est pas sans intérêt: les tribunaux ont interprété le paragraphe 2 de l'article IV ainsi que le 14^{e} amendement de la Constitution des États-Unis, qui sont autrement plus contraignants que ne le serait le nouvel article 121 comme autorisant les États à assortir le niveau des frais de scolarité et avantages connexes d'une exigence de durée de résidence.

Un cas d'espèce: le Chapitre VIII de la Charte de la langue française du Québec

Le Chapitre VIII de ladite Charte (articles 73 et suivants) restreint l'accès à l'école anglaise au Québec aux enfants dont un des parents a reçu son éducation élémentaire en anglais au Québec ainsi qu'aux enfants résidants ou de résidents déjà inscrits à l'école anglaise. Tous autres enfants doivent fréquenter l'école française.

Bien que cette distinction ne soit pas fondée directement sur la province de résidence, elle pourrait être interprétée comme contrevenant indirectement au critère pertinent énoncé au premier paragraphe de l'article 121(1). Un tribunal pourrait en outre juger que pareille discrimination entrave abusivement le fonctionnement de l'union économique canadienne par ses effets sur la mobilité de la main-d'oeuvre; mais il devrait tenir compte, ce faisant, des exceptions touchant les résidents temporaires pouvant être faites sous l'empire de l'article 85 de la Charte et qui visent précisémment à faciliter les déplacements de personnel.

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RÉGLEMENTATION LINGUISTIQUE

Problématique

Dans quelle mesure le nouvel article 121 limiterait-il la capacité d'une province à légiférer en matière linguistique?

Réponse

Aucunement, sauf si les lois pertinentes et les règlements qui en émanaient s'appliquaient différemment aux résidents et aux non-résidents, aux biens, services et capitaux d'origine ou de provenance de la province en cause et d'autres provinces. Soit dit en passant, seul le Chapitre VIII de la Charte de la langue française pourrait être remis en cause par le nouvel article 121.

Ainsi, une province aurait toute latitude pour prescrire les exigences linguistiques que requiert, à son jugé, l'exercice d'un métier, d'une profession ou de toute autre activité économique.

De même, une province pourrait prescrire que tout affichage, règlement, annonce, ou information destinés au consommateur se fassent dans une ou les deux langues officielles ou si elle jugeait que l'intérêt public le commande.

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Il va sans dire que, pour être conforme à l'article 121, les lois et règlements pertinents ne devraient pas comporter de distinction du type proscrit par l'article 121, sauf par dérogation en vertu de 121(2).

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Labour Relations

The notes below consider how several aspects of labour relations might be affected by the proposed section 121 (or the Charter if mobility is to be covered there).

Provincial laws or regulations which:

- specify generally that companies or the provincial public service must not hire persons from outside the province would be counter to the new section 121.
- specify that companies or the provincial public service must give preference to the hiring of qualified local persons in areas within a province which are, for example, economically depressed, would not be counter to the new section 121.
- specify that companies and the public service generally give preference to qualified provincial residents, would not run counter to the section 121 provided that, when such residents are not available, qualified residents from other provinces can be hired.
- specify that a position holder in the province must also live in that province would be counter to the new section 121, but such laws or regulations could require a person to live near his work for practical reasons which might incidentally require the employee to move to the province of his work.
- specify that a professional or other class of worker from another province pass the same tests before becoming employed as are required of provincial residents, would not run counter to the new section 121; special tests intended to make employment more difficult for "outsiders" would run counter.

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- specify unreasonable periods of residence before former non-residents would be eligible to apply for public service or other jobs in a province would run counter to the new section 121.
- specify a capacity in one or both of Canada's two official languages as a condition for employment in various types of work would not be counter to the new section 121 (or the Charter).

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Provincially-owned monopolies

Issue

Would the proposed section 121 interfere with the creation or continuation of provincially-owned monopolies such as:

- utilities - Ontario Hydro, Manitoba Telephones, Saskatchewan Power Corporation, etc.
- Saskatchewan Government Insurance Office (vis-à-vis sale of compulsory basic automobile insurance)
- provincial liquor boards in all provinces.

Comment

1. When a province decides to create a publicly owned monopoly, it is deciding that an activity or enterprise ought to be in the public sector, not the private sector. It can only so decide with respect to that portion of such activity or enterprise as is carried on within the province, and it can only commit its own public institutions to that ownership, not those of other provinces who have no governmental function within its territory. Such a legislative decision is therefore not designed to discriminate against non-residents but rather to implement a policy of public ownership within the province. In short

   (a) non-resident private investors are not discriminated against, because resident private investors are also precluded from participation in this activity or enterprise;

   (b) "non-resident governments" (i.e., other provinces or territories - the federal government is surely "resident" everywhere) are not discriminated against in terms of public ownership, because they enjoy no governmental power outside their own boundaries and are in the same role there as a would-be private owner.

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2. There is an analogy in the 1977 Supreme Court decision in Canadian Indemnity Corporation v. Insurance Corporation of B.C. The general rule has always been that a federally-incorporated (private) company cannot be denied legal existence by a province, and thus cannot be discriminated against, but it is subject to all provincial "laws of general application". In that case federally-incorporated companies attacked the B.C. law excluding all private companies from the automobile insurance business, on the basis that this law was directed against their status and capacity. The court rejected this argument and said that they were subject to the same laws as natural persons and provincially-incorporated companies, all of whom were equally barred from the automobile insurance business in B.C. Similarly, one could assume that if the Saskatchewan compulsory insurance scheme were attacked on the basis of a new section 121, non-resident insurance companies could not argue that they were discriminated against in being deprived access to that market, because resident insurers are equally barred.

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LES CORPORATIONS PUBLIQUES PROVINCIALES À CARACTÈRE NON MONOPOLISTIQUE

Problématique:

L'article 121 proposé empêcherait-il une province de faire commerce par le biais d'une corporation dont elle serait l'actionnaire principal?

Réponse:

L'article 121 proposé ne contient aucune prohibition visant la capacité d'un corps législatif provincial de créer des corporations, et le droit d'un gouvernement de s'engager dans une activité commerciale. Ce que cet article vise ce sont les lois et usages discriminatoires qui entravent d'une manière abusive le fonctionnement de l'union économique. Encore faut-il que le caractère discriminatoire d'une loi ou d'un usage soit fondé sur la résidence pour les personnes sur l'origine ou la destination pour les biens, les services et les capitaux.

A titre d'exemple, la loi du Québec créant la Société Générale de financement, S.R.Q. 1977, c S-17, serait inattaquable à partir du texte de l'article 121 proposé, à l'exception de la disposition traitant de la résidence des administrateurs de la Société.

Corrollaire:

Si une province utilise une telle corporation pour acquérir de gré à gré ou par voie d'expropriation des entreprises exercées par des non-résidants, cette façon d'agir pourrait-elle devenir un usage soumis au contrôle du nouvel article 121?

Il nous apparaît que cet usage serait ni discriminatoire, ni une entrave au fonctionnement de l'union économique canadienne si le mode d'acquisition assure au vendeur ou à l'exproprié une indemnité fondée sur la valeur de l'entreprise acquise. Le nouvel article 121 ne vise pas à empêcher les provinces à faire commerce ou à assurer une plus grande participation de leurs citoyens à une activité économique quelconque. Ce droit est corollaire à la souveraineté déjà attribuée par ailleurs aux provinces et comprend le droit d'une province de choisir pour des fins politiques propres, d'investir dans un secteur de l'activité économique qu'elle considère comme névralgique dans le cadre de son développement, par exemple. Ce que le nouvel article 121 prohibiterait c'est de traiter injustement des non-résidants. Il nous apparaît qu'un usage comportant l'acquisition d'entreprises exercées par des non-résidants contre versement d'une indemnité fondée sur la valeur des biens acquis, ne constituerait pas un traitement injuste de non-résidants. En conséquence, cet usage constituerait ni une entrave, ni une discrimination au sens du nouvel article 121.

A titre d'exemple, la loi québécoise créant la Société Nationale de l'amiante laquelle comporte des dispositions visant l'acquisition ou l'expropriation d'entreprises oeuvrant dans ce secteur d'activité, ne serait pas invalide en regard du nouvel article 121.

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PROVINCIAL LAND OWNERSHIP LAWS

Issue: Would the proposed section 121(1) preclude provinces from limiting or precluding the acquisition by non-residents of land in the province, whether privately owned or Crown-owned?

In this connection it should be noted that P.E.I. has a law (upheld by the Supreme Court) that prohibits any non-resident of the province from buying over 10 acres of land without the consent of the provincial Cabinet. Saskatchewan has limitations on how much farm land a non-resident can own. (Alberta, instead, imposes restrictions on acquisitions by aliens.)

Comment:

1. Discrimination based on residence would be involved here and, assuming we are talking about land for investment (and not just residential or recreational land) the mobility of capital would be hindered and the operation of the economic union would be impeded. Whether the impediment would be "undue" could be debatable, depending on the nature and amount of property affected.

2. It must be asked why provinces pursue such policies. Generally they justify them as means to:

a) limit speculation

b) ensure that land is used for economically beneficial purposes, is kept in production, etc.

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c) ensure that property is maintained in good order and not ignored by an absentee owner.

However, there is no logical connection between the province of residence of the owner and the achievement of these objectives. Owners within the province may also be speculators, uninterested in production from or maintenance of, the property, etc. The residency test is used as a politically easy and administratively simple solution, but the means bear no direct relationship to the ends sought.

In fact provinces have developed other means for land use management -- e.g., laws in B.C. and Quebec protecting farm lands from non-agricultural use.

3. It is now legally possible for provinces to exclude or limit acquisitions by non-Canadians. While the Citizenship Act provides generally that aliens have the same right to hold property as citizens, it was amended in about 1976 to allow provinces to limit the rights of aliens to own land. Alberta has taken advantage of this provision.

4. It may be necessary at some point in the future to reconsider whether our proposed section 121 might have to be narrowed to permit some degree of discrimination by a province in its disposition of Crown lands. As owner, arguably, it should have more discretion as to whom it sells or gives Crown lands than it should have as legislator in controlling the market in privately owned land.

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Resource Management

a) Situation

- because provinces cannot regulate with respect to interprovincial trade, the federal government is in a position to ensure that discriminatory pricing of natural resources on an interprovincial basis does not take place. However, provinces control the rate and nature of resource development within their boundaries in a number of ways, notably through conservation, allocation and processing policies as well as through proprietary rights where applicable.

b) Applicability of Proposed Sec. 121

- as proposed, sec. 121 would prohibit provinces using their legislative powers to achieve:
  - discriminatory interprovincial pricing of resource commodities (relieving the federal government of the need to intervene in this regard under the trade and commerce power); and
  - discriminatory interprovincial resource allocation (requiring equal access to provincial processing incentives and fair treatment of out-of-town province customers).
- it would not appear to affect provincial jurisdiction over the rate of resource extraction or harvesting; hence the need to retain adequate declaratory powers.
- it is important to distinguish between the legislative powers to regulate and proprietary or ownership rights with respect to natural resources. In the latter instance provinces can act more freely, including the fixing of minimum sale prices for provincially-owned resources going into interprovincial or international trade, subject to overriding federal legislation. Currently, provincial Crown ownership accounts for over 90% of the forest lands allocated to wood production in Canada outside the Territories, and provinces have shown an inclination to increase their direct mineral holdings as well, such as for potash in Saskatchewan and asbestos in Quebec.

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REGLEMENTATION PROVINCIALE DES INSTITUTIONS FINANCIERES

Problématique

Le nouvel article 121 empêcherait-il les provinces de réglementer les institutions financières?

Réponse

Le nouvel article 121 ne traite pas de cette question directement. La réglementation provinciale s'appuie sur leur compétence sur le commerce local et l'incorporation. Elle vise surtout à protéger ceux qui transigent avec les institutions financières soit à titre d'investisseurs, soit à titre de prêteurs, soit à titre de commerçants surtout. Les corporations étrangères à une province doivent se conformer à la réglementation provinciale et, dans la plupart des provinces, obtenir une licence afin d'y faire affaire.

Le nouvel article 121 n'invaliderait pas cette réglementation si elle n'est pas dicriminatoire au sens du paragraphe (1) du texte proposé. Une province pourrait continuer à exiger qu'une corporation étrangère issue d'une autre province obtienne l'autorisation de faire affaire dans la mesure où les conditions imposées ne sont différentes à l'égard de ces corporations étrangères que celles imposées aux corporations résidentes.

Evidemment, toute condition visant à restreindre le droit d'être actionnaire ou de détenir des titres dans une corporation qui serait fondée sur la résidence du détenteur ou de l'origine du capital, serait prohibée à moins que la province ne puisse convaincre le tribunal que la condition n'entrave pas le fonctionnement de l'union économique canadienne de manière abusive.

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A titre d'exemple si le Québec utilisait sa loi de 1978 visant l'acquisition de certaines compagnies de prêts hypothécaires de manière à empêcher l'achat d'actions par des Canadiens non résidents au Québec, cet usage serait attaquable, mais la province pourrait tenter de démontrer qu'il ne s'agit pas d'une entrave abusive au fonctionnement de l'union économique canadienne.

et, de la sorte, mieux protéger le public assuré. Le nouvel article ne ferait pas obstacle à une telle mesure.

Enfin, le nouvel article 121 n'empêcherait pas une province de réglementer quant à la garde des titres sur son territoire afin de s'assurer qu'on puisse s'en emparer au bénéfice des assurés dans l'éventualité ou la corporation serait en défaut à leur endroit.

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"Is the Problem Serious?"

Several provinces have suggested that the problem is not serious, that there is no real threat to the Canadian economic union. The federal government holds the opposite view, that there is an increasing trend which sees provincial governments applying or threatening to apply discriminatory measures which run sharply counter to the principles of the economic union. This trend, if continued, could destroy the value of the union, and in the long run could destroy Canada itself.

Annex A to the Government of Canada's paper on Securing the Economic Union (Doc. 830-81/036 of July 9) listed a great number of measures taken by governments (including the federal government itself) which have threatened to a greater or lesser extent the viability of the Canadian economic union. Most of these measures have been justified on grounds which, in themselves, seemed reasonable. Few, however, would seem to have been adopted with adequate consideration for their potential effect on the economic union.

It is not a new problem. The Safarian study of 1969 expressed many of the concerns the federal government then felt. The intervening years, as evidenced by Annex A mentioned above, heightened that concern. The worries of the federal government are shared in many respects by important authorities who have commented on the question, including the Task Force on Canadian Unity (Pepin-Robarts) 1979, the Canadian Bar Association (Committee on the Constitution) 1978, the Ontario Advisory Committee on Confederation, 1979, and the Constitutional Committee of the Quebec Liberal Party, 1980.

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The federal government recognizes that, in a federation, and in a country as vast as Canada, there are bound to be differences in the way things are done, in the ways the local economies are handled. At the same time, the benefits of the Canadian economic union can only be obtained if the economy is open and free flowing in its essential characteristics.

A reasonable balance is essential and constitutional "ground rules" seem clearly the most certain way to ensure that balance. That there is a problem today is perhaps demonstrated most strikingly by the great concern that a number of provinces are now expressing that the new anti-discrimination clauses in the Constitution, as proposed by the federal government, may interfere with current or future provincial legislation.

The longer action to solve the problem is postponed, the more extensive it will be and the more deeply rooted will have become the many practices and measures which now menace the effectiveness and security of our economic union.

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"If the Problem exists, an Administrative Solution is best"

The present problem has developed despite the existence over many years of the best administrative arrangements that could be devised by the Government of Canada and the governments of the provinces. Our governments have for years tried to use these arrangements in their attempt to find solutions to all kinds of problems affecting the economic union. The lack of success is demonstrated by the growing list of measures which threaten the union. Annex A to the Government of Canada Paper on Securing the Economic Union (Doc. 830-81/036 of July 9) is evidence of this.

A good example of administrative arrangements can be found in the tax collection agreements which have long been a feature of the Canadian scene, to the advantage of business and Canadians generally. These agreements are now being rejected by two more provinces, it would seem, principally because they seek greater flexibility to discriminate in favour of their own residents and against outsiders from the rest of Canada.

Administrative arrangements would seem to be of little help when many governments and two orders of government are involved, particularly when each is responsible for a number of the important levers which can ensure the success or failure of the economic union.

All our experience tells us that something more is needed: the setting out of the basic "ground rules" in the Constitution. With that done, governments can work together in the knowledge that the Constitution itself leads the way in providing the broad definition of the fundamental and reasonable balance between local and national interests in the operation of the Canadian economic union.

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Preliminary Legal Examination and Commentary on Proposed Section 121

Section 121 (1)

The general purpose of the new Section 121 (1) is to prevent federal and provincial governments from creating barriers to interprovincial trade either by law or through discriminatory practices. Discrimination would be prevented not only with respect to the movement of persons, but also with respect to the movement of goods, services and capital across Canada.

1. The new Section 121 does not give additional legislative power to Parliament. It is not a section which confers legislative powers on any level of government. It places restrictions on powers presently held by both levels in the same way that a Charter of Rights would place restrictions on both. A Charter of Rights would not mysteriously increase federal legislative jurisdiction. The derogations in subsections (2) and (3) do not confer on Parliament or on provincial legislatures additional powers to those they now have. The two derogation clauses are parallel. Both subsections describe circumstances in which the respective legislatures could continue to exericse their existing legislative powers or in the case of Parliament, those newly conferred by an amended 91.2 even though such exercise was contrary to the restrictions imposed by subsection (1).

Any expansion of federal legislative jurisdiction from the federal proposal would only arise from the redrafted section 91.2. And that section does not confer authority on Parliament to prohibit provincial laws or practices which impede the operations of the economic union.

The new section expands federal powers only in three very specific and discrete ways:

- clarifies Parliament's authority over trade and commerce to include services and capital,
- adds express power over competition,
- adds express power over product standards.

2. It is extremely important to understand that the draft section 121 does not apply to the movement of persons, goods, services and capital within a province but merely between provinces. Therefore, provincial governments will be able to maintain all of their programs and policies which create differentiation within the province as long as these programs and policies do not discriminate against non-residents more than they discriminate against residents.

The word "territory" in the draft refers to the Northwest and the Yukon Territories, not to a territory within a province. This is consistent with the use of the term in the mobility rights section of the Charter and with the use of the word in the B.N.A. Act 1871. Also, section 20 of the Charter of Rights expressly states that the use of the word province in certain sections of the Charter includes the northern territories; thus elsewhere where province is used it does not include the territories and they must be expressly mentioned.

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3. The conduct prohibited is that which discriminates in a manner that unduly impedes the operation of the Canadian economic union (on the basis of province of residence ...). Thus, not all discriminatory legislation would be prohibited. Student loans granted only to the residents of a province, social welfare legislation applicable only to the residents of a province would not fall within the category. Equally, legislation for the protection of cultural or historic prospective would arguably not fall within the section. (Arguably the draft is not clear on this last aspect).

4. The conduct prohibited is that which discriminates in a manner that unduly impedes the operation of the Canadian economic union (on the basis of province of residence ...). Unduly is probably a fairly stringent test. Some guidance as to its meaning can be gleaned from its use in combines legislation where it has been interpreted by the courts as meaning "oppressively, excessively, inordinately", (recent sugar case - Atlantic Sugar Refineries et al v A.G.)

The word unduly has been put into the section to ensure that programs and policies such as affirmative action are not caught in the net of discriminatory practices. "Unduly" will allow the courts to look at the intent of legislation and interpret it in a flexible way. This should be considered a protection for the provinces.

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In other words, for a law or practice to be struck down, it must both discriminate on the basis of province of residence or province of origin or destination of goods, services and capital and must do so in a way that unduly impedes the operation of the Canadian economic union.

An argument is made that unduly also contains a quantitative requirement so that discrimination by small municipalities would not be caught but that larger ones would. Comparison to the use of this concept in combines legislation would indicate that this is so (e.g. rarely have prosecutions in that field been successful unless over 60% of the market was restricted). But whether a comparable interpretation would be imported into its use in S. 121 is speculative at best.

5. By law or practice

- the section would prevent discriminatory laws (statutes, regulations, and subordinate legislation) and government practices (e.g. purchasing policies),
- the section is intended to encompass not merely legislatures but all subordinate bodies, tribunals, judicial bodies, crown corporations, crown agents and proprietary corporations, municipalities, etc. The draft is arguably not clear on this point, although it was intended that the words Canada and province should include all subordinate bodies of whatever nature.

6. Directly or indirectly

- these words are intended to describe the type of discriminatory mechanism which might be used; they are not intended to sweep into the prohibited category impediments however indirect.
- an analogy could be drawn to the concept of direct and indirect control of corporations,

- the draft may not accurately reflect what was intended; we may want to redraft or to drop the reference completely.

7. Section 121 (2)

The wording follows that of the proposed Charter of Human Rights and is designed to ensure that public authorities will not have their hands tied by section 121(1) in the case of emergencies relating to disease or public disorder. If this section creates difficulties with the provinces, we are very willing to modify it as there is nothing of fundamental principle in it.

Section 121(3)

This section does not give new economic power to Parliament. It reocgnizes that Parliament, because of its national obligations, must pass laws which differentiate between provinces. There are countless examples of such laws, e.g. equalization, DREE, various farm programs, the Borden Line. This derogation to the principle of non-discrimination takes into account the need for economic intervention across the country by the Government of Canada just as section 121(1) does not prohibit provincial governments from pursuing different policies in different regions within a province. In fact, Parliament will have to declare its differentiated policies to be in the national interest other than in the case of equalization while provinces will not have to declare their differentiated policies to be in the provincial interest.

- there is no need for an express derogation to allow provincial policies promoting regional development since discrimination within a province is not prevented by the prohibition are in subsection (1),
- the derogation clauses (2) and (3) allow laws but not practices to discriminate in contravention of the principle because it is thought that as a policy matter derogations should only be allowed by means of express legislation.

- examples re: international obligations?

Section 121(4)

This section extends the present section 121 to services and capital as well as to goods. It prevents the establishment of tariff barriers but does not deal with non-tariff barriers. In itself, it is not a sufficient extension of the present section 121 to create the proper foundations for the Canadian economic union.

D. THE ROLE OF THE COURTS

Issue: Provinces worry that to have the possibility for the courts to interpret a constitutional provision like section 121 will be dangerous because, apparently:

a) it "transfers powers to the courts" on economic and social issues

b) the results would be unpredictable, and

c) the courts will probably hold against provincial powers.

Comment:

1. The role of the courts here would be exactly what it has been in relation to the present s.121 and the rest of the Constitution since Confederation -- to interpret its meaning in respect of particular laws of Parliament or legislatures. More generally, it is a role courts play in interpreting any law, written or unwritten, whether it is the Constitution, the Criminal Code, a provincial highways Act prohibiting driving "without due care and attention", or the common law of tort with its standard of "the reasonable man". Therefore, to be against possible interpretation and enforcement of the law by the courts is to be against the rule of law as we have known it -- "a government of laws and not of men".

2. In respect of constitutional interpretation, it is a wild exaggeration to say that judges replace legislators as law makers. One must recognize that the judicial process is carefully confined and controlled.

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a) Courts do not sit as "revolutionary councils" dispensing rules and orders at a whim, over any area of activity; instead, they only deal with such issues as private parties or governments happen to bring before them, and their decisions must be confined to those issues.

b) Courts generally are bound by previous decisions of the same or a higher court. While the Supreme Court considers itself no longer bound by this rule of stare decisis, it would clearly be a rare case in which the court would reverse itself. Thus courts only develop new interpretations to fill in "gaps" where they must apply the text of the Constitution to a new problem not previously considered by them.

3. There is no basis for assuming that judicial interpretation will generally work against provincial powers. It has certainly not been the history of the interpretation of our Constitution. While the provinces have not always won, it should be remembered that it was the courts who decided for example that:

a) the words "trade and commerce" do not include intraprovincial trade and commerce (1881)

b) Parliament could not enact Unemployment Insurance legislation, even in the Depression (1937)

c) Parliament cannot implement Canada's international obligations under treaties if the subject matter otherwise falls within provincial jurisdiction (1937).

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or more recently

d) that the trade and commerce power does not include the power

- to govern fair business practices (MacDonald v. Vapor(1976))

- to prescribe standards for beer in relation to certain labelling (Labatt's case, 1979)

- to prescribe grades for apples, where they are sold both locally and interprovincially (Dominion Stores case, 1979)

e) that Parliament's power to amend the "Constitution of Canada" does not include the power to alter the Constitution of the Senate (Senate Reform, 1979).

These courts have over the years upheld a vast array of provincial laws, giving the maximum scope to "property and civil rights" and minimizing limitations on provincial powers such as the requirement that taxation be "direct". The same Supreme Court that held invalid Saskatchewan's so-called "royalty" in C.I.G.O.L. upheld as a direct tax -- against any economic logic -- Saskatchewan's retail sales tax on materials being incorporated into houses built for resale. (Cairns Construction case (1960)).

BS:fg

The new head of federal power 91 2 would make it completely clear that federal jurisdiction over trade and commerce includes the regulation of services and capital as well as of physical commodities.

The new head 2.1 is designed to remedy two specific gaps in existing federal authority over trade and commerce. This provision would make it clear that Parliament can legislate to regulate competition and it would enable Parliament to regulate product standards to the extent necessary for the operation of the Canadian economic union. While Parliament regulates competition now, it does so through the exercise of its jurisidiction over criminal law. The amended section would give Parliament direct authority in this regard. Two recent decisions of the Supreme Court of Canada have brought into serious question the authority of Parliament to establish minimum food standards applicable to products sold across the country, particularly with respect to that portion of such products sold in the province of production. The proposed amendment would clarify Parliament's authority with respect to products standards generally where some of the product is sold outside the province of production.