

TABLE OF CONTENTS

1. Introduction	1
2. Arrangements Between States	2
2.1 The International Conference (ICAT)	2
<u>SECURING THE CANADIAN ECONOMIC UNION IN THE CONSTITUTION</u>	
3. Other Federations	10
3.1 United States	10
3.2 Australia	11
3.3 The Federal Republic of Germany	13
3.4 Switzerland	14
3.5 India	14
4. The Canadian Federation	14
4.1 Ambit of Section 121	15
4.2 Federal and Provincial Legislative Jurisdiction	17
4.3 Implications for the Operation of the Economic Union	19
4.4 An Institutional Perspective	21
4.5 Conclusions	21
<u>DISCUSSION PAPER SUBMITTED BY</u>	
5. General <u>THE GOVERNMENT OF CANADA</u>	24
6. Conclusion	27

ANNEXES

- A. Illustrative Survey of Actual or Potential Restrictions on the Interprovincial Mobility of Goods, Services, Labour and Capital within Canada
- B. Summary of Constitutional Proposals Directly Related to Economic Mobility within Canada

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POWERS OVER THE ECONOMY:  
SECURING THE CANADIAN ECONOMIC UNION IN THE CONSTITUTION

TABLE OF CONTENTS

	Page
1. Introduction . . . . .	1
2. Arrangements Between States . . . . .	5
2.1 The International Trading System (GATT) . . . . .	6
2.2 An Economic Community of Sovereign States (EEC) . . . . .	8
3. Other Federations. . . . .	10
3.1 United States . . . . .	10
3.2 Australia . . . . .	11
3.3 The Federal Republic of Germany . . . . .	13
3.4 Switzerland . . . . .	13
3.5 India . . . . .	14
4. The Canadian Federation . . . . .	15
4.1 Ambit of Section 121 . . . . .	16
4.2 Federal and Provincial Legislative Jurisdiction . . . . .	17
4.3 Implications for the Operation of the Economic Union . . . . .	18
4.4 An Institutional Perspective . . . . .	21
4.5 Constitutional Proposals Related to the Canadian Economic Union . . . . .	23
5. General Approach . . . . .	24
6. Conclusion . . . . .	27

ANNEXES

A. Illustrative Survey of Actual or Potential Restrictions on the Interprovincial Mobility of Goods, Services, Labour and Capital within Canada . . . . .	28
B. Summary of Constitutional Proposals Directly Related to Economic Mobility within Canada . . . . .	43

POWERS OVER THE ECONOMY:

SECURING THE CANADIAN ECONOMIC UNION IN THE CONSTITUTION

1. Introduction

The purpose of this document is to consider the means whereby the Canadian economic union could be better secured in the Constitution.

An economic union is an entity within which goods, services, labour, capital and enterprise can move freely, that is, without being subject to fiscal and other institutional barriers, and which is endowed with institutions capable of harmonizing the broad internal policies which affect economic development and of implementing common policies with regard to the entity's external economic relations. Moreover, the form which the political institutions of our economic union should take is determined since Canada is, and is destined to remain, a federal state. Accordingly, new constitutional provisions to safeguard and strengthen the Canadian market must take into account the other goals of the Federation, such as the preservation of its linguistic and cultural diversity, and the sharing of income and wealth among citizens and regions.

Canada has achieved a high degree of economic integration over the past century, but the existence and operation of a common market within its territory is not adequately safeguarded in its basic law. The two orders of government have the constitutional authority to restrict in numerous ways the free movement of persons, goods, services, capital and enterprise within the country.

Although the B.N.A. Act does not contain an explicit economic definition of the federation, the following description can be drawn from a number of provisions, as interpreted so far by the courts:

- a customs union, since provincial legislatures are prohibited from levying internal border taxes and Parliament is empowered to establish a common external tariff;
- an imperfect common market for goods — imperfect because Section 121 probably does not prohibit non-tariff barriers to interprovincial trade, and because judicial interpretation has limited the federal trade and commerce power;
- an imperfectly safeguarded common market for capital and enterprise, since provinces can impede the movement of some financial assets and business establishments across interprovincial borders;
- distinct and "protectable" provincial markets for labour and most other services, except in federally regulated industries;

- a highly integrated economic union nonetheless, by virtue of federal jurisdiction over taxation, money and banking, interprovincial trade, commerce and transportation, agriculture, communications, weights and measures, etc.

The Government of Canada is of the view that, of the five broad functional categories suggested in Powers over The Economy: A Framework for Discussion, the securing of the economic union should receive priority attention in the process of constitutional renewal. This view is founded on two basic realities.

The first reality is political. To be a citizen of Canada must be dynamic reality rather than a static abstraction, a reality that extends beyond the realm of political and legal institutions to the vital aspects of one's material existence. As the Government of Quebec argued twelve years ago in a proposal on the general aims of the Constitution, "all Canadians must be full citizens, having in principle the same rights, the same responsibilities and the same opportunities for self-fulfillment". To the extent compatible with federalism, this basic equality of all citizens must apply to economic affairs, under provincial law as well as under federal law. Wherever they may have been born or have chosen to reside in the country, Canadians should be free to take up residence, to acquire and hold property, to gain a livelihood, to invest their savings, to sell their products and purchase their supplies in any province or territory of Canada, provided they abide by the laws of general application of that province or territory.

There may be circumstances, of course when the pursuit of other political, social, economic and cultural goals justifies some restriction of the economic freedom of Canadians. But the freest possible access to the national market should be inherent to Canadian citizenship, and therefore secured in the Constitution. Any provincial authority should bear in mind that whenever it discriminates against the residents of other provinces, it exposes its own residents to retaliatory discrimination by the governments of these other provinces; and whenever it seeks to retain the ability to restrict the mobility of other provinces' residents, it simultaneously argues that the freedom of its own residents should be subject to curtailment by nine other governments. As for the federal authority, while it would be imprudent to limit its ability to meet the varying needs and aspirations of different parts of the country in a differentiated way, it should always be aware that such use of its powers can be quite contentious since it inevitably raises difficult problems of interpersonal and interregional equity.

The second reality is economic. It was admirably expressed in A Future Together, the main report of the Task Force on Canadian Unity:

"Our analysis indicates that greater economic benefits should result from increasing levels of integration. Some of these benefits are associated specifically with the integration of regional economic activities into a larger market. For example, larger markets provide a greater scope for the diversification of sectors and specialization, resulting in a better allocation of the factors of production. Competition is enhanced; industries can take advantage of economies of scale; and a larger and more efficient financial sector may be created. Moreover, the availability of a more diversified and broader natural resource base is an important benefit - when the market for one commodity is low it may be counter-

balanced by the more favourable position of other commodities.

"Other benefits related to size come into play, particularly when integration takes the form of federal union. We have in mind a variety of aspects related to the efficiency and effectiveness of the larger public sector, such as the economies of scale in the delivery of public goods (for example in national defence), and a greater scope for interregional policy coordination which would take into account programs whose impact could not be restricted to a single region. Also significant is the enhanced capacity of the public sector to raise funds through external borrowings.

"In a federal union the regions can expect their economies to perform better as a result of the movement of labour, capital, goods and services. Other advantages are the greater chance of restraining undue competition among the regions for development projects and the improved leverage of the regions in securing international trade advantages. Finally, as we have noted, a federation allows for interregional transfers of funds through income support measures and adjustment assistance to the regions.

"While such benefits may be difficult to measure precisely, they are nevertheless very real, and they are reflected in the standard of living Canadians have long enjoyed. In a nutshell, integration creates a surplus, because the whole is greater than its parts. And the surplus, using the central government as an instrument can be redistributed so that the strong parts help the weak to the benefit of the whole."

The Task Force also points out that Canada, given its geography, linguistic duality and cultural diversity, cannot be single-minded in its pursuit of economic integration — indeed, no country can afford to be. But it argues that there is still ample scope to increase the "surplus" or benefits arising from the Canadian economic union while keeping attendant costs at a reasonable and acceptable level.

The Federal Government not only shares that view, but considers that there is some urgency in safeguarding and strengthening our economic union, given prevailing trends in the world economy. Technological developments, the internationalization of factors of production, the need to get the benefits of greater economies of scale and specialization of production facilities, have generated considerable pressure for larger markets. There has been continuing liberalization of market access among the main industrialized countries through major tariff reductions. A number of countries have combined their market power through the creation of free trade areas or common markets. These and other developments in the world market place, including the constant emergence of new exporters, have made unavoidable structural adjustments of numerous individual sectors and lines of production within the Canadian economy. These adjustments run the risk

of being less effective and costlier if we are unable to exploit fully the potential strength of our national market.

Of particular concern, in this respect, are signs of economic segmentation within Canada which run counter to observed trends in other economic entities. Protectionism among provinces, and weakening of the federal government's ability to promote balanced economic development, can involve significant efficiency losses for Canada as a whole, and hence for each and every one of its parts:

- higher supply costs, fragmentation and stunted growth for firms, and diseconomies of scale which enhance import penetration and reduce the international competitiveness of domestic production;
- diversion of trade to foreign suppliers, when fragmentation results in neither in-province nor out-of-province suppliers being able to service provincial markets on a competitive basis;
- lower incomes and lesser employment opportunities for residents of all provinces;
- higher burdens upon national and provincial taxpayers, due to higher cost of public procurement and lower tax yields.

The converse, of course, applies. The competitiveness of Canadian industry and hence the incomes and employment opportunities of Canadians will be significantly enhanced if we succeed, not only in resisting trends towards segmentation of our domestic market, but in devising new constitutional arrangements which would make closer economic integration possible and compatible with the preservation of our federal system. It should be noted that any increase in the economic surplus generated by the Canadian economic union could only improve our ability to reduce regional economic disparities, provided adequate mechanisms to do so are in place.

The course of Canada's economic development as well as international experience, particularly in the past three decades, should give governments the confidence and the foresight to proceed in this direction, with due care of course, but also with boldness and imagination. Canadians owe much of their current prosperity to the economic union, however imperfect, established 113 years ago by the Fathers of Confederation. Also, the general post-war movement towards freer trade, which is now enshrined in international law, has resulted in enormous productivity and income gains for Canada, regional markets like the European Economic Community, and the world economy as a whole. Economic history and theory points to the benefits that would flow from strengthening and better safeguarding of the Canadian economic union.

In this regard, a survey of relevant provisions of the General Agreement of Tariffs and Trade (GATT), the Treaty of Rome, the constitutions of other federal states and that of Canada may help to bring out some of the deficiencies in the main operating rules of the Canadian economic union. There are, of course, basic differences between the nature, aims and institutions of the Canadian federation and that of a multilateral trade agreement like the GATT, which is based on reciprocity of benefits and a mutual balance of international rights and obligations, or a common market like the EEC, established by a treaty creating a community of sovereign states, and even other federations

like the United States, Australia, the Federal Republic of Germany, Switzerland and India, which have their own particular history, geography, social make-up and political traditions. Nevertheless, such comparisons may provide us with useful background and a broad perspective.

## 2. Arrangements Between States

The aspects of multilateral and regional economic arrangements of greatest interest for Canadian constitutional renewal are their fundamental principles and objectives. In addition, it is useful to review how major issues are dealt with, such as government aids and incentives, government procurement, technical regulations, public enterprises, commodity trade and the mobility of labour, capital and enterprise.

Government assistance, either through the fiscal system or direct or indirect subsidies, is widely used for the promotion of social and economic policy objectives such as regional development, sectoral adaptation, enhancement of industrial innovation and revenue stabilization. The legitimacy of such programs is recognized in international economic agreements, but concern about costly competitive subsidization between national treasuries and the effects which government subsidies may have on the trade interests of other countries have led to the negotiation of international rules to deal with them.

Government contracting for goods and services now represents a substantial portion of the markets available to many industrial sectors, particularly high technology industries, and this market power is considerably increased if agencies and entities directly or indirectly controlled by governments are included. Concerns about restrictive government purchasing practices and their impact on the efficiency of world trade and production patterns have led to the development of disciplinary provisions in international law.

In modern society, technical regulations are essential to protect human and animal life and health; to ensure that products offered to the consumer meet the necessary levels of quality, purity, technical efficiency and performance; to protect the environment; and for reasons connected with safety, national security, and the prevention of deceptive practices. Technical regulations are adopted by governments at all levels: central, provincial and municipal. However, such regulations can create significant distortions or obstacles to trade.

Governments often choose to engage directly through various institutions, in production and trade, including the retail level. A technique often used to regulate directly or indirectly imports or exports and the purchase and sale of certain goods and services is the establishment of public enterprises, with or without monopoly control. As yet, governments have shown little inclination to bring these governmental activities under common international discipline, but they do receive some specific attention in both the GATT and the EEC.

International commodity trade has become important for most national economies and for international development. Indeed, commodity trade issues have come to play a substantial role in the management of the international economy and have contributed to a heightened awareness of the degree of economic interdependence in the international community.

Finally, some international economic arrangements, notably common markets, attempt to go beyond the benefits of increased trade in products to capture efficiency gains arising from free movement of factors of production — labour, capital and enterprise. Accordingly, the EEC is a useful reference for this more advanced form of economic integration.

In reviewing international arrangements, one must keep in mind that these systems experience many operational problems which examination of their legal foundations does not necessarily reveal. The GATT, for example, does not require adherence of member countries to its more than one hundred subsidiary agreements, and its effectiveness in stemming the recent resurgence of protectionism is open to question. Similarly, there are many weaknesses in the actual operation of the European Economic Community, notably its continuing inability to develop efficient agricultural policies, remove non-tariff barriers to the mobility of factors of production, and harmonize broad economic policies. Many of these weaknesses may be attributed to the limited effectiveness of institutions established to implement such international arrangements. Notable, in the case of the EEC, are the delays, lengthy consultations and protracted negotiations resulting from the quasi-confederal nature of its decision-making (e.g., legislative and regulatory) processes and the very limited authority of its executive organs. Nevertheless, the overall effect of these arrangements has unquestionably been to facilitate the expansion and to enhance the efficiency of trade and production, both at world level and within the broad areas more immediately affected by the GATT and Western Europe in the case of the Treaty of Rome.

### 2.1 The International Trading System (GATT)

The GATT is the key multilateral instrument that lays down agreed rules for international trade. As such, it is the primary international safeguard for the maintenance of an open global trading system. Although the GATT is now a complex set of agreements incorporating rights, obligations and trade concessions, the fundamental principles and aims of the Agreement are comparatively few, namely the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce. The two key operating rules are the unconditional non-discriminatory treatment of like products originating in or destined for the countries of all other contracting parties (Article I) and the national treatment on internal taxation and regulations, including the principle that these should not be applied to imported or domestic products so as to afford protection to domestic production (Article III).

There is a GATT Agreement on Subsidies/Countervailing Measures aimed at reducing or eliminating trade restrictions or distortions arising from government subsidies and of countervailing measures, and establishing a framework of rights and obligations to deal with these effects. Under it, any form of subsidies (e.g., government financing of commercial enterprises, government support services and facilities, R & D fiscal incentives, government participation in or provision of equity capital, etc.) granted by any government or any public body within the territory of a signatory is subject to international rules. Except for export subsidies on non-agricultural products, which are prohibited, it is not subsidies per se but their effects which are objectionable, whether the effects are of an import substituting or of an export stimulating nature.

Concerning public procurement, there is an agreement based on the principles of non-discrimination and national treatment to be accorded to products and suppliers of signatory countries. The scope and coverage of the agreement on government procurement extends to any law, regulations, procedure and practice regarding the procurement of products and services incidental to the supply of these products. It applies to a negotiated list of purchasing agencies and entities of central governments and to contracts of a value of about \$220,000 and more. Further negotiations are envisaged to broaden the agreement so that it might include service contracts and products such as power generating, telecommunications and transportation equipment.

The GATT Agreement on Technical Barriers to Trade prohibits the adoption or application of technical regulations and related activities with the purpose of creating "obstacles to international trade" and accords non-discriminatory and national treatment in this regard to imports of like products. Recognizing that technical regulations introduced for legitimate domestic purposes may nevertheless adversely affect imports, the agreement obligates signatories to ensure that technical regulations and related activities do not have the "effect of creating unnecessary obstacles to international trade".

State trading enterprises are subject to the GATT rules (Article XVII) which require that public enterprises act in a manner consistent with the principles of non-discrimination and make purchases or sales solely in accordance with commercial considerations and afford the enterprises of other countries adequate opportunity, in accordance with customary business practice, to compete for participation for such purchases or sales.

Existing GATT rules with respect to commodity trade limit, in the main import restrictions on agricultural or fishery products to what is "necessary" for enforcement of governmental measures which operate an effective domestic supply management program (Article XI) and to measures undertaken in pursuance of obligations under bona fide intergovernmental commodity agreements (Article XX). As to export controls, existing GATT rules are relatively loose and permissive.

## 2.2 An Economic Community of Sovereign States (EEC)

The Treaty of Rome establishing the EEC contains a clear statement of principles and objectives, including (Article 3):

- elimination as between Member States of customs duties and of quantitative restrictions in regard to the importation and exportation of goods as well as "all other measures with equivalent effect";
- the establishment of a common customs tariff and commercial policy towards third countries;
- the abolition, as between Member States, of impediments to the free movement of goods, persons, services and capital;
- the establishment of common agricultural and transport policies;
- the establishment of a system ensuring that competition shall not be distorted in the common market;
- the implementation of procedures allowing co-ordination of the economic policies of Member States and resolution of payments imbalance among them; and,
- the approximation of their respective laws to the extent necessary for the functioning of the common market.

In addition, the principle of national treatment is clearly spelled out in the rules related to fiscal measures (Article 95) and the principle of non-discrimination is specifically reiterated in numerous sections.

These principles are carried through explicitly in many of the specific provisions dealing with the classes of activity brought under the discipline of the Treaty. For example, government aids which distort or threaten to distort competition by favouring certain enterprises or certain productions are regarded as incompatible with the development and functioning of the common market if they adversely affect trade between member states. Even certain aids which are specifically allowed for, such as consumer subsidies and regional development grants, must be extended without discrimination by origin of goods and not be contrary to the common interest.

Although the Treaty of Rome did not contain any explicit reference to the question of government contracting of goods and services, the Community had concluded, by 1976, an agreement based on the principle that restrictions to the free flow of goods contracted by public authorities, whether national, regional or local, are contrary to the provisions of the treaty prohibiting quantitative import restrictions and "all measures with equivalent effect" (Article 30). The scope and coverage of this agreement is still, however, incomplete as it does not apply to certain sectors such as defence, transportation, energy and telecommunications, nor to contracts below approximately \$220,000.

Another example of the application of the fundamental principles concerns the use of technical regulations for the purpose of restricting imports between member states. This is also prohibited as a measure with effects equivalent to quantitative restrictions unless they can be justified on grounds such as public safety, the protection of human or animal life or health, or the protection of national treasures. Even such restrictions must not "constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States" (Article 36).

The Treaty of Rome also directs Member States to progressively adjust any state monopolies of a commercial character in such a manner as to ensure the exclusion of all discrimination between nationals in regard to conditions of supply or marketing of goods (Article 37). This would appear to prohibit differential mark-up of domestic and other community products. This is reinforced by a provision clearly laying down that the rules governing competition apply equally to private and public enterprises. These rules are somewhat qualified in the case of state service monopolies or those of a fiscal character "... to the extent that the application of such rules does not obstruct the fulfillment of the specific tasks entrusted to such enterprises ..." without, however, affecting the development of trade "to such a degree as would be contrary to the interests of the community" (Article 90).

As for commodity trade, the Treaty of Rome prohibits as between member states, "quantitative restrictions on exportation and any measures with equivalent effect" (Article 34) and the introduction of "any new customs duties ..." and the increase of "such duties or charges as they apply in their commercial relations with each other" (Article 12). The European Court of Justice has interpreted this prohibition liberally. Thus all commercial regulation of Member States susceptible of impeding directly or indirectly, actually or potentially, intra-community commerce is considered a measure of equivalent effect. It should be noted that the marketing of agricultural products is regulated by the common agricultural policy, an area where efficiency gains arising from the operation of the common market have been less than impressive, and where the EEC's related commercial policies have been a significant source of distortion in international trade patterns.

Other Treaty of Rome provisions of major interest are those bearing upon the mobility of factors of production. The Treaty sets out explicitly and rigorously the conditions for the free circulation of labour, services, capital and enterprise by:

- abolishing all discrimination based on the nationality of workers of member countries concerning employment, remuneration and other conditions of work;

- establishing the right to settle freely, including the right to engage in any economic activity and to establish or manage companies and other enterprises;
- providing for the removal of restrictions on the offering of services by insurance companies, banks, other financial institutions, wholesale and retail trades and professionals (work is continuing on the co-ordination of regulations in member countries concerning the practice of professions); and,
- removing progressively restrictions on the movement of capital, with some exceptions for agreed protective measures.

### 3. Other Federations

In federal states economic union is usually achieved by the conjunction of two mechanisms: explicit provisions in the Constitution securing economic mobility within their territory, and the nature and scope of economic powers conferred on the federal and state authorities respectively.

#### 3.1 United States

There are two explicit provisions in the United States Constitution relevant to the establishment of an economic union. Section 2 of Article IV provides:

"the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states",

and the 14th Amendment provides:

"no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..."

Section 2 of Article IV prevents state legislatures denying to the residents of another state, merely because they reside elsewhere, the right to pursue a trade or calling, or the right to hold property on terms different from those pertaining to their own residents. It also prevents discriminatory taxation. The 14th Amendment has been interpreted to guarantee the right to move freely throughout the country ("the right to travel") as a right of citizenship. Thus state legislation establishing durational residence requirements for welfare benefits, voting rights, and state employment have been declared invalid. Not all distinctions are invalid, however. A state can single out non-residents for different and more onerous treatment if they can prove that it is necessary to serve a "compelling state interest" and that no less restrictive alternatives could have achieved the same purpose. Thus, durational residence requirements for administrative reasons (necessarily short) are valid, higher university fees for out-of-state residents are valid, special bar exams for out-of-state law students are valid but requirements that a

person must be resident in a state to be a member of the bar are not.

It should also be noted that while the states are entitled to levy import and export duties, this can only be done with the consent of Congress (Section 10 of Article I). Thus in practice the import-export duty power is attributed to the federal authority.

From a common market point of view, the most important feature of the United States Constitution is, of course, the breadth which has been given to the commerce clause (textually limited to international and interstate commerce). It has been interpreted as supporting federal legislation relating to, among other matters, "interstate transportation and communications" (there is no specific head of jurisdiction in the U.S. Constitution dealing with this). More importantly, it has by means of the Shreveport doctrine been interpreted to allow Congress to legislate with respect to intra-state activities which affect interstate commerce. Thus, when there is some connection to interstate trade, Congress may legislate with respect to: labour relations and cognate matters, hours of work, labour arbitration, retirement pensions, unemployment, local as well as interstate marketing including the fixing of prices, the production of commodities, and generally every phase of industrial production organized on a multi-state basis.

In addition, the commerce power has been interpreted as placing a limitation on State powers: the States may not legislate so as to place a "burden on interstate commerce". Thus the exercise of State powers, including taxing powers, may be struck down if they impede interstate commerce (e.g., States cannot tax the out-of-state business of a local industry, and laws designed to favour local industries are unconstitutional).

### 3.2 Australia

The Australian Constitution contains several explicit provisions relevant to the establishment of a common market.

Section 92 is most important. It provides:

"intercourse among the states.. shall be absolutely free."

This guarantee has been interpreted broadly by the courts and it binds not only the states but also the Commonwealth. It prevents laws which directly restrict trade, but not those which merely create remote and indirect obstacles. "Trade" has been interpreted to include not only traffic in commodities and energy products, but also the transmission of information, the movement of persons and investment. Thus, in Australia there is little scope for either the Commonwealth or the States to create, in a direct manner, impediments to interstate trade. However, the provision has become a source of difficulty in one respect. It has become, as a result of judicial interpretation, more than a "free border" clause; it has become a "free enterprise" clause

as well. This interpretation has sometimes prevented governments from legitimately regulating business activity in the public interest. Thus, the section prevented the creation of federal monopolies over air transportation and banking, and it has inhibited the creation of some marketing boards.

Section 99 prevents discrimination by the Commonwealth. It provides:

"the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof".

Also, under Section 102, Parliament may forbid preferences given by the States with regard to the operation of state railways. In addition, Section 117 provides:

"a subject... resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if... he were resident in such other State."

This clause, modelled on the privileges and immunities clause in the United States Constitution, was designed to prevent discrimination on the basis of State residence. Such discrimination was seen by the framers of the Constitution as inconsistent with the common citizenship being created. Nevertheless, Section 117 has not played a significant role; a very narrow and literal interpretation has been given to it by the courts.

As in other federal countries the powers conferred on the federal authority are very important for the establishment of a common market. Moreover, the exercise of federal taxation powers is expressly required to be uniform throughout the Commonwealth (s. 51(iii)) and cannot be used to "discriminate between States or parts of States" (51(ii)).

The trade and commerce power, 51(i), like that in the United States, is limited to interstate and international trade and commerce. The power has been interpreted as recognizing the need to regulate some commercial activities within a State when connected to inter-provincial or international trade, but it has not been stretched to the lengths of the Shreveport doctrine in the United States. An important head of federal legislative jurisdiction is section 51(xx) which confers authority with respect to foreign corporations and trading corporations (foreign or domestic). This power, combined with that over insurance and interstate commerce, gives the federal government significant authority in fields such as competition and securities regulation. The Commonwealth also has jurisdiction over industrial disputes extending beyond the boundaries of any one State.

Under the Constitution (ss. 86-90) the Commonwealth Parliament was given exclusive powers to impose duties of customs and excise (the major source of revenue at the

time it was written). This has been interpreted as preventing the States levying a wide variety of taxes which in other federations are of common resort: sales and purchase taxes, levies on the production of goods, taxes on the receipt of monies paid for the supply of goods, and other indirect taxes which have some relation to the quantity or volume of goods manufactured or sold.

### 3.3 The Federal Republic of Germany

There is at least one explicit provision in the Constitution of the Federal Republic of Germany dealing with mobility. Article 11(1) provides:

"All Germans shall enjoy freedom of movement throughout the federal territory."

Under sub-article (2) the right may be restricted by federal law, e.g., to combat epidemics, to protect young people from neglect, and to prevent crime.

Another article which may be relevant is 12(1). It provides:

"(1) All Germans shall have the right freely to choose their trade, occupation or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law."

The extent to which these provisions prevent interstate (Laender) barriers is not known but the answer may be academic since exclusive legislative jurisdiction is accorded the federal government over, "the unity of customs and commercial territory," "the freedom of movement" and "the exchange of goods".

In addition the federal government has the right to legislate on matters of concurrent federal and Land jurisdiction to the extent that a need for regulation by federal legislation exists because:

- a matter cannot be effectively regulated by the legislation of individual Laender; or
- the regulation of a matter by a Land law might prejudice the interests of other Laender or of the people as a whole; or
- the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of any one Land, necessitates such regulation.

### 3.4 Switzerland

The provisions of the Federal Constitution of Switzerland are designed to preserve the freedom of trade and industry and of movement, subject only to a minimum of government intervention. The federal

role in economic matters predominates. The cantons have only limited powers to affect the location of industry and economic development.

The principal guarantees of free movement are found in Article 31 of the Federal Constitution. Freedom of trade and industry is guaranteed throughout the territory of the Confederation, subject to limitations. Cantonal regulations concerning the exercise of trade and industry and the taxes on such activities are not to depart from the principle of freedom of trade and industry except where the Federal Constitution provides otherwise. Cantonal monopolies are excepted.

Article 31 authorizes the Confederation to take measures to promote the general welfare and economic security of its citizens, to favour specific economic sectors or professions, to protect agriculture, and to protect the regions whose economy is threatened; but in so doing, it is not to depart from the principle of the freedom of trade and industry except where necessary.

Article 45(1) provides that "Every Swiss citizen has the right to establish himself in every part of the Swiss territory ..." The cantons may enact laws on establishment but these require the approval of the Federal Council, the executive arm of the full government. Also, the canton to which a person moves may refuse to allow him to establish himself if he is unable to work or has been "a permanent burden to public relief". The right of establishment may exceptionally be refused to criminals and may be withdrawn from habitual criminals.

Article 60 provides "all cantons are bound to afford all Swiss citizens the same treatment as their own citizens in the fields of legislation and of judicial proceedings". Article 33 authorizes federal legislation to govern the certificates of professionals insofar as their validity throughout the Confederation is concerned. A new constitutional provision adopted in 1977, Article 42, gives the federal Parliament the authority to introduce framework legislation to harmonize the basic element of tax law among the 26 cantonal governments. This authority includes the power "to enact regulations, by means of legislation, against arrangements with taxpayers granting unjustified tax advantages", which could provide the basis for regulating cantonal tax incentives for industry.

### 3.5 India

The authors of the Indian Constitution borrowed from both the United States and the Australian experience. Article 301 provides:

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

The Indian Constitution has followed the Australian and American approaches in interpreting the words "trade, commerce and intercourse" of Article 301 quite broadly to include transportation and transportation facilities, movement of persons, etc. Similarly, the Australian example is followed in interpreting the freedom guaranteed in Article 301 as implying that neither level of government can adopt direct measures of constraint. However, the opening words of Article 301 subject this freedom to those other provisions of the Constitution which

enable the federal Parliament to enact laws restricting the freedom of trade and commerce when "required in the public interest" and as long as they are not discriminatory. Discriminatory restrictions, however, are permissible for purposes of national defence, where state subsidies are involved, or where an emergency shortage of goods exists. Since Parliament is the sole judge of whether or not a state of emergency is present, and since the courts may not intervene, the Constitution actually empowers Parliament to pass preferential and discriminatory legislation. The states may impose "reasonable" restrictions of a local nature, but such restrictions must be non-discriminatory and in the public interest; moreover, they require presidential sanction. Further, the burden of establishing that the state law is both reasonable and in the public interest lies with the state. Also relevant is Article 19(1)(g) which provides:

"All citizens shall have the right: (g) to practice any profession, or to carry on any occupation, trade or business".

The constitution confers on the federal Parliament exclusive legislative jurisdiction over "trade and commerce with foreign countries" and over "interstate trade and commerce". The states have jurisdiction over intrastate commerce. However, certain fields of commerce are treated as exceptions to the above and are matters of concurrent jurisdiction with federal paramountcy. These include regulation of the production, supply and distribution of "the products of any industry where the control of such industry... is declared by Parliament by law to be expedient in the public interest". In addition, certain activities which in other constitutions are matters of shared federal-state jurisdictions are specifically assigned in toto to federal jurisdiction even in the case of intrastate activities. This is the case for railroad and truck transportation, inland and international shipping, air transport, and banking, among others. Thus, for a number of reasons, the states have very limited trade and commerce powers.

#### 4. The Canadian Federation

Despite judicial pronouncements that section 121 and enumerated federal powers provide evidence that one of the objectives of Confederation was to form "an economic unit of the whole of Canada", it cannot be said that the B.N.A. Act establishes explicitly an economic union. Of course, an economic union largely exists; but what degree of economic mobility and integration is constitutionally secured?

#### 4.1 Ambit of Section 121

Section 121 is the only explicit provision of the B.N.A. Act relevant to the flow of goods between provinces. It provides that "All Articles of the Growth, Produce and Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

Court interpretation has made it clear that section 121 prohibits the imposition of customs duties on the movement of goods between provinces, but it has not been used to preclude non-fiscal impediments to the movement of goods, nor would it seem to prohibit the imposition of other kinds of taxes which might impede the free flow of goods.

There is some indication in the jurisprudence that section 121 might be capable of a broader meaning so as to prevent trade regulations that in essence related to provincial borders. This interpretation stems from Mr. Justice Rand's comments in the case Murphy v. C.P.R. and A.G. Canada. Although Mr. Justice Rand's significant departure in interpreting section 121 has been accepted by four of the nine judges of the Supreme Court of Canada in the recent Reference re Agricultural Products Marketing Act and two other Acts, it is certainly doubtful under the existing state of authorities that section 121 would be interpreted to prohibit non-tariff barriers on goods. The only certitude is that this section prohibits customs duties affecting interprovincial trade in provincial products. Also, it is to be noted that section 121 has been generally thought to apply equally to Parliament and provincial legislatures, although this is not completely clear. An argument can be made that Parliament's enumerated powers (e.g., taxation and trade and commerce) can override section 121 because those powers are given by the terms of the opening clause of section 91 "notwithstanding anything in this Act". In addition, the decision of the four Justices of the Supreme Court in the aforementioned Agricultural Products Marketing Act Reference indicated that the application of section 121 may be different depending upon whether federal or provincial legislation is involved.

Section 121 has additional shortcomings as a guarantee of free movement. The wording reflects the historical situation that the provinces, which formerly had customs duties, were to abolish such duties on trade with one another. At the same time, the power to enact a uniform tariff against other countries became federal by virtue of section 91(2), 91(3), and 122. The wording overlooks the possibility of taxes on commodities imported from abroad, hence not "of the Growth, Produce or Manufacture of any of the Provinces", as they cross provincial borders. Thus,

it is not all products within a province that are to be admitted free. Those originally imported from abroad might be subjected to a provincial tax based on section 92(2) and 92(9). This possibility may be remote since it would be difficult to frame such taxation in a way that did not offend Parliament's trade and commerce power, or that did not constitute indirect taxation.

A more fundamental defect is that the wording of section 121 makes no explicit reference to services, to capital, to enterprise, or to persons. In effect, section 121 is directed to the formation of a customs union, not a common market. This narrow scope is quite explainable in the context of the 1867 B.N.A. Act since the framers of that document thought they were conferring on the federal government jurisdiction over all trade and commerce as well as all economic powers necessary for the creation of a highly integrated economic union.

#### 4.2 Federal and Provincial Legislative Jurisdiction

The Canadian economic union, in fact, has been created more by the allocation to Parliament of certain exclusive powers than by Section 121. Exclusive federal jurisdiction on international and interprovincial trade has meant that in general provincial trade regulations which create direct barriers to the interprovincial movement of goods are ultra vires. It is not always easy to detect what forms of legislation do create these barriers, but it is clear, for example, from A.G. Manitoba v. Manitoba Egg and Poultry Association that a local board cannot impose quotas on goods entering the local market from an extra-provincial source, and from Central Canada Potash v. Govt. of Saskatchewan that provinces cannot regulate the sale-price of goods in the extraprovincial market. Perhaps the most interesting case is that of Crickard et al v. A.G., B.C. where a British Columbia law made it obligatory for each egg imported into the province to bear the name of its country of origin in ink. Since this was a very burdensome operation, the indirect effect of the law was to make it virtually impossible to import eggs into British Columbia. The Act was accordingly declared invalid.

At the same time, of course, the Privy Council's "compartmentalizing" of federal and provincial trade powers and its interpretation that Parliament's authority does not encompass the regulation of "the contracts of a particular business or trade within a province", together with the broad scope of provincial legislative jurisdiction pursuant to a number of headings but most importantly with respect to property and civil rights (92(13)) has meant that there is great capacity for provincial legislation to create barriers to trade. The most recent example, following on the decision in the Labatt's "Special Lite" case, is the potential barriers that can be created by different provincial product standards. In some sense, all exercise of legislative authority can create barriers. Some impediments, however, are more direct and restrictive than others and of a kind more usually classified as non-tariff barriers (i.e., those closely connected with trade).

The federal trade and commerce power may have some inhibiting effect on some kinds of provincial taxing powers. Thus, in the C.I.G.O.L. case, the Supreme Court found the Saskatchewan legislation invalid in part on the ground that it was designed to fix the price of oil in the export market and, therefore, constituted the regulation of interprovincial and international trade. However, no decision has declared provincial taxation invalid solely on the ground that it infringed the federal trade and commerce power and, indeed, in most cases it will be difficult to so characterize provincial taxation legislation.

The limiting of provincial taxing powers to direct taxation has been more effective in preventing provincial tax barriers to the free circulation of goods, since it has precluded provinces from imposing customs, excise, export or commodity taxes, which have all been characterized as indirect. However, indirect taxation has received such a narrow construction that the judicial test for direct taxation has been met in a large measure simply by properly drafting the provincial legislation in question. Accordingly, there is considerable scope for provincial taxes which create barriers to trade.

Exclusive federal jurisdiction over inter-provincial and international transportation guarantees some aspects of the free movement of goods and people. Thus, it will be recalled that in the Winner case the Privy Council denied to New Brunswick the power to regulate the New Brunswick portion of the route of a bus line which originated in the United States and passed through New Brunswick en route to Nova Scotia. This head of jurisdiction, of course, has no relevance to the free movement of capital and only limited relevance to the free movement of persons or services.

The free movement of capital is assured to a large extent by virtue of Parliament's exclusive authority over currency and coinage -- 91(14), banking, incorporation of banks and the issue of paper money -- 91(15), savings banks 91(16), legal tender -- 91(20), and its authority to borrow money on the public credit - 91(4). It is abundantly clear that provincial legislatures could not control the movement of capital by establishing separate monetary systems, currency controls, or banks. However, de facto provincial control over near-banks and constitutionally valid control over financial institutions other than banks gives the provinces considerable powers in this field, as does provincial jurisdiction over securities marketing. Whether or not "trade and commerce" includes regulations respecting the flow of capital, as opposed to the flow of commodities, is not clear. It is possible that some restriction of provincial impediments to the flow of capital may arise out of the federal trade and commerce power.

#### 4.3 Implications for the Operation of the Economic Union

In considering the implications of present constitutional law for the operation of the Canadian economic union, two points should be borne in mind. The first is that the ability of governments to restrict economic mobility should be assessed in terms of its potential impact upon the country's future development as well as of its actual

impact in the past. The second point concerns the combined and cumulative impact of impediments to economic mobility and interchange: individual measures which may seem by themselves relatively insignificant may lead, when taken together, to significant market fragmentation and efficiency losses.

That there exist today numerous restrictions to economic mobility within Canada, originating in both the federal and provincial domains, should come as a surprise to no one, given the deficiencies and uncertainties of our constitutional framework. An illustrative survey of such restrictions is annexed to this document (Annex A). It may be useful to review briefly these impediments and related constitutional provisions within the broad framework used to describe the relevant features of the international trading system, the European Economic Community and other federations.

### Principles and Objectives

As noted above, the B.N.A. Act does not contain a statement of the principles and objectives of the Canadian economic union. Consequently, rules which are embodied (in different ways and to a varying degree, of course) in the GATT, the Treaty of Rome and the constitutions of other federal states reviewed are not found in Canadian constitutional statutes. Most notable is the absence of any affirmation of the principles of non-discriminatory treatment of goods, services and factors of production, regardless of their province of origin or destination, and of their uniform treatment in provincial taxation and regulations (what is termed "national treatment" in international law). As a result, legislators and the courts have not always found a clear expression of intent in the application or interpretation of constitutional provisions relevant to the operation and management of the economic union.

### Government Aids and Incentives

The area of government subsidies and investment incentives in Canada is one without constitutional discipline, the only practical limit imposed upon governments being the cost of their programs to their taxpayers and a measure of common sense. Thus there is little in the Constitution to prevent government subsidies and tax incentives to producers which adversely affect the interests of extra-provincial producers. It is particularly noticeable that the rules established by the Treaty of Rome involve significantly more common discipline in cases of distortions or threats of distortion to internal competitive conditions. Indeed, some of the key operating rules of the GATT Agreement (e.g., serious prejudice, adverse effects) seem to impose more by way of common minimum discipline than there is within the Canadian market. (This does not necessarily mean, however, that they are effectively implemented.) Likewise, it would appear that the constitutions of other federal states contain provisions which may be used to place limitations on the ability of state authorities -- and, in the case of Australia, of the federal authority -- to grant discriminatory subsidies.

### Public Procurement

Under existing constitutional arrangements, governments' contracting power is analogous to their spending powers, i.e. unchecked by considerations related to the functioning of the economic union. For example, there is no requirement not to use provincial government purchasing to discriminate against or among out-of-province producers or suppliers, or not to use it to afford protection to their industries. There now exist preferential and restrictive procurement practices which are a source of segmentation of the Canadian market, as well as of conflict when these practices favour foreign suppliers over Canadian suppliers from a given province. These government preferences may be implicit or explicit, embodied in laws, regulations or procedures, or be purely a matter of practices. While this is an area where international law, as exemplified by the GATT and the Treaty of Rome, is rather lax, other federal constitutions appear to impose greater discipline in this respect than that of Canada.

### Technical Regulations

Under existing constitutional arrangements, both orders of government have some jurisdiction over consumer and environmental protection, product standards, and technical regulations. There is nothing in the B.N.A. Act that enjoins governments to ensure that their measures do not have the effect of creating unnecessary obstacles to trade. Similarly there is nothing in the B.N.A. Act calling for the "approximation" of laws and regulations that affect the functioning of the common market. As a result, the extent to which the technical requirements of economic mobility can be met depends upon the ambit of federal exclusive jurisdiction, or the good will and common sense of provincial authorities. There again, this is an area where international arrangements appear, at least in their intent, to be in advance of Canadian constitutional law, as evidenced by the recently negotiated GATT Agreement on Technical Barriers to Trade, as well as by the relevant provisions of the Treaty of Rome and directives issued pursuant to them.

### Public Enterprises

There is no provision in the Canadian Constitution comparable to the provisions of the Treaty of Rome prohibiting discrimination by state monopolies of a commercial character, and stipulating that rules governing competition apply equally to private and public enterprises. It should be noted that the other federal constitutions examined make it possible to bring public enterprises under some common market discipline.

Commodity Trade

Under existing constitutional arrangements, legislative authority over marketing of primary commodities is shared between Parliament and provincial legislatures, federal authority in this respect being significantly more limited in Canada than under other federal constitutions.

Mobility of Labour

In the absence of any provision in the B.N.A. Act affirming the mobility and associated rights of Canadian citizens, the mobility of labour within the economic union is not constitutionally secured. This deficiency is compounded by the lack of any safeguarding of business and professional mobility. In this respect, Canadian constitutional law contrasts sharply with the basic law of all other federal states previously surveyed, as well as with the provisions of the Treaty of Rome.

4.4. An Institutional Perspective

In spite of the deficiencies of the B.N.A. Act, the ability of the federal authority to derogate from common market principles is constrained by the fact that Parliament emanates from a national constituency whose support any federal government must preserve in order to remain in office. Thus, discrimination on the basis of province or region of residence, location, origin and destination in federal laws, regulations and practices must be approved by a majority of the people's representatives in the House of Commons, and may therefore be deemed to be in the national interest. Political and public debates, as well as representations regularly made by all provinces on the relative "fairness" or "unfairness" of federal policies and programs, bear witness almost daily to the effectiveness of this constraint.

There is no comparable limitation upon the ability of provincial legislatures to discriminate on the same basis, since they are accountable only to the electorate of a single province. As a result, the effective operation of the Canadian economic union is perhaps unduly sensitive to the precise delineation of powers between the two orders of government, which in turn is largely dependent upon judicial interpretation. Thus, if a judicial decision appears to restrict the authority of Parliament with respect to interprovincial trade, there is automatically a possibility, given the absence of

explicit constitutional principles governing the operation of the economic union, that provinces could use their legislative powers in a manner which would segment the Canadian market. Where self-interest governs the use of such powers, the only effective restraint upon provincial ability to do so is fear of retaliatory legislation by other provinces. Obviously, this restraint applies more forcefully to the smaller and economically weaker provinces.

While it must be recognized that enlightened self-interest has largely prevailed so far, one must consider whether this legal void should be allowed to persist. That the possibility of retaliatory discrimination at the provincial level is real has been exemplified recently by Nova Scotia's Bill 61, An Act Respecting Petroleum Resources providing under section 26(1)(f) that regulations may be made "respecting the nature and extent of employment of Nova Scotians by holders of petroleum rights and others performing work authorized by a petroleum right". This was largely prompted by Newfoundland's Petroleum and Natural Gas Act. Sub-section 124.1 of the regulations pursuant to that act provides that:

"124(1) It is deemed to be a term of every permit or lease that a permittee or lessee shall give preference in his hiring practices to qualified residents of the province and shall purchase goods and services provided from within the province where competitive in terms of fair current market price, quality and delivery."

For the purpose of the above section, residence has been defined to mean residence in the province for three years prior to 1978 or for a period of ten years at any time.

An earlier example of retaliation occurred when the Province of Quebec adopted The Quebec Construction Industry Labour Relations Act. This act gives preference in employment to Quebec workers within 13 construction regions. While this measure might have been perfectly legitimate given the particular nature of employment in the construction industry, it had the effect not only of restricting mobility within the province but also of restricting the mobility of workers into Quebec, since no part of contiguous provinces is considered to be within a Quebec construction region. The Ontario Government introduced retaliatory legislation when it proved impossible to amend Quebec's regulations so that Ontario residents might be eligible to apply for classification on the same basis as Quebec workers. However, the legislation was allowed to die on the Order Paper.

A further consequence of this constitutional void may be noted. While the provisions of the B.N.A. Act regarding taxation powers and the regulation of trade and commerce limit somewhat the ability of the provinces to erect tax barriers to economic mobility, it leaves considerable scope for discriminatory tax treatment. Until recently, there had been relatively few cases of provinces using their tax systems in this way, but there are indications that this may be changing. For instance, there is legislation in Quebec and British Columbia which provides special tax credits for investment in provincially-domiciled corporations

which are not extended for investment in other Canadian corporations. (British Columbia has not yet proclaimed its legislation.) Proliferation of such preferential tax provisions could easily lead to interprovincial competition which would raise provincial tax burdens and constrain the allocation of funds in the Canadian capital market. Moreover, this could aggravate regional economic disparities and raise difficult equity issues, since the more prosperous provinces would obviously have a greater capacity to escalate provincial tax preferences.

#### 4.5 Constitutional Proposals Related to the Canadian Economic Union

The constitutional foundation of the Canadian economic union has been the subject of increasing attention in various constitutional studies and reports. Some of the main proposals in this regard are summarized in Annex B.

Given the wide range of perspectives and views of the authors and sponsors of these reports, there is a striking degree of convergence in the importance which they attach to the maintenance of the economic union and to its constitutional safeguarding. This is typically sought by means of one or more of the following techniques: the entrenchment of mobility rights as a fundamental right accorded to individuals (or sometime citizens); a more general guarantee of a common market frequently expressed as ensuring the free movement of goods, services and capital; or a better delineation of trade and commerce and related powers.

When safeguarding is sought by the first technique the provision is often formulated to guarantee to individuals the right to settle, to earn a livelihood, to hold property in any province. Sometimes it is framed more generally, as in the report of the Committee on the Constitution of the Canadian Bar Association, as a guarantee that manpower may move freely without discrimination throughout the country. When the second technique is used, a broader range of guarantees are included, usually through revision to section 121 of the B.N.A. Act.

The most specific proposals come from the Committee on the Constitution of the Canadian Bar Association, the Task Force on Canadian Unity and the Constitutional Committee of the Quebec Liberal Party. Interestingly, the Committee of the Bar Association uses the terminology of international law to frame its proposal, referring specifically to duties, quantitative restrictions and measures of equivalent effect. The proposal of the Quebec Liberal Party, in addition to the above (with some derogations) would also extend coverage to enterprise, by securing the right of provincially-incorporated firms to do business in another province or to engage in activities under federal jurisdiction, on the condition that they respect provincial and federal laws of general application.

Several of the reports deal specifically with the trade and commerce power, and in particular note the direct relationship between this power and the effective functioning of the economic union. Accordingly, the general pattern is support for continued federal jurisdiction in matters of international and interprovincial trade and commerce, and for provincial control over intraprovincial trade and commerce. The Joint Committee of the Senate and the House of Commons (1972) recommended extension of the federal

jurisdiction to include the "instrumentalities" of international and interprovincial trade. The Ontario Advisory Committee also seems to envisage extension of the federal jurisdiction, but would subject the exercise of the federal power to consultation with, but not veto by, the provinces through an improved intergovernmental discussion process. The Bar Association Committee would give Parliament additional power to harmonize intraprovincial trade upon a declaration of necessity supported by a 2/3 majority in a reconstituted Upper House. The Quebec Liberal Party's proposal would specify that the federal trade and commerce power extends to standards for products entering into international and interprovincial trade, but would subject federally-initiated marketing plans for agricultural products (both international and interprovincial) to provincial approval through the proposed Federal Council.

In addition, a number of other government activities are generally recognized in the constitutional studies reviewed as bearing on the operation of the economic union. A number of these, such as currency and banking and transportation, are generally considered central to the fulfillment of the economic responsibilities of the federal government. Others, including competition policy and securities regulation, are dealt with in varying ways. For example, The 1972 Report of the Special Joint Committee of the Senate and the House of Commons recommends that for both of these fields there be concurrent powers with federal paramountcy, while the Constitutional Committee of the Quebec Liberal Party and the Ontario Advisory Committee propose that competition be federal and securities provincial.

#### 5. General Approach

In the light of the above observations, the Government of Canada is of the view that there are compelling reasons for securing in the Constitution of Canada the basic operational rules of our economic union and for ensuring that both orders of government abide by these rules. Affirmation of the rights inherent to Canadian citizenship demands it. Prudence and faith in our common destiny require it. Economic theory and experience prescribe it. Precedents, in both international and constitutional law, commend it.

The Federal Government is also of the view that the following considerations should be borne in mind in devising the appropriate means of achieving these goals.

The determination of what rules should be constitutionalized and how this could best be done requires careful consideration. Three complementary techniques could be used:

- (i) entrenching in the Constitution the mobility rights of citizens, as well as their right to gain a livelihood and acquire property in any province, regardless of their province of residence or previous residence, subject to laws of general application;
- (ii) placing limitations upon the ability of governments to use their legislative and executive powers to impede economic mobility by way of general provisions through the revision and expansion of Section 121 of the B.N.A. Act;

(iii) broadening federal powers so that they may encompass all matters which are necessary for economic integration, thus ensuring that the relevant laws and regulations will apply uniformly throughout Canada, or that the "test" of the public interest will be brought to bear upon derogations from uniformity.

Prescriptions which would be too detailed would run the risk of being circumvented, or of preventing governments from adapting their laws and regulations to changing circumstances. Moreover, sweeping general provisions like those of the Australian Constitution, or attribution to the federal authority of virtually all-encompassing jurisdiction, as seems to be the case in the Federal Republic of Germany and India, would not be suitable for Canada.

While theoretical requirements for economic union are an essential reference point, absolute freedom of movement for goods, services and factors of production is neither attainable nor desirable in the real world. Economic efficiency is not the only goal pursued by governments, and the maximization of economic integration does not necessarily lead to a social optimum. Therefore, provisions to secure the Canadian economic union will have to allow governments to pursue other social and economic goals, such as redistribution of income and wealth among citizens and the fostering of economic development in lagging areas of the country.

The constitutional securing of absolute economic mobility within Canada would obviously be incompatible with the maintenance of a federal system. The recognition of distinct political entities within the Federation is predicated upon the existence, and continued existence, of different economic, social and cultural aspirations among the various populations they serve. Consequently, provincial legislation and regulations must be capable of variation from province to province, and such variation will inevitably cause some impediments to economic mobility; but these must be kept within the bounds of necessity.

The political dynamics of the Canadian Federation have always required some compromise between the optimal aménagement of national markets and the search for an equitable distribution of economic benefits among the various regions of the country. While this is essentially the responsibility of the federal government, it has become customary, under our present constitution, for provincial authorities to use their powers to affect the trade-offs between these two broad goals within the territory under their jurisdiction. These trade-offs should continue to be possible.

Trade-offs between these goals are not without cost, however, and the choice of means to implement them is not a matter of indifference. As previously noted, protectionism among provinces is not an economically neutral way of redistributing economic activity among provinces: it can involve significant efficiency losses for Canada as a whole, and hence for each and

every one of its parts. It should also be noted that costs can result from injudicious use of the federal government's virtually unrestrained ability, under the present Constitution, to derogate from principles of economic union in areas under its jurisdiction.

A critical requirement to secure constitutionally the Canadian economic union, therefore, is the prohibition of discrimination in relevant laws, regulations and practices on the basis of the province of residence of persons subject to them and of the province of location, origin and destination of the matters they affect, except in special circumstances when such discrimination is deemed in the public interest. This could be achieved by the first and second techniques mentioned above.

Other unwarranted obstacles to economic mobility within Canada should be dealt with through the exercise of federal regulatory powers. In this respect, the strengthening of our economic union may require a better delineation and some broadening of Parliament's jurisdiction over trade and commerce.

Still other undesirable impediments to mobility which may arise from the exercise of federal or provincial jurisdiction would be best dealt with through political and administrative arrangements between the two orders of government, which can be tailored to particular situations and adapted to changing circumstances. Thus, the management of the Canadian economic union has institutional implications which governments should bear in mind in their discussion of other aspects of constitutional renewal, such as intergovernmental relations, legislative delegation and a possible reconstitution of the Senate.

The Federal Government proposes that governments immediately consider how the three complementary techniques mentioned above could be used to better secure in the Constitution the existence and operation of the Canadian economic union, without prejudice to other proposals which they might wish to make at a later stage regarding the division of powers affecting the economy.

6. Conclusion

The Government of Canada has little doubt that agreement in principle will be reached on the strengthening and safeguarding the economic union, since all governments are committed to the preservation of the Canadian economic union. Discussions are of course required to determine the full constitutional implications of this fundamental goal, and to establish by what means it could best be achieved. Needless to say, the Federal Government is not wedded to any particular suggestion or proposal advanced in this document, and is prepared to consider alternative views and approaches which other governments may put forward. But it is firmly convinced that any constitutional renewal which did not adequately safeguard the economic foundations of our Federation would fail to meet the expectations of Canadians.

In this respect, there are serious deficiencies in the Constitution of Canada. Our basic law lags behind that of other federations. Our constitutional statutes do not even embody principles enshrined in international law and by which sovereign states have accepted to be bound. The correction of these deficiencies is an essential element of our agenda for change.

Canada is of course much more than an economic union. But Canada's political integrity, cultural development and social progress would be grievously compromised if its governments failed to secure its future economic prosperity. Thus it was that, a century ago, the Fathers of Confederation founded a federal union which enabled all parts of the country to reap the benefits of virtually unprecedented economic growth by world standards. And thus it is today that we, their spiritual heirs and political successors, must review and improve on their considerable accomplishment, so that Canada may successfully meet the economic challenges of the next century.

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INTRODUCTION

The following survey has been prepared for illustrative purposes, as background to the relevant sections of the main document. It is not meant to be exhaustive, but it includes examples of federal as well as provincial measures which could constitute internal barriers to

ANNEX A

The measures listed on the following pages affect mobility across Canada in different ways and to differing degrees. Several measures are associated with policies and programs concerned with such goals as consumer protection, affirmative action and regional development. Their effect on economic mobility may be only incidental. Other measures have been more clearly designed to protect provincial markets.

ILLUSTRATIVE SURVEY OF ACTUAL  
OR POTENTIAL RESTRICTIONS  
ON THE INTERPROVINCIAL MOBILITY  
OF GOODS SERVICES  
LABOUR AND CAPITAL WITHIN CANADA

It should be emphasized that the proposals put forward by the Federal Delegation in the main document would not necessarily cover all the measures included in the survey. But it is hoped that the range of examples of interprovincial barriers to trade identified in this survey will be helpful in upcoming discussions.

A. RESTRICTIONS ON THE FREE MOVEMENT OF GOODS

1. PROVINCIAL POLICY INTRODUCTION

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1. Tender Evaluation. Conceptually, preferences are easiest to spot and measure at this stage. If an in-province bid for some commodity is accepted despite it being higher than an outside province bid, the magnitude of the preference might be deemed to be the difference between the two.

A. RESTRICTIONS ON THE FREE MOVEMENT OF GOODS

1. Procurement Policies

- Federal procurement policy

To ensure that all regions in Canada benefit to the greatest extent possible from Supply and Services contracts, internal DSS policy states that goods and services should be purchased as close as possible to the ultimate point of consumption.

To meet this objective DSS seeks to direct an increasing number of requisitions from Headquarters to Regional Operations. While the vast majority of the number of purchases are made by Regional Operations, only a relatively small percentage of the value of purchases (20%) is made by Regional Operations. As regional purchases are limited to the region in which they are to be used this might be considered a non-tariff barrier to trade.

- Provincial procurement policy

Most provincial governments give some implicit or explicit preference to provincially made goods. The extent and form of the preference varies from one province to another and stems from purchasing policy rather than law. To the extent that purchasing preferences favour local firms as opposed to firms that are more cost-competitive, such practices would, in the long run, lead to a fragmentation of the industrial structure.

There are three distinct ways in which preferences can be given on a government purchase, and the extent of the preference is not always easy to identify. The three techniques are:

1. Requirements Definition. Governments often set their own performance requirements for items they buy. If those standards are tailored closely and exclusively to the capabilities of firms within the province, this could constitute an interprovincial non-tariff barrier to trade.
2. Sourcing Policy. Most governments maintain source lists of producers who can supply wanted commodities. To the extent that firms outside a province have more difficulty getting on such lists than firms inside, or are not invited to tender, this constitutes a form of preference.
3. Tender Evaluation. Conceptually, preferences are easiest to spot and measure at this stage. If an in-province bid for some commodity is accepted despite it being higher than an outside province bid, the magnitude of the preference might be deemed to be the difference between the two.

A point form summary of explicit provincial preferences follows.

British Columbia - "committed" to provincial preference.  
- maximum premium of 10% based on provincial content.

Saskatchewan  
- generally buy-Saskatchewan when all other factors are equal.  
- limited number of products are restricted to in-province sources (Cabinet policy).  
- small premium paid on special occasions to buy-Saskatchewan.

Quebec  
- when sufficient competition exists, only Quebec enterprises are invited to tender.  
- in exceptional cases, the above can be applied even without sufficient competition if it serves industrial development objectives.  
- for contracts exceeding \$50,000, a preference of up to 10% is applied to the Quebec content of bids.  
- tenders must state the percentages of Quebec, Canadian and foreign content.

Nova Scotia  
- Government Purchasing Act (1964) states wherever possible Nova Scotia products should be purchased and purchases should be from persons who maintain and operate businesses in the province.  
- if at least three Nova Scotia suppliers are available, tenders are restricted to the province.  
- even if less than three, tendering can be limited if Nova Scotia suppliers are reasonably competitive.  
- up to 10% premium in favour of Nova Scotia business, on an ad hoc basis to maintain particular industries.

New Brunswick  
- new policy based on New Brunswick content (October 1977), now being monitored.  
- tenders are routinely evaluated both by cost and likely impact on New Brunswick employment and economy.  
- information is demanded on all out-of-province sub-contracting and reasons therefor.  
- sourcing limited to N.B. suppliers if three or more available.  
- if nature of government demand warrants, New Brunswick sources can be developed through initial "cost plus" contracts, or product development assistance.

### 3. Product Standards

The lack of uniformity or overlapping, jurisdictional standards can impede the provincial boundaries.

Moreover, following the agreement on technical product standards in Canada in a situation where Canada trade advantages equivalent one of Canada's trading partners being "affected" by provincial technical requirements.

Newfoundland

- Department of Public Works and Service Act states, wherever possible, Newfoundland products should be purchased and purchases should be from persons who maintain and operate businesses in the province.
- premiums of up to 10% are allowed in respect of products wholly or mainly, manufactured, grown or produced in the province.

Provinces normally urge local governments, hospitals and universities under their jurisdiction to follow the provincial procurement practice. In addition, in some provinces, provincially-owned utility companies adopt a buy-provincial policy.

2. Marketing Boards

These agencies operate under supply management plans that involve an agreed sharing of the national market. If market shares were allocated on the basis of comparative advantage and adjusted over time on that basis, then trade flows would be unaffected by the market sharing arrangement. This is not generally the case.

Although quotas are initially allocated on the basis of past performance, there is considerable reluctance to reallocate market shares, and even more reluctance to base that reallocation on the principle of comparative advantage. Marketing agencies are required to consider the principle of comparative advantage in allocating additional quotas, but it need not be the overriding consideration.

Some provinces which import under supply management arrangements feel that they should have preferred access in their local market. This would further impede interprovincial trade.

Since market shares are negotiated for one commodity only, these arrangements do not allow the advantages of specialization and trade to be fully captured.

3. Product Standards

The lack of uniformity which may arise from multiple or overlapping jurisdictions with respect to product standards can impede the free flow of goods across provincial boundaries.

Moreover, following the negotiation of an international agreement on technical barriers, the multiplicity of product standards in Canada could potentially result in a situation where Canadian exporters would be denied trade advantages equivalent to the trade interest of one of Canada's trading partners being "significantly affected" by provincial technical regulations.

4. Processing and Export of Natural Resources

- Processing Allowances for Natural Resources Refining

Whether or not processing allowances constitute barriers to trade in Canada depends on two variables. First, there is an incentive to process locally if the rate of the allowance is too high compared to the "true profits" from the refining operation. Second, the allowance could be given only for processing that takes place in the province.

- Restrictions on Exports

New Brunswick

New Brunswick requires that the site of every smelter, mill or refinery be approved by the Lieutenant-Governor in Council. If minerals coming from any mines in the province are removed from the province for treatment, or are treated in a non-approved facility within the province, the taxes payable may be increased up to three times the normal rate.

Quebec

If mineral substances from mines in the province are shipped for treatment outside Quebec without the prior authorization of the Lieutenant-Governor in Council, he may impose additional duties up to twice the normal duties.

Saskatchewan

The Mineral Disposition Regulations of Saskatchewan state that all minerals, mineral ores and mineral-bearing substances extracted from a 'disposition area' shall be treated and refined in Saskatchewan unless otherwise authorized by the Minister. In the event of non-compliance, the rights to the disposition area can be declared null and void.

British Columbia

The B.C. Mineral Processing Act stipulates that all minerals produced in B.C. shall be processed, smelted and refined in the province subject to the availability of facilities. Under the Act, the Minister of Mines and Petroleum Resources may direct that a maximum of 50% of the production of any provincial mine be delivered to a processing plant, smelter or refinery in the province designated by the Minister.

The Act, although it pertains to all minerals, was specifically designed to encourage the establishment of a copper smelter in B.C. To this end, a regulation to the Act was approved in 1970, which provides that the Minister may notify a producing mine to deliver to a B.C. copper smelter a tonnage of its production equal to 12.5% of the tonnage which is produced thereafter and committed under a contractual sale arrangement approved by the Minister. Although no new copper smelter has been established in B.C., the Act could be used to assure a supply of ore to any such smelter.

Alberta

The Alberta Natural Gas Resources Preservation Act of 1949 was apparently enacted for the purposes of the conservation of oil and gas resources of the province to provide for effective utilization having regard to present and future needs of the residents of the province.

However, the nature of the legislation is such that any purchaser of oil and gas within the province who proposes to remove it from the province for use or consumption elsewhere than within that province must make application to a Board for permission to remove the product from the province. In granting such approval the Board in question has to make its own judgment whether the amount requested would be surplus to the present and future needs of the people of the province.

Furthermore, this type of legislation has provisions whereby the Board, with the approval of the Lieutenant-Governor in Council, may make an order requiring the diversion of all or any portion of the product, to which a permittee is entitled to remove from the province, in the event that it is necessary to meet an emergency or other circumstance arising within the province.

The Petroleum Marketing Act of Alberta assented to on December 14, 1973, as amended, authorizes a Commission, established by the legislation to acquire, sell or exchange petroleum or related products in Alberta and to act as an agent or broker in connection with the purchase, sale or exchange of such products. It also authorizes the Commission to own and operate any facilities for storage or transportation of petroleum and related products within the province. Although the legislation refers to operations in Alberta it seems obvious that the authority granted to the Commission would permit it to prevent the removal of petroleum from the province.

In Ontario, for example, rates are not requested, but amendments to tariffs may be filed with the Ontario Highway Transport Board and such amendments are effective only after 90 days. In Nova Scotia, amendments can be retroactive by 18 days. Carriers operating between provinces such as Quebec with a high degree of rate regulation and P.E.I. where rates are accepted as filed, also run into problems.

Whether the overall complexity and technical differences among producers are in themselves barriers to trade, the discretionary powers that each Board has remains the main instrument for controlling "undesirable" entrants.

Parliament gave each province the authority to issue licenses for extra-provincial undertakings operating into or through the province. A number of regulatory weaknesses have since been identified. Each provincial highway transport board's considerations are confined to a specific province, and the approach taken by provincial legislatures, inconsistencies, lack of uniformity and even discriminatory behaviour, was through the system.

B. RESTRICTIONS ON THE FREE MOVEMENT OF SERVICES

1. Procurement Policies

Discriminating preference policies in favour of local labour are sometimes employed in the case of professional architects and engineers.

2. Regulation of the Trucking Industry

The transportation industry is one of the most highly regulated in Canada. Interprovincial carriers are subjected to regulations at both the federal and provincial levels of government. Federal authorities impose safety standards and labour legislation but the bulk of economic and other regulations are promulgated at the provincial level. All provinces have authority to impose physical, operational and economic controls on both intra- and extra-provincial motor carriers, and each has developed its own set of rules and regulations. There are essentially, in Canada, ten sets of regulations regarding entry and exit into the for-hire trucking industry, provision of service, conditions of carriage, rates and level of consumer protection.

Five provinces (Newfoundland, P.E.I., Quebec, Manitoba and Saskatchewan) control both entry and the level of rates. The degree and level of their control, however, vary greatly. Alberta does not control entry nor the rates of intra-provincial carriers. Extra-provincial carriers can only operate in Alberta if they obtain a licence which is provided against different criteria for a non-resident than a resident. The remaining provinces control entry but not rates; rates are usually accepted as filed.

Provincial regulation of rates could be a barrier to trade, because of the variability in structures and procedural differences in the registration of rates. In Ontario, for example, rates are not regulated, but amendments to tariffs may be filed with the Ontario Highway Transport Board and such amendments are effective only after 30 days. In Nova Scotia, amendments can be retroactive by 10 days. Carriers operating between provinces such as Quebec with a high degree of rate regulation and P.E.I. where rates are accepted as filed, also run into problems.

Whereas the overall complexity and technical differences among procedures are in themselves barriers to trade, the discretionary powers that each Board has remains the main instrument for controlling "undesirable" entrants.

Parliament gave each province the authority to issue licences for extra-provincial undertakings operating into or through the province. A number of resulting weaknesses have since been identified. Each provincial highway transport board's considerations are confined to a specific province, and the approach taken by provincial statutes. Inconsistencies, lack of uniformity and even discriminatory behaviour run through the system.

C. Compliance cost is also a problem due to the fact that a carrier must be licensed in each province. Except in the Atlantic provinces, and by a recently concluded agreement between Ontario and Quebec, there is little or no reciprocity or agreement between provinces to respect each other's licences. The consequence for the motor carrier has been inefficiency and lowered competitive ability. In the case of small carriers with less access to professional expertise, the need to be familiar with the regulations in each province acts as a deterrent.

Planning, construction and operation of the Alaska Highway and Pipeline. The Northern Pipeline Agency has further required that this plan contain provisions for affirmative action initiatives to enhance employment opportunities for women and natives and to give preference in hiring to local residents along the pipeline route.

In respect of the pipeline in the Yukon, the current draft of the Social-Economic Terms and Conditions (which must also be accepted by the Minister), provides a preference first for residents of the Yukon and second for residents of the N.W.T.

The Department of Regional Economic Expansion (DREE) provides financial incentives to industry in designated areas under the Regional Development Incentives Act. Section 15 of the regulations under this Act contains a local hire provision as follows:

"The employer shall undertake to train and employ to the maximum extent practicable persons who are resident, at the time the application for an incentive was made, of the designated region in which the facility is located."

Furthermore, in some cases, DREE Subsidy Agreements under the General Employment Agreements with the provinces contain local hire provisions. For example, the Manitoba-Northern Agreements state, in part, "... it is agreed that in order to be of direct benefit to northerners, all construction contracts let under this agreement shall contain northern employment preference provisions..." (The area in which one must reside in order to qualify as a "northern resident" is defined in the Agreement but there is no length of residence requirement. "Northern residents", provided they are occupationally qualified, must be hired before other applicants.)

The Federal Public Service Employment Act (Section 13) enables the Public Service Commission, in making the appointment from outside the Public Service, to give preference in appointment to qualified candidates who reside in the area served by the local office over qualified candidates who do not so reside.

#### Newfoundland

The Petroleum and Natural Gas Act of Newfoundland provides for the issuing of permits or leases to persons for the exploration and exploitation of petroleum and gas in the territory under the jurisdiction of Newfoundland. Section 13(1) of the regulations provides as follows:

C. RESTRICTIONS ON THE FREE MOVEMENT OF LABOUR

1. Local Hiring Restrictions

Federal Government

The Northern Pipeline Act requires Foothills to provide a comprehensive manpower plan for acceptance by the Minister of State for Economic Development in regard to the planning, construction and operation of the Alaska Highway Gas Pipeline. The Northern Pipeline Agency has further required that this plan contain provisions for affirmative action initiatives to enhance employment opportunities for women and natives and to give preference in hiring to local residents along the pipeline route.

In respect of the pipeline in the Yukon, the current draft of the Socio-Economic Terms and Conditions (which must also be accepted by the Minister), provides a preference first for residents of the Yukon and second for residents of the N.W.T.

The Department of Regional Economic Expansion (DREE) provides financial incentives to industry in designated areas under the Regional Development Incentives Act. Section 16 of the regulations under this Act contains a local hire provision as follows:

"The employer shall undertake to train and employ to the maximum extent practicable persons who are resident, at the time the application for an incentive was made, of the designated region in which the facility is located."

Furthermore, in some cases, DREE Subsidiary Agreements under the General Development Agreements with the provinces contain local hire provisions. For example, the Manitoba Northlands Agreement states, in part, "... it is agreed that in order to be of direct benefit to northerners, all construction contracts let under this agreement shall contain northern employment preference provisions..." (The area in which one must reside in order to qualify as a "northern resident" is defined in the Agreement but there is no length of residence requirement. "Northern residents", providing they are occupationally qualified, must be hired before other applicants.)

The Federal Public Service Employment Act (Section 19) enables the Public Service Commission, in making the appointment from outside the Public Service, to give preference in appointment to qualified candidates who reside in the area served by the local office over qualified candidates who do not so reside.

Newfoundland

The Petroleum and Natural Gas Act of Newfoundland provides for the issuing of permits or leases to persons for the exploration and exploitation of petroleum and gas in the territory under the jurisdiction of Newfoundland. Subsection 124(1) of the regulations provides as follows:

"124. (1) It is deemed to be a term of every permit or lease that a permittee or lessee shall give preference in his hiring practices to qualified residents of the province and shall purchase goods and services provided from within the province where competitive in terms of fair current market price, quality and delivery."

In administering this section the Newfoundland government is using the following definitions:

Residence means residence in Newfoundland for 3 years prior to 1978 or residence in Newfoundland for a period of 10 years at any time. Preference means that those who are qualified as Newfoundlanders and are qualified occupationally must be hired before those not so qualified.

#### Nova Scotia

Nova Scotia's Bill 61, "An Act Respecting Petroleum Resources", has been passed by the legislature but not yet promulgated. Under Section 26(1)(f), regulations may be made "respecting the nature and extent of employment of Nova Scotians by holders of petroleum rights and others performing work authorized by a petroleum right." The Regulations defining Nova Scotians and the nature and extent of the employment involved have not yet been released.

#### Quebec

The Quebec Construction Industry Labour Relations Act establishes a three-tier system of construction worker classification which gives preference in employment to Quebec workers within the 13 construction regions. The Act thus imposes severe restrictions on intra-provincial mobility as well as on mobility of workers into Quebec, since no part of any contiguous province is considered to be within a Quebec construction region.

#### Ontario

To protect Ontario residents many of whom have traditionally worked in Quebec, the Ontario Government had proposed that the regulations be amended so that Ontario residents would be eligible to apply for classification on the same basis as Quebec workers. This was rejected by the Government of Quebec. Ontario then introduced retaliatory legislation which received second reading in the legislature. It has since been allowed to die on the Order Paper.

#### Saskatchewan

The Saskatchewan Department of Northern Development signs Specific Lease Agreements with resource development firms seeking Licences to operate in Saskatchewan. Such agreements have a northern preference hiring clause which requires that 50% of the staff be northern residents. Northern resident in this case is defined as someone who has lived in Northern Saskatchewan for 15 years at any time. If occupationally qualified, such a person must be hired before other non-residents.

Quebec and Nova Scotia

The Quebec and Nova Scotia public service legislations give preference in recruitment to their residents.

2. Licensing of Professionals

Acting under provincial law, associations for the licensing and regulating of the practitioners in various professions impose requirements which vary considerably from province to province and association to association and sometimes discriminate in favour of provincial residence. For example:

- (i) Lawyers seeking to transfer to some provinces must have practised law full time in their own province for a given number of years after the call to the bar in order to be eligible for transfer exams. It is not obvious how this ensures greater familiarity with law in the province to which they relocate.
- (ii) In Alberta an out-of-province applicant for registration as a pharmacist must have resided in the province during three months preceding the application while in Ontario the residence requirement is six months.

3. Differences in Requirements for Practice

- Impediments to Professionals

In the case of some professions, the intrinsic body of knowledge differs from province to province (e.g., law). Intrinsic language requirements also differ as a knowledge of the French language is a condition of registration for professionals in Quebec just as English is a similar requirement in other provinces. In addition to intrinsic differences, there are variations in requirements for licensing caused by differing views as to what basic requirements should be. For example, professional engineers seeking registration in Quebec are required to pass an examination in ethics, a requirement of no other province. Similarly, a medical doctor, who was previously a UK immigrant and wishes to move from a province whose medical society has a reciprocal agreement with the UK General Council could experience difficulties if he attempted to migrate to a province without such an agreement.

- Impediments to Skilled Tradesmen

Substantial provincial variation exists with regard to certification and licensing provisions of various skilled trades and crafts (e.g., automotive mechanics). Such non-uniformity tends to impede labour mobility in much the same way as in the professions. While trade certification in some cases is voluntary, and the mobility barrier consequently less, the potential for problems in this area is seen from the fact that upwards of 1/3 of craftsmen in production and process occupations are subject to some form of licensing in Canada.

D. Progress in counteracting such barriers has been made through the "Red Seal" (Interprovincial Standards) Program co-ordinated by the Canada Employment and Immigration Commission. Under this program, provinces agree to recognize the qualifications of tradesmen in certain trades who receive their training in other provinces and pass an intergovernment examination. In all, at the present time, approximately 87,000 tradesmen have been issued interprovincial seals in 21 trades. In the fiscal year 1977-78 about 11,000 seals were issued with some 9,000 of these going to persons newly completing apprenticeships. However, the program is not universally applied. Only British Columbia covers all the 21 trades and with the less structured apprenticeship system in Quebec, a relatively few Red Seals are issued in that province.

A high degree of local investment is proscribed for various provincial investment funds. Some provinces also have legislation enabling them to require that insurance corporations invest in the province a certain percentage of their assets.

## 2. Business mobility

### Direct Measures

#### All provinces

All provinces, except New Brunswick, require extra-provincial corporations to register as a condition of doing business, and most impose duties on these companies, such as retaining an attorney resident in the province and giving notice of changes in corporate activities or structure. In practice, it appears that these requirements have not represented a significant barrier to business mobility, but the right of a province to refuse registration is a potentially serious obstacle to mobility.

#### Prince Edward Island

The Prince Edward Island Real Property Act restricts the rights of Canadian non-residents of the province (including corporations) to land ownership.

#### Quebec

The Quebec Bookless Accreditation Act prohibits public financial aid to related companies unless they are incorporated in Quebec, have their main place of business there, the majority of directors and the principal executives are domiciled there, and the latter control at least fifty percent of the shares.

More than fifty percent of the shares of a publishing company must be owned by persons domiciled in Quebec, to qualify for a loan guaranteed under the Quebec Industrial Assistance Act.

#### Alberta

Under the Alberta Companies Act, at least half of the board of directors must be resident Albertans, as well as Canadian citizens.

D. RESTRICTIONS ON THE FREE MOVEMENT OF CAPITAL

1. Mobility of Financial Assets

- Restrictions on Takeovers bids

A recent obstacle to an extraprovincial takeover (of MacMillan Bloedel) occurred in British Columbia, where the applicable sanctions were understood to have been indirect (related to provincial control over timber resources). Takeovers of provincial financial institutions can be directly blocked in Quebec (Crédit Foncier).

- Restrictions on out-of-province investment

A high degree of local investment is prescribed for various provincial investment funds. Some provinces also have legislation enabling them to require that insurance corporations invest in the province a certain percentage of their assets.

2. Business Mobility

Direct Measures

All provinces

All provinces, except New Brunswick, require extraprovincial corporations to register as a condition of doing business, and most impose duties on these companies, such as retaining an attorney resident in the province and giving notice of changes in corporate activities or structure. In practice, it appears that these requirements have not represented a significant barrier to business mobility, but the right of a province to refuse registration is a potentially serious obstacle to mobility.

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The Prince Edward Island Real Property Act restricts the rights of Canadian non-residents of the province (including corporations) to land ownership.

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The Quebec Booksellers Accreditation Act prohibits public financial aid to related companies unless they are incorporated in Quebec, have their main place of business there, the majority of directors and the principal executives are domiciled there, and the latter control at least fifty percent of the shares.

More than fifty percent of the shares of a publishing company must be owned by persons domiciled in Quebec, to qualify for a loan guarantee under the Quebec Industrial Assistance Act.

Alberta

Under the Alberta Companies Act, at least half of the Board of Directors must be resident Albertans, as well as Canadian citizens.

British Columbia

The British Columbia Companies Act provides that at least one director must be ordinarily resident in the province.

Other Measures

- Grants and subsidies to business

Through different programs, some provinces provide incentives to businesses to settle or to increase their activities in the province. These incentives take the form of direct grants to businesses, grants to municipalities resulting in lower municipal taxes or higher level of municipal services available to businesses, or other indirect grants resulting in lowering the cost of production in the province.

- Investment Tax Credits

Income taxation can be used by provinces and the federal government to provide investment incentives of a regionally discriminatory nature.

For example, the federal government has a regionally differentiated investment tax credit and employment tax credit.

There is legislation in Quebec and British Columbia which provides special tax credits for investment in provincially-domiciled corporations which are not extended for investment in other Canadian corporations. (British Columbia has not yet proclaimed its legislation.)

Recently provinces have been entering the field of venture capital by providing special credits or grants to individuals or corporations which invest in small businesses. One of the criteria for eligibility of these small businesses is that they do most of their business in the province.

- Restrictions on interjurisdiction amalgamation

Amalgamation of corporations incorporated under different jurisdictions is made difficult and in some cases impossible, by the necessity for each of the corporations to transfer into the jurisdiction of the other prior to amalgamation. This transfer is possible only when reciprocal legislation exists in both provinces.

- Industrial Development Permits

The Government of Alberta has taken steps to ensure that very large local users of Albertan gas or oil conduct their activities "beneficially". Any proposal (by any person, Albertan or not) to establish a facility which would consume more than one trillion BTU's of energy per annum is subject to an industrial development permit.

To maximize Albertan or Canadian "benefit", the applicant is expected to maximize Albertan or Canadian content. Accordingly, the applicant is required to, "whenever practicable", use Albertan engineering and other professional services or tradesmen, construction and materials and supplies". There is an overriding requirement that such sources of supply be competitive.

Generally, the government reserves the right to examine bidders' list, and to add the names of suitable Albertan or other Canadian candidates. The government demands as well that there be some measure of objectivity with respect to criteria for selecting the successful bidder. All procurement must take place from an office in Alberta, but exceptions are possible.

STATE OF ALBERTA  
DEPARTMENT OF HIGHWAYS  
EDMONTON, ALBERTA  
ALBERTA CANADA

ANNEX B

SUMMARY OF CONSTITUTIONAL  
PROPOSALS RELATED TO  
ECONOMIC MOBILITY  
WITHIN CANADA

1. Canada West  
Federation  
1978

2. Special Joint  
Committee of the  
Senate and of  
the House of  
Commons, 1972

3. Canada West  
Federation  
1978

4. On October 10, 1978, the Special Joint Committee of the Senate and of the House of Commons, in its report, "Economic Mobility Within Canada", recommended that the federal government should take steps to improve economic mobility within Canada. The report also recommended that the federal government should take steps to improve economic mobility within Canada.

Summary of Constitutional Proposals Directly Related to Economic Mobility within Canada\*

<u>Proposal</u>	<u>Mobility Rights</u>	<u>Movement of goods, services and capital</u>	<u>Trade and Commerce</u>	<u>Indirect Taxation</u>
1. Working Documents submitted by the Quebec Delegation to the Continuing Committee of Officials on the Constitution, July 1968	Unrestricted movement of persons within the Union should be guaranteed by the Constitution	Unrestricted movement of goods within the Union should be guaranteed by the Constitution	International trade should be an exclusive federal power	Allow indirect taxation by provinces, with the exception of customs revenue
2. Special Joint Committee of the Senate and of the House of Commons, 1972	Right to acquire property and to dispose of it should be guaranteed in any province		Parliament should have exclusive jurisdiction over international and interprovincial trade, including the instrumentalities of such power. Intraprovincial trade should remain with the provinces	Allow provincial indirect taxation except that it should not impede international and interprovincial trade and not fall on persons resident in other provinces
3. Canada West Foundation: Update, March, 1978			Federal powers that trade and commerce should not include ineffective provincial jurisdiction and control over their natural resources	Allow provinces indirect taxation within the province for provincial purposes. Assumes federal trade and commerce power would prevent provinces from establishing customs duties

\*NOTE: In addition to the four general categories of provisions directly related to economic mobility listed in the table, a number of other government activities are recognized in constitutional reports as bearing on the nature of the economic union. These include matters such as currency and banking, the external tariff, competition policy, securities regulation and transportation.

Proposal

4. The Constitutional Amendment Bill, June, 1978

Mobility Rights

Right to move and take up residence in any province and to equal protection of the law regardless of place of residence

Right to acquire property and to pursue gaining of a livelihood in any province

5. British Columbia's Constitutional Proposal, September, 1978

Movement of goods, services and capital

Trade and Commerce

Indirect Taxation

6. Harmony in Diversity: Alberta Government, October, 1978

Federal powers over trade and commerce should not render ineffectual provincial jurisdiction and control over their natural resources

Provincial access to indirect taxation except customs and excise taxes. However, every effort must be made to prevent such taxes from creating artificial economic barriers in restraint of commerce

Allow provinces access to indirect taxes, except customs duties

Proposal

7. Committee on the Constitution, The Canadian Bar Association, 1978

Mobility Rights

That manpower may move freely without discrimination throughout the country

Movement of goods, services and capital

Goods, services and capital in any province shall be admitted to each of the other provinces free of duties, quantitative restrictions or measures of equivalent effect except as may be necessary for health and safety

Trade and Commerce

Federal Parliament have exclusive jurisdiction to regulate interprovincial and international commerce and the provinces have exclusive jurisdiction to regulate intraprovincial commerce. Federal Parliament should have power to harmonize intraprovincial trade upon a declaration of necessity but only after obtaining a 2/3 majority in the reconstituted Upper House

Indirect Taxation

Allow provinces indirect taxation except customs duties and taxes which have a tendency to be automatically passed to persons outside the province. Neither the federal Parliament nor provinces should be able to levy taxes which create barriers to interprovincial trade

8. Task Force on Canadian Unity, February, 1979

Impediments to mobility of persons in professions, trades etc. should be reduced by application of widely accepted common standards

Guarantee more effectively free trade between the provinces for produce, manufactured goods and services

Procurement policies should be based on market costs unless specified social and economic objectives would be otherwise served

Prohibit barriers to interprovincial movement of capital

Allow provinces indirect taxation except customs and excise taxes. Provincial indirect taxes should not fall on persons outside the province

<u>Proposal</u>	<u>Mobility Rights</u>	<u>Movement of goods, services and capital</u>	<u>Trade and Commerce</u>	<u>Indirect Taxation</u>
9. Ontario's Second Report of the Advisory Committee on Confederation, March, 1979	Right of each Canadian to settle anywhere and to enjoy rights identical to those of the citizens of the province where he settles	Entrench a "freedom of movement of people, capital, goods and information" in the Constitution. Provision should be carefully drafted so as not to invalidate provincial legislation with an incidental and minor effect on movement	Federal primacy in interprovincial and international trade subject to consultation with, but not any veto by, the provinces	Provincial access to all modes of taxation, subject to the proviso that no provincial tax shall be imposed on residents of another province
10. Constitutional Committee of the Quebec Liberal Party, 1980	Right of each Canadian to settle anywhere and to enjoy rights identical to those of the citizens of the province where he settles	Guarantee the free circulation of goods and capital subject to provincial right to <ul style="list-style-type: none"> <li>(a) adopt general laws of a non-discriminatory nature</li> <li>(b) regulate investments of certain financial institutions</li> <li>(c) pass laws relative to health, public safety and professions</li> </ul> A provincial company should be allowed to do business in another province subject to respecting laws of general application	Central jurisdiction over international and interprovincial trade, including the standardizing of products destined for such trade	Allow provinces indirect taxation except tariffs and customs duties  Imposition by provinces of tariff measures in any form whatsoever should be prohibited