

POWERS OVER THE ECONOMY:  
OPTIONS SUBMITTED FOR CONSIDERATION BY  
THE GOVERNMENT OF CANADA  
TO SAFEGUARD THE CANADIAN ECONOMIC UNION  
IN THE CONSTITUTION

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In a Discussion Paper submitted to the Continuing Committee of Ministers on the Constitution on July 9, 1980<sup>(1)</sup>, the Government of Canada outlined three techniques which could be used to safeguard the Canadian economic union in the Constitution:

- (i) entrenching the mobility rights of citizens in the proposed Charter of Rights;
- (ii) subjecting the exercise of legislative and executive powers to the provisions of a revised Section 121 of the B.N.A. Act;
- (iii) clarifying and, to a limited extent, broadening the federal trade and commerce power.

Federal proposals regarding mobility rights of citizens are contained in Section 8 of the proposed Canadian Charter of Rights and Freedoms tabled on July 10, 1980. A copy of that section is attached. Legislative drafts tabled today, and also attached, outline a manner in which the other two techniques might be implemented.

A New Section 121

The existing Section 121 of the B.N.A. Act prohibits only the imposition of border taxes (e.g., customs duties) within Canada. Therefore, it establishes only a customs union and does not constitute an adequate foundation for the Canadian economic union.

The new draft submitted for consideration by the federal government would secure in the Constitution an essential operating principle for economic union, namely the principle of non-discrimination in law or practice on the basis of the province of residence of persons, and the province of origin or destination of goods, services and capital. The draft would apply to both orders of government, not only to the provinces.

The new Section 121 would not seek to prohibit all possible impediments to economic mobility, since the federal government recognizes that the Canadian Federation has other goals -- political, social, cultural, as well as economic -- the pursuit of which must not be restricted by too sweeping provisions regarding economic mobility. Accordingly, the suggested legislative text would provide for exceptions, so that the principle of non-discrimination would be applied in a flexible manner.

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(1) Powers Over the Economy: Securing the Canadian Economic Union in the Constitution, July 9, 1980, CCMC Document 830-81/036.

Thus, the new provisions would not prevent affirmative action programs, regional development policies, industrial incentives, income redistribution, etc. For example, it would be absurd that the Constitution should prevent the federal government from introducing measures such as the National Oil Policy put in place in the early 1960's, to facilitate the development of Western Canada's oil resources while allowing Quebec and the Atlantic provinces to obtain lower priced oil from foreign sources. Similarly, provincial governments should not be prevented from implementing differentiated policies and programs to meet the special needs of various areas and communities within a province.

#### The Trade and Commerce Power

In general terms, the federal trade and commerce power has been interpreted as applying only to international and interprovincial movement of goods. It is not certain to what extent it applies to services and capital. The suggested draft of Section 91(2) of the B.N.A. Act annexed to this document and submitted for consideration would make clear that the federal trade and commerce power does apply to such matters. The draft would also provide for the regulation of competition and product standards throughout Canada to the extent reasonably necessary for the operation of the Canadian economic union.

The Government of Canada is not wedded to the particular options it has advanced for safeguarding the Canadian economic union in the Constitution and is prepared to consider other options which may be put forward. But it is convinced that the constitutional safeguarding of the Canadian economic union must be achieved.

QUALITY REVIEW

ANNEXES

Rights of  
Citizenship  
Rights of  
Citizenship  
Rights of  
Citizenship  
Rights of  
Citizenship  
Rights of  
Citizenship

1. Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has

A. Extract from Canadian Charter of Rights and Freedoms

B. Discussion Draft of Revised Section 121

C. Discussion Draft of Revised Section 91 2 and New 91 2.1

D. Explanatory Notes

subject to any laws of general application in force in that province or territory other than any such law that discriminates among persons to whom this provision applies generally on the basis of province or territory of present or previous residence or domicile.

Justifiable  
Limitations

(3) The rights declared by this section may be made subject only to such limitations prescribed by law as are reasonably justifiable in a free and democratic society in the interests of national security, public safety, order, health or morals.

MOBILITY RIGHTS

Rights of  
citizens

8. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights of  
citizens and  
persons  
lawfully  
admitted for  
permanent  
residence

(2) Every citizen of Canada and every person who has been lawfully admitted to Canada for permanent residence and has not lost the status of a permanent resident has the right

(a) to move to and take up residence in any province or territory, and

(b) to acquire and hold property in, and to pursue the gaining of a livelihood in, any province or territory,

subject to any laws of general application in force in that province or territory other than any such laws that discriminate among persons to whom this provision applies primarily on the basis of province or territory of present or previous residence or domicile.

Justifiable  
limitations

(3) The rights declared by this section may be made subject only to such limitations prescribed by law as are reasonably justifiable in a free and democratic society in the interests of national security, public safety, order, health or morals.

DRAFT

FOR DISCUSSION PURPOSES ONLY

July 16, 1980

Canadian  
economic  
union

121. (1) Neither Canada nor a province shall by law or practice discriminate in a manner that unduly impedes the operation of the Canadian economic union, directly or indirectly, on the basis of the province or territory of residence or former residence of a person, on the basis of the province or territory of origin or destination of goods, services or capital or on the basis of the province or territory into which or from which goods, services or capital are imported or exported.

Derogation

(2) Nothing in subsection (1) renders invalid a law of Parliament or of a legislature enacted in the interests of public safety, order, health or morals.

Idem

(3) Nothing in subsection (1) renders invalid a law of Parliament enacted pursuant to the principles of equalization and regional development to which Parliament and the legislatures are committed or declared by Parliament to be in an overriding national interest or enacted pursuant to an international obligation undertaken by Canada.

Customs  
union

(4) Nothing in subsection (2) or (3) renders valid a law of Parliament or a legislature that impedes the admission free into any province of goods, services or capital originating in or imported into any other province or territory.

DRAFT

ANNEX C

FOR DISCUSSION PURPOSES ONLY

July 16, 1980

91. 2. The regulation of trade and commerce in goods, services and capital.

2.1. The regulation of competition throughout Canada and the establishment of product standards applicable throughout Canada where such regulation or such standards are reasonably necessary for the operation of the Canadian economic union.

July 16, 1980

Explanatory Notes

Section 121

Section 121 of the British North America Act, 1867 provides:

"All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

This section only applies to the interprovincial movement of goods, and only those originating in a province of Canada. It is not clear that it prohibits barriers other than interprovincial customs duties.

The new subsection 121 (1) would expand this section to prevent federal and provincial governments creating barriers to interprovincial trade either by law or through discriminatory practices. Discrimination would be clearly prevented not only with respect to the movement of goods but also with respect to the provision of services and with respect to the investment, transfer or disposition of capital. It would also cover barriers other than tariff barriers, if they would "unduly" impede movement. (That is, measures that might have minor effects on free movement would not be prevented.)

Subsection (2) allows both Parliament and the provincial legislatures to enact legislation restricting free movement where such legislation is required for purposes of public safety, public order, public health or public morals. Such restrictions to be valid would have to be imposed by statute and not merely be effected through administrative practices.

Subsection (3) allows Parliament to enact legislation restricting free movement where required to serve regional development purposes including the making of equalization payments or in order to fulfill an international obligation. In addition, Parliament can restrict free movement where it determines this to be necessary to serve an overriding national interest, but it would have to state expressly in its legislation the interest being served.

Subsection (4) provides that derogations may not create customs barriers at provincial borders. This preserves the present prohibition in section 121 against interprovincial customs barriers with respect to goods and ensures that it applies to services and capital as well.

Section 91

Section 91 of the British North America Act, 1867 provides:

"It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-

....

2. The Regulation of Trade and Commerce"

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

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