

FEDERAL-PROVINCIAL CONFERENCE
OF
FIRST MINISTERS

Report of the Continuing Committee of Ministers
on the Constitution to First Ministers

THE POWERS OVER THE ECONOMY

B. TRADE AND COMMERCE

POWERS OVER THE ECONOMY

B. TRADE AND COMMERCE (Section 91(2))

The Ministers discussed amendments proposed by the federal government to Section 91(2).

Issues for the First Ministers' Consideration

- (1) Should a new head of power over competition be added to section 91?
- (2) Should a new head of power over product standards be added to section 91?
- (3) If the answer is yes to questions 1 or 2, what is the best means of preserving provincial legislation not in conflict with federal legislation under this new head?
- (4) Should the ambit of the federal trade and commerce power be clarified to ensure that services and capital are included?

Comments

The new head "competition" was proposed by the federal government because of the difficulties it has experienced in incorporating and enforcing competition policy under criminal law power. There was no agreement as to the possible effects such a head would have on existing provincial legislative powers to regulate professions, insurance companies and the marketing of agricultural products, etc.

The federal government proposed a new head of power for product standards because of its concern that its legislative powers over uniform product standards have been significantly curtailed as a result of recent Supreme Court decisions.

The federal government argued that, while a substantial body of opinion believes existing section 91(2), trade and commerce, includes services and capital, it was desirable to incorporate these words in the Constitution to clarify its legislative powers, thereby eliminating any doubts.

The attached draft was developed

- (1) to preserve section 91(2) in its present form to maintain existing jurisprudence; and
- (2) to establish new concurrent powers with federal paramountcy over
 - (a) competition; and
 - (b) product standards.

SUGGESTED FEDERAL DRAFT

1. Add to section 91 the following heads of jurisdiction immediately following head 91.2:

- 2.1 Competition

While some provinces recognized the usefulness of a civil head of power to regulate competition, most still express concern over the possible effect of this change on existing provincial jurisdiction.

- 2.2. The establishment of product standards throughout Canada

While it was recognized that recent court decisions have placed federal jurisdiction in jeopardy, some provinces expressed concern that the proposed modification, in spite of subsection (3) below, might restrict provincial ability to establish standards for products circulating essentially within a province, or standards at a level different from national ones.

2. Add to section 91 the following new subsections:

- (2) For greater certainty, "regulation of trade and commerce" in subsection (1) includes the regulation of trade and commerce in goods, services and capital.

There is no agreement on this proposal. Provinces take the view that it is not necessary, or that it is not necessary on existing provincial jurisdiction must be more fully assessed before they take a view on the matter. To meet this concern, it is suggested that the words "For greater certainty" be added at the beginning.

- (3) The authority conferred on Parliament by heads 91 (2.1) and 91 (2.2) does not render invalid a law enacted by a legislature that is not in conflict with a law of Parliament enacted under either of those heads.