

CONFIDENTIAL

FEDERAL-PROVINCIAL CONFERENCE

OF

FIRST MINISTERS

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

THE POWERS OVER THE ECONOMY

A. THE ECONOMIC UNION

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A. THE ECONOMIC UNION (Section 121)

The Ministers reviewed various proposals and alternatives to further and maintain the objectives of an economic union.

Issues for the First Ministers' Consideration

- (1) Do governments accept provisions in the Constitution to safeguard the economic union?
- (2) Do governments think that the principles contained therein should be enforceable?
- (3) If there is agreement that enforceability is necessary then how should such enforceability be reflected within the Constitution?
 - (a) Should it be by recourse to the courts?
 - (b) Should it be through reference to a political mechanism such as a new Upper House (Council of the Provinces) or a First Ministers' Conference?
 - (c) Should it be by some combination of (a) and (b) above - courts and a political mechanism?
- (4) To what extent should there be provision for derogations from the principles of the economic union?

Comments

Discussion focussed on two distinct alternatives on how the economic union should be furthered and maintained.

The first alternative focussed on the position advanced by the federal government which wished to minimize economic discrimination within Canada based on provincial or territorial boundaries. In its draft the federal government did not propose an absolute prohibition, recognizing there were differentiated social and economic policies of governments. Three different approaches are attached reflecting different ways of enforcing the objectives of the economic union. For the purposes of discussion the approaches have been identified as

- (a) the "unduly impedes" test (Draft 1)
- (b) the "non-discrimination" test (Draft 2)
- (c) the "pith and substance" test (Draft 3)

The second alternative (Draft 4) discussed by the Ministers and accepted by a majority of provinces was a statement of economic principles in the Constitution which does not limit federal and provincial legislative authority. It is similar in approach to the equalization draft. In addition the second alternative contains a statement committing governments to the ongoing systematic and co-operative review by them of the operation of the Canadian economic union.

The Ministers discussed various alternatives for referring derogations to a political body. Depending upon the form and responsibilities of a new Upper House (Council of the Provinces), provincial derogations might be referred to it for consideration. Such a review could take place after the courts had examined a particular law or practice and found it to be in contravention to the principles found in section 121. Another proposal was suggested which would permit provinces to submit specific derogations to a revised Upper Chamber prior to their enactment. Another alternative would be to have First Ministers' Conferences discuss and possibly rule on provincial derogations.

DRAFT 1

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 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.

(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.

(3) Subsection (1) does not render invalid a law of Parliament enacted

(a) in accordance with the principles of equalization and regional development recognized in section ; or

(b) in relation to a matter that is declared by Parliament in the enactment to be of an overriding national interest.

121. (1) This is based on the the original draft presented by the Government of Canada. Concern was expressed by provinces over the "unduly impedes" test as creating uncertainty, thereby leaving too much discretion to the courts.

Some provinces expressed concern over the inclusion of the word "practice".

(2) Derogation

(3) Federal derogation

Saskatchewan suggests ratification by the upper house.

- (4) Subsection (1) does not render invalid a law of a legislature
- (a) providing for reasonable residency requirements as a qualification for the receipt of publicly provided goods or services
 - (b) enacted in relation to the reduction of economic disparities between regions wholly within a province that does not discriminate to a greater degree against persons resident or formerly resident outside the province or against goods, services or capital from outside the province than it does against persons resident or goods, services or capital from a region within the province.
- (5) 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.
- (6) Nothing in this section confers any legislative authority on Parliament or a legislature.
- (7) A law or practice of Parliament or a legislature that is found inconsistent with subsection (1) by final judgment of a court of competent jurisdiction shall stand and be deemed to be valid and operative, unless
- (4) Provincial derogation.
- The Government of Canada agrees with the objective of (a) but reserves its position on the drafting.
- Whether (b) is necessary in light of subsections (1) and (2) is not certain.
- Depending on the type of adjudication process, some provinces wished to see a broader area of derogations
- Saskatchewan proposed two further derogations relating to monopolies owned and operated by the province and the export from the province of government-owned capital.
- Nova Scotia suggests a derogation which would recognize the special case of have-not provinces.

repealed or rescinded,
for six months after
the date of the judgment
during which time the
[New Second Chamber]
shall consider the law
and if the [New Second
Chamber] ratifies the
law or practice as being
desirable public policy
notwithstanding that
it is inconsistent
with subsection (1),
the law shall continue
to stand thereafter.

DRAFT 2

ECONOMIC UNION

121. (1) Canada is an economic union within which all persons may move without discrimination based on province or territory of residence or former residence and within which all goods, services and capital may move without discrimination based on province or territory of origin or entry into Canada or of destination within or of export from Canada.

(2) Neither Canada nor a province shall by law or practice contravene the principle expressed in subsection (1).

121. (1) This draft is based on a draft presented by the Government of Canada on August 25 and was designed to overcome provincial concerns. Most provinces feel that while this subsection diminishes the discretion of the court, it does not give sufficient latitude for reasonable derogations from the principles contained within the subsection.

(2) The concern expressed above may be overcome by reinserting the unduly impedes test in subsection (2).

REMAINDER OF THIS DRAFT AS IN DRAFT 1.

DRAFT 3

ECONOMIC UNION

(ONTARIO PROPOSAL)

121. (1) It is hereby declared that Canada is an economic union and

(a) every citizen of Canada and every person lawfully admitted to Canada for permanent residence has the right,

(i) to move to and reside in any province or territory,

(ii) to pursue the gaining of a livelihood in any province or territory without discrimination based on residence or former residence,

(iii) to acquire and hold property in any province or territory in Canada, and

(b) all goods, services and capital may move freely and without discrimination within Canada based on the province or territory of origin or destination.

(2) Neither Parliament nor a legislature may enact a law that in its pith and substance is inconsistent with subsection (1).

(2) The "pith and substance" clause is thought by Ontario to provide a more accurate judicial test than "unduly impedes" or other such phrases and would effectively replace most of the specific derogations contained in the other drafts

(3) Neither the Government of Canada nor of a province shall engage in any practice that is intended to operate in a manner that is inconsistent with subsection (1).

THIS DRAFT CAN BE EXTENDED
BY THE PROCESS ENVISAGED
IN SUBSECTION (7) OF DRAFT 1.

ECONOMIC UNION

(SASKATCHEWAN PROPOSAL)

121. (1) Without altering the legislative or other authority of Parliament or the legislatures or of the Government of Canada or the governments of the Provinces or the rights of any of them with respect to the exercise of their respective legislative or other authority:

(a) Parliament and the legislatures, together with the Government of Canada and the governments of the Provinces, are committed to

(i) the maintenance and enhancement of the Canadian economic union,

(ii) the movement throughout Canada of persons, goods, services and capital without discrimination by Canada or any Province, by law or practice, in a manner that unjustifiably impedes the operation of the Canadian economic union, and

(iii) the harmonization of federal and provincial laws, policies, and practices that affect the Canadian economic union; and

(b) pursuant to the commitments specified in clause (a), the Government of Canada and the governments of the Provinces are committed to the ongoing, systematic and co-operative review by them of the operation of the Canadian