overnment of Canada / Gouvernement du Canada

Annex D

MEMORANDUM **NOTE DE SERVICE**

LL/lm

TO / A: André Juneau
c.c. G. Veilleux
J.H. Lynn

FROM / DE: Lisette Lafontaine

SECURITY - CLASSIFICATION - DE SÉCURITÉ: CONFIDENTIAL
OUR FILE/NOTRE RÉFÉRENCE:
YOUR FILE/VOTRE RÉFÉRENCE:
DATE: June 13, 1980.

SUBJECT / OBJET: Constitutional Provision Regarding the Barriers Between Provinces

Judging by the way the Prime Minister talked at his Press Conference last Monday, he may want to have a provision in the Constitution concerning the abolition of inter-provincial barriers. This raises the question of how it could be done technically. I looked at the EEC Treaty to find out how the absence of barriers was provided for and found out that the Treaty defines very specifically how the free movement of goods, persons, services and capital shall be assured within the Community. Because a Constitution is not flexible, the level of details found in a Treaty would not be desirable in a Constitution.

If the Prime Minister wants to include something on barriers in the Constitution, it could be done technically in two ways:

- through specific powers
- through a "motherhood" statement.

I Specific Powers

Again, it could be done in two ways:

- As a federal power:

Notwithstanding anything in the Act, the Parliament of Canada might be given the power to make laws to abolish obstacles to the free circulation of people, goods, services and capital between provinces.

In that case, an overriding federal law would nullify dispositions which create barriers in the provincial laws. The federal government would have discretionary powers to decide which barriers are tolerable and which ones are to be abolished. We are not likely to get an agreement on such broad federal powers. Moreover, such a disposition would give rise to numerous Court cases, due to the absence of a definition of an obstacle to the circulation. It might also place the federal government in a politically odious situation.

- As a limitation to provincial powers:

There could be a provision at the end of the list of provincial powers stating that the powers given to the legislatures of provinces should not be exercised to create obstacles to the free circulation of people, goods, services and capital between provinces.

This clause would ensure that no barrier could exist between provinces. Because it would be in general terms, provinces might end up in Court to defend almost any of their laws. Moreover, we are not sure at this stage that we want to abolish all barriers between provinces, and with such a provision all barriers would be unconstitutional. Provinces are not likely to agree to its inclusion.

II Motherhood Statement

The other option would be to include in the Preamble to the Constitution a declaration of principle on the necessity to abolish inter-provincial barriers.

It could be done either through a statement of fact like:

"Canada is an economic community in which people, goods, services and capital circulate freely."

or through a declaration of intention like:

"The Government* of Canada and the Governments of its Provinces and Territories shall work together to ensure the free circulation of people, goods, services and capital between provinces."

A statement of fact would be stronger, since it could be interpreted by the courts as a limitation to provincial powers.

A declaration of intention would be an incitation for the provinces to enter into an agreement on a Code of Economic Conduct.

This Code would go into the detail of what should be eliminated and what could be tolerated.

It should be noted that those sections would not catch all the discriminatory dispositions included in the provincial tax systems. A fiscal advantage granted to invest in a place might not be legally an obstacle to capital flow, even though, in fact, it constitutes one.

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* Assuming the Governments are mentionned in the Constitution.