

August 28, 1980

REPORT OF THE
COMMITTEE ON NATURAL RESOURCES,
INTERPROVINCIAL TRADE AND
POWERS OVER THE ECONOMY

POWERS OVER THE ECONOMY

The Committee on Natural Resources, Interprovincial Trade and Powers over the Economy met on August 26 and 27, 1980, to discuss a revised draft of section 121 prepared by the Government of Canada. At this stage of their deliberations the committee was not in a position to submit a "best efforts" draft to the Ministers for their consideration.

Two perspectives on how best to maintain and further the objectives of the economic union are presented for ministerial consideration. The essential difference between them is whether the objectives, as outlined in section 121, should be ^{enforceable} ~~judicially enforced~~. Drafts 1, 2 and 3 provide for such enforcement while Draft 4 (the Saskatchewan draft) does not.

In addition the committee discussed various alternatives to enforcing the objectives of the economic union. Three different approaches were identified:-

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

Issues for Ministerial Consideration

1. Do governments prefer an enforceable ~~or non-enforceable~~ provision to safeguard the economic union?
2. If the answer to (1) is yes - then
 - a) which of the three alternatives for enforcement is preferable?
 - b) to what extent should there be specific derogations for the provinces as contained in subsection (4) of Draft 1?
 - c) should there be a provision for reference to a political body (new Second Chamber) ~~if~~ a court finds a law or practice of Parliament or a legislature to be in contravention of section 121?

Comment

The committee did not review constitutional provisions on mobility rights (other than the words contained in section 121) on the understanding these were being reviewed under the heading of the Charter (although there are some mobility rights in Draft 3).

of the Canadian economic union, particularly 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.

which implies that in creating uncertainty, thereby leaving too much discretion to the courts.

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

(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.

(2) Derogation

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

(3) Idea

(a) in accordance with the principles of equalization and regional development referred to in section 38 or

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

Backatchew suggests ratification of the upper house.

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, ~~[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.

(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) Idem

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.
- Subject to drafting the Government of Canada reserves its position on (a).
- Depending on the type of adjudication process, some provinces wished to see a broader area of derogations.
- Saskatchewan proposed two derogations:
- (a) establishing monopolies owned and operated by the province;
 - (b) relating to the import into or export from the province of government-owned capital.
- Nova Scotia wishes to insert one derogation which would recognize the special case of have-not provinces.
- (7) This subsection is an attempt to draft a mechanism whereby laws or practices considered by individuals and/or other governments to be discriminatory could be reviewed by a political body after a court had found them to be in contravention of subsection (1).

DRAFT 1

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.

...nation 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).

(1) This draft is based
on a draft presented
by the Government of
Canada on August 26
and was designed to
overcome provincial
concerns. Most
provinces feel that
while this subsection
diminishes the dis-
cretion 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).

REMINISCE OF THIS DRAFT AS IN DRAFT 1.

DRAFT 2

ECONOMIC REUNION

(ONTARIO PROPOSAL)

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 26 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.

(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 to provide a more adequate judicial test than unduly impedes or other such phrases and which would effectively replace most of the specific derogations contained in the other drafts.

(2) 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 VIEWED
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IN WASHINGTON (AT 1000 1000)

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 to provide a more accurate judicial test than unduly impedes or other such phrases and which 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 (6) OF DRAFT 1.

DRAFT 4

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 economic union.